

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 427

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY,

Renewable Resource Automatic  
Adjustment Clause (Schedule 122)  
(Clearwater Wind Project).

ORDER

**DISPOSITION:** MOTION TO SUSPEND PROCEDURAL SCHEDULE DENIED;  
HIGHLY CONFIDENTIAL DESIGNATION RETAINED; NEWSUN  
DENIED ACCESS; MOTION TO CLARIFY SCOPE DENIED;  
MOTION TO COMPEL DENIED

**I. MOTION TO SUSPEND PROCEDURAL SCHEDULE**

On August 13, 2024, NewSun Energy LLC moved to suspend the procedural schedule pending resolution of discovery. Due to the necessity of reserving time for a hearing so that the Commission can accommodate its own scheduling considerations, we deny this motion. We will set a hearing for November 20 and 21, 2024, and the briefing schedule will be set at the hearing. The tariff will be suspended for the remaining period under ORS 757.215(1), until March 1, 2025. This timeline should allow for resolution of pending discovery matters while also ensuring that the proceeding can be concluded within the suspension period.

**II. REQUEST TO ACCESS HIGHLY CONFIDENTIAL INFORMATION**

On August 1, 2024, NewSun filed a request for access to information designated as highly confidential under the Modified Protective Order (MPO). NewSun sought either to be able to sign the MPO or for the level of confidentiality of the information to be lowered so that it is protected under the General Protective Order (GPO) instead. We deny both requests.

There are two sets of information in question. The first is confidential bidder information which, Portland General Electric (PGE) states, contains counterparty names, avoided energy values (pricing), evaluation, modeling, and scoring information. The second is specific contractual terms of the Clearwater contracts. On reply, NewSun states that it does not object to having PGE redact access to counterparty names and project or bid-specific pricing. It also states that it is willing to wall off regulatory counsel and ensure that personnel who will be engaged in developing bids are not given access to the information.

The Northwest & Intermountain Power Producers Coalition (NIPPC) and Renewable Northwest (Renewable NW) filed a joint response and a surreply to NewSun's motion urging that the Administrative Law Judge prevent NewSun from accessing any confidential bidder information, even with names and project- or bid-specific pricing redacted. NIPPC and Renewable NW state that if any of the information in the response is information a bidder provided to the utility under the understanding that it would not be shared and would be treated as highly confidential information, then other independent power producers should not be given access to that information. They also oppose the solution of walling off regulatory counsel, stating that access to this information could still provide that independent power producer a competitive advantage.

PGE also objects to providing NewSun the information, even in redacted form and even to regulatory counsel only. It states that “[e]valuation, modeling and scoring information is specific to a bid/project, which are subject to NDAs with developers and are dependent on very commercially sensitive information concerning prices and all costs associated with projects.”<sup>1</sup> It does not believe that redacting names of bidders or prices provides adequate protection. On the Clearwater contracts, PGE states that Staff of the Public Utility Commission of Oregon and the independent evaluator (IE) have reviewed those contracts and that it is unnecessary for NewSun to do so.

We agree with PGE, and place special weight on the fact that NIPPC and Renewable NW are concerned that their bidder information might be given to a competitor, even with safeguards on that information. As we have said before, developers participating in Commission proceedings may sometimes have to accept limits on their ability to access information in those proceedings. While we may sometimes be able to develop solutions, such as “non-competitive duty personnel eyes only,” in this case, we deem the information in question too directly related to NewSun's role as a bidder to either allow NewSun to sign the MPO or to lower the level of protection on the information in question. While NewSun points out that it is not bidding in the current Request for

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<sup>1</sup> PGE Surreply at 8.

Proposal (RFP), this information could even be relevant to other utility RFP proceedings, and we do not believe it is appropriate for NewSun to access.

We are also persuaded that it is unnecessary for NewSun to access the particular contract provisions for the Clearwater project, placing weight on the fact that Staff and the IE have reviewed those contracts and that they contain sensitive information resulting from confidential negotiations.

Accordingly, NewSun may not sign the Modified Protective Order and the highly confidential designation is retained on the information in question.

### III. MOTION TO CLARIFY SCOPE OF DOCKET

On August 21, 2024, NewSun filed a motion to clarify the scope of the proceeding. NewSun states that it understands that the core issue in this docket is whether PGE granted preferential treatment to the Clearwater Project in the 2021 RFP. It continues that, “to the extent there was such preferential treatment, this then begs the question of whether PGE *deliberately designed* the 2021 RFP to raise the minimum bid requirement (and hence bid prices) for competitive suppliers, knowing full well that its own benchmark project would not have to comply.”<sup>2</sup> NewSun states its discovery requests are commensurate with the scope of the docket.

When we rejected the stipulation earlier in this proceeding, we were clear about what we would be looking for in this phase of the proceeding. We stated that “we are not convinced that the terms of the stipulation go far enough to address the fairness concerns raised in the record to date regarding PGE's actions in the RFP process or the risks associated with Clearwater not meeting the 80 percent transmission requirement.”<sup>3</sup> We continued that “we are at this point unsure that the stipulation provides enough encouragement to PGE to improve the fairness of its conduct in future RFPs.”<sup>4</sup> We decline to endorse NewSun’s specific theory of the case as our own statement of the scope of the proceeding; parties should look to our order for guidance in interpreting the scope of this proceeding.

We therefore deny NewSun’s motion to further clarify the scope.

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<sup>2</sup> NewSun Motion to Clarify Scope at 2.

<sup>3</sup> Order No. 24-091 at 5.

<sup>4</sup> *Id.*

#### IV. MOTION TO COMPEL

We deny NewSun's motion to compel. We address the specific data requests below but say at the outset that NewSun's motion evinces a fundamental misunderstanding of the discovery process. At the end of the day, it is the responsibility of opposing counsel to produce responsive documents; if opposing counsel represents that there are no responsive documents or that all responsive documents have been produced, this Commission will accept those representations. In this, we rely on the fundamental obligations that counsel have under the Oregon Rules of Professional Conduct to "make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."<sup>5</sup> Breach of those obligations carries significant professional consequences. In this proceeding, PGE's counsel has represented, for instance, that PGE has produced responsive documents for DR 9 and that the "hundreds of thousands" of potentially responsive documents it found were properly winnowed using more specific search terms and responsive documents produced. This Commission accepts those representations by counsel. With that, we address each of NewSun's requests in turn.

##### A. DR 9

NewSun's DR 9 seeks all external communications between PGE and the IE or NextEra concerning communications specifically related to Clearwater's long-term transmission rights or assets. PGE grouped its response to DRs 5, 9, 15, 16, 19, and 20 into a single aggregate production. NewSun states that it is not clear that PGE provided any documents related to DR 9 specifically. In its response, PGE states that it has produced all responsive documents in its possession targeted by DR 9. As stated above, we will take PGE at its word, as bound by the Oregon Rules of Professional Conduct. Accordingly, we deny the motion to compel.

##### B. DR 5

NewSun DR 5 asks for correspondence between PGE and the IE or NextEra. NewSun argues that PGE objected to this request to the extent it seeks material subject to the attorney-client privilege but did not produce a privilege log. In its response, PGE confirms that it did not withhold any material due to the attorney-client privilege. Accordingly, we find that PGE has fully responded to this DR and deny NewSun's motion to compel.

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<sup>5</sup> Rule 3.4(d).

**C. DR 68**

In DR 68, NewSun asks:

Please provide all Documents, and correspondence exchanged between PGE employees internally, or with the IE, NextEra, or any other third-party, discussing or mentioning NewSun, the NewSun affiliated entities that bid into the 2021 RFP, or Jacob (or Jake) Stephens.

PGE objected to this discovery response on numerous grounds. While PGE did object on the grounds of attorney-client privilege and did not produce a privilege log, it also objected on the basis that it was overly broad and unduly burdensome, among other things.

We agree with PGE. Our discovery standards state that “[d]iscovery must be commensurate with the needs of the case”<sup>6</sup> and that “[d]iscovery that is unreasonably cumulative, duplicative, burdensome, or overly broad is not allowed.”<sup>7</sup> We find this request to be overly broad. The question we are addressing in this proceeding is the prudence of the Clearwater Project—it is not clear that any mention of NewSun or Jake Stephens is likely to produce primarily information that bears on that question. NewSun’s projects and bids are not at issue. Therefore, we will not compel PGE to answer it.

**V. ORDER**

IT IS ORDERED that:

1. NewSun Energy LLC’s outstanding motions are denied.
2. The hearing in this proceeding is set for November 20 and November 21, 2024.

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<sup>6</sup> OAR 860-001-0500(1).

<sup>7</sup> OAR 860-001-0500(2).

3. Advice No. 23-20 is suspended for a period of time not to exceed nine months from June 1, 2024, the effective date of the tariff sheets, until March 1, 2025.

Made, entered, and effective Sep 13 2024.

*Megan W Decker*

**Megan W. Decker**  
Chair

*Letha Tawney*

**Letha Tawney**  
Commissioner

*Les Perkins*

**Les Perkins**  
Commissioner

