

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 233

In the Matter of)
)
IDAHO POWER COMPANY) CUB AND OICIP’S OBJECTIONS TO
) PACIFICORP’S PETITION TO
) INTERVENE AND REQUEST FOR
Application for Authority to Increase its Rates) RECONSIDERATION OF ALJ ARLOW’S
and Charges for Electric Service in the State of) RULING GRANTING INTERVENTION
Oregon)
_____)

I. INTRODUCTION

Pursuant to ORS 756.561(2), OAR 860-001-0720(3)(d) and OAR 860-001-0300 subsections (6) and (7), the Citizens’ Utility Board of Oregon (CUB), and the Oregon Industrial Customers of Idaho Power (OICIP), hereby file their objections to the Petition to Intervene filed by PacifiCorp in this docket and respectfully request that ALJ Arlow reconsider the Ruling issued on April 20, 2012, and deny the Petition for Intervention requested by PacifiCorp. Upon reconsideration, should ALJ Arlow continue to believe that PacifiCorp’s Petition to Intervene should be granted, CUB and OICIP respectfully request that the scope of PacifiCorp’s intended

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briefing be strictly limited. CUB and OICIP's Request for Reconsideration is based upon OAR 860-001-0720(3)(d) – good cause for further examination of an issue essential to the decision.¹

II. BACKGROUND

Idaho Power Company (IPCO) filed its general rate case – docket UE 233 - on July 7, 2011. Prior to ALJ Arlow's granting of PacifiCorp's Petition to Intervene, the parties to the docket included the Oregon Irrigation Pumpers Association, Inc. (OIAPA), OICIP, Portland General Electric (PGE), CUB, Staff and IPCO.² On December 2, 2011 IPCO, filed an Errata Exhibit 901 indicating that over \$8 million in investments in emission control upgrades at the Jim Bridger 3 coal plant, jointly owned with PacifiCorp, went into service in July 2011 and not in July 2008 as previously reported in the original UE 233 Exhibit 901.³ Not having time to conduct discovery on this matter, prior to the deadline for filing its Opening Testimony, CUB stated:

CUB has no choice but to request that the Commission disallow Idaho Power's investments in emission control upgrades at the Jim Bridger plant for the Company's failure to demonstrate prudence.⁴

PacifiCorp did not seek to intervene at that time.

Following the Intervenors' Opening Testimony, the parties to the UE 233 docket, except

¹ OICIP does not have the funds available to further participate actively in Phase II of the UE 233 docket but joins CUB in this motion because of the seriousness with which it takes the issue of late intervention of PacifiCorp in this docket. OICIP recognizes that it itself intervened late in the docket and this issue is discussed herein but OICIP would note that all of the later interventions prior to that of PacifiCorp all occurred prior to settlement conferences, prior to testimony and prior to the Partial Stipulation – see also next footnote.

² The Deadline for filing Petitions to Intervene was September 6, 2011, the ALJ granted late intervention to three parties: OICIP 9-28-2011, OIPA 10-27-2011 and PGE 11-2-2011. All of these petitions were granted prior to the first settlement conference, prior to the filing of Staff and Intervenor Opening Testimony and prior to the Partial Stipulation entered in Phase I of this docket which set up the procedures to be followed in Phase II of this docket.

³ "This filing corrects an error located on Line 42 of the original Exhibit 901. The original Exhibit 901 incorrectly listed the "In Service Date" as "July, 2008." This filing corrects that date to read "July, 2011." December 11, 2011 cover letter from Attorney Adam Lowney.

⁴ UE 233/CUB/100 Feighner-Jenks/16 lines 11-14;

PGE, proceeded to enter into a Partial Stipulation. The parties could not stipulate to a full agreement because there remained an unresolved issue. As stated in the Partial Stipulation:

The unresolved issue relates to the prudence of the costs associated with pollution control investments at the Jim Bridger Coal Plant ("Bridger Pollution Control Investments"). The details of that issue, and the process by which the Parties propose to resolve that issue, within this docket, is discussed below.⁵

* * * *

The Parties have agreed to request a schedule for the docket which will permit the filing of a deferral to address the outstanding Bridger Pollution Control Investments prudence issue, until that issue is settled or the Commission rules thereon, and which allows for the application of the above adjustments and the implementation of the agreed upon rates effective date of March 1, 2012.⁶

* * * *

16. Bridger Pollution Control Investments: The Company's filed case includes \$8.2 million of gross plant-in-service, on a total-system basis, associated with investments in pollution control equipment at the Jim Bridger Plant ("Bridger Plant"). The Company estimates that these investments result in \$27,500 of Oregon jurisdictional revenue requirement.

17. As of the date of filing of this Partial Stipulation, 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. If CUB continues to dispute the prudence of the Company's Bridger Pollution Control Investments, CUB and Intervenors may file Reply testimony and the Parties will request a Commission ruling on this issue. The Parties agree that even if the issue of the prudence of the Bridger Pollution Control Investments is not resolved by March 1, 2012, the rates implemented on March 1, 2012, will include the Company's Bridger Pollution Control Investments as filed; however, the Company will request to defer the variance between revenues resulting from rates that include the Bridger Pollution Control Investments and revenues resulting from rates without the Bridger Pollution Control Investments. The

⁵ Partial Stipulation at 1 lines 14-18.

⁶ Partial Stipulation at 4 lines 13-17.

Parties agree to support Idaho Power's request for deferral of this variance. If the Commission concludes that all or any portion of the incremental Bridger Pollution Control Investments are imprudent, Idaho Power will refund to customers any money collected from ratepayers for the imprudent investment. Any such refund will be credited to customers' benefit against the outstanding Power Cost Adjustment True Up Balancing Account deferral balance as reflected on Idaho Power's books. In this way, if CUB's issue regarding the Bridger Plant portion of the Revenue Request is not resolved by March 1, 2012, any money that the Company collects for the disputed Bridger Pollution Control Investments will be eligible for return to ratepayers, depending on the Commission's ruling regarding the prudence of the investment.⁷

PacifiCorp did not file a request to intervene at this time either.

The Parties could not have more clearly recorded and telegraphed, in the Partial Stipulation, CUB's intent to ensure that the Commission review IPCO's pollution control investments in Bridger 3 in accordance with the prudence standard. In fact, the Stipulation laid out the entire process as to how the review would take place, the inclusion up front of the costs in rates and the deferral that would be required if it was later determined that the costs should not be included in rates. And still PacifiCorp did not intervene in the UE 233 proceeding. As noted above, other electric utilities were aware of the first phase of the docket. However, out of all the electric utilities only PacifiCorp - the majority owner of Bridger 3 - chose not to intervene.

Of particular note is the fact that CUB and OICIP did not anticipate or propose a process in the Partial Stipulation to determine PacifiCorp's prudence related to its Bridger 3 investments. CUB and OICIP did not do this because PacifiCorp's share of the plant is not relevant in relation to whether Idaho Power was prudent when it agreed to pay its share of the Bridger 3 costs. If CUB and OICIP had thought they were taking on the prudence of both utilities, they would have

⁷ Partial Stipulation at 6 line 8 to page 7 line 13.

proposed a different process and might not have agreed to allow the IPCO costs into rates. In addition, if CUB and OICIP had thought that PacifiCorp's share of the plant was at issue, they would have conducted discovery on PacifiCorp and addressed their share of the Bridger 3 costs in their testimony.

Phase II of the UE 233 docket commenced with the Commission's adoption of the Partial Stipulation in Phase I on February 23, 2012. The issues to be litigated were clear from the moment the docket commenced. PacifiCorp – the majority owner in the Bridger 3 plant - still did not intervene.

IPCO filed its Phase II supplemental testimony – still PacifiCorp did not intervene.

On April 13, 2012, CUB filed its Supplemental Testimony responding only to Staff and IPCO in regard to IPCO's issues because Staff and IPCO were the only parties who had filed, or were planning to file, testimony in Phase II of the docket. CUB responded to both Staff and IPCO because the current schedule permits CUB only one round of testimony and IPCO the final reply. Not until April 19, 2012, did CUB's Counsel, Catriona McCracken, receive a voicemail from PacifiCorp's Counsel, Sarah Wallace, stating that PacifiCorp intended to intervene in UE 233 Phase II, did not intend to file testimony - only to brief the legal issue - and to call if there were questions. CUB was shocked.

Counsel McCracken returned Ms. Wallace's call the same day, prior to the time of PacifiCorp's filing, and left a message advising that CUB would be objecting to the PacifiCorp Petition for Intervention – on which specific grounds she had yet to decide but CUB definitely

did intend to object to PacifiCorp's Petition to Intervene. Later that same day, PacifiCorp filed its Petition to Intervene without any reference to the fact that CUB had stated its intent to object. Unknowing of CUB's intent to object, Judge Arlow granted PacifiCorp's Petition early in the morning of April 20, 2012. At the time it was filed, CUB's General Counsel was just beginning to draft CUB's objections to the Petition to Intervene because CUB understood it would have 10 days to voice those objections as provided in OAR 860-001-0300(6).

CUB and OICIP have many objections to PacifiCorp's petition to intervene. Most of these objections relate to the UE 233 docket but others relate to the bad precedent that will be set for future dockets by the acceptance of such a late intervention. CUB and OICIP's objections and the grounds for its Request for Reconsideration are set forth below.

III. OBJECTIONS TO THE PETITION TO INTERVENE AND REQUEST FOR RECONSIDERATION

1. The Legal Standard.

The legal standard for intervention in all OPUC dockets is set forth in ORS 756.525, which provides:

756.525 Parties to proceedings. (1) The Public Utility Commission may permit any person to become a party who might, on the institution of the proceeding, have been such a party, if application therefor is made before the final taking of evidence in the proceeding.

(2) At any time before the final taking of evidence in a proceeding, any person may apply to the commission for permission to appear and participate in the proceeding. *The commission shall determine the interest of the applicant in the proceeding* and shall grant the application, subject to appropriate conditions, if the commission determines that such appearance and participation will not unreasonably broaden the issues or

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burden the record, *and otherwise may deny the application.*

(3) This section does not apply to any person who might have been an original party in a proceeding before the commission if that person is required by statute to file a pleading or other response in the proceeding within a specified time.⁸

ORS 756.525 is implemented by the Commission through OAR 860-001-0300 subsections (6) and (7). Subsection (6) specifically permits parties to object to the intervention within 10 days of the service of the petition “unless otherwise directed by the ALJ.” In CUB and OICIP’s prior experience, “unless otherwise directed by the ALJ” has meant a *reduction* of the time for parties to respond but not the *foreclosure* of the rights of all parties to respond prior to a Petition to Intervene being granted. Subsection (7) provides several requirements that the ALJ should review prior to granting a Petition to Intervene, and what the ALJ must or may find when making his or her determination that the requirements of OAR 869-001-0300 subsections (6) and (7) have been satisfied. Specifically, OAR 869-001-0300(7) states:

If the Commission or ALJ finds the petitioner has sufficient interest in the proceedings and the petitioner’s appearance and participation will not unreasonably broaden the issues, burden the record, or delay the proceedings, then the Commission or ALJ must grant the petition. The Commission or ALJ may impose appropriate conditions upon any intervenor’s participation in the proceedings, such as restricted access to confidential information. The ALJ may rule on a petition to intervene at a prehearing conference.

CUB and OICIP respectfully request that ALJ Arlow reconsider his ruling for the reasons set forth below.

⁸ ORS 756.525 (emphasis added).

2. OAR 860-001-0300(7) – the sufficient interest test.

CUB and OICIP understand that at first glance it might appear that PacifiCorp has a sufficient interest in this docket – after all, PacifiCorp is the majority owner of the Bridger 3 plant, a portion of whose total pollution control costs are at issue in this docket. However, the pollution control costs at issue in this docket are *not* PacifiCorp’s Bridger 3 pollution control costs. Rather, they are IPCO’s Bridger 3 pollution control costs and this docket is about what **IPCO** knew or should have known at the time that **IPCO** invested money in pollution control at the Bridger 3 plant. This docket is not about what PacifiCorp knew or should have known at the time that **IPCO** made incremental investments in pollution control at the Bridger 3 plant.

Notwithstanding the fact that PacifiCorp states that it does not intend to file testimony in this docket and only intends to brief the legal issues, the fact remains that this docket is **not** about PacifiCorp, and PacifiCorp should not be permitted to turn this docket into a pre-determination of the prudence of any pollution control investments made by PacifiCorp in the Bridger 3 plant.

With this in mind, and bearing in mind that PacifiCorp willfully declined to timely petition for intervention in this docket – see following section – it would appear that PacifiCorp does not in fact have sufficient interest in this docket to be granted intervenor status.

The question of sufficient interest is extremely important because only if the ALJ finds that the Company can show sufficient interest does the ALJ get to consider the other factors set forth in OAR 860-001-0300(7). It is extremely prejudicial to CUB and OICIP’s positions in this docket should PacifiCorp be allowed to enter the docket at this late date. As noted above,

PacifiCorp has not been subjected to the crucible of discovery, has not filed testimony illuminating its positions, will not appear at hearing (following discovery upon its testimony) where it could be subject to cross examination. CUB and OICIP will have no means of divining the basis for any arguments that PacifiCorp might make. Put another way, PacifiCorp is seeking to set precedent that will predetermine the PacifiCorp General Rate Case and they will be making arguments based on facts that are known only to PacifiCorp. Because of this the parties to the UE 233 docket may well miss the significance of an argument because they do not know the facts upon which it is based. This will be highly prejudicial to those parties and to Oregon ratepayers. As discussed in the following paragraphs this is like “trial by ambush.” CUB and OICIP respectfully request, for all the reasons set forth above, and those that follow below, that upon reconsideration the ALJ find that PacifiCorp does not have sufficient interest to participate in this docket, that its late entrance to the docket even had it sufficient interest would be prejudicial to the other parties and intervention should not therefore be granted. CUB and OICIP respectfully request the ALJ to reverse his prior ruling.

3. ORS 756.525, OAR 860-001-0300(2) – late intervention and trial by ambush.

While the OPUC has frequently granted petitions to intervene out of time, and several such petitions were previously granted without objection in this docket,⁹ it is a rare circumstance where intervention is granted so late in a proceeding. Here, PacifiCorp waited out the entire first phase of this docket, and most of the second phase, before attempting to join the proceedings. It

⁹The Deadline for filing Petitions to Intervene was September 6, 2011, the ALJ granted late intervention to three parties: OICIP 9-28-2011, OIPA 10-27-2011 and PGE 11-2-2011. All of these petitions were granted prior to the first settlement conference and the filing of Staff and Intervenor Opening Testimony.

is CUB and OICIP's position that the granting of PacifiCorp's Petition to Intervene in this docket sets bad precedent not only in this proceeding but for all future OPUC proceedings. Parties will be tempted to wait out dockets to save money then jump in at the last minute to save the day, upsetting the evidentiary record, the schedule, in fact the entire apple cart as PacifiCorp is seeking to do in this docket. CUB and OICIP strenuously encourage the ALJ to deny PacifiCorp's attempted intervention in this docket.

A. PacifiCorp has failed to note any extenuating circumstances.

It is CUB and OICIP's position that parties should be discouraged from filing late petitions to intervene and that such petitions should only be granted in very unusual and specific extenuating circumstances – there must be a showing of “good cause”. CUB acknowledges that under ORS 756.525(1), an interested party may intervene at any time prior to the time that final evidence is taken into the record. However, it is CUB and OICIP's position, as the Commission has previously stated, that late intervention should be supported by a showing of good cause.¹⁰ In Docket No. UE 111, the Commission denied Biomass One's petition to intervene, which it filed eight months after PacifiCorp's initial filing.¹¹ The Commission hinged its decision on the fact that Biomass One's participation would unreasonably broaden the issues and burden the proceeding, and was careful to note that Settlement conferences, direct and rebuttal testimony, and a stipulation had already taken place, and the hearing was scheduled to begin shortly, and that the issues raised by Biomass One “should have been addressed in discovery, direct

¹⁰ *Re: PacifiCorp*, Docket No. UE 111, Order No. 00-427 at 2 (Aug. 7, 2000).

¹¹ *Id.*

testimony, and settlement conferences.”¹² Ultimately, the Commission concluded that Biomass One “failed to establish good cause to support a late intervention.”¹³

Like Biomass One, PacifiCorp has failed to point to any extenuating circumstances that would establish good cause as to why it did not petition to intervene at an earlier date – PGE had intervened back in November. Similar to UE 111 discussed above, Phase 1 of the docket has been open and ongoing since July 29, 2011 when IPCO filed its initial application. The parties addressed the issue at hand during Phase I of the docket in Settlement Conferences, direct testimony, reply testimony, and the Stipulation. CUB’s position on IPCO’s pollution control investments has been available for all to see since the filing of CUB’s December 7, 2011 Opening Testimony in Phase I of this docket.¹⁴ Phase II has been ongoing since February 23, 2012 when the Commission issued its order adopting the Partial Stipulation.

And CUB’s position on PacifiCorp’s own investments in coal plants, including Bridger 3, has been clear for all to see since CUB’s intervention in the PacifiCorp IRP – LC 52 and filing of its Opening Comments in that docket on August 25, 2011. CUB’s position was repeated in its Reply Comments in LC 52 on November 3, 2011 and in its letter to the Commission related to the submission of CUB, NWECA, RNP, and Sierra Club’s (with support of ODOE) Proposed

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ UE 233/CUB/100 Feighner-Jenks/2 lines 2-3; UE 233/CUB/100 Feighner-Jenks/16 lines 1-17 specifically lines 11-14 (filed December 7, 2011) “As such, CUB has no choice but to request that the Commission disallow Idaho Power’s investments in emission control upgrades at the Jim Bridger plant for the Company’s failure to demonstrate prudence.”; *See also*, LC 53 CUB Opening Testimony filed October 18, 2011 which was all about the need for coal studies and specifically mentioned Bridger; CUB’s LC 53 Reply Comments (filed January 3, 2012) page 4 “Until Idaho Power agrees to conduct such an analysis, CUB will continue to oppose the acknowledgment of an IRP containing plans for additional coal investments.”

Edits to PacifiCorp Action Item No. 8 with attached Coal Evaluation Template on December 7, 2011. PacifiCorp knows what CUB's position is and has known for a long time. CUB's position would require the utility to analyze its proposed coal investments and any alternatives thereto in an IRP or face CUB in a contested case prudence determination when CUB is asking for disallowances. It seems clear to CUB and OICIP that the purpose of PacifiCorp's intervention in this docket at this time is completely intentional – intervene now and respond to CUB's arguments when CUB has no opportunity to do discovery and no means to cross examine PacifiCorp on the underpinnings for the arguments. This is not a practice the Commission should be encouraging especially when CUB has been telegraphing its intentions in Technicolor for months if not years. In point of fact, CUB has been practically begging the utilities to do the necessary analysis before making any investments. CUB has been trying to help the utilities avoid the train wreck.

PacifiCorp has failed to demonstrate good cause for willfully failing to intervene in this docket prior to April 19, 2012. Admitting PacifiCorp at this late stage in the docket is inappropriate, would unreasonably broaden the issues, burden the proceeding and prejudice the Intervenors. See additional arguments which follow. CUB and OICIP respectfully request that the ALJ, upon reconsideration, deny PacifiCorp's petition for intervention.

B. PacifiCorp has failed to state any special knowledge or expertise that could assist the Commission in resolving the issues in this proceeding.

OAR 860-001-0300(2)(f) requires that entities wishing to intervene in dockets to set forth what, if any, special knowledge or expertise they have that could assist the Commission in

resolving the issues in the proceedings.¹⁵ PacifiCorp has made only a perfunctory statement in its Petition to Intervene that it has special knowledge or expertise that may assist the Commission, but has failed to state what that expertise or special knowledge is. CUB and OICIP fail to understand what, if any, expertise or special knowledge that PacifiCorp can offer the Commission in light of the fact that PacifiCorp has not filed any testimony in this docket and does not intend to do so, and only intends to make *legal arguments* during briefing. Furthermore, how can PacifiCorp possibly assist the Commission with any special expertise or knowledge related to IPCO's due diligence, or the lack thereof, in the making of IPCO's decision to invest in pollution control for Bridger 3 coal investment costs, that would be above and beyond the knowledge and expertise possessed about those subjects by IPCO and its own attorneys?

In point of fact, it has always been CUB and OICIP's understanding that the individual companies jealously guard information from each other – is PacifiCorp now, when the evidentiary record is about to close, sharing additional information with Idaho Power in an attempt to refresh IPCO's recollection as to what PacifiCorp feels IPCO knew or should have known? Do PacifiCorp's attorneys have skills beyond those attained by Idaho Power's Counsel? CUB and OICIP can only guess since PacifiCorp failed to provide any explanation as to what if any special knowledge or expertise PacifiCorp possesses in relation to IPCO's internal decision making process and whether IPCO should have invested in pollution control for the Bridger 3 plant.

¹⁵ OAR 860-001-0300(2)(f).

Given the above arguments, CUB and OICIP respectfully request that the ALJ upon reconsideration deny PacifiCorp's Petition to Intervene. Should the ALJ, upon reconsideration, determine to grant PacifiCorp's Petition to Intervene, CUB and OICIP respectfully request that the ALJ condition PacifiCorp's participation in this docket upon CUB being permitted an additional round of discovery against IPCO so that CUB may probe IPCO's Reply Testimony and determine what if any additional information was obtained by IPCO from PacifiCorp prior to the filing of IPCO's Reply Testimony in this docket, or provided to PacifiCorp by IPCO prior to the filing of IPCO's Testimony in this docket. CUB and OICIP would respectfully request that CUB be accorded a further round of oral discovery at the beginning of the hearing to determine what if any information was exchanged between the filing of the IPCO Reply Testimony and the time of Hearing by the companies, their employees or attorneys. A claim of attorney client or work-product privilege in regard to trial preparation materials for this docket should not be countenanced because CUB "has substantial need of the materials in the preparation of [CUB's] case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."¹⁶

It is CUB and OICIP's position that PacifiCorp should not be allowed to intervene this late in the docket. What PacifiCorp is suggesting to do is equivalent to trial by ambush. PacifiCorp has chosen not to provide testimony to date in this docket, has not been exposed itself to discovery in this docket, is choosing not to appear at hearing thus preventing cross examination (this one is not surprising as there is nothing to cross-examine them on), but now

¹⁶ ORCP 36B(3).

wants to provide the legal arguments for the case. CUB and OICIP do not think that parties who willfully fail to participate in a docket should be permitted to ice the cake so as to cover its blemishes before commandeering it and consuming it.

C. PacifiCorp’s participation in this docket will unreasonably broaden the issues.

As set forth above, any person may intervene in a Commission proceeding, if they can demonstrate that they have sufficient interest in the proceeding, and that they “will not unreasonably broaden the issues. . . .” PacifiCorp’s rendition of the legal issue, upon which it intends to provide briefing, is in one sense non-existent (it does not state what it believes the legal issue to be) and is in another sense much broader than the actual legal issue (singular) in the case. PacifiCorp states that it intends to “file briefs on the legal issues.” What legal issues? There is but one legal issue in this proceeding – the prudence of **IPCO’s** pollution control investments at Bridger 3. The filing of legal briefs in regard to anything else should be found to be beyond the scope of this docket. PacifiCorp has failed to show that they will not broaden the issues in this docket.

Another way in which the intervention of PacifiCorp is likely to unreasonably broaden the issue is that it will also force other parties to petition to intervene. Parties like the Industrial Customers of Northwest Utilities (ICNU) fearing that PacifiCorp is trying to obtain predetermination of the prudence of PacifiCorp’s own investments in Bridger, without the filing of any testimony or the conducting of any discovery in the PacifiCorp general rate case UE 246, may well choose to intervene to ensure that no such predetermination takes place. Parties like

ICNU do not normally intervene in IPCO dockets because there is a separate organization that represents the Oregon industrial customers of Idaho Power (OICIP). But if PacifiCorp is permitted to intervene to try, based upon facts unknown by anyone else, to influence the law to be applied in PacifiCorp's current rate case, then all the parties from the PacifiCorp rate case, and not just ICNU, are also likely to want to intervene in the IPCO UE 233 docket.

It is not, and was not, ever CUB's intent to try PacifiCorp's prudence in this docket. CUB has made no attempts in this docket to try and determine what PacifiCorp knew or should have known about its Bridger 3 investments. Had CUB wanted to do such a thing, it would have subpoenaed information from PacifiCorp to force them into this docket where CUB would then have conducted extensive discovery related to what PacifiCorp knew or should have known. But as previously stated – this docket is not about PacifiCorp and PacifiCorp should not be allowed to attempt to have the Commission pre-determine any issue relevant to the PacifiCorp General Rate Case UE 246. That is for another day and another docket – a docket in which PacifiCorp's own prudence can be appropriately scrutinized, subjected to intensive discovery, testimony, hearing and briefing. These things cannot occur in the UE 233 docket. PacifiCorp should not be granted intervenor status in the UE 233 docket.

In summary, it is, as noted above, trial by ambush to allow PacifiCorp to come in at this late stage in the game and attempt to insert additional issues into the docket. It also undermines not only this docket but the UE 246 docket to allow PacifiCorp to attempt to achieve predetermination of the prudence issues it will face in the UE 246 docket in this UE 233 docket

all without its having to undergo any discovery, testimony, cross examination related to PacifiCorp's investments in Bridger 3. The costs at issue here are IPCO's costs and any legal issue is related to IPCO's costs and not those of PacifiCorp. CUB respectfully requests that ALJ Arlow deny PacifiCorp's request to intervene at this late stage of the IPCO docket.

CUB and OICIP therefore respectfully request that ALJ Arlow, upon reconsideration, find that: CUB, having been denied all ability to probe the basis of the legal argument that PacifiCorp intends to make, PacifiCorp having failed to demonstrate good cause through a showing of extenuating circumstances for its willful failure to timely intervene in this docket, PacifiCorp having failed to demonstrate any special knowledge or expertise in regard to IPCO's internal decision making process - its due diligence or lack thereof - and thus the prudence or imprudence of the IPCO decision-making, and in addition because of the bad precedent that will be set by the granting of this petition for late intervention which will encourage others to behave in like fashion in future dockets, the granting of intervenor status to PacifiCorp in this docket should be denied. If, on the other hand, the ALJ determines that the Petition should continue to be granted, then that ALJ Arlow should, in order to prevent trial by ambush, condition PacifiCorp's participation in this docket upon CUB being permitted an additional round of discovery against IPCO so that CUB may determine what if any additional information was obtained by IPCO from PacifiCorp prior to the filing of IPCO's Reply Testimony in this docket. CUB and OICIP also respectfully request that PacifiCorp, in advance of CUB's final discovery request to IPCO – as set forth above, be required to notify all parties of the legal issues upon

which it intends to brief. CUB and OICIP further request that should the ALJ, after reconsideration, still permit intervention by PacifiCorp into this docket that the ALJ restrict all legal arguments to their application to the facts at play in the UE 233 IPCO docket and specifically state that intervention in this case does not set a precedent for intervention by others in other dockets, and that any Order entered by the Commission in the UE 233 docket is not a pre-determination of the issue of the prudence of PacifiCorp's Bridger 3 coal investment costs which will be litigated and determined as part of the proceeding in UE 246 and dockets related thereto.

4. The ALJ has the discretion to “impose appropriate conditions upon any intervenor’s participation in the proceeding . . .” as requested by CUB

The Commission has imposed conditions upon interventions which sought to raise issues outside scope of the proceeding, which would unreasonably broaden the issues, burden the record and delay the proceeding – see the prior discussion of Biomass One. In another recent proceeding, the ALJ first conditioned and then the Commission terminated the participation of the International Brotherhood of Electrical Workers (“IBEW”).¹⁷ The ALJ conditioned IBEW participation because the IBEW might “abuse” the regulatory process “to extract concessions regarding matters exogenous to” the case.¹⁸ IBEW’s intervention was conditioned by allowing any party to file a motion to terminate its participation based upon a showing that IBEW attempted to use the regulatory process in a manner beyond the scope of the proceeding.¹⁹ The

¹⁷ *Re: Verizon*, Docket No. UM 1431, Order No. 09-409 at 6 (Oct. 14, 2009).

¹⁸ *Re: Verizon*, Docket No. UM 1431, Ruling at 2 (July 2, 2009).

¹⁹ *Id.*

Commission ultimately terminated IBEW's party status because IBEW had sought to use the discovery process in a manner that exceeded the scope of the docket.²⁰

If ALJ Arlow determines to continue with the granting of intervenor status to PacifiCorp, then ALJ Arlow should condition PacifiCorp's participation in this proceeding in the manner requested in the prior sections by CUB and OICIP. This docket is all about what **IPCO** knew or should have known at the time it made its decision to enter into the Bridger 3 coal investments. Issues other than the issue of IPCO's prudence are beyond the scope of issues in this proceeding. The Partial Stipulation has already determined what is to happen to the costs at issue in this docket if they are found to have been imprudently incurred. A finding of imprudence would result in a deferral and the monies being refunded to customers. PacifiCorp should not be allowed to burden the record in this truncated proceeding with any extraneous and irrelevant issues that have no bearing on the question of IPCO's prudence in this docket.

Despite the limited scope of this proceeding, PacifiCorp's Petition to Intervene identifies issues (plural) that it intends to address that are beyond the scope of this proceeding. No party should be allowed to leverage their participation in this proceeding to obtain an advantage in a separate, unrelated matter. For these reasons, CUB and OICIP respectfully request that should ALJ Arlow, upon reconsideration, determine to continue with the granting of intervenor status to PacifiCorp that ALJ Arlow condition the approval by specifically referencing the narrow scope of this proceeding and specifically forbidding parties to broaden the proceeding to address irrelevant issues such as PacifiCorp's Bridger 3 pollution control investment costs. ALJ Arlow

²⁰Re: *Verizon*, Docket No. UM 1431, Order No. 09-409 at 6.

may consider utilizing the process recently used in the above-discussed Verizon proceeding and allow parties to file motions to terminate another parties participation if any party attempts to unreasonably broaden the issues, burden the record, or unreasonably delay the proceeding. Responses to any such motion should be due within five days, which is consistent with the Verizon proceeding and the truncated nature of this proceeding. Again, CUB and OICIP do not think that intervention should be granted to PacifiCorp, but if it is then PacifiCorp's participation should be strictly limited in all the ways previously requested by CUB in each section of this argument.

IV. CONCLUSION

PacifiCorp is trying to do an end run around the regulatory process. CUB and OICIP strenuously object to PacifiCorp's attempt to muscle into the IPCO docket. This docket is only about what IPCO knew or should have known at the time it made its decisions to enter into the pollution control investments made at Bridger 3. What PacifiCorp knew, or should have known, at that time is not relevant to this matter. PacifiCorp has failed to demonstrate that it can meet the sufficient interest test.

PacifiCorp has also failed to demonstrate good cause for its failure to timely intervene in this docket.

PacifiCorp cannot show that its intervention will not prejudice the intervenor parties to this docket. Intervenors have been unable to conduct discovery against PacifiCorp, unable to review PacifiCorp testimony, unable to cross-examine PacifiCorp witnesses on their non-existent

testimony and the non-existent discovery that would have been requested and should have been received. Put another way, PacifiCorp is seeking to set precedent in the IPCO docket that will predetermine the PacifiCorp General Rate Case (UE 246). PacifiCorp will therefore be making arguments based on facts that are only known to PacifiCorp. Because of this, the parties to the UE 233 docket may well miss the significance of an argument because they do not know the facts upon which it is based. This will be highly prejudicial to those parties and to Oregon ratepayers. Allowing PacifiCorp to intervene in this docket and attempt to obtain a predetermination of the costs it expended in its own pollution control investments in the Bridger 3 plant will broaden the issues in this docket.

It will also burden the docket. Everyone who is a party to the PacifiCorp General Rate Case UE 246 will likely also petition to intervene in the IPCO docket and this proceeding will turn into a three ring circus.

CUB and OICIP respectfully request that ALJ Arlow reconsider this matter and then deny PacifiCorp's Petition to Intervene. However, if ALJ Arlow still wishes, after reconsideration, to admit PacifiCorp into these proceedings then CUB and OICIP would, in the alternative, respectfully request that the ALJ strictly limit PacifiCorp's participation in this docket and allow other parties to move to have them ejected from the proceedings should their actions later broaden the scope of the docket or burden the docket in any way.

Dated this 24th day of April, 2012.

Respectfully submitted,



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UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of April, 2012, I served the foregoing **CUB AND OICIP'S OBJECTIONS TO PACIFICORP'S PETITION TO INTERVENE AND REQUEST FOR RECONSIDERATION OF ALJ ARLOW'S ORDER GRANTING INTERVENTION** 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.

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(C denotes service of Confidential material authorized)

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