

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UE-171

In the Matter of the Request of)	
)	
PACIFIC POWER & LIGHT)	WATERWATCH OF OREGON'S
(PACIFICORP))	REPLY ON MOTION TO COMPEL
)	KLAMATH WATER USERS
Klamath Basin Irrigation Rate)	ASSOCIATION TO RESPOND TO
_____)	DISCOVERY
)	

WaterWatch of Oregon (“WaterWatch”) is filing this reply regarding the response of the Klamath Water Users Association (“KWUA”) to WaterWatch’s motion to compel discovery requested in WaterWatch’s first set of data requests to KWUA. Specifically, WaterWatch requests an order requiring KWUA to respond to number two of WaterWatch’s first set of data requests to KWUA.

I. BACKGROUND

On March 4, 2005, WaterWatch submitted its first set of data requests to KWUA. WaterWatch requested: (1) KWUA’s responses to a list of requests made in PacifiCorp’s first set of data requests to KWUA; and (2) information relating to the alleged contribution of water by on- or off- Project irrigators to the Klamath River. Two weeks later, on March 18, KWUA responded to WaterWatch’s first set of data requests by refusing to provide any of the requested data. As to data request number one, KWUA attached its response to PacifiCorp refusing to give PacifiCorp any of the data requested in PacifiCorp’s first data request; as to data request number two, KWUA raised a number of objections and also stated that it had no such information that it had “commissioned.” KWUA’s First Set of Data Responses to WaterWatch of Oregon at 2.

On March 24, 2005 WaterWatch filed with the Public Utility Commission of Oregon (“Commission”) a motion to compel the Klamath Water Users Association (“KWUA”) to respond to discovery. The motion sought an order compelling Klamath Water Users’ Association (“KWUA”) to produce immediately all non-privileged documents responsive to WaterWatch’s first set of data requests number one (which incorporated PacifiCorp’s data requests 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, and 1.17) and number two.

As reported in the motion to compel, pursuant to OAR 860-014-0070(2), WaterWatch counsel conferred with KWUA counsel on Wednesday, March 22 in an effort to resolve or narrow this dispute without Commission intervention. KWUA counsel agreed to produce and did produce certain documents on March 25. The parties agreed that WaterWatch would file the motion to compel pending review of the produced documents.

The documents produced by KWUA on March 25 are copies of documents that KWUA produced in response to PacifiCorp’s first set of data requests and subsequent motion to compel, and thus apparently intended to be responsive to WaterWatch’s data request to KWUA number one, but not number two. The documents are Bates Numbered KWUA 00001- 01571 and were packaged with a cover letter to PacifiCorp’s counsel.

On April 8, KWUA counsel submitted a letter to the administrative law judge handling the UE-171 docket, the Honorable Michael Grant, regarding WaterWatch’s motion to compel. The letter reports on the March 25 production of documents, and states that KWUA has been “more than reasonable in responding to” the data requests “despite the fact that PacifiCorp, not KWUA, is the petitioner and bears the burden of

proof.” Regarding WaterWatch’s data request number two, KWUA reiterates its March 18th response that it has no studies responsive to the request that it has commissioned, and informs WaterWatch of drafts of a United States Bureau of Reclamation study entitled “Undepleted Natural Flow of the Upper Klamath River.” At 1-2.

II. DEFICIENCIES IN KWUA’S RESPONSE TO WATERWATCH’S DATA REQUEST NUMBER TWO

A. WaterWatch’s Request and KWUA’s Response

WaterWatch’s first set of data requests to KWUA included the following request:

2. Please provide all data, analyses, reports, studies or correspondence commissioned by or in the possession of KWUA regarding the alleged contribution of water by on- or off-Project water users to Klamath River surface water flows, and/or to PacifiCorp’s hydroelectric facilities on the Klamath River. Please include all draft as well as final versions of the above-requested documents.

With respect to this data request, KWUA raised the following objections:

- a) The material sought does not bear upon, nor reasonably could lead to matters that bear upon, any issue in this proceeding.
- b) This proceeding is a rate case filed by PacifiCorp, not a water adjudication hearing instituted by KWUA.
- c) KWUA will provide its legal position in accordance with the established UE-171 Briefing Schedule.
- d) KWUA objects to any data request that is not is not reasonably related to its legal position or that requires KWUA to respond prior to stating its legal position.
- e) The request is not “commensurate with the needs of this case.”
- f) The request is unreasonably cumulative, duplicative and overly broad.
- g) KWUA objects to the request to the extent that it seeks materials protected by attorney/client privilege or materials that KWUA is otherwise obligated or entitled to keep confidential.

- h) KWUA objects to the request to the extent that it seeks public documents available from the United States Bureau of Reclamation, or documents that are in the possession of the applicant bearing the burden of proof in this proceeding: PacifiCorp.
- i) “Subject to, as limited by, and without waiving the foregoing objections” KWUA has no responsive information “commissioned by KWUA.”

B. KWUA has Not Adequately Responded to WaterWatch’s Data Request

1. KWUA has Not Answered WaterWatch’s Request for Responsive Documents that are in KWUA’s Possession

WaterWatch requested any documents responsive to number two “commissioned by *or in the possession of KWUA.*” (Emphasis added). KWUA has stated twice, once in its March 18 response to the data request (at 2) and then again in its April 8 letter to the Honorable Michael Grant (at 1), that it has “not commissioned” such a study. As pointed out in the motion to compel, KWUA does not indicate whether it has any information in its possession that is responsive to the request. Accordingly, the response is incomplete and any responsive information in the possession, custody or control of KWUA should be produced.

It is difficult for WaterWatch to believe that KWUA has no such documents based on claims KWUA is making in other forums that it is currently negotiating with PacifiCorp on the very issue about which this data request seeks information. For example, the following statement is contained in the “Klamath Water Users Association Electrical Power Brief,” released by KWUA on March 3, 2005 and posted on the KWUA website:

Klamath Water Users Association (KWUA) and representatives from PacifiCorp are currently engaged in “Credit for Value” negotiations, and Federal Energy Regulatory Commission (FERC) settlement discussions regarding re-licensing of the Klamath River power generation facilities.

<http://www.klamathbasin crisis.org/Poweranddamstoc/kwuapowrbrief030605.htm> (visited April 11, 2005)

KWUA explained the “Credit for Value” concept and reiterated the KWUA’s negotiation efforts in a meeting it recently held regarding the power issue:

Lyn Long, [KWUA] Power Contract Committee Chairman told the audience that Klamath Water Users (KWUA) have been on negotiating a new power contract with PacificCorp (sic) for the past 7 months . . . One important factor in the contract negotiations is “Credit for Value.” We need to receive credit for the value of the water we supply down river for hydropower generation year round.

Klamath Water Users Association, Power and Water Update Meeting, March 3, 2005, Klamath County Fairgrounds,
http://www.klamathbucketbrigade.org/KWUA_powerwatermeeting030305.htm (visited April 11, 2005)

Given these statements, documents responsive to Request No. 2 no doubt exist and must be produced. These documents bear directly on the rate issues in this matter.

2. The Data Requested Easily Fall within the Scope of Discovery Permitted by ORCP 36

KWUA’s responses (a) through (e) above can be summarized by stating that KWUA has claimed that the “alleged contribution of water by on- or off-Project water users to Klamath River surface water flows, and/or to PacificCorp’s hydroelectric facilities on the Klamath River” is irrelevant to this proceeding. Thus, while KWUA is apparently simultaneously negotiating with PacificCorp for lower power rates based on some concept that irrigation interests somehow contribute water to the river that benefits hydro operations (*see* section B 1 above), KWUA is at the same time also claiming that the concept of the irrigators putting water down the river “does not bear upon, nor reasonably could lead to matters that bear upon” this power rate setting proceeding. KWUA cannot have it both ways.

WaterWatch based its data request number two on a statement by another intervening irrigator group, the Klamath Off-Project Water Users (“KOPWU”), at the prehearing conference that it intended to use information encompassed by this request at some point in this proceeding to garner low power rates for its members. WaterWatch is not certain where the truth lies on this point, but has a right to documents relevant to issues that a party has stated it intends to raise in the proceeding.

The question of relevancy under ORCP 36 is rarely a basis upon which to deny production of documents in discovery. Any asserted issue regarding the relevancy of the requested information at the discovery stage here is resolved by KWUA’s use of the very information sought in negotiations with PacifiCorp on rate issues and by KOPWU’s assertion that it intends to make use of such information in this proceeding. Accordingly, WaterWatch requested the information from the irrigator interests in anticipation of this use.

WaterWatch will withdraw the request if both irrigation interests in this matter certify that they will not attempt to present or use any such information in this proceeding (or in UE-170) for any purpose. In the absence of such a promise, KWUA should be required to produce any documents in its possession, custody or control responsive to WaterWatch’s data request number two.

3. WaterWatch is Asking the Commission to Compel Production of Non-Privileged Documents Only

WaterWatch is asking the Commission to compel production of non-privileged documents only. Therefore, KWUA’s objections regarding attorney/client privilege and confidentiality are not warranted here.

III. REQUEST FOR EXPEDITED HEARING

WaterWatch requests an expedited hearing regarding this matter due to the expedited schedule in this docket. The discovery sought is relevant to issues that at least one party has stated it intends to raise in this docket and is needed by WaterWatch immediately.

CONCLUSION

KWUA's objections to production of the requested documents are not legally valid, and are in conflict with its own statements available on its website. Further, KWUA has not answered WaterWatch's request for any documents responsive to data request number two that are in KWUA's possession. Thus, WaterWatch respectfully requests the Commission to require KWUA to promptly and fully respond by producing all non-privileged documents responsive to WaterWatch request number two.

Respectfully submitted this 12th day of April, 2005,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served WaterWatch of Oregon's reply on motion to compel Klamath Water Users Association to respond to discovery by postage prepaid mail (where postal address is provided) and email upon each person listed below at the addresses indicated, and upon the Oregon Public Utility Commission (email to Carol.Hulse@state.or.us; puc.filingcenter@state.or.us) (original and five copies mailed pursuant to 860-013-0060).

Dated: April 12, 2005

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