

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP,)	UE 390
DBA: PACIFIC POWER,)	
)	CALPINE ENERGY SOLUTIONS,
)	LLC’S RESPONSE TO THE
PacifiCorp 2022 Transition Adjustment)	CITIZENS UTILITY BOARD’S
Mechanism (TAM))	MOTION TO ADMIT
)	TESTIMONY AND EXHIBITS
)	

INTRODUCTION AND SUMMARY

Calpine Energy Solutions, LLC (“Calpine Solutions”) respectfully submits this response objecting, in part, to the motion to admit testimony and exhibits filed by the Citizens Utility Board of Oregon (“CUB”) on September 2, 2021. For the reasons explained below, Calpine Solutions objects to the admission of each of CUB’s proposed cross-examination exhibits into the record as evidence.¹

The exhibits at issue include:

- CUB 300 – *PacifiCorp’s Redacted Final Shortlist for the 2020 All Source Request for Proposals and Sensitivity Analysis Presentation*, Docket No. UM 2059 (July 30, 2021).
- CUB 301 – *PacifiCorp’s Opening Comments*, Docket No. UM 2024 (March 16, 2020).
- CUB 302 – *Portland General Electric Company’s Opening Comments*, Docket No. UM 2024 (March 16, 2020).

Although CUB has not explained how it intends to use these materials in briefing, each of these proposed exhibits appears to be directed in whole, or in part, to support CUB’s testimony

¹ Calpine Solutions does not object to admission of CUB’s remaining testimony and exhibits listed in its motion.

supporting PacifiCorp’s position that the Public Utility Commission of Oregon (“Commission”) should adopt a constraint on the calculation of the Consumer Opt-Out Charge that would prevent it from being a credit to prospective direct access customers in this year’s opt-out window.²

However, CUB did not use these proposed exhibits in cross examination, and the manner of the proposed introduction of this material into the evidentiary record, outside of the hearing, is improper. First, these exhibits lack foundation because no witness has sponsored the exhibits. Second, while the lack foundation alone requires exclusion, it would be prejudicial to Calpine Solutions to admit these exhibits into the record as evidence in this proceeding at this time because CUB’s proposed cross-examination exhibits significantly expand the opinions and assertions made thus far regarding direct access programs and the Consumer Opt-Out Charge without any opportunity for other parties to provide context, cross examination, or responsive evidence at the hearing. The Commission should therefore exclude CUB’s cross-examination exhibits.

ARGUMENT

1. The Commission Should Exclude CUB’s Cross-Examination Exhibits for Lack of Foundation

CUB’s motion to admit its cross-examination exhibits should be denied because these exhibits lack foundation. Foundation is a basic requirement for the admission of any exhibit as evidence.³ Where a proposed exhibit lacks foundation, the Commission excludes it from the

² CUB/200, Jenks/24-29.

³ See Ore. Rule Evid. 602 (requiring witnesses to possess personal knowledge of the matters to which they testify); Ore. Rule Evid. 702 (requiring qualification as an expert to opine on technical or specialized matters); Ore. Rule Evid. 901 (authentication of documents).

evidentiary record.⁴ No witness sponsored these exhibits in this proceeding. The exhibits are not mentioned in CUB's accompanying Declaration of Bob Jenks in support of CUB's other testimony and exhibits.

The lack of foundation is particularly problematic with the exhibits that directly express assertions and opinions regarding direct access programs. Specifically, two of the proposed exhibits, CUB/301 and CUB/302, are comments filed by PacifiCorp and Portland General Electric Company ("PGE") in the Commission's investigation into direct access issues, Docket No. UM 2024.⁵ These lengthy sets of comments, totaling 73 pages, express a wide range of opinions and assertions regarding numerous issues related to direct access in Oregon. If admitted, these assertions and opinions in CUB's proposed exhibits would appear to have the effect of expert testimony typically admitted in Commission proceedings through successive rounds of pre-filed testimony. But in the case of CUB's exhibits offered here, there is no expert in this proceeding that has sponsored such opinions and assertions, and such opinions and assertions are completely without foundation. Expert opinion testimony must be supported by foundation.⁶ Here, the most basic foundation of a sponsoring witness is lacking. On that basis alone, CUB's cross-examination exhibits should be excluded.

⁴ See *In the Matter of Pacific Power and Light Co.: Oregon Committee for Fair Utility Rates and Utility Reform Project*, Docket No. UK 21, Order No. 84-898, 1984 ORE. PUC LEXIS 4, *13, n. 4 (Nov. 14, 1984) (noting exhibits were properly excluded for lack of foundation where witness did not properly identify exhibits).

⁵ CUB's remaining cross-examination exhibit, CUB/300, is a presentation by PacifiCorp of a short-list analysis for PacifiCorp's recent request for proposals. The relevance and purpose of this exhibit is not apparent to Calpine Solutions. To the extent CUB seeks to rely on that exhibit in support of CUB's arguments regarding the Consumer Opt-Out Charge, Calpine Solutions objects to its admission into the record. To the extent its admission is expressly limited for purposes of some other use, Calpine Solutions does not object.

⁶ *Kingsbury v. Hickey*, 56 Or App 492, 496, 642 P2d 339, *rev den* 293 Or 146 (1982).

2. While Lack of Foundation Alone Warrants Exclusion, CUB's Cross-Examination Exhibits Should Also Be Excluded to Prevent Unfair Prejudice

Aside from the lack of foundation for CUB's exhibits, the Commission should exclude the exhibits because admitting them into the evidentiary record would be unfair and prejudicial. Under the Commission's administrative rules, even relevant evidence "[m]ay be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay."⁷ Additionally, the Commission's hearing process is intended "to ensure that persons affected by agency action . . . are able to respond to all evidence and argument offered by other parties."⁸

As noted above, CUB's proposed exhibits contain opinions and assertions made by parties other than CUB in other proceedings. The exhibits are not offered to impeach anyone's testimony in this proceeding, but instead are apparently offered to buttress and support CUB's own position. In effect, CUB seeks to use its proposed cross-examination exhibits to present a whole new round of testimony in this proceeding in support of its position – and to do so without any other party having the opportunity to cross examine such assertions or provide any responsive evidence to the new assertions made in CUB's new exhibits.

Under the Commission's hearing process, parties were afforded multiple rounds of pre-filed testimony to raise issues related PacifiCorp's transition adjustment mechanism, and then the hearing was held to allow for cross-examination of witnesses' pre-filed testimony. After cross-examination and introduction of cross-examination exhibits, an opportunity for re-direct testimony is provided to clarify and respond to any new matters introduced through cross

⁷ OAR 860-001-0450(1)(c).

⁸ *In the Matter of Pub. Utility Comm'n of Ore., Amending Internal Operating Guidelines*, Docket No. UM 2055, Order No. 20-386, at Attach. A at 15 (Oct. 27, 2020).

examination and cross-examination exhibits. In this case, CUB was provided two rounds of testimony to address the Consumer Opt-Out Charge issue and the opportunity to cross examine other parties' witnesses, including Calpine Solutions' witness who supplied two rounds of testimony on the subject. Had CUB introduced such exhibits through cross-examination, Calpine Solutions at least would have had the opportunity to address its disagreements with the assertions contained in CUB's cross-examination exhibits through re-direct testimony. But as proposed for admission there was no such opportunity.

Again, two of the exhibits, CUB/301 and CUB/302, are particularly problematic because they are substantive comments filed by PacifiCorp and PGE in Docket No. UM 2024. Calpine Solutions does not agree with many of the assertions in those comments, and it filed response comments in Docket No. 2024 expressing its disagreements. The procedural schedule proposed in that docket will likely call for discovery, testimony, and an evidentiary hearing, with a final decision not likely until the middle of next year. Admitting as evidence in this docket the two isolated sets of preliminary comments by PGE and PacifiCorp from UM 2024 without any context or any of the responsive comments filed in UM 2024 is highly prejudicial.

Notably, there was ample opportunity to present arguments being made in UM 2024 through witnesses in this proceeding, but no witness did so. PacifiCorp filed three rounds of testimony in this proceeding, but its witness only briefly mentioned UM 2024 in less than a page of testimony and did not present the opinions and assertions presented in PacifiCorp's comments from UM 2024 as evidence in this proceeding.⁹ Likewise, CUB's witness briefly mentioned CUB's own comments regarding direct access cost shifts in UM 2024,¹⁰ but CUB's witness did

⁹ PAC/1500, Meredith/5.

¹⁰ CUB/200, Jenks/26-29.

not express many of the opinions and assertions in the 73 pages of exhibits it now proposes for admission and certainly did not provide 73 pages of testimony on the subject. PGE is not even a party to this case, and it is not readily apparent how its assertions in UM 2024 regarding its own direct access programs have any bearing on PacifiCorp's rates to be set in this case. It is unfair to allow such opinions and assertions to be admitted as evidence after the hearing. And if the Commission were to admit these exhibits as probative to the Consumer Opt-Out Charge issue in this proceeding, it would necessarily need to provide other parties the opportunity to present responsive opinions and assertions that have been made so far in Docket No. UM 2024. But that is not feasible without undue delay.

Additionally, while the Commission may generally take official notice of documents contained in its records, official notice is analogous to judicial notice and may only be taken of uncontestable facts.¹¹ Official notice may be taken of certain matters in lieu of formal proof where those matters are indisputably true, but such notice may not be taken of contested facts or opinions.¹² For example, official notice could be taken of the fact that the comments were filed in the other proceeding, but assertions and opinions contained in such comments cannot become evidence used for the truth of the matters asserted in this proceeding through the use of official notice.¹³ Thus, the assertions and opinions in the CUB's proposed exhibits are not properly subject to official notice. In any event, even if the facts asserted in CUB's exhibits could be

¹¹ OAR 860-001-0460.

¹² See, e.g., *Arlington Educ. Ass'n v. Arlington Sch. Dist. No. 3*, 177 Or App 658, 663–668, 34 P3d 1197 (2001) (agency erred to take official notice of contents of a letter located in the administrative record but not properly admitted as evidence into the proceeding); *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal App 4th 471, 482–484 (2010) (court may “not take judicial notice of the truth of any factual assertions” within pleadings filed in separate court action).

¹³ See *Arlington Educ. Ass'n*, 177 Or App at 665 (noting the “distinction between judicially noticing the existence of a court record and noticing the truth of the contents of that record” (internal quotation omitted)).

subject to official notice, parties would need to be provided 15 days to respond to any officially noticed facts after notice is taken of specific facts asserted in CUB's exhibits,¹⁴ which would further unduly delay the proceedings and the briefing schedule.

Thus, admitting CUB's proposed cross-examination exhibits into the evidentiary record would subvert the entire hearing process and deprive Calpine Solutions of its due process right to respond to the evidence presented by other parties.

CONCLUSION

For the reasons stated above, the Commission should exclude CUB's cross-examination exhibits, which are numbered CUB/300, CUB/ 301, and CUB/302.

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¹⁴ OAR 860-001-0460(2).