

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 227

In the Matter of)	
)	
PACIFICORP, dba PACIFIC POWER)	THE INDUSTRIAL CUSTOMERS OF
)	NORTHWEST UTILITIES' MOTION
2012 Transition Adjustment Mechanism)	TO STRIKE SURREBUTTAL
Schedule 201, Net Power Costs, Cost-Based)	TESTIMONY OF FRANK C. GRAVES
Supply Service Schedule 205, TAM)	
<u>Adjustment for Other Revenues</u>)	EXPEDITED CONSIDERATION
		REQUESTED

I. INTRODUCTION

Pursuant to OAR § 860-001-0420, the Industrial Customers of Northwest Utilities (“ICNU”) submits to the Public Utility Commission of Oregon (“OPUC” or the “Commission”) this Motion to Strike the Surrebuttal Testimony of Frank C. Graves (“Motion”). Mr. Graves’ testimony should be stricken for at least three reasons: 1) PacifiCorp’s (or the “Company”) filing of this testimony is contrary to the August 25, 2011 Ruling of Administrative Law Judge (“ALJ”) Lisa D. Hardie (the “Ruling”); 2) Mr. Graves’ surrebuttal testimony in the fifth and final round of testimony impermissibly expands, rather than properly narrows, the issues in this docket and is well beyond the scope of ICNU’s surrebuttal testimony; and 3) it would severely prejudice and prevent any effective response by ICNU given the enormous amount of new data and arguments filed five business days before the hearing. ICNU’s counsel informed PacifiCorp’s counsel of its intent to file this Motion during Mr. Schoenbeck’s deposition on September 1, 2011. ICNU’s counsel attempted to confer today, but was unable to reach PacifiCorp’s counsel other than through email.

PAGE 1 – ICNU’S MOTION TO STRIKE THE GRAVES SURREBUTTAL TESTIMONY

Mr. Graves' surrebuttal testimony suffers from the same deficiencies as his earlier stricken testimony—it is late filed testimony and ICNU does not provide sufficient opportunity in which to review and respond. Due to the short time remaining before the September 8, 2011 hearing, ICNU requests expedited consideration of this Motion. Specifically, ICNU respectfully requests a decision by ALJ Hardie by the start of the hearing, if possible.

II. BACKGROUND

On August 25, 2011, ALJ Hardie denied PacifiCorp's untimely attempt to file Mr. Graves' "supplemental" testimony, in which PacifiCorp sought to add Mr. Graves as a new witness after the due date for the Company's reply testimony had passed, and by which Mr. Graves proposed to expressly adopt his June 2011 Utah Public Service Commission ("Utah Commission") testimony filed as PacifiCorp exhibit PPL/405 in this Docket. ICNU will not repeat the background in this Motion, but incorporates by reference the background in the ICNU and CUB response to PacifiCorp's motion to admit testimony.

Notwithstanding ALJ Hardie's Ruling, PacifiCorp filed a repackaged version of Mr. Graves' rejected testimony just five days later on August 30, 2011. As explained below, the Graves surrebuttal testimony is substantively no different from the stricken Graves supplemental testimony filing. Hence, ICNU has filed this timely Motion in order to (once again) ensure that PacifiCorp is not permitted to submit prejudicial and late filed testimony, testimony that could have been easily filed as direct or timely rebuttal testimony.

III. ARGUMENT

A. The Filing of the Graves Surrebuttal Testimony Is Contrary to the Ruling's Proscription against Prejudicial New Witness Filings

ALJ Hardie denied PacifiCorp's Motion to admit Mr. Graves' supplemental testimony. Ruling at 3. Specifically, ALJ Hardie found that PacifiCorp had not "justified filing the supplemental testimony out-of-time." Id. Conversely, the Ruling explained that had PacifiCorp "identified Mr. Graves as a potential witness in its July 29, 2011 filing, when CUB and ICNU had more time to conduct discovery on Mr. Graves, the disputed issue might be whether identification of a new witness at that stage was an appropriate response to CUB's and ICNU's testimony." Id.

In other words, the Ruling found that PacifiCorp may have been able to make a persuasive argument to file testimony from a new witness, had such testimony been filed with the Company reply testimony due date of July 29, 2011 instead of on August 9, 2011. The Ruling states that a timely July 29 filing would have allowed PacifiCorp to explain the key issue: whether ICNU and CUB would have sufficient "time to conduct discovery on Mr. Graves." Id. Mr. Graves' late filed supplemental reply testimony, however, did not provide sufficient time for CUB and ICNU to conduct discovery and responsive testimony. Id.

The Ruling's import as applied to the surrebuttal testimony of Mr. Graves suggests: since PacifiCorp's August 9, 2011 filing of new witness testimony provides for an insufficient discovery period and response time, then the Company's August 30, 2011 filing of substantially the same testimony is even more inappropriate. The hearing date in this proceeding

is September 8, 2011. There is simply no time to conduct adequate discovery on this new, expansive testimony.

The repackaging of Mr. Graves' earlier rejected testimony as surrebuttal testimony is even more prejudicial to ICNU than the earlier, stricken testimony because it provides no opportunity to respond because there is not sufficient time to conduct discovery and the schedule does not provide for any opportunity for ICNU or CUB to provide responsive testimony. These are problems of PacifiCorp's own creation as the Company could have provided all parties an opportunity to conduct discovery and submit responsive testimony if it had filed Mr. Graves' testimony with its original rebuttal testimony on July 29, 2011 instead of on August 30, 2011.

B. The Graves Surrebuttal Testimony Impermissibly Expands the Scope of Issues in the Proceeding

In the last sentence of the Ruling, ALJ Hardie explained that, with a fifth and final surrebuttal round of testimony, PacifiCorp could still "file any testimony that is relevant and appropriate in scope." Ruling at 3 (emphasis added). This statement was not a carte blanche to the Company to simply repackage, rename, and then refile Mr. Graves' Utah Commission testimony in five days' time. Rather, ALJ Hardie noted that the Company may file surrebuttal testimony so long as it is "appropriate in scope." Id. Mr. Graves' surrebuttal testimony does not meet this condition because it addresses the same issues as his rejected Utah testimony and responds to the direct testimony of Messrs. Schoenbeck, Jenks and Feighner instead of their later filed rebuttal testimony. The final surrebuttal testimony should be part of the continuous progression of narrowing the scope of issues being addressed.

ICNU's and CUB's direct testimony recommended that a portion of PacifiCorp's gas hedging costs be disallowed because it locked in far too much gas far too quickly. E.g. ICNU/100, Schoenbeck/3. Messrs. Schoenbeck, Jenks and Feighner filed rebuttal testimony on the gas hedging issue, but it was narrow in scope and specifically designed to rebut issues raised by PacifiCorp. For example, Mr. Schoenbeck's gas hedging rebuttal testimony constituted less than four pages and address only four limited issues. ICNU/110, Schoenbeck/9-13. Similarly, CUB's gas hedging rebuttal testimony is less than two full pages and primarily reduces the impact of its proposal, partially agreeing with the Company's rebuttal testimony. CUB/200, Jenks-Feighner/6-8.

Mr. Graves' testimony significantly expands the scope of issues for ICNU to review at this late stage of the proceeding. The testimony is 20 pages long, plus it includes a detailed and complex exhibit, including numerous tables of complex data. For example, Mr. Graves' Excel spreadsheet supporting his volatility analysis alone contains over 40 worksheets containing numerous calculations. This analysis goes well beyond Mr. Graves' Utah testimony that was stricken, but ICNU has virtually no time to audit and review the analysis. Mr. Graves does not directly respond to ICNU's and CUB's last round of testimony, but instead outlines his view regarding what a prudent hedging strategy should include, describes his opinions regarding the current hedging, gas and electric markets, and responds to the issues raised ICNU's and CUB's first round of direct testimony regarding the appropriateness of PacifiCorp's far forward hedging strategy. Mr. Graves raises a plethora of issues and makes a number of controversial

factual arguments that require significant analysis and rebuttal that cannot be accomplished given its late filing.

Mr. Graves' surrebuttal testimony is also functionally identical to the Utah Commission testimony he sought to adopt in supplemental testimony, except that it contains additional supporting documentation. The functional equivalence and marked similarities of Mr. Graves' rejected Utah testimony and Oregon surrebuttal testimony is apparent even in a cursory review of the testimonies. For example, in the opening "general conclusions" statement within each testimony version, both the Utah Commission and the surrebuttal testimony make the same statements defending "out of the money" utility hedges made within a 48 month window, and each cites substantial/dramatic natural gas price reductions and shale gas developments as contributing factors to out of the money results. Compare PacifiCorp Ex. PPL/405, Bird/4–5, with PacifiCorp Ex. PPL/700, Graves/3. Likewise, while Mr. Graves' Utah Commission testimony is organized to address "the question of whether too much was hedged, for too long forward," his surrebuttal testimony begins by addressing the ICNU argument "that PacifiCorp executed too many hedges too far in advance." Compare PacifiCorp Ex. PPL/405, Bird/6, with PacifiCorp Ex. PPL/700, Graves/5. Further, Mr. Graves uses many of the same answers in surrebuttal testimony (including nearly verbatim sentences), as he used in the Utah Commission testimony to answer the same questions. E.g., PPL/405, Bird/13 at ll. 222–23, and PacifiCorp Ex. PPL/700, Graves/5 at ll. 6–7; PPL/405, Bird/14 at ll. 236–43, and PacifiCorp Ex. PPL/700, Graves/5 at ll. 7–16.

Ultimately, the real point is not that Mr. Graves has copied and pasted his Utah testimony, but that it dramatically exceeds the scope of permissible surrebuttal testimony and is substantively so similar to his rejected Utah Commission testimony. There is little of substance in Mr. Graves' surrebuttal testimony that could not have been filed earlier, and ICNU should not be forced to bear the prejudicial impact of PacifiCorp's decision to blind side the regulatory process with a pattern of trying to make its case in rebuttal and surrebuttal testimony.

C. Long-Standing Precedent Forbids the Filing of Mr. Graves' Surrebuttal Testimony

In accord with ALJ Hardie's Ruling, the Commission and the Oregon appellate court precedent forbid new filings which significantly increase discovery burdens and which prejudice responsive parties. For example, the Commission holds that its "primary consideration" in allowing new filings over the course of a proceeding is whether other parties will be prejudiced. Re Revised Tariff Schedules Applicable to Electric Service Filed by PacifiCorp, Docket No. UE 111, Order No. 00-090 at 5 (Feb. 14, 2000). Similarly, the Oregon Court of Appeals has found that 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. v. Beri, 73 Or App 773, 779 (1985). In fact, the OPUC rules also apply the same principle—i.e., evidence is inadmissible if it causes unfair prejudice or confusion of the issues. OAR § 860-001-0450(1).

ICNU has been left only five business days before the hearing to digest Mr. Graves' improperly expansive surrebuttal testimony. The schedule only allowed ICNU one

business day to review the testimony and to draft appropriate data requests. This one-day discovery turn around may be appropriate for limited surrebuttal testimony, but Graves' testimony is new and expansive and should have been filed earlier. Had PacifiCorp filed this testimony with the Company's rebuttal testimony, then ICNU would have had an opportunity to conduct reasonable discovery, including a deposition, and to respond with rebuttal testimony (ICNU's second and final round of testimony). But, as it presently stands, ICNU has now been unjustly afforded no opportunity to rebut or even fully understand Mr. Graves' expansive testimony through discovery.

The burden placed upon ICNU through the filing of Mr. Graves' testimony is illustrated by the likelihood that ICNU will have only a few hours to analyze the Company's responses to data requests treating issues raised in surrebuttal, including matters covering calculations and arguments which are highly technical in nature. ICNU sent out its final set of data requests on August 31, 2011, the day after receiving Mr. Graves' surrebuttal testimony. PacifiCorp has until September 7, 2011, the day before the hearing, to respond to those requests. Thus, assuming that many of PacifiCorp's responses will not be served until well into afternoon of September 7, and that ICNU's expert and counsel will need a decent night's sleep in order to be ready for the hearing, ICNU will, in all likelihood, have but a few hours to review PacifiCorp's responses before the hearing.

This meager time period is all the more inadequate when the technicality and breadth of the specific issues are revealed. ICNU was only able to conduct discovery on a

limited amount of the issues raised by Mr. Graves, but the following provides just a sampling of expected PacifiCorp response material ICNU will need to review in a few hours:

- The hedging program Mr. Graves helped design, implement and gain approval of for a western U.S. gas and electric utility along with all documents filed with the state commission seeking approval of the program (related to PPL/701, Graves/2);
- Mr. Graves' direct and rebuttal testimony in Application CPUC R. 01-10-024 (related to PPL/701, Graves/18);
- The three publications, papers or presentations co-authored with Mr. Steve Levine dated September 30, 2010, July 2010 and February 11, 2010 (related to PPL/701, Graves/22);
- An explanation and quantification of the minimal costs associated with longer term hedges as compared to shorter horizons (related to PPL/700, Graves/4);
- An identification of the hedging policies reviewed by Mr. Graves and an identification of which policies may have allowed hedging over 48 months, including all supporting documents and hedging policies reviewed (related to PPL/700, Graves/4);
- The circumstances and actual examples of where an electric utility obtained a good deal on a long term financial gas hedge in an illiquid market (related to PPL/700, Graves/9);
- A detailed explanation of how Mr. Graves would determine if a longer term gas financial swap hedge (greater than 48 months) was prudent or imprudent for consumers (related to PPL/700, Graves/9); and
- All the broker quotes that were provided to Mr. Graves, including an identification of each broker providing each quote (related to PPL/700, Graves/15).

Note that this is just a partial list of the material ICNU's expert will need to review (in the few hours afforded him before the hearing) related only to issues directly addressing Mr. Graves' testimony. In addition, ICNU would have conducted far more extensive discovery had ICNU been provided the normal amount of time to review such comprehensive testimony.

PAGE 9 – ICNU'S MOTION TO STRIKE THE GRAVES SURREBUTTAL TESTIMONY

IV. CONCLUSION

The filing of the Graves surrebuttal testimony is prejudicial to ICNU and should be rejected. It violates the same principles relied upon by ALJ Hardie in denying the Graves supplemental testimony; i.e., allowing responsive parties much too little time to conduct necessary discovery upon a new witness. Moreover, the surrebuttal testimony improperly expands upon issues in the proceeding, and both OPUC and Oregon appellate precedent prohibit the prejudicial filing of such expansive, new testimony. For these reasons, the Company's surrebuttal testimony of new witness Frank C. Graves should be denied.

Dated this 6th day of September, 2011.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion A. Sanger

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Of Attorneys for Industrial Customers
of Northwest Utilities

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Dated this 6th day of September, 2011.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion A. Sanger

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September 6, 2011

Via Electronic and U.S. Mail

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 Motion to Strike Surrebuttal Testimony of Frank C. Graves on behalf of the Industrial Customers of Northwest Utilities in the above-referenced docket. Thank you for your attention to this matter.

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

Sincerely yours,

/s/ Sarah A. Kohler
Sarah A. Kohler

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Strike on behalf of the Industrial Customers of Northwest Utilities 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 6th day of September, 2011.

/s/ Sarah A. Kohler
Sarah A. Kohler

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