

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1449

INTERNATIONAL PAPER COMPANY,)	
)	
Complainant,)	
)	
v.)	INTERNATIONAL PAPER
)	COMPANY'S RESPONSE IN
)	OPPOSITION TO PACIFICORP'S
PACIFICORP, dba PACIFIC POWER,)	MOTIONS TO DISMISS AND FOR
)	EXTENSION OF TIME TO ANSWER
Defendant.)	
)	
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I. Introduction

International Paper Company (“International Paper”) submits this response in opposition to PacifiCorp’s motions to dismiss and for extension of time to answer (“PacifiCorp Motions”), filed with the Public Utility Commission of Oregon (“OPUC” or the “Commission”) in Docket No. UM 1449 on September 23, 2009. International Paper respectfully requests that the Commission deny the PacifiCorp Motions for the reasons stated below.

II. Background

Pursuant to OAR § 860-029-0100, International Paper filed a complaint with the OPUC against PacifiCorp on September 4, 2009 (“Complaint”). International Paper also filed a motion for waiver of OAR § 860-029-0100(5)(a), and for leave to file its complaint on September 4, 2009 (“Waiver Motion”). In the Waiver Motion, International Paper explained why the usual (5)(a) requirement—i.e., that a complainant

state that 60 days had passed after submission of written commentary to a utility on a draft power purchase agreement (“PPA”) *before* filing a complaint—would be inequitable due to PacifiCorp’s lack of good faith in unreasonably delaying qualifying facility (“QF”) PPA negotiations. Waiver Motion at 2–3. Accordingly, International Paper asked the Commission to waive the paragraph (5)(a) requirement, and to grant International Paper leave to file its Complaint. *Id.* at 4.

On September 23, 2009, along with the PacifiCorp Motions, PacifiCorp filed a response in opposition to the Waiver Motion (“PacifiCorp Response”). International Paper replied in opposition to the PacifiCorp Response and in support of the Waiver Motion (“Reply”) on September 28, 2009, pursuant to the September 17, 2009 ruling of ALJ Grant. In the Reply, International Paper pointed out the factual inconsistencies upon which the legal arguments in the PacifiCorp Response were premised. In support, International Paper filed five exhibits with the Reply, evincing the actual timing of relevant actions and the *originally* asserted positions of PacifiCorp, which were contrary to representations in the PacifiCorp Response.

III. Discussion

A. The Motion to Dismiss is Unfounded on a Procedural or Substantive Basis

According to PacifiCorp, its motion to dismiss the Complaint is based “on two independent grounds”; *i.e.*, both a procedural and a substantive basis for dismissal. PacifiCorp Motions at 23–24. Procedurally, PacifiCorp claims that the Complaint is “in violation of the 60-day requirement of OAR 860-029-0100.” *Id.* Substantively, PacifiCorp avers that International Paper did not create a legally enforceable obligation

for PacifiCorp to purchase its QF power before revised avoided cost rates went into effect on September 9, 2009. Id. Under this logic, PacifiCorp concludes that the Complaint should be dismissed because International Paper has failed “to state a claim upon which relief can be granted.” Id. Nevertheless, neither of these proffered bases is founded in truth or law, and neither should be accepted by the Commission.

1. The Commission Has Authority to Waive Procedural Requirements, Especially when PacifiCorp Violates Tariff Obligations

Section B.5.a of Schedule 38 requires that, in PPA negotiations, PacifiCorp “will not unreasonably delay negotiations and will respond in good faith to” proposals. In short, it makes no sense to dismiss the Complaint and then require IP to refile after the 60 days run since PacifiCorp is unwilling to negotiate based on the earlier proposed terms.

As thoroughly explained in the Reply, PacifiCorp unilaterally withdrew all pricing provisions from a third draft PPA agreement on August 21, 2009, after International Paper had already assented to the pricing terms proposed in the first and second draft PPAs. Reply at 2–3; Reply Exhibits 4, 5. Indeed, in accord with Schedule 38, Section B.6, International Paper had requested a final PPA draft for execution on August 19, 2009: two days *before* PacifiCorp withdrew all pricing provisions in the third draft PPA. Reply at 2, Reply Exhibit 3. PacifiCorp’s subsequent decision on August 21—to suspend all PPA pricing negotiation until its revised avoided cost filing went into effect—was, therefore, a transparent and unreasonable attempt to delay negotiations in bad faith.

The Commission has authority to waive procedural rules, like the 60 day complaint filing period of OAR § 860-029-0100(5)(a), pursuant to ORS § 756.040. Specifically, the OPUC has a mandate to “make use of [its] jurisdiction and powers” in order to protect customers and the public “from unjust and unreasonable exactions and practices” of a utility. ORS § 756.040(1). The legislature expressly vested the Commission “with power and jurisdiction to supervise and regulate every public utility . . . and to *do all things necessary and convenient* in the exercise of such power and jurisdiction.” ORS § 756.040(2) (emphasis added). Plainly, when a utility fails to honor its own tariff obligations, the Commission has authority to waive otherwise applicable procedural requirements when necessary and convenient to protect a utility customer from unjust and unreasonable practices. Hence, PacifiCorp’s motion to dismiss is unfounded on a procedural basis, since the Commission can and should exercise its power to waive OAR § 860-029-0100(5)(a) and allow the Complaint to be filed.

2. PacifiCorp Had an Obligation to Purchase Power while Prior Avoided Rates Were in Effect

The pivotal question of *when* PacifiCorp incurred a legally enforceable obligation to purchase power from International Paper’s QF is answered by OAR § 860-029-0010(29), which states:

“Time the obligation to purchase the energy capacity or energy and capacity is incurred” means *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.

(Emphasis added). In brief, subsection (b) of this rule equates to the date in which a QF requests a final, executable version of a PPA under Schedule 38, Section B.6.

Subsection (b) requires an agreement, manifest in writing, establishing a date that an obligation for rate calculation purposes is incurred. In the present case, such a written agreement came into existence on August 19, 2009. First, when International Paper submitted a written request for a final version of the PPA for execution on August 19, it necessarily signaled its agreement to all the terms and conditions proposed by PacifiCorp in the second draft PPA. For its part, Schedule 38, Section B.6 itself constitutes a written agreement by PacifiCorp to supply a final, executable PPA to a QF within fifteen business days as soon as “both parties are in full agreement as to all terms and conditions of the [PPA].” 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.

Obviously, if “full agreement” had been achieved by the parties, no further negotiation was necessary. All that remained was for the finalized PPA to be executed. Therefore, “the date the obligation is incurred for the purposes of calculating the applicable rate” is simply the date the QF provided written consent to PacifiCorp’s terms, the date of full agreement; in this case August 19, 2009. OAR § 860-029-0010(29)(b).

Notwithstanding the Commission’s rule, PacifiCorp however argues that a legally enforceable obligation could not have existed before September 10, 2009, at the

earliest. PacifiCorp Motions at 23. PacifiCorp arrives at this conclusion on the apparent assumption that a legally enforceable obligation could not exist prior to the running of the fifteen business day period under which PacifiCorp must provide a final, executable PPA pursuant to Schedule 38, Section B.6. The problem with this assertion is that it essentially rewrites OAR § 860-029-0010(29) by omitting subsection (29)(b). Under subsection (29)(a), the legally enforceable obligation *may* be calculated on the date a binding, written PPA is entered into between a utility and QF. But OAR § 860-029-0010(29) explicitly calculates the date of the legally enforceable obligation at “the earlier of” subsection (a) or (b). In other words, the actual execution of a PPA will sometimes occur *after* a legally enforceable obligation is incurred.

A brief illustration demonstrates how either OAR § 860-029-0010(29) subsection may apply. For instance, if parties fully agreed to all terms and conditions of a proposed PPA under Schedule 38, Section B.6—but a QF did *not* manifest such agreement in writing—subsection (b) would be inapplicable, since it requires a written agreement. Thus, a legally enforceable obligation could not exist except as provided under subsection (a); *i.e.*, upon the actual execution of a final PPA. In the present case, however, when International Paper had conveyed its agreement to all terms and conditions in writing to PacifiCorp’s proposals, the legally enforceable obligation was instead calculated under the earlier subsection (b) date, which is the date when full agreement was manifested: August 19, 2009.

If OAR § 860-029-0010(29) is not construed in a manner that gives effect to *both* its subsections—*i.e.*, allowing a legally enforceable obligation to be incurred

before final PPA execution—then two untenable results will ensue: 1) Schedule 38, Section B.5 will become a dead letter; and 2) the Oregon Court of Appeals’ seminal decision in Snow Mountain Pine Co. v. Mauldin, 84 Or App 590 (1987), will be contravened.

First, if only subsection (29)(a) is given practical effect, such that a legally enforceable obligation is not recognized until a final PPA is actually executed, then PacifiCorp can simply continue doing what it did in this case—delay and even freeze negotiations, until avoided cost rate revisions go into effect. The mandate of Schedule 38, Section B.5, that PacifiCorp “will not unreasonably delay negotiations and will respond in good faith to” QF proposals, will become a mere dead letter. That is, if PacifiCorp proposals are not treated as legitimate offers, containing final material terms which a QF may agree to and accept, then PacifiCorp would be within its rights to propose an indefinitely continual succession of new PPAs, regardless of *full* QF agreement, such that unreasonable delay could never be imputed.^{1/} Surely, such a fantastic result could not be the intent of the Commission.

But second, and equally important, failure to give effect to subsection (29)(b) would essentially overturn Snow Mountain, in which the Court of Appeals found:

^{1/} Even PacifiCorp treats a proposed draft PPA as an offer which may be accepted, although PacifiCorp only does so selectively. According to PacifiCorp, “final material terms” were “proposed” in the third draft PPA. PacifiCorp Motions at 3. Presumably, by this statement, PacifiCorp would have treated written assent to the third draft PPA as “full agreement . . . to all terms and conditions,” pursuant to Schedule 38, Section B.6, since the third draft PPA allegedly contained “final material terms.” But there is no basis to construe the second draft PPA as being any different from the third draft PPA, in the sense of being an offer of final proposed terms that is capable of being accepted. Indeed, PacifiCorp radically modified the third draft PPA by removing all pricing provisions—such that if the radically altered third draft was a final proposal, much more the modestly revised second draft PPA was a final proposal, which International Paper could and did accept.

“To permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent.” 84 Or App at 599–600. Stated briefly, Snow Mountain stands for the proposition that utility delay in incurring a legally enforceable obligation is contrary to federal and Oregon law. PacifiCorp has not and cannot challenge the continued efficacy of Snow Mountain, based on the Court’s interpretation of federal and state legislative requirements, despite the dispersions PacifiCorp casts toward the decision upon other grounds. E.g., PacifiCorp Motions at 8–10, 15–16.

Therefore, OAR § 860-029-0010(29) cannot be interpreted in such a way as to permit delay in PPA negotiations when a QF is fully ready, willing, and able to obligate itself to provide power. On August 19, 2009, International Paper was ready, willing, and able to obligate itself to provide PacifiCorp with power, which is unquestionably demonstrated by its written request for a final PPA version for execution.^{2/} PacifiCorp’s argument that fifteen business days had to pass from this date before the incurrence of a legally enforceable obligation is a sham, because PacifiCorp did not provide a final, executable PPA on September 10, 2009. PacifiCorp’s Motions at

^{2/} In fact, as stated in the Complaint, International Paper was ready, willing, and able to provide power to PacifiCorp on August 11, 2009, when written commentary was submitted to PacifiCorp in assent to the terms and conditions of the first draft PPA. Complaint at ¶ 14. The August 19 date is used here, however, as there can be no question that —regardless of any disputation concerning full agreement by August 11—negotiations were concluded by this later date, and full agreement reached on all terms and conditions in light of International Paper’s written request for a final PPA for execution pursuant to Schedule 38, Section B.6. Since the pricing terms were unchanged between the first and second draft PPAs, there can be no signification in any distinction between the readiness, willingness, and ability of International Paper to provide power on either date.

23. Indeed, PacifiCorp has still not produced an executable PPA well into October, and has ignored International Paper's request and full agreement to the second draft PPA terms and conditions. Consequently, dismissal on PacifiCorp's substantive legally enforceable obligation contentions would be wholly improper.

B. The Motion for Extension of Time to File an Answer is Unnecessary, since PacifiCorp has Already Addressed Relevant Facts and Legal Issues Appropriate to an Answer

PacifiCorp has failed to show that good cause exists for an extension of time to file its answer, should the Commission rightly deny its motion to dismiss and grant the Waiver Motion. According to PacifiCorp, since its "motion to dismiss has the potential to dispose of this case and eliminate the need to answer the complaint," the OPUC should extend its time to answer an additional five business days. *Id.* at 24. The Commission need only review the Complaint, however, to see that PacifiCorp has made a significant portion of its answer already through the PacifiCorp Motions and PacifiCorp Response filings of September 23, 2009. Hence, PacifiCorp cannot credibly contend that an additional five days is warranted, beyond the standard statutory allotment of ten days, ORS § 756.512, because PacifiCorp's answer will in large measure be a mere restatement of the comprehensive response already submitted.

In the PacifiCorp Motions and PacifiCorp Response filings of September 23, 2009, PacifiCorp provided more than two pages of factual summary of this case. PacifiCorp Motions at 2–4. The factual allegations are responsive to the fact statements made in the Complaint, and comprehensively survey the entire course of negotiation events. PacifiCorp will have little to do in its answer than to merely restate these factual

allegations. To the extent that PacifiCorp will provide greater detail to its fact summary, PacifiCorp Motions at 2 n 1, the normal ten day response period should suffice.

Likewise, PacifiCorp has *thoroughly* addressed the legal claims contained in the Complaint. Procedurally, three pages of the Complaint are devoted to an enumeration of International Paper's compliance with relevant regulatory requirements. Complaint at 6–8. Correspondingly, PacifiCorp's motion to dismiss addresses these claims at great length, arguing that International Paper has failed to comply with necessary procedural requirements. E.g., PacifiCorp Motions at 4–6, 10–16, 19–24. Substantively, PacifiCorp conjoined these procedural arguments with additional analysis in order to respond, in a full twenty pages of text, to the specific legal claims within the Complaint. Id. at 4–23. Good cause does not exist which could justify an additional time extension to largely restate these arguments.

IV. Conclusion

For the foregoing reasons, PacifiCorp's motion to dismiss should be denied. As PacifiCorp's motion for an extension of time to file its answer lacks good cause, it should also be denied.

Dated this 8th day of October, 2009.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Melinda J. Davison

Melinda J. Davison

Jesse E. Cowell

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 phone

(503) 241-8160 facsimile

mjd@dvclaw.com

jec@dvclaw.com

Of Attorneys for International Paper Company

Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

October 8, 2009

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of International Paper Company v. PacifiCorp
Docket No. UM 1449

Dear Filing Center:

Enclosed please find the Response in Opposition to PacifiCorp's Motions to Dismiss and for Extension of Time to Answer on behalf of the International Paper Company in the above-referenced docket.

Thank you for your assistance.

Sincerely yours,

/s/ Allison M. Wils
Allison M. Wils

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day filed the foregoing Response in Opposition to PacifiCorp's Motions to Dismiss and for Extension of Time to Answer on behalf of the International Paper Company, upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail.

Dated at Portland, Oregon, this 8th day of October, 2009.

/s/ Allison M. Wils
Allison M. Wils

(W) LOVINGER KAUFMANN LLP
JEFFREY S LOVINGER
825 NE MULTNOMAH STE 925
PORTLAND OR 97232-2150
lovinger@lklaw.com

(W) PACIFIC POWER & LIGHT
JORDAN A WHITE
825 NE MULTNOMAH STE 1800
PORTLAND OR 97232
jordan.white@pacificorp.com

(W) PACIFICORP OREGON DOCKETS
OREGON DOCKETS
825 NE MULTNOMAH ST STE 2000
PORTLAND OR 97232
oregondockets@pacificorp.com