

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP, dba PACIFIC POWER,)	Docket No. UM 1794
)	
Investigation into Schedule 37 - Avoided Cost Purchases from Qualifying Facilities of 10,000 kW or Less.)	REPLY OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND RENEWABLE ENERGY COALITION IN SUPPORT OF REQUEST FOR ALJ CERTIFICATION
_____)	

I. INTRODUCTION

The Community Renewable Energy Association (“CREA”) and Renewable Energy Coalition (“Coalition”) (jointly, “Joint QF Parties”) respectfully submit this reply in support of the request that Administrative Law Judge (“ALJ”) Allan Arlow certify the ruling issued November 2 (“November 2nd Ruling”) for consideration by the Oregon Public Utility Commission (“Commission” or “OPUC”). This discrete discovery dispute regards CREA’s data requests regarding PacifiCorp’s 2016 Renewable Request for Proposals (“2016 RFP”) (CREA Data Request Nos. 1.1 through 1.7) and a single data request (CREA Data Request No. 1.11) seeking documents already produced during PacifiCorp’s Renewable Portfolio Standard Implementation Plan (“RPIP”) docket, which is ongoing docket UM 1790.

As ALJ Arlow initially ruled during an expedited discovery conference,¹ the requested materials are unquestionably relevant, and should be produced. The withholding of this

¹ See *Ruling* at 1 (Oct. 20, 2016) (stating, “At the conference, I *ruled* that the information should be provided to CREA, but that it should only be done under such terms as had been agreed to by the parties with respect to modifying the existing protective order, in order to mitigate PacifiCorp's concerns about the disclosure’s impact on future RFP processes.” (emphasis added))

information has materially compromised the Joint QF Parties' ability to meaningfully vet PacifiCorp's currently effective avoided cost rates and its new proposal in this docket to lower those rates even further.

Recent developments demonstrate that the November 2nd Ruling is now in conflict with another ALJ ruling, and PacifiCorp's own actions in other Commission dockets where PacifiCorp has produced information related to the 2016 RFP – creating an inconsistency in rulings among ALJs that should be resolved by the Commissioners. And there is no lawful basis expressed in any filing or ruling for withholding the RPIP materials. If allowed to stand any longer, the November 2nd Ruling's refusal to compel production of this critically relevant material warrants consideration by the Commissioners who directed the vetting of PacifiCorp's avoided costs in this docket.

II. REPLY ARGUMENT

A. Certification Is Required Because the Requested RFP Materials Are Critically Important and the ALJ Ruling at Issue Is in Conflict with Commission Policy and Treatment of the RFP Materials In Other Commission Rulings and Proceedings.

As detailed in voluminous prior filings, the requested materials from the 2016 RFP contain information relevant to both the costs of an avoided renewable resource and whether it is reasonable to assume that PacifiCorp will not acquire another renewable resource until 2028, as it alleges in this case. PacifiCorp is wrong to suggest the material is not relevant and that it is too “highly confidential” to produce – a claim that would be properly addressed under the terms of a protective order as PacifiCorp's own actions in other dockets demonstrate.

1. The Requested RFP Material Is Relevant.

We will again highlight the relevance of the information requested in one of the data

requests in particular to illustrate the unjust outcome of the November 2nd Ruling. In CREA Data Request No. 1.6, CREA requested documents presented to PacifiCorp’s management on the course of action after the 2016 RFP. The very purpose of the RFP was to determine if PacifiCorp should acquire a physical renewable resource in the near term in order to comply with SB 1547, despite prior plans in the 2015 IRP not to acquire any renewable resources in the next 20 years. *In re NIPPC Petition for Temporary Rulemaking and Investigation into PacifiCorp’s 2016 Request for Proposal*, Docket AR 598, UM 1771, Order No. 16-188 at App. A at 3 & 5-6 (May 19, 2016). Thus, assuming PacifiCorp is a prudent utility, these 2016 RFP materials presented to PacifiCorp’s management should speak directly to PacifiCorp’s actual belief regarding its resource needs and the least-cost plan for Renewable Portfolio Standard (“RPS”) compliance after SB 1547. Such analysis would necessarily weigh the impacts of expiring tax credits, projected renewable resource costs, new regulatory requirements like SB 1547, and other recently collected information since acknowledgement of the 2015 IRP. Those documents would therefore contain information addressing the major issue in this docket – when PacifiCorp is likely to acquire another major renewable resource in light of changed circumstances since the 2015 IRP.

PacifiCorp has never denied that such documents analyzing the 2016 RFP results exist, and as discussed below it is now clear that documents of this type have actually been produced in other proceedings during the pendency of this dispute. Therefore, they must be produced.

2. PacifiCorp’s Actions in Another Docket and Another ALJ Ruling Undermine PacifiCorp’s Confidentiality Objection As a Complete Bar to Discovery.

PacifiCorp incorrectly asserts that the highly confidential nature of the information at

issue precludes discovery. *See PacifiCorp's Response to ALJ Certification Request* at 2 (filed Dec. 1, 2016). However, PacifiCorp's arguments contradict its own actions in other dockets and conflict with another ALJ ruling in a third docket, as well as any fair reading of the Commission's administrative rules regarding discovery of commercially sensitive information.

First, the Joint QF Parties recently discovered that PacifiCorp voluntarily produced its 2016 RFP analysis in another ongoing proceeding. Specifically, in docket UE 313, PacifiCorp seeks retail cost recovery for the renewable energy certificates ("RECs") that it acquired instead of physical renewable resources in the 2016 RFP. *See Redacted Staff Report: In re PACIFICORP, dba PACIFIC POWER, Schedule 203, Renewable Resource Deferral Supply Service Adjustment*, Docket No. UE 313/Advice No. 16-011 (filed Dec. 1, 2016), available at <http://edocs.puc.state.or.us/efdocs/HAU/ue313hau122441.pdf>. In its detailed memorandum to the Commissioners, Staff noted that in the 2016 RFP, "PacifiCorp evaluated both new generation proposals and REC proposals against a base-case alternative of building new generation on a 'just-in-time' basis." *Id.* at 2. According to Staff's review of the information, "PacifiCorp found that a least cost method of satisfying the new RPS was to purchase RECs through long-term contracts." *Id.* The Staff memorandum further notes that "Staff reviewed 26 responses to information requests submitted in this filing." *Id.* The Staff memorandum goes on to discuss the prudence of PacifiCorp's management decision to procure the RECs, and includes several redacted sections that apparently discuss the commercially sensitive RFP information provided in UE 313. *Id.* at 3-4. It is now well-established, therefore, that the material PacifiCorp relies on to support the decision in the 2016 RFP is not completely beyond the reach of discovery because it has been produced and relied upon in another ongoing proceeding.

Moreover, in the time since this dispute arose, another Commission ALJ, Tracie Kirkpatrick, has issued a ruling that directly contradicts the November 2nd Ruling – creating another inconsistency that warrants consideration by the Commissioners. *See In re Pub. Util. Comm’n of Or. Investigation into Qualifying Facility Contracting and Pricing*, Docket UM 1610, Ruling at 2-3 (Oct. 27, 2016). ALJ Kirkpatrick’s ruling granted the Coalition’s motion to compel production of materials presented to the Commissioners at the July 26, 2016 special public meeting and related RFP bid submittal information on the ground that it might be relevant to transmission costs associated with PURPA facilities at issue in that PURPA proceeding. *Id.* PacifiCorp finally produced RFP material to the UM 1610 parties’ representatives, including representatives of the Coalition and CREA, subject in part to a modified protective order, on November 30, 2016, during the pendency of this certification request.

In its filings in this docket, however, PacifiCorp continues to assert the 2016 RFP materials cannot be produced in any form or to any extent because they are “highly confidential.” *See PacifiCorp’s Response to ALJ Certification Request* at 2 (filed Dec. 1, 2016). According to PacifiCorp, providing this material to CREA or the Coalition (even under protective order) in this docket would allow bidders in a future PacifiCorp RFP to obtain the information, even though at least some of the information has already been provided to the same parties in another docket.

PacifiCorp’s arguments are misguided. To clarify the record, CREA and the Coalition do not bid into RFPs. They are renewable energy advocacy groups with membership from a broad spectrum of interests, including governmental entities, irrigation districts, and small independent renewable generators. For example, all of the Coalition’s members sell power as mandatory

sales from QFs and none of them are selling power to PacifiCorp pursuant to a RFP. CREA and the Coalition themselves intervene and participate only through their representatives and qualified witnesses. The Joint QF Parties have not asked for RFP bid materials to be supplied to “bidders” in past or future RFPs, or that the identity of specific bidders in the 2016 RFP be provided.² The Joint QF Parties requested that the material be supplied to the *representatives* of parties to this proceeding, who are bound by the Commission’s rules of representation before the Commission. *See* OAR 860-001-0310.

If PacifiCorp is concerned that some element of the information requested is confidential or that it may fall into the hands of future bidders, PacifiCorp may propose to redact any truly qualifying material from the public version of the production and provide it only subject to the general protective order already in place. Or, if it can demonstrate the need, PacifiCorp could provide some redacted parts of the production subject to a more restrictive modified protective order. *See* OAR 860-001-0080 (allowing for the use of protective orders to solve these types of problems so that parties may participate through their representatives). A bidder in a future RFP could not obtain any sensitive 2016 RFP material produced here unless a qualified person under the protective order (such as counsel or a qualified witness/consultant) were to violate the terms of the protective order by supplying the information to an unqualified market-participant bidder.

PacifiCorp’s real argument needs to be more than an assertion that the material is “highly confidential.” Instead, PacifiCorp’s implicit suggestion is that party representatives qualified to sign a protective order cannot be trusted with the material. Essentially, PacifiCorp claims that

² In fact, three of the requests at issue specifically suggested that PacifiCorp may redact bidder identities to protect confidentiality of bidders into the 2016 RFP. *See* CREA Data Request Nos. 1.1, 1.2, & 1.3.

counsel signing this pleading will break their professional ethical responsibilities by sharing PacifiCorp's information with its competitors. Carried to its logical extreme, PacifiCorp's argument would effectively prohibit any party with a direct interest in the matters regulated by the Commission from intervening in Commission proceedings to assert their rights through their qualified representatives. But that undermines the rights of parties and calls into question the Commission's use of any protective order at all. The impact is sweeping and unfair.

PacifiCorp's arguments in support of the November 2nd Ruling strike at the heart of the Joint QF Parties' ability to meaningfully participate in Commission proceedings.

Therefore, PacifiCorp's 2016 RFP materials are not so "highly confidential" that they are beyond the reach of discovery. PacifiCorp has made similar (if not identical) information from the 2016 RFP available in other dockets since the time that the RFP concluded, including a PURPA docket with the same parties, and also including a retail rate-setting docket where the material is at issue.³

3. PacifiCorp's Pleadings Continue to Make Factually Incorrect Statements.

PacifiCorp continues to incorrectly state that "neither the Company nor the Commission relied on the confidential RFP bid information as evidence to support cost and performance inputs or the resource deficiency date in UM 1729(1) or in this proceeding." *See PacifiCorp's Response to ALJ Certification Request* at 7 (filed Dec. 1, 2016). More troubling, PacifiCorp's ongoing misstatements appear to have been relied upon in the November 2nd Ruling. *See id.* at 1 (arguing that ALJ Arlow relied upon the assertion that PacifiCorp never relied upon the RFP

³ There may be additional instances where PacifiCorp has made the RFP information available in Oregon or other jurisdictions of which the Joint QF Parties are not aware.

information in his decision to deny discovery); *Ruling: Motion to Compel Granted in Part and Denied in Part* at 2 (Nov. 2, 2016) (stating, “PacifiCorp adds that neither the company nor the Commission relied on the RFP bid information to set PacifiCorp’s avoided cost prices in the UM 1729(1) proceeding . . .”).

PacifiCorp’s response fails to adequately explain away the extensive statements at the public meeting on August 16, 2016, wherein it specifically and explicitly relied upon the alleged information from the 2016 RFP in support of its proposal for a 2028 deficiency date. *CREA-Coalition Joint Request for ALJ Certification* at 8-10 (filed Nov. 17, 2016) (quoting from the recording of the public meeting). PacifiCorp’s general counsel directly discussed the uncertainty prior to the 2016 RFP and argued “what we’re saying is that what we’ve learned in the interim is that there’s nothing to justify a deviation from the Commission’s standard practice of using an acknowledged IRP.” Public Meeting Video Recording at 1:21:15 (Aug. 16, 2016) (statement of Sarah Kamman, Pacific Power’s General Counsel). In other words, PacifiCorp’s General Counsel argued to the Commissioners that the management decision emerging from the 2016 RFP supported the 2028 deficiency date recommended by PacifiCorp instead of the 2018 date recommended by other parties – directly placing the information requested by CREA in issue here. The Joint QF Parties’ request and desire is not an attempt to re-litigate the results of the 2016 RFP; it is simply a request for directly relevant RFP information relied upon by PacifiCorp itself in its assertions regarding the proper deficiency date for avoided cost rates.

Furthermore, even without taking the time to listen to the audiotape from the public meeting, a cursory review of PacifiCorp’s own written pleadings demonstrates PacifiCorp relied upon the alleged RFP results as the basis to support its proposed avoided costs in UM 1729(1).

Several of CREA's data requests at issue (Nos. 1.1, 1.2, and 1.3) directly quote from PacifiCorp's UM 1729(1) pleading where it argued that the lowest cost bids in the 2016 RFP had a capacity-weighted capital cost and capacity factor consistent with PacifiCorp's proposed use of the 2015 IPR Update figures in avoided costs. PacifiCorp itself acknowledged during this same discovery dispute that its Supplemental Application in UM 1729(1) "referenc[ed] the preliminary results from the resource RFP as consistent with data in the 2015 IRP Update for cost and performance." *PacifiCorp's Motion for Clarification, or Alternatively, Certification* at 3 (filed Oct. 12, 2016).

PacifiCorp repeatedly relied on the 2016 RFP results, and its incorrect statement to the contrary should not be accepted.

4. Good Cause Exists for Certification or Outright Reversal of the November 2nd Ruling on the Requested RFP Materials.

In sum, with the benefit of presently available information, it is now clear that the November 2nd Ruling relies on PacifiCorp's incorrect factual statements, conflicts with another ALJ ruling on the same topic (in UM 1610), conflicts with PacifiCorp's own conduct in another docket (UE 313), undermines the Commission's use of protective orders, and generally strikes at the heart of the Joint QF Parties' ability to participate in this proceeding, or indeed any Commission proceeding with commercially sensitive information. It sets an unjust precedent that contradicts the facts, the law, and basic due process. The fact that ALJ Arlow himself first ruled this material is relevant and discoverable before relying on PacifiCorp's misstatements to rule otherwise supports the need for further review. The Joint QF Parties therefore respectfully request that ALJ Arlow certify the denial of the discovery of the 2016 RFP materials or simply

reverse the ruling denying the request for the RFP information and compel its production as has been done now in another PURPA proceeding.

B. Certification Is Warranted for the Requested RPIP Materials Because the Materials Are Also Critically Important And No Reasonable Basis Has Yet Been Articulated to Deny Production.

PacifiCorp's response regarding its RPIP materials is entirely lacking in substance or merit. The November 2nd Ruling likewise provides no reasonable basis to withhold this material which is unquestionably within PacifiCorp's possession. As summarized below, the RPIP material should be immediately produced.

PacifiCorp appears to suggest the RPIP proceeding is irrelevant. But that is wrong. The RPIP proceeding evaluates PacifiCorp's costs of RPS compliance and its least-cost plan to comply with the RPS. The Commission's RPIP rules provide that "if conditions have materially changed from the conditions assumed in [the IRP] filing, the company must provide sufficient documentation to demonstrate how the implementation plan appropriately balances risks and expected costs" OAR 860-083-0400(4). In the wake of SB 1547's enactment and PacifiCorp's 2016 RFP, the Commission has expressly stated, "Until those [RPIP] plans are updated, we are unable to determine what actions by utilities are least cost and least risk" and it "expect[ed] a thorough evaluation of all potential strategies over a wide range of possible futures." Order No. 16-188 at 2 (May 19, 2016). That is the very same issue in this ongoing avoided cost docket, where the Commission directed a vetting of PacifiCorp's avoided costs in light of changed circumstances since the acknowledgment of PacifiCorp's 2015 IRP.

CREA's data request simply sought production of PacifiCorp's filings and data responses in the RPIP docket, including the confidential material that representatives of CREA and the

Coalition could not simply reproduce in this docket without PacifiCorp's consent. In other words, all the Joint QF Parties' requested was that counsel for PacifiCorp direct an administrative assistant to copy the documents PacifiCorp has filed or produced in docket UM 1790 and send them to CREA for use in evaluating the avoided costs in this docket. The request allows for expedited production of potentially admissible material without the need for the Joint QF Parties to reinvent the wheel by lodging all of the same data requests already made in UM 1790 – a docket covering the same topic as this docket. It could take PacifiCorp less than 15 minutes of administrative time to supply the requested documents to the Joint QF Parties. In PacifiCorp's voluminous filings to date, it has provided no substantive explanation for why this material is unlikely to lead to the discovery of admissible evidence or why it cannot be produced.

ALJ Arlow should reverse the denial of discovery of the RPIP materials. If the November 2nd Ruling will stand on this point, it should be certified for Commission review because it materially prejudices the Joint QF Parties by withholding directly relevant evidence.

III. CONCLUSION

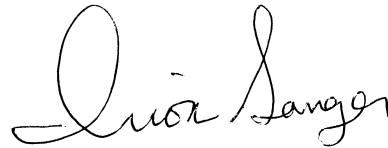
For the reasons described above, the Joint Parties respectfully request that ALJ Arlow certify for Commissioner consideration, or simply reverse, the November 2nd Ruling.

RESPECTFULLY SUBMITTED this 8th day of December, 2016.



Gregory M. Adams (OSB No. 101779)
Richardson Adams, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
greg@richardsonadams.com

Of Attorneys for the Community Renewable
Energy Association



Irion A. Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for Renewable Energy
Coalition