SIERRA CLUB
FOUNDED 1892

September 16, 2014

**Via Electronic Filing and FedEx**

Public Utility Commission
Attn: Filing Center
3930 Fairview Industrial Drive SE
Salem, OR 97308

Re: Docket No. LC 57 Sierra Club's Reply Challenging PacifiCorp's Confidential Designation

Please find enclosed the original and five (5) copies of Sierra Club's Reply Challenging PacifiCorp's Confidential Designation in the above-referenced docket. The allegedly confidential version of this document is being filed with the Commission and served pursuant to Protective Order No. 13-095 upon all eligible party representatives via FedEx.

Please let me know if you have any questions. Thank you.

Respectfully submitted,

*/s/ Derek Nelson*

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cc: Service List

PUBLIC VERSION

# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

LC 57

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| In the Matter of<br><br>PACIFICORP, dba PACIFIC POWER,<br><br>2013 Integrated Resource Plan | SIERRA CLUB'S **REPLY** CHALLENGING PACIFICORP'S CONFIDENTIAL DESIGNATION<br><br>ORAL ARGUMENT REQUESTED |

## I. INTRODUCTION

Proceedings before this Commission are, to the greatest extent possible, intended to be conducted in public. Thus, while there is a protective order in this case, No. 13-095, its scope is limited, and the Commission urges utilities to be "deliberate and moderate" with their designations.[1] Under Oregon law, PacifiCorp may only designate information as confidential if it "reasonably believes that the information falls within the scope of ORCP 36(C)(7)."[2] In particular, PacifiCorp must make its designation "in good faith and . . . limit[it] to the portions of the document that qualify as a protected trade secret or other confidential research, development, or commercial information."[3] A confidential workshop was held in this proceeding on August 6, 2014. Sierra Club attended the meeting with pre-existing knowledge of certain data discussed at the workshop that had been previously disclosed through non-confidential means. Sierra Club subsequently used its non-confidential knowledge to develop a set of data requests in a separate

[1] In the Matter of PORTLAND GENERAL ELECTRIC ORDER COMPANY 2012 Annual Power Cost Update Tariff, Order 11-432, hereinafter ("PGE Order"), Docket No. UE 228, at p. 3 (Nov. 2, 2011).
[2] OAR 860-001-0080(2)(b). In seeking a protective order here, PacifiCorp described the type of information potentially in need of protection as "proprietary cost data and models, commercially sensitive pricing information, and market analyses and business projections, the release of which could prejudice the company and its customers." Protective Order 13-095 at p. 1, hereinafter ("Protective Order"), Docket No. LC 57, (March 22, 2013).
[3] *Id.*

proceeding before the Wyoming Public Service Commission.[4] PacifiCorp claims that it designated all of the information shared in the August 6 workshop as "confidential" and has challenged Sierra Club's action as a violation of the protective order in this proceeding. Sierra Club has responded separately to PacifiCorp's allegation in UM 1707.[5]

As part of this dispute, Sierra Club challenged (by motion dated August 21, 2014) PacifiCorp's designation of all the information, written and oral, exchanged at the workshop. We took this step out of an abundance of caution. Sierra Club's position is that information it has obtained through public channels is not shielded by the protective order, and that Sierra Club need not go through a de-protection proceeding before using that information in a public manner. Sierra Club has initiated this phase of the dispute over confidentiality to establish a simple point: data that is available publicly is not entitled to protection as "confidential." PacifiCorp's attempt to make overly broad designations of public knowledge is inconsistent with Oregon law, the Commission's directions and their underlying objectives to provide for public transparency. Because Sierra Club challenged PacifiCorp's position that all information from the August 6 workshop was designated confidential, it is the company's burden to show that it acted in good faith and limited its designations to specific workshop disclosures that constituted actual trade secrets. However, the company has not done so. Of most importance, PacifiCorp has not explained the basis for claiming as "confidential" information of which the Sierra Club workshop attendees were aware prior to the workshop.

[4] Sierra Club's Third Set of Data Requests to Rocky Mountain Power, WY PSC, Docket No. 20000-446-ER-14, (Aug. 7, 2014).

[5] *See* Sierra Club's Initial Brief on Protective Order, Docket No. LC 57, (Aug, 21, 2014); and Sierra Club's Reply Brief Denying Alleged Violations of Protective Order, hereinafter ("Sierra Club's Reply"), Docket No. UM 1707, (Sept. 5, 2014) [*Sierra Club's Initial Brief was originally docketed in LC 57 and subsequently transferred to Docket No. UM 1707*].

In these circumstances, and for the reasons stated below, the Sierra Club requests that the Commission find that the data Sierra Club used in drafting the Wyoming data requests is public and not "confidential," and that data is not transformed into "confidential" information simply because it is discussed at a "confidential" workshop.

## II. FACTUAL BACKGROUND

We hereby incorporate by reference all documents filed in UM 1707 and summarize the relevant facts here. On August 6, 2014, the Commission held a confidential technical workshop to review PacifiCorp's analysis of planned environmental investments at the Craig and Hayden coal plants. On August 7, 2014, Sierra Club propounded data requests in a proceeding before the Public Service Commission of Wyoming. On August 8, 2014, PacifiCorp contacted Sierra Club alleging that the Wyoming data requests violated protective order 13-095 by "specifically citing to portions of the confidential PowerPoint presentation provided by PacifiCorp during the August 6 workshop."[6] The letter also alleged that the "questions include[d] confidential information regarding the analysis provided during discussions of the confidential workshop."[7] Sierra Club acknowledges that the Wyoming data requests addressed the Craig and Hayden coal plants and, therefore, contained some overlap with the subject matter of the August 6 confidential workshop. However, Sierra Club used publicly available information to prepare its Wyoming data requests. Sierra Club has been actively involved in the ongoing Wyoming rate case, and has already submitted several rounds of discovery in that proceeding regarding coal plant expenditures. Sierra Club did not disclose trade secrets or other sensitive business information, as shown in our papers filed in UM 1707.

[6] PacifiCorp's August 8 letter at p. 2.
[7] *Id.*

## III. ARGUMENT

The Commission rules are clear: in a dispute regarding the propriety of confidential data designations, once a party files an objection challenging the designation of certain information as confidential, the burden shifts to the designating party to show the designated information falls within ORCP 36(C)(7). Sierra Club advanced an appropriate challenge, but PacifiCorp has failed to meet its burden.

### A. PacifiCorp Did Not Meet Its Burden of Showing the Challenged Information is a Trade Secret or Other Confidential Research, Development, or Commercial Information

#### 1. Because Sierra Club Identified the Challenged Information, PacifiCorp Carries the Burden of Proof

Sierra Club's August 18, 2014, challenge to PacifiCorp's designation identified "the challenged information" as the company's "designation as confidential all information contained in Sierra Club's data requests."[8] To avoid any potential for confusion, our motion and related correspondence made plain that "the scope of the "information at issue" under OAR 860-001-0080 is the information PacifiCorp alleges has been designated as confidential that was allegedly "used or disclosed" in Sierra Club's data requests."[9] Sierra Club continued in its effort to understand each and every instance where the Wyoming data requests allegedly ran afoul of the protective order: "To be absolutely clear, the 'information in dispute' is whatever you contend is confidential in our data requests. Please refer to those data requests and let us know

[8] Sierra Club's Motion Challenging Confidential Designations, hereinafter ("Sierra Club's Motion to Challenge"), Attachment 1, Docket No. LC 57, (Aug, 21, 2014); *see* Email from Gloria D. Smith to Michael Grant, "RE: Sierra Club's Notice of Challenge of Designation of Confidential Information," dated August 18, 2014 at 5:03 PM, which read in part "While Sierra Club strongly disputes PacifiCorp's allegations of breach and disputes that the data requests contain any confidential information, Sierra Club hereby challenges PacifiCorp's 'designation' of confidential all information contained in Sierra Club's data requests under OAR 860-001-0080(2)(d)"

[9] Sierra Club's Motion to Challenge at p. 1.

the specific instances where you contend Sierra Club disclosed protected information."[10] The company responded that "it is concerned about every one of the sixteen data requests...because every one of those requests either uses or discloses (or both) confidential information provided during the confidential August 6, 2014 workshop at the Oregon Public Utility Commission."[11]

Rather than address the matter at hand, PacifiCorp's response claims that the Sierra Club is at fault for having "fail[ed] to identify the specific information from the August 6 workshop it alleges was improperly designated as confidential."[12] In so doing, PacifiCorp sidesteps the issue Sierra Club's motion raised— because PacifiCorp alleged that we disclosed designated confidential information, we asked the company to identify those precise instances *in the data requests*.[13] PacifiCorp claims that it designated the information in the presentation, as well as all statements made during that presentation, as confidential, and that Sierra Club disclosed some of that information. However, despite repeated opportunities, PacifiCorp has failed to identify the specific instances where there is overlap – where information designated as confidential in the workshop appeared in the data requests. Nor has PacifiCorp addressed Sierra Club's contention that any "overlapping" data had been obtained by the Sierra Club through public channels, meaning that the information should be treated as having been produced outside of the protective order.

The Commission has previously and correctly rejected utility efforts to reverse the burden of proof and place it on the challenger rather than the party claiming confidentiality. In 2011, the Industrial Customers of Northwest Utilities (ICNU) moved to challenge PGE's designation of

[10] *Id.* at p.1 and Attachment 2.
[11] See *Id.* at Attachment 3, Email from Sarah Wallace to Gloria D. Smith, "RE: Sierra Club's Notice of Challenge of Designation of Confidential Information," dated August 19, 2014 at 4:33 PM.
[12] PacifiCorp's Response at p. 4, hereinafter ("Response"), Docket No. UM 1707, (Aug. 26, 2014).
[13] Rather than address the data requests, the company responsive file spoke generally about the importance of keeping specific economic and legal analyses protected.

certain information on rate adjustments in an annual power cost docket. PGE—much like PacifiCorp here—objected to the disclosure of the data on grounds that "ICNU failed to show why the information is non-confidential."[14] The Commission rejected this maneuver saying the company, as the respondent, misunderstood its burden. According to the Commission, the challenger need only challenge the designation. Sierra Club has been plain that the scope of its challenge is the specific material included in Sierra Club's Wyoming data requests that PacifiCorp claims is confidential and were allegedly improperly disclosed by the Sierra Club.[15] PacifiCorp cannot now claim that it need not respond on the ground that it does not understand the specific information at issue in our motion.

**2. PacifiCorp Did Not Limits Its Designations to Aspects of the Workshop that Qualified as Trade Secrets**

According to the company, the information discussed at the workshop designated as confidential consisted of legal and economic analyses.[16] The company devoted nearly four pages of its responsive filing to describing why the substance of its emissions control investments, and its legal analyses covering its participation agreements and coal contracts, should be considered trade secrets. In other words, rather than address the actual pieces of information that are the subject of this dispute, i.e. the specific data points included in Sierra Club's Wyoming data requests, the company's responsive brief described in a more abstract manner why particular types of information could be designated as confidential. PacifiCorp notably chose not to point to specific words, numbers or dates that it considered both justifiably designated "confidential" and part of any of the sixteen data requests. Curiously, PacifiCorp's general discussion in its

[14] PGE Order at p. 2.
[15] Sierra Club's Motion to Challenge at p.1 and Attachment 2.
[16] Response at p. 5.

responsive filing contains far more detail on the substance of the information exchanged at the August 6 workshop than any of the Sierra Club's sixteen challenged Wyoming data requests.

PacifiCorp cannot assert that every aspect of the August 6 workshop, whether spoken or written, was designated confidential[17] when certain information referenced at the workshop was already in the public realm. Sierra Club and other parties attended the meeting with some prior understanding of the economics of the Craig and Hayden coal plants, and the company itself had already disclosed a great deal of information on these plants in several current dockets in other states. Yet, the company now seeks to convert public information into confidential data, thereby somehow transforming workshop attendees' prior (and public) knowledge into trade secrets. The protective order does not obligate Sierra Club to treat information that it obtained publicly as confidential simply because PacifiCorp repeated the public information in a "confidential" workshop. To demonstrate the public, and therefore non-confidential, origin of the information set forth in each of the sixteen Wyoming data requests and to aid the Commission in adjudicating the Sierra Club's challenge, we attach Allegedly Confidential Attachment 1, showing that the company has not met its burden under Oregon law.[18] This attachment unequivocally shows that Sierra Club's data requests were based on information that was already in the public domain.

In any case, during the course of briefing UM 1707, Sierra Club determined that it had utilized several words and a date that were not matters of public record. Categorically, PacifiCorp has not explained how these few words constitute "proprietary cost data and models,

[17] Response at p. 1. According to the company, the designated information from the August 6 workshop "qualifies as 'protected trade secrets or other confidential research, development, or commercial information,' [which] the Commission should continue to protect."

[18] Sierra Club has marked certain portions of this attachment as confidential only out of an abundance of caution. As explained below, the marked portions are indeed based on publicly available information.

commercially sensitive pricing information, [or] market analyses and business projections."[19] These words are allegedly confidential:

[redacted][20]

These words, isolated and unconnected to any broader meaning, cannot be considered confidential data nor can it reasonably be shown that they are actual confidential trade secrets. And, again, the company has not claimed these specific words were designated confidential or otherwise attempted to meet its burden concerning these off-the-shelf terms and date. Therefore, PacifiCorp has not shown that these words were designated as confidential or claimed that Sierra Club's use of these words violated the protective order.

### B. Sierra Club Did Not Bring an Earlier Challenge to the Information Because Public Information Falls Outside of the Scope of the Protective Order

PacifiCorp is correct that Sierra Club did not challenge the company's confidentiality designations until after we filed the data requests and after the company complained that the discovery violated the protective order.[21] We did not challenge the designation for the simple

[19] *See* Protective Order at p. 1
[20] *See*, e.g., non-confidential Order No. 14-493, at pp. 17-25, Docket No. UE 246 (Dec. 20, 2012), where timing and dates of PVRR(d) analyses were widely discussed.
[21] Response at p. 2.

reason that we were not aware of any need to mount such a challenge. Sierra Club was using knowledge about the plants gained prior to the workshop, and previously-disclosed public information, neither of which can or should be designated as "confidential."

Moreover, the Commission's July 30 memorandum noticing the workshop stated that protective order No. 13-095 "will govern the confidential information to be addressed at the workshop."[22] Sierra Club understood this to mean that only the information discussed at the workshop that was in fact "confidential" was subject to the protective order. Protective order 13-095 defines "Confidential Information" as information that falls within the scope of ORCP 36(C)(7) ("a trade secret or other confidential research, development, or commercial information"), and Paragraph 12 directs that parties "may not use or disclose Confidential Information for any purpose other than participating in these proceedings." Sierra Club reasonably interpreted these Commission directives and the operative protective order as covering the company's "proprietary cost data and models, commercially sensitive pricing information, and market analyses and business projections."[23] Thus, in crafting the Wyoming data requests, Sierra Club took steps to ensure that we did not reveal "proprietary cost data and models, commercially sensitive pricing information, and market analyses and business projections."

PacifiCorp alleges that Sierra Club violated protective order 13-095, but the protective order's terms cannot allow PacifiCorp to over-designate the entire workshop. Rather, the company's over-designation shows disregard of the protective order by ignoring its requirements to exercise good faith and limit confidential designations to only those aspects of the material that actually qualify as confidential. As the Commission previously advised PGE,

[22] Memorandum In the Matter of PacifiCorp, 2013 Integrated Resource Plan, Docket No. LC 57 (July 30, 2014).
[23] Protective Order at p. 1.

> PGE's use of the confidential designation appears to be too liberal and includes material that does not appear to be confidential.... We strongly encourage PGE to be more deliberate and moderate in its use of the designation in the future and refer PGE to OAR 860-001-0080(3)(a).[24]

## III. CONCLUSION

PacifiCorp has not met its burden of "identifying the legal basis for the claim of confidentiality" for the information contained in each of the Wyoming data requests; indeed, the company failed to point to specific words, numbers or dates that it claims are protected. Sierra Club, on the other hand, has shown that the data requests relied on publicly obtained knowledge. Because PacifiCorp failed to meet its burden, and consistent with Section 15 of the Protective Order and OAR 860-001-0080(2)(e), the Commission should find that the information that is contained in Sierra Club's Wyoming data requests was not designated as confidential.

Dated: September 16, 2014

Respectfully submitted,

*/s/ Gloria D. Smith*

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[24] PGE Order at p. 3.

Attachment 1

OMITTED

Due to allegedly confidential material

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of September, 2014, I caused to be served the foregoing SIERRA CLUB'S REPLY CHALLENGING PACIFICORP'S CONFIDENTIAL DESIGNATION upon all party representatives on the official service list for this proceeding. The public version of this document was served upon parties via email, and the allegedly confidential version of this document was served pursuant to Protective Order No. 13-095 upon all eligible party representatives via FedEx.

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Dated this 16th day of September, 2014 at San Francisco, CA.

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