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May 26, 2016

Via Electronic Filing and Federal Express

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: PACIFICORP, dba PACIFIC POWER
Petition for Approval of the 2017 Inter-Jurisdictional Allocation Protocol
Docket No. UM 1050

Dear Filing Center:

Enclosed for filing in the above-referenced docket, please find the redacted version of the Confidential Opening Brief of the Industrial Customers of Northwest Utilities.

The confidential portions of ICNU's brief are being handled pursuant to the general protective order issued in this proceeding and will follow to the Commission via Federal Express.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the confidential portions of the Opening Brief of the Industrial Customers of Northwest Utilities upon the parties shown below by mailing a copy via First Class U.S. Mail, postage prepaid.

DATED this 26th day of May, 2016

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1050

In the Matter of	)
	)
PACIFICORP, dba PACIFIC POWER,	)
	)
Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol.	)

CONFIDENTIAL OPENING BRIEF

OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

May 26, 2016

(REDACTED VERSION)

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I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") respectfully submits this Opening Brief, recommending that the Oregon Public Utility Commission ("OPUC" or the "Commission") approve the 2017 Inter-Jurisdictional Allocation Protocol ("2017 Protocol"), subject to two key modifications. Specifically, adoption of the 2017 Protocol would be in the public interest of Oregon ratepayers, so long as the following modifications are implemented:

- Elimination of the proposed caps and floor on Oregon's Hydro Endowment or Embedded Cost Differential ("ECD") calculation; and
- Reduction of the $2.6 million annual Oregon Equalization Adjustment deferral in proportion to the amount of incremental revenues received as a direct result of Senate Bill ("SB") 1547 provisions on production tax credit ("PTC") forecasting, which Oregon signatories to the 2017 Protocol are on record as having not considered.

In addition to adopting these two modifications, ICNU requests, as another important means to protect Oregon ratepayers, that the Commission approve the 2017 Protocol with an express acknowledgment that the OPUC retains full discretion over the allocation treatment of loads lost to direct access programs in Oregon and in other states.

II. LEGAL STANDARDS

The Commission has used the following principles to guide its consideration of settlement agreements:

- "… we clarify that we do not defer to, and are not bound by the terms of *any* stipulation";[1/]
- "We also affirm that, as set out in OAR 860-001-0350, we may adopt or reject a stipulation in its entirety, or adopt it with modifications to its terms";[2/]

1/ Re PacifiCorp, UE 267, Order No. 15-060 at 4 (Feb. 24, 2015) (emphasis in original).
2/ Id.

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- "As in every settlement we look at the proposed outcome as a point in *a range of possible outcomes*";[3/]

- "When we evaluate the reasonableness of a settlement, we search the record for evidence that supports the stipulation";[4/]

- "We may adopt a non-unanimous settlement agreement *so long as we make an independent finding*, supported by substantial competent evidence in the record as a whole, that the settlement will result in just and reasonable rates";[5/] and

- "the [utility] bears the burden of showing that its proposed rate change is just and reasonable."[6/]

Moreover, the Commission has explained that "an important consideration in reviewing settlements is whether all parties support the settlement. If they do, we approach the proposed settlement with a high degree of confidence."[7/] Conversely, then, a contested settlement should not be approached "with a high degree of confidence."

In addition, the Commission has stated that when further consideration of the issues is warranted, it will require such review before adopting a settlement.[8/] ICNU submits that under these standards of review, the Commission should find that the evidence is inadequate to support, as reasonably within the Oregon public interest, the implementation of ECD caps or an unmodified Equalization Adjustment deferral.

3/ Re Nw. Natural Gas Co., UM 1717, Order No. 15-297 at 7 (Sept. 28, 2015) (emphasis added).
4/ Re Avista Corp., UG 284, Order No. 15-109 at 6 (Apr. 9, 2015).
5/ Re PacifiCorp, UE 227, Order No. 11-435 at 3 (Nov. 4, 2011) (emphasis added). See also Re PacifiCorp, UM 995, Order No. 02-469 at 75 (July 18, 2002) ("Where some parties oppose a stipulation, as here, we will adopt a stipulation *only* if competent evidence supports it") (emphasis added).
6/ UE 227, Order No. 11-435 at 3.
7/ Re Nw. Natural Gas Co., UM 1475, Order No. 11-051 at 5 (Feb. 10, 2011).
8/ Re OPUC, UM 1481, Order No. 15-005 at 3 (Jan. 12, 2015).

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III. ARGUMENT

A. Oregon ECD Caps Are Potentially Harmful and Unjustified

The proposed implementation of caps on the Oregon ECD calculation may significantly harm Oregon ratepayers, both during and after the term of the 2017 Protocol. As Mr. Mullins has demonstrated, and hardly a year prior to the Oregon signatories agreeing to the imposition of a $10.5 million Oregon ECD cap,[9/] the Company had distributed updated foundational studies showing Oregon ECD forecasts to be [redacted] in 2018 and 2019, respectively.[10/] Thus, it is likely that Oregon ratepayers are at risk of significant and immediate harm over the next two years if the ECD cap is adopted.

Staff has conceded that Oregon customers could benefit by removing the proposed ECD caps.[11/] Similarly, CUB acknowledges that the cap "would reduce the value of the hydro endowment."[12/] The record also shows that ECD benefit caps are not in the public interest, given that PacifiCorp is not proposing to cap any of the *costs* associated with the Company's hydro system.[13/] Specifically, Oregon customers have contributed more than $100 million in Klamath Dam Removal Surcharges, against zero contributions from the Company's eastern states,[14/] with a further surcharge increase likely in the coming months. Klamath Surcharge legislation authorizes "recovery of Oregon's allocated share" of Klamath Dams

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9/ PAC/101, Dalley/17:4-11 (including the implementation of a slightly higher $11.0 million cap if and when a second general rate case were to be filed during the 2017 Protocol term).

10/ ICNU/100, Mullins/3:3-6 (citing ICNU/102). As Staff witness Lance Kaufman testified, Mr. Mullins used ECD forecasts presented to MSP parties on October 16, 2014. Staff/200, Kaufman/4:8-9. All Oregon signatories to the MSP settlement, i.e., PacifiCorp, Staff, and CUB, signed the 2017 Protocol just fourteen months later, in December 2015. ICNU/104, Mullins/36-37.

11/ Staff/200, Kaufman/5:9-10.

12/ ICNU/201, Mullins/8 (CUB Response to ICNU Data Request ("DR") 3.8 to CUB).

13/ ICNU/100, Mullins/16:17-18:10.

14/ Id. at 17:5-7; ICNU/104 at 32-33 (Company's response to ICNU DR 21.1, Att. ICNU 21.1).

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costs.[15/] It would be unfair to limit Oregon's allocated share of the benefits pertaining to Northwest hydro resources, while imposing Oregon's full share of allocated hydro costs.

Moreover, while the proposed protocol is limited in term, the Commission should not ignore the practical likelihood that both the Company and other MSP states will argue in the future that continuation of the caps would "continue" to be in the public interest. As Mr. Mullins states: "If Oregon decides to give up its rights to the Hydro Endowment, it may never regain its preference to the low cost hydro resources in the Northwest …. [In] future, more permanent cost allocation methodologies."[16/]

1. PacifiCorp Has Not Carried Its Burden of Demonstrating that ECD Caps Will Not Harm Oregon Ratepayers

The Company's attempt to discredit Mr. Mullins' calculations of the benefits Oregon will forego under ECD caps are unpersuasive. First, the Company now essentially disavows the accuracy and reliability of the "foundational studies," which were presented to MSP parties in order to "help develop the 2017 Protocol."[17/] Yet, these foundational studies were used by PacifiCorp to induce Broad Review Work Group ("BRWG") parties into settlement negotiations that led to the current settlement.

Second, the extreme variance of ECD forecasts, prepared within a relatively short period of time, does far more to demonstrate an increased likelihood that ECD caps may be applied to limit Oregon ratepayer benefits, than to support the Company's purported expectation

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15/ ORS § 757.734(2).

16/ ICNU/100, Mullins/14:19-15:2. To the extent that PacifiCorp denies the common sense implications of the ECD caps being potentially continued, such rationale would be consistent with very recent Company representations before the WUTC. See, e.g., WUTC v. Pacific Power, WUTC Docket UE-152253, Order 08 at ¶ 13 (Apr. 29, 2016) ("Frankly, it tests the bounds of reason to argue, as Pacific Power did here, that the Company provided a complete and correct response …. [C]ommon sense dictates that Pacific Power should have acted in good faith ….").

17/ PAC/200, McDougal/2:11-21.

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that the cap will not actually be exceeded.[18/] It is not consistent for the Company to assert that it truly does not expect the cap to be exceeded, while the record demonstrates that this entire contested proceeding would have been avoided, had the Company merely agreed to eliminate the ECD caps.[19/]

a. Updated Foundational Studies Contain Relevant and Reliable ECD Forecasts, unless the Company Acted with a Lack of Good Faith

The Company's initial testimony offers no indication that ECD forecasts provided during the MSP process were in any way unreliable. Quite the opposite, PacifiCorp witness Steven R. McDougal's Direct Testimony notes that the Company not only prepared the foundational studies "to help develop the 2017 Protocol," but that, over the course of a three-year period in which the BRWG met "to analyze and discuss various alternatives," the Company "then updated the base data in the foundational study in 2014 to reflect more current data and to incorporate changes such as new depreciation rates."[20/]

Common sense would indicate that the BRWG would not have "met regularly over a three-year period," spending a considerable portion of that time analyzing two iterations of the Company's foundational studies, unless those studies contained reasonably reliable data.[21/] Nor would it make sense for Mr. McDougal to originally highlight the fact that PacifiCorp updated the foundational study, to expressly "reflect more current data and to incorporate changes,"[22/] unless the foundational studies were providing useful information to the BRWG.

18/ ICNU/104, Mullins/41 (Company Response to ICNU DR 24.2).
19/ Mullins, TR. 111:18-22 (testifying that the 2017 Protocol would be in the public interest if the ECD cap and floor were removed).
20/ PAC/200, McDougal/2:11-21.
21/ Id.
22/ Id.

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Notwithstanding, Mr. McDougal devotes the entirety of his rebuttal testimony to discrediting ICNU's ECD recommendation, on the purported basis of "ICNU's use of stale data when evaluating the dynamic ECD."[23/] The Company fails to acknowledge that to discredit the reliability of the foundational studies so completely, as the Company is apparently attempting to do, is to effectively discredit the value of the entire MSP process and the settlement that it produced. If the Company acted in good faith throughout the BRWG process by providing useful and reliable ECD data, then ICNU's reliance on *potential* ECD outcomes contained within the foundational studies is justifiable.

b. ECD Calculations Are Difficult to Forecast and Have Varied Wildly in Recent Years, Adding to the Potential that Caps May Be Exceeded

In recommending that the Commission modify the 2017 Protocol to eliminate ECD caps, Mr. Mullins explained that the proposed caps have "the potential to be damaging to customers for several reasons," in part because "the foundational studies referenced by Mr. McDougal showed that the ECD has the potential to be much higher than the proposed cap levels over the term of the 2017 Protocol."[24/] Thus, the critical consideration on the reasonableness of the proposed ECD caps is whether the Commission should protect Oregon customers from the high level of risk created by the ECD caps.

Given Oregon ECD foundational study forecasts of [redacted] in 2018 and 2019, respectively,[25/] there is no question that considerable risk exists that the Oregon ECD could exceed the proposed caps by a wide margin during the term of the 2017 Protocol. Moreover, expert witnesses for both Staff and the Company agree that ECD

23/ PAC/400, McDougal/1:18-21.
24/ ICNU/100, Mullins/11:16-20 (emphasis added).
25/ Id. at 3:3-6 (citing ICNU/102).

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calculations are difficult to forecast, as an initial matter. Mr. Kaufman has testified: "There is no tractable method of assigning probabilities to ECD outcomes."[26/] At hearing, Mr. McDougal agreed with this statement.[27/] From a conceptual standpoint, therefore, the record plainly indicates an agreement among experts that assigning probabilities to future ECD levels is a difficult and inexact science—in other words, a high risk proposition.

As a matter of actual practice, the record fully demonstrates the extreme difficulty in predicting ECD outcomes, based on the wild variance in ECD calculations presented within only the last two years. At hearing, the Company submitted an excerpted page from its 2015 Oregon Results of Operations ("ROO"), showing an unadjusted Oregon ECD calculation of $7.6 million.[28/] This represents a [redacted] difference, when compared with Oregon ECD forecasts for the 2017 Protocol term, as had been calculated in the updated foundational studies that were presented to MSP parties as recently as October 2014.[29/]

While there are different ways this variance could be considered, none should provide the Commission with any confidence that proposed caps do not create a severe risk of significant harm to Oregon ratepayers. If the forecasts used by the BWRG to develop the settlement turn out to be accurate, then Oregon customers will be harmed by the artificially derived ECD caps. If the forecasts now preferred by the Company are more accurate, then the end result will be much the same as if the caps were adopted. This means that there is no benefit to adoption of the caps, only significant risk to Oregon ratepayers. Therefore, ICNU

[26/] Staff/200, Kaufman/4:4-5.
[27/] McDougal, TR. 96:5-8.
[28/] PAC/500 at 2.
[29/] Staff/200, Kaufman/4:8-9.

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recommends eliminating the proposed caps to protect Oregon ratepayers against such a potentially harmful outcome.

2. Implementing ECD Caps May Create a Harmful Precedent

ICNU recommends against implementing ECD caps because, as a practical matter, taking this novel step would create a precedent in future MSP protocol negotiations. As explained by Mr. Mullins, "the ability of Oregon parties to argue in favor of retaining the full Hydro Endowment in the future will be hindered" if ECD limitations are approved.[30/]

Moreover, approval in this proceeding of new ECD limitations and the establishment of a practical precedent is especially inappropriate, given the interim nature of the 2017 Protocol.[31/] As CUB explains: "This is an interim agreement that fails to resolve some of the *fundamental* issues, such as the different views between Oregon and Utah on the appropriate allocation of hydro resources."[32/] ICNU submits that the establishment of a potential practical precedent on Oregon ECD caps is improper, with MSP parties still to resolve such "fundamental issues" as appropriate hydro resource allocation in future negotiations.

B. Deferral of the Equalization Adjustment is Not Supported by the Record

ICNU has filed unrebutted evidence demonstrating that the Company's proposal to defer an annual $2.6 million Equalization Adjustment is not reasonable. In particular, this deferral amount was held to be reasonable by Oregon signatories of the 2017 Protocol prior to a major change in Oregon regulatory law—i.e., the passage of SB 1547 in March 2016. Other parties have largely ignored this event, and no party has even attempted to rebut Mr. Mullins'

30/ ICNU/100, Mullins/18:12-14.
31/ Id. at 14:15-15:2.
32/ CUB/200, Jenks/9:12-14 (emphasis added).

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calculation that the Company could potentially collect approximately $28.5 million in additional Oregon PTC revenues, as a result of SB 1547.[33/]

As the proponent of an annual $2.6 million rate increase, "Pacific Power bears the burden of showing that its proposed rate change is just and reasonable."[34/] Based on the record in this proceeding, however, there is no evidence to support the deferral of a black-box Equalization Adjustment of $2.6 million to Oregon rates. If the Commission does not reject the Oregon Equalization Adjustment outright, ICNU recommends that the Equalization Adjustment deferral be reduced by the amount of incremental PTC forecasting revenues that the Company eventually receives as a result of SB 1547. By modifying the 2017 Protocol in this manner, the Commission will ensure that the Equalization Adjustment produces an equitable result, consistent with the public interest.

1. An Oregon Equalization Adjustment Must Be Justified by Principles of Equity and Cost Causation

The Company explains that a key criterion for inter-jurisdictional cost allocation in the MSP is to "[p]rovide an equitable solution for the Company and all states based on principles of cost causation."[35/] When asked how MSP parties addressed "the equity issue with the 2017 Protocol," PacifiCorp witness R. Bryce Dalley testified that "an Equalization Adjustment was added to the 2017 Protocol to account for inconsistent implementation of the 2010 Protocol, and to allow the Company a better opportunity to recover its costs."[36/] Thus, a relevant consideration in this proceeding is whether the record truly supports the Company's

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[33/] ICNU/100, Mullins/19:16-20:4; ICNU/103.
[34/] UE 227, Order No. 11-435 at 3.
[35/] PAC/100, Dalley/5:14-20.
[36/] Id. at 6:7-10.

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assertion that the Equalization Adjustment provides an equitable solution to the alleged inconsistent implementation of the 2010 Protocol.

a. Evidence Shows that Allocation Shortfalls Are Caused by Eastern State Implementation of the 2010 Protocol and Are the Responsibility of PacifiCorp Shareholders

Based on evidence supplied by PacifiCorp, Staff identified the Equalization Adjustment as related to an allocation shortfall resulting from inconsistent ECD treatment among various states.[37/] More specifically, on the subject of causation, Mr. Kaufman "confirmed that the majority of this shortfall is due to Utah choosing to treat costs as Rolled In," as "Utah does not incorporate any form of the ECD."[38/] Indeed, Staff ultimately concluded that, "[i]f Utah were to comply with the 2010 Protocol (and the Revised Protocol) the allocation shortfall described by [Mr.] Dalley would be *negligible*."[39/]

In sum, the record shows that there would be virtually no need for any Equalization Adjustment in the 2017 Protocol, if Utah had chosen to actually comply with the terms of the 2010 Protocol (and the Revised Protocol, for that matter). Thus, a $2.6 million annual Oregon rate increase conflicts with principles of cost causation. To this end Mr. Kaufman, after noting "that PacifiCorp has agreed that its shareholders will bear the cost of the allocation shortfall caused by Utah's decision not to recognize the West's hydro endowment," via the Company's original 1988 merger stipulation, testified: "PacifiCorp has not sufficiently demonstrated that the use of the Equalization Adjustment as an allocation mechanism is consistent with the 1988 Stipulation."[40/]

[37/] Staff/100, Kaufman/11:5-10.
[38/] Id. at 11:11-15.
[39/] Id. at 12:1-2 (emphasis added).
[40/] Id. at 12:3-17.

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Likewise, ICNU has provided considerable evidence demonstrating that inter-jurisdictional allocation shortfalls should not be the responsibility of Oregon ratepayers, and that Oregon has suffered rate increases over the last decade caused by Utah's unilateral elimination of the hydro endowment.[41/] CUB witness Bob Jenks also testifies that, "[a]t the heart of the MSP disagreement over cost allocation between the various PacifiCorp states is a disagreement over hydro benefits and the promises that were made during the Utah Power and Pacific Power merger,"[42/] with Mr. Jenks agreeing, at hearing, that PacifiCorp shareholders—and *not* Oregon ratepayers—should not be "responsible for absorbing any allocation shortfall resulting from multi-state allocations."[43/]

b. The Amount of the Proposed Annual Rate Increase is Inequitable

Mr. Kaufman testifies that "Staff's primary concern relates to the *equity* of the Equalization Adjustment."[44/] Mr. Kaufman goes on to state that "Staff does not anticipate that a long term allocation agreement will include such an adjustment."[45/] Thus, it appears that Staff has taken the position that a deferred, $2.6 million annual rate increase, lasting two to three years, was an acceptable "concession" in exchange for PacifiCorp's commitment to provide studies that "can" or might identify equitable hydro endowment allocations.[46/] But, essentially paying the Company somewhere between $5.2 million to $7.8 million over the term of the 2017 Protocol—simply to conduct equitable allocation studies—is neither equitable nor in the public interest. As Judge Rowe asked Mr. Kaufman at hearing, the Commission must consider the

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41/ ICNU/100, Mullins/7:1-9:17.
42/ CUB/200, Jenks/9:12-14 (emphasis added).
43/ Jenks, TR. 122:2-12.
44/ Staff/100, Kaufman/14:15-16 (emphasis added).
45/ Id. at 12:19-20.
46/ Id. at 14:16-19.

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doubtful equity behind Staff's "short term concession"—i.e., whether, without charging ratepayers several million dollars, "the Commission could not just order the Company to do the studies?"[47/]

For its part, CUB also believes that the 2017 Protocol "is reasonable and in the public interest, because … it requires the Company to study a Divisional Split."[48/] Mr. Jenks originally explained that the 2017 Protocol "maintains a deadline for resolving the difficult issues that divide the PacifiCorp states."[49/] When subsequently asked whether the Divisional Split study would actually resolve these difficult issues, however, CUB conceded: "A study of 'a Divisional Split' *may not* resolve the issues between the PacifiCorp states."[50/] Thus, potential study benefits hardly seem to justify rate increases exceeding $5 million, especially when the Commission can simply order PacifiCorp to conduct the studies.

At hearing, Mr. Kaufman testified that Staff's "concession" on the annual $2.6 million Equalization Adjustment deferral was essentially a quid pro quo, or an exchange for both PacifiCorp's commitment to perform cost studies and "the rate case stay out."[51/] As described in further detail below, any alleged value assigned to this rate case stay-out period should equitably factor SB 1547 impacts associated with PTC forecasting. However, even before considering the impacts of SB 1547, Staff's assessment of rate case stay-out period value is highly problematic, for several other reasons.

47/ Kaufman, TR. 141:19-20.
48/ CUB/200, Jenks/10:3-5.
49/ Id. at 9:20-21.
50/ ICNU/201, Mullins/9 (CUB Response to ICNU DR 3.11 to CUB) (emphasis added).
51/ Kaufman, TR. 140:25-141:13.

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First, the proposed general rate case stay-out period only precludes a general rate case increase for the first year that the 2017 Protocol would be in effect, allowing the Company to file a new general rate case within the next 12 months, or as early as next spring.[52/] Next, given the inherent informational asymmetry between the Company and non-company parties—i.e., other parties do not necessarily have access to information required to determine whether it would be beneficial for the Company to file a general rate case, while PacifiCorp does—Mr. Mullins testifies that "it is typically difficult for customers to assign much value to a rate case stay-out provision."[53/] Indeed, the Company would presumably be disinclined to file a general rate case at present, regardless of a stay-out pledge, based on apparent evidence of overearning (demonstrated through the very recent reporting of a normalized return on equity above PacifiCorp's authorized return level).[54/]

Further, the value of the stay-out provision to Oregon ratepayers is materially reduced when considering that, over the last decade, PacifiCorp reports that 62% of rate increases have been implemented outside of a general rate case.[55/] In other words, the Company traditionally does not rely primarily on general rate cases to increase Oregon rates anyway, a pattern which promises to continue based on recent strategy to avoid general rate case constraints in Washington, in addition to PTC forecasting impacts resulting from the passage of SB 1547.[56/]

Still further, as explained by Mr. Mullins, Staff's assignment of a $7.3 million value to the general rate case stay-out period was not based on "the most rigorous methodology

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52/ ICNU/100, Mullins/15:15-17.
53/ Id. at 15:17-16:1.
54/ ICNU/308 (showing a 9.904% normalized return on equity for 2015).
55/ ICNU/100, Mullins/16:6-9; ICNU/104, Mullins/30-31 (Company Response to ICNU DR 20.6, Att. ICNU 20.6).
56/ ICNU/100, Mullins/16:9-16.

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to assign value"; instead, Staff "[s]imply look[ed] at the smallest general rate case in the past ten years."[57/] As Mr. Mullins testifies, "review of a long-term financial plan" would be a better evaluative approach,[58/] although the dilemma of informational asymmetry means that only the Company would typically have "detailed long-term plans to determine when it might be beneficial to file a holistic, general rate case."[59/]

2. The Commission Must Find that the Equalization Adjustment Qualifies for Deferral

The 2017 Protocol provides for the annual Equalization Adjustment to "be deferred from January 1, 2017, until the 2017 Protocol Equalization Adjustment is reflected in base rates through the Company's next general rate case."[60/] As Mr. Mullins has pointed out, however, the Equalization Adjustment is "a black-box number … not necessarily representative of any particular cost that is capable of satisfying the requirements of ORS § 757.259(2)."[61/] Accordingly, the Commission must initially determine whether a deferral of the Equalization Adjustment is proper under Oregon statute.

While the Commission adopted a deferral for the uncontested 2010 Protocol, the 2017 Protocol is a contested settlement. As the Commission has noted: "an important consideration in reviewing settlements is whether all parties support the settlement. If they do, we approach the proposed settlement *with a high degree of confidence*."[62/] In this proceeding, the Commission should not approach the contested Equalization Adjustment deferral with the same "high degree of confidence."

57/ ICNU/200, Mullins/4:9-10.
58/ Id. at 4:11-12.
59/ Id. at 3:12-15.
60/ PAC/101, Dalley/15:15-17.
61/ ICNU/100, Mullins/22:2-4.
62/ UM 1475, Order No. 11-051 at 5 (emphasis added).

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In this light, Oregon statute instructs the Commission to approve a deferral only for "*[i]dentifiable* utility expenses or revenues, the recovery or refund of which the commission finds should be deferred in order to … match appropriately the costs borne by and benefits received by ratepayers."[63/] Mr. Mullins has explained that, "[b]y its very definition, a black-box adjustment does not qualify as an expense that is 'identifiable,'" nor can it "be said that the deferral of a black-box amount matches costs and benefits received by ratepayers."[64/] As a result, the Commission should not accept this adjustment based solely on the parties' agreement to its terms.

3. If Approved, the Equalization Adjustment Should Be Reduced to Reflect SB 1547 Impacts, since Significant Ratepayer Impacts Were Not Considered by Oregon Signatories when Agreeing to the 2017 Protocol

Mr. Mullins has provided unrebutted evidence demonstrating that the Company could potentially be allowed to collect approximately $28.5 million of additional PTC revenues due to the passage of SB 1547.[65/] In addition, neither Staff nor CUB considered any SB 1547 impacts when agreeing to 2017 Protocol terms—indeed, the record establishes the fact that these Oregon signatories consciously decided *not* to factor in the rate impacts of SB 1547. Accordingly, the initial determination by Staff and CUB, that a $2.6 million Equalization Adjustment was presumably reasonable and equitable in December 2015, failed to account for the hugely significant potential Oregon rate impacts of SB 1547, pushed by PacifiCorp, and passed in 2016.

63/ ORS § 757.259(2)(e) (emphasis added).
64/ ICNU/100, Mullins/22:2-4 (emphasis omitted).
65/ Id. at 19:16-21:2; ICNU/103.

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a. PTC Provisions in SB 1547 Are Relevant and Could Result in a Material Increase to Oregon Rates over the Term of the 2017 Protocol, and Outside of a General Rate Case

The passage of SB 1547 in March 2016 "allows the Company to include production tax credit forecasts in rates, and [] may be implemented via annual power cost filings outside of a general rate case proceeding."[66/] As detailed by Mr. Mullins through Exhibit ICNU/103, "the Company stands to potentially increase rates by approximately $18.1 million" during the first two years of the 2017 Protocol term, "an amount which is about seven times greater than the Equalization Adjustment."[67/] If the 2017 Protocol extends to a third year, the Company could collect "as much as $28.5 million in incremental revenues, without having to file a general rate case."[68/]

The relevance of new PTC rate increases resulting from SB 1547, in relation to the 2017 Protocol, has been affirmed by Staff. Specifically, Mr. Kaufman testifies: 1) "I agree that SB 1547 reduces the value of the rate case stay out"; and 2) "[h]ad SB 1547 not passed, my estimated value of a rate case stay out would have increased …."[69/] Thus, Staff agrees that SB 1547 provisions have a direct impact on the value of a major, Oregon-specific term of the 2017 Protocol, rendering consideration of SB 1547 impacts highly relevant to any assessment of the reasonableness of the MSP settlement.

66/ ICNU/100, Mullins/16:14-16; ICNU/106.
67/ ICNU/100, Mullins/20:15-17.
68/ Id. at 20:18-21:2.
69/ Staff/200, Kaufman/3:11, 14-15.

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b. Oregon Signatories Did Not Factor Relevant SB 1547 Impacts When Considering the Reasonableness and Equity of 2017 Protocol Terms

SB 1547, formerly known as House Bill ("HB") 4036,[70/] and the 2017 Protocol were negotiated simultaneously. CUB and PacifiCorp were integral members of the coalition that crafted HB 4036 in the fall of 2015,[71/] although neither Staff nor ICNU were invited to participate in HB 4036 negotiations.[72/] All Oregon MSP parties, however, participated in 2017 Protocol negotiations in the fall of 2015, including the final BRWG meeting held on November 17, 2015, with Staff and CUB eventually signing the settlement agreement on December 21 and 30, 2015, respectively.[73/]

Despite concurrent participation in both negotiation processes, however, CUB never held discussions, with the Company or any other MSP party, on HB 4036 impacts "relative to the 2017 Protocol."[74/] This statement, combined with the fact that Staff and ICNU were not invited to participate in HB 4036 negotiations, means that SB 1547 impacts relative to the 2017 Protocol were not discussed among any Oregon MSP parties prior to the 2017 Protocol being finalized and agreed to by the Oregon signatories.

In fact, Staff has expressly acknowledged that, when signing the 2017 Protocol, it did not "consider the ratepayer impacts of any 'significant changes' to Oregon's regulatory

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70/ ICNU/301. As Staff has previously explained and then affirmed at hearing: "HB 4036 was ultimately rolled into what is now known as SB 1547." ICNU/304 at 5, n.1; Kaufman, TR. 146:1-11.

71/ ICNU/307 at 3 (including CUB's self-description as a "cotter pin" in the negotiations, which lasted "for the equivalent of two full work weeks – 80 hours").

72/ ICNU/305 at 4 (asserting that Staff had been "left out of the process on purpose"); Kaufman, TR. 145:8-25 (affirming that Staff had been left out of the HB 4036 negotiation process).

73/ ICNU/104, Mullins/37-38 (Company Responses to ICNU DRs 22.3 & 22.2).

74/ ICNU/306 (CUB Response to ICNU DR 1.5 to CUB).

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construct associated with HB 4036."[75/] Similarly, CUB apparently made a conscious choice not to consider SB 1547 impacts when signing the 2017 Protocol, explaining that "CUB does not believe that the impacts of HB 4036 are relevant to this matter."[76/] However, as Mr. Mullins explains: "if the terms of the stay-out provision, including the $2.6 million Equalization Adjustment deferral, were found to be reasonable in the absence of the incremental revenues associated with SB 1547, it follows that the terms of the stay-out provision can no longer be said to be reasonable after considering the incremental revenues that the Company now stands to collect outside of a general rate case."[77/]

Mr. Dalley argues that MSP parties were "well aware of the *potential* for a mechanism to account for variances in PTCs during 2015."[78/] This argument is meaningless, because Staff would have no more considered PTC impacts relative to the 2017 Protocol in the context of UM 1662, than it did in the context of SB 1547, prior to that legislation becoming law.[79/]

Accordingly, contrary to the Company's assertion, evidence on record provides ample support for ICNU's contention "that the Equalization Adjustment deferral was 'held to be reasonable by Oregon signatories to the 2017 Protocol *only without knowledge*' of the impact of Senate (SB) 1547."[80/] Therefore, it falls to the Commission to consider the value of this

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75/ ICNU/104, Mullins/8 (Staff Response to ICNU DR 5.4 to Staff). See also Kaufman, TR. 145:18-22 (affirming, at hearing, that SB 1547 effects are, indeed, complicated and involve significant changes to the regulatory construct in Oregon).

76/ ICNU/104, Mullins/1 (CUB Response to ICNU DR 1.2 to CUB).

77/ ICNU/100, Mullins/21:10-15.

78/ PAC/300, Dalley/14:1-6 (emphasis added).

79/ Compare ICNU/104, Mullins/5 (Staff Response to ICNU DR 4.2 to Staff) (refusing to consider potential impacts relative to the 2017 Protocol, prior to a legal enactment), with ICNU/303 at 1 (Staff Response to ICNU DR 7.1 to Staff) (conceding that provisions were "no longer speculation," but only after enactment).

80/ PAC/300, Dalley/2:21-3:1 (emphasis added).

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subsequently passed bill, as it considers appropriate conditions to attach to any approval of the settlement.

c. The Equalization Adjustment Deferral Amount Should Be Modified, Based on SB 1547 Impacts

The Commission is under a mandate to allow annual PTC forecasts in rates pursuant to SB 1547, Section 18b, which provides that "the Public Utility Commission shall allow those forecasts to be included in rates through any variable power cost forecasting process established by the commission."[81/] While the impacts of SB 1547 are assured, however, it remains to be seen "how the provision related to production tax credits in SB 1547 will be implemented for ratemaking purposes,"[82/] as well as the exact amount of the impacts.

Hence, ICNU recommends that, if the Commission approves a deferred Equalization Adjustment in some capacity, the amount of the deferral "should be reduced by the unforeseen revenues the Company now stands to recover pursuant to SB 1547."[83/] Mr. Mullins testifies that, if, for the sake of argument, "*before* SB 1547 was enacted, it would be equitable for the Commission to approve a $2.6 million annual deferral for the Oregon Equalization Adjustment to reduce an alleged 'allocation shortfall the Company was experiencing with the 2010 Protocol,' then the continuing equity of such increases must be reconsidered *after* SB 1547 has become law, considering that the Company stands to recover much more than $2.6 million on an annual basis during the stay-out period."[84/] Consequently, ICNU further recommends that, should the incremental revenues received pursuant to SB 1547 exceed the Oregon Equalization

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81/ ICNU/106, Mullins/2.
82/ ICNU/100, Mullins/20:10-11.
83/ Id. at 23:1-3.
84/ Id. at 22:14-23:1 (quoting PAC/100, Dalley/6:18-21).

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Adjustment deferral, a fair and equitable Oregon rate result would require that the deferral become a credit to customers.[85/]

C. Commission Acknowledgment of Future Allocation Discretion Is in the Public Interest

In addition to adopting the recommended ECD and Equalization Adjustment adjustments, ICNU requests that the Commission approve the 2017 Protocol with an express acknowledgment "that it has full discretion regarding the allocation treatment of loads lost to direct access programs in Oregon, as well as the allocation treatment of loads lost to direct access programs in other states."[86/] This simple acknowledgment would be appropriate, given expected developments that might impact the Company during, if not even before, the 2017 Protocol would go into effect.

For instance, a direct access program is currently under development in Utah which, as Mr. Mullins has testified, could potentially have significant repercussions in Oregon:

> In its 2015 legislative session, the State of Utah enacted the Utah Eligible Customer Program. Under that program, a certain large customer in Utah is now eligible to transfer service to a non-utility energy supplier. Absent the Oregon Commission's ability to determine the allocation treatment of that large customer's load, a material amount of costs could be shifted to Oregon customers as a result of the departure of that Utah customer's load.[87/]

In recognition of this development, an express acknowledgement of the Commission's full discretion on allocation treatment, if and when required to prevent material cost shifting to Oregon customers, is a modest request that may efficiently avoid considerable future controversy. This would be prudent and consistent with the Oregon public interest

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85/ Id. at 23:3-5.
86/ Id. at 23:14-17.
87/ Id. at 25:3-8 (citing Utah Code Annotated § 54-3-32).

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because "the 2017 Protocol does not explicitly describe how the treatment of loads lost to direct access programs in other states will be handled under the 2017 Protocol."[88/]

Notably, the 2017 Protocol provides: "Nothing in the 2017 Protocol is intended to abrogate a State Commission's right and/or obligation to … consider the impact of changes in laws, regulations, or circumstances on inter-jurisdictional allocation policies and procedures when determining fair, just, and reasonable rates."[89/] Thus, as explained by Mr. Mullins, "the Oregon Commission retains the right to independently consider the impacts of [Utah's Eligible Customer] program on Oregon's inter-jurisdictional allocation policies and procedures over the term of the 2017 Protocol."[90/]

D. Conditional Approval of the 2017 Protocol Will Not Adversely Affect Consideration in other States

The Company asserts that the 2017 Protocol should be approved, as-filed and without either of the modifications recommended by ICNU, essentially on account of it being a negotiated settlement agreement. As an initial matter, however, the fact that the 2017 Protocol is a "negotiated, multi-party settlement"[91/] provides no basis for the Commission to simply accept it, as-filed. This is especially true, given the Commission's duty to protect the public interest within the state, and its clarification that it "do[es] not defer to, and [is] not bound by the terms of any stipulation."[92/]

88/ Id. at 25:19-20.
89/ PAC/101, Dalley/3:13-18.
90/ ICNU/100, Mullins/26:9-12.
91/ PAC/300, Dalley/2:1
92/ UE 267, Order No. 15-060 at 4.

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Likewise, the Commission has stated that "[w]hen we evaluate the reasonableness of a settlement, we search the record for evidence that supports the stipulation."[93/] Similarly, "[w]here some parties oppose a stipulation, as here, we will adopt a stipulation only if competent evidence supports it."[94/] Further, the 2017 Protocol itself states that it is not intended to "abrogate a State Commission's right and/or obligation to: (1) determine fair, just, and reasonable rates … [or] (2) consider the impact of changes in laws, regulations, or circumstances on inter-jurisdictional allocation policies."[95/]

For its part, the Company concedes that "certain state commissions conditionally approved either the Revised Protocol or 2010 Protocol."[96/] As previously noted, Utah's decision not to comply with either the 2010 or Revised Protocols, but to modify both original settlements to implement its own, preferred "Rolled In" allocation methodology, created the vast majority of the Company's alleged under-recovery. There is no reason to believe that Utah will do anything else but continue to ignore carefully negotiated ECD provisions that would otherwise have eliminated all but a negligible share of inter-jurisdictional shortfalls.

Wyoming also conditionally approved the 2010 Protocol, adopting what the Company supported and described as "two key modifications to the 2010 Protocol."[97/] These unilateral modifications to the negotiated settlement included a change to ECD calculations and "rate mechanisms *designed to protect Wyoming ratepayers*."[98/] Moreover, in ultimately

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93/ UG 284, Order No. 15-109 at 6.
94/ UM 995, Order No. 02-469 at 75.
95/ PAC/101, Dalley/3:13-18.
96/ ICNU/104, Mullins/28 (Company Response to ICNU DR 19.2).
97/ Re Rocky Mountain Power, Wyoming Public Service Commission ("PSC") Docket No. 20000-381-EA-10 (Record No. 12624), Memorandum Opinion, Findings and Order Approving Stipulation at ¶ 27 (July 7, 2011).
98/ Id. at ¶¶ 28-29 (emphasis added).

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approving those modifications, the Wyoming PSC cited the following legal standard: "The public interest must come first in our decisions; and, as the Wyoming Supreme Court has stated, the desires of the utility are secondary to it."[99/] Thus, Wyoming's handling of the 2010 Protocol represents another example of an MSP state considering and protecting the interests of its own ratepayers first, and explicitly relegating the system-wide concerns of PacifiCorp, which obviously include potential impacts on other states, to a secondary level.

In addition, the Wyoming PSC conditionally approved the 2010 Protocol, including the "two key modifications" noted above, subject to the following, additional condition:

> Upon any rejection of the 2010 Protocol or any material deletion, alteration or additions to its terms by any one or more of the four Commissions, the Commissions who have previously conditionally adopted the 2010 Protocol shall initiate proceedings to determine whether they should reaffirm their prior ratification of the 2010 Protocol.[100/]

This condition demonstrates that Wyoming was not only aware that other states might modify the original, negotiated 2010 Protocol settlement, but also expressly provided for a means to consider such events. Moreover, neither Wyoming nor Oregon chose to initiate any reaffirmation proceedings, even though Utah modified the original 2010 Protocol settlement approximately seven months later[101/]—further indicating that, in practice, MSP states accept that other jurisdictions will similarly modify originally negotiated settlement terms. In sum, given the plain history of MSP states conditionally approving and modifying negotiated protocol settlements in the public interests of their own ratepayers, there is no compelling basis to

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[99/] Id. at ¶ 49.
[100/] Id. at p. 12, Ordering ¶ 2.
[101/] ICNU/104, Mullins/39 (Company Response to ICNU DR 23.3).

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conclude that a conditional approval of the 2017 Protocol in this proceeding will adversely affect settlement consideration in other states.

IV. CONCLUSION

ICNU respectfully recommends that the Commission adopt the two settlement modifications proposed herein, as consistent with the public interest and as necessary to protect Oregon ratepayers. At the end of the day, the Company is asking to increase Oregon rates for alleged inter-jurisdictional allocation shortfalls which have not been caused by Oregon, and for which the Company originally agreed to bear responsibility for, when the Commission approved the Oregon-Utah merger. Further, the record does not contain evidence demonstrating sufficient value offered by the Company to justify the "concession" of ECD limitations or a $2.6 million Equalization Adjustment deferral, even on a temporary basis. Finally, an express acknowledgment by the Commission of its full discretion over the allocation treatment of loads lost to direct access programs could prevent considerable controversy during the 2017 Protocol term.

Dated this 26th day of May, 2016

Respectfully submitted,

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