BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 399

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

INTRODUCTION

NewSun Energy, LLC ("NewSun") respectfully submits this Opening 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 sets forth the terms and conditions of PacifiCorp's Voluntary Renewable Energy Tariff ("VRET"), which PacifiCorp has named the Accelerated Commitment Tariff ("ACT Tariff"). For the reasons set forth herein, NewSun objects to the Fourth Partial Stipulation.

The proposed ACT Tariff language reflects PacifiCorp's intention to impose non-standard wholesale power purchase agreement ("PPA") terms and conditions in its procurement of ACT generating resources ("ACT Resources"). Specifically, PacifiCorp wants to be able to terminate ACT Resource PPAs based on the under-delivery of power. As explained below, this is not consistent with industry-standard PPA terms. NewSun's concern is that wholesale power suppliers will be required to accept non-standard default and termination provisions as gating criteria in PacifiCorp's single competitive procurement process for both ACT Resources and system resources. Imposing such non-standard wholesale contract terms in PacifiCorp's competitive procurement process could stifle competition and inflate bid prices for both ACT

Resources and for system resources used to serve PacifiCorp's cost-of-service customers not participating in the ACT ("Non-Participating Customers").

While the issues that NewSun describes below are serious, the remedies are straightforward. The problematic language in the ACT Tariff is the following:

> 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 shall make reasonable efforts to begin to procure a new PPA with another renewable energy supplier as soon as practicable with the cost of energy to the Customer revised accordingly.

For the reasons explained below, NewSun respectfully requests the Commission strike the forgoing clause from the ACT Tariff and replace it with the following provision:

> In the event an ACT program resource(s) (cumulatively or individually) either (i) underperforms relative to participants' demand or (ii) are terminated, PacifiCorp will take reasonable efforts to remediate associated shortfall with bundled RECs subject to coordination with participating customers on any associated impacts projected including price, clean attributes, and the schedule and timing affecting the participants related to the shortfalls and proposed remedial actions. Remedial actions may be long-term or short-term, may include working with the resource owner(s)to take remedial actions for a given facility, retirement of banked RECs (as below) or further procurement of new resources and shall include competitive evaluation of non-utility owned resources and take into account resources' associated weather-related generation variability.

As explained below, the forgoing changes are either consistent with other Commission-approved tariff provisions, or otherwise expressly state the expectations and intentions of the Stipulating Parties.

ARGUMENT

1. PacifiCorp's Proposed Act Tariff Language Relies on Non-Standard PPA Terms.

The proposed ACT Tariff language indicates that PacifiCorp intends to acquire ACT Resources pursuant to non-standard PPA terms. Specifically, the ACT Tariff language presumes that if there is any under-delivery of power from an ACT Resource, then PacifiCorp would have

the right to declare an event of default and to terminate and replace the ACT Resource PPA. The applicable ACT Tariff language is the following:

> 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 shall make reasonable efforts to begin to procure a new PPA with another renewable energy supplier as soon as practicable with the cost of energy to the Customer revised accordingly.

For those who do not engage in wholesale power transactions, this language may appear innocuous. But for those versed in wholesale PPA terms, this language is highly problematic because it opens up a Pandora's Box of non-standard default and termination rights.

It is clear in context that the use of the word "default" in the ACT Tariff applies specifically to the under-delivery of power by an ACT Resource. In the initial version of the ACT Tariff that PacifiCorp filed, for example, the corresponding 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." In the Joint Response Testimony In Support of Fourth Stipulation ("Joint Response"), the Stipulating Parties testify that they understand that "NewSun's primary concern focuses on what might occur if a resource used to serve a customer under the ACT fails to deliver sufficient energy and defaults on its PPA . . ."[1] Thus, where the proposed ACT Tariff language in question uses the term "default" generically, it is specifically referring to an ACT Resource's failure to deliver.

The Stipulating Parties' claim that the ACT Tariff termination language reflects PacifiCorp's standard contract terms is not supported by evidence in the record. In the Joint Response, the Stipulating Parties testify that it is necessary for PacifiCorp to have the right to

[1] Joint Stipulating Parties/200, McVee et. al./3: 18-19.

terminate an ACT Resource PPA for under-delivery in order to be "consistent with all other PPAs."[2] The Joint Response further states that "the fundamental terms and conditions of an ACT PPA, including terms around under-delivery, default, and termination, will mirror the terms in non-ACT PPAs PacifiCorp negotiates for system resources."[3] On cross-examination, however, PacifiCorp's witness admitted that no such "non-ACT PPA" is in the record of this proceeding.[4] Further, the witnesses from the other Stipulating Parties admitted that—notwithstanding their Joint Testimony—they had not actually reviewed such non-ACT PPAs.[5] Thus, they had no factual basis for making this comparison. There is no evidence in the record to conclude that the aggressive default and termination rights reflected in the ACT Tariff "mirror" non-Act PPAs.

What the record actually *does* reflect, however, is that industry standard wholesale PPAs expressly state that non-delivery is *not* an event of default that is subject to termination.[6] The parties generally agree that industry-standard wholesale agreements include master agreements developed by the Edison Electric Institute ("EEI"), the Western Systems Power Pool ("WSPP"), and the International Swap Dealers Association ("ISDA").[7] The applicable defaults and remedies provisions of the EEI Master Agreement have been submitted as an exhibit to NewSun's Objection to Fourth Partial Stipulation.[8] Section 4.1 of the EEI states that the remedy for failure to deliver power is that the seller must pay the buyer the difference between the contract price and the replacement power price.[9] Section 5.1(c) of the EEI expressly states the

[2] Id. at 5: 5.
[3] Id. at 5: 19-21.
[4] TR McVee/63: 1-20.
[5] TR Gray/42: 24-25; 43: 1. "I have not personally reviewed those non-ACT PPAs for comparison to what should be expected for inclusion in the ACT itself."
[6] NewSun/100, Stephens/11: 1-16.
[7] Id. *See also,* TR Gray/42: 1-6.
[8] NewSun/102.
[9] Id. at Stephens/1.

sole remedy for the failure to deliver power is payment of cover damages pursuant to Section 4.2, and that the failure of a party to deliver power thereunder is *not* an event of default.[10]

The default and remedies provisions of the WSPP Master Agreement work the same as the EEI Master Agreement. PacifiCorp is a member of the WSPP. The applicable defaults and remedies provisions of the WSPP Master Agreement have been submitted as an exhibit to NewSun's Objection to Fourth Partial Stipulation.[11] Section 21.3(b) of the WSPP Master Agreement states that cover damages are the "sole and exclusive remedy" for the non-delivery of power.[12] Section 22 of the WSPP Agreement catalogues the actions or omissions that would be considered an Event of Default.[13] Conspicuously absent from the Events of Defaults listed in Section 22 is the failure to deliver power.

The same construct is found in the ISDA North American Power Annex. The applicable defaults and remedies provisions of the ISDA North American Power Annex have been submitted as an exhibit to NewSun's Objection to Fourth Partial Stipulation.[14] Section 6(c)(i) of the ISDA North American Power Annex mirrors section 4.1 of the EEI.[15] In both cases, the remedy for the non-delivery of power is not termination of the transaction but recovery of the increased cost of replacement power.

It is important for the Commission to understand why under all of these industry standard PPAs, the non-delivery of product is <u>not</u> an event of default. The EEI, ISDA, and WSPP terms were drafted through a collaboration of experts in wholesale power markets. These agreements all recognize that the power to terminate is the power to destroy. Delivery failures are fairly

[10] Id. at Stephens/2.
[11] NewSun/101.
[12] Id. at Stephens/6.
[13] Id. at Stephens/8-10.
[14] NewSun/103.
[15] NewSun/102, Stephens/2.

common in the electric industry—and are often due to a cause or event that does not reflect negligence or misconduct by the seller. It would cause chaos within the industry if PPAs were terminable each time there was non-delivery. As explained below, this would also make it extremely difficult to finance the construction of generating resources. Further—and most important—is the 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 buyer and would be detrimental to the proper functioning of energy markets.

The mismatch between the ACT Tariff language and industry-standard PPA terms is exposed in the cross-exam transcript for this proceeding. Quite simply, none of the Stipulating Parties actually know the industry-standard PPA terms. CUB's witness Will Gehrke testified that CUB does not regularly deal with wholesale PPA terms, and that Mr. Gehrke does not consider himself to be an expert on wholesale PPA terms.[16] Testifying on behalf of NIPPC, Mr. Spencer Gray, said "I don't personally negotiate wholesale power contracts or use the WSPP contract terms."[17] Even PacifiCorp's own witness, Mr. Matthew McVee, admitted that he has not personally done any transactions using the EEI or ISDA, and that he has no personal understanding of how the default and remedy provisions of the EEI and the ISDA work.[18]

The Stipulating Parties' response that industry standard PPA terms are irrelevant because they are only used for "spot" purchases is just plain wrong.[19] Notwithstanding the fact that none of the Stipulating Party witnesses has any experience using the industry standard PPAs, the Stipulating Parties nevertheless testify that it is "our understanding" that such industry standard

[16] TR Gehrke/27: 17-23.
[17] TR Gray/42: 1-10.
[18] TR McVee/52.
[19] Joint Stipulating Parties/200, McVee et. al./11: 9-16.

PPAs are only used for short-term and "spot" purchase.[20] It is not clear what is the basis of such "understanding." There is no maximum delivery period in any of the EEI, WSPP, or ISDA agreements. Upon cross examination, Mr. McVee admitted that he did not know whether the EEI or ISDA could be used for a purchase having a delivery term matching the minimum ACT Tariff period of five (5) years.[21] Nor did Mr. McVee know if PacifiCorp has ever used the EEI or ISDA to make a five (5) year purchase.[22] In fact, 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.[23]

The issue here is not that industry standard PPA terms are irrelevant. The issue is that the Stipulating Parties incorrectly assumed, based on their lack of relevant knowledge and experience, that industry standard PPA terms treat non-delivery as an event of default. Thus, the Stipulating Parties simply failed to recognize the potential dangers of allowing PacifiCorp to hardwire non-standard PPA termination rights into the Act Tariff.

2. PGE's VRET Tariff Reflects Industry Standard Contract Terms.

PacifiCorp's incorporation of non-standard default and termination provisions in the ACT Tariff could be easily remedied by adopting the language proposed by NewSun. In Order 16-251, the Commission established criteria for VRET tariff language that applies to both PacifiCorp and to Portland General Electric ("PGE"). PGE's VRET tariff is Schedule 55. In a series of orders in docket UM 1953, the Commission approved PGE's Schedule 55. Paragraph 3

[20] Id.
[21] TR McVee/51: 14-25.
[22] Id.
[23] *See* https://www.pacificorp.com/suppliers/rfps/2019c-request-for-proposal.html

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).

In the face of under-delivery, PGE would not declare an event of default and terminate the entire PPA. 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.

PGE's VRET tariff language is more consistent with industry standard PPA terms. As discussed above, the remedy for non-delivery under each of the WSPP, EEI, and ISDA agreements is that the buyer obtains replacement product at the expense of the seller. But non-delivery is not an event of default, and the buyer has no termination right for non-delivery. Schedule 55 reflects this standard contract structure. If a PGE VRET resource under-delivers, Schedule 55 does not assume that this will result in an event of default allowing PGE to terminate the underlying VRET PPA. Instead, Schedule 55 simply directs PGE to obtain replacement RECs on behalf of the participating customer.

PacifiCorp's initial proposal in this docket actually mirrored General Provision 3 of PGE's Schedule 55. In the initial version of the ACT that PacifiCorp filed with its 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."[24] The Direct Testimony of Erik Anderson in support of the initial draft version says that this language is designed to prevent cost-shifting to non-participating customers[25] and meets the criteria established by the Commission in Order 16-251.[26] NewSun raised no objection to this initial language. This begs the question of why PacifiCorp has changed its position? One of NewSun's concerns is that the changes may be specifically driven by a desire to influence the outcome pending resource procurement proceedings.

3. Non-Standard PPA Terms Are Likely to Increase PacifiCorp's Resource Procurement Costs.

The Commission should consider how PacifiCorp's use of non-standard default and termination PPA terms in the ACT Tariff might influence the outcome of pending and future requests for proposals ("RFPs"). Imposing a specific delivery obligation backed by a termination right amounts to a *de facto* performance guarantee. As explained above, industry standard PPAs do not include delivery guarantees that are remedied by a right to terminate the PPA. Although the Joint Response says that a "performance guarantee" is not *required* by the ACT Tariff language,[27] on cross-examination PacifiCorp's witness did not deny that PacifiCorp intends to require performance guarantees for ACT Resource PPAs.[28]

The evidence in the record before the Commission demonstrates how the *de facto* performance guarantees reflected in the Act Tariff is likely to have a chilling effect on bidder participation in PacifiCorp's RFPs. As compared to industry-standard PPA terms, a performance guarantee creates a heightened risk of default and PPA termination. Facing a heightened risk of

[24] PAC/ 801, Anderson/2,
[25] PAC/ 800, Anderson/3.
[26] PAC/ 800, Anderson/21-23.
[27] Joint Stipulating Parties/200, McVee et. al./ 10: 12-14.
[28] TR McVee/50: 3-6.

default termination, potential bidders may choose to forgo participating in PacifiCorp's RFP process altogether. Testifying on behalf of the Stipulating Parties, Mr. Spencer Gray agreed that the risk of PPA termination is something that potential bidders would take into consideration in deciding whether or not to submit a bid.[29] Mr. Gray explained that "expectation of what will be included in the PPA terms . . . [does] effect the potential for companies to enter into those contracts if they are competitively bidding . . .."[30]

The evidence in the record further shows how the ACT Tariff's *de facto* performance guarantee is likely to raise resource acquisition costs. First, if non-delivery is an event of default that could result in termination of the PPA, then the developer will have to over-invest in project contingency features in order to mitigate the non-delivery risk.[31] Second, non-standard PPA termination rights could also raise overall contract prices by raising the costs of project financing.[32] Mr. Gray agreed that, at least in some cases, project lenders will examine PPA terms as part of their due diligence of financing and energy project.[33] Mr. Gray explained that "financiers of projects often ask for specificity about the risks faced by a given project. And so, if any one of those risks looks like its heightened for a given project, the capital costs may increase depending on how its financed."[34] Mr. Gray concluded that "So, riskier projects tend to lead to higher prices."[35] In the context of PacifiCorp's RFP, this Commission has acknowledged "serious issues for PPA resources, particularly regarding the issues of third-party financers being unwilling to support the performance guarantee."[36]

[29] TR Gray/45: 2-5.
[30] TR Gray/43: 13-18.
[31] NewSun/100, Stephens/16-19.
[32] Id.
[33] TR Gray/45: 17-21.
[34] TR Gray/45: 9-16.
[35] TR Gray/44: 13-14.
[36] Order 22-130, p. 9.

These factors are compounded with respect to intermittent renewable generating resources. Mr. Gray explained that "if the wind blows 80% of the time, and the performance guarantee is that it blow 90% of the time, that would certainly affect the project viability and financing."[37] The question of whether intermittent renewable generating resources should be subject to performance guarantees as opposed to availability standards is currently being evaluated by the Commission in other ongoing dockets. In the RFP itself, the Commission directed the IE to further examine and to report back to on whether it is reasonable for PacifiCorp to impose a performance guarantee.[38] NewSun is concerned that PacifiCorp could simply use the ACT Tariff language as an end-run around RFP criteria decisions simply by requiring that that ACT Resources have delivery obligations backed by termination rights.

Finally, the Commission should be aware how the *de facto* performance guarantee in the ACT Tariff could tilt the RFP in favor of PacifiCorp-owned resources. As explained above, such performance guarantees could both deter competition and increase costs of third-party bids, making the company-owned option appear more competitive by comparison.[39] On cross examination, Mr. Gray testified as follows:

> Q. And based on your experience, can imposing performance guarantees, or delivery obligations in the context of an RFP, be used to favor utility owned resources in that competitive process?
>
> A. In proceedings other than this one, NIPPC has engaged in both disputes and negotiations with utilities on that point. And so depending on how a performance guarantee is drafted, it can affect utility ownership outcomes in a competitive solicitation.
>
> Q. To the detriment of third parties?
>
> A. In some cases, that's the case.[40]

[37] TR Gray/47: 10-14.
[38] Order 22-130, p. 10.
[39] NewSun/100, Stephens/17: 13-21.
[40] TR Gray/47: 22-25; TR Gray/48: 1-7

As compared to third-party bidders, PacifiCorp has the luxury of knowing that it will not terminate its own projects for under-delivery or for trivial defaults. The Commission has already acknowledged the risk that company-owned resources do not face the same performance risk as third-party PPAs.[41]

4. Increased ACT Resource Procurement Costs Would Also Harm Non-Participating Customers.

An increase in resource acquisition costs, for the reasons described above, would also harm Non-Participating Customers. PacifiCorp explained in its opening testimony that it intends to acquire ACT Resources through the same competitive procurement process that it acquires system resources for cost-of service customers.

> Initially, PacifiCorp plans to leverage its existing procurement process initiated as a result of the 2021 IRP, the 2022 All-Sources RFP (2022AS RFP). The IRP action plan and the subsequent RFPs will identify least-cost, least-risk resource for the system prioritizing selection for all cost-of-service customers. Next, PacifiCorp will identify additional least-cost resources for compliance with other state policy obligations on behalf of the state's retail customers, including Oregon's renewable Portfolio Standard and HB 2021. Projects that are not selected for system or state-specific needs will be considered as potential projects for the ACT program.[42]

This means is that PacifiCorp is not conducting a separate competitive procurement process that is specific to ACT Resources. Any contracting requirements from the ACT Tariff that bleed through to the RFP will impact procurement for both ACT Resources and system resources.

Because PacifiCorp intends to acquire ACT Resource as part of the same procurement process that it is acquiring system resources, *all* bidders in that procurement process will have to satisfy the non-standard PPA obligations reflected in the ACT Tariff. Bidders in the single procurement will not be able to specify whether their bids are intended to be ACT Resource or

[41] Order 22-130, pp. 9-10.
[42] PAC/800, Anderson/17: 11-19.

system resources.[43] If PacifiCorp can bind itself to a *de facto* performance guarantee through its ACT Tariff language in a general rate case docket, and then impose those contract obligations on all bidders in its system resource procurement process on the basis that they are "required" by ACT Tariff, then PacifiCorp could easily frustrate both stakeholder participation and Commission management and regulation of the RFP process.

Upon examination, it was clear that several of the Stipulating Parties did not fully appreciate the fact that PacifiCorp intends to acquire ACT Resources as part of the same RFP in which it acquires system resources. For example, when asked of his understanding of the ACT Resource procurement process, Commission Staff witness Mr. Madison Bolton responded "There are certain rules, requirements, laid out in – I don't know the chapter and division off the top of my head, I do not have them pulled up . . ."[44] When asked whether PacifiCorp intended to use the same resource procurement process for ACT Resources as it does for system resources, Mr. Bolton responded "I'm not entirely –I am not entirely sure how to answer that." When asked whether PacifiCorp intended to conduct a procurement process specific for ACT Resources, CUB witness Will Gehrke said "I'm not—that's not an interest—so, based on that—I know that they're going to be subjected to competitive bidding guidelines or waivers . . .."[45] Mr. Gehrke further testified that "I don't know if there will be VRET specific RFPs." And when asked very specifically whether CUB would be concerned if VRET PPAs and system PPAs were procured through the same RFP process, Mr. Gehrke simply said "No."[46]

By not understanding how PacifiCorp's acquisition of ACT Resource could directly impact PacifiCorp's acquisition of system resources, the Stipulating Parties have overlooked a

[43] TR Bolton/25: 11-22.
[44] TR Bolton/23: 6-21.
[45] TR Gehrke/33: 10-14.
[46] Id.

significant risk to Non-Participating Customers. As explained above, if PacifiCorp handcuffs itself through the ACT Tariff to non-standard PPA terms that increase bid costs of ACT Resources, then this will also necessarily increase the bid costs of system resources.

5. The ACT Tariff Would Allow PacifiCorp to Terminate ACT Resources Without Customer Input.

The proposed ACT Tariff language gives PacifiCorp the unilateral right to terminate and replace a participating ACT resource without Customer consent for any "default," no matter how insignificant. The point is illustrated by an extreme example. Assume there is an ACT Resource PPA having a favorable contract price and a firm annual delivery obligation of 200,000 MWh. Assume further that the ACT Resource delivers 199,999 MWh during a year. Under PacifiCorp's proposed ACT Tariff language, instead of simply replacing the one REC that was under-delivered and continuing with the otherwise favorable contract, PacifiCorp could choose to terminate and replace the PPA in its entirety with a more expensive ACT Resource, including a PacifiCorp-owned resource.

There is nothing in the ACT Tariff that requires PacifiCorp to show restraint in terminating an ACT Resource PPA, even if that is what the Participating Customer would expect.[47] The Stipulating Parties testify that they "*expect* PacifiCorp will diligently pursue any reasonable options short of termination."[48] (Emphasis added). Further, the Stipulating Parties say that they did not *intend* 'default' to capture minor issues or disputes, only event materially affecting resource production and delivery of the bundled product."[49] 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-

[47] TR Kronauer and Cebulko/40: 5-23.
[48] Joint Stipulating Parties/200, McVee et. al./9: 13-15.
[49] Joint Stipulating Parties/200, McVee et. al./6: 11-13.

> participating customers, and those remedies mitigate impact to participating customers, then PacifiCorp *may* pursue those alternatives remedies.[50] (Emphasis added).

The problem is that these "intentions" and "expectations" are not included in the ACT Tariff language. Why not draft into the ACT Tariff language that actually implements the Stipulating Parties' own expectations and intent?

Not only can PacifiCorp terminate for any "default" no matter how minor, there is no provision in the ACT Tariff for a Participating Customer to object to such termination. Depending on the nature of the default or the level of non-delivery, it may be in the best interest of the Participating Customer for PacifiCorp to exercise other industry-standard contract remedies rather than terminate the PPA altogether. Termination of an *entire resource*, especially coupled with a last-minute replacement of the *entire resource* by PacifiCorp at its sole discretion, could actually result in the *most* expensive and risky solution for the Participating Customer. Although the Fourth Partial Stipulation vaguely states that PacifiCorp will "coordinate" with the Participating Customer *following* termination of an ACT Resource PPA, there is nothing in the Fourth Partial Stipulation that requires customer consent or coordination *prior* to termination.[51]

This stands in stark contrast to PGE's Schedule 55. Under General Provision 3 of Schedule 55, PGE may terminate a VRET resource only "at the election of the Subscribing Customer." Unlike PacifiCorp's proposed language, PGE does not have the unilateral right to terminate a VRET resource for a minor under-delivery (the remedy is replacement RECs), or if the Subscribing Customer wishes to retain the VRET resource notwithstanding an event of default. As Mr. Bolton testified for Commission Staff, this provision of Schedule 55 is "intended

[50] Joint Stipulating Parties/200, McVee et. al./ 8: 12-15.
[51] TR Kronauer and Cebulko/40: 18-23.

to give the customer transparency and options in the event of under generation, or termination of a resource."[52]

6. The ACT Tariff Language Gives PacifiCorp's Unfettered Discretion to Replace ACT Resources.

The Act Tariff language appears to grant PacifiCorp nearly unfettered discretion as to how PacifiCorp would replace an ACT Resource that it has terminated. It is unclear whether replacement ACT Resources must be acquired by PacifiCorp through a competitive procurement—or how such a competitive procurement for replacement resources would work. The Fourth Partial Stipulation states summarily that the Commission's competitive bidding rules should apply to ACT Resource acquisition.[53] NewSun is not aware of any provision of the ACT Tariff, the Fourth Partial Stipulation, or otherwise that expressly requires competitive bidding for *replacement* ACT Resource PPAs. Further, it is unclear how the mechanics of a competitive procurement would work in the context of acquiring a replacement resource following the completion of the 2022AS RFP. NewSun's concern is that, in the absence of clear procurement procedures and facing a time constraint created by PacifiCorp's unilateral termination of a PPA, the default replacement will be an existing PacifiCorp-owned resource.

It is also unclear whether and to what extent PacifiCorp is *required* to consider Participating Customer input with respect to the acquisition of replacement resource. The Fourth Partial Stipulation states that "PacifiCorp will *coordinate* with participating customers if the PPA is terminated."[54] (Emphasis Added). Because this language is not expressly stated in the ACT Tariff, it is unclear whether it creates any legally enforceable obligation—particularly with respect to Participating Customers who are not Stipulating Parties. It should also be noted that,

[52] TR Bolton/18: 15-25.
[53] Fourth Partial Stipulation at Section 16, page 4.
[54] Fourth Partial Stipulation at page 4: 1-2.

on its face, the obligation to "coordinate," whatever that means, kicks-in only *after* the resource has already been terminated by PacifiCorp. Nor is it clear what it even means for PacifiCorp to "coordinate" with the Participating Customer in this context. According to the Stipulating Parties, "coordination" does *not* mean that the Participating Customer gets to "veto" PacifiCorp's replacement resource decision.[55] If a Participating Customer is already facing a shortfall in its subscribed amount because PacifiCorp has unilaterally terminated an ACT Resource PPA, the unspecified right to "coordinate" with respect to a replacement resource may not mean much at all.

7. PacifiCorp May Replace ACT Resources with PacifiCorp-Owned Resources.

The Act Tariff language gives PacifiCorp broad discretion to replace a third party ACT Resource procured through a competitive bid process with a PacifiCorp-owned resource. NewSun is particularly concerned that PacifiCorp may be tempted to abuse its unilateral power to terminate ACT Resource PPAs due to minor infractions or due to under-delivery in order to replace them with PacifiCorp-owned resources. In its opening testimony, PacifiCorp states that it "will consider both PPAs and company-owned assets as eligible renewable resources for the ACT program."[56] The Fourth Partial Stipulation states that, prior to using a company-owned resource as an ACT Resource, PacifiCorp need only submit to the Commission accounting methods and safeguards.[57] In response to NewSun's objections that PacifiCorp may replace ACT Resource PPA with third-parties with company-owned resources, the Stipulating Parties simply stated that PacifiCorp does not intend to use PacifiCorp-owned resources as an ACT Resource

[55] Joint Stipulating Parties/200, McVee et. al./10: 1-2.
[56] PAC/ 800, Anderson/18: 8-10.
[57] Fourth Partial Stipulation at Section 17, page 5.

"at this time or for the known future."[58] This response does not, of course, actually rule out the use of PacifiCorp-owned resources at any time in the future.

The witnesses for the Stipulating Parties appear to misunderstand the Commission's oversight of PacifiCorp-owned resources as ACT Resources. PacifiCorp's commitment to submit to the Commission "detailed accounting methods and safeguards" before using PacifiCorp-owned resources is intended to comply with Commission's VRET program criterion number 7. This criterion specifically states, in pertinent part, that "the regulated utility may own a voluntary renewable energy resource but may not include any voluntary renewable energy resource in its general rate base."[59] In context, therefore, Commission oversight of company-owned resources is narrowly tailored to ensure that the cost of "premium" PacifiCorp-owned ACT Resources are not shifted to Non-Participating Customers. In other words, Commission review is intended to protect Non-Participating Customers from cost shifts, and not to protect the Participating Customers from PacifiCorp. On cross-examination, however, Commission Staff expressed their belief that the Commission *may* undertake a substantive review of whether the PacifiCorp-owned resource is in the best interest of the *Participating Customer*.[60] Staff's optimistic view of the breadth and depth of Commission review does not appear to be supported by the Commission's VRET orders.

8. Commission Modification of Stipulated Tariff Language is Warranted in this Case.

It would be reasonable for the Commission to ask why it should interfere with a stipulation that appears to have widespread support amongst stakeholders? The Commission might decide to intervene in this instance if it finds that the Stipulating Parties did not fully

[58] Joint Stipulating Parties/200; McVee et. al./13: 12-16.
[59] *See, e.g.,* Order 21-091, pg. 3.
[60] TR Bolton/22: 1-4.

understand or appreciate certain important aspects or nuances of the ACT Tariff terms to which they were stipulating. For example, as stated above, Staff appears to have overestimated the level of Commission review of company-owned resources. Upon cross-examination, many of the Stipulating Parties were unable to articulate the process by which PacifiCorp intends to acquire ACT Resources—notably the fact that it intends to do so in the same procurement as it acquires system resource.[61] At least one witness incorrectly believed that PacifiCorp is required to "coordinate" with Participating Customers *prior to* termination rather than after termination of an ACT Resource PPA.[62] Many of the Stipulating Parties testified authoritatively in the first-person about non-ACT PPA terms that they had never actually seen and that are not in the record.[63] None of the Stipulating Party witnesses have a working knowledge of how industry-standard PPAs treat the under-delivery of power.[64] The Stipulating Parties mistakenly believe that the proposed ACT Tariff is consistent with, and includes the same "core protections" as, PGE's Schedule 55.[65] The Stipulating Parties admit, however, that they did not actually take the time to directly review the proposed ACT Tariff language against Schedule 55.[66]

NewSun also submits that the issues that it has raised in this proceeding are important and merit meaningful review and oversight. As explained herein, NewSun's concern is that non-standard default and termination provisions added to the ACT Tariff will become criteria in PacifiCorp's RFP, which will in turn stifle competition from third-party power suppliers and raise bid prices. This could directly impact PacifiCorp's acquisition of hundreds of MWs of ACT Resources, worth hundreds of millions of dollars**.** These same forces would also apply to

[61] TR Bolton/23: 6-21; TR Gehrke/33: 10-14.
[62] TR Kronauer and Cebulko/40: 5-12.
[63] Joint Stipulating Parties/200, McVee et. al./5: 3-5.
[64] TR Bolton/27:17-23; TR Kronauer and Cebulko/42: 1-10; TR McVee/52.
[65] Joint Stipulating Parties/200, McVee et. al./6: 1-3; TR Bolton/16: 16-21.
[66] TR Bolton/14: 20-24.

PacifiCorp's simultaneous procurement of system resources, thereby also harming Non-Participating Customers.

CONCLUSION

NewSun has identified potentially serious flaws in PacifiCorp's ACT Tariff language. While the issues that NewSun describes below are serious, the remedies are straightforward. The problematic language in the ACT Tariff is the following:

> 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 shall make reasonable efforts to begin to procure a new PPA with another renewable energy supplier as soon as practicable with the cost of energy to the Customer revised accordingly.

For the reasons explained above, NewSun respectfully requests the Commission strike the forgoing clause from the ACT Tariff and replace it with the following provision:

> In the event an ACT program resource(s) (cumulatively or individually) either (i) underperforms relative to participants' demand or (ii) are terminated, PacifiCorp will take reasonable efforts to remediate associated shortfall with bundled RECs subject to coordination with participating customers on any associated impacts projected including price, clean attributes, and the schedule and timing affecting the participants related to the shortfalls and proposed remedial actions. Remedial actions may be long-term or short-term, may include working with the resource owner(s)to take remedial actions for a given facility, retirement of banked RECs (as below) or further procurement of new resources and shall include competitive evaluation of non-utility owned resources and take into account resources associated weather-related generation variability.

DATED this 8th day of December, 2022.

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