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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: Docket UG 490 – In the Matter of Northwest Natural Gas Company, dba NW Natural, Application for a General Rate Revision

Attention Filing Center:

Attached for filing in the above-referenced docket, please find NW Natural's Reply in Support of NW Natural's Motion to Strike CUB's Additional Exhibits.

Please contact this office with any questions.

Sincerely,

Lauren Richards
Legal Assistant
McDowell Rackner Gibson PC

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UG 490

In the Matter of
NORTHWEST NATURAL GAS COMPANY,
dba NW Natural,
Application for a General Rate Revision.

**NW NATURAL'S REPLY IN SUPPORT
OF MOTION TO STRIKE CUB'S
ADDITIONAL EXHIBITS**

Expedited Consideration Requested

I. INTRODUCTION

Pursuant to Administrative Law Judge (“ALJ”) Spruce’s ruling at the August 1, 2024 cross-examination hearing, Northwest Natural Gas Company dba NW Natural (“NW Natural” or the “Company”) hereby submits to the Public Utility Commission of Oregon (“Commission”) its Reply in Support of the Company’s Motion to Strike the Oregon Citizens’ Utility Board’s (“CUB”) Additional Exhibits filed with CUB’s Cross-Examination Statement on July 29, 2024. In response to NW Natural’s Motion, CUB makes several arguments—none of which has merit:

- 1) CUB argues that seeking to admit new exhibits at this late stage of the proceeding has occurred before and is not prohibited.¹ In fact, introducing multiple voluminous exhibits at this late stage in the proceeding is contrary to the procedural schedule in this case and well-established Commission processes, is not common practice, and it should not be endorsed or encouraged.
- 2) CUB claims that the additional exhibits should be admitted to ensure a robust record regardless of potential prejudice to NW Natural.² However, a robust record is developed through the orderly submission of evidence, wherein parties have the opportunity to respond to the evidence in the record, and the issues are narrowed and more sharply

¹ CUB’s Response to NW Natural’s Motion to Strike at 3-5 (Aug. 2, 2024).

² CUB’s Response to NW Natural’s Motion to Strike at 4.

1 focused in each round of testimony, and the evidence is carefully vetted and scrutinized
2 by the parties before it is presented to the Commission. NW Natural questions whether
3 the addition of CUB's exhibits would indeed make the record more robust, but in any event,
4 the pretense of pursuit of a robust record cannot overcome the Company's right to due
5 process and administrative fairness, especially where CUB has been evaluating the Line
6 Extension Allowance ("LEA") since the Company's last rate case and nevertheless
7 significantly expanded a proposal on this issue for the first time in rebuttal testimony and
8 then waited to provide allegedly relevant evidence until after all five rounds of testimony
9 were concluded.

10 3) CUB asserts that NW Natural is not unfairly prejudiced because it has an opportunity to
11 respond in briefing and at oral argument and is allegedly familiar with the exhibits.³ CUB's
12 reasoning cannot be accepted, as it would undermine the rules of evidence and the orderly
13 admission of testimony and exhibits in Commission proceedings. And contrary to CUB's
14 assertion, NW Natural does not have a meaningful opportunity to respond to the new
15 material, and CUB has not laid the proper foundation for the claim that the Company is
16 familiar with the exhibits.

17 4) Finally, CUB argues that the exhibits are relevant because they respond to the Company's
18 claims about the reasonableness of its "portfolio approach"⁴ for line extension allowances.
19 CUB is incorrect and apparently misunderstands the Company's discussion of the
20 "portfolio approach." **To be clear, the Company does not use a "portfolio" approach**
21 **in the manner alleged by CUB and discussed in the exhibits.** Accordingly, the exhibits
22 are not relevant, and introducing them at this late stage will only confuse and burden the
23 record. The factual dispute created by the admission of these exhibits is particularly

³ CUB's Response to NW Natural's Motion to Strike at 10-11.

⁴ CUB's Response to NW Natural's Motion to Strike at 4-5, 6-10.

1 totaling 282 pages that CUB seeks to admit here.¹⁰ Moreover, in docket UE 374, PacifiCorp was
2 able to review the document, understand the potential relevance of the article to the proceeding,
3 and provide the Supplemental Testimony of Frank C. Graves and Declaration (PAC/4600)
4 responding to the academic study as an attachment to its objection.¹¹ This was a key factor in
5 ALJ Lackey allowing CUB/500 into the record in docket UE 374: “Any procedural concerns with
6 the late timing of CUB’s filing of CUB/500 are mitigated by the admission of PAC/4600 which
7 allowed PacifiCorp to respond to the exhibit.”¹² In this case, NW Natural simply has not had time
8 while preparing for hearing and then drafting its opening brief to review 282 pages of completely
9 new exhibits, surmise their relevance to the proceeding, and prepare supplemental testimony.
10 Accordingly, in contrast to the situation in docket UE 374, allowing CUB’s proffered exhibits into
11 the record in this case is not only procedurally improper, but also unfairly prejudices NW Natural.

12 CUB also relies on ALJ Spruce’s decision in docket UM 1908 to grant CUB’s motion to
13 admit several responses to data requests issued by other parties that were not previously
14 attached to CUB’s testimony or offered as cross-examination exhibits.¹³ Despite finding the
15 request “procedurally unusual,” ALJ Spruce admitted the documents because they were
16 responses to data requests issued by parties, where the parties’ familiarity with their responses
17 was unquestionable, and the data responses’ relevance to the issues in the case was apparent.
18 Importantly, in that case, no other party objected to the admission of the exhibits.¹⁴ Here, where
19 the relevance of and foundation for the documents is anything but clear, and NW Natural objects

¹⁰ CUB/500 is 57 pages, CUB/501 is 174 pages, CUB/503 is four pages, and CUB/505 is 47 pages.

¹¹ See Docket UE 374, PacifiCorp’s Objection to the Oregon Citizens’ Utility Board’s Motion to Admit CUB/500 (Sept. 24, 2020).

¹² Docket UE 374, Ruling: Testimony and Exhibits Admitted; Record Closed at 1 (Dec. 16, 2020).

¹³ In the Matter of Lumen Technologies, Proposed Commission Action Pursuant to ORS 756.515 to Suspend and Investigate Price Plan, Docket UM 1908, Ruling: Stipulation and Testimony and Exhibits Admitted at 1-2 (Dec. 1, 2023).

¹⁴ Further, CUB has inaccurately attributed ALJ Spruce’s ruling to the Commission, implying that the ruling was consistent with prior Commission policy. CUB’s Response to NW Natural’s Motion to Strike at 4 (citing UM 1908, Ruling: Stipulation and Testimony and Exhibits Admitted at 2).

1 to their admission, the factors that would potentially mitigate CUB's "procedurally unusual" request
2 are absent.

3 The Commission has consistently expressed a preference for five rounds of testimony so
4 that the issues in the case are appropriately narrowed¹⁵ and "to allow Staff and intervenors the
5 opportunity not only to identify disagreements with the utility's application, but also to address the
6 utility's more detailed response to those matters identified as in dispute."¹⁶ CUB's request to file
7 late supplemental exhibits to its pre-filed testimony is not only "procedurally unusual," but overtly
8 conflicts with the Commission's goals of: (1) narrowing the issues to be resolved; (2) allowing a
9 schedule that is administratively fair and recognizes "the practical inability of a utility to anticipate
10 which parts of a general rate request might be opposed, as well as the need for Staff and
11 intervenors to respond to supporting information when it is subsequently produced by the utility;"¹⁷
12 and (3) granting utilities the "last word" in order to allow them to meet their burden of production
13 and persuasion.¹⁸

14 As a matter of civil procedure and best practice, the Commission should not allow CUB's
15 additional exhibits into the record and should set a clear policy that such practice will not be
16 permitted moving forward. Allowing parties to expand issues, create new factual disputes, and
17 provide completely new evidence not for the purposes of cross-examination, *after the very last*
18 *round of testimony* and right before hearing, encourages—or at least implicitly approves of—a

¹⁵ *In the Matter of Avista Corp. Request for a Gen. Rate Revision*, Docket UG 288, Order No. 16-109 at 22 (Mar. 15, 2016) (noting that by requiring five rounds of testimony, in response to the utility's reply testimony, "the issues have been identified and the testimony is more sharply focused").

¹⁶ *In the Matter of PacifiCorp, dba Pacific Power, 2017 Transition Adjustment Mechanism*, Docket UE 307, ALJ Ruling at 1 (July 1, 2016) (citing Order No. 16-109 and setting five rounds of testimony "to allow Staff and intervenors the opportunity not only to identify disagreements with the utility's application, but also to address the utility's more detailed response to those matters identified as in dispute").

¹⁷ Docket UG 288, Order No. 16-109 at 22.

¹⁸ See, e.g., *In the Matter of Pub. Util. Comm'n of Or.; Investigation into Forecasting Forced Outage Rates for Electric Generating Units*, Docket UM 1355, Order No. 10-157 at 6-7 (Apr. 26, 2010) (rejecting the Industrial Customers of Northwest Utilities' ("ICNU") argument that "utilities are not implicitly given 'the last word' in a proceeding" and allowing Idaho Power Company the opportunity to address ICNU's proposed modification to Staff's FOR collar).

1 lack of due diligence in the first instance in bringing forward issues in a case-in-chief.¹⁹ If the
2 Commission endorses this approach here, it could mean that parties may even intentionally hold
3 back issues until the last minute before the record closes to disadvantage the opposing party who
4 will not have a sufficient opportunity to respond. The Commission should avoid encouraging such
5 prejudicial behavior.

6 **B. The pretense of pursuit of a robust record cannot overcome basic fairness and**
7 **the Company's right to due process.**

8 CUB argues its additional exhibits should be admitted in order to pursue a more robust
9 evidentiary record.²⁰ While the Company does not disagree that a robust record is an appropriate
10 goal for any proceeding, that aim is accomplished by providing parties the opportunity to engage
11 with and test the evidence that is presented, and is not achieved by a party attempting to add
12 volumes of material in the record at the last minute, creating new factual disputes. Importantly,
13 CUB's claims that it is merely pursuing the development of a robust record cannot be used as a
14 pretense to overcome basic administrative fairness and to prejudice a party by denying the party's
15 right to due process. This is exactly the case here. As an initial matter, the evidentiary record
16 must be cut off at some point. There is almost always more that a party could say in response to
17 opposing testimony, but at some point, the ability for parties to provide testimony and evidence
18 has to end so the issues can be reviewed and resolved. This is particularly true for rate cases
19 where there is a statutory suspension period. Accordingly, the development of the record must
20 be balanced against undue delay, confusion of the issues, and administrative fairness. To allow
21 CUB's additional exhibits into the record would destroy that balance.

¹⁹ Due process requires that all issues to be examined in a proceeding “be raised as early as possible, so that all parties may have a reasonable opportunity to respond via the submission of testimony, the cross-examination of witnesses of opposing parties in a public forum and the presentation of legal argument.” Docket UE 188, Order No. 07-573 at 6-7.

²⁰ CUB's Response to NW Natural's Motion to Strike at 4.

1 CUB claims the Commission’s rules allow these late-filed exhibits, citing OAR 860-001-
2 0480(7),²¹ but CUB’s reliance is misplaced. That rule is about orderly exchange of properly
3 offered cross-examination exhibits that were not pre-filed, and it pre-dates the current practice of
4 requiring parties to pre-file their cross-examination exhibits.²² The rule’s language—“*[w]hen*
5 testimony or exhibits are offered in evidence at a hearing...” —plainly assumes that there is an
6 independent basis for the admission of such testimony or exhibits. Thus, the rule provides for an
7 orderly process for exchanging and admitting exhibits, but it does not dictate whether the exhibits
8 are admissible. Clearly, the rule is not a blanket invitation to offer new additional exhibits to
9 supplement pre-filed testimony, which CUB acknowledges is the case here.²³

10 CUB also argues that pursuant to OAR 860-001-0480(9),²⁴ the Commission “anticipates
11 introduction of papers and documents on file with the Commission in its rules,” like CUB/501.²⁵
12 However, like OAR 860-001-0480(7), OAR 860-001-0480(9) simply provides the procedures for
13 referencing exhibits that are independently admissible. The moving party must still demonstrate
14 that the materials are relevant to the proceeding. As discussed in more detail in Section II.D
15 below, CUB has not satisfied that requirement.

16 Even if OAR 860-001-0480(7) or OAR 860-001-0480(9) were somehow interpreted as
17 CUB suggests, in this case, the procedural schedule did not contemplate the admission of
18 additional exhibits that were not used for cross-examination,²⁶ and therefore NW Natural was
19 neither afforded warning about CUB’s intent to seek to file supplemental exhibits nor does the

²¹ CUB’s Response to NW Natural’s Motion to Strike at 6.

²² OAR 860-001-0480(7) provides “When testimony or exhibits are offered in evidence at a hearing and were not previously filed, the offering party must give copies to each party, the Commission, and the ALJ. When practicable, the parties must distribute copies of exhibits before or at the beginning of the hearing.”

²³ CUB’s Response to NW Natural’s Motion to Strike at 5-6.

²⁴ OAR 860-001-0480(9) provides “Papers and documents on file with the Commission may be introduced by reference to number, date, or by any other method of identification satisfactory to the Commission or ALJ.”

²⁵ CUB’s Response to NW Natural’s Motion to Strike at 6.

²⁶ Prehearing Conference Memorandum (Feb. 5, 2024).

1 Company have an opportunity to rebut the exhibits. If the Company had understood that
2 additional exhibits were allowed at this late stage in the case, the Company would have (1)
3 ensured the schedule provided it with an opportunity to respond, and (2) potentially added its own
4 additional exhibits to the record. But the Company—and apparently all of the other parties to the
5 case—did not understand the schedule to allow for this. CUB is an experienced practitioner
6 before the Commission in rate case proceedings, and was aware of the Commission’s policy for
7 five rounds of testimony and the procedural schedule in this case. Nevertheless, CUB waited a
8 significant time after the July 2, 2024 deadline for providing testimony and evidence to request to
9 introduce into the record six new exhibits, four of which still remain in dispute.²⁷ The ALJ should
10 hold CUB to the schedule that was set months ago.

11 It is important to note that what CUB seeks to do here is fundamentally different from the
12 common practice of stipulating to the admission of an exhibit that could properly be admitted
13 through cross-examination (such as the party’s own data response or something else the witness
14 wrote). In these circumstances, the parties often stipulate to admission of that exhibit to avoid
15 the need for cross-examination, as occurred with several exhibits in this case.²⁸ But the four
16 disputed exhibits CUB offers differ in that they lack any clear relation to the case and CUB has
17 not established that the Company and its witnesses have any prior familiarity with the documents.
18 And critically, NW Natural objects to the additional exhibits and has not stipulated to their
19 admission.

²⁷ CUB confirmed its withdrawal of CUB/504 at the August 1, 2024 cross-examination hearing. NW Natural also confirmed it is willing to stipulate to the admissibility of CUB/502, which is a report dated July 11, 2024, to which NW Natural witness Gregg Therrien contributed research.

²⁸ See Coalition's Amended Cross-Examination Statement, Exhibits, & Active Participant List at 2 (Aug. 1, 2024) (amending exhibit list to include NW Natural data request responses stipulated to by NW Natural); NW Natural’s Amended Cross Examination Statement and Cross Examination Exhibit (July, 31, 2024) (amending exhibit list to include Staff amended response to data request stipulated to by Staff).

1 CUB seeks to justify its late-filed exhibits by claiming that it was not aware of certain
2 aspects of the Company's administration of its LEA until the Coalition²⁹ raised the issue or that it
3 could not provide the proffered exhibits until after the Company's surrebuttal testimony because
4 it was not aware of the Company's use of the "portfolio" approach,³⁰ but those arguments do not
5 hold water. CUB has been evaluating NW Natural's LEA since the last general rate case.³¹ In
6 addition, CUB raised a similar issue approximately a year ago in Avista Corporation's general rate
7 case, docket UG 461.³² And the Company's "portfolio approach" that CUB now seeks to address
8 was referenced in the Company's reply testimony³³ and not for the first time in surrebuttal, as
9 CUB seems to acknowledge.³⁴

10 CUB also seems to rely on the fact that NW Natural did not raise an objection to CUB's
11 expanded testimony on the LEA adjustment as support for its attempt to introduce completely
12 new exhibits into the record.³⁵ This reliance is misplaced. NW Natural did in fact consider raising
13 an objection because CUB improperly addressed and expanded the Coalition's LEA rate base
14 adjustment for the first time in its rebuttal testimony, but ultimately did not object because the
15 Company determined that it had to focus its time and resources on responding in its surrebuttal
16 testimony. CUB simply proves the point that NW Natural was unfairly prejudiced by its improper
17 behavior, and CUB has now exacerbated the injury to NW Natural by introducing even more late-

²⁹ The Coalition includes the Coalition of Communities of Color, Climate Solutions, Verde, Columbia Riverkeeper, Oregon Environmental Council, Community Energy Project, and Sierra Club.

³⁰ CUB's Response to NW Natural's Motion to Strike at 2-3.

³¹ See, e.g., *In the Matter of NW Natural Gas Co., dba NW Natural, Request for a General Rate Revision*, Docket UG 435, CUB's Rebuttal and Cross Answering Testimony of Bob Jenks and William Gehrke (CUB/400, Jenks/10-34) (June 30, 2022).

³² See *In the Matter of Avista Corp., dba Avista Utilities, Request for a General Rate Revision*, Docket UG 461, CUB's Opening Testimony of Bob Jenks and John Garrett (CUB/100, Garrett-Jenks/2-31) (July 7, 2023).

³³ NW Natural Reply Testimony of Jeffrey M. Zaubi (NW Natural/4100, Zaubi/13-14) (June 4, 2024).

³⁴ CUB's Response to NW Natural's Motion to Strike at 2-3.

³⁵ CUB's Response to NW Natural's Motion to Strike at 2 ("The Company did not raise an objection to CUB testimony on this issue until it filed its Motion to Strike.").

1 filed and procedurally improper material. Two procedural wrongs do not make a right, and NW
2 Natural's decision not to object to the first wrong does not justify CUB's late-filed exhibits.

3 Finally, the fact that CUB's exhibits may be given the appropriate weight in the proceeding,
4 in consideration of content, context, and the time and manner the evidence was offered in the
5 proceeding, as CUB suggests, does not resolve the Company's fairness and due process
6 concerns.³⁶ Such a solution does not indicate to the parties prior to briefing what weight, if any,
7 such exhibits will be given or if such exhibits will be determinative in the Commission's findings
8 and conclusions. If NW Natural does not know whether or how much weight the evidence will be
9 granted, the Company still must spend time responding to the new exhibits in briefing as best it
10 can. There is therefore no meaningful difference between admitting CUB's additional exhibits
11 and assessing the weight later, and simply admitting the exhibits outright. Moreover, as a general
12 matter, if a party is allowed to offer new exhibits days before briefing and there is not sufficient
13 time to thoroughly review, rebut and respond to such exhibits, the exhibits may nevertheless be
14 a decisive factor in the outcome in the proceeding. This lack of meaningful due process does
15 "not pass the muster of administrative fairness."³⁷

16 **C. NW Natural does not have a meaningful opportunity to respond.**

17 Contrary to CUB's claims, the procedural schedule does not allow NW Natural an
18 opportunity to respond to this new evidence. CUB argues that NW Natural is not unfairly burdened
19 because it can respond in its opening brief or at oral argument,³⁸ but that argument is a red
20 herring. Briefing and oral argument are not the proper vehicles for providing new facts into the

³⁶ CUB's Response to NW Natural's Motion to Strike at 4.

³⁷ In the Matter of Portland Gen. Electric Co., Request for a Rate Increase in the Company's Oregon Annual Revenues of \$13,000,000 for Biglow Canyon, Docket UE 188, Order No. 07-573 at 6-7 (Dec. 21, 2007) (rejecting the ICNU's late filing of testimony regarding the new issue of rate spread because the initial rate change was already addressed in a stipulation, allowing such testimony into the record would "not pass the muster of administrative fairness," and the issue of rate spread with respect to the annual adjustment was not lost and could be dealt with "fully in subsequent proceedings").

³⁸ CUB's Response to NW Natural's Motion to Strike at 10-11.

1 record and responding to new factual arguments. For example, in docket UK 21, the Commission
2 admonished a party for attempting “to circumvent the hearing process by endeavoring to introduce
3 new evidence in its posthearing briefs.”³⁹ The Commission held that while the hearing process is
4 designed to provide parties a full opportunity to present their views, cross-examine, and rebut the
5 arguments and evidence presented by other parties, briefs were limited to summarizing the
6 parties’ respective positions on the issues in dispute and providing legal argument.⁴⁰ The
7 Commission concluded that this tactic is

8 clearly unfair to other parties because it denies them the opportunity to discuss or
9 challenge the forecast data during the evidentiary phase of the hearing. Also,
10 because the [party adding evidence] did not identify the new material, it is difficult
11 to determine which assertions are based on the record, thereby confusing the
12 issues and complicating the decisionmaking process.⁴¹
13

14 In that case, while the Commission recognized the time and financial constraints facing the party,
15 the Commission nevertheless found that such circumstances did “not excuse a lack of diligence”
16 or “lack of professionalism in preparing post-hearing briefs.”⁴² In essence, CUB is suggesting that
17 due to its own tardiness, NW Natural must respond in an improper manner clearly disfavored by
18 the Commission. This is not acceptable and should be rejected.

³⁹ In the Matter of Pacific Power and Light Company; Intervenors: Oregon Committee for Fair Utility Rates and Utility Reform Project, Docket UK 21, Order No. 84-898, 1984 ORE. PUC LEXIS 4 at *45 (Nov. 14, 1984)

⁴⁰ Docket UK 21, Order No. 84-898, 1984 ORE. PUC LEXIS 4 at *45-46; see also In the Matter of Oregon Public Utility Commission Staff; Requesting the Commission Direct PacifiCorp, dba, Pacific Power, to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket UE 177, Order No. 08-176 at 3 (Mar. 20, 2008) (Noting “the well-established principle that legal argument per se, belongs in briefs and not in the testimony of non-lawyer witnesses”) (emphasis in original).

⁴¹ Docket UK 21, Order No. 84-898, 1984 ORE. PUC LEXIS 4 at *46; see also *In the Matter of Pacific Northwest Bell Telephone Company*, Docket UT 43, Order No. 87-406, 1987 ORE. PUC LEXIS 2 at *6 (Mar. 31, 1987) (“[Pacific Northwest Bell Telephone Company] made new factual assertions in the briefs it filed. That practice, especially when rates are in effect on an interim basis, disadvantages other parties because the parties must (1) compromise their positions by allowing the assertions to stand or (2) delay the proceeding by moving against the assertions.”).

⁴² Docket UK 21, Order No. 84-898, 1984 ORE. PUC LEXIS 4 at *46-47.

1 As NW Natural explained in its Motion, the factual record is comprised of the testimony
2 (pre-filed and live testimony offered at hearing) and exhibits.⁴³ The purpose of the five rounds of
3 testimony is to narrow the issues before the parties, to allow sufficient time to respond to newly
4 introduced arguments and evidence, and to give the utility the last word given that it bears the
5 burden of persuasion to support its rate request in this case.⁴⁴ Allowing CUB to admit hundreds
6 of pages of new exhibits essentially creates a sixth round of testimony and gives CUB the last
7 word—undermining these well-established processes and NW Natural's rights. NW Natural has
8 no ability to explain its position or respond to the factual assertions in CUB's exhibits or to provide
9 responsive evidence.

10 CUB offers that NW Natural could file supplemental testimony.⁴⁵ This is not a legitimate
11 option for the Company at this late stage in the case. The exhibits were offered three days before
12 the evidentiary hearing and 17 days before the opening brief is due. The Company has already
13 been prejudiced because it had to divert resources and time to addressing this evidentiary issue
14 instead of preparing for hearing and briefing. The Company would need to divert additional

⁴³ ORS 756.558(1). Importantly, the statute authorizing the Commission to reopen the evidentiary record includes provisions designed to protect parties' due process rights. If the Commission reopens the record and allows further evidence, the Commission must give parties a "reasonable opportunity" to "examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence."

⁴⁴ *In the Matter of Avista Corp. Request for a Gen. Rate Revision*, Docket UG 288, Order No. 16-109 at 22 (Mar. 15, 2016) (noting that by requiring five rounds of testimony, in response to the utility's reply testimony, "the issues have been identified and the testimony is more sharply focused"); *see also In the Matter of PacifiCorp, dba Pacific Power, 2017 Transition Adjustment Mechanism*, Docket UE 307, ALJ Ruling at 1 (July 1, 2016) (citing Order No. 16-109 and setting five rounds of testimony "to allow Staff and intervenors the opportunity not only to identify disagreements with the utility's application, but also to address the utility's more detailed response to those matters identified as in dispute"). The Commission has generally recognized utilities' arguments for having the "last word" in rate case proceedings due to their burden to show that the proposed rates are just and reasonable. *See, e.g.*, Docket UM 1355, Order No. 10-157 at 6-7; *see also In the Matter of Portland General Electric Company's Proposal to Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149*, Docket UE 115, Order No. 01-777 at 4 n.9 (Aug. 31, 2001) (noting that utilities are generally given the "last word" in rates cases because of their burden of production and persuasion and that Portland General Electric Company's argument in this proceeding was contrary to that stance).

⁴⁵ CUB's Response to NW Natural's Motion to Strike at 11 ("Further, CUB also has no objection to the Company submitting supplemental testimony in response to these Exhibits if it wishes to do so.").

1 resources to prepare testimony at this late stage in the case. Accordingly, the Company would
2 be unfairly prejudiced and denied due process even if it were granted the option to provide
3 supplemental testimony.

4 **D. CUB's additional exhibits are not relevant.**

5 Setting aside the process and fairness concerns—which are significant—CUB's additional
6 exhibits should not be admitted because, contrary to CUB's claims, the exhibits are not relevant
7 and will confuse the record.⁴⁶ CUB states that the exhibits are relevant because they “show that
8 the portfolio approach as described by [NW Natural] does not really exist or at least is not
9 described in these broad overviews of how LEAs work by providing national and Oregon analyses
10 that counter this assertion by the Company.”⁴⁷ However, CUB's claim of relevance is incorrect
11 because CUB conflates two different analyses that both bear the descriptor “portfolio.”

12 Based on CUB's remarks at the hearing and CUB's Response, it appears that CUB
13 believes the Company is not following Schedule X,⁴⁸ and instead has adopted a “portfolio
14 approach” to determining LEAs as discussed in the Senate Bill (“SB”) 32 investigation.⁴⁹ To be
15 clear, the Company does not determine LEAs and customer contributions based on a portfolio
16 approach; rather, the Company follows Schedule X and assesses the LEA on an individual
17 customer basis utilizing estimated construction costs and expected usage for each applicant for
18 new service.⁵⁰ Accordingly, the *forward-looking* economics of the LEAs are established on a
19 customer-by-customer basis, not on a portfolio basis as CUB alleges. Only after construction is
20 complete, when assessing prudence, does the Company perform an overall portfolio analysis
21 over the thousands of annual new connections it has installed. This evaluation allows the
22 Company to determine the present value of revenue requirement (“PVR”) from the LEAs to

⁴⁶ See CUB's Response to NW Natural's Motion to Strike at 2-3, 6-10.

⁴⁷ CUB's Response to NW Natural's Motion to Strike at 3.

⁴⁸ CUB's Response to NW Natural's Motion to Strike at 2.

⁴⁹ CUB's Response to NW Natural's Motion to Strike at 4-5.

⁵⁰ NW Natural/4100, Zaubi/10.

1 evaluate impacts to current customers, without having to perform an individual analysis of every
2 new connection.⁵¹ As NW Natural’s surrebuttal testimony made clear, the line extensions show
3 a negative PVRP, indicating no harm to existing customers and supporting the fact that the
4 Company has acted prudently in administering the LEAs.⁵²

5 Because CUB’s exhibits are aimed at rebutting a position that the Company has not taken
6 (i.e., the Company is not doing what CUB claims that it is doing), the exhibits are wholly irrelevant,
7 and this raises the question of whether CUB has adequately investigated this issue before making
8 such an extreme proposal of disallowing rate base that has already been approved by the
9 Commission in the Company’s past three rate cases. In addition, CUB’s exhibits would create a
10 new factual dispute regarding whether the Company is using a portfolio approach to assess LEAs
11 on a forward-looking basis, which demonstrates that their admission would unfairly prejudice the
12 Company because it would not be able to respond. Moreover, because CUB offers the exhibits
13 to bolster its case which is based on a fundamental misunderstanding of the Company’s LEA
14 administration, there is no doubt that admission of the exhibits without time to allow NW Natural
15 to provide responsive evidence would significantly confuse the record.

16 For the reasons discussed below, the Company disagrees with CUB that CUB/500,
17 CUB/501, CUB/503, and CUB/505 are relevant to this proceeding or that CUB has provided
18 sufficient foundation to establish that the Company is familiar with the additional exhibits such that
19 it is not unfairly prejudiced by their admission.⁵³

20 1. *CUB/500*

21 CUB claims that CUB/500 is offered in response to NW Natural’s claims regarding the
22 “portfolio approach,” but as discussed above, CUB is confused regarding the Company’s position

⁵¹ NW Natural Surrebuttal Testimony of Jeffrey M. Zaubi and Zachary D. Kravitz (CUB/5000, Zaubi-Kravitz/13-16) (July 24, 2024).

⁵² NW Natural/5000, Zaubi-Kravitz/16.

⁵³ CUB’s Response to NW Natural’s Motion to Strike at 6-10.

1 and the “portfolio approach” discussed in the exhibit is not the same one discussed in the
2 Company’s testimony. CUB also argues that CUB/500 “is relevant because it shows how
3 regulators have viewed LEAs while assuming expansion of the gas system, even without
4 considering electrification trends.”⁵⁴ This is a misleading characterization of CUB/500. While NW
5 Natural was only able to complete a cursory review of the document, the National Regulatory
6 Research Institute (“NRRI”) report makes a “suggestion,”⁵⁵ discusses “[t]he problem with the last
7 two reasons for allocating line-extension costs to existing customers,”⁵⁶ offers a “preferred
8 approach,”⁵⁷ and provides “[r]ecommendations.”⁵⁸ The NRRI report is therefore just as much an
9 advocacy piece as it is a synopsis of the regulatory environment.

10 CUB asserts that the exhibit would not prejudice NW Natural because Company witness
11 Gregg H. Therrien “co-authored” CUB/502, which cites CUB/500.⁵⁹ Again, CUB’s
12 characterization of Mr. Therrien’s involvement and familiarity is misleadingly overstated—a fact
13 that would have been established if CUB had properly sought to introduce CUB/500 through cross-
14 examination. As an initial matter, Mr. Therrien did not “co-author” CUB/502, and only provided
15 research assistance.⁶⁰ Moreover, even though CUB/502 cites CUB/500, it only does so in one
16 limited, unrelated occasion regarding gas as a “viable energy supply alternative to higher carbon
17 or higher cost fuels.”⁶¹ For these reasons, while Mr. Therrien is aware of CUB/500, he is not
18 familiar with the document in such a manner that NW Natural would not be unfairly prejudiced by
19 the document’s admission as CUB cavalierly suggests.⁶² And more broadly, documents are not
20 admissible or relevant simply because a witness may be aware of them—relevance requires a

⁵⁴ CUB’s Response to NW Natural’s Motion to Strike at 7.

⁵⁵ CUB/500 at 12.

⁵⁶ CUB/500 at 5.

⁵⁷ CUB/500 at 5.

⁵⁸ CUB/500 at 50-52.

⁵⁹ CUB’s Response to NW Natural’s Motion to Strike at 7.

⁶⁰ CUB/502 at 2.

⁶¹ CUB/502 at 12.

⁶² CUB’s Response to NW Natural’s Motion to Strike at 7.

1 showing tying the document more clearly and directly to the matters at issue in the case and due
2 process requires that the opposing party have an opportunity to respond.

3 CUB offers that in the alternative the Commission could take judicial notice of CUB/500
4 under Evidence Rule 201(b).⁶³ ORS 40.065 provides that a judicially noticed fact must be one not
5 subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction
6 of the trial court; or (2) capable of accurate and ready determination by resort to sources whose
7 accuracy cannot reasonably be questioned. Because (1) NRRI is “corporately independent” of
8 the National Association of Regulatory Utility Commissioners (“NARUC”) and “serves as a
9 research instrument to its dues payers”⁶⁴ and (2) the NRRI report is more than a summary of
10 legislative findings, but also includes advocacy, CUB/500 is an exhibit that is neither generally
11 known nor whose accuracy cannot reasonably be questioned, and therefore does not meet the
12 statutory definition of a judicially noticed fact.⁶⁵

13 Finally, it is worth noting that to the extent CUB relies on CUB/500 to provide general
14 background material regarding LEAs, CUB has provided no explanation whatsoever to justify its
15 failure to timely offer this exhibit—which it could have readily provided with its rebuttal testimony.

16 2. CUB/501

17 CUB argues that CUB/501 is relevant due to the report’s discussion of the portfolio
18 approach for LEAs that was not ultimately adopted by the Commission.⁶⁶ As the Company noted
19 above, such discussion is completely irrelevant because the Company is in fact not using the
20 approach discussed in the report.

⁶³ CUB’s Response to NW Natural’s Motion to Strike at 7.

⁶⁴ The NARUC-NRRI Relationship, NRRI, <https://nrri-web.github.io/about/> (last visited Aug. 3, 2024).

⁶⁵ Note that ORS 40.075 also provides that parties are entitled to an opportunity to object to judicial notice. See ORS 40.075 (“A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.”). If judicial notice of CUB/500 is taken, NW Natural will respond accordingly.

⁶⁶ CUB’s Response to NW Natural’s Motion to Strike at 3-4, 8.

1 CUB further claims that NW Natural is not unfairly prejudiced because it is a member of
2 the Northwest Gas Association, a party to the work group that studied methods to inform the
3 report, and was “directly engaged in [the] investigative process.”⁶⁷ Again, while NW Natural may
4 be a member of the Northwest Gas Association, and the Company did present to the work group
5 on its activities,⁶⁸ NW Natural would nevertheless be unfairly prejudiced by not having an
6 opportunity to respond to the 174-page report in testimony. And again, the mere fact that the
7 Company may have some familiarity with the report does not make the report relevant and
8 admissible.

9 In its Response, CUB also requests that the Commission or ALJ take official notice of
10 CUB/501 pursuant to OAR 860-001-0460(1)(b).⁶⁹ Importantly, if official notice is taken, OAR 860-
11 001-0460(2) allows a party to object to the fact noticed within 15 days of the hearing during which
12 notice was given, the ALJ ruling, or the Commission order, and the objecting party may explain
13 or rebut the noticed fact.⁷⁰ This process of taking official notice therefore allows NW Natural a
14 chance to respond to and rebut the proffered evidence, whereas simply admitting late-filed
15 exhibits into the record does not. While NW Natural does not agree that this is a worthwhile use
16 of resources at this late stage in the proceeding given the Company’s relevance-based objections,
17 if official notice is taken, NW Natural will respond accordingly.

18 **3. CUB/503**

19 CUB argues that CUB/503 is relevant because it “describes other states’ regulatory
20 reviews of LEAs and includes citations and hyperlinks to the legislation, laws, and dockets

⁶⁷ CUB’s Response to NW Natural’s Motion to Strike at 7-8.

⁶⁸ CUB/501 at 15.

⁶⁹ CUB’s Response to NW Natural’s Motion to Strike at 8. OAR 860-001-0460(1)(b) provides that “The Commission or ALJ may take official notice of the following... Rules, regulations, administrative rulings, and reports of the Commission and other governmental agencies[.]”

⁷⁰ “The Commission or the ALJ must notify the parties when official notice is taken. The notice may be given on the record during the hearing, in an ALJ ruling, or in a Commission order. A party may object to the fact noticed within 15 days of the hearing during which notice was given, the ALJ ruling, or the Commission order. The objecting party may explain or rebut the noticed fact.”

1 relevant to each state’s policy summary.”⁷¹ CUB/503 is not an objective summary of laws, but
2 instead is an article with purpose prepared by Advanced Energy United— a lobbying group that
3 “advocates for policies that allow our member companies to compete to power our economy with
4 100% clean energy.”⁷² Advanced Energy United “is the only industry association in the U.S. that
5 represents the full range of advanced energy technologies and services, both grid-scale and
6 distributed,”⁷³ and therefore is antagonistic toward LEA policies. Accordingly, the exhibit was not
7 authored by a neutral third party, putting in question the accuracy and relevance of the state
8 policies summaries.

9 CUB argues that admission of CUB/503 does not unfairly prejudice NW Natural because
10 (1) “as a member of this industry, it is familiar with general practices of natural gas utilities,”⁷⁴ and
11 (2) the national trends discussed in the article “are certainly understood and familiar to the
12 Company’s Witness Therrien who contributed to the AGA Line Extension report that also
13 references the LEA policies and decisions summarized in [CUB/503].”⁷⁵ First, while NW Natural
14 may be familiar with general trends and practices in the industry, to then jump to the conclusion
15 that NW Natural is therefore somehow familiar with *any and all* articles and reports related to the
16 industry is nonsensical. Moreover, as discussed above, just because CUB/502 references a
17 rulemaking docket resulting from a law cited in CUB/503 and Mr. Therrien may be aware of the
18 docket and law, does not mean that Mr. Therrien is completely familiar with all the relevant
19 documents related to that docket and law. CUB’s characterization of Mr. Therrien’s involvement
20 and familiarity is misleadingly overstated—a fact that would have been established if CUB had
21 properly sought to introduce CUB/503 through cross-examination. And finally, the Company’s or
22 Mr. Therrien’s familiarity is not dispositive of the document’s relevance or admissibility. For all

⁷¹ CUB’s Response to NW Natural’s Motion to Strike at 8.

⁷² About Us, Advanced Energy United, <https://advancedenergyunited.org/about> (last visited Aug. 3, 2024).

⁷³ About Us, Advanced Energy United, <https://advancedenergyunited.org/about> (last visited Aug. 3, 2024).

⁷⁴ CUB’s Response to NW Natural’s Motion to Strike at 8-9.

⁷⁵ CUB’s Response to NW Natural’s Motion to Strike at 9.

1 the reasons above, CUB has not demonstrated that the document is admissible or that NW
2 Natural would not be unfairly prejudiced by the admission of CUB/503.

3 To the extent CUB requests that the Commission take judicial notice of the laws and orders
4 referenced in footnotes ii–xvii as an alternative,⁷⁶ the Company does not believe that taking
5 judicial notice is appropriate given its relevance-based objections.

6 *4. CUB/505*

7 CUB argues that CUB/505 is relevant because it is a direct response to NW Natural's
8 "claim in Surrebuttal that it should not charge a customer actual customer costs of an LEA by
9 showing an example of a Company that does so."⁷⁷ Here, CUB is referring to the Company's
10 statement in surrebuttal testimony regarding its policy of honoring signed customer agreements—
11 which the Company also made clear in its reply testimony.⁷⁸ CUB offers no reason why it did not
12 seek to provide this exhibits with its rebuttal testimony, and now seeks an additional round of
13 evidence where the procedural schedule affords none.

14 CUB also asserts CUB/505 is relevant because it is an "example" of a contract that "has
15 the potential to save ratepayers millions of dollars and eliminate future LEA overspend."⁷⁹ CUB
16 mischaracterizes CUB/505. CUB/505 is a guidebook of one natural gas utility in another
17 jurisdiction doing business under different laws, regulations, and tariffs; it is not in any way specific
18 to NW Natural nor provides any evidence concerning customer savings. There is simply nothing
19 in the SoCalGas Natural Gas Service Guidebook that would support CUB's assertion, and
20 therefore the exhibit's relevancy is not clear, and its admission would only confuse the record.
21 Importantly, CUB/505 provides information regarding one other utility's approach that CUB

⁷⁶ CUB's Response to NW Natural's Motion to Strike at 9; CUB/503 at 4.

⁷⁷ CUB's Response to NW Natural's Motion to Strike at 9.

⁷⁸ NW Natural/4100, Zaubi/13.

⁷⁹ CUB's Response to NW Natural's Motion to Strike at 9.

1 supports, but because CUB delayed filing this exhibit, NW Natural has no opportunity to provide
2 responsive evidence regarding other utility approaches that align with the Company's approach.

3 CUB also claims that while it believes the entire document should be admitted into the
4 record, it is willing to limit the information in the exhibit to information about SoCalGas's
5 contracts.⁸⁰ NW Natural does not agree that admitting irrelevant evidence into the record that the
6 Company has no opportunity to rebut will address the Company's concerns regarding procedural
7 fairness and lack of due process, regardless of CUB's willingness to instead provide an excerpt
8 of the materials.

9 **III. CONCLUSION**

10 The Commission should grant NW Natural's Motion and strike (or decline to admit)
11 CUB/500, CUB/501, CUB/503, and CUB/505 into the administrative record. The exhibits are not
12 relevant, and CUB's attempt to supplement the record at a time when NW Natural has no ability
13 to respond is unfair, prejudicial, and contrary to established Commission policy.

DATED this 5th day of August 2024.

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⁸⁰ CUB's Response to NW Natural's Motion to Strike at 9.