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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
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Attn: Filing Center

RE: UM 1050 – PacifiCorp’s Reply

PacifiCorp d/b/a Pacific Power provides for filing in the above-referenced docket its reply to the Motion of the Industrial Customers of Northwest Utilities to Determine the Rights and Status of its Expert Consultant.

Please contact me with any questions regarding this filing at (503) 813-6583.

Sincerely,

Natasha Siores
Manager, Regulatory Affairs

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1050

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Request to Initiate and Investigation of Multi-
Jurisdictional Issue and Approve an Inter-
Jurisdictional Cost Allocation Protocol.

PACIFICORP'S REPLY TO THE
MOTION OF THE INDUSTRIAL
CUSTOMERS OF NORTHWEST
UTILITIES TO DETERMINE THE
RIGHTS AND STATUS OF ITS
EXPERT CONSULTANT

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) files this Response to the Industrial Customers of Northwest Utilities' (ICNU) Motion to determine the rights and status of its expert consultant, Dr. Marc Hellman (Motion) under OAR 860-001-0420(4). ICNU requests that the Commission find that: (1) Dr. Hellman may represent ICNU, and receive confidential information, in PacifiCorp's Multi-State Process (MSP) Workgroup meetings; and (2) grant permission under OAR 860-001-0330(2) for Dr. Hellman to appear as a witness on behalf of ICNU in UM 1050. PacifiCorp objects to both of ICNU's requests. ICNU has not presented any credible basis to support deviation from the restriction in OAR 860-001-0330 or offered any mitigation to address serious due process concerns inherent in ICNU's request. Further, ICNU has engaged in questionable behavior and failed to comply with the MSP 2nd Amended and Restated Intervenor Funding Agreement (MSP IFA) and Commission order approving that agreement. For these, and the other reasons discussed below, PacifiCorp requests that the Commission deny ICNU's motion. Alternatively, if the Commission grants the Motion, PacifiCorp requests that the Commission initiate an investigation into whether ICNU has materially violated the MSP IFA and ICNU's eligibility to receive funding be terminated per Section 7.1(c). If the Commission granted

ICNU's motion, PacifiCorp also requests that for consistency, all Oregon MSP participants must execute a separate non-disclosure agreement (NDA) with PacifiCorp to access future confidential information in the MSP.

I. ARGUMENT

ICNU's motion should be denied. Most importantly, ICNU has not presented any credible rationale supporting its request. Secondly, ICNU's behavior has been questionable and should not be condoned. ICNU argues that PacifiCorp's concerns are misplaced and that Dr. Hellman's extensive experience in UM 1050 would continue to benefit the record in the proceeding. ICNU provides no other justification to support the Commission's first waiver of the restriction in OAR 860-001-0330. Applying ICNU's level of analysis, however, would undermine the entire basis for OAR 860-001-0330 and threaten the integrity of the Commission's process. Furthermore, ICNU's attempt to circumvent the MSP IFA, and PacifiCorp's legal counsel, was inappropriate, and PacifiCorp requests that the Commission make a direct statement that ICNU's behavior cannot continue.

A. **ICNU Has Not Presented Sufficient Basis to Justify the Potential Prejudice to Other Parties' Right to Due Process, and Granting ICNU's Request Based on the Claims in the Motion Would Remove All Meaning From OAR 860-001-0330(2)**

ICNU claims that PacifiCorp has not provided a valid basis to prevent Dr. Hellman from representing ICNU in the MSP.¹ The burden, however, is not on PacifiCorp, but on ICNU to show that Dr. Hellman's continued participation would not be prejudicial to other Parties' interests and that due process can be protected. ICNU has not met this burden.

¹ Motion at 6.

OAR 860-001-0330 states that absent the written permission of the Commission, a former Commission employee may not appear as a witness on behalf of other parties in a contested case. UM 1050 has both contested and non-contested phases. While UM 1050 is not currently in a contested phase, it will be in the future. ICNU knows this and requests written permission to allow Dr. Hellman to participate in the future contested case phase without restriction. Accordingly, ICNU's attempts to distinguish between a contested and non-contested proceeding is merely a distraction given its request for permission under OAR 860-001-0330(2). While it is within the Commission's discretion to permit a former employee to act as a witness for other parties, the Commission should be careful to protect due process and the integrity of the proceeding.

1. Granting ICNU's Motion Would Set a Precedent Contrary to the Policy Articulated in OAR 860-001-0330

Granting ICNU's motion would set a precedent that would undermine the very intent of OAR 860-001-0330(2). The one and only basis for ICNU's request is its claim that Dr. Hellman's prior participation in UM 1050 "will contribute to a fuller and better record...."² If this were the standard for waiving the restriction in OAR 860-001-0330(2), requesting authorization under OAR 860-001-0330(2) would be a mere formality. It would be impossible to argue that any witness for Staff does not have experience regarding the issues to which that witness had previously testified, or utility regulation generally.

The fundamental purpose of OAR 860-001-0330(2) is to protect the integrity of the process. Witnesses for Staff have knowledge of internal positions and privileged legal advice. Witnesses for Staff also have the sole ability to interpret their prior testimony. Given

² Motion at 9.

the important due process and conflicts issues protected by OAR 860-001-0330(2), the Commission should apply a higher standard than ICNU suggests.

A more appropriate standard would address the potential risk to due process and prejudice to other parties' ability to represent their interests. PacifiCorp agrees that, under certain limited circumstances, it may be acceptable for a former Staff witness to continue to participate in a proceeding for another Party. At the least, the Commission should consider the following factors:

- Was the prior testimony purely technical in nature or policy based (i.e. subject to interpretation of intent)?
- Was the former Staff witness involved in management or administration, such that they may have had access to confidential Staff position development or access to privileged legal advice?
- Did the former Staff witness have a lead role in the proceeding or a lead role in the development of Staff's position?
- The length of the proceeding and whether there is sufficient documentation or institutional knowledge to effectively challenge the recollection of the former Commission employee.
- Whether the former employee has sought an opinion from the Oregon Government Ethics Commission, or otherwise addressed the potential for a conflict of interest.

These are critical concerns that ICNU has failed to address in its Motion. Due process, however, dictates that the Commission carefully consider the risk of prejudice before allowing participation by a former Commission employee. On balance, the risk of allowing Dr. Hellman to continue in the MSP and UM 1050 greatly outweigh ICNU's professed benefits.

2. Dr. Hellman's Former Position within Staff and the Nature of Involvement in MSP and Prior Testimony Are the Basis for PacifiCorp's Concerns

PacifiCorp's MSP has been an ongoing process for nearly two decades and resulted in three inter-jurisdictional allocation protocols approved by the Commission. Dr. Hellman has

been a witness and the lead negotiator for Staff. As an administrator and senior employee of the Commission, many of Staff's policy and negotiation positions were developed by Dr. Hellman or with his input. This is particularly true for PacifiCorp's MSP. Additionally, Dr. Hellman, by his own admission had a leadership role within Staff until just recently, both generally and in the relation to the MSP.³ Once that leadership role appeared to be at an end, but while still employed as an advisor to the Commission, Dr. Hellman started offering services to ICNU.⁴ While Dr. Hellman had been consulting for ICNU in other states, last December, Dr. Hellman specifically sought to provide ICNU with consulting services in the MSP and UM 1050 based on his extensive participation.⁵

As an administrator, Dr. Hellman would have access to confidential company information, confidential Staff position discussions, and privileged legal advice related to UM 1050 and PacifiCorp's MSP. Allowing Dr. Hellman to act as a witness for ICNU, would provide ICNU with access to confidential Staff positions. This would provide an unfair advantage to ICNU in both the MSP, allocation methodology negotiations, and any subsequent contested case proceedings. Contrary to ICNU's claim that its interests are aligned with Staff,⁶ ICNU has fully litigated two of the three allocation protocols approved by the Commission.⁷ In those proceedings, PacifiCorp and the other Parties, including Staff, reached negotiated settlements.

³ Motion, Exhibit A, Affidavit of Dr. Marc M. Hellman, Page 1-2, paragraphs 3-4.

⁴ *Id.*

⁵ Dr. Hellman's affidavit does not identify any communication with the Oregon Government Ethics Commission regarding his potential conflict of interest, discussed further below.

⁶ Motion at 8.

⁷ See *In the Matter of PacifiCorp, dba Pacific Power, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol*, Order No. 16-319 (August 23, 2016); and *In the Matter of PacifiCorp Request to Initiate an Investigation of Multi-Jurisdictional Issues and Approve an Inter-Jurisdictional Cost Allocation Protocol*, Order No. 05-021 (January 12, 2005).

Dr. Hellman is also in a position to ‘interpret’ his prior testimony for the benefit of ICNU. Dr. Hellman’s testimony was not technical in nature, but rather based on policy and other regulatory positions. This is true for both Dr. Hellman’s Direct Testimony and his testimony in support of the stipulation in 2004.

While Dr. Hellman’s prior testimony was filed in 2004, the nature of the MSP often results in the resurfacing of allocation issues. Indeed, Staff has indicated that in UM 1824, it is considering the hybrid allocation methodology discussed in Dr. Hellman’s 2004 testimony. Parties to UM 1824 have indicated that they believe that process will inform their positions in the MSP and UM 1050 when PacifiCorp files a new allocation methodology. ICNU has anticipated this and seeks permission for Dr. Hellman to act as a witness on ICNU’s behalf.

3. *The Length of a Proceeding Only Increases the Risk of Prejudice and the Need for More Caution by the Commission*

ICNU argues that “[t]he fact that ICNU must request permission under OAR 860-001-0330 for [Dr. Hellman] to appear in this docket on its behalf is simply a reflection of how long this docket has gone on....” Again, ICNU’s argument ignores the risk to other Parties’ interests. The length of the proceeding is a critical consideration. The longer a proceeding goes on, the greater the risk that other Commission employees with knowledge of the proceeding may have retired or moved on, eliminating the ability to contradict the recollection of the former employee.

ICNU is not requesting a Commission order allowing Dr. Hellman to participate simply because of his general understanding of utility regulation. ICNU sees value in Dr. Hellman’s experience in this proceeding as a former witness and because of his lead role for Staff in the MSP. Most of the current Staff representatives attending the MSP have not been

involved in the MSP from the beginning. As a result, Dr. Hellman's continued participation would be prejudicial to other Parties' because it would be impossible to determine whether Dr. Hellman's statements or testimony regarding prior Staff positions were based on an accurate recollection of his employment by the Commission or biased by his current consulting engagement. Thus, the length of the proceeding and Dr. Hellman's participation increases the risk of prejudice and the threat to due process.

4. *Dr. Hellman's Participation Could Violate Oregon Conflict of Interest Statutes.*

ORS 244.040(4) states that a public official may not attempt to further or further the personal gain of the public official through the use of confidential information gained in the course of or by reason of holding position as a public official or activities of the public official. ORS 244.040(5) applies the same restriction to former public officials.

ORS 244.020(15) defines 'public official' as including state employees or acting as an agent serving the state of Oregon. PacifiCorp believes Dr. Hellman may be incentivized to divulge confidential information gained in the course of his employment by the Commission for the benefit of ICNU to further his independent consulting business.

ICNU claims that there is no conflict of interest because "Dr. Hellman's engagement for ICNU on this matter does not put him in a position to incur any private pecuniary benefit, either for himself or for any relative or associated business...."⁸ This statement lacks any credibility. Presumably, Dr. Hellman is not providing his services to ICNU for free. If he is getting paid for his services, he is receiving a benefit, and there could be a conflict of interest. The potential for a conflict of interest does not terminate, and ORS 244.040(5) applies after

⁸ Motion at 7-8 (internal quotations omitted).

Dr. Hellman's retirement.⁹ PacifiCorp believes that even if Dr. Hellman's association with ICNU has not already created a conflict of interest, there is a strong possibility that a conflict of interest may occur in the future. ICNU's failure to acknowledge this risk, in either the Motion or Dr. Hellman's affidavit, is concerning.

B. ICNU's Behavior Raises Serious Questions Regarding Its Intent to Comply With Its Commitments and the Propriety of Its Statements to the Commission

1. As Part of the MSP IFA, ICNU Agreed to Be Bound by the Protective Order in UM 1050 to Access Confidential Information in the MSP

ICNU's statement that the UM 1050 Protective Order has been used merely out of convenience¹⁰ does not comply with the terms of the MSP IFA. By signing the MSP IFA, ICNU committed to comply with the Protective Order in UM 1050, for all of its representatives. ICNU's argument that Dr. Hellman's execution of the non-Oregon MSP NDA is sufficient, and "there is no reason to require him to also sign the Protective Order"¹¹ contradicts ICNU's obligation in the MSP IFA, and violates the Commission order approving the funding agreement.

Section 4.7 of the MSP IFA states that:

The Parties agree to take steps to safeguard Confidential Information provided during MSP Activities and consent to be bound by any currently effective General Protective Order or Modified Protective Order issued in UM 1050, ("Protective Order"), to govern the acquisition and use of Confidential Information related directly to the MSP Activities under this Agreement.¹²

⁹ *Moine v. Oregon Government Ethics Comm'n*, 128 Or.App. 681 (1994), *review denied* 320 Or. 270.

¹⁰ Motion at 4 ("ICNU does not dispute that parties have viewed confidential information in the MSP Workgroup process under the UM 1050 protective order. The reason for this, though, as ICNU understands it, is merely one of convenience.")

¹¹ Motion at 4.

¹² MSP 2nd Amended and Restated Intervenor Funding Agreement at 7, filed January 6, 2017 and approved by Order No. 17-028 (February 7, 2017).

As stated by ICNU, MSP Activities under the MSP IFA include the Commissioner Forum and MSP Workgroup.¹³

By agreeing to this provision, ICNU committed that its representatives would be bound by the applicable Protective Order in UM 1050 as a condition of receiving intervenor funding. ICNU now claims that a NDA is sufficient, contrary to the express terms of the MSP IFA. Protection of PacifiCorp's confidential information provided during the MSP is material to the MSP IFA, and any inconsistency in obligations between the Parties increases the risk of disclosure. Accordingly, if the Commission grants ICNU's Motion, PacifiCorp requests that the Commission initiate an investigation to determine whether ICNU's intervenor funding should be terminated per Section 7.1(c) of the MSP IFA.

2. *If the Commission Grants ICNU's Motion, the Commission Should Terminate the Protective Order in UM 1050 and Clarify That All Oregon Parties Must Execute a NDA to Gain Access to Confidential Information in the MSP*

PacifiCorp is concerned that it cannot adequately protect its confidential information if representatives from Oregon Parties in the MSP are subject to different confidentiality requirements. Granting ICNU's Motion would create a situation where different Parties would be subject to different terms governing the confidentiality of information. This would be difficult to manage, and potentially lead to gaps that would result in the disclosure of confidential company information. Accordingly, if the Commission finds that a NDA is sufficient to protect PacifiCorp's confidential information, the Commission should also find that the Protective Order in UM 1050 only applied to contested case phases and instruct Parties that to gain access to confidential information through the MSP in the future they

¹³ Motion at 5-6.

must execute a NDA with PacifiCorp. Such a NDA would be a separate agreement between PacifiCorp and each individual party. PacifiCorp would then request that the Commission issue a new Protective Order in each of the contested case phases of UM 1050.

3. *ICNU's Motion Raises Serious Questions Regarding Its Behavior That Should Not Be Condoned by the Commission*

On January 2, 2018, ICNU's legal counsel requested a copy of the non-Oregon MSP NDA from an employee of PacifiCorp.¹⁴ ICNU's legal counsel had not discussed this request with PacifiCorp's legal counsel, and did not include PacifiCorp's legal counsel on the email.¹⁵ Dr. Hellman signed the non-Oregon MSP NDA the day of receipt, January 2, 2018. The next day, ICNU's legal counsel executed a Consent to be Bound under the Protective Order.¹⁶ ICNU has not explained why it sought different treatment for Mr. Pepple and Dr. Hellman, or why it ignored its obligation under the MSP IFA. By intentionally circumventing its commitment under the MSP IFA and failing to include PacifiCorp's legal counsel in its request for the non-Oregon MSP NDA, ICNU has exhibited a willingness to ignore applicable rules.

The internal inconsistencies in the Motion also raise questions of credibility of ICNU's claims. Exhibit B to the Motion indicates that ICNU had already retained Dr. Hellman before requesting the non-Oregon MSP NDA. Dr. Hellman's affidavit, however, states that he was not retained until January 15, 2018.¹⁷

¹⁴ Motion, Exhibit B.

¹⁵ *Id.*

¹⁶ UM 1050, ICNU Consent to be Bound of Tyler C. Pepple, filed January 3, 2018.

¹⁷ Motion, Exhibit A, Page 2, Paragraph 4.

Dr. Hellman's affidavit also lacks detail regarding his participation in the MSP and UM 1050. Dr. Hellman's discussion of his involvement in the MSP in the affidavit is limited to two sentences.

During my term as Administrator, I represented PUC Staff at various of PacifiCorp's [MSP] meetings as well as testified on behalf of Staff in contested case dockets. I last testified on behalf of Staff in UM 1050 in 2004.¹⁸

While accurate to a degree, it lacks a thorough discussion of Dr. Hellman's role for Staff in the MSP. For example, Dr. Hellman was the lead negotiator for Staff during the development of the 2017 Protocol. He also executed the Stipulation to the PacifiCorp's 2010 Protocol on behalf of Staff.¹⁹

Unfortunately, PacifiCorp lacks sufficient basis to test the statements made in Dr. Hellman's affidavit regarding his recent employment by the Commission. Dr. Hellman's status with the Commission has not been clear to external parties for some time. However, by Dr. Hellman's own admission, while employed by the Commission he provided services to a law firm and intervenor frequently appearing before the Commission.²⁰ From the information provided by ICNU and Dr. Hellman, it does not appear that Dr. Hellman sought an opinion from the Oregon Government Ethics Commission as to whether this dual employment constituted a conflict of interest. If nothing else, Dr. Hellman's affidavit is

¹⁸ Motion, Exhibit A, Page 1, Paragraph 2.

¹⁹ *In the Matter of PacifiCorp, dba Pacific Power, Petition for Approval of Amendments to Revised Protocol Allocation Methodology*, UM 1050, Order No. 11-244, Appendix A (Stipulation), Page 9.

²⁰ Motion, Exhibit A, Pages 1-2 (According to his affidavit, Dr. Hellman was no longer an administrator as of October 2017, and was hired by Davison Van Cleve, P.C. to represent ICNU after his role as administrator ended. Dr. Hellman was still employed by the Commission from October to December 2017 as an advisor. Dr. Hellman was also employed by the Commission starting on January 10, 2018, and retained by ICNU on January 15, 2018.)


evidence that he did not consider the risk of either a conflict of interest or an appearance of a conflict of interest.

II. CONCLUSION

ICNU has failed to provide a rational basis for allowing the participation of Dr. Hellman in PacifiCorp's MSP or for the grant of permission for Dr. Hellman to be a witness in future contested case phases of UM 1050. Accordingly, PacifiCorp requests that the Commission deny the Motion. If the Commission grants the Motion, PacifiCorp requests that the Commission find that ICNU's failure to comply with Section 4.7 of the MSP IFA was a material breach of Order No. 17-028, and initiate an investigation as to whether ICNU's eligibility to receive intervenor funding under the MSP IFA be terminated. If the Commission grants the Motion, PacifiCorp also requests that the Commission clarify that all Oregon participants to the MSP must agree to execute a NDA to gain access to future confidential information in the MSP.

Respectfully submitted this 12th day of February, 2018.

By:



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PacifiCorp d/b/a Pacific Power