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June 22, 2023

VIA ELECTRONIC FILING

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

Re: UM 2183—PacifiCorp's Motion for a Modified Protective Order
Expedited Consideration Requested

PacifiCorp d/b/a Pacific Power hereby submits for filing its Motion for Modified Protective Order with Expedited Consideration Requested. The entry of a modified protective order will prevent delay in providing highly confidential information in this proceeding, including information of a third-party that is competitively sensitive.

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

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2183

In the Matter of

PACIFICORP, d/b/a PACIFIC POWER's

Application for Authority to Implement a
Decommissioning Cost Recovery
Adjustment and Coal Removal Mechanism.

PACIFICORP'S MOTION FOR
MODIFIED PROTECTIVE ORDER

Expedited Treatment Requested

INTRODUCTION

In accordance with OAR 860-001-0420 and OAR 860-001-0080(3), PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) hereby moves the Public Utility Commission of Oregon (Commission) for entry of a Modified Protective Order to supplement the Commission's General Protective Order¹ in this proceeding. For the reasons outlined below, good cause exists to issue the proposed Modified Protective Order, submitted as Attachment A. The Modified Protective Order will provide additional protection to highly confidential information in this proceeding, including information of a third-party, Kiewit Engineering Group, Inc. (Kiewit), that is competitively sensitive. PacifiCorp has conferred with all parties in this matter regarding the present motion and attests that no party opposes the entry of the Modified Protective Order.

I. BACKGROUND

On July 8, 2021, PacifiCorp filed its Application for Authority to Implement a Decommissioning Cost Recovery Mechanism (Application), which initiated this proceeding.

¹ *In re PacifiCorp, dba Pac. Power, Application to Implement a Decommissioning Cost Recovery Adjustment and Coal Removal Mechanism*, Docket No. UM 2183, Order No. 21-218 (July 9, 2021).

In Order 20-473, the Commission determined that this proceeding would be opened to provide parties an opportunity to more thoroughly review coal decommissioning cost studies conducted by Kiewit (Kiewit Studies).² The Kiewit Studies, which are contractor-assisted engineering studies of decommissioning costs for certain coal-fired generation plants, were undertaken by the Company as part of the 2020 PacifiCorp Interjurisdictional Allocation Protocol. As part of the review of the Kiewit Studies, an Independent Evaluator (IE), Sargent & Lundy LLC, was selected by the Company and parties in this docket to conduct an independent review of the studies.

As part of its review, the IE has requested information that has been designated as highly confidential, because it includes competitively sensitive information of third parties, specifically, Kiewit and its first-tier subcontractors who assisted on the Kiewit Studies (referred to collectively as Kiewit in the Modified Protective Order). Because of the highly confidential nature of the information requested, PacifiCorp seeks additional protections beyond those contained in the Commission's General Protective Order. The goal of the proposed protections is to limit dissemination of highly confidential information, to ensure that the parties receiving highly confidential information treat it with the utmost care, and to limit the forms of duplication and transmission of such information so that it does not fall into the possession of market competitors or the general public. This approach will allow the Commission and the parties the opportunity to fully review highly confidential information, while providing strong protection against unauthorized disclosure. To ensure the protection of this highly sensitive information, the Company requests that the Commission enter a modified protective order.

² *In the matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 17-18. (Dec. 18, 2020).

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 Information Involved (OAR 860-001-0080(3)(a)(A)).

As noted above, the IE has requested information related to the Kiewit Studies. Such information involves highly confidential information of third-parties—Kiewit and its subcontractors—in addition to PacifiCorp’s highly confidential information. Certain of Kiewit’s workpapers used to conduct its studies are highly confidential because they contain sensitive information about the processes Kiewit used to estimate the Company’s coal-fired decommissioning costs, and the nature of these expenses. This information is highly proprietary to Kiewit and its subcontractors and disclosure would cause significant commercial harm to these parties.

It is possible that highly confidential information will be requested by other parties in discovery after the IE has submitted its report. With a Modified Protective Order in place, PacifiCorp will be able to expedite its response to such discovery.

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

ORCP 36(C)(1) provides protections against unrestricted discovery of “trade secrets or other confidential research, development, or commercial information.” Oregon’s Uniform Trade Secrets Act, ORS 646.461 to 464.475, defines “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 Record 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 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.”³

In docket UE 400, the 2023 Transition Adjustment Mechanism, the Commission entered a modified protective order to cover similar information—highly sensitive contractual and financial information regarding PacifiCorp’s coal generation resources.⁴ The Commission also entered a modified protective order during PacifiCorp’s Energy Vision 2020 request for proposals (RFP) that protected “highly confidential bid information” and the “analysis and modeling” based on that information.⁵ This modified protective order was designed in part to facilitate an IE’s review of the RFP process. Considering that the Kiewit Studies contain sensitive financial information about the Company’s coal resources and reflect the analysis and modeling Kiewit used to conduct its

³ ORS 192.345(2).

⁴ *In re PacifiCorp, dba Pac. Power, 2023 Transition Adjustment Mechanism*, Docket No. UE 400, Order No. 22-063 (Feb. 25, 2022); see also *In re PacifiCorp, dba Pac. Power, 2021 Transition Adjustment Mechanism*, Docket No. UE 375, Order No. 20-145 at 1 (Apr. 27, 2020); *In re PacifiCorp, dba Pac. Power, 2020 Transition Adjustment Mechanism*, Docket No. UE 356, Order No. 19-113 at 1 (Apr. 3, 2019).

⁵ *In re PacifiCorp, dba Pac. Power, Application of Final Draft 2017R Request for Proposals*, Docket No. UM 1845, Order No. 18-057 at 1 (Feb. 20, 2018); see also *In re PacifiCorp, dba Pac. Power, Application to Open Docket & Appointment of an Indep. Evaluator for a 2009 Request for Proposals for Supply-Side Renewable Res.*, Docket No. UM 1429, Order No. 09-413 at 1 (Oct. 19, 2009) (approving a Modified Protective Order for “highly confidential work papers” supporting the initial and final shortlist selections in the request for proposals process); *In re Portland Gen. Elec. Co., Application to Open Docket for Request for Proposals for Energy Res.*, Docket No. UM 1345, Order No. 07-440 at 1 (Oct. 16, 2007) (approving a Modified Protective Order for “confidential and proprietary information” relating to bidding and models that PGE used to conduct its request for proposals).

cost estimates, the information protected with the proposed Modified Protective Order falls under the definition of “trade secrets” and the Commission’s prior precedent.

The information for which PacifiCorp seeks additional protection is non-public, highly proprietary, and commercially sensitive. The revelation of Kiewit’s competitively sensitive data may provide its competitors with a significant commercial advantage, which could harm it. PacifiCorp will designate such third-party competitively sensitive data as highly confidential and requests reasonable protections for this information.

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

The terms of the Modified Protective Order are narrowly tailored and intended to apply only to PacifiCorp’s or a third party’s most sensitive information. The proposed Modified Protective Order facilitates IE and Staff access to Kiewit’s highly confidential information underlying the Kiewit Studies, enabling preparation of the IE’s report. Once the IE’s report is complete, the Modified Protective Order allows CUB and counsel for parties access to the highly confidential portions of the IE’s report, and the highly confidential information underlying the report. The Modified Protective Order also sets up a process by which an expert may seek to be qualified to review specific Highly Protected Information.

Consistent with past Commission decisions, the Modified Protective Order will require interested parties to review highly confidential data either in PacifiCorp’s offices or Kiewit’s offices or through a secure cloud-based content management system in view only mode.⁶ Qualified parties are not authorized to make copies of any document designated as highly confidential. Qualified parties reviewing the highly confidential information may

⁶ See, e.g., 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).

make limited notes regarding the documents for reference purposes only. After reviewing the highly confidential information, if a party reasonably believes that a limited, specific part of such document is necessary for inclusion in testimony in this proceeding or for use at hearing, PacifiCorp will work with the party to prepare an unredacted copy of the required portion of the highly confidential document.

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 Kiewit's information available to the IE and to qualified persons seeking to review and analyze the IE's report 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 and Kiewit. 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 could also delay discovery and interfere with the expeditious handling of highly confidential information.

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

Without a Modified Protective Order tailored to these circumstances, PacifiCorp will not be able to provide access to Kiewit's highly confidential information to the IE, Staff, or qualified persons from parties. There are no intermediate measures that are available to resolve this unique issue involving third-party information. Additional protections, such as those contained in the proposed Modified Protective Order, are necessary when the potential impact of disclosure would be especially severe. The Modified Protective Order also limits the ways in which highly confidential information can be stored, maintained, and

transmitted, thereby reducing the risk of unintentional disclosure. These safeguards and restrictions are sensible for the protection of the sensitive, non-public information and analysis involved in this proceeding.

III. CONCLUSION

For these reasons, PacifiCorp respectfully requests that the Commission approve the issuance of a Modified Protective Order in the format provided in Attachment A to this Motion. The proposed additional protections are reasonably designed and specifically targeted to reduce the possibility of harm to both PacifiCorp and Kiewit that may arise from the public disclosure of competitively sensitive information relating to the Kiewit Studies.

Respectfully submitted this 22nd day of June, 2023



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ATTACHMENT A

PROPOSED MODIFIED PROTECTIVE ORDER

MODIFIED PROTECTIVE ORDER
Docket No. UM 2183

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. This order covers two categories of Highly Protected Information:

- A. Highly Protected Information of PacifiCorp’s third-party contractor Kiewit Engineering Group, Inc. and its first-tier subcontractors (collectively, Kiewit) who assisted in the 2020 decommissioning studies for PacifiCorp (Kiewit Studies) (Kiewit’s Highly Protected Information). For purposes of this order, Kiewit’s Highly Protected Information may include, but is not limited to, its proprietary pricing data, modeling software, historical data, calculations, estimating drawings, and cost estimation methodology used to prepare the Kiewit Studies.
- B. All other documents designated as Highly Protected Information.

General Protective Order No. 21-218 governs the acquisition and use of “Protected Information.”

Designation of “Highly Protected Information”:

2. Any party, including a third-party contractor for a party (which here means Kiewit), 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 particularly 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. 23-___

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. 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.

5. 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:

6. 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 appropriate. 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 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) but is not required to disclose the challenged information itself. If the designating party does not timely respond to the objection, the Commission will remove the protected designation from the challenged information.

9. The challenging party must either file a written reply to any response within five business days of service of an objection or the challenged protected designation shall be deemed accepted. 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, as necessary. Until a ruling by the ALJ, the challenged protected designation shall be treated as Highly Protected Information pursuant to this Modified Protective Order. If the ALJ determines that the challenged protected designation should be removed, such ruling will not take effect for a period of fourteen (14) days to give the designating party time to appeal the ALJ’s decision. Any decision of the ALJ to remove a protected designation shall be stayed during the pendency of any appeal.

Access to Highly Protected Information:

10. 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 taking part as an analyst or in a decision-making, managerial, supervisory, or support role in the Proceeding;
- (b) Assistant Attorneys General assigned to represent the Commission

11. Persons qualified to access Highly Protected Information only upon signing the Signatory Page for Highly Protected Information, Appendix B, are:

- (a) An employee who is taking part in the review or litigation of the Proceeding or counsel of the Regulatory Division at the Oregon Citizens' Utility Board;
- (b) Counsel for a party; and
- (c) The Independent Evaluator (IE) designated by the parties and the Commission in this docket.

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.

12. After the release of the IE's report evaluating such information, a party bound by the General Protective Order No. 21-218 may seek to qualify its own expert (limited to one individual) to access certain specific Highly Protected Information by:

- (a) Having such expert complete and sign Appendix C, and submitting that information to the designating party and the Commission;
- (b) Identifying and describing the certain specific Highly Protected Information being sought; and
- (c) Explaining why such party's expert requires direct access to the certain specific Highly Protected Information being sought. Within five business days of receiving a copy of Appendix C and the above details, the designating party must either provide the access to the requested information designated as Highly Protected Information or file an objection under paragraph 15.

13. Access to Kiewit's Highly Protected Information, as described in Paragraph 1, will be provided to Qualified Persons at PacifiCorp's offices or Kiewit's offices. For all other Highly Protected Information, access will also be provided in a secure cloud-based content management system in view only mode. 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 regulatory 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, 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 an unredacted copy of the required portion of the document and provide it to that party within five business days.

14. 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 provided pursuant Paragraph 22 or uploaded to a file folder designated "highly protected" in Huddle, if applicable.

Objection to Access to Highly 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. If Kiewit is the designating party believing there are reasons to restrict access to Highly Protected Information, PacifiCorp may act on Kiewit's behalf in objecting to access to the Highly Protected Information. 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. If the ALJ determines that the specific Highly Protected Information may be disclosed to the person seeking access, such ruling will not take effect for a period of fifteen (15) calendar days to give the designating party time to seek certification of the ALJ's decision. Any decision of the ALJ to provide a person under paragraph 15 with specific Highly Protected Information may not be disclosed to the person during the pendency of any certification or appeal.

Use of Highly Protected Information:

17. 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 13 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.

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. 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.

21. Other than the parties designated in Paragraph 10 and the IE, no parties will have access to any of Kiewit's independently prepared workpapers and data until after the release of the IE's report evaluating such information. After the release of the IE report, Qualified Persons under Paragraphs 11 and 12 may seek access to these third-party documents through discovery pursuant to this Order.

22. If Highly Protected Information must be submitted to the Commission's Administrative Hearings Division, the designating party must file a copy of the referenced document containing Highly Protected Information with the Commission's Administrative Division printed on green paper and placed in a sealed envelope or other appropriate container. The envelope/container must bear the legend:

THIS ENVELOPE IS SEALED UNDER ORDER NO. 23-___ AND CONTAINS HIGHLY PROTECTED INFORMATION. THE INFORMATION MAY BE SHOWN ONLY TO PERSONS QUALIFIED TO ACCESS HIGHLY PROTECTED INFORMATION AS DEFINED IN THE ORDER.

Duration of Protection:

23. The Commission will preserve the designation of information protected as Highly Protected Information until the Highly Protected Information is no longer considered to be Highly Protected Information or 2040. The Commission will notify PacifiCorp at least two weeks prior to the release of Highly Protected Information. Nothing in this paragraph is intended to conflict with Oregon public record law requirements.

APPENDIX B

**Signatory Page for Highly Protected Information
Docket No. 2183**

Persons Qualified pursuant to Paragraph 11, 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 No. UM 2183

Persons Seeking Qualification under Paragraph 12 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.

| | | |
|--|--|--------------|
| Signature: | | Date: |
| Printed Name: | | |
| Physical Address: | | |
| Email Address: | | |
| Employer: | | |
| Associated Party: | | |
| Job Title: | | |
| If not employee of party, complete and thorough description of practice and current and past clients: | | |