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October 15, 2021

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 Motion for a Modified Protective Order

PacifiCorp d/b/a Pacific Power hereby submits for filing its Motion for a Modified Protective Order in the above docket.

Please direct any inquiries about this filing to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Shelley McCoy
Director, Regulation

Enclosure

**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 MOTION FOR
MODIFIED PROTECTIVE ORDER
Expedited Consideration Requested

I. INTRODUCTION

Under Oregon Administrative Rules (OAR) 860-001-0420 and OAR 860-001-0080(3), PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) moves the Public Utility Commission of Oregon (Commission) for entry of a Modified Protective Order in its 2021 Integrated Resource Plan (IRP) proceeding. Specifically, PacifiCorp requests the Administrative Law Judge issue the Modified Protective Order attached as Appendix A to this Motion. A Modified Protective Order would provide additional protection for highly commercially sensitive, non-public information related to PacifiCorp's coal supply agreements, and fueling strategy at its coal-fired generation facilities.

On August 30, 2021, the Administrative Law Judge granted Protective Order No. 21-271 in this proceeding. Following the entry of this general protective order, intervenor Sierra Club issued a data requests seeking coal supply and transportation agreements for the Company's owned and co-owned coal units and long-term fuel plans for the Company's coal plants (Sierra Club Data Requests 3.6 and 3.7). For the reasons set forth below, additional safeguards are necessary to protect the highly confidential nature of the information that is responsive to this request.

Through email correspondence, the Company conferred with Parties to this proceeding and has been authorized to represent that the Northwest & Intermountain Power Producers Coalition and the Renewable Energy Coalition take no position on the Company's motion. Sierra Club opposes the Company's motion.¹

II. REQUEST FOR ADDITIONAL PROTECTION

OAR 860-001-0080(3)(a) contains five requirements for seeking a modified protective order. This motion addresses each of these requirements in the following subsections.

A. Exact Nature of the Information Involved (OAR 860-001-0080(3)(a)(A)).

The documents that are responsive to Sierra Club Data Request 3.6 and 3.7 include PacifiCorp's coal supply and transportation and long-term-fuel plan for its coal plants that, if disclosed, would reveal PacifiCorp's proprietary strategies for managing its coal supplies at all of its coal-fired generation facilities. Release of this information would put PacifiCorp at a commercial disadvantage when negotiating future coal supply agreements. This commercial disadvantage is particularly problematic given the current business climate for coal supply. The Company (and other utilities) have released plans to close certain coal facilities. As a result, the coal supply market is subject to greater scrutiny and the Company's bargaining power is reduced relative to its reduced share of this market.

B. Legal Basis for the Claim the Information is Protected under Oregon Rules of Civil Procedure (ORCP) 36(C)(1) (OAR 860-001-0080(3)(a)(B)).

ORCP 36(C)(1) provides protection against unrestricted discovery of "trade secrets or other confidential research, development, or commercial information." The fueling strategy

¹ At the time of filing, the Company had not received responses from Commission Staff, Alliance of Western Energy Consumers, NewSun Energy, NW Energy Coalition, Oregon Citizens Utility Board, Portland General Electric, Renewable Northwest, and Swan Lake North Hydro, LLC and FFP Project 101, LLC.

documents that are responsive to Sierra Club’s data request constitute “trade secret” information protected under ORCP 36(C)(1) and Oregon’s Public Records Laws. Oregon’s Uniform Trade Secrets Act, Oregon Revised Statute (ORS) 646.461 to 646.475, defines a “trade secret” as information, including cost data, that: (a) derives independent economic value, actual or potential, from not being generally known to the public or to other person 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. The Oregon Public Records Law, ORS 192.311 to 192.338, exempts from disclosure public records that are “trade secrets” that “may include but are not limited to, 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.”²

The information that is responsive to Sierra Club Data Requests 3.6 and 3.7 is non-public information that is highly proprietary and commercially sensitive. As described above, PacifiCorp and other utilities are reducing their reliance on coal units. As a result, the coal fuel supply market is becoming smaller, and this reduces the Company’s bargaining power in contract negotiations. For this reason, the competitive disadvantage that would result from release of the information that is responsive to Sierra Club Data Requests 3.6 and 3.7 is particularly problematic. This harm would ultimately flow through to customers in the form of higher costs and less advantageous terms and conditions in future contracts.

² ORS 192.345(2).

Public disclosure of this information would also harm the competitive position of the Company's suppliers and joint venture parties and may expose PacifiCorp to claims from those entities for breach of contract. The information requested is specific to issues in the current proceedings and may not be requested by parties in subsequent proceedings.

C. Exact Nature of the Relief Requested (OAR 860-001-0080(3)(a)(C)).

The terms of the Modified Protective Order are narrowly tailored and intended to apply only to PacifiCorp's most sensitive information. The proposed Modified Protective Order will allow the review of Highly Protected Information to qualified parties and recognizes that there is certain Highly Protected Information that parties will share only with their attorneys, with the exception of non-attorneys at Staff and the Oregon Citizens' Utility Board. The Modified Protective Order also sets up a process by which an expert may seek to be qualified to review specific Highly Protected Information. The Commission has entered modified protective orders with virtually identical provisions in the past.³

Also consistent with past Commission decisions, the Modified Protective Order will require interested parties to review Highly Protected Information at PacifiCorp's offices.⁴ Because of the ongoing COVID-19 pandemic and the related limitations on travel and gatherings, however, PacifiCorp is now conducting these reviews using remote conferencing and screen-sharing programs. As necessary and reasonable, a party may request copies of limited, specific portions of the Highly Protected Information for reference or inclusion in testimony, and PacifiCorp will provide copies under the terms of the Modified Protective Order.

³ *In the Matter of PacifiCorp, dba Pacific Power, 2020 Transmission Adjustment Mechanism*, Docket No. UE 356, Order No. 19-113 (Apr. 3, 2019); *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-131 (Apr. 24, 2020).

⁴ *See, e.g., Id.*

The Modified Protective Order also requires that Highly Protected Information be maintained in a manner distinct from non-confidential information and from Protected Information, by requiring that Protected Information and Highly Protected Information be printed on a different color of paper. Like Protected Information, Highly Protected Information may not be used or disclosed for any purpose other than participation in this proceeding. Finally, the Modified Protective Order prohibits electronic copying or distribution of Highly Protected Information.

D. Specific Reasons the Relief Requested is Necessary (OAR 860-001-0080(3)(a)(D)).

Entry of a Modified Protective Order with additional protections will allow PacifiCorp to make the information available to the parties in a manner consistent with the fact that it is highly sensitive commercial information. Granting the requested additional protection also will significantly limit the risk of an inadvertent breach of confidentiality, which could adversely affect PacifiCorp, its joint venture parties, its coal suppliers, its coal transporters, and its customers.

The standard protective order is insufficient because it does not provide adequate safeguards against the disclosure of highly confidential information. Reliance on the Standard Protective Order also would delay discovery and interfere with the expeditious handling of the highly confidential information in this proceeding.

E. Description of the Intermediate Measures Explored by the Parties (OAR 860-001-0080(3)(a)(E)).

The information sought by Sierra Club is relevant to review of the 2021 IRP. However, without the additional protection requested pursuant to this motion, the standard protective order will be insufficient to protect the Company's highly sensitive commercial

information. Intermediate measures are not available. Specifically, because the responsive information is to be provided as work papers selected redaction is not possible.

III. CONCLUSION

For these reasons, PacifiCorp respectfully requests that the Commission issue a Modified Protective Order in the format provided as Appendix A to this Motion for the purposes of docket LC 77, to allow PacifiCorp to provide its complete response to Sierra Club Data Requests 3.6 and 3.7, without unnecessary risk to the Company, its suppliers and joint venture parties.

Respectfully submitted this 15th day of October, 2021.

By: 

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APPENDIX A

PROPOSED MODIFIED PROTECTIVE ORDER

MODIFIED PROTECTIVE ORDER
DOCKET NO. LC 77

Scope of this Order:

1. This order supplements General Protective Order No. 21-271 and governs the acquisition and use of “Highly Protected Information” produced or used by any party to docket LC 77.

Designation of Protected Information and “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)(1) (a trade secret or other confidential research, development, or commercial information);
 - (b) Is not publicly available; and
 - (c) Is not adequately protected by the 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 MODIFIED PROTECTIVE ORDER NO. 21-_____

The party should make reasonable efforts to designate as Highly Protected Information only the portions of the information that satisfies paragraph 2 of this Modified Protective Order.

4. For a filing containing Highly Protected Information, a Highly Protected version and a public version of the document must be created and filed with the Filing Center. The Highly Protected versions of documents shall be grouped together and should be clearly marked as Highly Confidential. The Commission’s Filing Center receives files electronically outside of the Huddle program. For discovery containing Highly Protected Information, the file should be uploaded to a Huddle file folder designated “Highly Protected.”
5. 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.
6. 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 publicly available or no longer falls within the scope of ORCP 36(C)(1), 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:

7. 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)(1) and that the “Highly Protected Information” designation is necessary.
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 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 192.311 *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 ten business days of service of the last filing.

Access to Highly Protected Information:

11. Only Qualified 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.
12. Persons qualified to access Highly Protected Information upon a party signing the Signatory Page for Highly Protective Information, Appendix B, are:
 - (a) Counsel for the party;
 - (b) An employee of the Regulatory Division at the Oregon Citizens’ Utility Board.

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 General Protective Order No. 21-271 may seek to qualify other persons to access certain specific Highly Protected Information by having those persons complete and sign Appendix C, and submitting that information to the designating party and the Commission. Within five business days of receiving a copy of Appendix C, the designating party must either provide the access to the requested information designated as Highly Protected Information or file an objection under paragraph 15.

Objection to Access to Protected Information:

14. 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, or objects to a person seeking qualification under Paragraph 14, the designating party must provide the 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 five business days of service of an objection. The ALJ will make all reasonable efforts to resolve the matter within ten 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.
16. Access to Highly Protected Information will be provided to Qualified Persons only at PacifiCorp's offices. During the COVID-19 pandemic, PacifiCorp will facilitate access to the Highly Protected Information using video-conference and screen-sharing technology until such time as all parties determine that it is reasonably safe to review the documents in person. Qualified persons are not authorized to, and shall not make, copies of any document designated as containing Highly Protected Information. Qualified persons reviewing the Highly Protected Information may make limited notes regarding the documents for reference purposes only. Such notes shall not constitute a verbatim or substantive transcript of the documents, and shall be considered Highly Protected Information subject to the terms of this protective order. After reviewing the Highly Protected Information at PacifiCorp's offices, if a party reasonably believes that a limited, specific part of a document containing Highly Protected Information is necessary for inclusion in testimony in this proceeding or for use at hearing, the party may request a copy. In response to such a request, PacifiCorp will prepare a copy of the required portion of the document and provide it to that party.

Use of 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 under this order.
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.

26. 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. Any other person retaining Highly 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 Highly Protected Information. This paragraph does not apply to the Commission or its Staff.

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.

CONSENT TO BE BOUND AND SIGNATORY PAGE
DOCKET NO. LC 77

I. Consent to be Bound:

_____ (Party) agrees to be bound by the terms of this Modified Protective Order.

Signature: _____

Printed Name: _____

Date: _____

II. 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 Confidential 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: _____

III. Persons Seeking Qualification under Paragraph 14:

I have read the modified protective order, agree to be bound by the terms of the order, and provide the following information to seek access to certain specific information designated as Highly Confidential Information.

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

I seek access to the following specific information designated as Highly Protected Information for the following reasons: