

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1845

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Application for Approval of Final Draft  
2017R Request for Proposals.REVISED MODIFIED  
PROTECTIVE ORDER

DISPOSITION: APPLICATION FOR RECONSIDERATION GRANTED;  
MODIFIED PROTECTIVE ORDER REVISED

This order rescinds and replaces Modified Protective Order No. 18-057 to accept a change proposed by PacifiCorp, dba Pacific Power, and to address the concerns of parties to this proceeding. This order broadens the persons that may access highly protected information contained in the Independent Evaluator's (IE) closing report on PacifiCorp's 2017R Request for Proposals (RFP). Paragraph 13(b) is revised to allow access to "Persons (including attorneys) that are not involved in PacifiCorp's ongoing 2017R or 2017S solicitation process as bidders."

**I. BACKGROUND**

On February 22, 2018, Northwest and Intermountain Power Producers Coalition (NIPPC) filed a request for reconsideration of PacifiCorp's Modified Protective Order No. 18-057.<sup>1</sup> Commission Staff, PacifiCorp, and the Industrial Customers of Northwest Utilities (ICNU) filed responses. NIPPC filed a reply.

NIPPC specifically objects to PacifiCorp's restrictions that (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." NIPPC states these terms are overly restrictive and will preclude NIPPC's participation in the final shortlist review. NIPPC explains that several past RFP protective orders allowed NIPPC and ICNU to review the

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<sup>1</sup> See OAR 860-001-0080(1) (Decisions by the ALJ regarding protective orders may be appealed to the Commission under OAR 860-001-0720).

highly confidential material because attorneys who do not represent active bidders in the RFP are generally allowed.<sup>2</sup>

Staff and ICNU agree with NIPPC that attorneys should have access to highly confidential material, as this has been standard practice. Staff states that it is unnecessary to exclude attorneys because they are ethically bound to keep the commitments in signed protective orders that prohibit unauthorized disclosure. ICNU proposes that any requirements on attorneys should be limited to attorneys who would reasonably expect to advise bidders in a PacifiCorp RFP or negotiate PPAs directly with PacifiCorp for one year.<sup>3</sup>

Staff and ICNU also assert on-site review of confidential information is burdensome. Staff and ICNU explain this limitation is inconsistent with the fact that PacifiCorp mailed the information to CUB and Staff, that the confidential information is central to shortlist acknowledgement, and that parties must file comments on the shortlist on an expedited schedule.

In response, PacifiCorp proposes to ease restrictions and allow access for attorneys that do not represent or advise bidders in either the 2017R RFP or the concurrent and ongoing RFP for solar resources (2017S RFP), subject to case-by-case challenges. PacifiCorp recommends revising paragraph 13(b) of the Modified Protective Order as follows:

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

- (a) An employee or counsel of the Regulatory Division at the Oregon Citizens' Utility Board; and
- (b) Persons that are not involved in PacifiCorp's ongoing solicitation process as bidders, including 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.~~

PacifiCorp states this protection should remain in place until final contracts are executed in each solicitation process. PacifiCorp does not recommend any changes to paragraph 15 of

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<sup>2</sup> NIPPC explains examples from previous RFP dockets including Docket Nos. UM 1208, UM 1374, UM 1368, UM 1429, UM 1535, UM 1613, and UM 1982.

<sup>3</sup> Concurrently with its comments, ICNU filed a letter withdrawing its signatory pages for the modified protective order. ICNU states that Mr. Pepple and Mr. Peck cannot commit to not being involved in the negotiation of any PPA for the next two years.

the Modified Protective Order, so that it can maintain the ability to perform case-by-case challenges.<sup>4</sup>

PacifiCorp states that it worked diligently to identify the highly confidential material in the IE's closing report, and the designation is strictly limited to only bid information and analysis that necessarily relied on that information. PacifiCorp explains that disclosure of commercially sensitive bid information will harm its negotiating position, to the detriment of customers.

PacifiCorp maintains that its prohibition on attorney access is consistent with the blanket prohibition on bidder access. PacifiCorp believes that any representative of a bidder, even an employee working on unrelated matters, should not access highly confidential bid information from the 2017R RFP. PacifiCorp is concerned that once an attorney sees the commercially sensitive bidder information, that knowledge will inexorably inform the attorney's advice to clients.

PacifiCorp maintains that on-site review of highly confidential information should be affirmed because on-site review is consistent with the protections in other states addressing the same highly confidential information. PacifiCorp states that consistent treatment of highly confidential information minimizes the risk of inadvertent public disclosure.

NIPPC responds that PacifiCorp's new language still bars attorneys that represent bidders on matters entirely unrelated to the 2017R or 2017S RFPs.

## II. DISCUSSION

We modify PacifiCorp's proposal to rewrite paragraph 13(b) of Modified Protective Order 18-057 to more specifically address NIPPC's concerns. The language is revised to limit only persons (including attorneys) that are involved in PacifiCorp's 2017R or 2017S RFPs. This will limit attorneys that represent current bidders in the 2017R or 2017S RFP process, but does not extend to attorneys that represent bidders on unrelated matters. The remainder of the modified protective order is unchanged. The revised protective order is attached to this order.

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<sup>4</sup> Paragraph 15 states "All persons qualified to have access to Highly Protected Information will have access to Highly 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."

We find that the revision largely addresses two of NIPPC's main arguments related to UM 1182. First, non-bidders should have access to information.<sup>5</sup> Second, we have encouraged non-bidders to participate in shortlist acknowledgement to voice concerns while the Commission is actively considering the shortlist, rather than after the bidding has completed.<sup>6</sup>

The revision also addresses PacifiCorp's key concerns. Highly confidential material will be protected and bidders will not be able to access the information. The revised modified protective order also maintains PacifiCorp's requirement for on-site review. Because we have relaxed the restrictions so that a person that works with a bidder on matters unrelated to the RFPs may access the information, there is even stronger rationale for PacifiCorp to require on-site review of the information, to reduce any inadvertent disclosure.

PacifiCorp has requested that this protection remain until it completes this solicitation process. The attached protective order contains a default duration of five years for the Commission to preserve the designation of information as highly protected. PacifiCorp may request changes to this protective order at any time, and may ease restrictions on highly protected information after the solicitation is complete by making a filing with the Commission.

### III. ORDER


IT IS ORDERED THAT Modified Protective Order No. 18-057 is rescinded and replaced with the attached modified protective order.

Made, entered, and effective MAR 08 2018.

  
**Lisa D. Hardie**  
 Chair

  
**Stephen M. Bloom**  
 Commissioner



  
**Megan W. Decker**  
 Commissioner

<sup>5</sup> *Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 06-446 at 14 (Aug 10, 2006) ("non-bidding parties should have access to this information and have written the guideline accordingly.")

<sup>6</sup> *Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149 at 14 (Apr 30, 2014) ("The certainty of mandatory acknowledgement should reduce instances when the Commission requires acknowledgement on a case-by-case basis, or holds additional proceedings to address concerns after the RFP process has concluded.").

**MODIFIED PROTECTIVE ORDER**

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**Scope of this Order:**

1. This order governs the acquisition and use of "Highly Protected Information" produced or used by any party to these proceedings. General Protective Order No. 17-218 governs the acquisition and use of "Protected Information."

**Designation of "Highly Protected Information":**

2. Any party may designate as Highly 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 publicly available; and
  - (c) Is extremely commercially sensitive and requires additional restrictions on who may access the information than that provided under the Commission's general protective order.
3. To designate information as Highly Protected Information, a party must place the following legend on the material:

HIGHLY PROTECTED INFORMATION  
SUBJECT TO GENERAL PROTECTIVE ORDER NO. 18 - \_\_\_\_

The party should make reasonable efforts to designate as Highly Protected Information only the portions of the information covered by the above definitions.

4. Each page of a document containing Highly Protected Information filed with the Commission or provided to Qualified Persons under this order must be printed on green paper. Only the portions of a document that fall within the above definitions may be placed in the envelope/container. The envelope/container must bear the legend:

THIS ENVELOPE IS SEALED UNDER ORDER NO. 18- \_\_\_\_ AND  
CONTAINS HIGHLY PROTECTED INFORMATION. THE INFORMATION  
MAY BE SHOWN ONLY TO PERSONS QUALIFIED TO ACCESS HIGHLY  
PROTECTED INFORMATION AS DEFINED IN THE ORDER.

5. Highly Protected Information disclosed by a designating party to a person qualified to access Highly Protected information through informal discovery or by means of the Commission's Huddle website will be marked "Highly Protected Information" and uploaded to a file folder designated "highly protected" in Huddle, if applicable.
6. A party may designate as Highly Protected Information any information previously provided by giving written notice to the Commission and other parties. Parties in

possession of newly designated Highly 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.

7. A designating party must make reasonable efforts to ensure that information designated as Highly Protected Information continues to warrant protection under this order. If designated information becomes publically available or no longer falls within the scope 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 Highly Protected:**

8. A party may informally challenge any designation of Highly 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) and bears the burden of showing that the "Highly Protected Information" designation is necessary.
9. 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.
10. Within five business days of service of the objection, the designating party must either remove the challenged 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.
11. 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 Highly Protected Information:**

12. Only Qualified Persons may access Highly Protected Information designated by another party under this Modified Protective Order. Persons automatically bound by this protective order and qualified to access Highly Protected Information are:
  - (a) Commission employees; and
  - (b) Assistant Attorneys General assigned to represent the Commission.
13. Persons qualified to access Highly Protected Information upon signing the Signatory Page for Highly Protected Information, Appendix B, are:

- (a) An employee or counsel of the Regulatory Division at the Oregon Citizens' Utility Board; and
  - (b) Persons (including attorneys) that are not involved in PacifiCorp's ongoing 2017R or 2017S solicitation processes as bidders.
14. Access to Highly Protected Information will be provided to all persons qualified under paragraph 13(b) only at PacifiCorp's offices. PacifiCorp will distribute Highly Protected Information to only those persons qualified under paragraphs 12 and 13(a).

**Objection to Access to Highly Protected Information:**

15. All persons qualified to have access to Highly Protected Information will have access to Highly 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.
16. 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 Highly Protected Information may not be disclosed to the person subject to the objection.

**Use of Highly Protected Information:**

17. All Qualified Persons must take reasonable precautions to keep Highly Protected Information, secure. Qualified Persons may reproduce Highly Protected Information only to the extent necessary to participate in these proceedings. A Qualified Person may discuss Highly Protected Information obtained under this order only with other Qualified Persons who have obtained the same information.
18. Without the written permission of the designating party, any person given access to Highly Protected Information under this order may not disclose Highly Protected Information for any purpose other than participating in these proceedings.
19. 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.
20. Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Highly 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.

**Duration of Protection:**

21. The Commission will preserve the designation of information as Highly Protected Information 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 Highly Protected Information.



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**I. Persons Qualified pursuant to Paragraph 13: Highly Protected Information**

I have read the Modified Protective Order and agree to be bound by the terms of the order.

I certify that:

I understand that ORS 756.990(2) allows the Commission to impose monetary sanctions if a party subject to the jurisdiction of the Commission violates an order of the Commission.

The party I am associated with has a legitimate and non-competitive need for the Highly Protected Information for this proceeding and not simply a general interest in the information.

By: Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Employer: \_\_\_\_\_

Job Title: \_\_\_\_\_

By: Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Employer: \_\_\_\_\_

Job Title: \_\_\_\_\_

By: Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Employer: \_\_\_\_\_

Job Title: \_\_\_\_\_