

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 433

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Request for a General Rate Revision.

ORDER

DISPOSITION: ALJ RULING AFFIRMED IN PART

I. BACKGROUND

On October 11, 2024, the Alliance of Western Energy Consumers (AWEC) filed a motion seeking reconsideration of the Administrative Law Judge's (ALJ) October 10, 2024 ruling establishing an evidentiary record in this docket. On October 14, 2024, the ALJ issued a ruling construing the motion as a request for certification to the Commission under OAR 860-001-0110.

AWEC's filing asks that we reconsider the ALJ's conclusion that testimony and exhibits from Victor Palfreyman and the *James* class were not part of the evidentiary record in this docket because Mr. Palfreyman and the *James* class did not file a motion to admit its testimony and exhibits. Mr. Palfreyman and the *James* class filed a motion for reconsideration of that ruling, noting that while they intended to file a motion to admit testimony and exhibits and did serve such a motion on most counsel for the parties, they had inadvertently failed to submit the motion to the Commission's Filing Center.

AWEC states it relied on the Mr. Palfreyman and the *James* class' email serving a motion to admit. AWEC did not seek to move for the admission of any of the Palfreyman testimony and exhibits. AWEC asks that we reconsider the ALJ's treatment of the Palfreyman testimony and exhibits and admit them as evidence. In the alternative, AWEC asks that we take official notice of the testimony and exhibits that are court records under OAR 860-001-0460. As an additional alternative, AWEC asks that we allow it to cite its entire cross-examination of PacifiCorp witness Berreth.

PacifiCorp objects to the inclusion of any Palfreyman testimony and exhibits as evidence and also objects to the Commission's taking official notice of it.¹

Shortly after AWEC filed its request for certification, the ALJ issued a ruling denying Mr. Palfreyman and the *James* class' request to certify the ALJ's October 10, 2024 ruling establishing an evidentiary record in this docket.

II. DISCUSSION

It was reasonable for AWEC to assume that Mr. Palfreyman and the *James* class had properly filed its motion to admit testimony and exhibits given that AWEC's counsel was served with such a motion. As such, we will consider AWEC's request that some or all of the Palfreyman testimony and exhibits be admitted as evidence in this docket.

As an initial matter, we note that the Palfreyman testimony and exhibits lack a supporting declaration or affidavit from the witness. Counsel for Mr. Palfreyman and the *James* class filed an affidavit "sponsoring testimony and exhibits on behalf of Victor Palfreyman." There is, however, no declaration or affidavit from Mr. Palfreyman regarding the truthfulness of his testimony or legitimacy of his exhibits. We also note that AWEC failed to file any material from the *James* litigation with its testimony. Reliance on another party's exhibits in a case comes with peril should that other party not seek to admit that evidence or otherwise have it excluded.

Given these circumstances in combination with the rationale in the ALJ's October 11, 2024 ruling denying Palfreyman's request to certify the ruling excluding the testimony and exhibits from the evidentiary record here, we decline to admit the Palfreyman testimony and exhibits as evidence in whole or in part.

AWEC also asks that we take official notice of the Palfreyman exhibits as court records under OAR 860-001-0460 as a matter "of which the courts of the State of Oregon take judicial notice[.]"

Our rules allow us to take official notice of "[a]ll matters of which the courts of the State of Oregon take judicial notice[.]"² In Oregon, courts may take judicial notice of facts "not subject to reasonable dispute" that is either "generally known within the territorial jurisdiction of the trial court" or "[c]apable of accurate and ready determination by resort

¹ PacifiCorp filed objections to motions to admit on October 8, 2024, and objected to Mr. Palfreyman and the *James* class' opening testimony, in its July 8, 2024 objection to Mr. Palfreyman's petition to intervene.

² OAR 860-001-0460(1)(a).

to sources whose accuracy cannot reasonably be questioned.”³ The Oregon Court of Appeals has clarified that “there is a distinction between judicially noticing the existence of a court record and noticing the truth of the contents of that record, much less the truth of the contents of a document that happens to be appended to the court record.”⁴ In concluding that taking judicial notice of the accuracy of a statement included in a document in an Oregon agency record was inappropriate, the Court of Appeals explained that “[e]ven under the federal rules, although it may be appropriate to judicially notice [the existence of a court record], it is inappropriate to notice the [truth of the contents of that record.]”⁵

Our rule on official notice also provides that “[a] party may object to the fact noticed within 15 days * * *. The objecting party may explain or rebut the noticed fact.”⁶

AWEC’s request for official notice appears to be based on the relevance of facts contained within the James class’ exhibits, rather than the existence of those court records.⁷ Additionally, AWEC does not identify with specificity any fact or facts contained within the extensive court record for which it seeks official notice. This would effectively preclude the possibility of any objection under our rules. Accordingly, we decline to take official notice of the Palfreyman exhibits as court records.

Finally, AWEC asks we reconsider the exclusion of certain parts of its cross-examination of PacifiCorp witness Berreth. We grant AWEC’s request. As part of its cross-examination of PacifiCorp witness Berreth, AWEC referenced Palfreyman Exhibit 257.⁸ During the cross-examination of the witness, PacifiCorp’s witness authenticated the exhibit and was able to discuss its contents. AWEC asserts that the discussion related to Palfreyman/257 is not contingent upon Palfreyman/257 itself being in the record because the questions were based on narratives directly read into the record and that the cross examination can stand alone, as with that related to use of a demonstrative exhibit. We agree. The entirety of the cross examination of witness Berreth is included in the record.

³ ORS 40.065.

⁴ *Arlington Educ. Ass’n v. Arlington Sch Dist. No. 3*, 177 Or App 658, 665, 34 P.3d 1197, 1201 (2001) (quoting *Thompson v. Telephone & Data Systems, Inc.*, 130 Or App 302, 881 P.2d 819, *adhered to as mod on recons*, 132 Or App 103, 107, 888 P.2d 16 (1994)).

⁵ *Id.*; see also *Petersen v. Crook County*, 172 Or App 44, 51, 17 P.3d 563 (2001) (“A distinction must be drawn between noticing the existence of court records or information in court records and noticing the truth of that information. The fact that certain records or entries exist or certain statements were made may be indisputable. However, the truth of those statements may be disputable, and hence will not be subject to judicial notice.” (citation omitted)).

⁶ OAR 860-001-0460(2).

⁷ AWEC Oct. 10, 2024 Motion at 4.

⁸ Palfreyman, on behalf of the *James* class/257, Victor Palfreyman/1-8.

III. ORDER

IT IS ORDERED that the ALJ's October 10, 2024 ruling establishing an evidentiary record is affirmed in part and reversed in part consistent with this Order.

Made, entered, and effective Oct 15, 2024.

Megan W. Decker

Megan W. Decker
Chair

Letha Tawney

Letha Tawney
Commissioner



Les Perkins

Les Perkins
Commissioner