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March 9, 2021

Via Electronic Filing
To puc.filingcenter@state.or.us

AR 641 Stakeholders

ALJ Nolan Moser
201 High Street, Suite 100
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Salem, OR 97308-1088

Re: AR 641 – Informal Phase Comments re Discovery, Data Requests, Confidentiality

Dear AR 641 Stakeholders:

NewSun Energy LLC (NewSun) submits these comments in response to ALJ Nolan Moser's February 24, 2020 request for feedback on the Oregon Public Utility Commission's (PUC's) rules regarding discovery, data requests, and confidentiality and in advance of the informal stakeholder workshop scheduled for March 12, 2020. NewSun is concerned about data transparency and the burdens the current process places on stakeholders. The below recommendations intend to help alleviate these concerns.

Background

As a preliminary matter, NewSun notes that it has participated in a variety of PUC proceedings including rulemakings, contested cases, hybrid dockets like integrated resource plans (IRPs) and requests for proposals (RFPs), and other dockets that go before the PUC at public meetings, which are classified as "other than contested cases" under the Oregon Administrative Procedures Act. In the contested case arena, NewSun has both participated as an intervenor in cases concerning broader policy issues or issues of broader applicability, as well as a litigant in cases where the PUC acts as a court would in determining the rights of parties before it.

NewSun draws on these experiences in making its recommendations and notes that the PUC's Division 1 rules could be improved to more clearly delineate these different types of procedures and the rights and obligations of stakeholders in each type of procedure, as well as the Staff and PUC responsibilities in terms of responding to stakeholder input. These concerns extend not only to discovery, data requests and confidentiality issues, but also on other issues as well. However, in these comments, NewSun will focus on the current issues at hand.

Recommendations

NewSun makes four recommendations intended to improve data transparency and alleviate some of the burdens of participating in PUC proceedings:

1. Make data requests and responses public in general matters of utility regulation.
2. Articulate sideboards around what types of information is confidential.
3. Eliminate interrogatories and extend the deadline for non-utility parties to respond to requests for production of documents to 30 days.
4. Limit discovery of non-utility intervenors to only matters upon which the intervenor has testified.

Each of these are discussed in detail below.

1. **Public Data Responses**
   Applicable sections: OAR 860-001-0540

By requiring that certain data requests be made public and accessible to anyone, the PUC can help ensure better transparency and facilitate stakeholder engagement for groups that have fewer resources to participate or less experience. The problem NewSun sees is that in order to view data requests or responses, a stakeholder group or individual must file an intervention and a request for huddle access (or if huddle is not being used, must request that all data requests and responses be sent to it from the other parties). This is true even in dockets where intervention is not required to participate, like the PUC's hybrid procedures for IRPs and RFPs.

However, NewSun's recommendation is not limited to those hybrid procedures. Rate cases, for one, have broad public interest implications. Second, the PUC often uses other types of proceedings to examine issues that have a broad general applicability, that set policy, or that otherwise concern matters of general utility regulation. For example, the PUC has historically set broad, generally applicable policy in a contested case format, or investigated a matter in a contested case format which then informed a later PUC rulemaking. Intervention is required for participation in those dockets and in order to gain access to data. Aside from any concerns about whether those are the appropriate processes to use to determine broadly applicable policy, if the PUC is going to continue using such procedures to set or investigate policies, the data produced in those processes should be public and not limited to only groups that have the resources and expertise to intervene. Finally, stakeholders interested in a rulemaking should have equal access to the data disclosed in the prior contested case that informed the rulemaking, even if they did not individually participate in that docket.

This recommendation would apply only to data requests not designated as confidential and the redacted versions of confidential data requests. Types of cases this rule would cover include rate cases, IRPs, RFPs, rulemakings, or other contested cases, declaratory rulings, or dockets other than contested cases where the subject of the dispute is a policy issue, has general applicability, or otherwise concern matters of general utility regulation. In other words, it would not apply to contested cases where the PUC is acting as a court would in litigating the rights of individual parties before it.

2. **Confidential Information**
   Applicable sections: OAR 860-001-0070, 860-001-0080

Better sideboards around which types of information qualify as confidential can also facilitate broader stakeholder participation. Many stakeholders are reluctant to sign protective orders and so will never have the opportunity to see what information utilities designate as confidential or challenge that designation. Additionally, there are instances where a trade group may not sign a protective order, but their attorney does, and the over-designation of confidential information can impair that group from being able to effectively communicate with its counsel. Further, as a policy matter, it should not be the responsibility of stakeholders to police the utilities' designation of confidential data.

Practically speaking, it is unclear whether the confidentiality designation for public records purposes in OAR 860-001-0070 and a confidentiality designation for general protective orders in OAR 860-001-0080 are intended to cover the same types of information or whether one is intended to be broader or narrower. Additional clarity would be helpful from a practical standpoint.

3. **Eliminate Interrogatories and Extend Document Request Deadline**
   Applicable sections: OAR 860-001-0540

Eliminating interrogatories and extending the deadline for document requests to 30 days for non-utility parties reduces the burden to participate and aligns the PUC process with the Oregon Rules of Civil Procedure (ORCP). The ORCP does not permit written interrogatories and any requests for production of documents are due in 30 days. While NewSun understands the PUC's desire and need to acquire information from utilities in the form of an interrogatory or in a 14-day period, NewSun believes that it should not be more burdensome for other stakeholders to participate in a PUC proceeding than it is to participate in litigation in Oregon State court.

4. **Limit Discovery Requests to Matters in Testimony**
   Applicable sections: OAR 860-001-0500

Finally, the PUC can facilitate broader participation and a help alleviate the burden on non-utility intervenors in contested cases by limiting any discovery directed at them to only matters upon which the intervenor has testified. There is some hesitancy to intervene in a case due to concerns about being overly burdened by discovery requests. NewSun's above recommendations alleviate this to some degree but requiring that requests be more narrowly tailored to matters upon which the intervenor has testified will also help address that concern.

Conclusion

On final comment is that it may be wise for the PUC to take a proactive approach to reach out to other groups and traditionally under- or un-represented parties before the PUC to get their input in this docket on how the PUC processes can better accommodate their needs. NewSun welcomes any feedback on the above recommendations and looks forward to continuing the discussion around these important topics.

Sincerely,

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