BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

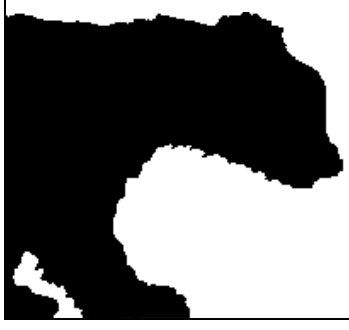
UM 1707

In the Matter of	)
SIERRA CLUB,	)
Regarding violation of Protective Order No. 13-095.	)

BRIEF OF THE

CITIZENS' UTILITY BOARD OF OREGON

September 23, 2014



BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1707

In the Matter of	)	
SIERRA CLUB,	)	BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON
Regarding violation of Protective Order No. 13-095.	)	

I. The Reasons for CUB's Intervention.

CUB moved to Intervene in this docket because the following issues need to be addressed herein from a position other than that of the two main actors: PacifiCorp and Sierra Club. The additional issues that need to be addressed are:

- The need for transparency of process in all proceedings.
- The Importance Of Discovery To The Ability Of All Intervenors To Participate Effectively In All Dockets - What Protective Orders are Really Designed To Accomplish
- The Positions Taken By PacifiCorp In Its Brief , If Adopted, Would Change The Way Discovery Has Been Done In Oregon For Years.
    a. Information has always been available in more than one docket.
    b. PacifiCorp states that it provided hard copies of a PowerPoint. presentation that were marked as confidential under Order 13-095 and reiterated that the workshop materials and discussion were confidential under the protective order[1] - Information that is not confidential

[1] PacifiCorp August 8, 2014 letter to Sierra Club with the subject line "Re: Violation of Protective Order No. 13-095".

outside of the immediate proceeding is not "confidential information" and parties should not be required to challenge the designation before use.

c. How trade secrets and commercially sensitive information are defined in the Oregon and federal legal systems – in Oregon the determination is a question of fact.

- The sanctions requested in regard to this alleged violation.

II. Arguments.

The dispute in question in this docket arises out of the LC 57 Integrated Resource Plan docket and pertains to the use, outside of the LC 57 proceeding, of allegedly confidential information obtained through the discovery process in the LC 57 docket pursuant to Protective Order 13-095 available to all parties who signed the protective order and attended a workshop held at the Commission on August 6, 2014.

A. The Need For Transparency In All Proceedings

This UM 1707 docket was initiated only after other parties became aware of a dispute was taking place between PacifiCorp and the Sierra Club and that none of the filings related to the dispute were being uploaded to the Commission's website. This was very concerning to CUB and so CUB requested that the dispute be brought out into the open. We thank the Commission and both parties for their willingness to have a formal docket opened in regard to this matter so that other parties have the opportunity to weigh in on these important issues.

Transparency in all proceedings is vital to the health of the administrative process under which the OPUC operates in Oregon. Transparency is important to ensure notice to all parties of all issues under consideration, to provide the opportunity for all persons/entities to participate, and to provide a fully developed record upon which the

Commission can rule. Transparency is also vital to all discovery proceedings. While only one party to any case in Oregon may, in practice, ask a particular data request that circumstance occurs because all parties are trying to be cognizant of the time it takes to appropriately respond to data requests and the fact that duplication of questions leads to unnecessary duplication of answers – a waste of everyone's time. Thus, in Oregon it is common for Staff to ask questions in which CUB is interested and if Staff asks the question first, CUB will not ask the same question but will instead wait for the data response to be sent to Staff and the other parties, including CUB, to the extent that each party has standing requests on file for responses to all data requests. CUB not asking the same data request as Staff does not necessarily mean that CUB is not interested in the answer. Should a utility fail to respond to the data request, and the propounding party have to file a motion to compel, naturally in the above example, CUB would also want to be heard on the issue of why it is so important that the utility be required to respond to that data request. CUB cites this example to demonstrate the effect of discovery disputes and rulings on all parties intervened in a docket. Because of the interconnectedness of discovery issues, any ruling on discovery necessarily affects all parties to Commission proceedings. And it is precisely for this reason that CUB respectfully requests to be heard on the discovery issues at play in this docket.

B. The Importance Of Discovery To The Ability Of All Intervenors To Participate Effectively In All Dockets; What Protective Orders are Really Designed To Accomplish

The ability of any intervenor in a docket to assist with the development of the record is determined almost exclusively by the ability of that intervenor to obtain discovery. The General Protective Order used by the OPUC governs the obtaining,

protection and use of confidential utility information in all of the OPUC's dockets. The General Protective Order states as follows:

> The order *permits the broadest possible discovery* consistent with the need to protect confidential information. *It shields no specific documents and makes no judgment about whether any particular document contains a trade secret or commercially sensitive information.* Rather, the order adopts a process for resolving discovery disputes that include sensitive information.[2]

So the purpose of the General Protective Order is not to permit a utility to hide information and prevent its review by the public; rather, it is to protect only a small subset of utility information - trade secrets and other commercially sensitive information - from disclosure to the general public. The true nature of the General Protective Order is to ensure the broadest possible discovery for Staff and intervenors.

Intervenors into OPUC dockets, wherein a utility claims to have confidential information, must sign the General Protective Order. While CUB cannot in all honesty state that it thinks the current General Protective Order is perfect, the General Protective Order has, in the past, been functional. CUB believes that it has generally been able to obtain the information it needs to see for review and analysis of utility activities. This does not mean that, at times, utilities have not attempted to shield more information than that which is truly confidential. It should be the rare document that is entirely confidential and cannot be presented in a redacted format.

[2] Order No. 13-095 entered Mar 22, 2013 in Docket LC 57 *(emphasis added)*.

C. The Positions Taken By PacifiCorp In Its Briefing, If Adopted, Would Change How Discovery Has Been Done In Oregon For Years

CUB is requesting to be heard in this docket because the positions taken by PacifiCorp in its briefings if adopted would change how discovery has been practiced in Oregon for years.

i. Information has always been available to more than one docket

Paragraph "12." of the current General Protective Order states:

> Without the written permission of the designating party, any person given access to Confidential Information under this order may not use or disclose Confidential Information for any purpose other than participating in these proceedings.

Intervenors, however, have always been able to utilize knowledge learned in one docket to ask questions in another docket – for example, IRP dockets. In an IRP, the utility lays out its 20 year plan and asks for acknowledgment of the investment actions that it will take in the first four years of that plan. Whether or not the Commission acknowledges the action items in the plan, the utility almost always seeks rate recovery (in a ratemaking proceeding) for investments that were previously discussed in the IRP. Intervenors in the ratemaking docket will try to determine whether the utility's actions in making those investments were prudent. In order to analyze the prudence of the utility's investment actions, the Intervenors will have to review analysis done by the utility prior to or during the pendency of the IRP docket – which the intervenors know about possibly only because of the IRP docket. Were the Commission to rule broadly in favor of PacifiCorp in this UM 1707 docket, CUB and every other intervenor could lose the ability to perform necessary discovery in dockets with overlapping issues and investments. Dockets beyond IRPs. This is because a utility, under a broad Commission ruling in this docket, would be

able to designate information as confidential in one docket and thus bury it from sight in every future docket because the Commission had ruled that intervenors could only use information in one docket - ever. This is an enormous concern for CUB and we want to bring this terrifying possibility to the attention of the ALJ and the Commissioners.

Simply put, no utility should be allowed to permanently deep six any information by labeling it as confidential in one proceeding and seeking to enforce its use in only that docket.

ii. PacifiCorp states that it provided hard copies of a PowerPoint presentation that were marked as confidential under Order 13-095 and reiterated that the workshop materials and discussion were confidential under the protective order[3] - Information that is not confidential outside of the immediate proceeding is not "confidential information" and parties should not be required to challenge the designation before use.

Another change that would be wrought were the Commission to rule broadly in favor of PacifiCorp is that information, which has never previously been considered confidential, would suddenly be confidential. PacifiCorp, in its pleadings, states that every word uttered at the August 6, 2014 workshop must be considered confidential as must every piece of paper reviewed there. This is not how such confidential workshops have been viewed in the past. In the past, all parties, to CUB's knowledge, have taken the position that only confidential information pursuant to ORCP 36(c)(7) (trade secrets and commercially sensitive information) is confidential in such settings and that knowledge parties had from other sources, brought up during such proceedings, would remain non-confidential.[4] To allow otherwise would create a situation where non-confidential information, known to a party, informs a question, the party asks the

[3] PacifiCorp August 8, 2014 letter to Sierra Club with the subject line "Re: Violation of Protective Order No. 13-095".

[4] CUB distinguishes confidential information subject to a protective order from confidential settlement discussions, which are confidential pursuant to OAR 860-001-0350(3).

question and then suddenly the previously non-confidential information is confidential information because it was discussed at the confidential workshop. Such a result is not logical, inconsistent with the concept of confidentiality, and should not be condoned by the Commission. By definition, information that is not confidential and has been disseminated cannot later be deemed confidential, no matter what a utility titles it in its proceeding. Parties should not have to challenge every utility designation, so long as if challenged, they can show an alternate, non-confidential source for the information.[5]

CUB takes this position because we frequently find that one of the utilities has labeled something as confidential that is available to us on a non-company website such as the FTC, DEQ, FCC, EPA etc. websites. It would cause a huge uptick in CUB's work load were we to have to stop and challenge the Company's confidential designation of the information before presenting it in testimony or a brief. Instead we have chosen in the past to use the non-confidential information and to cite to its alternate, non-confidential source. But were CUB ever to forget to cite to the non-confidential source, would the document be any less non-confidential? Of course not. If a document is out in the public domain it is out in the public domain and it is not confidential.

[5] *Zyprexa Litig.* 474 F. Supp. 2d 385, 416; 2007 US Dist. LEXIS 10329, 76 , 79 citing to *Seattle Times Co. v. Rhinehart,* 467 US 20 104 S.Ct. 2199, 81 L. Ed. 2d 17 (1984), distinguishable from the case at hand on the facts nonetheless provide good instruction in the following quotation: "While parties may be restrained from disseminating information obtained through the discovery mechanism they "may disseminate the identical information . . . as long as the information is gained through means independent of the court's processes."

iii. How trade secrets and commercially sensitive information are defined in the Oregon and federal legal systems – in Oregon the determination is a question of fact.[6]

Oregon case law is sparse on the issue of alleged violation of "umbrella protective orders" there is, however, a lot of discussion of trade secrets and commercially sensitive information.[7] In terms of alleged violation of umbrella protective orders CUB, therefore, looked at the Federal Rules of Civil Procedure (FRCP) 26(c) in addition to the Oregon Rules of Civil Procedure 36C. The two rules are remarkably similar. FRCP 26(c) provides as follows:

> (c) PROTECTIVE ORDERS.
> (1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:*
> * * * * * *
> (G) requiring *that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way*; . .

And ORCP 36C provides as follows:

> **C Court order limiting extent of disclosure.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) *that a trade secret or other confidential research,*

[6] *Kaib's Roving R.P.H. Agency, Inc. v. Smith,* 237 Ore. App. 96, 103; 239 P.2d 247, 250; 2010 Ore. App. LEXIS 997 (Jan 2010) (The definition set out in the statute necessarily implies that whether information is or is not a trade secret is a question of fact.")

[7] *Massey Coal Servs., Inc. v. Victaulic Co. of Am.,* 249 F.R.D. 477, 478; 2008 U.S. Dist. LEXIS 32969, 3, 10 (2008)("There is limited authority on the designation of documents as "CONFIDENTIAL" under an umbrella protective order.")

> *development, or commercial information not be disclosed or be disclosed only in a designated way*;

CUB next reviewed the case law pertaining to the interpretation of each and determined the following.

First:

> Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not satisfy the Rule 2(c) test. Moreover, the harm must be significant, not a mere trifle.[8]

Second:

> [T]o succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.[9]

Third:

> [F]actors of secrecy to be considered when determining if given information ought to be treated as a trade secret are: 1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information;(4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended . . . in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[10]

Using the above citations as a frame of reference, CUB has always taken the position that the name of a confidential document is not itself confidential. Furthermore, CUB has never considered dates to be confidential although some of the utilities have. While the Commission allows the imposition of umbrella protective orders, it does not

[8] *Massey Coal Servs., Inc. v. Victaulic Co. of Am.,* 249 F.R.D. 477, 478; 2008 U.S. Dist. LEXIS 32969, 3, 10 (2008) citing to *Cipollone v. Liggett Group, Inc.,* 785 F.2d at 1108, 1121 (3d Cir. 1986).

[9] *Massey Coal Servs., Inc. v. Victaulic Co. of Am.,* 249 F.R.D. 477, 478; 2008 U.S. Dist. LEXIS 32969, 3, 10 (2008) citing to *Cipollone v. Liggett Group, Inc.,* 785 F.2d at 1108, 1121 (3d Cir. 1986).

[10] *Massey Coal Servs., Inc. v. Victaulic Co. of Am.,* 249 F.R.D. 477, 478; 2008 U.S. Dist. LEXIS 32969, 3, 15 (2008) citing to *Pansy v. Borough of Stroudsburg,* 23 F.3d 772 (3d Cir. 1994). *See also Citizens' Util. Bd. v. Oregon Pub. Util. Comm'n,* 128 ORE. App. 650, 658-659; 877 P.2d. 116, 121; 1994 ORE. App. LEXIS 972, 14 (1994).

review the materials at issue unless one of the parties objects to the confidential designation or the disclosure. CUB thinks that in all cases the ALJ's and Commissioners, rather than assuming that something is automatically confidential, should in fact be going through the kind of tests used by the Oregon and federal courts when the utility complains that its trade secrets or other commercially sensitive materials have been disclosed. As an example, CUB cites to a discussion in *Massey Coal Services v. Victaulic* wherein the Court found as follows:

> The first document, an email of unknown date, has no discernible commercial value whatsoever. It merely suggests the possibility that failed couplings came from particular material runs.
>
> The second document, a chronology dated sometime after June 2005, sets forth actions taken to develop information which "will be used to support the accuracy of our written response to Massey". . . The chronology is simply a recitation of facts of an investigation, and the court cannot discern any commercial value to the entries. It is possible that the document constitutes evidence of Defendant's good faith efforts to investigate the warranty claims by Plaintiffs.
>
> The third document is a notice of a meeting to take place on April 19, 2005 . . .the court cannot discern any commercial value it may have.
>
> The fourth document, an email is dated February 9, 2005, and recites representations made by a . . .salesman . . . .The court has no means of determining whether the representations are true or flase; it is merely a memorandum of remarks which may have some evidentiary value in this case. The court does not perceive any commercial value to the document.

The *Massey* court went on to conclude when summing up that "[t]he documents themselves make no indication of falsity of information, or willful omission of material information. In fact, the second document was prepared for the purpose of providing accurate information to Plaintiffs. It is possible that these documents may lead to damaging conclusions when considered with other documents or testimony, but that is not the court's concern."[11]

CUB believes this final point to crucial. If the information a utility is trying to keep confidential is not a trade secret or commercially sensitive information, as the courts have interpreted that term, then the information is not confidential and should not be considered so no matter the designation by the utility to the contrary and no matter how embarrassing its disclosure might be to the utility.

D. The Imposition of Sanctions.

In determining sanctions for disclosure of information contained within a document that was wholly designated as confidential by a utility, the Commission should take into consideration whether the material should really have been designated as confidential in the first place not simply assume that the material was, in fact, confidential. Any party can make an inadvertent mistake. If the Commission limits itself to sanctioning everyone who makes a mistake with material that is not, in fact, a trade secret or confidential commercial information, at the same level as someone who deliberately leaks truly

[11] *See also Wyndham Vacation Resorts, Inc. v. Faucett* ,438 B.R. 564; 2010 Bankr. LEXIS 3505, 12 at 13 FN 1 (October 12, 2010) (As the court has already observed, that a given document would be harmful in the sense of exposing a party to liability for allegedly wrongful acts is not the sort of harm that section 107 was designed to prevent."). According to the early text in the same opinion on page 12, Bankruptcy proceedings section 107 only protects information that would give someone else a "competitive" advantage, not a "litigation" advantage.

confidential information – see for example the *Zyprexa* case[12] where individuals colluded to obtain and effect disclosure of materials – the Commission may find itself in the future ultimately having excluded all the possible Intervenors in utility cases. This would be a side effect of PacifiCorp's request that the Commission throw the book at the Sierra Club, and presumably anyone else.

III. Conclusion

CUB believes that it is imperative that the Commission conduct a broader review of the issues presented in this docket. A transparent process for the review of all discovery disputes is vital to the health of the administrative process. And, the discovery process is vital to the development of each and every record developed during the administrative processes before the Commission. Any Commission ruling that would in any way inhibit the discovery process is a rule that CUB does not wish to see implemented by this Commission. CUB respectfully requests that CUB be permitted to be heard in this and any future discovery resolution process.

Dated September 23rd, 2014,

Respectfully submitted,

G. Catriona McCracken, OSB #933587
General Counsel, Regulatory Program Director
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland OR 97205
(503) 227-1984 ph
(503) 274-2956 fax
Catriona@oregoncub.org

[12] *Zyprexa Litig.* 474 F. Supp. 2d 385; 2007 US Dist. LEXIS 10329, 76.

UG 1707 – CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of September, 2014, I served the foregoing **BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UM 1707 upon each party listed in the UM 1707 PUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)

(C denotes service of Confidential material authorized)

W DAVISON VAN CLEVE
C JESSE E COWELL
333 SW TAYLOR ST., SUITE 400
PORTLAND OR 97204
jec@dvclaw.com

W DAVISON VAN CLEVE
MELINDA J DAVISON
333 SW TAYLOR - STE 400
PORTLAND OR 97204
mjd@dvclaw.com

W MOUNTAIN WEST ANALYTICS
BRADLEY MULLINS
333 SW TAYLOR STE 400
PORTLAND OR 97204
brmullins@mwanalytics.com

W PACIFIC POWER
C SARAH WALLACE
825 NE MULTNOMAH ST STE 1800
PORTLAND OR 97232
sarah.wallace@pacificorp.com

W PARKS LAW OFFICES, LLC
KEVIN E PARKS
310 SW 4TH AVE., STE. 806
PORTLAND OR 97204
kevin@parks-law-offices.com

W PUC STAFF – DOJ
C JASON W JONES
1162 COURT ST NE
SALEM, OR 97301-4096
jason.w.jones@state.or.us

W SIERRA CLUB LAW PROGRAM
C GLORIA D SMITH
85 SECOND STREET
SAN FRANCISCO CA 94105
gloria.smith@sierraclub.org

//

//

//

//

//

//

Respectfully submitted,

Sommer Templet, OSB #105260
Staff Attorney
Citizens' Utility Board of Oregon
610 SW Broadway, Ste. 400
Portland, OR 97205
(503) 227-1984 phone
(503) 224-2596 fax
sommer@oregoncub.org