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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 Motion to Strike CUB's Additional Exhibits. Expedited consideration is requested for this motion.

Please contact this office with any questions.

Sincerely,

Lauren Richards
Legal Assistant
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**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 MOTION TO STRIKE
CUB'S ADDITIONAL EXHIBITS**

Expedited Consideration Requested

I. INTRODUCTION

1
2 Pursuant OAR 860-001-0420, Northwest Natural Gas Company (“NW Natural” or the
3 “Company”) moves to strike four of the Oregon Citizens’ Utility Board’s (“CUB”) additional exhibits
4 filed with CUB’s Cross-Examination Statement on July 29, 2024. Specifically, NW Natural objects
5 to the admission of: (1) CUB/500, titled “Line Extensions for Natural Gas: Regulatory
6 Considerations;” (2) CUB/501, titled “Senate Bill 32 Work Group: Study of Natural Gas Expansion
7 to Unserved Areas;” (3) CUB/503, titled “Case Studies: Gas Line Extension Allowances;” and
8 (4) CUB/505, titled “Natural Gas Service Guidebook.”¹ CUB submits these voluminous exhibits
9 for inclusion in the administrative record despite the fact that the deadline for CUB’s testimony
10 and exhibits has passed, and CUB neither discussed these documents in its testimony nor
11 requested to conduct any cross-examination on these documents. CUB’s attempt to supplement
12 the record at a time when NW Natural has no ability to respond is unfair, prejudicial, and contrary
13 to established Public Utility Commission of Oregon (“Commission”) policy. Therefore, NW Natural
14 respectfully requests that the Commission decline to admit CUB’s additional exhibits and strike
15 them from the record.

16 NW Natural requests expedited consideration of this Motion so that all parties understand
17 whether these exhibits will be included in the record before filing their opening briefs on August

¹ CUB’s Cross-Examination Statement & Exhibit List at 1-2 (July 29, 2024).

1 15, 2024. Specifically, NW Natural requests that Administrative Law Judge Spruce address this
2 Motion during the August 1, 2024 evidentiary hearing and issue a ruling by August 6, 2024. NW
3 Natural conferred with CUB about its objection to the exhibits and about this request for expedited
4 consideration. CUB does not object to the request for expedited consideration.

5 **II. BACKGROUND**

6 CUB's additional exhibits appear to relate to Line Extension Allowances ("LEA"), and NW
7 Natural understands CUB offers at least some of these documents as evidence on the LEA rate
8 base issue in particular. While CUB provided opening testimony on the LEA more generally, CUB
9 did not raise the LEA rate base issue until its rebuttal testimony, where it significantly expanded
10 a proposal that was originally made by the Coalition.² As a result, NW Natural was afforded only
11 about three weeks to address this issue in surrebuttal testimony. Now CUB seeks to add new
12 exhibits to the record **after** the Company filed its surrebuttal testimony—and without providing the
13 Company any opportunity to respond. As shown in the discussion of the disputed exhibits below,
14 each of the exhibits could have been included with CUB's rebuttal testimony. And even if the
15 Company were now given the opportunity to respond to the exhibits, there is not adequate time
16 left in the schedule to do so before the parties begin briefing this case.

17 The specific exhibits offered by CUB that NW Natural objects to are as follows:

- 18 • CUB/500 appears to be an academic report, entitled "Line Extensions for Natural Gas:
19 Regulatory Considerations" written by Ken Costello, Principal Research, the National
20 Regulatory Research Institute. The report was published in 2013, approximately 11 and
21 a half years ago. The report is not cited in testimony by any party, and its relevance to
22 this case is not apparent—especially given the vintage of the report. Because the report
23 addresses line extensions for natural gas, and because CUB opposes NW Natural's

² The Coalition includes the Coalition of Communities of Color, Climate Solutions, Verde, Columbia Riverkeeper, Oregon Environmental Council, Community Energy Project, and Sierra Club.

1 proposed LEA, the Company assumes CUB/500 is being offered as an additional exhibit
2 on the LEA or CUB's LEA rate base issue.

3 • CUB/501, entitled "Senate Bill 32 Work Group: Study of Natural Gas Expansion to
4 Unserved Areas," appears to be a report to the Oregon Legislative Assembly from the
5 Commission dated September 15, 2016. Again, the report is not cited in testimony by any
6 party, and its relevance to this case is not apparent. Because the report explores potential
7 mechanisms to increase funding for the expansion of natural gas service in Oregon, and
8 because CUB opposes NW Natural's proposed LEA, the Company assumes CUB/501 is
9 being offered as an additional exhibit on the LEA or CUB's LEA rate base issue.

10 • CUB/503, entitled "Case Studies: Gas Line Extension Allowances," is apparently written
11 by Advanced Energy United and is undated. The document is not cited in testimony by
12 any party, and its relevance to this case is not apparent. However, because the document
13 appears to be a limited list of state policy summaries on LEA, and because CUB opposes
14 NW Natural's proposed LEA, the Company assumes CUB/503 is being offered as an
15 additional exhibit on the LEA or CUB's LEA rate base issue.

16 • CUB/505, entitled "Natural Gas Service Guidebook," is a document from July 2023
17 prepared by SoCalGas regarding its LEA. The document is not cited or discussed in
18 testimony by any party, and its relevance to this case is not apparent. However, because
19 the document addresses another utility's LEA, and because CUB opposes NW Natural's
20 proposed LEA, the Company assumes CUB/505 is being offered as an additional exhibit
21 on the LEA or CUB's LEA rate base issue.

22 CUB did not confer with the Company prior to filing its additional exhibits, but CUB and
23 NW Natural conferred immediately after CUB's filing, and NW Natural communicated its objection

1 to all but one of the additional exhibits.³ After understanding the Company's objection to
2 CUB/504, CUB agreed to withdraw that exhibit.⁴ However, having been made aware of the
3 Company's objections to CUB/500, CUB/501, CUB/503, and CUB/505, CUB declined to withdraw
4 these exhibits and did not seek to amend its Cross-Examination Statement to designate cross-
5 examination and attempt to establish a foundation for these disputed exhibits. CUB elected to
6 waive all cross-examination and failed to articulate any basis for admissibility of these exhibits in
7 its Cross-Examination Statement.

8 **III. STATEMENT OF LAW**

9 As defined by OAR 860-001-0450, "relevant evidence" is that which tends to make the
10 existence of any fact at issue in the proceedings more or less probable than it would be without
11 the evidence and is admissible if it is of a type commonly relied upon by reasonably prudent
12 persons in the conduct of their serious affairs. This rule also provides for the exclusion of evidence
13 if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of
14 the issues, or undue delay.

15 For evidence to be admissible, it must be properly authenticated.⁵ Documents that have
16 not been authenticated lack foundation and may appropriately be excluded from the record as
17 hearsay. While hearsay is not categorically excluded in administrative agency proceedings, it is
18 nevertheless well established that hearsay testimony cannot be given much weight and does not
19 provide sufficient indicia of reliability where cross-examination of the author of such testimony is
20 not permitted.⁶ Where a party fails to authenticate a document, it therefore lacks *any* indicia of
21 reliability, and the Commission should exclude such documents from the record.

³ NW Natural is willing to stipulate to the admission of CUB/502, which is a report dated July 10, 2024, on which NW Natural witness Gregg Therrien provided research assistance.
⁴ NW Natural notes that CUB/504 appears in two locations in CUB's additional exhibit filing—on page 301 of the exhibit pdf and again on page 349.
⁵ ORS 40.505(2).
⁶ *Central Lincoln People's Util. Dist. v. Verizon Nw. Inc.*, Docket UM 1087, Order No. 04-379 at 5 (July 8, 2004) (citing *Schacher v. Dunne*, 109 Or App 607, 611 (1991) (finding that the purpose of cross-

1 **IV. ARGUMENT**

2 CUB’s attempt to add exhibits to the record at this late stage is contrary to the procedural
3 schedule in this case and well-established Commission processes. Consistent with its express
4 preference, the Commission provided for five rounds of testimony in this case.⁷ The procedural
5 schedule included a July 2, 2024 deadline for CUB’s rebuttal testimony and exhibits. While the
6 schedule contemplated that the record could be expanded at the cross-examination hearing
7 scheduled for August 1, 2024, it did not include an opportunity for CUB or any other party to add
8 exhibits to the record outside the context of cross-examination. As the Commission has
9 explained, five rounds of testimony allow parties to supplement their analysis in response to the
10 Company’s more detailed reply testimony, while still preserving the Company’s opportunity to
11 respond in its surrebuttal testimony to new evidence. This opportunity to respond is especially
12 crucial given that the Company bears the burden of persuasion to support its rate request in this
13 case. Allowing CUB to introduce new evidence *after all five rounds of scheduled testimony are*
14 *complete* is fundamentally inconsistent with the Commission’s approved process for developing
15 a full and fair record—a process with which CUB as a long-time Commission participant has
16 significant experience. Therefore, CUB’s additional exhibits should be rejected as inconsistent
17 with the procedural schedule in this case specifically and with the Commission’s general rate case
18 process.

examination is to indicate to the fact finder what weight to give to witness testimony)); *Sheedy v. Stall*, 255 Or 594, 596 (1970) (“Hearsay evidence is excluded because of its untrustworthiness. The declarant’s accuracy and veracity cannot be tested by cross-examination.”), *aff’d*, *State v. Mendez*, 308 Or 9, 18-19 (1989)).

⁷ *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”).

1 Admission of CUB’s new exhibits would unfairly prejudice NW Natural and deprive the
2 Company of due process because NW Natural has no ability to respond to the factual assertions
3 in CUB’s exhibits or to provide responsive evidence. NW Natural does not have further
4 opportunity to provide testimony—nor is there time in the procedural schedule to add another
5 round of testimony. NW Natural also does not have the ability to cross-examine its own witnesses
6 at the cross-examination hearing, and CUB has not requested to do so. Nor would it be
7 appropriate for NW Natural to perform cross-examination in connection with CUB’s proffered
8 exhibits.⁸

9 Under these circumstances, admitting CUB’s new exhibits would be wholly unfair and
10 inconsistent with due process. Due process requires that all issues to be examined in a
11 proceeding “be raised as early as possible, so that all parties may have a reasonable opportunity
12 to respond via the submission of testimony, the cross-examination of witnesses of opposing
13 parties in a public forum and the presentation of legal argument.”⁹ In this instance, CUB did not
14 raise these exhibits “as early as possible,”¹⁰ rather, CUB waited until *after* its last round of
15 testimony to provide additional evidence. Admitting these documents as exhibits at this late stage
16 does not provide meaningful due process and does not “pass the muster of administrative
17 fairness.”¹¹

18 The prejudice to the Company is particularly acute under the circumstances here. CUB

⁸ See ORS 40.370(2) (“Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.”); see also *Penn v. State*, 574 So 2d 1079, 1082 (Fla. 1991) (“If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own.”).

⁹ *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 Industrial Customers of Northwest Utilities’ 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”).

¹⁰ Order No. 07-573 at 6.

¹¹ Order No. 07-573 at 7.

1 improperly raised the LEA rate base adjustment for the first time in CUB's rebuttal testimony by
2 significantly modifying and expanding an adjustment that was proposed by the Coalition. The
3 four additional exhibits CUB now seeks to add together represent 282 pages.¹² If these exhibits
4 were admitted, the burden would be on the Company to divine CUB's intended use of the
5 documents because CUB has not referenced these documents in its testimony or offered cross-
6 examination regarding these documents. Indeed, the first time NW Natural will understand how
7 CUB intends to use the additional exhibits is after CUB submits its opening brief. The Company
8 will then be forced to respond to new facts and arguments for the first time in its closing brief.
9 This unfairly places the burden on NW Natural to divine CUB's intent in requesting that these
10 documents be admitted into the record and their relevance to the case, or otherwise forces the
11 Company to wait until its closing brief to respond. And in either case, the Company will be
12 required to respond without the opportunity to introduce any new responsive evidence.

13 Finally, CUB has not and cannot show that the challenged exhibits are admissible. Cross-
14 examination is an opportunity to question an opposing party's witness about that witness's own
15 testimony, or matters affecting that witness's credibility.¹³ It is not an opportunity to supplement
16 a party's own direct case.¹⁴ For cross-examination exhibits to be admissible, a party must lay the
17 necessary foundation to authenticate the document and demonstrate that it is within the proper
18 scope of cross-examination.¹⁵ CUB failed to establish this foundation and instead waived cross-
19 examination of NW Natural's witnesses. When dealing with clearly admissible cross-examination
20 exhibits such as data request responses or witnesses' prior testimony on related issues, it is

¹² CUB/500 is 57 pages, CUB/501 is 174 pages, CUB/503 is four pages, and CUB/505 is 47 pages.

¹³ ORS 40.370(2) ("Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."); see also *Peters v. Consol. Freight Lines, Inc.*, 157 Or 605, 610 (1937) ("It is a general principle that a witness cannot be cross-examined as to collateral or irrelevant matters, merely for the purpose of contradicting him by other evidence[.]").

¹⁴ *Ah Doon v. Smith*, 25 Or 89, 93-94 (1893) ("It is true the party against whom a witness is called cannot, on cross-examination, go into an independent or affirmative case on his part, but must confine his examination to such facts connected with the direct examination[.]").

¹⁵ ORS 40.505(2).

1 common practice for parties to stipulate to admissibility, which obviates the need for a party to
2 establish an exhibit's foundation through cross-examination. NW Natural did not stipulate to
3 CUB/500, CUB/501, CUB/503, and CUB/505 because the admissibility of these documents is
4 anything but clear.¹⁶ CUB was therefore required to establish the foundation for these documents
5 as a prerequisite to their admission and failed to do so.

6 **V. CONCLUSION**

7 The Commission should decline to admit CUB/500, CUB/501, CUB/503, and CUB/505
8 into the administrative record as the deadline for CUB to provide testimony and exhibits has
9 passed, these documents were presented without adequate foundation, and NW Natural does
10 not have an opportunity to respond, resulting in unfair prejudice to the Company and lack of due
11 process.

DATED this 31st day of July 2024.

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¹⁶ Even if the document is self-authenticating under ORS 40.510, the Commission would still need to determine whether cross-examination on the document was proper under the rules of evidence. In fact, as noted in the 1981 Conference Commentary on the adoption of this rule, "Establishing the authenticity of the publication may, of course, still leave open questions of authority and responsibility for items therein contained."