

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 233

In the Matter of)
)
IDAHO POWER COMPANY) CUB AND OICIP’S REPLY TO IDAHO
) POWER COMPANY’S RESPONSE TO
) CUB AND OICIP’S MOTION TO STRIKE
Application for Authority to Increase its Rates)
and Charges for Electric Service in the State of) **EXPEDITED CONSIDERATION**
Oregon) **REQUESTED**
_____)

I. INTRODUCTION

Pursuant to ORS 756.040 and OAR 860-001-0420(6) the Citizens’ Utility Board of Oregon (CUB) and the Oregon Industrial Customers of Idaho Power (OICIP) hereby file their Reply to Idaho Power Company’s Response to CUB and OICIP’s Motion to Strike. CUB and OICIP respectfully request that they also be permitted to reply to the Idaho Power Company Response to CUB and OICIP’s Motion to Amend Procedural Schedule. CUB and OICIP filed the Motion to Amend Procedural Schedule in this docket to allow time for this Motion to Strike to be heard and also to allow CUB to engage in the additional discovery necessitated by the Company’s last minute filing, eleven days before hearing, of large amounts of new evidence never before disclosed. CUB and OICIP are also requesting additional time to file Surrebuttal Testimony in this docket. Hearing in this docket originally set for May 16, 2012, has been cancelled.

**II. REPLY TO IDAHO POWER COMPANY’S RESPONSE TO CUB AND OICIP’S
MOTION TO STRIKE**

1. *Idaho Power Company failed to fully and completely answer, or supplement its answer, to CUB Data Request 36 and should not now be permitted to stuff the record with this new information.*

CUB’s Data Request No. 36, dated January 20, 2012, stated as follows:

Idaho Power’s responses to CUB data requests 33 and 34 listed past expenditures and anticipated future expenditures related to capital and O & M at the Bridger coal plant. Please provide any studies or evaluations that demonstrate the prudence of these expenditures as opposed to investment in alternative replacement generation. In the absence of existing studies or evaluations, please provide a new analysis that demonstrates this prudence versus that of resource alternatives, especially with regard to planned future expenditures. (emphasis added)

In response to this data request on February 3, 2012, Idaho Power Company stated that it “has not performed the requested studies or evaluations of all expenditures as opposed to investment in alternative replacement generation.” And in its February 1, 2012 Supplemental Testimony the Company referred only to studies done by PacifiCorp, but did not specify what they were, or state that it had seen them.¹ The only study the Company actually referenced by name, in the February Supplemental Testimony, was the CH2M HILL study which it provided at that time – it had not provided this study prior to the filing of its Testimony.²

Idaho Power did not later supplement its response to CUB Data Request 36 to provide information or documents related to any other PacifiCorp studies and so CUB naturally assumed

¹ Idaho Power/1300 John Carstensen/4 at lines 19-23. “PacifiCorp completed detailed analyses of the appropriate technology to be applied to this BART-eligible facility to achieve established emissions control objectives. After a thorough analysis the owners concluded that upgrading the scrubbers presented a cost –effective method to bring the Jim Bridger Unit 3 into compliance with current, proposed and probable environmental regulations.”

² Idaho Power/1300 John Carstensen/6 at lines 18 – 20.

that Idaho Power did not have access to any additional studies when in fact it clearly had obtained such information and intended to use it in its own filings.

Only when Idaho Power filed the Rebuttal Testimony of John Carstensen on May 4, 2012 – three months after its original response to CUB’s Data Request No. 36 - did the record suddenly contain additional references to “studies or evaluations that demonstrate prudence of these expenditures as opposed to investment in alternative replacement generation.”

CUB’s Data Request No. 36 was specifically not limited to studies and evaluations done by Idaho Power. Idaho Power should have disclosed the existence of the later found studies to CUB. Idaho Power should not now be permitted to enter testimony into the record that is supported by studies it failed to disclose in response to data requests from other parties. Idaho Power should also not be permitted to enter the studies themselves – Idaho Power is mistaken in its belief that CUB is not also moving to strike the studies themselves.³ It would be nonsensical for CUB to move for the striking of the testimony if that did not also include any exhibits that that testimony seeks to have included in the record. Let there be no mistake, CUB is seeking to have both the testimony and the exhibits it seeks to introduce stricken from the record.

2. *Idaho Power Company’s claims that it limited its testimony to the publically available information filed by PacifiCorp is false.*

Idaho Power Company claims at page 3 lines 3 and 4 of its Response to CUB and OICIP’s Motion to Strike that its “discussion in the Rebuttal Testimony of the CAI Capital Projects Study for Jim Bridger U 3 was limited to the information that was publically filed by

³ Idaho Power Company’s Response to CUB and OICIP’s Motion to Strike at 3 lines 8 footnote 4.

PacifiCorp in UE 246 and available on the Commission’s website . . .”⁴ The Company then immediately eviscerates its own argument by noting “with the exception of the fact that Idaho Power’s Rebuttal Testimony included the confidential numbers that were not publically available through the Commission’s website.”⁵ Idaho Power further compounds its folly by stating that [w]hile it is true that Idaho Power subsequently obtained the confidential portions of the testimony, as well as, the confidential analysis supporting the testimony, there is nothing underhanded about this fact. CUB and OICIP cannot reasonably claim that there is something devious about Idaho Power becoming aware of publically available information that is relevant to issues it is litigating and then using that publicly available information in Idaho Power’s testimony.”⁶ CUB begs to differ. Idaho Power was using information not available to the other parties that it must have obtained from PacifiCorp outside of the discovery process in this docket. This information should have been disclosed in response to CUB Data Request No. 36 as noted in the argument above.

CUB’s Data Request No. 36 was specifically not limited to studies and evaluations done by Idaho Power. Idaho Power should have disclosed these additional later found studies to CUB. Using disclosed publicly available information is one thing but using non-public, un-disclosed information is entirely another. Idaho Power should not now be permitted to enter testimony into the record that is supported by studies it failed to disclose in response to data requests from other parties. Idaho Power should also not be permitted to enter the studies themselves. The testimony and the studies should be stricken.

⁴ Idaho Power Company Response to CUB and OICIP’s Motion to Strike at 3 lines 2-4.

⁵ Idaho Power Company Response to CUB and OICIP’s Motion to Strike at 3 lines 4-6.

⁶ Idaho Power Company’s response to CUB and OICIP’s Motion to Strike at 6 lines 21-23 and 7 lines 1-2.

3. *Idaho Power Company claims that since it was not a party to LC 52 it is not bound by the confidentiality agreement/protective orders signed in that docket by the parties to that docket.*

Idaho Power Company states that since it was not a party to LC 52 it is not bound by the confidentiality agreement/protective orders signed in that docket by the parties to that docket.⁷ This argument all but blew the CUB bear's socks off! Can CUB claim in future dockets that if a utility provides confidential information to CUB outside of the discovery process of a docket, and without requiring CUB to sign a confidentiality agreement, that CUB can freely use that information in any docket of its choosing? Wow that would be really something! The argument also signifies that Idaho Power did in fact get this information from PacifiCorp and again failed to disclose that information in response to CUB's Data Request 36. If Idaho Power can freely disclose that confidential information as it seems to be offering to do now⁸ then Idaho Power should have disclosed that confidential information to CUB pursuant to CUB Data Request 36.

Another thing this set of facts demonstrates, is that the utilities choose to put the confidential designation on documents, and choose to fight legal battles about who can use it when, and only when, it suits them. They quickly throw away the designation when it is no longer helpful to them to have it – does this mean the information should never have been designated as confidential in the first place? The information Idaho Power is referring to was confidential to all parties in LC 52, including PacifiCorp, and limited in its use and disclosure in

⁷ Idaho Power Company's Response to CUB and OICIP's Motion to Strike at 9 lines 17- 20 and at 10 line 1. "Here, none of the confidential information relied on by Idaho Power was received by Idaho Power in another docket pursuant to a protective order in that docket. Because Idaho Power did not participate in LC 52, Idaho Power did not sign and is not bound by the terms of a protective order to not use the information in this docket."

⁸ Idaho Power Company's Response to CUB and OICIP's Motion to Strike at 10 lines 2-5. "If CUB and OICIP believe that they must review the full confidential version of the 2011 IRP Update in order to rebut the Company's claim that the Naughton 3 decision is not relevant to the scrubber upgrade decision then the Company can provide confidential pages as necessary to remedy this concern."

LC 52.⁹ PacifiCorp filed its signatory pages on November 3, 2011.¹⁰ But now it suits PacifiCorp to no longer have this confidential information be limited to use only in the LC 52 docket so Idaho Power suddenly can distribute these confidential pages in this UE 233 docket – CUB’s memory was that PacifiCorp said it only wanted to come in and brief the legal issues and not participate in the docket?¹¹

CUB’s Data Request No. 36 was specifically not limited to studies and evaluations done by Idaho Power. Idaho Power should have disclosed the later found studies to CUB. Idaho Power should not now be permitted to enter testimony into the record that is supported by studies it failed to disclose in response to data requests from other parties. Idaho Power should also not be permitted to enter the studies themselves – the testimony and the studies should be stricken.

⁹ General Protective Order 11-186 issued June 10, 2011. Preamble: “To receive confidential information, all parties except Commission Staff must sign the "consent to be bound" in section I of Appendix B. *This includes the party that moved for issuance of the general protective order because any party may designate information as confidential under the order.* By signing the "consent to be bound," a party agrees to be bound by the terms of the general protective order and certifies that it has an interest in the proceedings that is not adequately represented by other parties to the proceedings.

All persons given access to confidential information must monitor their own conduct to ensure compliance with the general protective order. Without the written permission of the designating party, no person may use or disclose the information for any purpose other than participating in these proceedings. All qualified persons must take reasonable precautions to keep confidential information secure. . . .” (*emphasis added*) See also, Section 12 and 13 of the order.

¹⁰ LC 52 – PacifiCorp’s Signatory Page, filed by Andrea L. Kelly on November 3, 2011.

¹¹ April 27, 2011 UE 233 - Response to CUB and OICIP’s Objection to Petition to Intervene at 2 lines 26-28 and at 3 line 1. “The Company intends to submit briefs concerning the correct interpretation of the prudence standard only. The Company does not intend to apply the standard to any specific facts, or to seek a predetermination of any factual issues in the Company’s pending general rate case. The Company’s participation in this docket will not unreasonably burden the record, delay the proceedings, or broaden the issues.”

4. *Idaho Power's inclusion of studies performed by PacifiCorp expands the scope of this docket.*

It is simply preposterous of Idaho Power to argue that the inclusion of the PacifiCorp studies in this docket does not seriously increase the scope of this docket. It is also preposterous to argue that Idaho Power's sudden desire to bolster the record also does not change the scope of the docket – Idaho Power could have put all of this testimony and these facts in its original Supplemental Testimony but chose not to do so.

CUB would not have sought to amend the schedule in order to do discovery and additional testimony if the testimony filed by Idaho Power did not increase the scope of the docket. The short and simple fact is that the sudden inclusion in this docket of new testimony and studies, not previously disclosed to the parties notwithstanding CUB Data Request No. 36, changes the scope of Phase II of this docket. The identified Testimony and the exhibits it seeks to have admitted should be stricken. CUB should be permitted time to conduct additional discovery and file additional testimony, and the briefing schedule should be lengthened.

5. *CUB should be permitted to obtain discovery on the new information and then to file testimony related to what that testimony shows.*

Should the ALJ decide not to grant CUB and OICIP's Motion to Strike then CUB would respectfully request that the ALJ grant CUB and OICIP's Motion to Amend the Procedural Schedule. With the entry of the new testimony and new studies into the docket at this late juncture, CUB has no opportunity to rebut the previously un-disclosed information. Idaho Power should not be allowed to profit from its loose interpretation of when it needs to supplement data responses, its loose interpretation of when it may use confidential information

from other dockets and its loose interpretation of the scope of the record. In order to make this docket an even playing field the ALJ needs to permit CUB to conduct discovery on the newly disclosed information and then to apply the data contained in those studies to the actual facts at hand in this case and to write testimony thereon. CUB should also be allowed to include in this testimony projections into the future as the Company is seeking to do with the introduction of its after the fact studies.

6. *The Company argues that CUB misunderstands the objective nature of the prudence test – CUB Disagrees.*

The Company wants to force CUB into a debate of the prudence standard in this Motion to Strike. It is CUB’s position that this is not the time or place for that debate that is the purpose of the briefs for which so many parties are now filing to intervene. Notwithstanding this fact, CUB will respond to the order to which Idaho Power cites. Idaho Power cites CUB to Order No. 02-469 and argues that CUB is misinterpreting the legal standard. In that Order the Commission stated that in a prudence review, the Commission examines the objective reasonableness of a company’s actions measured at the time the company acted: “Prudence is determined by the reasonableness of the actions ‘based on information that was available (or could reasonably have been available) at the time.’” Order No. 02-469 at 4 citing to *In re PGE., UE 102, Order No. 99-033 at 36-37. (citations omitted)* The Commission went on to say that in applying this standard, “the Commission does not focus on the outcome of the utility’s decision” It then cited to *In re Transition Costs*, UM 834, Order No. 980353 at 9:

[When utilities mitigate transition costs,] they must behave prudently, meaning that their decision were reasonable, based on information that was available or could reasonably have been available) at the time. The Commission

has applied this prudence standard for many years in deciding whether to include in rate base the full amount of a utility's investment in a new resource (as opposed to a standard that, say, focuses on the outcome of the utility's decisions).

CUB is not now, and never has, argued that the focus should be on the outcome of the utility's decision, CUB has always argued that prudence is based on what the utility knew or should have known regardless of the outcome. Here CUB is arguing that Idaho Power should have conducted studies in advance of making the decision to invest in the Scrubber Upgrade Project for Bridger Unit 3. What CUB wants the Commission to focus on is what did the utility know, or should it/could it reasonably have known if it had in fact done its due diligence before "consenting" to the upgrade. CUB is arguing what the utility should have known goes towards mitigation or increasing the egregiousness of the utilities failure to do its due diligence prior to making its decisions. The Commission's arguments in the cited docket not to the contrary.

Where the Company and CUB differ interpreting the standard and the Commission's interpretation of the standard is - what happens when there is historical information available today to review, and where there was the same historical information available to the company to review then, when the Company had to make a decision but, the Company failed to avail itself of that information? Would the reasonable person cited by PacifiCorp in UM 995, and referenced by the Commission in its order¹², have thought it was reasonable for a person who had access to information, or who could easily have had access to information, have in fact been reasonable if they had chosen to ignore the available information and made the decision they had to make without any basis whatsoever?

¹² Order No. 02-469 at 5.

Why would the Commission take into account historical facts and circumstances and ignore any actual information known or easily available to the Company. This would be irrational. The Commission must consider both if both are available. And that is what the UM 995 Order no. 02-469 says:

According to PacifiCorp, if the record demonstrates that a challenged business decision was objectively reasonable, taking into account established historical facts and circumstances, the utility's decision must be upheld as prudent *even if the record lacks detail on the utility's actual subjective decision making process.*"(emphasis added).

We note that Commissioner Hemmingway filed a Concurring Opinion of the Chairman in UM 995. In that opinion he stated as follows:

Although I have concerns about PacifiCorp's resource planning strategy, I cannot hold that the company acted imprudently. The prices of the 2000-2001 western power crisis were simply beyond prudent prediction.

In the future, however, I do expect that electric utilities regulated by this commission will undertake an analysis of risk in their resource planning exercises that they bring before this commission. Uncertainties regarding loads, fuel costs, weather, generator output, hydro relicensing, and environmental constraints, among others, need to be explicitly examined. Goals for a risk mitigation strategy need to be set, and options for meeting those goals evaluated.

A fundamental role of this Commission is to work with regulated companies to agree upon strategies to balance costs and risks, so that the consequences for companies and customers from unpredictable events will be known in advance. If we and the companies perform this role well, this kind of case can be largely avoided in the future.¹³ (emphasis added)

CUB wants to the Commission to apply the prudence standard as outlined above and determine whether Idaho Power did its due diligence prior to making its decisions – was Idaho

¹³ UM 995, Order No. 02-469 Concurring Opinion of Chairman Roy Hemingway at 76.

Power's decision to do the Scrubber Upgrade Project at Bridger 3 prudent based upon what it knew or should have known at the time the decision was made?

7. *CUB has never, contrary to the Company's filing, sought to limit the Company's right to the final reply in this docket.*

CUB has not, contrary to the Company's filing¹⁴, stated anywhere that the Company should not have the option of a final reply. In point of fact CUB specifically referenced such in its Motion to Amend Procedural Schedule, Conclusion at 10. CUB stated:

CUB respectfully requests that the Procedural Schedule in this docket be amended to permit additional time for discovery, the filing of Surrebuttal Testimony by CUB and OICIP, the *filing of Surrebuttal Testimony by the Company, if requested*, and the amendment of the briefing schedule to allow for thoughtful, well researched and well reasoned briefs. (*emphasis added*)

III. CONCLUSION

For all of the above cited reasons, and to eliminate prejudice, CUB respectfully requests that portions of the Rebuttal Testimony of John Carstensen and the Exhibits it seeks to enter into the record, identified in CUB and OICIP's original Motion to Strike, be stricken from the evidentiary record in this docket and if not stricken that Idaho Power Company be required to disclose all confidential materials, to which they have cited, to all parties in this docket and that all parties in the docket be permitted to also cite to that confidential information regardless of its original source. CUB further request that it be permitted additional time to conduct discovery, file responsive Surrebuttal Testimony, and have additional time for responsive briefing all as requested in CUB's simultaneously filed Motion to Amend Procedural Schedule.

¹⁴ Idaho Power Company's Response to CUB and OICIP's Motion to Amend Procedural Schedule at 2 lines 13-15.

Dated this 14th day of May, 2012.

Respectfully submitted,



G. Catriona McCracken, OSB #933587
General Counsel, Regulatory Program Director
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland OR 97205
(503) 227-1984 ph
(503) 274-2956 fax
Catriona@oregoncub.org

UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of May, 2012, I served the foregoing **CUB AND OICIP'S REPLY TO IDAHO POWER'S RESPONSE TO CUB AND OICIP'S MOTION TO STRIKE** in docket UE 233 upon each party listed in the UE 233 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and one copy by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)
(HC denotes highly confidential)

(C denotes service of Confidential material authorized)

W DON READING
C 6070 HILL ROAD
HC BOISE ID 83703
dreading@mindspring.com

W JOSHUA D JOHNSON
C 101 S. CAPITOL BLVD., STE 300
HC BOISE ID 83702
jdj@racinelaw.net

W ERIC L OLSEN
C 201 E CENTER ST
HC POCAPELLAO ID 83201
elo@racinelaw.net

W MCDOWELL RACKNER & GIBSON
C LISA F RACKNER
HC 419 SW 11TH AVE, STE 400
PORTLAND OR 97205
dockets@mcd-law.com

W IDAHO POWER COMPANY
C CHRISTA BEARRY
HC PO BOX 70
BOISE ID 83707-0070
cbearry@idahopower.com

W DEPARTMENT OF JUSTICE
C STEPHANIE S ANDRUS
HC 1162 COURT ST NE
SALEM OR 97301-4096
stephanie.andrus@state.or.us

W IDAHO POWER COMPANY
C LISA D. NORDSTROM
HC PO BOX 70
BOISE ID 83707-0070
lnordstrom@idahopower.com

W PUBLIC UTILITY COMMISSION
C JUDY JOHNSON
HC PO BOX 2148
SALEM OR 97308-2148
judy.johnson@state.or.us

W RICHARDSON & O'LEARY
C PETER J RICHARDSON
HC PO BOX 7218
BOISE ID 83707
peter@richardsonandoleary.com

W PUBLIC UTILITY COMMISSION
C ERIK COLVILLE
HC PO BOX 2148
SALEM OR 97308-2148
erik.colville@state.or.us

W UTILITY NET.INC
C ANTHONY J YANKEL
HC 29814 LAKE RD
BAY VILLIAGE OH 44140

W RICHARDSON & O'LEARY
C GREGORY M. ADAMS
HC PO BOX 7218
BOISE ID 83702

tony@yankel.net
W **PACIFIC POWER**
R. BRYCE DALLEY
825 NE MULTNOMAH ST., STE 2000
PORTLAND OR 97232
bryce.dalley@pacificorp.com

W **PACIFIC POWER**
SARAH WALLACE
825 NE MULTNOMAH ST STE 1800
PORTLAND OR 97232
sarah.wallace@pacificorp.com

W **DAVISON VAN CLEVE**
IRION A SANGER
333 SW TAYLOR - STE 400
PORTLAND OR 97204
mail@dvclaw.com

W **REGULATORY &
COGENERATION SERVICES**
DONALD W SCHOENBECK
900 WASHINGTON ST STE 780
VANCOUVER WA 98660-3455
dws@r-c-s-inc.com

w **ESLER STEPHENS &
BUCKLEY**
JOHN W STEPHENS
888 SW FIFTH AVE STE 700
PORTLAND OR 97204-2021
stephens@eslerstephens.com;
mec@eslerstephens.com

greg@richardsonandoleary.com
W **PORTLAND GENERAL ELECTRIC**
RANDY DAHLGREN
121 SW SALMON ST - 1WTC0702
PORTLAND OR 97204
pge.opuc.filings@pgn.com

W **PORTLAND GENERAL ELECTRIC**
DOUGLAS C TINGEY
121 SW SALMON 1WTC13
PORTLAND OR 97204
doug.tingey@pgn.com

W **PACIFIC POWER**
OREGON DOCKETS825 NE
MULTNOMAH ST, STE 2000
PORTLAND OR 97232
oregondockets@pacificorp.com

W **DAVISON VAN CLEVE**
MELINDA J DAVISON
333 SW TAYLOR - STE 400
PORTLAND OR 97204
mail@dvclaw.com

w **RENEWABLE NORTHWEST
PROJECT**
MEGAN WALSETH DECKER
421 SW 6TH AVE #1125
PORTLAND OR 97204-1629
megan@rnp.org

Respectfully submitted,



G. Catriona McCracken, Attorney #933587
Legal Counsel
Citizens' Utility Board of Oregon
610 SW Broadway, Ste. 400
Portland, OR 97205
(503) 227-1984 phone
(503) 274-2596 fax
Catriona@oregoncub.org

