

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PACIFICORP, d/b/a PACIFIC POWER
& LIGHT COMPANY,

Respondent.

NO. UE-032065

MOTION TO STRIKE ON
BEHALF OF COMMISSION
STAFF

*Expedited Consideration
Requested*

I. INTRODUCTION

I The Washington Utilities and Transportation Commission (Commission) Staff (Staff) respectfully moves to strike portions of the rebuttal testimony and exhibits filed by PacifiCorp, d/b/a Pacific Power & Light (PacifiCorp or Company). Specifically, Staff moves to strike the testimony and exhibits identified in Attachment A. The testimony and exhibits relate to Company's revised Protocol. As argued more fully below, this testimony is not proper rebuttal testimony. By waiting to file this evidence until its rebuttal case, the Company puts Staff and other parties at a considerable disadvantage. The testimony and exhibits are inconsistent

with the Commission's procedural rules and contrary to the public interest. Staff respectfully requests expedited review and a ruling on this motion before the start of evidentiary hearings on August 30, 2004.

II. BACKGROUND

2 PacifiCorp filed its direct testimony and exhibits on December 16, 2003. The Company included with that filing its Inter-jurisdictional Cost Allocation Protocol (Original Protocol).

3 On May 7, 2004, PacifiCorp sent a letter to the MSP participants in Oregon, Utah, Idaho and Wyoming enclosing for their review a final draft of the revised Protocol and appendixes (Revised Protocol).¹ Ms. Kelly stated that the Revised Protocol would "form the basis of the Company's upcoming filings in Utah, Idaho, Oregon and Wyoming."²

4 On May 21, 2004, PacifiCorp filed a Revised Protocol in Oregon and Utah. Exhibit ____ (ALK-3T) (Kelly, Rebuttal), at 3, ll. 10-11. PacifiCorp did not file the Revised Protocol in Washington. In response to a discovery request regarding why the Company was not planning on filing the Revised Protocol in Washington, PacifiCorp attorney James Van Nostrand answered:

¹ Letter from Andrea Kelly to MSP Participants (May 7, 2004) (Attachment B hereto).

² *Id.*

PacifiCorp is not currently aware of an opportunity for it to make an additional filing in this proceeding in advance of the filing of testimony by Commission Staff and intervenors PacifiCorp would be prepared to file such a revised Protocol in a supplemental filing in these proceedings if: a) Commission Staff and intervenors are agreeable to such a filing and b) such a filing would not delay the issuance of a final order in these proceedings.³

5 On June 22, 2004, Ms. Kelly was deposed in this proceeding regarding the Company's position on the Protocol and Revised Protocol. Ms. Kelly unequivocally stated that, "the Company, for the purposes of this Washington rate case, is proposing this [Original] Protocol." Exhibit ____ (RJF-18) (Falkenberg, Direct) (Excerpt of Deposition of Andrea Kelly), at 5. Ms. Kelly stated that the Company does not "have any current strategy around what we're going to do on rebuttal" in response to the question of whether it would update its "testimony with regard to the current version of the Protocol on rebuttal". *Id.* at 9

6 The Commission Staff and intervenors filed responsive testimony on July 2, 2004. In his testimony, Staff witness Alan P. Buckley analyzes the Original Protocol, recommends an alternative inter-jurisdictional cost allocation methodology for setting rates in this docket, and addresses other issues. The bulk of Mr. Buckley's 151 pages of testimony is devoted to his analysis of the Original Protocol. Because

³ PacifiCorp's Response to ICNU Data Request No. 8.7 (June 16, 2004) (Attachment C hereto).

the Company had not filed its Revised Protocol in Washington, Staff naturally responded to the Original Protocol. In his testimony, Mr. Buckley expressed some concern that the Company might switch gears and file the Revised Protocol in its rebuttal testimony, and noted that if the Company were allowed to do so, other parties would be precluded from undertaking any meaningful analysis of it.

Exhibit ____ (APB-1T) (Buckley, Direct), at 10, ll. 3-9. Mr. Buckley's concerns materialized when the Company filed the Revised Protocol in its rebuttal case.

7 On July 28, 2004, PacifiCorp filed its rebuttal testimony, including the Revised Protocol and supporting testimony. PacifiCorp asks this Commission to adopt and establish rates based on the Revised Protocol. Exhibit ____ (DNF-2T) (Furman, Rebuttal), at 7, ll. 5-6. The Company's Revised Protocol in this docket is substantially the same as the May 21, 2004, Revised Protocol that PacifiCorp filed in Oregon and Utah. For example, Mr. David Taylor's rebuttal testimony regarding the Revised Protocol is almost exactly the same as his Oregon testimony, except for changes to the special contracts section, a last question and answer regarding Washington, and changes that removed most, but not all, of the references to the Oregon exhibits. Exhibit No. ____ (DLT-13T) (Taylor, Rebuttal), at 8-22.

8 According to PacifiCorp witness Donald Furman, the Company was "advised that there was no procedural opportunity to file" the Revised Protocol,

short of waiting until the rebuttal deadline. Exhibit No. ____ (DNF-2T) (Furman, Rebuttal), at 6. The Commission’s record shows that the Company did not move for leave to file supplemental direct testimony.

III. ARGUMENT

A. The Testimony and Exhibits Are Not Proper Rebuttal.

9 Proper rebuttal evidence is admitted to allow a party to answer new matters that are presented in response to the direct case. *See State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). A party “is not allowed to withhold substantial evidence supporting any of the issues on which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant’s case.” *Id.* at 395.

10 PacifiCorp’s submission of the Revised Protocol as its “preferred” inter-jurisdictional cost allocation methodology in this docket is not proper rebuttal. The Company has the burden of proving that its proposed rate increase is fair, just, reasonable, and sufficient. RCW 80.04.130(4). Therefore, the Company was obligated to file its direct case, including its preferred inter-jurisdictional cost allocation methodology, last December. If the revised Protocol was not available at that time, the Company should have filed it as soon as it became available, which was at least as early as May 21, 2004.

B. Filing the Testimony and Exhibits In the Rebuttal Case Greatly Prejudices Commission Staff and Other Parties.

11 The Commission Staff has spent considerable time reviewing, analyzing, and drafting testimony regarding the Original Protocol, including the period of time between May 21, 2004 (the date PacifiCorp filed its Revised Protocol in Utah and Oregon), and July 2, 2004 (the date Staff filed its testimony). Rather than file the Revised Protocol in Washington on May 21, 2004, and allow Staff and other parties a minimum of six weeks to analyze it,⁴ the Company held off and filed it on rebuttal.

12 By waiting until its rebuttal case to introduce a new inter-jurisdictional cost allocation methodology, the Company has deprived Staff and other parties of their right to respond to it. The Commission recently has admonished parties that “rebuttal testimony should not be used to ‘sand bag’ opponents with evidence that should have been included in the direct case.” *AT&T Communications of the Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, Docket No. UT-020406, Seventh Supplemental Order, ¶ 45, n. 1 (April 8, 2003). Although the Company did not have

⁴ The Commission Staff likely would have moved for additional time to respond to the Revised Protocol had the Company filed it on May 21, 2004. Staff believes it would have been possible to build in sufficient time to respond to the Revised Protocol and still resolve this matter during the ten-month suspension period. However, because the Company decided to wait until its rebuttal case to file the Revised Protocol, it is impossible to speculate how the Commission would have resolved the scheduling issue.

its Revised Protocol in time to include it in its direct case, the Company could have filed it weeks earlier and avoided all or much of the ensuing prejudice to Staff and other parties.

13 Staff and intervenors cannot conduct a meaningful review of the Revised Protocol within the time remaining before hearing. This prejudice is a direct result of the Company's failure to file the Revised Protocol earlier in this docket. The only reasonable solution is to strike the Revised Protocol from consideration as an inter-jurisdictional cost allocation methodology in this proceeding.

14 The Company cannot justify its decision to wait until rebuttal to file its Revised Protocol on the procedural schedule in this docket. *See* Exhibit ____ (DNF-2T) (Furman, Rebuttal), at 6-8 ("We were advised that there was no procedural opportunity to file supplemental direct testimony incorporating the Revised Protocol."). The ten-month suspension period is intended to allow companies (like PacifiCorp) to obtain rate relief in a timely manner. The ten-month period should not be used offensively against other parties. In other words, a company filing a rate case should not be allowed to wait until its rebuttal case to submit material testimony because the responding parties would not have adequate opportunity to review the evidence due in part to the tight procedural schedule mandated by the suspension period. The Commission should not permit this result.

C. The Commission Should Strike the Testimony and Exhibits Pursuant to Its Procedural Rules.

15 Under the Commission's procedural rules a party that wishes to make substantive changes (*i.e.* changes other than to correct errors of fact) to its prefiled testimony must seek leave from the presiding officer to do so. WAC 480-07-460(1)(b)(ii). The Revised Protocol is substantively different from the Original Protocol. Exhibit ____ (ALK-3T) (Kelly, Rebuttal), at 8, ll. 18-20 (the revised Protocol contains "material changes" from the original Protocol). The Company did not move for leave to file the Revised Protocol.

16 The presiding officer may exclude evidence that is irrelevant, repetitive, or inadmissible. WAC 480-07-495(1). *See David and James Stevens et al. v. Rosario Utils.*, Docket No. UW-011320, Third Supplemental Order, at 1-7 (July 12, 2002); *AT&T Communications of the Pac. Northwest Inc. v. Verizon Northwest Inc.*, Docket No. UT-020406, Fifth Supplemental Order (Feb. 21, 2003). The testimony and exhibits fall within this category. To the extent that the Company advocates that the Commission adopt the Revised Protocol for purposes of setting rates, the evidence is inadmissible, for the reasons stated above. To the extent that the Company does not advocate that the Commission adopt the Revised Protocol as an inter-jurisdictional cost allocation methodology, the evidence is irrelevant. The

Commission should not permit PacifiCorp to burden the record with the details of a cost methodology that the Company does not advocate the Commission adopt.

17 The evidence also is inconsistent with WAC 480-07-510, which requires companies filing for a general rate increase to prefile their direct testimony and exhibits. PacifiCorp filed one version of an inter-jurisdictional cost allocation methodology in its direct case, and a materially different version in its rebuttal case. PacifiCorp's new evidence contravenes the letter and spirit of this rule.

D. Granting Staff's Motion is Consistent With the Public Interest.

18 The inter-jurisdictional cost allocation issue is a substantial issue in this docket. The parties have offered significant evidence on this issue. The choice of an inter-jurisdictional cost allocation methodology has a tremendous impact on the rates that will result from this docket. The Commission's decision on each issue in this docket is informed by the scrutiny with which the parties analyze the evidence. Because the cost allocation issue is so important, Staff's and other parties' review and analyses of the Company's proposed methodology are particularly valuable to the Commission. Therefore, it is contrary to the public interest for the Commission to consider a methodology that Staff and other parties will not have adequate opportunity to review and analyze.

IV. CONCLUSION

19 For the foregoing reasons, the Commission should strike the identified testimony and exhibits from the Company's rebuttal case.

Respectfully submitted, this 19th day of August, 2004.

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