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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER of the Petition of Greycliff Wind Prime, LLC To Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A. § 69-3-603	Cause No. D2015.8.64 GREYCLIFF WIND PRIME, LLC'S MOTION <i>IN LIMINE</i> TO EXCLUDE USE OF POWERSIMM MODEL UNLESS AND UNTIL IT IS MADE AVAILABLE FOR FREE AND ON A NON- DISCRIMINATORY BASIS AND RESPONSE TO NWE'S OBJECTIONS TO GREYCLIFF'S AND THE MONTANA PUBLIC SERVICE COMMISSION'S DATA REQUESTS
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I. INTRODUCTION

Petitioner Greycliff Wind Prime, LLC (hereinafter "Greycliff") hereby submits its motion *in limine* to exclude NorthWestern Energy ("NWE") from relying upon the PowerSimm model as the basis for its avoided cost calculations unless and until NWE makes PowerSimm available to Greycliff on a free and non-discriminatory basis. In addition, Greycliff also submits its responses to NorthWestern Energy's (hereinafter "NWE") objections to Greycliff data requests GWP-006(a) and (c), GWP-007, GWP 010(a), GWP-010(c) and also responds to NWE's objections to PSC-020(b), PSC-024, and PSC-025.

II. MOTION IN LIMINE

NWE is attempting to limit Greycliff's access to the same avoided cost information and modeling that NWE utilized to purportedly calculate an avoided cost for the Greycliff project, just as NWE attempted to do with Greenfield in the *Greenfield* proceeding, D2014.4.43. Then as now, NWE's continued reliance on a "black box" to calculate avoided costs while objecting to providing the data either used as inputs or outputs from the model, appears to be little more than an effort to disadvantage other parties in this proceeding. NWE had many other options available to it by which to calculate avoided costs for Greycliff, and NWE chose to use a proprietary third party model and now has requested payment from Greycliff to access that model.

As first identified by Greenfield in Docket D201.4.43, the facts of this case are similar to those in a dispute resolved by the Oregon Public Utility Commission in *In re Qwest: Investigation to Review Costs and Establish Prices for Certain Unbundled Network Elements provided by Qwest Corp.*, Pub. Util. Comm. of Ore., Docket No. UM 1025, Order No. 03-533, at 4, 10 (Aug. 28, 2003) (attached hereto as Exhibit 1). In that case, "AT&T and WorldCom retained a consulting firm, Taylor, Nelson, Sofres (TNS) to create the customer clusters used in the HAI model. TNS developed a computer code, or algorithm, for that purpose. The algorithm requires the use of geocoded customer location data specific to the state of Oregon." Exhibit 1, at p. 2.

In responding to a motion to compel by Qwest Corporation regarding data requests directed to determining AT&T and WorldCom's assumptions and related data used in creating the client clusters, AT&T and WorldCom argued:

(a) Qwest has already received a substantial amount of detailed information regarding the HAI model. The information provided is sufficient to

enable Qwest to analyze the accuracy of the customer location data and ascertain how the HAI model functions;

(b) Under ORCP 43A, AT&T and WorldCom are not required to produce the customer location data and clustering algorithm. That information is the intellectual property of TNS and has never been in the possession, custody or control of AT&T and WorldCom;

(c) AT&T and WorldCom's failure to produce the customer location data is not "inherently prejudicial" to Qwest's analysis of the HAI model because much of the requested information is commercially available from TNS for a fee;

(d) The data requested by Qwest is overly broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence;

(e) If Qwest had provided its customer location data to AT&T and WorldCom in the first place, it would not need the data developed by TNS.

Id. at pp. 3-4.

The Oregon PUC disagreed with AT&T and WorldCom's position, stating:

Furthermore, as Qwest points out, the cases cited by AT&T and WorldCom interpreting FRCP 34 can be distinguished from the factual situation presented here. In those cases, the federal courts declined to require production of documents possessed by a third party that were prepared, not for use in the litigation, but in the ordinary course of the third party's business. *In this case, by contrast, AT&T and WorldCom retained TNS to develop cost model inputs that are at the very heart of the Commission's investigation. We agree with the AIJ that AT&T and WorldCom's decision to employ a third party to supply important model inputs should not insulate them from the duty to disclose relevant information about their model. Under the circumstances, it was both logical and reasonable to expect that the Commission and other parties would require access to the customer location data and clustering algorithm.*

Id. at p. 7 (emphasis added).

The Oregon PUC continued:

The public is ill served by allowing a party to foreclose discovery of crucial information simply because another entity was used to develop that information. Such a policy would seriously constrain the fact finding ability of the Commission and prevent us from making decisions based upon a full and complete record. As the AIJ recognized, the Commission has adopted a protective order process designed to safeguard confidential information. *There is no reason why AT&T*

and WorldCom could not have made arrangements with TNS to have the customer location data and clustering algorithm released pursuant to the protective order.

AT&T and WorldCom's proposal to have Qwest pay to obtain the customer location materials from TNS is also contrary to the public interest. As the ALJ emphasized, such a policy would disadvantage parties without significant financial resources and would seriously limit the fact gathering capability of the Commission Staff

Id. at p. 8 (emphasis added).

In response to arguments by AT&T and WorldCom that they were being unfairly sanctioned, the Oregon PUC responded:

The flaw in this argument is that AT&T and WorldCom have a fundamental obligation to make essential elements of their model available to the Commission and other parties for review and analysis. Without such information, the Commission does not have an adequate basis upon which to judge the merits of the model. While there is certainly nothing improper about retaining a third party to develop model inputs, it does not relieve AT&T and WorldCom of their duty to produce data underlying their model. As emphasized above, AT&T and WorldCom should have known that every significant element of the HAI model would be subject to discovery and should have taken this into account when they made arrangements with TNS to develop the customer location data and clustering algorithm. AT&T and WorldCom cannot rely on their arrangement with TNS to shield critical data from discovery and still expect the Commission to accord substantial weight to the results of the cost model.

In fact, AT&T and WorldCom are in a predicament of their own making. When they retained TNS to develop the customer location/clustering data, they knew that TNS had refused to disclose the same data in other jurisdictions. AT&T and WorldCom explain that they decided to use TNS only after Qwest refused to produce its actual customer location data. They further add that they chose not to seek an order compelling Qwest to respond because of their concern about delay. This may be true, but the fact remains that AT&T and WorldCom opted to use TNS despite knowledge of its nondisclosure policy. They now blame Qwest for their situation, but, in reality, they made a strategic error by assuming they would not have to divulge the customer location data and clustering algorithm in this proceeding. Any sanctions AT&T and WorldCom incur for failure to comply with the June 11 ruling will not constitute undue prejudice.

Id. at pp. 8-9 (emphasis added).

The Oregon PUC concluded:

AT&T and WorldCom cannot prevent discovery of relevant information central to the outcome of this proceeding simply because they chose to have the data

developed by a third party. Second, we find that it is contrary to the public interest to require parties to Commission proceedings (and potentially the Commission itself) to pay for discovery.

Id. at pp. 9-10.

The applicability of foregoing reasoning by the Oregon PUC to NWE's reliance on the PowerSimm model and its attempt to require other parties to pay to access the model is obvious. First, Greycliff cannot be required to pay for access to the data or the model utilized by NWE. If NWE is not willing provide the model free of charge, the Commission cannot accept the model as evidence regarding the appropriate avoided cost calculation for Greycliff.

Second, there is no "burdensomeness" objection here that should be taken seriously in that without access to the same model and the same data NWE purportedly utilized in creating its avoided cost estimates for Greycliff, Greycliff cannot replicate NWE's results and thereby test the validity, reliability and accuracy of the PowerSimm model's results. As the ALJ wrote in the Oregon PUC proceeding:

Qwest should not have to perform a separate analysis or study in an effort to recreate how the HAI model functions. Qwest and the Commission should have access to the formulas and algorithms that allow them to replicate the customer clusters and meaningfully audit the process TNS used to create the clusters.

Third, this is an important public policy question for Commission consideration: may a public utility with an obligation to publish avoided cost data as well as its avoided cost, effectively prevent inquiry into its calculations, methods and data, simply by refusing to produce the exact data and by requiring payment of substantial costs to even access the model? If so, it would seem to create an incentive on the part of any public utility that the Commission regulates to simply "farm out" its calculations and modeling to third parties in an effort to prevent others from being able to verify, replicate, and ensure the validity, reliability and accuracy of the

utility's model and results. This sort of gamesmanship undermines the ability of the Commission and the parties to uncover facts vital to the creation of good public policy as well as undercutting the Commission's discovery rules.

Just as AT&T and WorldCom knew that there would be an issue with releasing the customer clustering algorithm to third parties due to its proprietary licensing, NWE has known since at least the *Greenfield* proceeding that this was also an issue with PowerSimm. Just as the Oregon PUC said it would be inappropriate for parties to a PUC proceeding to pay to have access to modeling or data, it is inappropriate for NWE to charge parties for such access here as it apparently does in response to GWP-010 and PSC 12(b). And, again, like the situation with AT&T and WorldCom, NWE knew or should have known that every part of the PowerSimm model, its data, input, and assumptions would be subject to scrutiny once NWE made it a central issue in this case. Nobody should be expected to take seriously NWE's modeling as long as it continues to attempt to shield its model, data, and inputs from scrutiny. NWE has created this problem, and it can solve it.

In the alternative, NWE can make the PowerSimm model available to parties who request access free of charge. QFs, who already must bear the costs of hiring their own attorneys and experts once litigation commences, cannot be in addition expected to spend thousands of dollars on obtaining access to the model chosen by NWE. This would be an unreasonable impediment to QFs selling their output to NWE at avoided cost. If NWE agrees to provide access to PowerSimm to Greycliff and its expert on a free and non-discriminatory basis, Greycliff will withdraw the instant motion.

III. GREYCLIFF'S RESPONSES TO NWE'S OBJECTIONS TO GWP-006(a) and (c), GWP-007, and GWP-010.

A. GWP-006(a) and (c).

Greycliff posed the following questions to NWE in GWP-006(a) and (c):

GWP-006

Witness: Luke P. Hanson

Page: LPH-4

Subject: PowerSimm Dispatch Assumptions

On Page LPH-4 of NWE's response testimony, you state that "PowerSimm™ first calculates the hourly dispatch of NorthWestern's supply portfolio and then compares the Greycliff energy production to that supply portfolio. Only after this comparison is made can the value of the Greycliff wind resource be calculated."

(a) Please provide the hourly, monthly and annual demand levels, and the hourly, monthly and annual generator dispatch levels for NWE supply resource modeled in PowerSimm™.

(c) Please provide the hourly, monthly and annual energy and/or capacity market prices used in the PowerSimm™ simulation for purposes of estimating avoided cost in this proceeding.

NWE objected to these questions as follows:

Montana Rules of Civil Procedure, Rule 26(b)(2)(C)(iii) provides that the tribunal may limit discovery when it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Subparts (a) and (c) both seek hourly information. According to NorthWestern's Energy Supply, for example, providing the hourly production information for the generation alone as requested will result in excess of 100 million individual pieces of data. In response to this data request, NorthWestern will be providing the monthly and annual information, but asserts that the burden of producing the hourly information will exceed any benefit that Greycliff may gain from reviewing the granular level of detail in the hourly information.

NWE's Objections to Greycliff Data Requests at pp. 2-3 (hereinafter "NWE Obj. at p. __)

Since Montana's rules of civil procedure were modeled on the federal rules, resort to federal court jurisprudence is appropriate. See e.g., *Myers v. Twenty-First Judicial Dist. Of*

Mont (In re Marriage of Cox), 2015 MT 134, P.12, 379 Mont. 535, 353 P.3d 506 (regarding sanctions under Rule 11). The federal district court for Montana has stated:

"Based on the liberal discovery policies of the Federal Rules of Civil Procedure, a party opposing discovery carries a 'heavy burden' of showing why discovery should not be allowed." *Moe*, 270 F.R.D. at 618 (D. Mont. 2010) (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Id.* (citations and internal quotation marks omitted).

Educ. Logistics, Inc. v. Laidlaw Transit, Inc., 2012 U.S. Dist. LEXIS 2652, *3-4, 2012 WL 73189 (D. Mont. Jan. 10, 2012)

NWE's contention that Greycliff's requests under GWP-006(a) and (c)) are burdensome are mere allegations of burdensomeness. No explanation is offered as to why, even if one presumes that the request would require NWE to produce a 100 million pieces of data, such data could not be quickly downloaded and shared. Moreover, as noted by the Oregon PUC in the *In re Qwest* proceeding, it is important for the parties to have access to the same information so that the results of NWE's study can be replicated. Moreover, NWE placed itself in this position by utilizing data of this sort, and it is only fair that it shares all the information upon which its avoided cost analysis is based. In addition, NWE's assertion that the costs of production will outweigh any benefits to Greycliff is difficult to take seriously. First, NWE has not even described the burden of producing the requested information. Second, NWE caused the problem in the first place by basing its avoided cost analysis on hourly data. Third, NWE has no basis for making an assertion as to how useful Greycliff may find the hourly data. NWE's argument in support of its objection is thus little more than a naked assertion.

Furthermore, NWE's use of the PowerSimm model in this proceeding to calculate avoided costs is non-transparent, and the model itself is, like the model utilized by AT&T and

WorldCom in Qwest, a black box. At present, Greycliff has no ability to audit or examine the calculations used by NWE in determining its estimate of avoided cost for Greycliff.

Furthermore, the input data provided by NWE thus far in discovery are not at an hourly level, so it is not clear how NWE developed hourly data for variables such as Day-Ahead energy prices.

Similarly, NWE is stating in its testimony that it completed hourly dispatch analysis, and valued the energy from Greycliff based on that hourly dispatch analysis. Without receipt of the hourly data and calculations used in this analysis, it is impossible for Greycliff, or for the Commission, to fully evaluate NWE's avoided cost methodology and estimates. These data are critical to the estimates developed by NWE, and it is not reasonable for NWE to object to providing the data and, at the same time, ask the Commission to rely upon its analysis.

Finally, Greycliff believes it would not be costly or burdensome for NWE to provide the hourly data. These data can be provided electronically, and should already be available on NWE's computers and easily transmittable in electronic format. It is routine in the power industry to provide hourly data, and for analysts to review hourly data and calculations. NWE has not carried its burden of demonstrating that the burden to NWE of producing the hourly data outweighs the usefulness to Greycliff of receiving the hourly data, and NWE's objections to GWP-006(a) and (c) are without merit and should be overruled by the Commission.

B. GWP-007.

Greycliff posed the following questions to NWE in GWP-007

GWP-007

Witness: Luke P. Hanson

Page: LPH-4

Subject: PowerSimm Dispatch Assumptions

On Page LP11-7 of NWE's response testimony, you state that the "market forecasts for carbon dioxide, coal, natural gas, and electricity were also updated" for the avoided cost calculations.

Please provide the hourly, monthly and annual price series for electricity, natural gas, coal and carbon dioxide, as those series were used in external modeling and in the PowerSimm™ simulation and derivation of NWE’s avoided cost estimate.

NWE essentially repeats the same argument it makes with respect to GWP-006(a) and (c), and Greycliff refers the Commission to its response to that objection.

C. GWP-10(a) and (c).

GWP-010
Witness: Luke P. Hanson
Page: LPII-4
Subject: PowerSimm Dispatch Assumptions

On Page LPH-4 of NWE’s response testimony, you state that “PowerSimm™ first calculates the hourly dispatch of NorthWestern’s supply portfolio and then compares the Greycliff energy production to that supply portfolio. Only after this comparison is made can the value of the 8 Greycliff wind resource be calculated.” Please answer the following questions regarding this statement:

- (a) Please provide the hourly, monthly and annual demand levels, and the hourly, monthly and annual generator dispatch levels for each NWE supply resource modeled in PowerSimm™.

- (c) Please provide the hourly, monthly and annual energy and/or capacity market prices used in the PowerSimm™ simulation for purposes of estimating avoided cost in this proceeding.

NWE’s objection that GWP-010(a) and (c) are identical to GWP-006(a) and (c) is well taken. Greycliff hereby withdraws GWP-010, except and to the extent that NWE is required to produce the data requested by GWP-06.

IV. GREYCLIFF’S RESPONSE TO NWE’S OBJECTIONS TO PSC-020(b)

A. PSC-020(b)

The Commission staff posed data request PSC-020(b) to NWE, which posed the following question:

RE: Facility Size Impact on Avoided Cost

Witness: LaFave

b. What would you propose as the avoided cost of the Greycliff facility if it were still the 20-MW configuration that had been proposed when it was a CREP?

NWE objects to PSC-020(b) because it is irrelevant under the liberal standards of discovery and “not reasonably calculated to lead to admissible evidence.” NWE Obj. at p. 5. NWE does not cite, however, the Montana Supreme Court’s repeatedly cited edict that “The rules of civil procedure are premised upon a policy of liberal and broad discovery.” *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 385, 46 P.3d 642, 645 (citing *Burlington Northern v. District Court* (1989), 239 Mont. 207, 216, 779 P.2d 885, 891). Furthermore, NWE omits from its briefing that *Hendricksen* ruling was an appeal from a district court order:

"The District Court has inherent discretionary power to control discovery based on its authority to control trial administration." *Anderson v. Werner Enterprises, Inc.*, 1998 MT 333, P13, 292 Mont. 284, P13, 972 P.2d 806, P13. We review a district court's rulings on discovery motions for an abuse of discretion. *Anderson*, P13. The party claiming error in the district court's discovery rulings must show prejudice. *Anderson*, P13. We will reverse these discretionary rulings only when the court's "judgment may materially affect the substantial rights of the complaining party and allow the possibility of a miscarriage of justice." *Anderson*, P13.

Hendricksen v. State, 2004 MT 20, ¶ 35, 319 Mont. 307, 317, 84 P.3d 38.

In other words, the Supreme Court was reviewing whether the district court had committed error on appeal and found that the Court’s decision did not materially affect the substantial rights of the State. The “abuse of discretion” standard is one which is quite deferential to the district court and stands in stark contrast to the liberal rules of discovery --

rules which do not even require discovery to necessarily result in admissible evidence, but instead only requires that discovery requests be “reasonably calculated” to lead to the discovery of admissible evidence. In short, this is not a case where the Commission’s decision to restrict or allow discovery is under appellate review and the party seeking to overturn must demonstrate prejudice. Thus, *Hendricksen* is inapplicable to this particular discovery dispute.

Even on its facts, the *Hendrickson* Court’s review of the district court’s decisions prohibiting discovery pose distinctly different questions from those presented in this matter. In explaining its decision finding the district court had not abused its discretion in limiting discovery, the Supreme Court stated:

The District Court granted an order protecting Kristin’s financial documents, school transcript, and personnel records. The State sought to have these records produced in an effort to quantify Kristin’s damages. However, the court ruled that Kristin’s statement of damages was sufficient and the documents were not likely to lead to discovery of any relevant information.

Because the State is the party alleging error in the District Court’s discovery rulings, the State must show how it was prejudiced by the trial court’s ruling. *Anderson*, P13. Kristin does not claim lost earnings or lost earning capacity; rather her mental and emotional states are at issue. The requested documents have no bearing on these legitimate issues. The State fails to show that the denial of the requested documents substantially prejudiced it or impaired its ability to present a defense. We find no abuse of discretion. We affirm.

Id. at ¶¶ 43-44.

In other words, when asked to explain on appeal how the State was prejudiced by not having financial documents, school transcript and personnel records as they related to Plaintiff’s mental and emotional issues, the State was unable to adequately explain its position. Due to the State’s inability to connect the requested discovery to the requested relief, the Supreme Court found that the district court’s decision was not an abuse of discretion.

The situation here is very different than that presented in *Hendricksen*. A legitimate issue in dispute in this proceeding is the avoided cost rate estimate for Greycliff's project, and necessarily this inquiry includes the manner and method in which that estimated rate was calculated. Commission data request PSC-0020(b) asked NWE to make different assumptions and re-run its model to test the reliability, accuracy, and assumptions used by NWE in calculating Greycliff's avoided cost rate using PowerSimm. If the rate is substantially different than that which NWE now proposes, questions about the validity, reliability and accuracy of NWE's avoided cost calculations will arise and further lines of inquiry developed. This is precisely the goal of proper discovery requests.

It is hard to see how the production of modeling results which relate to the effect of size on avoided cost would be irrelevant under Mont. R. Civ.P. 26(b)(1) to the "legitimate" question of how NWE calculated Greycliff's avoided cost rate, and whether that calculation is valid, reliable, and accurate. Whereas in *Hendricksen*, the Court could not see a relationship between financial records, transcripts, and personnel records to a claim of mental and emotional distress, the only purpose for which PSC-020(b) would be used is related to the legitimate issue of whether NWE has properly calculated Greycliff's avoided costs. NWE's objection should be overruled.

B. PSC-024

Commission data request PSC-024 posed the following two questions:

RE: NPV Sensitivity and Avoided Cost Calculation

Witness: Hansen

- a. Please replace the values used for the price of energy, including the carbon price adder, in the valuation of the Hydros conducted as Exhibits __ (JMS-1) and (JMS2) in Docket No. D2013.12.85, with the updated forecast of energy and carbon

prices that you are using to calculate an avoided cost in this proceeding. What is the difference in NPV of the Hydros given the two different forecasts?

- b. Please replace the values used for the price of energy, including the carbon price adder, in the calculation of the avoided cost of Greycliff's output conducted in this docket, with the forecast of energy and carbon prices that Mr. Stimatz used to value the Hydros in D2013.12.85. What is the difference in avoided cost of Greycliff's output given the two different forecasts?

Apart from relying on the wholly inapplicable Supreme Court decision in *Hendricksen*, NWE argues that PSC-020(a) is irrelevant because: (1) the evaluation of the purchase of PPL Montana's hydroelectric facilities was not based on an avoided cost calculation but a discounted cash flow ("DCF") analysis; (2) inputting current market information into DCF for the hydroelectric facilities would not change the outcome of that docket and would not "matter" for purposes of this docket because the hydroelectric facilities are no longer avoidable resources for purposes of calculating avoided costs. NWE Obj. at pp. 6-7.

NWE's arguments regarding PSC-020(a) are without merit. The point of PSC-024(a) is not whether NWE used a DCF or an avoided cost analysis, but rather how utilizing the very same data, assumptions, and modeling that NWE proposes to use in this proceeding would produce a different or disparate calculation from that developed and approved by the Commission in D2013.12.85. If there is a substantial deviation in the projected avoided costs for Greycliff and a valuation of the hydroelectric facilities, it will tell the Commission something about the inputs, outputs, data selection, methodology and approach used by NWE in estimating Greycliff's avoided costs.

NWE's argument that the hydroelectric facilities are no longer avoidable is a red herring. PSC-020(b) does not assume or even imply the hydroelectric facilities are still avoidable and thus should be used in calculating an avoided cost for Greycliff. Rather the data request is

designed to test the modeling assumptions, methodology and data sets used by NWE to produce an avoided cost for Greycliff in this proceeding. Whether or not such analysis would be admissible at hearing is a different question than whether the question is designed to elicit useful, relevant information regarding NWE's calculations of Greycliff's avoided costs, which is definitely a "legitimate" area of inquiry.

With respect to part (b), NWE's objections are equally misplaced. NWE argues that: (1) PSC-024(b) seeks information that is inappropriate under the law based on *Whitehall Wind LLC v. Montana Public Service Comm'n*, 2010 MT 2, ¶ 21, 355 Mont. 15, 223 P.3d, because avoided costs must be based on current information; (2) conditions in the market place and the economy have changed sufficiently such that inputting data from two years ago into a current model will only produce unintelligible results and will not produce an appropriate avoided cost rate.

NWE's arguments with respect to PSC-024(b) are also a red herring. No party in this proceeding has suggested or even implied that NWE base its avoided cost rate estimates on stale data. Instead, the question seeks to develop answers by which to test the results of NWE's modeling against the avoided cost estimates it proposes in this case. If NWE's modeling results produce output which varies greatly from what NWE is testifying to in this proceeding are NWE's projected avoided costs, it raises substantial questions about the proposed avoided cost rate as well as the way in which NWE is utilizing the model (and, perhaps, the model itself).

NWE appears to be attempting to deflect attention away from its modeling exercise by transforming this into an argument about avoided costs. However, NWE is mislabeling legitimate inquiries in order to bootstrap itself into an argument that complying with a Commission data request would violate the law. This is specious as nothing in the Commission's data requests suggest, imply, or require NWE to violate any law.

NWE's arguments also conflate the scope of permissible discovery under Mont.R.Civ.P. 26(b)(1) with questions of whether the evidence would be relevant and admissible at hearing or trial. The latter question is not appropriate at this stage of this proceeding. If the modeling runs requested by the Commission produce anomalous or inconsistent results when compared with NWE's proposed avoided cost, then these results are a productive and relevant line of inquiry into the manner and method by which NWE developed its avoided cost projections in this proceeding. Frankly, it is hard to imagine how such inquiry would not be a permissible area of discovery considering that the essential subject matter of this proceeding is the proper calculation of avoided costs. NWE's objection should be overruled.

C. PSC-025

Commission data request PSC-025 asks as follows:

RE: Colstrip Avoidance Mythology

Witness: Hansen

- a. Please explain whether there were any hours, and quantify the number of such hours, when NWE's owned and contracted resources were sufficient to meet NWE customer demand before the Hydros were acquired.
- b. If the answer to subpart (a) is that there were such hours, please explain why NWE's valuation of the Hydros did not incorporate the avoided fuel-cost methodology for Colstrip Unit IV that NWE proposes to use in this docket.
- c. Please identify the number of hours when NWE's resource portfolio would have been short without the Hydros but will be long with the Hydros, and identify for those hours the lowest and highest quartile and mean price of energy during those oversupplied hours, as well as the lowest and highest quartiles and mean oversupply in MWhs.

NWE essentially repeats the objections to these data requests that it made earlier, and again the Commission's questions are only designed to elicit responses regarding the reliability, validity and accuracy of NWE's modeling, its data set, its methodology and its assumptions.

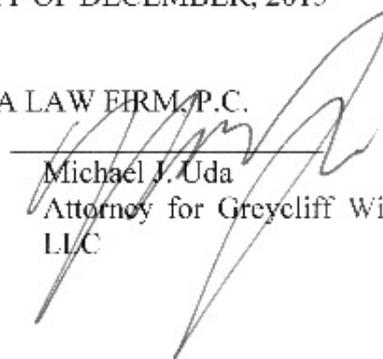
Changing the inputs into the model can allow the Commission and the parties to assess the reasonableness of NWE's modeling which produced an avoided cost estimate which is a legitimate subject matter of this proceeding. Even using historically known data to test the current model's results will assist the Commission and the parties to more fully comprehend and test NWE's model, data, methodology and assumptions. NWE may not wish to answer these questions, but they are aimed at the legitimate issue in this inquiry; namely how NWE calculated its avoided cost rate for Greycliff and whether that avoided cost is consistent with the law.

V. CONCLUSION

With the exception of GWP-010(a) and (c), NWE's objections to Greycliff's discovery and the Commission's discovery should be overruled. Furthermore, the Commission should either exclude the use of PowerSimm in this proceeding or require NWE to make PowerSimm available to the Commission and any parties that request access to it on a free and non-discriminatory basis.

RESPECTFULLY SUBMITTED THIS 30th DAY OF DECEMBER, 2015

UDA LAW FIRM, P.C.

By: 

Michael J. Uda

Attorney for Greycliff Wind Prime,
LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on this 30th day of December, 2015 upon the following by first class mail postage pre-paid:

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I hereby certify an original was e-filed, and ten copies of the foregoing were hand-delivered to the following:

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Jackie Haskins-Legal Assistant

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1025

In the Matter of)	
)	
QWEST CORPORATION,)	
)	ORDER
Investigation to Review Costs and)	
Establish Prices for Certain Unbundled)	
Network Elements provided by Qwest)	
Corporation.)	

DISPOSITION: MOTION TO COMPEL GRANTED IN PART

Introduction

On June 11, 2003, the presiding Administrative Law Judge (ALJ) granted in part a motion filed by Qwest Corporation (Qwest) to compel discovery of certain information relating to a cost model filed in this docket by AT&T Telecommunications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Oregon, and WorldCom, Inc. (AT&T and WorldCom.).

On June 23, 2003, AT&T and WorldCom filed a Motion for Certification of the ALJ's decision pursuant to Oregon Administrative Rule 860-014-0091 and OAR 860-012-0035(1)(I). In accordance with an agreement by the parties, Qwest responded to the motion on July 10, 2003. AT&T and WorldCom replied on July 28, 2003.

The presiding ALJ has determined that AT&T and WorldCom failed to show that the challenged ruling will result in substantial prejudice to the public interest, undue prejudice to any party, or deny or terminate any person's participation in this proceeding. See OAR 860-014-0091. Nevertheless, because the instant dispute involves a matter of first impression for the Commission and a departure from the Oregon Rules of Civil Procedure (ORCP), the ALJ certified this issue for Commission resolution.

Procedural History

Pursuant to the Telecommunications Act of 1996, incumbent local exchange carriers (ILECs) such as Qwest must provide unbundled network elements (UNEs) to competitive local exchange carriers (CLECs) at cost-based rates. In prior dockets, the Commission established the recurring and nonrecurring rates that Qwest currently charges for UNEs. This investigation docket was initiated to determine if the Commission-approved UNE rates assessed by Qwest should be revised.

Both Qwest and AT&T/WorldCom have filed cost models in this proceeding for consideration by the Commission. The purpose of the models is to estimate the type and cost of telecommunications facilities required to serve Oregon customers, and specifically, the cost of UNEs. The relative merits of the competing cost models are the central focus of this investigation.

The cost model sponsored by AT&T and WorldCom is known in the telecommunications industry as the "HAI model."¹ According to Qwest:

[T]he initial step in the [HAI] model upon which the other steps are based is determining the amount and location of current demand for local exchange service, network elements, and network interconnection in Oregon. To establish the location of current demand, the model relies on geocoded customer location data, when available, combined with a method of assigning surrogate locations when geocoded information is not available. After customers are placed in locations, they are grouped into clusters, with each cluster representing "a single telephone plant serving area." [T]he clusters have a significant effect on the amount of network-related investment that the model includes, because they are specifically used to estimate the type and amount of outside plant required to serve customers. The make-up of a cluster determines, for example, the amount of feeder and distribution plant and related investment that HAI assumes is required to serve a group of customers. There is, therefore, a direct relationship between the accuracy of HAI's customer locations and clusters on the one hand, and the accuracy of the model's estimated investment for outside plant, on the other.²

AT&T and WorldCom retained a consulting firm, Taylor, Nelson, Sofres (TNS) to create the customer clusters used in the HAI model. TNS developed a computer code, or algorithm, for that purpose. The algorithm requires the use of geocoded customer location data specific to the state of Oregon.

¹ There have been several versions of the HAI model. The version at issue here is "Release 5.3."

² Qwest Motion to Compel, dated April 4, 2003 at 2-3. *See also*, HAI Model, Release 5.3 at 3.

AT&T originally requested that Qwest provide its actual customer location data for Oregon. When Qwest objected to providing the data,³ AT&T and WorldCom asked TNS to develop the information. TNS created geocoded customer location data from the most current residential and business address lists available, pursuant to restrictive licensing agreements with other companies. TNS then used this customer location data to produce the customer clusters that were delivered to AT&T and WorldCom for inclusion in the HAI model.⁴

On February 6, 2003, Qwest filed a series of data requests designed to ascertain the methodologies and assumptions used in compiling the HAI model. Among other things, Qwest requested information regarding the process that the model uses to place customers at particular locations in Oregon and to create “clusters” of customers that the model treats as the equivalent of distribution areas. As noted above, the customer location and cluster inputs have a direct impact on the amount of outside plant investment estimated by the HAI model to be necessary to serve Oregon customers. AT&T and WorldCom refused to provide Qwest with the customer location data and clustering algorithm developed by TNS.

On April 4, 2003, Qwest filed a Motion to Compel responses to several of its data requests.⁵ With respect to the HAI model, Qwest sought to compel discovery of (a) the data used to determine the locations of customers; (b) the clustering algorithm used for creating the clusters; (c) documents and data relied upon by the company (TNS) that created the clusters, including any documents that explain TNS’ processes and methods for creating the clusters; (d) explanations of the methodology used to place customers when their actual locations were unknown; and (e) information and data that permit Qwest to understand the extent to which the customer clusters were formed without data establishing actual locations of customers.⁶

On April 17, 2003, AT&T and WorldCom filed a response opposing Qwest’s Motion to Compel. They contend that:

- (a) Qwest has already received a substantial amount of detailed information regarding the HAI model. The information provided is sufficient to enable Qwest to analyze the accuracy of the customer location data and ascertain how the HAI model functions;

³ Qwest responded that the customer location data requested by AT&T was confidential information, overly broad, unduly burdensome, and required Qwest to conduct an unduly expensive special study. Qwest Response to AT&T’s First Set of Data Requests, Request No. 001.

⁴ AT&T and WorldCom’s Motion to Request Certification of ALJ Petrillo’s Ruling Granting Qwest’s Motion to Compel (hereafter, Motion to Certify), dated June 23, 2003, at 2.

⁵ Qwest’s Motion to Compel also requested disclosure of information relating to AT&T and WorldCom’s construction costs and practices. Those data requests were addressed in the June 11 Ruling, but are not mentioned in AT&T and WorldCom’s Motion to Certify.

⁶ Qwest First Set of Data Requests, Nos. 1-021, 1-022, 1-023, 1-026, and 1-031.

- (b) Under ORCP 43A, AT&T and WorldCom are not required to produce the customer location data and clustering algorithm. That information is the intellectual property of TNS and has never been in the possession, custody or control of AT&T and WorldCom;
- (c) AT&T and WorldCom's failure to produce the customer location data is not "inherently prejudicial" to Qwest's analysis of the HAI model because much of the requested information is commercially available from TNS for a fee;
- (d) The data requested by Qwest is overly broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence;
- (e) If Qwest had provided its customer location data to AT&T and WorldCom in the first place, it would not need the data developed by TNS.

On April 23, 2003, Qwest filed a reply to AT&T and WorldCom. Qwest refutes the claims made by AT&T and WorldCom and emphasizes that the customer location data and clustering algorithm are relevant and discoverable.

On May 7, 2003, a telephone conference was convened by the ALJ to discuss the status of the discovery dispute. During the conference, the parties agreed to hold additional discussions in an effort to resolve the issue informally.

On May 16, 2003, AT&T and WorldCom notified the Commission that TNS will allow Qwest to view the customer location data developed for Oregon, as well as the processes TNS used for creating the cluster information. In order to view this data, however, Qwest has to pay TNS \$5,000 for the "set up," and \$4,000 per day thereafter. On the other hand, TNS considers the clustering algorithm as "highly confidential intellectual property," and refuses to make that information available to Qwest under any circumstances.⁷

On May 23, 2003, Qwest notified the Commission that AT&T and WorldCom's proposal was inadequate. Without access to the algorithms, Qwest can not replicate the process used by TNS to create the customer clusters in the HAI model. Qwest also objects to having to pay TNS to view the customer location data. Qwest estimates that it will have to spend approximately \$100,000, and will still be unable to conduct a meaningful audit.⁸

⁷ Letter dated May 15, 2003, from Lisa F. Rackner, counsel for AT&T and WorldCom, to ALJ Petrillo.

⁸ Letter dated May 20, 2003, from John M. Devaney, counsel for Qwest, to ALJ Petrillo.

On or about June 5, 2003, the parties notified the Commission that they had reached impasse regarding the disputed information requests. On June 10, 2003, AT&T and WorldCom filed supplemental materials in support of their position.

On June 11, 2003, a telephone conference was held to consider Qwest's Motion to Compel and other pending procedural matters. At the conference, the ALJ issued an oral ruling (June 11 Ruling) granting Qwest's motion in part.

On June 23, AT&T and WorldCom filed a Motion for Certification of the ALJ's June Ruling pursuant to OAR 860-014-0091 and OAR 860-012-0035(1)(I).

The June 11 Ruling

At the telephone conference held on June 11, 2003, the ALJ concluded that:

- The customer location data and clustering algorithm requested by Qwest are critical elements of AT&T and WorldCom's HAI model and are relevant to this proceeding.⁹ See discussion above.
- AT&T and WorldCom have participated in numerous Commission cost investigations over the past several years. They are aware that when a party submits a cost model for consideration, it is subjected to detailed examination by other parties and the Commission. They also know that it is standard practice in Commission proceedings for the parties to submit extensive data requests to determine how cost models function.
- AT&T and WorldCom knew or should have known that information essential to the operation of its HAI model would be subject to detailed discovery in this proceeding. Specifically, it was reasonable for AT&T and WorldCom to contemplate that Qwest and other parties would seek discovery of the customer location data and clustering algorithm. Thus, any arrangement that AT&T and WorldCom made with TNS to develop data used in the HAI model should have contemplated the need for discovery by other parties and the Commission.

⁹ OAR 860-014-0045(1) defines "relevant evidence" as (a) Evidence tending to make the existence of any fact at issue in the proceeding more or less probable than it would be without the evidence, and (b) Is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Relevant evidence may be excluded under subsection (1)(c) if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The ALJ ruled that AT&T and WorldCom must respond to all of Qwest's discovery requests, with the exception of Nos. 1-013(b), 1-021, and 1-043. Those requests were found to be overbroad and were limited in scope by the ALJ.

- It is unreasonable for AT&T and WorldCom to claim that data critical to the operation of its cost model cannot be produced simply because AT&T and WorldCom chose to use a third party to develop that information. If the Commission and other parties cannot ascertain how the HAI model operates, it effectively becomes a “black box” and cannot be analyzed in detail or compared with other cost models presented for consideration. AT&T and WorldCom’s decision to retain TNS does not justify refusal to produce information central to the outcome of this investigation.
- The position advocated by AT&T and WorldCom also creates an incentive to “farm out” data development to third parties in order to avoid discovery. This result is contrary to the public interest because it prevents disclosure of relevant information, disadvantages other parties, and impedes the ability of the Commission to carry out its statutory responsibilities.
- AT&T’s and WorldCom’s proposal that Qwest pay TNS a fee to obtain the customer location data used in the HAI model is rejected. It is unreasonable to require parties and/or the Commission to pay for discovery. Not only does such a policy seriously disadvantage opposing parties, it also limits the Commission’s fact finding ability. Both are clearly unacceptable from a public interest standpoint.
- AT&T and WorldCom’s claim that Qwest already has sufficient information to enable it to recreate the customer location data and clustering algorithm is not persuasive. Qwest should not have to perform a separate analysis or study in an effort to recreate how the HAI model functions. Qwest and the Commission¹⁰ should have access to the formulas and algorithms that allow them to replicate the customer clusters and meaningfully audit the process TNS used to create the clusters.
- AT&T and WorldCom have not explained why the protective order issued in this proceeding does not adequately protect the confidentiality of the information requested by Qwest.¹¹ The Commission’s standard protective order is specifically tailored to safeguard confidential commercial information from unauthorized disclosure.

Motion to Certify

¹⁰ AT&T and WorldCom also declined to provide PUC Staff with the customer location data used in the HAI model. *See*, Response of AT&T Communications of the Pacific Northwest to Staff Request No. AT&T 18-23, Dated May 6, 2003, Response to Data Request No. 19.

¹¹ Order No. 02-771, entered October 30, 2002.

OAR 860-014-0091(1) provides that a ruling of the ALJ may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling (a) May result in substantial detriment to the public interest or detriment or undue prejudice to any party; or (b) Denies or terminates any person's participation. AT&T and WorldCom argue that the June 11 Ruling is "contrary to law and the public interest, and will result in substantial prejudice."¹²

ORCP 43A. AT&T and WorldCom reiterate their claim that the June 11 Ruling is unlawful because it contravenes ORCP 43A, which limits discovery to documents in the "possession, custody and control of the party upon whom the request is served." AT&T and WorldCom acknowledge that "Oregon appellate courts have not interpreted the phrase "possession, custody and control," but emphasize that cases interpreting Rule 34 of the Federal Rules of Civil Procedure (FRCP) require that a party have "control" over the requested items.¹³

AT&T and WorldCom's argument is not persuasive. To begin with, OAR 860-011-0000(3) specifically provides that "the Oregon Rules of Civil Procedure shall govern in all cases, *except as modified by these rules, by order of the Commission, or by ruling of the ALJ.*" Subsection (3) acknowledges that it may be necessary for the Commission to adopt procedures different from those set forth in the ORCP in order to accommodate circumstances unique to utility regulatory proceedings. The instant dispute is an example of precisely such a situation.¹⁴ Here, AT&T and WorldCom have taken the illogical position that fundamental elements of their cost model should be shielded from discovery when the model itself is the focus of this docket. As the ALJ emphasized in his June 11 Ruling, the Commission and other parties must be able to examine fully all of the formulas and algorithms essential to the operation of the model. Absent such information, the model is little more than a "black box," and cannot be accorded substantial weight.

Furthermore, as Qwest points out, the cases cited by AT&T and WorldCom interpreting FRCP 34 can be distinguished from the factual situation presented here. In those cases, the federal courts declined to require production of documents possessed by a third party that were prepared, not for use in the litigation, but in the ordinary course of the third party's business. In this case, by contrast, AT&T and WorldCom retained TNS to develop cost model inputs that are at the very heart of the Commission's investigation. We agree with the ALJ that AT&T and WorldCom's decision to employ a third party to supply important model inputs should not insulate them from the duty to disclose relevant information about their model. Under the circumstances, it was both logical and reasonable to expect that the Commission and other parties would require access to the customer location data and clustering algorithm.

¹² AT&T and WorldCom Motion to Certify at 3.

¹³ *Id.* at 4-6.

¹⁴ Although the parties do not address this point, it is arguable that TNS is an agent of AT&T and WorldCom, thereby affording them "possession, custody, and control" of the TNS data.

In their reply comments, AT&T and WorldCom claim that the June 11 Ruling contravenes the public interest. They maintain that the Commission “has a strong interest in ensuring that parties who appear before it can expect fair procedural rulings that uphold the ORCP.”¹⁵ While it is certainly true that parties are entitled to “fair procedural rulings,” the public interest clearly necessitates an exception to ORCP 43A in this case for the reasons described above. The public is ill served by allowing a party to foreclose discovery of crucial information simply because another entity was used to develop that information. Such a policy would seriously constrain the fact finding ability of the Commission and prevent us from making decisions based upon a full and complete record. As the ALJ recognized, the Commission has adopted a protective order process designed to safeguard confidential information. There is no reason why AT&T and WorldCom could not have made arrangements with TNS to have the customer location data and clustering algorithm released pursuant to the protective order.

AT&T and WorldCom’s proposal to have Qwest pay to obtain the customer location materials from TNS is also contrary to the public interest. As the ALJ emphasized, such a policy would disadvantage parties without significant financial resources and would seriously limit the fact gathering capability of the Commission Staff.

Undue Prejudice. AT&T and WorldCom argue that the June 11 Ruling results in undue prejudice because it subjects them to discovery sanctions “for failing to produce documents that they do not possess and cannot obtain.”¹⁶ AT&T and WorldCom assert that their decision to contract with TNS was not “improper or illegal” and should not cause them to be “punished” because they are unable “to do the impossible.”¹⁷

The flaw in this argument is that AT&T and WorldCom have a fundamental obligation to make essential elements of their model available to the Commission and other parties for review and analysis. Without such information, the Commission does not have an adequate basis upon which to judge the merits of the model. While there is certainly nothing improper about retaining a third party to develop model inputs, it does not relieve AT&T and WorldCom of their duty to produce data underlying their model. As emphasized above, AT&T and WorldCom should have known that every significant element of the HAI model would be subject to discovery and should have taken this into account when they made arrangements with TNS to develop the customer location data and clustering algorithm. AT&T and WorldCom cannot rely on their arrangement with TNS to shield critical data from discovery and still expect the Commission to accord substantial weight to the results of the cost model.¹⁸

In fact, AT&T and WorldCom are in a predicament of their own making. When they retained TNS to develop the customer location/clustering data, they knew that

¹⁵ AT&T and WorldCom Reply at 7.

¹⁶ AT&T and WorldCom Motion to Certify at 1; Reply at 1.

¹⁷ *Id.*

¹⁸ AT&T and WorldCom acknowledge that, “to the extent that the Commission determines that the HAI model is not adequately verifiable, that should be factored into the weight it gives the model.” AT&T and WorldCom Reply at 6.

TNS had refused to disclose the same data in other jurisdictions.¹⁹ AT&T and WorldCom explain that they decided to use TNS only after Qwest refused to produce its actual customer location data. They further add that they chose not to seek an order compelling Qwest to respond because of their concern about delay.²⁰ This may be true, but the fact remains that AT&T and WorldCom opted to use TNS despite knowledge of its nondisclosure policy. They now blame Qwest for their situation, but, in reality, they made a strategic error by assuming they would not have to divulge the customer location data and clustering algorithm in this proceeding. Any sanctions AT&T and WorldCom incur for failure to comply with the June 11 ruling will not constitute undue prejudice.

Oregon Trade Secret Act. AT&T and WorldCom have asked TNS to produce the information required by the June 11 Ruling. TNS has refused, however, claiming that the customer location and clustering algorithm are “trade secrets.” AT&T and WorldCom assert that TNS’ trade secret claim “appears to be sound” and that the disputed information is therefore protected from disclosure by the Oregon Trade Secret Act, ORS §646.461 *et seq.* They allege that the June 11 Ruling therefore places them “in an impossible bind, contrary to the public interest, and to their significant detriment.”²¹

Again, this argument misses the point. If AT&T and WorldCom want the Commission to accord weight to the results of the HAI cost model in this proceeding, they must disclose all of the information necessary to determine how the model works. AT&T/WorldCom cannot rely on TNS’ trade secret claim to make relevant information inaccessible to other parties and the Commission.

While AT&T and WorldCom have clearly placed themselves “in a bind,” their situation may not be “impossible” as they contend.²² If TNS is unwilling to provide the customer location data and clustering algorithm required to properly analyze the HAI model, perhaps AT&T and WorldCom can resubmit the model using actual customer location data obtained from Qwest, and a clustering algorithm developed by a firm other than TNS. Since AT&T and WorldCom never addressed this possibility, it is unclear whether these tasks can be performed within a reasonable time frame. Nevertheless, there remains a possibility that AT&T and WorldCom might be able to find a way out of the dilemma they have created for themselves.

Commission Decision

For the reasons set forth above, the Commission affirms the ALJ’s June 11 Ruling granting, in part, Qwest’s Motion to Compel. We find that an exception to ORCP 43A is appropriate under the circumstances presented in this case. AT&T and WorldCom cannot prevent discovery of relevant information central to the outcome of

¹⁹ AT&T and WorldCom Motion to Certify at 7.

²⁰ This decision was made notwithstanding the fact that the Arizona Commission had previously ordered Qwest to provide its customer location data within 30 days. *See*, Supplemental Materials in Support of AT&T and WorldCom’s Opposition to Qwest’s Motion to Compel Discovery at 5, also, Exhibit D.

²¹ AT&T and WorldCom Motion to Certify at 7-8.

²² *Id* at 8.

this proceeding simply because they chose to have the data developed by a third party. Second, we find that it is contrary to the public interest to require parties to Commission proceedings (and potentially the Commission itself) to pay for discovery.

If AT&T and WorldCom do not produce the information required by the June 11 Ruling, the Commission will accord limited weight to those elements of the HAI model that depend on the omitted information.

ORDER

IT IS SO ORDERED.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.