

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2032

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation into Treatment of Network
Upgrade Costs for Qualifying Facilities.

RULING

DISPOSITION: JOINT UTILITIES' REVISED TESTIMONY ACCEPTED

I. BACKGROUND

On August 24, 2020, the Joint Utilities filed joint testimony (Joint Utilities' Exhibit 100 sponsored by Richard A. Vail, Kris Bremer, Shaun Foster, Sean Larson, and Jared Ellsworth (Joint Utilities/100), and Joint Utilities Exhibit 200 sponsored by Michael G. Wilding, Robert Macfarlane, and Alison Williams (Joint Utilities/200)). On September 2, 2020, the Northwest and Intermountain Power Producers Coalition and the Community Renewable Energy Association (together the Interconnection Customer Coalition) filed a motion to strike portions of the Joint Utilities/100 and Joint Utilities/200. Pursuant to the expedited schedule¹, the Joint Utilities filed a response to the motion to strike on September 14, 2020. On September 17, 2020, the Interconnection Customer Coalition filed a reply.

On October 7, 2020, a ruling was issued that granted and denied the motion to strike in parts. The ruling struck specific text in the Joint Utilities Exhibits 100 and 200 deemed to represent not just legal understanding providing context for factual testimony, or policy advice since this a policy proceeding, but interpretation or application of law better presented in a legal brief.

On October 19, 2020, the Joint Utilities filed revised testimony. Their cover letter indicated that the specific portions of testimony struck by the ruling were either entirely removed or revised to comply with the ruling. Revisions for compliance were made to preserve the logic and flow of the testimony, the Joint Utilities indicated.

On October 27, 2020, the Interconnection Customer Coalition filed a response to the Joint Utilities' stricken testimony. The response asserted that the Joint Utilities were not invited by the October 7 ruling to revise stricken testimony rather than remove it. The Interconnection Customer Coalition claimed prejudice due the imminent deadline for

¹ ALJ Ruling at 1 (Sep 3, 2020).

reply testimony on October 30, 2020. The Interconnection Customer Coalition asserted that the Joint Utilities should have stricken the testimony as directed, and separately have sought permission to revise testimony.

On October 29, 2020, the Joint Utilities responded. The ruling did not address how to handle the sentence fragments that resulted by removing text, they noted, and pointed out that this approach in *Blue Marmot v. Portland Gen. Elec. Co.*, docket UM 1829 resulted in disjointed and incomplete testimony that was difficult to read. The Joint Utilities sought to provide revised testimony that complied with the ruling's analysis of appropriate policy testimony with thorough explanations of the changes made for the purpose of compliance. The Joint Utilities note that the Interconnection Customer Coalition does not argue that the revised testimony is inconsistent with the ruling's articulation of principles regarding appropriate policy testimony. The Joint Utilities rebut the contention of prejudice, observing that new issues were not raised by the revised testimony, and that the sufficient time was allowed to address the revised testimony between its filing on October 19, 2020, and the agreed-upon deadline extension for response testimony until October 30, 2020. The Joint Utilities ask that the revised testimony be accepted into the record.

II. RULING

As noted in the ruling issued on October 7, 2020, the Commission typically allowed "testimonial discussion about legal and policy matters, with the understanding that the value of such testimony is weighed in context of its circumstances," resulting in little testimony being struck. A stricter standard was applied in the *Blue Marmot* case, however, in the context of a complaint seeking an interpretation of policy and law as applied to specific facts. In applying the *Blue Marmot* standard in this docket, which involves the Commission's refinement of policy on particular issues, I ruled that "testimony that individually interprets the law and applies the law to specific facts is not admissible" and struck testimony deemed to do so. I did not strike testimony that discussed policy and law in the context of policy recommendations offered in a proceeding to refine policy.

In the legal filings regarding the motion to strike, no party addressed next steps should any testimony be struck. Based on the *Blue Marmot* case, the Interconnection Customer Coalition presumed that the Joint Utilities would revise the direct testimony by removing the specific text struck. Noting deficiencies associated with creating sentence fragments by removing portions of text, the Joint Utilities assert that they sought to revise the stricken testimony for compliance with the ruling's allowance of policy recommendations and not the application of legal interpretation to facts while maintaining the coherence and flow of the testimony. Although the Joint Utilities provided clarification about how and why the testimony was revised to comply with the ruling, they did not ask permission to change rather than remove testimonial words for compliance purposes, the Interconnection Customers Coalition observes.

Based on the positions taken in these filings, the question presented is not whether the Joint Utilities' revised testimony is substantively compliant with the ruling, as the

Interconnection Customer Coalition do not contest this point, but whether the revisions were procedurally proper. Given, however, that the parties agree that the actions allowed in response to the ruling will be precedential, I deem it important to address the substantive matter of how to best assist the Commission's decision-making on the policy issues presented in this case, and in policy-focused cases on a going forward basis. To facilitate consideration of this substantive matter, I will treat the Joint Utilities' cover letter explaining the revised testimony as a motion to file the revised testimony.

I grant that motion and accept the revised testimony into the record. In a policy refinement docket, the Commission's long-held approach to allowing testimony about policy matters with the understanding that its evidentiary value is assessed in context of the circumstances should be respected, particularly in light of the Commission's strong preference for a complete and thorough testimony. The ruling clarified that policy testimony should not interpret and apply law to specific facts and struck testimonial language deemed to do so. The revised testimony removes such language, adding language that is compliant with the ruling's principles to render testimony that is complete and coherent. The Interconnection Customer Coalition did not raise concerns about the Joint Utilities' revised testimony until twelve days after it was filed, and only three days before filing response testimony on the deadline; based on this timing, I do not find that the Interconnection Customer Coalition was prejudiced by the revised testimony, noting as well that the Interconnection Customer Coalition acknowledges that there remains an opportunity to fully address all policy matters in briefing rather than testimony.

Dated this 6th day of November, 2020, at Salem, Oregon.



Traci Kirkpatrick
Administrative Law Judge