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June 2, 2015

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
3930 Fairview Industrial Drive SE
Salem OR 97302

Re: In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC and CLATSKANIE PEOPLE'S UTILITY DISTRICT
Petition for Declaratory Ruling
Docket No. DR 49

Dear Filing Center:

Enclosed for filing in the above-referenced matter, please find the Revised Petition for Declaratory Ruling on behalf of Georgia-Pacific Consumer Products (Camas) LLC and Clatskanie People's Utility District ("Petitioners").

PacifiCorp has authorized the Petitioners to state that it accepts the revised statement of assumed facts and questions presented for purposes of the declaratory ruling.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosure

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 49

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I. INTRODUCTION

Pursuant to ORS 756.450 and OAR 860-001-0430, Georgia-Pacific Consumer Products (Camas) LLC ("GP") and the Clatskanie People's Utility District ("Clatskanie") (collectively, the "Petitioners") jointly petition the Public Utility Commission of Oregon ("OPUC" or the "Commission") for a declaratory ruling on the applicability of certain of Oregon's direct access laws, ORS 757.600 *et seq.*, and territory allocation laws, ORS 758.400 *et seq.*, to a proposed electric service agreement between GP and Clatskanie. A declaratory ruling from the Commission will assist in resolving certain potential disputes between GP, Clatskanie, and PacifiCorp, d/b/a Pacific Power ("PacifiCorp" or the "Company"), with respect to electric service at GP's Camas Mill.

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GP and Clatskanie have entered into a non-binding memorandum of understanding ("MOU") to explore a transaction, pursuant to which GP would take delivery of electric service in Washington from Clatskanie. Subject to negotiation of definitive binding agreements, Clatskanie would purchase certain electric lines from GP, and, effective January 1, 2016, use those lines to supply GP's electric requirements at its mill located in Camas, Washington.

Through this Petition for Declaratory Ruling, GP and Clatskanie collectively seek a ruling that: (1) Oregon's "direct access" law does not apply to Clatskanie's delivery of electricity in Washington to a customer located in Washington that will use the delivered electricity exclusively in Washington; (2) Clatskanie will not be providing "direct access" service to GP; and (3) Clatskanie will not be providing utility service in any exclusive territory allocated to PacifiCorp.

Petitioners respectfully request expedited consideration of this Petition. The current special contract between GP and PacifiCorp expires at the end of 2015. In order to secure a power supply beginning in 2016, GP has devoted much of the past two years to negotiating with PacifiCorp, Clatskanie, and other potential suppliers. Since learning in late 2014 that PacifiCorp may object to the arrangements that GP and Clatskanie are proposing, the Petitioners have endeavored, in good faith, to resolve potential issues without involving the Commission or initiating other litigation. Because these efforts have not successfully resolved certain limited issues, and because a large amount of work must be completed by the end of 2015, good cause exists for the Commission to give expedited consideration to this Petition For Declaratory Ruling so that the parties involved will have certainty as they put into place the

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equipment and systems that will be necessary to ensure reliable and uninterrupted electric service to GP's Camas Mill.

II. RELEVANT ASSUMED FACTS

The Petitioners allege the following facts ("Assumed Facts"):

1. GP owns and operates a manufacturing facility in Camas, Washington ("Camas Mill") that produces pulp and consumer paper products. The Camas Mill is physically located outside of Oregon.

2. Even though the Camas Mill is located in Washington, PacifiCorp has served the Camas Mill from Oregon under special contracts or other Oregon rate tariffs since PacifiCorp merged with the Northwestern Electric Company in1947.

3. The Camas Mill currently takes electric service from PacifiCorp under a bilateral special contract (an arrangement that includes a cogeneration and steam supply agreement, a lease agreement and a transmission agreement (collectively the "Contract")) between the Company and GP's predecessor, James River Paper Company. The Contract has a 20-year term that expires on December 31, 2015. The Commission approved the Contract, filed as Pacific Power & Light Company Advice No. 93-107, at its August 31, 1993 Public Meeting, in which it adopted the Commission Staff's recommendation. The Staff Report recommending approval of the Contract is attached hereto as Exhibit B. The Commission's decision was memorialized in a letter to PacifiCorp, dated September 2, 1993, in which the Commission approved the Company's "request to provide service to James River Paper Company's Camas WA mill under the utility's standard large industrial tariff Schedule 48T, effective upon commencement of construction of the new generating unit at the site…"

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4. Before the Contract, PacifiCorp served the Camas Mill through a special pulp and paper tariff for many years. In return for the discounted rate offered through that tariff, the Camas Mill waived its right to return to PacifiCorp's standard Oregon tariff, absent Commission approval.

5. Under the Contract, PacifiCorp paid for and constructed a steam turbine generator and made other improvements at the Camas Mill, at a cost of approximately $60 million. PacifiCorp owned and handled major maintenance on the steam turbine generator at the Camas Mill, while GP operated it and provided minor maintenance. Under the Contract, GP received a royalty for delivery of steam to the generator, from which PacifiCorp's investment costs and an allowance for major maintenance were subtracted. In 2015, PacifiCorp executed agreements to sell the steam turbine generator and a 69 kilovolt ("kV") transmission line to GP under the Contract for a total sales price of approximately $486,000. On May 19, 2015, the Commission approved these sales in Order No. 15-151 in Docket UP 325.

6. Under the Contract, PacifiCorp delivers electricity to the Camas Mill at the Company's Troutdale Substation, located on the west side of NW Sundial Road in Troutdale, Oregon. GP owns two 69 kV lines that interconnect with PacifiCorp-owned transformation facilities at the Troutdale Substation (the "69 kV Lines") and cross the Columbia River to the Camas Mill. After GP accepts delivery of power at the Troutdale Substation, electricity passes over these lines and across the Oregon-Washington border, where it is consumed at the Camas Mill. Thus, under the current special contract, GP takes delivery of electricity from PacifiCorp in Oregon, and the Camas Mill is considered a PacifiCorp Oregon customer.

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7. Under Article 7 of the Contract, GP agreed that during the term of the Contract it would "remain an one-hundred percent (100%) Oregon customer and will not take any action which may have the effect of preventing Pacific Power from treating the service provided to the Mill as an Oregon customer."

8. As an Oregon customer of PacifiCorp, GP is subject to ORS 757.612 and pays a three percent public purpose charge. The Energy Trust of Oregon ("ETO") has funded studies and provided incentives to GP Camas for 104 energy efficiency projects since 2004, including five projects installed in late 2014 and early 2015. At its December 16, 2014 Public Meeting, the Commission adopted the Staff recommendation that the ETO "should not provide any more financial incentives to [the Camas Mill] or continue to fund studies for projects not currently committed, given the clear indication that [the Camas Mill] will no longer be a PacifiCorp customer as of January 1, 2016."

9. GP seeks a new arrangement for the delivery of electricity to the Camas Mill after its Contract with PacifiCorp expires. To that end, on September 17, 2014, GP entered into the MOU with Clatskanie, under which the parties agreed to explore a transaction through which the Camas Mill will take electric service from Clatskanie upon expiration of GP's Contract with PacifiCorp. Clatskanie is an Oregon peoples' utility district ("PUD"), which currently has service territory in and around Clatskanie, Oregon, approximately 70 miles from Troutdale, Oregon and Camas, Washington.

10. Under the proposed transaction, effective January 1, 2016, GP will sell to Clatskanie the 69 kV Lines that run from the interconnection with PacifiCorp's facilities at the Troutdale Substation to the Camas Mill in Camas, Washington. The 69 kV lines are depicted on

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the map attached as Exhibit A. The 69 kV Lines will become part of Clatskanie's distribution system. Under the proposed transaction, GP will no longer be interconnected with PacifiCorp or take delivery of electric service from PacifiCorp in Oregon, but instead GP will take delivery of electric service from Clatskanie in Washington over facilities owned by Clatskanie. Under the proposed transaction, there is no change in the physical location of the Camas Mill.

11. In order to provide electric service to the Camas Mill, Clatskanie, or a third-party selling wholesale power to Clatskanie, will obtain transmission service pursuant to PacifiCorp's open access transmission tariff ("OATT"). The power will be transmitted over the PacifiCorp transmission system and delivered to Clatskanie at Clatskanie's proposed point of interconnection with PacifiCorp at the Troutdale Substation. Clatskanie will then deliver this power, via the 69 kV Lines, to GP's customer-owned facilities at the Camas Mill.

12. Clatskanie filed an interconnection request and a transmission service request under PacifiCorp's OATT to accomplish the wholesale interconnection between PacifiCorp and Clatskanie, and the wholesale delivery of power at the Troutdale Substation. On March 31, 2015, Clatskanie and PacifiCorp executed a Long-Term Firm Point-To-Point Transmission Service Agreement for delivery of wholesale power to Clatskanie at the Troutdale Substation, and the remaining studies related to the interconnection request are in process or have successfully been completed by PacifiCorp Transmission.

13. GP has requested the studies necessary to move the Camas Mill load and the cogeneration plant located at the Camas Mill from the PacifiCorp balancing authority area to the Bonneville Power Administration ("BPA") balancing authority area, and these studies either are in process or have successfully been completed by PacifiCorp and BPA.

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14. Although definitive agreements to implement the transaction have not been completed, the following information about the MOU was reported in The Chief, a Columbia County newspaper, on September 26, 2014. The agreement calls for CPUD to buy power on the open market and resell that power to GP. "We will be buying power at cost and selling to them at cost," explained Eric Hiaasen, Director of Energy Resources and Services for the utility. GP would pay a flat fee to CPUD as well as pay all of CPUD's expenses, he said."

III. APPLICABLE STATUTES

This Petition involves the applicability of certain provisions of Oregon's "direct access" and "exclusive service territory" laws to Clatskanie's proposed delivery of electric service to the Camas Mill in Washington under the Assumed Facts.

A. Direct Access Law

Under ORS 757.672(2), a "consumer-owned utility" that sells electricity "directly" to "a nonresidential electricity consumer of another electric utility *in this state,* shall permit any other electricity service supplier to sell electricity to the consumer-owned utility's nonresidential electricity consumers" whose usage is at or above a certain level.[1/] Any such consumer-owned utility "shall be subject to ORS 757.649(1) to (4) and rules adopted thereunder."[2/]

ORS 757.649(1) requires entities acting as an "electricity service supplier" to be "certified by the Public Utility Commission." An electricity service supplier is defined as "a person or entity that offers to sell electricity services *available pursuant to direct access* to more

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1/ ORS § 757.672(2) (emphasis added).
2/ Id.

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than one retail electricity consumer."[3] "Direct access," in turn, means "the ability of a retail electricity consumer to purchase electricity . . . from an entity other than the distribution utility,"[4] and "distribution utility" is defined as "an electric utility that owns and operates a distribution system connecting the transmission grid to the retail electricity consumer."[5]

ORS 757.607(1) provides that the "provision of direct access to some retail electricity consumers must not cause the unwarranted shifting of costs to other retail electricity consumers of the electric company." OAR 860-038-0160(1) provides, in part, that "each Oregon retail electricity consumer of an electric company will receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all economic utility investments and all uneconomic utility investments of the electric company as determined pursuant to an auction, an administrative valuation, or an ongoing valuation." *See also* OAR 860-038-0005(41) (defining "ongoing valuation").

Under OAR 860-038-0005(31), "load" means "the amount of electricity delivered to or required by a retail electricity consumer at a specific point of delivery."

B. Exclusive Service Territory Law

ORS § 758.410 allows for the execution of contracts between utility service providers "for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting

[3] Id. § 757.600(16) (emphasis added).
[4] Id. § 757.600(6).
[5] Id. § 757.600(9).

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parties." Any such contract is valid and enforceable only "when approved by the Public Utility Commission."[6]

If a utility service provider operating "in a territory that is not served by another person providing a similar utility service" has not been allocated a territory through an approved contract, that provider may apply to the Commission "for an order allocating such territory to it."[7] Once territory has been allocated to a utility service provider by approved contract or by other order of the Commission, "no other person shall offer, construct or extend utility service in or into" that territory.[8]

Utility service, however, "*does not include* service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service."[9]

Other than bilateral agreements between utilities, Washington law does not provide for the creation of exclusive utility service territories.[10]

C. Federal Power Act

Finally, the relief requested in this Petition may involve certain provisions of the Federal Power Act ("FPA"). In particular, Section 211(a) of the FPA allows "any

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[6] Id. 758.415.
[7] Id. 758.435(1).
[8] Id. 758.450(2).
[9] Id. 758.400(3) (emphasis added).
[10] See RCW § 54.48.

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electric utility" to "apply to [FERC] for an order . . . requiring a transmitting utility to provide transmission services" to the applicant.[11/]

IV. QUESTIONS PRESENTED

(1) Under the Assumed Facts, does Oregon's direct access law apply to Clatskanie's delivery of electric service to GP under the terms of the proposed transaction?

(2) Under the Assumed Facts, does Clatskanie's delivery of electric service to GP under the terms of the proposed transaction violate Oregon's territorial laws?

V. ARGUMENT

A. The Oregon Direct Access Law does not apply to Clatskanie's Delivery of Electricity to GP's Camas Mill in Washington.

GP and Clatskanie understand that PacifiCorp believes that the proposed arrangement for service to GP's Camas Mill, as set forth in the Assumed Facts, may require Clatskanie to provide service as an ESS pursuant to ORS 757.672(2), which is part of Oregon's direct access law, ORS 757.600-691. This is not correct. As explained below, Oregon's direct access law is inapplicable to the Assumed Facts.

In determining the application of the direct access law, the Commission must interpret the statute. The Oregon Supreme Court has stated that "rules of statutory interpretation … serve the paramount goal of discerning the legislature's intent."[12/] Thus, "[t]he first step [in

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11/ 16 U.S.C. § 824j(a).
12/ State v. Gaines, 346 Or 160, 171 (2009).

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interpreting a statute is] an examination of text and context."[13/] Additionally, courts look to legislative history to interpret a statute's meaning, particularly when its meaning is not plain from the text.[14/]

In this case, analysis of the relevant laws, as applied to the Assumed Facts, demonstrates that GP's arrangement with Clatskanie is not direct access under the plain meaning of the statute. Further, the language of ORS 757.672(2) indicates that this particular section, which specifically addresses consumer owned utilities, is inapplicable to the situation in question. This interpretation is supported by the legislative history of the statute, which demonstrates that it was intended to apply to situations in which a consumer-owned utility provides direct access service to a nonresidential customer as an ESS.

1. Oregon's Direct Access Law Applies Only to the Delivery of Electricity to Oregon Customers, in Oregon.

The Oregon direct access law does not apply to the situation described by the Assumed Facts because Oregon direct access provisions do not apply to utility service that does not take place within Oregon. Under the Assumed Facts, Clatskanie's service to GP's Camas Mill will not take place in Oregon. The Commission may not impose its regulatory authority on the provision of utility service that does not occur in this State.

While ORS 757.600-691 do not specifically state that Oregon's direct access laws apply only to retail service within the State of Oregon, the principles of state sovereignty make this limitation to the applicability of Oregon direct access laws self-evident. The Commission is

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13/ Id.
14/ Id. at 171-72.

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vested with power and jurisdiction to supervise and regulate utilities "in this state,"[15] and has never attempted to impose its regulatory power on utility service that does not occur within Oregon. The Commission's own regulations provide that an entity must register with the Commission as an ESS if it intends to sell power to Oregon retail customers.[16] Further, a consumer-owned utility, such as Clatskanie, is only subject to the direct access provisions if it is operating as an ESS with regard to "a nonresidential electricity consumer of another electric utility *in this state* . . . ."[17]

Currently, the electrical system at the Camas Mill includes the 69 kV Lines that cross the Columbia River and interconnect at the Troutdale Substation in Oregon, which is where PacifiCorp's point of delivery is located. Under the Assumed Facts, GP will sell all of its existing facilities within the State of Oregon to Clatskanie. Once that sale is completed, the Camas Mill will include no facilities within the State of Oregon and will be a customer located entirely within the State of Washington. Further, Clatskanie will deliver electricity to the Camas Mill over facilities owned by Clatskanie and located in Washington. Oregon laws, including direct access laws, do not apply to the provision of utility service within the State of Washington. Because the Camas Mill will have no facilities within the borders of the State of Oregon, there will be no basis for the Commission to regulate the utility service that it receives, even if it were to be styled as direct access. As a result, the Oregon direct access laws, including ORS 757.672(2), do not apply to service to the Camas Mill, a customer located entirely within Washington State.

15/ ORS 756.040(2).
16/ OAR 860-038-0400(15).
17/ ORS 757.672(2) (emphasis added).

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2. After the Expiration of the Current Agreement, GP's Camas Mill will not be a PacifiCorp Customer.

In Oregon, "'Direct access' means the ability of a retail electricity consumer to purchase electricity and certain ancillary services . . . directly from an entity other than the distribution utility."[18] A "[r]etail electricity consumer" is defined as "all end users of electricity served through the distribution system of an electric utility."[19] A "[d]istribution utility" is defined as "an electric utility that owns and operates a distribution system connecting the transmission grid to the retail electricity consumer."[20] These statutory definitions make it clear that a customer must be interconnected with a utility to be considered a retail electricity consumer of that utility.

Under the Assumed Facts, the Contract pursuant to which the Camas Mill has been taking service from PacifiCorp will have expired. The Camas Mill will be located entirely outside of PacifiCorp's exclusive service territory in Oregon, and nowhere near the areas served by PacifiCorp in Washington State, which does not have exclusive service territories. Further, the lines over which GP takes its electric supply will not be interconnected to PacifiCorp's facilities. As a result, PacifiCorp will no longer be GP's distribution utility because it will no longer be using its distribution system to connect the transmission grid to the Camas Mill, and the Camas Mill will not be a retail electricity consumer of PacifiCorp because it will not be interconnected with the PacifiCorp distribution system.

Thus, there is no basis for PacifiCorp to claim that GP is a retail electric consumer of PacifiCorp once the current special contract expires, and the 69 kV Lines are sold to

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[18] Id. 757.600(6).
[19] Id. 757.600(29).
[20] Id. 757.600(9).

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Clatskanie. As a result, the Assumed Facts do not constitute direct access, and the direct access laws, including ORS § 757.672(2), do not apply in this case.

B. Even if the Oregon Direct Access Law Could Theoretically be Applied to the Assumed Facts, Clatskanie's Delivery of Electricity will not Constitute "Direct Access."

1. Clatskanie will be Providing Service to its Own Non-Residential Customer After Clatskanie Purchases the 69 kV Lines.

Under ORS 757.672(2), consumer-owned utilities like Clatskanie are "subject to" the ESS certification requirements under ORS § 757.649(1), *only if* they sell electricity to "a nonresidential electricity consumer of another electric utility."[21/] Although "nonresidential electricity consumer" is not defined in the statute, the Commission's direct access rules define "nonresidential consumer" as "a retail electricity consumer who is not a residential consumer."[22/] Consequently, a "nonresidential electricity consumer" is a nonresidential "retail electricity consumer."[23/] "Distribution" is defined as "the delivery of electricity to retail electricity consumers through a distribution system …."[24/]

When Clatskanie purchases the 69 kV Lines from GP, these lines will become part of Clatskanie's distribution system because Clatskanie will use them to deliver electricity to the Camas Mill.[25/] This will make the Camas Mill a retail electricity consumer of Clatskanie.[26/] GP will no longer be a retail customer of PacifiCorp, because it will not be connected to PacifiCorp's distribution system. Thus, Clatskanie will be selling electricity directly to its own

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21/ Id. 757.672(2).
22/ OAR 860-038-0005(40).
23/ ORS 757.600(29).
24/ Id. 757.600(8).
25/ Id.
26/ Id. 757.600(29).

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nonresidential electricity consumer, not another utility's. This renders the requirements of ORS 757.672(2) inapplicable to Clatskanie under the Assumed Facts.

This plain reading of the statute's purpose is consistent with its legislative history. The OPUC itself proposed the language that is now ORS 757.672(2), and explained to the Senate Public Affairs Committee considering the bill that this provision was intended to apply to a situation in which a consumer-owned utility provides direct access service, as an ESS, to a nonresidential customer of another utility.[27] In such a situation, the consumer-owned utility would sell electricity to "a nonresidential electricity consumer of another electric utility" because the nonresidential electricity consumer would still be connected to the distribution system of the other electric utility.[28] This confirms the statute's plain meaning that if, as is the case under the Assumed Facts, Clatskanie will own the interconnecting facilities and serve GP as its own customer, ORS 757.672(2) and its ESS certification requirement does not apply to Clatskanie's service, even if the statute were applicable to a sale to an entity located entirely outside of Oregon.

2. Clatskanie's Arrangement With GP to Serve the Camas Mill Involves a Common FERC-jurisdictional Wheeling Arrangement pursuant to Section 211 of the Federal Power Act.

The FPA allows FERC to require PacifiCorp to provide transmission services to Clatskanie so that Clatskanie may use its facilities (the 69 kV Lines) to deliver power to its customer, GP's Camas Mill. Rather than implicating direct access, Clatskanie's proposed service of the Camas Mill falls squarely within FERC's jurisdiction to require transmitting

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[27] OPUC Suggested Amendments to Senate Public Affairs Committee, New Section 24 (Consumer Owned Utility Exemption) (Apr. 2, 1999); see also OPUC Suggested Amendments to House Commerce Committee, Section 14 (Consumer Protection) (May 19, 1999).

[28] ORS 757.672(2).

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utilities to provide transmission service to other electric utilities. Section 211(a) of the FPA states that "[a]ny electric utility … may apply to [FERC] for an order … requiring a transmitting utility to provide transmission services … to the applicant."[29/] FERC may grant the application if doing so is in the public interest and meets the requirements of Section 212 of the FPA.[30/]

Clatskanie is an "electric utility" under the FPA because it sells electric energy.[31/] PacifiCorp is a "transmitting utility" under the FPA because it owns facilities used for the transmission of electric energy in interstate commerce.[32/] Section 212 of the Federal Power Act allows FERC to require such transmission if a political subdivision of a state, such as Clatskanie, utilizes transmission or distribution facilities that it owns or controls to deliver the power to the customer.[33/] Accordingly, under the Assumed Facts, all of the requirements of Section 211(a) are met, and the issue is not whether Clatskanie is subject to Oregon's direct access laws (which it is not), but whether PacifiCorp is required to provide FERC-jurisdictional transmission services to Clatskanie to allow Clatskanie to serve the Camas Mill. PacifiCorp has acknowledged this requirement by executing a Long-Term Firm Point-to-Point Transmission Agreement with Clatskanie.

FERC has granted a number of applications for transmission service in situations similar to the Assumed Facts. In those cases, pursuant to its authority under the FPA, FERC required the transmission requested.

29/ 16 U.S.C. § 824j(a).
30/ Id.; 16 U.S.C. § 824k.
31/ Id. § 796(22).
32/ Id. § 796(23).
33/ Id. § 824k(h).

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The Cleveland Electric decision provides a good example. In Cleveland Electric Illuminating Co., a retail customer of the Cleveland Electric Illuminating Company ("Cleveland Electric") opted to switch electric service providers to the City of Cleveland following the expiration of its contract with Cleveland Electric.[34/] The City of Cleveland proposed to take power from the Ohio Power Company over Cleveland Electric's transmission lines, and deliver it to the retail customer over a 138 kV line that the City of Cleveland owned.[35/] Cleveland Electric argued that it could not be required to provide transmission service to the City of Cleveland because this arrangement violated Section 212(h) of the FPA, which prohibits the transmission of electric energy "directly to an ultimate consumer."[36/] FERC, however, determined that Cleveland Electric was obligated to provide transmission service because the arrangement, like the Assumed Facts, met the requirements of Section 212.[37/] FERC based its decision on the fact that the City of Cleveland was a political subdivision of a state and would utilize transmission or distribution facilities that it owned to deliver the power to the customer.[38/] Thus, FERC ordered Cleveland Electric to provide transmission service to the City of Cleveland.[39/]

34/ Cleveland Elec. Illuminating Co., 76 F.E.R.C. ¶61,115 (July 31, 1996), and Order Denying Rehearing, 82 F.E.R.C. ¶61,254 (Mar. 13, 1998).

35/ 76 F.E.R.C. at 61,596.

36/ Id.; 16 U.S.C. § 824k(h).

37/ 76 F.E.R.C. at 61,599.

38/ Id.

39/ Id. at 61,595; see also, People's Elec. Coop., 93 F.E.R.C. ¶61,218, PP. 61,726, 61,732-33 (Nov. 24, 2000) (finding that an arrangement between the Byng Public Works Authority and People's Electric Cooperative did not violate § 212(h) because Byng took title to electricity from People's and delivered it to end users over distribution facilities it leased from People's, and therefore, controlled); Laguna Irrigation Dist., 84 F.E.R.C. ¶61,226, PP. 62,088-89 (Sept. 16, 1998), and 95 F.E.R.C. ¶61,305, PP. 62,036-37 (May 30, 2001) (finding that the Laguna Irrigation District would not violate § 212(h) because it would take electricity over Pacific Gas & Electric's ("PG&E") transmission lines and distribute it to end users using its own distribution facilities even though these distribution facilities did not yet exist, would not be extensive, and would duplicate PG&E's own distribution facilities in the area); PG&E, Fresno Irrigation Dist., 88 F.E.R.C. ¶61,231, P.61,763 (Sept. 16, 1999) (making same finding as in Laguna Irrigation Dist. based on similar facts); Southwestern Pub. Serv. v. El Paso Elec. Co., 80 F.E.R.C. ¶61,159, PP. 61,695-96 (Aug. 1, 1997)

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Similarly here, Clatskanie will take power over PacifiCorp's transmission facilities at the Troutdale Substation and deliver it to the Camas Mill over the 69 kV Lines that it will own. GP is not requesting direct access service from Clatskanie; it is simply substituting Clatskanie as the distribution utility for the Camas Mill once GP's and PacifiCorp's mutual obligations to each other under the Contract have expired. Accordingly, the arrangement between Clatskanie and GP constitutes a retail power supply arrangement which is supplied by Clatskanie using FERC-jurisdictional transmission services that have nothing to do with direct access.

D. Clatskanie will not Provide Utility Service Within any Exclusive Territory Allocated to PacifiCorp.

As discussed below, Clatskanie's service to the Camas Mill would not infringe upon utility service territory laws because Clatskanie will not provide "utility service" within an Oregon allocated territory. Furthermore, PacifiCorp does not, as a matter of law, have an exclusive service territory that includes the Troutdale Substation.

1. Clatskanie will not Provide "Utility Service" to the Camas Mill Within PacifiCorp's Exclusive Service Territory.

Under the Assumed Facts, Clatskanie will not provide "utility service" to GP's Camas Mill within any PacifiCorp exclusive service territory because no service over Clatskanie facilities will terminate in or be used in Oregon.

ORS 758.450(2) states that "no other person shall offer, construct or extend utility service in or into an allocated territory." The Commission has held that:

(where the City of Las Cruces planned to take power from Southwestern Public Service over El Paso's transmission facilities, such an arrangement did not violate § 212(h) because Las Cruces' proposed sale of electricity to end users would occur once it owned the distribution facilities).

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> For a violation of ORS 758.450 to occur, four elements must be established by the Assumed Facts: The entity or entities must be "persons" as defined in Subsection (2) of ORS 758.400; the arrangement involved must constitute "utility service" as defined in Subsection (3) of ORS 758.400; the "utility service" must be in an allocated territory; and none of the exemptions set out in Subsection (4) of ORS 758.450 must apply.[40]

Under the Assumed Facts, it appears that Clatskanie may be a "person," and that it will provide "utility service" to the Camas Mill, however; it is equally true that Clatskanie will not provide "utility service" in an allocated territory.

The definition of "utility service" specifically excludes "service provided through or by the use of any equipment, plant or facilities . . . which pass through or over but are *not used to provide service in or do not terminate in* an area allocated to another person providing a similar utility service."[41] When Clatskanie purchases the 69 kV Lines, it will be providing service that passes through the Troutdale Substation, but that terminates at a point of delivery located at the Camas Mill in Washington. Since no power is delivered within an exclusive service territory, or to a customer located in an exclusive service territory, Clatskanie will not provide "utility service" within a service territory allocated to PacifiCorp. Therefore, even if PacifiCorp had an allocated service territory at the Troutdale Substation, Clatskanie will not be providing "utility service" within that service territory.

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[40] In re Pet. of NW Natural Gas Co. for a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass to Two or More Indus. Customers Violates ORS 758.400 *et seq.*, DR 23, Order No. 01-719 at 2 (Aug. 9, 2001) (rev'd on other grounds, NW Nat. Gas Co. v. Or. Pub. Util. Comm'n, 195 Or. App. 547 (2004).

[41] ORS 758.400(3) (emphasis added).

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PacifiCorp followed a similar analysis in a recent motion for summary judgment it filed in Docket No. UM 1670.[42/] In that case, PacifiCorp argued that it was not infringing on the Columbia Basin Electric Cooperative's (the "Cooperative") exclusive service territory by providing "utility service" to the Caithness Shepherd Flatt wind farm even though some of the facility's turbines were located in the Cooperative's service territory.[43/] "PacifiCorp provides utility service at Slatt Substation—the designated point of delivery in the PacifiCorp/Caithness power purchase agreement," the Company stated.[44/] "From Slatt Substation, the power is moved over customer-owned facilities to the various phases of the project. PacifiCorp does not own or control any of the customer-owned facilities . . . ."[45/] Thus, PacifiCorp argued in that case that it is where the "utility service" occurs that matters. PacifiCorp further argued that, in order for the Cooperative to provide utility service to Shepherd's Flatt, including at least some load that sinks within the Cooperative's own service territory, it would need to "make deliveries at Slatt Substation," which would invade PacifiCorp's allocated territory.[46/]

Following PacifiCorp's logic, PacifiCorp currently provides "utility service" to the Camas Mill at the Troutdale Substation, which is the designated point of delivery, after which electricity travels over customer-owned lines into Washington and to the load. After GP sells the 69 kV Lines to Clatskanie, the electricity will "pass through" the Troutdale Substation, across Clatskanie-owned lines, to the "designated point of delivery" at the Camas Mill in Washington, which is where the "utility service" will occur, outside of any Oregon allocated

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42/ In re Columbia Basin Elec. Coop. v. PacifiCorp, Docket No. UM 1670, PacifiCorp's Motion for Summary Judgment (Oct. 6, 2014).
43/ Id. at 2.
44/ Id.
45/ Id.
46/ Id. at 12-13.

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service territory. Thus, Clatskanie will provide "utility service" not at the Troutdale Substation, but at a point in Washington. Therefore, it will not violate ORS 758.450(2), regardless of whether PacifiCorp has an allocated territory that includes the Troutdale Substation.

2. PacifiCorp does not Have an Allocated Service Territory at the Troutdale Substation.

Under ORS 758.400 *et seq.*, exclusive service territories may be allocated to a utility only through Commission approval of a contract between service providers, or Commission approval of an application for allocation of territory.[47/] To avoid anti-competitive conduct prohibited by Section 1 of the Sherman Act,[48/] an allocation of exclusive service territory must be "clearly articulated and affirmatively expressed as state policy."[49/] No Commission decision has ever granted a contract or application, pursuant to the applicable statutes, allocating the Troutdale Substation to PacifiCorp as exclusive service territory. Accordingly, PacifiCorp does not have an allocated exclusive service territory that includes the Troutdale Substation.

In 1963, soon after Oregon's territory allocation statutes were first passed, and it became possible to acquire exclusive service territories, Commission Order No. 39026 allocated most of the territory around the Troutdale Substation to Portland General Electric Company ("PGE").[50/] According to the Order, because of the objection of the City of Portland to exclusive service territories, a portion of the area remained unallocated, including the west side of NW

47/ ORS 758.410, 415, 425, 435, 440.

48/ 15 U.S.C. § 1.

49/ Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1436 (9th Cir. 1996) (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

50/ Docket No. UF 2342, Order No. 39026 (Jan. 21, 1963).

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Sundial Road, where the Troutdale Substation is located.[51] In 1969, PacifiCorp and PGE entered into a facilities exchange agreement covering certain distribution facilities in Multnomah County. Both utilities applied to the Commission for approval of the exchange agreement "pursuant to the provisions of ORS 757," but they did not apply for a territorial allocation pursuant to the territory allocation statutes.[52] The Commission approved this agreement in Order No. 70-219, but did not specifically allocate service territory or invoke the service territory allocation laws.[53] In 1972, PGE and PacifiCorp entered into another exchange of facilities agreement in which PacifiCorp agreed to transfer all of its distribution facilities in the area encompassing, and including, the Troutdale Substation to PGE. The Commission approved this exchange of facilities agreement in Order No. 72-870.[54] Again, the Commission did not invoke the service territory allocation laws in its order.

As a consequence, in a subsequent antitrust lawsuit against PGE, the Ninth Circuit Court of Appeals held, in Columbia Steel, that Order No. 72-870 did not, as a matter of law, establish exclusive service territories that were immune from an antitrust violation.[55] "Neither the 1972 Order nor the 1972 Agreement it approved says anything about exclusive service territories in the city of Portland," the Court noted.[56] Furthermore, "the 1972 Order does not cite

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51/ Id. at 5, 7, 25-26.

52/ Docket Nos. UF 2797 & UF 2800, Order No. 70-219 at 1 (Mar. 12, 1970).

53/ Id. at 3. It is not clear from Order 70-219 whether the Troutdale Substation was included within this facilities exchange agreement, and the Petitioners have been unable to locate the exhibits attached to this order. However, PacifiCorp has previously asserted the relevance of this order to GP and Clatskanie, so the Petitioners assume, solely for purposes of this Petition, that the facilities exchange agreement approved by Order 70-219 included the Troutdale Substation.

54/ Docket No. UF 2947, Order No. 72-870 (Dec. 15, 1972).

55/ 111 F.3d at 1440.

56/ Id. at 1437.

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any of the statutory provisions governing the allocation of exclusive service territories."[57/] Thus, because the Commission "did not 'specifically and clearly authorize[] by the relevant statutory process' a division of the Portland market into exclusively served territories," PGE was not cloaked with state action immunity against a violation of Section 1 of the Sherman Act.[58/]

Before the Ninth Circuit issued its opinion in Columbia Steel, the Commission issued Order No. 92-557, which did create exclusive service territories by adopting the "1991 Allocation Agreement" made between PGE and PacifiCorp, which replicated the borders formed by the 1972 facilities exchange agreement.[59/] According to Order No. 92-557, both PGE and PacifiCorp represented to the Commission that all customers within the parcel that includes the Troutdale Substation were served by PGE.[60/] Accordingly, following the boundaries first created by Order No. 72-870, Order No. 92-557 assigns the area encompassing the Troutdale Substation as an exclusive service territory allocated to PGE, not PacifiCorp.[61/] Petitioners are not aware of any Commission order that establishes an exclusive service territory for PacifiCorp in this area.

As a matter of law, the applicable Commission orders allocate retail service territory at the Troutdale Substation to PGE, not PacifiCorp. Order No. 70-219, assuming for the sake of argument that it is even relevant to the locations in question, is merely an approval of an exchange of facilities in an area that remained unallocated until 1992, and it does not speak with

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57/ Id. at 1438.

58/ Id. at 1441 (quoting PacifiCorp v. Portland Gen. Elec. Co., 770 F. Supp. 562, 571 (D. Or. 1991).

59/ Docket Nos. UA 37 & UA 41, Order No. 92-557 at 18, 21 (Apr. 16, 1992).

60/ Order No. 92-557 at 18, App. A, 2-3 ("parcel C" contains the Troutdale Substation).

61/ Order No. 92-557 purports to apply retroactive effect to its allocations of service territory to Order No. 72-870. Nevertheless, in Columbia Steel, the Ninth Circuit held that Order No. 92-557 could not be used to shield PGE from its federal antitrust violations. 111 F.3d at 1441-42. Whether Order No. 92-557 did have retroactive effect for state law purposes, however, is not clear. In any event, a resolution of this issue is irrelevant to this Petition because it remains the case either way that the relevant orders have allocated the territory including the Troutdale Substation to PGE, not PacifiCorp.

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sufficient clarity to allocate any service territory that would confer state action immunity from antitrust violations. It does not speak of the allocation of exclusive service territories, nor does it invoke the service territory allocation statutes. Moreover, a subsequently issued order – Order No. 92-557 – has spoken with the necessary clarity in allocating the territory including the Troutdale Substation to PGE without approving any alleged pre-existing carve-outs. Therefore, PacifiCorp, as a matter of law, does not have any allocated service territory at the Troutdale Substation that Clatskanie's service to the Camas Mill could invade.

Since PacifiCorp has been delivering electricity to GP at a location within PGE's exclusive service territory for the entire 20-year term of the contract, it suggests that the Camas Mill is not located in any Oregon allocated service territory by virtue of the fact that the Camas Mill is located in Washington.

VI. RELIEF REQUESTED

GP and Clatskanie respectfully request expedited consideration and a declaratory ruling from the Commission that, under the Assumed Facts:

(1) Clatskanie is not subject to Oregon's direct access laws, and specifically ORS 757.672(2), as a result of its proposed service to the Camas Mill, including any obligation to be certified as an ESS; and

(2) Clatskanie's service to the Camas Mill will not violate ORS 758.450(2) because PacifiCorp does not have an exclusive service territory at the Troutdale Substation and/or because Clatskanie will not provide "utility service" within an Oregon allocated service territory.

VII. CONTACT INFORMATION

The name and contract information for the Petitioners is:

Phil Zirngibl
Georgia-Pacific
Director, Procurement
133 Peachtree Street, NE
Atlanta, GA 30303

Marc Farmer
General Manager
Clatskanie People's Utility District
P.O. Box 216
Clatskanie, OR 97016

PacifiCorp also has legal rights, duties, or privileges that will be affected by this Petition. PacifiCorp's contact information is:

Bryce Dalley
Vice President, Regulation
Pacific Power
825 NE Multnomah, Suite 2000
Portland, Oregon 97232

The Petitioners do not know of any other person that will be impacted by this Petition.

VIII. CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Commission issue a declaratory ruling providing the relief requested in this Petition.

Dated this 2nd day of June 2015.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

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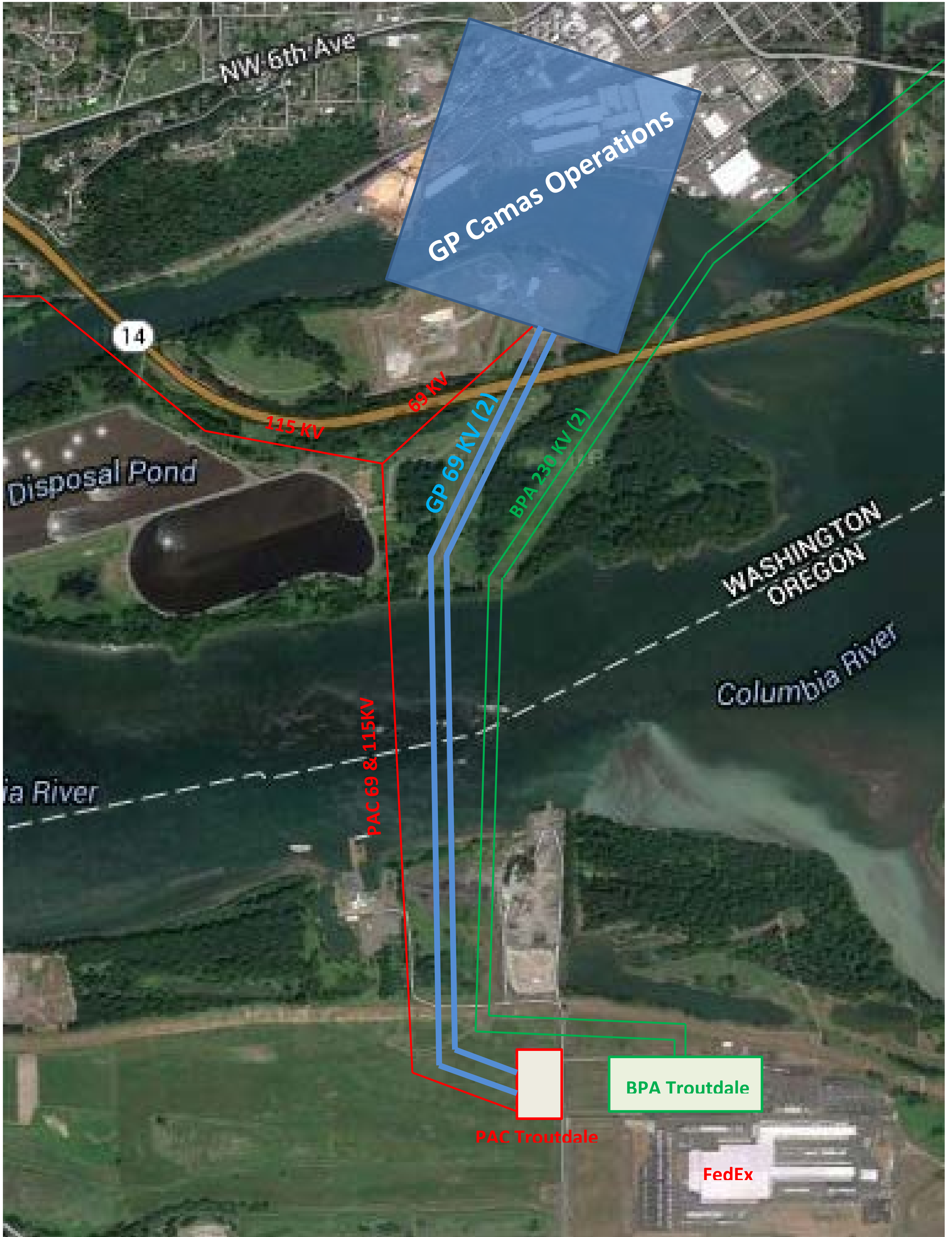
Exhibit A

GP Camas 69 KV Electric Supply and other local Transmission Lines



Source: Google Maps

NTS. For illustrative purposes only

EXHIBIT B

ITEM NO. 1

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: August 31, 1993

REGULAR AGENDA X **CONSENT AGENDA** ___ **EFFECTIVE DATE** As Noted

DATE: August 23, 1993

TO: Mike Kane through Bill Warren

FROM: Lee Sparling

SUBJECT: PacifiCorp, Advice No. 93-107
Requests authorization to transfer the James River Paper Company's Camas WA mill from pulp and paper Schedule 42T to standard industrial Schedule 48T

SUMMARY RECOMMENDATION:

I recommend that the Commission authorize service to James River Paper Company's Camas WA mill under PacifiCorp's standard large industrial tariff Schedule 48T, effective upon commencement of construction of the new generating unit at the site, but no earlier than October 1, 1993.

DISCUSSION:

On February 24, 1993, PacifiCorp (Pacific) applied for authorization to transfer the Camas WA mill of the James River Paper Company (James River) from pulp and paper Schedule 42T to standard large industrial Schedule 48T. The Camas facility is one of four mills served under the pulp and paper tariffs that were allowed to go into effect in 1987. James River's current Schedule 42T rate exceeds the standard rate. All four customers selected contract terms that specified rates through September 30, 1994. The applicable rates after that time are to be negotiated, based on the services provided by Pacific, the level and extent of the customer's commitment to purchase from Pacific, the cost of alternative electricity supplies available to the customer, and Pacific's marginal energy and capacity costs. The customers explicitly waived their right to service at standard rates. Any rate negotiated for service after September 30, 1994 would be subject to Commission approval.

The pulp and paper contracts also gave Pacific the right to call for the installation and operation of new on-site generation and to participate in the development of any such resource. Earlier this year, Pacific and James River signed a contract to build and operate a 50 megawatt high efficiency steam turbine generator at the Camas mill. Steam for the generator will be provided from existing boilers fired with natural gas, black liquor, and hog fuel. The existing boilers, piping, and paper machine drives will be upgraded to make more efficient use of the steam, and a short connection to Northwest Pipeline will be built for additional gas supply. The projected cost of the steam generator and necessary improvements is $59 million.

Under the agreement, Pacific will pay all capital costs up to $64 million; James River will pay any excess. James River will provide fuel for the boilers and steam for the generator, and it will operate and perform routine maintenance on the generator. Pacific will pay for periodic major overhauls. It will also pay James River steam royalties designed so that the overall cost of power to Pacific is somewhat less than its avoided costs.

The royalty calculation starts with a stream of annual payments per kWh that has a present value over 20 years equal to 95 percent of Pacific's avoided costs. The calculated payment for kWh generated in any year is then offset by Pacific's investment carrying costs and an allowance for the major maintenance. The net royalty payment cannot be negative in any year, but Pacific's unrecovered costs can be carried over to subsequent years. Pacific also has the right to operate the facility even if James River shuts down its pulp and paper operations.

The steam royalty calculation also contains a provision that protects James River from unexpected fluctuations in the retail rates it would pay under Schedule 48T. If actual rates (and bills) under Schedule 48T are higher or lower than specified bounds, then the steam royalty payments will be increased or decreased to compensate. The bounds are set at about eight percent above and below a base forecast of Schedule 48T rates that increases at an annual rate of four percent (projected inflation).

The cogeneration development agreement also gives Pacific a right of first refusal on construction of a combined cycle combustion turbine at Camas. Furthermore, James River commits to service from Pacific from the date of its transfer to Schedule 48T until at least 20 years after the new steam turbine generator begins operating. As a result, Pacific argues that James River has given up its service options and is entitled to the same protections afforded other captive customers.

Most of our discussions about Pacific's request have focused on the appropriate standards to apply. I believe (and our legal counsel agrees) that Pacific's application should be treated like a special contract filing, for two reasons. First, the terms of the pulp and paper tariffs do not allow participating customers to switch rate schedules as easily as other customers can: the pulp and paper customers signed up for seven-year terms and waived their right to return to standard tariffs. Second, service to the Camas mill will not strictly adhere to the terms and conditions of Schedule 48T: James River is agreeing to make a 20-year service commitment not required of other customers, and it is somewhat insulated from fluctuations in rates through adjustments in the steam royalty payments.

The usual standards for Commission review of special contracts are set forth in ORS 757.230 and Order 87-402. The former lists issues to be considered when customers are classified on the basis of available supply options, and the latter identifies rate classification criteria

and other legal requirements for discounts. Generally, these standards require that: 1) other customers benefit from the offer of a special contract, 2) the contract rate is no lower than necessary, and 3) the offer is not unduly discriminatory. Each of these general standards is addressed below.

1. Will other customers benefit?

The usual analysis of a special contract compares the discounted rates to the utility's avoided costs over the term of the contract. Pacific expects that Schedule 48T rates (which are based on average costs) will be less than its avoided costs over the next 20 years (in present value terms). The company believes that generation at the Camas site will provide benefits that more than offset the net cost of providing retail service to the mill, but I disagree. Assuming for the sake of argument that the generation benefits do not offset the net cost of service at standard rates, other Pacific customers in Oregon would be better off if the Commission denied the request to transfer the Camas mill to Schedule 48T.

I do not believe that the Commission should apply this net benefits analysis, however. Any new customer or a customer returning to the system after taking advantage of alternative supplies would qualify for service at standard rates. The returning customer would be eligible even if its alternative supply costs had skyrocketed. As noted above, retail service to these customers under Schedule 48T would have a net cost to other Pacific customers over 20 years. Requiring special contract customers to demonstrate net benefits in order to return to standard rates at some point would discourage customers with supply options from staying on the system--at a discount--and making some contribution to fixed costs.

In this case, I think the appropriate standard should instead be that returning the Camas mill to standard rates will provide more benefits to other Pacific customers in Oregon than service to either a new or returning customer. This condition may seem severe in light of the fact that a returning customer would not need to make such a showing, but I believe it is fair, for two reasons. First, James River found the pulp and paper rates sufficiently more attractive than its supply alternatives to offset any uncertainty about rates after the contract term. Second, the pulp and paper contract allowed James River to avoid commitments to new generating resources; any customer that instead builds its own generating unit and leaves the system would be saddled with the fixed costs and would not find a return to standard rates attractive until operations and maintenance costs (not total costs) rise above Pacific's standard rates.

I believe that conditioning the transfer of the Camas mill to Schedule 48T on the agreement to develop generation at the site meets this modified benefits test. Pacific estimates that the steam turbine generator will provide benefits with a present value of $6.7 million,

based on an overall cost equal to 95 percent of its avoided costs. Pacific notes that James River bears both the construction cost risk (because Pacific's investment costs are subtracted from the gross steam royalty payment and because James River pays all construction costs exceeding $64 million) and the fuel price risk. The company expects that the combined-cycle unit will be developed at a lower cost (because some facilities will be used in common with the steam turbine generator); at 85 percent of avoided cost, the present value of the unit is $21.6 million. The value of the first unit alone exceeds the loss in revenues (up to $2.8 million) associated with the shift from Schedule 42T rates to Schedule 48T rates through September 30, 1994. Location of the generating units west of the Cascades will also reduce the exposure of the transmission system to voltage collapse. Pacific claims some planning benefit from the 20-year commitment by James River, but the load is not large enough (85 megawatts) to reduce uncertainty in Pacific's system.

Benefits to other customers could also be affected by adjustment of the steam royalty payments to protect James River from Schedule 48T rates increasing substantially more or less than a four percent rate of inflation. We proposed that Pacific bear the risk that the steam royalty payments will be adjusted; that is, for the purpose of estimating revenues and costs in a rate case, the Camas mill will always be assumed to pay Schedule 48T rates, with no adjustment of steam royalty payments. Pacific has agreed to take the risk (it will benefit if Schedule 48T rates are below the lower bound in the steam royalty formula), and so other customers will not be affected by this provision.

2. Is the rate lower than necessary?

We usually answer this question by comparing the contract rate to the customer's alternative costs. Pacific estimates that James River's alternative costs--based on the costs of the cogeneration unit and additional service from Clark County PUD--are only slightly higher (about one percent) than projected Schedule 48T rates over 20 years. I conclude that the rate offered to James River is not lower than necessary, particularly in light of the benefits provided to Pacific under the agreement.

3. Is the offer discriminatory?

No. Any other pulp and paper contract customer seeking service under Schedule 48T would need to give Pacific the right to develop its generation potential, make a long-term commitment to service from Pacific, and otherwise meet the modified benefits test described above.

STAFF RECOMMENDATION:

I have reviewed Pacific's application, and I recommend that the Commission authorize service to James River's Camas WA mill under Pacific's standard large industrial tariff Schedule 48T, effective upon commencement of construction of the new generating unit at the site, but no earlier than October 1, 1993.

ls/8456H