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October 24, 2013

***VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY***

Public Utility Commission of Oregon
3930 Fairview Industrial Dr. S.E.
Salem, OR 97302-1166

Attn: Filing Center

Re: Docket UE 267—PacifiCorp's Argument in Response to ALJ Ruling

In accordance with the Administrative Law Judge's (ALJ) Ruling of October 17, 2013, PacifiCorp d/b/a Pacific Power submits this argument on whether the opposing parties' agreement is a proper stipulation under OAR 860-001-0350.

If you have questions about this filing, please contact Joelle Steward, Director of Pricing, Cost of Service and Regulatory Affairs, at (503) 813-5542.

Sincerely,


William R. Griffith
Vice President, Regulation

Enclosures

cc: UE 267 Service List

1 filed reply testimony objecting to Schedule 296. On September 25, 2013, PacifiCorp and the
2 other parties, Staff; Industrial Customers of Northwest Utilities; Noble Americas Energy
3 Solutions LLC; Wal-Mart Stores, Inc.; Shell Energy North America (US), LP; Constellation
4 NewEnergy, Inc.; Fred Meyer Stores, Inc./Kroger, Co.; the Northwest and Intermountain
5 Power Producers Coalition; Safeway Inc.; and Vitesse, LLC (collectively, Opposing
6 Parties), convened a settlement conference.¹ After PacifiCorp and the Opposing Parties
7 failed to reach a settlement, the Opposing Parties unilaterally executed and filed a document
8 that they refer to as a “stipulation.”

9 Before the Opposing Parties made this filing, PacifiCorp communicated its position
10 that: (1) the filing was not a valid stipulation under OAR 860-001-0350 for purposes of
11 resolving the disputed issues in this tariff filing; and (2) while PacifiCorp did not object to
12 the Opposing Parties filing testimony supporting a new joint position in this case, this
13 testimony should supersede the Opposing Parties’ prior testimony and limit the scope of
14 PacifiCorp’s rebuttal testimony accordingly.

15 III. ARGUMENT

16 A. The Opposing Parties’ Agreement Is Not a Stipulation That Resolves Disputed 17 Issues Between Adverse Parties.

18 The purpose of a stipulation under OAR 860-001-0350 is to resolve some or all of the
19 disputed issues in a contested case proceeding.² To be effective, a stipulation requires

¹ Portland General Electric (“PGE”) attended the settlement conference, but did not participate in the settlement negotiations and did not join the Opposing Parties’ Agreement.

² See OAR 860-001-0350(1) (“[i]n all Commission contested case proceedings, some or all of the parties may enter into a settlement of any or all issues at any time during the proceedings.”); OAR 860-001-0350(2) (settlement discussions intended to resolve issues pending in contested case). See also *Re PacifiCorp’s 2010 Transition Adjustment Mechanism*, Docket UE 207, Order No. 09-432 at 6 (Oct. 30, 2009) (“The Commission concludes that the Stipulation is an appropriate resolution of all primary issues in this docket.”); *Re PacifiCorp Request for a General Rate Revision*, Docket UE 210, Order No. 10-022 at 6 (Jan. 26, 2010) (“When considering a stipulation, we have the statutory duty to make an independent judgment as to whether any given settlement constitutes a reasonable resolution of the issues.”); *Re PacifiCorp Request for a General Rate*

1 agreement between parties on adverse sides of an issue. A stipulation among aligned parties
2 may unify their positions on an issue, but without the participation of the opposing party,
3 such a stipulation will not resolve the underlying dispute. Thus, a stipulation is valid to
4 resolve a dispute only if necessary parties (*i.e.*, adverse parties) have agreed to it.³

5 The Commission has previously rejected as invalid a purported stipulation that did
6 not “represent a compromise between parties with adverse interests.”⁴ In this manner, the
7 Commission recognized that OAR 860-001-0350 authorizes stipulations that resolve
8 disputes, not agreements to consolidate litigation positions. PacifiCorp was unable to find a
9 single tariff filing in which the Commission approved a stipulation under OAR 860-001-0350
10 that was not based on a compromise between utility and non-utility entities.

11 PacifiCorp supports Schedule 296 and all Opposing Parties object to it. With the
12 exception of Staff, all Opposing Parties are potential direct access customers or direct access
13 providers. As reflected in the Opposing Parties’ individual reply testimony, the Opposing
14 Parties are aligned with one another in this tariff filing, and are adverse to PacifiCorp.
15 Because the Opposing Parties’ Agreement does not constitute a compromise with
16 PacifiCorp—the adverse party in this tariff filing—the Agreement is not a stipulation
17 cognizable under OAR 860-001-0350. The Commission’s approval of the Opposing Parties’
18 Agreement will bind the Opposing Parties to a joint litigation position, but it will not resolve
19 the underlying dispute in this case over the adoption of Schedule 296.

Revision, Docket UE 246, Order No. 12-493 at 5 (Dec. 20, 2012) (“After reviewing the stipulation, we conclude that the proposed stipulation fairly resolves the contested issues.”).

³ See *Abrishamian vs. Washington Gas Light Company*, Case No. 8946, Order No. 79580, 2004 WL 3327764 (Md. P.S.C. 2004) (settlement invalid for failure to include all necessary parties); *In the Matter of the Compensation of Robert deGraff*, 52 Or App 317, 628 P2d 437 (May 18, 1981) (settlement without necessary party invalid); *CP National Corp. v. Bonneville Power Administration*, 928 F2d 905 (9th Cir. 1991) (BPA necessary party because it has an interest in the controversy and the court cannot resolve entire controversy without BPA’s participation); ORCP 29A (defining necessary parties).

⁴ *Re Portland General Electric Company*, Docket UE 178(1), Order No. 09-126 at n. 4 (Apr. 10, 2009) (rejecting a purported stipulation between parties with common interests).

1 **B. The Opposing Parties’ Agreement is an Improper Response to PacifiCorp’s**
2 **Schedule 296.**

3 In a tariff filing under ORS 757.210, PacifiCorp has “the burden of showing that the
4 rate or schedule of rates proposed to be established or increased or changed is fair, just and
5 reasonable.”⁵ Staff and intervenors “have the burden of producing evidence to support their
6 argument in opposition to the utility’s position.”⁶

7 In this case, PacifiCorp has the burden to establish that Schedule 296’s five-year cost-
8 of-service opt-out program for eligible direct access consumers is fair, just, and reasonable.
9 The parties have the burden of going forward with evidence showing why Schedule 296 is
10 unreasonable. By unilaterally filing a document they claim is a “stipulation,” the Opposing
11 Parties cannot displace Schedule 296 with another proposal, nor can they shift PacifiCorp’s
12 burden of proving the reasonableness of Schedule 296 to the burden of showing the
13 unreasonableness of the Opposing Parties’ proposal.⁷

14 If the Opposing Parties wish to propose their own five-year cost-of-service opt-out
15 program, they should file a complaint under ORS 756.500, assume the burden of proof in that
16 proceeding, and establish that the Commission has the statutory authority to involuntarily
17 impose their program on PacifiCorp. The Opposing Parties cannot commandeer PacifiCorp’s
18 tariff filing to promote their own proposal and attempt to avoid assuming the burden of proof
19 and responding to the associated legal challenges.

⁵ ORS 757.210(1)(a).

⁶ *In the Matter of Portland General Electric Company’s Application to Amortize the Boardman Deferral*,
Docket UE 196, Order No. 09-046 at 8 (Feb. 5, 2009).

⁷ *See In re Oregon Electric Utility Company, LLC., et al.*, Docket UM 1121, Order No. 05-114 n. 14 (March 10,
2005) (Commission review of utility filing does not provide for consideration of competing proposals).

1 **C. The Opposing Parties' Agreement Supersedes the Opposing Parties' Prior**
2 **Litigation Positions.**

3 By its terms, the Opposing Parties' Agreement supersedes the Opposing Parties'
4 individual positions in their pre-filed testimony.⁸ While the Opposing Parties' Agreement is
5 ineffective to resolve this case under OAR 860-001-0350, if allowed by the Commission, the
6 Agreement requires the Opposing Parties to forego their individual positions and join in a
7 uniform, joint position in opposition to Schedule 296.

8 PacifiCorp does not object to the Opposing Parties filing joint testimony in this case
9 to reflect the terms of the Opposing Parties' Agreement. If the Commission allows such
10 testimony to jointly oppose Schedule 296, however, it should clarify that the Opposing
11 Parties' prior testimony is superseded for all future purposes in this case, including
12 PacifiCorp's rebuttal testimony. This is consistent with the terms of the Opposing Parties'
13 Agreement, avoids confusion over the record in this case, and defines the scope of the
14 controversy in this case.

15 **D. The Commission Should Establish A Schedule That Allows PacifiCorp Adequate**
16 **Time to Respond to the Opposing Parties' Joint Testimony.**

17 The original schedule in this case gave PacifiCorp five weeks to prepare rebuttal
18 testimony. PacifiCorp requests that the new schedule in this case provide a five-week period
19 for PacifiCorp's rebuttal from the date of the Opposing Parties' new testimony or the date of
20 the order denying the Opposing Parties' request to file such testimony.

21 If the Commission requires PacifiCorp to respond to both the Opposing Parties' prior
22 individual testimony and to its new joint testimony, PacifiCorp requests eight weeks to file
23 rebuttal testimony.

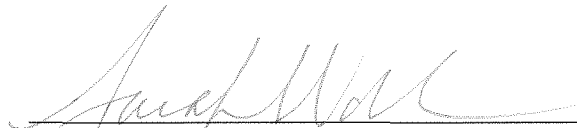
⁸ Opposing Parties' Agreement at 2.

1 PacifiCorp is willing to agree to an extension of the statutory suspension period in
2 this case to accommodate the scheduling changes associated with the Opposing Parties'
3 Agreement.

4 **IV. CONCLUSION**

5 For the reasons set forth above, PacifiCorp respectfully requests that the Commission
6 reject the Opposing Parties' Agreement as a valid stipulation under OAR 860-001-0350.
7 PacifiCorp does not object to the Opposing Parties filing new joint testimony, but submits
8 that such testimony should supersede the Opposing Parties' prior testimony. Finally,
9 PacifiCorp requests a schedule that permits it adequate time to rebut the adverse positions in
10 this case.

Respectfully submitted this 24th day of October, 2013.



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Sarah Wallace
PacifiCorp d/b/a/ Pacific Power
Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of PacifiCorp's Argument in Response to ALJ Ruling on the parties listed below via electronic mail and/or US mail in compliance with OAR 860-001-0180.

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Dated this 24th of October, 2013.



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