BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

LC 77

In the Matter of PACIFICORP, dba PACIFIC POWER, 2021 Integrated Resource Plan	NEWSUN ENERGY LLC'S RESPONSE TO REQUESTS FOR CERTIFICATION OF ALJ RULING AND REQUEST FOR CLARIFICATION

I. INTRODUCTION

Pursuant to Oregon Administrative Rule ("OAR") 860-001-0420(4), NewSun Energy LLC (NewSun) respectfully submits this Response in opposition to PacifiCorp d/b/a Pacific Power's (PacifiCorp) and Northwest and Intermountain Power Producers Coalition (NIPPC) requests to certify and clarify Administrative Law Judge (ALJ) Katherine Mapes' January 21, 2022 ruling (Ruling) in the above-captioned docket before the Oregon Public Utility Commission (Commission), which denied PacifiCorp's objection to NewSun's request to access protected information under General Protective Order 21-271 (Protective Order). At this time, NewSun—while reiterating its previously expressed *willingness* to accept PacifiCorp production of IRP information with RFP bidder pricing—recommends the following combination of practical and expedited actions.

First, the certification requests should be denied because the applicable standards are not met, and certification would contribute unnecessarily to further delay and obstruction of the function and viability of the regulatory process, further facilitating abuse and delay of the IRP process, including its schedule.

Second, NewSun respectfully requests that the ALJ clarify the order to state that PacifiCorp must produce all the applicable materials promptly to NewSun, with redaction solely of all current 2020 AS RFP bidder *price* information. This is the appropriate degree of redaction of acutely sensitive commercial information, *relative to a legitimate and expert stakeholder which has duly obligated itself to compliance with the confidentiality obligations of the General Protective Order* (GPO). Immediate production, with limited redactions, is necessary to: (1) ensure the transparency required for a functional IRP process; and (2) which does not also, by going further and requiring more complex and extensive redactions on non-acutely sensitive matters, further create administrative and implementation (i.e. redaction) complexity unnecessary and counterproductive to timely production, which could have the unintended consequence of creating new burdensomeness claims by PacifiCorp. Production is also consistent with bidder non-disclosure agreement (NDA) provisions which emphasize price as a key sensitive item, but also provide for regulatory disclosure exceptions, meaning that this remedy allows PacifiCorp to appropriately honor its NDA obligations to bidders. The ALJ should thus clarify its prior order, and its permission for, and requirement of, PacifiCorp to do this, for these reasons (and as further discussed below).

Third, NewSun is requesting a stay and tolling of the IRP schedule, to be submitted under a separate motion. There should be a consequence for utilities' behaviors, for the regulatory process and authority to be functional and effective, and the IRP process must ensure stakeholders timely access to information before critical process, reports, analysis, and decisions occur, which is irreparably undermined if legitimate stakeholders are shut out and obstructed and thereby denying and prejudicing them and other stakeholders, including Commission decision

makers, from participation in all applicable forms which the process includes to duly evaluate a IRP.

NewSun also urges the ALJ to adopt additional remedies to mitigate and prevent obstructive and/or abusive investor-owned utility behaviors at the Commission and in IRP processes, as well as express confirmation of their obligation to comply promptly and in good faith, including:

- Clarity that a utility's obligations under the IRP process are (1) to be responsive and produce materials timely and promptly to stakeholders which have executed the appropriate confidentiality commitments; and (2) to the extent there is any limited area of dispute as to material which should be produce, the utility should promptly produce the balance while expediting resolution of disagreements on the most discrete and limited basis possible; i.e. maximizing prompt transparency and stakeholder participation viability and minimizing any potential need for delays relative to limited information for which production might be delayed (if at all).
- Provide whatever guidance or order possible instructing PacifiCorp to take such measures necessary to present information in its future IRPs in a manner such that its current and future concerns about "burdens" to present redactions of select information to stakeholders is self-mitigated is not a source of future complaints by PacifiCorp about its ability to appropriately support stakeholder participation in IRP processes.
- Clarify that the redaction and privilege of such information is limited (for select General Protective Order signatories like NewSun) through just a 2 year period from bid submission. This is (conveniently) consistent with the current NDA term, as well

as timing consistent the ALJ's prior order's statements about the duration of price information sensitivity.

- Clarify that primary plant operating characteristics are not information restricted from visibility to GPO signatories. The fundamentals of how a power plant operates (and suites of power plants operate) is the very *heart* of the IRP process. The utility conducts IRP modeling with primarily relies on the inputs of plant size, availability, dispatchability, production levels and their variations relative to their supply inputs (wind and sun, for example, for renewables). These are inappropriate to redact. Nor are these outputs or primary design aspects super-special state secrets, but rather the product of common technologies and (especially for solar) overwhelmingly public tools and data sources (NREL, etc.). Indeed, confirming the assumptions, inputs, and outputs used in the IRP are not "wonky" (for lack of a better term) is a primary objective of transparency and IRP function, as experts should be able to flag if a utility is making assumptions that seem inappropriate or concerning (or just merit further inquiry). By analog, if a coal plant that normally had a 99% capacity factor were assume to have a 90% capacity factor, or perhaps have an odd payment structure associated with it, this should be visible and flaggable and analyzable for additional inquiry by those familiar with the same. Ultimately, PacifiCorp shouldn't be cherry picking its audiences or scrutinizers.
- Finally, NewSun urges that the Commission not open a rulemaking or take other actions which inappropriately defer and/or delay transparency and 2021 IRP participation, or which create further abuse and obfuscation and stakeholder burdens through unwieldy and burdensome process. There is sufficient information and

clarity in this docket to address the issues at hand, including as well articulated in ALJ's order. And even if some of these matters might eventually be revisited more expansively later in another focused proceeding[1], there is not cause (and would be harm) to failing to ensure the transparency and stakeholder participation needed *presently*. Such delay would subvert the necessary outcomes and integrity of the current processes, then feed further adjudication unnecessarily into a highly resource imbalanced process, with commensurate stakeholder burdens. In addition, the "highly confidential information" designation advocated by NIPPC should not be used as a standard, because it will contribute to utility abuses of designation, have unintended consequences, and impose an inappropriately long duration of non-transparency to expert participants. 5 years is a multi-procurement-cycle lifetime in our procurement and regulatory universe, and far too long for sunlight and expert visibility to apply to utility behaviors and assumptions, which require visibility as soon as possible for regulatory scrutiny to have effect and meaning—much less the potential for prompt course correction and/or other regulatory action, including the informing of the next cycle, or application of further scrutiny to concerning actions.

At the heart of sunlight principles applicable here, and required for the health of the regulatory process*, the ever-present pressure of imminent and high probability visibility of inappropriate actions must be constantly maintained and kept healthy*, lest the consequences (and probabilities of any consequences) for such abuses be rendered moot and neutered in practice, and thereby undermine the regulatory construct and creating implicit permissivity and *de facto* cloaking cover for the regulated utilities' actions not having consequences or

[1] If there were another process for this, we would likely believe should require discovery rights to properly investigate abuse issues, thus not be sure a rulemaking would be appropriate.

appropriate limits. The basic premise of other experts' ability to spot-check and flag a power plant's operating characteristics is fundamental to this. And the power of sunlight's cleansing and dis-abusing effects are directly proportional to the number of expert eyes and the promptness and soon-ness of access and visibility to such information.

In this case, PacifiCorp also has not demonstrated burdensomeness. One of the nation's largest utilities, spanning half a dozen states, and linked to and among a dozen other utility's grids, is requesting review and approval of plans and modeling relative to dozens and dozens of generators and hundreds of miles or more of existing power lines and billions of dollars of new and pending transmission projects, and billions of new procurement, and even a radical new nuclear technology they want to wire into Oregon's modeling and ratepayer exposures, in the midst of a generational and legislatively mandated radical transformation of the entire generating capacity and infrastructure of Oregon's (and the Northwest's and California's and…) investor owned utilities and markets… while phasing out decades and GW-scale of fossil plants… and PacifiCorp is presenting a concern about it being burdensome to spend a few dozen hours redacting bid prices for a stakeholder to be able to participate in the process? *This is an absurd assertion*, and fundamentally disrespectful to stakeholder community, NewSun, and the Commission itself. Moreover, relative to the distortions of other information presented, it is questionable whether this estimate is even accurate. Regardless, it is a request long overdue and completely reasonable to occur in the IRP process; it is somewhat a miracle (if not better explained by other prospective IRP participants getting phone calls like that received by NewSun pressuring them to not seek, or withdraw, GPO status in the IRP) that PacifiCorp has not already had to implement such redactions. Finally, PacifiCorp has made this problem themselves, through their own approaches and preparations and presentation of materials—which apparently

assumed the claim of "burdensomeness" would prove sufficiently impenetrable to allow PacifiCorp to perpetuate its cloak of obfuscation indefinitely and repel obligations to actually transparently provide information to stakeholders. Such should not be rewarded; it is anathema to the regulatory process.

NewSun notes that PacifiCorp has spent more time arguing about the production of information than it would have taken to produce the same, notwithstanding that the challenges claimed are of PacifiCorp's own making, and arguably comprise a web of self-justifying, self-reinforcing, circularly iterative transparency-reducing blockages designed for the same purpose: to be able to argue their own (self-made) processes, reports, and formats inextricably prevent transparency's achievability. The Commission must not let such stand, nor be rewarded, nor be consequence free. This is even more so the case given that NewSun offered, from the outset and notwithstanding overall disagreement with PacifiCorp's refusals, to consider interim disclosure solutions, such as redactions, which PacifiCorp denied.

NewSun further notes that—setting aside that NewSun is no longer a participant in the PacifiCorp 2020AS RFP, and is neither on initial or final shortlist—NewSun is not requesting, and has made explicitly clear to PacifiCorp, as well as commenters Longroad, NIPPC, and Invenergy through direct communications (and attempted to communicate with Next Era Energy Resources), that it does not request or require, and is happy to accept delivery of IRP information without, any RFP bidders' price information. Furthermore, NewSun presumed such information already would have been redacted by PacifiCorp.

Notwithstanding the willingness of NewSun to receive appropriately redacted material, the duration of the privilege of redaction should be acutely focused to the period of RFP bid submissions, negotiations, and final contracting, when competitivity concerns are acute. As the

ALJ noted describing the , "Chapter 7 of PacifiCorp's IRP describes *changing prices for new renewable projects*, indicating that past cost information is a useful input for the IRP, but not so sensitive as to create a competitive advantage to a GPO signatory… *We further reject the argument that release of generator cost information to a GPO signatory will impact RFP bids expected in docket UM 2193 in the first quarter of 2023*." (emphasis added).

NewSun notes that the certification request standard of "substantial detriment to the public interest" is not *remotely* met in these circumstances. It is indeed essentially the *opposite* of what PacifiCorp claims—due to the overwhelming broader issues, including the impacts and risks to function of the regulatory process whose health and viability are critical to the public interest; and impairment, as evidenced by the very nature of the regulatory construct and compact which causes utility commissions to exist—when the issues and facts here are properly weighed, and which overwhelmingly trump PacifiCorp's concerns, even if such had been argued effectively and without distortions and misrepresentation, and even without NewSun's proposed accommodations, as was indeed properly and well-articulated by the ALJ in her decision.[2]

NewSun concludes noting a broad array of misrepresentative and distortive arguments and representations in PacifiCorp Motion for Certification filing, as further discussed below. PacifiCorp has clearly misled various parties, including the ALJ and other commenters (i.e. bidders whose letters or comments reported their assessments "based on communications with PacifiCorp Staff"[3]), and made material misrepresentation of its interactions and communications with NewSun, and as such PacifiCorp's comments, credibility, and consequences should be adjudicated accordingly in this matter, including leading such parties to believe, somewhat slanderously, that NewSun's primary objective was to acquire their RFP bid materials,

[2] These issues were discussed extensively throughout NewSun's original reply to PacifiCorp's objection.
[3] Invenergy comments, 2/11/2022, Page 2.

notwithstanding repeated express statements to the contrary by NewSun to PacifiCorp, including on the day of its filing, hours before its submission[4].

II. LEGAL STANDARD

A party may request that the ALJ certify its written or oral ruling for the Commission's consideration within 15 days of the date of service of the ruling.[5] The ALJ must certify the ruling to the Commission *if* the ALJ finds that: (a) the ruling may result in substantial detriment to the public interest or undue prejudice to a party; (b) the ruling denies or terminates a person's participation; or (c) good cause exists for certification.[6] The Commission or ALJ can also clarify a final order or ruling. The Commission has done so in the past where, *inter alia*, the scope and effect of the order is unclear.[7] As NIPPC notes, the same would apply for an ALJ ruling.

As relates the ALJ's authority to administer this matter and order conclusions and actions as requested and proposed by NewSun, per various provisions of OAR 860-001-0090 on ALJ authority, the ALJ does have authority and discretion to decide procedural matters, adjust filing deadlines, regulate proceedings and their schedules, manage protective order issues, and take other actions consistent with their duties, which in this case pertain to the full scope of issues presented here.[8]

As relates the ALJ authority for further actions against PacifiCorp relative to concerning and questionable behavior amongst market participants, including NewSun and other bidders, and submissions to the Commission related thereto, the combination of -0090(1)(m) and -0090(2) make clear that acting on participant conduct which impedes an ALJ's ability to conduct

[4] See Longroad and Next Era Energy Resources letters.
[5] OAR 860-001-0110(1).
[6] OAR 860-001-0110(2).
[7] See in re Investigation into the Use of Virtual NPA/NXX Calling Patterns, Docket No. UM 1058, Order No. 04-704 (Dec. 8, 2004) (clarifying the scope and effect of a final order)
[8] OAR 860-001-0090(1) (a), (f), (g), (h), (i), (k), (l), and (m) .

a process in an "impartial manner" or "interferes with this duty" is with the ALJ's scope of actions consistent with her duty; deliberate provision of misleading information and misrepresentation of party positions and actions is certainly not conducive to Commission processes occurring in a manner that facilitates impartial and un-interfered outcomes, as the ALJ must rely on the good faith and integrity of process participants and cannot produce such outcomes if presented with compromised information and inaccurate representations, or if other parties who engage have been led to rely on mis- or distorted information.[9]

III. DISCUSSION

A. Certification of the Ruling is Not Required under OAR 860-001-0110(2).

PacifiCorp requests certification of the Ruling pursuant to OAR 860-001-0110(1).[10] PacifiCorp alleges that the ALJ erred by concluding that PacifiCorp failed to substantiate its assertion that competitive harm would result from granting NewSun's request for access to the confidential data disk and, further, erred by failing to analyze or draw conclusions about NewSun's interest in receiving the information at issue.[11] Therefore, PacifiCorp alleges that good cause exists for certification (under sub-part (a), not (b) or (c)), because the Ruling may result in substantial detriment to the public interest or undue prejudice to a party pursuant to OAR 860-001-0110.[12] Those arguments do not have merit. Indeed, the inverse of PacifiCorp's position arguably applies. As such, and for administrative efficiency and the health of the regulatory process of this IRP and IRPs in general, as well as the ability of this IRP to proceed in a

[9] (2) The ALJ must conduct proceedings in a fair and impartial manner and maintain order. If a person engages in conduct that interferes with this duty, then the ALJ may suspend the proceeding or exclude the person from the proceeding.
[10] PacifiCorp's Request for Certification of ALJ Ruling at 1.
[11] *Id.* at 7.
[12] *Id.*

functional, non-stakeholder disenfranchising manner, the Ruling should *not* be certified to the Commission, as further discussed below.

1. Certification Should be Denied Because the Parties Requesting Certification have Not Met The Legal Standards to Require Certification.

The standard of "substantial detriment to the public interest" is not remotely met in this case—and is indeed the inverse of what PacifiCorp claims—due to the overwhelming broader issues, including the function of the regulatory process, public and experts' viable and robust access and participation, consequences of abuse and obfuscation by a regulated utility and risks and consequences thereof to undermining its own regulation and the associated public interests, and as further discussed below, which when balanced with that more significant public benefit context, as cited by the ALJ, and particularly in combination with NewSun's proposed accommodations, comprise "useful input for the IRP, but not so sensitive as to create a competitive advantage for a GPO signatory". Conversely, the public and ratepayers would likely benefit from indicators which better focus the competitiveness of bids in future solicitations if it helped more bidders (which generally otherwise bid in the dark) submit more aggressively priced bids to become competitive in future solicitations, thereby creating a more aggressively competitive procurement environment. Conversely, to whatever extent obstruction of transparency and regulatory process efficacy by a utility deters and diminishes scrutiny and screening of utility self-dealing behaviors and/or insufficiently market-competitive actions, procurements, assets, and costs, the overwhelming public benefit is for the ratepayer to be protected from the same; again this is the entire reason for the regulatory construction of public utility commissions (and in particular for IRP and RFP processes), to limit the inherent, natural, and overwhelmingly self-advantaging dynamics, capacities, and powers a monopoly utility unavoidably has, particularly when managing its own procurement activities against competitors

seeking to offer non-utility owned solutions; this is true even in cases unlike this one, where PacifiCorp has not implemented segregating protections for its commercial teams from the same information it seeks to deny NewSun (and other stakeholders), and effectively created advantages for itself in this same area of data access which it seeks (and has succeeded) to deny others; and would also be true and concerning for IOUs less spectacularly powerful and market-power wielding as this multi-state behemoth, which routinely swings that weight in regulatory processes, playing different states' utility commissions and their processes and schedules off each other, while wielding such purchasing power and behavior influence as few if any American utilities wield.

2. Tools Exist to Prevent Disclosure of Competitively Sensitive Information.

As a threshold matter, certification is not required because PacifiCorp already has the tools to prevent the substantial detriment to public interest that *it* alleges would occur. While PacifiCorp states that "the Ruling would require it to disclose competitively sensitive information from previous energy resource procurements to NewSun" resulting in an unfair commercial advantage and undermining the competitive bid process,[13] the Ruling clearly states that PacifiCorp could either "designate information it believes falls within ORCP 36(C)(1)" or "seek a modified protective order to carve out certain information that it believes requires increased protection (e.g., to the extent a utility can identify specific bidder information that it is

[13] PacifiCorp's Request for Certification of ALJ Ruling at 2, 9, 12. NewSun questions whether PacifiCorp is the appropriate party to issue objections to the extent that it is not the "designating party" under the General Protective Order; for example, if another independent power producer designated information as Protected Information, then perhaps that party, rather than PacifiCorp, should have objected to NewSun obtaining that information. *See, e.g.*, *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Invenergy LLC's Comments in Support of Northwest & Intermountain Power Producers Coalition's Request for Certification, or in the Alternative, Request for Clarification (Feb. 7, 2022) (noting that "Invenergy submitted proposals in response to the 2020AS RFP and, in doing so, designated project-specific information that Invenergy deemed confidential") (Invenergy Comments).

obligated not to disclose)[.]"[14] While PacifiCorp cites the various ways that disclosing project-specific pricing and other bid information could harm the public interest (and setting aside the flaws of those assertions), PacifiCorp has both the burden and the tools to prevent that harm. *Moreover, NewSun has repeatedly offered to PacifiCorp not only explore specific solutions, but proposed specific solutions as relates the primary and acute issue involved.* While PacifiCorp claims to have offered to work with NewSun on this—which it only raised conceptually on the day of its filing (on a call replying to NewSun's offer to accept redactions), PacifiCorp has not actually done so and its claims in its brief are inaccurate at best.

Therefore, good cause does not exist for certification because the Ruling specifically identifies the legal actions PacifiCorp may take to protect competitively sensitive information, and doing so will prevent the assumed substantial detriment to the public interest that is raised in PacifiCorp's request for certification; further clear remedies exist, as proposed by NewSun previously and in this reply, and as may be promptly administered and resolve while preserving the appropriate balance of, one the one hand, the outsized and primary public interest in a transparent functional IRP process with, on the other hand, the extremely limited and highly addressable issue of protecting acutely sensitive live bidder price information from competitors for a short appropriate period before transparency and sunlight principles again outweigh short term interests.

3. Rather than Requesting Certification, PacifiCorp Could Simply Issue a Modified Protective Order.

PacifiCorp's proposed remedies conflict with the regulatory requirements in OAR Chapter 860, Division 1. PacifiCorp's request for certification states that if the Commission reverses the Ruling, it should either: (1) direct PacifiCorp to "work with NewSun to identify a

[14] Ruling at 5.

subset of redacted or aggregated files from the confidential IRP data disc that support the Company's preferred portfolio"; or (2) "open a rulemaking to evaluate how best to facilitate public participation in the IRP without significantly burdening the already data-intensive process with a requirement to provide two distinct data sets."[15]

NewSun *might* agree with the suggestion by NIPPC that PacifiCorp can file a revised motion for a modified protective order, but as explained previously, NewSun not believe that certification is required to reach that outcome.[16] Moreover, NewSun is concerned that if a Modified Protective Order approach is pursued, risks of overly broad application would undermine the effect of the Ruling and the ALJ's primary findings. NewSun's proposed remedies are more targeted and provide a lesser risk of deleterious effects on the IRP process.

OAR 860-001-0080 states that a modified protective "provides additional protection beyond that provided by the general protective order" and "may include specialized restrictions on access to certain highly protected information." The regulations also state:

> A modified protective order may limit the persons that may access the highly protected information, or designate the time or place or special handling for highly protected information. A modified protective order may also require signatories to make a more specific certification that they have a legitimate and non-competitive need for the designated information and not simply a general interest in the proceeding, and that they intend to be actively involved in the docket by filing written materials and participating in proceedings.[17]

Irrespective of form, the appropriate remedy to ensure that competitors like NewSun do not obtain access to that competitively sensitive information like bid pricing and contractual terms under negotiation is for PacifiCorp to file a modified protective order, should not be some

[15] Request for Certification, at 21-22.
[16] *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Northwest & Intermountain Power Producers Coalition's Request for Certification, or in the Alternative, Request for Clarification (Feb. 7, 2022) (NIPPC Comments).
[17] OAR 860-001-0080(3).

nascent and burdensome remedy that further obfuscates the regulatory process and NewSun's ability to meaningfully participate as a stakeholder. In fact, PacifiCorp already obtained a modified protective order in this proceeding to "provide additional protections for highly confidential, commercially sensitive, non-public information related to PacifiCorp's coal supply agreements and fueling strategy at its coal-fired generation facilities."[18] [19] The request for certification should be denied for the simple reason that PacifiCorp could have, and may still, motion for approval of a modified protective order to preclude NewSun from accessing competitively sensitive bid information. In the meantime, however, PacifiCorp must comply with the Ruling and begin producing information on the confidential data disk that would not be subject to such an order.

4. NewSun is Not Seeking Acutely Competitively Sensitive Confidential Information that Harms the Competitive Bid Process.

In addition to the fact that PacifiCorp can already prevent disclosure of competitively sensitive confidential information under the Ruling, NewSun is not interested in obtaining project-specific pricing and contractual terms under negotiation. NewSun recognizes that project pricing and terms are ongoing under current Power Purchase Agreement negotiations, which should have an appropriate period of privilege (which balances the issues present throughout this brief). Therefore, NewSun does not object to PacifiCorp's redaction of acutely confidential information related to project-specific pricing and commercial terms under negotiation, which is protected under confidentiality agreements. NewSun does not necessarily agree, however, that all aspects of bids are acutely sensitive. Specifically, macro-components of information like AC-DC

[18] *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Order No. 21-399 (Nov. 5, 2021).

[19] Notwithstanding this citation, it is very hard to see why that material required such burdensome provisions either, having attended the Executive Work Session on the same.

ratio and plant operating characteristics are important to public and expert stakeholder knowledge to ensure sunlight and transparency in the IRP process. NewSun agrees that certain acutely confidential bidder information like project specific pricing should not be disclosed, provided that there is a default or baseline of overall access to information that errs towards public and expert access while managing acute commercial sensitivities for bidders to balance transparency and the health of regulatory and competitive process.

For that reason, NewSun respectfully disagrees with NIPPC's proposal to change the Ruling to limit access to "highly protected information" because that term is not descriptive enough to ensure the type of sunlight and transparency NewSun is advocating.[20] NewSun and Sierra Club previously highlighted strong concerns about PacifiCorp's over-designation of information as "highly protected", meaning that the Commission should be surgical in its approach here, limiting exceptions to acutely sensitive competitive interests. In this docket proceeding, PacifiCorp is still undergoing contract negotiations with bidders from its 2020 RFP, so the information still has significant commercial value. Thus, Pacificorp should be allowed to redact this very limited information—while simultaneously required to expedite production, first of all other materials while redactions occur; then the balance promptly thereafter. Further, NewSun is concerned that NIPPC's approach likely has unintended consequences, and unavoidably casts a longer term of transparency than is compatible with various issues and principles outlined of it.

The ALJ already reviewed and rejected PacifiCorp's arguments that competitive harm would result from granting NewSun's request for access to the confidential data disk, concluding in the Ruling that "generator's cost information from past years [does not have] such significant

[20] NIPPC Comments at 2.

commercial value that the information may not be shared under the protections of the GPO."[21] As NewSun explained in its prior briefing, IRP data is "public" and does not provide a competitive advantage to NewSun.[22] While PacifiCorp alleges that the IRP process, analysis, and data contain commercially sensitive information that would give potential bidders an unfair advantage,[23] PacifiCorp itself indicated that it may submit one or more benchmark bids for the upcoming 2022 all-source RFP, and PacifiCorp's benchmark team will not be screened from the IRP team and data, and could even be made up of the same individuals working on the IRP. Therefore, PacifiCorp would have an unfair advantage over NewSun and all other potential bidders even if such information were produced to NewSun.

5. PacifiCorp's Actions Inhibit NewSun's Participation in the IRP.

While PacifiCorp "does not oppose NewSun's access to non-competitively sensitive confidential information" PacifiCorp has repeatedly argued that producing *any information* on the data disk is unduly burdensome, citing the figure that creating a redacted data disk would require a minimum of 140 manhours of work.[24] Yet PacifiCorp has engineered its own burdensome framework. Indeed, the Ruling recognizes that PacifiCorp "is largely in control of how it treats its information" and has "not provided any alternative or partial options for NewSun to access information in the IRP."[25] What's more, PacifiCorp has likely devoted significant manhours and resources objecting to NewSun obtaining information under the General

[21] Ruling at 4.
[22] *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, NewSun Energy LLC's Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons at 12 (Jan. 3, 2022) (NewSun Response).
[23] *In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 4 (Dec. 23, 2021) (PacifiCorp Request for Certification).
[24] PacifiCorp Request for Certification at 3, 4. Notably, PacifiCorp originally stated that the 2021 IRP data disk contains over 1,500 files, but has determined that there are actually only 1,000 files. *Id.* at 19.
[25] Ruling at 5, 4.

Protective Order—thus far submitting an objection, a reply, and a request for certification—rather than working to redact the data disk to enable NewSun's meaningful participation in the IRP, which in turn has required NewSun to devote significant resources to obtaining information rather than to reviewing, analyzing, discussing, commenting, and ultimately improving the IRP.

PacifiCorp's failure to properly separate material between public, protected, and subject to non-disclosure has limited and impaired the health of its IRP process. While this is a problem of PacifiCorp's own making, it is not something the Commission should ignore. Rather, the Commission should remain focused, as it did in the Ruling, on expanding and ensuring access to critical information when expert stakeholders, like NewSun, agree to be bound by protective provisions under appropriate confidentiality agreements like the General Protective Order. Parties that sign general protective orders should have broad access to protected information, except for a limited sphere to information of that is of a direct and immediate consequence to the competitive bidding process that is still underway.[26]

PacifiCorp's tactics illustrate the fundamental issue in this dispute, which is *not* NewSun obtaining Protected Information (excluding acutely competitively sensitive bid information) under the General Protective Order, but rather PacifiCorp's intent to limit the information and transparency available to experts that can critically review and highlight problems in the IRP in a timeline and form that is substantive enough to enable a check on utility behavior. PacifiCorp's position illustrates its gross misconduct, mismanagement of data, and intent to obscure and undermine full participation in the IRP. PacifiCorp should not be rewarded for interfering with

[26] NewSun believes that a limited protection period before and after active RFP negotiations may apply (e.g. information protected under RFP bidder's 2-year non-disclosure agreements), but recognizes the tension of that timeline with the need for timely and transparent information access to benefit the regulatory process. If PacifiCorp redacts the data disk to exclude current RFP bid prices and other select information related to non-utility bids and proposals, that issue would be resolved until later in the next IRP cycle and would appropriately protect bidder interests.

stakeholder participation, which fundamentally harms the regulatory process and the public interest that PacifiCorp so curiously argues it is seeking to protect.

6. Information Access is Crucial to Adequate Stakeholder Participation in the IRP and to Protect the Regulatory Process.

NewSun and other independent power producers and stakeholders must be able to access protected information under a General Protective Order in an IRP or RFP proceeding. Information access is not only crucial to IRP and RFP participation, but is necessary to support a vital, healthy, fully informed regulatory process, where a full suite of expert stakeholders capable of understanding the substance, analysis, and consequences can duly scrutinize and, where necessary, fully challenge a utility's assumptions, analysis, and conclusions, to determine if the utility made any errors and make meaningful recommendations to the utility and Commission, whether for further inquiry or for changes in prospective utility or regulator actions and/or approvals. If the scope and expertise of participants is limited to exclude other industry experts who critically understand key information—and the scope of matters involved in an IRP is incredibly broad—then the utility also has an unfair advantage, not just against IPP competitors, but also over its regulator(s), which fail to profit from the full benefit of sunlight and experts that should be reviewing the materials for issues of concern. Indeed, the health of the regulatory process depends on the ability of unique and diverse experts to efficiently and timely access IRP information.

7. Incorrect Pacificorp Claims:

a.) **Pacificorp's claims of damage to faith in the RFP are overblown and inaccurate,** including for the reasons the ALJ included in her order, relative to a rapidly evolving space, as well as due to the time gaps involved. Further, the timeline to *all expenses* of a regulated utility being transparent is of critical concern to the regulatory

process's effectiveness. The *point* of transparency is for expert stakeholders to have the opportunity to identify, flag, analyze, discuss, etc., wonky or concerning behaviors.

If prices paid for major resources are obscured from sunlight for periods too long to be useful, too late to act (as may be perceived or in reality), then sunlight's value is diminished and undermined—and so is the regulatory process.

Pacificorp further confused the need for a fair process—which NewSun supports—and which allows negotiations to be completed confidentiality, without fear of currently competitive bidders having information to undermine another live bidder—with the notion that this requires eternal secrecy, or justifies a permanent veil over its behaviors. This is categorically untrue and, once again, inconsistent with good regulatory and sunlight principles. Things should be "seeable" soon enough to have a deterrent effect on untoward behaviors.

b.) **Pacificorp misleads about NewSun claims of who it represents.** PacifiCorp attempts to misdirect and distort issues of NewSun IRP participation and confuse its expert participation and concern for healthy processes as somehow incompatible with also being an affected stakeholder. Further, they are grossly inconsistent with the principles and concerns for the regulatory process clearly and expansively described in NewSun's reply. These are bad faith and misleading arguments and should be rejected and condemned. Furthermore, NewSun indeed represents the type of competitive market participant destined to be abused and suppressed as a result of IOU suppression of transparency and abuse of market function through obfuscation. Its comments are abundantly relevant. Indeed their insights as to the challenges of

the regulatory process and consequences of IOU abuses are exactly relevant and illustrative of the value of experts participating in the IRP more robustly. (Meanwhile Pacificorp, again in bad faith, ignores the competitive advantages it has created for itself discriminatorily through the architecture of its IRP processes and lack of segregation of access to competitive information among its own employees of relevance.)

8. Importance of Transparency Extremely High Now as Pacificorp Transitions to Massive New Procurement Effort, with Billions of Dollars of Ratepayer Obligations on the Line—and as Pacificorp Transitions to Major Participation of PacifiCorp-owned Resources Hereafter.

Pacificorp, per its subsequent next RFP filing intends to participate in future RFPs at a massive, perhaps unprecedented scale[27]. Remedying non-transparency before such plans and participation move forward is more critical than ever.

9. Pacificorp Claims of Exclusions of PURPA related information is counter-intuitive (at best).

It somewhat defies logic that the rates Pacificorp would be paying to Qualified Facilities contracting under PURPA, under federally required and state commission administered rates should somehow be precluded from visibility. Moreover, there is a public interest to be served on transparency for these matters relative to extensive behaviors and claims by Pacificorp about QFs in numerous, numerous proceedings. Obfuscation of related data, including to expert stakeholders on the same, is concerning and should draw red flags.

[27] PacifiCorp also filed thousands of MW of new pumped storage filings at FERC, which it would also presumably "compete" in future RFP processes, as well as have the ability to artificially advantage in IRP modeling and assumptions in future years.

10. RFP NDA provides exceptions and clarity of regulatory disclosures.

See attached PacifiCorp pro forma NDA which provides various terms, conditions, and exceptions which allow for provision under GPO type circumstances under an IRP docket. Among other provisions:

"(b) Upon the establishment of a docket or proceeding relating to the Bid before any public service commission, public utility commission, or other agency having jurisdiction over PacifiCorp, Recipient's obligations to Disclosing Party with respect to the Confidential Information ***will automatically be governed solely by the rules and procedures governing such docket and not by this Agreement****."*

B. The ALJ Should Clarify the Ruling to Explain that Acutely Sensitive Confidential Bid Information Should be Redacted.

A decision to clarify an order is within the discretion of the Commission. The Commission "may at any time, upon notice to the public utility or telecommunications utility and after opportunity to be heard as provided in ORS 756.500 to 756.610, rescind, suspend or amend any order made by the commission. ORS 756.568.

NewSun respectfully requests that the ALJ issue a clarification of the Ruling to clarify that statements with UM 2059 bidders[28] price information should be redacted, but that all other material not requiring targeted redaction is subject to immediate disclosure to NewSun under the General Protective Order to avoid unduly impeding and delaying a legitimate stakeholder's participation (as well as the ability of other stakeholders, including Staff, to prospectively benefit from another expert stakeholder's review).

[28] This could be active, still remaining bidders, or all bidders. We note potential value in both, but that PacifiCorp's downselected bidders may provide useful expertise in flagging if the downselected bids appear to be curiously so removed from the competitive process; for example, PacifiCorp preserved rights in its RFP to modify generation profiles of bidders, and if such occurred or other comparative curiosities existed, transparency on the same would be valuable to the regulatory process.

While the Ruling reaches the correct conclusion, considering the comments submitted by NIPPC, Invenergy, and other independent power producers,[29] NewSun believes that the Ruling should be clarified to state that acutely sensitive confidential bid information related to project-pricing and contractual terms under negotiation are subject to redaction. Due to ambiguities in PacifiCorp's filings, it appears that the parties, including NewSun, and perhaps even the ALJ, may have understood that PacifiCorp already redacted sensitive bid information for the current RFP underway from the confidential data disk. While not all bid information has the same sensitivity of needing removal to protect competitive interests because some information may be sufficiently covered by confidentiality obligations, that is not the case for bidder price bids, and likely other bidder-designated confidential information. Therefore, NewSun recommends that clarification of the Ruling so that it is clear that PacifiCorp can produce all other materials to NewSun but that acutely sensitive commercially competitive confidential bid information from PacifiCorp's UM 2059 RFP cannot be accessed by bidders or persons who represent or advise bidders in that RFP.

IV. CONCLUSION

The ALJ should not grant certification of the Ruling because PacifiCorp, NIPPC, and Invenergy fail to state sufficient grounds for certification. As explained in this response, the appropriate remedy is for PacifiCorp to be required to promptly produce information to NewSun under the General Protective Order as proposed, focused on the most discrete limited redaction, namely active RFP bidder price information, along with the other remedies, actions, and clarifications proposed by NewSun in this response, to promote and protect the integrity, functionality, and viability of the regulatory process at the Commission and for its IRPs

[29] PacifiCorp submitted letters from Longroad Development Company, LLC and NextEra Energy as Attachment C to its Request for Certification of ALJ Ruling.

specifically, and is consistent with the approach and statements of the ALJ's prior order on this matter.

Dated this 1st day of March, 2022.

Respectfully submitted,

NewSun Energy LLC

/s/ Jake Stephens

NewSun Energy LLC
550 NW Franklin Ave., Ste 408
Bend, OR 97703
Telephone: (971)978-7501
myoklic@newsunenergy.net

APPENDIX G-1

Confidentiality Agreement

MUTUAL CONFIDENTIALITY AGREEMENT

This MUTUAL CONFIDENTIALITY AGREEMENT (this "Agreement") is entered into as of the __ day of _____, 2020 (the "Effective Date"), by and between PacifiCorp, an Oregon corporation ("PacifiCorp"), and _____ ("Counterparty").

WHEREAS, Counterparty is submitting a bid in response to PacifiCorp's 2020AS Request for Proposals (the "Bid"), and in connection therewith the parties wish to exchange certain Confidential Information (as hereinafter defined).

NOW, THEREFORE, in consideration of the above and the mutual promises herein contained, the parties hereto agree as follows:

1. Confidential Information. "Confidential Information" means information made available by one party (the "Disclosing Party") to the other (the "Recipient") on or after the Effective Date, that is in a writing marked conspicuously as "CONFIDENTIAL," and is any of the following in relation to the Bid or PacifiCorp's evaluation of the Bid: (a) non-public financial information of the Disclosing Party or its proposed guarantor, if any, (b) the specifics of the price and business terms and conditions of the Bid; or (c) documentation exchanged between the parties pertaining to PacifiCorp's evaluation of the Bid or negotiation with Counterparty on a definitive agreement in relation to the Bid. Confidential Information does not include information which at the time of disclosure: (x) is generally available to the public (other than as a result of disclosure by Recipient), (y) was available to Recipient on a non-confidential basis from a source other than a Disclosing Party not actually known by Recipient to be under a duty of confidentiality to a Disclosing Party, or (z) independently developed by Recipient without reliance on the Confidential Information.

2. Confidentiality; Disclosure.

(a) Until the establishment of a docket or proceeding relating to the Bid before any public service commission, public utility commission, or other agency having jurisdiction over PacifiCorp, the Confidential Information will be kept confidential by Recipient and will not be used knowingly for any purpose by Recipient other than for the purpose set forth above and Recipient must restrict the dissemination of the Confidential Information to its employees who have a need to see it.

(b) Upon the establishment of a docket or proceeding relating to the Bid before any public service commission, public utility commission, or other agency having jurisdiction over PacifiCorp, Recipient's obligations to Disclosing Party with respect to the Confidential Information will automatically be governed solely by the rules and procedures governing such docket and not by this Agreement.

3. Protective Order. Except as provided in Section 2(b) of this Agreement, if Recipient becomes legally compelled to disclose any Confidential Information, it must provide Disclosing Party with

prompt prior written notice so that Disclosing Party may seek a protective order or other appropriate remedy. If such protective order or other remedy is not obtained, Recipient must (i) furnish only that portion of the Confidential Information which, in accordance with the advice of its own counsel, is legally required to be furnished, and (ii) exercise reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information so furnished. Notwithstanding the foregoing, and without limiting Section 2(b), the parties acknowledge that PacifiCorp is required by law or regulation to report certain information that could embody Confidential Information from time to time, and may do so from time to time without providing prior notice to Counterparty. Such reports include models, filings, and reports of PacifiCorp's net power costs, general rate case filings, power cost adjustment mechanisms, FERC-required reporting such as those made on FERC Form 1, Form 12, or Form 714, market power and market monitoring reports, annual state reports that include resources and loads, integrated resource planning reports, reports to entities such as the North American Electric Reliability Corporation, Western Electricity Coordinating Council, Pacific Northwest Utility Coordinating Committee, Western Regional Generation Information System, or similar or successor organizations, or similar or successor forms, filings, or reports, the specific names of which may vary by jurisdiction, along with supporting documentation. Additionally, in regulatory proceedings in all state and federal jurisdictions in which it does business, PacifiCorp will from time to time be required to produce Confidential Information, and may do so without prior notice and use its business judgment in its compliance with all of the foregoing and the appropriate level of confidentiality it seeks for such disclosures.

4. Conduct of Process. Neither PacifiCorp nor Counterparty is under any obligation, and each party is free to elect not to consummate an agreement or to furnish or receive information. Nothing contained in this Agreement will prevent PacifiCorp from negotiating with or entering into a definitive agreement with any other person or entity without prior notice to Counterparty. Until PacifiCorp and Counterparty enter into a definitive agreement, no contract or agreement or other investment or relationship is deemed to exist between them as a result of this Agreement, the issuance of a term sheet, the issuance, receipt, review or analysis of information, the negotiation of definitive documentation, or otherwise, and none of the foregoing may be relied upon as the basis for an implied contract or a contract by estoppel.

5. Intellectual Property Rights. Nothing contained herein grants any rights respecting any intellectual property (whether or not trademarked, copyrighted or patented) or uses thereof.

6. Costs and Expenses. Except as otherwise provided in any other written agreement between the parties, the parties will bear their own costs and expenses, including without limitation fees of counsel, accountants and other consultants and advisors.

7. Remedies. Disclosing Party is entitled to equitable relief, including injunction and specific performance, in the event of any breach hereof, in addition to all other remedies available to it at law or in equity. In no event will any party be liable to the other for punitive or consequential damages for any alleged breach hereof. No failure or delay by a party in exercising any right, power or privilege hereunder will operate as a waiver, nor will any single or partial exercise or waiver of a right, power or privilege preclude any other or further exercise thereof. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED. SUCH WAIVERS WILL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

8. Venue and Choice of Law. This Agreement is governed by the laws of the State of Oregon. Any suit, action or proceeding arising out of the subject matter hereof, or the interpretation, performance or breach hereof, will be instituted in any State or Federal Court in Multnomah County, Oregon (the "Acceptable Forums"). Each party agrees that the Acceptable Forums are convenient to it, and each party irrevocably submits to the jurisdiction of the Acceptable Forums, and waives any and all objections to jurisdiction or venue that it may have any such suit, action or proceeding.

9. Miscellaneous. The term of this Agreement is two years from the date hereof. This Agreement constitutes the entire agreement of the parties relating to its subject matter, and supersedes all prior communications, representations, or agreements, verbal or written. This Agreement may only be waived or amended in writing. Notices hereunder must be in writing and become effective when actually delivered. This Agreement may be executed in counterparts, each of which, when taken together, will constitute one and the same original instrument. Neither party may assign or otherwise transfer its rights or delegate its duties hereunder without the prior written consent of the other party, and any attempt to do so is void.

IN WITNESS WHEREOF, the undersigned parties have executed this Mutual Confidentiality Agreement as of the date first written above.

PACIFICORP	_____
an Oregon corporation	a _____
By: _____	By: _____
Its: _____	Its: _____