

**BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-170033/UG-170034
(Consolidated)

**MONTANA’S CONSOLIDATED
RESPONSE TO STAFF’S AND
SIERRA CLUB’S MOTIONS TO
STRIKE PATRICK M. RISKEN’S
TESTIMONY**

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I. INTRODUCTION

1 Utility and Transportation Commission staff (“Staff”) ignores Montana’s interests in these consolidated proceedings and the basis for Montana’s intervention. As a result, Staff (a) mischaracterizes the nature of Mr. Risken’s August 9, 2017 cross-answering testimony as a “legal brief”; (b) relies on authorities that wholly fail to support the motion’s arguments;¹ and (c) misapprehends any effect Mr. Risken’s testimony might have on future proceedings before this Commission. The Commission should deny Staff’s and Sierra Club’s motions, an “administrative burden” of their own making.²

II. FACTS

2 On February 6, 2017, Montana petitioned the Commission to intervene in these consolidated rate proceedings. Montana noted certain circumstances of the rate proceedings. Specifically, in its petition Montana acknowledged the existence of prefiled testimony by PSE witnesses and remarked that some of those witnesses’ testimony regarding costs could be affected by then-pending legislation in Montana.

3 Also within its petition to intervene, Montana described its interests in these proceedings. Specifically, Montana described Colstrip’s status as an “eligible coal plant” under RCW 80.84.010, which allows funds to be set aside in a retirement account to cover decommissioning and remediation costs associated with Colstrip unit closures. Montana further explained that, given Colstrip’s large economic footprint in Montana, closing Colstrip generating units would result in

¹ Rather than add much legal substance, Sierra Club’s motion to strike adds mostly inflammatory rhetoric. However, because Sierra Club incorporates by footnote or otherwise agrees with Staff’s motion to strike, Montana includes Sierra Club’s motion within the scope of this response. Where Sierra Club adds anything to Staff’s motion’s arguments, Montana notes that below.

² Staff Mot. ¶ 17.

a significant number of lost jobs and large losses of tax revenue.³

4 On February 15, 2017, the Commission granted Montana’s petition to intervene,⁴ among other such petitions that it granted. The Commission denied another petition to intervene.⁵ The Commission concluded that Montana’s participation is “in the public interest,” and added that Montana should focus its “efforts on issues within the Commission’s jurisdiction that are related to the Colstrip facilities.”⁶

5 The Commission also issued a procedural schedule on February 15, 2017.⁷ The procedural schedule includes several testimony deadlines. PSE’s “Supplemental Testimony” was due April 3, 2017.⁸ “Staff, Public Counsel, and Intervenor Response Testimony and Exhibits” were due June 30, 2017.⁹ PSE “Rebuttal Testimony and Exhibits” were due August 9, 2017.¹⁰ And “Staff and Intervenor Cross-Answering Testimony and Exhibits” were also due August 9, 2017.¹¹

6 On August 9, 2017, Montana submitted cross-answering testimony from Montana Assistant Attorney General Patrick M. Risken. Mr. Risken opened by describing the timing and purpose of his testimony, including the fact that Montana sought “to be respectful of other parties whose interests in the rate case are more immediate and will be determined,” in part because those other parties’ interests would presumably ultimately and finally be determined by these proceedings.¹² In that regard, Mr. Risken’s testimony was aimed at clarifying and informing other testimony; Mr. Risken’s testimony clarified and informed other intervenors’ testimony only, within the larger

³ Montana Pet. at ¶¶ 5-9.

⁴ Order 03, ¶ 8.

⁵ *Id.* ¶¶ 9-10.

⁶ *Id.* ¶ 8.

⁷ *Id.* ¶ 15 & App. B.

⁸ *Id.* at 11.

⁹ Order 03, at 11 (App. B).

¹⁰ *Id.*

¹¹ *Id.*

¹² Risken, Exh. PMR-1T at 2:10-12.

context of the entirety of the rate proceedings and that context’s application to Montana’s interests only.

7 Staff imprecisely describes the topics that Mr. Risken’s testimony covers.¹³ Most accurately and fairly stated, Mr. Risken’s testimony covers: (1) forum and venue considerations;¹⁴ (2) the level of certainty – not size – of decommissioning and remediation cost estimates for Colstrip Units 1 and 2;¹⁵ (3) *joint and several* liability issues;¹⁶ (4) potential constitutional issues that could arise, depending on this Commission’s *application of* Washington public service statutes;¹⁷ and (5) Montana’s concerns surrounding other intervenors’ apparent attempts to secure a ruling that, directly or indirectly, would bear on Colstrip Units 3 & 4.¹⁸

III. LEGAL STANDARD

8 Washington’s Administrative Procedure Act states generally that “the presiding officer shall refer to the Washington Rules of Evidence as *guidelines* for evidentiary rulings.”¹⁹ This Commission’s administrative rules state “[t]he presiding officer will consider, *but is not required to follow*, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.”²⁰ “Generally speaking, administrative hearings proceed under significantly relaxed rules of evidence.”²¹ “By their own provisions, the rules of evidence apply only to court proceedings.”²²

9 Staff’s urging through inapposite references to citations addressing criminal jury trials

¹³ See Staff Mot. ¶ 5.

¹⁴ Risken, Exh. PMR-1T at 3:17-4:4.

¹⁵ *Id.* at 4:21-5:13.

¹⁶ *Id.* at 5:24-6:22.

¹⁷ *Id.* at 9:15-24 (following context behind Montana’s constitutional concerns).

¹⁸ *Id.* at 10:22-12:22.

¹⁹ RCW 34.05.452(2) (emphasis added).

²⁰ WAC 480-07-495(1) (emphasis added).

²¹ *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 524, 173 P.3d 259 (2007) (interpreting RCW 34.05.452(2)).

²² *Id.* at 525.

would create an unworkable evidentiary standard for rate proceedings where no similar standard exists anywhere in the agency adjudicative proceeding context.²³ None of the same issues that a court faces with jury protection exists here such that a rigorous application of the Evidence Rules is warranted. In essence, the Commission can itself evaluate Mr. Risken’s usefulness, using its expertise beyond the layman (or juror in the case of a criminal jury trial),²⁴ as opposed to cautioning against its admissibility outright.²⁵

IV. ARGUMENT

A. **Montana’s interests in this proceeding are unique, but their consideration serves the public interest.**

10 As a state, Montana has powers and duties generally aimed at representing or protecting its citizens’ interests. Regarding powers, Montana’s legislature may pass laws,²⁶ and several of its agencies may promulgate rules, which have the force of law. Regarding duties, Montana must “maintain and improve a clean and healthful environment in Montana for present and future generations.”²⁷ As a government, Montana funds its government to represent and protect citizen interests through, among other things, tax revenue.²⁸ As a result, the nature of Montana’s interests here is unique and unlike the nature of any other party to these proceedings.

11 Further, Colstrip and any of its units’ closure implicates Montana’s unique interests in a

²³ Criminal jury trials implicate numerous constitutional rights under the 4th, 5th and 6th Amendments, thereby requiring strict adherence to the Rules of Evidence.

²⁴ Indeed, even in a formal litigation setting, dangers that might attend to protecting a jury against admissibility of expert testimony or otherwise diminishes if the proceeding is a bench trial, a situation more akin, yet still more formal than, and devoid of expert adjudicators as in, an adjudicative administrative proceeding. *See, e.g., F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014); *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008); *Shore v. Mohave Cty., State of Ariz.*, 644 F.2d 1320, 1322-23 (9th Cir. 1981).

²⁵ *See, e.g., Faghih v. Dep’t of Health, Dental Quality Assurance Comm’n*, 148 Wn. App. 836 (2009) (attack on evidence credibility); *see also* RCW 34.05.452(1) (hearsay ordinarily admissible at presiding officer’s discretion).

²⁶ Mont. Code Ann. § 1-1-102.

²⁷ Mont. Const. Art. IX § 1(1).

²⁸ *See id.* Art. VIII.

unique way. On the one hand, as part owner of all four Colstrip units, PSE has ownership interests in the largest employer and largest taxpayer in the City of Colstrip, Montana. Indeed, much of southeastern Montana's economic wellbeing turns on the Colstrip facility and its operation. And, the economic and physical wellbeing of residents of the City of Colstrip are similarly tied to the proper and orderly operation, as well as the proper and orderly decommissioning and remediation, of any Colstrip units.

12 On the other hand, in order to ensure it has adequate funding to cover its costs from any Colstrip units' decommissioning and remediation, PSE may petition this Commission for a rate increase or other regulatory approvals, as it has in these proceedings. Montana's sovereign interests with respect to the people and community of Colstrip, then, directly center on raising issues unique to Montana, which this Commission has already concluded are in the public interest.²⁹ Staff and Sierra Club entirely ignore this aspect of Montana's involvement in these proceedings, but it is important to recall the nature of Montana's interests before considering the nature and purpose of Mr. Risken's testimony. And in light of considering whether to exclude Mr. Risken's testimony entirely, rather than correctly apply less strict evidentiary standards than a court would in a criminal jury trial, it is also worth considering the urging of other parties through testimony to attempt to lay a foundation for early closure of Colstrip Units 3 & 4, a tactic Montana describes further below.

13 Montana's ultimate role in Montana will be to regulate, by law, the decommissioning and remediation of any Colstrip units. Mr. Risken's non-technical role in Montana government is irrelevant. Rather, Mr. Risken's testimony concerning the legal risks and proper framing of issues before this Commission are important to understand as this Commission considers cost figures that

²⁹ See Order 03, ¶ 8.

other parties have discussed without identifying cost variables the same way that Mr. Risken has. In that regard, no basis for exclusion cited by either motion applies.³⁰

14 Indeed, in this sense, Mr. Risken’s testimony regarding legal risks, proper issue framing, and similar matters has the “tendency to make the existence” of cost level certainty from various testimony “less probable” than without his testimony, because Mr. Risken’s testimony highlights issues that raise uncertainty regarding the cost figures presented thus far. Even under Staff’s misplaced, rigorous application of court evidence rules to this proceeding,³¹ Mr. Risken’s testimony is relevant.

B. Mr. Risken’s testimony is not a “legal brief.” To the extent Mr. Risken’s testimony identifies legal issues, it does so only insofar as other parties have already submitted factual material that presumes incorrect legal bases or Montana’s unique interests require consideration of mixed questions of law and fact.

15 This Commission allowed Montana to intervene, because it concluded that Montana’s participation is in the public interest.³² This Commission qualified its conclusion with the understanding that Montana would focus its efforts on “issues *within the Commission’s jurisdiction* that are related to the Colstrip facilities.”³³ Because Montana’s involvement in these proceedings is limited in that way, it follows that Montana may identify issues on threshold matters – such as venue, forum, and jurisdiction – in order to frame its own testimony, and any Commission ruling, accordingly.

16 Further, while ultimate conclusions on *whether* jurisdiction exists or *where* appropriate venue or forum might lie are legal conclusions, some level of factual context is necessary to drive

³⁰ See RCW 34.05.452(1) (listing mandatory and discretionary bases of exclusion, none of which applies to Mr. Risken’s testimony).

³¹ *Id.* ¶ 8.

³² See Order 03, ¶ 8.

³³ *Id.* (emphasis added).

those conclusions.³⁴ This Commission does not have a final say over the limits of its power,³⁵ but that does not mean the Commission can ignore threshold matters, and the factual issues driving them. Otherwise, the Commission or any other agency could act as broadly or narrowly as it liked, leaving the courts to clean up unnecessarily invasive agency action based on avoidance of threshold issues and the facts that underlie their resolution. Mr. Risken’s testimony regarding venue, forum, and jurisdiction seeks only to ensure those issues are properly framed before these proceedings’ evidentiary hearing, post-hearing briefing, and decision.

17 Moreover, issues of venue, forum, and jurisdiction are inextricably intertwined with core fact issues in this proceeding – decommissioning and remediation *costs* and their uncertainty. Because Montana will have final say over decommissioning and remediation planning, process, and requirements, real costs cannot sensibly be known with much certainty until much later.³⁶ This is not a legal issue as Staff apparently means that phrase. Rather, Mr. Risken’s testimony identifies a legal risk that drives decommissioning and remediation cost uncertainty. Staff propounded many data requests on Montana for legal resources, including Montana laws and administrative rules, from years past to present. Yet, neither PSE’s direct nor other parties’ response testimony appeared to have addressed cost drivers typically associated with legal risk. In other words, to Montana, it appeared that cost issues associated with legal risk were being ignored and, consequently, the mere

³⁴ See, e.g., Black’s Law Dictionary (10th ed. 2014) (defining “jurisdictional fact” as “fact that must exist for a court to properly exercise its jurisdiction over a case, party, or thing.”)

³⁵ See *Port Townsend Sch. Dist. No. 50 v. Brouillet*, 21 Wn. App. 646, 653, 587 P.2d 555 (1978). Staff erroneously assumes otherwise. See Staff Mot. ¶ 12.

³⁶ Staff inexplicably asserts that the “ultimate cost of decommissioning and remediation associated with Colstrip Units 1 and 2 is not at issue in this proceeding. But the amount that is currently known and measurable, however, is at issue.” Staff Mot. ¶ 13. First, Mr. Risken’s testimony highlights that even the figures presented so far by all parties insufficiently account for issues identified by Mr. Risken, which in turn raises those figures’ uncertainty. Thus, what is “currently known and measurable” regarding decommissioning and remediation is inherently questionable. To the extent Staff means that the Commission can work from the numbers currently presented and let PSE file another rate case later to hike fees again, Montana is greatly concerned that the prospect of piecemeal rate increase requests associated with decommissioning and remediation of Colstrip Units 1 & 2 will make those requests less likely to result in sufficient revenues for adequate decommissioning and remediation.

existence of that variable needed to be presented for the Commission’s consideration in the way that Mr. Risken’s testimony presents it.

18 As to joint and several liability, Mr. Risken testified regarding environmental laws that impose joint and several liability, because it appeared that all testimony presumed that PSE’s liability is only several. Whether liability is joint, several, or joint and several, that is a legal issue. However, once again, that legal issue drives further cost uncertainty – a fact issue – in this proceeding, because much of the testimony relevant to decommissioning and remediation costs appears to assume that joint and several liability does not apply here. The fact that PSE discussed the facts surrounding its proportionate share in direct testimony is irrelevant,³⁷ because the entire point of Mr. Risken’s raising the issue as a cost driver in cross-answering testimony is that the issue appeared to be taken for granted by all parties. Surely Staff cannot be suggesting a rule that if a topic is covered by a party in direct testimony, then that topic can only be discussed by another party in cross-answering testimony if that party also raises it in the incomplete context of response testimony. That would be unworkable and unwise, even if some testimony in some instances lends itself to that approach.

19 Staff also misapprehends Mr. Risken’s discussion of potential constitutional issues.³⁸ Mr. Risken did not assert that any public service statute was unconstitutional on its face. Rather, Mr. Risken identified a concern that based on all testimony, the Commission might view the issue of so-called “social costs” as only relevant for consideration within the bounds of Washington State. In other words, it might well be that social costs, including those associated with lost tax revenue, lost jobs, and others, will be borne by PSE as determined in a Montana or other forum. However,

³⁷ Staff Mot. 6 ¶ 14.

³⁸ *Id.* ¶ 15.

such “social costs,” which are very difficult to determine at this stage, ought not be ignored as either a legal or factual matter in this proceeding, because they too are real costs of decommissioning and remediation of any Colstrip units. Foreclosing consideration of their effect on cost figures present so far, whether in this proceeding specifically or in any proceeding concerning similar costs outside Washington’s boundaries generally, could raise the constitutional problem that Mr. Risken identified in his testimony.³⁹

20 Finally, it seems clear that Staff’s and, particularly, Sierra Club’s decision to file motions to strike Mr. Risken’s testimony highlights the desire of some parties to bring the future of Colstrip Units 3 & 4 before this Commission in a way that “tees up” their early closure. Montana has already expressed its view that Colstrip Units 3 & 4 should be disentangled from this proceeding, especially when decommissioning and remediation costs for Units 1 & 2 have not yet been established. It is one thing for these proceedings to consider new depreciation schedules for Colstrip Units 3 & 4. It would be an entirely different matter, in light of Sierra Club’s testimony that their depreciation schedule should be much more aggressive, for this Commission to accept without hearing an opposing view the testimony of Sierra Club’s expert which essentially equates the final year of their depreciation with the “retirement” of 3 & 4.⁴⁰ In other words, Sierra Club’s own testimony betrays that it seeks some perceived basis here for earlier actual retirement of Units 3 & 4.

³⁹ Staff cites a 60-year-old edition of Kenneth Culp Davis’s *Administrative Law Treatise* to support the proposition that agencies cannot determine statutes’ constitutionality. *Id.* at 6 n.27. However, that and all more recent editions clearly state: “A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed.” 3 K. Davis, *Administrative Law Treatise* § 20.04, at 74 (1958). Again, Mr. Risken’s testimony on possible constitutional issues centers on the constitutional application of Washington legislation.

⁴⁰ See, e.g., Ezra Hausman, Sierra Club Witness Response Testimony (EDH-1T), at 6:15-7:2; 5:5-7 (June 30, 2017) (discussing “estimated *retirement*” date instead of “end of useful life”); *id.* at 9:8-13 (discussing retirement dates for Units 3 & 4 as “suggest by” depreciation schedules).

21 If this Commission, for example, picks Sierra Club’s accelerated depreciation schedule for Colstrip Units 3 & 4, one must wonder: How does choosing such a schedule based on Sierra Club testimony advance that intervenor party’s interests, which were the basis for its intervention? Likewise, since PSE chose not to propose such an accelerated depreciation schedule – PSE instead proposed maintaining a depreciation schedule that would be *less* expensive for ratepayers over time – how would Sierra Club’s much more aggressive proposal ultimately translate to a “prudently” incurred costs, as this Commission typically applies that standard? Montana’s testimony is that Sierra Club’s proposal would not be prudent but rather would overcharge ratepayers now for what is Sierra Club’s ultimate end – an early closure of Colstrip Units 3 & 4. In turn, that would drive plant-closure cost uncertainty associated with so-called “social costs” even higher, which would make determining “prudent” decommissioning and remediation costs associated with Colstrip unit closures even more difficult in these proceedings.

22 While Mr. Risken’s testimony at most involves mixed questions of law and fact, it is the unique nature of Montana’s interests as a sovereign entity with lawmaking and regulatory policing power over decommissioning and remediation within its borders that requires some legal patina be applied to his testimony. Undeniably, cost uncertainty associated with the legal risk that Mr. Risken’s testimony identifies affects core fact issues of these proceedings: What are “prudent” decommissioning and remediation costs? What might be the effect of underestimating those costs now? What might be the unintended effects of overestimating some of those costs now, including Sierra Club’s overly aggressive depreciation schedule associated with Colstrip Units 3 & 4? Mr. Risken’s testimony bears on all of these fact issues.

C. Staff’s motion to strike relies on authorities that do not support its arguments.

23 Ignoring the flexible evidentiary standard that applies in agency adjudicative proceedings,

Staff urges the Commission to apply an overly restrictive version of admissibility. The Commission should reject Staff's position. Otherwise, the Commission will adopt an unnecessary and overly restrictive version of fundamental evidentiary standards, one that does not even apply in the irrelevant criminal contexts that Staff cites for support.

24 First, staff equates *cross-answering* testimony in rate case proceedings with *rebuttal* testimony in criminal jury trials.⁴¹ Comparing cross-answering testimony in this agency context to rebuttal testimony in the criminal context compares apples to oranges. On the one hand, both response testimony and cross-answering testimony could be considered an analogous form of “rebuttal” testimony, because the former allows all non-PSE parties to respond to PSE testimony. On the other hand, the latter allows all non-PSE parties to respond to *other non-PSE parties’* testimony. Cross-answering testimony is the first time that any intervenor had to respond to any other intervenor’s prefiled testimony. PSE’s August 9, 2017, “rebuttal” testimony, then, is closer to a form of ordinary rebuttal testimony, but is not identical. Even the inapposite criminal cases that Staff cites supports Montana’s position.

25 *State v. Coe*,⁴² which simply block quotes the other criminal case that Staff cites,⁴³ states in relevant part that “[r]ebuttal evidence is admitted to enable the *plaintiff* to answer new matter presented by the *defense*.”⁴⁴ Neither Staff nor Sierra Club enjoy any analogous “plaintiff” status in this proceeding; at best, Staff or Sierra Club would need to identify some portion of PSE “rebuttal” testimony to make the strained analogy fit.

26 Second, even if either Staff or Sierra Club did enjoy a sort of “plaintiff” status here, Staff’s

⁴¹ See Staff Mot. at 5 nn.16, 20; 6 n.25; 7 n.28.

⁴² 109 Wn.2d 832, 847, 750 P.2d 208 (1988) (emphasis added).

⁴³ See, e.g., Staff Mot’n at 5 n.16 (citing *Coe* for its block quote of *State v. White*, 74 Wn.2d 386, 444 P.2d 661 (1968)).

⁴⁴ *Coe*, 109 Wn.2d at 847 (1988) (emphasis added).

misplaced reliance on particular criminal cases (where challenged rebuttal evidence was ultimately admitted anyway)⁴⁵ would needlessly result in an overly restrictive evidentiary standard in rate case proceedings. To recount the relevant legal standard here, Washington’s Administrative Procedure Act states generally that “the presiding officer shall refer to the Washington Rules of Evidence as *guidelines* for evidentiary rulings.”⁴⁶ This Commission’s administrative rules state “[t]he presiding officer will consider, *but is not required to follow*, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.”⁴⁷ “Generally speaking, administrative hearings proceed under significantly relaxed rules of evidence.”⁴⁸ “By their own provisions, the rules of evidence apply only to court proceedings.”⁴⁹ Nothing requires this Commission to apply guideline evidentiary rules more stringently than even this state’s leading criminal cases on “rebuttal” evidence have, and this Commission ought not adopt such an approach here.

27 In a somewhat more analogous situation within a FERC rate proceeding, an interest group moved to strike testimony from non-respondent electric companies as improper cross-answering testimony, because the testimony contained information that “should have been filed as direct or answering testimony.”⁵⁰ Specifically, that testimony advanced an affirmative set of proposed rates.⁵¹ Another movant claimed the cross-answering testimony constituted improper “sandbagging.”⁵² Reciting a FERC rule with nearly identical language to that of relevant WUTC procedural

⁴⁵ *Coe*, 109 Wn.2d at 848; *White*, 74 Wn.2d at 395.

⁴⁶ RCW 34.05.452(2) (emphasis added).

⁴⁷ WAC 480-07-495(1) (emphasis added).

⁴⁸ *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 524, 173 P.3d 514 (2007) (interpreting RCW 34.05.452(2)).

⁴⁹ *Id.* at 525.

⁵⁰ 32 No. 6 FERC Prac. & Proc. Manual Newsl. 3 (2014).

⁵¹ *Id.*

⁵² *Id.*

rules here, the FERC ALJ denied the parties' motion to strike all of the challenged testimony.⁵³ There, the ALJ noted that rebuttal testimony, unlike cross-answering testimony, is both the last-filed testimony *and* is filed by the party with the ultimate burden of proof (here, PSE). Here, neither Staff nor Sierra Club nor Montana carries any burden of proof, and each could have elected to file no response testimony and only cross-answering testimony – or no testimony at all, depending on the party's theory of the proceeding.

28 And while here Montana could have filed some sort of response testimony on June 30, 2017, it did not believe its testimony (1) would have been as well informed until after it had reviewed the cross-answering testimony of other intervenors and (2) would have added perspective worth noting until that same time. Indeed, without any burden of proof, Montana could have elected to file *no* testimony at all and filed only legal briefing. However, Montana concluded that because some of the legal issues in this case were incorrectly prejudged by all parties and were inextricably intertwined with the chicken-and-egg issue of how legal risk informs cost uncertainty, Montana decided to file cross-answering testimony in light of these proceedings' framing, as such framing became apparent from all testimony filed in these proceedings through June 30.

29 Staff's and Sierra Club's claim that allowing Mr. Risken's cross-answering testimony now somehow prejudices other parties is unfounded. None of Mr. Risken's cross-answering testimony falls outside the scope of this proceeding, nor does it raise any new issues that require an entirely renewed set of testimony, although even that would not be prohibited by Commission rules. Indeed, Mr. Risken's testimony seeks to underscore problems arising from other parties' misapprehension of this proceeding's proper scope. And, as was the case in the 2014 FERC rate proceeding described above, Mr. Risken's testimony is "still subject to cross-examination and rebuttal via

⁵³ *Id.*

participants' briefs."⁵⁴

30 Because Montana carries no burden of proof in this proceeding, it could have waited until the briefing stage of these proceedings to lay out a full legal theory couched in the factual issues that Mr. Risken raised in his testimony. However, Montana concluded that this would be too late to raise the inherent factual issues that are bound up in legal ones as described above. Montana further concluded, given all testimony filed to date (particularly testimony from non-PSE parties), that raising certain intertwined legal and factual issues would be helpful for this Commission as the evidentiary hearing commenced, and would hew closely to Montana's interests that fall within the scope of this Commission's jurisdiction. And no party is thereby prejudiced, because any issue with Mr. Risken's testimony can be addressed through cross-examination, post-hearing briefing, or both; Sierra Club's own request for half an hour of cross-examination of Mr. Risken shows this lack of prejudice. Nevertheless, Staff filed an unnecessary and overly formalistic motion to strike, creating an administrative burden all its own,⁵⁵ and Sierra Club seized the moment to file an inflammatory polemic lacking legal analysis or merit. The Commission should deny both.

D. Staff misapprehends any effect Mr. Risken's testimony might have on future proceedings before this Commission.

31 Staff also asserts that allowing testimony like Mr. Risken's might "invit[e] other parties in other dockets to submit legal testimony in lieu of a legal brief."⁵⁶ Staff's concerns are misplaced.

32 First, Staff presumes that parties like Montana in the future would file testimony *in lieu of*

⁵⁴ 32 No. 6 FERC Prac. & Proc. Manual Newsl. 3 ("Because pre-filed testimony is subject to cross-examination at hearing and to rebuttal in post-hearing briefs, the other participants will not be prejudiced by admission of the testimony . . .").

⁵⁵ Staff Mot. ¶ 17.

⁵⁶ Staff Mot. ¶ 17.

a brief. Montana has never stated that it does not plan to file a post-hearing brief in these proceedings. Quite the opposite, as noted above Montana, as a party without a burden of proof, had considered filing only a post-hearing brief but concluded after seeing all testimony that some factual issues already raised needed separate treatment. Certainly, legal argument supporting Mr. Risken's testimony can follow in a post-hearing brief.

33 Second, Staff's concerns rest entirely on an incorrect view of how court evidence rules apply in agency adjudicative proceedings. Indeed, even had Staff filed its present motion in a criminal jury trial, it likely would have lost, since the very cases that Staff cites for support of its unsupported view of evidentiary standards in agency adjudicative proceedings involved rulings *allowing* contested testimony. Moreover, adopting the Staff's overly formalistic and unworkable adherence to the Rules of Evidence in administrative hearings such as this could trigger even more motions to strike, or even motions to compel based on a theory that a Data Request does not seek admissible evidence. For example, Montana could have sought relief from the majority of Staff's Data Requests propounded to it, because the data sought legal authority rather than factual data.⁵⁷ Montana declined to do so, in part because it recognized that such motions would create an unnecessary administrative burden on the Commission.

34 Third, and perhaps most notably, Staff ignores entirely the nature of Montana's interests as an intervenor in these proceedings. Montana is a sovereign entity that protects and advances its citizens' interests through, among other things, law and regulation. The legal risks and costs of compliance associated with the actual process of decommissioning and remediation are substantial and real. Those risks and costs of compliance, in turn, drive decommissioning and remediation

⁵⁷ See, e.g., CR 26(b)(1)(A) (regarding proper objections for discovery requests that are, among other things "obtainable from some other source that is more convenient, less burdensome, or less expensive.").

costs. Simply implying that PSE can come back another day if its decommissioning and remediation compliance costs are greater than anticipated is inefficient and could easily result in a more difficult case to be made for another rate increase on the exact same subject matter. Likewise, Montana's interests are in ensuring an orderly and proper decommissioning and remediation process. That is unlikely to happen if PSE's revenues are uneven or its retirement account too small.

35 As a result, the adverse environmental and economic effects on Colstrip's residents in particular and Montana as a whole will be larger than necessary. It is unlikely, then, that considering in advance of the evidentiary hearing Mr. Risken's testimony regarding legal risks as cost drivers (among other issues) will wreak any havoc on this Commission's precedent on evidentiary standards going forward, particularly where Montana's interests as a sovereign entity are so unique to it as a party. Staff's concerns are overblown. This Commission should deny its and Sierra Club's motions to strike.

V. CONCLUSION

36 Staff concerns about administrative burdens can best be addressed by denying their motion, which is based on inapposite case law and would create the bad precedent of which it complains. And the Sierra Club simply used Staff's motion to strike as an opportunity to lob insults. The Commission should deny both motions.

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