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

2020 RATE PROCEEDING	)	Docket Number BP-20

ORDER DENYING JP01 MOTION TO FILE SURREBUTTAL AND TO STRIKE

BACKGROUND:

On April 8, 2019, Joint Party 1 filed a "Motion to File Surrebuttal on Portions of the Rebuttal Testimony of PPC, Powerex, and BPA; Motion to Strike" (the "Motion," at BP-20-M-JP01-03). Joint Party 1 filed proposed surrebuttal testimony concurrently with the Motion.

Bonneville[1] filed an answer (the "Bonneville Answer," at BP-20-M-BPA-05) responding to the portions of the Motion seeking to file surrebuttal directed at Bonneville rebuttal testimony and seeking to strike certain parts of Bonneville's rebuttal testimony.

Powerex Corp. ("Powerex") and the Public Power Council ("Power Council"), together as Joint Party 4, filed an answer (the "Joint Party 4 Answer," at BP-20-M-JP04-01) responding to the portion of the Motion seeking to file surrebuttal testimony. The Power Council also filed an answer individually (at BP-20-M-PP-01) in response to the portion of the Motion seeking to strike parts of the Power Council's rebuttal testimony.

For the reasons explained below, Joint Party 1's Motion is denied in its entirety.

MOTION TO FILE SURREBUTTAL:

Although Joint Party 1 states that the Rules are "silent as to when surrebuttal testimony is permitted" (Motion at 4), Section 1010.13(a)(5), which governs the opportunity for Litigants to file rebuttal in this proceeding, provides:

> Litigants shall be provided an adequate opportunity to offer refutation or rebuttal of any material submitted by any other Party or by Bonneville. Any rebuttal to Bonneville's direct case must be included in a Party's direct testimony, along with any affirmative case that Party wishes to present. **Any subsequent rebuttal testimony must be limited to rebuttal**

[1] Capitalized terms not otherwise defined in this order have the meanings given to them in Bonneville's Rules of Procedure.

> **of the Parties' direct cases.** New affirmative material may be submitted in rebuttal testimony only if in reply to another Party's direct case. No other new affirmative material may be introduced in rebuttal testimony. Rebuttal testimony must refer to the specific material being addressed (pages, lines, topic). (Emphasis added.)

This language expressly limits rebuttal testimony to Parties' direct cases.[2] Rebuttal after Parties file their direct cases can be directed neither at Bonneville's direct case (because that opportunity was already provided concurrently with Parties' opportunity to file their direct cases) nor at any filing other than another Party's direct case.

While Joint Party 1 accurately notes that there have been previous Bonneville rate cases when surrebuttal was not only permitted, but requested (Motion at 2), there are two important distinctions relevant to the Motion in this proceeding. First, in each of the instances cited by Joint Party 1, Bonneville supplemented its direct case after the initial filing (that is, at the rebuttal stage), and invited responsive surrebuttal (in that context, the Parties' first and only bite at the apple for Bonneville's supplemental direct testimony).[3] Bonneville did not offer Parties a *second* bite at the apple to rebut other Parties' (or Bonneville's) previously filed rebuttal.

Second, those proceedings were conducted under Bonneville's former procedural rules (the "Rules of Procedure Governing Rate Hearings"). Those rules included language (in the analogue to current Section 1010.13(a)(5)) that expressly contemplated surrebuttal. The applicable section of the former rules (Section 1010.11(a)(2)) stated:

> 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 cases. **In lieu of cross-examination, the hearing officer is encouraged to allow the filing of surrebuttal testimony on an issue**."[4]

---

[2] In its answer, Bonneville also notes that "[c]ontrary to [Joint Party 1]'s claim, the procedures for this proceeding provide the answer. The procedural rules call for the Hearing Officer to adopt a procedural schedule, and the schedule adopted by order of the Hearing Officer does not provide for the filing of testimony after rebuttal." Bonneville Answer at 4 (citations omitted).

[3] *See* WP-10-M-BPA-08; WP-10-HOO-26; BP-12-M-BPA-15; BP-12-HOO-53; BP-16-M-BPA-03; and BP-16-HOO-11.

[4] Emphasis added. Bonneville's former rules, the Rules of Procedure Governing Rate Hearings, do not appear to be readily available on the Bonneville Website. For ease of reference, an excerpt of the former rules with the text of Section 1010.11(a)(2) of those rules is included as Attachment A to this order.

Joint Party 1 states that the Hearing Officer should permit its requested surrebuttal to comply with Section 7(i)(2)(A)[5] of the Pacific Northwest Electric Power Planning and Conservation Act (the "Northwest Power Act"), which governs Bonneville ratemaking. Motion at 5. The relevant provision states:

> [A]ny person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator.

Joint Party 1's reading of Section 7(i)(2)(A) of the Northwest Power Act would lead to an interpretive rule with no limiting principle. If the intended meaning of this language (which is echoed in the first sentence of Section 1010.13(a)(5) of Bonneville's Rules) is as Joint Party 1 suggests, then there would be literally no valid end to the rebuttal stage of a Bonneville rate proceeding. Any Litigant against whom rebuttal or surrebuttal was filed would be deprived of *its* statutorily mandated opportunity to "offer refutation or rebuttal of *any* material submitted by any other person or the Administrator" if not permitted yet another round of surrebuttal.

A more workable reading of the passage is that the phrase "any material" in Section 7(i)(2)(A) encompasses Litigants' direct cases, not rebuttal. This is consistent with the Rules Bonneville has adopted to implement Section 7(i) of the Northwest Power Act.[6]

Joint Party 1 emphasizes the Hearing Officer's fundamental responsibility to develop a "full and complete record" as required by Section 7(i)(2)[7] of the Northwest Power Act. Motion at 1, 4, 5, and 12. Joint Party 1 is correct, but it is also true that the Hearing Officer must carry out this responsibility so as to harmonize all provisions of Section 7(i) and comply with the Rules Bonneville has adopted to govern proceedings conducted under Section 7(i).[8]

Joint Party 1 states that in the rebuttal testimony of *Graessley et al*. (the "Bonneville Rebuttal," at BP-20-E-BPA-25), Bonneville made "claims, raised for the first time in rebuttal, of substitutes for hourly transmission service." Motion at 8. Bonneville points out that Joint Party 1 raised "substitutability" in its direct case, both by the introduction of excerpts from the BP-18 rate case and in its direct testimony in this proceeding, "faulting Bonneville for not considering it more in the preparation of the Initial Proposal." Bonneville Answer at 8 (citing to testimony of Peters on behalf of Joint

---

5 16 U.S.C. § 839e(i)(2)(A).

6 *See, generally, Bonneville Power Administration, Final Rules of Procedure,* 83 Fed. Reg. 39,993 (Aug. 13, 2018). There are no proceedings pending that contend the Rules do not comport with the Northwest Power Act.

7 16 U.S.C. § 839e(i)(2).

8 *See, for example, Rodriguez v. Holder Jr.*, 619 F.3d 1077, 1079 (9th Cir. 2010) ("We read the words of the statute in their context and with a view to their place in the overall statutory scheme. We interpret each provision to fit harmoniously as part of a symmetrical and coherent statutory scheme." (internal citation and quotation marks omitted)). *See also* Section 1010.3 of Bonneville's Rules.

Party 1 at BP-20-E-JP01-01, 21-22, as well as excerpts from the BP-18 Record at BP-20-E-JP01-01-AT04). After reviewing the direct testimony of Peters, its accompanying attachments, and the Bonneville Rebuttal, I find the discussion of substitutability in the Bonneville Rebuttal responds to Joint Party 1's direct case, and is therefore properly within the scope of Section 1010.13(a)(5) and does not support Joint Party 1's request to file surrebuttal.

Joint Party 1 also characterizes the failure of Powerex and the Power Council to file direct testimony as "act[ing] in a manner prejudicial" to Joint Party 1, faulting as well their failure to "seek explanations from [Joint Party 1] in discovery regarding the various perceived shortcomings of [Joint Party 1]'s econometric analysis." Motion at 6.

Nothing in Section 7(i) or in Bonneville's Rules states, or even implies, that a Party's right to "offer refutation or rebuttal of any material submitted by any other person or the Administrator" is contingent on submitting direct testimony or propounding Data Requests.[9] Powerex and the Power Council note in their answer that Joint Party 1 "does not allege that Powerex or [the Power Council] in any way violated the Rules, Hearing Officer orders, or any statutes." Joint Party 4 Answer at 5.

To overlay by interpretation of statute or rule the principle for which Joint Party 1 advocates would be ill-advised. Following it to its logical conclusion, it would, in effect, charge every Party in a Bonneville proceeding with anticipating the direct case of every other Party, and filing responsive direct case testimony, as a condition to exercising the right of rebuttal.

With respect to Joint Party 1's concerns about prejudice (Motion at 6, 12), there is recourse in the remaining stages of this proceeding and in Bonneville's Rules. To the extent Joint Party 1 could not and did not anticipate the critiques leveled at its direct case testimony in the rebuttal testimony of Bonneville, Powerex, or the Power Council, Joint Party 1 has at least three (and potentially four, depending on how the Administrator resolves contested issues in his Draft Record of Decision) opportunities to introduce into the record its assessments of these critiques: in cross-examination,[10] in its initial brief, at oral argument, and, if warranted, in a brief on exceptions. Of particular note here is the text of Section 1010.17(b) of Bonneville's Rules (governing initial briefs), which provides the following:

---

[9] Bonneville's Rules likewise do not state or imply that Litigants are obligated at any time to submit Data Requests to other Litigants for any reason. *See, generally,* Section 1010.12 of Bonneville's Rules. Interpreting Section 7(i)(2)(A) or Bonneville's Rules to use Data Requests as means to establish the permissible scope of rebuttal would, at the very least, create problematic incentives at odds with the instruction in Section 1010.12(b)(1)(i) that "[e]ach Litigant shall be reasonable in the number and breadth of its Data Requests . . ."

[10] Based on Joint Party 1's Notice of Intent to Cross-Examine (at BP-20-M-JP01-04), Joint Party 1 does intend to cross-examine the witnesses that sponsored rebuttal testimony for Bonneville, Powerex, and the Power Council.

> At the conclusion of the evidentiary portion of a proceeding, each Party may file an initial brief. The purpose of an initial brief is to identify separately each legal, factual, and policy issue to be resolved by the Administrator and present all arguments in support of a Party's position on each of these issues. **The initial brief should also rebut contentions made by adverse witnesses in their Prefiled Testimony and Exhibits.** The initial brief must contain a final revised exhibit list reflecting the status of all of the Party's Prefiled Testimony and Exhibits, Cross-examination Exhibits, and any other exhibits, including those admitted, withdrawn, conformed, and rejected.[11]

MOTION TO STRIKE:

Bonneville Rebuttal Testimony

Joint Party 1 states that the Bonneville Rebuttal "offer[s] a new claim on rebuttal." Motion at 12. Joint Party 1 explains that "[h]ad [Bonneville] included a regression analysis in its direct testimony, [Joint Party 1] would have had some opportunity to respond." Motion at 11.

In reviewing the portion of the Bonneville Rebuttal Joint Party 1 seeks to strike, I find that, rather than introducing a wholly new element improperly withheld from its initial proposal, Bonneville used the data it obtained from Joint Party 1 through Data Requests to perform an additional run of the price regressions from Joint Party 1's direct case.[12] The passage Joint Party 1 quotes from the Bonneville Rebuttal (" . . . after better accounting for seasonality, [Joint Party 1's] regressions and variable interpretation suggest that the hourly rate increase did not have meaningful impacts on Mid-C prices, either in day-ahead or real-time markets," Motion at 12, quoting the Bonneville Rebuttal at 13) demonstrates Bonneville's purpose—not to supplement its own initial proposal, but to rebut Joint Party 1's direct case testimony.

And, even if Bonneville's variation on Joint Party 1's price regressions could be fairly characterized as new material, it would fall within the scope of Section 1010.13(a)(5), which states that "[n]ew affirmative material may be submitted in rebuttal testimony only if in reply to another Party's direct case." This passage coexists in the same subsection of the Rules that restricts rebuttal solely to other Parties' direct cases. There is no basis to conclude that a Litigant's reliance on this provision triggers a surrebuttal right for the Party whose direct case is rebutted by the new material because if that were intended, the Rule could have easily said so.[13]

---

[11] Emphasis added. Section 1010.2(u) of Bonneville's Rules eliminates any potential doubt about whether Section 1010.17(b) encompasses rebuttal testimony. It does. ("'Prefiled Testimony and Exhibits' means any testimony, exhibits, studies, documentation, or **other materials in a Litigant's direct or rebuttal case submitted** in accordance with the procedural schedule. Prefiled Testimony and Exhibits do not include pleadings, briefs, or Cross-examination Exhibits." (emphasis added)).

[12] *See* Bonneville Rebuttal at 13. *See also* Bonneville Answer at 9-10.

[13] As explained above, the predecessor to current Rule 1010.13(a)(5) did expressly address surrebuttal.

I find the Bonneville Rebuttal, and its accompany attachments, are consistent with Section 1010.13(a)(5) of Bonneville's Rules. As noted above, Joint Party 1 has, and appears prepared to avail itself of, further opportunities within the existing procedural schedule and the Rules to explain how its conclusions regarding price regressions differ from those offered in the Bonneville Rebuttal.

Power Council Rebuttal Testimony

Joint Party 1 states that the rebuttal testimony filed by the Power Council (the "Power Council Rebuttal," at BP-20-E-PP-02) "relitigates the BP-18 proceeding, quoting at length from the BP-18 Record of Decision and otherwise making the same arguments that had been made . . . in the BP-18 proceeding." Motion at 9. I have reviewed the relevant portions of the Power Council Rebuttal. I also reviewed the direct case testimony and exhibits filed by Joint Party 1, which contain extensive discussion of the BP-18 proceeding and the rationales for and consequences of the rate increase Bonneville adopted for hourly service on its Southern Intertie[14] as well as attachments with several hundred pages of excerpts from the Record in the BP-18 proceeding.[15]

I find the discussion of the BP-18 proceeding in the Power Council Rebuttal testimony to be within the scope of Joint Party 1's direct case testimony and exhibits, and therefore consistent with Section 1010.13(a)(5) of Bonneville's Rules.

ORDER:

Joint Party 1's Motion is denied in its entirety. Joint Party 1's surrebuttal testimony is rejected and will not be entered into Evidence for purposes of this proceeding. *See* Section 1010.3(e) of the Rules ("The Hearing Officer may reject or exclude all or part of any document or materials not submitted in accordance with these rules.").

SO ORDERED, April 19, 2019.

/s/ Sarah Dennison-Leonard
Sarah Dennison-Leonard
BP-20 Hearing Officer

[14] *See, for example, Peters,* BP-20-E-JP01-01 at 2-3, 7-18, 21-31, 52, and 54-55.

[15] *See, for example,* BP-20-E-JP01-AT04(01), BP-20-E-JP01-AT04(02), and BP-20-E-JP01-AT04(03).

ATTACHMENT A

Excerpt with Text of Section 1010.11(a)(2) of Bonneville's Former Procedural Rules (the Rules of Procedure Governing Rate Hearings)

(g) Sanctions. The hearing officer may remedy any refusal to comply with an order compelling answer to a data request or clarification question by:

(1) Striking the testimony or exhibits to which the question or request relates, or

(2) Limiting discovery or cross-examination by the party refusing to answer or respond, or

(3) Recommending to the Administrator that an appropriate adverse inference be drawn against the party refusing to answer or respond.

(h) Copies. Any party wishing copies of data responses should request them from the party submitting the response.

Section 1010.9 General Rate Proceedings

(a) General rule. a general rate proceeding is a hearing on the Administrator's proposal to revise all, or substantially all, of BPA's power and transmission rates in instances where the Administrator does not utilize the procedures in § 1010.10 for an expedited rate proceeding. The hearing officer may establish the procedures and conduct hearings, consistent with this rule, as necessary to develop a full and complete record and to receive public comment and argument related to the proposed rates.

Section 1010.10 Expedited Rate Proceedings

(a) General Rule. The record of decision in rate hearings conducted under this section shall be issued within 90 days after notice is issued under § 1010.3, except as provided in paragraph (b) of this section. Consistent with fairness to the parties, the hearing officer shall establish the procedures or special rules necessary to satisfy the Administrator's expedited schedule.

(b) Extensions. Only the hearing officer may request the Administrator to extend the 90-day hearing limit, on a showing of good cause by a party. Upon a determination of the hearing officer that a party's showing has merit and is not dilatory, the hearing officer may request in writing an extension of time from the Administrator. Submission of a request shall not have the effect of staying the proceedings. The Administrator shall notify the hearing officer and the parties of his determination within four days thereafter.

(c) Special procedure. Oral argument will not be heard in expedited rate proceedings, unless all parties agree to substitute oral argument for a brief on exceptions.

Section 1010.11 Testimony And Exhibits

(a) General Rule.

(1) Parties shall be provided an adequate opportunity to offer refutation or rebuttal on any material submitted by any other party or by BPA. Except as provided in § 1010.5, witnesses shall submit all testimony and exhibits at the times specified in the procedural schedule. Oral testimony will be permitted only by leave of the hearing officer.

(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 cases. In lieu of cross- examination, the hearing officer is encouraged to allow the filing of surrebuttal testimony on an issue.

(3) Written testimony must have line numbers inserted in the left-hand margin of each page. It is the responsibility of each party to obtain from the hearing officer's clerk exhibit numbers for display on prefiled testimony and exhibits.

(4) The hearing officer shall reject exhibits and other documentation of excessive length. Parties may only introduce into evidence excerpts or summaries of such documentation, which exclude irrelevant or redundant material.

(b) Items by reference. Testimony, exhibits, or studies from other BPA rate hearings may be designated as items by references in any proceeding. Items by reference should not be physically included in the record, unless the hearing officer so orders.

(c) Official notice. The administrator or the hearing officer may take official notice of any matter that may be judicially noticed by federal courts, or any matter about which BPA is expert.

(d) Motions to strike. Motions to strike prefiled testimony and exhibits shall be filed within 7 days after service. Answers to the motion may be made; however, the movant may not reply to the answer.

(e) Record of participants. Testimony and comments received pursuant to § 1010.5 shall be compiled in a separate section of the record.

(f) Sanctions. The hearing officer may reject or exclude all or part of any evidentiary material or pleading not submitted in accordance with this section.

Section 1010.12. Hearing

(a) Panels. The hearing officer may permit a party's witnesses to testify in a panel, provided that each panel member (1) has submitted a statement of qualifications, and (2) is under oath. Any panel member may respond to a cross-examination question.

(b) Cross-examination.

(1) Cross-examination shall be limited to issues relevant to the proposed rates or to issues identified in a statement of issues adopted by the hearing officer. The hearing officer may impose reasonable time limitations on the cross-examination of any witness.

(2) Only counsel for a witness may object to questions asked during cross- examination, except in instances of friendly cross-examination or where the objector can demonstrate that answers would unduly prejudice its interests.

(3) Where parties have substantially similar positions, the hearing officer may appoint lead counsel to conduct cross-examination.