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August 31, 2009

Via Electronic Filing and U.S. Mail

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

Re: SWALLEY IRRIGATION DISTRICT, Complainant, vs.
PACIFICORP dba PACIFIC POWER, Respondent
OPUC Docket No. UM1438

Attention Filing Center:

Enclosed for filing in the above-captioned docket is 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*. This document is being filed by electronic mail with the Filing Center.

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: UM1438 Service List

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1438

SWALLEY IRRIGATION DISTRICT,

Complainant,

vs.

PACIFICORP dba PACIFIC POWER,

Respondent.

**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**

1 PacifiCorp, d/b/a Pacific Power, (“PacifiCorp”) hereby appears and respectfully
2 moves for an expedited determination as to whether the above-captioned proceeding is
3 subject to OAR 860-029-0100. In the event this proceeding is subject to OAR 860-029-
4 0100, PacifiCorp respectfully moves to dismiss the complaint of Swalley Irrigation
5 District (“Swalley”) for failure to satisfy the timing and/or content requirements of OAR
6 860-029-0100. In the alternative, PacifiCorp moves to require Swalley to amend its
7 complaint to make its complaint more definite and certain by providing all of the
8 information required by OAR 860-029-0100(5)&(6). PacifiCorp respectfully reserves the
9 right to file an answer as necessary pending the outcome of these motions. PacifiCorp
10 attempted to confer with opposing counsel but was unable to contact him prior to this
11 expedited request.

1 **A. The Nature of the Case**

2 Swalley seeks to develop a 750-kilowatt generation facility as a Qualifying
3 Facility under the regulations of the Federal Energy Regulatory Commission. Swalley
4 seeks to interconnect its Qualifying Facility to PacifiCorp's system in Oregon and to sell
5 the output of the Qualifying Facility to PacifiCorp under the terms of a power purchase
6 agreement. Swalley and PacifiCorp entered into an interconnection agreement for the
7 Qualifying Facility on September 17, 2008. Swalley and PacifiCorp have not yet entered
8 into a power purchase agreement.

9 Swalley alleges that it proffered PacifiCorp "a definitive power-purchase
10 agreement containing all of the provisions requested by PacifiCorp on July 20, 2008."
11 *Complaint* at 3. Swalley also alleges that PacifiCorp indicated it would prepare a final
12 power purchase agreement for signature and submit such an agreement to Swalley by
13 September 15. *Id.* Swalley further alleges that PacifiCorp "recently refused to execute
14 the completed power-purchase agreement Swalley submitted in July." *Id.* Finally,
15 Swalley alleges "PacifiCorp now states it will only sign the agreement when new, lower
16 power-purchase prices are established by the Commission pursuant to its pending Advice
17 No. 09-012." *Id.* Swalley asks the Commission to order PacifiCorp "forthwith to
18 execute the fully-negotiated power-purchase agreement containing avoided-cost prices
19 currently in effect." *Id.* at 4.

20 On July 9, 2009, PacifiCorp filed with the Commission new avoided cost rates
21 intended to reflect PacifiCorp's actual avoided costs. These new rates are substantially
22 lower than the prior rates. PacifiCorp's rate filing is now the subject of a staff
23 investigation in UM-1442. PacifiCorp has filed new avoided cost rates because it

1 believes the old rates are no longer a good proxy for actual avoided costs. PacifiCorp
2 believes that public policy and equity to customers support a Commission resolution in
3 UM-1442 that affirms new, lower avoided cost rates and which prevents qualifying
4 facilities from securing old, outdated avoided cost rates during the UM-1442
5 investigation.

6 **B. Motion for Expedited Determination of Applicability of OAR 860-029-0100**

7 Swalley served its complaint August 21, 2009. On the same day, the staff of the
8 Commission's administrative hearings division informed PacifiCorp that its answer was
9 due in 20 days pursuant to OAR 860-013-0025. On August 24, 2009, staff revised its
10 position informing PacifiCorp that the Swalley complaint is subject to OAR 860-029-
11 0100 and that PacifiCorp's response is therefore due 10 calendar days after service
12 pursuant to OAR 860-029-0100(7).

13 It is unclear to PacifiCorp whether OAR 860-029-0100 applies to Swalley's
14 complaint. On its face, the rule appears to apply; OAR 860-029-0100(1) states:

15 This rule applies to a complaint, filed pursuant to ORS 756.500, regarding
16 the negotiation of a Qualifying Facility power purchase agreement. These
17 provisions supplement the generally applicable hearing procedures
18 contained in OAR chapter 860, divisions 011 through 014.

19 However, the Commission's order adopting OAR 86-029-0100 arguably rejected
20 application of the rule to disputes involving Qualifying Facilities with capacity of
21 10 megawatts or less. *See In the Matter of a Rulemaking to Update Division 029 Rules,*
22 *OPUC Order No. 08-355, 2008 Ore. PUC LEXIS 273 at p. 3 (July 7, 2008).* PacifiCorp
23 respectfully requests an expedited determination of whether OAR 860-029-0100 governs
24 the complaint in the above-captioned proceeding.

25

1 **C. Motion to Dismiss or to Make More Definite and Certain**

2 PacifiCorp respectfully requests dismissal of Swalley’s complaint on the grounds
3 that it has been filed before the expiration of the sixty-day period required by OAR 860-
4 029-0100(3)&(5)(a). In the alternative, Swalley’s complaint should be dismissed because
5 the complaint lacks the information required by OAR 860-029-0100(5) and lacks the
6 direct testimony required by OAR 860-029-0100(6). In the alternative, Swalley should
7 be required to make its complaint more definite and certain by amending the complaint to
8 provide the information required by OAR 860-029-0100(6) and by filing the direct
9 testimony required by OAR 860-029-0100(7).

10 Specifically, OAR 860-029-0100(3) states:

11 At any time after sixty calendar days from the date a Qualifying Facility
12 has provided written comments to the public utility regarding the public
13 utility’s draft power purchase agreement, the Qualifying Facility may file a
14 complaint with the Commission asking for adjudication of any unresolved
15 terms and conditions of its proposed agreement with the public utility.

16 In addition, OAR 860-029-0100(5) states that a complaint *must* contain each of the
17 following:

- 18 (a) A statement that the Qualifying Facility provided written comments to
19 the utility on the draft power purchase agreement at least 60 calendar
20 days before the filing of the complaint.
- 21 (b) A statement of the attempts at negotiation or other methods of informal
22 dispute resolution undertaken by the negotiating parties.
- 23 (c) A statement of the specific unresolved terms and conditions.
- 24 (d) A description of each party’s position on the unresolved provisions.
- 25 (e) A proposed agreement encompassing all matters, including those on
26 which the parties have reached agreement and those that are in dispute.

27 Finally, OAR 860-029-0100(6) states that, along with the complaint, “the
28 Qualifying Facility must submit written direct testimony that includes all
29 information upon which the complainant bases its claims.”

1 Swalley has not alleged that it provided written comments to PacifiCorp on
2 the draft power purchase agreement at least sixty calendar days before filing the
3 complaint. Indeed the only date alleged by Swalley that might conceivably start
4 the sixty-day period required by OAR 860-029-0100(3) is the July 20, 2009 date
5 alleged by Swalley in paragraph 5 of its Complaint. Assuming *arguendo* that the
6 sixty-day period required by OAR 860-029-0100 began to run on July 20, 2009, it
7 is clear that Swalley's August 21, 2009 complaint is premature and should be
8 dismissed. *In the Matter of American Civil Liberties Union of Oregon v. Verizon*
9 *Northwest, Inc., and QWEST Corp.*, OPUC Order No. 06-673, 2006 Ore. PUC
10 Lexis 563 at pp. 4-6 (December 11, 2006) (complaint dismissed for failure to
11 allege facts necessary to state a claim). Dismissal without prejudice to file a new
12 complaint if and when the dispute is ripe will not prejudice either party and may
13 allow the parties the necessary time to resolve this matter without a complaint
14 proceeding.

15 Swalley's complaint should also be dismissed because it fails to provide
16 any of the information required by OAR 860-029-0100(5) and because Swalley
17 has failed to provide the direct testimony required by OAR 860-029-0100(6).
18 *In the Matter of Verizon Northwest, Inc.*, OPUC Order No. 04-306, 2004 Ore. PUC
19 Lexis 401, at p. 15 (May 27, 2004) (petition dismissed for failure to provide
20 information required by rule). Without the information and testimony mandated
21 by the rule, it is difficult or impossible for PacifiCorp to meaningfully answer the
22 complaint in a manner that complies with the requirements of OAR 860-029-
23 0100(7). Alternatively, and at a minimum, the Commission should require

1 Swalley to amend its complaint and file direct testimony to bring the pleadings into
2 compliance with OAR 860-029-0100(5)&(6).

3 WHEREFORE, in the event the Commission determines that OAR 860-
4 029-0100 governs Swalley's complaint, PacifiCorp respectfully requests (a) that
5 Swalley's complaint be dismissed as premature, or (b) alternatively that Swalley's
6 complaint be dismissed for failure to provide required information, or
7 (c) alternatively that Swalley be required to amend its complaint and file the
8 required direct testimony.

Dated this 31st day of August 2009.

Respectfully submitted,

By



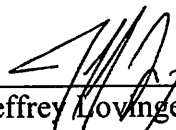
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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2009, I served a true and correct copy of the foregoing *Motion for Expedited Determination of the Applicability of OAR 860-029-0100, Motion to Dismiss, and Alternative Motion to Make More Definite and Certain* on the following named persons/entities by depositing a true copy thereof in the United States Mail at Portland, Oregon:

<p>Thomas H. Nelson Attorney for Swalley Irrigation District P.O. Box 1211 Welches, OR 97067</p>	<p>Filing Center Public Utility Commission of Oregon 560 Capitol St. NE, NO. 215 PO Box 2148 Salem, OR 97308-2148</p>
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Jeffrey Lovinger
Attorney for PacifiCorp