

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 05-1042C

(Filed: April 2, 2009)

THE DALLES IRRIGATION DISTRICT,)
)
Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant.)

ORDER

Pending before the court in this contract case is defendant's Motion *in Limine* to Exclude Plaintiff's Expert's Testimony and Report, filed on March 2, 2009. Defendant requests that the court exclude from evidence the testimony and expert report of plaintiff's expert, Carol Opatrny. Plaintiff has responded to defendant's motion and defendant has filed a reply. Accordingly, the matter has been fully briefed and is ready for a decision.

The parties and the court are preparing for a trial on damages scheduled to occur in Portland, Oregon on April 22-24, 2009. After an earlier trial on liability, the court concluded that defendant had breached a contract with plaintiff irrigation district for the provision of hydroelectricly generated power for irrigation pumping purposes. *See Dalles Irr. Dist. v. United States*, 82 Fed. Cl. 346, 364-65 (2008). The breach arose because defendant had included a so-called "lost revenue component" in the rates charged the district for power, and that component impermissibly included an interest provision as well as adjustments made more often than the periodic five-year rate cycle contemplated by the contract. *Id.* The trial on damages thus should focus on the overcharges attributable to inclusion of the lost revenue component in the rates for power charged the irrigation district by the government.

In significant measure, defendant's motion reprises a motion *in limine* filed by it on October 18, 2007 (Docket No. 51), in advance of the trial on liability. That motion was denied by the court on November 6, 2007 (Docket No. 61), and the court received Ms. Opatrny's testimony during the trial on liability. The court reaches the same result respecting the instant motion.

Several of defendant's objections to Ms. Opatrny's report and projected testimony have

been withdrawn. *See* Def.'s Reply (Docket No. 97) at 1. However, defendant maintains its objections premised upon Ms. Opatrny's inclusion in her report of topics previously addressed during the trial on liability as to which the court found no breach. *See id.* at 2. Correlatively, pre-trial submissions made by defendant indicate that it, like plaintiff, also wishes to take positions at the damages stage that the court previously rejected. *See, e.g.*, Def.'s Mem. of Fact and Law on Damages (Docket No. 95) at 6-8. The court recognizes that each party is seeking to preserve its legal position in this contract case and that the trial on damages necessarily will address certain topics previously canvassed by the court at the liability stage. Nonetheless, no good cause has been shown to revisit determinations previously made about liability. Accordingly, the witnesses to be called by both sides in the trial on damages, whether fact or expert witnesses, should focus on the lost revenue component. Other matters may be addressed only by way of background to establish a framework for consideration of damages respecting the lost revenue component.

Insofar as the lost revenue component is concerned, defendant's objections to Ms. Opatrny's report and projected testimony are unavailing. Ms. Opatrny may testify at the trial regarding damages so long as she is properly qualified through *voir dire*. As a result, defendant's motion *in limine* to preclude her testimony is DENIED.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge