

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 374

In the Matter of

PACIFICORP, dba PACIFIC POWER

Request for a General Rate Revision.

RULING

DISPOSITION: CONFIDENTIAL DESIGNATIONS MAINTAINED

This ruling denies Sierra Club's objection to PacificCorp dba Pacific Power's designation of protected information in Sierra Club Exhibit Nos. 410, 411, and 412.¹

I. BACKGROUND

The Commission's general protective order governs the access and use of protected information in its proceedings. The general protective order allows a party to unilaterally designate material as protected if the party reasonably believes that the information constitutes "a trade secret or other confidential research, development, or commercial information."² Once designated, the information may not be used or disclosed for any purpose other than participating in the proceeding without the written permission of the designating party.

OAR 860-001-0080 explains that the general protective order does not determine whether a particular document is exempt from disclosure, but establishes a process for parties to designate information as protected and rules for parties to exchange protected information with authorized persons. A party may challenge another party's designation of information as protected by notifying the designating party, who must then show that the challenged information either falls within the scope of ORCP 36(C)(1) or is exempt from disclosure under the Public Records Law. If parties are unable to resolve a dispute about a protected designation informally, the challenging party may request a conference with an Administrative Law Judge, or file an objection to the confidential designation. The Commission has encouraged parties to challenge the confidential designation of any

¹ These documents are the responses to Sierra Club data requests 9.6, 7.4-1 (first supplemental), and 7.4-2 (first supplemental), respectively.

² ORCP 36(C)(1).

publicly available information to help ensure that designations are limited and made in good faith.³

II. PROCEDURAL HISTORY

On February 10, 2020, PacifiCorp filed a motion for a general protective order in this proceeding, which was issued as Order No. 20-040 on February 11, 2020. On September 3, 2020, Sierra Club filed an objection to PacifiCorp's designation of three documents offered as Sierra Club Exhibit Nos. 410, 411, and 412. Sierra Club represents that before filing an objection, it made reasonable efforts to achieve informal resolution of the dispute by contacting counsel for PacifiCorp on August 28, and 29 and September 2, 2020. Sierra Club requested expedited consideration of its objection due to the evidentiary hearings starting on September 9, 2020. On September 4, 2020, I issued a memorandum declining to address the objection on an expedited basis. On September 11, 2020, PacifiCorp filed a response challenging Sierra Club's objections. Under the terms of the protective order, any reply to PacifiCorp's response was due within five business days, on September 18, 2020. Sierra Club did not file a reply.

III. LEGAL STANDARDS

The Commission's general protective order states, "a party may designate as Protected Information any information that the party reasonably determines: (1) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information); and (2) Is not publicly available."

The Oregon Uniform Trade Secrets Act defines trade secrets 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 not 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.⁴

The Oregon Court of Appeals has applied a three-part test to determine what constitutes a trade secret.⁵ Specifically, trade secret information: (1) derives economic value from not being generally known, (2) is subject to reasonable efforts to maintain its secrecy, and

³ *In the Matter of Sierra Club Regarding Violation of Protective Order No. 13-095*, Docket No. UM 1707, Order No. 14-392 at 7 n.6 (Nov. 6 2014).

⁴ ORS 646.461(4).

⁵ *Pfizer v. Oregon Department of Justice*, 254 Or. App. 144, 161-162 (Dec 19, 2012).

(3) disclosure would cause a significant harm.⁶ These determinations are made by engaging in a fact-specific inquiry focusing on the circumstances presented.

The Oregon Public Records Law, ORS 192.355(4) establishes an exemption for “information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.”

IV. POSITIONS OF THE PARTIES

A. Sierra Club

Sierra Club characterizes Sierra Club Exhibit No. 410 as a letter sent to the Wyoming Department of Environmental Quality in 2009. Sierra Club states that Sierra Club Exhibit No. 411 is a 2003 document analyzing emissions reduction technology options to comply with clean air requirements. Sierra Club describes Sierra Club Exhibit No. 412 as a 2005 document analyzing federal Clean Air Act compliance options. Sierra Club contends that due to the age of each document, they do not contain any proprietary business secrets. Additionally, Sierra Club contends that because Sierra Club Exhibit No. 410 was sent to a state agency, it is a public record and that there is no reasonable basis for PacifiCorp to claim a confidential proprietary interest in the document.

B. PacifiCorp

PacifiCorp asserts that the Commission should confirm the Company’s confidentiality designations for these documents because each qualifies as a protected “trade secret or other confidential research, development, or commercial information” under ORCP 36(C)(1), as set forth in Order No. 20-040. PacifiCorp represents that all of the disputed materials were developed by and are valuable to the Company, remain relevant to ongoing confidential negotiations and pending litigation, and have been never been publicly disclosed.

PacifiCorp disputes Sierra Club’s assertion that due to the age of each document, they do not contain any proprietary business secrets, and contends that, as a legal matter, the Oregon Court of Appeals has rejected the position that a trade secret necessarily loses protected status merely by virtue of its age.⁷

⁶ *Pfizer*, 254 Or. App. at 161-162, citing *Citizens' Utility Board v. Public Utility Commission of Oregon*, 128 Or App 650, 658 (June 29, 1994).

⁷ PacifiCorp Response at 4-5, citing *Pfizer*, 254 Or. App. at 165-166.

PacifiCorp describes Sierra Club Exhibit No. 410 as a letter from PacifiCorp to the Wyoming DEQ, sent as a part of confidential settlement negotiations between the parties. PacifiCorp argues that the company provided this document to the state of Wyoming in confidence, and that the document has not been publicly disclosed. PacifiCorp contends that disclosure would chill future confidential negotiations between the company and its regulators. PacifiCorp disputes Sierra Club's contention that the letter cannot be confidential because it was provided to a public agency, and argues the Oregon Public Records Act exempts from disclosure certain information submitted to a public agency in confidence.

PacifiCorp argues that Sierra Club Exhibit No. 411 includes a cover letter with two attachments sent by PacifiCorp to the Environmental Protection Agency (EPA), the Utah Department of Environmental Quality (DEQ), and the Wyoming DEQ as part of confidential settlement communications. PacifiCorp contends that the contents of these documents remain relevant to PacifiCorp's ongoing negotiations with its regulators, and ongoing litigation pending before the Tenth Circuit Court of Appeals. Additionally, PacifiCorp states that these documents contain information that if disclosed, would put the company at a disadvantage in negotiating compliance requirements and could expose the company to unnecessary litigation risk based on a misunderstanding of the company's actions. As a result, PacifiCorp contends that the business value of the documents contained in Sierra Club Exhibit No. 411 is ongoing.

PacifiCorp argues that the contents of Sierra Club Exhibit No. 412 remain commercially relevant today, and if disclosed could provide an advantage to competitors. Similar to Sierra Club Exhibit No. 411, PacifiCorp asserts that these materials are the subject of ongoing confidential negotiations and are relevant to pending litigation before the Tenth Circuit Court of Appeals.

V. DISCUSSION

Based upon my review of the parties' filings and the contents of Sierra Club Exhibit Nos. 410, 411, and 412, I find that the designation of these documents as confidential should be maintained. As the designating party, PacifiCorp has met its burden of showing that the challenged information is covered by ORCP 36(C)(1) or exempt from disclosure under the Oregon Public Records Law. The contents of Sierra Club Exhibit Nos. 410, 411, and 412 are relevant to ongoing negotiations and litigation, these materials thus have potential economic value with respect to those negotiations and litigation. The documents are non-public information that has been provided to other parties only in the context of confidential settlement negotiations and otherwise kept confidential with the general protective order. PacifiCorp has met its burden of showing that disclosure of

these documents would harm the company by placing PacifiCorp at a competitive disadvantage in negotiating compliance requirements.

Additionally, as correspondence within confidential settlement negotiations between PacifiCorp and the Wyoming DEQ, Sierra Club Exhibit No. 410, is exempt from public records law under ORS 192.355(4). The letter was submitted in confidence, not otherwise required by law, was reasonably considered confidential, and the public interest would suffer by the disclosure as a result of the potential chilling effect on future negotiations.

Sierra Club's objection to designation of these documents as confidential is denied.

Dated this 29th day of September, 2020, at Salem, Oregon.



Alison Lackey
Administrative Law Judge

A party may request certification this ruling for the Commission's consideration. Under OAR 860-001-1100(1). A request for certification must be filed within 15 days of the date of service of this ruling.