

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1050

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Petition for Approval of the 2017
PacifiCorp Inter-Jurisdictional Allocation
Protocol.

RULING

DISPOSITION: MOTION GRANTED IN PART

A. Introduction

On January 26, 2018, the Industrial Customers of Northwest Utilities' (ICNU) filed a motion requesting that the Commission find that Marc Hellman, Ph.D., may represent ICNU and receive confidential information in PacifiCorp's Multi-State Process (MSP) Workgroup meetings. ICNU's motion also contained a second request that the Commission allow Dr. Hellman to participate as a witness on behalf of ICNU in docket UM 1050, but ICNU later withdrew that request. PacifiCorp filed two responses to the motion,¹ ICNU filed two responses, and the Oregon Citizens' Utility Board filed a reply.

B. MSP Background

PacifiCorp's current multi-state protocol, the 2017 Protocol, is intended as a temporary agreement to determine the allocation of the utility's costs across its six-state service territory. The Commission adopted the 2017 Protocol in this docket, in Order No. 16-319, and extended it for one year with Order No. 17-124. To provide structure to ongoing negotiations on a new allocation methodology, the 2017 Protocol describes a process called the MSP Workgroup, and lists the type of MSP work to be done in MSP Workgroup meetings.

The 2017 Protocol describes how PacifiCorp will convene MSP Workgroup meetings before the annual Commissioner Forums, that the MSP Workgroup is broadly open to

¹ PacifiCorp filed a motion requesting leave to file its second response per OAR 860-001-0420. PacifiCorp states it needs the opportunity to respond to additional information. The motion is granted for good cause shown.

any interested person, and that the purpose of the MSP Workgroup meetings will be to discuss any inter-jurisdictional issue.

C. Timeline

ICNU's motion includes an affidavit of Dr. Hellman, which provides facts relevant to ICNU's request.² Dr. Hellman served as an Administrator of two different divisions of the Commission for over 15 years. During this time he represented Staff in MSP meetings, testified for Staff in docket UM 1050 (most recently in 2004), and led Staff negotiations for the 2017 Protocol and previous protocols. His role as Administrator ended in September 2017, he was then rehired as an advisor to Staff from October 2017 to December 2017, and in January 2018 was reemployed with the Commission for a one-month limited duration position to train new Staff on non-MSP matters.

Dr. Hellman was also retained by Davison Van Cleve in January 2018 to work on MSP matters. At that time, ICNU submitted Dr. Hellman's signatory pages for PacifiCorp's "Letter of Agreement," a non-disclosure agreement PacifiCorp is using to protect its confidential information that is used in the MSP forum.³ PacifiCorp objected to Dr. Hellman representing ICNU, stating that Dr. Hellman could not participate due to his conflict with the Oregon Commission.⁴ In addition to the non-disclosure agreement in the MSP Workgroups, PacifiCorp is using Protective Order No. 15-416 to govern the use of protected information in docket UM 1050.

Since PacifiCorp has objected to Dr. Hellman's participation in MSP Workgroups, ICNU states that it has excluded him from all such process pending resolution of this motion.

D. Argument

1. Commission's Authority

ICNU asks the Commission to find that Dr. Hellman may participate in MSP Workgroup meetings and receive confidential information in those meetings, or find that there is no legal prohibition against Dr. Hellman representing ICNU in the MSP Workgroups because he is not legally conflicted out of participating in the *informal* MSP process.

Both PacifiCorp and ICNU agree that the Commission does not have explicit authority over the MSP Workgroups. ICNU states that the MSP Workgroup meetings exist in a gray area where there is some Commission oversight but not complete Commission

² ICNU Motion at Ex. A (Jan 26, 2018); ICNU Reply at Ex. F (Feb 20, 2018).

³ ICNU Motion at Ex. B, C and D.

⁴ ICNU Motion at Ex. E.

authority. ICNU points to the Commission-approved MSP Intervenor Funding Agreement, a Commissioners' forum, and exchange of confidential information under the protective order in UM 1050. ICNU states that this motion is its only recourse against PacifiCorp's actions.

Ultimately, PacifiCorp maintains that the Commission cannot direct it to release confidential information outside of an open docket, such as the UM 1050 proceeding. PacifiCorp states that ICNU seeks a Commission order directing PacifiCorp to enter into a bilateral agreement, with no legal authority to support its request. PacifiCorp believes it is well within its rights to refuse Dr. Hellman's access to confidential information and participation the MSP Workgroups.

CUB supports ICNU's motion and requests that Dr. Hellman be allowed to represent ICNU in the MSP Workgroup meetings and be granted full access to confidential information in these meetings.

2. Merits of Dr. Hellman's Participation

PacifiCorp's primary concern is that Dr. Hellman's MSP experience at the Commission was so extensive that it will affect current MSP negotiations. For example, PacifiCorp states that Staff is currently considering past allocation methodologies, and Staff will not be able to determine whether Dr. Hellman's statements regarding past Staff testimony are based on an accurate recollection or biased by his current consulting engagement. PacifiCorp also asserts that allowing Dr. Hellman to act as a witness for ICNU would provide ICNU with access to confidential Staff positions.

ICNU responds that PacifiCorp's suggestions are baseless and irrelevant. ICNU states that Dr. Hellman has been careful to comply with his ethical obligations. CUB comments that Dr. Hellman's extensive MSP experience adds great value to the process, benefiting the MSP process and Oregon ratepayers generally.

PacifiCorp also believes that ICNU violated the MSP Intervenor Funding Agreement when Dr. Hellman signed the MSP Workgroup non-disclosure agreement instead of the current general Protective Order in this docket. PacifiCorp explains that the Intervenor Funding Agreement for the MSP provides that parties agree to be bound by any currently effective protective order in UM 1050 as a condition of receiving intervenor funding. PacifiCorp asks the Commission to investigate whether ICNU has violated the Intervenor Funding Agreement such that its eligibility to receive funding should be terminated.

ICNU responds that it is perfectly willing to be subject to the protective order in this docket, a separate non-disclosure agreement, or a combination of both, as directed by the Commission. ICNU explains that it has not violated the Intervenor Funding Agreement.

E. Discussion

I grant ICNU's motion in part, by making its requested finding that the Commission has no legal basis to exclude Dr. Hellman from participating in PacifiCorp's informal MSP Workgroup meetings. The terms of the 2017 Protocol state that "the MSP Workgroup will be open to any utility regulatory agency, customer, and other person or entity potentially affected by inter-jurisdictional allocation procedures that expresses an interest in participating."⁵ Thus, the 2017 Protocol contemplates broad participation. It is within the Commission's authority to interpret the terms of a Commission-adopted stipulation.⁶

However, this finding is limited, and does not extend to ICNU's full request for an affirmative finding that PacifiCorp must share confidential information with Dr. Hellman. Rather, I agree with PacifiCorp that the Commission cannot require PacifiCorp to share confidential information with Dr. Hellman because the Commission has no role in determining access to PacifiCorp's confidential information in its MSP Workgroup meetings.

The MSP Workgroup process is neither a Commission-led nor a Commission-directed process. Rather, it was created by PacifiCorp to provide structure to its inter-jurisdictional allocation negotiations, and is an agreement among the signatories to the 2017 Protocol for facilitating continued dialogue among states related to inter-jurisdictional allocation issues.⁷ For this reason, and due to the fact that stakeholders from all states—not just those that appear before the Oregon Commission—participate in this process, PacifiCorp's use of a non-disclosure agreement is an appropriate tool to facilitate the access and use of protected information used or produced in that process.

I acknowledge that, in addition to the non-disclosure agreement, PacifiCorp has used the protective order adopted in docket UM 1050 to provide access to protected information for certain Oregon parties. By its terms, however, that protective order is limited to proceedings before this Commission relating to an investigation of PacifiCorp's inter-jurisdictional issues. Because ICNU is not seeking to qualify Dr. Hellman to be eligible

⁵ Order No. 16-319, App A at 12 (Aug 23, 2016).

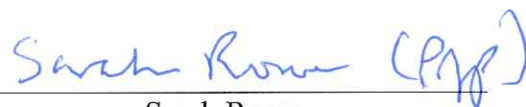
⁶ *In the Matter of the Revised Tariff Schedules of Portland General Elec, Co.*, Docket No. UE 47, Order No. 87-1017 at 6 (Sep 30, 1987) ("Even where all the parties unanimously agree to the stipulation, the Commission must make its own independent inquiry into the facts and draw its own conclusions.").

⁷ *Id.* ("If any Party intends to propose a new inter-jurisdictional allocation procedure, the Party will attempt, consistent with their legal obligations, to: (1) bring that proposal to the Commissioner Forum or the MSP Workgroup and (2) resolve the proposal in good faith.").

to access protected information for use in any UM 1050 proceeding before this Commission, the terms of that protective order are not applicable here.

As the parties have concluded, the only potentially relevant Commission authority on ex-employee participation is OAR 860-001-0330, which by its terms applies to contested case proceedings.⁸ Because the current MSP Workgroup meetings are uniquely informal and utility-lead, I do not address this rule, nor reach the parties' other novel arguments concerning the policy behind conflict of interest rules, the factors the Commission should consider, the extent of Dr. Hellman's knowledge of Staff positions, and whether ICNU has violated its Intervenor Funding Agreement.

Dated this 16th day of April, 2018, at Salem, Oregon.



Sarah Rowe
Administrative Law Judge

⁸ OAR 860-001-0330(2) ("Except with the Commission's written permission, a former Commission employee may not appear as a witness on behalf of other parties in contested case proceedings in which the former employee took an active part on the Commission's behalf.").