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September 11, 2020

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: UE 374 – In the Matter of PACIFICORP d/b/a PACIFIC POWER’S Request for a General Rate Revision.

Attention Filing Center:

Attached for filing in the above-referenced docket is PacifiCorp d/b/a Pacific Power’s Response to Sierra Club’s Objection to Designation of Certain Information as Confidential.

Confidential material in support of the filing will be provided to qualified parties under Protective Order No. 20-040 via encrypted zip file.

Please contact this office with any questions.

Sincerely,

Katherine McDowell

Attachment

CERTIFICATE OF SERVICE

I certify that I delivered a true and correct copy of the confidential pages of PacifiCorp's **Response to Sierra Club's Objection to Designation of Certain Information as Confidential** on the parties listed below that have signed the modified protective order via electronic mail and/or or overnight delivery in compliance with OAR 860-001-0180.

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Dated this 11th day of September, 2020.



Alisha Till
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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 374

In the Matter of

PACIFICORP d/b/a PACIFIC
POWER

Request for a General Rate Increase.

PACIFICORP'S RESPONSE TO
SIERRA CLUB'S OBJECTION TO
DESIGNATION OF CERTAIN
INFORMATION AS CONFIDENTIAL

I. INTRODUCTION

1 In accordance with Paragraph 9 of the General Protective (Order No. 20-040) issued by the
2 Public Utility Commission of Oregon (Commission) in this docket, PacifiCorp d/b/a Pacific Power
3 (PacifiCorp or Company) responds to Sierra Club's Objection to Designation of Certain
4 Information as Confidential (Objection), filed on September 3, 2020. Sierra Club challenges the
5 designation of three documents:

- 6 1. Confidential Attachment to Sierra Club 7.4-1 1st Supplemental.
- 7 2. Confidential Attachment to Sierra Club 7.4-2 1st Supplemental.
- 8 3. Confidential Attachment to Sierra Club 9.6.

9 The Commission should confirm the Company's confidentiality designations for these documents
10 because each qualifies as a protected "trade secret or other confidential research, development, or
11 commercial information" under ORCP 36(C), as set forth in Order No. 20-040. Moreover,
12 disclosure of these documents would prejudice ongoing negotiations between the Company and
13 its regulators and could prejudice ongoing litigation pending before the Tenth Circuit Court of
14 Appeals. None of these documents have previously been disclosed publicly, and the
15 confidentiality of each should remain protected.

II. LEGAL STANDARD

1 The Commission’s general protective order is “specifically tailored to safeguard
2 confidential commercial information from unauthorized disclosure.”¹ Under its terms, “[a]ny
3 party may designate as Protected Information any information the party reasonably determines:
4 (a) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research,
5 development, or commercial information); and (b) Is not publicly available.”² If the
6 confidentiality of information is challenged, the party asserting confidentiality must demonstrate
7 how the challenged information is protected under ORS 192.311 *et seq.* (Oregon Public Records
8 Act) or ORS 646.461(4) (Uniform Trade Secrets Act).³

9 ORCP 36(C)(1) limits disclosure of “a trade secret or other confidential research,
10 development, or commercial information.”⁴ The Uniform Trade Secrets Act defines “trade
11 secrets” as:

12 information, including a drawing, cost data, customer list, formula, pattern,
13 compilation, program, device, method, technique or process that: (a) Derives
14 independent economic value, actual or potential, from not being generally known
15 to the public or to other persons who can obtain economic value from its
16 disclosure or use; and (b) Is the subject of efforts that are reasonable under the
17 circumstances to maintain its secrecy.⁵

18 To determine what constitutes a trade secret, Oregon courts examine six factors:

¹ *In the Matter of Qwest Corp., Investigation to Review Costs and Establish Prices for Certain Unbundled Network Elements provided by Qwest Corp.*, Docket UM 1025, Order No. 03-533 at 6 (Aug. 28, 2003).

² Order No. 20-040, Appendix A at 1 (Feb. 11, 2020).

³ Order No. 20-040, Appendix A at 2.

⁴ ORCP 36(C)(1).

⁵ ORS 646.461(4). The Oregon Public Records Act similarly defines “trade secrets” as “any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.” ORS 192.345(2). The two definitions within the Oregon Public Records Act and the Uniform Trade Secrets Act are substantively similar, and Order No. 20-040 requires the Company to demonstrate that any confidential material is protected under *either* ORS 646.461(4) *or* ORS 192.345(2). Order No. 20-040, Appendix A at 2.

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

8 As the Oregon Court of Appeals explained in *Kaib's Roving R.P.H. Agency, Inc. v. Smith*, “[i]f
9 facts and circumstances are presented to establish that the information derives economic value
10 from not being generally known and is subject to reasonable efforts to maintain its secrecy, then
11 the information is a trade secret within the meaning of the statute.”⁷

III. DISCUSSION

A. Sierra Club's Objection is Belated and Prejudicial.

12 As an initial matter, Sierra Club's decision to belatedly file its Objection prejudices
13 PacifiCorp's ability to fully respond. Under Order No. 20-040, a party that has designated
14 information as confidential has five business days to file a response following submission of a
15 written objection.⁸ In this case, PacifiCorp provided Sierra Club with the Confidential Attachment
16 to Sierra Club 9.6 on July 20, 2020, and the fully un-redacted Confidential Attachments to Sierra
17 Club 7.4 on August 7, 2020.⁹ Nonetheless, Sierra Club first questioned the documents'
18 confidentiality on August 28, 2020 (with 6 business days remaining before hearing) and formally
19 presented its objection on September 3, 2020—leaving a mere two business days to fully litigate
20 this dispute while parties simultaneously prepare for hearing. Sierra Club does not offer any basis

⁶ *Citizens' Util. Bd. of Or. v. Or. Pub. Util. Comm'n*, 128 Or App 650, 658-59 (1994) *rev den* 320 Or 272 (1994) (internal citations omitted); *see also Pfizer Inc. v. Or DOJ*, 254 Or App 144, 161 n.12 (2012) (same).

⁷ 237 Or App 96, 103 (2010).

⁸ Order No. 20-040, Appendix A at 2.

⁹ As indicated in the data requests, Sierra Club has had the documents requested in Sierra Club 7.4 since 2012 and were filed, in redacted form, by Sierra Club in docket UE 246, Pacific Power's 2012 Request for a General Rate Revision, as Exhibits Sierra Club 114 and 115.

1 for the lateness of its Objection. Despite this eleventh-hour filing, PacifiCorp has nonetheless
2 attempted to respond expeditiously and completely under the circumstances.

B. Confidential Attachment to Sierra Club 7.4-1 1st Supplemental Contains Trade
Secrets Relevant to Ongoing Compliance Negotiations and Litigation and Is Subject
to a Confidentiality Agreement.

3 This document contains a cover letter with two attachments sent by PacifiCorp to the
4 Environmental Protection Agency (EPA), the Utah Department of Environmental Quality (DEQ),
5 and the Wyoming DEQ on February 14, 2003, as part of confidential settlement communications.

6 This document notes that [REDACTED]
7 [REDACTED]. One of the attachments further notes that [REDACTED]
8 [REDACTED].¹⁰

9 Sierra Club claims that this document “does not contain any proprietary business secrets”
10 because of the document’s “age.”¹¹ This is incorrect in two respects. First, as a legal matter, the
11 Oregon Court of Appeals has rejected the position that a trade secret necessarily loses protected
12 status merely by virtue of its age.¹² Second, as a factual matter, the contents of the document
13 remain relevant to PacifiCorp’s ongoing negotiations with its regulators—specifically, [REDACTED]
14 [REDACTED], both of which are
15 addressed in this document. In addition, this document contains information [REDACTED]
16 [REDACTED] that would be relevant to ongoing
17 litigation with Sierra Club in the Tenth Circuit Court of Appeals, and could be prejudicial to

¹⁰ Confidential Attachment to Sierra Club 7.4-1 1st Supplemental (NOx Paper).

¹¹ Sierra Club’s Objection to Designation of Certain Information as Confidential at 1 (Sept. 3, 2020).

¹² *Pfizer*, 254 Or App at 165-166 (rejecting an argument that documents were not trade secrets because “[t]he information is old and of no value to a competitor” by stating that these “bare assertions” were unsupported by “any factual submission”).

1 PacifiCorp if made available in that proceeding.¹³ In addition, the document contains information
2 about [REDACTED]. [REDACTED]
3 [REDACTED] would still place
4 the Company in a competitive disadvantage when interacting with co-owners of facilities, vendors,
5 and regulatory agencies when negotiating compliance requirements. Further, public disclosure of
6 [REDACTED] may expose the Company to unnecessary litigation risk, based on a misunderstanding
7 of the actions and negotiations of the Company. Accordingly, public disclosure could directly lead
8 to increased costs for the Company and its customers. For all of these reasons, the business value
9 of this document remains ongoing.

C. Confidential Attachment to Sierra Club 7.4-2 1st Supplemental Contains Trade
Secrets Relevant to Ongoing Compliance Negotiations and Litigation.

10 This document consists of [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]. Again, Sierra Club states that this document “does not contain any
14 proprietary business secrets” because of its “age.”¹⁴ As previously noted, Sierra Club’s assertion
15 depends on a mistaken understanding of the law, which does not remove trade secret protections
16 merely by virtue of a document’s age.¹⁵ [REDACTED]
17 [REDACTED] remain relevant today and could provide a competitive advantage to
18 PacifiCorp’s competitors. Moreover, this document similarly concerns matters—namely,

¹³ See *Wyoming v. EPA*, Case No. 14-9534 (10th Cir., currently stayed and in settlement discussions; Sierra Club is an intervening party); *Utah v. EPA*, Case No. 16-9541 (10th Cir., currently stayed and in settlement discussions, Sierra Club is an intervening party); *Sierra Club v. EPA*, Case No. 18-9507 (10th Cir. July 2, 2020). The *Sierra Club v. EPA* case involves a dispute over air permitting actions from the late 1990s.

¹⁴ Sierra Club’s Objection to Designation of Certain Information as Confidential at 1.

¹⁵ *Pfizer*, 254 Or App at 166.

1 [REDACTED]

2 [REDACTED], as well as [REDACTED]

3 [REDACTED]—that remain the subject of ongoing confidential negotiation and are

4 relevant to pending litigation before the Tenth Circuit Court of Appeals.

D. Confidential Attachment to Sierra Club 9.6 Contains Confidential Settlement Negotiations.

5 This document consists of a letter from PacifiCorp to the Wyoming DEQ setting out

6 [REDACTED], with the goal of

7 resolving ongoing negotiations between the parties. This document specifically states that [REDACTED]

8 [REDACTED].

9 Sierra Club claims that this document cannot be confidential because it was provided to a

10 public agency.¹⁶ This is an incorrect statement of law. Information provided to a public agency

11 is not subject to disclosure under the Oregon Public Records Act where it is “submitted to a public

12 body in confidence and not otherwise required by law to be submitted, where such information

13 should reasonably be considered confidential, the public body has obliged itself in good faith not

14 to disclose the information, and when the public interest would suffer by the disclosure.”¹⁷ Here,

15 PacifiCorp explicitly provided the document in confidence; the parties’ confidential settlement

16 negotiations carried the good faith obligation not to disclose the information; and disclosure would

17 chill future confidential negotiations between the Company and its regulators. Consistent with

18 this understanding, the document has never been publicly disclosed.

¹⁶ Sierra Club’s Objection to Designation of Certain Information as Confidential at 1.
¹⁷ ORS 192.355(4).

IV. CONCLUSION

1 The three documents that Sierra Club seeks to reclassify contain information that was
2 developed by and is valuable to the Company, remain relevant to ongoing confidential negotiations
3 and pending litigation, and have been never been publicly disclosed. Each one of these documents
4 therefore contains trade secrets and is appropriately designated confidential.

Dated this 11th date of September 2020.



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