

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 57

In the Matter of PACIFICORP, dba PACIFIC POWER, 2013 Integrated Resource Plan	Sierra Club’s Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club’s Motion Challenging PacifiCorp’s Confidential Designation
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Pursuant to OAR 860-001-0110, Sierra Club respectfully requests that ALJ Pines clarify or certify the ruling granting Sierra Club’s Motion Challenging PacifiCorp’s Confidential Designation in LC 57 to the Commission for consideration.

On January 2, 2014, Chief ALJ Grant stated in no uncertain terms: “If a party designates publically available information as confidential, the party has violated the terms of the protective order.”¹ On January 9, 2015, ALJ Pines granted in full Sierra Club’s motion challenging PacifiCorp’s confidential designation of an August 6, 2014 PowerPoint presentation in this docket. Through its motion, Sierra Club showed that PacifiCorp knowingly made wholesale designations of publicly available information as confidential, yet the ruling ascribes no responsibility to PacifiCorp.

PacifiCorp failed to limit its confidential designations in good faith to legally protected confidential information, and refused to retract its vast over-designation despite repeated opportunities to do so. Instead, the company continuously argued that the entire PowerPoint presentation was designated confidential. In fact, PacifiCorp’s over-designation was the basis for the company asking the Commission for maximum sanctions and to permanently ban Sierra Club

¹ Ruling Denying Motion for Certification, Docket No. LC 62 (Jan. 2, 2015).

from future Commission proceedings.² Therefore, Sierra Club respectfully requests that the ALJ clarify its ruling to make clear PacifiCorp violated the protective order by over-designating the entire presentation as confidential, or to certify this issue to the Commission. As it stands, the order is confusing and incomplete to even the most informed reader.

I. BACKGROUND

The full background is provided in Sierra Club's two briefs in this matter, which we incorporate in full here. In short, although the PowerPoint largely contained publicly available information, PacifiCorp designated the entire document as confidential. After PacifiCorp refused to resolve this matter informally, Sierra Club challenged PacifiCorp's designation of the entire PowerPoint as confidential on August 21, 2014. Under the Commission's rules, once Sierra Club filed an objection challenging the designation of information as confidential, the burden shifted to PacifiCorp to show the designated information fell within ORCP 36(C)(7). Yet PacifiCorp's response brief, filed on September 5, 2014, contained only vague and general statements about why the entirety of the PowerPoint presentation must remain confidential. PacifiCorp refused to limit or even justify its wholesale designation of the 16-page PowerPoint presentation. Instead, the company maintained the designated information from the August 6 workshop "qualifies as 'a protected trade secret or other confidential research, development, or commercial information,' [which] the Commission should continue to protect."³

On October 17, 2014, ALJ Pines ordered PacifiCorp to redline the PowerPoint in a second round of briefing, because "[e]ven a cursory review...shows that the document contains

² See UM 1707.

³ PacifiCorp Response (Sept. 5, 2014).

information that was publicly available at the time of the workshop, including a quotation from a publicly available Commission order.”⁴

For months and through numerous briefings it was PacifiCorp’s burden to justify its designations under the General Protective Order and Oregon law, yet PacifiCorp refused to limit its designations to confidential information all the way up to its October 23 redacted PowerPoint. In that exercise, PacifiCorp designated information as confidential that it revealed elsewhere in the same presentation. In other instances, the company continued to claim information that was publicly available elsewhere was a company trade secret in Oregon. In its October 29 reply, Sierra Club had to shoulder the burden of providing publicly available sources of information to demonstrate that many of PacifiCorp’s designations were still improper.

On January 9, 2015, ALJ Pines issued a ruling granting Sierra Club’s motion in full and accepting Sierra Club’s very limited redactions that actually qualified as confidential under Oregon law. But the Ruling came up short because it made no finding of culpability against PacifiCorp.

II. ARGUMENT

Proceedings before this Commission are, to the greatest extent possible, intended to be conducted in public. 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).”⁵ Importantly, 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.”⁶ The Commission’s General Protective

⁴ Ruling, Docket No. LC 57 (Oct. 17, 2014).

⁵ OAR 860-001-0080(2)(b).

⁶ *Id.*

Order is limited in scope, and the Commission urges utilities to be “deliberate and moderate” with their designations.⁷

Here, PacifiCorp made grossly over-broad designations of publicly available information in violation of the Protective Order and governing law, and refused to make proper claims of privilege despite repeated opportunities to do so. After PacifiCorp refused to support its confidentiality designations or redline portions of the PowerPoint in the first round of briefing, the ALJ’s October 17, 2014 Ruling unequivocally found that “the document contains information that was publicly available at the time of the workshop, including a quotation from a publicly available Commission order.”⁸ Based on the second round of briefing, the ALJ’s January 9, 2015 Ruling did not accept PacifiCorp’s redactions but accepted in full the very limited confidential designations identified in Sierra Club’s Attachment 1 to its October 23, 2014 reply. The January Ruling acknowledges that “Sierra Club cited to publicly available sources for some of the information that PacifiCorp designated as confidential.” Yet the January Ruling fails to make any specific findings about PacifiCorp’s actions, or provide PacifiCorp with any warning to exercise better care to limit its future designations.

PacifiCorp’s steadfast refusal to comply with the Protective Order in this case shifted the burden to public interest intervenors to prove why the information should not be protected, contrary to the General Protective Order. The Ruling finds that Sierra Club’s attachment “properly narrows down the confidential designations to PacifiCorp’s PowerPoint presentation” as if it were Sierra Club’s responsibility to do so. This cannot be how the General Protective Order is supposed to work.

⁷ In the Matter of PORTLAND GENERAL ELECTRIC ORDER COMPANY 2012 Annual Power Cost Update Tariff, Order 11-432, Docket No. UE 228, at p. 3 (Nov. 2, 2011).

⁸ Ruling, Docket No. LC 57 (Oct. 17, 2014).

If not clarified, the ALJ's ruling would further encourage utilities to make overly broad designations, since the Ruling provides neither a disincentive to do so nor even a word of caution about the Company's future designations. This Ruling means that a company can designate publicly available information as its own confidential information, and then shift the burden to an intervenor to expend precious resources providing publicly available sources for the claimed information. This is not a just or proper message for the Commission to send.

As Chief Judge Grant made clear in a recent order, PacifiCorp's actions to designate publicly available information amount to a violation of the terms of the protective order.⁹ PacifiCorp's actions were inconsistent with Oregon law, the Commission's directions and the underlying objective to promote public transparency. This is especially true given that the company used its overbroad designations to argue that a public interest intervenor should be permanently banned from PacifiCorp-related proceedings before this Commission. In sum, good cause and principles of fairness dictate that the ALJ or the Commission should include findings describing PacifiCorp's culpability in this matter.

III. CONCLUSION

PacifiCorp must demonstrate "good faith" in making confidential designations, and there can be no question that it failed here, despite several opportunities to set the record straight. Sierra Club respectfully requests that the ALJ clarify the January 9, 2015 Ruling to state that PacifiCorp violated the protective order by making overly broad designations of publicly available information.¹⁰ Sierra Club further requests that the Ruling direct PacifiCorp to exercise proper restraint in future designations to comply with Oregon law and the Commission's regulations and orders, and clarify that the company cannot designate confidential information

⁹ Sierra Club requests a finding of violation in this matter and does request any further sanctions.

¹⁰ See Ruling Denying Motion for Certification, Docket No. LC 62 (Jan. 2, 2015).

that is publicly available. In the alternative, Sierra Club requests that the ALJ certify these issues to the Commission given that “the ruling may result in substantial detriment to the public interest or undue prejudice to a party” and “good cause exists for certification” under OAR 860-001-0110.

Dated: January 23, 2015

Respectfully submitted,

/s/ Josh Smith

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January 23, 2015

Via Electronic Filing and FedEx

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Re: Docket No. LC 57: Sierra Club Request to ALJ to Clarify or Certify Ruling

Please find enclosed the original and three (3) copies of Sierra Club's Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club's Motion Challenging PacifiCorp's Confidential Designation in the above-referenced docket. This document has been e-filed with the Commission and served on parties via email.

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

Respectfully submitted,

/s/ Derek Nelson

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2015, I caused to be served the foregoing SIERRA CLUB REQUEST TO ALJ TO CLARIFY OR CERTIFY RULING upon all party representatives on the official service list for this proceeding via electronic mail.

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Dated this 23rd day of January, 2015 at San Francisco, CA.

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