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April 22, 2020

***VIA ELECTRONIC FILING***

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

Attn: Filing Center

**RE: UE 375—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) 813-6583.

Sincerely,

Michael Wilding  
Director, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UE 375**

In the Matter of  
PACIFICORP, d/b/a PACIFIC POWER,  
2021 Transition Adjustment Mechanism.

PACIFICORP’S MOTION FOR  
MODIFIED PROTECTIVE ORDER

**I. INTRODUCTION**

Under OAR 860-001-0420 and OAR 860-001-0080(3), PacifiCorp d/b/a Pacific Power (PacifiCorp) moves the Public Utility Commission of Oregon (Commission) for entry of a Modified Protective Order in these proceedings.<sup>1</sup> 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, fueling strategy at its coal-fired generation facilities, and the documents and records of affiliated coal mining companies.

Order No. 20-023 provided for a workshop by PacifiCorp to “provide information on minimum take penalties, and the flexibility of the fueling arrangements with company-owned and third-party coal suppliers in light of earlier end of life dates.”<sup>2</sup> Additionally, on April 8, 2020, the Commission provided an agenda that requested information on “PacifiCorp’s plans and strategies for managing coal fueling arrangements for plants that have earlier retirement

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<sup>1</sup> PacifiCorp is not seeking to modify Protective Order No. 16-128 on a permanent basis, but only in Docket No. UE 374 to address the Highly Protected Information necessary in this docket.

<sup>2</sup> *In the matter of PacifiCorp, dba Pacific Power, 2020 Transition Adjustment Mechanism*, Docket No. 356, Order No. 20-023 (Jan. 22, 2020).

dates or lower operating levels in the 2019 Integrated Resource Plan (IRP).”<sup>3</sup> In order to appropriately respond to these issues, PacifiCorp must provide highly sensitive contractual and financial information regarding PacifiCorp’s coal generation resources.

## II. BACKGROUND

PacifiCorp’s annual TAM filing updates net power costs for the upcoming year and sets the transition adjustment for Oregon customers who choose direct access in the November open enrollment window. The TAM Guidelines include a commitment to make any protective order an ongoing protective order that will continue to be effective in future TAM proceedings.<sup>4</sup> In this case, the Commission issued an updated general protective order on March 28, 2016, reflecting changes to the general protective order in Order No. 15-243.<sup>5</sup>

In an Order following PacifiCorp’s 2020 TAM, the Commission approved PacifiCorp’s proposed Workshop “provide information on minimum take penalties, and the flexibility of the fueling arrangements with company-owned and third-party coal suppliers in light of earlier end of life dates.”<sup>6</sup> Additionally, on April 8, 2020, the Commission provided an agenda that requested information on “PacifiCorp’s plans and strategies for managing coal fueling arrangements for plants that have earlier retirement dates or lower operating levels in the 2019 Integrated Resource Plan (IRP).”<sup>7</sup>

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<sup>3</sup> Commissioner Agenda (Apr. 8, 2020).

<sup>4</sup> *In the matter of PacifiCorp dba Pacific Power, 2010 Transition Adjustment Mechanism*, Docket No. UE 207, Order No. 09-274, TAM Guidelines at A.7 (July 16, 2009).

<sup>5</sup> *Re PacifiCorp, dba Pacific Power, 2017 Transition Adjustment Mechanism*, Docket No. UE 307, Order No. 16-128 (Mar. 28, 2016).

<sup>6</sup> *In the matter of PacifiCorp, dba Pacific Power, 2020 Transition Adjustment Mechanism*, Docket No. 356, Order No. 20-023 (Jan. 22, 2020).

<sup>7</sup> Commissioner Agenda (Apr. 8, 2020).

### **III. 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. Parties and Exact Nature of the Information Involved (OAR 860-001-0080(3)(a)(A)).**

The parties to this case are Commission Staff (Staff), Oregon Citizens' Utility Board (CUB), the Alliance of Western Energy Consumers (AWEC), Calpine Solutions, LLC (Calpine Solutions), Northwest and Intermountain Power Producers Coalition (NIPPC), Klamath Water User Association (KWUA), Sierra Club, and Vitesse, LLC (Vitesse).

PacifiCorp's coal inventory policies and procedures, along with information about PacifiCorp's coal supply and transportation agreements, identify PacifiCorp's proprietary strategies for managing its coal supplies at all of its coal-fired generation facilities and include market sensitive information regarding PacifiCorp's coal procurement. Release of this information would put PacifiCorp at a commercial disadvantage when negotiating coal supply agreements and could lead to higher costs that would be passed on to customers.

#### **B. Legal Basis for the Claim the Information is Protected under 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." Certain Information that PacifiCorp would like to provide to Commissioners in docket UE 375 and the 2021 TAM constitute "trade secret" information protected under ORCP 36(C)(1) and Oregon's Public Records Laws. Oregon's Uniform Trade Secrets Act, 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 complication 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.”<sup>8</sup> In docket UE 356, the 2020 TAM, the Commission entered a modified protective order to cover similar information—highly sensitive contractual and financial information regarding PacifiCorp’s coal generation resources.<sup>9</sup>

The information that PacifiCorp has agreed to file is non-public information that is highly proprietary and commercially sensitive. This is true for both the company’s coal inventory policies and procedures and PacifiCorp’s coal supply and transportation agreements. Public disclosure of the information would harm the company’s competitive position in the negotiation of future coal supply and coal transportation agreements because competitors would gain a competitive advantage through an understanding of PacifiCorp’s fueling strategies at all of its coal-fired generation facilities. This harm would ultimately

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<sup>8</sup> ORS 192.501(2).

<sup>9</sup> *In the Matter of PacifiCorp, dba Pacific Power, 2020 Transition Adjustment Mechanism*, Docket No. UE 356, Order No. 19-113 (Apr. 3, 2019).

flow through to customers in the form of higher costs and less advantageous terms and conditions of future contracts.

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 CUB. 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.<sup>10</sup>

Also consistent with past Commission decisions, the Modified Protective Order will require interested parties to review Highly Protected Information at PacifiCorp's offices.<sup>11</sup> 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

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<sup>10</sup> See, e.g., *Id.*

<sup>11</sup> See, e.g., *In the Matter of PacifiCorp, Application for Approval of Final Draft 2017R Request for Proposals*, Docket No. UM 1845, Order No. 18-080 (Mar. 8, 2018) (granting motion for reconsideration of Modified Protective Order in part, but affirming PacifiCorp's procedures for on-site review).

testimony, and PacifiCorp will provide copies under the terms of the Modified Protective Order.

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 Protected Information. Reliance on the Standard Protective Order also would delay discovery and interfere with the expeditious handling of in the upcoming case.

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

As discussed above, the Commission has requested additional information on PacifiCorp's plans and strategies for managing coal fueling arrangements. Without

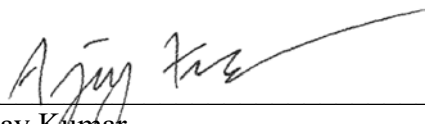
additional protection, the standard protective order will be insufficient to protect the company's highly sensitive commercial information. Intermediate measures are not available.

#### **IV. 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 UE 375, to allow PacifiCorp to provide responsive information to the Commissioners in this case, along with supporting documentation, without unnecessary risk to the company, its suppliers and joint venture parties.

Respectfully submitted this 22<sup>nd</sup> day of April, 2020.

By:

  
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**APPENDIX A**

PROPOSED MODIFIED PROTECTIVE ORDER

**MODIFIED PROTECTIVE ORDER**  
**Docket UE 375**

**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. 16-128 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)(1) (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. 20-\_\_**

The party should make reasonable efforts to designate as Highly Protected Information only the portions of the information covered by the definition in Paragraph 2 of this order.

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 and placed in a sealed envelope or other appropriate container. 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. 20-\_\_ 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 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:**

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)(1) and bears the burden of showing that the “Highly Protected Information” designation is necessary. Any party may request that the ALJ hold a conference to help resolve disputes about proper designation.

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 192.311 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.

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) Counsel for a party.

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.

14. A party bound by the General Protective Order No. 20-040 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 16.

15. Access to certain Highly Protected Information will be provided to all persons qualified under paragraphs 13 and 14 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.

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

16. 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.

17. 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:**

18. All Qualified Persons must take reasonable precautions to keep Highly Protected Information secure. Qualified Persons may request copies of Highly Protected Information in accordance with paragraph 15 of this order 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.

19. 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.

20. 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.

21. 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:**

22. 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.

## APPENDIX B

### Signatory Page for Highly Protected Information Docket UE 375

#### **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 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: \_\_\_\_\_

**APPENDIX C**  
**QUALIFICATION OF OTHER PERSONS UNDER MODIFIED PROTECTIVE ORDER**  
**Docket UE 375**

**Persons Seeking Qualification under Paragraph 14 to access Highly Protected Information:**

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 Protected Information.

<b>Signature:</b>		<b>Date:</b>
<b>Printed Name:</b>		
<b>Physical Address:</b>		
<b>Email Address:</b>		
<b>Employer:</b>		
<b>Associated Party:</b>		
<b>Job Title:</b>		
<b>If not employee of party, description of practice and clients:</b>		