

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

LC 57

In the Matter of

PACIFICORP, dba PACIFIC POWER,

2013 Integrated Resource Plan.

RULING

**DISPOSITION: REQUEST TO CERTIFY DENIED; REQUEST FOR CLARIFICATION GRANTED IN PART AND DENIED IN PART**

Sierra Club contests my January 9, 2015 ruling granting its challenge to PacifiCorp, dba Pacific Power's confidential designation of information contained in the company's August 6, 2014 PowerPoint presentation. In that ruling, I adopted Sierra Club's revised designation of PacifiCorp's PowerPoint presentation to remove the designation of all publically available material. Sierra Club now requests that I either certify my ruling to the Commission, or clarify that PacifiCorp's designation of publicly available material constituted a violation of the protective order in this docket.

Confidentiality

The general protective order in this docket, Order No. 13-095, provides a process to facilitate the use and access of potentially confidential information, as reflected in OAR 860-001-0080. Our rules allow a party to designate as confidential any information that it reasonably believes falls within the scope of ORCP 36(C)(7) or is exempt from public disclosure under the Public Records Law. A confidential designation must be made in good faith, and to the extent practicable, be limited to the portions of the document that qualify as a protected trade secret or other confidential research, development, or commercial information.<sup>1</sup>

A party may challenge the designation of information as confidential by notifying the designating party and identifying the information in dispute. Once notified, the designating party bears the burden of showing that the challenged information is covered by ORCP 36(C)(7) or exempt from disclosure under the Public Records Law. If the parties are unable to resolve their dispute informally, any party may request that the ALJ conduct a conference to facilitate resolution of the dispute. A challenging party may also

<sup>1</sup> See OAR 860-001-0080(2); Order No. 13-095 (Mar 22, 2013).

file an objection to the confidential designation; the objection must identify the information in dispute. The designating party must then either remove the confidential designation, or file a response identifying the legal basis for the claim of confidentiality.<sup>2</sup>

### Background

On August 6, 2014, the Commission held a workshop, at which PacifiCorp summarized its analysis on the planned environmental investments at the Craig and Hayden coal plants. At the workshop, PacifiCorp provided copies of a PowerPoint presentation marked as confidential under protective Order No. 13-095. On August 22, 2014, Sierra Club challenged PacifiCorp's designation of the entire PowerPoint presentation as confidential. In response, PacifiCorp argued that the material was properly designated. I subsequently issued a ruling directing PacifiCorp to file an updated version of the PowerPoint that designated only confidential information. PacifiCorp filed an updated version of the PowerPoint, and Sierra Club filed a reply, noting instances in which PacifiCorp continued to designate publicly available information as confidential.

### Request for Certification or Clarification

Sierra Club requests that I certify my ruling to the Commission, because 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. Alternatively, Sierra Club requests that I amend my ruling to explicitly find that PacifiCorp violated the terms of the protective order in this docket, and that I direct PacifiCorp to exercise proper restraint in future designations to comply with Oregon law and the Commission's rules. Sierra Club states that, as it stands, my ruling will encourage utilities to make overly broad designations, because it does not caution companies not to over-designate, and shifts the burden to intervenors to do the work.

PacifiCorp states that no grounds for certification or clarification exist. PacifiCorp notes that my ruling provided Sierra Club with all relief contemplated by the terms of the protective order. PacifiCorp notes that the protective order recognizes that the precise designation of confidential materials may be impractical under various circumstances. Under this process, PacifiCorp contends that materials may at times be over-designated without any violation of the order. The company also states that the Commission has never issued a show-cause order directed at PacifiCorp, nor conducted any proceeding that would support a finding that PacifiCorp violated the order. Finally, PacifiCorp notes that in a telephone conference prior to my ruling, I notified the parties that I intended to adopt Sierra Club's designations, and asked the parties whether they were requesting any further action from the Commission; both parties stated that they were not.

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<sup>2</sup> OAR 860-001-0080(2)(e).

## Resolution

Our rules regarding confidentiality distinguish between violating a protective order and overly designating information as confidential. On the one hand, information whose disclosure would be harmful to a party should be protected, and care should be taken to avoid disclosure, because once confidential information is improperly disclosed, the harm has been done. For that reason, the Commission requires compliance with protective orders while the confidentiality of information is being challenged. On the other hand, our rules allow for some margin for error with regard to the designation of material, to ease the exchange of voluminous material during discovery. For this reason, there is some flexibility in the language regarding over-designation. Our general protective order notes that confidentiality designations should be limited "to the extent practicable," and our rules provide that an initial designation may be based on a reasonable belief, rather than a strict certainty, in the material's confidentiality.

I agree with Sierra Club that once I issued a ruling directing PacifiCorp to re-submit its PowerPoint presentation with only confidential information designated, the company had the duty to carefully review its materials and remove the designation of confidentiality from material that had been discussed publicly. I direct PacifiCorp to exercise care in future designations of confidentiality, and to limit those designations to material that qualifies as confidential material under our rules. In the future, a company's repeated failure to carefully designate confidential material may well rise to the level of violating the good faith requirement in our rules. However, under the current language in our rules, I decline to find that PacifiCorp's actions in this case constituted a violation of the protective order or were in bad faith. Our rules do not, and are not intended to, impose a strict liability standard with regard to over-designation.

The Commission is currently considering revisions to our form of general protective order. As part of that process, the Commission will consider making our rules more explicit about the consequences of over-designation of confidential material, and about the consequences for failure to follow the terms of a protective order. On that basis, I also decline Sierra Club's request for certification. To the extent that Sierra Club argues that the public interest will be harmed if utilities are not found to be acting in bad faith when they designate information that is publicly available elsewhere, it will have the opportunity to make that argument more broadly during the Commission's consideration of revisions to the general protective order. The revisions adopted in that process will apply to all parties going forward.

Dated this 3<sup>rd</sup> day of March, 2015 at Salem, Oregon.

  
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Shani Pines  
Administrative Law Judge