

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 227

In the Matter of

PACIFICORP, dba PACIFIC POWER

2012 Transition Adjustment Mechanism.

RULING

**DISPOSITION: MOTION TO ADMIT SUPPLEMENTAL REPLY TESTIMONY DENIED; TESTIMONY DEEMED OUT-OF-TIME**

On August 9, 2011, PacifiCorp, dba Pacific Power, filed a motion to admit the supplemental reply<sup>1</sup> testimony of Frank C. Graves. The Citizens' Utility Board of Oregon (CUB) and the Industrial Customers of Northwest Utilities (ICNU) object to the motion.

**A. Background**

Under the existing procedural schedule, Pacific Power's deadline to file reply testimony was July 29, 2011. Pacific Power filed reply testimony on that date, including reply testimony from Pacific Power witness Stephan Bird. Attached as an exhibit to Mr. Bird's testimony was testimony filed by consultant Frank C. Graves in a recent proceeding before the Utah Public Service Commission.

On August 9, 2011, Pacific Power filed supplemental reply testimony consisting of a short piece of testimony from Mr. Graves himself. In the supplemental testimony, which was not anticipated by the procedural schedule, Mr. Graves states that he adopts his Utah testimony in this docket and makes clear that he will be available as a witness in these proceedings. Mr. Graves had not previously been identified as a witness in this docket.

**B. Parties' Arguments**

Pacific Power explains that the supplemental testimony simply affirms that Mr. Graves' Utah testimony is still true and correct, and makes clear that he will be made available as a witness in this docket. Pacific Power explains that the supplemental testimony was filed in response to data

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<sup>1</sup> Pacific Power refers to Mr. Graves' testimony as supplemental "rebuttal" testimony. The ruling adopting the procedural schedule, as well as both ICNU and CUB, refers to the testimony as "reply" testimony. For purposes of consistency, it will be referred to as supplemental reply testimony.

requests served by ICNU, which inquired about Mr. Graves' prior testimony (which was, at that point, an exhibit to Mr. Bird's testimony) and his availability for cross-examination in this docket. According to Pacific Power, the supplemental testimony is not substantive, so other parties will not be prejudiced by its admission. Moreover, CUB and ICNU are the parties who raised testimony from the Utah proceedings initially, so it is appropriate to allow Pacific Power to respond in this manner.

ICNU and CUB argue that Pacific Power's motion should be denied for several reasons. They argue that the motion is procedurally inappropriate because Pacific Power did not seek leave to modify the schedule to allow for supplemental testimony. They also argue that prefiled testimony is not "admitted" into the record until the evidential hearing, so a motion to admit the testimony is premature.<sup>2</sup>

On substantive grounds, ICNU and CUB argue that the supplemental testimony is "irrelevant and inadmissible" in this docket, because it is "recycled testimony from a Utah general rate case proceeding that responds to six Utah witnesses, not of whom are testifying in the proceeding."<sup>3</sup> They assert that its admission would prejudice ICNU and CUB because schedule does not provide them with an opportunity to respond in writing.

They also note that successive rounds of testimony should become narrower in scope as the docket progresses, not wider, and assert that "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."<sup>4</sup> They argue that if the testimony is admitted, then the testimony of all six witnesses to whom his testimony was responding in the Utah docket should also be admitted.

### **C. Ruling**

CUB and ICNU are correct that the appropriate time to move for admission of prefiled testimony is generally during the hearing. The parties are in the process of filing testimony, but they are not yet seeking the admission of that testimony into the record.<sup>5</sup> Consequently, a motion to admit testimony is premature.

The next question is whether the Commission will accept the late filing of supplemental testimony. Pacific Power's testimony is intended to respond to CUB and ICNU, who initially referenced testimony from the Utah proceedings. In response, Pacific Power initially elected to attach Mr. Graves' Utah testimony as an exhibit to Mr. Bird's testimony, rather than identify

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<sup>2</sup> Pacific Power filed a reply testimony in which the company agrees with this point.

<sup>3</sup> ICNU and CUB's Response in Opposition to Motion to Admit Testimony at 1 (Aug 17, 2011).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> This point was muddied by a prior ruling in this docket in which I granted Staff's motion for the admission of the late-filed testimony of Staff witness Brian Bahr. Staff filed Mr. Bahr's testimony three days late, and sought leave to file the testimony with a "motion to admit" the testimony. No objections were filed, and Staff's uncontested motion was granted. For purposes of clarification, that ruling should be construed as a ruling that allowed the late filing of Staff's testimony, nothing more. Staff will still be required to move Mr. Bahr's testimony into evidence at the hearing in this docket, and other parties will have the opportunity to object to that testimony.

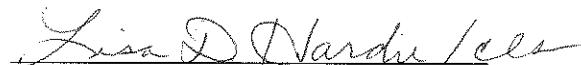
Mr. Graves himself as a witness in this docket. Having chosen to respond in this manner, Pacific Power may not file unanticipated testimony out-of-time in response to discovery requests. Pacific Power could have filed a motion to amend the procedural schedule to allow for the supplemental testimony if the circumstances warranted such a motion, but it did not do so.

Moreover, the supplemental testimony was filed only seven days before CUB's and ICNU's final rounds of written testimony were due, making it difficult for CUB and ICNU to respond. Responding to an exhibit is a different exercise from addressing an entirely new witness, who is subject to expanded discovery requests, depositions, and cross-examination.

Had Pacific Power 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. But the issue here is a different one: whether Pacific Power has justified filing the supplemental testimony out-of-time. I find the company has not done so.

Accordingly, the motion to admit supplemental reply testimony is denied. Moreover, Mr. Graves' testimony was filed out-of-time and will not be accepted. Pacific Power may, of course, file any testimony that is relevant and appropriate in scope in its August 30, 2011 surrebuttal.

Dated at Salem, Oregon, this 25<sup>th</sup> day of August, 2011.

  
Lisa D. Hardie  
Administrative Law Judge