

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 267

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Transition Adjustment, Five-Year Cost of  
Service Opt-Out.

RULING

**DISPOSITION: STIPULATION ACCEPTED INTO RECORD**

**I. BACKGROUND**

In Order No. 12-500, entered in docket UM 1587, the Commission directed PacifiCorp, dba Pacific Power, to file a tariff offering to provide a five-year opt-out program that would allow a customer choosing direct access to pay fixed transition charges for only five years, being no longer subject to transition adjustment charges thereafter. On February 28, 2013, Pacific Power filed Schedule 296, in Advice No. 13-004, setting forth the proposed terms of a five-year opt-out program.

Following opening testimony filed by Pacific Power, Commission Staff and intervening parties filed reply testimony taking various positions with regard to Schedule 296. Then, following a settlement conference, all parties other than Pacific Power reached settlement and filed a document titled "Stipulation."<sup>1</sup>

Pacific Power disputes the validity of the Stipulation under OAR 860-001-0350(1), which provides, "[i]n all Commission contested case proceedings, some or all of the parties may enter into a settlement of any or all issues at any time during the proceedings." Accordingly, the procedural schedule was suspended, and the parties were directed to file argument regarding how the Stipulation should be treated.

**II. POSITIONS OF THE PARTIES**

**A. The Stipulating Parties**

The Stipulating Parties contend that the Stipulation is valid under Commission rules and should be entered into the record. They argue that for the purposes of OAR 860-001-0010(7), the term "party" is defined to include "a person entitled as a matter of right to a

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<sup>1</sup> The Stipulating Parties are Staff, the Industrial Customers of Northwest Utilities (ICNU), Noble Americas Energy Solutions LLC (Noble Solutions), Wal-Mart Stores, Inc. (Wal-Mart), Shell Energy North America (US), LP (Shell), Constellation NewEnergy, Inc. (Constellation), Fred Meyer Stores, Inc./Kroger, Co. (Fred Meyer), the Northwest and Intermountain Power Producers Coalition (NIPPC), Safeway Inc. (Safeway), and Vitesse, LLC (Vitesse).

hearing before the Commission, an intervenor, or Commission Staff.” They assert that the rule does not specify that a stipulation must include particular parties, nor identify the types of parties that must enter into a stipulation—such as adverse parties. The Stipulating Parties also observe that a settlement under OAR 860-001-0350(1) may be made for the purpose of resolving one or more—“any or all”—of the issues pending in a proceeding. They also point out that OAR 860-001-0350(2) defines, a “settlement discussion” as “any communication between two or more parties for the purpose of resolving issues pending in contested case proceedings.” The Stipulating Parties argue that discussions involving Staff and nine other intervening parties on several controversial issues in a contested case meet this definition. They also assert that a comprehensive agreement by these ten parties on this issue represents a negotiated compromise that involves real concessions on behalf of individual parties, giving examples of the bargains made.

The Stipulating Parties acknowledge that a stipulation is not binding on the Commission, and need not even be the final word in a proceeding. The Stipulating Parties expect Pacific Power to submit testimony that responds to the Stipulation. The Stipulating Parties assert, however, that a stipulation among several, but not all, parties in a proceeding has value because it facilitates the Commission’s resolution of issues by narrowing positions taken and developing the record. In this docket, they argue that instead of “confronting a myriad of different positions on all the issues in this proceeding, the Commission will be presented with two alternative proposed resolutions: PacifiCorp’s filing and the joint recommendation of the Stipulating Parties,” and that “[t]here is no reason to unnecessarily require the Stipulating Parties to revert to, or for the Commission to resolve, the numerous previously filed positions, when the Stipulating Parties have agreed to resolve their disputed positions through a Stipulation.”<sup>2</sup>

The Stipulating Parties further observe that a stipulation under OAR 860-001-0350 may be entered into evidence. They express concern that if the agreement is not classified as a stipulation, then it will not be admitted into the record, and the compromises reflected in the document will not otherwise be presented to the Commission.

## **B. Pacific Power**

Pacific Power contends that the Stipulation is not valid, because it does not involve “an agreement between parties on adverse sides of an issue.”<sup>3</sup> Pacific Power asserts that an agreement between aligned parties may unify positions on issues in a docket, but does not resolve the disputed underlying the issues. Pacific Power cites several cases from varying jurisdictions that rejected a proffered settlement agreement for failure to include a party defined to be “necessary.”<sup>4</sup> Pacific Power also asserts that in docket UE 178, a document that was filed as a stipulation between two aligned parties was rejected because it did not represent a compromise with adverse interests.

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<sup>2</sup> Joint Brief in Support of Stipulation, p. 6.

<sup>3</sup> PacifiCorp’s Argument in Response to ALJ’s Ruling, pp. 2-3.

<sup>4</sup> *Id.* at 2, fn. 3.

Pacific Power states that legal research did not yield a single tariff filing in which the Commission approved a stipulation under OAR 860-001-0350 that was not based on a compromise between utility and non-utility entities. The company also indicates the Commission has previously rejected a "purported stipulation" because it did not "represent a compromise between parties with adverse interests."<sup>5</sup>

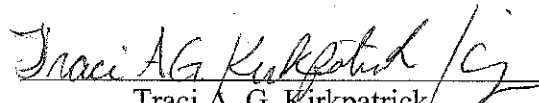
Pacific Power avers that that each of the Stipulating Parties objects to Schedule 296 and, with the exception of Staff, all are direct access customers that are aligned with one another and adverse to Pacific Power. Pacific Power indicates the function of the Stipulation is to bind the parties in a joint litigation position, not to resolve the issues in the case. If the Commission allows the Stipulation to be considered, Pacific Power argues that it supersedes the individual positions of the Stipulating Parties. Pacific Power indicates that it would not oppose the Stipulating Parties filing joint testimony to present the terms of the Stipulation.

### III. DISCUSSION

The agreement made by the Stipulating Parties and presented to the Commission as a Stipulation satisfies the terms of OAR 860-001-0350, and is accepted into the record as a Stipulation. The language used in OAR 860-001-0350 is broad, but unambiguous, allowing "some or all of the parties" to "into a settlement of any or all issues" at any time during a contested case. It does not require all parties to agree, nor does it specify that "necessary" or "adverse" parties must agree.

The Stipulation offered in this case involves Staff and nine intervening parties that were not originally aligned on all issues, distinguishing it from a "purported stipulation" between two parties that routinely file joint testimony before the Commission. Although the Stipulation may not *resolve* any issues as it fails to include Pacific Power, it does have value in terms of administrative efficiency by narrowing the range of positions on issues and further developing the record. Acceptance of the Stipulation into the record does not conclude the proceedings, and subsequent procedural steps to allow Pacific Power to respond will be adopted in the prehearing conference scheduled in this docket on November 18, 2013.

Dated this 15<sup>th</sup> day of November, 2013, at Salem, Oregon.

  
Traci A. G. Kirkpatrick  
Administrative Law Judge

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<sup>5</sup> Id. at 3, *see* fn. 4.