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VIA ELECTRONIC FILING AND FIRST CLASS POST

August 31, 2009

Chairman Lee Beyer
Commissioner Ray Baum
Commissioner John Savage
Public Utility Commission of Oregon
550 Capitol Street NE, Suite 215
Salem, OR 97301-2551

Re: PacifiCorp Advice Filing 09-012 and the Filed Rate Doctrine:
Swalley Irrigation District's Post-Hearing Comments on Utility Obligation to Purchase

Dear Commissioners:

These comments are submitted on behalf of Swalley Irrigation District ("Swalley"), which appeared and participated actively in the Commission meeting of August 25, 2009. In addition, Swalley has a complaint now pending before the Commission in UM 1438 challenging PacifiCorp's refusal to enter into a power-purchase agreement with Swalley in a timely manner and requesting extension of existing avoided-cost prices until such time as PacifiCorp fulfils its legal obligations. This letter is for the purpose of bringing the Commission current regarding events that have occurred since the meeting and filing of the complaint and to put those events into a larger legal and administrative context.

By way of background, under the Public Utility Regulatory Policies Act of 1978 and this Commission's adoption of implementing regulations, jurisdictional electric utilities have a continuing obligation to purchase the output from qualifying facilities ("QFs") at the utilities' current avoided costs. That obligation, of course, means that the utilities must be able to specify at all times the various reasonable contractual inputs (term and termination, prices, interconnection, etc.); a failure to specify all such terms and conditions in advance would defeat the purpose of PURPA. In order to achieve compliance with this requirement, utilities have adopted "generic" power purchase agreements and have specified avoided-cost prices that, like other utility rates, must remain in effect until changed by Commission order. PacifiCorp's recent refusal to offer to purchase electric power and energy from Swalley violates the state and federal requirements of PURPA as well as the filed rate doctrine and led to the filing of the pending complaint.

Since the filing of the complaint, PacifiCorp Director Stacey Kusters informed Swalley that PacifiCorp may be willing to enter into a power-purchase agreement with Swalley but that the prices in the agreement would be the prices to be established by the Commission at some point in the future. This position is a blatant, even breathtaking, violation of the filed rate doctrine (which requires utilities to adhere strictly to the current filed rates and tariffs) as well as the must-purchase requirements of PURPA and the Oregon implementing statutes and regulations. Just as there can be only one set of retail electric rates to customers at any time, there can be only one set of avoided-cost rates in effect at any one time.

Director Kusters' position is directly akin to a utility's telling its retail customers that it will meet its duty to serve by hooking new customers up but that, because the utility expects a rate increase in the future, the rates for such sales will not be the rates currently on file but, rather, rates to be determined when a pending rate case is completed. The Commission would not tolerate such a violation of the filed rate doctrine because, among other reasons, such would game future retail rates. In the QF context, Director Kusters' approach would mean that if, for example, avoided-cost rates are expected to rise PacifiCorp could continue purchases at existing prices while dragging out the regulatory process; if, on the other hand (as is the case in this situation), rates are expected to drop PacifiCorp could impose a moratorium on contracts containing existing, approved avoided-cost rates and then push hard to get the new, lower rates approved. Thus for the same reason that utilities are required to adhere to the filed rate doctrine in retail sales they must also adhere to such doctrine in the case of QF purchases. Consequently, PacifiCorp *must* contract to purchase Swalley's output at the rates currently on file.

There was some discussion of "grandfathering" during the August 25 meeting. That concept is but another manifestation of the filed rate doctrine; essentially, "grandfathering" means that QFs who have taken substantial action toward putting their projects on line (some in direct reliance upon the utility's current avoided-cost rates) should be paid the filed rates even if the power is not actually generated until after the rates change. "Grandfathering" is explicitly anticipated in the PURPA regulations, which allow rates for purchases to be different from the rates in effect at the time of actual purchase. 18 C.F.R. § 292.304(b)(5). The Commission's past resort to "grandfathering," particularly in circumstances when there was a radical change anticipated in avoided-cost rates, merely was an attempt to avoid unfairness to QFs that had expended significant effort and funds to bring renewable resources on line. In the present context, however, "grandfathering" is not technically involved because Swalley is ready, willing, and able to enter into a binding contractual agreement today – indeed, it has been demanding a contract from PacifiCorp for some time.

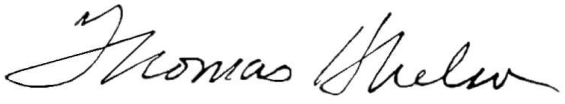
Finally, as noted above PacifiCorp's position regarding Swalley Irrigation District appears to be a clear violation of the filed rate doctrine. In this context it may be appropriate to point out the provisions of ORS 756.185, which provides:

> **756.185 Right to recover for wrongs and omissions; treble damages.** (1) Any public utility which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or willful misconduct, the public utility is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. Except as provided in subsection (2) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.
>
> (2) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (1) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.
>
> (3) Any recovery under this section does not affect recovery by the state of the penalty, forfeiture or fine prescribed for such violation.
>
> (4) This section does not apply with respect to the liability of any public utility for personal injury or property damage.

While Swalley would much rather resolve the pending complaint administratively and amicably, by submitting the question of PacifiCorp's obligation to purchase the output of Swalley's project at current avoided-cost rates Swalley should not be considered to have chosen a remedy inconsistent with judicial enforcement of its rights. Rather, Swalley's submission of the complaint is simply an attempt to exhaust its administrative remedies prior to possible commencement of judicial litigation.

Swalley Irrigation District looks forward to working with the Commission to resolve these issues. Please let me know if you have any questions.

Very truly yours,



Thomas H. Nelson
Attorney for Swalley Irrigation District

cc: Client