BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 538 and UM 1452

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation into Pilot Programs to demonstrate the use and effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems.	STAFF COMMENTS Regarding potential Federal Energy Regulatory Commission preemption of volumetric incentive rates set by the PUBLIC UTILITY COMMISSION OF OREGON

2009 Or Laws Ch. 748 (also known as House Bill 3039) requires the Public Utility Commission of Oregon (OPUC) to establish pilot programs to test whether volumetric incentive rates (VIR) paid by investor-owned utilities (IOUs) can incent the installation of solar photovoltaic (SPV) systems. In a December 15, 2009 memorandum sent to the OPUC Utility Program Director, Stephanie Andrus, a Senior Assistant Attorney General with the State of Oregon, provided legal analysis addressing how the Federal Energy Regulatory Commission's (FERC's) exclusive jurisdiction to establish rates for wholesale sales of electricity in interstate commerce impacts the ability of the OPUC to implement HB 3039.

Pursuant to Administrative Law Judge Power's December 18th ruling in this docket, Staff of the OPUC submits this letter to provide parties with Ms. Andrus's legal analysis and to explore several regulatory routes that could be taken to avoid preemption by the FERC. Ms. Andrus's memorandum is attached to this letter.

Staff draws three primary policy conclusions from Ms. Andrus's memorandum:

1. The FERC has exclusive jurisdiction to set rates for wholesale sales of electricity by public utilities in interstate commerce;

2. The electricity transactions outlined in HB 3039 and further defined in the Straw Proposal filed on December 4, 2009, are likely to be classified as wholesale sales in interstate commerce, and customers selling power to the electric companies are likely to be classified as FERC-jurisdictional public utilities; and therefore the ability of the OPUC to set VIR for these transactions is limited by FERC jurisdiction; and

3. The OPUC has considerable flexibility to re-define the electricity transactions outlined in HB 3039 and further defined in the Straw Proposal; and therefore alternative routes to implementing the VIR pilot programs are possible.

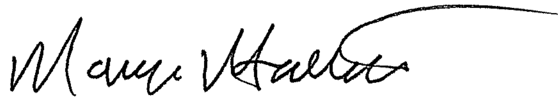
In other words, in her memorandum Ms. Andrus not only identifies a problem with the current Straw Proposal, but she also provides guidance on where to look to for possible solutions. The problem is that the OPUC has no authority to set the rates for wholesale sales of electricity, the type of transactions outlined in the Straw Proposal. Potential solutions include changing the type of transactions in the Straw Proposal, retaining the type of transactions in the Straw Proposal but allowing the rates to be set under FERC's authority, or some combination of these two routes.

Alternative Routes to Implementing HB 3039

Net Metering Transactions: According to Ms. Andrus's memorandum, the FERC has concluded that net metering transactions, where a retail customer is credited by a public utility for electric energy generated on the customer side of the meter, are not transactions subject to its jurisdiction, as long as there is no net sale over a reasonable period of time. One solution to the problem with the current Straw Proposal would be to re-define the transactions to be net-metering transactions. The OPUC would have the authority to set the rates of these transactions for Oregon's IOUs. Retail electricity consumers who installed SPV systems could be credited for generation on a monthly basis. If generation during the month exceeded the customer's electricity consumption during the month, then the excess generation (in kilowatt-hours) could roll forward to the next month. The monthly credit for any generation not rolled forward (i.e., generation that is not in excess of monthly consumption) could be set equal to the rates proposed in the current straw proposal minus the retail rate in effect at the time. Subtracting the retail rate is appropriate because the consumer gets the benefit of not having to buy the energy from the electric company. At the end of the year any remaining excess generation could either be given to charity or, if the SPV system owner had applied for and received FERC market-based rate authority, sold to the IOU at a market index rate. This net-metering approach would work best in situations where the SPV system was sized to generate at or below the annual consumption level of the retail electricity consumer. This would allow the SPV system owner to receive the full VIR for each kilowatt-hour of energy produced and to achieve the 15-year payoff assumed in the rate calculation. This approach to conforming the VIR pilot programs to the OPUC's regulatory jurisdiction would probably would work best for smaller SPV systems.

Competitive Bidding for Pilot Program Capacity: Another potential solution to the problem with the current Straw Proposal would be to require the IOUs to conduct competitive solicitations for SPV system capacity. Retail consumers interested in becoming SPV system owners would compete for a share of the IOUs assigned pilot program capacity by bidding a fixed fifteen year VIR. The winning bidders and the IOUs could then enter into a standard purchase power agreement (PPA) for the output of the SPV system. Since these PPAs would be considered wholesale sales, the SPV system owner would need to acquire market-based rate authority from the FERC. Since this approach to adapting the VIR pilot program requires the SPV system owner to put their SPV systems under the rate regulation of the FERC, this approach would probably work best for business consumers and larger SPV systems.

The best approach to adapting the current Straw Proposal and the proposed VIR Pilot Programs may be to use a combination of each of these solutions. The Staff of the OPUC looks forward to exploring these potential solutions with the parties in Docket Nos. AR 538 and UM 1452. Staff is attempting to schedule a workshop to discuss these issues for January 6, 2010.



Maury Galbraith

Electric Rates & Planning

ATTACHMENT A

DEPARTMENT OF JUSTICE
INTEROFFICE MEMO

DATE: December 15, 2009

TO: Lee Sparling and Maury Galbraith

FROM: Stephanie S. Andrus, Senior Assistant Attorney General
Regulated Utility & Business Section

SUBJECT: 2009 Or Laws Ch. 748

I. Introduction.

2009 Or Laws Ch. 748 requires the Public Utility Commission of Oregon (OPUC) to establish pilot programs to test the extent to which volumetric incentive rates (VIR) for power sold to investor-owned utilities (IOUs) by customers owning or operating solar photovoltaic (SPV) systems incent installation of SPV systems. In this memorandum, I analyze how federal law vesting the federal government with exclusive jurisdiction to establish rates for wholesale sales of electricity in interstate commerce impacts the OPUC's ability to establish VIR for power sold to IOUs for resale.[1]

II. 2009 Or Laws Ch. 748.

2009 Or Laws Ch. 748 requires the OPUC to establish a pilot program for each of the three IOUs operating in Oregon to test the use of VIR for SPV-system-generated power to incent development of SPV systems. The legislature instructed the OPUC to cap the pilot programs at 25 mw (for all three IOUs combined), and to design the pilot programs with the goal of having 75 percent of the energy generated by "smaller" SPV systems. The legislative history of the measure indicates the legislature contemplated that smaller systems would be those installed by residential customers.[2]

2009 Or Laws Ch. 748 does not require the Commission to establish the VIR at any particular level. Instead, the Act authorizes the Commission to set VIR for electricity sold under the pilot programs at a rate that is higher than the "resource value" of the electricity. The resource value is defined as the investor-utility's avoided cost, including avoided fuel price volatility, minus the costs of firming and shaping, avoided distribution and transmission cost and the renewable energy certificates established under ORS 469A.130.

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[1] 16 U.S.C. § 824, *et seq.* (granting FERC exclusive authority over interstate sales of electricity for resale by public utilities).

[2] The legislature left it to the OPUC's discretion to determine what constitutes a "smaller" system so that the OPUC would be free to determine what mix of variables, e.g., capacity of project, rate, etc., best obtained the goals of the legislation.

III. Analysis.

The United States Supreme Court has made clear that states have jurisdiction to regulate local retail rates to "ultimate customers," but have no jurisdiction to regulate sales at wholesale by public utilities to local distributing companies.[3] Under the Federal Power Act (FPA), only the Federal Energy Regulatory Commission (FERC) may set rates for wholesale power sales by public utilities in interstate commerce.[4] The Ninth Circuit Court of Appeals has concluded that Part II of the FPA delegates to FERC "exclusive authority to regulate the . . . sale at wholesale of electric energy in interstate commerce."[5] The United States Supreme Court has concluded that FERC's regulation of wholesale power rates is plenary and preempts state regulation in the area:

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the states.[6]

The exception to this bright-line rule is found in PURPA, which authorizes state public utilities commissions to establish an avoided cost price for utilities' purchases from QFs, in accordance with rules established by FERC.[7]

To determine whether sales contemplated by 2009 Or Laws Ch. 748 fall within the jurisdiction of the federal government under the FPA, I analyzed the following questions:

(1) Are sales of energy generated by customers and sold to investor-owned utilities wholesale sales under the FPA?

(2) Are the sales contemplated by 2009 Or Laws Ch. 748 (sale of a *de minimis* amount of power to IOUs over distribution lines) in interstate commerce?

(3) Is a retail customer that sells power to an IOU over the IOU's distribution lines a public utility?

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[3] *Federal Power Commission v. Southern Cal. Edison Co.*, 376 U.S. 205, 214 (1964) (citing *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498 (1941)).
[4] 16 U.S.C. §§ 824-824m.
[5] *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.,* 295 F.3d 918, 928 (9th Cir. 2002), *quoting New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).
[6] *Federal Power Commission v. Southern Cal. Edison Co.*, *supra*, 376 U.S. at 216.
[7] 16 U.S.C. § 824a-3, *et seq.*

A. Are the transactions between customers and IOUs that are contemplated by 2009 Or Laws Ch. 748 wholesale sales?

I divide this question into two parts: are the transactions "sales," and if so, are they "wholesale sales"?

1. Are the transactions between the customers and IOUs "sales"?

It appears the legislature intended that the pilot program transactions between the customers and IOUs would be sales. A "sale" is defined as "the act of selling: a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or other consideration[.]).[8] The legislature specified that retail customers participating in the pilot programs may receive payments from the IOUs for all of the power generated by the SPV systems owned or operated by the customers.[9]

However, it appears the legislature left the Commission sufficient flexibility to create pilot programs in which the transactions between the customers and IOUs are not sales, but net metering transactions. Net metering means measuring the difference between the electricity supplied by the electric utility and the electricity generated by a customer-generator and fed back to the electric utility over the applicable billing period.[10] FERC has concluded that net metering transactions in which a customer is credited by a public utility for energy generated by the customer and transmitted to a public utility is not a sale subject to FERC's jurisdiction, as long as the transactions do not result in a net sale over a reasonable period of time, such as a billing period.[11]

If the pilot program transactions are net metering transactions, it is within the Commission's jurisdiction to establish rates for the energy transmitted from the customer to the utility, to the extent the transmissions do not result in a net sale over a reasonable period, such as a month-long billing period.

If the pilot program transactions are sales, it is necessary to answer the second and third questions set forth above, as well as the second part of the first question—whether the transaction is a wholesale sale—to determine the extent of the OPUC's authority to establish VIR for the transactions.

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[8] Webster's Third Int'l Dictionary 2003 (unabridged ed 2002.)
[9] 2009 Or Laws Ch. 748, sec. 2(4).
[10] ORS 757.300(1)(c).
[11] 94 FERC 61,340 2001 WL 306484 (*MidAmerican Energy Co.*). *See also* 129 FERC 61,146 (Nov. 19, 2009)(*SunEdison LLC.*).

2. Are the transactions between the IOUs and customers "wholesale sales"?

A "wholesale sale" is defined in the FPA as "sale of electric energy to any person for resale."[12] 2009 Or Laws Ch. 748 specifies that the primary purpose of a SPV system that is eligible for a pilot program is to serve the IOU's retail customers.[13] In other words, the legislature has specified that sales from SPV system owners or operators under pilot programs established under 2009 Or Laws Ch. 748 are sales of energy to IOUs for resale to its retail customers. Accordingly, to the extent the transactions between the customers and IOUs are sales, they are wholesale sales.

B. Are sales of *de minimis* amounts of electricity to IOUs over the IOUs' distribution lines in interstate commerce?

The fact the wholesale sales will be on distribution lines raises two questions: (1) are the sales subject to FERC jurisdiction when the power is transmitted on facilities traditionally used for distribution and traditionally subject to state jurisdiction; and (2) are the sales in interstate commerce when the energy sold by the customers will most likely be sold to the IOUs' customers within Oregon (as opposed to on the wholesale market)?

1. Are the sales subject to FERC's jurisdiction when they are made over facilities traditionally subject to state jurisdiction?

The FPA specifies that the federal government has jurisdiction over wholesale sales in interstate commerce. This jurisdiction is not qualified by the type of facilities used to transmit the power that is sold. Accordingly, the fact that such sales may be made over facilities that are most often used for local retail sales does not divest FERC of its jurisdiction.[14]

2. Are the sales in interstate commerce if the power generated by customers and sold to IOUs is used to serve the IOU's retail load within the state?

In *New York v. FERC*,[15] the United States Supreme Court addressed challenges to FERC's decision to assert jurisdiction over facilities traditionally used to distribute energy to end-use customers (local distribution facilities) when the facilities are used in

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[12] 16 U.S.C. § 824b(2)(d).
[13] 2009 Or Laws Ch. 748 § 1(3)(b)(A).
[14] *See e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. 2000), *aff'd New York v. FERC*, 535 U.S. 1 (2002)("FPA § 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used. FERC's assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority."). *See also Detroit Edison Co. v. FERC*, 334 F.3d 48, 51(2003)("[W]hen a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 210(b)(1).").
[15] 535 U.S. 1, 7-8 (2002).

wholesale transactions. The Court implicitly rejected the argument that any energy that stayed within confines of local distribution facilities may not be in interstate commerce. The Court noted,

> Technological advances have made it possible to generate electricity efficiently in different ways and in smaller plants. In addition, unlike the local power networks of the past, electricity is now delivered over three major networks, or "grids," in the continental United States. Two of these grids—the "Eastern Interconnect" and the "Western Interconnect"—are connected to each other. It is only in Hawaii and Alaska and on the "Texas Interconnect" – which covers most of that State – that electricity is distributed entirely within a single state. ***In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.***[16]

The Court used arguments provided by an *amicus*, the Electrical Engineers, et al., to support its conclusion.

> As *amici* explain in less technical terms, "[e]nergy flowing onto a power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid." Brief for Electrical Engineers, et al. * * * As a result, explain *amici,* any activity on the interstate grid affects the rest of the grid. * * * *Amici* dispute the States' contentions that electricity functions "the way water flows through a pipe or blood cells flow through a vein" and "can be controlled, directed and traced," as these substances can be, calling such metaphors "inaccurate and highly misleading."[17]

Under *New York v. FERC*, the electricity generated by a pilot program SPV system will be in interstate commerce once the electricity enters an IOU's distribution lines for transmission away from the retail customer owning or operating the SPV system.

Finally, the fact that customers would sell only a small amount of electricity under the pilot programs also would not preclude FERC jurisdiction, if the pilot program transactions are "sales." The United States Supreme Court has concluded the federal regulator's jurisdiction under the FPA is not conditioned on any particular volume or proportion of interstate energy involved.[18]

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[16] 535 U.S. at 7-8 (emphasis added).
[17] 535 U.S. at 8 n 5(emphasis in Court opinion).
[18] *Connecticut L. & P. Co. v. FPC*, 324 U.S. 515, 535-36 (1945).

C. Is a retail customer that sells electricity to an IOU for resale a public utility?

A retail customer selling to an IOU power that is generated by a facility installed by the retail customer would be a public utility under the FPA. "Public utility" is defined for purposes of subchapters II and III of the FPA as any person who owns or operates facilities subject to the jurisdiction of the Commission.[19] Jurisdictional facilities are described in Sections 201(a) and 201(b)(1) of the FPA as facilities for wholesale sales in interstate commerce or for transmission in interstate commerce.[20] Accordingly, whether the IOU customers that sell energy to IOUs are public utilities under the FPA turns on whether the customers will own or operate "facilities" subject to the jurisdiction of FERC.

Because the owners or operators of the SPV systems will enter into agreements with the IOUs regarding the sale of power generated by the SPV systems, the SPV system owners and operators that sell power to IOUs will be public utilities. FERC has interpreted "facilities" broadly to include wholesale sales contracts through which entities engage in wholesale power sales.[21] Similarly, in *Hartford v. FPC*, the Court of Appeals for the Second Circuit analyzed whether a company that owned no transmission assets, but that made wholesale sales in interstate commerce was a public utility. The Court concluded that it was, noting that the entity did own "facilities"—contracts, accounts, etc. – used for the purpose of making the sales.[22]

IV. FERC Orders.

FERC has addressed the legality of state statutes establishing or authorizing incentive rates for wholesale sales of energy generated by renewable resources and concluded that the statutes are preempted, unless the rates are for QFs and established in accordance with the avoided cost rules promulgated under PURPA. In 1995, FERC analyzed whether a Connecticut statute regulating the rates for the sale of power by a resources-recovery facility owned or operated by or for the benefit of a municipality to an electric utility is preempted by PURPA. FERC concluded the statute was preempted if the energy sellers were QFs or public utilities, but was not preempted if the sellers were public agencies:

> [I]f the facility addressed by the Connecticut statute is a qualifying facility (QF) under PURPA, this Commission has responsibility for the QF's rates

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[19] 16 U.S.C. § 824b(2)(e).
[20] 16 U.S.C. § 824b(1).
[21] *Citizens Energy Corporation,* 35 FERC 61,198 (1986 WL 77603) (holding that an entity need not have capability to generate or transmit energy to be a public utility under the FPA and that an entity intending to engage in sales for resale of energy to utilities and to arrange for transmission of such energy for purposes of selling in interstate commerce is a public utility under the FPA). *See also Automated Power Exchange, Inc.*, 82 FERC 61,287 (1998 WL 131416) (noting that entity exercising control over "paper" facilities used to effectuate power sales is a public utility under the FPA).
[22] *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (1942).

> for sales for resale. Rates may be established by the state but only pursuant to and consistent with this Commission's regulations under PURPA. Second, if the facility addressed by the Connecticut statute is not a QF but the seller is a public utility within the meaning of the Federal Power Act (FPA), this Commission has exclusive jurisdiction over its rates for sales for resale in interstate commerce. States may not set rates for public utility sales for resale in interstate commerce. Finally, if the facility addressed by the Connecticut statute is not a QF and the seller is not a public utility, but, for example, instead is a governmental entity within the scope of section 201(f) of FPA, this Commission does not have jurisdiction over its rates.[23]

Similarly, in 1997, FERC addressed whether orders of the Iowa Utilities Board (Board) implementing a statute authorizing the Board to order electric utilities to contract with "Alternate Energy Production Facilities" (APFs) to purchase energy and authorizing the Board to set economically reasonable rates for the purchases were preempted by PURPA or the FPA or both. FERC concluded that the state did have authority to order utilities to enter into power sale contracts with APFs. However, FERC concluded that the Board orders were preempted by PURPA to the extent they obligated electric utilities to purchase power generated by APFs that were also QFs under PURPA at rates exceeding the utilities' avoided costs. And, FERC concluded that the orders were inconsistent with the FPA to the extent they set rates for public utilities for sales for resale in interstate commerce.[24]

However, as discussed above, FERC has clarified that to the extent net-metering transactions do not result in a net sale from the end-use customer to the utility, net metering transactions between a customer and utility are not wholesale sales subject to FERC jurisdiction.

V. Conclusion.

The Commission's authority to set VIR for the pilot programs mandated by 2009 Or Laws Ch. 748 is dependent on the appropriate classification of the transactions between the customers and IOUs under the pilot programs. If the pilot programs are designed so that the transactions between the SPV system owners and operators are net metering transactions, it is within the Commission's jurisdiction to establish rates for the energy transmitted to the IOU by the customer, provided the transmissions do not result in a net sale to the IOU over the course of a reasonable period.

To the extent the transactions are "sales," then the transactions are subject to FERC jurisdiction and the Commission's authority to establish VIR is limited. Specifically, for pilot program participants that are QFs, the Commission must set the VIR at the

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[23] 70 FERC 61,012, 1995 WL 9931 (*Connecticut Light and Power Company*).

[24] 78 FERC 61,067, 1997 WL 34082 (*Midwest Power Systems, Inc.*).

purchasing utility's avoided cost. For pilot program participants that are not QF's, the Commission may not establish VIR, but must design pilot programs that either incorporate a wholesale market rate as the VIR, or that use a rate determined by the IOUs and customers. If the latter, Commission could:

(1) Require the IOUs to enter into power purchase agreements with pilot program participants. The contracting parties would voluntarily agree to a rate for power sold under the contract; or

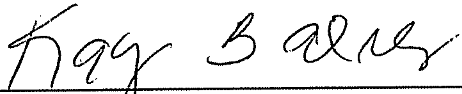
(2) Require IOUs to issue Requests for Proposals to pilot program participants for supply of energy.

CERTIFICATE OF SERVICE

AR 538 AND UM 1452

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-13-0070, to the following parties or attorneys of parties.

Dated at Salem, Oregon, this 21st day of December, 2009.



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