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April 2, 2010

## VIA ELECTRONIC FILING AND FIRST CLASS MAIL

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 2148  
Salem, OR 97308-2148

**Re: Docket UE 219 – In the Matter of PacifiCorp’s Application to Implement Provisions of Senate Bill 76.**

Enclosed for filing in the above captioned docket are the original and one copy of Motion for Leave to File a Reply and Reply to ICNU’s Response in Opposition to Motion for Modified Protective Order.

A copy of this filing has been served on all parties to this proceeding as indicated on the attached Certificate of Service.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Amie', with a long horizontal flourish extending to the right.

Amie Jamieson

Enclosure

cc: Service list

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing document in UE 219 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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DATED: April 2, 2010



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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 219**

In the Matter of:

PACIFICORP d/b/a Pacific Power's

Application to Implement the Provisions of  
Senate Bill 76.

**MOTION FOR LEAVE TO FILE A REPLY  
AND  
REPLY TO ICNU'S RESPONSE IN  
OPPOSITION TO MOTION FOR  
MODIFIED PROTECTIVE ORDER**

PacifiCorp d/b/a Pacific Power (the "Company") submits this Motion for Leave to File a Reply and Reply to the Industrial Customers of Northwest Utilities' ("ICNU's") Response in Opposition to PacifiCorp's Motion for Modified Protective Order ("Response") to the Public Utility Commission of Oregon ("Commission"). The Commission's rules do not explicitly permit or deny the filing of a reply to a response to a motion. It is therefore in the Commission's discretion to allow such a reply. PacifiCorp's reply is limited to issues raised in ICNU's Response and provides the Commission with information necessary to make a just determination of the issues presented in the Company's Motion for Modified Protective Order ("Motion").<sup>1</sup> PacifiCorp therefore respectfully requests that the Commission accept this Reply to ICNU's Response.

**I. ARGUMENT**

Given the significant risk of disclosure or improper use of Highly Confidential Information that exists in this proceeding, PacifiCorp's proposed additional protections are necessary to prevent harm to the Company's customers in any future relicensing proceedings or settlement discussions. Moreover, the additional protections are not only consistent with

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<sup>1</sup> See OAR 860-011-0000(6). In addition, allowing PacifiCorp's reply is consistent with the Commission's general practice of allowing the party that bears the burden to have the last word on the issue. See *Idaho Power Co. 2009 Integrated Resource Plan*, Docket LC 50, Ruling at 1-2 (Mar. 24, 2010).

1 SB 76, but are required to prevent the use of commercial information for a purpose other than  
2 that allowed by SB 76.

3 **A. PacifiCorp Has Presented Good Cause to Implement Heightened Protections.**

4 **1. Heightened Protection of Highly Confidential Information is Necessary to**  
5 **Protect the Integrity of Any Future Relicensing Proceedings Because of**  
6 **the Increased Risk of Disclosure and Improper Use.**

7 Heightened protection of Highly Confidential Information is necessary because the  
8 Commission's standard protective order cannot adequately protect the highly sensitive  
9 information that PacifiCorp will be filing in this proceeding. First, the reality is that past  
10 protective orders have not consistently protected against the disclosure and use of highly  
11 sensitive information. ICNU attempts to discount the protective order breach in Docket  
12 UM 1121 that formed the basis for the Commission's finding in the SB 408 dockets that it "had  
13 no choice but to adopt a safe-room discovery mechanism to govern the use of highly  
14 confidential information in these dockets." *Re. PacifiCorp's Tariffs Establishing Automatic*  
15 *Adjustment Clauses under the Terms of SB 408, Docket UE 177, Order No. 06-033 at 4 (Jan.*  
16 *25, 2006) ["Order No. 06-033"]. The Commission's evaluation of the potential for disclosure in*  
17 *the SB 408 dockets is instructive for this proceeding. As was the case in the UM 1121 and*  
18 *the SB 408 dockets, the issues raised in this docket are highly politicized and publicized,*  
19 *increasing the risk of disclosure. See id.*

20 In addition to this increased politicization and publicity, this proceeding is likely to  
21 include intervenors who do not usually participate in Commission proceedings and are not  
22 familiar with the Commission's prohibitions on both using and disclosing confidential  
23 information. Therefore, there is no reasonable basis to find that the increased risk of  
24 disclosure that led to the Commission instituting higher protections in the SB 408 dockets  
25 does not also exist in this docket. The Commission should therefore institute similar  
26 protections in this proceeding.

1 More recent experience shows that the Commission's heightened protections may not  
2 protect against use and disclosure of highly confidential material. For example, the  
3 Commission recently terminated a party's participation in a proceeding for improperly using  
4 highly confidential material. *Re. Verizon Comm. Inc. and Frontier Comm. Corp. Joint*  
5 *Application for an Order Declining Jurisdiction*, Docket UM 1431, Order No. 09-409 at 6  
6 (Oct. 14, 2009). The Commission found that a party in that proceeding improperly used highly  
7 confidential material in a proceeding in another state. *Id.* at 5-6. Even with the highly  
8 confidential designation in that case, the Commission's protective order did not prevent the  
9 improper use in a different proceeding—exactly what PacifiCorp is concerned may happen in  
10 this case. *See id.* at 5-6. The Commission's experiences in UM 1431 and UM 1121 show that  
11 it would be unreasonable to assume that the Commission's standard protections are enough  
12 to protect highly sensitive material from use and disclosure in politicized and publicized  
13 dockets. PacifiCorp's proposed protections are reasonably calculated to prevent the type of  
14 improper use and disclosure that occurred in UM 1431 and UM 1121.

15 More importantly, PacifiCorp's actual experience of improper disclosure of confidential  
16 material related to the issues in this proceeding provide a basis for heightened protection.  
17 Significant leaks of PacifiCorp's confidential information related to the Klamath dams have  
18 already occurred during negotiation of the Klamath Hydroelectric Settlement Agreement  
19 ("KHSA"). Consequently, the heightened risk of disclosure is a certainty in this proceeding,  
20 and the protections proposed by PacifiCorp are necessary to prevent it.

21 Second, even if the increased risk of improper disclosure did not exist, the  
22 Commission's standard protective order is insufficient to prevent use—even if unintentional—  
23 of the Highly Confidential Information by individuals who may later participate in relicensing  
24 negotiations. While allowing all parties to review the Highly Confidential Information at the  
25 Company's offices may limit improper disclosure, such a procedure cannot prevent those  
26 parties from using the information in a related proceeding. Only limiting review to parties and

1 individuals who will not participate in any future relicensing proceedings related to the Klamath  
2 facilities will prevent such misuse of the information. Once parties have knowledge of Highly  
3 Confidential Information, they cannot be presumed to forget it before participating in  
4 relicensing proceedings. Therefore, the only way to prevent the use of the information and  
5 protect the integrity of potential future relicensing proceedings is to institute heightened  
6 protections such as those proposed in PacifiCorp's Motion.

7 ICNU's Response implies that PacifiCorp will decide which parties may view the Highly  
8 Confidential Information. To the contrary, the party itself will determine whether it is likely to  
9 participate in relicensing proceedings. If a party commits to not participating in any future  
10 relicensing proceedings related to the Klamath facilities, it will have access to the Highly  
11 Confidential Information under the terms of a protective order. PacifiCorp does not expect  
12 that this restriction will apply to parties that usually participate in rate proceedings—namely  
13 Staff, ICNU, and the Citizens' Utility Board of Oregon. Such parties would have access to the  
14 Highly Confidential Information, subject to conditions related to attorneys and consultants who  
15 may be involved in relicensing. The Commission has approved special protective orders that  
16 limit some parties' or individuals' ability to view certain highly sensitive information in the past.  
17 *See, e.g., Re. NW Natural Gas Co. Annual Purchased Gas Cost and Technical Rate*  
18 *Adjustments*, Docket UG 187, Order No. 09-341 (Sept. 1, 2009); *Re. Verizon Comm. Inc. and*  
19 *Frontier Comm. Corp. Joint Application for an Order Declining Jurisdiction*, Docket UM 1341,  
20 Highly Confidential Protective Order, Order No. 09-273 (July 17, 2009). Given the harm that  
21 would result from use of the Highly Confidential Information by parties and individuals that  
22 participate in future relicensing proceedings related to the Klamath facilities and the significant  
23 risk of such use, such restrictions are appropriate in this proceeding.

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1           **2.      PacifiCorp’s Explanation of Highly Confidential Information and Potential**  
2           **Harm Resulting from Use or Disclosure of Such Information is Consistent**  
3           **with Commission Precedent.**

3           ICNU claims that PacifiCorp did not meet the standard of showing that the material  
4 sought to be protected constitutes a trade secret or confidential commercial information.  
5 Response at 6. To the contrary, the Company explained that certain analyses that would  
6 inform its negotiating position in a potential future relicensing proceeding or settlement  
7 discussions are highly confidential and could be used by other parties to the detriment of  
8 PacifiCorp and its customers, and that the Company is taking steps before this Commission to  
9 safeguard this information. PacifiCorp has not designated its primary economic analysis as  
10 highly confidential. The summary results of this analysis, which is the primary analysis on  
11 which PacifiCorp relied to make its decision to execute the KHSA, were attached to the  
12 testimony of Andrea L. Kelly as Exhibit PPL/202. Consistent with the terms of the KHSA, all  
13 qualified parties under the Commission’s standard protective order will be provided with this  
14 confidential information. However, there are additional sensitivities related to the primary  
15 analysis that further assess the risks to customers in the absence of the settlement that must  
16 be subject to additional protections to prevent improper use and disclosure. Moreover,  
17 PacifiCorp’s proposed protective order is limited to trade secrets and provides that only  
18 material meeting the definition of trade secrets may be designated as confidential or Highly  
19 Confidential.

20           ICNU also incorrectly implies that PacifiCorp must show that harm will certainly result if  
21 the requested protective measures are not granted. Response at 4-5. ICNU’s proposed  
22 standard is not the one used by the Commission to evaluate the need for additional protection.  
23 The Commission weighs the “harm that *might* occur from the disclosure” and the “risk of  
24 disclosure” to determine whether additional protections are necessary. Order No. 06-033 at 4  
25 (emphasis added). PacifiCorp is not required to show that such harm will certainly result  
26 absent additional protection. The Commission cannot, as ICNU proposes, ignore the potential



1 for harm resulting from the improper use or disclosure of the Highly Confidential Information to  
2 undermine future relicensing proceedings.

3 Finally, PacifiCorp's description of the Highly Confidential Information and explanation  
4 of harm to the Company's competitive position in the event of disclosure of the information is  
5 consistent with the level of detail included in prior motions for protection granted by the  
6 Commission. *See, e.g., Re. Verizon Comm. Inc. and Frontier Comm. Corp. Joint Application*  
7 *for an Order Declining Jurisdiction*, Docket UM 1431, Motion for Highly Confidential Protective  
8 Order (July 1, 2009) (granted in Order No. 09-273); *Re. PacifiCorp Request for Approval of a*  
9 *2008R-1 Solicitation Process for New Renewable Resources*, Docket UM 1368, Motion for  
10 Additional Protection (Apr. 24, 2009) (granted in Order No. 09-160); *Re. PacifiCorp's Tariffs*  
11 *Establishing Automatic Adjustment Clauses under the Terms of SB 408*, Docket UE 177,  
12 Motion for Protective Order (Dec. 13, 2005) (granted in Order No. 06-033). The Commission  
13 should reject ICNU's attempt to institute a higher standard for granting protective orders than  
14 the Commission has employed in the past.

15 **B. The Additional Protections Proposed by PacifiCorp Are Consistent with SB 76.**

16 The protections proposed by PacifiCorp, including the limitations and conditions  
17 related to parties and individuals who may participate in future relicensing proceeding related  
18 to the Klamath facilities, are consistent with SB 76. ICNU claims that SB 76 "expressly  
19 provides that docket participants are allowed 'to obtain and use' commercially sensitive  
20 information upon signing a protective order." Response at 3. In fact, SB 76 does not include  
21 such a directive. The statute directs the Commission to "require any person participating in a  
22 proceeding relating to the surcharge to sign a protective order prepared by the commission  
23 before allowing the participant to obtain and use the information." ORS 757.736(6). SB 76  
24 does not require access, but merely predicates such access on a protective order prepared by  
25 the Commission. SB 76 does not prohibit the limits on disclosure proposed by PacifiCorp. In  
26 fact, allowing access under a protective order that is insufficient to prevent use of the

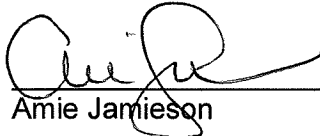
1 commercially sensitive information for "any purpose other than determining whether the  
2 imposition of surcharges under the terms of the final agreement results in rates that are fair,  
3 just and reasonable" is contrary to the intent of the statute. See ORS 757.736(6).

4 **II CONCLUSION**

5 For the foregoing reasons and those set forth in PacifiCorp's Motion, the Company  
6 respectfully requests that the Commission enter the Modified Protective Order proposed by  
7 PacifiCorp. Anything less would result in a significant risk of improper use and disclosure of  
8 Highly Confidential Information, contrary to SB 76.

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10 DATED: April 2, 2010.

MCDOWELL RACKNER & GIBSON PC

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