

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1670

In the Matter of

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.,

Complainant;

vs.

PACIFICORP, dba PACIFIC POWER,

and

NORTH HURLBURT WIND, LLC,

Defendants.

RULING

DISPOSITION: MOTION TO AMEND COMPLAINT DENIED IN PART
AND GRANTED IN PART

I. INTRODUCTION

In this ruling, I deny, in part, Columbia Basin Electric Cooperative, Inc.'s (Columbia Basin) Motion to Amend Complaint by disallowing Columbia Basin's new claims of attorney's fees and treble damages against PacifiCorp, dba Pacific Power. I grant, in part, Columbia Basin's motion by allowing the cooperative to add three new defendants to its complaint: South Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC, and Caithness Shepherds Flat, LLC (Caithness).

II. PROCEDURAL HISTORY

Columbia Basin filed its original complaint on August 28, 2013. The parties conducted discovery until December 5, 2013, when the proceeding was stayed to allow for settlement discussions. Settlement negotiations failed and on March 18, 2014, the parties agreed to a new procedural schedule. Approximately a week later, Columbia Basin filed its motion to amend the complaint. North Hurlburt Wind, LLC, and Pacific Power each filed responses opposing Columbia Basin's motion.

III. FACTS

For context, I summarize some of the undisputed facts provided by the parties.¹ North Hurlburt, South Hurlburt, and Horseshoe Bend (collectively referred to as “the wind projects”) each own and operate a separate wind energy generation facility with Caithness as the corporate parent. Each wind project has an average capacity of approximately 100 megawatts (MW) and peak capacity of approximately 300 MW.

When the wind projects were developed, Bonneville Power Administration (BPA) expanded its Slatt Substation to add a 230 kilovolts (kV) yard.² The new transformer allowed power from the wind projects to be stepped up from 230 kV to the 500 kV level of BPA’s transmission system in this area. Slatt Substation is physically located within the exclusive retail service territory of Pacific Power, and Pacific Power accesses Slatt Substation under its BPA firm transmission agreement.³

The station service requirements of the wind projects range between 0.5 MW and 2.0 MW.⁴ When possible, the wind projects self-supply this power. When winds are low, the wind projects take delivery of station service power from Pacific Power at Slatt Substation. The metering for the wind projects is bi-directional, allowing measurement of both incoming and outgoing power. Caithness receives a monthly bill from Pacific Power and divides it among the wind projects with no mark-up to itself.

The wind projects share ownership of interconnection and transmission facilities, consisting of a 230 kV ring bus and two 4.5 mile, 230 kV lines. They individually own certain 34.5 kV collecting lines and a 34.5/230 kV switchyard necessary to connect the generators to the shared facilities.⁵ Caithness has no ownership interest in the interconnection or transmission facilities.

Regarding the location of the wind projects, North Hurlburt is entirely within Pacific Power’s service territory. Some of South Hurlburt’s turbines and all of Horseshoe Bend’s turbines are in Columbia Basin’s territory.

IV. COLUMBIA BASIN’S MOTION

Columbia Basin’s original complaint alleges that Pacific Power and North Hurlburt offered and provided utility service into, and in, Columbia Basin’s exclusive service territory, in violation of provisions of the Territory Allocation Law⁶ and Commission Order No. 38089 that granted Columbia Basin its service territory. In its motion,

¹ To the extent any of these facts are disputed, parties may raise their concerns in subsequent filings or at hearing.

² *BPA Revised Record of Decision for Offer of Conditional Commitment for a Loan Guarantee for, and Electrical Interconnection of, the Shepherds Flat Wind Project*, 75 Fed. Reg. 64,296 at 64,297 (Oct 19, 2010).

³ BPA is prohibited from selling power at retail.

⁴ Station service is the power consumed by a power plant due to the operation of pumps, heaters, battery chargers, electrical control equipment, motors, computers, and associated electrical losses.

⁵ *Horseshoe Bend Wind, LLC*, 135 FERC ¶ 61,251, at P 3-6 (2011).

⁶ ORS 758.450.

Columbia Basin seeks to add an additional remedy of treble damages and attorney fees against Pacific Power, and to join Caithness, South Hurlburt, and Horseshoe Bend as additional defendants.

Columbia Basin explains that the three new defendants are necessary because data requests in this proceeding revealed that Caithness is the entity that purchases energy from Pacific Power and distributes it to the wind projects, and not North Hurlburt as Columbia Basin previously believed. Columbia Basin states that Caithness redistributes the power to the wind projects on transmission facilities that are jointly owned by the wind projects. Columbia Basin believes that Caithness is the owner of the membership interests of the wind projects. Thus, Columbia Basin seeks to add Caithness as a party due to its ownership and management control over the wind projects at issue and its involvement in providing utility service into Columbia Basin's service territory.

Columbia Basin also seeks to add South Hurlburt and Horseshoe Bend as defendants because of their role in jointly owning and operating, along with North Hurlburt, the facilities that are used to deliver energy.

Columbia Basin maintains that the Commission has jurisdiction to hear this complaint due to the Commission's jurisdiction over complaints, the Territory Allocation Law, and the broad definitions of "person" and "utility service".⁷

Columbia Basin also seeks to amend the complaint to add additional remedies of treble damages and attorney fees against Pacific Power based on information set forth in notes it has obtained from a meeting between Pacific Power, Caithness Development, LLC, and BPA. Columbia Basin alleges that the meeting notes indicate that Pacific Power offered to provide service into Columbia Basin's exclusive service territory as a result of either gross negligence or willful misconduct under ORS 756.185.

Columbia Basin asserts that it may amend its complaint at any time, before the completion of taking of evidence, by order of the Commission. Columbia Basin maintains that the Oregon Rules of Civil Procedure permit the joining of additional defendants if there are common questions of law or fact between all defendants.⁸ Columbia Basin states that the original claims against North Hurlburt and Pacific Power were based on violations of the Territorial Allocation Law and Order No. 38089 and the new claims asserted against South Hurlburt, Horseshoe Bend, and Caithness arise out of the same transactions, and Columbia Basin is seeking the same remedies against the new parties. Columbia Basin asserts that, because the parties are still in the discovery process, the existing parties would not be prejudiced by the additional defendants.

Columbia Basin asserts that the additional remedy against Pacific Power is likewise permitted, because the amended claim against Pacific Power is still based on the same series of occurrences as the original claim.⁹

⁷ Columbia Basin Reply at 5-6 (citing ORS 756.500(1), 758.405, 758.400(2), 758.400(3)).

⁸ Columbia Basin Motion at 4 (citing ORCP 28).

⁹ Columbia Basin Motion at 4 (citing *Reeves v. Reeves*, 203 Or App 80 at 84 (2005)).

A. Pacific Power's Position

Pacific Power opposes the additional remedy of treble damages and attorney fees against it. Pacific Power states that the circuit court, not the Commission, has exclusive jurisdiction over claims for damages and fees under ORS 756.185(1). Pacific Power maintains that the Commission should deny Columbia Basin's motion because it lacks jurisdiction to grant the new relief sought.¹⁰

Pacific Power takes no position on the joining of additional defendants.

B. North Hurlburt's Position

North Hurlburt raises three arguments in response to Columbia Basin's motion. First, North Hurlburt states there has been no violation of Order No. 38089 because it is physically impossible for anyone to provide utility service to the wind projects within Columbia Basin's territory because there are no transmission facilities within that area. North Hurlburt maintains that utility service may only be provided at the sole point of interconnection at Slatt Substation, where delivery is completed outside the territory claimed by Columbia Basin. North Hurlburt asserts that none of the defendants is providing utility service, because such service is, of physical necessity, provided in Pacific Power's service territory at Slatt Substation. If Columbia Basin were to propose the construction of new 230 kV facilities, it would require duplication of existing BPA 230 kV facilities in violation of ORS 758.405.

Next, North Hurlburt argues that the Commission's jurisdiction does not extend to the new defendants, or to North Hurlburt. ORS 756.500 states that a complaint "shall be against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the Commission." North Hurlburt maintains that the wind projects and Caithness are not regulated by the Commission and are not a "public utility" under ORS 757.005(1)(a). North Hurlburt further asserts that ORS 756.500(5), which allows a utility to bring a complaint against one of its customers, cannot be used as the basis of the complaint because none of the wind projects are a station service customer of Columbia Basin, and there are no questions of rates or service.

Finally, North Hurlburt believes that Columbia Basin admitted that it mistakenly named North Hurlburt as a defendant when it stated in its motion, "[t]he Cooperative named Pacific Power and North Hurlburt Wind, LLC as the defendants in its initial complaint based on the incorrect information available to the Cooperative at that time." North Hurlburt states that its entire facility is located within Pacific Power's exclusive service territory, and this is undisputed. North Hurlburt requests that it be removed as a defendant, and instead be allowed to participate as an intervenor.

¹⁰ Pacific Power Response at 1 (citing *Perla Dev. Co., Inc. v. PacifiCorp*, 82 Or App 50, 53-54 (1986)). (Claims for treble damages under ORS 756.185 "are within the jurisdiction of the circuit court"); *Belozar Poultry Farms, Inc. v. Portland Gen. Elec. Co.*, Docket No. UC 201, Order No. 92-825 (Jun 8, 1992) ("The Commission lacks jurisdiction to award damages plus attorney fees pursuant to ORS 756.185(1)").

V. DISCUSSION

ORS 756.500 provides that a complaint may be amended at any time before the completion of taking of evidence, by order of the Commission.¹¹ The Commission shall freely give leave to amend a pleading when justice so requires.¹²

A. Addition of New Claims

I deny Columbia Basin's motion to amend its complaint to add treble damages and attorney fees as a remedy against Pacific Power. The Commission has only those powers granted by statute. While the statutory section cited by Columbia Basin mentions damages, the section is one of a series of provisions that provide for judicial enforcement of "statutes and ordinances relating to utilities." It does not explicitly give the Commission authority to order a utility company to pay damages, and consequently, has long been interpreted as enabling an action in court, not before this Commission.¹³

In addition to the statutory provision for the recovery of damages and attorney fees (ORS 756.185), the Territory Allocation Law has a specific section governing its enforcement procedure. ORS 758.465 states that the aggrieved person may file an action in the circuit court for an injunction, or any other remedy provided by law. The Commission's primary function in this docket will be to determine if there have been violations of the Territory Allocation Law or Commission order, and the court, if requested, may address remedies, including treble damages and attorney fees.

I clarify, however, that the Commission does have authority under ORS 756.990 to impose penalties. If Columbia Basin prevails and establishes that Pacific Power violated a Commission order or statute, 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.

B. Addition of New Defendants

Consistent with our precedent, I find that parties may be added under the four-part test of the *Forsi* case: (1) the proposed amendment's nature and relationship to the existing parties; (2) prejudice to the opposing party; (3) timing; and (4) the merit of the proposed amendment.¹⁴ I find that the addition of South Hurlburt, Horseshoe Bend, and Caithness

¹¹ OAR 860-001-0090(g) provides that the Commission delegates to the ALJ the authority to decide procedural matters, but not to grant contested motions to dismiss or other contested motions that involve final determination of the proceedings.

¹² ORCP 23 A.

¹³ *Schaefer v. CenturyTel of Oregon, Inc.*, Docket No. UC 569, Order No. 01-157 (Feb 8, 2001) (finding the Commission has no jurisdiction to award damages for disconnection of service); *Pac. Parts Locator Serv. v. Pac. NW Bell Tele. Co.*, Docket No. UC 15, Order No. 84-042 (Jan 24, 1984) (the Commissioner does not have jurisdiction to award monetary damages); *Intell-Com, Inc. v. GTE NW*, Docket No. UC 255, Order No. 95-288 (Mar 17, 1995) (In a foreclosure/contract case, stating that this is the kind of dispute normally resolved in the judicial system).

¹⁴ *Forsi v. Hildahl*, 194 Or 667 (1974); *NW Public Comm'ns Council v. Qwest Corp.*, Docket No. DR 26, Order No. 09-155 at 8 (May 4, 2009) (applying the *Forsi* test and allowing plaintiffs to be joined).

as defendants all relate to Columbia Basin's original claim against North Hurlburt, insofar as the claims all relate to the same transactions, with the same allegations. Due to the close relationship of the wind projects and Caithness, I see no prejudice from the amendment. This proceeding is at a relatively early stage, and thus there is no issue with the timing of the amendment. The addition of the defendants has sufficient merit, as the station power at issue appears to be aggregated between the wind projects, delivered to the wind projects on jointly owned facilities, and billed to Caithness as the corporate parent.¹⁵

Finally, I agree with Columbia Basin that the Commission's jurisdiction extends to the wind projects and Caithness for the limited purpose of hearing this territory allocation complaint. The Territory Allocation Law prohibits a "person" from providing "utility service" into an allocated territory, and those terms are broadly defined to cover partnerships or corporations distributing electricity to users.¹⁶ As the agency charged with implementing the Territory Allocation Law, the original defendants and the three new defendants are subject to the Commission's jurisdiction for this proceeding.

C. Procedural Matters

Columbia Basin's reply raised a concern over the additional costs to refile another amended complaint. I clarify that Columbia Basin need not refile its complaint to comply with this ruling. Columbia Basin's amended complaint, filed on March 26, 2014, is deemed filed, except that the damages and attorney fees claims are stricken.

In addition, I will not require Columbia Basin to serve its amended complaint on the new defendants, due to the common ownership of the wind projects and Caithness, and because all entities are represented by the same counsel.

Similarly, the new defendants are not required to file answers to the amended complaint, and will not be deemed in default pursuant to OAR 860-001-0410.

Any party may appeal this ruling to the Commission under OAR 860-001-0110 within 15 days of the date of service of this ruling.

Dated this 28th day of April, 2014, at Salem, Oregon.



Sarah Rowe
Administrative Law Judge

Attachment: Notice of Contested Case Rights and Procedures

¹⁵ North Hurlburt Response at 5-6.

¹⁶ ORS 758.400, 758.450.

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at www.puc.state.or.us. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.