BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP	)	UE 307
	)	
PacifiCorp 2017 Transition Adjustment Mechanism	)	
	)	
	)	

NOBLE AMERICAS ENERGY SOLUTIONS LLC'S RESPONSE BRIEF

REDACTED

SEPTEMBER 26, 2016

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I. INTRODUCTION AND SUMMARY

Noble Americas Energy Solutions LLC ("Noble Solutions") hereby files with the Public Utility Commission of Oregon ("OPUC") its post-hearing legal brief in the above-captioned proceeding. Although other intervenors primarily focus on net power costs for cost-of-service customers in PacifiCorp's annual transition adjustment mechanism ("TAM") dockets, Noble Solutions actively participates in the TAM to address the rates PacifiCorp may charge direct access customers who purchase generation from an electricity service supplier ("ESS").

Oregon law has long provided that customers should have access to retail alternatives through Oregon's direct access law and many customers have recently expressed interest in such retail alternatives. However, PacifiCorp's transition adjustment charges have created an economic barrier to direct access, and even after implementation of PacifiCorp's new five-year opt-out program, participation in direct access in PacifiCorp's service territory remains at an extremely low level of 3.5 percent of eligible load.[1]

Noble Solutions submits two proposals in this docket to improve the calculation of the transition charges and mitigate the arbitrary economic barrier to direct access that currently exists in PacifiCorp's service territory:

- *First*, the Schedule 294 (one-year program), 295 (three-year program) and 296 (five-year program) transition charges should be reduced to reflect the value of freed-up renewable energy certificates ("RECs"). It is undisputed that a customer's direct access election provides PacifiCorp with freed-up RECs, and that those freed-up RECs constitute a stranded benefit retained by PacifiCorp.

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[1] OPUC Status Report on Electricity Restructuring (July 2016), available at http://www.puc.state.or.us/electric_restruc/statrpt/2016/June_2016_Status_Report.pdf.

The only dispute is over how to value that stranded benefit. PacifiCorp unreasonably argues the Commission should assume the freed-up RECs are completely valueless. But Noble Solutions has demonstrated that a reasonable value can be assigned to the freed-up RECs, and doing so is consistent with the notion that stranded benefits should be used to reduce the stranded cost charges. The Commission should therefore acknowledge that freed-up RECs are a stranded benefit and require PacifiCorp to include a reasonable REC credit in transition adjustment calculation.

- *Second*, in calculating the transition charges assessed in the five-year program, PacifiCorp should not *escalate* its projected fixed generation costs in Schedule 200 for a full 10 years after the customer commits not to use PacifiCorp's generation resources. Rather, fixed generation investments attributed to the participant in the five-year program should be frozen after year five (at the latest), and Schedule 200 should therefore decline each year from year six through year 10 to reflect the effects of increased accumulated depreciation and declining returns on those previously made investments. Unlike last year, PacifiCorp has actually argued in this proceeding that it is reasonable to continue charging a direct access customer for PacifiCorp's *new* generation investments for a full 10 years after the direct access customer commits not to use those resources. PacifiCorp's new argument demonstrates the unlawfulness of its current rate calculation because Oregon's direct access law reasonably limits the transition charges to the pool of generation investments that *were* incurred on the direct

access customer's behalf – not those that occur six to 10 years after the customer's departure. Thus, although this issue is currently on appeal from last year's TAM, the Commission has the opportunity, and the obligation, to correct this erroneous miscalculation of the consumer opt-out charge based on the record developed in this proceeding.

II. REGULATORY BACKGROUND

A. Oregon's Direct Access Law and Regulations.

Under a retail direct access program, the direct access customer continues to use the utility's distribution system but obtains energy from another retail supplier. Noble Solutions/100, Higgins/5. Initially enacted in 1999, Oregon's direct access law ("S.B. 1149") specifically instructs the Commission to develop policies to "eliminate barriers to the development of a competitive retail market structure[.]" ORS 757.646(1). In its findings supporting the legislation, the legislative assembly declared 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. The direct access law requires that all nonresidential retail customers be allowed direct access to competitive markets by purchasing generation services from a Commission-certified ESS. ORS 757.600(6), (16), 757.601(1), 757.649(1)(a).

The law further addresses stranded costs and stranded benefits caused by a customer's direct access election. *See* ORS 757.607(2). It characterizes stranded costs as "uneconomic utility investments," which are defined, in pertinent part, as certain investments "that *were* prudent at the time the obligations *were* assumed but the full costs of which are no longer

recoverable *as a direct result of* [*direct access*], absent transition charges." ORS 757.600(35) (emphasis added).

But the law also contemplated stranded benefits, which were characterized as "economic utility investments." ORS 757.600(10). If, for example, the utility's existing generation fleet could produce electrical output or other valuable attributes that are more valuable than the remaining costs of those facilities, a significant loss of customer load could result in profits that would flow to the utility's shareholders or its remaining customers. *See* Noble Solutions/100, Higgins/8-9. Thus, economic utility investments could benefit the customers that do not elect direct access if a credit is not provided to direct access customers in the amount of the benefit. *See id.* at 17.

The law allows the PUC to apply "transition charges" or provide "transition credits" to a customer who departs from the incumbent electric company's traditional generation offering in amounts up to, *but not in excess of*, the full amount of the electric company's transition costs. ORS 757.600(31) & (32), 757.607(2). If necessary to prevent "unwarranted shifting of costs," the PUC may assess direct access customers with transition charges. ORS 757.607(1).

The Commission's administrative rules provide that direct access customers "will receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all [investments] as determined pursuant to an auction, an administrative valuation, or an ongoing valuation." OAR 860-038-0160(1). The rules further require that PacifiCorp use the "ongoing valuation" method, which determines the "transition costs or benefits for a generation asset by comparing the value of the asset output at projected market prices for a defined period to an estimate of the revenue requirement of the asset for the same time period." OAR 860-038-

0005(41); *see also* OAR 860-038-0080(5)-(6), 860-038-0140(1). The design logic in this approach places departing direct access customers in an economically "break even" position with respect to the choice of direct access service, while at the same time holding non-participating customers harmless. Noble Solutions/100, Higgins/8-9.

B. PacifiCorp's Direct Access Programs.

Prior to the 2016 shopping year, customers in PacifiCorp's service territory had a choice between one-year and three-year programs, under which the customer is never able to cease paying for PacifiCorp's generation resources. However, this is the second year that PacifiCorp's five-year program will provide the opportunity for eligible customers to enter into a permanent opt-out program and eventually stop paying PacifiCorp for generation resources.

1. PacifiCorp's One-Year (Schedule 294) and Three-Year (Schedule 295) Programs.

PacifiCorp's one-year and three-year programs implement a perpetual ongoing valuation rate structure. PacifiCorp's transition adjustment equals the difference between PacifiCorp's net power cost (as reflected in Schedule 201)[2] and the estimated market value of the electricity that is freed up when a customer chooses direct access service. Noble Solutions/100, Higgins/11. However, even though PacifiCorp's transition adjustment results in a credit to the customer, PacifiCorp's direct access customers must continue to pay for the Company's fixed-generation costs through Schedule 200. *Id*. The end result is that the one-year or three-year program participant pays substantial amounts to PacifiCorp for generation resources the customer does not use. *See id.* at 12 (noting that the 2017 one-year program participant on Schedule 48-P will

[2] Schedule 201's "net power costs" include long-term power purchase contracts, short-term market purchases, and fuel for power generation; whereas Schedule 200's "fixed generation costs" include the costs of PacifiCorp-owned power plants placed in rate base upon which PacifiCorp is allowed to earn its authorized rate of return. Noble Solutions/100, Higgins/10-11.

pay PacifiCorp $26.73 per megawatt-hour ("MWh") on Schedule 200 but is projected to only receive a transition credit of $1.81 per MWh during heavy load hours and an average credit of $0.24 per MWh during light load hours).

Additionally, the one-year and three-year program participants will pay the ESS for generation supply and pay PacifiCorp for delivery service. *Id.* at 6-7. At the conclusion of the one-year or three-year term, the customer returns to cost-of-service or elects a new one-year or three-year term. Under this regime, the customer never stops paying for PacifiCorp's generation resources. *Id.* at 7.

2. PacifiCorp's Five-Year Program (Schedule 296).

In contrast to the one-year and three-year programs, PacifiCorp's five-year program allows customers to eventually migrate to 100 percent market prices without any remaining obligations to PacifiCorp for generation resources. The customers in the five-year program must provide four years' advance notice to return to PacifiCorp's cost-of-service rates for generation resources. *In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, OPUC Order No. 15-060, at 12-13 (Feb. 24, 2015). The program is therefore effectively a permanent opt-out program, and PacifiCorp does not plan to serve the customer's load. *See In the Matter of PacifiCorp, dba Pacific Power, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol*, OPUC Order No. 16-319, at App. A at 8-9 (Aug. 23, 2016) (noting Schedule 296 allows customers "to permanently opt-out of cost-of-service rates after ten years of transition costs in Oregon"); *In the Matter of Pub. Util. Comm'n of Or.: Investigation Into Integrated Resource Planning*, OPUC Order No. 07-002, at 19 (Jan. 8, 2007) (concluding that customers in PGE's analogous five-year program are

"'effectively committed to service' under direct access" and should be excluded from the utility's planning until they provide notice to return to cost-of-service rates).

Schedule 296 consists of two major parts: (1) a five-year transition adjustment component that is nearly identical to the calculation of the Schedule 294 and 295 transition adjustments; and (2) a consumer opt-out charge, which brings forward into years one through five the projected Schedule 200 costs for years six through 10, net of projected net power cost savings attributed to the departed opt-out load. Noble Solutions/100, Higgins/22-23. In addition to the Schedule 296 charge, the customer must also pay PacifiCorp the base Schedule 200 charge for the first five years, which may be updated in each rate case during that period. *Id.* at 23. From the effective date of the opt-out election forward, i.e., January 1, 2017 in the case of this year's TAM, the customer will also pay the ESS for generation supply and pay PacifiCorp for delivery service. *Id.* Although the one-year and three-year programs can theoretically result in a "break even" value proposition for the customer due to savings on market purchases through the ESS, the five-year program is guaranteed to result in a negative value proposition until the customer completes its five-year transition term. *Id.* at 23-24.

To illustrate the economic barrier, the record demonstrates that in the first year of the five-year program, a Schedule 48-P customer would pay an average of $26.73 per MWh for Schedule 200, while receiving a transition adjustment credit of only $1.76 per MWh, for a net charge of $24.97 per MWh, prior to considering the consumer opt-out charge. *Id.* at 24. Then, *in addition*, the customer would pay a consumer opt-out charge of $13.37 per MWh. *Id.* Based on PacifiCorp's sample charges, a participating customer opting out this year and using 10,000 MWh of energy per month (roughly the size of a 10 MW customer) would pay PacifiCorp

$4,600,800 in 2017 alone for transition charges. *Id.* The customer would continue to pay additional transition charges for the each of five years through 2021. These charges for PacifiCorp's generation that the customer does not use will exist prior to purchasing the generation supply that will actually serve the customer's load from the ESS.

III. LEGAL STANDARD

When the Commission sets rates for a public utility, it is performing a quasi-legislative function. *Gearhart v. Pub. Util. Commn. of Or.*, 356 Or 216, 221, 339 P.3d 904 (2014). Oregon law requires that rates assessed to direct access customers in each final Commission order be fair, just and reasonable. ORS 756.040(1), 757.210(1)(a). The burden of proof is borne by the utility throughout the proceeding. ORS 757.210(1)(a); *In the Matter of Portland General Electric Co.: 2012 Annual Power Cost Update*, OPUC Order No. 11-432, at 3 (Nov. 2, 2011). Thus, the Commission has a statutory duty to ensure that the direct access rates approved in this docket are just and reasonable and provide eligible customers with a meaningful opportunity to access competitive retail markets.

IV. ARGUMENT

The Commission should adopt Noble Solutions' reasonable recommendations to prevent assessment of unjust and unreasonable rates to customers eligible for direct access in PacifiCorp's service territory.

A. The Commission Should Rule that Freed-Up RECs Are a Stranded Benefit and Should Include a REC Credit in the Transition Adjustment Calculation.

Direct access customers should receive a credit for the freed-up value of PacifiCorp's RPS resources during the period that those RPS resources are not serving the customer's load. The transition adjustment calculation includes an assumed value of the freed-up *energy* produced

from PacifiCorp's RPS portfolio, but it overlooks that those resources also generate valuable RECs that are ignored in the calculation made through GRID modeling. Noble Solutions' proposal to implement a REC credit is a conservative and reasonable way to compensate one-year, three-year, and five-year program participants for the value of the renewable attributes of freed-up energy. PacifiCorp's arguments against a REC credit are not reasonable.

1. Freed-up RECs are stranded benefits warranting inclusion in the transition adjustment calculation.

The facts supporting implementation of a REC credit are largely undisputed. No party disputes that the direct access election frees up RECs for PacifiCorp's use. Tr. at vol. I p. 27 (Dickman)[3]; *id.* at 102 (Gibbens). The RECs are freed up because PacifiCorp's RPS obligation is reduced proportionately to a direct access customer's load when a customer migrates to direct access and purchases RPS-compliant energy through an ESS. *Id.* at 22-23 (Dickman); ORS 469A.052(1)(b), 469A.065.[4] It is also undisputed that during the transition period the direct access customer continues to pay for PacifiCorp's RPS-compliant resources through Schedule 200 and Schedule 201. Tr. at vol. I p. 23 (Dickman). The parties further agree that the current transition adjustment calculation contains no credit for the value of the freed-up RECs. *Id.* at 23-

[3] The final transcript has not been filed as the date of filing this brief. This brief cites to expected volume and page numbers in the final transcript based on communications with other parties and the court reporter. From the draft transcript available at the time of this filing, Volume I is the transcript labeled non-confidential; Volume II is the transcript initially labeled confidential; and Volume III is the transcript initially labeled highly confidential.

[4] The quantity of RECs required to be retired for an RPS compliance year is tied to the load served in MWh in that compliance year. ORS 469A.052(1). The Commission does not require the utilities and ESSs to retire the RECs until after issuance of an order approving the compliance report in the year after the compliance year. ORS 469A.170; OAR 860-083-0350; *see, e.g., In the Matter of Noble Americas Energy Solutions, 2015 Renewable Portfolio Compliance Report*, OPUC Order No. 16-343, Append. A at 3 (Sept. 13, 2016). Thus, the RECs retired for a compliance year should always flow directly from the MWh of load served by PacifiCorp or the ESS in that compliance year.

24 (Dickman). In addition, those direct access customers must pay their ESS for the RECs that will actually be retired to meet the RPS obligation tied to those customers' load. *See supra* n. 4.

For example, if 50 average MW of load enters the five-year program, as is assumed in the calculation of the transition charges, then roughly 65,700 RECs would be freed up for PacifiCorp's use in 2017 alone under the conservative assumption that PacifiCorp's portfolio of resources in Schedule 200 and 201 support a 15-percent RPS standard. Tr. at vol. I pp. 26-27 (Dickman).[5] Those customers would fund that same amount of stranded RECs for each of the 10 years that they must pay for the actual or projected Schedule 200 and 201 charges. *Id.* (Dickman). They would therefore receive no credit for the stranded benefits of roughly 657,000 RECs generated over those 10 years. Instead, PacifiCorp retains the 657,000 RECs for no payment. That is so because the transition adjustment calculation assumes that the only benefits freed up are the benefits reflected in GRID – such as the value of the freed-up energy sold on the wholesale market or the fuel-cost savings in backing down thermal generation. *See Id.* at 32 (Dickman); *accord* Noble Solutions/100, Higgins/13, 20.

In other words, the Commission's currently approved mechanism for calculating the charges for the five-year program assumes that roughly 657,000 RECs will be freed up by the direct access customers that enter the program each year, but also assumes those RECs have no value that should reduce the stranded cost charge to those customers. The same conceptual flaw exists in the one-year and three-year programs. Noble Solutions/100, Higgins/21-22.

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[5] In fact, PacifiCorp's witness testified that the portfolio of RPS resources currently in Schedules 200 and 201 "actually provide more than 15 percent REC[s]." *Id.* at 31 (Dickman). Thus, the direct access customers are actually paying for a portfolio that generates more RECs than assumed in the conservative example here.

The record demonstrates that freed-up RECs are a classic example of a stranded benefit. In terms of Oregon's direct access law, they are the benefits of an "economic utility investment," which includes investments in generation that "were prudent at the time the obligations were assumed but the *full benefits of which* are no longer available to consumers as a direct result of [direct access], absent transition credits." ORS 757.600(10) (emphasis added). In contradiction to the law and the Commission's rules, the direct access customers pay for the costs of PacifiCorp's renewable resources, but do not receive a credit back for the full benefits those resources produce. *See* OAR 860-038-0160(1) (requiring that customers receive credit or charge equal to "100 percent" of the net value of the benefits and costs of freed-up resources).

The Commission should correct this disparity by requiring PacifiCorp to include a credit for the value of the renewable attributes in the transition adjustment calculation. In the mechanics of the calculation that derives a value per MWh of freed-up energy, the credit could easily be computed by multiplying the assumed value of a freed-up REC by 15 percent.[6] For example, Noble Solutions' witness, Kevin C. Higgins, cited the U.S. Department of Energy's compilation of public sources of data regarding REC values, and testified that the general range of unbundled REC values is approximately $1 per REC. Noble Solutions/200, Higgins/7 & n. 2. The REC credit would constitute $1 multiplied by the RPS percentage met by PacifiCorp's resources (e.g., 15 percent in 2017), which would result in adding $0.15 to the weighted average market price of freed-up energy in the TAM calculation. Noble Solutions/100, Higgins/22. The Commission could use this public value or other confidential data in the record, including prices

[6] Each MWh of RPS-compliant energy generates one REC. OAR 330-160-0015(15).

PacifiCorp recently paid for unbundled RECs in its request for proposals ("RFP"), to set a reasonable REC credit. *See* Noble Solutions/200, Higgins/8.

The record demonstrates that it is equitable and necessary to include a REC credit in the calculation of the transition adjustment for the one-year (Schedule 294), three-year (Schedule 295), and five-year (Schedule 296) programs, as well as for the consumer opt-out charge that captures the Company's generation costs for years six through 10 in the five-year opt-out program (Schedule 296). Noble Solutions/100, Higgins/21-22, 25. Without the REC credit, direct access customers are paying twice for their RPS obligations and subsidizing RPS compliance for cost-of-service customers. *Id.* The Commission should acknowledge that the freed-up RECs are a stranded benefit and require PacifiCorp to include a reasonable credit for their value to reduce the overall stranded cost charges to direct access customers.

2. PacifiCorp's arguments in opposition to a REC credit are misplaced.

PacifiCorp makes several misguided arguments in opposition to adoption of a REC credit. However, as discussed below, PacifiCorp's objections provide no basis to ignore the value of the freed-up RECs in the transition adjustment calculation.

a. Last year's order did not address the circumstances or arguments before the Commission this year.

First, PacifiCorp argues that this issue was resolved in last year's TAM order. However, PacifiCorp overlooks that the circumstances have changed.

Last year, the Commission rejected Noble Solutions' proposal to implement a REC credit with the following reasoning:

> "Noble Solutions' formula for valuing freed-up RECs assumes PacifiCorp will sell its RECs. As PacifiCorp points out, today and for the foreseeable future, PacifiCorp will be banking RECs. Further, PacifiCorp states if the RECs are sold

> in the future, departing direct access customers will receive a share of the revenues from sales. At best, the net present value of the value of any freed-up RECs is *de minimis*."

In the Matter of PacifiCorp, dba Pacific Power, 2016 Transition Adjustment Mechanism, OPUC Order No. 15-394, at 12 (Dec. 11, 2015). Thus, the Commission rejected Noble Solutions' argument for a REC credit on the basis that the Commission understood the argument to rely upon PacifiCorp *selling* the freed-up RECs. According to last year's order, by the time PacifiCorp may actually sell those RECs several years in the future, the present value from that future sale would be "de minimis." *Id.*

In contrast to the circumstances assumed in last year's order, Noble Solutions' argument does not rely on the assumption PacifiCorp will sell freed-up RECs. *See* Noble Solutions/100, Higgins/20. As Noble Solutions' witness explained, we have pointed to actual data of actual REC transactions, including data of the prices PacifiCorp recently *paid to acquire* RECs, for the sole purpose of developing a reasonable value of the freed-up RECs. Noble Solutions/200, Higgins/5, 8. PacifiCorp's witness acknowledged that Noble Solutions' argument is not based on an assumption that PacifiCorp will sell the freed-up RECs. Tr. at vol. I pp. 28-29 (Dickman).[7] In contrast to last year, PacifiCorp's witness agrees that the critical question is not whether freed-up RECs will be sold, but whether those RECs provide quantifiable value to the Company and the remaining customers. *Id.* at 32-33 (Dickman); *id.* at 35:17-24 (Dickman).

In addition, the circumstances are materially different this year, rendering last year's resolution of the issue off point. There is no basis to assume that PacifiCorp must sell RECs to recognize that they have value this year because, unlike last year, PacifiCorp is now actively

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[7] Consequently, Staff's testimony on this topic is irrelevant because it only addresses the circumstance where PacifiCorp must sell the RECs to justify the REC credit. Tr. at vol. I p. 103.

purchasing RECs to meet Senate Bill 1547's increased RPS requirements. The increased RPS requirement obviously increases PacifiCorp's need for the freed-up RECs and makes it much easier to determine a reasonable present value of those RECs today. In fact, PacifiCorp just purchased a significant amount of RECs in an RFP, and it plans to continue to hold future RFPs to acquire RECs. Noble Solutions/200, Higgins/8-9; Tr. at vol. I pp. 33-34 (Dickman).

At a time when PacifiCorp is actively acquiring RECs, a REC credit is just as warranted as assigning value to avoided purchases of fuel and other thermal generation expenses in GRID. As PacifiCorp's witness acknowledged, the transition adjustment calculation assigns value for freed-up generation even if GRID determines that PacifiCorp would not sell the freed-up energy from that generation. Tr. at vol. I p. 32 (Dickman). Instead, if the freed-up energy available from freed-up generation cannot be sold, GRID assigns value associated with backing down the generation plants, such as lower fuel costs associated with purchasing less fuel. *Id.*; Noble Solutions/100, Higgins/13, 20. This is directly analogous to the fact that the freed-up RECs will enable PacifiCorp to purchase less RECs, and there is no basis for requiring RECs to be sold when other freed-up benefits do not need to be sold.

In short, last year's order does not address the changed circumstances before the Commission this year, which fully support inclusion of a REC credit.

b. Freed-up RECs have quantifiable value that is not "de minimis."

Next, PacifiCorp appears to assert that the freed-up RECs have no quantifiable value. Although PacifiCorp is currently purchasing RECs for a known value and plans to do so again in the future, PacifiCorp asserts there is "no reliable basis to value the freed-up RECs," and consequently the "net present value" of freed-up RECs is "de minimis." *PacifiCorp's Opening*

Br. at 56. According to PacifiCorp, the alleged difficulty in precisely forecasting the value of the RECs dictates that it is reasonable to assume the freed-up RECs *are worth absolutely nothing*. However, continuing to assume that freed-up RECs are completely valueless is not reasonable.

The record contains ample evidence of the value of freed-up RECs. As noted above, Mr. Higgins testified that publicly available data sources demonstrate that an unbundled REC has a value in the range of $1. BEGIN HIGHLY CONFIDENTIAL

[8]

END HIGHLY CONFIDENTIAL[9]

[8] *See* BEGIN HIGHLY CONFIDENTIAL END HIGHLY CONFIDENTIAL

[9] In fact, it would be reasonable to assume that several factors will put upward pressure on the

(*continued on next page*)

PacifiCorp's argument also overlooks that the REC credit will not be *de minimis* to an individual customer. BEGIN HIGHLY CONFIDENTIAL [10] END HIGHLY CONFIDENTIAL For the five-year program, the credit would apply in each of the 10 years for which the customer pays for PacifiCorp's generation resources, further multiplying the reduction the transition charges to that customer. While PacifiCorp may believe that these amounts are insignificant compared to its overall revenue requirement, the REC credit would be significant to the individual customer, and recognition of this stranded benefit is the equitable policy the Commission should adopt.

c. There is no need for a "REC tracking" mechanism.

PacifiCorp further asserts that the freed-up RECs must be tracked, and administration of this tracking mechanism is too burdensome on the Company. *PacifiCorp's Opening Br.* at 56; PAC/400, Dickman/90-91. This assertion relies on the assumption that a direct access customer will return to cost-of-service rates and somehow use the same RECs for which it previously received a credit to lower its transition charges. PacifiCorp's argument fails.[11]

First, with regard to the five-year program, the customers will not return to cost-of-service rates, so PacifiCorp's tracking argument is inapplicable. As PacifiCorp itself has

(*continued from prior page*) value of RECs in the next few years, including increasing RPS targets in the West, increasing customerparticipation in voluntary renewable energy programs, Clean Power Plan implementation, and other potential carbon policies.

[10] BEGIN HIGHLY CONFIDENTIAL END HIGHLY CONFIDENTIAL

[11] Notably, PacifiCorp made this same argument last year, but the Commission did not rely upon it in last year's order.

acknowledged, the five-year program is a permanent opt-out, and PacifiCorp does not need to continue planning for five-year program participants. *See* PAC/800, Dickman/43:21-23. Thus, PacifiCorp's tracking argument only applies to the one-year and three-year programs because those are the only customers potentially returning to cost-of-service rates.

Further, PacifiCorp's tracking argument is also unreasonable even for the one-year and three-year programs. It is undisputed that the direct access customers are freeing up the RECs at the same time they are paying for the resources that generate those RECs, and that those RECs have value to PacifiCorp and the remaining customers. If the customer in the one-year or three-year program subsequently returns to cost-of-service rates, it will then be paying for PacifiCorp's full bundled portfolio again and should be entitled to use the *new* RECs created by that portfolio in that future RPS-compliance year just the same as any other existing or new customer. *See* Noble Solutions/200, Higgins/10-11. PacifiCorp's tracking argument lacks merit.

d. Proposed Schedule 203 does not cure the flaw in the rate calculation.

Finally, PacifiCorp suggested in surrebuttal and in redirect testimony that PacifiCorp's newly proposed Schedule 203 will cure this problem by exempting participants in the five-year program from the charges for PacifiCorp's recent acquisition of unbundled RECs. PAC/800, Dickman/43-44; Tr. at vol. I pp. 78-79 (Dickman). This argument fails because the five-year program participants will still be paying for the existing RPS portfolio of resources through Schedule 200 and 201 for 10 full years, Tr. at vol. I p. 79 (Dickman), and that portfolio actually generates RECs at a rate in excess of the current RPS requirement of 15 percent. *Id.* at 31 (Dickman). Exempting the participants of the five-year program from *incremental acquisitions* of RECs is certainly necessary to prevent the unfair situation from becoming worse. But it does

not provide any credit for the stranded benefit of the RECs generated by the existing portfolio of RPS generation that direct access customers are in fact still funding.

Accordingly, PacifiCorp's arguments provide no basis to ignore the value of the freed-up RECs in the transition adjustment, and the Commission should adopt a REC credit.

B. The Commission Should Require PacifiCorp to Properly Account for the Impact of Accumulated Depreciation in Calculation of PacifiCorp's Fixed Generation Costs in the Consumer Opt-Out Charge for the Five-Year Program.

PacifiCorp's consumer opt-out charge for the five-year opt-out program impermissibly escalates the fixed generation costs included in the transition charges for a full 10 years after the customer commits to stop using PacifiCorp's generation resources. However, the unrebutted evidence (as well as basic regulatory accounting principles) establishes that once the pool of stranded generation assets is closed, the revenue requirement for that pool of assets should decline each year due to the effects of normal increases in accumulated depreciation and declining returns. Although this issue was addressed last year and is currently on appeal in the Oregon Court of Appeals, the record in this proceeding supports correction of this basic miscalculation of the consumer opt-out charge for this year's election window in November.

1. Transition Charges for New Generation Investments Made Up to 10 Years After a Permanent Opt-Out Election Violate Oregon's Direct Access Law.

For a permanent opt-out such as the five-year program, PacifiCorp may not lawfully include incremental generation investments among the stranded generation assets included in transition charges. As noted above, Oregon's direct access statute allows the Commission to set transition charges up to the full value of PacifiCorp's uneconomic utility investments. *See* ORS 757.607(2) (OPUC may approve "transition charges" that allow "full or partial recovery of the costs of uneconomic utility investments"); ORS 757.600(31) ("'Transition charge' means a

charge or fee that recovers all or a portion of an uneconomic utility investment.”). However, the law defines “uneconomic utility investments” as “all electric company *investments*, including plants and equipment and contractual or other legal obligations, *properly dedicated to generation*, conservation and workforce commitments, that *were* prudent at the time the obligations *were* assumed but the full costs of which are no longer recoverable *as a direct result of* [*direct access*], absent transition charges.” ORS 757.600(35) (emphasis added). The “statute’s past tense phrasing reflects a focus on completed conduct,” *Shuler v. Distrib. Trucking Co.*, 164 Or App 615, 620, 994 P2d 167 (1999), *rev den* 330 Or 375 (2000), – in this case, PacifiCorp’s completed conduct of incurring an obligation to generation investments *prior* to the customer’s commitment not to purchase generation services from PacifiCorp.

According to the Commission’s administrative rules, the “ongoing valuation” method determines the “transition costs or benefits for a generation asset by comparing the value of the asset output at projected market prices for a defined period to an estimate of the revenue requirement of the asset for the same time period.” OAR 860-038-0005(41); Noble Solutions/100, Higgins/8-9. Within this framework, the PUC determined in docket UE 267 to require participants in PacifiCorp’s five-year program to pay for the projected ongoing valuation charges for PacifiCorp’s generation investments for 10 years instead of for just five years. *In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-Out*, OPUC Order No. 15-060, at 6-7; *see also* OAR 860-038-0140(2) (requiring establishment of period for conducting the ongoing valuation components). However, the law and administrative rules do not allow for that stranded “revenue requirement” attributable to the direct access customer to continually expand by adding new investments well after a permanent

opt-out election. Otherwise, PacifiCorp could ignore the customer's commitment not to use PacifiCorp's generation resources and continue to acquire and charge the direct access customer for additional uneconomic utility investments into perpetuity.

2. PacifiCorp's Consumer Opt-Out Charge Unreasonably Charges Direct Access Customers for New Generation Investments Made Six to 10 Years After the Customer Commits Not to Use PacifiCorp's Generation Resources.

While the mechanics of the calculation are complicated, the record clearly establishes that PacifiCorp's consumer opt-out charge unlawfully assigns the costs of PacifiCorp's new generation investments to participants of the five-year program for 10 years after they enter the program.

As noted above, the five-year program (Schedule 296) consists of two major parts. First, it contains the transition adjustment component for the first five years, which includes the credits for each of those years that will be applied to reduce the customer's payment of the actual Schedule 200 rates in effect during the first five years. Noble Solutions/100, Higgins/22-23. Second, Schedule 296 includes the consumer opt-out charge, which is the projected Schedule 200 costs for years six through 10, minus the projected savings and proceeds from market sales attributed to the departed opt-out load calculated under the ongoing valuation method for those years. *Id.* The customer pays all of those charges in the first five years. *Id.* Critically, under PacifiCorp's proposed rates, the projected revenue requirement for Company-owned investments contained in the consumer opt-out charge for years six through 10 are simply the currently effective Schedule 200 rates *escalated* at an assumed inflation rate. *Id.* at 26.

However, absent new additions to the pool of generation investments for 10 years after the opt-out election, the projected Schedule 200 costs attributable to the customer in the five-year

program should not be escalated for 10 years. As Noble Solutions' witness, Mr. Higgins, explained, under basic rate-making principles, once the portfolio of assets is "frozen" for the purposes of a stranded cost calculation, the revenue the utility earns from its return on these rate-based investments will decline each year as those investments are depreciated and amortized. *Id.* at 26-27. This is a function of the fact that a utility is authorized to earn a return only on its *net* plant in rate base, which requires accumulated depreciation and amortization to be subtracted from rate base. *Id.* Consistent with Mr. Higgins' testimony, it is well understood that the revenue requirement of a set of stranded generating plants is "'generally a steadily declining function.'" Gregory N. Basheda, et al, *The FERC, Stranded Cost Recovery and Municipalization*, 19 ENERGY L J 351, 367 (1998). "Normal stranded plant revenue requirements therefore have a downward sloping shape * * * ." *Id.*

PacifiCorp's consumer opt-out charge should not add new investments to rate base, or ignore the effect of depreciation of the existing rate base for a closed pool of generation investments six to 10 years after a permanent opt-out election. Instead, just as PacifiCorp does for cost-of-service rates, the law requires application of the downward effect of accumulated depreciation in calculating "an estimate of the revenue requirement of the asset * * *" for transition charges. OAR 860-038-0005(41). However, the record demonstrates that PacifiCorp does not close the pool of generation investments until year 10 because it is undisputed that PacifiCorp applies virtually identical inflation rates to Schedule 200 in year one through five as it applies in years six through 10. Noble Solutions/200, Higgins/16.[12]

[12] *Compare* Noble Solutions/104, Higgins/2-3 (containing PacifiCorp's proposed calculation with escalating Schedule 200 projections at the same inflation rate for 10 full years in column (d) of the exhibit), *to* Noble Solutions/105, Higgins/2-3 (demonstrating Mr. Higgins' proposed escalation of (*continued on next page*)

In contrast to PacifiCorp's proposal, Noble Solutions' un-rebutted evidence demonstrates that the effect of normal growth in accumulated depreciation on a closed pool of rate-based investments in Schedule 200 is a significant decline in revenue requirement in the consumer opt-out charge for years six through 10. Noble Solutions/100, Higgins/26-27; Noble Solutions/105. Noble Solutions' calculation allowed the Schedule 200 charge to escalate at PacifiCorp's inflation rate for five full years, which conservatively assumes PacifiCorp made commitments to new generation investments at the time of the opt-out election that cannot be unwound for the first five years. Noble Solutions/200, Higgins/12. However, once the generation portfolio is frozen, PacifiCorp's existing generation rate base and associated return shrinks by 8.38 percent per year. Noble Solutions/100, Higgins/28. Thus, even when allowing for an escalating rate base in the first five years, the Schedule 200 entry for years six through 10 should decline by approximately 2.36 percent per year to properly account for growth in accumulated depreciation and the associated reduction in returns. *Id.*; Noble Solutions/105, Higgins/1. That refinement would merely reduce, but not eliminate, PacifiCorp's consumer opt-out charge for customers on delivery Schedule 48-P from 13.37 per MWh to 10.55 per MWh, which would reduce the overall transition charges to a hypothetical 10 MW customer on Schedule 48-P from $4,600,800 to $4,262,400 in 2017. Noble Solutions/100, Higgins/28.

PacifiCorp does not refute the testimony on the effect of accumulated depreciation on a closed pool of generation assets, but instead it makes unsupported arguments that other elements of Schedule 200 will somehow justify its continuous escalation of fixed generation costs for 10 full years. PacifiCorp speculates in its brief that other elements of Schedule 200 will somehow

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(*continued from prior page*) Schedule 200 in years one through five using PacifiCorp's escalation rate before closing the pool of generation investments and decreasing Schedule 200 in years six through 10 in column (d) in the exhibit).

increase in cost to "offset the impact of accumulated depreciation." *PacifiCorp's Opening Br.* at 59. But, as with last year, PacifiCorp provided no evidence containing any quantification or explanation of how this might be possible. The record is limited to mere speculation and contains no actual data or examples in support of PacifiCorp's argument. *See* PAC/400, Dickman/94. Moreover, PacifiCorp improperly points to new generation investments and capital additions at existing generation facilities to bolster its argument. *See id.* Reliance on such *new* investments overlooks that Oregon's direct access law does not allow transition charges to include new "electric company investments . . . properly dedicated to generation, conservation and workforce commitments" made up to 10 years after the permanent opt-out election. *See* ORS 757.600(35). Those new investments would be made for going forward services some six to 10 years (or more) after the permanent opt-out and cannot be reasonably or lawful attributed to the direct access customer. *See* Noble Solutions/200, Higgins/17.

PacifiCorp also incorrectly argues that the "time value of money" justifies its escalation of Schedule 200. PAC/400, Dickman/93. Noble Solutions' witness thoroughly refuted this assertion with the additional round of rebuttal testimony afforded this year. *See* Noble Solutions/200, Higgins/14. As Mr. Higgins explained, when applying present value analysis using a nominal discount rate, an inflation adjustment is necessary only to the extent that the variable in question is actually subject to inflation. *Id.* And, absent additions of new generation investments after year five, the variables in question in Schedule 200 are not subject to inflation after year five. *See id.* Thus, there is no basis to mechanistically apply an inflation adjustment to derive a present value, and PacifiCorp's argument has no applicability here.

3. PacifiCorp Has Changed Its Position From Last Year and Now Acknowledges that Its Consumer Opt-Out Charge Includes Newly Acquired Generation Investments.

Last year, the Commission relied upon PacifiCorp's assertion that incremental generation is not added to the consumer opt-out charge after year five, but this year PacifiCorp has contradicted that assertion – undercutting the basis for last year's order on this issue.

The "Resolution" of this issue from last year's TAM was as follows:

> "We have previously addressed the claim that the customer [sic, consumer] opt-out charge should be reduced to reflect a more accurate estimate of fixed generation costs. Noble Solutions has produced no new evidence or argument to persuade us to change our positon [sic]. *PacifiCorp explains that incremental generation is not added after year five.* PacifiCorp also explains that, in real (inflation-adjusted) terms, the fixed generation costs are held constant through year 10. As we did in previous orders, we find it reasonable to assume that fixed generation costs will increase at the rate of inflation after year five."

In the Matter of PacifiCorp, dba Pacific Power, 2016 Transition Adjustment Mechanism, OPUC Order No. 15-394 at 12 (emphasis added, footnote omitted). PacifiCorp argued last year that the consumer opt-out charge was lawful because it did not include any new generation assets added in years six through 10, and the Commission appears to have relied on that assertion in its order. *Id.*[13]

In contrast, PacifiCorp now concedes that the structure of its consumer opt-out charge allows for incremental generation investments to be added for a full 10 years. PAC/800, Dickman/49:20-21. PacifiCorp now argues that "under the Consumer Opt-Out Charge the generation assets are frozen in year 10, not five." *Id.*; *see also id.* at 49:1-2; *id.* at 50:13-16.

[13] In fact, last year, PacifiCorp went so far as to accuse Noble Solutions of making "misrepresentations" of the record to assert that the PacifiCorp's consumer opt-out charge includes additions of new generation investments in years six through 10. *See PacifiCorp's Posthearing Reply Br.*, OPUC Docket UE 296, at 29 (filed Oct. 5, 2016) ("Contrary to Noble Solutions' Misrepresentations, the Consumer Opt-Out Charge does not Include Generation Assets Added in Years Six Through 10.").

PacifiCorp's witness now agrees with Noble Solutions' understanding of the charge by stating that, "It is reasonable to consider the assets frozen after year 10, which is effectively what happens with the Consumer Opt-Out Charge." *Id.* at 51:20-21. Unlike last year, PacifiCorp now asserts it was within the Commission's discretion to require departing customers to pay actual Schedule 200 costs for the full 10 years after entering the five-year program, and "[n]owhere has the Commission concluded that the generation assets are 'frozen' in year five." *PacifiCorp's Opening Br.* at 58.[14]

The question for resolution is therefore whether it is lawful and reasonable to charge direct access customers for PacifiCorp's new generation investments made for 10 full years after the customers' election to permanently stop using any of PacifiCorp's generation resources. *See* PAC/800, Dickman/49:21 - 50:2 ("If the portfolio of assets is not frozen in year five, there is no basis for Noble Solutions' recommendation."). For the reasons explained herein and in prior proceedings, Noble Solutions submits it is not lawful or reasonable to wait 10 full years to freeze the pool of generation investments stranded by a permanent direct access election. PacifiCorp provides no evidence or explanation of why it takes 10 years to stop acquiring new generation for customers that commit not to use PacifiCorp's generation.

In fact, PacifiCorp itself acknowledges the critical point that it is unreasonable to charge participants in the five-year program for *incremental* acquisitions of resources that are not used to serve them. Specifically, in conceding that future acquisitions of RECs should not be included in rates paid by participants in the five-year program, PacifiCorp explained as follows:

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[14] PacifiCorp's position is admittedly contradictory on these points, as it also asserts that its inflation adjustment is not intended to include new generation investments in years one through five or years six through 10. PAC/800, Dickman/51:9-12. This assertion makes no sense, however, given PacifiCorp's concession that its calculation does not freeze the portfolio of generation investments until year 10.

> "[T]he Company does not intend for direct access customers participating in the five-year program to pay Schedule 203. Because the Company is no longer planning to serve those customers and the costs are easily identifiable, it is reasonable that those customers not pay for the cost of RECs purchased to meet the Company's current and future RPS obligation."

PAC/800, Dickman/43-44; *see also* Tr. at vol. I pp. 78-79 (Dickman). If PacifiCorp is correct that incremental REC acquisitions made from this point forward cannot be fairly attributed to participants in the five-year program, then there is no legitimate basis to wait 10 full years to freeze the pool of other generation-related investments in Schedule 200.

The Commission should require PacifiCorp to close the pool of incremental generation investments in Schedule 200 after year five and require PacifiCorp to apply the effects of accumulated depreciation to the consumer opt-out charge.

C. The Commission Has an Ongoing Obligation to Change Rates and Should Reject PacifiCorp's Proposal to Merely Rely on Prior Orders Regarding Direct Access.

In response to both the REC credit and the consumer opt-out charge issues, PacifiCorp asks the Commission to rely on prior orders addressing these topics, but doing so would be unreasonable and unlawful. As explained in detail above, the circumstances and arguments presented on both issues are different this year than from last year's TAM, in part because this year's TAM afforded Noble Solutions an additional round of testimony to develop the record and rebut PacifiCorp's initial arguments. No prior orders have addressed the precise facts and record that are before the Commission this year.

Additionally, the law imposes an ongoing obligation on utility commissions to evaluate rates anew based upon the record developed in each rate case. *American Can Co. v. Davis*, 28 Or App 207, 224, 559 P2d 898 (1977) (holding that commission has the duty, after a proper

showing of evidence, to change rates even in an executed contract to ensure they are just and reasonable).

Furthermore, even if prior orders addressed the same topics, it is well established that preclusion doctrines do not apply to rate orders. "A new rate order will supersede an old one." Or. Atty. Gen. Opin. No. 6454, 1992 WL 526799 at * 9 (June 8, 1992). This is so because "[e]ven when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act." *Id.* (quoting Davis, *Administrative Law Text*, § 18.01, at 370-71 (3d ed. 1972)). The Commission should address the evidence and arguments presented to ensure that the rates that go into effect in this year's election window are fair, just and reasonable to customers eligible for direct access.

V. CONCLUSION

For the reasons asserted herein, the Commission should require PacifiCorp to include a REC credit in the transition adjustment calculation for the one-year, three-year, and five-year programs, and should require PacifiCorp to properly account for the effect of accumulated depreciation in the consumer opt-out charge for the five-year program.

DATED this 26th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that on September 26, 2016, I served the non-confidential portions of Noble Americas Energy Solutions LLC's Response Legal Brief on all parties to the service list for UE 307 via the Oregon Public Utility Commission's electronic filing system, and that I served the highly confidential portions of the filing on the following qualified individuals via Federal Express two-day delivery.

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