

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Docket No. UM-1209

In the matter of)	
)	
MIDAMERICAN ENERGY HOLDINGS CO.)	HOOPA VALLEY TRIBE'S
)	MOTION TO COMPEL
Application for Authorization to Acquire)	RESPONSES TO DATA
Pacific Power & Light, dba PacifiCorp)	REQUESTS AND <u>REQUEST FOR</u>
_____)	<u>EXPEDITED CONSIDERATION</u>
)	

MOTION TO COMPEL RESPONSES TO DATA REQUESTS

The Hoopa Valley Tribe ("Tribe") respectfully moves to compel responses to data requests served on the applicants PacifiCorp and MidAmerican Energy Holdings Company (hereinafter the "Applicants") on September 12, 2005. The motion is made pursuant to OAR 860-014-0070(3). The Applicants' responses, dated September 23, 2005, objected and wholly failed to respond to 12 of the Tribe's 19 data requests.¹ The Applicants objected and partially responded to five other data requests.² The Tribe's data requests, and the Applicants' responses are attached as **Exhibit A**.³ The Tribe requests an order compelling the Applicants to fully respond to the Tribe's data requests.

A. Request For Expedited Consideration

The Tribe's opening testimony in this matter is due November 21, 2005. Pursuant to OAR 860-013-0050(3)(d), responses to the Tribe's motion to compel would normally be due

¹ Applicants objected and completely failed to respond to data requests 1, 2, 4, 5, 7, 8, 9, 10, 12, 13, 16, and 17.

² Applicants objected and partially responded to data requests 3, 6, 11, 14, and 15.

³ Due to the Confidential information contained therein, Exhibits to this motion are being provided to Judge Smith and the Applicants only, subject to any further direction from Judge Smith.

fifteen (15) days from filing. Given the upcoming deadlines for submission of testimony in this proceeding, the Tribe respectfully requests expedited consideration of this motion, and requests that the deadline for Applicants' response be shortened to five (5) days, with the Tribe's reply due two (2) days after.

B. Certification Pursuant To OAR 860-014-0070(3)

The parties have conferred but have been unable to resolve this discovery dispute. On October 12, 2005, counsel for the Tribe called the Applicants' counsel, Katherine McDowell, to discuss the discovery responses. The Tribe explained its position that the data requests were within the scope of this proceeding and that the Applicants' objections were unfounded. Applicants' counsel disagreed, but suggested that the Applicants would consider disclosing additional information if the Tribe clarified the scope of its data requests.

On October 19, 2005, the Tribe sent Applicants' counsel a letter clarifying each of the Tribe's data requests. A copy of the October 19, 2005 letter is attached as **Exhibit B**. Applicants' counsel acknowledged receipt of the Tribe's letter on October 23, 2005, and asked for some additional time to respond. On October 28, 2005, after not receiving any additional response, counsel for the Tribe left a voice message for Applicants' counsel asking for a response to the Tribe's letter. On October 31, 2005, PacifiCorp produced one additional page of material, Confidential Attachment 3-4. On November 3, 2005, counsel for the Tribe left a voice message for Applicants' counsel explaining that the response was still deficient and asking Applicants, due to the time constraints imposed by the schedule, to produce any additional responsive information by the close of business on November 4. Receiving no response as of November 7, the Tribe filed this motion.

C. The Commission Should Compel Full Responses to The Tribe's Requests.

The Tribe's data requests directly relate to issues within the scope of this proceeding; that is, what are the costs that PacifiCorp expects to incur in obtaining its new license to operate the Klamath Hydroelectric Project and in complying with the anticipated conditions of that license. The Tribe's data requests 1-15 request information relating to PacifiCorp's estimated costs of obtaining the FERC license and its estimated costs of implementing the license once issued. Data requests 16-17 ask how PacifiCorp intends to finance the significant costs associated with license compliance. Data requests 18-19 focus on the commitments MEHC has made to ensure that funding is available for license compliance.

The Applicants' primary objection, repeated throughout their responses, is that the Tribe's data requests are outside the scope of this proceeding. The Commission in this proceeding must determine whether the acquisition of PacifiCorp by MEHC provides a net benefit to Oregon's citizens. ORS § 757.511; *In re Merger Standards Investigation*, Order No. 01-778, at p. 11. MEHC argues in its application that its acquisition of PacifiCorp is in the public interest due primarily to MEHC's ability and asserted willingness to invest hundreds of millions of dollars in upgrades to PacifiCorp's infrastructure. MEHC Application, p. 16, 19. In its application, MEHC cites numerous infrastructure improvements that it plans to undertake, but conspicuously omits any reference to the Klamath Hydroelectric Project, a project that will be legally required to undergo significant upgrades as a result of a forthcoming FERC license.

Before this Commission evaluates whether the MEHC acquisition is in the public interest, it should consider how the proposed transaction will affect PacifiCorp's ability to finance, implement, and comply with any future conditions associated with the Klamath Hydroelectric Project that may be imposed in the FERC license. The Tribe is not asking the

Commission to focus directly on the adverse environmental impacts of the Klamath Project, but instead to evaluate whether the Applicants are adequately prepared to meet the costs associated with the forthcoming FERC license conditions.

Before the Commission can evaluate how the transaction will affect PacifiCorp's ability to finance or comply with the FERC license conditions, it is necessary that the Commission have access to information about PacifiCorp's estimated costs of complying with the license conditions, and how the Applicants intend to finance those costs. Without that underlying information, there is no way for the Commission to make an informed decision about how the proposed transaction will affect PacifiCorp's ability to finance, implement, and comply with the conditions in the FERC license.⁴

The Applicants are improperly attempting to construe any question that relates to the Klamath River dams as outside the scope of this proceeding. The Tribe's data requests are not focused on the adverse environmental impacts of PacifiCorp's facilities. The Tribe's questions do not ask for information regarding water quality, instream flows, fish kills, fish passage, or any other issue directly relevant to environmental impacts of the Klamath dams. The Tribe's data requests are limited to issues that are clearly within the scope of this proceeding; that is, what are the estimated costs associated with obtaining the new license from FERC and the estimated costs of complying with the environmental conditions that will be contained in that license.⁵ Questions

⁴ The Applicants disclosed some information regarding cost estimates, but that information is deficient in numerous respects. First, the figures provided by Applicants in Confidential Attachments 3-2 and 3-3/3-4 regarding costs of license compliance are significantly inconsistent. Second, the Applicants supply no documentation or explanation to support the figures provided in the Confidential Attachments. As a result, there is no way for the Tribe or the Commission to test the accuracy of these figures.

⁵ Applicants' objections also improperly raise the standard for discoverable information. Facts are discoverable, even if not ultimately admissible at trial, so long as discovery appears reasonably calculated to lead to discovery of admissible evidence. Civil Rule 26(b)(1). Therefore, the proper test at this stage is not whether the Tribe's requests are outside the scope of the proceeding, but whether the requests are sufficiently calculated to lead

relating to the cost of compliance with legal obligations in the FERC license are within the scope of this proceeding and the Commission should compel the Applicants to fully respond to the Tribe's data requests.

In general, the evaluation of legal liabilities a utility will incur in the near future and how a proposed merger will affect satisfaction of the utility's legal obligations is within the scope of the Commission's duties. In any proceeding where the Commission is asked to approve a merger, it is important for the Commission to have a full understanding of the upcoming legal liabilities that the utilities will face, and how the utilities propose to meet those obligations.⁶ PacifiCorp will soon be ordered to implement infrastructure improvements which will likely cost tens, if not hundreds, of millions of dollars to implement. In order for this Commission to properly engage in a full review of the effects of the MEHC acquisition, PacifiCorp must disclose its current estimates of the costs associated with license compliance, explain with detail the basis for its estimates, and explain how it intends to finance those obligations.

The Tribe's data requests are within the scope of this proceeding, and there is no adequate basis for the Applicants to refuse providing the documents to the Tribe and this Commission. The Tribe requests that the Commission compel full responses to the Tribe's data requests.⁷

to the discovery of information within the scope of the proceeding. Under either standard, the Tribe's requests are appropriate and should be answered in full.

⁶ For example, it would be appropriate for the Commission to require PacifiCorp to provide a reasonable estimate of its costs of operations, maintenance, and capital expenditures over the next five to ten years and evaluate how the MEHC transaction will affect PacifiCorp's ability to meet those costs. Without accurate information about PacifiCorp's estimated capital expenditures, such an analysis would be of little value.

⁷ To the extent that the Applicants object on grounds of attorney-client or work product privilege, the Tribe requests the Commission to order production of a privilege log that includes the date, author, all addressees or persons to whom the document has been disclosed, and a description of the document, so that the privilege assertion can be adequately assessed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2005, in addition to electronic filing, I mailed the original and one copy of Hoopla Valley Tribe's Motion to Compel Responses to Data Requests and Request for Expedited Consideration, via *First-Class Mail* to:

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

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I declare the above to be true and correct under penalty of perjury. Executed

November 7, 2005, at Seattle, Washington.

/s/ Nina Cordova
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