BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

UM 1182

PHASE 2

In the Matter of NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION Petition for an Investigation Regarding Competitive Bidding	PREHEARING BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON

I. INTRODUCTION

Pursuant to the procedural schedule for this docket, the Citizens' Utility Board of Oregon ("CUB") respectfully submits its Pre-hearing Brief. CUB appreciates the Commission's opening of this investigatory docket and its continued efforts to make utility requests for proposals ("RFPs") as fair and transparent as possible pursuant to Guideline 10(d), which requires the independent evaluator ("IE") to compare the unique risks and advantages of utility benchmark proposals.

The Commission identified four risks to be analyzed in Phase II of this docket.[1] Those risks are:

1. Cost Over-run and Under-run Risk

2. Wind Capacity Factor Risk

3. Counter-Party Risk

4. Heat-Rate Degradation Risk

[1] OPUC Order No. 12-324, page 4.

CUB agrees that all four of these risks have the ability to significantly alter the bidding process.[2] However, CUB limits its recommendation for change through this docket to:

- *Cost Over-run and Under-run Risk* - CUB endorses NIPPC's recommendation for a construction cost adder or else a requirement that utilities demonstrate that self-build options do not include significant risk of cost overruns. CUB would like to see bid prices that provide greater certainty and shield customers from the risk of being responsible for cost over-runs.[3]

- *Wind Capacity Factor Risk* - CUB endorses NIPPC's recommendation that a capacity factor adder be applied to utility-owned bids for wind generation. CUB believes that NIPPC's recommendation is a step in the right direction in terms of developing a methodology to correct the inherent differences between utility-owned and independent resource bids. CUB believes that this adder would therefore improve the fairness of bid evaluations; however, CUB is not prepared to accept or endorse any specific quantitative adders at this time.[4]

CUB does not believe that any party has provided sufficient evidence to necessitate a change in the bid evaluation methodology to account for counterparty risk or heat rate degradation risk.[5]

II. PROCEDURAL BACKGROUND

In response to the UM 1066 Commission Order No. 11-007, the parties held a series of workshops to identify a list of twelve comparative risks or advantages (items) to consider in improving Competitive Bidding Guideline 10(d). The parties then filed comments

[2] UM 1182/CUB/100/Jenks-Feighner/2 at 1.
[3] UM 1182/CUB/100/Jenks-Feighner/7 at 3 – 7.
[4] UM 1182/CUB/100/Jenks-Feighner/6 at 18 – 21 and at 7 lines 1-2.
[5] UM 1182/CUB/100/Jenks-Feighner/7 lines 8-10.

recommending a reduced list of elements warranting further investigation. By procedural ruling dated May 30, 2012, Administrative Law Judge ("ALJ") Kirkpatrick determined further consideration of three issues was warranted, which included: (1) Cost Over-runs and Under-runs, (2) Heat Rate Degradation, and (3) Counter Party Risk. After certification of the ALJ Ruling, the Commission determined by order dated August 23, 2012, that investigation of a fourth factor was also warranted – (4) Wind Capacity Factor.

On November 16, 2012, NIPPC, Portland General Electric Company ("PGE"), PacifiCorp, Idaho Power Company ("Idaho Power"), and Commission Staff each filed Opening Testimony. On January 14, 2012, those same parties and the Citizens' Utility Board of Oregon ("CUB") filed Reply Testimony. The procedural schedule now calls for the filing of Pre-hearing Briefs.

III. STATUTORY AUTHORITY

A. The Commission's Authority to Regulate Public Utilities

Oregon law requires the Commission to "protect . . . customers, and the public generally, from unjust or unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[6] The Oregon legislature bestowed upon the Commission "broad power …to perform its delegated function."[7] Because of this, the Commission possesses wide-ranging authority to ensure that the utilities conduct their procurement processes in a way designed to obtain the most cost-effective mix of utility-owned and non-utility-owned generation resources so as to ensure that customer rates are indeed fair and reasonable.

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[6] ORS 756.040(1).
[7] *Pacific Northwest Bell v. Katz*, 116 Or. App. 302, 309 n.5 (1992) (internal quotation omitted).

B. The Commission's Competitive Bidding Orders and Rules

The OPUC's orders dating back to 1991 demonstrate that the OPUC is aware of the benefits of a fair and competitive bidding process.[8] Those orders evidence the OPUC's view that competitive bids should act to complement the Integrated Resource Planning (IRP) process and assist the utilities in obtaining the best mix of power resources at the least cost and with the least risk. The early competitive bidding goals were not, however, mandatory and contained extremely flexible guidelines. Those early guidelines were updated in a 2006 order.[9] That update was the cause of utilities having to conduct an RFP for all major resource acquisitions, subject to certain exceptions in Guideline 2.[10] In addition, the update also permitted the submission, on behalf of the utility, of a self-build option offered on a cost-of-service basis. It also permitted the utility to accept ownership transfers within an RFP solicitation.[11] This was new and troubling to CUB and other Intervenors. The 1991 guidelines had stated that permitting a utility or its affiliates to bid in its own RFP might damage the perceived credibility and fairness of the bidding process by raising questions of self-dealing. This update now permitted the submission of self build options or the acceptance of ownership transfers.

Recognizing the concerns expressed by CUB and other Intervenors, the Commission added into Guideline 5 the requirement that the utility contract for the services of an independent evaluator to ensure the process and bid scoring were fair.[12] The IE was to analyze the RFP design, oversee the utility's scoring of the bids, and provide a final report on the shortlist

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[8] *See Re Competitive Bidding by Investor-Owned Electric Utility Companies*, OPUC Docket No. UM 316, Order No. 91-1383, 127 PUR 4th 306 (1991).
[9] *Re Investigation Regarding Competitive Bidding*, OPUC Docket No. UM 1182, Order No. 06-446 (2006).
[10] *Id.* at 3-4.
[11] *Id.* at 5.
[12] *Id.* at 6-7.

selection to aid the Commission.[13] Guideline 10(d) provided:

> If the RFP allows affiliate bidding or includes ownership options, the IE will independently score the utility's Benchmark Resource (if any) and all or a sample of the bids to determine whether the selections for the initial and final short-lists are reasonable. In addition, *the IE will evaluate the unique risks and advantages associated with the Benchmark Resource (if used), including the regulatory treatment of costs or benefits related to actual construction cost and plant operation differing from what was projected for the RFP*.[14]

The Commission explained the changes to Guideline 10(d) as follows:

> Fourth, pursuant to PGE's proposal, we modify language, set forth in subsection (d), to make the discussion on risk more neutral. *<u>We</u> <u>reject</u>, however, <u>PacifiCorp's</u> <u>recommendations</u> that the Benchmark Resource option should not be treated and evaluated like a bid and <u>that</u> <u>non-price</u> <u>factors,</u> <u>such</u> <u>as</u> <u>possible</u> <u>cost</u> <u>overruns,</u> <u>should</u> <u>not</u> <u>be</u> <u>considered</u>.* We recognize that Benchmark Resources are different from other bids in that price and performance is not fixed. Such differences, however, emphasize the need to consider *the additional risk* customers bear in deciding the best option from the RFP. *This risk to customers is present even if the actual costs of the Benchmark Resource are equally likely to be lower or higher than projected in the RFP.*[15]

C. Other Historical Dockets Relevant to Competitive Bidding

The Commission opened docket UM 1276 in August 2006 "to address the *bias inherent* in the utility resource procurement process *that favors utility ownership of generation assets over PPAs* with third parties."[16] But the Commission declined to adopt any of the incentive mechanisms posited by the Intervenors for overcoming utility ownership bias.[17] Then, in UM 1066, the Commission repealed the rule requiring utilities to recover costs at market prices, expressing instead its intent to return to a cost basis for utility-owned resources.[18] But the

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[13] *Id.* at 6-9, 12-14.
[14] *Id.* at 12 (emphasis added).
[15] *Id.* at 13 (emphasis added).
[16] *See Re An Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build-vs.-Buy Bias*, OPUC Docket UM 1276, Order No. 11-001, at 1 (2011) (emphasis added).
[17] Order No. 11-001 at 5-6.
[18] *Re Investigation into Regulatory Policies Affecting New Resource Development*, OPUC Docket UM 1066, Order No. 11-007, at 1-2 (2011).

Commission did at least state that it accepted "the premise that a bias exists in the utility resource procurement process that favors utility-owned resources over PPAs."[19] And the Commission noted that "[a]lthough these guidelines have greatly increased confidence that the utility RFP process is being conducted fairly and properly, we believe further *improvements are needed to fully address utility self-build bias*."[20] The Commission also asked the parties to provide recommendations to improve Guideline 10(d):

> Guideline 10(d) requires the IE to evaluate the unique risks and advantages of utility benchmark resources, including consideration of the regulatory treatment if construction costs and plant performance should differ from expected levels. In practice, ***the IE's evaluation of the comparative risks and advantages of utility benchmark resources has not met our expectations.*** When the benchmark has been a natural gas resource, the evaluation has primarily focused on the terms of the engineering, procurement, and construction (EPC) contract. When the benchmark has been a wind resource, the evaluation has tended to focus on the value of the site location after the plant's useful life. ***We want a more comprehensive accounting and comparison of all of the relevant risks, including consideration of construction risks, operation and performance risks, and environmental regulatory risks. We also want more in-depth analysis of all of these risks.*** We invite comment on the analytic framework and methodologies that should be used to evaluate and compare resource ownership to purchasing power from an independent power producer.[21]

IV. ARGUMENT

A. The Commission Should Adopt a Construction Cost and a Wind Capacity Factor Bid Adder for Each Utility Self-Build Proposal

As stated in the Introduction to this Pre-hearing Brief, CUB endorses NIPPC's recommendation for a construction cost adder, or else a requirement that utilities demonstrate that self-build options do not include significant risk of cost over-runs. CUB would like to see bid prices that provide greater certainty and shield customers from the risk of being responsible

[19] Order No. 11-001, at 5.
[20] *Id.* at 6 (emphasis added).
[21] *Id.* at 6 (emphasis added).

for cost over-runs.[22] CUB endorses NIPPC's recommendation that a capacity factor adder be applied to utility-owned bids for wind generation. CUB believes that NIPPC's recommendation is a step in the right direction in terms of developing a methodology to correct the inherent differences between utility-owned and independent resource bids. CUB believes that this adder would therefore improve the fairness of bid evaluations; however, CUB is not prepared to accept or endorse any specific quantitative adders at this time.[23]

CUB does not believe that any party has provided sufficient evidence to necessitate a change in the bid evaluation methodology to account for counterparty risk or heat rate degradation risk.[24]

B. The Commission Should Adopt the Construction Cost and Wind Capacity Bid Adders Recommended Above

As discussed by NIPPC, in its Pre-hearing Brief, Oregon IEs have had difficulty implementing Guideline 10(d). PacifiCorp's past IE, Boston Pacific, has stated the problem with a benchmark bid "is that it is offered on a *cost-plus* basis while third-party bidders are required to guarantee their price and performance parameters."**[25]** Rather than accounting for the risk, Boston Pacific has "routinely requested that the Company to [sic] be held to its cost and performance projections in future rate cases should it be declared a winner."[26] Boston Pacific has noted that even when PacifiCorp provided no benchmark, "the 'soft costs' or 'owners costs,' which are added to the [engineering, procurement and construction ("EPC")] costs to get the full cost of the project, are still not definite. . . . [and] we would continue to ask that the Commission hold the

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[22] UM 1182/CUB/100/Jenks-Feighner/7 at 3 – 7.
[23] UM 1182/CUB/100/Jenks-Feighner/6 at 18 – 21 and at 7 lines 1-2.
[24] UM 1182/CUB/100/Jenks-Feighner/7 lines 8-10.
[25] *Re PacifiCorp: Request for Approval of Final Draft 2011 All Source Request for Proposals*, OPUC Docket No. UM 1540, Order No. 12-111, Appendix A, p. 15 (2011) (emphasis added).
[26] *Id.*

Company to their cost estimates in future ratemaking cases."[27] Similarly, PGE's IE has highlighted the risk differential between a PPA and a UOG structure with regard to wind capacity factor errors, and even proposed that "a risk adjustment should be assessed to the ownership option."[28] But the IE provided no actual accounting of this risk.CUB agrees with NIPPC that proposing risk adjustments without actually implementing any adjustment and leaving the problem unaddressed until a future ratemaking proceeding is inadequate. A better quantitative method of accounting for risk is warranted. CUB recommends that bid Construction Cost and Wind Capacity Factor adders should be incorporated into the Guideline 10(d) analysis, and that the Commission should require the IE, as part of the analysis to create an RFP's shortlist, to apply each adder to the price evaluation of any bid that would result in utility ownership after commissioning the plant.[29]

C. Arguments in Favor of the Construction Cost Adder

CUB recognizes that there are benefits to customers for both utility-owned and independent generation projects. Independent bids insulate customers from cost over-runs through contractual obligations and penalties for late project delivery. Utility-owned projects provide no such protections, but customers do benefit from cost under-runs in the form of a reduced overall rate base for the utility. There is certainly a need to address the asymmetry involved in this issue.[30]

PGE endorses an approach of minimizing cost over-run risk by seeking fixed price guarantees from contractors and by careful management of work change orders. The utility

[27] *Id.*; *see also* Confidential UM 1182 NIPPC/311/ Monsen/9.
[28] UM 1182/NIPPC/300/Monsen/46 (internal citation omitted).
[29] UM 1182/NIPPC/100/Monsen/3.
[30] UM 1182/CUB/100/Jenks-Feighner/2 lines 1-7.

proposes a bid adder for construction cost guarantees submitted by contractors.[31] PacifiCorp states that it currently requires fixed-price bids from contractors, adjusts those bids for a number of risk factors, and requires the inclusion of contingency reserves. PacifiCorp recommends that the Commission adopt its approach and sees no reason to significantly alter the bid scoring methodology.[32]

NIPPC proposes a construction cost over-run adder to account for the risk that ratepayers will be held responsible for cost over-runs of utility-owned generation projects.[33] This adder would serve to assign a risk premium to utility-owned projects that reflects the responsibility customers have for cost over-runs.[34]

CUB is receptive to NIPPC's argument that customers are fully responsible for a utility's cost over-runs, and therefore there is an inherent risk involved. On the other hand, both PGE's and PacifiCorp's arguments are founded on the utilities' ability to lock in construction costs on self-bid options. For this reason CUB recommends that the Commission should either adopt NIPPC's adder or require the utilities to demonstrate that self-build options do not include significant risks of cost over-runs.

As a final note, CUB refers the Commission to NIPPC's discussion in its Pre-hearing Brief related to what is and is not standard industry practice. The responses to NIPPC's recent discovery sheds some fresh light on that issue and are worth special note. As set forth by NIPPC, it is standard industry practice to include a construction cost contingency in any cost projection for a major generation resource. This is so even with an EPC contract that may lead a utility to

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[31] UM 1182/PGE/100/Outama-Bettis-Mody-Hager/21-22.
[32] UM 1182/PacifiCorp/100/Kusters/10-11; UM 1182/CUB/100/Jenks-Feighner/2 lines 8-14.
[33] UM 1182/NIPPC/100/Monsen/4.
[34] UM 1182/CUB/100/Jenks-Feighner/2 lines 15-18.

believe that it has some percentage of fixed costs for its UOG project because "even a well-drafted EPC contract will not protect the utility or its ratepayers against all contingencies and risks."[35] As noted by NIPPC, PacifiCorp itself stated that accounting for contingencies is "consistent with industry practices," and thus PacifiCorp has used cost contingencies even for UOG bids supported by an EPC contract.[36] However, only PacifiCorp has claimed to use such an adder, and no utility in this proceeding has committed to do so in the future. Furthermore, PacifiCorp's past use of an adder appears to overlook cost over-runs and deferred capital additions that spill into the first five years of operation and is not large enough to account even for the full risk of cost over-runs during the initial construction period.[37] The Commission should *require* use of a contingency adder by the IE in its evaluation of UOG projects to account for full magnitude of the risk of cost over-runs in UOG projects, unless the utility can demonstrate contractual terms that protect customers from cost over-run risks.

While NIPPC recommends specific bid adders for the initial construction cost and for the first five years of a plant's operations, CUB has some concerns that it is difficult to calculate one specific adder that represents all potential contract terms. A utility with a fixed-cost construction contract might have a different adder than one with a variable-cost contract. It may be that a bid adder range can be provided to the IE, or that the Commission can set one based on the difference in rights associated with the self-build proposed contracting versus the short list options.

D. Arguments in Favor of the Wind Capacity Factor Adder

Independent power producers and utilities have significant incentives to assume differing

[35] UM 1182 NIPPC/500 Kasper/2.
[36] *See* PacifiCorp/100, Kusters/20; NIPPC/500, Kasper/10; NIPPC/502.
[37] *See* NIPPC/300, Monsen/21.

wind capacity factors when submitting project bids. For utility-owned generation projects, an assumption of a higher capacity factor is beneficial, as these projects are rate-based, so customers are charged for the same level of investment regardless of generation. Customers assume the downside risk of higher prices per unit of energy generated, as well as a reduction in the number of renewable energy credits (RECs) generated by the project. Customers also receive the benefit of lower net power costs if generation exceeds estimates; however, there is little downside risk to the utility in this situation.[38]

Independent power producers, on the other hand, have an incentive to assume a lower capacity factor. There is a loss of revenue to the project if generation is lower than expected; there is also a risk to customers, as higher net power costs and additional REC purchases may be necessary to offset lower generation. When generation exceeds expected levels, however, most power purchase agreements lock the utility in to purchasing the excess generation. This means that net power costs can increase and REC purchases can be greater than expected if the contract price exceeds the current market price for electricity. This situation leaves customers to bear higher costs, yet increases revenues for the project developer.[39]

Both PGE[40] and PacifiCorp[41] believe that more robust and independent assessments of wind capacity factors can account for the inherent bias in bids from all parties. While capacity factor estimate metrics are certainly improving, CUB believes that utilities have an incentive to forecast wind availability near the highest level of the forecast range, while independent power producers have an incentive to forecast availability near the lowest level of the forecast range.

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[38] UM 1182/CUB/100/Jenks-Feighner/4 lines 5-13.
[39] UM 1182 CUB/100 Jenks-Feighner/4 lines 14-22.
[40] *See* UM 1182/PGE/100/Outama-Bettis-Mody-Hager/28-29.
[41] *See* UM 1182/PacifiCorp/100/Kusters/10-11.

NIPPC proposes an adder that reduces the wind capacity factor of utility-owned projects to account for this fundamental difference.[42] NIPPC claims this is necessary to shield customers from the potential for increased costs to customers resulting from lower-than-expected generation. CUB agrees with this approach, although not necessarily with NIPPC's methodology or the actual value of the proposed adder.[43]

As noted by NIPPC in its Pre-hearing Brief, the Oregon IEs have specifically noted the risk differential for wind capacity factor error at a UOG plant compared to a PPA structure. The IPP is only paid a fixed price per MWh and renewable energy credit produced, while UOG bids pass on all prudent capital costs of the project to the ratepayers regardless of actual production.[44] As further noted by NIPPC, Accion Group has noted in one IE report that two capacity factor estimates for a UOG bid that were completed within three months of each other varied by more than 5%, and this affected the projected levelized cost of the project by about $20 per MWh.[45] As noted above, Accion has recommended a "risk adjustment" for UOG bids, but thus far no IE has utilized any quantitative adjustment.

A bid adder is needed to account for this risk differential, which has undeniably increased costs to Oregon ratepayers. While CUB believes that NIPPC has presented compelling evidence of systemic capacity factor over-estimates at PacifiCorp's 12 wind plants that began operating prior to 2010,[46] CUB is not, however, prepared to accept or endorse any specific quantitative adders at this time.[47]

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[42] UM 1182/NIPPC/100/Monsen/4.
[43] UM 1182 CUB/100 Jenks-Feighner/5 lines 1-11.

[46] NIPPC/100 / Monsen/30.
[47] UM 1182 CUB/100 Jenks-Feighner/6 at 18 – 21 and at 7 lines 1-2.

CUB notes in closing that it agrees with NIPPC that PacifiCorp's and PGE's recommendation of the use of a "Capacity Factor Expert" to analyze all short list bids in future RFPs seems to acknowledge the existence of the forecasting issue. While CUB, like NIPPC, agrees this is a good suggestion that should be *required* in all renewable RFPs, CUB also believes that use of such an expert would not negate the need for bid adders. First, this expert would not be able to evaluate the capacity factors of *all* bids in the RFP, and UOG bids could make it to the short list improperly.[48] Second, while the expert may provide a best estimate of capacity factor given available information, the expert would not be able to address the differential in *risk* of a forecasting error between a UOG and IPP project. Only bid adders can fully address this risk.

E. Arguments Opposed to the Counter-Party Risk Adder

CUB acknowledges that there is some degree of counter-party risk involved with independent generation projects. However, CUB agrees with NIPPC Witness Camden Collins in her assessment that no compelling case has been made by the utilities to show that counter-party risk, financial or otherwise, should be a significant factor in bid evaluation.[49] If a sound methodology for assigning values to credit differentials can be developed, CUB would welcome its inclusion in the bid evaluation process.[50]

F. Arguments Opposed to the Heat Rate Degradation Risk Adder

Heat rate degradation results in a lower energy output for the same amount of fuel input. As such, a generation facility will become costlier and less efficient over its operational life.

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[48] *Id.*
[49] UM 1182/NIPPC/200/Collins.
[50] UM 1182/CUB/100/Jenks-Feighner/5 lines 13-18.

Assumptions regarding at what rate the degradation will occur can significantly affect the bid prices of generation resources.[51]

IPPs are generally contractually liable for heat rate degradation at their facilities, so the higher expenses that result are already accounted for in initial bids. NIPPC proposes an adder to account for the assumed degradation in heat rate over the operational life of utility-owned bids.[52] NIPPC therefore assumes that utility-owned projects do not already account for heat rate degradation. The testimony of both PGE[53] and PacifiCorp[54] indicates, however, that utility-owned bids incorporate assumptions about heat rate degradation from the plant equipment manufacturer. It is likely that this rate is similar to any assumption that is included in an independent bid, although a more conservative estimate may be used by independent contractors to account for their cost liability. Without additional information relating to how utilities and IPPs account for heat rate degradation, it is impossible to quantify the level of risk.[55]

V. CONCLUSION

It is clear from the above discussion that certain bid adders are indeed warranted for "cost-plus" utility resources. Given the Commission's broad statutory authority, the Commission has the ability, and the responsibility, to find that the current Competitive Bidding Guidelines do not adequately account for the significant risk of Construction Cost Over-runs and Wind Capacity Factor errors. As things stand, a prudent IPP must incorporate the potential cost associated with these risks into its fixed price RFP bid for a PPA structure, but a utility does not have to. Without mandatory bid adders, a "cost-plus" UOG bid could easily ignore these risks

[51] UM 1182/CUB/100/Jenks-Feighner/6 lines 2-5.
[52] UM 1182/NIPPC/100/Monsen/4.
[53] UM 1182/PGE/100/Outama-Bettis-Mody-Hager/18.
[54] UM 1182/PacifiCorp/100/Kusters/12.
[55] UM 1182/CUB/100/Jenks-Feighner/6 lines 6-16.

and an IE would have no basis to fault the bid. This would result in the continuation of the passing of these increased costs onto customers. Substantial evidence indisputably exists for the Commission to correct the flaws in this process by requiring bid adders for UOG bids in the areas of Construction Cost Over-runs and Wind Capacity Factor errors. For these reasons, CUB respectfully requests that the Commission revise the Guideline 10(d) analysis to require bid adders for Construction Cost Over-runs and Wind Capacity Factor Errors.

Dated this 1st day of February, 2013.

Respectfully submitted,

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UM 1182– CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of February, 2013, I served the foregoing **PREHEARING BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UM 1182 upon each party listed in the UM 1182 PUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

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Respectfully submitted,

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