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February 7, 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 Request for Certification of ALJ Ruling

PacifiCorp d/b/a Pacific Power encloses for filing PacifiCorp's Request for Certification of ALJ Ruling 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 REQUEST FOR
CERTIFICATION OF ALJ RULING**

Pursuant to Oregon Administrative Rule (OAR) 860-001-0110, PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully requests that the Administrative Law Judge (ALJ) certify for the Public Utility Commission of Oregon’s (Commission) consideration the January 21, 2022, ruling denying PacifiCorp’s Objection to NewSun Energy LLC’s (NewSun) Designation of Qualified Persons under General Protective Order No. 21-271 (Ruling).

I. INTRODUCTION

In an unprecedented decision, the Ruling requires PacifiCorp to release competitively sensitive information of projects from previous energy resource procurements to a developer and its consultant, including the projects on the recently acknowledged final shortlist in the Company’s 2020 All-Source Request for Proposal (2020AS RFP) *for which the Company is still in the process of negotiating agreements.*¹ PacifiCorp is not aware of a previous Commission decision where a developer was allowed such access to its competitors’ project-specific information with a simple admonishment that the information should not be used in developing future bids. The Ruling runs contrary to the very Commission principles that govern the integrated resource plan (IRP) process, which includes the protection of

¹ *In re PacifiCorp, dba Pac. Power, Application for Approval of 2020 All-Source Request for Proposal*, Docket No. UM 2059, Order No. 21-437 (Nov. 24, 2021).

competitive secrets and undermines the integrity of the competitive bidding process for energy resource procurement. The Company requests the Ruling be certified to the Commission and that the Commission reverse the Ruling and deny NewSun access to competitively sensitive information of its potential competitors.

There is good cause to certify the Ruling to the Commission. The Ruling may result in substantial detriment to the public interest if not reversed because it requires PacifiCorp to disclose competitively sensitive information from previous energy resource procurements to NewSun.² Providing NewSun with its competitors' project-specific information, including pricing, especially from an active bidding process, would unjustifiably give NewSun an unfair commercial advantage in future development opportunities and would cause irreparable harm to PacifiCorp's competitive bidding processes, thereby harming PacifiCorp and its customers. Furthermore, NewSun has failed to demonstrate that it holds a legitimate noncompetitive need to access the confidential pricing information to participate in this proceeding. And, despite its suggestions to the contrary, NewSun can cite no Commission precedent suggesting that the "public" nature of the Commission's IRP proceedings means developers have a right to receive project-specific information of its competitors.³ The Ruling is especially problematic given that the Company initiated a 2022AS RFP approval process on September 2, 2021, and expects to receive bids for that RFP in early 2023.⁴ If not reversed, the Ruling's detrimental impact will extend into the foreseeable future as the Company is facing extraordinary climate goals in Oregon and other jurisdictions and

² The information that NewSun seeks to access is contained in PacifiCorp's 2021 IRP confidential data disc and includes project-specific information related to final shortlist bids acknowledged in the Company's recently concluded 2020AS RFP and previous Company procurements.

³ See NewSun's Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons at 2 (Jan. 3, 2022).

⁴ *In re PacifiCorp, dba Pac. Power, Application for Approval of 2022 All-Source Request for Proposals*, Docket No. UM 2193, Application to Open Independent Evaluator Selection Docket (Sept. 2, 2021).

anticipates that it will continue to face demanding overlapping IRP and RFP cycles in future years. Thus, it is likely that there will be an open RFP proceeding and/or recently concluded RFPs as the Commission considers an IRP.

PacifiCorp welcomes public participation in its IRP process and supports NewSun's right as a party to meaningfully participate in this proceeding by having access to certain PacifiCorp data. To be clear, PacifiCorp does not oppose NewSun's access to non-competitively sensitive confidential information and is only recommending denying access to the 2021 IRP confidential data disc because the unduly burdensome nature of redacting or aggregating such information. NewSun's access to competitively sensitive information, to be able to advance its position regarding the Company's 2021 IRP, must be weighed against the harm to PacifiCorp and its customers by providing that information. The harm caused to PacifiCorp and its customers outweigh NewSun's access to its competitors' project-specific information from previous resource procurements because NewSun has not and cannot demonstrate a legitimate noncompetitive interest in this information. Furthermore, releasing such information would cause PacifiCorp to set aside commitments it has made to its RFP bidders and would undermine the integrity of the competitive bidding process.

Therefore, PacifiCorp urges the Commission to reverse the Ruling. In reversing the Ruling, if the Commission determines that NewSun should be provided greater access to non-competitively sensitive confidential information, PacifiCorp recommends that it be directed to work with NewSun to identify a subset of redacted or aggregated files from the confidential IRP data disc that support the Company's preferred portfolio. Because of the unduly burdensome nature of trying to redact competitively sensitive data and in an attempt to resolve this matter, PacifiCorp has already offered to provide a list of files on the

confidential data disc and to work with NewSun to identify files that it is interested in analyzing. In repeating its position that it needs the information for use in docket UM 2011⁵ and to evaluate the 2021 IRP, NewSun indicated that at this time it is interested in receiving the confidential data disc with only the 2020AS RFP competitively sensitive information redacted or aggregated. However, PacifiCorp could not agree, not only because the scope of redaction/aggregation should be greater than the information related in the 2020AS RFP, but to create such a disc would take well over 140 manhours to complete. PacifiCorp informed NewSun that if it changes its position, the Company remains open to resolving this issue.

PacifiCorp also recommends, that if the Commission wants to set parameters around the presentation of confidential information so as to increase the access to information in IRP proceedings, it should initiate a rulemaking, where it can evaluate whether and to what extent information should be redacted or withheld from a particular stakeholder. The Commission's current protective order rules, while generally workable in the context of a typical contested case proceeding, are unworkable in the context of an IRP with its sheer volume of information, particularly if IRPs going forward are likely to involve the participation of competitive developers insisting on reviewing confidential information that includes competitively sensitive data.⁶ In a rulemaking, Staff, utilities, developers, and other stakeholders can meaningfully participate and provide input and evaluate issues such as when information from previous procurement cycles becomes stale and no longer has commercial value. Allowing the Ruling to stand would decide a broad policy issue affecting all Oregon utilities by effectively determining the scope of public participation and access to developer

⁵ *In the Matter of Public Utility Commission of Oregon, General Capacity Investigation*, Docket No. 2011.

⁶ PacifiCorp is unaware of any prior IRP proceeding where a competitive developer intervened and requested the type of information sought by NewSun.

project-specific information in all future IRP proceedings—all in a proceeding in which only a handful of stakeholders are represented.

In sum, and for the reasons set forth in this request, the Ruling will cause substantial detriment to the public interest and good cause exists for certification.

II. BACKGROUND

On September 1, 2021, PacifiCorp filed its 2021 IRP in docket LC 77. Pursuant to the General Protective Order issued in this proceeding,⁷ the Company provided public and confidential workpapers supporting its 2021 IRP. The confidential workpapers were contained on the 2021 IRP confidential data disc, which includes project-specific information from previous resource procurement processes, including the final shortlist acknowledged in the Company's recently concluded 2020AS RFP. Only parties that executed the General Protective Order were provided the confidential data disc.

NewSun intervened on September 27, 2021. Pursuant to the procedural schedule in docket LC 77, on December 3, 2021, Staff and Intervenor comments were filed and NewSun did not file comments. On December 6, 2021, NewSun filed signatory pages under the General Protective Order in this docket for its Chief Executive Officer, Mr. Jacob Stephens; In-House Counsel, Policy & Regulatory Affairs, Ms. Marie Barlow; executive assistant, Ms. Leslie Schauer; and its consultant, Ms. Brittany Andrus. NewSun is a developer of solar and energy storage projects. As described in greater detail in its Objection to NewSun's Designation of Qualified Persons, filed on December 23, 2021 (Objection), which is Attachment A to this Request for Certification, PacifiCorp determined that it would be inappropriate to provide a developer like NewSun the competitively sensitive project-specific

⁷ Order No. 21-271.

information contained within its 2021 IRP confidential data disc because disclosure thereof would put PacifiCorp and its customers at a significant commercial disadvantage and would force PacifiCorp to set aside commitments it made to third-party developers. PacifiCorp therefore asked NewSun to withdraw its signatory pages under the General Protective Order. NewSun did not agree to withdraw its signatory pages and PacifiCorp thereafter filed its Objection pursuant to Paragraph 15 of the General Protective Order.

On January 3, 2022, NewSun filed its Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons (NewSun's Response) and on January 5, 2022, the Sierra Club filed its Response to PacifiCorp's Objection to NewSun's Designation of Qualified Persons and NewSun Energy's Response Thereto (Sierra Club's Response).

On January 10, 2022, PacifiCorp filed its Motion for Leave to File Reply and Reply to NewSun's Response (Reply) asking the Commission to uphold its Objection, which is Attachment B to this Request for Certification.

On January 21, 2022, the ALJ issued the Ruling denying PacifiCorp's Objection. PacifiCorp requests certification and reversal of the ALJ's Ruling for the reasons set forth below.

III. LEGAL STANDARD

Under OAR 860-001-0110, a party may request that an ALJ certify an ALJ's written or oral ruling for the Commission's consideration within 15 days of the date of service of the ruling or date of the oral ruling.⁸ An ALJ must certify a ruling to the Commission if the ALJ

⁸ OAR 860-001-0110(1).

finds that good cause exists for certification or that the ruling “may result in substantial detriment to the public interest or undue prejudice to a party[.]”⁹

IV. ARGUMENT

As the ALJ Ruling correctly states, “[w]hen evaluating disputes under a protective order, [the Commission] consider[s] whether the party or person seeking to be qualified has a legitimate and non-competitive need to access the information for the purposes of participating in the proceeding in which the information was filed. [The Commission] also consider[s] the potential harm that could result from allowing access to the information in question.”¹⁰

With respect to the question of harm, the ALJ concluded that PacifiCorp failed to substantiate its assertion that competitive harm would result from granting NewSun’s request for access to PacifiCorp’s confidential information.¹¹ In applying the Commission’s analysis, the Ruling neither analyzed nor drew conclusions about NewSun’s interest in receiving the information at issue. PacifiCorp asserts that both of these conclusions were in error.

A. Release of Project-Specific Information to Other Developers Would Cause Irreparable Harm to PacifiCorp’s Future Competitive Solicitations and PacifiCorp Customers.

1. The ALJ Ruling erred by concluding that project-specific information from previous resource procurements is not competitively sensitive.

As PacifiCorp explained in its Objection and Reply, the 2021 IRP confidential data disc includes project-specific information related to previous and current Company energy resource procurements, including the final shortlist bids acknowledged in the Company’s

⁹ OAR 860-001-0110(2)(a).

¹⁰ Ruling at 4.

¹¹ Ruling at 4.

recently concluded 2020AS RFP, where contract negotiations are ongoing. This includes cost and operational data for each non-qualified facility (QF) power purchase agreement (PPA) and owned asset. Table 1 below summarizes the data at issue for each group of these resources.

Table 1: Resource Groups and Information

<u>Resource Group</u>	<u>Information at Issue</u>
RFP projects	IRP inputs include project-specific prices, 8760 capacity factors, and other operating characteristics. IRP outputs include cost and volume.
Non-QF PPAs	IRP inputs include project-specific prices, 8760 capacity factors, and other operating characteristics. IRP outputs include volume.
Owned Assets	IRP inputs include project-specific 8760 capacity factors and other operating characteristics. IRP outputs include volume.

In analyzing this information, the ALJ concluded that “PacifiCorp has not shown generators’ cost information from past years has such significant commercial value that the information may not be shared under the protections of the [General Protective Order].”¹² The ruling further concluded that, “PacifiCorp’s IRP describes changing prices for new renewable projects, indicating that past cost information is a useful input for the IRP, but not so sensitive as to create a competitive advantage to a [General Protective Order] signatory.”¹³ Respectfully, these conclusions are manifestly incorrect.

First, sensitive pricing information and other non-public competitive information related to project development has commercial value and meets the legal definition of a trade

¹² Ruling at 4.

¹³ Ruling at 4.

secret.¹⁴ Courts have long concluded that the release of a company's trade secrets to competitors can give those competitors a market advantage, and in doing so, give rise not only to a finding of harm, but a finding of irreparable harm.¹⁵

Because project-specific information from previous RFPs is competitively sensitive, its release to competitors would undermine third parties' trust in the integrity of PacifiCorp's RFP process and damage those developers whose information was released. Information that can be gleaned from the information in Table 1 above can be used to inform not only a receiving developer's future bids providing it an edge in tailoring its submitted bids in future procurements but also provide details about these existing projects, such as location, and renewable resource information that can then be used to unfairly constrain that existing project (i.e. land surrounding a project can be purchased thereby limiting expansion of the facility). NewSun's access to pricing data, resource data (such as 8760 capacity factors) and any insights into operating and maintenance pricing of projects would provide it with confidential information that would have otherwise been developed independently of NewSun. With this information, NewSun would have development insights that could impact competing developers' resources (such as wind waking)¹⁶ and possibly impact PacifiCorp Transmission energy resource interconnection service/network resource interconnection service costs through creating additional area congestion. As a result,

¹⁴ See, e.g., *SI Handling Sys. v. Heisley*, 753 F2d 1244 (3d Cir 1985) (pricing information not readily obtainable to other competitors in the industry qualifies for trade secret protection); *Hillenga v. Dep't of Revenue*, No. TC-MD 170035G, 2019 Ore. Tax LEXIS 87, at *4 (TC Dec. 20, 2019) (same).

¹⁵ See, e.g., *SI Handling Sys. v. Heisley*, 753 F2d 1244 (3d Cir 1985) (pricing information not readily obtainable to other competitors in the industry qualifies for trade secret protection); *Hillenga v. Dep't of Revenue*, No. TC-MD 170035G, 2019 Ore. Tax LEXIS 87, at *4 (TC Dec. 20, 2019) (same).

¹⁶ The wake effect is the aggregated influence on the energy production of a wind farm, which results from the changes in wind speed caused by the impact of the turbines on each other. It is important to consider effects from neighboring wind farms and the possible impact of wind farms that will be built in the future.

historically, the Commission has recognized that forcing utilities to share sensitive project-specific data with other developers is untenable and has consistently protected competitive market information from disclosure to other developers.

For example, during PacifiCorp’s 2017 TAM proceedings, when PacifiCorp had not yet finalized all of the purchase agreements under its renewable energy certificate (REC) RFP, the ALJ agreed with PacifiCorp that its ongoing negotiations with counterparties “require[d] the utmost [sic] confidentiality.”¹⁷ The ALJ upheld PacifiCorp’s objection to sharing the information with parties who “could be either competitors for the future purchase of RECs or potential future REC sellers” under *any* type of protective order.¹⁸ The ALJ further notes that the information in dispute was not necessary for the party to advance its arguments. The Commission likewise shielded confidential bidder information received by PacifiCorp and Portland General Electric Company (PGE) during their respective RFP processes from existing competitors as well as bidders in “future RFPs.”¹⁹

Second, information from PacifiCorp’s 2020AS RFP process is far from stale. PacifiCorp’s request for approval of its 2020AS RFP was filed in early 2020, that request

¹⁷ *In re PacifiCorp, dba Pac. Power, 2017 Transition Adjustment Mechanism*, Docket No. UE 307, Ruling Sustaining PacifiCorp’s Objection to Noble Solutions Request to Designate Kevin C. Higgins as a Qualified Consultant Under Order No. 16-231 (Aug. 25, 2016) (hereinafter UE 307 Ruling) (In sustaining PacifiCorp’s objection, the Commission rejected Noble Solutions’ attempt to designate its consultant as a qualified person to review highly confidential information concerning PacifiCorp’s 2016 REC RFP, including the volume, vintage, and price of RECs. In so holding, the Commission acknowledged that the Company had not yet finalized all its purchase agreements under the REC RFP and the ongoing negotiations with counterparties required the utmost confidentiality. The Commission also recognized that Mr. Higgins represented entities that could be either competitors for the future purchase of RECs or potential future REC sellers.)

¹⁸ Docket No. UE 307, ALJ Ruling at 1 (sustaining PacifiCorp’s objection to providing RFP information to a potential competitor).

¹⁹ *In re PacifiCorp, dba Pac. Power, Application for Approval of Final Draft 2017R Request for Proposals*, Docket No. UM 1845, Order No 18-080 (Mar. 8, 2018) (adopting a modified protective order that prevents bidders accessing competitively sensitive information and only provides access to attorneys who work with bidders on unrelated matters); *In re Portland Gen. Elec. Co., 2018 Request for Proposals for Renewable Resources*, Docket No. UM 1934, Order No. 18-366 at 1 (Oct. 3, 2018) (adopting a protective order to shield confidential market information from individual developers that could “bid in future RFPs”).

kicked off the regulatory process. PacifiCorp did not receive bids or enter into negotiations until much later in the RFP process. In fact, Commission rules state that negotiations with developers on the final shortlist cannot begin until a utility submits the final shortlist with the Commission for acknowledgement.²⁰ With respect to the 2020AS RFP, PacifiCorp filed its request for acknowledgement of the final shortlist on June 15, 2021, and acknowledgement was not received until November 24, 2021. That acknowledgement simply allowed PacifiCorp to move forward in earnest with negotiations, which remain active and ongoing today.

Thus, while it may not have been clear from PacifiCorp's Objection and Reply, negotiations for the projects on the 2020AS RFP final shortlist are ongoing and agreements have not been finalized even though the regulatory docket has concluded. PacifiCorp continues to negotiate terms and conditions of agreements with the developers on its acknowledged final shortlist and as such the contracts associated with the RFP are not yet complete. In short, information from the 2020AS RFP process is competitively sensitive.²¹ Concluding that information from a 2020AS RFP is no longer competitively sensitive misunderstands the cadence of PacifiCorp's contracting process.

Ordering PacifiCorp to turn the project-specific information in Table 1 above over to NewSun—and, presumably, any other competitive bidder that asks for it—would undermine the competitive nature of the RFP process, erode bidder trust in the RFP process, and irreparably damage PacifiCorp's ability to conduct a robust and meaningful RFP. This is especially concerning as the Company has just filed for approval of another RFP, the

²⁰ OAR 860-089-0500(2).

²¹ Given this timeline, the information would remain highly sensitive in February 2022 even if PacifiCorp had concluded its recent contract negotiations.

2022AS RFP, for which bids are expected to be received in early 2023.²²

The Company maintains that NewSun be denied access to the information contained in Table 1. Perhaps there is a point that project-specific information of a certain vintage is stale and access to which would be appropriate. However, that is a question that should be addressed in a rulemaking where all interested stakeholders, including developers, can participate.

2. Releasing Competitively Sensitive Information to NewSun Would Undermine Trust in Oregon’s RFP Process.

The Commission has recognized that an RFP is most effective—and thus most likely to yield benefits to customers—when it draws a wide range of competitive bids. Disclosing developers’ project development information—including pricing, capacity factors, and other operating characteristics—particularly during ongoing negotiations²³—would be unfair to those developers and undermine confidence in the Company’s ability to maintain the confidential nature of commercially sensitive information, discouraging participation in Commission-regulated RFPs.²⁴ In short, a Commission decision requiring disclosure of competitively sensitive information to developers in an IRP proceeding will damage the RFP process—a critical element of the Commission’s regulatory oversight of utilities. Because of

²² See Docket No. UM 2193, Application to Open Independent Evaluator Selection Docket (Sept. 2, 2021).

²³ The Company reiterates the point that it has not yet executed contracts from its 2020AS RFP.

²⁴ NewSun suggested in its Response that PacifiCorp had not truly committed to keeping developer project-specific information confidential because PacifiCorp merely “*represent[ed]*” to bidders” it would “attempt to maintain [the] confidentiality” of their bid information. NewSun’s Response at 19-20 (emphasis in original). NewSun misunderstands the legal context in which regulated utilities make such commitments. It is impossible for a regulated utility subject to Commission authority to promise a bidder that project-specific information will be strictly protected from release. The utility must share the information with its regulators, including the Commission, an independent evaluator, and in some cases, non-developers under an appropriate protective order. PacifiCorp’s efforts to honor its commitments include keeping the information in an appropriate location accessible only to appropriate personnel; releasing the competitive information only when required by the Commission or other legally compelled disclosure; seeking to shield the information under protective orders; and, in the current circumstances, challenging a ruling that inappropriately requires the release of the data.

the commitments it has made in the RFP process, the Company began the process of notifying developers of this release of their competitively sensitive information.

Attachment C to this request for certification are letters from developers the Company received regarding the Ruling.

The Ruling attempts to remedy this problem by admonishing NewSun to not consider the information received in docket LC 77 when bidding into future RFPs. However, this is wholly inadequate. Once information is known to NewSun, that knowledge will inexorably inform its future bids. How is this to be monitored by the Commission, PacifiCorp, or an RFP independent evaluator, who is charged with ensuring that an RFP is conducted fairly, transparently, and properly?²⁵ Providing such access to competitively sensitive information would not only impact PacifiCorp's future competitive resource processes, but other utility procurement processes where NewSun may submit a bid. If the Commission upholds the Ruling, PacifiCorp believes there is a reasonable likelihood that one or more of the developers with projects on PacifiCorp's 2020AS RFP final shortlist will seek injunctive relief in court.

3. Providing Competitive Project-Specific Information to Other Developers Under a Protective Order Does Nothing to Mitigate the Harm Caused by That Release.

In addition to rejecting PacifiCorp's assertion that project-specific information is competitively sensitive, the ALJ also appeared to conclude that any harm caused by the release of that information would be mitigated by the fact that a protective order is in place. The ALJ Ruling concluded that the release of project-specific information is sufficiently

²⁵ OAR 860-089-0450(1).

protected because a competitor like NewSun “may not disclose Protected Information for any purpose other than participating in these proceedings.”²⁶

Providing competitively sensitive project-specific information to NewSun under a protective order does nothing to mitigate the fundamental harm that would be caused by the release of that information; specifically, bidders in PacifiCorp’s RFP process will see their competitive information handed over to their development competitors. It would be no comfort to Verizon to know that its competitively sensitive information was being provided to AT&T under a protective order. Nor would Apple consider itself unharmed because a protective order was in place as its trade secrets were being handed to Samsung. The release of the information to competitors is the damage, and as noted previously, such release has been sufficient to support a finding of irreparable harm in other competitive contexts. A protective order does not remedy that damage.

B. NewSun’s Right to Participate in the IRP Process Does Not Entitle It to Receive Competitively Sensitive Information that Would Damage the RFP Process.

In light of the harm that would be caused by the release of competitively sensitive information to other developers, the next step in the Commission’s analysis is to evaluate whether NewSun has a legitimate, non-competitive need to access its competitor’s highly confidential pricing data.²⁷ PacifiCorp believes there is none.

PacifiCorp recognizes the long history of the Commission encouraging public participation in the IRP. The Commission has long believed, and PacifiCorp has concurred, that public participation is a key element of a robust IRP process. That said, the Commission has also always taken great care to protect a utility’s competitively sensitive information in

²⁶ Ruling at 4 (citing Order No. 21-271, App’x A at 3).

²⁷ Ruling at 5.

the context of 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.²⁸

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

Unlike the UM 307 Ruling, the Ruling in docket LC 77 does not appear to consider NewSun's need to have the project-specific information set forth in Table 1 above to advance its position regarding the Company's 2021 IRP. NewSun has not articulated why the information is necessary in its review of the Company's 2021 IRP. In fact, NewSun, which intervened in docket LC 77 in September 2021, executed the General Protective Order and requested access to the 2021 IRP confidential data disc only after the disc was mentioned in a December 2021 workshop in docket UM 2011. In recent discussions, NewSun continues to restate its need of the 2021 IRP confidential data disc in part for use in docket UM 2011.

²⁸ *In re Pub. Util. Comm'n of Or. Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07-002 at 1-2 (Jan. 8, 2007) (citing *In re Investigation into Least-Cost Planning in Oregon*, Docket No. UM 180, Order No. 89-507 (Apr. 20, 1989)) (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.

Requesting information in any proceeding is not for the purpose of having the information generally but it is intended to facilitate a stakeholder's participation in that proceeding only. Furthermore, in docket UM 2011, in accordance with its agreement with stakeholders, PacifiCorp filed its capacity contribution results and associated inputs on January 25, 2022, and all stakeholders, including NewSun, have the same access to all the information submitted. NewSun's meaningful participation in docket LC 77 does not hinge on access to the confidential data disc; it has access to the 2021 IRP, which contains over 800 pages of information, and it has the opportunity to propound discovery on PacifiCorp. However, to date, NewSun has not propounded any discovery on the Company. The Company has also offered to NewSun to provide a list of the files on the 2021 IRP confidential data disc and to work with NewSun to identify files on the disc that can be appropriately redacted and provided.

Further, NewSun claims to have "special knowledge or expertise that may assist the Commission in resolving issues in this proceeding."²⁹ While the value of NewSun's special knowledge is for the Commission to evaluate, PacifiCorp submits that any expertise NewSun may bring to Commission in terms of IRP analysis simply does not outweigh the damage to the RFP process and the trust in the Commission's regulatory process that would result from the proposed disclosure, especially where it has not articulated the need to see the project-specific information contained in Table 1 above. PacifiCorp is concerned that the damage to the Commission's robust RFP process and cascading impacts on customers are likely to far outweigh the benefits that would accrue to the Commission from NewSun's evaluation of RFP bid information.

²⁹ Petition to Intervene of NewSun Energy LLC at 2 (Sept. 27, 2021).

NewSun’s arguments in support of its request are also inconsistent with its stated scope of participation. NewSun argues that it wishes to review competitively sensitive information “*for the ratepayers,*”³⁰ presumably on the theory that NewSun’s expertise will add to the Commission’s review of PacifiCorp’s IRP data and potentially lower the overall cost of resources identified in PacifiCorp’s IRP. NewSun’s petition to intervene in docket LC 77, however, states that it sought intervention on its own behalf and “anticipate[d] participating to the extent necessary to ensure *its* interests are protected.”³¹ NewSun does not claim to represent the interests of “ratepayers.” NewSun does not represent PacifiCorp customers’ interests in this proceeding, and in fact, there are two other experienced participants who represent customer interests in this proceeding. Specifically, the Commission and its Staff and the Oregon Citizens Utility Board (CUB) represent utility customer interests. The general powers of the Commission includes “represent[ation of] the customers of any public utility or telecommunication utility and the public generally in all controversies respecting, rates, valuations, service and all matters of which the commission has jurisdiction.”³² CUB is also authorized by statute to represent utility customer interests. Specifically, CUB is charged with the authority to “effective[ly] advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests.”³³ CUB is an intervenor of right and an interested party or otherwise participate in Commission proceedings.³⁴ The Commission and its Staff and CUB are experienced advocates for utility customer interests and are specifically charged by statute to do so.

³⁰ NewSun’s Response at 15.

³¹ Petition to Intervene of NewSun Energy LLC at 2 (Sept. 27, 2021). (emphasis added)

³² ORS §756.040(1).

³³ ORS §774.020.

³⁴ ORS §774.180.

NewSun’s claim that it needs access to the confidential information of its competitors for the interests of “ratepayers” should be rejected. It has neither demonstrated that it is qualified to represent utility customers’ interests, nor has it even asserted that it would in its petition to intervene.

Moreover, as PacifiCorp has established, giving NewSun access to this information would give it 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.³⁵ 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.

Tellingly, NewSun implicated its own financial interest in reviewing PacifiCorp’s competitive market information,³⁶ but failed to present a single argument as to why it needs to review its competitors’ pricing and related information to meaningfully participate in this proceeding. Conversely, NewSun has not—and presumably cannot—demonstrate a legitimate noncompetitive need to receive the competitively sensitive information from previous resource procurement processes, including the 2020AS RFP. This alone justifies denial of NewSun’s access under the Commission’s policy.³⁷

³⁵ See PacifiCorp’s Objection at 4-5.

³⁶ 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.

³⁷ Ruling at 4 (“...[the Commission] consider[s] whether the party or person seeking to be qualified has a legitimate and *non-competitive need* to access the information for the purposes of participating in the proceeding in which the information was filed.”)(emphasis added).

C. In the Event the Commission Determines that NewSun Should Have Greater Access to Non-Competitively Sensitive Confidential Information, the Remedy Should Not Be to Order the Release of the Confidential Data Disc in its Entirety, but to Fashion a Different Remedy.

In considering the Ruling, if the Commission determines that NewSun should have greater access to non-competitively sensitive confidential information, PacifiCorp believes that there are other potential alternative remedies than releasing the 2021 IRP confidential data disc in its entirety or requiring PacifiCorp produce a redacted disc.

Releasing the 2021 IRP confidential data disc to NewSun pursuant to the General Protective Order should be rejected for all the reasons set forth above as NewSun has not demonstrated its need for *any* confidential data to meaningfully participate in this IRP and it would cause irreparable harm to PacifiCorp and its customers. Furthermore, upon the filing of NewSun's signatory pages to the General Protective Order in docket LC 77, PacifiCorp did undertake a review of the 2021 IRP confidential data disc to determine whether a separate disc could be provided. The 2021 IRP confidential data disc contains in excess of 1,000 files,³⁸ with competitively sensitive information embedded throughout the files, often in multiple places in each file. The Company has presented the information in a similar manner in its previous IRP proceedings.

PacifiCorp has started a review of the 2021 IRP confidential data disc with just removing the project specific information related to the 2020AS RFP as NewSun has requested. In order to prepare a separate disc for NewSun, PacifiCorp would have to review each of the over 1,000 files, which includes large excel spreadsheets, and determine if the information at issue is in a particular file, and then evaluate whether the file can be redacted

³⁸ In its Objection and Reply, PacifiCorp originally believed that there were over 1,500 files on the 2021 IRP data disc. However, PacifiCorp has recounted the number files and there are just over 1,000 files.

or if the Company needs to prepare a new file that aggregates the information. In reviewing just 347 of the over 1,000 files, PacifiCorp would need to filter and sum the data across several tabs, replace about 30,000 data points with aggregated rows by technology type and by year for RFP resources across 30 plus columns. The problematic data cannot simply be removed, as doing so will break pivot tables and formulas, which the Company is obligated to provide, and which comprise the purpose of each impacted report. As a consequence, redaction actually means manually creating 347 new data sets. Next the Company would need to update the pivot tables and formulas for the workbook and validate that nothing changed in the final reporting. Then the Company would need to save a new copy of each report. This is extremely meticulous work, prone to error on large spreadsheets. For just these 347 files, PacifiCorp estimates more than 140 hours of work at minimum spread among several people including peer reviewers. Even with this effort, the remaining granular resource-specific data could still be used to determine the proxy costs by tech type and category.

As PacifiCorp explained in its Reply, the Commission’s protective order process requires utilities to make “reasonable efforts” to designate only the portions of information that are confidential.³⁹ In the context of an IRP process, however, which is far more data intensive than most other Commission proceedings, and with respect to PacifiCorp’s confidential data disc in particular, selective redaction/aggregation would be extremely onerous and unduly burdensome.⁴⁰

To avoid release of such competitively sensitive information to NewSun or any developer that decides to participate in the Company’s IRP proceeding, PacifiCorp proposes

³⁹ PacifiCorp’s Reply at 10.

⁴⁰ See PacifiCorp’s Objection at 3-5.

several recommendations to the Commission to address the immediate issue in docket LC 77 and the broader policy issue.

First, in the event the Commission, in reversing the Ruling, concludes that NewSun should be given greater access to non-competitively sensitive confidential information in this docket, PacifiCorp recommends that it be directed to work with NewSun to identify a subset of redacted or aggregated files from the confidential IRP data disc that support the Company's preferred portfolio. This allows NewSun to receive additional information regarding the 2021 IRP preferred portfolio and still allows the Company to protect the commercially sensitive information in Table 1 above.

Second, the Ruling grants NewSun unprecedented access to the competitively sensitive information of its competitors. It is PacifiCorp's understanding that no project developer has ever insisted on receiving such data in a utility IRP. As the Company noted in its Objection, in PGE's 2016 IRP, developers filed signatory pages to the General Protective Order in that proceeding but then withdrew them.⁴¹ Even though certain of the information from the Company's 2017R RFP and 2020AS RFP are still subject to the Modified Protective Orders in those proceedings,⁴² the convention in IRP proceedings has been to provide most information under a general protective order to facilitate participation in the IRP where the identity of the stakeholders raises no issue of competitive harm. It has been PacifiCorp's experience that developers who intervene in IRP proceedings generally do not

⁴¹ *In re Portland Gen. Elec. Co., 2016 Integrated Resource Plan*, Docket No. LC 66, Invenergy LLC's Letter from Jeffery D. Jeep (Feb. 21, 2017) and National Grid USA's Letter from Chris Zentz (Mar. 6, 2017). *Also see In re Portland Gen. Elec. Co., 2019 Integrated Resource Plan*, Docket No. LC 73, Ruling at 1 (June 28, 2019) (PGE initially filed an objection to Northwest and Intermountain Power Producers Coalition's consultant having access to confidential information.).

⁴² Docket No. UM 1845, Order No. 18-080, Revised Modified Protective Order (Mar. 8, 2018) (default duration of five years); and Docket No. UM 2059, Order No. 21-202, Modified Protective Order (Jun. 17, 2021) (five-year duration).

seek access to the confidential data disc. However, if competitive developers will henceforth be seeking access to confidential IRP information, the Commission's existing protective order construct may significantly burden the IRP process as a five-year duration to protect competitively sensitive information may not be sufficient.

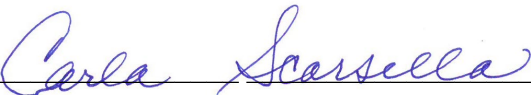
For this reason, PacifiCorp believes it would be timely for the Commission to open a rulemaking to evaluate how best to facilitate public participation in an IRP without significantly burdening the already data-intensive process with a requirement to provide two distinct data sets. As described above, to prepare a "developers only" confidential data disc would require preparing essentially two sets of files and would be unduly burdensome. PacifiCorp would note that the IRP is not a contested case proceeding where due process rights are at issue but a utility planning process that benefits greatly from public input. Because new stakeholders continue to join IRP proceedings, PacifiCorp would submit that it would be helpful for the Commission to evaluate how to facilitate public participation without slowing down or significantly burdening that process and requiring utilities to release competitively sensitive information to stakeholders who should not receive it. In a rulemaking proceeding all interested stakeholders can participate and evaluate how information should be presented and who should have access so as not to reveal competitive secrets in the IRP proceeding and not compromise the RFP process.

V. CONCLUSION

PacifiCorp respectfully requests that the ALJ certify the ruling denying PacifiCorp's Objection to NewSun's request for confidential information. Good cause exists to grant certification as the Ruling will cause irreparable harm to PacifiCorp's future RFPs, its customers, and other utilities and developers. Therefore, the Commission should reverse the

Ruling and prevent NewSun from gaining access to its competitors' extremely commercially sensitive pricing and project information and instead allow PacifiCorp to work with NewSun to provide it the information with respect to the 2021 IRP preferred portfolio that does not compromise competitively sensitive information. If the Commission wants to take up the issue of more clearly defining "public participation," PacifiCorp recommends it do so in a rulemaking proceeding in which all affected stakeholders can provide input.

Respectfully submitted this 7th day of February, 2022.

By: 

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Attachment A



825 NE Multnomah, Suite 2000
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December 23, 2021

VIA ELECTRONIC FILING

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

Attn: Filing Center

**RE: LC 77—PacifiCorp's Objection to NewSun Energy's Designation of Qualified
Persons**

PacifiCorp d/b/a Pacific Power encloses for filing its Objection to NewSun Energy's Designation of Qualified Persons 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, d/b/a PACIFIC POWER,
2021 Integrated Resource Plan

PACIFICORP’S OBJECTION TO
NEWSUN ENERGY’S DESIGNATION
OF QUALIFIED PERSONS

Under Section 15 of the General Protective Order adopted in Order 21-271 (General Protective Order) in the above captioned proceeding, PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) objects to NewSun Energy’s (NewSun) request to access confidential information and objects to the designation of the following individuals as qualified persons: Jacob H. Stephens, Marie Barlow, Leslie Schauer, and Brittany Andrus.

On December 6, 2021, NewSun filed signatory pages under the General Protective Order in docket LC 77 for its Chief Executive Officer, Mr. Stephens; In-House Counsel, Policy & Regulatory Affairs, Ms. Barlow; executive assistant, Ms. Schauer; and its consultant, Ms. Andrus.¹ PacifiCorp objects to the designation of these qualified persons under the General Protective Order as they either are employees of a developer of energy resources or are a consultant representing a developer. Disclosure of the protected commercially sensitive information would put PacifiCorp and its customers at a significant commercial disadvantage and would violate commitments made to third-party developers in previous request for proposals (RFPs) for energy resources to maintain the confidentiality of certain information from competitors.

¹ See Attachment A to this Objection.

PacifiCorp respectfully requests that the Public Utility Commission of Oregon (Commission) deny access of confidential commercially sensitive information to NewSun representatives and its consultant.

I. BACKGROUND

On September 1, 2021, PacifiCorp filed its 2021 IRP in docket LC 77. The Company provided public and confidential workpapers supporting its 2021 IRP. The confidential workpapers were contained on the 2021 IRP confidential data disc. Only parties that executed the General Protective Order were provided the confidential data disc.

On December 6, 2021, NewSun filed signatory pages for the General Protective Order in docket LC 77 as explained above. The filing of the signatory pages was followed by an email from NewSun counsel to PacifiCorp counsel asking for the 2021 IRP confidential data disc and instructions on where on the disc NewSun could locate certain information that was discussed in a workshop held that day in docket UM 2011,² the Commission's investigation into capacity. Following internal discussions at PacifiCorp regarding the appropriateness of providing a developer, such as NewSun, and/or its consultant, the 2021 IRP confidential data disc and providing information relevant to docket UM 2011 in docket LC 77, PacifiCorp requested that NewSun withdraw its signatory pages in docket LC 77 and PacifiCorp would provide the necessary information in docket UM 2011 at the appropriate time subject to any necessary protective orders that would need to be filed. PacifiCorp also discussed the possibility of redacting the confidential data disc. Acknowledging that it is appropriate to receive relevant information for docket UM 2011 in docket UM 2011, NewSun stated that for it to participate meaningfully in docket LC 77, it

² *In the Matter of Public Utility Commission of Oregon, General Capacity Investigation*, Docket No. 2011.

would still need access to the confidential data disc and, if there are restrictions on access, it would like those to be narrowly defined. PacifiCorp notes however, NewSun did not file written comments to the 2021 IRP on December 3, 2021 as set for in the proceeding’s schedule. In a good faith effort, PacifiCorp evaluated the information contained on the 2021 IRP confidential data disc and determined that it would be overly burdensome to adequately scrub the information on the confidential data disc, through redaction and aggregation, in a way to provide the data disc, to a developer such as NewSun.

II. INFORMATION CONTAINED ON THE 2021 IRP CONFIDENTIAL DATA DISC

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 2020AS RFP³ and previous Company procurements. This includes cost and operational data for each non-QF PPA and owned asset. Table 1 below summarizes the data at issue for each group of these resources.

Table 1: Resource Groups and Information

<u>Resource Group</u>	<u>Information at Issue</u>
RFP bid	IRP inputs include project-specific prices, 8760 capacity factors, and other operating characteristics. IRP outputs include cost and volume.
Non-QF PPAs	IRP inputs include project-specific prices, 8760 capacity factors, and other operating characteristics. IRP outputs include volume.
Owned Assets	IRP inputs include project-specific 8760 capacity factors and other operating characteristics. IRP outputs include volume.

³ *In the Matter of PacifiCorp, dba Pacific Power, Application for Approval of 2020 All-Source Request for Proposal*, Docket No. UM 2059, Order No. 21-437 (Nov. 24, 2021).

The 2021 IRP confidential data disc contains in excess of 1,500 files. Files related to the preferred portfolio, long-term studies, medium-term studies, short-term studies, PLEXOS inputs, input assumptions, and IRP chapters and appendices would all need to be reviewed and scrubbed of the information contained in Table 1 above. Further, the information often occurs in multiple instances in each file.

III. PROVISION OF THE 2021 IRP CONFIDENTIAL DATA DISC TO NEWSUN WOULD BE HARMFUL TO PACIFICORP AND ITS CUSTOMERS

The information contained on the 2021 IRP confidential data disc if provided to a developer of energy resources that bids into the Company's RFP would provide that developer an unfair advantage in an RFP. It would also violate the Company's commitment to third-party developers in prior RFPs to maintain confidentiality of certain information from competitors.

The information described in Section II of this objection is commercially sensitive information that would give NewSun an unfair advantage over other developers participating in the Company's current 2022AS RFP⁴ and future RFPs. Specifically, with information regarding price, capacity factors, other operating characteristics, cost, and volume of its competitors' projects, NewSun would have unfair access to a competitor's project development information potentially impacting their development efforts (e.g. land procurement and/or leasing). Further, it could result in a lack of confidence of the Company's ability to maintain the confidential nature of commercially sensitive information that would have a chilling effect on participation in the Company's RFPs, not only harming

⁴ *In the Matter of PacifiCorp, dba Pacific Power, Application for Approval of 2022 All-Source Request for Proposal*, Docket No. UM 2193.

PacifiCorp's competitive bidding process but also eventually the competitiveness of resources selected for customers.

With respect to third-party developers of projects from the Company's RFPs, PacifiCorp represents that it will attempt to maintain the confidentiality of all bids submitted, to the extent consistent with law or regulatory order. As part of PacifiCorp's current RFP requests, bidders are responsible to clearly indicate in its bid proposals what information it deems to be confidential and subject to the terms of the executed confidentiality agreement. Bidders may not mark an entire proposal as confidential, but bidders must mark specific information on individual pages to be confidential to receive confidential treatment for that information under the terms of the executed confidentiality agreement.

In accordance with Paragraph 15 of the General Protective Order, PacifiCorp attempted to resolve this issue with NewSun prior to filing its objection. However, the alternative of scrubbing the data from the 2021 IRP confidential data disc is unduly burdensome. The Company would need to review over 1,500 files to determine what information would need to be redacted or aggregated so as to scrub the commercially sensitive information.

This appears to be the first instance in one of the Company's IRP proceedings where a developer has sought such access to confidential data. In fact, the Company is not aware of an instance where a developer has been granted such access to an electric utility's confidential IRP data. If initially allowed, signatory pages were subsequently withdrawn. For example, in Portland General Electric's (PGE) 2016 IRP, Invenergy LLC initially filed signatory pages for the protective order but later withdrew its signatory pages noting it no

longer desired access to such information.⁵ In that same proceeding, following discussions with PGE counsel, National Grid USA withdrew its signatory pages of the Protective Order.⁶ Further, in docket 73, PGE initially objected to providing access to confidential information to a consultant engaged by the Northwest and Intermountain Power Producers Coalition (NIPPC), who at times represented industrial customers, electric service suppliers, and independent power producers, some of whom are PGE's competitors in the wholesale electric market.⁷ In that instance, PGE and NIPPC were able to reach agreement on the parameters surrounding the consultant's access to confidential information. This proceeding differs from the circumstances in docket LC 73 and a developer and a consultant representing a developer are requesting access to confidential information.

Furthermore, over the last several IRP filings, parties have been able to participate meaningfully in the Company's IRP dockets without requesting access to confidential data.⁸ Thus, not having access to such confidential data would not diminish NewSun's ability to meaningfully participate in docket LC 77, especially in light of the harmful impacts such access if granted could have on the Company's RFPs and its customers.

To the extent NewSun is seeking information in docket LC 77 for its participation in docket UM 2011, the Company has committed to provide analyses as discussed by

⁵ *In the Matter of Portland General Electric Company, 2016 Integrated Resource Plan*, Docket No. LC 66, Letter from Jeffery D. Jeep (Feb. 21, 2017). Initially, it appears signatories included: two Invenenergy LLC employees (John W. Weil and Jasmine Ring), a consultant (Charles J. Black), and outside counsel (Jeffery D. Jeep). See signatory pages filed on Dec. 22, 2016. While Invenenergy LLC filed comments that did not contain confidential information, it is unclear from the record whether it accessed confidential information to prepare those comments.

⁶ Docket LC 66, Letter from Chris Zentz (Mar. 6, 2017).

⁷ *In the Matter of Portland General Electric Company, 2019 Integrated Resource Plan*, Docket No. LC 73, Ruling at 1 (June 28, 2019).

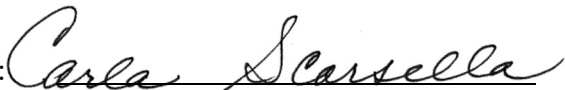
⁸ For example, Swan Lake North Hydro LLC has participated in the last two PacifiCorp IRP proceedings, including submitting of comments, without signing the protective order and accessing confidential information. See *In the Matter of PacifiCorp, dba Pacific Power, 2019 Integrated Resource Plan*, Docket No. LC 70 and *In the Matter of PacifiCorp, 2021 Integrated Resource Plan*, Docket No. LC 77.

stakeholders in that proceeding at the end of January 2022. The Company will also continue to work with NewSun and all stakeholders in that proceeding to provide necessary information to allow them to meaningfully participate. The Company anticipates that much of the data to be provided in docket UM 2011 will be non-confidential and thus available to all stakeholders. Additional supporting details and assumptions will need to be presented in a manner that will scrub commercially sensitive information and the Company will need to make the appropriate protective order filings to protect confidential and highly confidential information and will ensure this process is in place for all stakeholders including NewSun. However, providing access to confidential information in docket LC 77 is not the appropriate mechanism for NewSun to participate meaningfully in docket UM 2011.

IV. CONCLUSION

For these reasons, given the unreasonable commercial risk and potential harm to its customers, PacifiCorp respectfully request that the Commission deny access to commercial sensitive information in the Company's 2021 IRP to NewSun representatives and its consultant.

Respectfully submitted this 23rd day of December 2021.

By: 

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Attachment B



825 NE Multnomah, Suite 2000
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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 assertion 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 sensitive 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



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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).

Attachment C



February 4, 2022

Ron Scheirer
Director, Valuation and Commercial Business
PacifiCorp
825 Multnomah Street
Portland, OR 97232

Re: Oregon Public Utilities Commission Docket UM 2059 - 2020 All-Source Request for Proposals

Dear Mr. Scheirer,

Longroad Development Company, LLC (together with its affiliates, "Longroad") was responsive to PacifiCorp's 2020 RFP and is aware of NewSun's request to access confidential information (including Longroad's responses). Longroad is also aware of PacifiCorp's objection to NewSun's request.

Longroad strongly supports PacifiCorp's objection in this matter. Responding to PacifiCorp's 2020 RFP took a significant amount of effort and cost. But more importantly, among other sensitive data we provided to PacifiCorp, our RFP response materials included project-specific site, data, generation estimates, contractual terms, and pricing. These confidential data are proprietary and are critical elements of our competitive differentiation.

If NewSun had access to all of the bids from the 2020 RFP, it would gain an unfair and unearned advantage not only in the upcoming PacifiCorp 2022 RFP but for any other RFP where NewSun would be bidding projects in competition with Longroad. When we signed a confidentiality agreement as part of our response to the PacifiCorp RFP, we trusted that our information would be held in confidence. We respectfully request that such confidence be maintained as the parties intended.

If future submissions into PacifiCorp's RFP process will be subject to competitor access, Longroad (and likely other developers) will strongly reconsider its participation in future RFPs, which will likely sharply reduce the competitive landscape the ratepayers of PacifiCorp deserve in energy procurement.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Michael U. Alvarez".

Michael U. Alvarez
Co-founder and Chief Operating Officer
Longroad Development Company, LLC



February 3, 2022

Ron Scheirer
Director, Valuation and Commercial Business
PacifiCorp
825 Multnomah Street
Portland, OR 97232

Re: Oregon Public Utilities Commission Docket (“OPUC”) UM 2059 – In the Matter of PacifiCorp, dba Pacific Power, 2021 Integrated Resource Plan

Dear Mr. Scheirer:

NextEra Energy Resources, LLC (together with its affiliates “NEER”) understands that NewSun Energy LLC’s (“NewSun”) is seeking to obtain and publicly disclose highly competitive and proprietary information of NEER (the “NEER Confidential Information”) that bid into the PacifiCorp renewable energy request for proposals in OPUC Docket No. UM 2059 (the “IRP Docket”). NEER objects to the public disclosure of the NEER Confidential Information because such disclosure would provide competitors of NEER, such as NewSun, access to information valuable to them in making their own competitive decisions, without such competitors expending the time and money necessary to gather and develop the information, which, in turn, will directly harm the competitive interests of NEER. NEER submitted the NEER Confidential Information to PacifiCorp in its IRP Docket with the understanding that it would not be shared with NEER’s competitors. While NEER does not object to the NEER Confidential Information, under an appropriate protective order, being provided to the OPUC, its staff, and the administrative law judge presiding over the proceeding, as well as entities representing ratepayer and environmental interests, I strongly object to the disclosure of NEER Confidential Information to any competitor of NEER, including NewSun.

NEER and its affiliates derive an independent economic value, and a competitive advantage, from the secrecy of the NEER Confidential Information. The NEER Confidential Information is not included in public records or information generally known in the renewable energy industry. In this regard, if the NEER Confidential Information is publicly disclosed and provided NEER’s competitors, would allow NEER’s competitors to understand the proprietary building blocks NEER uses to bid renewable projects. Similarly, the disclosure of the NEER Confidential Information would provide competitors with an understanding of NEER’s proprietary operation and maintenance plans for renewable energy plants, which were assembled by NEER on a confidential basis, at considerable expense and for NEER’s sole use. Knowledge of that information would also assist NEER’s competitors undercut NEER’s future bids and negotiations, without expending the time and money required to assemble and understand the import of NEER’s operational and maintenance plans. Disclosing the NEER Confidential Information to the public would damage NEER’s economic interests by providing its competitors with an advantage they would not otherwise have.

Additionally, disclosure of the NEER Confidential Information would ultimately harm the bidding process, and those who benefit from it, customers of PacifiCorps. Maintaining the confidentiality of the NEER Confidential Information allows NEER and its affiliates to provide candid bidding information. Public disclosure of the NEER Confidential Information would have a chilling effect on future bidding

processes as bidding parties would be reluctant to submit confidential information for consideration. Oregon energy consumers would be harmed as a result.

For the foregoing reasons, NEER objects to the disclosure of NEER Confidential Information to its competitors, including NewSun Energy.

Thank you for your consideration.

Sincerely yours,



Jim Shandalov
Vice President, Development