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March 31, 2015

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
3930 Fairview Industrial Drive SE
Salem OR 97302

Re: PACIFICORP dba PACIFIC POWER
Application for Approval of Deer Creek Mine Transaction
Docket No. UM 1712

Dear Filing Center:

Enclosed for filing in the above-referenced docket, please find the Industrial Customers of Northwest Utilities' Brief Regarding Written Objections to Settlement.

Thank you for your assistance. If you have any questions, please do not hesitate to contact our office.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1712

In the Matter of	)	
	)	BRIEF OF THE INDUSTRIAL
PACIFICORP d/b/a PACIFIC POWER	)	CUSTOMERS OF NORTHWEST
	)	UTILITIES REGARDING WRITTEN
Application for Approval of Deer Creek Mine Transaction.	)	OBJECTIONS TO SETTLEMENT
	)	

I. INTRODUCTION

As directed by Administrative Law Judge ("ALJ") Arlow during the prehearing conference of March 30, 2015, the Industrial Customers of Northwest Utilities ("ICNU") submits briefing on the proposed inclusion of written testimony in written objections to the stipulation filed by PacifiCorp (or the "Company") and the Citizens' Utility Board of Oregon ("CUB") on March 25, 2015 ("Stipulation"). For reasons stated herein, including consideration of both fairness and the creation of a complete record, parties opposing the Stipulation should have an opportunity to submit responsive testimony on April 10, 2015, as inclusive within the written objections parties may file by right under OAR § 860-001-0350(8).

II. BACKGROUND

On March 25, 2015, the Public Utility Commission of Oregon (or the "Commission") issued a Notice of Cancellation of Hearing ("Notice"), cancelling the hearing in this proceeding that had been scheduled for March 30, 2015. The hearing was cancelled following an agreement by all parties to waive cross examination, based on the filings and positions of the parties known at that time. That same day, less than four hours *after* the issuance of the Notice, PacifiCorp and CUB filed the Stipulation that purports "to resolve the issues in

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docket UM 1712."[1/] As counsel for ICNU, Staff, and the Sierra Club stated during the March 30, 2015 prehearing conference, none of the non-settling parties had reviewed the Stipulation prior to its filing, and ICNU and Sierra Club stated that they had not even been aware of the Stipulation until it was filed.

At the March 30, 2015 prehearing conference, all parties reached agreement on a revised procedural schedule, including the filing of written objections, per OAR § 860-001-0350(8), on April 10, 2015. ICNU and the Company disagreed, however, as to whether responsive testimony should be included within any written objections to the Stipulation. After hearing the positions of ICNU and PacifiCorp, ALJ Arlow took the matter under advisement and directed counsel for each party to submit briefing on their respective positions by close of business on March 31, 2015.

III. DISCUSSION

A. Commission Rule and Precedent Provide Ample Authority to Allow Responsive Testimony within a Written Objection Filing

Because the Commission very recently determined that a contested stipulation performs "the same function as joint testimony,"[2/] PacifiCorp and CUB's Stipulation filing is the functional equivalent to a joint testimony submission, thereby justifying responsive testimony. While ICNU does not take issue with the rights of parties to file a stipulation under OAR § 860-001-0350, whether contested or not, fairness is best served by allowing opposing parties to respond—in kind, through responsive testimony—to PacifiCorp and CUB's election to make a filing that performed the exact same function as if the two parties had made a joint testimony filing. That is, whether styled as a contested "stipulation" or "joint testimony," either *form*

[1/] Stipulation at ¶ 1.

[2/] In Re PacifiCorp, Docket No. UE 267, Order No. 15-060 at 3 (February 24, 2015).

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performs "the same function"—i.e., providing "value", not because any issues are actually resolved, but "in terms of administrative efficiency by narrowing the range of positions on issues and further developing the record."[3/]

To this end, ICNU recommends that the fairest and best possible provision for "developing the record" would be to allow responsive testimony on the subject of the Stipulation. The Commission's rule on settlements allows parties to file written objections "on the merits."[4/] Parties should not be precluded from objecting to the merits of the Stipulation by an exclusion of written responsive testimony, since such an exclusion would deprive the record of relevant expert analysis on settlement issues.

Likewise, the Commission's rule on settlements provides for "a hearing to receive *testimony* and evidence *regarding the stipulation*."[5/] In light of the rule's express provision for testimony received at hearing on specific issues pertaining to "the stipulation," it would be helpful, reasonable, and justifiable from an administrative efficiency standpoint to not limit testimony to an oral format at hearing. Plainly, testimony "regarding the stipulation" is an acknowledged and relevant issue, both now and through the rest of the proceedings. Further, based on the recent agreement by all parties to waive cross examination prior to the Stipulation filing, and the resultant hearing cancellation, it is entirely possible that allowance for April 10 responsive testimony could ultimately lead to a similar waiver and cancellation, thereby creating further administrative efficiency.

Fair treatment for all parties requires that the stipulating parties do not receive deference. This principle accords with the Commission's recent clarification, in the context of

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[3/] Id. (*quoting* Docket No. UE 267, ALJ Ruling at 3 (Nov. 15, 2013)).
[4/] OAR § 860-001-0350(8).
[5/] Id. (emphasis added).

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the contested stipulation in docket UE 267, that "we do not defer to, and are not bound by the terms of *any* stipulation."[6/] If PacifiCorp and CUB are allowed to file a stipulation performing the same function as joint testimony, then other parties should be allowed to file testimony in response, in order to prevent deferential treatment of the stipulation and the stipulating parties.

B. Relevance and Applicability of Precedent Discussed During the Prehearing Conference

ICNU understands that PacifiCorp believes that the Commission's resolution of docket UE 267, in Order No. 15-060, is not applicable as precedent relevant to the appropriate treatment of the Stipulation. ALJ Arlow specifically requested briefing on this matter. ICNU disagrees with the Company because the Commission: 1) did not use terminology limiting its resolution on the treatment of contested stipulations merely to circumstances in which PacifiCorp or a utility is the adverse party to a stipulation; and 2) did not rewrite or otherwise make any determinations discordant with OAR § 860-001-0350, as the Company seems to contend. Also, the Company and Staff referenced further precedent potentially bearing upon the propriety of including responsive testimony in a written objections filing—docket UE 227 and the Commission's recent rejection of stipulations for lack of supporting evidence, respectively—which ICNU will discuss.

1. The Commission's Resolution of Docket UE 267 Is Relevant and Applicable

a. Important Terminology Chosen by the Commission in Docket UE 267

The Commission's resolution of contested stipulation issues in docket UE 267 was not limited, by its terms, as a narrow holding applicable only to PacifiCorp. The ALJ in docket UE 267 had stated that the contested stipulation in that proceeding "may not *resolve* any

6/ Docket No. UE 267, Order No. 15-060 at 4 (emphasis in original).

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issues as it fails to include Pacific Power."[7/] In its order, however, the Commission made two significant changes when incorporating the ALJ's statement into its resolution.

First, the Commission stated that the stipulation in docket UE 267 "*does* not '*resolve* any issues,'"[8/] thereby clarifying the definitive meaning of the ALJ's original use of the word "may." Second, the Commission found that the contested stipulation in docket UE 267 did not resolve any issues "since the adverse party in that docket, PacifiCorp, opposes its terms."[9/] Whereas the ALJ's original statement could have been interpreted to mean that the ruling was applicable only to Pacific Power—i.e., because "it fails to include Pacific Power"—the Commission clarified that it found a lack of resolution because the contested stipulation was opposed by "the adverse party," which under the circumstances happened to be PacifiCorp.

The Commission's distinction as to the general applicability of its finding to any "adverse party" is manifest by its later encouragement for "parties to submit joint testimony as a means of aligning positions against *an* adverse party."[10/] Had the Commission meant to limit its resolution simply to PacifiCorp, as the Company now seems to contend, it would have made little sense for the Commission to craft a generic encouragement to "parties" about what to do "[i]n the future," under similar contested stipulation circumstances.[11/] Similarly, the Commission's use of an indefinite term, "an adverse party," further manifests the general applicability of the Commission's resolution. Accordingly, it is immaterial that "adverse" parties include non-Company parties to the contested Stipulation in the present docket.

7/ Docket No. UE 267, ALJ Ruling at 3 (emphasis in original).
8/ Docket No. UE 267, Order No. 15-060 at 3 (*citing* Docket No. UE 267, ALJ Ruling at 3 (Nov. 15, 2013) (first emphasis added).
9/ Docket No. UE 267, Order No. 15-060 at 3.
10/ Id. at 3 (emphasis added).
11/ Id.

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b. Docket UE 267 Harmonizes with Commission Rules

According to Commission rule, along with a stipulation, "parties must file . . . [a]n explanatory brief *or* written testimony in support of the stipulation."[12/] ICNU notes that PacifiCorp and CUB filed neither a brief nor a separate piece of testimony "[w]ith the stipulation," as required by the rule, nor did the stipulating parties file with the Stipulation "[a] motion to offer the stipulation and *any* testimony as evidence in the proceeding,"[13/] as also required by the rule. In any event, the rule does not require the filing of a separate piece of "testimony" with a stipulation. Stipulating parties may simply file a supporting brief alongside a stipulation, instead of a designated "testimony" filing, and the requirement to offer the stipulation alongside "any" testimony presupposes that parties may have elected not to file a separate piece of testimony.

All of this supports the understanding that a contested stipulation filing performs "the same function as joint testimony." In other words, the rule does not need to require a separate "testimony" filing because a stipulation is the functional equivalent of testimony. Thus, if a party elects only to file a stipulation alongside a supporting brief, the party is required only to motion for the offering of the stipulation, which makes sense given the functional equivalency of a stipulation to testimony. Hence, there is no discord between the Commission's resolution of docket UE 267 and the Commission's rule on settlements, contrary to what PacifiCorp appears to allege.

2. Docket UE 227 Does Not Provide Relevant Precedent

The Commission's determinations and the circumstances regarding the contested stipulation in docket UE 227 provide no analog to the present docket. In docket UE 227, after

[12/] OAR § 860-001-0350(7)(a) (emphasis added).
[13/] OAR § 860-001-0350(7)(a)-(b) (emphasis added).

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the hearing had been completed, parties essentially filed a "black box" stipulation, which was opposed by ICNU. According to the Commission, the post-hearing stipulation reduced the Company's requested rate increase by about $8 million from what was proposed at hearing, yet the stipulating parties did "not detail the reasons for the additional $8 million reduction or break down the $8 million into specific adjustments."[14/]

Conversely, PacifiCorp and CUB have filed a contested stipulation in this case, which is not a "black box" style compromise concerning a final rate increase amount. The Stipulation changes material terms of the Company's proposals in reply testimony, including the application of a pre-rate collection interest rate. Moreover, CUB has apparently changed its position completely on critical issues such as single-issue ratemaking, coal supply agreement termination liability, and the treatment of Transaction costs through a deferral mechanism as opposed to a simple rate increase. Given these dissimilarities, docket UE 227 does not provide a relevant source of precedent.

3. Precedent Referenced by Staff Provides Guidance in this Proceeding

During the March 30, 2015 prehearing conference, Staff noted the Commission's recent rejection of stipulations for lack of supporting evidence. This precedent provides important guidance as to the need to fully develop the record concerning a stipulation, especially when significant policy considerations are at issue.

Based upon research and follow-up discussion with Staff counsel, ICNU understands that the recent decision referenced by Staff was the rejection of stipulations in

[14/] In re PacifiCorp, Docket No. UE 227, Order No. 11-435 at 3 (Nov. 4, 2011).

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docket UM 1635.[15/] In that proceeding, all parties filed two stipulations intended to resolve all disputed issues in the docket.[16/] Nevertheless, the Commission rejected these unanimous stipulations, finding that they did not "fairly and prudently resolve" the sharing of environmental remediation costs between customers and the utility.[17/] The Commission also found that, "[b]ased on the record," a stipulated cost recovery disallowance figure was "too low."[18/] Finally, in regard to "significant public policy considerations" concerning cost sharing between the utility and customers, the Commission held that such "issues should not be resolved through a stipulation, but rather through a more thorough examination of the facts and policy standpoints."[19/]

Each of these findings by the Commission in docket UM 1635 is applicable and instructive here. First, both the UM 1635 stipulations and the Stipulation filed by PacifiCorp and CUB are integrally bound to questions of appropriate cost sharing between customers and a utility. The fact that the UM 1635 stipulations were not contested, yet were still found wanting in "fairly and prudently" resolving customer cost sharing issues, means that even greater caution should be exercised in considering the fairness and prudency of the strongly contested Stipulation. ICNU believes that fairness and prudency determinations are best made with the fullest record possible, including responsive testimony to the Stipulation. Likewise, ultimate findings "based on the record" can best be rendered through such testimony.

Lastly, ICNU contends that highly significant policy considerations are at issue in the instant proceeding, not least of which is single-issue ratemaking and the Company's attempt

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15/ Re Northwest Natural Gas Company, Docket No. UM 1635, Order No. 13-424 (Nov. 18, 2013). See also Re Avista Corp., Docket No. UG 284, Order No. 15-054 (Feb. 23, 2015) (involving an even more recent stipulation rejection).

16/ Docket No. UM 1635, Order No. 13-424 at 1.

17/ Id. at 7.

18/ Id.

19/ Id.

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to create new precedent for large rate increases outside of a traditional forum. Considering CUB's reversal on this very issue relative to its response testimony position, ICNU believes that, as in docket UM 1635, "a more thorough examination of the facts and policy standpoints" is warranted, with responsive testimony providing the ideal medium.

IV. CONCLUSION

ICNU respectfully requests permission to include written testimony in written objections to the Stipulation, due on April 10, 2015, for reasons stated herein.

Dated this 31st day of March, 2015.

Respectfully submitted,

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