

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 77

In the Matter of
PACIFICORP, dba PACIFIC POWER,
2021 Integrated Resource Plan

NORTHWEST & INTERMOUNTAIN
POWER PRODUCERS COALITION’S
REQUEST FOR CERTIFICATION, OR
IN THE ALTERNATIVE, REQUEST
FOR CLARIFICATION

I. INTRODUCTION

Pursuant to OAR 860-001-0110, the Northwest & Intermountain Power Producers Coalition (“NIPPC”) respectfully requests that Administrative Law Judge (“ALJ”) Katherine Mapes certify the ruling served on January 21, 2022 (“Ruling”) in the above-captioned docket before the Oregon Public Utility Commission (the “Commission” or “OPUC”). The Ruling denied PacifiCorp, dba Pacific Power’s (“PacifiCorp’s”) objection to NewSun Energy’s (“NewSun’s”) request to access protected information under the General Protective Order 21-271.¹ NIPPC is generally supportive of the Ruling, and appreciates that the ALJ confirmed that stakeholders should have broad access to material relied upon by a utility in the preparation of its integrated resource plan (“IRP”), and NIPPC specifically supports the finding that PacifiCorp has not shown good cause to exclude NewSun from accessing protected information.

The Ruling, however, could be interpreted to allow parties that are bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 request for proposals

¹ Ruling at 1.

(“RFP”) to access highly protected information. Highly protected information could include commercially sensitive information such as project specific pricing, energy, and plant operating characteristics. This would result in substantial detriment to the public because it would harm the competitive market. Further, good cause exists to certify the Ruling because it could undermine the RFP process.

The ALJ should certify the Ruling to the Commission, and the Commission should vacate the Ruling and: 1) change the Ruling to limit bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 RFP access to highly protected information; or 2) require PacifiCorp to revise its modified protective order so that it limits access to highly protected information similar to modified protective orders in PacifiCorp’s RFP dockets.²

In the alternative, NIPPC seeks clarification of the ALJ’s Ruling so that PacifiCorp can file a revised motion for a modified protective order now, with a provision that bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 RFP may not access highly protected information.

Finally, NIPPC recommends that the Commission resolve the issue expeditiously. NIPPC understands that NewSun has not been provided access to any protected information, and the next date for comments is March 11, 2022.

² See, e.g., *in re PacifiCorp Application for Approval of 2020 All Source RFP*, Docket No. UM 2059, Order No. 21-202 (Jun. 17, 2021).

II. LEGAL STANDARD

A party may request certification of a ALJ's written or oral ruling.³ If a party requests certification the ALJ must certify the ruling to the Commission if: “(a) The ruling may result in substantial detriment to the public interest or undue prejudice to a party; (b) The ruling denies or terminates a person’s participation; or (c) Good cause exists for certification.”⁴ A party has 15 days from date of service of the ruling to request certification.⁵

A Commission or ALJ can also clarify a final order or ruling. The Commission has done so in the past where, *inter alia*, the scope and effect of the order is unclear.⁶ The same would apply for an ALJ ruling.

III. REQUEST FOR CERTIFICATION

A. The ALJ’s Ruling Generally Produces the Correct Result

Generally, the ALJ’s Ruling produces a reasonable and correct result. PacifiCorp objected to NewSun’s access to confidential information and claimed “the alternative of scrubbing the data from the 2021 [Integrated Resource Plan (“IRP”)] confidential data disc is unduly burdensome” and PacifiCorp “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.”⁷ PacifiCorp’s objection would have prevented

³ OAR 860-001-0110(1).

⁴ OAR 860-001-0110(2).

⁵ OAR 860-001-0110(1).

⁶ *See in re Investigation into the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UM 1058, Order No. 04-704 (Dec. 8, 2004) (clarifying the scope and effect of a final order).

⁷ PacifiCorp’s Objection to NewSun Energy’s Designation of Qualified Persons at 5 (Dec. 23, 2021).

NewSun and similar-situated parties from viewing any protected information—not just highly protected information.

Generally, independent power producers, like NewSun, should be able to access protected information under a general protective order in IRP or RFP proceedings. Access to information is vital to fully participating in proceedings like an IRP or RFP. Additionally, access to information is important to fully challenge a utility's conclusions, determine if the utility made any errors, and make meaningful recommendations to the utility and Commission. If the utility has access to the information, but other parties do not, then the utility is at an unfair advantage. Thus, independent power producers should have access to protected information if they are willing to sign a general protective order.

Here, PacifiCorp erred by objecting to NewSun's access to all protected information. PacifiCorp should have objected in a focused way to NewSun accessing highly protected information, filed a revised motion for a modified protective order, and/or granted NewSun limited access to protected information.

Public participation in the IRP is encouraged.⁸ To participate in an IRP, the public should have access to as much information as possible. When PacifiCorp prepared and filed its IRP, it should have properly separated material between public, protected, and highly protected information. PacifiCorp should be required to segregate and redact the highly protected information rather than preclude access to protected information, and promptly provide all protected information.

⁸ *In re Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07-047, Appendix A at 2-3 (Feb. 9, 2007).

Generally, a utility should designate as much information as possible as public, and there should be broad access to protected information to ensure that all parties have the ability to effectively participate in regulatory proceedings. Here, PacifiCorp sought to prevent an independent power producer from accessing any protected information, when that party had a legitimate and non-competitive need to access protected information to participate in the integrated resource plan proceeding.

It is sometimes necessary to designate certain information as confidential and it is reasonable for parties to request access to protected information. If a party is willing to sign a general protective order, it should have broad access to protected information. NewSun, along with any other independent power producers willing to sign a general protective order, should be allowed access to most protected confidential information.

B. The Ruling Will Result in Substantial Detriment to the Public

While the Ruling generally produces the correct result, the Ruling should be certified because the Ruling would result in substantial detriment to the public. NIPPC interprets the Ruling as allowing bidders or persons who represent or advise bidders in PacifiCorp's UM 2059 RFP, including independent power producers like NewSun, to access highly protected information such as commercially sensitive bid information. NIPPC recommends that the Commission modify the Ruling so that highly protected information from PacifiCorp's UM 2059 RFP cannot be accessed by bidders or persons who represent or advise bidders in that RFP. Specifically, NIPPC recommends that the Commission use the modified protective order from PacifiCorp's RFP (Docket No. UM 2059) in its IRP (Docket No. LC 77).

The Ruling does not appear to restrict a party's access to highly protected information such as commercially sensitive bid information. The Ruling indicates that bidder-specific information from UM 2059 and qualifying facility power purchase agreement information would not be highly protected information.⁹ The Ruling reasons 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.]"¹⁰ Additionally, the Ruling reasons the "release of generator cost information to a [general protective order] signatory will [not] impact RFP bids expected in docket UM 2193" because "[u]sing confidential IRP data for another proceeding, such as UM 2193, is prohibited by the protected order[.]"¹¹

NIPPC respectfully disagrees and hopes that it can provide a unique perspective that supports designating this information as highly protected. PacifiCorp is still undergoing contract negotiations with bidders from its 2020 RFP, so the information still has significant commercial value. Additionally, the Modified Protected Order in UM 2059 states highly protected information must remain highly protected for several years unless extended by the Commission.¹² Thus, this information should be considered highly protected information and access to it should be limited.

Providing access to this information could give certain independent power producers unfair advantages over other independent power producers, and limit their participation in future RFPs. As a result, this could negatively impact the competitive

⁹ Ruling at 4.

¹⁰ Ruling at 4.

¹¹ Ruling at 4.

¹² Docket No. UM 2059, Order No. 21-202, Appendix A at 3.

market. If the competitive market is harmed, then the public would also be harmed because it could skew power costs and result in the public paying higher costs for electricity. Thus, allowing bidders or persons who represent or advise bidders in PacifiCorp's UM 2059 RFP to access highly protected information in this IRP could harm the competitive market and the public.

NIPPC notes that it is not taking a position on whether any specific piece of information is highly protected.¹³ NIPPC has not reviewed the relevant confidential IRP material to determine what specific information is confidential from the RFP, what commitments were made to bidders in the RFP to maintain confidentiality, what highly protected information was included in the IRP, whether any confidential bidder information can be sufficiently masked, etc. The Commission should clarify that in general confidential bidder information like project specific pricing, energy, and certain plant operating characteristics be protected as highly protected information, but resolve any specific challenge to any particular piece of information on a case by case basis (if necessary).

C. Good Cause Exists to Certify the Ruling

The Ruling should also be certified because good cause exists. In RFPs, bidders provide commercially sensitive information to the utility under the impression that it will not be shared and will be treated as highly protected information. PacifiCorp states it “represents [to bidders] that it will attempt to maintain the confidentiality of all bids

¹³ NIPPC and its attorneys have not executed the modified protective order in PacifiCorp's UM 2059, but NIPPC's attorneys have executed prior versions of the same order.

submitted, to the extent consistent with law or regulatory order.”¹⁴ If the bidders’ competitors can have general access to information that was submitted under a commitment that it not be shared, then it could undermine the RFP process and undermine independent power producers’ trust in the utility to maintain confidentiality.¹⁵ This would also result in harm to the competitive market and public in general. Thus, good cause exists to limit bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 RFP access to highly protected information because it could undermine the RFP process.

IV. REQUEST FOR CLARIFICATION

In the alternative, NIPPC seeks clarification of the Ruling. NIPPC interprets the Ruling to mean that NewSun must be provided access to protected information, but PacifiCorp is free to file a revised modified protective order to limit the type of information available and PacifiCorp could designate information as highly protected information. Thus, PacifiCorp could limit access to highly protected information. NIPPC seeks clarification that the Ruling allows this.

Assuming the Ruling does allow PacifiCorp to file a revised motion for a modified protective order and designate information as highly protected information, then

¹⁴ PacifiCorp’s Objection to NewSun Energy’s Designation of Qualified Persons at 5.

¹⁵ Again, NIPPC is not taking a position on whether any specific piece of information should be considered highly protected. NIPPC understands that utilities often over designate information as confidential, and NIPPC would be concerned that a utility could attempt to unnecessarily restrict access to information by entering into agreements with bidders to not share the information. However, the strong presumption should be that any information that the bidder designates as confidential and not to be shared with competitors should be protected.

there is information that would qualify as highly protected information. However, the Ruling indicates that bidder-specific information from UM 2059 and qualifying facility power purchase agreement information would not be highly protected information because “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.]”¹⁶ NIPPC believes this is the type of information that should be considered highly protected information for the reasons articulated above.

Thus, NIPPC seeks clarification that PacifiCorp is free to file a revised motion for a modified protective order that can designate commercially sensitive information such as project-specific information as highly protected information and limit access to that information by bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 RFP.

V. CONCLUSION

For the reasons above, the ALJ should certify the Ruling to the Commission, and the Commission should vacate the Ruling and: 1) change the Ruling to limit bidders or persons who represent or advise bidders in PacifiCorp’s UM 2059 RFP access to highly protected information; or 2) require PacifiCorp to file a revised modified protective order that limits access to highly protected information similar to modified protective orders in PacifiCorp’s RFP dockets.¹⁷ In the alternative, the ALJ should clarify the Ruling so that

¹⁶ Ruling at 4.

¹⁷ *See, e.g., in re PacifiCorp Application for Approval of 2020 All Source RFP*, Docket No. UM 2059, Order No. 21-202 (Jun. 17, 2021).

PacifiCorp can file a revised motion for a modified protective order and bidders or persons who represent or advise bidders in PacifiCorp's UM 2059 RFP may not access highly protected information.

Dated this 7th day of February 2022.

Respectfully submitted,



Irion Sanger
Ellie Hardwick
Sanger Law, PC
4031 SE Hawthorne Blvd.
Portland, OR 97214
Telephone: (503) 756-7533
Fax: (503) 334-2235
irion@sanger-law.com

Attorney for the Northwest & Intermountain
Power Producers Coalition