

**BEFORE THE OREGON DEPARTMENT OF ENERGY**  
**December 11, 2007**

**POST-HEARING COMMENTS OF PACIFICORP TO ESTABLISH  
RENEWABLE ENERGY CERTIFICATE TRACKING AND REPORTING  
SYSTEM FOR THE OREGON RENEWABLE PORTFOLIO STANDARD**

Pursuant to the Oregon Department of Energy's (the "Department") Notice of Proposed Rulemaking to establish a renewable energy certificate tracking and reporting system for the Oregon Renewable Portfolio Standard ("RPS"), PacifiCorp respectfully submits these post-hearing comments recommending that the Department revise the proposed rules to provide that, consistent with Sections 2, 3 and 4 of Senate Bill 838 ("SB 838"), all Qualifying Electricity produced since January 1, 1995 by a Renewable Energy Source shall qualify toward the issuance of Renewable Energy Certificates ("RECs") under Section 14 of SB 838 (as these terms are defined therein), except to the extent that the renewable energy attributes have previously been used to satisfy the requirements of a renewable energy program in another state or have been included in an Oregon voluntary renewable energy tariff program.

PacifiCorp has reviewed the Department's revised proposed rules issued December 4, 2007, and participated in the Department's December 5, 2007 formal public hearing on the proposed rules. PacifiCorp reasserts its **strong opposition** to the Department's proposed date for REC certification of October 1, 2007 – modified from the original date of January 1, 2008 - including the Department's rationale for making such a revision. The Department's inclusion of October 1, 2007 is arbitrary, inconsistent with SB 838, undermines important consumer protection measures contained in the legislation, and penalizes the customers of pioneering utilities, such as PacifiCorp, that increased their use of renewable energy sources before the law required them to do so – none of which the Legislature intended when it crafted the bill. Additionally, the proposed October 1, 2007 date indicates disparate treatment between customers of consumer-owned utilities and investor-owned utilities by rewarding certain parties, but not others, for early action. SB 838 did not intend for such discriminatory treatment.

PacifiCorp submits that the Department was not delegated authority in SB 838 to determine what Qualifying Electricity production may be used to satisfy the requirements of the law. The delegation to the Department in Section 14 is very limited: "establish a system of renewable energy certificates that can be used ... to establish compliance with the **applicable** renewable portfolio standard." (emphasis supplied). SB 838 does not delegate any authority to the Department to promulgate those applicable standards; those standards are established in finite detail in SB 838. Indeed, it is significant that a statute such as SB 838 that delves into minute detail is completely silent on delegating any substantive rulemaking authority to the Department.

Assuming, arguendo, that the Department has been given authority to establish the date of production from Renewable Energy Sources that constitutes Qualifying

Electricity, such date requires a rational and nondiscriminatory basis. If the Department believes that the date that utilities could have reasonably anticipated the enactment of a renewable energy requirement in Oregon is the appropriate date, a date such as October 1, 2007 that is only relevant to some public power utilities is neither rational nor nondiscriminatory. A more rational alternative would be April 12, 2005, the date of the Oregon Renewable Energy Action Plan, which led to the development of SB 838.

## I. DISCUSSION

The inter-relationship and language of Sections 2, 3 and 4 of SB 838 clearly indicate that the Legislature intended that all Qualifying Electricity generated at Renewable Energy Sources since January 1, 1995 qualifies toward compliance with SB 838, including the issuance of RECs under Section 14. The legislative provisions reflect a careful attempt not to unreasonably harm the customers of utilities such as PacifiCorp that have been investing in renewable generation for a century. The Legislature understood that by selecting January 1, 1995 as the watershed date, PacifiCorp would not be able to count any of the production (ever) from its existing geothermal units and the vast majority of its production from its existing hydropower units. By selecting January 1, 1995 as the watershed date, however, PacifiCorp could count production from several Qualifying Facilities (from which state and federal law requires that it make purchases) and its Rock River (2001), Combine Hills (2003) and Wolverine Creek (2006) wind purchase agreements, as well as the Foote Creek (1999) and Leaning Juniper (2006) wind facilities that PacifiCorp owns. This reflects the Legislature's attempt not to penalize the customers of PacifiCorp for PacifiCorp's pioneering efforts "to increase their use of renewable energy sources" -- the stated intent of SB 838. *See* SB 838 preamble.

It is crucial to recognize that it is PacifiCorp's customers who will be harmed by the Department's interpretation of SB 838. By counting less production from existing Renewable Energy Sources as Qualifying Electricity, PacifiCorp will have fewer RECs to sell -- and the proceeds from such sales benefit customers, not shareholders. Customers will also have paid (through depreciation) for Renewable Energy Sources whose previous production will not have counted toward the requirements and whose remaining lives are shorter than if PacifiCorp had waited to add the Renewable Energy Sources until required by law. The incentive that the Department is creating for utilities by its interpretation is to delay investments in renewable energy (and, by extension, environmental improvements) until required by law. It is noteworthy that this regulatory incentive to inaction is precisely the inaction that utilities are often criticized for.

Section 2 of SB 838 defines Qualifying Electricity to include electricity generated (i.e., produced) from Renewable Energy Sources that meet the requirements of Section 3. Section 3 of SB 838, with enumerated exceptions, provides that electricity may be used to comply with SB 838 "if the electricity is generated by a facility that becomes operational on or after January 1, 1995." Neither these sections nor any other sections of SB 838 specify any date other than January 1, 1995, for electric production to begin counting as Qualifying Electricity.

Importantly, it is significant that of the eight subsections in Section 4 of SB 838, only subsection 4(4) contains restrictive dates and those are limited to the vintage of the Renewable Energy Source facilities or upgrades. Without the limitation of the January 1, 1995 date in Section 3, the types of Renewable Energy Sources identified in Section 4 and all of their associated production would qualify toward compliance. The selection of January 1, 1995 as a limit on the vintage of most Renewable Energy Sources and the first date for electric production to count as Qualifying Electricity demonstrates a thoughtful attempt to balance the encouragement of new Renewable Energy Sources while avoiding penalizing developers and utilities that were pioneers in the development of Renewable Energy Sources in the West.

It is also significant that the Department's interpretation of SB 838 nullifies an entire subsection of SB 838. The Department's interpretation makes subsection 4(4)(b) completely redundant with subsection 3(3). This is contrary to statutory rules of construction that all provisions are presumed to have meaning.

PacifiCorp was actively involved in the negotiations of SB 838 and advocated for the adoption of SB 838 before the Legislature. SB 838 was designed with a careful balance between promoting the development of new renewable resources for Oregon and doing so in a cost-effective manner. This balance is recognized throughout SB 838 in a number of consumer protection provisions. Among many consumer protection measures included in SB 838, REC banking is a key provision for pioneers in Renewable Energy Sources and Oregon consumers.

The Legislature clearly intended for banking to provide consumers with the benefits of early action to acquire renewable energy. The Legislature sought to avoid penalizing early action by designating the January 1, 1995 date in Section 3 for Qualifying Electricity produced by Renewable Energy Sources. The Legislature did not simply identify the vintage of Renewable Energy Sources that count toward meeting the RPS. Rather, Sections 2, 3 and 4 all specifically state that electricity "generated" (i.e., produced) from such sources "may be used to comply with a renewable portfolio standard." The link between Section 2 and 3, as explained in *PacifiCorp's Initial Comments* filed in this proceeding on November 29, 2007, represents the concept of REC banking in action – to avoid penalizing early adopters of renewable energy and their consumers by allowing the RECs associated with a qualifying facility to be used toward compliance.

Unfortunately, the Department's proposed rule makes substantive changes to SB 838's carefully crafted provisions by modifying the date for RECs eligible for compliance. This action has the effect of de-linking the Qualifying Electricity from the Renewable Energy Source that produced it, which was not contemplated by the Legislature and is inconsistent with the intent of SB 838. The Department's proposal effectively undermines an important customer protection by eliminating the ability to use RECs generated between January 1, 1995 and October 1, 2007 to comply with the RPS. In doing so, the Department's approach creates an arbitrary reduction in the amount of

RECs contemplated by the Legislature, which could increase the cost of compliance for utilities and their consumers beyond that anticipated by the Legislature.<sup>1</sup>

PacifiCorp understands that some parties have concerns that, if the January 1, 1995 date is used for determining Qualifying Electricity, fewer new Renewable Energy Sources may be developed. As a preliminary observation, PacifiCorp would note that the same concern could be raised regarding the vintage of Renewable Energy Sources that qualify under SB 838, but those same parties are noticeably silent on that issue. Moreover, the concern is not well founded as to PacifiCorp. First, between 1995 and 2003, there were a limited number of Oregon eligible resources from which to collect RECs. This is a limiting factor from the outset. Second, while PacifiCorp can not disclose exact numbers of RECs for commercial and proprietary purposes, the majority of PacifiCorp's RECs were produced after 2001, and mostly in the past two years, so the vintage of PacifiCorp RECs are quite recent. Third, PacifiCorp's analysis of available RECs produced on a system-wide basis shows that PacifiCorp cannot meet the first compliance target on banked RECs alone. Among other things, this is why PacifiCorp continues to aggressively procure cost-effective renewable energy to serve Oregon customers.<sup>2</sup> And finally, Section 17 of SB 838 contains a 20 percent cap on the use of unbundled RECs (including banked RECs) for compliance by large utilities, so these utilities can not comply with the RPS solely through these types of REC purchases.

The Department's proposed October 1, 2007 banking date clearly undermines and ignores the efforts undertaken by the largest utilities in the state—the investor-owned utilities of PacifiCorp and Portland General Electric—not only in response to the passage of SB 838, but in anticipation of a comprehensive renewable portfolio standard in Oregon, which resulted in SB 838. The Department's purported rationale for October 1, 2007, as noted in its December 4, 2007 *Summary of Changes between Drafts #1A and #2*, is “to align with start of BPA fiscal year and related early action taken by some utilities in direct response to passage of SB 838.” However, the BPA fiscal year is only relevant to the consumer-owned utilities and has no bearing on actions of the investor-owned utilities. As a result, the Department's proposed date would disenfranchise consumers of investor-owned utilities by ignoring the prudent actions undertaken on their behalf by investor-owned utilities and denying consumers the benefits of these early investments. The statute does not contemplate this type of disparate treatment.

The Oregon Department of Justice has interpreted SB 838 to provide that any date after January 1, 1995 can be implemented relating to REC certification and banking. However, any date that the Department adopts other than the January 1, 1995 date

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<sup>1</sup> It should also be noted that the Department's proposal also has the illogical effect of dictating that a utility in 2011 – the first year of compliance – will be able to use 2008 RECs for compliance, but not January 1, 2007 to September 30, 2007 RECs, despite the fact that the character of the RECs remains unchanged month-to-month, and that October 1, 2007 has no foundation in the statute.

<sup>2</sup> Notably, PacifiCorp – as a multi-jurisdictional utility – is also subject to RPS requirements in California and Washington, and has sponsored proposed requirements in Utah – all of which provide further incentives for PacifiCorp's aggressive acquisition of renewable energy throughout its six-state service territory.

provided by statute must have a rational and nondiscriminatory basis. Accordingly, if the Department determines that its criterion for establishing such date is the date upon which utilities might reasonably have begun taking actions to comply with a state renewable energy requirement, the more appropriate, nondiscriminatory date would be April 12, 2005, the date of the Renewable Energy Action Plan for the state. This initiated the Renewable Energy Working Group, which worked to create legislation that ultimately resulted in SB 838. From the beginning, PacifiCorp and other parties actively participated in the working group to craft the legislation, and also undertook efforts to begin preparing for eventual compliance with the potential renewable portfolio standard.

The April 12, 2005 date also avoids penalizing PacifiCorp and its customers for agreeing to and implementing a state renewable energy requirement that predates the passage of SB 838. As part of its acquisition by MidAmerican Energy Holdings Company, PacifiCorp began negotiating commitments in 2005 to “increase [its] use of renewable energy sources” (*See* SB 838 preamble) by 100 MW in 2006, 400 MW in 2007 and 1400 MW by 2015.<sup>3</sup> These commitments created a utility-specific renewable energy requirement and were approved by the Commission, giving them the force and effect of law. At a minimum, PacifiCorp’s customers should be credited with the renewable resources that were acquired in this timeframe toward compliance with the statewide RPS which followed shortly thereafter.

PacifiCorp’s proposal that a REC certification date reflect the early action of parties in crafting a framework for a renewable portfolio standard in the state is consistent with the December 10, 2007 comments submitted by the Citizens’ Utility Board of Oregon (“CUB”) on the draft rules, in which it states:

[T]here may be relatively recent investments that were made in anticipation of a renewable portfolio standard. An earlier date that encompasses these resources but does not go too far back in time would reduce costs for the customer and still preserve the integrity of the Act.

Finally, in comments presented at the Department’s December 5 formal public hearing, the Renewable Northwest Project (“RNP”) raises the prospect that WREGIS is limited in its capability of certifying RECs beyond “summer 2007” and that this alleged technological limitation is justification for rejecting the January 1, 1995 date embedded in SB 838. Simply stated, this is an inaccurate representation of the WREGIS Operating Rules and capabilities. The WREGIS Operating Rules at Section 12.9, Retroactive Creation of Certificates, on page 39, clearly provide that WREGIS is capable of certifying REC’s as necessary to comply with state RPS requirements. Specifically, Section 12.9 states:

Automatic creation of retroactive Certificates is not part of the standard functionality of WREGIS. However, a process exists that allows the creation of these Certificates if it is needed. WREGIS will not have a time

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<sup>3</sup> *See* Public Utility Commission of Oregon Order No. 06-082 (entered February 24, 2006), Docket UM 1209.

limit for which retroactive Certificate creation will be allowed. Retroactive Certificate creation will be allowed in WREGIS upon request from an Account Holder who has eligibility in a state or provincial program that requires retroactive Certificates to be created for a certain period of time. The length of time for which retroactive Certificate creation will be allowed will be dictated by the states or provinces that require it.

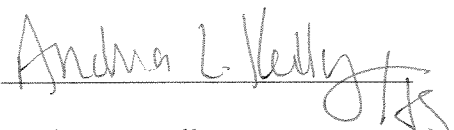
As discussed herein, Section 14 of SB 838 does not authorize the Department, or the regional tracking system (WREGIS), to ignore or modify the REC certification date embedded in SB 838. Accordingly, WREGIS Operating Rules should have no bearing on the Department's adoption of a REC certification date.

## II. CONCLUSION

PacifiCorp suggests the revised REC certification date of October 1, 2007 is arbitrary, discriminatory, not within the Department's authority, makes a unilateral interpretation of the bill that de-links Qualifying Electricity from the Renewable Energy Source that produced it, and undermines important consumer protection measures in SB 838. At a minimum, the Department's interpretation of SB 838 should recognize as Qualifying Electricity the production from Renewable Energy Sources commencing with the April 12, 2005 issuance of the Renewable Energy Action Plan.

For all of the foregoing reasons, PacifiCorp respectfully requests that the Department reconsider the proposed rules under SB 838 as described herein.

Respectfully submitted this December 11, 2007 at Salem, Oregon.

By 

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