

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

2010 WHOLESALE POWER)		
AND TRANSMISSION RATE)	Docket Number	BPA-10
ADJUSTMENT PROCEEDING)		WP-10
)		TR-10

**MOTION OF BONNEVILLE POWER ADMINISTRATION
TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY
OF M-S-R PUBLIC POWER AGENCY**

INTRODUCTION

Pursuant to section 1010.11(d) of the Procedures Governing Bonneville Power Administration (BPA) Rate Hearings, 51 Fed. Reg. 5611 (1986), BPA moves for an order striking the following portions of the Rebuttal Testimony filed by M-S-R Public Power Agency (“MSR”), TR-10-E-MS-03 and WP-10-E-MS-05:

Page 1, Lines 22 through 31;

Page 3, Line 27 through Page 4, Line 5;

Page 6, Lines 5 through 13;

Page 6, Line 17 through to the sentence that ends on Line 29; and

Page 6, Line 30 beginning with “BPA should” through Page 7, Line 26.

The reasons for this motion are described below.

Discussion

The Special Rules of Practice to Govern These Proceedings, Order WP-10-HOO-02, state:

Rebuttal

Rebuttal evidence must refer to the specific evidence being refuted (pages, lines, topic). Such topical references must be neutral.

New affirmative matter (not in reply to another litigant's direct case or not a proper response to relevant cross-examination) may not be included in rebuttal evidence.

Section 1010.11(2) of the Rules of Procedure Governing Rate Hearings states:

(2) Any rebuttal to BPA's direct case must be contained in a party's direct testimony, which shall also contain any affirmative case that party wishes to present. Any subsequent rebuttal testimony permitted by the hearing officer shall be limited to rebuttal of the parties' direct case.

The portions of MSR's rebuttal testimony cited above are in direct contravention of these rules regarding rebuttal testimony. The cited testimony does not refer to specific evidence being refuted, but instead raises new affirmative matters that amount to improper rebuttal of BPA's direct case. In addition, MSR raises several issues and arguments that were not offered in any parties' direct case, such as equitable allocation (Page 1) and Black box settlement (Page 6-7). MSR should have raised such matters in its direct case instead of on rebuttal of the issues.

The restrictions on rebuttal testimony are necessary to protect rate case parties and BPA by not allowing any party to enter new evidence, issues, and arguments into the record through rebuttal testimony, without affording other parties or BPA the opportunity to respond through testimony to the new evidence, issues, and arguments. Under different circumstances, allowing sur-rebuttal to new issues raised in rebuttal testimony may be appropriate. As is the case with some issues that BPA included in its rebuttal testimony, a party may make a motion to allow for sur-rebuttal for new issues. MSR has filed no such motion in regard to its rebuttal testimony. Notably, because this proceeding is on a very tight schedule, any additional unanticipated sur-rebuttal of MSR's new issues would be burdensome on BPA and other parties. Striking MSR's rebuttal testimony is appropriate because: (1) schedule constraints make the scheduling of additional

sur-rebuttal problematic; (2) MSR failed to recognize and adhere to the applicable rules pertaining to rebuttal testimony; and (3) MSR has not filed a timely motion, nor has an order been issued, to allow for sur-rebuttal on the new evidence presented in its Rebuttal Testimony.

Although almost all of MSR's rebuttal testimony is focused on refuting BPA's direct case, BPA is not moving to strike the sections of MSR's rebuttal testimony that at least make a passing reference to another party's direct case.

CONCLUSION

For the reasons stated above, BPA respectfully requests the Hearing Officer to grant BPA's Motion to Strike the portions of MSR's rebuttal testimony identified above.

DATED April 28, 2009.

RESPECTFULLY SUBMITTED,

/s/ Todd E. Miller (by electronic filing)

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