

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1712

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Application for Approval of Deer Creek
Mine Transaction.

**MEMORANDUM
AND
RULING**

**DISPOSITION: NEW PROCEDURAL SCHEDULE ADOPTED;
TESTIMONY MAY ACCOMPANY OBJECTIONS TO
SETTLEMENT**

Following the filing of testimony and cancellation of an evidentiary hearing on that testimony, PacifiCorp, dba Pacific Power, and the Citizens' Utility Board of Oregon (CUB) filed a stipulation setting forth an agreement between the two parties. Other parties to the case—Commission Staff, the Industrial Customers of Northwest Utilities (ICNU), and Sierra Club—have indicated they intend to object to the stipulation, and state that none of them had knowledge of the stipulation's existence or any of its contents prior to its filing with the Commission.

At the March 30, 2015 Public Meeting, the parties agreed to a new procedural schedule to address the stipulation, but failed to agree on whether the non-signatories to the stipulation were entitled to accompany their objections to the settlement with sworn testimony. ICNU asserted that it was entitled to accompany its objections with sworn testimony and PacifiCorp asserted that it (and other intervenors) was not. For reasons that follow, I conclude that accompanying testimony is allowed.

Positions of the Parties

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," as Commission rules allow other parties to object to a stipulation and to request "a hearing to receive *testimony* and evidence *regarding the stipulation*."¹ ICNU notes that the Commission recently found that a contested stipulation performs "the same function as joint testimony,"² which therefore justifies the filing of responsive testimony by other parties.

¹ ICNU Brief at 2, citing *In re PacifiCorp*, Docket No. UE 267, Order No. 15-060 at 4 (Feb 24, 2015). (Emphasis in original).

² *Id.* at 4. .

PacifiCorp argues that the stipulation is “straightforward and based entirely on testimony now on file in this docket”, making only changes to its reply testimony based on CUB’s response testimony. Because the stipulation was submitted after several rounds of testimony and is based on that testimony, PacifiCorp contends it is appropriate to file a brief rather than testimony. PacifiCorp states that the rules governing stipulations, OAR 860-001-0350 “is silent on the right of non-settling parties to file testimony in response to a stipulation, and this issue has been addressed on a case-by-case basis, taking into consideration the state of the record and timing constraints in the proceeding.”³

Discussion

The question presented is whether Staff, ICNU, and Sierra Club should be allowed to append testimony to their objections to the stipulation. In light of the history of this proceeding, the answer must be in the affirmative.

Due process, fairness and the avoidance of surprise, as well as efficiency and orderliness of proceedings, lie at the heart of the Commission’s rules governing administrative proceedings. OAR 860-001-0350(8) ensures that non-signatories to a stipulation have the opportunity to object and fully respond to a stipulation filed by other parties. The rule provides that the Commission “may hold a hearing to receive testimony and evidence regarding the stipulation,” and that the “ALJ may require evidence of any facts stipulated.”

Here, PacifiCorp and CUB filed a stipulation within hours after Staff, ICNU, and Sierra Club had agreed to waive their rights to a hearing and to cross-examine witnesses. All of the non-signatories intend to challenge the stipulation. Each has stated that, had they known of the changes in CUB’s positions with respect to its previously filed testimony, they would not have waived their right to a hearing.

PacifiCorp essentially argues that no new testimony is needed because the stipulation is based on prior testimony presented. Even assuming that is the case, a stipulation itself might raise new issues warranting additional evidence. As noted above, Commission rules provide for “a hearing to receive testimony and evidence regarding the stipulation.”⁴

PacifiCorp has requested an extremely tight procedural schedule for a Commission decision on this complex matter. The company has added additional pressures to that schedule by entering into a settlement with CUB without discussion with other parties and filing that with the Commission immediately after other parties had waived the right to a hearing. Under these circumstances, fairness is best served by allowing Staff, ICNU, and Sierra Club the opportunity to include testimony when filing objections if they find it necessary to respond to the stipulation.

³ *Id.* at 4.

⁴ OAR 860-001-0350(8).


Accordingly, I find that the inclusion of testimony with objections will not unduly burden the record or delay the proceedings. The scope of such testimony shall be reasonably related to any matters contained in the stipulation, including impeachment via reference to prior testimony. If testimony is filed, PacifiCorp will be entitled to respond to that testimony at hearing.

The following schedule for the remainder of the proceeding is adopted:

EVENT	DATE
PacifiCorp and CUB file Brief or Testimony in Support of Stipulation	April 3, 2015
Written Objections and Responsive Testimony due	April 10, 2015
Cross-Examination Exhibits and Statements	April 14, 2015
Hearing	April 17, 2015
Simultaneous Opening Briefs due	April 28, 2015
Simultaneous Reply Briefs due	May 5, 2015

Requests for discovery shall be responded to within five business days.

Dated this 2nd day of April, 2015, at Salem, Oregon.



Allan J. Arlow
Administrative Law Judge