

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1670

In the Matter of

COLUMBIA BASIN ELECTRIC  
COOPERATIVE, INC.,

Complainant;

vs.

PACIFICORP, dba PACIFIC POWER,  
NORTH HURLBURT WIND, LLC,  
SOUTH HURLBURT WIND, LLC,  
HORSESHOE BEND WIND, LLC,  
and CAITHNESS SHEPHERDS FLAT,  
LLC.

Defendants.

RULING

DISPOSITION: DEFENDANTS ORDERED TO ANSWER DATA  
REQUESTS IN PART

**I. INTRODUCTION**

On July 21, 2014, a discovery conference was held to discuss data requests submitted by the complainant and contested by defendants North Hurlburt Wind, LLC (North Hurlburt), and Caithness Shepherds Flat, LLC (Caithness). In large part, this ruling orders North Hurlburt and Caithness to answer the data requests, with specific limitations discussed below.

I first identify the elements of the claims and defenses that have been asserted in this proceeding, and then apply the tests of relevancy and reasonableness to each data request. The facts of this proceeding and the parties' arguments are summarized here for the limited purpose of this ruling.

The gravamen of Columbia Basin Electric Cooperative, Inc.'s (Columbia Basin) complaint is that defendants have provided utility service into, and in, Columbia Basin's exclusive service territory by providing station service power to the wind projects. To make its claim, Columbia Basin seeks to identify who is providing utility service to each wind project at specific locations. These facts have not yet been established, in part, because the wind projects jointly own interconnection and transmission facilities, the

station power for the three projects is aggregated by Pacific Power, and the wind projects' parent company, Caithness, allocates the station service bills among the wind projects.

In short, the defendants respond that Pacific Power lawfully provides station service power at the wind projects' points of interconnection at Slatt Substation.

This case is one of first impression for the Commission, and the legal question of whether a "person" provides "utility service" under the Territory Allocation Law for station service power at a point of interconnection, at the wind tower, or somewhere in-between, has not yet been determined. Thus, it is reasonable for Columbia Basin to try to precisely identify the arrangement of the station power flows for the wind projects in order to make its claims.

My primary concerns in evaluating the data requests is whether the requested information is relevant,<sup>1</sup> and whether the data requests are unreasonably cumulative, duplicative, burdensome, or overly broad.<sup>2</sup> In determining whether a request is reasonable, I also consider the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates.<sup>3</sup>

With the above factors in mind, I make the below determinations.

## **II. DETERMINATIONS**

### **A. Columbia Basin's Data Requests to North Hurlburt**

#### ***1. Accurate Diagram***

Columbia Basin seeks an accurate diagram of the interconnection facilities between the Slatt Substation and each collector substation for each wind project, with designations of the ownership of each power line, substation, ring bus, and similar equipment. Columbia Basin states that it has only received a simple one line drawing that Bonneville Power Administration (BPA) developed. North Hurlburt responds that it does not have any other diagrams and should not be required to develop any drawings.

I will require North Hurlburt to produce (if attached to the Operations Support Agreement), or, if necessary, develop, the requested diagram. Defendants are correct that a party is not normally required to develop information. However, Commission rules allow for this when the capability to develop the information is possessed uniquely by the party from whom discovery is sought, the request is not unduly burdensome, and the information sought has a high degree of relevance to the issues in the proceedings.<sup>4</sup>

I find that a diagram showing the interconnection facilities and ownership designations of

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<sup>1</sup> OAR 860-001-0450(1) states that relevant evidence is evidence tending to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence.

<sup>2</sup> OAR 860-001-0500(2).

<sup>3</sup> OAR 860-001-0500(1).

<sup>4</sup> OAR 860-001-0500(4).

power lines, substations, ringbuses, and switchyards is necessary not only for Columbia Basin to make its claims regarding which entity may be providing utility service in its territory, but also to allow the Commission to understand the case. North Hurlburt is not required to show “other equipment” such as the individual towers, collector systems, or meteorological towers. A single line drawing developed by BPA is not adequate to understand the facts of this case.<sup>5</sup>

## ***2. Ownership of the Facilities, the Non-FERC Shared Facilities Agreement, and the Operations Support Agreement***

Columbia Basin requests “all agreements, documents, notes, communications, and other information concerning the ownership of the electric facilities jointly owned by the three wind projects.” Columbia Basin clarifies that it believes the jointly owned facilities are in-between the Slatt Substation and the individual collector substations. Columbia Basin states that it needs this information to determine what “person” is providing “utility service” under the statute.

I will not require North Hurlburt to respond to the first part of this request because it is overly broad and beyond the scope of the basic ownership information needed by Columbia Basin to make its claims.

The second part of this data request involves a document referred to as the “Non-FERC” Shared Facilities Agreement, which contains a different description of the jointly owned facilities than the publicly-available FERC Shared Facilities Agreement.<sup>6</sup> My understanding is that this document is no longer contested, as Columbia Basin has a copy and North Hurlburt has removed the confidential designation.

A third part of this data request involves the Operations Support Agreements, referred to as “O&M Agreements” in the Shared Facilities Agreement. Columbia Basin has only been able to review an eyes-only copy in North Hurlburt’s office. Columbia Basin states that this document contains information concerning who operates and controls the jointly owned facilities. North Hurlburt responds that the Operations Support Agreements contain commercially sensitive information, and that one of the parties to the agreement will only allow Columbia Basin an eyes-only review of one unredacted document, and an eyes-only review of the other documents in redacted form. North Hurlburt maintains that it has asked Columbia Basin to take a look at the documents and to explain if it really needs information from the documents for its case, but that Columbia Basin has not done so.

The publicly-available Shared Facilities Agreement describes the O&M Agreements as documents that direct a manager to manage the operations and maintenance of the shared

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<sup>5</sup> See e.g., [http://efw.bpa.gov/environmental\\_services/Document\\_Library/ShepherdsFlatWindFarm/ShepherdsFlatFigure1.pdf](http://efw.bpa.gov/environmental_services/Document_Library/ShepherdsFlatWindFarm/ShepherdsFlatFigure1.pdf)

<sup>6</sup> See *Horseshoe Bend Wind, LLC*, FERC FPA Electric Tariff, Shepherds Wind Project Shared Facilities Agreement (Jun 17, 2011) Docket ER11-3381, available at: [http://elibrary.ferc.gov/idmws/file\\_list.asp?document\\_id=13911025](http://elibrary.ferc.gov/idmws/file_list.asp?document_id=13911025)

assets.<sup>7</sup> Because this document may shed light on the division of the shared facilities, and enable Columbia Basin to make its claim, this information is relevant. North Hurlburt and Caitlness have not explained any extraordinary commercial sensitivity of this document.

To the extent that this document, or any other disputed document, such as the Administrative Management Agreement, O&M Budget, or Option Agreement, are particularly commercially sensitive, the burden is on North Hurlburt and Caitlness to make that clear. There is already a standard protective order in place in this proceeding. If defendants would like to modify the protective order for heightened protection, they may file a motion.<sup>8</sup> Otherwise, North Hurlburt and Caitlness are required to provide a copy of the O&M Agreements (as described in Data Request No. 13 to Caitlness), including amendments, to Columbia Basin.

### **3. *Copies of Power Purchase Sales Agreements***

Columbia Basin seeks the PPAs to discover information relating to the commercial operation dates of the wind projects (to respond to the statutes of limitations defense), the interconnection points and transfer of title of the power, any trading of station service power between the wind projects, and the self-supply arrangements for station service power. North Hurlburt responds that the PPAs are commercially sensitive because they describe business relationships and the terms of the deals. North Hurlburt believes that the PPAs were filed with the California Public Utilities Commission in strict confidence.

PPAs typically describe key terms of the power delivery. The Commission routinely reviews PPAs for Oregon's retail load serving utilities, and a standard protective order (in place here) adequately protects the information in a PPA. Because the PPAs here may help Columbia Basin understand how the wind projects are self-supplying station service power, or potentially sharing station service power among themselves, we will require North Hurlburt to produce the PPAs. However, we will allow North Hurlburt to redact the limited information it believes is highly commercially sensitive—and to explain what information was redacted and why. To the extent that the redaction impairs Columbia Basin's review, I expect the parties to confer and then, if there is no resolution, Columbia Basin may ask the administrative law judge for assistance.

### **4. *Communications Relating to Pacific Power's Position That It Has the Legal Right to Serve the Station Service Power of the Wind Projects***

Columbia Basin requests "all communications, documents, notes and other communication or information relating to Pacific Power's position that it has the legal right to serve the station service power" of the wind projects.

North Hurlburt objects to the disclosure, citing work product grounds.

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<sup>7</sup> See *id.* at § 8.2.

<sup>8</sup> See Order No. 06-033 (Jan 25, 2006) (requiring a safe-room discovery mechanism for review of confidential portions of tax documents); see also Order No. 13-426 at 4 (Nov 19, 2013) (the standard protective order's instructions on how to seek additional protection).

I find that Columbia Basin's request is overly broad. However, I will require a more tailored disclosure because this issue is fundamental to Columbia Basin's claim. One of Columbia Basin's previously filed exhibits is a document with meeting notes between Pacific Power, BPA, and Caithness Development regarding the potential arrangement of station service power.<sup>9</sup> The notes predict that Columbia Basin would challenge Pacific Power's provision of station service to Horseshoe Bend, noting that Horseshoe Bend is in Columbia Basin's service territory. The meeting notes indicate that Pacific Power had a theory of how to arrange station power service to avoid a service territory dispute, and Pacific Power discussed this with the wind projects before the projects were developed. Any follow-up communications concerning this issue may directly relate to Columbia Basin's claim. Thus, we will require North Hurlburt to produce any documents that Pacific Power provided to it that directly mentions station service and Columbia Basin (referenced by any of its names or abbreviations) or service territory, within one year of the meeting notes. This documentation is not protected by the attorney-client privilege because there is no attorney-client relationship between Pacific Power and North Hurlburt,<sup>10</sup> and it is not work product because any documentation from this time frame would not have been produced in anticipation of litigation.<sup>11</sup>

#### **5. Commercial Operation Dates**

Columbia Basin requests the commercial operation date of each wind project so that it may respond to the statute of limitations defense. Although North Hurlburt has provided dates for when intermittent station power service began, Columbia Basin states these dates may be for construction purposes, not commercial operation.

Publicly available documents indicate that the wind projects began commercial operation in February 2012, July 2012, and August 2012.<sup>12</sup> In conference, North Hurlburt referenced 2011 and 2012 dates for station power service. Because there appears to be a difference in these dates, I will require North Hurlburt to respond to this data request. This response is relevant and reasonable because it will allow Columbia Basin to discern between construction dates and commercial operation dates.

#### **6. Direct and Indirect Owners**

Columbia Basin seeks the identity of all direct and indirect owners of each of the three wind projects. Columbia Basin asserts that, if all the owners of the LLCs are the same entity, that would be relevant to the joint operation of the facilities. North Hurlburt does not believe this information is relevant.

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<sup>9</sup> Columbia Basin Motion to Amend Complaint, Declaration of Raymond Kindley in Support of Motion, Exhibit 1 at 3-4 (Mar 26, 2014).

<sup>10</sup> Or. Evid. Code 503(2) (protects communications between the client and the client's lawyer).

<sup>11</sup> Or. R. Civ. P. 36(B)(3); *United Pac. Ins. Co. v. Trachsel*, 83 Or App 401, 404 (1987) (the work product rule protects only those things that are prepared in anticipation of litigation and not those prepared in the regular course of business).

<sup>12</sup> *Horseshoe Bend Wind, LLC, Updated Market Power Analysis*, Docket ER11-3377-002 (Mar 4, 2014), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13478712>.

I do not believe this information, beyond what is publicly available and otherwise required by this ruling, is relevant to Columbia Basin's claim of which entity may be providing utility service in its service territory. I will not require a response to this item.

**7. *Station Service Power Invoices***

Columbia Basin seeks copies of all invoices that Pacific Power has sent to Caithness. Columbia Basin states that this information will help it understand Caithness' individual role in the alleged provision of utility service. North Hurlburt responds that it has provided one year of invoices, and expresses its general concern with disclosing information for purposes of this case.

All invoices for station service power provided to the wind projects are relevant to Columbia Basin's claim. It is reasonable for either North Hurlburt, or Pacific Power, to provide all of these invoices, and such a requirement is not unusual in complaint proceedings before the Commission. Regarding North Hurlburt's concerns over disclosure of this information to Columbia Basin's manager, we note that the Protective Order in place in this proceeding states that any person (other than counsel of record) must destroy or return confidential information within 90 days of the resolution of the case, unless the designating party consents to retention of the information.<sup>13</sup>

**8. *Station Service Power Allocation***

Columbia Basin seeks records concerning how Caithness allocates the power costs from Pacific Power to each wind project. Columbia Basin states that it seeks to understand Caithness' role as the billing agent, to verify that Caithness is not marking up the station service invoices when it allocates the bills to the wind projects, and to better understand the individual wind projects' consumption of station service power. North Hurlburt responds that this data request should not be disputed, because North Hurlburt has already provided one year worth of these records.

To the extent that North Hurlburt has already provided this information, this request is moot. If North Hurlburt is mistaken, and it has not provided this information, it should as it does not protest the request.

**9. *Aggregation of Station Power Service***

Columbia Basin seeks the calculations and the monthly savings that each wind project realizes by Pacific Power's aggregation of the three wind projects' demand factors into a single aggregated demand factor. Columbia Basin states that this will help it understand how Pacific Power is charging the wind projects and whether Columbia Basin can provide the same service. Columbia Basin also believes this information will show how Pacific Power arranged the deal to allegedly provide service into Columbia Basin's territory.

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<sup>13</sup> Order No. 13-426, app A at 3 (Nov 19, 2013).

North Hurlburt responds that Columbia Basin can only provide the station service through the Slatt Substation, which would be uneconomic. North Hurlburt further maintains that the information requested is not maintained in the ordinary course of business.

I will require North Hurlburt to provide this information. It is possible that the aggregation of the station service between the wind projects directly impacts the amount and cost of station service delivered into Columbia Basin's territory, a main aspect of this case. The request does not appear unreasonable, and if the information is not already available, it can likely be determined by comparing the various meter readings.

## **B. Columbia Basin's Data Requests to Caithness**

### ***1. Administrative Management Agreement***

Columbia Basin requests all agreements between Shepherds Flat Management, LLC (Shepherds Flat), and North Hurlburt, LLC, including but not limited to, the Administrative Management Agreement and any amendments. Columbia Basin explains that it wants to know who is doing the work because it believes that Shepherds Flat is operating and maintaining the shared facilities. North Hurlburt responds that Shepherds Flat is not a party to this proceeding, and it objects to releasing another agreement that may have commercially sensitive information.

The Administrative Management Agreement is referenced throughout the publicly-available Shared Facilities Agreement. The Administrative Management Agreement appears to directly relate to the management of the shared interconnection facilities, and these shared facilities are relevant to Columbia Basin's claims regarding which person may be providing utility service in its service territory. I will require Caithness to produce the Administrative Management Agreements between Shepherds Flat and North Hurlburt, South Hurlburt, and Horseshoe Bend, including any amendments. I will not require Caithness to produce "all agreements" as this is overly broad.

### ***2. Employees' Job Titles and Duties***

Columbia Basin seeks the job titles, duties, and number of employees employed by the three wind projects, Caithness, and Shepherds Flat. Columbia Basin states this information goes to who is doing the work on the shared facilities, and that if the wind projects have individual interconnection points in Slatt Substation then they should have separate employees maintaining the facilities. Caithness objects to this request as irrelevant.

I will not require Caithness to produce this information because I question its relevance. Assuming, arguendo, that shared employees are maintaining the individual facilities, I do not see how this impacts Columbia Basin's claim that a person is providing utility service in its exclusive service territory.

### **3. *Generation Source of Station Service Power***

Columbia Basin asks for the generation source, *e.g.*, system, wind, solar, etc., for the power that Pacific Power provides under the power sales agreement between Pacific Power and Caithness. Columbia Basin notes that the Territory Allocation Law provides an exemption for renewable resources, and Columbia Basin requests this information for its defense. Caithness responds that this question should be directed at Pacific Power.

This information is relevant because of the statutory exception in ORS 758.450(4)(c). To the extent that Caithness has this information, it is required to produce it.

### **4. *O&M Budget***

Columbia Basin ask for copies of the Approved Shared Facilities O&M Budget, as discussed in section 4.6 of the Shared Facilities Agreement for years 2011, 2012, 2013, and 2014. Columbia Basin seeks the information to understand how the jointly owned facilities are administered.

Similar to the Administrative Management Agreement discussed above, the O&M Budget is referenced in the publicly-available Shared Facilities Agreement as a document that describes the general operations plans for the shared facilities and the shared expenses. This information is relevant to Columbia Basin's claim as it directly relates to the shared facilities, which Columbia Basin is trying to distinguish from the individually owned facilities to make its claim. I will require Caithness to produce these documents.

### **5. *Option Agreement for Saddle Butte***

Columbia Basin seeks the Option Agreement to understand how another undeveloped wind project, Saddle Butte, may join the interconnection at Slatt Substation. Caithness does not believe this agreement is necessary, and objects to the large number of agreements requested.

The publicly available Shared Facilities Agreement describes how the Saddle Butte wind project may acquire an interest in the excess capacity of the shared facilities pursuant to the Option Agreement. Considering that this agreement will likely become public at some point in the future if Saddle Butte moves forward, this request is reasonable. The request is also relevant because it involves the interconnection facilities at Saddle Butte that are central to Columbia Basin's claim. Thus, I will require Caithness to produce this agreement.



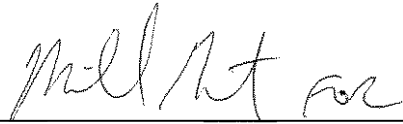
**C. Procedural Matters**

Caithness filed a motion July 15, 2014, requesting seven business days from the date of this ruling to respond to Columbia Basin's data requests. Caithness' motion is granted. North Hurlburt is required to submit its responses, as specified above, at the same time.

During the discovery conference, Columbia Basin expressed concern over the procedural schedule in this proceeding and the August 22, 2014, due date for Cross Summary Judgment Motions. The parties may request a new deadline with a new motion.

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 25th day of July, 2014, at Salem, Oregon.



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Sarah Rowe  
Administrative Law Judge