

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2166

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY,

2021 All-Source Request for Proposals

MEMORANDUM

On May 10, 2022, Circuit Court Judge Jodie Bureta issued an opinion letter regarding an appeal of Commission Order No. 21-460 issued in this docket. New Sun Energy LLC appealed Order No. 21-460 to the Marion County Circuit Court. In the May 10, 2022 letter, Judge Bureta granted a motion to dismiss New Sun's appeal filed by the Public Utility Commission.¹ The letter is attached to this memorandum as Appendix A. I clarify that it is the expectation for entities appealing our decisions, either to the Circuit or Appeals court, to serve such appeals upon the service list for the applicable docket at the time the appeal is made.

Dated this 18th day of May 2022, at Salem, Oregon.



Nolan Moser
Chief Administrative Law Judge

Attachment: Opinion Letter

¹ The attached letter contains a typo regarding its date. The letter was issued May 10, 2022, not March 17, 2022.



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

2022
DIE A. BURETA
Circuit Court Judge
PHONE: (503) 588-8485
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March 17, 2022

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RE: *NewSun Energy LLC v. Oregon Public Utility Commission and Portland General Electric Company, Marion County Case Number 22CV05442*

Counsel,

The Petitioner has requested judicial review of PUC order 21-460, specifically they argue that the order does not comply with the mandate of HB 2021 because it does not include as a requirement for acknowledgment of PGE's RFP any language preferring in-state projects. This matter came before the Court for oral argument on May 5, 2022, on Respondent and Interveners Motions to Dismiss for Lack of Subject Matter Jurisdiction. All parties appeared through their respective counsel. The Court has considered the arguments of all parties, the written materials submitted and has carefully reviewed the cases cited by each party including *Teel Irrigation Dist. V. Water Resources Dep't*, 323 Ore. 663 (1996), *Grobovsky v. Bd. Of Med. Examiners*, 213 Ore. App 136 (2007), and *Hawes v. State*, 203 Ore. App. 255 (2005).

The parties agree that jurisdiction in this case is governed by the Administrative Procedures Act which distinguishes between an “order” and a “final order” and allows judicial review of only a final order, or “except upon a showing that the agency is proceeding without probable cause, or that the party will suffer substantial and irreparable harm if interlocutory relief is not granted”. ORS 183.480(3).

Further, final orders are a “final agency action expressed in writing”. ORS 183.310(6)(b). That definition specifically excludes “any tentative or preliminary agency declaration or statement that:

- (A) precedes final agency action; or
- (B) Does not preclude further agency consideration of the subject matter of the statement or declaration.”

On the record before it, the Court makes the following findings:

- PUC Order 21-460 (*f. Resolution*) reads “we noted that we will continue to consider this provision as we work through HB 2021 implementation, and there will be discussion beginning in multiple other forums of capturing community benefits from HB 2021 implementation.”
- PUC Order 21-460 acknowledges or approves, with modifications, PGE’s RFP for resource acquisition consistent with the Commission’s rules.
- PGE is free to proceed with any RFP as drafted, regardless of whether the PUC acknowledges or approves the RFP. PUC acknowledgment or approval is not required for PGE to implement a RFP, though not having acknowledgment at that stage might make a later rate case more difficult.
- Following Order 21-460 there are multiple avenues for subsequent agency action regarding this subject, and therefore the Order is not the ultimate decision on the matter. In fact, the OAR’s outline at least 5 additional steps that are taken prior to the rate case determination.
- PUC Order 21-460 is not a final order for purposes of judicial review.
- Pursuant to caselaw, the provisions in ORS 183.480(3) allowing relief upon a showing that the agency is proceeding without probable cause, or that a party will suffer substantial and irreparable harm if relief is not granted, must be addressed in an “action or suit” and not through a petition for judicial review. Proceeding without probable cause or substantial and irreparable harm do not provide an independent basis for jurisdiction to judicially review an agency action.
- Nothing in this opinion restricts any right of the Petitioner to proceed pursuant to any other statute that might confer jurisdiction.

Therefore, the Court is granting the Respondent and Intervenors Motions to Dismiss for Lack of Subject Matter Jurisdiction. Mr. Mancuso would you kindly prepare an order consistent with the Court's ruling.

Sincerely,

Jodie A. Burke
Circuit Court Judge

A handwritten signature in black ink, appearing to read "Jodie A. Burke". The signature is written in a cursive style with a large, looping initial "J".