

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1209**

In the Matter of MIDAMERICAN	)	
ENERGY HOLDINGS COMPANY	)	<b>HOOPA VALLEY TRIBE'S</b>
and PACIFICORP Application for	)	<b>RESPONSE TO PACIFICORP AND</b>
Authorization to Acquire Pacific	)	<b>MEHC'S REQUEST FOR</b>
Power & Light, dba PacifiCorp	)	<b>CERTIFICATION</b>
_____	)	

PacifiCorp and MEHC's (the "Applicants") request for certification, relating to the Hoopa Valley Tribe's (the "Tribe") data requests #7, 12, and 13, fails to meet the standard required for certification under OAR 860-014-0091. PacifiCorp would not suffer "undue prejudice" if compelled to answer data requests 7, 12, and 13, nor would the public interest be harmed. However, in a good faith attempt to resolve this discovery dispute, the Tribe suggests some clarifications to the Order to Compel that should eliminate any possible need for certification to the Commission.<sup>1</sup>

The Tribe previously specified, both in its letter to PacifiCorp dated October 19, 2005, and in its Motion to Compel, that data requests 12 and 13 relate only to the reports and backup documentation that support the cost estimate *already produced* by PacifiCorp in this proceeding.<sup>2</sup> The Applicants will suffer no prejudice by disclosing the information that supports the cost estimate that they previously produced. Rather than certify this question to the Commission, the Tribe requests Administrative Law Judge Smith to clarify that PacifiCorp, in response to data requests 12 and 13, need only produce the reports and backup documentation

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<sup>1</sup> The Applicants did not contact the Tribe's counsel to discuss this ongoing discovery dispute before filing their motion for certification. In addition, twelve days after ALJ Smith's Order to Compel, the Tribe has yet to receive any supplemental documents from Applicants regarding other data requests in response to that order.

<sup>2</sup> That cost estimate, characterized as PacifiCorp's "low cost estimate" for FERC license compliance, was produced in Confidential Attachments 3-3 and 3-4 to Applicants' Responses to Hoopa Valley Tribe's Data Requests.

that support the cost estimate previously disclosed in Confidential Attachments 3-3 and 3-4. Such a clarification would eliminate any possible prejudice to PacifiCorp, and would prevent an unnecessary adjudication by the full Commission.

Applicants claim that disclosure of PacifiCorp's "high-cost estimate" of license compliance will cause undue prejudice by "undermining" their settlement position in the FERC re-licensing. As discussed below, PacifiCorp places undue importance on this "high-cost" estimate as it relates to the FERC re-licensing. The Tribe's interest is not to artificially drive PacifiCorp's costs of settlement up, but rather just the opposite -- to negotiate the lowest cost solution that adequately protects water quality and the fishery resource in the Klamath. In this Oregon PUC proceeding, the Tribe's interest is to ensure that the Commission is presented with an accurate estimate of the upcoming costs of FERC re-licensing and to ensure that MEHC's proposed acquisition facilitates, and does not impair, PacifiCorp's ability to meet those re-licensing costs.

Although the Tribe disagrees with Applicants' arguments in their request for certification, the Tribe suggests a compromise approach for Data Request #7 in order to promptly resolve this discovery dispute. The Tribe suggests that PacifiCorp's responses to Data Request #7 need only be filed under seal with the Commission, with copies provided to ALJ Smith and MEHC,<sup>3</sup> and not to the Tribe or other parties to the FERC re-licensing proceeding. This compromise approach would allow the Commission to evaluate PacifiCorp's high-cost estimate of license compliance while eliminating any possible prejudice to PacifiCorp. The Tribe presents this option to the Commission as a good faith attempt to resolve this dispute and does not waive any rights to any other data requested in this proceeding.

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<sup>3</sup> The "high-cost estimate" should be provided to MEHC because PacifiCorp may not have already disclosed it to MEHC. It is unclear from PacifiCorp's discovery responses whether MEHC is aware of PacifiCorp's "high-cost estimate" for the costs of FERC license compliance.

**A. The Applicants Will Not Suffer Prejudice By Disclosing Supporting Documentation For The Cost Estimate Previously Produced.**

The Applicants have not appealed the entirety of Judge Smith's Order to Compel, but only seek certification relating to data requests 7, 12, and 13. Under OAR 860-014-0091, certification to the Commission is appropriate only where the ALJ's ruling may result in substantial detriment to the public interest or undue prejudice to any party. Neither element is met with respect to data requests 12 and 13 and certification should be denied.

The Applicants claim that compelling responses to data requests 7, 12, and 13 will prejudice their position in the ongoing FERC re-licensing settlement negotiations. Applicants' claim of prejudice, as it relates to data requests 12 and 13, is unfounded considering that Applicants have previously voluntarily produced their estimate of the costs of license compliance. The Applicants previously supplied the Tribe with a one-page "cost estimate" but gave no information about how the figures in the estimate were reached or what information the cost estimate was based on. The Tribe filed its motion to compel as a result of the Applicants' refusal to provide any supporting documentation for that cost estimate. Data requests 12 and 13 quite reasonably seek some modicum of supporting documentation so that the validity of PacifiCorp's one-page cost estimate can be evaluated. Applicants do not deny that they possess such documents.

It is unclear why PacifiCorp strenuously objects to providing backup documentation for the cost estimate previously disclosed in Confidential Attachments 3-3 and 3-4. Now that PacifiCorp's cost estimate has been disclosed, it is difficult to understand how providing the supporting documentation for that estimate could prejudice PacifiCorp or "undermine" their settlement position in the FERC re-licensing. A possible explanation is that the cost estimate provided in the few words contained in Confidential Attachments 3-3 and 3-4 is baseless and

entirely unsupportable. PacifiCorp should be required to produce documentation regarding its estimate.

Since providing the supporting documentation for a cost estimate already disclosed will have no foreseeable prejudice on PacifiCorp's position in the FERC re-licensing negotiations, and will not harm the public interest, the standard for certification in OAR 860-014-0091 is not satisfied. The request for certification as it relates to data requests 12 and 13 should be denied.

**B. Certification of Data Request #7 Should Be Denied, Or In The Alternative, The Compromise Approach Suggested By The Tribe Below Should Be Adopted.**

The Applicants also object to disclosing their "high-cost estimate" of compliance with the FERC license in response to data request #7 on grounds that it will prejudice their settlement position in the FERC re-licensing. The Applicants' brief misrepresents the Tribe's interest in the FERC re-licensing proceeding. The Tribe's sole interest is to reach a solution that provides adequate volitional passage for anadromous fish to historic spawning habitat and that adequately protects water quality in the Klamath. The Tribe's interest is not to arbitrarily "push PacifiCorp to its settlement 'cap' so that PacifiCorp and its customers provide as much funding as possible . . . ." *See Applicants' Request for Certification*, p. 4. The only publicly available study on the costs of dam decommissioning shows that removal of the four dams furthest downstream on the Klamath could be accomplished for approximately 1/4 of PacifiCorp's "low-cost estimate" for installing fish passage facilities on those same dams.<sup>4</sup> Far from seeking to drive the costs of re-licensing up, the Tribe would support an option that satisfies the Tribe's interests, PacifiCorp's ratepayers, and presumably, PacifiCorp's bottom line.

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<sup>4</sup> Compare Exhibit D and Confidential Attachment 1 of Opening Hoopa Valley Tribe Testimony of Robert Franklin.

Moreover, the protective procedures already established in this proceeding are adequate to protect PacifiCorp from "undue prejudice." Procedures exist to protect "confidential" and "highly confidential" information from disclosure outside of this proceeding. The Applicants now seek to create a third, even more sensitive, level of data that is completely immune from disclosure, regardless of its relevance. Given the existing protections, and given that the Applicants have no basis to believe that the Tribe would fail to honor the requirements of protective orders that it has signed, further protections are unwarranted.

It is crucial for the Commission to have knowledge of PacifiCorp's "high-cost estimate" for FERC license compliance. MEHC and PacifiCorp must be adequately prepared to finance the "low-cost estimate," but also must be prepared to meet the worst case scenario. The Commission should be aware of the potential high-cost estimate for FERC license compliance when it evaluates how MEHC's proposed acquisition will affect PacifiCorp's ability to comply with and implement the FERC license conditions.

Although the Tribe disagrees with the Applicants' position, it is willing to accept a compromise solution in a good faith effort to resolve the dispute relating to data request #7. The Tribe suggests that ALJ Smith order PacifiCorp to fully respond to data request #7, and to file the responses to data request #7 under seal with the Commission, with copies to ALJ Smith and MEHC, but not to the Tribe or any other party. The confidential responses to data request #7 should be designated in a way that the Tribe can refer to them in their briefing and argument, and so that the Commissioners can easily locate them in the file for this proceeding. Although this approach will somewhat impair the Tribe's ability to make its arguments, the Tribe's compromise approach would allow the Commission to independently consider PacifiCorp's projected "worst case scenario" with regard to the costs of FERC license compliance, while eliminating any

potential prejudice that could possibly arise from the disclosure of that information directly to the Tribe or other participants in the FERC re-licensing proceeding.

The Tribe's suggested compromise solution makes disclosure of the supporting documentation for PacifiCorp's "low-cost estimate" (previously provided in Confidential Attachments 3-3 and 3-4) all the more important to the Tribe's case. At the very minimum, the Tribe must be allowed to evaluate how PacifiCorp reached its low-cost estimate to determine if that estimate is valid and reflected in the Applicants' capitol planning. If there are flaws in PacifiCorp's methodology in calculating the low-cost estimate, those flaws would also likely flow to the high-cost estimate, and the Tribe could raise those concerns with the Commission. Since disclosure of the basis for the low-cost estimate already disclosed causes no foreseeable prejudice to PacifiCorp, there is no justification for withholding it or for granting the request for certification under OAR 860-014-0091.

**C. Conclusion.**

The Tribe respectfully requests that the Commission deny Applicants' request for certification. If the Commission finds it appropriate, the order to compel responses to data requests 7, 12, and 13 should be clarified as suggested by the Tribe above. Such modification to the order would eliminate any possible prejudice to PacifiCorp and any need for certification.

RESPECTFULLY SUBMITTED this 29th day of November, 2005.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on November 29, 2005, in addition to electronic service, I mailed the original and one copy of *Hoopa Valley Tribe's Response to PacifiCorp and MEHC's Request for Certification*, via First-Class Mail to:

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I further certify that on November 29, 2005, I served a copy of the foregoing document on counsel via *E-mail or First-Class Mail* to the following addresses:

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[Notice will not be electronically mailed, but mailed *First-Class* to]:

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I declare the above to be true and correct under penalty of perjury. Executed November 29, 2005, at Seattle, Washington.

/s/ *Nina Cordova*  
Nina Cordova

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nmc:11/29/05