

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1209**

4 In the Matter of

5 MIDAMERICAN ENERGY HOLDINGS
6 COMPANY

7 Application for Authorization to Acquire
8 Pacific Power & Light, dba PacifiCorp

STAFF'S RESPONSE IN OPPOSITION TO
MEHC AND PACIFICORP'S REVISED
MOTION TO AMEND PROTECTIVE ORDER

9 **INTRODUCTION**

10 On July 27, 2005, the Public Utility Commission of Oregon ("Commission") issued
11 Order No. 05-867 (the "Order"), which provided a Protective Order to govern the disclosure of
12 confidential information in this proceeding. Paragraph 16 of that Protective Order provides that
13 there may be circumstances that justify additional protection. If such circumstances arise, a party
14 must file a motion seeking additional protection. Such motions are very specific and generally
15 involve one, or a limited number of, data requests that have been served on the moving party.

16 On October 12, 2005, MidAmerican Energy Holdings Company ("MEHC") and
17 PacifiCorp (collectively "Movants") filed a motion to amend the Protective Order ("Motion").
18 In response to Movant's motion, Staff discussed concerns with the Motion with the Movant's
19 counsel. In addition, on October 14, 2005, Administrative Law Judge ("ALJ") Christina Smith
20 presided over a telephone conference where the parties discussed issues related to the Motion.

21 During the conference, the Movants stated their intent to file a revised motion to amend
22 the protective order ("Revised Motion"), which it believed would mitigate some of the parties
23 concerns related to the original motion. As a result, ALJ Smith established a schedule that
24 provided that Movants would file a revised motion on October 17, 2005, and those parties'
25 objections to the Revised Motion would be filed on October 24, 2005. At the conference, Staff

1 noted that it was waiting to see the Revised Motion and reserved its right to comment once the
2 Revised Motion had been filed.

3 Staff has reviewed the Movant’s Revised Motion. Pursuant to the schedule adopted by
4 ALJ Smith, Staff takes this opportunity to file its objections to Movant’s Revised Motion. As
5 currently drafted, Staff opposes Movant’s Revised Motion as its “safe room” procedures result in
6 unreasonable hardship and delay. Furthermore, although Staff is fundamentally concerned with
7 its own access to information, Staff is concerned that the proposed Revised Motion hampers the
8 parties’ and Commissions’ ability to develop a full and complete record, especially considering
9 the very tight procedural schedule in this proceeding. Therefore, Staff opposes Movant’s
10 Revised Motion and respectfully requests that it be denied.

11 **ANALYSIS**

- 12 1. Movant’s proposed discovery restriction of a “safe room” in Portland results in an
13 undue hardship for Staff.

14 The Movant’s Revised Motion proposes to add an additional paragraph to the Protective
15 Order, which among other things would limit Staff’s review of certain documents to a “safe
16 room” located at the offices of Stoel Rives LLP in Portland. Movants generally describe the type
17 of documents subject to “safe room” review as, “due diligence materials of MEHC and
18 ScottishPower, including business plans, financial projections, board minutes, fairness opinion
19 materials and tax information.” Thus, the documents at issue are likely to be some of the most
20 relevant documents to this proceeding. The Revised Motion’s proposed language provides that
21 Staff would be allowed to make copies of these protected documents, subject to special handling
22 instructions.¹

23 ¹ In a footnote, the Movants reserve their right to prohibit copying if it involves “extremely
24 confidential” information. “Extremely confidential” is undefined. Staff understands that the
25 burden of prohibiting Staff from copying “extremely confidential” documents would fall on the
26 Movants and requires them to file a separate motion seeking additional protection. Obviously, if
such a situation arose it would very likely result in substantial delay of discovery, which would
be a great burden considering the already tight schedule.

1 As a starting point, the Protective Order in this proceeding provides for “the broadest
2 possible discovery consistent with the need to protect confidential information.” *See* Order
3 No. 05-867 at 1. While the Movant’s Revised Motion superficially notes the need for broad
4 discovery, it then goes on to create unnecessary restrictions on collecting discovery that result in
5 an unreasonable hardship for Staff.

6 In order to review these “highly confidential” documents under Movant’s proposal, Staff
7 would likely have to make numerous trips to Portland. Indeed, the unreasonable hardship is
8 more than the lost time traveling to Portland once. In fact, Staff has a team of employees
9 reviewing different areas of the proposed acquisition. As such, each team member would be
10 required to do their review in the “safe room,” resulting in much more lost time. Already under a
11 very tight review schedule, it would certainly be a hardship for Staff to send numerous team
12 members, likely on numerous days, to review information that is likely extremely relevant to this
13 transaction.

14 Furthermore, traveling to a “safe room” in Portland would require burdensome
15 scheduling problems. Staff has numerous obligations and proceedings other than this docket,
16 which require time, attendance, and participation. Instead of the opportunity to review
17 documents in between other obligations, Staff would be forced to reshuffle their entire schedule
18 (if possible) to block out entire days to travel to Portland. As mentioned above, this reshuffling
19 of work loads would likely involve numerous employees working on the Staff review team.

20 The Revised Motion’s proposed procedure of a “safe room” will result in unreasonable
21 hardship to Staff. Indeed, this undue hardship, if allowed, would likely result in delay of Staff’s
22 review, which is another hardship considering the limited amount of time provided for in the
23 schedule. The unreasonable hardship and possible delay should be balanced against the
24 Movant’s stated reasons for additional protection. As described in more detail below, the
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1 Movant’s alleged “good cause” for restrictive discovery procedures are misplaced and do not
2 outweigh the hardship that would result to Staff.

3 2. Movants have not demonstrated good cause for their proposed additional and unduly
4 restrictive discovery procedures.

5 As a threshold issue, the Movants have not established that the current procedure
6 established in the Protective Order is insufficient. Indeed, the only “good cause” the Movants
7 offer for their restrictive discovery procedures is another states’ procedure and the leak that
8 occurred in Texas Pacific Group’s application to acquire Portland General Electric.

9 PacifiCorp operates in six states. As support for its Revised Motion, Movants cite to one
10 state, Idaho, which apparently has some procedure for the treatment of “highly confidential”
11 documents. *See* Amended Motion at 3-4. We are not enlightened on the discovery procedures in
12 the other four states. In fact, the cited Idaho provision provides that the discovery will be made
13 “at a place and time mutually agreed upon by the parties.” *See Id.* at 3. The procedures that
14 Movants propose in this proceeding are more restrictive than those for the one state they cite to
15 for support of additional protection.

16 Regardless, while other states’ discovery procedures may be interesting, they are utterly
17 irrelevant to the Commission’s discovery procedures. Even if the Commission was familiar with
18 the legal discovery parameters of the other states, it should not find itself beholden to a certain
19 restrictive discovery procedure because another state so provides. As an example, the Oregon
20 Commission is not obligated to follow other states’ return on equity approvals, but instead
21 independently reviews the facts of the case as presented in Oregon. The same is true in this
22 situation. The Commission should decline the Movant’s attempt to limit the Commission’s
23 discovery procedures to what another state may provide.

24 Likewise, Movant’s reliance of the leak that occurred in Docket UM 1121 does not
25 justify or support the restrictive procedures proposed by the Movants. Unfortunately, a leak did
26 occur in the UM 1121 docket. However, as the Commission noted in its order in that docket, it

1 was disturbed and displeased with the unlawful violation of the protective order and it intended
2 to investigate the matter. In fact, an Attorney General’s investigation remains pending. The
3 Commission’s treatment of confidential discovery has historically worked extremely well.
4 Recently, a very rare circumstance occurred – an unlawful leak. As an unlawful leak, it is
5 currently under investigation.

6 Instead of waiting for the results of the investigation, Movants attempt to use this very
7 rare and unlawful violation of a Commission protective order to establish novel, restrictive
8 discovery procedures that create an undue hardship. The best way to protect future confidential
9 information in Commission proceedings is to take the unlawful leak seriously and attempt to
10 bring the violator/s to justice. That is exactly what the Commission has, and is, doing.

11 Even if the Commission was sympathetic to the Movant’s concerns related to the
12 unlawful leak, the repercussions of allowing Movant’s restrictive discovery proceeding, based
13 upon one unlawful leak, are easy to follow. In future proceedings, the subject utility will claim
14 that a very discrete and very rare problem – one unlawful leak – warrant restrictive discovery
15 procedures that unduly burden the discovery process. Admittedly, the unlawful leak is very
16 troubling. However, the Commission should not allow one isolated and unlawful act to
17 fundamentally drive its discovery process, which has been historically very safe. To do so would
18 likely have far-reaching consequences and offer fertile opportunities to limit needed discovery
19 well into the future.

20 3. If the Commission deems that additional protection is appropriate, there are more
21 narrowly tailored and less burdensome ways to protect Movant’s confidential
information, while also providing Staff with relevant information.

22 Movant’s Revised Motion should be denied for the reasons set forth above. However,
23 assuming *in arguendo*, that the Commission deems additional protection appropriate there are
24 more narrowly tailored and less burdensome ways of accomplishing the Movant’s objectives.

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1 For example, a “safe room” could be created at the Commission. Of course, it would be
2 necessary that Staff had sufficient time to access the information in the “safe room.”²

3 As described above, the Revised Motion would create undue burden on Staff and result in
4 delay of its review. If the Commission deemed the additional protections Movants request
5 appropriate, some of the undue burden on Staff could be mitigated by lengthening the schedule,
6 which would allow more time to accommodate the additional burden created by the restrictive
7 “safe room” procedures.

8 In sum, Staff opposes Movant’s motion and respectfully submits that it should be denied
9 outright. However, if the Commission believes additional protection warranted, there are more
10 narrowly tailored procedures that would be less burdensome to Staff, while still protecting the
11 Movant’s confidential information.

12 4. Staff is concerned that, even if Staff’s issues are resolved, the integrity of the record
13 as a whole may be jeopardized by the Movant’s proposed treatment of other parties.

14 Staff’s concern with the Revised Motion is mostly related to the undue burden it would
15 create for Staff. In addition, Staff expects other parties to file their own responses or objections
16 to the Revised Motion. However, Staff is sympathetic to the Industrial Customers of the
17 Northwest Utilities’ concern, stated during the telephone conference presided over by ALJ
18 Smith, that the proposed procedures are creating an undue burden on other parties.

19 For example, Staff agrees that review of discoverable documents in a “safe room” is
20 problematic when the parties’ witnesses, who need to review the documents, are located
21 throughout the country. While this specifically may be an issue for each party, the record as a
22 whole is benefited by a robust discovery system that allows each party an opportunity to conduct

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24 ² As mentioned above, Staff has competing obligations and time commitments. A Company
25 proposal that creates a “safe room” for a limited time period, such as a day, may be unworkable
26 and burdensome. However, creating a “safe room,” with sufficient time for review at the
Commission, instead of Portland, would mitigate some of the burden resulting from Movant’s
proposed restrictive procedures.

1 discovery and advocate their positions before the Commission. Therefore, Staff believes that the
2 integrity and completeness of the record as a whole will be best served under the adequate
3 procedures that have already been adopted in the Protective Order for this proceeding.

4 **CONCLUSION**

5 For the foregoing reasons, Staff respectfully requests that Movant's Revised Motion be
6 denied. However, if additional protection is granted, Staff further requests that its more narrowly
7 tailored alternatives be adopted in lieu of the Movant's unnecessarily burdensome procedures.

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9 DATED this 24th day of October 2005.

10 Respectfully submitted,

11 HARDY MYERS
12 Attorney General

13 /s/ Jason W. Jones
14 Jason W. Jones, #00059
15 Assistant Attorney General
16 Of Attorneys for Staff of the Public Utility
17 Commission of Oregon
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CERTIFICATE OF SERVICE

I certify that on October 24, 2005, I served the foregoing upon the parties hereto by sending a true, exact and full copy by regular mail, postage prepaid or by hand delivery/shuttle mail and by electronic mail to:

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