

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1818

In the Matter of

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.

v.

UMATILLA ELECTRIC COOPERATIVE,
INC.

STAFF'S REPLY BRIEF

I. INTRODUCTION

Columbia Basin Electric Cooperative, Inc. (CBEC) filed this complaint alleging Umatilla Electric Cooperative, Inc. (UEC) is violating ORS 758.450(2) by providing utility service in CBEC's allocated territory. CBEC and UEC share a service territorial boundary, and UEC provides electric service to a UEC member, Greg te Velde, doing business at various times as Willow Creek Dairy and Lost Creek Farm¹ (Willow Creek Dairy). Willow Creek Dairy's property straddles the service territories of both UEC and CBEC. Staff of the Public Utility Commission of Oregon (Staff) submits, in this brief, that CBEC has not established a violation of ORS 758.450(2). More importantly, for the reasons set forth below, Staff recommends the Commission take no action on this complaint.

II. DISCUSSION

1. Staff recommends the Commission find Umatilla Electric Cooperative, Inc. has not violated ORS 758.450(2).

Under the Territory Allocation Law, the Commission has the authority to allocate service territory among most of the entities providing utility service in this state by (1) ruling on petitions to allocate unserved territory and territory served by the petitioning utility that is not

¹ Staff/100, Gibbens-Rossow/3.

1 served by another person providing similar service and (2) approving or disapproving
2 agreements between utilities to allocate territory or customers between them.² Once territory is
3 allocated in a particular geographic area, ORS 758.450(2) provides that “except as provided in
4 subsection (4) of this section, no other person shall offer, construct or extend utility service in or
5 into an allocated territory.”

6 We note that there are four exceptions to ORS 758.450(2), but none are applicable to this
7 complaint.³ Therefore, to determine whether UEC has violated ORS 758.450(2), we consider
8 whether it has offered, constructed or extended utility service in or into the allocated territory of
9 another utility, namely, CBEC.

10 This statute is composed of inexact terms, embodying a complete expression of
11 legislative policy.⁴ When interpreting inexact terms, an administrative agency’s interpretation
12 must be consistent with the standard principles of statutory construction.⁵ Under the
13 methodology for statutory construction, we first examine the text and context of the statute in
14 question, giving words of common usage their plain, natural and ordinary meaning.⁶ We also
15 consider legislative history after examining text and context where the legislative history appears
16 useful to the analysis.⁷ Second, if unable to determine a clear meaning of the statute, we apply
17 general maxims of statutory construction to determine the legislative intent.⁸

18 We first consider the specific meaning of “utility service” as it is used in ORS
19 758.450(2). “Utility service” is defined in the Territory Allocation law:⁹

20 ‘Utility service’ means *service provided by any equipment, plant or facility for the*
21 *distribution of electricity to users* or the distribution of natural or manufactured
22 gas to consumers through a connected and interrelated distribution system.

23 ² See ORS 758.400 to ORS 758.475.

24 ³ ORS 758.450(4).

25 ⁴ *Springfield Education Assn v. Springfield School Dist. et al*, 290 Or 217, 223-4 (1980).

26 ⁵ *Coast Security Mortgage Corp v. Real Estate Agency*, 331 Or 348 (2000).

27 ⁶ *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993); *State v. Gaines*, 346 Or 160 (2009);
28 ORS 174.010.

29 ⁷ *State v. Gaines*, 346 Or at 160.

30 ⁸ *PGE v. BOLI*, 317 Or at 612.

31 ⁹ ORS 758.400(3) (emphasis added).

1 “Utility service” does not include service provided through or by the use of any
2 equipment, plant or facilities for the production or transmission of electricity or
3 gas which pass through or over but are not used to provide service in or do not
 terminate in an area allocated to another person providing a similar utility service.

4 This definition refers to service provided through plant, facilities or equipment used to distribute
5 electricity. The ordinary meaning of the term “distribute” is “to dispense: administer”.¹⁰ In
6 construing this definition, the Court of Appeals has concluded that “[t]he focus of the definition
7 in the statute is on the use of facilities to distribute natural gas to those who use it that is,
8 “consumers.” *It is the physical act of distribution to more than one user of electricity or more*
9 *than one consumer of natural gas that constitutes utility service; the contractual or other*
10 relationship between the entity that provides the electricity or gas and the entity that uses or
11 consumes it is irrelevant under the statutory definition.”¹¹

12 In summarizing the definition of utility service in the Territory Allocation bill to the
13 legislature, the Public Utility Commissioner emphasized the importance of the term
14 “distribution”: “[u]tility service is defined to include the distribution of electricity, gas and
15 telephone service. Excluded are water service, bottled gas, private telephone lines, farmer lines
16 and transmission facilities that pass through or over an area allocated to another person or entity
17 and do not provide service in such area.”¹²

18 In addition, the Oregon Supreme Court has considered the common meaning of “user”,
19 finding that:¹³

20 In ordinary usage, the verb “to use” means “to put into action or service[;] have
21 recourse to or enjoyment of [;] employ.” *Webster’s Third New Int’l Dictionary*
22 2523–24 (unabridged ed 2002). Synonyms for that verb include to “employ,
 utilize, apply, avail.” *Id.* at 2524. “Use * * * indicates any putting to service of a

23 ¹⁰ WEBSTER’S THIRD NEW INT’L DICTIONARY at 660 (Unabridged 2002).

24 ¹¹ *Northwest Natural Gas Co. v. Oregon Public Utility Commission*, 195 Or App 547, 558 (2004)
(emphasis added).

25 ¹² Minutes, House Planning and Development Committee (Senate Bill 487) at 8, April 6, 1961, Exhibit
26 Comment and Summary on SB 487 submitted by PUC at 1; see also Minutes, Senate Commerce and
Utilities Committee (Senate Bill 487) April 6, 1961, Exhibit Comment and Summary on SB 487
submitted by PUC at 1.

¹³ *PacifiCorp Power Marketing, Inc. v. Department of Revenue*, 340 Or 204, 215 (2006).

1 thing, usu[ally] for an intended or fit purpose or person[.]” *Id.* Those definitions
of “use” make clear that some degree of control is necessary.

2 Thus, with respect to electricity, utility service refers to a physical act that distributes electricity
3 to users over any plant, equipment, or facility to the point where the user takes some control for
4 its own use.

5 Next, we consider the meaning of the three active verbs in ORS 758.450(2). The term
6 “offer” is commonly defined as “to make available or accessible” or “to place on sale”.¹⁴ The
7 term “construct” is commonly defined as “to form, make or create by combining parts or
8 elements: build: fabricate”.¹⁵ The term “extend” is commonly defined as “to cause to stretch out
9 or reach (as from one point to another)”.¹⁶

10 Read together with the definition of utility service, a person violates this statute if (1) it
11 offers to engage in distributing electricity over plant, equipment or facility to a point where a
12 user takes control in an allocated territory, i.e. makes such service available in the other territory,
13 (2) it constructs (builds or fabricates) plant, equipment or facilities in another allocated territory
14 that distributes electricity into the control of a user, or (3) it extends plant, equipment or facilities
15 into an allocated territory that distributes electricity into the control of a user.

16 Willow Creek Dairy purchased the land on which it operates the dairy and associated
17 agricultural operations from the Boardman Tree Farm, LLC in 2015 and became a member of
18 UEC soon after.¹⁷ UEC installed equipment to establish service at six different service locations
19 on the property, including upgrading a transformer.¹⁸ The dairy hired an electrician to install
20 wiring connecting a UEC meter in the UEC territory to serve six of the dairy’s irrigation circles
21 that are located within CBEC’s territory.¹⁹ Staff did not find any evidence UEC had constructed
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24 ¹⁴ WEBSTER’S at 1566.

25 ¹⁵ WEBSTER’S at 489.

26 ¹⁶ WEBSTER’S at 804.

¹⁷ Staff/100, Gibbens-Rossow/3.

¹⁸ Staff/100, Gibbens-Rossow/3-4.

¹⁹ Staff/100, Gibbens-Rossow/6-7.

1 utility service in CBEC's territory nor that it had extended its utility service into CBEC's
2 territory.²⁰

3 CBEC asserts in its opening brief that the use of the word "into" in ORS 758.450(2)
4 indicates the legislature "expressly precludes a utility from having a point of service in its own
5 service territory and providing power 'into' another's territory."²¹ What is prohibited by ORS
6 758.450(2) is the extension of utility service into another territory. Utility service, by definition
7 refers to the distribution of electricity using plant equipment or other facilities. UEC has not
8 extended such materials into CBEC's territory. The statute does not employ "point of service"
9 terminology and the legislative history does not discuss such terms as "point of use", "point of
10 delivery" or "geographic load". Adopted in 1961, it predates the case law discussing such
11 terms.²²

12 The purpose of the Territory Allocation Law is to eliminate and prevent duplication of
13 utility facilities, and "to promote efficient and economic use and development and the safety of
14 operation of utility services while providing adequate and reasonable service to all territories and
15 customers affected thereby."²³ This reflects the concerns expressed to the legislature when the
16 law was adopted, as the members heard testimony on safety concerns for workers when electric
17 utility lines are run along both sides of a street, crossing one system over another, and about the
18 pressure for rates to be higher in areas of competition that need to support two sets of lines, two
19 substations, two offices, etc.²⁴

20 Also, at the time the Territory Allocation Law was adopted, the Public Utility
21 Commissioner, who supported the bill, explained the language codified as ORS 758.450(2) as
22 "[prohibiting] any person from invading territory allocated to another person or in creating a
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24 ²⁰ Staff/100, Gibbens-Rossow/6.

25 ²¹ CBEC's Opening Brief at 9 lines 3-5.

26 ²² Or Laws 1961 c. 691.

²³ ORS 758.405.

²⁴ Minutes, House Planning and Development Committee (Senate Bill 487), April 6, 1961 at 2, 5-6,
Exhibit of photographs taken of electric lines and facilities.

1 serving agency inside an allocated territory and duplicating facilities.”²⁵ In testimony before the
2 House committee, the Commissioner explained that “if the territory allocated to one service was
3 being invaded by another service, then this would prevent duplication. No service would be
4 given the right to duplicate another service in the same area.”²⁶ Thus, the legislature was
5 concerned with regulating what a person could do inside the territory of another; it does not
6 prohibit actions taken within a utility’s own territory.

7 Read in context, the intent of the legislature in adopting ORS 758.450(2) was to prevent a
8 person from taking action within the allocated territory of another to provide utility service, by
9 offering service, by constructing utility service within the other utility’s territory or by extending
10 utility service into that territory. Applied to the facts in this proceeding, the record does not
11 support a violation of ORS 758.450(2) by UEC. The steps UEC that took to provide utility
12 service to Willow Creek Dairy were taken within its own territory. The utility has not placed any
13 equipment, plant or facilities used for distribution within CBEC’s territory, nor is there evidence
14 that it has offered to do so.

15 2. Application of the Geographic Load Center Test Does Not Support the Complaint.

16 CBEC alleges the geographic load center test applied by the Commission is not
17 applicable, and if it is, does not provide a defense to UEC.²⁷ As set forth in the foregoing
18 section, CBEC has not established a violation of ORS 758.450(2). Given the scope of the
19 complaint in this matter, it is not necessary to apply the geographic load center test. The
20 geographic load center test, if applied, supports a finding that UEC has not violated CBEC’s
21 allocated territory.

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24 ²⁵ Minutes, House Planning and Development Committee (Senate Bill 487), April 6, 1961, Exhibit
25 Comment and Summary on SB 487 submitted by PUC at 3; see also Minutes, Senate Commerce and
26 Utilities Committee (Senate Bill 487) April 6, 1961, Exhibit Comment and Summary on SB 487
submitted by PUC at 3.

²⁶ Minutes, House Planning and Development Committee (Senate Bill 487), April 18, 1961, at 6.

²⁷ CBEC’s Opening Brief at 9-17.

1 **A. The Geographic Load Center Test Is not Relevant to this Complaint.**

2 Jurisdictions with authority to allocate territory using the point of delivery test, point of
3 use test, or geographic load center test are not bound to use a particular test in every
4 circumstance.²⁸ Unlike in Docket UM 1670, which concerned whether an investor-owned utility
5 should serve a particular customer that straddled adjoining territories (Shepherd’s Flat Central)
6 CBEC does not seek to serve all of Willow Creek Dairy’s load. It has offered only to provide
7 partial service, serving the portion of the Willow Creek Dairy property in its service territory.²⁹
8 It is readily apparent in this docket that no violation of ORS 758.450(2) has occurred. Further
9 analysis is unnecessary to determine whether a violation has occurred or not.

10 The geographic load center test, as the Commission found, is the optimal test to apply to
11 a customer whose property straddles service territories, in order to avoid concerns about
12 manipulation of territory under either the point of use or point of service test.³⁰ Staff supports
13 the application of this test in determining the allocation of customers, as discussed further in
14 Section III. Below.

15 **B. The Geographic Load Center Test Supports a Finding that UEC should serve**
16 **Willow Creek Dairy.**

17 Under the geographic load center test, we consider the location of the permanent electric
18 loads that have been or will be installed on the property in question within a reasonable time as
19 part of existing plans. The utility that “serves a majority of a customer’s load” is the utility that
20 should serve the entire load under this test.³¹

21 The customer load in this case is that of Willow Creek Dairy. In Docket UM 1670, the
22 Commission identified three separate customers, and thereafter applied the geographic load

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24 ²⁸ See *Opinion of the Virginia Attorney General*, OP-05-064, 2005 WL 3627382 (December 15, 2005); *In*
25 *the Matter of Northern States Power Co.*, 489 NW2d 365 (1992) (application of majority load test not
26 binding; point of delivery or point of service may be applied in different set of facts).

25 ²⁹ CBEC/100, Wolff/16.

26 ³⁰ *In the Matter of Columbia Basin Electric Cooperative, Inc. v. PacifiCorp*, Docket UM 1670, Order No.
15-110 (April 10, 2015).

³¹ Order No. 15-110 at 7.

1 center test only to the one customer that straddled adjoining territories.³² CBEC's assertion that
2 the three customers identified by the Commission in Docket UM 1670 held property owned by a
3 different entity conflicts with the holding in Order No. 15-110.³³ In this proceeding, Willow
4 Creek Dairy is the enterprise of one individual property owner and UEC member, Greg te Velde.
5 There is no precedent for CBEC's argument that this individual customer's property interests
6 should be further divided for purposes of analysis.

7 The majority of Willow Creek Dairy's load is in UEC territory. All of the booster
8 stations and pump stations powering the dairy's irrigation system are located in UEC territory.³⁴
9 Nearly all of the irrigation pivots that require electricity are located in UEC territory.³⁵ Only six
10 irrigation circles are currently located in CBEC's service territory. Of the planned irrigation
11 circles for the dairy's agricultural operations, 84 percent will be in UEC territory.³⁶ In terms of
12 load, 95 percent of the Willow Creek Dairy load is in UEC territory.³⁷ Thus, the clear center of
13 the load lies in UEC territory.

14 3. Staff Recommends the Commission Dismiss the Complaint without taking Action.

15 In the event that the Commission finds allocated territory is served by a person that is not
16 authorized to serve in that territory, either the aggrieved person or the Commission may file an
17 action for an injunction in the circuit court for any county in which some or all of the allocated
18 territory is located.³⁸ Such action is discretionary on the part of the Commission.

19 In addition to CBEC's failure to establish a violation of ORS 758.450(2), a number of
20 additional considerations leads Staff to recommend that the Commission take no action on this
21 complaint: the potential harm to customers, the geographic load center lies in UEC territory, and
22 none of the concerns raised by CBEC affect the public interest. For the reasons set forth in

23 ³² Order No. 15-110 at 6.

24 ³³ CBEC's Opening Brief at 12 lines 21-22, at 13 lines 1-2; Order No. 15-110 at 5-6.

25 ³⁴ Staff/100, Gibbens-Rossow at 7-8.

26 ³⁵ Staff/100, Gibbens-Rossow/7-8. See also UEC/100, Lankford/2-3.

³⁶ Staff/100, Gibbens-Rossow/8.

³⁷ Staff/100, Lankford/3.

³⁸ ORS 758.465.

1 further detail below, Staff recommends the Commission dismiss the complaint without taking
2 enforcement action.

3 This outcome does not leave CBEC without a remedy under existing law. The
4 cooperative may negotiate an agreement with UEC further allocating territory or specifically
5 allocate service involving Willow Creek Dairy, or seek an injunction on its own initiative.

6 **A. CBEC's Complaint does not Support a Finding under ORS 758.450(2).**

7 CBEC states that the Commission "must address whether a consumer can choose its
8 electric service provider by building the necessary infrastructure to connect and deliberately
9 circumvent service territory laws."³⁹ This request is beyond the scope of this complaint. The
10 initial proposal for a Territory Allocation Law did provide the commissioner with broad
11 authority to grant certificates conferring authority to provide utility service.⁴⁰ This approach was
12 rejected in favor of the current law because electric cooperatives and municipalities objected to
13 coming under the jurisdiction of the commissioner.⁴¹ The only reference in the current law to the
14 allocation of customers is in ORS 758.410, which is the statute authorizing two persons
15 providing utility service to seek agreement among themselves as to the allocation of customers
16 and territory.

17 The statute that is the basis of CBEC's complaint is ORS 758.450(2), which is concerned
18 only with the invasion of an allocated service territory by a person providing utility service. It is
19 silent as to what a customer may or may not do. To insert any restrictions would be inconsistent
20 with the statutory maxim that we do not insert in the text of a statute what has been omitted by
21 the legislature. ORS 174.010.

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24 ³⁹ CBEC/200, Wolff/16-17.

25 ⁴⁰ Senate Bill 42 (1961).

26 ⁴¹ Minutes, Senate Commerce and Utilities Committee (Senate Bill 487), March 1, 1961 at 1; Minutes,
House Planning and Development Committee (Senate Bill 487) April 6, 1961 at 1; Minutes, House
Planning and Development Committee (Senate Bill 487) Exhibit, March 14, 1961, Letter to Senator
Alfred Corbett from Francis Hill, attorney for Pacific Power & Light Company and Northwest Natural
Gas Company at 1.

1 CBEC appears primarily concerned with Willow Creek Dairy's actions to maintain a
2 single electric service provider. CBEC alleges "Willow Creek Dairy cannot 'jump' territories by
3 constructing lines to an artificial point of service in Umatilla's service territory."⁴² However, this
4 complaint concerns only UEC and whether UEC offers, constructed or extended utility service
5 into CBEC's territory in violation of ORS 758.450(2).

6 As set forth above, CBEC has not established that UEC violated its territory, nor has it
7 included in its complaint an allegation that Willow Creek Dairy violated its territory by
8 extending utility service. The available recourse for CBEC in seeking to allocate a customer like
9 Willow Creek Dairy is the negotiation of a contract for that purpose. The Commission need not
10 take action to compel allocation of the customer without a contract to review before it.

11 **B. Taking Action on the Complaint Would Pose a Risk of Harm.**

12 CBEC proposes to serve only the portion of Willow Creek Dairy's electric load that is
13 located in its service territory, currently the electric service to power six irrigation circle pivots.
14 Willow Creek Dairy raises valid concerns that its operations may be disrupted or its irrigation
15 system may be negatively affected if it is required to receive power from two different utilities.⁴³
16 Willow Creek Dairy provides the example of when a power outage to an irrigation pivot occurs,
17 but a different provider continues to power the dairy's water pumps and boosters, irrigation
18 water would continue to flow, possibly damaging crops or the irrigation system, or causing
19 flooding.⁴⁴ Staff is further concerned that transferring even a portion of service to CBEC would
20 leave UEC members burdened with stranded costs.⁴⁵ Taking action to compel shared service
21 presents a risk of harm.

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25 ⁴² CBEC's Opening Brief at 9, lines 18-19.

26 ⁴³ Staff/100, Gibbens-Rossow/8; WCD/100, Aylett/5, 8.

⁴⁴ WCD/100, Aylett/6.

⁴⁵ Staff/100, Gibbens-Rossow/11.

1 **C. The Geographic Load Center Test Supports Leaving Service for the Customer**
2 **with UEC.**

3 The Commission has found that the geographic load center test best ensures the integrity
4 of service territories by preventing manipulation of delivery points, but at the same time
5 accepting the reality that a customer's facilities may cross a service area boundary and allowing
6 the predominate utility to serve the customer's entire load.⁴⁶ While none of UEC's plant,
7 equipment or facilities cross the service boundary so as to implicate ORS 758.450(2), this
8 customer's service lines do cross the boundary. The geographic load center test is therefore a
9 valid policy consideration that may inform allocation of the customer under any utility allocation
10 contract. As discussed above, the geographic load center test supports leaving Willow Creek
11 Dairy's electric service with UEC. Taking action to compel shared service would not be
12 consistent with this test.

13 **D. CBEC's Policy Concerns do not Warrant action by the Commission.**

14 CBEC raises the concern that allowing UEC to continue to serve Willow Creek Dairy
15 will result in UEC extending its distribution into CBEC territory and will allow other customers
16 to build lines to receive service from distant utilities of their choosing.⁴⁷ Declining to take action
17 is unlikely to lead to any such effects. As another jurisdiction has noted: Approving utility
18 service at a point of delivery on property owned by the customer is entirely different from the
19 situation in which a customer seeks to acquire property inside another utility's territory for the
20 purpose of establishing service at a cheaper rate.⁴⁸ Moreover, as Staff testified, even customers
21 tempted to seek alternate utility service are likely deterred by the expense associated with
22 constructing and maintaining their own facilities.⁴⁹ Allowing continued service by UEC does not
23 invite the construction or extension of utility service into CBEC territory by other utilities. Any
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25 ⁴⁶ Order No. 15-110 at 8.

26 ⁴⁷ CBEC's Opening Brief at 12, lines 6-10; CBEC/100, Wolff/17-18.

⁴⁸ *Lukens Steel Co. v. Pennsylvania Public Utility Service Commission*, 499 A2d 1134, 1137 (1985).

⁴⁹ Staff/100, Gibbens-Rossow/9.

1 changes in the customer's load or the facilities used to distribute electricity can be evaluated in
2 light of ORS 758.450(2) should such changes come to pass.

3 CBEC further alleges that allowing UEC to continue to serve all of Willow Creek Dairy
4 will result in duplication of electric facilities.⁵⁰ A number of years (decades) ago, CBEC
5 installed facilities near the six irrigation circles in its territory to provide service to a previous
6 property owner that held the land. If Willow Creek Dairy sold its property that lies in CBEC's
7 territory, those CBEC facilities, if appropriate use can be made of them at that time, would again
8 be available to provide service to a customer located in CBEC's territory. There is currently no
9 duplication of facilities within either cooperative's territory.⁵¹ Taking action to compel shared
10 service is not necessary to prevent duplication of facilities in either territory.

11 III. CONCLUSION

12 Staff's recommendation is that the Commission find UEC has not violated ORS
13 758.450(2) by providing electric service to Willow Creek Dairy within its own allocated service
14 territory, and regardless of that finding, Staff respectfully requests that the Commission exercise
15 its discretion to take no action on the Complaint. The allocation of Willow Creek Dairy between
16 neighboring cooperatives is a matter best resolved by a mutually agreed-upon contract under
17 ORS 758.410, on consideration of the best interests of the customer and the utility in the best
18 position to serve the entire load for the customer.

19 DATED this 8th day of December 2017.

20 Respectfully submitted,

21 ELLEN F. ROSENBLUM
22 Attorney General

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24 Johanna M. Riemenschneider, #990083
25 Sr. Assistant Attorney General
Of Attorneys for Staff of the Public Utility
Commission of Oregon

26 ⁵⁰ CBEC's Opening Brief at 17.

⁵¹ Staff/100, Gibbens-Rossow/10.