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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
3930 Fairview Industrial Dr. S.E.
Salem, OR 97302-1166

Attn: Filing Center

RE: Docket UM 1670—Motion for Clarification

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Motion for Clarification.

Please direct any informal inquiries to Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1670

In the Matter of

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.,

Complainant;

v.

PACIFICORP d/b/a PACIFIC POWER,
NORTH HURLBURT WIND, LLC.,
SOUTH HURLBURT WIND, LLC.,
HORSESHOE BEND WIND, LLC., and
CAITHNESS SHEPHERDS FLAT, LLC.

Defendants.

PACIFICORP’S MOTION FOR
CLARIFICATION

I. INTRODUCTION

Under OAR 860-001-0420 and OAR 860-001-0720, PacifiCorp d/b/a Pacific Power (PacifiCorp) respectfully requests clarification of one aspect of the Public Utility Commission of Oregon (Commission) Order No. 15-110 (Order). Specifically, PacifiCorp asks the Commission to clarify its statement that PacifiCorp “violated the Territorial Allocation Law by providing service to Shepherds Flat South via [a] privately-owned transmission line[.]”¹ PacifiCorp does not challenge the Commission’s adoption of the geographic load center test or its conclusion that the Columbia Basin Electric Cooperative (Cooperative) is entitled to serve the Shepherds Flat South load (once it is able to do so).

¹ Order at 10.

At the time PacifiCorp determined it had the right to serve Shepherds Flat South, the Commission had not clarified how to resolve service territory disputes between adjacent utilities. In fact, in the Order, the Commission recognized that the Territory Allocation Law provides no guidance on this point and had not previously been interpreted in the context of adjacent electric utilities.² PacifiCorp, reasonably and in good faith, adopted a policy under which it would serve loads where the point of delivery was located in its service territory. The Commission recognized that PacifiCorp's interpretation of the law was consistent with interpretations of similar laws in other jurisdictions.³

In the Order, the Commission decided to adopt a different standard (the geographic load center test). It would, however, be manifestly unfair to conclude that PacifiCorp violated an admittedly ambiguous law when there was no previous Commission guidance on the appropriate interpretation of the law or the standard that would be applied in Oregon. Such a finding would be even more unfair given the fact that no other utility is currently capable of serving the Caithness load. Finally, clarifying that PacifiCorp has not violated, and currently is not violating, the Territory Allocation Law is necessary because the Commission has ordered PacifiCorp to continue serving the Shepherds Flat South load until the Cooperative is able to do so.

II. BACKGROUND

In this docket, the Commission was asked to clarify PacifiCorp's and the Cooperative's respective rights to provide retail station service to the Caithness Shepherds Flat wind resources under the Territory Allocation Law, ORS 758.400-.475. The dispute arose because Caithness' wind turbines and related facilities are spread across both

² Order at 7.

³ Order at 7.

PacifiCorp’s and the Cooperative’s exclusive service territories. More specifically, the Shepherds Flat North resource is located within PacifiCorp’s service territory, Shepherds Flat Central straddles PacifiCorp’s and the Cooperative’s respective service territories, and Shepherds Flat South is located within the Cooperative’s service territory.

The Commission first determined that each of the three resources were individual customers (rather than one integrated customer).⁴ Based on that finding, the Commission then analyzed which utility was entitled to serve each of the projects and concluded that PacifiCorp “is entitled to provide service to Shepherds Flat North and Shepherds Flat Central, while [the Cooperative] is entitled to serve Shepherds Flat South.”⁵

III. ARGUMENT

PacifiCorp opposes neither the Commission’s adoption of the geographic load center test nor its conclusion that the Cooperative is entitled to serve the Shepherds Flat South load (once it is able to do so). Instead, PacifiCorp is concerned with the Commission’s statement that “we have concluded that PacifiCorp has violated the Territory Allocation Law by providing service to Shepherds Flat South[.]”⁶ As detailed below, the Commission’s statement that PacifiCorp has violated the Territorial Allocation Law is problematic on three grounds.

⁴ Order at 5-6.

⁵ Order at 1. *See also* Order at 12 (“We conclude that [the Cooperative] has the right and obligation to serve Shepherds Flat South.”).

⁶ Order at 10. PacifiCorp notes that this language is found in section III(B)(3)(b) of the Order, which analyzes whether the Caithness Defendants violated the Territory Allocation Law. Similar language is not found in section III(B)(3)(a) analyzing PacifiCorp’s compliance with the law. This language therefore appears to be dicta as it is not necessary to support the Commission’s principal rulings (i.e., that the Cooperative is entitled to serve the Shepherds Flat South load).

A. Based on the absence of clear statutory guidance, PacifiCorp reasonably determined that it was entitled to serve the entire Shepherds Flat load based on the location of the point of delivery

Concluding that PacifiCorp violated the Territory Allocation Law is manifestly unfair when: (1) the statute is admittedly ambiguous and the Commission had not previously resolved the ambiguity; and (2) PacifiCorp reasonably interpreted the ambiguous statute using a test adopted by other jurisdictions.

Territory Allocation Law was unclear at the time PacifiCorp determined that it had the right to serve the entire Shepherds Flat station power load, and in light of that ambiguity, PacifiCorp made a good-faith determination that it had the right to serve the entire Shepherds Flat load based on the point of delivery. In the Order, the Commission expressly stated that “[t]he Territory Allocation Law is unclear as to which utility has the right to serve a customer that straddles adjoining service territories.”⁷ The Commission also acknowledged that this proceeding involved an issue of first impression: “the [issue] has not been expressly addressed in Oregon.”⁸

PacifiCorp responded to this lack of clarity by adopting a policy that looked to the point of delivery for determining when it had the right to serve a particular load. Under PacifiCorp’s “Backup and Station Retail Service Policy for Generation Resources,” PacifiCorp maintained the right to provide service to an entire load as measured at the point of delivery if the point of delivery was located in its service territory.⁹ Based on this policy (and the lack of unambiguous statutory guidance), PacifiCorp made a good-faith

⁷ Order at 7.

⁸ Order at 7.

⁹ See Declaration of Chuck Phinney at ¶ 8 and Exhibit A (Oct. 6, 2014) (filed in support of PacifiCorp’s Motion for Summary Judgment) (Phinney Dec.).

determination that it had the right to serve the entire Shepherds Flat load because the Slatt Substation point of delivery is located in PacifiCorp's territory.¹⁰

PacifiCorp's policy at the time it determined it could serve the entire Shepherds Flat load was consistent with one of the tests the Commission identified in the Order as available for resolving service territory questions—the point of service test, which looks to the point where power is delivered rather than consumed.¹¹ While the Commission ultimately adopted a different test (the geographic load center test), PacifiCorp's reliance on the point of service/point of delivery test to determine its rights and obligations to provide retail electric service was reasonable at the time and should not be considered a violation of the Territory Allocation Law.

B. The Commission has ordered PacifiCorp to continue serving Shepherds Flat South

In recognition that the Cooperative cannot, at the present time, serve the Shepherds Flat South station power load, the Commission instructed “PacifiCorp to continue to provide service the Shepherds Flat South.”¹² The Commission ordered additional proceedings to resolve the transition of service from PacifiCorp to the Cooperative.¹³ In effect, the Commission ordered PacifiCorp to maintain an on-going violation of the Territory Allocation Law. The Commission can avoid ordering an on-going violation by clarifying that PacifiCorp did not violate the Territory Allocation Law when it reasonably interpreted the ambiguous Territory Allocation Law as allowing use of the established point of delivery test. The fact that the Cooperative is currently unable to serve the load makes clarification all the more appropriate.

¹⁰ Phinney Dec. at ¶¶ 7 and 9.

¹¹ Order at 7, citing *Pub. Serv. Comm'n of Colo. v. Pub. Util. Comm'n of Colo.*, 765 P.2d 1015 (Colo. 1988).

¹² Order at 12.

¹³ Order at 12.

C. The Commission’s conclusion potentially exposes PacifiCorp to civil damages

A finding that PacifiCorp violated the Territory Allocation Law also potentially exposes PacifiCorp to a civil action for penalties of damages—a result that would be inequitable under the facts in this proceeding and the Commission’s instruction that PacifiCorp continue serving the Shepherds Flat South load. The Territory Allocation Law includes specific enforcement provisions that allow aggrieved parties to seek injunctive relief or “any other remedy provided by law.”¹⁴ The Administrative Law Judge (ALJ) in this proceeding has also stated that, if a violation was found, “the Commission may initiate a complaint proceeding to seek penalties. Under that statute, penalties only may be imposed on public utilities, must be enforced in court, and are paid into the General Fund and credited to the Commission’s account.”¹⁵

The Commission’s unnecessary statement that PacifiCorp “violated” the Territory Allocation Law by serving Shepherds Flat South could potentially preclude PacifiCorp from defending itself in a civil action seeking damages or penalties brought by the Cooperative or the Commission.¹⁶ Again, such a result would be inequitable given the fact that PacifiCorp’s decision to serve Shepherds Flat South was based on its good-faith effort to address recognized ambiguity in the Territory Allocation Law.

D. Other matters

Finally, it appears that two numbers were inadvertently transposed in the first sentence of Section III(B) on page 4 of the Order. The relevant sentence states: “The Territory Allocation Law, codified in ORS 785.400 to 758.475, gives this Commission the

¹⁴ ORS 758.465; *see also* Administrative Law Judge Ruling at 5 (Apr. 28, 2014).

¹⁵ *Id.*


¹⁶ PacifiCorp does not concede that the Commission’s rulings would have preclusive effect in a civil damages or penalty action, and PacifiCorp does not waive its rights to fully defend itself in such an action.

authority to create exclusive service territories for electric and gas utilities” (emphasis added). To avoid confusion, the Order should be revised to reflect the correct citation: “ORS 758.400 to 758.475.”

IV. CONCLUSION

PacifiCorp respectfully asks the Commission to clarify its conclusion that PacifiCorp has not violated the Territory Allocation Law by serving the Shepherds Flat South load.

Respectfully submitted this 9th day of June, 2015

By: 
Dustin Till
Senior Counsel
PacifiCorp d/b/a Pacific Power