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VIA ELECTRONIC FILING

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RE: Docket A-130355—Pacific Power & Light Company’s Comments on Proposed Revisions to the Standard Protective Order

In response to the Notice of Opportunity to Submit Written Comments issued by the Washington Utilities and Transportation Commission (Commission) on October 17, 2018, Pacific Power & Light Company (Pacific Power), a division of PacifiCorp, submits the following written comments on the proposed revisions to the Commission’s standard protective order (the Proposed Protective Order). Included as an attachment to these comments is a redline to the Proposed Protective Order reflecting Pacific Power’s recommended revisions.

General Format and Structure of the Standard Protective Order

Pacific Power recommends certain architectural revisions to the Proposed Protective Order. These revisions are intended to clarify the Proposed Protective Order by consolidating related provisions into the same sections. Pacific Power’s recommended architectural changes can be viewed in its proposed redline edits, which are included as Attachment A.

Section A – General Provisions

Definition of “Confidential Information” (¶ 3)

After a robust public process, the Commission recently adopted extensive revisions to the administrative rules governing confidentiality.¹ The new rules include a revised definition of “confidential information,” which is codified in WAC 480-07-160(2)(b).

This phase of the proceeding is intended to conform the existing standard protective order to the recently adopted rule amendments. As currently drafted, the Proposed Protective Order would establish a new definition of “confidential information” that conflicts with the definition the Commission recently adopted.

The Proposed Protective Order retains the following language from the current standard protective order, which says, “[t]he Commission expects Confidential Information to include only numbers, customer names, and planning details.” This language cannot be reconciled with the new definition of “Confidential Information,” because it is a smaller set of information than is covered by the new definition contained in WAC 480-07-160(2)(b).

¹ See General Order R-593, Docket A-130355 (Sept. 19, 2018).

The Proposed Protective Order also limits the designation of confidential information:

A party must limit the information it designates as confidential to information that reasonably could compromise the party's ability to compete fairly or that otherwise might impose a legitimate business risk to the party if the information is disclosed without the protections provided in this Order and WAC 480-07-160.

This language is inconsistent with the definition adopted in WAC 480-07-160(2)(b).

The Proposed Protective Order could create significant confusion and uncertainty as to what qualifies as Confidential Information unless the language used is consistent with the language adopted by the Commission and set forth in WAC 480-07-160(2)(b). Pacific Power recommends that the language in the Proposed Protective Order as proposed in the attached redline to point to the definition contained within the rules.

Limitation on Use (¶ 5)

Pacific Power recommends that this section be modified to clarify that the use of Confidential Information by a receiving party is limited by the terms of the standard protective order. Furthermore, the section addressing limitations on use need not address who may request confidential information. Requests for confidential information, and objections to those requests, are evidentiary issues that are separate and distinct from the protection of Confidential Information under a protective order. Pacific Power recommends revising this section as follows:

A party, or a party's counsel or experts, having access to Confidential Information pursuant to this protective order may request, review, use, or disclose Confidential Information received from another party that only for purposes of this proceeding.

Pacific Power also recommends consolidating this language into the section addressing the use of Confidential Information in Section C.

Section B – Access to Confidential Information

Persons Permitted Access (¶ 6)

Pacific Power recommends that each party should be required to execute a Consent to Be Bound by the standard protective order before they can receive confidential information. As drafted, the Proposed Protective Order only requires attorneys and experts to execute consent forms. Pacific Power suggests adding language that mirrors the language used in the Public Utility Commission of Oregon's general protective order:

A party may not receive Confidential Information unless it has first consented to be bound to the protective order by signing the Non-Disclosure Agreement (Appendix A).

Pacific Power additionally recommends that this language be consolidated into the section addressing access to Confidential Information in the Non-disclosure Agreement paragraph.

The standard protective order should also clarify to whom a receiving party can disclose Confidential Information. Pacific Power proposes the following revisions to this section:

No A party who receives Confidential Information and is bound by this protective order may only be disclosed Confidential Information to anyone other than the

Commissioners, Commission Staff, the presiding officer(s), and, subject to the requirements in paragraph 7 below, ~~the receiving party's counsel for each of the parties to this proceeding, each~~ such counsel's administrative staff, and persons designated by the ~~receiving parties~~ as ~~an~~~~their~~ experts in this ~~matter~~ proceeding.

In addition, Pacific Power requests guidance on the intent of the following sentence in the Non-disclosure Agreement paragraph:

No expert other than members of Commission Staff may be an officer, director, direct employee, major shareholder, or principal of any party or any competitor of any party unless the provider of the Confidential Information waives this restriction.

It is unclear, in the context of this paragraph, what set of circumstances this language is intended to resolve. It also suggests that a utility employee could not be an expert, which would be an unreasonable restriction on who could qualify as an expert.

Section C – Use of Confidential Information

Negotiations on Unauthorized Disclosure (¶ 9)

The Proposed Protective Order requires the parties to “negotiate how best to prevent unauthorized disclosures of Confidential Information...[.]” The Proposed Protective Order, however, is already clear on how Confidential Information may be used and is therefore clear on what constitutes an unauthorized disclosure of Confidential Information. Pacific Power is unclear what further negotiations could achieve that are not already appropriately achieved by the clear terms of the standard protective order. This negotiating process is likely to result in unnecessary and inefficient disputes that would require resolution by the presiding officer. Pacific Power recommends deleting this requirement.

Notice of Use in Oral Testimony (¶ 9)

The Proposed Protective Order establishes procedures for a receiving party to notify the party that provided the Confidential Information if they intend to use the Confidential Information in oral testimony, cross-examination, or oral argument. The proposed language imposes an ambiguous “prior notice as feasible” standard on the receiving party to provide such notice. The standard protective order, however, should establish a clearly defined and absolute standard for providing notice that a party's Confidential Information will be used at a hearing. Clear expectations will allow the party who provided the Confidential Information to dispute the proposed use of Confidential Information, and will provide the presiding officer with sufficient time to establish appropriate procedures for the hearing. Furthermore, clearly defining the notice obligation will avoid unnecessary disputes about what constitutes “feasible” notice. Pacific Power recommends the following edits:

Counsel or other representative of any party that intends to disclose Confidential Information during oral testimony, cross-examination, or argument must give ~~such prior notice as is feasible~~ to the provider of that information and the presiding officer at least five business days before such disclosure is intended. That notice, at a minimum, must permit the presiding officer an opportunity to clear the hearing room of persons not bound by this Order or to take such other action as is appropriate in the circumstances.

Right to Challenge Confidential Information (§§ 11-12)

The Commission's recently adopted rules establish the procedures for resolving disputes regarding the designation of information as "confidential." See WAC 480-07-160(5)(e). The Proposed Protective Order is generally consistent with the new rules, and adds some useful detail to the process for challenging confidential designations. However, the Commission's rules state that the *Commission* will resolve disputes regarding confidential designations, while the Proposed Protective Order ambiguously suggests that the presiding officer is responsible, in the first instance, for issuing a final ruling that resolves such disputes. The language of these paragraphs should be clarified to ensure that, consistent with the Commission's rules, it is the Commission that is responsible in the first instance for resolving disputes regarding confidential designations. Pacific Power recommends the following changes:

Confidential Information shall be treated in all respects as protected under the terms of this Order. The commission may express its ruling ~~The presiding officer will make his or her determination~~ orally on the record in an adjudicative proceeding, or in a written order.

If the ~~Commission~~presiding officer determines the challenged information is not entitled to protection under this Order and WAC 480-07-160, the information will continue to be protected under this Order for ten days from the date of the ~~presiding officer~~Commission's determination. If a party seeks ~~Commission or~~ judicial review of the determination within that time, the Commission will stay the determination ~~pending an order from the Commission or~~ a decision by a reviewing court. If no party seeks ~~Commission or~~ judicial review of the ~~presiding officer~~Commission's determination within 10 days, or if the ~~Commission and any~~ reviewing court upholds that determination, the Commission will require the challenged information to be refiled without the confidential designation or otherwise treated as public information.

Return of Confidential Information (§ 14)

The Proposed Protective Order establishes procedures for a party's counsel and experts (*i.e.*, parties who have executed a Non-Disclosure Agreement) to return Confidential Information to the party that provided it. This obligation should equally apply to the receiving parties (not just their counsel and experts). Paragraph 14 should be modified as follows:

Within thirty days following the conclusion of this proceeding, including any administrative or judicial review, every party to this proceeding (or such party's designated counsel and experts) ~~person who has executed a Non-disclosure Agreement and~~ that has received, or possesses or controls any Confidential Information provided by another party (including personal notes that make substantive reference to Confidential Information), either must return all Confidential Information to the party that provided it or must certify in writing that all copies and substantive references to Confidential Information in notes have been destroyed; PROVIDED, that counsel may retain exhibits that contain Confidential Information as counsel records subject to the terms and conditions of this Order.

Freedom of Information Laws / Compelled Production in Other Jurisdictions (¶ 16)

Pacific Power is unclear on the intent of this provision. It appears that the language in paragraph 16 attempts to bind federal agencies, or define how federal or state agencies must treat Confidential Information. But federal and state agencies would not be bound by the standard protective order, and it would seem that the Commission does not have the authority to bind federal and state agencies through a standard protective order. Federal and state agency obligations about handling and releasing Confidential Information are addressed in applicable statutory provisions, and should not be redefined in the standard protective order. Pacific Power recommends striking this paragraph.

Pacific Power appreciates staff's efforts to ensure that the standard protective order conforms to the newly adopted procedural rules. As always, the company looks forward to collaborating with staff and stakeholders to further streamline procedural practices at the Commission as part of this rulemaking.

Sincerely,

_____/s/
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Enclosures

Attachment A—Redline Edits to the Proposed Protective Order