

October 28, 2014

***VIA ELECTRONIC FILING
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Public Utility Commission of Oregon
3930 Fairview Industrial Dr. S.E.
Salem, OR 97302-1166

Attn: Filing Center

RE: UM 1670—PacifiCorp's Reply in Support of Motion for Summary Judgment

PacifiCorp d/b/a Pacific Power submits for filing an original and five copies of the reply in the above-referenced proceeding.

It is respectfully requested that all formal data requests to the Company regarding this filing be addressed to the following:

By e-mail (preferred): datarequest@pacificorp.com

By regular mail: Data Request Response Center
PacifiCorp
825 NE Multnomah, Suite 2000
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Please direct any informal inquiries to Natasha Siores, Director of Regulatory Affairs & Revenue Requirement, at (503) 813-6583.

Sincerely,



R. Bryce Dalley
Vice President, Regulation

Enclosures

Cc: UM 1670 service list

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of PacifiCorp's Reply in Support of Motion for Summary Judgment on the parties listed below via electronic mail and/or US mail in compliance with OAR 860-001-0180.

UM 1670

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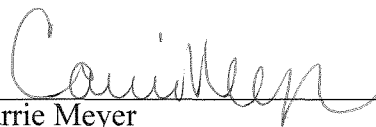
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Dated this 28th of October 2014.



Carrie Meyer
Supervisor, Regulatory Operations

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1670

In the Matter of

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.,

Complainant;

v.

PACIFICORP d/b/a PACIFIC POWER,
NORTH HURLBURT WIND, LLC.,
SOUTH HURLBURT WIND, LLC.,
HORSESHOE BEND WIND, LLC., and
CAITHNESS SHEPHERDS FLAT, LLC.

Defendants.

DEFENDANT PACIFICORP'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

In its Motion for Summary Judgment, Defendant PacifiCorp d/b/a Pacific Power (PacifiCorp) demonstrated that it provides “utility service” within its owner service territory at Slatt Substation and that it has not violated ORS 758.450(2). The burden then shifted to Complainant Columbia Basin Electric Cooperative (the Cooperative) to show a genuine dispute of material fact via admissible evidence. The Cooperative completely failed to satisfy this bedrock standard. The only admissible evidence in the record demonstrates that:

1. Slatt Substation is located in PacifiCorp's exclusive service territory;¹
 2. PacifiCorp delivers high-voltage station power to consumers at Slatt Substation;²
- and

¹ Declaration of Chuck Phinney (Oct. 6, 2014) (Phinney Dec.) at ¶ 7; Declaration of Jeffery Delgado (Oct. 6, 2014) (Delgado Dec.) at ¶ 25.

3. The consumptive use of power by each of the three Shepherds Flat wind resources begins upon delivery at Slatt Substation.³

The facts demonstrating that PacifiCorp’s “utility service” begins and ends at Slatt Substation remain unrebutted. In its response brief, the Cooperative did not submit affidavits, declarations, or any other admissible evidence demonstrating that “utility service” occurs at a point other than Slatt Substation. Similarly, the Cooperative failed to submit admissible evidence supporting its allegation that it can serve any portion of the Shepherds Flat station power load via existing facilities or newly constructed facilities. The Cooperative’s speculation cannot overcome uncontroverted record evidence.

The Cooperative has unexpectedly conceded that “utility service” occurs at Slatt Substation. The Cooperative argues that it could also serve a portion of the Shepherds Flat station power load by delivering power at Slatt Substation (within PacifiCorp’s service territory). The Cooperative correctly acknowledges that it would need a territorial allocation agreement to deliver power to customers at Slatt Substation because such deliveries would constitute “utility service” at Slatt Substation, which is undisputedly in PacifiCorp’s exclusive service territory. Without a territorial allocation agreement, the Cooperative would be doing the very thing it alleges PacifiCorp is doing—providing “utility service” in another utility’s allocated territory. The Cooperative can no longer credibly argue that PacifiCorp’s “utility service” is occurring within the Cooperative’s service territory when it also takes the position that it would be providing “utility service” if it delivered station power to consumers at Slatt Substation. Simply put, the Cooperative cannot have it both ways.

² Phinney Dec. at ¶¶ 12 and Ex. B (Article I, definition of “Point of Delivery”).

³ Delgado Dec. at ¶ 65 (“For all three wind energy resources, the consumption of back-up station power commences immediately upon receipt of station power at their respective POIs within Slatt Substation and within Pacific Power’s Oregon retail service territory.”)

As further detailed below, the Cooperative failed to meet its burden of demonstrating the existence of disputed material facts. Because there is no factual dispute, the Commission must grant PacifiCorp’s Motion for Summary Judgment on all claims.

I. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁴ “No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.”⁵

The party opposing a summary judgment motion (here, the Cooperative) “must offer admissible evidence at the summary judgment stage that creates a genuine issue of material fact [.]”⁶ The opposing party “may not rest upon the mere allegations or denials of that party’s pleadings.”⁷ Instead, the opposing party “must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue of material fact.”⁸ “Absent counter-affidavits or conflicting evidence, facts set forth in a supporting affidavit will be taken as true.”⁹ As demonstrated below, the Cooperative failed to satisfy these most basic evidentiary requirements.

⁴ Oregon Rule of Civil Procedure (ORCP) 47C; *City of Portland v. Portland Gen. Elec. Co.*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov. 17, 2006). The ORCPs apply to contested cases before the Commission, and the Commission has applied ORCP 47C in reviewing summary judgment motions. OAR 860-001-0000(1); *Metro One Telecommunications, Inc.*, Docket No. IC 1, Order No. 02-126 at 2 (Feb 28, 2002).

⁵ ORCP 47C.

⁶ *Davis v. Cnty. of Clackamas*, 205 Or. App. 387, 394 (2006).

⁷ ORCP 47D.

⁸ *Davis*, 205 Or. App. at 394.

⁹ *Comley v. State Bd. of Higher Ed.*, 35 Or. App. 465, 469–70 (1978).

II. ARGUMENT

A. **Unrebutted record evidence demonstrates that PacifiCorp’s “utility service” begins and ends at Slatt Substation**

In its Motion for Summary Judgment, PacifiCorp demonstrated that its provision of “utility service” occurs solely at Slatt Substation, since that is the point at which station power is delivered to the ultimate consumers and the point at which the consumptive use of power begins. PacifiCorp properly supported its motion with sworn declarations and admissible evidence.¹⁰

As the nonmoving party, the Cooperative bears the burden of demonstrating with admissible evidence that there are disputed facts concerning the location where “utility service” occurs.¹¹ The Cooperative made no effort to satisfy this burden. Indeed, the Cooperative produced no affidavits, declarations, or other admissible evidence suggesting that PacifiCorp’s “utility service” occurs at a location other than Slatt Substation. Because there are no disputed material facts, the evidentiary record demonstrates that PacifiCorp’s “utility service” occurs within its own service territory upon the delivery of station power at Slatt Substation, and the Commission should grant summary judgment in PacifiCorp’s favor.¹²

B. **The Cooperative agrees that “utility service” occurs at Slatt Substation**

Rather than producing admissible evidence demonstrating that “utility service” occurs somewhere other than Slatt Substation, the Cooperative devotes a considerable portion of its

¹⁰ See, e.g., Phinney Dec. at ¶ 12 (station power delivered at Slatt Substation); Delgado Dec. at 67 (station power delivered at Slatt Substation); Delgado Dec. at 65 (consumptive use of power begins at Slatt Substation).

¹¹ ORCP 47D (“When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party’s pleading, but the adverse party’s response, by affidavits, declarations or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial.”)

¹² ORCP 47D (If the nonmoving party fails to demonstrate disputed material facts via admissible evidence, “the court shall grant the motion if appropriate.”)

response brief attempting to demonstrate that it could also serve a portion of the Shepherds Flat station power load via deliveries at Slatt Substation. And in making that argument, the Cooperative concedes that “utility service” occurs within PacifiCorp’s service territory at Slatt Substation. The Cooperative’s admission is remarkable because the Cooperative now agrees with PacifiCorp and the Caithness Defendants on the central dispositive issue in this proceeding—that “utility service” begins and ends at Slatt Substation.

The Territorial Allocation Law prohibits one utility from providing “utility service” in another utility’s allocated territory.¹³ The statute, however, provides a framework under which utilities can agree to allocate territory or customers.¹⁴ Territorial allocation agreements are, among other things, a vehicle for allowing one utility to provide “utility service” to a customer located in another utility’s allocated territory (i.e., allocating a customer). But if a utility only provides “utility service” within the confines of its own service territory, and does not seek to provide “utility service” a customer in another allocated territory, a territorial allocation agreement is not needed.

Here, the Cooperative argues that it can serve a portion of the Shepherds Flat station power load via deliveries at Slatt Substation. In an important admission, the Cooperative acknowledges that it could not deliver station power at Slatt Substation without a territorial allocation agreement.¹⁵ There is only one reason why an allocation agreement would be needed—because the delivery of station power to consumers at Slatt Substation constitutes “utility service,” and if the Cooperative made such deliveries at Slatt Substation it would be

¹³ ORS 758.450(2).

¹⁴ ORS 758.410(1). *See also Portland Gen. Elec. Co.*, Docket No. UA 37, Order No. 92-557 (Apr. 16, 1992) (“In the statutory scheme for territorial allocation, ORS 758.410 governs allocation by contract between two utilities.”) Territorial allocation agreements are filed with the Commission for approval. ORS 758.420-.430.

¹⁵ Cooperative’s Response at 8 (“[T]his alternative would require an agreement with Pacific Power and, likely, approval by the Commission” and 14 (“[T]hat alternative would require the agreement of Pacific Power and, likely, a review and decision by the Commission.”)

providing “utility service” in PacifiCorp’s exclusive service territory. The corollary to this proposition is also true—PacifiCorp’s station power deliveries at Slatt Substation constitute “utility service” within its own exclusive service territory.

It is undisputed that PacifiCorp and the Cooperative have not entered into a Commission-approved territorial allocation agreement under ORS 758.410.¹⁶ PacifiCorp and the Cooperative attempted to negotiate a territorial allocation agreement, but as the Cooperative acknowledges, a binding agreement was not consummated.¹⁷ The fact that the Cooperative attempted to negotiate a territorial allocation agreement in order to deliver station power at Slatt Substation further evinces the Cooperative’s understanding that the “utility service” at issue occurs within PacifiCorp’s exclusive service territory. Otherwise, an agreement would not be needed.

Because the Cooperative concedes that “utility service” occurs within PacifiCorp’s service territory upon the delivery of station power to consumers at Slatt Substation, there are no disputed factual or legal issues preventing the Commission from granting summary judgment in PacifiCorp’s favor.

C. The Cooperative failed to support its allegation that it could serve a portion of the station power load via existing facilities

In the alternative, the Cooperative claims that it could serve a portion of the Shepherds Flat station power load via existing facilities located in its own service territory. But again, the Cooperative blatantly ignores its burden of proof and the summary judgment

¹⁶ See Phinney Dec. at ¶ 19 (“Pacific Power and Columbia Basin Electric Cooperative have not entered into a contract under ORS 758.410 that would allow the Cooperative to provide utility service at Slatt Substation or any other point within Pacific Power’s exclusive retail service territory.”)

¹⁷ Cooperative’s Response at 14.

standard by failing to support its contentions with any evidence. The Cooperative's rank speculation cannot trump undisputed record evidence.

The un rebutted record evidence demonstrates that the Cooperative does not own facilities from which station power could be delivered to the Shepherds Flat Central and South resources at a useful voltage. The Shepherds Flat project is electrically isolated from the Cooperative's facilities.¹⁸ The only Cooperative facility in the vicinity of the project is low-voltage (120/240-volt) radial line from which retail power is provided to the Shepherds Flat South maintenance building.¹⁹ The Caithness Defendants' declarant, Mr. Jeffery Delgado, has testified that "it would not have been, nor would it be now, electrically feasible to use this low-voltage connection to transmit power from, or to, the wind turbines and other high-voltage equipment comprising Shepherds Flat South [.]"²⁰ Mr. Delgado's testimony is un rebutted and must be taken as true.²¹

The Cooperative's argument relies exclusively on counsel's conjecture rather than admissible evidence. The Cooperative suggests without any evidentiary support that it "could serve those loads with existing facilities." The Cooperative does not specify what facilities it would use to serve the high-voltage station power demand of Shepherds Flat South and a portion of Shepherds Flat Central. Neither does it explain how the Cooperative's facilities could interconnect with the existing customer-owned facilities. Moreover, the Cooperative fails to explain how it could electrically isolate the Shepherds Flat Central turbines within its service territory from those in PacifiCorp's service territory for purposes

¹⁸ Delgado Dec. at ¶¶ 34, 41, 43, 48, and 50.

¹⁹ Delgado Dec. at ¶¶ 48 and 73.

²⁰ Delgado Dec. at ¶ 48.

²¹ *Comley*, 35 Or. App. at 469–70 ("Absent counter-affidavits or conflicting evidence, facts set forth in a supporting affidavit will be taken as true.")

of delivering station power. Indeed, the Cooperative completely ignores the fact that it has no facilities in the vicinity of the Shepherds Flat Central project.²²

There is simply no admissible evidence in the record demonstrating how the Cooperative could serve any portion of the station power load. The Cooperative may not rest on the mere allegations in its summary judgment response to establish disputed material facts.²³ Instead, the Cooperative must “offer admissible evidence ... that creates a genuine issue of material fact” in order to defeat PacifiCorp’s summary judgment motion.²⁴ The Cooperative has utterly failed to meet to this basic legal standard. It has not rebutted Mr. Delgado’s sworn declaration that the Cooperative’s 120/240-volt facilities could not serve the project’s high-voltage equipment. The Cooperative’s bare assertion that it can serve the station power load via existing facilities is wholly inadequate to defeat PacifiCorp’s properly supported motion.²⁵

D. The Commission should disregard the Cooperative’s speculation concerning newly-constructed facilities

In a last ditch effort to create a factual dispute, the Cooperative speculates that it could construct new facilities to serve the Shepherds Flat South and a portion of the

²² PacifiCorp provides low-voltage power for the Shepherds Flat Central maintenance building. Delgado Dec. at ¶ 41. While the Cooperative has a 120/240-volt radial line in the vicinity of Shepherds Flat South, it does not have similar facilities (or any facilities) in the vicinity of Shepherds Flat Central. Delgado Dec. at ¶¶ 41 and 48.

²³ *Warren L. Bostick Family Trust v. Magliocco*, 64 Or. App. 305, 308 (1983) (“[T]he opposing party may not rest upon the mere allegations or denials of that party’s pleadings but must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue of material fact”) (internal citations omitted).

²⁴ *Davis*, 205 Or. App. at 394.

²⁵ The Cooperative suggests that it need not station deliver power at 230-kV in order to reliably serve the project’s station power demand. It is true that the equipment that draws station power does not operate at 230-kV. But the unrebutted record establishes that the Cooperative’s 120/240-volt service is inadequate to serve the station power demand of turbines and other high-voltage equipment. Delgado Dec. at ¶ 41 (“[I]t would not have been electrically feasible to use this low-voltage connection to transmit power from, or to, the wind turbines and other high-voltage equipment ...”) Furthermore, PacifiCorp’s delivery at 240-kV is not “an anomaly of the transaction,” as the Cooperative argues. Instead, PacifiCorp delivers station power at 240-kV because that is the voltage required to serve the project’s station power demand via the EFSC- and BPA-approved facilities.

Shepherds Flat Central station power demand. As an initial matter, the Cooperative’s admission reflects the fact that it currently does not, and cannot, provide “similar utility service” as PacifiCorp. But more importantly, the Cooperative has once again failed to offer any admissible evidence in support of its wishful arguments.

The Cooperative failed to explain what type of facilities it would construct, where those facilities would be located, and how it would finance those facilities. Indeed, it is absurd to believe that it would be economically viable to construct new 230-kV facilities in order to serve an approximately 2 MW load at a 22% load factor.²⁶ Furthermore, the Cooperative failed to acknowledge the significant regulatory hurdles that stand in the way of new energy facilities, including siting, interconnection, and environmental requirements imposed by the Oregon Energy Facility Siting Council and the Bonneville Power Administration.²⁷ The Commission should not be persuaded the Cooperative’s speculation.

E. The location of the meters is irrelevant

The Cooperative would have the Commission focus on the location of the meters, and suggests that the fact that two of the meters are located within its service territory is dispositive. The Cooperative’s argument ignores the relevant facts.

It is true that station power deliveries are not metered at Slatt Substation. Instead, they are measured using BPA meters located at the collector substations.²⁸ It is also true that the Shepherds Flat South meters are located in the Cooperative’s service territory. But this arrangement was not consensual. PacifiCorp preferred to have the meters located at the Slatt

²⁶ Delgado Dec. at ¶¶ 61-62.

²⁷ The Caithness Defendants detail these regulatory hurdles in Section II.D.5 of their Reply Brief in Support of Summary Judgment Motion.

²⁸ *E.g.*, Phinney Dec. at ¶13 and Ex. B (Sections 6.01 and 6.03).

Substation point of delivery consistent with its retail station power policy.²⁹ But BPA refused access to Slatt Substation, and the only other revenue-quality meters available to measure retail deliveries are the collector substation meters.³⁰ The collector substation meter readings are adjusted for line losses to derive a single value for deliveries at Slatt Substation.³¹ These types of calculations are commonplace in the industry, and the Cooperative has not argued that they are improper.³² Ultimately, the customer is billed based on deliveries to Slatt Substation because that is the point at which the consumptive use of power (i.e., the “utility service”) begins.

F. The delivery of station power within the Cooperative’s service territory is exempt from the Territorial Allocation Law

In its Motion for Summary Judgment, PacifiCorp established that it provides “utility service” within its own service territory at Slatt Substation. In the alternative, PacifiCorp demonstrated that the provision of 230-kV station power within the Cooperative’s service territory would be exempt from the definition of “utility service.” Because the undisputed record demonstrates that the Cooperative has no ability to serve high-voltage load, it cannot provide “similar utility service.” Therefore, the provision of high-voltage power to energy-consuming machinery in the Cooperative’s service territory is exempt from the definition of “utility service” found in ORS 758.400(3).

The Cooperative misapprehends the statutory exemption from the definition of “utility service” in ORS 758.400(3). In its Response, the Cooperative argues that ORS 758.450(2) is not concerned with a utility’s “ability to serve.” The Cooperative’s reading

²⁹ Phinney Dec. at ¶¶ 13-15 and Ex. C.

³⁰ *Id.*

³¹ *Id.* and Ex. B (Sections 6.01 and 6.03).

³² Phinney Dec. at ¶ 15.

misses the mark. ORS 758.450(2), which the Cooperative cites, prohibits a utility from providing “utility service” in another utility’s allocated territory. To determine whether this provision is violated, one must look to the definition of “utility service” found in ORS 758.400(3), and that definition undoubtedly concerns itself with “ability to serve.” The legislature made clear that a utility is not providing “utility service” for purposes of the Territorial Allocation Law if another utility does not provide “similar utility service.” PacifiCorp’s interpretation of the relevant statutory language would not “unilaterally amend[] ORS 758.450.” Instead, PacifiCorp’s interpretation adheres to the plain statutory language, which ensures that no territorial violation occurs when two utilities provide dissimilar service—precisely the circumstance here.

F. Limited relief is available

In its Response, the Cooperative argues for the first time that it is entitled to relief under ORS 756.040. Specifically, the Cooperative argues that ORS 756.040(1) and (2) authorizes the Commission to enjoin violations of the Territorial Allocation Law. That statutory provision, however, is inapplicable here. ORS 756.040(1) is a consumer protection statute that requires the Commission to represent the interests of *customers* of public utilities and protect them from “unjust and unreasonable extractions and practices and to obtain for them adequate service at fair and reasonable rates.” Here, Cooperative is not a “customer” for purposes of ORS 756.040(1), and “adequate service at fair and reasonable rates” is not at issue.

And while ORS 756.040(1) and (2) have been interpreted as providing a mechanism whereby the Commission can order refunds for excessive rates,³³ the Cooperative has cited to no authority suggesting that those sections authorize the Commission to enjoin alleged service territory violations. In fact, such an interpretation would fly in the face of the legislature's unambiguous enactments. ORS 758.465 expressly states that the circuit court, not the Commission, is authorized to enjoin violations of the Territorial Allocation Law. The specific remedies set out in ORS 758.465 control over the general powers enumerated in ORS 756.040.³⁴

Finally, the Cooperative's Amended Complaint did not claim that it was entitled to relief under ORS 756.040. By claiming for the first time in its Response that it is entitled to relief under that statute, the Cooperative has sought to improperly amend its complaint. The Commission should disregard the Cooperative's new claim absent an amended pleading.³⁵

IV. CONCLUSION

The Cooperative did not meet its summary judgment burden. Where PacifiCorp supported its motion with sworn declarations and other admissible evidence, the Cooperative rests solely on speculation and conjecture. The Cooperative failed to offer any admissible evidence showing that there is a genuine dispute of material fact. Without admissible evidence to the contrary, PacifiCorp's evidence must be taken as true. The un rebutted record

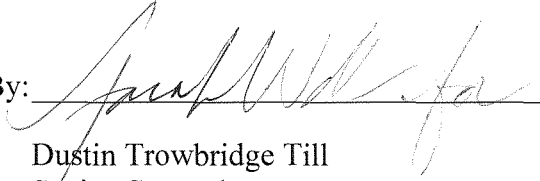
³³ *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or. App. 302 (1992).

³⁴ See ORS 174.020(2) ("When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *Hansen v. Abrasive Eng'g & Mfg., Inc.*, 317 Or. 378, 392 (1993) ("[W]hen two statutes seemingly are in conflict, the more specific statutes controls over the more general statute."); *In re Legal Standard for Approval of Mergers*, Docket UM 1011, Order No. 01-778 (Sept. 4, 2001) ("The more specific provision ... controls the general provision.")

³⁵ *Peterson v. Acumed, LLC*, No. CV-10-586, 2011 WL 1561015 at 7 (D. Or. Apr. 25, 2011) ("This court generally does not consider a new claim on summary judgment absent amendment of the pleadings.")

evidence demonstrates that PacifiCorp provides “utility service” within its own service territory at Slatt Substation. Indeed, the Cooperative now agrees that “utility service” occurs at Slatt Substation. The Cooperative’s failure to properly support its motion, and its agreement on the overarching dispositive issue in this proceeding has left the Commission with but one option—to grant summary judgment in PacifiCorp’s favor on all of the Cooperative’s claims.

Respectfully submitted this 28th day of October, 2014.

By: 
Dustin Trowbridge Till
Senior Counsel
PacifiCorp d/b/a Pacific Power