

McDowell Rackner & Gibson PC



WENDY MCINDOO
Direct (503) 595-3922
wendy@mcd-law.com

June 27, 2012

VIA ELECTRONIC AND U.S. MAIL

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

Re: UE 233 – Idaho Power Company’s Application for Authority to Increase its Rates and Charges for Electric Service to its Customers in the State of Oregon

Attention Filing Center:

Enclosed for filing in the above-identified docket is an original and one copy of Idaho Power Company’s Response to the Citizens’ Utility Board of Oregon’s Motion to Compel.

A copy of this filing has been served on all parties to this proceeding as indicated on the attached Certificate of Service.

Please contact me with any questions.

Very truly yours,

A handwritten signature in black ink that reads "Wendy McIndoo". The signature is written in a cursive, flowing style.

Wendy McIndoo
Office Manager

Enclosures

cc: Service List

1 prudence of the incremental pollution control investments—consisting only of the scrubber
2 upgrades—that were installed at Jim Bridger Unit 3 during the 2011 Test Year.² Any
3 request for information irrelevant to that narrow issue is outside of the scope of discovery
4 in this case.

5 Here, data requests 48, 49, and 52(b) and (c) (collectively, “Data Requests”) relate
6 exclusively to pollution control investments whose prudence is not at issue in this docket.
7 Data Request 48 asks when Idaho Power first became aware that Jim Bridger Unit 3
8 would require a Selective Catalytic Reducer (“SCR”), Data Request 49 asks when Idaho
9 Power gave its consent for the SCR investment, and Data Request 52(b) and (c) request
10 cost estimates related to the SCR investment and any additional capital investments
11 related to the Regional Haze Rules (“RHR”). These requests are not relevant.

12 In its Motion, CUB attempts to expand the scope of the issues in this case to include
13 the SCR and other pollution control investments by incorrectly characterizing the issue in
14 the case. Specifically, CUB claims that the issue in this docket is the “prudence of the
15 **clean air investments** made by Idaho Power Company at the Bridger Unit 3 Power
16 Plant.”³ From this incorrect statement, CUB concludes that therefore the “Commission
17 must review what IPCO knew or should have known when it made its decision to make
18 **each of the clean air investments** in Bridger 3.”⁴ However, contrary to CUB’s claim, the
19 issue in this case is narrow and discrete and specifically limited to the investment related
20 to the scrubber upgrade that was made in 2011. The prudence of any other pollution
21

22 of the utility’s supply portfolio. Relying on the pleadings filed by the utility, the Commission found
23 that the estimates would not affect the Commission’s decision, so the bases for the estimates were
irrelevant and parties could not obtain them through discovery.

24 ² *Re Idaho Power Company*, Docket UE 233, Order No. 12-055 at Appendix A at 6 (Feb. 23, 2012);
Idaho Power/1300, Carstensen/2.

25 ³ Motion at 4.

26 ⁴ Motion at 4 (emphasis added). Although CUB’s Motion lacks page numbers, Idaho Power’s
response will reference the appropriate pages as if they were properly numbered.

1 control investments, whether made by the Company in the past or anticipated to be made
2 in the future, are not at issue in this case. Indeed, the narrow scope of the issues in this
3 phase of UE 233 was explicitly noted by Administrative Law Judge (“ALJ”) Shani Pines in
4 her May 30, 2012, Prehearing Conference Memorandum.⁵

5 Rather than addressing the narrow issues in this docket, CUB is attempting to litigate
6 general issues relating to utility planning processes and the continued operation of coal
7 plants. These issues are more properly raised in an Integrated Resource Plan docket
8 (which CUB has done⁶) and CUB should not be allowed to unreasonably broaden the
9 scope of this docket to include prudence determinations of investments for which the
10 Company has not sought rate recovery and that have yet to be made.

11 It is true that PacifiCorp’s CAI Capital Projects Study for Jim Bridger U3 did include
12 the SCR investment in its analysis of the cost-effectiveness of the scrubber upgrades for
13 Jim Bridger Unit 3. The SCR investment was included in that study to allow PacifiCorp to
14 determine whether the continued operation of the Bridger—including all of the pollution
15 control costs it expected to make to allow the plant to continue—was cost effective as
16 compared with idling Jim Bridger Unit 3. However, simply because the SCR investment
17 was included in the PacifiCorp’s CAI Capital Projects Study for Jim Bridger U3 does not
18 make CUB’s Data Requests relevant nor does it make the prudence of the SCR
19 investments an issue in this case.

20 Moreover, the Company has made clear through its testimony and pleadings in this
21 docket that Idaho Power is not relying on its subjective knowledge, e.g., when Idaho
22 Power learned that the SCR investment would be required, to demonstrate the prudence

23
24

25 ⁵ See *Re Idaho Power Company*, Docket UE 233, Prehearing Conference Memorandum at 2 (May
30, 2012) (“Given the narrow scope of issues in UE 233 . . .”).

26 ⁶ *Re Idaho Power Company*, Docket LC 53, CUB’s Opening Comments (Oct. 18, 2011).

1 of its decision to invest in the scrubber upgrade.⁷ Rather, the Company is relying on the
2 fact that the decision to move forward with the scrubber upgrades was in objectively the
3 prudent decision at the time, and therefore what the Company actually knew or when the
4 Company knew it will not affect the Commission's decision. Thus, discovery related to the
5 Company's subjective knowledge or actions is irrelevant, especially in this case where the
6 knowledge relates to investments that are not at issue.

7 **B. The Company's Reliance on PacifiCorp's CAI Capital Projects Study for Jim**
8 **Bridger U3 Does Not Render the Data Requests Relevant.**

9 CUB argues that Idaho Power's reliance on PacifiCorp's CAI Capital Projects Study
10 for Jim Bridger U3⁸ makes the SCR investment relevant to this case because the CAI
11 Capital Projects Study for Jim Bridger U3 included the SCR investment.⁹ This argument
12 ignores the actual questions posed by CUB in the Data Requests. Even assuming that
13 the SCR investment is relevant because it was included in the CAI Capital Projects Study
14 for Jim Bridger U3, its relevance is limited to its use in the CAI Capital Projects Study for
15 Jim Bridger U3. CUB's Data Requests, however, do not seek information related to how
16 the SCR investment was included in the CAI Capital Projects Study for Jim Bridger U3.
17 Rather, CUB seeks unrelated information regarding the Company's subjective knowledge
18 of the SCR investments that goes well beyond their inclusion in the CAI Capital Projects
19 Study for Jim Bridger U3. For example, Data Request 49 asks when Idaho Power
20 became aware that SCRs would be required at Jim Bridger Unit 3. This information is
21 irrelevant to how the SCR investment was accounted for in the CAI Capital Projects Study
22 for Jim Bridger U3 because Idaho Power is not the author of that study so its subjective
23

24 ⁷ See e.g., See Idaho Power/1400, Carstensen/3-4; Idaho Power Company's Response to CUB
and OICIP's Motion to Strike at 6.

25 ⁸ See Idaho Power/1403.

26 ⁹ Motion at 6-7.

1 knowledge is irrelevant. CUB has failed to demonstrate why the date Idaho Power
2 became aware of the need for the SCR investment is relevant to that investment's
3 inclusion in the CAI Capital Projects Study for Jim Bridger U3.

4 Moreover, Data Request 52(c) does not even address the SCR investment; it seeks
5 cost estimates for all pollution control investments made at Jim Bridger related to RHR. If
6 the Commission concludes that the Company's reliance on the CAI Capital Projects Study
7 for Jim Bridger U3 makes SCR-related Data Requests relevant, it does not follow that
8 Data Request 52(c) also relevant because it does not ask about SCR investments.

9 **C. CUB's Argument Relies on a Misunderstanding of ORCP 36B(1).**

10 CUB argues that even "if the information CUB was seeking was not relevant, but
11 might lead to relevant information, CUB would still be entitled to receive the requested
12 information."¹⁰ This is the language in ORCP 36B(1) related to *inadmissible* evidence, not
13 *irrelevant* evidence. Admissibility and relevance are distinct concepts and CUB wrongly
14 conflates the two.¹¹ Indeed, the Commission has recognized that "[w]hile ORCP 36B does
15 not require material sought through discovery to be admissible evidence, the material
16 must be relevant to some issue in the case."¹² Irrelevant material is not subject to
17 discovery under any circumstance. Here, the Data Requests all seek irrelevant material
18 and therefore the Motion should be denied.

19

20

21

¹⁰ Motion at 5.

22

23

24

25

26

¹¹ See e.g., OAR 860-001-0450(1) (distinguishing between relevant evidence and admissible evidence). CUB also argues that "IPCO ignores the fact that ORCP 36(B)(1) concludes by stating that: '[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'" Motion at 3. In making this argument, CUB incorrectly suggests that the basis of Idaho Power's objection is that the requested information is *inadmissible*, when the basis of its objection is relevance. Again, CUB appears to conflate these two distinct concepts.

¹² Order No. 98-163 at *4.

1 **D. CUB Again Misapplies the Commission’s Prudence Standard.**

2 CUB argues that the requested material is relevant because “a full record of the
3 **clean air investments being considered by IPCO** for the Bridger Unit 3 Power Plant, in
4 order to meet the clean air compliance statutes and regulations, and **any plan or analysis**
5 **conducted by IPCO** in determining what it needed, and needs, to do to stay in
6 compliance with state and federal clean air regulations is relevant to whether the scrubber
7 upgrades already completed at Bridger Unit 3 were part of a prudent plan and were
8 themselves a prudent investment.”¹³ In other words, CUB argues that its Data Requests
9 are relevant because they are related to what Idaho Power actually considered and the
10 analysis Idaho Power actually performed prior to making the decision to invest in the
11 scrubber upgrades. This argument misunderstands and misapplies the Commission’s
12 objective prudence standard.

13 As ALJ Pines made clear in her May 22, 2012, Ruling on CUB’s Motion to Strike, the
14 Commission’s prudence standard examines what a utility knew *or should have known* at
15 the time a decision was made.¹⁴ In this respect, the prudence standard is purely
16 objective.¹⁵ Idaho Power’s argument in this case relies on the objective nature of the
17 prudence standard. Idaho Power’s testimony and pleadings do not claim that Idaho
18 Power performed the analysis CUB argues is a prerequisite for a prudence
19 determination.¹⁶ Rather, Idaho Power’s testimony and pleadings establish that the
20 Company did not perform the analysis, but that *if it had* performed the analysis based on

21 ¹³ Motion at 5-6 (emphasis added). See also, Motion at 4-5 (“CUB is attempting to obtain, and if
22 appropriate, submit into evidence information related to the clean air investment studies and
23 analyses conducted by IPCO, and others, and also decisions made related to those studies and
analyses completed by IPCO, or others, in relation to the Bridger Unit 3 Power Plant.”).

24 ¹⁴ *Re Idaho Power Company*, Docket UE 233, Ruling at 3 (May 22, 2012).

25 ¹⁵ See also, *Re PacifiCorp*, Dockets UM 995/UE 121/UC 578, Order No. 02-469 at 4-5 (July 18,
2002); *Re Portland General Electric Co.*, Docket UE 196, Order No. 10-051 at 6 (Feb. 11, 2010).

26 ¹⁶ See *Idaho Power/1400, Carstensen/3-4*; *Idaho Power Company’s Response to CUB and OICIP’s*
Motion to Strike at 6.

1 the information that was available at the time the decision was made, that analysis would
2 have demonstrated that the scrubber upgrade investment was prudent.¹⁷ Therefore,
3 Idaho Power's subjective knowledge does not affect the Commission's decision in this
4 case and the Data Requests are seeking irrelevant material.¹⁸

5 **E. CUB should not be Allowed to File Supplemental Testimony.**

6 CUB requests an opportunity to file supplemental testimony in the event that the
7 Commission grants its Motion.¹⁹ This request should be denied for two reasons.

8 *First*, it is CUB's delay in conducting discovery that has limited CUB's ability to
9 analyze discovery prior to its next round of testimony. The Data Requests were issued by
10 CUB on May 15, 2012. However, Data Requests 49 and 50 relate generally to SCR
11 investments and therefore CUB has had months to conduct this discovery. Indeed, CUB's
12 testimony in this docket filed on April 13, 2012, discussed the SCR investments—making it
13 clear that CUB believed the SCR investments were relevant at that time.²⁰ At any time
14 CUB could have issued Data Requests 49 and 50, but chose not to.

15 CUB's Motion claims that it served the Data Requests in response to the Company's
16 answer to data request 48.²¹ This is untrue. On May 15, 2012, CUB served on Idaho
17 Power data requests 37 to 56. Data request 48 was served on the Company at the same
18 time as the Data Requests and therefore the Company's response to data request 48
19 could not have "caused CUB to file Data Requests 49, 50, and 52(b) and (c)."²²

20 ¹⁷ See Idaho Power/1400, Carstensen/3-11.

21 ¹⁸ See Order No. 98-163 at *4 (requested material was found irrelevant because "according to
22 PGE's application and pleadings, [the requested material], will not affect the Commission's
23 decision.").

23 ¹⁹ Motion at 7.

24 ²⁰ See CUB/200, Feighner-Jenks/5, 10.

25 ²¹ Motion at 2 and footnote 2. Also, CUB's Motion states that the Company's response to data
26 request 48 was included as part of Exhibit B to the Motion. On the version of the Motion that was
served on Idaho Power, the response to data request 48 was not included.

²² Motion at 2.

1 CUB may also claim that the Data Requests were prompted by the Company's
2 rebuttal testimony, which was filed on May 4, 2012. But only Data Request 52(b) and (c)
3 relate to issues raised for the first time in the Company's rebuttal testimony. And yet CUB
4 did not serve Data Request 52 on the Company until May 15 and then waited nine full
5 days from the receipt of the Company's objections to confer regarding this Motion. CUB's
6 delay in issuing the Data Requests and filing the Motion should not be grounds to further
7 delay this docket or otherwise provide CUB an additional opportunity to file testimony.
8 Any prejudice alleged by CUB resulting from the timeliness of a ruling on this Motion is the
9 result of CUB's own inaction.

10 *Second*, if the Company is required to respond to the Data Requests, then CUB will
11 not be prejudiced if it is unable to address the Company's responses in a supplemental
12 round of testimony. The procedural schedule in this case provides CUB with an additional
13 opportunity to file testimony on August 13, 2012, and CUB can address these responses
14 in that testimony.

15 III. CONCLUSION

16 The Commission should deny CUB's Motion because the Data Requests seek
17 information that is irrelevant to the single issue in this phase of UE 233—the prudence of
18 the scrubber upgrades at the Jim Bridger Unit 3. If the Commission does grant CUB's
19 Motion, the procedural schedule in this docket should not be delayed because CUB failed
20 to timely conduct discovery and CUB can address Idaho Power's responses in CUB's
21 August 13, 2012, testimony.

22

23

24

25

26

1 Respectfully submitted this 27th day of June, 2012.

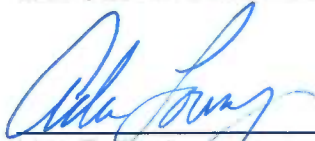
2

3

MCDOWELL RACKNER & GIBSON PC

4

5



6

Lisa F. Rackner
Adam Lowney

7

8

IDAHO POWER COMPANY

9

Lisa Nordstrom
Lead Counsel
1221 West Idaho Street
P.O. Box 70
Boise, Idaho 83707

10

11

12

13

Attorneys for Idaho Power Company

14

15

16

17

18

19

20

21

22

23

24

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in UE 233 on the following named person(s) on the date indicated below by email addressed to said person(s) at his or her last-known address(es) indicated below.

Citizens' Utility Board of Oregon
OPUC Dockets
dockets@oregoncub.org

Robert Jenks
Citizens' Utility Board of Oregon
bob@oregoncub.org

Catriona McCracken
Citizens' Utility Board of Oregon
catriona@oregoncub.org

Stephanie Andrus
Assistant Attorney General
stephanie.andrus@state.or.us

Don Reading
dreading@mindspring.com

Judy Johnson
Public Utility Commission of Oregon
judy.johnson@state.or.us

Erik Colville
Public Utility Commission of Oregon
Erik.colville@state.or.us

Gregory M. Adams
Richardson & O'Leary
greg@richardsonandoleary.com

Peter J. Richardson
Richardson & O'Leary
peter@richardsonandoleary.com

Joshua D. Johnson
Attorney at Law
jdj@racinelaw.net

Eric L. Olsen
Attorney at Law
elo@racinelaw.com

Anthony J. Yankel
Utility Net. Inc.
tony@yankel.net

Randy Dahlgren
Portland General Electric
pge.opuc.filings@pgn.com

Douglas C. Tingey
Portland General Electric
doug.tingey@pgn.com

Irion Sanger
Davison Van Cleve
mail@dvclaw.com

Melinda J. Davison
Davison Van Cleve
mail@dvclaw.com

R. Bryce Dalley
Pacific Power
Bryce.dalley@pacificorp.com

Sarah Wallace
Pacific Power
sarah.wallace@pacificorp.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Oregon Dockets
PacifiCorp
oregondockets@pacificorp.com

John W. Stephens
Esler Stephens & Buckley
Stephens@eslerstephens.com
mec@eslerstephens.com

Wendy Gerlitz
NW Energy Coalition
wendy@nwenergy.org

DATED: June 27, 2012

Donald Schoenbeck
Regulatory & Cogeneration Services
dws@r-c-s-inc.com

Megan Walseth Decker
Renewable Northwest Project
megan@rnp.org


Wendy McIndoo
Office Manager