

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1209

In the Matter of)	
)	THE JOINT PARTIES' MOTION FOR
)	CERTIFICATION
MIDAMERICAN ENERGY HOLDINGS)	
COMPANY)	
)	
Application for Authorization to Acquire)	
Pacific Power & Light, dba PacifiCorp.)	
_____)	

I. Introduction

Pursuant to OAR 860-013-0031, 860-012-0035(1)(i), and 860-014-0091, the Citizens' Utility Board ("CUB"), the Industrial Customers of Northwest Utilities ("ICNU"), Community Action Directors of Oregon and the Oregon Energy Coordinators Association ("CADO/OECA"), Renewable Northwest Project ("RNP"), and NW Energy Coalition ("NWEC") (collectively, the "Joint Parties")¹ submit this Motion for Certification of the August 4, 2005 Ruling (the "Ruling") establishing the procedural schedule in Public Utility Commission of Oregon ("OPUC" or the "Commission") Docket No. UM 1209. The Commission Staff does not oppose this motion. The Joint Parties request that the Administrative Law Judge ("ALJ") certify the Ruling to the Commission because the schedule adopted in the Ruling will result in unnecessary and undue prejudice to Intervenor such as the Joint Parties. The parties at the prehearing

¹ The City of Portland also has stated that it supports this Motion. Counsel for the City attended the prehearing conference on August 2, 2005, but the City has not submitted a petition to intervene as of the date of this Motion.

conference agreed to, and proposed that the ALJ adopt, a schedule that was less expedited than the one established in the Ruling (the “Proposed Schedule”). The Ruling rejected the Proposed Schedule without explanation² and adopted a more expedited schedule that shortens these proceedings by approximately four weeks (the “Adopted Schedule”). The shortening of the schedule comes largely at the expense of Intervenors, which unduly prejudices the Joint Parties’ ability to fully and adequately participate in all aspects of this proceeding. In the event that the ALJ certifies the Ruling to the Commission, the Joint Parties request that the Commission consider the arguments in this Motion and adopt the Proposed Schedule agreed to at the prehearing conference.

II. Motion for Certification

The Joint Parties move that the ALJ certify to the Commission the question of the procedural schedule for this proceeding. OAR §§ 860-014-0091 and 860-012-0035(1)(i) govern certification of ALJ rulings to the Commission. OAR § 860-012-0035(1)(i) authorizes an ALJ to “[c]ertify a question to the Commission for consideration and disposition.” OAR § 860-014-0091(1)(a) provides:

A ruling of the [ALJ] may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR § 860-012-0035(1)(i), upon a finding that the ruling: (a) May result in substantial detriment to the public interest or undue prejudice to any party; or (b) Denies or terminates any person’s participation.

² On August 5, 2005, an errata ruling regarding the schedule was issued. The errata ruling states: “I understand the parties have concerns that I did not adopt the schedule proposed at the prehearing conference. The schedule ultimately adopted uses some of the dates and events in the proposed schedule, but modified other events to better serve the needs of the Commission to develop a sound factual record and arguments in a timely fashion.”

In addition to the grounds for certification stated in this rule, ALJs have granted motions for certification for other reasons. See Re Qwest Corp., OPUC Docket No. UM 1025, Order No. 03-533 at 1 (Aug. 28, 2003). For example, a motion for certification was granted in UM 1025 because the ALJ found that the disputed issue concerned a matter of first impression for the Commission. *Id.* Certifying the question of the procedural schedule in this proceeding is appropriate because the Adopted Schedule will result in undue prejudice to the Joint Parties.

A. The More Expedited Adopted Schedule Unnecessarily and Unduly Prejudices the Joint Parties

The parties at the August 2, 2005 prehearing conference agreed to an expedited, but acceptable, schedule to review MidAmerican Energy Holding Company's Application to Acquire PacifiCorp in this proceeding.³ The parties agreed on the Proposed Schedule only after extended discussions that involved compromise on the part of all those involved. The Ruling, however, rejected the Proposed Schedule and adopted a more expedited schedule without providing any explanation for doing so. The more truncated Adopted Schedule accelerates these proceedings by roughly four weeks, and the shortening of the schedule comes largely at the expense of the time that Staff and intervenors have to prepare initial testimony. This modification, along with the shortening of the intervals in the second half of the schedule in general, will result in unnecessary and undue prejudice to Intervenors such as the Joint Parties.

³ The Ruling states that the following parties attended the prehearing conference: MidAmerican Energy Holdings Company, PacifiCorp, Idaho Power Company, the City of Portland, Pacific Coast Federation of Fishermen's Associations, the Yurok Tribe, the Utility Workers Union of America, the Karuk Tribe, the Utility Reform Project, and the Hoopa Valley Tribe, and each party listed as one of the "Joint Parties" submitting this Motion. Ruling at 1.

Both the Proposed Schedule agreed to by the parties at the prehearing conference and the Adopted Schedule are depicted in the following table.

Event	Proposed Schedule (P)	Adopted Schedule (A)	Intervals
Application Filed	July 15, 2005	July 15, 2005	
Applicants letter on effects of PUHCA repeal on Application	Not Included	Aug 22, 2005	
Deadline for Petitions to Intervene and Submit Intervenor Budgets	Not Included	Aug 29, 2005	
Workshops	Aug. 29-30, 2005	Aug. 29-30, 2005	
Opening Comments	Oct. 14, 2005	Oct 14, 2005	
Settlement Conference	Oct. 24, 2005	Oct. 24, 2005	
Workshop/Issues Presentation	Nov. 3, 2005	Oct. 25, 2005 ⁴	
Applicants' Supplemental Direct Testimony	Oct. 28, 2005	Oct 28, 2005	P: 104 days A: 104 days
Settlement Conference	Nov. 7, 2005	Nov. 7, 2005	
Staff & Intervenor Testimony	Dec. 12, 2005	Nov. 21, 2005	P: 45 days A: 24 days
All Parties' Rebuttal Testimony	Jan. 9, 2006	Dec. 12, 2005	P: 28 days A: 21 days
Executive Summary and Cross-Examination Statements	Jan. 13, 2006	Dec. 21, 2005	P: 4 days A: 9 days
Opening presentations to Commissioners	Not Included	Jan. 4, 2006	A: 14 days
Hearings	Jan. 23-24, 2006	Jan. 5-6, 2006	A: 1 day
Opening brief (all parties)	TBD	Jan. 27, 2006	A: 22 days
Reply brief (all parties)	TBD	Feb. 10, 2006	A: 11days

1. The Shortening of the Time for Staff and Intervenor's to Submit Initial Testimony Prejudices the Joint Parties

As this table demonstrates, the Adopted Schedule is more accelerated than the Proposed Schedule beginning with the due date for Staff and Intervenor initial testimony. Under the Adopted Schedule, Staff and Intervenor initial testimony is due twenty-one

days sooner than under the Proposed Schedule. This change is unnecessarily prejudicial given that the Applicant and PacifiCorp, which were the only parties supporting a six-month schedule, agreed to the less expedited process in the Proposed Schedule. This change is unduly prejudicial in that the shortening of the time for Staff and Intervenors to prepare initial testimony is the primary means by which the Adopted Schedule shortens the Proposed Schedule, and this modification affects only Staff and Intervenors. There is no reduction in time for a particular event in the Adopted Schedule that applies uniquely to the Applicant and PacifiCorp; any shortening of the schedule that applies to the Applicant and PacifiCorp under the Adopted Schedule applies to Intervenors as well. Intervenors should not bear the burden of achieving a shortened schedule when no Intervenor supported such a schedule.

The fact that the Adopted Schedule retains the same date as the Proposed Schedule for the Applicants' supplemental testimony only highlights the undue prejudice to Staff and Intervenors. The Adopted Schedule provides the Applicant and PacifiCorp the same amount of time to prepare supplemental testimony as they would have had under the Proposed Schedule, but ensures that Staff and Intervenors have three weeks less time to review the supplemental testimony and prepare a response. Indeed, the Proposed Schedule provided forty-five days between the dates that the Applicants file supplemental direct testimony and Staff and Intervenors file initial testimony. The Adopted Schedule, however, provides only twenty-one days.

This shortened interval between the Applicant's supplemental testimony and the Staff and Intervenor initial testimony will severely curtail the opportunity to conduct

⁴ The Proposed Schedule included a workshop with the Commission to be held on November 3, 2005. The Ruling indicates that issues presentations were scheduled in lieu of this workshop.

meaningful discovery regarding any new issues raised in the supplemental testimony. In fact, given the ten-business-day response time for data requests under the OPUC rules, the Adopted Schedule provides only a five-day window after the Applicant files supplemental testimony for Staff and Intervenors to submit data requests in order to receive responses prior to the due date for Staff and Intervenor initial testimony. Furthermore, even if a party submits a data request within the five-day window and receives the response in ten business days, the Adopted Schedule provides no ability to submit follow-up requests regarding that response and receive responses prior to filing testimony. In other words, Staff and Intervenors are uniquely prejudiced by the more expedited process in the Adopted Schedule in a way that the Applicants and PacifiCorp are not.

The shortening of the time for Staff and Intervenors to submit initial testimony is especially problematic given that the initial testimony is the *only* opportunity that Staff and Intervenors will have to submit evidence to respond to the Applicant's testimony. Although the Proposed Schedule and the Adopted Schedule provide Staff and Intervenors the opportunity to submit rebuttal testimony, that testimony will respond to issues raised by Staff and other Intervenors rather than the Applicant.⁵ The Staff and Intervenor response to the Applicant's proposals likely will be much more important and helpful for the Commission than the Staff and Intervenor responses to each other. Under these circumstances, shortening the time for Staff and Intervenors to respond to the Applicant's

⁵ Ruling at 3.
Rebuttal testimony typically is reserved for responding to issues raised in the immediately preceding round of testimony. The testimony that will immediately precede the Staff and Intervenor rebuttal testimony is the Staff and Intervenor initial testimony. As a result, Staff and Intervenor Rebuttal testimony will respond to issues raised by parties other than the Applicants.

testimony by over three full weeks was among the most prejudicial modifications to the Proposed Schedule that could have been made.

2. The Burden of Holding Opening Presentations One Day Before the Hearing Outweighs the Benefit

The addition of the opening presentations to Commissioners one day before the hearing is prejudicial in that it will limit the time to prepare for the hearing, but will consist only of argument based on an incomplete record that already will have been summarized in writing. Scheduling the opening presentation to the Commissioners the day before the hearing limits the time to prepare cross-examination exhibits and questions immediately before the hearing. Considering that the opening presentations and hearing under the Adopted Schedule immediately follow the holiday season during late December and early January, the prejudice that results from limiting hearing preparation by even one day is undue and unnecessary. No party is served by limiting hearing preparation time, because limiting such preparation will ensure that the hearing does not produce the most complete record possible.

In addition, scheduling the opening presentations to the Commission one day before the hearing is procedurally awkward. The opening presentations will be based on a limited evidentiary record that likely will be substantially supplemented the very next day at hearing. The Ruling indicates that no evidence will be accepted into the record during the opening presentations. Ruling at 2 (“If factual questions arise [in the opening presentations], the Commissioners may also participate in the hearing to ask questions of appropriate witnesses on supplemental direct examination.”) Thus, the arguments presented to the Commission will be limited to those based on evidence in the record. At that point, the only evidence in the record will include prefiled testimony and exhibits

and the parties already will have provided written arguments regarding that evidence in testimony and summarized those arguments in the executive summaries. As a result, parties will make opening arguments based on a limited evidentiary record on January 4, 2006, but will submit new evidence into the record the very next day. Although the Joint Parties do not object to holding opening presentations to the Commissioners, the prejudice that results from limiting the preparation time for hearing one day after the New Year holiday far outweighs the benefit of orally presenting arguments about a limited subset of evidence that the parties already will have summarized in writing.

B. The Adopted Schedule Departs Significantly From The Schedule Followed in UM 1121

The prejudice to the parties of the truncated Adopted Schedule is evident in light of the substantially more lengthy schedule adopted by the Commission in Docket UM 1121, in which Oregon Electric Company and Texas Pacific Group submitted an ORS § 757.511 application to acquire Portland General Electric. The UM 1121 proceedings took approximately one year to complete and Intervenors had significantly more time to conduct discovery and prepare testimony in that proceeding than they will under the Adopted Schedule. Re Oregon Electric et al., OPUC Docket No. UM 1121, Order No. 05-114 at 10-14 (Mar. 10, 2005). Furthermore, the UM 1121 applicants also requested a six-month process to review their application; however, the schedule in that proceeding clearly placed the burden of expediting any process on the applicants rather than Staff and Intervenors. The schedule adopted in UM 1121, along with the Adopted Schedule, is depicted in the table below.

Event	UM 1121 Schedule (U) ⁶	Adopted Schedule (A)	Intervals
Application Filed	Mar. 8, 2004	July 15, 2005	U/A: 0 days
Applicants letter on effects of PUHCA repeal on Application	Not Included	Aug 22, 2005	
Deadline for Petitions to Intervene and Submit Intervenor Budgets	Apr. 29, 2004	Aug 29, 2005	
Workshops	May 6-7, 2004	Aug. 29-30, 2005	
Opening Comments	Not Included	Oct 14, 2005	
Settlement Conference	Not Included	Oct. 24, 2005	
Applicants' Supplemental Direct Testimony	May 27, 2004	Oct 28, 2005	U: 80 days A: 104 days
Settlement Conference	June 8, 2004	Nov. 7, 2005	
Staff & Intervenor Testimony	July 21, 2004	Nov. 21, 2005	U: 55 days A: 24 days
Applicants' (U) or All Parties' (A) Rebuttal Testimony	Aug. 16, 2004	Dec. 12, 2005	U: 26 days A: 21 days
Staff & Intervenor Surrebuttal Testimony	Sept. 22, 2004	Not Included	U: 37 days
Applicants' Sursurebuttal Testimony	Oct. 11, 2004	Not Included	U: 19 days
Executive Summary and Cross-Examination Statements	Not Included	Dec. 21, 2005	A: 9 days
Opening presentations to Commissioners	Not Included	Jan. 4, 2006	A: 14 days
Hearings	Oct. 19-21, 2004	Jan. 5-6, 2006	U: 8 days A: 1 day
Opening brief (all parties)	Nov. 17, 2004	Jan. 27, 2006	U: 27 days A: 22 days
Reply brief (all parties)	Dec. 3, 2004	Feb. 10, 2006	U: 16 days A: 11days
Oral Argument	Dec. 13, 2004	Not Included	U: 10 days
Commission Order	Mar. 10, 2005	TBD	U: 87 days

The comparison of the UM 1121 schedule with the Adopted Schedule is informative in several respects. From a broad perspective, the UM 1121 schedule included 158 business days from when the application was filed to the hearing date. In

⁶ The schedule initially set in UM 1121 was amended on June 23, 2004. This table reflects the amended dates for those dates that occurred after June 23, 2004.

contrast, the Adopted Schedule includes only 118 working days, and this period encompasses the Thanksgiving, December, and New Year holidays, which decreases the practical number of working days by an even greater amount. Developing the record on all aspects of the proposed transaction will be extremely important in this proceeding, and that development will occur only if parties have adequate time to conduct and analyze discovery, prepare testimony, and present arguments to the Commission. The Adopted Schedule achieves an expedited process at the expense of Intervenors opportunity to complete these tasks. No entity involved in this proceeding, including the Commission, will be served by a decision made on an incomplete record. The UM 1121 order includes a summary of the substantial factual record developed in that proceeding. OPUC Docket No. UM 1121, Order No. 05-114 at 10-14.

The Adopted Schedule also does not reflect the amount of time that was devoted to settlement in UM 1121 and that likely will be devoted to that cause in this case. The Adopted Schedule provides for two days of settlement conferences; however, settlement discussions likely will actually take up significantly more time. In UM 1121, parties participated in a total of twelve days of settlement conferences, along with additional meetings between the applicants and individual parties. The Ruling indicates that a moderator may be used in this Docket to, among other things, “smooth the progress of talks between the parties,” indicating an emphasis on creating the opportunity to reach agreement in this proceeding. Ruling at 2. The Adopted Schedule provides the parties time to create the record to contest the Application or to work toward a settlement, but not both.

In addition, the applicants in UM 1121 also requested review according to a six-month schedule; however, in attempting to achieve a more expedited review, the schedule in UM 1121 shortened the response times specific to the applicants rather than those for Staff and Intervenors. Indeed, the Applicants' supplemental testimony was due eighty days after the application was filed in UM 1121, whereas in this case it is due 104 days later. Staff and Intervenor initial testimony in UM 1121 was due fifty-five days after the applicants filed supplemental testimony, and Staff and Intervenors had thirty-seven days to respond to the applicants' rebuttal testimony. In contrast, the UM 1121 applicants had only twenty-six days to respond to Staff and Intervenor initial testimony and only nineteen days to respond to surrebuttal testimony. In UM 1209, however, the Applicant and PacifiCorp do not bear the burden of any shortened response time that does not apply to all other parties as well. The UM 1121 applicants' acceptance of the burden of moving the schedule along in that proceeding is much different than in this Docket, in which the burden of an expedited schedule has been forced upon Staff and Intervenors.

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For all the reasons stated above, the Joint Parties request that the ALJ certify the Ruling to the Commission, and that the Commission adopt the Proposed Schedule stated in this Motion.

Dated this 10th day of August, 2005.

Respectfully submitted,

Citizens' Utility Board

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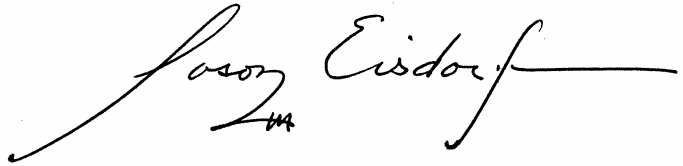
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2005, I served the foregoing Joint Motion for Certification of the Citizens' Utility Board of Oregon, the Industrial Customers of Northwest Utilities, Community Action Directors of Oregon and the Oregon Energy Coordinators Association, the Northwest Energy Coalition, and the Renewable Northwest Project in docket UM 1209 upon each party listed below, by email, or, when not available, by mail, postage prepaid, and upon the Commission by email and by sending 6 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,



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