

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 67

In the Matter of
PACIFICORP, dba PACIFIC POWER,
2017 Integrated Resource Plan

SIERRA CLUB’S MOTION, UNDER
O.A.R. 860-001-0000, FOR
COMMISSION RECONSIDERATION
OF AUGUST 7, 2018
ADMINISTRATIVE LAW JUDGE
RULING

As directed by the administrative law judge’s (“ALJ”) October 4, 2018 ruling, Sierra Club respectfully moves for waiver of any requirement that an ALJ first certify an appeal to the Commission and, in the alternative, for waiver of the 15-day deadline for such requests. Because the ALJ’s August 7, 2018 ruling invites utilities to freely designate as confidential whatever information they choose, the Commission must reconsider the ALJ’s ruling.

That ruling gave PacifiCorp a free pass to shield the high-level results of a unit-by-unit evaluation of the economic health of the company’s coal fleet (“coal analysis”)—a study ordered by the Commission at the conclusion of LC 67 and over which the Commission explicitly retained direct control, including over the study’s development and subsequent presentation. In these unique circumstances of expressly retained Commission oversight, good cause exists for granting Sierra Club’s request for waiver and reconsideration by the Commission. Moreover, because the August 7 ruling encourages PacifiCorp and other utilities to cherry pick what information they share with the public and when, the public interest strongly favors Sierra Club’s request.

I. The Commission Explicitly Retained Control Over The Development and Presentation Of The Coal Analysis.

Under Oregon Administrative Rule 860-001-0000(2), “the Commission or ALJ may modify or waive any of the rules . . . for good cause shown.” Here, because the Commission explicitly retained authority over the development and presentation of the coal analysis, good cause exists for the Commission to review the ALJ’s August 7 ruling without any intermediate certification by the ALJ.

On April 27, 2018, at the conclusion of LC 67, the Commission ordered PacifiCorp to prepare a unit-by-unit analysis evaluating whether the continued operation of the company’s coal fleet made economic sense in light of evidence that at least some of the company’s coal plants might not be economic. The commissioners explicitly retained direct oversight over that Commission-ordered study: “PacifiCorp is directed to perform the system optimizer runs for each coal unit and a base case and provide the results to the parties in LC 67 by June 30, 2018, and Staff to *update the Commission* prior to June of any delays or difficulties.”¹ “A *Commissioner workshop* will be scheduled to review this analysis once it is complete.”² The Commission’s order thus made clear that the commissioners would (1) directly address any delays or difficulties that arose in PacifiCorp’s development of the study; and (2) be directly responsible for the manner in which the results of that study were presented, including whether PacifiCorp improperly sought to shield the study’s high-level results from the public. Nothing in the Commission’s order suggested that an ALJ would have the last word on such matters. Rather, the Commission ordered the opposite.

¹ LC 67, Order 18-138 at p. 13 (Apr. 27, 2018) (emphasis added).

² *Id.* at 12 (emphasis added).

Under these circumstances, the rule governing certification has no application. That rule helps an ALJ effectively fulfill its enumerated duties, which together give an ALJ control over its active docket. An ALJ, for example, may (1) regulate how a proceeding progresses, (2) make evidentiary rulings, (3) supervise and control discovery, (4) issue a protective order to limit disclosure of confidential information, (5) certify a question to the Commission for consideration and disposition, and (6) decide procedural matters.³ By requiring parties to request certification within 15 days of an ALJ ruling and by identifying only three circumstances in which certification is required, the certification rule guards against unnecessary delay of an ongoing ALJ proceeding.⁴ The certification rule thus is narrowly targeted at a specific purpose: ensuring that an ALJ can control, and ensure the efficiency of, its active docket.

Here, when the commissioners retained direct oversight over the development and presentation of the coal analysis there was no risk that such control would interfere with the ability of an ALJ to effectively fulfill its duties. The ALJ proceeding had already concluded—all evidentiary matters in LC 67 had been resolved; the Commission’s general protective order had been issued; and all other procedural matters had been decided. The same continues to be true. Sierra Club’s appeal challenges redactions in a standalone document—PacifiCorp’s June 28, 2018 PowerPoint presentation, in which PacifiCorp hid all of the high-level results of the coal analysis from the public. Nothing in that completed presentation implicates any ongoing matter before an ALJ. Under these circumstances, the certification rule serves no purpose.

In light of these unique circumstances, and the plain language of the Commission’s order, good cause exists for the Commission to reconsider the ALJ’s August 7 ruling without any

³ Or. Admin. R. 860-001-0090(1).

⁴ *Id.* 860-001-0110.

intermediate step of ALJ certification. Whether PacifiCorp improperly shielded the high-level results of the coal analysis falls squarely within the Commission's purview.

II. The 15-Day Certification Deadline Has No Application Here.

In the alternative, the 15-day deadline for requesting certification of the ALJ's August 7 ruling should be waived. As shown above, the purpose of requesting certification under Oregon Administrative Rule 860-001-0110, and the related 15-day deadline for such requests, is to prevent delay or inefficiency in an ongoing ALJ proceeding. Because the ALJ proceeding in LC 67 concluded before the Commission issued its April 27, 2018 order, there is no risk that Sierra Club's appeal of the August 7 ruling will cause delay or inefficiency. Sierra Club's appeal challenges redactions in the standalone June 28, 2018 PowerPoint presentation.

Further, despite the ALJ's labeling, the coal analysis and the illegitimacy of PacifiCorp's baseless designations fall squarely within LC 67. Those designations have nothing to do with the entirely new coal study PacifiCorp is preparing for the 2019 Integrated Resource Plan. The coal analysis and related PowerPoint presentation are standalone documents that exist entirely outside that docket. Sierra Club's appeal, thus, cannot possibly interfere with LC 70.

Because Sierra Club's appeal will not delay or cause inefficiency in an ongoing ALJ proceeding, the 15-day deadline for requesting certification should be waived. Further, because the Commission explicitly retained direct control over the development and presentation of the coal analysis, the ALJ must certify Sierra Club's appeal.⁵

⁵ *Id.* 860-001-0110(2) (ALJ "must" certify when a "ruling may result in substantial detriment to the public interest" or when "[g]ood cause exists").

III. The Public Interest Strongly Favors the Commission’s Reconsideration of the ALJ’s Ruling, Which Invites Utilities to Baselessly Designate Information as Confidential.

The Commission’s general protective order, which was adopted in LC 67, requires parties to act in good faith when designating information as confidential and, when challenged, to prove based on specific well-supported facts and targeted legal arguments that the challenged information is covered by ORCP 36(C)(7).⁶ Yet, the August 7 ALJ ruling completely disregarded that purposeful structure and, in so doing, threatened to eliminate the key mechanism by which stakeholders and the rate-paying public may challenge baseless designations.

As shown in Sierra Club’s appeal, the ALJ’s ruling permitted PacifiCorp to maintain its confidential designations based on no more than the company’s self-serving and entirely unsupported beliefs.⁷ The ruling consequently invited PacifiCorp and other utilities to freely, and baselessly, designate as confidential whatever information they choose, confident that other parties and the public will lack meaningful recourse.

These same concerns are squarely on the table in LC 70. Already, the Commission has directed PacifiCorp to identify what information it intends to share with the public.⁸ But, the public cannot wait for PacifiCorp to cherry pick what information it chooses to share and when. Commission guidelines demand that “[t]he public . . . be allowed significant involvement in the preparation of the IRP.”⁹ Such “[i]nvolvement includes opportunities to contribute information and ideas, *as well as receive information.*”¹⁰ Absent public disclosure of the high-level results of

⁶ LC 67, General Protective Order No. 16-461 ¶¶ 2–10 (Dec. 5, 2016).

⁷ See LC 67, Ruling at pp. 4–5 (Aug. 7, 2018).

⁸ LC 67, LC 70, Ruling at p. 1 (Oct. 4, 2018) (“PacifiCorp should explain whether present value revenue requirement differential (PVRR(d)) values from the updated coal analysis will be public, or any other planned release of information.”).

⁹ UM 1056, Order No. 07-002, Guideline 2 at p. 8 (Jan. 1, 2007).

¹⁰ *Id.* (emphasis added).

the LC 67 coal analysis, the public will not be able to hold PacifiCorp fully accountable for its resource decisions. Those high-level results will allow the public to scrutinize how the company's economic evaluations have changed over time and to assess whether PacifiCorp is acting in the best interest of its ratepayers.

The public interest, therefore, strongly favors Commission reconsideration of the ALJ's standardless ruling. For these reasons, good cause also exists for the Commission to do so directly, waiving any intermediate certification requirement.

Based on the above, Sierra Club respectfully requests that the Commission (1) reconsider the ALJ's August 7, 2018 ruling, based on the petition submitted on September 28, 2018; and (2) grant the requested waiver of the general rule that such requests be first presented to the ALJ for certification or, in the alternative, grant a waiver of the related 15-day deadline for such requests.

Respectfully submitted this 5th day of October, 2018.

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