

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2054

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Modifications to the General Protective Order.

ORDER

DISPOSITION: ADMINISTRATIVE HEARINGS DIVISION'S
RECOMMENDATION ADOPTED

At its public meeting on April 3, 2023, the Public Utility Commission of Oregon adopted the Administrative Hearings Division's recommendation in this matter to adopt a blanket general protective order (GPO). This blanket GPO is available for use in future PUC proceedings upon the filing of a notice, a sample of which is attached to this order.

I. INTRODUCTION

On January 14, 2020, in Order No. 20-013, the PUC opened a proceeding to revise its GPO. On February 11, 2021, then presiding administrative law judge (ALJ) Alison Lackey issued a memorandum with proposed redline changes to the GPO and a request for comments. The proposed revisions included updates to references to the relevant Oregon Rules of Civil Procedure (ORCP) and Oregon Public Records law (OPRL), and clarifications regarding the informal and formal dispute processes under the GPO and certification process for signatories. The memorandum sought comments on several additional issues, including whether the PUC should issue a blanket (or umbrella) GPO to be effective across all docketed matters and on streamlining the designation process for certain individuals.¹

Northwest Natural Gas Company, dba NW Natural; PacifiCorp, dba Pacific Power; and Portland General Electric Company (PGE) filed comments on March 18, 2021. Interested parties participated in a workshop on June 11, 2021, to address the proposed

¹ While the memorandum also sought comments on whether to expand the scope of this docket to consider model MPO provisions addressing the handling of highly confidential information, the remainder of this proceeding stayed within the original scope, focusing on the GPO only.

changes. On June 28, 2021, ALJ Lackey issued a memorandum soliciting comments on revised versions of the GPO and signatory pages, including corrected internal cross references and additional revisions based on the discussion at the workshop. The memorandum summarized proposals (1) for the PUC to issue a blanket GPO to be effective across any prospective docketed matter upon the filing of a notice by a party seeking to designate information as protected, and (2) to create a streamlined process for a party's employees to be identified for purposes of access that party's own protected information only. Also provided with the memorandum was a sample of the notice that a party would file to use the GPO in a particular docket. On July 15, 2021, NW Natural and Oregon Citizens' Utility Board (CUB) filed comments.

Activity in the docket paused thereafter. This pause coincided with a hold in the rulemaking docket AR 641 which addresses a review of Division 001 procedural rules that was paused due to the PUC's efforts to develop a new docketing system. Although the rulemaking docket remains on hold, the contemplated changes to the GPO proceeded in this docket.

II. DISCUSSION

The primary purpose of this docket is to update the provisions of the GPO. During this proceeding, other changes to improve efficiency were also addressed, including a recommendation that the PUC issue the GPO as a broadly applicable PUC order to be effective across future dockets, and changes to streamline the process for a party's employees to access its own protected information.

A. Adoption of Blanket GPO

This order adopts a blanket GPO as a broadly applicable order, to be available for use across all prospective PUC proceedings and adopts the processes set forth below. Specifically, to use the GPO in a particular docket, the party seeking to designate information as protected needs to file a notice. The notice must contain a brief description of information anticipated to be designated as protected (*i.e.*, falls within the scope of ORCP 36(C)(1) or the exemptions under OPRL ORS 192.345 and 192.355 and is not publicly available). The notice must also contain reference to the GPO, including where it may be accessed. The purpose of including this information is to ensure that parties who are newer to the PUC's proceedings have ready access to the GPO once it is in use in a docket. Parties may choose to attach the GPO or provide a direct link to the document on the PUC's website. Finally, the applicable signatory pages must be provided with the notice to ensure that they are readily available within the docket. The intent of this change is to streamline the process for accessing protected information by enabling parties to file signatory pages as soon as the notice is filed. A sample notice is

attached as Appendix D. AHD will maintain an updated sample notice on the PUC's website for reference.

Commenters and workshop participants in this docket recognized the potential efficiency of a blanket GPO and emphasized the need for signatory pages in individual dockets, and for parties to understand that confidential material could not be used from one docket to another. Consistent with the comments received, the signatory pages have been revised to include additional language to reinforce that protected information cannot be used from one docket to another. Issuance of this blanket GPO necessitates changes to the rule addressing protective orders, which will be addressed in the pending rulemaking, docket AR 641.

B. Streamlining Access

This order adopts changes to streamline the process for a party's employees to be identified for purposes of accessing that party's own protected information only. Commenters and workshop participants supported streamlining the process for an entity's employees to access its own protected information. For a case where a party wants to view another party's protected information, participants agreed that the use of the existing designation process should remain unchanged. PGE also noted a need for flexibility to add employees, as appropriate, during a proceeding. NW Natural expressed strong support for the revisions to streamline the process for a party's employees to access that party's own protected information as an improvement to the current process without impairing confidentiality.

This change is implemented via a revision to the GPO to distinguish between individuals who must be qualified under the GPO (*i.e.*, those seeking access to another party's information) and those who need only be identified for purposes of accessing their own information within the PUC's discovery and filing systems. With this revision, a party would be able to identify its own employees for this purpose within the notice of use of the GPO. Any other party would still need to qualify individuals under the terms of the GPO to access that information. As set forth in the sample notice, a party may also identify a generic email address for purposes of sending and receiving protected information. Once any party has filed a notice that it intends to use the GPO in a particular proceeding, other parties may designate their own information and provide it under the terms of the GPO and need not file a separate notice of use of the GPO in that docket. However, another party designating its own information as protected may also file a notice for purposes of identifying its employees who should have access to its own information. Any party that provides a list of its employees for this purpose must provide updates during the proceeding to ensure that it accurately identifies the employees who should have access.

C. GPO Revisions

1. *Revisions Addressed in Comments*

The attached GPO includes numerous revisions to the GPO, including those to update references to the relevant ORCP and OPRL, and to clarify the informal and formal dispute processes and certification process for signatories under the GPO. Initial comments were supportive of the language included in the GPO regarding the dispute process as sufficient to efficiently address disputes and reflective of current practice involving informal resolution of most disputes. Commenters were also supportive of retaining the existing language in Appendix A of the protective order, requiring a party to certify that it has “an interest in these proceedings that is not adequately represented by other parties to the proceedings,” to designate qualified individuals. Commenters and workshop participants agreed that the certification underscores the importance of showing that such access to confidential information is necessary for the purposes of participating in the proceeding.

NW Natural proposed additional revisions to paragraph 16 regarding the handling of another party’s electronic protected information. Specifically, NW Natural proposed that the GPO prohibit a party from downloading the protected information from the shared workspace without consent. NW Natural explains that downloading information renders the information less secure and more susceptible to inadvertent disclosure via mistake than information provided in hard copy, such as inadvertently emailing the information to someone who should not have access, laptop theft, or cybersecurity attack. NW Natural acknowledged that protected information that is provided electronically through means other than a shared workspace must be downloaded but contends that such information may be protected via encryption or other means.

CUB recommended against NW Natural’s proposed changes to paragraph 16 and argues that the requirement that qualified persons take reasonable precautions to keep protected information secure is longstanding. CUB stated that this requirement, in conjunction with an executed consent to be bound by the terms of the GPO offers significant protection and that instances of inadvertent disclosure have been rare. CUB maintained that given the resource and information asymmetry between utilities and intervenors and the lack of demonstrable history of GPO violations, additional burdens should not be placed on intervenors regarding the handling of protected information. CUB also contends that requiring permission from a designating party to download protected information may give the designating party notice regarding the information an intervenor is considering using in its case, giving the designating party an unfair advantage.

Adopting AHD's recommendation, the Commission does not adopt NW Natural's proposed revisions to paragraph 16 within the GPO. The existing language of the GPO requires that qualified individuals "take reasonable precautions to keep Protected Information secure." What constitutes reasonable precautions will continue to evolve as parties update their systems and procedures to address current cybersecurity concerns. The restriction proposed by NW Natural, which would prohibit downloading of the protected information from a shared workspace without obtaining permission, is proposed in the rulemaking in the context of a modified protective order regarding the handling of highly confidential information. This heightened level of protection is appropriate for use on a case-by-case basis for highly sensitive information. Rather than adopt this more stringent requirement in the GPO to be broadly applicable, the GPO adopted here retains the original language, requiring that parties continue to be responsible for making commercially reasonable efforts to ensure the security of the protected information they access under the GPO. While there is some measure of risk of inadvertent disclosure in providing protected information in any format, measures to mitigate that risk must be balanced with the burden imposed on other parties. In this instance, the burden this provision would impose on qualified individuals, by limiting their ability to readily access protected information outweighs the risk posed by their downloading of protective information from a shared workspace, particularly where there is no indication of increasing inadvertent disclosures.

2. Revisions First Addressed in Order No. 23-039

The GPO also includes revisions first incorporated in a modified GPO, entered on February 10, 2023, in Order No. 23-039 in Docket UE 416. These revisions provide alternative methods for providing confidential information, including through the Commission's discovery portal, or a password protected and encrypted electronic ZIP file distributed electronically. The availability of the alternative methods is consistent with Order No. 20-088, which waived the requirement of OAR 860-001-0070 to allow for electronic submission of confidential information.

3. Final Revisions from March 2023

In mid-March 2023, the draft GPO and notice was sent to a broad notification list to solicit any final comments. Some comments and suggestions were received. Based on those comments, minor changes to the GPO were made. First, language in paragraph 15 which discusses disputes over objections to a person having access to material under the order is revised. The language removed refers to factors an ALJ may review when considering an objection, but because these factors are not applicable to all objections, it was eliminated. This does not change how an ALJ will examine objections, and an ALJ will consider the eliminated factors when applicable to a particular challenge.

Similarly, language is added to paragraph 4 that provides clarification regarding the marking of spreadsheets. The GPO requires individual pages to be numbered, but this can be difficult in the context of a spreadsheet. The new language clarifies that designating parties can utilize a reasonable alternative method to designate confidential spreadsheet entries.

III. DISPOSITION

At its public meeting on April 4, 2023, the Public Utility Commission of Oregon adopted the Administrative Hearings Division's recommendation in this matter.

BY THE COMMISSION:



Nolan Moser
Chief Administrative Law Judge



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 Circuit Court for Marion County in compliance with ORS 183.484.

GENERAL PROTECTIVE ORDER

Scope of this Order:

1. This order governs the access to and use of Protected Information produced or used by any party to proceedings before the Public Utility Commission of Oregon.

Designation of Protected Information:

2. Any party may designate as Protected Information any information the party reasonably determines:

- (a) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information); or the exemptions under Oregon Public Records Law, ORS 192.345 and 192.355 (OPRL) and
- (b) Is not publicly available.

3. To designate information as Protected Information, a party must place the following legend on the material:

PROTECTED INFORMATION
SUBJECT TO GENERAL PROTECTIVE ORDER

The party may designate a document or a portion of a document as Protected Information. The party should make a good faith effort to designate as Protected Information only the information protected under ORCP 36(C)(1) or OPRL.

4. Protected Information will be provided either through: (a) the Commission's discovery portal; (b) a password protected and encrypted electronic ZIP file distributed electronically; or (c) through physical production.

For materials provided through physical production, each page of a document containing Protected Information filed with the Commission or provided to Qualified Persons under this order must be printed on yellow paper and placed in a sealed envelope or other appropriate container. THIS ENVELOPE IS SEALED UNDER ORDER NO. 23-132 AND CONTAINS PROTECTED INFORMATION. THE INFORMATION MAY BE SHOWN ONLY TO QUALIFIED PERSONS AS DEFINED IN THE ORDER.

Each page of a document containing Protected Information electronically filed with the Commission or provided to Qualified Persons under this order, electronically or through a designated shared workspace must be clearly marked as protected and maintained in a

separate, secured file folder. Any file or folder containing Protected Information must be designated “Protected.” If the cells in a spreadsheet or other tabular document include information that has been designated as confidential and that would be impractical or unduly burdensome to mark as required above, the party designating information as confidential need not comply with this requirement but must identify that information in a way that reasonably provides the Commission and Qualified Persons with sufficient identification of the information to be protected.

Only the portions of a document containing information designated as protected may be treated as Protected Information under the terms of this order. Any information not constituting Protected Information contained in such a document may not be afforded the protections under this order and must be separately provided in an unrestricted manner.

5. A party may designate as Protected Information any information previously provided by filing notice with the Commission and other parties. Parties in possession of newly designated Protected Information must make reasonable efforts to ensure that all paper or electronic copies of the material containing the information are treated consistent with the requirements of paragraph 4 once requested by the designating party.

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 publicly available or is no longer protected under ORCP 36(C)(1) or OPRL, the designating party should make reasonable efforts to remove the protected designation and file notice with the Commission and other parties.

Challenge to Designation of Information as Protected:

7. A party may informally challenge any designation of Protected Information by notifying the designating party. Once notified, the designating party bears the burden of showing that the challenged information is protected under ORCP 36(C)(1) or OPRL. The parties must promptly confer and make every effort to cooperatively resolve disputes themselves. Any party may request that the ALJ hold an informal dispute resolution conference.

8. If a dispute under paragraph 7 cannot be resolved informally, the challenging party may file an objection to seek formal resolution by the ALJ. The objection must identify the information in dispute and certify that reasonable efforts to achieve informal resolution have failed. Within five business days of service of the objection, the designating party must either remove the protected designation or file a response. A response must identify the factual and legal basis of how the challenged information is

protected under ORCP 36(C)(1) or OPRL. Broad allegations unsubstantiated by specific facts are not sufficient. The challenging party may file a reply to any response within five business days of service of the response. The designating party may file a sur-reply within three business days of service of a reply. The ALJ will make all reasonable efforts to resolve the matter within 10 business days of service of the last filing. Pending the ALJ's decision, the disputed information will be treated as Protected Information.

Access to Protected Information:

9. An entity or individual must be a party in order to seek to be qualified under this Protective Order. Only Qualified Persons may access Protected Information designated by another party under this Protective Order. A party must agree to be bound by the Protective Order for its Qualified Persons to be eligible to receive or access Protected Information. Persons automatically bound by this protective order and qualified to access Protected Information are:

- a. Commission employees; and
- b. Assistant Attorneys General assigned to represent the Commission.

10. Persons qualified upon a party signing the Consent to be Bound section of Appendix B are:

- a. Counsel for the party;
- b. Any person employed directly by counsel of record; and
- c. Any employee of the Regulatory Division at the Oregon Citizens' Utility Board.

A party must identify all these persons in section II of Appendix B when consenting to be bound by the order and must update this list throughout the proceeding to ensure it accurately identifies Qualified Persons.

11. A party may seek to qualify other persons to access Protected Information by having those persons complete and sign Appendix C and submitting that information to the Commission and all parties. Persons seeking qualification under Appendix C are subject to a five-business day waiting period, as addressed in paragraph 14. A party may seek to qualify a person under Appendix C on an expedited basis by contacting the other parties and filing a motion certifying that its signatory page is uncontested.

12. A party's own employees need not be qualified under this Protective Order to access that party's Protected Information but must be identified by the designating party for purposes of being provided access within the docket. The designating party must update this list throughout the proceeding to ensure it accurately identifies the employees who should have access.

Objection to Access to Protected Information:

13. All Qualified Persons have access to Protected Information unless the designating party objects as provided in this paragraph. As soon as the designating party becomes aware of reasons to restrict access to an already Qualified Person, the designating party must provide the Qualified Person and his or her counsel notice stating the basis for the objection. The parties must promptly confer and attempt to resolve the dispute on an informal basis.

14. A designating party may object to a person who seeks to become a Qualified Person under Appendix C. Within five business days of receiving a copy of Appendix C, the designating party must either provide the requested access to Protected Information or notify the PUC Filing Center and the party seeking to be qualified of its objection. The notice of objection must explain the basis for the objection. The parties must promptly confer and attempt to resolve the dispute on an informal basis. The parties must notify the PUC Filing Center of any informal resolution as soon as possible.

15. If a dispute under paragraphs 13 or 14 cannot be resolved informally, either party may file an objection to seek formal resolution by the ALJ. The objection must describe the dispute and certify that reasonable efforts to achieve informal resolution have failed. The other party may file a response to the objection within 5 business days of service of an objection. The ALJ will make all reasonable efforts to resolve the matter within 10 business days of the last filing. Pending the ALJ's decision, Protected Information may not be disclosed to the person subject to the objection.

Use of Protected Information:

16. All Qualified Persons must take reasonable precautions to keep Protected Information secure. A Qualified Person may reproduce Protected Information to the extent necessary to participate in these proceedings. A Qualified Person may discuss Protected Information obtained under this order only with other Qualified Persons who have obtained the same information.

17. Without the written permission of the designating party, any Qualified Person given access to Protected Information under this order may not use or disclose Protected Information for any purpose other than participating in these proceedings. Nothing in this protective order precludes any party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this protective order.

18. Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Protected Information to the extent reasonably necessary to maintain a file of these proceedings or to comply with requirements imposed by another governmental agency or court order. The information retained may only be disclosed to Qualified Persons under this order. Any other person retaining Protected Information must destroy or return it to the designating party within 90 days after final resolution of these proceedings unless the designating party consents in writing to retention of the Protected Information. This paragraph does not apply to the Commission or its Staff.

Duration of Protection:

19. The Commission will preserve the designation of information as protected for a period of five years from the date of the final order in these proceedings, unless extended by the Commission at the request of the designating party. The Commission will notify the designating party at least two weeks prior to the release of Protected Information.

CONSENT TO BE BOUND
QUALIFICATION OF COUNSEL AND OREGON CITIZENS' UTILITY BOARD
[DOCKET NO.]

I. Eligibility

Under paragraph 10, persons qualified under the Commission's general protective order upon a party signing this Appendix are:

- a. Counsel for the party;
- b. Any person employed directly by counsel of record; and
- c. Any employee of the Regulatory Division at the Oregon Citizens' Utility Board.

A party must identify all Qualified Persons in section III below when consenting to be bound by the order, and must update this list throughout the proceeding to ensure it accurately identifies Qualified Persons.

II. Consent to be Bound:

The general protective order governs the use of Protected Information in these proceedings. Without the written permission of the designating party, any Qualified Person given access to Protected Information under this order may not use or disclose Protected Information for any purpose other than participating in these proceedings.

_____ (Party) agrees to be bound by the terms of the general protective order, Order No. 23-132, and certifies that it has an interest in these proceedings that is not adequately represented by other parties to the proceedings.

Signature: _____

Printed Name: _____

Date: _____

III. Additional Persons Qualified under Paragraph 10:

_____ (Party) identifies the following person(s) as qualified under paragraph 10. The party's signatory, as identified immediately above, is a Qualified Person under paragraph 10 without also being listed separately below.

PRINTED NAME	DATE

QUALIFICATION OF OTHER PERSONS
[DOCKET NO.]

I. Eligibility

Under paragraph 11, a party may seek to qualify persons other than those eligible under Appendix B (i.e., paragraph 10) to access Protected Information by having those persons complete and sign this appendix. The signed appendix must be, submitted to the Commission and all parties. After a five-day waiting period, if no party has objected, the persons identified below will be considered Qualified Persons.

II. Consent to be Bound

The general protective order governs the use of Protected Information in these proceedings. Without the written permission of the designating party, any Qualified Person given access to Protected Information under this order may not use or disclose Protected Information for any purpose other than participating in these proceedings.

I have read the terms of the general protective order, Order No. 23-132, and agree to be bound by the terms of the order and provide the following information.

Signature:		Date:
Printed Name:		
Physical Address:		
Email Address:		
Employer:		
Associated Party:		
Job Title:		

<p>If not employee of party, description of practice and clients:</p>	
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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

[DOCKET NO.]

In the Matter of

[CAPTION].

**NOTICE OF USE OF GENERAL
PROTECTIVE ORDER**

[PARTY] hereby provides notice that it anticipates designating information to be produced or used in this docket as protected under the Commission’s General Protective Order, No. 23-132 (GPO). *[Include brief description of information anticipated to be designated as protected (i.e., falls within the scope of ORCP 36(C)(1) or the exemptions under Oregon Public Records Law, ORS 192.345 and 192.355 and is not publicly available)].* The GPO is [ATTACHED/AVAILABLE AT specify, e.g., link to copy on Commission website, or reference if incorporated in docket]. Other parties to the proceeding may seek access to the protected information under the terms of the GPO using the attached signatory pages, pre-marked for use in this docket.

The individuals listed in the table below are employees of [PARTY] and are identified for purposes of accessing information designed as protected by [PARTY] within the docket. [PARTY] will provide updates to this table during the course of the proceeding to ensure that it accurately identifies the employees who should have access. [PARTY] includes below a generic email address for purposes of sending and receiving protected information, which can only be accessed by those individuals listed below.

PRINTED NAME	EMAIL	DATE