

April 13, 2023

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
P.O. Box 1088
201 High Street S.E., Suite 100
Salem, OR 97308-1088

Re: Docket No. PCN 5 – In the Matter of Idaho Power Company’s Petition for Certificate of Public Convenience and Necessity.

Dear Judge Mellgren:

Idaho Power Company (“Idaho Power” or the “Company”) is writing to request clarification as to the purpose and process for cross-examination at the upcoming hearing in this docket. On April 12, 2023, parties filed their cross-examination statements. Idaho Power has reviewed the filed statements and is concerned that there may be confusion about the purposes of a cross-examination hearing. Idaho Power identifies its specific concerns below and requests that Your Honor provide clarification regarding the procedures of a cross-examination hearing as detailed below, and provide direction to parties regarding the filing of revised cross examination statements. Idaho Power respectfully requests that Your Honor provide a memorandum clarifying these issues on Friday, April 14, 2023, and to direct parties to file revised Cross-Examination Statements by 9 AM on Monday, April 17, 2023 to facilitate the preparation of a schedule for the Cross-Examination Hearing by end of day on Monday, April 17, 2023.

New Witnesses Identified for Cross-Examination

The Public Utility Commission of Oregon (“Commission”) recently stressed the importance of the procedural schedule in narrowing the issues as the parties come to a better understanding of each other’s positions over time and with further information.¹ With that goal in mind, it is Idaho Power’s understanding that the cross-examination hearing scheduled in this docket is intended solely to allow parties an opportunity to cross-examine witnesses on the pre-filed testimony they have provided to-date in this matter and that the hearing does not provide parties an opportunity to submit new direct testimony and evidence.

¹ *In re Avista Corp., dba Avista Utils., Request for a Gen. Rate Revision and Application for Authorization to Defer Expenses or Revenues Related to the Nat. Gas Decoupling Mechanism*, Docket Nos. UG 288 and UM 1753, Order No. 16-109 at 22 (Mar. 15, 2016).

Cross-examination is intended only to establish the proper weight to be given to prior testimony,² and therefore parties may not introduce new witnesses to testify for the first time at the hearing. Your Honor recently confirmed that “[g]enerally parties must limit their cross-examination of witnesses at hearing to those witnesses that previously submitted testimony.”³

Greg Larkin, an intervenor in this case, identifies three new witnesses whom Mr. Larkin intends to question at the hearing.⁴ Although Mr. Larkin describes the general topics of the witnesses’ testimony in his “Cross statements,” there is in fact no pre-filed testimony to serve as the basis for cross-examination. In effect, Mr. Larkin intends to provide untimely direct testimony. Thus, the witnesses Mr. Larkin has identified are not appropriate for a cross-examination hearing and Mr. Larkin should not be permitted to introduce new testimony from these witnesses at this late stage of the proceedings.

Relatedly, Your Honor should clarify to the parties in this case that they may cross-examine only witnesses who have provided testimony, not other individuals who have participated in this matter. Irene Gilbert, an authorized representative of Mr. Larkin, requests to cross-examine Jocelyn Pease, an attorney representing Idaho Power.⁵ Ms. Pease has not sponsored any testimony and therefore Ms. Gilbert may not cross-examine Ms. Pease at the hearing.⁶

Finally, because cross-examination is intended to determine the appropriate weight given to a witness’s testimony, the parties’ cross-examination must be limited to topics that the witnesses addressed in their pre-filed testimony. In the Company’s review of the parties’ cross-examination statements, Idaho Power identified two parties who appear to seek cross-examination of specific individuals regarding topics that other witnesses raised.

1. The topics that Ms. Gilbert identifies in her request to cross-examine Ms. Pease include the process for establishing fair compensation to impacted landowners and the finalization of mitigation plans for the Boardman to Hemingway Transmission Line Project (“Project”).⁷ Although Ms. Pease is not available for cross-examination, several of the topics identified for Ms. Pease were addressed in the Reply and Surrebuttal Testimonies of Lindsay Barretto. Although Ms. Gilbert did not include Ms. Barretto in her list of cross-examination witnesses, Ms. Barretto can be available for cross-examination at the hearing on these topics. If Ms. Gilbert intends to cross-examine Ms. Barretto, Idaho Power requests that Ms. Gilbert promptly revise her cross-examination statement to include this witness.
2. Additionally, in her cross-examination statement relating to the testimony of Mark Bastasch, Ms. Gilbert includes statements relating to the Company’s Programmatic

² *Cent. Lincoln People’s Util. Dist. v. Verizon N.W. Inc.*, Docket UM 1087, Order No. 04-379 at 5 (July 8, 2004) (“[The] purpose of cross-examination is to indicate to [a] fact-finder what weight to give to witness’ testimony”).

³ ALJ Memorandum at 1 (Apr. 6, 2023).

⁴ Greg Larkin’s Witness List and Exhibits at 1 (Apr. 12, 2023). Mr. Larkin’s authorized representative, Irene Gilbert, would conduct the questioning. *Id.*

⁵ Irene Gilbert’s Cross Examination Statement and Exhibits at 9-10 (Apr. 12, 2023).

⁶ See ORS 183.450(3) (limiting cross-examination to witnesses who testified in the contested case); see Order No. 04-379 at 5 (requiring a party’s attorney to be made available for cross-examination *only* because the attorney had sponsored pre-filed testimony in that matter).

⁷ Irene Gilbert’s Cross Examination Statement and Exhibits at 9-10.

- Agreement for potential impacts to historic properties.⁸ Mr. Bastasch's testimony is specific to noise impacts from the Project and does not address the Programmatic Agreement. However, two other Company witnesses, Kirk Ranzetta and Stephen Anderson, provided testimony on these topics. If Ms. Gilbert intends to cross-examine either Mr. Ranzetta or Mr. Anderson, Idaho Power requests that Ms. Gilbert promptly revise her cross-examination statement to include those witnesses.
3. Wendy King includes in her cross-examination statement a request to question Idaho Power witness Mitch Colburn.⁹ However, Ms. King identifies in her request statements relating to the Company's analysis of wildfire risk that are outside the scope of the testimony Mr. Colburn has sponsored in this docket. Dr. Christopher Lautenberger's testimony specifically addresses wildfire risk. If Ms. King intends to cross-examine Dr. Lautenberger, Idaho Power requests that Ms. King revise her cross-examination statement to clarify her intent.

Identification of Cross Examination Exhibits

In Your Honor's Pre-Hearing Memorandum, you informed parties that cross-examination statements should include "[a] list of exhibits to be referenced during the examination of *each* witness."¹⁰ However, several intervenors seek to cross-examine multiple witnesses and provide an extensive list of exhibits purportedly relating to that cross-examination without clarification of which exhibits are relevant to which witness.¹¹ Absent this specification, Idaho Power's witnesses do not have an opportunity to prepare for the hearing and instead would be required to become familiar with the entirety of the intervenors' exhibits. This would severely prejudice those witnesses' ability to prepare for cross-examination.

Additionally, several parties identify new exhibits in their cross-examination statements, but do not identify any witness to cross examine. However, any new exhibits cannot be entered into the record unless the party first lays a foundation establishing and authenticating those documents. To ease the process in this matter, Idaho Power will stipulate to the admission of the Company's responses to data requests, but does not concede that any other exhibits may be entered into the record, unless offered and admitted through cross-examination.

Relatedly, Ms. Gilbert includes in her identified cross-examination exhibits data requests that Mr. Larkin sent to Idaho Power, but does not include the Company's responses to those requests.¹² Based on Ms. Gilbert's request to cross-examine Ms. Pease, Idaho Power believes Ms. Gilbert may have included these requests because Idaho Power objected to the requests in the Company's responses. In most cases, the Company objected to the request, but also responded to the question. To the extent Ms. Gilbert intends to respond to Idaho Power's objections, as stated above Idaho Power will stipulate to the admission of the Company's responses to data requests, provided that the objection is preserved.

⁸ *Id.* at 7.

⁹ Wendy King's Cross Examination Statement and Exhibits at 1 (Apr. 12, 2023).

¹⁰ Pre-Hearing Memorandum at 1 (Mar. 22, 2023) (emphasis added).

¹¹ See, e.g., STOP B2H's Cross Examination Statement and Testimony at 2-10 (Apr. 12, 2023) (identifying three witnesses for cross-examination but listing the entire record of multiple proceedings at the Commission and other state agencies as relevant exhibits).

¹² Greg Larkin/400, Larkin/2-12.

To clarify the use of cross-examination exhibits and facilitate the presentation of cross-examination exhibits at the hearing, Idaho Power requests that Your Honor provide an explanation to all parties in this docket of the process for laying a foundation so that all parties may properly enter their cross-examination exhibits into the record. Moreover, Idaho Power respectfully requests that Your Honor explain the role of cross-examination exhibits generally, and that the cross-examination hearing is not an opportunity to simply enter new direct evidence into the record.

New Testimony and Exhibits Submitted with Cross-Examination Statements

Several intervenors identified new exhibits for the hearing but then did not request to cross-examine any witnesses. As Your Honor recently clarified in an April 6, 2023 Memorandum, the last opportunity for testimony was Idaho Power's surrebuttal and "there is no additional opportunity to file testimony in the current schedule."¹³ Because the deadlines for submitting pre-filed written testimony have passed, any new testimonial evidence submitted for reasons other than cross-examination is untimely and should not be admitted into the record. From Idaho Power's review, the Company identified the following parties that submitted new testimonial evidence in their cross-examination statements:

1. Susan Geer stated that she "do[es] not plan to cross examine any witnesses" but identifies her own response to data requests that Ms. Geer seeks to enter into the record.¹⁴ As stated above, Idaho Power will stipulate to the admission of its own responses to data requests but does not concede that other documents—including other parties' responses to data requests—may be entered into the record without first laying a foundation.
2. Sam Myers filed a document that he identified as "Testimony" which consists of additional testimony describing the weather history in Morrow County and introducing new factual evidence into the record.¹⁵
3. Ms. King includes in her exhibits new testimonial evidence, including a letter from Roger Morter dated April 11, 2023.¹⁶ Given the fact that this letter is dated after the deadline for Ms. King's rebuttal testimony and was not filed with Ms. King's testimony, this untimely evidence should not be included in the record.
4. Mr. Larkin provides links to three new exhibits relating to tornados, Aeolian vibrations, and negative ions.¹⁷ However, Mr. Larkin does not identify any Company witnesses that he seeks to cross-examine.¹⁸
5. John Williams includes in his cross-examination statement eight documents identified as "New Exhibits for Cross & Evidentiary Hearing Phase[.]"¹⁹ However, Mr. Williams states that he does not intend to cross-examine any witnesses.²⁰

¹³ ALJ Memorandum at 1 (Apr. 6, 2023).

¹⁴ Susan Geer's Letter Regarding Cross Examination at 1 (Apr. 12, 2023).

¹⁵ Sam Myers's Testimony (Apr. 12, 2023).

¹⁶ Wendy King's Cross Examination Statement and Exhibits, Exhibit 26.

¹⁷ Greg Larkin's Witness List and Exhibits at 2.

¹⁸ As discussed above, Mr. Larkin instead lists three witnesses from whom Mr. Larkin intends to provide new direct testimony.

¹⁹ John Williams/301-308.

²⁰ John Williams' Cross Examination Exhibits at 1 (Apr. 12, 2023).

Clarification of Confidential Cross-Examination

From Idaho Power's review of the cross-examination statements, it does not appear that any parties included a statement that the cross-examination will include confidential materials.²¹ If any party intends to include confidential material in their cross-examination, Idaho Power requests that those parties clarify that intent prior to the hearing.

Clarification Regarding Representatives and Parties

While the ALJ provided leave for Ms. Gilbert to serve as a representative for Mr. Larkin's interests in this proceeding, he did not grant her leave to intervene. And yet, Ms. Gilbert and Mr. Larkin filed two separate cross-examination statements, and it appears that Ms. Gilbert is attempting to appear on her own behalf as though she were a party. Idaho Power requests clarification that Ms. Gilbert's only role in this case is to represent Mr. Larkin's interests and that Mr. Larkin, or Ms. Gilbert on Mr. Larkin's behalf, should file a total of only one cross-examination statement.

Proposed Table Format for Revised Cross-Examination Statements

To the extent that any parties must revise their cross-examination statements, Idaho Power proposes the use of a simple table for parties to identify the witnesses they wish to cross-examine, the estimated time of cross, the topics of cross, and the exhibits for that specific witness, which is provided as Attachment A to this letter. The Company proposes use of the table format to provide consistency in cross-examination statements and to facilitate Your Honor's preparation of a hearing schedule. Given the simplicity of the table format, Idaho Power anticipates that intervenors can respond to this request for clarification in an expedited manner.

Conclusion

Based on the foregoing, Idaho Power respectfully requests that Your Honor issue a ruling on April 14, 2023 clarifying:

- The purpose and process for a cross-examination hearing;
- The process for laying foundation for a new exhibit through cross-examination;
- Rejecting Greg Larkin's proposal to use the cross-examination hearing to develop the testimony of entirely new witnesses that have not provided pre-filed testimony in this proceeding;
- Rejecting Irene Gilbert's request to cross-examine Ms. Pease;
- Advising parties that untimely testimony offered with cross-examination statements may be stricken from the record;
- Clarifying Ms. Gilbert's role in the proceeding;

²¹ Mr. Larkin stated that his examination of new witnesses will include confidential materials. However, as discussed above, Mr. Larkin seeks to offer new direct testimony from these witnesses, not cross-examination. If Mr. Larkin's new testimony is allowed, Idaho Power acknowledges that that testimony must be submitted confidentially.

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- Directing parties to use the attached table to revise their cross-examination statements and submit any such revisions by 9 AM on Monday, April 17, 2023; and
- Confirming that the ALJ will issue a schedule for the cross-examination hearing by end of day on Monday, April 17, 2023.

Regards,



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Attorney for Idaho Power Company

Attachment A: Table Format for Cross-Examination Statements

<i>Name of Witness</i>	<i>Estimated Time for Cross-Examination</i>	<i>Topics of Cross-Examination</i>	<i>Specific Exhibits for Cross-Examination</i>	<i>Confidential (Yes/No)</i>

DOCKET PCN 5 - CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2023 Idaho Power Company's Letter to ALJ Mellgren regarding Cross-Examination Statements was served by USPS First Class Mail and Copy Center to said person(s) at his or her last-known address(es) as indicated below:

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DATED: April 13, 2023

/s/ Alisha Till

Alisha Till
Paralegal