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February 27, 2006

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VIA ELECTRONIC FILING

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**Re: PacifiCorp's Response to KWUA's Motion to Compel
Docket UE 170 (Klamath River Basin Irrigator Rates)**

Enclosed for filing is PacifiCorp's Response to KWUA's Motion to Compel in the above-referenced proceeding. A copy of this filing was served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

Sarah J. Adams Lien

SJL:knp
Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 170

In the Matter of PACIFIC POWER &
LIGHT (dba PacifiCorp) Request for a
General Rate Increase in the Company's
Oregon Annual Revenues
(Klamath River Basin Irrigators Rates)

**PACIFICORP'S RESPONSE TO
KWUA'S MOTION TO COMPEL**

I. INTRODUCTION

Pursuant to ALJ Grant's February 23, 2006 Ruling in UE 170, PacifiCorp respectfully submits this response to the Klamath Water Users Association's ("KWUA") Motion to Compel a Response to KWUA's Fifth Set of Data Requests.

II. ARGUMENT

Late in the afternoon on February 14, 2006, with only one full day remaining before the evidentiary hearing in this proceeding, KWUA served a fifth set of data requests on PacifiCorp. Despite the fact that KWUA had waived cross-examination of PacifiCorp witness R. Steven Richardson, the data requests pertained to Mr. Richardson's rebuttal testimony, and to no other witness. In the data requests, KWUA did not specify any particular documents or information; rather, KWUA requested that PacifiCorp produce all documents in all files of PacifiCorp, Mr. Richardson, or Mr. Richardson's law firm, Van Ness Feldman PC, that contain any document that relates in any way to Mr. Richardson's rebuttal testimony or Mr. Richardson's representation of PacifiCorp on issues related to the Klamath Hydroelectric Project since 2002 (*i.e.*, the FERC relicensing case). *See* Motion to Compel, Ex. A (KWUA Data Requests). Inasmuch as PacifiCorp did not open its files and Mr. Richardson's files to the extent sought by KWUA, KWUA claims that PacifiCorp failed to fully respond to these data requests.

1 Because PacifiCorp's responses were not due until *after* the evidentiary hearing,
2 KWUA has no opportunity to move them into the record of this proceeding. Accordingly,
3 KWUA's fifth set of data requests cannot be calculated to the lead to the discovery of
4 admissible evidence, cannot be used to impeach Mr. Richardson's testimony, and cannot be
5 cited in KWUA's legal briefs. Moreover, even if KWUA had propounded the discovery in a
6 timely manner, PacifiCorp has properly responded. Despite KWUA's claims to the contrary,
7 the mere fact that Mr. Richardson testified in this case and represents PacifiCorp in another
8 proceeding does not waive the attorney-client and work product privileges. PacifiCorp is not
9 required to produce irrelevant or privileged documents, nor to respond to requests that are
10 overly broad and unduly burdensome. Accordingly, PacifiCorp respectfully requests the
11 Commission deny KWUA's Motion to Compel.

12 **A. KWUA's Fifth Set of Data Requests Are Untimely, Not Relevant and Not**
13 **Calculated to Lead to the Discovery of Admissible Evidence.**

14 Commission Rule OAR 860-011-0000(3) provides that the Oregon Rules of Civil
15 Procedure govern in all cases before the Commission except as modified by the Commission
16 or Administrative Law Judge. Pursuant to ORCP 36B, any party may seek discovery about
17 any matter that is relevant to its position or a defense. However, the information sought must
18 be reasonably calculated to lead to the discovery of admissible evidence. *See, e.g., Baker v.*
19 *English*, 324 Or. 585, 588 n.3 (1997); *In re Portland Extended Area Service Region*, Docket
20 UM 261, Order No. 91-958 at 5 (OPUC July 31, 1991).

21 KWUA served discovery barely more than a day before the scheduled evidentiary
22 hearing in this docket. KWUA had ample time to serve discovery on PacifiCorp earlier,
23 following submission of PacifiCorp witness Steven Richardson's rebuttal testimony. Despite
24 the fact that other parties served discovery regarding Mr. Richardson's rebuttal testimony in a
25 timely manner such that responses were due before the February 16, 2006 evidentiary
26 hearing, KWUA neglected to do so. KWUA served discovery on PacifiCorp late in the

1 afternoon on February 14, 2006—more than a week after PacifiCorp filed and served
2 Mr. Richardson’s rebuttal testimony and only one full business day before the evidentiary
3 hearing. *See* Motion to Compel at 2. Even under the expedited 5-day discovery schedule,
4 PacifiCorp’s response was not due until after the close of the evidentiary hearing.¹

5 Moreover, KWUA’s Revised Cross-Examination Statement, dated February 15, 2006,
6 did not list Mr. Richardson as a witness KWUA intended to cross-examine. Accordingly,
7 KWUA waived cross-examination of Mr. Richardson. *See* Memorandum and Notice of
8 Hearing issued by ALJ Grant (Jan. 30, 2006) (stating that “[f]ailure to timely submit a cross-
9 examination statement will result in a waiver of a party’s ability to cross-examine
10 witnesses.”). Nevertheless, despite the fact that Mr. Richardson was made available for
11 cross-examination at the evidentiary hearing, KWUA did not cross-examine Mr. Richardson.
12 Nor did KWUA request that the evidentiary hearing remain open or that Mr. Richardson
13 remain available for cross-examination. It is therefore disingenuous for KWUA to now
14 claim that its untimely discovery request is designed to lead to admissible evidence when it
15 has exhausted its opportunities to move evidence into the record and has made no effort to
16 ensure that the record remain open so that it may do so at a later time.

17 KWUA’s untimely discovery requests are not calculated to lead to the discovery of
18 admissible evidence. The evidentiary hearing in the docket has closed and KWUA has made
19 no effort to keep the hearing open. Moreover, as explained above, KWUA declined to cross-
20 examine Mr. Richardson, the subject of KWUA’s discovery request. Thus, KWUA’s
21 discovery was not calculated to impeach Richardson’s testimony. As a fallback, KWUA
22 claims the information it seeks is relevant to its briefing. *See* Motion to Compel at 1, 4.

23

24 ¹ KWUA states in its Motion to Compel that “[i]f PacifiCorp had responded fully and
25 completely to KWUA’s request by the appropriate *January 21, 2006 deadline*, KWUA
26 would have had ample time to review the responsive documents and ascertain whether or not
any of them are germane to the upcoming briefing and argument.” *See* Motion to Compel at
4 (*italics added*). Five business days after February 14, 2006 was Wednesday, February 22,
2006.

1 However, KWUA's briefs must refer to evidence that is reflected in the record. *See*
2 Memorandum issued by ALJ Grant (Feb. 22, 2006) ("when referring to evidence in briefs,
3 parties should include appropriate citations to the transcript, testimony or exhibit"). Because
4 KWUA's discovery requests are not calculated to lead to the discovery of admissible
5 evidence, KWUA's Motion to Compel should be denied.

6 **B. KWUA Seeks Discovery of Communications Protected by Attorney-Client and**
7 **Work-Product Privileges.**

8 **1. PacifiCorp Has Not Waived Attorney-Client or Work-Product Privileges.**

9 KWUA claims PacifiCorp "waived its right to assert the attorney-client privilege with
10 respect to any matter testified to by Mr. Richardson." Motion to Compel at 6. KWUA's
11 argument is in error. KWUA's assertion relies on a Commission order entered in *Central*
12 *Lincoln People's Utility District v. Verizon Northwest Inc.*, OPUC Docket No. UM 1087,
13 Order No. 04-379 (July 8, 2004). In that proceeding, Verizon sought discovery of
14 information related to testimony given by the attorney representing the Central Lincoln
15 People's Utility District ("CLPUD") in that proceeding. Order No. 04-379 at 2. In response
16 to Verizon's data requests, CLPUD asserted attorney-client privilege. Order No. 04-379 at 1.

17 In granting Verizon's motion to compel, the Commission stressed the importance of
18 permitting discover in order to allow for effective cross-examination. The Commission's
19 order states:

20 "Without negotiating the attorney-client privilege as to every
21 disputed data request between Verizon and CLPUD, we
22 address the larger policy question: whether testimony can be
23 fairly considered without allowing discovery and cross-
24 examination on that testimony. It is well established that the
25 testimony of a witness cannot be given much weight without
26 permitting cross-examination. *See Schacher v. Dunne*, 109 Or.
App. 607, 611 (1991) (purpose of cross-examination is to
indicate to fact-finder what weight to give a witness'
testimony). Allowing testimony without cross-examination
makes it difficult to determine whether the testimony is
credible. *See, i.e., Sheedy v. Stall*, 255 Or. 594, 596 (1970)
("Hearsay evidence is excluded because of its

1 untrustworthiness. The declarant's accuracy and veracity
2 cannot be tested by cross-examination."), *aff'd, State v.*
3 *Mendez*, 308 Or. 9, 18-19 (1989)." Order No. 04-379 at 5
(footnote omitted).

4 Accordingly, the Commission determined that "Verizon must have a response to its limited
5 data requests in order to facilitate cross-examination."

6 The policy underlying *Central Lincoln People's Utility District* is not implicated here,
7 because KWUA waived cross-examination of Mr. Richardson. Thus, KWUA cannot rely on
8 *Central Lincoln People's Utility District* to support its argument that it should have access to
9 Mr. Richardson's privileged communications with PacifiCorp.

10 **2. In any Event, Mr. Richardson's Testimony Did Not Pertain to**
11 **Information Learned in the Course of his Past Representation of**
12 **PacifiCorp.**

13 *Central Lincoln People's Utility District* is also distinguishable on the ground that
14 discovery in that case was sought from an attorney who was representing CLPUD in that
15 proceeding. Moreover, that attorney's testimony pertained to communications he had with
16 representatives of Verizon, information he learned in the course of his representation of
17 CLPUD. Order No. 04-379 at 2. In contrast, Mr. Richardson is not representing PacifiCorp
18 in UE 170 and he did not provide testimony regarding attorney-client communications.
19 Rather, Mr. Richardson's testimony related to information gleaned from publicly available
20 information. Unlike *Central Lincoln People's Utility District*, Mr. Richardson's testimony
21 does not pertain to information he could only have learned in the course of representation.

22 In ordering CLPUD to produce documents requested by Verizon, the Commission,
23 after finding no relevant Oregon case law on the matter, turned to *McCormick on Evidence*,
24 vol. I, § 93, 375 (1999). Order No. 04-379 at 5-6. *McCormick* states:

25 "[I]f the client uses the lawyer to prove matter *which he would*
26 *only have learned in the course of his employment* this again
should be considered a waiver as to related communications."
McCormick on Evidence, vol. I, § 93, 375 (5th ed. 2003)
(emphasis added).

1 Here, Mr. Richardson testified to facts known to him from publicly available
2 information, not information obtainable only through employment as PacifiCorp's counsel in
3 another case. For this reason, PacifiCorp submitted the non-privileged, publicly available
4 information upon which Mr. Richardson based his testimony in response to KWUA's data
5 requests. As such, Mr. Richardson's testimony cannot be deemed a waiver of PacifiCorp's
6 attorney-client or work product privilege.

7 **C. KWUA's Fifth Set of Data Requests Are Unduly Burdensome and Overly Broad.**

8 KWUA's data requests are overly broad and unduly burdensome. It is well-
9 established that a party responding to "facially overbroad or unduly burdensome discovery
10 need not provide specific, detailed support." *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197 (D.
11 Kan. 1996).

12 Here, KWUA's data requests seek not just documents from Mr. Richardson's and his
13 law firm's files that Mr. Richardson relied upon for his testimony,² but also everything in any
14 way *related* to the facts referred to in his testimony as well as copies of or access to all files
15 that contain any documents or information that relate to Mr. Richardson's testimony. *See*
16 Motion to Compel, Ex. A at 1-3 (KWUA Data Requests 44-54 seeking "all documents and
17 information" that "that relate to or concern" various aspects of Mr. Richardson's testimony);
18 *id.* at 3 (KWUA Data Requests 55 seeking copies of or access to all files of PacifiCorp, Van
19 Ness Feldman PC, or Mr. Richardson that "contain any documents or information reflecting,
20 memorializing or concerning the facts and legal conclusions asserted by Mr. Richardson in
21 his testimony").

22

23

24 ² In response to KWUA's request for "workpapers, electronic files, spreadsheets,
25 technical data, or other documents" that "support" Mr. Richardson's testimony, PacifiCorp
26 provided Mr. Richardson's resume, identified and provided full citations for 21 publicly
available documents that support Mr. Richardson's testimony, and provided copies of 10
additional documents that support Mr. Richardson's testimony. *See* Motion to Compel, Ex.
B at 1-3 (PacifiCorp Response to KWUA Data Request 43).

1 Even more egregious is Data Request 56, which asks for copies of or access to all
2 files of PacifiCorp, Mr. Richardson and Van Ness Feldman PC “that contain documents or
3 information reflecting memorializing or concerning Mr. Richardson’s representation of
4 PacifiCorp on issues related to the Klamath Hydroelectric Project since 2002.” *Id.* at 4. That
5 request, in addition to being objectionable on the grounds stated above, is especially overly
6 broad and unduly burdensome given that it seeks all of Mr. Richardson’s files in the FERC
7 relicensing proceeding.

8 Such broad requests are always improper and are particularly burdensome when
9 propounded in the days preceding the evidentiary hearing and filing of legal briefs. As such,
10 these requests are facially defective, and general objections were appropriate.

11 III. CONCLUSION

12 For the reasons stated above, PacifiCorp respectfully requests the Commission deny
13 KWUA’s Motion to Compel.

14 DATED: February 27, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket UE 170 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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