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 PACIFICORP'S OBJECTION TO NEWSUN'S DESIGNATION OF QUALIFIED PERSONS

I. INTRODUCTION

NewSun Energy LLC (NewSun) respectfully submits this Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons in this proceeding pursuant to General Protective Order No. 21-271.

The Oregon Public Utility Commission (Commission or PUC) should not only *not* restrict NewSun's access to confidential information *in this docket* – including as per the merits, facts, and context presented for this matter and PacifiCorp's objection in more detail below – but the Commission should review this matter and craft an order mindful of the broader consequences and issues related participation rights and effects in the regulatory process which are wrapped around PacifiCorp's objections in this case.

Specifically, we invite, and ask, the Commission to consider here the consequences of suppressed, burdened, limited, and otherwise challenged participation at the PUC, as relates to such participation's essential role and contributions to the Commission's critical functions in regulating electric utilities in this state. Indeed the Commission's efficacy as a *Regulator*—one charged distinctly with the obligation of protecting ratepayers against the abuses of *regulated utilities*—there *must* be *robust* participation in processes before the Commission, there must be

access, and the means must exist—*healthy, actionable, un-burdened, unimpeded means*—for the qualified experts which understand the matters, and for the *potentially or actually affected* stakeholders, to review the information with sufficient ease to be able to not just participate, but to be able to easily evaluate and know whether they should or might participate. And to discuss it with those others who *might* be affected or have pertinent expertise to render. This is especially true for integrated resource plans (IRPs) that are "public" and where denying the public access to the relevant data would give the incumbent investor-owned utilities a competitive advantage in preparing their benchmark or affiliate bids for its own RFPs.

And just as in voter suppression, there are *invisible* non-participants in many of the PUC's processes (particularly IRP processes)—prospective, possible, and/or likely participants who do not, cannot, will not show up, will not even try to show up (even, in many cases despite having sophistication, relevant knowledge, expertise, etc, and even in many cases who participate in other PUC processes)—whose non-participation, non-presence are not readily visible because of the realities of the rules and non-rules—the de facto mechanics of the processes—because of the challenges, burdens, costs, and exposures that participation may or might bring—because of the overwhelmingness of it all—because of resources constraints—but also, at a basic level, because the PUC's processes, as discussed further below, are sufficiently opaque and/or levered into de facto suppression by the utilities approaches to these processes. The suite of behaviors accomplishing this *de facto stakeholder participation suppression* comprise a broad range, from bullying behaviors, to raising the framework level cost of participation (time and money), to unnecessary procedural challenges, to bad faith contortions and/or misrepresentation of facts and arguments, to abuse of process, to invoking fear of consequences direct and indirect, to additions of hurdles for participation—including as simple

as the chance or risk of having to respond to something such as this—to the *suppression of visibility and access to the issues and data*, through mixes of the above and (as discussed more below) inappropriate, overreaching, and/or overly broad designation of confidential data.

The Commission's prospective stakeholders and various candidate experts—including those at utility competitors or belonging to or serving such groups—*can not even know, can not even evaluate, can not even consider or discuss or analyze, whether to participate in PUC processes if all the information of pertinence is hidden from them*. If it is all buried under layers of "protection".

Put differently: How does a stakeholder realize there's a problem to consider if it can never see it? Red flags being "seen" require not just owning eyes but the opportunity to "look". If the myriad of potential eyes and minds that might "see flags" and "identify questions" never get the chance… what is the effect of that?

The answer to that question: Less gets seen. Less gets asked. Fewer problems are identified. And the effect of that is inferior and sub-par regulation.

Ultimately, *none of us* is the expert on *everything*. Not Staff, not the Northwest & Intermountain Power Producers Coalition, not the Renewable Energy Coalition or Community Renewable Energy Association or Renewable Northwest, not NewSun Energy, not Portland General Electric, not PacifiCorp—nor is any one employee, consultant, lawyer, or analyst. Conversely, *all of us are <u>in</u>expert,* or insufficiently expert—or perhaps insufficiently conversive or just basic competent—on many things.

By logical extension—call it the Law of Regulatory Participation Inverse Proportionality—the bigger and more complicated a matter, and the fewer people that have access and visibility to the contents of such matter, the higher the probability of insufficient

scrutiny and of unidentified issues, unasked pertinent questions, and unintended and unknown consequences. The logical corollary to that is that *regulatory abuse exposure is inversely proportional to ease of participation and access of the experts and affected parties*; and the efficacy of the regulator is directly proportional to (and increases) with the number of expert eyes capable of viewing critical information.

In this context, the Commission—put simply—*exists* to protect against utility abuses. The Commission would not exist but for this purpose. Concealment of critical information is, no doubt, a very powerful tool for potential and actual utility abuse of their privileged role as a regulated party granted special privileges of monopoly and guaranteed returns on investment. Which makes this a very serious matter indeed.

Thus, in short, the Commission, to the extent it seeks to be a better regulator, and to have better expertise applied to the matters and parties it oversees, has a vested interest in the health and ease of access—of those capable of identifying problems *having the opportunity to see and identify them*. By extension, the ratepayers also have a vested interest ease of access to information about the utilities they are supposed to be protected against.

II. CONTEXT

Providing further context to this matter (and as discussed further below): NewSun Energy is attempting to participate more fully and formally (i.e. beyond just commenting at IOU IRP workshops) for the *first time ever* in an IRP. NewSun did not participate in the past in these—including for reasons that relate to not intervening formally until 2020 in any contested case—for many of the reasons above: It is hard, scary, expensive, time consuming, comes at risk of utilities bullying you or imposing (or attempting to impose) costs on you for trying. The IRP is an unwieldy beast of process—and, candidly, most parties that consider or do participation in

an IRP have little (or highly dimmed, diminished, and cynically limited) expectations of any ability to move the needles in the process. This is true too for various trade groups and organizations, including some of the Commission's regular stakeholders, that just cannot bear the pain, process, cost, and little consequence-of-outcome of participation in the IRPs. Which then ultimately means their members are insufficiently represented in the IRPs if at all—including NewSun.

But ultimately, non-participation comes at a cost too.

On many occasions, NewSun has been told "you should have participated in the IRP…", "…it's too late to raise that now after the IRP…", and "oh, you only get that information if you participate in the IRP…" Yet we need access to participate, to comment on other matters, to render expertise, to identify issues, and Not only that, but we—as do other IPP stakeholders—need access to be able to support the trade groups we belong to, who cannot and do not have sufficient expertise on their own—despite numerous highly expert members—to fully (or even fractionally) review, address, and identify issues.

Yet here we are, attempting to participate, as we did in UM 2032, and the hurdles are being stacked up. In this case, those hurdles and objections are stacked *by the same utility that in UM 2011 recommended we get access to this data in the IRP docket.*

We are certainly more sophisticated on many matters than other prospective stakeholders. We had to actually hire full-time counsel to attempt to participate at the PUC properly—even with decades of experience in our core team. And yet it still intimidates us, burdens us, discourages us, and costs us—for the mere *attempt* to participate in what is supposed to a core function of regulation. How must it then be for others, with fewer resources? With information access blocked?

There has historically been a pattern of under-participation in PacifiCorp's IRP processes before the Commission from competitive interests. For the causes discussed above. And due to the Cost. (Yes, Cost is a barrier—including for essentially every member-funded stakeholder group that comes before you, that have very, very limited budgets, and routinely decide that the IRP is too expensive to delve into, and too laced with cost curveballs—one could scarcely budget for such a thing—among other challenges.)

Yet the Commission would undoubtedly benefit from more robust participation from non-utility expert opinions that are fully informed by all of the relevant data. NewSun is an example of that. NewSun has participated in numerous Commission proceedings regarding capacity and capacity valuation issues, among others. It's expertise—just like that of so, so many other IPPs and developers and energy experts, large, small, and in between—can, and does, and should, act as a helpful check on utility experts.

But that benefit only exists with proper and easeful access to the process and the information which underlies the IRP as its bedrock.

Denial of NewSun's access here—which attempt represents a rare and limited case of IPPs, much less small IPPs or developers attempting to engage in this burdensome, costly process—would not just perpetuate the utility's game of hide-the-ball, but further embolden them and their abusive, competition and participation suppression behaviors, and allow them to further systematically constrain sunlight on their dealings. And, through further suppression of others, to further exacerbate the current problematic dynamic of being treated, with great deference, almost without exception, as the expert witnesses at their own trials.

Unless and until the Commission decides to make a "public" process truly transparent and public, the utility's inappropriate behavior, of over-designating confidential data and hiding

behind protective orders—among many other surrounding dynamics resulting in de facto suppression of participation, and of effective regulation by this Commission—will continue endlessly. Ultimately, the point of the IRP process is not to *enable* the utilities to gain, develop, and perpetuate competitive advantages against those which might aid in their regulation or execute more cost effectively to the benefit of ratepayers. But rather to shine maximal sunlight on the practices of the utilities the Commission exists to regulate. This includes the data.

As explained more fully below, there is no reason to restrict NewSun's access, and the Commission should not buy into PacifiCorp's overblown concerns especially given that what PacifiCorps is doing effectively gives itself a competitive advantage.

I. PROCEDURAL BACKGROUND

NewSun filed its signatory pages on December 6, 2021 to General Protective Order No. 21-271. Specifically, NewSun's CEO, Jacob Stephens, signed the consent to be bound section of appendix B to the protective order and under paragraph 12, that would automatically qualify NewSun's in-house counsel, Marie Barlow, and executive assistant, Leslie Schauer, who is employed by NewSun and provides support to both Jacob Stephens and Marie Barlow among other responsibilities. NewSun also sought to qualify its consultant, Brittany Andrus, under paragraph 13 of the protective order and submitted an appendix C signature page. On that same day, NewSun emailed PacifiCorp to request that PacifiCorp send the confidential data disc. By December 15, 2021, NewSun had not heard back and followed up with PacifiCorp. At that time, PacifiCorp notified NewSun that it objected to providing the confidential data disc because it contained certain specific price information regarding bids from its 2020 all-source request for proposal (RFP). NewSun explained that as a participant and stakeholder in PacifiCorp's integrated resource planning (IRP) process and docket, NewSun was not amenable to completely

withdrawing its signatory pages to the protective order. Without agreeing that any need existing to protect *any* of the data, NewSun requested that if PacifiCorp believed there were *certain* data that needed to be subject to a higher level of protection, that PacifiCorp narrowly define such content to focus the area of concern and related discussion. NewSun fully intended to participate in the IRP and was not willing to be bullied out of the entire IRP data. But at a minimum NewSun believed PacifiCorp should at least focus the issue, which could allow an interim constructive solution that would not require potentially burdening and delaying both UM 2011 and the IRP process due to PacifiCorp's overly broad assertions. PacifiCorp indicated it would follow up with the IRP team, but after having not heard back by December 22, 2021, NewSun followed up again. It was at that time that PacifiCorp notified NewSun that it would object to NewSun's signatory pages in their entirety and refused segregate the data.

It is NewSun's understanding that PacifiCorp now objects to NewSun having access to ***all*** protected information in this docket (not just the project specific pricing information previously mentioned and not just the confidential data disc) both as a party and for each of the NewSun individuals that have consented to be bound or would otherwise be qualified by the terms of the protective order.

While PacifiCorp lists certain project-specific price information it believes NewSun should not have access to, it also states that it believes it would be "overly burdensome to adequately scrub" that information from the confidential files in this docket.[1] The specific data PacifiCorp lists as at issue are "IRP inputs include[ing] project-specific prices, 8760 capacity factors, and other operating characteristics. IRP outputs include[ing] cost and volume" for RFP

[1] PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 3 (Dec. 23, 2021).

bids, non-QF PPAs, and owned assets.[2] NewSun finds it curious that PacifiCorp finds the burden of having to consider *which* information is indeed properly confidential, and managing its disclosures and designations, for a public regulatory process, as a regulated entity, so burdensome. Particularly given the vast resources the Commission privileges PacifiCorp with the financial ability to support, paid for at ratepayer expense, and when visibility of that information is at the core of the efficacy regulated process. It is exactly this sort of broad, hand-wavy, "burdensome" while (effectively) infinitely-resourced (especially relative to every other stakeholder in their processes) behavior and claims that forms the heart of the problematic behavior which is inappropriate for a regulated utility and which creates the de facto effect of information and access and participation and expertise suppression at the commission if and when condoned by the Commission.

II. LEGAL STANDARD

Under OAR 860-001-0080, the Commission can enter a general protective order upon request of a party when it expects a filing or discovery to involve information that falls within the scope of Oregon Rule of Civil Procedure (ORCP) 36(C)(1). Under ORCP 36(C)(1), disclosure can be limited where it involves a "trade secret or other confidential research, development, or commercial information." Finally, under the terms of the general protective order and Order No. 21-271 in this docket, signatories agree, among other things, to:

- Take reasonable precautions to keep protected information secure;
- Only reproduce such information to the extent necessary to participate in these proceedings;
- Only disclose such information to other qualified persons; and

[2] *Id.*

- Not disclose protected information for any purpose other than participating in these proceedings unless they have obtained the written permission of the designating party.[3]

Additionally, the Commission sometimes enters a *modified* protective order when "the moving party seeks a protective order with any changes, however minor, from the Commission's general protective order. For instance, 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, or restrictions applied to specific information or specific signatories. Such heightened protections and additional restrictions are not available under the terms of the general protective order."[4] Further, only under a *modified* protective order, may a signatory be required to certify active participation in the proceeding where that signatory has not actively participated to date," but even in those circumstances a party's strategic and financial case management decisions such as "not submitting filings during certain phases of a proceeding. . .will not lead to automatic decertification."[5]

III. DISCUSSION

A. The IRP is Public

In adopting its IRP guidelines, the Commission placed high value on public participation in the IRP process including the public's opportunity to receive information, make relevant inquiries and have access to relevant data. Guideline 2, specifies that:

Guideline 2: Procedural Requirements.

[3] Order No. 21-271, Appendix A at ¶¶ 16, 17 (Aug. 30, 2021).
[4] *In re Rulemaking to Amend OAR 860-001-0080, Protective Orders*, Docket No. AR 628, Order No. 20-013 at 5 (Jan. 14, 2020); OAR 860-001-0080(3).
[5] *Id.*

(a) The public, which includes other utilities, should be allowed significant involvement in the preparation of the IRP. Involvement includes opportunities to contribute information and ideas, as well as to receive information. Parties must have an opportunity to make relevant inquiries of the utility formulating the plan. Disputes about whether information requests are relevant or unreasonably burdensome, or whether a utility is being properly responsive, may be submitted to the Commission for resolution.

(b) While confidential information must be protected, the utility should make public, in its plan, any non-confidential information that is relevant to its resource evaluation and action plan. Confidential information may be protected through use of a protective order, through aggregation or shielding of data, or through any other mechanism approved by the Commission.

(c) The utility must provide a draft IRP for public review and comment prior to filing a final plan with the Commission.[6]

Further, when a utility submits a bid into its on RFP, the Commission has recently refused to require that the utility IRP staff be prevented from working on that bid in part based on the representations that the IRP is "public." In Portland General Electric's (PGE) 2021 request for proposals (RFP) docket, PGE sought to submit one or more benchmark and/or affiliate bids. Stakeholders recommended that if PGE were permitted to submit such bids, the Commission should require that any PGE staff that had participated in the IRP would not also work on the bids, and to confirm that everyone working on the bids would not and will not have access to any data, analysis, or other resources to the same extent as non-affiliate bidders. PGE declined to make any change based on the rationale that "the IRP process is public."[7] Ultimately, the Commission "declined to adopt any additional changes to the RFP on the affiliate bid, other than Staff's recommended change. . .to have the affiliate marked as tentative until December 17, 2021 when PGE will indicate if it is moving forward with an affiliate bid," also

[6] *In re Pub. Util. Comm'n of Or Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07-047, at appendix A at 2-3 (Feb. 9, 2007).

[7] *In re PGE 2021 All-Source Request for Proposals*, Docket No. UM 2166, PGE Reply Comments at 36 (Nov. 10, 2021).

noting that it "found that the competitive bidding rules sufficiently address treatment of affiliate bids."[8] While the Commission subsequently rejected the affiliate filing in another docket, PGE still indicated an intent to bid an affiliate into the RFP.[9] Therefore, in that docket, ultimately the PGE staff working on the affiliate bid may be the same people that have worked on the IRP, and those individuals are not restricted from having access to any and all data and analysis, including that which was designated as confidential, in the IRP. Therefore, the IRP data is "public" and should be equally accessible to all potential bidders, not just those affiliated with the incumbent investor-owned utility. Indeed it is in ratepayers' interest to do so.

Here, PacifiCorp claims instead that the IRP process, analysis, and data, in fact, contains commercially sensitive information that if provided to a potential bidder would give that bidder "an unfair advantage in an RFP."[10] Yet, PacifiCorp itself indicates that it may submit one or more benchmark bids for its upcoming 2022 all-source RFP.[11] Because the Commission does not require the benchmark team to be screened from the IRP team and data, PacifiCorp's benchmark team may be made up of the same individuals working on the IRP, and those individuals will be entitled access to the IRP data that NewSun is seeking access to here. If the Commission restricts NewSun's access as requested by PacifiCorp, then it will give PacifiCorp an unfair advantage over NewSun and all other potential bidders in its upcoming RFP. Therefore, because the IRP data is "public," there is no reason to restrict NewSun's access.

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8 *In re PGE 2021 All-Source Request for Proposals*, Docket No. UM 2166, Order No. 21-460 at 7-8 (Dec. 10, 2021) (noting also that the appropriateness of the affiliate would be addressed separately in the affiliate filing). Note that the competitive bidding rules require that "[a]ny individual who participates in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company may not participate in the preparation of an electric company or affiliate bid and must be screened from that process." OAR 860-089-0030(1)(b).

9 *In Re PGE AI Transaction with Portland Renewable Resource Company*, Docket No. UI 461, Order No. 21-482 (Dec. 22, 2021); *In re PGE 2021 All-Source Request for Proposals*, Docket No. UM 2166, PGE Notice of Intent to Submit Affiliate Bid (Dec. 17, 2021).

10 PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 4.

11 PacifiCorp Draft RFP Circulated to UM 2193 Stakeholders Prior to Workshop at 4 (Dec. 28, 2021).

B. The Commission Benefits from a Variety of Expert Opinions

As noted above, the Commission's IRP guidelines place strong emphasis on public participation. Public participation is a necessary and important facet of the Commission's processes as it provides the Commission with a variety of expert opinions. Without full and informed participation of non-utility energy industry experts, the Commission allows, and *causes,* reduction of expertise in its proceedings. And further exacerbates the issues of treating the incumbent investor-owned utilities to be the expert witnesses at their own trial, not subject to check by competing interests or a full suite of competent experts.

It is these incumbent investor-owned utilities, often participating in Commission dockets as the "Joint Utilities,"[12] who are the regulated utilities *subject* to oversight by the Commission and over which the Commission is statutorily obligated to balance the interests of the utility investor and consumer.[13] *The utility investor is guaranteed a rate of return in* ***exchange*** *for Commission regulatory oversight*. However, regulatory oversight is only as good as the inputs into that process. Suppression of applicable expertise is not conducive to that cause. The Commission can, should, and must ensure—or at least try—to facilitate and attempt to maximize, informed and effective oversight by providing open and transparent data access to the industry experts and to the public, the opportunity to access and review that data, a process to bring issues to the Commission's attention including funding opportunities for stakeholder participation, en route to a robust decision-making process.

It is well established that competition in the market for generation assets is in the interests of ratepayers, yet participation from competitive interests in IRPs has been limited. Many

[12] *See e.g.* Docket Nos. UM 2011, UM 2032.
[13] ORS 756.040.

associations representing competitive generation interests do not engage in robust participation in the IRP process both in the initial stakeholder advisory meetings and later in the actual PUC dockets.[14] Participation in IRPs, particularly PacifiCorp's, can be extremely burdensome. The initial stakeholder advisory process usually involves monthly meetings of two full days each month, and then the IRP docket itself can be a months-long process with a huge amount of data and potential issues to review. There is no one expert that can effectively review and identify all issues in an IRP. So, even where a trade association might participate, it may often rely on the expertise of individual members as to the reasonableness of certain data, assumptions, contracting terms or practices, facility operating characteristics and others. Therefore, in order to benefit from a broad range of experts, it is critical that the Commission ensure maximal access to data for all stakeholders. This includes NewSun, and it includes many other independent power producers, developers, and experts. At a minimum, the Commission should react strongly to bullying and attempts to suppress participation, whether directly or indirectly, by utilities.

Some of these participants, yes, may be competitors of the utilities. But that is okay—and appropriate. Indeed, *those* are the companies whose experts *have the relevant expertise* to IRP matters and the full complexity of development, markets, transmission, interconnection, power marketing, etc, a scope of incredibly expertise that no state commission can hope to replicate in its highly limited (by time, numbers, and specific experiences) staff and commissioners, who can never have all the specific knowledge necessary to flag and discuss the scope of issues in a IRP. *These are also the market participants whose robustness and health of*

[14] The Northwest & Intermountain Power Producers Coalition (NIPPC) intervened in this docket but has not submitted any comments, and neither the Oregon Solar + Storage Industries Association (OSSIA) nor the Community Renewable Energy Association (CREA) have intervened. In PacifiCorp's 2017 and 2019 IRPs, OSSIA and CREA similarly did not intervene although CREA joined one set of comments on a narrow issue in the 2017 IRP. NIPPC only submitted one set of comments 6 pages long on a very narrow issue in the 2019 IRP and submitted some comments in in the 2017 IRP.

market is vital to the competitive pressures and investments which cause cost pressure on the monopoly utilities—i.e. reduce abuse of ratepayers through minimization of unchecked monopolies.

Conversely, the arguments of utilities that they deserve special competitive protections is Bogus. These processes do not exist for utilities to create, protect, and/or expand competition positions; they are not *for* the utilities. They are *for the ratepayers*. The same is true of the Commission itself. These processes and institutions exist to protect ratepayers *against the utilities*. And that requires the presence of expertise, like that which a company like NewSun Energy brings, and their access to the process and all pertinent information. Absent this, blinders are artificially applied.

The benefits of this are borne out by NewSun's own engagement at the commission. NewSun has participated in numerous IRP and non-IRP processes at the Commission including by taking on a leadership role in the industry and with other stakeholders in an effort to bring other expert opinions to the Commission and ensure a fair airing of the issues.[15] For example, NewSun intervened in PGE's 2019 IRP following the filing of its IRP update. In that docket, NewSun took issue with PGE's effective load carrying capacity (ELCC) methodology including the amount of solar resources PGE assumed in its baseline and the reference solar project's underlying operating assumptions.[16] Specifically, PGE incorrectly and inappropriately assumed many unviable or already dead projects would still reach their scheduled commercial operation despite evidence to the contrary, assumed ridiculous outage assumptions fundamentally inconsistent with normal solar power plant design and operations, assumed very questionable the

[15] Among a number of other dockets on other subjects as well.

[16] *In re PGE 2019 Integrated Resource Plan*, Docket No. LC 73, NewSun's Comments (Mar. 10, 2021).

underlying solar resource's assumptions, while basing assumptions on extremely outdated system designs for DC/AC ratio, and resulting in very odd (at best) in terms of the capacity factor and generation output assumptions; most or none of these issues would have been properly raised without an expert such as NewSun present.[17] NewSun then also participated in PGE's subsequent qualifying facility (QF) avoided cost update filing following the IRP Update, raising the same issues and providing additional analysis.[18] In that docket, the Commission ultimately approved a settlement among several stakeholders adjusting the ELCC value to a higher percentage than what PGE initially proposed and directing PGE to perform additional analyses on both the issues NewSun advocated for.[19] Though we also note that NewSun was repeatedly told in these matters that it *should have* participated in the prior IRP in order to properly raise those issues. NewSun had not, due to many above cited issues, but also due to then previously not realizing how little the trade groups often representing us would participate (again, largely due to resource constraints), resulting in underrepresentation. But meanwhile, this only highlights that critical *fundamental* information gets missed in the IRP due to underparticipation—the problem we are raising here—as PacifiCorp seeks to suppress our participation rights, capacity, and competency, by suppression of access to information.

While NewSun's advocacy has had some measurable impact, it has been disadvantaged by not signing protective orders in other dockets contrary to PacifiCorp's assertion that "parties have been able to participate meaningfully. . .without requesting access to confidential data."[20] In PGE's IRP, NewSun's decision not to sign the protective order put it at a significant

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17 *Id.*

18 *In re PGE Updates to Schedule 201 Qualifying Facility (10 MW or Less) Avoided Cost*, Docket No. UM 1728, NewSun's Comments (June 6, 2021).

19 *In re PGE Updates to Schedule 201 Qualifying Facility (10 MW or Less) Avoided Cost*, Docket No. UM 1728, Order No. 21-215 (July 6, 2021).

20 PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 6.

disadvantage. This is illustrated by the fact that several of the data responses PGE provided to other stakeholders on the same issues NewSun was concerned with were provided under the protective order[21] and that in responding to some of NewSun's arguments, PGE cited to its own confidential data responses provided to other stakeholders.[22] Without access to those confidential data responses, NewSun was unable to fully review review the issues and provide the Commission with its fully informed and expert opinion. (Nor could NewSun properly advise the trade groups it is a member of, and comment there—which, given that the same was true for essentially all their other members, means that other stakeholders were denied access to experts too—and (again) likely the opportunity to ever identify issues which might exist, because they couldn't ever see the information.)

Similarly, NewSun has taken on an active and, at a times, a leadership, role in UM 2011, participating extensively in workshops and with other stakeholders to work towards a useable and understandable capacity valuation methodology. Recently, for example, NewSun organized a joint letter that eight stakeholders signed onto and was a primary participant in two recent workshops on November 16, 2021 and December 6, 2021 discussing specific data and examples the utilities will provide. In both of those workshops, PacifiCorp directed parties to review data on its IRP confidential data disc to better understand PacifiCorp's proposals. NewSun believes that PacifiCorp should simply provide that data in the UM 2011 context so all parties to that docket can have access to the data rather than just parties to this docket. PacifiCorp has thus far not provided the referenced data in that docket. It represents that it will provide some data, but apparently not necessarily the data that it has referred to in reference to its IRP confidential data

[21] *In re PGE 2019 Integrated Resource Plan*, Docket No. LC 73, The Renewable Energy Coalitions Comments on the IRP Update at Attachment A (Mar. 10, 2021).

[22] *In re PGE 2019 Integrated Resource Plan*, Docket No. LC 73, PGE's Reply Comments at 13 (Mar. 24, 2021).

disc given that PacifiCorp anticipates "much of the data. . .will be non-confidential."[23] Stakeholders in that docket have been asking for data and concrete examples from the utilities for months (if not years) at this point and until the utilities are required to provide full and transparent access, they will continue to drag out that process, depleting resources of stakeholders and effectively avoiding ever having to ascribe to a generic capacity valuation methodology that is harmonized across numerous contexts. In any event, NewSun's internal expertise and consultant, Brittany Andrus, has provided and continues to provide critical analytical expertise on the topic of capacity valuation in various Commission dockets.

Here, NewSun participated in PacifiCorp stakeholder advisory meetings leading up to the filing of this IRP and intervened in this docket to further participate. The value of capacity is also an issue in this docket.[24] Also notable, is that Staff's most recent proposal in UM 2011 recommends that the capacity valuation methodology developed in that docket would NOT apply in the IRP context.[25] As such, even though PacifiCorp represents that it will provide *some* data in the UM 2011 context, the data on its confidential data disc is also relevant in this docket, and NewSun is a stakeholder here and needs access here in order to participate and help provide the Commission with expert opinions that compete with the utility's own internal experts. Such non-utility expertise is essential to informed decision making as it acts as an important check on utilities.

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[23] PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 7.

[24] *See* Renewable Northwest's Opening Comments at 9-11 (Dec. 3, 2021) (discussing ELCC, UM 2011 and other issues with PacifiCorp's capacity modeling); *See also* Renewable Energy Coalitions Opening Comments (Dec. 3, 2021); *See also* Sierra Club's Opening Comments, at 4 (Dec. 6, 2021) ("There are inconsistencies between PacifiCorp's capacity contribution study and the Preferred Portfolio with respect to the capacity value of solar plus storage.").

[25] *In re General Capacity Investigation*, Docket No. UM 2011, Staff's Capacity Value Best Practices Updated Draft (Sept. 30, 2021).

Further, we do not need, nor is it appropriate to have the utilities (the regulated party) making filtering decisions about what the appropriate experts can see.

C. Utilities Over-Designate Data as Confidential

NewSun is concerned that utilities over-designated data as confidential (a concern we know is shared by other stakeholders and believe is long overdue to be properly addressed). As noted above, it is highly questionable whether the data at issue here should protected at all given that the IRP is "public," and allowing it to remain confidential (or only accessible by PacifiCorp's internal teams) would give PacifiCorp's benchmark bid a competitive advantage over other potential bidders in its upcoming RFP. The goal of the regulatory process should not be to protect the incumbent regulated investor-owned utility from having competition. But rather, the goal should be *sunlight*: ratepayers have a vested interest in any information that would allow the market to conclude that it can compete competitively. In order to achieve that goal, full and absolute transparency is required.

Further, while PacifiCorp's objection makes vague assertions and references to potentially confidential data submitted by bidders in its prior RFPs, PacifiCorp does not actually allege that any data it would disclose to NewSun was designated as confidential by a bidder under the terms of its confidentiality agreement with that bidder.[26] Specifically, PacifiCorp states vaguely that it "*represents*" to bidders that it will "attempt to maintain confidentiality of all bids submitted to the extent consistent with law or regulatory order." It then proceeds to describe the detailed process by which a bidder may designate only specific information on individual pages of its bid to receive confidential treatment under executed confidentiality agreements.[27]

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[26] PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 5.

[27] *Id.* (emphasis added).

PacifiCorp does not, however, make the logical next step which is to state that the specific data it would provide here was actually designated as confidential by a bidder under that process. Rather than stating that disclosure of the data would violate specific confidentiality agreements, PacifiCorp asserts vaguely that it would violate "*commitments*" to third-party developers.[28] In any event, PacifiCorp admits that the Commission can issue a regulatory order to require disclosure.

Without access to the protected data, NewSun cannot fully review or opine on the nature of the data in question including whether it can be properly designated as confidential or whether if properly confidential, it can or cannot (or would be overly burdensome to) be aggregated or shielded. PacifiCorp notes that it believes it would be overly burdensome to scrub the data disc through redaction and aggregation. However, as long as PacifiCorp is allowed to hide the ball and there are no checks on a utility's ability to designate data as confidential, the Commission will continue to deprive itself of valuable stakeholder involvement. Stakeholders are unable to evaluate even the appropriate level of involvement in a particular proceeding without access to data.

Should the Commission be inclined to keep the some or all of the confidential designation or otherwise require redaction or aggregation, the Commission's processes need to provide for at least some stakeholder and/or neutral party review of the relevant data in order to determine the appropriate level of public vs protected data. As noted in its petition to intervene, NewSun's interests in this proceeding are not adequately represented by any other party so is extremely concerned that other parties with access to the data in question will not be able to

[28] *Id.* at 1 (emphasis added).

appropriately object to the confidential designations on NewSun's behalf. In fact, there is no reason why any other party would do so.

Finally, under Order No. 20-013, PacifiCorp is supposed to enter a modified protective order if it thinks there will be intervenors with competitive interests.[29] PacifiCorp clearly knew that there would be intervenors with competitive interests in this docket.[30] In this docket, PacifiCorp requested, and the Commission entered a modified protective order (Order No. 21-399). NewSun is not seeking to sign that order; however, given the above concerns about the IRP as a public process and the competitive advantage PacifiCorp's benchmark team may gain over other bidders by having access to that data, there is concern that the data subject to that order should also be public.

D. All of the NewSun Signatories Need Access to the Data

This particular data requires analytical expertise to fully review and opine on. NewSun is aware that in some dockets, an attorney may sign a protective order for a party but not other subject matter experts. Here, PacifiCorp objects to all of NewSun's signatories, but should the Commission be inclined to limit some but not all of the signatories, it should consider the nature of the data as analytically complex. NewSun's counsel works closely with its subject matter experts on these issues and NewSun would be significantly disadvantaged if its subject matter experts were declined access to the data.

E. NewSun Has Signed Other Protective Orders and Understands How to Treat Data as Confidential

[29] Order No. 20-013 at 5.

[30] PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 5-6 (noting several instances where competitive interests participated in IRPs).

NewSun has also signed general protective orders in other dockets[31] and understands the nature of protective orders and how to treat confidential data. NewSun has reasonable systems in place to keep protected information secure and the signatories have all read and understand the terms of the general protective order.

F. Stakeholders are Not Required to Submit Written Comments

PacifiCorp seemed to imply that the fact that NewSun did not submit opening comments was relevant to the issue of whether NewSun should have access to the data.[32] It is not. The Commission's processes, especially the IRP process, allows for flexible participation. Further, under Order No. 20-013, parties do not need to certify active participation in a docket in order to sign a *general* protective order.[33] Even under a *modified* protective order, the Commission will not automatically decertify someone if financial or strategic case management decisions result in the party not submitting comments at particular points in the proceeding.[34] This smacks of adding burdens to participation and is anathema to access and sunlight principals for a healthy process, and should be squarely rejected by the Commission for clarity to the utilities.

G. PacifiCorp Did Not Provide Access or Object Within Five Business Days

Finally, under paragraph 13 of the protective order, the designating party is required to provide the requested access to protected information or file an objection within five business days of receiving a copy of appendix C. NewSun provided an executed appendix C on December 6, 2021, requesting the confidential data disc that same day, and did not learn that PacifiCorp had any issue with it until December 15, 2021 when NewSun sent a follow up email.

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31 *See e.g.* Docket No. UM 1728 and Docket No. UM 2032.

32 PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons at 3 ("PacifiCorp notes however, that NewSun did not file written comments to the 2021 IRP on September 3, 2021")

33 Order No. 20-013 at 5-6.

34 *Id.*

PacifiCorp did not actually file an objection until December 23, 2021. PacifiCorp thus failed to meet the regulatory deadline applicable here.

IV. CONCLUSION

The Commission should not restrict NewSun's access to confidential information in this docket as it is essential to the Commission's critical functions in regulating electric utilities in this state for there to be robust participation in processes before the Commission. This is especially true for IRPs that are "public" and where access to the relevant data would give the incumbent investor owned utilities a competitive advantage in preparing their benchmark or affiliate bids for their own RFPs. Rather the Commission benefits from non-utility expert opinions that are fully informed by all of the relevant data. This is even more important given the recent passage of ambitious climate legislation in this state which requires major reconstruction of the entire generating capacity in the Pacific Northwest.

Dated this 3rd day of January 2022.

Respectfully submitted,

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