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October 12, 2016

***VIA ELECTRONIC FILING***

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

Attn: Filing Center

**RE: UM 1794—PacifiCorp's Motion for Clarification, or Alternatively, Certification**

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Motion for Clarification.

If you have questions about this filing, please contact Natasha Siores at (503) 813-6583.

Sincerely,

R. Bryce Dalley  
Vice President, Regulation

Enclosure

**CERTIFICATE OF SERVICE**

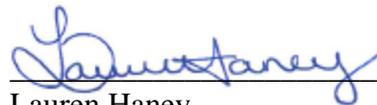
I certify that I served a true and correct copy of PacifiCorp’s Motion for Clarification, or Alternatively, Certification on the parties listed below via electronic mail and/or or overnight delivery in compliance with OAR 860-001-0180.

**Service List  
UM 1794**

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Dated this 12<sup>th</sup> day of October, 2016.



Lauren Haney  
Coordinator, Regulatory Operations

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1794

In the Matter of

PACIFICORP d/b/a PACIFIC POWER,

Investigation into Schedule 37 – Avoided  
Cost Purchases from Qualifying Facilities  
of 10,000 kW or Less.

PACIFICORP’S  
MOTION FOR CLARIFICATION  
OR, ALTERNATIVELY,  
CERTIFICATION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully requests clarification that the October 6, 2016 discovery conference held under OAR 860-001-0500(6) did not result in a ruling compelling PacifiCorp to produce highly confidential, commercially sensitive bid information from the Company’s requests for proposals (RFPs). In the alternative, if the Administrative Law Judge’s (ALJ) statements at the October 6 informal discovery conference constituted a ruling, then PacifiCorp respectfully requests certification of that ruling to the Public Utility Commission of Oregon (Commission).

As detailed below, clarification that the ALJ did not order PacifiCorp to disclose highly confidential, commercially sensitive information from the RFP bids at the October 6 conference is appropriate because the informal discovery dispute process outlined in OAR 860-001-0500(6) is intended to allow the parties to informally mediate discovery disputes before an ALJ without the need for motions to compel or written arguments. The process is not intended to replace a motion to compel or act as “oral argument” on a discovery dispute, and therefore should not result in a ruling by the ALJ.

In this case, the Community Renewable Energy Association (CREA) undermined the discovery dispute resolution process by invoking informal resolution under

OAR 860-001-0500(6) while effectively triggering OAR 860-001-0500(7) with its written filing. CREA's tactics conflated two distinct procedural mechanisms for resolving discovery disputes and created procedural confusion thereby hindering a prompt resolution of the underlying dispute.

Alternatively, if the ALJ's statements at the October 6 discovery conference are considered to be a binding ruling, certification is appropriate because the ruling will prejudice PacifiCorp by requiring it to disclose highly confidential, commercially sensitive RFP bids, which are unrelated to setting the Company's avoided cost prices. Disclosure of this information will shift the focus away from the inputs to the Company's avoided cost prices; instead, parties will improperly use this investigation to challenge the process and results of the RFPs, which is outside the scope of this proceeding.

Additionally, good cause exists to certify the ALJ's October 6 ruling because CREA misused the discovery dispute process to unfairly disadvantage PacifiCorp and prevent it from fully presenting its arguments to the ALJ.

## **I. STATEMENT OF FACTS**

This investigation was opened at the conclusion of a lengthy process to update the Company's avoided cost prices in UM 1729(1). In Order No. 16-307, the Commission opened this expedited contested case proceeding to: (1) allow PacifiCorp to propose updated avoided cost prices; and (2) allow stakeholders to vet PacifiCorp's proposal in light of the issues raised in UM 1729(1).<sup>1</sup> This docket, however, is not an opportunity for CREA and others to relitigate and retroactively challenge the prices established in UM 1729(1).

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<sup>1</sup> *In the Matter of PacifiCorp, d/b/a Pacific Power, Application to Update Schedule 37 Qualifying Facility Information*, Docket No. UM 1729(1), Order No. 16-307 (Aug. 18, 2016).

In this new proceeding, CREA, an organization that represents potential bidders in future RFPs, seeks to compel PacifiCorp to provide detailed bid information from the Company's RFPs, among other requests. The Company has not yet made its initial filing in this proceeding, and neither the Company nor the Commission relied on the RFP bid information to set PacifiCorp's avoided cost prices in UM 1729(1).

On March 1, 2016, PacifiCorp filed its updated avoided cost prices using inputs from the Company's 2015 Integrated Resource Plan (IRP) under OAR 860-029-0080. In Order No. 16-117, the Commission declined to approve the Company's and directed parties to work together to propose a non-contested case process to update the Company's avoided cost prices in light of the potential impact of Senate Bill (SB) 1547. After multiple discussions, parties were unable to reach agreement.

On June 21, 2016, PacifiCorp filed a supplemental update to its standard avoided cost prices with inputs from the Company's 2015 IRP Update—*not the RFP bids*. In that filing, the Company reasoned that use of cost and performance inputs from the 2015 IRP Update was appropriate as part of a compromise to use 2018 as the renewable resource deficiency date. The Company argued that it would be unfair to customers to accelerate the deficiency date without updating cost and performance. The RFP bids were *not* used as evidence in that proceeding; PacifiCorp merely made an anecdotal comment referencing the preliminary results from the resource RFP as consistent with data in the 2015 IRP Update for cost and performance.<sup>2</sup> The prices from the RFP bids were never referenced or used as support for the Company's avoided cost prices. As the Company explained, the issuance of the RFPs did not mean that PacifiCorp was resource deficient; the RFPs were not issued to satisfy a specifically identified resource

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<sup>2</sup> See *In the Matter of PacifiCorp, d/b/a Pacific Power, Application to Update Schedule 37 QF Information*, Docket No. UM 1729(1), Supplemental Application at 4 (June 21, 2016).

need. Rather, the RFPs were issued to test the market and evaluate its RPS compliance alternatives, including potential near-term, time-sensitive opportunities to allow the best opportunity for customers to take full advantage of the federal tax credits.<sup>3</sup>

CREA unsuccessfully attempted to access the confidential RFP bids in UM 1729(1). PacifiCorp did not produce this information because UM 1729(1) was not a contested case proceeding and discovery was not permitted. Although CREA contends that the confidential bids were relevant in UM 1729(1), no such finding or determination was ever made.

UM 1729(1) concluded with the Company's August 22 compliance filing, which updated its standard avoided cost prices based on renewable and non-renewable deficiency periods beginning in 2028, and cost and performance data from its 2015 IRP, *not the RFP bids*.

On September 23, 2016, CREA issued its first set of data requests to PacifiCorp seeking commercially sensitive information from the confidential RFP bids. CREA seeks to require PacifiCorp to provide a broad range of information from its RFPs, including all bids and supporting work papers developing the weighted average costs and capacity factors (Data Request 1.1). CREA seeks disclosure of the "lowest cost bids," the number of bids for a physical wind resource, whether each bid would use third-party transmission, assumed Bonneville Power Administration transmission costs, the complete list of the final short list of bids, and any changes made by the bidders (CREA Data Requests 1.2, 1.3, 1.4, and 1.7). CREA seeks a complete list of the selected bids for the renewable energy credit purchases (CREA Data Request 1.5). CREA also seeks all documents provided to executive officers or members of the Board of Directors as part of the approval process for the RFP procurement decisions (Data

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<sup>3</sup> *Id* at 3.

Request 1.6). CREA seeks an explanation of why PacifiCorp did not accept bids from physical resources located in Wyoming in the RFP (Data Request 1.8).

PacifiCorp and CREA were unable to resolve this discovery dispute informally. On September 19, 2016, PacifiCorp contacted CREA to discuss the Company's concerns with the data requests, and CREA disagreed with the Company's position. After CREA received the Company's objections, CREA reached out to the Company for clarification. The Company reiterated its position and offered to hold a call to discuss the responses. CREA declined the Company's offer, stating CREA did not believe such a call would be productive.

CREA attempted to resolve this discovery dispute with the ALJ by conflating the processes outlined in OAR 860-001-0500(6) and OAR 860-001-0500(7). On October 4, 2016, CREA contacted the ALJ to request an informal resolution of this discovery dispute, citing OAR 860-001-0500(6), but also submitted a lengthy legal argument in pleading form. CREA characterized its pleading as a Request for Informal Resolution of Discovery Dispute.

PacifiCorp had agreed to an expedited conference, but was unaware CREA would submit what amounted to a motion to compel. On October 5, 2016, PacifiCorp sent a limited written response to CREA's request, and on October 6, 2016, the Renewable Energy Coalition (REC) sent written arguments in support of CREA's position. CREA's request and the email communications between parties are included as Attachment A.

On October 6, 2016, the ALJ held a telephone conference to discuss the discovery dispute between CREA and PacifiCorp. Representatives from CREA, PacifiCorp, REC, and Commission Staff participated in the telephone conference. At that conference, the ALJ stated he had reviewed parties' written materials and allowed each party to supplement their positions. At the conclusion of the conference, the ALJ concluded against PacifiCorp's repeated objections

that the confidential RFP bid information was discoverable. The ALJ directed PacifiCorp to work with parties to draft a highly confidential protective order to facilitate the disclosure of certain highly confidential, commercially sensitive bid information from the Company's RFPs.<sup>4</sup> The ALJ did not issue a written ruling, and the conference was not recorded.

## II. PACIFICORP'S REQUEST FOR CLARIFICATION

PacifiCorp seeks clarification that, in accordance with the informal, non-binding process outlined in OAR 860-001-0500(6), the ALJ did not issue a ruling at the October 6 conference compelling PacifiCorp to disclose certain highly confidential, commercial sensitive information from the RFP bids.

### A. Legal Standard

The non-binding dispute resolution process under OAR 860-001-0500(6) states: "If parties are unable to resolve a dispute informally, then any of the parties involved in the dispute may ask the ALJ to conduct a conference to *facilitate the resolution* of discovery disputes" (emphasis added). At the conference, the ALJ serves as a mediator to facilitate discussion between parties to resolve the dispute without motions, if possible.<sup>5</sup> The ALJ does not issue a ruling or otherwise direct parties to respond to discovery,<sup>6</sup> and the discovery conference is not binding on parties.<sup>7</sup>

Before the conference, the requesting party—in this case CREA—is required to submit a short summary "identify[ing] the specific discovery sought and describ[ing] the efforts to resolve

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<sup>4</sup> CREA also seeks all filings and discovery responses made by PacifiCorp in ongoing docket UM 1790 (CREA Data Request 1.11). At the October 6 discovery conference, parties focused on the disclosure of the highly confidential, commercially sensitive RFP bid information; therefore, PacifiCorp understands that CREA Data Request 1.11 was not within the scope of the ALJ's statements at that conference.

<sup>5</sup> See OAR 860-001-0500(6).

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

the dispute informally.”<sup>8</sup> The dispute resolution process does not provide for lengthy written arguments before the conference, and the conference is not intended to be an oral argument. Rather, this is an expedited process to *avoid* lengthy written arguments, if possible.

A party may use a separate procedure to seek formal resolution of a discovery dispute by filing a motion to compel under OAR 860-001-0500(7), which can be used in lieu of the informal discovery conference, or alternatively, if parties fail to reach agreement at the conference. When a party files a motion to compel, parties have time to respond and reply to the motion in writing.<sup>9</sup> The two discovery dispute processes are not intended to be invoked simultaneously or otherwise conflated.

## **B. Argument**

PacifiCorp seeks clarification that the ALJ did not order PacifiCorp to disclose highly confidential, commercially sensitive information from the RFP bids at the October 6 conference when parties did not agree that this information is within the scope of this proceeding. In this case, the dispute resolution process was undermined by CREA’s attempts to use parts of both OAR 860-001-0500(6) and OAR 860-001-0500(7) to suit its needs.

CREA misused the discovery rules by asking the ALJ to issue a ruling not permitted by OAR 860-001-0500(6), submitting what effectively constituted a motion to compel, and denying PacifiCorp the opportunity to respond to its written pleading in the timelines provided for in the Commission’s rules. Rather than provide a summary of the discovery dispute as required by OAR 860-001-0500(6), CREA submitted a lengthy legal argument. In its request, CREA asked the ALJ to “compel PacifiCorp to provide complete responses” to its data requests. CREA asked the ALJ to hold a discovery conference within days of submitting its “motion.” CREA

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<sup>8</sup> *See id.*

<sup>9</sup> Under 860-001-0420(4), parties have 15 days to respond to the motion, and a reply is permitted under OAR 860-001-0500(7).

undermined this process by confusing the formal and informal discovery dispute processes and asking the ALJ to take action not permitted by the rules. This is not the process outlined in OAR 860-001-0500(6)<sup>10</sup> and deprived PacifiCorp of the basic procedural protections afforded by the motion to compel process in OAR 860-001-0500(7).

### **III. PACIFICORP'S REQUEST FOR CERTIFICATION**

In the alternative, under OAR 860-001-0110, PacifiCorp moves for certification of the ALJ's purported ruling at the October 6 discovery conference. As detailed below, certification is appropriate because the October 6 ruling will prejudice PacifiCorp and good cause exists for certification.

#### **A. Legal Standard**

OAR 860-001-0110(1) specifies that any party may request that the ALJ certify its ruling for the Commission's consideration within 15 days. The standard for certification of an ALJ ruling is set forth in OAR 860-001-0110(2), which provides that an ALJ must certify a ruling if: "(a) the ruling may result in substantial detriment to the public interest or undue prejudice to a party; (b) the ruling denies or terminates a person's participation; or (c) good cause exists for certification." Here, certification is appropriate under either subpart (a) or (c).

Under the Oregon Rules of Civil Procedure (ORCP), "parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party."<sup>11</sup> Relevant evidence is evidence that tends to make the existence of any fact at issue in the proceeding more or less probable than it would be

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<sup>10</sup> In light of parties' recent practice of conflating the two discovery dispute processes outlined in OAR 860-001-0500(6) and (7), it would be helpful for the Commission to clarify the process contemplated in OAR 860-001-0500(6) is a non-binding discovery dispute process that should not be invoked at the same time that parties seek formal resolution through OAR 860-001-0500(7).

<sup>11</sup> ORCP 36 B(1). The Oregon Rules of Civil Procedure apply in Commission contested case and declaratory ruling proceedings unless inconsistent with Commission rules, a Commission order, or an Administrative Law Judge ruling. *See* OAR 860-001-0000(1).

without the evidence; and be of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.<sup>12</sup> The Oregon courts and the Commission have affirmed that the information sought in discovery must be reasonably calculated to lead to the discovery of admissible evidence.<sup>13</sup>

## **B. Argument**

If the ALJ's statements at the October 6 conference are considered a ruling, the ALJ should certify this ruling to the Commission because it will unduly prejudice PacifiCorp and good cause exists for certification.

PacifiCorp will be prejudiced by the disclosure of highly confidential, commercial sensitive RFP bids, which are outside the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. As discussed above, the RFP bids were not and are not used to set the Company's avoided cost prices. Nor were they considered by the Commission when it approved PacifiCorp's current avoided cost prices. If the Company is required to disclose this highly confidential, commercially sensitive information, this proceeding will become a forum for parties to attack the process and results of the RFPs. Furthermore, compelling PacifiCorp to disclose confidential bids would have a chilling effect on future RFPs as bidders would not be assured that the confidential bids would remain protected from discovery by potential competitors. This expedited, contested case proceeding is to set the Company's avoided cost prices, not an investigation into the process and results of the Company's RFPs.

The highly confidential, commercially sensitive information from the Company's RFPs, including all bids, supporting work papers, and documents from management's procurement decisions, is irrelevant to this investigation into the PacifiCorp's avoided cost prices. CREA

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<sup>12</sup> OAR 860-001-0450.

<sup>13</sup> See *Baker v. English*, 324 Or. 585, 588 n.3 (1997); *In re Portland Extended Area Service Region*, Docket No. UM 261, Order No. 91-958 at 5 (Jul. 31, 1991).

claims that PacifiCorp’s refusal to produce this irrelevant information is a delay tactic; however, PacifiCorp has not even made its initial filing so CREA cannot reasonably argue that PacifiCorp will rely on the RFP bids in its filing.

CREA attempts to tie the RFPs to this investigation by complaining that it was unable to compel PacifiCorp to produce the information in UM 1729(1), but ignores that the RFP bids were not relied on by the Company or the Commission in that proceeding. In the June 21 filing in UM 1729(1), the Company sought to update the stale cost and performance data as part of a compromise to use a 2018 renewable resource deficiency date. The Company did not rely on the RFP bid information as evidence, and the reference to the RFP bid information was not necessary to support the use of cost and performance inputs from the 2015 IRP Update. PacifiCorp anecdotally observed that the cost and performance data from the Company’s 2015 IRP Update was consistent with the preliminary results from the resource RFP.<sup>14</sup>

Neither did the Company rely on the commercially sensitive RFP bids in its August 22 compliance filing in UM 1729(1). In its “motion,” CREA even highlighted that Order No. 16-307 directed PacifiCorp to file new avoided cost prices based on cost and performance data from the 2015 IRP, *not the RFP bids*. CREA admits that the currently effective prices are not based on information from the RFP bids, but still attempts to inappropriately use this proceeding to gain broad information from the RFP process.

Additionally, PacifiCorp should not be required to produce highly confidential, commercially sensitive RFP bid information to CREA, which represents entities that could be

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<sup>14</sup> Supplemental Application at 4.

competitors in future RFPs.<sup>15</sup> Disclosing this information to such entities would undermine the competitive nature of future RFPs, particularly to expert consultants or other individuals that would be involved in future RFP processes.

Good cause exists to certify the ALJ's ruling because PacifiCorp was unfairly disadvantaged by CREA's abuse of the informal discovery process. As discussed previously, CREA ignored the requirements in OAR 860-001-0500(6). Rather than submit a summary of discovery sought, CREA basically submitted a motion to compel just two days before the requested conference. Had CREA correctly filed the motion to compel at the conclusion of the discovery conference, PacifiCorp would have had 15 days to respond. PacifiCorp did not have adequate time to respond to CREA's motion and prepare for the discovery conference. CREA's misuse of the rules prevented PacifiCorp from fully presenting its arguments to the ALJ.

#### IV. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests clarification that the ALJ did not issue a binding ruling at the October 6 discovery conference. In the alternative, if the ALJ's statements are considered a ruling, PacifiCorp respectfully requests certification of that ruling.

Respectfully submitted this 12<sup>th</sup> day of October, 2016.

By:   
Erin Apperson  
Legal Counsel  
PacifiCorp d/b/a Pacific Power

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<sup>15</sup> In PacifiCorp's recent Oregon transition adjustment mechanism proceeding, the Commission did not allow an expert witness on behalf of Noble Americas Energy Solutions to access the confidential RFP materials in part because the expert witness represents entities that could be either competitors for the future purchase of RECs or potential future REC sellers. *In the Matter of PacifiCorp d/b/a Pacific Power 2017 Transition Adjustment Mechanism*, Docket No. UE 307, Ruling at 1 (Aug. 25, 2016).