

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 233**

In the Matter of	)	
	)	
IDAHO POWER COMPANY	)	CUB AND OICIP'S MOTION TO STRIKE
	)	
Application for Authority to Increase its Rates	)	<b>EXPEDITED CONSIDERATION</b>
and Charges for Electric Service in the State of	)	<b>REQUESTED</b>
Oregon	)	
_____	)	

**I. INTRODUCTION**

Pursuant to ORS 756.040 and OAR 860-001-0420 the Citizens' Utility Board of Oregon (CUB) and the Oregon Industrial Customers of Idaho Power (OICIP) hereby respectfully request **Expedited Consideration** of their Motion to Strike portions of the Rebuttal Testimony of John Carstensen. Simultaneously CUB and OICIP are also filing a Motion to Amend the Procedural Schedule in this docket to allow time for this Motion to Strike to be heard and also to allow CUB to engage in the additional discovery necessitated by the Company's last minute filing, eleven days before hearing, of large amounts of new evidence never before disclosed. CUB and OICIP are also requesting additional time to file Surrebuttal Testimony in this docket. **Hearing in this docket is currently scheduled for May 16, 2012.**

UE 233	CUB AND OICIP'S MOTION TO STRIKE
	<b>EXPEDITED CONSIDERATION REQUESTED</b>

CUB, via email dated on the morning of May 8, 2012, alerted all parties to this docket that CUB would be filing both a Motion to Strike and a Motion to Amend the Procedural Schedule. CUB requested that the parties advise CUB of their client's positions so that their positions might be reflected in this filing. The following parties to this docket have advised that their positions regarding this Motion to Strike are as follows:

- Idaho Power Company** - **Objects to the Motion to Strike.**
- PacifiCorp** - **Prior to receipt of the draft motion PacifiCorp had advised that it would take no position.**
- OIPA** - **No response received at time of filing.**
- Portland General Electric** - **No response received at time of filing.**
- ICNU** - **Had not had time to review the motion at the time of filing.**
- OPUC Staff** - **Staff had not yet reviewed the motion at the time of filing.**

## **II. BACKGROUND**

Before ALJ Arlow granted PacifiCorp's Petition to Intervene, the parties to the docket included the Oregon Irrigation Pumpers Association, Inc. (OIPA), OICIP, Portland General Electric (PGE), CUB, Staff and IPCO. Following PacifiCorp's Intervention, the Industrial Customers of Northwest Utilities (ICNU) also moved to intervene and was granted Intervenor status. CUB has been advised that several other parties also intend to file Petitions to Intervene in this docket.

Idaho Power Company (IPCO) filed its general rate case – docket UE 233 - on July 7,

2011. 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.<sup>1</sup> 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.<sup>2</sup>

CUB and the other parties to the UE 233 docket, except PGE, then entered into a Partial Stipulation which specifically set aside the Bridger Unit 3 emission control upgrade issue for further proceedings.

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 . . . . 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.<sup>3</sup>

The Commission, in Order No. 12-055 dated February 23, 2012, adopted the Partial Stipulation.<sup>4</sup>

Phase II of the UE 233 docket commenced with the Commission's adoption of the Partial Stipulation in Phase I. On April 13, 2012, all parties responded to the Company's Supplemental Testimony - CUB filed its "Supplemental Testimony" and Staff filed its "Response Testimony."

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<sup>1</sup> "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.

<sup>2</sup> UE 233/CUB/100 Feighner-Jenks/16 lines 11-14;

<sup>3</sup> Partial Stipulation at 6 line 13 to page 7 line 13.

Then, on April 19, 2012, PacifiCorp filed its Petition to Intervene for purposes of briefing. On April 20, 2012, the Petition to Intervene was granted. Shortly thereafter, on April 24, 2012, CUB and OICIP filed their Objections to PacifiCorp's Petition to Intervene and Request for Reconsideration of ALJ Arlow's Ruling Granting Intervention. In their objections, CUB and OICIP noted their concern that PacifiCorp's entry into the docket had the potential to change the issue from whether IPCO acted prudently to whether PacifiCorp and IPCO acted prudently. CUB and OICIP expressed concern that PacifiCorp would share information with IPCO to "refresh IPCO's recollection" as to what it knew or should have known.<sup>5</sup> CUB and OICIP requested that the ALJ order an additional round of discovery if he allowed PacifiCorp to participate.<sup>6</sup> CUB and OICIP warned that this docket is not about what PacifiCorp knew or should have known and that this docket should not be a vehicle for PacifiCorp to submit evidence and obtain a predetermination of the issues in its General Rate case.<sup>7</sup> Finally CUB and OICIP requested that the ALJ limit the legal argument to the facts in the record.<sup>8</sup> On April 27, 2012, Pacific Power filed its Response to CUB's and OICIP's Objection to Petition to Intervene. On May 1, 2012, ALJ Arlow issued a Ruling Affirming the Petition to Intervene. The Ruling did not order any of the restrictions requested by CUB and OICIP. On May 2, 2012, ICNU also moved to intervene for purposes of briefing and was granted Intervenor status.

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<sup>5</sup> CUB and OICIP's Objections To PacifiCorp's Petition To Intervene And Request For Reconsideration Of ALJ Arlow's Ruling Granting Intervention, at 13.

<sup>6</sup> CUB And OICIP's Objections To PacifiCorp's Petition To Intervene And Request For Reconsideration Of ALJ Arlow's Ruling Granting Intervention at 14.

<sup>7</sup> CUB And OICIP's Objections To PacifiCorp's Petition To Intervene And Request For Reconsideration Of ALJ Arlow's Ruling Granting Intervention at 21.

<sup>8</sup> CUB and OICIP's Objections To PacifiCorp's Petition To Intervene And Request For Reconsideration Of ALJ Arlow's Ruling Granting Intervention, at 18.

The Company filed John Carstensen’s Rebuttal Testimony on May 4, 2012. CUB is once again faced with last minute evidence and no opportunity to rebut – trial by ambush.

**III. PORTIONS OF MR. CARSTENSEN’S REBUTTAL TESTIMONY SHOULD BE STRICKEN**

The standard of review in this docket is Prudence. When evaluating the prudence of a utility’s actions, the OPUC has consistently articulated and applied the following standard:

In a prudence review, the Commission examines the objective reasonableness of a company’s actions measured at the time the company acted: “Prudence is determined by the reasonableness of the actions ‘based on information that was available (*or could reasonably have been available*) at the time.’” *In re PacifiCorp*, UM 995/UE 121/UC 578, Order No. 02-469 at 4 (emphasis added); *See also In re PGE*, UM 196, Order No. 10-051 at 5-6; *In re PGE*, UE 102, Order No. 99-033 at 36-37; *In re Transition Costs*, UM 834, Order No. 98-353 at 9.

With the prudence standard of review in mind, portions of Mr. Carstensen’s Rebuttal Testimony should be stricken for at least three reasons:

- 1) IPCO’s Rebuttal Testimony of John Carstensen relies on a mixture of non-confidential and confidential information received from PacifiCorp either just before or just after its intervention into this docket.<sup>9</sup> CUB and OICIP’s Objections to the PacifiCorp Petition to Intervene warned against possible attempts by PacifiCorp to bolster and subvert the record in this docket by passing information to Idaho Power that Idaho Power did not previously have knowledge of, access to, or have in its records. This is exactly what appears to have happened with regard to the listed CAI study. Idaho Power may have been glad to

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<sup>9</sup> Idaho Power/1400 Carstensen/8 lines 7-16. “**Q. Has the Company since reviewed any additional analysis that demonstrates that the Jim Bridger Unit 3 Scrubber upgrade project is still the least cost option?** A. Yes. In the past week, PacifiCorp has provided Idaho Power an analysis, entitled “CAI Capital Projects Study for Jim Bridger U3 – Dec. 2008 . . . .”

see the CAI study, but its attempt to include that study in the record for this docket is inappropriate and should not be permitted.

This docket is about what Idaho Power knew or should have known. If Idaho Power did not have that study at the time that it made its decision to “consent” to the upgrades, and did not rely on that study at the time it made its decision to “consent” to the upgrades, then it cannot now seek to rely on that study as proof of its having done its due diligence prior to making its decision to “consent” to the upgrades.

CUB respectfully requests that the John Carstensen Rebuttal Testimony, set forth at Idaho Power/1400 Carstensen/8 at line 7 through and including page 9 line 26, be stricken and if not stricken, that CUB’s Motion to Amend the Procedural Schedule, so as to allow time for discovery related to this document and Surrebuttal Testimony on this document, be granted. This is new evidence to this record received at the last minute and not previously relied on by Idaho Power.

2) Mr. Carstensen’s Supplemental Testimony at page 12, line 16, footnote 10, again seeks to rely on a mixture of confidential and non-confidential information. Specifically, Mr. Carstensen cites to PacifiCorp docket LC 52, 2011 Integrated Resource Plan Update at Redacted Appendix A at 86-90 (Mar. 30, 2012). Mr. Carstensen cites to this redacted document and claims that this redacted document supports his position. There are several important things to note here. First, Mr. Carstensen is citing to a redacted document (read confidential) from another docket – LC 52 PacifiCorp’s 2011 IRP. Second, Mr. Carstensen claims that the cited portions of that confidential document support his positions but he does not state whether it is the portions in the redacted or un-redacted versions that support his

positions. This creates a serious problem. A read of the pages he cites shows that what is left after the redactions do not in fact support his position. This leaves the impression that his argument is supported by the sections that are redacted, but it is only an impression since the confidential document is not on the record in this docket. How can any of the parties and the ALJ know whether what is being said is true or not true without access to the entire confidential document?

The Commission's rules allow for admission only of relevant evidence – evidence that tends to make any fact at issue in the proceeding more or less probable than it would be without the evidence.<sup>10</sup> And, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.<sup>11</sup> Here, the evidence did not exist at the time that Idaho Power made its determination to “consent” to the upgrades – the evidence is not probative or relevant. And the evidence, even if probative which CUB thinks it is not, is substantially outweighed by the danger of unfair prejudice, confusion of the issues and delay.

CUB and OICIP therefore respectfully request that Mr. Carstensen's Rebuttal Testimony set forth at Idaho Power/1400 Carstensen/12 lines 14 to 16, and footnote 10, be stricken from the record in this docket for the reasons that the document did not exist at the time that Idaho was required to make its decision to “consent” or not consent to the upgrades and Idaho Power could not therefore have relied on this document – the document has no relevance to the matter of what IPCO knew or should have known at the time because the document simply did not exist; for the reason that the document does not support the claim

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<sup>10</sup> OAR 860-001-0450(1)(a).

<sup>11</sup> OAR 860-001-0450(1)(c).

that is being made – it has no probative value; for the reason that the document cites to both non-confidential and confidential information from another docket not available to the other parties in this docket; and for the reason that there is an extreme danger of unfair prejudice, confusion of the issues, and delay. Idaho Power has objected to similar testimony in other Idaho Power dockets. Idaho Power should not now be permitted to profit from engaging in the same tactics.<sup>12</sup>

3) Idaho Power’s submission of Mr. Carstensen’s Rebuttal Testimony, with its reliance upon documents and information recently provided to it by PacifiCorp, takes this docket far outside its original scope. The whole point of this prudence review was to ascertain what Idaho Power knew or should have known at the time it consented to the Scrubber Upgrade Project at Jim Bridger 3. Nowhere did CUB seek to raise the issue of PacifiCorp’s prudence, in this or any other PacifiCorp docket, related to its Jim Bridger Unit 3 decision making and PacifiCorp should not be allowed to meddle in the discovery process by providing Idaho Power with information, confidential or otherwise, outside of the discovery process in this docket. PacifiCorp was granted intervention in this docket to brief the legal issue. PacifiCorp was not granted intervention in this docket to bless inappropriate, back door discovery techniques on the part of the two utilities. This is the behavior that CUB and OICIP warned could happen. CUB respectfully requests, that the testimony set forth in 1 and 2 above be stricken so as to prevent the expansion of the scope of this docket.

The inclusion of the testimony set forth above in this docket would severely prejudice and prevent any effective response by CUB, given the extensive nature of the new

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<sup>12</sup> UE 214 Idaho Power Company’s Motions to Strike Testimony; or in the Alternative, For leave to File Rebuttal Testimony at 5.



information, its late entry into the evidentiary record, and with a schedule that does not provide for CUB and OICIP to have additional discovery or to provide Surrebuttal Testimony. CUB respectfully requests that if this testimony is not stricken, that CUB be permitted additional time for discovery and the filing of Surrebuttal Testimony, and additional responsive briefing time all as requested in CUB's Motion to Amend the Procedural Schedule filed simultaneously in this docket.

#### IV. CONCLUSION

For all of the above cited reasons, CUB respectfully requests that portions of the Rebuttal Testimony of John Carstensen, identified herein, be stricken from the evidentiary record in this docket and if not stricken that CUB be permitted additional time to conduct discovery, file responsive Surrebuttal Testimony, and have additional time for responsive briefing all as requested in CUB's simultaneously filed Motion to Amend Procedural Schedule.

Dated this 9<sup>th</sup> day of May, 2012.

Respectfully submitted,



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## UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 9<sup>th</sup> day of May, 2012, I served the foregoing **CUB AND OICIP'S MOTION TO STRIKE** 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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(HC denotes highly confidential)

(C denotes service of Confidential material authorized)

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Respectfully submitted,



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