

LOVINGER | KAUFMANN LLP

825 NE Multnomah • Suite 925
Portland, OR 97232-2150

office (503) 230-7715
fax (503) 972-2921

September 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 MOTION TO DISMISS INTERNATIONAL PAPER COMPANY'S
COMPLAINT and PACIFICORP'S RESPONSE IN OPPOSITION TO MOTION FOR
WAIVER OF RULE AND LEAVE TO FILE COMPLAINT and PACIFICORP'S MOTION
FOR EXTENSION OF TIME TO ANSWER.*

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 MOTION TO
DISMISS INTERNATIONAL
PAPER COMPANY’S COMPLAINT
and PACIFICORP’S RESPONSE IN
OPPOSITION TO MOTION FOR
WAIVER OF RULE AND LEAVE
TO FILE COMPLAINT and
PACIFICORP’S MOTION FOR
EXTENSION OF TIME TO
ANSWER**

1 Pursuant to OAR 860-012-0031, PacifiCorp d/b/a Pacific Power (“PacifiCorp”)
2 respectfully moves the Public Utility Commission of Oregon (“Commission”) to dismiss
3 the complaint of International Paper Company, L.L.C. (“International”). PacifiCorp also
4 respectfully requests that the Commission deny International’s September 4, 2009 motion
5 seeking waiver of the 60-day requirement of OAR 860-029-0100 and seeking leave to
6 file a complaint against PacifiCorp (“waiver motion”). Finally, pursuant to OAR 860-
7 012-0031, PacifiCorp respectfully moves the Commission for an extension of time to
8 answer in the above-captioned proceeding until five business days after the Commission
9 has ruled on PacifiCorp’s motion to dismiss.

I. NATURE OF THE CASE

A. Factual Summary¹

International owns a 45-megawatt qualifying facility (“QF”) in Albany, Oregon. International sells the output of the QF to PacifiCorp under the terms of an existing power purchase agreement executed on December 10, 2007 and expiring on December 31, 2009.

On May 29, 2009, International requested a new power purchase agreement (“PPA”) from PacifiCorp initiating the process established in PacifiCorp’s Oregon Tariff Schedule 38 (“Schedule 38”). International did not provide, with its request, the written information about the project it was required to provide per section B(1) on page 2 of Schedule 38. On June 1, in an effort to facilitate the provision of the information required by section B(1) of Schedule 38, PacifiCorp provided International with a specific set of questions and information that it asked International to answer and verify such that PacifiCorp would have sufficient information to develop indicative pricing. International responded to the June 1 request on June 5, 2009, and again requested indicative pricing. PacifiCorp was satisfied with International’s June 5 request and began the process of generating an indicative pricing proposal. Twenty-four days later, on July 1, 2009, PacifiCorp provided International with an indicative pricing proposal. On July 10, 2009, International requested PacifiCorp to provide a draft PPA based upon the indicative pricing proposal.

¹ PacifiCorp provides this factual summary for context. PacifiCorp will provide its detailed version of the facts, which differs significantly from International’s version, when PacifiCorp files its answer.

1 The parties then began the process of generating, reviewing and revising draft
2 PPAs. PacifiCorp provided International with an initial draft PPA on August 10, 2009.
3 International provided oral comments on this draft on August 11, 2009, and PacifiCorp
4 incorporated these comments and provided a second draft PPA to International on
5 August 13, 2009. International provided oral comments on the second draft PPA on
6 August 19, 2009. On August 21, 2009, PacifiCorp provided International with a third
7 draft of the PPA. The third draft contained new material terms regarding insurance and
8 credit. It did not contain specified purchase prices because there was considerable
9 uncertainty at the time regarding which published avoided cost rate in PacifiCorp's
10 Oregon Tariff Schedule 37 ("Schedule 37") would be in effect at the conclusion of the
11 negotiations.² PacifiCorp told International both in writing and verbally that PacifiCorp
12 would calculate and insert the contract price based on the parties' previously agreed-to
13 Schedule 38 adjustment factors and whichever Schedule 37 rate the Commission
14 ultimately determined was in effect when the PPA became effective, and asked
15 International to comment on the third draft.

16 International terminated PPA discussions on or about August 21, 2009 without
17 explanation. International never rejected or accepted the final material terms PacifiCorp
18 proposed in its August 21, 2009 draft PPA. PacifiCorp informed International by
19 telephone on September 1 that it was waiting for a response to its third draft. Instead of
20 acknowledging and responding to the redlined changes in the August 21 draft, on

² The Schedule 37 rate serves as the starting point or core rate for the negotiation of a rate under Schedule 38. On July 9, 2009, PacifiCorp filed Advice No. 09-012 seeking Commission approval of a reduction in Schedule 37 avoided cost rates to be effective August 12, 2009, which was later extended to August 26, 2009. On August 20, Commission Staff issued its Staff Report, in which it recommended that the Commission allow PacifiCorp's new rates to take effect August 26, 2009. At its September 8, 2009 public meeting, the Commission ultimately approved PacifiCorp's rate request and the new Schedule 37 rates became effective September 9, 2009.

1 September 3 International gave PacifiCorp one day to tender it an executable PPA
2 containing the terms set forth in the August 11 draft. On September 4, 2009,
3 International filed its complaint in the above-captioned proceeding.

4 **B. Legal Issues Before the Commission**

5 In its complaint, International alleges that PacifiCorp had a legally enforceable
6 obligation to purchase International's net output on August 11, 2009. (Complaint, ¶ 14.)
7 International asks the Commission to order PacifiCorp to execute a PPA with
8 International containing Schedule 38 prices based on the Schedule 37 in effect on that
9 date. (Complaint at 11.) International requests this relief from the Commission
10 notwithstanding that: (a) OAR 860-029-0100 and Schedule 38 explicitly require a QF to
11 wait sixty days from the date it provided PacifiCorp written comments on PacifiCorp's
12 draft PPA (October 12, 2009 for International)³ before filing a complaint; (b) OAR 860-
13 029-0100 has no provision for waiver of the 60-day wait rule, or any other requirement
14 contained therein; and (c) International terminated negotiations without ever responding
15 to substantive changes to the draft PPA that PacifiCorp proposed on August 21, 2009.

16 To PacifiCorp's knowledge, this proceeding is the first time OAR 860-029-0100
17 has been applied to an actual case or controversy before the Commission, and it raises
18 novel issues of law. Specifically, International's complaint makes it necessary to
19 determine whether the Commission's dispute resolution rules extend existing Oregon law
20 regarding when a QF's request for a PPA becomes a legally enforceable obligation
21 ("LEO") upon the QF and utility. For the reasons provided below, PacifiCorp suggests

³ An October 12, 2009 date for the completion of the 60-day period required by OAR 860-029-0100 is calculated based on International's allegation that it first commented in writing on PacifiCorp's draft PPA on August 11, 2009. PacifiCorp does not agree that International's August 11 comments were written and reserves the right to argue that the 60-day wait period was triggered at a later date.

1 that OAR 860-029-0100 has extended Oregon law to make compliance with both the rule
2 and Schedule 38 a precondition to creating a LEO.

3 In this pleading PacifiCorp will argue that the Commission can and should find
4 that Schedule 38, OAR 860-029-0100, and the Commission's orders in UM 1129⁴ have
5 created a comprehensive regulatory scheme that establishes a series of negotiation
6 milestones and dispute resolution prerequisites which must be satisfied before a QF can
7 unilaterally establish a LEO requiring a public utility to purchase the QF's output.
8 Because International did not complete the Schedule 38 and OAR 860-029-0100
9 milestones and prerequisites before PacifiCorp's new Schedule 37 rates became effective,
10 the Commission can conclude, as a matter of law, that International is not entitled to a
11 new PPA with prices based on PacifiCorp's old Schedule 37 rates. If the Commission
12 reaches this conclusion, the complaint should be dismissed with prejudice for failure to
13 state a claim upon which relief can be granted.

14 Moreover, for the reasons discussed below, the Commission should deny
15 International's request to waive OAR 860-029-0100(5)(a) and, at a minimum, dismiss
16 International's complaint on procedural grounds as premature. Waiver should be denied:
17 (1) because waiver of OAR 860-029-0100 is not provided for by the Commission's rules;
18 (2) because the 60-day requirement of OAR 860-029-0100 is substantive as well as
19 procedural and waiver of the requirement would unfairly prejudice PacifiCorp's defense;
20 (3) because International has not asserted grounds for waiver which justify waiver in the
21 public interest; and (4) because waiver of the 60-day requirement when a QF terminates

⁴ *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities.*

1 negotiations and declares further negotiations futile would invite future QF's to abandon
2 the Schedule 38 and OAR 860-029-0100 process whenever they are dissatisfied.

3 II. APPLICABLE LAW

4 A. The "Legally Enforceable Obligation" under PURPA

5 The regulations of the Federal Energy Regulatory Commission ("FERC") provide
6 that a QF may sell energy or capacity pursuant to a "legally enforceable obligation" over
7 a specified term. *See* 18 CFR § 292.304(d).⁵ FERC has explained that this rule enables a
8 QF to sell energy to a utility either by entering into a contract or pursuant to a legally
9 enforceable obligation, or "LEO." *Power Resource Group, Inc. v Pub. Util. Comm. of*
10 *Texas*, 422 F.3d 231, 237-238 (5th Cir. Tex. 2005). "Use of the term 'legally enforceable
11 obligation' is intended to prevent a utility from circumventing the requirement [to
12 purchase capacity from] an eligible QF merely by refusing to enter into a contract with
13 the QF." *Small Power Prod. and Cogeneration Facilities' Regulations Implementing*
14 *Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg 12,214,
15 12,224 (Feb 25, 1980). Consequently, in cases where a utility is not a willing participant
16 in the creation of a contract, a utility may still acquire an obligation to purchase power.
17 *Public Serv. Co. v. State ex rel. Okla. Corp. Comm'n*, 2005 OK 47 (2005). Significantly,

⁵ 18 CFR § 292.304(d) states:

*Purchases "as available" or pursuant to a legally enforceable obligation. Each
qualifying facility shall have the option either:*

(1) To provide energy as the qualifying facility determines such energy to be available for
such purchases, in which case the rates for such purchases shall be based on the
purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the
delivery of energy or capacity over a specified term, in which case the rates for such
purchases shall, at the option of the qualifying facility exercised at the beginning of the
specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

1 the creation of a legally enforceable obligation is not governed by the common law of
2 contracts; it is a concept created by federal and state statutes, regulations, and
3 administrative rules. *Id.*

4 **B. States must determine when a LEO arises.**

5 FERC has expressly delegated to the states the responsibility to determine
6 whether a QF has established a LEO to deliver power and, if so, when the obligation
7 arose. “It is up to the States, not [FERC], to determine the specific parameters of
8 individual QF power purchase agreements, including the date at which a legally
9 enforceable obligation is incurred under State law.” *W. Penn Power Co.*, 71 FERC ¶
10 61,153, 61,495 (1995); *accord Metropolitan Edison Co.*, 72 FERC ¶ 61,015, 61,050
11 (1995).

12 **C. Oregon courts and the OPUC have examined when a LEO arises, in *Snow***
13 ***Mountain Pine* (1987), *Water Power* (1989) and in *Oregon Energy* (1998).**

14 In the more than thirty years since the passage of PURPA, only three reported
15 Oregon cases have considered when a QF may unilaterally establish a LEO. In *Snow*
16 *Mountain Pine Co. v. Mauldin*, the Oregon Court of Appeals determined that a LEO
17 arose when Snow Mountain tendered a contract obligating itself to provide power, and
18 that the contract price was the utility’s avoided cost in effect on the date that Snow
19 Mountain made its tender. 84 Or App 590, 600 (1987) (“*Snow Mountain Pine*”).

20 The two subsequent opinions constrained the unqualified holding of *Snow*
21 *Mountain Pine*. In *Water Power Co., Inc. v. PacifiCorp*, the court acknowledged *Snow*
22 *Mountain Pine*, but elaborated that a utility is not required to purchase in any and all
23 events and may insist that the QF obtain a transmission agreement to a certain delivery
24 point by a certain date. 99 Or App 125, 130 (1989) (“*Water Power*”). In *Portland*

1 *General Electric Co. v. Oregon Energy Co. LLC*, the Commission determined that a
2 contract tendered by Oregon Energy Company (“OEC”), a QF, to Portland General
3 Electric Company (“PGE”) did not create a LEO pursuant to OAR 860-029-
4 0040(4)(b)(B). OPUC Order No. 98-055, 1998 Ore. PUC LEXIS 131 (1998) (“*Oregon*
5 *Energy*”).⁶ The Commission reached this determination based on three independent
6 grounds. First, the OEC contract contained specific price terms for purchase of power
7 that exceeded PGE’s avoided cost. Second, because OEC lacked a wheeling agreement
8 to transmit power from its off-system site, it was not ready, willing, and able to deliver
9 power to PGE, a prerequisite to creating a LEO. Third, because the OEC contract lacked
10 language required by Commission rules to be in all QF contracts, it did not demonstrate
11 the QF’s requisite intent to establish a QF contract. *Id.*⁷

12 The three cases above are founded on Commission rules that have since been
13 repealed or revised (*see* discussion in Section III (C)(2), *infra*). Furthermore, neither the
14 Commission’s new rules, in OAR 860-029-0100, nor Schedule 38 existed at the time
15 *Snow Mountain Pine, Water Power.*, and *Oregon Energy* were decided.

16 **D. Neither the Oregon court nor the Commission have examined when a LEO**
17 **arises since the Commission concluded UM 1129, approved Schedule 38, and**
18 **adopted OAR 860-029-0100.**

19 On July 7, 2008, this Commission adopted new rules (codified at OAR 860-029-
20 0100) applicable to disputes between a utility and a qualifying facility with a capacity in
21 excess of 10 megawatts. OAR 860-029-0100 established two threshold requirements
22 before a QF may file a complaint and involve the Commission in a dispute arising out of

⁶ *Application for Reh’g Den’d by* OPUC Order No. 98-238, 1998 Ore. PUC LEXIS 204 (1998).

⁷ *Id.* The Commission also held that the QF could not amend the contract retroactively to correct the deficiency because doing so would be “manifestly unjust” to the utility. *Id.* at *21.

1 the negotiation of a PPA. First, the QF must comply with the procedures set forth in
2 Schedule 38.⁸ Second, the QF must wait to file a complaint with the Commission until at
3 least 60 days after the QF has provided the utility with written comments on the utility's
4 draft PPA.⁹ OAR 860-029-0100(3)&(5)(a) states:

5 (3) At any time after sixty calendar days from the date a Qualifying
6 Facility has provided written comments to the public utility regarding
7 the public utility's draft power purchase agreement, the Qualifying
8 Facility may file a complaint with the Commission asking for
9 adjudication of any unresolved terms and conditions of its proposed
10 agreement with the public utility. * * *

11 (5) The complaint must contain each of the following, as described by the
12 complainant:

13 (a) A statement that the Qualifying Facility provided written comments to
14 the utility on the draft power purchase agreement at least 60 calendar
15 days before the filing of the complaint.

16 OAR 860-029-0100 applies to a complaint regarding the negotiation of a QF PPA and
17 changes the legal framework that existed at the time the courts and the Commission
18 decided *Snow Mountain Pine, Water Power, and Oregon Energy*. OAR 860-029-0100
19 and Schedule 38 establish mandatory timelines for utilities and QFs to follow during PPA
20 negotiations and PPA dispute resolution. These changes, and other changes to the
21 Commission's rules that have occurred after *Snow Mountain Pine, Water Power, and*
22 *Oregon Energy* were decided¹⁰, all suggest an evolution in Oregon's application of the
23 "LEO" concept, and raise the following important questions in this proceeding:

⁸ OAR 860-029-0100(2) states: "Before a complaint is filed with the Commission, the Qualifying Facility must have followed the procedures set forth in the applicable public utility's tariff regarding negotiated power purchase agreements."

⁹ The 60-day wait requirement is also explicit in Schedule 38, at page 5.

¹⁰ See, e.g., the definition of "Time the obligation to purchase the energy capacity or energy and capacity is incurred" at OAR 860-029-010(29). This definition has changed significantly since the court relied upon it in *Snow Mountain Pine*.

1 1. Are the timing and other requirements of Schedule 38 preconditions to a QF's
2 ability to unilaterally establish a LEO?

3 2. Are the timing and other requirements of OAR 860-029-0100 preconditions of
4 a QF's ability to unilaterally establish a LEO?

5 The Commission's determination of how a LEO may be created taking into account the
6 new rules in Schedule 38 and OAR 860-029-0100 is necessary to determine whether
7 International established a LEO to sell its power to PacifiCorp before PacifiCorp's
8 published avoided cost rates changed on September 9, 2009. For the reasons discussed
9 below, it is well within the Commission's discretion to conclude that a QF cannot
10 establish a LEO before completion of the Schedule 38 timelines and passage of the 60
11 days required by OAR 860-029-0100(2). Indeed, failing to so conclude would effectively
12 nullify Schedule 38 and OAR 860-029-0100. If the Commission finds that Schedule 38
13 and/or OAR 860-029-0100 are preconditions to a QF's ability to unilaterally establish a
14 LEO, then International's complaint should be dismissed as a matter of law.

15 **III. ARGUMENT 1:**

16 **INTERNATIONAL HAS NOT PLEADED FACTS SUFFICIENT**
17 **TO SHOW THAT PACIFICORP HAS A LEGALLY ENFORCEABLE**
18 **OBLIGATION TO PURCHASE INTERNATIONAL'S OUTPUT.**

19
20 **A. Every state has broad discretion to determine when a LEO may be created**
21 **under its implementation of PURPA.**

22 States have broad discretion to determine when a LEO has been established.
23 *Power Resource*, 422 F.3d at 239. States have used their discretion differently as the
24 following brief survey of approaches indicates:

25 **Pennsylvania.** In Pennsylvania a LEO does not exist, notwithstanding serious
26 negotiations between the parties including the conclusion of an agreement in principle or
27 an agreement on price, if the QF has not yet obligated itself to deliver power and if it

1 remains free to walk away from negotiations without liability. *Armco Advanced*
2 *Materials v. Pub. Util. Comm'n*, 579 A.2d 1337, 1347 (Pa. Commw. Ct. 1990). Avoided
3 costs are calculated when a QF "offers energy of sufficient reliability and with sufficient
4 legally enforceable guarantees of deliverability to permit the purchasing electric utility to
5 avoid the need to construct a generating unit." *Armco Advanced Materials Corp. v. Pa.*
6 *Pub. Util. Comm'n*, 664 A.2d 630 (Pa. Commw. Ct. 1995).

7 **Oklahoma.** Oklahoma has implicitly recognized that only a viable project can
8 incur a LEO. *Public Serv. Co. v. State ex rel. Okla. Corp. Comm'n*, 2005 OK 47 (No
9 LEO created where QF "did not . . . attempt to obtain a contract for construction,
10 operation and maintenance of the proposed project or a contract for the purchase of
11 natural gas.")

12 **Idaho.** The Idaho Public Utilities Commission has held that before a QF can
13 secure a rate, there must be a signed contract to sell at that rate or a meritorious complaint
14 alleging that the project was mature and that the developer had attempted and failed to
15 negotiate a contract with the utility. *A.W. Brown Co., Inc. v. Idaho Power Co.*, 828 P.2d
16 841 (Idaho 1992).

17 **New Hampshire.** In New Hampshire a LEO arises when a QF agrees to an
18 obligation to deliver and files a rate petition accompanied by a signed interconnection
19 agreement. *Appeal of Pub. Serv. of N.H.*, 539 A.2d 275, 280 (N.H. 1988).

20 **Texas.** The most recent and most exhaustive analysis of the breadth of a State's
21 authority to define when a LEO arises is the decision of the United States Court of
22 Appeals for the Fifth Circuit in *Power Resource Group, Inc. v Pub. Util. Comm. of Texas*,
23 422 F.3d 231 (5th Cir. Tex. 2005) ("*Power Resource*"). In *Power Resource* the plaintiff

1 challenged the Texas Public Utility Commission’s 90-day rule.¹¹ 422 F.3d 231. The 90-
2 day rule allowed a QF to apply for, and negotiate a PPA at any time. However, if the
3 utility and the QF did not reach agreement on the terms of the PPA, the QF could not
4 unilaterally create a LEO until the 90th day prior to the QF being ready to deliver energy.
5 After the QF achieved commercial operation, it could look back 90 days prior, and the
6 utility’s avoided cost on that day became the avoided costs for the QF’s PPA. Power
7 Resource Group, builder of a natural gas-fired cogeneration QF, alleged that the 90-day
8 rule violated a QF’s right to create a LEO pursuant to 18 C.F.R. § 292.304(d) because a
9 new QF cannot be financed and constructed in 90 days. The federal court rejected the
10 QF’s arguments and held that the rule was permissibly within the state’s broad discretion
11 under PURPA. The court reasoned that neither PURPA nor 18 C.F.R. § 292.304(d) give
12 qualifying facilities the right to create a LEO “at any time.” 422 F.3d at 238-39. Further,
13 the court noted that, if FERC had determined that States must allow a QF to lock in rates
14 with a LEO prior to construction of a facility, it could have said so in its rules. *Id.* at 239.

15 **B. The Commission may decide that compliance with OAR 860-029-0100 and**
16 **Schedule 38 timelines are preconditions to creation of a LEO.**

17 The Fifth Circuit’s reasoning in *Power Resource, supra*, makes clear that
18 18 C.F.R. § 292.304(d) does not entitle a QF to unilaterally create a LEO by merely
19 declaring that it is “ready, willing, and able” to enter into a LEO. Rather, FERC
20 delegated to state commissions the broad authority to impose specific and substantial
21 preconditions to a QF’s ability to create a LEO. Compared to the 90-day rule, the
22 negotiation process in Schedule 38, combined with the dispute resolution procedures in
23 OAR 860-029-0100, have far less potential to discourage QF development. Even if a

¹¹ Texas PUC SUBST. R. 25.242(f)(1)(B). See <http://puc.state.tx.us/rules/subrules/electric/index.cfm>.

1 utility uses the maximum time allowed at each step of the process, a QF may expect to
2 receive an executable PPA within 60 days of providing the utility all required
3 information. And if the utility and the QF are unable to agree on terms, the QF may ask
4 the Commission to decide the terms of a final PPA 60 days after the date the QF first
5 provided written comments on a draft PPA to the utility. If the Commission determines,
6 as a matter of law, that a QF cannot establish a LEO unless and until these timelines are
7 met, such an interpretation would be well within the bounds of the analysis the Fifth
8 Circuit laid out, in *Power Resource*.

9 **C. In interpreting its own rules, the Commission considers (1) text and context of**
10 **the rule; (2) other sources of law; and (3) the Commission's policy objectives.**

11 The Commission has noted that “[a]n agency's interpretation of its own rule will
12 be upheld as long as it is plausible and not inconsistent with the wording of the rule itself,
13 the rule's context, or with any other source of law.” *In The Matter of Portland General*
14 *Electric Company Petition for a Declaratory Ruling Regarding the Application of OAR*
15 *860-022-0045*, OPUC Order No. 05-1064, DR 32, 2005 Ore. PUC LEXIS 512 at *8-9
16 (internal citations omitted).

17 When interpreting its own regulations the Commission considers “the broad
18 policies implemented in the administrative rules, as well as the text and context of the
19 rules.” *Id.* In accordance with these principles, when considering how the process
20 established by Schedule 38 and by OAR 860-029-0100 has altered the prerequisites
21 necessary under Oregon law for a QF to unilaterally establish a LEO to sell its net output
22 to a public utility, the Commission should consider: (1) the text and context of the tariff
23 and the rules, (2) the common law including *Snow Mountain Pine*, *Water Power*, and
24 *Oregon Energy*, and (3) the broad policies which the Commission seeks to implement

1 with its rules, orders and holdings regarding the purchase of QF output by public utilities.
2 Each factor is discussed below.

3 **(1) The text and context of the tariff and the rules suggests that compliance is**
4 **precondition to LEO.**

5 In Order No. 07-360, the Commission announced that its goal, in standardizing
6 negotiations and dispute resolution of large QF PPAs, “is to encourage the economically
7 efficient development of QFs, while protecting ratepayers by ensuring that utilities incur
8 costs no greater than they would have incurred in lieu of purchasing QF power (avoided
9 costs).” UM 1129, 2007 Ore. PUC LEXIS 279, at *1. In furtherance of that goal, the
10 Commission approved the procedures and timelines specified in PacifiCorp's
11 Schedule 38, and directed other utilities to adopt similar procedures and timelines. It also
12 developed a streamlined complaint procedure to be used to resolve contract issues.
13 *Id.* at 1-2.

14 In the same order, the Commission also mentioned delivery of energy pursuant to
15 a “legally enforceable obligation” ten times, although it never mentioned a QF’s ability to
16 unilaterally create a LEO.¹² The Commission did not mention any right in the QF to
17 create a LEO outside the procedures ordained in Schedule 38 and the Commission’s
18 dispute resolution rules. Indeed, if a QF were entitled to opt out of the Schedule 38
19 process and create a LEO anytime it became impatient, then Schedule 38 and OAR 860-
20 029-0100 would be effectively meaningless. In order to prevent the process and
21 timelines of Schedule 38 and OAR 860-029-0100 from becoming meaningless, the
22 Commission should conclude that a QF cannot create a LEO, until *after* the QF has
23 followed Schedule 38 and OAR 860-029-0100.

¹² See *Id.* at 22-28 (discussing how QF rates are calculated consistent with 18 C.F.R. § 292.304(d)(2)).

1 **(2) OAR 860-029-0100 and Schedule 38 may be viewed as a natural evolution**
2 **of the Commission’s previous decisions, in *Snow Mountain Pine, Water***
3 ***Power, and Oregon Energy*.**

4 In *Snow Mountain Pine*, the court held that a LEO arose when Snow Mountain
5 tendered a contract obligating itself to provide power. 84 Or App at 600. The court’s
6 holding was premised on the fact that OAR 860-029-010, *at that time*, defined “time the
7 obligation is incurred” as “the date on which a binding obligation first exists to delivery
8 energy.” *Id.* at 599. OAR 860-029-010 has since been amended, and now defines *time*
9 *the obligation is incurred* as the earlier of:

10 (a) The date on which a binding, written obligation is entered into *between*
11 *a qualifying facility and a public utility* to deliver energy, capacity, or
12 energy and capacity; or

13 (b) The date *agreed to, in writing, by the qualifying facility and the*
14 *electric utility* as the date the obligation is incurred for the purposes of
15 calculating the applicable rate.

16 *See* OAR 860-029-010(29). (emphasis added). Under the current version of the rule, it
17 appears that a binding obligation cannot exist absent an agreement between the utility and
18 the QF. Also, in *Snow Mountain Pine*, neither the negotiation process of Schedule 38 nor
19 the dispute resolution process of OAR 860-029-0100 existed. Because of these changes
20 to the Commission’s regulations, the *Snow Mountain Pine* court may well have reached a
21 different conclusion if it were reviewing the same case today. The same may be said of
22 *Oregon Energy*, which considered whether a contract presented to PGE established a
23 LEO under the since-repealed OAR 860-029-040(4)(b)(B).

24 Furthermore, it appears likely that the change to OAR 860-029-010, above, was a
25 deliberate move by the Commission away from the concept of the unilaterally created
26 LEO; an evolution that was continued by OAR 860-029-0100. In its place the
27 Commission appears to have provided a dispute resolution process wherein the QF may

1 not create a LEO at least until it files a complaint with the Commission 60 days after
2 providing comments on a draft PPA to the utility. OAR 860-029-0100, like OAR 860-
3 029-010, makes the most sense in this light. Because the court's and the Commission's
4 past holdings in *Snow Mountain Pine*, *Water Power*, and *Oregon Energy* were based
5 upon a dramatically different and simpler set of Commission rules, the Commission may
6 legitimately determine that the LEO under Oregon law has evolved and that Schedule 38
7 and OAR 860-029-0100 impose prerequisites on a QF's ability to establish a LEO.

8 **(3) The broad policies that the Commission seeks to implement with its rules,**
9 **orders and holding regarding the purchase of QF output by public**
10 **utilities are furthered by holding that OAR 860-029-0100 and Schedule**
11 **38 impose new preconditions to the LEO.**

12 In UM 1129, in response to an assertion by a utility that standardization of
13 negotiation parameters for large QFs is unnecessary, the Commission responded that
14 guidelines are likely to be useful to both parties, and guidelines will increase certainty
15 and may streamline the process to the ultimate benefit of customers. Order No. 07-360,
16 at 9. This statement illustrates the importance the Commission placed on certainty and
17 efficiency when adopting Schedule 38 and OAR 860-029-0100. If the Commission
18 allows International to bring its complaint in spite of Schedule 38 and OAR 860-029-
19 0100, uncertainty and inefficiency will result. Rather than having a clear, scheduled
20 process that ensures the QF reasonably fast completion while providing the utility needed
21 time to perform due diligence, International's complaint, if successful, will tell utilities
22 that abiding by the timelines in Schedule 38 is insufficient. Such a result violates the
23 carefully crafted balance struck in Schedule 38. Even worse, if International is
24 successful, other QFs may follow its lead and ignore the Schedule 38 rules, realizing that

1 following them is not necessary. Ultimately, such a volatile and ad hoc process may
2 translate to higher costs for customers.

3 **D. Equities do not favor International.**

4 PacifiCorp's rate filing in early July (Advice 09-012) should not have surprised
5 International since PacifiCorp is required by statute to file new rates at least every two
6 years. International, who participated in the development of the Commission's rate
7 methodology, also should have known that PacifiCorp's QF avoided cost rates are based
8 on gas future prices and therefore were likely to decrease compared to its previous rates.
9 However, it neither completed negotiations nor otherwise established a LEO before
10 PacifiCorp's new rates took effect on September 9, 2009. Hardship to International is not
11 a good reason to require PacifiCorp's customers to buy International's output at the old
12 Schedule 37 prices, which are well in excess of PacifiCorp's current avoided cost prices.
13 International asks the Commission to apply the timelines in Schedule 38 strictly. Strict
14 allegiance to the rules requires that International's complaint be dismissed for failure to
15 comply with the Commission's rules and Schedule 38.

16 **E. As a matter of law, UM 1129, Schedule 38, and OAR 860-029-0100 have**
17 **modified a QF's prerequisites to LEO and, therefore, International's complaint**
18 **should be dismissed for failure to state a claim.**

19 All of the reasons discussed above support a Commission conclusion that the
20 processes, timelines and requirements established by UM 1129, Schedule 38, and OAR
21 860-029-0100 are prerequisites to a QF's ability to unilaterally establish a LEO regarding
22 the sale of its net output. If the Commission reaches this conclusion, International's
23 complaint should be dismissed for failure to state a claim upon which relief can be
24 granted because International cannot, on the facts alleged in its complaint, complete the

1 Schedule 38 and OAR 860-029-0100 process and unilaterally establish a LEO before
2 PacifiCorp's Schedule 37 rates changed effective September 9, 2009.

3 **IV. ARGUMENT 2:**

4 **INTERNATIONAL HAS NOT DEMONSTRATED**
5 **THAT WAIVER OF OAR 860-029-0100 AND SCHEDULE 38**
6 **IS IN THE PUBLIC INTEREST.**

7 **A. The 60-day requirement of OAR 860-029-0100 should not be waived because**
8 **waiver is disfavored and the rule does not specifically provide for waiver.**

9 The Commission disfavors waiver of the requirements of its regulations. *In the*
10 *Matter of a Rulemaking to Consider Implementation of Changes to Division 038 required*
11 *by House Bill 3633 on a Permanent Basis*, OPUC Order No. 02-135, AR 426, 2002 Ore.
12 PUC LEXIS 33, at *3 (March 5, 2002) ("The Commission generally does not favor
13 exempting an entity from compliance with any administrative rule"). Moreover, where the
14 Commission intends to allow for the possibility of waiver, the Commission inserts a
15 specific waiver provision into its rules. *See e.g.* OAR 860-021-0005; OAR 860-036-
16 0001; OAR 860-038-0001. Indeed, the Commission has recognized the importance of
17 doing so if it wants to establish the possibility of waiver. *See* Order No. 02-135 at *2-3
18 (Commission agrees that waiver may be appropriate under division 038 of its rules and
19 that it is therefore advisable to modify the proposed division 038 rules to specifically
20 provide for waiver and to articulate the standard to be applied to waiver requests).¹³

21 In adopting OAR 860-029-0100, the Commission elected not to include a waiver
22 provision. Neither has the Commission provided a generally applicable waiver provision

¹³ Order No. 02-135 also suggests that, if a QF feels that this is unfair, it should petition the Commission to amend its rules by adding a provision for waiver containing standards for granting such a waiver.

1 for division 029 regulations.¹⁴ Because waiver is generally disfavored and because the
2 Commission has elected not to provide for waiver of OAR 860-029-0100, International's
3 request for waiver should be denied.

4 **B. The 60-day requirement of OAR 860-029-0100 should not be waived because the**
5 **requirement performs a substantive function and waiver would prejudice**
6 **PacifiCorp.**

7 As discussed above, PacifiCorp believes that both Schedule 38 and OAR 860-
8 029-0100 perform a substantive and not merely a procedural function in that they
9 establish a series of prerequisites which must be accomplished *before* a QF can
10 unilaterally establish a LEO to sell its output to a utility. Because the 60-day requirement
11 of OAR 860-029-0100 performs a substantive function, its waiver would prejudice
12 PacifiCorp and should be denied.

13 **C. The 60-day requirement of OAR 860-029-0100 should not be waived because**
14 **International has failed to show that granting a waiver is in the public interest.**

15 In its waiver motion, International argues that good cause exists to waive the 60-
16 day requirement because: (1) International needs a rapid resolution in order to facilitate
17 its planning for 2010 operations, (International's M. for Waiver at 3); and (2) the 60-day
18 requirement is futile because PacifiCorp refuses to negotiate the only remaining open
19 term – price – until Commission Staff completes UM 1442 at the end of December,
20 (International's M. for Waiver at 2, 3).¹⁵ For the following reasons, PacifiCorp believes
21 the waiver motion should be denied because International has failed to show good cause
22 and waiver is not in the public interest.

¹⁴ OAR 860-029-0050(4), the only waiver provision in division 029, permits the Commission to waive -
0050(3), and then only after a public comment period and Commission findings regarding the effect on the
utility and its customers.

¹⁵ International also alleges several conclusions of law that are unsupported by its alleged facts (e.g.
PacifiCorp's negotiation "has breached its legal duties." (International's M. to Dismiss at 3.))

1 **(1) International's justifications do not demonstrate good cause.**

2 International and its counsel knew, or should have known, the timelines
3 associated with Schedule 38 and OAR 860-029-0100 and could have easily determined
4 the time to negotiate a PPA and resolve any associated disputes. Thus, the solution for
5 International would have been the same as it should be for any QF that finds itself
6 confronted by an internal deadline: begin the Schedule 38 process sooner. International
7 clearly failed to do so and now requests a waiver of the Commission's rules. These
8 circumstances are not good cause for a waiver.

9 Additionally, International argues that the 60-day requirement should be waived
10 because price is the only outstanding term and PacifiCorp has "frozen all PPA pricing
11 term negotiations" until Commission Staff completes UM 1442. (International's M. for
12 Waiver at 2.) As described *supra* in Part I(A), pp. 1-3, PacifiCorp disagrees with these
13 allegations. The only negotiated aspect of price, the Schedule 38 modifiers, has long
14 been resolved. The Schedule 37 rates, which serve as the starting point for the
15 calculation of the price to be paid to International, are not subject to negotiation – the
16 Commission approves them and sets their effective date. The open terms in this PPA
17 negotiation are the insurance, credit, and other terms proposed by PacifiCorp in its
18 August 21 draft of the PPA. International has never responded to those proposed terms.
19 International, not PacifiCorp, has effectively frozen negotiations.

20 International now seeks to skirt the Schedule 38 process and the Commission's
21 dispute resolution procedures through its waiver request. A QF should not be allowed to
22 cease negotiations, declare further discussion futile, and file a complaint without
23 complying with the timing requirements of Schedule 38 and OAR 860-029-0100. The
24 Commission need not decide the parties' factual dispute at this stage. It is sufficient to

1 note that the parties differ regarding who is refusing to negotiate. International's
2 contested allegation that PacifiCorp refuses to negotiate the only remaining terms of the
3 PPA is not good cause to waive the 60-day requirement of OAR 860-029-0100.

4 **(2) International's justifications serve its private interests not the public**
5 **interest.**

6 International's justifications for waiver serve International's private interest not
7 any public interest. The Commission has granted waiver of its rules in limited
8 circumstances where it found doing so to be in the public interest.¹⁶ Instances where the
9 Commission found waiver to be in the public interest include the waiver of a requirement
10 to prepare an obsolete and expensive report, OPUC Order No. 08-214, 2008 Ore. PUC
11 LEXIS 147, and the closing of an inadvertent loophole that created financial risk for a
12 utility and its customers, OPUC Order No. 04-243, 2004 Ore. PUC LEXIS 200. In
13 contrast, International's concerns are its own: its alleged urgency and its perception that
14 further negotiation is futile and resultant abandonment of negotiation.

15 In summary, International's allegations do not show good cause or a public
16 interest to grant a waiver of the 60-day requirement. In fact, granting a waiver would
17 discourage future QFs from commencing negotiations in a timely manner and from
18 completing the 60-day negotiation period prior to including the Commission. Enforcing
19 the 60-day requirement allows parties sufficient time to reconsider their positions in the
20 normal course of negotiations.

¹⁶ It is worth noting that, almost all waivers were granted under the authority of specific waiver rules; no such waiver rule applies to the 60-day requirement, as discussed, *supra*. One exception is OPUC Order No. 06-305 which granted a waiver apparently not based on any waiver rule. 2006 Ore. PUC LEXIS 268. That order, however, followed a significant proceeding and found that waiver would result in overall savings for customers.

1 **D. The 60-day requirement of OAR 860-029-0100 should not be waived because it**
2 **provides the necessary time to ensure that the Schedule 38 process is completed**
3 **as required by OAR 860-029-0100(2).**

4 OAR 860-029-0100(2) requires that a qualifying facility comply with all
5 requirements of a public utility's applicable tariff (in this case Schedule 38) before filing
6 a complaint with the Commission. The parties differ with regard to whether International
7 has complied with and completed the negotiation process required under Schedule 38.

8 One of the purposes of the 60-day requirement of OAR 860-023-0100 is arguably to
9 provide a sufficient time to conclude the Schedule 38 process before the QF is free to file
10 a complaint. PacifiCorp recommends that the Commission deny the motion to waive the
11 60-day period of OAR 860-029-0100 because that period helps to ensure that the
12 requirements of OAR 860-029-0100(2) are satisfied.

13 **E. International's Motion for Waiver Should be Denied and International's**
14 **Complaint Should be Dismissed as Premature.**

15 In sum, PacifiCorp recommends that the Commission deny International's waiver
16 motion and dismiss International's complaint because: (1) waiver of some or all of OAR
17 860-029-0100 is not provided for under the rules; (2) waiver would prejudice
18 PacifiCorp's defense because the 60-day requirement of OAR 860-029-0100 is best
19 viewed as a prerequisite to International's ability to unilaterally establish as LEO;
20 (3) waiver is not supported by a public interest justification; and (4) waiver of the 60-day
21 requirement would eliminate the only concrete assurance provided by the rules that the
22 Schedule 38 process is allowed sufficient time for completion before a qualifying facility
23 may elevate a dispute to the Commission.

1 **V. MOTION TO DISMISS**

2 PacifiCorp respectfully moves the Commission to dismiss International's
3 complaint.

4 For the reasons discussed in Section III above, PacifiCorp recommends that the
5 Commission conclude that International cannot establish a LEO before: (A) October 12,
6 2009, the earliest date on which International Paper can file a complaint to resolve a
7 dispute regarding the negotiation of its new PPA; or (B) September 10, 2009, the earliest
8 date on which International Paper can argue that PacifiCorp is obligated to provide
9 International with a final executable PPA under Schedule 38.¹⁷ If the Commission
10 determines that International cannot establish a LEO before PacifiCorp's new published
11 avoided cost rates became effective on September 9, 2009, International's complaint
12 should be dismissed for failure to state a claim upon which relief can be granted.

13 In the alternative, for the reasons discussed in Section IV above, PacifiCorp
14 recommends that the Commission deny International's motion to waive the 60-day
15 requirement of OAR 860-029-0100. If the Commission denies waiver of the 60-day
16 requirement, the complaint should, at a minimum, be dismissed on procedural grounds as
17 premature.

18 **VI. MOTION FOR EXTENSION OF TIME TO FILE AN ANSWER**

19 PacifiCorp has moved the Commission to dismiss International's complaint on
20 two independent grounds: (1) on procedural grounds as prematurely filed in violation of
21 the 60-day requirement of OAR 860-029-0100; and (2) on substantive grounds because

¹⁷ A September 10, 2009, deadline for providing a final executable PPA is based on International's allegation that it requested an executable PPA on August 19, 2009. Complaint ¶ 11. Schedule 38 requires PacifiCorp to honor such a request, if ripe and properly made, within 15 business days. PacifiCorp does not concede that the Schedule 38 process was complete and that PacifiCorp's obligation to provide a final PPA accrued on August 19, 2009.

1 International cannot unilaterally establish a LEO to sell its output to PacifiCorp until after
2 the processes established by Schedule 38 and OAR 860-029-0100 have been completed.
3 Because PacifiCorp's motion to dismiss has the potential to dispose of this case and
4 eliminate the need to answer the complaint, PacifiCorp respectfully moves the
5 Commission to extend the time to answer until at least five business days after the
6 Commission has ruled on PacifiCorp's motion to dismiss.

7 WHEREFORE, PacifiCorp: (1) respectfully requests that the Commission deny
8 International's September 4, 2009 Motion for Waiver of Rule and for Leave to File
9 Complaint; (2) PacifiCorp respectfully moves the Commission to dismiss International's
10 complaint either on procedural grounds as prematurely filed or on substantive grounds for
11 failure to state a claim for relief because International cannot, as a matter of law,
12 unilaterally establish a legally enforceable obligation to sell its qualifying facility output
13 to PacifiCorp before PacifiCorp's new Schedule 37 rates became effective on September
14 9, 2009; and (3) PacifiCorp respectfully moves the Commission to extend the time to
15 answer in the above-captioned proceeding until at least five business days following a
16 Commission ruling on PacifiCorp's motion to dismiss.

Dated this 23rd day of September 2009.

Respectfully submitted,

By 

Jeffrey S. Lovinger, OSB 962147
Kenneth E. Kaufmann, OSB 982672
Lovinger Kaufmann LLP
Of Attorneys for PacifiCorp
825 N.E. Multnomah, Suite 925
Portland, Oregon 97232
(503) 230-7715
lovinger@lklaw.com

Jordan A. White, OSB 092270
Senior Counsel
Pacific Power
PacifiCorp
825 N.E. Multnomah, Suite 1800
Portland, Oregon 97232
(503) 813-5613
Jordan.White@PacifiCorp.com

CERTIFICATE OF SERVICE

I hereby certify that, on September 23, 2009, I served a true and correct copy of the foregoing *PACIFICORP'S MOTION TO DISMISS INTERNATIONAL PAPER COMPANY'S COMPLAINT and PACIFICORP'S RESPONSE IN OPPOSITION TO MOTION FOR WAIVER OF RULE AND LEAVE TO FILE COMPLAINT and PACIFICORP'S MOTION 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
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JORDAN A WHITE (W) SENIOR COUNSEL PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 1800 PORTLAND OR 97232 jordan.white@pacificorp.com	OREGON DOCKETS (W) PACIFICORP OREGON DOCKETS 825 NE MULTNOMAH ST STE 2000 PORTLAND OR 97232 oregondockets@pacificorp.com
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Jeffrey Lovinger
Attorney for PacifiCorp