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Portland, Oregon 97232

February 23, 2018

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-3398

Attn: Filing Center

RE: UM 1050 – PacifiCorp’s Motion Requesting Leave to Respond and Response

PacifiCorp d/b/a Pacific Power provides for filing in the above-referenced docket its Motion Requesting Leave to Respond and Response to the Industrial Customers of Northwest Utilities’ Reply.

Please contact me with any questions regarding this filing at (503) 813-6583.

Sincerely,

A handwritten signature in black ink, appearing to read "Natasha Siores".

Natasha Siores
Manager, Regulatory Affairs

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1050

In the Matter of

PACIFICORP, d/b/a PACIFIC POWER,

Request to Initiate and Investigation of Multi-
Jurisdictional Issue and Approve an Inter-
Jurisdictional Cost Allocation Protocol.

PACIFICORP'S MOTION
REQUESTING LEAVE TO RESPOND
AND RESPONSE TO THE
INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES' REPLY

I. INTRODUCTION

Under OAR 860-001-0420, PacifiCorp d/b/a Pacific Power files this Motion Requesting Leave to Respond and Response (PacifiCorp Motion) to the Industrial Customers of Northwest Utilities' (ICNU) Reply filed February 20, 2018 (Reply). Good cause exists for the Public Utility Commission of Oregon (Commission) to grant PacifiCorp's Motion because PacifiCorp would not otherwise have the opportunity to review and respond to the additional information, including two new exhibits attached to the Reply, provided by ICNU in its Reply, and, more importantly, ICNU's lack of legal authority supporting its revised request.

II. BACKGROUND

On January 26, 2018, ICNU filed a Motion requesting that the Commission find that: (1) Dr. Marc Hellman may represent ICNU, and receive confidential information, in PacifiCorp's Multi-State Process (MSP) Workgroup meetings; and (2) grant permission under OAR 860-001-0330(2) for Dr. Hellman to appear as a witness on behalf of ICNU in UM 1050 (ICNU Motion). Attached in support of the ICNU Motion were five exhibits (Exhibits A-E), including an affidavit by Dr. Hellman. On February 1, 2018, Chief Administrative Law Judge Michael Grant clarified that ICNU's motion was a substantive motion under the Commission's rules. On February 12, 2018, PacifiCorp filed its response

to ICNU's motion. On February 20, 2018, eight days after PacifiCorp filed its response, ICNU filed a Reply. In its Reply, ICNU withdrew its request under OAR 860-001-0330(2). ICNU also attached two new exhibits (Exhibits F and G), that included additional emails and a second affidavit from Dr. Hellman.

III. ARGUMENT IN SUPPORT OF PACIFICORP'S MOTION

In its Reply, ICNU introduced additional documentation in support of its original motion, including two new exhibits, and fundamentally changed its request for Commission action. By including new exhibits with its Reply, ICNU created an unclear record and thwarted PacifiCorp's ability to adequately respond to ICNU's arguments. More importantly, ICNU's revised request fundamentally alters the Commission's analysis and raises new legal issues—specifically the issue of whether there is a legal basis for ICNU's request. These are important issues, and PacifiCorp respectfully requests the ability to respond.

A. Including New Exhibits in a Reply is Inappropriate by Foreclosing PacifiCorp's Ability to Respond to Inaccurate Assertions

ICNU's inclusion of new evidence in its Reply is inappropriate and prevents PacifiCorp's ability to adequately respond to ICNU's claims and purported facts. PacifiCorp is specifically concerned with ICNU's timeline of events and insinuation that PacifiCorp is attempting to foreclose all future employment for Dr. Hellman. Moreover, ICNU is well aware that legal counsel for both ICNU and PacifiCorp spoke on January 8, 2018, an item omitted from ICNU's new timeline. Additionally, the new Exhibits F and G are inappropriate and provide no clarification regarding the risks associated with retaining Dr. Hellman.

PacifiCorp should be given an opportunity to respond to ICNU's allegations in its Reply and the new Exhibits F and G. Without the ability to respond, PacifiCorp cannot adequately represent its interests.

B. ICNU's Revised Request Fails to Explain on What Authority the Commission Can Grant the Requested Relief

ICNU's Reply also modifies its request in such a way that it raises new issues of law. ICNU's withdrawal of its request that the Commission allow Dr. Hellman to participate as a witness under OAR 860-001-0330(2) results in a stand-alone request that the Commission direct PacifiCorp to allow Dr. Hellman to represent ICNU, and receive confidential information, in PacifiCorp's Multi-State Process (MSP). ICNU argues that the MSP is not part of a proceeding before the Commission, but has cited no legal authority on which the Commission could direct the release of confidential information outside of an open docket. Similarly, ICNU's request appears to seek an order from the Commission directing PacifiCorp to enter into a bilateral agreement. ICNU cites no legal authority to support its request now that it has withdrawn the OAR 860-001-0330 component. Given ICNU's claim that the MSP is not associated with a proceeding before the Commission, ICNU's request appears to be outside the authority of the Commission, and PacifiCorp is well within its rights to refuse Dr. Hellman's access to confidential information and participation the MSP. PacifiCorp should be allowed an opportunity to respond to ICNU's Reply to address the significant legal issues raised by the withdrawal of ICNU's request to allow Dr. Hellman to participate in UM 1050.

IV. PACIFICORP'S RESPONSE TO ICNU'S REPLY

PacifiCorp does not wish to prolong this matter more than is necessary, but is compelled to respond to the additional facts presented by ICNU in its Reply and the lack of

legal support for ICNU's modified request. Accordingly, PacifiCorp will limit its response to the new issues raised by ICNU in its Reply.

A. ICNU's Additional Exhibits Are Self-Serving and Do Not Address the Fundamental Concerns

ICNU attached two new exhibits to its Reply. Exhibit F is a new affidavit from Dr. Hellman. In the Affidavit, Dr. Hellman admits that he led Staff's negotiations for the Revised Protocol, 2010 Protocol, and the 2017 Protocol. Dr. Hellman also attempts to clarify his recent role in the MSP for both Staff and ICNU. While the new affidavit from Dr. Hellman may support ICNU's assertion that it did not violate the terms of the Protective Order in UM 1050, it also indicates that ICNU was having Dr. Hellman attend meetings, despite PacifiCorp's express concerns, before seeking Commission clarification.

Similarly, ICNU's new Exhibit G includes an email chain professing to show PacifiCorp's implied consent to Dr. Hellman's execution of the non-disclosure agreement. ICNU also includes a new timeline of events in its Reply with additional information not included in its original motion.¹ Neither Exhibit G nor the timeline, however, referenced the telephone call between ICNU and PacifiCorp's legal counsel on January 8, 2018. PacifiCorp's legal counsel was out of the office the first week of January and responded to the immediate issue regarding the appearance and protective order for ICNU's new legal counsel. PacifiCorp's legal counsel then followed up requesting a call to discuss Dr. Hellman's participation upon returning to the office on January 8, 2018 (*see* attached Exhibit A). During the call, PacifiCorp's legal counsel articulated the company's concern over Dr. Hellman's continued participation. Accordingly, ICNU cannot credibly claim reliance on the non-disclosure agreement or implied consent by PacifiCorp. The timing of

¹ ICNU Reply at 11-12.

PacifiCorp's response was well within reason and ICNU's failure to include a reference to the January 8, 2018 conversation is, unfortunately, another example of ICNU's selective reference to events to support its request.

B. ICNU Fails to Grasp the Basic Concerns Expressed by PacifiCorp Regarding Dr. Hellman's Participation

ICNU continues to miss the point regarding how inappropriate it is to retain Dr. Hellman for the MSP. ICNU incorrectly claims that PacifiCorp's reading of the prohibitions to Dr. Hellman's participation "would prevent a former public official from ever getting paid to work for another organization in the same industry[.]"² This is a blatant misstatement of PacifiCorp's argument in its response. PacifiCorp was responding to ICNU's request under OAR 860-001-0330(2), and the precedent it would set given the information provided in ICNU's Motion. Now that ICNU has withdrawn its request under OAR 860-001-0330(2), ICNU appears to cherry-pick PacifiCorp's Response to support its request that the Commission direct PacifiCorp outside of a Commission proceeding.

Unlike ICNU's express intent in hiring Dr. Hellman to work on MSP issues—where he was the lead Staff assigned to the issue while employed by the Commission—PacifiCorp did not hire former Commission employees to participate in proceedings where they appeared on behalf of the Commission or were the lead Staff representative. It is not unreasonable to prohibit former Commission employees from representing other parties in the same proceedings in which they took an active part on behalf of the Commission.

To be clear, PacifiCorp is not seeking to foreclose Dr. Hellman from future employment based on his experience in regulatory matters. It would be entirely appropriate for ICNU to retain Dr. Hellman on new matters on which Dr. Hellman had previously not

² ICNU Reply at 5

participated on behalf of Staff. PacifiCorp's concern is that ICNU has retained Dr. Hellman to participate in a process in which he was the lead for Staff for more than a decade.³

C. ICNU's Revised Request Has No Legal Basis and Appears to Support PacifiCorp's Unilateral Right to Refuse to Provide Confidential Information to Dr. Hellman

ICNU's withdrawal of its request that the Commission allow Dr. Hellman to participate as a witness under OAR 860-001-0330(2) necessitates the denial of ICNU's Motion. ICNU now argues that there are no restrictions on Dr. Hellman participating in the MSP because "the MSP Workgroup process is not even part of a Commission proceeding[.]"⁴ This raises the fundamental question regarding whether the Commission has authority to grant the ICNU Motion. Neither the ICNU Motion nor ICNU's Reply provide any authority under which the Commission can direct PacifiCorp to take action outside of the UM 1050 proceeding. Further, under ICNU's logic, the filing of the ICNU Motion in UM 1050 was entirely outside the scope of the proceeding.

Further, while the Protective Order in UM 1050 is clearly subject to Commission oversight, a non-disclosure agreement outside the proceeding is a bilateral agreement, meaning both parties must agree before there is an exchange of confidential information. PacifiCorp does not agree to provide Dr. Hellman confidential information.

D. The Commission Should Address the Policy Prohibiting Dr. Hellman's Participation in its Ruling Despite ICNU's Withdrawal of its OAR 860-001-0330(2) Request

ICNU's attempt to game the Commission's process is all too clear. ICNU appears to recognize the significant issues raised by its request under OAR 860-001-0330(2), and therefore revised its request to merely allow Dr. Hellman to participate in the MSP. ICNU,

³ ICNU Reply at Exhibit F.

⁴ ICNU Reply at 3.

however, reserves its right to submit a future request under OAR 860-001-0330(2). At that future point, it is inevitable that ICNU will claim that Dr. Hellman has been integral to ICNU's efforts in the MSP. PacifiCorp requests that the Commission reject ICNU's attempt to avoid consideration of the policy issues underlying OAR 860-001-0330(2) and deny ICNU's Motion.

V. CONCLUSION

For the reasons discussed above, company requests that the Commission grant PacifiCorp's Motion Requesting Leave to Respond and accept this Response to ICNU's Reply filed on February 20, 2018.

Respectfully submitted this 23th day of February 2018.

By:



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Exhibit A

McVee, Matthew

From: Tyler C. Pepple <tcp@dvclaw.com>
Sent: Monday, January 08, 2018 11:42 AM
To: McVee, Matthew
Subject: [INTERNET] RE: MSP NDA

**** STOP. THINK. External Email ****

Sure Matt. I'm available until 3 today and then tied up until Thursday morning. Feel free to call at your convenience today or let me know if you would like to schedule a different time.

Tyler

Tyler C. Pepple | Attorney
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From: McVee, Matthew [mailto:Matthew.McVee@pacificorp.com]
Sent: Monday, January 08, 2018 11:14 AM
To: Tyler C. Pepple <tcp@dvclaw.com>
Subject: RE: MSP NDA

Tyler – do you have some time to discuss Marc's participation in this proceeding the OAR 860-001-0330?

From: Tyler C. Pepple [mailto:tcp@dvclaw.com]
Sent: Wednesday, January 03, 2018 8:33 AM
To: McVee, Matthew <Matthew.McVee@pacificorp.com>; Weston, Ted <Ted.Weston@pacificorp.com>
Cc: Barrett, Jeffrey <Jeffrey.Barrett@pacificorp.com>
Subject: [INTERNET] RE: MSP NDA

**** STOP. THINK. External Email ****

Thanks Matt. I've filed an appearance in UM 1050 and we will get the PO filed today. Attached are also the signed NDAs for Marc Hellman and me.

Tyler

Tyler C. Pepple | Attorney

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From: McVee, Matthew [<mailto:Matthew.McVee@pacificorp.com>]
Sent: Tuesday, January 02, 2018 1:05 PM
To: Weston, Ted <Ted.Weston@pacificorp.com>; Tyler C. Pepple <tcp@dvclaw.com>
Cc: Barrett, Jeffrey <Jeffrey.Barrett@pacificorp.com>
Subject: RE: MSP NDA

Tyler - have you filed an appearance on UM 1050? You will need to execute that Protective Order.

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Weston, Ted"
Date: 01/02/2018 10:19 AM (GMT-07:00)
To: tcp@dvclaw.com
Cc: "Barrett, Jeffrey" , "McVee, Matthew"
Subject: MSP NDA

Tyler,
Attached is a copy of the MSP non-disclosure agreement, I would appreciate if you and Marc would sign the NDA and email me a PDF of the executed agreement.

Thank you

Ted Weston
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