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ADMITTED IN OREGON AND WASHINGTON

October 21, 2014

VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
P.O. Box 2148
Salem, OR 97308-2148

Re: UM1670 – Columbia Basin Electric Cooperative vs Pacific Power et al.

Attention Filing Center:

Enclosed for filing in docket UM-1670, are an original and five copies of a Columbia Basin Electric Cooperative's Response to Defendants' Motion for Summary Judgment and Motion for Summary Determination.

A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Please contact this office with any questions.

Sincerely,



Raymond S. Kindley
Attorney for Columbia Basin Electric Cooperative, Inc.

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2014, I served the foregoing document upon the persons named on the service list by electronic mail only as all parties have waived paper service.

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**BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON**

COLUMBIA BASIN ELECTRIC)	Docket No. UM 1670
COOPERATIVE, INC. an Oregon)	
cooperative corporation	)	COLUMBIA BASIN ELECTRIC
Complainant,	)	COOPERATIVE, INC'S RESPONSE TO
vs.	)	DEFENDANTS' MOTIONS
PACIFICORP, dba Pacific Power, an	)	FOR SUMMARY JUDGMENT
Oregon business corporation,)	
Defendant,)	
)	
NORTH HURLBURT WIND, LLC, a)	
foreign limited liability company,)	
Defendant,)	
)	
SOUTH HURLBURT WIND, LLC, a)	
foreign limited liability company,)	
Defendant,)	
)	
HORSESHOE BEND WIND, LLC, a)	
foreign limited liability company,)	
Defendant,)	
and)	
CAITHNESS SHEPHERDS FLAT, LLC, a)	
foreign limited liability company,)	
Defendant)	

The Complainant Columbia Basin Electric Cooperative, Inc. (the "Cooperative") in this matter submits its response to the motions for summary judgment filed by defendants Pacific Power and the Caithness Defendants (Caithness Shepherds Flat, LLC, North Hurlburt Wind, LLC, South Hurlburt Wind, LLC and Horseshoe Bend Wind, LLC) in the above listed docket before the Oregon Public Utility Commission (the "Commission").

1
2 **INTRODUCTION**

3 Pacific Power’s and the Caithness Defendants’ motions for summary judgment raise a
4 host of defenses that, for the most part, are irrelevant to the whether they have violated the
5 statutory language of the Territory Allocation Law.¹ There are four elements to prove a violation
6 of ORS 758.450: (i) the entity must be a “person” or “persons” as defined by ORS 758.450(2);
7 (ii) the arrangement must involve “utility service” as defined in ORS 758.450(3); (iii) the utility
8 service must be “offered, constructed or extended in or into an allocated territory”; and (iv) none
9 of the exemptions in ORS 758.450(4) can apply.

10 Pacific Power and the Caithness Defendants, however, ignore the statutory language and
11 attempt to justify their actions of providing utility service in and into the Cooperative’s allocated
12 territory based on irrelevant arguments. They argue that the Cooperative cannot serve load in its
13 own allocated territory because it does not own 230 kV transmission facilities, the Cooperative’s
14 Board may adopt discriminatory rates, or that the Cooperative’s complaint is a collateral attack
15 on the Oregon Energy Facility Siting Council’s jurisdiction. Aside from factually incorrect,
16 these arguments are simply beyond the scope of the statutory language in ORS 758.450(2) and
17 the analysis of whether that statute has been violated.

18 Additionally, Pacific Power and the Caithness Defendants advance positions and
19 statutory interpretations that fundamentally conflict with the Territory Allocation Law. Pacific
20 Power and the Caithness Defendants argue that a utility’s territory allocation is not based on a
21 geographic area, but based on differences in voltage of transmission or distribution facilities.
22 The defendants’ argument flies in the face of the statutory language.

23 As argued in the Cooperative’s motion for summary judgment, the Caithness Defendants
24 raise all of these allegations and claims simply to avoid paying separate demand charges for each
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¹ ORS §§ 758.400 to 758.475.

1 of the Three Wind Projects because Pacific Power has permitted the Three Wind Project to
2 aggregate their loads to create just one.

3 4 **ARGUMENT**

5 **I. The Territory Allocation Law Applies to the Caithness Defendants**

6 The Caithness Defendants argue the Territory Allocation Law does not apply to any of
7 them because they all fall within the exemption of ORS 758.450(4). ORS 758.450(4) provides:

8 (4) The provisions of ORS 758.400 to 758.475 do not apply to any
9 corporation, company, individual or association of individuals providing heat,
10 light, or power (a) From any energy resource to fewer than 20 customers, if it
11 began providing service to a customer prior to July 14, 1985; (b) From any energy
12 resource to fewer than 20 residential customers so long as the corporation,
13 company, individual or association of individuals serves only residential
14 customers; (c) From solar or wind resources to any number of customers; or (d)
15 From biogas, waste heat or geothermal resources for nonelectric generation
16 purposes to any number of customers.

17 The Caithness Defendants claim they are exempt because the Three Wind
18 Projects own wind resources and sell power from those wind resources.

19 **A. The Caithness Defendants, Operating as an Association for Supplying 20 Backup Power to the Three Wind Projects, Are Not Exempt from the 21 Territory Allocation Law**

22 The Caithness Defendants operate as an unincorporated association for the
23 purpose of supplying backup power to the Three Wind Projects. Under *Northwest
24 Natural*,² this association is not exempt under ORS 758.450(4). The association did not
25 begin providing heat, light or power to a customer prior to July 14, 1985, it does not
26 provide heat, light or power to fewer than 20 residential customers, it neither provides
heat, light or power to the Three Wind projects from solar or wind resource nor from
biogas, waste heat or geothermal resources for nonelectric generation purposes.

² *Northwest Natural v. Oregon Public Utility Commission*, 195 Or.App. 547 (2004)

1 It does purchase system power from Pacific Power for the sole purpose of
2 providing backup power to the Three Wind Projects.³ That fact precludes it from any
3 exemption in ORS 758.450(4) since that transaction involves system power from Pacific
4 Power.

5 Under the holding in *Northwest Natural*, the Caithness Defendants' association
6 must be viewed and treated separately from the individual members of the association. In
7 *Northwest Natural*, the Commission claimed that each individual industrial customer had
8 the right to self-supply and, thus, the Territory Allocation Law's prohibition did not apply
9 to those individual industrial gas consumers. The court, however, found that the
10 individual members had joined together as an association with the common goal of
11 obtaining gas supplies. The court's holding turns on the finding that the joint efforts of
12 the individual industrial customers created an unincorporated association that was
13 separate and independent from the individual members under the definition of a "person"
14 under ORS 758.400(2).

15 Here, the association of Caithness Shepherds Flat, North Hurlburt Wind, South
16 Hurlburt Wind and Horseshoe Bend Wind is an entirely separate organization under the
17 *Northwest Natural* holding from each individual member. It owns no generation assets
18 and it does not provide heat, light or power from any renewable resources. Therefore,
19 neither the association's transactions nor its status satisfies any of the exemptions listed
20 in ORS 758.450(4).

21 **B. Caithness Shepherds Flat is Not Exempt from the Territory**
22 **Allocation Law**

23 Caithness Shepherds Flat clearly does not fall within any of the exemptions in ORS
24 758.450(4). It cannot fall under the rubric of an entity that "provides heat, light or power from a
25 solar or wind resource" because it does not provide any power from solar or wind facilities. The
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³ CBEC Motion for Summary Judgment, Kindley Decl., Exhibit J.

1 power it provides to the Three Wind Projects is system power it purchases from Pacific Power.
2 It has no other power transactions with wholesale or retail users. It is undisputed that the Three
3 Wind Projects are not residential customers of Caithness Shepherds Flat. It also is undisputed
4 that Caithness Shepherds Flat's power transaction with the Three Wind Projects commenced
5 long after July 14, 1985. Therefore, none of the exemptions apply to Caithness Shepherds Flat.

6 The Caithness Defendants, however, argue that Caithness Shepherds Flat should be
7 exempt from the Territory Allocation Law because it is the parent corporation of the Three Wind
8 Projects. In other words, they argue that the ORS 758.450(4) should be read to include parent
9 corporations and affiliate corporations of wind projects simply because of the corporate
10 relationship among the affiliates.

11 Caithness Defendant's interpretation would mean that any utility that owned a subsidiary
12 with solar or wind generation could claim it is exempt from the Territory Allocation Law. For
13 instance, if Portland General Electric or Central Electric Cooperative were parent corporations to
14 subsidiaries that own wind generation facilities, they would be categorically exempt from the
15 Territory Allocation Law. If the Commission upholds this interpretation of ORS 758.450(4), the
16 Territory Allocation Law will have little meaning as Oregon utilities develop solar and wind
17 resources in the future.

18
19 **C. The Three Wind Projects Are Not Exempt Under ORS 758.450(4) in Their**
20 **Acquisition of Backup Power Supply**

21 The Caithness Defendants claim Three Wind Projects should be categorically excluded
22 from the Territory Allocation Law in their acquisition of retail backup power supply because
23 they own wind resources. It is undisputed that the power the Three Wind Projects acquire for
24 their backup power supply is system power from Pacific Power via the transaction with
25 Caithness Shepherds Flat. Therefore, they are not providing "providing heat, light or power
26 from solar or wind resources to any number of customers" in this transaction.

1 Caithness Defendants' argument that all wind or solar generators are categorically
2 exempt from the Territory Allocation Laws conflicts with the plain language in ORS 758.450(4).
3 The exemptions only apply to companies or entities that satisfy the listed criteria. For instance,
4 the criteria for the second exemption applies to companies that provide heat, light or power from
5 any resource to fewer than 20 residential customers. If an exempt company provides power to an
6 industrial customer, then it loses its exemption for that transaction with the industrial customer.
7 Its exemption under that criterion does not give it immunity to all power transactions.

8 Under the fourth exemption, companies avoid Law's prohibits to the extent the company
9 provides biogas, waste heat or geothermal resource for *nonelectric* generation purposes. If that
10 same company provides biogas, waste heat or geothermal resource for *electric* generation
11 purposes, it loses its exemption for that transaction.

12 The Caithness Defendants' interpretation means every transaction of wind generator is
13 exempt, even if it purchases and resells brown power. That interpretation conflicts with the plain
14 statutory language and would create all types of loopholes to avoid the Territory Allocation Law.
15 Their interpretation means every company that calls itself a solar or wind company or owns even
16 the most insignificant solar or wind resource, e.g., a one kilowatt solar panel, is categorically
17 exempt. That is not how the statute is written. A company must provide heat, light or power
18 "*from* solar or wind resources."

19 The Caithness Defendants' interpretation neither reflects the plain language of ORS
20 758,450(4) nor satisfies the purpose of giving a "lift" to solar or wind resources.

22 **II. The Cooperative Can Serve the Load Located in Its Allocated Territory**

23 Both Pacific Power and Caithness argue that the Cooperative cannot physically serve the
24 Wind Project's loads located in its service territory because the Cooperative does not own 230
25 kV transmission lines in the vicinity.⁴ They both claim that a person can extend electric lines

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⁴ Pacific Power's position here is ironic because it does not own any electric facilities in the vicinity of the Three Wind Projects.

1 into an allocated if those extensions are at a different voltage than what is present in the allocated
2 territory.

3 First their argument first is factually wrong, second it is legally irrelevant under ORS
4 758.450(2), and third it is directly contrary to the Territory Allocation Law.

5 **A. The Cooperative Does Have the Ability to Serve the Backup Loads of South**
6 **Hurlburt Wind and Horseshoe Bend Wind Projects.**

7 Pacific Power and the Caithness Defendants allege the Cooperative has no means to serve
8 the loads of the South Hurlburt Wind and Horseshoe Bend Wind projects located in the
9 Cooperative's allocated service territory. They focus on the fact that the Slatt Substation is
10 located in Pacific Power's allocated territory and Pacific Power sells backup power to Caithness
11 Shepherds Flat at 230 kV. They incorrectly allege that the Cooperative neither has any access to
12 transmission or distribution facilities in this vicinity nor has any facilities of its own that could
13 serve the backup loads of the South Hurlburt Wind and Horseshoe Bend Wind projects.

14 **1. The Cooperative Can Use the Existing Transmission System**

15 The Cooperative has the ability to use existing transmission facilities to serve the South
16 Hurlburt Wind and Horseshoe Bend Wind loads. The Cooperative is a full requirements power
17 customer of BPA and has a Network Transmission ("NT") contract with BPA for the delivery of
18 that power. Under its NT contract the Cooperative can designate points of delivery anywhere on
19 BPA's transmission system to serve the Cooperative's loads including the Slatt Substation. Like
20 Pacific Power, the Cooperative can make a simple transmission request to BPA for a point of
21 delivery at the Slatt Substation.

22 In fact, in anticipation of serving the loads in its allocated territory in this vicinity, the
23 Cooperative has already made a request for a new point of delivery at the Slatt Substation.⁵

24 The Cooperative has also sent a letter on October 3, 2014, to the Three Wind Projects
25 making a transmission request to deliver electric power up to 4 MW of capacity to the

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⁵ See Wolff Decl. attached hereto.

1 Cooperative at the Horseshoe Bend Wind collector substation.⁶ The Three Wind Projects have
2 currently obtained a waiver from the Federal Energy Regulatory Commission (“FERC”) that
3 exempts their transmission facilities from complying with the open access regulations. Pursuant
4 to that waiver, FERC Order 135 FERC ¶ 61,251, however, the Three Wind Projects must file
5 with the Commission a *pro forma* Open Access Transmission Tariff within 60 days of the date of
6 any transmission request, and must comply with any additional regulatory requirements effective
7 on the date of the request in compliance with Order Nos. 888 and 890.⁷ Absent that waiver, the
8 Three Wind Projects must provide transmission service on their transmission facilities.

9 The Cooperative has made the request to provide service to the loads of the Horseshoe
10 Bend Wind and South Hurlburt Wind projects located in the Cooperative’s territory, and the
11 future load of a dairy in the Cooperative’s allocated territory.⁸

12 The Cooperative can also pursue the service alternative proposed by the Caithness
13 Defendants in their July 31, 2012, service request.⁹ Under this alternative, the Cooperative
14 would deliver power to the Slatt Substation for distribution to the Three Wind Projects. As noted
15 by the Caithness Defendants, this alternative would require an agreement with Pacific Power
16 and, likely, approval by the Commission.

17 2. The Cooperative Can Use Existing Facilities to Serve the Load

18 The Cooperative also has distribution facilities locate in the vicinity of the South Hurlburt
19 Wind and Horseshoe Bend Wind projects. In fact, the Cooperative currently serves the station
20 service loads of the Horseshoe Bend Wind project’s storage and maintenance facilities. Pacific

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22 ⁶ See Wolff Decl., Exhibit A.

23 ⁷ “If the Applicants receive a request for transmission service, it must file with the Commission a *pro forma* OATT
within 60 days of the date of the request, and must comply with any additional regulatory requirements effective on
the date of the request in compliance with Orders Nos. 888 and 890.” 135 FERC ¶ 61,251

24 ⁸ On October 17, 2014, the Cooperative received a letter from Mr. John Cameron, who incorrectly denied the
Cooperative’s request based on the argument the Cooperative had made a sham wholesale transaction. Mr.
Cameron has apparently misread 16 U.S.C. § 824k(h) and believes the Cooperative is an “ultimate consumer” and
making a request for retail wheeling. The Cooperative is not a power consumer and is requesting the wheeling of
wholesale power. The Cooperative will pursue its transmission request at the Federal Energy Regulatory
Commission if Caithness representatives continue to deny its request.

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26 ⁹ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit L.

1 Power and the Caithness Defendants have made strong arguments that the backup power service
2 to the wind turbines requires 230 kV service. Those claims are false. The Power Pacific Power
3 delivers to Caithness Shepherds Flat at Slatt Substation is delivered to collector substations for
4 each wind project. The 230 kV power is stepped down to 34.5 kV at each collector substation.
5 From the collector substation, the power is distributed to each wind tower. According to the
6 Caithness Defendants, that power is used to run computes, battery chargers, lights and other low
7 voltage equipment. That equipment does not operate at 230 kV. Therefore, the fact that Pacific
8 Power sells power at 230 kV is an anomaly of the transaction occurring at the Slatt Substation;
9 not because the equipment in the towers operate at 230 kV.

10 **3. As Last Resort the Cooperative Can Build Facilities**

11 If the Three Wind Projects prevent the Cooperative from exercising its rights to use the
12 Projects' electric facilities, the Cooperative can build transmission and distribution facilities to
13 serve the load located in its service territory. The Cooperative has made an initial
14 interconnection request with BPA to interconnect its distribution system at the Slatt Substation.
15 From the Slatt Substation the Cooperative can extend lines to serve the South Hurlburt Wind and
16 Horseshoe Bend Wind projects' loads in the Cooperative's allocated territory. The actual
17 delivery point and voltages for such deliveries would be dependent upon the service requests by
18 those projects.

19 **B. The Ability to Serve Is Not Relevant Under ORS 758.450(2).**

20 Nothing in ORS 758.450(2) concerns a utility's ability to serve the load located within its
21 service territory. ORS 758.450(2) provides, "[e]xcept as provided in subsection (4) of this
22 section, no other person shall offer, construct or extend utility service in or into an allocated
23 territory."¹⁰

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26 ¹⁰ The determination of a utility's ability to service is addressed when the Commission considers a utility's application for an allocated territory. To the extent Pacific Power and Caithness Defendants' argument challenges the Cooperative's ability to serve, that challenge is an impermissible collateral attack on the Commission's decision to give the Cooperative an allocated service territory.

1 The defendants' interpretation would add a new element into the existing statutory
2 language, i.e., the utility with an allocated territory must have existing transmission or
3 distribution facilities to provide service at a specified voltage. In short, the defendants'
4 interpretation would supersede the state legislature and the statutory language by unilaterally
5 amending ORS 758.450. The defendants' claim is irrelevant under ORS 758.450(2).

6
7 **C. The Defendants Do Provide Similar Utility Service in the Cooperative's**
8 **Allocated Territory**

9 The defendants' voltage argument also conflicts with the definition of utility service and
10 its application the Territory Allocation Law. ORS 758.450(2) provides that no person "shall
11 offer, construct, or extend utility service" ORS 758.400(3) defines the term "utility service" as:

12 service provided by any equipment, plant or facility for the distribution of
13 electricity to users or distribution of natural gas or manufactured gas to consumers
14 through a connected and interrelated distribution system.

15 The term "service" as used in Chapter 758, "is used in its broadest and most inclusive
16 sense." ORS 756.010(8).

17 Additionally, plain language in the definition of "utility service" indicates the term is
18 broadly inclusive; service provided by "any equipment, plant or facility for the distribution of
19 electricity to users" is included. That definition does not make a distinction among transmission
20 facilities that use 500 kV, 230 kV, 134 kV or any other voltage. In fact, its use of the words,
21 "any equipment, plant or facilities for the production or transmission of electricity" would
22 include 230 kV transmission lines.

23 Pacific Power and Caithness Defendants' ignore this statute. Instead, they focus on a
24 tortured interpretation of the phrase "similar utility service" in that last sentence of ORS
25 758.400(3) and ignore the first sentence of ORS 758.400(3) and the other uses of the phrase
26 "similar utility service" in ORS 758.400(1).

1 Their interpretation would set aside geographic boundaries and establish voltage
2 boundaries instead. It would mean any person could simply avoid the territory allocation law by
3 building distribution facilities first and then claiming that the utility with the allocated territory
4 could not serve a load at a specific voltage.

5 Pacific Power’s argument is ironic in that if the Commission agrees with this
6 interpretation, Pacific Power’s allocated territory will become as porous as the Cooperative’s
7 territory. Pacific Power will lose industrial, commercial and residential loads in its allocated
8 territory to other utilities and companies that can provide service at a slightly different voltage
9 than Pacific Power’s facilities.

10
11 **III. Caithness Defendants Do Provide Utility Service in the Cooperative’s Service**
12 **Territory**

13 The Caithness Defendants assert they do not provide “utility service” in the
14 Cooperative’s allocated territory because they don’t serve “users;” they serve only themselves.
15 Also, they don’t provide utility service because they “disseminate electricity . . . through an
16 isolated system that does not serve other entities or form an integrated transmission system.”

17 Pursuant to the holding in *Northwest Natural*, the Caithness Defendant’s arguments have
18 already been addressed and dismissed. As stated in *Northwest Natural*:

19 Because of the statutory definitions, it does not matter under the act that the
20 facilities are co-owned by the consumers of the gas or the owners do not offer
21 service to the general public. It also does not matter that they operate jointly and
22 are not customers of each other. What does matter is that the business entities
23 involved do not each connect to the Williams pipeline but, rather, jointly operate a
24 system as a separate entity, an entity that has a common connection to the
25 pipeline.¹¹

26 Here, it is undisputed that the Three Wind Projects do not separately interconnect to the
BPA transmission facilities. The Caithness Defendants operate the transmission and distribution

¹¹ *Northwest Natural*, 195 Or.App. at 560.

1 facilities as a separate legal entity.¹² The Caithness Defendants’ association has a common
2 connection to the BPA transmission facilities.¹³ Under the *Northwest Natural* holding, it does
3 not matter that the Caithness Defendants do not serve the public or other customers. Caithness
4 Defendants’ claim they only serve themselves is no defense.

5 The court in *Northwest Natural* also stated:

6 It is the physical act of distribution to more than one user of electricity or more
7 than one consumer of natural gas that constitutes utility service; the contractual or
8 other relationship between the entity that provides the electricity or gas and the
9 entity that uses or consumes it is irrelevant under the statutory definition.¹⁴

10 It is undisputed that the Pacific Power sells backup power to Caithness Shepherds Flat for
11 the distribution to the Three Wind projects. Caithness Defendants claim that Pacific Power
12 distributes the electricity directly to the Three Wind Projects and Caithness Shepherds Flat is
13 merely a “billing facilitator for the three affiliates.”¹⁵ It is not disputed that Caithness Shepherds
14 Flat purchases the Power from Pacific Power and distributes it to the Three Wind Projects over
15 jointly owned facilities. Therefore, Caithness Defendants, as an association, distribute the power
16 to more than one user – the Three Wind Projects.

17 The Caithness Defendant’s argument they don’t provide utility service also fails. In
18 *Northwest Natural*, the contractual relationships between Pacific Power and Caithness Shepherds
19 Flat and Caithness Shepherd Flat and the Three Wind Projects do not matter in determining
20 “utility service.” It also does not matter whether the electric system is complex, simple or
21 something in between, the only factor that matters is the physical act of distributing more
22 electricity to more than one user. The Caithness Defendants jointly distribute power to the three
23 end users of the electricity.

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25 ¹² See CBEC Motion for Summary Judgment, Section I.A.1.b.

26 ¹³ See CBEC Motion for Summary Judgment, Section I.B.

¹⁴ *Northwest Natural*, 195 Or.App. at 559.

¹⁵ Caithness Defendants Motion for Summary Determination p. 14. The Cooperative disagrees that Caithness Shepherds Flat is merely a billing facilitator given its contract with Pacific Power and its control over the Three Wind Projects.

1 **IV. The Cooperative Will Not Create Duplicative Facilities If It Serves Load in Its Own**
2 **Allocated Territory**

3 Pacific Power and the Caithness Defendants argue that the Cooperative's service to the
4 loads in its own allocated territory will cause duplication of utility facilities and, thus, conflict
5 with the purpose of the Territory Allocation Law.

6 **A. The Cooperative's Service Would Not Duplicate Any Pacific Power Facilities**

7 As to Pacific Power, the Cooperative's service to the loads in its allocated territory would
8 not duplicate any electric facilities owned by Pacific Power. By its own admission, Pacific
9 Power owns no electric facilities used for its sale of power to serve the Three Wind Projects.¹⁶ It
10 has no electric facilities at the Slatt Substation and it uses BPA's meters at each collector
11 substation of the Three Wind Projects. Therefore, the Cooperative's service of the backup loads
12 of the South Hurlburt Wind and Horseshoe Bend Wind projects would not duplicate any utility
13 facilities owned by Pacific Power under any service scenario.

14 **B. The Cooperative's Service Will Not Duplicate the Three Wind Project's**
15 **Electric Facilities**

16 Caithness Defendants adamantly argue that the Cooperative's service to South Hurlburt
17 Wind and Horseshoe Bend Wind can only be achieved by the Cooperative's construction of new
18 transmission and distribution facilities. They claim that if the Commission enforces the Territory
19 Allocation Law that would lead to an impermissible duplication of utility facilities.

20 As a factual matter, the Caithness Defendant's argument is incorrect. As discussed
21 above, the Cooperative can, and has, made a request for transmission service across the power
22 lines owned by the Three Wind Projects. The Three Wind Projects must now develop and offer
23 open access to their power lines. With that access, the Cooperative can serve the loads in its
24 allocated territory without any, or with minor, construction of new electric facilities.¹⁷

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26 ¹⁶ Pacific Power's Motion for Summary Judgment p. 5. "PacifiCorp owns not electric facilities in the vicinity."

¹⁷ Currently, the Cooperative cannot identify the exact service arrangements or construction because that would depend upon a service request by the Three Wind Projects.

1 An alternative to the Cooperative using the Three Wind Projects' electric facilities is for
2 the Cooperative to service the loads with its existing facilities. In spite of the defendants'
3 allegations that the Three Wind Projects' backup power service must be provided at 230 kV, the
4 facts do not support those allegations. The Three Wind Projects' backup power is for fairly low
5 voltage equipment, such as serve electric motors, computers, battery chargers and other electrical
6 equipment.¹⁸ That equipment does not operate at 230 kV. It is undisputed that the 230 kV
7 power delivered at the Slatt Substation is stepped down to 34.5 kV at each collector substation.

8 It is also undisputed that the Cooperative has distribution facilities in the vicinity of the
9 Horseshoe Bend Wind and South Hurlburt Wind loads. Based on the specific service needs of
10 the backup loads, the Cooperative could serve those loads with existing facilities.

11 Another alternative suggested by the Caithness Defendants is for the Cooperative to
12 deliver backup power to the Slatt Substation and for Pacific Power and the Cooperative to divide
13 the service according to the percentage of loads located in each utility's allocated service
14 territory.¹⁹ As noted by the Caithness Defendants, that alternative would require the agreement
15 of Pacific Power and, likely, a review and decision by the Commission. This is a viable service
16 alternative for the Cooperative and would not require any additional construction. Pacific Power
17 and the Cooperative agreed to this alternative in 2013, but the Caithness Defendants' decided to
18 abort this course to avoid multiple demand charges.²⁰

19 If the Cooperative had to construct any facilities to serve the loads, it would not duplicate
20 the 230 kV system owned by the Caithness Defendants. The defendants' system is designed to
21 move the power generated at the wind projects out to the BPA transmission system. They were
22 not designed to simply serve the backup power needs of the Three Wind Projects. So, to the
23 extent the Cooperative did construct facilities, they would not duplicate the Caithness
24 Defendant's equipment.

25
26 ¹⁸ Caithness Defendants' Motion for Summary Disposition, p.4. The back-up power is "for consumption by electric motors, computes, battery chargers and other electrical equipment . . ."

¹⁹ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit L. Caithness letter to CBEC requesting service.

²⁰ See CBEC Motion for Summary Judgment, Kindley Decl. Exhibit M. Caithness and BPA email exchange.

1 **C. Duplication of Electric Facilities Owned by Customers Is Not a Factor Under**
2 **the *Northwest Natural* Holding**

3 The purpose of the Territory Allocation Law is to avoid the duplication of utility
4 facilities.²¹ That purpose is to avoid duplication of utility facilities owned by utilities. This
5 policy concern does not provide customers with immunity to the Territory Allocation Law if they
6 construct electric facilities.

7 In *Northwest Natural* several of the industrial customers had constructed interconnected
8 gas pipelines to connect with the Williams interstate gas line. The court recognized that the
9 industrial customers had already invested in the construction and operation of those gas
10 pipelines.²² The Commission argued that industrial customers' facilities do not result in
11 duplication of service because ORS 758.405 only concerns the duplication of facilities owned by
12 "utilities" and the industrial customers are not utilities. The court held the association controlled
13 the existing and proposed jointly owned facilities, which violated the Territory Allocation Law.
14 In short, the fact that the industrial customers had built gas facilities did not provide them with an
15 exception or immunity to the Territory Allocation Law.

16 The court's policy behind this aspect of the decision is sound. The Territory Allocation
17 Law could be easily circumvented by any person can build gas or electric facilities and then
18 claim immunity under the Territory Allocation Law because any service by the local utility with
19 the allocated territory would be duplicative. The purpose of the Territory Allocation Law is to
20 prevent duplication of utility facilities. The means of avoiding that problem, however, is for the
21 Commission to allocate territories and to prohibit any person from offering utility service into
22 and in an allocated territory. Those means do not permit a person to break the law and then
23 claim immunity. If the Commission finds the defendants violated the Territory Allocation Law,
24 the existence of the Three Wind Project's electric facilities does not give them immunity from
25 the Law.

26 ²¹ ORS 758.405

²² *Northwest Natural*, 195 Or.App. at 549-550.

1 **V. The Cooperative's Rates are Not a Factor Under ORS 758.450**

2 The Caithness Defendants allege the Cooperative will impose “discriminatory charges”
3 and the Cooperative “would deny service under its generally applicable rates, instead imposing a
4 much higher and discriminatory rate.”²³ The Caithness Defendants provide no documents or
5 other evidence that the Cooperative would charge discriminatory rates or deny service under its
6 generally applicable rates. These claims are entirely specious.

7 Aside from those misrepresentations, the Cooperative's rates are not relevant to the
8 determination of whether the Caithness Defendants have violated the Territory Allocation Law.
9 Nothing in ORS 758.450 concerns rates. Nothing in ORS 758.450 justifies a person of violating
10 a utility's allocated territory simply because of power rates. Caithness can point to no law or
11 case that looks to rates as a reason for not enforcing the Territory Allocation Law. If it was an
12 element, then industrial customers of every utility would make spurious claims that their rates
13 were discriminatory and avoid the allocated territory of the local utility.

14 The Caithness Defendants allege that the Cooperative would “deny them the economic
15 benefits of demand aggregation for billing purposes, as now allowed by PacifiCorp.” That is
16 apparently the “discriminatory charges” that the Cooperative would impose on them. It is the
17 reason for this case.²⁴

18 The Cooperative, as a full requirements customer, would treat each wind project as a
19 separate customer and bill each a demand charge. The Cooperative's proposed service to the
20 Caithness Defendants is neither discriminatory nor inconsistent with industry standards.

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26 ²³ Caithness Defendants Motion for Summary Determination, p. 16.

²⁴ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit M. Email exchange between BPA and Delgado.

1 **VI. Pacific Power's Provides Utility Service "Into" the Cooperative's Allocated**
2 **Territory**

3 Pacific Power's primary defense to its violations of the Territory Allocation Law is that it
4 sells power to Caithness Shepherds Flat at the Slatt Substation located in Pacific Power's
5 allocated territory. Its argument appears to be that it is not providing "utility service" to "users"
6 in the Cooperative's service territory. As discussed in the Cooperative motion for summary
7 judgment, Pacific Power's argument does not provide it with immunity to the Territory
8 Allocation Law.

9 **A. Pacific Power's Sale is for the Three Wind Projects which are the Users of**
10 **that Power.**

11 Unlike other portions of the territory allocation law the definition of "utility service" does
12 not refer to the "customers" of a utility but to the "users" or "consumers" of the product."²⁵

13 ORS 758.400(3) defines "utility service" as "service provided by any equipment, plant or
14 facility for the distribution of electricity to users or the distribution of natural or manufactured
15 gas to consumers through a connected and interrelated distribution system." The definition of
16 "utility service" is focused on the distribution of electricity to "users" i.e., those who use and
17 consume the power. Under these rules, the Commission should look to the end users of the
18 power to enforce the Territory Allocation Law.

19 Here, it is undisputed that Pacific Power sells power to Caithness Shepherds Flat for the
20 sole purpose of providing backup power to the Three Wind Projects, e.g. the "users" of the
21 power. The recital and provisions in Pacific Power's contract with Caithness Shepherds Flat
22 unambiguously state Pacific Power's sale is to serve the loads of the Three Wind Projects.²⁶

23 Pacific Power also threatened Caithness representatives with litigation if they did request utility
24

25 ²⁵ *Northwest Natural*, 195 Or.App at 559.

26 ²⁶ "WHEREAS, Customer desires to purchase power and energy needed to meet the back-up power requirements of the Facility under this Agreement and Pacific Power desires to be the provider of such back-up power to Customer's Facility subject to the terms and conditions contained herein." See CBEC Motion for Summary Judgment, Kindley Decl. Exhibit I. Pacific Power and Caithness Shepherds Flat Power Agreement, Second Recital.

1 service for all Three Wind Projects.²⁷ Furthermore, Pacific Power admits in its motion for
2 summary judgment that it is serving the consumptive uses of the electric power by the Three
3 Wind Projects.²⁸ Therefore, it is undisputed that Pacific Power’s power sale services the loads
4 of South Hurlburt Wind and Horseshoe Bend Wind, which are electric “users” located in the
5 Cooperative’s allocated territory. Pacific Power’s sale is “into” the Cooperative’s service
6 territory.

7 **B. Pacific Power’s Sale Depends Upon Utility Facilities Located in the**
8 **Cooperative’s Allocated Territory**

9 It is also undisputed that Pacific Power’s sale to Caithness Shepherds Flat and service to
10 the Three Wind Projects’ loads depends upon BPA’s meters located in the collector substations
11 of each wind project. The delivery of the power from Pacific Power to the Three Wind Projects’
12 load also depends upon the transmission facilities owned by the Three Wind Projects.

13 Pacific Power asks the Commission to ignore those facts because they are fatal to its
14 defense. The definition of “utility service” means “service provided by any equipment, plant or
15 facility for the distribution of electricity to users . . .”²⁹ The issue of whether the person is using
16 equipment owned by other persons or entities is not an element of the definition of “utility
17 service.” The statute focuses on whether utility service relies on *any* equipment, plant or facility
18 for the distribution of electricity to users.

19 The policy behind this definition is sound. It prevents violators of an allocated territory
20 from avoiding the Territory Allocation Law by simply creating subsidiaries to own distribution
21 facilities or, in this case, using customers’ distribution facilities.

22 Here, Pacific Power’s supply of power to the Three Wind Projects and sale to Caithness
23 Shepherds Flat depends upon the BPA metes located in each collector substation and the electric
24 facilities owned by the Three Wind Projects.

26 ²⁷ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit H.

²⁸ Pacific Power Motion for Summary Judgment at 8.

²⁹ ORS 758.400(3)

1 Both Pacific Power and the Caithness Defendants alleged that since BPA required the
2 meters to be in each collector substations, that they are immune to the Territory Allocation Law.
3 The definition of “utility service,” however, does not provide them with that immunity. It
4 plainly states that utility service is the use of *any* equipment for the distribution of equipment.
5

6 **VII. The Cooperative’s Arguments Are Not an Impermissible Collateral Attack on EFSC**
7 **Jurisdiction**

8 The Caithness Defendants claim that the Three Wind Projects’ siting certificates from the
9 Oregon Energy Facility Siting Council (“EFSC”) supersedes the Territory Allocation Law. They
10 argue the Commission has no jurisdiction or ability to now rule on whether the Caithness
11 Defendants have violated ORS 758.450(2). Like their other arguments, they have misinterpreted
12 the statutory language and exaggerated EFSC’s jurisdiction.

13 EFSC’s authority and jurisdiction arises in ORS 469. ORS 469.401(4) provides:

14 Nothing in ORS chapter 469 shall be construed to preempt the jurisdiction
15 of any state agency or local government over matters that are not included
16 in and governed by the site certificate or amended site certificate. Such
17 matters include but are not limited to employee health and safety, building
18 code compliance, wages and hour and other labor regulations, local
19 government fees and charges or other design or operational issues that do
20 not relate to siting the facility.

21 Pursuant to ORS 469.401(4) if a project’s site certificate does not address a matter, then
22 the site certificate does not have any effect on another state agency’s consideration of that matter.

23 Case law emphasizes the limits of EFSC’s jurisdiction and the scope of site certificates.
24 *See Oregon v. EFSC*, 121 P.3d 1141, 339 Or. 353 (2005). In *Oregon v. EFSC*, the court held
25 that state and local governments are only bound “to issue permits specified in the site certificate
26 without further proceedings.” Conversely, if the site certificate does not address a specific
permit, then the actions and jurisdictions of state and local governments are not curtailed in any
manner regarding other permits.

1 Here, the Shepherds Flat Project initially was one large project that included all of the
2 current Three Wind Projects. EFSC issued one site certificate for the Shepherds Flat wind
3 project. EFSC's Final Order for the Site Certificate for the Shepherds Flat Wind Farm, July 25,
4 2008, recognizes the limitations on EFSC's jurisdiction. It provides at page 10:

5 The Council has no jurisdiction over design or operational issues that do not relate
6 to siting, such as matters related to employee health and safety, building codes
7 compliance, wage and hour or other labor regulations, or local governmental fees
8 and charges. ORS 469.401(4).

9 Furthermore, EFSC's Final Order for the Site Certificate for the Shepherds Flat Wind
10 Farm, July 25, 2008, also provides at page 143:

11 Under ORS 469.401(4), the Council does not have authority to preempt the
12 jurisdiction of any state agency or local government over matters that are not
13 included in and governed by the site certificate or amended site certificate. Such
14 matters include specific design-specific construction or operating standards and
15 practices that do not relate to siting. . . .

16 Nothing in the original Shepherds Flat site certificate requires the Commission to set
17 aside the enforcement of the Territory Allocation Law or requires the Commission to allocate a
18 territory to the Three Wind projects. In fact, nothing in the original site certificate even
19 addresses matters concerning the Territory Allocation Law. The Territory Allocation Law
20 concerns operational matters that do not relate to the siting of energy facilities.

21 After the Caithness developers split the Shepherds Flat wind project into the Three Wind
22 Projects, the EFSC amended the original site certificate and issued three separate site certificates.
23 Nothing in the Three Wind Projects' site certificates concern the Cooperative's allocated
24 territory or the Three Wind Projects right to ignore the Territory Allocation Laws.³⁰

25
26 ³⁰ The Three Wind Projects' site certificates are attached to Caithness Defendants' Motion for Summary
Determination, Delgado Decl. and posted at <http://www.oregon.gov/energy/Siting/Pages/SFN.aspx>;
<http://www.oregon.gov/energy/Siting/Pages/SFC.aspx>; and <http://www.oregon.gov/energy/Siting/Pages/SFS.aspx>.
The original site certificate for the Shepherds Flat Wind Farm is provided at each of the above posting.

1 In short, neither EFSC's jurisdiction regarding the siting of energy facilities nor the site
2 certificates of the Three Wind Projects supersede the Commission's jurisdiction and authority to
3 enforce the Territory Allocation Law in this circumstance.

4 Additionally, the Cooperative's position would not require modification of the site
5 certificates. As discussed previously, the Cooperative has several alternative means to service
6 the loads in its allocated territory. To the extent any of those alternatives require construction of
7 new facilities, the Cooperative will do that construction, not the Three Wind Projects.

9 **VIII. The Cooperative Was Timely In Filing Its Complaint with the Commission**

10 The Caithness Defendants claim the Cooperative unreasonably delayed in filing its
11 complaint and, therefore, they should be granted relief because of laches.

12 Under Oregon law, the Caithness Defendants bear the burden that defense of laches
13 applies. Laches requires the Defendants to establish that (1) plaintiff delayed asserting its claim
14 for an unreasonable length of time, (2) with full knowledge of all the relevant facts (and laches
15 does not start to run until such knowledge is shown to exist), (3) resulting in such substantial
16 prejudice to defendants that it would be inequitable for the court to grant relief.³¹

17 The Cooperative reasonably believed until 2013 shortly before it filed its complaint at the
18 Commission that it would be serving that portion of the South Hurlburt Wind and Horseshoe
19 Bend Wind projects' load located in the Cooperative's allocated territory.

20 It is undisputed that the Cooperative had many years of discussion with representatives of
21 the Three Wind Projects regarding the Cooperative providing backup service to the projects.³²
22 Those discussions concerned the Cooperative serving the load in its territory; they did not
23 provide the Cooperative notice until July 2013 that the Caithness Defendants would not take
24 service from the Cooperative.

25
26 ³¹ *Fontana v. Steenson*, 145 Or.App 229, 233 (1996).

³² Caithness Defendants' Motion for Summary Determination, p 29; CBEC Motion for Summary Judgment, Kindley Decl., Exhibit F.

1 It is undisputed that Caithness Shepherds Flat had entered into Oregon Strategic
2 Investment Program Agreement (“SIP Agreement”) with Morrow County in 2009.³³ The SIP
3 Agreement provides that the Three Wind Projects must request electric service from the
4 Cooperative as a condition for receiving tax incentives from the county. Section 4.m. of the
5 Agreement provides:

6 Caithness agrees to request station-service power from Columbia Basin Electric
7 Cooperative for those project facilities located in Columbia Basin’s service
8 territory.³⁴

9 The Cooperative reasonably relied on that assurance that it would serve the Projects’
10 loads in its allocated territory.

11 Representatives from BPA, the Caithness Defendants and the Cooperative met on July
12 21, 2010, to discuss alternative means for the Cooperative to serve the loads in its allocated
13 territory.³⁵ Although the Caithness Defendants did not request transmission service at that
14 meeting, the notes of that meeting demonstrate the discussions of the service alternatives would
15 lead the Cooperative to reasonably assume that it would serve those loads in its service territory.

16 The Cooperative was not invited or present when Pacific Power offered to serve the
17 entire backup loads of the Three Wind Projects at the meeting between BPA, Pacific Power and
18 the Caithness Defendants on August 5, 2010.³⁶

19 It is not disputed that Caithness representatives finally made a service request to the
20 Cooperative on July 31, 2012, for the Cooperative to serve the wind projects load located in the
21 Cooperative’s service territory.³⁷ The Cooperative responded on August 21, 2012, and agreed to
22 provide service as requested by the Caithness Defendants.³⁸ The Cooperative, Caithness

23
24 ³³ Attached hereto in Kindley Declaration, Exhibit N, Oregon Strategic Investment Program Agreement “Shepherds
25 Flat Wind Farm.” The SIP Agreement was assigned to the Three Wind Projects later. See Kindley Decl. Exhibit O
26 attached hereto.

³⁴ *Id.*, at 5.

³⁵ See CBEC Motion for Summary Judgment, Kindley Decl. Exhibit G.

³⁶ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit H.

³⁷ See CBEC Motion of Summary Judgment, Kindley Decl., Exhibit L.

³⁸ See CBEC Motion for Summary Judgment, Kindley Decl., Exhibit F.

1 Defendants and Pacific Power worked together from August 2012 until July 24, 2013, to develop
2 a means for the Caithness Defendants to receive service from the Cooperative for the loads in the
3 Cooperative's service territory. Pacific Power and the Cooperative reached an agreement on
4 how to divide the load and how to serve the Three Wind Projects.³⁹ It was only when BPA
5 informed the Caithness Defendants on July 24, 2013, that the Three Wind Projects' loads would
6 not be served as one but, instead, would incur three demand charges that the Caithness
7 Defendants terminated the service request with the Cooperative.⁴⁰

8 The Cooperative filed its complaint in this proceeding on August 28, 2013,
9 approximately one month after Caithness Defendants terminated their service request with the
10 Cooperative.

11 The Caithness Defendants argue that the Cooperative should have filed its complaint with
12 the Commission in 2010 because the Cooperative "knew the parties general positions."
13 Additionally, they claim the delay has been prejudicial to them because the current Commission
14 proceeding is "more costly" and the "loss of control over confidential and proprietary business
15 information."

16 These arguments do not satisfy the necessary three elements for laches. The Cooperative
17 disputes that it delayed its claim, that it had full knowledge of all the relevant facts, and the
18 defendants have suffered substantial prejudice.

19 First, the Cooperative filed its complaint approximately one month after the Caithness
20 Defendants withdrew the service request for the Projects. That is not an unreasonable delay by
21 any standard. The Caithness Defendants have not proved the Cooperative unreasonably delayed
22 the filing of its complaint.

24 ³⁹ See CBEC Motion for Summary Judgment, Kindley, Decl., Exhibit M. In this email Delgado wrote to BPA,
25 "Under the replacement station service agreement, Pacific Power and Columbia Basin Cooperative have agreed to
26 share the aggregated stations service loads, with 55 percent of the aggregated load being served by Pacific Power
and 45 percent of that aggregated load going to the Coop." Caithness' Delgado now claims that "no agreement was
reached." Caithness Defendants Motion for Summary Disposition, Delgado Decl. at ¶ 83.

⁴⁰ See CBEC Motion for Summary Judgment, Kindley Decl. Exhibit M.

1 Second, the Cooperative lacked relevant facts to file its complaint in 2010. In fact, in
2 2010 the Cooperative had a meeting with Caithness Defendants and was lead to believe it would
3 be receiving a service request. It also was aware of the terms of the SIP Agreement with
4 Morrow County and thought that Agreement required the Caithness Defendants to request
5 service. The Caithness Defendants believed the same because their July 31, 2012, letter requests
6 service from the Cooperative to comply with that requirement in the SIP Agreement. It was not
7 until July 24, 2013, that the Cooperative finally learned that the Caithness Defendants would not
8 request service from the Cooperative. The Caithness Defendants have not proved the
9 Cooperative had full knowledge of all the relevant facts to file its complaint earlier than July 24,
10 2013.

11 Finally, the Caithness Defendants have not suffered substantial prejudice to the extent
12 that it would be inequitable for the court to grant relief to the Cooperative. The only harm they
13 claim is the cost of this proceeding and “loss of control of proprietary business information”
14 from participating in this proceeding. Had the Cooperative filed its complaint earlier, the
15 Caithness Defendants would have incurred similar costs and it would have been subject to the
16 same discovery. Also, the Caithness Defendants have not lost control over proprietary business
17 information. All proprietary business information is held confidential in this proceeding. The
18 Caithness Defendants have not shown prejudice to the extent it is inequitable for the Commission
19 to grant relief to the Cooperative.
20

21 **IX. The Commission Has Statutory Authority to Provide Relief for the Cooperative**

22 The Caithness Defendants claim the Commission “lacks statutory authority to enjoin the
23 end-user business activities or to abrogate Caithness’ contract with PacifiCorp.”⁴¹ Pacific Power
24 claims that Commission cannot award damages or enjoin Pacific Power’s power deliveries to the
25 Caithness Defendants because the circuit court only has that authority.⁴² In short, the defendants
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⁴¹ Caithness Defendants Motion for Summary Determination at 31.

⁴² Pacific Power Motion for Summary Judgment at 18.

1 basically claim the Commission cannot enforce the Territory Allocation Law because it cannot
2 provide any effective relief if a person violates the law.

3 ORS 756.040(1) and (2) grants the Commission broad powers to regulate utilities and any
4 other persons under the jurisdiction of the Commission. ORS 756.040(1) provides in relevant
5 part,

6 [T]he commission shall represent the customers of any public utility . . . and the
7 public generally in all controversies respecting . . . service and all matters of
8 which the commission has jurisdiction. In respect thereof the commission shall
9 make use of the jurisdiction and power of the office to protect such customers,
10 and the public generally, from unjust and unreasonable extractions and practices .
11 ..

12 Additionally, ORS 756.040(2) provides:

13 The Commission is vested with power and jurisdiction to supervise and regulate
14 every public utility . . . in this state, and to do all things necessary and convenient
15 in the exercise of such power and jurisdiction.

16 Oregon courts have held that the Commission has very broad powers under ORS
17 756.040(1) and (2). *See Isom v. Portland General Electric Co.*, 67 Or.App. 97, 102 (1984).
18 (Commission has authority to establish rules for termination of service in winter).

19 In *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or.App. 302 (1992) one of the
20 issues is whether the Commission has general authority to issue refunds under ORS 756.040 if
21 another specific statute (ORS 759.185) grants the Commission authority to issue refunds under
22 different circumstances. The court noted that the “legislature has granted broad power to the
23 PUC to perform its delegated function . . . It is well settled that an agency has such implied
24 powers as are necessary to enable the agency to carry out the power expressly granted to it.”⁴³
25 The court held that although the Commission had specific authority under ORS 759.185, the
26 Commission also had general authority under ORS 756.040 to order a refund. The court noted it

⁴³ *Id.* at 310-11.

1 would be inconsistent with the Commission's regulatory role to hold it does not have authority to
2 order a refund of temporary rates that failed to comply with an ordered revenue reduction.⁴⁴

3 Here, Pacific Power and the Caithness Defendants argue that the Commission has no
4 authority to enjoin Pacific Power's sale to the Caithness Defendants. Pacific Power claims that
5 the statutes provide only express authority to the courts to enjoin the power sale or to award
6 treble damages.⁴⁵

7 The Cooperative strongly disagrees. Like the holding in *Pacific Northwest Bell*
8 *Telephone Co. v. Katz*, the Commission's broad powers under ORS 756.040(1) and (2) grant the
9 Commission the authority to regulate Pacific Power, including the authority to enjoin its power
10 sale to Caithness Shepherds Flat. It also has authority under ORS 756.040(1) to circumscribe
11 any of the Caithness Defendants' activities that violate the Territory Allocation Law. Like the
12 court observed in *Pacific Northwest Bell Telephone Co. v. Katz*, it would be inconsistent with the
13 Commission's regulatory role and authority in ORS 758.450 to authorize the Commission to
14 administer the Territory Allocation Laws and have jurisdiction over would be violators, but not
15 grant the Commission any regulatory measures to enforce the Law. The Commission has
16 authority to grant the Cooperative relief if the Commission finds the defendants violated the
17 Territory Allocation Law.

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25 ⁴⁴ *Id.* at 311.

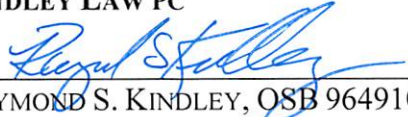
26 ⁴⁵ Pacific Power cites the ALJ's decision in this proceeding regarding the Cooperative motion to amend its
complaint as authority that the Commission's enforcement authority is limited. The Cooperative disagrees. The
ruling simply addressed whether the Commission had authority to grant treble damages and attorneys fees under
ORS 756.185.

1 **CONCLUSION**

2 For the above reasons, Columbia Basin Electric Cooperative respectfully requests the
3 Oregon Public Utility Commission to grant the Cooperative's Motion for Summary Judgment.
4

5 DATED this 21st day of October 2014.
6
7

8 **KINDLEY LAW PC**

9 By 
10 RAYMOND S. KINDLEY, OSB 964910
11 Email: kindleylaw@comcast.net
12 Tel: (503) 206-1010
13 Attorney for Columbia Basin Electric
14 Cooperative, Inc.
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1 **BEFORE THE**

2 **PUBLIC UTILITY COMMISSION OF OREGON**

3	COLUMBIA BASIN ELECTRIC)	Docket No. UM 1670
4	COOPERATIVE, INC. an Oregon)	
	cooperative corporation	)	DECLARATION OF RAYMOND S.
5	Complainant,	)	KINDLEY IN SUPPORT OF COLUMBIA
	vs.	)	BASIN ELECTRIC COOPERATIVE, INC'S
6	PACIFICORP, dba Pacific Power, an	)	RESPONSE TO DEFENDANTS' MOTIONS
	Oregon business corporation,	)	FOR SUMMARY JUDGMENT
7	Defendant,)	
)	
8	NORTH HURLBURT WIND, LLC, a)	
	foreign limited liability company,)	
9	Defendant,)	
)	
10	SOUTH HURLBURT WIND, LLC, a)	
	foreign limited liability company,)	
11	Defendant,)	
)	
12)	
	Horseshoe Bend Wind, LLC, a)	
13	foreign limited liability company,)	
	Defendant,)	
14	and)	
	Caithness Shepherds Flat, LLC, a)	
15	foreign limited liability company,)	
16	Defendant.)	

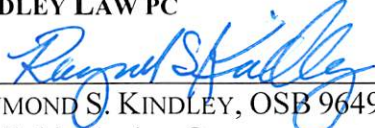
17
18 I, Raymond S. Kindley, do declare the following if called to testify, would and could
19 completely testify thereto:

- 20 1. I am over age of 18, and make this Declaration based upon personal knowledge.
 - 21 2. I am an attorney at the law firm of Kindley Law, P.C., in Oregon City, Oregon,
 - 22 and I am the attorney of record for Columbia Basin Electric Cooperative, Inc. (the
 - 23 "Cooperative") in the above captioned docket before the Public Utility Commission of Oregon
 - 24 ("OPUC").
 - 25 3. True and correct copy of the Oregon Strategic Investment Program Agreement
 - 26 between Morrow County and Caithness Shepherds Flat, LLC, dated July 9, 2009, is attached
- hereto as Exhibit N.

1 4. True and correct copy of the Assignment of the Strategic Investment Program
2 Agreement with Morrow County, Oregon and Also of Related First-Source Hiring Agreement,
3 dated September 7, 2011, is attached hereto as Exhibit O.
4

5 DATED this 21st day of October 2014.

6 **KINDLEY LAW PC**

7 By 
8 RAYMOND S. KINDLEY, OSB 964910
9 Email: kindleylaw@comcast.net
10 Tel: (503) 206-1010
11 Attorney for Columbia Basin Electric
12 Cooperative, Inc.
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**OREGON STRATEGIC INVESTMENT PROGRAM AGREEMENT
"SHEPHERDS FLAT WIND FARM"**

Morrow County, a political subdivision of the State of Oregon, (hereinafter "County"), and Caithness Shepherds Flat, LLC, a Delaware limited liability company authorized to do business in the State of Oregon, (hereinafter "Caithness") hereby enter into this Strategic Investment Program (hereinafter "SIP") Agreement, to cover all portions of the Shepherds Flat Wind Farm in, or relating to, the County.

WITNESSETH:

WHEREAS, the Oregon Legislature has established the Strategic Investment Program (hereafter "SIP") to promote industrial competitiveness and to improve employment in the area where projects are to be located by encouraging businesses engaged in projects to hire local employees. (See ORS 307.123 and ORS 285C.600 – 285C.620.); and

WHEREAS, SIP encourages local governments to enter into agreements with key industries to attract and retain long-term investment and employment; and

WHEREAS, Caithness proposes to build and operate within Morrow County and adjoining Gilliam County a commercial wind energy generation project, known as the Shepherds Flat Wind Farm, pursuant to a site certificate issued by the Oregon Energy Facility Siting Council, as that certificate may be amended from time to time; and

WHEREAS, the Shepherds Flat Wind Farm is expected to have a capital cost of at least \$25 million and create approximately thirty-two (32) new, permanent full-time jobs; and

WHEREAS, in order to develop a very large renewable resource such as the Shepherds Flat Wind Farm, Caithness will divide that resource into four separate renewable energy resource facilities, each to be separately owned financed, constructed and operated by North Hurlburt Wind, LLC, South Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC, and Shepherds Flat Common Facilities, LLC, respectively; and

WHEREAS, Caithness and the County have entered into negotiations to develop this Oregon SIP Agreement (the "Agreement"), and Caithness has provided to the County a copy of the Oregon Economic and Community Development Department ("OECDD") SIP application filed with the OECDD and will submit updates to the SIP application to the OECDD after the parties have fulfilled their requirements under State law. It is the intent of this SIP Agreement to provide the competitive tax structure in the County that is essential for Caithness to provide a source of renewable energy in Oregon and to contribute to the State of Oregon's quality of life; and

WHEREAS, the County and Caithness have provided public information and an opportunity for public input regarding the Strategic Investment Program generally and

Caithness' SIP application specifically, including a formal public hearing on this Agreement held on July 8, 2009 and;

WHEREAS, this Agreement provides the terms and conditions under which the County agrees to recommend to the State that the SIP application be approved and tax abatement be granted for the Project, as defined below, in exchange for performance by Caithness of the obligations herein; and

WHEREAS, Caithness and Morrow County will have a separate SIP agreement with a separate 15-year SIP exemption for Caithness Property to be located in Morrow County;

NOW, THEREFORE, in consideration of the mutual covenants of the parties, each to the other giving, the parties do hereby agree as follows:

1. **Project Definition and Scope.** The "Project" means all tangible and intangible Property (whether held in fee, leasehold or by contract) having Morrow County (as distinct from Gilliam County) as its tax situs, comprising, or otherwise relating to, the Shepherds Flat Wind Farm, both before and after the Shepherds Flat Wind Farm is divided into four separate renewable energy resource facilities. The Project shall be comprised of wind turbine generators, that may be installed or placed in service in phases or stages in the County during the term of this Agreement, as well as all associated property, including without limitation roads and civil construction work, underground and overhead electrical lines and pole structures, high-voltage transmission lines and pole structures, meteorological monitoring towers, an operations and maintenance facility, grid interconnection facilities, one or more substations, land, and associated supporting infrastructure and facilities, together with associated power sale agreements, interconnection and transmission agreements, easements, other related contracts, environmental attributes and other tangible and intangible property rights and interests. The Project further includes repairs, replacements, modernization, renovations and remodeling of such Property made during the term of this Agreement. The Project shall first exist when the real market value of the foregoing property is at least \$25 million. Subject to applicable site permits and state and local land use laws, Caithness may add to or subtract from the Property that constitutes the Project in the County (including repairs, replacements, modernization, renovations or remodeling); provided that the total combined electrical capacity of Shepherds Flat Wind Farm covered by this Agreement and any corresponding agreement with Gilliam County shall not exceed 909 MW. For purposes of this Agreement, "Property" has the meaning assigned to that term in ORS 308.505 through 308.665.

2. **SIP Exemption Period.** The "SIP Exemption Period" under this Agreement shall begin, as defined in ORS 307.123 (1)(b), during, and for, the Property Tax Year when the Project commences Commercial Operation and also has a real market value equal of at least \$25 million, and shall continue thereafter for 15 Property Tax Years as provided by ORS 307.123(1)(b). As used in this Agreement, "Commercial Operation" shall mean the date on which the Project first produces electrical energy and that electrical energy is transmitted into the regional transmission grid for delivery to a power purchaser, and "Property Tax Year" means each period of 12 months beginning July 1.

3. **Conditions Precedent and Contingent Reopener.** The obligations set forth herein are conditioned upon a determination by the OECDD or its designee that the Project is eligible for the tax exemption provided in ORS 285C.606, ORS 307.123, and applicable administrative rules.

This SIP Agreement is based upon the intention of Caithness to build out the Morrow County portion of the Wind Project by the end of 2012. If construction is not completed in Morrow County by the end of 2015, then Morrow County reserves the right to reopen and renegotiate the monetary terms of Section 4.e for prospective application during the period this Agreement thereafter remains in effect.

4. **Caithness Obligations.**

a. **Ad Valorem Property Taxes.** The first \$25 million in real market value of the Project shall be taxable at its assessed value, subject to annual increase at the rate of three percent (3%) per annum, as provided by ORS 307.123 and 308.146. The remainder of the real market value of the Project shall be exempt from ad valorem taxation as provided by ORS 307.123.

b. **Community Service Fee ("CSF").** Pursuant to ORS 285C.609 (4) (b) (B), for each year of the SIP Exemption Period, Caithness shall pay to the County a CSF, in an amount equal to twenty-five percent (25%) of the property taxes that would, but for the exemption, be due on the exempt property in each assessment year, but not exceeding \$500,000 in any Property Tax Year. Each year, no later than October 25, the County shall provide Caithness with a statement describing its calculations and the amount due, if any, for the Property Tax Year that includes that October 25, and Caithness shall pay such amount to the County within 60 days.

c. **Additional Amount.** Caithness shall notify the County each year, at the time of the filing with the Oregon Department of Revenue of the annual statement for property tax purposes covering the Project, of the connected nameplate capacity (in Megawatts) of the Project as of January 1 of that year, which MW amount shall be used to calculate any Additional Amount for the Property Tax Year commencing on the following July 1. For purposes of this Agreement, the following definitions apply:

"Statutory Amount" means, for each Property Tax Year during the SIP Exemption Period, the sum of (i) the ad valorem property taxes due for the Property Tax Year pursuant to Section 4.a. and (ii) the corresponding CSF.

"Per-Megawatt Amount" means the amount shown in the table below for each Property Tax Year.

"Minimum Revenue Amount" means the product of (a) the connected nameplate capacity (in Megawatts) of the Project as of January 1 of each year, and (b) the corresponding Per-Megawatt Amount for the Property Tax Year commencing on the following July 1.

If in any Property Tax Year of the SIP Exemption Period, the Statutory Amount is less than the Minimum Revenue Amount for that Property Tax Year, then Caithness shall pay to the County an amount equal to the difference between the Minimum Revenue Amount and the Statutory Amount (the "Additional Amount"). The Additional Amount shall be payable in addition to any property taxes and CSF for the year. Each year, no later than October 25, the County shall provide Caithness with a statement describing its calculations and the Additional Amount due, if any, for the Property Tax Year that includes that October 25, and Caithness shall pay any such Additional Amount to the County within 60 days. Exhibit A to this Agreement is an illustrative example showing a sample calculation of the amounts specified for payment to the County under this Agreement.

The Per-Megawatt Amounts for this SIP Agreement is agreed to as shown in the following table:

<u>Year of SIP Exemption Period</u>	<u>Per-Megawatt Amount</u>
1-3	\$10,407
4-7	\$9,907
8-15	\$9,507

d. First-Source Agreement. Caithness shall enter into a first-source hiring agreement, with a third-party provider or contract agency acceptable to the County, in substantially the form required pursuant to OAR 123-070-1000-2400. The County is to be designated a third-party beneficiary of the first-source hiring agreement and shall be entitled to enforce its terms. If the third-party provider is unable to perform the first-source hiring agreement to the satisfaction of Caithness or the County, then the Parties shall cooperate in procuring the services of a substitute third-party provider.

e. On January 5 of each of the fifteen Payment Dates after a Facility has commenced commercial operation, the Caithness entities shall pay the County an amount equal to \$100 multiplied by the nameplate capacity of the Facility as of the prior January 1. The County will then remit these funds to the Community Renewable Energy Association (CREA), an Oregon ORS Chapter 190 organization, provided that County has evidence that CREA is in good standing at the state level. Additional Amounts specified for payment to the County under Section 4.c shall be reduced, dollar-for-dollar, by the amount of any payments specified under this Section 4.e.

f. County Cost of Preparation of SIP. In addition to the above, Caithness agrees to reimburse County for its reasonable, one-time costs incurred for SIP preparation including staff, legal administrative, and professional fees. Payment of these costs to be made within 30 days after receipt of invoice, which will be submitted upon OECD approval of the SIP Agreement.

g. SIP Application. Caithness shall file a SIP application with the State and pay all applicable fees as provided in ORS 285C.612 and applicable administrative rules.

h. Property Tax Disclosures. Caithness shall provide all information reasonably requested by the County Assessor concerning Property constituting the Project reasonably relating to determination of the real market value of such Property. Each year at the time for filing the annual property tax statement with the Oregon Department of Revenue, Caithness shall notify the County of the current connected nameplate capacity (in Megawatts) of all Project property within the County and list the taxable Property in the Project, within the County, as of January 1st of that Property Tax Year.

i. State Road Repair Agreement. Caithness Entities agree to coordinate with and reasonably satisfy requests of Oregon Department of Transportation (ODOT) for repairs of any State highways impacted by project construction traffic and, in addition, reimburse County its direct, out-of-pocket cost of any repair or extraordinary maintenance of County roads resulting from Caithness' construction.

j. Caithness agrees to utilize the Morrow County Building Inspector for all applicable building code activities such as permits and inspections for structural and electrical, and other building code requirements.

k. Caithness will work with the Morrow County Weed Control Officer to develop and implement an effective weed control program on the Project site.

l. Caithness agrees to coordinate with the County Emergency Services and Sheriff's office to develop an Emergency Services siting plan of the Project's wind turbines, roads, and associated structures.

m. Caithness agrees to request station-service power from Columbia Basin Electric Cooperative for those Project facilities located in Columbia Basin Electric's service territory.

5. County Obligations.

a. Within 15 days after the last signature below, the County shall request that the Oregon Economic and Community Development Commission determine that the Property constituting the Project be granted exemption from ad valorem property taxation for the SIP Exemption Period.

b. The County shall be solely responsible for disposition of the CSF and the Additional Amount, including paying any portions that are due or payable to any other jurisdiction. Neither Caithness nor any permitted assignee shall have any liability or obligation to any other person with respect to the CSF, the Additional Amount, or any ad valorem property tax on the exempted amount after Caithness has discharged its duty to pay the County as set forth in Sections 4.b. and 4.c. above.

6. **Joint Obligations.** In addition to the other obligations set forth in this Agreement, the parties shall:

- a. Cooperate with the OECDD and the Department of Revenue to secure approval of the SIP and take such steps as may, from time to time, be necessary to maintain the tax exemption.
- b. Provide such information and resources to each other as may be reasonably necessary to ensure proper calculation of the amounts due under this Agreement.

7. **Ad Valorem Property Taxes.** Nothing herein shall govern the assessment, payment, or collection of ad valorem property taxes on the non-exempted portion of the Project that is taxable as described in Section 4.a. of this Agreement or on property not part of the Project, as defined herein.

8. **Miscellaneous Provisions.**

- a. The laws of the State of Oregon shall govern this Agreement and venue is in the Circuit Court of the State of Oregon for the County of Morrow. The parties agree that in case of any disputes that arise under this Agreement they shall first attempt to resolve such disputes through good-faith negotiations between authorized representatives for both parties.
- b. Unless defined herein, the terms herein shall be given their normal and customary meaning, except that terms relating to the payment of property taxes and fees in lieu of taxes shall be construed consistently with the tax laws and rules of the State of Oregon. No provision shall be construed against a party on the basis that the party drafted the provision.
- c. Failure to make payment in full of the CSF or the Additional Amount by the due date shall result in interest being charged on the past due balance in the same amount as is provided by law for late payment of ad valorem property taxes.
- d. Default by Caithness.

(1) For purposes of this Agreement, "Caithness Default" means a failure by Caithness to pay by the end of the Cure Period, any amount due and payable under Section 4.b, 4.c, or 4.e of this Agreement. "Cure Period" means:

- (i) If a failure to pay occurs during a Property Tax Year in which the production of electricity by the Project (, or any renewable energy resource facility into which the Shepherds Flat Wind Farm has been divided) has been reduced by at least 25 percent for a period of at least 1 month due to a Force Majeure event, the Cure Period shall extend for 90 days after such Force Majeure has ended, or

- (ii) If a failure to pay occurs for any reason other than Force Majeure, the Cure Period shall extend for 60 days after notice the County sends Caithness written notice of a Caithness Default.

“Force Majeure” means an event that is not within the reasonable control of Caithness and that by the exercise of due diligence Caithness is unable to prevent or overcome. Force Majeure includes, but is not limited to, major equipment failures affecting the Project or the Project substations, acts of God, fire, civil disturbance, labor dispute, labor or material shortage, electrical disturbance, transmission-service curtailment, sabotage, action or restraint by court order or public or governmental authority (including Bonneville Power Administration).

(2) The County shall have the right to enforce payment of any and all amounts due to it by Caithness and/or any permitted assignee (including interest, as provided in Section 8.c.), through an appropriate action to collect such amounts. In case suit or action is instituted to enforce compliance with any of the terms, covenants or conditions of this Agreement, or to collect the CSF or the Additional Amount due hereunder or any portion thereof, Caithness agrees to pay, in addition to the costs and disbursements provided by statute, such additional sums as the court may adjudge reasonable for attorneys’ fees, the County’s consulting fees, and other out-of-pocket county expenses to be allowed plaintiff in said suit or action, provided County is the prevailing party. Caithness also agrees to pay and discharge all reasonable costs and expenses actually incurred, including the County’s reasonable attorney’s fees, reasonable consulting fees, and other reasonable out-of-pocket county expenses that shall arise from enforcing any provisions of this agreement in the event of any Caithness Default even though no suit or action is instituted. Nothing in this Section 8.d. is intended to limit any remedies otherwise available to the County to enforce any of the provisions of this Agreement, including payment of any and all amounts due to the County by Caithness and/or any Permitted Assignee.

(3) The County and Caithness hereby agree to this Agreement in its entirety. The parties understand and agree that the County will only get the full benefit of its bargain if it receives all payments contemplated in Sections 4.e and 8.g. Therefore, if there is a Caithness Default under this Agreement, at the County’s election, this Agreement shall be terminated and the County shall be entitled to receive liquidated damages equal to the Default Amount and this Default Amount shall be owed by Caithness to the County. For purposes of this section 8.d.(3), the “Default Amount” shall mean the amount equal to the sum of (A) 67% of the sum of the Minimum Revenue Amount for the property year in which the Caithness Default occurred and for each succeeding Property Tax Year thereafter up to and including the last Property Tax Year of the SIP Exemption Period and in addition, (B) the sum of the present values of amounts payable by Caithness under Section 4.e that have not been paid and remain to be paid by Caithness. The County shall submit to Caithness an invoice for the amount of liquidated damages due, together with a statement setting forth its calculations. Caithness shall pay

such invoiced amounts on or before 60 days after its receipt of the invoice; provided, however in the event Caithness does not agree with the calculations Caithness and the County shall attempt to resolve such disputes through good-faith negotiations between authorized representatives for both parties during such 60-day period.

e. At the discretion of the Morrow County Court and in accordance with Oregon law, in the event of an overpayment of the CSF or the Additional Amount the County shall either issue an overpayment refund check or return the incorrect payment and request that Caithness reissue payment in the correct amount. In the event of returned payment the Assessor shall establish a schedule for payment.

f. If Caithness fails to pay the CSF and Additional Amount by the end of the Property Tax Year in which it is due, the tax exemption for the Project shall be suspended and the property shall be fully taxable for the following year and for each subsequent property tax year for which the CSF and additional amount remains unpaid. If an unpaid CSF is paid after the exemption is suspended, the property shall again be eligible for the SIP exemption, beginning with the Property Tax Year after the payment is made. Reinstatement of the exemption shall not extend the 15-year SIP Exemption Period.

g. All notices and other communications required or permitted under this SIP Agreement shall be in writing and shall be either hand delivered in person, sent by facsimile, sent by certified or registered first-class mail, postage pre-paid, or sent by nationally recognized express courier service. Such notices and other communications shall be effective upon receipt if hand delivered or sent by facsimile, three days after mailing if sent by mail, and one day after dispatch if sent by express courier, to the following addresses, or such other addresses as any party may notify the other parties in accordance with this Section 8.h.:

<p>If to County, to:</p> <p>Morrow County Assessor Post Office Box 247 Heppner Oregon 97836 Facsimile No.: (541) 676-5610 Telephone No.: (541) 676-5607 Attention: County Assessor</p>	<p>If to Caithness, to:</p> <p>Caithness Shepherds Flat, LLC 565 5th Avenue, 29th floor New York, NY 10017 Facsimile No.: (212) 921-9239 Telephone No.: (212) 921-9099 Attention: Vice President, Business Management</p>
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Either party may change its designated contact person by sending the other party notification thereof in accordance with this provision. In the event this Agreement is assigned to multiple assignees in accordance with Section 9, each assignee shall provide its contact information to the County.

9. Assignment.

a. Upon written notice to the County, but without prior approval by the County, Caithness shall have the right to assign all or any part of its rights and releasing all or any part of its obligations under this Agreement to any or all of the following Caithness affiliates: North Hurlburt Wind, LLC, South Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC, and/or Shepherds Flat Common Facilities, LLC; provided, however, that such assignment(s) shall not become effective unless and until the assignor shall have paid all amounts then due and payable to the County under this Agreement. Upon assignment that includes an agreement to be bound by this Agreement, each assignee shall be entitled to the SIP exemption relating to that portion of the Project assigned to it by Caithness ("Allocated Portion") in return for continuing payment of its corresponding share of the amounts due and payable to the County under this Agreement, as separately invoiced to each assignee by the County over that portion of the SIP Exemption Period then remaining after assignment. A default of any obligation under this Agreement by one assignee with regard to its Allocated Portion shall not be treated as a default by any other assignee.

b. Upon written notice to the County, but without prior approval by the County, Caithness, or any permitted assignee of Caithness, may assign this Agreement as collateral to any person or entity providing debt or equity financing refinancing, or credit to or for the Project, or any Allocated Portion thereof; provided, however, that such assignment(s) shall not become effective unless and until the assignor shall have paid all amounts then due and payable to the County under this Agreement.

c. No other assignment by Caithness may be made without the prior written consent of the County, which consent shall not be unreasonably withheld or delayed, provided the assignee satisfies all applicable requirements under ORS 285C.600 to 285C.626 and assumes the obligations, conditions, requirements and other terms of the agreement described.

10. **Cooperation.** Caithness and the County agree to cooperate and execute any and all supplementary documents and to take all additional actions as may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

11. **Term.** The term of this Agreement shall commence on the date of execution by the parties and shall continue through to and terminate on the sixtieth (60th) day after the expiration of the SIP Exemption Period.

12. **Merger.** This contract constitutes the complete and exclusive agreement between the parties with respect to the Project, and supersedes all prior agreements and proposals, oral or written and any other communication between the parties on this matter. No waiver, modification, amendment or other change will be binding on either party, except as a written addendum, signed by authorized agents for both parties.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate effective the 8th day of July, 2009.

MORROW COUNTY

Terry Tallman
Terry Tallman, County Judge

Absent
Ken Grieb, County Commissioner

Leann Rea
Leann Rea, County Commissioner

CAITHNESS SHEPHERDS FLAT, LLC

By [Signature]

By CAITHNESS SHEPHERDS FLAT, LLC

By Vice President.

**Exhibit A to the
Strategic Investment Program ("SIP") Agreement
Between Morrow County and
Caithness Shepherds Flat, LLC
Concerning the Shepherds Flat Wind Energy Resource**

(Illustrative Calculations Assuming Full Build-Out of 909 MW Project)

Assumptions:				
Term	15 Years			
Total MWs	227.25 (909 total in two Counties)			
Per MW Amount Years 1-3	\$10,407			
Per MW Amount Years 4-7	\$9,907			
Per MW Amount Years 8-15	\$9,507			
All Phases				
	SIP - \$25MM	SIP - Community Service Fee	SIP - Additional Amount	Grand Total of Payments ¹
2012	\$344,510	\$500,000	\$1,520,481	\$2,364,991
2013	\$354,845	\$500,000	\$1,510,145	\$2,364,991
2014	\$365,491	\$500,000	\$1,499,500	\$2,364,991
2015	\$376,455	\$500,000	\$1,374,910	\$2,251,366
2016	\$387,749	\$500,000	\$1,363,617	\$2,251,366
2017	\$399,382	\$498,389	\$1,353,595	\$2,251,366
2018	\$411,363	\$462,790	\$1,377,213	\$2,251,366
2019	\$423,704	\$427,191	\$1,309,571	\$2,160,466
2020	\$436,415	\$391,592	\$1,332,459	\$2,160,466
2021	\$449,507	\$355,992	\$1,354,966	\$2,160,466
2022	\$462,993	\$320,393	\$1,377,080	\$2,160,466
2023	\$476,882	\$284,794	\$1,398,789	\$2,160,466
2024	\$491,189	\$249,195	\$1,420,082	\$2,160,466
2025	\$505,925	\$213,595	\$1,440,946	\$2,160,466
2026	\$521,102	\$177,996	\$1,461,367	\$2,160,466

¹ Each annual CSF and Additional Amount is estimated, based on anticipated future Dept. of Revenue assessments and County tax rates. The annual Grand Total of Payments is not an estimate; it is the maximum total payments to the County in and for the applicable tax year of the SIP Exemption Year.

**ASSIGNMENT OF
STRATEGIC INVESTMENT PROGRAM AGREEMENT WITH MORROW COUNTY,
OREGON, AND ALSO OF RELATED FIRST-SOURCE HIRING AGREEMENT**

This ASSIGNMENT OF STRATEGIC INVESTMENT PROGRAM AGREEMENT WITH MORROW COUNTY, OREGON, AND ALSO OF RELATED FIRST-SOURCE HIRING AGREEMENT (this "Assignment"), made as of September 7, 2011, by and among CAITHNESS SHEPHERDS FLAT, LLC, a Delaware limited liability company authorized to do business in the State of Oregon ("Assignor") and NORTH HURLBURT WIND, LLC, a Delaware limited liability company, SOUTH HURLBURT WIND, LLC, a Delaware limited liability company, and HORSESHOE BEND WIND, LLC, a Delaware limited liability company, all authorized to do business in the State of Oregon (each an "Assignee," and collectively, the "Assignees").

WITNESSETH:

WHEREAS, Assignor and Morrow County, Oregon ("Morrow County") are parties to that certain "Oregon Strategic Investment Program Agreement 'Shepherds Flat Wind Farm'" dated July 8, 2009 ("Morrow County SIP Agreement"); and

WHEREAS, the condition precedent specified in Section 3 of the Morrow County SIP Agreement was satisfied on July 20, 2009, with the approval of the Morrow County SIP Agreement by action of the Business Development Commission for the State of Oregon; and

WHEREAS, Assignor is party to a "First-Source Hiring Agreement," executed pursuant to Section 4.d of the Morrow County SIP Agreement; and

WHEREAS, Assignor and Gilliam County, Oregon ("Gilliam County") are parties to that certain "Oregon Strategic Investment Program Agreement 'Shepherds Flat Wind Farm'" dated April 23, 2009 ("Gilliam County SIP Agreement"); and

WHEREAS, collectively, the Morrow County SIP Agreement and the Gilliam County SIP Agreement provide for a 15-year property tax exemption, under the Strategic Investment Program established pursuant to ORS 285C.600 – 285C.620, for all Property comprising, or relating to, the Shepherds Flat Wind Farm, a Project consisting of the following three discrete wind energy resources: Shepherds Flat North, Shepherds Flat Central and Shepherds Flat South; and

WHEREAS, Shepherds Flat North, now owned by North Hurlburt Wind, LLC, is more fully described in its First Amended Site Certificate, issued by the Oregon Energy Facility Siting Council ("EFSC") on March 12, 2010, as that Site Certificate may hereafter be amended, and also includes associated intangible Property; and

WHEREAS, Shepherds Flat Central, now owned by South Hurlburt Wind, LLC, is more fully described in its First Amended Site Certificate, also issued by EFSC on March 12, 2010, as that Site Certificate may hereafter be amended, and also includes associated intangible Property; and

WHEREAS, Shepherds Flat South, now owned by Horseshoe Bend Wind, LLC is more fully described in its First Amended Site Certificate, also issued by EFSC on March 12, 2010, as that Site Certificate may hereafter be amended, and also includes associated intangible Property; and

WHEREAS, certain Property comprising Shepherds Flat North, Shepherds Flat Central and Shepherds Flat South is held in common by all Assignees; and

WHEREAS, subject to providing notice to Morrow County, but without the need to obtain Morrow County assent, and subject to Assignor having paid all amounts then due and payable to Morrow County under the Morrow County SIP Agreement, the Assignor has the express right to assign the Morrow County SIP Agreement to each of the Assignees in such manner as Assignor may unilaterally decide; and

WHEREAS, as of the date of this Assignment, Assignor has paid all amounts then due and payable to Morrow County under the Morrow County SIP Agreement; and

WHEREAS, Assignor intends to assign one hundred (100%) percent of its rights, interests and obligations regarding the Project under the Morrow County SIP Agreement to Assignees, collectively and individually, and each of the Assignees intends to accept such assignment and to assume all rights, interests, obligations and undertakings of Assignor under the Morrow County SIP Agreement so assigned to that individual Assignee, in order for the Assignees to receive, for their respective wind energy resources, the full tax-exemptions and abatements, up to a specified Project maximum capacity of 909 MW, over entire the SIP Exemption Period specified in the Morrow County SIP Agreement; and

WHEREAS, by separate document substantially identical to this Assignment, Assignor also intends to assign one hundred (100%) percent of its rights, interests, obligations and undertakings regarding the Project under the Gilliam County SIP Agreement to the Assignees;

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties covenant and agree to be bound as follows:

1. **Definitions**. All capitalized terms used in this Assignment, unless otherwise defined herein, shall have the meanings ascribed to them in the Morrow County SIP Agreement.

2. **Assignment of Morrow County SIP Agreement**. By this instrument, Assignor assigns and transfers to Assignees one hundred (100%) percent of its rights, title and interests in, to and under the Morrow County SIP Agreement, regarding the Project, to each of the Assignees, with each Assignee receiving the following "Allocated Portion" with regard to the Project defined in the Morrow County SIP Agreement:

To: NORTH HURLBURT WIND, LLC, an Allocated Portion, estimated as of the date of this Assignment as zero (00.00%) percent of the Project, intended to cover all of the Project now comprising Shepherds Flat North;

- To: SOUTH HURLBURT WIND, LLC, an Allocated Portion, estimated as of the date of this Assignment as 37.21% percent of the Project, intended to cover all of the Project covered by the Morrow County SIP Agreement now comprising Shepherds Flat Central; and
- To: HORSESHOE BEND WIND, LLC, an Allocated Portion, estimated as of the date of this Assignment as 62.79% percent of the Project, intended to cover all of the Project covered by the Morrow County SIP Agreement now comprising Shepherds Flat South.

The respective Allocated Portions specified in this Section 2 are estimates, made prior to the completion of Project construction, for illustrative purposes, with a zero (00.00%) percent Allocated Portion for Assignor. Assignor and Assignees agree to amend this Section 2, when and if requested by any of them, to substitute actual, post-construction Allocated Portions for the estimates shown above.

3. Assumption of Morrow County SIP Agreement. By this instrument, each Assignee accepts and assumes all the respective obligations and undertakings of Assignor under the Morrow County SIP Agreement, performing such agreement as if it were the original party thereto with regard to its Allocated Portion, but not with regard to the Allocated Portions assigned to the other two Assignees. Specifically, with regard to all of Assignor's ongoing payment obligations under the Morrow County SIP Agreement, including but not limited to those specified in Section 4 thereof, each Assignee shall pay the exact percentage portion of such payment obligations equal to its Allocated Share; provided, however, that each Assignee shall be responsible for the entirety of any penalty or late payment obligation due to its failure to make timely payment in accordance with the terms of the Morrow County SIP Agreement.

4. Assignment and Assumption of First-Source Hiring Agreement. North Hurlburt Wind, LLC, agrees to faithfully perform all of Assignor's obligations under the First Source Hiring Agreement with regard to Shepherds Flat North. South Hurlburt Wind, LLC, agrees to faithfully perform all of Assignor's obligations under the First Source Hiring Agreement with regard to Shepherds Flat Central. Horseshoe Bend Wind, LLC, agrees to faithfully perform all of Assignor's obligations under the First Source Hiring Agreement with regard to Shepherds Flat South. Upon reasonable request by Morrow County, each Assignor agrees that it will execute a replacement to the First Source Hiring Agreement.

4. Acknowledgment of Release. Each Assignee will keep, perform and fulfill all such obligations and undertakings of Assignor from and after the date of this instrument, relieving Assignor of any further obligation therefor. Assignor is hereby released of all of its obligations under the Morrow County SIP Agreement as provided for in Section 9 thereof.

5. Designation of Substitute Contact Persons. Assignor shall communicate to Morrow County the following contact information for each Assignee, for purposes of receipt of any assessments, invoices or notices, in replacement of the Caithness designation specified in Section 8.g of the Morrow County SIP Agreement:

<p><u>If to North Hurlburt Wind, LLC:</u></p> <p>North Hurlburt Wind, LLC ATTN: Derrel A. Grant, Jr. c/o Caithness Corporation 565 Fifth Avenue, 29th floor New York, New York 10017</p>	<p><u>If to South Hurlburt Wind, LLC:</u></p> <p>South Hurlburt Wind, LLC ATTN: Derrel A. Grant, Jr. c/o Caithness Corporation 565 Fifth Avenue, 29th floor New York, New York 10017</p>
<p><u>If to Horseshoe Bend Wind, LLC:</u></p> <p>Horseshoe Bend Wind, LLC ATTN: Derrel A. Grant, Jr. c/o Caithness Corporation 565 Fifth Avenue, 29th floor New York, New York 10017</p>	<p><u>If to Caithness Shepherds Flat, LLC:</u></p> <p>Caithness Shepherds Flat, LLC ATTN: Derrel A. Grant, Jr. c/o Caithness Corporation 565 Fifth Avenue, 29th floor New York, New York 10017</p>

6. Merger and Integration, Superseding Effect. This Assignment, from and after the date hereof, embodies the entire agreement and understanding among the parties hereto with respect to its subject matter, and supersedes and has merged into it all prior oral and written agreements on the same subjects by and among the parties hereto with the effect that this Assignment shall control with respect to such subjects.

6. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of Oregon.

7. Counterparts. This Assignment may be executed in any number of counterparts, each of which, when so executed and delivered, shall be deemed to be an original, and all of which counterparts, when taken together, shall constitute one and the same instrument.

8. No Cross Default. Assignor has assigned different Allocated Portions to each of the Assignees. In accordance with Section 9.a of the Morrow County SIP Agreement, Assignor and Assignees agree that a default of any obligations of an Assignee with regard to its Allocated Portion shall not be treated as a default by any other Assignees.

9. Further Assignment. In the event of any dispute involving county or state taxing authorities regarding the adequacy of the Assignees' respective Allocated Portions to cover the entirety of their respective wind energy resources comprising the Project, the Assignees shall make commercially reasonable efforts to modify this Assignment, as necessary, to eliminate such dispute and such modification shall be deemed to occur under the authorization conveyed to Assignor under Section 9.a of the Morrow County SIP Agreement, subject only to written notice thereof being provided to Morrow County. Any other further assignment of this Assignment shall conform to the applicable requirements of Section 9.b or 9.c of the Morrow County SIP Agreement.

IN WITNESS WHEREOF, the parties have duly executed this Assignment as of the day and year first written above.

Assignor:

CAITHNESS SHEPHERDS FLAT, LLC

By: Caithness Northwestern Wind, LLC
its Managing Member

By: 
Name: David Casale
Title: Senior Vice President

Assignees:

NORTH HURLBURT WIND, LLC

By: Caithness Shepherds Flat, LLC
its Manger

By: Caithness Northwestern Wind, LLC
its Managing Member

By: 
Name: David Casale
Title: Senior Vice President

SOUTH HURLBURT WIND, LLC

By: Caithness Shepherds Flat, LLC
its Manger

By: Caithness Northwestern Wind, LLC
its Managing Member

By: 
Name: David Casale
Title: Senior Vice President

HORSESHOE BEND WIND, LLC

By: Caithness Shepherds Flat, LLC
its Manger

By: Caithness Northwestern Wind, LLC
its Managing Member

By: David Casale

Name: David Casale

Title: Senior Vice President

Acknowledged Receipt of Notice of
Assignment:

Morrow County, Oregon

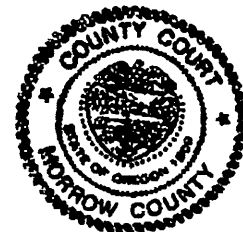
By: Terry K. Tallman

Name: TERRY K. TALLMAN

Title: MORROW COUNTY JUDGE

9/7/2011

Attest:
Sobhi Childers by
Chelsea Crawford
Morrow County Clerk



1 **BEFORE THE**

2 **PUBLIC UTILITY COMMISSION OF OREGON**

3	COLUMBIA BASIN ELECTRIC	)	Docket No. UM 1670
4	COOPERATIVE, INC. an Oregon)	
5	cooperative corporation	)	DECLARATION OF THOMAS WOLFF IN
6	Complainant,	)	SUPPORT OF COLUMBIA BASIN
7	vs.	)	ELECTRIC COOPERATIVE, INC'S
8	PACIFICORP, dba Pacific Power, an	)	RESPONSE TO DEFENDANTS' MOTIONS
9	Oregon business corporation,	)	FOR SUMMARY JUDGMENT
10	Defendant,)	
11)	
12	NORTH HURLBURT WIND, LLC, a)	
13	foreign limited liability company,)	
14	Defendant,)	
15)	
16	SOUTH HURLBURT WIND, LLC, a)	
17	foreign limited liability company,)	
18	Defendant,)	
19)	
20	Horseshoe Bend Wind, LLC, a)	
21	foreign limited liability company,)	
22	Defendant,)	
23)	
24	and)	
25	Caithness Shepherds Flat, LLC, a)	
26	foreign limited liability company,)	
	Defendant.)	

18 I, Thomas Wolff, do declare the following if called to testify, would and could
19 completely testify thereto:

- 20 1. I am over age of 18, and make this Declaration based upon personal knowledge.
- 21 2. I am the General Manager of Complainant Columbia Basin Electric Cooperative,
- 22 Inc. (the "Cooperative") as set forth in the above captioned docket before the Public Utility
- 23 Commission of Oregon ("OPUC").
- 24 3. I have contacted Eric Taylor, Bonneville Power Administration ("BPA")
- 25 Transmission Account Executive, to request an additional point of delivery at the Slatt
- 26 Substation for delivery of power under the Cooperative's Network Transmission contract with
- BPA.

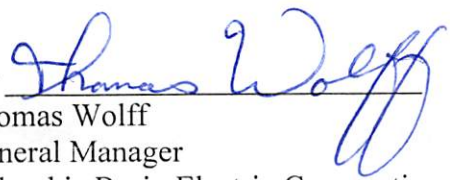
1 4. I have sent a letter to Mr. Jeffrey Delgado, dated October 2, 2014, requesting
2 transmission service on transmission facilities owned by North Hurlburt Wind, LLC, South
3 Hurlburt Wind, LLC and Horseshoe Bend Wind, LLC. A true and accurate copy of that letter is
4 attached to this declaration as Exhibit A.

5 5. In the letter, the Cooperative requests transmission service from the Slatt
6 Substation to the Horseshoe Bend Wind, LLC collector substation. The Cooperative requests the
7 reservation of up to 4 megawatts of transmission capacity.

8 6. The Cooperative requests the transmission service to serve electric loads located
9 in the Cooperative's service territory including service to the South Hurlburt Wind project load
10 located in the Cooperative's allocated territory, the Horseshoe Bend Wind project, the Saddle
11 Butte Wind project and a dairy to be located in that vicinity.

12 7. Pursuant to Federal Energy Regulatory Commission Order, 135 FERC ¶ 61,251,
13 North Hurlburt Wind, LLC, South Hurlburt Wind, LLC and Horseshoe Bend Wind, LLC are
14 obligated to produce a FERC *pro forma* Open Access Transmission Tariff within 60 days of the
15 Cooperative's request to Mr. Jeffrey Delgado.

16
17 DATED this 16th day of October 2014.

18
19 By 
20 Thomas Wolff
21 General Manager
22 Columbia Basin Electric Cooperative, Inc.
23 171 Linden Way
24 P.O. Box 398
25 Heppner, OR 97836
26



COLUMBIA BASIN ELECTRIC COOPERATIVE, Inc.

171 N. LINDEN WAY • P.O. BOX 398 • HEPPNER, OREGON 97836-0398
Telephone (541) 676-9146 • Fax (541) 676-5159
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joshc@columbiabasin.cc
debbiel@columbiabasin.cc

VIA ELECTRONIC MAIL AND US POSTAL

October 02, 2014

Jeffrey J. Delgado, Director
Caithness Corporation
565 Fifth Avenue, 29th Floor
New York, New York 10017

EXHIBIT "A"

RE: Request for Transmission Service.

Dear Mr. Delgado:

Columbia Basin Electric Cooperative, Inc. (the "Cooperative") requests transmission service on transmission facilities owned by Horseshoe Bend Wind, LLC, South Hurlburt Wind, LLC and North Hurlburt Wind, LLC (the "Companies"). These companies jointly own transmission facilities located in Oregon between the Bonneville Power Administration's Slatt Substation and the Horseshoe Bend Wind, LLC collector substation.

The Cooperative requests to reserve up to four megawatt (4 MW) of capacity for point-to-point service on the transmission facilities between the Slatt Substation and the Horseshoe Bend Wind, LLC collector substation. The Cooperative would like to reserve that amount of transmission capacity as soon as possible to serve loads located in the Cooperative's service area.

The Cooperative understands that the Federal Energy Regulatory Commission (the "FERC") previously granted the Companies a waiver to certain requirements under Orders Nos. 888, 889, and 890 and section 35.28, Part 37, and Part 38 of the Commission's regulations to Horseshoe Bend Wind, LLC, South Hurlburt Wind, LLC and North Hurlburt Wind, LLC. The terms of those waivers are set forth in FERC Order Accepting Shared Facilities Agreement and Granting Requests for Waivers, 135 FERC ¶ 61,251. Paragraph 14 of that Order, however, provides, "[i]f the Applicants receive a request for transmission service, it must file with the Commission a pro forma OATT within 60 days of the date of the request, and must comply with any additional regulatory requirements effective on the date of the request in compliance with Order Nos. 888 and 889." Therefore, the Cooperative requests transmission service as set forth above.

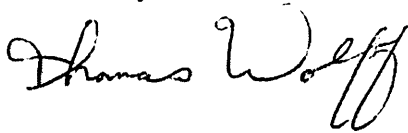
The Cooperative recognizes its transmission request will require the Companies to development an Open Access Transmission Tariff and transmission rates. The Cooperative would like to

Jeffrey Delgado
October 02, 2014
Page 2

receive a copy of the Open Access Transmission Tariff and the applicable rates as soon as possible after the Companies develop the Tariff and rates.

Any questions regarding the Cooperative's transmission request should be directed to me, the Cooperative's General Manager. Please respond by October 10th, 2014 to acknowledge the Companies receipt of our Transmission Request.

Sincerely

A handwritten signature in black ink that reads "Thomas Wolff". The signature is written in a cursive style with a large, looped "W" and a long, sweeping tail.

Thomas Wolff
CEO / General Manager
Columbia Basin Electric Cooperative, Inc.

Cc: John Cameron, Atty.