

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, |) | DOCKET UE-161204 |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | MOTION TO STRIKE OF BOISE WHITE |
| |) | PAPER, L.L.C.; ALTERNATIVE MOTION |
| PACIFIC POWER & LIGHT COMPANY, |) | FOR FULL CROSS-EXAMINATION |
| |) | |
| Respondent. |) | |
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I. INTRODUCTION

1 Pursuant to WAC § 480-07-375(1)(d), Boise White Paper, L.L.C. (“Boise”) files the following motion to strike (“Motion”), requesting that the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) strike specified portions from the Pacific Power & Light Company (“Pacific Power” or the “Company”) Rebuttal Testimony of R. Bryce Dalley, Exh. RBD-5T. Boise also files an alternative motion to allow full cross-examination on these specified portions of testimony (“Alternative Motion”), if the Commission elects not to strike testimony from the record.

2 In brief, Mr. Dalley improperly testifies as a legal witness in the specified portions of rebuttal testimony. While Boise believes Mr. Dalley’s legal testimony should simply be stricken from the record, Boise will not be prejudiced if the Alternative Motion is granted. That is, so long as Boise can fully cross-examine Mr. Dalley on all legal issues in testimony portions not stricken, the Company will not have an unfair advantage via hearing objections—e.g., that Mr. Dalley is not a lawyer, and so cannot answer legal questions on cross-examination.

II. MOTION TO STRIKE

3 In this Motion, Boise respectfully requests that the Commission strike the following sections of Mr. Dalley’s rebuttal testimony from the record, as improper legal statements from a non-legal expert witness:

- Exh. RBD-5T at 12:14-21; and
- Exh. RBD-5T at 13:4-14:11.

For the convenience of the Commission and parties, Attachment A to this Motion contains the referenced pages of Mr. Dalley’s testimony in legislative format, with strike-through to indicate portions of testimony to be stricken from the record.

4 To be perfectly clear, Boise does not allege any impropriety with the Company including these portions of testimony in *later* briefing. In fact, Boise suspects that the specified portions of Mr. Dalley’s testimony may have been prepared by Company attorneys or other personnel in the first place. Nevertheless, if Mr. Dalley is not prepared to be cross-examined fully on his legal statements—and, perhaps more importantly, Company counsel is not prepared to *allow* Mr. Dalley to be fully cross-examined on legal statements appearing in his testimony—then such legal content should be stricken from the record.

5 The material facts at issue are as follows. First, Mr. Dalley brusquely assays to tell the Commission what sundry U.S. Constitutional Clauses “require” in terms of Company compensation, replete with curated quotation from the U.S. Supreme Court.^{1/} Second, Mr. Dalley was not content to merely testify that, in his opinion, the Commission, WUTC Staff (“Staff”), and other parties had “recognized the application of the regulatory compact in

^{1/} Dalley, Exh. RBD-5T at 12:14-21.

numerous proceedings.”^{2/} Instead, Mr. Dalley again plays legal curator, this time to state “regulatory compact” precedent, by selectively quoting favored snippets of WUTC orders over the past three decades^{3/}—albeit with sufficient imprecision to suggest more of a rushed, stream-of-consciousness outpouring, rather than a well-considered new foray into the legal profession.^{4/}

6 Stated concisely, the specified portions of Mr. Dalley’s testimony should be stricken as the improper inclusion of legal opinion by the Company in testimony. The impropriety of legal testimony is well established in Washington; simply put: “Conclusions of law and statutory interpretation are not proper subjects for testimony.”^{5/} Notwithstanding, Mr. Dalley draws a bare legal conclusion in testifying as to what U.S. Constitutional Clauses “require” in this proceeding.^{6/} Accordingly, this portion of testimony is not a proper subject for witness testimony and should be stricken. Likewise, Mr. Dalley’s lengthy curation of “regulatory compact” precedent is an improper attempt to form a conclusive legal statement or interpretation of Washington law applicable to the Commission.^{7/} For this reason, such testimony should also be stricken.

^{2/} Id. at 13:1-3.

^{3/} Id. at 13:4-14:11.

^{4/} See, e.g., id. at 13:8-16 (attributing a “Separate Statement of Chairman Danner” quotation to “p. 11” of an order with only eight pages, notwithstanding Mr. Dalley’s citation to the same paragraph of Chairman Danner’s Separate Statement on the preceding page, in footnote 12, to “§ 2”); id. at 13:17 (citing to a “*WTUC v. Pacific Power & Light Company*” proceeding) (emphasis added); id. at 13:17-21 (attributing a quotation from Boise witness Bradley G. Mullins to “p. 219” of an unnumbered “Final Order” (there were two final orders in the referenced proceeding), though the order associated with the referenced date contained only 132 pages, counting appendices—presumably, Mr. Dalley (or some other drafter of this legal reference) meant to cite to page 105 of Order 08, at ¶ 247, where the Commission includes a block quote from Mr. Mullins’ testimony).

^{5/} Chester v. Deep Roots Alderwood, LLC, 193 Wash. App. 147, 158 (2016), *rev. den. sub. nom. Chester v. Deep Roots Tattoo & Body Modification*, 186 Wash. 2d 1011 (2016) (citing Everett v. Diamond, 30 Wash. App. 787, 791 (1981)). See also Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co., 53 Wash. App. 777, 782 (1989), *rev. den.*, 113 Wash. 2d 1003 (1989) (finding a statement improper when “nothing more than an opinion on a legal issue to be decided by the court”).

^{6/} Dalley, Exh. RBD-5T at 12:14-21.

^{7/} Id. at 13:4-14:11.

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Under Washington law, there is a line separating proper witness testimony, which may touch upon “a matter of law,” from improper witness testimony, which takes the form of a purely legal interpretative or conclusory statement.^{8/} Indeed, the Commission follows the same delineation recognized by Washington courts—i.e., allowing testimony comprised of an application of law to fact, as distinct from pure legal opinion.^{9/} For this reason, Boise does not take issue with Mr. Dalley’s attempted application of Washington law to the facts at issue in this proceeding, up to a reasonable point.^{10/} But, the testimony portions forming the basis of this Motion descend to the realm of pure legal conclusion and unfiltered legal statements.

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The distinction between proper testimony touching upon “a matter of law” and improper legal testimony is perhaps best exemplified by contrasting the testimony of Staff witness David J. Panco and Mr. Dalley. Responding to Mr. Dalley’s fulsome citation to a “regulatory compact,” as referenced within a Separate Statement of Chairman Danner, Mr. Panco describes the “regulatory compact” as only “a metaphor.”^{11/} Unlike Mr. Dalley, however, Staff’s witness does not then attempt to transform himself into a lawyer, either by offering legal conclusions on Constitutional Clauses or by curating bulleted lists of WUTC precedent on the subject of regulatory compacts. Rather, Mr. Panco clarifies that, precisely because the “regulatory compact” is nothing more than a metaphor, the “regulatory compact” has no legal effect.^{12/} This is not an improper legal conclusion so much as the acknowledgment of the *absence* of a relevant legal issue, from Staff’s perspective.

^{8/} Everett, 30 Wash. App. at 791.

^{9/} Worldcom, Inc. v. GTE Nw., Docket UT-980338, Second Suppl. Order at 5 (Feb. 3, 1999).

^{10/} E.g., Dalley, Exh. RBD-5T at 12:3-13; id. at 13:1-3; id. at 14:12-22.

^{11/} Panco, Exh. DJP-1T at 5:4.

^{12/} Id. at 5:14-15.

In any event, Mr. Panco stays on the proper side of the line—by which courts and the Commission allow testimony touching only upon “a matter of law,” short of descending to pure legal testimony. Mr. Panco actually considered the same U.S. Supreme Court precedent that Mr. Dalley misappropriated as legal testimony; however, in stark contrast to Mr. Dalley, Staff’s witness discreetly and prudently excluded legal conclusions on the regulatory compact “which *informed* the development of Staff’s testimony.”^{13/} Similarly, Mr. Mullins noted that Staff had provided “highly informative considerations” in discovery relating to the regulatory compact, statute, and U.S. Supreme Court precedent; yet, Mr. Mullins never attempts to go to the next, improper step of offering legal conclusions or attempting to curate block quotes of precedent within testimony.^{14/} Indeed, Mr. Mullins suggests that further consideration is warranted,^{15/} implicating that proper analysis should take place within future legal briefing, unlike the approach taken by Mr. Dalley and the Company.

III. ALTERNATIVE MOTION FOR FULL CROSS-EXAMINATION

If the Commission does not strike portions of Mr. Dalley’s testimony, specified within the foregoing Motion, then Boise respectfully requests, via this Alternative Motion, that the Commission allow for full cross-examination of Mr. Dalley on any such testimony.^{16/} In short, if the specified portions of Mr. Dalley’s testimony are not considered improper legal

^{13/} Compare Exh. BGM-5 at 3-7 (Staff’s Response to Pacific Power Data Request 1 & “attached article by Scott Hempling,” which contains block quotation from and discussion of Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)) (emphasis added), with Dalley, Exh. RBD-5T at 12:15-21 (quoting Duquesne). See also Binkley v. Salmon Shores RV Park and Puget Sound Energy, Inc., Docket UE-091531, Order 02 at n.5 (June 2, 2010) (exhibiting similar carefulness to not draw impermissible legal conclusions: “Staff notes, with the caveat that it is *not* reaching any legal conclusions or providing any legal advice”) (emphasis added).

^{14/} Mullins, Exh. BGM-4T at 4:1-13.

^{15/} Id. at 4:1-3.

^{16/} As necessary or helpful, Boise incorporates by reference any relevant information within the Motion to this Alternative Motion.

testimony, then there should be no rational basis for Pacific Power counsel to object at hearing that Mr. Dalley cannot fully answer questions about such testimony.

11 Stated differently, parties would be unfairly prejudiced if the Company could *both*: 1) submit legal statements into evidence, via Mr. Dalley’s testimony; and 2) shield Mr. Dalley from cross-examination on those very same statements at hearing, by objecting on various grounds related to a complaint that Mr. Dalley is not a lawyer or a legal expert. As noted in the foregoing Motion, Boise readily concedes that a line must be drawn between proper testimony that may touch upon “a matter of law,” and improper testimony that draws legal conclusions and interprets law. Through this Alternative Motion, Boise merely asks the Commission to purposely consider and apply the *same* line at hearing that would inevitably have to be drawn to rationally justify any denial or partial denial of the Motion.

12 For example, if Mr. Dalley’s curated list of “regulatory compact” precedent is not stricken,^{17/} then Boise (and other parties) should be allowed to ask Mr. Dalley detailed questions as to how and why he chose to list certain decisions in testimony, where to begin and end quotations or insert an ellipsis, why other potentially relevant precedent was omitted, and the import of statements quoted. Necessarily, such cross-examination will delve into substantive legal analysis, since this portion of testimony contains nothing but raw legal statement. Similarly, if Mr. Dalley’s quotation from and legal conclusion on U.S. Constitutional jurisprudence is not stricken,^{18/} then Boise (and other parties) should be allowed to freely question Mr. Dalley on jurisprudential issues associated with Mr. Dalley’s conclusions and interpretation of seminal U.S. Supreme Court precedent.

^{17/} Dalley, Exh. RBD-5T at 13:4-14:11.

^{18/} Id. at 12:14-21.

13 In lieu of striking specified portions of testimony from the record, a grant of the Alternative Motion is necessary to ensure fundamental due process considerations related to fairness and equity. As the Commission has stated: “Commission rules should provide a fair process without technical traps for the unwary.”^{19/} Whether through prescient design on the part of Pacific Power or happenstance, the Commission should avoid the “technical trap” of an unfolding scenario in which the Company inserts legal testimony into the record and then shields against any cross-examination on that testimony. At the very least, the fruition of such a scenario would fall short of any reasonable notion of “fair process.”

14 As a final word in support of the Alternative Motion, and in quoting the Supreme Court of Washington, the Commission recognizes that the “WUTC must in each rate case endeavor not only to assure *fair process* and service to customers, but also to assure that regulated utilities earn enough to remain in business—each of which functions is as important in the eyes of the law as the other.”^{20/} Pacific Power has lost no opportunity in this proceeding to repeatedly emphasize concerns over the utility earnings side of this equation; through this Alternative Motion, Boise simply seeks assurances from the Commission on the competing, but equally “important” interest, of “fair process” to utility customers.

IV. CONCLUSION

15 The Commission has considerable discretion in the treatment of the specified portions of Mr. Dalley’s testimony through either a grant of the Motion or the Alternative

^{19/} Re Inter-Run, Inc., Hearing P-71544, Order M.V. 138234, 1988 WL 1662961 (Aug. 15, 1988).
^{20/} WUTC v. PacifiCorp, Docket UE-032065, Order 06 at ¶ 34 (Oct. 27, 2004) (quoting People’s Organization for Washington Energy Resources v. Utilities & Transp. Comm’n, 104 Wn.2d 798, 808 (1985) (citing State ex rel. Puget Sound Power & Light Co. v. Department of Pub. Works, 179 Wash. 461, 466 (1934))) (emphasis added).

Motion, or some combination of the two. Boise would prefer a Motion grant as a cleaner and simpler solution, ultimately saving the Commission and parties time and expense that may otherwise be needlessly expended at hearing through a potentially farcical cross-examination of Mr. Dalley on purely legal testimony. Nonetheless, due process considerations associated with fairness and equity require that Boise and all other parties have a full opportunity to cross-examine Mr. Dalley on any specified testimony portions that are allowed to remain in the record. Thus, Boise respectfully requests that the Commission grant the Alternative Motion, at a minimum.

Dated this 22nd day of May, 2017.

Respectfully submitted,

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