

BEFORE THE  
PUBLIC UTILITY COMMISSION OF OREGON

|                             |   |                          |
|-----------------------------|---|--------------------------|
| In the Matter of            | ) | DR 49                    |
|                             | ) |                          |
| GEORGIA-PACIFIC CONSUMER    | ) | RESPONSE BRIEF           |
| PRODUCTS (CAMAS) LLC        | ) | OF NOBLE AMERICAS ENERGY |
|                             | ) | SOLUTIONS LLC            |
| and                         | ) |                          |
|                             | ) |                          |
| CLATSKANIE PEOPLE’S UTILITY | ) |                          |
| DISTRICT                    | ) |                          |
|                             | ) |                          |
| Petitioners.                | ) |                          |
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**I. INTRODUCTION AND SUMMARY**

Pursuant to the scheduling ruling in this docket, Noble Americas Energy Solutions LLC (“Noble Solutions”) respectfully submits this Response Brief to the Public Utility Commission of Oregon (“OPUC” or “Commission”) with regard to the Petition for Declaratory Ruling (“Petition”) filed by Georgia Pacific Consumer Products (Camas) LLC (“GP”) and Clatskanie People’s Utility District (“Clatskanie”). Noble Solutions’ Opening Brief reserved the right to modify Noble Solutions’ position after having reviewed PacifiCorp’s Opening Brief. However, PacifiCorp’s arguments and position in this proceeding have not changed Noble Solutions’ position set forth in its Opening Brief. Therefore, Noble Solutions maintains that the Commission should resolve this proceeding by issuing an order declaring:

(1) The assumed facts do not describe a transaction that would be subject to Oregon’s direct access law because the customer is no longer an Oregon customer.

Additionally, policy considerations dictate against concluding the proposed transaction is

a direct access transaction to the extent that it may impact the availability of PacifiCorp's five-year opt-out program to otherwise eligible customers.

(2) The assumed facts do not describe a violation of PacifiCorp's rights under Oregon's service territory laws.

## II. RESPONSE ARGUMENT

### A. The Assumed Facts Do Not Describe a Transaction That Would Be Subject to Oregon's Direct Access Laws.

Noble Solutions agrees with the Petition's argument that Oregon's direct access law does not apply to the proposed transaction because the proposed transaction will constitute a delivery of electricity outside of the State of Oregon. *See Revised Petition* at 11-13; *Noble Solutions' Opening Brief* at 3-4; *see also Sam Francis Found. v. Christies*, 784 F.3d 1320, 1323-24 (9th Cir. 2015) (en banc) (invalidating a California statute under the Dormant Commerce Clause because the statute regulated out-of-state sales transactions, even though sellers resided in California). PacifiCorp presents no colorable argument as to why the Camas Mill should remain an Oregon customer, subject to the OPUC's jurisdiction over retail service, after the point of delivery for retail service is moved to a location in the State of Washington. PacifiCorp's failure to address the undisputed fact that the customer will be purchasing electricity in Washington is fatal to its argument that Oregon's direct access law applies to the transaction.

PacifiCorp's reliance on the direct access law's provisions regarding cost shifting as a basis to bar the transaction is misplaced. PacifiCorp appears to suggest that cost-shifting will occur under the proposed transaction and introduces a host of irrelevant issues, including "cost-shifting that could occur in other contexts; e.g., cost-shifting resulting from growth in distributed generation or from retail-turned-wholesale customers (i.e., newly formed municipal utilities)."

*PacifiCorp's Opening Brief* at 24. But this proceeding is limited to application of the law to the assumed facts. And the assumed facts do not state that cost shifting will occur under the proposed transaction. In any event, arguments regarding cost shifting are irrelevant to this proceeding because Oregon's direct access law does not apply to the transaction.

Furthermore, even if Oregon's direct access law could apply to the transaction, policy considerations lead to a conclusion that the proposed transaction should not be considered a direct access transaction, and that the Camas Mill's load should not count towards the 175 average megawatt eligibility criteria for PacifiCorp's newly created five-year opt-out program. *See Noble Solutions' Opening Brief* at 3-4. PacifiCorp has not yet addressed Noble Solutions' position on this point, and thus Noble Solutions reserves the right to respond to any arguments PacifiCorp may make through Noble Solutions' Reply Brief.

**B. The Assumed Facts Do Not Describe a Transaction that Violates PacifiCorp's Rights Under Oregon's Service Territory Laws.**

As stated in Noble Solutions' Opening Brief, the proposed transaction involves a sale of electricity at retail beyond the boundaries of the State of Oregon, and therefore Oregon's service territory laws, ORS 758.400 to 758.475, do not apply to the delivery and end use in the State of Washington. *See Noble Solutions' Opening Brief* at 4-5.

PacifiCorp argues that through the proposed transaction, Clatskanie (1) has already violated PacifiCorp's exclusive service territory by offering to provide utility service to a PacifiCorp retail customer, and (2) will further violate PacifiCorp's exclusive service territory rights by extending its distribution system to reach a PacifiCorp retail customer. *PacifiCorp's Opening Brief* at 14. PacifiCorp conveniently ignores the plain language of the applicable

statute, which only bars offering or extending “utility service” in an exclusive territory and unambiguously provides:

“Utility service” means service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. *“Utility service” 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.*

ORS 758.400(3) (emphasis added); *see also* ORS 758.450(2). Offering to transport electricity through PacifiCorp’s service territory for end use by a customer located in the State of Washington is not “utility service” occurring in the State of Oregon and cannot be governed by Oregon’s service territory statute. The statute completely defeats PacifiCorp’s argument.

According to PacifiCorp, its historic service to the Camas Mill at the Troutdale substation renders the Camas Mill a PacifiCorp Oregon customer – presumably *forever*. PacifiCorp argues that the service territory law allocates “customers” to PacifiCorp. *PacifiCorp’s Opening Brief* at 15-16 (citing ORS 758.410(1)). But Oregon law has no effect in the State of Washington and cannot be construed to bar a facility in Washington from ceasing to buy electricity from PacifiCorp. None of the cases PacifiCorp cites from other states enable a state commission to require a customer physically located in another state to buy electricity from any particular utility.

PacifiCorp’s assertions of “subterfuge” and “manipulation” are wholly unavailing. *See PacifiCorp’s Opening Brief* at 15, 23. The agreed-to facts demonstrate that the sale of the 69 kilovolt (“kV”) line from PacifiCorp to the Camas Mill is expressly allowed under applicable contracts that PacifiCorp willingly signed. *See Revised Petition* at 4, ¶ 5; *see also* OPUC Order

No. 15-151 at Appendix A at 2. That the Camas Mill may subsequently choose to sell the line to Clatskanie, or any other third party, to allow for delivery of electricity through PacifiCorp's service territory without terminating therein is no affront to Oregon's territory allocation laws. *See* ORS 758.400(3).

### III. CONCLUSION

In sum, Oregon's direct access law and its service territory laws do not apply to the proposed transaction.

DATED this 28th day of July, 2015.

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*/s/ Gregory M. Adams*

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