

1 Staff disagrees with each of these arguments. As to the first assertion, the Commission
2 has made a lawful policy choice to exclude transmission costs/benefits from the avoided cost
3 calculation. As will be discussed in this Reply Brief, the Commission's policy choice is a strong
4 indication of its intent to allow a utility to impose a charge for such costs upon a QF, while
5 giving credit for any related benefits, on a case-by-case basis.

6 As to CREA/RNP's second argument, all parties appear to agree that PURPA would not
7 be violated if the Commission continues with its current policy choice to exclude transmission
8 costs/benefits. It would be a lawful, logical extension of such a policy choice to allow a utility to
9 account for QF transmission costs/benefits on an individual case-by-case basis. Indeed, it would
10 very likely be unlawful, and not logical, if the opposite were true. Stated differently, if the
11 Commission's current policy were to include transmission costs/benefits in the avoided cost
12 calculation, then clearly PURPA would be violated if the Commission were to also allow a utility
13 to deal with such costs and benefits on an individual, QF case-by-case basis.

14 Finally, as to CREA/RNP's final argument, staff stands by its conclusion that PURPA is
15 very likely violated if PacifiCorp is required to absorb net third-party "load pocket" transmission
16 charges for its Schedule 37 energy purchases. As currently structured in Oregon for PacifiCorp,
17 transmission costs and benefits are excluded from PacifiCorp's PURPA calculation. As such,
18 requiring PacifiCorp to also pay third-party transmission costs for load pocket QFs would
19 essentially represent an unlawful overpayment of avoided cost rates under PURPA.

20 Finally, should the Commission desire to review whether to include transmission costs
21 and benefits in the avoid costs calculation on an aggregate, system-wide basis, staff recommends
22 that this be accomplished in a separate docket created for that purpose.

23 **2. Use of Material Facts**

24 Staff's Response Brief was based upon the Material Facts set forth by PacifiCorp in its
25 Opening Brief. In its Response Brief, CREA accepts some facts and rejects others. CREA then
26 proceeds to include "Additional Material Facts." For its part, RNP states it is "agnostic" about

1 the truth of the key facts, and recommends the scope of any factual inquiry be broadened to
2 include all QFs before the Commission decides to approve PacifiCorp's Advice Filing.
3 Accordingly, a factual dispute may exist in this docket.

4 Staff has not independently verified the veracity of either PacifiCorp's Material Facts or
5 CREA's Additional Material Facts. As such, in preparing this Reply Brief, staff considered
6 whether the existence of a factual dispute would negate the ability of the Commission to decide
7 the primary legal issues presented by the parties in Phase One. After such consideration, staff
8 believes the Commission may proceed on this basis on the current filings.

9 Importantly, all parties appear to agree that the avoided cost calculation for PacifiCorp
10 does not include a transmission component (an agreed-upon "fact"), and that the Commission's
11 decision to exclude such a component is within its authority granted under PURPA (an agreed-
12 upon "legal conclusion"). Based upon this one key fact, and the undisputed reading of
13 applicable law, staff concludes the record is sufficient for the Commission to decide the primary
14 legal questions set forth above in the Introduction and Summary of Argument.

15 3. Argument

16 **A. The Commission exercised its lawful discretion when it decided that**
17 **transmission should not be included in the avoided cost calculation. Evidence supports the**
18 **conclusion that the Commission purposely excluded transmission from the avoided cost**
19 **rate because it intended to account for QF transmission on a case-by-case basis.**

20 As a legal matter, all parties seem to agree that the Commission's decision to include, or
21 not, transmission costs and benefits in the avoid cost calculation is a discretionary policy choice
22 within the Commission's authority to make under PURPA. As CREA and RNP note, a recent
23 decision by the Federal Energy Regulatory Commission (FERC) holds that a state Commission
24 *may* include certain transmission costs and benefits in avoided cost rates under PURPA. *See*
25 CREA Response Brief at 14; RNP Response Brief at 1, both citing to *California Pub. Util.*
26 *Commission v. So. Cal. Edison Co. et al*, 133 FERC ¶ 61,059 (2010) (*So. Cal. Edison*). Staff
27 *///*

1 agrees with CREA and RNP's reading of *So. Cal. Edison*. However, it is important to observe
2 that FERC did not *mandate* that transmission be included in avoided cost rates. Instead, FERC
3 simply upheld the CPUC's decision to do so for certain transmission costs/benefits under certain
4 circumstances. *See So. Cal. Edison* at ¶ 31.

5 Further, all parties seem to agree that the Commission's current policy is to not consider,
6 on an aggregate basis, transmission in the calculation of the standard avoided cost rate for QFs
7 10 MW or less. Indeed, this determination is illustrated by the Commission defining "avoided
8 costs," in relevant part, as the utility's incremental costs of *electric energy or capacity or both.*"
9 *See OAR 860-029-0010(1)* (emphasis added). "Transmission" is noticeably absent as a cost
10 component from this definition. CREA/RNP do not dispute that PacifiCorp acted consistently
11 with this rule when it created its current Schedule 37 setting forth avoided cost rates that do not
12 account for transmission costs and benefits. *See also* CREA Response Brief at 11 "Additional
13 Material Facts #s 10 and 11."

14 However, CREA and RNP arrive at a very different conclusion than staff about the
15 significance of the Commission's policy choice described above. CREA and RNP ultimately
16 argue that, under the Commission's current policy decision, PacifiCorp is not allowed to
17 consider, on a case-by-case basis, transmission costs and benefits arising from PacifiCorp's
18 purchase of energy from a QF. Indeed, based upon its reading of the Commission's policy
19 choice, CREA hypothesizes that "the Commission has a policy that transparency and simplicity
20 for standard Schedule 37 contracts warrant assuming that the aggregate *project specific costs*
21 *balance out with the aggregate project specific benefits, and adjustments in pricing up or down*
22 *for transmission are not warranted.*" CREA Response Brief at 16, 23 (emphasis added).
23 Importantly, however, CREA offers no support for its speculation that the absence of a
24 transmission component from the avoided cost calculation represents a Commission
25 determination that transmission costs and benefits, in aggregate, balance out.

26 ///

1 In contrast, staff takes the same premise, that being the Commission's decision to not
2 include transmission in the avoided cost formula, and comes to an entirely different conclusion:
3 the Commission views transmission costs and benefits arising from a utility's energy purchase
4 from a 10 MW or less QF to be a consideration the utility may address on a case-by-case basis
5 *outside and independent of* the PURPA avoided costs calculation.

6 Staff reaches this conclusion starting with the undisputed proposition that OAR 860-029-
7 0010(1) expressly excludes consideration of transmission from the avoided cost calculation. The
8 most logical supposition from such a decision is that the Commission intended for transmission
9 costs/benefits to be dealt with *apart from* the avoided cost calculation. Indeed, it is illogical to
10 take a rule that excludes a component from a formula used to set avoided cost rates and conclude
11 that: (1) the rule implicitly includes the component, and further (2) the rule's silent "inclusion" of
12 the component represents an implicit finding that the costs and benefits of the missing
13 component balance out and are to be set at zero dollars (\$0). The more sensible reading of the
14 rule, which is the one recommended by staff, is that the rule's exclusion of the transmission
15 component means transmission is not part of the avoided cost calculation at all. As such,
16 transmission costs and benefits arising from a particular situation may be properly dealt with
17 outside of PURPA on an individual case-by-case basis.

18 Further, statements from selected Commission Orders, while not definitive, evidence the
19 Commission's intent that individual QFs should be held responsible for transmission costs, and
20 given credit for benefits, arising from their sale of energy to PacifiCorp on a case-by-case basis.
21 As previously noted by staff and PacifiCorp, the Commission holds the QF responsible for
22 necessary system upgrades caused by their interconnection with the purchasing utility. *See* Staff
23 Response Brief at 6; PacifiCorp Opening Brief at 18-19. The same reasoning would apply to
24 requiring the individual QF to pay for additional transmission costs caused by its delivery of
25 power to PacifiCorp (and receive credit for any benefits). *See, e.g.* Commission Order No. 07-
26 360 (concerning QFs larger than 20 MW) at Appendix A, page 4, Guideline 15: "The utility

1 should not adjust avoided cost rates for any distribution or transmission system upgrades needed
2 to accept QF power. Such costs should be separately charged as part of the interconnection
3 process.”).

4 The Commission’s policy choice to exclude consideration of transmission does not
5 support the assumption made by CREA/RNP that the Commission has decided that such costs
6 and benefits, on aggregate, balance out. To the contrary, the Commission has implicitly made a
7 policy choice that transmission costs and benefits are akin to interconnection costs for which a
8 utility may charge (and credit, if appropriate) a QF on a case-by-case basis.

9 **B. PURPA would not be violated if the Commission approves PacifiCorp’s**
10 **Advice Filing.**

11 CREA argues that PURPA would be violated if PacifiCorp is allowed to charge for third-
12 party transmission costs to move QF load out of “load pocket” areas because, in aggregate,
13 PacifiCorp’s avoided cost rate under-pays Schedule 37 QFs. *See* CREA Response Brief at 18,
14 25.² Similarly, RNP first states it is “agnostic” about whether PacifiCorp’s standard avoided cost
15 rates systemically over or undervalues avoided costs. RNP Response Brief at 1. RNP then
16 asserts that PURPA requires a review of *all* Schedule 37 QF transmission costs and benefits
17 before the Commission may approve PacifiCorp’s Advice Filing. *See* RNP Response Brief at 3
18 (“Transmission benefits of QFs not located in load-constrained areas should be given a full airing
19 as well”.)

20 Staff disagrees that PURPA would be violated if the Commission should approve
21 PacifiCorp’s Advice Filing. CREA and RNP fail to offer persuasive support for their position.

22 ///

23 ² Indeed, CREA goes so far as to suggest that the relevant Commission orders on this issue are
24 unlawful because they under-compensate Schedule 37 QFs. CREA Response Brief at 18. To the
25 extent that CREA is suggesting that unnamed “Commission orders” violate the law, CREA has
26 missed the time for appealing any such order if it was issued more than 60 days ago. ORS
756.610(1); ORS 183.482(1).

1 Both parties merely cite to the *So. Cal. Edison* decision discussed earlier. But *So. Cal Edison*
2 does not state, or even suggest, what CREA and RNP argue.³

3 The proper analysis of this question starts with the proposition that the Commission may
4 lawfully choose to exclude consideration of transmission costs/benefits under PURPA. *So. Cal.*
5 *Edison* supports this point of law. *So. Cal Edison* concerned, in relevant part, CPUC's request to
6 FERC for clarification that for "combined heat and power" (CHP) facilities located in
7 transmission-constrained areas, avoided costs may include an "adder" to reflect the avoided costs
8 of construction of distribution and transmission upgrades that would otherwise be needed. FERC
9 held that such an adder was *permissible* under PURPA if the CPUC based it upon the actual
10 determination of the expected costs of upgrades to the distribution and transmission system that
11 the QFs would permit the purchasing utility to avoided. *So. Cal. Edison, supra* at ¶ 31.

12 Thus, *So. Cal. Edison* supports the principle that the Commission has discretion to
13 include a selected transmission component in the avoided cost calculation. However, FERC's
14 opinion does not mandate that, should the Commission choose to exclude a component from the
15 calculation (such as transmission), it may not then allow a utility to account for costs/benefits
16 arising under that component on a case-by-case basis. And, this conclusion makes sense as well.
17 Clearly, the Commission could not approve PacifiCorp's Advice Filing under an avoided cost
18 scheme that already *includes* a transmission component. Conversely, it is logical that the
19 Commission may allow for a case-by-case accounting of such costs and benefits under an
20 avoided cost calculation that *excludes* a transmission component, as is presently the case for
21 PacifiCorp in Oregon.

22 ///

23 ///

24 ////

25

26 ³ CREA also makes a general reference to the PURPA avoided cost calculation criteria found in
18 C.F.R. § 292.304(e)(2-4). CREA Response Brief at 18.

1 **C. PURPA likely violated if the Commission rejects PacifiCorp’s Advice filing**

2 As discussed in staff’s Response Brief, and by PacifiCorp in its Opening Brief, PURPA is
3 likely violated if PacifiCorp is required to pay standard avoided costs and must also pay for
4 third-party transmission to move QF output from the point of delivery to PacifiCorp’s load.⁴
5 Staff stands by this conclusion. In very brief summary, because PacifiCorp’s avoided cost rates
6 do not include a transmission component, PURPA would likely be violated if PacifiCorp also
7 paid the net transmission costs on behalf of load pocket QFs. Having so concluded, staff
8 reserves judgment on other types of additional costs/benefits that may generally be absorbed by
9 the utility, rather than the QF, without violating PURPA.

10 **D. Commission may open a generic investigation to review whether to include**
11 **transmission in the avoided cost calculation**

12 Finally, should the Commission desire to review whether to include transmission costs
13 and benefits in the avoid cost calculation on an aggregate, system-wide basis, for PacifiCorp, or
14 Portland General Electric Company, or both, staff recommends that this be accomplished in a
15 separate docket created for that purpose.

16 ///
17 ///
18 ///
19 ///
20 ///
21 ///
22 ///

23 _____
24 ⁴ As stated earlier, staff has not independently verified the veracity of the “Material Facts”
25 PacifiCorp presents in its Opening Brief nor the “Additional Material Facts” CREA presents in
26 its Response Brief. However, because all parties agree that the avoided cost calculation lawfully
does not include a transmission component, staff believes the Phase One legal issues may be
resolved without the need for an evidentiary hearing.

1 **4. Conclusion**

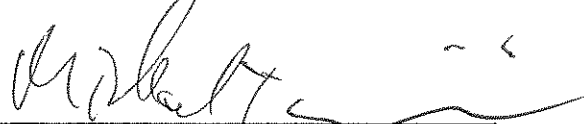
2 For the reasons stated, the Commission should approve PacifiCorp's Advice No. 11-011.

3 DATED this 12th day of December, 2011.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Respectfully submitted,

JOHN R. KROGER
Attorney General



Michael T. Weirich, #82425
Assistant Attorney General
Of Attorneys for Staff of the Public Utility
Commission of Oregon

1 **CERTIFICATE OF SERVICE**

2 I certify that on December 12, 2011, I served the foregoing The Staff of the Public Utility
3 Commission of Oregon's Reply Brief upon the parties in this proceeding by electronic mail.

4
5 **W**
6 THOMAS H. NELSON
7 ATTORNEY AT LAW
8 PO BOX 1211
9 WELCHES OR 97067-1211
10 nelson@thnelson.com

W
LOVINGER KAUFMANN LLP
JEFFREY S LOVINGER
825 NE MULTNOMAH STE 925
PORTLAND OR 97232-2150
lovinger@lklaw.com

8 **W**
9 **COMMUNITY RENEWABLE ENERGY**
10 **ASSOCIATION**
11 PAUL R WOODIN
12 EXECUTIVE DIRECTOR
13 1113 KELLY AVE
14 THE DALLES OR 97058
15 pwoodin@communityrenewables.org

W
PACIFIC POWER
MARY WIENCKE
825 NE MULTNOMAH ST, STE 1800
PORTLAND OR 97232-2149
mary.wiencke@pacificcorp.com

13 **W**
14 **DAVISON VAN CLEVE**
15 IRION A SANGER
16 ASSOCIATE ATTORNEY
17 333 SW TAYLOR - STE 400
18 PORTLAND OR 97204
19 mail@dvclaw.com

W
PACIFICORP, DBA PACIFIC POWER
OREGON DOCKETS
825 NE MULTNOMAH ST, STE 2000
PORTLAND OR 97232
oregondockets@pacificcorp.com

17 **W**
18 **ESLER STEPHENS & BUCKLEY**
19 JOHN W STEPHENS
20 888 SW FIFTH AVE STE 700
21 PORTLAND OR 97204-2021
22 stephens@eslerstephens.com;
23 mec@eslerstephens.com

W
PUBLIC UTILITY COMMISSION OF
OREGON
STEVE SCHUE
PO BOX 2148
SALEM OR 97308-2148
steve.schue@state.or.us

21 **W**
22 **LOVINGER KAUFMANN LLP**
23 KENNETH KAUFMANN
24 825 NE MULTNOMAH STE 925
25 PORTLAND OR 97232-2150
26 kaufmann@lklaw.com

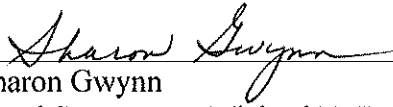
W
REGULATORY & COGENERATION
SERVICES INC
DONALD W SCHOENBECK
900 WASHINGTON ST STE 780
VANCOUVER WA 98660-3455
dws@r-c-s-inc.com

1 W
2 RENEWABLE ENERGY COALITION
3 JOHN LOWE
4 12050 SW TREMONT ST
5 PORTLAND OR 97225-5430
6 jravenesanmarcos@yahoo.com

W
RICHARDSON & O'LEARY
GREGORY M. ADAMS
PO BOX 7218
BOISE ID 83702
greg@richardsonandoleary.com

5 W
6 RENEWABLE NORTHWEST PROJECT
7 MEGAN WALSETH DECKER
8 421 SW 6TH AVE #1125
9 PORTLAND OR 97204-1629
10 megan@rnp.org

W
RICHARDSON & O'LEARY PLLC
PETER J RICHARDSON
PO BOX 7218
BOISE ID 83707
peter@richardsonandoleary

11 
12 Sharon Gwynn
13 Legal Secretary to Michael T. Weirich
14 Department of Justice
15 Business Activities Section