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**Douglas C. Tingey**  
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August 29, 2011

*Via Electronic Filing and Hand Delivery*

Oregon Public Utility Commission  
Attention: Filing Center  
550 Capitol Street NE, #215  
PO Box 2148  
Salem OR 97308-2148

**Re: UE 228**

Attention Filing Center:

Enclosed for filing in the captioned docket are an original and two copies of:

- **MOTION TO STRIKE [EXPEDITED CONSIDERATION REQUESTED]**

Attachment A is confidential and subject to Protective Order No. 11-102. It is being provided under separate cover.

This is being filed by electronic mail with the Filing Center. An extra copy of the cover letter is enclosed. Please date stamp the extra copy and return to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "DCT", written over a faint, larger version of the signature.

**DOUGLAS C. TINGEY**  
Assistant General Counsel

DCT:cbm  
Enclosures

**BEFORE THE PUBLIC UTILITY**

**COMMISSION OF OREGON**

**UE 228**

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY

2012 Annual Power Cost Update Tariff  
(Schedule 125)

**PGE'S MOTION TO STRIKE CERTAIN  
PORTIONS OF SURREBUTTAL  
TESTIMONY AND DEPOSITION OF  
DONALD W. SCHOENBECK  
EXPEDITED CONSIDERATION  
REQUESTED**

Portland General Electric Company ("PGE") moves to strike the following portions of the testimony of Donald Schoenbeck ("Mr. Schoenbeck") for the Industrial Customers of Northwest Utilities ("ICNU"):

- (1) ICNU Exhibit 108, Surrebuttal Testimony of Donald W. Schoenbeck: Page 5 Line 13, through Page 6 Line 6 and Page 6 Line 10 through Page 6 Line 12 ("Testimony").

These testimony pages have been designated as confidential. Without disclosing any confidential information, PGE notes that Mr. Schoenbeck cites to confidential information not in the record or even identified by Mr. Schoenbeck, and Mr. Schoenbeck further suggests that the Commission itself has the confidential information and should use it in this proceeding. A copy of this portion of the testimony is attached as Attachment A. Attachment A is confidential and subject to Protective Order No. 11-102. It is being provided under separate cover.

- (2) ICNU Exhibit 109, Deposition Transcript of Donald W. Schoenbeck on August 2, 2011: Page 113 Line 5 through Page 114 Line 3 ("Deposition").

On these pages Mr. Schoenbeck testified regarding certain studies regarding hedging strategies. But when asked to identify the studies, Mr. Schoenbeck stated he could not. Counsel for ICNU stated that the information was subject to a protective order and could not be disclosed. A copy of these pages from the deposition is attached as Attachment B.

The information above was not made available to PGE, does not comply with the rules of evidence in the state of Oregon, and at least some of it appears to be offered in violation of a Commission-issued protective order. PGE therefore respectfully requests those portions of the Testimony and Deposition be stricken from the record.

PGE requests expedited consideration of this Motion given that the hearing in this docket is scheduled for August 30. PGE has conferred with ICNU regarding the subject matter of this motion and ICNU opposes the motion. ICNU does not oppose expedited consideration by the Commission.

## **ARGUMENT**

### **I. PORTIONS OF MR. SCHOENBECK'S TESTIMONY AND DEPOSITION SHOULD BE STRICKEN FROM THE RECORD ON THE GROUND THAT IT IS INADMISSIBLE UNDER THE OREGON RULES OF EVIDENCE**

Oregon Administrative Rule ("OAR") 860-001-0090(d) authorizes administrative law judges to rule on evidentiary issues. OAR 860-001-0450 addresses evidence before the Commission and OAR 860-001-0480 addresses testimony and exhibits. These sections, however, are silent regarding testimony of expert witnesses based on confidential information. Therefore, we turn to the Oregon Evidence Code, as codified. Oregon Revised Statutes ("ORS") § 40.425 states:

Rule 705. Disclosure of fact or data underlying expert opinion. An expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The underlying data that Mr. Schoenbeck is relying on to form his opinion is confidential information, and Mr. Schoenbeck states he cannot provide the information, yet used it as the basis for his expert testimony. In its discovery requests regarding Mr. Schoenbeck's Surrebuttal

Testimony, PGE asked for the same materials for the identified portion of the Testimony. The response given this morning, Attachment C hereto, states, “The requested information is confidential and subject to various protective orders.”

The identified portions of the Testimony and Deposition violate Rule 705 as codified. Though there is no Oregon case on point, other courts hold where an expert cannot be cross-examined due to the confidential nature of his source material, testimony based on that information should be stricken. In *In re Leap Wireless International, Inc.*, 301 B.R. 80 (S.D. Cal. 2003) the court granted a shareholder’s motion to strike expert testimony and report where confidential information relied on was not disclosed. The court held that the failure to disclose the source data denied the opposing party the right to cross-examine the expert’s methodology. *See also U.S. ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC*, 2006 WL 2053534, No. CIVA04CV01224PSFCBS (D. Colo. 2006) (denying the motion to strike without prejudice to allow expert to supplement his opinion with non-confidential information or the motion to strike could be renewed).

Because Mr. Schoenbeck has failed to disclose information underlying his testimony concerning practices of other utilities, PGE is unable to verify the basis of Mr. Schoenbeck’s expert opinion and unable to cross-examine him under Rule 705. Therefore his testimony should be stricken from the record.

**II. PORTIONS OF MR. SCHOENBECK’S TESTIMONY AND DEPOSITION SHOULD BE STRICKEN FROM THE RECORD ON THE GROUND THAT IT IS BASED ON CONFIDENTIAL INFORMATION COVERED UNDER A PROTECTIVE ORDER**

OAR 860-001-0080 allows for protective orders in Commission proceedings. That rule states that before a person can receive confidential information the person must sign a

consent to be bound section of the protective order and certify that the person “will not use or disclose the information for any purpose other than to participate in the proceedings unless the designating party gives written consent.” OAR 860-001-0080(3)(b). Section 12 of the Commission’s standard protective order contains similar language: “Without the written permission of the designating party, any person given access to Confidential Information under this order may not use or disclose Confidential Information for any purpose other than participating in these proceedings.”

The cited sections of Mr. Schoenbeck’s Surrebuttal testimony and deposition testimony refer to information covered by a protective order in another proceeding. The deposition testimony is not detailed enough to determine if the information was disclosed in an Oregon PUC proceeding, or in some other state. However, the surrebuttal testimony specifically refers to confidential information that Mr. Schoenbeck has and this Commission has. That appears to be information disclosed to Mr. Schoenbeck under a protective order issued by this Commission.

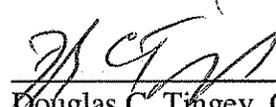
This is improper for a number of reasons. First, it is a violation of Rule 705 as the use of claimed facts that cannot be disclosed on cross-examination. PGE cannot verify even the existence of this claimed information, let alone cross-examine the witness regarding the information. This also appears to be a violation of OAR 860-001-0080(3)(b) and the Commission’s standard protective order cited above. It is particularly troublesome that Mr. Schoenbeck encourages the Commission itself to violate the confidential nature of this information.

## CONCLUSION

In his Testimony and Deposition, Mr. Schoenbeck refers to, and uses as a basis for his opinion, confidential information covered by protective orders and states that he cannot disclose the information. Those portions of the Testimony and Deposition should be stricken as a violation of the rules of evidence of the state of Oregon. Some of the information also appears to be used in violation of a protective order issued by this Commission. Therefore, PGE requests that the Commission strike the improper portions of the Testimony and Deposition.

DATED this 29<sup>th</sup> day of August, 2011.

Respectfully submitted,



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**Motion to Strike - Attachment A**

**ICNU Exhibit 108 – Pages 5-6**

**CONFIDENTIAL AND SUBJECT TO  
PROTECTIVE ORDER 11-102**

**Motion to Strike - Attachment B**

**ICNU Exhibit 109 – Pages 113-114**

1           A. No, you could hedge against it. It would  
2 reduce your risk in that year, but I'm saying there are  
3 offsetting other aspects that may make that an imprudent  
4 decision.

5           With respect to third-party studies, I can  
6 say, yes, I'm aware of third-party surveys that have said  
7 the typical hedging strategy is 48 months or less.

8           Q. Can you tell me what those studies are?

9           A. It's -- again, it's -- the problem is  
10 they're -- they've been under confidentiality agreements  
11 and at another jurisdiction. So this is a problem.

12          Q. Is there some -- I'm trying to figure out, is  
13 there some way we can access it that it's not -- perhaps  
14 there's portions of it that are not under a confidentiality  
15 agreement? Is there --

16          A. There's --

17          MS. DAVISON: No. You know, if I can jump in,  
18 I mean, basically what Mr. Schoenbeck is saying is that for  
19 every one of these regulatory proceedings, as Mr. Tingey  
20 can attest to, the utility comes in and files for a  
21 protective order and marks a huge amount of this  
22 information confidential. And a lot of this data,  
23 including third-party data, is considered proprietary.

24                 So the only way that Mr. Schoenbeck could  
25 divulge that data is if you get, you know, approval from

1 either the utility or from the Utility Commission.

2 And, you know, sitting here today, he  
3 obviously can't do that.

4 MS. KANER: Let me ask a broader question,  
5 then.

6 (Confidential portion beginning on next page)

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**Motion to Strike - Attachment C**

**ICNU Response to PGE Data Request No. 015**

BEFORE THE OREGON PUBLIC UTILITY COMMISSION

DOCKET NO. UE 228

ICNU'S RESPONSE TO PGE'S DATA REQUEST NO. 015

August 29, 2011

**Data Request No. 015:**

Please provide the source materials for Mr. Schoenbeck's testimony at ICNU Exhibit 108, page 5, line 13-page 6, line 4.

**Response to Data Request No. 015:**

The requested information is confidential and subject to various protective orders.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused **MOTION TO STRIKE [EXPEDITED CONSIDERATION REQUESTED]** to be served by electronic mail to those parties whose email addresses appear on the attached service list for OPUC Docket No. UE 228. I have this day also caused the confidential attachment to be hand-delivered to CUB, ICNU, Staff and the Commission, and to be sent via U.S. Mail to those other parties on the service list who have signed the Protective Order.

Dated at Portland, Oregon, this 29<sup>th</sup> day of August, 2011.



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