BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of	)	UM 1050
	)	
PACIFICORP, dba PACIFIC POWER, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol.	)))	OPENING LEGAL BRIEF OF NOBLE AMERICAS ENERGY SOLUTIONS LLC

I. INTRODUCTION AND SUMMARY

Noble Americas Energy Solutions LLC ("Noble Solutions") hereby submits its opening legal brief in this proceeding before the Public Utility Commission of Oregon ("OPUC" or "Commission"). As an active electricity service supplier ("ESS") in PacifiCorp's service territory, Noble Solutions intervened in this proceeding to ensure that the outcome is consistent with the Commission's statutory obligation to develop policies that encourage competitive retail access. *See* ORS 757.646(1). In the recent docket developing PacifiCorp's five-year opt-out program (docket UE 267), PacifiCorp relied heavily on the unreasonable provisions of the currently effective multi-state agreement to thwart a reasonably designed five-year opt-out program that may have provided Oregon customers a meaningful opportunity to access retail choice. The Commission should ensure PacifiCorp cannot use any new version of the multi-state agreement to again thwart Oregon law, or create anti-competitive advantages for itself in the provision of retail alternatives, such as PacifiCorp's recent attempt to develop a voluntary renewable energy tariff ("VRET").

Specifically, Noble Solutions recommends that the Commission make two clarifying points in any order approving use of the 2017 Inter-Jurisdictional Allocation Protocol ("2017 Protocol") for ratemaking purposes in Oregon:

- *First*, in order to preserve the Commission's ongoing obligation to remove barriers to a competitive retail market, *see* ORS 757.646(1), the Commission should clarify that if future orders modify PacifiCorp's five-year opt-out program, then Section X.A of the 2017 Protocol will be interpreted to allow adjustments to the inter-jurisdictional allocation of the five-year opt-out load consistent with the terms in those future orders.
- *Second*, in order to mitigate PacifiCorp's vertical and horizontal market power, *see* ORS 757.646(1), the Commission should clarify that for purposes of Oregon ratemaking, any load served by a PacifiCorp-owned resource under a VRET or similar program will be treated consistent with the inter-jurisdictional allocation of direct access loads.

II. BACKGROUND

PacifiCorp commenced this proceeding in 2002, in an effort to establish a consistent ratemaking treatment and allocation of costs in each of its six jurisdictions. *See In the Matter of PacifiCorp: Requesting to Initiate an Investigation of Multi-Jurisdictional Issues*, OPUC Order No. 02-193 (2002). In 2005, the Commission "ratified" PacifiCorp's Revised Inter-Jurisdictional Costs Allocation Protocol ("Revised Protocol"). *In the Matter of PacifiCorp: Requesting to Initiate an Investigation of Multi-Jurisdictional Issues and Approve an Inter-Jurisdictional Cost Allocation Protocol*, OPUC Order No. 05-021, at 12 (2005). In 2011, the Commission "adopted" amendments to the Revised Protocol, which became termed the "2010 Protocol." *In the Matter of PacifiCorp dba Pacific Power: Petition for Approval of Amendments to Revised Protocol Allocation Methodology*, OPUC Order No. 11-244, at 6 (2011). However, instead of simply adopting the 2010 Protocol as written for purposes of Oregon ratemaking, the

Commission adopted modifications to the use of the 2010 Protocol in Oregon ratemaking proceedings consistent with a stipulation by several Oregon parties. *Id.* at 3-4, 6. The 2010 Protocol expires and does not apply to regulatory filings made on and after January 1, 2017. *PacifiCorp's Petition for Approval of the 2017 Inter-Jurisdictional Allocation* at 5 (filed Dec. 30, 2015) (*"Petition*").

Noble Solutions was not a party to the Revised Protocol or the 2010 Protocol. However, as explained in more detail below, PacifiCorp relied heavily upon the 2010 Protocol to defeat a stipulation entered into by Noble Solutions and multiple other parties advocating for a reasonable five-year opt-out program in docket UE 267. PacifiCorp argued that the 2010 Protocol precluded the Commission from considering PacifiCorp's entire system in developing the transition charges for that program, which resulted in the Commission requiring participants of the program to pay for 10 years of transition charges, not five years. *See In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, OPUC Order No. 15-060, at 4-7 (2015).[1] Shortly thereafter, PacifiCorp advocated for the right to file a PacifiCorp-owned retail-choice alternative under a VRET, which could contain more flexible enrollment windows and other more favorable terms than existing direct access programs. *See In the Matter of Public Utility Commission of Oregon: Voluntary Renewable Energy Tariffs for Non-Residential Customers*, OPUC Order No. 15-258, at Appendix A at 70, 77-78, 81 (2015). PacifiCorp's proposed VRET would have transition charges, if any, determined at a future date. *Id.*

[1] A "transition charge" is a "charge or fee that recovers all or a portion of an uneconomic utility investment." ORS 757.600(31). The OPUC calculates transition charges for direct access under the "ongoing valuation" method. OAR 860-038-0005(41), 860-038-0080(5)-(6), 860-038-0140.

PacifiCorp now requests this Commission approve the 2017 Protocol for use in setting Oregon rates through 2018, with a possible one-year extension. *Petition* at 6-7. Noble Solutions was not a party to the negotiations that resulted in the 2017 Protocol. However, the 2017 Protocol contains provisions addressing treatment of Oregon direct access loads. Specifically, Section X.A.1 effectively states that loads and transition charges associated with PacifiCorp's one-year and three-year direct access programs will be assigned to Oregon. PAC/101, Dalley/9. Section X.A.2 states that the allocation of loads and transition charges associated with PacifiCorp's five-year program will remain with Oregon for 10 years, consistent with the UE 267 orders. *Id.* at 9-10. Section X.A.3 further provides:

> "To the extent Oregon adopts new laws or regulations regarding Oregon Direct Access Programs, Oregon's treatment of loads lost to Oregon Direct Access Programs may be re-determined in a manner consistent with the new laws and regulations. In the event Oregon adopts such new laws or regulations, the Company will inform the State Commissions and the Parties of the same."

Id. at 10. No provision of the 2017 Protocol specifically states that Company-owned VRET loads will be treated identically to the treatment of direct access loads.

In the same timeframe that the 2017 Protocol was executed, the Commission issued its final order in Phase II of the VRET docket – UM 1690. In that order, the Commission rejected proposals by utilities, including PacifiCorp, that a utility-owned VRET could be offered with different transition charges and conditions than the utility's direct access programs. *In the Matter of Public Utility Commission of Oregon: Voluntary Renewable Energy Tariffs for Non-Residential Customers*, OPUC Order No. 15-405 at 2 (2015).

III. ARGUMENT

Oregon law directs the Commission to remove barriers to retail choice and to mitigate PacifiCorp's vertical and horizontal monopoly. ORS 757.646(1). Yet, more than 15 years after

enactment of that law, only 1.4 percent of PacifiCorp's eligible direct access load is served by competitive ESSs.[2] The Commission should ensure that any order approving the 2017 Protocol does not limit the Commission's ability to continue to revise PacifiCorp's direct access programs or its ability to limit PacifiCorp's vertical and horizontal monopoly power through programs like a Company-owned VRET.

A. The Commission Should Clarify that the 2017 Protocol Will Allow for Modifications to PacifiCorp's Direct Access Programs.

The Commission has a statutory duty to ensure that, if approved, the terms of the 2017 Protocol do not impede further development of viable direct access programs. In enacting Oregon's electric restructuring legislation in 1999, Oregon's Legislative Assembly directed that "retail electricity consumers that want and have the technical capability should be allowed, either on their own or through aggregation, to take advantage of competitive electricity markets as soon as is practicable." Or Laws 1999, ch 865 at preamble. The law specifically instructs the PUC to develop policies to "eliminate barriers to the development of a competitive retail market structure" and "to mitigate the vertical and horizontal market power of incumbent electric companies * * * ." ORS 757.646(1).

1. PacifiCorp Relied Upon the 2010 Protocol to Frustrate Direct Access.

The record contains evidence that PacifiCorp relied heavily upon the 2010 Protocol as a basis to impose extra transition charges to prospective direct access customers during the Commission's recent attempt to create a viable direct access program for PacifiCorp's customers. *See* Noble Solutions/200. As explained below, PacifiCorp's past reliance on the

[2] *See* OPUC's 2015 Restructuring Report, available at: http://www.puc.state.or.us/electric_restruc/statrpt/2015/July_2015_Status_Report.pdf .

existing multi-state allocation agreement warrants extra scrutiny of PacifiCorp's position in this docket.

In 2012, the Commission began developing PacifiCorp's five-year opt-out program after finding that PacifiCorp's then-existing programs had extremely low participation. *See In the Matter of Public Utility Commission of Oregon: Investigation of Issues Related to Direct Access*, OPUC Order No. 12-500, at 8-9 (2012). Unlike Portland General Electric Company's ("PGE") customers, PacifiCorp's direct access customers were effectively unable to ever leave the cost-of-service system and had to pay transition charges for PacifiCorp's generation services through the ongoing valuation methodology into perpetuity. *See id.* The Commission appropriately directed PacifiCorp to file a tariff for a five-year opt-out program, similar to PGE's long-standing five-year program, which would allow "a qualified customer to go to direct access and pay fixed transition charges for the next five years, and then to be no longer subject to transition adjustments * * * ." *Id.* at 10.

PacifiCorp filed its proposed five-year program, under a tariff titled Schedule 296, in docket UE 267. *See In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, OPUC Order No. 15-060. However, PGE's five-year program assessed transition charges under the ongoing valuation method for only five years, while PacifiCorp's proposed program sought to charge the direct access customers for 15 additional years of transition charges beyond the five-year period based upon a 20-year forecast of generation charges and ongoing valuation calculations. *Id.* at 4-5. PacifiCorp termed this additional charge the "consumer opt-out charge." *Id.* at 4.

In response, the other nine active parties to docket UE 267, including Noble Solutions and OPUC Staff, entered into a stipulation to adopt a program with only five years of transition

charges, without the consumer opt-out charge. The stipulating parties pointed out, among other things, that the maximum departure of 175 average megawatts ("MW") allowed into the program is a small proportion of PacifiCorp's total system load of 7,000 average MW, and will be entirely offset by projected load growth in PacifiCorp's multi-state service territory within five years. *Id.* at 6. In other words, the fixed costs previously paid by the 175 average MW of direct access load would be paid by new loads in PacifiCorp's multi-state system within five years – negating the need for transition charges after five years.

However, PacifiCorp merely adjusted its proposal to require 10 years of transition charges. It proceeded to argue, at length, that Section X of the 2010 Protocol precluded the stipulating parties' attempt to rely upon the growing loads of PacifiCorp's entire system to offset the departing direct access load and justify the use of only five years of transition costs. Over PacifiCorp's objection, the Administrative Law Judge admitted PacifiCorp's UE 267 testimony on this point into the record in this proceeding. Tr. at 82; Noble Solutions/200. Reviewing that testimony demonstrates why the Commission should make its intent clear if it approves the latest version of the multi-state allocation protocol.

PacifiCorp argued that the Commission could not adopt a PGE-type five-year program, with five years of transition charges, because "SECTION X WILL CAUSE COST SHIFTING." Noble Solutions/200 at 9. PacifiCorp explained that under the 2010 Protocol "Oregon customers will potentially pay for the costs of the resources (both existing and new) that are necessary to serve direct access loads even if those resources are not actually serving those loads." *Id.* at 13. In PacifiCorp's view, "Because the costs of resources under this scenario will be allocated to Oregon as if the direct access load was being served by that resource, the costs of that resource

allocable to the now-absent direct access load will be shifted to remaining Oregon customers" – instead of being spread across the growing system load in excess of 7,000 average MW. *Id.*

PacifiCorp's argument for 10 years of transition charges, instead of only five years, relied explicitly on Section X of the 2010 Protocol. In PacifiCorp's view, "Unless and until Section X is changed in the MSP, the Company's Five-Year Program should include the Consumer Opt-Out Charge to protect customer from Section X's cost-shifting." *Id.* at 14. PacifiCorp also included with its testimony over 100 pages of testimony by Staff's witness in the initial inter-jurisdictional allocation proceeding in 2004, as an additional basis to prohibit the 2014 Commission from adjusting direct access policies in response to changed circumstances and the failure of the prior policies. *Id.* at 36-146. There was no way to revisit the issue in an Oregon ratemaking proceeding, argued PacifiCorp, unless the entire multi-state agreement was first amended. *Id.* at 14-15. Thus, according to PacifiCorp, the Commission was bound by the 2010 Protocol in UE 267, even if it required a different result than Oregon's statutory directive that the Commission remove barriers to competitive retail choice.

Even though it was undisputed that system load growth would absorb the maximum departure of 175 average MW of the program within five years, the OPUC rejected the stipulating parties' reliance on system load growth and approved PacifiCorp's revised proposal for 10 years of projected transition charges. *In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, Order No. 15-060 at 6-7. The charges associated with years six through 10 would be assessed through the consumer opt-out charge on top of, and at the same time as, the transition charges for years one through five after the opt-out election. *Id.* The Commission subsequently denied rehearing of this ruling, but in doing so it explicitly stated "if in the future the joint parties believe they have new evidence or

arguments demonstrating that the consumer opt-out charge is unjust or unreasonable, they may seek our review at that time." *In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, OPUC Order No. 15-195, at 2-3 (2015).

2. The Commission Should Clarify the Treatment of Direct Access.

If the Commission elects to approve the 2017 Protocol, it should clarify that it will implement the revised Section X.A of the Protocol in a manner that allows for modifications to Oregon's direct access programs.

Section X.A.2 cites specifically to orders issued in UE 267. If the 2017 Protocol is approved and if the Commission subsequently revises aspects of PacifiCorp's five-year program as described in the referenced UE 267 orders, such as the term over which transition costs are calculated, then the Commission should retain its authority to alter the inter-jurisdictional allocation used for Oregon rates to reflect those changes. For example, if the Commission determines that 10 years of transition charges are excessive and effectively bar participation in direct access, the Commission should ensure that the 2017 Protocol contains the flexibility to allow the Commission to revise the five-year program without facing the same type of arguments PacifiCorp made in UE 267.

As noted above, Section X.A.3 states that if Oregon adopts "new laws or regulations regarding Oregon Direct Access Programs, Oregon's treatment of loads lost to Oregon Direct Access Programs may be re-determined in a manner consistent with the new laws and regulations." PAC/101, Dalley/10. Because this section is somewhat ambiguous, the Commission should clarify its understanding that Section X allows for the Commission to issue new orders implementing Oregon's direct access programs and that Oregon's treatment of the cost allocations under the 2017 Protocol will be consistent with those new orders. This reading

is consistent with the language of Section X.A.3 that accommodates new "laws and regulations" because a "regulation" includes a "rule or *order*, having legal force, issued by an administrative agency or a local government." Bryan A. Garner, *Black's Law Dictionary*, 1289 (7th ed. 1999) (emphasis added).

Most parties to this proceeding appear to agree with this interpretation of Section X. *See* ICNU/100, Mullins/25 ("if the Commission were to decide to change its policy on the 10-year period in which loads lost to direct access programs in Oregon are included in the Load-Based Dynamic Allocation factors, it would not violate the 2017 Protocol for the Commission to do so."); PAC/300, Dalley/3 ("None of the parties to this proceeding contest ICNU's interpretation"); *see also* Noble Solutions/100, Higgins/9. However, PacifiCorp also appears to suggest that prior to modifying any Oregon direct access program, the Commission must engage in negotiation with other states regarding how Oregon may allocate inter-jurisdictional loads in Oregon rates. PAC/300, Dalley/16:13-18. PacifiCorp appears to leave open the possibility that it will again make the type of arguments that it did in docket UE 267.

Clarification is therefore warranted. The Commission should clarify its understanding that if the Commission were to decide to change its policy on the 10-year period in which loads lost to direct access programs in Oregon are included in the Load-Based Dynamic Allocation factors, it would not violate the 2017 Protocol for the Commission to do so.

B. The Commission Should Clarify that It Will Treat a VRET Program Consistent with Direct Access Programs.

For similar reasons as those requiring clarification of the treatment of direct access loads, the Commission should clarify the treatment of any VRET loads served by PacifiCorp-owned generation. The 2017 Protocol does not directly address how loads and costs associated with a

VRET program will be treated in Oregon rates under the inter-jurisdictional allocation. Thus, clarification is clearly warranted.

Like direct access, a VRET would provide a retail-choice alternative that enables a customer to opt out of PacifiCorp's traditional cost-of-service portfolio developed through the Commission's least-cost planning oversight. *In the Matter of Public Utility Commission of Oregon: Voluntary Renewable Energy Tariffs for Non-Residential Customers*, OPUC Order No. 15-405 at App. A at 9-14. Thus, a certain amount of that least-cost portfolio could be stranded for payment by other customers, absent transition charges.

If VRET loads were not treated the same as direct access loads, PacifiCorp may be able to use the 2017 Protocol to create an undue competitive advantage for a PacifiCorp-owned VRET resource over a competitively supplied direct access product. Noble Solutions/100, Higgins/7-8. PacifiCorp may be able to create a Company-owned VRET product that effectively spreads stranded costs associated with a customer's VRET election across the larger customer base of the multi-state system, instead of being situs-assigned to Oregon customers for a 10-year period as is the case with the five-year opt-out direct access program. *Id.* To mitigate PacifiCorp's vertical and horizontal market power as required by ORS 757.646(1), the Commission should ensure that the 2017 Protocol cannot be used to create a competitive advantage for a PacifiCorp-owned VRET resource over a competitively supplied direct access product. *Id.* This principle should also extend to any future programs that may be created that have similar attributes, i.e., specialty generation products provided by the utility that implicate transition costs and compete with direct access programs. *Id.* at 8.

The Commission has already taken a firm stance consistent with Noble Solutions' recommendation on this point. While PacifiCorp has not yet proposed a VRET, one of the VRET guidelines issued by the Commission provides:

> "VRET terms and conditions (including the timing and frequency of VRET offerings), as well as transition costs, must mirror those for direct access. PGE and PacifiCorp may propose VRET terms and conditions that differ from current direct access provisions but must proposed [sic] changes to their respective direct access programs to match those changes."

In the Matter of Public Utility Commission of Oregon: Voluntary Renewable Energy Tariffs for Non-Residential Customers, OPUC Order No. 15-405 at 2. It is not clear if PacifiCorp will ever attempt to file a VRET that can meet this standard, but it is clear that PacifiCorp has already sought to establish a preferential VRET product that would compete with direct access.

Staff suggests that Section IV.4 addresses the VRET. Staff/200, Kaufman/2. But that section does not expressly discuss the VRET or how to allocate fixed costs associated with loads lost due to participation in a VRET. Instead, Section IV.4 only addresses "costs and benefits of Resources." PAC/101, Dalley/6, *see also id.* at 34 (defining "Resources"). At most, Section IV.4 establishes that the above-market costs to acquire a VRET Resource will be assigned to Oregon. It says nothing about allocation of lost loads among the states. *Compare to id.* at 9-10 (allocating loads lost due to direct access under the five-year program to Oregon for 10 years in Section X.A.2); *id.* at 11 (allocating across the entire system certain losses of load up to five percent of system load and "gain or loss of large customers" for other unspecified reasons in Section XI). Staff also recommends that the Commission should wait until a VRET is finalized to address this issue. Staff/200, Kaufman/2. But that approach may leave the Commission unable to make adjustments to the inter-jurisdictional allocation, and may invite PacifiCorp to continue to develop preferential products that compete with direct access. As PacifiCorp argued

in UE 267, the multi-state agreement may be difficult to revise after it is approved. Noble Solutions/200 at 14-15.

Therefore, the Commission should clarify that if the 2017 Protocol is approved for ratemaking in Oregon, there will be no reduction to Oregon's Load-Based Dynamic Allocation Factors associated with VRET load supplied by PacifiCorp-owned resources to the extent that no reduction is applied for direct access load.

IV. CONCLUSION

Noble Solutions recommends that the Commission clarify its understanding of the treatment of direct access and VRET loads if it approves the 2017 Protocol.

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