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September 22, 2008

VIA ELECTRONIC FILING AND U.S. MAIL

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

Re: Docket No. UE 200

Enclosed in the above-referenced docket are an original and five copies of PacifiCorp's Opening Brief. A copy of this filing has been served on all parties to this proceeding as indicated on the Service List.

Very truly yours,

Amie Jamieson

Enclosure
cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Dockets UE 200 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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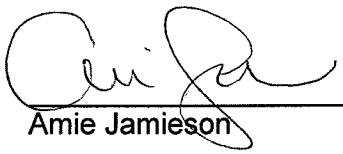

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 200

In the Matter of: PACIFICORP, dba PACIFIC POWER 2009 Renewable Adjustment Clause Schedule 202	**PACIFICORP'S OPENING BRIEF**

I. INTRODUCTION

This is the first Renewable Adjustment Clause ("RAC") filing before the Public Utility Commission of Oregon ("the Commission"), pursuant to Senate Bill 838 ("SB 838" or "the Act") and *Re Investigation of Automatic Adjustment Clause Pursuant to SB 838*, UM 1330, Order No. 07-572 (Dec. 19, 2007) ("RAC Order"). The clear and fair resolution of this case is a critical implementation milestone for SB 838. It is also a matter of the greatest importance to PacifiCorp (or "the Company"), because the case includes 713 MW of new renewable resources, representing a major investment of Company capital and human resources. PPL/100, Kelly/6, ll. 17–18. The Company's RAC filing asks the Commission to fulfill the requirement of SB 838 that utilities will recover all of the prudent costs of renewable energy investments necessary to comply with the Act.

The parties raised various issues in this case, many of which have been resolved. First, Staff's proposed adjustment for operations and management expenses was settled by a partial stipulation, filed on September 12, 2008.

Second, through testimony, PacifiCorp addressed and resolved: (1) Staff's and the Industrial Customers of Northwest Utilities' ("ICNU") concerns about how to establish RAC Schedule rates using 2009 forecast loads (PPL/101, Kelly/2, ll. 11–15; PPL/400, Ridenour/2, ll. 3–10); (2) Staff's objection to the introduction of additional resources, Glenrock III and Seven Mile Hill II, into the RAC (PPL/101, Kelly/3, ll. 2–7); (3) ICNU's

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proposal that PacifiCorp establish a regulatory liability for banked renewable energy credits ("RECs") (ICNU/11, Falkenberg/2, ll. 33–39; Tr. 123, ll. 7–20); and (4) ICNU's adjustment for liquidated damages paid to PacifiCorp associated with construction delays for Goodnoe Hills (PPL/101, Kelly/2, l. 16–Kelly/3, l. 1).

Third, Staff concedes that its proposal to examine the impact of the RAC on cost of capital should occur within a general rate case, not in this docket. Similarly, it appears that Staff's issues concerning the approach used by PacifiCorp for assessing the economics of renewable resources (the alternative compliance or "ACC" approach) are most appropriately addressed in AR 518, the docket in which the Commission will develop rules to define the "incremental cost of compliance" with SB 838 and otherwise determine how to calculate the cost off-ramp resulting from SB 838.

This leaves three primary issues for resolution in this case: (1) Staff's proposal to disallow $60.5 million in capital costs for the Rolling Hills project (or the equivalent amount in annual net power costs) including phantom RECs and phantom federal production tax credits ("PTCs"), based on a finding of acquisition imprudence and using an imputed 38% capacity factor for the project,[1] (2) Staff's proposal to disallow $14 million in capital costs

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[1] In this case and the related Transition Adjustment Mechanism ("TAM") filing, UE 199, the Company used the capacity factors estimated at project approval for projects under construction, including Rolling Hills (31%) and Glenrock (38.6%). This is the capacity factor relevant to a prudence determination, since it reflects the information known to the Company at the time of project approval. PPL/203, Tallman/4. In the Company's RAC rebuttal testimony, however, it provided the most recent capacity factor estimates for its renewable resources under construction for ratemaking purposes. PPL/203, Tallman/1-4. Rolling Hills now has a 33.8% estimated capacity factor and Glenrock has a 37.4% estimated capacity factor. The RAC Order contemplates such updates for cost elements of projects under construction. RAC Order, Appendix A, page 5, section 6(e).

Staff challenged the capacity factors of Rolling Hills and Glenrock in both UE 199 and UE 200. In the Stipulation in UE 199, the parties agreed to consolidate the adjustments associated with Rolling Hills and Glenrock in UE 200. UE 199 Stipulation, page 6 at section 13(a). The parties also agreed to a November update in the TAM for the Commission-ordered capacity factors and associated generation profiles decided in this case. *Id.* While the Company strenuously objects to Staff's proposal to impute fictitious or outdated capacity factors for Rolling Hills and Glenrock in the RAC and the TAM, it does not object to updating the RAC and the TAM for the most recent capacity factors estimated for these resources. PPL/203, Tallman/3. In the case of Rolling Hills, this would

(continued...)

for the Glenrock project (or the equivalent amount in net annual power costs) by increasing the estimated capacity factor from 38.6% to 41%; and (3) ICNU's proposal to exclude Rolling Hills from rates on the basis of acquisition imprudence or, in the alternative, penalize PacifiCorp for acquiring resources outside of an RFP process by imputing a disallowance in this case measured as the difference between certain qualifying facility ("QF") contract costs and the first year costs of Glenrock and Rolling Hills in the test year.

The most pressing questions presented in this case relate to the application of the Commission's Competitive Bidding Guidelines ("Guidelines") to renewable energy resources that are smaller in size than 100 MW and thus are not "Major Resources." While the Guidelines are completely silent on this issue, Staff contends that the Guidelines should be expanded to require aggregation of certain separate renewable energy resources below 100 MW into a single resource to create one Major Resource that would then be subject to RFP requirements. In cross-examination, the sponsoring Staff witness did not propose any guideline criteria that a utility could use for determining whether this ex post aggregation will occur, instead proposing that each instance be decided on a case-by-case basis.

Staff's position in this case—coupling an expansion of the Guidelines with a proposed capital recovery disallowance of more than $60 million—has created considerable uncertainty and risk for renewable resource acquisition efforts. For example, PacifiCorp has the Glenrock III (39 MW) and Seven Mile Hill II (19.5 MW) wind resources

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increase its capacity factor and associated generation profile in the TAM from 31% to 33.8%; in the case of Glenrock, it would decrease its capacity factor and associated generation profile in the TAM from 38.6% to 37.4%. One other RAC resource under construction has an updated capacity factor: Seven Mile Hill now has a capacity factor of 40.3%, a reduction from the 41.3% capacity factor estimate used in the RAC and TAM filings. PPL/203, Tallman/2.

under construction and is poised to immediately begin site preparation and receive turbines this year on the High Plains (99 MW) wind resource. *See* PPL Cross Exhibit 6, Slides 16–18. To avoid a slow down in renewable resource development and acquisition inconsistent with the legislative intent of SB 838, PacifiCorp urges the Commission to reject Staff's proposed changes to the Guidelines in this proceeding. If the Commission wishes to consider Staff's proposed changes, then the basic requirements of administrative law require commencement of an investigation or rulemaking to consider expansion of the Guidelines. In such a proceeding, the Commission will be able to hear from all SB 838 stakeholders, make a generic policy determination, and properly apply it both prospectively and uniformly.

The Commission should reject the Staff and ICNU adjustments in this case, which are based on PacifiCorp's failure to comply with guidelines that do not yet exist—and under Staff's case-by-case approach will never exist as guidelines. The Commission should likewise make clear that, unless and until new rules or policies to the contrary are developed for prospective application, renewable energy resources 100 MW or above are exempt from the Guidelines in all circumstances.

II. BACKGROUND

A. PacifiCorp Acquired the Renewable Resources in this Case Consistently with the Legislative Objectives of SB 838.

SB 838, the Oregon Renewable Energy Act, was enacted on June 6, 2007. "The Act establishes a Renewable Portfolio Standard for electricity, which requires that utilities meet specified percentages of their Oregon load with electricity generated by eligible renewable resources by specified dates." RAC Order at 1.

SB 838 "provides a comprehensive renewable energy policy for Oregon, enabling industry, government and all Oregonians to *accelerate* the transition to a more reliable and affordable energy system." PPL Cross Exhibit 10 at 1, Preamble to SB 838 (emphasis

added). The law reflects the Governor's and the Legislature's clear intent that PacifiCorp and other utilities reduce their reliance on fossil fuels. Tr. 42, ll. 6–12.

SB 838 sets aggressive renewable acquisition targets, which the Company can meet only through an all-out, creative, timely, and collaborative approach. PPL/101, Kelly/6, ll. 17–19; Cross Exhibit 8 at ICNU/100, Falkenberg/7, ll. 5–7 ("given the ambitious targets set forth under SB 838, it appears that it will be a challenge for PGE and PacifiCorp to meet those goals."). This is particularly true because, as Staff notes, "the market demand for equipment has been volatile partly due to renewable portfolio type-standards in other states, and to the uncertainty each year whether Congress will renew the annual Federal Renewable Production Tax Credit for wind installations . . . wind turbine equipment has consistently been in short supply; and . . . there is significant competition for sites more favorable to wind production where transmission availability is not a major obstacle." Staff/100, Garcia/8, ll. 2–8.

Section 13 of SB 838 provides that "*all* prudently incurred costs associated with compliance with a renewable portfolio standard are recoverable in rates of an electric company." (emphasis added). Section 13 does not require utilities to acquire renewable resources through competitive bidding as a prerequisite to cost recovery. The RAC is the Commission's mechanism adopted to implement Section of SB 838. RAC Order at 9–10.

PacifiCorp's RAC filing includes eight new renewable resources, which have come into service since September, 2006, or are expected to be in service prior to January 1, 2009. PPL/100, Kelly/6, l. 17–Kelly/7, l. 4. It is undisputed that all resources included in this filing, including Rolling Hills, are eligible resources, acquired in compliance with SB 838. Staff/200, Schwartz/2, ll. 11–13.

B. PacifiCorp Acquired the Renewable Resources in this Case Consistently with Its Acknowledged Integrated Resource Plans ("IRPs") and Its Commitments Approved by this Commission.

In *Re PacifiCorp 2004 Integrated Resource Plan*, Docket LC 39, Order No. 06-029 at 3, 63 (Jan. 23, 2006), the Commission acknowledged PacifiCorp's 2004 IRP acquisition target of 1400 MW of renewable resources. PPL/200, Tallman/4, ll. 13–15. In *Re PacifiCorp 2007 Integrated Resource Plan,* Docket LC 42, Order No. 08-232 at 1, 4 (Apr. 24, 2008), the Commission acknowledged PacifiCorp's 2007 IRP acquisition target of 2000 MW of renewable resources by 2013. Staff/200, Schwartz/5, ll. 1–7. With respect to renewable resource procurement, PacifiCorp's 2007 IRP provides that "the company will continue to aggressively pursue the acquisition of these resources through various approaches including new request for proposals, bi-lateral negotiations, the Public Utilities Regulatory Policy Act, and self-development." *Re PacifiCorp 2007 Integrated Resource Plan*, Docket LC 42, PacifiCorp's 2007 IRP at 229 (May 30, 2007) ("2007 IRP").[2]

Relatedly, as a part of the MidAmerican Energy Holdings Company ("MEHC") acquisition, PacifiCorp agreed to acquire 100 MW of renewable resources within one year of closing the transaction, 400 MW of renewable resources by the end of 2007, and reaffirmed the Company's commitment to acquire 1400 MW of cost-effective new renewable resources. PPL/200, Tallman/6, l. 19–Tallman/7, l. 9. Staff has acknowledged that "The 400 MW by 2007 renewable resources target was particularly aggressive given the circumstances: the federal production tax credit was set to expire in 2007, increasing demand for turbines, project sites and labor." Staff/200, Schwartz/7, ll. 16–19.

The parties do not dispute that all resources in this filing, including Rolling Hills, were acquired consistently with PacifiCorp's acknowledged IRPs. Staff/200, Schwartz/2,

[2] Pursuant to OAR 860-014-0050(1), PacifiCorp requests that the Commission take official notice of its 2007 Integrated Resource Plan filed in Docket LC 42 on May 30, 2007.

ll. 11–13. Staff acknowledges that this is evidence in support of favorable ratemaking treatment. Staff/200, Schwartz/3, ll. 14–15; *see also* Cross Exhibit 5, *Re PacifiCorp's Integrated Resource Plan*, Docket LC 42, Order No. 08-232 at 38 (April 24, 2008) ("In rate-making proceedings in which the reasonableness of resource acquisitions is considered, the Commission will give considerable weight to utility actions which are consistent with acknowledged integrated resource plans.")

C. PacifiCorp Acquired the Renewable Resources in this Case Consistently with the Commission's Guidelines.

The Commission adopted the Guidelines on August 10, 2006, prior to enactment of SB 838. *Re Investigation Regarding Competitive Bidding,* Docket UM 1182, Order No. 06-446 (Aug. 10, 2006). Guideline 1 requires competitive bidding for acquisition of Major Resources, defined as resources with durations greater than 5 years and quantities greater than 100 MW. *Id.* at 3. Guideline 2 provides for a waiver of Guideline 1 in certain circumstances, including when the acknowledged IRP provides for alternative acquisition methods for a Major Resource. *Id.* at 4. Guideline 2 also allows the Commission to waive the Guidelines on a case-by-case basis. *Id.*

The Guidelines are silent on their applicability to separate renewable resources located within close proximity to one another. The Guidelines are also silent on penalties or automatic cost disallowances for noncompliance. The policy goals of the guidelines militate against implying new requirements into the guidelines, especially on an ad hoc, retroactive basis. The goals include to: "Not unduly constrain utility management's prerogative to acquire new resources;" "Be flexible, allowing the contracting parties to negotiate mutually beneficial exchange agreements;" and "Be understandable and fair." *Id.* at 2.

Additionally, as Staff as previously noted, the Commission has encouraged acquisition of shorter-term or smaller resources that fall below the 100 MW threshold for Major Resources:

> Besides the benefits associated with having PPAs with diverse supply terms, shorter-term PPAs are part of the bridging strategy the Commission wants the utilities to evaluate in resource planning and acquisition, considering the costs, risks and uncertainties of long-term commitments to fossil-fuel plants. Further, the Commission's resource planning guidelines emphasize the value of maintaining flexibility, including evaluation of resource duration. While the Commission's resource planning order does not explicitly address the value of smaller resources, such resources clearly fall within the Commission's emphasis on optionality. In various proceedings and reports, staff has noted the benefits of acquiring resources in a modular fashion, as needed, rather than all at once as lumpy additions the utilities need to grow into.

Re Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build-vs.-Buy Bias, Docket UM 1276, Staff's Reply Comments of Lisa Schwartz, Commission Staff at 8–9 (Jan. 29, 2008) (footnotes excluded).[3]

In this case, Staff has argued that Rolling Hills and Glenrock should be deemed aggregated and, therefore, the Guidelines deemed applicable to Rolling Hills, even though: (1) each resource is 99 MW, below the Major Resource threshold; (2) the decisions to proceed on Rolling Hills and Glenrock were made at different times and based on stand-alone economic analysis; (3) each resource has a separate certificate of public convenience and necessary certification from the Wyoming Public Service Commission; (4) each resource has separate construction contract obligations; (5) each resource has stand-alone collector substations and transformers; and (6) the Company

[3] Pursuant to OAR 860-014-0050(1), PacifiCorp requests that the Commission take official notice of Staff's Reply Comments filed in Docket UM 1276 on January 29, 2008.

procured wind turbines for the resources at different times in different negotiations. PPL/203, Tallman/15, l. 12–Tallman/16, l. 8; UE 199, PPL/400, Tallman/7, l. 15–Tallman/8, l. 15. While the resources were presented to Wyoming siting commission in the same application, they were listed as separate resources, so the siting commission could have permitted none, one, or both resources. PPL/203, Tallman/16, ll. 6–8.

Staff has not articulated any standard for determining when separate renewable energy resources should be aggregated for purposes of determining whether they constitute a Major Resource. Initially, Staff asserted that the Commission should apply the five-mile radius standard the Commission adopted in UM 1129 to determine if separate QF resources with the same owner should be aggregated for purposes of determining whether they were under 10 MW. UE 199, Staff/200, Schwartz/6, l. 9–Schwartz/7, l. 6; UE 199, Staff/600, Schwartz/5, l. 9–Schwartz/6, l. 4. The Stipulation that proposed this proximity standard, however, expressly contained the parties' agreement that the provisions of the Stipulation were not "appropriate for resolving issues in any other proceeding." PPL Cross Exhibit 3, *Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket UM 1129, Errata Order No. 06-586, Appendix B at 4 (2006).

At hearing, Staff clarified that it was advocating only that the Commission adopt the reasoning behind the QF proximity standard, not the five-mile radius standard itself. Tr. 54, ll. 7-14. When pressed to explain what standard the Commission should apply to determine if aggregation was appropriate, Staff refused to articulate a standard and instead pointed only to the particular facts of this case. Tr. 69, ll. 2-16. According to Staff, the fact that Glenrock and Rolling Hills are both owned by the Company, on the same site about one mile apart, and scheduled to come on line in the same year means that it is "obvious" that the resources should be aggregated to constitute a Major Resource. For

this reason, Staff explained that "we didn't need to go through and develop a set of criteria." Tr. 64, ll. 13-14.

Staff's position raises numerous policy and practical questions, to which Staff has responded with some version of either "the answer depends on the circumstances of the case" or "we don't know." For example, PPL Cross Exhibit 2, PPL Data Request 3.9 asked Staff when a later project is built near an earlier project and the projects total over 100 MW, are both projects then subject to the Guidelines, or just the later project? Staff's response was that "The answer depends on what the Company knew, or could have known, at the time it made the decision to proceed with the earlier resource regarding future development plans at the site, and the most economic development of the site based on the wind resource, equipment cost trends and other factors." PPL Cross Exhibit 2, PPL Data Request 3.9.

Similarly, PPL Cross Exhibit 2, PPL Data Request 3.10 asked when a timely request for a waiver of the Guidelines would be due in the case of aggregation. Staff's response pointed to the Guidelines, which as previously noted, are completely silent on this issue and PacifiCorp's application for a waiver for the Chehalis plant, which is completely inapplicable to this scenario. PPL Cross Exhibit 2, PPL Data Request 3.10. At hearing, Staff was asked whether the deemed aggregation would apply if projects were on the same site with the same owners, but came on line in different years. Staff responded only by pointing to its responses to PPL Data Requests 3.9 and 3.10—which do not address this issue at all. Tr. 66, l. 25–Tr. 67, l. 18.

When asked about whether Staff had considered recommending a rulemaking or investigation to address the aggregation of resources under the Guidelines, Staff responded: "No. Staff did not contemplate that a utility would find the Major Resource definition unclear regarding projects the utility develops at the same site with the same estimated on-line date." PPL Cross Exhibit 2, PPL Data Request 3.17. Staff also

responded that it "did not contemplate that the Commission would apply ownership and proximity criteria only to Qualifying Facilities." *Id.*

Staff's view that there is no need to design and articulate a clear policy around resource aggregation under the Guidelines is in contrast to the Commission's approach in the QF docket, where the Commission fully investigated the issue, adopted a well-defined proximity standard, and applied the standard on a prospective basis only. It is also in contrast to the manner in which similar issues have been addressed by the Oregon Department of Energy, which issued OAR 330-090-0120(6), defining standards for distinct facility characteristics to qualify for BETCs. UE 199, Staff/601, Schwartz/2–4. Similarly, while Oregon Energy Facility Siting Council ("EFSC") does not currently apply distance-based criteria in determining jurisdiction over siting (UE 199, PPL/400, Tallman/7, ll. 11–14), the EFSC minutes attached to Staff's testimony suggest that if EFSC decides to promulgate new policy on this issue, it would do so through a rulemaking with opportunity for notice and comment. UE 199, Staff/602, Schwartz/3.

D. PacifiCorp Acquired the Renewable Resources in this Case Through a Reasonable Resource Acquisition Process.

On January 16, 2007, the Commission denied approval of PacifiCorp's draft 2012 RFP. *Re PacifiCorp Draft 2012 Request for Proposals*, Docket UM 1208, Order No. 07-018 (Jan. 16, 2007). The Commission indicated that it expected "the company to fully explore . . . renewable resources . . . at levels incremental to the amounts in the acknowledged 2004 IRP Action Plan." *Id.* at 6. The Commission noted in this regard "that competitive bidding may not be the appropriate mechanism to acquire all resources that may be part of the best cost/risk portfolio." *Id.* The Order also noted that "A utility's RFP must take into account resources that will be acquired through mechanisms other than competitive bidding . . .." *Id.*

The Company followed the Commission's direction to meet or exceed its IRP renewable resource targets and to use both the competitive bidding process and other acquisition processes as appropriate. In determining its acquisition strategies, the Company considered factors such as market changes, the rise in major equipment and construction costs, the time-limited nature of renewable resource opportunities, and the reasonable expectation that a resource could be placed in-service before the then-current expiration of the PTC. UE 199, PPL/400, Tallman/9, ll.9–16. In each case, whether or not the competitive bidding process was used, the Company employed the same analytical tools to determine the cost-effectiveness of the resource. UE 199, PPL/400, Tallman/9, ll. 16–18.

Three of the Company's renewable resources in this case, Leaning Juniper 1, Marengo, and Marengo II, resulted from RFP 2003-B. Staff/202, Schwartz/1.

PacifiCorp separately developed Seven Mile Hill, Glenrock, and Rolling Hills. The wind turbines that are being installed at Rolling Hills were procured for another resource located in another state. UE 199, PPL/400, Tallman/8, ll. 4–12. When the Company decided not to pursue that resource, it determined that Rolling Hills was the best option to ensure completion of a resource before expiration of the PTC on December 31, 2008. *Id.* The engineer, procure, construct services, and collector substation transformer for each of these projects resulted from RFPs issued by the Company's procurement department. Staff/202, Schwartz/1.

Similarly, PacifiCorp developed the Blundell Bottoming Cycle project and acquired the engineer, procure, construct services, and the major generation equipment supply from a PacifiCorp RFP issued by the Company's procurement department. *Id.*

Goodnoe Hills was acquired with Staff's assistance in the negotiation of funding agreements with the Energy Trust of Oregon. Goodnoe Hills was originally contemplated as two 56 MW projects (Goodnoe Hills West and Goodnoe Hills East) in close proximity to

one another that would have been constructed by the same contractor, with the same on-line date and with a shared single collector substation and transformer. PPL/203, Tallman/12, n.5. Staff never raised the issue of aggregation of these projects into a single 112 MW resource that would be deemed a Major Resource, even though Staff was involved with the project both during the development of the Guidelines and after their promulgation in August 2006. Staff Cross Exhibit 504, Letter from Energy Trust to Lisa Schwartz on the two 56 MW resources dated September 14, 2006 (confidential attachment to OPUC 6-2, Exhibit C to Energy Trust-PacifiCorp Agreement).

Looking forward, the Company now has two 2008 RFPs pending for renewable resources. One is in the process of being issued and seeks Major Resources over 100 MW, whereas the other was issued on January 31, 2008, and targets renewable resources under 100 MW. PPL/200, Tallman/5–6; PPL/101, Kelly/12. Pursuant to the January 31, 2008, RFP, the Company recently announced execution of a new 20-year, 99 MW power purchase agreement ("PPA") with Duke Energy. Staff Cross Exhibit 508. In announcing the PPA, Duke Energy observed that "Soaring interest in wind energy has translated into a growing demand for turbines and a tightening supply." *Id.*

III. ARGUMENT

A. The Commission Should Reject Staff's Proposed Rolling Hills Disallowance.

1. Staff Provides No Basis for a Commission Finding that the Costs of Rolling Hills Were Imprudently Incurred.

Staff claims that its proposed Rolling Hills disallowance is based on a finding of acquisition imprudence. UE 200, Staff/200, Schwartz/2, ll. 14–16. Staff, however, has presented no basis for the Commission to make such a finding. Pursuant to Section 13 of SB 838, "*all prudently incurred costs* associated with compliance with a renewable portfolio standard are recoverable in the rates of an electric company." PPL Cross Exhibit 10 at 8 (Emphasis added). Because the Company has shown that the costs associated

with Rolling Hills were prudently incurred, the Commission may not deny recovery of these costs.

To determine whether the utility's decision to acquire a given resource is prudent, the Commission will examine the objective reasonableness of the decision. *Re PacifiCorp,* Docket UM 995, Order No. 02-469, 218 P.U.R.4th 465, 468 (July 18, 2002). The Commission will consider the utility's decision at the time it was made, meaning without the benefit of hindsight. *Id.* at 469; *Re Tariffs filed by Juniper Utility Co. for Water Service*, Docket UW 65, Order No. 00-543 at 8 (Sept. 14, 2000). Importantly, the Commission cannot substitute its judgment for that of the utility. *Pac. Tel. & Tel. Co. v. Flagg*, 189 Or. 370, 395–96 (1950). The determination of what is reasonable with respect to a utility's business is the primary responsibility of management of the utility, not the Commission. *Id.*

In its testimony, Staff insinuates that PacifiCorp must show that the acquisition of Rolling Hills was the "best" resource or the "best" combination of cost and risk to meet its burden of showing that the acquisition was prudent. *See* UE 199, Staff/600, Schwartz/3, ll. 18–19; UE 200, Staff/100, Garcia/8, l. 22–Garcia/9, l. 2. This is not, however, the standard the Commission uses to judge prudence. The Company must show that the acquisition was objectively reasonable, not that it was the "best" choice from Staff's or the Commission's perspective. *See Re PacifiCorp*, Docket UM 995, Order No. 02-469, 218 P.U.R.4th 465, 468 (July 18, 2002).

Another guiding standard in prudence reviews is that the Commission must exercise "a high degree of caution" in evaluating prudence. *Re Portland Gen. Elec. Co.*, Docket UE 139, Order No. 02-772, 222 P.U.R.4th 139, 149 (Oct. 30, 2002). The Commission has recognized the need for regulatory certainty, and the corresponding high standard the Commission must use when examining the reasonableness of utility decisions to further this policy. *Id.* As evidence of the Commission's cautious approach to

findings of imprudence, the Commission has never concluded that one of PacifiCorp's owned resources was imprudent. PPL/101, Kelly/7, ll. 4–9.[4]

In addition, SB 838 may require parties advocating a finding of imprudence to meet a higher burden for renewable resources. According to ICNU, "Because the acquisition of eligible renewable resources is mandated by SB 838, parties are likely to face a heightened standard for showing that the Utilities have been imprudent." PPL Cross Exhibit 4, Order 07-572 at 7. Staff has also identified the timely recovery of prudently-incurred costs required by SB 838 as an element that reduces regulatory risk to the Company. UE 200, Staff/300, Brown/14, ll. 1–2.

Despite its position that SB 838 reduces regulatory risk to the Company, Staff has proposed an unprecedented prudence disallowance in this proceeding. PPL/101, Kelly/7, ll. 4–9. Staff recommends a finding of imprudence on the basis that the acquisition of Rolling Hills was inconsistent with the Guidelines. UE 200, Staff/200, Schwartz/2, ll. 14–16. Staff does not address the objective reasonableness of the acquisition except with respect to consistency with the Guidelines. As described below, PacifiCorp has presented uncontradicted evidence that the acquisition of Rolling Hills was objectively reasonable and therefore prudent. Accordingly, under SB 838, there is no basis for a disallowance of costs related to Rolling Hills.

2. PacifiCorp's Acquisition of Rolling Hills Was Objectively Reasonable.

a. Rolling Hills Is Consistent with the Company's IRP and Its Costs Are Below those of the IRP Proxy.

Staff found that Rolling Hills is consistent with the Company's most recently approved IRPs. Staff/200, Schwartz/2, ll. 11–13. At hearing, Staff acknowledged that the

[4] None of PacifiCorp's other five state commissions have made such a finding either. PPL/101, Kelly/7, ll. 4–9.

Commission will give considerable weight to utility actions that are consistent with acknowledged IRPs when evaluating the reasonableness of the actions. Tr. 81, l. 17–Tr. 82, l. 4.

Moreover, the capital costs of Rolling Hills are well below the costs of proxy resources in the Company's approved IRP. PPL/203, Tallman/10–11; Confidential Exhibit PPL/207. Staff testified that the projected capital costs of Rolling Hills are above the 2007 IRP proxy of $2,011 per kW. Staff/102, Garcia/1; Staff/200, Schwartz/5, l. 16–Schwartz/6, l. 8. Staff, however, noted that the IRP proxy costs it cites are in 2006 dollars. UE 200, Staff/200, Schwartz/6, n.2. Rolling Hills, on the other hand, is a 2008 resource. PPL/203, Tallman/9, ll. 18–20. Staff did not dispute that when IRP proxy costs are adjusted for reasonable inflation, Rolling Hills costs are below the IRP proxy costs. Tr. 79, l. 8–Tr. 80, l. 8; PPL/203, Tallman/9, l. 20–Tallman/10, l. 4. Indeed, according to Staff/102, Garcia/1, capital costs for wind projects increased by 8.9% from 2006 to 2007 and by 12.3% from 2007 to 2008 estimates.

Staff's analyses supporting its contention that Rolling Hills costs are higher than IRP proxy costs is flawed on two other bases. First, the IRP proxy does not include integration costs whereas the Rolling Hills calculation does. PPL/203, Tallman/10, ll. 11–12. Second, the IRP reference is on a real-levelized basis whereas Staff's reference to Rolling Hills is on a nominal-levelized basis. PPL/203, Tallman/10, ll. 12–15. Real-levelized representations and nominal-levelized representations cannot be directly compared. PPL/203, Tallman/10, ll. 14. When the Rolling Hills costs are conservatively compared with the IRP proxy that appropriately includes wind integration costs and both are on a real-levelized basis, the projected cost of Rolling Hills is well below the IRP proxy. PPL/203, Tallman/10, l. 16–Tallman/11, l. 2; Confidential Exhibit PPL/207.

b. Rolling Hills Costs are Below Avoided Costs.

Rolling Hills costs are below PacifiCorp's Oregon avoided costs. PPL/203, Tallman/11, ll. 3–8; Confidential Exhibit PPL/208; Staff/202, Schwartz/10. Oregon's Schedule 37 avoided cost is currently $60.54 per MWh on a real-levelized basis, without wind integration. PPL/203, Tallman/11, ll. 3–8. The projected costs of Rolling Hills are lower than that amount, using either the original capacity factor for project approval or the updated capacity factor. Confidential Exhibit PPL/208.

c. Rolling Hills' ACC Is Below Another Resource Not Challenged by Staff and Below Market.

In addition to the costs of Rolling Hills being below the Company's IRP proxy cost and avoided cost, Rolling Hills' ACC is lower than that of another resource that Staff found to be prudent. Goodnoe Hills' ACC is $6.37 per MWh, whereas Rolling Hills' ACC was $4.53 per MWh at project approval. PPL/203, Tallman 12, ll. 7–14. Staff never disputed that an ACC of $4.53 per MWh is reasonable. PPL/203, Tallman 12, ll. 7–8. In addition, updating the ACC with the most recent capacity factor results in an ACC for Rolling Hills that is below market—negative $2.91 per MWh. PPL/203, Tallman/12, l. 15–Tallman/13, l. 1. The Company's economic analysis was conservative, as it used the conservative projected capacity factor of 31% and did not factor in the terminal value that benefits customers, avoided lease costs, portfolio risk reduction value, or the possibility, which has come to fruition, that the estimated capacity factor would increase. PPL/203, Tallman/14, ll. 7–8; Tallman/14, l. 22–Tallman/15, l. 2.

d. Staff Found that Rolling Hills Capital Costs Are Reasonable.

Staff explicitly found that the capital costs of Rolling Hills on a capacity basis are within a reasonable range. Staff/100, Garcia/8, ll. 22–23. Also, the capital costs of Rolling Hills are below the costs of Glenrock and Goodnoe Hills—neither of which have been targeted by Staff for a prudence disallowance. *See* Staff/102, Garcia/1.

e. Staff's Sole Concern with the Reasonableness of Rolling Hills is the Capacity Factor.

In support of its Rolling Hills disallowance, the only concern Staff has raised with respect to the resource itself is the capacity factor. Capacity factor, however, is not the only determinant of whether a project is cost effective. PPL/203, Tallman/4, ll. 12–15. Staff agrees that it is important to consider other factors in addition to capacity factor when assessing the prudence of a wind resource. Tr. 90, ll. 15-18. In fact, Staff criticized the Company for relying too heavily on the cost of compliance in evaluating a resource without weighing other attributes. Staff/300, Brown/7, ll. 16-22.

In addition to inappropriately focusing on only one element of the resource, Staff's proposed disallowance on the basis of capacity factor is unreasonable in light of the capacity factors of other resources that Staff has found to be prudent. Rolling Hills' annual capacity factor estimated at project approval was 31%—higher than that of Marengo II, which the Company acquired through an RFP and Staff did not challenge. *See* PPL Cross Exhibit 6, Slide 12. In addition, the final build design estimate of Rolling Hills' capacity factor is 33.8%—higher than Marengo I, Marengo II, and Goodnoe Hills, which Staff also did not challenge. *See* PPL Cross Exhibit 6, Slides 9, 12, 13. The Commission can not reasonably find that the estimated capacity factor of Rolling Hills causes the resource to be imprudent when lower capacity factors do not cause the same result with respect to other resources.

Moreover, the Company was aware of no site with a higher capacity factor that would have been available to the Company if the Company issued an RFP. PPL/203, Tallman/18, ll. 5–13; PPL/101, Kelly/10, ll. 2–5. No party presented evidence to the contrary. *Id.*; *see* PPL Cross Exhibit 2, PPL Data Request 3.7. The Company announced its intention to issue an RFP in 2008 and this announcement yielded no additional siting

applications in Wyoming as of September 7, 2008, even though the Company's intent to issue a renewable RFP was known for several months. Tr. 39, l. 23–Tr. 40, l. 8.

3. The Commission Cannot Find that the Acquisition of Rolling Hills Was Imprudent Based on Alleged Noncompliance with Guidelines.

Staff's recommended disallowance of costs related to Rolling Hills is based solely on Staff's assertion that PacifiCorp did not comply with the Guidelines in acquiring Rolling Hills. In order to find that PacifiCorp violated the Guidelines, the Commission must accept Staff's expansion of the Guidelines that was revealed only upon Staff's filing of its testimony in this case and even now, after rounds of testimony and a hearing, remains ambiguous.

For three reasons the Commission should reject application of Staff's proposed changes to the guidelines in this proceeding. First, it is inappropriate for the Commission to establish new rules of general applicability in a contested case, as would be required in order to adopt Staff's position. Instead, the proper forum to address changes to the Guidelines is in an expedited investigation or rulemaking proceeding. Second, retroactive application of a rule would be unreasonable under the circumstances of this case. Third, nothing in the Guidelines or in the Commission's other rules or orders bars cost recovery of a resource not acquired in compliance with the Guidelines.

a. The Commission Must Establish Rules of General Applicability in a Rulemaking or Investigation, Not in this Contested Case.

A contested case proceeding is an inappropriate forum for establishing new rules of general applicability, as Staff is seeking to do in this case. Although the Guidelines were not promulgated in a Commission rulemaking docket, they are properly interpreted as "rules" under the Oregon Administrative Procedures Act ("APA"). The APA defines a "rule" as "any agency directive, standard, regulation, or statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or

practice requirements of any agency." ORS 183.310(9). Agency decisions that are not directed to a named person and involve a quasi-legislative act of general applicability are rules. *Pac. NW Bell Tel. Co. v. Eachus*, 107 Or. App. 539, 542 (1991). This is the case even if the rule was not promulgated in accordance with the APA. *See Burke v. Children's Services Div.*, 288 Or. 533, 537–538 (1980) (a statement adopting an agency program was a rule regardless of the informal nature of its promulgation because it met the definition of "rule" in the APA). A court has previously interpreted a Commission guideline as a rule. *See Pac. NW Bell Tel. Co. v. Davis*, 43 Or. App. 999 (1979). In the present case, the Guidelines are considered rules for purposes of analysis under the APA, because they are quasi-legislative in nature and are applicable to all parties and all RFP proceedings to which the Guidelines apply.

Although agencies may establish rules in contested cases under certain circumstances, this method is inappropriate where the purpose is adopting policies of general application. *Multnomah Cty. v. Davis*, 35 Or. App. 521, 526 (1978). Contested case procedures do not afford the broader public input that is required when enacting such policies. *Id.*

In this case, Staff is proposing to add additional requirements to the Guidelines. In doing so, the Commission would adopt additional policies of general application that should be implemented in a manner that involves broader public input than is possible in a contested case proceeding. When establishing the Guidelines, the Commission gave notice that it would be investigating the Guidelines at a public meeting, held numerous conferences and workshops, and reviewed two rounds of comments from participating parties. The Commission acknowledged the benefit of public notice and participation by conducting a comprehensive and open process for adopting the Guidelines. It would be unfair to other parties that participated in drafting the Guidelines to make significant changes to the Guidelines without a similar opportunity for notice and participation.

The need for public notice and input on Staff's proposed changes to the Guidelines is even more pronounced under these circumstances, because it is still unclear what standard Staff is proposing be applied in this case and in the future. Although a reasonable reading of Staff's pre-filed testimony indicated that that Staff was proposing that the Commission apply the QF proximity principle to the definition of Major Resource, Staff modified this position at hearing. UE 199, Staff/200, Schwartz/6, l. 12–Schwartz/7, l. 6.; Tr. 57, l. 21–Tr. 58, l. 1. Then, when asked what standards Staff proposed to apply to its new interpretation of the definition of Major Resource, Staff did not articulate any standards. Tr. 64, ll. 7–14; Tr. 68, l. 23–Tr. 69, l. 11. Staff stated that it "didn't need to go through and develop a set of criteria" because in the case of Rolling Hills "[i]t's obvious." Tr. 64, l. 12–14. Staff's apparently ad hoc approach to modifying Commission rules is inconsistent with the Commission's policy of promoting regulatory certainty and would result in arbitrary decision-making.

The proper forum to address changes to the Guidelines is in an investigation or an expedited rulemaking proceeding. Staff's approach to the Guidelines present serious policy issues for the acquisition of all resource types, not just wind resources, that the Commission should consider in a more deliberate way than is allowed in this proceeding. For example, the proximity criterion originally proposed by Staff could have the effect of creating a five-mile exclusion zone around each resource because it would not be clear whether adding a resource within that distance would trigger an RFP requirement. PPL/101, Kelly/11, ll. 6–11. Such an effect would discourage expeditious acquisition and investment in time-limited renewable resources, such as the Glenrock III and Seven Mile Hill II wind resources currently under construction. The case-by-case approach Staff proposed at hearing is even more problematic because it effectively makes the applicability of the Guidelines discretionary to Staff.

b. The Commission Cannot Apply Staff's Recommended Rule Changes Retroactively.

Staff's position would require the Commission to apply new rules retroactively, a result that is inconsistent with Oregon law. The Commission may only apply new rules retroactively under certain circumstances. A retroactive rule will be invalid if its retroactivity is unreasonable under the circumstances. *Gooderham v. Adult & Family Serv. Div.*, 64 Or. App. 104, 108 (1983). When evaluating whether the Commission may apply a rule retroactively, a court will consider: (1) whether case is one of first impression; (2) whether the new rule is an abrupt departure from well established practice or resolves unsettled area of the law; (3) the extent to which the party relied on former rule; (4) the degree of the burden a retroactive order would impose on party; and (5) the statutory interest in applying new rule. *Id.* at 109 (citing *Retail, Wholesale and Dep't Store U. v. N.L.R.B.*, 466 F.2d 380, 390 (D.C.Cir. 1972)).

All five of these factors weigh against retroactive application of Staff's proposed changes to the Guidelines. First, this case is not the first time the Commission has addressed the definition of "Major Resource." In the proceeding in which the Commission adopted the Guidelines, Staff never proposed the definition of "Major Resource" that it is now proposing in this case. It would be unreasonable for the Commission to change the Guidelines retroactively to PacifiCorp's detriment when Staff could have raised its proposed definition in a previous proceeding.

Second, Staff's proposed expansion of the Guidelines is an abrupt departure from well-established Commission practice. Staff admits that no party raised the QF proximity standard with respect to the Guidelines prior to Staff's testimony in this case. Tr. 56, l. 20–Tr. 57, l. 20. No party raised this issue or a similar issue in the Guideline proceedings. Staff's injection of a proximity standard is an abrupt departure from the current Guidelines.

Third, it is undeniable that PacifiCorp relied upon the former rule defining Major Resources as those 100 MW or greater when deciding to acquire Rolling Hills and Glenrock. Tr. 42, l. 2–Tr. 43, l. 4.

Fourth, retroactive application of the new guidelines would impose a significant burden on PacifiCorp. The most obvious burden would be the cost disallowance proposed by Staff in this case. In addition, however, the Company plans to construct the 99 MW High Plains resource for 2009. PPL Cross Exhibit 6, Slide 18. Staff's proposal regarding the definition of Major Resource is so unclear that it is not certain whether this project will be deemed a Major Resource on the theory that the size of the resource could or should be expanded at some point in the future. Potential retroactive application of an ambiguous "Major Resource" standard is unfair and burdensome with respect to resources now in construction and those now under development.

Finally, there is a statutory interest in *not* applying Staff's position retroactively because SB 838 mandates aggressive renewable resource targets and requires that utilities be allowed to recover prudently incurred costs related to compliance with the statute.

Under these circumstances—where the utility had no prior notice of the new guidelines, relied on the previous version of the Guidelines, will be significantly harmed by retroactive application, and the only statutory interest is in not applying the Staff's position retroactively—retroactive application would be unreasonable.

c. Commission Precedent Does Not Bar Full Cost Recovery for a Resource Not Acquired According to the Guidelines.

Staff's position in this case is that noncompliance with the Guidelines bars full cost recovery of the relevant resource. Nothing in the Guidelines or other Commission precedent dictates such a result. In fact, Commission and Staff statements on

Commission review of resources with respect to the IRP indicate the opposite—that inconsistency with an IRP or RFP does not bar cost recovery.

In its order acknowledging PacifiCorp's 2007 IRP, the Commission stated that utilities "will also be expected to explain actions they take which may be inconsistent with Commission-acknowledged plans." *Re PacifiCorp Application for Acknowledgement of its 2007 Integrated Resource Plan*, Docket LC 42, Order 08-232 at 38 (Apr. 24, 2008). The Commission does not state that actions that are inconsistent with an acknowledged IRP will automatically be subject to cost disallowance. To the contrary, the fact that the Commission stated that it will give "considerable weight" to actions that are consistent with an acknowledged IRP indicates that it will give less weight to actions that are inconsistent with an IRP. This standard would require a greater burden on the utility to show that an inconsistent action was prudent, but would not automatically require some degree of cost disallowance.

In this case, the acquisition of Rolling Hills was consistent with the Company's acknowledged IRP, but Staff is alleging that the Company did not comply with the Guidelines in acquiring the resource. In the event that the Commission agrees with Staff's interpretation, the Commission should apply the same standard to actions that are inconsistent with the Guidelines as it does to actions that are inconsistent with an acknowledged IRP—giving less weight to such actions. This standard would track the Commission's previous statement that acceptance or rejection of a utility's RFP may be relevant in a future rate proceeding, but the lack of an approved RFP does not automatically bar cost recovery. *Re PacifiCorp Draft 2009 Request for Proposals*, Docket UM 1208, Order No. 06-676 at 4 (Dec. 20, 2006).

Finally, even if the Commission adopts Staff's new definition of Major Resource in this proceeding, the Commission should use its discretion to waive the application of the Guidelines with respect to Rolling Hills. Guideline 2(b) allows waivers contemplated by

the utility's IRP and Guideline 2(c) provides that the Commission may waive the guidelines on a case-by-case basis. Order No. 06-446 at 4.

A waiver is appropriate in this case. PacifiCorp's acknowledged 2007 IRP specifically noted that PacifiCorp planned to acquire renewable resources through competitive bidding *and* self-development. 2007 IRP at 229. Additionally, PacifiCorp provided evidence that the turbines used for Rolling Hills were available only on a time-limited basis. Tr. 42, ll. 20–24. PacifiCorp would not have been able to hold the turbines for the duration of an RFP process and had limited ability to sell them. PPL/203, Tallman 19, l. 5–Tallman/22, l. 7. Therefore, use of an RFP process in this case would have resulted in the loss of the turbines and the loss of a cost-effective wind resource timed for completion before the current expiration of the PTC at the end of 2008.

Furthermore, the Commission has stated that the goals of the Guidelines include being flexible and fair. It would be unfair to impose upon PacifiCorp new standards that it had no reason to anticipate would be applied in this case. Application of those standards in this case would thwart the Legislature's and the Governor's goal of encouraging utilities to invest in renewable resources and the statutory mandate that prudent costs associated with such resources are recoverable. Under these circumstances, the appropriate action on the part of the Commission is to waive the RFP requirement with respect to Rolling Hills pursuant to Guideline 2(b) and 2(c), assuming the Commission finds that the requirement is applicable in the first place.

4. Even if the Commission Finds that the Acquisition of Rolling Hills Was Imprudent, Staff's Proposed Capacity Factor Imputation is Inappropriate.

If the Commission finds that the Company's acquisition of Rolling Hills was imprudent, it should not adopt Staff's proposed capacity factor imputation. By definition, the Commission's authority to disallow imprudent costs requires identification and quantification of costs that are objectively unreasonable. *See Re Tariffs Filed by Juniper*

Utility Co. for Water Serv., Docket UW 65, Order No. 00-543 at 8 (Sept. 14, 2000). The Commission may adjust utility rates that fail to meet a just and reasonable standard. *Id.* When doing so, the Commission will set rates that reflect the costs the utility would have incurred if its action was prudent. *Id.* The costs of Rolling Hills are objectively reasonable, so there is no basis for a prudence disallowance in this case.

In past orders in which it found a utility's construction of a project to be imprudent, the Commission ordered that only the cost of the resource that the Commission deemed appropriate would be included in rates. *Re NW Natural Gas Co.*, Docket UG 132, Order No. 99-697 at 53 (Nov. 12, 1999). Similarly, with respect to imprudent power purchase agreements, the Commission repriced the contracts "to more appropriate levels." *Re Portland Gen. Elec. Co.*, Docket UE 139, Order No. 02-772, 222 P.U.R.4th 139, 151 (Oct. 30, 2002).

The Commission has never imputed a higher capacity factor as a remedy for a finding of imprudence. There is a sound reason why the Commission has not done so in the past and should not in this case. Capacity factor is but one element that affects the overall cost effectiveness of a resource. It would undermine the Commission's policy of exercising a high degree of caution with respect to imprudence determinations if the Commission were to hinge its finding of imprudence on one cost element, when overall the resource is cost effective.

Even if the Commission finds that a utility's decisions were not prudent, that finding will not necessarily result in a disallowance of expenses related to the decisions if the Commission does not find that the decision harmed ratepayers. *Re Avista Utilities*, Docket UG 165, Order No. 05-1053, Appendix A at 13 (Sept. 29, 2005). For example, in an order approving recovery of gas costs, the Commission adopted Staff's finding that a disallowance was not appropriate because Staff could not draw a nexus between harm to the ratepayer and the company's gas procurement decisions. *Id.*

In this case, Staff found that the capital costs of Rolling Hills were reasonable. Staff/100, Garcia/8, ll. 22–23. By definition, then, there are no unreasonable capital costs to disallow, as has been the Commission's remedy in response to a finding of imprudence in the past. There is no nexus between the Company's acquisition of Rolling Hills and harm to ratepayers, so there is no basis for a cost disallowance.

In addition, Staff's proposed disallowance is unreasonably high, especially given the fact that the cost of Rolling Hills was reasonable. The impact of Staff's proposed capacity imputation is approximately $44 million, or $452 per kW. PPL/203, Tallman/7, l. 11–14. Including the phantom RECs and phantom PTCs that Staff imputes as a result of increasing the capacity factor of Rolling Hills, the total amount of Staff's proposed disallowance is an additional $14.5 million and $1.5 million respectively, bringing the total disallowance to approximately $60.5 million. PPL/203, Tallman/8, l. 8–l. 17. The effect of this level of disallowance is to reduce the costs of Rolling Hills to $1,474 per kW. PPL/203, Tallman/8, l. 20–Tallman/9, l. 5. This disallowance would result in costs for Rolling Hills that are far lower than any other resource in this case—including Leaning Juniper, which was completed two years ago. PPL/203, Tallman/7, l. 19–Tallman/8, l. 2.

If it determines that the Company's acquisition of Rolling Hills was imprudent and that a cost disallowance is appropriate, the Commission should exclude Rolling Hills from rates, as is proposed by ICNU in the event the Commission rejects Staff's disallowance. ICNU/100, Falkenberg/16, ll. 2–3. It would be unfair for Oregon to disallow costs related to a renewable resource but claim a full share of the RECs related to the resource. PPL/101, Kelly/5, ll. 3–18. Permanently removing the resource from rates would be the only equitable result if the Commission decides to disallow costs related to Rolling Hills.

5. If the Commission Accepts Staff's Proposed Capacity Factor Imputation, the Relevant Capacity Factor is 35%, Not 38%.

If the Commission decides to implement Staff's proposed capacity factor imputation, the proper capacity factor to use is 35%, not the 38% proposed by Staff. Staff stated in pre-filed testimony that its proposed capacity factor imputation is based on what Staff claims is the average capacity factor for Wyoming wind resources serving PacifiCorp. UE 199, Staff/600, Schwartz/11, ll. 8–12. At hearing, after being confronted with evidence that the correct capacity factor is 35%, Staff altered its position to state that its proposed imputation was still 38%, but was no longer based on the average capacity factor for the Company's Wyoming wind resources. Tr. 75, ll. 15–25. Staff never explained its new basis for its 38% proposal. Tr. 73, l. 7–Tr. 76, l. 6.

The average capacity factor for Wyoming wind resources serving PacifiCorp is 35%, not 38%. PPL/203, Tallman/5, ll. 2–10. This is also the average capacity factor for Wyoming resources used in the Company's acknowledged 2007 IRP. Tr. 73, ll. 10–12. Although Staff stated that it identified problems with the 35% average capacity calculation, it never proposed an alternative calculation, described precisely how the identified problems affected the calculation, or adequately identified problems with PacifiCorp's workpapers supporting this calculation. Tr. 73, l. 21–Tr. 75, l. 14.

Based on the correct calculation for the average capacity factor for the Company's Wyoming wind resources serving PacifiCorp and Staff's interpretation of Rolling Hills and Glenrock as one project, there is no basis for a capacity imputation for Rolling Hills. It is a pre-condition to Staff's proposed disallowance that the Commission apply Staff's expanded Guidelines and deem Rolling Hills and Glenrock a single resource. Therefore, the relevant capacity factor is the combined capacity factor of both resources. Based on project approval estimates, the combined capacity factor is 34.8%. PPL/203, Tallman/5, ll. 11-13. Based on more recent final build design estimates, the combined capacity factor is

35.6%. *Id.* Both of these estimates are at the average for the Company's Wyoming wind resources, so there is no basis for a disallowance related to Rolling Hills.

B. The Commission Should Reject Staff's Proposed Glenrock Disallowance.

Staff also recommends a capital cost disallowance of $14 million related to Glenrock, or an equivalent disallowance in annual net power costs. Staff's proposal imputes a 41% capacity factor to Glenrock, an increase from the 38.6% capacity factor PacifiCorp relied upon in approving the resource and in filing this case. Staff/200, Schwartz/17, ll. 13–20. Unlike Staff's position with respect to Rolling Hills, the proposed Glenrock adjustment is not based on prudence. PPL Cross Exhibit 1, Response to PPL Data Request 1.9 ("With the exception of Rolling Hills, Staff finds each resource in the RAC prudently acquired.")

Staff has presented no basis for a disallowance of costs related to Glenrock. First, such a result is prohibited under SB 838. SB 838 mandates cost recovery for prudent resources generating electricity eligible to comply with Oregon's RPS standards. Staff explicitly stated that the Glenrock adjustment is not based on prudence, so the proposed cost disallowance is not allowed under SB 838. In addition, Staff stated that the issue of capital disallowance of a RAC resource is only relevant within a prudence review. PPL Cross Exhibit 2, PPL Data Request 3.14. Staff also states that it would be open to reconsidering the Glenrock capacity factor in the future, an action inconsistent with the one-time nature of prudence disallowances. Tr. 119, ll. 20–23.

If Staff's proposed disallowance is properly viewed as an update to the RAC, not a disallowance, Glenrock's capacity factor should be set at 37.4%. Although the interim technical site review for Glenrock estimated the capacity factor at 41%, the more recent final build design estimate projected the capacity factor at 37.4%. PPL/203, Tallman/2, ll. 4–7; Confidential Exhibit PPL/205, Tallman/21. The RAC Order provides that all cost elements of the RAC are subject to updating through November. RAC Order, Appendix A

at 5. Staff agreed that capacity factor is a cost element. Tr. 101, ll. 12–14. Therefore, the most recent capacity factor estimate, 37.4%, should be used for Glenrock, not the 41% proposed by Staff.[5]

C. The Commission Should Reject ICNU's Proposed Rolling Hills, Glenrock, and Seven Mile Hill Adjustments.

ICNU proposes to disallow costs related to Rolling Hills, Glenrock, and Seven Mile Hill on the basis that these 99 MW projects were acquired without an RFP. ICNU/100, Falkenberg/2, ll. 24–31. ICNU proposes to implement the disallowance by limiting the first-year cost of Rolling Hills and Glenrock to the cost of three wind QF resources that the Company acquired via power purchase agreement for 2008. ICNU/100, Falkenberg/22, l. 15–Falkenberg/23, l. 2. ICNU's proposal includes only Rolling Hills and Glenrock because Seven Mile Hill's first-year cost is less than that of the QF projects. ICNU/100, Falkenberg/23, n.7.

ICNU's proposed disallowance is flawed on a number of bases. First, the Commission cannot disallow the costs of prudently incurred renewable resources under SB 838. Second, ICNU's proposal is flawed because, similar to Staff's proposed Rolling Hills disallowance and as described in detail above, it rests on retroactive application of new Commission rules. It also imposes a remedy for violation of the new rules that is unreasonable in light of past Commission precedent in IRP and RFP orders.

In addition, the operation of ICNU's proposed disallowance is flawed. ICNU compares the test year costs of the three QF resources to the first year costs for Glenrock and Rolling Hills. Tr. 125, ll. 9–13. ICNU's witness Randall Falkenberg, however, previously criticized the use of first year costs when designing rate recovery for renewable resources. PPL Cross Exhibit 8 at ICNU/100, Falkenberg/12, l. 6–Falkenberg/15, l. 6.

[5] See footnote 1.

ICNU's criticism is based on the fact that the first year cost of a renewable resource is much higher than its levelized cost. Tr. 127, ll. 17–19. ICNU agreed that comparing the levelized cost of Rolling Hills and Glenrock to the QF costs would avoid this problem. Tr. 128, ll. 10–16. Additionally, SB 838 contemplates use of levelized costs in determining costs of compliance. SB 838, Section 12(4). When the levelized costs of Rolling Hills and Glenrock are compared with QF PPA costs, the costs compare favorably. PPL/203, Tallman/17, l. 19–Tallman/18, l. 4; Staff/202, Schwartz/10. This is especially true considering that the QF PPA costs do not include any wind integration charges. Tr. 124, l. 23–Tr. 125, l. 2.

ICNU states that if the Commission does not adopt Staff's proposed disallowance with respect to Rolling Hills, ICNU recommends removing Rolling Hills from the RAC with an offsetting increase to the TAM. ICNU/100, Falkenberg/2, ll. 16–22. ICNU argues that the wind potential data supporting the project was insufficient and the acquisition of Rolling Hills was therefore imprudent. ICNU/100, Falkenberg/2, ll. 10–15. ICNU's selective quotes from the wind study do not undermine the fact that the Company gathered long-term, on-site data prior to going forward with the project. PPL/203, Tallman/13, l. 10–Tallman/14, l. 2. In any event, ICNU's complaints about the Company's due diligence on Rolling Hills are not actionable without some showing that these actions resulted in harm to customers, a showing that ICNU cannot make given the uncontradicted evidence of the cost-effectiveness of Rolling Hills.

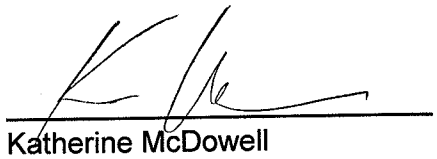
IV. CONCLUSION

The Commission should reject the cost disallowances proposed by Staff and ICNU in this proceeding. The Company has presented evidence that the renewable resources in its RAC filing are cost effective resources that were prudently acquired and will provide benefits to ratepayers. The proposed disallowances would therefore be contrary to SB 838's mandate that utilities recover the prudently incurred costs related to

RPS resources. Adopting Staff's and ICNU's proposals would also create uncertainty around the acquisition of renewable resources. Such uncertainty would either slow utilities' acquisition of such resources, prevent acquisition altogether, or result in customers missing out on the benefit of the Company developing these resources—results that are plainly contrary to the utilities' mandate to acquire renewable resources as part of accelerating Oregon's transition to a more reliable and affordable energy future.

DATED: September 22, 2008

McDowell & Rackner PC



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