ISSUED: August 7, 2018

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

LC 67 and LC 70

In the Matters of PACIFICORP, dba PACIFIC POWER, 2017 Integrated Resource Plan and 2019 Integrated Resource Plan.	RULING

DISPOSITION: CONFIDENTIAL DESIGNATION MAINTAINED

This ruling denies Sierra Club's objection to PacifiCorp, dba Pacific Power's designation of protected information in its June 29, 2018 coal analysis compliance filing. This ruling applies to both docket LC 67 (the compliance docket for the coal analysis) and docket LC 70 (PacifiCorp's 2019 Integrated resource Plan (IRP) docket where the coal analysis will be relevant). Although Sierra Club initiated this challenge in docket LC 67, PacifiCorp designated the challenged information under protective orders issued in both docket LC 67 (Order No. 16-461) and docket LC 70 (Order No. 18-216).

I. BACKGROUND

The Commission's general protective order (GPO) governs the access and use of protected information in its proceedings. The protective order allows a party to unilaterally designate material as protected if the party reasonably believes that the information constitutes "a trade secret or other confidential research, development, or commercial information."[1] Once designated, the information may not be used or disclosed for any purpose other than participating in the proceeding without the written permission of the designating party.

OAR 860-001-0080 explains that the general protective order does not determine whether a particular document is exempt from disclosure, but merely establishes a process for parties to designate information as protected and rules for parties to exchange protected information with authorized persons. A party may challenge another party's designation of information as protected by notifying the designating party, which must then show that the challenged

[1] ORCP 36(C)(7).

information is either covered by ORCP 36(C)(7) or exempt from disclosure under the Public Records Law. If parties are unable to resolve a dispute about a protected designation informally, the challenging party may request a conference with an Administrative Law Judge, or file an objection to the confidential designation. The Commission has encouraged parties to challenge the confidential designation of any publicly available information to help ensure that designations are limited and made in good faith.[2]

II. PROCEDURAL HISTORY

As part of its review of PacifiCorp's 2017 IRP, the Commission directed the company to perform additional analysis on the economics of coal unit retirements. PacifiCorp agreed "to perform 25 system optimizer (SO) runs, one for each coal unit and a base case [and] to summarize the results providing a table of the difference in present value of revenue requirement (PVRR) resulting from the early retirement of each unit, an itemized list of coal unit retirement costs assumptions used in each SO run, and a list of coal units that would free up transmission along the path from the proposed Wyoming wind projects if retired."[3]

PacifiCorp presented this coal analysis in a confidential stakeholder meeting on June 28, 2018, and filed the information in docket LC 67 on June 29, 2018, as a compliance filing. PacifiCorp designated three portions of the coal analysis as confidential: (1) PVRR(d) results found on page 5; (2) an exemplary graph on page 7 to show what type of information was included in the confidential workpapers supporting the coal analysis; and (3) a description of the results and a description of the PVRR(d) results if both Jim Bridger Units 1 and 2 are retired, both on page 9.

On July 9, 2018, Sierra Club filed its written objections to all of PacifiCorp's designations of protected information in the coal analysis. Sierra Club argues that residential ratepayers, many of their advocates, the press, and the general public should have access to the important information in the coal analysis. Sierra Club states that failure to disclose this information is inconsistent with both standard IRP planning practice, prior PacifiCorp planning practice, and the intent and spirit of Order No. 18-138 in docket LC 67. Sierra Club challenges PacifiCorp's position that the study is limited, incomplete, and that competitors could read too much into it. Sierra Club also argues the material does not meet the standards for trade secrets because the company cannot show that competitors or other persons could gain economically if the results are made public. Sierra Clubs states that PacifiCorp is a regulated monopoly protected from other investor-owned utilities encroaching on its territory, and that information on how some of its coal assets are performing economically cannot be shown to put it at a competitive disadvantage.

PacifiCorp opposes Sierra Club's challenge and explains that the redacted information is limited to the cost inputs for coal units (consisting of long-term assumptions developed by PacifiCorp) and the PVRR(d) results show estimated costs and benefits of changing the retirement date of

---

[2] *In the Matter of Sierra Club Regarding Violation of Protective Order No. 13-095*, Docket No. UM 1707, Order No. 14-392 at 7 (Nov 6, 2014).

[3] Order No. 18-138 at 11-12.

individual coal units. PacifiCorp maintains that this information qualifies as a protected "trade secret or other confidential research, development, or commercial information" under ORCP 36(C) because disclosure could competitively disadvantage PacifiCorp and its customers in transactions relating to operating, maintaining, or transitioning or decommissioning its coal plants.

Sierra Club filed a reply and PacifiCorp filed a sur-reply. Sierra Club's reply specifically addresses why it believes the coal analysis PVRR(d) values should not be considered confidential. Sierra Club explains that PVRR(d) analysis compares a base case and a test case with a changed assumption, and the PVRR(d) is the model's estimated cost difference between the two scenarios. Sierra Club emphasizes that the PVRR(d) is a modeled estimate, not a contract price, a tax basis, a dispatch plan, or a business plan. Sierra Club states that while it can be an incredibly important piece of information in long-term planning, it is not the type of information that day-to-day market transactions are based on.

PacifiCorp responds that it has consistently and diligently maintained the confidentiality of PVRR(d) results related to preliminary economic studies of coal plants. PacifiCorp explains that the unit-by-unit coal study is preliminary and incomplete and, by itself, will not establish assumed coal plant retirements in the 2019 IRP. PacifiCorp believes that if the PVRR(d) results are made public—even if the inputs and assumptions remain protected—the market, affected employees, and local businesses, and other currently engaged or potential future 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.

The Renewable Energy Coalition filed comments stating that it supports Sierra Club's objection. The Coalition states that the public and those stakeholders who have not signed the protective order have a right to know the coal analysis results.

Sierra Club and PacifiCorp also both filed motions to supplement their filings. Sierra Club seeks to admit a letter from stakeholders in other states supporting Sierra Club's challenge. PacifiCorp filed a copy of a temporary restraining order from Washington. I grant both motions.

III. LEGAL STANDARD

The Commission's GPO states, "a party may designate as Protected Information any information that the party reasonably determines: (1) falls within the scope of ORCP 36(C)(7) (a trade secret or other confidential research, development, or commercial information); and (2) is not publicly available."

The Oregon Uniform Trade Secrets Act defines trade secrets as information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:

> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]

Oregon courts examine several factors when determining whether information constitutes a trade secret, focusing in particular on the potential economic value of the information.[5] Other relevant factors are the secrecy of the information and the ease or difficulty with which the information could be properly acquired or duplicated by others.

IV. DISCUSSION

I find that the coal analysis satisfies both elements of a trade secret, because it has economic value in potential or actual transactions, and it is not public information. I discuss each element in turn below.

The factor most central to this dispute is whether the information derives independent economic value from being kept secret. Courts evaluate the degree to which secret information confers a competitive advantage on its owner,[6] the cost and effort necessary to develop the secret information,[7] and the specific facts and circumstances of the case.

PacifiCorp has provided several reasons why it believes the PVRR(d) inputs and results have economic value and could place the company at a competitive disadvantage in actual or potential transactions. PacifiCorp states that disclosure of its estimated environmental compliance costs included in the PVRR results could disadvantage it in contract negotiations with environmental equipment suppliers. I find this plausible considering that PacifiCorp is actively considering different compliance options for several coal plants, ranging from natural gas conversion to early retirement to installation of equipment to reduce air pollution.[8] These decisions and the required capital investment associated with each option are significant. Stakeholders are closely watching the company's statements around the substance and timing of decisions. It is believable that vendors who would have to bid into a request for proposal (RFP) to provide equipment or services would value any company estimate of the cost anticipated.

PacifiCorp also asserts that disclosure of the cost inputs and PVRR(d) results could disadvantage the company when it negotiates with other parties to purchase coal for its plants by disclosing to potential counterparties the company's underlying economic assumptions and analysis (including coal cost assumptions). While many of the coal fuel contracts are cost-based, and may not be as moveable based on negotiating position, it is undisputed that PacifiCorp engages in coal supply

---

[4] ORS 646.461(4).
[5] *Ameritox Ltd. v. Savelich*, 92 F Supp 3d 389 (D Md 2015) (interpreting an Oregon agreement and finding confidential pricing information is a trade secret but general customer information is not).
[6] *See MAI Sys. Corp. v. Peak Computer. Inc.*, 991 F2d 511 at 521 (9th Cir 1993) (finding economic value in the secrecy of a customer database because a competitor would be able to direct sales efforts to those customers).
[7] *Kaib's Roving R.PH. Agency, Inc. v. Smith*, 237 Or App 96, 239 (2010) (whether information is or is not a trade secret is a question of fact, and if facts and circumstances are presented to establish that the information derives economic value from not being generally known and is subject to reasonable efforts to maintain its secrecy, then the information is a trade secret within the meaning of the statute).
[8] PacifiCorp IRP Update at Chapter 3 and 6 (May 1, 2018).

and transportation markets with few suppliers.[9] These markets are illiquid, and it is possible that the coal analysis could impact a transaction by leading a supplier to believe that a particular coal unit is more profitable to PacifiCorp than other units.

With regard to the second element, reasonable measures for maintaining secrecy, courts look at whether information is readily ascertainable.[10] The Ninth Circuit held that efforts to maintain the secrecy of a design were sufficient when, among other things, a confidentiality agreement was used.[11] PacifiCorp states it has maintained the secrecy of the coal analysis PVRR(d) inputs and results. PacifiCorp states the PVRR(d) results and the underlying cost assumptions are not public information known outside PacifiCorp and that only a limited number of PacifiCorp's employees have access to PacifiCorp's coal analysis filing, as demonstrated by the signatory pages PacifiCorp has filed under the protective order. I find that the redacted information in the coal analysis is non-public information that has been kept confidential with the GPO.

PacifiCorp has met its burden of showing that disclosure of either the inputs (that include long-term assumptions developed by PacifiCorp) or the results (that show estimated costs and benefits of changing the retirement date of individual coal units) would place the company at a competitive disadvantage.

In reaching this decision, I emphasize that maintaining the protected status of this information does not impair Sierra Club or other stakeholders in its representation before the Commission. Although I have concluded that the designated information should continue to be treated as protected under the GPO and not publicly disclosed, my ruling does not restrict the ability of signatories to the GPO, including Sierra Club and others qualified persons, to access the information for its use in presenting evidence and argument in this docket before the Commission.

Dated this 7th day of August, 2018 at Salem, Oregon.

Sarah Rowe
Administrative Law Judge

[9] *See In the Matter of PacifiCorp 2017 Transition Adjustment Mechanism,* Docket No. UE 307, Order No. 16-402 at 4-7 (Dec 20, 2016) (discussing the limited options and multiple steps required to change the fuel supply of the Jim Bridger plant).

[10] *W. Med. Consultants, Inc. v. Johnson*, 80 F3d 1331, 1337 (9th Cir 1996) ("The information used by Johnson in opening her own IME business was not a Western trade secret. Western's customer lists were compiled from various generally known and accessible sources, including the yellow pages, industry publications, or through inquiry to an appropriate state insurance agency.").

[11] *United States v. Chung*, 659 F3d 815, 827 (9th Cir 2011).