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April 10, 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 ____

Dear Filing Center:

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

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: R. Bryce Dalley
Sarah Wallace
(via e-mail)

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR ____

In the Matter of)	
)	
GEORGIA-PACIFIC CONSUMER)	
PRODUCTS (CAMAS) LLC)	PETITION FOR
)	DECLARATORY RULING
and)	
)	
CLATSKANIE PEOPLE’S UTILITY)	
DISTRICT)	Expedited Treatment Requested
)	
Petitioners.)	
_____)	

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.

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

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 and outside of any exclusive service territory that has been allocated to any party by the Commission.
2. The Camas Mill currently takes electric service from PacifiCorp under a bilateral special contract (the "Contract") with a 20-year term that expires on December 31, 2015.
3. 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 kilovolt ("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.
4. 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.

5. 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"). The 69 kV lines are depicted on the map attached as Exhibit A. The 69 kV Lines will become part of Clatskanie's distribution system, and GP will become a Clatskanie retail customer. As a result of the sale of the 69 kV Lines to Clatskanie, GP will no longer be interconnected with PacifiCorp or take delivery of electric service from PacifiCorp in Oregon, but instead will take delivery of electric service from Clatskanie in Washington.

6. 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.

7. 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.

8. 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.

9. Other than bilateral agreements between utilities, Washington law does not provide for the creation of exclusive utility service territories.^{1/}

10. Upon information and belief, GP and Clatskanie understand that PacifiCorp believes that Clatskanie’s delivery of electricity in Washington to the Camas Mill would constitute “direct access” under Oregon law and subject Clatskanie to the requirements of ORS § 757.672(2), including an obligation that Clatskanie be certified as an “electricity service supplier” (“ESS”).

11. Upon information and belief, GP and Clatskanie understand that PacifiCorp believes that Clatskanie would invade an exclusive Oregon service territory allocated to PacifiCorp at the Troutdale Substation by delivering electricity to the Camas Mill in Washington, in violation of ORS § 758.450(2).

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.

^{1/} See RCW § 54.48.

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.^{2/} Any such consumer-owned utility “shall be subject to ORS 757.649(1) to (4) and rules adopted thereunder.”^{3/}

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 than one retail electricity consumer.”^{4/} “Direct access,” in turn, means “the ability of a retail electricity consumer to purchase electricity . . . from an entity other than the distribution utility,”^{5/} 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.”^{6/}

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

^{2/} ORS § 757.672(2) (emphasis added).

^{3/} Id.

^{4/} Id. § 757.600(16) (emphasis added).

^{5/} Id. § 757.600(6).

^{6/} Id. § 757.600(9).

parties.” Any such contract is valid and enforceable only “when approved by the Public Utility Commission.”^{7/}

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.”^{8/} 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.^{9/}

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.”^{10/}

C. Federal Power Act

Finally, the relief requested in this Petition is consistent with certain provisions of the Federal Power Act (“FPA”). In particular, Section 211(a) of the FPA allows “any electric utility” to “apply to [FERC] for an order . . . requiring a transmitting utility to provide transmission services” to the applicant.^{11/}

^{7/} Id. § 758.415.

^{8/} Id. § 758.435(1).

^{9/} Id. § 758.450(2).

^{10/} Id. § 758.400(3) (emphasis added).

^{11/} 16 U.S.C. § 824j(a).

IV. QUESTIONS PRESENTED

- (1) Under the Assumed Facts, does Oregon’s direct access law apply to the delivery of electricity in Washington to a Washington customer for use exclusively in Washington?
- (2) Even if Oregon’s direct access law could theoretically apply, would Clatskanie be providing direct access if it provides electricity service over its own distribution lines to its own nonresidential customer?
- (3) Under the Assumed Facts, would Clatskanie be providing utility service within any exclusive territory allocated to PacifiCorp?

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

^{12/} State v. Gaines, 346 Or. 160, 171 (2009).

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 vested with power and jurisdiction to supervise and regulate utilities “in this

^{13/} Id.
^{14/} Id. at 171-72.

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).

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.

^{18/} Id. § 757.600(6).

^{19/} Id. § 757.600(29).

^{20/} Id. § 757.600(9).

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 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/}

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

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 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.

^{26/} Id. § 757.600(29).

^{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).

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 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

^{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).

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.

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

^{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.

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/}

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

^{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) (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).

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:

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

^{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).

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.

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

^{41/} ORS § 758.400(3) (emphasis added).

^{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.

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 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

^{46/} Id. at 12-13.

^{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)).

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 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

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

^{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.

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 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

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

^{55/} 111 F.3d at 1440.

^{56/} Id. at 1437.

^{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).

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 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.

^{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.

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 10th day of April, 2015.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

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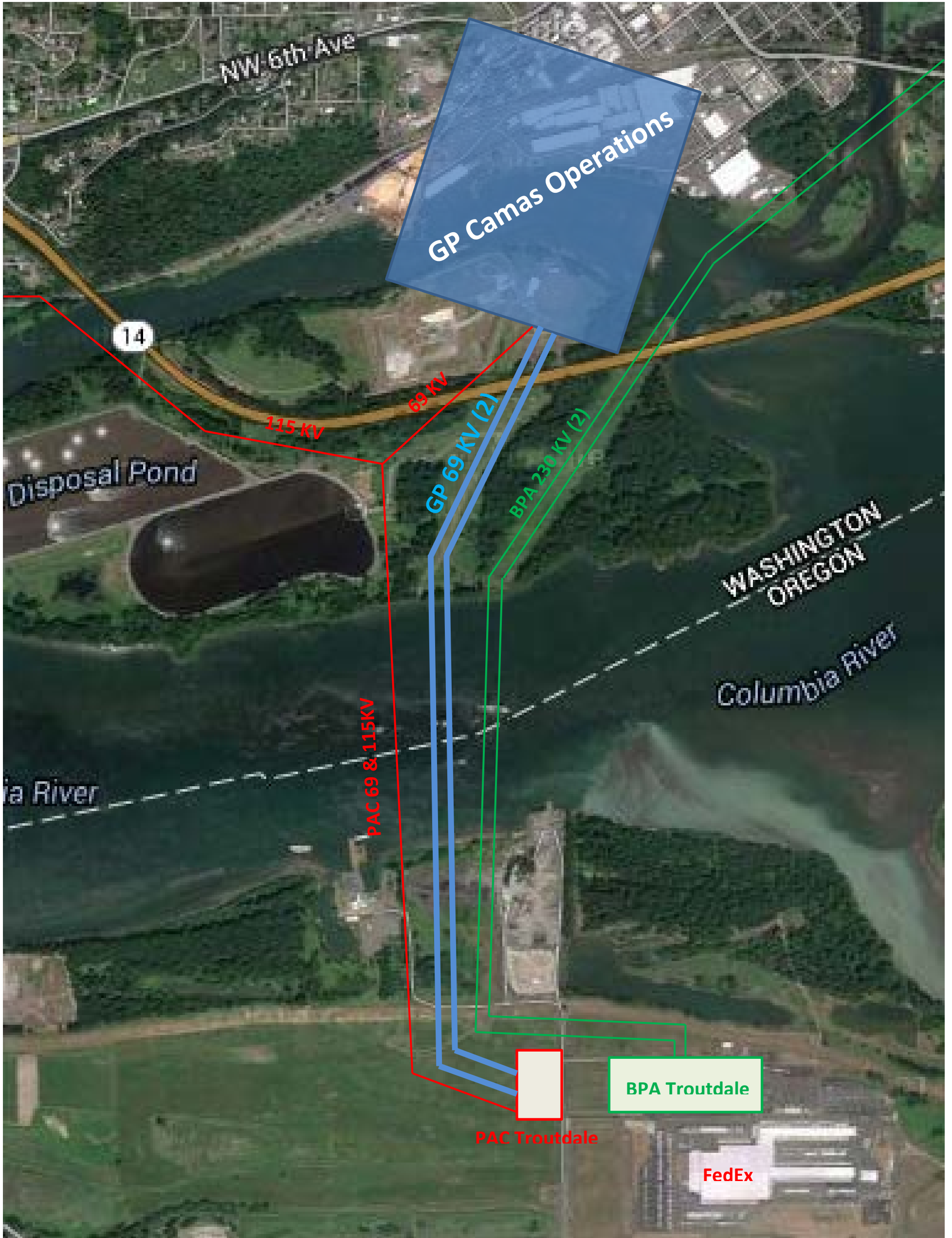
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Exhibit A

GP Camas 69 KV Electric Supply and other local Transmission Lines



Source: Google Maps

NTS. For illustrative purposes only