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September 1, 2017

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
PO Box 1088
Salem, OR 97308-1088

Re: Docket UM 1892 – Portland General Electric Company’s Motion for Modified Protective Order.

Dear Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company’s Motion for Modified Protective Order.

Please contact this office with any questions.

Very truly yours,

Alisha Till

Attachment

1
2 **BEFORE THE PUBLIC UTILITY COMMISSION**
3 **OF OREGON**

4 **UM 1892**

5 In the Matter of

6 PORTLAND GENERAL ELECTRIC
7 COMPANY,

8 Application for Waiver of the Competitive
9 Bidding Guidelines.

**MOTION FOR MODIFIED
PROTECTIVE ORDER**

10 Pursuant to OAR 860-001-0080(3), Oregon Rule of Civil Procedure 37(C)(7), and OAR
11 860-001-0420, Portland General Electric Company (PGE or Company) moves the Public Utility
12 Commission of Oregon (Commission) for the entry of a Modified Protective Order in this
13 proceeding. For the reasons outlined below, good cause exists to issue a Modified Protective
14 Order to protect highly confidential commercially sensitive business information and scoring
15 workpapers related to the Company's bilateral negotiations to fill its capacity need. The
16 Commission has already adopted a General Protective Order which covers the Confidential
17 Information filed with the Application for Waiver of the Competitive Bidding Guidelines
18 (Application or Application for Waiver).¹ PGE asks for the entry of a Modified Protective Order
19 to cover two types of documents that the Company anticipates will be requested by Commission
20 Staff: (1) the terms sheets containing counterparty offers; and (2) PGE's workpapers supporting
21 the scoring of counterparty offers.

22 Because this Highly Confidential Information is extremely sensitive and cannot
23 adequately be protected under the Commission's General Protective Order, PGE requests that the
24 Commission issue a Modified Protective Order that will allow it to provide the Highly

25 ¹ See Order No. 17-320.

1 Confidential Information initially only to Commission Staff and the Citizens Utility Board of
2 Oregon (CUB). Any other party may seek to be qualified to receive the Highly Confidential
3 Information, and if this occurs, PGE and the requesting party will enter into discussions to
4 resolve the request on a case-by-case basis. If the parties cannot resolve the request, they may
5 seek assistance from the Commission. The proposed Modified Protective Order is attached
6 hereto as Attachment A.

7
I. BACKGROUND

8 On August 25, 2017, PGE filed its Application for Waiver, related to its bilateral
9 negotiations for capacity resources to meet its Commission-acknowledged long-term capacity
10 need with medium-term resources. As exhibits to that filing, PGE provided Protected
11 Information subject to the General Protective Order, including detailed information about its
12 scoring process used to evaluate the offers received through bilateral negotiations, and the results
13 of its scoring. This information is sensitive, and constitutes “Protected Information,” but it can
14 be adequately protected under the terms contained in the Commission’s General Protective
15 Order.

16 However, the Company expects that in addition to the information provided with the
17 Application, Staff will request more granular information about the offers and scoring process,
18 which is appropriately categorized as “Highly Confidential Information.” This Highly
19 Confidential Information includes the term sheets offered by the counterparties to the bilateral
20 negotiations, which reflect the identities of the counterparties and the details of the price and
21 non-price terms of their indicative offers, as well as the workpapers supporting the scoring
22 process. These documents are extremely commercially sensitive, because they show the
23 identities of the counterparties and details of competing offers while negotiations are ongoing.
24 As a result, any public disclosure of such information—even inadvertent disclosure—could
25 damage and distort PGE’s bilateral negotiation process and hinder the Company’s efforts to
26 acquire for its customers the most cost-effective capacity. More broadly, release of this

1 commercially sensitive information to market participants could hamper *future* resource
2 acquisition efforts, by revealing which terms, conditions, and prices might be acceptable to these
3 market players, and to PGE.

4 For these reasons, the Company is requesting additional protections for such information,
5 beyond those contained in the General Protective Order. The goal of PGE's proposed
6 protections is to minimize the number of persons who have access to the Highly Confidential
7 Information and to ensure that it does not fall into the hands of market participants or get used in
8 commercial negotiations. Specifically, PGE asks that the Highly Confidential Information be
9 made available initially only to Commission Staff and their counsel, and in addition, to
10 employees and counsel for the CUB. Any other party may seek to be qualified to receive the
11 Highly Confidential Information, and if this occurs, PGE and the requesting party will enter into
12 discussions to resolve the request on a case-by-case basis. This approach will strike a balance,
13 ensuring that those parties charged by the legislature with protecting the public and customer
14 interests have an opportunity to fully vet the offers received through the bilateral negotiations
15 and PGE's scoring and evaluation of those offers, while at the same time providing PGE with the
16 ability to protect the integrity of the ongoing negotiation process.

17 PGE has conferred with Staff and the intervenors to date—CUB, Industrial Customers of
18 Northwest Utilities (ICNU), and Northwest and Intermountain Power Producers Coalition,
19 (NIPPC)—as required by OAR 860-001-0420. All have indicated that they do not oppose this
20 request.

21 II. REQUEST FOR ADDITIONAL PROTECTION

22 As required by OAR 860-001-0080(3)(a), PGE provides the following information:

23 A. Parties and Exact Nature of the Information Involved.

24 In addition to Commission Staff, CUB, ICNU, and NIPPC have intervened in this
25 proceeding. In addition to NIPPC, PGE expects that other organizations that represent the
26 interests of developers and sellers of energy resources, such as Renewable Northwest Project, the

1 Renewable Energy Coalition, and Community Renewable Energy Association, may also
2 intervene.

3 To be clear, PGE is providing a significant amount of information under the normal
4 “Protected” designation to those parties who qualify under the General Protective Order in place
5 in this case. The Protected Information includes PGE’s confidential “Scoring Procedures”
6 exhibit, which explains in detail how PGE evaluated and scored the indicative offers it has
7 received. This document reflects not only the characteristics PGE values in evaluating resource
8 acquisitions but also how much value is placed on each. The Protected Information also includes
9 the results of PGE’s scoring analyses, including each offer’s price and non-price score and how it
10 performed in the portfolio analysis, PGE’s final shortlist, and the top-performing offers with
11 which PGE plans to negotiate. Importantly, in all of these documents, the identities of the
12 counterparties have been blinded to protect the integrity of the ongoing negotiations.

13 The two groups of documents the Company proposes to provide under the Highly
14 Confidential Information designation—the counterparty term sheets and workpapers—are even
15 more sensitive. The terms sheets are the actual offers received by PGE from the counterparties
16 to the bilateral negotiations. These term sheets show the identities of the counterparties, and the
17 granular details of each term and condition comprising their offers, including price. The
18 workpapers supporting the Company’s scoring similarly reveal the identities of the
19 counterparties, as well as each term and condition.

20 **B. Legal Basis for the Claim that the Information is Protected under ORCP 36(C)(7).**

21 ORCP 36(C)(7) provides for limitations on the disclosure of “trade secret[s] or other
22 confidential research, development, or commercial information.” The Highly Confidential
23 documents contain commercially sensitive information, within the scope of ORCP 36(C)(7).
24 Public disclosure of this information likely would cause significant harm to the Company’s and
25 its customers’ financial interests by compromising the Company’s negotiating power and ability
26 to engage competitively in business transactions to acquire resources.

1 **C. Exact Nature of the Relief Requested.**

2 The Company requests that the Commission enter the attached Modified Protective
3 Order. The Modified Protective Order, which will supplement the existing General Protective
4 Order, will protect the Highly Confidential Information described in this Motion by limiting
5 access to the following: Staff and their counsel, CUB and its counsel, and other parties who seek
6 to be qualified, on a case by case basis, if agreed to by PGE or ordered by the Administrative
7 Law Judge. The Commission and the Administrative Law Judge assisting the Commission
8 would also have access to Highly Confidential Information that is offered in evidence.

9 The Modified Protective Order also requires that Highly Confidential Information be
10 maintained in a manner distinct from non-confidential information and from Protected
11 Information; Highly Confidential Information must be printed on a color of paper that
12 distinguishes it from Protected Information and public information. Like Protected Information,
13 Highly Confidential Information must be stored in a locked room or cabinet, and Highly
14 Confidential Information may not be used or disclosed for any purpose other than participation in
15 this proceeding.

16 **D. Specific Reasons Requested Relief is Necessary.**

17 As explained above, PGE's efforts to procure resources through bilateral negotiations are
18 ongoing. Accordingly, any release of the identities or the granular details of the terms and
19 conditions of the counterparty offers could significantly distort negotiations, disrupting the
20 competitive process and causing harm to market participants, PGE, and its customers. For this
21 reason, it is essential that the Commission adopt a Modified Protective Order that limits the
22 number of people who receive Highly Confidential Information and ensures that current
23 participants in the bilateral negotiations will not have access to the Highly Confidential
24 Information.

25 Moreover, the Modified Protective Order is necessary to address competitive concerns
26 that go beyond the bilateral negotiations. The Highly Confidential Information filed in this

1 docket reveals the prices and terms that the counterparties generally are willing to accept for
2 their resources, and that PGE generally is willing to pay. Therefore, disclosure of this
3 information to *any* persons who participate in wholesale power markets could distort and disrupt
4 transactions other than the bilateral negotiations, including *future* transactions.

5 For these reasons, it is essential to prevent the Highly Confidential Information from
6 being provided, not only to the participants in the bilateral negotiations, but to any persons who
7 participate in wholesale power markets. Importantly, the nature of the Highly Confidential
8 Information in this docket is such that even an individual who currently is not participating in the
9 market would not be able to “forget” the information once it is disclosed in this docket. As a
10 result, if a person reviews the Highly Confidential Information in this docket and later
11 participates in the market, the Highly Confidential Information necessarily would influence their
12 actions, despite the prohibition on its use.

13 This Commission has recognized that ongoing negotiations require “the upmost
14 confidentiality,” and individuals who represent current or potential future market competitors or
15 market participants should not be allowed access to Highly Confidential Information about the
16 characteristics or pricing of products in that market.² Therefore, it is essential that this
17 Commission adopt safeguards to ensure no market participants have access to the Highly
18 Confidential Information, and, by generally limiting the number of other persons who have
19 access to the information, minimize the potential for leaks.

20 **E. Intermediate Measures Explored and Why These are Insufficient.**

21 The Modified Protective Order is narrowly tailored to ensure that access to Highly
22 Confidential Information is available to those who do not participate in the market and need it to

23 _____
24 ² *In the Matter of PacifiCorp, dba Pacific Power, 2017 Transition Adjustment Mechanism*, Docket No. UE 307,
25 Ruling Sustaining Objection (Aug. 25, 2016) (sustaining PacifiCorp’s objection to a request to qualify a consultant
26 to review highly confidential information concerning PacifiCorp’s Renewable Energy Credit (REC) Request For
Proposals because negotiations were ongoing and the consultant “represents entities that could be either competitors
for the future purchase of RECs or potential future REC sellers”).

1 evaluate PGE’s Application on behalf of the Commission and PGE’s residential customers.
2 There is precedent for limiting disclosure of Highly Confidential Information to Staff only,³ but
3 PGE chose to provide this information to CUB as well—as the only statutorily recognized
4 intervenor under Oregon law. In addition, PGE is open to discussing requests by other parties
5 who may seek to be qualified to receive the Highly Confidential information. And finally, if
6 those discussions come to an impasse, PGE will bring the dispute to the Commission. These
7 measures represent a reasonable compromise to protect this very sensitive information while
8 providing access as appropriate.

9 As explained above, it is necessary to limit access to highly specific information
10 regarding bilateral negotiation offers because viewing such information would inevitably
11 influence the actions of market participants and potential market participants and those who
12 advise them, and no precautions other than limiting access can prevent this outcome.
13 Furthermore, disclosure of Protected Information under terms like those in the Commission’s
14 General Protective Order is rare, however it does occur from time to time. Typically, the
15 disclosure is inadvertent, although intentional disclosures have occurred.⁴ Given such
16 disclosures, additional protections, such as those contained in the proposed Modified Protective
17 Order, are appropriate when the consequences of disclosure would be particularly grave, as in
18 this case.

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22 ³ *In the Matter of the Application of Scottish Power plc and PacifiCorp for an Order Authorizing Scottish Power plc*
23 *to Exercise Substantial Influence Over the Policies and Actions of PacifiCorp*, Docket No. UM 918, Order No. 99-
106 at 2 (Feb. 19, 1999); Docket No. UM 918, Order No. 99-293 at 2 (Apr. 27, 1999).

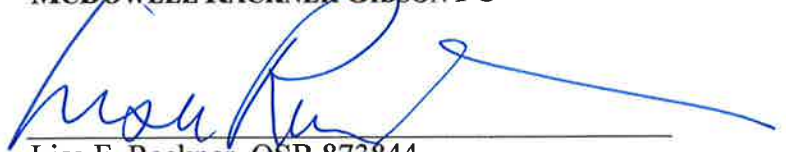
24 ⁴ *In the Matter of Oregon Electric Utility Co., LLC, et al., Application for Authorization to Acquire Portland Gen.*
25 *Elec. Co.*, Docket No. UM 1121, Order No. 05-114 at 9-10 (Mar. 10, 2005) (noting that “one of more parties
26 decided to provide material identified as ‘confidential’ to *Willamette Week*, a weekly newspaper in Portland,
Oregon, which was then broadcast by television and radio stations and disclosed in other print media”).

1 **III. Conclusion**

2 For the foregoing reasons, PGE respectfully requests entry of the Modified Protective
3 Order, attached as Attachment A, in this docket.

4
5 DATED: September 1, 2017.

MCDOWELL RACKNER GIBSON PC

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Attorneys for Portland General Electric
Company

ATTACHMENT A

To

Portland General Electric Company's

Motion for Modified Protective Order

MODIFIED PROTECTIVE ORDER
DOCKET NO. UM 1892

Scope of this Order:

1. This order governs the acquisition and use of “Highly Confidential Information” produced or used by any party to these proceedings.

Designation of Highly Confidential Information:

2. Any party may designate as Highly Confidential Information any information the party reasonably determines:

- (a) Falls within the scope of ORCP 36(C)(7) (a trade secret or other confidential research, development, or commercial information);
- (b) Is not publicly available; and
- (c) Is extremely competitively sensitive information that cannot be disclosed to current or future participants in wholesale power markets—even under the Commission’s normal safeguards for Protected Information—without jeopardizing current or future resource acquisition efforts.

3. To designate information as Highly Confidential Information, a party must place the following legend on the material:

HIGHLY CONFIDENTIAL INFORMATION
SUBJECT TO MODIFIED PROTECTIVE ORDER

The party should make reasonable efforts to designate as Highly Confidential Information only the portions of the information covered by the above definitions.

4. Each page of a document containing Highly Confidential 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. _____
AND CONTAINS HIGHLY CONFIDENTIAL INFORMATION.
THE INFORMATION MAY BE SHOWN ONLY TO QUALIFIED
PERSONS AS DEFINED IN THE ORDER ELIGIBLE TO RECEIVE
HIGHLY CONFIDENTIAL INFORMATION.

5. A party may designate as Highly Confidential Information any information previously provided by giving written notice to the Commission and other parties. Parties in possession of newly designated Highly Confidential 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.

A designating party must make reasonable efforts to ensure that information designated as Highly Confidential 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)(7), the designating party should make reasonable efforts to remove the designation and provide written notice to the Commission and other parties.

Challenge to Designation of Information as Highly Confidential:

6. A party may informally challenge any designation of Highly Confidential Information by notifying the designating party. Once notified, the designating party bears the burden of showing that the challenged information is covered by the applicable definition in this Order. Any party may request that the ALJ hold a conference to help resolve disputes about proper designation.

7. 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.

8. Within five business days of service of the objection, the designating party must either remove the Highly Confidential 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 192.410 *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 designation from the challenged information.

9. 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 Confidential Information:

10. Only Qualified Persons may access Highly Confidential Information designated by another party under this Modified Protective Order. Persons automatically bound by this protective order and qualified to access Highly Confidential are:

- (a) Commission employees; and
- (b) Assistant Attorneys General assigned to represent the Commission.

11. Persons qualified to access Highly Confidential Information upon a signing the Consent to be Bound section of Appendix B are:

- (a) An employee or counsel of the Citizens Utility Board of Oregon; or
- (b) Any other party or party representative, upon the mutual agreement of that party and PGE, and subject to any additional restrictions mutually agreed-upon. Any dispute that arises under this section will be resolved under paragraph 13.

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.

Objection to Access to Highly Confidential Information:

12. All persons qualified to access Highly Confidential Information shall have access to such 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.

13. 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 Confidential Information may not be disclosed to the person subject to the objection.

Use of Highly Confidential Information:

14. All Qualified Persons must take reasonable precautions to keep Highly Confidential Information secure. A Qualified Person may reproduce Highly Confidential Information to the extent necessary to participate in these proceedings. A Qualified Person may discuss Highly Confidential Information obtained under this order only with other persons qualified to receive the same information.

15. Without the written permission of the designating party, any Qualified Person given access to Highly Confidential Information under this order may not use or disclose Highly Confidential Information for any purpose other than participating in these proceedings. A party who receives Highly Confidential Information under this order may not disclose it to any other party, even a party who is qualified under this order.

16. 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.

Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Highly Confidential 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. The information retained may only be disclosed to Qualified Persons under this order. Any other person retaining Highly Confidential 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 Confidential Information. This paragraph does not apply to the Commission or its Staff.

Duration of Protection:

17. The Commission will preserve the designation of information as protected 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 Confidential Information.

**APPENDIX B: QUALIFICATION OF PERSONS TO RECEIVE
HIGHLY CONFIDENTIAL INFORMATION**

DOCKET NO. UM 1892

**I. Persons Seeking Qualification to receive Highly Confidential Information
under Paragraph 14:**

I have read the Modified Protective Order, agree to be bound by the terms of the order. I certify that:

- (a) I am an employee of the Citizens Utility Board of Oregon, and have a legitimate and non-competitive need for the Highly Confidential Information and not simply a general interest in the information; **or**
- (b) I am not an employee of the Citizens Utility Board of Oregon and PGE and I have come to a mutual agreement that I am qualified to receive Highly Confidential Information; **or**
- (c) I am not an employee of the Citizens Utility Board of Oregon and the Administrative Law Judge has issued a ruling allowing my qualification to receive Highly Confidential Information.

I provide the following information:

Signature:		Date:
Printed Name:		
Physical Address:		
Email Address:		
Employer:		
Associated Party:		
Job Title:		

If not employee of party, description of practice and clients:	
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