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VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
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**Re: MEHC's and PacifiCorp's Request for Certification of Order Granting Hoopa Valley Tribe's Motion to Compel
Docket UM 1209**

Enclosed for filing please find MEHC's and PacifiCorp's Request for Certification of Order Granting Hoopa Valley Tribe's Motion to Compel in the above-referenced docket. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Katherine A. McDowell', written over a horizontal line.

Katherine A. McDowell

KAM:knp
Enclosure
cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UM 1209**

4 In the Matter of MIDAMERICAN
5 ENERGY HOLDINGS COMPANY and
6 PACIFICORP Application for
Authorization to Acquire Pacific Power &
Light, dba PacifiCorp

**MEHC'S AND PACIFICORP'S
REQUEST FOR CERTIFICATION OF
ORDER GRANTING HOOPA
VALLEY TRIBE'S MOTION TO
COMPEL**

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8 Pursuant to OAR 860-012-0035(1)(i) and 860-014-0091, MidAmerican Energy
9 Holdings Company ("MEHC") and PacifiCorp request Administrative Law Judge Smith to
10 certify the November 17, 2005 Ruling (the "Ruling"), granting a Motion to Compel filed by
11 the Hoopa Valley Tribe (the "Hoopa Tribe"), to the Commission for reconsideration. MEHC
12 and PacifiCorp specifically seek certification of that aspect of the Ruling requiring them to
13 provide highly detailed cost estimates for Klamath relicensing. MEHC and PacifiCorp have
14 grounds for a certification and reconsideration of this issue because, if allowed to stand, it
15 may result in substantial detriment to the public interest and undue prejudice to PacifiCorp
16 and MEHC. *See* OAR 860-014-0091(1)(a).

17 **I. BACKGROUND**

18 The data requests for which the Hoopa Tribe seeks to compel responses are directed
19 at the estimated costs associated with the relicensing of the Klamath project and the financing
20 of those costs. *See* data requests 1, 2, 4, 5, 7-10, 12-13, 16-17. The data requests also
21 request information PacifiCorp has provided to MEHC regarding Klamath relicensing costs,
22 and request information about MEHC's position in the case. MEHC and PacifiCorp
23 generally provided information in response to these latter requests. *See* data requests 3, 6,
24 11, 14-15 and 18-19. This information included an estimate of the costs of Klamath
25 relicensing, which indirectly responded to the Hoopa Tribe's request for a relicensing cost
26 estimate.

1 After MEHC and PacifiCorp provided the desired relicensing cost estimate, the
2 Hoopa Tribe demanded a detailed break-down of the cost estimate. In an effort to avoid this
3 discovery dispute (and without waiving its position that the Hoopa Tribe was seeking
4 discovery that was outside the proper scope of ORCP 36B), PacifiCorp supplemented its
5 discovery responses to the Hoopa Tribe with a detailed cost estimate, which included a
6 break-down of the costs of complying with environmental conditions and fish passage
7 measures.

8 The Hoopa Tribe asserted that it needs even more detail on Klamath relicensing costs,
9 as well as information on the financing of such costs, and moved to compel responses.
10 MEHC and PacifiCorp opposed this motion on the basis that the information sought was
11 outside the proper scope of an ORS 757.511 proceeding and that disclosure of the
12 information would prejudice PacifiCorp’s position in the Klamath relicensing settlement
13 negotiations now underway.

14 The Ruling granted the Hoopa Tribe’s motion to compel, concluding that the data
15 requests were “reasonably calculated to lead to the discovery of admissible evidence” on
16 issue 2.b. on the Issue List for this case: “Acknowledgement and ability to pay possible
17 liabilities pursuant to FERC relicensing of Hydroelectric projects owned by PacifiCorp.”
18 Ruling at 2. The Ruling also acknowledged PacifiCorp’s concerns about the use of this
19 information in the Klamath relicensing settlement, but ruled that production of the
20 information under the protective order would preclude its use in that context.

21 The Ruling granted Hoopa Tribe’s Motion to Compel order responses to the data
22 requests to which PacifiCorp had not responded regarding relicensing cost estimates, data
23 requests 1, 2, 4, 5, 7-10, 12-13, and financing of relicensing costs, data requests 16-17. In
24 light of the determination in the Ruling with respect to relevance, MEHC and PacifiCorp will
25 respond to the data requests addressing the latter issue, and will provide supplemental
26

1 responses to other requests, but seeks certification and reconsideration of the Ruling ordering
2 responses to requests 7, 12 and 13.

3 **II. ARGUMENT**

4 MEHC and PacifiCorp seek certification of the Ruling because the disclosure of the
5 detailed Klamath relicensing cost¹ information requested by Hoopa Valley may result in
6 substantial detriment to the public interest and undue prejudice to PacifiCorp. *See* OAR 860-
7 014-0091(1)(a). For the reasons outlined below, MEHC and PacifiCorp submit that
8 disclosure of the detailed relicensing cost estimate information sought by the Hoopa Tribe
9 will ultimately prevent PacifiCorp from negotiating the most advantageous relicensing
10 settlement possible for ratepayers. Whatever marginal relevance the Hoopa Tribe’s
11 discovery has in this proceeding is far outweighed by the damage the discovery will cause to
12 PacifiCorp and its customers in the Klamath relicensing settlement.

13 The Klamath relicensing settlement involves the value of continued operation of the
14 project, or alternatively, the lost value that would occur with dam removal. PacifiCorp’s
15 settlement position in the Klamath relicensing negotiations is driven by its estimates of these
16 values, which are informed by estimates of relicensing costs. The information sought in
17 Requests 7, 12 and 13 go to the very heart of those values.² PacifiCorp’s relicensing costs
18 are ultimately borne by its ratepayers and prudence requires PacifiCorp to agree to settlement
19 of the Klamath relicensing only if it is the lowest cost/lowest risk outcome. Thus,
20 PacifiCorp’s estimate of the costs of a fully-litigated relicensing order effectively becomes its
21 “cap” for a relicensing settlement.

22 ¹ PacifiCorp herein uses the term “relicensing cost” as including the costs of
23 compliance with a FERC license, such as environmental conditions.

24 ² Request 7 seeks “the maximum dollar amount PacifiCorp estimates compliance with
25 the FERC license will cost;” Request 12 seeks “all written budgets, cost estimates, or reports
26 relating to the estimated costs associated with the re-licensing of the Klamath Hydroelectric
Project;” and Request 13 asks for “all written budgets, cost estimates, or reports relating to
the estimated costs associated with compliance with environmental conditions, including
fishway prescriptions, related to the FERC license.”

1 The interests of PacifiCorp and its customers in the relicensing settlement are to
2 accomplish the lowest cost/lowest risk relicensing of the Klamath project, well below the
3 cost of a litigated outcome if possible. The interests of the Hoopa Tribe, on the other hand,
4 are to push PacifiCorp to its settlement “cap” so that PacifiCorp and its customers provide as
5 much funding as possible for the issues the Hoopa Tribe have raised in the relicensing
6 proceeding. It is presumably this interest that has caused the Hoopa Tribe to intervene in
7 this proceeding and seek extensive discovery into PacifiCorp’s estimates of its relicensing
8 costs. The more information the Hoopa Tribe has on this issue—effectively PacifiCorp’s
9 bottom line settlement position—the more leverage it has to increase the costs of the
10 relicensing settlement, all to the detriment of PacifiCorp and its customers.

11 The Ruling granting the Motion to Compel addresses MEHC’s and PacifiCorp’s
12 concerns on this point by quoting a portion of the Protective Order issued in this case
13 addressing the disclosure of Confidential Information, and stating, “Business competition is
14 not the issue in this motion; use of the information in another proceeding is, and that use is
15 strictly prohibited under the protective order.” *See* Ruling at 2. As a practical matter,
16 however, the Protective Order cannot prevent the Hoopa Tribe from using the information
17 disclosed in this case to inform its settlement position.

18 Once the confidential information is disclosed to the representatives of the Hoopa
19 Tribe (the same representatives who are participating in the settlement negotiations), that
20 information will exist not only on paper, it will reside in the minds of the individuals who
21 review the information. It will be impossible for those individuals to sequester the
22 information in their minds so as to prevent them from considering the information in their
23 settlement negotiations. The only way to avoid that potential use of the confidential
24 information is to prevent its disclosure in the first instance.

25 The Hoopa Tribe does not need PacifiCorp’s detailed relicensing cost analysis to
26 assert its position in this case that Klamath relicensing will “require a significant investment

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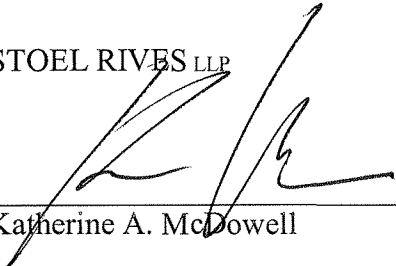
1 of potentially hundreds of millions of dollars,” and that MEHC “should guarantee that
2 PacifiCorp will have all funds necessary to meet its upcoming legal obligations under the
3 FERC license.” Hoopa Tribe Testimony of Robert Franklin/6-7. PacifiCorp does not dispute
4 that the Klamath relicensing will “require a significant investment of potentially hundreds of
5 millions of dollars;” indeed, it has provided a high-level estimate of these costs to the Hoopa
6 Tribe.

7 The disputed issue in the case is whether the acquisition of PacifiCorp by MEHC
8 creates any “harm” in the context of the Klamath relicensing, such that the Commission can
9 legally condition the acquisition in the manner proposed by the Hoopa Tribe. *See In re*
10 *Oregon Electric Utility Company*, Order 05-114 at 35 (proposed conditions that are not
11 related to either the potential harms of the transaction or the transaction itself are outside the
12 scope of ORS 757.511; the issue of whether the transaction “is in the public interest” does
13 not expand the scope of the proceedings such that parties can pursue conditions unrelated to
14 the alleged harms posed by the transaction.); *In re PacifiCorp and Utah Power*, Order 88-767
15 at 19 (no requirement that an Applicant demonstrate that a merger will not adversely impact
16 environment). The Hoopa Tribe’s discovery will not develop the record on this point.

17 **III. CONCLUSION**

18 For the foregoing reasons, MEHC and PacifiCorp respectfully request the
19 certification of the Ruling to the Commission for reconsideration.

20 DATED: November 23, 2005.

21 STOEL RIVES LLP
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23 _____
24 Katherine A. McDowell

25 Of Attorneys for MEHC and PacifiCorp
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document in Docket UM 1209 on the following named person(s) on the date indicated below by

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- hand delivery
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to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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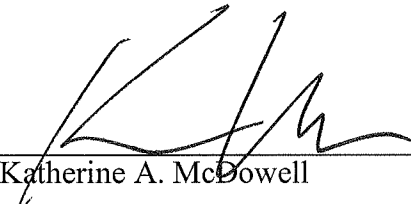
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