

**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 MOTION TO
COMPEL DISCOVERY RESPONSES

Sierra Club hereby moves the Commission's Administrative Law Judge Alison Lackey to order PacifiCorp to provide the documents requested in Sierra Club Data Request 7.4. OAR 860-001-0500(7). The requested records are the unredacted versions of two documents previously filed in Oregon UE 246. PacifiCorp objected to the request as "overly burdensome" and "outside the scope of this proceeding."

Between July 13, 2020 and July 29, 2020, Sierra Club communicated with PacifiCorp via e-mail in an attempt to obtain the unredacted versions, as requested. On July 24, counsel for PacifiCorp indicated that the Company would be able to locate and provide the unredacted documents by July 27. On July 29, having not received the documents or any further communication from PacifiCorp, Sierra Club inquired as to the status of the documents. Sierra Club has not received a response. As explained below, the documents requested are central to the full resolution of this general rate docket and are within the set of information to which a party to this case is entitled.

I. Background

PacifiCorp seeks authorization to recover costs associated with installing environmental retrofits and pollution controls at several of its coal-fired power plants, including Jim Bridger,

Hayden, and Craig. Because PacifiCorp is seeking to charge customers for these costs, whether the expenditures were prudently incurred is directly at issue in this case.

In 2003 and 2005, PacifiCorp generated two reports—“Control Report” and “Air Quality Reference Case Investments”—that evaluated the Company’s options for installing pollution control equipment at its coal plants. These reports contain plant-specific information, including SCR estimated costs, and were before PacifiCorp as it was making decisions on whether to install pollution control equipment at coal plants. Most relevant, the two documents shed light on *when* PacifiCorp commenced its decision-making process. Put differently, a central issue in this case is PacifiCorp’s decision-making timeline. The requested information is highly relevant because *when* PacifiCorp decided to move forward with the SCRs bears on whether PacifiCorp’s final decision to move forward was prudent. Sierra Club requested the unredacted version of each report on June 29, 2020. On July 6, 2020, PacifiCorp objected, stating that the request was “overly burdensome,” “outside the scope of this proceeding,” and that Sierra Club should already possess the documents requested.

Specifically, Sierra Club submitted the following data request and PacifiCorp stated the following objection:

Sierra Club Data Request 7.4

Refer to Oregon UE 246 Pacific Power’s 2012 Request for a General Rate Revision.

(a) Provide an unredacted version of Exhibit Sierra Club 114 from Sierra Club’s Direct Testimony, filed June 20, 2012

(b) Provide an unredacted version of Exhibit Sierra Club 115 from Sierra Club’s Direct Testimony, filed June 20, 2012.

PacifiCorp's Objection:

PacifiCorp objects to this request as requiring information that is overly burdensome, outside the scope of this proceeding and not likely to lead to the discovery of admissible evidence. Further, Sierra Club should have these documents as its legal counsel is allowed to keep confidential materials under the applicable protective orders in that proceeding. Paragraph 14 of Order 12-060 provided that “[c]ounsel of record may retain memoranda, pleadings, testimony, discovery or other documents containing Confidential Information to the extent reasonably necessary to maintain a file of these proceedings these documents [*sic*]...”

PacifiCorp is partially correct that Sierra Club has these documents from a prior proceeding but they are heavily redacted such that they provide little useful information in their redacted form. Following numerous email communications with the Company, PacifiCorp indicated that it would locate and produce the *unredacted* reports. However, PacifiCorp has failed to do so. Because PacifiCorp has not raised any other objection to SC Data Request 7.4, all other objections are waived. O.R.C.P. 43(B)(3).

II. Standard of review

Under the Oregon Rules of Civil Procedure, a party may obtain discovery “regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery.” O.R.C.P. 36(B)(1); *see also* O.A.R. 860-001-0540 (indicating that data requests are subject to the discovery rules in the Oregon Rules of Civil Procedure). “Relevant evidence” is defined by Oregon statute as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Or. St. § 40.150. Information sought need not be admissible as evidence itself, but need only be “reasonably calculated to lead to the discovery of admissible evidence.” O.R.C.P. 36(B)(1).

The Commission has recognized that the prudence of a utility’s action is “based on all that it knew or should have known at the time . . . in light of the circumstances which then

existed.” *In the Matter of PacifiCorp, DBA Pac. Power Request for A Gen. Rate Revision*, No. 12 493, 2012 WL 6644237 (Dec. 20, 2012). Not only is the utility’s ultimate decision relevant to a prudency review, but also “the process used by the utility to make [the] decision.” *Id.*

In limited circumstances and for “good cause shown,” discovery of otherwise relevant information may be limited in order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.” O.R. C. P. 36(C)(1).

III. The Commission Should Overrule PacifiCorp’s Objections because Sierra Club’s Data Requests are Relevant to the Prudence of PacifiCorp’s Requested Cost Recovery for SCRs and Production of the Requested Documents would not be “Unduly Burdensome”

PacifiCorp objects to Sierra Club’s data request – and has failed to produce the requested documents—because, according to the Company, the request is outside the scope of this proceeding (*i.e.*, irrelevant) and overly burdensome. Both objections fail.

First, Sierra Club’s data request seeks information concerning PacifiCorp’s decision-making process to install pollution control devices on various coal-fired power plants, costing ratepayers hundreds of millions of dollars. Sierra Club requires this information in order to assess the prudency of those decisions, which are directly at issue in this case and have been challenged as imprudent by the Sierra Club. It appears the Company relied on the detailed information contained in the reports prior to electing to install pollution control devices and may help to explain PacifiCorp’s timelines and decision-making process. As a result, they are relevant to the Company’s ultimate decision as well as the “the process used by the utility to make [the] decision.”

Even though PacifiCorp ultimately failed to produce the unredacted documents, by offering to do so is a concession that the reports are relevant and within the scope of discoverable material in this proceeding. The only dispute is whether PacifiCorp must produce the *unredacted*

versions. As Sierra Club has signed all relevant protective orders to view confidential and highly confidential material, there is no dispute that Sierra Club is entitled to view the unredacted versions.

Second, producing the requested reports would not cause the Company any undue burden. The requested reports were created by or for PacifiCorp. Notably, Sierra Club is not asking PacifiCorp to conduct new analysis—only to provide analysis that it has already completed. Additionally, PacifiCorp appears to have the reports in its possession, as counsel for the Company indicated that the reports would be located and produced. Even assuming PacifiCorp was required to spend time locating the reports, PacifiCorp has not provided any details explaining why locating the reports would constitute an *unreasonable* burden on company resources. Sierra Club clearly identified both the reports requested and which proceeding in which the reports had been previously introduced.

IV. Conclusion

For the foregoing reasons, Sierra Club's Data Request 7.4 is not only directly relevant to the current rate proceeding but also within the Company's possession and easily produced. Sierra Club respectfully requests that the Commission grant this motion to compel, order PacifiCorp to furnish a full response to SC Data Request 7.4, and grant such further relief to which Sierra Club may be entitled.

Dated: August 7, 2020

Respectfully submitted,

 /s/ Gloria D. Smith
Gloria D. Smith (*pro hac vice*)
Managing Attorney

Joshua Smith
Senior Attorney
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5560
gloria.smith@sierraclub.org
joshua.smith@sierraclub.org

Christopher Bzdok (*pro hac vice*)
Olson, Bzdok and Howard, P.C.
420 East Front Street
Traverse City, Michigan 49686
(231) 946-0044
chris@envlaw.com