

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 926**

4 In the Matter of
5 The Investigation Regarding the Purchase of
6 Subscription Power from the Bonneville
7 Power Administration

STAFF REPLY COMMENTS

8 At the March 16, 2004 Public Meeting, Commission Staff (Staff) submitted a status
9 report regarding settlement negotiations between Bonneville Power Administration (BPA) and
10 public and investor-owned utilities and other parties in the region to resolve pending litigation in
11 several suits challenging BPA Records of Decision regarding BPA's provision of benefits to the
12 residential and other matters. The Staff Report included discussion of PacifiCorp's deferral of a
13 Reduction of Risk Discount (RRD) negotiated in PacifiCorp's "Financial Settlement Agreement"
14 with BPA, and a recommendation that the Commission revisit the issue at its May 4, 2004 Public
15 Meeting and at that time, direct PacifiCorp to terminate deferral of the RRD.

16 On March 24, 2004, Administrative Law Judge Mike Grant issued a ruling allowing
17 parties opportunity to file opening and reply comments regarding Staff's recommendation for the
18 May 4, 2004 Public Meeting. This memorandum serves as Staff's reply comments.

19 Following submission of opening comments, PacifiCorp requested Commission approval
20 of a settlement agreement with BPA resolving pending litigation between these two entities and
21 amending two previous agreements, (The "FY 2007-2011 Agreement"). Among other things,
22 the agreement contemplates that PacifiCorp will waive its right to receive one-half of the RRD,
23 and will begin receipt of the remainder from October 2006 through September 11, 2007.

24 Staff supports the Settlement Agreement. Prior to the May 4, 2004 Public Meeting, Staff
25 will modify its recommendation regarding termination of the RRD so that in the event the
26 Commission approves the agreement and it is finally executed, the Commission's direction to

1 PacifiCorp will comport with the agreement reached between BPA and PacifiCorp.¹ If the FY
2 2007 – 2011 Agreement is not finalized, Staff’s recommendation remains the same.

3 **ORS 757.040.**

4 Staff disagrees with the Public Power’s² description of a distinction between the
5 Commission’s role, as defined in ORS 756.040, in a rate proceeding and that in reviewing Staff’s
6 motion to require BPA to terminate its deferral of the RRD. The Commission’s obligation to
7 utilities and the public generally is the same in all matters. The Commission is required to
8 “make use of its powers to protect public utility customers and the public generally from unjust
9 and unreasonable exactions practices and to obtain for them adequate service at fair and
10 reasonable rates[,]” in all matters of which the commission has jurisdiction.

11 The important distinction between the Commission’s role with respect to customers of
12 publicly-owned utilities and those of the utilities that it regulates is that the Commission simply
13 has no authority over the rates charged by publicly-owned utilities. Accordingly, it has little
14 opportunity to “make use of its powers” in the manner prescribed by the legislature to with
15 respect to customers other than those of the utilities that it actually regulates. The legislature
16 created the Public Utility Commission to protect customers of investor-owned utilities and to set
17 utility rates for those customers. Customers of consumer-owned utilities are protected by
18 elected boards that ensure the reasonableness of rates charged to the customers.

19 In any event, no basis to decline Staff’s recommendation is found in ORS 756.040.
20 Requiring PacifiCorp to terminate its deferral of the RRD is not contrary to the legislature’s

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23 ¹ The treatment of the RRD in the FY 2007 – 2011 Agreement appears to address the primary
24 concern voiced by Public Power in its opening comments. In those comments, Public Power
25 urged the Commission to delay any order directing PacifiCorp to terminate deferral of the RRD
26 and discusses the impact that payment of the RRD would have on utility rates in the Northwest
in 2004 – 2006. As noted above, PacifiCorp’s receipt of the RRD is delayed under the FY
2007 – 2011 Agreement until 2007.

² The Public Power Council submitted comments on behalf of itself and several associations.
These groups are referred to as “Public Power” in their comments, and will be in this document
as well.

1 directives to protect customers or the public from “unjust and unreasonable exactions” and to
2 obtain for them “fair and reasonable” rates.

3 First, no party argues that PacifiCorp’s termination of the RRD will result in rates that do
4 not satisfy the standard for fair and reasonable rates. While some parties argue that the rates of
5 utilities are currently higher than PacifiCorp’s, and will be more so if PacifiCorp terminates the
6 deferral of the RRD, they do not argue that these utility rates will exceed the bounds of
7 reasonableness.

8 Second, to the extent any party argues that directing PacifiCorp to terminate deferral of
9 the RRD results in “unjust and unreasonable” charges to non-PacifiCorp customers because the
10 RRD is contrary to public policy, Staff disagrees. PacifiCorp agreed to the RRD as
11 consideration for an opportunity to obtain what it hoped would be certainty regarding its receipt
12 of the benefits for the term of its contract with BPA. Staff does not believe such an agreement is
13 contrary to public policy.

14 As noted by parties in their opening comments, PacifiCorp agreed to a reduction in the
15 price of power sold to BPA and thereby, to a lower level of residential exchange benefits,
16 contingent on a negotiated resolution to several legal challenges to its Residential Exchange
17 Settlement Agreement. PacifiCorp did so to facilitate the stability of benefits for its customers.
18 With the Commission’s consent, PacifiCorp has continued to defer receipt of the discount
19 payments past October 2002 (the date on which payment by BPA was to begin in the event no
20 settlement was reached) to encourage ongoing settlement negotiations in 2002 and 2003.

21 At the time the Commission allowed PacifiCorp to defer receipt of the RRD in 2002, the
22 Commission did not contemplate that PacifiCorp would ever be obligated to defer indefinitely its
23 right to the RRD. The Commission addressed PacifiCorp’s 2002 request to continue its deferral
24 of the RRD in OPUC Order No. 02-414. In that order, the Commission adopted the Staff
25 recommendation to allow the deferral. Staff predicated its recommendation on the fact that
26 PacifiCorp’s residential and small-farm customers would receive a benefit from the deferral

1 because it would enhance the likelihood of settlement between the publicly-owned utilities and
2 the IOU's. Further, Staff encouraged the Commission to allow the deferral even though the
3 interest that would accrue on the RRD was not as high as PacifiCorp's as the interest rate the
4 Commission applied to PacifiCorp's other balancing accounts.

5 It is now apparent that PacifiCorp will not receive this hoped-for certainty regarding
6 receipt of the residential exchange benefits. In late 2003, BPA entered into a proposed
7 comprehensive settlement of several pending Ninth Circuit Court Appeals with the majority of
8 the parties to these appeals, including **all** Oregon litigants. Because a handful of publicly-owned
9 utilities declined to enter into the settlement, the settlement was not finalized. BPA is not
10 attempting to negotiate another such settlement. There is little chance that the publicly-owned
11 utilities' challenges to PacifiCorp's Residential Exchange Settlement Agreement will be resolved
12 by a negotiated resolution.

13 It is neither unjust nor unreasonable that PacifiCorp now collect the residential exchange
14 benefits to which it is entitled, even if doing so will impact rates of other utilities. PacifiCorp's
15 customers are entitled to those benefits under federal and state legislation. In fact, it is implicit
16 in the legislation that residential and small-farm customers may benefit from the receipt of these
17 benefits at the expense of other regional customers.

18 Further, contrary to arguments of some publicly-owned customers, the RRD has not
19 "chilled" the publicly-owned utilities' rights to appeal the BPA's Records of Decision regarding
20 the Residential Exchange Benefits. Many Petitions for Review filed by publicly-owned utilities
21 to challenge the Settlement Agreement are currently pending.

22 **ORS 757.663.**

23 Staff agrees with Public Power that the Commission may consider, under ORS 757.663,
24 the impact that PacifiCorp's termination of the RRD will have on customers of other utilities.
25 However, for reasons similar to those discussed above, Staff disagrees this consideration
26 compels the Commission to decline Staff's recommendation.

1 ORS 757.663 provides,

2 In order to preserve the benefits of federal low-cost power for residential and
3 small-farm consumers of electric utilities, the Public Utility Commission may require an
4 electric company to enter into contracts with the Bonneville Power Administration for the
5 purpose of securing such benefits. The contracts shall be subject to approval by the
6 commission. In reviewing a contract, the commission, at a minimum, shall consider:

- 7 (1) The short-term expected cost of electric power from the Bonneville Power
8 Administration compared to market-priced alternatives;
- 9 (2) The long-term benefits of retaining the rights to purchase electric power from the
10 Bonneville Power Administration at cost; and
- 11 (3) Other factors deemed relevant by the commission.

12 As noted by Public Power in its opening comments, the Commission may in deciding how best
13 to preserve the benefits of federal low-cost power for residential and small-farm customers,
14 consider any factor that the Commission considers relevant. Presumably, “other factors” may
15 include the impact that PacifiCorp’s receipt of the Residential Exchange benefits may have on
16 the customers of other utilities.

17 However, notwithstanding that the Commission may consider how PacifiCorp’s receipt
18 of Residential Exchange benefits may impact the customers of other utilities under ORS
19 757.663, the legislature’s mandate to the Commission in that statute is to “preserve the benefits
20 of federal low-cost power for residential and small-farm project.” Unless PacifiCorp’s receipt
21 of the residential exchange benefits to which some of its customers are entitled, would “unduly”
22 harm customers of other utilities, Staff does not believe it is appropriate for the Commission to
23 consider exercising its authority, or declining to exercise its authority, in a manner that precludes
24 customers from receiving benefits to which they are entitled.

25 Public Power and other parties appear to suggest the Commission’s review is simply a
26 matter of balancing the interests of all utility ratepayers in Oregon and deciding its course of
27 action by determining how the largest group of customers will be benefited. Staff does not
28 believe the Commission’s review is so simple.

1 Contrarily, the Commission's review must be anchored by the fact that the benefits at
2 issue are benefits to which PacifiCorp's residential and small-farm are entitled to by federal and
3 state legislation and by contract. In these circumstances, Staff believes the Commission should
4 exercise its authority to deny PacifiCorp customers those benefits only if extraordinary
5 circumstances warrant such an action. For the reasons discussed above, Staff does not believe
6 such circumstances currently exist.

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8 DATED this _____ day of April 2004.

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Respectfully submitted,

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HARDY MYERS
Attorney General

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Stephanie S. Andrus, #92512
Assistant Attorney General
Of Attorneys for Public Utility
Commission of Oregon

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