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June 15, 2021

VIA ELECTRONIC FILING

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

**RE: UM 2059—PacifiCorp's 2020 All Source Request for Proposal—Motion for
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,

A handwritten signature in blue ink that reads "Shelley McCoy".

Shelley McCoy
Director, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2059

In the Matter of

PACIFICORP, d/b/a PACIFIC POWER,

Application for Approval of 2020 All Source
Request for Proposals.

PACIFICORP'S MOTION FOR
MODIFIED PROTECTIVE ORDER

I. INTRODUCTION

In accordance with OAR 860-001-0420 and OAR 860-001-0080(3), PacifiCorp d/b/a Pacific Power (PacifiCorp or the Company) moves the Public Utility Commission of Oregon (Commission) for entry of a Modified Protective Order in this proceeding granting additional protections for highly confidential information, consisting of bid information, analysis and modeling that relies on bid information, and reports provided by independent evaluators that rely on and refer to bid information.

PacifiCorp's Request for Acknowledgement of Final Shortlist of Bidders in the 2020 All Source Request for Proposals (2020AS RFP) (Request for Acknowledgment), filed concurrently with this motion, includes information submitted by bidders in the 2020AS RFP. The 2020AS RFP is ongoing. PacifiCorp is negotiating final agreements with the bidders selected to the final shortlist in the 2017R RFP. Therefore, bid information and analysis and modeling based on that bid information, is highly sensitive, non-public commercial information. If disclosed, the highly confidential bid information would harm customers by compromising PacifiCorp's ability to successfully negotiate final agreements and could result in less competitive bids in future RFPs.

To better prevent the inadvertent disclosure or improper use of highly commercially sensitive bid information, PacifiCorp requests that the Commission issue a Modified Protective Order that includes two narrowly tailored protections:

- First, PacifiCorp requests on-site review of the highly confidential information for all intervenors, except Staff and the Oregon Citizens' Utility Board (CUB). Should the ongoing COVID-19 pandemic continue to limit travel and gatherings, PacifiCorp can also conduct these reviews using remote conferencing and screen-sharing programs.¹ Preventing widespread distribution of the highly confidential information makes public disclosure, and the attendant harm, substantially less likely.
- Second, PacifiCorp requests that no access to highly confidential information be provided to persons involved in the Company's ongoing solicitation processes as bidders, including persons who represent or advise bidders. Restricting access to these persons better ensures that bidders cannot, intentionally or not, improperly obtain an unfair competitive advantage by relying on another bidder's information. In the Modified Protective Order, the Company has reflected the language that the Commission approved in docket UM 1845.²

Attachment A to this Motion is PacifiCorp's proposed Modified Protective Order.

II. BACKGROUND

On February 24, 2020, PacifiCorp filed an application for approval of its 2020AS RFP. On March 11, 2020, PacifiCorp filed a Motion for a General Protective Order, which was granted on March 12, 2020.³

Concurrent with the filing of this motion, PacifiCorp filed its Request for Acknowledgment. As required by OAR 860-089-0500(3), the Company's Request for Acknowledgement includes the closing report prepared by PA Consulting Group, Inc., the independent evaluator (IE) approved by the Commission.⁴ The IE's report includes details

¹ PacifiCorp's offices are currently closed to external parties during the COVID-19 pandemic. On-site reviews may resume after safety precautions are lifted.

² *In the Matter of PacifiCorp, dba Pacific Power, Application for Approval of Final Draft 2017R Request for Proposals*, Docket No. UM 1845, Order No. 18-080 (Mar. 8, 2018).

³ Order No. 20-077.

⁴ Order No. 20-114.

related to the bids that were submitted and analyzed as part of the 2020AS RFP. A Modified Protective Order would provide additional protection for highly commercially sensitive, non-public bid information, and related analysis.

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

PacifiCorp limited its highly confidential designation to only the 2020AS RFP bid information and related analysis based on the bid information. This information constitutes highly sensitive commercial information that if disclosed would result in unfair competitive injury to the Company, and, therefore, 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.” 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 another 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 exempts from disclosure public records that are “trade secrets,” which “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.”⁵

The information for which PacifiCorp seeks additional protection is non-public information that is highly proprietary and commercially sensitive. PacifiCorp has not finalized all the agreements for the 2020AS RFP. The ongoing nature of the 2020AS RFP and continuing negotiations with counterparties mandates the utmost confidentiality. PacifiCorp’s ability to negotiate least-cost, least-risk final agreements directly benefits the Company’s retail customers. Accordingly, any disclosure of the bid information would have an immediate and deleterious effect on PacifiCorp’s ability to successfully negotiate the final agreements on behalf of customers. Disclosure of the price, terms, or conditions included in the 2017AS RFP bids, or disclosure of PacifiCorp’s modeling and analysis of price, terms, and conditions, would provide current and potential future counter-parties a significant commercial advantage at the expense of the Company and its customers.

Disclosure could also impact the competitiveness of future RFPs if bidders use highly confidential data from this case to inform their future bids. In addition, if bidders are not confident that their commercially sensitive bids will remain protected, they may choose to forego future RFPs. Thus, public disclosure of bid information will likely chill participation in future solicitations, make them less competitive, and reduce the likelihood that future RFPs result in the least-cost, least-risk resource for customers.

PacifiCorp has appropriately designated the bid information and associated analysis, as highly confidential information and requested reasonable protections to minimize the risk

⁵ ORS 192.345(2).

of disadvantaging the Company in its negotiations in the 2020AS RFP and to better ensure that future RFPs are competitive.

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

PacifiCorp's proposed relief is set forth in Attachment A and includes two key protections. The Company's recommended protections reasonably balance the interests of intervenors and customers by allowing appropriate access to highly confidential information, while also minimizing the risk of inadvertent disclosure or improper use, and the customer harm that would follow.

First, PacifiCorp recommends that review of the highly confidential information occur at the Company's offices once safety protocols are lifted or using remote conferencing and screen-sharing programs, for all parties except Staff and CUB. On-site review will limit the risk that highly confidential information will be inadvertently disclosed because the information will remain in PacifiCorp's possession and control.

Second, PacifiCorp recommends that on-site review be restricted to only those persons that meet the following requirement: Persons (including attorneys) that are not involved in PacifiCorp's ongoing 2020AS RFP solicitation process as bidders.

PacifiCorp's second proposed condition is intended to preclude access to highly confidential bid information by any person that performs work on behalf of bidders in the 2020AS RFP and persons that may perform work on behalf of any counter-party in negotiated power purchase agreements related to the 2020AS RFP. Restricting access protects against a person improperly using highly confidential bid information to inform their participation in other solicitations, to the detriment of customers. This restriction is

consistent with prior rulings⁶ and consistent with the Commission's competitive bidding rules, which contemplate that bidding information, including scoring and evaluation, will not be made available to other bidders.⁷

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 bidders, and its customers.

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

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

Additional protections, such as those contained in the proposed Modified Protective Order, are appropriate when the consequences of disclosure would be particularly severe. The Modified Protective Order also restricts the manner and means by which highly confidential information may be maintained, stored, and transmitted, thus minimizing the risk of inadvertent disclosure. Such protections and restrictions are prudent for the highly

⁶ See, e.g., *In the Matter of PacifiCorp d/b/a Pacific Power's 2017 Transition Adjustment Mechanism*, Docket No. UE 307, Ruling (Aug. 25, 2016) (precluding an expert witness's access to RFP results while final agreements were being negotiated because the expert represents competitors); see also, Docket No. UM 1845, Order No. 18-080.

⁷ OAR 860-089-0400(6); OAR 860-089-0550.


commercially sensitive, non-public information related to the rail transportation services contract at issue in this proceeding.

IV. CONCLUSION

For these reasons, PacifiCorp respectfully requests that the Commission issue a Modified Protective Order in the format provided as Attachment A to this Motion.

PacifiCorp's proposed additional protections are reasonably designed and narrowly tailored to minimize the risk of customer harm resulting from the public disclosure of highly sensitive commercial information related to the 2020AS RFP bids.

Respectfully submitted this 15th day of June 2021.

By: 
Carla Scarsella
Senior Attorney
PacifiCorp d/b/a Pacific Power

ATTACHMENT A

PROPOSED MODIFIED PROTECTIVE ORDER

MODIFIED PROTECTIVE ORDER

UM 2059

Scope of this Order:

1. This order governs the acquisition and use of “Protected Information” and “Highly Protected Information” produced or used by any party to these proceedings. General Protective Order No. 20-077 governs the acquisition and use of “Protected Information.”

Designation of Protected Information and “Highly Protected Information”:

2. Any party may designate as 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. 21 - ____

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

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. 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. 21- ____ 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.
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 192.410 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 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 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 a party 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) Persons (including attorneys) that are not involved in PacifiCorp's ongoing 2020AS RFP solicitation process as bidders.
14. Access to Highly Protected Information will be provided to all persons qualified under paragraph 13(b) 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. PacifiCorp will distribute Highly Protected Information to only those persons qualified under paragraphs 12 and 13(a).

Objection to Access to Protected Information:

15. 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.
16. 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:

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.
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.
20. 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.

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.

I. 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 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: _____