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October 23, 2009

Via Electronic Filing and U.S. Mail

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

Re: INTERNATIONAL PAPER COMPANY, Complainant, vs.
PACIFICORP dba PACIFC POWER, Respondent
OPUC Docket No. UM 1449

Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and one copy of *PACIFICORP'S REPLY TO INTERNATIONAL PAPER COMPANY'S RESPONSE IN OPPOSITION TO PACIFICORP'S MOTIONS TO DISMISS AND FOR EXTENSION OF TIME TO ANSWER*

PacifiCorp understands from a press release issued yesterday by International Paper Company that International will permanently close its Albany Plant (the qualifying facility in this case) by the end of this year. The press release can be found at the following link:

http://www.internationalpaper.com/US/EN/Company/Media/IPNews.html

PacifiCorp is currently uncertain how this development will impact the above-captioned proceeding.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided. Thank you in advance for your assistance.

Sincerely,

Jeff Lovinger

cc: UM 1449 Service List

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1449

INTERNATIONAL PAPER COMPANY, Complainant, **vs.** **PACIFICORP dba PACIFIC POWER,** Respondent.	**PACIFICORP'S REPLY TO INTERNATIONAL PAPER COMPANY'S RESPONSE IN OPPOSITION TO PACIFICORP'S MOTIONS TO DISMISS AND FOR EXTENSION OF TIME TO ANSWER**

I. INTRODUCTION

PacifiCorp, d/b/a/ PacifiCorp Power ("PacifiCorp" or "Company") submits the following reply to International Paper Company's ("International") response in opposition to PacifiCorp's motion to dismiss International's complaint. International's response argues that PacifiCorp unreasonably delayed power purchase agreement ("PPA") negotiations on August 21, 2009 when it sent International proposed non-pricing terms without final pricing terms. International's response also argues that it unilaterally established a legally enforceable obligation when it sent PacifiCorp a written request for a final PPA on August 19, 2009. Both of these arguments are invalid as a matter of law. PacifiCorp's motion to dismiss should be granted because: (1) International lacked sufficient cause to disregard the Commission's requirement to wait 60 days after giving written comments on the draft PPA before filing a complaint; or (2) alternatively, that

International has failed to allege facts that, if true, would entitle it to a PPA with PacifiCorp's avoided cost prices in effect prior to September 9, 2009.

II. PROCEDURAL HISTORY

On September 4, 2009 International filed a complaint ("Complaint") and a motion to waive the 60-day requirement of OAR 860-029-0100 ("Waiver Motion"). On September 23, PacifiCorp filed a response in opposition to the Waiver Motion. On the same date, PacifiCorp also moved to dismiss the Complaint ("Motion to Dismiss"). On September 28, International filed a reply to PacifiCorp's response to the waiver motion ("International's Reply"). On October 8, International filed a response to the motion to dismiss ("International's Response").

III. RELEVANT LAW

International's Response alleges that PacifiCorp violated its duties under its Oregon Tariff Schedule 38 ("Schedule 38"). In order to explain the fallacy of International's assertions, it is first necessary to establish what Schedule 38 requires. This Section III describes the Schedule 38 process.

The Schedule 38 process involves four discrete stages – the indicative pricing stage, the draft PPA stage, the negotiation stage, and (if necessary) the dispute resolution stage:

Indicative Pricing Stage: The Schedule 38 process is initiated when a qualifying facility ("QF") requests an indicative pricing proposal from PacifiCorp. *See* Schedule 38 at Section B(1). To obtain an indicative pricing proposal, the QF must provide in writing to PacifiCorp general project information reasonably required for the development of indicative pricing including without limitation the information enumerated as items

(a) through (j) in Section B(1). *Id*. PacifiCorp has no obligation to provide an indicative pricing proposal until all of this information has been received in writing from the QF. *Id*. at Section B(2). Once PacifiCorp has received the required information in writing from the QF, PacifiCorp has 30 days to provide the QF with an indicative pricing proposal. *Id*. The prices are merely indicative and not binding. *Id*. Indeed, Schedule 38 expressly states: "*Prices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties*." *Id*. (emphasis added).

Draft PPA Stage: If the QF wishes to proceed after reviewing the indicative pricing proposal, it may request in writing that PacifiCorp prepare a draft PPA. *Id*. at Section B(3). PacifiCorp has no obligation to provide a draft PPA until the QF provides all required project information requested by PacifiCorp to complete a draft including the information enumerated in items (a) through (f) in Section B(3). *Id*. at Section B(4). Once the QF has provided all required information, PacifiCorp has 30 days to provide a draft PPA containing a comprehensive set of proposed terms and conditions including specific pricing terms. *Id*. The draft PPA serves as "the basis for subsequent negotiations between the parties and, *unless clearly indicated, shall not be construed as a binding proposal by the Company*." *Id*. (emphasis added).

Negotiation Stage: Once PacifiCorp provides a draft PPA, it has no obligation to negotiate until the QF provides PacifiCorp with an initial set of written comments and proposals regarding the draft PPA ("Initial Comments"). Schedule 38 at Section B(5). Following PacifiCorp's receipt of such Initial Comments, the QF may contact PacifiCorp "to schedule contract negotiations at such times and places as are mutually agreeable to

the parties." *Id*. The parties then negotiate until they reach full agreement as to all terms and conditions of the PPA. *Id*. at Section B(6).

The terms and conditions proposed by the parties during the Schedule 38 negotiation process are non-binding and there is no prohibition against subsequent revision or retraction of previously proposed terms or conditions.[1] There is no requirement that these negotiations involve an exchange of complete draft PPAs.[2] There is no express time limit on the negotiation process. PacifiCorp must not unreasonably delay negotiations and PacifiCorp must respond in good faith to any modifications proposed by the QF. *Id*. at Section B(5)(a). However, so long as PacifiCorp and/or the QF have modifications to propose, the negotiation process continues. When the parties achieved full agreement on all terms and conditions, PacifiCorp has 15 business days to prepare a final, executable PPA. *Id*. at Section B(6).

Dispute Resolution Stage: At any time after 60 days from the date the QF provides PacifiCorp with written Initial Comments, the QF may file a complaint with the Commission asking the Commission to adjudicate any unresolved contract terms or conditions. *Id.* at Section B(7). The right to seek Commission resolution after 60 days of negotiation is paralleled by the complaint process established in the Commission's regulations at OAR 860-029-0100.

[1] *See* Schedule 38 at Section B(6): "Prices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties."

[2] There is no prohibition against the parties conducting negotiations by exchanging partial drafts of the proposed PPA or even by exchanging the text of individual provisions of the proposed PPA. The only time PacifiCorp is required to provide a comprehensive draft of a PPA is at the beginning of the negotiation process when PacifiCorp is required under Section B(4) to provide the initial draft PPA and at the end of the negotiation process when PacifiCorp is required under Section B(6) to provide the QF with a final, executable PPA.

IV. DISCUSSION

A. REBUTTAL OF ALLEGATIONS IN INTERNATIONAL'S RESPONSE

1. PacifiCorp did not behave improperly or in bad faith when it proposed new insurance and credit terms in an August 21 proposal that did not include price terms because Schedule 38 authorizes the parties to propose revised terms until both parties execute a PPA and because Schedule 38 does not require negotiation by exchange of comprehensive drafts of the proposed PPA.

International alleges that PacifiCorp acted improperly when it provided International with a third draft of the PPA on August 21, 2009 ("August 21 proposal"). Complaint at 9-11; International's Reply at 3; International's Response at 3.[3] The August 21 proposal contained modifications to the insurance and credit provisions and no pricing terms.[4] International alleges that PacifiCorp's August 21 proposal was improper: (1) because International had foreclosed further negotiation by requesting a final PPA on August 19, 2009 (International's Reply at 3; International's Response at 3); and

[3] International also accused PacifiCorp of making untrue statements in its Motion to Dismiss. In that motion, PacifiCorp noted that International commented *orally* on August 11 and August 19. Motion to Dismiss at 3. In its reply, International called PacifiCorp's statement about oral comments a "false" claim and a "disingenuous recitation of facts." International's Reply at 2. PacifiCorp strongly disagrees with these assertions. On August 11, International provided PacifiCorp with extensive oral comments regarding the draft PPA. PacifiCorp employee Jim Schroeder took notes on these comments and used them as the basis for many of the revisions proposed by PacifiCorp on August 13. *See* Testimony of Jim Schroeder ("Schroeder Testimony") at Exhibit PacifiCorp/101. As discussed in Mr. Schroeder's testimony, International did communicate with PacifiCorp by e-mail on August 11 but merely to provide International's current contact information for updating the notification addresses in Section 22 of the draft PPA. Schroeder Testimony at Exhibit PacifiCorp/102. In a similar fashion, International employee Greg Comatas called Mr. Schroeder on or about August 19 to provide comments on PacifiCorp's August 13 proposal. The same day, Mr. Comatas sent Mr. Schroeder an e-mail to confirm that fact. The email included contact information for two additional International contacts, to be added to Section 22 of the draft PPA. *See* International's Reply at Exhibit 3. In short, PacifiCorp stands by its statements regarding the oral comments of International on August 11 and August 19. That being said, the issue is entirely irrelevant to PacifiCorp's motion to dismiss. PacifiCorp's motion does not depend in any way on whether International's comments were oral or written. For purposes of analysis and argument, PacifiCorp's motion to dismiss and this reply always assume that International's August 11 comments on the draft PPA served to trigger the negotiation process established in Section B(5) of Schedule 38 and served to trigger the 60-day period for filing a complaint under Section B(7) of Schedule 38 and under OAR 860-029-0100.

[4] *See* Complaint, at 4 (regarding no price terms); *See, also,* excerpts from August 21 proposal, copy attached to Schroeder Testimony as Exhibit PacifiCorp/103 (regarding proposed changes to insurance and credit provisions).

(2) because PacifiCorp's August 21 proposal lacked pricing terms (Complaint at 7, 9; International's Response at 3).

International's objections to PacifiCorp's August 21 proposal reflect a fundamental misperception about how the Schedule 38 process works. As explained in Section III, *supra*, the negotiation stage of the Schedule 38 process continues until both parties reach full agreement on all terms and conditions. *See* Schedule 38 at Section B(6). *Id*. Neither party can unilaterally terminate the negotiation stage by declaring an agreement if the other party in good faith continues to negotiate. Once the parties do reach agreement on all terms, PacifiCorp must provide the QF with a final, executable PPA within 15 business days. *Id*. However, because the terms and conditions negotiated by the parties are not binding until the parties both execute a PPA,[5] either party remains free to propose good faith revisions even during the 15-day period leading up to production of a final draft PPA. Therefore, International's August 19 request for a final PPA did not foreclose the possibility of further revisions by PacifiCorp at anytime prior to September 10, 2009 (15 business days after August 19). As it turned out, PacifiCorp proposed revised insurance and credit provisions on August 21. However, rather than respond to these new terms, International broke off negotiations and prematurely filed a complaint on September 4, 2009.

Having established that, under a proper understanding of the Schedule 38 process, PacifiCorp was well within its rights to propose new insurance and credit terms on August 21, 2009 PacifiCorp next replies to International's allegation that PacifiCorp

[5] *See* Schedule 38 at Section B(6): "Prices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties."

acted improperly by removing pricing terms from its August 21 draft of the PPA. Complaint at 7, 9; International's Response at 3, 7 n.1. In both its Complaint and its Response, International makes much of the fact that PacifiCorp removed all pricing terms from its August 21 proposal.

There is nothing wrong, however, in PacifiCorp's election to remove pricing terms from the August 21 proposal because Schedule 38 does not require that the parties negotiate by means of complete and comprehensive drafts of the proposed PPA.[6] Indeed, International never provided its proposed revisions in the form of a complete and comprehensive draft of the proposed PPA. Rather, International generally provided PacifiCorp with oral comments about the isolated aspects of the agreement on which it sought a revision. There was nothing wrong with proceeding this way because Schedule 38 does not obligate either party to negotiate by means of complete and comprehensive proposed draft PPAs. The only time Schedule 38 requires PacifiCorp to provide a complete and comprehensive PPA is at the beginning of the negotiation stage – when it provides the initial draft required by Section B(4) – and at the end of the negotiation stage – when it provides the final, executable PPA required by Section B(6) of the Schedule 38. PacifiCorp did not violate any requirement nor act in bad faith when it excluded price information from its August 21 proposal regarding revisions to the insurance and credit provisions of the proposed PPA.[7]

[6] See Section III, footnote 2, *supra*

[7] While it is not strictly relevant to the pending motion to dismiss, PacifiCorp's motivation in removing the price terms from the August 21 proposal was its concern that Schedule 37 avoided cost rates could change at any point during the late August negotiation of the new PPA with International. In August of 2009, there was significant uncertainty regarding when new Schedule 37 rates would become effective and PacifiCorp had no way of knowing what its effective rate would be on the date the parties ultimately executed a PPA. By removing the price term from the August 21 proposal, PacifiCorp was not refusing to enter into a PPA

2. International has not established a legally enforceable obligation because International and PacifiCorp have not executed a PPA or other written agreement establishing the date of a legally enforceable obligation.

As International points out in its response, the Commission's regulations state that a QF incurs a legally enforceable obligation for these purposes on the earlier of:

> (a) The date on which a binding, written obligation is entered into between a qualifying facility and a public utility to deliver energy, capacity, or energy and capacity; or
>
> (b) The date agreed to, in writing, by the qualifying facility and the electric utility as the date the obligation is incurred for the purposes of calculating the applicable rate.

OAR 860-029-0010(29). There is no other provision by which a QF may establish a legally enforceable obligation for the delivery of output under Oregon law. Provision (a) and (b), above, both require that the QF and the utility acknowledge the legally enforceable obligation in a written agreement. International cannot prove, based upon the facts it alleged, that PacifiCorp and International have a written agreement acknowledging a legally enforceable obligation.

a. <u>International's assertion that a written agreement between PacifiCorp and International occurred August 19 (or any time) is incorrect as a matter of law.</u>

International argues the parties reached full agreement on a PPA on August 19. International's Response at 5. International reasons that PacifiCorp's August 13 proposal

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with International nor was it refusing to calculate applicable pricing before resolution of UM 1442, rather PacifiCorp was merely recognizing that the core of its price calculation – the Schedule 37 avoided cost rate, which is a rate that is not subject to negotiation – might very likely change before the parties could reach final agreement and execute a PPA. Under such circumstances, PacifiCorp believed it was counter productive to include price terms which might be inapplicable and which, in any event, were not necessary to negotiate the revised insurance and credit provisions proposed on August 21. In the cover e-mail accompanying its August 21 proposal, PacifiCorp indicated that it would finalize pricing pursuant to Commission direction regarding the effective date of its new Schedule 37 rates. *See* August 21 e-mail from Jim Schroeder to Greg Comatas, copy attached as Exhibit PacifiCorp/104 to the Schroeder Testimony. The August 21 proposal was not an attempt to renegotiate the rate adjustments previously negotiated by the parties but was rather an indication that PacifiCorp did not know what Schedule 37 avoided cost rate would be in effect when the process of negotiating a PPA with International was complete.

was a binding offer and that International effectively accepted that offer when it requested a final PPA on August 19. International summed up its argument as follows: "In simple terms, PacifiCorp made an offer via the second draft PPA that International Paper accepted—resulting in full agreement of all conditions and terms in the second draft PPA [PacifiCorp's August 13 proposal]." *Id.* This conclusion is clearly incorrect. As a matter of law the Commission can easily conclude that International's August 19 request did not establish an agreement between the parties because such a conclusion would be contrary to contract law and contrary to the applicable provisions of Schedule 38.

(i) PacifiCorp made clear its August 13 proposal was not an offer.

The text of PacifiCorp's August 13 proposal clearly and unambiguously stated that the proposal was not a binding offer. The disclaimer was in bold text on the front page of the document and it read:

> **THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON EACH PARTY'S RECEIPT OF ALL REQUIRED MANAGEMENT APPROVALS (INCLUDING FINAL CREDIT AND LEGAL APPROVAL). ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS WORKING DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS WORKING DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THIS AGREEMENT IS NEGOTIATED, APPROVED BY MANAGEMENT, SIGNED AND DELIVERED, NO PARTY SHALL HAVE ANY OTHER LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS WORKING DRAFT OR IN THE COURSE OF NEGOTIATIONS.**

August 13 Proposal, copy of page one attached to Schroeder Testimony as Exhibit PacifiCorp/105.[8] Given the language quoted above, it defies understanding how

[8] The August 13 proposal also contained a margin comment on page 8 stating that Section 3.2.8 was subject to review by PacifiCorp's Credit department; and a margin comment on page 14, stating that the

International could in good faith argue that PacifiCorp made a binding offer on August 13 and that International established a full agreement between the parties by accepting that offer on August 19.

(ii) Schedule 38 requires that no agreement between the utility and the QF is final until the parties both execute a PPA.

Schedule 38 repeatedly states that the terms and conditions proposed by the parties under the Schedule 38 process are not final and binding until both parties execute a PPA.[9] In order to embrace International's argument, the Commission must ignore the clear and repeated mandate of Schedule 38 that "[p]rices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties." Schedule 38 at Section B(2).

In light of the disclaimer language of PacifiCorp's August 13 proposal and the language of Schedule 38 regarding the non-binding nature of proposed terms and conditions, it is clear as a matter of law that International did not establish an agreement between the parties on August 19 by "accepting" PacifiCorp's August 13 proposal.

b. Rule 860-29-0010(29) and Schedule 38 make clear that there can be no legally enforceable obligation before the parties execute a PPA or enter into a written agreement establishing the date a legally enforceable obligation was incurred.

International seeks to provide PacifiCorp with firm output from its QF "pursuant to a legally enforceable obligation for the delivery of [output] over a specified term"[10] at prices based on PacifiCorp's "avoided costs projected over the life of the obligation and

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indemnification, liability, and insurance requirements were subject to review by Risk Management. *See* Exhibit PacifiCorp/105 to Schroeder Testimony.

[9] These explicit provisions are discussed in Section III, *supra*

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[10] *See* OAR 860-029-0040(4)(b).

calculated at the time the obligation is incurred."[11] The "time the obligation is incurred" is defined in OAR 860-029-0010(29), *supra*. As explained above, OAR 860-029-0010(29) provides that a legal obligation may arise (a) upon the date the parties enter into a written PPA; or (b) upon any other date agreed to in writing between the parties. International does not allege it met the criteria to qualify under OAR 860-029-0010(29)(a), and International cannot meet the criteria for OAR 860-029-0010(29)(b), for all the reasons discussed above. Therefore, International cannot show that it has a written agreement with PacifiCorp establishing the date of (nor the existence of) a legally enforceable obligation.

International argues that, if the Commission were to refuse to conclude that International's August 19 request for a final PPA established an agreement in writing by the parties, it would nullify OAR 860-029-0010(29)(b). International's Response at 6-7. International is wrong. OAR 860-029-0010(29)(b), which allows a utility and a QF to agree in writing that a legally enforceable obligation occurred (for purposes of determining the utility's avoided cost) on a specified date other than the date a written PPA was entered into by both parties, serves an important function in PPA negotiations—one that does not require the Commission to adopt International's contorted logic. International's concern – that interpreting OAR 860-029-0010(29)(b) to require an actual agreement in writing would render it "dead letter" – is not valid.

c. <u>The *Snow Mountain* decision does not control the Commission's interpretation of Rule 860-29-0010 and Schedule 38.</u>

In its response, International asserted, without explanation, that the "continuing efficacy" of the Court of Appeals' decision, in *Snow Mountain Pine Co. v. Mauldin,* 84

[11] *See* OAR 860-029-0040(3)(b)(B).

Ore. App. 590 (1987), cannot be challenged. Response at 8. This is incorrect. *Snow Mountain* was based upon the Oregon Court of Appeals' interpretation of OAR 860-029-0100(29), as it existed at the time of the dispute.[12] While *Snow Mountain* is still technically good law because it has not been overturned, it interpreted a Commission rule that has since been significantly and materially revised and supplemented. As a result, the *Snow Mountain* holding is no longer a controlling interpretation of the current requirements of OAR 860-029-0010(29).

International's assertion (on page 8 of its Response) that *"Snow Mountain* stands for the proposition that utility delay in incurring a legally enforceable obligation is contrary to federal and Oregon law" overstates the scope of the Court's holding. In *Snow Mountain*, the Court found that the Commission erred when it interpreted its definition of "time the obligation is incurred" to mean the time of a Commission order settling a dispute.[13] Therefore, the *Snow Mountain* decision stands only for the proposition that "time the obligation is incurred" in OAR 860-29-0010 (as that regulation existed at the

[12] The Court of Appeals of Oregon affirmed the circuit court's conclusion that the obligation occurred when Snow Mountain tendered a contract in July 1983. A careful examination of the court's opinion confirms that its decision relied upon OAR 860-029-0010(29). First the court observed that Snow Mountain had a right, under 18 CFR § 292.304(d)(2) and ORS 758.525, to sell CP power at the avoided cost "calculated at the time the obligation is incurred." However, neither the FERC's rule nor the Oregon statute define "time the obligation is incurred," so the court relied on the OAR 860-29-0010(29), which provided: "'Time the obligation is incurred' means the date on which a binding obligation first exists between a qualifying facility and a utility to deliver capacity or firm energy." In its order that gave rise to the dispute in *Snow Mountain*, the Commission interpreted the definition, above, to mean, in the case of a dispute between the utility and the QF, the date of the final Commission order resolving the dispute. However the Court disagreed and instead held that the date on which the qualifying facility obligates itself to deliver energy fixes the date on which the "avoided costs" are determined.

[13] To the extent the Court cites to FERC and Oregon statute in support of its conclusion, such elaboration is not part of the holding; rather it is evidence to support the Court's conclusion that the Commission erred in interpreting its own rule.

time of the dispute) means the date on which the qualifying facility obligates itself to deliver energy by tendering the utility an agreement that obligates it to provide power.

The Commission has rewritten OAR 860-29-0010(29) since the *Snow Mountain* dispute by, *inter alia*, requiring that a legally enforceable obligation be established by written agreement.[14] Given the fundamental change between the version of OAR 860-029-0010(29) interpreted by the court in *Snow Mountain* and the version of OAR 860-029-0010(29) that exists today, the continuing viability of *Snow Mountain* is very limited, at best.[15] The case no longer provides a binding or relevant interpretation of OAR 860-029-0010(29). The fact that *Snow Mountain has* not been overturned does not require the Commission to treat it as binding precedent, where the Commission has since fundamentally modified the Commission rule that formed the basis of the *Snow Mountain* holding.[16]

[14] Under the version of the rule interpreted by the *Snow Mountain* court, "Time the obligation is incurred" meant "the date on which a binding, obligation first exists between a qualifying facility and a utility to deliver energy [and/or] capacity." The current version of the rule only allows a legally enforceable obligation to arise when there is either a written and executed PPA between the QF and the utility or else a written agreement between the QF and the utility stating the date the obligation is incurred.

[15] At most, *Snow Mountain* remains relevant for the proposition that the utility cannot prevent a QF from obtaining a legally enforceable obligation by refusing to sign a power purchase agreement. However, as explained in PacifiCorp's Motion to Dismiss (pages 10-12), Oregon has broad authority to implement the requirements of PURPA, and the process it has created via Schedule 38 and OAR 860-029-0100 provides a process that did not exist at the time of *Snow Mountain* and which allows the Commission to prevent abuse by regulated utilities. *Snow Mountain* does not require that the Commission ignore Schedule 38 and OAR 860-029-0100, as International suggests.

[16] *See, Corey v. Dep't of Land Conservation & Dev.,* 344 Or 457 (2008) (wherein the Court declared that a prior decision interpreting the law in question was not binding precedent in the current proceeding because the law being interpreted had been amended and revised after the initial decision.)

B. THE COMISSION CAN GRANT PACIFICORP'S MOTION TO DISMISS

1. International's Complaint should be dismissed because International lacked sufficient cause to disregard the Commission's requirement that it wait 60 days after giving written comments on the draft PPA before filing a complaint.

a. Commission rules make no provision for waiver of the 60-day wait requirement in OAR 860-029-0100.

In its Motion to Dismiss, PacifiCorp noted that OAR 860-029-0100, unlike many other Commission rules, makes no provision for waiver. PacifiCorp noted, further, that the Commission generally does not favor exempting an entity from compliance with any administrative rule. Motion to Dismiss at 18-19. International's Response did not dispute these conclusions.

b. Even if the possibility of waiver exists under ORS 756.040, International has not shown good cause for such a waiver.

International asserts that ORS 756.040 gives the Commission organic authority to disregard OAR 860-029-0100. PacifiCorp does not concede that ORS 756.040 bestows such authority on the Commission.[17] But even assuming the Commission does have inherent authority to waive its own rule, International has not alleged, let alone proved,[18] good cause in this instant proceeding. International argues that the rule should be waived for three reasons: (1) PacifiCorp violated its duty to negotiate in good faith, International's Response at 3; (2) further negotiation with PacifiCorp would be futile,

[17] ORS 756.040 empowers the Commission to represent and protect "customers" and "the public generally" from unjust and unreasonable rates and practices. In the context of this dispute, International is a qualifying facility, and may not be either a "customer" or "the public generally".

[18] PacifiCorp also questions whether the Commission can grant a waiver for good cause without holding a hearing to determine whether International's allegations have merit.

Waiver Motion at 3; and (3) time is of the essence to International, *Id*. at 4. These justifications for waiver should be rejected for two reasons.

First, PacifiCorp did not violate its duty to negotiate in good faith when it made its August 21 proposal. International has erroneously concluded that it established an agreement when it requested a final PPA on August 19 and erroneously concluded that PacifiCorp violated the requirements of Schedule 38 when it proposed revised terms on August 21. *See* Sections IV(A)(2)(a) and IV(A)(1), respectively, for a discussion of why these conclusions are wrong.

Second, if the Commission were to grant International's waiver request based on the reasons put forth by International; the exception would destroy the rule, and the 60-day wait requirement would, as a practical matter, cease to exist.

c. Subsequent passage of time does not moot International's violation of the 60-day wait requirement because International abandoned contract negotiations after only 24 days.

The fact that more than 60 days now have passed since International first provided comments on the draft PPA does not moot PacifiCorp's argument that International's complaint (filed only 24 days after commenting on the Draft PPA) was premature. International's noncompliance with the 60-day wait requirement has already harmed PacifiCorp by causing it to defend a complaint that is not permitted by law until International has satisfied the 60-day wait requirement. International's haste deprived PacifiCorp of the chance to continue negotiations with International on the power purchase agreement – negotiations that International abandoned when it failed to respond to revised terms PacifiCorp sent to it on August 21, 2009. PacifiCorp suspects that one of the reasons behind the Commission's 60-day wait requirement is to compel the utility and

the qualifying facility to spend ample time negotiating a solution in hope of eliminating the need for a complaint – a goal that was short-circuited by International's untimely complaint. Another purpose of the 60-day wait requirement is to conserve the Commission's resources against unnecessary litigation. Unless the Commission's reaction to International's willful disregard of the 60-day wait requirement serves as a deterrent, more qualifying facilities are likely to follow International's example in the future.[19]

2. International's Complaint should be dismissed because, as a matter of law, International has not pleaded facts sufficient to demonstrate the establishment of a legally enforceable obligation to purchase International's output.

a. International's First Claim must fail because facts pleaded by International show that PacifiCorp did not take more than 30 days to provide an indicative pricing proposal.

As discussed in Section III, *supra*, under Schedule 38, PacifiCorp is not obligated to provide indicative pricing until it receives the general project information specified in Schedule 38, Section B, paragraph 1. Schedule 38 at Section B(2). Once it has received the written information from the QF, PacifiCorp has 30 days to provide the QF with an indicative pricing proposal. *Id*.

In its complaint, International asserts that PacifiCorp violated the 30 day requirement of Section B(2). Complaint at ¶ 24. Presumably, International has based this assertion on the fact that 33 days transpired between its May 29 request for indicative pricing and PacifiCorp's July 1 provision of such pricing. However, as discussed below,

[19] The Commission may take notice of the fact that, under the Resource Conservation and Recovery Act (RCRA), Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Endangered Species Act, and many other federal statutes, the requirement that a plaintiff give a defendant at least 60 days notice before filing a suit is a jurisdictional prerequisite, and failure to strictly comply therewith results in dismissal with prejudice. *See, Hallstrom v. Tillamook County*, 493 U.S. 20, 23 n.1 (1989).

the 30 day requirement of Section B(2) does not begin until the QF has provided all necessary information in writing. That did not occur until June 5, 2009.

On May 29, 2009, International requested an indicative pricing proposal. Complaint at ¶ 6. On June 1, 2009, PacifiCorp asked International to confirm in writing the information required to satisfy the information requirements of Schedule 38, Section B(1). Complaint at ¶ 7. On June 5, 2009, International provided PacifiCorp with written confirmation of the required information and thereby satisfied the information requirements of Schedule 38, Section B(1). *Id.* PacifiCorp then had 30 days, or until July 5, 2009, to provide International with an initial pricing proposal as required by Schedule 38, Section B(2). On July 1, 2009, PacifiCorp timely provided International with an indicative pricing proposal. *Id*. at ¶ 8. The Commission therefore should conclude, as a matter of law, that PacifiCorp timely provided International with and indicative pricing proposal.

b. International's Second Claim for Relief must fail because removal of price terms was not a breach of Schedule 38.

Paragraph 27 of International's Complaint alleges that removal of the price terms from PacifiCorp's August 21 proposal constituted a breach of PacifiCorp's duties under Schedule 38. For the reasons discussed on pages 5 to 7 and footnote 7, *supra*, International is wrong as a matter of law. Schedule 38 does not require that PacifiCorp negotiate by exchange of a complete and comprehensive draft PPA.

c. International's Third Claim for Relief must fail because the facts alleged fail to establish that PacifiCorp proposed PPA pricing terms different from those authorized by Schedule 38.

Paragraph 12 of International's complaint alleges that on August 21, 2009, PacifiCorp:

> . . . deleted all specific purchase pricing terms from Draft III [PacifiCorp's August 21 proposal]. In the place of the 2009 PPA avoided cost pricing rates that were included in Draft I [the August 10 initial draft PPA] and Draft II [PacifiCorp's August 13 proposal], PacifiCorp offered to 'finalize pricing per OPUC directions' resulting from the OPUC Public Meeting scheduled on August 25, 2009.

Assuming paragraph 12 is true, PacifiCorp's proposal to "finalize pricing per OPUC directions" does not equate to offering International unauthorized pricing terms. To the contrary, it manifests PacifiCorp's intent to *obey* the Commission's direction.

The Commission may take notice that, on August 20, 2009, Staff for the Commission circulated a draft memorandum regarding Pacific Power & Light's Advice No. 09-012 docket, in which it recommended that the Commission allow Pacific Power & Light's proposed new Schedule 37 rates to go into effect on August 26, 2009.[20] That document gave PacifiCorp good cause to believe that its Schedule 37 rates were likely to change on or about August 26.

Given that International and PacifiCorp had not yet reached agreement on all terms on August 21, the date upon which PacifiCorp would deliver International a final PPA was still indeterminate and could have been after new rates took effect. As discussed in Section III, *supra*, no terms of the draft PPA are final until the written agreement is executed by both parties. Because PacifiCorp could not know when the parties would execute the final PPA, PacifiCorp could not, with confidence, predict the correct Schedule 38 prices in its August 21 proposal. PacifiCorp always intended, and communicated as much to International Paper, that the pricing terms in the final PPA would be those pricing terms authorized by the Commission on the date that the final

[20] *See*, draft Public Utility Commission of Oregon Staff Report re scheduled August 25, 2009 Public Meeting to discuss Advice No. 09-012.

PPA was executed. Because PacifiCorp never proposed to deviate from Schedule 38 prices, International's Third Claim must fail as a matter of law.

d. The Commission can conclude as a matter of law that no legally enforceable obligation was established before PacifiCorp's Schedule 37 rates changed on September 9, 2009.

International argues that it incurred a legally enforceable obligation on August 19 and that it is therefore entitled to a purchase price based on the Schedule 37 rates that were in effect on August 19.[21] Response at 5. As discussed *supra* at Section IV(A)(2), International's August 19 request for a final PPA did not establish an agreement (written or otherwise) between the parties. As a result, neither OAR 860-029-0010(29)(a) nor OAR 860-029-0010(29)(b) were satisfied on August 19 and no legally enforceable obligation was established at that time.

Indeed, a legally enforceable obligation remains to be established. A legally enforceable obligation will be established when the parties execute a PPA or agree in writing to the date of a legally enforceable obligation. *See* OAR 860-029-0010(29). Given that International requested a final PPA on August 19, the earliest it would have been entitled to an executable PPA as a matter of right under Schedule 38 would have been 15 business days[22] later (September 10, 2009, a day

[21] International even suggests it may have established a legally enforceable obligation on August 11 when it indicated to PacifiCorp the changes it wanted to PacifiCorp's August 10 draft PPA. Response at 8, n.2. International could not establish a legally enforceable obligation by "accepting" PacifiCorp's August 10 proposal for the same reason it cannot do so by "accepting" PacifiCorp's August 13 proposal – because the August 10 proposal was not a binding offer which was subject to acceptance. *See*, Section IV(A)(2), *supra*.

[22] This is not to suggest that PacifiCorp must, or even regularly does, take all 15 days to produce a final PPA; however, the QF cannot compel as of right a final PPA from PacifiCorp in less than 15 business days and PacifiCorp has the right to propose revisions (in good faith) at any point during the 15-day period.

after PacifiCorp's Schedule 37 rates changed) *provided* PacifiCorp had not proposed any revisions after August 19. However, because PacifiCorp did propose additional revisions on August 21, the soonest International could have had an executable PPA as a matter of right became September 14, 2009 (15 business days after August 21). Of course, International would have a had a right to an executable PPA on September 14 *only if* it had agreed on August 21 to PacifiCorp's proposed revisions and *only if* neither party had proposed any new or revised terms before September 14.[23] In reality, International did not agree to the new terms proposed by PacifiCorp on August 21. Rather, International broke off negotiations and prematurely filed a complaint with the Commission.

International was not entitled to an executable PPA as a matter of right before PacifiCorp's Schedule 37 rates changed on September 9, 2009. In addition, the parties clearly did not enter into a PPA before September 9, nor did they agree in writing that International incurred a legally enforceable obligation before September 9. It therefore follows, as a matter of law, that no legally enforceable obligation existed before September 9 and that International is not entitled to a purchase price based on PacifiCorp's old Schedule 37 rates.

IV. CONCLUSION

WHEREFORE, PacifiCorp respectfully requests that the Commission. Dismiss International's Complaint as violating the 60-day wait period of OAR

[23] Contrary to the suggestion in footnote 1 of International's Response, PacifiCorp does not believe that International's assent to the revised terms proposed by PacifiCorp on August 21 would have immediately established a final agreement. If International had assented to the revisions proposed on August 21, PacifiCorp would have had until September 14 to produce a final PPA and either party would have remained free to propose new or revised terms at any point before execution of the final PPA.

860-029-0100 or, alternatively, for failure to state a claim upon which relief can be granted.

Dated this 23rd day of October 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2009, I served a true and correct copy of the foregoing *PACIFICORP'S REPLY TO INTERNATIONAL PAPER COMPANY'S RESPONSE IN OPPOSITION TO PACIFICORP'S MOTIONS TO DISMISS AND FOR EXTENSION OF TIME TO ANSWER* on the following named persons/entities by depositing a true copy thereof in the United States Mail at Portland, Oregon:

JESSE E COWELL DAVISON VAN CLEVE 333 SW TAYLOR ST., SUITE 400 PORTLAND OR 97204 jec@dvclaw.com	MELINDA J DAVISON DAVISON VAN CLEVE PC 333 SW TAYLOR - STE 400 PORTLAND OR 97204 mail@dvclaw.com

I hereby certify that, on October 23, 2009, I served a true and correct copy of the foregoing *PACIFICORP'S REPLY TO INTERNATIONAL PAPER COMPANY'S RESPONSE IN OPPOSITION TO PACIFICORP'S MOTIONS TO DISMISS AND FOR EXTENSION OF TIME TO ANSWER* on the following named persons/entities by electronic mail:

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