

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 77

In the Matter of

PACIFICORP, dba PACIFIC POWER,

2021 Integrated Resource Plan.

RULING

DISPOSITION: CONFIDENTIAL DESIGNATION RETAINED

This ruling overrules the objection of Sierra Club to the confidential designation by PacifiCorp, dba Pacific Power, of a spreadsheet providing projected carbon dioxide (CO₂) emissions from the company's Jim Bridger Units 1 and 2 provided in response to Staff data request OPUC 097.

I. PROCEDURAL HISTORY

On September 1, 2021, PacifiCorp filed its 2021 Integrated Resource Plan (IRP). PacifiCorp requested a general protective order in this proceeding, which was issued as Order No. 21-271 on August 30, 2021.

PacifiCorp's 2021 IRP includes Action Item 1c which provides for the natural gas conversion of Jim Bridger Units 1 and 2 by 2024. Numerous data requests have been propounded in this proceeding, including OPUC 097 from Staff asking the company to "provide annual emissions for the Jim Bridger 1 and 2 units, including emissions from before and after conversion to natural gas."¹ PacifiCorp's response provided "an excel spreadsheet with the forecasted annual emissions for Jim Bridger Units 1 and 2 for the years 2021 through 2040 based on the PLEXOS model dispatch of the units."² PacifiCorp designated this spreadsheet as confidential under the general protective order issued in the docket.

On February 22, 2022, after informally discussing concerns with PacifiCorp, Sierra Club filed an objection to this designation. On March 1, 2022, PacifiCorp filed a response to the objection. On March 4, 2022, Sierra Club filed a sur-reply. PacifiCorp also filed a sur-reply on March 9, 2022.

¹ PacifiCorp's Response to Sierra Club's Objection to PacifiCorp's Designation of Certain Information as Confidential at 1.

² *Id.*

II. LEGAL STANDARD

Access to and use of protected information in the Commission's proceedings is governed by protective orders under OAR 860-001-0080. Under the Commission's general protective order, if a party reasonably believes that certain material falls within the scope of ORCP 36(C)(1) because it constitutes "a trade secret or other confidential research, development, or commercial information," and is not publicly available, the party may unilaterally designate that material as confidential. There are two definitions of trade secrets in Oregon law. The Uniform Trade Secrets Act, ORS 646.461(4) defines a trade secret as:

Information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:

- (a) Derives independent economic value, actual or potential, from being generally known to the public or to other persons 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 192.345(2) defines a trade secret to include:

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.

The general protective order provides a process for another party to dispute that designation, with the designating party having the burden to demonstrate that the challenged information is protected by the Uniform Trade Secret Act or is exempt from disclosure under the Public Records Law.

In *Citizens' Utility Board v. Oregon Public Utilities Commission*, the Oregon Court of Appeals relied on federal law regarding the identification of a trade secret to identify the following six factors for consideration:

- (1) the extent to which the information is known outside the business;
- (2) the extent to which it is known by the employees and others involved in the business;
- (3) the extent of measures taken to safeguard the secrecy of the information;
- (4) the value of the information to the business or its

competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.³

The Oregon Court of Appeals later provided a three-part test to assess the existence of a trade secret:

1) derives economic value from not being generally known; 2) is subject to reasonable efforts to maintain secrecy; and 3) disclosure would result in significant harm.⁴ With regard to demonstrating harm, the Oregon Court of Appeals previously indicated there needed to be “a clearly defined and seriously injury” as opposed to “[b]road allegations of harm unsubstantiated by specific examples or articulated reasoning.”⁵

III. PARTIES’ POSITIONS

A. SIERRA CLUB

Sierra Club objects to PacifiCorp’s confidential designation of a spreadsheet providing projected carbon dioxide (CO₂) emissions from the company’s Jim Bridger Units 1 and 2 between 2021 and 2037 that was provided in response to Staff data request OPUC 097. In its objection, Sierra Club asserts that the information contained in the spreadsheet could not reasonably be classified as confidential because CO₂ emissions data is to be reported to the United States Environmental Protection Agency (EPA), and then made publicly available through the EPA’s Clean Air Markets Database.⁶

The carbon intensity of PacifiCorp’s generation plants, including Jim Bridger Units 1 and 2, is of great interest to Sierra Club as well as the general public, because the information will facilitate critical assessment of PacifiCorp’s IRP filing as well as the company’s assertions about reducing greenhouse gas emissions in transition to operating a fleet of clean energy plants. Sierra Club contends that PacifiCorp fails to meet its burden to demonstrate the information at issue qualifies for confidential protection from public disclosure.

Sierra Club challenges PacifiCorp’s assertion that its response to Staff data request OPUC 097 is covered by the Uniform Trade Secrets Act and ORS 646.461(4) because PacifiCorp fails to identify a “clearly defined and serious injury” resulting from the

³ *Citizens’ Util. Bd. of Oregon Pub. Util. Comm’n v. Oregon Public Utility Commission*, 128 Or App 650, 658-59 (1994) (internal citations omitted).

⁴ *Pfizer, Inc. v. Oregon Department of Justice*, 254 Or App 144, 160-162 (2012).

⁵ *Citizens’ Util. Bd. of Oregon Pub. Util. Comm’n*, 128 Or App at 658-659.

⁶ Sierra Club’s Objection to Designation of Certain Information as Confidential, at 1, fn 2 citing U.S. Envtl. Prot. Agency, Clean Air Markets Database, <https://ampd.epa.gov/ampd/>.

disclosure of projected CO₂ emissions at the Jim Bridger Units 1 and 2. Concerns about the ability of suppliers and contractors to overprice bids for emission control equipment or technology due to the ability to discern information about PacifiCorp's emission control requirements from forecasted carbon dioxide emissions are speculative at best, Sierra Club asserts. Sierra Club points out that there are no existing state or federal carbon dioxide control requirements. In any case, if there were, it would be likely that PacifiCorp would disclose projected emissions data in needed air permit applications, or in requests for bids, Sierra Club states.

Sierra Club also contests PacifiCorp's assertion that public knowledge of a generating unit's CO₂ emissions puts the company at a competitive disadvantage when buying and selling power because third parties can estimate expected dispatch at that plant. Sierra Club indicates that PacifiCorp acknowledged, during informal discussions about the confidential designation, "that third parties are likely able to extrapolate projected emissions at Jim Bridger based on plant's closure dates contained in the 2021 IRP and publicly available, historical CO₂ emission data available through the EPA's Clean Air Markets Program Data website."⁷ Sierra Club also argues that PacifiCorp fails to demonstrate why the information at issue should be confidential because it is estimated by PLEXOS and not historical data. PacifiCorp points to expenditures to develop modeling techniques and input assumptions, but Sierra Club observes that it seeks model outputs not inputs.

B. PACIFICORP

PacifiCorp asserts that the information at issue in the company's response to OPUC 097 falls within the scope of ORCP 36(C) as a "trade secret" under ORS 646.461(4). The information is non-public, proprietary, and commercially sensitive as its disclosure would harm customers because the company would be placed at a commercial disadvantage with suppliers and contractors as well as when buying and selling power, PacifiCorp states.

PacifiCorp asserts that Sierra Club is incorrect that the information is a type not typically withheld from the public, explaining that the information at issue is estimated, not recorded or historical. The two types of data sets—*i.e.*, forecasted versus historical—are completely different, PacifiCorp states. Emissions data reported to the EPA and made publicly available on the Clean Air Markets Program Data website is collected by continuous emissions monitoring equipment that is certified, maintained, and operated pursuant to Title 40 of the Code of Federal Regulation Part 75, PacifiCorp explains. In contrast, the forecast emissions data provided in response to OPUC 097 is estimated from PLEXOS modeling specific to the company's system with inputs based on the company's 2021 IRP assumptions. PacifiCorp states that only a limited number of company

⁷ *Id.* at 5.

employees have access to forecasted emissions information for Jim Bridger Units 1 and 2, as demonstrated by the signatory pages filed under the protective order. PacifiCorp states that comparable forecasted emissions data has never been made publicly available in a Commission proceeding or in a report to an agency, and that protecting the OPUC 097 response information as confidential under a protective order is consistent with the Commission's IRP guidelines and precedent.

Sierra Club adds to the confusion in reply comments, PacifiCorp observes, by conflating forecasted emissions with not only historical emissions, but also with extrapolated data and permitted emissions. While PacifiCorp offered that Sierra Club could try to extrapolate the desired information from the company's recorded data, PacifiCorp did not represent that Sierra Club would be able to generate accurate results. In sur-reply comments, PacifiCorp characterized extrapolation as a "crude guesstimate."⁸ Sierra Club is also incorrect that the company's forecasted emissions would be disclosed in air permit applications; the company submits historical emissions to establish compliance with permitted emissions and submits permit applications seeking permission to emit according to permitted emissions limits, but neither submission discloses forecasted emissions. In any case, as Sierra Club points out that no federal or state CO₂ emission control requirement currently exist, it is not possible that PacifiCorp would be seeking such a permit. The fact that such regulations may be imposed in the future reinforces the company's need to maintain confidentiality about forecasted CO₂ emissions at its generating units to retain secrecy and a competitive advantage regarding future expenditures needed to control such.

Disclosure of the company's response to OPUC 097 would result in substantial harm, PacifiCorp contends, in two ways: 1) suppliers and contractors could use forecasted emissions data to glean information about emission control needs at Jim Bridger Units 1 and 2 thereby putting the company at a disadvantage when requesting bids on emission control equipment or technology due to third parties' ability to discern PacifiCorp's willingness to pay; and 2) power market participants could discern the expected dispatch of the units, putting the company at a disadvantage when buying or selling power.

In sur-reply comments, PacifiCorp responds to Sierra Club's assertions about failure to establish substantial harm from disclosure of the OPUC 097 data. Sierra Club claims that the company will provide forecasted CO₂ emissions data to contractors and suppliers in requests for bids but is mistaken because the company prefers to issue RFPs with "bid specifications that align with permitted emission limits as opposed to providing forecasted emissions;" if the company does provide forecasted CO₂ emissions data in an RFP, it protects data confidentiality with various forms of a nondisclosure agreement. As to Sierra Club's claim that the ability to extrapolate from historical data undercuts the

⁸ PacifiCorp's Sur-Reply to Sierra Club's Objection to PacifiCorp's Designation of Certain Information as Confidential at 6.

need to keep forecasted data confidential, PacifiCorp further explains the highly speculative nature of extrapolation versus the obvious insight provided by forecasted CO₂ emissions information into PacifiCorp's willingness to pay in the future to control CO₂ emissions from a particular generating unit, or how the Jim Bridger units might be dispatched and the company's resulting plans to buy or sell power.

IV. DISCUSSION

After review of the parties' filings with consideration of the legal standard in mind, I find PacifiCorp's confidential designation of a spreadsheet providing projected carbon dioxide (CO₂) emissions from the company's Jim Bridger Units 1 and 2 provided in response to Staff data request OPUC 097 should be maintained. Sierra Club's objection to the confidential designation primarily focuses on PacifiCorp's alleged failure to demonstrate sufficient harm from public disclosure of the data contained in the spreadsheet, with underlying contentions that the data can be adequately extrapolated or obtained in other public filings. I find, however, that PacifiCorp explains that the information at issue is forecasted in a manner relying on a model proprietary to the company. It is evident that the resulting outputs from the model, which is what Sierra Club expressly seeks to make public, are not otherwise available. PacifiCorp explains why extrapolation from historical data is significantly different in terms of reliability and the ability to cause competitive harm. PacifiCorp also specifies that the information at issue is known by only a few PacifiCorp employees and would not be included in any other public filing such as requests for bids, permit applications, or reports to agencies. Finally, PacifiCorp provides two persuasive examples of how the data could realistically be used to potentially harm the competitive position of PacifiCorp to seek certain goods or services and to buy or sell power.

Sierra Club's objection to the confidential designation by PacifiCorp of a spreadsheet providing projected carbon dioxide (CO₂) emissions from the company's Jim Bridger Units 1 and 2 provided in response to Staff data request OPUC 097 is overruled.

Dated this 31st day of March, 2022, at Salem, Oregon.



Katharine Mapes
Administrative Law Judge