

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 77

In the Matter of

PACIFICORP, dba PACIFIC POWER,

2021 Integrated Resource Plan.

ORDER

DISPOSITION: ADMINISTRATIVE LAW JUDGE RULING CERTIFIED,
VACATED, AND REVERSED

I. INTRODUCTION

On February 7, 2022, PacifiCorp, dba Pacific Power, filed a request for certification of a January 21, 2022 ruling by an Administrative Law Judge (ALJ) in this proceeding. On the same day, the Northwest and Intermountain Power Producers Coalition (NIPPC) filed a request for certification, or in the alternative, request for clarification. Both requested certification of an ALJ ruling granting access to confidential information to certain persons designated as qualified by another participant in this proceeding, NewSun Energy LLC (NewSun). Also on February 7, 2022, Invenergy LLC filed comments in support of NIPPC's request. Clearway Energy Group also filed comments asking that the Commission not allow the disclosure of bid information to NewSun. On March 1, 2022, NewSun filed an opposition to those requests for certification. On March 8, 2022, PacifiCorp filed a reply.

The decision underlying these motions dealt with NewSun's attempt to receive certain information from PacifiCorp that is protected by the general protective order (GPO) issued in this proceeding. On December 23, 2021, PacifiCorp filed an objection to NewSun's designation of four people under the GPO. PacifiCorp stated that each of the individuals are either employees of a developer of energy resources or a consultant representing a developer. The information that NewSun seeks to access and that PacifiCorp opposes sharing with developers includes: IRP inputs with project-specific prices, 8760 capacity factors and other operating characteristics, and IRP outputs that include cost and volume for request for proposal (RFP) bids, non-qualifying facility

power purchase agreements (PPAs), and PacifiCorp-owned assets. PacifiCorp states the information often occurs in multiple instances in each file. PacifiCorp argues that information could provide developers like NewSun with a competitive advantage. NewSun, on the other hand, argues that the information is necessary for it to fully participate in the docket. It also states that it is willing to accept the data with bid price information redacted, a process which PacifiCorp states would take a minimum of 140 hours of work.

On March 21, 2022, the ALJ issued a ruling denying PacifiCorp's objection, stating:

PacifiCorp failed to substantiate its assertions that competitive harms would result from granting NewSun's requested access. In addition, it did not provide any alternative or partial options for NewSun to access information in the IRP.

II. PACIFICORP'S AND NIPPC'S MOTIONS TO CERTIFY

Both PacifiCorp and NIPPC argue that there is good cause to certify the ALJ's ruling. PacifiCorp argues that providing NewSun with competitor's project specific information would give NewSun an unfair advantage in future development opportunities. It states that the information in question—sensitive pricing and other non-public competitive information related to project development—meets the legal definition of a trade secret. In this case, it argues, the information in question:

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).

As such, it urges the Commission to deny NewSun access to the data in question entirely. To the extent the Commission chooses not to do so, it requests that the Commission instead order PacifiCorp to work with NewSun to identify a subset of redacted or aggregated files that could be produced.

NIPPC's request for certification or, in the alternative, motion for clarification states that it is generally supportive of the ALJ's ruling but is concerned that it "could be interpreted to allow parties that are bidders or persons who represent or advise bidders in

PacifiCorp's UM 2059 RFP to access highly protected information.”¹ Accordingly, NIPPC requests that the Commission vacate the ALJ's ruling and provide additional limits on bidders and their representatives that seek to access highly protected information. In the alternative, it asks for clarification that PacifiCorp can file a motion for a revised modified protective order in this proceeding that prevents bidders and their representatives from accessing highly protected information.

III. NEWSUN'S REPLY IN OPPOSITION AND ADDITIONAL COMMENTS AND REPLIES

In NewSun's response to PacifiCorp's request for certification, it states that it has asked for an appropriate degree of redaction of acutely sensitive commercial information—namely, all current 2020 AS RFP bidder *price* information. That level of redaction, it states, would be consistent with bidder non-disclosure agreements “which emphasize price as a key sensitive item, but also provide for regulatory disclosure exceptions.”² NewSun additionally argues that the time spent redacting the information in question is reasonable for a company of PacifiCorp's size and with its resources. It also states that much of the information in question is fundamental operating plan characteristics, such as plant size, availability, dispatchability, and production levels and their variations relative to their supply inputs. NewSun states that these are the heart of the IRP process.

PacifiCorp filed its reply on March 8, 2022, in which it argued that NewSun had not articulated a legitimate non-competitive need to access the information. It made additional arguments about the potential for irreparable harm caused by release of the information and the burden that would be caused by NewSun's proposed redactions.

On March 21, 2022, NewSun filed request for leave to reply and a reply. In that pleading, NewSun emphasized the larger transparency issues it saw in this proceeding, as well as its attempts to seek redacted information from PacifiCorp. It also argued that PacifiCorp had not established irreparable harm.

¹ NIPPC Request for Certification, or In the Alternative, Request for Clarification at 1 (Feb 7, 2022).

² NewSun Response to Request for Certification of ALJ Ruling and Request for Certification at 2 (Mar 1, 2022)

IV. RESOLUTION

The ALJ has found good cause to certify the ALJ's ruling under OAR 860-001-0110(2). At the March 22, 2022 Regular Public Meeting, we vacated and overruled the ALJ's ruling. This order memorializes that decision.

Based on the information provided by PacifiCorp, it appears that the information in question (1) is competitively sensitive; and (2) would be unduly burdensome to redact. Given the circumstances of this case, we are persuaded that this information should not be produced to NewSun at this time.

In making this decision, we rely on prior Commission handling of confidential information that could ultimately give a developer a competitive advantage. As PacifiCorp notes, in one such proceeding, an ALJ denied access to confidential information where an outside consultant and his company represented industrial customers, electricity service suppliers, and independent power producers which could have benefitted competitively from the information.³ In other cases, the Commission or an ALJ adopted modified protective orders that specifically shielded sensitive competitive information from developers.⁴

Unlike this proceeding, those cases involved information subject to modified protective orders which laid out an additional level of protection above and beyond what was provided for in the general protective order also entered in those dockets. While the Commission's general protective order does—as seen here—provide an opportunity for parties to object to certain signatories and to the protection of certain information, in general, the modified protective order is a better tool for protecting highly confidential information, trade secrets, and information that could be used for competitive purposes.

We encourage, and in the future may require, utilities to consider at the outset of a proceeding the extent to which they might need to limit competitors from accessing information and what safeguards they can place on access to allow full participation in the docket to the greatest extent possible. A modified protective order can then be shaped to implement those safeguards. In addition, we question the practices that have led PacifiCorp's data discs to be developed in a form that cannot easily be redacted.

³ *In re PacifiCorp, dba Pac. Power, 2017 Transition Adjustment Mechanism*, Docket No. UE 307.

⁴ *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); *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).

Here, however, we will not require PacifiCorp to file a revised modified protective order that governs the information sought by NewSun. We are mindful that the information sought by NewSun does appear to have competitive implications, that NewSun has not proposed walling off competitive duty personnel, and that the redactions sought by NewSun would—both PacifiCorp and NewSun appear to agree—take significant amounts of time.

We prioritize the openness and transparency of our proceedings as well as the integrity of processes we oversee, such as RFPs. That requires balancing access to information with potential harm caused by release of that information. We are also mindful that participants involved in competitive proceedings may not intend to use protected information for inappropriate competitive purposes, but nonetheless retain knowledge of information that they have worked with in other proceedings and cannot “unknow” those details.

At the same time as we welcome participation in our generic proceedings by any stakeholder, including developers like NewSun, we caution that there may be inevitable constraints on a developer’s ability to have all of its employees and consultants fully participate in both roles. There may be situations in which developers have to meet a higher bar to access information that could also grant them a competitive advantage. In future proceedings, we would be more receptive to requests for information from developers that put special safeguards on highly confidential information. Those may include “attorneys’ eyes only” protections, access granted only to outside consultants retained for the purpose of the generic proceeding, or provisions made to wall off competitive duty personnel. In appropriate proceedings, as discussed above, we may also conclude that greater utility efforts at redaction and entry of modified protective orders will be required.

Here, however, we conclude that, given the balance of harms and the absence of a strong effort by the requesting parties to meet the higher bar that their status as a project developer requires, the balance of factors does not warrant granting access to the information. For the foregoing reasons, the ruling on certification is vacated and reversed.

V. ORDER

IT IS ORDERED that:

1. The motions to certify the Administrative Law Judge ruling dated February 7, 2022, are granted.

2. The Administrative Law Judge ruling dated February 7, 2022, is vacated and reversed.

Made, entered, and effective Apr 25 2022.



Megan W. Decker
Chair



Letha Tawney
Commissioner



Mark R. Thompson
Commissioner



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.