ORDER NO. 14 392

ENTERED NOV 06 2014

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1707

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

DISPOSITION: NO SANCTIONS IMPOSED; SIERRA CLUB'S COMMITMENTS ACCEPTED; SIERRA CLUB DIRECTED TO TAKE FURTHER ACTION

In this order, we find that Sierra Club committed a technical violation of Protective Order No. 13-095, but decline to impose formal sanctions. Instead, we accept Sierra Club's commitments to ensure future compliance and direct Sierra Club to take further actions, described below, to demonstrate its commitment to following our rules in future proceedings. Finally, we decline to report the violation to the state bar, and find no basis to exclude Sierra Club's attorneys or witnesses from this or any future proceeding.

I. PROCEDURAL HISTORY

On August 8, 2014, we received a copy of a letter from counsel for PacifiCorp, dba Pacific Power, addressed to Gloria Smith, counsel for Sierra Club. In the letter, PacifiCorp alleged that Sierra Club knowingly violated the protective order issued in docket LC 57 by serving data requests on Rocky Mountain Power, and sending the data requests to a non-confidential service list, in a docket before the Public Service Commission of Wyoming. PacifiCorp stated that the data requests specifically cited to portions of a confidential PowerPoint presentation provided by PacifiCorp during an August 6, 2014, workshop before this Commission in docket LC 57, and cited to confidential information regarding the analysis provided during discussions at the workshop.

On August 11, 2014, counsel for Sierra Club filed a letter requesting that we appoint an Administrative Law Judge to resolve PacifiCorp's allegations, stating that Sierra Club was careful to ensure that its data requests did not disclose any protected information.

A procedural schedule was adopted to address whether Sierra Club violated our confidentiality rules. Sierra Club, PacifiCorp, the Citizens' Utility Board of Oregon (CUB), Renewable Northwest, and the NW Energy Coalition filed briefs. Sierra Club, PacifiCorp, CUB, and Renewable Northwest also participated in oral argument.

II. BACKGROUND

This Commission has developed a general protective order (GPO) to address confidential information in its proceedings. The protective order allows a party to unilaterally designate material as confidential 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.

The designation of information under a GPO does not constitute a determination that the document actually contains a trade secret or commercially sensitive information. Rather, the order adopts a process to facilitate discovery by allowing the producing party to designate information it believes to be protected and quickly disclose it to authorized parties without the need to seek protected status for each document. A party may challenge another party's designation of information as confidential by notifying the designating party, who must then show that the challenged 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 confidential designation informally, the challenging party may request a conference with an Administrative Law Judge, or file an objection to the confidential designation.

Our administrative rules address potential sanctions for violating a protective order. OAR 860-001-0080(4) provides that the Commission may expel from the subject proceedings any person who fails to comply with the terms of a protective order, prohibit the person from appearing in future proceedings, and impose penalties under ORS 756.990(2)(C). The rule also provides that the Commission will report any attorney who violates a protective order to the bar associations in all states where the attorney is admitted to practice law.

III. DOCKET LC 57

This matter arose from a GPO we issued in docket LC 57, PacifiCorp's 2013 Integrated Resource Plan (IRP). At PacifiCorp's request, we issued Protective Order No. 13-095 to govern the discovery and use of commercially sensitive and confidential business information related to the company's long-term resource planning. Sierra Club, through its attorney Gloria Smith, signed the GPO and agreed to be bound by its terms. Sierra Club also identified various employees automatically qualified under the GPO to receive and review designated information, including Ms. Smith.

At the end of the LC 57 proceeding, we required PacifiCorp to provide further information about scheduled upgrades at the company's Craig and Hayden coal plants.

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

Specifically, we stated:

> Within three months of the order in this proceeding, PacifiCorp will schedule and hold a confidential technical workshop to review existing analysis on planned Craig and Hayden environmental investments.[2]

The workshop was subsequently scheduled for August 6, 2014. Prior to that workshop, we notified the participants that the provisions of Protective Order No. 13-095 would remain in effect. Sierra Club participated in the workshop and received copies of a PowerPoint presentation that PacifiCorp had designated as confidential.

IV. SIERRA CLUB'S DATA REQUESTS

The day after the Craig and Hayden workshop, Sierra Club served PacifiCorp, dba Rocky Mountain Power, a set of data requests in a general rate proceeding before the Public Service Commission of Wyoming. Sierra Club served copies of the data requests to parties to the proceeding, and did not designate them confidential under the terms of the protective order adopted in the Wyoming proceeding.

The set of 16 data requests sought information related to PacifiCorp's analysis of the emissions control equipment investments at the Craig and Hayden plants. The first data request asked Rocky Mountain Power to provide a copy of the confidential PowerPoint presentation PacifiCorp provided to participants in the August 6, 2014 Oregon workshop. The next fifteen data requests asked questions about various aspects of PacifiCorp's analysis of its Craig and Hayden plants. A number of questions directed Rocky Mountain Power to specific portions of the August 6 workshop presentation, including references to specific page numbers and bulleted items, and ask questions relating to issues that were discussed at the confidential workshop.

V. POSITIONS OF THE PARTIES

A. Sierra Club

Sierra Club acknowledges it made some errors in seeking information in the Wyoming rate case, but argues that filing the Wyoming data requests has neither harmed PacifiCorp nor jeopardized this Commission's regulatory process. Sierra Club requests that any sanctions imposed take into account the degree of the violation, and maintains that its actions were taken in good faith and designed to ensure that the Wyoming Commission had all pertinent information while considering PacifiCorp's pending rate case.

Sierra Club admits that it should have sought a copy of the confidential PowerPoint presentation first from PacifiCorp before serving data requests that referred to that document. Sierra Club states that it now understands that this

[2] Order No. 14-252 at 10 (Jul 8, 2014).

process would have been the more prudent route, but states it conflated the two-step process because the coal plant expenditures discussed at the August 6 workshop are moving towards a decision in the Wyoming rate case.

Sierra Club provides references and cites to publically available and independent information showing that Sierra Club had previous knowledge of information referred to in its data requests. Sierra Club admits that the data requests contained some limited words and phrases that were not previously disclosed, but maintains that the disclosure of these few isolated words did not harm the company.

Sierra Club also contends that PacifiCorp improperly designated as confidential information that Sierra Club already knew. Sierra Club argues that PacifiCorp cannot designate the entire August 6 workshop as confidential because Sierra Club had already obtained some of the information discussed at the workshop through public channels. Sierra Club maintains that PacifiCorp cannot repackage publicly known information as confidential, and in doing so has violated the protective order's provisions requiring limited designations.

B. PacifiCorp

PacifiCorp contends that Sierra Club violated the GPO by improperly using and disclosing information designated as confidential. PacifiCorp contends that, contrary to Sierra Club's arguments, the references in the Wyoming data requests to the confidential presentation constitute "use" of the presentation in a proceeding other than LC 57.

PacifiCorp contends that Sierra Club's data requests also disclosed information designated as confidential. In an attachment to its brief, PacifiCorp details how the data requests were a product of Sierra Club's participation in the August 6 workshop. PacifiCorp maintains that Sierra Club's reference to a specific page or bullet point contained in the presentation, followed by a question about that citation, at least impliedly, and in some instances expressly, revealed the designated information. PacifiCorp maintains that even referring in a generic fashion to issues relevant to its confidential analysis revealed that those issues mattered and provided insight into the analysis.[3] For example, PacifiCorp contends that a question regarding its gas scenario analysis revealed the type of gas scenario analysis the company conducted, and by extension provided insight into the company's confidential technical and legal evaluation of its plants.

PacifiCorp initially recommended that the Commission impose all sanctions identified in OAR 860-001-0080(4). These include prohibiting Sierra Club from participating in any other PacifiCorp proceeding, imposing penalties up to $160,000, and reporting Ms. Smith to the appropriate state bar associations. At oral argument, rather than advocating for specific sanctions, PacifiCorp instead stated that it is in the Commission's discretion to determine what sanctions may

[3] *See* Oral Argument Tr. at 45-46 (counsel for PacifiCorp stating that there is "a lot of information to be gleaned from the questions that follow because of the context in which they're asked. And because of that, it gives a lot of information about what we input into that analysis and what mattered.")

be appropriate. PacifiCorp proposed that, to determine appropriate sanctions, the Commission should consider whether Sierra Club's actions were inadvertent, negligent, reckless, or knowing.

C. CUB

CUB intervened in this proceeding to raise general concerns about the need for broad discovery in Commission proceedings, and to emphasize that information protected by the protective order should only be a small subset of utility-owned information. CUB believes that positions taken here by PacifiCorp are contrary to how discovery has traditionally been conducted in Oregon and, if adopted, could preclude the ability of intervenors to conduct discovery on issues addressed in earlier dockets and could chill participating in Commission proceedings.

CUB also challenges PacifiCorp's assertion that the entire discussion at the August 6 workshop was designated as confidential, and that Sierra Club was required to challenge the designation of any information discussed—even if that information was otherwise publically available. CUB contends that parties should not be required to challenge every utility designation so long as they can show an alternative, non-confidential source for the information.

D. Renewable Northwest

Renewable Northwest notes that all participants in the Commission's proceedings have a high degree of respect for the protective order, and that sanctions for a technical violation are not necessary to protect the Commission's process. Renewable Northwest also notes that intervenors wade through a laborious amount of information in order to try to help the Commissioners see economic analyses from all sides, and requests that the Commission not make that process more difficult than it already is.

VI. RESOLUTION

The analysis and review of evidence that utilities and intervenors conduct before this Commission requires the sharing of confidential and highly confidential information, the disclosure of which could be immensely harmful. As a result, we treat issues of confidentiality with the highest seriousness, and we expect any party participating in proceedings before this Commission to do the same to ensure that information is shared safely and securely.

Turning to the facts here, we find that Sierra Club violated the GPO in docket LC 57 by using information that had been designated confidential to draft non-confidential data requests in an out-of-state docket. Sierra Club's repeated and specific references to the confidential presentation as being the source of the information requested in those data requests demonstrate that Sierra Club used the confidential presentation for purposes other than the LC 57 proceeding. We also find that Sierra Club disclosed confidential information. Sierra Club admits that at least some of its data requests referred to matters that were not otherwise discussed in public documents, and that it served those data requests on a public service list. This was improper.

Having found that Sierra Club violated the GPO, we now address the question of sanctions. To determine what sanctions are appropriate, we are guided by the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions, adopted by Oregon courts in determining dispositions.[4] The ABA Standards examine four criteria: the duty violated (owed to a client, the public, the legal system or the profession); the mental state of the lawyer (intentional, knowing, negligent, or strict liability); the extent of injury (actual, potential, or none); and the existence of mitigating and aggravating factors. Although these standards were adopted with reference to attorney discipline, we find them suited to govern our consideration of whether sanctions should be imposed on any individual who signs and commits to the terms of our GPO, regardless if that person is an attorney or non-attorney.[5]

Applying those criteria here, we find that Sierra Club's actions violated a duty to protect both PacifiCorp and the Commission's processes from the potential harm that might arise from the public release of information designated as confidential. We require absolute adherence to protective orders, and parties must err on the side of caution and consult with utilities before using or disclosing information that has been designated confidential.

We further find, however, that the record fails to support a finding that Sierra Club acted with the intent to violate our rules. At most, Sierra Club's violation of our rules was negligent. We are persuaded that Sierra Club reasonably believed that, by excluding what it considered to be confidential information and referring to only those portions of the document that Sierra Club believed were non-confidential, Sierra Club thought it was acting in compliance with our rules.

We also find minimal evidence of injury to PacifiCorp and our processes resulting from the data requests' disclosure. In addition, we find a lack of aggravating factors in Sierra Club's conduct. Although Sierra Club has demonstrated a lack of familiarity with our rules in other contexts beyond this particular dispute, including our filing deadlines and other procedural matters, Sierra Club has no previous disciplinary history before us. Moreover, it has cooperated with our investigation and has committed to train its employees so that it does not commit similar errors regarding the GPO again.

Based on these findings, we reject PacifiCorp's initial request that maximum sanctions be imposed, including penalties of $160,000 and prohibiting Sierra Club and its witnesses from participating in any future PacifiCorp proceedings. The proposed maximum magnitude of sanctions is more punitive than merited by the facts of this case. We also recognize that such sanctions, if adopted, could have a negative effect on practice before the Commission, and would establish precedent to penalize both intervenors and utilities for any disclosure of confidential information, even if the disclosure was inadvertent.

At the same time, as stated above, we take violations of our orders seriously. Although we do not find evidence of intentional misconduct, Sierra Club's actions were improper, and we expect any intervening party to scrupulously follow our rules regarding protective

[4] *See In re Leonhardt*, 324 Or 498 (1997).

[5] Our rules governing practice and procedure require all persons, including non-attorneys, to conform to the standards of ethical conduct required of attorneys appearing before the courts of Oregon. *See* OAR 860-001-0310(1).

orders. A signatory to a protective order does not have discretion to make its own determination regarding what should or should not have been designated as confidential under a protective order. Signatories to a protective order must either seek permission from the designator or challenge a confidential designation before using or disclosing designated information.[6]

We accept Sierra Club's commitment to taking certain actions identified in its reply brief.[7] Those commitments are as follows:

1. All Sierra Club lawyers and legal assistants involved in this matter will receive training on the treatment of confidential information and the operation of protective orders;

2. Sierra Club will designate at its San Francisco office a "responsible person" for protective order compliance. That person will also receive training on treatment of confidential information; and

3. Sierra Club will report the events of this proceeding to all other Sierra Club lawyers and legal assistants, and will emphasize the need to pay close attention to the treatment and use of confidential materials, and will urge that any staff involved in the handling of confidential materials consider taking specific training.

In addition to those commitments, we also direct Sierra Club to take the following steps to ensure its compliance with our rules in future proceedings:

1. Sierra Club will appear before this Commission within three months of the date of this order to give a presentation demonstrating that Sierra Club has implemented its training regarding the treatment of confidential information and the operation of protective orders. The presentation must demonstrate Sierra Club's familiarity with and commitment to following all of our rules, including rules governing protective orders and rules addressing filing and service procedures; and

2. At Sierra Club's presentation, counsel for Sierra Club will confirm that all lawyers and legal assistants participating in dockets before this Commission have received thorough training on our rules regarding the treatment of confidential information and the operation of protective orders, and service and filing rules.

Because we find that Sierra Club operated with the intent to comply with our rules, we decline to report Sierra Club's attorney to any bar association. We are guided here by the standard provided in the Oregon Rules of Professional Conduct, which state that it is

[6] We agree that if information designated as confidential also exists in the public realm, parties may use or rely on the publicly available source of the information without violating the protective order. We encourage parties to challenge the confidential designation of any publically available information to help ensure that designations are limited and made in good faith.

[7] Sierra Club Reply Brief at 17 (Sept 5, 2014).

professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."[8] We interpret our rule consistent with those standards, and exercise our discretion to waive our rule where the attorney intended to comply with our rules.

Finally, we note that PacifiCorp has taken the step of barring Sierra Club and its outside consultant, Dr. Jeremy Fisher, from participating both in docket LC 57 workshops and in unrelated proceedings in other jurisdictions. We find no basis for PacifiCorp's barring Sierra Club witnesses or consultants from this or any other jurisdiction. This show cause hearing was opened to determine whether counsel for Sierra Club violated the protective order in this docket. The investigation did not relate to Dr. Fisher, and we see no cause for Dr. Fisher to suffer a penalty.

VII. ORDER

IT IS ORDERED that Sierra Club comply with the terms of this order.

Made, entered, and effective NOV 0 6 2014.

COMMISSIONER ACKERMAN WAS UNAVAILABLE FOR SIGNATURE

Susan K. Ackerman
Chair

John Savage
Commissioner

Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

[8] *See* ORPC Rule 8.4(3).