

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 77

In the Matter of
PACIFICORP, dba PACIFIC POWER,
2021 Integrated Resource Plan

INVENERGY LLC'S COMMENTS IN
SUPPORT OF NORTHWEST &
INTERMOUNTAIN POWER
PRODUCERS COALITION'S
REQUEST FOR CERTIFICATION, OR
IN THE ALTERNATIVE, REQUEST
FOR CLARIFICATION

I. INTRODUCTION

Invenergy LLC (“Invenergy”) submits these comments in support of the request by Northwest & Intermountain Power Producers Coalition (“NIPPC”) for certification, or in the alternative, request for clarification of the January 21, 2022 ruling (“Ruling”) by Administrative Law Judge (“ALJ”) Katherine Mapes in Docket LC 77. Invenergy is not a party in LC 77 and does not seek party status. Rather, Invenergy submits these comments to support NIPPC’s request and to substantiate NIPPC’s contention pursuant to OAR 860-001-0110(2) that the Ruling, as it applies to project-specific information received from bidders, “may result in detriment to the public interest” and that “good cause exists for certification.”

The Ruling concerns PacifiCorp’s objection to NewSun Energy LLC’s (“NewSun”) request to access confidential information under General Protective Order 21-271. Specifically, PacifiCorp objected to providing NewSun with a data disk,

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requested by NewSun, reportedly containing 1500 files, some of which included project-specific information received by PacifiCorp as part of RFP bids.

II. INVENERGY SUBMITTED CONFIDENTIAL PROJECT-SPECIFIC DATA IN RESPONSE TO PACIFICORP'S 2020 ALL-SOURCE RFP

Invenergy does not have access to the data disk and has no independent knowledge of the files contained on the data disk. Based on communications with PacifiCorp staff, however, it is Invenergy's understanding that the data disk includes project-specific bid information that Invenergy designated as confidential in submitting bids in response to PacifiCorp's 2020 "All-Source" RFP ("2020AS RFP").¹ Some information on the 2020AS RFP is important to understand the context in which Invenergy submitted bids.

PacifiCorp's 2020AS RFP was approved, subject to modification and condition, on July 16, 2020 in the Commission's Order No. 20-228 in Docket UM 2059. Section 2.D of the 2020AS RFP provides:

PacifiCorp will attempt to maintain the confidentiality of all bids submitted, to the extent consistent with law or regulatory order, as long as such confidential treatment does not adversely impact a regulatory proceeding. It is the bidder's responsibility to clearly indicate in its proposal what information it deems to be confidential and subject to the terms of the executed confidentiality agreement. Bidders may not mark an entire proposal as confidential, but must mark specific information on individual pages to be confidential in order to receive confidential treatment for that information under the terms of the executed confidentiality agreement.²

¹ The 2020AS RFP can be found here:

https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/2020AS_RFP_Main_Document_July_7_2020.pdf

² 2020AS RFP at 7.

Section 3.I of the 2020AS RFP provides that a bidder’s proposal can be rejected for failure to meet a number of eligibility criteria, including “Failure to permit disclosure of information contained in the proposal to PacifiCorp’s agents, contractors, regulators, or *non-bidding* parties to regulatory proceedings consistent with terms of executed confidentiality agreement.”³ Simply put, submittal of bids for specific projects does not in any way constitute consent for disclosure of a bidder’s information to other “bidding parties.” The acquisition and use of “highly protected information” in UM 2059 are governed by a Modified Protective Order which provides: “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.”⁴

Consistent with Section 6.A of the 2020AS RFP, PacifiCorp created an “Initial Shortlist.” The “Final Shortlist,” developed pursuant to Section 6.C, was acknowledged by the Commission in a Special Public Meeting on October 12, 2021, as memorialized in Order No. 21-247.

Invenergy submitted proposals in response to the 2020AS RFP and, in doing so, designated project-specific information that Invenergy deemed confidential, as required by Section 2.D of the 2020AS RFP. Two Invenergy projects were included on the Final Shortlist; Invenergy is in negotiations with PacifiCorp to enter into definitive agreements with PacifiCorp with respect to both projects.

³ 2020AS RFP at 15 (emphasis added).

⁴ Docket No. UM 2059, Order No. 21-202, Appendix A at 3.

III. DISCLOSURE OF BIDDER-DESIGNATED CONFIDENTIAL INFORMATION TO COMPETITORS WOULD RESULT IN DETRIMENT TO THE PUBLIC INTEREST

The project-specific bidder-designated confidential information that the Ruling would provide to NewSun, a competitor, includes project-specific pricing, production, and operational information. For the reasons discussed below, that is precisely the type of information that has significant commercial value and, if disclosed, would result in competitive harm.

A. The Bidder-Designated Confidential Information Can Have Significant Commercial Value Even as to Projects on the Final Shortlist.

Invenergy, and other Final Shortlisted bidders, are *still negotiating definitive agreements* with Pacificorp that are based on the bidder-designated confidential information provided one and a half years ago. Although not anticipated, if those negotiations were to fall through and not result in a mutually agreeable definitive agreement for any of the Final Shortlisted projects, competitors could seek to be the next resource in line. A competitor with access to the project-specific cost, production, and operational data of other projects would have a competitive advantage over Invenergy, or any other competitor, in advancing its particular projects because it uniquely will have information about other bidders' projects. This is the textbook definition of information of commercial value, which, if disclosed, would cause competitive harm.

Even if Invenergy's negotiations for definitive agreements do not fall through, NewSun could approach Pacificorp with revised bid prices or production or operational data for its projects after seeing that information for every other Initially Shortlisted project. Again, NewSun would possess information of commercial value which would

give it a competitive advantage that no other bidder has. NewSun could undercut prices by a penny or project production of one additional watt-hour such that their projects would now be “superior” to the other projects.

B. The Bidder-Designated Confidential Information Will Have Significant Commercial Value in Other RFPs.

Even if the Initially Shortlisted projects do not end up in negotiations for definitive agreements with PacifiCorp in the 2020AS RFP, those projects could be bid again in PacifiCorp’s planned 2022AS RFP or in several other RFPs already issued or expected to be issued in the near future for other offtakers in the region. Invenenergy expects to bid some, or all, of the Initially Shortlisted projects from the 2020AS RFP that did not make the Final Shortlist in those upcoming RFPs. In that instance, NewSun would have confidential pricing, production, and operational information about projects it would be bidding against that those projects do not possess with respect to NewSun’s potential bids. Having that information allows a bidder to marginally underbid the price or overbid the production of the worst project it believes will make the Final Shortlist. This would provide an unfair competitive advantage compared to every other project in the respective RFP.

C. Bidder-Designated Confidential Information Remains “Highly Protected Information” After One-and-a-Half Years.

Even though the information provided in bids under the 2020AS RFP is a year and a half old, the project-specific production and operational data is unlikely to change in that time. And even if the pricing information might change over that timeframe, a competitor knows pricing information changes for its own projects or based on industry-

wide price trend information. Applying the price difference known to itself or industry, a competitor with the information from others' 2020 bids could thus "reverse engineer" the pricing it expects to see from the projects placed on the Initial Shortlist from the 2020AS RFP. Even though that method is not necessarily 100% predictive, it provides commercially valuable information and an unfair competitive advantage that no other bidder to the 2022AS RFP possesses.

As already noted, moreover, the Modified Protective Order in UM 2059 provides a minimum of *five years* of protection for "highly protected information." "Highly protected information" includes any information a party reasonably determines is "extremely commercially sensitive and requires additional restrictions on who may access the information than that provided under the Commission's general protective order."⁵ A determination that project-specific data simply loses commercial value in less than two years is inconsistent with the protection afforded by the Modified Protective Order.

D. The General Protective Order Does Not Address the Problem of Disclosure to a Competitor

The Ruling notes that using confidential IRP data for another proceeding is prohibited by the General Protective Order. The cited portion of the General Protective Order states: "any Qualified Person given access to Protected Information under this order may not disclose Protected Information for any purpose other than participating in these proceeding." This language, however, does *not* prohibit a Qualified Person from

⁵ Docket No. UM 2059, Order No. 21-202, Appendix A at 1.

using Protected Information to submit bids into other RFPs that may or may not be subject to the Oregon PUC's jurisdiction.

Moreover, the issue here is not one of access by outside counsel or consultants, who may have a level of engagement, separation, and ethical duty that would allow or require them to segregate that confidential information from other work-product. In this case, the bidder-designated confidential information would be seen by the Chief Executive Officer and In-House Counsel of a competitor. It is unreasonable to believe that they could "forget" that information when approaching PacifiCorp as a back-up bidder in the 2020AS RFP, preparing and submitting bids into PacifiCorp's 2022AS RFP, or preparing and submitting bids in other regional offtakers' solicitations, which may or may not be subject to the jurisdiction of the Oregon PUC. In those instances, one market competitor would have other bidders' confidential information while enjoying confidentiality protection of its own projects' information, giving it a clear competitive advantage that comes with significant commercial value.

E. Disclosure of Bidder-Designated Confidential Information Discourages Participation in the RFP Process

The interests of Oregon utility customers are best served by a robust RFP process, including many bidders and projects. Oregon is not, however, the only locus for offtake contracts. Many projects that are bid into Oregon RFPs almost certainly will be bid into other RFPs in the region. To the extent that participation in an Oregon RFP compromises a bidder's ability to protect its project-specific, commercially sensitive information from disclosure to competitors – affecting a bidder's ability to compete not only in Oregon but in other markets – Oregon will be a less attractive state in which to participate in RFPs.

IV. CONCLUSION

Invenergy does *not* object to the disclosure of its bidder-designated confidential information to other signatories to the General Protective Order or any modified protective order, including the Oregon PUC, ALJs, staff, or any other interested party that is *not* a competitor. Disclosure of this information to competitors – including employees and executives of competitors -- is the problem. Once given access to this confidential information, it cannot be “unseen.” The promotion of a fair and competitive opportunities under an RFP cannot rely on the fiction that employees and executives, once aware of the confidential bidding information of their competitors, will forget it in contexts outside of this particular proceeding.

Dated this 7th day of February 2022.

Respectfully submitted,



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