

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1129

In the Matter of	)	
	)	
PUBLIC UTILITY COMMISSION OF	)	
OREGON	)	RULING
	)	
Staff's Investigation Relating to Electric	)	
Utility Purchases from Qualifying Facilities.	)	

DISPOSITION: ISSUES LIST AND SCHEDULE FOR PHASE II  
(TRACK II) ISSUES MODIFIED; PARTIES  
DIRECTED TO SUBMIT PREHEARING BRIEFS ON  
JURISDICTIONAL ISSUES

**BACKGROUND**

In a ruling dated February 7, 2006, I directed parties to work together to submit a proposed issues list regarding power purchase agreements for off-system qualifying facilities (QF) projects under 10 MW that could be addressed simultaneously with the second track of the second phase of the above-captioned docket (Track II). If parties did not agree to a list of issues, parties were free to submit separate, proposed issues lists. Anticipating that questions regarding the Commission's jurisdiction to address issues related to the interconnection of a utility and an off-system QF might arise, I asked parties to consider the Commission's jurisdiction and provide any explanation necessary to justify why the Commission could address a particular issue.

On February 23, 2006, Sherman County Court and J. R. Simplot Company (Sherman County/Simplot) filed a "Motion to Accept Modified Issues List and Procedural Schedule" (Motion). The Motion indicated that all active parties, other than PacifiCorp, Idaho Power Company and Portland General Electric Company (PGE), agree to a proposed issues list that would allow issues regarding off-system QF contracts to be addressed in Track II. The proposed issues list contained one broad issue, with six sub-issues. Each sub-issue poses two questions--one being substantive and the other being jurisdictional.

On February 23, 2006, PacifiCorp submitted a "Response to Sherman County/Simplot's Motion to Accept Modified Issues List" (Response). As represented

by PacifiCorp, PGE joins the Response. The Response indicated a limited exception to the proposed issues list, as follows:

Rather than specifying numerous jurisdictional issues which for the most part appear to be stated in a manner reflecting Sherman County/Simplot's view that certain matters in PacifiCorp's proposed off-system PPA [power purchase agreement] are FERC jurisdictional, there is only one jurisdictional issue that needs to be addressed: Does an off-system QF's use of FERC-jurisdictional facilities to transmit its energy and capacity to the purchasing utility deprive the Commission of its jurisdiction to review and approve or disapprove requirements set forth in the terms and conditions of the power purchase agreement under which a utility will make purchases from a QF pursuant to PURPA?

On March 2, 2006, Sherman County/Simplot filed an answer to PacifiCorp's response (Answer). The Answer complains that PacifiCorp's statement of jurisdictional issues is overly broad and "fatally ambiguous." The Answer also expresses concerns that PacifiCorp's statement of jurisdictional issues would require the Commission to commit an *ultra vires* act.

## **RULING**

This second phase of the above-captioned docket has two purposes: 1) to address the compliance of standard QF contracts filed pursuant to Order No. 05-584 (Track I compliance issues); and 2) to address the substance of unexamined or partially investigated issues related to the development QF contracts (Track II).<sup>1</sup> Although PacifiCorp filed a standard contract for off-system QFs during the compliance track of this second phase, the contract apparently contains terms involving issues not already addressed by the Commission. Consequently, it was inappropriate to address the compliance of such terms; therefore, parties were directed to propose related issues that could be appropriately addressed in Track II.

In Track II, however, it is inappropriate to exclusively focus on the reasonableness of proposed contractual terms involving policy or procedural matters not previously addressed by the Commission. The reasonableness of proposed terms, with regard to compliance with Commission directives, cannot be evaluated until the Commission has established underlying policy and procedure.<sup>2</sup> The Motion proposes

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<sup>1</sup> Originally, there were three tracks in this second phase of the above-captioned docket. As issues in the first track were resolved by agreement (See Order No. 05-1061), two tracks—one regarding compliance issues and another regarding unresolved issues—remained and have been referred to, for convenience, as Track I and Track II, respectively.

<sup>2</sup> At the end of Track II, when a Commission order has been issued, it will likely be necessary for utilities to file revised standard contracts for off-system QFs in order to comply with a Commission order. At that

substantive issues, however, exclusively in terms of whether specific provisions of off-system standard QF contracts filed by PacifiCorp and PGE,<sup>3</sup> involving matters yet unresolved by the Commission, are “reasonable.” Consequently, as worded, the proposed issues list is inappropriate. Nevertheless, I partially grant the Motion by adding issues to the existing Track II issues list in order to address off-system QF contracts. I have removed “Issue No. 12.0,” and rephrased and renumbered the other proposed issues, however, as stated below:

14. How shall the standard form contracts for off-system QFs of PacifiCorp and PGE address where title to the power changes hands? Development of terms for standard off-system QF contracts, and development of negotiation parameters and guidelines for nonstandard off-system QF contracts to address issues related to the transfer of title to off-system power. For example:
  - a. What metering provisions are appropriate to facilitate interconnection between a utility and an off-system QF?
  - b. What telemetry provisions are appropriate between a utility and an off-system QF?
  - c. What data exchange provisions are appropriate between a utility and an off-system QF?
  - d. What production balancing provisions are appropriate between a utility and an off-system QF?
  - e. May a utility require an off-system to use firm transmission for delivery of power? If so, what definition of “firm” transmission should be used?

I find it unnecessary to move Track I issues list No. 12. Instead, I have included some of its wording in the new Issue No. 14. With regard to existing Issue No. 3(b), the motion was not entirely clear as to how the issue should be properly addressed,<sup>4</sup> but I discern that the intent was to address Issue No. 3(b), to the extent that it needs to be addressed simultaneously with the new Issue No. 14. The motion is granted on this point.

With regard to the jurisdictional components of the proposed issues, I find it unnecessary to separately identify “jurisdictional issues.” Whether or not the Commission has the jurisdiction to make policy or procedural decisions with regard to a particular issue of policy or procedure is a legal question that should be addressed by

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time, Staff will be responsible for evaluating the compliance of any off-system standard QF contracts, and Staff or other interested parties may challenge a contract’s compliance.

<sup>3</sup> The Motion indicates that Idaho Power’s off-system standard QF contract should not be at issue in this track of Phase II.

<sup>4</sup> The motion appears to call for Issue No. 3(b) to be handled simultaneously with the new issues, but Exhibit A to the motion appears to indicate that the substance of Issue No. 3(b) is better addressed with regard to other issues, which presumably will be handled on the regular schedule.

legal argument in briefing, not by evidentiary testimony. I am also hesitant to limit the scope of legal argument, at this time. Consequently, parties should submit prehearing briefs, simultaneous with testimony, that address any jurisdictional questions that they believe need to be raised. I expect briefs and testimony to be complementary—in other words, I expect a particular party’s briefs to provide legal justification why the Commission has the jurisdiction to approve the policy and procedure with regard to off-system QFs that the party’s testimony advocates. The procedural schedule is modified accordingly, as further discussed below.

I adopt the following procedural schedule as proposed by the Motion, and modified herein:

<b>Track II – Phase II Issues</b>	
PGE files proposed standard contract for resolution of off-system standard contracts	February 27, 2006 <sup>5</sup>
Parties file direct testimony on all Phase II issues other than Issue No. 14 or Issue No. 3(b).	February 27, 2006 <sup>6</sup>
Settlement workshop	March 8, 2006 <sup>7</sup>
Parties file direct testimony on Phase II Issue No. 14 and Issue No. 3(b)	March 24, 2006
Parties file prehearing briefs on any jurisdictional matters related to Phase II Issue No. 14 and Issue No. 3(b)	March 24, 2006
Parties file rebuttal testimony on Phase II Issue No. 14 and Issue No. 3(b)	April 14, 2006
Parties file prehearing response briefs on any jurisdictional matters related to Phase II Issue No. 14 and Issue No. 3(b)	April 14, 2006
Hearing on all Phase II issues.	May 2–3, 2006 (Details TBD)
Briefing	TBD

All filing dates are considered “in hand.” A new listing of all issues for Track II is attached as Appendix A, for the convenience of parties.

Dated this 3<sup>rd</sup> day of March, 2006, at Salem, Oregon.

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**Traci A. G. Kirkpatrick**  
Administrative Law Judge

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<sup>5</sup> Due date has passed.

<sup>6</sup> Due date has passed.

<sup>7</sup> This is not an official procedural date. Parties may cancel, or change the date of a settlement workshop without notification to, or approval from, the Commission.

## APPENDIX A:

### UM 1129 PHASE II ADOPTED ISSUES LIST

1. Development of negotiation parameters and guidelines for nonstandard QF contracts. For example:
  - a. What contract length should Qualifying Facilities larger than 10 MW be entitled to? [Order No. 05-584 at 17]
  - b. How should QF power supply commitments differentiate between “as available” and “legally enforceable obligations” for delivery of energy and capacity? [PGE]
  - c. How should “firm” or “non-firm” supply commitments be defined and differentiated through contractual default and damages provisions? [PGE]
  - d. How should avoided costs be adjusted for factors, such as those described in 18 CFR § 292.304, for a Qualifying Facility’s specific power supply attributes and commitments? [PGE]
  - e. Regarding PacifiCorp’s Schedule 38 for qualifying facilities larger than 10 MW, are the procedures for negotiating avoided costs, schedules for negotiations, and the information to be exchanged by PacifiCorp and the Qualifying Facility reasonable? [ICNU]
  - f. Can the utilities adjust the avoided cost calculations for Qualifying Facilities over 10 MW based on factors that have not been approved by the Oregon Public Utility Commission? [ICNU]
2. In the event of the inability of a QF to establish creditworthiness, determination of an appropriate amount of default security to be required.\*
3. Further exploration of how the calculation of avoided costs should reflect the nature and quality of QF energy. Specifically:
  - a. How should firm vs. non-firm commitments and integration of intermittent resources affect the calculation of avoided costs?
  - b. Costs and contractual provisions necessary to address purchases from QF projects that are located outside of the utility’s control area.
4. Further exploration of a Mechanical Availability Guarantee (MAG). For example, are avoided cost prices affected by a Mechanical Availability Guarantee?
5. Further exploration of market pricing options and alternatives to using nameplate capacity to determine the size of a QF project for standard contract eligibility purposes, including:

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\* Staff proposes to address issues 2 and 6 on the same schedule as the Phase I Compliance investigation. Therefore, staff did not include these items in its proposed consolidated list of issues for that investigation.

- a. Should PacifiCorp offer a market pricing option?
  - b. Provide clear definition of “nameplate capacity” if that is retained as basis for defining eligibility for standard contracts and avoided cost rates.
6. Cap on amount of default losses that can be recouped, pursuant to future QF contract payment reductions.
7. Liability insurance for QFs with a design capacity at or under 200 kW.
8. Negotiation parameters and guidelines for “simultaneous sale and purchase” QF contract.
9. Negotiating “net output sales” for non-standard contracts.
10. Further exploration of Staff’s role in the informal dispute resolution of QF contract disputes. Related to that issue, what is the role of the Commission in dispute resolution during contract negotiations and during the term of the power purchase agreement?
11. Should competitive bidding be used to set pricing for Qualifying Facilities greater than a certain size (e.g., larger than 100 MW) if the utility has recently completed an RFP, or a bidding process is in progress or imminent? If so, how?
12. Do provisions of the Energy Policy Act of 2005 affect the rules regarding new contracts with Qualifying Facilities? Specifically, should an Oregon electric company be required to enter into a new contract with a Qualifying Facility that is located in the service territory of an electric utility that has been relieved by FERC of a mandatory purchase obligation under PURPA?
13. Is it appropriate to consider the effect of debt imputation issues resulting from new accounting rules on avoided costs and if so, how?
14. How shall the standard form contracts for off-system QFs of PacifiCorp and PGE address where title to the power changes hands? Development of terms for standard off-system QF contracts, and development of negotiation parameters and guidelines for nonstandard off-system QF contracts to address issues related to the transfer of title to off-system power. For example:
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- d. What production balancing provisions are appropriate between a utility and an off-system QF?
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