BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 374

In the Matter of PACIFICORP d/b/a PACIFIC POWER, Request for a General Rate Revision	SIERRA CLUB'S REPLY TO PACIFICORP'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES

On May 27, 2020, Sierra Club filed a Motion to Compel Discovery Responses, moving ALJ Lackey to order PacifiCorp to provide documents requested in Sierra Club Data Request 2.3. On June 11, 2020, PacifiCorp filed a Response in Opposition to Sierra Club's Motion, raising four primary arguments. For the reasons stated below, each argument fails and ALJ Lackey should grant Sierra Club's Motion.

ARGUMENT

I. PacifiCorp May Not Claim that an Issue is Moot due to Its Refusal to Provide Critical Information Related to that Issue

As PacifiCorp acknowledged, a legal issue is only moot when "further related legal proceedings can have no effect, thereby rendering the issues purely academic and without practical significance if resolved." *In the Matter of R.M. Order v. PacifiCorp*, 2012 WL 3801323, Docket No. UCR 150 Order No. 12-334 (Aug. 29, 2012). PacifiCorp argued that providing a response to SC Data Request 2.3 is moot because Sierra Club did not dispute the prudency of the Craig Unit 2 SCR project in its opening testimony and may not raise the issue in rebuttal testimony. PacifiCorp Response in Opposition at 3. PacifiCorp argued that as a result, a response would have no effect on the current rate case. PacifiCorp's logic is flawed for at least two reasons.

First, Sierra Club may dispute the prudency of the Craig Unit 2 SCR project through its rebuttal testimony, as it was unable to assess the validity of a prudency challenge prior to filing opening testimony due to PacifiCorp's refusal to provide responsive documents to SC Data Request 2.3. Now prohibiting Sierra Club from raising the prudency of the Craig Unit 2 SCR project – which PacifiCorp admits was not an economic investment – would be fundamentally unfair and inhibit the Commission from fully considering whether authorizing PacifiCorp's recovery of costs associated with the project would result in just and reasonable rates for captive ratepayers. Second, PacifiCorp acknowledged that parties routinely raise and revise issues in rebuttal testimony. Such practice is standard before this Commission. The procedural schedule allows for PacifiCorp to file surrebuttal testimony, thereby ensuring that PacifiCorp is not prejudiced due to new or expanded issues raised on rebuttal. Accordingly, to the extent that PacifiCorp might suffer any harm, such harm is minimal, of its own making and is further outweighed by the public benefit of fully evaluating the prudency of costs that will be passed on to ratepayers.

II. PacifiCorp Waived the Attorney-Client Privilege by Divulging the Material Substance of Privileged Communications

While conceding that the attorney-client privilege is waived when a party discloses "any substantial part of the matter or communication," PacifiCorp next argued that the privilege was not waived because PacifiCorp's testimony merely acknowledged that legal counsel was consulted regarding the Craig Unit 2 SCR Project. But Mr. Teply's testimony is directly at odds with this characterization. More than merely acknowledging that legal counsel had been consulted, Mr. Teply divulged the "ultimate determination of the internal and external legal reviews" and further provided the three-part justification for this "ultimate determination." PAC/800 at Teply/46:18-23 – 47:1-7. This level of detail revealed the material substance of the

internal and external legal communications, constituting waiver of the attorney-client privilege. *Elizabeth Retail Properties, LLC v. KeyBank Nat'l Ass'n*, No. 3:13-CV-02045-SB, 2015 WL 6549616, at *4 (D. Or. Oct. 28, 2015) (applying Oregon state law).

III. The Privileged Communications are Necessary for Sierra Club to Contest the Prudency of the Craig Unit 2 SCR Project

PacifiCorp does not challenge applying the *Hearn* test to determine whether the attorney-client privilege has been implicitly waived, but merely contests whether the privileged information is "vital" to Sierra Club's case. PacifiCorp's entire justification for why the Commission should approve cost recovery for a major capital investment that the Company itself determined was imprudent is that it properly relied on advice of its internal and external counsel that opposing the project would be futile. Sierra Club is unable to rebut that assertion without review of the legal advice provided to the Company. PacifiCorp argued that Sierra Club could raise a prudency argument based on its own review of the Participation Agreement. However, the issue here turns not on Sierra Club's review of the Participation Agreement, but on what advice PacifiCorp received regarding its ability to contest the Craig Unit 2 SCR project under the Participation Agreement or other legal avenues. The prudency of PacifiCorp's decision not to contest the SCR project encompasses "the process used by the utility to make [the] decision," *In the Matter of Pacificorp, DBA Pac. Power Request for a Gen. Rate Revision*, No. 12 493, 2012 WL 6644237 (Dec. 20, 2012), which can only be assessed in this instance by "test[ing] what information had been conveyed by the client to counsel and vice-versa." *Glenmede Trust Co.*, 56 F.3d 476, 486 (3d Cir. 1995).

IV. PacifiCorp's Proposed "Errata" Fundamentally Changes its Opening Testimony in a Veiled Attempt to Continue Using Privileged Communications as both a Sword and a Shield

Finally, in order to "avoid controversy" PacifiCorp proposed fundamentally changing its opening testimony to remove strategic references to "internal and external legal reviews" while continuing to rely upon the same information to support its request to recover costs associated with the Craig Unit 2 SCR project. Despite the fact that the original testimony clearly stated that the internal and external legal reviews came to a particular conclusion for specified reasons, PacifiCorp would change the testimony to read that after consulting with legal counsel, *the Company* reached its own, independent determination on whether to challenge the SCR project. PacifiCorp may not have its cake and eat it too. Either PacifiCorp must withdraw its "advice of counsel" justification for why it should be permitted to recover costs for an uneconomic capital expenditure or it must disclose the advice of counsel on which it relied.

CONCLUSION

For the foregoing reasons, PacifiCorp has waived the attorney-client privilege pertaining to internal and external legal opinions on the Craig Unit 2 SCR project. Sierra Club respectfully requests that the Commission grant its motion to compel, order PacifiCorp to furnish a full response to SC Data Request 2.3, and grant such further relief to which Sierra Club may be entitled.

Dated: June 15, 2020

Respectfully submitted,

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