BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP, dba PACIFIC POWER, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol.	))))))	UM 1050 CROSS-ANSWERING LEGAL BRIEF OF NOBLE AMERICAS ENERGY SOLUTIONS LLC

I. INTRODUCTION AND SUMMARY

Noble Americas Energy Solutions LLC ("Noble Solutions") hereby submits its cross-answering legal brief in this proceeding before the Public Utility Commission of Oregon ("OPUC" or "Commission"). Noble Solutions maintains its prior recommendation in its testimony and its opening brief, and provides this limited response to assertions in the opening briefs of the OPUC Staff and PacifiCorp. The two clarifications sought by Noble Solutions would ensure that the Commission preserves its full ability to implement the directives of Oregon law – to "eliminate barriers to the development of a competitive retail market structure" and "to mitigate the vertical and horizontal market power of incumbent electric companies * * * ." ORS 757.646(1). No party provides any substantive reason why the Commission should compromise its ability to continue to revise direct access policies or compromise its ability to mitigate PacifiCorp's vertical and horizontal market power, as Oregon law requires. And the record evidence demonstrates that PacifiCorp used the currently existing multi-state agreement to impose a barrier to competitive retail access in docket UE 267. Thus, clarification is warranted.

To summarize, Noble Solutions maintains its recommendation that the Commission make two clarifying points in any order approving use of the 2017 Inter-Jurisdictional Allocation Protocol ("2017 Protocol") for ratemaking purposes in Oregon:

- *First*, in order to preserve the Commission's ongoing obligation to remove barriers to a competitive retail market, *see* ORS 757.646(1), the Commission should clarify that if future orders modify PacifiCorp's five-year opt-out program, then Section X.A of the 2017 Protocol will be interpreted to allow adjustments to the inter-jurisdictional allocation of the five-year opt-out load consistent with the terms in those future orders.
- *Second*, in order to mitigate PacifiCorp's vertical and horizontal market power, *see* ORS 757.646(1), the Commission should clarify that for purposes of Oregon ratemaking, any load served by a PacifiCorp-owned resource under a voluntary renewable energy tariff ("VRET") or similar program will be treated consistent with the inter-jurisdictional allocation of direct access loads.

II. ARGUMENT

A. The Commission Should Clarify that the 2017 Protocol Will Allow for Modifications to PacifiCorp's Direct Access Programs.

Noble Solutions demonstrated that PacifiCorp has relied upon the currently effective multi-state agreement to thwart direct access, and therefore the Commission should remove all ambiguity regarding its understanding that the 2017 Protocol, if approved, will not limit the Commission's discretion to adjust direct access policies. *See Noble Solutions' Opening Br.* at 5-10. The Northwest and Intermountain Power Producers Coalition ("NIPPC") and the Industrial

Customers of Northwest Utilities ("ICNU") agree with Noble Solutions' position. However, Staff and PacifiCorp argue against clarification and removal of ambiguity.

Staff argues: "every party agrees with ICNU's interpretation" of Section X that the Commission "retains full discretion over the allocation treatment of loads lost to direct access programs in Oregon[,]" and therefore "there is no need for clarification." *Staff Opening Br.* at 7. If this were true, Noble Solutions would agree there is no need for clarification. However, PacifiCorp has made its position ambiguous, both in its testimony and its opening brief. Therefore, the clarification is not only appropriate, but necessary in order to preserve the Commission's statutory authority to remove obstacles to competitive retail access.

Specifically, PacifiCorp's witness, Mr. Bryce Dalley, testified:

> "[T]he 2017 Protocol includes a process for addressing changes to laws, regulations or policies that may affect inter-jurisdictional allocations. Through this process, the parties have agreed to negotiate issues that may impact the 2017 Protocol inter-jurisdictional allocation methodology in good faith."

PAC/300, Dalley/16:14-18. While unclear, Mr. Dalley appears to suggest that if Oregon were to change its direct access policies, such as the 10-year period for assessment of transition charges in the five-year program, the 2017 Protocol requires the OPUC to first engage in some unspecified negotiation process with PacifiCorp and other states. PacifiCorp's opening brief echoes this position, but it does so more clearly than the testimony. PacifiCorp asserts, "In the event of changed circumstances regarding direct access, the 2017 Protocol contemplates that Parties will reconvene to discuss any necessary modifications." *PacifiCorp's Opening Br.* at 17.

It is not clear what provision of the 2017 Protocol PacifiCorp relies upon for its interpretation. Section X.A.3 merely states that if Oregon adopts a change to its direct access laws and regulations, PacifiCorp must to "*inform* the State Commissions and Parties of the

same." PAC/101, Dalley/10 (emphasis added). It does not contain an "agreement to negotiate" the impact of such changes, as Mr. Dalley suggests. PAC/300, Dalley/16:14-18. Nor does it contain an agreement to "reconvene and discuss any necessary modifications," as PacifiCorp posits in its brief. *PacifiCorp's Opening Br.* at 17. Such a requirement would completely undermine the Commission's ability to modify its direct access programs consistent with Oregon law, as PacifiCorp argued the currently effective version of the multi-state agreement did in docket UE 267. *See Noble Solutions' Opening Br.* at 5-10. PacifiCorp has inserted ambiguity into this issue, and its past arguments in docket UE 267 demonstrates the risk that ambiguity could be exploited without a clarification at this time. *Id.*

Thus, the Commission should clarify this point by confirming that it is approving the 2017 Protocol with the understanding that Section X.A of the 2017 Protocol allows the OPUC to make adjustments to the inter-jurisdictional allocation of the five-year opt-out load consistent with the terms in future OPUC orders – *without first engaging in inter-state negotiations prior to changing Oregon's direct access policies and load allocations in Oregon rates.*

B. The Commission Should Clarify that It Will Treat a VRET Program Consistent with Direct Access Programs.

Noble Solutions maintains that the Commission should clarify that if the 2017 Protocol is approved for ratemaking in Oregon, there will be no reduction to Oregon's Load-Based Dynamic Allocation Factors associated with VRET load supplied by PacifiCorp-owned resources to the extent that no reduction is applied for direct access load. *Noble Solutions' Opening Br.* at 10-13. The Commission's statutory obligation to mitigate PacifiCorp's vertical and horizontal market power necessitates this clarification. *Id.*; ORS 757.646(1).

Staff continues to assert that the Commission should leave this issue unresolved. Noble Solutions disagrees. Staff believes, "The Commission retains the discretion to determine how VRET load is treated as part of a VRET proceeding and need not decide the issue as part of the 2017 Protocol." *Staff Opening Br.* at 8. But Staff cites no provision of the 2017 Protocol containing such treatment. And, in fact, no provision of the 2017 Protocol states that the Commission retains complete discretion as to how it will treat VRET loads. No provision directly addresses the VRET whatsoever, let alone how lost VRET loads would be treated. Once approved, the 2017 Protocol will be a policy that PacifiCorp will rely upon for ratemaking purposes in Oregon. The Commission should clarify how the 2017 Protocol will be used now, instead of approving it with a large loophole for PacifiCorp to potentially exploit with anti-competitive alternatives, VRET or otherwise, that do not include the same restrictive terms and prohibitive costs as direct access.

III. CONCLUSION

Noble Solutions recommends that the Commission clarify its understanding of the treatment of direct access and VRET loads if it approves the 2017 Protocol.

DATED this 8th day of June, 2016.

RICHARDSON ADAMS, PLLC

/s/ *Gregory M. Adams*

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Gregory M. Adams (OSB No. 101779)
Peter J. Richardson (OSB No. 066687)
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
greg@richardsonadams.com
peter@richardsonadams.com
Of Attorneys for Noble Americas Energy Solutions LLC