

**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

In the Matter of:

COLUMBIA BASIN ELECTRIC  
COOPERATIVE, INC.,  
Petitioner,

v.

PUBLIC UTILITY COMMISSION  
OF OREGON,  
Respondent,

and

UMATILLA ELECTRIC  
COOPERATIVE, INC. and WILLOW  
CREEK DAIRY,  
Intervenor/Respondents.

Public Utility Commission of Oregon  
Docket No. UM 1818

CA Case No. \_\_\_\_\_

PETITION FOR JUDICIAL REVIEW  
OF ORDER OF THE PUBLIC  
UTILITY COMMISSION OF  
OREGON

**PETITION FOR JUDICIAL REVIEW**

Petitioner seeks judicial review of the Public Utility Commission of Oregon’s Order No. 19-350, dated October 29, 2019, and Order No. 19-221, dated July 2, 2019, which dismissed Columbia Basin Electric Cooperative, Inc.’s (CBEC) complaint against Umatilla Electric Cooperative, Inc. (UEC) and determined that UEC had not violated ORS 758.450(2). Copies of the Orders are attached.

This petition for judicial review is timely filed because it was filed within 60 days of Order No. 19-350, which denied the application for reconsideration of Order No. 19-221. ORS 183.482, ORS 756.500, ORS 756.610.

The parties to this proceeding before the Court of Appeals are:

Petitioner:

Columbia Basin Electric Cooperative, Inc.  
171 W. Linden Way  
Heppner, Oregon 97836

Respondent:

Public Utility Commission of Oregon  
201 High Street NE, Suite 100  
Salem, OR 97301

Intervenor/Respondents:

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750 West Elm St.  
Hermiston, Oregon 97838

Willow Creek Dairy  
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Tipton, CA 93272

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Petitioners seek review of the Public Utility Commission's Order No. 19-221 in Docket No. UM 1818, which dismissed CBEC's complaint against UEC and determined that UEC's provision of utility service to the Willow Creek Dairy did not violate ORS 758.450(2), the statute regarding allocation of exclusive service territories. Petitioners also seek review of Order No. 19-350, which denied CBEC's application for reconsideration of Order No. 19-221.

Petitioner was a party to the administrative proceeding in Docket No. UM 1818.

Petitioner is willing to work with the Respondents to shorten the record to eliminate unnecessary or irrelevant material.



Pursuant to ORS 183.482(8)(a), (b), and (c), Petitioner requests that the Court of Appeals reverse Public Utility Commission Order Nos. 19-221 and 19-350, because they rely on erroneous interpretations of law, are outside the range of discretion delegated to the agency by law, and/or are not supported by substantial evidence in the record.

Respectfully submitted this 26th day of December 2019.

MCDOWELL RACKNER GIBSON PC

/s/ Katherine McDowell

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I served the foregoing **PETITION FOR JUDICIAL REVIEW OF ORDER OF THE PUBLIC UTILITY COMMISSION OF OREGON**, on December 26, 2019, on the parties listed below in the manner indicated:

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I further certify that I filed the foregoing **PETITION FOR JUDICIAL REVIEW OF ORDER OF THE PUBLIC UTILITY COMMISSION OF OREGON** with the Appellate Court Administrator on December 26, 2019, via the Oregon Appellate Court eFiling system.

/s/ Katherine McDowell  
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Of Attorneys for Petitioner

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1818

COLUMBIA BASIN ELECTRIC  
COOPERATIVE, INC.,

Complainant,

vs.

UMATILLA ELECTRIC COOPERATIVE,

Defendant.

Regarding Willow Creek Dairy.

ORDER

DISPOSITION: RECONSIDERATION DENIED

**I. SUMMARY**

On August 30, 2019, Columbia Basin Electric Cooperative, Inc. (Columbia Basin) filed with the Commission an application for reconsideration and rehearing of Order No. 19-221, pursuant to ORS 756.561 and OAR 860-001-0720. In that order, the Commission dismissed a complaint by Columbia Basin against Umatilla Electric Cooperative (UEC) alleging that UEC had violated the Territory Allocation Law. UEC filed a response in opposition to the application on September 16, 2019. For the reasons set forth below, Columbia Basin's application for reconsideration and rehearing is denied.

**II. BACKGROUND**

In Order No. 19-221, we resolved all issues related to Columbia Basin's complaint against UEC. We reviewed the facts relevant to the 7,300 acre parcel and found that 95 percent of the dairy operations were physically located within the UEC service territory. The facts also demonstrated that, when considering the irrigation pivots only, 86 percent of the irrigation loads are within UEC's service territory.

We concluded that we may rely on the geographic load center test to allow one utility to serve a unified load that straddles two service territories, because the statute is ambiguous as to the appropriate treatment of a unified load that straddles two service territories and the context and purpose of the territorial allocation law supports the geographic load test. We concluded that UEC has the right and obligation to serve the entirety of the Willow Creek Dairy Property electric loads.<sup>1</sup>

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<sup>1</sup> See Order 19-221 at 6.

### III. REQUEST FOR RECONSIDERATION OR REHEARING

#### A. Applicable Law

ORS 756.561(1) provides that a party may request reconsideration of a final order within sixty (60) days of service of that order. The Commission may grant reconsideration “if sufficient reason therefore is made to appear.” OAR 860-001-0720(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant establishes one or more of the following grounds:

- (a) New evidence that is essential to the decision and that was unavailable and not reasonable discoverable before issuance of the order;
- (b) A change in the law or policy since the date the order was issued relating to an issue essential to the decision;
- (c) An error of law or fact in the order that is essential to the decision; or
- (d) Good cause for further examination of an issue essential to the decision.

OAR 860-001-0720(2) requires the applicant to specify what changes in the order the Commission is requested to make and to explain how such changes will alter the outcome.

#### B. Columbia Basin’s Application for Reconsideration

Columbia Basin submitted its petition for reconsideration on August 30, 2019. Columbia Basin made six arguments on reconsideration and requests that the Commission reconsider three of its conclusions: (1) that the Commission has the discretionary authority to adopt and use the geographic load test; (2) that the Commission has the discretionary authority to adopt and use the point of service test; and (3) that UEC’s actions did not result in the duplication of Columbia Basin’s facilities.

#### C. UEC’s Reply

UEC submitted its reply on September 16, 2019. UEC argues that Columbia Basin’s petition does not follow the law regarding reconsideration in that it “failed to identify any error of law or fact” in the Commission’s decision.<sup>2</sup> UEC opines that, contrary to Oregon law, Columbia Basin simply “re-argue[s] points of law and fact it already presented to the Commission.”<sup>3</sup>

### IV. DISCUSSION AND RESOLUTION

We conclude that Columbia Basin has not demonstrated grounds justifying reconsideration of Order No. 19-221 and its request is denied.

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<sup>2</sup> UEC Response in Opposition to Petition for Clarification and Reconsideration at 1 (Sep 16, 2019).

<sup>3</sup> *Id.* at 2.

**A. Commission Has Authority to Apply the Geographic Load Test Under the Facts of This Case.**

Columbia Basin argues that we lack the authority to resolve allocated territory disputes using the geographic load center test. Although acknowledging that the territory allocation law does not address situations where a customer's electricity load may straddle two service territories, Columbia Basin claims the statutory language is unambiguous and that we cannot consider any test but the point of use test for resolving disputes over a load straddling two territories.<sup>4</sup> By implication, Columbia Basin argues that the language of the statute does not and cannot recognize the nature of the customer load – and, if a customer straddles two service territories, that customer *must* receive service from two utilities, regardless of the impact to the customer or the physical or economic constraint on the customer to subdivide that load and receive service from two providers.

In our order, we determined that the territory allocation statute did not address situations where a unified customer load straddled two service territories and was ambiguous in this crucial respect. We then applied the test which we have previously determined best furthers the legislative purpose and direction of the territory allocation law in situations where a unified customer load straddles two service territories. We consider the statute ambiguous with respect to customer loads that straddle two service territories. We appropriately resolved this ambiguity in a manner consistent with the purpose and legislative intent reflected in the territory allocation law.

**B. The Commission's Alternative Resolution Correctly Applied the Point of Service Test.**

Columbia Basin's second assignment of error asserts that we do not have the authority to adopt the point of service test.<sup>5</sup> In order No. 19-221, we determined that application of the point of service test resulted in the same conclusion as our application of the geographic load center test, and adopted it as an alternative rationale for our decision.

In applying the geographic load center test, we found that the text was ambiguous and allowed the use of the geographic load test consistent with the intent and purpose of the legislative intent of the territory allocation law. However, in the alternative, we concluded that if the text of the statute is unambiguous it requires a point of service test, not a point of use test, which means the end result would be the same under these facts.

Under an unambiguous interpretation of the statute, utility service refers to the physical act that distributes electricity to users over plant, equipment, or facilities to the point where the user takes some control for its own use. We, therefore, concluded that UEC did not violate ORS 758.450(2) under application of what is commonly referred to as the

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<sup>4</sup> The point of use test requires that only the utility authorized to serve within a certified territory may provide power to a facility within that service territory, even where the consumer or facility straddles or extends into another service territory.

<sup>5</sup> The point of service test focuses on the point at which the commodity is delivered rather than on the point at which it is consumed. If a utility provides a commodity to a customer within its allocated territory, the sale is proper, even if the customer transport the commodity into the allocated territory of another utility for the customer's use.

point of service test because the facts of this case demonstrate that UEC did not offer, construct, or extend plant, equipment or facilities into Columbia Basin's service territory for the distribution of electricity to users.

We reiterate that we determined in order No. 15-110 that the statute is ambiguous as it applies to a unified load that straddles two allocated service territories and applied the geographic load center test as consistent with the purpose and legislative intent of the territory allocation law.<sup>6</sup> However, even if the text were determined to be unambiguous and establishes a point of service test, the result would be the same under the facts in this case.

**C. The Commission Use of the Point of Service Test as an Alternative Rationale Does Not Reverse the Rationale We Have Previously Adopted When Faced with Factual Situations That Involve a Unified Load That Straddles Two Allocated Service Territories**

Columbia Basin asserts that our order reversed the rationale we adopted in order No. 15-110, where we declined to adopt an argument based on the point of service test. That is incorrect. We have not reversed that rationale. Instead, we adopted an alternative rationale that concludes the result would be the same if we applied the point of service test.

**D. The Commission's Determination That There Was No Duplication of Facilities Is Supported by the Record**

Columbia Basin argues that we erred in finding that facilities were not duplicated in order to serve the Willow Creek Dairy. In making this claim, Columbia Basin states that our determination that facilities were not duplicated was based entirely on Staff testimony. We did rely on Staff testimony in our order, but we also cited to additional evidence in the record, including evidence submitted by Columbia Basin. For example, we reviewed and cited a letter, submitted by Columbia Basin into evidence, which indicated that facility improvements were necessary regardless of whether or not the irrigation circles in question were to be served by Columbia Basin or UEC. The letter stated that new trenches and infrastructure needed to be installed in order for Columbia Basin to serve the Willow Creek dairy.<sup>7</sup> Based upon the totality of the record, we found "improvements were necessary in either case," which supports the determination that facilities were not duplicated.

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<sup>6</sup> *Columbia Basin Electric Cooperative, Inc., v. PacifiCorp, dba Pacific Power, et al.*, Docket No. UM 1970, Order No. 15-110 at 4 (Apr 10, 2015).

<sup>7</sup> CBEC/111, Wolff/3.

**V. ORDER**

IT IS ORDERED THAT Columbia Basin's request for reconsideration and rehearing is denied.

Made, entered, and effective Oct 29 2019.



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**Megan W. Decker**  
Chair



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**Stephen M. Bloom**  
Commissioner



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**Letha Tawney**  
Commissioner



A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.



**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1818

COLUMBIA BASIN ELECTRIC  
COOPERATIVE, INC.,

Complainant,

vs.

UMATILLA ELECTRIC COOPERATIVE,

Defendant.

Regarding Willow Creek Dairy

ORDER

DISPOSITION: COMPLAINT DISMISSED; DOCKET CLOSED

In this order, we determine that the Commission is an appropriate statutory arbiter of Territory Allocation Law disputes and interpret the law in the manner that best achieves the Legislature's intent. We find that operations on the Willow Creek Dairy Property constitute a unified load for the purposes of applying the Territory Allocation Law. Based on that finding, we conclude that Umatilla Electric Cooperative (UEC) is entitled to serve the Willow Creek Dairy Property. Accordingly, we dismiss the complaint by Columbia Basin Electric Cooperative (Columbia Basin) against UEC and order that this docket be closed.

**I. INTRODUCTION**

This proceeding involves a complaint filed by Columbia Basin alleging that UEC is offering and providing electric utility service within Columbia Basin's exclusive service territory in violation of the Territory Allocation Law.<sup>1</sup> Columbia Basin asserts that UEC is illegally serving six irrigation circles located within Columbia Basin's territory on property formerly occupied by the Willow Creek Dairy.

Willow Creek Dairy began its operations on existing facilities within UEC's service territory, but expanded those operations in 2016 and developed six irrigation circles in the northern part of Columbia Basin's territory. UEC is currently providing utility service for the new irrigation circles and pumps utilizing infrastructure added in 2016. UEC also

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<sup>1</sup> ORS 758.450(2) ("no other person shall offer, construct, or extend utility service in or into an allocated territory").

had plans to serve any additional Willow Creek Dairy circles—both inside and outside UEC’s allocated territory.

Future plans were thrown in doubt in April 2018 when the owner of the Willow Creek Dairy, Mr. Greg te Velde, filed for bankruptcy. The bankruptcy court appointed a trustee (Trustee) for the te Velde estate on September 18, 2018. The entire property in question, including the irrigation circles at issue, was sold to Canyon Farm. Subsequently, Canyon Farm contracted with Easterday Farms as an operator on the property.

The following table summarizes how this order refers to the various entities and operators concerned with the property:

<b>Name</b>	<b>Description</b>
Willow Creek Dairy	Refers to the dairy owned by Greg te Velde that ceased operations subsequent to the te Velde bankruptcy
Canyon Farm	The current owner of the entirety of the property in question, which was purchased through the te Velde bankruptcy process
Trustee	The court-appointed trustee for the te Velde bankruptcy
Easterday Farms	A current operator on the farm
Willow Creek Dairy Property	Refers to the entirety of the property and operations in question, both prior to and following the te Velde bankruptcy
Boardman Tree Farm	Refers to the company that owned the entire Willow Creek Dairy Property before the Willow Creek Dairy began operations, and that currently leases a portion of the Willow Creek Dairy Property

The Willow Creek Dairy Property is currently owned by Canyon Farm. Both Easterday Farms and the Trustee have operational rights on the Willow Creek Dairy Property.

## II. FACTS

### A. Service Territory Boundary

In October 1961, the Commission approved Columbia Basin’s exclusive territory boundary.<sup>2</sup> The Commission’s order, Order No. 38089, is silent as to how loads that are part of both the Columbia Basin service territory and the service territory of an adjacent utility should be managed or served.

Order No. 38089 references a boundary agreement between Columbia Basin and UEC, approved and adopted by the separate boards of the two electric cooperatives.<sup>3</sup> This

<sup>2</sup> *In the Matter of Columbia Basin Electric Cooperative, Inc., Heppner Oregon, for an order allocating utility service territory*, Docket No. UF 2308, Order No. 38089 (Oct 27, 1961).

<sup>3</sup> *Id.* at 8.

agreement, however, was not attached to Order No. 38089, and has not been presented as evidence in this proceeding. Consequently, we do not know if this agreement contains provisions for addressing territorial disputes between Columbia Basin and UEC or for managing loads that straddle the two service territories.

## **B. Willow Creek Dairy and Property**

The Willow Creek Dairy Property is a 7,300 acre parcel of land in Morrow County, Oregon. The Willow Creek Dairy formerly occupied the property. The Willow Creek Dairy was designed to accommodate 30,000 dairy cattle.<sup>4</sup> The Willow Creek Dairy Property is contiguous, and during the operation of the Willow Creek Dairy, it was entirely owned and operated by Mr. Greg te Velde.<sup>5</sup> Mr. te Velde purchased the property from the Boardman Tree Farm in 2015.<sup>6</sup>

The vast majority of the Willow Creek Dairy's operations—up to 95 percent—were within the UEC service territory.<sup>7</sup> The remaining portion was located in Columbia Basin service territory, and is comprised of irrigation circles installed as part of an expansion of operations in 2016. To serve the new irrigation circles, Willow Creek Dairy installed electrical wires and equipment from the circles to a new point of service in UEC service territory. Willow Creek Dairy planned to continue to expand its facilities by adding additional irrigation circles located within Columbia Basin's territory. Willow Creek Dairy placed one additional irrigation circle in the UEC service territory before the bankruptcy.

The Willow Creek Dairy constituted a large “closed loop” system, with agricultural operations supporting dairy operations.<sup>8</sup> As such, the Willow Creek Dairy's water intake needed to be highly coordinated, and the loss or interruption of service to one part of its “closed loop” system would result in a complete system shutdown.<sup>9</sup> The Willow Creek Dairy asserted that service by two distinct distribution utilities could allow an outage in one part of the system and not in the other, potentially creating significant operational challenges.<sup>10</sup>

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<sup>4</sup> Staff/100, Gibbens-Rossow/3.

<sup>5</sup> CBEC/100, Wolff/5.

<sup>6</sup> Staff/100, Gibbens-Rossow/3.

<sup>7</sup> UEC/100, Lankford/3.

<sup>8</sup> WCD/100, Aylett/1.

<sup>9</sup> WCD/100, Aylett/5.

<sup>10</sup> WCD/100, Aylett/6.

**C. Bankruptcy and Post-Bankruptcy Operations<sup>11</sup>**

The Willow Creek Dairy faced significant environmental and permit problems, stemming from an inability to properly and legally remove or process waste from the dairy operation. The Willow Creek Dairy did not control enough acreage to legally apply all waste generated by the Dairy to the agricultural fields it controlled.

On April 26, 2018, Mr. te Velde filed for bankruptcy. The Bankruptcy Court appointed a Trustee, who sold the property to Canyon Farm but retains significant responsibilities at the Willow Creek Dairy Property. The Trustee has no intention to continue dairy operations.

The Trustee has entered into an agreement with Easterday Farms and Canyon Farms concerning the operation of the Property. The agreement outlines the cleanup plan for the overall property. It makes Easterday Farms responsible for contracting for electric service for all meters on the property. The agreement also describes a crop plan for the property. Nutrient (waste water) will be applied to the property at the direction of the Trustee.

Easterday Farms will not operate on the property in the same way as Willow Creek Dairy operated. The Willow Creek Dairy operated primarily as a dairy, and originally intended to lease a significant portion of the property to Boardman Tree Farm, a previous owner, through 2026. Those plans have been abandoned, and removal of Boardman Tree Farm trees has been accelerated in order to provide for more agricultural land to speed the legal disposal of large amounts of animal waste onto that land.<sup>12</sup>

The Willow Creek Dairy's livestock have been sold. The Trustee has developed a plan to install additional irrigation pivots and to land-apply animal waste. Under the operational agreement, Easterday Farms is responsible for maintaining and operating all irrigation equipment.<sup>13</sup> The Trustee will direct the land application of nutrient waste across the property.<sup>14</sup> No dairy operations will be continued under the current operational plan at the Willow Creek Dairy Property.

Considering irrigation pivots only (*i.e.*, assuming no dairy operations), the percentage of Easterday Farm irrigation loads located in Columbia Basin's service territory is approximately 14 percent, with approximately 86 percent of the current irrigation pivot load is located within UEC's service territory. The percentage of total loads within

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<sup>11</sup> In this section, we refer to facts associated with the te Velde bankruptcy that can be accessed through the bankruptcy filing *In re Gregory John te Velde*, Voluntary Petition for Individuals Filing for Bankruptcy, Doc ID 1, Case No. 18-11651 A-11 (Bankr ED Cal Apr 26, 2018).

<sup>12</sup> Columbia Basin Supplemental Brief Exhibit 7 at 7 of 27 (May 1, 2019).

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.* at 13.

UEC's service territory is greater. Easterday Farms receives all of its electric service from UEC.

#### **D. Attempts at Negotiation and Resolution**

Columbia Basin learned that UEC was serving Willow Creek Dairy's electricity needs for the six new irrigation circles in Columbia Basin's service territory in 2016, and communicated directly with Willow Creek Dairy and requested that UEC's service to Willow Creek Dairy cease. In the alternative, Columbia Basin proposed developing an agreement by which Willow Creek Dairy would be completely served by UEC, but under which Columbia Basin would receive revenues based on what Columbia Basin would have received from UEC had it been serving the portion of the load within its service territory.<sup>15</sup> Efforts to resolve the service issue through negotiation or agreement failed however, and Columbia Basin filed a complaint against UEC on January 13, 2017.

### **III. DISCUSSION**

#### **A. Positions of the Parties**

Columbia Basin argues that UEC is violating the Territory Allocation Law by providing service to the six irrigation circles in its service territory. Columbia Basin contends that UEC illegally extended service to the southern portion of UEC's territory for the express purpose of facilitating Willow Creek Dairy's extension of UEC service into Columbia Basin's territory.

UEC argues it is entitled and required to service the entire load at the Willow Creek Dairy Property. It relies on the geographic load center test used in a previous Commission order to determine service responsibility for loads that straddle two service territories. As more fully described below, that test allows the utility that serves the majority of a customer's load to serve the entire load, regardless of the geographic boundaries of a service area.

Staff supports UEC's right to serve all of Willow Creek Dairy's load, but states it is not necessary to apply the geographic load center test.<sup>16</sup> Staff argues under a plain reading of ORS 758.450(2) a person only violates the statute if that person (1) offers to engage in distributing electricity over plant, equipment or facilities to a place where a user takes control in the territory of another person, (2) constructs plant, equipment or facilities in the territory allocated to another person that distributes electricity into the control of a

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<sup>15</sup> Staff/105, Gibbens-Rossow/5. August 4, 2016 email from Thomas Wolff of Columbia Basin to Robert Echenrode of UEC proposing terms under which Columbia Basin would allow UEC to serve Willow Creek Dairy's load in Columbia Basin's allocated territory.

<sup>16</sup> Staff did not file supplemental briefs discussing the noticed facts associated with the te Velde bankruptcy, so references to Staff's positions in this brief may refer to the Willow Creek Dairy, and not the current entities operating on the Willow Creek Dairy Property.

user, or (3) it extends plant, equipment or facilities into an allocated territory that distributes electricity into the control of a user.<sup>17</sup> According to Staff, UEC has not physically extended distribution service into Columbia Basin territory because it has placed a point of service in its own territory that Willow Creek Dairy utilized for operations that extended into Columbia Basin's service territory.

Columbia Basin responds that our earlier decision to adopt the geographic load center test is invalid, and cannot be relied upon to allow UEC to serve facilities located within Columbia Basin's territory. Columbia Basin maintains that service territory allocation is established by original Commission order under ORS 758.450, and that this Commission may not adopt any test that effectively reallocates established territories and allows a utility to provide services in the allocated territory of another. Columbia Basin states that because an application of the geographic load center test can result in the predominant utility providing services in the subordinate utility's service territory, it directly conflicts with ORS 758.450, and that such an "invasion" is prohibited under any circumstances.<sup>18</sup>

In the alternative, Columbia Basin argues that the geographic load center test does not apply here, because Willow Creek Dairy's load was not unified and the load of the current operator, Easterday Farm, is not unified. Columbia Basin contends that service to the irrigation circles in the Columbia Basin service territory should be considered a distinct and separate load from the rest of the Willow Creek Dairy Property load.

## **B. Analysis**

This dispute comes before us because Order No. 38089, which approved a territorial division of UEC's and Columbia Basin's service territory under the Territory Allocation Law, does not include any provisions for dealing with loads that straddle two service territories.<sup>19</sup> Similarly, there is no agreement or contract in evidence between UEC and Columbia Basin that speaks to resolution of these issues.

We address this matter in three parts. First, we reject Columbia Basin's claim that we may not rely on the geographic load center test to allow one utility to serve a unified load that straddles adjoining service territories. We conclude that this Commission has authority to address and adjudicate utility territorial allocation issues, and if necessary may adopt standards to address conflicts and issues associated with a unified load that straddles two service territories. Second, we consider Columbia Basin's alternative argument that the geographic load center test does not apply here, because the load at the Willow Creek Dairy Property is not unified. Third, we apply the geographic load center test to determine that UEC has the right and obligation to serve Willow Creek Dairy Property electric loads.

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<sup>17</sup> Staff Reply Brief at 4 (Dec 8, 2017).

<sup>18</sup> Columbia Basin Reply Brief at 6 (Dec 22, 2017).

<sup>19</sup> See Order No. 38089.

In closing, we hold that, even if we did not apply the geographic load test, we would reach the same conclusion. Were we to interpret ORS 758.450(2) as proposed by Staff, we would conclude that UEC has not violated ORS 758.450(2) because it has not extended its own physical infrastructure into Columbia Basin's service territory.

***1. Authority to Adopt Geographic Load Center Test***

The Territory Allocation Law, codified in ORS 785.400 to 758.475, gives this Commission the authority to create exclusive service territories for electric and gas utilities. These provisions set out a process by which utility service territories may be allocated thus providing a utility with the exclusive right and obligation to serve customers in a specific territory. Once territory is allocated to a particular utility, ORS 758.450(2) prohibits other persons from providing utility service in that territory.

The Territory Allocation Law does not, however, speak to which utility has the right to serve a customer whose land, facilities and operations straddle adjoining service territories. ORS 758.410 allows adjoining utilities to enter into a contract to transfer territory, customers, and facilities. The statute is silent as to the legality of service to that customer when utilities are not able to reach a negotiated resolution, and provides no specific guidance to the Commission in the resolution of allocated territory disputes between utilities.

In Order No. 15-110, we addressed a similar service territory dispute involving a customer that straddled adjoining territories. There, we noted that other jurisdictions had adopted one of three tests to determine which utility may properly provide service to a customer with property located in adjoining territories. We summarized those tests as follows:

The point of service test focuses on the point at which electricity is delivered rather than on the point at which it is consumed. If a utility provides electricity to a customer within its certificated territory, the sale is proper, even if the customer transports the electricity into the certificated territory of another utility for the customer's use.

The geographic load center test is defined as a theoretical point determined by giving consideration to the location of the permanent electric loads which have been or which will be installed within a reasonable time as part of existing plans. In effect, this test permits the utility which serves a majority of a customer's load to serve the entire load, regardless of the territorial boundaries of a service area.

The point of use test requires that only the utility authorized to serve within a certificated territory may provide power to a facility within that territory. Thus, this test strictly enforces the territorial boundaries of regulated utilities in the provision of their electric service.<sup>20</sup>

As a matter of policy to resolve the circumstances presented in that earlier dispute, we applied the geographic load center test because we found that it best furthers the purpose of the Territory Allocation Law.<sup>21</sup> We are not persuaded by Columbia Basin's arguments that we may not apply the geographic load center test in any instance because the application of that test would allow a utility to provide service to a customer with some facilities located in another utility's service territory.

ORS 758.450(2) provides that, once territory is allocated, "no other person shall offer, construct, or extend utility service in or into an allocated territory." The Territory Allocation Law defines "[u]tility service," but does not speak to whether a "user" may be a unified customer load that straddles two or more service territories, nor does it provide any guidance to the Commission as to how such loads should be served.

We interpret the term "users" in a manner that allows us to carry out the intent of the Territory Allocation Law, which its drafters stated as follows:

The elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475[.]<sup>22</sup>

Based upon the text and context of the statutory scheme, and in the absence of explicit statutory direction on the meaning of "user" when a load straddles two service territories, we carry out the intent of the statute by interpreting "user" to mean a customer load. To determine whether a person has extended "utility service" to a "user" with load in two adjoining service territories, we will consider whether the "user" is a unified customer load. If so, we will apply the geographic load test to determine which utility has the right and obligation to serve the user.

The Oregon Legislature expected the Commission to work to address customer needs and system efficiencies. Columbia Basin's interpretation of ORS 758.450(2) is contrary to the primary intent of the Territory Allocation Law. Under Columbia Basin's interpretation,

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<sup>20</sup> *In re Columbia Basin Electric Cooperative v. PacifiCorp*, Docket No. UM 1670, Order No. 15-110 at 7 (Apr 10, 2015), citing *Public Service Commission of Colorado v. Public Utility Commission of Colorado*, 765 P2d 1015 (Colo. 1988).

<sup>21</sup> *Id.* at 8.

<sup>22</sup> ORS 758.405.



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 in the law to limit duplication of facilities.

This 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 territorial 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.”<sup>23</sup>

The fact that we recognize that a single load straddles two service territories does not mean that we modify existing service territories. Rather, we are interpreting and implementing the Territory Allocation Law in a manner consistent with its express legislative intent. Loads by their very nature do not adhere to territory maps. Loads are individual, subject to the economic activity that load is serving, and may extend across service territory boundaries. A load that straddles two service territories is not in itself evidence of a current or past violation of the Territory Allocation Law. Likewise, a Commission determination that one utility may serve a unified load that straddles two allocated service territories is not a Commission revision of those service territory designations.

Columbia Basin’s interpretation would also prevent any arrangements or agreements between utilities with territorial 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.

We find that this Commission has the authority to address and adjudicate utility territorial allocation issues, and has the authority to adopt standards to address conflicts and issues on which the Territory Allocation Law is silent or ambiguous, including issues associated with a load that straddles two service territories. We find that the geographic load center test presents the most reasonable method for resolving issues associated with loads

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<sup>23</sup> *Pac. Power & Light Co. v. State Tax Com.*, 249 Or 103, 110, 437 P2d 473, 476 (1968).

straddling two service territories. Finally, we 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.

## 2. *Willow Creek Dairy Property Load*

Having reaffirmed our authority to use the geographic load center test to address disputes associated with a unified load that straddles two adjoining territories, we must examine whether the load in question is properly characterized as a unified load, or whether the six irrigation pivots at issue should be characterized as a load separate and distinct from the balance of the operations. If the Willow Creek Dairy Property load is not unified, and one of the separate loads is entirely within an allocated service territory, then ORS 758.450(2) prohibits an adjacent utility provider from serving it.

UEC and Staff argue that the entirety of the Willow Creek Dairy should be viewed as one load for the purpose of this analysis.<sup>24</sup> After the te Velde bankruptcy filing, UEC continues to assert that the load at the Willow Creek Dairy Property is unified. Columbia Basin argues that the Willow Creek Dairy constituted many individual distinct loads, including one load that is entirely within the Columbia Basin service territory.<sup>25</sup>

In Order No. 15-110, we reviewed a series of factors to help us characterize loads as unified or separate. Specifically, we reviewed the following elements: ownership of facility operations, control of property, ownership of electric service facilities, the nature of the service agreements associated with the load, major regulatory documents, and significant contracts.<sup>26</sup>

Applying this review to the loads at the Willow Creek Dairy Property, we find that they all favor a characterization of the operations at the Willow Creek Dairy Property as a single, unified load. The Willow Creek Dairy Property is wholly owned by Canyon Farms, has one arrangement for the provision of utility service through Easterday Farms, is regulated by state agencies as a single farming operation, and is operated according to a coordinated and unified plan developed in the course of the te Velde bankruptcy. The agreement between Easterday Farms, Canyon Farms, and the Trustee specifies how the Willow Creek Dairy Property will be managed and the purpose of removing waste, planting crops, and maintaining facilities. We find that this agreement indicates a unified and coordinated operation, which is intended to carefully and legally dispose of animal waste generated by the Willow Creek Dairy and support agricultural plantings for this purpose.

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<sup>24</sup> Staff Reply Brief at 8; UEC Response Brief at 6 (Dec 8, 2017).

<sup>25</sup> Columbia Basin Opening Brief at 16 (Nov 17, 2017).

<sup>26</sup> Order No. 15-110 at 5-6

The need for duplication of facilities can and should be considered when determining if a load is unified or separate, as part of application of the geographic load center test. No test we might adopt or apply for resolving a load that straddles two service territories should allow an incursion into an adjacent utility service territory that could most appropriately be characterized as an separate load that could effectively be served by the utility in which territory that load lies. In this case, we find that the load that is the subject of the claim against UEC—the six irrigation pivots located in Columbia Basin’s territory—is part of a unified agricultural operation occurring on the Willow Creek Dairy Property, focused on the coordinated disposal of animal waste from the Willow Creek Dairy across agricultural fields. Notably, bankruptcy records indicate that the crop circles in the Columbia Basin territory are definitively part of the waste removal plan.<sup>27</sup>

We find that the operational agreement between the Trustee, Easterday Farms, and Canyon Farm supports a factual conclusion that the Willow Creek Dairy Property as a whole, as currently operated, represents a unified load that straddles the UEC and Columbia Basin service territories.

### ***3. Application of the Geographic Load Center Test***

Having found that the load is unified and straddles the two service territories, we now apply the geographic load center test to determine the legally authorized and obligated utility to serve the Willow Creek Dairy load. As discussed above, in docket UM 1670, we reviewed three tests for addressing loads that straddle two adjacent service territories and adopted the geographic load center test for the following reasons:

[A]s a matter of policy to resolve the circumstances presented here, we apply the geographic load center test because it best furthers the purpose of the Territory Allocation Law for two reasons. First, the geographic load center test helps best ensure the integrity of the allocated territories by focusing on the nature of the service to be provided. The test precludes a customer from manipulating delivery points and running transmission lines across boundaries to obtain service from a neighboring utility. Second, the geographic load center helps avoid the duplication of facilities by accepting the reality that a customer’s facilities may cross a service area boundary and allowing the [predominant] utility to serve the customer’s entire load.<sup>28</sup>

The geographic load center test recognizes the totality of the customer’s load over the two adjacent service territories, taking into account the location of any permanent electric

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<sup>27</sup> Records indicate that all available agriculture land on the property has been or will be commandeered for the legal application of waste in a systemic manner. Additionally, tree clearing activity has been accelerated for this same purpose.

<sup>28</sup> Order No. 15-110 at 8.

loads which have been or will be installed within a reasonable time frame. Effectively, the utility that serves a majority of the customer's load, under this test, is entitled to serve the entire load, including portions of the load that may extend into an adjacent service territory. In applying the geographic load center test we are cognizant of the purpose of the Territory Allocation Law, which is in part to prevent duplication of utility services and in part to ensure the efficient provision of services for the benefit of customers. The geographic load test allows us to resolve territorial disputes in a manner that will lead to an objective and evidence-based determination of the appropriate utility to serve a straddled load in consideration of the objectives and purposes of the Territory Allocation Law.

The record indicates that a substantial majority of the Willow Creek Dairy Property's operations, land, and electrical loads are in UEC's territory. As observed by Staff: "In looking at the permanent facilities which have been or which will be installed within a reasonable time, it is clear the load center is located in Umatilla's territory \* \* \*. Approximately 84 percent of the irrigation circles will reside entirely in Umatilla's service territory. The irrigation circle load in Columbia Basin's territory remains part of a single customer's load, who owns and operates one business."<sup>29</sup> Despite the subsequent to Velde bankruptcy, the fundamental conclusions reflected in Staff testimony remain accurate; the vast majority of the load associated with the Willow Creek Dairy Property lies in UEC's territory.

In making this determination, we note that the geographic load center test we apply takes operational characteristics into account, and considers the duplication of facilities. We find that the record indicates that regardless of which utility ultimately served the new irrigation circles, improvements were necessary in either case.<sup>30</sup> Additionally, Staff testified that UEC's actions taken to develop infrastructure to serve the Willow Creek Dairy Property load did not result in duplication of facilities.<sup>31</sup> No evidence has been presented in this case that one set of utility or customer improvements would be more significant than the other.

We observe that an application of the geographic load center test allowing an incursion into an adjacent territory that resulted in unnecessary duplication of facilities, and where the customer in question had a load that by its nature was readily subject to division or separation, would not be consistent with Oregon's Territory Allocation Law. Therefore, we retain the discretion to carefully apply the geographic load center test in the future to limit allocated territory incursions wherever practicable.

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<sup>29</sup> Staff/100, Gibbens-Rossow/8.

<sup>30</sup> See CBEC/111, Wolff/3; Letter from Columbia Basin to Willow Creek Dairy indicating that electricians needed to be engaged and new trenches needed to be dug to provide service to the six irrigation circles in question.

<sup>31</sup> Staff/100, Gibbens-Rossow/10.

We also hold that in applying the geographic load center test to determine the appropriate utility to serve a load straddling two service territories, we are not acting to alter previously adopted service territory boundaries. Our determination in this order applies to the specific customer load and facts presented to us, not to the permanent status of the UEC and Columbia Basin service territory boundaries nor to distinct ownership or operational circumstances that may arise at the Willow Creek Dairy Property in the future. The territory allocations themselves are not altered by this order, and this order applies only to the facts presented in this case.

#### **4. *Alternative Grounds for Conclusion***

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. Under that interpretation, a person only violates the statute if their infrastructure is used to distribute power to a customer in another territory or they build or extend equipment into another territory. UEC has not physically extended distribution service into Columbia Basin territory; its point of service remains in its own territory, and Willow Creek Dairy extended its infrastructure to irrigation pivots located in Columbia Basin's service territory.

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

### **IV. CONCLUSION**

We interpret ORS 758.450(2) to fulfill the intent of the Territorial Allocation Law. When examining the legality of "utility service" to "users" whose property and operations straddle two service territories, we will examine the nature and location of the "user" being served, including whether that the user represents a unified load. 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.

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."

Finally, as suggested by Staff, we encourage utilities to work to develop contractual agreements that provide for the resolution of ongoing or potential future issues associated with customer loads that straddle adjacent service territories.

**V. ORDER**

IT IS ORDERED that:

1. Umatilla Electric Cooperative has not violated ORS 758.450(2) by serving the electric load of the Willow Creek Dairy Property.
2. This docket is closed.

Made, entered, and effective Jul 02 2019.



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**Megan W. Decker**  
Chair



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**Stephen M. Bloom**  
Commissioner



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**Letha Tawney**  
Commissioner



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.