

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION**

2007 SUPPLEMENTAL WHOLESAL
POWER RATE ADJUSTMENT
PROCEEDING

BPA Docket No. WP-07

**RESPONSE OF IDAHO PUBLIC UTILITIES COMMISSION TO
ASSOCIATION OF PUBLIC AGENCY CUSTOMERS' MOTION TO
STRIKE A PORTION OF THE DIRECT TESTIMONY OF THE
IDAHO PUBLIC UTILITIES COMMISSION**

INTRODUCTION

On April 11, 2008, the Association of Public Agency Customers ("APAC") submitted a motion to strike portions of Idaho Public Utilities Commission ("IPUC") witness LouAnn Westerfield's Direct Testimony filed on March 31, 2008. For the reasons more fully stated below, the Motion should be denied in its entirety.

ARGUMENT

I. APAC HAS FAILED TO CITE TO ANY CONTROLLING LEGAL AUTHORITY DEFINING IPUC WITNESS WESTERFIELD'S DIRECT TESTIMONY AS INADMISSIBLE "ARGUMENT" OR "LEGAL OPINION."

Movant has failed to include any relevant case law to assist the trier of fact in its review of Witness Westerfield's testimony. Instead, movant merely offers conclusory statements that "the portions of the testimony constitutes legal opinion and argument;" and "identified portions of testimony offer opinions on the application of statutes and

BPA rates . . .” WP-07-M-AP-4, at pp. 1-2. It has neglected to offer any precedential support for the definition of the terms “legal opinion” or “legal argument.”

The definitions section of the BPA Rules of Procedure Governing Rate Hearings defines a legal issue as “any issue grounded on any contractual right or obligation, any of BPA's organic statutes, the Administrative Procedure Act, 5 U.S.C. 551, et seq., or the Trade Secrets Act, 18 U.S.C. 1905, which has a bearing of the propriety of a rate proposed by BPA or any party,” BPA Rules of Procedure Governing Rate Hearings, § 1010.2(f), but it does not offer a substantive definition of “legal opinion” or “legal argument.”

It is beyond cavil that argument and legal opinion are the “province of the lawyer, not the witness.” WP-07-O-01. However, in order to prevail on its motion the movant must meet its burden to demonstrate that Witness Westerfield’s testimony falls within that rubric. *See Farmland Mut. Ins. Co. v. AGCO Corp*, 2008 WL 763215, *1 (D. Kan. 2008) (“The movant has the burden of demonstrating that evidence is inadmissible on any relevant ground.”) Accordingly, movant must not be allowed to rely solely upon “bare assertions” as the only support for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328, 106 S.Ct. 2548, 2555 (1986) (White, J., concurring).

II. IPUC WITNESS WESTERFIELD IS AN EXPERT IN HER FIELD AND THEREFORE SHOULD BE ALLOWED TO OFFER HER OPINIONS REGARDING GENERAL RATEMAKING CONCEPTS.

IPUC Witness Westerfield’s Qualification Statement, outlining her extensive education, employment history and training in the area of utility ratemaking, establishes her as an expert witness qualified to offer her opinion regarding generally accepted practices and norms within the utility industry. *See* WP-07-Q-ID-1. Witness Westerfield

has more than twenty years of experience in the area of utility regulation and during that time has served on the staff of three (3) separate state utility commission staffs, Arkansas, Wyoming and Idaho. In addition to her current position as a policy strategist for the IPUC, she has worked as a senior policy and rate analyst, and as an internal auditor and financial analyst for a municipal utility. Finally, she has offered testimony before numerous state utility commissions, the Federal Energy Regulatory Commission, the United States Securities and Exchange Commission and the Southwestern Power Administration.

APAC has implicitly acknowledged Witness Westerfield's status as an expert in the field of utility ratemaking. To date, APAC has not offered a challenge to Witness Westerfield's qualifications and therefore should not now be heard to complain of her testimony regarding well known and generally accepted utility ratemaking theories and concepts. *See State v. Florczak*, 76 Wash. App. 55, 72, 882 P.2d 199 (1994) (A party's failure to challenge an expert's credentials amounted to a waiver).

"Testimony regarding the 'ordinary practices of those engaged in [a particular business] . . . or concerning other trade customs' is admissible . . ." *Moffitt v. Icyne, Inc.*, 407 F. Supp 2d 591, 606 (D. Vt. 2005)(quoting *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir.1977)). This specific type of testimony, evincing the proponent's "scientific, technical, or other specialized knowledge," is always admissible to "assist the trier of fact to understand the evidence or determine a fact in issue" so long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education . . ." Federal Rule of Evidence 702.

The trier of fact is permitted a measure of discretion in its inquiry as to whether the IPUC testimony is admissible testimony from an expert. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171 (1999). The hearing officer in the original rate case that preceded this supplemental proceeding offered a definition of ‘opinion evidence’ and ruled that testimony offered by expert witnesses revealing their opinions regarding specific facts in dispute would be admissible:

Opinion Evidence is ‘evidence of what the witness thinks, believes, or infers in regard to facts in dispute as distinguished from his personal knowledge of the facts themselves and is not admissible...*except in the case of experts.*

Order No. WP-07-O-15, February 22, 2006 (*quoting Black’s Law Dictionary*, 4th Edition) (emphasis added).

Witness Westerfield’s testimony does not contain impermissible argument or legal opinion. The opinions expressed in Witness Westerfield’s testimony should be admitted into evidence because she is qualified expert witness and therefore should be allowed to offer her opinion regarding factual issues arising from BPA’s Lookback Study and Analysis.

III. IPUC WITNESS WESTERFIELD’S TESTIMONY IS ENTIRELY APPROPRIATE FOR THIS RATE CASE PROCEEDING.

IPUC Witness Westerfield’s entire testimony should be deemed admissible. The portions of the IPUC testimony that APAC has moved to strike were simply included to provide context and address the scope and impact of BPA’s proposed Lookback Analysis upon the IOU customers within Idaho. *See Columbia Gulf Transmission Company, Columbia Gas Transmission Corporation*, 20 FERC 63051, Docket No. RP75-105-000,

August 23, 1982 (Order Denying Motion to Strike expert testimony and finding that witness' "accusations that the initial decision [of the Presiding Judge] was in error" amounted to "factual assertions" about the "impact of the Commission's stand-alone policy . . ."). (Emphasis added).

The testimony cited by APAC focuses primarily on two areas: 1) IPUC testimony referring to the general ratemaking concept known as "retroactive ratemaking;" and 2) IPUC testimony referencing the so called "deemer" accounts managed by BPA on behalf of the Northwest IOU's.

A. The Rule Against Retroactive Ratemaking Is a Bedrock Principle of Conventional Utility Ratemaking and a Widely Used Policy Tool by Utility Regulation Professionals.

The term "retroactive ratemaking" did not originate as a legal term emanating from a court of law. While it is true that courts have universally cited and endorsed the rule against retroactive ratemaking, this industry-wide term owes its conception to the professionals within the utility regulation field. See James C. Bonbright et al., *Principles of Public Utility Rates*, (2d ed. 1988) at p. 198 ("Nor as a general rule of ratemaking will a utility be allowed to set rates to recover past losses. Commissions are generally proscribed from fixing retroactive rates . . .") In short, it is a term used to describe a generally accepted ratemaking principle used by utility ratemaking professionals to prevent regulated utilities from applying today's prices to yesterday's service.

B. The Issue of IOU Deemer Balances are a Permissible Subject for Direct Testimony Because they Directly Affect BPA's Lookback Analysis and the IOU's Ability to Receive Future REP Benefits.

IPUC Witness Westerfield's testimony concerning the deemer balance calculations was submitted in direct response to BPA's invitation to offer alternatives to its proposed

Lookback Analysis and Approach. *See* 78 Fed. Reg. 7539, 7551 (February 8, 2008) (“BPA encourages parties to propose alternatives to this or other elements of BPA’s proposal . . .”); *see also* WP-07-E-BPA-52, Testimony of Raymond D. Bliven, Charles W. Forman, JR. and Elizabeth A. Evans, Witnesses for Bonneville Power Administration, Section 7: Alternatives to BPA’s Lookback Approach, at p. 28, Lines 5-6 (“BPA welcomes other approaches to respond to the Court’s Rulings.”)

In full compliance with BPA’s open invitation for alternative views and approaches, Witness Westerfield offered her expert opinion pertaining to the foreseeable negative consequences that BPA’s deemer balance calculations would have upon the Lookback Analysis and, consequently, upon the IOU’s residential and small farm customers in Idaho. She then expanded upon her analysis of BPA’s Lookback approach and offered an alternative approach on how to address the deemer balance issue in response to the 9th Circuit decisions. In her testimony, Witness Westerfield makes only general references to the Northwest Power Act and the 9th Circuit opinions and does so only to provide a necessary context behind the initiation of this rate proceeding and BPA’s Lookback Analysis.

Ironically, APAC’s pre-filed testimony offered an excellent example of what constitutes inadmissible legal opinion and argument when it commented on the recent 9th Circuit opinions in its testimony and, in contrast to the IPUC testimony, went so far as to offer a legal opinion as to the precise holding in those cases. *See* WP-07-E-AP-1, Direct Testimony of Lincoln Wolverton, at p. 1, Lines 17-18. Basic notions of equity demand that APAC be precluded from ‘having it both ways.’ APAC should be estopped from objecting to the IPUC testimony because it has submitted witness testimony containing

blatant and obvious legal conclusions. See *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* 324 U.S. 806, 814, 65 S.Ct. 993, 997 (1945) (“Equitable maxim that he who comes into equity must come with clean hands . . . is far more than a mere banality.”) (Emphasis added).

To be sure, every party, including BPA, to the instant proceeding has made reference to the 9th Circuit decisions and the Northwest Power Act in their respective testimonies. Referring to these decisions and the statute which gave rise to the BPA’s Residential Exchange Program can hardly be avoided. Moreover, if a party is to effectively respond to BPA’s invitation and offer a thoughtful critique and/or a useful alternative to the BPA’s proposal it ought not be prevented from doing so.

CONCLUSION

For the aforementioned reasons stated above, the Motion should be denied in its entirety.

Respectfully Submitted,

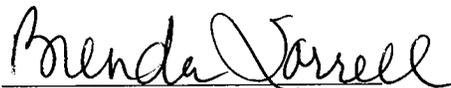


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CERTIFICATE OF SERVICE

I, Brenda Sorrell, certify that I have caused the *Response of Idaho Public Utilities Commission to Association of Public Agency Customers' Motion to Strike a Portion of the Direct Testimony of the Idaho Public Utilities Commission* to be served by fax and electronic mail on the parties listed below pursuant to Order No. WP-07-HOO-43.

Dated this 18th day of April 2008 at Boise, Idaho.



Brenda Sorrell

WP-07 Supplemental Wholesale Power Rate Adjustment Proceeding Service List

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