BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1670

COLUMBIA BASIN ELECTRIC COOPERATIVE, INC., Complainant, v. PACIFICORP dba PACIFIC POWER, NORTH HURLBURT WIND, LLC, SOUTH HURLBURT WIND, LLC, HORSESHOE BEND WIND, LLC and CAITHNESS SHEPHERDS FLAT, LLC, Defendants.	**REPLY IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION OF DEFENDANTS NORTH HURLBURT WIND, LLC, SOUTH HURLBURT WIND, LLC, HORSESHOE BEND WIND, LLC AND CAITHNESS SHEPHERDS FLAT, LLC**

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

TABLE OF CONTENTS

Page(s)

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

INTRODUCTION

Defendants North Hurlburt Wind, LLC ("North Hurlburt"), South Hurlburt Wind, LLC ("South Hurlburt"), Horseshoe Bend Wind, LLC ("Horseshoe Bend") and Caithness Shepherds Flat, LLC ("Caithness" or "CSF") (collectively the "Caithness Defendants") file this reply in support of their motion for summary determination, seeking dismissal of all claims of Complainant Columbia Basin Electric Cooperative, Inc. ("CBEC," the "Cooperative," and "Columbia Basin") against them.

Because of the cross-motions positioning of this case, the parties have had two opportunities to brief their positions and create the record. In most respects, Columbia Basin used its second opportunity to rewrite its theory of the case while, notably, failing to create a factual record to support its new assertions. A party opposing summary judgment must provide admissible evidence to overcome the evidence provided by the moving party. Columbia Basin's failure to do so here is fatal to its case.

Columbia Basin seeks to avoid the express, statutory exemption of wind generators from the Territorial Allocation Law in arguing that the Caithness Defendants, as entities providing wind energy, somehow lie outside that exemption. The statutory language in ORS 758.450(4)(c) does not support Columbia Basin's position. Yet, even without reference to this exemption, the record evidence demonstrates that no Caithness Defendant is providing "utility service" as that term is used in ORS 758.450. Although Columbia Basin's case is based on speculation, the record does contain a number of admissions by Columbia Basin, which support the positions of the Caithness Defendants and PacifiCorp. Its most significant admission, found on page 8 of its response, necessarily means that the current acquisition of retail, back-up station power for the Shepherds Flat wind resources through PacifiCorp at Slatt Substation is lawful. In other words, Columbia Basin now concedes the correctness of the defendants' fundamental position in this case.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

I. COLUMBIA BASIN HAS NEVER PROVIDED *ADMISSIBLE EVIDENCE* TO OVERCOME THE CAITHNESS DEFENDANTS' MOTION FOR SUMMARY DETERMINATION.

By agreement of all named parties, the Commission set a schedule for resolution of this case through cross-motions for summary judgment. *See* June 12, 2014, Order. As noted in both the Caithness Defendants' and PacifiCorp's summary determination motions, the Oregon Rules of Civil Procedure, which apply to this contested case, OAR 860-001-0000(1), establish the parties' obligations on summary judgment. Under ORCP 47, a party opposing a properly supported summary judgment motion cannot rest on mere allegations and assertions, but rather must put on *evidence* to support its position. ORCP 47D; *see also* ORCP 47C.

As described below, Columbia Basin' response brief is conspicuously lacking in actual evidence on key issues – it is long on conjecture and legal assertions, but devoid of evidence to back up its allegations. Despite having had 14 months to prepare its case, Columbia Basin has failed to create a record to overcome the defendants' motions.[1]

II. COLUMBIA BASIN HAS FAILED TO DEMONSTRATE ANY VIOLATION OF THE TERRITORIAL ALLOCATION LAW.

Nothing in Columbia Basin's response brief or supporting materials rebuts the Caithness Defendants' central arguments regarding the Territorial Allocation Law. Columbia Basin incorrectly interprets the law repeatedly in attempting to apply it to this case, only buttressing the Caithness Defendants' position.

[1] Columbia Basin's opposition brief, like its motion for summary judgment, also inaccurately and inappropriately relies on factual assertions from the parties' attempt to settle this dispute in 2013. As the Caithness Defendants asserted in their opposition brief, it is improper to include such settlement discussion material as purported evidence of the parties' positions. Such "evidence" is irrelevant and prejudicial. Regardless, for purposes of the Caithness Defendants' motion, the assertions made and conclusions drawn by Columbia Basin regarding those settlement discussions are not material. Nothing contained within those settlement discussions – even if this Commission rules them admissible – has any effect on the grounds the Caithness Defendants have argued in support of their motion for summary determination; all that is material is the undisputed fact that no settlement was reached.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

A. Exemption 4(c) to the Territorial Allocation Law, as found in ORS 758.450, applies to the Caithness Defendants.

The parties disagree on the meaning of the exemption to the Territorial Allocation Law found in ORS 758.450(4)(c). This issue, dispositive if answered in the Caithness Defendants' favor, is a straightforward question of statutory interpretation ripe for decision on summary judgment. As quoted in the Caithness Defendants' prior briefing, the statutory language is as follows:

> (2) Except as provided in subsection (4) of this section, *no other person* shall offer, construct or extend utility service in or into an allocated territory.
>
> (4) The provisions of ORS 758.400 to 758.475 *do not apply to any corporation, company, individual or association of individuals* providing heat, light or power:
>
> . . .
>
> (c) *From solar or wind resources to any number of customers . . . .*

ORS 758.450 (emphases added).

The statute's "plain language" creates an exemption that applies to the entities themselves, not simply their conduct. The statute is phrased in terms of an exemption for all "persons" that offer, construct or extend utility service in or into an allocated territory, ORS 758.450(2), if those "persons" meet the criteria in subsection 4. The criteria in 4(c) is straightforward: an entity "providing heat, light or power . . . [f]rom solar or wind resources to any number of customers."

Columbia Basin asks the Commission to read ORS 758.450(4)(c) differently. It attempts to construe this exemption as being *transactional*, to exempt only certain conduct, and not wind generators as exempt entities. To do so, it must delete the words "*any corporation, company, individual or association of individuals"* from the statute. In Columbia Basin's view, the statute should simply read: "The provisions of ORS 758.400 to 758.475 do not apply to the provision of heat, light or power from solar or wind resources." If the Legislature intended to simply exempt transactions, it would have written the statute that way. Instead, the actual statute passed by the

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Legislature is much more broadly worded, focusing on the entities themselves, not just some of their activities.

This attempt to override the Legislature is necessary for Columbia Basin to rehabilitate its case. Columbia Basin wants to make this exemption apply only when the local winds across Shepherds Flat Central or North are strong enough to allow self-generation of each wind resource's station power needs. When the winds are strong enough to produce wind power to light the aircraft-warning beacons atop all wind towers, maintain communications, etc.,[2] the exemption applies – according to Columbia Basin's theory. However, to complete this theory, whenever winds are becalmed, the statutory exemption of wind generators disappears. Presumably, when the winds pick up again the exemption reappears – and so this "exemption cycle" would repeat itself again and again. This on-again, off-again transactional exemption from the Territorial Allocation Law is an invention of Columbia Basin, appearing for the first time in its response brief. The plain wording of ORS 758.450(4)(c) cannot be squared with Columbia Basin's construction.

Another new theory of Columbia Basin is its treatment of the four Caithness Defendants as some sort of combined, separate "association." The reason Columbia Basin attempts to force such a theory here is transparent: Columbia Basin's entire case relies on its reading of *Northwest Natural Gas Co. v. Oregon PUC*, 195 Or App 547 (2004). The facts of record in *Northwest Natural Gas* contained actual evidence about an "association" of non-affiliated natural-gas consumers that wanted to bypass their existing retail supplier, Northwest Natural Gas Company. The court concluded that this association was subject to the Territorial Allocation Law.

Seeing the word "association" used in *Northwest Natural Gas* in a way that might support its case, Columbia Basin has used it, without the requisite supporting evidence, as a hypothetical construct in its response pleading. CBEC Response at 3-4. The Caithness Defendants have

[2] *See* Delgado Declaration, Para. 58, for a complete description of station power needs.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

previously explained why the description in *Northwest Natural Gas* of unaffiliated, "independent industrial consumers" that "join together to create a different entity," 195 Or App at 550 and 557, has no application here – where there is no dispute that the Caithness Defendants are affiliated companies who did not "join together to create a different entity," and certainly not for the purpose of providing "utility service."[3]

This same disconnect undercuts Columbia Basin's assertion that CSF, as the parent organization of the three other defendants, cannot qualify for the exemption in ORS 758.450(4)(c). As convenient, Columbia Basin ties CSF to its subsidiary organizations' projects – except with respect to the attributes that provide the exemption. *See* CBEC Response at 4-5. In reality, Columbia Basin's argument only proves that CSF is not providing "utility service." If it is not involved in wind generation because it owns no physical assets, it cannot be providing any "utility service." On the other hand, if it is involved in wind generation, it is exempt under ORS 758.450(4)(c). Either way, Columbia Basin has no valid argument against CSF.

Moreover, *Northwest Natural Gas* deals with gas users, none of which could possibly be covered by the exemption of wind generators and solar operators under ORS 758.450(4)(c). When "*any corporation, company, individual or association of individuals"* in the business of wind or solar generation works with another similarly exempt entity, why would the two of them lose the statutory exemption they possess individually? Columbia Basin never explains why this should be so. This re-interpretation would put at risk any activity that might be construed as collaborative, e.g., membership by wind generators in the American Wind Energy Association.

The combined effect of Columbia Basin's two statutory re-interpretations would be the perversion of ORS 758.450(4)(c) into an on-again, off-again transactional exemption from the

[3] Columbia Basin's own arguments make this point. On page 14 of its response brief, it acknowledges that the Caithness Defendants' "system" was "not designed to simply serve the backup power needs of the Three Wind Projects." As explained below and in in their own prior briefing, the Caithness Defendants do not necessarily agree with all of Columbia Basin's characterizations of its facilities. But the basic point made by Columbia Basin undermines its attempted analogy to *Northwest Natural Gas*.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Territorial Allocation Law for wind and solar generators, dependent on wind velocity or sunshine, and available only when the operator was acting completely on its own and not acting together with other wind or solar generators. This would turn ORS 758.450(4)(c) into a trap for unwary wind and solar generators. It is merely Columbia Basin's attempt to reverse-engineer the statute to fit its ends. It cannot be squared with the legislative history of ORS 758.450(4)(c), intended by the Legislature to give a "lift" to wind and solar generators, not to entrap them.

B. Columbia Basin overlooks the Caithness Defendants' arguments on "Utility Service."

Columbia Basin's response brief avoids the Caithness Defendants' discussion of utility service in ORS 19.400(3) by incorrectly asserting that the Caithness Defendants "ignore this statute." CBEC Response at 10. That assertion itself overlooks significant portions of the Caithness Defendants' briefing; indeed, pages 19-21 of the Caithness Defendants' opening brief is dedicated to the subsection of ORS 19.400(3) that Columbia Basin asserts is "ignored." The Caithness Defendants' extensive discussion, on pages 22-26 of their opening brief, of the distinctions between the present case and *Northwest Natural* similarly concerns the application of ORS 19.400(3). Columbia Basin's response does not address these distinctions.

One argument that Columbia Basin' briefing does appear to recognize to be advanced by the Caithness Defendants is that the definition of "utility service" cannot apply because the Caithness Defendants do not distribute electricity to users "through a connected and interrelated distribution system." ORS 19.400(3). But Columbia Basin then falsely states that this issue "has already been addressed and dismissed" by the holding in *Northwest Natural*. *See* CBEC Response at 11. In fact, the opinion in *Northwest Natural* expressly declined – twice – to address this very issue:

> The trial court did not accept the PUC's statutory analysis but affirmed its decision on the ground that the system was not sufficiently complex to be "connected and interrelated" under the statutory definition of "utility service." . . . *It is not a court's task to create a basis for the PUC's ultimate conclusion that is different from the basis that the PUC itself expressed. Rather, it is for the PUC on remand to reconsider the issues involved*.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

> In their briefs, the parties discuss whether the bypass and lateral pipelines constitute a connected and interrelated system. * * * *Those are issues for the PUC to consider on remand in light of the controlling statutory definitions.*

195 Or App at 559-60 (emphases supplied). *Northwest Natural*, which is the sole grounds relied upon by Columbia Basin to refute the Caithness Defendants' argument, provides it no support.

C. Columbia Basin now concedes that utility service occurs at the point of delivery to the user at Slatt Substation, and not at the point of consumption.

It has been made abundantly clear in the record of this case that BPA's Slatt Substation is located well within the service territory of PacifiCorp, regarding which PacifiCorp has the same legal rights under the Territorial Allocation Law as those claimed by Columbia Basin for itself regarding a different territory. Columbia Basin now concedes that the only lawful way by which it might deliver power at retail at or within Slatt Substation is through a mutually agreeable contract with PacifiCorp, entered pursuant to ORS 758.410. It makes this concession in describing one conceptual "alternative" by which it might hope to deliver power at retail to one or more of the Caithness Defendants' wind projects:

> Under this alternative, the Cooperative would deliver power to the Slatt Substation for distribution to the Three Wind Projects. *As noted by the Caithness Defendants, this alternative would require an agreement with Pacific Power* and, likely, approval by the Commission.

CBEC Response at 8 (emphasis added).

This concession – that delivering power at Slatt "would require an agreement with Pacific Power" – is dispositive here. Columbia Basin has now undercut its own previously asserted position that "utility service" occurs at the end-point of the user's own equipment – at each specific wind turbine within a wind resource. *See, e.g.,* Columbia Basin's MSJ at 2. In conceding that the delivery of back-up station power to the Caithness Defendants at their respective BPA-designated points of interconnection ("POI") within Slatt Substation

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

constitutes the provision of utility service at Slatt, Columbia Basin now adopts the very position advanced by the defendants: that utility service occurs at the Slatt Substation delivery point.

Columbia Basin's ORS 758.410 admission is also an unmistakable concession that PacifiCorp's delivery of back-up station power to the Caithness Defendants *at Slatt Substation* is perfectly legal. If it were otherwise, Columbia Basin would not "*require an agreement with Pacific Power*" in order to displace that Slatt-Substation service with its own. As addressed further below, with this concession, Columbia Basin tacitly abandons its own theory.

D. Columbia Basin now concedes that it cannot now, nor may it ever be able to, provide "Similar Utility Service" under ORS 758.450.

1. Statement of Columbia Basin's legal dilemma

Perhaps the most telling aspect of Columbia Basin's response is the manner in which it attempts to explain how it is providing "similar utility service" under ORS 758.450. Throughout discovery, Columbia Basin resisted answering the central issue of how it might serve a 230-kV load from a system that tops out at 115-kV and does not even come close to either the Shepherds Flat Central or Shepherds Flat South collector substations, except for delivering at household voltage of 120/240 volts for Shepherds Flat South. *See* Declaration of Jeffrey Delgado ISO Caithness Defendants' Summary Determination Motion ("Delgado Decl."), Exhibit 8 at 1-2, 5-15, 23-36; *see also* Delgado Decl. Para. 48. However, with the filing of its responsive pleading, that evasiveness has ended with the clear recognition that Columbia Basin cannot provide "similar utility service" to the 230-kV service it alleges defendants to be providing. Nor (again by its own admission) is it likely to provide "similar utility service" within the foreseeable future – and perhaps never will.

Columbia Basin's attempt at rejoinder is to claim that the issue of "similar utility service" is irrelevant to the Commission's four-part determination under ORS 758.450 referenced by the court in *Northwest Natural Gas, supra*. It suggests that defendants are attempting to add a fifth

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

prong to this test. CBEC Response at 2. This claim evidences a misunderstanding of the statutory scheme. The 4-part test referenced in *Northwest Natural Gas* expressly requires examination of whether there is "utility service" involved, as defined in ORS 758.400(3).[4] The definition of "utility service" under ORS 758.400(3) contains the express exclusion discussed by the Caithness Defendants:

> 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*. [Emphasis supplied.]

The Commission's 4-part test that Columbia Basin invokes unquestionably requires determining whether any "utility service," as defined in ORS 758.400(3), is even involved. If there is none, then no further decision is reached under ORS 758.450. Thus, the question about "similar utility service" is not irrelevant; it is central to the statutory analysis.

2. Columbia Basin correctly concedes that it cannot provide "similar utility service" – or any other service at all – at Slatt Substation without an agreement with PacifiCorp.

As explained above, Columbia Basin concedes that it cannot lawfully deliver power at retail to any Caithness Defendant within PacifiCorp's service territory at Slatt Substation, unless it first obtains an agreement under ORS 758.410. There is no such "agreement with Pacific Power." Part of the acrimony exhibited in both Columbia Basin's motion and in its response to defendants' cross-motions is due to the absence of any such agreement, which Columbia Basin demanded of PacifiCorp and the Caithness Defendants when it threatened to bring the

[4] As in its opening brief, Columbia Basin refers to the second element of this test as involving "'utility service' as defined in ORS 758.450(3) . . ." CBEC Response at 2; CBEC MSJ at 22. The Caithness Defendants assume Columbia Basin intends to refer to the definition of "utility service" in ORS *758.400(3)*, not ORS 758.450(3) (which includes no such definition), consistent with the court's explanation of the Commission's test. *See Northwest Natural*, 195 Or App at 553.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

complaint that it ultimately filed to begin these proceedings. Because Columbia Basin's demands were unreasonable, this attempted intimidation failed. *See* Declaration of John Cameron ISO Caithness Defendants' Opposition to Columbia Basin's MSJ ("Cameron Decl."), Paras. 5-6. Attempts to settle this case subsequent to the filing of Columbia Basin's complaint have also failed (as reflected in the procedural record), meaning that no agreement under ORS 758.410 is ever likely to be reached.

For purposes of the Caithness Defendants' motion for summary judgment, the important message in Columbia Basin's response is its concession that it cannot lawfully deliver back-up station power at Slatt Substation for end-use at Shepherds Flat Central, Shepherds Flat South or, indeed, to any end-user.[5] Accordingly, Columbia Basin would need to find another way to provide "similar utility service."

3. Columbia Basin cannot use "retail wheeling" to provide "similar utility service" power to Horseshoe Bend or South Hurlburt.

On October 2, 2014, two business days before summary judgment cross-motions were filed, Columbia Basin's new General Manager, Thomas Wolff, sent a letter to Caithness Corporation,[6] making the following request:

> The Cooperative requests to reserve up to four megawatt (4 MW) of capacity for point-to-point service on the transmission facilities between the Slatt Substation and the Horseshoe Bend Wind, LLC collector substation. The Cooperative would like to reserve that amount of transmission capacity as soon as possible to serve loads located in the Cooperative's service area.

[5] On page 7 of its response, Columbia Basin states that, in anticipation of serving the loads, it has "made a request for a new point of delivery at the Slatt Substation." This new assertion does not help Columbia Basin. The text of Columbia Basin's same pleading, quoted above, contains its admission that it cannot lawfully deliver power at retail at Slatt Substation without first securing an agreement under ORS 758.410 with PacifiCorp whose retail service territory includes Slatt Substation.

[6] Columbia Basin's response specifies the date of the letter as October 3, 2014, but the date on the letter attached to the response as its Exhibit "A" is October 2, 2014.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Mr. Wolff's letter is included in Columbia Basin's response of October 21, 2014, as Exhibit "A" to the Declaration of Thomas Wolff. The facilities mentioned in Mr. Wolff's letter are the same Shepherds Flat South interconnection facilities described in Paragraph Nos. 44-50 to the Delgado Declaration that was submitted in support of the Caithness Defendants' Motion for Summary Judgment on October 6, 2014.

On October 17, 2014, the Caithness Defendants responded in writing to Mr. Wolff's letter. *See* Supplemental Declaration of Jeffrey Delgado ISO Caithness Defendants' Motion for Summary Determination ("Supp. Delgado Decl.") at Supp. Ex 1. In that letter, Caithness observed that Mr. Wolff was requesting "retail wheeling" or a "sham wholesale transaction," neither of which any Caithness Defendant has any legal obligation to accommodate under the express prohibition found in Section 212(h) of the Federal Power Act, 16 U.S.C. § 824k(h) (2000). Columbia Basin's attempt to rebut this letter in its response brief relies on mistaken assertions of relevant law and fact.

First, Columbia Basin revealingly describes Mr. Wolff's letter as a request "to deliver up to 4 MW of capacity to Columbia Basin's *at the Horseshoe Bend collector substation*." Columbia Basin response at 7-8 (emphasis supplied). However, Columbia Basin has no facilities "at the Horseshoe Bend collector substation," Delgado Declaration, Paragraph Nos. 46-49, and has no facilities at any other location on any of the three wind facilities, *id.*, Paragraph Nos. 32-25, 39-42, 73.[7] Thus, Columbia Basin cannot accept delivery of power "at the Horseshoe Bend collector substation." This necessarily means that Columbia Basin's letter of October 2, 2014, requests wheeling "directly to an ultimate consumer," i.e., Shepherds Flat South, and, hence,

[7] Other than an electrically isolated 120/240 volt line to Shepherds Flat South. Delgado Decl. Para. 73; *see also* Supp. Delgado Decl., Para. 3.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

falls within the retail-wheeling prohibition of Federal Power Act ("FPA") Section 212(h)(1). The statute is quoted on page 2 of the letter in Supp. Ex. 1 to the Supplemental Delgado Declaration.

Second, footnote 8 of Columbia Basin's response presumes that retail wheeling is only prohibited by FPA Section 212(h) if the request comes from a retail consumer, not from a retail power provider: "The Cooperative is not a power consumer and is requesting the wheeling of wholesale power." Besides being wrong in mischaracterizing the transaction as wholesale, this sentence is also wrong in its attempt to distinguish an intended retail provider from an intended retail consumer. FPA Section 212(h) recognizes no such distinction. It provides: "No order issued under this chapter shall be conditioned upon or require the transmission of electric energy … directly to an ultimate consumer." It does not matter, legally, whether the retail wheeling request was made by the intended provider or by the electric consumer. Both are prohibited.[8]

Third, Columbia Basin is correct that its only potential transmission-service remedy lies with the Federal Energy Regulatory Commission (FERC). *See* CBEC Response at 8 ("The Cooperative will pursue its transmission request at the Federal Energy Regulatory Commission if Caithness representatives continue to deny its request."). But the availability of this remedy would be contingent on Columbia Basin convincing FERC that it should order retail wheeling

[8] In this case, it would make no sense for Horseshoe Bend, as a consumer of station power, to request retail wheeling across its own generator tie line, to receive retail power from Columbia Basin at Slatt Substation. Doing so would be to its material economic disadvantage. Columbia Basin would charge it a discriminatorily high power rate and undoubtedly also demand reimbursement of any retail-wheeling charges it paid Horseshoe Bend, plus the BPA transmission charges to transmit power to Slatt Substation for delivery to the wind project. As noted in Paragraph No. 82 to the Delgado Declaration, calculation of the precise economic harm is not possible because Columbia Basin failed to identify to the Caithness Defendants what its charges would be, only that they would be segregated into a new rate class comprised only of one or more Caithness Defendants.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

in the face of the express prohibition of FPA Section 212(h). If any such FERC action were to be initiated, FERC would correct Columbia Basin's fundamental misunderstanding about the difference between permitted and prohibited wheeling requests under FPA Section 212(h).

Columbia Basin's other allegations about its expectations for retail wheeling similarly rely on mistaken application of the relevant law, *see* CBEC Response at 7-8, and were refuted by the Caithness response to Mr. Wolff's retail-wheeling request:

> Because of this statutory prohibition, FERC cannot order retail wheeling or sham wholesale transactions under the Federal Power Act. Dating back to its Order No. 888-A in 1997, FERC has ruled that an entity requesting retail wheeling or a sham wholesale transaction is not an "eligible customer" under the Open Access Transmission Tariff ("OATT"). Thus, even if he had met the other criteria of 18 C.F.R. §2.20(b), Mr. Wolff is incorrect in claiming that his letter would have triggered any obligation by Caithness or any of its affiliates to file an OATT under the FERC order cited in his letter.

Supp. Delgado Decl, Supp. Ex. 1 at 3 (emphasis in original).

4. Columbia Basin's speculative claim that it can provide "similar utility service" through its existing facilities is not supported by record evidence – and incorrect.

Columbia Basin asserts that it can provide "similar utility service" by using its existing facilities. CBEC Response at 8. There is no evidence to support this claim.

Moreover, Columbia Basin puts on no evidence to rebut the evidence submitted by the Caithness Defendants that expressly supports the contrary conclusion. Specifically, the record evidence is that the only CBEC line in the vicinity of any of the three facilities is the low-voltage radial line over which it serves the low-voltage (120/240 volt) needs of Shepherds Flat South, Delgado Decl. Para. 73,[9] Supp. Delgado Decl., Para. 3, and it is not electrically feasible to use that low-voltage connection to transmit power from or to the wind turbines or other high-voltage equipment. Delgado Decl. Para. 48; Supp. Delgado Decl.. Para. 3. That is the actual evidence.

[9] As noted in Paragraph 2 of the Supplemental Delgado Declaration, Paragraph 73 of the original Delgado Declaration mistakenly referred to a 120/240-kV load, rather than a 120/240 *volt* line. There is no dispute that this was simply a typographical error.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

To avoid summary judgment, it is not sufficient for a party's brief simply to disagree with the facts of record. Here, it was Columbia Basin's obligation to put its own facts into the record. It has utterly failed to do so. Thus, it does not meet even the most minimal requirements, either for prevailing on its own summary judgment or in resisting the cross-motions of the defendants.

5. Columbia Basin's claim that it can build new facilities to reach South Hurlburt's and Horseshoe Bend's wind resources has no support in fact.

As its "last resort," *see* CBEC Response at 9, Columbia Basin makes the following claim:

> If the Three Wind Projects prevent the Cooperative from exercising its rights to use the Projects' electric facilities, the Cooperative can build transmission and distribution facilities to serve the load located in its service territory. The Cooperative has made an initial interconnection request with BPA to interconnect its distribution system at the Slatt Substation. From the Slatt Substation the Cooperative can extend lines to serve the South Hurlburt Wind and Horseshoe Bend Wind projects' loads in the Cooperative's allocated territory. The actual delivery point and voltages for such deliveries would be dependent upon the service requests by those projects.

Given Columbia Basin's admission that it cannot deliver retail power at Slatt Substation (pp. 7 to 10, above) and the unavailability of retail wheeling (pp. 10 to 13, above), this "last resort" becomes Columbia Basin's "only resort." Columbia Basin effectively concedes that the only way it might supply back-up station power either to South Hurlburt or Horseshoe Bend would be through its siting, financing, constructing and interconnecting new, redundant, radial 230-kV lines from Slatt Substation to undetermined terminals somewhere in its claimed territory. The sole purpose of these costly, redundant new lines would be to supply back-up loads of only about 2 MW at 22 percent load factor. Delgado Declaration, Paragraph Nos. 61-62.

Merely stating this proposition is to observe its absurdity. In this regard, BPA may well have called Columbia Basin's bluff in (according to Columbia Basin's opening brief) informing PacifiCorp and the Caithness Defendants that "Columbia Basin would not be interested in being

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

in the transmission business," CBEC Summary Judgment Motion at 15. The point here is that we don't know – and neither does the Commission – *because Columbia Basin has introduced no evidence to support its positon*. That absence of evidence should end the analysis; speculation in a brief about Columbia Basin's intentions and abilities, unsupported by any testimony or documentary support, is not a sufficient basis to oppose summary judgment.

Even if there was any evidentiary support for Columbia Basin's "last resort," the Caithness Defendants make the following observations. First, plans for the design of such a line are not even yet on the drawing board, some three years after the wind resources commenced operation. This is made clear through Columbia Basin's response to the Caithness Defendants' Data Response 8(a):

> Data Request No. 8(a):
>
> 8. Regarding the Cooperative's allegations regarding its rights to provide electric service to South Hurlburt Wind, LLC, regarding the Shepherds Flat Central wind, regarding the Shepherds Flat Central wind project, as stated in its Complaint, paragraph no. 21:
>
> a. Please specify, by location and by voltage(s), the retail point(s) of delivery at which the Cooperative would provide such electrical service.
>
> Response to Data Request No. 8(a):
>
> Columbia Basin Electric Cooperative objects to this request as requesting information not maintained in the ordinary course of business or development of a special study, is not commensurate to the needs of this case, and is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Subject to such objection, Columbia Basin Electric Cooperative provides the following: Columbia Basin Electric Cooperative has not done this analysis as the analysis depends on the outcome of this proceeding.

Delgado Declaration Exhibit No. 8 at 5; *see id.* at Exhibit No. 8 at 26.

Second, before undertaking construction of any new 230-kV line through Gilliam and Morrow Counties, Columbia Basin would need to obtain a Site Certificate from the Oregon

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Energy Facility Siting Council ("EFSC"). EFSC jurisdiction extends, under ORS 469.300(11)(a)(C), to: "A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more to be constructed in more than one city or county in this state…" The distance from Slatt Substation to the Shepherds Flat South collector substation is over 16 miles. Even as the crow flies, the straight line distance is more than 10 miles. *See* Supp. Delgado Decl., Para. 5. Using either number, the distance exceeds EFSC's jurisdictional threshold of 10 miles.[10]

This new facility would qualify as a "nongenerating facility" under EFSC's rules, OAR 345-023-0005. That rule incorporates the definition of ORS 469.503(2)(e), which includes 230-kV transmission lines of more than 10 miles in length and spanning two counties. Under OAR 345-023-0005, Columbia Basin would have to demonstrate "the need for the facility" as follows:

> The applicant shall demonstrate need:
>
> (1) For electric transmission lines under the least-cost plan rule, OAR 345-023-0020(1), or the system reliability rule for transmission lines, OAR 345-023-0030, or by demonstrating that the transmission line is proposed to be located within a "National Interest Electric Transmission Corridor" designated by the U.S. Department of Energy under Section 216 of the Federal Power Act …

This lengthy explanation is necessary in order to join with BPA's asserted skepticism (according to Columbia Basin's prior briefing) in Columbia Basin's "last resort"

[10] Columbia Basin's brief claims, without any substantiation, that it might construct new transmission facilities at some voltage other than 230-kV. This deflection fails because Columbia Basin's argument rests on the following statement: "The Cooperative has made an initial interconnection request with BPA to interconnect its distribution system at the Slatt Substation." CBEC Response at 9. There are only two voltages available at the Slatt 500/230-kV Substation. The "high-side" is at 500-kV, the voltage of all BPA transmission lines in the vicinity. The "low-side" is at 230-kV, the lower voltage of the new 500/230-kV transformer funded by North Hurlburt, South Hurlburt and Horseshoe Bend as required under their respective BPA LGIAs. *See* Delgado Decl. Paras. 8, 15. This leaves Columbia Basin with only two choices: "to interconnect its distribution system at the Slatt Substation" at either the high-side voltage of 500-kV or the low-side voltage of 230-kV.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

transmission-construction alternative. Columbia Basin can point to no evidence to support that it intends to build the facilities that would be required here. Even if such evidence existed, Columbia Basin could not convince EFSC of the need for new, redundant 230-kV transmission facilities that would be used only to transmit, intermittently, only about 2 MW – out of a total, design 230-kV transfer capability of several hundred MW. *See* Delgado Decl. Paras. 60-62. Put differently, that line would go unloaded about 78 percent of the time.

Even assuming the line could obtain an EFSC site certificate, it would still have to be financed. Assuming such financing, Columbia Basin would have to contend with the fallout from its customers about the enormous cost for a utility with fewer than 4,000 customers. *See* Delgado Decl. Ex. 8 at 20. It seems inevitable that Columbia Basin would try to deflect such complaints by attempting to pass all the costs onto any load of any Caithness Defendant it managed to capture. In the absence of regulation as a "public utility" under ORS Chapter 757 and 758, there may be nothing to prevent Columbia Basin from doing so. Nothing, that is, except the reality that undertaking such a project would be both an economic and environmental waste. That reality is the likely reason that there is no evidence to support the speculation in Columbia Basin's briefing.[11] It is no surprise that the Columbia Basin General Manager is not on record confirming that Columbia Basin intends to build such facilities. Instead, his letter and supporting declaration make it clear that his request to BPA concerns an attempt at retail wheeling, not the construction of new facilities. It is only Columbia Basin's briefing that raises the issue of new facilities. Once again, however, unsupported speculation in a brief is not evidence.

[11] Columbia Basin claims it needs this new interconnection, in part, to serve a dairy farm. It would be amazing to learn that any dairy farm across Oregon is served at 230-kV, and Columbia Basin has provided no evidence to support such a presumption. The dairy farm may very well be simply a rhetorical prop, employed in the hope of showing that Columbia Basin is focused on more than just the Shepherds Flat Central and South loads.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

In any event, this is simply not what the Territorial Allocation Law contemplates or allows. The most straightforward resolution of Columbia Basin's speculations about how it might somehow and someday own or have access to 230-kV facilities is for the Commission to declare, based on Columbia Basin's own admissions and the law applicable to this case, that Columbia Basin does not provide "similar utility service" within the meaning of ORS 758.400.

E. Columbia Basin's assertions regarding duplicative facilities are not supported by evidence and are legally flawed.

Columbia Basin's argument that its provision of back up service to the wind resources of Horseshoe Bend and South Hurlburt would not require the duplication of electrical facilities is factually unsupported, and legally incorrect as well. Columbia Basin makes the statement that, "to the extent the Cooperative did construct facilities, they would not duplicate the Caithness Defendant[s'] equipment." CBEC Response at 14. The explanation Columbia Basin provides is that the Caithness Defendants' facilities were "not designed to simply serve the backup power needs of the Three Wind Projects." CBEC Response at 14. That is true, as it is undisputed that the wind resources' facilities are used to transmit power generated at the wind resources to the BPA transmission system. But it is also true that the facilities are used for bi-directional transmission. Again, that is what the evidence in fact shows: "Externally supplied station power flows inward along project 230-kV transmission facilities, reverse to the outflow of project output. Shepherds Flat North, Shepherds Flat Central, and Shepherds Flat South *were each designed to rely on this configuration.*" Delgado Decl. Para. 63 (emphasis added). Columbia Basin again has failed to introduce evidence in rebuttal.

Regardless, Columbia Basin's argument makes no sense. The undisputed fact is that the wind resources obtain their back up power through the use of the existing facilities. Any new facilities would, thus, be duplicative of the existing facilities.

Columbia Basin also misunderstands the Caithness Defendants' position about the holding of *Northwest Natural Gas Company v. PUC* concerning duplication of utility facilities.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Columbia Basin again attempts to apply the holding of *Northwest Natural* to this case. That's a challenge because the facts of *Northwest Natural* were entirely different. As addressed in the Caithness Defendants' prior briefing, the court in *Northwest Natural* considered a fact situation in which Northwest Natural's gas mains came first. Several unaffiliated customers of Northwest Natural then proposed to cease their respective retail purchases by bypassing the gas company's existing system, potentially leaving unamortized capital costs for recovery by Northwest Natural from the retail customers that would remain on its system. The bypass facilities had "no functional value except as connected or related to the bypass pipeline." 195 Or App at 550. The court remanded the case to the Commission (which had found no violation of the Territorial Allocation Law in the bypass), and the case settled before any subsequent administrative or judicial decision was issued.

This case is entirely different. Here, Columbia Basin has never supplied any back-up station power load. It has no facilities with which it might do so and, hence, no unrecovered capital costs that might be shifted to other customers. It is the Caithness Defendants' 230-kV facilities that have come first, constructed pursuant to exacting specifications in their respective BPA LGIAs and conditions in their respective EFSC Site Certificates.

None of the three wind resources have any transmission facilities explicitly constructed to transmit power into Columbia Basin's claimed territory because separate power-inflow facilities were deemed unnecessary by BPA, EFSC and the Caithness developers. Instead, as noted above, the same 230-kV facilities constructed to move all wind generation out of Columbia Basin's claimed territory were determined to be suitable to accommodate approximately 5 MW of back-up station power during intermittent intervals when the wind dies down. *See* Delgado Decl. Paras. 61-63. In other words, there are no bypass facilities like the ones of concern to the court in *Northwest Natural Gas Company v. PUC.* BPA and EFSC did not permit the Caithness Defendants to construct any station-power lines from Slatt Substation "in or into" Columbia Basin's claimed territory because the export lines of Shepherds Flat Central and Shepherds Flat

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

South, moving wind energy "out or out of" the resources could serve double duty without the need for any redundant facilities.

Only now does Columbia Basin, not any of the defendants, propose to build redundant transmission facilities under its "last resort" alternative, "in or into" its claimed territory for the purpose of bypassing existing 230-kV facilities required under each wind project's BPA LGIA and EFSC Site Certificate. Indeed, it would be Columbia Basin's "last resort" facilities that would have "no functional value except as connected or related to the bypass . . . ." *Compare* 195 Or App at 550. This case turns *Northwest Natural Gas* on its head.[12]

Ultimately, the decision about whether Columbia Basin could build its "last resort" bypass 230-kV transmission facilities will likely rest with BPA and EFSC. Columbia Basin presently has no means of accessing Slatt Substation. Before granting Columbia Basin's new Slatt-Substation interconnection request referenced in the Wolff Declaration, BPA would be required under the National Environmental Policy Act to conduct an environmental review – just as it did before granting the interconnection request for the Caithness wind resources. *See* Delgado Decl. Paras. 13-14. It will not escape BPA's attention that Columbia Basin's interconnection request relates to proposed 230-kV transmission facilities intended to go unloaded 78 percent of the time when the winds blow with sufficient force to provide for station power self-supply. The adverse environmental consequences of the new 230-kV transmission that BPA would "enable" by granting Columbia Basin's request could not be reconciled, under NEPA and other federal environmental laws, with this truly novel, yet indisputable, fact. As explained above, this issue must also be addressed by EFSC under its "need for nongenerating facility" standard.

[12] Columbia Basin also purports to distinguish between duplication of utility facilities versus duplication of non-utility facilities. CBEC Response at 15. It should be noted that North Hurlburt, South Hurlburt and Horseshoe Bend are each a "utility" under Part II of the Federal Power Act. They are simply not "public utilities" under ORS 757.005. *See* ORS 757.005(1)(C)((iii).

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

III. THERE IS NO ADMISSIBLE EVIDENCE TO SUPPORT COLUMBIA BASIN'S FAILURE TO RAISE ITS COMPLAINT IN A TIMELY MANNER.

Columbia Basin's argument against laches turns on the unsupported assertion that it "reasonably relied" on CSF's 2009 Strategic Investment Program Agreement ("SIP") with Morrow County to assume it would serve the wind project's station service requirements. CBEC Response at 22. Columbia Basin's motion further asserts that Columbia Basin was "aware of the terms of the SIP . . . and thought that Agreement required the Caithness Defendants to request service," CBEC Response at 24, and that when it met with Caithness Defendant representatives in 2010, it was "le[d] to believe it would be receiving a service request" for back-up station service. *Id*.

Once again, however, there is no *evidentiary* support for these assertions. No witness for Columbia Basin has gone on record to confirm Columbia Basin's supposed reliance or belief of any of the claimed "facts." It is simply speculation and argument made in a brief. The lack of evidence makes Columbia Basin's argument a non-starter.

These unsupported assertions are all the more defective because they contradict the evidence that is, in fact, in the record. The Delgado Declaration (Paragraph Nos. 66, 68 and 72) recounts how Caithness approached both Columbia Basin and PacifiCorp about back-up station power in 2009. In meeting with Columbia Basin, Caithness left with the following information:

- "Based on the meeting with CBEC, the Caithness Business Entities understood that CBEC had no 230-kV transmission facilities on its system and no high-voltage transmission lines of any voltage in the vicinity of either Shepherds Flat Central or Shepherds Flat South." The only CBEC line in the vicinity of any of the three facilities is the low-voltage radial line over which it serves the low-voltage (120/240 volt) needs of the Shepherds Flat South facilities. [Delgado Declaration, Para. 73; Suppl. Delgado Decl. Paras. 2-3]

- "Also based on the meeting described in Paragraph No. 72, the Caithness Business Entities understood that CBEC hoped to deliver station power to Shepherds Flat Central and Shepherds Flat South within Pacific Power's Oregon retail service territory, at Slatt Substation. However, it was the Caithness Business Entities' understanding that CBEC did not have any

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

> agreement with Pacific Power by which CBEC might lawfully make such deliveries. . . ." [Delgado Decl. Para. 75.]
>
> - "Also based on the meeting described in Paragraph No. 72, the Caithness Business Entities understood that CBEC did not intend to serve any such station-power load at any of its published rates, but would instead insist on applying a higher rate that it had yet to develop. . . . CBEC would discriminate against Shepherds Flat South and Shepherds Flat Central by singling them out for a much higher rate, based on the 'Tier 2' wholesale rate then under development by BPA for its preference-power customers, such as CBEC. On top of this Tier 2 CBEC would also intend to add a mark-up and other unspecified charges." [*Id*., Para. 75.]

It is counter-intuitive to suggest that this information-exchange could have left either participant with any expectation of a future business relationship. If Columbia Basin had any such expectation, it failed to thereafter: add any 230-kV transmission facilities to its system, secure agreement with Pacific Power under ORS 758.410, or either develop a new, nondiscriminatory rate or simply offer to apply its generally applicable rates. Moreover, the SIP Agreement with Morrow County cannot be read to require the Caithness Defendants to buy back-up power from Columbia Basin. Although Caithness renewed its inquiry to Columbia Basin in 2012, *see* Delgado Declaration, Para. 83, nothing had changed in the meantime.

Finally, Columbia Basin's claim of reliance extends to all back-up power loads it seeks to capture. Part of that load, for Shepherds Flat Central (including Shepherds Flat Central's collector substation), is not even in Morrow County. *See* Delgado Decl. Ex. 8.

Columbia Basin has put on no evidence to rebut that Columbia Basin's stated position *in 2010* was that it intended to seek a declaratory ruling from the Commission regarding the station service issue, as recounted in the CSF letter of July 31, 2012. *See* Delgado Decl. Ex. 11 at 2. And Columbia Basin cannot seriously argue (and does not, through any evidence) that it in fact lacked sufficient information to bring a complaint during the time in question. According to Columbia Basin's then-manager, it "never received a request for station service" until July 2012. Delgado Decl. Ex. 11 at 4. The three wind resources became operational in 2011 and early 2012. *See* Delgado Decl. ¶ 56. Columbia Basin's position would require this Commission to accept –

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

again, based on no evidence – that despite the fact that the wind resources were constructed *and commenced operation* during this time, Columbia Basin lacked knowledge that the wind resources were using station power obtained through means other than Columbia Basin. No Columbia Basin representative has gone on record supporting that position.

Columbia Basin's response brief is further notable in that it provides no response to the untimeliness argument by the Caithness Defendants related to the EFSC and BPA proceedings. [13] Accordingly, there is no factual dispute that Columbia Basin, despite being on notice of both the EFSC siting process and the BPA's interconnection process and having an opportunity to comment, failed to do so. There is no dispute that Columbia Basin stood silently by when the point of interconnection for all three wind resources was designated in PacifiCorp's territory. There is no dispute that Columbia Basin did not object when the design for the facilities was developed and approved. Nor is there any dispute about the extraordinary costs the Caithness Defendants' invested in this process, only now to have Columbia Basin raise an objection.

IV. EVEN IF COLUMBIA BASIN HAD MADE A COLORABLE CASE, THE COMMISSION STILL LACKS AUTHORITY TO ISSUE ANY INJUNCTION.

In filing the complaint that led to this proceeding, Columbia Basin had its choice of two possible forums. It could have filed its complaint in Oregon circuit court under ORS 758.465, which expressly allows that "the aggrieved person or the commission may file an action in the circuit court for any county in which is located some or all of the allocated territory allegedly involved in said breach or invasion, for an injunction against said alleged breach or invasion." This statute authorizes a court action either by a private party or by the Commission, expressly identifying the circuit courts as *the* proper forum for injunctive relief. Columbia Basin chose

[13] Columbia Basin's response does not address the significance of the LGIA agreements at all. And in asserting that the EFSC site certificates are irrelevant, Columbia Basin fails to acknowledge their significance to this case and the relief Columbia Basin seeks. *See* Caithness Defendants' Motion for Summary Determination at 30-31 and Caithness Defendants' Response at 19-21.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

instead to file its complaint with the Commission, which lacks the authority to issue injunctions in its own right. It would make no sense to grant the Commission the authority to seek injunctive relief through court proceedings if it already had that authority on its own. Having chosen the Commission as its forum, Columbia Basin cannot now infer the existence of some equitable power for the Commission that is expressly reserved for the trial court. *See* Columbia Basin Response at 24-26.

In an attempt to rehabilitate its desire for injunctive relief in this proceeding, Columbia Basin quotes from ORS 756.040(1) and (2). But it again misses the salient point from the language it quotes. ORS 756.040(1) is a consumer-protection statute, requiring that:

> The commission shall represent *the customers* of any public utility or telecommunications utility *and the public generally* in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office *to protect such customers, and the public generally,* from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. [emphases added]

This statute requires the Commission to protect the Caithness Defendants as part of "the public generally." If any sustainable inference about injunctive powers were evident in this provision, or in ORS 756.040(2) (which concerns the Commission's authority over public utilities, which the Caithness Defendants indisputably are not), such power could only be exercised on behalf of "customers" or "the public generally," not on behalf of Columbia Basin. However, no such inference is warranted.

Columbia Basin also cites *Pacific Northwest Bell Telephone Co.* v. *Katz,* 116 Or App 302 (1992), but does so selectively. That case stands solely for the proposition that the Commission has very broad authority when it comes to ordering the refund of excessive utility

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

rates and charges – a role basic and fundamental to any public utility commission. What Columbia Basin overlooks in its selective quotation is the following passage of that opinion:

> Utility regulation, including ratemaking, is a legislative function, and the legislature has granted broad power to PUC to perform its delegated function. It is well settled that an agency has such implied powers as are necessary to enable the agency to carry out the powers expressly granted to it. However,
>
> > "[T]he powers of a regulatory agency or agent are not . . . without limits. Like the legislature itself, a regulatory agency is bound to exercise its authority within the confines of both the state and federal constitutions. An agency's authority may be further limited by the legislature itself; its power arises from and cannot go beyond that expressly conferred upon it."

116 Or App at 310 (internal footnote and citations omitted; internal quotes in original); *see also Gearhart v. Oregon Public Utility Comm'n*, __ Or ___, 2014 WL 4924311 at *9 (Oct. 2, 2014) ("The powers and duties of the PUC, like those of other executive agencies, are limited to those expressly authorized or necessarily implied by statute.").

As noted above, the only "expressly conferred" power to grant any injunctive relief is the power granted to circuit courts under ORS 758.465. An alleged power to grant injunctive relief has not been "expressly conferred upon" the Commission by the Legislature. It cannot go beyond its expressly conferred powers to grant the relief Columbia Basin has mistakenly sought in the wrong forum, no matter how "strongly" Columbia Basin disagrees. CBEC Response at 26.

V. CONCLUSION

Columbia Basin used the threat of this litigation in an attempt to induce the defendants to execute, against their business interests, an agreement under ORS 758.410 that would provide Columbia Basin with a legal basis to supply back-up station power to Shepherds Flat Central and South for delivery within PacifiCorp's service territory, at Slatt Substation. This is evident in Columbia Basin's largely improper discussion of the settlement talks that failed to produce such an agreement.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

During the 14 months since it filed its complaint in August of 2013, Columbia Basin has engaged in multiple rounds of discovery. Yet, its case remains based on speculations and factoids, e.g., the ownership of vehicles used in the maintenance of these wind resources and an excerpt from the cover letter to a FERC filing. Columbia Basin's legal position is unsupported, and its many admissions of record support the positions of the defendants.

Regarding the Caithness Defendants' and Columbia Basin's cross-motions for summary judgment now before the Commission, undisputed record facts, admissions and relevant law require the following conclusions of law and findings of fact:

FINDING AND CONCLUSION NO. 1:

The Caithness Defendants Are Exempt under ORS 758.450(4)(c).

Facts: North Hurlburt, South Hurlburt and Horseshoe Bend are each a company in the sole business of providing power from wind resources to its customer. Delgado Declaration, Para. 3-6. CSF is a company in the sole business of providing power from wind resources to customers through these three wholly owned subsidiaries. *Id*., Para. 7. These facts are undisputed.

Law: ORS 758.450(4)(c) expressly exempts from the Territorial Allocation Law "any corporation, company, individual or association of individuals providing … power … from wind resources to any number of customers." The plain language of this statute does not limit the exemption only to certain activities; it is the "companies" themselves that are exempted. Legislative history of ORS 758.450(4)(c) supports that the Legislature created this exemption to give a "lift" to wind-energy development in Oregon. Green Declaration ISO Caithness Defendants' Motion for Summary Determination, Ex. 1 at 2.

FINDING AND CONCLUSION NO. 2:

The Caithness Defendants' Acquisition of Back-up Station Power at Slatt Substation for Use Solely in Their Own Individual Wind Resources is Perfectly Lawful.

Facts: By Columbia Basin's admission on page 8 of its response brief, it acknowledges that it cannot lawfully sell or deliver retail power to any Caithness Defendant or any other desired retail customer at Slatt Substation without first securing an agreement with PacifiCorp under ORS 758.410. *See* discussion above at 7-9. No such agreement exists. Declaration of Chuck Phinney ISO PacifiCorp's Motion for Summary Determination Para. 19. The point of interconnection for all three wind resources is at Slatt Substation. *See* Delgado Decl. Paras. 18, 20, 22.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Law: A necessary corollary to this Columbia Basin admission is that the manner in which each of the three wind resources acquires back-up station power in PacifiCorp's territory, at 230-kV at Slatt Substation, for use in their own wind resources, is perfectly lawful and does not violate the Territorial Allocation Law.

FINDING AND CONCLUSION NO. 3:

Columbia Basin's 1961 Territorial Allocation Order Does Not Even Apply to this Case.

Facts: Columbia Basin did not have in 1961, and does not have now, any 230-kV facilities anywhere on its system. Amended Complaint Ex. 1; Delgado Paras. 73-74.

Law: The 1961 territorial-allocation order on which Columbia Basin rests its case is voltage-specific and the highest voltage mentioned is only 69 kV. That order reflects that the applicant, Columbia Basin, never even requested coverage for any higher voltage. The 1961 order is tentative, and reserves judgment about whether Columbia Basin or some other utility would be in a better economic position to serve large customers or higher voltages. Nothing in the 1961 order warrants the conclusion that it even applies to service at 230-kV, and – regardless of what the Territorial Allocation Law might theoretically allow – Columbia Basin has no rights beyond what this 1961 order provides. The interpretation of the Commission's own orders and precedents is a matter of law; the only requirement is that such interpretations be reasonable.

FINDING AND CONCLUSION NO. 4:

ORS 758.450 Cannot Apply
Because Columbia Basin Provides No "Similar Utility Service."

Facts: Columbia Basin does not, *and cannot*, provide "similar utility service" within the definitional exclusion of "utility service" under ORS 758.400(3):

- Columbia Basin cannot deliver power at 230-kV within its claimed territory, admitting that: "Columbia Basin Electric Cooperative's system does not include any 230 kV lines, substations, or other facilities at this time." Delgado Decl. Ex. No. 8 at 2.
- Columbia Basin has not developed a plan to add any 230-kV transmission facility within its claimed territory. "Columbia Basin Electric Cooperative has not done this analysis as the analysis depends on the outcome of this proceeding." Delgado Decl. Ex. No. 8 at 5, 26. If Columbia Basin ever decided to build such a line, its length would be in excess of 10 miles. Supp. Delgado Decl. Para. 5.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

- Columbia Basin admits that it cannot lawfully deliver retail power at Slatt Substation without an ORS 758.410 agreement with PacifiCorp. *See* Finding and Conclusion No. 2 above.
- No Caithness Defendant wishes to provide retail wheeling. Doing so would simply allow Columbia Basin to increase its costs with no corresponding benefit. *See* Supp. Delgado Decl, Supp. Ex 1.

Law: ORS 758.450 deals with "utility service," as defined in ORS 758.400(3). That definition in ORS 758.400(3) contains an express exclusion: "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*." (Emphasis supplied.)

FPA Section 212(h), 16 U.S.C. § 824k(h) (2000), is entitled "prohibition on mandatory retail wheeling and sham wholesale transactions." Columbia Basin cannot use the FPA to compel any Caithness Defendant to provide retail wheeling. This conclusion of law could only be decided by FERC in the event Columbia Basin pursues its retail-wheeling claim further. Columbia Basin has no basis for seeking retail wheeling before the Commission.

EFSC jurisdiction extends, under ORS 469.300(11)(a)(C), to: "A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more to be constructed in more than one city or county in this state…"

FINDING AND CONCLUSION NO. 5:

Even Without Regard to Finding and Conclusion No. 4 Above, There Has Been No Offer, Construction or Extension into Columbia Basin's Claimed Territory.

Facts: No line has ever been constructed by any of the defendants for the purpose of offering, constructing or extending utility service into Columbia Basin's claimed territory because BPA and EFSC did not permit the Caithness Defendants to do so. Instead, the facilities are designed to use the same 230-kV lines used to move wind energy output to the BPA Transmission system. Columbia Basin concedes this on page 14 of its response brief. *See* discussion of this concession above, at 5 n.3 and 18. The only way such offer, construction or extension might occur would be through Columbia Basin's own construction of duplicative 230-kV facilities.

Law: ORS 758.450(2) provides in part: "no other person shall offer, construct or extend utility service in or into an allocated territory." There can be no violation of ORS 758.450 by any of the defendants because this statutory factual predicate has not been met.

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

***

Any of these five Findings and Conclusions, standing alone, entitles the Caithness Defendants to prevail on their summary judgment motion. In contrast, Columbia Basin must overcome *all five* conclusions and findings in order to survive the cross-motion. Yet, aside from its far-fetched hope to overcome the express retail-wheeling prohibition of FPA Section 212(h) before FERC its own data responses (now of record) and its admissions on brief defeat its theory.

However, even if Columbia Basin had presented a colorable case – which it has not – it would still have to survive the following two, additional Findings and Conclusions:

FINDING AND CONCLUSION NO. 6:

If Columbia Basin Were to Serve Non-Members Anywhere Within an Exclusive Service Territory, It Thereby Subjects Itself to Regulation by the Commission as a "Public Utility."

Facts: "Neither Horseshoe Bend nor South Hurlburt desire to become, and are actively opposed in becoming, a 'member' of CBEC regarding any back-up, station power service to either of their facilities." Delgado Declaration, Para. 84. In response to Caithness Defendants' Data Request No. 14, Columbia Basin admitted that it seeks to capture the back-up loads of these two wind generators "[t]o ensure the integrity of its exclusive service territory." *See* Cameron Declaration, Exhibit No.1.

Law: Electric cooperatives are excluded from the definition of "public utility" under ORS 757.005, and exempted from Commission public-utility regulation, only so long as they limit their service to their "members." However, under Oregon Attorney General opinions that are binding on the Commission, a cooperative that serves non-members across an exclusive service territory forfeits its ORS 757.005 exclusion and becomes subject to regulation by the Commission as a "public utility." *See* discussion in the Caithness Defendants' Response at 22-25.

FINDING AND CONCLUSION NO. 7:

This Commission Lacks the Power to Grant any Injunctive Relief.

Facts: Columbia Basin's complaint includes a request for injunctive relief.

Law: If Columbia Basin is seeking injunctive relief, it has chosen the wrong forum. ORS 758.465 grants the power of injunctive relief only to circuit courts, not the Commission. "An agency's authority may be further limited by the legislature itself; its power arises from and cannot go beyond that expressly conferred upon

DWT 25075234v5 0084118-000016

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

> it." *Pacific Northwest Bell Telephone Co.* v. *Katz*, 116 Or App at 310 (internal quotation marks and citations omitted).

The Commission need not take up either Finding and Conclusion No. 6 or No. 7 unless it rejects the other five Findings and Conclusions.

Based on the undisputed facts of record, Columbia Basin's many admissions and the applicable law, it is time for the Commission to put an end to this complaint proceeding. For all the foregoing reasons, the Caithness Defendants respectfully request this Commission grant their motion for summary determination on all of Columbia Basin's claims.

DATED this 28th day of October, 2014.

DAVIS WRIGHT TREMAINE LLP

By: /s/ John A. Cameron

John A. Cameron, OSB #92873
Derek D. Green, OSB #042960
Tel: 503-241-2300
Fax: 503-778-5299
Email: johncameron@dwt.com
Email: derekgreen@dwt.com
Of Attorneys for Caithness Defendants

CERTIFICATE OF FILING AND SERVICE

Docket No. UM 1670

I hereby certify that on the date given below the original and five true and correct copies of the foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION OF DEFENDANTS NORTH HURLBURT WIND, LLC, SOUTH HURLBURT WIND, LLC, HORSESHOE BEND WIND, LLC AND CAITHNESS SHEPHERDS FLAT, LLC** were sent by email and first-class mail to:

Public Utility Commission of Oregon
3930 Fairview Industrial Drive SE
PO Box 1088
Salem, OR 97308-1088
E-mail: puc.filingcenter@state.or.us

On the same date, a true and correct copy of the foregoing document was sent to the following parties at the contact information as indicated on the attached Service List as follows:

☒ by electronic mail on the date set forth below; and/or

☐ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said party's last-known address and deposited in the U.S. Mail at Portland, Oregon on the date set forth below.

DATED this 28th day of October, 2014.

DAVIS WRIGHT TREMAINE LLP

By: /s/ John A. Cameron
John A. Cameron, OSB #92873
Derek D. Green, OSB #042960
Email: johncameron@dwt.com
Email: derekgreen@dwt.com

Of Attorneys for Defendants North Hurlburt Wind, LLC, South Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC and Caithness Shepherds Flat, LLC

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

UM 1670
SERVICE LIST

W = waives paper service

W
Thomas Wolff, Manager
COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.
P O Box 398
Heppner, OR 97836-0398
Email: tommyw@columbiabasin.cc

W
Dustin Till, Senior Counsel
PACIFIC POWER
825 NE Multnomah, Suite 1800
Portland, OR 97232
Email: Dustin.Till@PacifiCorp.com

W
Charles N. Fadeley
Attorney at Law
P. O. Box 1408
Sisters, OR 97759
Email: fade@bendbroadband.com

W
Oregon Dockets
Pacificorp, dba Pacific Power
825 NE Multnomah St., Suite 2000
Portland, OR 97232
Email: oregondockets@pacificorp.com

W
Raymond S. Kindley
KINDLEY LAW, PC
P O Box 569
West Linn, OR 97068
Email: kindleylaw@comcast.net

W
Ted Case, Executive Director
OREGON RURAL ELECTRIC
COOPERATIVE ASSOCIATION
698 12th Street SE, Suite 210
Salem, OR 97301
Email: tcase@oreca.org

W
Thomas M. Grim
Tommy A. Brooks
CABLE HUSTON
1001 SW Fifth Ave., Suite 2000
Portland, OR 97204-1136
Email: tgrim@cablehuston.com
tbrooks@cablehuston.com

W
Steve Eldrige
Umatilla Electric Cooperative Assn.
P O Box 1148
Hermiston, OR 97838
Email: steve.eldrige@ueinet.com

BEFORE THE

PUBLIC UTILITY COMMISION OF OREGON

COLUMBIA BASIN ELECTRIC COOPERATIVE, INC., Complainant, v. PACIFICORP, dba Pacific Power, NORTH HURLBURT WIND, LLC, SOUTH HURLBURT WIND, LLC, HORSESHOE BEND WIND, LLC, and CAITHNESS SHEPHERDS FLAT, LLC, Defendants.	Case No. UM1670 SUPPLEMENTAL DECLARATION OF JEFFREY DELGADO IN SUPPORT OF CAITHNESS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Jeffrey Delgado, under penalty of perjury under the laws of the State of Oregon, declare as follows:

1. I previously submitted a declaration in this matter in support of the Caithness Defendants' Motion for Summary Determination (the "Delgado Declaration"). The Delgado Declaration addresses my qualifications and background.

2. The Delgado Declaration contains a typographical error in Paragraph 73. It states: "The only CBEC line in the vicinity of any of the three facilities is the low-voltage radial line over which it serves the low-voltage, 120/240-kV load of the Shepherds Flat South maintenance facility. *See* Paragraph No. 48 above." (emphasis added). The underlined reference to "low-voltage, 120/240-kV load" was intended to state "low-voltage, 120/240 volt load," as reflected by the reference to a "low-voltage" load and the reference to Paragraph No. 48, which correctly identifies the service provided by CBEC at Shepherds Flat South maintenance facility

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

as "120/240 volt service (household voltage) by which CBEC provides low-voltage retail power."

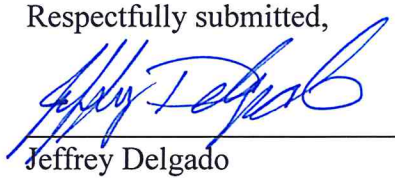
3. As stated in my previously submitted Delgado Declaration, CBEC provides low-voltage (120/240-volt) retail power to the Shepherds Flat South maintenance building. *See* Delgado Declaration Paragraph No. 48. It is my updated understanding that the low-voltage line servicing this maintenance building continues on to the collector substation, where it services low-voltage equipment and remains electrically isolated from all high-voltage equipment. As stated previously, it is not electrically feasible to use CBEC's low-voltage 120/240 volt connection to transmit power from, or to, the wind turbines and other high-voltage equipment comprising Shepherds Flat South. *See* Delgado Declaration Paragraph No. 48.

4. Attached hereto as Supp. Ex. 1 is a true and correct copy of an October 17, 2014 letter sent by our counsel in this case to Columbia Basin Electric Cooperative's Manager, Thomas Wolff.

5. The distance from Slatt Substation to the Shepherds Flat South collector substation over the current transmission lines is over sixteen and a half miles. Even as the crow flies, the straight line distance is over ten miles (and is closer to eleven miles).

DATED this 28th day of October, 2014.

Respectfully submitted,



Jeffrey Delgado

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, Oregon 97201-5610
(503) 241-2300 main · (503) 778-5299 fax

Davis Wright Tremaine LLP

October 17, 2014

Via Email and U.S. Mail

Raymond S. Kindley
Kindley Law PC
P O Box 569
West Linn, OR 97068

Re: CBEC Request for Retail Wheeling; OPUC Docket UM 1670

Dear Ray:

This is a response to a letter addressed to Jeff Delgado, Caithness Corporation ("Caithness"), by Columbia Basin Electric Cooperative ("CBEC") General Manager Thomas Wolff, dated October 2, 2014. I am responding because Mr. Wolff's letter relates to a complaint proceeding brought by CBEC before the Oregon Public Utility Commission, Docket UM1670, in which you and I are opposing counsel. Like Mr. Wolff's letter, the complaint in Docket UM1670 concerns CBEC's effort to impose a retail power sale relationship on a Caithness affiliate, Horseshoe Bend Wind, LLC, regarding the back-up station power requirement of the "Shepherds Flat South" wind energy facility – an end-use that CBEC has never supplied. Information in the record in Docket UM1670 indicates that if CBEC were to prevail in forcing a retail relationship on Caithness affiliates, it could increase their ongoing costs without any corresponding benefit.

Mr. Wolff's letter fails to satisfy the minimum criteria established by the Federal Energy Regulatory Commission ("FERC") in 18 C.F.R. §2.20(b) (2014) for a "good faith request for transmission service" and, thus, imposes no obligation on the addressee even to respond. However, Caithness provides the following information regarding two specific elements of a good faith request, 18 C.F.R. §2.20(b)(2) and §2.20(b)(3), which it asks your client to consider.

On page 1 of his letter, Mr. Wolff states: "The Cooperative requests to reserve up to four megawatt (4 MW) of capacity for point-to-point service on the transmission facilities between the Slatt Substation and the Horseshoe Bend Wind, LLC collector substation. The Cooperative would like to reserve that amount of transmission capacity as soon as possible to serve loads located in the Cooperative's service area." The transmission facilities mentioned in Mr. Wolff's request comprise a generator tie line -- an "interconnection customer interconnection facility" in the parlance of the Large Generator Interconnection Agreement ("LGIA") between Horseshoe Bend Wind, LLC, as owner of Shepherds Flat South, and the wind facility's transmission provider, Bonneville Power Administration. This generator tie line is radial, originating at BPA's Slatt

Substation and terminating in the middle of a wheat field where it connects to the Shepherds Flat South wind facility's electrical switchyard ("Gen-Tie"), and to no one else. There are no other 230-kV lines within many miles of that Gen-Tie, excepting only the two other generator tie lines owned by two other Caithness wind-energy affiliates. CBEC itself has no 230-kV facility anywhere on its system, or any facility of any voltage connected to the Shepherds Flat South generator tie line.

The back-up station power requirement of Shepherds Flat South is the only load that can be supplied at the Gen-Tie, without significant prior modifications. However, Mr. Wolff's letter does not mention any such modifications. Although Mr. Wolff's letter does not identify Shepherds Flat South by name as the "load" CBEC intends to serve, the facts related above and the contemporaneous pleading you filed on October 6, 2014, in Docket UM1670 make it clear that Mr. Wolff is requesting transmission service directly to Shepherds Flat South, i.e., retail wheeling.

Section 212(h) of the Federal Power Act, 16 U.S.C. § 824k(h) (2000), is entitled "prohibition on mandatory retail wheeling and sham wholesale transactions." It provides:

> No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:
>
> **(1)** directly to an ultimate consumer, or
>
> **(2)** to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:
>
> **(A)** such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C. 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and
>
> **(B)** such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer. [Emphasis supplied.][1]

[1] Section 212(h) concludes with a proviso that is not relevant.

Because of this statutory prohibition, FERC cannot order retail wheeling or sham wholesale transactions under the Federal Power Act. Dating back to its Order No. 888-A in 1997, FERC has ruled that an entity requesting retail wheeling or a sham wholesale transaction is not an "eligible customer" under the Open Access Transmission Tariff ("OATT"). Thus, even if he had met the other criteria of 18 C.F.R. §2.20(b), Mr. Wolff is incorrect in claiming that his letter would have triggered any obligation by Caithness or any of its affiliates to file an OATT under the FERC order cited in his letter.

If Mr. Wolff has any facts that might shed further light on his letter, he is welcome to provide them for Mr. Delgado's consideration. Please forward this response to your client.

Sincerely,

John A. Cameron

JAC:smp

cc. Mr. Jeffrey Delgado

CERTIFICATE OF FILING AND SERVICE

Docket No. UM 1670

I hereby certify that on the date given below the original and five true and correct copies of the foregoing **SUPPLEMENTAL DECLARATION OF JEFFREY DELGADO IN SUPPORT OF CAITHNESS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** were sent by email and first-class mail to:

Public Utility Commission of Oregon
3930 Fairview Industrial Drive SE
PO Box 1088
Salem, OR 97308-1088
E-mail: puc.filingcenter@state.or.us

On the same date, a true and correct copy of the foregoing document was sent to the following parties by electronic mail as indicated on the attached Service List.

DATED this 28th day of October, 2014.

DAVIS WRIGHT TREMAINE LLP

By: /s/ John A. Cameron
John A. Cameron, OSB #92873
Derek D. Green, OSB #042960
1300 SW Fifth Avenue, Suite 2400
Portland OR 97201
Tel: 503-241-2300
Fax: 503-778-5299
Email: johncameron@dwt.com
Email: derekgreen@dwt.com

Of Attorneys for Defendants North Hurlburt Wind, LLC, South Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC and Caithness Shepherds Flat, LLC

UM 1670
SERVICE LIST

W = waives paper service

W
Thomas Wolff, Manager
COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.
P O Box 398
Heppner, OR 97836-0398
Email: tommyw@columbiabasin.cc

W
Dustin Till, Senior Counsel
PACIFIC POWER
825 NE Multnomah, Suite 1800
Portland, OR 97232
Email: Dustin.Till@PacifiCorp.com

W
Charles N. Fadeley
Attorney at Law
P. O. Box 1408
Sisters, OR 97759
Email: fade@bendbroadband.com

W
Oregon Dockets
Pacificorp, dba Pacific Power
825 NE Multnomah St., Suite 2000
Portland, OR 97232
Email: oregondockets@pacificorp.com

W
Raymond S. Kindley
KINDLEY LAW, PC
P O Box 569
West Linn, OR 97068
Email: kindleylaw@comcast.net

W
Ted Case, Executive Director
OREGON RURAL ELECTRIC
COOPERATIVE ASSOCIATION
698 12th Street SE, Suite 210
Salem, OR 97301
Email: tcase@oreca.org

W
Thomas M. Grim
Tommy A. Brooks
CABLE HUSTON
1001 SW Fifth Ave., Suite 2000
Portland, OR 97204-1136
Email: tgrim@cablehuston.com
tbrooks@cablehuston.com

W
Steve Eldrige
Umatilla Electric Cooperative Assn.
P O Box 1148
Hermiston, OR 97838
Email: steve.eldrige@ueinet.com