

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 228

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY

RULING

2012 Annual Power Cost Update Tariff.

DISPOSITION: MOTION TO STRIKE TESTIMONY AND AFFIDAVIT
GRANTED IN PART; MOTIONS TO ADMIT PREFILED
TESTIMONY GRANTED

This ruling addresses the following motions: the Motion to Strike Testimony and Supporting Affidavit of Portland General Electric (PGE), and the Motions to Admit Prefiled Testimony of the Citizens' Utility Board of Oregon (CUB) and PGE.

Motion to Strike Testimony and Affidavit

On August 29, 2011, PGE filed a motion to strike portions of the deposition and surrebuttal testimony of Industrial Customers of Northwest Utilities (ICNU) witness Donald Schoenbeck. On August 31, 2011, ICNU filed a Response in Opposition to PGE's Motion (Response). On September 2, 2011, PGE filed a reply in support of its Motion. In this ruling, I grant PGE's Motion.

PGE

PGE moves to strike the portions of Mr. Schoenbeck's surrebuttal testimony and deposition in which he (1) refers to confidential information not in the record or identified by ICNU; (2) suggests that this Commission has the confidential information and should use it in this proceeding; and (3) testifies regarding certain confidential hedging strategy studies without identifying the studies.¹ PGE states that the information referred to but not identified by Mr. Schoenbeck violates Oregon Evidence Code (OEC) 705 and may also violate the terms of protective orders previously signed by Mr. Schoenbeck.

¹ PGE Motion at 1, citing ICNU Exhibit 108, p. 5, line 13 through p. 6, line 6; ICNU Ex. 108, p. 6, lines 10 through 12; and ICNU Ex. 109, p. 113, line 5 through p. 114, line 3. At the hearing that took place on August 30, 2011, PGE clarified that it is no longer seeking to strike ICNU Ex. 108, p. 5, line 20 through p.6, line 6. (Hearing Transcript at 9).

PGE first argues that Mr. Schoenbeck's testimony regarding unidentified confidential information violates OEC 705.² PGE states that because Mr. Schoenbeck has failed to disclose information underlying his testimony, PGE is unable to verify the basis of his opinion or cross-examine him. PGE further argues that the Commission should strike Mr. Schoenbeck's testimony because it violates the terms of protective orders he signed. PGE notes that protective orders typically state that without the written permission of a designating party, parties subject to the protective order cannot use or disclose confidential information for any purpose other than participating in that proceeding.³

ICNU

ICNU argues in its Response that OEC 703 controls this issue.⁴ ICNU states that Mr. Schoenbeck explicitly based his opinion on facts and data known to him prior to this case, made known to him during his over 40 years of experience as a purchaser, seller, and consultant on energy-related matters. ICNU notes that PGE could have cross-examined Mr. Schoenbeck at the hearing regarding his experience and the basis for his opinion, to help the Commission determine how much weight to give to Mr. Schoenbeck's testimony, but that PGE declined to do so. ICNU notes that because the expert witness testimony in this docket is related to competitive markets, where underlying data is routinely subjected to confidentiality restrictions, it would be virtually impossible for an expert to give an opinion if the Commission imposed a requirement that all confidential data underlying the opinion be disclosed.

Finally, ICNU argues that Mr. Schoenbeck did not violate the terms of protective orders, because he did not reveal any confidential information, but instead suggested that the Commission verify with third parties referenced in other dockets that they had certain hedging products available. With its response, ICNU includes a new affidavit, from ICNU's counsel, documenting a conversation with a spokesman for a company who confirmed that the company purchased and sold monthly and quarterly options during 2007 and 2008.⁵

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Under Oregon's discovery rules, an expert may wait until he is being cross-examined to reveal the facts and data underlying his opinion.⁶ Because PGE waived cross-examination of Mr. Schoenbeck, his failure to reveal the facts and data underlying his testimony and deposition did not violate OEC 705.

However, I agree with PGE that Mr. Schoenbeck's surrebuttal testimony directing the Commission to consult information deemed confidential in other dockets was inappropriate, and I strike the contested surrebuttal testimony on that basis. The Commission's rules provide that

² OEC 705 provides: "An expert may testify in terms of opinion or inference and give reasons therefor 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." ORS 40.425.

³ PGE Motion, pp. 3-4.

⁴ OEC 703 states: "Facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." ORS 40.415.

⁵ See Declaration of Melinda J. Davison in Support of ICNU's Response (Declaration).

⁶ See Laird C. Kirkpatrick, *Oregon Evidence* 453-454 (5th ed. 2011), citing ORS 40.425.

by signing the “consent to be bound” section of a protective order, a party certifies “that the party 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). Signatories to a protective order may not direct the Commission to review confidential information covered by that order in other proceedings. The Commission will strike from the record the contested portions of Mr. Schoenbeck’s surrebuttal testimony.

The Commission will also strike from the record the Declaration filed by ICNU regarding counsel’s verification with a third party vendor that certain options were available in 2007 in 2008. Introduction of new evidence through an affidavit filed after the evidentiary hearing is improper. It is also improper for counsel to serve as a witness in this proceeding.⁷

Motions to Admit Prefiled Testimony

CUB

On September 6, 2011, CUB filed a motion to admit CUB’s prefiled opening testimony. In its motion, CUB notes that it had two revisions to the prefiled testimony: on page 5, line 20 and page 7, line 13, the number 36 should be changed to 48. CUB notes that this change results from CUB’s revised opinion regarding the point at which hedging becomes imprudent. CUB notes that no party at the hearing objected to CUB’s request to file a motion to admit its testimony. In support of its motion, CUB also submits affidavits of its witnesses Feighner and Jenks.

PGE

On September 7, 2011, PGE moved to admit the prefiled testimony of witnesses Niman and Weitzel (exhibits PGE/100-101 and PGE/102C), and the pre-filed testimony of witnesses Cody and Macfarlane (PGE/200-202). PGE also filed affidavits of the testifying witnesses, Niman, Weitzel, Cody, and Macfarlane, attesting to the truth and accuracy of their pre-filed testimony and exhibits.

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CUB’s and PGE’s motions are granted. CUB’s opening testimony and exhibits (CUB/100-104 Jenks – Feighner) are admitted into the record in this proceeding. PGE’s testimony and exhibits PGE/100-101, PGE/102C, and PGE/ 200-202, are admitted into the record in this proceeding.

Dated at Salem, Oregon, this 23rd day of September, 2011.



Shani M. Pines
Administrative Law Judge

⁷ See, e.g., Docket DR 10/UE 88/UM 989, Ruling, Sept 19, 2005, p. 4, citing Oregon Rule of Professional Conduct 3.7.