

ORDER NO. 15 243

ENTERED AUG 25 2015

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 587

In the Matter of Revisions to
OAR 860-001-0080, Protective Orders.

ORDER

DISPOSITION: RULE MODIFICATIONS ADOPTED

I. INTRODUCTION

In this order, we amend the administrative rule regarding the use of protective orders in Commission proceedings. We also revise our standard protective order, move its provisions out of the rule itself, and include it as an attachment to the rule.

II. BACKGROUND

Prior to official rulemaking proceedings, we conducted workshops with stakeholders on February 18, 2015, April 1, 2015, and May 14, 2015. At the workshops, stakeholders presented concerns about the existing protective order rule and potential solutions for those concerns. The language proposed in formal rulemaking results from compromises reached in those workshops.

On June 3, 2015, we filed a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact with the Secretary of State, and we provided notice of the rulemaking and copies of the proposed amendments to all interested persons on the service lists established under OAR 860-001-0030(1)(b) and to legislators specified in ORS 183.335(1)(d). The Secretary of State published notice of the rulemaking in the July 2015 *Oregon Bulletin*.

We held a rulemaking hearing on July 23, 2015. At the hearing, Sierra Club presented comments thanking the Commission for taking on the issues and supporting the proposed changes. We accepted comments on the proposed amendments through July 31, 2015.

III. DISCUSSION

The primary purpose of this rulemaking is to update our standard protective order. Although it has been used for almost 30 years to govern the access of confidential and proprietary

information presented in Commission proceedings, the standard protective order contained inconsistent or ambiguous language, included certain onerous or confusing requirements, and failed to articulate procedures to be used to address disputes arising under the order.

Through a collaborative process with our stakeholders, we have revised and improved the standard protective order. The purpose of the order remains the same—to permit the broadest possible access to information consistent with the need to protect proprietary data. It shields no specific documents and makes no judgment about whether any particular document actually contains a trade secret or commercially sensitive information. Rather, the standard protective order adopts a process that allows a party to designate information as protected and allows other parties to access that information upon agreeing to not publically disclose any designated information.

The key changes to the standard protective order include

- Requiring parties to designate information as “Protected” rather than “Confidential” to reflect the fact that the designation of information does not necessarily mean the information is, in fact, confidential as a matter of law;¹
- Explicitly prohibiting a party from designating as Protected Information any information that is publically available;
- Adding language requiring a designating party to use reasonable efforts to ensure that any designated information continues to warrant protection under the order. This provision is intended to address designated information that continues to be subject to on-going discovery and at issue in testimony and briefs;
- Adding additional procedures to be used to resolve a challenge to whether information is properly designated, including what information a designating party must provide to establish how the information at issue is protected under Oregon law;
- Clarifying that the standard protective order governs access to information designated by another party, and does not impair a designating parties’ ability to review and use its own information;
- Clarifying the allowable uses of Protected Information;

¹ We note that the adopted language in sections (1) and (2) differs from the proposed rule in that reference to “confidential” information is changed to reflect protected information.

- Adding provisions recognizing that nothing in the standard protective order precludes any party from independently seeking in other forums information produced under the order;
- Revising the three levels of Qualified Persons eligible to access Protected Information and clarifying what action is necessary for these persons to become qualified:

Action Required	Qualified Persons
Issuing standard protective order	<ul style="list-style-type: none"> • Commission employees • Assistant Attorney Generals assigned to represent Commission
Party signing the standard protective order and agreeing to be bound by its terms	<ul style="list-style-type: none"> • Counsel for the party and persons employed directly by counsel • Employees of the Regulatory Division at the Citizens' Utility Board
Individually reading standard protective order, agreeing to be bound by its terms, and providing information required in Appendix C	<ul style="list-style-type: none"> • Other persons associated with party agreeing to be bound by standard protective order

- Adding procedures allowing designating party to object to a Qualified Person from obtaining access to Protected Information.

In addition to the changes to the standard protective order, this rulemaking amends OAR 860-001-0080, which generally governs the use of protective orders in Commission proceedings. This rulemaking significantly streamlines the rule by taking language from the standard protective order out of the rule itself, and including the standard protective order as an attachment to the rule. The rule changes also clarify language regarding modified protective orders for additional protection and sanctions for violation for a protective order.

IV. CONCLUSION

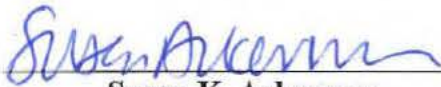
We adopt the rule amendments consistent with this order. The adopted rule changes are set forth in Appendix A. The attachment to the rule is set forth in Appendix B.

IV. ORDER

IT IS ORDERED that:

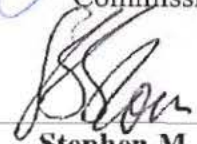
1. The changes to OAR 860-001-0080 are adopted.
2. The rule changes become effective upon filing with the Secretary of State.

Made, entered, and effective AUG 25 2015.


Susan K. Ackerman
Chair




John Savage
Commissioner


Stephen M. Bloom
Commissioner

A person may petition the Public Utility Commission of Oregon for the amendment or repeal of a rule under ORS 183.390. A person may petition the Oregon Court of Appeals to determine the validity of a rule under ORS 183.400.

860-001-0080

Protective Orders

(1) Upon request by a party and for good cause shown, an ALJ may issue protective orders to limit disclosure of ~~confidential~~ information that falls within the scope of ORCP 36(C)(7) in specific Commission proceedings. Decisions by the ALJ regarding protective orders may be appealed to the Commission under OAR 860-001-0720.

(2) General Protective Order. The Commission's general protective order adopts a process for parties to ~~resolve~~avoid discovery disputes that include ~~confidential~~protected information. The order allows the broadest possible discovery consistent with the need to protect ~~confidential~~such information; it does not determine whether a particular document is exempt from disclosure.

ED. NOTE: The general protective order is not included in rule text. Click here for PDF copy of the general protective order.

~~(a) Under the terms of a general protective order, a party may designate information that it reasonably believes falls within the scope of ORCP 36(C)(7) or is exempt from public disclosure under the Public Records Law. Information designated as confidential may be disclosed only to a "qualified person" as defined in the general protective order.~~

~~(b) A confidential designation must be made in good faith and be limited to the portions of the document that qualify as a protected trade secret or other confidential research, development, or commercial information.~~

~~(c) Except for Commission Staff, a party must sign the "consent to be bound" section of the protective order to receive confidential information. By signing the "consent to be bound," the party certifies that it has an interest in the proceedings that is not adequately represented by other parties to the proceedings, that the party will not use or disclose the information for any purpose other than to participate in the proceedings unless the designating party gives written consent, and that the party will take all reasonable precautions to keep the confidential information secure.~~

~~(d) A party may challenge the designation of information as confidential by notifying the designating party. Once notified, the designating party must show that the challenged information is covered by ORCP 36(C)(7) or exempt from disclosure under the Public Records Law.~~

~~(e) If the parties are unable to resolve a dispute about a confidential designation informally, then any party may request that the ALJ conduct a conference to facilitate the resolution of discovery disputes. A challenging party may also file an objection to the confidential designation. The objection must identify the information in dispute and include a certification that the parties have made reasonable efforts to achieve a resolution, but have been unable to resolve the controversy without the ALJ's assistance. Within 7 days of the objection, the designating party must either remove the confidential designation or file a written response identifying the legal basis for the claim of confidentiality. The challenging party may file a written reply to the response within 7 days.~~

(3) Modified Protective Order Motion for Additional Protection.

(a) A party may request that the ALJ issue a modified protective order that provides additional protection beyond that provided by the general protective order by filing a motion under OAR 860-001-0420. The motion must include:

(A) The parties and the exact nature of the information involved;

(B) The legal basis for the claim that the information is protected under ORCP 36(C)(7) or the Public Records Law;

(C) The exact nature of the relief requested;

(D) The specific reasons the requested relief is necessary; and

(E) A detailed description of the intermediate measures, including selected redaction, explored by the parties and why these measures are insufficient.

(b) The ALJ will provide expedited review of any motion for additional protection.

Pending the ALJ's ruling on a motion for additional protection, the information at issue need not be released.

~~(a) A motion for additional protection must include:~~

~~(A) The parties involved;~~

~~(B) A detailed description of the information to be protected;~~

~~(C) Legal authority for the claim that the information is protected under the ORCP 36(C)(7) or the Public Records Law;~~

~~(D) The reasons the general protective order is inadequate to protect the information at issue;~~

~~(E) A description of the intermediate measures, including selected redaction, explored by the parties and why these measures are insufficient; and~~

~~(F) A description of the measures of additional protection sought, why they are necessary, and how they are narrowly tailored to address the circumstances presented in the docket.~~

~~(b) In determining whether to issue a modified protective order to provide additional protection of designated information, the ALJ will, at minimum, consider the following as applicable:~~

~~(A) The extent to which the information is known outside of the moving party's business;~~

~~(B) The extent to which the information is known by employees and others involved in the moving party's business;~~

~~(C) The extent of measures taken by the moving party to guard the secrecy of the information;~~

~~(D) The value of the information to the moving party and its competitors;~~

~~(E) The amount of effort or money expended by the moving party in developing the information;~~

~~(F) The ease or difficulty with which the information could be properly acquired or duplicated by others;~~

~~(G) The extent, kind, and likelihood of harm that may occur should the information be disclosed;~~

~~(H) Whether the additional protection sought would unreasonably restrict the intervenors from fully participating in the proceeding, recognizing that the tax information of an unregulated nonutility business in a regulated utility's affiliated group is sensitive;~~

~~(I) Whether the additional protection sought would unreasonably restrict the ability of the Commission to develop a full and complete record of all facts relevant to the proceeding; and~~

~~(J) Other considerations the Commission deems relevant.~~

(c) To receive access to **confidential** information that has been given additional protection beyond that of the general protective order, a party may be required to certify that it intends to fully participate in the proceedings. Fully participating means being actively involved in the docket, as appropriate, by filing testimony; participating in settlement negotiations, **participating in workshops, participating in** conferences, **participating in and** hearings; **and filing other pleadings as required.** If a certifying party fails to fully participate in the proceedings, the party may decertify itself or, upon the request of a party or the ALJ's own motion, be decertified as eligible to receive information under a modified protective order.

~~(d) Challenges to the designation of information as warranting additional protection under a modified protective order are to be handled as described in section (2) above, unless the modified protective order provides otherwise.~~

~~(e) If, during the course of the subject proceedings, a dispute arises regarding the application of a modified protective order, any of the affected parties may ask the ALJ to conduct a conference to facilitate resolution of the dispute. The ALJ will schedule a conference to take place within three business days, or as soon as practicable, to expedite the resolution of the dispute. The ALJ may require in camera inspection of the documents for which a party seeks additional protection.~~

~~(4) 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). If an attorney violates a protective order, the Commission will report the violation to the bar associations in all states where the attorney is admitted to practice law.~~

(4) A party alleging that the terms of a protective order have been violated may file a complaint under ORS 756.500, or the Commission may, on the Commission's own initiative, file such complaint. Any person that fails to comply with the terms of a protective order may be subject to sanctions. Depending upon the severity of the violation, the Commission may impose any sanction it deems appropriate, up to and including:

(a) Issuing a public reprimand;

(b) Expelling the person or associated party from the proceeding in which the protective order was violated;

(c) Prohibiting the person or associated party from appearing in future proceedings;

(d) Imposing penalties under ORS 756.990(2)(c); or

(e) Reporting any attorney that violated the protective order to the bar association in all states where the attorney is admitted to practice law.

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Stat. Auth.: ORS 756.040 & 756.060

Stats. Implemented: ORCP 36, ORS 756.040, 756.055 & 756.990

Hist.: PUC 5-2010, f. & cert. ef. 10-22-10; PUC 4-2012, f. & cert. ef. 4-17-12

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GENERAL PROTECTIVE ORDER
DOCKET NO. []

Scope of this Order:

1. This order governs the acquisition and use of Protected Information produced or used by any party to these proceedings.

Designation of Protected Information:

2. Any party may designate as Protected Information any information the party reasonably determines:
- (a) Falls within the scope of ORCP 36(C)(7) (a trade secret or other confidential research, development, or commercial information); and
 - (b) Is not publically available.
3. To designate information as Protected Information, a party must place the following legend on the material:

PROTECTED INFORMATION
SUBJECT TO GENERAL PROTECTIVE ORDER

The party should make reasonable efforts to designate as Protected Information only the portions of the information covered by ORCP 36(C)(7).

4. Each page of a document containing Protected Information filed with the Commission or provided to Qualified Persons under this order must be printed on yellow paper and placed in a sealed envelope or other appropriate container. *Only the portions of a document that fall within ORCP 36(C)(7) may be placed in the envelope/container.* The envelope/container must bear the legend:

THIS ENVELOPE IS SEALED UNDER ORDER NO. _____
AND CONTAINS PROTECTED INFORMATION. THE
INFORMATION MAY BE SHOWN ONLY TO QUALIFIED
PERSONS AS DEFINED IN THE ORDER.

5. A party may designate as Protected Information any information previously provided by giving written notice to the Commission and other parties. Parties in possession of newly designated Protected Information must make reasonable efforts to ensure that all copies of the material containing the information bear the above legend if requested by the designating party.
6. A designating party must make reasonable efforts to ensure that information designated as Protected Information continues to warrant protection under this order. If designated information becomes publically available or no longer falls within the scope

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of ORCP 36(C)(7), the designating party should make reasonable efforts to remove the protected designation and provide written notice to the Commission and other parties.

Challenge to Designation of Information as Protected:

7. A party may informally challenge any designation of Protected Information by notifying the designating party. Once notified, the designating party bears the burden of showing that the challenged information is covered by ORCP 36(C)(7). Any party may request that the ALJ hold a conference to help resolve disputes about proper designation.

8. If the dispute cannot be resolved informally, the challenging party may file a written objection with the ALJ. The objection need only identify the information in dispute and certify that reasonable efforts to achieve informal resolution have failed.

9. Within five business days of service of the objection, the designating party must either remove the protected designation or file a written response. A written response must identify the factual and legal basis of how the challenged information is protected under the Oregon Public Records Act, ORS 192.410 et seq, or the Uniform Trade Secrets Act, ORS 646.461(4). Broad allegations unsubstantiated by specific facts are not sufficient. If the designating party does not timely respond to the objection, the Commission will remove the protected designation from the challenged information.

10. The challenging party may file a written reply to any response within five business days of service of an objection. The designating party may file a sur-reply within three business days of service of a response. The ALJ will make all reasonable efforts to resolve the matter within 10 business days of service of the last filing.

Access to Protected Information:

11. Only Qualified Persons may access Protected Information designated by another party under this Protective Order. Persons automatically bound by this protective order and qualified to access Protected Information are:

- a. Commission employees; and
- b. Assistant Attorneys General assigned to represent the Commission.

12. Persons qualified upon a party signing the Consent to be Bound section of Appendix B are:

- a. Counsel for the party;
- b. Any person employed directly by counsel of record; and
- c. An employee of the Regulatory Division at the Citizens' Utility Board of Oregon.

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A party must identify all these persons in section 2 of Appendix B when consenting to be bound by the order, and must update this list throughout the proceeding to ensure it accurately identifies Qualified Persons

13. A party bound by the protective order may seek to qualify other persons to access Protected Information by having those persons complete and sign Appendix C, and submitting that information to the Commission and all parties. Within five business days of receiving a copy of Appendix C, the designating party must either provide the requested access to Protected Information or file an objection under Paragraph 14.

Objection to Access to Protected Information:

14. All Qualified Persons have access to Protected Information unless the designating party objects as provided in this paragraph. As soon as the designating party becomes aware of reasons to restrict access to a Qualified Person, the designating party must provide the Qualified Person and his or her counsel notice stating the basis for the objection. The parties must promptly confer and attempt to resolve the dispute on an informal basis.

15. If the parties are unable to resolve the matter informally, the designating party must file a written objection with the ALJ. The requesting party may file a response to the motion within 5 business days of service of an objection. The ALJ will make all reasonable efforts to resolve the matter within 10 business days of the last filing. Pending the ALJ's decision, the specific Protected Information may not be disclosed to the person subject to the objection.

Use of Protected Information:

16. All Qualified Persons must take reasonable precautions to keep Protected Information secure. A Qualified Person may reproduce Protected Information to the extent necessary to participate in these proceedings. A Qualified Person may discuss Protected Information obtained under this order only with other Qualified Persons who have obtained the same information.

17. Without the written permission of the designating party, any Qualified Person given access to Protected Information under this order may not disclose Protected Information for any purpose other than participating in these proceedings.

18. Nothing in this protective order precludes any party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this protective order.

19. Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Protected Information to the extent reasonably necessary to maintain a file of these proceedings or to comply with requirements imposed by another governmental agency or court order. The information retained may only be disclosed to

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Qualified Persons under this order. Any other person retaining Protected Information must destroy or return it to the designating party within 90 days after final resolution of these proceedings unless the designating party consents in writing to retention of the Protected Information. This paragraph does not apply to the Commission or its Staff.

Duration of Protection:

20. The Commission will preserve the designation of information as protected for a period of five years from the date of the final order in these proceedings, unless extended by the Commission at the request of the designating party. The Commission will notify the designating party at least two weeks prior to the release of Protected Information.

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CONSENT TO BE BOUND
DOCKET NO. []

I. Consent to be Bound:

This general protective order governs the use of Protected Information in these proceedings.

_____ (Party) agrees to be bound by the terms of the general protective order and certifies that it has an interest in these proceedings that is not adequately represented by other parties to the proceedings.

Signature: _____

Printed Name: _____

Date: _____

II. Persons Qualified under Paragraph 12:

_____ (Party) identifies the following person(s) qualified under paragraph 12.

PRINTED NAME	DATE

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QUALIFICATION OF OTHER PERSONS
DOCKET NO. []**III. Persons Seeking Qualification under Paragraph 13:**

I have read the general protective order, agree to be bound by the terms of the order, and provide the following information.

Signature:		Date:
Printed Name:		
Physical Address:		
Email Address:		
Employer:		
Associated Party:		
Job Title:		
If not employee of party, description of practice and clients:		

APPENDIX C
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