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**VIA ELECTRONIC FILING**

Attention: Filing Center  
Public Utility Commission of Oregon  
201 High Street SE, Suite 100  
P.O. Box 1088  
Salem, Oregon 97308-1088

**Re: Docket UM 2032 – Investigation into the Treatment of Network Upgrade Costs for Qualifying Facilities**

Attention Filing Center:

Attached for filing in the above-captioned docket is the Joint Utilities' Response to NewSun Energy, LLC's Motion for Clarification of Order No. 21-343 and Alternative Application for Reconsideration.

Please contact this office with any questions.

Sincerely,

Alisha Till  
Paralegal

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 2032**

In the Matter of

PUBLIC UTILITY COMMISSION OF  
OREGON,

Investigation into the Treatment of Network  
Upgrade Costs for Qualifying Facilities.

**JOINT UTILITIES' RESPONSE TO  
NEWSUN ENERGY LLC'S MOTION  
FOR CLARIFICATION AND  
ALTERNATIVE APPLICATION FOR  
RECONSIDERATION**

In accordance with OAR 860-001-420(4), Idaho Power Company, Portland General Electric Company, and PacifiCorp dba Pacific Power (together, the Joint Utilities) submit this Response to NewSun Energy LLC's (NewSun) Motion for Clarification of Order No. 21-343 and Alternative Application for Reconsideration (Motion), filed on December 21, 2021. In Order No. 21-343, the Commission denied NewSun's motion to compel, finding that NewSun's data requests were overly broad in scope and not commensurate with the current needs of the case.<sup>1</sup> NewSun now requests that the Commission issue a "simple ruling" clarifying that Order No. 21-343 is not a "final order," as defined by the Administrative Procedures Act (APA).<sup>2</sup> If the Commission determines that Order No. 21-343 is a "final order," NewSun requests reconsideration and asserts that the order should more clearly and individually articulate the reasoning for declining to compel responses to each of NewSun's data requests.<sup>3</sup>

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<sup>1</sup> Order No. 21-343 at 1 (Oct. 22, 2021).

<sup>2</sup> NewSun's Motion for Clarification and Alternative Application for Reconsideration at 3 (Dec. 21, 2021) (Motion); ORS 183.310(6)(b).

<sup>3</sup> Motion at 5.

The Joint Utilities agree that Order No. 21-343 is not a final order under the APA and do not object to the Commission confirming this point. Because Order No. 21-343 was correctly decided and included sufficient explanation, there is no basis for reconsidering or revising the order.

## I. ARGUMENT

### A. Order No. 21-343 is not a “final order.”

A “final order” is a written expression of “final agency action,” and does not include a “tentative or preliminary” action that “precedes final agency action; or [d]oes not preclude further agency consideration of the subject matter.”<sup>4</sup> Order No. 21-343 precedes final agency action. The Commission confirmed that it will resolve the questions presented in the first phase of this docket after further testimony and briefs are submitted.<sup>5</sup> Order No. 21-343 also does not preclude further consideration of the issues raised by NewSun. In fact, it confirms that they may be addressed in Phase II, if appropriate.<sup>6</sup>

While every order is final, in a sense, as to the specific subject that it covers, a “final order” constitutes the agency’s ultimate decision, when viewed within the applicable regulatory context.<sup>7</sup> A preliminary step in reaching a later decision is not a final order.<sup>8</sup> Here, Order No. 21-343 does not include the Commission’s ultimate decision regarding any of the issues in the docket. Rather, it simply confirms the scoping and phasing of this investigation and enforces the Commission’s discovery rules.<sup>9</sup> Thus, Order No. 21-343 is a preliminary step in the investigative process that

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<sup>4</sup> ORS 183.310(6)(b).

<sup>5</sup> Order No. 21-343 at 6.

<sup>6</sup> Order No. 21-343 at 6.

<sup>7</sup> See *Grobovsky v. Bd. of Med. Exam’rs*, 213 Or App 136, 143 (2007).

<sup>8</sup> See *Grobovsky*, 213 Or App at 143.

<sup>9</sup> Order No. 21-343 at 5-6.

will conclude when the Commission takes further action to decide the issues presented in the docket.<sup>10</sup>

Contrary to NewSun’s suggestion, Order No. 21-343 does not limit or deny NewSun’s participation in any way.<sup>11</sup> NewSun remains a party to the case and may submit evidence and legal argument within the Commission-defined scope. However, NewSun does not have an inherent right to submit evidence that is outside the scope of the proceeding, nor does NewSun have a right to conduct discovery that violates the Commission’s discovery rules. NewSun appears to be concerned that it will not be permitted to obtain and submit the evidence sought in its motion to compel if this docket does not proceed to Phase II.<sup>12</sup> If the Commission ultimately determines that Phase II is not necessary, and if NewSun takes issue with that decision, then NewSun can take appropriate steps to challenge the decision at that time—but any challenge now would be speculative and premature.

The Commission’s procedural rules confirm that Order No. 21-343 is not a final order. Discovery disputes, including motions to compel, may be resolved by the Administrative Law Judge (ALJ) rather than the Commission itself.<sup>13</sup> Under the Commission’s rules, ALJs have authority to supervise and control discovery and make evidentiary rulings, but not to grant “contested motions that involve final determination of the proceedings.”<sup>14</sup> In other words, an ALJ

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<sup>10</sup> See *Grobovsky*, 213 Or App at 145-46 (concluding that a Board of Medical Examiners’ order compelling a doctor to undergo a medical evaluation was not a “final order” because it was an investigatory tool the Board used in order to implement its decision-making powers and reach an ultimate decision regarding the doctor’s license).

<sup>11</sup> Motion at 4.

<sup>12</sup> Motion at 4.

<sup>13</sup> See, e.g., *Blue Marmots v. PGE*, Docket UM 1829, ALJ Ruling Granting Motion to Compel Discovery (Mar. 18, 2020); Docket UM 1829, ALJ Ruling Granting in Part and Denying in Part Motion to Compel (Dec. 13, 2017); Docket UM 1829, ALJ Ruling Denying Motion to Compel (Oct. 30, 2017).

<sup>14</sup> OAR 860-001-0090.

cannot issue a “final order.” Because the discovery dispute resolved by Order No. 21-343 could have been decided by the ALJ rather than the Commission, Order No. 21-343 is not a “final order.”

**B. The Commission should not reconsider or revise Order No. 21-343.**

Because Order No. 21-343 is not a final order, the Commission need not reach NewSun’s alternative application for reconsideration.<sup>15</sup> If the Commission reaches the question, it should deny reconsideration. Order No. 21-343 correctly and fully articulated why NewSun’s motion to compel lacked merit.

NewSun asserts that there is good cause to reconsider Order No. 21-343 if the order is a “final order” because the order is “erroneous and incomplete in that it does not clearly state that it is a final order and does not articulate its findings of fact and conclusions of law as to each of NewSun’s data requests at issue.”<sup>16</sup> NewSun’s request for additional explanation falls far short of establishing good cause for reconsideration. Order No. 21-343 summarizes the data requests at issue, consistent with the parties’ descriptions, and then explains that all of the data requests at issue are overly broad and not commensurate with the needs of the case.<sup>17</sup> Notably, NewSun’s motion to compel also addresses the data requests in broad categories rather than discussing each request individually.<sup>18</sup> Under the circumstances, the Commission was not required to individually address each of the numerous data requests and subparts. NewSun’s attempt to impose that burden on the Commission is unsupported and unjustified.

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<sup>15</sup> See Motion at 4-5.

<sup>16</sup> Motion at 5.

<sup>17</sup> Order No. 21-343 at 2-3, 6.

<sup>18</sup> See generally NewSun’s Motion to Compel (May 28, 2021).

## II. CONCLUSION

Order No. 21-343 is not a final order, and therefore the Commission need not reach NewSun's alternative request for reconsideration. In any case, NewSun has failed to establish good cause for the Commission to reconsider or revise the order. The Commission should not permit NewSun to further delay this docket and should proceed toward an efficient resolution.

Dated January 5, 2022

**MCDOWELL RACKNER GIBSON PC**



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