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September 18, 2009

Via Electronic Filing and U.S. Mail

Public Utility Commission of Oregon
Attention: Filing Center
PO Box 2148
Salem, OR 97308-2148

Re: In the Matter of the Complaint of
SWALLEY IRRIGATION DISTRICT
v. PACIFICORP d/b/a PACIFIC POWER
OPUC Docket No. UM 1438

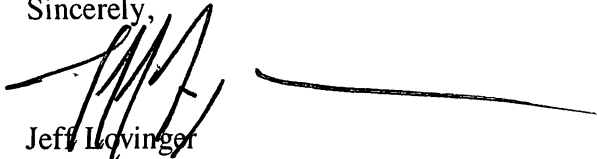
Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and one copy of *PacifiCorp's Answer and Affirmative Defenses*.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,


Jeff Lovinger

cc: UM 1438 Service List

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1438

SWALLEY IRRIGATION DISTRICT,

Complainant,

vs.

PACIFICORP,

Respondent.

**PACIFICORP’S ANSWER
AND AFFIRMATIVE DEFENSES**

1 PacifiCorp, d/b/a Pacific Power (“PacifiCorp”), hereby answers the complaint of
2 Swalley Irrigation District (“Swalley”) in the above-captioned proceeding.

3 **A. NATURE OF THE CASE**

4 Swalley alleges that PacifiCorp and Swalley reached agreement on all provisions
5 of a draft power purchase agreement prepared in conformance with PacifiCorp’s Oregon
6 Tariff Schedule 37 (“Schedule 37”) on July 20, 2009; and that PacifiCorp wrongfully
7 refuses to execute that power purchase agreement in an attempt to deprive Swalley of the
8 benefit of PacifiCorp’s Schedule 37 avoided cost rates in effect immediately prior to
9 September 9, 2009 (“old Schedule 37 rates”). Complaint at ¶¶ 5, 6, respectively.
10 Swalley therefore asks that this Commission order PacifiCorp to execute the July 20
11 power purchase agreement containing old Schedule 37 rates. *Id.* at ¶ 6.

1 PacifiCorp admits it received a draft of a Schedule 37 standard power purchase
2 agreement (“PPA”) from Swalley on July 21, 2009, and that PacifiCorp has not since
3 provided Swalley with, either, revisions to the July 21 draft or an executable PPA.
4 However, PacifiCorp denies that it delayed its response in an attempt to deny Swalley a
5 PPA at the old Schedule 37 rates. PacifiCorp has not sent Swalley an executable PPA
6 because PacifiCorp is uncertain whether Swalley is eligible for a Schedule 37 PPA.
7 During its routine, final internal review of the July 21 draft PPA, PacifiCorp discovered
8 that Swalley does not yet have a Federal Energy Regulatory Commission (“FERC”)
9 license or license exemption necessary to operate its qualifying facility, that FERC
10 rejected Swalley’s first license exemption application on July 20, 2009, and that FERC
11 has not yet accepted Swalley’s revised application as sufficient. PacifiCorp questions
12 whether, under this Commission’s holding in *Portland General Electric v. Oregon*
13 *Energy Company, L.L.C.*, Order No. 98-055, UC 315, 1998 Ore. PUC LEXIS 131
14 (February 17, 1998) (“*Oregon Energy Company*”), Swalley is eligible for a power
15 purchase agreement at this time, where FERC has not accepted Swalley’s application for
16 a conduit exemption from the Federal Power Act’s licensing requirements, and where it is
17 therefore highly unlikely that the Swalley facility will be able to make the Scheduled
18 Commercial Operation Date, of April 1, 2010, specified in the draft PPA.

19 Under the Commission’s prior holding in *Oregon Energy Company*, a qualifying
20 facility that otherwise was eligible for a standard PPA was found to be not eligible until it
21 had executed a wheeling agreement necessary to bring its output to the utility’s system.
22 *Oregon Energy Company* at 20-21. The Commission reasoned that a qualifying facility
23 that does not have a final wheeling agreement is not “ready, willing, and able” to deliver

1 power to the utility and therefore cannot create a legally enforceable obligation. This
2 same rationale reasonably suggests that Swalley has not yet become eligible for a
3 standard Oregon PPA because it is not ready, willing, and able to deliver power to
4 PacifiCorp.

5 Shortly before the date PacifiCorp's Schedule 37 rates were scheduled to change,
6 PacifiCorp received a number of requests for Schedule 37 PPAs that appeared to be
7 rushed by the seller in an attempt to qualify for the old Schedule 37 rates.¹ PacifiCorp is
8 concerned that permitting projects to qualify for a specific rate before they have
9 demonstrated sufficient progress to ensure their completion: (1) gives the seller an option
10 rather than a two-way contract²; (2) increases the risk of QF default; (3) increases power
11 costs to PacifiCorp's customers; and (4) encourages recklessness and gaming on the part
12 of the QF. PacifiCorp therefore believes it is sound public policy to extend *Oregon*
13 *Energy Company* and hold that a qualifying small renewable hydropower project that
14 does not have an application accepted by FERC is not "ready, willing, and able" to
15 deliver power and, therefore, Swalley's requested relief should be denied. PacifiCorp
16 raises this question regarding the eligibility of Swalley for a Schedule 37 PPA as required

¹ On August 17, 2009, Central Oregon Irrigation District ("COID") and PacifiCorp executed a Schedule 37 PPA for a planned conduit exempt hydroelectric project. COID did not inform PacifiCorp, and PacifiCorp did not learn until September 2, 2009, that FERC rejected COID's conduit exemption application as patently deficient, on August 3, 2009. On August 31, PacifiCorp received requests for three Schedule 37 PPAs with the old Schedule 37 rates from qualifying wind facilities that are still in early planning phases, with requested online dates of September 1, 2010.

² A seller who executes a Schedule 37 PPA at the old Schedule 37 rates and then fails to complete the project is unlikely to owe damages because liquidated damages under the PPA arise only where the market price exceeds the Schedule 37 PPA price (see Standard PPA, Section 11.3.3), an unlikely occurrence given the sharp drop in market prices from the old Schedule 37 rates. Therefore, a seller risks little by obligating itself to a Schedule 37 PPA before it is sure whether the facility whose output is being sold will be built. The utility and its customers however are still damaged. Allowing qualifying facilities to sign contracts before their projects are sufficiently certain of being built wastes the utility's and the Commission's time, is detrimental to the utility's system resource planning, and exceeds a public utility's duty under PURPA.

1 by page two of Schedule 37.³ If the Commission determines that Swalley became
2 eligible for a Schedule 37 PPA on or before September 8, 2009, notwithstanding the
3 uncertain status of its application for FERC authority to operate its proposed hydropower
4 project, then PacifiCorp will of course offer Swalley a Schedule 37 PPA at the old
5 Schedule 37 rates.

6 **B. ANSWER**

7 PacifiCorp hereby answers Swalley's complaint in the above-captioned
8 proceeding and states as follows:

- 9 1. The allegations of paragraph 1 of the complaint are admitted.
- 10 2. The allegations of paragraph 2 of the complaint are admitted.
- 11 3. The allegations of paragraph 3 are conclusions of law requiring no
12 response.
- 13 4. Having insufficient information or knowledge regarding the truth or
14 falsity of the allegations of paragraph 4 of the complaint, PacifiCorp
15 denies the allegations contained therein and leaves Swalley to the proof
16 thereof. With regard to the allegation in paragraph 4 of the complaint
17 that the project will return 29 cubic feet per second permanently to the
18 Deschutes River with a priority date of 1899, PacifiCorp believes it is
19 important to clarify that Swalley does not yet have a required state
20 hydropower water right for the qualifying facility and cannot apply for
21 such water rights until after it receives its FERC conduit exemption.

³ Page 2 of Schedule 37 provides that "[a]ny dispute concerning a QF's entitlement to the standard rates and standard contract shall be presented to the Commission for resolution." Accordingly, when PacifiCorp is uncertain as to an applicant's entitlement to a Schedule 37 PPA, deferring further action pending the Commission's review is proper.

1 See ORS 543.765 (2007). Moreover, regarding Swalley's allegation in
2 paragraph 4 of the complaint that Swalley anticipates that the Facility
3 will go on line no later than February 2010, PacifiCorp believes that it
4 is important to note that this alleged on line date appears to be unlikely
5 given the fact that the FERC rejected Swalley's application for a
6 conduit project exemption on July 20, 2009 and given that FERC has
7 not yet accepted as sufficient Swalley's resubmission of its application
8 for conduit exemption after Swalley submitted supplemental
9 information to FERC on July 20 and on August 15.

- 10 5. Having insufficient information or knowledge regarding the truth or
11 falsity of the allegations of paragraph 5 of the complaint, PacifiCorp
12 denies the allegations contained therein and leaves Swalley to the proof
13 thereof. Swalley knows, or should know, that PacifiCorp's published
14 avoided cost rates are subject to periodic adjustment at least every two
15 years per ORS 758.525, and that Swalley has no right to rely on
16 obtaining a particular published avoided cost rate until Swalley has
17 established a legally enforceable obligation to sell its qualifying facility
18 output to PacifiCorp. If Swalley did detrimentally rely on current rates
19 not changing or upon any PacifiCorp quotation of rates, its reliance is
20 misplaced. *See In the Matter of the Application of Beaver Creek Coop.*
21 *Telephone Co. for a Boundary Line Amendment*, Order No. 00-299,
22 UM 177, 2000 Ore. PUC LEXIS 345 at 8-10 (June 7, 2000); *Rio*

1 *Communications, Inc. v. U.S. West Communications, Inc.*, Order No.
2 99-611, UC 410, 1999 Ore. PUC LEXIS 10 (October 5, 1999).

- 3 6. The allegations of paragraph 6 of the complaint are denied. Swalley
4 alleges that PacifiCorp earlier advised Swalley that Swalley had
5 provided all necessary information and that the contract was prepared
6 for signature and would be submitted to Swalley by September 15. On
7 or about July 21, 2009, PacifiCorp advised Swalley that it appeared
8 Swalley had provided all required information and that PacifiCorp
9 would begin its regular process of internal review by legal, credit and
10 other relevant groups. PacifiCorp also advised Swalley that pending a
11 positive outcome from those reviews, PacifiCorp should be able to
12 provide Swalley with an executable power purchase agreement by
13 September 15, 2009. As discussed in the Nature of the Case, *supra*,
14 PacifiCorp's legal review of the draft Swalley power purchase
15 agreement and related information and correspondence has raised a
16 legitimate question regarding Swalley's ability to request and require a
17 power purchase agreement from PacifiCorp at this time. It is
18 inappropriate for PacifiCorp to offer Swalley a final, executable power
19 purchase agreement until this question is resolved and it is determined
20 that Swalley is presently entitled to a power purchase agreement.
- 21 7. The relief sought by Swalley in the final paragraph of the complaint
22 should be denied.

1 PacifiCorp denies any allegation not specifically admitted above. PacifiCorp
2 reserves the right to supplement this answer or file a new answer in the event Swalley
3 amends or otherwise modifies its complaint. PacifiCorp reserves the right to assert and
4 file any affirmative or special defense that may become known by discovery proceedings
5 or by other means.

6 C. AFFIRMATIVE DEFENSES

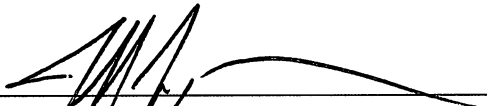
7 For its FIRST AFFIRMATIVE DEFENSE, and for the reasons provided in the
8 Nature of the Case, *supra*, PacifiCorp asserts that Swalley cannot establish a legally
9 enforceable obligation to sell the output from its proposed qualifying facility to
10 PacifiCorp before FERC has even accepted as sufficient Swalley's application for a
11 FERC conduit exemption and this Commission should therefore deny the relief requested
12 in Swalley's complaint as a matter of law.

13 WHEREFORE, PacifiCorp hereby respectfully asks the Commission for the
14 following relief.

- 15 1. An Order declaring that Swalley is not entitled to a power purchase
16 agreement at the old Schedule 37 rates;
- 17 2. An Order declaring that Swalley is not eligible for a Schedule 37 PPA
18 until FERC grants Swalley a conduit exemption or a hydropower license; alternatively
- 19 3. An Order declaring that Swalley is not eligible for a Schedule 37 PPA
20 until FERC at least accepts Swalley's application for conduit exemption; and
- 21 4. Such other relief that the Commission may deem appropriate.

Dated this 18th day of September 2009.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I hereby certify that, on September 18, 2009, I served a true and correct copy of the foregoing *PacifiCorp's Answer and Affirmative Defenses* on the following named persons/entities by depositing a true copy thereof in the United States Mail at Portland, Oregon:

Thomas H. Nelson Attorney for Swalley Irrigation District P.O. Box 1211 Welches, OR 97067	Filing Center Oregon Public Utilities Commission 560 Capitol St. NE, NO. 215 PO Box 2148 Salem, OR 97308-2148
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I hereby certified that, on September 18, 2009, I also served a true and correct copy of the foregoing *PacifiCorp's Answer and Affirmative Defenses* on the following named persons/entities by electronic mail:

Jordan A. White Senior Counsel PacifiCorp 825 NE Multnomah Ste 1800 Portland, OR 97232 jordan.white@pacificorp.com	PacifiCorp Oregon Dockets 825 NE Multnomah Ste 2000 Portland, OR 97232 oregondockets@pacificorp.com
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Jeffrey Lovinger
Attorney for PacifiCorp