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September 3, 2024

VIA E-MAIL TO

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

**Re: Docket No. UG 490 – In the Matter of Northwest Natural Gas Company, dba
NW Natural, Request for a General Rate Revision.**

Attention Filing Center:

Attached for filing in the above-referenced docket, please find NW Natural's Motion to Strike Portions of the Coalition's and AWEC's Briefs and Evidence Outside the Record. Expedited consideration is requested for this motion.

Please contact this office with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Cole Albee".

Cole Albee
Paralegal
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 MOTION TO STRIKE
PORTIONS OF THE COALITION'S AND
AWEC'S BRIEFS AND EVIDENCE
OUTSIDE THE RECORD**

Expedited Consideration Requested

I. INTRODUCTION

1
2 Pursuant to OAR 860-001-0420, Northwest Natural Gas Company (“NW Natural” or the
3 “Company”) moves to strike portions of the Coalition’s¹ Opening and Closing Briefs, as well as
4 portions of the Alliance of Western Energy Consumers’ (“AWEC”) Closing Brief, referencing
5 evidence outside the record in this proceeding. In particular, the Coalition relies on an Oregon
6 Capital Chronicle published on August 13, 2024 for the allegation that “NW Natural continues to
7 lobby its customers to advocate political positions on the Company’s behalf[.]”² This article was
8 published nearly two weeks after the last opportunity to provide additional information in the
9 record at the hearing on August 1, 2024. AWEC also included new alleged facts for the first time
10 in its Closing Brief regarding the Willamette Falls Paper Company and Columbia Steel Casting
11 Company to support its new position that if the Public Utility Commission of Oregon
12 (“Commission”) were to approve a rate shock mechanism, it should apply to all customers, not
13 just residential customers.³ The Coalition’s and AWEC’s attempts to supplement the record at a
14 time when NW Natural has no ability to respond is unfair, prejudicial, and contrary to established

¹ The Coalition includes the Coalition of Communities of Color, Climate Solutions, Verde, Columbia Riverkeeper, Oregon Environmental Council, Community Energy Project, and Sierra Club.

² Coalition’s Opening Brief at 41-42, n.192 (Aug. 15, 2024); see also Coalition’s Closing Brief at 28 (Aug. 26, 2024).

³ AWEC’s Closing Brief at 7 (Aug. 27, 2024).

1 Commission policy. Therefore, NW Natural respectfully requests that the Commission strike the
2 portions of the Coalition’s and AWEC’s briefs that rely on evidence outside the record of this
3 proceeding. For the reasons discussed below, the portions of the Coalition’s and AWEC’s briefs
4 marked in the attached Exhibit A should be stricken.

5 NW Natural requests expedited consideration of this Motion so that all parties understand
6 whether this evidence will be excluded from the record before oral argument on September 12,
7 2024. To that end, NW Natural proposes that parties respond by Monday, September 9, 2024,
8 NW Natural files a reply by Tuesday, September 10, 2024, and the ALJ issue a Ruling by
9 Wednesday, September 11, 2024. NW Natural has conferred with the Coalition, AWEC, CUB,
10 and Staff, and no party opposes the Company’s request for expedited consideration and proposed
11 timing.

12 **II. BACKGROUND**

13 The procedural schedule in this case included five rounds of testimony, as well as a
14 hearing allowing for cross-examination. Despite the fact that parties’ last opportunity to produce
15 new evidence was through the cross-examination hearing, the Coalition has referenced and relied
16 on an article in its Opening Brief and Closing Brief that is outside the record and published on
17 August 13, 2024—12 days after the hearing.⁴ The article from the Oregon Capital Chronicle is
18 written by Alex Baumhardt and is entitled “Environmental regulators say NW Natural misleading
19 customers about state climate credit program.” The article includes a link to the July, August 2024
20 NW Natural Comfort Zone Newsletters, and includes commentary from another party to this
21 proceeding—the Oregon Citizens’ Utility Board.

⁴ Coalition’s Opening Brief at 41-42, n.192; Coalition’s Closing Brief at 28.

1 this case.⁸ The procedural schedule included a July 2, 2024 deadline for the Coalition’s and
2 AWEC’s rebuttal testimony and exhibits. While the schedule contemplated that the record could
3 be expanded at the cross-examination hearing scheduled for August 1, 2024, it did not include an
4 opportunity for the Coalition, AWEC, or any other party to add exhibits to the record outside the
5 context and beyond the time of cross-examination. As the Commission has explained, five rounds
6 of testimony allow parties to supplement their analysis in response to the Company’s more
7 detailed reply testimony, while still preserving the Company’s opportunity to respond in its
8 surrebuttal testimony to new evidence. This opportunity to respond is especially crucial given that
9 the Company bears the burden of persuasion to support its rate request in this case.

10 Allowing the Coalition and AWEC to introduce new evidence ***after all five rounds of***
11 ***scheduled testimony are complete and after the cross-examination hearing where parties***
12 ***had their last opportunity to produce new evidence is concluded*** is fundamentally
13 inconsistent with the Commission’s approved process for developing a full and fair record—a
14 process with which the Coalition and AWEC should be aware. Therefore, the Coalition’s and
15 AWEC’s reliance on new evidence in their briefs should be rejected as inconsistent with the
16 procedural schedule in this case specifically and with the Commission’s general rate case
17 process.

18 Moreover, allowing the Coalition and AWEC to rely on evidence outside the record in their
19 legal briefs would unfairly prejudice NW Natural and deprive the Company of due process
20 because NW Natural has ***no*** ability to provide rebuttal evidence to the assertions in the article

⁸ *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 included by the Coalition or the new alleged facts relied on by AWEC. NW Natural does not have
2 any opportunity to provide testimony and offer contrary evidence in the record. Under these
3 circumstances, admitting the portions of the Coalition’s and AWEC’s briefs that rely on evidence
4 outside the record would be wholly unfair and inconsistent with due process. Due process
5 requires that all issues to be examined in a proceeding “be raised as early as possible, so that all
6 parties may have a reasonable opportunity to respond via the submission of testimony, the cross-
7 examination of witnesses of opposing parties in a public forum and the presentation of legal
8 argument.”⁹ Admitting the portions of the Coalition’s and AWEC’s briefs that rely on evidence
9 outside the record at this late stage does not provide meaningful due process and does not “pass
10 the muster of administrative fairness.”¹⁰

11 The prejudice to the Company is particularly acute under the circumstances here. NW
12 Natural has no opportunity to offer testimony or additional evidence to rebut the article relied on
13 in the Coalition’s briefs or the alleged facts relied on by AWEC in its Closing Brief. For these same
14 reasons, the Commission has previously held that:

15 Parties must request permission to supplement the record, explain the reason
16 the evidence could not be submitted earlier, and do so in the most timely manner
17 possible. ***New factual assertions put forward in a brief, especially a***
18 ***reply brief, are not appropriate.***¹¹

19 Finally, the Coalition and AWEC have not and cannot show that the challenged evidence is
20 admissible. The cross-examination hearing was on August 1, 2024, and the article relied on by

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 7.

¹¹ *In re Pacific Northwest Bell Telephone Company*, Docket UT 43, Order No. 87-406, 1987 ORE. PUC LEXIS 2 at *6 (Mar. 31, 1987) (emphasis added).

1 the Coalition was published 12 days later. By virtue of the timing of publication, the Coalition could
2 not include the article in its Amended Cross-Examination Statement, Exhibits, and Active
3 Participation List.¹² Similarly, AWEC did not provide any testimony on the Willamette Falls Paper
4 Company and Columbia Steel Casting Company, and only first provided information on the
5 companies in its Closing Brief. AWEC also missed the deadline to provide new evidence on the
6 rate shock mechanism issue. And NW Natural did not stipulate to the extra-record evidence relied
7 on by the Coalition and AWEC because the admissibility of the article and the new information in
8 AWEC's Closing Brief is anything but clear.¹³ The Coalition and AWEC have not established any
9 basis for admission of this article and new information regarding the Willamette Falls Paper
10 Company and Columbia Steel Casting Company, respectively.

11 **V. CONCLUSION**

12 The Commission should strike the portions of the Coalition's Opening and Closing Briefs,
13 as well as AWEC's Closing Brief, relying on evidence outside the record. The Coalition's
14 referenced article was published after the deadline for the Coalition to provide testimony and
15 exhibits (and after the cross-examination hearing), and AWEC raised new facts for the first time
16 in its Closing Brief. NW Natural does not have an opportunity to provide rebuttal evidence,

¹² See Coalition's Amended Cross-Examination Statement, Exhibits, & Active Participant List (Aug. 1, 2024).

¹³ Even if the document were 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."

- 1 resulting in unfair prejudice to the Company and lack of due process. The Company respectfully
- 2 request expedited consideration of this motion, as detailed above.

DATED this 3rd day of September 2024.

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BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

DOCKET UG 490

NW Natural's Motion to Strike Portions of the
Coalition's and AWEC's Briefs and Evidence Outside
the Record

Exhibit A

Excerpts of Coalition's Opening and Closing Briefs
and AWEC's Closing Brief

September 3, 2024

C. NW Natural Inconsistently Applies its Already Too-Narrow Lobbying Policy.

The need for Commission intervention in this matter is best demonstrated by NW Natural's actions surrounding the April 16, 2024 public hearing on its proposed rate increase. At that meeting, numerous organizations, including homebuilders, developers, and chambers of commerce, testified in favor of the Company's proposed LEA.¹⁸⁶ As the Coalition identified in its testimony, the comments from such organizations were remarkably similar and seemingly choreographed to focus solely on issues such as energy choice and reliability.¹⁸⁷ NW Natural admits that it solicited these organizations to participate in the public hearing.¹⁸⁸ However, NW Natural has taken the position that while such communication is not lobbying, it has decided to, in this instance, not charge ratepayers for time spent soliciting participation in the public hearing for the rate case.¹⁸⁹ Instead, the Company argues these activities constitute "core utility business[.]"¹⁹⁰ The Company made this same argument in Dkt. No. UG 435 for activities that the Commission ultimately deemed political activities.¹⁹¹

Here, the flaws in NW Natural's policy are on full display. The Company argues that soliciting the public to take action to influence a public official—here, the utility's own regulator, the Commission—is not lobbying.¹⁹² Not only did NW Natural ask these

¹⁸⁶ Coalition/200, Apter-Connolly/Page 62–63.

¹⁸⁷ *Id.*

¹⁸⁸ Exhibit Coalition/502, NW Natural Response to Coalition DR 270.

¹⁸⁹ *Id.*

¹⁹⁰ NW Natural/4600, Williams/Page 25; *see also* NW Natural/3300, Williams/Page 19.

¹⁹¹ UG 435 NW Natural/2400, Heiting-Bracken/Page 40–41.

¹⁹² ~~As recently as this week, NW Natural continues to lobby its customers to advocate political positions on the Company's behalf, but has relied on misinformation in its communications, falsely alleging the State's proposed carbon crediting program might not lead to direct greenhouse gas emission cuts. Baumhardt, *Environmental regulators say NW Natural misleading*~~

organizations to support a policy before the PUC that benefitted the Company, but that position was directly opposed to the interest of ratepayers, who would otherwise be on the hook for those costs. However, despite arguing that such activity is “core utility business,” NW Natural asserts it is nonetheless charging these costs below-the-line in this proceeding—yet it has not provided any detailed accounting to verify this statement.¹⁹³ By doing this, the Company highlights the inadequacies of its policy; not only is it inconsistent and relies on individual decisions about when an activity that does not otherwise meet the definition of lobbying should be excepted from recovery, but because such actions are not lobbying according to NW Natural, there is no record of the time spent by its employees on that matter, as exception time tracking is only required for lobbying activities under the policy.¹⁹⁴ Further, even if these costs may have been charged below-the-line, future similar activities *can* be charged to ratepayers under the Company’s lobbying policy.

As a result, the Coalition and the Commission are left with merely the claims of the Company that it actually did book these costs below-the-line and is not recovering them from customers. Absent clear direction from the Commission on this issue, the public is left in a state of limbo, with no assurances or accountability that the Company will not engage in similar activity in the future, using ratepayer dollars to fuel its interests and political agenda in activities outside the purely legislative context and then seek recovery from ratepayers. These kinds of

~~*customers about state climate credit program*, Oregon Capital Chronicle (Aug. 13, 2024), <https://oregoncapitalchronicle.com/2024/08/13/environmental-regulators-say-nw-natural-misleading-customers-about-state-climate-credit-program/>.~~

¹⁹³ In fact, it is entirely possible the Company seeks to avoid the Commission’s review of its communications to these customers by voluntarily foregoing recovery of any costs associated with the activity.

¹⁹⁴ See Exhibits Coalition/502–504, NW Natural Response to Coalition DR 270, 273 & 274 (refusing to state whether the Company logged exception time for this activity). See also Exhibit Coalition/521, NW Natural Response to Coalition DR 369.

encouraging political engagement on the Company's behalf before such institutions. Yet, despite claiming that it views such activities as lobbying under its policy, it then defends its behavior as merely "informational" and "core utility business."¹²³

Directing the public to engage in political action is lobbying, because it is a communication intended to influence a public official. While NW Natural may have charged costs below the line for its solicitations to influence this rate case, it is uncertain how similar activities will be expensed in the future because the Company's policy does not categorize these communications as lobbying. ~~For example, during the pendency of this case, NW Natural solicited ratepayers to oppose the revised CPP rulemaking.~~¹²⁴ Ratepayers should not be charged for this lobbying activity, but again, there is no way to verify the exclusion of these costs.

2. *Proactive "informational" communications may constitute lobbying.*

The Commission was abundantly clear in Order No. 22-388 that NW Natural's lobbying policy was inadequate since it did not cover the Company's proactive communications with public officials regarding topics like gas bans.¹²⁵ While the Commission recognized that communications intended to provide public officials routine information do not qualify as lobbying expenses,¹²⁶ many of NW Natural's communications went "well beyond" informational purposes and had intent to influence.¹²⁷ The Commission reiterated that NW Natural must be clear whether it is engaging primarily in an informational capacity in response to local

¹²³ NW Natural/3300, Williams/Page 14.

¹²⁴ ~~Coalition Opening Br. at 41-42, n.192.~~

¹²⁵ Order No. 22-388 at 22-23.

¹²⁶ *Id.* at 23.

¹²⁷ *Id.*

then delay collection of a portion of those rates to some point in the future without a deferral. ~~In the last month, Willamette Falls Paper Company announced layoffs impacting most of its workforce and a decision to permanently close the Portland plant will be made by August 30, 2024, potentially resulting in the permanent layoff of hundreds of employees. In 2022, Columbia Steel Casting Company, which had been operating for more than 100 years, closed its Portland facility resulting in the permanent layoff of 225 employees.~~ AWEC's members provide 1000s of living wage jobs to residential customers, and are facing the same cost pressures as other customers. If the Commission were to adopt CUB's rate shock proposal, it should apply to all customers.

III. CONCLUSION

AWEC urges the Commission to approve both the First Stipulation and the Second Stipulation because they result in rates that are fair, just and reasonable. The First and Second Stipulations are a fair resolution of the issues in this docket and are not opposed by any party.

The Commission should also: (1) decline to provide an advisory opinion on a multi-year rate plan in this docket without involving other utilities and stakeholders; (2) decline to approve NW Natural's proposed modifications to the ACC; (3) only approve the \$95 million revenue requirement increase which assumes the Coalition's Lobbying Expense Adjustment has been disallowed; and (4) if the Commission approves CUB's rate shock proposal, it should apply equally to all customer classes.