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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
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Attn: Filing Center

RE: LC 67—PacifiCorp's Sur-Reply

PacifiCorp d/b/a Pacific Power provides the enclosed sur-reply to Sierra Club's Written Objection to PacifiCorp's Confidential Designations, in accordance with Paragraph 9 of General Protective Order No. 16-461 issued by the Public Utility Commission of Oregon.

Please direct questions on this filing to Natasha Siores at (503) 813-6583.

Sincerely,

A handwritten signature in black ink, appearing to read "Etta Lockey".

Etta Lockey
Vice President, Regulation

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 67

In the Matter of
PACIFICORP, d/b/a PACIFIC POWER,
2017 Integrated Resource Plan.

PACIFICORP'S SUR-REPLY TO
SIERRA CLUB'S OBJECTION TO
PACIFICORP'S CONFIDENTIAL
DESIGNATIONS

I. INTRODUCTION

In accordance with Paragraph 9 of the General Protective Order issued by the Public Utility Commission of Oregon (Commission) in this docket,¹ PacifiCorp d/b/a Pacific Power, files this sur-reply to Sierra Club's Written Objection to PacifiCorp's Confidential Designations.

The Commission's long-standing policy for integrated resource planning allows for the confidential designation of commercially sensitive information.² The Commission's policy reasonably balances the need for full public disclosure, with the competing need to protect commercially sensitive information when disclosure would harm customers. Consistent with the Commission's policies, PacifiCorp has consistently and diligently maintained the confidentiality of present value revenue requirement differential (PVRR(d)) results related to preliminary economic studies of coal plants. Disclosure of PVRR(d) results here would mark a dramatic change in policy that could have far reaching consequences for PacifiCorp, its customers, and the region.

¹ *In the Matter of PacifiCorp, dba Pacific Power, 2017 Integrated Resource Plan*, Docket No. LC 67, Order No. 16-461 (Dec. 5, 2016).

² *In the Matter of the Investigation into Least-Cost Planning for Resource Acquisitions by Energy Utilities in Oregon*, Docket No. UM 180, Order No. 89-507 at 5 (Apr. 20, 1989).

PacifiCorp has gone to great lengths in recent planning processes to develop a comprehensive methodology for the economic evaluation of its coal units and their retirement assumptions. Over the 2017 Integrated Resource Plan (IRP) planning horizon, the company assumes 3,650 MW of existing coal capacity will be retired.³ These assumed retirement dates were made public only after the company completed comprehensive portfolio analysis showing that the assumed retirements result in a preferred resource portfolio that is least-cost, least-risk, and consistent with the long-term public interest.⁴

In contrast, the unit-by-unit coal studies the company agreed to produce in the 2017 IRP (the Coal Analysis),⁵ are preliminary and incomplete and, by themselves, will not establish assumed coal plant retirements in the 2019 IRP. But if the PVRR(d) results are made public—even if the inputs and assumptions remain confidential—the market, affected employees and local businesses, and other currently engaged counterparties could misinterpret them to suggest that certain units are uneconomic and will be retired sooner than currently expected or that some units will remain in-service longer than currently assumed. And it is not speculation to think that such misinterpretation could occur—Sierra Club has been clear that it intends to use the confidential information to advance just such a narrative. Premature public disclosure of the results of preliminary and incomplete scenario analyses will harm customers by disadvantaging the company as it transacts for goods and services to maintain its coal units and can have wider ranging negative impacts on individuals that rely on these facilities for their livelihood.

³ 2017 Integrated Resource Plan (IRP) at 6.

⁴ *In the Matter of the Public Utility Commission of Oregon Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07-002 at 2 (Jan. 8, 2007).

⁵ *In the Matter of PacifiCorp, dba Pacific Power, 2017 Integrated Resource Plan*, Docket No. LC 67, Order No. 18-138 at 11-12 (Apr. 27, 2018).

Moreover, public disclosure could adversely impact regional wholesale power markets if participants infer from the results that coal units will be retired earlier (or later) than currently assumed, even if that inference is not supported by the actual Coal Analysis. The risk of market impacts strongly supports the Commission upholding the company's confidential designations, as it has done in previous IRPs, to protect customers and the public interest.

II. ARGUMENT

A. Public disclosure of the PVRR(d) results will competitively disadvantage PacifiCorp in actual or potential transactions.

PacifiCorp provided concrete examples of scenarios where public disclosure of the PVRR(d) results⁶ would place PacifiCorp at a competitive disadvantage in the market.⁷ In response, Sierra Club argues that none of the scenarios described by PacifiCorp are “currently unfolding so there is no specificity to the purported risks.”⁸ This argument is both legally and factually incorrect.

1. A trade secret can exist even when there is no currently pending commercial transaction.

The PVRR(d) results are trade secrets, which are defined in ORS 646.461(4) as information that has “actual *or potential*” economic value “from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.” The fact that the disclosure of the confidential PVRR(d) results could cause a competitive

⁶ The PVRR(d) results are found on page 5 of the Coal Analysis. But page 9 included a description of the results and therefore is confidential for the same reason as the results themselves. Page 9 also includes a redaction that describes the PVRR(d) results if both Jim Bridger Units 1 and 2 are retired. The basis for designating this information confidential is the same as the basis for designating the PVRR(d) results on page 5 confidential, which is why the company addressed them together in its reply.

⁷ PacifiCorp's Response to Sierra Club's Objection to PacifiCorp's Confidential Designations at 7.

⁸ Sierra Club's Reply to PacifiCorp's Response to Sierra Club's Objections to Confidential Designations at 4 (hereinafter Sierra Club's Reply).

disadvantage in a future transaction does not mean that the Coal Analysis is not a protected trade secret now under ORCP 36C.⁹

2. PacifiCorp regularly engages in competitive markets that will be impacted by the public disclosure of the PVRR(d) results.

PacifiCorp is regularly engaged in the market for the purchase of goods and services required to maintain and operate existing coal plants and disclosure of the PVRR(d) results could unfavorably influence pricing, terms, and conditions for these transactions. For example, the company is regularly engaged in regional coal supply and transportation markets with relatively few suppliers. Although the company's forecasted coal prices themselves are not specifically identified in the PVRR(d) results, even knowledge of preliminary economic analysis of an individual coal unit will adversely impact the company's bargaining position. If a counterparty misinterprets the results as suggesting that a particular coal unit is uneconomic and therefore will be retired early, that knowledge will detrimentally impact the company's negotiating position. Conversely, if a counterparty believes that the PVRR(d) results suggest that a coal plant is economic and will not be retired in the near-term, that understanding will impact the counterparties' bargaining with the company. In either scenario, the company and customers are at a competitive disadvantage if the results of the preliminary and incomplete unit-by-unit economic analysis is publicly released.

The same is true for labor negotiations—if the labor market is led to believe that a particular coal plant is uneconomic, based on preliminary and incomplete analysis, the company's ability to retain the necessary highly skilled workforce for that plant will be compromised.

⁹ Order No. 16-461, App. A at 1; ORCP 36C(1).

PacifiCorp is also actively monitoring market opportunities to sell plant or mine assets that are no longer necessary for providing utility service. The company’s bargaining position in these actual or potential transactions will be harmed if counterparties infer from the PVRR(d) results the strength of the company’s negotiating position.

Sierra Club argues that counterparties would not rely on the PVRR(d) results when negotiating with PacifiCorp because they would “undertake complex research before” contracting with PacifiCorp and would not “base multimillion-dollar decisions on a PowerPoint presentation that is rife with explicit caveats and disclaimers.”¹⁰ Sierra Club’s argument is over-simplistic. While it is true that counterparties may not rely exclusively on the PVRR(d) results, they could use the results as a data point to gain commercial advantage when they negotiate with the company.

Although Sierra Club is casually dismissive of the market impacts of releasing the PVRR(d) results, even high-level results can create a competitive disadvantage for the company—which is why the company has diligently maintained the confidentiality of comparable PVRR(d) results.

B. PacifiCorp has never previously disclosed preliminary coal analysis PVRR(d) results.

Sierra Club claims that the company “regularly releases preliminary results to the public” and points to a fact sheet and draft results of analysis from the 2015 IRP process.¹¹ But the results Sierra Club cites are not unit-by-unit results, which are at issue here. Instead, the preliminary results Sierra Club cites were fact sheets that “summarize[d] key assumptions

¹⁰ Sierra Club’s Reply at 4.

¹¹ Sierra Club’s Reply at 5.

and *portfolio results for each portfolio* being developed for the 2015 IRP.”¹² The PVRR(d) results here do not show entire resource portfolio results and are therefore entirely distinct from the preliminary results that were publicly released during the 2015 IRP process.

Sierra Club also claims that the PVRR(d) results in the Coal Analysis are “exactly the same as the analysis PacifiCorp provided in support of its Energy Vision 2020 projects for the Utah Commission when seeking pre-approval[.]”¹³ Contrary to Sierra Club’s claim, the Energy Vision 2020 analysis and the Coal analysis are not the “exact same.” The publicly disclosed Energy Vision 2020 PVRR(d) results reflected final, comprehensive portfolio analyses that definitively and reliably informed the company’s resource planning process for an aggregation of new wind and transmission resources. As PacifiCorp previously explained, those types of modeling results are typically made public. The Coal Analysis, in contrast, is preliminary and incomplete and will be used as a starting point in further discussions of the development of coal studies in the 2019 IRP. It also addresses individual coal generation resources that PacifiCorp operates in competitively challenging markets. Sierra Club could not identify any instance where comparable results were publicly disclosed.

C. The confidential designations upheld by the Commission in the 2013 IRP are substantively the same as the confidential designations here.

Sierra Club concedes that the Commission upheld the company’s confidential designation of PVRR(d) results related to the Craig and Hayden plants in the 2013 IRP, over Sierra Club’s objections.¹⁴ But Sierra Club claims that the PVRR(d) results here are distinguishable because in the 2013 IRP, PacifiCorp was engaged in “current negotiations”

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http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Integrated_Resource_Plan/2015IRP/PacifiCorp_2015IRP_DRAFTCoreCase_FactSheets_11-14-14.pdf (emphasis added).

¹³ Sierra Club’s Reply at 7.

¹⁴ Sierra Club’s Reply at 10.

for the installation of emission control equipment, whereas here the company is not.¹⁵ Not only is the lack of current negotiations irrelevant and factually incorrect, as discussed above, Sierra Club's characterization of the 2013 IRP is also factually incorrect. In fact, in the 2013 IRP, PacifiCorp argued that the PVRR(d) results were the product of the company's "research and internal analysis, and this information is confidential because disclosure would harm PacifiCorp and its customers by placing PacifiCorp and the other plant owners at a competitive disadvantage."¹⁶ PacifiCorp cited the *potential* for future litigation associated with the need for emission control investments at the Hayden plant as one basis for protecting the PVRR(d) results.¹⁷ The company was in current negotiations and litigation related to the Craig plant, but not Hayden, and yet the PVRR(d) results for both plants were designated confidential for the same reasons PacifiCorp has cited here.

D. Public disclosure could adversely impact wholesale power markets.

Sierra Club also claims that the disclosure of the Coal Analysis would not place PacifiCorp in a competitive disadvantage when it transacts in the wholesale electric market.¹⁸ Sierra Club is wrong. Regional wholesale power markets are impacted by the potential closure of coal units and reduced power supply. The public release of preliminary and incomplete PVRR(d) results could adversely impact those markets if participants are led to believe that early retirements will occur (or that assumed retirements will be delayed). There could be market repercussions on prices, liquidity and depth. In addition, release of the PVRR(d) results could cause concerns around reliability not only for PacifiCorp, but for the

¹⁵ Sierra Club's Reply at 5 (emphasis in original).

¹⁶ *In the Matter of PacifiCorp, dba Pacific Power, 2013 Integrated Resource Plan*, Docket No. LC 57, PacifiCorp's Response to Ruling Requiring Redesignation of Workshop Presentation at 3 (Oct. 23, 2014).

¹⁷ *Id.* at 4.

¹⁸ Sierra Club's Reply at 7.

broader Western Interconnection regarding reliability services that these plants provide, such as frequency response, and voltage support if the market infers that coal units may retire earlier than currently expected. All of these potential impacts to the market support the company's confidential designation of preliminary and incomplete PVRR(d) results.

E. The PVRR(d) results for the Jim Bridger units without emission controls are confidential.

The Coal Analysis includes two redactions showing the impact on the PVRR(d) results for Jim Bridger Units 1 and 2 if the cost of selective catalytic reduction equipment (SCRs) is removed from the base case analysis.¹⁹ The company explained that disclosure of these PVRR(d) results would place the company at a competitive disadvantage in negotiations with regulators and counterparties regarding the need for and alternatives to SCRs for these units.²⁰

Sierra Club claims that the PVRR(d) results would have no impact on potential environmental compliance costs because the company “has no plans to retrofit any of its coal units in the foreseeable future.”²¹ But the fact the 2017 IRP preferred portfolio does not include installation of SCRs at any coal plant does not mean that the company is not actively engaged with regulators related to the potential need for emission control equipment or the best approach to avoiding emission control investments. Indeed, the 2017 IRP was clear that “[a]s in past IRPs, the 2017 IRP studies a range of Regional Haze compliance scenarios, reflecting potential bookend alternatives that consider early retirement outcomes as a means to avoid installation of expensive SCR equipment.”²² “The individual unit-specific outcomes

¹⁹ Coal Analysis at 5.

²⁰ PacifiCorp's Response to Sierra Club's Objection to PacifiCorp's Confidential Designations at 7.

²¹ Sierra Club's Reply at 4; *see also id.* at 8.

²² 2017 IRP at 6.

assumed in the 2017 IRP preferred portfolio will ultimately be determined by *on-going rulemaking; litigation results; and future negotiations with state and federal agencies, partner plant owners, and other vested stakeholders.*”²³ Action item 5 from the 2017 IRP, which relates to coal resources, indicates that the company continues to engage in negotiations with regulators and stakeholders, including, in some cases litigation, regarding the need for emission control investments for the Hunter, Huntington, Dave Johnston, Wyodak, and Craig plants.²⁴ The company will be disadvantaged in each of these processes by public disclosure of the PVRR(d) results.

F. The year-by-year system cost data included in the workpapers supporting the Coal Analysis is confidential.

The Coal Analysis includes an exemplary graph on page 7 to show what type of information was included in the confidential workpapers supporting the Coal Analysis. Sierra Club argues that this excerpt from the workpapers must be publicly disclosed.²⁵ The workpaper excerpt is confidential for precisely the same reasons that the PVRR(d) results are confidential. Indeed, the fact that the workpaper excerpt is more granular than the overall PVRR(d) results means that it contains more information and would be even more harmful if publicly disclosed. For example, the graph shows the year-to-year change in forecasted fuel costs for Jim Bridger Unit 1. As discussed above, disclosure of the company’s coal price forecasts would materially harm customers when the company goes to market to purchase coal for the unit. Sierra Club appears to acknowledge that the information included in the graph is particularly commercially sensitive, because notwithstanding its argument that the workpaper excerpt must be publicly disclosed, it also claims that it has “not asked the

²³ 2017 IRP at 6 (emphasis added).

²⁴ 2017 IRP at 19-20.

²⁵ Sierra Club’s Reply at 9.

Commission to open up the underlying workpapers, analyses, or other input documents that support the PowerPoint.”²⁶

G. The public interest is served through the orderly resource planning process adopted by the Commission, which allows for the protection of confidential information.

Sierra Club did not dispute that the IRP Guidelines specifically allow for the protection of confidential information. Sierra Club could not dispute that the company has diligently maintained the confidentiality of substantially similar coal studies in previous IRPs. Yet, Sierra Club now argues that the public must have unfettered access to PacifiCorp’s confidential information or the resource planning process cannot work as intended.

Just as PacifiCorp’s previous resource planning processes were not adversely impacted by the confidential designation of substantially identical PVR(d) results, the company’s confidential designation here will not adversely impact the 2019 IRP process. If the confidential designation is upheld, Sierra Club, along with all the other stakeholders that have agreed to be bound by the protective order, will still be able to use the confidential Coal Analysis in the 2019 IRP process. Sierra Club’s ability to participate in the Commission proceeding is unaffected by the confidential designation.²⁷ What is affected, however, is Sierra Club’s apparent plan to misuse the confidential information in a public relations campaign in opposition to coal-fired generation. The resource planning process is not intended to be used as Sierra Club proposes and will not be compromised by the continued protection of confidential coal unit analysis.

²⁶ Sierra Club’s Reply at 6; *see also id.* at 1 (Sierra Club seeking only “summary results—not the inputs”).

²⁷ *Citizens’ Util. Bd. of Oregon v. Oregon Pub. Util. Comm’n*, 128 Or. App. 650, 660 (1994).

Sierra Club argues repeatedly that the public must have access to the confidential information so that the “public [can] know whether the company must make changes to its resource mix in order to manage costs and risks” and that without full disclosure “no one but a select few can understand” the economics of the company’s coal units.²⁸ The Court of Appeals previously rejected this very argument and Sierra Club failed to distinguish its claim here from those already rejected by the court.²⁹

Sierra Club further claims that the public interest is served by the release of the confidential information by making unfounded accusations that the company has “failed to comply with the Commission’s requirement to pursue least-cost, least-risk planning.”³⁰ Sierra Club cites nothing to support claim—which is not unexpected because the Commission has acknowledged every PacifiCorp IRP since the Commission adopted its IRP Guidelines.³¹ In fact, the company agreed to provide the Coal Analysis as part of the 2017 IRP proceeding and in that case the Commission “acknowledge[d] all action items in PacifiCorp’s action plan.”³²

Moreover, disclosure of the commercially sensitive PVRR(d) results could harm the public interest in communities where the company’s coal plants are located. These communities could experience substantial and irreparable harm if the market, counterparties,

²⁸ Sierra Club’s Reply at 9.

²⁹ *CUB*, 128 Or. App. at 660.

³⁰ Sierra Club’s Reply at 6.

³¹ See *In the Matter of PacifiCorp, dba Pacific Power, 2007 Integrated Resource Plan*, Docket No. LC 42, Order No. 08-232 (Apr. 24, 2008) (acknowledged with exceptions and requirement for next plan); *In the Matter of PacifiCorp, dba Pacific Power, 2008 Integrated Resource Plan*, Docket No. LC 47, Order No. 10-066 (Feb. 24, 2010) (acknowledged with exception); *In the Matter of PacifiCorp, dba Pacific Power, 2011 Integrated Resource Plan*, Docket No. LC 52, Order No. 12-082 (Mar. 9, 2012) (acknowledged with exception); *In the Matter of PacifiCorp, dba Pacific Power, 2013 Integrated Resource Plan*, Docket No. LC 57, Order No. 14-252 (July 8, 2014) (acknowledged with exception and revision); *In the Matter of PacifiCorp, dba Pacific Power, 2015 Integrated Resource Plan*, Docket No. LC 62, Order No. 16-071 (Feb. 29, 2016) (acknowledged with exception).

³² Order No. 18-138.

or labor infers—even incorrectly—that plant retirements will occur sooner than expected. The potential adverse economic impact on these communities weighs heavily against publicly disclosing preliminary and incomplete analysis.

Finally, despite Sierra Club’s repeated claims that the public interest “demands” releasing the Coal Analysis,³³ not a single other stakeholder in any of PacifiCorp’s six states has supported Sierra Club’s challenge. And, as the company pointed out, stakeholders have not historically challenged the confidentiality of substantively identical PVR(d) results.

H. Sierra Club is collaterally attacking the Commission’s protective order through a public records request in Washington.

Collateral attacks on Commission orders are impermissible.³⁴ Yet, that is precisely what Sierra Club is doing under Washington’s Public Records Act, where Sierra Club is attempting to force disclosure of the Coal Analysis regardless of the Commission’s determination here.

Sierra Club signed the protective orders issued by the Commission in both dockets LC 67 and LC 70 (the 2017 and 2019 IRP dockets, respectively). By doing so, Sierra Club agreed to be bound by the terms of those protective orders.³⁵ PacifiCorp provided Sierra Club a confidential version of the Coal Analysis subject to the protections in the LC 67 and LC 70 protective orders. After obtaining access to the confidential information under the Commission protective orders, on July 13, 2018, Sierra Club filed a public records request with the Washington Utilities and Transportation Commission (WUTC) asking that the

³³ Sierra Club’s Reply at 6.

³⁴ See, e.g., *In the Matter of Oregon Public Utility Commission Staff; Requesting the Commission direct PacifiCorp, dba Pacific Power, to file tariffs establishing automatic adjustment clauses under the term of SB 408*, Docket No. UE 177, Order No. 08-176 (Mar. 20, 2008) (striking testimony that collaterally attacked a protective order); see also *Morgan v. Portland Traction Co.*, 222 Or 614, 622, 331 P2d 344 (1958); *Mt. Hood Stages, Inc. v. Haley*, 252 Or 538, 542, 451 P2d 125 (1969); *Garrison v. Pacific Northwest Bell*, 45 Or App 523, 530, 608 P2d 1206 (1980); *Simpson v. Phone Directories Co.*, 82 Or App 582, 586, 729 P2d 578 (1986).

³⁵ Order No. 16-461, App. B at 1.

WUTC release the confidential Coal Analysis, which was provided informally to WUTC Staff following the June 28, 2018, public input meeting. The company is now in litigation in the Thurston County Superior Court in Washington to prevent the public disclosure of the confidential Coal Analysis.

Sierra Club's end-run around the Commission's protective order constitutes a collateral attack on the order. The company recognizes that its regulation by six states means that inevitably parties will seek confidential information in other states. But in this case, there is no current proceeding in Washington in which Sierra Club is a party and in which it intends to use the Coal Analysis. Instead, Sierra Club's actions here demonstrate its underlying purpose for wanting public disclosure is not to advance the 2019 IRP process. Instead, Sierra Club apparently seeks to mount a broad challenge to coal-fired generation using commercially sensitive information provided by the company through the Commission's process.

III. CONCLUSION

Because the information challenged by Sierra Club qualifies as a protected "trade secret or other confidential research, development, or commercial information," PacifiCorp respectfully requests that the Commission confirm the Company's designation of the information as confidential under the protective order and deny Sierra Club's objection.

Respectfully submitted this 26th day of July, 2018.

By:



Matthew McVee
Chief Regulatory Counsel