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November 18, 2011

Via Electronic and U.S. Mail

Public Utility Commission of Oregon
Attn: Filing Center
P.O. Box 2148
Salem, OR 97308-2148

Re: In the matter of Tumbleweed Energy II, LLC vs. Idaho Power Company
OPUC Docket No. UM 1552

Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and five copies of
PacifiCorp's Response Brief on Jurisdiction.

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,



Jeffrey S. Lovinger
Attorney for PacifiCorp

cc: UM 1552 Service List

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1552

In the Matter of

TUMBLEWEED ENERGY II, LLC,
Complainant

vs.

IDAHO POWER COMPANY,
Defendant

PACIFICORP'S RESPONSE BRIEF
ON JURISDICTION

I. BACKGROUND

PacifiCorp, dba Pacific Power, files this response brief on jurisdiction pursuant to the Prehearing Conference Memorandum issued on October 19, 2011 by Administrative Law Judge Sarah Wallace of the Public Utility Commission of Oregon ("Commission" or "OPUC"). Judge Wallace directed the parties to brief the question of whether the Commission has jurisdiction over complaints filed in OPUC Docket Nos. UM 1552 and UM 1553.¹ PacifiCorp filed a motion to intervene in each docket on October 26, 2011 and each motion was granted on November 1, 2011.

Complainant, Tumbleweed Energy, LLC (the "LLC") is a Qualifying Facility ("QF") as defined by the Public Utility Regulatory Policies Act of 1978 ("PURPA").² The LLC seeks to develop a 10 MW wind QF located in Elmore County, Idaho. The LLC seeks: (1) to compel Idaho Power Company ("Idaho Power") to interconnect with the QF in Idaho; (2) to compel

¹ *In the Matter of Tumbleweed Energy II, LLC v. Idaho Power Company* (UM 1552) and *In the Matter of Western Desert Energy, LLC v. Idaho Power Company* (UM 1553). PacifiCorp's simultaneous briefs in UM 1552 and UM 1553 are identical except for the name, size, and county of the complainant LLC.

² 16 U.S.C. § 824a-3, *et seq.*

1 Idaho Power to wheel the QF's net output to a point of delivery in Oregon; and (3) to compel
2 Idaho Power to purchase the QF net output at Idaho Power's standard Oregon avoided cost rates.
3 Idaho Power disputes that it must offer its standard Oregon QF contract to the LLC under these
4 circumstances. Idaho Power previously filed a petition for a declaratory order requesting that the
5 Idaho Public Utilities Commission ("IPUC") exercise jurisdiction over the proposed transaction
6 with the LLC and declare that a QF located in Idaho Power's service territory in the state of
7 Idaho, interconnecting with Idaho Power's system in the state of Idaho, must contract with Idaho
8 Power pursuant to the IPUC's PURPA rules, rates, and regulations.³

9 PacifiCorp has intervened in both the Oregon complaint proceeding and the Idaho
10 declaratory proceeding because PacifiCorp, as a multi-jurisdictional utility operating in both
11 Idaho and Oregon, may be confronted with QFs proposing similar transactions. In the IPUC
12 docket, PacifiCorp filed comments arguing that: (1) concurrent jurisdiction exists with both the
13 IPUC and the OPUC having authority over this matter; (2) a QF waives its PURPA right to
14 obligate a utility to purchase net output when the QF requires the interconnecting utility to wheel
15 the QF's net output; and (3) if the IPUC were to find that the PURPA purchase obligation exists,
16 IPUC-approved rates should apply.

17 PacifiCorp disagrees with the LLC's assertion that the Commission must order Idaho
18 Power to purchase the LLC's net output in Oregon at Idaho Power's Oregon Tariff Schedule 85
19 prices. PacifiCorp urges the Commission to conclude that the transaction proposed by the LLC
20 is not authorized by PURPA and that the Commission therefore lacks jurisdiction over the LLC's
21 complaint. Alternatively, if the Commission concludes that the proposed transaction is
22 authorized by PURPA, PacifiCorp urges the Commission to conclude that it has concurrent

³ See Idaho Power's Petition for Declaratory Order at 13 (July 8, 2011) in *In the Matter of Idaho Power Company's Petition for Declaratory Order Regarding PURPA Jurisdiction*, IPUC Docket No. IPC-E-11-14.

1 jurisdiction with the IPUC over the subject-matter of the LLC’s complaint and to defer to the
2 IPUC’s resolution of the matter.

3 II. ARGUMENT

4 A. Unless the proposed transaction is authorized under PURPA the Commission lacks 5 jurisdiction to regulate the LLC’s proposed sale to Idaho Power.

6 1. The Commission’s authority to approve wholesale sales and purchases of electricity 7 in interstate commerce is limited to PURPA transactions.

8 The LLC’s proposal to generate power in Idaho and sell it to Idaho Power in Oregon
9 constitutes a wholesale sale in interstate commerce.⁴ The Federal Power Act (“FPA”) provides
10 the Federal Energy Regulatory Commission (“FERC”) with exclusive authority to regulate
11 wholesale electricity sales in interstate commerce.⁵ PURPA sales are the only exception to
12 FERC’s exclusive jurisdiction over wholesale power sales.⁶ PURPA delegates to the states the
13 authority to implement PURPA statutory provisions and FERC’s PURPA regulations.⁷ FERC
14 has summarized this role, stating “Congress has authorized a role for states in setting wholesale

⁴ 16 U.S.C. § 824(d) (“The term ‘sale of electric energy at wholesale’ when used in [the FPA] means a sale of electric energy to any person for resale.”); 16 U.S.C. § 824(c) (“For the purpose of the FPA, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof...”).

⁵ *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 209-210 nn. 5-6 (1964); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988) (“FERC has exclusive authority to determine the reasonableness of wholesale rates.”); *see also Transmission Agency of N. Cal. v. Sierra P. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (re-affirming the FPA’s exclusive grant of jurisdiction to FERC over all interstate wholesale transactions); *see also* 16 U.S.C. §§ 824(b), 824d, 824e.

⁶ *Cal. Pub. Utils. Comm’n*, 132 FERC ¶ 61,047, ¶ 64 (2010) (FERC’s authority under the FPA includes exclusive jurisdiction to regulate sales for resale of electric energy in interstate commerce by public utilities; Congress has authorized a role for States in setting wholesale rates under PURPA but Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce); *Conn. Light & Power*, 71 FERC ¶ 61,035, 61,153 (1995); *Orange and Rockland Utils., Inc.*, 43 FERC ¶ 61,067, 61,197 (1988) (Sousa, Commr., concurring) (“Except for PURPA, states would not have authority to set rates for wholesale QF transactions in interstate commerce. *** Any authority that the states have in this area must be found in PURPA.”), *vacated as moot*, 70 FERC ¶ 61,014 (1995).

⁷ 16 U.S.C. § 824a-3(f).

1 rates under PURPA” and FERC has noted that the state’s role is limited to developing avoided
2 cost rates and approving PURPA transactions.⁸

3 **2. The LLC’s proposed transaction is not a PURPA transaction.**

4 Under FERC’s PURPA regulations (codified in 18 C.F.R. Part 292) there are two ways a
5 QF can obligate a utility to purchase QF output. QFs have the right to interconnect with a public
6 utility and to sell the QF’s net output to the directly interconnected utility.⁹ Alternatively, a QF
7 may purchase transmission service to deliver to a second utility, which is compelled to purchase
8 the QF’s net output.¹⁰ The transaction proposed by the LLC is not either of these options.
9 Rather, the LLC proposes to interconnect to Idaho Power in Idaho, purchase point-to-point
10 transmission service from Idaho Power to wheel QF net output to a point of delivery on Idaho
11 Power’s system in Oregon, and then compel a PURPA sale to Idaho Power in Oregon at Idaho
12 Power’s standard Oregon avoided cost rates. The purpose of this transaction is to obtain
13 published avoided cost rates in Oregon when the QF’s net output does not qualify for published
14 avoided cost rates in Idaho.¹¹

15 The LLC’s proposed transaction is so novel that in over thirty years since the enactment
16 of PURPA neither FERC, nor the OPUC, nor any other state utility commission, has ruled on
17 whether PURPA authorizes a QF to interconnect in one state, buy a wheel from the directly
18 interconnected utility, deliver to the directly interconnected utility in a second state, and compel
19 the directly interconnected utility to purchase the net output in the second state at that state’s

⁸ *Cal. Pub. Utils. Comm’n*, 132 FERC ¶ 61,047, ¶¶ 64-66.

⁹ 18 C.F.R. § 292.303(a)(1); for text of regulation, see *infra* page 5.

¹⁰ 18 C.F.R. § 292.303(a)(2); for text of regulation, see *infra* page 5.

¹¹ On February 7, 2011, the IPUC reduced the standard avoided cost eligibility cap for wind and solar qualifying facilities from 10 average MW down to 100 kW nameplate capacity. *In the Matter of the Joint Petition of Idaho Power Co., Avista Corp., and PacifiCorp dba Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, IPUC Case No. GNR-E-10-04, Order No. 32176, 8-9 (2011).

1 avoided cost rates. Notwithstanding the LLC's assertions, there is no support for such a
2 transaction to be found in PURPA, the regulations implementing PURPA, or the policies
3 embodied in PURPA. FERC has recognized that states do not have PURPA authority beyond
4 that established by the statute and FERC's PURPA regulations.¹²

5 When construing a federal regulation, the Commission follows the methods of
6 construction prescribed by the federal courts.¹³ In construing regulations, a federal court first
7 considers the plain meaning of the language used in a regulation.¹⁴ If the language is ambiguous,
8 the court then considers any administrative interpretation of the regulation.¹⁵

9 Neither the plain meaning of PURPA regulations nor FERC's interpretation of those rules
10 permit the type of sale of QF net output proposed by the LLC. FERC Rule 292.303 (18 C.F.R. §
11 292.303) sets forth the utility's obligation to purchase from QFs, and does *not* require a utility to
12 buy QF output it has wheeled to itself. Paragraph (a) of the regulation provides a QF with
13 alternative options for selling net output:

14 (a) *Obligation to purchase from qualifying facilities.* Each electric utility shall
15 purchase ... any energy and capacity which is made available from a qualifying
16 facility:

- 17 (1) Directly to the electric utility; or
18 (2) Indirectly to the electric utility in accordance with paragraph (d) of this
19 section.¹⁶

¹² See *Conn. Light & Power Co.*, 71 FERC ¶ 61,035, 61,153 (1995) (FERC rejects attempt by QFs to read into FERC's PURPA regulations rights that are not there).

¹³ See *In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns*, OPUC Docket No. UM 1058, Order No. 03-552 (2003) ("In matters of interpretation of federal law, the Ninth Circuit Court of Appeals is the highest authority in the State of Oregon, save the Supreme Court of the United States."); accord *Hagan v. Gemstate Mfg., Inc.*, 328 Or 535, 545 (1999) ("When this court construes a federal statute or regulation, we follow the methodology prescribed by federal courts.").

¹⁴ *Hagan*, 328 Or at 545.

¹⁵ *Id.*

¹⁶ 18 C.F.R. § 292.303(a).

1 Option (a)(1) in FERC’s rule is a sale *directly*¹⁷ to the electric utility with which a QF is
2 interconnected. Indirect sales under option (a)(2) are provided for in paragraph (d):

3 (d) *Transmission to other electric utilities.* If a qualifying facility agrees, *an*
4 *electric utility which would otherwise be obligated to purchase energy* or capacity
5 from such qualifying facility may transmit the energy or capacity *to any other*
6 *electric utility.* Any electric utility to which such energy or capacity is transmitted
7 shall purchase such energy or capacity under this subpart as if the qualifying
8 facility were supplying energy or capacity directly to such electric utility...¹⁸

9 Option (a)(2), as explained in paragraph (d) of the regulation, explicitly applies to sales to “any
10 other electric utility”—that is, sales to any utility other than the transmitting utility. Clearly, the
11 indirect purchase obligation in paragraph (a)(2) only applies to a utility other than the wheeling
12 utility.¹⁹ Furthermore, the phrase “which would otherwise be obligated to purchase energy” in
13 paragraph (d) plainly provides that the wheeling utility is relieved of its purchase obligation.²⁰
14 As a result, the indirect purchase obligation arises only for sales to third-party (non-wheeling)
15 utilities. PURPA does not grant a QF the right to specify delivery points for the energy or
16 capacity sold to the directly interconnected utility. If a QF chooses to incur transmission
17 expenses and sell its output to the utility of its choice as permitted by paragraph (d), it cannot
18 also obligate the directly interconnected utility to purchase its net output. In sum, according to
19 the plain-meaning of FERC’s PURPA regulations, a QF developer cannot obligate a utility to
20 both wheel net output *and* purchase net output. However, that is exactly what the LLC proposes
21 to do here.

¹⁷ “Directly” means “in immediate physical contact”. *Merriam-Webster’s Collegiate Dictionary* 328 (10th ed. 1998).

¹⁸ 18 C.F.R. § 292.303(d) (emphasis added).

¹⁹ *See e.g. Exxon Mobil Chem. Co. v. Entergy Gulf Sts, Inc.*, 91 FERC ¶ 61,106, 61,383 (2000) (finding 18 C.F.R. § 292.303(d) not relevant where QF sells to directly interconnected utility); *see also Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc.*, 83 FERC ¶ 61,224, 61 (1998) (applying 18 C.F.R. § 292.303(d) in context of QF wheeling net output to third-party, not directly interconnected, utility).

²⁰ “[A]n electric utility which *would otherwise be obligated to purchase energy...* may transmit the energy or capacity to any other electric utility...” 18 C.F.R. § 292.303(d) (emphasis added).

1 FERC's interpretation of Rule 292.303 in Order No. 2003²¹ and Order No. 2006²² also
2 does not recognize the type of sale proposed by the LLC. In Order No. 2003 and Order
3 No. 2006, FERC sought to establish uniform rules for all interconnections subject to federal
4 jurisdiction.²³ In addressing QF interconnections, FERC described the universe of QF
5 interconnections where the QF sells pursuant to the PURPA purchase obligation, referring to
6 Rule 292.303.²⁴ FERC's interpretation reinforces the plain meaning analysis above—QFs can
7 interconnect to sell directly (without wheeling) to the interconnected utility *or* QFs can
8 interconnect and wheel to third-party (non-wheeling) utilities.²⁵

9 [FERC's] Regulations govern a QF's interconnection with most electric utilities
10 in the United States, including normally nonjurisdictional utilities. When an
11 electric utility is obligated to interconnect under Section 292.303 of the
12 Commission's Regulations, that is, when it purchases the QF's total output, the
13 relevant state authority exercises authority over the interconnection and the
14 allocation of interconnection costs. But *when an electric utility interconnecting*
15 *with a QF does not purchase all of the QF's output and instead transmits the QF*
16 *power in interstate commerce*, the Commission exercises jurisdiction over the
17 rates, terms and conditions affecting or related to such service, such as
18 interconnections.²⁶

19 The distinction between the two forms of transaction creates a jurisdictional boundary
20 between FERC and state regulatory entities regarding QFs. FERC exercises jurisdiction over

²¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005); Order No. 2003 addresses interconnection of generators with a capacity over 20 MW.

²² *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006); Order No. 2006 addresses interconnection of smaller generators with capacity of 20 MW or less.

²³ Because FERC perceives that generator interconnection service is an integral part of transmission service, FERC regulates interconnections where the generator would wheel power under a FERC-jurisdiction Open Access Transmission Tariff. *See* Order No. 2003 at ¶¶ 10-11.

²⁴ Both Order Nos. 2003 and 2006 apply the same jurisdictional analysis to QFs.

²⁵ Order No. 2003 at ¶¶ 813-815; Order No. 2006 at ¶¶ 516-518.

²⁶ Order No. 2003 at ¶ 813.

1 interconnections where the interconnected QF's output is transmitted and sold to a third-party
2 other than the directly interconnected utility; states exercise jurisdiction over interconnections
3 where QF sells all of its net output to the directly interconnected utility. FERC did not consider,
4 and has not authorized, the approach proposed by the LLC where a QF sells net output to the
5 directly interconnected utility pursuant to a PURPA purchase obligation after choosing to
6 purchase transmission to wheel the net output to an alternate specified point of delivery in a
7 second state. Consistent with the plain language of Rule 292.303 and Order Nos. 2003 and 2006,
8 a QF may invoke the PURPA purchase obligation by interconnecting and selling directly
9 (without wheeling) to the interconnected utility *or* by wheeling through the interconnected utility
10 and selling to a third-party utility. Nothing in PURPA or Order Nos. 2003 and 2006 gives a QF
11 the right to require the directly interconnected utility to both wheel and purchase the QF output.

12 The transaction proposed by the LLC does not trigger the PURPA mandatory purchase
13 obligation. The LLC does not propose to interconnect with *and* sell directly to Idaho Power
14 (without a wheel) under Rule 292.303(a)(1). Nor does the LLC propose to have Idaho Power,
15 the directly interconnected utility, wheel the net output so that the QF can sell to another utility
16 under Rule 292.303(a)(2) and (d). A QF that interconnects to a utility's system in one state and
17 buys point-to-point transmission from that utility to deliver net output to the utility's system in a
18 different state is an unauthorized combination of two well-defined and mutually exclusive legal
19 options. Neither FERC's regulations implementing PURPA nor its regulations implementing its
20 Open Access Transmission Tariff ("OATT") recognize the transaction proposed by the LLC.
21 There is simply no right under FERC's PURPA regulations to require the same utility to wheel
22 *and* purchase the QF's net output.²⁷ As discussed above, unless a wholesale sale is authorized by

²⁷ Although not an issue for the OPUC to decide, whether the LLC is eligible for the benefits of Idaho Power's OATT is an open question that may require resolution by FERC if the LLC is to sell net output to Idaho Power in

1 PURPA, the Commission lacks jurisdiction and only FERC may approve the rates as just and
2 reasonable. Because the LLC’s proposed transaction is not a PURPA transaction, it is not
3 eligible for standard Oregon QF rates and it not entitled to the requested relief from the
4 Commission.

5 **B. The LLC’s arguments on jurisdiction misconstrue the nature of FERC jurisdiction**
6 **under PURPA and the Federal Power Act.**

7 PacifiCorp has argued that under PURPA a QF does not have the power to compel a
8 directly interconnected public utility to both: (1) purchase the QF’s net output; and (2) wheel the
9 QF’s net output from the point of initial delivery on the purchasing utility’s system to a point of
10 receipt in a second state. The LLC attempts to address this problem by arguing that the OPUC
11 cannot consider how QF net output reaches Oregon. The LLC argues that the OPUC has no
12 jurisdiction over the LLC in Idaho, stating: “The OPUC has no regulatory reach outside the State
13 of Oregon ... the Complainants are in Idaho—where the OPUC has no jurisdictional reach.”²⁸
14 The LLC also argues that FERC has exclusive jurisdiction over transmission of LLC output from
15 Idaho to Oregon.²⁹ In a section of its brief entitled *Federal law preempts all state PUC control*
16 *over the Complainant’s choice of jurisdiction in which to effect a sale for resale of their QF*
17 *power*, the LLC argues that it has a right to require Idaho Power to wheel its net output to
18 Oregon under Idaho Power’s OATT and that this relationship between the LLC and Idaho Power
19 is subject to the exclusive jurisdiction of FERC.³⁰ This approach is wrong for two reasons.

Oregon under PURPA. See *Am. Ref-Fuel Co. of Niagara L.P. v. Niagara Mohawk Corp.*, 97 FERC ¶ 61,158, 61702 (2001) (FERC declined to order a jurisdictional utility to provide transmission service where the utility had a non-frivolous dispute over a PURPA contract).

²⁸ Brief on Jurisdiction by LLC at 3-4 (“LLC Brief”).

²⁹ LLC Brief at 6.

³⁰ LLC Brief at 5-8.

1 First, the LLC is wrong to suggest that the OPUC has no jurisdiction over transactions in
2 Idaho.³¹ It is simply not true that the OPUC has no PURPA jurisdiction over a QF before the QF
3 transmits its net output to Oregon. As discussed in Section II(C) below, all state utility
4 commissions with ratemaking authority over Idaho Power have concurrent jurisdiction over
5 PURPA transactions involving Idaho Power.

6 Second, the LLC's argument that it has a right to compel Idaho Power to wheel net
7 output from Idaho to Oregon under Idaho Power's OATT, and that such a transaction is subject
8 to the exclusive jurisdiction of FERC,³² proves too much. PacifiCorp agrees that if a QF is
9 directly interconnected to a utility but does not seek to sell to that utility under PURPA, the QF
10 has a right to request transmission service from the directly interconnected utility under the
11 utility's OATT. PacifiCorp also agrees that such a relationship between the QF and the utility
12 would be subject to exclusive FERC jurisdiction.³³ However, a QF cannot have it both ways. It
13 cannot invoke FERC's exclusive jurisdiction over wholesale sales and interstate transmission to
14 support a case that its proposed transaction is a PURPA transaction subject to OPUC jurisdiction.
15 The LLC's argument conflates the nature of FERC's jurisdiction over wholesale transactions and
16 FERC's jurisdiction over PURPA transactions, which it has delegated to the states.

17 **C. In the alternative, if the Commission finds that it has jurisdiction over the LLC's**
18 **complaint, it should nevertheless defer to the IPUC and the IPUC's implementation of**
19 **PURPA.**

20 For the reasons discussed above, PacifiCorp believes that the transaction proposed by the
21 LLC is not a PURPA sale and that both the OPUC and the IPUC therefore lack jurisdiction over
22 the proposed transaction. However, if the Commission determines that the transaction proposed

³¹ The LLC argument under discussion is found at pages 3-4 of the LLC Brief.

³² The LLC argument under discussion is found at pages 5-8 of the LLC Brief.

³³ See LLC Brief at 7 (stating "FERC therefore has exclusive jurisdiction over the movement of Complainant's power to the state of Oregon.").

1 by the LLC *is* a PURPA transaction,³⁴ then the OPUC and the IPUC have concurrent jurisdiction
2 over the sale. In that case, PacifiCorp respectfully requests, for the reasons explained below, that
3 the Commission defer the exercise of its jurisdiction in favor of the IPUC. Such deference is
4 consistent with the doctrine of comity and with the IPUC’s practice of recognizing primary
5 jurisdiction in the state where the QF’s net output is first delivered onto the purchasing utility’s
6 system.

7 **1. The Commission and the IPUC share concurrent jurisdiction over the sale proposed**
8 **by the LLC.**

9 State jurisdiction to implement PURPA derives from Section 210(f)(1) of PURPA.³⁵
10 Under Section 210(f)(1), state public utility commissions, such as the OPUC and the IPUC, are
11 required to implement FERC’s PURPA rules for each utility that is subject to the commission’s
12 ratemaking authority:

13 [A]fter any rule is prescribed by the Commission under [PURPA]..., each State
14 regulatory authority³⁶ shall... implement such rule... *for each electric utility for*
15 *which it has ratemaking authority.*³⁷

16 Both the OPUC and the IPUC have ratemaking authority over Idaho Power.³⁸ Therefore, under
17 the plain meaning of Section 210(f)(1), both the OPUC and the IPUC are empowered, indeed are
18 required, to implement FERC’s PURPA regulations with respect to Idaho Power. Notably,

³⁴ While the OPUC has jurisdiction to determine whether it has subject-matter jurisdiction over the transaction proposed by the LLCs, the OPUC does not necessarily need to resolve the question of subject-matter jurisdiction if it decides to defer to the IPUC and the IPUC renders a decision as to subject-matter jurisdiction.

³⁵ 16 U.S.C. § 824a-3(f)(1).

³⁶ “State regulatory authority” means “any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility (other than such State agency)...”. 16 U.S.C. § 2602(17).

³⁷ 16 U.S.C. § 824a-3(f)(1) (emphasis added).

³⁸ The OPUC has state ratemaking authority over Idaho Power Company under ORS 757.005 (defining “public utility”) ORS 756.040 (granting the OPUC ratemaking authority over public utilities) and; the IPUC has state ratemaking authority under Idaho Code § 61-129 (defining “public utility”) and Idaho Code § 61-502 (granting the IPUC ratemaking authority over public utilities).

1 Section 210(f)(1) does not limit the State’s implementation to the geographic borders of the
2 State.

3 Not only do the OPUC and the IPUC share PURPA jurisdiction over Idaho Power, they
4 share jurisdiction over the sale proposed by the LLC (if such sale is determined to be a
5 transaction authorized by PURPA).³⁹ Although concurrent jurisdiction under PURPA is a matter
6 of first impression for the OPUC, the IPUC has on multiple occasions found concurrent
7 jurisdiction under Section 210(f)(1). The IPUC has consistently held that, with respect to a given
8 utility, it shares PURPA jurisdiction with other States that have ratemaking authority over that
9 utility.⁴⁰ The IPUC does not consider PURPA jurisdiction to be restricted to geographic borders
10 of the State.⁴¹ Instead, as the IPUC recently stated, “jurisdiction under PURPA is shared by all

³⁹ This argument—that both the OPUC and the IPUC have concurrent jurisdiction over the proposed sale—is made in the alternative to the argument in Section II(a), *supra*, that neither the OPUC or the IPUC have PURPA jurisdiction over the proposed sale because it is not a PURPA sale.

⁴⁰ *Earth Power Energy & Minerals, Inc. v. Idaho Power Co.*, IPUC Case No. IPC-E-92-29, Order No. 25174 (1993) (“*Earth Power I*”), *on rec’n*, Order No. 25249 (1993) (“*Earth Power IP*”) (The IPUC found it shared concurrent jurisdiction with the Nevada Public Service Commission over a multi-state utility and a QF located in Nevada as both Commissions asserted ratemaking authority over the utility and implemented a state PURPA scheme); *Island Power Co., Inc. v. PacifiCorp, dba Utah Power & Light Co.*, IPUC Case No. UPL-E-93- 4, Order No. 25245 (1993) (“*Island Power P*”) (The IPUC found it shared concurrent jurisdiction with the Montana Public Service Commission (Montana PSC) over a multi-state utility and a QF located in Montana as both Commissions asserted ratemaking authority over the utility and implemented a state PURPA scheme), Order No. 25528 (1994) (“*Island Power IP*”) (finding that, although the QF was eligible for Idaho rates, it had not yet locked-in rates); *Vaagen Bros. Lumber, Inc. v. Wash. Water Power Co.*, IPUC Case No. WWP-E-94-6, Order No. 25716 (1994) (“*Vaagen Bros.*”) (The IPUC found it shared concurrent jurisdiction with the Washington Utilities and Transportation Commission over a multi-state utility and a QF located in Washington as both Commissions asserted ratemaking authority over the utility and implemented a state PURPA scheme); *In the Matter of the Application of Idaho Power Co. for a Determination Regarding the Firm Energy Sales Agreement with Clark Canyon, LLC for the Sale and Purchase of Electric Energy*, IPUC Case No. IPC-E-11-09, Order No. 32294 (2011) (“*Clark Canyon*”) (The IPUC found that the Montana PSC lacked concurrent PURPA jurisdiction over a purchasing multistate utility with respect to sales from a QF located in Montana because the utility did not make retail sales within Montana and the Montana PSC did not have ratemaking authority over the utility).

⁴¹ *Earth Power*, Order No. 25174 (“Had Congress intended to constrain its jurisdictional grant in such a way, it would have done so. Nor do we believe the failure to include a geographic limit was the result of oversight or mistake. Congress certainly knew that many electric utilities have operations in more than one state, and Congress certainly knew that electricity in the interconnected, multi-state transmission grid flows through that grid irrespective of state boundaries.”).

1 state regulatory authorities who exercise ‘ratemaking authority’ over multi-jurisdictional
2 utilities.”⁴²

3 In sum, under the plain meaning of Section 210(f)(1) of PURPA and the IPUC’s
4 longstanding interpretation of PURPA, the OPUC and the IPUC share jurisdiction over all
5 PURPA sales to Idaho Power. As a consequence, both the OPUC and the IPUC have jurisdiction
6 over the proposed sale if the proposed sale is authorized by PURPA.

7 **2. Comity may weigh in favor of the OPUC declining jurisdiction.**

8 Comity is defined as “a willingness to grant a privilege, not as a matter of right, but out of
9 deference and good will.”⁴³ Comity is applied where two entities have proper jurisdiction over a
10 matter and one defers its jurisdiction to prevent conflicting outcomes and to respect the authority
11 of a neighboring court or other body.⁴⁴ In Oregon, comity is applied in situations where one
12 jurisdiction actively asserts its authority, when another entity, with equally valid authority could
13 step in.⁴⁵

14 Comity favors deferral to the IPUC if the IPUC decides to regulate the proposed
15 transaction. The IPUC actively regulates QF sales to investor owned utilities in Idaho including
16 Idaho Power. The IPUC was the first commission asked to decide whether the LLC’s proposed
17 transaction is permitted under PURPA. And (because the matter was submitted on briefs in
18 September 2011) the IPUC is likely to rule on the question before the OPUC comes to its own
19 determination on the merits. Under these facts the doctrine of comity suggests that the OPUC

⁴² *Clark Canyon*, Order No. 32294, 2; *see also* PURPA § 210, 16 U.S.C. 824a-3.

⁴³ *Black’s Law Dictionary* 334 (4th ed. 1968).

⁴⁴ For example, federal courts may defer to a state court’s review of a PUC decision where proper review procedures have taken place. *P. Tel. & Telegraph Co. v. Pub. Utils. Comm’n of Cal.*, 443 U.S. 1301 (1979). States frequently defer jurisdiction to another state’s authority where both may have properly asserted jurisdiction. For example, see the Nevada Supreme Court’s description of its decision to defer to a California court that had asserted jurisdiction over a tax board decision case. *Fran. Tax Bd of Cal. v. Hyatt*, 538 U.S. 488 (2003).

⁴⁵ *Landis v. City of Roseburg*, 243 Or 44, 51 (1966).

1 not act until the IPUC has issued its determination in IPUC Case No. IPC-E-11-14. If the OPUC
2 does act it risks the possibility that both state commissions will publish orders that are mutually
3 exclusive. This risk is a further reason why the OPUC should observe comity in this case.

4 **3. The IPUC is the appropriate forum for the proposed sale because the QF output will**
5 **first enter Idaho Power's system in Idaho.**

6 Which Commission should regulate the proposed transaction is a question of first
7 impression in Oregon. However, the IPUC has had three cases where it had to consider whether
8 to exercise PURPA jurisdiction over QFs located outside Idaho. Although it did not say so
9 explicitly, the IPUC in each case found that the Commission of the state where the QF output
10 first enters the purchasing utility's system should have the first opportunity to regulate the sale.

11 **a. *Earth Power***

12 The first case, *Earth Power*, involved a QF located in Nevada that interconnected to
13 Idaho Power in Nevada and attempted to enter into an Idaho PURPA contract with Idaho
14 Power.⁴⁶ The IPUC found that Idaho Power, which has retail customers in both Nevada and
15 Idaho, is subject to concurrent PURPA regulation by both Nevada and Idaho.⁴⁷ Because the
16 project was located in Nevada and the Nevada Public Service Commission ("NPSC") was
17 actively asserting its jurisdiction over the transaction, the IPUC declined to exercise its
18 jurisdiction, stating:

19 ... when a project is located within another state and when the commission in that
20 state is exercising the jurisdiction conferred upon it by PURPA, we find that we
21 should decline to assert our jurisdiction. In circumstances such as these we will
22 assert our jurisdiction only if the commission of the other state declined for some
23 reason to exercise its jurisdiction. We also emphasize that we will not be a forum

⁴⁶ *Earth Power I*, Order No. 25174, *Earth Power II*, Order No. 25249.

⁴⁷ *Earth Power*, Order No. 25174, at 1.

1 for relitigation of issues ultimately decided by the Nevada PSC. We will not
2 entertain requests that we second-guess the decision of another commission.⁴⁸

3 However, after initially declining jurisdiction while the NPSC actively asserted its jurisdiction,
4 the IPUC later exercised its jurisdiction because the NPSC dismissed the case and relinquished
5 its jurisdiction.⁴⁹

6 **b. *Island Power***

7 The second example is the *Island Power* case.⁵⁰ *Island Power*, a QF located in Montana,
8 proposed to buy transmission service from Idaho Power and deliver its net output to PacifiCorp's
9 system at Goshen, Idaho.⁵¹ Again, the IPUC noted that because PacifiCorp had retail customers
10 in both Montana and Idaho, concurrent jurisdiction existed between the IPUC and the Montana
11 Commission.⁵² However, the IPUC noted that the QF in this instance *was not directly*
12 *interconnected* to PacifiCorp but sought to wheel its output from a separate Montana
13 transmission system into a PacifiCorp substation in Idaho.⁵³ Under these facts, the IPUC found
14 that it would exercise its jurisdiction to require PacifiCorp to contract with *Island Power* under
15 Idaho's rules, regulations and rates.⁵⁴ The IPUC stated that it found it reasonable to exercise its
16 jurisdiction because, although the project was located in Montana, the QF interconnected with
17 another utility, and the delivery point of the output to the purchasing utility was in Idaho.⁵⁵

⁴⁸ *Id.*

⁴⁹ *Earth Power II*, Order No. 25249.

⁵⁰ *Island Power I*, Order No. 25245, *Island Power II*, Order No. 25528.

⁵¹ *Island Power I*, Order No. 25245, at 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* The LLC cites another IPUC case with a similar fact pattern for the proposition that the IPUC has exercised jurisdiction over QF net output wheeled into Idaho. LLC Brief at 10 (citing to *Afton Energy, Inc. v. Idaho Power Co.*, IPUC Case No. U-1006-199, Order No. 17478, 12-14 (1982), *aff'd Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781 (1984)). However, in *Afton Energy*, as in *Island Power*, the QF output was wheeled to the purchasing

1 **c. *Vaagen Brothers***

2 The third case from the IPUC that considers the issue of concurrent PURPA jurisdiction
3 is the *Vaagen Brothers* case.⁵⁶ Vaagen was a QF located in Washington and interconnected to
4 Washington Water Power (“WWP”) in Washington.⁵⁷ Vaagen sought an Idaho PPA with
5 WWP.⁵⁸ Noting that WWP had retail customers in Washington and Idaho, the IPUC found that
6 the two states shared concurrent PURPA jurisdiction.⁵⁹ However, under the facts of the case, the
7 IPUC declined to exercise its jurisdiction and deferred to Washington, reasoning that “Vaagen is
8 an existing facility sited in the Washington service territory of the utility that it wishes to sell to,
9 the Washington Water Company... [t]he established point of delivery is in the state of
10 Washington.”⁶⁰ The IPUC further stated that “common sense dictates” in certain circumstances,
11 it is best to defer its PURPA jurisdiction to another state.⁶¹

12 **d. Conclusions**

13 Reviewing the decisions of the IPUC and comparing them to the facts presented by the
14 instant case, the closest analogy available from the IPUC is the *Vaagen Brothers* case. In
15 *Vaagen Brothers*, the QF was interconnected to a utility in one state and sought to sell to the
16 same utility under a second state’s standard avoided cost rate structure. In *Vaagen Brothers* the
17 utility involved was subject to the concurrent jurisdiction of the utility commissions in both the
18 state of interconnection and the state setting the avoided cost rates sought by the QF. The

utility by third-party transmission. *Afton Energy, Inc.*, Order No. 17478 (Bonneville Power Administration to wheel QF electricity).

⁵⁶ *Vaagen Bros.*, Order No. 25716 (1994).

⁵⁷ *Id.* at 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 6-7.

⁶⁰ *Id.*

⁶¹ *Id.*

1 transaction proposed by the LLC has similar facts—the LLC seeks to interconnect to Idaho
2 Power in Idaho and to sell to Idaho Power at the standard avoided cost rates that apply in
3 Oregon. Moreover, both Idaho and Oregon have concurrent PURPA jurisdiction over Idaho
4 Power. Faced with such facts in *Vaagen Brothers*, the IPUC concluded that it would defer and
5 allow the state in which delivery was first made to the buyer—in that case Washington—to
6 assert regulatory authority over the transaction. In *Earth Power* the Idaho Commission deferred
7 to the Nevada PSC to exercise regulatory authority because the QF output was first delivered to
8 the buyer in Nevada. However, when the Nevada PSC ultimately declined to exercise regulatory
9 authority, the IPUC stepped in to fill the regulatory vacuum. Finally, the transaction proposed by
10 the LLC is unlike that proposed in the *Island Power* case, where the QF sought to wheel from a
11 separate utility to the purchasing utility. In this case, the LLC is directly interconnected to Idaho
12 Power in Idaho and it wishes to sell to Idaho Power.

13 *Vaagen Brothers* and *Earth Power* demonstrate a common sense and workable approach
14 to regulating interstate PURPA transactions: Where more than one commission has jurisdiction
15 to regulate the proposed sale, the commission for the state where the net output first reaches the
16 purchasing utility's system has the first opportunity to regulate the transaction. If (as in *Vaagen*
17 *Brothers*) that state chooses to regulate the transaction, then the commission(s) from other
18 state(s) should decline to exercise their concurrent jurisdiction (thereby avoiding the inherent
19 problems associated with dual regulation). However, if that state elects not to regulate the
20 proposed transaction, then (as in the *Earth Power* case) the another commission may exercise
21 concurrent jurisdiction.

22 Such an approach will work very well in this case, where the IPUC's jurisdiction is
23 subject to a declaratory judgment petition and fully submitted on brief before the IPUC. If the

1 IPUC decides it should assume jurisdiction then the OPUC should decline jurisdiction (as the
2 IPUC did in *Vaagen Brothers*). And if the IPUC decides to decline jurisdiction, then the OPUC
3 may assume jurisdiction to avert the possibility of the LLC falling into a regulatory vacuum (as
4 the IPUC ultimately did in *Earth Power*).

5 **III. CONCLUSION**

6 PacifiCorp respectfully requests that the Commission dismiss the LLC's complaint on the
7 grounds that the transaction proposed by the LLC is not authorized by PURPA and the
8 Commission therefore lacks jurisdiction over the subject-matter of the complaint. Alternatively,
9 if the Commission concludes that the proposed transaction is permissible under PURPA,
10 PacifiCorp respectfully requests that the Commission recognize that it has shared PURPA
11 jurisdiction with the IPUC and PacifiCorp urges the Commission to defer regulation of the
12 proposed transaction to the IPUC.

Dated this 18th day of November 2011.

Respectfully submitted

By



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CERTIFICATE OF SERVICE

I hereby certify that, on November 18, 2011, I served a true and correct copy of the foregoing *PacifiCorp's Response Brief on Jurisdiction* regarding OPUC Docket No. UM 1552 on the following named persons/entities by electronic mail:

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