



Portland General Electric Company

Legal Department
121 SW Salmon Street • 1WTC1301 • Portland, Oregon 97204
Phone 503-464-7371 • Fax 503-464-2200
portlandgeneral.com

Brendan J. McCarthy

Assistant General Counsel III
brendan.mcarthy@pgn.com

March 20, 2024

Via Electronic Filing

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

Re: Docket UM 2273 - PUBLIC UTILITY COMMISSION OF OREGON, Investigation Into
House Bill 2021 Implementation Issues

Dear Filing Center:

Enclosed for filing in the above-referenced docket is Portland General Electric Company's
response to NewSun Energy LLC application for reconsideration.

Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "Brendan J. McCarthy". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Brendan J. McCarthy
Assistant General Counsel III

BJM:bp

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 2273**

In the Matter of
PUBLIC UTILITY COMMISSION OF
OREGON,
Investigation Into House Bill 2021
Implementation Issues.

RESPONSE TO NEWSUN ENERGY LLC
APPLICATION FOR
RECONSIDERATION

Consistent with OAR 860-001-0720, Portland General Electric Company (PGE) respectfully files a response to NewSun Energy LLC’s (NewSun) Application for Reconsideration of Order No. 24-002 issued by the Public Utility Commission of Oregon (OPUC or Commission) in UM 2273, dated January 5, 2024.

As discussed below, the Commission’s decision in UM 2273 was correct as a matter of law, reasonable, and no rehearing or reconsideration is appropriate.

I. BACKGROUND

In its Application, NewSun seeks reconsideration of only one issue: that the existing Clean Energy Plan (“CEP”) and Integrated Resource Plan (“IRP”) review processes are the appropriate place for ensuring continual progress.¹ As a proposed remedy, NewSun requests that an “evergreen” docket be opened.² According to NewSun, this path would allow determinations of continual progress to be made in a docket with its own record, and with a final, written decision that is subject to judicial review.

¹ NewSun Energy LLC Application for Reconsideration at 1 (Mar. 5, 2024).

² *Id.* at 2.

In its initial scoping order for UM 2273, the commission asked parties for feedback and discussion on whether the commission “should oversee continual progress and prompt action using processes for Integrated Resource Plan review and acknowledgment, *or whether we should establish different or additional processes* – for instance, annual filings like the separate implementation plan and compliance filings under the renewable portfolio standard.”³ (emphasis added). The commission indicated its preliminary determination, at least before the first compliance target in 2030, that it would rely on CEP review and acknowledgment decisions to accomplish the oversight.

The Commission provided three opportunities to weigh in regarding the Scoping Order, allowing for the filing of an opening brief, a reply brief and oral argument.⁴ NewSun participated in all rounds of this phase of UM 2273.⁵

In its opening brief, NewSun did not suggest that a separate docket was necessary for ensuring continual progress and indeed barely touched on the notion of the continual progress determination other than to note the Commission’s broad authority in this regard.⁶ In its reply brief, NewSun provided more detail regarding giving effect to the continual progress mandate of ORS 469A.415(6), and noted that such a demonstration could occur “in all relevant proceedings over which the Commission has jurisdiction.”⁷

In oral argument, where NewSun asked for and received time to provide comment under the section asking “What *procedural approach* should the Commission take to oversee continual

³ Commission Scoping Order No. 23-194 at 6 (Jun. 5, 2023).

⁴ Commission Order No. 23-227 at 1 (Jun. 29, 2023).

⁵ NewSun filed an opening brief, filed a reply brief and participated in oral argument.

⁶ See, e.g., NewSun Energy LLC’s Opening Brief, UM 2273, (Jul. 24, 2023) at 8 (“The Commission has broad discretion to select which method or methods it prefers to ensure true and meaningful compliance . . . with the Act.”).

⁷ NewSun Energy LLC’s Reply Brief, UM 2273, (Aug. 21, 2023) at 2.

progress . . . ?” (emphasis added) NewSun’s representative, Mr. Jake Stephens, spent his time discussing the need for a primarily punitive approach for utilities failing to meet continual progress and did not once suggest that a separate docket, *a procedural approach*, be opened.^{8,9} In this same segment of oral argument, Ms. Tonia Moro of Rogue Climate, specifically suggested that a separate docket be opened to determine continual progress.¹⁰

In Order No. 24-002, the Commission did not specifically provide for a separate docket to be opened regarding determinations of continual progress, but did note several times its ability and authority to open additional proceedings and to order utilities to take actions.

II. STANDARD OF DECISION

The Commission will grant reconsideration or rehearing of a prior Commission order when “sufficient reason” is presented.¹¹ Sufficient reason exists where “[n]ew evidence that is essential to the decision . . . that was unavailable and not reasonably discoverable before issuance of the order” or that “[g]ood cause” exists ‘for further examination of an issue essential to the decision.’¹² NewSun relies exclusively on these two rationales in making its Application.¹³ The burden is on NewSun to show that reconsideration is justified.¹⁴

III. ARGUMENT

A. **“Good cause” does not exist because NewSun had ample opportunities prior to the issuance of Order No. 24-002 to make the same request it now makes, and it did not.**

⁸ Memorandum Regarding Schedule for Oral Argument, ALJ Mellgren, (Nov. 7, 2023) at 2.

⁹ OPUC Special Public Meeting UM 2273, (Nov. 17, 2023), video starting at 1:41.

¹⁰ *Id.* at 1:54.

¹¹ ORS 756.561 (1).

¹² OAR 860-001-0720 (3)(a) and (3)(d).

¹³ NewSun Application for Reconsideration at 8.

¹⁴ OAR 860-001-0720(3) “The Commission may grant an application for ... reconsideration *if the applicant shows that there is...*” (emphasis added); *See also*, ORS 183.450 (2) “The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”; *Harris v. SAIF*, 292 Or. 683, 690, 642 P.2d 1147 (1982) (In administrative cases “[t]he general rule is that the burden of proof is upon the proponent of a fact or position, the party who would be unsuccessful if no evidence were introduced on either side.”).

The Commission should not grant reconsideration for the simple fact that NewSun had ample opportunities prior to the Commission’s issuance of Order No. 24-002 to ask for what it now requests that the Commission provide. As noted above, the Commission specifically asked parties to UM 2273 to provide feedback on this exact topic: procedural approaches to determining continual progress. NewSun had the same opportunity as other parties to make arguments that the Commission needed greater flexibility, a specific venue to receive evidence and a regular checkpoint.¹⁵ Through opening briefs, reply briefs and oral argument, NewSun declined to propose the opening of a separate docket to address continual progress compliance issues. Instead, NewSun took a different approach, arguing that the Commission had existing authority and processes in place: to give “meaningful effect to [the continual progress] mandate, the Commission should require that utilities ‘demonstrate continual progress’ in all relevant proceedings over which the Commission has jurisdiction.”¹⁶ This strategic and procedural argument was a choice on the part of NewSun.

Having not swayed the Commission to its position and failing to put forward alternative approaches during the proper times and places, NewSun now seeks a fourth bite at the apple. NewSun has provided no evidence in its Application that it was, in any way, prohibited from or denied the opportunity to argue for a separate proceeding and docket for continual progress determinations, as Rogue Climate did.¹⁷ An interest in litigating a topic for which the opportunity has already been granted does not show good cause, but a desire for special treatment. “Further examination of an issue essential to the decision” would be unnecessary had

¹⁵ NewSun Application for Reconsideration at 8.

¹⁶ NewSun Reply Brief at 2.

¹⁷ NewSun suggests that because “this is a new regulatory scheme, good cause exists for the Commission to reconsider whether it has established the appropriate regulatory tools and processes.” NewSun Application for Reconsideration at 11. This may be true, but does not explain why NewSun failed to suggest its proposal during the eight month long process of UM 2273.

NewSun merely taken the opportunity, at the time afforded to NewSun and all other parties, to argue what it now does.

Finally, Rogue Climate’s request for a separate proceeding and docket reduces the strength of NewSun’s “good cause” argument to almost nil. The existence of that request means that the Commission has already considered the idea, weighed the concept, and included it to the extent the Commission agreed, in Order No. 24-002.

B. There is no “new evidence” that was “unavailable and not reasonably discoverable” that would change the Commission’s determination.

NewSun suggests that new evidence exists that could change the decision made in Order No. 24-002. As support for this assertion, NewSun cites to “utility comments and the Commission’s recent deliberations” in IRPs, specifically LC 80 and LC 82, to make the argument that these dockets are ill-suited to making backward-looking compliance determinations.¹⁸ What NewSun fails to mention is that the IRP and acknowledgement processes under which LCs 80 and 82 were conducted have been substantially in place in their current form since the adoption of Commission Order No. 07-002 in January 2007. NewSun points to no specific comments post-January 5, 2024, that suggest a *change* to the manner in which IRPs or IRP acknowledgement processes are conducted that modify the landscape that existed *prior* to the issuance of the order. The Commission has not, for example, in recent weeks adopted a change to its IRP guidelines. Thus, it is a leap to suggest that comments made in the latest IRP round are “new evidence” that would justify reconsideration. Put another way, if the IRP is a docket that is “ill-suited for review of backward-looking compliance determinations related to the Commission’s obligation to ensure continual progress,” to the extent that this

¹⁸ NewSun Application for Reconsideration at 8.

concern existed for NewSun, it existed in the same manner during the pendency of UM 2273 and the briefing period.

Pointing to processes that have been in place in substantially the same form for over 15 years does not meet NewSun's burden. NewSun fails to provide specific evidence that anything in utility comments or the Commission's deliberations changed any specific IRP requirements or offered new interpretations of IRP processes, merely that the Commission "has wrestled with" IRP dockets.¹⁹ NewSun has failed to show that there is new evidence that was unavailable or not reasonably discoverable that would change the Commission's determination in Order No. 24-002 and therefore the Commission should not grant reconsideration.

C. NewSun's requested relief has already been granted.

As noted above, in its briefing in UM 2273, NewSun noted the plenary authority of the Commission in regard to ensuring compliance.²⁰ PGE agrees.²¹ As does the Commission. In Order No. 24-002, the Commission stated that in order to determine continual progress, it "could initiate additional processes if we need to direct utility action."²² The Commission also recognized that if it determines, in an IRP or CEP docket that continual progress has not been demonstrated, "we may also initiate additional proceedings."²³ Further, the Commission recognized that it has the flexibility and nimbleness, as well as the separate potential venue that NewSun complains in its Application is lacking, when the Commission stated that if it needs to

¹⁹ *Id.*, at 9.

²⁰ *Supra*, fn. 6.

²¹ See, e.g., ORS 756.040 and 756.060.

²² Order No. 24-002 (Jan. 5, 2024) at 26.

²³ Order No 24-002 (Jan. 5, 2024) at 29.

direct additional utility action it could utilize contested case proceedings subject to appellate review.^{24,25}

NewSun pleads that “[t]he legislature did not intend for the clean energy targets in HB 2021 to be merely aspirational goals to be considered by the utilities on a planning basis.”²⁶ But no one has suggested that the clean energy targets are purely aspirational, and NewSun’s argument does not transfer to a presumption that the Commission failed to provide for a path for ensuring continual progress. The Commission clearly stated that it has the authority to require “separate determinations, in separate orders entered in the same docket, for continual progress” and if insufficient, can institute additional proceedings and further develop the record. Therefore, not only is the relief that NewSun seeks – reconsideration to allow for the creation of an “evergreen” docket – not supported by good cause or new evidence, the request is further undercut by the fact that Order 24-002 itself already recognizes the potential for the supplemental processes for which NewSun now pleads.

The Commission should deny the Application on this basis alone.

IV. ARGUMENT IN THE ALTERNATIVE

In Order No. 24-002 the Commission states, “[w]e have treated IRP acknowledgement orders as non-final decisions . . . in which our acknowledgment is preliminary to a final decision in a rate case, and this reasoning may extend to our highly intertwined CEP acknowledgement decisions.”²⁷

²⁴ NewSun Application for Reconsideration at 8 “the Commission must have (i) some level of flexibility and nimbleness to direct action; (ii) a venue to receive evidence and review actions.”

²⁵ Order No. 24-002 (Jan. 5, 2024) at 30 “If we conclude that utilities are not making ‘continual progress’ or ‘taking actions as soon as practicable’ such that we must direct additional utility actions, we may need to initiate separate proceedings because certain types of direction could require contested case adjudication.”

²⁶ NewSun Application for Reconsideration at 10.

²⁷ Order No. 24-002 (Jan. 5, 2024) at 29.

Here, PGE agrees that the IRP/CEP is a forward-looking planning exercise, and, except as it relates to analysis required in future plans or regulatory filings, does not require specific actions on the part of the utility.^{28,29} As the Commission stated in Order No. 24-002, “[a]cknowledgment decisions inform the cost recovery risk the utility faces as it decides to take or not take certain resource actions.”³⁰ As the IRP/CEPs are planning documents, it is appropriate to consider them forward-looking and non-final determinations.

The Commission took pains to assure parties that while the acknowledgment orders were non-final, continual progress determinations under ORS 469A.415(6) would be made as final decisions subject to judicial review.³¹ And the Commission made clear that the acknowledgment and continual progress determinations would be made in “separate determinations, in separate orders.”³² What the Commission may not have done through that language was ensure that all parties understood that an acknowledgment order under ORS 469A.415 (4)(e) was a separate and distinct decision from a continual progress determination in ORS 469A.415 (6).³³ Thus, the acknowledgment order under paragraph (4)(e) was a forward-looking non-final determination and a continual progress determination under paragraph (6) was backward-looking determination.

²⁸ NewSun Application for Reconsideration at 9.

²⁹ Order No. 24-002 (Jan. 5, 2024) at 30.

³⁰ *Id.*

³¹ *Id.*, at 29. PGE demurs on whether it agrees necessarily that the latter part of this sentence is true, as we do not yet have an order that determines continual progress.

³² *Id.*

³³ Clearly, NewSun did not see it that way, and stated in its Application for Reconsideration, at 11, that “the existing IRP and CEP processes are appropriate for reviewing the adequacy of a utility’s CEP as required by ORS 469A.415 (4)(e). But these forward-looking processes are not the appropriate processes for the Commission to conduct fact-based investigations required by ORS 469A.415 (6) . . . Conducting compliance dockets apart from planning dockets would remove any doubt as to the finality and reviewability.”

PGE believes that the Commission correctly decided this issue, and that reconsideration is unnecessary to provide this clarity.³⁴ However, if the Commission determines that reconsideration is appropriate in this matter, PGE asks that the Commission provide further clarification such that, in the future, all parties understand that a CEP acknowledgment order is a non-final determination and is a different order than one assessing continual progress. PGE continues to agree with the Commission that there is no need for a separate proceeding and that continual progress determinations, under a separate order, can be made within the IRP/CEP process.

In sum, PGE believes that there are, at a minimum, three orders that could follow from a combined IRP/CEP process: 1) a non-final order acknowledging a utility's IRP; 2) a non-final order acknowledging a utility's CEP under ORS 469A.415 (4)(e); and 3) an order making a determination as to the utility's continual progress under ORS 469A.415 (6). Finally, if these are insufficient, the Commission can initiate additional proceedings.

V. CONCLUSION

PGE respectfully requests that Commission deny the Application for Reconsideration. If, however, the Commission determines that reconsideration is appropriate in this matter, PGE respectfully requests that the Commission consider PGE's proposal to provide additional clarification to Order No. 24-002 consistent with section IV of this response.

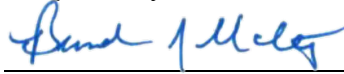
///

///

³⁴ As already noted, language in the order plainly states the Commission's intentions to make separate determinations in separate orders for continual progress and acknowledgment.

Dated this 20th day of March, 2024.

Respectfully submitted,



Brendan McCarthy, OSB No. 963556
Assistant General Counsel III
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
Telephone: 503-464-7371
Email: brendan.mccarthy@pgn.com