IN THE COURT OF APPEALS OF THE STATE OF OREGON

NEWSUN ENERGY LLC, a Delaware limited liability company,
Petitioner-Appellant,

v.

OREGON PUBLIC UTILITY COMMISSION, an agency of the State of Oregon,
Respondent-Respondent,

and

PORTLAND GENERAL ELECTRIC COMPANY,
Intervenor-Respondent.

Deschutes County Circuit Court
22CV37061

CA No. A182799

BRIEF OF *AMICUS CURIAE* THE GREEN ENERGY INSTITUTE AT LEWIS & CLARK LAW SCHOOL AND SIERRA CLUB

On Appeal from General Judgment entered October 31, 2023, of the Circuit Court for Deschutes County; The Honorable Beth M. Bagley

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BRIEF OF AMICI CURIAE

I. INTRODUCTION AND INTEREST OF AMICI CURIAE

Amicus Curiae Green Energy Institute at Lewis & Clark Law School (GEI) is an organization housed in the law school's Environmental, Natural Resources, and Energy Law Program. Its mission is to develop equitable, comprehensive, effective strategies to prevent catastrophic climate change by furthering the just transition to a sustainable, carbon-free energy grid. GEI's analyses and recommendations aim to hasten the energy transition by strengthening existing policies, eliminating barriers, and promoting innovative strategies to design and help implement just and ambitious energy and climate policies.

In addition to policy development, GEI engages in regulatory proceedings at the Oregon Public Utility Commission. Participating in a variety of dockets, involving both gas and electric investor owned utilities, GEI works to avoid fossil fuel lock-in, implement equitable decarbonization measures, and encourage a transparent and open process for new participants.

Amicus Curiae Sierra Club is a national nonprofit organization with 67 chapters and over 680,000 members, including over 18,000 members who reside in Oregon. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth and to practicing and promoting the responsible use of the

earth's ecosystems and resources. The Sierra Club's most important current priority is to advance smart, clean energy solutions that address the critical problems of climate change, air pollution, and our nation's dependence on fossil fuels. To that end, Sierra Club is a regular participant before public utility commissions across the country, including the Oregon Public Utility Commission, in both gas and electric utility proceedings. The Sierra Club's interest in this case stems from its active involvement before the Oregon Public Utility Commission in a wide range of dockets, nearly all of which directly impact the equitable and rapid transition to clean energy necessary to avoid the worst impacts of climate change.

GEI and Sierra Club respectfully request that the Court hold that Order No. 22-315 is a "final order" under the Administrative Procedures Act (APA) and subject matter jurisdiction exists for judicial review.

II. STATEMENT OF THE CASE

GEI and Sierra Club concur with and adopt the Statement of the Case of NewSun.

III. ASSIGNMENTS OF ERROR

GEI and Sierra Club concur with and adopt the Assignment of Error 1 of NewSun. GEI and Sierra Club do not take a position on Assignment of Error 2.[1]

IV. ARGUMENT

GEI and Sierra Club concur with and adopt the Argument of NewSun pertaining to Assignment of Error 1. Consistent with ORAP 5.77(1), this brief does not repeat NewSun's arguments but provides additional context to assist the Court in understanding "the context of the regulatory scheme within which the agency issued the order." *Grobovsky v. Bd. of Med. Examiners*, 213 Or App 136, 143, 159 P3d 1245, 1248 (2007).

This brief focuses on the importance of a Commission's order acknowledging a regulated utility's final shortlist at the end of its request for proposals (RFP) process. Applying the statutory criteria leads to a finding that the Commission's final shortlist acknowledgment is a final order, subject to judicial review, and recognizes the unique role the Commission serves in the development of the RFP—a role that is different from the function it plays in a rate case. In fact, the decision made by the Commission to acknowledge a final shortlist is never

[1] GEI and Sierra Club note that should the Court rule in NewSun's favor on Assignment of Error 1, the issues raised in Assignment of Error 2 should be heard before the trial court.

again available for review, not even in a rate case. Finally, other jurisdictions agree that RFP decisions are final orders.

A. Background on RFPs from Amici Perspective

At first glance, this appears to be a dispute brought by a renewable energy developer who has been elbowed out by the utility and other developer competition. In reality, the outcome of this dispute will ripple far beyond NewSun Energy and its ability to develop a project for an investor-owned utility. Importantly, the Oregon courts appear to never have addressed which of the many orders issued by the Commission constitute a final order for purposes of appeal, other than in rate cases. *See Northwest Public Communications Council v. Public Utility Comm'n*, 196 Or App 94, 100 P3d 776 (2004) (challenging whether PUC used the correct rate-setting method for payphone services); *Chang v. Public Utility Comm'n of Or*, 256 Or App 151, 301 P3d 934 (2013) (industrial customer challenged rates as unjust and unreasonable); *Calpine Energy Solutions LLC v. Public Utility Comm'n of Or*, 298 Or App 143, 445 P3d 308 (2019) (challenging PUC's approval of a charge imposed on customers who chose to "opt out" of purchasing electricity from PacifiCorp); *Utility Reform Project v. Or Public Utility Comm'n*, 277 Or App 325, 372 P3d 517 (2016) (addressed issue of administrative costs charged to ratepayers in long line of cases involving Trojan nuclear plant).

A determination from the Court that the order is final will resolve larger questions about separation of powers, will assure reviewability of agency actions that affect how Oregon addresses climate change, and will deliver on promises of accessibility and meaningfulness of participation in agency proceedings. A contrary conclusion will relegate stakeholders, advocates, and individuals to participating in less meaningful processes that ultimately produce unreviewable and unenforceable results, potentially depriving stakeholders of a remedy in the face of a violation of the law.

Amici dispute the characterization that all proceedings at the Commission result in only one final order that comes at the very end of years' long engagement. Any description of the Integrated Resource Plan (IRP), an RFP, and a rate case as three phases of a single process culminating in a single final order at the conclusion of a rate case misapprehends the importance of each of the distinct processes. The utilities' view—that each of these regulatory requirements is part of one monolithic process culminating in a final order—may be consistent with the perspective of an investor-owned entity whose ultimate goal is maximizing rates and hence profit. However, each of the processes serves its own purpose, involving different stakeholders, different regulatory requirements, and resulting in different outcomes.

B. The RFP Shortlist Meets the Statutory Criteria of a "Final Order"

An acknowledgement order of an RFP shortlist satisfies the criteria of ORS 183.310(6)(b) and, therefore, is a final order subject to judicial review. The Commission and PGE attempt to inject confusion into a straightforward statutory analysis that demonstrates that a final shortlist acknowledgement is a final order.

ORS 183.310(6)(b) defines a "final order" as "a final agency action expressed in writing." Final orders do not include "any tentative or preliminary agency declaration or statement that: (A) Precedes final agency action; or (B) does not preclude further agency consideration of the subject matter of the statement or declaration." ORS 183.310(6)(b). The Commission's acknowledgement of a utility final shortlist means that the Commission has determined that the utility's final shortlist is in compliance with Commission rules; no more, no less. OAR 860-089-0500(1). The Commission's acknowledgement is not subject to further review or reconsideration. In other words, it is final for purposes of ORS 183.310.

Additionally, the RFP shortlist acknowledgement is neither a "tentative" nor a "preliminary" agency declaration. ORS 183.310. A shortlist acknowledgement is not a step preceding a final agency action; it is the final determination as to whether the utility's shortlist is compliant with Commission rules. Once the Commission acknowledges the shortlist, the utility has the "green light" to move forward, and can do so without concern that the Commission will reopen or

reconsider its finding on the matter. As we discuss below, while a final shortlist acknowledgment order does not determine the prudency of future utility actions (as will be determined in a rate case), that issue *is not before the Commission* in an RFP proceeding. Rather, in an RFP proceeding, the Commission must evaluate whether the utility has complied with the Commission's requirements necessary for a final shortlist acknowledgment. OAR 860-089-0500(1). Commission acknowledgement is not, then, a step preceding a final agency action; it is the culmination of the competitive bidding process and the final determination as to whether shortlist is compliant with Commission rules.

C. The Purpose of the RFP Process is Unique

To suggest that the only consequence of a final shortlist is the establishment of future rates is a wholly subjective perspective, representative of only the utility's point of view. For ratepayers, the whole point of an RFP is to introduce a mechanism to counteract the non-competitive nature of a monopolistic market structure by introducing competitive bidding for resource construction. The assurance of the competitive nature of an RFP is not a part of a ratemaking process; rather, it is a separate determination made by the Commission pursuant to a separate statutory requirement to ensure that the competitive nature of the RFP is preserved. ORS 469A.075(4)(d); OAR 860-089-0010(1).

Specifically, the Commission's statutory requirement is to "[p]rovid[e] for the evaluation of competitive bidding processes that allow for diverse ownership of renewable energy sources that generate qualifying electricity." ORS 469A.075(4). The Commission implemented that statutory directive by adopting the competitive bidding rules contained in OAR 860, Division 89. *See also In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources*, Docket No. AR 600, Order 18-324 (Aug. 30, 2018).

Pursuant to those rules, review and approval of the final shortlist is an essential function of the Commission's, and one that helps to ensure more competition within the power market. The integrity of the entire RFP process encourages independent power producers to participate in bidding, knowing that the Commission oversees the design, proposed scoring and modeling, and evaluates the RFP to "establish a fair, objective, and transparent competitive bidding process" and ensure it will result in a "fair and competitive bidding process." OAR 860-089-0010; OAR 860-089-0250(5). The Commission's "acknowledgement" of the final shortlist means something; it requires the Commission to "find[]" that the "final shortlist of bid responses appears reasonable at the time of acknowledgement and was determined in a manner consistent with the rules in this division." OAR 860-089-0500. Further, the selection of the final shortlist of bidders must be based on bid scores according to the Commission-

approved RFP design. OAR 860-089-0400(5). Therefore, Commission acknowledgment of the final shortlist is not merely one step in the process towards a rate case, but fulfills a distinct and separate statutory and regulatory responsibility to ensure competition, diverse ownership of resources, and a fair, objective and transparent process.

D. The Commission's Decision on the Final Shortlist Cannot Be Addressed in a Rate Case

As it pertains to its later effect in the rate case, a Commission decision to acknowledge an RFP shortlist has the same legal effect as a Commission's decision to acknowledge an IRP; in other words, consistency with the acknowledgement final shortlist "may be evidence in support of favorable rate-making treatment of the action, although it is not a guarantee of favorable treatment." OAR 860-089-0500(2); *In the Matter of Public Utility Comm'n of Oregon Investigation into Integrated Resource Planning*, Docket No. UM 1056, Order No. 07-002 (Jan. 8, 2007) (imposed via OAR 860-027-0400(2) .

In practice, this effectively shifts the burden of proof in a rate case from the utility to challenging parties. Once the utility demonstrates that its costs were incurred in alignment with an acknowledged shortlist, it becomes intervening parties' burden to demonstrate that the utilities' proposed costs are nevertheless unfair, unjust, and unreasonable, despite intervening parties having far less access

to information than the utility does. The final acknowledged shortlist and the benefit that the acknowledgment provides to the utility is not revisited at a later stage, whether in a rate case or in any other docket, and thus cannot be challenged except by appealing a final shortlist acknowledgment.

Notably, rate cases are extremely difficult forums to evaluate whether the utility should have taken a different course of action than it did. This inquiry requires looking back at what the utility knew or should have known at the time it made its resource decision and evaluating whether a different course of action would have been less costly or lower risk. Even if participants are able to convincingly demonstrate that "the road not taken" was the better course of action, the only available recourse is to not allow the utility to recover costs for the actions that it did take. The rate case will not, for example, result in an order directing a utility to go back to the RFP shortlist and instead pick a different more cost-effective resource or a resource that would have reduced more greenhouse gasses. Therefore, rate case review does not provide for review of the final shortlist acknowledgment decision.

E. Other Jurisdictions Recognize that RFP Decisions are Reviewable

Other jurisdictions have never questioned the natural conclusion that RFP decisions are final orders and subject to judicial scrutiny. For example, the New Mexico Supreme Court reviewed a utility commission's order approving one of the

six bids responding to a utility's RFP. Treating the order as a final order, the court analyzed whether the Commission's approval was arbitrary, capricious, and supported by substantial evidence. *New Mexico Industrial Energy Consumers v. New Mexico Public Regulation Commission*, 450 P3d 393 (NM 2019).

Additionally, the Supreme Court of Vermont reviewed an order from the Vermont Commission approving a facilitator's selection of three projects out of the thirty-eight proposals submitted in response to an RFP. In explaining the context for the dispute, the court touched on several considerations that inform the value served by judicial review of a final shortlist acknowledgement. For example, analysis of whether bids comply with mandatory requirements set out in the RFP, any decisions to waive variations from the requirements and whether the variations are material or not, and the need for "fundamental fairness" in a bidding process. *Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019*, 251 A3d 525 (Vt 2020).

These cases demonstrate the essential function of judicial review in ensuring that RFP designs are fair, conform to the Commission's underlying statutes, that their terms are adhered to during the bidding process, and that the final shortlist that the Commission acknowledges reflects the compliant bid responses.

V. CONCLUSION

For the foregoing reasons, the Court should reverse the General Judgment and remand this case to the trial court for further proceedings.

DATED: February 29, 2024.

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