

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UE 214**

4
5 In the Matter of:

6 Idaho Power Company's 2010 Annual
7 Power Cost Update.

**IDAHO POWER COMPANY'S MOTIONS
TO STRIKE TESTIMONY, OR IN THE
ALTERNATIVE, FOR LEAVE TO FILE
REBUTTAL TESTIMONY**

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9 **I. INTRODUCTION**

10 Pursuant to OAR 860-013-0031, Idaho Power Company ("Idaho Power" or
11 "Company") hereby requests that the Public Utility Commission of Oregon ("Commission")
12 strike portions of reply testimony filed by Commission Staff ("Staff") witness, Michael
13 Dougherty, on March 17, 2010. Specifically, the Company requests that the Commission
14 strike the following portions of Mr. Dougherty's testimony related to his analysis of Powder
15 River Basin ("PRB") coal: Staff/400, Dougherty/4, line 14 to Dougherty/5, line 7 and
16 Staff/401, Dougherty/16-18, and the following portions of his testimony related to a new
17 argument involving the operating margin for coal purchased from an affiliate: Staff/400,
18 Dougherty/9, line 13 to Dougherty/10, line 13.

19 Idaho Power makes this motion because the specified portions of Mr. Dougherty's
20 testimony improperly raise new argument, are irrelevant, confusing, lack support, and are
21 based on the improper use of confidential information from a PacifiCorp docket.

22 In the alternative, Idaho Power requests leave to file rebuttal testimony in response
23 to Mr. Dougherty's reply.

24 Due to the limited schedule in this docket, Idaho Power requests expedited
25 consideration of these motions.

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1 opening testimony. On the contrary, included in Mr. Dougherty's testimony is a new
2 analysis of alternative sources of coal from the Powder River Basin ("PRB")⁵ and an
3 extensive discussion of his understanding of the cost and pricing structure used by the
4 Company when it purchases coal from an affiliated mine.⁶ With respect to both of these
5 new analyses, Mr. Dougherty's reply testimony fails to provide any explanation or
6 justification for why he waited to conduct discovery until *after* filing his opening testimony
7 or why he did not include these arguments in his opening testimony.

8 III. ARGUMENT

9 A. The Commission Should Strike New Arguments Raised For the First Time in 10 Mr. Dougherty's Reply Testimony.

11 In Mr. Dougherty's "reply" testimony he raises two new arguments that he did not
12 include in his opening testimony. *First*, he includes an additional lower of cost or market
13 analysis based on PRB coal.⁷ This analysis is based entirely on confidential testimony he
14 filed in UE 207, PacifiCorp's 2010 Transition Adjustment Mechanism docket. *Second*, Mr.
15 Dougherty's testimony includes analysis and argument related to BCC's operating
16 margin.⁸ In each instance the Commission should strike the testimony because it raises
17 new issues for the first time and the schedule in this docket does not allow the Company
18 to file additional testimony to respond to these new issues. In addition, with respect to the
19 PRB coal analysis, it should be struck because it is an improper use of confidential
20 information from another docket and it is irrelevant and confusing.

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23 ⁵ Staff/400, Dougherty/4, l. 14 – 5, l. 7

24 ⁶ Staff/400, Dougherty/9, l. 13 – 10, l. 13.

25 ⁷ Staff/400, Dougherty/4, l. 14 – 5, l. 7; Staff/401, Dougherty/16-18.

26 ⁸ Staff/400, Dougherty/9, l. 13 – 10, l. 13.

1 **1. Staff should not be allowed to use the reply round of testimony to**
2 **“respond to itself” by raising new issues.**

3 The schedule in this docket allowed Staff three months to prepare and file its case.
4 Accordingly, Staff had the opportunity to file several rounds of data requests and follow up
5 requests—prior to the time its testimony was due. There is simply no reason why Staff
6 could not have filed its full analysis on January 20, as contemplated by the schedule.

7 Moreover, contrary to the stated purpose for his testimony, Mr. Dougherty’s new
8 analysis regarding PRB coal does not rely on any “updated information” but rather is
9 based solely on an analysis Mr. Dougherty performed in Docket UE 207. That original
10 testimony was filed on July 14, 2009. There is no reason Mr. Dougherty could not have
11 included this analysis in his opening testimony and his “reply” testimony provides no
12 explanation for why he waited to provide this analysis.

13 Similarly, Mr. Dougherty testifies for the first time in his reply testimony that the cost
14 analysis he performed did not account for the operating margin of the coal purchased from
15 the Company’s affiliated mine.⁹ While Mr. Dougherty cites a data response he received
16 after he filed his opening testimony, he testifies extensively about his interpretation of that
17 data response and his analysis of its impact on his proposed adjustment. Because Mr.
18 Dougherty did not address this issue in his opening testimony—although he provided no
19 explanation for his failure to do so—the Company was unable to address it in the only
20 reply testimony currently allowed in this docket.

21 In each instance, Mr. Dougherty raises new issues in his reply testimony and
22 provides no explanation for his failure to raise the issues in his opening testimony;
23 therefore, this testimony should be struck from the record because it unfairly prejudices
24 the Company’s ability to argue its case and meet its burden of proof.

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26 ⁹ Staff/400, Dougherty/9, ll. 16-17.

1 **2. The PRB coal testimony violates the UE 207 Protective Order.**

2 According to the terms of the General Protective Order in UE 207, persons given
3 access to confidential information produced in that docket are prohibited from using or
4 disclosing that information for “any purpose other than the purpose[] of preparation for and
5 conduct of this proceeding.”¹⁰ Mr. Dougherty’s testimony in this docket violates the terms
6 of that order because he relied on confidential information provided by PacifiCorp pursuant
7 to the terms of the UE 207 protective order to bolster his analysis in this docket. It is true
8 that Mr. Dougherty does not disclose the specific confidential numbers on which his
9 analysis was based. However, his use of PacifiCorp’s confidential information disclosed in
10 UE 207 to build his case in this docket, in and of itself, constitutes a violation of the
11 protective order.¹¹ For this reason, the Commission should strike Mr. Dougherty’s
12 testimony.

13 **3. The PRB coal testimony is irrelevant because Mr. Dougherty cannot**
14 **support it with non-confidential analysis.**

15 The Commission’s rules allow admission only of relevant evidence—evidence that
16 tends to make any fact at issue in the proceeding more or less probable.¹² This rule
17 applies equally to written testimony in Commission proceedings.¹³ Even relevant
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19 ¹⁰ *Re PacifiCorp 2010 Transition Adjustment Mechanism*, Docket UE 207, Order No. 09-113 at App.
20 A at 3 (Apr. 1, 2009). Although Staff is not required to sign the protective order, “[a]ll persons who are
given access to confidential information” are bound by its terms. *Id.* at 2.

21 ¹¹ See *Re Verizon Communications, Inc. and Frontier Communications Corp. Joint Application for an*
22 *Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of*
23 *Control of Verizon Northwest Inc.*, Docket UM 1431, Order No. 09-409 at 6 (Oct. 14, 2009) (“the
reference to the highly confidential document *and its use in the preparation*” of pleadings in another
docket “clearly constitutes a violation of the Protective Order”) (emphasis in original).

24 ¹² OAR 860-014-0045(1)(a); see, e.g. *Am. Can Co. v. Lobdell*, 55 Or. App. 451, 466 (1982)
25 (upholding Commission’s exclusion of irrelevant evidence and citing OAR 860-014-0045(1) for
support).

26 ¹³ See OAR 860-014-0060.

1 evidence, however, can be excluded if its probative value is substantially outweighed by
2 the danger it will confuse the issues.¹⁴ Mr. Dougherty's reply testimony regarding PRB
3 coal is so confusing as to make it ultimately irrelevant and should therefore be stricken.

4 As discussed above, in support of Mr. Dougherty's PRB coal analysis, he provides
5 testimony that he filed in PacifiCorp's UE 207 docket. That testimony is so heavily
6 redacted that it is impossible to determine how Mr. Dougherty performed his analysis,
7 what numbers he used in his analysis, or how that analysis is relevant here.¹⁵ Moreover,
8 portions of his UE 207 analysis were based on PacifiCorp's confidential responses to data
9 requests in that docket—which he also did not provide.¹⁶ In short, Idaho Power cannot
10 make heads or tails of Mr. Dougherty's PRB analysis included in his reply testimony. It is
11 therefore irrelevant and should be stricken from the record.

12 **B. The Commission Should Allow Idaho Power an Opportunity to Respond to**
13 **Staff's Testimony.**

14 Alternatively, if the Commission denies the motion to strike Mr. Dougherty's
15 testimony, it should allow Idaho Power an opportunity to file responsive testimony. As the
16 party with the burden of proof¹⁷, Idaho Power should not be precluded from responding to
17 Staff's arguments simply because Staff chose to wait until filing "reply" testimony to raise
18 new issues.¹⁸

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21 ¹⁴ OAR 860-014-0045(1)(c).

22 ¹⁵ Staff/401, Dougherty/16-18.

23 ¹⁶ Staff/401, Dougherty/16, ll. 13-14.

24 ¹⁷ ORS 757.210(1).

25 ¹⁸ See *Re Internal Operating Guidelines for the Public Utility Commission of Oregon*, Docket UM
26 1016, Order No. 01-253 at 7 (Mar. 26, 2001) ("All parties are given an opportunity to present their
evidence and all other parties are given an opportunity to respond to that evidence.").

1 Furthermore, Idaho Power cannot respond to Mr. Dougherty's PRB coal analysis
2 without access to the unredacted version of his testimony and all of the confidential
3 analysis underlying his conclusions. The Company acknowledges that on this point the
4 Commission faces a "Catch-22"—Idaho Power cannot respond to Staff's analysis without
5 access to PacifiCorp's confidential information; and the Commission cannot order a
6 release of the confidential order without a further violation of the UE 207 protective order.
7 For this reason, Idaho Power believes that Mr. Dougherty's PRB analysis must be stricken
8 altogether. However, if the Commission declines to do so, Idaho Power must have an
9 opportunity to review the unredacted analysis, all of the underlying data, and to file a full
10 response to the same. Refusing to provide this confidential material would deny Idaho
11 Power a reasonable chance to respond and would be a clear violation of Idaho Powers
12 right to due process.

13 Mr. Dougherty's reply testimony includes new arguments not raised in his opening
14 testimony; thus, the Company was unable to respond to these arguments in its reply
15 testimony. To remedy this inequity, the Commission should allow responsive testimony.
16 Here, allowing Idaho Power to respond is particularly important because Mr. Dougherty's
17 proposed adjustment is so substantial and his analysis is so flawed. Although it is
18 impossible to decipher the factual basis for his PRB analysis—because his only support is
19 a heavily redacted version of his UE 207 testimony—the Company disputes his contention
20 that coal from the PRB is an available and cost-effective alternative to coal purchased
21 from its affiliated mine. With respect to his BCC operating margin analysis, the Company
22 also disputes his analysis because it contains serious flaws. If the Company is allowed to
23 file responsive testimony it will ensure that the Commission has a full and complete record
24 upon which to base its decision.

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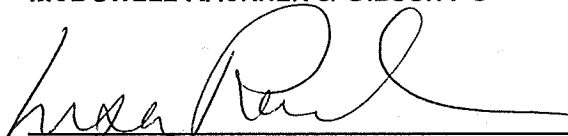
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1 **IV. CONCLUSION**

2 Idaho Power respectfully requests that the Commission strike portions of Mr.
3 Dougherty's testimony that raises new issues for the first time in his reply testimony.
4 Alternatively, if the Commission denies that motion, the Company requests that it be
5 entitled to examine the analysis from UE 207 and that it be granted leave to file a
6 response to Mr. Dougherty's "reply" testimony. This will ensure the full and proper
7 development of the record in this docket.

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9 Respectfully submitted this 23 day of March, 2010.

10 **MCDOWELL RACKNER & GIBSON PC**

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14
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