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March 3, 2014

***VIA ELECTRONIC FILING
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Public Utility Commission of Oregon
3930 Fairview Industrial Drive SE
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Attn: Filing Center

RE: DR 48 – Response of PacifiCorp to the Renewable Energy Coalition’s Petition for Declaratory Ruling

PacifiCorp d/b/a Pacific Power encloses for filing the company’s response to the above-referenced proceeding. As indicated on the attached certificate of service, a copy of this filing is being served on all parties on the service list.

If you have questions about this filing, please contact Gary Tawwater, Manager, Regulatory Affairs, at (503) 813-6805.

Sincerely,


R. Bryce Dalley
Vice President, Regulation

Enclosure

cc: Service List – DR 48

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 48

In the Matter of:
THE RENEWABLE ENERGY COALITION
Petitioner.

RESPONSE OF PACIFICORP TO THE
RENEWABLE ENERGY COALITION'S
PETITION FOR DECLARATORY
RULING

I. INTRODUCTION

Under OAR 860-001-0400 and OAR 860-001-0430, PacifiCorp, d/b/a Pacific Power (PacifiCorp or the Company) provides this response to the February 10, 2014 Petition for Declaratory Ruling (Petition) filed by the Renewable Energy Coalition (Coalition). In the Petition, the Coalition requests that the Public Utility Commission of Oregon (Commission) issue a declaratory ruling interpreting a provision of PacifiCorp's standard form Power Purchase Agreement for Qualifying Facilities with 10,000 kW Facility Capacity Rating, or Less, and not an Intermittent Resource (Small Firm Contract). For the reasons set forth below, PacifiCorp strenuously objects to the Commission substantively considering the Coalition's Petition.

II. BACKGROUND

In docket UM 1129, the Commission undertook a comprehensive evaluation of issues related to electric utility purchases from qualifying facilities (QFs) under the Public Utility Regulatory Policy Act of 1978 (PURPA). As part of that investigation, Order No. 05-584 directed PacifiCorp and Oregon's other electric utilities to make compliance filings that

included a standard power purchase contract for small QFs (10 megawatts or less).¹

PacifiCorp filed its Small Firm Contract per the directive of Order No. 05-584 and the Small Firm Contract was subsequently reviewed and approved by the Commission in Order No. 06-538.² Since the conclusion of docket UM 1129, the Commission opened a new general investigation—UM 1610—to examine QF contracting and pricing issues. Order No. 14-058 concluding Phase I of docket UM 1610 was issued by the Commission February 24, 2014; however, Phase II of UM 1610 is set to address contracting issues, including the maximum time allowed between contract execution and power delivery and termination for failure to meet mechanical availability limits.³

The Coalition requests that the Commission determine whether PacifiCorp’s Small Firm Contract allows the Company to terminate a QF for an uncured default for delays in commercial operation during a period of resource sufficiency. The outcome hinges on whether the period of resource sufficiency is determined by PacifiCorp’s “in fact”⁴ resource position at the time of the operational delays or, as PacifiCorp interprets the Small Firm Contract, by the resource sufficiency and deficiency periods identified in the Schedule 37 effective at the time the Small Firm Contract was executed and incorporated into the Small Firm Contract as an addendum to the contract. As evidenced by the significant discussions of this and other related issues in dockets UM 1129 and UM 1610, a utility’s resource sufficiency or deficiency and its impact on avoided cost rates is an important policy issue that

¹ *In the Matter of Public Utility Commission of Oregon Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005) (Order No. 05-584).

² *In the Matter of Public Utility Commission of Oregon Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 (September 20, 2006) (Order No. 06-538).

³ See *Chief Administrative Law Judge Michael Grant Ruling* (Dec. 21, 2012); see also *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 at 28, 30 (Feb. 24, 2014).

⁴ *In the Matter of the Renewable Energy Coalition, Petition for Declaratory Ruling*, Docket No. DR 48 at 1 (the Petition).

has consequences for the utility, the QF, and customers. Restricting the ability of the utility to terminate for delays in commercial operation allows QFs to delay commercial operations with the hope of a different outcome from that set forth in the contract with the utility—in this case the resource sufficiency or deficiency periods contained in the Schedule 37 effective at the time of contract execution—creates an opportunity for the QF to delay operations until such a time when avoided cost rates have shifted in the QF’s favor and to the detriment of customers who will bear the cost of the utility paying rates in excess of the avoided costs. Thus, while the Coalition appears to request interpretation of a contractual provision, the policy implications of that interpretation must be considered not only in light of the terms of the contract itself, but also in light of the Commission’s long-standing goal of protecting retail customers by ensuring utilities pay no more than their avoided costs for QF power.

**III. THE COMMISSION SHOULD DECLINE TO SUBSTANTIVELY
CONSIDER THE COALITION’S PETITION.**

The declaratory ruling process is not the appropriate method for resolution of the issue raised by the Coalition. First, the Coalition does not ask the Commission to apply a statute or rule to a set of clearly identified facts as required by ORS 756.450, but rather seeks a Commission decision on a policy issue that is best decided as part of a general investigation. Second, the Coalition seeks a ruling that will be broadly applicable to all QFs entering into PacifiCorp Small Firm Contract. Declaratory rulings are binding only between the Commission and the party seeking relief and are therefore inappropriate for resolution of broadly applicable policy issues.

a) The Commission should decline to substantively consider the Petition because it fails to request application of a rule or a statute.

ORS 756.450 states that the Commission may “issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any *rule or statute* enforceable by the Commission.”⁵ In *Central Oregon Irrigation District*, the Commission agreed with Staff’s recommendation and declined to substantively consider the petition for a declaratory ruling of Central Oregon Irrigation District (COID), in part because COID did not identify any statute or rule for the Commission to apply. Rather, COID’s request was for the Commission to interpret the provisions of a QF power purchase agreement to determine whether the utility or the QF owned the renewable energy credits associated with the QF’s generation. The Commission adopted Staff’s recommendation to not substantively consider COID’s petition; as Staff noted, substantive consideration of the petition by the Commission would amount to a decision on the matter “not as a policy choice but as a matter of strict contract interpretation,” which Staff found “best-suited for the courts.”⁶ Ultimately, Staff found COID’s request was a policy matter best considered by the Commission as part of a generic investigation.⁷

Similarly, the Coalition is requesting the Commission interpret the meaning of a provision of the Company’s Small Firm Contract, rather than application of a statute or rule as required by ORS 756.450. The fundamental disagreement between the Coalition and PacifiCorp, however, is about the policies surrounding the maximum amount of time between contract execution and power deliveries from the QF, an issue specifically identified for consideration in Phase II of UM 1610.

⁵ O.R.S. 756.450 (emphasis added).

⁶ *In the Matter of Central Oregon Irrigation District Petition for Declaratory Ruling*, Docket No. DR 45, Order No. 10-495, Appendix A at 4-5 (Dec. 27, 2010).

⁷ *Id.* at 5. However, the Commission declined to open a generic investigation to further consider the issue.

Resource sufficiency or deficiency, and the corresponding impact on avoided cost rates, impacts the incentive mechanisms for both the utility and the QF as it relates to project timelines. Fair consideration of the Coalition’s request requires examination of the policies preventing unreasonable gaming of differentials between resource sufficient and resource deficient avoided cost pricing and the impact of termination on regulatory certainty for both the utility and the QF. Should the Commission choose to consider the issue, this type of examination is most appropriately done as part of a general investigation, such as UM 1610. Phase II of UM 1610 includes consideration of contracting issues, and in the event the Commission wishes to consider the broader policy issues raised by the Petition, the Company proposes that the issue be considered by in Phase II of UM 1610. Nonetheless, the Company recommends that the Commission decline to substantively review the Petition because it inappropriately asks the Commission to resolve a policy issue that guides the interpretation of a contract provision rather than apply a statute or rule as required by ORS 756.450.

b) The Petition inappropriately seeks a broadly applicable decision rather than a decision binding between only the Commission and the Coalition.

Declaratory rulings are only appropriate as a means of resolving application of statutes or rules as between the Commission and the petitioner.⁸ As stated in ORS 756.450, “[a] declaratory ruling is binding between the commission and the petitioner[.]”⁹ Generally applicable policy issues should not be addressed via the declaratory ruling process but rather through a general investigation docket. In the Petition, the Coalition clearly states that its intent is to seek a ruling from the Commission that will be broadly applicable to all QFs seeking contracts with the Company that contain default and termination provisions similar

⁸ See O.R.S. 756.450 and O.A.R. 860-001-430.

⁹ O.R.S. 756.450.

to Section 11.3.1 of the Small Firm Contract.¹⁰ In support of the need for a declaratory ruling, the Coalition argues that “[b]ecause a ruling on the proper interpretation of the provision in question *potentially impacts all new QFs* subject to PacifiCorp’s Small Firm Contract, it will have *broader applicability* than the relief contemplated through the complaint process[.]”¹¹ A broadly applicable policy issue such as the one presented by the Coalition is more appropriately decided as part of a general investigation and not by declaratory ruling.

In addition, it is unclear how a decision by the Commission on the merits of the Petition would be applicable to the Coalition, an entity that has not entered into and is unlikely to enter into a Small Firm Contract with the Company. Although the Coalition’s membership includes QF projects that have executed Small Firm Contracts with the Company, as far as the Company is aware, the Coalition has authorization from only one QF project to negotiate or act on their behalf—OM Power 1, LLC (OM Power). This authorization, however, is limited to the issue raised in the Petition and not the complete Small Firm Contract negotiation process. The Company has not exercised its option to terminate OM Power or any other QF in default for delays in commercial operation, nor have any individual QFs filed a complaint with the Commission, which is the typical route for resolution of individual QF contracting issues. If PacifiCorp seeks to terminate a QF’s Small Firm Contract for delays in commercial operation—and to reiterate, the Company has not yet done so—the individual QF, and not the Coalition, is the appropriate party to file a complaint or bring a petition for a declaratory ruling.

¹⁰Petition at 11.

¹¹*Id.*

In contravention of ORS 756.450, the Coalition is requesting a ruling that is broadly applicable rather than binding as between the Commission and the Coalition, and the Commission should therefore decline to substantively consider the Petition.

**IV. A DECLARATORY RULING IN FAVOR OF THE COALITION IS
NOT SUPPORTED BY THE FACTS**

The understanding of the Company has always been that both the avoided cost rate and the resource sufficiency and deficiency periods set forth in the Schedule 37 effective at the time of contract execution are applicable to the QF for the life of the contract. This is consistent with the legal principles of contract interpretation—requiring parties to be bound by the words in their contract absent other words in their contract saying otherwise—as well as with the Commission’s policies on QF pricing and contracting. A Commission decision requiring the Company to interpret Section 11.3.1 of the Small Firm Contract as an absolute prohibition on the Company’s right to terminate based on a Company’s resource deficiency or sufficiency period other than the periods contained in the Schedule 37 effective at the time the contract is executed raises serious issues of contract interpretation, as well as policy issues that are better considered as part of Phase II of UM 1610, not as part of a declaratory ruling.

The Coalition’s interpretation of the Small Firm Contract is that the parties to the Small Firm Contract should not look at the words of the contract itself, which refers to the resource sufficiency periods in the Original Sheet 37-3 attached to the Small Firm Contract and with the pricing options set forth on Original Pages 37-5 and 37-6, the terms of which are incorporated into the Small Firm Contract by its Article 5. The result of the Coalition’s interpretation is that parties to the Small Firm Contract would not be able to rely on the resource sufficiency and deficiency periods and corresponding rates clearly identified in the

Small Firm Contract, a result at odds with principles of contract interpretation. If a QF wishes for the terms that could be applicable to its Small Firm Contract later in time—for example, an updated resource sufficiency or deficiency period—to apply to its contracts, the QF can enter into such contracts at such later time. But if a QF enters into a contract, it should be bound by the contract it signs.

If the Commission nonetheless exercises its discretion to substantively consider the Petition, the Commission should find that PacifiCorp is authorized to terminate the Small Firm Contract in the event of an uncured default for delay in commercial operation for two reasons. First, principles of contract interpretation support the Company’s interpretation of its right to terminate for default based on the resource sufficiency or deficiency periods effective at the time the Small Firm Contract was executed. Second, a declaratory ruling in favor of the Coalition is inconsistent with prior Commission decisions.

a) Principles of contract interpretation support the Company’s interpretation of its right to terminate for delays in commercial operation.

As noted by the Coalition in the Petition, “[a] contract with unambiguous terms is generally interpreted according to the plain meaning of those terms.”¹² Section 11.3.1 of Small Firm Contract states that “PacifiCorp shall not terminate . . . for default under Section 11.1.5 unless PacifiCorp is in a resource deficient state during the period Commercial Operation is delayed[.]” Further, and missing from the Coalition’s presentation of the issue in its Petition, PacifiCorp’s then-effective Schedule 37, which is attached as an addendum to the Small Firm Contract, clearly specifies when PacifiCorp is in a resource deficient state and thus when PacifiCorp has the ability to terminate for delays in commercial operation. The Coalition’s request for a ruling that PacifiCorp may not terminate for delays in commercial

¹² *Value Mobile Homes Ins. Co. v. Bank of Am. Or.*, 132 Or. App. 1, 5 (1994).

operation unless PacifiCorp is “in fact” resource deficient at the time of the delays directly contradicts the clear and unambiguous terms of the Small Firm Contract. Additionally, accepting any interpretation other than the Company’s, provides no protection to customers and essentially renders meaningless the upfront statement of resource sufficiency and deficiency periods set forth in Schedule 37.

b) A declaratory ruling in favor of the Coalition is inconsistent with prior Commission decisions.

The Commission’s goal in implementing PURPA is to encourage the development of QFs while protecting customers by ensuring that utilities incur costs not greater than they would have incurred in lieu of purchasing QF power.¹³ Recognizing that whether a utility is actively planning to acquire new resources has an impact on the resource avoided by the purchase of QF power, and therefore on avoided costs, the Commission established separate avoided cost calculations based on whether a utility is resource sufficient or resource deficient.¹⁴ In general, avoided cost rates are higher when a utility is in a resource deficient period and lower when the utility is in a resource sufficient position.

When a QF enters into a Small Firm Contract with the Company, the Schedule 37 rates in effect at the time the Small Firm Contract is executed are the rates paid to the QF project for the term of the contract and do not change when new avoided cost rates with new resource sufficiency and deficiency periods are filed and approved. One potential impact of granting the Coalition’s request is that a QF that enters into the Small Firm Contract during a period of resource sufficiency could end up with a nearly open-ended period during which it

¹³ See *In the Matter of Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 07-360 at 1 (Aug. 20, 2007); see also Order No. 05-584 at 11; see also 16 U.S.C. § 824a-3(b), (d); *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413(1983); see also *Connecticut Light and Power*, 70 F.E.R.C. 61,012, 61,029 (1995).

¹⁴ Order No. 05-584 at 22. (“The theory that underlies separate calculations for periods of resource sufficiency and deficiency is that a utility is actively planning to acquire, and therefore can actually avoid acquiring new resources, only when the utility is in a resource deficient position.” *Id.*).

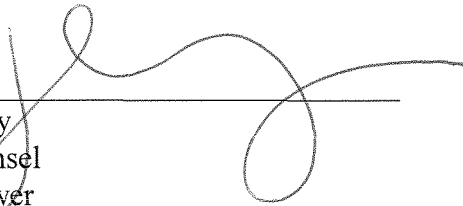
could remain in default for delays in commercial operation and still receive resource deficient avoided cost rates, even if the QF comes online and begins delivering power during a period of resource sufficiency. This is at odds with the Commission's stated goal of encouraging development of renewable resources while protecting customers by ensuring utility payment of accurate avoided cost rates and therefore the Commission should deny the Coalition's request.

V. CONCLUSION

The Commission should decline to substantively consider the Coalition's Petition because resolution of PacifiCorp's right to terminate the Small Firm Contract for delays in commercial operation raises policy questions. Should the Commission choose to consider the broader policy issues raised by the Petition, it would be preferable to resolve the issue as part of Phase II of UM 1610. Further, because resolution of this issue would be broadly applicable to a large subset of small QFs eligible for a standard contract, a declaratory ruling is inappropriate.

Alternatively, if the Commission chooses to substantively consider the Coalition's Petition, PacifiCorp urges the Commission to reject the Coalition's interpretation of the Company's right to terminate as contrary to the unambiguous terms of the Small Firm Contract and inconsistent with the Commission's long-standing policy of protecting customers by ensuring utilities pay no more than the avoided cost for electricity from QFs.

Respectfully submitted this 3rd day of March, 2014.



Etta Lockey
Legal Counsel
Pacific Power

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document, in Docket DR 48, on the date indicated below by email, addressed to said parties at his or her last-known address(es) indicated below.

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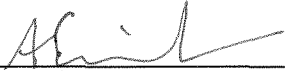
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DATED: March 3, 2014



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