



WENDY MCINDOO
Direct (503) 290-3627
wendy@mrg-law.com

August 30, 2019

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: Docket UM 1818 – Columbia Basin Electric Cooperative, Inc. v. Umatilla Basin Electric Cooperative, Inc.

Dear Filing Center:

Attached for filing in the above-captioned docket is the Petition for Clarification and Reconsideration of Columbia Basin Electric Cooperative, Inc.

Please contact this office with any questions.

Sincerely,

Wendy McIndoo
Office Manager

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1818

In the Matter of the Complaint of)	
)	
COLUMBIA BASIN ELECTRIC)	PETITION FOR CLARIFICATION
COOPERATIVE, INC.)	AND RECONSIDERATION OF
)	COLUMBIA BASIN
v.)	ELECTRIC COOPERATIVE,
)	INC.
UMATILLA ELECTRIC COOPERATIVE, INC.)	

PETITION

1 Pursuant to OAR 860-001-420 and OAR 860-001-0720, Columbia Basin Electric
2 Cooperative, Inc. (“Columbia Basin”) files this petition for clarification and reconsideration of
3 the Public Utility Commission of Oregon (“Commission” or “OPUC”) Order No. 19-221 dated
4 July 2, 2019 (“Order”). Columbia Basin respectfully requests the Commission to reconsider its
5 conclusions in Order No. 19-221, including: (i) that the Commission has the discretionary
6 authority to adopt and use the geographic load test; (ii) that the Commission has the discretionary
7 authority to adopt and use the point of service test; and (iii) that Umatilla Electric Cooperative,
8 Inc.’s (“Umatilla”) actions did not result in the duplication of Columbia Basin’s facilities.

BACKGROUND

1 In Order No. 38089, dated 1961, the Commission approved an agreement between
2 Columbia Basin and Umatilla concerning the formation of exclusive service territories.¹ Order
3 No. 38089 delineated the boundary between Columbia Basin's and Umatilla's service territories
4 with clear legal descriptions. There was no ambiguity in Order No. 38089.

5 During the late 1960s, Columbia Basin installed electric facilities, including a 14.4 kV
6 line, to serve a portion of a farm's irrigation load that was located in Columbia Basin's service
7 territory although the majority of that farm's fields and irrigation loads were located in
8 Umatilla's service territory.²

9 The farm used canal water from Columbia Improvement District to irrigate all of its
10 fields, including the alfalfa fields in Columbia Basin's territory.³ Although the farm had one
11 water irrigation system that depended on the one source of canal water located in Umatilla's
12 service territory, Umatilla and Columbia Basin divided the farm's electric load according to the
13 geographic boundaries as set forth in Order No. 38089.⁴

14 Later the farm was sold to the Boardman Tree Farm, which planted trees and removed the
15 irrigation facilities used for alfalfa and, instead, installed a drip irrigation system for watering
16 trees.⁵ The irrigation water for the trees came from the same canal located in Umatilla's
17 territory.⁶ Although the electric load for pumping the drip irrigation system was re-located to
18 Umatilla's territory, Columbia Basin retained its electric distribution facilities next to the former
19 alfalfa fields in its service territory.⁷

¹ Opening Testimony of Thomas Wolff at 3 (hereinafter "Wolff Initial Testimony").

² Wolff Initial Testimony at 13.

³ *Id.*, at 14.

⁴ *Id.* at 13.

⁵ *Id.*, at 14.

⁶ *Id.*, at 14.

⁷ *Id.*, at 14.

1 In 2015, te Velde purchased the Boardman Tree Farm and began removing the trees and
2 planted crops to support a dairy operation called the Willow Creek Dairy.⁸ te Velde installed six
3 irrigation pivots in Columbia Basin’s service territory in the former alfalfa fields.⁹ Instead of
4 connecting with Columbia Basin’s existing distribution facilities, which were still located
5 immediately adjacent to the six new irrigation circles, te Velde ran new underground power lines
6 to Umatilla’s service territory.¹⁰ Umatilla installed new electric distribution facilities during
7 2016 in its service territory to interconnect with te Velde’s underground power lines and to serve
8 the electric load of the six irrigation circles located in Columbia Basin’s service territory.¹¹ The
9 facilities that Umatilla installed served only those six irrigation circles located in Columbia
10 Basin’s service territory.¹²

11 Columbia Basin objected to Umatilla’s actions, attempted to negotiate a mutually
12 acceptable arrangement to serve the irrigation circles, and after failing to resolve the service
13 dispute with Umatilla during 2016, Columbia Basin filed its complaint against Umatilla on
14 January 13, 2017. On July 2, 2019, the Commission issued Order No. 19-221 dismissing
15 Columbia Basin’s complaint.

16 In Order No. 19-221, the Commission concluded it had the discretionary authority to
17 adopt various, potentially contradictory tests to allocate load that straddles exclusive service
18 territory boundaries. The Commission adopted and used the “geographic load center test” to
19 determine that Umatilla had the exclusive right to serve the load of the six irrigation circles

⁸ *Id.*, at 6.

⁹ *Id.*, at 9.

¹⁰ *Id.*, at 9.

¹¹ *Id.*, at 9.

¹² *Id.*, at 10.

1 located in Columbia Basin’s service territory.¹³ The Commission also concluded that it had the
2 authority to adopt and use the “point of service test.”¹⁴

3 The Commission stated that its 1961 Order No. 38089 permitted the Commission to use
4 these tests because, “Order No. 38089, is silent as to how loads that are part of both the
5 Columbia Basin service territory and the service territory of an adjacent utility should be
6 managed or served.”¹⁵ The Commission noted there was a written contract between Columbia
7 Basin and Umatilla for the allocation of service territories, but the Commission did “not know if
8 this agreement contains provisions for addressing territorial disputes between Columbia Basin
9 and UEC or for managing loads that straddle the two service territories.”¹⁶

10 Based on the Commission’s determinations in Order No. 19-221 regarding its
11 discretionary authority to allocate load, the Commission applied the geographic load test and
12 concluded the load located in Columbia Basin’s service territory was unified with the rest of the
13 Willow Creek Dairy electric load located in Umatilla’s service territory.¹⁷ The Commission also
14 concluded that there would be no duplication of electric facilities in spite of the stranding of
15 Columbia Basin’s pre-existing facilities located immediately next to the six irrigation circles.¹⁸
16 The Commission based its conclusion entirely on the OPUC Staff’s testimony that, “[n]either
17 UEC or CBEC has duplicated facilities within their respective territories as a result of Willow
18 Creek Dairy’s construction of service lines to its irrigation circles.”¹⁹ However, OPUC Staff’s
19 conclusion of no duplication is contradicted by OPUC Staff’s own testimony and briefing

¹³ Order No. 19-221 at 13. “Applying the geographic load center test, we conclude that UEC has the right and obligation to serve the unified load at the Willow Creek Dairy Property.”

¹⁴ Order No. 19-221 at 13. “In the alternative, we conclude that UEC has not violated ORS 758.450(2) under an interpretation of the statute that is primarily concerned with the location of utility infrastructure, or the “point of service.”

¹⁵ Order No. 19-221 at 2.

¹⁶ *Id.*, at 2.

¹⁷ *Id.*, at 11.

¹⁸ *Id.*, at 12.

¹⁹ OPUC Staff Exhibit 100, Reply Testimony, Gibbens-Rossow at 10.

1 indicating that Columbia Basin has existing facilities that could have served the Willow Creek
2 Dairy; facilities which are now stranded and duplicated.

3 Thus, the Commission’s decision in Order No. 19-221, in effect, unilaterally amended the
4 territory allocation agreement approved in Order No. 38089; ignored the plain language of ORS
5 758.450 prohibiting any person from providing utility service in, or into another utility’s
6 allocated territory; and validated the stranding of Columbia Basin’s existing electric facilities and
7 the duplication of electric facilities—contrary to the primary purpose of the Oregon territory
8 allocation law.

ARGUMENT

A. The Commission Erred in its Adoption and Use the Geographic Load Center Test

9 The plain language of the Oregon territory allocation law, ORS 758.450(2) states,
10 “[e]xcept as provided in subsection (4) of this section, no other person shall offer, construct or
11 extend utility service in or into an allocated territory.”²⁰

12 The Commission must interpret ORS 758.450 according to the plain language of the
13 statute and cannot put policy considerations into the meaning in place of words that the
14 legislature has chosen to use. *Northwest Natural Gas Co. v. Oregon Public Utility Comm’n*, 195
15 Or.App. 547, 557 (2004) (“*Northwest Natural*”). When interpreting a statute under Oregon law,
16 the first level of analysis is to determine the intent of the legislature by examining the text and
17 context of the statute, which is the best evidence of the legislature’s intent. *Portland General*
18 *Electric Co. v. Bureau of Labor and Industries*, 317 Or. 606, 611 (1993) (“*PGE v. BOLI*”). *See*
19 *also, Young v. State*, 161 Or.App. 32, 36 (1999) (“*Young*”). If the legislative intent is clear from
20 this first level of inquiry, further inquiry is unnecessary. *PGE v. BOLI*, at 612.

²⁰ The exceptions in subsection (4) do not apply here.

1 There is no ambiguity in the express terms of ORS 758.450(2). The plain language sets
2 forth a clear prohibition – “no other person shall offer, construct or extend utility service in or
3 into an allocated territory.” That should have been the end of the Commission’s inquiry in this
4 proceeding.

5 The Commission, however, reasoned in Order No. 19-221 that “[t]he Territory Allocation
6 Law defines ‘[u]tility service,’ but does not speak to whether a ‘user’ may be a unified customer
7 load that straddles two or more service territories, nor does it provide any guidance to the
8 Commission as to how such load should be served.”²¹

9 Contrary to the Commission’s conclusion, ORS 758.450(2) does provide express
10 guidance that each utility should only serve the load located in its respective service territory.
11 The statute does not say each utility shall only serve the load in its service territory, except when
12 a user’s load extends across the territory allocation boundary. There is no such exception in
13 ORS 758.450(2). As aptly stated by the court in a similar case, the Commission must, “recognize
14 the ordinary meaning of the words that the legislature used in ORS 785.450(2).”²²

15 Here, the Commission focused on the term “user” in an attempted to find ambiguity in
16 the statute. The term “user” is set forth in the defined term of “utility service” in ORS
17 758.400(3), which provides in relevant part:

18 “Utility Service” means service provided by any equipment, plant or facility for
19 the distribution of electricity to *users* or the distribution of natural or
20 manufactured gas to consumers through a connected and interrelated distribution
21 system. . . (emphasis added).

²¹ Order No. 19-221 at 8. This statement appears to ignore the context of the territory allocation laws in ORS 758.400 *et. seq.*, which clearly contemplate that utilities will negotiate and enter contracts to allocate or amend territories and that the Commission must approve such contracts. ORS 758.410–430. Application of tests that allow territory incursions conflicts with the statutory provisions that indicate the procedures for dividing territory, and also undermines utilities’ incentives to make contractual adjustments to agreed-upon boundaries in a fair and reciprocal manner.

²² *Northwest Natural*, at 557, “[t]he most significant aspect of the PUC’s explanation is its failure to recognize the ordinary meaning of the words that the legislature used in ORS 785.450(2).”

1 In its order, the Commission asserted that “users” does not have its normal meaning of a
2 person or entity that uses electricity and concluded that:

3 [b]ased on the test and context of the statutory scheme, in the absence of explicit
4 statutory direction on the meaning of “user” when a load straddles two service
5 territories, we carry out the intent of the statute by interpreting “user” to mean
6 customer load.²³

7
8 However, the absence of text in a statute does not provide a basis for ignoring the
9 unambiguous, plain language of the statute. *Young* at 40. There is no ambiguity in ORS
10 758.450(2), and the Commission can neither ignore the plain meaning of the text nor create
11 ambiguity by inserting language that does not exist into the text.

12 The Commission’s re-interpretation of “user” also leads to a new definition of the term
13 “utility service.” With the Commission’s new meaning of “user,” the term “utility service” in
14 ORS 758.400(3) now means “service provided by any equipment, plant or facility for the
15 distribution of electricity to *customer loads* or the distribution of natural or manufactured gas to
16 consumers through a connected and interrelated distribution system . . .” (emphasis added). The
17 Commission’s new definition is contradictory to established law.

18 In *Northwest Natural*, the court explains how “user” fits into the definition of the term
19 “utility service:”

20 The focus of the definition [of utility service] in the statute is on the use of the
21 facilities to distribute natural gas to those who use it that is, ‘consumers.’ It is the
22 physical act of distributing to more than one user of electricity or more than one
23 consumer of natural gas that constitutes utility service; the contractual or other
24 relationships between the entity that provides the electricity or gas and the entity
25 that uses or consumes it is irrelevant under the statutory definition. Thus, unlike
26 the other portions of the territory allocation law, *see e.g.*, ORS 758.410, the
27 definition of “utility service” does not refer to “customers” of a utility but to the
28 “users” or “consumers” of the product.²⁴

²³ Order No. 19-221 at 8.

²⁴ *Northwest Natural* at 559.

1 Here, the Commission’s re-interpretation of “user” fundamentally changes the meaning of
2 “utility service” as defined by the court in *Northwest Natural*.

3 While the Commission explained that its re-interpretation of the term “user” was to
4 further the legislative intent in the Oregon territory allocation law to prevent duplication of
5 electric facilities, the actual effect of the Commission’s interpretation can result in duplication of
6 facilities. For example, the Commission’s interpretation validates Umatilla’s construction of
7 new electric facilities to serve the load in Columbia Basin’s service territory when Columbia
8 Basin already had existing facilities adjacent to the six irrigation circles.

9 The Commission also explained that following the plain language of ORS 758.450(2)
10 would lead to absurd results, such as two utilities serving portions of an industrial load that
11 crossed territory boundaries.²⁵ In other words, the Commission alleged the absurdity-result
12 maxim granted it discretionary authority to adopt the geographic load center test. However, *PGE*
13 *v. BOLI* forbids the application of the absurdity-result maxim to determine legislative intent
14 where there is no ambiguity in the text or context of the statute.²⁶ Again, there is no ambiguity
15 in ORS 758.450(2) regarding the prohibition on providing service in the allocated territory of a
16 utility.

17 Additionally, applying the plain language of ORS 758.450(2) carries out the intent of the
18 legislature in ORS 758.410 to 430 by requiring utilities, when confronted with loads that cross
19 their territory boundaries, to address and settle disputes regarding who serves such loads by
20 agreeing on re-adjustments to their territory boundaries. The Oregon territory allocation laws

²⁵ Order No. 19-221 at 9, which provides:

Under Columbia Basin’s interpretation, which corresponds to the “point of use” test summarized above, a customer that plainly operated a single load – such as a large single manufacturing or generating facility that geographically straddled two service territories – could not be served by only one of the two utilities without triggering a violation of the Territory Allocation Law. To address the violation, that one load would need two duplicate sets of utility service infrastructure, which is a result contrary to one of the express intent of the law to limit duplication of facilities.

²⁶ *PGE v. BOLI* at 40.

1 contemplate and encourage utilities to resolve such disputes through agreement to adjust
2 boundaries and then to obtain OPUC approval of such boundary changes.²⁷ The Commission’s
3 adoption and use of the geographic load test or point of service test undercut utilities incentives
4 for reaching mutual agreements on boundary adjustments and, instead, can lead to the wrong
5 result of one utility providing service in another utility’s allocated service territory.

6 The Commission also stated that its decision does not modify existing service territory
7 boundaries. It claimed:

8 Loads by their very nature do not adhere to territory maps. Loads are individual,
9 subject to the economic activity that load is serving, and may extend across
10 service boundaries. A load that straddles two service territories is not in itself
11 evidence of a current or past violation of the Territory Allocation Law. Likewise,
12 a Commission determination that one utility may serve a unified load that
13 straddles two allocated service territories is not a Commission revision of those
14 service territory designations.

15
16 The Commission has confused “load” with “utility service.” ORS 758.450(2) prohibits
17 persons from extending “utility service” in or into an existing service territory. The statute does
18 not prohibit “loads” from crossing existing service territory boundaries as the Commission
19 asserted. Thus, loads are geographically fluid and may cross territory boundaries without
20 violation of ORS 758.450(2). Columbia Basin never argued that loads extending across territory
21 boundaries violate ORS 758.450(2).

22 The Commission was correct, however, in that it cannot adjust the boundaries of
23 allocated territories by application of the geographic load test. Pursuant to ORS 758.430, only
24 the parties to a Commission-approved contract for the allocation of territory may amend the
25 contract and seek a new order approving the new allocation. The statutory scheme of the
26 territory allocation law does not permit the Commission to unilaterally adjust the territory
27 boundaries or alter the contract rights and duties of the parties.

²⁷ ORS 758.410.

1 Finally, the Commission found that a strict interpretation of ORS 758.450(2) would
2 prevent two utilities from adjusting their service territories or re-allocating electric users between
3 them without the Commission’s involvement and without a Commission order.²⁸ According to
4 the Commission, “such agreements could be reasonable and encouraged by this Commission.”²⁹
5 The Commission also declared that, according to Columbia Basin, “such an agreement would
6 facilitate an illegal invasion of another utility’s territory unless filed as a permanent boundary
7 change and approved by the Commission.”

8 The Commission’s position conflicts with the overall regulatory scheme under the
9 Oregon territory allocation law and federal antitrust laws. Whether it is an initial contract for
10 allocation of territory, or any amendment thereto, the Oregon territory allocation law requires the
11 parties file the contract with the Commission and obtain approval by order.³⁰ Additionally, as
12 noted in *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427 (1996)
13 (“*Columbia Steel*”), the filing of a territory or customer allocation contract, or amendments
14 thereto, is necessary for compliance with federal antitrust law.³¹

15 The Commission’s conclusion that Columbia Basin’s interpretation would prevent
16 bilateral resolution of territory allocation issues without the Commission approval fails to

²⁸ Order No. 19-211 at 9, provides:

Columbia Basin’s interpretation would also prevent any arrangement or agreements between utilities with territory boundary issues from resolving them bilaterally in a way that results in one utility servicing a customer partially located in an adjacent territory without also securing a Commission approved boundary alteration. Although a negotiated private agreement to a dispute could be reasonable and encouraged by this Commission, according to Columbia Basin’s reading of ORS 758.450(2), such an agreement would facilitate an illegal invasion of another utility’s territory unless filed as a permanent boundary change and approved by the Commission.

²⁹ *Id.* at 9.

³⁰ See ORS 758.410, 758.415, 758.420, 758.425, and 758.430.

³¹ *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427, 1437-38 (1996), quoting from *PacifiCorp v. Portland Gen. Elec. Co.*, 770 F.Supp. 562, 570 (D.Or. 1991) (In order to lawfully displace competition as a method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the [O]PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive immunity which is provided by the state statutory scheme from the federal antitrust laws.).

1 recognize that the Oregon territory allocation law and federal antitrust law never condoned such
2 agreements in the first place. In addition, as noted above, the Order undermines rather than
3 supports utility service territory agreements.

4 In summary, the Commission's conclusion that it has authority to adopt and use the
5 geographic load test is unsupported by the text of ORS 758.450(2), Oregon's rules of statutory
6 construction, and the overall regulatory scheme set forth in the Oregon territory allocation law.
7 Columbia Basin requests the Commission to reconsider Order No. 19-211 and revise it to
8 comply with Oregon statutes, case law and federal law.

B. The Commission Erred in its Conclusion it has the Authority to Adopt and Use the Point of Service Test.

9 The Commission claimed that, in addition to its authority to adopt the geographic load
10 center test, the Commission has the authority to adopt and use the "point of service" test to
11 allocate loads that straddle service territory boundaries.³²

12 As discussed above regarding the Commission's lack of authority to use the geographic
13 load center test, the Commission similarly lacks authority to use the point of service test, which
14 permits a customer to extend its power lines across territory boundaries without any violation of
15 the territory allocation law. Specifically, the point of service test permits a consumer whose load
16 is located entirely in one utility's service territory to extend electric facilities to an adjoining
17 utility's electric facilities to receive power from the adjoining utility. Thus, under a point of
18 service test, a consumer can choose its power provider at any time (such as when the consumer
19 initially wants power or after years of service by the local utility) simply by running power lines
20 to its chosen utility.

³² Order No. 19-221 at 10. "[W]e note that we would reach the same conclusion under an application of the geographic load center test as we would Staff's interpretation of ORS 758.450(2), which we apply below in the alternative." Order No. 19-221 at 13. "Our decision remains the same were we to apply Staff's construction of ORS 758.450(2), which is essentially the 'point of service' test."

1 The point of service test conflicts with the plain language in ORS 758.450(2). As held by
2 the Commission in Order No. 15-110, pursuant to ORS 758.450(2), “utility service” is not
3 restricted to only providing electric service at the point of service or point of delivery.³³ ORS
4 758.450(2) prohibits anyone from providing “utility service in and *into* an allocated territory.”
5 The Commission held in Order No. 15-110 that PacifiCorp violated the territory allocation law
6 because the point of service test did not provide a defense to violations of ORS 758.450(2) and
7 was contrary to Oregon’s territory allocation law. In the instant case, however, the Commission
8 opined that it could use the point of service test.

9 In addition, because the point of service and geographic load center tests can produce
10 different results in a particular case—such as in Order No. 15-110—the Commission’s adoption
11 of both tests in this case lacks substantial reason.

C. The Commission Must Explain Deviations from Prior Decisions and Rules.

12 The Commission must follow its prior decisions or provide a reasonable basis for
13 departing from its prior decisions.³⁴ As discussed above, in Order No. 15-110 the Commission
14 rejected PacifiCorp’s argument that it did not violate Columbia Basin’s service territory because
15 PacifiCorp’s point of service with the Shepherds Flat Central wind farm was located in
16 PacifiCorp’s service territory.³⁵ The Commission held that the “point of service” test is contrary,
17 and provides no defense, to the Oregon territory allocation law.

³³ Order No. 15-110 at 7, “We reject the basis of PacifiCorp’s assertion – that all ‘utility service’ occurs at the point of delivery.”

³⁴ *Calpine Energy Sol. V. PUC*, 298 Or.App. 143, 163 (2019) (“*Calpine*”). ORS 183.482(8)(b)(B) requires a court to remand an agency order if the agency’s exercise of discretion is “[i]nconsistent with an agency rule, and officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency.”

³⁵ Order No. 15-110 at 7. (We reject the basis for PacifiCorp’s assertion – that all “utility service” occurs at the point of delivery. Such a premise, if adopted, would effectively render meaningless all allocated service territories, as a customer could choose its own utility service provider simply by constructing its own transmission line to an adjoining service territory.)

1 Here, similar to the facts regarding delivery points in Order No. 15-110, the operator of
2 the Willow Creek Dairy property simply extended the Dairy's electric facilities from Columbia
3 Basin's service territory to a service point in Umatilla's territory. The Commission's finding in
4 Order No. 19-221 that it can now use the point of service test to validate Umatilla's service to the
5 six irrigation circles in Columbia Basin's service territory appears to reverse its rationale and
6 decision in Order No. 15-110.

7 The Commission has provided neither a rational basis nor explanation in Order No. 19-
8 221 for reversing its decision in Order No. 15-110. The Commission appeared to accept the
9 OPUC Staff's position that a person only violates the statute if that person's infrastructure
10 distributes power to a customer in an allocated territory or if the person builds or extends electric
11 equipment into another territory.³⁶ The Commission further explained:

12 In Staff's interpretation, "utility service" refers to the distribution of electricity
13 using plant, equipment or other facilities located in the service territory of
14 another. Staff observes that there is no evidence that UEC constructed utility
15 service infrastructure in Columbia Basin's territory. The Legislature, in
16 developing the Territory Allocation Law, was primarily concerned with regulating
17 what a utility could do in the service territory of another and not with actions
18 taken within its own service territory. UEC's activities occurred in its own
19 service territory, not that of Columbia Basin, and under this interpretation of the
20 statute we would likewise conclude that UEC has not violated 758.450(2).³⁷

21 That is the extent of the Commission rationale and explanation for its conclusion that it
22 has the authority to adopt and use the point of service test. By turning a blind eye to the
23 installation of facilities by the customer to create an artificial point of service in another utility's
24 service territory, the Commission is condoning the user choosing its electric utility supplier. The
25 Commission is also introducing significant confusion when it adopts a test which would produce

³⁶ Order No. 19-221 at 13. "Our decision remains the same were we to apply Staff's construction of ORS 758450(2), which is essentially the "point of service" test. Under that interpretation, a person only violates the statute if there infrastructure is used to distribute power to a customer in another territory or they build or extend equipment into another territory."

³⁷ Order No. 19-221 at 13.

1 a different result than the geographic load center test in many cases. Yet the Commission fails to
2 explain how it can rationalize the use of two tests that can result in very different outcomes under
3 the same facts.

4 There is no Commission discussion of its holding in Order No. 15-110 where the
5 Commission held the point of service test would “render meaningless all allocated service
6 territories.” There is no discussion of why the Commission has the authority to use the point of
7 service test now, but could not use it in 2015. There is no discussion even regarding whether
8 Order No. 19-221 overrules Order No. 15-110. The Commission improperly ignored Order No.
9 15-110.

D. The Commission Must Interpret its Statutes to Provide Clear and Predictable Guidance.

10 Columbia Basin agrees that the Commission’s statement in its Order that it has an
11 obligation to interpret the statute “to develop clear and predictable ways in which parties can
12 resolve questions associated with territory allocation.”³⁸ But the Commission’s apparent
13 position that it can adopt and use either the geographic load center test or the point of service test
14 on a case-by-case basis will create additional confusion and disputes because the tests, when
15 applied to a set of facts, can produce entirely different results. Parties will not know which test is
16 appropriate when a territory allocation issue arises. Because the application of the geographic
17 load center test can lead to a different result from the point of service test under the same fact
18 pattern, the Commission’s possible use of either test will force utilities to seek the Commission

³⁸ Order No. 19-221 at 9, which provides

The Commission has the obligation to resolve the issues associated with loads that straddle two service territories and to develop clear and predictable ways in which parties can resolve questions associated with territory allocation. It is our responsibility to interpret legislation “to ascertain the intention of the Legislature and to refuse to give literal application to language when to do so would produce ‘an absurd or unreasonable result,’ but, rather, “to construe the act, if possible, so that it is a reasonable and workable law and not inconsistent with the general policy of the Legislature.”

1 involvement to determine which test applies. The Commission’s decision that it may
2 alternatively apply the geographic load test or the point of service test fails to provide a clear and
3 predicable way for parties to resolve territory allocation disputes.

4 Additionally, with Order No.15-110 and Order No. 19-221, the Commission now has two
5 valid and enforceable orders that can be interpreted as directly contrary to each other, which
6 creates inherent confusion as to which order utilities and courts should rely upon for the
7 Commission’s interpretation of ORS 758.450(2). Also, the two conflicting orders create
8 confusion as to whether the point of service test is contrary to, or consistent with, ORS
9 758.450(2). Order No. 19-221 has not provided the certainty and predictability that is required.
10 In comparison, the plain text of ORS 758.450(2) creates a bright line for determining which
11 utility serves a load without the Commission’s involvement. It is clear and predictable.

E. The Commission Erred by Ignoring its Prior Order No. 38089

12 The Commission established an exclusive service territory boundary between Columbia
13 Basin and Umatilla during 1961 in Order No. 38089. Pursuant to ORS 758.415, once a contract
14 is approved by the Commission, that contract “shall be valid and enforceable.”

15 In Order No. 19-221, the Commission effectively unilaterally amended the contract
16 approved in Order No. 38089. The Commission observed that Order No. 38089 was silent as to
17 the parties’ allocation of loads that “are part of both the Columbia Basin service territory and the
18 service territory of an adjacent utility . . .” The Commission rationalized it had the authority to
19 ignore the plain language in Order No. 38089 (and the allocation agreement between Umatilla
20 and Columbia Basin) and to insert provisions that fundamentally change the Order and the
21 agreement that give the Commission authority to the use the geographic load center test or the
22 point of service test.

1 The Commission must adhere to the terms of the approved contract and its prior Order.
2 No. 38089.³⁹ Here, Order No. 38089 delineated Columbia Basin’s and Umatilla’s service
3 territories according to designated boundaries. There is no ambiguity in the legal description of
4 those boundaries. It also does not provide, as the Commission notes, any language that sets forth
5 an exception to those boundaries. The language is clear and unambiguous. Umatilla serves the
6 load in its service territory, and Columbia Basin serves the load in its service territory. The
7 Commission cannot simply make up and insert new terms into Order No. 38089 (and the
8 associated contract) that are not in those documents. In sum, the Commission can neither
9 unilaterally amend the contract between Columbia Basin and Umatilla nor ignore its prior Order
10 No. 38089.⁴⁰

**F. The Commission Ignored the Stranding of Columbia Basin’s Electric Facilities that
Previously Serve the Location of the Six Irrigation Circles in Columbia Basin’s
Service Territory.**

11 In Order No. 19-221, the Commission determined that the actions of Umatilla and
12 Willow Creek Dairy would not result in the duplication of electric facilities.⁴¹ The Commission
13 based its conclusion entirely on the testimony of OPUC Staff and ignored the contrary testimony
14 of Columbia Basin’s General Manager.⁴²

15 The Commission’s conclusion, however, overlooked the OPUC Staff’s testimony and
16 briefing that demonstrate there was a duplication of electric facilities. The OPUC Staff testified,
17 “UEC constructed distribution facilities within its allocated territory and CBEC has pre-existing
18 facilities within its own allocated service territory,”⁴³ and explained that Umatilla’s construction

³⁹ ORS 758.415.

⁴⁰ ORS 578.415.

⁴¹ Order No. 19-221 at 12, “Additionally, Staff testified that UEC’s actions taken to develop infrastructure to service Willow Creek Dairy Property load did not result in duplication of facilities.”

⁴² *Id.*, at 12.

⁴³ OPUC Staff Exhibit 100, Reply Testimony, Gibbens-Rossow at 10.

1 occurred in 2016.⁴⁴ Yet, the OPUC Staff’s Reply Brief acknowledged that Columbia Basin had
2 pre-existing electric facilities constructed to serve the same land where the six irrigation circles
3 are now located,⁴⁵ and admitted that Columbia Basin’s electric facilities could serve the area of
4 the six irrigation circles.⁴⁶

5 OPUC Staff’s testimony also incorrectly claimed that, “Columbia Basin customers would
6 not be harmed beyond their current state should UEC continue to serve the load, while UEC
7 customers would be required to deal with stranded costs it would otherwise not have to bear.”⁴⁷
8 The only way Umatilla would have “stranded costs” if Columbia Basin served the load of the six
9 irrigation circles is if the new facilities installed by Umatilla and te Velde unnecessarily
10 duplicated Columbia Basin’s existing facilities.

11 The above statements by the OPUC Staff support the testimony of Columbia Basin’s
12 General Manager, who testified Umatilla’s new electric facilities stranded Columbia Basin’s
13 existing facilities. The only significant discrepancy in the testimony of OPUC Staff and
14 Columbia Basin’s General Manager, was the OPUC Staff’s unfounded conclusion that there
15 was no duplication of service. A careful review of the OPUC Staff’s testimony and briefing as a
16 whole, however, does not even support that conclusion.

17 The Commission’s decisions must be based on substantial evidence and supported by
18 substantial reason.⁴⁸ The Commission’s conclusion that there was no duplication of facilities was
19 not based on substantial evidence. Columbia Basin requests the Commission reconsider its
20 factual conclusion that there was no duplication of facilities.

⁴⁴ *Id.*, at 3.

⁴⁵ OPUC Staff Reply Brief at 12. “A number of years (decades) ago, CBEC installed facilities near the six irrigation circles in its territory to provide service to a previous property owner who held the land.”

⁴⁶ OPUC Staff Reply Brief at 12.

⁴⁷ OPUC Staff Exhibit 100, Reply Testimony, Gibbens-Rossow at 11.

⁴⁸ *Calpine* at 157. “[W]e review the PUC’s order for legal error and whether the order is “supported by substantial evidence in the record.” ORS 183.482(8)(a), (c). As part of our substantial evidence review, we also review the PUC’s order for substantial reason.”

CONCLUSION

1 For the above reasons, Columbia Basin respectfully requests the Commission to clarify or
2 reconsider its decisions in Order No. 19-221.

DATED this 30th day of August, 2019.

KINDLEY LAW, PC

By /s/ Raymond S. Kindley

RAYMOND S. KINDLEY, OSB 964910

Email: kindleylaw@comcast.net

Tel: (503) 206-1010

Of Attorneys for Columbia Basin Electric
Cooperative, Inc.