

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**LC 77**

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

NEWSUN ENERGY LLC'S REQUEST FOR  
LEAVE TO FILE A REPLY AND REPLY

**I. REQUEST FOR LEAVE TO FILE REPLY**

Pursuant to OAR 860-001-0420(5), NewSun Energy LLC (“NewSun”) respectfully requests leave to file a reply to PacifiCorp’s Reply to NewSun’s Response to the Request for Certification of ALJ Ruling filed on March 8, 2022 (“PacifiCorp Certification Response”) and Invenergy LLC’s Reply in Support of Northwest Intermountain Power Producers Coalition’s Request for Certification, or in the Alternative, Request for Clarification filed on March 18, 2022 (“Invenergy Reply”). NewSun requests leave to file a reply in order to respond to unanticipated points and ensure a full record for the ALJ and the Commission to consider in this very important matter. A reply is also necessary to identify misrepresentations and mischaracterizations in the PacifiCorp Response and rebut the arguments PacifiCorp continues to make based on those factual inaccuracies.

**II. INTRODUCTION**

The Oregon Legislature prescribed the Commission’s purpose and duty in statute. The purpose of the Commission is to “represent *the customers* of any public utility or telecommunications utility *and the public generally* in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction” and that the duty of

the Commission is to “make use of the jurisdiction and powers of the office to protect such customers, and the public generally, *from unjust and unreasonable exactions and practices* and to obtain for them adequate service at fair and reasonable rates.”<sup>1</sup> PacifiCorp’s behavior in this dispute rises to the level of unjust and unreasonable practices. First, PacifiCorp’s responsive briefings have mischaracterized and misrepresented the factual and procedural history of this case, bordering on unethical behavior.<sup>2</sup> Second, PacifiCorp has undertaken unreasonable practices to stonewall stakeholder participation, prevent transparency in the regulatory process, and cherry-pick its audience, ultimately resulting in a dispute over information access that has lasted the entirety of the IRP schedule. The Commission cannot effectively function as a regulator in a procedural quagmire where there are no consequences for misbehavior by the utility it regulates.

This docket has been marred by process and transparency issues, a problem that Commission staff itself highlighted in its final report, stating that “Staff’s concerns regarding the 2021 IRP are generally around transparency and accuracy of the modeling inputs . . . typographical errors and inaccurate data provided in the IRP create confusion and frustration for stakeholders . . . [and] the level of transparency . . . has been disappointing in this IRP.”<sup>3</sup> PacifiCorp’s refusal to provide NewSun access to the confidential data disk is just one of many process and transparency problems. In fact, *every single comment* submitted in response to the Final Staff Report emphasized process and transparency problems.<sup>4</sup>

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<sup>1</sup> ORS 756.040(1) (emphasis added).

<sup>2</sup> NewSun also rebuts factual inaccuracies contained in PacifiCorp’s Response to NewSun and Sierra Club’s Joint Motion to Stay Proceedings and Stay the Procedural Schedule filed on March 10, 2022 (“PacifiCorp Stay Response”, together with the PacifiCorp Certification Response, the “PacifiCorp Responses”) to the extent those inaccuracies are relevant to the Commission’s resolution of the requests for certification.

<sup>3</sup> *In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket. No. LC 77, Staff Report at 3, 24 (Feb. 11, 2022) (“Final Staff Report”).

<sup>4</sup> *See id.*; Renewable Northwest’s Comments on Staff Report at 3 (“we support Staff’s process- and transparency-oriented recommendations”); Sierra Club’s Comments on Staff Report at 26-27 (the “lack of

NewSun has gone to great lengths to resolve this dispute by continually and repeatedly contacting PacifiCorp for the express purpose of accepting the confidential data disk with appropriate redactions, expending significant time and expense to resolve this dispute, which burdens NewSun's ability to participate in the IRP in the first place. NewSun also consulted with the interested parties on many occasions, including multiple conversations with Invenergy, emails and phone calls with Longroad Energy, emails with NextEra Energy, and multiple conversations with NIPPC, Sierra Club, NWECA and RNW.<sup>5</sup> In those conversations, NewSun made clear its willingness to accept the confidential data disk with RFP bid prices redacted, in addition to its consideration of appropriate treatment of RFP bid materials and confidentiality to protect the RFP bid process.

PacifiCorp now encourages the Commission to approve the IRP with conditions rather than revisions to the 2021 IRP Action Plan, regardless of multitude of transparency and procedural issues.<sup>6</sup> NewSun urges the Commission not to condone the type of utility behavior exhibited by PacifiCorp in this case. Rather, NewSun reiterates that PacifiCorp should be ordered to disclose the confidential data disk with acutely sensitive bid pricing information redacted. NewSun also advises that the Commission provide guidance to PacifiCorp and other utilities clarifying: (1) utility obligations under the IRP process including responsiveness to

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information is counterproductive to fostering a collaborative and collegial stakeholder process that is focused on achieving the best solutions for the public interest.”); Comments of NW Energy Coalition on the Staff Report and Recommendations at 1 (“the process has been flawed”); The Renewable Energy Coalition’s Reply Comments at 10 (“PacifiCorp did not actually comply with the Commission directive from Order No. 20-186” related to QF renewals and a “detailed explanation was only provided in PacifiCorp’s Reply Comments and data responses than in PacifiCorp’s actual IRP”); Comments of the Citizen’s Utility Board on Staff Report at 3 (“There has been extensive discussion in this proceeding on the lack of transparency and analysis on costs and risks of [the Natrium plant].”).

<sup>5</sup> Due to the burden of these proceedings and the time and expense necessary to compile evidence of these conversations and interactions, such evidence is not included with this reply but may be provided by NewSun upon request.

<sup>6</sup> *In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket. No. LC 77, PacifiCorp’s Response to Staff’s Final Report and Recommendations at 2 (Mar. 11, 2022).

stakeholder requests for information; (2) information and data management and presentation best practices; (3) that privileged information under general protective orders is protected for a period of 2 years from bid submission; and (4) that plant operating characteristics are not privileged information.

### **III. BACKGROUND**

NewSun respectfully submits this reply to clarify the facts and circumstances of this dispute and to rebut PacifiCorp's inaccurate and/or misleading assertions. NewSun also submits comments in response to unanticipated points raised by Invenergy. The actions and dates relevant to this dispute are as follows:

- PacifiCorp filed its 2021 IRP on September 1, 2021.
- NewSun petitioned to intervene on September 27, 2021.
- Opening comments were due on December 3, 2021.
- NewSun submitted signatories to the General Protective Order on December 6, 2021. The same day, NewSun contacted PacifiCorp requesting the confidential data disk.
- After no response, NewSun sent another request for the data disk to PacifiCorp on December 15, 2021. The same day, PacifiCorp called NewSun and notified NewSun that it objected to disclosing RFP price information from its 2020 RFP, but was vague about what that information was, and requested that NewSun withdraw its signatories. NewSun informed PacifiCorp that it was not comfortable withdrawing its signatories but that it understood some information may need to be redacted and requested that PacifiCorp narrowly construe that redaction. PacifiCorp stated that it would coordinate with its IRP team regarding redactions.

- After no further correspondence from PacifiCorp, NewSun again contacted PacifiCorp regarding obtaining the confidential data disk on December 22, 2021. The same day, PacifiCorp called NewSun and notified NewSun that it would file an objection.
- PacifiCorp filed objection to NewSun’s signatories on December 23, 2021.
- NewSun filed reply comments on December 23, 2021, explaining that NewSun acknowledged that certain information may need to be redacted by that “PacifiCorp now objects to NewSun having access to all protected information in this docket (not just project specific pricing information previously mentioned[.]”).<sup>7</sup>
- ALJ Mapes denied the objection on January 21, 2022.
- NewSun again called PacifiCorp and left a voicemail stating NewSun’s desire to discuss how the parties could amicably resolve the dispute on February 4, 2022.
- PacifiCorp returned NewSun’s phone call on February 7, 2022. During a 28-minute phone call, NewSun again explicitly offered to accept the confidential data disk with RFP bid prices redacted, as well as to consider other solutions. PacifiCorp again refused to produce the data disk, or even to discuss other solutions, again citing burdensomeness. PacifiCorp stated, however, that it was considering offering a list of documents that PacifiCorp deemed appropriate from which NewSun could request delivery. PacifiCorp made clear that this would be a material reduction in data files and reports with no effort to redact information. NewSun stated it believed that delivery of the full data disk (but with 2020 AS RFP bid prices redacted) was appropriate, but that it would review

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<sup>7</sup> *In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket. No. LC 77, Newsun Energy LLC’s Response to PacifiCorp’s Objection to NewSun’s Designation of Qualified Persons at 3-4 (Jan. 3, 2022) (“NewSun Objection Response”).

PacifiCorp's proposal and document list and consider it. PacifiCorp never sent NewSun its full proposal nor a list of documents it might consider producing.

- PacifiCorp requested certification of the ALJ denial on February 7, 2022.
- NewSun downloaded, but did not open or review, the “Attach OPUC 026 CONF.xlsx” file on February 9, 2022.
- Staff filed its Final Report and Recommendations on February 11, 2022.
- NewSun and Sierra Club motioned to stay and toll or amend the procedural schedule on March 3, 2022.
- The Commission’s Public Meeting on Acknowledgement is scheduled for March 29, 2022.

This series of events illuminates PacifiCorp’s misrepresentations and mischaracterizations of the facts alleged in the PacifiCorp Responses. NewSun has clearly and repeatedly stated that it does not seek acutely commercially sensitive information including bid pricing and commercial terms currently under negotiation and has made numerous good faith attempts to work with PacifiCorp to obtain a redacted version of the confidential data disk. Access to information on the confidential data disk is a prerequisite to meaningfully participate in the IRP because it is necessary to review, evaluate, and then identify red flag issues in the IRP that merit further scrutiny and discussion. NewSun, like all other stakeholders, has an interest in ensuring that the content of the IRP that is considered and acknowledged by the Commission is complete, accurate, and truthful.

#### **IV. DISCUSSION**

##### **A. NewSun Needs Information on the Confidential Data Disk to Meaningfully Participate in the LC 77 Docket Proceedings and Cannot Submit Meaningful Comments Without that Information.**

NewSun’s briefs have clearly articulated the compelling reason why NewSun needs access to the redacted confidential data disk: expert stakeholders, like NewSun, must have access to utility IRP information to evaluate the assumptions and conclusions made by the utility, challenge those assumptions and conclusions as necessary, and protect against utility abuses (which, notably, is also the Commission’s statutory duty) and protect its own interests.<sup>8</sup> PacifiCorp itself identifies one of exact reasons why NewSun should have access to the redacted data disk: the IRP process is informational in nature.<sup>9</sup> Without sunlight and transparency as to what the information *actually is*, it is *impossible* for stakeholders like NewSun to meaningfully participate in the IRP proceedings.

**1. PacifiCorp has Not Established an Irreparable Harm to Bidders or PacifiCorp Customers.**

PacifiCorp alleges that NewSun has not responded to the harms PacifiCorp has identified or why NewSun needs information on the confidential data disk to advance certain arguments in the 2021 IRP.<sup>10</sup> That is not accurate. First, NewSun’s briefs responded to PacifiCorp’s argument that accessing the confidential data disk would irreparably harm other bidders and PacifiCorp customers. The current state of the regulatory process where expert stakeholders cannot obtain relevant information is what harms PacifiCorp customers because PacifiCorp can obtain acknowledgement of IRPs that may be misinformed, misleading, or contrary to ratepayer interests.<sup>11</sup> In addition, PacifiCorp, like all the independent power producers, is a for-profit business and its behavior in these proceedings must be informed by that fact, whether or not it is

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<sup>8</sup> *Id.*; *In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket. No. LC 77, Newsun Energy LLC’s Response to Requests for Certification of ALJ Ruling and Request for Clarification at 5-6, 18 (Mar. 1, 2022) (“NewSun Certification Response”).

<sup>9</sup> PacifiCorp Stay Response at 1.

<sup>10</sup> PacifiCorp Certification Response at 4.

<sup>11</sup> *See* NewSun Certification Response at 19-21.

subject to various regulations and regulatory proceedings. NewSun previously explained that it is disadvantaged by a veiled IRP proceeding where it cannot access PacifiCorp information because, without relevant data, the investor-owned utilities are at an advantage in preparing benchmark or affiliate bids for its own RFPs.<sup>12</sup> While PacifiCorp alleges that benchmark bids are not relevant to this dispute because they are subject to regulatory oversight (which is inapposite to NewSun’s argument that those bids may be misinformed or contain other problems that must be reviewed by expert stakeholders), PacifiCorp has not, and cannot, refute NewSun’s arguments that denying public access to relevant data gives PacifiCorp a competitive advantage in preparing its affiliate bids.

**2. NewSun Does Not Seek to Harm Other Bidders and Has Repeatedly Offered and Agreed to Accept the Confidential Data Disk Without Bid Pricing Information.**

PacifiCorp has misrepresented NewSun’s position and the history of the parties’ negotiations and states that “NewSun’s goal is to use discovery in this docket to obtain bidders’ competitively sensitive data to inform its bids in upcoming RFPs.”<sup>13</sup> PacifiCorp also makes the wholly false assertion that NewSun “believes that an appropriate use of the competitively sensitive information. . . is to refine its bid in future solicitations for energy resources.”<sup>14</sup>

As outlined in the procedural history above, NewSun has repeatedly offered to accept the confidential data disk with bid pricing information redacted. NewSun’s Response to the Request for Certification of ALJ Ruling stated explicitly: “NewSun is not interested in obtaining project-specific pricing and contractual terms under negotiation.”<sup>15</sup> In fact, NewSun’s Response

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<sup>12</sup> NewSun Objection Response at 2.

<sup>13</sup> *Id.* at 9; *see also In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, PacifiCorp’s Reply to NewSun’s Response to the Request for Certification of ALJ Ruling at 1 (Mar. 8, 2022) (“NewSun believes that an appropriate use of the competitively sensitive information . . . is to refine its bids in future solicitations for energy resources.”) (“PacifiCorp Reply”).

<sup>14</sup> PacifiCorp Certification Response at 1-2.

<sup>15</sup> NewSun Response at 15.



requested that the ALJ order PacifiCorp to produce the confidential data disk with bidder price information redacted.<sup>16</sup>

Second, PacifiCorp stated that “on February 4, 2022, just prior to the Company’s filing of its request for certification on February 7, 2021, the Company offered to provide a list of files to NewSun and work with it to identify files that it wanted the Company to produce, which NewSun rejected.”<sup>17</sup> As explained in the procedural history above, NewSun, in fact, stated that it did not believe such an approach would be adequate, but that it *would* review the list and respond to PacifiCorp. PacifiCorp never provided the list and, instead, filed its request for certification.

While NewSun included an *arguendo* comment in response to PacifiCorp’s claimed harm arguments to demonstrate that the harm standard was not met and that, *theoretically*, the public and ratepayers would likely not only *not* be harmed, but could perhaps benefit from tracking indicators that better focus the competitiveness of bids (by indirectly driving down bid prices and allowing for less expensive energy procurement), PacifiCorp alleges that such argument indicates NewSun’s intent. That claim is false and contrary to NewSun’s repeated, express statements made throughout the procedural history and its briefing that it was not seeking to obtain bid pricing information and would accept the redacted confidential data disk. NewSun, in fact, agrees with part of the comments by Longroad Energy and NextEra Energy that disclosing bid pricing information during the active RFP process through negotiations is not in independent power producers’ interest (NewSun included); it would be non-sensical for NewSun to argue that it wishes to either obtain or disclose others or its own bid pricing information. For that reason, NewSun clearly and repeatedly stated that it offered and agreed to accept the confidential data

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<sup>16</sup> *Id.* at 2.

<sup>17</sup> PacifiCorp Reply at 14.

disk without active bid pricing information.<sup>18</sup> Thus, disclosing the confidential data disk to NewSun, as properly redacted, would not have a negative or chilling effect on PacifiCorp's procurement process because information that is competitively sensitive bid information would not be disclosed. As ALJ Mapes noted in the Ruling being challenged, changing prices in the renewable energy market indicate that past cost information is not so sensitive as to create a competitive advantage such that it should not be shared under the protection of a protective order.<sup>19</sup>

### **3. Developers and Independent Power Producers Have Not Commented on the Substance of the IRP.**

PacifiCorp alleges that NewSun “has not explained why it cannot respond to Staff’s Report (like all other developers) based on the robust non-confidential record here and the pre-filing stakeholder public-input process.”<sup>20</sup> That assertion misrepresents the scope of both NewSun and other stakeholders’ participation in this IRP. While stakeholders like NewSun are not required to file comments in response to staff reports, filing substantive comments would have been meaningless because it would have been based on inaccurate, incomplete, and missing information.

In truth, only Swan Lake North Hydro, LLC and FFP Project 101, LLC, submitted written comments on the draft IRP during the public-input process, and those comments were limited to demonstrating “why advancing the procurement of pumped storage in the Draft IRP is not only warranted, but necessary, for PacifiCorp to achieve its clean energy goals.”<sup>21</sup> Those comments represent the developer’s project-specific interests and *do not* address the reason that

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<sup>18</sup> NewSun Certification Response at 15-17.

<sup>19</sup> Ruling at 4.

<sup>20</sup> PacifiCorp Stay Response at 2.

<sup>21</sup> *In the Matter of PacifiCorp dba Pacific Power, 2021 Integrated Resource Plan*, Docket No. LC 77, Comments of Swan Lake North Hydro, LLC and FFP Project 101, LLC at 3 (Dec. 3, 2021).

NewSun has repeatedly stated why it needs access to the confidential data disk: to create sunlight and transparency in the utility's regulatory process to ensure that the *utility's* assumptions, factual assertions, modeling, recommendations, and decisions withstand even a minimal level of scrutiny from expert stakeholders.

In addition, not a *single* developer submitted comments in response to the Final Staff Report. The fact that *no* developers or independent power producers submitted comments on the substance of the IRP fully demonstrates the black box type of regulatory proceeding PacifiCorp has managed to establish and now so vigorously defends.

#### **4. NewSun has Repeatedly Participated in the IRP Proceedings and NewSun is Not Required to File Written Comments.**

PacifiCorp alleges that NewSun has failed to participate in the stakeholder public-input process.<sup>22</sup> That assertion is a blatant misrepresentation. Stakeholders like NewSun are not required to file comments in response to staff reports in order to “participate” in an IRP, or any other Commission proceeding.<sup>23</sup> And, while NewSun has not filed written comments in response to staff reports, NewSun has, in fact, repeatedly participated in the IRP proceedings, including: participation in public input meetings conducted by PacifiCorp during the development of LC 77 on October 22, 2020, December 3, 2020, January 29, 2021, February 10, 2021, April 23, 2021, June 25, 2021, July 30, 2021, August 6, 2021, and August 27, 2021; participation in the special public meeting LC 77 workshop on November 2, 2021; and providing oral comments at Commission public meetings January 13, 2022, February 25, 2022, and March 8, 2022. Therefore, NewSun has participated in the stakeholder public-input process *more* than other developers. However, that participation has been limited by the surface-level information

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<sup>22</sup> PacifiCorp Stay Response at 2.

<sup>23</sup> Order No. 20-013 at 5-6.

available to parties that are not signatories to the General Protective Order. In order to fully and meaningfully participate in the IRP and comment on red flag issues that, perhaps, only expert stakeholder developers may be able to identify and analyze, NewSun must have full access to the confidential data disk, as properly redacted to protect acutely commercially sensitive information.

**B. NewSun has Not Accessed Confidential Data.**

PacifiCorp also accuses NewSun of downloading confidential data request responses due to a “clerical oversight” by PacifiCorp.<sup>24</sup> NewSun downloaded the “Attach OPUC 026 CONF.xlsx” file from the Huddle site, which included 40 documents, on February 9, 2022. However, NewSun hereby attests that while that file was downloaded, no one at NewSun, including any of the signatories to the General Protective Order, opened or reviewed the content of those documents. Regardless, as demonstrated by the procedural history above, that download occurred on February 9, 2022, *after* NewSun had submitted signatories to the General Protective Order and *after* ALJ Mapes denied PacifiCorp’s objection to NewSun’s signatories to the General Protective Order on January 21, 2022.

**C. Plant Operating Characteristics Should not be Redacted.**

NewSun respectfully disagrees with Invenergy’s proposed scope of information that should be redacted from the confidential data disk. Invenergy states that “both price and project performance information” should be redacted because project-specific operating characteristics that are not yet under contract to PacifiCorp may never be committed to supplying power and would result in an unfair advantage in future competitive bidding to PacifiCorp or other utilities.<sup>25</sup> However, the purpose of the IRP is to review and evaluate the utility’s resource plan,

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<sup>24</sup> PacifiCorp Response at 5.

<sup>25</sup> Invenergy Response at 2-3.

which means evaluating all bids, as would be true in a rate case or any other matter examining utility procurement efforts. Much of the point of sunlight and transparency is a stakeholders' ability to flag concerning assumptions by investor-owned utilities. As NewSun previously explained in its briefing, project-specific operating characteristics like sunlight hours, plant size, and availability, dispatchability, and production levels relative to supply inputs are common information based that is generally already publicly available and are not competitive secrets. Removing all plant operating characteristics would preclude expert stakeholders' ability to confirm that assumptions, inputs, and outputs in the IRP are accurate and acceptable.

## V. CONCLUSION

NewSun appreciates the opportunity to respond to the PacifiCorp and Invenergy Responses and clarify the relevant factual background. NewSun thanks the Commission for its ongoing attention to this matter and the Staff and stakeholders for highlighting the procedural and informational flaws in this docket. Based on the facts, and for the reasons articulated now and in prior briefing, NewSun respectfully urges the Commission to order PacifiCorp to immediately disclose the confidential data disk as properly redacted.

Dated this 21st day of March 2022.

Respectfully submitted,

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