

# KINDLEY LAW, PC

RAYMOND S. KINDLEY

ADMITTED IN OREGON AND WASHINGTON

February 17, 2017

*Via Electronic Mail*

Public Utility Commission  
Attn: Filing Center  
201 High St. S.E., Suite 100  
P.O. Box 1088  
Salem, OR 97308-1088

Re: UM 1818 Columbia Basin Electric Cooperative v. Umatilla Electric Cooperative

Dear Filing Center:

Please find enclosed Columbia Basin Electric Cooperative's Response to Umatilla Electric Cooperative's Motion to Bifurcate in UM 1818 filed pursuant to OAR 860-001-0420(4). This Response to the Motion to Bifurcate was filed at the Commission's filing center email address [puc.filingcenter@state.or.gov](mailto:puc.filingcenter@state.or.gov).

Thank you for your assistance.

Sincerely,

/s/ Raymond S. Kindley  
Raymond S. Kindley  
KINDLEY LAW, P.C.  
Of attorneys for Columbia Basin  
Electric Cooperative, Inc.

Enclosures

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**BEFORE THE  
PUBLIC UTILITY COMMISSION OF OREGON**

**UM 1818**

COLUMBIA BASIN ELECTRIC	)	COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC. an Oregon	)	COOPERATIVE’S RESPONSE TO
cooperative corporation	)	UMATILLA ELECTRIC COOPERATIVE’S
Complainant,	)	MOTION TO BIFURCATE
vs.	)	
UMATILLA ELECTRIC COOPERATIVE,	)	
INC., an Oregon cooperative corporation,	)	
Defendant	)	
	)	

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**RESPONSE OF COLUMBIA BASIN ELECTRIC COOPERATIVE TO UMATILLA  
ELECTRIC COOPERATIVE’S MOTION TO BIFURCATE**

Pursuant to OAR 860-001-0420(4), Columbia Basin Electric Cooperative, Inc. files this Response to Umatilla Electric Cooperative’s Motion for bifurcation. CBEC’s Response is based on materials in the record and by the Points and Authorities set forth below. As discussed below, CBEC opposes UEC’s Motion.

**POINTS AND AUTHORITIES**

**I. Introduction**

Umatilla Electric Cooperative (“UEC”) moves the Commission to issue a ruling bifurcating Columbia Basin Electric Cooperative’s (“CBEC”) Complaint “into two separate proceedings.” UEC’s Motion appears to request an Order whereby CBEC must retract its current Complaint and file two new complaints to commence two separate proceedings with each

proceeding addressing one of CBEC's two claims.<sup>1</sup> CBEC respectfully requests that UEC's Motion be denied.

## **II. Basis for Denying Motion**

UEC's argument for its Motion fails to provide a valid basis for bifurcation of the proceeding. UEC argues that the "Commission's rules do not expressly provide for bifurcation of issues in a proceeding."<sup>2</sup> UEC argues that bifurcation is necessary in this situation because CBEC's Complaint involves different parties, different fact scenarios, and the application of different laws. UEC's argument fails to consider the Commission's rules or the Oregon rules of Civil Procedure that apply to a motion to bifurcate. UEC's Motion also is unsupported by UEC's own rationale for bifurcation or the Commission's Orders that UEC references in its Motion.

### **A. UEC's Motion Fails to Comply with the Commission's Rules and the Oregon Rules of Civil Procedure, Rule 53B.**

ORS 756.528 does provide the Commission with authority to segregate issues and order separate hearings. ORS 756.528, however, does not provide an express standard for implementing the authority to bifurcate.

Commission rules provide that the Oregon Rules of Civil Procedure govern in contested cases where no specific rule or statute applies, unless the Commission or an Administrative Law Judge ("ALJ") rules otherwise. *See*, OAR 860-001-0000(1). Oregon Rules of Civil Procedure do provide standards that provide guidance on when bifurcation is proper.

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<sup>1</sup> UEC Motion, p. 7: UEC "requests the Commission to issue a ruling bifurcating those two claims and establish a separate docket and schedule for each claim."

<sup>2</sup> UEC Motion, p. 4: "Although the Commission's Rules do not expressly provide for bifurcation in a proceeding,"

The Oregon Rules of Civil Procedure, Rule 53, subd. B, (“ORCP Rule 53B”) permits bifurcation of issues into separate trials only under certain specific circumstances. A trial judge may order a separate trial of any claim or any issues “only (1) in furtherance of convenience, (2) to avoid prejudice, or (3) if conducive to expedition and economy.” *Bremner By and Through Bremner v. Charles*, 312 Or. 274, 279-280 (1991). Bifurcation of issues for trial is not to be ordered routinely and a trial judge may order bifurcation only as a result of informed exercise of discretion on the merits of the case. *Id.* at 280. Furthermore, “[a] prerequisite to the exercise of discretion is that bifurcation will promote one or more of the purposes of the rule, *i.e.*, convenience, avoidance of prejudice, or conduciveness to expedition and economy.” *Id.* at 280.

The Commission has also followed this standard in determining whether to bifurcate or consolidate issues. In *Portland General Electric*, UA 37 and *Pacific Power and Light Company*, UA 41, Commission Order No. 92-557, PGE submitted three applications concerning allocations of service territory and requested the Commission to treat each application separately and independently. The Commission assigned the three applications to one proceeding, UA 37. Later, PGE and PP&L jointly filed two applications relating to territory allocation of electric service, which were assigned to another proceeding, UA 41. The Commission later consolidated the two proceedings after it determined they presented several issues relating to the allocation of service territory, the issues overlapped, and considering them together was the most efficient and logical approach. The Commission subsequently bifurcated the proceeding because one issue would need an evidentiary hearing and the remaining issues would not. The Commission’s basis to bifurcate and consolidate reflect the standards set forth in ORCP 53A; the Commission was looking for the most efficient way to resolve the issues.

Here, UEC’s proposed bifurcation would not satisfy any of the prerequisites of ORCP Rule 53A. In fact, granting UEC’s Motion would cause just the opposite result. UEC’s Motion would cause inefficiency and additional cost. It would force CBEC to rescind its current Complaint and file two other complaints, conduct two discovery processes instead of one, file

two separate motions for each motion it would have otherwise filed in one proceeding, and the ALJ would need to hold two hearings for each hearing the ALJ would hold if there was only one proceeding. In short, it would almost double the amount of work and cost of the litigation.

The bifurcation of CBEC's Complaint also would be inconvenient by creating two schedules and creating additional scheduling conflicts for the parties, their attorneys, the ALJ and the Commission's staff.

Additionally, UEC's Motion would likely lead to a delayed resolution due to the creation of two proceedings and schedules. The additional work and scheduling for conducting two proceedings will likely take more time than one proceeding, thus delaying a decision for each of the claims.

CBEC would be prejudiced by the bifurcation of the issues. CBEC believes the two violations are related and wants the opportunity to litigate both issues together to show that relationship. UEC's construction of the transmission line would displace CBEC's ability to develop its own transmission system to distribute retail power to its members. There are only a few transmission corridors available in CBEC territory and the construction by UEC in the proposed corridor would preclude CBEC from constructing its own lines. Consequently, CBEC would be forced to purchase transmission services from UEC for CBEC to serve its own retail loads, which would erode the integrity of CBEC's exclusive service territory. CBEC is concerned that UEC service to Willow Creek Dairy is another means whereby UEC can further attack the integrity of CBEC's service territory. The bifurcation of the two claims into two separate proceedings would make CBEC's ability to present and argue this issue more difficult and would prejudice CBEC's efforts to litigate UEC's violations of ORS 758.450(2).

In short, granting UEC's Motion to Bifurcate is unsupported by any of the prerequisites necessary to comply with ORCP, Rule 53B. Instead granting the Motion would lead to additional inconvenience, cost, effort and it would prejudice CBEC.

**B. UEC's Motion Fails to Support Bifurcation Even Under its Own Rationale.**

UEC creates its own standard for bifurcation. It argues that bifurcation is necessary because CBEC's claims involve different parties, different laws and different facts. UEC's argument fails by its own criteria.

CBEC's claims do not involve different parties. CBEC is not bringing two separate claims against two entirely different parties. CBEC and UEC are the only two parties to this proceeding. UEC argues that CBEC "has alleged no connection or relationship between the Willow Creek Dairy customer and the Wheatridge Project customer." CBEC does not need to make such an allegation because Wheatridge and Willow Creek Dairy are not parties to this proceeding. UEC's argument that CBEC's claims involve different parties is baseless.

UEC also contends that CBEC's claims involve different laws. Both of CBEC's claims against UEC concern only one statute, ORS 758.450(2). Granted, it concerns two different violations of the same statute, but CBEC's claims are no different than a party claiming two occurrences of trespass that happened at different times by the same trespassing party. UEC's argument for bifurcation due to different laws is entirely unsupported.

UEC also argues that CBEC's claims involve different facts. Obviously, different claims always involve different facts. UEC's contention for bifurcation because CBEC's claims involve different facts is not a valid justification.

UEC casually speculates at the end of its Motion that "because the two matters are distinct, it may be possible to resolve one matter more efficiently than the other."<sup>3</sup> UEC further contends that because the resolution of CBEC's claims are not interdependent, or are not dependent upon the same set of facts or law, "CBEC will therefore not be prejudiced if its claims are processed separately."<sup>4</sup> UEC provides no argument or justification for these unsupported

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<sup>3</sup> UEC Motion p. 6.

<sup>4</sup> UEC Motion p. 6.

assertions that two proceedings would be more efficient than one and CBEC would not be prejudiced.

Speculation and specious arguments are invalid reasons to bifurcate CBEC's claims. As noted in *Bremner* and ORCP Rule 53B, a decision to bifurcate is extraordinary and should only occur after the prerequisites have been satisfied and the judge has made an informed decision on the merits. It cannot be based on unsupported speculation as UEC proposes.

UEC's standard for bifurcation should be ignored. If adopted and substituted for ORCP 53B, the standard for bifurcation would be set so low that bifurcation would be justified for any complaint that included more than one issue. The requirements of ORCP Rule 53B should apply in this case to protect the interests of CBEC, for convenience, for efficiency, for economy, and to avoid creating any precedent for future proceedings that would conflict with ORCP 53B.

### **C. The Commission's Orders Cited by UEC Don't Support Its Motion**

UEC references Commission Orders 96-175 and 00-240 to justify the requested bifurcation. Order 96-174 concerned revisions to PacifiCorp's tariff schedules. The Order provides that the ALJ in that proceeding bifurcated the proceeding into two phases, not two proceedings. Phase I of the proceeding addressed the issue of Traditional Cost-of-Service Regulation and Phase II concerned the approval of an alternative form of regulation. The bifurcation in that proceeding merely addressed the timing of when issues would be addressed by the Commission. The ALJ's decision to bifurcate the issues did not cause PacifiCorp to initiate two entirely separate proceedings. Order 96-174 does not support UEC's Motion to bifurcate the current UM 1818 into two separate proceedings.

Order 00-240 concerned issues of the collocation service tariffs filed by GTE Northwest. In that proceeding, the ALJ proposed to bifurcate the proceeding into two separate proceedings:

one to investigate generic collocation issues common to all incumbent exchange carriers and the other to address rate issues specific to GTE's filing.

The basis for the bifurcation in Order 00-240 is significantly different than UEC's rationale for bifurcation here. Order 00-240 demonstrates the bifurcation was useful because one proceeding would address issues common to all incumbent exchange carriers (e.g. multiple parties' interests) and the other proceeding would address rates issues specific to GTE (one party's interests). The basis for bifurcation in Order 00-240 UEC's is significantly different than UEC's Motion where UEC wants bifurcate two claims that concern the same parties and the same law. Order 00-240 does not support UEC's Motion.

### **CONCLUSION**

UEC's Motion should be denied because it conflicts with the Commission administrative rules and ORCP 53B. UEC has not provided any legitimate argument or reason to ignore the standards set forth in ORCP 53B for bifurcation. UEC's assertions that bifurcation is warranted because CBEC's claims involve different parties and different law are simply wrong. UEC's contentions that bifurcation would result in more efficiency and would not prejudice CBEC are entirely unsupported. Therefore, CBEC respectfully requests the Commission to deny UEC's Motion to Bifurcate.

DATED this 17<sup>th</sup> day of February 2017.

Respectfully submitted

By /s/ Raymond S. Kindley

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Of Attorneys for Columbia Basin Electric  
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## **CERTIFICATE OF FILING**

I hereby certify that on February 17, 2017, on behalf of Columbia Basin Electric Cooperative, Inc. I filed the foregoing COLUMBIA BASIN ELECTRIC COOPERATIVES'S RESPONSE TO UMATILLA ELECTRIC COOPERATIVE'S MOTION TO BIFURCATE in UM 1818 with the Public Utility Commission; Att'n Filing Center, by electronic transmission to [puc.filingcenter@state.or.gov](mailto:puc.filingcenter@state.or.gov).

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