

KINDLEY LAW PC

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ADMITTED IN OREGON AND WASHINGTON

October 28,, 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 Reply to Defendants' Motions in Opposition

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 28st 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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I. INTRODUCTION

Pacific Power’s and the Caithness Defendants’ oppositions to Columbia Basin Electric Cooperative’s (the “Cooperative”) motion for summary judgment ignore fatal flaws in their factual or legal arguments.

Caithness Defendants also raise two new arguments that irrelevant to the application of the Territory Allocation Law. They make a collateral attack on the Commission’s order that grants the Cooperative an allocated territory in the vicinity of the South Hurlburt Wind and Horseshoe Bend Wind projects. They claim the order only grants the Cooperative an exclusive service territory consisting up to 69 kV facilities, but not greater. Their novel interpretation of the Commission’s order and the Territory Allocation Law is entirely unsupported by any statute or case law.

The Caithness Defendants also claim the Cooperative is a “public utility” and the Commission should regulate the Cooperative’s alleged discriminatory rates and practices. Their argument hinges on the position that the Horseshoe Bend Wind and South Hurlburt Wind would never become members of the Cooperative and, if the Cooperative prevails here, the Cooperative would have to become a regulated public utility to serve the projects. In addition to this argument not being relevant to the territory allocation issue, it completely misses the mark with Horseshoe Bend Wind, LLC, which is already a member of the Cooperative.

As to South Hurlburt Wind, LLC the allegations of the Cooperative being a “public utility” with discriminatory rates and practices is neither ripe for review nor relevant to the issues of whether Pacific Power or the Caithness Defendant’s violated the Territory Allocation Laws.

The Caithness Defendants also make several factual allegations that are simply wrong. For instance, they argue the Cooperative unreasonably filed its complaint too late and has used documents that are protected as settlement discussions. The facts and Commission rules do not support the Caithness Defendants’ positions.

1 Pacific Power response again argues its service to the Caithness Defendants does not
2 violate the Territory Allocation Laws because its sells power only to Caithness Shepherds Flat,
3 LLC at the Slatt Substation, which is located in Pacific Power's allocated territory. Pacific
4 Power argues that that the Cooperative cannot provide service at 230 kV and its territory
5 allocation only excludes service at 69 kV and lower. Pacific Power's arguments are factually
6 incorrect and legally unsupported.

7 Pacific Power and the Caithness Defendants try to distinguish the *Northwest Natural*
8 holding. Both ignore the courts conclusions regarding the definition of the term "utility service"
9 as the act of distribution power to two or more users. They also ignore the court's treatment of
10 an "association" and its inclusion under the term "person."

11 12 **II. SUMMARY JUDGMENT STANDARD**

13 The Commission can grant summary judgment only when a moving party has
14 demonstrated there are no genuine issues of material fact and the moving party is entitled to
15 judgment as a matter of law.¹ Here, all three parties have filed motions for summary judgment.
16 As to the motions for summary judgment filed by Pacific Power and Caithness Defendants, the
17 Commission must view the record most favorable to the Cooperative as the non-moving party.

18 19 **III. MATERIAL FACTS**

20 The Cooperative has set forth material facts in its motion for summary judgment and
21 responses to the defendants' motions for summary judgment. Pacific Power does not dispute the
22 Cooperative's statement of facts concerning Pacific Power in its motion for summary judgment.²
23 The Caithness Defendants claim it disputes the Cooperative's facts, but the disputed facts do not
24 appear to be material or are actually legal arguments.³

25
26 ¹ Oregon Rules of Civil Procedure 47C.

² PacifiCorp's Opposition to Columbia Basin Electric Cooperative's Motion for Summary Judgment at 4 (hereafter referred to as "Pacific Power's Opposition".)

1 The Cooperative does dispute several of Pacific Power's and the Caithness Defendants'
2 alleged facts.

3 **1. Cooperative's Ability to Serve**

4 Pacific Power and the Caithness Defendants claim, as a factual matter, the Cooperative
5 has no ability to serve the loads of Horseshoe Bend Wind and South Hurlburt Wind projects
6 located in the Cooperative's allocated territory.⁴

7 The Cooperative disputes that allegation. The Cooperative's response to the Defendants'
8 motion for summary judgment demonstrates that the Cooperative has several means to serve
9 those loads.⁵

10 Pacific Power also contends the Horseshoe Bend Wind and South Hurlburt Wind projects
11 are isolated from the Cooperative's transmission and distribution system.⁶ The Cooperative
12 disputes those allegations because it currently serves part of the station load of Horseshoe Bend
13 Wind. The Cooperative's distribution system is also not far from the location of the South
14 Hurlburt Wind project.

15 The Cooperative argues the Cooperative's ability to serve is not relevant under ORS
16 758.450(2). If the Commission determines it is relevant, then the Cooperative disputes those
17 allegations and argues the Commission cannot grant the Defendants' motions for summary
18 judgment due to disputed material facts concerning this issue.

19 **2. Pacific Power's Delivery of Power**

20 The parties in this proceeding disagree about Pacific Power's delivery of power. Pacific
21 Power claims that it delivers back-up power directly to Caithness Shepherds Flat under its power
22 sales agreement with Caithness Shepherds Flat. Pacific Power's motion for summary judgment
23
24

25 ³ Caithness Opposition of Defendants North Hurlburt Wind, LLC, South Hurlburt Wind, LLC, Horseshoe Bend
26 Wind, LLC and Caithness Shepherds Flat, LLC to Columbia Basin Electric Cooperative's Motion for Summary
Judgment (hereafter referred to "Caithness Opposition") Section III.

⁴ Pacific Power's motion for summary judgment at

⁵ Cooperative's response at p. 7-9.

⁶ Pacific Power's Opposition at p. 5.

1 provides, “PacifiCorp delivers station power (i.e., provides ‘utility service’) to Caithness at a
2 point within its own exclusive service territory – Slatt Substation.”⁷

3 Caithness Defendants’ contend otherwise:

4 Although Caithness is signatory [to] the Pacific Power contract, Caithness
5 [Shepherds Flat] neither owns [n]or operates any facility for the production,
6 transmission, distribution, or consumption of electric power. It has no ability to
7 take delivery of any power from Pacific Power, which power is delivered directly
8 to North Hurlburt, South Hurlburt and Horseshoe Bend at their respective POIs
9 within [the] Slatt Substation, as specified in their individual LGIAs. Caithness is
10 not a party to those LGIAs.⁸

11 Based on the express terms of Pacific Power’s sales agreement with Caithness Shepherds
12 Flat, the Cooperative contends Pacific Power delivers the power to Caithness Shepherds Flat at
13 the Slatt Substation on behalf of the Three Wind Projects. Caithness Shepherds Flat uses the
14 Three Wind Project’s jointly-owned and separately-owned transmission and distribution
15 facilities to deliver that power to each wind projects loads. Caithness Shepherds Flat never
16 transfers ownership of that power to the Three Wind Projects because there is no power sales
17 agreement for that transfer of power to the Three Wind Projects.

18 If the fact of Pacific Power’s delivery of power to Caithness or the Three Wind Projects
19 is a material fact under ORS 758.450, then this is a disputed material fact and the Commission
20 cannot rule on the parties’ motions for summary judgment.

21 **3. Caithness Shepherds Flat’s Role**

22 The parties dispute the role of Caithness Shepherds Flat. The Caithness Defendants claim
23 that Caithness Shepherds Flat is merely a “billing facilitator”⁹ and it plays no material role in the
24 purchase or distribution of the back-up power from Pacific Power.

25 Pacific Power and the Cooperative both claim that Caithness Shepherds Flat is a party to
26 the power sales agreement with Pacific Power. The Cooperative contends Caithness Shepherds
Flat has a key role in the purchase of power and as a participant in the association that provides

⁷ Pacific Power’s Motion for Summary Judgment at 8.

⁸ Caithness Motion for Summary Determination, Delgado Decl., at ¶ 69, p. 23.

⁹ Caithness Motion for Summary Determination, Delgado Decl., at ¶ 70, p. 23.

1 “utility service” into and in the Cooperative’s allocated territory and that role is a material fact
2 under ORS 758.450. If the Commission concludes Caithness Shepherds Flat is merely a
3 bookkeeper and is not a participant in the association of the Caithness Defendants in providing
4 utility service in the Cooperative’s allocated territory, the Commission cannot grant the
5 Caithness Defendant’s motion for summary determination with that material fact in dispute.

6 **4. Caithness Defendants Factual Disputes**

7 The Caithness Defendants claim that they do dispute facts in the Cooperative’s motion
8 for summary judgment.¹⁰ They dispute the Cooperative’s description of the jointly-owned
9 facilities, although they admit that they have described the jointly-owned facilities differently in
10 various forums and document.¹¹

11 They further object to the Cooperative’s factual discussion of the ownership arrangement
12 between the Caithness Defendants, but they do not dispute those facts.¹² Instead, they argue all
13 the material facts are in the Energy Facility Siting Council’s documents, the Bonneville Power
14 Administration’s Large Generator Interconnection Agreements, and the Caithness Defendants’
15 Shared Facilities Agreement.¹³ These arguments do not appear to be disputes of material facts.

16 Caithness Defendants also raise two legal issues in their discussion of facts. They argue
17 the Cooperative used hearsay materials and settlement materials that are not admissible in this
18 proceeding. The Cooperative addresses these claims in this reply later. These legal arguments,
19 however, are not disputes as to material facts.

20 If the non-moving parties do dispute material facts in moving parties’ motions for
21 summary judgment the Commission cannot grant those motions for summary judgment. The
22 Cooperative argues herein that several of the Caithness Defendant’s legal arguments are not
23 relevant to the issues concerning the violation of ORS 758.450(2), such as the issue of whether

24 ¹⁰ Caithness Opposition at Section III, commencing at 7.

25 ¹¹ The Caithness Defendants argue, “If the cooperative had focused on the agreement, rather than the cover letter, its
26 ‘discrepancy’ would have disappeared.” The counter is also true – if the Cooperative had ignored the agreement and
focused on the cover letter, the discrepancy would have also disappeared. The fact remains that there is a
discrepancy as to scope of the jointly-owned facilities. Caithness Opposition at 8.

¹² Caithness Opposition at 9.

¹³ *Id.*, at 9.

1 the Cooperative is a “public utility” and the Cooperative’s rates are discriminatory. The
2 Cooperative notes that those claims are based on disputed facts. Therefore, if the Commission
3 determines those arguments are relevant, these issues cannot be resolved by motions for
4 summary judgment.

6 III. ARGUMENT

7 A. The Territory Allocation Law Applies to the Caithness Defendants

8 The Caithness Defendants assert that they are all excluded from the Territory Allocation
9 Law pursuant to ORS 758.450(4)(c). The Cooperative has already addressed this argument in its
10 motion for summary judgment and response to the defendants’ motions for summary judgment.
11 The Cooperative argues the exemptions under ORS 758.450(4)(c) apply only to companies when
12 they provided heat, light, or power from solar or wind resources. They do not apply to
13 companies that own solar and wind resources when they provide heat, light or power from other
14 power resources.

15 Caithness Defendants claim the Cooperative’s argument is flawed because the exclusion
16 would only apply when the wind was blowing, but would not apply when the wind was not
17 blowing.¹⁴ Caithness Defendants’ example does highlight the rationale of the Cooperative’s
18 position.

19 The Cooperative does not contend that a company cannot self-serve, such the Three Wind
20 Projects using some of their generation to run their warning lights. Also, under those conditions,
21 the Three Wind Projects are supplying heat, light or power from wind resources, but not to “any
22 number of customers.”

23 When the wind does not blow, however, the Three Wind Projects work in association
24 with Caithness Shepherds Flat to purchase “system” power from Pacific Power. The defendants
25 jointly distribute that system power over common-owned facilities that comprise an interrelated
26 and interconnected distribution system to the Three Wind Projects. Under these circumstances,

¹⁴ Caithness Opposition at 12.
Page 7- CBEC REPLY

1 the Three Wind Projects are not “providing heat, light or power ” from their wind resources and
2 are not exempt under ORS 758.450(4)(c). They are consuming system power from Pacific
3 Power, which is not exempt under ORs 758.450(4).

4 Caithness Shepherds Flat cannot claim it is a wind company and exempt under ORS
5 758.450(4). According to Caithness Defendants, Caithness Shepherds Flat “has no direct
6 ownership or control of any power or transmission asset. . .”¹⁵ Under Caithness Defendants’ own
7 argument that hinges on ownership of a wind resource to be a “wind company,” Caithness
8 Shepherds Flat is not exempt under ORS 758.450(4).¹⁶

9 Caithness Defendants and Pacific Power claim the Cooperative is inconsistent in
10 claiming that the Caithness Defendants act as a single entity on the one hand but cannot be
11 viewed as a single “wind” company on the other. They overlook a significant fact.

12 he Cooperative claims the Caithness Defendants are working jointly as a single
13 association in the purchase and distribution of power into and in the Cooperative’s territory,
14 which violates the Territory Allocation Law. The Cooperative has never argued that the
15 Caithness Defendants work together as an association to “provide heat, light and power from
16 solar or wind resources to any number of customers.” As alleged by the Caithness Defendants,
17 each of the Three Wind Projects separately sells the output of all of its generation to a wholesale
18 customer.¹⁷ They neither work as an association in those sales nor work with Caithness
19 Shepherds Flat in those sales.

20 If the Commission accepts the Caithness Defendants’ interpretation of exempting all
21 companies that own wind generation facilities, then Portland General Electric, Pacific Power,
22 and many Oregon municipal and cooperative utilities would be categorically excluded from the
23 Territory Allocation Law because they currently own solar or wind resources. Under the
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25 ¹⁵ Caithness Motion for Summary Judgment, Delgado Decl., at ¶ 7.

26 ¹⁶ CBEC already addressed and opposed the claim that Caithness Shepherds Flat should be classified as a wind company due to its parent relationship to its three subsidiaries. That would conflict with ORS 758.450(4) and lead to wide abuse of the exemption.

¹⁷ Caithness Motion for Summary Determination, Delgado Decl. at ¶ 6.

1 Caithness Defendants' interpretation of ORS 758.450(4)(c), the exemption would swallow the
2 rule.

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4 **B. Caithness Defendants Do Provide Utility Service in the Cooperative's Service
5 Territory**

6 The Caithness Defendants contend they do not provide utility service into or in the
7 Cooperative's allocated territory under ORS 758.450(2). They argue that the Caithness
8 Shepherds Flat and the Three Wind Projects are simply consuming electricity and, consequently,
9 they are no different than a residential, commercial or industrial user.¹⁸ They further argue the
10 Cooperative's position is undercut by its claim that the Caithness Defendants operate as a single
11 association to obtain station service power.¹⁹

12 The Caithness Defendants' argument has little merit. Home owners, commercial
13 businesses or industrial customers do not construct miles of jointly-owned transmission and
14 distribution lines operated in common with other electric users. That is, however, what the
15 Caithness Defendants do here.

16 Under the *Northwest Natural* holding, joint ownership and operation of electrical
17 facilities used for the distribution of electric power is a violation of the local electric utility's
18 allocated territory. The facts associated with Caithness Defendants obtaining system power from
19 Pacific Power is entirely different than a homeowner "whenever she turned on her television or
20 home computer."²⁰

21 Furthermore, Caithness Defendants' allegation that when they operate as an association
22 they are simply self-supplying is similarly specious. It is undisputed that the Three Wind
23 Projects connect to the BPA transmission facilities with jointly-owned electric facilities. It is
24 undisputed that they use jointly-owned electric facilities to distribute power to each project's

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26 ¹⁸ Caithness Opposition at 12.

¹⁹ *Id.*, at 13.

²⁰ *Id.*, at 12.

1 collector substation. It is undisputed that the Three Wind Projects, in conjunction with Caithness
2 Shepherds Flat, jointly operate and jointly control the common facilities and much of the
3 separately owned facilities used to distribute the back-up power to each wind project. Under the
4 *Northwest Natural* holding, that is not self-supply of back-up power. It is not like a “resident
5 who turns on an upstairs light.”

6 Caithness Defendants also argue that no “utility service” is provided through a connected
7 and interrelated distribution system.”²¹ They argue they are immune from the Territory
8 Allocation Law because the jointly-owned facilities do not enter the Cooperative’s territory and
9 interconnection is in Pacific Power’s territory.

10 The Cooperative has previously discussed the definition of “utility service” in ORS
11 758.400(3). Importantly, the second sentence in that definition identifies what is not “utility
12 service.” Conversely, all service which does not fit that exclusion of what is not utility service is,
13 by definition, “utility service.” Any service via transmission line that terminates in an allocated
14 territory or used to provide service in an allocated territory is “utility service” under ORS
15 758.400(3). It is undisputed that the transmission and distribution lines owned in common by
16 the Three Wind Projects provide service in or into the Cooperative’s service territory. Absent
17 those lines, the loads of South Hurlburt Wind and Horseshoe Bend Wind located in the
18 Cooperative’s exclusive service territory could not receive the system power from Pacific Power.

19 Additionally, the Cooperative’s motion for summary judgment extensively describes the
20 close operational interrelationship between the Caithness Defendants through their corporate
21 ownership documents and through their operating agreements. Those documents show that the
22 Caithness Defendants jointly operate not only the jointly-owned electrical facilities, but also the
23 separately owned facilities. For instance, under the Shared Facilities Agreement, the Three Wind
24 Projects have joint ownership and use of maintenance equipment, cranes and a spare transformer.
25 That maintenance and transmission equipment are used to maintain the jointly-owned and

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²¹ Caithness Opposition at p. 12.

1 separately owned facilities. For instance, the spare transformer can be used if any of the
2 transformers in a collector substation, which are separately owned, need temporary replacement.
3 Through the various organizational documents wind projects and management agreements,
4 Caithness Shepherds Flat has management control over not only the joint facilities, but much of
5 the individually owned facilities of the Three Wind Projects.

6 Additionally, Caithness Shepherds Flat purchases power for the collective back-up power
7 needs of Three Wind Project. Caithness Shepherds Flat delivers that power to each of the Three
8 Wind Projects over the common and separately owned facilities.

9 Therefore, the electric facilities that the Caithness Defendants use for the delivery the
10 system power from Pacific Power are physically connected. That is undisputed. Those facilities
11 are also interrelated both physically and operationally. Some of the facilities are jointly-owned,
12 some are separately owned. But they are all connected and interrelated for the distribution of
13 power to the Three Wind Projects.

14
15 **C. The Cooperative Can Serve the Load Located in Its Allocated Territory**

16 **1. The Cooperative Disputes the Factual Allegations**

17 Pacific Power and the Caithness Defendants' both argue, as a factual matter, the
18 Cooperative has no means to provide utility serviced to the loads of the South Hurlburt Wind and
19 Horseshoe Bend Wind projects located in the Cooperative's allocated territory. The Cooperative
20 described the various ways it could provide service to those loads if it prevails in this proceeding
21 in its responses to the defendants' motions for summary judgment.²²

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²² Cooperative's Response at p. 6-9.

1 **2. The Cooperative’s Ability to Serve is Irrelevant and the Defendant Failed to**
2 **Plead this Argument**

3 The Cooperative reiterates that its ability to serve the loads of the South Hurlburt Wind
4 and Horseshoe Bend Wind projects is not relevant under ORS 758.450(2). These claims by the
5 defendants are a collateral attack on the Commission’s order granting the Cooperative its
6 allocated territory. Neither Pacific Power nor the Caithness Defendants raised this issue in their
7 answers as a counter claim or as an affirmative defense. This argument is irrelevant in this
8 proceeding.
9

10 **D. The Defendants Collaterally Attack the Commission’s Order that Grants the**
11 **Cooperative an Exclusive Service Territory.**

12 Caithness Defendants and Pacific Power continue their argument the Commission’s
13 Order does not give the Cooperative an exclusive service territory. The Caithness Defendant’s
14 contend the Commission’s Order only gives the Cooperative the right to service loads “only up
15 to the 69-kV service it could then provide.”²³

16 The Cooperative has addressed this issue in its response. In brief, ORS 758.450(2)
17 provides that once the Commission grants a utility an allocated territory, “no other person shall
18 offer, construct or extend utility service in or into an allocated territory.” ORS 758.400(3)
19 provides that the term “utility service” means “service provided by *any* equipment, plant or
20 facilities for the distribution of electricity to users . . . through a connected and interrelated
21 distribution system.” [Emphasis added]

22 The plain language of ORS 758.450(2) and ORS 758.400(3) defeats Pacific Power’s and
23 Caithness Defendants’ argument. Transmission facilities at 230 kV, 115 kV or any other voltage
24 fall within the definition of “any equipment, plant or facilities.” Thus, once the Commission
25 granted the Cooperative an exclusive service territory, all other persons are excluded from
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²³ Caithness Opposition at p. 18.

1 offering, constructing or extending electric utility service into the Cooperative's exclusive
2 service territory, regardless of the voltage of such facilities or service.

3 Additionally, courts have long recognized that once the Commission has granted an
4 electric utility an allocated territory, that utility has an exclusive rights to provide electric service
5 in that territory. *See Pacificorp v. City of Ashland*, 88 Or.App. 15, 18 (1987) (ORS 758.400 to
6 758.475 gives the PUC authority to allocate service territories exclusively, under defined
7 circumstances, to provide of utility services.”). *See also, Springfield Utility Bd. v. Emerald*
8 *People's Utility Dist.*, 191 Or.App. 536, 543-44 (2004). (“Only the PUC can award a PUD or
9 other supplier of electricity the exclusive right to serve a particular territory. The PUC does so
10 by allocating that territory to a particular person; once it has done so, no other person may offer,
11 construct, or extend utility service into the allocated territory.”). The distinction that Pacific
12 Power and the Caithness Defendants' contend that the PUC establishes exclusive service
13 territories for electric service based on voltage is not supported by the statutory language or by
14 court decisions.

15 **E. The Cooperative's Rates are Irrelevant Under ORS 758.450**

16 Caithness Defendants' alleged the Cooperatives rates and practices are “discriminatory”
17 and, thus, the Commission should regulate the Cooperative as a public utility. The Cooperative
18 has previously argued in its response that its rates are not relevant under ORS 758.450(2)
19 concerning the issue of whether Pacific Power or the Caithness Defendants have violated the
20 Cooperative's exclusive service territory. The Cooperative also argues in this reply that the
21 issue of whether the Cooperative is a public utility is also irrelevant under ORS 758.450(2).

22 As a factual matter, the Cooperative disputes the Caithness Defendants' arguments its
23 rates or practices are discriminatory. The Caithness Defendants' position is based solely on
24 unsupported assertions in the Delgado declaration.²⁴ Also, a determination of whether the
25 Cooperative's rates and practices is a legal issue. Thus, Delgado's assertions are simply an lay

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²⁴ Caithness Opposition, Delgado Decl., at ¶ 79, p. 26.

1 opinion. Furthermore, his primary basis for concluding such rates would be discriminatory is
2 that they would be based on BPA's Tier 2 wholesale power rates. Delgado's opinion does not
3 support the legal conclusion that the Cooperative's rates or practices are discriminatory. The
4 Cooperative disputes these "facts" and they are irrelevant to the issues pleaded in this
5 proceeding.

6
7 **F. Pacific Power's Provides Utility Service "Into" the Cooperative's Allocated**
8 **Territory**

9 Pacific Power position that it is not in violation of the Cooperative's exclusive service
10 territory is primarily based on its contention that it only provides "utility service" to the Slatt
11 Substation.²⁵

12 Pacific Power does not and cannot dispute the second recital in its power sales contract
13 with Caithness Defendants that provides Pacific Power is providing power to serve the Three
14 Wind Project loads.

15 Pacific Power's Corporate Account Manager, Chuck Phinney, declaration provides that
16 Pacific Power is serving the loads of the Three Wind Projects. It states that based on Pacific
17 Power's policy that the point of deliveries to a generation project determines the right to serve,
18 "the Company determined that it had the right to serve the Shepherds Flat project's high station
19 power via deliveries at Slatt Substation, since that is the only point at which 230-kV station
20 power could be delivered to Shepherds Flat."²⁶

21 Additionally, Phinney declares that Pacific Power's power sales agreement with
22 Caithness Defendant's "sets out the terms under which Pacific Power serves the Facilities' high-
23 voltage station service loads."²⁷

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26 ²⁵ Pacific Power's Opposition at p. 6-8.

²⁶ Pacific Power's Motion for Summary Judgment, Phinney Decl., at ¶ 9, p. 3.

²⁷ Id., at ¶ 12, p. 4.

1 There is no dispute that Pacific Power is serving the back-up loads of the Three Wind
2 Projects. Pacific Power's defense to the Cooperative's claim that such service violated its
3 exclusive service territory and ORS 758.450(2) is that the delivery point for such service is in
4 Pacific Power's service territory and its sale is to Caithness Shepherds Flat, not the Three Wind
5 Projects.

6 Pacific Power's delivery point to Caithness Shepherds Flat at Slatt Substation, however,
7 is based on only the contract terms in Pacific Power's power sales contract. Pacific Power has
8 no electric facilities at the Slatt Substation or any even in the vicinity of the Three Wind Projects.
9 It uses BPA's meters, located at each of the collector substations, one of which is located in the
10 Cooperative's exclusive territory. Pacific Power's own transmission or distribution system has
11 no physical point of interconnection with the Three Projects.²⁸

12 Pacific Power relies on the Three Wind Project's transmission and distribution facilities
13 and BPA's meters to serve the loads at the Three Wind Projects. Absent those facilities, Pacific
14 Power could not access or serve those loads. So, the fact the delivery point for Pacific Power sale
15 is in its territory, Pacific Power's service to the Three Wind Projects, including the load in the
16 Cooperative's exclusive territory, depends on electric facilities and equipment that "extend into
17 and in" the Cooperative's territory.

18 It is also undisputed that Caithness Shepherds Flat owns no facilities and has no
19 consumptive use of the electric power it purchases from Pacific Power. It is undisputed that
20 Caithness purchases the power from Pacific Power for the back-up power needs of the Three
21 Wind Projects. Pacific Power sale is "utility service" to the Three Wind Projects.

22 The delivery point and the sale to Caithness Shepherds Flat create only a thin veil over
23 Pacific Power's direct service to the back-up loads of the Three Wind Projects, including the
24 loads in the Cooperative's territory. Pacific Power is actually providing utility service to the
25 Three Wind Projects by electric facilities that extend into and in the Cooperative's territory.

26 ²⁸ The Three Wind Projects have points of interconnection with BPA on the BPA transmission system, not with Pacific Power or on Pacific Power's facilities.

1 Phenney states Pacific Power is directly serving the loads in the Cooperative's territory
2 consistent with Pacific Power's policy. That service violates ORS 758.450 and the
3 Cooperative's exclusive service territory.

4 These arrangement highlight the reason the Commission should not base the
5 determination of "utility service" on the delivery point instead of the location of the load.²⁹ Like
6 the transaction in this instance, parties who want to circumvent the Territory Allocation Law and
7 the Commission's jurisdiction can simply, by contract, establish a delivery point in a neighboring
8 service area and extend jointly-owned consumer power lines from the load to the delivery point.
9 As in this case, the delivery point may be on a third party transmission line, far removed from the
10 load, and far removed from the metering point(s). ORS 758.450 would be only applicable to
11 those utility customers who cannot band together and pay for joint-owned power lines to reach a
12 neighboring utility.

13 **G. The Cooperative Was Timely In Filing Its Complaint with the Commission**

14 The Caithness Defendants allege the Cooperative has missed it opportunity to obtain
15 relief from the Commission because the Cooperative should have raised its concerns in the EFSC
16 proceedings or in BPA's proceeding for the interconnection of the Shepherd Flat project at the
17 Slatt Substation.³⁰

18 The Cooperative has already addressed this issue in response to the Caithness
19 Defendant's defense of laches.³¹

20 The Cooperative could not raise its concerns before these agencies because neither
21 agency has the authority to enforce Oregon's Territory Allocation Law. At that time, the
22 Caithness Defendants had not made any decision regarding back-up power service for the
23 Cooperative to challenge.

25 ²⁹ The ALJ's prior order noted that that this proceeding raises for the first time the issue whether utility service
26 should be determined based on a point of interconnection or the loads. The Cooperative notes that in this case the
Three Projects do not have a point of interconnection with Pacific Power, only with BPA.

³⁰ Caithness Opposition at p. 20.

³¹ CBEC Response at p. 21-24.

1 The chronology of events shows the Cooperative inability to raise these issues in earlier
2 forums. The Three Wind Projects obtained their site certificates from EFSC on September 11,
3 2009. BPA concluded its record of decision for the Shepherds Flat project on July 18, 2008.

4 The Caithness Defendants, however, entered into the Strategic Investment Program
5 Agreement (the "SIP Agreement") with Morrow County on July 8, 2009. That agreement was
6 assigned to the Three Wind Projects on September 7, 2011. The SIP Agreement included a
7 provision, whereby the Caithness Defendants' agreed to request power service from the
8 Cooperative. In fact, the Caithness Defendants' did request power service from the Cooperative
9 for the back-up power loads of the South Hurlburt Wind and Horseshoe Bend Wind projects it
10 the letter dated July 31, 2012. Pursuant to that request, the Cooperative worked with Pacific
11 Power until July 24, 2013, to arrange power service in the manner and as directed by the
12 Caithness Defendants in their July 31, 2012, letter.

13 The Cooperative could not have challenged the Caithness Defendants' decisions
14 regarding back-up power service in the EFSC siting process or the BPA interconnection process.
15 Unless the Caithness Defendants negotiated and entered into the SIP Agreement in bad faith in
16 2009, they intended to take back-up power service from the Cooperative during the EFSC and
17 BPA proceedings.

18
19 **H. The Commission Has Statutory Authority to Provide Relief for the Cooperative**

20 The Caithness Defendants allege, again, that the Commission lacks the means to enforce
21 the Territory Allocation Law if it decided in favor of the Cooperative. They argue that the
22 Commission lacks injunctive relief and, even if the Cooperative prevailed in court, it could not
23 enjoin the transaction.³² In short, the Caithness Defendants assert the Territory Allocation Laws
24 are basically unenforceable.

25
26

³² Caithness Defendants' Motion in Opposition at p.20-21
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1 The Cooperative has already addressed this issue in its response to the defendants'
2 motion for summary judgment.³³ ORS 756.040 provides the Commission with broad general
3 powers that it can use to enforce the Territory Allocation Law.³⁴ ORS 758.465 does not preclude
4 the Commission from exercising its powers under ORS 756.040. ORS 758.465 provides, "The
5 remedies in this section shall be in addition to any other remedy provided by law." ORS 758.465
6 is not an exclusive remedy.

7 The Caithness Defendants claim that if the Cooperative prevailed, it could not enjoin the
8 transaction because the Caithness Defendants' actions are all authorized by binding orders or
9 decisions. The Cooperative believes the Caithness Defendants completely underestimate and fail
10 to appreciate the Commission's regulator authority and ability to enforce the Territory Allocation
11 Law. First, the Commission could find Pacific Power's sale to Caithness Shepherds Flat illegal
12 under the Territory Allocation Law and enjoin the sale to the extent it violates the Cooperative's
13 allocated territory.³⁵

14 Second, the Commission could find Caithness Shepherds Flat's purchase of power for the
15 loads in the Cooperative's allocated territory in violation of the Territory Allocation Law and
16 enjoin its actions under ORS 576.040 and 758.450(2). Caithness Shepherds Flat cannot wrap
17 itself in any alleged protection stemming from EFEC, FERC or BPA because Caithness
18 Shepherd Flat does not exist according to their orders.

19 Third, the Commission can enjoin the Three Wind Projects actions individually and in
20 association with Caithness Shepherds Flat. The orders from EFSC and FERC are not binding on
21 the Commission and do not provide any immunity to the Territory Allocation Law. The BPA
22 LGIA likewise does not provide any immunity to the Three Wind Projects.

23 The Cooperative does not need to enjoin FERC, EFSC or BPA or challenge any of those
24 agencies prior orders or contracts. Those decisions and documents neither address the Territory

25 ³³ CBEC Response at p.24-26.

26 ³⁴ See *Isom v. Portland General Electric Co.*, 67 Or.App. 97, 102 (1984); *Pacific Northwest Bell Telephone Co., v. Katz*, 116 Or.App. (1992).

³⁵ The Commission could also find the Pacific Power sale a sale for resale and terminate the sale as a violation of Pacific Power's power sales tariff and policies.

1 Allocations Law nor provide any immunity from the Law. In spite of the Caithness Defendant's
2 myopic contentions, the Commission has the ability to enforce the Territory Allocation Law.

3
4 **I. It is Irrelevant Whether the Cooperative is a "Public Utility" to Determine Whether
5 the Caithness Defendants have Violated the Territory Allocation Laws.**

6 The Caithness Defendants make a convoluted argument about the Cooperative being a
7 "public utility" and the Commission's obligation under ORS 756.040 to protect the Caithness
8 Defendant's from the Cooperative's "discriminatory rates and practices."³⁶ The thrust of the
9 Caithness Defendants' position is that Horseshoe Bend Wind, LLC and South Hurlburt Wind,
10 LLC don't want to be members of the Cooperative and, if the Cooperative prevails in this
11 proceeding and serves them, then the Commission "cannot lawfully deny" the Caithness
12 Defendants' demand for the Commission to regulate the Cooperative's rates.³⁷

13 The Caithness Defendants have overlooked one glaring fact. Horseshoe Bend Wind,
14 LLC is a current member of the Cooperative's. In response to a request by Horseshoe Bend
15 Wind, the Cooperative provides utility service to serve the station service loads of the Horseshoe
16 Bend Wind project. Under the Cooperative's Bylaws, Horseshoe Bend Wind is obligated to take
17 all of its power service from the Cooperative. The Cooperative did not force Horseshoe Bend
18 Wind to be a member of the Cooperative; Horseshoe Bend Wind voluntarily became a member
19 of the Cooperative. Given this fact, the Caithness Defendants' argument as to Horseshoe Bend
20 Wind is irrelevant and misguided.

21 Another questionable fact is the Caithness Defendant's assertion the Cooperative's rates
22 and practices would be "discriminatory." The Caithness Defendants have provided no facts to
23 support this assertion.³⁸ The assertion is also not ripe for Commission review. The Cooperative

24
25 ³⁶ Caithness Defendants' Motion in Opposition at p. 25.

³⁷ *Id.*, at 25

26 ³⁸ Caithness Defendants' Motion for Summary Determination, Delgado Decl., at 26. Delgado's discriminatory rate stems from the assertion that the Cooperative's rate would be based on BPA's Tier 2 rates with the inclusion of the Cooperative's administrative and distribution margin. The Cooperative disputes that any rate based on the cost of power supply, administrative, and distribution costs are discriminatory.

1 has not provided service to the backup loads to Horseshoe Bend Wind or to South Hurlburt
2 Wind. If the Cooperative prevails in this proceeding and its rates and practices are
3 discriminatory, then the Companies can raise that issue in court or raise the current issue that the
4 Cooperative is a “public utility” and ask the Commission to review the rates. Until those events
5 occur, however, the Caithness Defendants’ claims the Cooperative’s rates are discriminatory are
6 based on speculation and are not ripe for the Commission’s review.

7 As to the Cooperative’s right to serve South Hurlburt Wind’s load in the Cooperative’s
8 allocated service territory, it is irrelevant whether the Cooperative is a “public utility” regulated
9 by the Commission or not. It does not matter if the Cooperative is a “public utility” such as
10 Portland General Electric or Pacific Power or not, the analysis of whether the Caithness
11 Defendants have violated the Cooperative’s allocated territory would be the same. The
12 Territory Allocation Law applies equally to regulated “public utilities,” cooperatives and to all
13 other persons.

14 The Cooperative agrees with the Caithness Defendants that the Cooperative is subject to
15 the Commission’s jurisdiction. Under ORS 758.450, the Cooperative is regulated to the extent
16 has been provided an allocated territory by the Commission. Also, to the extent the Cooperative
17 violates the provisions of the Territory Allocation Law, the Cooperative would be subject to the
18 Commission’s determinations and orders.

19 The Cooperative previously argued in its response that the Commission has general
20 authority under ORS 756.040 to enjoin Pacific Power and the Caithness Defendants’ violations
21 of the Cooperative’s allocated territory. The Cooperative reiterates that argument and
22 incorporates it herein.

23 **J. The Cooperative did not Use Settlement Discussions as Evidence**

24 Caithness Defendants assert that the Cooperative’s inclusion of the email between
25 Caithness witness Delgado and BPA transmission employee Angela DeClerck, dated July 24,
26 2013, is improper because it is protected as settlement matters under OEC 408, ORS 40.190,

1 ORS 183.450(1), and OAR 860-001-450.³⁹ The Caithness Defendants’ object to the use of the
2 email because of the Cooperative’s assertion that Caithness Defendants’ refusal to support an
3 agreement between Pacific Power and the Cooperative on their mutual service to the Three Wind
4 Projects stemmed from BPA’s refusal to treat those projects load with one demand factor.⁴⁰

5 The Delgado-DeClerck email is not protected as settlement a settlement discussion under
6 the Commission’s rules. Commission Rule, OAR 860-001-0350(2) provides the definition of a
7 settlement discussion which is protected from admission:

8 A settlement discussion is any communication between two or more parties for
9 the purpose of resolving issues pending in contested case proceedings. Examples
10 of communications not constituting settlement discussions for purposes of this
11 rule include communications primarily for the purpose of discovery and
12 communications occurring before initiation of docketed proceedings.

13 By this definition, the Delgado-DeClerck email is not a protected “settlement
14 discussion.” The email is dated July 24, 2013. The Cooperative filed its complaint on August
15 28, 2013, over a month after the date of the email.

16 Furthermore, the email is relevant to this proceeding for several reasons. The Caithness
17 Defendants have argued that the Cooperative unreasonably delayed in filing its complaint and
18 should be subject to the defense of laches. The email shows that the Cooperative’s filing of its
19 complaint was not untimely. The Cooperative has also used the email to show Caithness
20 Defendants’ motivation for opposing the Cooperative’s service arises out its loss of the
21 aggregation of the Three Wind Projects load. The Caithness Defendants’ currently argue that the
22 Cooperative cannot physically serve the wind projects and that the Cooperative’s power rates are
23 discriminatory. The plain language of the July 24, 2013, email indicates that the Caithness
24 Defendants would have accepted service from the Cooperative, with the current facilities, at the
25 Cooperative’s power rates, except for the fact that the Three Wind Project’s loads would have
26

³⁹ Caithness Opposition at p. 11.

⁴⁰ *Id.*

1 been treated by the Cooperative and BPA for billing purposes as three separate loads instead of
2 one. The email is admissible and relevant to this proceeding.

3
4 **K. The Cooperative's Evidence is Admissible**

5 The Caithness Defendants' contend the Cooperative has admitted hearsay evidence
6 consisting of notes from meetings among BPA, Pacific Power, Caithness Defendants and the
7 Cooperative.⁴¹ Thus, the documents are not admissible.

8 The Cooperative disagrees the notes are hearsay. The Cooperative's attorney submitted
9 these notes as true copies of documents the Cooperative either had in its records or obtained
10 through discovery requests. Both are admissible under the Commission's rules. OAR 860-001-
11 0450 and OAR 860-001-0540(4).

12 Even if the notes are hearsay, they are admissible in this proceeding. *See Bonneville*
13 *Automobile Insurance Company v. Insurance Division, Department of Commerce, 53 Or.App.*
14 *440, 450 (1981).* Furthermore, ORS 183.450(1) provides in relevant part:

15 Irrelevant, immaterial or unduly repetitious evidence shall be excluded by
16 erroneous rulings on evidence shall not preclude agency action on the record
17 unless shown to have substantially prejudiced the rights of a party. *All other*
18 *evidence of a type commonly relied upon by reasonably prudent persons in*
19 *conduct of their serious affairs shall be admissible.* [Emphasis added]

20 The Caithness Defendants' do not claim the notes are irrelevant, immaterial or unduly
21 repetitious. The notes are the type of records commonly relied upon by persons in conduct of
22 their serious affairs. Pursuant to ORS 183.450(1) they are admissible.

23 **CONCLUSION**


24 For the above reasons, Columbia Basin Electric Cooperative respectfully requests the
25 Oregon Public Utility Commission to grant the Cooperative's Motion for Summary Judgment

26 _____
⁴¹ Caithness Opposition at p. 10.

1 and to deny Defendant Pacific Power's Motion for Summary Judgment and the Caithness
2 Defendants' Motion for Summary Determination.

3
4 DATED this 28th day of October 2014.

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