

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 399

In the Matter of)	
)	
PACIFICORP, d/b/a PACIFIC POWER)	NEWSUN ENERGY, LLC’S
)	RESPONSE TO PACIFICORP’S
<u>Request for General Rate Revisions</u>)	MOTION TO MODIFY
)	PROCEDURAL SCHEDULE

INTRODUCTION

NewSun Energy, LLC (“NewSun”) respectfully submits this opposition to the Motion to Modify Procedural Schedule (“Motion”) filed in this docket by PacifiCorp d/b/a Pacific Power (“PacifiCorp”) on October 6, 2022 and provides an alternative schedule. As noted by PacifiCorp in its Motion, NewSun does not oppose any aspect of the First, Second, and Third Partial Stipulations filed in this proceeding. Nor does NewSun object to the procedural schedule proposed by PacifiCorp with respect to the remaining Direct Access issue. NewSun supports PacifiCorp’s Motion to the extent it establishes a separate schedule with respect to the Fourth Partial Stipulation. NewSun’s opposition to the Motion relates solely to the truncated procedural schedule proposed by PacifiCorp for resolution of the Fourth Partial Stipulation.

As detailed below, NewSun timely identified and articulated very serious concerns with respect to language proposed by PacifiCorp in edits to the Accelerated Commitment Tariff (“ACT”). Specifically, PacifiCorp proposed in the ACT to bind itself to certain non-standard wholesale contract terms with respect to defaults and termination. NewSun’s concern is that potential wholesale power suppliers will be required to accede to these non-standard default and termination provisions as gating criteria in PacifiCorp’s procurement of wholesale resources. Imposing such non-standard wholesale contract terms will reduce the pool of eligible competitive wholesale suppliers and resources. For those third-party bidders who are still able to bid, the financial implications of the commercial terms and risks unnecessarily and inappropriately imposed through the ACT tariff language will likely inflate the cost of

bids. The net result will be to stifle competition, increase costs, and favor PacifiCorp's self-build alternatives.

The issue raised by NewSun directly affects PacifiCorp's procurement of hundreds of megawatts of power, costing participating customers hundreds of millions of dollars. Moreover, the language to which NewSun objects was not reflected in PacifiCorp's initial filing in this proceeding, but was only added by PacifiCorp months later. Given the importance of the issue, which has high risks of inappropriately and adversely affecting the terms and prices of PacifiCorp resource procurements in its pending request for proposals ("RFP") and for years to come, coupled with the fact that it arose late in this docket, NewSun proposes a modest adjustment to the procedural schedule as reflected below.

CONTESTED ISSUE

The issue that NewSun has raised with the ACT tariff language concerns the obligation that PacifiCorp terminate a resource contract for any event of default—including, but not limited to, the under-delivery of power. In the initial version of the ACT that PacifiCorp filed with its testimony, the applicable provision read: "In the event of yearly under generation from the renewable energy resource(s) facilitated through the contract, the Company will purchase renewable energy certificates on the Customer's behalf to ensure the Customer's subscribed quantity of energy is covered." NewSun had no objection to this language. Following the testimony, however, this particular provision evolved considerably. The iteration reflected in the Fourth Stipulation now reads: "In the event that the renewable energy supplier is in default of the terms of its PPA or is no longer able to supply bundled renewable energy to the Customer, the Company will make reasonable efforts to begin to procure a new PPA" Although the change in wording may appear subtle, the change in meaning is profound. The current version of the ACT reflects an assumption that the under-delivery of power pursuant to a wholesale contract would result in an event of default of the underlying wholesale transaction. Further, the revised ACT language seems to assume that the sole remedy for any default is termination of the underlying resource agreement.

The default and termination provisions that PacifiCorp is trying to shoe-horn into the ACT are inconsistent with industry-standard wholesale contract terms. Industry-standard wholesale agreements include master agreements developed by the Edison Electric Institute (“EEI”), the Western Systems Power Pool (“WSPP”), and the International Swap Dealers Association (“ISDA”). Articles 4.1 and 5.1(c) of the EEI Master Agreement unambiguously state that failure to deliver power is *not* an event of default, and that the sole remedy for the failure to deliver power is cover damages. Likewise, Section 21.3(b) of the WSPP Master Agreement states that cover damages are the “sole and exclusive remedy” for the non-delivery of power—which is not identified as an event of default under Section 22. The same construct is found in Section 6(c)(i) of the ISDA North American Power Annex. In each case, the under-delivery of power is *not* an event of default, and the remedy does not include termination of the transaction.

The question that NewSun has raised is why PacifiCorp is insisting upon mandating non-standard wholesale default and termination provisions in a retail tariff? PacifiCorp’s answer is that this is for the protection of participating customers. This is unpersuasive. First, PacifiCorp would be able to exercise whatever remedies are available to it under the wholesale agreement without mandating them in the retail tariff. Second, it is unclear that a participating customer would even *want* PacifiCorp to terminate and replace an entire wholesale resource due to any event of default or under-delivery. There is no provision in the ACT for the customer to provide direction or input to PacifiCorp regarding what remedies the customer would prefer. Depending on the nature of the default or level of non-delivery, and the cost of larger remedies, it may be in the best interest of the customer for PacifiCorp to exercise other industry-standard contract remedies rather than terminate the resource altogether. It may even be most advantageous to the customer for PacifiCorp to *waive* a default altogether. Mandatory termination of an *entire resource*, especially coupled with a last-minute replacement of the *entire resource* outside of any competitive processes by PacifiCorp at its sole discretion, would likely result in the *most* expensive and risky solution. By baking non-standard wholesale contract terms into the ACT tariff, PacifiCorp is

actually exposing its customers to unilateral resource procurement decisions made by PacifiCorp without transparency, cost-regulation, or off-ramps.

NewSun’s concern is that PacifiCorp’s insertion of non-standard default and termination language in the ACT is intended to serve as a poison-pill in its RFP process. Presumably, PacifiCorp intends to use the non-standard default and termination language from the ACT as part of the criteria for resource selection in its RFP. This will almost certainly deter and disqualify certain potential bidders who will not agree to grant PacifiCorp non-standard default and termination rights. These terms will also make new projects unfinanceable, as lenders will not take the risk of PacifiCorp’s mandatory termination for under-delivery. This language will raise the compliance costs of competitive suppliers, which puts a thumb on the scale of PacifiCorp-owned resource. The net effect of these provisions will be to hamper or eliminate competition by third-parties in the RFP. This language also opens the door for PacifiCorp to unnecessarily procure replacement resources outside of an RFP process altogether. This will allow PacifiCorp to charge captive customers “premium” prices for hundreds of MWs of PacifiCorp-owned resources without regulatory oversight of the costs.

PROPOSED PROCEDURAL SCHEDULE

Given the importance and scale of the issues presented by NewSun, together with the fact that they were not raised by PacifiCorp’s original filing, NewSun believes that a fulsome analysis by the Commission is appropriate. NewSun respectfully proposes the following schedule:

/ / /

/ / /

/ / /

Event	Date
Objection to Stipulation	October 21, 2022
Stipulating Parties Responsive Testimony to the Objections	November 11, 2022
Cross-examination statements and Cross Exhibits	November 18, 2022
Possible Hearing Dates	Week of November 28-December 1, 2022
Initial Briefs	December 15, 2022
Reply Briefs	January 6, 2023
Oral Argument	Week of January 30-February 3, 2023
Target Commission Order	March 1, 2023

As pertains specifically to the date to file the objection, OAR 860-001-0350(8) provides that the objection be filed within fifteen (15) days of the stipulation and OAR 860-001-0350(7) provides that the settlement must be memorialized in writing and that the parties must file an explanatory brief or written testimony in support of the stipulation. Here, the stipulation was filed September 30, but the Joint Testimony in support of the stipulation was not filed until October 7. NewSun’s proposed schedule would allow just fourteen (14) days to object following the filing of the Joint Testimony, which is still less than the time that would otherwise be afforded by OAR 860-001-0350(8).

As compared to PacifiCorp’s proposed schedule, NewSun’s proposed procedural schedule only extends the effective date by a month. While NewSun certainly understands PacifiCorp’s general preference to complete this docket sooner rather than later, PacifiCorp has not articulated any specific reason why it would be prejudiced by extending the schedule on this single issue by one month. PacifiCorp rests on broad and conclusory statements about linking the outcome of this proceeding with its RFP schedule. PacifiCorp fails to articulate any specific reason why NewSun’s proposed schedule is incompatible with the RFP schedule. Under the RFP schedule, bids are due February 14, 2023. By

March 1, the date of the target Commission Order under NewSun’s above proposed schedule, PacifiCorp will not have even finished with bid eligibility screening.¹ Therefore, even under NewSun’s proposed schedule, PacifiCorp will still be able to leverage the resources submitted to the RFP for the ACT program.² Further, if PacifiCorp truly has an urgent need to complete this docket, then it can restore the ACT language originally submitted with its filed case.

Finally, NewSun rejects any implication made by PacifiCorp in its Motion that NewSun did not timely assert its objections to the Fourth Stipulation. PacifiCorp writes that “NewSun did not file any testimony on the ACT in the proceeding to respond to either the Company’s original proposal or suggested modifications to the parties.” This statement is disingenuous. PacifiCorp knows that NewSun did not formally respond to the version of the ACT language attached to PacifiCorp’s initial filing because NewSun does not object to that language. The issue arose well after the testimony was filed as the ACT language subsequently evolved to include non-standard wholesale contracting requirements. Once these issues surfaced, NewSun worked directly with PacifiCorp and other stakeholders for several weeks to raise and attempt to resolve the issues.

/ / /

/ / /

/ / /

¹ <https://www.pacificorp.com/suppliers/rfps/2022-all-source-rfp.html>.

² In opening testimony, PacifiCorp stated that the ACT would be third in line for resources from the RFP behind PacifiCorp first selecting the least-cost, least-risk resources for cost-of-service customers, and second selecting additional least-cost resources needed to comply with other state policy goals such as Oregon’s renewable portfolio standard and HB 2021. PacifiCorp/800, Anderson/17.

CONCLUSION

NewSun has identified a potentially serious flaw in PacifiCorp's ACT language. NewSun's concern is that non-standard default and termination provisions added to the ACT tariff will become criteria in PacifiCorp's RFP, which will in turn stifle competition from third-party power suppliers. PacifiCorp's ACT language could also pry open a backdoor for PacifiCorp to unnecessarily procure "replacement" resources outside of the RFP process altogether. This could directly impact PacifiCorp's acquisition of hundreds of MWs of power supply, worth hundreds of millions of dollars. This is not an issue that should merely be swept under the rug as quickly as possible. NewSun has therefore proposed a very reasonable procedural schedule that balances the need for efficiency with the need for appropriate regulatory oversight.

DATED this 11th day of October, 2022.

/s/Richard G. Lorenz

Richard G. Lorenz, OSB No. 003086

Cable Huston LLP

1455 SW Broadway, Suite 1500

Portland, OR 97201-3412

(503) 224-3092 (Telephone); (503) 224-3176 (Fax)

rlorenz@cablehuston.com

Of Attorney for NewSun Energy, LLC