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February 28, 2018

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
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**Re: UM 1845 - In the Matter of PACIFICORP, dba PACIFIC POWER, Request
for Proposals of an Independent Evaluator to Oversee the Request for Proposal
Process.**

Attached for filing in the above-referenced docket is PacifiCorp's Reply in Support of
Motion for Modified Protective Order.

Please contact this office with any questions.

Sincerely,

Wendy McIndoo
Office Manager

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1845

In the Matter of
PACIFICORP, d/b/a PACIFIC POWER,
Application for Approval of 2017 Request for
Proposals.

PACIFICORP'S REPLY IN SUPPORT
OF MOTION FOR MODIFIED
PROTECTIVE ORDER

I. INTRODUCTION

1
2 In accordance with Chief Administrative Law Judge (ALJ) Michael Grant's February
3 23, 2018, Ruling, PacifiCorp d/b/a Pacific Power files this reply in support of the Modified
4 Protective Order issued by the Public Utility Commission of Oregon (Commission) on
5 February 20, 2018.¹

6 The Northwest and Intermountain Power Producers Coalition (NIPPC) objects to two
7 aspects of the Modified Protective Order.² First, NIPPC objects to the limitation on access to
8 highly confidential information by attorneys that are currently or reasonably expect to be
9 involved in solicitations or negotiations of power purchase agreements within the next two
10 years. NIPPC claims that this blanket prohibition is too broad and that the Commission
11 should instead adopt a general prohibition on bidder access to highly confidential bid
12 information and allow PacifiCorp to challenge a specific individual's access on a case-by-
13 case basis.³

¹ *In the Matter of PacifiCorp, d/b/a Pacific Power, Application for Approval of 2017 Request for Proposals*, Docket No. UM 1845, Order No. 18-057 (Feb. 20, 2018).

² Northwest and Intermountain Power Producers Coalition's Response in Opposition to Motion for Modified Protective Order (Feb. 22, 2018) (NIPPC Response).

³ NIPPC Response at 7, n. 25 and at 13 (acknowledging reasonableness of allowing case-by-case objections).

1 PacifiCorp proposes to modify the blanket prohibition to allow broader access to
2 highly confidential information for attorneys that do not represent or advise bidders in either
3 the 2017R Request for Proposal (RFP) or the concurrent and ongoing RFP for solar resources
4 (2017S RFP), subject to case-by-case challenges. Thus, PacifiCorp recommends revising
5 paragraph 13(b) of the Modified Protective Order as follows:

6 Persons qualified to access Highly Protected Information upon
7 signing the Signatory Page for Highly Protected Information,
8 Appendix B, are:

9 (a) An employee or counsel of the Regulatory Division at the
10 Oregon Citizens' Utility Board; and

11 (b) Persons that are not involved in PacifiCorp's ongoing
12 solicitation processes as bidders, including persons who
13 represent or advise bidders, ~~or persons that reasonably expect~~
14 ~~to be involved in solicitations or negotiations of power~~
15 ~~purchase agreements within the next two years.~~⁴

16 Disclosure of highly confidential bid information to bidders in the 2017S RFP would produce
17 the same harm as disclosure to bidders in the 2017R RFP. Therefore, limiting 2017S RFP
18 bidders, and their attorneys, from accessing highly confidential information is reasonable in
19 light of the concurrent solicitation processes.

20 Second, NIPPC objects to on-site review of the highly confidential information for all
21 intervenors, except Staff and the Oregon Citizens' Utility Board (CUB). The Commission
22 should reject this second objection and affirm the Modified Protective Order. On-site review
23 is consistent with the protections provided in the contested case processes in other states
24 addressing the same highly confidential 2017R RFP bid information. Consistent treatment of

⁴ To maintain the ability to perform case-by-case challenges, PacifiCorp does not recommend any changes to paragraph 15 of the Modified Protective Order.

1 highly confidential information minimizes the risk of inadvertent public disclosure and the
2 customer harm that would follow.

3 **II. BACKGROUND**

4 On February 16, 2018, PacifiCorp filed its Request for Acknowledgement of Final
5 Shortlist of Bidders in 2017R Request for Proposals (Request for Approval), as required by
6 competitive bidding guidelines (Guidelines) adopted by the Commission.⁵ Also, on February
7 16, 2018, PacifiCorp received the Independent Evaluator's (IE) Final Report on PacifiCorp's
8 2017R Request for Proposals (Final Report). Although the Request for Approval did not
9 include highly confidential bid information, upon review of the Final Report, PacifiCorp
10 discovered that the Final Report included highly confidential bid information, and analysis
11 relying on bid information. PacifiCorp worked diligently to identify the highly confidential
12 material, which was strictly limited to only bid information and analysis that necessarily
13 relied on that information.

14 To facilitate the timely filing of the Final Report concurrent with the Request for
15 Approval, on February 16, 2018, PacifiCorp also filed a Motion for Modified Protective
16 Order that requested additional protections for commercially sensitive, highly confidential
17 bid information contained in the Final Report.

18 Chief ALJ Grant granted a Modified Protective Order on February 20, 2018, on an
19 expedited basis to help facilitate the exchange of information, without precluding parties
20 from challenging the decision to issue the Modified Protective Order.⁶ Although the
21 Modified Protective Order was not identical to PacifiCorp's proposal, it does require on-site

⁵ *In the Matter of the Pub. Util. Comm'n of Or., Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149 at 14 (Apr. 30, 2014) (adopting mandatory acknowledgement of final shortlists to "promote transparency in the utility procurement process").

⁶ Order No. 18-057 at 2.

1 review of the highly confidential information for all intervenors, except Staff and the Oregon
2 CUB and it precludes access to highly confidential information for persons involved in the
3 company’s ongoing solicitation processes as bidders, including persons who represent or
4 advise bidders, or persons that reasonably expect to be involved in solicitations or
5 negotiations of power purchase agreements within the next two years. PacifiCorp proposed
6 these two provisions, in part, because of the ongoing negotiations in the 2017R RFP and
7 because the company also has an ongoing 2017S RFP.⁷

8 **III. ARGUMENT**

9 **A. The Modified Protective Order should preclude access to highly confidential bid**
10 **information by attorneys advising bidders in either the 2017R or the 2017S RFP.**

11 **1. Concerns over bidder access to highly confidential information are the same**
12 **for bidders in the 2017R and 2017S RFPs.**

13 The Modified Protective Order prohibits attorneys who represent or advise bidders in
14 the 2017R RFP from accessing highly confidential bid information. This protection is
15 consistent with the competitive bidding guidelines,⁸ prior protective orders,⁹ and the terms of
16 the Commission-approved 2017R RFP, which states that “PacifiCorp will attempt to prevent
17 such confidential bidder information from being supplied to intervening parties who are also
18 bidders, *or who may be providing services to a bidder*[.]”¹⁰ NIPPC “supports PacifiCorp’s
19 proposal to restrict access to bidders and any other person who has advised bidders regarding
20 their solicitation in this RFP.”¹¹

⁷ Motion for Modified Protective Order at 4.

⁸ *In the Matter of the Pub. Util. Comm’n of Or., Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 06-446 at 14 (Apr. 30, 2014).

⁹ See NIPPC Response at 5-7.

¹⁰ 2017R RFP at 13 (emphasis added).

¹¹ NIPPC Response at 8.

1 The Modified Protective Order reasonably extends the non-controversial protections
2 afforded bidder information to also prevent access to bid information by attorneys that advise
3 “persons that reasonably expect to be involved in solicitations or negotiations of power
4 purchase agreements within the next two years,” which would preclude access to bid
5 information for attorneys advising bidders in the 2017S RFP. NIPPC objects to the
6 additional protection because its seven attorneys may be currently advising independent
7 power producers in their power purchase negotiations or in their participation in solicitations
8 with PacifiCorp outside of the 2017R RFP or may do so within the next two years.¹²

9 In response to NIPPC’s concern, PacifiCorp proposes to delete this language from the
10 Modified Protective Order. But, in its place, the company requires specific language
11 prohibiting access to 2017R RFP bid information by any person, including attorneys, that are
12 advising bidders in the 2017S RFP and that this protection remain in place until final
13 contracts are executed in each solicitation process. Disclosure of highly confidential bidder
14 information to a bidder in the 2017S RFP would be just as detrimental as disclosure to a
15 bidder in the 2017R RFP.

16 First, disclosure of commercially sensitive bid information will harm PacifiCorp’s
17 negotiating position, to the detriment of customers. This rationale applies equally to a
18 negotiation occurring outside the context of the 2017R RFP. PacifiCorp evaluating bids in
19 the 2017S RFP and may soon engage in negotiations with counter-parties in that process. If
20 attorneys advising these counter-parties have access to the highly confidential bid
21 information from the 2017R RFP, then it will harm PacifiCorp’s ability to successfully

¹² NIPPC Response at 10 (“The Company’s restriction would require these attorneys to choose between representing NIPPC or stopping work on or taking up new matters that they currently or will likely provide legal advice on in the future.”).

1 negotiate final agreements on behalf of customers. In this respect, there is no material
2 distinction between a negotiation occurring with a 2017R RFP counter-party and a counter-
3 party in the 2017S RFP.

4 Second, bidders submitted commercially sensitive information to PacifiCorp with the
5 expectation that their competitors would not have access to that information.¹³ Disclosure of
6 this highly confidential information to a competitor will harm customers because potential
7 bidders in current RFPs could use the information to inform their current negotiating
8 position. Moreover, disclosure of commercially sensitive information to competitors will
9 likely chill participation in future solicitations, make them less competitive, and reduce the
10 likelihood that future RFPs result in the least-cost, least-risk resource for customers. Again,
11 this rationale applies equally to bidders in the 2017R and 2017S RFPs.

12 **2. The prohibition on access to highly confidential information should apply if**
13 **an attorney advises a bidder in any capacity.**

14 Although NIPPC “strongly agrees” that 2017R RFP bidders should not be able to
15 access highly confidential information,¹⁴ NIPPC also appears to argue that its counsel should
16 be able to access bidder information if they advise a bidder on unrelated matters.¹⁵ Such
17 access, however, creates a very real risk that the highly confidential bid information will be
18 inadvertently disclosed to bidders. PacifiCorp does not believe that that an attorney will
19 intentionally misuse the highly confidential information in violation of the protective order.
20 Rather, once an attorney sees the commercially sensitive bidder information, that knowledge
21 will inexorably inform the attorney’s advice to clients, even if the advice is ostensibly

¹³ See, e.g., 2017R RFP at 13.
¹⁴ NIPPC Response at 2.
¹⁵ NIPPC Response at 10.

1 unrelated to the 2017R or 2017S RFP. Thus, the risk of disclosure, whether intentional or
2 not, warrants protection.¹⁶

3 PacifiCorp’s strict prohibition on attorney access is consistent with the blanket
4 prohibition on bidder access. Any representative of a bidder, even an employee working on
5 unrelated matters, cannot access highly confidential bid information from the 2017R RFP.¹⁷
6 NIPPC has not presented any persuasive reason to apply a different standard to attorneys.

7 **3. PacifiCorp’s additional protection against disclosure is consistent with the**
8 **Guidelines.**

9 NIPPC argues that PacifiCorp has not justified the need for additional protections
10 beyond the minimal prohibition on bidder access to highly confidential information set forth
11 in Guideline 12.¹⁸ But when adopting Guideline 12, the Commission specifically
12 contemplated that additional protections may be necessary over and above simply prohibiting
13 bidder access to highly confidential bidder information.¹⁹ When PacifiCorp expressed a
14 concern over non-bidder access to bid-scoring and evaluation results, Staff suggested that
15 PacifiCorp’s concerns “could be addressed through heightened protective procedures.”²⁰ The
16 Commission agreed with Staff and adopted Guideline 12, which prohibited bidder access to
17 bidder information, while acknowledging that additional protections for non-bidders may be
18 warranted. PacifiCorp’s proposed revision to the Modified Protective Order recognizes that
19 the circumstances of the 2017R RFP require additional protections because of the concurrent

¹⁶ In response to NIPPC’s concern that its counsel may not know the identity of bidders in the 2017R or 2017S RFP process, PacifiCorp will work with NIPPC’s counsel to identify bidders on a confidential basis to facilitate access to highly confidential information if the attorney does not represent a bidder in any capacity.

¹⁷ See, e.g., Order No. 06-446 at 14; *In the Matter of PacifiCorp Draft 2012 Request for Proposals*, Docket No. UM 1208, Order No. 07-471 (Oct. 26, 2007) (modified protective order precludes access to highly confidential information by bidders, including “parties and their employees”); NIPPC Response at 5 (citing approvingly of Order No. 07-471).

¹⁸ NIPPC Response at 10.

¹⁹ Order No. 06-446 at 14.

²⁰ Order No. 06-446 at 14.

1 solar solicitation process. And the company’s recommended prohibition on 2017S RFP
2 bidder access is grounded in the same concerns and rationale that prompted the Commission
3 to prohibit bidder access for 2017R RFP bidders.

4 **4. PacifiCorp’s proposed changes to the Modified Protective Order will allow**
5 **NIPPC to effectively participate in the case.**

6 NIPPC claims that the Modified Protective Order “effectively precludes” it from
7 participating in the final shortlist phase of this case.²¹ But with the revisions proposed here,
8 the restrictions on access to highly confidential information are reasonably aligned with the
9 restrictions set forth in the Guidelines and prior Commission precedent.²² Therefore, if
10 NIPPC is precluded from participation, it is only because its attorneys represent bidders and
11 should, under any reasonable restriction, not have access to highly confidential information.²³
12 Any limitation on NIPPC’s ability to review highly confidential information is outweighed
13 by the risk of customer harm resulting from bidder access to highly confidential
14 commercially sensitive bid information.

15 **B. On-site review is not overly burdensome.**

16 A critical component of the Modified Protective Order calls for on-site review of highly
17 confidential information to minimize the risk of improper disclosure of commercially sensitive
18 bid information.²⁴ NIPPC’s only criticism of this requirement is that the “burden of restricting
19 use of the material to on-site review is significant because attorneys located in geographically
20 different locations will have difficulty communicating with each other regarding the

²¹ NIPPC Response at 1.

²² Order No. 06-446 at 14; NIPPC Response at 5-7.

²³ Moreover, NIPPC participated in Portland General Electric Company’s (PGE) most recent solicitation process, docket UM 1892, without obtaining access to highly confidential bid information. NIPPC Response at n. 25 (citing approvingly of PGE’s modified protective order in docket UM 1892, which NIPPC did not sign).

²⁴ Order No. 18-057, Appendix A at 3.

1 material.”²⁵ But NIPPC fails to explain why on-site review is burdensome just because it has
2 one attorney in Portland and one in Boise. If NIPPC’s attorneys otherwise meet the
3 requirements for review of highly confidential information, both attorneys can freely
4 communicate with one another while they are on-site reviewing the material. The burden
5 identified by NIPPC results from the fact it has chosen to have attorneys in geographically
6 different locations, not because of on-site review.

7 NIPPC’s unsubstantiated claims of burden are also undermined by the fact that parties
8 have successfully conducted on-site review of the same material in the ongoing contested
9 case processes in Utah, Wyoming, and Idaho related to the resource decisions resulting from
10 the 2017R RFP. If on-site review is not overly burdensome for the parties in those other
11 states, then it is not overly burdensome for NIPPC. PacifiCorp has also relied on on-site
12 review of other commercially sensitive information in Oregon proceedings, including highly
13 sensitive coal transportation agreements.

14 **C. The timing of the receipt of the IE Final Report limited PacifiCorp’s ability to**
15 **negotiate a Modified Protective Order prior to filing the highly confidential**
16 **information.**

17 NIPPC faults PacifiCorp for not consulting with the parties prior to requesting a
18 Modified Protective Order and for not exploring intermediate measures.²⁶ As described
19 above, however, PacifiCorp received the Final Report on the same day it was filed. The
20 company therefore had limited time to consult with parties regarding the appropriate
21 treatment of highly confidential information included in the Final Report. And the company
22 has agreed to intermediate measures here that largely address NIPPC’s concerns.

²⁵ NIPPC Response at 9.

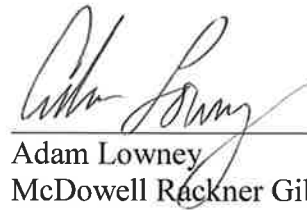
²⁶ NIPPC Response at 1, 14.

1 **IV. CONCLUSION**

2 The Commission should modify the Modified Protective Order to prohibit access to
3 highly confidential information by any attorney that advises a bidder in either the 2017R or
4 2017S RFP in any capacity. The Commission should affirm the Modified Protective Order's
5 requirement for on-site review. These two protections are reasonably designed and narrowly
6 tailored to minimize the risk of customer harm resulting from the public disclosure of highly
7 sensitive commercial information related to the 2017R and 2017S RFP bids.

Respectfully submitted this 28th day of February 2018.

By:



Adam Lowney
McDowell Rackner Gibson PC

Attorney for PacifiCorp

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of PacifiCorp’s Reply in Support of Motion for Modified Protective Order on the parties listed below via electronic mail in compliance with OAR 860-001-0180.

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UE 263**

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Dated February 28, 2018.



Wendy McIndoo
Office Manager