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May 20, 2013

VIA ELECTRONIC FILING & US MAIL

Oregon Public Utility Commission
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Re: In the Matter of Oregon Public Utility Commission of Oregon,
Investigation into Qualifying Facility Contracting and Pricing.
Docket No. UM-1610

Dear Filing Center:

Enclosed please find an original and five copies of Threemile Canyon Wind I, LLC's Prehearing Memorandum in the above-referenced docket.

Thank you for your assistance with this matter. Should you have any questions, please feel free to contact me.

Very truly yours,

/s/ Richard Lorenz

Richard Lorenz

RGL:tjb
Enclosures
Cc: UM-1610 Service List

4847-9935-4388, 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 PREHEARING MEMORANDUM

May 20, 2013

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I. INTRODUCTION

Aside from the issues list prepared for this proceeding, there is a threshold legal question that the Commission must address. The question is whether any of the policy decisions that the Commission makes in this investigation will apply retroactively. More specifically, does the Commission intend through this investigation to alter the legal rights and obligation of affected parties as they existed under the Commission's rules as far back as 2009? As explained more fully below, that is precisely what PacifiCorp is asking the Commission to do with respect to the allocation of third-party transmission costs.

Pursuant to the scheduling order issued on May 13, 2013, Threemile Canyon Wind I, LLC ("Threemile Canyon") respectfully submits this Prehearing Memorandum summarizing Threemile Canyon's position on four key issues:

- The outcome of this investigation should be prospective only, and must not retroactively alter any party's rights or obligations as they existed prior to this proceeding.
- It would be both unprecedented and contrary to federal law to require QFs making direct sales to host utilities to pay the host utility's transmission costs incurred to move QF output from one part of the host utility's retail distribution system to another.
- PacifiCorp's refusal to offer Threemile Canyon a long-term, standard contract since 2009 is precisely why the Commission must not leave the creation of a Legally Enforceable Obligation ("LEO") solely or even partially in anyone's hands other than the Qualifying Facility ("QF"), especially the purchasing utility.
- The concept of a Mechanical Availability Guarantee ("MAG") is no longer necessary under output-based power sales agreements because the seller already has a very significant financial incentive to maximize production and minimize maintenance outages.

II. BACKGROUND FACTS

Threemile Canyon developed a small wind generating facility in Morrow County, Oregon that has a nameplate capacity of approximately 9.9MW ("Facility").[1] The Facility is located in, and is directly interconnected with, PacifiCorp's retail service territory. The Facility is certified as a QF for purposes of the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), as amended. 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 the eligibility criteria for a long-term, standard contract back in 2009.[2] Threemile Canyon sought no contract amendments or other concessions from PacifiCorp, and committed to accepting the standard contract in precisely the form approved by this Commission in UM 1129.

As a condition of tendering the standard contract, however, PacifiCorp demanded that Threemile Canyon acquiesce to a unilateral price adjustment. PacifiCorp demanded that Threemile Canyon pay for PacifiCorp's third-party transmission cost to move the output of the Facility from one part of PacifiCorp's retail distribution system to another, even though Threemile Canyon was making a direct (not indirect) sale to PacifiCorp.[3] Threemaile Cnayon

[1] Background information concerning Threemile Canyon's Facility is included in the Direct Testimony of John Harvey, filed on March 18, 2013, at pages 6-10. For reference, this shall be referred to herein as Harvey 100. The Reply Testimony of John Harvey filed by Threemile Canyon on April 29, 2013 shall be referred to herein as Harvey 200.

[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.

[3] PacifiCorp's Oregon service territory is not contiguous, but is made up of several small chunks that it refers to as "load pockets." The Facility is located in a load pocket with a demand that is highly variable by season. In the summer there is high power demand for irrigation—more than enough to absorb the Facility output, but in the winter demand in the load pocket is only about 2-3aMW. This means that during the winter months, some portion of the Facility output must be transmitted out of the load pocket to another PacifiCorp load pocket. It turns out that PacifiCorp does not have adequate transmission rights or facilities in its system to move this power, and it must

refused to accept this "price adjustment" because it is contrary to this Commissions standard contract rules. For nearly four years since the Facility achieved commercial operation, PacifiCorp has refused to offer Threemile Canyon a long-term, standard contract.

The Commission developed the current version of the standard contract in the UM 1129 proceeding. Harvey 200, pp. 15-16. In the context of that proceeding, PacifiCorp specifically asked the Commission for flexibility to impose "price adjustments" to the standard contract. *Id.* In its Order No. 05-584, this Commission squarely rejected PacifiCorp's request and denied PacifiCorp the flexibility to make any price adjustments to the standard contract. *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 address project-specific characteristics." *Id.* Under a plain reading of Order 05-584, PacifiCorp was clearly prohibited from demanding any price adjustment from Threemile Canyon.

Documents produced to Threemile Canyon in response to data requests in this proceeding confirm that PacifiCorp was well-aware of the fact that it may not make any "price adjustments" to the standard contract. In an email dated July 13, 2006, for example, PacifiCorp employee Bruce Griwsold relates his conversation with Lisa Schwartz of the Commission Staff specifically concerning price adjustments for third-party transmission costs. Mr. Griswold explains that Ms. Schwartz' "general view was that the prices for the standard QF could not be adjusted * * *." A copy of this email is attached as Exhibit A. In a subsequent email dated March 9, 2007 from Mr.

purchase firm transmission from the Bonneville Power Administration ("BPA"). PacifiCorp would like to recover the costs of the BPA firm transmission from Threemile Canyon.

Griswold to PacifiCorp employee Jim Portouw concerning Threemile Canyon, Mr. Griswold states that "there is a significant load pocket issue around these projects. *Oregon standard contracts do not provide for any curtailment rights in the PPA or price adjustments for transmission constraints* * * *." (Emphasis added). A copy of this email is attached as Exhibit B. These documents demonstrate that PacifiCorp *knowingly* and *willfully* violated PURPA and Order 05-584 by demanding a price adjustment from Threemile Canyon for third-party transmission costs (even though Threemile Canyon, as a QF, had committed to making a direct sale to PacifiCorp, its host utility).

III. PROCEDURAL HISTORY

Threemile Canyon did not wish to bring its dispute with PacifiCorp into this proceeding. On July 1, 2011, Threemile Canyon filed a complaint with the Commission alleging that PacifiCorp violated PURPA and Order 05-584. This complaint was docketed as UM 1546. The docket was stayed shortly after it was opened to allow the Commission to complete a pending investigation into PacifiCorp's QF contracts and rate schedules. 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 sought to have the ALJ's decision 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.

IV. THE COMMISSION SHOULD CLARIFY THAT ITS DETERMINATIONS IN THIS PROCEEDING ARE PROSPECTIVE ONLY

A. PacifiCorp seeks a retroactive policy change.

As explained above, Order 05-584 prohibits purchasing utilities from imposing any "price adjustments" on the standard contract. Harvey 200, pp. 15-16. 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. PacifiCorp is well aware that the Commission's current rules preclude PacifiCorp from recovering third-party transmission costs from Threemile Canyon. *See* Exhibits A and B. PacifiCorp has therefore asked the Commission to change the current policy.

Putting aside the merits of PacifiCorp's proposed policy change, which Threemile Canyon addresses below, there are two threshold problems with PacifiCorp's proposal. First, PacifiCorp clearly intends to recover third-party transmission costs from Threemile Canyon even though Threemile Canyon is selling directly to PacifiCorp. PacifiCorp's Direct Testimony is aimed directly at the Threemile Canyon Facility. Griswold 200, pp. 13-15. Further, PacifiCorp's testimony conveniently ignores the fact that Threemile Canyon was entitled to the standard contract in 2009, and that PacifiCorp was prohibited from imposing any price adjustment in 2009. In short, PacifiCorp is asking the Commission to ignore both the fact of Threemile Canyon's direct sale to PacifiCorp and Threemile Canyon's pre-existing commitment to PacifiCorp in accordance with the standard contract's prices and terms. Thus, the result that PacifiCorp seeks in this proceeding is to retroactively strip Threemile Canyon of its right to a standard contract without any price adjustment pursuant to Order 05-584.

B. The outcome of this investigation shall be prospective only.

The Commission should reject PacifiCorp's invitation to retroactively apply any policy decisions that the Commission reaches in this investigation. It is a generally accepted ratemaking principle that changes in any rates offered, paid, demanded or received by a utility may be made only on a prospective basis. 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.*

The policy considerations underpinning the rule against retroactive ratemaking apply with equal force in the context of QF contracts. In fact, QF rates, terms and conditions are typically afforded even greater protection under the law than normal utility rates. *See generally Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co.,* 168 Or. App. 466, 482 (2000) (Holding that PURPA prohibits regulators from exercising any kind "of post-contractual, utility-type price modification authority.") Once they have been established, the rates, terms and conditions applicable to a specific QF are not even subject to adjustment on a *prospective* basis. *Id.* To take an extreme example, this Commission has determined that the standard contract rates, terms and conditions will not terminate *even if PURPA were repealed in its entirety.* Order 05-584, P. 57.[4] QFs and utilities alike must be able to rely on the existing rates, terms and conditions. Allowing retroactive amendments to QF contract terms would introduce intolerable uncertainty to the life of the QF project, thus raising a significant barrier to QF development.

This principle is illustrated by Threemile Canyon's experience in Oregon. In late 2008, Threemile Canyon committed to investing millions of dollars to develop the Facility. This financial commitment was made in reliance on the Commission's existing QF policies as established in UM-1129. Specifically, Threemile Canyon relied on its right to execute a standard contract without any price adjustments. PacifiCorp frustrated these expectations by refusing to offer the standard contract without a price adjustment, in violation of Order 05-584. If Threemile Canyon had known that PacifiCorp would simply refuse to tender the standard

[4] The Commission further noted that "[w]e cannot, however, predict the provisions of future legislation, although the repeal of PURPA on a retroactive basis might be legally barred." *Id.*

contract, and then later ask the Commission to retroactively change the rules, then Threemile Canyon may not have invested in this State in this first place.

C. The Commission's Order 05-584 is lawful.

PacifiCorp knows that there is no reasonable basis for its refusal to comply with Order 05-584. PacifiCorp, therefore, collaterally attacks the validity of the Order itself. PacifiCorp argues that the Commission's Order 05-584 is unlawful to the extent that it precludes PacifiCorp from recovering third-party transmission costs from QFs. PacifiCorp/Griswold 400, p 12, 14-15. Specifically, PacifiCorp argues that Order 05-548 violates PURPA by forcing PacifiCorp to incur transmission costs that are above and beyond its avoided costs. *Id.* at 15. PacifiCorp's collateral attack on Order 05-584 is unpersuasive for a number of reasons.

First, PacifiCorp misrepresents the legal standard. PacifiCorp treats all third-party transmission costs as if they are identical. They are not. Under FERC regulations, as will be discussed in greater detail below, transmission costs incurred by a utility purchasing power from a QF that is not on its system are to be treated differently than when the sale from the QF is a direct (on-system) sale. When the sale is an indirect sale, third-party transmission costs are treated as interconnection costs. When the sale is a direct sale, however, the transmission costs incurred by the utility to deliver power to its retail customers are not interconnection costs and are not part of the utility's avoided costs.

Additionally, under Section 210(b) of PURPA, the Commission is prohibited from establishing a rate that the purchasing utility must pay to QFs for output that exceeds the purchasing utility's incremental cost for alternative electric energy. The focus of the rule is on the level of compensation paid to the QF for power. Third-party transmission costs are neither paid to the QF, nor are they compensation for power received. They are costs paid to a third-party (for example, BPA) and not to the QF. Thus, the rate paid by PacifiCorp to the QF does not change, regardless of whether or not PacifiCorp must purchase third-party transmission in order to move QF output from the point of delivery to its retail customers..

Furthermore, Section 210(b) speaks only to the rate the utility pays for power. It does not speak to any other costs incurred by the utility to deliver QF power to its retail ratepayers. Again, the third-party transmission charges at issue here are not incurred to deliver QF output from the generator to PacifiCorp. They are incurred only after the PacifiCorp has already received the power, and for the sole purpose of allowing PacifiCorp to move the QF power from one portion of its retail distribution system to another. On its face, therefore, Section 210(b) of PURPA is inapposite here.

Even if PacifiCorp's argument could be squared with Section 210(b) of PURPA, PacifiCorp's basic premise has already been rejected by the Federal Energy Regulatory Commission ("FERC"). PacifiCorp's argument is that it is legally entitled under PURPA to impose unilateral, individualized price adjustments to the standard contract terms in order to recover any QF-related costs above its avoided costs. PacifiCorp is essentially arguing that PURPA requires individualized rates even for small QFs eligible for the standard contract. But it is the very nature of standard contracts that certain QFs will impose costs on the utility that are greater than the avoided cost rate. In Order No. 69, FERC recognized this inevitable outcome and expressly rejected the very argument PacifiCorp is making here. "If the Commission 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."[5]

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

This matter is well-settled. There is nothing unlawful about the Commission's current policy against unilateral price adjustments to standard contracts. The Commission reached exactly the right conclusion in Order 05-584, and there is no reason to retroactively abandon that policy decision.

V. ISSUE 4(B): HOST UTILITIES MAY NOT CHARGE FOR THIRD-PARTY TRANSMISSION COSTS WHEN THE SALE IS A DIRECT SALE

Threemile Canyon was entitled to a long-term, standard contract under the Commission's rules as they existed in 2009. Thus, any prospective policy changes through this proceeding should have no application to Threemile Canyon. Even with respect to future QFs, however, PacifiCorp's proposal to recover third-party transmission costs is unprecedented and would violate FERC's regulations.

A. Federal law prohibits utilities from recovering retail delivery costs from QFs.

PacifiCorp wishes to recover from Threemile Canyon and other QFs transmission costs incurred by PacifiCorp to deliver power to PacifiCorp's retail ratepayers. These costs are incurred *after* PacifiCorp has received the power from the QF at the designated point of delivery. Attempting to hold the QF responsible for these costs flies in the face of the utility's and the QF's respective legal obligations under PURPA.

It is the QF's responsibility under PURPA to deliver its output to the electrical system of purchasing utility. This would include, for example, transmission costs (if any) incurred by the QF to get the power from the generating facility to the point of delivery, as well as costs to interconnect with the purchasing utility. In this case, Threemile Canyon is actually located directly in PacifiCorp's service territory. Threemile Canyon has paid all costs to interconnect the Facility and to deliver the output to the point of delivery. Threemile Canyon has no responsibility under PURPA for any transmission or distribution costs incurred by PacifiCorp beyond the point of delivery.

Upon receiving and purchasing QF power at the designated point of delivery, it is the 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). An excerpt of the relevant portion of this FERC Order is attached hereto as Exhibit C. Likewise, PacifiCorp is obligated under PURPA to purchase any Facility output that is delivered to PacifiCorp's electric system. It is PacifiCorp's sole responsibility under PURPA to manage that energy and deliver it to its load. *See* PacifiCorp/ Griswold 400, p. 15 ("[T]he utility is obligated to purchase QF output and deliver it to load. The Company does not dispute this obligation.")

B. FERC regulations only allow utilities to recover transmission costs from QFs in one very narrow situation.

The general rule is that utilities shall purchase QF energy and deliver it to load without recovering from the QF any costs incurred by the utility after the point of delivery. The only exception to this general rule is set forth in 18 CFR §292.303(d). This rule 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. Harvey 100, pp 21-27. In such case, the host utility may recover its wheeling charges from the QF and not from the purchasing utility.

The narrow exception carved out in 18 CFR § 292.303(d) clearly 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 using the third-party transmission services not 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 QFs.

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 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 transmission costs from QFs, no special exceptions allocating transmission costs to QFs would be necessary. Under Oregon law, it is improper for this Commission to interpret the law so as to render certain 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.

C. PURPA makes no exception for transmission service to or from a utility's own "load pockets."

Given that the default rule under PURPA is that utilities may not recover downstream transmission costs from QFs, PacifiCorp is trying to read into PURPA a special exception for "load pockets." Nothing in PURPA allows a purchasing utility to recover from QFs transmission costs that it incurs to move QF power that it has received to or from the purchasing utility's "load pockets." Likewise, there is nothing PURPA that precludes or restricts in any way the QF's right to deliver output to a "load pocket." In fact, FERC does not even recognize PacifiCorp's use of the term "load pocket" under these circumstances. FERC understands the term "load pocket" to mean "an area that is separated electrically from the rest of the grid by one or more transmission constraints that limit the amount of energy that can be imported into the area."[6] PacifiCorp, on the other hand, uses the term "load pocket" to mean a portion of its distribution system that is not physically connected by PacifiCorp's facilities to other portions of PacifiCorp's distribution system. The Commission should reject PacifiCorp's attempt to read into PURPA a "load pocket" exception that does not exist. *See* ORS 174.010.

D. PacifiCorp's proposal is not only unlawful, but unprecedented.

As far as Threemile Canyon is aware, the policy choice that PacifiCorp is asking the Commission to make with respect to third-party transmission costs is unprecedented. In its opening and reply testimony, and in the course of a four-year dispute with Threemile Canyon, PacifiCorp has not identified even one precedent in FERC's decisions or its regulations that supports the proposition that a purchasing utility may charge third-party transmission charges to a QF. Likewise, PacifiCorp has not identified even one other state utility commission in the entire country that allows purchasing utilities to impose third-party transmission charges on standard QF contracts. The fact that PacifiCorp cannot find even one example of FERC or another state utility commission accepting PacifiCorp's proposed interpretation of PURPA should give this Commission pause.

E. PacifiCorp's ratepayers already pay massive third-party transmission costs.

[6] See "Order On Rehearing, Clarification, And Compliance Filings, Establishing Further Hearing Procedures, And Consolidating Proceedings," (Issued July 5, 2005) 112 FERC ¶ 61,031, p. 2.

Finally, PacifiCorp argues that it would be somehow unfair for ratepayers to incur third-party transmission costs with respect to QF power in load pockets. PacifiCorp/ Griswold 400, p 15. But PacifiCorp's ratepayers *already* incur significant third party transmission costs with respect to non-QF power. Harvey 100, pp. 28-30. PacifiCorp's accounting records show that PacifiCorp spends a massive amount of money on third-party transmission to move generation to load. *Id.* This specifically includes third-party transmission costs to move the output of PacifiCorp-owned wind generation from the Leaning Juniper and Goodnoe Hills projects to PacifiCorp's load centers. Harvey 200, p 15. PacifiCorp recovers these third-party transmission costs from its retail ratepayers. *Id.* There is nothing "unfair" about PacifiCorp's ratepayers paying the same third-party transmission costs for QF generation that they otherwise pay for non-QF generation, including PacifiCorp's own wind projects.

VI. ISSUE 6(B): CREATION OF A 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. 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's 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 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. Harvey 100, p. 36.

The concern of a utility withholding a standard contract may seem hypothetical, but it is precisely why Threemile Canyon is involved in this proceeding. Harvey 100, p. 37-38. As far back as 2009, Threemile Canyon had legal right to execute a standard contract, and PacifiCorp had a legal obligation to deliver a standard contract for execution. For nearly four years, however, PacifiCorp has failed to comply with its legal obligation and Threemile Canyon has been deprived of its legal right. PacifiCorp refuses to offer Threemile Canyon a final standard contract for execution unless and until Threemile Canyon yields to PacifiCorp's demand for an unlawful price adjustment (in violation of Order 05-584). That is 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.

VII. **MAG IS AN OUTDATED CONCEPT THAT IS NO LONGER NECESSARY**

Standard contracts no longer need to address mechanical availability. It is an out-of-date concept, given the change in compensation schemes over time. 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 even a diligent QF that experiences a forced outage, despite its full compliance with all maintenance requirements, does not get paid anything by the purchasing utility during the forced outage. In such case, the QF is already being financially penalized, in a sense, at a rate equal to the utility's avoided cost. *Id.* at 23-24. These forgone revenues give the QF every necessary incentive to restore the facility to operability as soon as practicable. Piling still more financial or contract penalties onto the QF under these circumstances would serve no purpose and would be merely punitive. Thus, QFs already have the direct economic incentive to maximize the mechanical availability of their facilities, and no additional penalties or remedies are likely to increase mechanical availability or otherwise change QF behavior. *Id.*

/ / /

VIII CONCLUSION

This Prehearing Memorandum summarizes Threemile Canyon's position on four key issues:

- The outcome of this investigation should be prospective only, and should not retroactively alter any party's rights or obligations as they existed prior to this proceeding.
- It would be both unprecedented and contrary to federal law to require QFs to pay a purchasing utility's transmission costs incurred to move QF output from one part of the utility's retail distribution system to another.
- PacifiCorp's refusal to offer Threemile Canyon a long-term, standard contract since 2009 is precisely why the Commission should not leave the creation of a LEO in the sole discretion of the purchasing utility.
- The concept of a MAG is no longer necessary under output-based power sales agreements because the seller already has a financial incentive to maximize production and minimize maintenance outages.

DATED this 20th day of May, 2013.

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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 PREHEARING MEMORANDUM** via electronic mail and, where paper service is not waived, via postage-paid first class mail upon the following parties of record:

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