

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 216

In the Matter of)	CUB’S REPLY TO PACIFICORP’S
)	MOTION FOR MODIFIED PROTECTIVE
)	ORDER
PACIFICORP, dba PACIFIC POWER,)	
2011 Transition Adjustment Mechanism)	
)	

Comes now the Citizens’ Utility Board of Oregon and files CUB’s Reply to PacifiCorp’s Motion for Modified Protective Order.

INTRODUCTION

CUB, through lack of time and resources, has been sitting on the sidelines watching the dispute between ICNU and PacifiCorp with regard to Official Forward Price Curve (OFPC) access to document issues. Now, with the filing of PacifiCorp’s Motion for a Modified Protective Order CUB finds it necessary to enter the fray. In this Reply CUB will address both the merits of this dispute – whether parties have a right to access this information – and possible discovery procedures.

ARGUMENT

A. CUB has fought long and hard over the years for access to OFPC documents. CUB agrees with ICNU that this information is relevant; that access to such information was not foreclosed by the prior stipulation; and that the Company must be ordered to produce the information in such a manner that it can be fully and completely vetted.

i. History related to OFPC.

The depth and breadth of CUB’s concern with lack of access to OFPC information is	
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demonstrated in the following quotation from the testimony of Bob Jenks in Docket UE 191:

We have expressed concern in numerous past dockets about the utilities' use of internally-generated forward electricity and natural gas price curves in their annual power cost updates. The forecast of electricity and natural gas prices used in the Company's annual power cost update will have a significant impact on the rates charged to customers. Due to the timing constraints of direct access, the forward price curves upon which rates are actually based are generated both after Staff and the parties have completed their examination of the Company's filing, as well as after the Commission's order authorizing rates based upon those curves to go into effect.

It is unwise to leave such a critical component of customer rates subject to so little, if any, review. In order to increase transparency and provide an automatic check of the Company's forward curves in its final TAM filing, we recommend that the Commission require PacifiCorp to include at least two independently-produced forward electricity and natural gas price curves with its final filing. The Company should also include a chart or table demonstrating, month-by-month, the difference between the Company's internally-generated curves and those of the independent parties. Any deviation of 5% or greater should be explained in the filing. As the Company most likely uses such curves and such a comparison in developing its own curves, the amount of work involved should be negligible.

Beside the automatic check of the reasonableness of the Company's forward price curves, another advantage of including such an analysis with the Company's filing would be that any problem in the internally-generated curves would be more readily apparent, and, given the tight timing requirements of direct access, more quickly addressed.¹

CUB could hardly have been more eloquent in voicing its dismay at the current process.

If there is any point at which a Company could easily game the system, the final update is that point. At that point Staff and Intervenors have all filed their final round of testimony, and even the Commission's rate setting order, which will implement those OFPCs has issued.

¹ UE 191/CUB/100/Jenks/6

- ii. *The documents sought are relevant. The Stipulation reserved the right to review additional elements – OFPCs are another element.*

PacifiCorp argues that the discovery sought is “outside the now very limited scope of this docket, as defined by the terms of the Stipulation.”² PacifiCorp overstates the breadth of the Stipulation and the Joint Testimony. The Joint Testimony provides:

Q. Can Staff and intervenors challenge these Updates?

Yes. The Stipulation retains Staffs and intervenors' ability to challenge the Updates for new NPC elements (e.g., new or updated contracts), including those in the July 7, 2010 update. However, the Parties agree to not make additional error corrections or other changes relevant to the Company's filings made prior to the date of the Rebuttal Update. For example, no Party can identify new errors in data inputs that were included in PacifiCorp's original filing. All parties have agreed to accept the risk that there may be unidentified errors in the Company's original filing.³

The references here are to limits on corrections that can be made to the Company's original filing. Here the information sought is in regard to future updates, specifically the final update. Discovery on that issue is not limited by the Stipulation. The Stipulation contains the following language at section 7.:

NPC Baseline and Rebuttal and Final Updates. The Company will update its Initial Filing consistent with the schedule adopted in this proceeding and as specified in the Page 2 - Stipulation TAM Guidelines, adopted in Order No. 09-274 and modified in Order No. 09-432. The Company shall file its Rebuttal Update on July 7, 2010, its Indicative Filing on November 8, 2010 and the Final Update on November 15, 2010 (collectively the Indicative Filing and the Final Update are referred to as the Final Updates). Parties agree that errors resulting from future updates are the only error corrections that may be made after execution of this Stipulation. *Staff and Intervenors reserve the right to challenge all other elements of the Updates. The Updates may increase or decrease the Oregon-allocated increase of \$58.2 million from base NPC.*⁴

CUB respectfully requests that the ALJ order PacifiCorp to disclose the requested

2 PacifiCorp's Motion for Modified Protective Order at page 1.

3 Joint/100 at page 4 lines 5-13.

4 Stipulation at Section 7 pages 2-3.

information to ICNU and any other party so requesting access thereto – specifically CUB.

- iii. *The Company must be ordered to produce the relevant documentation in a manner that allows it to be fully vetted.*

PacifiCorp argues that it has never sought to deny access to ICNU to the information only that it wishes for that access to be limited – no copies, no notes, with review only on Company premises or at Company attorney offices in Oregon or elsewhere.⁵ But putting these restrictions on this type of information, and the studies necessary to verify its accuracy, are tantamount to a denial of access. If CUB cannot make copies or take notes, there is no way to run a comparison of the Company’s figures on our own systems. There simply is no limited manner in which this information can be produced that would allow an accurate vetting of the Company’s forecasts. CUB respectfully requests that PacifiCorp be ordered to provide the information to ICNU and CUB in its entirety so that CUB and ICNU can appropriately review the Company’s figures.

B. Utilities have legitimate reasons for wishing to keep proprietary information confidential from “suppliers” and “competitors” but CUB doubts that OFPC information is “Highly Confidential Information”; and even if it is there is no legitimate reason for keeping such information confidential from CUB.

- i. *Utilities have legitimate reasons to keep “Highly Confidential Information” highly confidential – this is not highly confidential information.*

CUB recognizes that the utilities have legitimate business reasons for wishing to keep proprietary information confidential from “suppliers and competitors”.⁶ But CUB disagrees that OFPC information is highly confidential. First, CUB is unaware of any other utility requesting that such information be designated as highly confidential. Second, the information is only good for the moment in time that it is made, and even if confidential at that moment, there is no reason to keep it confidential thereafter. OFCPs change and become stale quickly, as they are point-in-

⁵ PacifiCorp’s Motion for Modified Protective Order Exhibit 1

⁶ PacifiCorp’s Motion for Modified Protective Order at page 1.

time estimates of the future. The reason that we do not use earlier OFPCs that have been subject to review is that these curves are already out-of-date. Because of the speed at which OFPCs become stale, their value in the marketplace is limited. Third, CUB respectfully requests that the Commission not permit the march, by all utilities, towards an ever-greater amount of data being designated as “highly confidential”.

ii. *Even if the requested OFPC information is highly confidential and cannot be shared with “suppliers” and “competitors”, it must be shared with the residential ratepayer advocate – CUB.*

CUB does not recognize any need to keep information highly confidential from the statutorily-designated residential ratepayer advocate – the Citizens’ Utility Board of Oregon (CUB). CUB is not a “supplier” and is not a “competitor”. In CUB’s case CUB believes that the public interest in disclosure generally outweighs the utilities’ needs for confidentiality. CUB has no reason to seek or to use proprietary information for its own benefit. ORS 774.020 sets forth the policy behind CUB’s existence:

“The people of the State of Oregon hereby find that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests”

To that end, CUB has the power “[t]o represent the interests of utility consumers before legislative, administrative and judicial bodies.” ORS774.030(2)(b). Furthermore, CUB has the right to intervene “[w]henever the board determines that any agency proceeding may affect the interests of utility consumers” and has standing to “obtain judicial or administrative review of any agency action, and may intervene as of right as a party or otherwise participate in any proceeding which involves the review or enforcement of any action by an agency, if the board determines that the action may affect the interests of utility consumers.” ORS 774.180.

CUB respectfully requests that PacifiCorp be ordered to produce its OFCP information in its entirety to CUB.

- iii. *Given CUB's statutory designation as a residential rate payer advocate CUB should be permitted review of confidential information at CUB's offices; CUB proposes alternative language for the proposed Modified Protective Order.*

CUB does not know at the time of writing whether its request for the same information (CUB's request was made on October 11, 2010, for copies of all documents sent in response to ICNU's data requests 13 and 14) would result in a similar response - review only at company facilities, no notes, no photocopies, etc. if there was no proposed modified protective order - but given the breadth of the language used in the Company's proposed "modified" protective order CUB has reason to believe the Company's intent is to pull all parties under the same umbrella with ICNU. As noted above, CUB does not believe that this information should be designated as highly confidential. If, however, the ALJ disagrees, then CUB respectfully requests that the Commission reject the Company's wording for the "Modified Protective Order" and accept instead the following proposed language (**bolded**) submitted herein by CUB:

The General Protective Order, Order No. 10-069, should be amended to include the following language:

1. The following specific information is Highly Confidential Information and subject to the protections identified below:
 - a. Documents reviewed by the Company in preparing the Official Forward Price Curve.
 - b. Work papers and spreadsheets used by the Company to develop and compute the Official Forward Price Curve.
2. All the protections afforded Confidential Information apply to Highly Confidential Information. In addition, the inspection and review of the specific Highly Confidential Information noted in Section 1 **by persons or entities considered by the Company to be "suppliers" or "competitors"** shall occur at only PacifiCorp's Portland office or a remote location mutually agreeable to PacifiCorp and the requesting party. PacifiCorp may have a

monitor present during review of Highly Confidential Information. Persons **or entities considered by the Company to be “suppliers” or “competitors”** reviewing documents containing Highly Confidential Information shall not make copies of any documents and may make limited notes regarding the documents for reference purposes only. Such notes shall be deemed Highly Confidential Information and shall not be a verbatim or substantive transcript of the documents.

- 3. CUB, as the designated statutory watchdog for residential rate payers, is exempt from the above procedures. CUB will be afforded access to such documents at its offices and may make copies as needed.**

CONCLUSION

It is CUB’s opinion that the information on OFPCs sought by CUB and ICNU is relevant in this matter and its discovery was not limited in the Stipulation and Joint Testimony filed in this matter. CUB respectfully request that the Company not be permitted to designate the OFCP information as Highly Confidential information and that the Company be ordered to provide such information pursuant to the General Protective Order without amendment.

If, however, the ALJ disagrees with CUB’s positions in this matter and permits the designation of the OFCP information as “Highly Confidential”, CUB then respectfully requests that the ALJ adopt the language as amended by CUB above.

Respectfully submitted,



G. Catriona McCracken, Attorney #933587
Legal Counsel
Citizens’ Utility Board of Oregon
610 SW Broadway Ste 400
Portland, OR 97205
(503) 227-1984
Catriona@oregoncub.org

UE 216 – CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October, 2010, I served the foregoing **CUB’S REPLY TO PACIFICORP’S MOTION FOR MODIFIED PROTECTIVE ORDER** in docket UE 216 upon each party listed in the UE 216 PUC 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)

(C denotes service of Confidential material authorized)

C MCDOWELL & RACKNER PC
AMIE JAMIESON
ATTORNEY
419 SW 11TH AVE., SUITE 400
PORTLAND OR 97205
amie@mcd-law.com

C DAVISON VAN CLEVE
IRION A SANGER
ASSOCIATE ATTORNEY
333 SW TAYLOR - STE 400
PORTLAND OR 97204
ias@dvclaw.com

MCDOWELL & RACKNER PC
KATHERINE A MCDOWELL
ATTORNEY
419 SW 11TH AVE., SUITE 400
PORTLAND OR 97205
amie@mcd-law.com

C DEPARTMENT OF JUSTICE
JASON W JONES
REGULATED UTILITY &
BUSINESS SECTION
1162 COURT ST NE
SALEM OR 97301-4096
jason.w.jones@state.or.us

C PUBLIC UTILITY COMMISSION
KELCEY BROWN
PO BOX 2148
SALEM, OR 97301
kelcey.brown@state.or.us

W ENERGY STRATEGIES LLC
C KEVIN HIGGINS
PRINCIPLE
215 STATE ST - STE 200
SALT LAKE UT 84111-2322
khiggins@energystrat.com

W PACIFIC POWER & LIGHT
JORDAN A WHITE
SENIOR COUNSEL
1407 W. NORTH TEMPLE, STE 320
SALT LAKE CITY UT 84116
jordan.white@pacificorp.com

W PACIFIC POWER & LIGHT
C JOELLE STEWARD
REGULATORY MANAGER
825 NE MULTNOMAH STE 2000
PORTLAND OR 97232
joelle.steward@pacificorp.com

W PACIFICORP
OREGON DOCKETS
825 NE MULTNOMAH ST, STE 2000
PORTLAND OR 97232
oregondockets@pacificorp.com

C RFI CONSULTING INC
RANDALL J FALKENBERG
PMB 362
8343 ROSWELL RD
SANDY SPRINGS GA 30350
consultrfi@aol.com

W RICHARDSON & O'LEARY
C GREGORY M. ADAMS
PO BOX 7218
BOISE ID 83702
greg@richardsonandoleary.com

W RICHARDSON & O'LEARY
C PETER J RICHARDSON
PO BOX 7218
BOISE ID 83707
peter@richardsonandoleary.com

W SEMPRA ENERGY SOLUTIONS
LLC
GREG BASS
401 WEST A STREET SUITE 500
SAN DIEGO CA 92101
gbass@semprasolutions.com

Respectfully submitted,



G. Catriona McCracken, Attorney #933587
Legal Counsel
Citizens' Utility Board of Oregon
610 SW Broadway Ste 400
Portland, OR 97205
(503) 227-1984
catriona@oregoncub.org