

**BEFORE THE**

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	
	)	
v.	)	DOCKET NOS. UE-140762 and
	)	UE-140617 ( <i>consolidated</i> )
PACIFICORP D/B/A PACIFIC POWER & LIGHT COMPANY,	)	
	)	
Respondent.	)	REPLY OF BOISE WHITE PAPER, L.L.C.
	)	TO PACIFIC POWER'S RESPONSE IN
	)	OPPOSITION TO MOTION TO STRIKE
	)	
In the Matter of the Petition of	)	
	)	
PACIFIC POWER & LIGHT COMPANY,	)	
	)	
For an Order Approving Deferral of Costs Related to Colstrip Outage	)	DOCKET NO. UE-131384
	)	( <i>consolidated</i> )
	)	
In the Matter of the Petition of	)	
	)	
PACIFIC POWER & LIGHT COMPANY,	)	
	)	
For an Order Approving Deferral of Costs Related to Declining Hydro Generation	)	DOCKET NO. UE-140094
	)	( <i>consolidated</i> )
	)	

**I. INTRODUCTION**

1 Pursuant to WAC 480-07-370(1)(d)(ii), Boise White Paper, L.L.C. (“Boise”) submits this reply (“Reply”) with the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) to “Pacific Power’s Response in Opposition to Motion to

Strike” (“Response”), filed by Pacific Power & Light Company (“PacifiCorp” or the “Company”) on November 25, 2014.

2           In brief, Boise urges the Commission to carefully consider Company inconsistencies and mischaracterizations in the Response, as well as factual allegations in both the Response and Declaration of Cindy A. Crane in Support of Pacific Power’s Response in Opposition to Motion to Strike (“Declaration”) that actually support Boise arguments in the Motion to Strike Certain Testimony Filed by PacifiCorp on Behalf of Boise White Paper, L.L.C. (“Motion”). The Company has chosen to prejudicially delay, until the rebuttal stage of these proceedings, the filing of unprecedented updates which result in a substantial increase to net power costs (“NPC”). Commission precedent supports the striking of such late-filed updates under these circumstances, and Boise respectfully requests that the Commission continue to follow those fair and equitable standards now.

## II. REPLY

### A. **Boise and All Other Non-Company Parties Will Be Prejudiced if PacifiCorp Testimony Is Not Struck**

3           PacifiCorp has completely inverted the appropriate Commission standard for determining whether to strike the relevant testimony. The Company contends that “Boise has not demonstrated that it will experience prejudice through inclusion of updated Bridger coal costs in the NPC update.”<sup>1/</sup> The relevant issue, however, is not whether Boise has demonstrated prejudice, but whether the Company has *created* prejudice, simply by the timing of its presentation of significant new cost information upon rebuttal—information which has never before been the subject of an update on rebuttal. Boise, however, has demonstrated prejudice by the failure to respond to this new assertion of coal costs in rebuttal testimony.

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<sup>1/</sup> Response at ¶ 11.

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In a case in which the Company repeatedly cites and quotes,<sup>2/</sup> the Commission affirmed “that, at some point, the company’s positions must be made clear in order for the other parties to respond to those positions. *That point is prior to rebuttal.* The parties in a rate case should not have to constantly respond to a moving target.”<sup>3/</sup> The Commission recently affirmed this principle in the most general of terms, articulating a concept applicable as a fundamental matter of fairness to any particular set of circumstances or factual context: “There comes a point in *every proceeding* when the evidence upon which a party wishes to rely must be fixed and certain.”<sup>4/</sup> In short, in any and “every” proceeding, the burden is not upon the party asserting prejudice when the very untimely nature of the filing establishes such prejudice to be self-evident. Consequently, the decision by a utility to force parties to respond to a moving target, in failing to clarify known positions prior to rebuttal, means that rebuttal testimony may be “properly excluded as an untimely attempt to revise the company’s figures.”<sup>5/</sup>

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The self-evident nature of the prejudice to other parties caused by the presentation of new evidence on rebuttal is apparent in a decision cited by the Company,<sup>6/</sup> in which the Commission approved the filing of supplemental testimony: “PSE timed its submission of supplemental testimony so that the other parties will have an opportunity to address the updated information in their response testimonies, *which would not be possible* if PSE first provided this information in rebuttal testimony.”<sup>7/</sup>

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<sup>2/</sup> Id. at ¶ 7 & n.12, ¶ 12 & n.19.

<sup>3/</sup> WUTC v. Harbor Water Co., Inc., Docket No. U-87-1054-T, 3<sup>rd</sup> Suppl. Order, 1988 Wash. UTC LEXIS 68 at \*37 (May 7, 1988) (emphasis added).

<sup>4/</sup> WUTC v. Puget Sound Energy, Inc. (“PSE”), Docket Nos. UE-090704 and UG-090705 (*consolidated*), Order 08 at ¶ 10 (Oct. 20, 2009) (emphasis added).

<sup>5/</sup> Docket No. U-87-1054-T, 3<sup>rd</sup> Suppl. Order, 1988 Wash. UTC LEXIS 68 at \*36.

<sup>6/</sup> Response at ¶ 11 & n.18.

<sup>7/</sup> WUTC v. PSE, Docket Nos. UE-072300 and UG-072301 (*consolidated*), Order 08 at ¶ 9 (May 5, 2008) (emphasis added); accord WUTC v. PSE, Docket No. UE-070565, Order 05 at ¶ 4 (June 4, 2007).

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On one level, the Commission recognized the impossibility for parties to address updated information on rebuttal because, as in the present proceedings, utility rebuttal testimony was scheduled to follow party response testimony.<sup>8/</sup> Additionally, there is no suggestion from the Commission that parties would have had an adequate opportunity to address rebuttal updates at the hearing, either—despite the fact that the interval between scheduled rebuttal testimony and the evidentiary hearing in that case was over one month *longer* than the same interval in the current proceedings.<sup>9/</sup> Therefore, prejudice to Boise and other parties is not eliminated by the Company’s suggestion that other parties may address the substantial coal supply price increase information in so short a span, whether by testimony or at the hearing.<sup>10/</sup> The Commission’s practice, however, is to only allow live testimony in rare instances.

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As directly quoted by the Company,<sup>11/</sup> the Commission provides for an exception to the bar against the “[p]resentation of new evidence on rebuttal,” but only “where extraordinary circumstances lead to a need.”<sup>12/</sup> Thus, according to the Commission, and as the Company itself acknowledges, the burden for presenting new evidence on rebuttal lies with the party presenting such evidence to prove “extraordinary circumstances,” and does not require another party to first demonstrate, as the Company wrongly infers, that the party “will experience prejudice.”

#### **B. The Company Has Not Updated These Costs in Prior Proceedings**

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Prejudice to Boise and all other parties exists because of the unprecedented breadth and magnitude of new information presented so late in the proceedings, but information which is not attributable to extraordinary circumstances which could possibly justify allowance.

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<sup>8/</sup> Docket Nos. UE-072300 and UG-072301 (*consolidated*), Order 03 at ¶ 13 (Jan. 17, 2008).

<sup>9/</sup> Compare *id.* (providing an interval of 2 months, 5 days), with Order 04 at 6, in the instant proceedings (providing an interval of just 1 month, 2 days).

<sup>10/</sup> Exh. No. \_\_\_ (GND-4T) at 12:8-9.

<sup>11/</sup> Response at 6, n.19.

<sup>12/</sup> Docket No. U-87-1054-T, 3<sup>rd</sup> Suppl. Order, 1988 Wash. UTC LEXIS 68 at \*37.

Both Boise and PacifiCorp quote the same relevant Commission principle applicable to the coal supply information presented here: “Presentation of new evidence on rebuttal should be allowed where *extraordinary circumstances* lead to a need . . . .”<sup>13/</sup> But there is nothing the least bit extraordinary about the “circumstances” resulting in the Black Butte Coal Company (“Black Butte”) and Bridger Coal Company (“BCC”) cost increases, newly presented by PacifiCorp on rebuttal. In fact, the Company’s main argument about why the new evidence “is procedurally proper” is to allege the commonplace, circumstantial nature of the current NPC increase; for example, PacifiCorp contends repeatedly in the Response that it included coal cost updates in several prior cases, even referring to those updates as “similar” to one another.<sup>14/</sup> Ms. Crane adds that cost increases attributable to both Black Butte and BCC coal supply are the result of RFP processes,<sup>15/</sup> “circumstances” which are not at all extraordinary.

9                    Nevertheless, while not comprising “extraordinary circumstances” in any sense of the term, the NPC increases resulting from both Black Butte and BCC price increases are completely *unprecedented* in magnitude, justifying the Commission in following precedent which bars the prejudicial presentation of such new update information on rebuttal. As the Company points out and as a testament to the sheer breadth of the new information parties must now grapple with on the eve of hearing, Boise issued numerous data requests related to NPC updates.<sup>16/</sup> Yet, far from countering or disproving “Boise’s claims of prejudice,”<sup>17/</sup> concessions in the Company’s responses as to the unparalleled magnitude of current coal supply updates have established and bolstered Boise’s claims of prejudice.

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<sup>13/</sup> Motion at ¶ 8; Response at 6, n.19 (quoting Docket No. U-87-1054-T, 3<sup>rd</sup> Suppl. Order, 1988 Wash. UTC LEXIS 68 at \*37) (emphasis added).

<sup>14/</sup> Response at ¶¶ 3, 6.

<sup>15/</sup> Declaration at ¶¶ 3, 8.

<sup>16/</sup> Response at ¶ 11.

<sup>17/</sup> *Id.*

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For example, when asked to provide a list of WUTC cases in which the Company proposed a new BCC budget on rebuttal, PacifiCorp responded that it has never before “updated its coal supply costs by including new budgets in its rebuttal filing.”<sup>18/</sup> The Company further conceded: “This case involves a broader BCC update than in past litigated cases.”<sup>19/</sup> Likewise, when Boise asked the Company to list WUTC proceedings in which a new Black Butte contract was included on rebuttal, PacifiCorp responded that it had never “previously included an entirely new contract with the Black Butte mine in its rebuttal filing.”<sup>20/</sup> The Company’s acknowledgement of the sheer, unprecedented magnitude of coal supply updates on rebuttal in these proceedings provides ample proof that Boise and all other parties will be prejudiced in attempting to adequately review PacifiCorp’s NPC increases, while simultaneously preparing for hearing in a consolidated general rate case of already considerable proportions.

**C. Factual Allegations Justify a Commission Decision to Strike PacifiCorp Testimony**

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PacifiCorp “acknowledges that the increase to NPC associated with the updated coal costs is *substantial*,” claiming that a decision to exclude coal cost updates “will create *significant hardship* for the Company.”<sup>21/</sup> If PacifiCorp itself, considering the comparative disparity between Company and customers in this still recovering economy, claims that denial of this “substantial” NPC increase would result in “significant hardship for the Company,” then Boise and other customers will surely face something even more than “significant hardship” if such “substantial” power cost updates are included in these proceedings, without the appropriate ability for other parties to conduct full discovery, analyze their prudence, and respond through written testimony.

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<sup>18/</sup> Attachment A, p. 1 (PacifiCorp Response to Boise Data Request 15.1).

<sup>19/</sup> Id.

<sup>20/</sup> Attachment A, p. 2 (PacifiCorp Response to Boise Data Request 15.2).

<sup>21/</sup> Response at ¶ 12 (emphasis added).

12                   The Company claims that it acted in good faith in choosing to update Bridger plant coal costs only on rebuttal.<sup>22/</sup> Notwithstanding, PacifiCorp affirms that BCC price increases were attributable to a new mine plan “completed in July 2014.”<sup>23/</sup> Ms. Crane also affirms that all responses related to its Request for Proposals (“RFP”) to replace Black Butte supply were received by July 11, 2014, explaining further that PacifiCorp initiated the RFP scarcely a month after filing its initial case, on June 9, 2014.<sup>24/</sup> In sum, the Company has confirmed that it had full knowledge of pending coal supply updates several months in advance of rebuttal testimony.

13                   The Company attempts to excuse the back loading of all this information on rebuttal by stating that “the *results* of the Bridger coal supply RFP ... were finalized in early November 2014,”<sup>25/</sup> alleging that PacifiCorp “needed the RFP results to present a complete Bridger coal cost update in this case,”<sup>26/</sup> with Ms. Crane also alleging that finalized Black Butte prices “are materially different from the terms proposed in Black Butte’s initial proposal in response to the RFP solicitation.”<sup>27/</sup> The Company’s explanation for such late presentation of new cost information rings woefully hollow, however, given the plethora of proposed pro-forma capital additions contained within the Company’s initial filing, including numerous projects which have been demonstrated by multiple parties to be “materially” imprecise or inaccurately reported as to cost estimation,<sup>28/</sup> along with other capital additions which are so speculative

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<sup>22/</sup> Id. at ¶ 9.  
<sup>23/</sup> Id.; accord Declaration at ¶ 8.  
<sup>24/</sup> Declaration at ¶ 3.  
<sup>25/</sup> Response at ¶ 9 (emphasis added).  
<sup>26/</sup> Id.  
<sup>27/</sup> Declaration at ¶ 5.  
<sup>28/</sup> E.g., Exh. No. \_\_\_(BGM-1CT) at 11:10-15, 12:9-13:9; Exh. No. \_\_\_(DMR-1CTr) at 14:12-15:6; Exh. No. \_\_\_(BAE-1T) at 8:5-7.

regarding known and measurable data that even PacifiCorp has agreed to remove these projects from revenue requirement.<sup>29/</sup>

**D. The Company’s Discussion of Relevant Commission Precedent Is Inconsistent and Grossly Mischaracterizes Boise’s Position**

14 The inconsistency of legal argument in the Response is apparent in that, immediately on the heels of critiquing Boise for contesting “generally” allowable updates and not using “directly applicable” authority,<sup>30/</sup> PacifiCorp itself acknowledges that “[i]n each case,” and “cases like this” (i.e., implicating both the universal and specific), the Commission balances “prejudice to parties” against the interest of adding to the record.<sup>31/</sup> Moreover, to the extent that PacifiCorp is attempting to demonstrate that NPC updates are proper in the instant proceedings simply because they have been allowed in the past without objection,<sup>32/</sup> the Company’s own citation to Commission precedent invalidates such reasoning—i.e., “the Commission ‘generally allows power costs to be updated during general rate cases....’”<sup>33/</sup> That is, PacifiCorp’s claim that the Commission only “generally” allows certain power cost updates in rate cases proves that Commission allowance is not axiomatic, and that simply filing an update should not trigger any automatic expectation of procedural propriety in regard to that update.<sup>34/</sup>

15 Moreover, in stating that “the Commission ‘generally allows’” updates during rate cases,<sup>35/</sup> the Response also mischaracterizes the Motion in building up a manifestly falsifiable straw argument—i.e., essentially alleging that Boise is attacking the very notion that the

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<sup>29/</sup> Exh. No. \_\_\_\_ (RBD-3T) at 10:5-10.

<sup>30/</sup> Response at ¶¶ 5-7.

<sup>31/</sup> *Id.* at ¶¶ 8, 11.

<sup>32/</sup> *Id.* at ¶¶ 3, 6.

<sup>33/</sup> *Id.* at ¶ 5 (quoting Docket No. UE-111048, Order 08 at ¶ 220) (emphasis added).

<sup>34/</sup> Merely because Boise has not moved to strike all PacifiCorp updates does not justify PacifiCorp’s conclusion that Boise is “conceding that the Colstrip coal cost update is reasonable.” *Id.* at ¶ 10. The fallacy of the Company’s reasoning here should be self-evident, such that Company claims as to “the logic of Boise’s Motion to Strike” proves only the illogic of PacifiCorp’s argument. *Id.*

<sup>35/</sup> Response at ¶¶ 5, 6 (quoting *WUTC v. Puget Sound Energy, Inc.* (“PSE”), Docket No. UE-111048, Order 08 at ¶ 220 (May 7, 2012)).



Commission may allow a utility to provide updates on rebuttal. In so doing, the Company completely misconstrues the central legal premise behind the Motion—namely, that the Commission has and should strike filings like Ms. Crane’s Black Butte and BCC rebuttal testimony, which contain new or updated information filed so late in a proceeding *as to unjustifiably prejudice or disadvantage other parties*, especially in circumstances in which the newly filed information could have been filed sooner.<sup>36/</sup> In other words, Ms. Crane’s testimony on these issues does not qualify as the sort of updates the Commission “generally allows.”

16 PacifiCorp cites repeatedly to (and relies heavily upon) several of the exact same Commission cases cited in the Motion, and for the same essential purpose of establishing evidentiary fairness and prejudicial considerations undertaken by the Commission.<sup>37/</sup> PacifiCorp also mischaracterizes both Boise’s position and the relevant elements pertaining to one particular decision (Order 08 in Docket No. UE-072300), ignoring the Commission’s explicit discussion on the propriety of updates *in the context of rebuttal filings*—despite direct quotation and added emphasis by Boise in the Motion—while at the same time wrongly alleging a dearth of Boise citations to cases addressing “rebuttal” evidence.<sup>38/</sup> Indeed, PacifiCorp’s abundant reliance upon the same authority used by Boise, without either attribution to the Motion or even apparent command of all relevant issues, speaks to the general unreliability and inconsistency in the presentation of legal argument in the Response.

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<sup>36/</sup> Motion at ¶¶ 6-12.

<sup>37/</sup> Compare Motion at ¶ 8 & n.13, with Response at 6, n.19 (quoting the very same language); compare Motion at ¶¶ 8, 12 & nn.14, 16-18, with Response at ¶¶ 8, 11 & nn.13, 18 (dealing with the opportunity for parties to respond to updates); compare Motion at ¶ 7 & nn.11-12, with Response at ¶ 11 & n.18 (dealing also with the opportunity for parties to respond to updates, though each party highlights various outcomes).

<sup>38/</sup> Compare Motion at ¶ 12, with Response at ¶¶ 7-8 (failing to state in Response ¶ 7 that Order 08, as quoted by Boise, did explicitly address “rebuttal” evidence, then proceeding in Response ¶ 8 to rely upon the same decision).

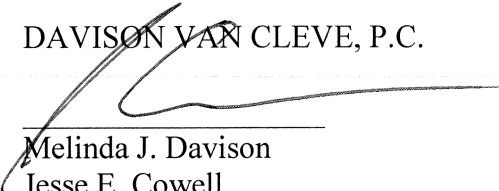
### III. CONCLUSION

17 Boise respectfully requests that the Commission grant its Motion to Strike certain testimony and evidence of Ms. Crane as prejudicial and improper on rebuttal.

Dated in Portland, Oregon, this 4th day of December, 2014.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.



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**Boise Data Request 15.1**

Please provide a list of each proceeding in Washington where the Company has proposed to include a new budget for the Bridger Coal Company (“BCC”) in its rebuttal filing.

**Response to Boise Data Request 15.1**

In past Washington cases, the Company has not updated its coal supply costs by including new budgets in its rebuttal filing. The BCC mine plan, however, is the key input to the BCC budget. The Company has proposed rebuttal updates based on mine plan updates in the 2010 and 2011 rate cases, and in this case. As stated in the rebuttal testimony of Gregory Duvall, in its last two fully litigated rate cases in Washington, the Company updated its third party coal contracts and fuel volumes; the fuel volume change in the 2010 case was based on an updated mine plan. In the 2011 case, which settled before Pacific Power filed rebuttal testimony, the Company proposed to update BCC costs based on an updated mine plan. This case involves a broader BCC update than in past litigated cases. As stated in the testimony of Greg Duvall, the update is reasonable in this case because the Company concurrently negotiated a contract for coal supply from the Black Butte mine through an RFP, corroborating the reasonableness of the costs reflected in the updated BCC mine plan.

PREPARER: Brian Durning

SPONSOR: Cindy A. Crane

**Boise Data Request 15.2**

Please provide a list of each proceeding in Washington where the Company has proposed to include a new contract with the Black Butte Mine in its rebuttal filing.

**Response to Boise Data Request 15.2**

The Company has not previously included an entirely new contract with the Black Butte mine in its rebuttal filing. The Company has, however, updated its coal costs and rail rates in rebuttal for other third-party contract changes, including updated Black Butte prices and volumes, in its last two litigated rate cases in Washington. The updates reflected projected changes in contract indices. Boise was a party to the Company's last rate case and did not object to PacifiCorp's update to third-party coal costs. Additionally, in its rebuttal testimony in the 2013 rate case, Boise pointed to the third-party Black Butte contract as representing a fair and current market value of coal supply to the Jim Bridger plant.

PREPARER: Brian Durning

SPONSOR: Cindy A. Crane