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September 28, 2012

Shani Pines
Administrative Law Judge
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: Objection to PacifiCorp Response
Docket No. UE 245

Dear Judge Pines:

The Public Utility Commission of Oregon Staff (“Staff”), the Industrial Customers of Northwest Utilities (“ICNU”), and the Citizens’ Utility Board of Oregon (“CUB”) submit this letter objecting to PacifiCorp’s response (“Response”) to ICNU and CUB’s objection to the admission of the late filed affidavit of Gregory Duvall, PAC/500 (“Duvall Affidavit”). On September 26, 2012, PacifiCorp filed this Response to the parties’ objections. PacifiCorp’s Response is not permitted under the Commission’s administrative rules and, if accepted, would establish a dangerous precedent for future Commission proceedings.

PacifiCorp’s Response is procedurally improper and should be disregarded. The Administrative Law Judge (“ALJ”) noted that the Duvall Affidavit was filed after the hearing and requested that any objections to the Duvall Affidavit be filed by September 25, 2012. The ALJ did not permit any parties to file any responses or replies to these objections.^{1/} ICNU, CUB, and Staff addressed the Duvall Affidavit in their Closing Briefs on September 21, 2012.^{2/} Then, without seeking permission of the ALJ, on September 26, 2012, PacifiCorp filed an impermissible reply to these responses.

PacifiCorp admits that the schedule established by the ALJ did not include an opportunity for PacifiCorp to file a reply, but argues that ICNU and CUB’s objection (which was requested by the ALJ), arguably constitutes “a motion, to which PacifiCorp has a right to a reply within seven days under OAR 860-001-0420(6).”^{3/} The parties responded to the ALJ’s Memorandum request; they did not file a procedural motion under the Commission’s rules.

^{1/} Re PacifiCorp, Docket No. UE 245, Memorandum at 2 (Sept. 18, 2012).

^{2/} ICNU and CUB objected to the admission of the Duvall Affidavit. While Staff’s post-hearing reply brief discussed issues related to the submission of the Duvall Affidavit and argued it should be given little or no weight on its merits, Staff did not object to its admission.

^{3/} PacifiCorp Response at 1 fn.1.

Procedural motions are requests to change how “the Commission regulates its proceedings; for example, a motion to modify a schedule.”^{4/} Under a procedural motion, a party must make a good faith effort to confer with other parties and describe such efforts, which PacifiCorp did not do.^{5/} The moving party that requests a change in the schedule “is not permitted to file a reply to a response to a procedural motion unless permitted by the ALJ.”^{6/} Under both the Commission’s administrative rules and the ALJ’s Memorandum, PacifiCorp should not be allowed to file a response or otherwise attempt to make up for its failure to properly request that the schedule be modified.

The resolution of procedural issues such as this one may seem trivial, but they have far reaching impacts in future Commission proceedings. The procedural process of all Commission proceedings will be dramatically transformed if parties are allowed to submit inappropriate pleadings and supplement their legal briefs with new factual claims and evidence after the close of the hearing. If allowed, in the future, other parties will likely cite to these filings to support the idea that they are allowed to file inappropriate pleadings and new factual evidence. While PacifiCorp’s Response, like the Duvall Affidavit, may not be integral to the substantive decision in this proceeding, it is nonetheless important to consistently apply the Commission’s rules of evidence and pleadings to establish precedent in future dockets.

In addition, PacifiCorp’s Reply raises new arguments for the first time regarding why the Duvall Affidavit should be admitted into the record. If the ALJ accepts the Response, then ICNU and CUB request an opportunity to respond these factual and substantive arguments.

For the reasons stated above, ICNU, CUB, and Staff respectfully request that the ALJ reject PacifiCorp Response.

Sincerely yours,

/s/ Jason Jones
Jason Jones

/s/ Irion A. Sanger
Irion A. Sanger

Catriona McCracken
Catriona McCracken

cc: Service List

^{4/} OAR § 860-001-0420(2).

^{5/} See OAR § 860-001-0420(3).

^{6/} OAR § 860-001-0420(6).