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April 6, 2016

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-1166

Attn: Filing Center

RE: UM 1742—PacifiCorp's Response to Motion to Compel

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Response to Motion to Compel.

If you have questions about this filing, please contact Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

A handwritten signature in black ink that reads "R Bryce Dalley" with a stylized flourish and the initials "EUA" written to the right.

R. Bryce Dalley
Vice President, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1742

SURPRISE VALLEY
ELECTRIFICATION CORP.,

Complainant

v.

PACIFICORP, d/b/a PACIFIC POWER,

Respondent.

PACIFICORP'S RESPONSE TO
MOTION TO COMPEL

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) files this response to Surprise Valley Electrification Corporation's (Surprise Valley) Motion to Compel. Per the agreement of the parties, PacifiCorp's response to this motion is due on April 6, 2016.

In its Motion to Compel, Surprise Valley seeks the non-confidential release of personal addresses of three former PacifiCorp employees.¹ However, Surprise Valley is moving to compel this limited information for a much broader purpose—namely, so that Surprise Valley can seek to improperly depose these former employees.

Surprise Valley's proposed depositions are improper under the Public Utility Commission of Oregon's (Commission) rules. More importantly, Surprise Valley's proffered justification for deposing these former employees is the allegation that PacifiCorp failed to respond properly to Surprise Valley's data requests. If this is the case, Surprise Valley should first be required to renew its motion to compel, if it believes PacifiCorp has not provided all of the information that it requested. Moreover, Surprise Valley has made no showing of need for

¹ PacifiCorp does not release former employee information on a non-confidential basis. PacifiCorp inquired as to Surprise Valley's other efforts to obtain the information through publicly-available means, such as an online search. Surprise Valley indicated it had not conducted such a search, and nothing in its motion indicates that it has exhausted that option.

the depositions. PacifiCorp intends to file testimony from Company employees who are knowledgeable about the issues raised by Surprise Valley’s complaint. These employees will be available to be deposed about their testimony. Additionally, Surprise Valley’s proposed depositions are procedurally improper. For each of these reasons, Surprise Valley’s motion should be denied.

I. INTRODUCTION

Surprise Valley is a cooperative utility that seeks to sell the net output of the Paisley Project, its 3.6 MW geothermal QF,² to PacifiCorp. Surprise Valley alleges in its Complaint that PacifiCorp has illegally refused to enter into a PPA with Surprise Valley to purchase the full net output of the Paisley Project.³ Surprise Valley concedes that nearly all of the QF’s power will flow into the cooperative’s system and be used to serve the cooperative’s own load.⁴ Nevertheless, Surprise Valley contends that it intends to deliver the full net output of the Paisley Project to PacifiCorp through “displacement,” or the movement of electrons.⁵ As PacifiCorp has explained, PacifiCorp does not believe this constitutes legitimate delivery of QF power under PURPA; moreover, it is not *verifiable* delivery—PacifiCorp has no way to measure how much power it may get by “displacement.”⁶

In its current motion, Surprise Valley asks the Commission to compel PacifiCorp to provide the personal addresses of *former* PacifiCorp employees so that Surprise Valley can

² See Surprise Valley Complaint at ¶¶ 11-12. The Paisley Project is not interconnected to PacifiCorp’s system.

³ See Surprise Valley Complaint at ¶¶ 138-140.

⁴ See Surprise Valley Complaint at ¶ 18; see also Direct Testimony of Lynne Culp, SVEC/200, Culp/10:16-20; Direct Testimony of Gary Saleba and Gail Tabone, SVEC/300, Saleba-Tabone/7:13-8:3.

⁵ See *id.*; see also SVEC/300, Saleba-Tabone/35:24-36:8.

⁶ See PacifiCorp’s Answer at 1:15-2:4, 5:7-6:21.

depose these individuals about issues related to transmission and metering requirements.⁷ This motion should be rejected. As PacifiCorp advised Surprise Valley, the contact information for these former employees can be readily researched online. However, PacifiCorp's main objection to Surprise Valley's request is Surprise Valley's *underlying* assertion—that it is entitled to depose PacifiCorp's former employees.

PacifiCorp would object to this general assertion for a number of reasons, including the following:

- The depositions are not authorized by Commission rule.
- PacifiCorp has responded fully to Surprise Valley's discovery requests, and to the extent Surprise Valley disagrees, it should be required to renew its motion to compel.
- Surprise Valley has made no showing of need that would justify the depositions of former employees.
- The depositions, if permitted, would be procedurally problematic.

Consequently, PacifiCorp respectfully requests that the Commission deny Surprise Valley's motion to compel.⁸

II. LEGAL STANDARD

Under the Oregon Rules of Civil Procedure (ORCP), “parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”⁹ The Oregon courts and the Commission have

⁷ Motion to Compel at 1-2.

⁸ If the Commission does require PacifiCorp to provide the addresses of the former employees, PacifiCorp asks the Commission to clarify that PacifiCorp retains the right to review and object to any specific subpoena Surprise Valley would seek to serve on any former employee. Without notice of the details contained in a specific subpoena (witness name, date of deposition, scope of deposition, etc.), PacifiCorp will not be able to address the specific issues potentially raised by each subpoena, and cannot effectively defend itself against any harm raised by each subpoena by filing a motion to quash. The generalized allegations in Surprise Valley's motion to compel are insufficient to serve as notice for that purpose.

⁹ ORCP 36 B(1). The Oregon Rules of Civil Procedure apply in Commission contested case and declaratory ruling proceedings unless inconsistent with Commission rules, a Commission order, or an Administrative Law Judge ruling. *See* OAR 860-001-0000(1).

affirmed, however, that the information sought in discovery must be reasonably calculated to lead to the discovery of admissible evidence.¹⁰ Moreover, the ORCP gives the Commission discretion to make any discovery order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹¹

III. ARGUMENT

A. The Commission’s Rules Do Not Permit Surprise Valley to Depose PacifiCorp’s Former Employees.

PacifiCorp should not be forced to divulge the personal information of former employees so that Surprise Valley can improperly seek to depose those employees. The Commission’s procedural rules do not authorize Surprise Valley to depose PacifiCorp’s former employees at all. Consequently, the addresses of those former employees are irrelevant. The language of OAR 860-001-0520 states as follows:

- (1) The testimony of a witness may be taken by deposition at any time before the record in a docket is closed.
- (2) A party proposing to take a deposition must notify all other parties in writing. Unless notice is waived, a party must provide 10 days’ notice to the parties of a deposition to be taken within the state and 15 days’ notice for a deposition to be taken out of state. The notice must state the witness’s name and address, the subject matter of the deposition, the time and place for taking the deposition, the method by which the deposition will be recorded, any materials to be produced at the deposition, and the reason for the deposition.

[* * *]

- (4) A party may examine a deponent on any matter not privileged that appears reasonably calculated to lead to the discovery of relevant evidence.

¹⁰ See *Baker v. English*, 324 Or. 585, 588 n.3 (1997); *In re Pacific Power & Light, dba PacifiCorp*, Docket No. UE 177, Order No. 08-003 at 2 (Jan. 4, 2008) (citing *In re Portland Extended Area Service Region*, Docket No. UM 261, Order No. 91-958 at 5 (Jul. 31, 1991)).

¹¹ ORCP 36 C.

The Commission has interpreted its deposition rule to mean, in the context of a contested case hearing, that “depositions may only be taken of *testifying witnesses* in a proceeding.”¹² For this reason, Surprise Valley’s motion should be denied.¹³

B. PacifiCorp Has Fully Responded to Surprise Valley’s Discovery Requests.

Surprise Valley provides no clear explanation of the information it is seeking through depositions, nor does it provide an explanation of the information it says PacifiCorp has withheld. Instead, Surprise Valley’s motion includes a number of generalized complaints into a motion to compel employee addresses, making its allegations difficult to address. The underlying premise, however, of Surprise Valley’s motion to compel—that PacifiCorp is “withholding” information from Surprise Valley—is wrong. In some instances, Surprise Valley simply misunderstands PacifiCorp’s discovery responses. In other instances, Surprise Valley is asserting a right to seek information in depositions *it has never previously requested*.

For example, Surprise Valley asserts that PacifiCorp refuses to inform Surprise Valley about transmission and metering issues that PacifiCorp requires before it will enter into a PPA with Surprise Valley.¹⁴ PacifiCorp has answered *many* discovery requests addressing these issues, and it has answered them fully, but Surprise Valley appears not to understand PacifiCorp’s responses. PacifiCorp’s efforts in providing full responses to the numerous

¹² See *In re Portland General Elec. Co.*, Docket No. UE 196, Order No. 10-051 at 5 (Feb. 11, 2010) (“Under OAR 860-014-0070 and 860-014-0065, data requests may only be served on parties to the proceeding and *depositions may only be taken of witnesses in the proceeding.*”) (emphasis added). As explained in Section E, below, there is good reason for this limitation in the context of a contested case with prefiled testimony, where witnesses cannot be called at will and direct testimony is not provided live.

¹³ Surprise Valley is correct that the Commission has subpoena power, but that does not undermine the Commission’s ruling that, in the context of contested-case proceedings with prefiled testimony, only *testifying witnesses* can be deposed. The Commission has used its subpoena power in the context of investigations, when it needs to compel the attendance of non-parties, or even to compel the attendance of *testifying witnesses* at depositions when those witnesses fail to respond to discovery requests, for example. However, these circumstances are not present here, and the Commission’s prior use of its subpoena powers does not undermine its ruling regarding depositions in the context of contested-case hearings.

¹⁴ Motion to Compel at 4.

discovery requests on these issues are just the most recent example of the great lengths and significant efforts PacifiCorp has expended to assist Surprise Valley in resolving the issues underlying this dispute.¹⁵ Before allowing Surprise Valley to launch into depositions of former employees, PacifiCorp asks the Commission for the right to explain its discovery responses to the Commission and to explain why Surprise Valley's complaints are without merit.

Surprise Valley's assertions about "whole megawatt-hour block" scheduling are even more confusing.¹⁶ As far as PacifiCorp is aware, Surprise Valley has not asked a single data request about whole megawatt-hour block scheduling. PacifiCorp is therefore at a loss to understand how the issue could be the subject of a motion to compel. Again, before allowing Surprise Valley to launch into depositions of former employees, PacifiCorp asks the Commission for the right to respond to an actual data request.

C. Surprise Valley's Motion is an Inappropriate Vehicle for the Relief it Seeks.

If Surprise Valley believes that PacifiCorp has not adequately responded to its data requests, an assertion PacifiCorp denies, Surprise Valley should renew its motion to compel. The parties can brief the issue of whether PacifiCorp has, in fact, failed to provide responsive answers and the ALJ can rule on that motion. If necessary, an appropriate remedy can be crafted at that time. Surprise Valley should *not* be permitted to circumvent the Commission's ordinary processes and procedures by noticing the depositions of former employees who are in no better position to answer Surprise Valley's questions than PacifiCorp's current employees.

D. Surprise Valley Has Made No Showing of Need that Would Justify the Depositions of Former Employees.

¹⁵ PacifiCorp's Answer at 4-8 (describing some of the various options PacifiCorp was willing to consider and offered to Surprise Valley for consideration, including options that may or may not strictly conform to Commission-approved contracts. Even so, PacifiCorp was nevertheless willing to consider such extraordinary options in order to attempt to resolve Surprise Valley's issues).

¹⁶ Motion to Compel at 6-7.

Surprise Valley has also made no showing of need that would justify Surprise Valley's deposing PacifiCorp's former employees. First, as noted above, PacifiCorp has responded fully to Surprise Valley's discovery requests, and will continue to do so. Second, PacifiCorp will sponsor witnesses fully capable of discussing the issues raised by Surprise Valley's complaint.

PacifiCorp is in the process of drafting its testimony, which is currently due on April 26, 2016. PacifiCorp currently intends to offer the testimony of Rick Vail (who will speak to, among other things, PacifiCorp Transmission's actions, communications, and role with respect to Surprise Valley's requests, as well as relevant Company policies), and Bruce Griswold (who will speak to, among other things, PacifiCorp Energy Supply Management's (ESM) actions, communications, and role with respect to Surprise Valley's requests, as well as relevant Company policies).¹⁷

Mr. Vail has knowledge of the relevant events, communications, issues, and company policies and procedures related to Surprise Valley's complaint as they relate to PacifiCorp Transmission. Mr. Griswold has knowledge of the relevant events, communications, issues, and company policies and procedures involved in Surprise Valley's complaint as they relate to PacifiCorp ESM.

Once PacifiCorp's witnesses file their testimony, Surprise Valley will be free to serve discovery requests asking about the testimony of PacifiCorp's witnesses, and it will be free to depose these witnesses. In short, Surprise Valley has made no showing that the former

¹⁷ Surprise Valley cites to a prior Commission docket in which Surprise Valley alleges that a party's procedural rights were abridged because the Company failed to produce a witness with personal knowledge of the issues at hand. *See* Motion to Compel at 18-19. Whether one agrees with this characterization or not, this problem does not present itself here. First, Surprise Valley has the burden of proof in this case, not PacifiCorp. Second, Surprise Valley's witnesses must carry the burden of proof, and they have already filed their direct case. Third, Surprise Valley has not identified any harm it will suffer if PacifiCorp's witnesses are somehow incapable of refuting Surprise Valley's assertions because there is none. Fourth, PacifiCorp will sponsor witnesses fully capable of addressing the issues raised by Surprise Valley's complaint.

employees it seeks to depose can provide any information critical to Surprise Valley's own stated needs that PacifiCorp's testifying witnesses cannot.

Given that knowledgeable Company witnesses will be available for deposition, there is no justification for the burden that would be imposed on both PacifiCorp and its former employees if the Commission were to allow the depositions of former employees to move forward.¹⁸

E. The Depositions of Former Employees Would Be Procedurally Problematic.

1. The Depositions Sought by Surprise Valley Would Yield Only Prejudicial Hearsay.

PacifiCorp does not intend to call these former employees as witnesses. This renders any statements they might make in depositions *pure hearsay*.¹⁹ While hearsay is sometimes admissible in administrative proceedings, that hearsay must be (at a minimum) probative, and its admission fundamentally fair.²⁰ Given the potential for bias implicated by the deposition of former employees, and the fact that PacifiCorp will not be able to call these former employees to hearing to cross-examine, rebut, or clarify any statements the former employees might make, Surprise Valley's use of such deposition testimony would not only be unduly burdensome but

¹⁸ Surprise Valley's other justifications are also without merit. Surprise Valley claims it needs these depositions because it needs to "1) test the accuracy of PacifiCorp's assertions made in interrogatory-style data requests; and 2) fill in the many gaps in several of PacifiCorp's data responses." *See* Motion to Compel at 2. Similarly, Surprise Valley states that it needs to take the depositions of former employees or it will "be unable [to] meaningfully cross-examine and rebut PacifiCorp's chosen witnesses, who are trained and paid to tell PacifiCorp's story." *See* Motion *id.* In other words, Surprise Valley believes PacifiCorp has not fully responded to discovery requests and asserts the right to pull former employees out of retirement because Surprise Valley is not able to effectively question and cross-examine those witnesses using the Commission's ordinary contested case hearing procedures. If Surprise Valley believes PacifiCorp has not fully responded to its data requests, Surprise Valley should renew its motion to compel discovery. Additionally, Surprise Valley's inability to utilize the Commission's contested case hearing procedures to prosecute its case does not constitute good cause to impose an undue burden on both PacifiCorp and its former employees.

¹⁹ *See* Oregon Rule of Evidence 40.450(3) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

²⁰ *See, e.g., Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (to be admissible in the context of administrative hearings, hearsay evidence must be "probative and its use fundamentally fair").

also fundamentally unfair. If the Commission allows the depositions to go forward and Surprise Valley seeks to admit the deposition statements as evidence, PacifiCorp will seek additional process at the Commission to protect its rights.

2. The Scope of Surprise Valley’s “Admissible Evidence” Is Now Limited to Rebuttal Evidence.

Even if the former employees identified by Surprise Valley could, in theory, provide information relevant to Surprise Valley’s claims, it is exceedingly unclear what Surprise Valley would be permitted to *do* with that testimony at this juncture.

Surprise Valley has already filed its direct case in this docket. Surprise Valley may not, at this late juncture, seek to introduce additional direct evidence to bolster its direct case. Surprise Valley has an opportunity to introduce more testimony in this case, but that testimony is limited in scope to Surprise Valley’s reply testimony, which is due on June 14, 2016.

As the Commission and courts have long held, a party’s reply testimony is not an opportunity to bolster a party’s direct case anew; the testimony is limited to “replying” to the testimony that came before it.²¹ Consequently, it is difficult to understand how Surprise Valley’s efforts to depose PacifiCorp’s former employees about basic elements of Surprise Valley’s claim at this point in time are “reasonably calculated to lead to the discovery of admissible evidence.”²²

Surprise Valley has every right to serve discovery requests inquiring about the testimony and exhibits of PacifiCorp’s witnesses once their testimony is filed on April 26, 2016, and to

²¹ See *In re Portland General Electric Co.*, Docket No. UM 1402, Order No. 11-315 at 2 (“We will not consider arguments that are raised for the first time in a reply brief when those arguments are not directly in response to arguments made in another party’s response.”); see also *U.S. v. Alcan Elec. & Eng’g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (arguments raised for the first time in a reply brief are waived and need not be considered); *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 436 (9th Cir.1992) (general rule is that presenting new arguments for first time in reply brief is not allowed).

²² See *Baker v. English*, 324 Or. 585, 588 n.3 (1997); *In re Pacific Power & Light, dba PacifiCorp*, Docket No. UE 177, Order No. 08-003 at 2 (Jan. 4, 2008) (citing *In re Portland Extended Area Service Region*, Docket No. UM 261, Order No. 91-958 at 5 (Jul. 31, 1991)).

depose these witnesses if it so wishes. At this point, however, a scorched-earth discovery effort to find evidence to bolster Surprise Valley's direct case is inappropriate.

IV. CONCLUSION

PacifiCorp respectfully asks the Commission to deny Surprise Valley's Motion to Compel. Most importantly, PacifiCorp also asks the Commission to clarify that Surprise Valley may not depose PacifiCorp's prior employees. If the Commission grants Surprise Valley's motion, PacifiCorp seeks the right to review and challenge—on a case-by-case basis—any specific subpoena Surprise Valley may seek to issue, consistent with the Company's standard procedural rights.

Respectfully submitted this 6th day of April, 2016.

By:



Matthew McVee
Assistant General Counsel
PacifiCorp d/b/a Pacific Power