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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-1166

Attn: Filing Center

RE: UM 1742—PacifiCorp's Limited Reply to Surprise Valley's Response in Opposition to Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Limited Reply to Surprise Valley's Response in Opposition to Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance.

If you have questions about this filing, please contact Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1742

SURPRISE VALLEY
ELECTRIFICATION CORP.,

Complainant

v.

PACIFICORP d/b/a PACIFIC POWER,

Respondent.

PACIFICORP'S LIMITED REPLY
TO SURPRISE VALLEY'S
RESPONSE IN OPPOSITION TO
MOTION TO SUSPEND
PROCEDURAL SCHEDULE AND
HOLD PROCEEDINGS IN
ABEYANCE

PacifiCorp d/b/a Pacific Power (PacifiCorp) files this limited reply (Reply) to Surprise Valley Electrification Corporation's (Surprise Valley) "Response in Opposition to Motion to Suspend Proceedings" (Response).¹ In short, PacifiCorp's Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance (Motion) should be granted because the transmission and delivery issues proposed by Surprise Valley raise a fundamental issue of whether PacifiCorp is actually required to purchase power from Surprise Valley under the Public Utility Regulatory Policies Act of 1978 (PURPA) and Federal Energy Regulatory Commission (FERC) regulations. This issue must *first* be resolved by FERC before the Public Utility Commission of Oregon (Commission) can meaningfully resolve any contract or pricing issues. PacifiCorp respectfully asks that the Commission accept this limited Reply and, in accordance

¹ Under OAR 860-001-0420(5), PacifiCorp is entitled to file a reply to Surprise Valley's Response within 7 days, meaning PacifiCorp's Reply is due on or before May 2, 2016.

with the Administrative Law Judge (ALJ) Grant’s prior statements, quickly rule on PacifiCorp’s Motion.

I. ARGUMENT

As PacifiCorp’s Motion explained in detail, Surprise Valley’s pleadings, testimony, discovery requests and discovery responses in this proceeding have increasingly made clear that this case involves fundamental transmission and delivery issues and an interpretation of PURPA and FERC regulations that must be resolved by FERC.² These are threshold issues and it would be a waste of the Commission’s resources, and those of all the parties, to continue a proceeding that may result in a decision contrary to FERC’s subsequent interpretation of its regulations. PacifiCorp will briefly address several inaccurate statements Surprise Valley makes in its Response.

A. **A FERC Ruling on Surprise Valley’s Qualifying Facility (QF) Power Delivery Proposal Is a Prerequisite to Any Meaningful Decision at This Commission**

Surprise Valley claims in its Response that, “There are key issues within this Commission’s jurisdiction, and prompt resolution of those issues can allow Surprise Valley to begin to sell power to PacifiCorp.”³ This statement is incorrect. Until FERC decides whether Surprise Valley’s complex and unorthodox “delivery” method raises any PURPA purchase obligation at all, PacifiCorp cannot be forced to sign a power purchase agreement (PPA) with Surprise Valley, and Surprise Valley cannot sell PacifiCorp any power from its QF.

² See PacifiCorp Motion at 1-2.

³ See Surprise Valley Response at 1. Similarly, Surprise Valley goes on to argue that, “The Commission has the authority and responsibility to resolve all of Surprise Valley’s claims for relief without awaiting [a] FERC decision.” See Response at 11.

As PacifiCorp has noted, and as this Commission understands, a utility is obligated to purchase the output of a QF under PURPA only if the *QF is willing and able to deliver its power to the utility*.⁴ Evidence of such ability is also required to establish a legally enforceable obligation (LEO).⁵ Despite years of discussions, Surprise Valley explained the QF power delivery proposal that is the basis for its complaint for the first time in its March 15, 2016 direct testimony (Surprise Valley Testimony). In its testimony, Surprise Valley admits the QF power would be used to serve Surprise Valley’s load. Nevertheless, Surprise Valley claims it will “deliver” the full net output of the Paisley Project through a “power swap” or “displacement” relying on revisions to various wholesale power sales and transmission agreements.⁶ That proposed delivery method is complicated and unverifiable, does not comport with PacifiCorp’s standard QF PPAs or even standard industry commercial practices, and fails to give rise to a PURPA mandatory purchase obligation.

⁴ See, e.g., *Kootenai Elec. Coop., Inc.*, 143 FERC ¶ 61,232 at P 33 (2013); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P 38 (2013) (QF must “deliver[]energy to the point of interconnection by the QF with that purchasing utility,” at which point the purchasing utility must take the energy).

⁵ OAR 860-0029-0030(4) (allowing off-system QF to sell power indirectly to a utility so long as it makes wheeling arrangements to deliver that power to the indirectly connected utility); see also, e.g., *Portland General Elec. Co. v. Oregon Energy Co.*, Docket No. UC 315, Order No. 98-238 (June 12, 1998) (confirming that a QF must obtain a wheeling agreement as a precondition to a utility’s obligation to purchase power indirectly from a QF). See also, *Portland General Elec. Co. v. Oregon Energy Co.*, Docket No. UC 315, Order No. 98-055 (Feb. 17, 1998) (without a binding wheeling arrangement to make power available to a utility, an off-system QF is not considered ready, willing, or able to deliver that power to a utility).

⁶ In order to “deliver” power to PacifiCorp, Surprise Valley would theoretically make a portion of the power it purchases from Bonneville Power Administration (Bonneville) available to PacifiCorp under a web of transactions that hinge on the FERC-jurisdictional General Transfer Agreement (GTA) between PacifiCorp and Bonneville. As conceived, this “power swap” would be entirely dependent on third party agreements that PacifiCorp is not party to, and would not provide PacifiCorp with any mechanism to ensure that delivery of the power by the third party is actually being made. See PacifiCorp Motion at 10 (citing to Surprise Valley’s response to PacifiCorp Data Request 3.2 and highlighting the importance of the GTA and its critical role in Surprise Valley’s proposed “delivery” arrangements); see also PacifiCorp Motion at 5, fn. 8 (citing Surprise Valley’s Direct Testimony and explaining its “power swap” or “displacement” theory of “delivery” for the QF’s net output); see also PacifiCorp Motion at 4 (noting that PacifiCorp has no way of *verifying* it is receiving *any power at all* from Surprise Valley under its proposed “delivery” arrangements).

Nothing in Surprise Valley's Response undermines this fundamental point. Unless FERC determines Surprise Valley's proposed delivery arrangements comply with FERC regulations to actually create a mandatory purchase obligation under PURPA, PacifiCorp cannot be forced to sign a PPA with Surprise Valley, and Surprise Valley cannot sell PacifiCorp any power from its QF. Further, without a purchase obligation, there is no LEO under PURPA for the Commission to impose on PacifiCorp. Therefore, Surprise Valley is mistaken that this Commission could meaningfully act on the contract and pricing issues at this time.⁷

B. Any Delay in these Proceedings Would Be Time-Limited and Would Not Result in an "Indefinite" Stay or Result in Substantial Injustice to Surprise Valley

Suspending these proceedings to allow FERC to rule on key threshold delivery issues would not result in an "indefinite stay," nor would it leave Surprise Valley "out of court."⁸ PacifiCorp has committed to seeking guidance from FERC about threshold PURPA delivery issues within sixty days of the ALJ's order,⁹ so any stay of these proceedings would put Surprise Valley "out of court" for sixty days or less. Once PacifiCorp files at FERC, Surprise Valley can participate in the FERC proceedings, and a FERC ruling would resolve the most critical point of

⁷ Surprise Valley cites to *PaTu Wind Farm, LLC v. Portland General Electric Co. (PaTu)* for the proposition that the Commission can bifurcate the issues over which it has jurisdiction and rule on certain contract and pricing issues now. Surprise Valley Response at 14-16. (PacifiCorp notes that Surprise Valley's citation appears incorrect. The proposition it cites seems to be supported by Order No. 12-316 at 8-9.) In particular, Surprise Valley cites to *PaTu* for its holding that the transmission issues raised in that proceeding were "not about *whether* PGE is required to receive power from an off-system [Qualifying Facility's (QF's)] energy, but rather about *how* [Portland General Electric (PGE)] is required to receive power." *Id.* The Commission ultimately concluded it could bifurcate the issues in PaTu's complaint and rule on the state issues, while leaving the Federal transmission issues to FERC. *See, PaTu Wind Farm, LLC v. Portland General Electric Co.*, Docket No. UM 1566, Order No. 12-316, at 8-9 (Aug. 21, 2012). As PacifiCorp has explained, however, the threshold transmission question here is about *whether* PacifiCorp would actually "receive" power from Surprise Valley at all; it is not quibbling at this time over the specific details of *how* PacifiCorp is to receive power. Therefore, FERC must first resolve *whether* PacifiCorp will receive any power from Surprise Valley before the Commission can resolve any details of a PPA for the purchase of such power. *Id.*

⁸ Surprise Valley Response at 12.

⁹ PacifiCorp Motion at 1 ("If this motion is granted, PacifiCorp will file a request for relief at FERC within sixty days of a ruling holding these proceedings in abeyance.").

dispute between the parties. If the Commission has concerns about the potential length of a stay, the ALJ could set a date certain for the parties to provide a status report to the Commission.¹⁰

C. By Making Certain FERC-Jurisdictional Transmission Agreements *Critical* to Its Delivery Proposal, Surprise Valley Has Elevated the Significance of Those FERC-Jurisdictional Agreements to this Dispute

Surprise Valley unfairly alleges that PacifiCorp has changed its position on whether PacifiCorp's FERC-jurisdictional GTA is relevant to PacifiCorp's obligation to purchase the net output of Surprise Valley's QF.¹¹ PacifiCorp has not changed its position about the GTA; it has simply read Surprise Valley's Testimony. Surprise Valley's Testimony elevated the GTA from a factual component of this case to a *critical* component of Surprise Valley's own power delivery proposal.¹² That delivery proposal appears to be a somewhat modified version of an unverifiable power "swap" with Bonneville, which PacifiCorp has maintained is inconsistent with PURPA since at least 2014.¹³ This puts PacifiCorp in an impossible posture: namely, Surprise Valley is attempting to leverage the GTA as a piece of its QF power delivery proposal—a proposal PacifiCorp believes is legally inconsistent with PURPA—while simultaneously arguing that only FERC has authority to address the GTA.¹⁴ PacifiCorp cannot defend itself in this situation.

¹⁰ PacifiCorp would also note that Surprise Valley itself moved for and received a four month delay in the procedural schedule, moving its own deadline for direct testimony from November 9, 2015, to March 15, 2016.

¹¹ Surprise Valley Response at 9.

¹² PacifiCorp Motion at 9-11.

¹³ See e.g. SVEC/202, Culp/83 (August 26, 2014 email from Bruce Griswold to Lynn Culp stating "Nothing in PURPA obligates us to do a swap however we have expended a large effort to find a physical means to show that your project's generated power reaches our system. It does not....PacifiCorp merchant has made it clear from our beginning discussions that we were not going to do any PPA that could not be physically metered and measured as having been delivered to PacifiCorp's system.").

¹⁴ PacifiCorp Motion at 6-9 (Nov. 6, 2015) (arguing that issues that pertain to a wholesale transmission agreement are outside of the Commission's regulatory authority and stating that the Commission cannot lawfully resolve such concerns because they are within FERC's exclusive jurisdiction).

As explained above, PacifiCorp is requesting a stay to allow FERC to resolve the sufficiency of the delivery arrangements proposed by Surprise Valley and whether such arrangements give rise to a mandatory purchase obligation under PURPA. PacifiCorp is not claiming that the GTA itself “bears on whether PacifiCorp is obligated to enter into a PPA;”¹⁵ rather, the lack of sufficient delivery arrangements—of which Surprise Valley has made the GTA a *critical* piece—is the reason PacifiCorp cannot sign a PPA. PacifiCorp cannot commit to purchasing power it cannot measure and that its customers may never receive.

II. CONCLUSION

For the forgoing reasons, PacifiCorp hereby asks the Commission to rule on PacifiCorp’s Motion as quickly as possible, and to suspend the procedural schedule and hold this proceeding in abeyance until such time as PacifiCorp and Surprise Valley have resolved the fundamental transmission issues underlying this case at FERC. PacifiCorp reiterates its commitment to filing with FERC within sixty days of a Commission’s ruling holding these proceedings in abeyance.

Dated this 28th day of April, 2016.

Respectfully submitted,



Matthew D. McVee
Assistant General Counsel
PacifiCorp

¹⁵ Surprise Valley Response at 9.