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August 16, 2011

***Via Electronic and FedEx***

Public Utility Commission  
Attn: Filing Center  
550 Capitol St. NE #215  
P.O. Box 2148  
Salem OR 97308-2148

Re: In the Matter of PACIFICORP 2012 Transition Adjustment Mechanism  
**Docket No. UE 227**

Dear Filing Center:

Enclosed please find an original and one (1) copy of the Response in Opposition to PacifiCorp's Motion to Admit Testimony on behalf of the Industrial Customers of Northwest Utilities and the Citizens' Utility Board of Oregon in the above-referenced docket. Thank you for your attention to this matter.

Sincerely yours,

/s/ Sarah A. Kohler  
Sarah A. Kohler  
Paralegal

Enclosures

cc: Service List

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Response in Opposition to PacifiCorp's Motion to Admit Testimony on behalf of the Industrial Customers of Northwest Utilities and the Citizens' Utility Board of Oregon upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, where paper service has not been waived.

Dated at Portland, Oregon, this 16th day of August, 2011.

/s/ Sarah A. Kohler

Sarah A. Kohler

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 227**

In the Matter of	)	
	)	
PACIFICORP, dba PACIFIC POWER	)	THE INDUSTRIAL CUSTOMERS OF
	)	NORTHWEST UTILITIES AND THE
2012 Transition Adjustment Mechanism	)	CITIZENS' UTILITY BOARD OF
Schedule 201, Net Power Costs, Cost-Based	)	OREGON'S RESPONSE IN
Supply Service Schedule 205, TAM	)	OPPOSITION TO MOTION TO ADMIT
Adjustment for Other Revenues	)	TESTIMONY

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**I. INTRODUCTION**

Pursuant to OAR § 860-001-0420(5), the Industrial Customers of Northwest Utilities (“ICNU”) and the Citizens’ Utility Board of Oregon (“CUB”) submit this response in opposition to PacifiCorp’s (or the “Company”) motion to admit the testimony of Frank Graves (“Motion”). PacifiCorp’s Motion should be denied because it is both procedurally and substantively flawed. The Motion is procedurally inappropriate, because PacifiCorp has not sought leave to change the schedule to allow for supplemental testimony, and the Company ignores the fact that testimony is not formally “admitted” into the record until the evidentiary hearing in Oregon Public Utility Commission (“OPUC” or the “Commission”) proceedings. The Motion should also be rejected, and Mr. Graves’ testimony should be stricken, because the testimony is not relevant to the issues in this proceeding. Mr. Graves’ testimony is irrelevant and inadmissible, because it is recycled testimony from a Utah general rate case proceeding that responds to six Utah witnesses, none of whom are testifying in this proceeding. The record in this transition adjustment mechanism (“TAM”) proceeding should not be expanded to review

PacifiCorp's irrelevant arguments regarding why the Utah Public Service Commission ("Utah Commission") should reject the proposals of various Utah parties. The admission of Graves' testimony would also unduly prejudice and harm ICNU and CUB, as the schedule does not provide ICNU and CUB with the ability to respond, and it would be impossible for ICNU and CUB to conduct discovery and fully respond to the arguments of the six Utah witnesses prior to the hearing in this case. If Graves' testimony is admitted, however, then all the testimony of the six witnesses to whom he responds should be included in the record, in order to fairly evaluate Mr. Graves' testimony.

## **II. BACKGROUND**

PacifiCorp filed its TAM proceeding on March 17, 2011, and the Administrative Law Judge ("ALJ") adopted a procedural schedule on April 18, 2011. The procedural schedule provides for five rounds of testimony, including PacifiCorp direct testimony, Staff and intervenors' direct testimony, PacifiCorp reply testimony, Staff and intervenor rebuttal testimony, and PacifiCorp surrebuttal testimony. Reply, rebuttal and surrebuttal testimony must be limited to responding to issues raised in direct testimony. In addition to the scope of issues for testimony becoming narrower as the case progresses, the parties have less time to prepare reply, rebuttal, and surrebuttal testimony, which is reflected in the shorter discovery and testimony due dates.

PacifiCorp filed reply testimony on July 29, 2011, including testimony from Gregory Duvall, Stephan Bird, Rick Link, and William Griffith. The testimony of these witnesses responded to the testimony of Staff and intervenors. Attached as Exhibit PPL/405 to the testimony of Mr. Bird is a copy of Mr. Graves' testimony on behalf of Rocky Mountain

Power in Utah Commission Docket No. 10-035-124, which does not reply to the testimony of Staff or the intervenors in this case. Mr. Bird states that Mr. Graves' testimony is attached as an exhibit in order to fairly evaluate the testimony of Dr. Lori Schell, who testified on behalf of the Utah Office of Consumer Services in Docket No. 10-035-124. PPL/400, Bird/21. A small portion of Dr. Schell's testimony is referred to, for illustrative purposes only, in the direct testimony of Bob Jenks and Gordon Feighner, who submitted testimony on behalf of CUB; however, Dr. Schell is not testifying, a complete copy of her testimony is not an exhibit, nor is she available for cross examination in this proceeding. ICNU and CUB have conducted discovery upon PacifiCorp's reply testimony but have not conducted substantive discovery on, or analysis of, any Utah testimony, including Mr. Graves' testimony.

PacifiCorp filed its Motion on August 9, 2011. PacifiCorp requests that Mr. Graves' testimony be admitted and submits supplemental testimony that includes Mr. Graves' qualifications, background, and resume. The Motion itself is sparse, totaling only a little more than one page, and relies upon a short argument that Mr. Graves' testimony should be offered as evidence because it responds to CUB and thus "parties are not prejudiced by the admission of the supplemental rebuttal testimony, which furthers the orderly development of the record in this case." Motion at 1-2. PacifiCorp should not be permitted to correct this paucity of support for the Motion by filing a reply, as replies to responses to procedural motions are not permitted under the Commission's rules. OAR § 860-001-0420(6).

### III. RESPONSE

#### 1. **PacifiCorp's Motion to Admit Testimony Before the Hearing is Procedurally Improper**

PacifiCorp is inappropriately attempting to admit late filed testimony before the evidentiary hearing has even been held. Testimony in Commission proceedings is not normally moved for "admission" into the evidentiary record until the evidentiary hearing is held. See OAR § 860-001-0480. PacifiCorp is seeking to admit testimony even before the CUB testimony that it is allegedly replying to has been formally introduced or admitted into the record. PacifiCorp's unusual approach should be rejected, because the Company provides no justification regarding why the usual Commission practice should be ignored or why the testimony of Mr. Graves should be prematurely admitted into the record before any other evidence.

PacifiCorp has also failed to seek leave to file late testimony or to move to change the schedule to allow the Company to file supplemental rebuttal testimony. Instead, PacifiCorp is requesting that Mr. Graves' late filed testimony be admitted based on the assumption that it has the unilateral right to file supplemental testimony at any time it wishes. The ALJ has the ability to modify or waive the rules or schedule, but only upon a demonstration of good cause. See OAR § 860-001-0000(2). PacifiCorp has not even attempted to make such a showing, and its Motion should be denied.

#### 2. **Mr. Graves' Testimony Should Be Stricken Because It Is Not Relevant to the Issues in this Proceeding**

The Commission should not admit but should strike testimony that is not relevant to the issues in the proceeding. Re Joint Application, Docket No. UP 96, Order No. 95-0526 (May 31, 1995). Admissible relevant evidence includes that which makes the existence of facts

at issue in the proceeding more or less probable than without the evidence. OAR § 860-001-0450(1). Mr. Graves' Utah testimony fails this standard and should be stricken, because it does not address facts at issue in this proceeding and instead responds to factual arguments in a different proceeding in another state.

**A. Mr. Graves' Testimony Was Crafted to Respond to Witnesses Other than Messrs. Jenks and Mr. Feighner**

PacifiCorp makes a brief, attenuated argument regarding the relevance of Mr. Graves' testimony, claiming that it is necessary to respond to CUB's testimony. CUB's direct testimony included a one paragraph discussion of Dr. Schell's testimony and quoted a couple of numbers that were contained therein, for illustrative purposes only. This summary supported CUB's argument that PacifiCorp's use of a hedging strategy longer than thirty six months was imprudent. CUB also included as Exhibit CUB/106 two pages from Dr. Schell's testimony that demonstrated how she had calculated the numbers cited by CUB. The adjustment that CUB is recommending to the Commission does not rely on Dr. Schell's testimony in any manner.

The testimony of Mr. Graves, which PacifiCorp seeks to have accepted into the record, was prepared before CUB even filed its testimony, is directed at six witnesses in a separate Rocky Mountain Power proceeding in Utah, and was obviously not prepared in order to respond to the CUB testimony. PacifiCorp has had a full and fair opportunity to submit reply testimony responding to the testimony of Staff and intervenors in this proceeding, but elected not to retain Mr. Graves to analyze and respond to the gas hedging arguments raised by ICNU and CUB. PacifiCorp cannot now decide to recycle Mr. Graves' testimony and use it to respond to ICNU's and CUB's proposed adjustments in this case.

Mr. Graves' testimony is not relevant because it does not address the facts at issue in this proceeding. Mr. Graves was retained by PacifiCorp to respond to the testimonies of six witnesses in the Utah general rate case proceeding, including Douglas Wheelwright and Mark Crisp, who testified on behalf of the Utah Division of Public Utilities, Dr. Schell and Paul Wielgus on behalf of the Office of Consumer Services, and Dr. Robert Malko and Mark Widmer on behalf of the Utah Industrial Energy Consumers. Exhibit PPL/405, Bird/3. None of these witnesses are testifying in this proceeding, none are available for cross examination at the hearing, and they addressed a number of other issues.

**B. Mr. Graves' Testimony Responds to Many Issues Not Raised in Oregon**

PacifiCorp's position appears to be that Mr. Graves' testimony is relevant because ICNU and CUB are contesting the prudence of PacifiCorp's gas hedging policies, and thus, Mr. Graves' Utah testimony on gas hedging is ipso facto relevant in this case. Mr. Graves' testimony, however, is not relevant merely because it addresses gas hedging. The purpose of reply testimony is to reply to the arguments and factual assertions raised in parties' direct testimony. As explained in the Mr. Graves' testimony, he is specifically replying to arguments raised by the witnesses in the Utah proceeding. Exhibit PPL/405, Bird/3. It is not clear whether the arguments of the Utah witnesses to whom Mr. Graves is responding have been raised or are relevant to issues raised by parties in this case, and it does not appear that Mr. Graves has even reviewed ICNU's and CUB's gas hedging testimony.

As noted above, PacifiCorp argues that Mr. Graves' testimony should be admitted, because it is necessary to respond to the testimony of CUB witnesses Messrs. Jenks and Feighner, but CUB's testimony includes only one paragraph of testimony summarizing one



of Dr. Schell's factual assertions, which is how much of PacifiCorp's hedging losses are due to contracts greater than 36 months. CUB/100, Jenks-Feighner/13. Messrs. Jenks and Feighner do not specifically quote or summarize any other gas hedging testimony from Utah. Thus, the testimony relied upon by CUB addresses only a narrow, single factual assertion used for illustrative purposes.

Instead of directly responding to Messrs. Jenks and Feighner's testimony on how many of PacifiCorp's hedging losses are the result of long term contracts, PacifiCorp is seeking to introduce 27 pages of testimony by Mr. Graves, which addresses a wide range of issues responding to the myriad arguments of six different Utah witnesses. It is unclear what, if any, of Mr. Graves' testimony is actually responding to the limited question of how many losses are the result of long-term hedges. In its Motion, PacifiCorp made no effort to specifically identify which aspects of Mr. Graves' testimony respond to Messrs. Jenks or Feighner, or even Dr. Schell's, arguments on the percentage of losses associated with long-term contracts or any other issues in this case. In fact, in ICNU and CUB's limited review of the Graves testimony, we were unable to locate any portion that specifically responds to the factual argument regarding what percentage of PacifiCorp's hedging losses are the result of long-term contracts. Instead, Mr. Graves' testimony appears to respond to a wide range of entirely different arguments raised by the six different Utah witnesses. Mr. Graves is not replying to testimony from ICNU or CUB, so his testimony should not be admitted and should be stricken from the record.

**C. If Mr. Graves' Testimony Is Admitted into the Record, then All the Testimony He Is Actually Responding to Should Be Admitted into the Record**

Mr. Graves' testimony should not be admitted without including in the record the underlying Utah testimony from each of the six witnesses he is responding to. The testimony of

Mr. Graves responds to a wide variety of arguments from the six Utah witnesses, and often does not specifically cite or identify the specific Utah witness to whom he is responding. E.g. PPL/405, Bird/3, 6, 12. In order to understand Mr. Graves' arguments, at a minimum, all of the testimony that he is responding to should be included in the record. In addition, the record should include a complete copy of all the relevant testimony if this proceeding is going to be expanded to consider the gas hedging arguments raised in Utah. It would not be fair to include in the record only PacifiCorp's one-sided explanation of these issues, without providing the context and arguments to which Mr. Graves is responding.

**3. Admission of Mr. Graves' Testimony Would Unduly Prejudice ICNU and CUB and Would Confuse the Issues in the Case**

Admission of the late filed testimony of Mr. Graves will unduly prejudice ICNU and CUB, because it will harm ICNU's and CUB's ability to prepare their respective cases and will inappropriately expand the scope of issues to include arguments made by Utah parties that are not participating in this proceeding. Evidence may be included through supplemental pleadings only if it does not prejudice the ability of other parties to present their cases. Re Revised Tariff Schedules Applicable to Electric Service Filed by PacifiCorp, Docket No. UE 111, Order No. 00-090 (Feb. 14, 2000); OPUC v. Eichler, Docket No. ME 1767, Order No. 95-968 (Sept. 26, 1995) citing LaPointe's Inc. v. Beri, 73 Or. App. 773, 779 (1985). Parties' ability to present their cases can be harmed in a number of ways, including when the evidence is not within the issues in the proceeding or if the parties do not have an adequate opportunity to respond to supplemental evidence. LaPointe's Inc., 73 Or. App. at 779; Order No. 0090 at 5-6. Evidence is also inadmissible if it causes unfair prejudice or confusion of the issues. OAR § 860-001-0450(1).

Admission of Mr. Graves' testimony would prejudice ICNU and CUB because there is no remaining opportunity in the procedural schedule to respond to Mr. Graves' testimony. It is ICNU and CUB's understanding that the Commission will not admit supplemental testimony, especially that which raises significant new issues, if the parties do not have a full opportunity to review and respond to the supplemental testimony. Re MidAmerican Energy Holdings Co., Docket No. UM 1209, Order No. 05-970 (Aug. 31, 2005). The tight schedule provides ICNU and CUB with twelve business days between PacifiCorp's reply testimony (July 29, 2011) and ICNU and CUB's rebuttal testimony (August 16, 2011), with only a seven-day turnaround on discovery. PacifiCorp elected to file its Motion on August 9, 2011, one week before ICNU and CUB's final rebuttal testimony was due. This short timeline does not provide ICNU and CUB with the ability to fully analyze or conduct any discovery on the testimony of Mr. Graves and the six parties to whom he responds prior to the filing of its last round of testimony.

ICNU and CUB would also be unduly harmed and the issues in the case unnecessarily confused regardless of the time provided to review Mr. Graves' testimony. The testimony responds to the issues raised by six Utah witnesses on behalf of three different parties, none of whom are participating in this case. ICNU and CUB cannot conduct discovery or cross examination on these parties and their testimony, and ICNU and CUB should not be required to review the confidential record in a separate rate proceeding to address issues in this TAM.

#### **IV. CONCLUSION**

The Utah testimony of Mr. Graves' should not be admitted and should be stricken in its entirety, because it was not prepared for this proceeding and is not directly responding to

any of the testimony of any party in this proceeding. Mr. Graves does not appear to have read the testimony of ICNU or CUB, and his views about the testimony of six different Utah witnesses is not relevant to whether the Commission should adopt either ICNU's or CUB's gas hedging proposals. PacifiCorp's Motion should also be rejected because it inappropriately seeks to admit testimony before the evidentiary hearing and seeks to introduce testimony outside of the normal schedule that unduly prejudices and harms ICNU and CUB's ability to prepare their respective cases. If the ALJ allows the admission of Mr. Graves' testimony, then the ALJ should also require the full submission of each Utah witnesses' gas hedging testimony to which Mr. Graves was responding.

Dated this 16th day of August, 2011.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion A. Sanger

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Mr. Graves responds to a wide variety of arguments from the six Utah witnesses, and often does not specifically cite or identify the specific Utah witness to whom he is responding. E.g. PPL/405, Bird/3, 6, 12. In order to understand Mr. Graves' arguments, at a minimum, all of the testimony that he is responding to should be included in the record. In addition, the record should include a complete copy of all the relevant testimony if this proceeding is going to be expanded to consider the gas hedging arguments raised in Utah. It would not be fair to include in the record only PacifiCorp's one-sided explanation of these issues, without providing the context and arguments to which Mr. Graves is responding.

**3. Admission of Mr. Graves' Testimony Would Unduly Prejudice ICNU and CUB and Would Confuse the Issues in the Case**

Admission of the late filed testimony of Mr. Graves will unduly prejudice ICNU and CUB, because it will harm ICNU's and CUB's ability to prepare their respective cases and will inappropriately expand the scope of issues to include arguments made by Utah parties that are not participating in this proceeding. Evidence may be included through supplemental pleadings only if it does not prejudice the ability of other parties to present their cases. Re Revised Tariff Schedules Applicable to Electric Service Filed by PacifiCorp, Docket No. UE 111, Order No. 00-090 (Feb. 14, 2000); OPUC v. Eichler, Docket No. ME 1767, Order No. 95-968 (Sept. 26, 1995) citing LaPointe's Inc. v. Beri, 73 Or. App. 773, 779 (1985). Parties' ability to present their cases can be harmed in a number of ways, including when the evidence is not within the issues in the proceeding or if the parties do not have an adequate opportunity to respond to supplemental evidence. LaPointe's Inc., 73 Or. App. at 779; Order No. 0090 at 5-6. Evidence is also inadmissible if it causes unfair prejudice or confusion of the issues. OAR § 860-001-0450(1).

Admission of Mr. Graves' testimony would prejudice ICNU and CUB because there is no remaining opportunity in the procedural schedule to respond to Mr. Graves' testimony. It is ICNU and CUB's understanding that the Commission will not admit supplemental testimony, especially that which raises significant new issues, if the parties do not have a full opportunity to review and respond to the supplemental testimony. Re MidAmerican Energy Holdings Co., Docket No. UM 1209, Order No. 05-970 (Aug. 31, 2005). The tight schedule provides ICNU and CUB with twelve business days between PacifiCorp's reply testimony (July 29, 2011) and ICNU and CUB's rebuttal testimony (August 16, 2011), with only a seven-day turnaround on discovery. PacifiCorp elected to file its Motion on August 9, 2011, one week before ICNU and CUB's final rebuttal testimony was due. This short timeline does not provide ICNU and CUB with the ability to fully analyze or conduct any discovery on the testimony of Mr. Graves and the six parties to whom he responds prior to the filing of its last round of testimony.

ICNU and CUB would also be unduly harmed and the issues in the case unnecessarily confused regardless of the time provided to review Mr. Graves' testimony. The testimony responds to the issues raised by six Utah witnesses on behalf of three different parties, none of whom are participating in this case. ICNU and CUB cannot conduct discovery or cross examination on these parties and their testimony, and ICNU and CUB should not be required to review the confidential record in a separate rate proceeding to address issues in this TAM.

#### **IV. CONCLUSION**

The Utah testimony of Mr. Graves' should not be admitted and should be stricken in its entirety, because it was not prepared for this proceeding and is not directly responding to

any of the testimony of any party in this proceeding. Mr. Graves does not appear to have read the testimony of ICNU or CUB, and his views about the testimony of six different Utah witnesses is not relevant to whether the Commission should adopt either ICNU's or CUB's gas hedging proposals. PacifiCorp's Motion should also be rejected because it inappropriately seeks to admit testimony before the evidentiary hearing and seeks to introduce testimony outside of the normal schedule that unduly prejudices and harms ICNU and CUB's ability to prepare their respective cases. If the ALJ allows the admission of Mr. Graves' testimony, then the ALJ should also require the full submission of each Utah witnesses' gas hedging testimony to which Mr. Graves was responding.

Dated this 16th day of August, 2011.

Respectfully submitted,

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