PACIFIC POWER
A DIVISION OF PACIFICORP

825 NE Multnomah, Suite 2000
Portland, Oregon 97232

January 10, 2022

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: LC 77—PacifiCorp's Motion for Leave to File Reply and Reply

PacifiCorp d/b/a Pacific Power encloses for filing PacifiCorp's Motion for Leave to File Reply and Reply in the above-referenced docket.

Informal inquiries may be directed to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Shelley McCoy
Director, Regulation

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

LC 77

In the Matter of PACIFICORP, dba PACIFIC POWER, 2021 Integrated Resource Plan.	**PACIFICORP'S MOTION FOR LEAVE TO FILE REPLY AND REPLY**

PacifiCorp dba Pacific Power (PacifiCorp or the Company) submits this Motion for Leave to File Reply and Reply in response to NewSun Energy LLC's (NewSun) Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons, filed on January 3, 2022 (NewSun's Response), and Sierra Club's Response to PacifiCorp's Objection to NewSun Energy's Designation of Qualified Persons and NewSun Energy's Response Thereto (Sierra Club Response), filed on January 5, 2022.

PacifiCorp respectfully asks the Public Utility Commission of Oregon (Commission) to uphold its Objection to NewSun's Designation of Qualified Persons (PacifiCorp's Objection).[1]

I. REQUEST FOR LEAVE TO FILE REPLY

The Commission's rules do not explicitly contemplate the filing of a reply in support of an objection to designation of qualified persons under a protective order. However, as a matter of discretion, the Commission or its Administrative Law Judges have allowed additional briefing or pleadings not otherwise contemplated by the procedural rules if the

[1] PacifiCorp filed an Objection to NewSun's Designation of Qualified Persons on December 23, 2021.

additional information may aid in understanding the issues in a docket, better explains a party's position, or will otherwise benefit the Commission's review of an issue.[2] Allowing a reply is especially warranted where a responding party has raised a new argument or filed an unauthorized response, because an opposing party does not otherwise have an opportunity to respond to the party's argument.[3] In this case, NewSun has raised a host of new issues in its response, and Sierra Club filed a response not contemplated by the Commission's rules or the protective order in this docket. PacifiCorp respectfully requests that the Commission accept this reply to the responses filed by NewSun and Sierra Club.[4]

II. ARGUMENT

A. PacifiCorp's Objection to NewSun's Designation of Qualified Persons Should Be Upheld

PacifiCorp reiterates its objections to providing NewSun, a competitive project developer, with access to confidential information in this docket. PacifiCorp will not repeat the information and arguments filed in PacifiCorp's Objection but will briefly respond to a number of NewSun's assertions.

---

[2] *See, e.g., In the Matter of Sandy River LLC v. Portland Gen. Elec. Co.,* Docket No. UM 1967, ALJ Ruling at 2 (Apr. 26, 2019) (granting leave to file sur-response and explaining supplemental briefing "may aid the understanding of issues in this docket[.]"); *In Re Pacific Power & Light, Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket No. UE 177, Order No. 08-002 at 4 (Jan. 3, 2008); *In Re Portland Gen. Elec. Co. Application for Deferred Accounting of Excess Power Costs Due to Plant Outage*, Docket No. UM 1234, Order No. 07-227 at 4 (Jun. 8, 2007) (explaining that the Commission would accept a reply because it "better explains [the party's] original position").

[3] *See, e.g., Ben-Kotel v. Howard University,* 319 F.3d 532, 536 (D.C. Cir. 2003) (noting that trial court routinely grants motions for leave to file additional reply when a party would be unable to contest matters presented to the
court for the first time in the opposing party's pleading (*citing Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C.
2001)).

[4] The protective order in this docket contemplates that PacifiCorp would file an objection and that NewSun would file a response; it does not contemplate filings by other stakeholders, nor did Sierra Club seek leave to file its response. *See* Order No. 21-271, Appendix A at ¶¶14-15 (Aug. 30, 2021).

First, NewSun is correct that the Commission has always encouraged public participation in its IRP process. But the public nature of integrated resource plan (IRP) proceedings was never intended to expose competitively sensitive information in a manner that would harm utility customers. Second, NewSun has provided no justification for receiving access to competitively sensitive information that would override the harm to the competitive solicitation process and ultimately to customers that would result. Third, to the extent NewSun is seeking the information for use in docket UM 2011, NewSun should make an appropriate request in that proceeding, where relevant information can be scoped and addressed commensurate with the needs of that proceeding. Finally, in response to NewSun's demands that PacifiCorp simply redact the information on the confidential data disc, the request is unreasonable. As PacifiCorp explained in PacifiCorp's Objection, redacting the data disc would be extremely onerous; as a result, even if PacifiCorp were to undertake this unreasonably burdensome effort, it would be unlikely to satisfy NewSun in any event.

1. The public nature of the Commission's IRP proceedings was never intended to expose competitively sensitive information to developers

According to NewSun, the Commission's interest in encouraging "public" participation in the IRP process means that NewSun, and any other competitive developer that might intervene, should have unfettered access to a utility's competitively sensitive information.[5] This, according to NewSun, is the definition of "public" process.

[5] NewSun asserts that all IRP participants should have access to all competitively sensitive information, even though "[s]ome of these participants, yes, may be competitors of the utilities. But that is okay—and appropriate." NewSun Response at 14.

The public process begins well before the IRP is actually filed. Leading up to the IRP filing, the Company conducts a robust, open and transparent process throughout the development of its IRPs and makes effort to be responsive to and incorporate where possible stakeholder feedback in the inputs, assumptions and methodologies among other aspects of its IRP, before it is even filed.[6] Further, contrary to NewSun's assertions, however, the public nature of IRP proceedings was never intended to expose competitively sensitive information to developers, a disclosure that would harm the competitive bidding process and ultimately utility customers. The Commission has always taken great care to protect a utility's competitively sensitive information and has done so in the IRP process since its inception. The Commission adopted least-cost, least-risk planning in the late 1980s with a key goal of lowering the cost of utility resource procurement. Consistent with this goal, the Commission identified the key procedural elements of that planning process as follows:

1. Significant public and other utility involvement in plan preparation.
2. *Protection of competitive secrets.*
3. Opportunity for parties to request supplemental orders to clarify or modify Commission's directives.[7]

The protection of competitive information, in other words, has always been foundational to the IRP process.

[6] For example, in its December 3, 2021 comments filed in docket LC 77, Staff acknowledged the Company's efforts to provide stakeholders and interested parties information on the resources planning process and the opportunity to provide feedback and the Company's efforts to incorporate feedback in the IRP. Staff's Opening Comments at 3.

[7] *In re Pub. Util. Comm'n of Oregon; Investigation into Integrated Resource Planning;* Docket No. UM 1056, Order No. 07-002 (Jan. 8, 2007) (*citing* Order No. 89-507) (emphasis added). The Commission's IRP guidelines were updated over time to specify in more detail the process for protecting confidential information, including "through use of a protective order, through aggregation or shielding of data, or through any other mechanism approved by the Commission." *See id*. at 8.

The Commission has recognized the importance of protecting competitively sensitive market information not only in the IRP process, but relatedly, in the context of competitive resource procurement—the source of the commercially sensitive data at issue. The Commission's Request For Proposals (RFP) process, like the IRP process, is driven in large part by the goal of "minimiz[ing] long-term energy costs" for customers.[8] Exposure of competitive market information to individual project developers who may bid in future RFPs—like NewSun—would undermine that process to the detriment of utility customers. The Commission has historically recognized the importance of protecting such information and should continue to do so.[9]

In short, the Commission's goal of encouraging "public participation" in IRP proceedings has never been interpreted to require the release of competitively sensitive information to individual developers with a financial interest in competitive project development.

2. NewSun has provided no justification for receiving competitively sensitive information that would override the harm to customers and RFP bidders.

NewSun argues that it wishes to review competitively sensitive information "*for the ratepayers,*" presumably on the theory that NewSun's special expertise will add to the

[8] *See, e.g., In re Competitive Bidding by Investor-Owned Elec. Utils.*, Docket No. UM 316, Order No. 91-1384 (Oct. 18, 1991). NewSun's assertion about benchmark bids misses the point of competitive resource solicitations. The regulatory goal of requiring a utility to conduct a competitive RFP is to allow a utility to obtain competitive, third-party market data against which a benchmark can be evaluated, with a goal of allowing the Commission to evaluate the utility's least-cost, least-risk options.

[9] *See id; see also, In re PGE, 2018 Request for Proposals for Renewable Resources*, Docket No. UM 1934, Order 18-366 (Oct. 3, 2018) (adopting a protective order intended to shield confidential market information from individual developers that could "bid into future RFPs"). NewSun argues that PacifiCorp never *promised* to protect bidders' competitively sensitive information, but only offered to use best efforts to do so. NewSun Response at 19. A utility's reputation as a counterparty acting in good faith requires it to take all steps necessary to protect a third-party's competitive information. Moreover, it is inappropriate to agree to be contractually bound to shield information where there remains any outside risk of compelled disclosure – in a lawsuit, for example – that would require a party to breach that promise.

Commission's review of PacifiCorp's IRP data. But giving NewSun access to this information would give NewSun an unfair advantage in a future RFP and would violate the Company's commitments to third-party developers, damaging PacifiCorp's ability to conduct a robust RFP process going forward.[10] Any specialized expertise NewSun might bring to the table—the specifics of which are unclear—is undermined by the harm that would be caused by granting NewSun's request.

Moreover, NewSun's assertion that independent power producers are not adequately represented in the Commission's IRP dockets is also unpersuasive, given that industry trade groups like Northwest and Intermountain Power Producers Coalition have long had a strong voice in the IRP process.[11] Meanwhile, NewSun's own financial interest in reviewing PacifiCorp's competitive market information is self-evident.[12]

Furthermore, NewSun alleges that PacifiCorp did not file an objection to NewSun's designation of qualified persons within the five business days noted in Section 13 of the Commission's General Protective Order. To the extent NewSun is suggesting that PacifiCorp has somehow waived its right to protect confidential data, PacifiCorp disagrees. First, PacifiCorp would note that the General Protective Order contemplates the parties' engaging in informal discussions to try to resolve the dispute before an objection is filed. *See* Sections 14 and 15. Upon receiving NewSun's signatory pages, PacifiCorp engaged in a good faith effort to examine the data disc and to discuss internally whether such information could be provided. Second, the context of this dispute would not support finding of waiver.

---

[10] *See* PacifiCorp's Objection at 4-5.
[11] *See, e.g.,* NewSun Response at 16. Trade groups like NIPPC can provide meaningful sector representation while maintaining the ability to shield confidential market data from individual developers.
[12] As NewSun noted in its petition to intervene in this docket, "[t]he outcome of this docket could have a direct impact on NewSun's business." Petition to Intervene of NewSun Energy LLC at 2 (Sept. 27, 2021).

The provisions of the Commission's protective order do not support such a remedy, which would undermine the customer-protection goals of the protective order in any event. Third, any delay by PacifiCorp caused no harm to NewSun, who remains free to assert its position in this docket. Finally, a finding of waiver would cause irreparable harm to PacifiCorp's customers, its third-party bidders, and the integrity of its RFP process. Thus, a finding of waiver would be inappropriate and inequitable.[13]

In short, NewSun's view that competitive market information should be available "to all potential [RFP] bidders"[14] is based on a faulty premise and its assertion that such information should be made widely available is anathema to sound regulatory practice. NewSun has provided no justification for receiving access to competitive market data in this docket that would justify the resulting harm to the RFP process and ultimately to customers.

3. To the extent NewSun wishes to obtain information relevant to docket UM 2011, it should make an appropriate request in that proceeding.

NewSun states that it is asking for confidential information in this docket because "*in UM 2011 [PacifiCorp] recommended we get access to this data in the IRP docket*."[15] A PacifiCorp representative in docket UM 2011 did, in fact, remark that information relevant to certain issues in docket UM 2011 could be found on the confidential data disc in docket LC 77. This informal comment was not meant to suggest that parties to docket UM 2011 who were not already participating in docket LC 77 should intervene in order to seek access to all

[13] It should be noted that NewSun has articulated no legal interest in this docket other than its own financial interest, and no public interest other than a broad interest in making its "experts" available to the Commission. Neither supports a legal "right" to obtain data that would harm customers.
[14] *Id.* at 12 (emphasis in original).
[15] NewSun Response at 5.

confidential information relevant to PacifiCorp's broader IRP docket, nor did it suggest that any party in particular was appropriately qualified to do so.

To the extent NewSun wishes to obtain information relevant to issues in docket UM 2011, NewSun should seek that information through an appropriately scoped discovery request in docket UM 2011. While it is not clear to PacifiCorp that this would solve all of the competitive market issues, the resolution of any disagreements regarding information relevant to docket UM 2011 should be resolved in docket UM 2011, where the scope and breadth of the information requested may be addressed within the context of that docket's specific scope.

4. To the extent NewSun demands that PacifiCorp simply redact the information on the confidential data disc, the request is unreasonable; moreover, it is unlikely to resolve the issues in dispute.

To the extent NewSun demands that PacifiCorp simply redact the information on the confidential data disc, the request is unreasonable. As PacifiCorp explained, the information contained in the 2021 IRP confidential data disc includes project-specific information related to final shortlist bids acknowledged in the Company's recently concluded 2020 All-Source RFP and previous Company procurements. The disc contains in excess of 1,500 files, with competitively sensitive information embedded throughout the files, often in multiple places in each file. Redacting the data would be extremely onerous. NewSun's request would likely lead to significant delays in the IRP proceedings, proceedings that are already extremely data-intensive and demanding.

Even if redaction were reasonable, which it is not, NewSun's Response makes clear that it is interested in receiving competitively sensitive information, not redacted confidential information. As NewSun explains, "we do not need, nor is it appropriate to have the utilities

(the regulated party) make filtering decisions about what the appropriate experts can see."[16] As NewSun concedes, it is not seeking to sign a modified protective order, and, in any case, NewSun has "concern that the data subject to [even a modified protective order addressing competitive issues] should also be public."[17] Thus, even if the Commission were to order PacifiCorp to designate the competitively sensitive material under a modified protective order or redact the competitively sensitive information, a task that would take a significant amount of time and heavily burden the information flow in this docket, it is not clear that NewSun would consider the designations or redactions appropriate in any event.[18]

Given this context, PacifiCorp respectfully asks the Commission to sustain PacifiCorp's Objection.[19]

B. Sierra Club

Sierra Club filed a response addressing NewSun's and PacifiCorp's dispute about NewSun's request for access to competitive information. Sierra Club does not meaningfully address the central issue in dispute, which is NewSun's assertation that it should have access

[16] NewSun Response at 19. In fact, a utility is required to exercise prudence in the operation of its business, which includes the duty to identify and protect information the release of which would harm the utility and its customers. In any case, this "filtering" is the foundation of every protective order that shields commercially sensitive information from disclosure, whether at the Commission or elsewhere.

[17] NewSun Response at 21.

[18] As noted previously, NewSun asserts that all IRP participants should have access to all competitively sensitive information, even though "[s]ome of these participants, yes, may be competitors of the utilities. But that is okay—and appropriate." NewSun Response at 14.

[19] PacifiCorp would be willing to seek a modified protective order focused on shielding market information from individual developers if the Commission believes that is the appropriate route. It is not clear, however, that the Commission would prefer PacifiCorp to take this action given the context of this dispute. To date, PacifiCorp has designated the confidential data disc under the Commission's general protective order to facilitate and streamline access for appropriately qualified parties. A modified protective order could, of course, contain specific provisions related to competitive entities, but it presumably would not solve any issues related to the overly burdensome task of redaction, nor would it address NewSun's assertion that it is *entitled* to competitively sensitively information. In the event the Commission believes a modified protective order is appropriate, PacifiCorp would be willing to seek such a protective order and designate the confidential data disc under that modified protective order. PacifiCorp would, however, maintain its objections to NewSun and other developers receiving that disc.

to competitively sensitive market information, including information on third-party RFP bids. Instead, Sierra Club's Response primarily makes broad, non-specific statements alleging utility over-designation of confidential information.[20]

PacifiCorp would note that the Commission's General Protective Order requires utilities to make "reasonable efforts" to designate only the portions of information that are confidential. This is relatively straightforward when a party is filing testimony, for example, and is required to selectively redact portions of that testimony. In this case, however, selective redaction would be extremely onerous and unduly burdensome, as the Company explained the unduly burdensome nature of this redaction in PacifiCorp's Objection.[21] Sierra Club's Response does not address this issue, nor does it offer any specific argument in response to issue, nor of PacifiCorp's assertion that its designation of the data disc as confidential was reasonable. Consequently, Sierra Club's broad assertions about implementation of the Commission protective orders do not aid in the resolution of this dispute.

Second, to substantiate its sweeping assertions that utilities routinely over-designate confidential information, Sierra Club points to PacifiCorp's designation of its coal supply contracts as confidential and asserts that PacifiCorp's designation of such information as confidential has long been inappropriate. PacifiCorp is able to over-designate information about its coal contracts as confidential, Sierra Club asserts, because parties like Sierra Club simply do not have the resources to challenge those designations.[22]

[20] Sierra Club Response at 2.
[21] *See* PacifiCorp's Objection at 3-5.
[22] Sierra Club Response at 2.

In fact, Sierra Club has challenged PacifiCorp's confidential designation of its coal supply agreements multiple times, not only at this Commission, but in court. For example, Sierra Club challenged PacifiCorp's confidential designation of information related to coal supply agreements as recently as 2018. At the end of that litigation, the Commission issued a 10-page order upholding PacifiCorp's confidentiality designations.[23]

In short, Sierra Club's Response makes broad, unsupported statements that have no bearing on the specific issues in dispute between PacifiCorp and NewSun.

III. CONCLUSION

PacifiCorp respectfully asks the Commission to uphold its Objection to NewSun's Designation of Qualified Persons.

Dated January 10, 2022

Carla Scarsella

Carla Scarsella
Deputy General Counsel
PacifiCorp
825 NE Multnomah Street, Suite 2000
Portland, Oregon 97232
Phone: (503) 813-6338
Email: carla.scarsella@pacificorp.com

Attorney for PacifiCorp, dba Pacific Power

[23] See In re PacifiCorp, dba Pacific Power, 2017 Integrated Resource Plan and 2019 Integrated Resource Plan, Docket Nos. LC 67 and LC 70, Order No. 18-465 (Dec. 14, 2018).