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August 11, 2015

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE
Salem OR 97301

Re: In the Matter of GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC and CLATSKANIE PEOPLE'S UTILITY DISTRICT Petition for Declaratory Ruling
Docket No. DR 49

Dear Filing Center:

Enclosed for filing in the above-referenced matter, please find the Reply Brief of Georgia-Pacific Consumer Products (Camas) LLC and Clatskanie People's Utility District.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosure
cc: Service List

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 Petitioners.	)	REPLY BRIEF OF GEORGIA-PACIFIC CONSUMER PRODUCTS (CAMAS) LLC AND CLATSKANIE PEOPLE'S UTILITY DISTRICT

I. INTRODUCTION

Georgia-Pacific Consumer Products (Camas) LLC ("GP" or the "Camas Mill") and Clatskanie People's Utility District ("Clatskanie") respectfully submit this Reply Brief in response to the briefs filed by PacifiCorp (or the "Company") and the Oregon Public Utility Commission ("Commission") Staff. Weighing in on the issues in this docket for the first time, Staff's brief argues for a result-oriented outcome based on factual errors, little statutory analysis, and a misreading of Commission precedent. PacifiCorp, for its part, recycles the arguments presented in its original brief, while introducing a new theory of judicial estoppel that is inapplicable in this case.

In this Reply Brief, Petitioners address the following, critical issues that neither Staff nor PacifiCorp can overcome:

- The proposed retail transaction between Clatskanie and GP will occur within the State of Washington. Regulation of a transaction that takes

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place entirely outside of the State of Oregon would be a *per se* violation of the Commerce Clause of the United States Constitution.

- Staff appears to misunderstand the physical location of the Troutdale Substation. It is located on the *west* side of N.E. Sundial Road. This is within Parcel B, which was transferred to PGE in the 1972 facilities exchange, and Parcel C, which was allocated to PGE in 1992. Thus, all of Staff's conclusions in its Response Brief rest on a factual error. The Troutdale Substation is physically located within territory that unequivocally was exclusively allocated to PGE.

- No Commission order references the Troutdale Substation or its location, let alone affirmatively allocates this substation to the Company. PacifiCorp has no basis for concluding that it has an exclusive allocation of this area simply because it did not transfer this substation to PGE in a 1971 application for a facilities exchange.

- Regardless of any allocation of the Troutdale Substation, neither Staff nor PacifiCorp can provide any support for their claim that the Camas Mill, a customer located in Washington, has been exclusively allocated to the Company.

- Under the Assumed Facts, the point of delivery, point of use, and location of the Camas Mill load will all be at the same place in Washington. Under any of the tests applied by the Commission for where "utility service" occurs under the territory allocation laws, the result is that it occurs in Washington, outside of any Oregon allocated territory.

- Finding that "utility service" to the Camas Mill occurs in Washington continues settled and well-supported precedent. By contrast, it is Staff's and PacifiCorp's outcome-oriented proposal to use different tests for different circumstances that would gut the policies behind the territory allocation laws.

- The Commission's current jurisdiction over GP's retail service (which is undisputed) rests upon an approved, voluntary special contract that specifies Oregon jurisdiction, not upon where PacifiCorp is providing "utility service" to the Camas Mill. Under the Assumed Facts, the Commission-approved contract will have expired by its own terms, and the factual situation will have changed, as there will be no retail transaction taking place in Oregon.

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- The only transactions taking place in Oregon are FERC-jurisdictional interconnection and wheeling services.

- Only the Petitioners base their analysis of Oregon's direct access law on the statute. Staff's analysis ignores both the plain text and legislative intent of the direct access law, and its analysis should be rejected out of hand. PacifiCorp, likewise, bases its analysis on vague threats of unsubstantiated stranded costs that it will impose upon Oregon customers, not the plain text of the statute.

As a result, no arguments presented by Staff or PacifiCorp can change the fact that GP is not an exclusive Oregon customer because the Camas Mill is *located in Washington*. If, following the explicitly stated expiration date under the Commission-approved bilateral special contract it negotiated with PacifiCorp (the "Contract"), GP chooses to take retail electric service in Washington, the law and the United States Constitution allow it to do so.

II. ARGUMENT

A. Commission Regulation of the Proposed Transaction Under the Assumed Facts Would Constitute a *Per Se* Violation of the Commerce Clause.

The Petitioners have consistently maintained throughout this proceeding that the Commission's exercise of jurisdiction over their proposed transaction would infringe upon fundamental principles of state sovereignty and would violate the Commerce Clause of the U.S. Constitution.[1/] The Revised Petition's Assumed Facts are explicit: "GP will take delivery of electric service from Clatskanie in Washington …."[2/] Adopting Staff's and PacifiCorp's recommendations to regulate the proposed transaction through the direct access law, or prohibit it altogether through application of the territory allocation laws, would regulate wholly

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[1/] Revised Petition at 11-12; Petitioners' Opening Br. at 6-7; Petitioners' Resp. Br. at 4-6.
[2/] Revised Petition at 6 (Assumed Facts ¶ 10).

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extraterritorial commerce. This is a *per se* violation of the Commerce Clause of the U.S. Constitution.[3/]

Staff does not even attempt to address this threshold issue in its Response Brief. PacifiCorp claims that the Commission's regulation of a retail electric sale in Washington would not violate the dormant Commerce Clause because it does not meet one of three "essential characteristics" that the Tenth Circuit Court of Appeals recently distilled for itself from various Supreme Court cases in ruling on the constitutionality of Colorado's renewable portfolio standard, a statute that had clear in-state impacts: "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."[4/] The Commission will not find any reference to "essential characteristics" in any Supreme Court or Ninth Circuit jurisprudence. This is because "discrimination and economic protectionism are not the sole tests" of a Commerce Clause violation.[5/] An analysis under the Tenth Circuit's "characteristics" is irrelevant here, where the proposed regulation is of wholly extraterritorial commerce.[6/]

In Sam Francis Foundation v. Christies, Inc., the Ninth Circuit Court of Appeals, sitting *en banc*, struck down a provision in a California law that required the payment of

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3/ Healy v. Beer Instit., Inc. 491 U.S. 324, 336 (1989); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

4/ PacifiCorp Resp. Br. at 6 (citing Energy & Env't Legal Instit. v. Epel, -- F.3d --, 2015 WL 4174876 at *4 (10th Cir. July 13, 2015)).

5/ Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993); see also, Midwest Title Loans v. Mills, 593 F.3d 660, 665 (7th Cir. 2010) ("as case law has long recognized, the commerce clause can be violated even when there is no outright discrimination in favor of local business … and that is where states actually attempt to regulate activities in other states").

6/ Miller, 10 F.3d at 639. Intervenor Noble America's Energy Solutions LLC ("Noble") is the only other party to recognize the straightforward application of the Commerce Clause to the Assumed Facts: "PacifiCorp's failure to address the undisputed fact that the customer will be purchasing electricity in Washington is fatal to its argument …." Noble Response Br. at 2.

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royalties on sales of fine art that occurred outside of the state's borders if the seller happened to reside in California.[7/] The Court "*easily* conclude[d] that the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause."[8/] In doing so, the Court relied on the "simple, well established constitutional rule summarized in"[9/] the Supreme Court's holding in Healy v. Beer Institute:

> [O]ur cases concerning the extraterritorial effects of state economic regulation stand *at a minimum* for the following proposition[]: … the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state …. The *critical inquiry* is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.[10/]

The Healy Court cited, among other cases, Brown-Forman Distillers Corp.'s holding that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce" in violation of the Commerce Clause.[11/]

Additionally, in Sam Frances Foundation, the Ninth Circuit held that cases such as Rocky Mountain Farmers Union v. Corey, which PacifiCorp cites to support its position in this case,[12/] did not apply because such cases "concerned state laws that regulated *in-state conduct* with allegedly significant out-of-state practical effects," whereas the law at issue in Sam Francis Foundation regulated "out-of-state conduct."[13/] The Ninth Circuit's decision is well-

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7/ 784 F.3d 1320, 1323 (9th Cir. 2015).
8/ Id. (emphasis added).
9/ Id. at 1325.
10/ Id. at 1323 (citing Healy, 491 U.S. at 336 (emphasis added)).
11/ Healy, 491 U.S. at 334 (citing Brown-Forman Distillers Corp., 476 U.S. at 582).
12/ PacifiCorp Resp. Br. at 6 n. 13 & 14.
13/ Sam Francis Found., 784 F.3d at 1324 (emphasis in original).

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supported in other circuits.[14/]

Under the Assumed Facts, Clatskanie will sell electricity to the Camas Mill in Washington.[15/] Just as California cannot regulate out-of-state sales made by sellers purely on the basis that they reside in California, neither can the Commission regulate sales that Clatskanie makes out-of-state simply because it is a legal entity organized under the laws of Oregon. An order that prohibits or regulates this transaction under Oregon's territory allocation or direct access laws would be an attempt to illegally exercise control "beyond the borders of the state," and, as such, would be *per se* unconstitutional.[16/]

Furthermore, even if the Commission were to improperly borrow the Tenth Circuit's newly formulated "essential characteristics" test, rather than apply controlling Ninth Circuit precedent, Commission regulation under the Assumed Facts would meet at least one of these tests because it would constitute price control by requiring a Washington customer to take retail electric service in Washington at Oregon-mandated rates. It would, therefore, be unconstitutional under the Tenth Circuit precedent as well. Notably, to the extent the Tenth

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[14/] See, e.g., Mills, 593 F.3d at 669 (finding that Indiana law that regulated title loans made in Illinois violated the Commerce Clause because it regulated wholly extra-territorial conduct, even though the law did not discriminate against out-of-state parties); Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 493-94 (4th Cir. 2007) (reading South Carolina law prohibiting sale of vehicles "directly or indirectly" to consumers in the state as not prohibiting sale of motor vehicles to South Carolina residents in other states in order to avoid violation of Commerce Clause based on extraterritorial application); Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 168 (2d Cir. 2005) ("a statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question"); Dean Foods Co. v. Brancel, 187 F.3d 609, 619-20 (7th Cir. 1999) ("as the legal rules we apply here make clear, the fact that a particular transaction may affect or impact a state does not license that state to regulate commerce which occurs outside of its jurisdiction").

[15/] Revised Petition at 5-6 (Assumed Facts ¶ 10).

[16/] Because regulation of the Petitioners' proposed transaction under the Assumed Facts would be of entirely out-of-state commerce, the balancing test the Supreme Court formulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), for laws that regulate evenhandedly and have only incidental effects on interstate commerce, is not applicable here. Brown-Forman, 476 U.S. at 579; Miller, 10 F.3d at 638.

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Circuit's other "essential characteristics" – discrimination and linking prices paid in-state with those paid out-of-state – do not fit the Assumed Facts, that is because, as the Ninth Circuit recognized, there is no in-state regulation of commerce with which to compare the out-of-state regulation.[17/]

The only commerce that is occurring in Oregon under the Assumed Facts is transmission wheeling and interconnection transactions.[18/] There does not appear to be any dispute in this case that these are subject to the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction.[19/] Accordingly, the Commission's assertion of jurisdiction over any part of the proposed transaction is either federally preempted or *per se* unconstitutional.

B. Neither Staff Nor PacifiCorp Provide Any Basis to Conclude that Either Troutdale or the Camas Mill Has Been Allocated to PacifiCorp.

Prohibiting the Petitioners' proposed transaction under the guise of the territory allocation laws is, in any event, unnecessary because, ultimately, PacifiCorp simply does not have an allocated territory at the Troutdale Substation, nor an exclusive right to serve the Camas Mill.

1. Staff misreads the Commission's orders in concluding that the Troutdale Substation has been allocated to PacifiCorp.

The Petitioners agree with Staff that the scope of a territorial allocation is "properly viewed as a legal question which is determined by the relevant Commissioner orders." In looking to the Commission's Order No. 72-870 (the "1972 Order"), which approved a 1971

17/ Sam Francis Found., 784 F.3d at 1324.

18/ Revised Petition at 6 (Assumed Facts ¶ 11).

19/ PacifiCorp Opening Br. at 25 n. 94; see also, Petitioners' Resp. Br at 10 n.29. Staff's Response Brief did not address FERC jurisdiction.

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facilities exchange agreement between PacifiCorp and Portland General Electric Company ("PGE"),[20/] Staff states that "the metes and bounds description for Parcel B, which was transferred by PacifiCorp to PGE, ends just to the *west* of the territory that encompasses the Troutdale Substation."[21/] Staff concludes that "[i]n this way, PacifiCorp preserved the Troutdale Substation as within its service territory."[22/] Staff further states that Commission Order 92-557 (the "1992 Order")[23/] "essentially leaves unchanged the 1971 exchange agreement."[24/]

a. The Troutdale Substation is within the 1972 Order's Parcel B and the 1992 Order's Parcel C.

Staff is correct that the metes and bounds description of Parcel B, transferred to PGE in the 1972 Order, is the same as the metes and bounds description of Parcel C, allocated to PGE in 1992 Order.[25/] Staff is wrong, however, that these parcels end just to the west of the territory that encompasses the Troutdale Substation. In fact, they both end just to the *east* of the Troutdale Substation, and therefore, encompass it. Consequently, **Staff's conclusion that PacifiCorp preserved the Troutdale Substation within its service territory – the only basis for *all* of its conclusions in its Response Brief – rests on a misunderstanding of where the Troutdale Substation is located.** Furthermore, even if the Troutdale Substation were located to

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20/ Re PacifiCorp & PGE, Docket No. UF 2947, Order No. 72-870 (Dec. 15, 1972).
21/ Staff Resp. Br. at 5.
22/ Id.
23/ Re PGE, Docket Nos. UA 37 & UA 41, Order No. 92-557 (Apr. 16, 1992).
24/ Staff Resp. Br. at 5.
25/ Compare Order No. 72-870, App. A at 2-3 with Order No. 92-557, App. A at 2-3. Note that Parcel C in the 1972 Facilities Exchange Agreement follows the same metes and bounds as the service territory allocation of the 1992 Order. It is only the 1972 Order approving the facilities exchange that re-ordered the numbering of these parcels. This renumbering appears to have been done because the 1972 Order separately approved both the facilities exchange at question and an unrelated service territory allocation in the Ranier, Oregon area. All references to "Parcel C" herein refer to the Parcel C described in the Facilities Exchange Agreement in 1972 (renumbered as "Parcel B" in the 1972 Order) and the service territory allocation in the 1992 Order.

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the east of the territory that was allocated to PGE in the 1992 Order, that territory to the east had already been allocated to PGE years earlier.

The history of the Commission's allocation of territory in the area around the Troutdale Substation is helpful in this regard. In 1962, PGE attempted to get Commission approval of an exclusive allocation in all of the territory it served, but met with opposition from the City of Portland, which did not want to be allocated to a single utility.[26/] As a result, the Commission approved PGE's allocation, but excluded the areas that Portland did not want allocated, resulting in Portland creating a "donut hole" in PGE's otherwise exclusively allocated service territory.[27/] The boundaries of this "donut hole" were set out in the order approving PGE's exclusive service territory in 1963, and except for a small part of the northern border, which ran up to the Washington State line, the Portland donut hole was entirely surrounded by PGE's exclusive service territory.[28/] This area that was excluded from PGE's service territory was called the "Portland Exclusion Area," and the metes and bounds description of this area is essentially identical to the metes and bounds description of Parcel C in the 1992 Order.[29/] Thus, the 1992 Order's allocation of Parcel C to PGE finally filled the donut hole in PGE's service territory allocation. PacifiCorp, on the other hand, was allocated three carve-outs within PGE's Parcel C: parcels A, B, and D, two of which were on the west side of the Willamette River in downtown Portland, and one of which was in North Portland, but extended east only as far as 122nd Street.

[26/] Order No. 92-557 at 3.
[27/] Id.
[28/] Re Application of PGE, Docket No. U-F-2342, Order No. 39026 App. A at 25-26 (Jan 21, 1963).
[29/] C.f. Id. with Order No. 92-557, App. A at 2-3.

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A review of the metes and bounds of Parcel C reveals that this parcel begins at a point on the state line that is an imaginary extension of the east side of Sundial Ranch Road (what is now Sundial Road).[30/] The boundary extends due south along the east side of Sundial Ranch Road all the way to the south line of the Banfield Expressway (I-84).[31/] As a result, the area to the *west* of Sundial Ranch Road and north of I-84 is part of Parcel C – PGE's former "donut hole" but now exclusively assigned service territory. To the east of Sundial Ranch Road is the "donut," territory that has been exclusively allocated to PGE since Order 39026 was issued in 1963. Staff notes that the border of the parcel is very close to the Troutdale Substation. Staff is correct; reference to any map will establish that the Troutdale Substation is situated adjacent to the *western* edge of Sundial Road, and the Petitioners formally request that the Commission take official notice of this fact.[32/] Because Parcel C extends as far east as the "east side of Sundial Ranch Road," the substation is located in Parcel C, and the nearest territory exclusively assigned to PacifiCorp is the Parcel A carve-out that was allocated in the 1992 Order and extends only as far east as 122nd Street. Thus, contrary to Staff's assertions, the legally operative metes and bounds description of PGE's service territory conclusively includes the Troutdale Substation.

Notably, PacifiCorp does not appear to dispute that the Troutdale Substation is in the 1992 Order's Parcel C. The Petitioners have consistently maintained this position throughout this proceeding, and the Company has not argued otherwise. Consistent with the Commission's Columbia Basin decision, PacifiCorp has never needed an exclusive service territory at the

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30/ Order No. 92-557, App. A at 2-3.

31/ Id.

32/ OAR 860-001-0460(1)(a); ORS 40.065(2) (a "judicially noticed fact must be one not subject to reasonable dispute in that it is … [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

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Troutdale Substation to serve a customer whose load is located entirely in Washington, outside of any Oregon exclusive service territory.

There is another substation that is on the east side of Sundial Road, which is owned by the Bonneville Power Administration. This can be seen in Exhibit A to the Revised Petition. Reference to a map will confirm that the street running between "PAC Troutdale" and "BPA Troutdale" in this Exhibit is Sundial Road. The border of Parcel C, therefore, runs just to the west of the BPA substation, so it is possible that Staff mistakenly believed that this was the Troutdale Substation. However, even if this were the case, the site of the BPA substation is located within the "donut" – the territory that has been exclusively allocated to PGE since 1963.

b. No Commission order allocates the Troutdale Substation to PacifiCorp.

In its Response Brief, PacifiCorp does not elaborate on the position it advanced in its Opening Brief that it has been exclusively allocated the Troutdale Substation because it reserved title to that substation for itself in the 1971 exchange agreement.[33/] As previously noted by the Petitioners, even if PacifiCorp did reserve ownership of the Troutdale Substation for itself in the 1971 exchange agreement, that does not result in it being part of the Company's allocated territory.[34/] A contract for the allocation of territories and customers must "designat[e] which territories and customers are to be served by which of said contracting parties."[35/] Therefore, the

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33/ PacifiCorp Opening Br. at 7-10. PacifiCorp also suggests in its Opening Brief that it was previously allocated territory within the 1992 Order's Parcel C, pursuant to Commission Order 70-219. This order does not provide any metes and bounds description of any allocated territory, and even if it were sufficient to allocate territory within Parcel C to PacifiCorp, that allocation has been superseded by the 1992 Order's allocation of all of Parcel C to PGE.

34/ Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1436 (9th Cir. 1996).

35/ ORS 758.410(1).

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failure to designate the Troutdale Substation as its allocated territory in the 1992 Order is fatal to the Company's argument.

The 1992 Order was not simply a ratification of the 1971 exchange agreement, as Staff and PacifiCorp have both seemed to suggest.[36/] It approved a *new* application pursuant to a *new* contractual agreement between the utilities that they specifically requested *prospectively* allocate service territory.[37/] Therefore, for purposes of determining which utility has which allocated territory, the 1971 facilities exchange agreement and the 1972 Order approving it are irrelevant. The Ninth Circuit Court of Appeals confirmed that, as a matter of federal antitrust law, the 1972 Order did not allocate any territory in the area in question.[38/]

The 1992 Order is the order that actually allocated territory in the area at issue. This order could not be clearer:

> [T]he utilities agree pursuant to ORS 758.410 that the area described as Parcels A, B, and D in the 1972 agreement and all customers within those parcels shall constitute territory allocated to PP&L. PP&L currently serves all customers located in those parcels. *The utilities further agree that the area described as Parcel C in the 1972 agreement and all customers in that area shall constitute territory allocated to PGE. PGE currently serves all customers in that parcel*.[39/]

The metes and bounds description of the parcels allocated unequivocally place the Troutdale Substation in Parcel C – "territory allocated to PGE."[40/] Parcel C has no carve-outs. The 1992 Order does not mention the Troutdale Substation. Therefore, any reservation of the Troutdale

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36/ Staff Resp. Br. at 5; PacifiCorp Opening Br. at 9-10.

37/ 1992 Order at 2 ("The applications ask the Commission to state the effect of a previous Commission order and to allocate territory *prospectively*") (emphasis added); see also, Petitioners' Resp. Br. at 12-13.

38/ Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1437 (9th Cir. 1996).

39/ Order 92-557 at 18 (emphasis added).

40/ Id., App. A at 2-3; see also, id., App. D at 1.

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Substation PacifiCorp made for itself in the 1971 facilities exchange agreement cannot supersede the failure to designate this substation as the Company's allocated territory in the application that the 1992 Order approves, as well as the 1992 Order's unambiguous allocation of the area surrounding and including the Troutdale Substation to PGE. In no case has PacifiCorp ever done more than retain ownership of a substation located within PGE's exclusive service territory, while legally using that substation to serve a customer located in unallocated Washington State.

2. Staff and PacifiCorp provide no reason to conclude the Camas Mill was allocated to PacifiCorp.

Furthermore, neither Staff nor PacifiCorp point to any order that references the Camas Mill, let alone a "clearly articulated and affirmatively expressed" designation of this customer as exclusively allocated to PacifiCorp.[41/] As the Petitioners have noted, the Camas Mill is physically located outside of any territory that the Commission could legally allocate, and unlike the affirmative rights reserved by PGE in DR 22, which assigned PGE the "sole and exclusive right" to serve the Boise-Cascade mill that was physically located within the Columbia River People's Utility District's newly acquired territory, no Commission order assigns the Camas Mill to PacifiCorp.[42/] Instead, in order to arrive at the conclusion that the Camas Mill is exclusively allocated to PacifiCorp, Staff simply "surmises" that the Commission "must have employed what it has recently termed a 'point of service' test to allow the current service structure."[43/]

41/ Columbia Steel, 111 F.3d at 1436; ORS 758.410(1).

42/ Re Portland General Electric Co., Docket No. DR 22, Order No. 99-748, 1999 WL 1489649 at *2 (Dec. 12, 1999).

43/ Staff Resp. Br. at 7, 6.

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It is telling that the only method Staff can devise to allocate the Camas Mill to PacifiCorp is the one the Commission explicitly rejected in Columbia Basin as undermining the purpose of the territory allocation laws because it would allow customers to manipulate service territories.[44/] Simply put, Staff confuses the facts surrounding the allocation of territory around the Troutdale Substation, and provides no basis for concluding that any purported allocation of territory to PacifiCorp included an allocation of an out-of-state customer.

C. The Petitioners' Proposed Transaction Does Not Undermine the Integrity of Allocated Territories.

Despite the fact that PacifiCorp has no allocated territory or "exclusively allocated customer" in this case, both Staff and PacifiCorp argue that the Petitioners' proposed transaction under the Assumed Facts is little more than a "creative attempt" to evade Oregon's territory allocation laws.[45/] Therefore, they argue that a finding in this proceeding that the territory allocation laws do not apply to the Assumed Facts would undermine the policy behind these laws.[46/] Both parties argue that the Commission should disregard its recent decision in Columbia Basin to look to the location of the customer's load in determining where "utility service" occurs for purposes of the allocation laws.[47/] They argue, instead, that the Commission should apply different tests to different circumstances.[48/] Nothing would undermine the policies behind the territory allocation laws more than adopting Staff's and PacifiCorp's outcome-driven proposal.

[44/] Columbia Basin Elec. Co-op., Inc. v. PacifiCorp, Docket No. UM 1670, Order No. 15-110 at 7 (Apr. 10, 2015).
[45/] Staff Resp. Br. at 11; PacifiCorp Resp. Br. at 5.
[46/] Id.
[47/] Staff Resp. Br. at 9-10; PacifiCorp Resp. Br. at 3, 5.
[48/] Staff Resp. Br. at 9; PacifiCorp Resp. Br. at 3.

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1. Extending the holding of Columbia Basin in this case will support, rather than undermine, Oregon's territory allocation laws.

In Columbia Basin, the Commission only considered certain tests for where "utility service" occurs in the context of the Shepherd's Flatt Central project because it straddled both PacifiCorp's and Columbia Basin's allocated territories.[49/] With respect to the two other wind projects that were not located astride the two utilities' allocated territories, the Commission found that the determination of which utility had the right to serve these projects required little discussion and was "straight-forward …. When an entire load is located within the service territory of a single utility, that utility has the right and obligation to serve that load."[50/] Indeed, less than a week before this Reply Brief was filed, the Commission confirmed in an order denying applications for clarification and reconsideration in Columbia Basin that there is not "*any ambiguity* in the application of the Territory Allocation Law for a customer that is wholly within an allocated territory."[51/] In this situation, "no test or analysis [is] necessary."[52/] As noted in the Petitioners' Response Brief, this decision is well-supported in other jurisdictions.[53/] It is also consistent with the statutory definition of "utility service," which specifically excludes service that "pass[es] through or over but … do[es] not terminate in" an allocated territory.

49/ Order 15-110 at 8.

50/ Id. at 6.

51/ Columbia Basin Elec. Co-op, Inc. v. PacifiCorp, Docket No. UM 1670, Order No. 15-229 at 3 (Aug. 6, 2015) (emphasis added).

52/ Id.

53/ Cent. Ill. Pub. Serv. Co. v. Ill. Comm. Comm'n, 560 N.E.2d 363, 365 (Ill. 1990); Pub. Serv. Co. of Colo. v. Pub. Utils. Comm'n of Colo., 765 P.2d 1015, 1017 (Colo. 1988); Lee County Elec. Co-op. v. Marks, 501 So.2d 585, 587 (Fla. 1987); O'Brien Co. Rural Elec. Coop., v. Iowa State Commerce Comm'n, 352 N.W.2d 264, 268 (Iowa 1984); Sw. Elec. Power Co. v. Carroll Elec. Coop. Corp., 554 S.W.2d 308, 309 (Ark. 1977); Capital Elec. Power Ass'n v. Miss. Power & Light Co., 218 So. 2d 707, 714 (Miss. 1968); Holston River Elec. Co. v. Hydro Elec. Corp., 66 S.W.2d 217, 218 (Tenn. 1933).

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The Camas Mill's load is unambiguously located wholly within Washington, outside of any Oregon allocated territory. Thus, there is no need to apply any of the tests the Commission articulated in Columbia Basin, nor the policies behind them. Nevertheless, it is also the case that looking to the location of the Camas Mill load best supports the Commission's articulated policies behind the territory allocation laws. The policy reason the Commission gave for adopting the "geographic load center test" in Columbia Basin to determine which utility had the right to serve the Shepherds Flatt Central project was that it "precludes a customer from manipulating delivery points and running lines across boundaries to obtain service from a neighboring utility."[54/] Both PacifiCorp and Staff argue that, because Petitioners will be moving the point of delivery from Oregon to Washington, they will violate this policy if they are allowed to proceed with their proposed transaction.[55/] But nothing could be further from the truth. In fact, the Petitioners propose to do the *precise opposite* of what the Commission was attempting to prevent when finding that "utility service" occurs at the location of the load.[56/] Rather than running a line from the location of the Camas Mill load into a neighboring utility's allocated territory, the Petitioners are proposing to make both the point of service and the location of the Camas Mill load one and the same.[57/] In fact, under *any of the tests* articulated in Columbia Basin for where utility service occurs, the result under the Assumed Facts is the same – utility

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54/ Order No. 15-110 at 8.
55/ Staff Resp. Br. at 11; PacifiCorp Resp. Br. at 5.
56/ Order No. 15-110 at 7.
57/ Revised Petition at 5-6 (Assumed Facts ¶ 10).

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service occurs at the Camas Mill, which is the location of the load, the point of service, and the point of use.[58/]

Looking to the location of the Camas Mill load in determining where "utility service" occurs, therefore, continues a sound and settled interpretation of which customers are allocated to which utilities and prevents customers from manipulating service territories by running lines *away* from their facilities and into other allocated territories. It also achieves the right result in this case because it recognizes the obvious fact that the Camas Mill is located in Washington, an area that cannot legally be allocated by the Commission. Moreover, application of any of the other Columbia Basin tests results in the same conclusion – under the Assumed Facts, the load, point of use, and point of delivery will all be at the Camas Mill – so modifying established precedent in this case has no impact on the outcome. This is also consistent with the statutory definition of "utility service," as Clatskanie will provide utility service that passes through and does not terminate in any Oregon allocated territory.

2. Adopting Staff's and PacifiCorp's recommendation would severely undermine Oregon's territory allocation laws.

In contrast to continuing settled and well-supported precedent, Staff and PacifiCorp recommend that the Commission apply a different rule for where utility service occurs each time it is faced with a different factual scenario.[59/] It is difficult to think of a policy that would be more likely to undermine the territory allocation laws. Under this scenario, utilities would never know whether they had an exclusive right and obligation to serve a

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[58/] Order No. 15-110 at 7.

[59/] Staff Resp. Br. at 9-10; PacifiCorp Resp. Br. at 3.

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customer, and customers would never know whether they could count on service from their utility.

Moreover, Staff's recommendation to use the point of service test in this case is inapplicable where the customer's load is located entirely outside of an allocated territory,[60/] and directly contradicts the important policies it states underlie the territory allocation laws. Staff appears to argue that applying the "point of service" test in this case prevents GP from moving that point of service.[61/] But that is exactly what the "point of service" test allows and exactly why the Commission has rejected it.[62/] Staff and PacifiCorp both recommend that the Commission arbitrarily reverse its own recent precedent in favor of an "ends justify the means" policy.[63/] They do not, however, propose a test that would actually achieve their outcome-oriented aims. Their arguments make no sense, and adopting them would constitute the essence of inconsistent agency action.[64/]

Furthermore, the implication of Staff's position is that the Commission has the authority to prevent GP from selling *its own private property* (the 69 kV lines that interconnect the Camas Mill with the Troutdale Substation) to a third party. Staff does not, and cannot, provide any support for this conclusion. GP intends to wholly and entirely remove itself from the area that PacifiCorp incorrectly claims to be its exclusive service territory. As a result, under

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60/ Order No. 15-229 at 3.
61/ Staff Resp. Br. at 9-10.
62/ Order No. 15-110 at 7.
63/ Staff Resp. Br. at 9-10; PacifiCorp Resp. Br. at 3.
64/ ORS 183.482(8)(b)(B); Gordon v. Bd. of Parole & Post-Prison Supervision, 343 Or. 618, 633 (2007) ("[t]he standards of review set out in ORS 183.482(8) reflect a legislative policy, embodied in the APA, that decisions by administrative agencies be rational, principled, and fair, rather than *ad hoc* and arbitrary").

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the Assumed Facts, the Camas Mill will be outside of any service territory under any service territory test.

3. Staff's and PacifiCorp's conclusion that the Petitioners are attempting to manipulate the territory allocation laws is unfounded and illogical.

Staff's and PacifiCorp's assertion that the Petitioners are attempting to manipulate the territory allocation laws depends upon the assumption that the Camas Mill is an exclusively allocated customer. Hence, Staff claims that Petitioners' arguments "are based upon the faulty premise that an Oregon customer receiving utility service in territory that has been allocated to its service provider may unilaterally, *without Commission input or approval*, switch to another Oregon provider to receive its utility service."[65/]

The Petitioners have demonstrated at length that PacifiCorp does not have allocated territory at the Troutdale Substation and why, even if it did, the Camas Mill is not, and never could be, an exclusively allocated PacifiCorp customer in Oregon.[66/] The Camas Mill is located in Washington.[67/] Requiring it to take electric service in Oregon following expiration of the Contract is beyond the Commission's jurisdiction and unconstitutional.[68/]

Moreover, Staff is wrong that, under the proposed transaction, the Camas Mill will "switch to another Oregon provider" to receive electric service.[69/] While Clatskanie is a corporation organized under Oregon law, it will, for purposes of electrical deliveries to the Camas Mill, be a *Washington* provider because it will make retail electric sales to the Camas

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65/ Staff Resp. Br. at 9 (emphasis in original).
66/ Supra at 7-14; Petitioners' Resp. Br. at 4-16; Petitioners' Opening Br. at 12-16; Revised Petition at 21-24.
67/ Revised Petition at 3 (Assumed Facts ¶ 1).
68/ Supra at 3-7.
69/ Staff Resp. Br. at 9.

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Mill in Washington, just as PacifiCorp, a corporation organized under Oregon law, is a Washington electricity provider when it makes retail sales of electricity to its customers located in the area surrounding Walla Walla in eastern Washington.

Notably, Staff essentially admits that the Commission would have no jurisdiction if the Camas Mill removed the 69 kV lines and took service from a Washington utility at a different interconnection point.[70/] Staff asserts that the difference between this scenario and the Assumed Facts is that Clatskanie is an "Oregon serving entity" that will use "the existing service infrastructure."[71/] But as just discussed, PacifiCorp itself is an "Oregon serving entity" as well as a Washington serving entity. Staff does not advance any reason why Clatskanie cannot be the same.

Furthermore, the suggestion that there must be a change in facility location to legitimize the proposed transaction is unfounded. For one, there will be significant changes. In addition to a sale of the 69 kV lines to Clatskanie, the proposed transaction requires new interconnection agreements, new interconnection infrastructure, transfer of the Camas Mill load to a new balancing authority area, energy and procurement agreements, transmission purchases pursuant to PacifiCorp's open access transmission tariff ("OATT"), FERC approvals, and other significant and complicated changes.[72/] While it is true that the Camas Mill and the 69 kV lines will remain in the same place, this is hardly unusual. Recently, PacifiCorp and Idaho Power Company exchanged transmission facilities around the Jim Bridger Generating Station.[73/] They

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[70/] Id. at 10 n. 2.
[71/] Id.
[72/] Revised Petition at 6 (Assumed Facts ¶¶ 11-13).
[73/] Docket No. UP 315, Order No. 15-184 (June 9, 2015).

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did not change the location of any of these lines, but that does not mean that the exchange was a "subterfuge" or a mere "paper transaction." In fact, a number of parties at FERC considered the exchange to be potentially quite significant.[74/] This simply acknowledges that the change in ownership of property changes the legal rights of the parties involved.

If parties had to physically move infrastructure in order to legitimize a transaction, the cost of these transactions for companies, utilities, and ratepayers would skyrocket. Here, it appears that PacifiCorp is attempting to force GP to install a new substation in Washington rather than making an economic use of its existing private property, and Commission Staff appears to condone this anticompetitive behavior. Likewise, PacifiCorp and Staff would prohibit Clatskanie from exercising its rights under federal law to interconnect with PacifiCorp's transmission system and obtain transmission service under PacifiCorp's OATT.

Finally, Staff's concern that "PacifiCorp has structured its utility operations in order to be in a position to serve the Camas Mill load and it would thus suffer harm if [GP] could simply choose to leave at its own whim" is nonsensical.[75/] GP is not leaving on a "whim." It is leaving following the stated expiration date in a long-term bilateral special contract that it negotiated with the Company and was approved by the Commission.[76/] It was explicitly acknowledged that GP was committed to buy from PacifiCorp for 20 years.[77/] If PacifiCorp made investments to serve the Mill beyond the Contract's explicit expiration date, then it did so

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74/ FERC Docket No. ER15-683-000 *et al.*, Motion of Powerex Corp. to Intervene and Comments at 4-6 (Jan. 9, 2015).

75/ Staff Resp. Br. at 11.

76/ Revised Petition at 3 (Assumed Facts ¶ 3).

77/ Id., Exh. B. at 2.

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at its own peril and neither GP nor the Company's other customers should be responsible for this imprudent utility planning.

The Camas Mill's obligation to be an Oregon customer is defined not by the territory allocation laws but by the terms of the Contract. The Commission has regulatory authority over this Contract, as it does over any other filed tariff.[78/] But that Contract expires under its own terms at the end of this year.[79/] If it were the case that the Camas Mill was exclusively allocated to the Company, then there would be no need for a special contract in the first place – a contract that is only available to "customers with *viable alternatives* to the Company's service" and was provided to GP on the understanding that it commit to service from PacifiCorp for a specific period of time.[80/] Likewise, there would be no need for the explicit provision that GP "remain an one-hundred percent (100%) Oregon customer" during the life of the Contract.[81/] GP has fulfilled its bargain with PacifiCorp, yet PacifiCorp now appears determined to use wrongfully Oregon's service territory and direct access laws to promote its anticompetitive behavior.

D. PacifiCorp Currently Provides Retail Service in Oregon to an Unallocated Customer.

PacifiCorp argues that Petitioners' position that PacifiCorp provides "utility service" to the Camas Mill in Washington but is subject to the Commission's jurisdiction because the Company provides "service" to the Mill in Oregon is an "absurd conclusion"

78/ Wah Chang v. PacifiCorp, Docket No. UM 1002, Order No. 09-343 at 11 (Sept. 2, 2009).
79/ Revised Petition at 3 (Assumed Facts ¶ 3).
80/ PacifiCorp Oregon Schedule 400 at 1, 3 (emphasis added), available at: https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/Rate_Schedules/Special_Contracts.pdf.
81/ Revised Petition at 5 (Assumed Facts ¶ 7).

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because "utility service," as defined under the territory allocation laws, and "service," under the Commission's general authority definitions, "are not substantively different."[82/] While PacifiCorp does make the obvious point that "'utility service" includes the word 'service,'"[83/] the two are, in fact, very different. The Commission recognized as much when, in Columbia Basin, it specifically "reject[ed] the basis of PacifiCorp's assertion – that all 'utility service' occurs at the point of delivery."[84/]

"Service" is to be "used in its broadest and most inclusive sense."[85/] It therefore encompasses everything over which the Commission has jurisdiction. The Commission has confirmed time and again the uncontroversial fact that it has jurisdiction over PacifiCorp's retail sale of electricity in Oregon.[86/] A retail sale occurs at the point where title to the electricity changes hands from the utility to the end-use customer.[87/] Under the current situation, PacifiCorp makes a retail sale of electricity to the Camas Mill at the Troutdale Substation in Oregon.[88/] This subjects PacifiCorp's "service" to the Camas Mill to the Commission's jurisdiction.

82/ PacifiCorp Resp. Br. at 4-5.

83/ Id. at 4.

84/ Order No. 15-110 at 7.

85/ ORS 756.010(8).

86/ See, e.g., Re PacifiCorp 2012 Transition Adjustment Mechanism, Docket No. UE 227, Order No. 11-435 at 1 (Nov. 4, 2011); Wah Chang v. PacifiCorp, Docket No. UM 1002, Order No. 09-343 at 10-11; Re Pacific Power & Light, Docket No. UE 171, Order No. 05-726 at 5 (June 6, 2005); Re Hermiston Generating Co., L.P., Docket No. DR 12, Order No. 94-1570, 1994 WL 733594 at *2 (Oct. 21, 1994).

87/ Merriam-Webster, http://www.merriam-webster.com/dictionary/sale (defining "sale" as "the transfer of ownership of and title to property from one person to another for a price")

88/ Revised Petition at 3-4 (Assumed Facts ¶¶ 2, 6).

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The defined term "utility service," on the other hand, functions to determine whether service occurs in an allocated territory or not.[89/] It is a defined term solely for purposes of the territory allocation laws.[90/] It is intended to ensure that utilities do not encroach on each other's allocated territories. That is why the Commission has interpreted "utility service" to occur at the load, not at the retail point of delivery.[91/]

PacifiCorp's alternative – that "service" and "utility service" are one and the same – while re-litigating an issue the Commission just resolved, has no impact on the outcome of this case, and could actually harm the Company. Under this scenario, and contrary to the recent decision in Columbia Basin, "utility service" would have to occur at the retail point of delivery, the Troutdale Substation. This would mean that PacifiCorp would be providing "utility service" within PGE's allocated territory, in violation of ORS 758.450(2). It would also mean that GP can move where "utility service" occurs by changing the retail point of delivery. Even if PacifiCorp's flawed reasoning were adopted, the result is the same – under the Assumed Facts the load as well as the point of delivery – all possible indicia of "utility service" – will be located at the Camas Mill in Washington.[92/]

The only reason PacifiCorp can claim that the distinction between the jurisdictional "service" and the territory allocation-specific "utility service" leads to an "absurd conclusion" is due to the unusual, if not unique, situation in which a customer located in Washington is voluntarily and contractually taking retail service in Oregon – a situation

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89/ ORS 758.400(3).
90/ ORS 758.400.
91/ Order No. 15-110 at 7.
92/ Revised Petition at 5-6 (Assumed Facts ¶ 10).

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PacifiCorp itself has facilitated and in which it has been an equal partner. Under the Assumed Facts, the Petitioners will unwind this unique situation following expiration of the Contract in order to accomplish the eminently ordinary transaction of a Washington customer taking retail service in Washington.[93/]

Staff makes a similar error when it "surmises that the Commission must have relied upon the Point of Service test in order to allow PacifiCorp to serve the Mill as an Oregon customer."[94/] The Commission's authority to allow PacifiCorp to serve the Camas Mill as an Oregon customer stems from the terms of the Contract and the retail delivery point at the Troutdale Substation, not where PacifiCorp provides "utility service" to the Camas Mill. The Commission's jurisdiction does not extend only to allocated territories; it has jurisdiction to regulate utility service provided in unallocated territories in Oregon as well. This is because a utility is providing *retail* service in Oregon.

For these reasons, the fact that PacifiCorp has been providing "utility service" to the Camas Mill in Washington does not mean that the Commission has been regulating extra-jurisdictional conduct for over 70 years. It simply means that PacifiCorp has been providing retail service to an unallocated customer, as the Company has long done in unallocated areas within Oregon.[95/] It also means that the Company has *not* been violating the service territory

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93/ Id.

94/ Staff Resp. Br. at 7.

95/ The territory allocation orders at issue in this docket serve as an example. As the Revised Petition notes, prior to Order 92-557, service territories around the City of Portland were unallocated and both PGE and PacifiCorp served customers in this area. See also, Re PacifiCorp & City of Monmouth, Docket No. UA 159, Order No. 11-479 (Dec. 5, 2011) (approving joint application to allocate unallocated territory); Re PacifiCorp & Re Wasco Elec. Coop., Inc., Docket Nos. UA 141, UA 143, Order No. 09-368 (dismissing and denying applications for allocation of unallocated territory).

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laws since Order 92-557 assigned Parcel C and the Troutdale Substation as PGE's allocated territory, because PacifiCorp is not providing "utility service" at the Troutdale Substation.

E. PacifiCorp's Judicial Estoppel Argument is Meritless

Judicial estoppel is an affirmative defense, and therefore, the party asserting it bears the burden to prove the following three elements: (1) a party benefitted from its position in an earlier proceeding; (2) there is a different judicial proceeding; and (3) the same party takes an inconsistent position in the different judicial proceeding with the position from which it benefitted in the earlier proceeding.[96/] Here, PacifiCorp cannot demonstrate these elements because GP is not taking inconsistent positions; rather, it is applying the law to changed circumstances.

PacifiCorp claims that the Camas Mill has taken advantage of representing itself as an Oregon customer in the past, and therefore, should be estopped from arguing that it is not an Oregon customer now.[97/] The Company notes, for instance, that the Camas Mill previously took service under the Company's pulp and paper tariff, "which was only available to customers within PacifiCorp's Oregon service territory."[98/]

PacifiCorp's argument fails on its face because the Camas Mill is not asserting that it is not currently and never has been an Oregon customer. It is an Oregon customer, and has been for the entire term of the Contract. The Contract itself specifies as much.[99/] Rather, the

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96/ Hampton Tree Farms, Inc. v. Jewett, 320 Or. 599, 611 (1995).
97/ PacifiCorp Resp. Br. at 8-9.
98/ Id. at 9.
99/ Revised Petition at 5 (Assumed Facts ¶ 7).

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Petitioners are arguing that the Camas Mill is not within an *allocated territory* in Oregon. They do not dispute that the Camas Mill takes retail service from PacifiCorp in Oregon. Furthermore, there is no requirement that a customer be located in an allocated territory in order for it to be eligible for the Company's tariffs. PacifiCorp has served customers in unallocated territories in Oregon for decades.[100/] These transactions are still subject to Commission jurisdiction, including its regulatory authority over the tariffed rates PacifiCorp charges its customers.

To the extent PacifiCorp's judicial estoppel claim is in reference to the Petitioners' arguments under the Assumed Facts, the Company's argument is wholly without merit. Judicial estoppel requires the taking of inconsistent positions.[101/] The Assumed Facts represent a circumstance that is materially different than the current situation – the Camas Mill will be a Washington retail customer that no longer has facilities interconnecting with PacifiCorp in Oregon.[102/] Thus, to the extent PacifiCorp is arguing judicial estoppel based on the fact that the Camas Mill has represented that it is an Oregon customer while taking retail service from PacifiCorp, but will be a Washington retail customer under the Assumed Facts, this position is not inconsistent because the facts are different.[103/]

F. Staff's and PacifiCorp's Direct Access Arguments Have No Basis in the Law.

In a prior declaratory ruling case before the Commission, Staff's response brief in DR 47 noted that the "first principle of statutory construction is to look at the text of the statute

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100/ Supra at n. 95.
101/ Jewett, 320 Or. at 611.
102/ Revised Petition at 5-6 (Assumed Facts ¶ 10).
103/ State ex rel. McAmis Indus. of Or., Inc. v. M. Cutter Co., 161 Or. App. 631, 642-43 (1999) ("[j]udicial estoppel is not applicable unless a party's position in separate proceedings are 'clearly contradictory'").

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as it is the best evidence of the legislature's intent."[104/] Staff further "stresse[d] that [] policy arguments are not recognized by the courts as having any weight when construing a statute, particularly one … which has not been shown to be of unclear or ambiguous meaning."[105/] Staff now ignores wholesale these rules of statutory construction in concluding that the proposed transaction under the Assumed Facts would constitute direct access.[106/] Staff does not cite to a single definition in the direct access law. Instead, it mistakenly relies on the illegal and unconstitutional assertion that the Camas Mill is the Company's exclusively allocated customer to support its argument that the direct access law applies to Clatskanie's service of the Camas Mill.[107/]

In fact, application of the direct access law in this case further demonstrates that the Camas Mill is not PacifiCorp's exclusively allocated customer. As discussed in the Petitioners' Response Brief, direct access was only intended to give alternative suppliers the opportunity to compete for otherwise captive nonresidential customers.[108/] Such customers have no way of reaching alternative suppliers unless the incumbent utility opens its distribution system to these suppliers. That is not the Camas Mill's situation. As the owner of the 69 kV lines that interconnect at the Troutdale Substation, it has the authority to sell these lines to anyone it wants or, indeed, to remove them altogether. The Assumed Facts contemplate that

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104/ Docket No. DR 47, Staff Resp. Br. at 6 (citing PGE v. Bureau of Labor & Indus., 317 Or. 606, 610 (1993)).

105/ Id. at 10.

106/ Staff Resp. Br. at 12-13.

107/ Id.

108/ Petitioners' Resp. Br. at 23-26; see also, ORS 757.600(6) (defining "direct access" as "the ability of a retail electricity consumer to purchase electricity … directly from an entity other than the distribution utility"); Re Honeywell Int'l, Inc. *et al.* Application for Declaratory Ruling, Docket No. DR 40, Order No. 08-388 at 12 (July 31, 2008) (noting that ESSs require "non-discriminatory access to the utilities' existing distribution systems").

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Clatskanie will procure transmission pursuant to PacifiCorp's FERC-jurisdictional OATT and then will itself deliver power to the Camas Mill,[109/] but even this arrangement is not necessary. As Staff recognizes, once the Contract expires, GP will have the option to establish a new interconnection within Washington if, contrary to law, the proposed transaction were deemed direct access.[110/] Alternatively, the Federal Power Act gives Clatskanie the right to remove the 69 kV lines that it will own from PacifiCorp's Troutdale Substation and instead request interconnection with the Bonneville Power Administration's substation, located across the street from the Troutdale Substation.[111/] Thus, the Camas Mill plainly is not a captive PacifiCorp customer and can choose to take *retail* service from another utility, not just energy purchases from an electricity service supplier pursuant to direct access.

PacifiCorp argues that application of the direct access law to the proposed transaction is compelled because customers will be harmed if the Commission finds that direct access does not apply to the proposed transaction.[112/] This is not a statutory argument, it is a policy argument – one to which the Commission should not give "any weight when construing" the direct access law's unambiguous statutory requirements.[113/] The Company's statement reflects a recognition that it cannot impose transition charges on the Camas Mill unless it is deemed to be taking direct access. PacifiCorp is essentially threatening the Commission that it will impose whatever stranded costs it thinks it will incur on its other Oregon customers if the Commission does not apply the direct access law to the Assumed Facts. The potential existence

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109/ Revised Petition at 6 (Assumed Facts ¶ 11).
110/ Staff Resp. Br. at 10 n. 2.
111/ 16 U.S.C. § 824k(i).
112/ PacifiCorp Resp. Br. at 7.
113/ Docket No. DR 47, Staff Resp. Br. at 10.

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of stranded costs, however, does not define what constitutes direct access; the definition of "direct access" is defined by statute.[114/] Furthermore, the Company does not have the authority to simply pass on to its customers any stranded costs it believes it will experience due to the Camas Mill's departure; it must seek Commission approval in a general rate case to do this, and it will have to demonstrate the prudence of incurring stranded costs in the face of an expiring Contract. Further, by removing its load from Oregon, the Camas Mill is no different from other PacifiCorp customers who chose to close their facilities or move them to another state.

The only way Oregon's direct access law could apply to Clatskanie's service of the Camas Mill is if Clatskanie were serving a "nonresidential electricity consumer of another electric utility in this state."[115/] The text of the statute – the "first principle of statutory construction"[116/] – demonstrates that Clatskanie does not meet this requirement under the Assumed Facts. The Assumed Facts explicitly state that "GP will no longer be interconnected with PacifiCorp or take delivery of electric service from PacifiCorp in Oregon, but instead GP will take delivery of electric service from Clatskanie in Washington over facilities owned by Clatskanie."[117/] Clatskanie will, therefore, be the Camas Mill's "distribution utility,"[118/] making the Camas Mill Clatskanie's own nonresidential "retail electricity consumer,"[119/] not one of another utility. Furthermore, the Camas Mill is not "in this state."[120/] The plain and

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114/ ORS 757.600(6). In an unallocated territory, a utility may incur stranded costs if a customer switches providers, but that does not authorize the utility to call what the customer has done "direct access" and impose transition charges on that customer.

115/ ORS 757.672(2).

116/ Docket No. DR 47, Staff Resp. Br. at 6.

117/ Revised Petition at 6 (Assumed Facts ¶ 10).

118/ ORS 757.600(9).

119/ ORS 757.600(29).

120/ ORS 757.672(2).

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unambiguous language of the direct access law (as well as the principles behind this law) demonstrate that it does not apply under the Assumed Facts.[121/] By definition, one cannot take service under Oregon's direct access law when one is not interconnected with the incumbent utility or "in this state."[122/]

Staff makes a bizarre attempt to get around the statutory problems with its argument by stating that the "Petitioners inappropriately based their arguments [that the direct access law will not apply] upon the *assumption* that the Proposed Transaction will occur" and proceed from this "faulty premise."[123/] It is hard to know what to make of this statement. The whole point of a petition for a declaratory ruling is to obtain a determination from the Commission regarding a law's applicability to the *assumed* facts.[124/] The idea is to assume the proposed transaction occurs and rule on whether that transaction violates the territory allocation laws or implicates direct access.

It appears that Staff's statement is a reflection of its position that the Camas Mill is exclusively allocated to PacifiCorp and cannot move its point of service without Commission approval. "[T]he Mill's point of service remains in Oregon, at a location within PacifiCorp's allocated territory, until the Commission decides otherwise," Staff decrees.[125/] This statement appears to directly contradict Staff's belief that circumstances would somehow be different if the

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121/ As it does in its Opening Brief, PacifiCorp again argues that the "clear and unambiguous requirements" of ORS 757.672(2) apply to the Assumed Facts without specifying how. The Petitioners responded to this argument in their Response Brief at 26-29.

122/ ORS 757.600(6).

123/ Staff Resp. Br. at 12 (emphasis added).

124/ ORS 756.450; OAR 860-001-0430.

125/ Staff Resp. Br. at 13.

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Camas Mill established a separate interconnection with a Washington utility,[126/] and as noted above, implies that the Commission has the power to prevent GP, a company that is not a utility, from selling its own lines to a third party, power the Commission does not have. Staff points to no statutory authority for the Commission to regulate the sale of privately owned lines. In any event, as already discussed, Staff's premise is erroneous because the Camas Mill has never been exclusively allocated to PacifiCorp, even if the Commission could find that the Troutdale Substation was a service territory exclusively allocated to the Company.

Again, ultimately the analysis is straightforward. Application of the statutory language of the direct access law to the Assumed Facts requires the Commission to find that Clatskanie will serve its own nonresidential electricity consumer. Under the Assumed Facts, the Camas Mill will have *no electrical facilities whatsoever* that interconnect with PacifiCorp in Oregon.[127/] It is, therefore, not possible for direct access to apply.

G. Additional Proceedings Are Unnecessary

Concluding that this proceeding "presents unique and novel circumstances," Staff proposes that the Commission open a new docket "to explore this matter in greater depth."[128/] Specifically, Staff proposes that the Commission could "(1) take a 'fresh look' at the unique circumstances presented here through the lens of the territorial allocation laws … and (2) review the extent of the harm to PacifiCorp, its customers, and the public inherent in allowing a large customer to switch Oregon service providers outside of the direct access laws."[129/]

126/ Id. at 10 n. 2.
127/ Revised Petition at 5-6 (Assumed Facts ¶ 10).
128/ Staff Resp. Br. at 13.
129/ Id. at 13-14.

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The Contract expires at the end of this year.[130/] Thus, resolution of the issues presented in this docket is time-sensitive, both for the Petitioners and PacifiCorp. Additionally, while the Petitioners recognize that the Camas Mill's service arrangement with PacifiCorp is unusual, if not unique, they do not believe that this makes the legal questions presented in this case too complex for resolution. At its heart, the Petitioners propose a Washington-jurisdictional retail transaction and FERC-jurisdictional wheeling and transmission interconnection transactions.[131/] Finding that these transactions do not implicate Oregon's territorial allocation laws is an unremarkable conclusion that would strengthen, rather than harm, the policies underlying these laws. Furthermore, large customers have always had the option to switch Oregon service providers outside of the direct access law when they are not located in an allocated territory.[132/] This, too, is unremarkable.

Finally, the Commission and interested parties will have a full opportunity to investigate and address Staff's concern, and PacifiCorp's allegation, related to possible stranded costs. Being a regulated utility, however, does not insulate PacifiCorp from all risk. As FERC has recognized, utilities have no automatic right to recover "costs associated with the normal risks of competition, such as self-generation, cogeneration, [] loss of load … [or] [i]f a customer leaves its utility supplier by exercising options …."[133/] The Camas Mill is a customer in an unallocated territory in Washington that has taken service from PacifiCorp pursuant to a special

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130/ Revised Petition at 3 (Assumed Facts ¶ 3).

131/ Revised Petition at 5-6 (Assumed Facts ¶¶ 10-11).

132/ Re Central Lincoln People's Utility District, Docket Nos. UA 58 & UA 60, Order No. 98-546, 1998 Ore PUC LEXIS 1 at *24 (Dec. 31, 1998) (noting that "[t]he Territory Allocation Law clearly permits competition to exist" by retaining mixed service territories).

133/ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 62 Fed. Reg. 12,274, 12,374 (Mar. 14, 1997).

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Contract with a fixed end date. It has options following the expiration of this Contract. In fact, those options formed the basis for the special contract in the first place.

PacifiCorp has not substantiated its claim that it or its customers will be harmed by the proposed transaction, but if this were true, that is not a basis for denying the Camas Mill's legal (indeed, constitutional) rights. PacifiCorp will have the opportunity to claim that it has stranded costs from the proposed transaction in its next general rate case, and the Commission will have the opportunity to investigate the reason for these costs and decide whether customers or the Company should bear them if, indeed, they do exist. Additional process is not necessary to resolve the legal issues raised in this docket, and could harm the Petitioners' interest by unnecessarily delaying resolution of this proceeding.

III. CONCLUSION

The Petitioners have demonstrated that PacifiCorp does not have an allocated territory at Troutdale, or an exclusive right to serve the Camas Mill. Once GP sells the 69 kV lines to Clatskanie, GP will no longer be interconnected with PacifiCorp in Oregon, and Clatskanie will provide retail electric service to the Camas Mill in Washington. The only transactions that will occur in Oregon are FERC jurisdictional interconnection and wheeling. Under these circumstances, Clatskanie's sale to GP in Washington is not subject to the Commission's jurisdiction, and neither the territorial allocation law, nor the direct access law apply. For these reasons, the Petitioners respectfully request that the Commission grant them the Relief Requested in the Revised Petition.

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Respectfully submitted,

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