CABLE HUSTON
CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP ▪ ATTORNEYS

RICHARD LORENZ

rlorenz@cablehuston.com
www.cablehuston.com

June 17, 2013

VIA ELECTRONIC FILING & US MAIL

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

Re: **UM-1610 --** *Investigation into Qualifying Facility Contracting and Pricing*

Dear Filing Center:

Enclosed please find an original and five copies of Threemile Canyon Wind I, LLC's Post-Hearing Brief in the above-referenced proceeding.

An electronic copy is also being served on the attached service list. Should you have any questions, please feel free to contact me.

Thank you for your assistance with this matter

Very truly yours,

/s/ Richard Lorenz

Richard Lorenz

RGL:tjb
Enclosures
cc: UM-1610 Service List

4819-3388-5460, v. 1

BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

UM 1610

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation Into Qualifying Facility Contracting and Pricing.	

THREEMILE CANYON WIND I, LLC'S

POST-HEARING BRIEF

June 17, 2013

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I. INTRODUCTION

Threemile Canyon Wind I, LLC ("Threemile Canyon") submits this post-hearing legal memorandum to address three issues from the issues list in this proceeding: Issues 4.B, 6.B, and 6.E.

Issue 4.B. Under the rules adopted by the Federal Energy Regulatory Commission ("FERC") to implement the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"), third-party transmission cost are treated differently where Qualifying Facilities ("QF") are directly interconnected with the purchasing utility as compared to making an indirect sale to the purchasing utility. Pursuant to FERC regulation §292.303(d), for example, the purchasing utility may not be forced to pay the cost of third-party transmission for the QF's output to reach the utility's delivery system where the QF is not directly interconnected with the purchasing utility (*i.e.*, an indirect sale). Where the QF is directly interconnected to the utility's delivery system (*i.e.*, direct sale), however, the purchasing utility is *not* allowed to charge the QF for third-party transmission with respect to any QF output that the purchasing utility receives directly on its distribution system.

PacifiCorp's renewed attempt (see UM 1129) to require small QFs to negotiate individualized, non-standard price adjustments to recover project-specific costs is no more appropriate now than it was eight years ago. During cross-examination, PacifiCorp's witness admitted that PacifiCorp raised essentially the same argument in this Commission's prior proceeding (UM 1129) establishing the current QF contracting rates and policies. The Commission has already rejected PacifiCorp's argument, and for all of the same reasons it must do so again.

The Commission's current QF contracting policies expressly prohibit purchasing utilities from requiring small QFs to negotiate project-specific price adjustments, or any other non-standard terms. PacifiCorp's witness conceded that the Commission's policy specifically includes price adjustments for third-party transmission costs incurred by PacifiCorp to deliver QF power that it has purchased and received directly on its distribution system. PacifiCorp is now asking the Commission to reverse the policy decision made in UM 1129 in a manner that would be both unprecedented and contrary to FERC's PURPA regulations. What is even worse, however, is that PacifiCorp is now asking the Commission to reverse the policy decision made in UM 1129 *retroactively*, so as to exculpate PacifiCorp's willful and intentional violation of that policy with respect to Threemile Canyon.

Issues 6.B and 6.E. Threemile Canyon's positions on these issues are as follows: (6.B) Legally Enforceable Obligations ("LEO") are created when a QF commits itself to an electric utility, and not the other way around. Threemile Canyon's experience with PacifiCorp illustrates why control of the process of commitment must rest with the QF rather than the purchasing utility; and (6.E) Mechanical Availability Guarantees are out-of-date and unnecessary given that QFs already have a direct financial incentive to adequately maintain their facilities and optimize generation output.

II. BACKGROUND FACTS

In 2009, Threemile Canyon developed a small wind generating facility in Morrow County, Oregon that has a nameplate capacity of approximately 9.9MW ("Facility"). The Facility is located in, and is directly interconnected with, PacifiCorp's service territory. Given its location directly in PacifiCorp's service territory, the Facility does *not* require third-party transmission for delivery from the Facility to PacifiCorp's service territory. For purposes of FERC's implementing regulations, therefore, Threemile Canyon's power sale to PacifiCorp is a "direct" sale.

The Facility is directly interconnected with a portion of PacifiCorp's service territory that PacifiCorp refers to as a "load pocket."[1] PacifiCorp's Oregon service territory is not a contiguous whole, but is made up entirely of multiple service islands surrounded by other utilities. The Facility happens to be located in a PacifiCorp "load pocket" with a demand shape that is highly variable by season. In the summer there is more than enough retail load to absorb the Facility output. In the winter, however, demand in the "load pocket" is insufficient to use all of the Facility output locally. During these months, therefore, PacifiCorp must move some portion of the Facility output from the "load pocket" in which it has been received and purchased to another portion of PacifiCorp's service territory for delivery to PacifiCorp's retail ratepayers. PacifiCorp apparently does not have adequate transmission rights or facilities in its system to move this power, and it must purchase firm transmission from the Bonneville Power Administration ("BPA"). Again, these third-party transmission costs are incurred by PacifiCorp for the sole purpose of managing and delivering QF power that has already been purchased and received by PacifiCorp on its electrical distribution system.

The Facility is self-certified as a QF for purposes of PURPA. Threemile Canyon first requested from PacifiCorp a long-term, standard contract in late 2008. The Facility achieved commercial operation in September of 2009. Threemile Canyon met every one of PacifiCorp's

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[1] PacifiCorp's use of the term "load pocket" is misleading for a couple of reasons. First, the term "load pocket" actually means an area that is constrained by a lack of transmission access into the area, and not a piece of a service territory that is load constrained. Second, it implies that there is some other portion of the service territory that is contiguous and whole. In fact, PacifiCorp's entire Oregon service territory is comprised of "load pockets," and every single QF located in PacifiCorp's Oregon service territory is located in a "load pocket."

and the Commission's eligibility criteria for a long-term, standard contract back in 2009.[2] Threemile Canyon sought to make a direct PURPA sale to PacifiCorp using the Commission-approved standard contract rates and terms. Threemile Canyon committed to accepting the standard contract without amendment and in precisely the form approved by this Commission in UM 1129. If PacifiCorp had complied with its legal obligations, Threemile Canyon and PacifiCorp would have executed a long-term, standard contract more than four years ago.

Instead, PacifiCorp simply refused to tender a long-term, standard contract to Threemile Canyon. PacifiCorp has demanded that Threemile Canyon acquiesce to a unilateral price adjustment to pay PacifiCorp's third-party transmission costs to move the Facility output from one part of PacifiCorp's retail distribution system to another. Threemile Canyon has refused to accept PacifiCorp's unilateral "price adjustment" because it is expressly prohibited by this Commission's standard contract rules.

The Commission's standard contract rules were developed in UM 1129. In that proceeding, PacifiCorp specifically asked the Commission for flexibility to impose "price adjustments" to the standard contract, such as the one that PacifiCorp has demanded from Threemile Canyon. *Id.* In its Order No. 05-584, the Commission expressly rejected PacifiCorp's request. *Id.* The Commission concluded that "[w]e believe that further flexibility in negotiating the terms of a standard contract would *fundamentally undermine* the purposes and advantages of standard contracts and, therefore, *deny the request by PacifiCorp and PGE for additional pricing flexibility*." Order No. 05-584, p. 39. (Emphasis added). The Commission further explained that "[i]t is inappropriate to request that standard contracts be subject to potential negotiation to

[2] As explained below, PacifiCorp did execute a short-term power purchase agreement with Threemile Canyon. Aside from the length of the agreement, the terms and conditions of the short-term power purchase agreement are identical to those of the long-term standard contract approved by this Commission. Because Threemile Canyon satisfied all of the eligibility requirements of the short-term agreement executed by PacifiCorp, it also would have satisfied all of the eligibility requirements of the long-term, standard contract.

address project-specific characteristics." *Id.* Under a plain reading of Order 05-584, therefore, PacifiCorp was and is prohibited from demanding any price adjustments from any small QFs, including Threemile Canyon.

It has been well over four years since Threemile Canyon first requested a standard contract. To this day, PacifiCorp still refuses to offer Threemile Canyon a long-term standard contract. Now, PacifiCorp asks the Commission to retroactively reverse the rules established in Order 05-584 (as described above) in order to justify PacifiCorp's unlawful demand that Threemile Canyon accept a unilateral price adjustment to the standard contract.

III. THREEMILE CANYON'S PARTICIPATION IN THIS PROCEEDING

On July 1, 2011, Threemile Canyon filed a formal complaint with the Commission alleging that PacifiCorp violated PURPA and Order 05-584. This complaint was docketed as UM 1546. By motion of PacifiCorp, the docket was stayed shortly after it was opened to allow the Commission time to complete a pending investigation into PacifiCorp's QF contracts and rate schedules (UE 235). After many months of inactivity, Threemile Canyon asked the ALJ to lift the stay and allow UM 1546 to proceed. The ALJ declined to lift the stay. Threemile Canyon then sought to have the ALJ's decision reviewed and certified by the Commission. The Commission upheld the ALJ's decision and, at PacifiCorp's urging, directed Threemile Canyon to address its third-party transmission issues in this UM 1610 docket. At every step of the way, Threemile Canyon sought only to pursue its own complaint proceeding and to avoid becoming entangled in any broad Commission investigations into QF contracting.

On at least two separate occasions, PacifiCorp has objected to Threemile Canyon's participation in UM 1610. PacifiCorp accuses Threemile Canyon of improperly commingling in this docket issues that may also be relevant to Threemile Canyon's pending complaint proceeding against PacifiCorp. First, on March 29, 2013, PacifiCorp filed a Motion to Strike the Opening Testimony of John Harvey on the grounds that it specifically addressed the Threemile Canyon Facility—despite the fact that PacifiCorp itself had also specifically (and at great length) addressed the Threemile Canyon Facility in its opening testimony. PacifiCorp's Motion to Strike was denied. Next, PacifiCorp objected at the hearing Threemile Canyon's attempt to question PacifiCorp's witnesses on issues relevant to third-party transmission costs incurred to serve Threemile Canyon.

In seeking to continue the stay of UM 1546, however, PacifiCorp actually argued (successfully) that Threemile Canyon's complaint regarding third-party transmission *should be* addressed in UM 1610. In its Order 12-475, Commission noted that "Pacific Power responds that it too desires an expeditious resolution of *this* third-party transmission cost issue, but prefers the Commission do so in docket UM 1610." *Id.* (Emphasis added).[3] Further, "Pacific Power contends that complainant [Threemile Canyon] has failed to support its claim that docket UM 1610 does not provide an adequate forum to resolve the issue raised in its complaint." *Id.* In other words, PacifiCorp sold the Commission on staying UM 1546 precisely because Threemile Canyon would be permitted to assert the issues raised in its UM 1546 complaint in the UM 1610 investigation. Furthermore, the Commission agreed that UM 1610 is an appropriate and "adequate forum" for "this" issue.

PacifiCorp's repeated objections to Threemile Canyon's participation in this proceeding are ironic, at best. Threemile Canyon never wanted or intended to raise its complaint issues in this docket. It was only at PacifiCorp's urging, and over Threemile Canyon's objections, that the Commission ordered Threemile Canyon to address its third-party transmission issues (which is,

[3] By referring to "this" third-party transmission cost issue, the Commission was clearly referring to the specific third-party transmission issue raised by Threemile Canyon in UM 1546 and not just to third-party transmission costs generically.

that third-party transmission costs where the sale is a direct sale may not be charged to the QF) in the context of this UM 1610 proceeding.

Ultimately, Threemile Canyon is *not* asking the Commission to provide redress in this proceeding for the allegations it has made against PacifiCorp in UM 1546. Threemile Canyon is asking, however, that the Commission expressly reject PacifiCorp's attempt in this proceeding to retroactively reverse the Commission's current policy prohibiting "price adjustments" for small QFs in order to escape the consequences of its actions in UM 1546. Threemile Canyon explains below why PacifiCorp's proposed change in policy would effectively deny small QFs full access to standard contract terms and rates, and should therefore be rejected outright. But even if the Commission were to make such a policy change, it must be clear that any policy change made in this proceeding is prospective only and has no impact on any person's existing legal rights or obligations.

IV. ANY CHANGE IN POLICY MUST BE PROSPECTIVE ONLY

As explained in Threemile Canyon's prehearing brief, a threshold question before the Commission is whether any policy changes that may be made in this proceeding from the current policies established in Order 05-584 are intended to retroactively alter any party's preexisting rights or obligations.

At the hearing, witnesses for both Staff and PacifiCorp agreed that the current QF contracting rules were adopted in the UM 1129 proceeding, specifically through Order 05-584. Cross-Examination Hearing pp. 9, 105. Order 05-584 expressly prohibits purchasing utilities from imposing any "price adjustments" on the standard contract, which would transform them into individualized, non-standard contracts. The Commission found that any such price adjustment would be "inappropriate" and would "fundamentally undermine" the very purpose of the standard contract. Order 05-584, at p. 39. In 2009, Threemile Canyon sought, and was legally entitled to, the standard contract under the rules established by the Commission in Order 05-584. Pursuant to that Order, PacifiCorp was categorically prohibited from imposing any price adjustments on Threemile Canyon's standard contract (or, in the alternative, from making the contract contingent upon Threemile Canyon's "voluntary" acquiescence to such price adjustment).

Upon cross examination, PacifiCorp's own witness conceded that it was his contemporaneous understanding that the Commission's prohibition against "price adjustments" found in Order 05-584 specifically applies to third-party transmission costs incurred by PacifiCorp to deliver QF power that it had already received and purchased on its distribution system.

> Q. My question was, it was your contemporaneous understanding that the Commission's order in 05-584 with respect to pricing did apply to third-party transmission costs?
>
> A. Yes, that was my understanding.

Cross-Examination Hearing, p. 105. Mr. Griswold's testimony concerning his understanding of Order 05-584 is corroborated by an email he authored to a colleague on March 27, 2007. With respect to Threemile Canyon, Mr. Griswold wrote that "[a]s you know, there is a significant load pocket issue around these projects. *Oregon's standard contracts do not provide for any curtailment rights in the PPA or price adjustments for transmission constraints*." Threemile Canyon/206.

PacifiCorp knowingly and willfully violated Order 05-584 by demanding that Threemile Canyon either accept curtailment of the Facility output or agree to a price adjustment to pay PacifiCorp's third-party transmission costs. Although Mr. Griswold's testimony admits that the standard contract approved by the Commission in UM 1129 does not provide for curtailment or price adjustments, Mr. Griswold testified during cross-examination that PacifiCorp went ahead and required Threemile Canyon to accept to one of two solutions to the "load-pocket" problem. "One was they could pay for the point-to-point transmission or we could curtail them without payment when the generation was over load." Cross-Examination Hearing, p. 100. In other words, Mr. Griswold's own testimony confirms that PacifiCorp forced Threemile Canyon to choose between two alternatives, neither of which was provided for in the standard contract or allowed by law.

Notwithstanding the current contracting rules adopted by the Commission in Order 05-584, both Staff and PacifiCorp now ask the Commission to allow purchasing utilities to allocate such third-party transmission costs to QFs, regardless whether the sale from QF to electric utility is a direct sale or an indirect sale. The merits of this proposal will be discussed below. For present purposes, the important point is that the policy decision recommended by PacifiCorp and Staff would, if adopted, represent a fundamental change and departure from the *status quo* in terms of how such costs are currently allocated. Specifically, it would be a fundamental change in the standard contract terms to which Threemile Canyon was legally entitled back in 2009. As Mr. Bless testified at the hearing, "Staff has deliberately recommended a change." Cross-Examination Hearing, p. 11. Mr. Bless reiterated at hearing that "we know we are recommending some changes to current policy." *Id.*

Mr. Bless' cross examination testimony frames the threshold issue before the Commission. Putting aside the merits of the proposed policy change, the threshold legal question before the Commission is whether any proposed changes to current policy would apply retroactively so as to modify the rights of existing QF facilities. As Threemile Canyon demonstrates in its prehearing memorandum, it is axiomatic that any policy changes adopted by this Commission apply only on a prospective basis.[4] Nevertheless, when the question was put to Mr. Bless whether Staff's proposed policy change was intended to apply to existing QF facilities, legal counsel for PacifiCorp sharply objected. Cross-Examination Hearing, p. 11. PacifiCorp's objection highlights its thinly-veiled attempt to retroactively change the Commission's policy in order to somehow excuse PacifiCorp's intentional and ongoing violation of Order 05-584.

Again, Threemile Canyon is not asking the Commission to make an affirmative decision in this docket whether PacifiCorp did or did not violate Order 05-584. What Threemile Canyon is asking for is a clear and unambiguous statement by the Commission that any and all policy changes adopted by the Commission in this proceeding will be applied prospectively only. In making such a statement, the Commission need not necessarily determine what any person's pre-existing rights and obligations may be. The Commission would simply clarify that this proceeding is not intended to modify any pre-existing rights or obligations, such as they are.

V. PROSPECTIVE ALLOCATION OF THIRD-PARTY TRANSMISSION COSTS

PacifiCorp's proposal to recover third-party transmission costs related to direct sales is unprecedented, contrary to FERC regulations, and should once again be rejected by the Commission. Since 2009, Threemile Canyon has been entitled to a long-term, standard contract under the Commission's rules established in Order 05-584. PacifiCorp's attempt to have any changes applied to parties having pre-existing rights is egregious. As explained above, any prospective policy changes wrought by the Commission through this proceeding should have no application to Threemile Canyon's pre-existing legal rights.

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[4] In *Dreyer v. Portland General Electric, Co.*, 341 OR. 262, 271 (2006), for example, the Oregon Supreme Court explained that the "rule against retroactivity" holds that approved utility rates may be modified only prospectively and that utilities cannot provide retrospective relief from such rates. The Court noted that this Commission has long applied the rule against retroactivity in Oregon, and that there are strong policy considerations underpinning this doctrine. *Id.*

A. PacifiCorp Misunderstands The Applicable Legal Standard

In its prehearing memorandum, PacifiCorp argues that the "but-for" legal standard compels the Commission to allocate third-party transmission costs to all QFs—even small QFs. PacifiCorp's Pre-Hearing Memorandum, pp. 9-10. PacifiCorp misunderstands the applicable legal standard. Unfortunately, PacifiCorp's own misunderstanding would mislead the Commission into somehow believing an apples and oranges measurement of the costs of purchasing from a QF ought to be compared to a utility's apples-only rate.

In support of the "but-for" standard for cost allocation, PacifiCorp cites to 16 CFR 824a-3(b) and (d), which is the codification of Sections 210(b) and (d) of PURPA. These provisions must first be put in context. 16 CFR 824a-3(a) sets forth FERC's basic obligation to prescribe and revise rules to implement PURPA, "... to encourage cogeneration and small power production." 16 CFR 824a-3(b) states that the rules adopted by FERC pursuant to subsection (a) must insure that the rates paid by a utility to a QF for the purchase of electric energy:

> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

16 CFR 824a-3(b) further states that "[n]o such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."

In applying this provision to this case, however, PacifiCorp asks the Commission to compare apples and oranges. PacifiCorp asks this Commission to compare QF costs, including third-party transmission costs, against only the avoided generation costs without third-party transactions costs. Based on this unfair comparison, PacifiCorp asks the Commission to find that the but-for standard requires the allocation of third-party transmission costs to all QFs—

including small QFs making direct sales. In doing so, however, PacifiCorp has conveniently failed to inform the Commission of its own oranges. Specifically, that PacifiCorp relies on a massive amount of third-party transmission, at its ratepayers' expense, to move non-QF generation.

PacifiCorp's FERC Form 1 shows that PacifiCorp spent over $142 million in 2012 on third-party transmission costs. Threemile Canyon/207, p. 2. During the same year, PacifiCorp only spent $206 million on total transmission expenses. *Id.* Thus, more than two-thirds of PacifiCorp's total transmission costs were paid to third-parties. For perspective, PacifiCorp's witness explained that only about $50,000 out of that $142 million spent on third-party transmission costs in 2012 was attributable to Threemile Canyon's Facility.[5] From this data, the Commission can reach two irrefutable conclusions: (1) Under PacifiCorp's basic utility business model, the use of third-party transmission to move non-QF power at its rate-payers' expense is the rule not the exception; and (2) The portion of third-party transmission services that PacifiCorp uses to manage and deliver QF generation, as compared to non-QF generation, is *de minimus*.

Upon cross-examination, PacifiCorp's witness confirmed that a substantial portion of PacifiCorp's third-party transmission costs are specifically attributable to its *own* wind generation. PacifiCorp owns two wind generation facilities called Leaning Juniper and Goodnoe Hills. Cross-Examination Hearing, 90. Unlike Threemile Canyon's Facility, both Leaning Juniper and Goodnoe Hills are located completely off, and are not directly interconnected with,

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[5] Cross-Examination Hearing, page 94. Mr. Griswold indicated in his reply testimony that PacifiCorp had spent about $200,000 on third-party transmission for the Facility. Upon cross-examination, Mr. Griswold explained that figure was cumulative for the years 2009-2012. Thus, Mr. Grisowold agreed with the proposition that if one were to assume that the $200,000 were incurred in equal amounts each year, that would equal approximately $50,000 per year.

PacifiCorp's distribution system. *Id.* Mr. Griswold confirmed that PacifiCorp relies on third-party transmission to move the output of these two wind facilities to PacifiCorp's distribution system. *Id.* at 91. Mr. Griswold also confirmed that PacifiCorp's retail ratepayers pay the costs of this third-party transmission service.[6] Because PacifiCorp's facilities are located completely off-system, PacifiCorp's ratepayers must pay third-party transmission costs to move 100% of the facility output to load. With respect to Threemile Canyon's Facility, however, PacifiCorp's ratepayers would only incur third-party transmission costs with respect to that portion of the generation that exceeds the local demand within the "load pocket."

When comparing apples to apples, the Commission can see that PacifiCorp's retail ratepayers are not disadvantaged at all by paying third-party transmission costs for direct purchases of QF power. Pursuant to the non-discrimination requirement set forth in 16 CFR 824a-3(b), Threemile Canyon actually could argue that PacifiCorp should recover third-party transmission costs for QF facilities on the same basis as it does for PacifiCorp-owned facilities. But Threemile Canyon takes a substantially more conservative position based on its understanding of FERC regulation §292.303(d). For small QFs making direct sales (*ie*, those that are directly interconnected to PacifiCorp's distribution system), PacifiCorp must pay for and recover from its retail ratepayers any third-party transmission costs, just as it does for third-party transmission costs of its own resources. Stated differently, PacifiCorp's retail ratepayers are not just "indifferent" to third-party transmission costs for direct QF purchases, they are actually *better-off* compared to the third-party transmission costs they would otherwise pay for PacifiCorp's own alternative resources such as Leaning Juniper and Goodnoe Hills.

[6] See Cross-Examination Hearing, p. 91. "**Q.** And PacifiCorp ratepayers pay for the third-party transmission for PacifiCorp's own wind generation, right? **A.** For those two projects."

B. PacifiCorp Remains Responsible For Managing And Delivering Any QF Power Delivered To Its System.

The law is clear that, upon receiving and purchasing QF power at the designated point of delivery, it is the purchasing utility's sole responsibility to manage and to deliver that power to load. *See* 18 CFR § 292.303(a). In *Entergy Servs., Inc.*, 137 FERC ¶ 61,199 (2011), for example, FERC rejected a utility's proposal to curtail deliveries of unscheduled QF energy when firm transmission service is insufficient. FERC explained that "[e]xcept in certain limited circumstance, Entergy is obligated under federal law to purchase unscheduled QF energy. *Once that energy is purchased, it is Entergy's responsibility to deliver that energy to its load (or otherwise manage the energy).*" *Id* at p. 52 (emphasis added). The *Entergy* case is significant in terms of reaffirming purchasing utilities' statutory responsibilities under PURPA. The case stands for the proposition that the QF's basic obligation is to deliver eligible power to the utility's distribution system, and it is the utility's obligation to purchase and receive such power regardless of whether firm transmission is available to move that QF power to load. Once the QF power has been purchased and received at its distribution system, it is the purchasing utility—and not the QF—that is responsible for managing the power and delivering it to load. If any purchasing utility does not like this statutory allocation of responsibilities, their redress lies solely with Congress and not with FERC or any state utility commissions.

As applied here, it is PacifiCorp's sole responsibility under PURPA to manage Facility output that it has received on its distribution system, and to deliver it to load. It is not Threemile Canyon's responsibility to ensure that PacifiCorp delivers its Facility output to load. Neither 16 CFR 824a-3(b) nor any provision of PURPA requires Threemile Canyon to indemnify PacifiCorp for the costs it incurs to manage and deliver output from the Facility.

C. Both This Commission And FERC Have Already Rejected Individualized Price Adjustments For Small QFs

PacifiCorp's argument in favor of individualized price terms for standard contracts has already been rejected both by this Commission and by FERC. PacifiCorp's argument is that it is legally entitled under PURPA to impose unilateral, individualized price adjustments to standard contract terms in order to recover any QF-related costs that it incurs above its avoided costs. In other words, PacifiCorp is arguing that PURPA *requires* individualized price adjustments for all QFs, even for small QFs that are eligible for the standard contract.

PacifiCorp made essentially the same argument in UM 1129. Upon cross-examination, PacifiCorp witness Bruce Griswold was asked whether this is the first proceeding in which PacifiCorp has argued that it should be able to recover project-specific costs from QFs. Cross-Examination Hearing, p. 96. Mr. Griswold replied, "Subject to check, I believe it was included in UM 1129." Indeed it was. Order No. 05-584 specifically recounts PacifiCorp's request to the Commission for flexibility to impose "price adjustments" to the standard contract to account for certain "project specific characteristics." Order 05-584, p. 38. The purpose of the "price adjustments" proposed by PacifiCorp would be to cover things like "integration costs, debt imputation, or commercial and operational costs associated with intermittent QF resources." Order 05-584, p. 38. In short, the project-specific pricing flexibility that PacifiCorp seeks in this proceeding is nearly identical to the project-specific pricing flexibility that PacifiCorp sought in the last proceeding.

In Order No. 05-584, the Commission not only rejected, but emphatically rejected PacifiCorp's request for project-specific price adjustments. *Id.* The Commission concluded that "[w]e believe that further flexibility in negotiating the terms of a standard contract would *fundamentally undermine* the purposes and advantages of standard contracts and, therefore, *deny* *the request by PacifiCorp and PGE for additional pricing flexibility.*" Order No. 05-584, p. 39. (Emphasis added). The Commission explained that "[i]t is inappropriate to request that standard contracts be subject to potential negotiation to address project-specific characteristics." *Id.* The Commission further explained that "[w]ith standard contracts, project characteristics that cause the utility's cost savings to differ from its actual avoided costs are ignored." *Id.* at 16. In other words, this Commission has long understood that it may lawfully establish and require standard contract rates for small QFs, without price adjustments and regardless of differences in project-specific costs or characteristics.

The Commission's understanding of its PURPA obligations is also perfectly consistent with FERC's long-standing implementation of PURPA. FERC too has already rejected the notion that PURPA requires individualized rates for small QFs, even when a specific project's costs exceed the average avoided cost rate. In Order No. 69, the seminal FERC Order implementing PURPA, FERC explained that it may impose standard rates for small QFs even though the supply characteristics of a particular QF may impose costs greater than the standard rate.

> [FERC] is aware that the supply characteristics of a particular facility may vary in value from the average rates set forth in the utility's standard rates required by this paragraph. If [FERC] were to require individualized rates, however, the transaction costs associated with administration of the program would likely render the program uneconomic for this size of qualifying facility. As a result, [FERC] will require that standardized tariffs be implemented for facilities of 100 kW or less."[7]

Thus, it has long been the policy of both FERC and this Commission that small QFs are entitled to a standard rate without any price adjustments to account for individual project characteristics. These Commission and FERC Orders stand in stark contrast to PacifiCorp's assertion that PURPA compels the recovery of all costs that would not have been incurred "but-for" the QF

[7] Order No. 69 as published in Federal Register, Vol. 45, No. 38, February 25, 1980, p. 12223.

purchase. If PacifiCorp's cost-recovery argument were correct, then FERC itself has been violating PURPA for more than thirty years.

D. Under FERC's PURPA Rules, A QF May Only Be Allocated Transmission Costs For An *Indirect* Sale

What PacifiCorp is asking for in this proceeding is the right to recover costs incurred to move QF power that it has already received on its distribution system to another portion of its distribution system. As explained above, the general rule established by PURPA is that utilities shall receive and purchase QF energy, and they shall manage and deliver it to load without recovering from the QF any costs incurred after the point of delivery. The only exception to this general rule is set forth in 18 CFR §292.303(d). This FERC regulation states that a QF may be required to pay transmission costs incurred by the host utility after the point of delivery *only* in the instance where the QF is making a voluntary but *indirect* sale to the second utility and the host utility (to which the QF is interconnected) agrees to wheel the output from the QF to the purchasing utility. Threemile Canyon/Harvey 100, pp. 21-27. In such case, the host utility may recover its wheeling charges from the QF rather than the purchasing utility.

The narrow exception carved out in 18 CFR § 292.303(d) does not apply here. *Id.* at 25-26. Threemile Canyon is making a *direct* sale to PacifiCorp, and it has not asked PacifiCorp to wheel Facility output to another purchasing utility. PacifiCorp is not using the third-party transmission services to wheel Facility output to another purchasing utility, as contemplated in §292.303(d), but to move Facility output from one part of PacifiCorp's retail distribution system to another. PacifiCorp's Reply Testimony agrees that §292.303(d) does not apply here. PacifiCorp/Griswold 400, p. 14. Neither §292.303(d) nor any other FERC rules allow PacifiCorp to recover third-party transmission costs from Threemile Canyon's Facility.

Although 18 CFR § 292.303(d) does not apply here, it does illustrate the error of PacifiCorp's position. PacifiCorp's states that it should be entitled to recover from QFs *any* transmission costs above its avoided costs. But this argument, if true, would render the special exception set forth in § 292.303(d) superfluous. If PacifiCorp had the blanket right to recover all third-party transmission costs from QFs, no special exceptions allocating such transmission costs to QFs would be necessary. Under Oregon law, it is improper for the Commission to interpret the law so as to render certain statutory provisions meaningless. *See* ORS 174.010. In fact, 18 CFR § 292.303(d) is not meaningless at all. It allows the host utility to recover transmission costs from a QF when they would otherwise not be permitted to do so.

E. PURPA Makes No Exception For "Load Pockets"

By asking the Commission to adopt novel cost-recovery rules for "load pockets," PacifiCorp is essentially asking the Commission to read into PURPA a special exception for "load pockets" that does not otherwise exist. There is nothing in PURPA, or FERC's implementing regulations, that creates any special rules, rates or cost recovery principles for QFs located in utility "load pockets." The normal PURPA rules apply under these circumstances, just as if the QF were not located in a "load pocket." And, again, those rules state that the utility is solely responsible for managing and delivering QF power that it has purchased and received anywhere on its system. *See Entergy Servs., Inc.*, 137 FERC ¶ 61,199 (2011) (Once that [unscheduled QF] energy is purchased, it is Entergy's responsibility to deliver that energy to its load (or otherwise manage the energy)." The normal rules also state that small QFs are entitled to a standard rate without price adjustment to account for individual project characteristics. *See,* Order 05-584; FERC Order 69. Likewise, there is nothing in PURPA that precludes or restricts in any way a QF's right to deliver output into a utility "load pocket." Under Oregon's rules of statutory construction, the Commission must reject PacifiCorp's attempt to read into PURPA a "load pocket" exception that does not exist. *See* ORS 174.010.

F. There Is No Legal Precedent That Supports PacifiCorp's Position

As far as Threemile Canyon is aware, the policy reversal that PacifiCorp is asking the Commission to make with respect to third-party transmission costs would be, if adopted, completely unprecedented. Even in its pre-hearing brief, PacifiCorp has not identified a single precedent in FERC's decisions or its regulations that directly supports the proposition that a purchasing utility may charge third-party transmission charges to a QF making a direct sale to the utility. Likewise, PacifiCorp has not identified even one other state utility commission in the entire country that allows purchasing utilities to impose third-party transmission costs on standard QF contracts. On the other hand, the known precedent established by both this Commission and FERC states that a purchasing utility may not require small QFs to negotiate individualized price terms that deviate from the standard contract. Order 05-587; FERC Order 69. The known precedent also confirms that it is the purchasing utility, and not the QF, that is responsible for managing and delivering QF power received at the utility's distribution system. *Entergy Services, Inc.* 137 FERC ¶ 61,199. The Commission should reject PacifiCorp invitation to navigate into unchartered policy waters.

G. In Making Its Recommendations, Commission Staff Admits That It Did Not Fully Consider Applicable State and Federal Law

Although Staff generally recommends that third-party transmission costs should be allocated to the QF, the Commission should assign little to no weight to this recommendation. Upon cross-examination, Staff's Witness Adam Bless admitted that he had only worked on PURPA matters for the past 15 months, and that he has never before testified on any PURPA matters. Cross-Examination Hearing, p. 5. Mr. Bless testified that he had not reviewed any orders from any other state commissions on how they interpret PURPA. *Id.* Nor did Mr. Bless review any FERC decisions, including but not limited to the *Entergy* decision, to verify how FERC interprets PURPA. *Id.* Mr. Bless admitted that he had not looked at the FERC regulations, such as 18 CFR § 292.303(d), applicable to the allocation of transmission costs for direct sales as compared to indirect sales. *Id.* In connection with third-party transmission costs in particular, Mr. Bless stated that he did not research what any other state commissions have done. *Id.* Further, he testified that he is not aware of any other states allocating third-party transmission costs in the manner that he has recommended. *Id.* Finally, Mr. Bless testified that he did not even examine how PacifiCorp allocates third-party transmission costs for non-QF power, including its own generation. *Id.*

PURPA is a complicated, multi-jurisdictional statutory and regulatory scheme with over 35 years of state and federal implementation history. Based on his own admissions on cross examination, it is clear that Mr. Bless was placed in the untenable position of having to testify on difficult PURPA policy matters over which he had insufficient experience and knowledge. Nor did he have the time or resources available to him to adequately research the important policy issues about which he was asked to advise this Commission. For those reasons, the Commission should give little to no weight to Mr. Bless' recommendations on this issue.

VI. LEGALLY ENFORCEABLE OBLIGATION

Issue 6B on the Commission's issues list for this proceeding asks: "When is there a legally enforceable obligation?' Under PURPA, a LEO exists when the QF commits itself to an electric utility. Threemile Canyon/Harvey 100, pp. 36-37. It is crucial for the Commission to recognize that the LEO is created under PURPA when the QF commits to the utility, and not when the utility voluntarily commits to the QF (if ever).

PacifiCorp's proposal with respect to the creation of the LEO turns this relationship on its head. PacifiCorp proposes to have a LEO commence only at the time a QF approves an acceptable final draft agreement presented to it by an electric utility. PacifiCorp/Griswold 400, p. 21. This proposal is exactly the opposite of what is required under PURPA, as it requires the utility to commit to the QF rather than acknowledging the QF's commitment to the utility. This is not the correct legal standard, as it would allow the utility to manipulate, delay or even stifle the creation of a LEO simply by withholding the final contract. Threemile Canyon/Harvey 100, p. 36.

Upon cross-examination, PacifiCorp's witness, Bruce Griswold, suggested that a QF would be able to use the Commission's complaint process if it felt that the utility were delaying the creation of a LEO. Cross-Examination Hearing, p. 88-89. Mr. Griswold testified that he "can't answer" how long it takes for a complaint to be resolved. *Id.* Mr. Griswold subsequently admitted that he was aware, however, that Threemile Canyon had filed a complaint against PacifiCorp in 2011, and that such complaint proceeding remains unresolved. *Id.* Thus, there is at least one proceeding that has taken more than two years to move through a complaint process and it remains unresolved.[8] The complaint proceeding recommended by Mr. Griswold is not always (if ever) an effective means of resolving disputes concerning the creation of a LEO.

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[8] Cross-Examination Hearing, p. 90:

> Q. Its fair to say that in at least one case its taken two years to go through that complaint process, and there is still no resolution of it?
> A. That—I guess you could interpret it that way.
> Q. Is there any other way to interpret it?
> A. No.

Threemile Canyon's lengthy complaint proceeding against PacifiCorp illustrates why the creation of the LEO cannot be left to the discretion of the utility. As far back as 2009, Threemile Canyon had the legal right to execute a standard contract under the rules established by the Commission in Order 05-584. For more than four years, however, PacifiCorp has failed to comply with its legal obligation to offer Threemile Canyon a standard contract for execution. As explained above, PacifiCorp refuses to offer Threemile Canyon a final standard contract for execution unless and until Threemile Canyon yields to PacifiCorp's demand for a price adjustment—which is itself a *prima facie* violation of Order 05-584. Again, that is precisely why the LEO should exist as soon as the QF has tendered to the purchasing utility a complete application for a standard contract, and should not leave the QF dependent upon utility action.

Taking a step back from the legal arguments, the practical reality is that Threemile Canyon chose to invest millions of dollars in Oregon to develop the Facility. This financial decision was made in direct reliance on the Commission's existing QF contracting policies as established in Order 05-584. Specifically, Threemile Canyon relied on its right to execute a standard contract without being forced to negotiate any project-specific price adjustments. Threemile Canyon was fully committed to selling its Facility output to PacifiCorp under the standard contract rates and terms. PacifiCorp frustrated these expectations by knowingly and willfully violating Order 05-584. The complaint proceeding initiated by Threemile Canyon two years ago to address this matter still has not been resolved.

If Threemile Canyon had known back in 2008 that PacifiCorp would simply refuse to tender the standard contract, and then later ask the Commission to retroactively change the applicable rules, then Threemile Canyon may not have invested in this State in this first place.

VII. MECHANICAL AVAILABILITY GUARANTEE

As explained in Threemile Canyon's prehearing brief, the concept of a mechanical availability guarantee is out-of-date given the change in compensation schemes over time. Threemile Canyon/Harvey 200, p. 21. All pricing under PacifiCorp's Schedule 37, for example, is paid based on actual energy production and not capacity. *Id.* This means that all QFs already have the financial incentive to maximize production and unit availability. Piling still more financial or contract penalties onto the QF under circumstances outside of its reasonable control would serve no purpose. Thus, no additional contract provisions are necessary to either increase mechanical availability or otherwise change QF behavior. *Id.*

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VIII. CONCLUSION

The Commission should once again reject PacifiCorp's attempt to require small QFs to negotiate individualized price adjustments. As explained above, PacifiCorp previously raised the same argument in UM 1129. The Commission rejected the argument. The Commission's current QF contracting policies expressly prohibit purchasing utilities from requiring small QFs to negotiate price adjustments. At cross-examination, PacifiCorp conceded that it knew this policy specifically prohibited price adjustments for third-party transmission costs. Nevertheless, PacifiCorp knowingly and willfully violated this policy by demanding that Threemile Canyon acquiesce to a price adjustment for third-party transmission costs. PacifiCorp is now asking the Commission to retroactively reverse the policy decision made in Order 05-584 so as to escape accountability for its actions. The only appropriate answer the Commission can give to PacifiCorp on this question is an unqualified "No."

DATED this 17th day of June, 2013.

/s/ Richard Lorenz
Richard Lorenz, OSB No. 003086
Cable Huston Benedict
Haagensen & Lloyd LLP
1001 SW 5th Avenue, Suite 2000
Portland, OR 97204
(503) 224-3092 (Telephone)
(503) 224-3176 (Fax)
rlorenz@cablehuston.com

Of Attorneys for the
Threemile Canyon Wind I, LLC

4829-2948-2260, v. 1

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **THREEMILE CANYON WIND I, LLC's POST-HEARING BRIEF** via electronic mail and, where paper service is not waived, via postage-paid first class mail upon the following parties of record:

PACIFIC POWER
Mary Wiencke
R. Bryce Dalley
825 NE Multnomah St., Ste 1800
Portland, OR 97232-2149
Mary.wiencke@pacificorp.com
Bryce.dalley@pacificorp.com

PUBLIC UTILITY COMMISSION OF OREGON
Brittany Andrus
Adam Bless
P.O. Box 2148
Salem, OR 97308-2148
Brittany.andrus@state.or.us
Adam.bless@state.or.us

PORTLAND GENERAL ELECTRIC
J. Richard George
Jay Tinker
121 SW Salmon ST - 1WTC1301
Portland OR 97204
richard.george@pgn.com
Pge.opuc.filings@pgn.com

PACIFICORP, DBA PACIFIC POWER
Oregon Dockets
825 NE Multnomah St., Ste. 2000
Portland, OR 97232
oregondockets@pacificorp.com

LOYD FERY
11022 Rainwater Lane SE
Aumsville OR 97325
dlchain@wvi.com

THOMAS H. NELSON
PO Box 1211
Welches OR 97067-1211
nelson@thnelson.com

OREGON DEPT OF ENERGY
Matt Krumenauer
Kacia Brockman
625 Marion ST NE
Salem OR 97301
matt.krumenauer@state.or.us
Kacia.brockman@state.or.us

ANNALA, CAREY, BAKER, PC
Will K. Carey
PO Box 325
Hood River OR 97031
wcarey@hoodriverattorneys.com

ASSOCIATION OF OREGON COUNTIES
Mike McArthur
PO BOX 12729
Salem OR 97309
mmcarthur@aocweb.org

CITIZENS UTILITY BOARD OF OREGON
OPUC Dockets
Robert Jenks
G. Catriona McCracken
610 SW Broadway, STE 400
Portland OR 97205
dockets@oregoncub.org; bob@oregoncub.org
catriona@oregoncub.org

CITY OF PORTLAND-
PLANNING AND SUSTAINABILITY
David Tooze
1900 SW 4TH STE 7100
Portland OR 97201
david.tooze@portlandoregon.gov

CLEANTECH LAW PARTNERS , PC
Diane Henkels
6228 SW Hood
Portland OR 97239
dhenkels@cleantechlawpartners.com

EXELON BUSINESS SERVICES
John Harvey
4601 Westown Parkway, Suite 300
West Des Moines, IA 50266
John.harvey@exeloncorp.com

Cynthia Fonner Brady
Assistant General Counsel
4300 Winfield Road
Warrenville, IL 60555
Cynthia.Brady@constellation.com

DAVISON VAN CLEVE
Irion A Sanger
Melinda Davison
S. Bradley VanCleve
333 SW Taylor - Ste 400
Portland OR 97204
ias@dvclaw.com;
mjd@dvclaw.com
bvc@dvclaw.com

ENERGY TRUST OF OREGON
Elaine Prause
John Volkman
421 SW Oak ST #300
Portland OR 97204-1817
elaine.prause@energytrust.org
john.volkman@energytrust.org

ESLER STEPHENS & BUCKLEY
John W Stephens
888 SW Fifth AVE Ste 700
Portland OR 97204-2021
stephens@eslerstephens.com;
mec@eslerstephens.com

IDAHO POWER COMPANY
Donovan E Walker
Julia Hilton
Regulatory Dockets
PO Box 70
Boise, ID 83707-0070
jhilton@idahopower.com
dockets@idahopower.com
dwalker@idahopower.com

SMALL BUSINESS UTILITY ASSOCIATES
James Birkelund
548 Market ST Ste 11200
San Francisco CA 94104
james@utilityadvocates.org

LOVINGER KAUFMANN LLP
Kenneth Kaufmann
Jeffrey S. Lovinger
825 NE Multnomah Ste. 925
Portland OR 97232-2150
kaufmann@lklaw.com
lovinger@lklaw.com

MCDOWELL RACKNER & GIBSON PC
Lisa F. Rackner
419 SW 11th Ave., Ste. 400
Portland OR 97205
dockets@mcd-law.com

NORTHWEST ENERGY SYSTEMS COMPANY LLC
Daren Anderson
1800 NE 8TH ST., Ste 320
Bellevue WA 98004-1600
da@thenescogroup.com

ONE ENERGY RENEWABLES
Bill Eddie
206 NE 28TH AVE
Portland OR 97232
bill@oneenergyrenewables.com

OREGON DEPARTMENT OF JUSTICE
Renee M. France
Natural Resources Section
1162 Court ST NE
Salem OR 97301-4096
renee.m.france@doj.state.or.us

OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION
Glenn Montgomery
PO BOX 14927
Portland OR 97293
glenn@oseia.org

OREGONIANS FOR RENEWABLE ENERGY POLICY
Kathleen Newman
1553 NE Greensword DR
Hillsboro OR 97214
k.a.newman@frontier.com
kathleenhoipl@frontier.com

OREGONIANS FOR RENEWABLE ENERGY POLICY
Mark Pete Pengilly
PO BOX 10221
Portland OR 97296
mpengilly@gmail.com

REGULATORY & COGENERATION SERVICES, INC
Donald W. Schoenbeck
900 Washington ST Ste 780
Vancouver WA 98660-3455
dws@r-c-s-inc.com

STOLL BERNE
David A Lokting
209 SW Oak Street, Suite 500
Portland OR 97204
dlokting@stollberne.com

PUBLIC UTILITY COMMISSION STAFF--DEPT OF JUSTICE
Stephanie S. Andrus
Business Activities Section
1162 Court ST NE
Salem OR 97301-4096
stephanie.andrus@state.or.us

RENEWABLE ENERGY COALITION
John Lowe
12050 SW Tremont ST
Portland OR 97225-5430
jravenesanmarcos@yahoo.com

RENEWABLE NORTHWEST PROJ
RNP Dockets
Megan Walseth Decker
421 SW 6TH AVE., Ste. 1125
Portland OR 97204
dockets@rnp.org
megan@rnp.org

RICHARDSON AND O'LEARY
Gregory M. Adams
Peter J. Richardson
PO BOX 7218
Boise ID 83702
greg@richardsonandoleary.com
peter@richardsonandoleary.com

ROUSH HYDRO INC
Toni Roush
366 E Water
Stayton OR 97383
tmroush@wvi.com

Dated in Portland, Oregon, this 17th day of June, 2013.

/s/ Richard Lorenz
Richard Lorenz, OSB No. 003086
Cable Huston Benedict Haagensen & Lloyd LLP
1001 SW Fifth Avenue, Suite 2000
Portland, OR 97204-1136
(503) 224-3092 (Telephone)
(503) 224-3176 (Fax)
rlorenz@cablehuston.com

Of Attorneys for the
Threemile Canyon Wind I, LLC

4843-4440-3476, v. 1