



900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

KATHERINE A. MCDOWELL
Direct (503) 294-9602
kamcdowell@stoel.com

November 14, 2005

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket UM 1209

Enclosed for filing please find MEHC and PacifiCorp's Response in Opposition to the Hoopa 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.

We apologize for the filing being a couple hours past the specified noon filing time.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Katherine A. McDowell".

Katherine A. McDowell

KAM:jlf
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's
6 Application for an Order Authorizing
7 MEHC to Exercise Substantial Influence
8 Over the Policies and Actions of PacifiCorp

**MEHC'S AND PACIFICORP'S
RESPONSE IN OPPOSITION TO THE
HOOPA VALLEY TRIBE'S MOTION
TO COMPEL**

9 MidAmerican Energy Holdings Company ("MEHC") and PacifiCorp respectfully
10 submit this Response in Opposition to the Hoopa Valley Tribe's ("Hoopa Tribe") Motion to
11 Compel Responses to Data Requests (the "Motion").

12 **I. BACKGROUND**

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

22 After MEHC and PacifiCorp provided the desired relicensing cost estimate, the
23 Hoopa Tribe demanded a detailed break-down of the cost estimate. In an effort to avoid this
24 discovery dispute (and without waiving its position that the Hoopa Tribe was seeking
25 discovery that was outside the proper scope of ORCP 36B), PacifiCorp supplemented its
26 discovery responses to the Hoopa Tribe with a detailed cost estimate, which included a

1 break-down of the costs of complying with environmental conditions and fish passage
2 measures.

3 The Hoopa Tribe now asserts that it needs even more detail on Klamath relicensing
4 costs, as well as information on the financing of such costs. It is not clear why the Hoopa
5 Tribe needs this level of detailed information in this proceeding, but it is clear that the Hoopa
6 Tribe would be advantaged in the current Klamath relicensing settlement negotiations if it
7 had this information because it is not available to any other party. This improper blurring of
8 the lines between this ORS 757.511 proceeding and the current Klamath relicensing
9 proceeding has always been the chief concern of MEHC and PacifiCorp with respect to the
10 Hoopa Tribe’s intervention in this case.

11 For the reasons stated below, MEHC and PacifiCorp do not agree that the costs of the
12 Klamath relicensing and the financing of these costs are relevant to this proceeding.
13 Assuming for the sake of argument that the Hoopa Tribe needs to know the estimated costs
14 of the Klamath relicensing to develop its position in this case, however, it now has this
15 information. Assuming further that the Hoopa Tribe needs to understand what cost
16 categories are included in this estimate, it now has this information. The Commission should
17 deny the Hoopa Tribe’s Motion to Compel, concluding that the Hoopa Tribe now has all of
18 the discovery to which it is even arguably entitled.

19 **II. ARGUMENT**

20 **A. The Hoopa Tribe’s Motion to Compel Must be Considered in the Context**
21 **of the Proper Scope of this Proceeding and the Limitation on the Hoopa**
22 **Tribe’s Participation in this Proceeding.**

23 As noted in the Commission’s Ruling limiting the intervention of the Hoopa Tribe,
24 “[p]roceedings under ORS 757.511 are limited in scope by statute and related Commission
25 decisions.” Ruling at 2, *Petitions to Intervene Granted; Participation Limited*, UM 1209
26 (August 26, 2005) (“August 26, 2005 Ruling”). The Commission’s task in reviewing the
Application in this case under ORS 757.511 is to determine whether the transaction provides

1 a net benefit to the utility’s customers and will not impose a detriment on Oregon citizens as
2 a whole. *In re Oregon Electric Utility Company*, UM 1121, Order 05-114 at 17 (Or Pub Util
3 Comm’n Mar. 10, 2005); *In re Legal Standard for Approval of Mergers*, UM 1011, Order
4 01-778 at 11 (Or Pub Util Comm’n Sept. 4, 2001).

5 The focus of such a case is the potential benefits and harms of the transaction
6 compared “against the state of the utility as it [is] currently configured.” August 26, 2005
7 Ruling at 2; *See In re Oregon Electric Utility Company*, Order 05-114 at 20. The focus of
8 such a case is *not* complaints about PacifiCorp’s current operations. PacifiCorp’s current
9 operations are relevant only as the base case or comparator from which a determination of
10 net benefits is derived. *See id.* at 18.

11 Proposed conditions that are not related to either the potential harms of the
12 transaction or the transaction itself are outside the scope of ORS 757.511. *Id.* at 35. Thus,
13 the issue of whether the transaction “is in the public interest” does not expand the scope of
14 the proceedings such that parties can pursue conditions unrelated to the alleged harms posed
15 by the transaction. *Id.*

16 The Hoopa Tribe’s Petition to Intervene alleged numerous concerns relating to
17 PacifiCorp’s current operation of the Klamath project and asserted that MEHC should have
18 included conditions related to the Klamath relicensing in its Application. In response to
19 MEHC’s and PacifiCorp’s motion to deny or limit the intervention of the Hoopa Tribe, the
20 Commission limited the Hoopa Tribe’s participation in this proceeding to “addressing issues
21 directly related to the legal issues in this proceeding.” August 26, 2005 Ruling at 3.

22 Since the time of this Order, the Hoopa Tribe has filed Opening Comments in this
23 case. Seemingly oblivious to the Commission’s August 26, 2005 Ruling, the Hoopa Tribe
24 indicated it “intervened in this proceeding to inform the Commission of the financial impact
25 of the harm that PacifiCorp’s Klamath Project has caused to historic Oregon fish runs and
26 habitat,” and to request “an express condition requiring MEHC to acknowledge its awareness

1 of and to guarantee, or act as a financial surety for, PacifiCorp’s legal and financial
2 obligations that arise from the new FERC license.” Hoopa Tribe Opening Comments at 1-2.

3 The Hoopa Tribe is a California-based Indian tribe. In limiting the Hoopa Tribe’s
4 intervention, the Commission also stated that the Hoopa Tribe “will be required to establish
5 how the issues they raise affect their members *in Oregon* and are otherwise relevant to the
6 Commission’s application of ORS 757.511 in this proceeding.” *Id.* (emphasis in original).
7 Since the time of this order, the Hoopa Tribe has entered into a settlement resolving this case
8 in California making an Oregon focus even more imperative. Motion of Settlement Parties
9 for Approval of Stipulation and Settlement, California Public Utilities Commission,
10 Application No. 05-07-010, filed October 21, 2005.

11 **B. The Hoopa Tribe is Inappropriately Seeking Information Irrelevant to**
12 **this Proceeding.**

13 PacifiCorp’s relicensing proceedings before FERC for its Klamath hydroelectric
14 project are but one aspect of PacifiCorp’s ongoing operations. There is nothing in the
15 proposed transaction that changes PacifiCorp’s pursuit of the relicensing or the conditions
16 that will accompany the relicensing.

17 As MEHC’s Application makes clear, this transaction proposes to replace MEHC for
18 ScottishPower as the owner of PacifiCorp, without other material changes in PacifiCorp’s
19 current structure, operations or assets. Thus, PacifiCorp will remain the license holder for
20 the Klamath project and all of its other hydro projects irrespective of whether MEHC’s
21 acquisition is approved. Similarly, PacifiCorp will remain bound by all agreements related to
22 such licenses irrespective of approval of the MEHC acquisition. MEHC has testified that this
23 transaction will not diminish PacifiCorp’s ability to perform its legal obligations associated
24 with its hydro facilities, and that PacifiCorp’s status as an investment grade public utility will
25 make reasonable financing available for PacifiCorp’s relicensing obligations. *See* PPL/404,
26 Goodman.2. Because the Application in this case does not implicate any changes to

1 PacifiCorp’s responsibility for its hydro projects, the issues related to PacifiCorp’s
2 relicensing and continued operation of the Klamath hydro project are outside of the scope of
3 the proceeding.

4 The Hoopa Tribe argues that, “Before the Commission can evaluate how the
5 transaction will affect PacifiCorp’s ability to finance or comply with the FERC license
6 conditions, it is necessary that the Commission have access to information about
7 PacifiCorp’s estimated costs of complying with the license conditions, and how the
8 Applicants intend to finance those costs.” (Motion at 4). This is the sole basis for the Hoopa
9 Tribe’s Motion to Compel and it is insufficient.

10 As reflected above, the matters that are relevant in this case are the effects of the
11 *transaction*. With regard to the costs of relicensing, *whatever they may be*, the only relevant
12 issue is whether the transaction will leave PacifiCorp in at least as good a position as it would
13 be without the transaction to pay the costs resulting from the relicensing. In adopting an
14 issues list for this case, the Commission listed the sub-issue “Acknowledgement and ability
15 to pay possible liabilities pursuant to FERC relicensing of hydroelectric projects owned by
16 PacifiCorp” under the heading “Financial Stability.” (November 1, 2005 Ruling, UM 1209).

17 The Hoopa Tribe fails to provide any rationale for its conclusion that the Commission
18 needs detailed cost information on the Klamath project in order to “consider how the
19 proposed transaction will affect PacifiCorp’s ability to finance, implement, and comply with
20 any future conditions associated with the Klamath Hydroelectric Project that may be imposed
21 in the FERC license.” Motion at 3. The Hoopa Tribe ignores the facts that: (1) the costs
22 related to relicensing will exist with or without the transaction; and (2) the costs of Klamath
23 relicensing are a relatively small part of PacifiCorp’s projected capital budget of \$1 billion
24 per year for the next five years.

25 Those points should not be lost on the Hoopa Tribe, given that it is a party to the
26 California Public Utilities Commission proceeding reviewing the MEHC transaction, in

1 which that commission specified that matters “outside the scope of this proceeding” include
2 “Issues that will continue to exist regardless of whether the proposed transaction is ultimately
3 approved and consummated.” (Assigned Commissioner’s Ruling and Scoping Memo,
4 9/26/05 at 3, Docket No. A05-07-010). Such issues are precisely what the Hoopa Tribe now
5 seeks to bring into this proceeding.

6 **C. The Hoopa Tribe is Inappropriately Seeking to Expand its Participation**
7 **Beyond the Limitation Set by the Commission.**

8 PacifiCorp’s objections to the Hoopa Tribe’s data requests based on lack of relevance
9 are consistent with the limitation on the Hoopa Tribe’s participation in this case. The Hoopa
10 Tribe’s participation in this case, including its participation in discovery, is “limited to
11 addressing issues directly related to the legal issues in this proceeding,” with an emphasis on
12 how this transaction uniquely impacts Hoopa Tribe’s Oregon members. *See* August 26, 2005
13 Ruling at 3. As shown above, the detailed costs related to the Klamath project, which will
14 exist with or without the transaction, are by no means directly related to legal issues in this
15 case, including how this case impacts Oregon members of the Hoopa Tribe. The limitation
16 on the Hoopa Tribe’s participation in the case requires that the Motion be denied.

17 **D. Disclosure of the Requested Information Would be Harmful to**
18 **PacifiCorp and its Customers.**

19 As a participant in settlement negotiations in the FERC relicensing proceedings, the
20 Hoopa Tribe would stand to obtain an advantage if it were to receive the detailed cost
21 information it is seeking in this case, information to which others in the relicensing
22 proceeding have no access. That advantage to the Hoopa Tribe would be at the disadvantage,
23 and cost, of PacifiCorp and its customers.¹

24
25 _____
26 ¹ The Company’s cost estimates regarding continued operation of the Klamath hydro
facilities are central to negotiations that turn on the issue of the value of continued operation
of the project, or alternatively, the lost value that would occur with dam removal.

1 The Commission has the discretion to deny the Motion on this ground. The
2 Commission should be mindful of the potential harm to customers that could occur *vis a vis*
3 the FERC settlement negotiations. The US Supreme Court has provided the following
4 admonition:

5 “In deciding whether a [discovery] request comes within the
6 discovery rules, a court is not required to blind itself to the
7 purpose for which the party seeks information. Thus, when the
8 purpose of a discovery request is to gather information for use
9 in proceedings other than the pending suit, discovery properly
10 is denied.”


11 *Oppenheimer Fund, Inc. v. Sanders*, 437 US 340, 353, n. 17 (1978). The denial of the Hoopa
12 Tribe’s motion is especially appropriate when the potential for harm resulting from
13 disclosure is considered alongside the irrelevant nature of the information sought, as
14 discussed above.

15 III. CONCLUSION

16 For all the reasons stated, MEHC and PacifiCorp respectfully request that the
17 Commission deny the Hoopa Tribe’s Motion to Compel.

18 DATED: November 14, 2005.

19 STOEL RIVES LLP

20 
Katherine A. McDowell

21 Of Attorneys for MEHC and PacifiCorp

CERTIFICATE OF SERVICE

1
2 I hereby certify that I served the foregoing document in Docket UM 1209 on the
3 following named person(s) on the date indicated below by

4 mailing with postage prepaid

5 hand delivery

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

10 NW Energy Coalition
11 219 First Street, Suite 100
12 Seattle, WA 98104

Rates & Regulatory Affairs
Portland General Electric
121 SW Salmon Street, 1WTC0702
Portland, OR 97204
pge.opuc.filings@pgn.com

13 Adam S. Arms
14 aarms@mbjlaw.com

Utility Workers Union of America
PO Box 37
San Clemente, CA 92674-0037
uwua@redhabanero.com

16 Jim Abrahamson
17 Community Action Directors of Or
18 4035 12th Street Cutoff SE, Suite 110
19 Salem, OR 97302
jim@cado-oregon.org

Douglas L. Anderson
MidAmerican Energy Holdings Co
302 S 36 Street, Suite 400
Omaha, NE 68131
gerickson@midamerican.com

20 Edward Bartell
21 Klamath Off-Project Water Users, Inc.
22 30474 Sprague River Road
23 Sprague River, OR 97639

Curtis G. Berkey
Alexander Berkey Williams
& Weathers
2000 Center Street, Suite 308
Berkey, CA 94704
cberkey@abwwlaw.com

24 Maggie Brilz
25 Idaho Power Company
26 PO Box 70
Boise, ID 83707-0070
mbrilz@idahopower.com

Lowrey R. Brown
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
lowrey@oregoncub.org

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Joanne M. Butler
 Idaho Power Company
 PO Box 70
 Boise, ID 83707-0070
jbutler@idahopower.com

Phil Carver
 Oregon Department of Energy
 625 Marion Street NE, Suite 1
 Salem, OR 97301-3742
philip.h.carver@state.or.us

Bryan Conway
 Oregon Public Utility Commission
 PO Box 2148
 Salem, OR 97308-2148
bryan.conway@state.or.us

Joan Cote
 Oregon Energy Coordinators Assoc
 2585 State Street NE
 Salem, OR 97301
cotej@mwvcaa.org

Melinda J. Davison
 Davison Van Cleve, PC
 333 SW Taylor, Suite 400
 Portland, OR 97204
mail@dvelaw.com

Jason Eisdorfer
 Citizens' Utility Board of Oregon
 610 SW Broadway, Suite 308
 Portland, OR 97205
jason@oregoncub.org

Andrea Fogue
 League of Oregon Cities
 PO Box 928
 Salem, OR 97308
afogue@orcities.org

D. Kevin Carlson
 Dept. of Justice
 General Counsel Division
 1162 Court Street NE
 Salem, OR 97301-4096
d.carlson@doj.state.or.us

Ralph Cavanagh
 Natural Resources Defense Council
 111 Sutter Street, FL 20
 San Francisco, CA 94104
rcavanagh@nrdc.org

John Corbett
 Yurok Tribe
 PO Box 1027
 Klamath, CA 95548
jcorbett@yuroktribe.nsn.us

Chris Crean
Christopher.d.crean@co.multnomah.or.us

Michael Early
 Industrial Customers of NW Utilities
 333 SW Taylor, Suite 400
 Portland, OR 97204
mearly@icnu.org

Ann L. Fisher
energlaw@aol.com

John R. Gale
 Idaho Power Company
 PO Box 70
 Boise, ID 83707-0070
rgale@idahopower.com

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Bernardo R. Garcia
Utility Workers Union of America
215 Avendia Del Mar, Suite M
San Clemente, CA 92672
uwua@redhabanero.com

David E. Hamilton
davidh@norrstev.com

Jason W. Jones
Department of Justice
Regulated Utility & Business Section
1162 Court Street NE
Salem, OR 97301-4096
jason.w.jones@state.or.us

Kaitlin Lovell
Charlton Bonham
klovell@tu.org
cbonham@tu.org

Mark C. Moench
MidAmerican Energy Holdings Co
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
mcmoench@midamerican.com

Barbara Lee Norman
Karuk Tribe of California
PO Box 657
Yreka, OR 96097
bnorman@karuk.us

Janet L. Prewitt
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
janet.prewitt@doj.state.or.us

Ann English Gravatt
Renewable Northwest Project
917 SW Oak, Suite 303
Portland, OR 97205
ann@rnp.org

William Miller
Nancy Harper
bill@ibew125.com
nancy@ibew125.com

Barton Kline
Idaho Power Company
PO Box 70
Boise, ID 83707-0070
bkline@idahopower.com

Daniel W. Meek
Attorney at Law
10949 SW 4th Avenue
Portland, OR 97219
dan@meek.net

Christy Monson
League of Oregon Cities
1201 Court Street NE, Suite 200
Salem, OR 97301
cmonson@orcities.org

Matthew W. Perkins
Davison Van Cleve PC
333 SW Taylor, Suite 300
Portland, OR 97204
mwp@dvclaw.com

Lisa F. Rackner
Ater Wynne LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
lfr@aterwynne.com

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Steve Rothert
strothert@amrivers.org

Gregory W. Said
Idaho Power Company
PO Box 70
Boise, ID 83707-0070
gsaid@idahopower.com

Thomas P. Schlosser
t.schlosser@msaj.com

Rob Roy Smith
r.smith@msaj.com

Thane Somerville
t.somerville@msaj.com

Glen H. Spain
Pacific Coast Federation of
Fishermen's Associations
PO Box 11170
Eugene, OR 97440-3370
fishlifr@aol.com

John W. Stephens
Esler Stephens & Buckley
888 SW Fifth Avenue, Suite 700
Portland, OR 97204-2021
stephens@eslerstephens.com

Mark Thompson
Public Power Council
1500 NE Irving Street, Suite 200
Portland, OR 97232
mthompson@ppcpdx.org

Douglas C. Tingey
Portland General Electric Co
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
doug.tingey@pgn.com

Sandi R. Tripp
Karuk Tribe
Dept. of Natural Resources
PO Box 1016
Happy Camp, CA 95546
strip@karuk.us

Sarah Wallace
Ater Wynne LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
sek@aterwynne.com

Benjamin Walters
Susan Anderson
bwalters@ci.portland.or.us
susananderson@ci.portland.or.us

Michael T. Weirich
Department of Justice
Regulated Utility & Business Section
1162 Court Street NE
Salem, OR 97301-4096
michael.weirich@state.or.us

Steven Weiss
Northwest Energy Coalition
4422 Oregon Trail Court NE
Salem, OR 97305
steve@nwenergy.org

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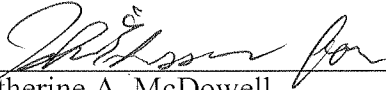
Linda K. Williams
Kafoury & McDougal
10266 SW Lancaster Road
Portland, OR 97219-6305
linda@lindawilliams.net

Peter J. Richardson
Richardson & O'Leary
PO Box 7218
Boise, ID 83707
peter@richardsonandoleary.com

Michael W. Orcutt
Hoopa Valley Tribe Fisheries Dept
PO Box 417
Hoopa, CA 95546
director@pcweb.net

Paul Woodin
Western Wind Power
282 Largent Lane
Goldendale, WA 98620-3619
pwoodin@gorge.net

DATED: November 14, 2005.


Katherine A. McDowell

Of Attorneys for MEHC and PacifiCorp