BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC and CLATSKANIE PEOPLE'S UTILITY DISTRICT Petitioners.	)	DR 49 REPLY BRIEF OF NOBLE AMERICAS ENERGY SOLUTIONS LLC

I. INTRODUCTION AND SUMMARY

Pursuant to the scheduling ruling in this docket, Noble Americas Energy Solutions LLC ("Noble Solutions") respectfully submits this Reply 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") (collectively "Petitioners"). PacifiCorp and the OPUC Staff argue that the Commission should assert jurisdiction over a retail electricity sale that occurs outside of the boundaries of the State of Oregon. They base their arguments on concerns with cost shifting and an apparent assumption that PacifiCorp had a reasonable expectation that the Camas Mill would remain a PacifiCorp retail customer forever. Despite the arguments of PacifiCorp and OPUC Staff, this case is extremely simple. Federal law unequivocally establishes that the Commission may not prohibit, or in any way regulate, the proposed retail electricity sale occurring wholly outside of Oregon's boundaries.

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. REPLY ARGUMENT

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

PacifiCorp and OPUC Staff ignore that the dormant Commerce Clause affirmatively bars the Commission from regulating a retail electricity sale occurring wholly outside of the State of Oregon. *See Noble Solutions' Opening Brief* at 3. PacifiCorp fails to even cite the single dispositive *en banc* Ninth Circuit decision issued on May 5, 2015, *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc).[1]

As GP and Clatskanie accurately point out, the dispositive facts in this matter are: (1) the Camas Mill's special contract to purchase electricity from PacifiCorp at a point of retail delivery in the State of Oregon will terminate later this year; (2) the Commission has already approved sale of the 69 kilovolt ("kV") lines from PacifiCorp to the Camas Mill at book value in Order No. 15-151; and (3) after the Camas Mill exercises its legal right to sell 69 kV lines to

[1] Both Noble Solutions and the Petitioners cited the *Christies* decision in their respective response briefs. *See Noble Solutions' Response Brief* at 2; *Petitioners' Response Brief* at 5 n.5.

Clatskanie, the Camas Mill's load *and* the point of retail delivery will be located in the State of Washington. The only activity occurring in the State of Oregon is the transmission of electricity in interstate commerce within the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction. It is beyond serious dispute that the OPUC has no jurisdiction over interstate transmission deliveries and the applicable interconnection to allow such deliveries. *See, e.g., Petitioners' Response Brief* at 10. Thus, this case regards a retail electricity sale from an Oregon entity (Clatskanie) to an out-of-state entity (the Camas Mill) which occurs wholly outside of the State of Oregon.

Christies is directly on point. In *Christies*, the Ninth Circuit addressed the lawfulness of a California statute that required the seller of fine art to pay the artist a five percent royalty if the seller resides in California *or* the sale takes place in California. 784 F.3d at 1322. Significantly, the statute applied to sales occurring outside of California, and attempted to use the California seller as the basis for California's regulatory authority. The Ninth Circuit explained, at a minimum, "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 1323 (quoting *Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989)). "Direct regulation occurs when a state law directly affects transactions that take place . . . entirely outside of the state's borders. Such a statute is invalid per se . . . ." *Id.* at 1323-24 (internal quotation omitted).

Applying this rule, the Ninth Circuit held: "We easily conclude that the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause." *Id.* at 1323. Simply put, "[u]nder *Healy,* 'the Commerce Clause precludes

the application of a state statute to commerce that takes place wholly outside of the State's borders.'" *Id.* at 1324-25 (quoting *Healy*, 491 U.S. at 336).

The well-established per se rule applied in *Christies* controls equally here. The OPUC may not regulate the retail electricity sale occurring in the State of Washington. Nor may the OPUC require the Washington-located Camas Mill to receive OPUC approval or pay PacifiCorp OPUC-set transition charges prior to entering into such a transaction. OPUC Staff suggests that the dormant Commerce Clause is not implicated because the seller (Clatskanie) is an Oregon entity. *See Staff's Response Brief* at 10 n.2. But *Christies* holds otherwise. In *Christies*, California could not regulate out-of-state art sales even where the seller was a California entity. 784 F.3d at 1322-23. Thus, in our case, the OPUC may not regulate an out-of-state retail electricity sale even where the seller is an Oregon entity.[2]

PacifiCorp fails to cite *Christies*, and instead directs the Commission to decisions upholding state restrictions on *in-state* activities. *See Energy & Env't Legal Inst. v. Epel*, No. 14-1216, 2015 WL 4174876, at *4 (10th Cir. July 13, 2015) (upholding Colorado's renewable portfolio standard because it regulated quality of electricity sold within state); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101-06 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2875 (2014) (upholding California's low carbon fuel standard, which regulates use of fuels *in*

[2] In fact, OPUC Staff appears to take the same position as that taken by the single dissenting judge among the twelve judges on the *en banc* panel in *Christies*. That single judge would have held that regulation of sales by California residents did not violate the per se rule. *Id.* at 1328 (Reinhardt, J. concurring and dissenting). The single dissenting opinion does not govern, and the majority opinion firmly establishes that the OPUC may not regulate the in-state seller in the sale transaction occurring in the State of Washington. Notably, however, even the single dissenting judge and two additional concurring judges each agreed with the nine-judge majority that the "Supreme Court's current case law requires us to hold unconstitutional the requirement by state laws that out-of-state entities take or refrain from taking actions outside of the regulating state." *Id.* at 1328 (Reinhardt, J. concurring and dissenting); *see also id.* at 1334 (Berzon, J., concurring). In other words, the law is so indisputable that all twelve of the Ninth Circuit judges on the *en banc* panel held that direct regulation of an out-of-state entity is per se invalid. Thus, all twelve of the Ninth Circuit judges on the *Christies* panel would have invalidated an OPUC requirement that the Washington-located Camas Mill pay transition charges as a precondition to purchasing retail electricity from an entity other than PacifiCorp.

California and products sold *in* California); *Southern Union Co. v. Missouri Pub. Serv. Comm.*, 289 F.3d 503, 507-08 (8th Cir. 2002) (holding that state public service commission could lawfully require a utility to seek approval of out-of-state stock sales as part of regulation of the utility's in-state retail electricity sales). These cases are easily distinguishable because they regulate activity occurring within the state's borders. As the *Christies* decision noted, *Corey* is distinguishable because it addressed "in-state conduct with allegedly significant out-of-state practical effects." 784 F.3d at 1324. In contrast here, the only in-state conduct is subject to FERC's exclusive jurisdiction and, as in *Christies*, the proposed sale transaction at issue occurs wholly outside of the State of Oregon.

Moreover, the *Christies* decision was issued less than three months ago – on May 5, 2015. The *Christies* decision was issued by an "*en banc*" panel, which means the decision supersedes any prior three-judge opinion of the Ninth Circuit to the contrary and can only be superseded by another *en banc* holding of the Ninth Circuit or a contrary holding of the United States Supreme Court. 28 U.S.C. § 46; *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Because the Ninth Circuit Court of Appeals encompasses the State of Oregon and has directly spoken to the legal issue in question, PacifiCorp's lengthy discussion of cases other than *Christies* is completely irrelevant to the inquiry here. *PacifiCorp's Response Brief* at 5-7.[3]

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[3] In any event, even if there were not an *en banc* Ninth Circuit decision directly on point, the per se rule against extra-territorial regulation is well-established throughout the country – contrary to the incorrect assertions in PacifiCorp's briefing. For example, in an effort to promote recycling with ten-cent deposits for beverage containers, Michigan passed a law requiring that beverage containers sold in Michigan bear a unique mark, and that the unique mark used on Michigan containers not be used on containers sold in other states. *American Beverage Ass'n v. Snyder,* 735 F.3d 362, 366-67 (6th Cir. 2013). The Sixth Circuit held that the law's unique-mark requirement was extraterritorial in violation of the dormant Commerce Clause because it regulated the marks on containers sold in other states. *Id.* at 373-76. Similarly, Indiana sought to protect its residents from predatory lending by purporting to apply Indiana (*continued to next page*)

No amount of stranded costs or other local impacts can overcome the per se rule that the OPUC may not regulate the transaction by requiring the out-of-state buyer to pay transition charges or by imposing any conditions on the in-state seller designed to regulate the out-of-state transaction.

Finally, aside from the dormant Commerce Clause, Noble Solutions maintains that applying the direct access law to the proposed transaction would unreasonably deprive Oregon customers of the newly created right to enroll in PacifiCorp's new five-year opt-out program. As we explained, the new five-year opt-out program has a 175 average megawatt ("aMW") enrollment cap that could be disproportionately populated by the Camas Mill's large load if it were deemed to be a participant in the five-year program. *See Noble Solutions' Opening Brief* at 3-4. The 175-aMW cap – agreed to by all parties to UE 267 – would have made little sense if a Washington-located facility could exhaust such a large proportion of that 175-aMW enrollment pool. PacifiCorp suggests that such policy considerations are irrelevant, but itself presents several policy arguments regarding cost shifting and benefits conferred on the Camas Mill by Oregon entities. Noble Solutions agrees that policy considerations need not control because the dormant Commerce Clause completely resolves this case. However, if the Commission needs any further support, the reasonable goal of preserving the 175-aMW cap for Oregon-based customers dictates against application of Oregon's direct access law to the proposed transaction.

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

PacifiCorp's proposal to apply the Oregon service territory statute to a retail sale in the

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lending regulations to all lending companies that enter into a loan transaction with a resident of Indiana. *Midwest Title Loans, Inc. v. Mills,* 593 F.3d 660, 662–63 (7th Cir. 2010). Despite the fact that this law did not discriminate against or disadvantage out-of-state companies, the Seventh Circuit held that the law's application to an Illinois loan company transacting with an Indiana resident violated the dormant Commerce Clause because it regulated transactions occurring in neighboring states. *Id.* at 665–69.

State of Washington is meritless. Preliminarily, as we demonstrated, the statute does not apply by its terms to the transportation of electricity through PacifiCorp's service territory – which is the only portion of the transaction occurring in the State of Oregon. *See Noble Solutions' Opening Brief* at 5; *Noble Solutions' Response Brief* at 3-4; ORS 758.400(3); ORS 758.450(2).

Even if the service territory statute could be read to apply to the retail sale of electricity in the State of Washington, it could not *lawfully* be so applied because the dormant Commerce Clause bars extraterritorial regulation by the OPUC. PacifiCorp asserts that Noble Solutions' did not invoke the dormant Commerce Clause with regard to the service territory statute. *PacifiCorp's Response Brief* at 6 n. 15. But that is incorrect. *See Noble Solutions' Opening Brief* at 4-5 (arguing, "Oregon's service territory laws, ORS 758.400 to 758.475, should not apply for the same reason that the direct access law should not apply – the delivery and use of the electricity is occurring in the State of Washington.").[4] As we have demonstrated, the dormant Commerce Clause unequivocally forecloses the application of Oregon's service territory laws to an out-of-state entity against its will. *See, e.g., Christies*, 784 F.3d at 1323-25.

PacifiCorp's argument would lead to an absurd result. According to PacifiCorp, any state could govern service territories in a neighboring state. Any state could even require customers located in another state to accept service from a single utility forever. For example, the State of Washington could prohibit a facility located in the State of Oregon from purchasing electricity from any supplier other than Washington's chosen supplier – forever, against the Oregon customer's will. The dormant Commerce Clause prohibits this result. *See Healy*, 491 U.S. at 336 (under the dormant Commerce Clause, courts must consider not only the direct

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[4] Moreover, a waiver of the dormant Commerce Clause argument by any party to this proceeding would provide no basis for the OPUC to violate the federal constitution.

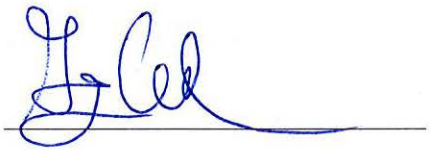
consequences of the challenged regulation but "what effect would arise if not one, but many or every, State adopted similar legislation"). The Camas Mill's facility is indisputably located in the State of Washington, and its past election to purchase electricity in the State of Oregon does not forever subject it to the OPUC's jurisdiction.

III. CONCLUSION

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

DATED this 11th day of August, 2015.

RICHARDSON ADAMS, PLLC



Gregory M. Adams (OSB No. 101779)
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
greg@richardsonadams.com

Of Attorneys for Noble Americas Energy Solutions LLC