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Re: DR 49 – In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC, and CLATSKANIE PEOPLE'S UTILITY DISTRICT, Petition for Declaratory Ruling

Attention Filing Center:

Attached for filing in the above-captioned docket is PacifiCorp's Reply Brief. Please contact this office with any questions.

Very truly yours,

Katherine McDowell

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC and CLATSKANIE PEOPLE'S UTILITY DISTRICT, Petition for Declaratory Ruling.	**DR 49**

PACIFICORP'S REPLY BRIEF

August 11, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Public Utility Commission of Oregon Orders

FERC Orders

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 49

In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC and CLATSKANIE PEOPLE'S UTILITY DISTRICT, Petition for Declaratory Ruling.	**PACIFICORP'S REPLY BRIEF**

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully submits this Reply Brief to the Public Utility Commission of Oregon (Commission). This brief replies to the joint response brief filed by the Clatskanie People's Utility District (Clatskanie) and Georgia-Pacific Consumer Products (Camas) LLP (GP or the Camas Mill) (collectively, the Petitioners), the response brief of Commission Staff, and the response brief of Noble Americas Energy Solutions LLC (Noble Solutions). Staff's brief supports PacifiCorp's position that the proposed transaction violates Oregon law, and nothing in the Petitioners' or Noble Solutions' briefs undermines this conclusion.

On the pivotal issue in this case, PacifiCorp and Staff have shown that the Commission exclusively allocated the Camas Mill to PacifiCorp. Based on this conclusion, the answers to the questions presented in the Revised Petition become clear—Clatskanie will violate Oregon's territorial allocation and direct access laws by providing utility service to the Camas Mill under the proposed transaction.

Petitioners' and Noble Solutions' arguments reveal a fundamental disregard for the Commission's regulatory authority. Given that Petitioners cannot now seriously contest that

the Commission allocated the Camas Mill to PacifiCorp, they confuse the issue by focusing on the relationship between the Camas Mill and PacifiCorp rather than the irrefutable facts and undisputable law. Petitioners resort to claims that the territorial allocation laws are somehow inapplicable to the Camas Mill, arguing that the Commission's legal authority to allocate the Camas Mill is limited by the mill's special contract, preempted by FERC's jurisdiction over interstate transmission, and barred by the constitutional prohibition on discrimination in interstate commerce. Petitioners further argue that the application of the Commission's own geographic load center test divests it of authority to allocate the Camas Mill.

None of these arguments have merit. Fundamentally, Petitioners cannot reconcile their position that the Commission lacks regulatory authority to allocate service to the Camas Mill with the fact that the Camas Mill has been an Oregon customer for over 70 years. Contrary to Petitioners' claims, the Camas Mill cannot unilaterally contract in and out of the Commission's regulatory framework. The Commission has jurisdiction over the proposed transaction and an obligation to protect all Oregon retail customers by enforcing Oregon law and affirming the illegality of the proposed transaction. The law controlling this case is well established. Based on the assumed facts, the Commission can resolve this case now without further proceedings.

II. ARGUMENT

A. The Commission Can Affirm the Illegality of the Proposed Transaction without Additional Proceedings.

Staff agrees with the Company that the proposed transaction violates both the territorial allocation and direct access statutes.[1] Despite this conclusion, Staff suggests that

[1] Staff Response Brief at 8.

the Commission consider a subsequent proceeding to develop a factual record on the allocation of the Camas Mill to PacifiCorp and the extent of harm to PacifiCorp's customers under the proposed transaction.[2] While the Company appreciates Staff's interest in facilitating resolution of this matter, the procedural posture of this case makes further proceedings unnecessary and potentially counter-productive. As Staff acknowledges, the assumed facts in the Revised Petition are sufficient for the Commission to answer the questions presented and determine that the proposed transaction is illegal. If additional or new issues arise later, the parties may make additional filings at the Commission as necessary. These filings will frame the issues and allocate the burden of proof much more effectively than would a Commission-initiated process.

Moreover, at this point, there is no need for a factual record quantifying the customer harm that would result from the proposed transaction.[3] As a matter of law, the Commission can consider the policies against customer cost-shifting embedded in the territorial allocation and direct access statutes.[4] Contrary to Petitioners' and Noble Solutions' arguments,[5] the Commission has already made the legal determination that departing loads that fail to pay transition costs shift costs to PacifiCorp's remaining customers.[6] In this proceeding, the Commission can rely on these authorities as a matter of law to support a determination that the proposed transaction is illegal.

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[2] *Id.* at 13-14.

[3] *See* Noble Solutions LLC's Response Brief at 3 ("assumed facts do not state that cost shifting will occur").

[4] *See* PacifiCorp's Opening Brief at 17-20, 23-25.

[5] Noble Solutions LLC's Response Brief at 3; GP/Clatskanie Response Brief at 20-22.

[6] *In re PacifiCorp Transition Adjustment, Five-Year Cost of Service Opt-Out*, Docket No. UE 267, Order No. 15-060 (Feb. 24, 2015).

B. The Camas Mill is Exclusively Allocated to PacifiCorp.

1. Staff's Analysis Confirms that the Camas Mill and the Troutdale Substation are Part of PacifiCorp's Exclusively Allocated Service Territory.

Petitioners continue to argue that the Commission "allocated the entire area surrounding the Troutdale Substation . . . to PGE as exclusive service territory."[7] Based on this argument, Petitioners contend that PacifiCorp's ownership of a substation within PGE's exclusive service territory does not mean that PacifiCorp has "retail service territory within PGE's allocated areas."[8] Petitioners' claim is contradicted by Commission orders establishing allocated service territories in and around Portland. These orders allocate the Troutdale substation, and the customer served through that substation, to PacifiCorp.[9]

Staff's analysis confirms PacifiCorp's conclusion "that the Troutdale Substation is located in territory that has been allocated to PacifiCorp" since at least the issuance of Order No. 92-557.[10] Staff further confirmed that Order No. 92-557 "essentially leaves unchanged" the agreement between PacifiCorp and PGE approved in Order No. 72-870.[11] Staff's analysis of the 1972 facilities exchange agreement found that "PacifiCorp preserved the Troutdale Substation as within its service territory."[12] Relying on this analysis, Staff agrees that Clatskanie will violate PacifiCorp's exclusive service territory under the proposed transaction.[13]

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[7] GP/Clatskanie Response Brief at 11.
[8] *Id.*
[9] *See* PacifiCorp's Opening Brief at 6-11.
[10] Staff Response Brief at 4-5.
[11] *Id.* at 5.
[12] *Id.*
[13] *Id.* at 8.

2. The Camas Mill was Allocated to PacifiCorp even though it was not Referred to by Name.

Petitioners argue that the Camas Mill was never exclusively allocated to PacifiCorp because Orders Nos. 72-870 and 92-557 do not specifically refer to the mill.[14] But Petitioners cite no legal requirement that an allocation order specifically refer to any individual customer to be valid. Order No. 92-557 does not refer to any individual customers, yet Petitioners do not contest that Order No. 92-557 was sufficiently specific and clear to create allocated service territories.[15] The fact that the Camas Mill was not specifically named in the order has no bearing on whether it was allocated.[16]

3. The 1972 Facilities Exchange Agreement Between PacifiCorp and PGE Created Exclusive Service Territories and Allocated the Camas Mill to PacifiCorp.

Petitioners do not dispute that PacifiCorp retained the Troutdale substation in the 1972 facilities exchange agreement between PacifiCorp and PGE.[17] Petitioners also do not dispute that PacifiCorp served the Camas Mill from that substation both before and after the 1972 agreement was executed and approved by the Commission.[18] Given these concessions, Petitioners argue that the 1972 agreement did not created exclusive service territories and was superseded by the creation of different service territories in 1992. Both of these legal arguments suffer from the same basic flaw—the Commission has already considered and rejected them.

Petitioners first contend that the 1972 facilities exchange agreement between PacifiCorp and PGE "is not an agreement to allocate customers or territories" and therefore

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[14] GP/Clatskanie Response Brief at 4.
[15] Revised Petition at 23.
[16] *In re Portland Gen. Elec. Co.*, Docket No. DR 22, Order No. 99-748, 1999 WL 1489649 (Dec. 12, 1999). (silence of previous order regarding allocation of particular customer does not mean that the customer was not allocated).
[17] GP/Clatskanie Response Brief 11.
[18] Revised Petition at 3.

PacifiCorp's retention of the Troutdale substation under that agreement is irrelevant.[19] But in Order No. 92-557, the Commission specifically found that the 1972 facilities exchange agreement was intended to create exclusive service territories because it contemplated both the exchange of facilities *and customers served by those facilities*.[20] The Commission easily dismissed the argument Petitioners make here, concluding that a "service territory is the *obvious* result of such a division of facilities and customers[.]"[21] Thus, the Commission amended Order No. 72-870 *nunc pro tunc* to make clear that it established exclusive service territories under Oregon law.[22]

Petitioners contrast the 1972 agreement here with the agreement between PGE and CRPUD that the Commission addressed in Order No. 99-748.[23] In that order, the Commission found that PGE had retained the exclusive right to serve a Boise Cascade mill because the facilities exchange agreement between PGE and CRPUD carved out the facilities necessary to serve the mill.[24] Petitioners distinguish that case, arguing that the agreement between PGE and CRPUD included specific language preserving PGE's right to serve the mill.[25] Although the 1972 agreement in this case is not as specific as the agreement at issue in Order No. 99-748, the Commission's rationale and conclusion from that case is fully applicable here. The Commission found that the right to serve followed the transfer of

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[19] GP/Clatskanie Response Brief at 11.
[20] *In re Pacific Power & Light Co. and Portland General Elec. Co.*, Docket Nos. UA 37 & UA 41, Order No. 92-557 at 11 (Apr. 16, 1992). The Commission also cited other examples where approval of a facilities exchange agreement created exclusive service territories.
[21] *Id.* at 12 (emphasis added). The Commission's order is consistent with 758.410(1) and (2), which provide that in addition to a contract allocating "territories and customers," utilities may also enter into contracts exchanging facilities. The statute does not require that the two agreements be separate documents, as Petitioners contend.
[22] *Id.* at 19.
[23] GP/Clatskanie Response Brief at 15.
[24] Order No. 99-748 at *3.
[25] GP/Clatskanie Response Brief at 15.

facilities.[26] In Order No. 99-748, because PGE retained the facilities, it also retained the customer served by the facilities. Here, PacifiCorp retained the Troutdale substation, and therefore it retained the Camas Mill served by the substation.[27]

Petitioners next argue that the 1972 agreement and Order No. 72-870 approving the agreement were superseded by Order No. 92-557, which Petitioners now contend created a different service territory.[28] To reach this conclusion, Petitioners point out that the application at issue in Order No. 92-557 included only a description of the service territories and not the 1972 facilities exchange agreement. Thus, Petitioners reason that in Order No. 92-557, the Commission could not have allocated the Troutdale substation to PacifiCorp because that substation was not referred to in the 1991 filing. Petitioners' argument fails as factual and legal matter.

First, the Commission amended Order No. 72-870 *nunc pro tunc* to make clear that it *had* created exclusive service territories in 1972 and to demonstrate the identity of the service territories created by Order No. 72-870 and Order No. 92-557.[29] Petitioners have no legal basis to conclude that Order No. 92-557 created different service territories than did Order No. 72-870.

Second, Petitioners' argument is contradicted by their previous position that Order No. 92-557 "explicitly allocated the area included in the facilities exchange agreement[.]"[30] Petitioners provide no justification or explanation for their change in position.

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[26] Order No. 99-748 at *3.
[27] Order No. 92-557 at 11 (the "1972 agreement and order provide for an exchange of customers as well as an exchange of facilities and equipment").
[28] GP/Clatskanie Response Brief at 12-13.
[29] Order No. 92-557 at 18-19.
[30] GP/Clatskanie Opening Brief at 16; *see also* Revised Petition at 23 (Order No. 92-557 "did create exclusive service territories by adopting the '1991 Allocation Agreement' made between PGE and PacifiCorp, which replicated the borders formed by the 1972 facilities exchange agreement").

C. The Camas Mill's Special Contract does not Place it Beyond the Commission's Jurisdiction to Allocate.

Petitioners now argue that the Camas Mill is a voluntary customer of PacifiCorp and that the "Company's right to serve the Camas Mill extends only through the term of the Contract."[31] Petitioners claim that the Camas Mill is not exclusively allocated to PacifiCorp and, in fact, could not ever be allocated to PacifiCorp. Petitioners cite no authority for the broad proposition that special contract customers are beyond the Commission's authority to allocate.

The Commission's rules provide that special contracts are "subject to supervision, regulation, and control" in the same manner as all other general tariffs.[32] Nothing in the rule states or implies that a special contract customer is beyond the Commissions "supervision, regulation, and control" for purposes of territorial allocation.

In a case involving a previous Camas Mill special contract, the Court of Appeals made clear that special contracts are "fully subject to the Commission[]'s regulatory authority."[33] Indeed, if customers could divest the Commission of jurisdiction through special contracts,

> then the whole public interest in utility regulation would become meaningless, since by making separate contracts with all or any of its individual customers, the utility and the customer could effectively bypass all or any relevant part of the public utility regulatory statutes and the regulations governing the public utility.[34]

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[31] GP/Clatskanie Response Brief at 6-7, 21-22.
[32] OAR 860-022-0035(1).
[33] *American Can Co. v. Davis*, 28 Or. App. 207, 222 (1977).
[34] *Id.*

The Commission has affirmed that "[p]ublic utilities and their customers cannot limit the Commission's power by private contract."[35]

Commission precedent further undermines Petitioners' claim that the Camas Mill's special contract affects its status as an allocated PacifiCorp customer. As discussed above, in Order No. 99-748, the Commission resolved a dispute involving the allocation of the Boise Cascade mill in St. Helens. At that time, Boise Cascade was served by PGE under a special contract.[36] Nowhere does the Commission's allocation order suggest that the tariff under which the customer was served had any impact on whether the customer was allocated to PGE. In fact, despite the fact that the mill was a special contract customer, the Commission found that it had been exclusively allocated to PGE.

Petitioners also argue PacifiCorp has never acted as if it had the exclusive right to serve the Camas Mill because special contracts require a finding that the mill had viable alternatives to PacifiCorp.[37] But, as Petitioners admit, the Camas Mill's alternatives were always service from a *Washington* utility through *Washington* facilities.[38] No stakeholder has ever indicated that the Camas Mill could seek service from another Oregon utility as a viable alternative justifying a special contract.

Finally, as set forth in the assumed facts, the Camas Mill has taken service under "special contracts *or other Oregon rate tariffs*" since 1947.[39] Petitioners' new argument that the mill has always been a "voluntary" customer taking service exclusively under special contracts is contradicted by the assumed facts in the Revised Petition.

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[35] *Wah Chang v. PacifiCorp*, Docket No. UM 1002, Order No. 09-343 at 13-14 (Sept. 2, 2009).
[36] *See In re Portland General Elec. Co.*, Docket No. UE 114, Order No. 00-491 (Aug. 31, 2000) (approving amendment to PGE's special contract with Boise Cascade, which had been in effect since 1986).
[37] GP/Clatskanie Response Brief at 14.
[38] *Id.* at 14; Revised Petition, Exhibit B at 4.
[39] Revised Petition at 3 (emphasis added).

D. Federal Law does not Preempt a Finding that Clatskanie Has Violated PacifiCorp's Exclusive Service Territory.

Petitioners claim that federal law preempts the Commission from finding a violation of PacifiCorp's exclusive service territory—even if the Camas Mill is allocated to PacifiCorp.[40] Petitioners reason that federal law governs Clatskanie's interconnection with PacifiCorp's system and Clatskanie's proposed transmission to the Camas Mill. Therefore, "a state law prohibition of a right accorded to Clatskanie by Section 211 of the FPA would be preempted" and the Commission cannot prohibit Clatskanie from serving the Camas Mill.[41] Petitioners' sweeping assertion is contradicted by the very same provision of the Federal Power Act (FPA) Petitioners rely on for their preemption argument. Section 212(g) of the FPA clearly states that FERC does not have jurisdiction over the establishment of exclusive service territories by states.[42] FERC has interpreted this provision to prohibit it from interfering with state service territory laws:

> The legislative history of FPA section 212(g) indicates that the provision was focused on not interfering with state laws governing retail service territories and not permitting [FERC] wheeling orders "for purposes of sale by a utility to an ultimate consumer who is within the service territory of another utility (other than the applicant) where such territory is established by or under State law, rule, or decision."[43]

Clatskanie cannot hide behind its right to acquire interstate transmission service to violate PacifiCorp's exclusive service territory. Far from preempting the Commission, the FPA specifically disclaims federal jurisdiction over the state law issues in this case.

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[40] GP/Clatskanie Response Brief at 10.
[41] *Id.* at 32.
[42] 16 U.S.C. § 824k(g) ("No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.").
[43] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No.888, 61 Fed. Reg. 21,540 at 432 (1996).

E. The Allocation of the Camas Mill does not Violate the Dormant Commerce Clause.

In a further attempt to evade Commission jurisdiction, Petitioners argue that the dormant Commerce Clause prohibits the Commission from allocating the Camas Mill to PacifiCorp because the mill is located in Washington.[44] Petitioners' argument relies on generalities and fails to articulate how territorial allocation of Oregon customers discriminates based on state boundaries or directly controls commerce occurring outside of Oregon.[45]

Petitioners' first argument is that the Commission cannot exclusively allocate the Camas Mill because doing so "discriminates against interstate commerce by preventing GP from transacting for electric service in another state."[46] Noble Solutions makes a similar argument.[47] The parties' reliance on the constitutional prohibition on discrimination is entirely misplaced.

For purposes of the dormant Commerce Clause, a regulation is discriminatory if it differentiates between in-state and out-of-state economic interests in a manner that benefits the former and burdens the latter.[48] Here, the Commission's allocation of the Camas Mill to PacifiCorp does not preclude the Camas Mill from taking electric service from a Washington utility. Rather, the allocation precludes all other Oregon utilities—including Clatskanie—from serving the Camas Mill through allocated territory and facilities located in Oregon.[49]

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[44] GP/Clatskanie Response Brief at 4-6.
[45] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 and 1101 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2875, 189 L. Ed. 2d 835 (2014) and *cert. denied sub nom. American Fuel & Petrochemical Mfrs. Ass'n v. Corey*, 134 S. Ct. 2875, 189 L. Ed. 2d 835 (2014) and *cert. denied*, 134 S. Ct. 2884, 189 L. Ed. 2d 835 (2014) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).
[46] GP/Clatskanie Response Brief at 5.
[47] Noble Solutions LLC's Response Brief at 4.
[48] *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994).
[49] ORS 758.450(2).

The Commission's exclusive service territory does not favor an in-state utility (PacifiCorp) over an out-of-state utility.

Creating an exclusive service territory that favors one in-state utility over other in-state utilities is fully consistent with the dormant Commerce Clause. In numerous cases, the U.S. Supreme Court has recognized that the creation of exclusive service territories "are a matter of local concern" that fall within a state's regulatory authority and do not implicate the dormant Commerce Clause.[50] For example, when a large industrial customer tried to bypass a local gas distribution utility in violation of the utility's exclusive service territory, the Court upheld the exclusive service territory and "again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers, even if such regulation resulted in an outright prohibition of competition for even the largest end users."[51]

Oregon's authority to establish exclusive service territories is consistent with its broad police power to regulate the retail sale of electricity in the public interest.[52] Federal law expressly recognizes states' authority to create and enforce exclusive service territories.[53] Petitioners have failed to cite any authority suggesting that the creation and enforcement of exclusive service territories is unconstitutional. The Commission's allocation of the Camas

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[50] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 290 (1997) ("Almost as soon as the States began regulating natural gas retail monopolies, their power to do so was challenged by interstate vendors as inconsistent with the dormant Commerce Clause. While recognizing the interstate character of commerce in natural gas, the Court nonetheless affirmed the States' power to regulate, as a matter of local concern, all direct sales of gas to consumers within their borders, absent congressional prohibition of such state regulation.") (citing *Pennsylvania Gas Co. v. Public Serv. Comm'n of N. Y.,* 252 U.S. 23, 28–31 (1920); *Public Util. Comm'n of Kan. v. Landon,* 249 U.S. 236, 245–246 (1919)).

[51] *Id.* at 306 (citing *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n,* 341 U.S. 329 (1951)).

[52] *See S. Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002) (dormant Commerce Clause not implicated when regulation was "of a local public utility for the protection of local Missouri ratepayers."); *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States").

[53] 16 U.S.C. § 824k(g).

Mill to PacifiCorp complies with the dormant Commerce Clause even though it prohibits the mill from taking service from all other Oregon utilities.

Petitioners next argue that because the Camas Mill is located in Washington, exclusive allocation "facially burdens interstate commerce" by requiring the mill to seek regulatory approval in Oregon before transacting in another state.[54] Petitioners compare the Commission's enforcement of its territorial allocation orders to price control statutes struck down by the Supreme Court.[55] Petitioners' comparison is inapt. The Commission's exercise of regulatory jurisdiction over an Oregon utility customer and an Oregon People's Utility District (PUD) has none of the characteristics typical of price control statutes struck down as unconstitutional.[56]

Noble Solutions agrees with Petitioners and relies on a recent Ninth Circuit case invalidating a California statute that required an art seller from California to pay the artist a royalty upon the sale of the artist's work.[57] The Ninth Circuit concluded this regulation violated the dormant Commerce Clause because it could potentially regulate transactions that have no connection whatsoever with California (*e.g.*, a sale occurring out-of-state with an out-of-state buyer and an out-of-state artist would require a California seller, even if the seller is living outside the state, to pay the artist a royalty).[58] This case is inapplicable here because Clatskanie is an Oregon utility, seeking to serve an Oregon customer allocated to another Oregon utility through the same Oregon facilities that have served the customer since 1947. Clatskanie's violation of Oregon's territorial allocation statutes occurs in Oregon.

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[54] GP/Clatskanie Response Brief at 5-6.
[55] *Id.* at 5.
[56] *Energy & Env't Legal Inst. v. Epel*, No. 14-1216, 2015 WL 4174876, at *4 (10th Cir. July 13, 2015) ("essential characteristics": the statute is a price control statute, the statute links the prices paid in-state with those paid out-of-state; and the statute discriminates against out-of-staters.).
[57] Noble Solutions LLC's Response Brief at 2 (citing *Sam Francis Found. v. Christies*, 784 F.3d 1320 (9th Cir. 2015) (en banc)).
[58] *Sam Francis Found.*, 784 F.3d at 1323.

The Supreme Court of Kansas rejected a dormant Commerce Clause claim in a similar case involving attempted evasion of that state's territorial allocation laws. The court upheld a water utility's exclusive service territory and prohibited an exclusively allocated customer from buying water in a neighboring state and piping the water into the exclusive service territory for use.[59] The court rejected the argument that the dormant Commerce Clause prohibited the Kansas water district from regulating the Missouri transaction, finding that the Kansas district had the exclusive right to provide service within the district.[60]

F. Petitioners' Continued Reliance on *Columbia Basin* is Misplaced.

Petitioners repeatedly assert that the Commission's adoption of the geographic load center test in *Columbia Basin*[61] is dispositive of the issues in this case because the Camas Mill's load is located in Washington and therefore it cannot be allocated to PacifiCorp.[62] But, as discussed by Staff, the Commission's adoption of the geographic load center test in *Columbia Basin* was in response to the "particular circumstances" of that case, and the Commission rejected adoption of a uniform test.[63] Based on the particular circumstances of this case, Staff concluded that the Commission must have applied the point of service test in approving PacifiCorp's historical service to the Camas Mill. Under this test, the mill was

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[59] *Water Dist. No. 1 of Johnson County v. Mission Hills Country Club*, 960 P.2d 239 (Kan. 1998).
[60] *Id.* at 249. The court found that the water district was acting as a quasi-municipal corporation. The U.S. Supreme Court has recognized that public utilities are analogous to municipal corporations for purposes of dormant Commerce Clause analysis. *See Tracy,* 519 U.S. at 313 (Scalia, J. concurring) ("Nothing in this Court's negative Commerce Clause jurisprudence" compels the conclusion "that private marketers engaged in the sale of natural gas are similarly situated to public utility companies"); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (laws favoring local governments are less scrutinized that laws favoring private businesses engaged in a competitive market and public utilities are similar to governments in this respect).
[61] *Columbia Basin Elec. Coop., Inc. v. PacifiCorp et al.*, Docket No. UM 1670, Order No. 15-110 at 7 (Apr. 10, 2015).
[62] GP/Clatskanie Response Brief at 14, 17.
[63] Staff Response Brief at 7.

allocated to PacifiCorp because the point of service is located in PacifiCorp's exclusive service territory.[64]

Moreover, Petitioners have failed to rebut the argument that the proposed transaction presents precisely the type of manipulation the Commission rejected in *Columbia Basin*.[65] Petitioners' only substantive response to this is their discredited argument that "there is no territorial allocation at all" in this case.[66] Petitioners cannot point to a single case where a commission or court has allowed a utility to move a customer out of another utility's exclusive service territory though purchase of that customer's transmission lines.

G. The Proposed Transaction is Distinct from a Physical Relocation.

Petitioners argue that the Camas Mill will wholly withdraw from Oregon once it sells its transmission lines to Clatskanie, so the proposed transaction is no different than if the Camas Mill physically relocated to another state.[67] The proposed transaction, however, is not comparable to a physical relocation because nothing material is being physically relocated. The assumed facts are clear that under the proposed transaction, "there is no change in the physical location of the Camas Mill."[68] As Staff recognized, "there will be no physical change to the Camas Mill or to any of the facilities involved with serving the Mill."[69]

Petitioners now contend that there will be "significant alternations" and a "major change to the way that power is delivered to the Camas Mill," including the installation of some new equipment and the migration of the mill to BPA's balancing area.[70] The minor

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[64] *Id.*
[65] *See* PacifiCorp's Opening Brief at 16-17, 19-20.
[66] GP/Clatskanie Response Brief at 17-19.
[67] *Id.* at 6.
[68] Revised Petition at 6.
[69] Staff Response Brief at 10.
[70] GP/Clatskanie Response Brief at 19-20.

facility changes described by Petitioners do not counter the essential fact that the only real change that will occur under the proposed transaction is to the point of delivery.

H. Clatskanie will Violate Direct Access under the Proposed Transaction.

To defend the proposed transaction from claims that Clatskanie will violate direct access, Petitioners rely heavily on the argument that the Camas Mill is not an allocated customer and therefore can choose its utility provider outside of direct access.[71] As discussed above, this is untrue. Clatskanie cannot serve an exclusively allocated customer of PacifiCorp except as provided in ORS 757.672(2). Therefore, Clatskanie will violate direct access under the proposed transaction.

Petitioners analogize the proposed transaction to an entirely different scenario where the Camas Mill takes service from a Washington utility through Washington facilities.[72] Petitioners reason that this alternative scenario would not violate direct access and therefore neither does the proposed transaction. As discussed above, and as Staff notes in its brief, taking service from a Washington utility "without using the existing 69 kV transmission lines" is "an entirely different issue than the one presented in the current proceeding."[73] The fact that a Washington utility is not subject to ORS 757.672(2) has no bearing on whether an Oregon utility, like Clatskanie, is subject to the statute. As an Oregon PUD, Clatskanie is subject to the Commission's jurisdiction when it provides direct access.[74]

Petitioners also argue that ORS 757.672(2) does not apply because Clatskanie will not serve "a nonresidential electricity consumer of another electric utility."[75] Petitioners claim that once Clatskanie begins serving the Camas Mill, the mill will be a customer of

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[71] *Id.* at 23-24, 28
[72] *Id.* at 25.
[73] Staff Response Brief at n. 2.
[74] Revised Petition at 5 ("Clatskanie is an Oregon peoples' utility district"); ORS 757.672(2).
[75] GP/Clatskanie Response Brief at 27.

Clatskanie, not PacifiCorp. This claim could apply to any direct access relationship—once the Energy Service Supplier (ESS) is serving the customer, the customer is no longer a customer of another utility. Under Petitioners' logic, ORS 757.672(2) would become meaningless because, once a PUD is serving a customer, the customer is no longer a customer of another utility. This is a result that the legislature surely did not intend.[76]

III. CONCLUSION

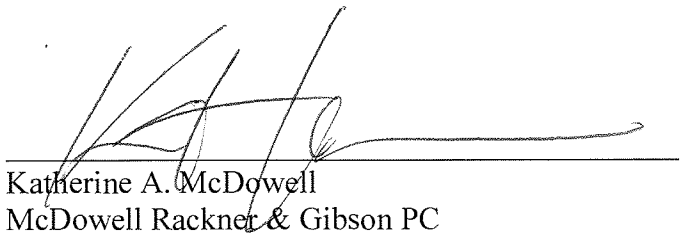
PacifiCorp and Staff have established that the Camas Mill is exclusively allocated to PacifiCorp. Clatskanie cannot serve a PacifiCorp customer through facilities located in Oregon regardless of where Clatskanie moves the point of delivery. Therefore, the proposed transaction violates PacifiCorp's exclusive service territory and direct access.

Clatskanie's argument is nothing more than a claim that it is above the law and beyond the Commission's jurisdiction. But both the territorial allocation and direct access frameworks were created by the legislature to promote and protect the public interest. The legislature granted the Commission broad regulatory authority under these statutory schemes, including the authority to regulate PUDs like Clatskanie. Approval of the proposed transaction would significantly erode both frameworks and encourage similar transactions to

[76] ORS 174.010 ("where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."); *Pac. Coast Recovery Serv. v. Johnston,* 219 Or. App. 570, 576–577 (2008) (refusing to adopt interpretation that would render statutory provision a nullity).

evade territorial allocation and bypass the customer protections built into direct access—to the detriment of customers and utilities alike.

Respectfully submitted this 11th day of August, 2015.



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