BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP, DBA: PACIFIC POWER,	)	UE 374
Request for a General Rate Revision	)	CALPINE ENERGY SOLUTIONS, LLC'S RESPONSE TO PACIFICORP'S MOTION FOR RECONSIDERATION OR CLARIFICATION

INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-0720(4), Calpine Energy Solutions, LLC ("Calpine Solutions") hereby respectfully submits to the Public Utility Commission of Oregon ("OPUC" or "Commission") this response to PacifiCorp's motion for reconsideration or clarification. This response is limited to the Schedule 272 issue, and Calpine Solutions takes no position on PacifiCorp's separate challenge regarding treatment of replaced meters.

For the reasons explained below, the Commission should deny PacifiCorp's motion for reconsideration or clarification of the Commission's resolution of the Schedule 272 issue. The Commission correctly determined that Staff should open an investigation into PacifiCorp's Schedule 272 to determine whether it is appropriately considered a Voluntary Renewable Energy Tariff ("VRET") subject to the Commission's VRET guidelines. Given that it could take months or longer to resolve such a question, the Commission also properly placed restrictions on PacifiCorp's use of Schedule 272 until such investigation is completed, including application of the VRET cap to Schedule 272 and proscription against acquisition of new generation resources under Schedule 272. Without such limitations, the Commission would be unable to correct any

harm that might occur during the investigation. PacifiCorp's arguments for reconsideration are without merit and its requests for clarification are either misplaced or unnecessary.

FACTUAL AND PROCEDURAL BACKGROUND

The Schedule 272 issue arose from PacifiCorp's proposal to place in rate base the new Pryor Mountain wind facility, which PacifiCorp acquired on an expedited basis outside of the ordinary procurement process to supply renewable energy certificates ("RECs") from the newly acquired facility to Vitesse, LLC (a wholly-owned subsidiary of Facebook, Inc.) ("Vitesse") under Schedule 272.[1] Under this arrangement, Vitesse contracted to purchase the RECs from the new wind facility under Schedule 272, and PacifiCorp's cost-of-service customers, including Vitesse, will purchase the power from the new wind facility as a system resource.[2] However, Schedule 272 is merely an unbundled REC rider, and was never intended for the acquisition of new utility-owned resources for a single customer. When Schedule 272 was approved, the Commission's approval was based on the understanding that Schedule 272 would not be used to acquire specific utility-owned resources to suit a particular customer's needs.[3]

Although PacifiCorp's acquisition of the new Pryor Mountain wind facility was unquestionably an acquisition of a new resource to suit a particular customer's needs, Staff generously concluded that the transaction could fall under PacifiCorp's REC rider, Schedule 272, so long as the RECs sold from PacifiCorp to Vitesse are characterized as "unbundled" RECs.[4]

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1 PAC/700, Link/68.

2 PAC/800, Teply/19.

3 *In re PacifiCorp dba Pacific Power: Advice No. 16-012 (ADV 386), Changes to Schedule 272 Renewable Energy Rider Optional Bulk Purchase Option*, Docket No. UE 318, Order No. 17-051, at App. A, p. 7 (Feb. 13, 2017) (containing Staff's Report, stating, "Staff struggles with NIPPC's position that this tariff constitutes a VRET given Staff's understanding that Schedule 272 customers are not purchasing renewable energy from a specifically identified source, *nor are specific resources being built to meet specific customer preferences*." (emphasis added)).

4 *Staff's Prehearing Br.* at 48 (citing Staff/800, Storm/46).

According to Staff, Schedule 272 would allow sale of such unbundled RECs without regard to whether the wind facility is owned by PacifiCorp or a third party.[5] However, Staff questioned whether the RECs in this circumstance are truly "unbundled."[6] In any event, given the ambiguity and unexpected use of Schedule 272, Staff concluded that Schedule 272 may be better considered a VRET subject to the Commission's VRET guidelines.[7] Staff recommended the Commission open an investigation on the subject and direct PacifiCorp to refrain from entering into Schedule 272 contracts selling RECs from utility-owned resources pending such investigation.[8]

Notably, Vitesse did not oppose Staff's proposal to open an investigation or the proposal to bar PacifiCorp from acquiring another utility-owned resource pending such investigation.[9] Vitesse was, however, concerned that its RECs should not be characterized as bundled RECs.[10]

While Calpine Solutions took no position on PacifiCorp's rate recovery for the Pryor Mountain facility or the question of whether Vitesse's RECs will be bundled or unbundled, Calpine Solutions supported Staff's proposal to open an investigation. Calpine Solutions explained that it shared Staff's concerns regarding future uses of Schedule 272, especially for utility-owned resources.[11] We further explained that, consistent with the VRET legislation, the VRET guidelines are intended to ensure a utility program offering a voluntary renewable energy product does not harm the competitive retail market and does not result in non-participants

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5 *Id.* at 48 (citing Staff/800, Storm/46).
6 *Id.*
7 *Id.* (citing *In re Public Utility Commission of Oregon,* OPUC Docket No. UM 1690, Order No. 15-405 at 1-2 (Dec. 15, 2015)).
8 *See Staff's Prehearing Br.* at 48-50.
9 *Vitesse's Prehearing Br.* at 1.
10 *Vitesse's Op. Br.* at 5-8
11 *Calpine Solutions' Post Hearing Op. Br.* at 5.

absorbing cost shifts or cross subsidies – including strict limitations on utility ownership of such VRET resources.[12] Calpine Solutions further explained that PacifiCorp sidestepped these limitations by packaging the green product as what it characterizes as an unbundled REC offered under Schedule 272, even though such use contradicted the assumptions regarding the proposed use of Schedule 272 at the time the Commission approved it.[13]

The Commission decided to allow PacifiCorp to continue to use Schedule 272 pending an investigation, but placed limits on such use.[14] First, the Commission "caution[ed] PacifiCorp against procuring new utility-owned resources to supply specified RECs to customers, which raises unique cost-shifting and competitive concerns that PacifiCorp should not be able to avoid by using Schedule 272 rather than a VRET."[15] Next, the Commission stated that "PacifiCorp should consider procurement of new PPA-based resources to supply Schedule 272 customers – including Pryor Mountain – to be subject to the cap set in UM 1690 (175 average MW for PacifiCorp), unless PacifiCorp can demonstrate to the Commission in advance that it has mitigated the potential impacts on non-participating cost-of-service customers."[16] Third, the Commission "caution[ed] PacifiCorp not to consider Schedule 272 an appropriate mechanism to provide community-wide green tariffs."[17]

In support of its decision, the Commission reasoned that approval of Schedule 272 "was

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12 *Id.* at 6 (citing *In re Public Utility Commission of Oregon*, OPUC Docket No. UM 1690, Order No. 15-405 at 1-2); *see also* 2014 Or Laws Ch 100, § 3(3) (requiring consideration of "(b) The effect of allowing electric companies to offer voluntary renewable energy tariffs on the development of a competitive retail market; (c) Any direct or indirect impact, including any potential cost-shifting, on other customers of any electric company offering a voluntary renewable energy tariff").

13 *See id.* at 6.

14 *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473, at 133 (Dec. 18, 2020).

15 *Id.* at 133-34.

16 *Id.* at 134.

17 *Id.*

based on the understanding that specific resources would not be built to meet specific customer preferences."[18] Therefore, the Commission "agree[d] with Staff that the acquisition of the Pryor Mountain wind resource to provide RECs under Schedule 272 to a single customer raises new questions regarding the appropriate use of Schedule 272."[19] The Commission found: "As CUB testified, for cost-of-service customers, these acquisitions may amount to essentially a 'brown resource with a variable load shape.'"[20] PacifiCorp's use of Schedule 272 "raises concerns regarding both adequacy of protections for non-participating cost-of-service customers and fairness to those who have relied on our VRET conditions to guide utility-offered customer choice programs."[21] Further, "[u]nlike Schedule 272, VRET programs are subject to guidelines designed to address these concerns, including a program cap."[22] Ultimately, the Commission "share[d] Staff's concerns regarding transparency into the procurement decisions and the allocation of costs, risks, and benefits between non-participating cost of service customers and those customers that elect the voluntary product under Schedule 272."[23]

ARGUMENT

The Commission should deny PacifiCorp's motion for reconsideration and clarification. PacifiCorp's arguments confuse the issues and overlook both the Commission's broad authority to regulate public utilities and the sound reasoning of the order at issue.

A. PacifiCorp's Reconsideration Arguments are Without Merit

PacifiCorp's first ground for reconsideration is that the decision to apply the 175-aMW

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18 *Id.* at 133.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*

cap to Schedule 272's use pending the new investigation is not supported by substantial evidence in the record.[24] This argument misses the mark.

First, PacifiCorp misconstrues the Commission's order, which imposed a cap only for acquisitions of new generation resources to supply RECs to Schedule 272 customers, such as the acquisition of Pryor Mountain.[25] The Commission's order was therefore narrowly targeted to the problem raised by Staff and Calpine Solutions, as well as the Commission's own finding that Schedule 272 was approved "based on the understanding that specific resources would not be built to meet specific customer preferences."[26] Indeed, the Staff report recommending approval of Schedule 272 in 2017 expressly stated that understanding.[27] Consistent with the original intended use of Schedule 272, the Commission's decision here allows PacifiCorp to continue using Schedule 272 without any cap for sale of unbundled RECs from facilities that were not acquired to meet a specific customer's preferences.

When properly framed, the Commission's order suffers from no legal flaws. The Commission has broad discretion to regulate public utilities, including PacifiCorp.[28] Under that discretion, the Commission was fully empowered – and arguably even required – to act with respect to future use of Schedule 272 in light of its finding that PacifiCorp's use of the tariff

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[24] *See PacifiCorp's Motion for Reconsideration or Clarification* at 4-7 (citing *Calpine Energy Sols. LLC v. Pub. Util. Comm'n of Or.*, 298 Or App 143, 163 (2019)).

[25] *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Order No. 20-473, at 134.

[26] *Id.* at 133.

[27] *See In re PacifiCorp dba Pacific Power: Advice No. 16-012 (ADV 386), Changes to Schedule 272 Renewable Energy Rider Optional Bulk Purchase Option*, Docket No. UE 318, Order No. 17-051, at App. A, p. 7 (Feb. 13, 2017) (describing PacifiCorp's proposed use of Schedule 272 and stating, "*nor are specific resources being built to meet specific customer preferences*." (emphasis added)).

[28] *See* ORS 756.040(1) (stating the Commission "shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them fair and reasonable rates").

contradicted the expectation of how the tariff would be used when approved. Substantial evidence and reasoning existed for imposing restrictions on the use of Schedule 272 because it is undisputed that the Commission properly found Schedule 272 was approved "based on the understanding that specific resources would not be built to meet specific customer preferences."[29] PacifiCorp makes no argument challenging this finding of fact, which is based on an undisputed statement in the Commission's own order approving Schedule 272. Therefore, its argument fails.

There is likewise no flaw in the Commission's reasoning. As PacifiCorp notes, the substantial evidence rule also requires that the Commission's order must establish a rational connection between its findings and its ultimate decision.[30] In this case, the Commission's order unquestionably does so. After finding PacifiCorp has used Schedule 272 inconsistent with how the Commission previously understood it would be used, the Commission logically placed a limit on PacifiCorp's use of Schedule 272 so the matter could be fully investigated. The Commission was well within its rights to do so. Indeed, given PacifiCorp's unilateral change in the use of the tariff without prior Commission approval, the Commission could have taken a much more drastic step than it did. But instead, the Commission adopted a narrowly targeted and limited restriction on PacifiCorp's use of Schedule 272 that merely proscribes the unexpected use until an investigation can be completed.

Further, aside from the legal shortcomings in PacifiCorp's reconsideration arguments, PacifiCorp has identified no practical harm to prospective customers. Customers seeking a new

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[29] *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Order No. 20-473, at 133.

[30] *Calpine*, 298 Or App at 159.

acquisition of a specified resource for their unique needs remain free to seek such resources through the Commission's direct access programs or the VRET program, or potentially even Schedule 272 until the cap established by the Commission's order here is reached. There is no legal flaw or unfair result here.

B. PacifiCorp's Proposed Clarifications Are Misguided and Unnecessary

Next, if the Commission declines to remove the cap, PacifiCorp proposes a number of clarifications it asserts the Commission should make regarding how to apply the cap and any other interim restrictions on Schedule 272. The Commission should deny PacifiCorp's proposed "clarifications," most of which are in fact proposals to undermine the protections created by the Commission's order. Furthermore, despite criticizing the Commission's order for lack of supporting evidence, PacifiCorp's proposed clarifications are made without all of the necessary evidence as to their likely impact, and many of its proposals are not supported in the record. For that reason, these issues are better addressed in the Commission's investigation into Schedule 272.

First, PacifiCorp proposes a "clarification" that Pryor Mountain should not be counted towards the 175-aMW cap established by the Commission's order.[31] The Commission's order was unambiguous on the point that Pryor Mountain is included within the resources subject to the cap. The order stated: "PacifiCorp should consider procurement of new PPA-based resources to supply Schedule 272 customers – *including Pryor Mountain* – to be subject to the cap set in UM 1690 (175 average MW for PacifiCorp)[.]."[32] There is no basis for clarification of this

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[31] *PacifiCorp's Motion for Reconsideration or Clarification* at 8, 10.

[32] *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Order No. 20-473, at 134 (emphasis added).

point. Admittedly, the order inadvertently uses the term "new PPA-resources" in describing the category of resources, including Pryor Mountain, which are subject the interim cap. However, even though Pryor Mountain is not a new PPA resource, the order clearly intends to count Pryor Mountain as subject to the interim cap. Including Pryor Mountain as subject to the cap is consistent with the order's intent to prevent harm that could occur through substantial additional resource acquisitions outside of the VRET guidelines. PacifiCorp's suggestion that the cap may not be applied retrospectively ignores the Commission's finding that PacifiCorp's acquisition of Pryor Mountain under Schedule 272 may well have been an acquisition that should have been subject to the VRET guidelines. Applying the cap to Pryor Mountain is a sound and rational decision, and if any clarification is issued it should confirm that intent.

Second, PacifiCorp proposes that the Commission should clarify that the cap does not apply to Schedule 272 transactions of unbundled RECs where no underlying resource has been specified.[33] There is no need for clarification on this point because nothing in the Commission's order suggests that there is any limit on such use of Schedule 272. Therefore, clarification is unnecessary on this uncontroversial use of Schedule 272.

Third, PacifiCorp seeks to overturn the effect of the 175-aMW cap by recasting it as a limit based on Oregon-allocated energy from the new resource.[34] Again, when read in context, the order contains no ambiguity in need of clarification here. The 175-aMW cap in the VRET guidelines was adopted to mirror the corresponding cap on PacifiCorp's long-term direct access

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33 *PacifiCorp's Motion for Reconsideration or Clarification* at 8-9.
34 *PacifiCorp's Motion for Reconsideration or Clarification* at 9.

program, which is based on average *load* in Oregon enrolled in the direct access program.[35] The order applies that same cap, based on average load using the program, to PacifiCorp's use of Schedule 272, and there is no reason for any different treatment from that in the cap used in direct access and VRET guidelines. If Vitesse had enrolled its facility in Oregon's direct access program or the VRET program to obtain 100 percent renewable generation supply, such participation would have counted toward the direct access cap or the VRET guideline's cap based on the amount of load at its Oregon-sited accounts in the direct access or VRET program, not based on PacifiCorp's systemwide generation allocation factors. In the case of Schedule 272, the amount of load counting towards the cap will easily be ascertained by tracking the number of RECs sold from covered Schedule 272 resources to PacifiCorp's Oregon customers. In other words, PacifiCorp is limited to an average sale of 175 RECs per hour, when averaged over the whole year, which would equate to 1,533,000 RECs per year.[36]

It would be illogical and unfair to expand the interim cap in Schedule 272 through use of systemwide allocation factors without making corresponding expansions of the caps for the direct access program. The Commission should therefore reject PacifiCorp's proposal, and if any clarification is made it should confirm the Schedule 272 cap is measured from Oregon load using the program, just as is the case with the direct access cap from which it is derived.

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[35] *See In re Public Utility Commission of Oregon, Voluntary Renewable Energy Tariffs for Non-Residential Customers*, Docket No. UM 1690, Order No. 15-405 (Dec. 15, 2015) (adopting Staff's proposal that: "The VRET program size is limited to 300 aMW for PGE and 175 aMW for PacifiCorp."); *see also id.* at App. A at 11 (stating in Staff's Report, "applying the same caps at levels equal to or lower than the direct access caps is recommended"); *In the Matter of PacifiCorp, dba Pacific Power: Transition Adjustment, Five-Year Cost of Service Opt-out*, OPUC Docket No. UE 267, Order No. 15-060, at 10 (Feb. 24, 2015) (establishing the cap in PacifiCorp's direct access program as follows: "We adopt the 175 aMW cap on the total amount of load that can be accepted in the five-year program, finding it to be a reasonable initial limit on the departure of load.").

[36] 8,760 hours x 175 RECs = 1,533,000 RECs.

Fourth, PacifiCorp proposes the cap should not apply to energy generated by qualifying facilities ("QF").[37] But this proposal is both unclear and beyond the scope of a clarification. PacifiCorp appears to suggest that all sales from QFs would occur at Commission-established avoided cost rates under Section 210 of the Public Utility Policies Act of 1978 ("PURPA") and thus hold non-participating customers harmless.[38] However, sales from QFs are not necessarily as limited as PacifiCorp suggests, and adopting its proposal may result in unforeseen loopholes. Qualifying facilities can include any facility that meets the qualification criteria to be a QF (e.g., a facility that uses renewable fuel, waste, biomass, or cogeneration), regardless of how or at what price it sells its power; indeed, even traditional electric utilities like PacifiCorp may own QFs.[39] Although QFs enjoy the right to compel purchases at the utility's avoided costs established by a state commission,[40] there is no requirement that they do so, and instead sales by QFs at other agreed-to rates are also allowed.[41] Indeed, any independent power producer making any type of sales to a utility may seek to certify itself as a QF merely to avoid certain regulatory and reporting burdens under the Federal Power Act, the Public Utility Holding Company Act, and state law that may otherwise apply absent such QF certification.[42] Therefore, any clarification on this complicated subject would require careful consideration, and it is beyond the scope of any reasonable clarification based on the record in this case.

Fifth, PacifiCorp proposes the cap should not apply to PPA-based resources acquired under Schedule 272.[43] While Calpine Solutions expressed heightened concern with acquisition

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37 *PacifiCorp's Motion for Reconsideration or Clarification* at 10.
38 *Id.*
39 *See* 18 CFR §§ 292.201-292.211 (containing qualification criteria).
40 *See* 18 CFR §§ 292.301-292.314.
41 18 CFR § 292.301(b)(1).
42 18 CFR §§ 292.601-292-602.
43 *PacifiCorp's Motion for Reconsideration or Clarification* at 10.

of utility-owned resources under Schedule 272 previously in this proceeding, the Commission's order presents sound reasoning to apply the interim cap to PPA-based resources because such PPA resources would also be covered by a VRET program. Calpine Solutions also supports the Commission's directive that PacifiCorp should not acquire any additional utility-owned resources to serve Schedule 272 customers because the Commission properly found such utility-owned resources "raise[] unique cost-shifting and competitive concerns that PacifiCorp should not be able to avoid by using Schedule 272 rather than a VRET."[44] PacifiCorp presents no compelling reasoning to revisit the Commission's determination.

Sixth, PacifiCorp asks for clarification on the showing that must be made to obtain authorization to exceed the interim cap.[45] But the order already provides guidance on this point. PacifiCorp must abide by the cap "unless PacifiCorp can demonstrate to the Commission *in advance* that it has mitigated the potential impacts on non-participating cost-of-service customers."[46] To the extent the Commission provides any further clarification, it should state that any such proceeding where PacifiCorp seeks such advance notification must be subject to stakeholder review and comment and, if necessary, evidentiary proceedings analogous to the proceedings to approve VRETs.

Next, PacifiCorp criticizes the order for proscribing acquisition of utility-owned resources and resources for community-wide tariffs under Schedule 272.[47] These criticisms are unfounded. As discussed above, the Commission logically determined that PacifiCorp has used

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44 *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Order No. 20-473, at 133-34.

45 *PacifiCorp's Motion for Reconsideration or Clarification* at 10-11.

46 *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Order No. 20-473, at 134 (emphasis added).

47 *PacifiCorp's Motion for Reconsideration or Clarification* at 11-12.

Schedule 272 – an unbundled REC rider – in a manner that was unexpected and never considered by the Commission. The Commission was well within its regulatory authority to clarify for PacifiCorp that the authorized use of the tariff is far more limited than PacifiCorp apparently believes. If PacifiCorp wishes to justify more expansive use of Schedule 272, it has been given the opportunity to do so in the upcoming investigation.

Finally, PacifiCorp proposes to delay the commencement of the Schedule 272 investigation until 2022, in order to coincide with processing a VRET PacifiCorp now states it will propose.[48] But there is no need for the Commission to resolve that procedural question in this case, when it could easily be resolved at the commencement of the Schedule 272 investigation convened by Staff or an Administrative Law Judge.

In sum, each of PacifiCorp's proposed clarifications is either unjustified or unnecessary, and the Commission should therefore deny PacifiCorp's proposed clarifications.

CONCLUSION

For the reasons stated above, the Commission should deny PacifiCorp's motion for reconsideration or clarification of the Commission's decision on use of Schedule 272.

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[48] *PacifiCorp's Motion for Reconsideration or Clarification* at 13.