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November 23, 2015

VIA ELECTRONIC FILING

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

Attn: Filing Center

RE: UM 1742—PacifiCorp's Response to Surprise Valley's Motion to Strike or Clarify Scope of Proceeding

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Response to Surprise Valley's Motion to Strike or Clarify Scope of Proceeding.

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

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1742

SURPRISE VALLEY ELECTRIFICATION CORP., Complainant v. PACIFICORP, d/b/a PACIFIC POWER, Respondent.	PACIFICORP'S RESPONSE TO SURPRISE VALLEY'S MOTION TO STRIKE OR CLARIFY SCOPE OF PROCEEDING

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) hereby responds to Surprise Valley Electrification Corporation's (Surprise Valley) Motion to Strike or Clarify Scope of Proceeding (Motion), filed with the Public Utility Commission of Oregon (Commission) on November 6, 2015.[1] The relief requested in the Motion is untimely and legally inappropriate. Moreover, it misconstrues PacifiCorp's pleadings and seeks relief based on incorrect assertions about PacifiCorp's statements in its Answer. Striking PacifiCorp's Answer, or redefining the scope of PacifiCorp's Answer to eliminate relevant facts contained therein, would prejudice PacifiCorp's ability to fully and fairly respond to Surprise Valley's Complaint and undermine PacifiCorp's ability to defend its rights in this docket.

I. INTRODUCTION

A motion to strike is only appropriate for "sham," "frivolous," or "irrelevant" claims or defenses. Surprise Valley's Motion to Strike asks the Commission to strike various references in

[1] The motion also asked the Commission to hold these proceedings in abeyance pending resolution of Surprise Valley's motion to strike or clarify the scope of the proceedings. PacifiCorp did not object to this portion of Surprise Valley's request. Chief Administrative Law Judge Michael Grant granted the motion to hold the proceedings in abeyance in a ruling dated November 9, 2015.

PacifiCorp's Answer to a transmission agreement between PacifiCorp and Bonneville Power Administration (Bonneville), called the General Transfer Agreement (GTA). None of PacifiCorp's references to the GTA constitute a "sham," "frivolous," or "irrelevant" defense, and Surprise Valley does not even attempt to so demonstrate.

Moreover, Surprise Valley asserts that PacifiCorp has raised the terms and conditions of the GTA as a "bar" to PacifiCorp's Public Utility Regulatory Policies Act (PURPA) obligations. This assertion is incorrect, yet forms the fundamental basis of Surprise Valley's Motion. As will be discussed, GTA is a transmission delivery contract, not an all-requirements contract for the sale of power, which means that Surprise Valley's reliance on FERC Order No. 69 for its "displacement" theory is misplaced.[2] But the FERC-jurisdictional terms and conditions of that agreement between PacifiCorp and Bonneville have no bearing on PacifiCorp's PURPA obligations.

It is axiomatic that a defendant, not a plaintiff, gets to identify the defendant's defenses, and the Commission would err by granting a motion to strike based on a plaintiff's redefinition of a defendant's position. To clear up this fundamental misunderstanding, PacifiCorp believes it is necessary in this introduction to reiterate the background of the parties' dispute and summarize PacifiCorp's defense to Surprise Valley's Complaint.

A. Surprise Valley's Complaint

Surprise Valley is a rural cooperative headquartered in Alturas, California. Surprise Valley owns a 3.6 MW geothermal qualifying facility (QF) located in Paisley, Oregon (the

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[2] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12214 (1980) ("Order No. 69"). Until Surprise Valley raised the "displacement issue" and asserted the GTA was relevant to that "displacement," PacifiCorp never needed to raise the issue of the GTA.

Paisley Project).[3] Surprise Valley is a full-requirements customer of the Bonneville, purchasing all of the electricity to serve its load from Bonneville.[4] The Paisley Project is interconnected with Surprise Valley's system, and Surprise Valley's system is in turn connected with PacifiCorp's system.[5] Surprise Valley wishes to sell the full net output of the Paisley Project to PacifiCorp through the execution of an Oregon QF power purchase agreement (PPA).[6]

In its Complaint, Surprise Valley alleges that PacifiCorp has a mandatory purchase obligation under PURPA, an allegation PacifiCorp believes is legally incorrect and contrary to Federal Energy Regulatory Commission (FERC) policy and Commission precedent. Surprise Valley asks the Commission to require PacifiCorp to purchase the full net output of the Paisley Plant under a QF PPA with Surprise Valley at the Company's Schedule 37 rates in effect before August 20, 2014.[7]

The Paisley Project is not directly interconnected with PacifiCorp's system. To reach PacifiCorp's system, the Paisley Project's power must be wheeled *across Surprise Valley's system* to PacifiCorp's system. As this Commission has recognized, PURPA requires off-system QFs like the Paisley Project to make arrangements to deliver the QF's power to the purchasing utility's system before a utility has any obligation to purchase that net output.[8] The requirement that a QF make firm, commercially appropriate arrangements to deliver its power to a utility's

[3] Surprise Valley Complaint at ¶ 2.
[4] *Id.* at ¶ 7.
[5] *Id.* at ¶ 14.
[6] *See* Surprise Valley Complaint at ¶12.
[7] *See* Surprise Valley Complaint at p. 34 (Prayer for Relief).
[8] As will be explained, at the federal level, this requirement is recognized in FERC's PURPA regulations and FERC orders. At the state level, the requirement is reflected in the Oregon Commission's rules, in Commission-approved PPAs, and in Commission-approved utility tariffs. The appropriate terms and conditions for PURPA's off-system QF delivery requirement were litigated in docket UM 1129.

system has been litigated and decided, and it is not controversial. To date, Surprise Valley has been unwilling or unable to make such arrangements.[9]

B. Surprise Valley Has Not Established a Right to Make a PURPA Sale to PacifiCorp

PacifiCorp's defense to Surprise Valley's Complaint is straightforward: A QF is required to make appropriate arrangements to deliver its power to the purchasing utility's system before a utility must purchase that power. This delivery requirement is a fundamental prerequisite to a utility's obligation to purchase QF power under PURPA. Surprise Valley has not made requisite delivery arrangements, and has indicated that it does not intend to do so. In addition, Surprise Valley's proposed alternative to making the delivery arrangements—its "displacement" theory—misinterprets FERC Order No. 69 and contradicts Commission precedent.[10] For that reason, PacifiCorp has no obligation to execute a PPA with Surprise Valley. This is a straightforward defense grounded in Oregon law, and it has nothing to do with the GTA.

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[9] As PacifiCorp has explained in this docket, PacifiCorp is mindful that Surprise Valley may have difficulty making adequate transmission arrangements for delivery of the Paisley Project's power to PacifiCorp's system. To that end, PacifiCorp is ready and willing to execute an on-system PPA with Surprise Valley to simplify Surprise Valley's delivery obligation. PacifiCorp's current on-system Oregon PPA incorporates the terms for this very situation. The Paisley Project is directly interconnected to Surprise Valley's distribution system, and Surprise Valley's distribution system is, in turn, directly interconnected to PacifiCorp's system. PacifiCorp is willing to treat Surprise Valley's intervening distribution system as essentially a long tie-line, which would allow PacifiCorp to simply meter the power not consumed by Surprise Valley's adjacent load that flows from Surprise Valley's system into PacifiCorp's system. Should Surprise Valley elect such a PPA, PacifiCorp would work with Surprise Valley to ensure appropriate metering is in place to enable this agreement. PacifiCorp would purchase the amount of power physically flowing into PacifiCorp's system from Surprise Valley's, up to the net output of the plant and in accordance with its Commission-approved on-system PPA. To date, Surprise Valley has not accepted such an agreement.

[10] *See* PacifiCorp Answer at ¶ 96; OAR 860-0029-0030(4) (allowing off-system QF to sell power indirectly to a utility so long as it makes wheeling arrangements to deliver that power to the indirectly connected utility); and *Portland General Elec. Co. v. Oregon Energy Co.,* Docket No. UC 315, Order No. 98-238 (June 12, 1998) (confirming that a QF must obtain a wheeling agreement as a precondition to a utility's obligation to purchase power indirectly from a QF). *See also, Portland General Elec. Co. v. Oregon Energy Co.,* Docket No. UC 315, Order No. 98-055 (Feb. 17, 1998) (without a binding wheeling arrangement to make power available to a utility, an off-system QF is not considered ready, willing, or able to deliver that power to a utility).

1. A QF Must Arrange to Deliver Its Power to a Utility's System Before a Utility Is Required to Purchase Power from that QF

FERC's PURPA regulations state as follows:

§ 292.303 Electric utility obligations under this subpart.

> (a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, any energy and capacity which is *made available* from a qualifying facility:
>
> > (1) *Directly to the electric utility;* or
> >
> > (2) *Indirectly to the electric utility* in accordance with paragraph (d) of this section.
>
> (d) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility *may transmit the energy or capacity to any other electric utility.* Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

18 C.F.R. § 292.303 (emphasis added). OAR 860-029-0030(1) parallels to Rule 292.303(a), and OAR 860-029-0030(4) states as follows in the place of Rule 292.303(d) (d):

> (4) Option to wheel power to other electric utilities or to [Bonneville]: At the request of a qualifying facility, a public utility (which would otherwise be obliged to purchase energy or capacity from such qualifying facility) may transmit (wheel) energy or capacity to any other electric utility or to [Bonneville], at the expense of the qualifying facility. Use of a public utility's transmission facilities shall be on a cost-related basis.[11]

Under the wording of either the FERC or Oregon rule, *Surprise Valley* is the *directly interconnected utility* that must "wheel" or "transmit" the Paisley Project's power to another utility to enable a PURPA sale with an indirectly interconnected utility like PacifiCorp.

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[11] OAR 860-029-0030(4).

Thus, there are two options under the rules. The Paisley Project is directly interconnected with Surprise Valley, so Surprise Valley can take the Paisley Project's power. Because the systems are interconnected, Surprise Valley can simply measure the power delivery through a meter at the point of interconnection.[12] To sell the Paisley Project's output to any other utility, Surprise Valley must arrange to "transmit" or "wheel" the Paisley Project's power to a distant utility's system before that utility must purchase the power. As FERC has explained, a "QF has the discretion to choose to sell to a more distant utility * * * and thus where to sell, *as long as the QF can deliver its power to the utility*."[13]

2. ***QF Delivery Arrangements Must Meet Certain Commercial Standards to Entitle a QF to Avoided Cost Rates; Those Standards Have Been Litigated in Oregon and They Are Laid Out Clearly in PacifiCorp's Off-System QF PPA***

Every key provision of a standard Oregon QF PPA has been litigated before and approved by this Commission.[14] It would be unusual for a QF to come before the Commission and argue that it is entitled to a standard QF PPA if that QF refused to agree to critical terms and conditions of that PPA, such as the PPA's various requirements for safety, security, and reliability, or provisions necessary for commercial reasonableness and customer protection, such as minimum and maximum delivery requirements and consent to the PPA's default and remedy provisions. The transmission delivery requirements in PacifiCorp's off-system PPAs are no different. They are needed to ensure a utility does not pay avoided costs rates for firm power

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[12] For a direct interconnection, the QF contacts the utility's transmission function for a separate *interconnection agreement* between the utility's transmission function and the QF, and any upgrades that are needed for the direct interconnection are negotiated between the QF and the utility's transmission function. This is not the case here, as the Paisley Project is not directly interconnected with PacifiCorp's system, as Surprise Valley admits in its Complaint.

[13] *Kootenai Elec. Coop., Inc.*, 143 FERC ¶ 61,232 at ¶ 33 (2013) (emphasis added).

[14] *See* Docket No. UM 1129.

unless the utility will actually *receive* that power on a firm, scheduled basis, and can verify receipt of that power—they ensure the utility actually gets what it pays for.

When the Company's standard QF PPAs were approved in docket UM 1129, Commission Staff explained why any QF wanting a standard off-system PPA must make *commercially appropriate arrangements for firm delivery of its power*:

> Q. IS IT REASONABLE FOR A UTILITY TO REQUIRE AN OFF-SYSTEM QF TO USE FIRM TRANSMISSION FOR DELIVERY OF POWER UNDER A STANDARD CONTRACT FOR OFF-SYSTEM QFS?
>
> A. Yes. The utilities have proposed that their standard off-system QF contracts specify the use of firm transmission. *If a QF wants to use non-firm transmission to deliver its output to the purchasing utility it may do so, but it would not receive capacity payments and would have to execute a non-standard contract.*[15]

The need for these commercially reliable requirements is straightforward. Unless a QF makes firm, scheduled delivery of its power, PacifiCorp cannot count on the availability of that power to serve load. The requirements are critical to the PPA.[16]

To meet these standards, an indirectly interconnected (or off-system) QF typically obtains a long-term, firm, point-to-point transmission contract with a third-party transmission provider to deliver the QF's power to the purchasing utility's system.[17] In fact, *every indirectly connected QF* with whom PacifiCorp has a QF PPA has made firm, point-to-point transmission

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[15] Direct Testimony of Stefan Brown, *In Re Public Util. Comm'n of Oregon Staff Investigation Relating to Elec. Util. Purchases from QFs*, Docket No. UM 1129 (Mar. 24, 2006).

[16] A QF can arrange for lower-quality non-firm transmission, of course, and sell that power to a utility on an as-available basis, but such a QF would not be entitled to receive standard avoided cost pricing—it would simply get market prices for its power as delivered. OAR 860-0029-0040. This is commercially appropriate, because if PacifiCorp cannot count on the delivery being scheduled and firm, PacifiCorp cannot schedule it to serve load (let alone peak load), and thus the power is not as valuable to customers. In this case, however, Surprise Valley wants a standard firm QF PPA for the full net output of the Paisley Plant, paid at PacifiCorp's standard avoided cost rate, not an as-available PPA.

[17] *See, e.g., Kootenai Elec. Coop., Inc. v. Idaho Power Co.,* Docket No. UM 1572, Order No. 13 062 at n.2 (Feb. 26, 2015) (noting QF's long-term, point-to-point transmission agreement with Avista to deliver QF power to Idaho Power Company).

arrangements with a third-party utility for delivery of the QF's power to PacifiCorp's system. This is the typical commercial standard. There are other ways a QF can meet its delivery obligations, as well, so long as those delivery arrangements are firm and meet the requirements detailed in the standard off-system PPA, such as commercially important requirements for scheduling, imbalance, and reserves that ensure the utility gets the quantity and quality of power that it pays for.[18]

PacifiCorp has no way of making these wheeling arrangements for Surprise Valley—only Surprise Valley can do so. The Paisley Project is interconnected with Surprise Valley's distribution system, so its power must be wheeled across that system. PacifiCorp does not own Surprise Valley's system, nor does it market or provide wheeling services across that system. Asking PacifiCorp to wheel the Paisley Project's power across Surprise Valley's system to PacifiCorp's system makes no sense.

Yet Surprise Valley has made *no* arrangements for the delivery of the Paisley Project's power to PacifiCorp's system, let alone the form of arrangements that would entitle Surprise Valley to a standard QF PPA.[19] Instead, Surprise Valley states that its QF will generate electricity that will "displace" other electricity on the grid, which will then result in PacifiCorp receiving power somewhere else in PacifiCorp's balancing authority area.[20] This is not commercially appropriate transmission delivery, let alone firm delivery. If it were, no QF would pay a utility for a point-to-point transmission contract to deliver its power. A QF would simply generate power, let that power flow somewhere onto the grid, and seek payment from some other

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[18] *See* PacifiCorp's Standard Off-System QF PPA at Addendum W.
[19] Neither has Surprise Valley explained how PacifiCorp would take title to the power.
[20] For example, Surprise Valley states in its Complaint that "[m]ost of the Paisley Project's net output is expected to displace electricity Surprise Valley has purchased from Bonneville and that PacifiCorp would otherwise transmit to Surprise Valley." Complaint at ¶ 18.

party on the grid. This is not the requirement under PacifiCorp's standard Oregon off-system QF PPA; nor is it, as far as PacifiCorp is aware, the standard for a firm PPA for *any QF in the country*. All of PacifiCorp's other off-system QFs have purchased firm transmission service to deliver the net output to PacifiCorp's system, and Surprise Valley should be held to the same standard.

In sum, PacifiCorp's defense to Surprise Valley's Complaint can be summarized as follows: Surprise Valley must make appropriate arrangements to deliver the Paisley Project's power to PacifiCorp's system before PacifiCorp is required to execute a PPA with Surprise Valley. PacifiCorp has offered Surprise Valley a standard off-system PPA, but Surprise Valley has rejected the delivery requirements. PacifiCorp has gone to extensive efforts to help Surprise Valley find another way to deliver its power in a commercially reasonable manner, but Surprise Valley has rejected those as well.[21] Simply put, the Company cannot sign a QF PPA with Surprise Valley that fails to meet the basic commercial standards established by this Commission, and it would be imprudent for the Company to do so.

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[21] As noted above in footnote 9, PacifiCorp is mindful that Surprise Valley may have difficulty making adequate transmission arrangements for delivery of the Paisley Project's power to PacifiCorp's system. To that end, PacifiCorp is ready and willing to execute an on-system PPA with Surprise Valley to simplify Surprise Valley's delivery obligation. PacifiCorp's current on-system Oregon PPA incorporates the terms for this very situation. The Paisley Project is directly interconnected to Surprise Valley's distribution system, and Surprise Valley's distribution system is, in turn, directly interconnected to PacifiCorp's system. PacifiCorp is willing to treat Surprise Valley's intervening distribution system as essentially a long tie-line, which would allow PacifiCorp to simply meter the power that flows from Surprise Valley's system to PacifiCorp's system. Should Surprise Valley elect such a power purchase agreement, PacifiCorp would work with Surprise Valley to ensure appropriate metering is in place to enable this agreement. PacifiCorp would purchase the amount of power physically flowing onto PacifiCorp's system from Surprise Valley's, up to the net output of the plant and in accordance with its Commission-approved on-system PPA.

3. PacifiCorp Is Fully Capable of Accepting the Paisley Project's Net Output, but Any Necessary Upgrades to PacifiCorp's System are Dependent on the Form of Delivery and Amount of Energy to be Delivered

Surprise Valley repeatedly suggests that there are questions about whether PacifiCorp Transmission has the technical ability to *accept* the output of the Paisley Project. Other times it asks whether PacifiCorp Transmission has the technical capability to *accept* "displacement." These statements misunderstand PacifiCorp's concerns.

To be clear, PacifiCorp is capable of "accepting and purchasing" the output of the Paisley Project delivered to PacifiCorp's system. However, the form of delivery—firm or non-firm—will dictate the necessary network upgrades and construction requirements. PacifiCorp's technical capabilities are not at issue so long as Surprise Valley makes the arrangements required by the Company's standard QF PPAs. As explained above, these Commission-approved delivery requirements are necessary for commercial reasons to ensure PacifiCorp receives firm, scheduled power that it can use to serve load.

What is at issue is Surprise Valley's willingness to comply with the terms of the standard QF PPAs.[22] PacifiCorp does not have the authority to arrange wheeling on Surprise Valley's system to deliver the Paisley Project's power to PacifiCorp's system. Surprise Valley must do so because it owns and operates that system, and to arrange to deliver the QF's power on a firm, scheduled basis. *At that point*, PacifiCorp Transmission can accept that power.

Nevertheless, Surprise Valley continues to seek information about various types of transmission arrangements within PacifiCorp's balancing authority area, arguing that PacifiCorp

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[22] PacifiCorp raised concerns in its Answer regarding Surprise Valley's technical ability to wheel energy across its system because Surprise Valley does not have an open access transmission tariff or wholesale distribution tariff. PacifiCorp, however, after filing its Answer, realized that Surprise Valley does in other circumstances provide transfer across its system to PacifiCorp and indeed may have the technical capability to wheel the Paisley Project net output to PacifiCorp's system.

can "technically" accept various kinds of transmission arrangements, possibly even "displacement." This is a red herring that continues to cause confusion. PacifiCorp's *capability* to accept a multitude of forms of transmission delivery that do not comply with the Commission-approved standard off-system QF PPA is irrelevant here. Stated another way, there are many types of transmission arrangements PacifiCorp can accept that do *not constitute firm delivery*, but these are irrelevant to a QF seeking a PPA for firm power at avoided cost rates.

This is not a new concept. A QF is required to make arrangements of a certain type and quality for delivery of QF power to a utility's system before it is entitled to a certain type of rate (full avoided cost) for that QF power. If Surprise Valley makes the type of transmission arrangements across its system for delivery to PacifiCorp's system required by PacifiCorp's Commission-approved standard off-system PPA, PacifiCorp Transmission will determine how best to accept that power, and it *will* accept that power.

4. Surprise Valley's Motion to Strike Misconstrues PacifiCorp's Defense to Surprise Valley's Complaint

Stated one more time, PacifiCorp's defense to Surprise Valley's Complaint is that Surprise Valley must agree to the terms and conditions of the Company's off-system PPA before PacifiCorp will sign that PPA. Surprise Valley misstates this defense in its Motion to Strike. Specifically, Surprise Valley asks the Commission to "

> strike PacifiCorp's arguments that the PacifiCorp and [Bonneville's] * * * [*GTA*] *bars or otherwise limits Surprise Valley's ability to sell the net output of the Paisley geothermal project * * * to PacifiCorp"* on grounds of federal preemption.[23]
>
> In the alternative, Surprise Valley asks the Commission to clarify the scope of the proceeding to "exclude PacifiCorp's *attempt to use the GTA*

[23] Motion to Strike at 1 (emphasis added).

> *as a defense against its statutory obligation* to purchase the net output of the Paisley Project."[24]

Aside from the fact that Surprise Valley's Motion to Strike fails to meet any applicable legal standard, the premise of its Motion to Strike is incorrect and the motion should be denied.

II. LEGAL STANDARD

Oregon Rule of Civil Procedure (ORCP) 21E allows a party to move to strike a pleading within 10 days after the service of that pleading.[25] The appropriate subject of a motion to strike includes:

> (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;
>
> (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.[26]

Under ORCP 12A, all pleadings "shall be liberally construed with a view of substantial justice between the parties."

III. ARGUMENT

Surprise Valley's Motion to Strike is untimely and fails to meet any applicable legal standard. Through that Motion, Surprise Valley is inappropriately attempting to litigate the merits of this case by requesting relief that would deny PacifiCorp the right to fully address Surprise Valley's "displacement" theory and the circumstances surrounding the parties' dispute. The Commission should allow the parties to fully develop the issues raised in their pleadings before it strikes relevant facts from any party's pleadings, honoring the requirement in ORCP 12E that all pleadings "shall be liberally construed with a view of substantial justice

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[24] Motion to Strike at 2 (emphasis added).
[25] OAR 860-001-0420 governs general motion practice before the Commission but does not specifically address motions to strike. The ORCP 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).
[26] ORCP 21E.

between the parties."[27] Finally, Surprise Valley's request is untimely, inappropriate, and prejudicial and should be denied.

A. Surprise Valley's Motion, Including Its Request for "Clarification," Is Untimely and Improper

Apart from its substance, Surprise Valley's Motion is untimely and fails to apply (or even invoke) the appropriate legal standard for a motion to strike. Under the ORCP, a Motion to Strike must be filed within *ten days* of the date of the pleading that is subject to the motion.[28] Surprise Valley's Motion to Strike was filed *more than 100 days* after PacifiCorp's Answer and could be denied for that reason alone.

The Motion to Strike also fails to cite the appropriate legal standard for motions to strike in Oregon, which applies to a "sham, frivolous, or irrelevant pleading or defense." The Motion then fails to identify any statement that falls within the scope of that standard. There is no allegation in the Motion that any portion of PacifiCorp's Answer constitutes a "sham, frivolous, or irrelevant pleading or defense." Moreover, as explained above, Surprise Valley misstates PacifiCorp's actual defense in this docket and makes numerous other prejudicial and misleading statements about PacifiCorp's position in support of its motion. These assertions should be rejected.

Finally, Surprise Valley's entire Complaint is premised on displacement of energy that is transferred under the GTA. In its Motion to Strike, Surprise Valley attempts to recast its arguments, arguing that: "The allegations of the Complaint regarding displacement deliveries merely explained the physical fact that utilities regularly make deliveries of electricity in the

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[27] Should the Commission consider granting Surprise Valley's Motion to Strike, PacifiCorp would ask the Commission to first provide the parties with the opportunity to brief the issue of the applicability of Surprise Valley's "Order No. 69" displacement theory to the facts of this case.
[28] ORCP 21E.

opposite direction of the flow of electricity on the grid at the point of delivery, and that PURPA allows, as do ordinary power sales, deliveries to occur through displacement."[29] This statement is merely another attempt to mislead the Commission. Utilities do regularly make deliveries of electricity in opposite directions, but those deliveries are scheduled to ensure each party is receiving a known amount of energy. This is consistent with the requirements of PacifiCorp's standard off-system PPA. In this case, Surprise Valley is arguing that PacifiCorp should be required to pay avoided cost rates for *Bonneville* energy that PacifiCorp is merely delivering under the GTA. This is not proper application of the displacement theory in FERC Order 69. Accordingly, granting Surprise Valley's Motion to Strike would limit the Commission's access to relevant facts and prejudice PacifiCorp's ability to fully and fairly respond to Surprise Valley's Complaint.

Surprise Valley's alternative request for "clarification of scope" is not a motion recognized or defined by the ORCP, but it can be interpreted as either: (1) a back-door method for seeking the same relief as the Motion to Strike, in which case the request for alternative relief is also untimely and should be denied; or (2) a premature effort to cut off PacifiCorp's arguments and prevent PacifiCorp from fully and fairly responding to issues raised in Surprise Valley's Complaint. In either case, the request for relief should be denied.

B. PacifiCorp's References to the GTA in Its Answer Are Appropriate and Relevant to PacifiCorp's Presentation of Its Case

As noted above, the very premise of Surprise Valley's Motion to Strike is wrong. PacifiCorp has not argued that the GTA is a bar to executing a PPA with Surprise Valley, nor has

[29] Motion to Strike at 3.

PacifiCorp claimed it is dissatisfied with the GTA.[30] PacifiCorp's references to the GTA simply illustrate flaws in Surprise Valley's legal arguments and the risk to PacifiCorp and its customers if PacifiCorp were to agree to Surprise Valley's displacement proposal. To further underscore this point, PacifiCorp will provide more context its references to the GTA. The GTA is a relevant fact in this case—nothing less and nothing more. PacifiCorp should be entitled to develop its case and argue it before the Commission.

1. The FERC-Jurisdictional Terms and Conditions of the GTA Have No Bearing on PacifiCorp's Obligation to Enter Into a Standard Oregon QF PPA with Surprise Valley

First, the FERC-jurisdictional terms and conditions of the GTA between PacifiCorp and Bonneville have no bearing on whether PacifiCorp is obligated to enter into a standard Oregon QF PPA with Surprise Valley. The GTA is a transmission agreement between Bonneville and PacifiCorp under which PacifiCorp Transmission, the transmission provider subject to FERC-mandated functional separation, delivers power to Bonneville's customers on Bonneville's behalf, including Surprise Valley. The parties to this agreement are Bonneville and PacifiCorp. Surprise Valley is not a party to that agreement.

PacifiCorp discusses the GTA in its Answer for essentially two reasons. First, Surprise Valley is a full-requirements customer of Bonneville, and PacifiCorp delivers Bonneville power to Surprise Valley under the GTA. Accordingly, the GTA is a part of the underlying story that helps explain the context for the parties' dispute and various facets of that dispute. For example, certain references to the GTA illustrate why the Commission's QF delivery requirements appear

[30] Even if this were PacifiCorp's argument, the fact that FERC has jurisdiction over the terms and conditions of a contract discussed in a pleading is *not* an appropriate legal basis for a motion to strike. Disputes addressing issues in the electric industry frequently involve the discussion of both FERC- and state-jurisdictional pleadings. Even a state utility rate case involves discussion of FERC-jurisdictional agreements and requirements, none of which are "stricken."

to be particularly important in this case.[31] Second, the GTA helps illustrate why Surprise Valley's reliance on FERC Order No. 69 in this docket is misguided. Under neither of these scenarios is FERC's jurisdiction over the terms and conditions of the GTA germane to this dispute, and under neither of these scenarios does PacifiCorp seek any relief from the Commission with respect to the GTA. Importantly, under neither scenario does PacifiCorp's reference to the GTA present a "sham, frivolous, or irrelevant pleading or defense" that would bring it within the proper scope of a motion to strike.

a. Surprise Valley's Load-Resource Mix Illustrates Why the Commission's QF Delivery Requirements Are Important for Customer Protection

First, PacifiCorp discusses the GTA in the context of describing Surprise Valley's load-resource balance. PacifiCorp *does not supply energy* to Surprise Valley, and PacifiCorp is not a party to the full-requirements power contract between Bonneville and Surprise Valley. PacifiCorp merely transfers energy under the GTA, on behalf of Bonneville, to Surprise Valley. PacifiCorp's only insight into whether Bonneville is supplying sufficient energy to ensure that there is actually QF power available for delivery to PacifiCorp is through the GTA. PacifiCorp's lack of information regarding Bonneville's practices, as indicated by the responses to the data requests attached to the Motion to Strike, is the fundamental risk faced by PacifiCorp under Surprise Valley's unique request for displacement. If Surprise Valley would agree to conform to the terms of the standard QF off-system PPA, then PacifiCorp's concerns would be alleviated because there would be hourly scheduled delivery. PacifiCorp's defense is the Company cannot and will not sign a standard QF PPA with a counterparty that refuses to agree to commercially

[31] *See* PacifiCorp Answer at p. 7.

important delivery requirements in that PPA.[32] To do so would be imprudent and harmful to PacifiCorp's customers because PacifiCorp would be paying avoided cost rates for Bonneville power that may or may not be actually reaching PacifiCorp' system.[33] This is not required by PURPA.

b. FERC's Order No. 69 "Offset" Exception Does Not Apply Here

PacifiCorp's Answer also mentions the GTA in the context of Surprise Valley's references to FERC Order No. 69. By way of background, Surprise Valley asserts in its Complaint that it intends to "deliver" power to PacifiCorp through "displacement." This does not appear to be any legally recognized form of delivery under PURPA, let alone the type of firm scheduled delivery required to obtain an Oregon standard QF PPA. As PacifiCorp understands it, under this theory the Paisley Project would simply generate power that ends up somewhere on the grid. This power would somehow "displace" some of the Bonneville-generated power that Bonneville is required to sell to Surprise Valley under the all-requirements contract between Bonneville and Surprise Valley. PacifiCorp Transmission would then somehow "keep" this Bonneville-generated power and call it QF power.[34] Or the power would just end up in PacifiCorp's BA somewhere, and PacifiCorp could just "keep" it.

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[32] If Surprise Valley were able to verifiably deliver the Paisley Project's generation to PacifiCorp's system, it would of course demonstrate that Surprise Valley does, indeed, have power to sell.

[33] In fact, if the Commission were to grant Surprise Valley's Motion, PacifiCorp's Answer would still continue to state PacifiCorp's defense: its Commission-approved QF PPA. The Commission would simply be deprived of context for the dispute.

[34] For example, Surprise Valley states in its Complaint that: "Most of the Paisley Project's net output is expected to displace electricity Surprise Valley has purchased from BPA and that PacifiCorp would otherwise transmit to Surprise Valley." Complaint at ¶ 18. In its Motion to Strike, Surprise Valley also explains that: "The allegations of the Complaint regarding displacement deliveries merely explained the physical fact that utilities regularly make deliveries of electricity in the opposite direction of the flow of electricity on the grid at the point of delivery, and that PURPA allows, as do ordinary power sales, deliveries to occur through displacement." Motion to Strike at 3.

Surprise Valley points to FERC's Order No. 69 as authority for this "displacement" method of delivery in both its Complaint and in its Motion to Strike.[35] As PacifiCorp explained in its Answer, however, Order No. 69 does not support Surprise Valley's "displacement" theory.[36] Order No. 69 references an extremely narrow PPA delivery offset scenario that simply does not apply here. PacifiCorp believes it would be inappropriate for the Commission to rule on the merits of this issue in the limited context of a motion to strike but feels compelled to briefly address the Order No. 69 offset issue so that the Company's GTA reference can be understood. That said, if the Commission feels inclined to rule on legal issue of whether FERC's Order No. 69 offset provision applies to the circumstances present here, PacifiCorp would respectfully ask for the right to brief that issue to the Commission separately.

FERC's Order No. 69 offset provision works as follows: Although PURPA requires a QF to physically deliver QF power to a utility's system, FERC has recognized an extremely narrow exception to this requirement, one that applies to an all-requirements cooperative like Surprise Valley. This "offset" exception is based on the unique contractual obligations of all-requirements buyers and sellers.[37] An all-requirements buyer (like Surprise Valley) is contractually required to purchase *all or nearly all* of its electrical requirements from its all-requirements seller (like Bonneville).[38] For that reason, PURPA's must-purchase obligation could put an all-requirements buyer in a bind. If a QF were to force an all-requirements buyer to purchase QF power, that all-requirements buyer might find itself in breach of its all-requirements contract with its seller.

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[35] Surprise Valley Complaint at ¶¶ 136, 138.
[36] *See* PacifiCorp Answer at 5.
[37] *See, e.g.,* FERC Order No. 69 at 12,219.
[38] *Id.*

FERC recognized that PURPA might force such entities to breach their contracts, so it offered them a very narrow escape route that still enabled a QF sale. Order No. 69 states that an all-requirements buyer (here, Surprise Valley) must still take power from a QF under PURPA, but it can use that QF power to serve its own load. That QF power will offset the energy that the all-requirements seller (here, Bonneville) would otherwise be obligated to supply to the all-requirements buyer (Surprise Valley) under the parties' all-requirements contract. The all-requirements supplier (Bonneville) will be *deemed* to have purchased the QF power (rather than the all-requirements buyer) and the parties' contract will remain legally unimpaired.[39] The appropriate avoided cost under this "offset" provision would be the avoided cost of the all-requirements seller (Bonneville), because it reflects the incremental costs of energy and capacity the all-requirements seller would have incurred to serve the all-requirements buyer's load *but for* the QF purchase.[40]

Here, Surprise Valley appears to be mistakenly applying the Order No. 69 offset to PacifiCorp, even though PacifiCorp is not an all-requirements seller. In fact, PacifiCorp does not sell Surprise Valley any wholesale power *at all.* The only appropriate Order No. 69 offset would be between Surprise Valley and Bonneville.[41] In short, Order No. 69 simply does not support Surprise Valley's "displacement" theory.

The GTA helps illustrate this point because it shows that PacifiCorp simply delivers power to Surprise Valley's system on Bonneville's behalf. The GTA is a *transmission delivery* contract between Bonneville and PacifiCorp, not an *all-requirements contract* between

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[39] *Id.*
[40] *Id.*
[41] Indeed, the FERC order cited by Surprise Valley in which the Order No. 69 "offset" was applied involved an all-requirements buyer and an all-requirements seller, as is required. *See* Motion to Strike at 11-12 (citing *Delta-Montrose Elec. Ass'n*, 153 FERC ¶ 61,028 (2015)).

PacifiCorp and Surprise Valley for the sale of power to meet Surprise Valley's load requirements. This fact seems to be self-evident and seemingly undisputed, yet Surprise Valley wants to strike this fact for some reason.

If the "offset" exception described in Order No. 69 does, indeed, apply to transmission providers, as Surprise Valley seems to assert (a proposition that neither Order No. 69 nor its logic supports), Surprise Valley should simply make its arguments to the Commission on the merits at the appropriate procedural stage of this docket. It is improper for Surprise Valley to seek to *strike* a factual statement that supports PacifiCorp's legal argument rather simply making its legal case on the merits, either at hearing on through appropriate briefing.

Finally, PacifiCorp's reference to the GTA in this context does not represent a "sham, frivolous, or irrelevant pleading or defense" that is appropriately subject to a motion to strike. For purposes of an Order No. 69 analysis, the relevant fact is simply that the GTA is *not* an all-requirements contract between Surprise Valley and PacifiCorp. The finer details of the GTA, including who has jurisdiction over its terms, are beside the point.

c. Surprise Valley Makes Numerous Misstatements About PacifiCorp and the GTA

For purpose of further clearing the air on a number of issues regarding the GTA, PacifiCorp will briefly address some other apparently misunderstandings in Surprise Valley's Motion:

- Surprise Valley asserts that: "The Commission cannot lawfully resolve PacifiCorp's concerns regarding the GTA because that agreement is within FERC's exclusive jurisdiction."[42]

  PacifiCorp is not seeking any relief at the Commission related to the GTA.

[42] Motion to Strike at 6.

- Surprise Valley states: "Nor can PacifiCorp hold Surprise Valley's PURPA rights hostage based on a GTA that PacifiCorp has unilaterally elected not to seek to revise."[43]

  PacifiCorp is not holding Surprise Valley's rights "hostage." If Surprise Valley agrees to the terms and conditions of the Company's standard Oregon off-system PPA (including its delivery requirements), PacifiCorp has no issue executing a PPA with Surprise Valley. No modification to the GTA is required to execute a standard QF PPA, on-system or off-system.

- Surprise Valley states: "PacifiCorp points to its dissatisfaction with the GTA as a reason to disregard its mandatory purchase obligation."[44]

  As explained at length above, this is simply wrong. No modification of the GTA is required as a prerequisite to a standard QF PPA.

- Surprise Valley states: "PacifiCorp avers that the GTA will fail to properly account for the sale of the Paisley Project's output to PacifiCorp."[45]

  This is incorrect. PacifiCorp contends that if Surprise Valley fails to make the firm, scheduled, verifiable delivery requirements detailed in the Company's standard off-system QF PPA, PacifiCorp may not receive the quantity and quality of power it has contracted to purchase. The discussion of the GTA addresses the impact *of that failure and resulting harm to customers.*

- Surprise Valley states: "PacifiCorp argues that the GTA with Bonneville is an obstacle to the company entering into a PPA with Surprise Valley because, if left unrevised, the GTA may cause increases in costs to PacifiCorp's retail customers."[46]

  As above, PacifiCorp is here discussing the harm that may accrue to customers if Surprise Valley fails to make appropriate arrangements to deliver its power to PacifiCorp's system. The full amount of power may not be delivered, and the magnitude of Surprise Valley's failure unverifiable. The discussion of the GTA addresses the resulting harm to customers.

  Moreover, PacifiCorp is under no obligation to modify its GTA with Bonneville to mitigate the damage caused by Surprise Valley's failure to verifiably deliver its power. Neither would a modification of the GTA eliminate Surprise Valley's requirements to comply with the terms of the Company's standard off-system PPA in any case.

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[43] *Id.*
[44] *Id.* at 3.
[45] *Id.*
[46] *Id.* at 4.

Surprise Valley repeats such assertions over and over in its Motion to Strike, and they simply miss the point.[47]

C. PacifiCorp's References to the GTA Do Not Give Surprise Valley the Unfettered Right to Discovery About the Transmission Contract Between Bonneville and PacifiCorp

Finally, Surprise Valley improperly tries to shoehorn a discovery issue into its Motion to Strike. Surprise Valley states, "PacifiCorp's refusal or inability to respond to discovery on the GTA provides an independent basis to strike the GTA defense from the Answer and conclude that the GTA is beyond the scope of the Commission's jurisdiction."[48] This assertion is absurd.

The fact that PacifiCorp mentions the GTA in its Answer does not give Surprise Valley the unfettered right to discovery about the GTA; nor does it mean that PacifiCorp's objection to a specific discovery request equates to a legal basis for *striking* part of PacifiCorp's Answer. This assertion is logically false and legally unsupported. To illustrate this point, for example, Surprise Valley discusses its contractors, Power Engineers, Inc. (PEI), in its Complaint, but this does not give PacifiCorp the open-ended right to seek discovery about PEI.[49] This, in turn, does not mean that references to PEI should be stricken from Surprise Valley's Complaint.

To the extent Surprise Valley disagrees with PacifiCorp about whether particular discovery requests are appropriate, Surprise Valley should be required to raise those issues in a motion to compel or through an informal discovery conference with the Administrative Law Judge (ALJ). The scope of discovery is governed by specific Commission guidelines and rules, and disputes over specific requests should be brought to the ALJ through a vehicle where the

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[47] For example, Surprise Valley also states, "the Commission has no authority to address PacifiCorp's dissatisfaction with the GTA." Motion to Strike at 9. PacifiCorp's satisfaction or dissatisfaction with the GTA is irrelevant to these proceedings, and PacifiCorp is seeking no relief related to the GTA.
[48] Surprise Valley Motion to Strike at 12-13.
[49] Surprise Valley Complaint at ¶¶ 24-27.

proper legal standards can be addressed. Disputes over discovery are properly decided in the context of discovery motions or informal dispute resolution (the Company's preferred approach, which it has repeatedly offered to Surprise Valley) rather than shoehorned into a motion to strike.

D. Summary

The heart of Surprise Valley's Motion to Strike is encapsulated in the opening sentence of its Request for Relief:

> PacifiCorp argues that the GTA is a legitimate ground to refuse to enter into a PPA with Surprise Valley.[50]

This statement is wrong.

Surprise Valley's unwillingness to agree to the terms of an Oregon QF PPA is the basis for PacifiCorp's refusal to enter into a QF PPA with Surprise Valley. The arguments in Surprise Valley's Motion to Strike stem from this fundamental error. Those arguments are meritless and should be rejected.

IV. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully asks the Commission to deny Surprise Valley's Motion to Strike. Surprise Valley's motion is untimely, inappropriate, and meritless. The relief requested is premature and legally unsupported, and would prejudice PacifiCorp's right to respond fully to the issues raised in Surprise Valley's Complaint and to develop and present its case before the Commission. Striking any portion of PacifiCorp's Answer would prejudice PacifiCorp's ability to fully and fairly respond to the allegations against it and would fail to honor the requirement found in ORCP 12A that "all pleadings shall be liberally construed with a view of substantial justice between the parties."

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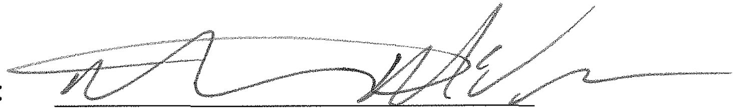
[50] Motion to Strike at 15.

Respectfully submitted this 23rd day of November, 2015.

By: 

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