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September 21, 2005

**VIA ELECTRONIC FILING**

PUC Filing Center  
Public Utility Commission of Oregon  
550 Capitol Street N.E. Suite 215  
Salem, Oregon 97301-2551

**Re: Docket AR 495**

Enclosed for filing please find an original and one copy of the Comments of PacifiCorp in the above-referenced matter. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Thank you for your assistance.

Very truly yours,

A handwritten signature in black ink that reads 'Jeanette C. Schuster'. The signature is written in a cursive style and includes a checkmark at the end.

Jeanette C. Schuster

JCS:ljr

cc: Service List

1 BEFORE THE PUBLIC UTILITY COMMISSION  
2 OF OREGON

3 AR 495

4 In the Matter of a Proposed Rulemaking to  
5 Adopt and Amend Rules Related to  
6 Ownership of the Non-energy Attributes of  
7 Renewable Energy (Green Tags), Energy  
8 Service Supplier Certification  
9 Requirements, and Use of the Terms  
10 “Electric Utility” and “Electric....

COMMENTS OF PACIFICORP

8 I. INTRODUCTION

9 In AR 495, the Oregon Public Utility Commission (the “OPUC”) Staff recommends  
10 the adoption of a rule providing that “unless otherwise agreed to by separate contract, the  
11 owner of the renewable energy facility retains ownership of the non-energy attributes  
12 associated with electricity the facility generates and sells to an electric company pursuant  
13 to: (a) The provisions of a net metering tariff; (b) An Oregon contract with the electric  
14 company entered into pursuant to Section 210 of the Public Utility Regulatory Policies Act  
15 of 1978; or (c) Another power production tariff.”

16 PacifiCorp requests that the OPUC deny the above recommendation and instead  
17 adopt the following rule:

18 (1) As used in this rule: “Non-energy attributes” means the environmental, economic and  
19 social benefits of generation from renewable energy facilities. These attributes are normally  
20 transacted in the form of Renewable Energy Credits (“RECs”).

21 (2) Existing contracts: For contracts entered into in Oregon between energy utilities and  
22 qualifying facilities (“QFs”) pursuant to the Public Utility Policies Act of 1978 (“PURPA”) prior to the effective date of this rule, the energy utility purchasing electrical output from the QF shall have ownership of all RECs associated with energy and capacity produced and delivered by the QF.

23 (3) Future contracts:

24 (a) For contracts entered into in Oregon between energy utilities and QFs pursuant  
25 to PURPA after the effective date of this rule, ownership of all RECs associated with energy  
26 and capacity produced and delivered by a QF is governed by the provisions of the contract pursuant to which the energy is purchased.

1 (b) Unless otherwise agreed to by contract, the developer of the QF shall have  
2 ownership of all RECs associated with energy and capacity produced and delivered by the  
3 QF, but only if and only while the following conditions are met:

4 (i) The reasonable cost of output of the QF determined in accordance with  
5 standards to be established by the Commission, which shall include a cost analysis  
6 performed by a third party, is greater than the avoided cost to be paid by the energy utility,  
7 and

8 (ii) The energy utility is not subject to a Renewable Portfolio Standard or  
9 other requirement pursuant to which it is required to purchase a portion of its output from  
10 renewable resources.

11 In all other cases, ownership of the RECs will remain with the energy utility purchasing the  
12 electrical output from the QF.

13 (4) The energy utility shall not resell RECs obtained under existing or future QF contracts,  
14 as set out in this rule, and must retain all RECs for ratepayer benefit, including the ability to  
15 count power purchased from renewable QFs as renewable energy in the utility generation  
16 mix.

## 17 II. Argument

### 18 A. Background

19 Staff recommends that QFs retain RECs in all PURPA contracts in Oregon. One  
20 rationale appears to be that the avoided cost mandated by the Commission for PURPA  
21 implementation is not intended to include the “environmental attributes” embodied by  
22 RECs, and to require a “transfer” of RECs from QFs to ratepayers would constitute an  
23 unwarranted taking from the QF.

24 On October 1, 2003, the Federal Regulatory Energy Commission (“FERC”) issued  
25 an order stating that “contracts for the sale of QF capacity and energy entered into pursuant  
26 to PURPA do not convey RECs to the purchasing utility (absent express provision in a  
contract to the contrary).” *American Ref-Fuel Company*, 105 FERC ¶ 61,004 at 61,007.  
FERC decided that “While a state may decide that a sale of power at wholesale  
automatically transfers ownership of the state-created RECs, that requirement must find its  
authority in state law, not PURPA.” *Id.* Consequently, FERC does not prohibit the transfer

1 of RECs to ratepayers and the OPUC has authority to adopt PacifiCorp’s proposed rule as  
2 set out above.

3 According to the National Association of Attorneys General, RECs (or,  
4 alternatively, “green tags”) “refers to a system of tracking environmental attributes of  
5 electricity generation in which the electricity, and the environmental attributes of the  
6 generating sources of the electricity, are distinct commodities and are sold or traded  
7 separately. Under such a system, a retail provider of electricity can buy electricity in one  
8 place and environmental attributes in another. The ‘tag’ is the right to claim the attributes  
9 of the electricity.”<sup>1</sup> NAAG also states that “Under a tagging system, the environmentally  
10 preferable attributes of specific power generation—the ‘*premium*’ associated with preferred  
11 generation—are available to be sold separately from the power itself.”<sup>2</sup>

12 While NAAG refers to “environmentally preferable attributes,” others have taken  
13 this to mean that RECs are synonymous with tradable emissions allowances or credits as  
14 recognized by the U.S. Environmental Protection Agency and/or state environmental  
15 jurisdictions such as Oregon Department of Environmental Quality. However, no  
16 environmental statute or rule provides a basis for this assumption, and it is an incorrect view  
17 of RECs.

18 The characteristic of RECs as proof of renewable generation raises the question of  
19 why RECs exist at all. The difference today is that markets have emerged in which such  
20 proof of generation can now be sold separately from the power generated. RECs have  
21 emerged in two types of markets: (1) a compliance market created by state Renewable  
22 Portfolio Standards (“RPSs”); and (2) a voluntary market in which retail or wholesales  
23 customers choose to pay a premium for renewable energy.

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25 <sup>1</sup> Resolution Adopting Environmental Marketing Guidelines for Electricity, National  
Association of Attorneys General, Winter Meeting, 1999, p. 6.

26 <sup>2</sup> *Id.* at 25.

1 In the compliance market, numerous states permit complying entities to purchase  
2 “unbundled RECs” (*i.e.*, RECs separated from the underlying power generation) to comply  
3 with mandated targets for renewable energy supply. Some states consider RECs to embody  
4 environmental attributes (*e.g.*, New York)—though the specific nature of these attributes is  
5 frequently unclear and associated formal decisions from state environmental agencies are  
6 conspicuously lacking—while others simply consider them to represent proof of renewable  
7 energy generation (*e.g.*, Texas).

8 In the voluntary market, RECs can represent the above-market cost of renewable  
9 energy, such that purchase of RECs represents a transaction essential to bringing new  
10 renewable generation on-line. RECs serve as a market mechanism to promote the  
11 development of renewable resources by allowing the transfer of “bragging rights” for  
12 renewable resources without having to tie up a transmission path from a potentially remote  
13 buyer directly to that renewable resource. The Bonneville Environmental Foundation, a  
14 green tag supplier in the Northwest, states that “environmental attributes [from the  
15 renewable energy facility] are credited to the customers who have paid a *premium* to create  
16 that benefit by buying Green Tags [*i.e.*, RECs].”  
17 [https://www.greentagsusa.org/GreenTags/faq\\_pages/about\\_greentags.cfm](https://www.greentagsusa.org/GreenTags/faq_pages/about_greentags.cfm) (emphasis  
18 added).

19 In sum, RECs have emerged as a commodity not to provide individuals with a way  
20 to offset their emissions—there is no example of a REC automatically representing an  
21 emissions allowance or offset in a Clean Air Act program, for example—but to provide (1)  
22 a way for individuals to support renewable energy by covering the premium required to  
23 bring renewable energy on line, and (2) a tool for entities covered by RPSs to comply  
24 without having to purchase the underlying power. In both markets—voluntary and RPS—  
25 the premise is that renewable energy embodies a premium above “the market” to expand  
26 and provide multiple public benefits, including a better environment.

1 **B. Existing Contracts**

2 The most certain characteristic of a REC—proof of renewable generation—raises  
3 the question of why utilities should be denied RECs in existing PURPA contracts. Such  
4 proof of generation not only has always existed in the form of attestations to the purchaser  
5 of renewable power, but it has existed in the meter between the QF and the purchasing  
6 utility's system. Essentially, utilities were already receiving RECs from QFs utilizing  
7 renewable generation. Section 210 of PURPA requires utilities to buy power from  
8 generation fueled by specific resources (biomass, solar, wind, waste, geothermal) or in  
9 specific configurations (*e.g.*, cogeneration). Given this condition, utilities have required  
10 proof that QFs fulfill the eligibility requirements of Section 210 of PURPA. Attestations—  
11 *i.e.*, RECs from those QFs based on renewable generation—have always been required to  
12 ensure compliance with PURPA, essentially representing the utility's right to claim the  
13 renewable attributes. Likewise, the meters between the QF and the utility's system have  
14 always shown the energy from that renewable resource flowing to the utility.

15 Merely because the term “REC” did not exist at the time of contract execution has  
16 no bearing on whether a particular renewable generation had non-power attributes at the  
17 time its output was acquired. Earlier renewable generation projects had the same non-  
18 power attributes as new renewable generation projects—the sole difference is that there is  
19 now a market for these non-power attributes. These non-power attributes did in fact exist  
20 when the contracts were entered into and, in fact, were the very attributes embodied in  
21 PURPA that resulted in QF status being conferred upon such projects and thereby triggering  
22 a utility obligation to purchase. Just because one attribute of what has already been sold  
23 subsequently acquires a separate market value does not mean that particular attribute now  
24 warrants separate compensation. Nor does it mean that the utility is no longer purchasing  
25 the electricity from a specified resource when it has always been purchasing the electricity  
26 from that specified resource, and has a contract to purchase the electricity from that specified

1 resource. These non-power attributes were used as the basis for invoking the utility's  
2 obligation to purchase under PURPA. A decision by the Commission that these RECs are  
3 already owned by the purchasing utilities does not make them "valueless," but simply  
4 recognizes that once a seller conveys these non-power attributes, they cannot be sold again.

5         Given this situation, Staff's proposal disregards the reality of who is purchasing the  
6 electricity, and therefore who has the right to claim the "renewable attributes" in past and  
7 existing PURPA contracts. Utilities, including PacifiCorp, have reported the output of  
8 existing renewable QFs as "renewable energy" in various reporting programs, including  
9 corporate environmental reporting, based on the reasonable assumption that QF contracts  
10 with renewable generation represents renewable energy for ratepayers. Additionally, since  
11 the purchasing utility is in fact purchasing energy from a specified resource as proven by  
12 attestations (*i.e.*, proof of renewable generation) conveyed to the utility, conventional fair  
13 trade, truth-in-advertising and antifraud statutes embodied in the NAAG Guidelines would  
14 likely prohibit another party's ability to lawfully make that same claim. Moreover,  
15 PacifiCorp is not aware of any legal authority pursuant to which it can be required to  
16 renounce that it is purchasing energy from the resource from which it is purchasing energy  
17 and say that it bought undifferentiated energy from the grid. PacifiCorp proposes, therefore,  
18 that RECs associated with past and existing PURPA contracts be assigned to the utility.

19 **C. Future Contracts**

20         With respect to future contracts, PacifiCorp respectfully differs from the Staff's  
21 proposal. The fact that RECs are proof of renewable generation, and that utilities have  
22 received attestations of generation from renewable generation who have qualified under  
23 PURPA, argues that the Staff proposal is a significant change in practice going forward.

24         Staff's proposal also neglects the fundamental role of RECs to support the growth of  
25 renewable generation by offering a conduit between a developer and a RECs purchaser to  
26 cover the *presumed premium* for renewable energy. Staff's position is that a REC is to be

1 owned by the QF in all cases, regardless of whether or not the reasonable cost of the QF  
2 (including a reasonable rate of return on investment) is fully covered by the avoided cost  
3 payments received from the purchasing utility. In this manner, the proposal essentially  
4 states that if a QF's reasonable cost is covered fully by the avoided cost, the QF is still free  
5 to hold the associated RECs and even sell them to the voluntary or compliance market.  
6 This is so even though the RECs, or the revenues from selling the RECs, would be a  
7 windfall to the QF, which does not need the revenues from the sale of RECs to generate  
8 renewable power, the cost of which is fully supported by the PURPA-mandated avoided  
9 cost payments.

10 In return for covering the *entire* reasonable cost of a QF, ratepayers would merely  
11 receive energy but would not be allowed to label that energy as "renewable." Instead, the  
12 utility could conceivably interconnect with and buy the entire output of a fleet of QFs, and  
13 yet would not be able to consider such generation as renewable.

14 Under the Staff proposal, the QF would be free to sell RECs to anyone. It is entirely  
15 possible that QFs would sell RECs to out-of-state customers and, as a result, Oregon  
16 ratepayers would not count the generation as renewable, but customers in California,  
17 Nevada or other states could. Currently, this issue is primarily related to fuel mix  
18 disclosure, as required in Oregon and other states. However, if and when a national RPS or  
19 even an Oregon RPS is enacted, Oregon ratepayers would be disadvantaged. In fact, there  
20 would be a speculative opportunity created for the benefit of buyers of RECs from Oregon  
21 QFs, who could cause scarcity in available Oregon renewable resources in the event of  
22 future RPS compliance requirements.

23 The proposal by PacifiCorp also avoids two additional negative implications.

- 24 • First, it avoids a saturation of the regional RECs market. The ability of QFs whose  
25 reasonable costs are covered by the avoided cost to sell tags in the regional market  
26 would undercut the RECs prices required by generation dependent upon RECs to  
cover their above-market costs.



1 • Second, it prevents a potentially perverse scenario in Oregon, whereby enactment of a  
2 state RPS that requires utilities and other load-serving entities to reach certain  
3 renewable energy targets would lead to utilities going back to the very QFs whose  
4 reasonable costs are already covered by the ratepayers to purchase RECs for RPS  
5 compliance, if in fact those RECs, which may have been sold forward into future  
6 years, can in fact be reacquired. In this scenario, ratepayers would be paying twice  
7 for renewable generation they have already supported and provide a windfall to QFs,  
8 or the entities that purchased and held the RECs from the QFs. In addition, the RPS  
would not promote new renewable generation. Rather, it would merely accord a  
windfall to existing generators, or their speculative RECs purchasers, with no clear  
public benefit. Thus, the Staff’s proposal can undermine the benefits of future  
renewables programs, including benefits from resource diversity or local economic  
development due to providing incentives for new renewable generation. Instead,  
existing QFs whose costs are fully covered will merely earn more windfall without  
direct benefits to Oregon.

9       Consequently, Staff is proposing that QFs receive a windfall from the sale of RECs  
10 in cases where the avoided cost paid by Oregon ratepayers covers the entire reasonable cost  
11 of the QF. There are no conditions under which the QFs’ windfall will go to benefit the  
12 public and/or ratepayers through additional renewable generation or through rate credit to  
13 ratepayers. Consequently, PacifiCorp finds no benefit to ratepayers in the Staff’s proposal,  
14 but only potential detriment to the public interest.

15 **D. Alternative Proposal To Protect Ratepayers and Recognize the Purpose of RECs**

16       PacifiCorp does believe that the role of RECs in development of renewable resource  
17 markets leaves room for the OPUC to permit PacifiCorp to provide in certain circumstances  
18 that the QF may retain ownership of the RECs in future contracts. The alternative proposal  
19 can readily address the imbalance embodied in the Staff proposal as discussed above—  
20 namely, recognizing RECs as a new market tool to benefit renewable generation, while  
21 crediting ratepayers for their role in supporting new renewable generation developed by  
22 QFs and fully paid for by ratepayers.

23       For future contracts, PacifiCorp proposes that the OPUC create proxy resources for  
24 the various types of renewables facilities eligible under PURPA, in order to determine the  
25 “reasonable cost” and whether or not a QF’s “reasonable” cost falls above, at, or below the  
26 avoided costs mandated by the OPUC under PURPA. In so doing, the OPUC can identify a

1 “reasonable” rate of return on investment by the QF developer—and provide results to  
2 utilities, the OPUC, and the QF developer.

3 In the case where the reasonable costs of a QF project are found to be above avoided  
4 costs, the QF could keep the RECs. This provision recognizes the fundamental purpose of  
5 RECs, and does not accord RECs to ratepayers when they were not entirely responsible for  
6 supporting new renewable generation.

7 In the case where the reasonable costs of a QF project are found to be at or below  
8 avoided cost, PacifiCorp proposes that the utility would be allowed the right to claim the  
9 renewable attributes (*i.e.*, it would own the RECs). The utility could be prohibited from  
10 selling the RECs it acquires due to purchase of energy from a QF and the RECs would be  
11 retained for ratepayers. Consequently, the utility could label the associated QF power as  
12 “renewable” in fuel mix disclosures, and the utility could hold RECs for compliance with  
13 potential RPSs at the state or federal level. PacifiCorp’s proposal also recognizes the  
14 physics involved, namely that the purchasing utility is in fact buying electricity from the QF  
15 with which it has contracted. This provision recognizes the ratepayers’ essential role in  
16 supporting new renewable generation, while avoiding undue windfalls to QFs and  
17 speculative RECs buyers.

18 PacifiCorp’s overall proposal matches the methodology of the ETO, in which the  
19 parties enter into a series of contracts which provide that ETO receives RECs from  
20 renewable generation to whom ETO provided financial support essential for the existence of  
21 the generation.

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1 **II. CONCLUSION**

2 PacifiCorp respectfully requests that the Commission adopt the changes to the  
3 proposed rule set forth above.

4 DATED: September 21, 2005.

5 STOEL RIVES LLP

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7 \_\_\_\_\_  
8 Katherine A. McDowell  
9 Jeanette C. Schuster

10 Attorneys for PacifiCorp

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**CERTIFICATE OF SERVICE**

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2 I hereby certify that I served the foregoing **COMMENTS OF PACIFICORP** in  
3 Docket AR 495 on the following named person(s) on the date indicated below by  
4  mailing with postage prepaid  
5  hand delivery  
6  facsimile transmission  
7  Electronic mail  
8 to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said  
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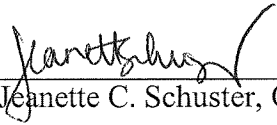
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DATED: September 21, 2005.

  
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