

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2273

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation Into House Bill 2021
Implementation Issues.

APPLICATION FOR
RECONSIDERATION OF NEWSUN
ENERGY LLC

Pursuant to ORS 756.561 and OAR 860-001-0720, NewSun Energy, LLC (“NewSun”) files this application for reconsideration of Order No. 24-002 of the Public Utility Commission (the “Commission”) in UM 2273, entered January 5, 2024 (the “Order”). NewSun seeks reconsideration of one issue: The Commission’s decision that existing Clean Energy Plan (“CEP”) and Integrated Resource Plan (“IRP”) review processes are the appropriate dockets for ensuring that utilities are achieving “continual progress” at an appropriate pace of action.

NewSun submits that there is a fundamental regulatory mismatch between the inflexible, forward-looking, and iterative planning function of the CEP and IRP processes and the Commission’s new statutory obligation to police the utilities’ *actual progress* toward decarbonization.¹ This new oversight requirement compels the Commission to look just not at what the utilities’ plan to do in the future, but also at what the utilities

¹ NewSun disagrees with the Commission’s litigation position that IRP decisions do not create final and reviewable orders. For the purposes of this reconsideration, however, the Commission’s interpretation of its IRP dockets and final acknowledgment decisions indicate that those processes are inappropriate for the ORS 469A.415(6) continual progress determinations.

have actually accomplished in terms of meeting their decarbonization standards.

Depending on the circumstances, the Commission also may direct the utilities to take appropriate actions to ensure continual progress. NewSun submits that a better fit for this administrative role may be an evergreen docket, similar to the Commission's avoided cost updates pursuant to the Public Utility Regulatory Process Act ("PURPA"), in which the Commission sets the standard for continual progress and makes annual determinations of whether it is achieved. To be clear, NewSun's recommendation in this reconsideration is specifically tailored to the Commission obligation to ensure continual progress under ORS 469A.415(6) as distinguished from the continual progress component of the CEP itself under ORS 469A.415(4)(e). NewSun makes this practical recommendation in light of the utility comments and Commission deliberations and decisions in Portland General Electric Company's ("PGE's") and PacifiCorp's IRP/CEP dockets (LC 80 and LC 82 respectively).

MEMORANDUM IN SUPPORT

Consistent with OAR 860-001-0720, NewSun provides the following additional information:

1. The portion of the challenged order that the applicant contends is erroneous or incomplete.

NewSun's Petition specifically applies to Section III(D) of the Order, which is addressed on pages 25-30. In Section III(D), the Commission determined that it would make binding, reviewable determinations of "continual progress" in the context of existing IRP and CEP processes:

Our conclusion that the assessment HB 2021 section 4(6) requires us to make is integrally connected to the IRP and CEP planning processes leads

us to the further conclusion that we will use IRP/CEP review processes and their timelines to assess whether utilities are making “continual progress” and “taking actions as soon as practicable.” In other words, we will evaluate continual progress regularly in connection with our proceedings for acknowledgment of IRPs and CEPs and review of IRP and CEP updates.

As explained below, shoe-horning the continual progress determination into the existing IRP and CEP processes fails to give effect to the plain meaning of ORS 469A.415(6).

2. The portion of the record, laws, rules or policy relied upon to support the application.

NewSun’s Petition relies on a plain reading of both ORS 469A.415(4)(e) and ORS 469A.415(6). While these two statutory provisions both discuss the utilities’ obligation to make “continual progress” toward emissions reductions, they actually create two separate and distinct regulatory requirements. The regulatory scheme created by the law is clear: First there is plan, but then there must also be *compliance* with the plan.

ORS 469(4)(e) specifically discusses what must be included in each utilities’ CEP:

- (4) A clean energy plan must:
 - (a) Incorporate the clean energy targets set forth in ORS 469A.410;
 - (b) Include annual goals set by the electric company for actions that make progress towards meeting the clean energy targets set forth in ORS 469A.410, including acquisition of nonemitting generation resources, energy efficiency measures and acquisition and use of demand response resources;
 - (c) Include a risk-based examination of resiliency opportunities that includes costs, consequences, outcomes and benefits based on reasonable and prudent industry resiliency standards and guidelines established by the Public Utility Commission;
 - (d) Examine the costs and opportunities of offsetting energy generated from fossil fuels with community-based renewable energy;
 - (e) Demonstrate the electric company is making continual progress within the planning period towards meeting the clean energy targets set forth in ORS 469A.410, including demonstrating a projected reduction of annual greenhouse gas emissions; and**

This provision indicates that the CEP must show—on a forward-looking basis—that the utility will take appropriate steps towards compliance with clean energy targets. NewSun agrees that it is appropriate for the Commission to review compliance with ORS 469A.415(4)(e) as part of its existing IRP and CEP processes.

Although it also uses the words “continual progress,” ORS 469A.410(6) is different in kind from ORC 469A.415(4)(e). ORS 469A.410(6) does not set forth what needs to be included in the CEP, but commands the Commission to investigate and determine whether utility has actually and sufficiently made continual progress towards reducing its greenhouse gas emissions. “The commission shall ensure that an electric company demonstrates continual progress as described in subsection (4)(e) of this section and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers.” Unlike ORS 469A.410(4)(e), therefore, ORS 469A.410(6) requires a backward facing factual investigation, review, and analysis into what the utility has done to date. Has the utility been implementing its CEP? Has the utility been taking actions as soon as practicable? Has there been a rapid reduction in greenhouse gas emissions? ORS 469A.410(6) is not about promises of future action, it is about the results realized to date.

This second inquiry should not be done as part of the Commission’s existing IRP and CEP processes, but should be conducted in separate dockets that require the utilities (and allow other stakeholders) to bring forth factual evidence concerning the utilities’ actual progress towards compliance (or non-compliance) with the clean energy targets. While the outcome of this investigation will undoubtedly shape the utilities’ subsequent CEPs, it could also result in other Commission penalties, remedies, and compliance

requirements to be enforced by the Commission independent from the IRP and CEP planning processes. The Commission recognizes this in the Order:

If we determine, in an IRP/CEP docket, that the continual progress required by HB 2021 has not been demonstrated, we may also initiate additional proceedings. We interpret HB 2021's direction for us to "ensure" continual progress to give us the authority to require a utility to take actions outside the context of the regulatory determination whether to acknowledge a CEP (*i.e.*, In addition to assessing the forward-looking actions identified in the planning process, we also will evaluate whether utilities are carrying out continual progress toward meeting the targets, including information on emissions reports from DEQ, to procure additional resources or make necessary infrastructure investments.)

NewSun agrees with the Commission's own conclusion that such enforcement actions would "stand in contrast to a fundamental premise of the PUC's IRP acknowledgment decisions—that IRP decisions do not direct a utility to take or not take specific actions, except as it relates to analysis required in future plans or regulatory filings."

NewSun's concern is that the Commission's treatment of "continual progress" in the Order conflates the two distinct regulatory requirements of ORS 469A.415(4)(e) and ORS 469A.415(6) into a single function that is planning only. While the Commission recognizes the inherent need to conduct enforcement and compliance actions outside of IRP and CEP processes, the Commission stops short of requiring the utilities to demonstrate compliance through dockets independent from the IRP and CEP dockets. The Commission then backtracks by suggesting that "continual progress" is a planning only function: "Planning is, by its nature, indicative and strategic, not determinative or certain, and HB 2021 places its continual progress requirements firmly within the planning context." As explained above, this is only half the story. HB 2021 places its continual progress requirements firmly within the planning context (ORS

469A.415(4)(e)) *and* firmly within the enforcement context (ORS 469A.415(6)). The IRP and CEP processes may be the right place to plan for continual progress in the future, but they are the wrong place to investigate and enforce continual progress in the present.

While the Commission recognizes the inherent contradiction of trying to ascertain and enforce continual progress through prospective planning processes, the Commission fails to fix the problem:

One procedural complication with making continual progress determinations in the same proceedings as IRP and CEP acknowledgment decisions involves the finality of these distinct determinations. We have treated IRP acknowledgment orders as non-final decisions whose appeal would lead to piecemeal review of annually evolving plans in which our acknowledgment is preliminary to a final decision in a rate case, and this reasoning may extend to our highly intertwined CEP acknowledgment decisions. However, we understand that the purpose of requiring continual progress is to ensure utility action during the years before compliance with the relevant target is required, and that a lack of continual progress may not be capable of remedy solely at the time of that eventual compliance determination. Therefore, we intend for continual progress determinations to be made as final decisions subject to judicial review. This means that we intend to make separate determinations, in separate orders entered in the same docket, for continual progress and acknowledgment, but we will rely on the same record.

The way to fix this so-called “procedural complication” is simple. Determinations of continual progress pursuant to ORS 469A.415(6) should be done in their own dockets, with their own record, and through final written decisions that are subject to judicial review.

3. The change in the Order that the Commission is requested to make:

NewSun requests that the Commission amend the Order such that the Commission’s fact-based determinations of continual progress pursuant to ORS 469A.415(6) be made through compliance dockets, separate and apart from the existing

IRP and CEP dockets. These compliance dockets could be similar to the Commission’s evergreen PURPA avoided-cost dockets (UM 1728, 1729 and 1730). The Commission could make final, reviewable determinations of substantial compliance in these dockets on an annual basis. To be clear, the Commission’s evaluation of whether the CEP demonstrates continual progress towards meeting clean energy targets as required by ORS 469A.415(4)(e) would still be done through the existing IRP and CEP processes. Each such CEP would still be informed by the Commission most recent continual progress determinations. Not only would the feedback loop between actual progress and future plan remain unbroken, but the Commission would have the ability to develop a more robust record to inform the utility’s planning needs.

4. How NewSun’s requested change in the Order will alter the outcome:

The requested change will alter how the Commission makes “continual progress” determinations for purposes of ORS 469A.415(6). Untethering compliance review from planning processes would allow for a more regular, robust, and granular review of utility actions, but without requiring constant or “continuous” Commission oversight. The Commission would still be free to use its informed judgment to reasonably conclude whether—based on the evidence in the record before it in the compliance docket—the utility has demonstrated continual progress towards meeting its emissions targets. Annual continual progress determinations would not only result in stricter enforcement of the clean energy targets, but would also facilitate more timely feedback to inform the utility’s next IRP and CEP processes.

5. The regulatory grounds for rehearing or reconsideration:

Pursuant to OAR 860-001-0720(3)(a) and (d), there is new evidence that is essential to the decision that was unavailable and not reasonably discoverable before issuance of the order and there is good cause to examine further an issue essential to the decision. Specifically, utility comments, and the Commission’s recent deliberations and decisions, in LC 80 and LC 82 make clear that those dockets are ill-suited for review of backward-looking compliance determinations related to the Commission’s obligation to ensure continual progress. To ensure continual progress, the Commission must have (i) some level of flexibility and nimbleness to direct action; (ii) a venue to receive evidence and review actions that have already been taken or not taken; and (iii) a regular check point to avoid simply kicking the can further down the road.

Recent experience confirms that the IRP/CEP dockets are not nimble and flexible enough to facilitate meaningful and timely change by the utilities. This is particularly a problem with PacifiCorp’s need to comply with multiple states’ filing deadlines which PacifiCorp states contributes to its inability or unwillingness to incorporate changes requested by the Commission, Staff, and stakeholders in Oregon.² The Commission will have a difficult time fulfilling its ORS 469A.415(6) obligation to ensure the utility is demonstrating continual progress if those determinations are wrapped up in the IRP process that creates a “perpetual cycle in which the changes that the commission and

² Oregon Public Utility Commission, Public Meeting on Feb. 20, 2024 (starting at 2:00:08) (“We can accommodate a partial of that, and much of the things that we can do are going to be deferred over until the 2025 IRP. There’s just not the time sufficient to be able to complete these things for the 23 IRP update.”).

stakeholders are asking for are never made.”³ Instead, if the Commission pulls this piece out of the IRP cycle into its own docket where the Commission can focus on Oregon issues, it can avoid the inflexibility that comes along with the IRP process.

In the recent IRP dockets, the Commission has also wrestled with the fact that the IRP docket is not a review of what the utilities have not done in the past—only what they plan to do in the future. The Commission does not acknowledge IRP action items that have already been taken.⁴ Regarding PGE’s IRP, the Commission at this time only reviewed whether the plan, as laid out, illustrates sufficient continual progress so long as it is executed on as described.⁵ However, since this was the first continual progress review, the Commission deferred any backwards looking review of whether PGE has in fact taken steps to make continual progress until the next IRP/CEP cycle. The difficulty with that approach is that the Commission does not acknowledge IRP action items that have already been taken,⁶ and thus the record in an IRP docket is inherently forward-looking and does not review past actions or inactions. That docket therefore would not be an appropriate forum to review backwards-looking progress as the Commission is not likely to have that evidence in the record to review. In a separate docket, however, the Commission could look at broader and different issues including what has or has not occurred.

³ Oregon Public Utility Commission, Public Meeting on Feb. 20, 2024 (starting at 1:55:20).

⁴ See Oregon Public Utility Commission, Public Meeting on Mar. 5, 2024 (video not posted yet at time of filing).

⁵ *Id.*

⁶ See Oregon Public Utility Commission, Public Meeting on Mar. 5, 2024 (video not posted yet at time of filing).

Third, while the continual progress determinations under ORS 469A.415(4)(e) may be firmly embedded in the planning process, the determinations under ORS 469A.415(6) reflect a different and separate Commission obligation to ensure continual progress which should be made on a regular cycle rather than in the iterative, non-determinative IRP environment. Lumping those continual progress determinations into the IRP process could lead to simply kicking the can further down the road and never definitively saying whether continual progress has been made at any given point in time. This concern is particularly illustrated with PacifiCorp's IRP/CEP, where the Commission divorced its determination of continual progress from the IRP/CEP acknowledgement decisions and instead deferred that decision to after it reviews PacifiCorp's 2023 IRP update.⁷ Deferring the decision on continual progress appears at first glance to be an implicit determination that as of the IRP/CEP acknowledgement decision date, continual progress has in fact not occurred. But it also leaves the door open that, at some later date, the Commission could find that continual progress has occurred. This conflicting procedural posture could be avoided if there were a separate docket with a regularly occurring check point where the Commission reviews and definitively states that as of the date of the order continual progress as or has not been made.

The Commission's enforcement of utility compliance with clean energy targets is essential to the success or failure of HB 2021. The legislature did not intend for the clean energy targets in HB 2021 to be merely aspirational goals to be considered by the utilities on a planning basis. The legislature intended for the utilities to take actions that would

⁷ *See id.*

actually reduce greenhouse gas emissions. And the legislature entrusted the Commission with the responsibility to ensure that the utilities are not just planning to reduce emissions, but are actually carrying out and complying with their CEPs. Therefore, even if the Commission directs the utility to take actions in the next IRP or CEP, it's not certain that the utilities will actually take those actions, and that process is still planning-based and does not look backwards at what actions the utility has or is currently taking that actually reduce greenhouse gas emissions.

Given that this is a new regulatory scheme, good cause exists for the Commission reconsider whether it has established the appropriate regulatory tools and processes to ensure that the utilities demonstrate compliance. For the reasons explained above, the existing IRP and CEP processes are appropriate for reviewing the adequacy of a utility's CEP as required by ORS 469A.415(4)(e). But these forward-looking processes are not the appropriate processes for the Commission to conduct fact-based investigations required by ORS 469A.415(6) to ensure actual utility compliance. Further, the Commission has repeatedly taken the position in litigation that final, written orders issued in its IRP and CEP dockets are not "final orders" and are not subject to judicial review.⁸ Conducting compliance dockets apart from planning dockets would remove any doubt as to the finality and reviewability of the Commission's continual progress determinations.

⁸ NewSun disagrees with this litigation position and reserves all rights to argue that the Commission's final, written decisions in IRP and RFP processes are subject to judicial review.

CONCLUSION

For the foregoing reasons, NewSun request that this Commission grant NewSun's application for reconsideration.

Dated this 5th day of March 2024.

Respectfully submitted,

NEWSUN ENERGY LLC

/s/ Marie P. Barlow

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