

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1742

Surprise Valley Electrification Corp.,)	
Complainant,)	SURPRISE VALLEY
)	ELECTRIFICATION CORP.
v.)	RESPONSE IN OPPOSITION TO
)	MOTION TO SUSPEND
PacifiCorp, dba Pacific Power,)	PROCEEDINGS
Defendant.)	
)	
)	
)	

I. INTRODUCTION

Surprise Valley Electrification Corp. (“Surprise Valley”) files this response in opposition to PacifiCorp’s motion requesting that the Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge (“ALJ”) indefinitely suspend the procedural schedule pending PacifiCorp making some sort of ill-defined filing with the Federal Energy Regulatory Commission (“FERC”). Surprise Valley sought assistance from PacifiCorp Transmission in 2012, has been seeking a power purchase agreement (“PPA”) with PacifiCorp since 2013, and legally obligated itself multiple times in 2014, yet is still waiting for PacifiCorp to finalize interconnection, transmission, and the PPA so that the Company can begin to accept and pay for the entire net output of the Paisley Project.

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. By contrast, waiting for FERC to resolve the transmission issues over which it has jurisdiction entails at least a year, and probably more, of needless delay in resolving a

Public Utility Regulatory Policies Act (“PURPA”) purchase arrangement that has already taken years to resolve. At some point, justice delayed will result in justice denied.¹

Surprise Valley agrees that PacifiCorp’s transmission arguments are outside of the OPUC’s jurisdiction, and should be resolved by FERC. The issues before the Commission, however, can be resolved without prior resolution of any matters within FERC’s jurisdiction, and should therefore be resolved at this time. Even if the Commission concludes that the FERC-jurisdictional issues are relevant, the OPUC does not need to wait for FERC to resolve these issues because they are not critical to the resolution of this state-jurisdictional complaint. In its most simple form, the key issue in this case is whether Surprise Valley committed to sell the net output of the Paisley Project to PacifiCorp under rates in effect as of August 2014. Each of Surprise Valley’s six claims for relief ultimately request that the Commission find that “Surprise Valley is entitled to a PPA with Schedule 37 rates effective prior to August 20, 2014.”²

In terms of PacifiCorp’s transmission arrangements arguments, all the Commission need conclude in this proceeding is that Surprise Valley (the owner and operator of the electrical facilities) committed to deliver, wheel, or otherwise provide the net output of the Paisley Project to PacifiCorp. Surprise Valley has sufficient wheeling capacity available to deliver the net output, and if Surprise Valley somehow fails to deliver power, or its transmission arrangements do not satisfy FERC’s requirements, then Surprise Valley may be in default or breach of its obligations. While the Commission

¹ Bryant v. Thompson, 324 Or. 141, 148 (Or. 1996) (quoting Lord Edward Coke and explaining the history of the maxim).

² Surprise Valley Complaint at 24-34 (June 22, 2015).

cannot opine on the adequacy of those FERC-jurisdictional issues, the OPUC can and should address the state jurisdictional issues with all deliberate speed.

As the ALJ is aware, PacifiCorp previously argued that these issues should be resolved by this Commission, and has contradicted its own prior position, which appears to be part of its overarching strategy of causing endless delays and ultimately refusing to purchase power from Surprise Valley. PacifiCorp could have raised its new objections years ago, and Surprise Valley should not be penalized because PacifiCorp is constantly coming up with new and creative ways to avoid its mandatory purchase obligations under PURPA.

PacifiCorp's complete reversal in its position appears to be a litigation tactic. The main thing that appears to have changed is that PacifiCorp may be concerned that the Commission may be a less hospitable forum, and may view the company's actions as yet another attempt to shut down its competition in the generation market. PacifiCorp also may be concerned that Surprise Valley is seeking to depose those current and former employees that it does not want to testify. Or maybe, PacifiCorp simply wants to drag out this case for another three to four years in hopes that Surprise Valley will just go away. Unlike most QFs that PacifiCorp successfully stonewalls to death, the Paisley Project is operating, albeit suffering financial damages because of PacifiCorp's continued delays.

II. BACKGROUND

Surprise Valley is a small electric cooperative that is not in the resource development business, has never developed a generation resource, and is not intending to construct additional geothermal projects. Surprise Valley has historically had a good

business relationship with PacifiCorp, including providing PacifiCorp with low cost transfer service across its own system, and provided the company with free or low cost services, including critical safety and reliability assistance.³ Surprise Valley relied upon PacifiCorp's promises, assurances, and obligations under PURPA, until it became clear that PacifiCorp was not negotiating in good faith.⁴

Surprise Valley contacted PacifiCorp Transmission in **2012** about its Paisley Project and contacted PacifiCorp Energy in **2013** seeking a PPA to sell the entire net output of its 2.4 megawatt ("MW")⁵ Paisley geothermal qualifying facility ("QF") ("Paisley Project") to PacifiCorp. As the Paisley Project is located in PacifiCorp's balancing authority, Surprise Valley informed PacifiCorp Transmission that Surprise Valley was planning on transferring the energy generated at its Paisley Project across its system to PacifiCorp at an existing interconnection between the utilities.⁶ Surprise Valley sought assistance for this delivery, but PacifiCorp Transmission informed Surprise Valley that delivery or wheeling issues across its own system would be resolved by PacifiCorp Energy submitting a network transmission service request to PacifiCorp

³ Exhibit SVEC/100, Direct Testimony of Brad Kresge at 11.

⁴ Id. at 11-12.

⁵ The Paisley Project's rated output is 3.65 MW, but the expected maximum net output of is 2.35 MW, and the expected average energy output will be approximately 2.1 MW. The Paisley Project is small, and PacifiCorp would have been able to successfully prevent the project from being constructed, if it had not been financed by an electric cooperative that received significant financial assistance from the U.S. Department of Energy and the Oregon Department of Energy, as well as other assistance from numerous state, federal and non-profit entities. See id. at 9-10.

⁶ E.g. Attachment A at 1-3 (Eric Birch email to Lynn Culp, Jan. 24, 2014).

Transmission.⁷ Later, PacifiCorp Transmission decided that delivery issues would be resolved through “metering.”⁸

PacifiCorp Energy was initially confused by Surprise Valley’s circumstances, including believing that the Paisley Project was located in Bonneville Power Administration’s (“BPA”) balancing authority, and being unsure whether the Paisley Project was an on or off system QF.⁹ Surprise Valley quickly corrected PacifiCorp about its location, and never questioned PacifiCorp’s characterization of whether the Paisley Project was on- or off-system.

PacifiCorp’s Motion to Suspend and Hold in Abeyance leaves the impression that “Surprise Valley’s most recent discovery responses” that were provided after Surprise Valley filed direct testimony “explain[] that the net output of Paisley would not be physically delivered to PacifiCorp’s system, but consumed by Surprise Valley’s load.”¹⁰ PacifiCorp has **always** been aware that, when the Paisley Project generates power, electrical flow at the point delivery would almost always continue to flow onto Surprise Valley’s system rather on onto PacifiCorp’s system.¹¹ From an electrical engineering

⁷ See *id.* at 1-2; see also Exhibit SVEC/200, Direct Testimony of Lynn Culp at 38-39.

⁸ Exhibit SVEC/200 at 8-10; Exhibit SVEC/202, Email Communications at 57, 59.

⁹ PacifiCorp did not finally make up its mind (or inform Surprise Valley about its understanding) about whether the Paisley Project was an on- or off-system PPA until it filed its Answer to Surprise Valley’s complaint in July 2015.

¹⁰ PacifiCorp Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance at 9.

¹¹ *E.g.*, Exhibit SVEC/202 at 21-22 (Surprise Valley informing PacifiCorp ESM again of the same basic delivery arrangements in December 2013); *id.* at 15-16 (PacifiCorp Transmission informing PacifiCorp ESM that they “[d]o not anticipate any issues” with Surprise Valley’s point of delivery in December 2013); *id.* at 57, 59 (PacifiCorp Transmission informing PacifiCorp ESM that any transmission arrangements would need to be resolved with metering in April 2014.).

perspective, this means that delivery would be accomplished by displacing the flow of electric energy that would otherwise flow from PacifiCorp's system to Surprise Valley.

PacifiCorp eventually concluded (or at least communicated to both Surprise Valley and FERC) that: 1) Surprise Valley would not need to provide **any** transmission arrangements across its own system; and 2) any transmission and metering issues would be resolved through PacifiCorp Energy's network transmission service request.¹² For example, PacifiCorp's network transmission request specifically stated that Surprise Valley would not need to provide any additional transmission arrangements.¹³ Similarly, once PacifiCorp Transmission finally completed its network transmission study, PacifiCorp Energy informed Surprise Valley it could sell the Paisley Project's net output after construction of the metering upgrades identified in the network transmission study.¹⁴ If PacifiCorp believed that Surprise Valley needed to provide any transmission arrangements across its own system, this was not communicated to Surprise Valley.

During numerous meetings and communications, Surprise Valley continued to not make a secret of how it proposed to deliver the power across its own system. Surprise Valley proposed how it believed delivery across its system should work in April of 2014 with a "concept paper."¹⁵ Surprise Valley, PacifiCorp and, sometimes BPA, met numerous times.¹⁶ Surprise Valley sent two different draft PPAs based on these proposed

¹² E.g., Exhibit SVEC/200 at 11, 24, 26-27, 30; Exhibit SVEC/202 at 15-16, 57, 59 (transmission had no concerns with the point of delivery and metering would resolve delivery issues); Exhibit SVEC/203, PacifiCorp Data Responses at 90-92 (PacifiCorp ESM's communication that there will be no third party transmission).

¹³ Exhibit SVEC/200 at 8-9, 26-27; Exhibit SVEC/203 at 90-92 (PacifiCorp ESM's communication that there will be no third party transmission).

¹⁴ Exhibit SVEC/100 at 27; Exhibit SVEC/200 at 25; Exhibit SVEC/202 at 105.

¹⁵ Exhibit SVEC/100 at 19; Exhibit SVEC/200 at 10; Exhibit SVEC/202 at 59-60.

¹⁶ E.g., Exhibit SVEC/200 at 8, 13, 33.

delivery and metering arrangements, which were discussed with PacifiCorp and Surprise Valley believed that PacifiCorp had agreed to these arrangements.¹⁷

At no point did PacifiCorp ask or even suggest that had any concerns PacifiCorp's general transfer agreement ("GTA") with BPA or state that any other FERC-jurisdictional transmission agreements impacted Surprise Valley's proposed delivery arrangements.¹⁸ Similarly, despite repeated requests from Surprise Valley asking if there was anything else they could provide, PacifiCorp did not ask that Surprise Valley provide additional transmission arrangements like ancillary services or verification through e-Tags.¹⁹ PacifiCorp raised dozens of obstacles and excuses, and had hundreds of opportunities to raise these issues with Surprise Valley, but it elected not to. PacifiCorp understood Surprise Valley's delivery arrangements, and PacifiCorp could have made a filing with FERC to resolve its alleged concerns numerous times in 2014, 2015 and 2016.

Surprise Valley also informed PacifiCorp in the spring of 2015 of the substantially the same factual circumstances as the Kootenai Electric Cooperative power purchase agreement with Avista Corp. and the CoGen Co. PPA with Idaho Power. Both Avista and Idaho Power purchased power from QFs that displaced third party power that the purchasing utility wheeled without raising any Chicken Little "Sky is Falling" concerns. Surprise Valley has repeatedly asked PacifiCorp to inquire with Avista and Idaho Power why they did not have any of the myriad of changing issues that PacifiCorp has raised with Surprise Valley.

¹⁷ Exhibit SVEC/206, Email and May 20, 2014 Draft PPA; Exhibit SVEC/207, Email and July 22, 2014 Draft PPA.

¹⁸ Exhibit SVEC/100 at 29.

¹⁹ E.g., Exhibit SVEC/200 at 18.

Surprise Valley filed its complaint on June 22, 2015, requesting that the Commission: 1) find PacifiCorp in violation of the mandatory purchase obligations of the Oregon and federal PURPA and related state and federal regulations, policies, and orders; 2) order PacifiCorp to enter into a PPA or legally enforceable obligation with Surprise Valley to purchase the entire net output of the Paisley Project at the Schedule 37 rates in effect prior to August 20, 2014; and 3) impose any other relief the Commission deems necessary.

PacifiCorp claims that Surprise Valley's complaint "vaguely" raised transmission issues.²⁰ A more accurate description is that Surprise Valley's complaint was silent on PacifiCorp's concerns because it could not respond to arguments that PacifiCorp had not raised in nearly two years of negotiations. PacifiCorp was either not negotiating with Surprise Valley in good faith, or it simply had not yet created these new theories regarding why it did not need to purchase the net output of the Paisley Project.

PacifiCorp filed its Answer on July 29, 2015. For the first time, PacifiCorp raised concerns about Surprise Valley needing a transmission agreement with itself, ancillary services or other transmission arrangements related to delivery across Surprise Valley's own system. Similarly, PacifiCorp finally decided to inform Surprise Valley that it believed the Paisley Project was an "off system" PPA. Outside of confidential settlement discussions that started after Surprise Valley sent a demand letter in April 2015, PacifiCorp's Answer was the first time the Company raised concerns that its FERC-jurisdictional GTA was an impediment to entering to a PPA. PacifiCorp again had an opportunity to seek FERC resolution, but declined to do so.

²⁰ PacifiCorp Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance at 8 (Apr. 6, 2016).

In November 2015, Surprise Valley sought to strike PacifiCorp’s arguments that the PacifiCorp and BPA GTA bars or otherwise limits Surprise Valley’s ability to sell the net output of the Paisley Project. Surprise Valley argued, and continues to believe, that the OPUC cannot interpret or rule on the impact of the GTA and other transmission arrangements because the subject of interstate transmission is within FERC’s exclusive jurisdiction and any action by the OPUC in that field would be preempted by the Federal Power Act and FERC’s regulations.²¹

Passing up another opportunity to seek FERC resolution of its alleged concerns regarding the GTA and other transmission issues, PacifiCorp argued that the OPUC **should** resolve its FERC jurisdictional objections. PacifiCorp claimed that the OPUC needed to address whether Surprise Valley has made “appropriate arrangements to deliver the Paisley Project’s power to PacifiCorp’s system” before requiring PacifiCorp sign a PPA with Surprise Valley, and issues related to delivery via “displacement.”²² PacifiCorp also specifically asserted that “the FERC-jurisdictional terms and conditions of the GTA between PacifiCorp and Bonneville have **no bearing** on whether PacifiCorp is obligated to enter into a standard Oregon QF PPA with Surprise Valley.”²³ Now, PacifiCorp has completely reversed itself believes that the GTA not only bears on whether PacifiCorp is obligated to enter into a PPA, but the GTA is a critical threshold issue that requires this entire proceeding to be put into indefinite abeyance.

²¹ See Surprise Valley’s Motion to Strike or Clarify Scope of Proceeding at 5-15 (Nov. 6, 2015).

²² PacifiCorp’s Response to Surprise Valley’s Motion to Strike or Clarify Scope of Proceeding at 9, 12 (Nov. 23, 2015).

²³ Id. at 15.

As PacifiCorp’s primary defense identified in its Answer rested upon whether Surprise Valley had provided ill-defined “transmission arrangements,” Surprise Valley investigated this new issue in the discovery process. Surprise Valley sought to determine: what transmission arrangements PacifiCorp requires, when PacifiCorp believed it communicated these transmission requirements, and whether PacifiCorp Transmission, as the relevant Balancing Authority, would provide transmission arrangements sufficient to allow PacifiCorp Energy to purchase the net output of the Paisley Project.

While it is clear that PacifiCorp never communicated its desire for transmission arrangements, it is also equally clear that PacifiCorp has made exhaustive and creative efforts to refuse to identify what transmission arrangements the company is requiring or is willing accept. PacifiCorp’s responses have been remarkably evasive, which has required multiple rounds of discovery, two motions to compel, and a need to take depositions of PacifiCorp current and former employees. PacifiCorp expended considerable time providing little to no useful information to Surprise Valley, but PacifiCorp once again passed up the opportunity make a FERC filing.

The purpose of this lengthy background section is not to detail the blow-by-blow history of this case, but to illustrate that PacifiCorp repeatedly had the opportunity raise its alleged concerns with FERC. Surprise Valley should not be penalized because PacifiCorp keeps changing its objections and legal theories, or waited to seek to suspend the procedural schedule as a litigation tactic in order to gain a preview of Surprise

Valley's testimony.²⁴ PacifiCorp should not be provided months, if not years, to prepare and refine its responsive testimony. As explained below, Surprise Valley does not object to PacifiCorp seeking resolution of FERC-jurisdictional issues at FERC; however, there is no reason to delay the prosecution of this complaint at this time, regardless of whether any party seeks FERC's resolution of any issues.

III. ARGUMENT

The Commission has the authority and responsibility to resolve all of Surprise Valley's claims for relief without awaiting FERC decision. Surprise Valley has raised six claims for relief, all of which squarely address issues within the Commission's jurisdiction, including whether Surprise Valley committed to sell the net output of the Paisley Project to PacifiCorp, and whether PacifiCorp negotiated in good faith or unnecessarily delayed negotiations.²⁵ As it has in previous circumstances in which there were issues that were outside of its jurisdiction, the Commission should resolve the issues it has authority over, and allow PacifiCorp or Surprise Valley to raise any FERC-jurisdictional issues in the appropriate forum.

If PacifiCorp does not want to defend this complaint and believes all issues should be resolved at FERC, then it can easily narrow the issues in this proceeding. PacifiCorp could simply agree to purchase the net output of the Paisley Project at pre-August 2014 rates, with the condition that any purchases will be contingent upon Surprise

²⁴ PacifiCorp has sought to use procedural tricks throughout both the negotiations and this complaint proceeding. For example, during the nine months between Surprise Valley's filing of the complaint and its direct testimony, PacifiCorp sent exactly two rounds of data requests, both of which were voluminous and timed to have their due dates at the same time as Surprise Valley's testimony was due.

²⁵ Surprise Valley Complaint at 24-34 (June 22, 2015).

Valley being able to provide whatever transmission arrangements FERC believes are appropriate.

1. Legal Standard

Although Oregon's administrative rules do not specifically address suspension or abatement of proceedings, the Commission should follow the Federal rules "good cause" standard in considering PacifiCorp's motion.²⁶ The Ninth Circuit has held that the "good cause" inquiry focuses on the party requesting modification, noting that the motion to modify should not be granted if the party seeking modification was not diligent.²⁷ Here, PacifiCorp suggestion that an "increasingly apparent" threshold issue as to PURPA's applicability indicates that, at a minimum, PacifiCorp has not been diligent in these proceedings or Surprise Valley's request for a PPA.

Moreover, granting PacifiCorp's motion would be contrary to the Supreme Court's policy disfavoring indefinite stays. Generally, stays should not be indefinite in nature or leave a party "effectively out of court."²⁸ Here, the Commission is not able to ensure that this stay would be of a short, or at least reasonable, duration. Because there is no FERC action currently pending, an abeyance would effectively put Surprise Valley out of court. In addition, even the case went to FERC, PacifiCorp agrees that there are state jurisdictional issues that must be resolved, the failure to address would indefinitely delay Surprise Valley's ability to sell power. Surprise Valley should not have to wait another three or four years for a contract. Thus, the Commission should allow these proceedings to continue.

²⁶ See OAR § 860-001-0420; FED. R. CIV. P. 16(b)(4).

²⁷ Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002).

²⁸ See Landis v. North American Co., 299 U.S. 248, 255 (1936); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 9-11 (1983).

2. The Commission Does Not Need to Address PacifiCorp’s FERC-Jurisdictional Transmission Issues in this Proceeding

The Commission does not need to resolve PacifiCorp’s transmission-related defenses to conclude that Surprise Valley has committed to provide transmission to deliver the net output of the Paisley Project. PacifiCorp can raise and obtain FERC resolution of its concerns with the sufficiency of Surprise Valley’s transmission, wheeling, or other delivery requirements. Surprise Valley, as the owner and operator of the relevant electrical equipment that the power would be wheeled or otherwise delivered, has committed to ensure proper deliveries. In addition, Surprise Valley may be willing to consider providing additional transmission arrangements, if PacifiCorp would only describe which arrangements it requires. Finally, Surprise Valley has committed to provide any and all transmission arrangements required by FERC, or it will default and ultimately breach its legal obligations to sell the net output of the Paisley Project to PacifiCorp.

PacifiCorp cites many of the same laws and cases that Surprise Valley did when Surprise Valley sought to strike PacifiCorp’s reliance on the GTA.²⁹ PacifiCorp now believes that “certain disputes over transmission issues raised in state QF complaint proceedings can be outside the Commission’s core jurisdiction and, instead, are more properly resolved by FERC.”³⁰ Surprise Valley agrees with this principle, and urges the Commission to take the same approach (although a different end result) as it has in the

²⁹ Compare PacifiCorp Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance at 7, 12-13 with Surprise Valley Motion to Strike or Clarify Scope of Proceeding at 7-9.

³⁰ PacifiCorp Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance at 7 (citing PaTu Wind Farm, LLC v. Portland General Elec. Co., Docket No. UM 1566).

past, which is to address the state jurisdictional issues **now** and let the parties address federal issues (if any exist) in a subsequent or parallel proceeding.

In PaTu, the Commission reviewed, addressed, and resolved a QF's claims regarding interpretation of its state-jurisdictional contract and other issues.³¹ Specifically, the Commission addressed the price that Portland General Electric Company ("PGE") should pay to the QF under the litigants' PURPA contract.³² Similarly, Surprise Valley is asking the Commission to find that PacifiCorp must pay Surprise Valley the pre-August 2014 rates for the net output that it can wheel or deliver to PacifiCorp.

The Commission, however, refused to address the QF's transmission related arguments in PaTu.³³ The QF argued that the Commission should conclude that PGE was required to accept a specific type of transmission arrangement.³⁴ The Commission explained that the fundamental aspect of the transmission related dispute was "not about *whether* PGE is required to receive power from an off-system QF's energy, but rather about **how PGE is required to receive the power.**"³⁵

The Commission then concluded that this transmission issue was outside the scope of its jurisdiction, and proceeded to resolve the pricing dispute that was within its jurisdiction. In reviewing PGE's similar standard off system contract, the Commission concluded that "we find it does not address transmission but **rather presumes it.**"³⁶ The

³¹ PaTu Wind Farm, LLC v. Portland General Elec. Co., Docket No. UM 1566, Order No. 14-287, at 12-15 (Aug. 13, 2014).

³² Id.

³³ Id. at 2; PaTu Wind Farm, LLC v. Portland General Elec. Co., Docket No. UM 1566, Order No. 12-316 at 8-9 (Aug. 21, 2012).

³⁴ Order No. 12-316 at 8-9.

³⁵ Id. at 8 (emphasis added).

³⁶ Id. (emphasis added).

Commission then refused to address the QF’s request that PGE be forced to accept a specific type of transmission because:

The contract presumes transmission of energy from the QF to the utility, but does not address the details of that transmission. The issues raised by PaTu do not, therefore, turn on contractual analysis. Thus, a finding that the standard contract does not prohibit dynamic transfer transmission would have no meaning, because the contract does not address the means of transmission in any way.³⁷

The Commission further explained that while it could consider issues that were contractual in nature, the problem with the QF’s “request for our help is that we don’t have the jurisdiction—nor possibly the expertise—to fully evaluate the impact of a dynamic transfer.”³⁸

The Commission is faced with similar dual jurisdictional questions in this case. On one hand, Surprise Valley has raised state-jurisdictional issues regarding whether PacifiCorp is required to purchase power pursuant to a legally enforceable obligation. On the other hand, PacifiCorp has raised concerns regarding the adequacy of Surprise Valley’s “transmission arrangements.” Despite PacifiCorp’s initial refusal to admit it, both Surprise Valley and PacifiCorp now agree that FERC should address any FERC-jurisdictional transmission issues regarding delivery.

The Commission, however, should proceed to address the state jurisdictional issues in the same procedural manner as in PaTu. The Commission should refuse to resolve any of PacifiCorp’s complaints that its own FERC-jurisdictional transmission agreement with BPA somehow prevents Surprise Valley from entering into a PPA or other legally enforceable obligation. The Commission should instead conclude that,

³⁷ Id.

³⁸ Id. at 9.

while Surprise Valley must deliver power to PacifiCorp, the state-jurisdictional PURPA contract and/or legally enforceable obligation does not require or address any specific form of transmission.

The Commission should address the state jurisdictional issues now rather than waiting months or years. The Commission can conclude that Surprise Valley is legally entitled to sell its power at rates in effect before August 2014. This contractual or other legal obligatory relationship between PacifiCorp and Surprise Valley presumes transmission. If either PacifiCorp or Surprise Valley have issues regarding the details of any such transmission, then they should be resolved by FERC because the Commission does not have the jurisdiction nor the expertise to fully evaluate the impact of the transmission arrangements PacifiCorp is requiring.

In fact, transmission issues in QF contracts are generally addressed after, rather than before, a contract or legally enforceable obligation is entered into. PacifiCorp's Schedule 37 requires a QF to provide information regarding the "status of interconnection or transmission arrangements", but does not require finalization of these matters before a power purchase agreement is signed.³⁹ Unless the QF is already operating or there are other unique circumstances, the interconnection process is almost never completed before the PPA because QFs generally need a signed contract in order to obtain financing necessary to pay for interconnections. In addition, while the specific transmission arrangements for most PPAs are not publicly available, PacifiCorp has signed numerous

³⁹ PacifiCorp Oregon Schedule 37 at 8, available at: https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/PURPA_Power_Source_Agreement/Schedule_37_Avoided_Cost_Purchases_From_Qualifying_Facilities_of_10000_kW_or_Less.pdf.

QF contracts that simply require the QF to pay for transmission that will subsequently be obtained.⁴⁰ If those contractual or physical arrangements fail or otherwise are not available, then the QF is liable for failure to deliver and is not prevented from entering into a PPA in the first place.

3. The Key Issues in this Proceeding Are PacifiCorp's Illegal Actions Designed to Avoid Entering Into a PPA with Reasonable Terms and Conditions

While the issue of “transmission arrangements” may be key to PacifiCorp’s defense, it is not the primary focus of Surprise Valley’s complaint. The core of Surprise Valley’s complaint and direct testimony is that PacifiCorp has repeatedly raised a host of constantly changing objections and hurdles in its effort to refuse to enter into a PPA. PacifiCorp reneging on its commitment that no additional transmission arrangements were required is only relevant as part of pattern of illegal refusals to purchase the net output of the Paisley Project. Surprise Valley only addressed the transmission arrangements issue because it appears to be most important objection PacifiCorp has left.

PacifiCorp’s state-jurisdictional illegal behavior that the Commission can address now includes but is not limited to:

- Repeatedly breaking promises to provide Surprise Valley with draft PPAs;
- Repeatedly breaking promises to provide comments on Surprise Valley’s draft PPAs;
- Repeatedly breaking promises to purchase the entire net output of the Paisley Project at pre-August 2014 rates;

⁴⁰ E.g., Power Purchase Agreement Between EBD Hydro, LLC and PacifiCorp, Addendum A at 1-2 (QF agrees: 1) that it is in a load pocket and third party transmission is required to deliver its net output to PacifiCorp load; and 2) that if additional transmission is needed and not purchased, then the QF will face curtailment) available at: <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=19097>.

- Requiring Surprise Valley to sign a non-Commission approved “Jury Trial Waiver” under which Surprise Valley would waive all rights to a jury trial for PacifiCorp’s illegal actions;
- Delaying the negotiation process by insisting that a PPA could not be signed until PacifiCorp Transmission completed a network transmission study;
- Failing to process the network transmission study process in a timely manner;
- Despite repeated requests to sign a PPA, waiting until immediately **after** rates changed in August 2014 to inform Surprise Valley that PacifiCorp had changed its position and that there were various unresolved metering concerns;
- Informing Surprise Valley in September 2014 that Surprise Valley would have to sell power at the post-August 2014 rates because Surprise Valley was “not far enough long” in the PPA negotiation process;
- Informing Surprise Valley in September 2014 for the first that they could have completed a PPA if they had pursued the never previously mentioned Schedule 38 process (which only applies to PPAs over 10 MWs);
- Repeatedly requesting that Surprise Valley provide the same information or requesting information that was not necessary; and
- Refusing to communicate with Surprise Valley on issues related to the PPA for months until Surprise Valley threatened to file a complaint.

The issue of Surprise Valley’s transmission arrangements may be relevant, but not for the reasons suggested by PacifiCorp. PacifiCorp argues that “there is no mandatory purchase obligation at all, and Surprise Valley’s Complaint must be dismissed” if Surprise Valley’s transmission arrangements are found inadequate.⁴¹ Under these circumstances, the relevant issue would be whether PacifiCorp negotiated in good faith. For example, PacifiCorp told Surprise Valley that no transmission arrangements needed to be made, but then changing its position. Similarly, PacifiCorp has refused to identify what transmission arrangements it requires or would accept.

⁴¹ PacifiCorp Motion to Suspend Procedural Schedule and Hold Proceedings in Abeyance at 8 (Apr. 6, 2016).

Surprise Valley cannot lose its right to sell power at pre-August 2014 rates because PacifiCorp has made herculean efforts to prevent Surprise Valley from providing whatever it is that PacifiCorp may or may not want. Surprise Valley should also not be penalized because of PacifiCorp's delays or repeated decisions to change its legal theories. Surprise Valley relied upon PacifiCorp's commitments and information, and diligently worked (and is trying to continue) to understand and provide PacifiCorp with all required information. If Surprise Valley needs to provide something to PacifiCorp before being able to legally obligate itself to sell power, then it is only reasonable that Surprise Valley know what that is.

The Commission need not, however, address these issues if it accepts Surprise Valley's fundamental legal theory and factual assertions. Surprise Valley has been working with PacifiCorp Transmission since 2012, and has been seeking a power purchase agreement from PacifiCorp since 2013. Surprise Valley took all reasonable steps to provide PacifiCorp with whatever information it requested, and legally obligated itself to sell the entire net output of the Paisley Project numerous times prior to August 2014. The fact that PacifiCorp did not negotiate in good faith, refused to provide draft power purchase agreements or comments on drafts, unreasonably delayed, broke promises to purchase the Paisley Project's net output, required illegal contract terms, and made other efforts to refuse to finalize a contract cannot legally bar Surprise Valley from being able to sell its power to PacifiCorp.

IV. CONCLUSION

The Commission has the jurisdiction and the obligation to address Surprise Valley's claim that it legally obligated itself and is entitled to the avoided cost rates in

effect prior to August 2014. PacifiCorp should not be allowed to further delay resolution of this issue by indefinitely delaying resolution of key state-jurisdictional issues for another year or more. The issue of the adequacy of Surprise Valley's transmission arrangements (whatever that means) should be addressed by FERC, and do not change the fact that Surprise Valley has taken every reasonable effort to sell power to PacifiCorp.

Dated this 25th day of April, 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large initial "I" and a long, sweeping underline.

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Of Attorneys for Surprise Valley Electrification
Corp.

Attachment A

From: Birch, Eric [<mailto:Eric.Birch@pacificorp.com>]
Sent: Monday, January 27, 2014 3:28 PM
To: Lynn Culp
Cc: Kirk Gibson; Brad Kresge; Jeff Mann 3356
Subject: RE: SVE PAC Interconnection

Hello Lynn,

Answers are in **RED** below.

Thanks!

Eric

From: Lynn Culp [<mailto:lynnsvec@frontier.com>]
Sent: Friday, January 24, 2014 7:53 AM
To: Birch, Eric
Cc: Kirk Gibson; Brad Kresge; Jeff Mann
Subject: SVE PAC Interconnection

Eric –

SVEC is expecting to execute a standard purchase power agreement with PAC for the generation coming from the Paisley Project in the near future. We are working on the remaining contract issues with John Younie at PAC.

I have reviewed the correspondence between SVEC and PAC and have few remaining clarifying questions to make sure that SVEC is meeting all of the appropriate transmission requirements for its Paisley Project. In your letter dated October 30, 2013, you state that there is a need to update certain relay settings at PAC's Mile Hi substation. It is my understanding that these updates are to be implemented in the first quarter of 2014 based on your letter.

In a later exchange of email correspondence between you and I, you concluded that there was no need to revisit existing SVEC/PAC interconnection agreements/contracts to accommodate the energy from the Paisley Project. However, you noted that there was a need to initiate a transmission service request if SVEC was planning to transmit the energy from its Paisley project to PAC. To be clear, SVEC is planning on transferring the energy generated at its Paisley project across its system to PAC at an existing interconnection between the utilities.

My questions are:

1. Does SVEC need to initiate a transmission service request if SVEC is delivering the energy from its Paisley project directly into the PAC system at an existing interconnection between the utilities? If so, who should I contact to initiate that request?
 - a. **PacifiCorp Energy should be submitting a transmission service request (“TSR”) to PacifiCorp Transmission in conjunction with the Paisley PPA. PacifiCorp Transmission has not yet received a TSR from PacifiCorp Energy for the Paisley generation.**
2. What time frame is involved in such a request from the initiation to completion?
 - a. **The timeframe for the TSR system impact study is 100 days and the TSR facilities study is 60 days, so 160 days is the timeframe. If the studies show a need for additional facilities, then the timeframe would expand to whatever is needed to construct such facilities.**
3. Is there anything that SVEC must do regarding the updates of the relay settings at PAC’s Mile Hi substation?
 - a. **Just continued collaboration with our Protection & Control people as needed.**
4. Are there any other requirements/obligations that SVEC should be working on from the transmission-side of PAC for purposes of getting the energy from the Paisley project to PAC’s system? If so, please advise.
 - a. **Check in with PacifiCorp Energy to verify that they have submitted a TSR to PacifiCorp Transmission for the Paisley generation pursuant to the PPA.**

Separate from the interconnect questions we have the following that we hope you might be able to clarify:

5. We have been told by PacifiCorp staff who are working through the PPA that a “real time signal” of the generation plant is required. Could you clarify what is required of a “real time signal” and how PAC would like that signal transmitted?
 - a. **Please ask PacifiCorp Energy what their requirements are pursuant to the PPA.**

Thanks for your valued assistance on these matters.

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