

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2274

In the Matter of
Portland General Electric Company,
Request for Waiver of 2023 RFP Process.

RESPONSE OF NEWSUN ENERGY
TO PORTLAND GENERAL
ELECTRIC COMPANY’S MOTION
FOR MODIFIED PROTECTIVE
ORDER

I. INTRODUCTION

Pursuant to OAR 860-001-0080(3)(d) and Administrative Judge Mapes’ Ruling dated March 8, 2024 in this docket, NewSun Energy LLC (“NewSun”) hereby submits this response to Portland General Electric Company’s (“PGE’s”) motion for a modified protective order (“MPO”) filed on March 8, 2024. In light of recent events, the Public Utility Commission of Oregon (the “Commission”) should re-evaluate its approach to PGE’s modified protective orders (“MPOs”) to protect the integrity of the competitive bidding process, prevent over-designation of information as highly protected, and to mitigate PGE’s ownership bias. The changes suggested below are warranted first because in PGE’s last RFP, critically important information tending to show PGE’s ownership bias was shielded from public view for months under the pretext of being “highly protected,” and second because PGE’s newly proposed use of its affiliate, the Portland Renewable Resource Company, LLC (“PRR”), and the specific way in which PGE proposes to use that affiliate in this and future RFPs introduces a new abuse potential that needs to be mitigated against.

NewSun recommends four changes to the MPO proposed by PGE to balance the interests of PGE and stakeholders:

1. First, the MPO should specify what categories of information are highly protected in order to avoid over-designation and mitigate against PGE's ownership bias;
2. Second, additional protection is necessary to ensure that PGE employees who have had access to Highly Protected Information are not able to use that information for an improper purpose, even if not intentional;
3. Third, rather than requiring PGE consent or an ALJ ruling to determine whether each potential signatory can be a qualified individual, there should be at least some non-bidding individuals who can become qualified upon the signing of the Appendix B Consent to Be Bound; and
4. Fourth, under Paragraph 11, challenging parties should be allowed more time to file a written reply, and not precluded from seeking additional time.

NewSun also proposes specific redlines to the MPO below but is open to suggestions and does not assert that these redlines are the only way to address the issues identified in his response.

II. RESPONSE

A. The Modified Protective Order Should Specify What Categories of Information are Covered.

Under OAR 860-001-0080(3), a modified protective order provides additional protection beyond the general protective order only for "*certain information* [that] is

designated as highly protected information.”¹ The Commission noted, for example, that “if a party seeking a protective order believes there will be any potential intervenors or signatories with competitive interests, a modified protective order would be required to address any heightened protection for sensitive information.”² PGE should specifically describe the categories of information that may be designated as highly protected to prevent the over-designation of information under the MPO. PGE’s proposed language is vague and unworkable and leaves too much discretion in the utility.

Paragraph 2 of PGE’s proposed MPO is identical to the terms of the general protective order in that both cover information that is not publicly available and falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information) or the exemptions under Oregon Public Records law, ORS 192.345 and 192.355 (OPRL).³ The only difference is that under this proposed MPO, information may receive the “Highly Protected” designation if it “[i]s not adequately protected by the general protective order.”⁴

The terms “not adequately protected” are subjective and not defined. It gives no certainty about what categories of information it covers and leaves it completely up to PGE’s (the designating party’s) discretion to determine what is and what is not

¹ OAR 860-001-0080(3) (emphasis added).

² *In re Rulemaking to Amend OAR 860-001-0080, Protective Orders*, Docket No. AR 628, Order No. 20-013 at 5 (Jan. 14, 2020).

³ Compare PGE Notice of Use of General Protective Order, Appendix A at ¶ 2 with PGE’s Motion for a Modified Protective Order, Appendix A at ¶ 2.

⁴ *Id.*

“adequately protected” by the general protective order. This is a vague and unworkable standard that is subject to abuse.

Indeed, it is this same vague and subjective standard that created the situation in PGE’s last RFP where critical information showing PGE’s ownership bias was shielded from the public for months. That information, which was ultimately disclosed, should have never been considered highly protected or even protected under the general protective order. It showed specifically that PGE’s own winning benchmark bid did not even meet the minimum bidding criteria for transmission and that similarly situated projects were only given the options to downsize or withdraw.⁵ While NewSun appreciates that the information in that docket was eventually made public, in the intervening months, the public, stakeholders, and parties to both that docket and this docket were deprived of knowing that information and the opportunity to advocate for a better outcome. This over-designation issue should be avoided, and it should not have been so difficult to get that critical information released publicly.

Highly protected information in the context of an RFP should also include individually identifiable information from third-party bidders. While NewSun has never viewed highly protected information, it is NewSun’s understanding that this is generally how MPOs in RFPs have functioned in the past and that the Commission and parties have implemented this through the practice of redacting project names and sometimes certain other characteristics that may make a project individually identifiable.

⁵ *Compare In re PGE’s 2021 Request For Proposals*, Docket No. UM 2166, Staff Summary Upon Conclusion of RFP (dated Oct. 30, 2023) *with* UM 2166 Errata to Staff Summary Upon Conclusion of RFP (dated Feb. 5, 2024).

For additional clarity, the MPO should not protect information showing whether bids met or did not meet the minimum bid requirements or any other objective criteria. It should also not protect information showing how bid costs and values (including the capacity contributions and curtailment assumptions) were adjusted by PGE through the use of its excel spreadsheets or its Aurora and Sequoia models into which bidders and the public have no transparency. Rather, there should be transparency into these items to a degree that would enable bidders to spot check their bids and other bids (especially the benchmark or PGE-ownership options) to ensure that comparable bids were treated comparably in the bid evaluation process. For example, while a bidder's specifically proposed 8760 should be protected, a bidder should be able to see capacity factors PGE assigned to other bids in comparable locations and with comparable characteristics. At a minimum, there should be transparency into the benchmark bids' value adjustments as part of the price score so that bidders can request detailed information about the bidders' own score and compare that against PGE's valuation of its own resource submission. This transparency is an important protection against the utility self-ownership bias and in favor of diverse ownership.

Finally, it should go without saying as part (b) in Paragraph 2 makes clear, that any information that is already publicly available, such as transmission posted on Bonneville Power Administration's oasis site, should also not be considered highly protected.

As such, NewSun proposes the following change to paragraph 2:

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

- (a) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information) or the exemptions under Oregon Public Records law, ORS 192.345 and 192.355 (OPRL);
- (b) Is not publicly available; **and**
- (c) **Is not adequately protected by the general protective order; and**

(d) Is individually identifiable information from third-party bidders.

B. Additional Protections are Needed to Ensure that PGE Employees are not Able to Use Highly Protected Information for an Improper Purpose

PGE employees that access highly protected information should be subject to a separation of functions requirement to mitigate against any potential opportunity to use that information for an improper competitive purpose, whether done so intentionally or not. When it comes to accessing highly protected competitively sensitive information, the Commission balances the need to “access. . . information with potential harm caused by release of that information,” and has erred in favor of denying individuals access to such information when it “could also grant them a competitive advantage.”⁶ In doing so, the Commission highlights that such individuals, while they “may not intend to use protected information for inappropriate competitive purposes,” they “nonetheless retain knowledge of information that they have worked with in other proceedings and cannot ‘unknow’ those details.”⁷

In Oregon’s current competitive bidding processes, it does not make sense to prevent the PGE RFP evaluation team from accessing highly protected information because they evaluate and select bids for the initial and final shortlists and negotiate contracts with winning bidders. The separation of functions protection NewSun seeks is a protection on what services those PGE employees can perform in the future, once they have seen and know the details of the highly protected information that will be subject to

⁶ *In re PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Order No. 22-128 at 5 (Apr. 25, 2022).

⁷ *Id.* (emphasis in original).

the MPO entered in this docket. When PGE’s affiliate, PRR, was approved, the Commission prevented PGE employees from providing services to PRR before the final shortlist filing if those employees had previous access to highly protected information from PGE’s most recent RFP.⁸

This ruling was in part based on PGE’s assertions that highly protected RFP information “rapidly” becomes stale.⁹ However, MPOs generally (and the proposed MPO in this case) cover highly protected information for a period of five years following the date of the final order in these proceedings.¹⁰ Therefore, because information remains relevant for a longer period of time, simply preventing PGE employees from providing such services if they had access to the highly protected information in the last RFP is insufficient. The prohibition on PGE employees should remain for a comparable time as the protection.

Additionally, the competitive advantage that PGE can gain from knowing the highly protected information in this case extends not only to the affiliate team, but to the benchmark team as well. When the Commission initially prohibited PGE employees who had acquired highly protected information in prior RFPs and integrated resource plans (“IRPs”) from working on affiliate bids, PGE changed the structure of how it intended to

⁸ *In re Portland Gen. Elec. Co., Application for Affiliated Interest Transaction with Portland Renewable Resource Co., LLC*, Docket No. UI 489, Order 23-369 at Appendix A at 12 (Oct. 18, 2023).

⁹ *In re Portland Gen. Elec. Co., Application for Affiliated Interest Transaction with Portland Renewable Resource Co., LLC*, Docket No. UI 489, PGE’s Application for Reconsideration or Motion for Clarification at 8 (Sept. 15, 2023).

¹⁰ Despite alleging that information from the last RFP is “stale” PGE has not proposed shortening this period of protection.

use the affiliate. Under the new structure, PGE’s benchmark team can possess that knowledge in the development of the benchmark bid and simply transfer the proposed resource to the affiliate after the final shortlist is filed.¹¹ The potential for the benchmark team to use previously acquired highly protected information for inappropriate competitive purposes existed prior to this affiliate structure because the competitive bidding rules only require a separation of the RFP evaluation team and benchmark team on the *current* RFP.¹² However, a benchmark resource nonetheless competes in the RFP against other third-party bids, and therefore the knowledge of highly protected information possessed by members on that team creates a real and cognizable risk that such information may be used for inappropriate competitive purposes to the disadvantage of third-party bidders. History has shown that PGE selected projects in which it has an ownership interest in nearly every RFP over the last decade. For example:

- In PGE’s 2012 Capacity and Energy RFP (UM 1535), PGE selected the Carty Generating Station and Port Westward 2 projects, in which PGE owns a 100% stake.
- In PGE’s 2012 Renewable RFP (UM 1613), PGE selected the Tucannon River Wind Farm project, in which PGE owns a 100% stake.

¹¹ *In re Portland Gen. Elec. Co., Application for Affiliated Interest Transaction with Portland Renewable Resource Co., LLC*, Docket No. UI 489, PGE’s Application for Reconsideration or Motion for Clarification at 5 (Sept. 15, 2023); *See also* Order 24-011 at Appendix A at 42.

¹² OAR 806-089-0300(1)(b).

- In PGE’s 2018 Renewable RFP (UM 1934), PGE selected the Wheatridge Wind, Solar, and Battery project, in which PGE owns a 1/3 share.¹³
- In PGE’s 2021 All Source RFP (UM 2166), PGE selected four projects (Clearwater Wind, Troutdale BESS, Seaside BESS, and Evergreen BESS), which were all benchmark bids and in which PGE owns some or all of three out of four of the bids, with an aggregate 61% stake.

Therefore, while it is possible that PGE truly has not used any highly protected information for competitive purposes in any of its prior RFPs, it is also possible that PGE’s consistent track records of winning all or a portion of each RFP is an indication that PGE has been using highly protected information for inappropriate competitive purposes, whether intentionally or not. Additionally, the introduction of the affiliate structure in this and future RFPs further complicates the matter and creates additional opportunities for PGE to gain a competitive advantage through the use of highly protected information.

Therefore, because individuals cannot “unknow” those details once they have seen them, a PGE employee who acquired knowledge of highly protected information should not be permitted to work on a subsequent affiliate or benchmark bid, provide services to the affiliate, or discuss potential or actual benchmark or affiliate bids with the

¹³ PGE’s 2018 Renewable RFP was the first RFP conducted under the Commission’s then-newly adopted Division 089 Competitive Bidding Rules.

benchmark or affiliate teams so long as the information is still subject to protection.

NewSun recommends the following revision to Paragraph 20:

The Commission will preserve the designation of information as Highly Protected Information for a period of five years from the date of the final order in these proceedings, unless extended by the Commission at the request of the designating party. The Commission will notify the designating party at least two weeks prior to the release of Protected Information or Highly Protected Information. **So long as the designation of information as Highly Protected Information remains under this Paragraph 20, any person qualified under Paragraph 13(a), may not participate in a PGE solicitation process on behalf of a benchmark or affiliate bidder, provide services to the affiliate, or discuss potential or actual benchmark or affiliate bids with any member of the benchmark or affiliate teams.**

C. Some Individuals Should Be Permitted to Access Highly Protected Data Without PGE Consent or a Ruling from the ALJ

PGE's requirements under Paragraph 13(b) and (c) that individuals can only become qualified to access highly protected information upon PGE's consent or an ALJ ruling is unduly burdensome. While some parties to this docket may have competitive interests, there are a number of parties or potential parties that clearly do not and that clearly should be permitted to access such information. Such parties may include for example, the Northwest & Intermountain Power Producers Coalition, the Community Renewable Energy Association, the Renewable Energy Coalition, the Oregon Solar + Storage Industry Association, Renewable Northwest, the Green Energy Institute, Sierra Club, the NW Energy Coalition, Climate Solutions, the Oregon Department of Energy, and others. Requiring such entities to first seek PGE consent or conduct briefing in front of an ALJ prior to obtaining access to highly protected information unduly burdens the process when such entities have no competitive interest in the material and will most likely be permitted an opportunity to review. Further, PacifiCorp utilizes a form of

modified protective order that permits access without PacifiCorp consent or an ALJ ruling.¹⁴ As such, NewSun recommends the following change to Paragraph 13(b):

Persons qualified to access Highly Protected Information upon a signing the Consent to be Bound section of Appendix B are:

...

b. ~~Persons (including attorneys) that are not involved in PGE's ongoing 2023 RFP solicitation process as bidders—Any other party or party representative, upon the mutual agreement of that party and PGE, and subject to any additional restrictions mutually agreed upon;~~

D. Challenging Parties Should Be Allowed More Time to Reply to PGE's Response

Under Paragraph 11, a challenging party is permitted 5 business days to file a written reply to PGE's legal and factual basis for designating the disputed information as highly confidential. PGE bears the burden of proving that its designation is appropriate and is also entitled to file a sur-reply. Under the Commission's rules for substantive motions, the party that does not bear the burden of persuasion is provided 15 days to review and respond to the motion.¹⁵ Given that the challenging party does not bear the burden of persuasion and only gets one opportunity to respond to PGE's legal and factual basis, the challenging party should be entitled at least the same amount of time to

¹⁴ *In re PacifiCorp, dba Pacific Power, 2023 Integrated Resource Plan*, Docket No. LC 82, Order No. 23-213, Appendix A at ¶ 12 (Jan. 15, 2023) (permitting access upon signing the consent to be bound for "Individuals (including attorneys) not involved in PacifiCorp's ongoing 2022 All Source RFP solicitation process as bidders."); *In re PacifiCorp, dba Pacific Power, Application for Approval of 2022 All Source Request for Proposal*, Docket No. UM 2193, Order No. 23-097, Appendix A at ¶ 13 (Mar 17, 2023) (permitting access upon signing the consent to be bound for "Persons (including attorneys) that are not involved in PacifiCorp's ongoing 2020AS RFP solicitation process as bidders.").

¹⁵ OAR 860-001-0420(4).

respond. Further, the MPO should not preclude a challenging party from requesting additional time. As such, NewSun recommends the following change to Paragraph 11:

The challenging party may file a written reply to any response within ~~five business-fifteen calendar~~ days of service of a response ~~or other such time as is reasonably necessary. Challenging parties shall not be precluded from requesting additional time to reply.~~ The designating party may file a sur-reply within three business days of service of a reply. The ALJ will make all reasonable efforts to resolve the matter within 10 business days of service of the last filing.

III. CONCLUSION

In light of recent events showing that the subjective standard used in PGE's prior MPOs errs in favor of over-redaction and the potential for future ownership bias abuse, NewSun recommends the above-changes to the MPO to protect the integrity of the competitive bidding process, prevent over-designation of information as highly protected, and to mitigate PGE's ownership bias.

Dated this 18th day of March 2024.

Respectfully submitted,

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