



April 28, 2015

**Via Electronic Filing**

Public Utility Commission  
Attn: Filing Center  
3930 Fairview Industrial Drive SE  
Salem, OR 97308

Re: Docket No. UM 1712: Sierra Club's Reply Brief

Please find enclosed Sierra Club's Reply Brief in the above-referenced docket. This filing has been e-filed with the Commission and served upon parties via email.

Please let me know if you have any questions. Thank you.

Respectfully submitted,

*/s/ Derek Nelson*

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1712

In the Matter of

PACIFICORP, dba PACIFIC POWER,  
Application for Approval of Deer Creek Mine  
Transaction

SIERRA CLUB'S REPLY BRIEF

In accordance with OAR 860-001-0650 and the procedural schedule issued on April 16, 2015 by Administrative Law Judge ("ALJ") Allan Arlow in the above-captioned docket, Sierra Club hereby submits its reply brief addressing PacifiCorp's request for approval of the Deer Creek Mine Transaction.

**I. THE HUNTINGTON CSA IS NOT PRUDENT UNLESS THE COMMISSION PROTECTS RATEPAYERS FROM TAKE-OR-PAY COSTS AND DAMAGES**

Sierra Club's primary concern in this docket is the risk ratepayers will face due to the long-term coal supply agreement ("CSA") to replace the fuel supply at the Huntington coal plant. In their initial brief, PacifiCorp and the Citizen's Utility Board ("CUB") appear to concede that the Commission should not conclusively determine that the Huntington CSA is prudent under all circumstances. PacifiCorp and CUB support the following limitation on a prudence determination:

If the Company is unable to successfully exercise its termination rights and is required to pay costs or damages related to the Huntington CSA for coal that it is unable to use at Huntington or another facility, then the prudence of any costs or damages will be

subject to future Commission review, taking into account the overall benefits to customers.<sup>1</sup>

PacifiCorp also clarified its commitment to conduct its future planning based on the assumption that it can terminate the Huntington CSA without penalty:

The Company has committed to conduct its future planning based on the understanding that the Company can terminate the Huntington CSA without penalty if environmental regulations make the plant uneconomic. This commitment will ensure that the Company has no incentive to continue burning coal at the Huntington plant because of the long-term CSA.<sup>2</sup>

Notwithstanding these commitments, the Stipulation asserts that the Huntington CSA is prudent without condition. Sierra Club therefore recommends that the Commission, at a minimum, explicitly include these commitments in a final order if it determines to approve the Deer Creek Application.

The provisions limiting any prudence finding with respect to the Huntington CSA are appropriate, but they do not go far enough. Sierra Club continues to assert that ratepayers would be better protected if the Commission explicitly conditions its approval of the Huntington CSA on a clear directive that ratepayers will be held harmless in the event the Company must pay take-or-pay costs or damages related to the long-term coal contract. While PacifiCorp agrees that parties would be free in a future docket to challenge the prudence of the take-or-pay costs, it is clear that PacifiCorp will argue that those costs, if they are incurred, should be borne by ratepayers.<sup>3</sup> The Commission need not wait to clarify its position on the Huntington CSA. The record shows that a prudent manager standing in the shoes of the utility today should not subject

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<sup>1</sup> Joint Opening Brief of PacifiCorp and CUB at p. 15.

<sup>2</sup> *Id.* at p.7 (internal citations omitted).

<sup>3</sup> Joint Opening Brief at 15 (“While the Company does not agree with CUB’s position that the fact of damages would support an imprudence finding, it does agree that CUB is free to make such arguments in the future if the situation arises”).

its customers to the risks of take-or-pay damages in a long-term coal contract. If, despite this concern, PacifiCorp proceeds with the Huntington CSA, then it must assume that risk. Parties have expended significant time and resources to develop the record in this proceeding, and there is more than sufficient evidence to support a finding that ratepayers should be held harmless from any potential take-or-pay costs or damages.

## **II. MARKET PURCHASES OF COAL ARE A VIABLE SCENARIO PUT FORTH BY PACIFICORP**

In the Joint Opening Brief, PacifiCorp premised its argument that the Huntington CSA is prudent on the assertion that take-or-pay provisions are an unavoidable feature of all long-term coal contracts.<sup>4</sup> Sierra Club accepts that it did not challenge PacifiCorp's assertion that long-term coal contracts typically include take-or-pay provisions. Sierra Club's position in this docket is that the long-term coal contract itself is imprudent in the current economic and regulatory climate if, as PacifiCorp claims, such long-term contracts necessarily entail significant take-or-pay damages for early termination.

PacifiCorp contended in the joint opening brief that a long-term CSA is a foregone conclusion. "To accept parties' arguments that the Company was imprudent to enter into a long-term CSA with a take-or-pay provision would require the Commission to conclude that the Company could have used short-term contracts or spot market purchases to fuel the Huntington plant."<sup>5</sup> Sierra Club agrees with this statement to the extent it assumes market alternatives are a reasonable alternative. Sierra Club made this assumption because it was a scenario explicitly put forth by PacifiCorp in its "Market Case." Sierra Club is frankly baffled by PacifiCorp's assertion that short-term contracts or market purchases are not viable. The Company's entire Application

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<sup>4</sup> Joint Opening Brief at pp. 6, 14-15.

<sup>5</sup> Joint Opening Brief at p. 15 (emphasis added).

was based on the comparison of the “Transaction Case” to a “Market Case” and a “Keep Case.”<sup>6</sup> PacifiCorp’s statement in the Joint Opening Brief is essentially an admission that its forward-looking analysis was a sham. The record shows that the Keep Case, in which the Deer Creek mine remains open, is already an unrealistic at this point because the Company closed Deer Creek at the end of 2014.<sup>7</sup> The Company now appears to assert that the Market Case was similarly unrealistic. The Commission should not condone this type of straw-man analysis by the Company. Sierra Club and other parties expended significant resources evaluating potential supply options that were put forth by the Company. To assert later in the proceeding that those options were never realistic calls into question the validity of PacifiCorp’s entire analysis.

Sierra Club also disagrees with the Company’s assertion that short-term contract or spot market purchases would be unworkable. PacifiCorp’s own witness noted that the regional coal mining market in Utah is struggling due to a lack of demand. “Utah coal has become less competitive over time with other sources of similar-quality coal (bituminous, low-sulfur) delivered to Eastern customers...”<sup>8</sup> Mr. Schwartz predicted that PacifiCorp may soon be one of the only customers left. “The demand for Utah coal will decline at other local power plants because most of these plants have announced dates when they will close...At that point, PacifiCorp is likely to be the only consumer of Utah coal in power plants, along with the industrial customers and the export markets.”<sup>9</sup> Under such a scenario where PacifiCorp essentially controls demand, it is plausible to conclude that PacifiCorp would be able to continue to negotiate favorable short-term contracts and/or spot market purchases from the captive Utah

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<sup>6</sup> Joint Opening Brief at p. 8.

<sup>7</sup> Sierra Club/100, Fisher/22.

<sup>8</sup> PAC/300, Schwartz/18.

<sup>9</sup> PAC/300, Schwartz/19-20.

coal mines. For this reason, it was reasonable for PacifiCorp to include the “Market Case” as an alternative to the Transaction.

PacifiCorp presented the Market Case as a viable option in its Application. Sierra Club tested the assumptions of that scenario and found that it overstated the relative value of obtaining a replacement coal supply for Huntington from a long term CSA. Based on the evidence submitted in this docket, the Commission has a sufficient and reasonable basis to conclude that a long-term coal contract for Huntington is not in the best interests of ratepayers if it includes take-or-pay costs or damages. Sierra Club therefor recommends that the Commission either reject the Huntington CSA, or expressly condition approval on a requirement that PacifiCorp bear the risk of take-or-pay costs or damages.

Dated: April 28, 2015

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of April, 2015, I caused to be served the foregoing SIERRA CLUB'S REPLY BRIEF upon all party representatives on the official service list for this proceeding via electronic mail.

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Dated this 28<sup>th</sup> day of April, 2015 at San Francisco, CA.

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