BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM-1129

IN THE MATTER OF THE PUBLIC UTILITY COMMISSION OF OREGON STAFF'S INVESTIGATION RELATING TO ELECTRIC UTILITY FACILITIES	SHERMAN/SIMPLOT'S ANSWER TO PACIFICORP'S RESPONSE TO SHERMAN/SIMPLOT'S STATEMENT OF ISSUES

The J.R. Simplot Company and Sherman County Court ("Sherman/Simplot") hereby respectfully lodges its answer to PacifiCorp's "Response" to Sherman/Simplot's statement of issues.

BACKGROUND

In rebuttal testimony, PacifiCorp filed, for the first time in this proceeding, its proposed standard contract for purchases from QFs not located in its load control area (so called "off-system QFs")[1]. PacifiCorp's testimony and exhibits addressing off-system QFs contain detailed provisions for the interconnection and provision of ancillary services to the off-system QF by the host utility. *See* PacifiCorp Exhibit 403 at Addendum "W" (Griswold).

The threshold issue to be determined by this Commission in dealing with off-system QFs is the extent of its jurisdiction to govern the relationship between the off-system QF and its

[1] Although filed as part of its rebuttal testimony, PacifiCorp's witness admitted that this testimony did not, in fact, rebut any other party's testimony. Tr. 39. By offering this non-rebuttal testimony at this stage in this proceeding PacifiCorp effectively precluded other parties from filing responsive testimony.

interconnecting host utility. The ALJ addressed this jurisdictional issue in her Ruling and required the parties to attempt to agree on revisions to the issues list for Phase II of this proceeding.[2] Sherman/Simplot's statement of the issue, which was agreed to by every party that took a position on it, except the three IOUs, succinctly and clearly identified the jurisdictional question as it relates to each ancillary service addressed in PacifiCorp's "rebuttal" testimony. PacifiCorp's proposed statement of this issue in its Response completely fails to comply with the ALJ's directive and, incredibly, asks this commission to commit what FERC has described as an *ultra vires* act.

PACIFICORP'S STATEMENT OF ISSUES

IS OUTSIDE THE SCOPE OF THE ALJ'S RULING

The scope of issues to be addressed in response to the ALJ's Ruling was clear – and well-defined. The ALJ limited the parties to submitting a proposed issues list for "off-system QF projects under 10 MW." Of course, the only distinction between an off-system QF and a QF that is located in the purchasing utility's service territory is ***how*** that QF delivers its power to the purchasing utility. To address anything else would, by definition, unravel and undermine all that the commission has accomplished in determining the terms and conditions for QF purchases for under 10 MW QFs. In compliance with the ALJ's directive, Sherman/Simplot's issues list was limited to addressing: (1) whether this Commission has jurisdiction over the provision of a specific ancillary service and (2) if this Commission has such jurisdiction, whether PacifiCorp's requirements for that ancillary service are reasonable. For example, Sherman/Simplot's Issue No. 12.01 states:

> Does the Commission have jurisdiction over metering provisions of off system contracts? If so, are the metering provisions reasonable?

[2] Post Hearing Memorandum, UM-1129 dated February 7, 2006.

The issue is succinctly presented and properly directed to only off-system QFs. It does not - and cannot - affect any decision this Commission has made or will make related to QFs that are located within the service territory of a purchasing utility.

PacifiCorp's proposed statement of the issues is as follows:

> Does an off-system QF's use of FERC-jurisdictional facilities to transmit its energy and capacity to the purchasing utility deprive the Commission of its jurisdiction to review and approve or disapprove requirements set forth in the terms and conditions of the power purchase agreement under which a utility will make purchases from a QF?

Unlike Sherman/Simplot's properly focused statement of the issues, PacifiCorp's statement is extremely broad. In fact it is so broad as to potentially overturn all of the hard work and progress the parties and the Commission have made to date. PacifiCorp would have the following statement guide the Commission for off-system QFs. At its core, PacifiCorp's proposed statement of issue provides:

> Does an off-system QF's use of FERC-jurisdictional facilities to transmit its energy . . . deprive the Commission of its jurisdiction to review and approve or disapprove . . . the terms and conditions of the power purchase agreement . . .[3]

This is nothing more than the classic "when did you stop beating your wife" type of a question: the answer to PacifiCorp's question depends upon whether the "terms and conditions" referred to are terms and conditions of the purchase of the QF's energy or whether the "terms and conditions" referred to are the terms and conditions of the interconnection and wheeling of the energy produced. If the former -- purchase -- the answer is yes. If the latter -- wheeling--the answer is no. For that reason alone, the Commission should reject PacifiCorp's tactical statement of the issue. It is fatally ambiguous. Further, as discussed below, any action this

[3] It is clear from the context that the word "Commission" refers to the Public Utility Commission

Commission may take in an attempt to regulate the terms and conditions of the interconnection of an off-system QF is *ultra vires.*

THE OREGON COMMISSION HAS NO AUTHORITY TO

ACT WITH REGARD TO WHEELING OF ELECTRICITY IN INTERSTATE COMMERCE

To the extent PacifiCorp's statement of the issue asks this Commission to regulate the interconnection and transmission of electric energy over a third party's electric system, PacifiCorp is asking the Commission to do that which is preempted by the Federal Power Act ("FPA").

This area of the law is well settled and PacifiCorp's approach is nothing if not frivolous. As recently as May of last year FERC issued its order on Standardization of Small Generator Interconnection Agreements and Procedures, ("SGIP")[4] In that order, FERC squarely addressed the question of which entity, the State Commission or the Federal Energy Regulatory Commission, has jurisdiction over the interconnection of so-called off-system QFs. It stated:

> The Commission [FERC] has regulations that govern a QFs interconnection with most electric utilities in the United States, including normally non-jurisdictional utilities. When an electric utility is required to interconnect under section 292.303 of the Commission regulations, that is, when it purchases the QFs total output, the state has authority over the interconnection and the allocation of interconnection costs. <u>But when an electric utility interconnecting with a QF does not purchase all of the QFs output and instead transmits the QF power in interstate commerce, the Commission [FERC] exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.</u>

Id at p. 136. (Emphasis provided).

FERC's unequivocal language leaves no room for misinterpretation. FERC has jurisdiction over the "rates, terms, and conditions" that <u>affect,</u> or are even <u>related</u> to the movement of the off-

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of Oregon.

[4] 18 C.F.R. Part 35, Docket No. RM-02-12-000; Order No. 2006.

system's QF power to the purchasing utility's system. Simply stated, the field is preempted.

It is well settled law that the field is preempted by the Federal Power Act. The FPA applies to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). "Part II of the Federal Power Act, codified at 16 U.S.C. § 824-824m, delegates to the Federal Energy Regulatory Commission 'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'" *Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3rd 918, 928 (9th Cir. 2002), (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982)). Indeed, "FERC's exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3rd 1042, 1056 (9th Cir. 2001). Thus FERC's exclusive jurisdiction is not subject to a case-by-case analysis:

> [Our] decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPA jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

FPC v. Southern California Edison Co., 376 U.S. 205, 215-216, 84 S.Ct. 644, 11 L.Ed2d 638 (1964). The states simply do not have any jurisdiction over the third party transmission of electricity in interstate commerce – off-system QFs.

PacifiCorp filed extensive comments in the SGIP docket. Indeed, PacifiCorp's comments in the SGIP docket addressed the question of FERC's jurisdiction over off-system QFs. Specifically PacifiCorp urged FERC to:

> [C]larify, in both the final rule and the SGIP, that a facility qualified under

> Section 210 of the PURPA . . . is not eligible for interconnection under the SGIP. Federal law imposes a comprehensive regulatory scheme for qualifying facilities, and that regulatory scheme involves deference to state regulation (within the parameters set by federal law) over the interconnection of and power sales from QFs to state-regulated utilities. To avoid confusion, the SGIP should clearly state that small power generators with QF status or intending to seek such status are not eligible for interconnection under the SGIP. …[FERC] should require a certification that the applicant [for interconnection] does not intend to seek QF status and agrees that, if it does seek such status, its interconnection will be reviewed to determine whether it meets state standards . . .

Comments of PacifiCorp, FERC Docket No. RM02-12-000, October 3, 2003, p. 15.

FERC did clarify the issue, but not in the manner PacifiCorp sought:

> PacifiCorp's proposal that the Commission [FERC] require the Interconnection Customer to certify that it does not intend to seek QF status is unnecessary. This Final Rule only applies when the interconnection is subject to the Commission's [FERC's] jurisdiction. Other rules apply if the generator seeks to interconnect as a QF. PacifiCorp has provided no convincing rationale why this proposed amendment is necessary for this rulemaking.

Supra at 136.

FERC offered additional clarification:

> The Commission thus exercises jurisdiction over a QF's interconnection if the QF's owner sells any of the QF's output to an entity other than the electric utility directly interconnected with the QF. . . . This applies to a new QF that plans to sell any of its output to a third party and to an existing QF interconnected with an electric utility or on-site customer that decides in the future to sell any of its output to a third party. States continue to exercise authority over QF interconnections when the owner of the QF sells the output of the QF only to the interconnected utility or to on-site customers.

Id.

Having unsuccessfully argued the issue before FERC, PacifiCorp is now seeking a second bite of the apple by raising the same issue in this proceeding. At a minimum, PacifiCorp has a duty to be candid with the tribunal. It should have advised the Commission that it had unsuccessfully raised the issue before FERC.

The SGIP order notwithstanding, FERC has ruled repeatedly that the states have no

authority over off-system QFs. For example in *Western Mass. Elec. Co.* [5] an electric utility argued that FERC does not have jurisdiction over a wheeling agreement for the movement of QF power to a third party purchaser. In rejecting that position, FERC explained:

> When a utility transmits QF power in interstate commerce . . . a Commission-jurisdictional transaction takes place; jurisdiction over the transmission of electric energy in interstate commerce and over agreements affecting or relating to such service (and the rates for such service) are subject to the Commission's exclusive jurisdiction and any attempt by a state authority to exercise jurisdiction over such service and agreements (and rates) would be *ultra vires.*

Id. at p. 61,662.

Not only has FERC rebuked utility attempts to evade its exclusive jurisdiction over off-system QFs, it has also ruled that the purchase by such off-system QFs of ancillary services, such as losses, does not constitute a sale-for-resale of power. In *Connecticut Valley Elec. Co. v. Wheelabrator, et. al,*[6] the FERC addressed the issue of how the transmission of QF power by a third party affects net output. This is an important point in that an off-system QF must purchase not only line losses but also load balancing services from the host utility. It is instructive to reproduce the entire discussion from the *Wheelabrator* decision on this important aspect of off-system QFs:

> <u>How does transmission of QF power by a third party utility affect net output</u>
>
> The Penntech Papers case raises an issue concerning the measurement of net output in situations where QF power is transmitted by a third party to the purchasing utility. We have addressed this matter in our Open Access Rule. In Order No. 888-A, the Commission explained that:
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> > a QF arrangement for the receipt of Real Power Loss Service or ancillary services from the transmission provider or a third party for the purpose of completing a transmission transaction is not a sale-for-resale of power by a QF transmission customer that would violate our QF rules.

[5] 61 FERC 61,182 (1992)
[6] FERC Docket Nos. EL94-10-000 and QF86-177-001 (1998)

In Order No. 888-B, the Commission recently clarified the matter as follows:

> [W]hile a QF can never sell more power that its net output at its point of interconnection with the grid, its location in relation to its purchaser (and thus its losses) may be relevant in the calculation of the avoided cost which it is entitled for the power it does deliver to its electric utility purchaser. However . . . the receipt of Real Power Loss Service or ancillary services is not a sale-for-resale of power. Rather, they are part of the costs of transmission which the QF must bear, in the absence of an agreement to share such costs with the transmitting utility.
>
> In conclusion, the purchase of line loss service for losses beyond the point of interconnection or an ancillary service by a QF from a third party does not result in the QF's engaging in a sale-for-resale of power produced by a facility other than a QF, which would result in loss of QF status.

Id. at 22.

In light of the foregoing, this Commission should adopt Sherman/Simplot's issue list. PacifiCorp's request that this Commission impose any contract terms and/or conditions relating to the interconnection of an off-system QF should be soundly rejected because this Commission lacks jurisdiction in this regard.

RESPECTFULLY SUBMITTED, this 3rd day of March, 2006.

By_____

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Sherman County Court and the J.R. Simplot Company