ISSUED: October 7, 2020

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2032

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into Treatment of Network Upgrade Costs for Qualifying Facilities.	RULING

DISPOSITION: MOTION TO STRIKE GRANTED IN PART AND DENIED IN PART

I. BACKGROUND AND PROCEDURAL HISTORY

This docket was opened "to address the appropriate cost allocation of interconnection-related Network Upgrades for qualifying facilities (QFs)."[1] The parties initially disputed the nature and scope of the proceeding—i.e., whether it should be a non-contested case proceeding focusing on legal and policy argument alone, or a contested case with factual development for application of legal and policy argument.

The proceeding was designated as a contested case, with the initial scope confined to two questions:

1. Who should be required to pay for Network Upgrades necessary to interconnect to a QF to a host utility?

2. Whether on system QFs should either be required to interconnect to a host utility with Network Resource Interconnection (NRIS) or have the option to interconnect with Energy Resource Interconnection Service (ERIS) or an interconnection service similar to ERIS.[2]

On August 24, 2020, PacifiCorp, dba Pacific Power, Idaho Power Company, and Portland General Electric Company (Joint Utilities) filed joint testimony (Joint Utilities' Exhibit 100 sponsored by Richard A. Vail, Kris Bremer, Shaun Foster, Sean Larson, and Jared Ellsworth (Joint Utilities/100), and Joint Utilities Exhibit 200 sponsored by Michael G. Wilding, Robert Macfarlane, and Alison Williams (Joint Utilities/200)).

On September 2, 2020, the Northwest and Intermountain Power Producers Coalition and the Community Renewable Energy Association (Interconnection Customer Coalition)

[1] ALJ Ruling on Issues List at 1 (May 22, 2020).
[2] *Id*. at 2.

filed a motion to strike portions of the Joint Utilities/100 and Joint Utilities/200. Pursuant to the expedited schedule,[3] the Joint Utilities filed a response to the motion to strike on September 14, 2020. On September 17, 2020, the Interconnection Customer Coalition filed a reply.

II. MOTION TO STRIKE

Rather than present significant factual information, data, studies, or other forms of evidence, the joint testimony primarily discusses legal precedence from the Oregon Public Utility Commission and the Federal Energy Regulatory Commission (FERC), the Interconnection Customer Coalition contends. To the extent this discussion by non-lawyer witnesses analyzes precedent and applies legal interpretation to the minimal amount of offered facts, the motion argues that the joint testimony is inadmissible and should be stricken. Exhibit A attached to the motion to strike highlights the specific language alleged to "constitute improper legal argument offered by non-lawyer witnesses" that should accordingly be stricken from the record.[4]

Legal argument belongs in briefs, not testimony, the Interconnection Customer Coalition asserts.[5] Non-lawyers should not engage in legal policy analysis. Testimony is intended to provide relevant evidence defined as "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."[6] With regard to the discussion of law and policy in testimony, the motion quotes a recent ruling on a similar motion to strike, "it is important to distinguish between the witness' understanding of the law and the witness' interpretation and application of the law to the facts* * *"[7] The former, the motion states, "relates to a witness's 'state of mind in developing testimony,' and the latter is considered legal analysis or a legal argument, both of which are inadmissible."[8] The Interconnection Customer Coalition elaborates, "[i]f the witnesses' testimony is essentially debating what the law is and how the law should be applied, then the witnesses' interpretation of that law is inadmissible as factual evidence for testimony."[9] The Interconnection Customer Coalition acknowledges that the Joint Utilities cite several Commission cases allowing witnesses to provide statements about relevant, settled law, but notes that those cases were decided prior to the *Blue Marmot* case. After *Blue Marmot*, the Interconnection Customer Coalition asserts

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[3] ALJ Ruling on Schedule at 1 (Sep 3, 2020).
[4] NIPPC, COALITION, and CREA Motion to Strike at 1 (Sep 2, 2020).
[5] *Id*. at 5, citing *In re Or. Pub. Util. Comm'n Staff Requesting the Comm'n Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket No. UE 177, Order No. 08-176 at 3 (Mar. 20, 2008).
[6] *Id.* at 5-6, citing OAR 860-004-0450(1)(a) (emphasis added in *italic*); *See, e.g.*, *m. Can Co. v. Lobdell*, 55 Or 451, 466 (1982) (upholding Commission's exclusion of irrelevant evidence); *see also* OAR 860-001-0480 (10) ("written testimony is subject to rules of admissibility").
[7] *Id*. at 6, citing *Blue Marmot v. PGE*, Docket No. 1829, Ruling at 3 (Dec. 13, 2017).
[8] *Id*. (citing Federal Rule of Evidence 702 (which permits the use of expert testimony only if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue."); Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325 (1992)).
[9] NIPPC, COALITION, and CREA Reply at 3 (Sep 17, 2020).

that a witness's testimony may reference and cite statutes and precedent, but only to establish factual evidence.

In addition to the general objections to legal conclusions and analysis by non-lawyers, the motion to strike specifically objects to certain portions of testimony, as follows:

1. Witness answers posed question with legal conclusions, arguments, or assumptions—e.g., witness makes legal conclusion by stating that Commission policy is consistent with PURPA's standards: Vail-Bremer-Foster-Larson-Ellsworth/5:16-18 ("The Commission's current policies, which allocate the costs of QF-driven Network Upgrades to the QFs that cause them, are consistent with PURPA's customer indifference standard."); 6:5-7 (Stating that the Commission's current QF policies are consistent with "customer indifference policies."); Joint Utilities/200, Wilding-Macfarlane-Williams/3:17-18 ("Current Commission policy is consistent with PURPA, state regulatory policy, and Oregon law."); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/22:9-15 (answering the question "is the Commission's QF-interconnection Network-Upgrade cost-allocation policy consistent with PURPA?").

2. Witness makes incorrect legal conclusion regarding regulatory entity having jurisdiction over interconnection customer: Joint Utilities/100 Vail-Bremer-Foster-Larson-Ellsworth/7:5-10; Joint Utilities/200, Wilding-Macfarlane-Williams/7:6-8

3. Concluded which laws apply to whom: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/9:17-18, 10:1-2 ("Do the Commission's small generator interconnection rules apply only to QFs?"); 10:7-10 ("What interconnection rules apply to QFs with a nameplate capacity between 10 and 20 MW?"); 35:7-10 (answering a question by explaining that "FERC's policies for FERC jurisdictional generators are governed by the FPA and do not face the limitation of customer indifference and the avoided cost rate. In contrast, the appropriate policies for QFs turn on the requirements imposed by PURPA and state regulatory policy, not the FPA, as the Joint Utilities' Regulatory Witnesses discuss.").

4. Applies law to fact to identify who must pay for upgrades: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/8:15-20, 9:1 ("Under the Commission's current policies, who is required to pay for the Network Upgrades necessary to interconnect a QF to the host utility"); 9:9-12 ("Who is required to pay for Interconnection Facilities and Distribution Upgrades under the QF-LGIA"); 11:6-11 ("who is required to pay for the various facilities and upgrades necessary to interconnect the generating resource to the utility's system?"); 34:5-7 (answering a question by explaining how "shifting the costs caused by a QF's interconnection from the QF to the utility would violate PURPA's customer indifference principle").

5. Applies law to fact to indicate how law defines term: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/29:20-22-19 (explaining without citation that PURPA's "interconnection costs" definition is so broad "it includes all types of facilities or upgrades that may be necessary for a QF's interconnection, including Network Upgrades").

6. Contested legal assertions that should be addressed in briefs not testimony: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/11:6-11 (legal assertion that "[u]nder the Commission's small generator interconnection rules, who is required to pay for the various facilities and upgrades necessary to interconnection the generating resource to the utility's system?"); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/34:5-7 (legal assertion that "shifting the costs caused by a QF's interconnection from the QF to the utility" "would violate PURPA's customer indifference principle"); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/30:15-17 (legal assertion that "FERC has made clear that a QF's output must be delivered using firm transmission service, and that QF output cannot be curtailed except in system emergencies."); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/31-32:7 (legal analysis of FERC orders); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/34:9-17 (legal interpretation of recent Oregon case); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/19:9-12 (legal assertion that "PURPA's unique operational requirements" means that "NR Network Upgrades are needed . . ."); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/22:11-13 (legal assertion that "requiring a QF to pay for the costs of Network Upgrades . . . is mandated by PURPA . . ."); Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/33:23-34:1, 34:5-7 (legal assertion that passing through costs of Network Upgrades to retail customer violates PURPA); e.g., Joint Utilities/200, Wilding-Macfarlane-Williams/3:17-18, 4:5-21 (legal assertions that current Commission policy is consistent with PURPA and Oregon law).

7. Conclusions About Scope: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/12:18-20 ("These Network Upgrades are defined by the Commission as 'Network Upgrades' and are clearly within the scope of this docket.").

8. Witness' "understanding of the law" actually interprets and applies the law: e.g., Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/7:8-10, 9:18, 22:12, 23:21, 24:4, 24:8-23, 25:2-8, 25:18-24, 27:7-28, 28:5-11, 31:2-22; Joint Utilities/200, Wilding-Macfarlane-Williams/5:7-12, 6:3-9, 7:6-12, 7:n.6, 10:17-21, 11:8-11, 11:13-16, 14:1-6.

9. Legal analysis with citations: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/23-28; Joint Utilities/200 all highlighted portions of Appendix A.

If the identified language is not stricken, the Interconnection Customer Coalition argues that preparation of its response testimony will be complicated with the decision either to: not refute the statements thereby creating prejudice; or to incur significant expense to conduct discovery, develop responsive testimony, and conduct cross-examination.

III. RESPONSE TO MOTION TO STRIKE

The Joint Utilities counter that the testimony at issue is appropriate because it provides factual evidence in context of the witnesses' understanding of the existing interconnection regulatory framework, or presents policy recommendations—both of which are admissible. As detailed in the joint testimony, the witnesses are qualified to provide testimony that discusses the interconnection framework and to make policy recommendations. As the testimony does not contain witnesses' interpretations of laws or policy, or the applications of laws or policies to facts, the Joint Utilities contend, the testimony is appropriate and should not be stricken. The Joint Utilities agree that the *Blue Marmot* ruling explains the pertinent legal standard, stating:

> It is well-established that the purpose of testimony is to provide relevant evidence, whereas legal argument should be reserved for briefing rather than included in the testimony of nonlawyers.[10] However, this does not mean that non-lawyer witnesses may not discuss their understanding of the legal or regulatory framework to provide context for their testimony. To determine whether testimony is impermissible legal analysis, "it is important to distinguish between the witness' understanding of the law and the witness' interpretation and application of the law to the facts purported to being offered in testimony."[11] Testimony describing a witness's understanding of the law "relates to the witness' state of mind in developing testimony (which may have some limited evidentiary value and be admissible in an administrative proceeding)."[12] On the other hand, testimony describing a witness's interpretation and application of the law to the facts "would constitute legal analysis or argument and be inadmissible."[13]

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[10] Joint Utilities Response to Motion to Strike at 3 (Sep 14, 2020), citing OAR 860-001-0450(1)(a); *In the Matter of Oregon Pub. Util. Comm'n Staff Requesting the Comm'n Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Order No. 08-176 at 3 (Mar 20, 2008).
[11] *Id*. at 3-4, citing *Blue Marmot V LLC, et al. v. Portland Gen. Elec. Co.*, Docket UM 1829, ALJ Ruling at 3 (Dec. 13, 2017) (emphasis in original).
[12] *Id.* at 4, citing ALJ Ruling at 3.
[13] *Id*.

The Joint Utilities' categorize the motion's objections to specific testimony into five broad categories, providing support for why testimony in each category should not be stricken:

1. Testimony describing the current interconnection and transmission frameworks, as well as the underlying policies, in Oregon and at FERC: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5:16-18; 7:5-10, 8:15-9:1, 9:9-12, 9:17-10:2, 10:7-10, 11:6-11, 13 n.17, 13:14-14:5, 18:14-17, 23:19-24:1, 24:4-5, 24:8-26:4, 27:23-28:2 & n.33, 28:18- 22, 30:15-17, 31:1-32:7, 34:9-17, 35:3-4; Joint Utilities/200, Wilding-Macfarlane-Williams/5:7-5:12; 6:13- 18, 7 n.6, 8:8-17, 9:1-6 & n.9, 9:17-10:6, 10:14-11:1, 11:4-11; 13:21.

   Witnesses' explanation of their understanding of the Commission's and FERC's interconnection study and cost-allocation processes is not legal analysis that should be stricken, the Joint Utilities argue, as the witnesses do not provide legal interpretation, nor apply law to facts. For example, they explain, the statement "[u]nder the QF-LGIA, a QF is required to pay for all Network Upgrades necessary to interconnect the QF to the host utility, unless the QF can demonstrate that its Network Upgrades provide 'quantifiable system-wide benefits'" simply restates a Commission order, with the appropriate quotation marks and cites, and represents knowledge that a utility transmission function employee responsible for interconnection-request processing and contract administration must understand to do the job. Similarly, the statement indicating that the QF-LGIP requires a QF to obtain Network Resource Interconnection Service (NRIS) is apparent on the face of the QF-LGIP, contains no legal interpretation or analysis, and must be understood to do the job at hand.

2. Testimony describing how each transmission provider operates its transmission system to accommodate QF generation and the practical implications of PURPA: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5:21-6:2, 15:9-13, 19:1-4, 9-12; Joint Utilities/200, Wilding-Macfarlane-Williams/7:17-8:7.

   The Joint Utilities argue that testimony explaining the understanding by witnesses for the Joint Utilities about operational requirements imposed by FERC should not be stricken. For example, they observe, the statement that "FERC has held that a purchasing utility must deliver a QF's power on firm transmission without curtailment (except in emergency conditions)" merely set forth an operational understanding.[14] They assert that witnesses also discuss their understanding of a FERC order clarifying these operational requirements and explaining how the operational considerations are factually relevant to the interconnection policy issues raised in this case, including whether QFs should be required to obtain

[14] *Id*. At 8.

NRIS. The Joint Utilities argue that testimony factually describes how the utility makes transmission arrangements and dispatches resources based on the witnesses' understanding of regulatory requirements and the practical implications of operations, and is appropriate. The witnesses also factually compare the types of facilities identified as Network Upgrades during the interconnection study process to the types of facilities described in FERC's definition of interconnection costs; making a factual comparison is not legal analysis, the Joint Utilities assert.

3. Testimony describing how interconnection costs are currently charged to interconnection customers and how changes to that cost-recovery framework would shift costs onto retail customers: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/6:5, 15:9-13 & n.20, 22:9-15, 33:23-34:7, 34:9- 17; Joint Utilities/200, Wilding-Macfarlane-Williams/4:5-10, 5:13-6:1 & n.3, 6:6-9, 12 n.13.

   PURPA's foundational customer-indifference requirement is explained in testimony as: "PURPA requires that customers remain economically indifferent to the source of power the utility purchases by ensuring the cost to the utility associated with purchasing energy and capacity from a QF does not exceed the cost it would incur if it were purchasing from some other source." They also factually explain that when QFs pay for the costs of their interconnection and customers do not, customers remain indifferent, the Joint Utilities assert. To remove concern that the Joint Utilities' testimony states that cost shifting violates the customer indifference standard, the Joint Utilities' agree to strike the word "standard" from the testimony.

4. Testimony providing policy recommendations: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/29:10-12, 35:7-10; Joint Utilities/200, WildingMacfarlane-Williams/3:12-15, 3:17-18, 4:11-5:1; 7:3-12, 8:19-21; 9:7-11, 10:8, 10:10-13, 11:12-16, 11:19- 20, 11:22-12:5, 12:20-13:7, 13:23-14:8.

   It is typical for testimony to provide policy recommendations in QF policy investigations like this one, the Joint Utilities assert, and the Joint Utilities argue that witnesses' policy views do not constitute impermissible legal analysis. For example, the Joint Utilities observe, the statement that "a utility's obligations under PURPA should not be understood to upend the utility's responsibility to prudently plan for and invest in cost-effective transmission and distribution system upgrades, or the Commission's responsibility to ensure that the rates customers pay are fair, just, and reasonable" is a policy recommendation, and not a legal conclusion that must be stricken. As a practical matter, they argue, it would be extremely difficult to understand parties' positions and efficiently develop a record for this policy investigation if policy recommendations were reserved for the briefing stage.

5. Witness' testimony about understanding of the docket: Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/12:19-20, 13:4-5, 12-13.

Testimony describing witnesses' understanding of the scope of the docket is not legal analysis, the Joint Utilities argue. Recitation of the witnesses' understanding of the scope of the docket provides important context for the witnesses' explanation of the issues list and how it relates to the interconnection processes that they oversee.[15] From a practical standpoint, discussion of witnesses' understanding of the scope of the docket provides an overview of the topics that be covered in the witnesses' testimony and why. The Joint Utilities observe that they did not understand the scope of the docket to be in dispute, but to the extent there are different views, it is important to make that clear early in the record.

The Joint Utilities argue that striking the testimony at issue would likely make the record less clear, and hamper the resolution of the policy issues.

IV. DISCUSSION AND RULING

Although this is a contested case proceeding, it is a proceeding focused on facilitating the Commission's refinement of policy on particular issues.[16] In contrast, the *Blue Marmot* proceedings, in which the recent ruling was issued that the motion to strike relies on, was a contested case involving a complaint between two parties with specific facts that sought the Commission's interpretation of law applied to those facts. In that case, Complainant Blue Marmot argued that the Commission typically allows testimonial discussion about legal and policy matters, with the understanding that the value of such testimony is weighed in context of its circumstances. The *Blue Marmot* Ruling examined each section of testimony subject to the motion to strike, striking those deemed not to relate to the witness' state of mind in developing the testimony, but rather to interpret or applying the law to specific facts of the complaint.

The parties in this case essentially agree that the *Blue Marmot* Ruling correctly determined that testimony that describes a witness' understanding of the law is relevant as to state of mind in developing the testimony and admissible because it potentially has some limited evidentiary value, but that testimony that individually interprets the law and applies the law to specific facts is not admissible. Applying this standard to the portions of testimony in Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth at issue here, I grant the motion to strike as to the selections

[15] *Id*. at 11, citing Docket UM 1610, CREA/500, Skeahan/8-9 (responding to the question "Please explain your understanding of the disputed issue.").

[16] ALJ Ruling on Issues List at 4. "This docket is part of a large, integrated plan that Staff recommended, almost a year ago, be undertaken by the Commission to fully address a range of issues regarding the continued implementation of PURPA." *In the Matter of Public Utility Commission of Oregon, Investigation into PURPA Implementation*, Docket No. UM 2000, Staff Report for the July 30, 2019 Public Meeting (Jul 22, 2020).

identified below. These portions of testimony are deemed to represent not just an understanding of a law that may provide context for factual testimony, or policy advice since this a policy proceeding, but an interpretation or application of that law that leads to legal interpretation or conclusions that would be better presented in a legal brief.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5: 18: the phrase, "are consistent with PURPA's customer indifference standard." This phrase interprets law by comparing state and federal standards and concluding they are consistent.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/6: 1-2: the phrase, "means that NRIS is the only appropriate interconnection service type for QFs." This phrase interprets law by concluding that a particular transmission arrangement is mandated.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/6: 5: the phrase, "customer indifference standard." This phrase repeats the conclusion made in Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/5: 18.

- Joint Utilities/100, Vail-Bremer-Foster-Laron-Ellsworth/15: 9-13: the passage "PURPA mandates a very specific arrangement: Under 10 PURPA, a directly interconnected QF arranges for its interconnection with the utility's system; the utility is then required by PURPA to make transmission service arrangements to deliver the power from the QF's point of delivery to the utility's load using firm transmission service," including fn. 2, "*See, e.g., Pioneer Wind Park I, LLC,* 145 FERC ¶ 61,15 a n. 73 (Dec. 16, 2013). This passage interprets law by making a legal conclusion about the particular transmission arrangements that are mandated.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/18: 14-17: the question and answer "Q. What type of interconnection service must an Oregon QF obtain? A. The Commission's QF-LGIP requires a QF to obtain NRIS. A QF's interconnection studies will therefore identify both ER and NR Network Upgrades triggered by the QF's interconnection." This question and answer interprets law by making legal conclusions about a particular transmission arrangement being mandated, and the consequent design of interconnection studies.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/19: 9-12: the phrase "given PURPA's unique operational requirements . . . ". This phrase represents a legal interpretation that PURPA mandates unique operational requirements.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/24: 1-9: the question and answer: "Q. Why do you say 'presumptively' responsible? A.

We understand the Commission the following qualifier to its ruling on QF cost responsibility for Network Upgrades . . . " Despite the "we understand" qualifier, the question and answer essentially interprets law by concluding that certain language in an order mandates a legal conclusion.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/25: 18-20: the sentence "Again, we are not legal experts, but we understand that the Commission was expressing its concern that FERC's policy is not consistent with PURPA's avoided cost framework." Although qualified with "we are not legal experts, but we understand," this sentence makes a legal judgment as to one legal body's evaluation of another legal body's action, for the purpose of stating a legal opinion, rather than discussing operational import.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/25: 21-23: the sentence "Eliminating Section 11.4.1 made QFs presumptively responsible for the cost of their Network Upgrades under the QF-LGIA." This sentence makes a legal conclusion about the effect of Commission direction.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/27: 23-28, 28: 1-2: the question and answer beginning "Q. Does this regulation's section . . ." Makes a legal conclusion about operational requirements based on cited legal sources.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/28: 18-22: the question and answer beginning "Q. Is PURPA's definition of 'interconnection costs' broad enough . . .". Makes a legal conclusion about scope of a statutorily defined term without any qualification about being advised, etc.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/29: 10-12: the sentence "Finally, there is no straightforward regulatory alternative to requiring NRIS that will ensure customers remain unharmed by a QF's interconnection in all instances." Makes legal conclusion that particular operational requirement is only legal option that won't hurt customers.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/30: 15-17: the phrase "FERC has made clear that a QF's output must be delivered using firm transmission service, and that QF output cannot be curtailed except in system emergencies." Makes general legal conclusion.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/33: 23, 34: 1: the phrase "and their pass-through to customers would be inconsistent with PURPA's customer indifference mandate." Makes legal conclusion about federal legality of certain costs.

- Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/34: 2-7: the question and answer beginning with "The directly interconnected utility . . ." Makes legal conclusion about federal legality of certain costs.

Applying this standard to the portions of testimony in Joint Utilities/200, Vail-Bremer-Foster-Larson-Ellsworth that at issue here, I grant the motion to strike as to the selections identified below. These portions of testimony are deemed to represent not just an understanding of a law that may provide context for factual testimony, or policy advice since this a policy proceeding, but an interpretation or application of that law that leads to legal interpretation or conclusions that would be better presented in a legal brief.

- Joint Utilities/200, Wilding-Macfarlane-Williams/3: 17-18: the sentence "Current Commission policy is consistent with PURPA, state regulatory policy, and Oregon law." This sentence interprets law by deeming Commission policy to be consistent with state and federal law.

- Joint Utilities/200, Wilding-Macfarlane-Williams/4: 12-15: the phrase, "sound state regulatory policy and the discharge of the Commission's statutory duties would themselves require the allocation of interconnection-driven Network Upgrades to the interconnecting generators that cause them." This phrase interprets legal principles and statutory law to require a particular legal conclusion.

- Joint Utilities/200, Wilding-Macfarlane-Williams/4: 5-8: the sentence, "The Commission's current policies are consistent with PURPA's requirement that a utility's retail customers should be indifferent to whether a utility purchases power from a QF or from some other source." This sentence compares state and federal law and concludes they are consistent.

- Joint Utilities/200, Wilding-Macfarlane-Williams/4: 20-21, 5:1: (the sentence, "Finally, allocating QFs' interconnection-driven Network Upgrade costs to QFs, rather than utility customers, is consistent with the Commission's statutory duty to ensure customer rates are just and reasonable." This sentence assesses policy advice to be consistent with state statutory law.

- Joint Utilities/200, Wilding-Macfarlane-Williams/6: 17-18: the phrase, "thus ensuring that the utility's purchase of QF power is consistent with PURPA's customer indifference standard." This phrase asserts without qualification that Commission policy is consistent with federal law.

- Joint Utilities/200, Wilding-Macfarlane-Williams/7: 3-12: the question and answer beginning, "QFs have argued that FERC's standard generator interconnection cost-allocation policies promulgated pursuant to the Federal

Power Act . . .” This discussion analyzes jurisdiction and the applicability of federal versus state law.

- Joint Utilities/200, Wilding-Macfarlane-Williams/8: 8-15: the question and answer beginning, “What do FERC’s PURPA regulations say about QF interconnection costs.” The discussion identifies federal law that should inform Commission policy.

I deny the motion to strike as to the other highlighted portions of testimony in Appendix A, finding that although these portions may discuss policy and law, they do so in the context of policy recommendations in a policy proceeding without interpreting or applying the law to specific facts, or making legal conclusions.

Dated this 7th day of October, 2020, at Salem, Oregon.

Traci Kirkpatrick
Administrative Law Judge