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March 29, 2010

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PACIFICORP Application to Implement the Provisions of Senate Bill 76
Docket No. UE 219

Dear Filing Center:

Enclosed please find an original of the Response in Opposition to Motion for Modified Protective Order on behalf of the Industrial Customers of Northwest Utilities in the above-referenced docket. Thank you for your attention to this matter.

Sincerely yours,

/s/ Brendan E. Levenick
Brendan E. Levenick

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Response in Opposition to Motion for Modified Protective Order on behalf of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail where paper service has been waived.

Dated at Portland, Oregon, this 29th day of March, 2010.

/s/ Brendan E. Levenick
Brendan E. Levenick

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 219

In the Matter of	)	
	)	THE INDUSTRIAL CUSTOMERS OF
PACIFICORP, dba PACIFIC POWER	)	NORTHWEST UTILITIES' RESPONSE
	)	IN OPPOSITION TO PACIFICORP'S
Application to Implement Provisions of	)	MOTION FOR MODIFIED
Senate Bill 76.	)	PROTECTIVE ORDER
	)	

I. INTRODUCTION

Pursuant to OAR 860-013-0050(3)(d), the Industrial Customers of Northwest Utilities ("ICNU") files this response in opposition to the Motion for Modified Protective Order ("Motion") of PacifiCorp (or the "Company"). The exclusionary breadth of PacifiCorp's proposed Order is unreasonable and without precedent, and PacifiCorp has not carried its requisite burden to establish that heightened protective measures for purported Highly Confidential Information are necessary. ICNU respectfully requests that PacifiCorp's Motion be denied, and the Administrative Law Judge ("ALJ") adopt the standard General Protective Order to govern the review of confidential material in this proceeding.

II. BACKGROUND

In 2009, the Oregon legislature passed Senate Bill ("SB") 76, later codified as ORS §§ 757.732 to 757.744. Under SB 76, PacifiCorp is authorized to collect surcharges from its customers for the purpose of paying for the costs of Klamath dam removal. ORS § 757.736. The legislature acknowledged that surcharge filings could involve commercially sensitive information. ORS § 757.736(6). Accordingly, the legislature struck a balance in SB 76 between

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protecting potentially proprietary utility information while still allowing intervenors to possess and use such information—i.e., the statute provides that the Commission shall require participants in an SB 76 surcharge docket "to sign a protective order prepared by the commission before *allowing* the participant to obtain and use the information." Id. (emphasis added).

In its Motion, PacifiCorp seeks heightened protection for alleged "Highly Confidential Information" filed in compliance with SB 76. Motion at 1. The statute requires PacifiCorp to file "all analyses or studies that relate to the rate-related costs, benefits and risks for customers of removing or relicensing Klamath River dams." ORS § 757.736(1). Nowhere in SB 76 is any express language or intimation found suggesting that such information was expected to be "highly confidential," or necessitate heightened protection: the statute just references normal, "commercially sensitive information." ORS § 757.736(6). Notwithstanding, and without any supporting explanation, PacifiCorp declares that certain of its analyses and studies are "highly confidential," and requests a modified protective order that would upset the balance between utility and intervenor interests in ORS § 757.736(6). Motion at 1.

PacifiCorp essentially requests three substantive modifications to the standard Commission protective order:

(1) Filing of Highly Confidential Information with the Commission under a special, "Highly Confidential seal";

(2) Complete restriction of access to Highly Confidential Information by anyone "who may participate in any relicensing process" concerning the Klamath River Project ("Project") dam removal; and

(3) Mandatory review of Highly Confidential Information at a safe room with a monitor present, i.e., "at the Company's Portland office or a mutually agreeable location with a Company representative present."

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Id. at 1–2. ICNU strongly opposes the proposed restriction on information access for UE 219 participants, and the institution of a safe room regime. PacifiCorp has requested that its Motion receive expedited consideration, and ICNU's Response is timely.

III. RESPONSE

A. The Information that PacifiCorp Seeks to Protect Is Relevant and Necessary to the Disposition of this Proceeding, and Must Be Disclosed

The Oregon Rules of Civil Procedure apply in proceedings before the OPUC. OAR § 860-011-0000(3); Citizens' Utility Board v. OPUC, 128 Or App 650, 655 (1994) ("CUB"). Information is discoverable under ORCP 36 if it is reasonably calculated to lead to discoverable information. The information regarding the Company's analyses and studies that PacifiCorp seeks to protect in its Motion has a direct bearing on the analysis that the parties and the Commission are required to make regarding a hugely impactful decision in the first SB 76 surcharge docket. Useful access to the information is crucial to informed intervenor involvement, and to the overall conduct of a fair, just, and fully participatory proceeding.

Moreover, SB 76 expressly provides that docket participants are allowed "to obtain and use" commercially sensitive information upon signing a protective order. ORS § 757.736(6). Indeed, PacifiCorp cites the long-running Commission standard on protective orders which recognizes them as "a reasonable means to protect 'the rights of a party to trade secrets and other confidential commercial information' *and* 'to facilitate the communication of information between litigants.'" Motion at 3 (*quoting* Re Investigation into the Cost of Providing Telecommunication Service, OPUC Docket No. UM 351, Order No. 91-500 (1991)) (emphasis added). The Commission recognizes protective orders as a means to *both* protect sensitive information *and* facilitate communication of information. Both objectives are

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to be achieved under a protective order, and this is precisely what ORS § 757.736(6) contemplates in providing for the obtainment and use of information.

Conversely, PacifiCorp's proposed Order would alter the established Commission standard and the legislative mandate in SB 76. In effect, by asking the OPUC to "restrict access" to SB 76 proceeding participants and prohibit certain parties and individuals from ever viewing the highly confidential material. PacifiCorp would use the UE 219 Protective Order to protect sensitive information and to *prohibit*—not facilitate—communication of information between litigants. Similarly, there is no basis to impose the extraordinarily burdensome safe room procedures for standard ratemaking and utility analysis regarding the costs, benefits, and risks associated with the removal of the Klamath dams.

B. PacifiCorp Has Not Met Its Burden for Obtaining a Heightened Protective Order

1. The Alleged Threat to PacifiCorp Is Far Too Speculative to Warrant Heightened Protection

Pursuant to ORCP 36(C), a party to a proceeding may obtain a protective order if the party establishes "good cause" showing that, inter alia, "disclosure would result in a clearly defined and serious injury." CUB, 128 Or App at 659.[1/] For purposes of this standard, "[b]road allegations of harm unsubstantiated by specific examples or articulated reasoning do not satisfy the good cause requirement." Id. at 658.

PacifiCorp has not articulated narrow allegations of harm substantiated by specific examples, as required by CUB. PacifiCorp admits that it "is not now pursuing relicensing of the Project," referring to the potential for proceedings before the Federal Energy

[1/] The factual issue in CUB was whether information should be protected from public disclosure, not whether a party should be denied access to information. But the legal principles in CUB are directly apposite to this case.

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Regulatory Commission ("FERC"). Motion at 1. Notwithstanding, PacifiCorp asks the Commission to completely restrict access of information to SB 76 participants based on detriment that "could" arise in a process in which PacifiCorp is not currently, and may never again be actively involved. Id.

In fact, PacifiCorp has premised its entire Motion upon little more than conjecture. For example, PacifiCorp mentions the "potential" that dams may not be removed; its "plans" to pursue relicensing "[i]f" removal does not occur; that confidential information would merely "inform" a potential "negotiating position" in settlement talks that would occur at some unspecified time in the future; and that information disclosure "could" be used to the detriment of PacifiCorp by a person who "may" participate in processes that are not being pursued. Id. at 1, 3. In sum, PacifiCorp seeks an unprecedented restriction upon discovery with nothing more substantial than indistinct and seemingly improbable potentialities.

The Commission should very carefully examine the speculative nature of the alleged detriment which PacifiCorp "could" suffer if all participants were equally allowed to obtain and use Highly Confidential Information. Id. at 1. PacifiCorp is literally asking the Commission to "restrict access to Highly Confidential Information" to UE 219 participants "who *may* participate in *any* relicensing process for the Project." Motion at 2 (emphasis added). PacifiCorp is asking the Commission for a grant of plenary power to altogether deny information to any UE 219 participant that PacifiCorp claims as a potential threat, based purely on possible strategies for proceedings that may never even occur.

PacifiCorp's Motion is well beyond the pale of allowable protection and should be denied. The Commission would establish dire precedent if a utility could simply piece

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together a string of improbable potentialities to allege that information "would" result in clear, defined, and serious injury—should those potentialities even translate to reality.

2. PacifiCorp Has Failed To Identify that Its Information Necessitates Heightened Protection

A party seeking to protect information must also make a threshold showing "that the information is a trade secret or confidential commercial information." CUB, 128 Or App at 658. PacifiCorp has further failed in carrying its burden by not even attempting to identify why the alleged Highly Confidential Information it seeks to withhold qualifies for heightened protection beyond the standard protective order. There are six factors impacting consideration on this issue:

> (1) The extent to which the information is known outside the business;
> (2) The extent to which it is known by employees and others involved in the business;
> (3) The extent of measures taken to safeguard the secrecy of the information;
> (4) The value of the information to the business or its competitors;
> (5) The amount of effort or money expended by the business in developing the information; and
> (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 658–59. Quite simply, ICNU has nothing specific to rebut, and the Commission has nothing specific on which to base a finding that PacifiCorp's purported Highly Confidential Information merits heightened protection, because the Motion does not apply the CUB factors. Consequently, PacifiCorp has not established "good cause" for a Modified Protective Order.

The summary nature of PacifiCorp's identification of material as "Highly Confidential" is manifest on the first page of its Motion. PacifiCorp simply informs the

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Commission that it has studies and analyses in compliance with statute, and that it "noted" in its filing "that it had certain analyses and studies which were highly confidential." Motion at 1. In the remaining pages of its Motion, PacifiCorp never discusses the CUB factors in relation to why certain information must receive heightened protection under a Modified Protective Order. PacifiCorp's request for a Modified Protective Order would also be woefully deficient under proposed rules currently under review in AR 535, which require a party to show, inter alia, "[t]he exact nature of the information involved" and "[a] detailed description of the intermediate measures, including selected redaction, explored by the parties . . . ." Proposed OAR 860-001-0100(4).

While PacifiCorp makes numerous claims about purported harms that may accrue to the Company, neither the Commission nor any other party can do more than guess about why "Highly Confidential" designations are justified or why modified protections are necessary. PacifiCorp's Motion should not be granted in the absence of such discussion, and any attempt by PacifiCorp to carry its burden in a reply to ICNU's response should be rejected in order to avoid sanctioning a sandbagging approach to Commission motion practice.

C. A General Protective Order Would Provide Adequate Protection

1. The OPUC Already Forbids Participants from Using Confidential Information in Other Proceedings

The Commission's standard General Protective Order already provides adequate protection for PacifiCorp. It provides that persons granted access to confidential information "shall not use or disclose the Confidential Information for any purpose other than the purposes of preparation for and conduct of *this proceeding*." Motion, Attachment B, ¶ 14 (¶16 in redline) (emphasis added). Unless the author of the confidential material agrees otherwise, participants

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in any Commission proceeding employing the General Protective Order are forbidden from using information in any other proceeding—whether before the Commission, a state or federal court, or even a federal agency like the FERC. In fact, this is even more protection than SB 76 affords, which provides only that "[t]he *commission* may not use any commercially sensitive information . . . for any purpose other than determining whether the imposition of surcharges . . . results in rates that are fair, just and reasonable." ORS § 757.736(6) (emphasis added).

PacifiCorp contends that disclosure of purportedly sensitive information to anyone "who may participate in" FERC settlement discussions "would be detrimental to the interests of PacifiCorp and its customers." Motion at 3. This argument ignores the protection afforded in the Commission's standard General Protective Order which already protects against any use or disclosure in any other proceeding. Moreover, UE 219 participants like ICNU *are* comprised of PacifiCorp customers—it is nonsense to state that disclosure of information to PacifiCorp customers will be detrimental to the interests of those same customers.

Attorneys and consultants who regularly practice and testify before the Commission are often privy to confidential information in numerous dockets which *could* be misused to gain advantage in other proceedings. This is part and parcel of modern reality, and is one reason why codes of ethics and standards of conduct govern attorney practice and agency proceedings. In short, attorneys and consultants routinely access confidential information in one proceeding that they are forbidden from using in a different proceeding. PacifiCorp has not explained why this provision of the standard General Protective Order is not sufficient to protect its alleged confidential material.

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Finally, in the case of consultants, information is normally destroyed upon completion of a proceeding, absent consent of the author of the confidential material. The danger of consultant misuse of Highly Confidential Information in UE 219 is all the more remote since the OPUC has a statutory duty to render a decision in this docket within six months. ORS § 757.736(4). Even in the unlikely event that PacifiCorp reinstitutes relicensing proceedings with the FERC, consultant information gained in UE 219 should destroyed by that time.

2. Complete Restriction on Information Access Is Not Merited

PacifiCorp argues that there is precedent for heightened protections which completely prohibit the disclosure of information to certain proceeding participants. Motion at 4. The circumstances for such protection are completely inapposite to UE 219. The Special Protective Order issued for PacifiCorp's 2008R-1 solicitation process prohibited *bidding* parties from reviewing PacifiCorp's RFP shortlists and shortlist work papers of their competitors' bids. Re PacifiCorp, OPUC Docket No. 1368, Order No. 09-160 (May 4, 2009). In UE 219, however, there are no parties bidding for PacifiCorp proposals, nor is there even a concurrent and active process which could implicate a potential misuse of information. The rationale behind restricting access to active bidders of competitive shortlist information from other bidders in the very same process in which bidding occurs is self-evident; but this common sense rationale has no application to SB 76 proceedings.

PacifiCorp's analogy to SB 408 provides further evidence against reading any sanction within SB 76 for a complete restriction of intervenor discovery access. According to PacifiCorp, the legislature used language in SB 76 that was "very similar" to that used in SB 408, the tax true-up statute, to balance the same two interests of utilities and intervenors.

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Motion at 2. Specifically, SB 408 provides: "An intervenor . . . may, upon signing a protective order prepared by the commission, obtain and use the information obtained by the Commission. . . according to the terms of the protective order." ORS § 757.268(11).

The Commission has always interpreted ORS § 757.268(11) as *allowing* full disclosure to intervenors of information received by the Commission, so long as a protective order is signed.[2/] For instance, when issuing the protective order governing all SB 408 proceedings, the Commission stated that it "*must* determine the form of the protective order that, upon signing, *will give intervenors access* to the tax reports pursuant to Section 3(11)." Re PacifiCorp, OPUC Docket No. UE 177, Order No. 06-033 at 2 (Jan. 25, 2006) (emphasis added).

Nevertheless, despite alleging the "very similar" language in ORS § 757.736(6) and ORS § 757.268(11), PacifiCorp has moved the Commission to apply a wholly separate construction upon the provision in SB 76. That is, PacifiCorp has requested a modified protective order in UE 219 which would "restrict access," or *not allow* some participants to receive any Highly Confidential Information. Motion at 2. Plainly, however, assuming PacifiCorp's construction, the "very similar" terms of ORS § 757.736(6) can only be reasonably interpreted as also mandating full "access" to information.

3. Safe Room Procedures Are Not Justified

As an initial matter, the Commission's past election to use safe room mechanisms is being reviewed by the Oregon Court of Appeals, and may be invalidated. But even according to the Commission's rationale, a safe room regime beyond the protections of a General Protective Order is inappropriate in SB 76 proceedings. In issuing an SB 408 safe room order, the Commission

[2/] The OPUC's election to implement *safe room* procedures in SB 408 Protective Orders is currently being reviewed by the Oregon Court of Appeals. ICNU continues to maintain that the safe room regime instituted in SB 408 proceedings is contrary to ORS § 757.268(11).

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premised its entire discussion on the observation that "[n]o party questions the sensitivity of the information contained in the SB 408 tax reports or the harm presented by its public release." Re PacifiCorp, Order No. 06-033 at 3. Conversely, ICNU *does* question the sensitivity of alleged Highly Confidential Information PacifiCorp seeks to protect, because PacifiCorp has eschewed identification of the CUB factors which would demonstrate the highly confidential nature of the information.

The "harm presented by . . . public release" of confidential utility tax information in SB 408 proceedings is a reference to a Portland newspaper leak. Id. at 4. Indeed, the Commission noted the extreme sensitivity of a public disclosure of tax information by pointing out that the offense is criminally punishable under ORS § 314.835. Id. SB 76 does not concern tax reports, and PacifiCorp has not established that the SB 76 analysis is anything other than the standard confidential utility analysis that is typically reviewed under a standard General Protective Order. There is also no history of unquestionable public harm that may be occasioned by dam removal calculations or any other confidential PacifiCorp documents having been released to the press. The initial premise, therefore, on which the OPUC justified safe room procedures in SB 408 proceedings, simply does not exist in UE 219.

Ultimately, the Commission stated it had "*no choice* but to adopt a safe-room discovery mechanism" in SB 408 proceedings, but the Commission inextricably tied its decision to "the significant harm that might occur from the disclosure of the *tax* information and the regrettable risk of disclosure that *now* exists." Id. (emphasis added). This decision was occasioned by an aberrational event within the narrow purview of tax proceedings. The implementation of safe room procedures in Order No. 06-033 is *not* broad new precedent casting under which utilities may hereafter routinely funnel allegedly "sensitive" information into confined spaces before the watchful

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eyes of a monitor. Crucially, the Commission did not phrase its order in expansive terms readily applicable to all manner of sensitive information, but specified that "absent the safe-room protection, we cannot provide reasonable assurance that the utilities' highly sensitive *tax* information will be protected." Id. (emphasis added). The specific sensitivity of "tax information," not a general consideration of sensitivity, occasioned a safe room regime.

Lest there be any doubt about the application of safe room mechanisms to other dockets, the Commission spelled out its intent in Order No. 06-033 in unmistakably plain language: "we emphasize that the circumstances surrounding this request are *unique*, and that *this order should not be used as general precedent* in support of the use of a safe-room discovery mechanism." Id. at 5 (emphasis added). Safe room mechanisms should not be applied to non-tax related SB 76 discovery in UE 219.

IV. CONCLUSION

PacifiCorp's Motion is an unacceptable attempt to limit the participation of customers and other parties in this proceeding. The Commission has previously indicated that utilities should not be given "too much control over the flow of information in [a] case." Re PacifiCorp, OPUC Docket Nos. UM 995/UE 121/UC 578, Ruling (March 7, 2001). Furthermore, PacifiCorp's Motion seeks to dramatically shift the control over discovery to the Company. If participants do not have equal access to information, they will be disadvantaged in making their case. As a policy matter, this Commission should reaffirm that all parties in any case have the same rights and opportunities to put on their case. Moreover, granting PacifiCorp this power is inconsistent with ORS § 757.736(6) and ORS § 757.268(11), ORCP 36(C), standard protective order terms, and established precedent.

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PacifiCorp has the burden of proof to demonstrate that UE 219 participants should be denied access to directly relevant information, and PacifiCorp has failed to meet its burden. Furthermore, there is no basis in this docket for asserting that one party may have access to confidential material while denying that access to other parties. Thus, for all the aforementioned reasons, ICNU respectfully requests that the ALJ deny PacifiCorp's Motion for Modified Protective Order.

Dated this 29th day of March, 2010.

Respectfully submitted,

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