BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP, dba PACIFIC POWER, Investigation into Schedule 37 - Avoided Cost Purchases from Qualifying Facilities of 10,000 kW or Less	Docket No. UM 1794 COMMUNITY RENEWABLE ENERGY ASSOCIATION'S RESPONSE TO PACIFICORP'S REQUEST FOR ALJ CERTIFICATION

I. INTRODUCTION

The Community Renewable Energy Association ("CREA") respectfully files this response in opposition to PacifiCorp's request to clarify or certify Administrative Law Judge ("ALJ") Allan Arlow's ruling requiring PacifiCorp to provide complete responses to CREA's first set of discovery requests under OAR 860-001-0500(6). The background and basis supporting ALJ Arlow's oral ruling directing PacifiCorp to provide complete discovery responses is set forth in detail in CREA's summary of the discovery dispute, which PacifiCorp filed as an attachment to its motion for clarification/certification. CREA stands by its substantive arguments and ALJ Arlow's directive in favor of those arguments without repeating them here, and instead responds to PacifiCorp's new motion for clarification/certification. For the reasons explained below, ALJ Arlow should deny PacifiCorp's request for certification and again direct PacifiCorp to provide complete discovery responses to prevent further delay of this expedited proceeding before the Oregon Public Utility Commission ("OPUC").

Additionally, in the alternative, if ALJ Arlow agrees that his prior directive at the discovery conference has no legal effect, CREA is concurrently filing an expedited motion to

compel discovery for the same reasons ALJ Arlow already directed PacifiCorp to provide discovery responses. ALJ Arlow could grant CREA's motion to compel, which would moot PacifiCorp's procedural arguments.

II. ARGUMENT

A. PacifiCorp's Objection to Providing Discovery Fails on the Merits.

On the merits of the discovery dispute, PacifiCorp offers nothing new that warrants reconsideration of ALJ Arlow's direction that PacifiCorp provide complete responses to CREA's first set of data requests. Although PacifiCorp asserts that its basic procedural rights were somehow violated, its arguments in its request for ALJ certification add nothing new to the arguments it previously presented at the discovery conference. ALJ Arlow should therefore again direct PacifiCorp to provide complete responses to all of the requests contained in CREA's first set of data requests.

As noted in CREA's prior submittal triggering the discovery conference, the data requests sought three categories of materials: (1) information regarding the 2016 Renewable Request for Proposals ("RFP") and internal documents supporting PacifiCorp's ultimate course of action in the RFP (data requests 1.1 through 1.7); (2) information regarding the assumptions and support for use of a Wyoming wind farm as the proxy resource, as exists in the currently effective avoided cost rates (data requests 1.8 and 1.9); and (3) information and documents related to PacifiCorp's need for renewable resources, including inconsistent statements made to the legislature and documents produced in the ongoing renewable implementation plan docket (data requests 1.10 and 1.11). PacifiCorp's motion for clarification/certification provides no argument whatsoever regarding the second and third categories of requests, and therefore

concedes that ALJ Arlow correctly directed complete responses to those requests.[1] PacifiCorp only actually presents argument disputing its obligation to provide information related to the RFP, but its sole argument lacks merit.

The requested RFP information was *placed in issue by PacifiCorp* in support of PacifiCorp's position. One of the most critical disputed issues in setting PacifiCorp's avoided costs in this proceeding and the precursor proceedings has been the proper cost assumptions for PacifiCorp's next avoidable wind facility. CREA and OPUC Staff have argued that the OPUC should require PacifiCorp to use the cost assumptions from its acknowledged 2015 Integrated Resource Plan ("IRP") for the purpose of setting avoided cost rates, but PacifiCorp has argued that the lower costs for a wind facility contained in its post-hoc, *unacknowledged* 2015 IRP Update are more reasonable. *See* Order No. 16-307 at App. A at 4-6. The OPUC has a well-established policy not to set avoided costs based upon an *unacknowledged* IRP Update. *See* Order No. 14-058 at 25-26. Thus, recognizing it had to somehow legitimize its *unacknowledged* 2015 IRP Update, PacifiCorp directly pointed to the alleged RFP results as a basis to corroborate the *unacknowledged* 2015 IRP Update's cost figures through its Supplemental Application in docket UM 1729 (cited in the data requests themselves), and then apparently presented those RFP results (or some summary of them) to the OPUC in an ex parte presentation of the RFP results on July 26, 2016. The RFP information requested is therefore inextricably intertwined with direct assertions PacifiCorp made to the OPUC in support of its wind proxy cost proposals from the *unacknowledged* 2015 IRP Update.

[1] Indeed, just yesterday, PacifiCorp provided supplemental responses to data requests 1.9 and 1.10, further conceding these topics are relevant and complete responses are also necessary to data requests 1.8 and 1.11.

PacifiCorp's recent filing of testimony in this docket only further supports the relevance of the RFP results that PacifiCorp has already presented to the OPUC. Despite arguing that it would not present evidence in docket UM 1794 that placed the RFP results in issue, PacifiCorp in fact relies again on its *unacknowledged* 2015 IRP Update. *See* UM 1794 PAC/100, Dickman/4:9-15 (relying on its UM 1729 Supplemental Application, which was "explicitly linked to using updated cost and performance assumptions for the proxy renewable resource"); *id.* at 6:9-10 (alleging there have been "significant reductions in the cost of renewable resources since the 2015 IRP was prepared," and the 2015 IRP Update is more accurate). Although PacifiCorp does not again cite its alleged RFP results as a basis to support the *unacknowledged* 2015 IRP Update, it already alleged the RFP results support its position and apparently presented those results to the OPUC in an ex parte proceeding. Put simply, that bell cannot be un-rung by relabeling this docket UM 1794 instead of docket UM 1729.

The RFP information is relevant and potentially useful for multiple additional reasons aside from the reasons PacifiCorp itself already used it in a presentation to the Commissioners and its Supplemental Application in docket UM 1729. For example, CREA's data request 1.7 requests the cost assumptions for Bonneville Power Administration transmission used for purposes of evaluating RFP bids, which may enable CREA to develop its own proposal for the avoided cost rates with inclusion of an appropriate transmission cost adder to the avoided costs for an Oregon wind farm. And CREA's data request 1.6 requests all documents provided to PacifiCorp's executive officers and board of directors regarding its decision not to acquire a physical resource in the RFP, which obviously may provide insights into PacifiCorp's actual resource sufficiency position beyond the statements made in its IRP's and filings at the OPUC.

PacifiCorp provides no basis to withhold such documents or a privilege log listing the materials it claims to be privileged. Furthermore, the RFP information is potentially useful and relevant for the independent reason to test the truth of the allegations PacifiCorp made earlier in this proceeding. If PacifiCorp or its witnesses misled or withheld material facts in making assertions about the RFP bid results and current market conditions, that fact would be useful for impeachment of the credibility of PacifiCorp and its witnesses in this proceeding.

PacifiCorp's objection that the material is confidential is misplaced. It is well settled that "a party's assertion that information responsive to a discovery request is confidential may not be used to delay the discovery process." OAR 860-001-0500(8). Additionally, PacifiCorp's claims are undercut by the fact that it apparently already shared much of the information (or a summary of it) at an ex parte meeting with the Commissioners. Having done so, PacifiCorp cannot withhold the data underlying its assertions from parties here.

PacifiCorp suggests that counsel for CREA will disseminate the RFP information for use among businesses that CREA represents for the purpose of gaming the next RFP. This suggestion actually contradicts PacifiCorp's lead position in its recently filed testimony, which is that it will not hold another renewable RFP to acquire a renewable resource until at least 2028. While CREA does believe that PacifiCorp will wait more than a decade to acquire new renewable resources, the bid results in the now-closed RFP may not be highly sensitive because there would be no way to use them to PacifiCorp's disadvantage in another RFP. In any event, such concerns can be, and regularly are, addressed by the terms of a modified protective order. Indeed, ALJ Arlow appropriately directed PacifiCorp to work with the other parties and Staff to

develop the necessary protective order. The allegedly sensitive nature of the material is not a basis to deny discovery.

Therefore, ALJ Arlow should again reject PacifiCorp's discovery objections.

B. PacifiCorp's Procedural Arguments Are Misplaced and Should Be Rejected.

1. ALJ's Directive at the Discovery Conference Is Binding on PacifiCorp.

The crux of PacifiCorp's latest gambit to refuse to cooperate is that ALJ Arlow did not have authority to direct PacifiCorp to produce the requested materials during a conference to facilitate resolution of a discovery dispute. But this argument fails.

The OPUC's administrative rules grant the ALJ broad discretion to "[s]upervise and control discovery." OAR 860-001-0090(g). The ALJ has express authority to "conduct a conference to facilitate resolution of discovery disputes," OAR 860-001-0500(6), and to "[t]ake *any other action* consistent with the duties of an ALJ." OAR 860-001-0090(m) (emphasis added). Accordingly, ALJ Arlow acted well within his authority to reject PacifiCorp's baseless arguments and direct PacifiCorp to *promptly* provide complete discovery responses and develop any reasonably necessary protective orders to allow for such discovery, particularly in this proceeding which the OPUC directed would be conducted on an expedited basis.

Ignoring the plain language of the OPUC's rules, PacifiCorp writes new restrictions on the authority of the ALJ. PacifiCorp cites OAR 860-001-0500(6), and asserts: "The ALJ does not issue a ruling or otherwise direct parties to respond to discovery, and the discovery conference is not binding on parties." *PacifiCorp's Motion for Clarification/Certification* at 6 (footnotes omitted). But the rule includes no such restrictions. Instead, as noted above, the ALJ has broad discretion to supervise and control discovery.

PacifiCorp chose to participate in the discovery conference. It could have declined to participate and submitted a polite correspondence indicating that it did not believe it could respond on an expedited basis. But it did not. Instead, PacifiCorp elected to participate, argued its position, and lost. Now it must comply with the directive made by ALJ Arlow in that conference – just as CREA did when ALJ Grant sided with PacifiCorp in a discovery conference on the same subject matter during the non-contested case in docket UM 1729.

Apparently, PacifiCorp believes it must only comply with directives that are in written orders, and may ignore an ALJ's resolution of a discovery dispute that occurs during an expedited discovery conference. However, the purpose of the right to request a discovery conference is to "facilitate *resolution*" of a discovery dispute – not to provide a proposed resolution PacifiCorp may choose to unilaterally ignore after the discovery conference. OAR 860-001-0500(6) (emphasis added). The obvious intent of the rule is to allow for expedited resolution of discovery disputes. Under PacifiCorp's interpretation of the rules, the right to seek ALJ resolution through an expedited conference would be useless because it would actually result in additional delays. Instead of obtaining resolution of the dispute, the party would be forced – as CREA has been here in the alternative – to file a motion to compel discovery *after* the ALJ has already directly opined and resolved the dispute at issue.

2. There is no basis for ALJ Arlow to certify the ruling to the Commission.

PacifiCorp incorrectly asserts that, if ALJ Arlow's directive is binding, certification to the Commission is warranted because the ruling may result "in substantial detriment to the public interest or undue prejudice to" PacifiCorp or because "good cause exists for certification." OAR 860-001-0110(2). Neither requirement for certification is met.

PacifiCorp can hardly claim it is "prejudiced" by disclosure of highly confidential RFP bids when it already presented the information (or a summary of it) to the Commissioners and when PacifiCorp has made no effort to craft an appropriate modified protective order.[2] In fact, the equities here weigh sharply against PacifiCorp's uncooperative behavior, particularly where certification will only further delay the proceedings and ensure that the existing procedural schedule will need to be modified for CREA, Staff and other intervenors to use the currently withheld materials in their own testimony.

PacifiCorp argues there is good cause for certification because its rights were impaired by CREA's summary of the discovery dispute submitted with its request for a discovery conference.[3] However, an ALJ could not promptly resolve a discovery dispute during a conference call without a clear summary of the disputed issues. CREA's request itself was only eight pages long and concisely summarized the issues and CREA's position. PacifiCorp cannot seriously claim any procedural harm because it knew CREA intended to request ALJ resolution days in advance, providing it ample time to assemble its responsive position. Furthermore, under the OPUC's rules, PacifiCorp must provide its objections to data requests "in writing" at the time that its responses are due. OAR 860-001-540(1). Therefore, CREA's submittal requesting resolution of the dispute was effectively a response to PacifiCorp's objections set forth in its answers to the data requests at issue. That PacifiCorp failed to provide complete explanation of its objections at the time it refused to respond to the data requests is no basis to punish or impose further delays upon CREA.

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[2] CREA is not aware of PacifiCorp reaching out to the other parties to propose, or even discuss, modified protective order language it would find acceptable.

[3] PacifiCorp suggests that the CREA's request for resolution of the discovery dispute was *filed* in the docket. It was not filed; instead, it was electronically submitted to ALJ Arlow and all parties to ensure that no ex parte contact occurred.

In any event, ALJ Arlow provided PacifiCorp with ample opportunity to respond on the merits of the discovery dispute prior to resolving the dispute. PacifiCorp responded to CREA's position both through an email to ALJ Arlow prior to the conference and through an opportunity to orally respond during the conference. The email submitted by PacifiCorp prior to the conference is attached to PacifiCorp's motion, and a cursory review of it reveals that PacifiCorp's email in fact makes virtually the same substantive arguments against discovery PacifiCorp now makes in its certification motion. The additional time has led to no new revelations in PacifiCorp's latest motion. PacifiCorp was therefore not prejudiced.

III. CONCLUSION

CREA requests that the ALJ deny PacifiCorp's request for clarification/certification and again direct PacifiCorp to comply with the rules of discovery by providing complete responses to CREA's first set of data requests. In the alternative, if ALJ Arlow's prior directive at the discovery conference has no legal effect, CREA is concurrently filing a motion to compel discovery for the same reasons ALJ Arlow already directed PacifiCorp to provide discovery responses, which the ALJ could grant to moot PacifiCorp's procedural arguments.

RESPECTFULLY SUBMITTED this 19th day of October, 2016.

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