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March 1, 2022

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: LC 77— PacifiCorp's Response to Sierra Club's Objection to PacifiCorp's Designation of Certain Information as Confidential

PacifiCorp d/b/a Pacific Power encloses for filing its Response to Sierra Club's Objection to PacifiCorp's Designation of Certain Information as Confidential in the above-referenced docket.

Informal inquiries may be directed to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Shelley McCoy
Director, Regulation

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 77

In the Matter of
PACIFICORP, d/b/a PACIFIC POWER,
2021 Integrated Resource Plan.

PACIFICORP'S RESPONSE TO
SIERRA CLUB'S OBJECTION TO
PACIFICORP'S DESIGNATION OF
CERTAIN INFORMATION AS
CONFIDENTIAL

I. INTRODUCTION

In accordance with Paragraph 9 of the General Protective Order issued by the Public Utility Commission of Oregon (Commission) in this docket,¹ PacifiCorp d/b/a Pacific Power (PacifiCorp or Company), responds to Sierra Club's Written Objection to PacifiCorp's Designation of Certain Information as Confidential (Sierra Club Objection). The information at issue concerns forecasted annual emissions for Jim Bridger Units 1 and 2 for the years 2021 through 2040, which was provided in response to a Staff data request in the above referenced proceeding. Because the challenged information qualifies as a protected "trade secret or other confidential research, development, or commercial information" under ORCP 36(C)(1), the Company's confidential designation is appropriate. This designation protects customers against harmful, public disclosure of the Company's trade secrets. PacifiCorp has provided the confidential information under the protective order, which appropriately balances the need to protect against harmful disclosure with the need for transparency and access.

¹ *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Order No. 21-271 (Aug. 30, 2021).

Sierra Club challenges the Company’s designation, claiming that “greenhouse gas emissions are not typically withheld from the public” and referenced information the Company reports to the United States Environmental Protection Agency (EPA) as an example.² However, Sierra Club errs in claiming that this information is typically made available to the public and ignores the important distinction between publicly available historic emissions reported to the EPA and the commercially sensitive and confidential nature of projected emissions data.

The Commission should confirm the Company’s designation of the data as confidential and deny Sierra Club’s objection.

II. BACKGROUND

On September 1, 2021, PacifiCorp filed its 2021 Integrated Resource Plan (IRP) in docket LC 77. Action Item 1c of the Company’s 2021 IRP includes the natural gas conversion of Jim Bridger Units 1 and 2 by 2024. During the course of the proceeding, stakeholders have propounded numerous data requests on the Company to which it has responded. On January 13, 2022, Staff propounded data requests OPUC 088 through 111 on PacifiCorp, which included data request OPUC 097. OPUC 097 asked the Company to “provide annual emissions for the Jim Bridger 1 and 2 units, including emissions from before and after conversion to natural gas.” PacifiCorp responded by providing an excel spreadsheet with the forecasted annual emissions for Jim Bridger Units 1 and 2 for the years 2021 through 2040 based on the PLEXOS model dispatch of the units. PacifiCorp appropriately designated the excel spreadsheet provided in response to data request OPUC

² Sierra Club Objection at 1.

097 as confidential under the protective order. Sierra Club now challenges PacifiCorp’s designation of the forecasted emissions data as confidential.

III. LEGAL STANDARD

The Commission’s general protective order is “specifically tailored to safeguard confidential commercial information from unauthorized disclosure.”³ Under the terms of the Commission’s general protective order, “any party may designate as Protected Information any information that the party reasonably determines: (1) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information); and (2) Is not publicly available.”⁴ ORCP 36(C) limits disclosure of “a trade secret or other confidential research, development, or commercial information.”⁵ Under ORS 646.461(4), “trade secret” are defined as

information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁶

³ *In re: Qwest Corp.*, Docket No. UM 1205, Order No. 03-533 at 6 (Aug. 28, 2003).

⁴ Order No. 21-271, App. A at 1.

⁵ ORCP 36C (1).

⁶ In addition, “trade secrets” is a defined term in the Oregon Public Records Act. ORS 192.345(2) (defining “trade secrets” to include “any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.”). The two definitions are substantively similar, and Order No. 21-271 requires the Company to demonstrate that the confidential material is protected under *either* ORS 646.461(4) *or* ORS 192.345(2). Order No. 21-271, App. A at 2.

Oregon courts examine several factors when determining whether information constitutes a trade secret. In the *Citizens' Utility Board of Oregon v. Oregon Public Utility Commission*, the Oregon Court of Appeals set forth six factors establishing a trade secret:

(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.⁷

Later, in *Pfizer v. Oregon Department of Justice*, the Oregon Court of Appeals provided a three-part test to determine what constitutes a trade secret: (1) derives economic value from not being generally known, (2) is subject to reasonable efforts to maintain secrecy; and (3) disclosure would result in significant harm.⁸

A party may challenge the designation of information as confidential under the Commission's general protective order.⁹ Once a designation is challenged, the party seeking protection must demonstrate that the challenged information is covered under the Oregon Public Records Act, ORS 192.311 *et seq.*, or the Uniform Trade Secrets Act, ORS 646.461(4).¹⁰ If the parties are unable to resolve a dispute over a confidential designation informally, a party may file an objection to the confidential designation.¹¹

⁷ *Citizens' Util. Bd. of Oregon v. Oregon Pub. Util. Comm'n*, 128 Or. App. 650, 658-59 (1994) (internal citations omitted).

⁸ *Pfizer, Inc. v. Oregon Department of Justice*, 254 Or. App. 144, 160-162 (2012).

⁹ Order No. 21-271, App. A at 2.

¹⁰ Order No. 21-271, App. A at 2.

¹¹ Order No. 21-271, App. A at 2.

IV. ARGUMENT

A. The information designated as confidential is covered by the Uniform Trade Secrets Act, ORS 646.461(4).

The information that PacifiCorp designated as confidential in its response to OPUC 097 clearly falls within the scope of ORCP 36(C) and constitutes a “trade secret” under ORS 646.461(4) because it is non-public information that is proprietary and commercially sensitive. Disclosure of the confidential information would harm customers by placing the Company at a commercial disadvantage.

First, forecasted emissions from any of the Company’s coal-fueled generation units are not public information “known outside [PacifiCorp].”¹² Indeed, that is the heart of the only justification offered by Sierra Club in its objection that this information is not information typically withheld from the public and provides the historical information that the Company reports to the EPA as an example. Not only is this unit-specific forecasted emissions information not publicly available, only a limited number of PacifiCorp’s employees have access to PacifiCorp’s forecasted emissions information for Jim Bridger Units 1 and 2, as demonstrated by the signatory pages PacifiCorp has filed under the protective order.

Second, PacifiCorp has taken reasonable efforts to “maintain the secrecy”, in other words, protect the confidentiality of, forecasted emissions data for individual coal units.¹³ PacifiCorp has never publicly disclosed comparable forecasted emissions data in any other proceeding. Also, as discussed further below, it is not the type of historical plant emission information provided or reported through the EPA that is publicly available.

¹² *CUB*, 128 Or. App. at 659.

¹³ ORS 646.461(4), *CUB*, 128 Or. App. at 659; *Pfizer*, 254 Or. App. at 161.

Third, disclosure of the forecasted emissions data would result in substantial harm to PacifiCorp and its customers because “other persons . . . can obtain economic value from its disclosure or use” or “gain value derived because it is not generally known.”¹⁴ In its 2021 IRP, PacifiCorp indicated that it would initiate the natural gas conversion of Jim Bridger Units 1 and 2 by 2024. The detailed, unit-specific forecasted emissions data provided in response to OPUC 097 could be used by suppliers and contractors to glean information about the Company’s emission control requirements at Jim Bridger Units 1 and 2, placing the Company at a competitive disadvantage in the marketplace if the Company requests bids on emission control equipment or technology. When PacifiCorp engages in requests for proposal (RFP) processes for emission control retrofits, it requires RFP respondents to maintain confidentiality of sensitive and protected data relating to unit operation, including projected emissions data. Providing the information at question publicly would give insight of the potential costs the Company would be willing to pay to control the emissions at Jim Bridger Units 1 and 2, which could artificially increase the bids submitted in an RFP process. This potential harm to PacifiCorp would flow through to its customers because they face increased costs when the Company is economically disadvantaged in commercial transactions. Furthermore, projected emissions data from Jim Bridger Units 1 and 2 could be used by power market participants to glean or estimate the expected dispatch of the units, which could in turn put PacifiCorp at a disadvantage when buying or selling power. Each of these harms would flow through to PacifiCorp’s customers.

¹⁴ ORS 646.461(4); *CUB*, 128 Or. App. at 659 (examining “the value of the information to the business or its competitors” to establish trade secret); *Pfizer*, 254 Or. App. at 161-162 (examining whether information “gain value because it is not generally known” and “harm must be significant,” citing *Kaib’s R.P.H. Agency, Inc. v. Smith*, 237 Or. App. 06, 103 (2010) and *CUB*, 128 Or. App. at 658 (1994).

Sierra Club incorrectly asserts that the forecasted emissions data cannot cause PacifiCorp a competitive disadvantage or otherwise harm customers because PacifiCorp reports historic emissions to the EPA.¹⁵ Sierra Club’s misleading assertion conflates the historic emission data provided to the EPA and the forecasted emissions data that results from the modeling for the Company’s 2021 IRP – the data sets are completely different. The *historical* emissions data that is reported to the EPA and made publicly available on the Clean Air Markets Program Data website is collected by continuous emissions monitoring equipment that is certified, maintained, and operated in accordance with federal regulations, specifically Title 40 of the Code of Federal Regulation Part 75. In contrast, the *forecasted* emission provided in the response data request OPUC 097 is the PLEXOS output of model dispatch and the result of assumptions made in the 2021 IRP. The two data sets are simply not comparable.

Fourth, PacifiCorp has expended significant resources to develop the modeling techniques and input assumptions underlying forecasted emissions data inputs and outputs from the PLEXOS modeling.¹⁶ Unit-specific forecast data pertaining to emissions, and therefore directly pertaining to generation, conservatively results from a minimum of two years’ work by a team of expert analysts using highly sophisticated and costly software and in consultation with the software provider.

Fifth, it would be extremely difficult for the forecasted emission inputs and outputs to be “properly acquired or duplicated by others” because the inputs and outputs rely on proprietary modeling.¹⁷ PacifiCorp’s modeling is specific to its system and represents

¹⁵ Sierra Club Objection at 1.

¹⁶ *CUB*, 128 Or. App. at 659 (examining the amount of effort or money expended by the business in developing the information” to establish trade secret).

¹⁷ *CUB*, 128 Or. App. at 659 (system that “could not be easily duplicated by others” found to be a trade secret).

comprehensive interactions including future resources such as proxy resources, that outside parties may be able to roughly estimate but cannot replicate at a unit-level of detail.

B. PacifiCorp’s designation of confidential information is consistent with the Commission’s IRP guidelines and precedent.

The Commission has long-recognized that the resource planning process must protect competitive secrets. When the Commission first adopted integrated resource planning in 1989, it adopted “key procedural elements” of resource planning, including that “[c]ompetitive secrets must be protected, either through the procedures presently used by the Commission, such as protective orders, or through some other mechanism.”¹⁸

When the Commission adopted its IRP guidelines in 2007, it affirmed that the protection of competitive secrets remained a “key procedural element” of utility resource planning.¹⁹ Guideline 2 includes a specific provision related to the preservation of confidential information in the context of resource planning:

While confidential information must be protected, the utility should make public, in its plan, any non-confidential information that is relevant to its resource evaluation and action plan. *Confidential information may be protected through use of a protective order, through aggregation or shielding of data, or through any other mechanism approved by the Commission.*²⁰

While resource planning involves extensive public participation and it is intended to be transparent and open, the Commission has consistently recognized that certain information must be reasonably provided on a confidential basis as a trade secret when public disclosure would harm customers. Such is the case here.

¹⁸ *In the Matter of the Investigation into Least-Cost Planning for Resource Acquisitions by Energy Utilities in Oregon*, Docket No. UM 180, Order No. 89-507 at 5 (Apr. 20, 1989).


¹⁹ Order No. 07-002 at 1-2.

²⁰ Order No. 07-002 at 8 (emphasis added).

V. CONCLUSION

Because the information challenged by Sierra Club qualifies as a protected “trade secret or other confidential research, development, or commercial information,” PacifiCorp respectfully requests that the Commission confirm the Company’s designation of the information as confidential under the protective order and deny Sierra Club’s objection.

Respectfully submitted this 1st day of March, 2022.

By: 

Carla Scarsella
Deputy General Counsel