

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 233

In the Matter of)	
	)	CUB’s Reply to Idaho Power
IDAHO POWER COMPANY	)	Company’s Response to the Citizens’
	)	Utility Board of Oregon’s Motion to
Request for General Rate Revision	)	Compel Idaho Power Company to
	)	Respond to CUB’s Data Requests and
	)	for Additional Time to Analyze and
	)	File Supplemental Testimony Related
	)	to Any Additional Information
	)	Provided
	)	Expedited Review Requested
)	

1 **I. INTRODUCTION.**

2 The Citizens’ Utility Board of Oregon (CUB), pursuant to OAR 860-001-0500(7), OAR
3 860-001-0540 and the RULING issued June 14, 2012 by ALJ Pines, hereby files “CUB’s Reply
4 to Idaho Power Company’s Response to the Citizens’ Utility Board of Oregon’s Motion to
5 Compel Idaho Power Company to Respond to CUB’s Data Requests and for Additional Time to
6 Analyze and File Supplemental Testimony Related to Any Additional Information Provided.”

7 **Expedited Review Requested.**

8 CUB’s Motion to Compel, and request for additional time, resulted from IPCO’s decision
9 not to provide discovery to CUB requested in CUB’s Data Requests 49, 50 and 52(b) and (c) [for
10 ease of reference we will refer to 52 (b) and (c) simply as 52] issued on May 15, 2012.

1 **II. CUB’S DATA REQUESTS SEEK RELEVANT INFORMATION AND ARE**
2 **WITHIN THE SCOPE OF DISCOVERY.**

3 A. *The information sought by CUB is relevant to any Commission decision in this matter.*

4 The Commission indicated during the LC 53 proceedings earlier this year that it too is
5 concerned that IPCO is making investments in response to clean air regulations without first
6 completing a comprehensive study of the possible costs and consequences of environmental
7 regulations associated with the Company’s partial ownership of three coal plants.¹ The

¹ Order 12-177 at 4. “As discussed at the public meeting, we share the concerns raised by CUB and RNP regarding Idaho Power's failure to perform a comprehensive study of the possible costs and consequences of environmental regulations associated with the company's partial ownership of three coal plants. Accordingly, we acknowledge Staffs proposed Action Item 11, but not any other IRP provision relating to new investments in coal plants until Idaho Power completes a study of its coal investment compliance costs and other parties have had the opportunity to comment on the study.”

* * * *

“Action Item 11 - Evaluation of Environmental Compliance Costs for Existing Coal-fired Plants

In its next IRP Update, Idaho Power will include an Evaluation of Environmental Compliance Costs for Existing Coal-fired Plants. The Evaluation will investigate whether there is flexibility in the emerging environmental regulations that would allow the Company to avoid early compliance costs by offering to shut down individual units prior to the end of their useful lives. The Company will also conduct further plant specific analysis to determine whether this tradeoff would be in the ratepayers' interest.” Order 12-177 Appendix A at 2.

* * * *

The Commission’s concerns were clear at the LC 53 Company presentation to the Commission:

Commissioner Savage: I’ve got to ask my empirical question now. Are you making investments related to EPA regs before the study is completed?

Mark Stokes: Again, I don’t have the specifics with me. I believe we do have some dollars in our budget this year...

Commissioner Savage: For EPA regulations...

Mark Stokes: Yeah, basically emissions-type equipment. I don’t believe it’s related to MACT, it might be related to the RH BART, I can’t specifically say at this point.

* * * *

Commissioner Bloom: How much money are you talking about to meet the EPA requirements?

Mark Stokes: Oh...Commissioner I apologize I can’t tell you exactly how much. I know back when we did the ...um...I do not believe it’s on the order of tens of millions. I think it’s less than that um...an exact amount though I cannot give you.

Commissioner Ackerman: Single digit millions?

Mark Stokes: I believe so or even less.

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1 Commission has also stated that it reserves ratemaking issues for ratemaking proceedings. UE
2 233 is the ratemaking proceeding specifically designated for the review of the clean air
3 compliance costs related to Bridger Unit 3 for the test year. For all that the Company desires that
4 this test year review be completely insulated from the Company's implementation of its
5 previously stated plans, that is not how utility regulation has worked in the past or works today.²
6 The bottom line here is that the parties fundamentally disagree on what is relevant. It is CUB's
7 position that a review of the compliance costs at issue in the test year requires, as CUB has stated
8 all along, a review of IPCO's total plan for dealing with clean air compliance at Bridger Unit 3.
9 It is for this reason that CUB has submitted Data Requests related to IPCO's knowledge of the
10 need for a Selective Catalytic Reducer (SCR) and any additional capital investments related to
11 the Regional Haze Rules (RHR). Without knowing about those investments, CUB will have to
12 request that all of the clean air compliance costs at issue in the test year be found not to be used
13 or useful because, without the SCR, these investments do not allow the plant to operate past the
14 BART compliance deadline. The Commission needs to know what the Company knew, in
15 addition to what the historical facts and circumstances were, in order to conduct a full prudence
16 review of this matter.

Commissioner Bloom: A million here, a million there....

Mark Stokes: I am sorry to interrupt here but I believe it's a minimal amount here in 12 it's certainly a number we could come up with and get to you though.

* * * * *

Mark Stokes: We were able to get some coal cost numbers um . . . for 2012 and the total was \$4,680,000 and that's all for engineering and design work this year only. It's not actual purchase and installation of equipment.

Commissioner Ackerman: And that is, that is, I'm sorry the coal work related to the MACT rules or BART?

Mark Stokes: No scrubbers and mercury controls.

UE 233/CUB/200 Feighner-Jenks/3 Fn.1.

² It is the Company's position that "[a]ny request for information irrelevant to [the prudence of the incremental pollution control investments – consisting only of the scrubber upgrades] is outside of the scope of discovery in this case." Idaho Power Company's response to the Citizens' Utility Board of Oregon's Motion to Compel at 2 lines 1-4.

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1 CUB asserts that the Commission should only find that the scrubber upgrade costs are
2 prudent if they are part of a prudent plan prudently implemented by the Idaho Power to meet the
3 BART/RHR requirements. In order for CUB to analyze the prudence of the Company's actions
4 in incurring these costs, CUB requires the answers to its Data Requests related to the Company's
5 other intended upgrades and costs that may also be necessary to meet clean air compliance
6 regulations. In other words, CUB must review the whole package to see if the incremental parts
7 appropriately add up to the whole. It is CUB's position that such data requests are clearly
8 relevant and within the scope of the proceeding in which the Commission must ultimately
9 determine whether the costs incurred by the Company in the test year were prudently incurred.
10 For example, assume a clean air standard requires two investments in a plant. Each has a net
11 present value cost of \$100 million. On the other hand, the cost of repowering with gas has a net
12 present value of \$150 million. Thus each individual investment is less than the cost of
13 repowering. A piecemeal approach, such as IPCO advocates, would find each of the clean air
14 investments prudent. However, an examination of the total cost of compliance would find
15 repowering with gas was the prudent resource choice because it would lead to the lowest rate for
16 customers.

17 *B. The Partial Stipulation sets forth the issues that CUB will litigate and IPCO agreed to*
18 *the litigation of those issues.*

19 IPCO argues that:

20 CUB attempts to expand the scope of the issues in this case to include the SCR
21 and other pollution control investments by incorrectly characterizing the issue in
22 the case. Specifically, CUB claims that the issue in this docket is the 'prudence of
23 the clean air investments made by Idaho Power Company at the Bridger Unit 3
24 Power Plant.'³

³ Idaho Power Company's Response to the Citizens' Utility Board of Oregon's Motion to Compel at 2, lines 12-16.

1 CUB is perplexed by this accusation. The Partial Stipulation which settled the other issues in UE
2 233 referred to the issues to be addressed in this docket in the following ways. The Stipulation
3 described CUB’s testimony in the matter as having:

4 focused on the . . . Company's treatment of capital investments in *clean air compliance at*
5 *its coal plants*.⁴ (*emphasis added*)

6 It then stated that:

7 As a result of the settlement conference, the Parties have reached a partial
8 settlement in this case — a settlement of all issues *except the prudence of the*
9 *Bridger Pollution Control Investments*.⁵ (*emphasis added*)

10 In elaborating on that statement, the Partial Stipulation provides at section 17 as follows:

11 17. As of the date of filing of this Partial Stipulation, *CUB believes that the*
12 *Company has not yet demonstrated the prudence of incremental Bridger Plant*
13 *pollution control equipment installed during the 2011 test year, and for that*
14 *reason Idaho Power has agreed to respond to additional data requests on this issue*
15 *and will provide testimony on the prudence of its investments on or before*
16 *February 1, 2012. If CUB continues to dispute the prudence of the Company's*
17 *Bridger Pollution Control Investments, CUB and Intervenors may file Reply*
18 *testimony and the Parties will request a Commission ruling on this issue. . . .*⁶
19 (*emphasis added*)

20 Clearly, the information sought by CUB is within the true scope of this docket. The
21 scope as detailed by the Stipulation and as set forth above by CUB.

22 C. *CUB has made no secret of the issues or information it is seeking.*

23 CUB has made no secret of its intent to review the prudence of the incremental Bridger
24 Plant pollution control equipment installed during the 2011 test year or the breadth of the review

⁴ *Re: Idaho Power Company*, Docket UE 233, Order No. 12-055, Appendix A: Partial Stipulation at 3 lines 8-10 (Feb. 23, 2012).

⁵ *Id.* at 4 lines 3 - 6.

⁶ *Id.* at 6 lines 13 -20.

1 that CUB believes should be applied. CUB noted its concerns in its Opening Testimony,⁷
2 included them in the Partial Stipulation filed February 1, 2012, and then elaborated on those
3 same concerns in CUB’s Supplemental Testimony (UE 233/CUB/200) filed in response to John
4 Carstensen’s February 1, 2012 Supplemental Testimony – testimony the Company chose to file
5 on the same day as the Partial Stipulation. Testimony none of the intervenors had seen prior to
6 the time of filing of both documents. Given the timing of IPCO’s testimony, CUB was unable to
7 elaborate on its concerns until after the Partial Stipulation was in place but elaborate it did. And
8 CUB has been seeking to follow up on its concerns ever since.

9 *D. The Discovery Standard is Broad - even Trial Preparation Materials are subject to*
10 *disclosure if relevant and the Company is the only source for the materials.*

11 In the same way that the Company believes 100% in the Company’s case, CUB believes
12 100% in the CUB case. The difference in the belief system here is that CUB believes that the
13 parties should be required to share information so as to vet each other’s cases whereas the
14 Company does not. Here IPCO holds all the cards. IPCO is the only one with information about
15 what IPCO knew and when it knew it. CUB is entitled under the discovery rules to probe
16 IPCO’s case. And the discovery rules are very broad in this regard. Even if the information
17 CUB sought was part of the Company’s “trial preparation materials” and attorney-client
18 privileged or work product protected, if the information was relevant and the Company was the
19 only one with access to that information, the ALJ could under the discovery rules order
20 disclosure of that information.⁸ If relevant information with that extreme level of confidentiality
21 can be ordered disclosed, then obviously relevant information not having that level of

⁷ UE 233/CUB/100 Feighner-Jenks/16 lines 1 – 17.

⁸ ORCP 36B(3).

1 confidentiality should be ordered disclosed. CUB's Data Requests 49, 50 and 52 do not seek
2 Trial Preparation Materials; rather, they seek only regular documents normally disclosed in
3 litigation proceedings. The Company's refusal to disclose these documents is bizarre. The fact
4 that the Company and CUB disagree as to this issue is a fact of litigation and not something
5 requiring such a strident response from the Company – the standard of review is for parties to
6 debate in their briefs and for the Commission to impose. The discovery that should take place in
7 order to allow for appropriate litigation of the case is all that needs to be determined in this
8 motion. The information CUB seeks is relevant to the litigation of this docket. IPCO agreed,
9 when it signed the Partial Stipulation, to respond to data requests from CUB. CUB thinks it is
10 time that IPCO abided by its agreement to answer additional data requests.⁹

11 **III. IPCO'S ADMISSION THAT IT DID NOT DO THE REQUIRED ANALYSIS**
12 **DOES NOT CHANGE THE RELEVANCE OF THE INFORMATION**
13 **SOUGHT BY CUB.**

14 On May 22, 2012, ALJ Pines wrote:

15 our prudence standard looks both to what a utility knew at the time it made its
16 decision and to the objective reasonableness of the utility's decision, taking into
17 account historical facts and circumstances.¹⁰

18 Thus, the Commission will look first at what the utility knew and second, given what it knew, the
19 Commission will determine whether its decision was objectively reasonable taking into account
20 historical facts and circumstances. It appears that IPCO, in hopes of avoiding discovery on the issue, is
21 now admitting that it did not perform the analysis sought by both the Commission and CUB in regards

⁹ Order No. 12-055, Appendix A: Partial Stipulation at 6 lines 13-17: CUB believes that the Company has not yet demonstrated the prudence of incremental Bridger Plant pollution control equipment installed during the 2011 test year, and for that reason Idaho Power has agreed to respond to additional data requests on this issue and will provide testimony on the prudence of its investments on or before February 1, 2012.

¹⁰Re: *Idaho Power Company*, Docket No. UE 233, RULING issued May 22, 2012 at 3.

1 to the costs at issue in this docket.¹¹ It goes on, however, to state that had it performed the analysis based
2 on the information that was available at the time the decision was made that the analysis would have
3 demonstrated that the scrubber upgrade investment was prudent.¹² It is not possible for anyone to
4 determine whether its investment was prudent without both sets of information. The information on
5 what the Company actually knew and, the information related to existing historical facts and
6 circumstances. To argue, as the Company does, that “Idaho Power’s subjective knowledge does not
7 affect the Commission’s decision in this case and that the Data Requests are seeking irrelevant
8 material”¹³ is ludicrous at best. CUB requires this relevant information to present its case to the
9 Commission—that based on what the Company knew, and the existing historical facts and
10 circumstances, the Company’s decision was not prudent. The Commission needs CUB to have the
11 information so that the Commission is presented with a complete record on which to apply the
12 appropriate prudence standard and determine the outcome in this case. This motion is not about the
13 prudence standard applicable in this case, rather this motion it is about the documents CUB is seeking
14 and whether they are relevant to, and within the scope of, these proceedings. CUB respectfully requests
15 that the Commission order IPCO to fully and completely respond to CUB Data Requests 40, 50 and 52.

16 **IV. IPCO ADMITS THAT THE SCR ANALYSIS IS RELEVANT TO THE COST-**
17 **EFFECTIVENESS OF THE SCRUBBER.**

18 IPCO admits that the SCR analysis is relevant to the cost-effectiveness of the scrubber:
19 “[i]t is true that PacifiCorp’s CAI Capital Projects Study for Jim Bridger U3 did include the SCR
20 investment in its analysis of the cost-effectiveness of the scrubber upgrades for Jim Bridger Unit

¹¹ Idaho Power Company’s Response to the Citizens’ Utility Board of Oregon’s Motion to Compel Idaho Power Company to Respond to CUB’s Data Requests . . . at 6 lines 19 – 20.

¹² *Id.* and at page 5 lines 1-2.

¹³ *Id.* at 7 lines 2-4.

1 3.”¹⁴ If it is relevant to the cost-effectiveness of the scrubber then CUB has the right to ask data
2 requests and have them answered.

3 **V. CUB’S ISSUES ARE ALL RATE MAKING ISSUES**

4 As the Commission stated in its order issued in LC 53:

5 We acknowledge a utility's IRP to the extent the plan satisfies our procedural and
6 substantive requirements, and the plan is deemed reasonable at the time of
7 acknowledgement. Acknowledgment does not constitute a determination of the
8 prudence of any resource acquisitions or other expenditures made by the utility
9 pursuant to the plan. *As a legal matter, we must reserve judgment on all rate-*
10 *making issues.*¹⁵ (*emphasis added*)

11 Notwithstanding that CUB is required to litigate ratemaking issues in ratemaking dockets like
12 UE 233, IPCO argues in its Response to CUB’s Motion to Compel that CUB is attempting to
13 litigate general issues relating to utility planning processes and the continued operation of coal
14 plants in the UE 233 docket.¹⁶ This is rather ironic. What IPCO fails to note is that CUB did
15 litigate those issues in the IRP and that is why IPCO is now required to provide a comprehensive
16 clean air cost compliance analysis for its IRP Update. It is CUB’s preference is to have clean air
17 investment plans reviewed in an IRP prior to the decision to proceed. Individual investments
18 would then come into rate cases after they are used and useful. But because, in this case, IPCO
19 chose not to bring its scrubber upgrade investments into the IRP, we are now left having to
20 conduct a prudence review on investments that did not go through an IRP. CUB is appropriately
21 litigating the prudence of the clean air costs incurred by the Company for the test year at issue in
22 this docket.

¹⁴ Idaho Power Company’s Response to Citizens’ Utility Board of Oregon’s Motion to Compel at 3 lines 11-13.

¹⁵ *Re: Idaho Power Company*, Docket LC 53, Order No. 12-177 at 1 (May 21, 2012).

¹⁶ Idaho Power Company Response to the Citizens’ Utility Board of Oregon’s Motion to Compel at 3 liens 5-10.

1 As previously discussed, Idaho Power simply misunderstands CUB’s position. To
2 reiterate, CUB is not seeking to expand the scope of the issues in this case to include a specific
3 prudence review of the SCR; rather, CUB agrees that the case is limited to looking at the
4 prudence of IPCO’s \$8.2 million investment in the scrubber during 2011 in the context of the
5 wider clean air investments. It is the scope of that prudence review that is one of the central
6 issues in this case, and that is where CUB and IPCO fundamentally differ in their respective
7 positions. It is CUB’s position that the Commission must review the clean air investments in
8 Bridger 3 by taking a comprehensive look at the scrubber investment in light of the other
9 investments that will be required to make the investment in the scrubber used and useful (i.e. the
10 SCR) rather than a looking at each individual investment on its own and out of context.¹⁷
11 IPCO’s position is much more narrow—advocating for a piecemeal look at individual
12 investments without evaluating the whole. The appropriate prudence standard and application
13 are appropriately reserved for *briefing*, rather than further discussion in discovery motions and
14 replies. It is CUB’s position that the information requested in the outstanding Data Requests is
15 relevant to its application of the appropriate scope of review for the investment at issue in this
16 docket. In short, looking at anticipated future investments, like the SCR, directly informs the
17 prudence of investing in the scrubber—the issue in this case. Idaho Power may disagree, but that
18 alone does not render the requested evidence outside of the scope of this docket. Idaho Power is
19 free to choose not to rely on such information in its case, but that does not mean that CUB is
20 precluded from doing so.

¹⁷ UE 233/CUB 300 Feighner-Jenks/2 lines 17-21.

1 The Data Requests that CUB has submitted are all within the scope of the UE 233 docket
2 and are relevant to the issues at play in this proceeding.

3 **VI. IPCO’S ARGUMENT THAT CUB HAS SOUGHT TO DELAY THESE**
4 **PROCEEDINGS IS ERRONEOUS**

5
6 IPCO’s allegation that CUB is attempting to delay this docket is patently absurd. It is
7 CUB that has been driving this docket forward and there is no incentive, in fact there is a severe
8 detriment to CUB to any delay in these proceedings. This seems to CUB, as the old saying goes,
9 “people who live in glass houses should not throw stones.”

10 **VII. CUB IS WILLING TO FILE ADDITIONAL TESTIMONY AND EVIDENCE**
11 **WITH REBUTTAL TESTIMONY ON AUGUST 13, 2012.**

12 So as to assist the Commission in its parallel review of the UE 246 and UE 233 dockets
13 CUB, after due consideration, has determined that its case will not be unduly prejudiced by
14 waiting until August 13, 2012 to file testimony related to any Commission ordered responses to
15 CUB’s Data Requests 49, 50 and 52 so long as IPCO is required to respond to the data requests
16 by July 18, 2012. Because of the limited time remaining in this docket, CUB respectfully, and
17 specifically, requests that the ALJ find that regardless of whether the Company addresses the
18 information disclosed in its response to Data Requests 49, 50 and 52(b) and (c) in its Reply
19 Testimony that CUB be allowed to address that information and those issues in its Rebuttal
20 Testimony scheduled to be filed on August 13, 2012.

21 **VIII. CONCLUSION.**

22 Data Requests 49, 50 and 52(b) and (c) all seek information within the scope of this
23 docket, they all seek relevant information. The Company’s attempts to block the discovery of
24 relevant information should not be rewarded.

1 CUB respectfully requests that the Commission order IPCO to fully and completely
2 answer Data Requests 49, 50 and 52 (b) and (c) and to do so on or before July 18, 2012. And,
3 because of the limited time remaining in this docket, CUB respectfully, and specifically, requests
4 that the ALJ find that regardless of whether the Company addresses the information disclosed in
5 its response to Data Requests 49, 50 and 52(b) and (c) in its Reply Testimony that CUB be
6 allowed to address that information and those issues in its Rebuttal Testimony scheduled to be
7 filed on August 13, 2012.

DATED this 11th day of July, 2012.

Respectfully submitted,



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UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of July, 2012, I served the foregoing **CUB's Reply to Idaho Power Company's Response to the Citizens' Utility Board of Oregon's Motion to Compel Idaho Power Company to Respond to CUB's Data Requests and for Additional Time to Analyze and File Supplemental Testimony Related to Any Additional Information Provided** in docket UE 233 upon each party listed in the UE 233 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and one copy by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)
(HC denotes highly confidential)

(C denotes service of Confidential material authorized)

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UE 233 - Certificate of Service CUB's Reply to Idaho Power Company's Response to the Citizens' Utility Board of Oregon's Motion to Compel Idaho Power Company to Respond to CUB's Data Requests and for Additional Time to Analyze and File Supplemental Testimony Related to Any Additional Information Provided

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