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VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

**Re: Docket UE 399 – In the Matter of PACIFICORP, dba PACIFIC POWER, Request
for a General Rate Revision**

Attention Filing Center:

Attached for filing in the above-referenced docket is the Stipulating Parties' Joint Response
Testimony in Support of the Fourth Partial Stipulation.

Please contact this office with any questions.

Sincerely,

Adam Lowney

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

STIPULATING PARTIES

Joint Response Testimony of Matthew McVee, Madison Bolton, Will Gehrke, Alex Kronauer,
Bradley Cebulko, and Spencer Gray in Support of Fourth Partial Stipulation

on behalf of

PacifiCorp, Public Utility Commission of Oregon Staff, Oregon Citizens'
Utility Board, Walmart, Vitesse, LLC, and NIPPC

November 2022

**JOINT RESPONSE TESTIMONY IN SUPPORT OF FOURTH PARTIAL
STIPULATION**

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1 **Q. Are you the same witnesses who previously submitted joint testimony in support of**
2 **the Fourth Partial Stipulation on behalf of PacifiCorp d/b/a Pacific Power**
3 **(PacifiCorp or the Company), Staff of the Public Utility Commission of Oregon**
4 **(Staff), the Oregon Citizens' Utility Board (CUB), Walmart Inc. (Walmart), Vitesse,**
5 **LLC (Vitesse), and the Northwest & Intermountain Power Producers Coalition**
6 **(NIPPC), together referred to as the Stipulating Parties?**

7 A. Yes, with respect to PacifiCorp, Staff, CUB, Walmart and Vitesse. NIPPC's witness is its
8 Executive Director, Spencer Gray, in place of Carol Opatrny. Mr. Gray previously
9 submitted testimony in this docket and adopts the previously submitted joint testimony.

10 **I. PURPOSE OF TESTIMONY**

11 **Q. What is the purpose of your response testimony?**

12 A. We respond to the testimony objecting to the Fourth Partial Stipulation filed by NewSun
13 Energy LLC (NewSun) on October 21, 2022.

14 **Q. Is NewSun the only party who has objected to the Fourth Partial Stipulation?**

15 A. Yes.

16 **Q. Please summarize the recommendations you make in your testimony.**

17 A. The Public Utility Commission of Oregon (Commission) should approve the Fourth Partial
18 Stipulation without conditions or modifications. The proposed Accelerated Commitment
19 Tariff (ACT) agreed to by the Stipulating Parties is reasonable and is expected to result in
20 a viable and robust voluntary program to allow customers to expeditiously decarbonize
21 their energy. The ACT, as reflected in proposed Schedule 273, also includes critical
22 customer protections—for both participating and non-participating customers. NewSun's
23 proposed changes would weaken those customer protections and are unnecessary to

1 produce a viable and beneficial ACT program. As such, NewSun's objections should be
2 rejected as unreasonable.

3 **II. BACKGROUND ON THE FOURTH PARTIAL STIPULATION**

4 **Q. Please provide an overview of the Fourth Partial Stipulation.**

5 A. The Fourth Partial Stipulation represents the settlement of PacifiCorp's proposed ACT
6 program, which will provide customers the opportunity to accelerate the decarbonization
7 of their energy supply by facilitating the development of new renewable energy facilities.
8 The proposed ACT will allow PacifiCorp to provide bundled renewable energy and the
9 corresponding renewable energy certificates (RECs) to participating customers through
10 specified renewable resources that are incremental additions to those selected for system
11 use. PacifiCorp will leverage existing competitive procurement processes conducted in
12 accordance with the Commission's competitive bidding rules to identify potential projects
13 eligible for the ACT or seek appropriate waivers of such processes where appropriate. This
14 will allow the Company to identify a variety of resources that meet customer expectations
15 while minimizing costs and maximizing overall system benefits. Further, the stipulation
16 includes important protections for non-participating customers such as a cap and robust
17 requirements to justify exceeding the program cap.

18 **Q. Please describe how resources will be selected for participation in the ACT program.**

19 A. PacifiCorp will select resources to serve ACT participants in accordance with the
20 Commission's competitive bidding rules. The resources that are selected to serve ACT
21 participants will execute a long-term renewable power purchase agreement (PPA) with
22 PacifiCorp. Like all PPAs, agreements for ACT resources will set forth the terms and
23 conditions that will apply to the developer and PacifiCorp. And like all PPAs, failure to

1 comply with the terms of the PPA can result in default. If not cured, certain defaults can
2 result in termination of the PPA. Ultimately, the terms of the negotiated PPA will dictate
3 what breaches constitute a default and whether a default results in termination.

4 **Q. What happens if an ACT resource defaults?**

5 A. The proposed Schedule 273 states:

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

12 Because any replacement resource must be procured in accordance with the Commission's
13 competitive bidding rules, it is critical that PacifiCorp have sufficient time to identify and
14 execute a PPA with the replacement resource if one is ultimately required.

15 **III. OVERVIEW OF NEWSUN'S OBJECTIONS**

16 **Q. Please describe your understanding of NewSun's objections to the Fourth Partial**
17 **Stipulation.**

18 A. NewSun's primary concern focuses on what might occur if a resource used to serve a
19 customer under the ACT fails to deliver sufficient energy and defaults on its PPA, including
20 the process that PacifiCorp would use to secure replacement resources if a PPA is
21 terminated.¹

22 **Q. What are NewSun's specific recommendations?**

23 A. NewSun does not object to the Commission approving the ACT, but recommends the
24 following conditions:

¹ NewSun/100, Stephens/5.

- 1 • Remove and “prohibit” any language from the stipulation implying that default should
2 result in termination or replacement of participating ACT resources;²
- 3 • Clarify that PacifiCorp may, but is not required to, take reasonable actions to address
4 any shortfalls in generation from participating resources, whether because the
5 participating resource defaults or otherwise fails to deliver;³
- 6 • Clarify that PacifiCorp must consider a range of possible remedies, and that the
7 reasonable actions PacifiCorp may, but is not required to, undertake to address
8 generation shortfalls need not include replacement of the entire participating resource
9 and may include shorter term or incremental actions;⁴
- 10 • Require PacifiCorp to coordinate with and obtain approval from affected participants,
11 whom PacifiCorp must inform about the risks and benefits of the range of possible
12 remedies;⁵
- 13 • Require that any retirement of banked RECs “beneficially accrue to the resources
14 which had previously overproduced them and should occur before any related damages
15 are charged under the PPA”;⁶ and
- 16 • Clarify that any replacement or augmenting resources for the ACT program are subject
17 to competitive bidding requirements.⁷

18 We understand these to be NewSun’s only proposed modifications, and the testimony
19 below responds to all of these proposals.

² NewSun/100, Stephens/5 (recommendation #1).

³ NewSun/100, Stephens/6 (recommendations #2(a) and #2(b)).

⁴ NewSun/100, Stephens/6 (recommendations #2(c), #2(c)(i), and #2(c)(ii)).

⁵ NewSun/100, Stephens/6 (recommendations #2(d), #2(d)(i), #2(d)(ii), and #2(d)(iii)). The testimony repeats (c), and the Stipulating Parties use (d) in lieu of the second (c) for clarity.

⁶ NewSun/100, Stephens/6 (recommendation #3).

⁷ NewSun/100, Stephens/6 (recommendation #4).

1 **IV. RESPONSE TO NEWSUN’S OBJECTIONS**

2 **Q. What is your overall response to NewSun’s objections?**

3 A. NewSun’s recommendations are unreasonable or unnecessary and should be rejected.
4 Adopting NewSun’s recommendations would weaken the ACT and prevent PacifiCorp
5 from negotiating terms and conditions consistent with all other PPAs, and could ultimately
6 harm participating customers and increase the risk of shifting costs to non-participating
7 customers. The Fourth Partial Stipulation resulted from a robust, collaborative process and
8 is supported by a wide range of parties, including potential customers who may participate
9 in the ACT, non-participating customer advocates, and developers. The agreement was
10 negotiated as a comprehensive program and should not be altered in a way that weakens
11 the critical customer protections the Stipulating Parties relied on to support adoption of the
12 ACT.

13 **Q. Are NewSun’s concerns within the scope of the Fourth Partial Stipulation and**
14 **proposed ACT?**

15 A. No. NewSun’s concerns are out of scope for approval of a customer-facing tariff like the
16 ACT. This is out of scope because, contrary to NewSun’s claims, the proposed Schedule
17 273 does not establish or dictate PPA terms between PacifiCorp and developers. PacifiCorp
18 will negotiate PPAs with participating resources and the terms of those PPAs are certainly
19 important. But the fundamental terms and conditions in an ACT PPA, including terms
20 around under-delivery, default, and termination, will mirror the terms in non-ACT PPAs
21 PacifiCorp negotiates for system resources. The tariff should not impose unnecessary
22 burdens or terms on participants or developers that would not apply to any other PPA.
23 Rather, specific terms should be negotiated on a case-by-case basis. The approach here is

1 generally consistent with the Commission’s approval of Portland General Electric
2 Company’s (PGE) voluntary renewable energy tariff, where the Commission approved a
3 tariff but did not dictate PPA terms and conditions.⁸

4 **Q. How do you respond to NewSun’s recommendation that the Commission “prohibit”**
5 **any language implying that default should result in termination or replacement of**
6 **participating ACT resources?**⁹

7 A. NewSun’s recommendation is unnecessary and unreasonable. NewSun claims that
8 Schedule 273 “appears to authorize—if not compel—PacifiCorp to terminate a PPA with a
9 [ACT] resource for *any* event of default no matter how minor[.]”¹⁰ This is untrue—there
10 is no assumption within the proposed Schedule 273 that any default results in automatic
11 termination, even a default for non-delivery. The Stipulating Parties did not intend
12 “default” to capture minor issues or disputes, only events materially affecting resource
13 production and delivery of the bundled product. The Stipulating Parties do not believe this
14 empowers PacifiCorp to terminate a PPA beyond the commercially typical terms and
15 conditions in place with a PPA. NewSun’s recommendation is therefore unnecessary.

16 The terms of the negotiated PPA will determine whether a particular event of
17 default, if uncured, can result in termination. The language in the Fourth Partial Stipulation
18 specifically states: “PacifiCorp shall take reasonable efforts to begin procurement of a
19 replacement resource(s) if an ACT program resource defaults under the PPA, *so that in the*
20 *event of termination*, a replacement resource(s) can be available as soon as practicable.”

⁸ After the tariff was approved, then PGE posted its PPA terms, which then could be challenged.
<https://portlandgeneral.com/energy-choices/renewable-power/green-future-impact/customer-supplied-option>.

⁹ NewSun/100, Stephens/5.

¹⁰ NewSun/100, Stephens/10 (emphasis in original).

1 (emphasis added) This language contemplates that some defaults may not require
2 termination, otherwise the emphasized clause would be unnecessary.

3 NewSun's recommendation is unreasonable because it would tie the Company's
4 hands and create greater uncertainty as it negotiates and manages its ACT PPAs, which
5 may harm participating customers. The premise underlying the ACT is that PacifiCorp is
6 matching participating customer load to generation from a participating renewable resource
7 or resources. This matching both ensures that the participating customer is receiving the
8 benefits of the ACT resource(s), and that non-participating customers are protected from
9 potential cost-shifting. To achieve the best possible outcome for customers, PacifiCorp
10 must be able to negotiate the best terms and conditions it can achieve in the PPAs and take
11 steps to remedy the failure of an ACT resource to perform in accordance with its contract.
12 Preemptively dictating or prohibiting terms that PacifiCorp can negotiate runs directly
13 counter to customers' interests.

14 **Q. Why does the proposed Schedule 273 and Fourth Partial Stipulation refer to**
15 **“defaults” resulting from under-delivery?**

16 A. PacifiCorp's earlier language references resources that were “consistently
17 underperforming.”¹¹ In the Fourth Partial Stipulation, other parties agreed that the
18 reference to “default” was preferable in the context of an as-generated subscription because
19 consistent underperformance may occur but not rise to the level of a contractual default.
20 By referencing a default, the Stipulating Parties' intention was to avoid setting PPA terms
21 and determining what “consistent underperformance” might mean. By removing the
22 ambiguous terms, the Stipulating Parties sought to avoid confusing customers about when

¹¹ PAC/2700, McVee/19.

1 PacifiCorp might act in response to under-delivery and to generally defer this issue to the
2 yet-to-be negotiated PPA terms that will carefully define when a “default” for consistent
3 underperformance has occurred.

4 **Q. How do you respond to NewSun’s recommendation that PacifiCorp may, but is not**
5 **required, to take reasonable actions to address any shortfalls in generation from**
6 **participating resources?**¹²

7 A. If a participating resource fails to deliver energy in accordance with the terms of the PPA,
8 PacifiCorp *must* take steps to remedy that shortfall. Otherwise, the participating customer
9 will not receive the expected generation benefits and the framework underlying the ACT
10 falls apart. If the default is not cured, the termination of the PPA is a reasonable option
11 under the circumstances, and termination is allowable by terms of the negotiated PPA, then
12 PacifiCorp should not be prohibited from pursuing that option. Similarly, if there are
13 remedies short of termination for under-delivery, those remedies are consistent with the
14 ACT and do not adversely impact non-participating customers, and those remedies mitigate
15 impact to participating customers, then PacifiCorp may pursue those alternative remedies.
16 The terms in Fourth Partial Stipulation contain adequate flexibility to ensure the program
17 is implemented in a way that protects the interests of participating and non-participating
18 customers. The tariff language is sufficiently flexible to accommodate a range of actions
19 and simply because the language allows a range of options it does not mean the Company
20 will take the most extreme option in every circumstance.

21 The Stipulating Parties see value in assurances to participating customers that
22 resources will perform as expected. PacifiCorp’s ability to remedy an issue like under-

¹² NewSun/100, Stephens/6.

1 delivery is critical to potential ACT participants and therefore it is reasonable for Schedule
2 273 to outline PacifiCorp's obligations in the tariff. It is important to emphasize that the
3 language in Schedule 273 and the Fourth Partial Stipulation does not provide PacifiCorp
4 with any additional rights or abilities to terminate a PPA; rather, the tariff confirms that
5 PacifiCorp will fix its program if the PPA resource is not meeting subscribers' needs.

6 **Q. How do you respond to NewSun's request that the Commission clarify that in the**
7 **event of a generation shortfall PacifiCorp should not automatically replace the entire**
8 **participating resource?**¹³

9 A. The terms of Schedule 273 neither require automatic termination of an ACT PPA for under-
10 delivery nor require replacement of the entire participating resource. NewSun's requested
11 clarification is therefore unnecessary. As NewSun concedes, the terms of the negotiated
12 PPA will determine whether an event of default has occurred and whether that event of
13 default, if uncured, is sufficient to allow termination.¹⁴ In managing the PPA, the
14 Stipulating Parties expect PacifiCorp will diligently pursue any reasonable options short of
15 termination. But if the resource cannot and is not expected to perform, then it should be
16 replaced, just as any other non-ACT resource would be replaced if it failed to meet its
17 contractual commitments.

18 The Stipulating Parties expect the Company's remedy to be responsive to the
19 specific circumstances and with necessary coordination and communication with
20 participants according to those circumstances. Contrary to NewSun's recommendation,¹⁵

¹³ NewSun/100, Stephens/6.

¹⁴ NewSun/100, Stephens/21.

¹⁵ NewSun/100, Stephens/6.

1 it is inappropriate to include in the tariff or mandate that the participant can veto a remedial
2 action.

3 **Q. Do you agree with NewSun that participating customers have no “off-ramp” if**
4 **PacifiCorp procures a replacement resource?**¹⁶

5 A. No. The Stipulating Parties agree that the proposed Schedule 273 includes a commitment
6 from PacifiCorp that it will coordinate with participating customers in the event that
7 PacifiCorp is required to replace an underperforming resource.

8 **Q. NewSun also expresses a concern that Schedule 273 requires a performance**
9 **guarantee in the ACT resource PPA and that any under-delivery is an act of default**
10 **that could lead to termination of the PPA.**¹⁷ **Does Schedule 273 require that a**
11 **performance guarantee be included in the PPA?**

12 A. No. Schedule 273 neither requires a specific performance guarantee nor states or implies
13 that failure to meet an agreed-upon performance guarantee is an event of default under the
14 PPA. As discussed above, PacifiCorp will negotiate ACT PPAs the same way it negotiates
15 all market based PPAs and seek to obtain fair terms for customers, both participating and
16 non-participating. If PacifiCorp negotiates a PPA with a guarantee, PacifiCorp must then
17 be able to enforce the terms of that PPA, including potential termination if allowed by the
18 PPA, in order to protect participating and non-participating customers.

19 **Q. Does NewSun appear to concede that the terms of the negotiated PPA will govern**
20 **whether PacifiCorp can terminate a PPA for under-delivery?**

21 A. Yes. NewSun admits that the language in Schedule 273 that it wants changed is “at best
22 superfluous” because “PacifiCorp will still have all the rights and remedies reflected in the

¹⁶ NewSun/100, Stephens/22 and 24.

¹⁷ See, e.g., NewSun/100, Stephens/10.

1 negotiated PPA terms regardless of whether those PPA terms are dictated by its retail
2 tariff.”¹⁸ If NewSun believes Schedule 273 is superfluous, then there is no reason to adopt
3 any of its recommended changes to that language.

4 **Q. NewSun is concerned that termination may be more costly for the participating**
5 **customer.¹⁹ Is that concern addressed by the terms of the Fourth Partial Stipulation?**

6 A. Yes. In the event of a default resulting in a termination, PacifiCorp is required to work
7 with a participating customer to ensure that its interests are sufficiently represented and
8 protected.

9 **Q. NewSun additionally points to certain industry standard wholesale agreements.²⁰ Are**
10 **these agreements appropriately used for comparison by NewSun?**

11 A. No. It is our general understanding that the Western Systems Power Pool Agreement,²¹ the
12 North American Power Annex to the International Swap Dealers Association (ISDA),²² and
13 the Edison Electric Institute Agreements²³ referenced by NewSun are all Master
14 agreements intended to facilitate short-term trades and spot purchases with another bilateral
15 party and are not indicative of common provisions negotiated as part of a long-term
16 renewable resource PPA.

¹⁸ NewSun/100, Stephens/21.

¹⁹ NewSun/100, Stephens/22.

²⁰ See, e.g., NewSun/100, Stephens/11.

²¹ *WSPP Agreement*, WESTERN SYSTEMS POWER POOL AGREEMENT (August 26, 2022) available at <https://www.wspp.org/pages/Agreement.aspx> (As noted on the site, “The WSPP Agreement represents a default standardized contract for electric power sales and physical options.”).

²² NewSun/103, Stephens/1 (This is noted specifically in the ISDA North American Power Annex where it is noted that the provision apply “solely to transactions between the parties for the purchase or sale of a Product on a spot or forward basis, or as an option to purchase, sell or transfer a Product (collectively, “Power Transactions”).

²³ EEI Master Contract, Edison Electric Institute (April 25, 2000), available at <https://www.eei.org/en/resources-and-media/master-contract> (Article Two specifically notes that there are individual transactions occurring under the Master Contract).

1 **Q. NewSun claims that the language in Schedule 273 requiring PacifiCorp to take actions**
2 **to mitigate the impact of ACT resource under-delivery is a “poison pill” that will limit**
3 **potential resources from participating in the ACT and increase costs for customers**
4 **participating in the ACT.²⁴ Do you agree?**

5 A. No. We do not agree that the proposed Schedule 273 will create prohibitively high costs
6 or deter potential resources from participating in the program. While yet to be established,
7 the terms within an ACT PPA associated with under-delivery, default, and termination, will
8 mirror the terms in non-ACT PPAs PacifiCorp negotiates for system resources. We believe
9 that adoption of the Fourth Partial Stipulation without modification provides an
10 opportunity to create a viable and robust voluntary renewable energy program for
11 PacifiCorp that, among other things, appropriately balances risk in compliance with
12 Condition 8 of the voluntary renewable energy tariff guidelines.²⁵

13 **Q. NewSun recommends that the Commission require that any retirement of banked**
14 **RECs “beneficially accrue to the resources which had previously overproduced them**
15 **and should occur before any related damages are charged under the PPA.”²⁶ Is this**
16 **reasonable?**

17 A. No. NewSun wants to shield ACT resources from damages or harm for deficiencies when
18 customers may have benefited from prior over-production from the ACT resource. This
19 recommendation improperly dictates PPA terms that would be subject to negotiation and
20 should not be dictated by the Commission.

²⁴ NewSun/100, Stephens/16.

²⁵ *In the Matter of Portland General Electric Company, Investigation into Proposed Green Tariff*, Docket UM 1953, Order No. 21-091 at 3 (Mar. 29, 2021) (“All direct and indirect costs and risks are borne by the participating voluntary renewable energy customers, shareholders of the utility or third party developers and suppliers with provisions...”).

²⁶ NewSun/100, Stephens/6.

1 **Q. How do you respond to NewSun’s request that the Commission clarify that any**
2 **replacement or augmenting resources for the ACT program are subject to competitive**
3 **bidding requirements?**²⁷

4 A. This recommendation is unnecessary. The Fourth Partial Stipulation requires that the
5 Company comply with the Commission’s competitive bidding rules for the acquisition of
6 all ACT resources—including both the initial resource and any potential replacement
7 resources.²⁸

8 **Q. How do you respond to the remaining clarifications NewSun requests?**²⁹

9 A. None of NewSun’s other clarifications are necessary because they address PPA terms that
10 can be negotiated and do not belong in the tariff and there is no need for additional
11 Commission clarification.

12 **Q. NewSun also expresses a concern that PacifiCorp may replace an ACT resource with**
13 **a PacifiCorp-owned resource.**³⁰ **Is that true?**

14 A. No, not at this time or for the known future. PacifiCorp explained in prior testimony that
15 before using any PacifiCorp-owned resource for the ACT program, the Company will come
16 to the Commission with a specific proposal for approval.³¹

17 **Q. Are there are any issues you wish to address?**

18 A. Yes. NewSun claims that “there is no real consequence for underdelivery of RECs” in the
19 ACT.³² The Stipulating Parties disagree. ACT participants agree to pay a premium for the
20 benefit of receiving bundled energy and RECs. Underdelivery of RECs, particularly

²⁷ NewSun/100, Stephens/6.

²⁸ Fourth Partial Stipulation at Section 16, page 4-5.

²⁹ NewSun/100, Stephens/6. Again, the Stipulating Parties understand the numbered list of recommendations on Stephens/5-6 to be NewSun’s only requested changes.

³⁰ NewSun/100, Stephens/24.

³¹ Fourth Partial Stipulation at Section 17, page 5.

³² NewSun/100, Stephens/22 (emphasis omitted).

1 underdelivery without relief as NewSun proposes,³³ means that participants may not
2 receive the benefit they paid for. In short, underdelivery harms participants, and that is a
3 “real consequence,” contrary to NewSun’s claim. The Fourth Partial Stipulation
4 appropriately designs the ACT to mitigate this risk to subscribers without imposing undue
5 burdens on non-participating customers.

6 **V. CONCLUSION**

7 **Q. What is your recommendation to the Commission?**

8 A. The Stipulating Parties urge the Commission to reject NewSun’s recommendations and
9 approve the Fourth Partial Stipulation in its entirety and without condition or modification.

10 **Q. Does this conclude your response testimony?**

11 A. Yes.

³³ See NewSun/100, Stephens/6 (recommendation #3).