

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 67, LC 70

In the Matters of

PACIFICORP, dba PACIFIC POWER,

2017 Integrated Resource Plan and

2019 Integrated Resource Plan.

ORDER

DISPOSITION: ADMINISTRATIVE LAW JUDGE RULING CERTIFIED AND
AFFIRMED

I. INTRODUCTION

This order considers whether PacifiCorp, dba Pacific Power, appropriately designated certain information as confidential, as so found by an Administrative Law Judge (ALJ) ruling that upheld the protected designation under the standards of the general protective orders issued in these dockets.¹ We affirm the ALJ ruling, finding that PacifiCorp carried its burden to show that the redacted information in its June 2018 coal analysis meets the definition of trade secret because the analysis is preliminary, it has potential commercial value from not being generally known, and is the subject of efforts to maintain its secrecy.

At issue is certain information in PacifiCorp's June 2018 coal analysis that describes the costs and benefits of different coal plant retirement dates. Sierra Club has made two filings that we address below: (1) a motion for waiver of the 15-day filing deadline for certification of an ALJ ruling, and (2) a motion for certification and Commission review of the ALJ ruling. The ALJ has certified the motion for waiver of the 15-day deadline under OAR 860-001-0090(j), and has also found good cause to certify the ALJ ruling for Commission review under OAR 860-001-0110(2)(c).

¹ *In the Matter of PacifiCorp 2017 Integrated Resource Plan*, Docket No. LC 67, Order No. 16-461 (Dec 5, 2016) (general protective order for the 2017 IRP); *In the Matter of PacifiCorp 2019 Integrated Resource Plan*, Docket No. LC 70, Order No. 18-216 (Jun 12, 2018) (identical general protective order for the 2019 IRP).

II. BACKGROUND

A. June 2018 Coal Analysis

In our order acknowledging PacifiCorp's 2017 IRP, we directed PacifiCorp to perform System Optimizer (SO) runs for each coal unit and a base case and to provide the results to the parties in docket LC 67 by June 30, 2018.² PacifiCorp first presented the results of this coal analysis in an IRP stakeholder meeting on June 25, 2018,³ and subsequently filed the presentation in docket LC 67.⁴

PacifiCorp designated as "protected" six individual redactions that fall into three categories. The first, and most contested group of redactions covers the difference in present value of revenue requirement (PVRR(d)) results of individually retiring each coal unit in 2022. In the June 2018 coal analysis, the PVRR(d) values are a dollar value that represents the change in PacifiCorp's total system cost from early retirement of a coal unit, as modeled by PacifiCorp's SO capacity expansion model. PacifiCorp also designated as protected a sample graph that is a visual depiction of the components that comprise the change in system cost over the 20-year period from the change in fixed costs, fuel costs, and emissions costs for Jim Bridger 1. Lastly, PacifiCorp designated as protected two statements that summarized or evaluated the PVRR(d) results.

Under our general protective order the protected designation precludes public disclosure of the information, but allows Commission stakeholders that have signed the protective order in either docket LC 67 or docket LC 70 to access the information. This includes certain individuals from the following organizations: PacifiCorp, Sierra Club, NW Energy Coalition, Renewable Northwest, Oregon Citizens' Utility Board, Alliance of Western Energy Consumers, Renewable Energy Coalition, Northwest and Intermountain Power Producers Coalition, Oregon Department of Energy, Commission employees, and Assistant Attorneys General assigned to represent the Commission.⁵

B. Protective Order Background and Sierra Club's Filing

Our general protective order shields no specific documents and makes no judgment as to whether any particular document is a trade secret or contains commercially sensitive

² *In the Matter of PacifiCorp, 2017 Integrated Resource Plan*, Docket No. LC 67, Order No. 18-138 (Apr 27, 2018).

³ PacifiCorp Letter, Docket No. LC 67 (Jun 25, 2018) (explaining how PacifiCorp would present the coal analysis).

⁴ PacifiCorp's Compliance Filing per Order No. 18-138, Coal Analysis, Docket No. LC 67 (Jun 29, 2018).

⁵ Notice of Commission Workshop, Docket No. LC 70 (Aug 7, 2018).

information. Instead, the general protective order adopts a process for parties to avoid discovery disputes that include protected information.⁶ That process allows any party to designate any item as protected if the party reasonably determines the information falls within the scope of ORCP 36(C)(7) as a trade secret and is not publicly available. The general protective order also authorizes any party to challenge any such confidential designation.⁷

On July 9, 2018, Sierra Club filed written objections to all of PacifiCorp's designations. Sierra Club argued that the public interest requires that the public have access to the coal analysis results, and that the protected designations were not supported. On August 6, 2018, the ALJ issued a ruling that upheld PacifiCorp's protected designation of the information. The ALJ ruling finds the information qualifies as trade secrets because it has economic value in potential or actual transactions.

C. Proceedings after the June 2018 Coal Analysis Filing

Following PacifiCorp's filing of its 2018 coal analysis, we held a two-hour Commission workshop on August 28, 2018, on the company's results with much of the discussion conducted publicly. Our publicly-available agenda lists our specific questions on the coal analysis, such as how potential capital investments were modeled, and how fuel cost projections impact the analysis. Our agenda explained that we were fully engaged on next steps for the coal analysis so that PacifiCorp's 2019 IRP could contain transparent analysis on how market forces are impacting resource planning decisions for PacifiCorp's coal fleet.

We further addressed the coal analysis and made decisions on the next steps at our September 25, 2018 Regular Public Meeting. In this open, public meeting (with live video and recorded video on our website) we discussed our primary goal with the coal analysis was to have the economics of the coal units evaluated in the 2019 IRP analysis. We considered how a robust analysis could be completed in a short period of time, and issued specific directives to PacifiCorp to submit filings with the Commission and to hold meetings with stakeholders on both the scope of the updated coal analysis and the results of the updated coal analysis.⁸

On December 5, 2018, PacifiCorp filed its updated coal analysis in docket LC 70. In its updated analysis, PacifiCorp did not designate the final PVR(d) results as protected

⁶ OAR 860-001-0080(2).

⁷ See Order No. 16-461 (Dec 5, 2016) (docket LC 67 protective order).

⁸ *In the Matter of PacifiCorp, 2019 Integrated Resource Plan*, Docket No. LC 70, Order No. 18-360 (Sep 28, 2018).

under the general protective order. The updated coal analysis contains over 100 slides with PacifiCorp's analysis of the cost or benefit of 2022 early retirement of each individual coal unit in its fleet, and also the cost or benefit of early retirement of combinations of units.

III. MOTION FOR WAIVER

A Sierra Club's Motion

Sierra Club filed a motion for waiver of any requirement that an ALJ first certify an appeal to the Commission and, in the alternative, for waiver of the 15-day deadline for such requests. Sierra Club states there is good cause to waive the intermediate certification by the ALJ because the Commission expressly retained control over the development and presentation of the coal analysis by requiring status updates and setting a compliance deadline. Sierra Club maintains that the certification rule serves no purpose in these circumstances when the ALJ's oversight is complete because the docket in which the Commission required the analysis—LC 67—is no longer active.

Alternatively, Sierra Club requests waiver of the 15-day deadline. Sierra Club states that its appeal of the ALJ ruling will not cause delay or inefficiency. Sierra Club explains that its challenge to the protected designations in the coal analysis will not interfere with the entirely new coal study PacifiCorp is preparing for the 2019 IRP in docket LC 70. Sierra Club adds that the public interest favors reconsideration of the ALJ ruling because (1) the ALJ ruling invites utilities to baselessly designate information as confidential, and (2) disclosure of the coal analysis will allow the public to scrutinize how the company's economic evaluations have changed over time and whether PacifiCorp is acting in the best interest of its ratepayers.

B. PacifiCorp's Response

PacifiCorp responds that Sierra Club has not met the good cause requirement for waiver of the 15-day deadline for certification of the ALJ ruling required by OAR 860-001-0110. PacifiCorp contends that Sierra Club has not explained why it failed to file for certification in a timely manner or at an earlier date. PacifiCorp states that the Oregon Commission's certification process was discussed in a parallel proceeding in Washington state one month before Sierra Club's filing here.

PacifiCorp also contends that Sierra Club should not be excused for not knowing the Commission's rules because all parties are charged with knowledge of our rules. PacifiCorp further states that in docket LC 57 the Commission specifically addressed

Sierra Club's lack of familiarity with Commission rules by requiring trainings and that Sierra Club's legal staff certify that it understood the Commission's procedural rules.⁹

C. Discussion

We grant Sierra Club's motion for waiver of the 15-day deadline for certification of an ALJ ruling contained in OAR 860-001-0110. As stated in OAR 860-001-0000, we may waive any of our procedural rules for good cause shown. Although we expect all parties to Commission proceedings to know and follow our procedural rules, we find that Sierra Club has established good cause to waive the deadline in order to allow an examination of the substance of Sierra Club's appeal, which has generated significant public and media interest. We also find that entertaining Sierra Club's appeal will not prejudice PacifiCorp, nor cause delay or inefficiency to our proceedings.

IV. REVIEW OF ALJ RULING

A. Sierra Club's Motion

Sierra Club seeks reversal of the ALJ's ruling upholding PacifiCorp's designation as protected of the PVRR(d) results in its June 2018 coal analysis. Sierra Club asserts that the ALJ's ruling simply accepts PacifiCorp's position that the redacted information constitutes trade secrets with commercial value without applying the proper standard or engaging in the necessary analysis. Sierra Club states that the ALJ did not review each of the contested redactions to determine whether each piece of redacted information is a trade secret. Sierra Club adds that the ALJ ruling relies on purely hypothetical transactions to determine that PacifiCorp would be disadvantaged if the challenged information were disclosed. Sierra Club contrasts the ALJ ruling's general conclusions against the Oregon trade secret standard of demonstrating that disclosure will work a clearly defined and serious injury.¹⁰

Sierra Club believes that the ALJ ruling disregards the protective order's purposeful standard and will invite companies to over-designate information as confidential. Sierra Club asks us to issue an order making clear that a designating party must prove, based on specific well established facts and sound legal analysis, that information designated as confidential properly falls within the scope of ORCP 36(C)(7).

⁹ PacifiCorp Response at 6 (Oct 22, 2018), citing *In the Matter of Sierra Club, Regarding Violation of Protective Order No. 13-095*, Docket UM 1707, Order No. 14-392 (Nov 6, 2014).

¹⁰ Sierra Club Request for Certification at 10 (Sep 28, 2018).

Lastly, Sierra Club argues that PacifiCorp did not carry its burden of proof to uphold the protected designations and did not individually and specifically address each redaction. Sierra Club states that the protective order requires the designating party to identify the factual and legal basis of how the challenged information is protected. Sierra Club primarily contests the protected designation of the PVRR(d) results. Sierra Club believes the PVRR(d) show an aggregate cost or benefit of holding or retiring each individual coal unit, and public release could not cause the company serious injury because it is not the information on which competitive market transactions are based. In its appeal, Sierra Club no longer challenges the redaction for the Jim Bridger 1 graph. However, Sierra Club states the other redacted information either discusses individual units or summarizes the PVRR(d) information, and would provide little meaningful information to third parties.

B. PacifiCorp's Response

PacifiCorp contends that the ALJ's ruling should be affirmed. The company explains that disclosure could mislead the public, distort the power markets, impede its ability to operate its coal plants, and cause serious harm to PacifiCorp and its customers. PacifiCorp explains how the coal analysis results are designated as protected to allow the company to share the results of its ongoing analytical process with stakeholders, while protecting against the harm and confusion caused by public release of studies that are not final or are otherwise insufficient for resource decision-making.

PacifiCorp states that its approach to designation of confidential information follows Commission precedent and the company's prior practice. PacifiCorp explains that we upheld the confidential designation of substantially similar preliminary coal plant PVRR(d) results over Sierra Club's objection in the 2013 IRP. PacifiCorp concludes that we have recognized the inherent sensitivity of the company's economic analysis and supply costs for its coal plants and the risk to customers associated with public disclosure.

C. Renewable Energy Coalition Comments

The Coalition supports Sierra Club's efforts to make all the results of PacifiCorp's filing publicly available. The Coalition states that its members include more than 30 entities that own and operate approximately 50 renewable energy generation facilities in Oregon, Idaho, Montana, Washington, Utah, and Wyoming. The Coalition explains that its members include irrigation districts, water districts, corporations, cooperatives, and individuals. Many of them are not familiar with the regulatory process, do not have legal counsel familiar with Commission protective orders, and are not willing to execute

protective orders. Thus, the Coalition disagrees with the ALJ's conclusion that restriction of access to information does not harm or impair the stakeholders' representation of its interests before the Commission. The Coalition explains that confidentiality restrictions, especially of a broad nature, significantly harm its ability to participate in this and other regulatory proceedings.

D. Commission Resolution

We affirm the ALJ ruling and uphold PacifiCorp's designation of information as protected. Below we address our standards for reviewing protective order designations, and we explain our limited finding here that PacifiCorp's coal analysis from June 2018 is preliminary and it meets the definition of trade secret because it has potential commercial value from not being generally known and is the subject of efforts to maintain its secrecy.

1. Legal Standard

Many of our proceedings involve commercially sensitive information. We use protective orders to allow parties the ability to review confidential information while ensuring that it is not disclosed publicly.¹¹ Once a party challenges the confidential designation of a particular document, the designating party bears the burden of showing that the challenged information falls within ORCP 36(C)(7).¹² The standard in ORCP 36(C)(7) provides that a court may limit disclosure of a "trade secret or other confidential research, development, or commercial information." Thus, we look to the statutory definition and the courts' explanation of what information may qualify as a trade secret.

Oregon Trade Secrets Law defines a trade secret as information that "derives independent economic value, *actual or potential*, from not being generally known to the public," and is the subject of efforts to maintain its secrecy.¹³ The Oregon Court of Appeals provided a three-part test to determine what constitutes a trade secret in *Pfizer v. Oregon Department of Justice*.¹⁴ The court explains that trade secret information: (1) derives economic value from not being generally known, (2) is subject to reasonable efforts to maintain its secrecy, and (3) disclosure would cause a significant harm.¹⁵ The court explained that these determinations are made by engaging in a fact-specific inquiry focusing on the facts and circumstances presented.

¹¹ Internal Operating Guidelines (Oct 14, 2014).

¹² *In the Matter of Oregon Electric Utility Co., Application for Authorization to Acquire Portland General Electric Company*, Docket No. UM 1121, Order No. 05-114 (Mar 10, 2005).

¹³ ORS 646.461(4) (emphasis added).

¹⁴ *Pfizer Inc. v. Oregon Department of Justice*, 254 Or App 144 (Dec 19, 2012).

¹⁵ *Id.* (citing *Citizens' Utility Board v. Public Utility Commission of Oregon*, 128 Or App 650, 658 (Jun 29, 1994)).

2. *Preliminary Results Could Cause Competitive Disadvantage*

We apply the first and third prongs of the test together because the potential economic value of the coal analysis involves a consideration of whether the company would experience significant harm from disclosure. PacifiCorp states that public disclosure of PVRR(d) results that are preliminary and incomplete could mislead, rather than inform, the public as well as the numerous agencies and regulators with which PacifiCorp is engaged. PacifiCorp contends that the public disclosure of such preliminary results could cause harm in its coal plant operations, coal plant transactions, and more broadly in the Northwest energy markets.

At the outset, we agree with Sierra Club and PacifiCorp's characterizations of the June 2018 coal analysis as a "modeling exercise". Our Staff originally designed the scope of the June 2018 coal analysis to isolate individual plant retirement impacts and costs and limited the analysis so that PacifiCorp could provide preliminary results on an expedited timeline. PacifiCorp voiced concerns with this design, stating it "will not give a complete, portfolio-level view of the economics of PacifiCorp's coal portfolio. The structure of the proposed unit-by-unit analysis requested by Staff does not capture system cost impacts that would result with early retirements at more than one facility."¹⁶ PacifiCorp explained that the "model runs will require further supplemental analysis regarding transmission and system balancing, based on the identification of any economic retirement, or a combination thereof, that may occur."¹⁷

We directed PacifiCorp to complete the coal analysis, using PacifiCorp's description of the scope of the analysis and the content of the analysis, by June 30, 2018. PacifiCorp had explained that the June deadline "aligns with the beginning of the stakeholder process for the 2019 IRP. This will also allow the new analysis to inform subsequent analysis in the 2019 IRP by providing coal-unit screening studies early in the public-input process." This explanation supports our finding that the preliminary June 2018 analysis was intended to *inform* the design of a more comprehensive system-wide portfolio analysis of early coal plant retirements, but not to produce results of comparable completeness and validity as a comprehensive portfolio analysis.

Having established that the 2018 coal analysis is preliminary in nature, we now consider whether PacifiCorp has met its burden to show that public release of preliminary analysis could cause harm or competitive disadvantage. PacifiCorp contends that disclosure of the protected information would harm its negotiations with agencies and regulators

¹⁶ PacifiCorp's Response to Staff's Public Meeting Memo, Docket No. LC 67 at 16-17 (Nov 28, 2017).

¹⁷ *Id.* at 17.

responsible for determining the necessary emissions control equipment at the individual coal units, and in contract negotiations with third party contractors to build and install any equipment necessary to meet environmental mandates.¹⁸ We adopt the ALJ's finding of potential economic value in the redacted cost inputs and PVRR(d) results in the context of PacifiCorp's environmental compliance. We look to PacifiCorp's 2017 IRP update that states "[i]ndividual unit outcomes under any regional haze compliance case will ultimately be determined by ongoing rulemaking, results of litigation, and future negotiations with state and federal agencies, partner plant owners, and other vested stakeholders." The IRP update shows multiple different coal units are subject to several different complex regulatory or court proceedings. We find that, in a contentious legal or regulatory proceeding, preliminary and incomplete early retirement PVRR(d) results or cost inputs may have potential economic value and cause competitive disadvantage. Contrary to Sierra Club's assertions, a showing of potential economic value is sufficient.¹⁹ We find that PacifiCorp has met its burden to establish that publicly releasing PVRR(d) results that are not the type or quality of analysis that it typically releases, such as in a completed IRP, could cause harm.

3. *Secrecy of the Information*

We find that PacifiCorp has met the final element of the trade secret test with several efforts to maintain the secrecy of the preliminary PVRR(d) results. PacifiCorp explains its practice has been to publicly release PVRR(d) results of previous coal studies only where those studies are based on final, comprehensive portfolio analyses that definitively and reliably inform the company's resource planning process. PacifiCorp has submitted several responses in this docket to defend its confidential designation. PacifiCorp has also litigated with Sierra Club in the Thurston County Superior Court in Washington to prevent the public disclosure of the confidential coal analysis under the Washington Public Records Act.²⁰

4. *Conclusion*

PacifiCorp has satisfied the standard in our protective order. As the designating party, PacifiCorp has met its burden of showing that the challenged information is covered by

¹⁸ PacifiCorp Opposition to Sierra Club's Waiver, Exhibit 1 at 6 (Oct 22, 2018) (Declaration of Chad Teply).

¹⁹ See ORS 646.461(4).

²⁰ PacifiCorp's Motion to Supplement the Record, Docket No. LC 67, Exh. 1 at 2-3 (Jul 31, 2018) (the Superior Court issued a temporary restraining order preventing disclosure); PacifiCorp Response to Sierra Club Motions at 3-4 (Oct 22, 2018) (explaining that the Superior Court judge subsequently issued a permanent injunction from the bench).

ORCP 36(C)(7). Our finding here is limited to the facts and circumstances of this filing. We have followed the *Pfizer* standards, and as the court explained, applied these standards as questions of fact.²¹

In reaching this decision, we note that the redacted preliminary PVRR(d) results in the June 2018 coal analysis have been superseded by PacifiCorp's December 5, 2018 filing of complete and updated coal analysis.²² PacifiCorp has made these updated results public, available on PacifiCorp's IRP website and our eDockets link on our website in the LC 70 docket. While Sierra Club and PacifiCorp have stated the updated coal analysis is entirely separate from the June 2018 coal analysis, and we understand that the updated coal analysis incorporates significant changes to the inputs and to the modeling, we nonetheless remind PacifiCorp that as the designating party, it has the responsibility under our protective order to remove a protected designation of information that no longer falls within the scope of ORCP 36(C)(7).²³

PacifiCorp's final PVRR(d) results show that the company may be able to accelerate the retirement of several coal units with a net benefit to the system. We will address these results for the first time at a public meeting on December 18, 2018. PacifiCorp has already indicated that it has "next steps" planned for the coal analysis, as it will evaluate additional combinations of units for accelerated retirement and more fully analyze the cost of reliability impacts.²⁴ We will continue to engage with the company's evolving coal analysis and are committed to fully considering the impact of early coal retirements in PacifiCorp's 2019 IRP process.

V. ORDER

IT IS ORDERED that:

1. The motion to waive the 15-day deadline in OAR 860-001-0110 is granted.
2. The motion to certify the Administrative Law Judge Ruling dated August 7, 2018, is granted.

²¹ *Pfizer Inc.*, 254 Or App at 161 (citing *Kaib's Roving R.P.H. Agency, Inc.*, 237 Or App 96, 103 ("whether information is or is not a trade secret is a question of fact")).

²² PacifiCorp's Compliance Filing in Accordance with Order No. 18-360, Docket No. LC 70 (Dec 5, 2018).

²³ Our General Protective Order provides, at paragraph 6:

A designating party must make reasonable efforts to ensure that information designated as Protected Information continues to warrant protection under this order. If designated information becomes publically available or no longer falls within the scope of ORCP 36(C)(7), the designating party should make reasonable efforts to remove the protected designation and provide written notice to the Commission and other parties.

²⁴ PacifiCorp's Compliance Filing in Accordance with Order No. 18-360, Docket No. LC 70 at 103.

3. The Administrative Law Judge ruling dated August 7, 2018, is affirmed.

Made, entered, and effective DEC 14 2018.


Megan W. Decker
Chair


Stephen M. Bloom
Commissioner


Letha Tawney
Commissioner



A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.