

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1845

In the Matter of)	
)	
PACIFICORP, dba PACIFIC POWER,)	NORTHWEST AND
)	INTERMOUNTAIN POWER
PacifiCorp’s Application for Approval of)	PRODUCERS COALITION’S
2017 Request for Proposals.)	RESPONSE IN OPPOSITION TO
)	MOTION FOR MODIFIED
)	PROTECTIVE ORDER
_____)	

I. INTRODUCTION

The Northwest and Intermountain Power Producers Coalition (“NIPPC”) submits this response in opposition to PacifiCorp’s Motion for Modified Protective Order (“Motion”). Without consultation with any parties and late in the proceeding, PacifiCorp has proposed that the Oregon Public Utility Commission (the “Commission”) adopt an unprecedentedly restrictive modified protective order that would effectively preclude NIPPC from participating in the final short-list phase of this proceeding. The Commission should reject PacifiCorp’s proposed restrictions because the core of PacifiCorp’s argument is that attorneys who have practiced before the Commission for decades cannot be trusted to review confidential material without using the information in an illegal manner to somehow benefit their other actual or potential clients.¹

¹ NIPPC recognizes that the Administrative Law Judge issued an order on February 20, 2017 adopting in part PacifiCorp’s proposed modified protective order. Re PacifiCorp, dba Pacific Power, Application for Approval of Final Draft 2017R Request for Proposals, Docket No. UM 1845, Order No. 18-057 (Feb. 20, 2018). The Order, however, did so “on an expedited basis, prior to the deadline for the filing of any objections. I do so to help facilitate the exchange of information needed to help inform the March 2, 2018 filing of party comments to the

NIPPC strongly agrees that highly confidential material should be protected and bidders should not be able to access the information, but recommends that the Commission should adopt the same special or modified protective order that has adequately protected the same type of information for over a decade. NIPPC specifically objects to PacifiCorp’s proposal to: 1) require parties other than Staff and the Citizens’ Utility Board of Oregon (“CUB”) to review information at PacifiCorp’s offices; and 2) bar access to highly confidential material to “persons who represent or advise bidders, or persons that reasonably expect to be involved in solicitations or negotiations of power purchase agreements within the next two years.”²

There have been less sweeping protective orders in place for all prior Commission competitive bidding proceedings, and PacifiCorp has not identified any distinguishing facts or relevant precedent to adopt new protections. None of NIPPC’s current lawyers would be able or are willing to gain access to highly confidential material under PacifiCorp’s unprecedented restrictions. In addition, PacifiCorp failed to explore other less restrictive protections, which it is required to do under the Commission’s rules. The Commission should reject PacifiCorp’s proposal and instead adopt the normal special or modified protective order for competitive bidding proceedings, which PacifiCorp has not even attempted to justify as being insufficient.

II. BACKGROUND

The Commission adopted its competitive bidding guidelines that provided the utility with the option to seek short-list acknowledgement and ensured that non-bidding

² Independent Evaluator’s Report. This quick action does not foreclose a party from seeking reconsideration of this decision.”
Motion at 2.

parties would have access to confidential bidding information.³ There have been numerous proceedings in which highly confidential bidder information was included for review by all non-bidding parties. In those prior proceedings, attorneys who represented non-bidding parties, including trade associations that included independent power producers with members that were bidders, were free to represent bidder companies on other matters unrelated to the RFP bidding, and were also subsequently free to represent clients in negotiating power purchase agreements with utilities, including PacifiCorp.⁴

Early in UM 1182, PacifiCorp raised concerns about the disclosure of detailed bid scoring and evaluation to non-bidding parties, and explained that “parties may include entities that could use this information to the commercial disadvantage of bidders or the utility.”⁵ Staff and Renewable Northwest Project (“RNP”), a renewable energy advocacy group that would likely have members who are bidders, opposed PacifiCorp’s proposal. The Commission agreed “with RNP and Staff that non-bidding parties should have access to this information and have written the guideline accordingly.”⁶

The Commission adopted the current version of the competitive bidding guidelines in 2014.⁷ The Commission’s order specifically adopted NIPPC’s proposed requirement “that the utilities file an application with the Commission seeking acknowledgment of their final shortlist of bidders.”⁸ The Commission provided two

³ Re Commission Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 06-446 at 14-15 (Aug. 10, 2006).

⁴ It is not possible for NIPPC to provide details regarding who bid into PacifiCorp’s past or current RFPs because most of that information is confidential.

⁵ Order No. 06-446 at 14.

⁶ Id.

⁷ Re Commission Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 14-149 (April 30, 2014).

⁸ Id. at 1.

explanations for the new requirement explaining that mandatory short-list review: 1) “will promote transparency” in the competitive bidding process by giving parties an opportunity to voice concerns; and 2) “will provide a more streamlined and defined process” to reduce case-by-case acknowledgement or additional proceedings after the bidding has completed.⁹ As the requirement was adopted upon the request of NIPPC to allow parties like NIPPC to review the final short list, it would be inconsistent with the intent and purpose of the guidelines to effectively prevent NIPPC from having the option to fully participate in the acknowledgement of the short-list.

The Commission adopted the new short-list requirement over the objections of the utilities, including PacifiCorp.¹⁰ PacifiCorp raised substantive concerns, including that: 1) “requesting acknowledgement of the shortlist was designed *for the utility* to provide some assurance that the development of the final short-list was reasonable” and not to predetermine prudence of short-list resources; and 2) it was important to allow the “utilities to maintain flexibility *not* to seek acknowledgement of the short-list, if” it was in customers’ best interest.¹¹ Notably, PacifiCorp did not raise *any* concerns about access to highly confidential material for non-bidding parties like NIPPC or that new restrictions should be imposed.

Since the adoption of the competitive bidding guidelines (which always included the option of the short-list acknowledgement), there have been numerous proceedings in which highly confidential bid scoring information was presented to the Commission and

⁹ Id. at 14.

¹⁰ Id. at 13-14.

¹¹ Re Commission Investigation Regarding Competitive Bidding, Docket No. UM 1182, PacifiCorp’s Reply Comments at 3-4 (Nov. 1, 2013) (emphasis in original).

non-bidding parties were permitted access. NIPPC and other trade associations that include bidders, their attorneys, and other attorneys who negotiated power purchase agreements and may have advised bidders on other matters were provided access to that same type of information and there have been no concerns raised by PacifiCorp. No one was required to visit PacifiCorp's offices to review any confidential material.

In UM 1208, PacifiCorp filed its 2009 Request for Proposals. Upon PacifiCorp's request, the Commission issued a "Special Protective Order." PacifiCorp sought to protect "commercially sensitive information" and "highly sensitive, non-public information submitted by parties and the Oregon Independent Evaluator (Oregon IE) in this proceeding related to the 2012 RFP."¹² PacifiCorp requested the special protections because some of the information included "bid scoring and evaluation results."¹³ This appears to be the same type of information PacifiCorp is requesting highly confidential treatment of in this proceeding. All non-bidding parties were authorized to sign the special protective order,¹⁴ including attorneys for organizations whose members may have included potential bidders (NIPPC, RNP and the Industrial Customers of Northwest Utilities ("ICNU")). PacifiCorp has not claimed or asserted that these protections were inadequate.

In Docket No. UM 1374, PacifiCorp filed a petition to waive the competitive bidding guidelines to acquire the Chehalis gas generation facility.¹⁵ PacifiCorp again

¹² In Re PacifiCorp, dba, Pacific Power and Light Co. Draft 2009 Request for Proposals, Docket No. UM 1208, Order No. 07-471 at 1 (Oct. 26, 2007).

¹³ Id.

¹⁴ Id. at Special Protective Order § 3.

¹⁵ Re PacifiCorp, dba, Pacific Power Petition for Waiver of the Commission's Competitive Bidding Guidelines, Docket No. UM 1374, Petition (April 1, 2008).

sought and obtained a “Special Protective Order” from the Commission.¹⁶ PacifiCorp requested the Special Protective Order because “negotiations are ongoing with regard to the Company’s 2012 RFP, Pacific Power contends that disclosing information about bid evaluation, bid status and the negotiation process to certain parties in this docket ‘could provide detrimental to the integrity of the 2012 RFP process and jeopardize the bidders and the Company’s competitive positions.’”¹⁷ Only non-bidding parties were allowed to review the highly confidential material,¹⁸ which included NIPPC and ICNU.¹⁹ PacifiCorp has not claimed or asserted that these protections were inadequate.

In Docket No. UM 1368, PacifiCorp filed its 2008 Renewable RFP and again requested a Special Protective Order.²⁰ PacifiCorp again sought a special protective order for the same reason it is seeking additional protections in this proceeding:

highly commercially sensitive, non-public information related to Pacific Power’s solicitation for new renewable resources (2008R-1 RFP), including the *Initial Shortlists and Final Shortlist work papers, bid scoring and evaluation results*, and any other highly sensitive, non-public information submitted by parties and the Oregon independent evaluator (IE) in this proceeding.²¹

¹⁶ Re PacifiCorp, dba, Pacific Power Petition for Waiver of the Commission's Competitive Bidding Guidelines, Docket No. UM 1374, Order No. 08-326 at 1 (June 16, 2008).

¹⁷ Id.

¹⁸ Id. at Special Protective Order § 3.

¹⁹ Docket No. UM 1374, Signature Pages for NIPPC and ICNU. Again, these attorneys did not represent bidders in PacifiCorp’s RFP, but they represented entities who negotiated power purchase agreements, and may have represented bidders on other non-RFP activities within two years of the RFP.

²⁰ Re PacifiCorp Request for Approval of a 2008R-1 Solicitation Process for New Renewable Resources, Docket No. UM 1368, Application (March 4, 2008); Re PacifiCorp Request for Approval of a 2008R-1 Solicitation Process for New Renewable Resources, Docket No. UM 1368, Order No. 09-160 at 1-2 (May 4, 2009).

²¹ Order No. 09-160 at 1 (emphasis added).

Again, the only limitation on access was to parties that could not be bidders.²²

PacifiCorp has not claimed or asserted that these protections were inadequate.

In UM 1429, PacifiCorp issued its 2009 RFP. PacifiCorp again sought substantially the *same* protective order to protect the *same* type of information with the *same* type of restrictions on access for non-bidding parties with the *same* attorneys gaining access to the highly confidential material.²³ PacifiCorp has not claimed or asserted that these protections were inadequate.

PGE has also issued RFPs over the years with slightly different types of restrictions on access but without the blanket prohibitions that PacifiCorp is proposing in this proceeding. PGE's last capacity and baseload energy resource proceeding (UM 1535), and renewable proceeding (UM 1613) only included the standard protective order,²⁴ and confidential bidding information was provided to NIPPC and ICNU. PGE's most recent waiver of the competitive bidding guidelines included both a standard and modified protective order, neither of which included the restrictions PacifiCorp is proposing in this proceeding.²⁵

²² Id. at § 4.

²³ Re PacifiCorp, dba, Pacific Power Application to Open Docket and Appointment of an Independent Evaluator for a 2009 Request for Proposals for Supply-side Renewable Resources, Docket No. UM 1429, Order No. 09-413 at 1-2 (Oct. 19, 2009).

²⁴ Re Portland General Electric Company Request for Proposals for Capacity and Baseload Energy Resources, Docket No. UM 1535, Order No. 11-097 (March 25, 2011); In Re Portland General Electric Company Request for Proposals for Renewable Resources, Docket No. UM 1613, Order No. 12-274 (July 3, 2012).

²⁵ Re Portland General Electric Company, Application for Waiver of Competitive Bidding Guidelines, Docket No. UM 1892, Order No. 17-320 (Aug. 24, 2017) (general protective order); Re Portland General Electric Company, Application for Waiver of Competitive Bidding Guidelines, Docket No. UM 1892, Order No. 17-343 at 1 (Sept. 13, 2017) (Additional restrictions included initially provide the designated highly confidential information only to Commission Staff and CUB,

III. RESPONSE

PacifiCorp has proposed broad restrictive limitations on access to highly confidential material that would effectively preclude NIPPC's participation in the final short-list review, have not been shown to be necessary, and that PacifiCorp failed to explore with the parties to determine if less onerous measures might be warranted. The Commission should reject PacifiCorp's proposals to: 1) require on-site review of the highly confidential information for all intervenors, except Staff and CUB; and 2) completely bar access to highly confidential information for "persons who represent or advise bidders, or persons that reasonably expect to be involved in solicitations or negotiations of power purchase agreements within the next two years." NIPPC does not object and supports PacifiCorp's proposal to restrict access to bidders and any other person who has advised bidders regarding their solicitation in this RFP. NIPPC instead recommends that the Commission approve the regular modified or special protection order that has worked well in PacifiCorp's past RFPs.

A. PacifiCorp's Proposed Restrictions Are Overly Broad and Effectively Prevent NIPPC From Participating in this Proceeding.

None of NIPPC's current attorneys will be able to review PacifiCorp's highly confidential material under the proposed modified protective order. NIPPC retains different outside counsel to represent it in various regulatory proceedings based on their unique skills and knowledge. NIPPC's attorneys also represent independent power producers and electricity service suppliers, which is what provides them the expertise to

and allowing other parties to request access to the information on a case-by-case basis. NIPPC did not oppose the modified protective order because its express terms did not bar NIPPC or its attorneys from gaining access to the highly confidential material—as PacifiCorp's proposed protective order does).

provide NIPPC valuable legal and policy advice. PacifiCorp's proposal would either require its attorneys to no longer represent other clients or for NIPPC to retain new outside counsel. Any new counsel is not likely to be familiar with NIPPC's interests and needs and may not have the requisite knowledge of the Commission's policies and/or competitive solicitations to provide competent legal advice.

NIPPC's attorneys of record in this proceeding include Irion Sanger and Greg Adams, and its other attorneys currently providing legal advice include Peter Richardson, Eric Christensen, Carl Fink, Sidney Villanueva, and Marie Barlow. None of these attorneys will or can sign PacifiCorp's proposed modified protective order. Mr. Sanger is located in Portland, Oregon, and Mr. Adams is located in Boise, Idaho. The burden of restricting use of the material to on-site review is significant because attorneys located in geographically different locations will have difficulty communicating with each other regarding the material.

PacifiCorp's proposed language is exceedingly broad and appears to prevent anyone who reviews the terms to not represent any entity which might participate in any solicitation or negotiated power purchase agreement in the two years after this solicitation, regardless of whether it is with PacifiCorp or another utility. Thus, PacifiCorp would require NIPPC to retain an attorney who would agree to not provide legal advice to clients in any future solicitations and power purchase agreement negotiations anywhere in the world for two years.

Even if limited to only PacifiCorp, the proposed modified protective order is still overbroad and unduly burdensome on non-bidding parties to this proceeding. PacifiCorp operates in six different Northwest and Rocky Mountain states and is the sole, or one of

the only electricity purchaser in those states. PacifiCorp is one of three investor owned utilities in Oregon, Idaho and Washington and the sole investor owned utility in Wyoming and Utah. That is a major geographic area from which to bar engagement in a significant percentage of possible transactional matters for an attorney that primarily practices in the energy industry for two years. The Company's restriction would require these attorneys to choose between representing NIPPC or stopping working on or taking up new matters that they currently or will likely provide legal advice on in the future.

PacifiCorp's proposed modified protective order would also appear to prevent NIPPC's attorneys from working for entities that are bidders, even on entirely unrelated matters. Some of the bidders are large multi-national or national independent power producers, while other bidders could have included smaller or local companies. Of course, NIPPC's counsel of record in this proceeding do not know the list of bidders, and (other than the short-listed bidders) do not know who might have bid into the RFP. Counsel of record may not even be currently aware of whether they are or were engaged as counsel in entirely unrelated matters by entities that are now bidders.

B. PacifiCorp's Proposed Modified Protective Order Is Unnecessary

PacifiCorp has not provided any justification to depart from past practice to impose this unprecedented restriction on access to highly confidential material. For the Commission to grant a modified protective order, PacifiCorp must explain "[t]he specific reasons the requested relief is necessary."²⁶ This does not simply mean that the information is confidential or needs protections, but why the "additional protection" is

²⁶ OAR 860-001-0080(3)(a)(D).

necessary.²⁷ There is no reason to make a change in this proceeding because PacifiCorp has not provided any explanation regarding why the normal modified or special protective orders have not been, or do not continue to be, sufficient.

As explained above, the Commission has routinely adopted modified or special protective orders that do not contain the broad and highly restrictive provisions that PacifiCorp is proposing. The type of information protected in those past proceedings is exactly the same type of information that PacifiCorp seeks to protect now. The specific attorneys and parties that would be subject to the protective order have not changed. In addition, the attorneys representing NIPPC in this proceeding have always and intend to continue to represent independent power producers.

The Commission should assume that the attorneys that practice before it will follow the letter and spirit of the law, and expects that they “treat issues of confidentiality with the highest seriousness ... to ensure that information is shared safely and securely.”²⁸ The special or modified protective orders used in *all* previous PacifiCorp RFPs and that NIPPC expected the Commission to use in this proceeding require all parties to comply with their good faith obligation to monitor their own conduct to ensure their compliance with the protective order.²⁹ This includes the requirement that any use of the confidential information is limited to the specific proceeding and cannot be used for any other purpose.³⁰

²⁷ OAR 860-001-0080(3)(a).

²⁸ Re Sierra Club, Regarding Violation of Protective Order No. 13-095, Docket No. UM 1707, Order No. 14-392 at 5 (Nov. 6, 2014).

²⁹ E.g., Order No. 07-471 at 2.

³⁰ E.g., id. at Protective Order § 9.

PacifiCorp has not cited or referred to any past problems that warrant a change. There is no allegation that the highly confidential material has been inappropriately disclosed or utilized. Nor has PacifiCorp asserted that any particular attorneys would not continue to scrupulously follow the applicable protective orders and rules. The Motion also strangely cites the Commission's order adopting the competitive bidding guidelines, in which the Commission rejected PacifiCorp's arguments to restrict access and instead concluded that non-bidding parties would be able to review the highly confidential material.

PacifiCorp cites only a single ruling from an Administrative Law Judge in Docket No. UE 307 for the proposition that its proposed restrictions are consistent with prior rulings and the Commission's competitive bidding guidelines.³¹ In UE 307, the Administrative Law Judge issued a ruling that an Electricity Service Supplier's ("ESS") expert witness could not review highly confidential information regarding the volume, vintage and price of renewable energy certificates ("RECs").³² The ESS sought to allow its expert witness to view the information to assist counsel in preparing for cross-examination of PacifiCorp's witness and defending cross-examination of the ESS's expert witness. But the Administrative Law Judge concluded the ESS could effectively present its case through use of the material solely by counsel and not the ESS's expert witness. The specific REC prices were not necessary, according to the ruling, because the ESS's counsel had effectively made the points for purposes of the issues in the case

³¹ Motion at 6. Given that there is likely no actual precedent for these restrictions, PacifiCorp uses a "*see, e.g.*" citation in citing this single ruling, which should be read as there is no precedent.

³² In Re PacifiCorp, dba Pacific Power, 2017 Transition Adjustment Mechanism, Docket No. UE 307, Ruling at 1 (Aug. 25, 2016).

through use of hypothetical prices. The ruling, which occurred in shortly before the scheduled evidentiary hearing, was not appealed to the Commissioners.

The current situation is starkly different. First, the Ruling did not apply to attorneys and specifically allowed the ESS's attorneys to review and utilize the information at hearing. Second, the information regarding confidential bid scoring and other information is critical to the central purposes of the short-list acknowledgement. Third, there is no way any party can review the redacted information provided by PacifiCorp to understand whether or not short-list acknowledgement is reasonable. Finally, the Ruling demonstrates the reasonableness of the Commission's established and historic protective orders, which is that parties can raise specific objections to specific individuals, and not blanket prohibitions. Thus, even if the Ruling was correctly decided, it does not apply in this circumstance.

Finally, while PacifiCorp did not refer to it, NIPPC recognizes that the Commission has the authority to establish "safe rooms" for certain highly confidential material.³³ The safe room was established to review highly confidential income tax material after a breach of confidentiality.³⁴ In establishing the safe room, the Commission recognized the difficulty in utilizing the process and noted that additional time would need to be provided to allow effective review.³⁵ In contrast, there has been over a decade of successful use of the current modified or special protective order, and the schedule to review PacifiCorp's current RFP is occurring on an expedited basis.

³³ Indus. Customers of Northwest Utils. v. PUC of Or., 240 Or App 147, 154 (2010).

³⁴ Re Pacific Power & Light Co., dba PacifiCorp et al., Docket Nos. UE 177, UE 178, UG 170 and UG 171, Order No. 06-033 at 3-5 (Jan. 25, 2006).

³⁵ Id. at 4-5.

PacifiCorp has not justified such a radical departure from the past handling of confidential RFP materials, especially at this last stage of this expedited review.

C. PacifiCorp Failed to Discuss Intermediate Measures with the Parties and Cannot Explain Why Any Intermediate Measures Are Insufficient

PacifiCorp's Motion fails to even attempt to demonstrate that it sought out or that any potential intermediate measures might be sufficient. PacifiCorp cites OAR 860-001-0080(3)(D), which requires PacifiCorp to provide: "A detailed description of the intermediate measures, including selected redaction, explored by the parties and why these measures are insufficient." PacifiCorp's Motion has general platitudes about needing to protect confidential material, but does not mention any intermediate measures or any explorations with the parties. PacifiCorp failed to make these efforts, and its Motion should be denied as being facially inconsistent with the Commission's rules.

This proceeding was opened on June 1, 2017, when PacifiCorp filed its request for proposals for an independent evaluator.³⁶ PacifiCorp has been aware for over eight months that it might seek acknowledgment of its short-list and has had ample opportunity to reach out to the parties explore potential intermediate measures. As PacifiCorp failed to explore any intermediate measures with the parties, the Company cannot plausibly explain why they are not sufficient. Therefore, the Commission should reject the Motion as being inconsistent with its rules.

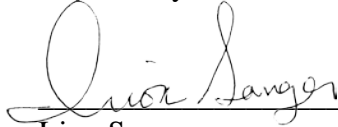
³⁶ Re PacifiCorp, dba, Pacific Power, Request for Proposals of an Independent Evaluator to Oversee the Request for Proposal Process, Docket No. UM 1845, Application (June 1, 2017).

IV. CONCLUSION

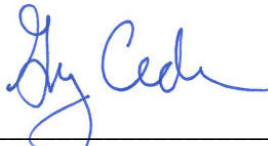
For the reasons explained above, the Commission should deny PacifiCorp's Motion and proposed extreme and unprecedented restrictions, and instead adopt the modified or special protective order that has adequately protected the same type of information for over a decade.

Dated this 22th day of February 2018.

Respectfully submitted,



Irion Sanger
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: (503) 756-7533
Fax: (503) 334-2235
irion@sanger-law.com



Gregory M. Adams
Richardson Adams, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
greg@richardsonadams.com

Of Attorneys for Northwest and Intermountain
Power Producers Coalition