ISSUED: August 6, 2024

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UG 490

In the Matters of NORTHWEST NATURAL GAS COMPANY, dba NW Natural, Request for a General Rate Revision.	RULING

DISPOSITION: MOTION TO STRIKE GRANTED ON EXPEDITED BASIS; CUB EXHIBITS 500, 501, 503, AND 505 EXCLUDED FROM THE RECORD

I. INTRODUCTION

On July 29, 2024, the Oregon Citizens' Utility Board (CUB) filed a cross-examination statement that included five documents identified as "additional exhibits" for inclusion in the administrative record. I directed CUB to address these additional exhibits and the basis for their inclusion in the record as part of its motion to admit due by August 5, 2024. On July 31, 2024, Northwest Natural Gas Company, dba NW Natural, filed a motion to strike CUB's additional exhibits and requested expedited consideration. NW Natural stated that it conferred with CUB and represented that it did not object to the request for expedited consideration.

At the hearing held August 1, 2024, CUB and NW Natural each argued their positions regarding the admissibility of CUB's additional exhibits. Consistent with the schedule set forth at the August 1 hearing, CUB filed a written response to the motion to strike on August 2, 2024, and NW Natural filed a written reply to CUB's response on August 5, 2024. Prior to the hearing, CUB voluntarily withdrew its proposed Exhibit 504. NW Natural stipulated to the admission of Exhibit 502.[1]

II. MOTION TO STRIKE

A. NW Natural Motion

NW Natural objects to the admission to CUB's proposed Exhibits 500, 501, 503, and 505.[2] NW Natural asserts that the deadline for CUB's rebuttal testimony and exhibits was

[1] NW Natural Motion to Strike CUB's Additional Exhibits at 4, n 3 (July 31, 2024).
[2] *Id*. at 2-5.

July 2, 2024, and that while the schedule contemplated that the record could be expanded during cross-examination at the hearing, it did not include an opportunity for parties to expand the record outside of that context. NW Natural contends that it does not have an adequate opportunity to respond to CUB's additional exhibits and that admitting CUB's proposed exhibits would unfairly prejudice NW Natural and deprive of it of due process. NW Natural maintains introducing new evidence at this stage is fundamentally inconsistent with the approved process for developing a full and fair record. NW Natural argues that because these exhibits were introduced separate from testimony, the first time it will understand how CUB intends to use these exhibits is in the opening brief, after which it will not have an opportunity to provide responsive evidence. NW Natural also contends that CUB has failed to establish foundation for these exhibits and that without sufficient foundation they should be excluded as hearsay. NW Natural asserts that any prior cases in which the Administrative Law Judge permitted the introduction of new exhibits after testimony were non-binding and distinguishable from the situation presented here.

B. CUB Response

CUB argues that these exhibits meet the requirements of relevant evidence under the Administrative Procedures Act (ORS 756.500 through ORS 756.558) and OAR 860-001-0300 *et seq*.[3] CUB maintains that the additional exhibits are a response to NW Natural's portfolio approach discussed in the surrebuttal testimony. CUB contends that the exhibits address how other utilities and regulators are addressing line extension allowances and provides important reliable, factual context for the Commission to make a fully informed decision. CUB maintains that even if the exhibits are hearsay, that would not impact admissibility but rather the weight afforded the evidence. CUB argues that the exhibits were not intended to be used for cross-examination and no foundation was necessary. CUB asserts that the rule allowing for exhibits to be offered at hearing is not limited to the introduction of cross-examination exhibits. CUB further contends that the Commission has allowed exhibits to be admitted separate from testimony, citing to rulings in other dockets.[4] CUB contends that NW Natural is not unfamiliar with the documents and that it has an opportunity to respond in its briefs and oral argument. CUB states that it does not object to NW Natural submitting supplemental testimony in response to the exhibits.

CUB contends that in the alternative, the Commission could take official or judicial notice of Exhibits 500, 501, and 503.

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[3] CUB Response to NW Natural's Motion to Strike at 3 (Aug. 2, 2024).

[4] *Id*. at 4, citing *In the Matter of Lumen Technologies, Proposed Commission Action Pursuant to ORS 756.515 to Suspend and Investigate Price Plan*, Docket No. UM 1908/*In the Matter of Qwest Corporation, Investigation Regarding the Provision of Service in Jacksonville, Oregon and Surrounding Areas*, Docket No. UM 2206, Ruling on Motions to Admit at 2 (Dec. 1, 2023*); In the Matter of PacifiCorp, Request for a General Rate Revision*, Docket No. UE 374, Ruling on Motions to Admit at 1 (Dec. 16, 2020).

C. NW Natural Reply

NW Natural argues that the briefs and oral argument do not provide it with a meaningful opportunity to respond to new material and CUB's argument undermines the rules of evidence and the orderly admission of testimony and exhibits. NW Natural maintains that CUB has not laid the proper foundation for the claim that NW Natural was already familiar with the exhibits. NW Natural notes that the circumstances in the prior rulings allowing late-filed exhibits that CUB cites were different from the circumstance presented here. NW Natural argues that the Commission should set a clear policy that such practice will not be permitted moving forward. NW Natural maintains that CUB's arguments the exhibits support a robust record cannot be used as a pretense to overcome basic administrative fairness and due process considerations. NW Natural asserts that there is almost always more that a party could say in response to testimony, but that the time for testimony and evidence must end at some point. NW Natural contends that CUB misunderstands OAR 860-001-0480(7) and that the rule governs the orderly process for exchanging and admitting exhibits but does not dictate admissibility. Finally, NW Natural argues that the additional exhibits are not relevant and will confuse the record because CUB has conflated two different analyses identified as "portfolio" and are therefore aimed at rebutting a position the company has not taken.

D. Resolution

Under OAR 860-001-0450(1), relevant evidence is evidence tending to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence and is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Additionally, OAR 860-001-0450(1)(c), provides that relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. After reviewing the exhibits and weighing the probative value against the danger of unfair prejudice, confusion of the issues, or undue delay, I determine that such dangers do outweigh the potential probative value of the exhibits offered in this instance.

Under the procedural schedule established in this docket, CUB had the opportunity to present opening testimony and exhibits on April 18, 2024, and rebuttal testimony and exhibits on July 2, 2024. The schedule also included the opportunity to file cross-examination exhibits on July 29, 2024, for any exhibits to be used in cross examination of witnesses at the evidentiary hearing. CUB offered these additional exhibits at the time established for cross-examination exhibits under the schedule but did not offer them as cross-examination exhibits or request to cross examine any witness.

Exhibits offered as part of a contested case should be submitted with testimony, consistent with the established procedural schedule, that establishes the relevance or

purpose of the exhibits.[5] Offering exhibits out of time in this manner presents issues of due process and prejudice. While CUB relies upon OAR 860-001-0480 as establishing a process for offering exhibits at a hearing, that rule addresses the distribution and filing of testimony and exhibits but does not create an additional opportunity to file exhibits outside of the procedural schedule established for a proceeding. To interpret OAR 860-001-0480(7) as allowing unlimited supplementation of the record around the hearing would frustrate the purpose of setting a schedule based upon multiple rounds of pre-filed testimony and exhibits as was done in this case.

The instances that CUB cites to, where late-filed exhibits were accepted, did not involve the same due process and fairness concerns as those raised here. The exhibits at issue in docket UM 1908 dealt with materials already familiar to the parties and that were submitted as part of a motion to admit that explained what the exhibits were and why they should be admitted into the record. Second, no party objected to the late-filed exhibits. In docket UE 374, the administrative law judge permitted a single additional exhibit after allowing for additional testimony from the company, thus mitigating any potential prejudice and due process concerns. There may in rare instances be fact-specific circumstances that might justify admitting additional exhibits outside of the established procedural schedule. In those cases, the proffering party would need to show good cause for such exhibits to be accepted outside of the existing schedule.

Here, I find that any potentially probative value of these exhibits is outweighed by the prejudice of offering new exhibits so late in the proceeding and the lack of time for additional testimony. CUB has stated that these exhibits were intended to address a topic the company expanded on in its surrebuttal testimony and that CUB thus did not have the chance to offer responsive testimony. Under the procedural schedule in this case, the remaining opportunity to address issues in the company's surrebuttal testimony was the evidentiary hearing on August 1, 2024. CUB had the opportunity to conduct cross examination on NW Natural's witnesses and chose not to avail itself of that opportunity.

III. RULING

I decline to admit these exhibits into the record for the reasons addressed above. For the same reasons, I decline to take official notice of these exhibits under OAR 860-001-0460.

Dated this 6th day of August, 2024.

Sarah Spruce
Administrative Law Judge

[5] *See, e.g.*, Docket Nos. UM 1908/UM 2206, Ruling on Motions to Admit at 2.