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**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

UE 111

In the Matter of the Revised Tariff Schedules )  
Applicable to Electric Service Filed by ) PROTECTIVE ORDER  
PacifiCorp. )

DISPOSITION: MOTION FOR ADDITIONAL PROTECTION  
GRANTED

In Order No. 99-700, the Administrative Law Judge issued a Standard Protective Order in this case. On April 27, 2000, PacifiCorp filed a motion for Additional Protection under Protective Order. PacifiCorp seeks heightened protection for documents responsive to data requests regarding wholesale market trading activities (ICNU's Data Request 5.144) and fuel procurement documentation (Staff's Data Request Nos. 308 and 309 and CUB's Data Request No. 35.) On May 8, 2000, ICNU filed a response urging the Commission to deny or limit PacifiCorp's request on the basis that the company has not meet the standards for additional protection. On May 15, 2000, PacifiCorp filed a reply to ICNU's response.

**PacifiCorp's Motion**

ICNU's Data Request 5.144 seeks information regarding PacifiCorp's decision making process related to wholesale trading activities. PacifiCorp contends that some information responsive to ICNU's data request is highly sensitive confidential information. It identifies two documents: the "Resolution Re Approval of Amendments to Interim Risk Management Program" adopted by the PacifiCorp Board of Directors, and a total of four pages from briefing papers that comprise a section titled "Risk Measurement and Management."

PacifiCorp seeks an order permitting the company to disclose these documents to counsel for parties to this rate case only, with disclosure to experts, consultants or other individuals retained by parties to this rate case subject to consent by PacifiCorp. The company contends that this additional protection is necessary because of the extreme commercially sensitive nature of the information and because certain consultants retained by ICNU or other

parties may represent a variety of parties engaged in wholesale energy transactions in the same markets in which PacifiCorp participates. PacifiCorp maintains that, to the extent that information regarding the company's trading strategies is disclosed to individuals that represent parties involved in negotiations with PacifiCorp, there is a substantial risk that such individuals would, perhaps inadvertently, use the information to gain a competitive advantage. PacifiCorp states that the distribution of this information is tightly controlled within the company, and contends that granting the requested protection will significantly limit the risk of an inadvertent breach of confidentiality.

PacifiCorp seeks similar protection for certain documents responsive to Staff's Data Request Nos. 308 and 309, as well as CUB's Data Request No. 35. PacifiCorp contends that information responsive to these data requests is highly sensitive confidential information regarding the company's strategies for procurement of coal and natural gas. This information includes summaries of bids in response to five Requests for Proposals, including documents titled "Coal Supply Proposals Ranked by Cost" and "Coal Purchase Optimization Model." It also includes a fifty-page document titled "Central Utah Mining Fuel Strategy."

Again, PacifiCorp seeks an order permitting the company to disclose these documents to counsel for parties to this rate case only, with disclosure to experts, consultants or other individuals retained by parties to this rate case subject to consent by PacifiCorp. The company contends that that this additional protection is necessary because of the extreme commercially sensitive nature of information regarding coal and natural gas procurement strategies. PacifiCorp states that the company must purchase substantial amounts of fuel under contract and on the spot markets. It explains that it has developed its fuel procurement plans based on its long experience participating in these markets, and that access to this information is carefully controlled within the company. It points out that some consultants retained by other parties may represent parties that would gain a competitive advantage through an understanding of how PacifiCorp uses contracts and spot markets in its fuel procurement. Given the competitive threat posed by the possibility of such information being used by parties that compete in the markets for fuel, PacifiCorp emphasizes that the company is sensitive to the dissemination of the information.

### **ICNU's Objection**

ICNU contends that the Commission should deny PacifiCorp's request on the basis that it does not meet the standards for a heightened protective order. It points out that PacifiCorp has made no specific allegations that ICNU, its counsel or consultants have in the past or will currently violate any Protective Order. ICNU also contends that PacifiCorp's concern that the requested information is "commercially sensitive" is inapplicable to ICNU, because ICNU is comprised of industrial customers, not PacifiCorp's competitors. Moreover, ICNU argues that to provide the

requested protection would give PacifiCorp unilateral power to determine what information is subject to disclosure and to possibly withhold information to prevent ICNU and other parties from making an independent determination of whether the company's rates are just and reasonable.

For these and other reasons, ICNU contends that PacifiCorp has not shown good cause in support of the motion. It maintains that the information sought falls well within the scope of discovery established by ORCP 36, and is not entitled to protection in addition to that already provided by the Standard Protective Order. In the alternative, ICNU proposes as a compromise solution that PacifiCorp work with other parties to identify which of the parties' consultants can view the information, and identifies three of its consultants for disclosure.

## **Discussion**

Paragraph 16 of the Standard Protective Order provides that "A person desiring additional protection may move for any of the remedies set forth in ORCP 36(C)." Paragraph 16 requires that a motion for additional protection state the parties involved, the nature of the information involved, the nature of the relief requested, and the specific reasons the relief is necessary. ORCP 36(C), in turn, states that, for good cause shown, the court may make any order which justice requires to protect a party. Among other things, the court may order that discovery be conducted with no one present except persons designated by the court, or that a trade secret or other confidential research, development, or commercially sensitive information not be disclosed or be disclosed only in a designated way.

Historically, the Commission rarely issued protection beyond that granted in the Standard Protective Order. The recent restructuring of the electric and natural gas industries, however, has focused greater attention on the need to limit the disclosure of certain confidential and proprietary information in Commission proceedings. Consequently, during the past couple years, the Commission has granted several request for additional protection. *See, e.g., In the Matter of the Application of Portland General Electric Company for Approval of the Customer Choice Plan*, UE 102, Order No. 98-163; *In the Matter of the Application of Northwest Natural Gas Company for a General Rate Revision*, UG 132, Order No. 98-505; *In the Matter of the Application of Scottish Power and PacifiCorp*, UM 918, Order Nos. 99-106 and 99-293.

In granting prior motions for additional protection, the Commission has balanced the potential harm from disclosure of the material against the benefit that might accrue from disclosure. In each case, the Commission found significant potential harm from disclosure and, in most cases, agreed that disclosure should be limited to Commission Staff only. In each case, the Commission also emphasized that the ruling was intended to be narrow and applied only to specific information identified by the moving parties.

In this case, PacifiCorp does not seek to limit disclosure to Commission Staff, but rather to counsel for parties only, with disclosure to experts and consultants retained by the parties with the company's consent. PacifiCorp contends that this additional protection is necessary because the Standard Protective Order does not provide for adequate monitoring of the disclosure of highly sensitive confidential information. The company acknowledges that Paragraph 8 of the Protective Order requires that, prior to disclosing confidential information to an unaffiliated expert, a party must provide written notice to the party desiring confidentiality at least three business days prior to the intended disclosure. PacifiCorp contends, however, that this provision of the Standard protective Order is routinely ignored. For example, the company states that it has provided confidential information to ICNU in this proceeding, but has no record of ICNU's providing any notice of disclosure of such information to any of its consultants. Therefore, PacifiCorp requests additional protection to insure the integrity of the highly sensitive confidential information that it must provide in response to the identified data requests.

PacifiCorp's motion for additional protection is granted. Contrary to ICNU's assertions, PacifiCorp has met its burden for obtaining a heightened protective order. PacifiCorp's motion identifies a discrete number of documents for which it seeks additional protection, and has explained the risk to the company should such sensitive information be disclosed to individuals also retained by its competitors. In addition, ICNU's claims that its members are customers of PacifiCorp, not competitors, fails to recognize the fact that its consultants may later be hired to work for competitors of the company. Moreover, as PacifiCorp notes, ICNU's members may soon be competitors under Oregon's direct access legislation.

In granting this request, the Commission is not giving PacifiCorp the unilateral authority to determine what information is subject to disclosure. First, this ruling is intended to be narrow and applies only to the specific information identified by PacifiCorp in its motion. Second, any party that believes that PacifiCorp is unreasonably refusing to consent to disclosure of this identified information to a particular consultant may move for an order compelling disclosure. The Commission intends that PacifiCorp will uphold its stated assurance that its consent will not be unreasonably withheld.

As in prior cases, we stress that this ruling does not reflect on the integrity of any attorney or other person involved in this matter. The disclosure of sensitive material may be inadvertent and may be undetectable, especially over long periods. While we are confident that a consultant would be scrupulous in abiding by the terms of a Protective Order, it might be impossible for that consultant to disregard all personal knowledge of the information in subsequent engagements where that information may be relevant. Due to such risks, the Commission believes that PacifiCorp should be entitled to adequately monitor the disclosure of the identified confidential documents that it must provide in response to the data requests.

**ORDER**

IT IS ORDERED that the request for Additional Protection under Protective Order, filed by PacifiCorp, is granted.

Made, entered, and effective \_\_\_\_\_.

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**Ron Eachus**  
Chairman

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**Roger Hamilton**  
Commissioner

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**Joan H. Smith**  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to ORS 756.580.