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February 5, 2010

Via Electronic and US Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation
into Forecasting Forced Outage Rates for Electric Generating Units
Docket No. UM 1355

Dear Filing Center:

Enclosed please find the original Response to the Motions to File Additional
Testimony on behalf of the Industrial Customers of Northwest Utilities in the above-referenced
docket.

Thank you for your assistance.

Sincerely,

/s/ Brendan E. Levenick
Brendan E. Levenick

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Response to the Motions to File Additional Testimony on behalf of the of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail where paper service has been waived.

Dated at Portland, Oregon, this 5th day of February, 2010.

Sincerely,

/s/ Brendan E. Levenick
Brendan E. Levenick

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1355

In the Matter of)	
)	THE INDUSTRIAL CUSTOMERS OF
THE PUBLIC UTILITY COMMISSION OF)	NORTHWEST UTILITIES' RESPONSE
OREGON)	IN OPPOSITION TO THE UTILITIES'
)	MOTIONS TO FILE ADDITIONAL
Investigation into Forecasting Forced Outage)	TESTIMONY
<u>Rates for Electric Generating Units.</u>)	

I. INTRODUCTION

Pursuant to Administrative Law Judge Arlow's ("ALJ") January 22, 2010 Ruling, the Industrial Customers of Northwest Utilities ("ICNU") files this response in opposition to the motions to file additional testimony ("Motions") of Portland General Electric Company ("PGE"), PacifiCorp, and Idaho Power Company ("Idaho Power") (jointly, the "Utilities"). The evidentiary record in this proceeding has been more than sufficiently developed and the Oregon Public Utility Commission ("OPUC" or the "Commission") should not allow further testimony on any issues since the Utilities did not satisfy the requirements set forth by the Commission and ALJ. The Commission should set a final briefing schedule that will result in a final Commission order that can be used to set rates in PGE and PacifiCorp's upcoming annual net power cost case proceedings. The final briefing schedule should provide the Utilities with ample opportunity to address the issues in this prolonged proceeding.

II. BACKGROUND

The background in this proceeding establishes that there is sufficient evidence in the record and that there have been far more opportunities for all parties to develop the evidentiary record than in most Commission investigation proceedings. All parties have been provided multiple opportunities to submit testimony and make their cases to the Commission, including the fact that PacifiCorp has been provided five specific opportunities to develop the record (three rounds of testimony, the Commission workshop and the evidentiary hearing).

The Commission opened this proceeding on November 2, 2007. The parties invested considerable effort and spent the first year of the proceeding discussing the issues in workshops, developing an issues list, and submitting forced outage rate proposals and comments.

ALJ Arlow adopted the agreed upon schedule for the evidentiary phase of this proceeding. Re Investigation into Forecasting Forced Outage Rates, Docket No. UM 1355, Ruling (Nov. 17, 2008). The original schedule contemplated a final Commission order by June 1, 2009, to incorporate in resolution of issues into the PGE annual update tariff and the PacifiCorp transition adjustment mechanism. The schedule provided for opening testimony by all parties in February 2009 and reply testimony by all parties in March 2009 with briefing completed by May 1, 2009. The original schedule was similar to a typical Commission investigation proceeding in which all parties would file reply testimony simultaneously. Therefore, the original schedule did not provide any party, including the Utilities, an opportunity to submit testimony responding to other parties' reply testimony. All parties, however, would have the right to conduct cross examination of any reply testimony at the evidentiary hearing.

After opening testimony had been filed, ALJ Arlow set a new schedule and granted an unopposed motion by Staff to modify the schedule. Docket No. UM 1355, Ruling (March 24, 2009). All parties agreed that the new schedule should allow for a Commission order that would set rates for the 2010 test year. Staff Motion at 1 (Feb. 20, 2009). The new schedule adopted by the ALJ included an evidentiary hearing on May 28, 2009, an anticipated Commission order by August 15, 2009, and maintained only one round of reply testimony. All parties filed reply testimony in May 2009.

The Commission postponed the evidentiary hearing and ALJ Arlow scheduled a Commissioner attended workshop on May 28, 2009. All parties attended the workshop, in which the parties made statements and presentations. The statements were made part of the evidentiary record, could be cross examined by the parties, and provided all parties a unique opportunity to explain their positions to the Commissioners.

After the workshop, PacifiCorp requested the ability to file additional testimony. Over the objection of Staff, ICNU and the Citizens' Utility Board ("CUB"), ALJ Arlow allowed two additional rounds of testimony. UM 1355, Ruling (July 6, 2009). The schedule allowed all the utilities an opportunity to submit testimony on July 23, 2009, and Staff and intervenors on August 13, 2009. Id. PacifiCorp's Motion makes two inaccurate statements regarding this ruling: 1) that the schedule allowed Staff and intervenors an opportunity to submit testimony on July 23, 2009; and 2) Staff and intervenors' testimony should be limited to only address issues raised by PacifiCorp. The plain language of the ALJ Ruling only allowed the utility "Companies" to file testimony on July 23, 2009. Staff and intervenors did not err in filing their

testimony on August 13, 2009, which was the specific time the ALJ the designated for “Staff, ICNU, and CUB [to] file Reply Testimony.” Id. Similarly, there is no support for PacifiCorp’s new view that Staff and ICNU were limited to responding to PacifiCorp’s testimony and could not submit new analysis and modifications to the collar.

After all parties submitted testimony, PGE and Idaho Power finalized their stipulations. PGE’s stipulation was filed on August 19, 2009, and Idaho Power’s stipulation was filed on September 1, 2009. PacifiCorp elected to waive cross examination of all parties on the collar issue, which could have allowed the Company the opportunity further develop or understand Staff and ICNU’s testimony. PacifiCorp, however, conducted extensive discovery on Mr. Falkenberg’s supplemental reply testimony before and after the scheduled hearing, and used some of the data responses as exhibits.

On October 7, 2009, the Commission issued a Notice regarding the forced outage issue, stating that it intended to adopt a modified forced outage collar. The Commission’s proposed forced outage collar is a hybrid of the Staff and ICNU proposals, both of which have been fully litigated. The Commission clarified its Notice, stating that it would provide the parties an opportunity to file additional testimony and cross examine witnesses related only to the forced outage rate collar, “to the extent they can show there are new facts that are in dispute.” UM 1355, Order No. 09-479 at 4 (Dec. 7, 2009). ALJ Arlow provided further direction, stating that the parties can only file additional testimony if they can demonstrate that there are “new issues of fact arising subsequent to the submission of reply and supplemental testimony.” UM 1355, Ruling at 2 (Jan. 22, 2010). The Commission also stated that it would provide the parties a

final opportunity to brief issues stating “[r]egardless of whether additional testimony may be allowed, all parties will be allowed to file opening and reply briefs with respect to those issues.”

UM 1355, Order No. 09-479 at 4.

III. RESPONSE

The Utilities have not identified new issues of fact regarding the Commission’s collar, but are instead seeking to address issues regarding the treatment of out-of-collar forced outages and the treatment of forced outage occurrences due to utility imprudence that have, or should have and could have been addressed in the multiple rounds of testimony in this proceeding. The evidentiary record is sufficiently developed in this proceeding, and the Commission should reject the Utilities’ efforts to present unnecessary and duplicative testimony.

According to the orders and rulings, the Utilities must meet a high standard before they can submit additional testimony. They must demonstrate that there are new facts arising after the filing of the final rounds of supplemental and reply testimony that need to be addressed. UM 1355, Ruling (Jan. 22, 2010). These new facts must be specifically related to only those aspects of the Commission’s collar that they could not have addressed in the testimony or at the hearing.

The Commission has already rejected many of the grounds upon which the Utilities are seeking to introduce new testimony. For example, after the Commission announced its intention to adopt its collar, PacifiCorp argued, *inter alia*, that: 1) there is no evidence explaining or analyzing the collar; 2) the language is ambiguous; 3) the treatment of imprudence

is beyond the issues and has not been supported in the record; and 4) hearings and testimony are necessary to examine the Commission's collar. UM 1355, Order No. 09-479 at 3.

The Commission rejected most of these arguments finding that:

Contrary to certain assertions raised in the filed responses, issues of the treatment of out-of-collar forced outages at coal fired generating facilities and treatment of forced outage occurrences due to company imprudence had been previously addressed in pre-filed testimony.

Id. at 4. The issues of imprudent outages and the treatment of how to model outages falling outside of the collar were addressed by the parties in testimony, and the Utilities should not have the right relitigate these issues because the Commission did not adopt their proposals. According to the rulings and orders, the Utilities can only submit testimony if they can demonstrate that the Commission's collar raises new factual issues that they could not have previously addressed.

Implicit in the Utilities' Motions is the view that they need the opportunity to present responsive testimony on: 1) any issue raised by Staff and intervenors in supplemental reply testimony; and 2) any aspect of the Commission's collar which was not specifically proposed by a witness. This represents a fundamentally mistaken view of Commission proceedings. The Utilities do not have the right to respond to the final testimony of Staff and intervenors, as the schedule for the first rounds of testimony and the supplemental testimony did not provide the Utilities with the "last word." The Utilities do not have the right to submit additional testimony merely because factual issues were raised in the final testimony of Staff and intervenors.

Similarly, the final collar the Commission adopts in this proceeding can differ from the specific proposals of the parties without the need for parties to submit additional testimony. The Commission's collar should be based on the evidence in the record, but the Commission is free to rely upon the evidence to create its own resolution of the issues. The Commission's options are not limited to only the specific collars proposed by the parties, but the Commission can craft its own collar. The Utilities do not have the right to submit testimony simply because the Commission's collar is not exactly the same as one of the collars proposed by a party. No party's due process rights are at issue here, given how extensive and prolonged the proceeding has been and given the additional briefing opportunities.

1. PacifiCorp Is Seeking to Relitigate the Treatment of Imprudent Outages and Outages Outside the Collar

PacifiCorp's Motion summarizes the new testimony it would file, which demonstrates that the Company primarily wishes to revisit issues that have already been addressed by the parties, including PacifiCorp. PacifiCorp states that its additional testimony would address issues related to NERC data as compared to the Company's operations, a variety of issues related to the treatment of imprudent outages, and how the Commission should replace outages outside the collar. PacifiCorp Motion at 4-5. PacifiCorp is not raising new issues, but is instead attempting to submit new evidence on issues that have been addressed in pre-filed testimony.

A. NERC Issues Have Been Fully Litigated

PacifiCorp wishes to present evidence that the Commission should not adopt its collar because it claims that its own fleet performance is better than the comparable NERC group, and that any collar should only apply if the utility's fleet is worse than a NERC average. *Id.* at 4. These are

issues that PacifiCorp could have, and in fact already did, present testimony on. PacifiCorp should not be provided another opportunity to submit different or duplicative evidence on these issues.

The issues related to use of NERC data have been extensively litigated in this case. Staff's first round of testimony proposed a forced outage collar based on using NERC information to determine both which outages should be excluded from the forced outage rate and how to replace outages that were outside of "normal" outage rates. Staff/100, Brown/2-3. PacifiCorp submitted testimony responding to Staff's NERC collar, specifically addressing how the Commission should use NERC data and how the proposal would impact PacifiCorp. E.g., PPL/102, Godfrey/4-11. PacifiCorp also proposed an "alternative proposal for excluding extreme events" that would compare "a unit's forced outage rate against available actual operating history to determine whether the rate is anomalous." Id. at 8-9. PacifiCorp should not be allowed a second "do over" to present testimony regarding yet another alternative proposal regarding the use of NERC data.

B. The Treatment of Imprudent Outages Has Already Been Litigated

PacifiCorp's disagreement with the Commission's proposed treatment of imprudent outages in the forced outage rate is not grounds to submit new testimony. PacifiCorp wishes to present testimony critiquing the Commission's resolution of the treatment of imprudent outages, and to propose an alternative manner to model imprudent forced outages. This issue was already addressed in the first rounds of testimony, and PacifiCorp should not be provided yet another opportunity to submit evidence on this issue. PacifiCorp appears to want to submit additional testimony in support of the exact same proposal (limiting excluded outages to 28 days) that it previously proposed.

As recognized by the Commission, the parties have already fully addressed the issues of prudence. UM 1355, Order No. 09-479 at 4. Both ICNU and CUB proposed that imprudent outages should be excluded from the forced outage rate. ICNU/100, Falkenberg/11-12; CUB/100, Jenks/3. ICNU's outage proposal, filed before any testimony, addressed imprudent outages recommending that "[i]f a plant has a history of poor performance, the utility should be required to use the average national outage rate for similar units." ICNU outage proposal at 4 (Oct. 2, 2008). In direct testimony, ICNU continued to propose that imprudent outages should be excluded, and proposed that they be replaced by assuming that "the resource would have been available and running in its normal pattern absent the event." ICNU/100, Falkenberg/11. PacifiCorp submitted rebuttal testimony on the issue of imprudent outages and how they should be treated. PPL/101, Godfrey/1-6. In fact, PacifiCorp proposed that only those outages that exceed 28 days should be excluded from the forced outage rate. PacifiCorp Opening Brief at 1-2, 5-7; PPL/405, Duvall/13-14. PacifiCorp now wants to submit additional testimony supporting this same proposal: that outages should only be excluded if they "exceed a specified length (i.e. 28 days)." Motion at 5.

The Commission's collar resolves the issue about how to treat imprudent outage in the forced outage rate. Specifically, the Commission has proposed that "[i]f the Commission, however, finds that any plant outage is due to utility imprudence, the FOR for that calendar year would be replaced in the four-year rolling average by the historical mean annual FOR for the unit." UM 1355, Order No. 09-479 at 1-2. Replacing imprudent outages in the forced outage rate with a historic mean forced outage rate is very similar to Mr. Falkenberg's recommendation that the forced outage rate assume the unit is running normally. There is no reason to provide

PacifiCorp another opportunity to submit additional testimony disagreeing with the proposals to remove imprudent outage nor should the Company be allowed to present testimony on an alternative proposal that it already made in earlier testimony.

C. PacifiCorp Has Not Raised Any Issues Regarding the Treatment of Outages Outside the Collar that Arose After the Filing of the Final Testimony

PacifiCorp is proposing a different treatment of excluded outages than the Commission's collar, but the Company is not seeking to submit testimony regarding any unique aspect of the Commission's collar. Instead, PacifiCorp wishes to submit testimony on an issue that the parties have addressed: the "treatment of out-of-collar forced outages at coal fired generating facilities" UM 1355, Order No. 09-479 at 4.

Staff originally proposed using the 90th and 10th percentiles in the first round of testimony. Staff/100, Brown/19-24. The parties responded to Staff's proposal: PacifiCorp criticized Staff and proposed that the Commission use 95th and 5th percentiles, as well as criticizing ICNU and proposing that the Commission utilize average outage rates. PPL/102, Godfrey/1-11; PPL/101, Godfrey/4-8; ICNU/300, Falkenberg/1-14. While ICNU's proposed change to the collar was made in reply testimony, this is not grounds for PacifiCorp to file new testimony because it is not a new issue of fact that arose after "to the submission of reply and supplemental testimony." UM 1355, Ruling at 2 (Jan. 22, 2010). Mr. Falkenberg's proposal was made as part of the "reply and supplemental testimony" that PacifiCorp could have cross examined. PacifiCorp does not have the right to the last word on all issues or to submit additional responsive testimony merely because it disagrees with a party's recommendations, or the Commission's decision.

2. PGE Fails to Establish that It Needs to Submit Additional Testimony

The Commission should deny PGE's Motion because PGE does not identify with sufficient particularity what testimony it intends to submit or how the testimony it wishes to submit is limited to new issues of fact regarding the Commission's proposed collar. PGE appears to want the right to submit testimony on all issues, not merely those related to the Commission's collar or those which could not be addressed after the filing of supplemental and reply testimony. ICNU understands that PGE is in a different position than PacifiCorp because PGE entered into a settlement of all issues; however, PGE should not be provided carte blanche to submit new testimony on all issues already addressed.

PGE suggests that any new testimony could potentially address all issues in this proceeding. Remarkably, PGE does not provide any explanation regarding why the existing record on issues unrelated to the collar or prudence may need additional testimony. PGE Motion at 3-4. According to PGE, additional settlement negotiation could eliminate the need to file additional testimony, but PGE does not appear to be willing to limit what testimony it will file or provide specific information regarding what issues it will submit testimony on. Id.

PGE's refusal to specify the issues its testimony would address is directly inconsistent with ALJ Arlow's direction that any party that wished to submit additional testimony must "set forth with particularity the new facts alleged which the testimony will purport to prove." UM 1355, Ruling at 3 (Jan. 22, 2010).

PGE also states that it wants to submit testimony responding to a wide array of issues regarding Mr. Falkenberg's supplemental reply testimony. Motion at 4-5. PGE does

actually state what its testimony will be or what new facts it intends to present, but instead identifies aspects of Mr. Falkenberg’s testimony it may rebut. PGE’s approach should be rejected because it is inconsistent with the ALJ’s direction to identify the specific new facts it wishes to establish. PGE should not be allowed to file an extra round of testimony to address issues that it would not have the opportunity to respond to, even if PGE had not entered into a settlement.

Further, PGE’s motion should be denied because its right to submit additional testimony is limited to any new issues regarding the Commission’s proposed collar. PGE does not have the right to respond to all issues raised by Mr. Falkenberg’s or Ms. Brown’s supplemental reply testimony. The Commission did not adopt ICNU’s or Staff’s collar, but a utilized components of both proposals. Instead of identifying the specific new issues PGE could not have addressed regarding the Commission’s collar, PGE wants to broadly respond to Ms. Brown’s testimony and “confirm or refute the validity of Mr. Falkenberg’s analysis, and address that analysis in testimony.” PGE Motion at 5. PGE also states that “PGE will also directly address the potential financial impact on PGE of” Mr. Falkenberg’s proposal. Id. The total financial impact of Mr. Falkenberg’s proposal is irrelevant because it is the Commission’s collar, not Mr. Falkenberg’s, that would impact PGE.

Finally, PGE states that it intends to submit testimony regarding the Commission’s decision to use mean annual forced outage rate from the unit’s entire historical data instead of a 20-year average. Motion at 5. PGE previously raised concerns regarding the use of historic data and the Commission responded by issuing a clarification ruling that there is a rebuttable presumption that information is available, and that issues related to the availability of relevant

information shall be addressed in future proceedings. UM 1355, Order No. 09-479 at 4. ICNU suggests that the Commission address PGE's concerns regarding its ability to implement the Commission's collar in future proceedings.

III. CONCLUSION

The Commission should not permit the Utilities to submit any additional testimony. The issues in this proceeding have been exhaustively addressed, and there is no reason to allow the Utilities the opportunity to submit final, responsive testimony, especially those which have been thoroughly addressed in earlier rounds of testimony.

Dated this 5th day of February, 2010.

Respectfully submitted,

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