PacifiCorp
825 NE Multnomah
Portland, OR 97232

May 11, 2012

***VIA ELECTRONIC SUBMISSION***

California Air Resources Board
1001 I Street
Sacramento, CA 95812

**Re: Comments of PacifiCorp on the May 4, 2012 Public Meeting to Discuss Compliance Requirements for First Deliverers of Electricity**

PacifiCorp respectfully submits these comments as requested during the May 4, 2012 Public Meeting to Discuss Compliance Requirements for First Deliverers of Electricity under the California Cap on Greenhouse Gas Emissions and Market Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols (hereinafter "Cap-and-Trade Program").

PacifiCorp is a regulated multi-jurisdictional retail provider (MJRP) serving 1.7 million retail electricity customers, in Utah, Oregon, Wyoming, Washington, Idaho and California. The company operates two balancing authority areas within those states. PacifiCorp owns, or has interests in, 78 thermal, hydroelectric, wind-powered and geothermal generating facilities, with a net owned capacity of 10,623 megawatts. PacifiCorp owns, or has interests in, electric transmission and distribution assets, and transmits electricity through approximately 16,200 miles of transmission lines and 62,800 miles of distribution lines. PacifiCorp also buys and sells electricity on the wholesale market with public and private utilities, energy marketing companies and incorporated municipalities as a result of excess electricity generation or other system balancing activities. In California, PacifiCorp serves approximately 46,500 customers in Del Norte, Modoc, Shasta and Siskiyou counties.

## Discussion

The primary purpose of these comments is to elucidate as clearly as possible that the Cap-and-Trade Program use of the last Purchasing-Selling Entity (PSE) on the North American Electric Reliability Corporation (NERC) e-tags to identify the first deliverer of electricity into California contravenes Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over interstate energy transactions. PacifiCorp explained at the workshop and in prior comments both how e-tags are not reliable for the task assigned to them and how the definition of electricity importer results in an overreach of California's jurisdiction. PacifiCorp now further posits that the appropriate forum for resolving the issues described below is a FERC proceeding. The comments also briefly address the issue of resource shuffling.

### *Definition of Electricity Importer and use of NERC e-tags*

The definition of Electricity Importer (95802(a)(87)) is the purchasing-selling entity (PSE) on the NERC e-tag listed on the last segment of the tag's physical path with the point of receipt located outside the state of California and the point of delivery located inside the state of California. This reliance on NERC e-Tags is problematic for a number of reasons.

Two sample e-tags attached to these comments show sales by PacifiCorp to counterparties at the California-Oregon Border intertie, which is physically in the State of Oregon. The First Tag is from a sale to EDF Trading North America. EDFTWE is identified on the e-tag as the PSE on the last segment of the tag's physical path with the point of receipt located outside the state of California (MALIN500) and the point of delivery located inside the state of California (NP15). The transaction reflected in this e-tag is an EDFTWE purchase from PacifiCorp (PAC01) at MALIN500. PacifiCorp relinquished title to the energy at MALIN500. Under §95802(a)(103), the buyer, EDFTWE, is identified as the first deliverer.

The Second Tag is from a sale to the CAISO at the same physical point. PacifiCorp (PAC01) is identified on the e-tag as the PSE on the last segment of the tag's physical path with the point of receipt located outside the state of California (MALIN500) and the point of delivery located inside the state of California (NP15). The transaction represented by this e-tag is a CAISO purchase from PacifiCorp at MALIN500. PacifiCorp relinquished title to the energy at MALIN500. Under §95802(a)(103), the seller, PacifiCorp is identified as the first deliverer.

The transactions reflected in these two e-tags (i.e., a sale at MALIN500) are the same- a sale of energy to a delivery point outside of California. However, in the case of the Second Tag, but not the First Tag, PacifiCorp is identified as the first deliverer. Importantly, in *neither case* does PacifiCorp own energy that is crossing California's border.

The sole reason for the difference between the tags is that the Second Tag represents a transaction with the CAISO and the CAISO, unique of market participants, requires an e-tag scheduling convention that the scheduling coordinator selling to the CAISO is listed as the PSE on the e-tag. This CAISO convention simply removes from the e-tag the information necessary to determine the entity that owns the energy when it crosses into California. Both transactions occur at a point outside California (MALIN500). In both cases, PacifiCorp does not pay for transmission from the path with the point of receipt located outside the state of California (MALIN500) to the point of delivery, or any point, located inside the state of California (NP15). Since PacifiCorp has no way to move the energy beyond the point of delivery at MALIN500 in Oregon, the energy cannot be seen as belonging to PacifiCorp after MALIN500.

In both cases, PacifiCorp relinquishes title to the energy at the California-Oregon border, and has no control over where and how that energy is delivered. PacifiCorp has no rights or obligations with respect to the transmission of the energy after the California-Oregon border intertie point.

Consider the following hypothetical. A group of investors forms a Nevada Limited Liability Corporation called Roadrunner LLC that builds as its single asset a power plant in Las Vegas. Roadrunner is not a California company, has no assets in California, and does not file California taxes. Roadrunner sells the output of the power plant to the CAISO at Mead, which is an intertie delivery point in Nevada. Roadrunner is identified as the PSE on the physical segment of the path crossing the border into California. Roadrunner fails to submit an emissions data report and does not purchase any greenhouse gas allowances. However, Roadrunner receives as the price of its energy the premium that the unspecified emissions factor and allowance obligation on entities that do comply with the Cap-and-Trade rules adds to the price of electricity at Mead. CARB discovers in 2014 that Roadrunner is the PSE on two million megawatt hours of e-tags for Mead transactions, and demands allowances from Roadrunner, which Roadrunner refuses to produce. At this point, CARB will have no legal remedy against Roadrunner because Roadrunner's activities took place in Nevada and in the wholesale electric power markets, and CARB does not have jurisdiction over either.

The effect of how the Cap-and-Trade program currently identifies electricity importers may only be exacerbated in the future by current proposed revisions to the CAISO tariff. In a discussion paper issued May 7, 2012, the CAISO proposed adopting tariff language that makes it a central counterparty to market transactions. The First Tag and the Second Tag attached as exhibits to these comments show that wholesale market participants currently have a choice- they can sell to other market participants, or they can sell to the CAISO. To the extent implementation of FERC Order 741 reduces the ability of market participants to choose whether or not a sale that ultimately will be delivered into the CAISO can be made to any entity other than CAISO, that choice will be diminished and the impact of these rules on market points outside of California increased.

At the May 4th workshop, ARB staff stated it is appropriate to regulate the entity that delivers energy to CAISO at points outside California because such a transaction represents a commitment for the flow of electricity into California. Apparently, the schedule represents a commitment for the entirety of the flow, beyond the point of interconnection outside of the State of California, for electricity into California. But the transaction itself is outside of the State, simply with a non-profit corporate citizen of the State. This may leave the Cap-and-Trade Program vulnerable to dormant commerce clause and due process claims. *See Quill Corp. v. North Dakota*; *see also Sacramento Suncreek Apartments, LLC v. Cambridge Advantaged Properties II, L.P.*, 187 Cal. App. 4th 1, 11 (Cal. App. 3d Dist. 2010); *Current, Inc. v. State Bd. of Equalization*, 24 Cal. App. 4th 382, 389-90 (Cal. App. 1st Dist. 1994).

PacifiCorp understands that CARB and CAISO do not want CAISO to bear the compliance obligation under the Cap-and-Trade Program, even if it can as a simple matter pass on that compliance obligation, the same way it passes on the cost of the electricity that CAISO purchases at the intertie points. PacifiCorp is not proposing that ARB identify the CAISO as the first deliverer, or that the CAISO be assigned a compliance obligation. Rather, PacifiCorp proposes that because this issue stems fundamentally from the nature of the CAISO and its tariff provisions the appropriate venue for resolution is with FERC.

*Federal Power Act and FERC Exclusive Jurisdiction*

The Cap-and-Trade Program is subject to challenge insofar as it intrudes on an area of regulation subject to the exclusive jurisdiction of FERC. The Federal Power Act (FPA) vests in FERC exclusive jurisdiction over, among other things, the rates, terms, and conditions for the sale of electric energy at wholesale in interstate commerce. *See, e.g.*, 16 U.S.C. §§ 824(a), 824d (2006); *New York v. FERC*, 535 U.S. 1 (2002). Indeed, FERC recently itself held that, although it lacks jurisdiction over sales of renewable energy certificates (RECs) standing alone, it has jurisdiction over RECs and allowances when bundled with energy otherwise subject to FERC's jurisdiction *See, e.g.*, *WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (finding that (1) an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within FERC's jurisdiction under sections 201, 205 and 206 of the FPA, but that (2) a bundled REC transaction, where a wholesale energy sale and a REC sale take place as part of the same transaction, does fall within FERC jurisdiction under FPA sections 205 and 206, as to both the wholesale energy portion of the transaction and the RECs portion of the transaction, and regardless of whether the contract price is allocated separately between the energy and RECs). Further, FERC has also held that, if a wholesale sale of electric energy by a public utility requires the use of an emissions allowance, that sale, and the cost of allowances in connection with it, is subject to review under FPA section 205. *Id*. at P 23 (citing *Edison Elec. Inst.*, 69 FERC ¶ 61,344 at 62,289 (1994) and explaining that such a sale or transfer of an emissions allowance may "affect" the rates a utility charges "for or in connection with" jurisdictional service, which triggers FERC jurisdiction under the language of Section 205 of the FPA). FERC also found in the *Edison Electric* order that, if the sale or transfer occurs independent of a sale of electric energy for resale in interstate commerce, it is outside of FERC review under FPA Section 205, unless a public utility seeks to flow through the costs in its wholesale rates. *Id*.

The Cap-and-Trade Program interferes with and frustrates FERC's regulation of interstate energy transactions by imposing regulations on interstate energy transactions that are subject to FERC's exclusive jurisdiction. Legal precedent is clear that state laws cannot interfere with or frustrate federal laws. *See, e.g.*, *Printz v. U.S.*, 521 U.S. 898, 913 (1997) (noting that all state officials have a duty to enact, enforce, and interpret state law in such fashion so as not to obstruct the operation of federal law, and that all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'") (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *see also De Canas v. Bica*, 424 U.S. 351, 357 (1976) ("Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation."). The Cap-and-Trade Program clearly interferes with FERC's jurisdiction by placing restrictions on the nature of energy that can enter the State of California. While it *may* be permissible for CARB or the California Public Utilities Commission (CPUC) to place restrictions on the energy purchased by utilities to serve retail customers under CPUC-filed tariffs, it has no right to restrict the energy sold at resale into the state generally. *De Canas v. Bica*, 424 U.S. 351, 357.

The CAISO and e-tagging issue described above is only one example of the ways in which the Cap-and-Trade Program, by virtue of its regulation of imported electricity, interferes with FERC's regulation of interstate energy transactions. As another example, under its rules, ARB applies a different emissions factor to purchases from the Bonneville Power Administration. The effect of this is to set a different price for the energy from one specific wholesale market participant outside of California which in turn impacts pricing in the WECC. This amounts to interference with FERC's exclusive jurisdiction over wholesale market prices. Because of this, areas of the Cap-and-Trade Program that interfere with FERC's regulation of interstate energy transactions should be resolved at FERC.

*Resource Shuffling*

PacifiCorp understands the difficulty that CARB faces with respect to defining what exactly constitutes resource shuffling given that rational market behavior could potentially be construed or mischaracterized as resource shuffling. The best thing that CARB can do is work toward defining the rules – while fully engaging stakeholders in the process of doing so. The risk and uncertainty created by this ambiguity is likely to result in market volatility or, at the extreme, cause market paralysis.

In addition, PacifiCorp recommends that CARB explore how it will enforce the resource shuffling provisions. At the May 4th workshop, CARB staff indicated that any resource shuffling enforcement action would be taken against the entity with the compliance obligation i.e. the first deliverer. However, it is still unclear what responsibility the first deliverer may have with respect to transactions that are downstream from the transaction that results in an import into California. Clarity on this point is also critical so that first deliverers are fully aware of potential liabilities.

## **Conclusion**

PacifiCorp appreciates the time and effort of ARB staff dedicated to understanding and resolving these issues. PacifiCorp is more than willing to engage further with ARB staff to continue a dialogue on how to address and resolve these core issues while still maintaining the central tenets of AB 32 and the goals of the Cap-and-Trade Program. Thank you for your consideration of these comments.

Dated: May 11, 2012

Respectfully submitted,

By

*/s/ Mary Wiencke*

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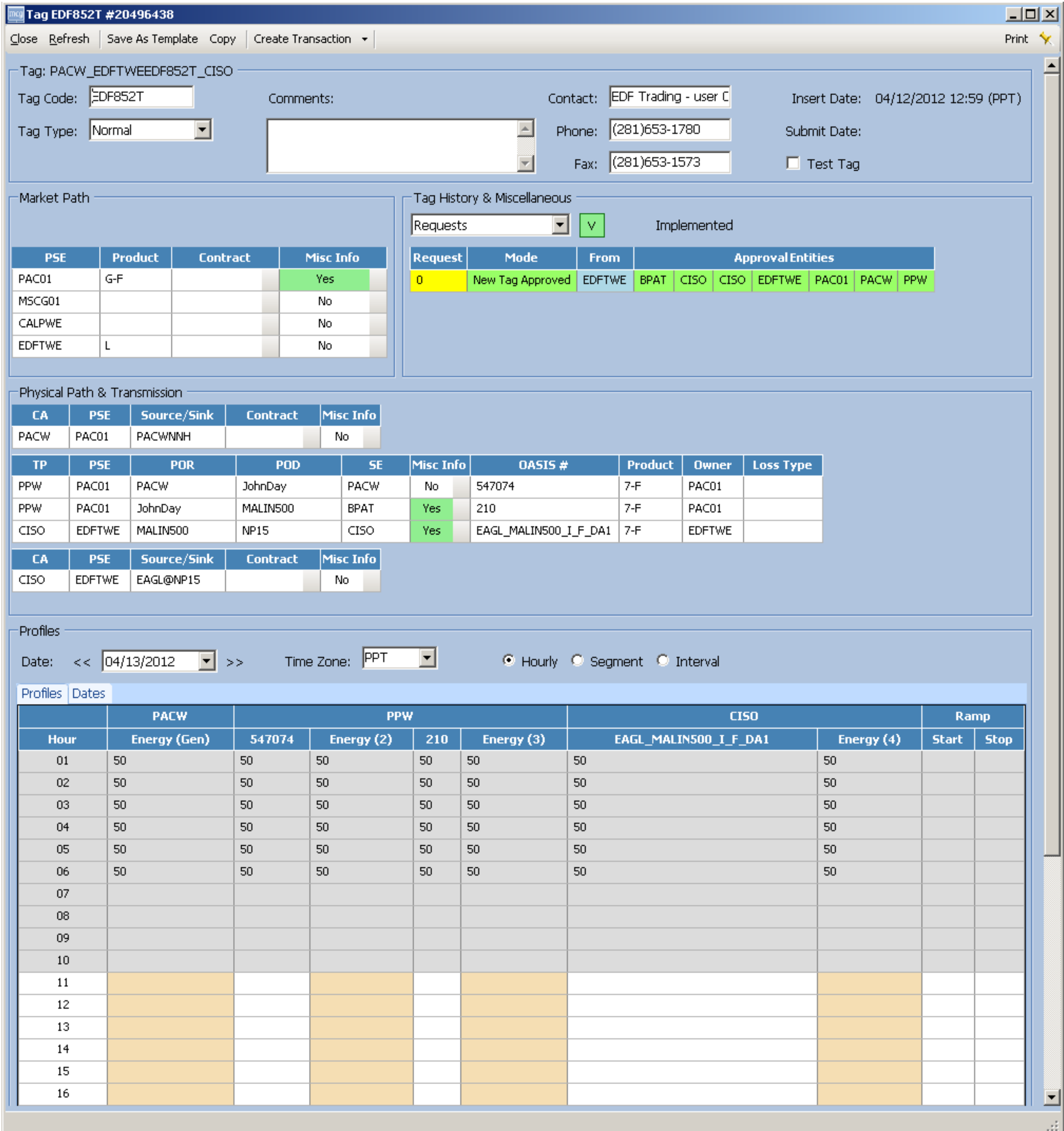
First tag:



Tag EDF852T #20496438

Close Refresh Save As Template Copy Create Transaction Print

Tag: PACW_EDFTWEEDF852T_CISO

Tag Code: EDF852T

Tag Type: Normal

Comments:

Contact: EDF Trading - user C

Phone: (281)653-1780

Fax: (281)653-1573

Insert Date: 04/12/2012 12:59 (PPT)

Submit Date:

Test Tag

Market Path

| PSE | Product | Contract | Misc Info |
|---|---|---|---|
| PAC01 | G-F | | Yes |
| MSCG01 | | | No |
| CALPWE | | | No |
| EDFTWE | L | | No |

Tag History & Miscellaneous

Requests V Implemented

| Request | Mode | From | Approval Entities | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 0 | New Tag Approved | EDFTWE | BPAT | CISO | CISO | EDFTWE | PAC01 | PACW | PPW |

Physical Path & Transmission

| CA | PSE | Source/Sink | Contract | Misc Info |
|---|---|---|---|---|
| PACW | PAC01 | PACWNNH | | No |

| TP | PSE | POR | POD | SE | Misc Info | OASIS # | Product | Owner | Loss Type |
|---|---|---|---|---|---|---|---|---|---|
| PPW | PAC01 | PACW | JohnDay | PACW | No | 547074 | 7-F | PAC01 | |
| PPW | PAC01 | JohnDay | MALIN500 | BPAT | Yes | 210 | 7-F | PAC01 | |
| CISO | EDFTWE | MALIN500 | NP15 | CISO | Yes | EAGL_MALIN500_I_F_DA1 | 7-F | EDFTWE | |

| CA | PSE | Source/Sink | Contract | Misc Info |
|---|---|---|---|---|
| CISO | EDFTWE | EAGL@NP15 | | No |

Profiles

Date: << 04/13/2012 >> Time Zone: PPT Hourly Segment Interval

Profiles Dates

| | PACW | PPW | | | | CISO | | Ramp | |
|---|---|---|---|---|---|---|---|---|---|
| Hour | Energy (Gen) | 547074 | Energy (2) | 210 | Energy (3) | EAGL_MALIN500_I_F_DA1 | Energy (4) | Start | Stop |
| 01 | 50 | 50 | 50 | 50 | 50 | 50 | 50 | | |
| 02 | 50 | 50 | 50 | 50 | 50 | 50 | 50 | | |
| 03 | 50 | 50 | 50 | 50 | 50 | 50 | 50 | | |
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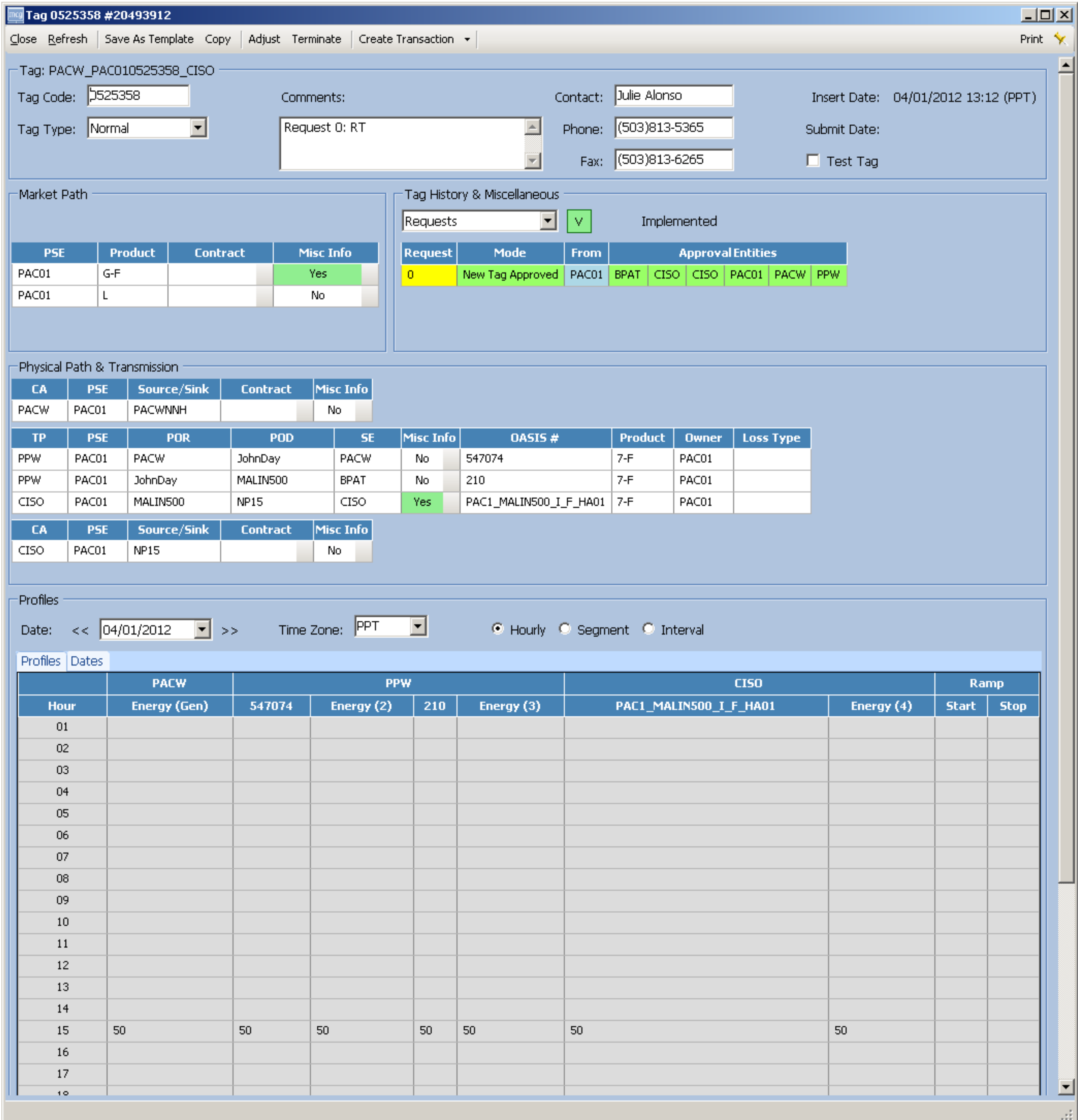

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Tag: PACW_PAC010525358_CISO

Tag Code: 0525358

Tag Type: Normal

Comments: Request 0: RT

Contact: Julie Alonso

Phone: (503)813-5365

Fax: (503)813-6265

Insert Date: 04/01/2012 13:12 (PPT)

Submit Date:

Test Tag

Market Path

| PSE | Product | Contract | Misc Info |
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| PAC01 | G-F | | Yes |
| PAC01 | L | | No |

Tag History & Miscellaneous

Requests V Implemented

| Request | Mode | From | Approval Entities | | | | | |
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| 0 | New Tag Approved | PAC01 | BPAT | CISO | CISO | PAC01 | PACW | PPW |

Physical Path & Transmission

| CA | PSE | Source/Sink | Contract | Misc Info |
|---|---|---|---|---|
| PACW | PAC01 | PACWNNH | | No |

| TP | PSE | POR | POD | SE | Misc Info | OASIS # | Product | Owner | Loss Type |
|---|---|---|---|---|---|---|---|---|---|
| PPW | PAC01 | PACW | JohnDay | PACW | No | 547074 | 7-F | PAC01 | |
| PPW | PAC01 | JohnDay | MALIN500 | BPAT | No | 210 | 7-F | PAC01 | |
| CISO | PAC01 | MALIN500 | NP15 | CISO | Yes | PAC1_MALIN500_I_F_HA01 | 7-F | PAC01 | |

| CA | PSE | Source/Sink | Contract | Misc Info |
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| CISO | PAC01 | NP15 | | No |

Profiles

Date: << 04/01/2012 >> Time Zone: PPT Hourly Segment Interval

Profiles Dates

| | PACW | PPW | | | | CISO | | Ramp | |
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| Hour | Energy (Gen) | 547074 | Energy (2) | 210 | Energy (3) | PAC1_MALIN500_I_F_HA01 | Energy (4) | Start | Stop |
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