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September 7, 2011

VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: **UE 227 – PacifiCorp's 2012 Transition Adjustment Mechanism**

Attention Filing Center:

Enclosed for filing in the above captioned docket are the original and one copy of PacifiCorp's Response to ICNU's Motion to Strike Surrebuttal Testimony. A copy of this filing was served on all parties to this proceeding as indicated on the attached Certificate of Service.

Very truly yours,



Katherine McDowell

cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UE 227**

4 In the Matter of:

5 PACIFICORP, dba PACIFIC POWER
6 2012 Transition Adjustment Mechanism

**PACIFICORP'S RESPONSE TO THE
MOTION TO STRIKE SURREBUTTAL
TESTIMONY**

7
8 Pursuant to OAR 860-001-0420(5), PacifiCorp (or the Company) responds to the
9 Motion to Strike the Graves Surrebuttal Testimony (Motion) filed on September 6, 2011, by the
10 Industrial Customers of Northwest Utilities (ICNU).

11 **I. BACKGROUND**

12 On August 30, 2011, PacifiCorp filed surrebuttal testimony, in accordance with the
13 procedural schedule in this docket.¹ This schedule called for the Company to file its
14 surrebuttal testimony nine days before hearing.

15 Included in the Company's surrebuttal filing is testimony from Frank C. Graves. The
16 stated purpose of Mr. Graves' testimony was to address the rebuttal testimony filed by Public
17 Utility Commission of Oregon (Commission) Staff, the Citizens' Utility Board of Oregon (CUB),
18 and ICNU relating to the Company's natural gas hedging policies.²

19 On September 6, 2011, ICNU filed its Motion arguing that Mr. Graves' testimony
20 should be stricken from the record for three reasons: (1) the filing of Mr. Graves' testimony is
21 contrary to Administrative Law Judge (ALJ) Hardie's August 25, 2011, Ruling disallowing
22 PacifiCorp to file supplemental testimony not called for by the procedural schedule; (2) Mr.
23 Graves' testimony is beyond the scope of ICNU's rebuttal testimony; and (3) the filing of

24 ¹ *Re PacifiCorp 2012 Transition Adjustment Mechanism, Docket UE 227, Prehearing Conference*
25 *Memorandum* (Apr. 19, 2011).

26 ² PPL/700, Graves/2.

1 voluminous surrebuttal testimony is prejudicial to ICNU because the agreed upon schedule
2 provides them with insufficient time to analyze and respond to voluminous surrebuttal
3 testimony.

4 II. ARGUMENT

5 A. Fundamental Fairness Requires that PacifiCorp Be Allowed to Rebut ICNU's and 6 CUB's Testimony and Respond to Staff's Testimony.

7 The Oregon Supreme Court held that "fundamental fairness requires that a party be
8 permitted to introduce evidence to rebut inferences the [fact finder] can draw from the
9 opposing party's evidence."³ This is particularly true in the context of a Commission
10 proceeding where by statute PacifiCorp has the burden of proof to demonstrate that its
11 proposed rates are fair, just, and reasonable⁴ and, as such, PacifiCorp is entitled to the last
12 word.⁵ Importantly, ICNU does not contest the relevance of Mr. Graves' testimony.⁶

13 The unfairness that would result from striking PacifiCorp's responsive testimony is
14 significant in this case because both ICNU and CUB changed their positions on hedging
15 between their initial and rebuttal testimony. ICNU's initial basis for its hedging adjustment was
16 that the Company's policies only allowed 36 month hedges and the challenged hedges all
17 represented a deviation from the Company's policy.⁷ After the Company explained in reply
18 testimony that such transactions were consistent with Company policy, in rebuttal testimony
19 ICNU shifted the focus of its argument to the fact that that the hedges were imprudent under
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21 ³ *Sellars v. Presbyterian Intercommunity Hospital*, 277 Or. 101, 106 (1977).

22 ⁴ ORS 757.210(1)(a).

23 ⁵ See *Re Idaho Power Company's 2009 Integrated Resource Plan*, Docket LC 50, Ruling (Mar.
24 24, 2010) (denying Idaho Power the right to file a reply to a response to a petition to intervene because
the petitioner has the burden and therefore gets the last word).

24 ⁶ Relevant evidence is admissible "if it is of a type commonly relied upon by a reasonably
25 prudent person in the conduct of their serious affairs." OAR 860-001-0450(1)(b).

26 ⁷ ICNU/100, Schoenbeck/12-13.

1 the "too much too soon theory."⁸ Similarly, CUB initially objected to hedging contracts for
2 periods more than 36 months prior to delivery in opening testimony, but conceded on rebuttal
3 that hedges up to 48 months prior to delivery are prudent.⁹ And Staff opined on hedging for
4 the first time on rebuttal. Depriving PacifiCorp of the opportunity, already contemplated in the
5 schedule, to respond to these new arguments and new positions would be unfair.

6 **B. Mr. Graves' Testimony is Relevant and Proper Surrebuttal Testimony.**

7 In Docket UM 1121, the ALJ denied a motion to strike filed by ICNU because the
8 testimony "arguably responds to an issue previously raised."¹⁰ Here, Mr. Graves' surrebuttal
9 testimony also responds to issues raised in intervenor's and Staff's rebuttal testimony; in
10 particular, the revised positions of ICNU and CUB presented in their rebuttal testimony and
11 Staff's position on ICNU's and CUB's hedging adjustments first presented in Staff's rebuttal
12 testimony.¹¹

13 Indeed, a review of Mr. Graves' surrebuttal demonstrates the following:

- 14 • On pages 5 to 9, Mr. Graves responds to Mr. Schoenbeck's claim in his
15 rebuttal testimony that the Company's hedging strategy resulted in the
16 execution of too many hedges too soon.¹²
- 17 • On pages 9 to 11, Mr. Graves responds to the hedging strategy that underlies
18 Mr. Schoenbeck's proposed disallowance based on his assessment that the
19 Company's hedges too much gas too soon.

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22 ⁸ ICNU/110, Schoenbeck/11.

23 ⁹ CUB/100, Jenks-Feighner/16; CUB/200, Jenks-Feighner/8.

24 ¹⁰ *Re Oregon Electric Utility Company, LLC*, Docket UM 1121, Ruling (Oct. 18, 2004) (finding that
the testimony was relevant under former OAR 860-014-0045(1)(b) (current OAR 860-001-0450(1)(b))).

25 ¹¹ PPL/700, Graves/2.

26 ¹² ICNU/110, Schoenbeck/11.

- 1 • Pages 12 to 20 respond directly to claims made in Mr. Schoenbeck’s rebuttal
2 testimony relating to the prudence of the Company’s hedging practices.¹³ Mr.
3 Schoenbeck’s direct testimony does not discuss this issue at all—it is raised
4 only in his rebuttal testimony.

5 ICNU’s Motion fails to identify any specific issue raised by Mr. Graves that is outside
6 the scope of the rebuttal testimony. ICNU’s Motion contains a multitude of conclusory
7 statements that Mr. Graves’ testimony does not respond to the rebuttal testimony, but
8 nowhere does ICNU’s Motion cite to specific examples where this allegedly occurred. As
9 discussed above, even a cursory review of Mr. Graves’ testimony demonstrates that his
10 analysis is responsive to issues raised in rebuttal testimony. Like the ALJ’s denial of ICNU’s
11 motion to strike in Docket UM 1121, the Commission should also deny ICNU’s motion here
12 because Mr. Graves’ surrebuttal testimony “arguably responds to an issue previously raised.”

13 ICNU’s Motion focuses not on the content of Mr. Graves’ surrebuttal testimony, but
14 rather its length. In support of its claim that Mr. Graves’ testimony impermissibly expands the
15 issues in this proceeding, ICNU argues that its rebuttal testimony included only four pages of
16 hedging testimony and CUB’s rebuttal testimony included less than two pages.¹⁴ ICNU then
17 argues that Mr. Graves’ testimony is 20 pages and includes extensive analysis and exhibits.¹⁵

18 The length of the surrebuttal testimony is immaterial to its admissibility. The schedule
19 in this docket provided no limits on the length of surrebuttal testimony, even though all parties
20 were aware it was being filed only nine days before hearing.

21 In addition, while ICNU’s motion focuses on the brevity of ICNU’s testimony, it omits to
22 mention the complexity and scale of the hedging adjustment ICNU proposes. For the first

24 ¹³ ICNU/110, Schoenbeck/11.

25 ¹⁴ Motion at 5.

26 ¹⁵ *Id.*

1 time ever in Oregon, ICNU proposes that the Commission disallow dozens of PacifiCorp's
2 natural gas hedges. For all of the reasons stated in the Company's testimony, ICNU's
3 adjustment has significant and far-reaching policy ramifications. The size of the adjustment is
4 also huge, representing one of the largest net power costs adjustments ever proposed against
5 the Company in this state. It is unfair for ICNU to raise an adjustment of this nature and then
6 seek to limit the Company's response to a length that ICNU arbitrarily claims is proportionate
7 to its testimony.

8 Without more, the claim that Mr. Graves' testimony is simply longer than the rebuttal
9 testimony of ICNU and CUB fails to demonstrate that it expands the scope of the issues.

10 **C. ICNU's Motion Fails to Demonstrate that its Claimed Prejudice Substantially**
11 **Outweighs the Probative Value of Mr. Graves' Testimony.**

12 ICNU argues that the filing of Mr. Graves' surrebuttal testimony is prejudicial and
13 should therefore be stricken.¹⁶ However, the Commission's rules allow the exclusion of
14 otherwise relevant evidence only "if the probative value is substantially outweighed by the
15 danger of unfair prejudice."¹⁷ This rule requires the Commission to engage in a balancing
16 exercise where it must balance the probative value of the evidence against the risk of *unfair*
17 prejudice. As the Oregon Supreme Court noted, the "testimony must be not only prejudicial,
18 but unfairly so."¹⁸

19 Here, Mr. Graves' surrebuttal testimony has significant probative value because it
20 responds directly to the issues raised in the rebuttal testimony of Staff, CUB, and ICNU.
21 ICNU's witness is proposing a significant disallowance based on the Company's hedging
22 practices and therefore evidence directly rebutting ICNU's methodology and analysis has

23 ¹⁶ Motion at 7.

24 ¹⁷ OAR 860-001-0450(1)(c).

25 ¹⁸ *McCathern v. Toyota Motor Co.*, 332 Or. 59, 71-72 (2001) (discussing the identical language in
26 OEC 403).

1 significant probative value. Even ICNU's Motion admits that the substance of Mr. Graves'
2 testimony is responsive to evidence provided by intervenors in this case.¹⁹

3 Turning to the balancing required by OAR 860-001-0450(1)(c), the prejudice ICNU
4 claims does not substantially outweigh the probative value of the testimony. ICNU claims it
5 will be prejudiced because it will be unable to conduct discovery in the abbreviated schedule
6 between the filing of PacifiCorp's surrebuttal testimony and the hearing. This claimed
7 prejudice, however, is hardly unfair—ICNU agreed to this schedule knowing full well of the
8 time limitations between the Company's surrebuttal filing and hearing. It is disingenuous for
9 ICNU to now claim the surrebuttal testimony is prejudicial because of this fact.

10 ICNU also argues that it is unfairly prejudiced by the filing of Mr. Graves' testimony
11 because it "has now been unjustly afforded no opportunity to rebut" Mr. Graves' testimony.²⁰
12 This claim of prejudice is unfounded. ICNU will have sufficient ability to address and respond
13 to Mr. Graves' testimony through cross examination and briefing. Indeed, in Docket UM 1355
14 the Commission denied PacifiCorp's claims that it was unable to respond to a novel proposal
15 made by an ICNU witness eight days before hearing because the Company "had the
16 opportunity to cross-examine ICNU's sponsoring witness" and addressed "ICNU's proposal[]
17 in opening and reply briefs."²¹ In that case, ICNU argued that "Utilities do not have the right to
18 submit additional testimony merely because factual issues were raised in the final testimony of
19 Staff and intervenors."²² Here, ICNU can cross-examine Mr. Graves at hearing and has
20 expressed the intent to do so. ICNU will also have an opportunity to address Mr. Graves'

21 ¹⁹ Motion at 5 ("Mr. Graves . . . outlines his view regarding what a prudent hedging strategy
22 should include, describes his opinions regarding current hedging, gas and electric markets, and responds
to the issues raised in ICNU's and CUB's first round of direct testimony . . .").

23 ²⁰ Motion at 8.

24 ²¹ *Re Investigation Into Forecasting Forced Outage Rates for Electric Generating Units*, Docket
UM 1355, Order No. 10-157 at 4 (Apr. 26, 2010).

25 ²² *Re Investigation Into Forecasting Forced Outage Rates for Electric Generating Units*, Docket
UM 1355, ICNU Response in Opposition (Feb. 5, 2010).

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1 testimony through briefing. Therefore, any claim of prejudice arising from ICNU's inability to
2 rebut Mr. Graves' testimony is disingenuous based on ICNU's positions in other dockets and
3 contrary to Commission precedent.

4 ICNU's motion fails to demonstrate that its claimed prejudice *substantially outweighs*
5 the admitted probative value of Mr. Graves' testimony. Indeed, ICNU's Motion fails to even
6 engage in this fundamental analysis required in order to strike evidence as inadmissible based
7 on claims of unfair prejudice. Therefore, ICNU has not met its burden as the moving party
8 under OAR 860-001-0450(1)(c) and the motion to strike should be denied.

9 **D. The ALJ's Ruling Does Not Preclude the Filing of the Graves Surrebuttal**
10 **Testimony.**

11 ICNU argues that the filing of Mr. Graves' surrebuttal is contrary to the Ruling of
12 August 25, 2011. To reach this conclusion, ICNU argues that the Ruling stands for the
13 proposition that the attempt to file Mr. Graves' testimony on August 9, 2011 was improper
14 because it did not afford ICNU sufficient time for discovery and response.²³ Contrary to
15 ICNU's argument, the Ruling is focused not on the substance of Mr. Graves' testimony, but
16 rather on the fact it was filed out-of-time.²⁴ ALJ Hardie noted in the Ruling that "any testimony
17 that is relevant and appropriate in scope" may be filed in the Company's surrebuttal
18 testimony.²⁵ As discussed above, Mr. Graves' testimony is both relevant and appropriate in
19 scope.

20 Here, Mr. Graves' testimony was timely filed on August 30, 2011, pursuant to the
21 schedule that was agreed to by all the parties to this docket, including ICNU, and adopted by
22 ALJ Hardie.²⁶ While ICNU now complains that there is insufficient time between the filing of

23 ²³ Motion at 3-4.

24 ²⁴ Ruling at 3.

25 ²⁵ Ruling at 3.

26 ²⁶ Prehearing Conference Memorandum.

1 the Company's surrebuttal testimony and hearing, ICNU knew when it agreed to the schedule
2 in this docket that it had only nine days from the filing of the surrebuttal testimony to the
3 hearing. It cannot now use this fact to support a motion to strike surrebuttal testimony that it
4 argues is so voluminous it will be difficult to analyze prior to hearing.

5 Moreover, ICNU was aware of the Company's intention to call Frank Graves as an
6 expert witness in this case by August 10, 2011, when the Company responded to ICNU's data
7 requests 13.24 and 13.25 inquiring about Mr. Graves' appearance in this case and his
8 availability for cross examination. ICNU also had Mr. Graves' testimony from the Utah case
9 by July 18, 2011, in response to ICNU 10.1.²⁷ Given that ICNU was aware that Mr. Graves
10 would be appearing in this case and that his testimony responds directly to issues raised in
11 the intervenors' and Staff's rebuttal testimony, ICNU is not prejudiced by the timing of the
12 testimony.

13 ICNU also argues that because Mr. Graves' testimony is "functionally identical" to the
14 testimony that was filed late, it should be stricken from the record now even though it was
15 timely filed.²⁸ This argument lacks merit because it presumes that the Ruling concluded that
16 the testimony was inappropriate because of its content, not because of the fact it was filed
17 late. Nothing in the Ruling supports this conclusion. In any event, a comparison of the two
18 pieces of testimony shows many differences. For example, Mr. Graves' Utah testimony
19 extensively addressed the differences between the hedging programs of natural gas utilities
20 and electric utilities. This discussion is not included in Mr. Graves' Oregon surrebuttal
21 testimony. Similarly, Mr. Graves' Oregon surrebuttal testimony addresses the issue of
22 volatility to analyze the "too much too soon" issue and the prudence of the Company's hedges
23 in 2007-2008. This discussion was not included in the Utah testimony.

24 ²⁷ On May 18, 2011, ICNU received extensive discovery on the full range of hedging issues
25 raised in Utah in response to ICNU 7.3.

26 ²⁸ Motion at 6.

1 **E. ICNU's Claims of Inadequate Time for Discovery are Without Merit.**

2 ICNU argues at length that the admission of Mr. Graves' testimony will result in unfair
3 prejudice because ICNU has insufficient time to conduct discovery because the hearing in this
4 matter was set for nine days after the filing of the surrebuttal testimony.²⁹ This argument lacks
5 merit because ICNU agreed to the procedural schedule in this docket that called for
6 PacifiCorp to file surrebuttal testimony just nine days before the hearing. That order included
7 no limits on the length of the surrebuttal testimony, meaning the Company could file any
8 relevant, admissible surrebuttal testimony of whatever length. Finally, 20 pages is not an
9 unreasonable amount of testimony, especially given that it is in response to CUB's and
10 ICNU's changed positions on a significant adjustment and to Staff's first discussion of the
11 issue.³⁰

12 **F. Long-standing Precedent Does Not Support ICNU's Argument.**

13 ICNU argues that "long-standing precedent forbids the filing of Mr. Graves' surrebuttal
14 testimony."³¹ To support this contention, ICNU cites to one Commission order and one Court
15 of Appeals case that both address amending *pleadings* while a case is pending. In Order No.
16 00-090 the Commission noted that "pleadings are easily amended and deficiencies may
17 generally be corrected during the course of the proceeding. The primary consideration is
18 whether other parties to the proceeding are prejudiced by the amendment."³² Likewise, in
19 *LaPoint's Inc. v. Beri*, the Court of Appeals held that under ORCP 23B a court may allow a
20 party to amend its pleadings during the pendency of the case to conform to the evidence if the
21 admission of the evidence does not prejudice the ability of the objecting party to defend the
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23 ²⁹ Motion at 6-9.

24 ³⁰ Notably, ICNU recently filed 13 pages of surrebuttal testimony on hedging only six days before
the hearing in PGE's Docket UE 228.

25 ³¹ Motion at 7.

26 ³² *Re PacifiCorp*, Docket UE 111, Order No. 00-090 at 5 (Feb. 14, 2000).

1 case on its merits.³³ In that case, the trial court allowed a party to present evidence in support
2 of a counterclaim that was not originally pled. The Court of Appeals upheld the trial court's
3 decision to allow the evidence into the record when the objecting party could only claim that it
4 was "surprised" at trial by the new evidence.

5 Neither of these cases represent "long-standing precedent" that would preclude the
6 admission of Mr. Graves' testimony. Indeed, both these citations address the amendment of
7 pleadings, not the filing of rebuttal testimony by a party in a Commission proceeding. ICNU
8 provides no other legal authority in support of its claim that "long-standing precedent forbids
9 the filing of Mr. Graves' surrebuttal testimony."

10 With respect to motions to strike, in a filing made to the Commission on September 6,
11 2011, in Docket UE 228 ICNU acknowledged that "the Commission has set a very high
12 standard which a moving party must meet in order to prevail on a motion to strike."³⁴ ICNU's
13 Motion in this docket fails to even reference this "very high standard," let alone demonstrate
14 why it has satisfied it.

15 IV. CONCLUSION

16 For the foregoing reasons, the Commission should deny ICNU's Motion and accept the
17 surrebuttal testimony filed by the Frank C. Graves on behalf of PacifiCorp.

18 DATED: September 7, 2011.

19 
20 Katherine McDowell
Amie Jamieson

21 Attorneys for PacifiCorp

22 _____
23 ³³ 73 Or. App. 773, 779 (1985).

24 ³⁴ *Re Portland General Electric Co. 2012 Annual Power Cost Update Tariff*, Docket UE 228,
25 Response in Opposition to PGE's Motion to Strike Portions of Surrebuttal Testimony and Deposition of
26 Donald W. Schoenbeck (Sept. 6, 2011) (ICNU cited to the Commission's Order No. 09-177 in Docket UE
177 where the Commission admitted previously stricken testimony even after concluding that it was not
relevant).

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in UE 227 on the following named person(s) on the date indicated below by email addressed to said person(s) at his or her last-known address(es) indicated below.

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