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Via Email and US Post

September 4, 2009

Filing Center
Public Utility Commission of Oregon
560 Capitol Street NE, No. 215
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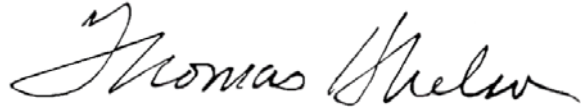
Re: UM 1438 – Swalley Irrigation District’s Memorandum in Response, etc.

Dear Filing Center:

Accompanying this transmittal letter is Swalley Irrigation District’s Memorandum in Response and Opposition to PacifiCorp’s Motion for Expedited Determination of the Applicability of OAR 860-029-0100, Motion to Dismiss, and Alternative Motion to Make More Definite and Certain. As explained in the accompanying document, the referenced administrative rule has no applicability to “standard” contracts of less than 10 megawatts, which is the type of agreement PacifiCorp is requiring Swalley Irrigation District to use in its proposed arrangements with PacifiCorp.

Please let me know if you have any questions.

Very truly yours,



Thomas H. Nelson
Attorney for Swalley Irrigation District

cc: Jeff Lovinger, Esq.

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1438

Swalley Irrigation District,

Complainant,

v.

PacifiCorp,

Respondent.

Swalley Irrigation District's Memorandum
in Response and Opposition to
PacifiCorp's Motion for Expedited
Determination of the Applicability of OAR
860-029-0100, Motion to Dismiss, and
Alternative Motion to Make More Definite
and Certain

Introduction

1
2 On August 31, 2009, Respondent PacifiCorp moved against the pending
3 complaint in this docket by requesting Commission guidance on the question of whether
4 OAR 860-029-0100 ("Rule 0100") governs the procedures that must be followed by the
5 parties in addressing Swalley Irrigation District's ("Swalley") complaint and then
6 requesting that Swalley's complaint be dismissed or, alternatively, be made more
7 definite and certain in order to comply with the purported requirements of Rule 0100.
8 For the reasons set forth below, Swalley submits that Rule 0100 was not intended to,
9 and does not, have any applicability to the "standard" contracts with QFs of under 10
10 megawatts, that PacifiCorp has required Swalley to use such a "standard" contract for
11 its proposed arrangements with PacifiCorp, and therefore that all of PacifiCorp's
12 motions must be denied.

1 **Discussion**

2 As PacifiCorp correctly notes, the Commission’s Order 08-355 adopting Rule
3 0100 on its face indicates that the Commission “rejected application of [Rule 0100] to
4 disputes involving Qualifying Facilities with capacity of 10 megawatts or less.”
5 PacifiCorp Motion at 3, lines 19-21. Accordingly, the beginning point to determine
6 applicability of Rule 0100 is Order 08-355.

7 The Commission itself explicitly set forth the purpose, scope, and effect of Rule
8 0100. Order 08-355 states in part:

9 The proposed amendment to OAR 860-029-0001 (Amended Rule)
10 is necessary to comply with Senate Bill 838, Section 27(4), signed into law
11 June 6, 2007. Proposed OAR 860-029-0100 (New Rule) is intended to
12 clarify the scope of complaint proceedings relating to *negotiated* Qualifying
13 Facility (QF) power purchase agreements. The New Rule establishes a
14 dispute resolution process and identifies the responsibilities of those
15 involved in the complaint. Following the guidelines set forth in Order No.
16 07-360, the resultant process is intended to reduce the time and cost of
17 resolving disputes for QFs, utilities, and the Commission.

18
19 Emphasis added. Attention is directed first to the phrase, “complaint proceedings
20 relating to *negotiated* Qualifying Facility power purchase agreements.” As explained
21 below, such negotiated “nonstandard” agreements apply only to QFs of over 10
22 megawatts. Second, attention is directed to the phrase, “Following the guidelines set
23 forth in Order No. 07-360, . . .” Order No. 07-360 involves QFs of over 10 megawatts
24 that trigger “nonstandard” contracts, not smaller QFs such as Swalley’s. Indeed, in
25 2005 the Commission adopted Order 05-584 (May 13, 2005), which established
26 “standard” contracts for QFs fewer than 10 megawatts that could be executed in the
27 *absence* of the type of negotiations referenced in Rule 0100. Order 05-584 at 12. The
28 Commission explained:

1 If a QF is not eligible for a standard contract, a utility is still obligated to
2 purchase a QF's net output at the utility's avoided cost, but the QF *must*
3 *negotiate* the rates, terms and conditions of a power purchase contract
4 with the purchasing utility.
5

6 *Id.* (emphasis added). The order went on to discuss and decide the content of such
7 standard contracts. Swalley submits that the contract PacifiCorp offered to it and which
8 Swalley signed and tendered to PacifiCorp was just such a "standard" contract, *i.e.*, a
9 contract not requiring the type of negotiations anticipated in Rule 0100. Therefore, the
10 information required by Rule 0100 cannot be imposed upon Swalley.

11 Returning to 08-355, it is instructive that Sorenson Engineering, one of the
12 participants in underlying docket (AR 526), requested specifically that the provisions of
13 Rule 0100 be available at the QF's option to QFs of 10 megawatts or less that use
14 standard contracts. See <http://edocs.puc.state.or.us/efdocs/HAC/ar526hac16225.pdf> at

15 2. The Commission in the order addressed and rejected this request, noting:

16 The Commission takes note of the concerns raised by both
17 Sorenson and Roush, appreciating that the issues raised are highly
18 relevant to the development of a full, fair, and integrated Division 29
19 dispute resolution process. *Nonetheless, we find these concerns outside*
20 *the scope of AR 526. . . .*
21

22 Order 08-355 at 2 (emphasis added). Consequently, even if Swalley *had* wished to
23 invoke the provisions of Rule 0100 in its dispute with PacifiCorp, the very order
24 PacifiCorp references in its motions would prohibit it from doing so.

25 **Conclusion**

26 For the foregoing reasons Swalley Irrigation District submits that Rule 0100 has,
27 and can have, no applicability to the present docket. Consequently, Swalley Irrigation

1 District respectfully requests that PacifiCorp's pending motions that would require
2 Swalley to adhere to some of the provisions of that rule be denied in their entirety.

3 Respectfully submitted this 4th day of September, 2009.
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6
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CERTIFICATE OF SERVICE

I hereby certify that, on September 4, 2009, I served a true and correct copy of the foregoing Memorandum in Response and Opposition on the following named persons/entities by depositing a true copy thereof in the United States Mail at Welches, Oregon.

Jeffrey Lovinger
Lovinger Kaufmann LLP
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Portland, OR 97232-2150
Attorney for PacifiCorp

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A handwritten signature in black ink that reads "Thomas H. Nelson". The signature is written in a cursive style with a large initial 'T'.

Thomas H. Nelson
Attorney for Swalley Irrigation District