BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 399

In the Matter of	)	
	)	NEWSUN ENERGY, LLC'S
PACIFICORP, d/b/a PACIFIC POWER	)	CLOSING BRIEF
	)	
Request for General Rate Revisions	)	

INTRODUCTION

NewSun Energy, LLC ("NewSun") respectfully submits this Closing Brief in Opposition to the Fourth Partial Stipulation filed in this docket by PacifiCorp d/b/a Pacific Power ("PacifiCorp"), Commission Staff, the Northwest Independent Power Producers Coalition ("NIPPC"), the Oregon Citizen's Utility Board ("CUB"), Walmart Inc. ("Walmart"), and Vitesse, LLC ("Vitesse") (collectively, the "Stipulating Parties"). The Fourth Partial Stipulation includes PacifiCorp's Voluntary Renewable Energy Tariff ("VRET"), which PacifiCorp has named the Accelerated Commitment Tariff ("ACT Tariff").

ARGUMENT

The Stipulating Parties claim to have the common goal of a successful VRET program and dismiss NewSun's concerns about the ACT Tariff as "unnecessary and unreasonable."[1] The Stipulating Parties further argue that "the Stipulation and Schedule 273 do not dictate any PPA terms and do not require termination of a PPA in the event of a default."[2] The Stipulating Parties presumably make these arguments because the ACT Tariff is technically applicable only to participating customers and not ACT resources and Power Purchase Agreements (PPAs). But

[1] Stipulating Parties Joint Post Hearing Brief p. 18
[2] *Id.* at 21

the Stipulating Parties ignore the fact that the ACT Tariff language outlines PacifiCorp's VRET program, which will unquestionably impact PPA negotiations and requirements.

NewSun also wants a successful VRET program and merely wants to be able to negotiate commercially reasonable and industry standard terms and conditions of PPAs for VRET resources. NewSun has objected to the Fourth Stipulation for the limited purpose of ensuring that the ACT Tariff is not used by PacifiCorp to require non standard terms and conditions in VRET PPAs, which will undermine the purpose and viability of the program. NewSun urges the Commission to adopt its suggested revisions to Schedule 273, or in the alternative, use the VRET language the Commission previously approved in Portland General Electric's Schedule 55.

At the most basic level, NewSun urges the Public Utility Commission of Oregon ("Commission") to avoid approving language that would unnecessarily favor, or provide PacifiCorp the justification to adversely affect VRET market participation, market pricing, PPA negotiations as well as the general health and viability of the VRET programs and the RFP process. Most acutely, the Commission should be very cautious to not take any action outside of the RFP process—a critical, carefully structured stand-alone Commission process, with extensive stakeholder process and its own specific rules, to dictate PPA terms and conditions. Failure to do that could: (1) limit RFP participation; (2) decrease competition; (3) increase prices; or (4) prevent, limit, or constrain the ability of the Commission, ratepayers, utilities, and other stakeholders from even being able to see the full range of prices achievable.

Put simply, (non-utility) bidders into an RFP are acutely sensitive to *termination conditions, triggers and exposures,* as well as minimum delivery requirements. These conditions, triggers and exposures directly affect prices—and even whether Independent Power Producers and developers ("IPPs") would even decide to bid in a RFP.

Many billions of dollars of assets and power sales are at stake, especially with new clean energy laws and corporate decarbonization mandates. The specialized and focused process of an RFP docket exists not only for focused attention by the regulator, but for focused stakeholder attention and participation, including ratepayer advocates, and market participants. There are different sets of participants in a rate case process, such as we have here, and in a RFP process. The Oregon stakeholders concerned with proper regulation of procurement and regulation (RFPs) are put on notice that there, in the RFP docket, is where such issues are addressed and regulated, and participate (or not) accordingly.

It is also worth noting that the seemingly innocent framing around PacifiCorp's (and other utilities) assertions that defaults should and must cause termination misdirects away from the context and consequence in the applicable situation. There are myriad ways to address the underdelivery of power that should be the sole focus. Underperformance could be due to weather, wild fire smoke, defective components under warranty, force majeure events, or even just an defective system that fails to produce as expected. But all of these cases (each of which might or might not lead to various types of defaults) are just *under* performance. The best solution may not be, and indeed is extremely unlikely to be, replacement of the entire power plant. Developing power plants is hard, expensive, and does not happen instantaneously. In a clean energy supply constrained world, the solution PacifiCorp has framed as essentially the only appropriate solution—replacing the entire power plant—especially if under compressed circumstances—is likely to cost more, not less. Thus, the Schedule 273 language that appears to condone the right of the utility to replace the entire power plant, is completely misdirected, ripe for abuse, and completely inappropriate.

In short, VRET program language suggesting that there may be conditions in which the utility might have to take some form of remedial actions in some cases is appropriate and reasonable. However, it is not appropriate nor reasonable for any such language to create any utility right or obligation subjecting PPAs and power plants to specific termination risk and specific performance obligations. These dynamics would burden the voluntary VRET program, and its prospective and actual participants, with unnecessary costs, cost increase exposures, and limitations on a full range of options.

Thus, NewSun's proposals and principles here are appropriate, reasonable, and consistent with the obligations and responsibilities of the Commission. They align with appropriate protections and abuse prevention as it relates to the VRET program. And they align with the specific regulatory structures and processes related to procurement, and ensuring such matters are appropriately handled in the appropriate venues.

A. Schedule 273 Should Reflect Industry Standard and Commercially Reasonable PPA Terms.

The evolution of Schedule 273 suggests that PacifiCorp intends to require default and termination provisions for the under delivery of power in PPAs, even though the record demonstrates that such terms are not industry standard. In response to NewSun's concern, the Stipulating Parties erroneously claim that it is NewSun attempting to dictate VRET PPA terms and conditions for default, under-delivery and termination. The Stipulating Parties argue:

> "New Sun recommends that the Commission dictate the terms of the power purchase agreements (PPA) between PacifiCorp and resources used to serve ACT customers, including specific prohibitions on PacifiCorp's ability to negotiate default and termination provisions and remedies for under-performance."[3]

[3] *Id*. at 2

A review of the record shows that NewSun only made its recommendations after the ACT Tariff language was significantly changed by the Stipulating Parties. NewSun is asking the Commission to approve an ACT Tariff that is fair, just and reasonable without creating program requirements that mandate non-industry standard and commercially unreasonable PPA terms and conditions. Further, such PPA terms and conditions should not be developed outside of an RFP docket with full stakeholder participation.

B. PacifiCorp's ACT Tariff Changed Without Justification.

The language to which NewSun now objects was not included in PacifiCorp's initial filing in this proceeding. In the original version of Schedule 273 filed with PacifiCorp's initial testimony, the applicable provision read:

> "In the event of yearly under generation from the renewable energy resource(s) facilitated through the contract, the Company will purchase renewable energy certificates on the Customer's behalf to ensure the Customer's subscribed quantity of energy is covered.

NewSun had no objection to this language.

PacifiCorp's Schedule 273 evolved considerably late in this proceeding without justification and without consideration of the potential adverse consequences for the VRET program. The version of Schedule 273 filed with the Fourth Stipulation now reads:

> "In the event that the renewable energy supplier is in default of the terms of its PPA or is no longer able to supply bundled renewable energy to the Customer, the Company will make reasonable efforts to begin to procure a new PPA with another renewable energy supplier as soon as practicable with the cost of the renewable energy to the Customer revised accordingly. . . ."

Although Schedule 273 was only slightly modified, the changes in meaning are significant. The Fourth Stipulation provides that "PacifiCorp shall take reasonable efforts to begin procurement of a replacement resource(s) if an ACT program resource defaults under the PPA, so that in the

event of termination, a replacement resource(s) can be available as soon as practicable."[4] It is, therefore, clear that PacifiCorp intends that the word "default" in the ACT Tariff applies to, among other things, the under-delivery of power by an ACT Resource, which would lead to termination of a PPA—the most extreme type of remedy. Other "defaults" with a lowercase "d" that are not material, also generally do not necessitate the extreme remedy of termination, yet this ACT program language would seem to require it. NewSun's concern is that PacifiCorp will use this tariff language to constrain PPA negotiations to such unreasonable terms.

C. PGE's VRET Tariff is More Closely Aligned with Industry Standard PPA Agreements.

PacifiCorp's intent with regard to default and termination becomes even more clear when comparing PacifiCorp's Schedule 273 to PGE's VRET Tariff – Schedule 55. PacifiCorp's Schedule 273 departs significantly from Schedule 55, even though most of the Stipulating Parties participated in the development of PGE's VRET Tariff. In a series of orders in docket UM 1953, the Commission approved PGE's Schedule 55. Paragraph 3 of the General Provisions of PGE's Schedule 55 is analogous to the language of PacifiCorp's Schedule 273 that is at issue here. PGE's version reads:

> The Company shall procure Bundled Renewable Energy on the Subscribing Customer's behalf – or through collaborative sourcing with a customer for the CSO – from a new renewable energy facility. *In the event of yearly under-generation from the renewable energy resource, the Company will purchase RECs on the Subscribing Customer's behalf to assure that the Customer's subscribed amount is covered under this tariff.* In the event that the renewable energy supplier is no longer able to supply bundled renewable energy to the subscribing Customer, the Company, at the election of the Subscribing Customer, shall make reasonable efforts to procure a new resource on behalf of the Subscribing Customer as soon as practicable with the cost of the renewable energy to the Subscribing Customer revised accordingly. (Emphasis added).

[4] Fourth Partial Stipulation at 3.

PGE's VRET Tariff more closely aligns with industry standard PPAs for intermittent resources. As shown in the language above, PGE would not declare an event of default and terminate the entire PPA for the under delivery of power. Instead, PGE would simply obtain replacement RECs. PGE would only terminate and replace a PPA in its entirely if the supplier were no longer able to supply bundled renewable energy (as opposed to mere under delivery) *and* the customer consents.

The Stipulating Parties, however, argue that Schedule 55 is "vaguer"[5] that Schedule 273 and view Schedule 273 as a "refinement of a potentially ambiguous term that may avoid confusing customers regarding when PacifiCorp might act in response to under-delivery."[6] A close review of the language in question actually shows that Schedule 55 is more precise and is more consistent with industry standard contract terms and conditions for intermittent resources. Further, the Stipulating Parties argument that Schedule 273 was a refinement of Schedule 55 rings hollow since at least some of the Stipulating Parties admit that they did not actually take the time to directly review PacifiCorp's proposed ACT Tariff language against Schedule 55.[7]

D. Schedule 273 Will Allow PacifiCorp to Require a Performance Guarantee.

Imposing a specific delivery obligation backed by a termination right amounts to a *de facto* performance guarantee. Although the Joint Response says that a "performance guarantee" is not *required* by the ACT Tariff language,[8] on cross-examination PacifiCorp's witness did not deny that PacifiCorp intends to require performance guarantees for ACT Resource PPAs.[9]

[5] *Id.* at 26
[6] *Id*. at 27
[7] TR Bolton/14: 20-24
[8] Joint Stipulating Parties/200, McVee et. al./ 10: 12-14
[9] TR McVee/50: 3-6

The risk that PacifiCorp will require a performance guarantee for VRET resources is more than a hypothetical. PacifiCorp previously requested a 90 percent performance output guarantee in its 2022 All-Source Request for Proposals. The Commission discussed the performance guarantee and stated as follows:

> We decline to direct to require PacifiCorp to implement an availability guarantee in place of the performance guarantee in its Pro Forma PPA. We acknowledge, however, that stakeholders have raised serious issues for PPA resources, particularly regarding the issue of third party financers being unwilling to support the performance guarantee. We also recognize that utility-owned resources are based upon utility forecasts of expected performance, but a utility can later request recovery of actual costs of performance and, absent ratepayer protections, customers could be at risk for paying more than forecasted. On the other hand, PPA performance guarantees mean that the PPA asset owners carry the risk of underperformance. This dynamic could mean that the performance risks are treated differently for the two types of assets and that customers could bear more risk of utility asset underperformance than PPA asset underperformance. We direct the IE to examine the issue of the performance guarantee versus the availability guarantee and report on the impact of this requirement, particularly as it relates to a potential advantage for owned resources. We reserve the right to judge the reasonableness of PacifiCorp's position on this issue during negotiations, if it is determined that insistence on this provision significantly limited resource choice or tilted the field inappropriately in the favor of utility-owned resources.[10]

Although it is clear that PacifiCorp interprets the default language in the tariff to allow a performance guarantee, the actual default and termination references in Schedule 273 are vague and ambiguous at best. Relying on the ambiguity, the Stipulating Parties dismiss NewSun's concerns as alarmist and unfounded and argue that they "*expect* PacifiCorp will diligently pursue any reasonable options short of termination."[11] (Emphasis added). Further, the Stipulating Parties say that they did not *intend* 'default' to capture minor issues or disputes, only event

[10] PacifiCorp Application for Approval of 2022 All-Source Request for Proposals, Docket UM 2193, Order 22-130, p. 9

[11] Joint Stipulating Parties/200, McVee et. al./9: 13-15

materially affecting resource production and delivery of the bundled product."[12] The Stipulating Parties testify:

> Similarly, if there are remedies short of termination for under-delivery, those remedies are consistent with the ACT and do not adversely impact non-participating customers, and those remedies mitigate impact to participating customers, then PacifiCorp *may* pursue those alternatives remedies.[13] (Emphasis added).

Further, Vitesse notes its understanding is that those PPA terms will be collaboratively negotiated in the future. Vitesse witness Cebulko testified:

> In the CSO context, Vitesse would envision that, as part of the contract negotiations, the participating customer would work with PacifiCorp to include reasonable contract provisions to address the specific problem of persistent under-delivery (i.e., a default or termination). For example, the contract could specify that the CSO developer is responsible for procuring replacement RECs due to under delivery. The developer and participating customer might be open to an alternative approach in which the customer is paid damages and procures its own replacement RECs. The stipulation simply clarifies that neither PacifiCorp nor ratepayers would be obligated to compensate a participating customer for the risk of under-delivery from a CSO resource.[14]

But the Stipulating Parties understandings, assumptions and expectations are not incorporated in the Schedule 273. This is likely intentional because the Stipulating Parties also appear to endorse or at least accept a performance guarantee. The Stipulating Parties argue:

> "If the Commission were to limit PacifiCorp's authority to remedy under-delivery, participating customers would be denied the expected generation benefits and the entire ACT framework would collapse."[15]

In other words, the Stipulating Parties appear to argue that if PacifiCorp is required to negotiate industry standard PPAs under a tariff that is similar to PGE's Schedule 55, the entire "Act framework would collapse." Not only is this statement overly dramatic, it lacks merit and only

[12] Joint Stipulating Parties/200, McVee et. al./6: 11-13
[13] Joint Stipulating Parties/200, McVee et. al./ 8: 12-15
[14] Vitesse/300, Cebulko/22
[15] Stipulating Parties Joint Post Hearing Brief at 22

confirms that PacifiCorp will likely require non-standard default and termination provisions as gating criteria for ACT Resources. Imposing such non-standard wholesale contract terms in PacifiCorp's competitive procurement process could stifle competition and inflate bid prices for ACT Resources.

Moreover, it is inappropriate for the Commission to rely on "intentions" and trusting that a utility will not act in its own interest. Indeed the opposite is the case. The regulation of investor owned utilities exist to *protect against* these types of abuses. Schedule 273 should be more precise to prevent different interpretations of terms that favor the utility to the detriment of customers and the VRET program. NewSun has demonstrated in the record how the imprecise language in Schedule 273 could harm the VRET Program, and participating customers.

E. Failure to Deliver Power Should not be an event of default that is subject to termination.

The record shows that industry standard wholesale PPAs expressly state that non-delivery is *not* an event of default that is subject to termination.[16] For intermittent resources, under-delivery of power is fairly common and are often due to a cause or event that does not reflect negligence or misconduct by the seller and are often easily remedied. Further, there is a recognition within the industry that the recovery of any incremental costs for replacement power is an adequate remedy for under-delivery. In other words, the electric industry as a whole recognizes that a PPA termination right is not necessary for the protection of the counterparty and would be detrimental to the proper functioning of energy markets.

The Stipulating Parties, however, argue that these industry-standard wholesale agreements including master agreements developed by the Edison Electric Institute ("EEI"), the Western Systems Power Pool ("WSPP"), and the International Swap Dealers Association

[16] NewSun/100, Stephens/11: 1-16

("ISDA") are not applicable because they are only used in short term transactions and not for specific resources.[17] While it is true that these agreements are used in short term arrangements, they are also commonly used in longer term transactions and for specific resources. Further, it is not clear how Stipulating Parties are making these statements since not one of their witnesses have any experience negotiating PPAs. There is no maximum delivery period in any of the EEI, WSPP, or ISDA agreements. Further, PacifiCorp *has* recently used the EEI and ISDA to solicit contracts as long as five (5) years. In its 2019C RFP, for example, PacifiCorp expressly sought bids for contracts having terms as long as five (5) years using the EEI Master Agreement or the ISDA Power Annex.[18] So the Stipulating Parties' attempt to shift the focus away from industry standard PPA terms and conditions should be rejected.

More importantly, overly harsh termination provisions should not be hard coded as obligations for VRET or RFP PPAs. And, non-standard provisions should not be decided in a non-RFP docket, where stakeholder participation may be limited. Additionally, such default and termination terms and conditions are unequally borne by utility and non-utility resources, as the de facto reality of termination risk, penalties, and other default risk are unavoidably asymmetric when one resource is owned by the utility that would have to impose such penalties on itself. This dynamic likely creates a shadow comparative price advantage for a utility in comparison with non-utility resource bidders. The Commission should be wary of such an outcome, and should ensure that any matters related to that risk are dealt with in an RFP docket.

[17] Stipulating Parties Joint Post Hearing Brief p. 23-24

[18] *See* https://www.pacificorp.com/suppliers/rfps/2019c-request-for-proposal.html

F. Requiring a Performance Guarantee will jeopardize the Success of the VRET Program.

NewSun generally supports the VRET program but the performance guarantee suggested by Schedule 273 will undermine PacifiCorp's VRET Resource acquisition process. At a minimum, it will have high likelihood of adversely affecting the candidate pool of resource options, likely reducing bidders and options.[19] Further, for those bidders who are able to bid, it will impact the prices of those options, because bidders must account for the performance guarantee and termination risk (i.e. price higher for harsher guarantee provisions).[20] Finally, it is questionable whether renewable development projects with atypical PPA terms can be financed. Lenders not only review the project, project documents and financial projections, lenders will also look closely at a PPA and the events of default and termination provisions because they directly affect the ability of the developer to repay the lender.[21] They will view *all* terms cumulatively, including how such risk relates to price and the ability to ensure debt payments will always be covered. Because of this, lenders almost always require notice of any default, certain minimum cure periods, and step-in rights to cure defaults directly to avoid termination. Conversely, lender will view any lack of the ability to mitigate termination risk very harshly.[22] If the under delivery of power could lead to a PPA's termination, lenders will likely not finance the project. The harsher and riskier the terms and exposures, the less likely and more expensive any capital, especially debt and tax equity, will be. This will drive up costs for those who do bid, and drives down potential participation, and is adverse to ratepayers and VRET program participants.

[19] NewSun/100, Stephens/16
[20] NewSun/100, Stephens/18
[21] NewSun/100, Stephens/19
[22] *Id.*

CONCLUSION

NewSun supports the VRET program but objects to the Fourth Partial Stipulation because the ACT Tariff language is not in the public interest and will undermine the success of the program. While the issues are serious, the remedies are straightforward. NewSun urges the Commission to adopt its suggested revisions to Schedule 273, or in the alternative, use the VRET language the Commission previously approved in Portland General Electric's Schedule 55.

The matters at stake here are serious, interwoven with the core functions of the Commission as a regulator and agency, and its obligations and processes to protect ratepayers. NewSun urges the Commission to send a clear signal that it will rely on the actual tariff language and not the intentions or understandings of parties.

DATED this 22nd day of December, 2022.

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