

KINDLEY LAW PC

RAYMOND S. KINDLEY

ADMITTED IN OREGON AND WASHINGTON

June 24, 2015

VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
P.O. Box 2148
Salem, OR 97308-2148

Re: UM 1670 – Columbia Basin Electric Cooperative vs Pacific Power et al.

Attention Filing Center:

Enclosed for filing in docket UM 1670 are an original and two copies of a Columbia Basin Electric Cooperative's Response to PacifiCorp's Motion for Clarification.

A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Please contact this office with any questions.

Sincerely,

/s/ Raymond S. Kindley

Raymond S. Kindley
Attorney for Columbia Basin Electric Cooperative, Inc.

cc: Service List

1 **BEFORE THE**

2 **PUBLIC UTILITY COMMISSION OF OREGON**

3	COLUMBIA BASIN ELECTRIC)	Docket No. UM 1670
4	COOPERATIVE, INC. an Oregon)	
	cooperative corporation)	COLUMBIA BASIN ELECTRIC
5	Complainant,)	COOPERATIVE, INC'S RESPONSE TO
	vs.)	PACIFICORP'S MOTION FOR
6	PACIFICORP, dba Pacific Power, an)	CLARIFICATION
	Oregon business corporation,)	
7	Defendant,)	
)	
8	NORTH HURLBURT WIND, LLC, a)	
	foreign limited liability company,)	
9	Defendant,)	
)	
10	SOUTH HURLBURT WIND, LLC, a)	
	foreign limited liability company,)	
11	Defendant,)	
)	
12)	
)	
13	HORSESHOE BEND WIND, LLC, a)	
	foreign limited liability company,)	
14	Defendant,)	
	and)	
15	CAITHNESS SHEPHERDS FLAT, LLC, a)	
	foreign limited liability company,)	
16	Defendant)	
)	

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18 **I. INTRODUCTION**

19 The Complainant Columbia Basin Electric Cooperative, Inc. (the "Cooperative") in this
20 matter respectfully requests the Oregon Public Utilities Commission (the "Commission") to deny
21 PacifiCorp's Motion for Clarification.

22 PacifiCorp wants to the Commission to reverse its decision in Order No. 15-110
23 ("Order") and find that PacifiCorp did not violate ORS 758.450(2). PacifiCorp's request would
24 require the Commission to ignore its findings of fact and existing law and, instead, adopt new
25 law and unsupported claims. A determination that PacifiCorp did not violate the Territory
26

1 Allocation Law would likely leave the Cooperative without any remedy or right to serve loads
2 within its exclusive service territory.

3 II. BACKGROUND

4 The Commission's Order rests on findings of fact and conclusions of law grounded in
5 statutory language and case law. The Order concludes that PacifiCorp violated the Territory
6 Allocation Law by providing utility service to the Horseshoe Bend Wind Project ("Shepherds
7 Flat South Project") located in the Cooperative's exclusive service territory.

8 In its Motion for Summary Judgment PacifiCorp argued it did not provide "utility
9 service" into the Cooperative's exclusive service territory because it only provided utility service
10 to the Slatt Substation, which is located in PacifiCorp's service territory. PacifiCorp also argued
11 that since the Cooperative did not own any 230 kV transmission facilities, PacifiCorp could
12 provide service at that voltage to the Shepherd Flat South Project without the duplication of
13 service or violating the Cooperative's rights.

14 The Commission first determined that the Shepherds Flat project consisted of three
15 separate projects. Commission then determined that based on location of the loads, PacifiCorp
16 had the right to serve the Shepherds Flat North Project and the Cooperative had the right to serve
17 the Shepherds Flat South Project. Order at 6.

18 The Commission, however, stated its determination concerning service to the Shepherd
19 Flat Central Project was more difficult because that Project's load straddled the service territories
20 of both utilities. The Commission considered the appropriate method for addressing this issue
21 based on three tests from other jurisdictions. The Commission adopted the geographic load
22 center test to determine that PacifiCorp had the right to serve the Shepherd Flat Central Project.

23 The Commission dismissed PacifiCorp's argument that voltage of transmission facilities
24 was a factor under the Territory Allocation Law.

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3 **III. ARGUMENT**
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5 **A. PacifiCorp’s Motion is an Inappropriate Collateral Attack on the**
6 **Commission’s Order**

7 PacifiCorp claims that it is simply requesting a clarification of the Commission’s Order.
8 PacifiCorp requests the Commission, however, to reverse its decision that PacifiCorp has
9 violated the Territory Allocation Law.

10 PacifiCorp’s requests the Commission to dismiss its current findings of fact and replace
11 them with new findings of fact. For instance, the Commission’s Order found that the
12 Cooperative had several means to serve the Shepherds Flat South Project from using the
13 Cooperative’s existing transmission and power contracts with BPA to the Cooperative building
14 new transmission facilities. Order at 12. PacifiCorp’s Motion for Clarification now alleges that
15 the Cooperative is “unable to serve the load.” PAC Motion at 5. PacifiCorp’s request would
16 require the Commission to ignore its findings of fact, and instead adopt PacifiCorp’s unsupported
17 claims.

18 PacifiCorp Motion also requests the Commission to set aside its conclusions of law and
19 instead adopt new legal tests for determining whether a violation of the Territory Allocation Law
20 has occurred. For example, the Commission concluded that PacifiCorp violated the Law by
21 providing “utility service” into the Cooperative’s exclusive service territory. Order at 8. The
22 Commission also concluded as a matter of law that, since the load of the Shepherds Flat South
23 Project is entirely located in the Cooperative’s service territory, the Cooperative has exclusive
24 right to serve that load. Order at 6. PacifiCorp asks the Commission to ignore this conclusion of
25 law and, instead, find PacifiCorp did not violate the Territory Allocation Law because of the
26 three arguments proposed by PacifiCorp.

Furthermore, PacifiCorp alleges that the Commission has ordered PacifiCorp to continue
an ongoing violation of the Territory Allocation Law. PacifiCorp contends that the Commission
can avoid this dilemma “by clarifying that PacifiCorp did not violate the Territory Allocation

1 Law when it reasonably interpreted the ambiguous Territory Allocation Law as allowing use of
2 the established point of delivery test.” Motion at 5. This argument is a direct attack on the
3 Commission’s decision under the cloak of “clarification.” The Commission rejected the point of
4 delivery test.

5 PacifiCorp is inappropriately requesting the Commission to reverse the factual findings
6 and legal conclusions set forth in the Order with a Motion for Clarification. The Commission
7 should deny PacifiCorp’s Motion as an inappropriate collateral attack on the Commission’s
8 Order.

9 **B. PacifiCorp’s Request Would Require the Commission to Ignore Existing**
10 **Law and to Use Three New Tests to Determine a Violation of ORS 758.450(2)**

11 PacifiCorp argues that the Commission should ignore ORS 758.450(2) and instead find
12 that Pacific had complied with the law based on three new legal tests; (i) the case was one of first
13 impression and PacifiCorp was reasonable in relying on a legal theory that the Commission
14 rejected, (ii) PacifiCorp’s unsupported allegation that the Cooperative cannot serve the load of
15 the Shepherds Flat South Project, and (iii) the decision would expose PacifiCorp to civil
16 damages.

17 None of these arguments are elements under the Territory Allocation Law, ORS 758.400-
18 .475, to determine whether a utility has violated the Law. ORS 758.450(2) provides:

19 Except as provided in subsection (4) of this section, no other person shall offer,
20 construct or extend utility service in or into an allocated territory.

21 There are four elements to prove a violation of ORS 758.450: (i) the entity must be a
22 “person” or “persons” as defined by ORS 758.450(2); (ii) the arrangement must involve “utility
23 service” as defined in ORS 758.450(3); (iii) the utility service must be “offered, constructed or
24 extended in or into an allocated territory”; and (iv) none of the exemptions in ORS 758.450(4)
25 can apply. *Northwest Natural Gas Co. v. Oregon Public Utility Comm’n*, 195 Or. App. 547, 554
26 (2004). The Commission applied these elements in its Order.

1 PacifiCorp is basically requesting the Commission to ignore existing law and,
2 alternatively, to use the three new legal tests proposed by PacifiCorp. PacifiCorp's Motion for
3 Clarification should be denied to the extent it requests the Commission to overrule existing
4 statutory language and applicable case law.

5
6 **C. PacifiCorp's Motion Attacks the Commission's Decision Regarding Service**
7 **to the Shepherds Flat Central Project, Not Service to the Shepherds Flat**
8 **South Project**

9
10 1. The Commission Did Not Apply New Law to Determine the
11 Cooperative's Right to Serve the Shepherds Flat South Project.

12 PacifiCorp argues that the Commission's determination that PacifiCorp violated the
13 Territory Allocation Law by serving the Shepherds Flat South Project was "manifestly unfair."
14 PacifiCorp alleges the Law was "admittedly ambiguous" and PacifiCorp reasonably interpreted
15 the "ambiguous statute." PAC Motion at 4.

16 PacifiCorp's argument misinterprets the Order. The Order demonstrates that the
17 Commission used existing law to determine that PacifiCorp violated the Territory Allocation
18 Law by serving the Shepherds Flat South Project. The Order states the determination of which
19 utility should serve the North and South Shepherds Flat projects is straight-forward:

20 When an entire load is located within the service territory of a single utility, that
21 utility has the right and the obligation to serve that load. . . Because Shepherds
22 Flat South lies exclusively in Columbia Basin's territory, we conclude that
23 Columbia Basin has the right to serve Shepherds Flat South.

24 Order at 6. The Commission did not rely on any new law or interpretation of law to
25 make its determination that PacifiCorp violated the Territory Allocation Law by serving the
26 Shepherds Flat South Project.

The Commission looked to the three tests used by other jurisdictions, however, to
determine which utility had the right to serve the Shepherds Flat Central Project, which straddles
the service boundary between PacifiCorp and the Cooperative. Order at 7-8. The Order states,
"The Territory Allocation Law is unclear as to which utility has the right to serve a customer that

1 straddles adjoining service territories.” Order at 7. After review of the various tests, the
2 Commission concluded that “PacifiCorp may serve all of Shepherds Flat Central.” Order at 8.

3 PacifiCorp is basically attacking the Commission’s decision that PacifiCorp has the right
4 to serve to the Shepherds Flat Central Project. That is the only determination that relied upon the
5 Commission’s analysis of the three different tests. PacifiCorp argument is not a reasonable
6 basis for reversing the Commission’s decision.

7 2. PacifiCorp Did Not View the Shepherds Flat Project as a Single Project
8 and Reasonably Apply the Point of Service Test

9 PacifiCorp’s Motion also argues that PacifiCorp was reasonable to “determined it had the
10 right to serve the entire Shepherds Flat station power load” and to rely on the point of service test
11 “to serve the entire Shepherds Flat load.” Motion at 4. Basically, PacifiCorp contends it
12 previously viewed the three Shepherds Flat projects as a single load that straddled the territory
13 boundary and its decision to apply the point of service test to that single load was reasonable.
14 This argument conflicts with PacifiCorp’s previous position that it was serving three separate
15 loads, not one.

16 In PacifiCorp’s Opposition to Columbia Basin Electric Cooperative Inc.’s Motion for
17 Summary Judgment (“PAC Opposition”), PacifiCorp argued that it was serving each of the three
18 projects separately regardless of its contract with Caithness Shepherds Flat. There, PacifiCorp
19 argued:

20 The fact that PacifiCorp has a contractual relationship with Caithness, rather than
21 the three resources, is irrelevant. . . the three wind resources (Shepherds Flat
22 North, Central, and South) each interconnects and begin their consumptive use of
23 power within PacifiCorp’s exclusive service territory at Slatt Substation.

24 PAC Opposition at 6-7.

25 Until the Commission’s Order, PacifiCorp argued against the Cooperative’s contention
26 that the Caithness Shepherds Flat and the North, Central and South Project were operating in
concert as a single entity. As set forth above, PacifiCorp argued it was serving three different

1 loads. PacifiCorp's position and arguments supported the Commission's conclusion to "treat
2 each wind project as a separate customer for this proceeding." Order at 6.

3 Now, to avoid the Commission's determination that it violated the Territory Allocation
4 Law, PacifiCorp changes its position and argues it viewed the three Shepherds Flat project loads
5 as a single load. If PacifiCorp stands by its prior position that the three projects are separate
6 loads, it cannot argue that it was reasonable to view the entire Shepherds Flat project was one
7 load that straddled the territory boundary.

8 To the extent PacifiCorp's "manifestly unfair" argument rests on the reasonableness of
9 PacifiCorp's alleged view that the three Shepherd Flat projects were a single load, the
10 Commission should dismiss this argument.

11
12 **D. PacifiCorp Wants the Commission to Reverse its Decision Because This Was
13 a Case of First Impression**

14 PacifiCorp wants the Commission to adopt a holding whereby parties in cases of first
15 impress have no liability or consequences. PacifiCorp's Motion, on the one hand, admits that
16 "the Cooperative is entitled to serve the Shepherds Flat South load." Motion at 3. On the other
17 hand, PacifiCorp contends its service to the Shepherds Flat South project "should not be
18 considered a violation of the Territory Allocation Law." Motion at 5.

19 As stated above, PacifiCorp's violation of the Territory Allocation Law by providing
20 service to the Shepherds Flat South Project is not a case of first impression. The Commission's
21 decision stemmed from two determinations: (i) the three projects were three separate loads and
22 (ii) a utility has the right to serve a load that is located entirely in its service territory.

23 Neither of these determinations rested on new law. The first determination was primarily
24 factual. The second determination, as described by the Commission, was a straight-forward
25 application of the Territory Allocation Law. It was not novel.
26

1 The only novel legal analysis concerning this issue was the Commission's determination
2 of which utility had the right to serve the Shepherd's Flat Central project, which fell in
3 PacifiCorp's favor.

4 To the extent PacifiCorp requests the Commission to hold PacifiCorp, or any party for
5 that matter, above the law simply because the parties have advanced argues of first impression,
6 the Commission should deny such requests. Courts have not adopted that practice and, if the
7 Commission were to adopt such a policy, it would lead to parties advancing outlandish and novel
8 arguments simply to avoid liability. The Commission should dismiss this argument.

9
10 **E. The Cooperative Can Serve the South Shepherds Flat Project**

11 PacifiCorp claims that Cooperative cannot serve the Shepherds Flat South station power
12 loads. PacifiCorp further contends that Commission should reverse its finding that PacifiCorp
13 violated the Territory Allocation Law because the Commission has "ordered PacifiCorp to
14 maintain an on-going violation of the Territory Allocation Law." Motion at 5.

15 PacifiCorp's allegations that the Cooperative cannot provide service are baseless. In the
16 Order, the Commission recognized that the Cooperative had several alternative means to provide
17 service to Shepherd Flat South. The Order expressly describes one alternative, "Columbia Basin
18 may designate Slatt Substation as a new point of delivery under its existing BPA transmission
19 agreement." Order at 12.

20 Columbia Basin has in fact contacted BPA and received assurances that it can request
21 transmission service to the Slatt Substation and additional power for service to the Shepherd Flat
22 South project. Wolff Decl. at 1-2.¹ Service could start as early as July 1, 2015. As determined
23 by the Commission the Cooperative has other alternatives of service.

24 As to the Commission ordering PacifiCorp to violate the Territory Allocation Law, the
25 Order provides, "we authorize PacifiCorp to continue to provide service to Shepherds Flat
26

¹ Wolff Declaration, Incorporated herein and attached hereto as Exhibit A.

1 South.” That statement of authorization does not appear to “order” PacifiCorp to provide
2 service.

3 **D. PacifiCorp’s Potential Liability Is Not a Basis for Reversing the**
4 **Commission’s Decision**

5 PacifiCorp argues it would be “inequitable under the facts of this proceeding and the
6 Commission’s instructions” to expose PacifiCorp to civil damages. Motion at 6. PacifiCorp
7 contends that “PacifiCorp’s decision to serve Shepherds Flat South was based on good-faith
8 effort to address recognized ambiguity in the Territory Allocation Law.” Id.

9 PacifiCorp again requests the Commission to set aside the existing law, e.g. the
10 enforcement provisions in the Territory Allocation Law, and to substitute PacifiCorp’s view of
11 an equitable resolution. The State Legislature created regulatory structure in the Territory
12 Allocation Law that it intended the Commission and others to follow. That regulatory design
13 includes enforcement provisions for violations of the Territory Allocation Law. In other words,
14 PacifiCorp basically wants the Commission to revise the existing statutes adopted by the State
15 Legislature and to create an entirely different regulatory scheme. That is the purview of the State
16 Legislature, not the Commission.

17 PacifiCorp also claims the Commission’s action would be justified because PacifiCorp’s
18 position was based on good-faith effort to address ambiguity in the Territory Allocation Law.
19 PacifiCorp’s claim rests on unsupported facts. There are no facts in the record that demonstrate
20 PacifiCorp acted in good faith. It is also too late for the Cooperative to challenge PacifiCorp’s
21 contention or to conduct discovery to counter this unsupported allegation.

22 The Commission should dismiss PacifiCorp’s claim that its exposure to civil damages
23 under the Territory Allocation Law is justification for determining PacifiCorp did not violate the
24 Law.

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IV. CONCLUSION

For the above reasons, the Cooperative respectfully requests the Commission to deny PacifiCorp's Motion for Clarification.

DATED this 24th day of June 2015.

KINDLEY LAW PC

By /s/ Raymond S. Kindley
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Cooperative, Inc.

EXHIBIT A

DECLARATION OF THOMAS WOLFF

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1 **BEFORE THE**

2 **PUBLIC UTILITY COMMISSION OF OREGON**

3 COLUMBIA BASIN ELECTRIC) Docket No. UM 1670
4 COOPERATIVE, INC. an Oregon)
cooperative corporation) DECLARATION OF THOMAS WOLFF IN
5 Complainant,) SUPPORT OF COLUMBIA BASIN
vs.) ELECTRIC COOPERATIVE, INC'S
6 PACIFICORP, dba Pacific Power, an) RESPONSE TO PACIFICORP'S MOTION
Oregon business corporation,) FOR CLARIFICATION
7 Defendant,)
8 NORTH HURLBURT WIND, LLC, a)
foreign limited liability company,)
9 Defendant,)
10 SOUTH HURLBURT WIND, LLC, a)
foreign limited liability company,)
11 Defendant,)
12)
13 Horseshoe Bend Wind, LLC, a)
foreign limited liability company,)
14 Defendant,)
and)
15 Caithness Shepherds Flat, LLC, a)
foreign limited liability company,)
16 Defendant.)

17
18 I, Thomas Wolff, do declare the following if called to testify, would and could
19 completely testify thereto:

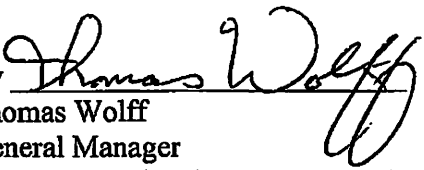
- 20 1. I am over age of 18, and make this Declaration based upon personal knowledge.
21 2. I am the General Manager of Complainant Columbia Basin Electric Cooperative,
22 Inc. (the "Cooperative") as set forth in the above captioned docket before the Public Utility
23 Commission of Oregon.
24 3. I have contacted Eric Taylor, Bonneville Power Administration ("BPA")
25 Transmission Business Line Account Executive for the Cooperative, to request an additional
26 point of delivery at the Slatt Substation for delivery of power under the Cooperative's Network
Transmission contract with BPA.

1 4. I also contacted Dan Bloyer, BPA Power Business Line Account Executive for
2 the Cooperative, to request additional wholesale power for delivery to the Cooperative to serve
3 the Horseshoe Bend Project load.

4 5. On June 23, 2015, Eric Taylor informed me that BPA would be ready to provide
5 transmission service to the Slatt Substation, and to establish the Horseshoe Bend Substation as a
6 metering point for the Cooperative, as early as July 1, 2015.

7 6. On June 23, 2015, Dan Bloyer informed me that BPA would be ready to provide
8 the Cooperative with power for service to the Horseshoe Bend Project load as early as July 1,
9 2015.

10
11 DATED this 24th day of June 2015.

12
13 By 
14 Thomas Wolff
15 General Manager
16 Columbia Basin Electric Cooperative, Inc.
17 171 Linden Way
18 P.O. Box 398
19 Heppner, OR 97836

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2015, I served the foregoing document upon the persons named on the service list by electronic mail only as all parties have waived paper service.

W

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W=waives paper service

DATED: June 24, 2015

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