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September 5, 2014

***VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY***

Public Utility Commission of Oregon
3930 Fairview Industrial Drive SE
Salem, Oregon 97302-1166

Attn: Filing Center

**Re: LC 57—PacifiCorp's Response to Sierra Club's Motion Challenging the Company's
Confidential Designation**

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) submits for filing its Response to Sierra Club's Motion Challenging Confidential Designation in this docket.

Please contact Natasha Siores, Director, Regulatory Affairs & Revenue Requirement, at (503) 813-6583, for questions on this matter.

Sincerely,

A handwritten signature in cursive script that reads "R Bryce Dalley / nas".

R. Bryce Dalley
Vice President, Regulation

Enclosures

cc: Service List—LC 57

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

LC 57

In the Matter of
PACIFICORP d/b/a PACIFIC POWER
2013 Integrated Resource Plan.

PACIFICORP'S RESPONSE TO
SIERRA CLUB'S MOTION
CHALLENGING CONFIDENTIALITY
DESIGNATION

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) files this response to Sierra Club's Motion Challenging PacifiCorp's Confidential Designation. In the motion, Sierra Club challenges the confidential designation of information provided at a Public Utility Commission of Oregon (Commission) workshop on August 6, 2014. Because the challenged information qualifies as "a protected trade secret or other confidential research, development, or commercial information," the Commission should continue to protect the information as confidential under the protective order in this proceeding (Order No. 13-095).

II. STATEMENT OF FACTS

On August 6, 2014, the Commission held a confidential workshop in this proceeding to discuss PacifiCorp's analysis of certain investments in emissions control equipment at the Craig and Hayden coal-fired generating plants. This workshop was held in compliance with the final order partially acknowledging PacifiCorp's 2013 Integrated Resource Plan in which the Commission adopted Staff's recommendation to hold a "technical workshop to review existing analysis on planned Craig and Hayden environmental investments" within three months of the issuance of the order.¹ At the beginning of the workshop, PacifiCorp provided

¹ Order No. 14-252 at 10 (Jul. 8, 2014).

1 hard copies of a PowerPoint presentation that were marked as confidential under Order
2 No. 13-095 and reiterated that the workshop materials and discussion were confidential
3 under the protective order.

4 On August 7, 2014, Sierra Club used and disclosed information from the workshop
5 that had been designated as confidential in a set of data requests issued in an unrelated
6 proceeding before the Wyoming Public Service Commission. Importantly, Sierra Club did
7 not challenge PacifiCorp’s confidentiality designations at the time of the designation or
8 before its use and disclosure of the confidential information on August 7. Sierra Club did not
9 file its motion challenging PacifiCorp’s confidentiality designations until *after* PacifiCorp
10 protested Sierra Club’s unauthorized use and disclosure of confidential information.²

11 III. LEGAL STANDARD

12 The Commission’s general protective order is “specifically tailored to safeguard
13 confidential commercial information from unauthorized disclosure.”³ Under the terms of the
14 Commission’s general protective order, “a party may designate information that it reasonably
15 believes falls within the scope of ORCP 36(C)(7) or is exempt from public disclosure under
16 the Public Records Law.”⁴ ORCP 36(C)(7) limits disclosure of “a protected trade secret or
17 other confidential research, development, or commercial information.” “Trade secrets”
18 include:

² In its motion, Sierra Club also does not ask for specific relief, such as removing the confidential designation from certain information. Instead, Sierra Club states that briefing on the confidential designation is necessary to determine certain issues related to the breach of the protective order, which is being investigated in docket UM 1707. Sierra Club’s request is improper because, as ALJ Grant has made clear, whether the information was properly designated as confidential is not relevant to the investigation of the breach of the protective order. See PacifiCorp’s Response to Sierra Club’s Initial Brief at 8, Docket No. UM 1707 (Aug. 26, 2014).

³ *In re: Qwest Corp.*, Docket No. UM 1205, Order No. 03-533 at 6 (Aug. 28, 2003).

⁴ See OAR 860-001-0080(2)(b). See also Order No. 13-095 at 1.

1 [A]ny formula, plan, pattern, process, tool, mechanism, compound,
2 procedure, production data, or compilation of information which is
3 not patented, which is known only to certain individuals within an
4 organization and which is used in a business it conducts, having
5 actual or potential commercial value, and which gives its user an
6 opportunity to obtain a business advantage over competitors who
7 do not know or use it.⁵

8 Oregon courts examine six factors when determining whether information constitutes a trade
9 secret under the Public Records Law:

10 (1) the extent to which the information is known outside the
11 business; (2) the extent to which it is known by employees and
12 others involved in the business; (3) the extent of measures taken to
13 safeguard the secrecy of the information; (4) the value of the
14 information to the business or its competitors; (5) the amount of
15 effort or money expended by the business in developing the
16 information; and (6) the ease or difficulty with which the
17 information could be properly acquired or duplicated by others.⁶

18 A party to a Commission proceeding may challenge the designation of information as
19 confidential.⁷ Once a designation is challenged, the party seeking protection must
20 demonstrate that the challenged information is covered under ORCP 36(C)(7).⁸ If the parties
21 are unable to resolve a dispute over a confidential designation informally, a party may file an
22 objection to the confidential designation.⁹ The objection “must identify the information in
23 dispute.”¹⁰

⁵ ORS 192.501(2).

⁶ *Citizens’ Util. Bd. of Oregon v. Oregon Pub. Util. Comm’n*, 128 Or. App. 650, 658-59 (1994), citing *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D.Mich.1981).

⁷ See OAR 860-001-0070(2)(d). See also Order No. 13-095 at 1, App. A at 1 (¶ 6).

⁸ See OAR 860-001-0080(2)(e); Order No. 13-095 at 1, App. A at 1 (¶ 6); *In re U.S. West Comm.’s*, Docket No. UM 960, Order No. 00-002 at 5 (Jan. 3, 2000).

⁹ See OAR 860-001-0070(2)(e). See also Order No. 13-095 at 1, App. A at 3 (¶ 15).

¹⁰ OAR 860-001-0080(2)(e).

IV. ARGUMENT

As discussed above, the Commission’s protective order provides a mechanism for resolving disputes concerning the designation of confidential information. Specifically, paragraph 15 requires a party challenging a confidential designation to “file an objection with the ALJ that *identifies the information in dispute*[.]”¹¹ The burden is then on the designating party to identify the legal basis for the claim of confidentiality.¹² In this case, Sierra Club failed to identify the information from the confidential August 6 workshop that Sierra Club contends was improperly designated as confidential. Instead, Sierra Club states that 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.”¹³ This is similar to Sierra Club’s approach during the informal discussions regarding the confidentiality designation, where Sierra Club challenged “PacifiCorp’s ‘designation’ as confidential all information contained in Sierra Club’s data requests.”¹⁴

Given Sierra Club’s failure to identify the specific information from the August 6 workshop it alleges was improperly designated as confidential, in this response, PacifiCorp categorizes the information provided during the workshop and explains the legal basis for the confidentiality designation for each category.

A. The Information Designated As Confidential is Covered by ORCP 36(C)(7)

The information PacifiCorp designated as confidential during the August 6 workshop clearly falls within the scope of ORCP 36(C)(7) as “a protected trade secret or other

¹¹ Order 13-095 at ¶ 15.

¹² *Id.*

¹³ Sierra Club’s Motion at 1.

¹⁴ Aug. 18, 2014 electronic mail from Gloria Smith to ALJ Grant (provided as Attachment 1 to Sierra Club’s motion).

1 confidential research, development, or commercial information.” The information provided
2 during the workshop falls into two categories: (1) PacifiCorp’s economic analyses of
3 investments in emissions control equipment required under state and federal law at the Craig
4 and Hayden generating plants; and (2) PacifiCorp’s legal analyses of participation
5 agreements and coal supply contracts.

6 ***1. PacifiCorp’s economic analyses of the Craig and Hayden emissions control***
7 ***investments qualify as protected trade secrets or other confidential research***
8 ***or commercial information.***

9 During the workshop, PacifiCorp discussed its economic analyses of the emissions
10 control equipment required under Colorado’s regional haze state implementation plan and the
11 Colorado Clean Air Clean Jobs Act. In determining whether to make a given investment,
12 PacifiCorp analyzes the present value revenue requirement differential, or PVRR(d), of the
13 investment versus other alternatives across a range of scenarios defined by input variables.
14 Public disclosure of these analyses would harm PacifiCorp and its customers by placing
15 PacifiCorp at a disadvantage in multiple forums, including without limitation: (1) any
16 requests for proposals or contract negotiations with third-party contractors hired to design,
17 build, or install the emissions control equipment; (2) discussions, if any, between PacifiCorp
18 and other parties related to the potential sale of PacifiCorp’s interest in the Craig or Hayden
19 generating plants; or (3) negotiations, if any, between PacifiCorp and the federal and state
20 agencies responsible for determining the necessary emissions control equipment at the Craig
21 and Hayden units.

22 In addition, the emissions control requirements at the Craig generating unit have been
23 the subject of active civil litigation that only recently resulted in a settlement, as well as rate
24 cases and other regulatory proceedings. Given this civil and regulatory litigation, as well as
25 potential litigation regarding emissions control requirements at the Hayden facility,

1 PacifiCorp conducted its economic analyses at the direction of counsel and in preparation for
2 litigation. PacifiCorp waived the protections of the attorney-work-product doctrine and
3 attorney-client privilege to provide the economic analyses to its regulatory commissions. But
4 the analyses are clearly still protected as trade secrets or confidential research and
5 commercial information. Disclosing PacifiCorp's confidential, internal economic analyses
6 could potentially weaken the Company's litigation position, to its customers' detriment.

7 Finally, PacifiCorp's economic analyses of the emissions control investments are not
8 publically available. PacifiCorp not only limits access to these analyses externally in
9 regulatory processes, but also takes steps to ensure necessary or appropriate access to
10 confidential information within the Company.¹⁵

11 **2. *PacifiCorp's legal analyses of the participation agreements and coal supply***
12 ***contracts for the Craig and Hayden facilities qualify as protected trade***
13 ***secrets or other confidential research or commercial information.***

14 During the confidential workshop, PacifiCorp also discussed at length its legal
15 analyses of the participation agreements and coal contracts for the Craig and Hayden
16 facilities during the confidential August 6 workshop. The terms of these agreements and
17 contracts are confidential and commercially sensitive because disclosure of contract terms
18 that the Company previously agreed to would undermine PacifiCorp's ability to negotiate
19 different terms in future contracts. This could in turn result in higher costs and less favorable
20 contract terms in the future, to the detriment of PacifiCorp and its customers.

21 Furthermore, the discussions and materials at the workshop included not only
22 information about the participation agreements and the coal contracts, but also included
23 PacifiCorp's legal analyses of some of the terms of those agreements and contracts. These

¹⁵ *Citizens' Util. Bd.*, 128 Or. App. at 658-59.

1 legal analyses were used in developing certain assumptions included in the Company's
2 economic analysis. The analyses also were used to determine PacifiCorp's course of action
3 in discussions with the co-owners of the Craig and Hayden facilities regarding whether to
4 invest in certain emission control equipment. The analyses were prepared by an attorney and
5 were protected by the attorney-client privilege.

6 The confidentiality of PacifiCorp's legal analyses must be maintained given
7 PacifiCorp's obligations to the co-owners of the Craig facilities. Because there is active
8 litigation regarding Craig and ongoing discussions related to regional haze compliance
9 obligations with federal and state agencies, PacifiCorp and the other owners of the Craig
10 facilities have entered into an agreement protecting discussions between them as
11 confidential.

12 PacifiCorp limits access to its legal analyses of the participation agreements and coal
13 contracts externally in regulatory processes, and also takes steps to ensure necessary or
14 appropriate access to confidential information within the Company.¹⁶ Like the economic
15 analyses, PacifiCorp waived the protections of the attorney-client privilege for its legal
16 analyses so the Company could provide them analysis to regulatory commissions. But the
17 analyses are still protected as trade secrets or confidential research and commercial
18 information.

19 Disclosing PacifiCorp's confidential, internal legal analyses could potentially weaken
20 the Company's litigation positions, to its customers' detriment. In addition, disclosure could
21 potentially negatively affect PacifiCorp's negotiating position in multiple forums, including:
22 (1) discussions, if any, between PacifiCorp and other parties related to the potential sale of

¹⁶ *Citizens' Util. Bd.*, 128 Or. App. at 658-59.

1 PacifiCorp's interest in the Craig or Hayden generating plants; (2) negotiations, if any,
2 between PacifiCorp and the federal and state agencies responsible for determining the
3 necessary emissions control equipment at the Craig and Hayden units; and (3) discussions, if
4 any, between PacifiCorp and the co-owners of the Craig and Hayden facilities regarding the
5 participation agreements or the investments in emissions control equipment.

6 **V. CONCLUSION**

7 Because the information challenged by Sierra Club qualifies as "a protected trade
8 secret or other confidential research, development, or commercial information," PacifiCorp
9 respectfully requests that the Commission continue to protect the information as confidential
10 under the protective order in this case and deny Sierra Club's motion.

Respectfully submitted this 5th day of September, 2014.

By:



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Attorneys for PacifiCorp d/b/a Pacific Power

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of PacifiCorp's Response on the parties listed below via electronic mail and/or Overnight Delivery in compliance with OAR 860-001-0180.

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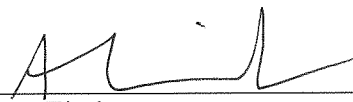
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Dated this 5th of September, 2014.



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