

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1818

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC. an Oregon
cooperative corporation,

Complainant,

v.

UMATILLA ELECTRIC
COOPERATIVE, INC., an Oregon
cooperative corporation,

Defendant.

Regarding Willow Creek Dairy.

UMATILLA ELECTRIC
COOPERATIVE'S RESPONSE TO
COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.'S OPENING
BRIEF

Introduction

Pursuant to the stipulated schedule adopted in this docket, Umatilla Electric Cooperative (“UEC”) submits this Response Brief. Columbia Basin Electric Cooperative, Inc. (“CBEC”) filed its Complaint on January 13, 2017, alleging violations of its rights under Oregon’s Territory Allocation Law, ORS 758.400 *et seq.* CBEC’s Complaint alleges that UEC is providing utility service to Willow Creek Dairy (“Dairy”) and that UEC’s action of providing such service violates ORS 758.450 and CBEC’s exclusive service territory. More specifically, the Complaint alleges UEC is in violation of ORS 758.450(2) because it is providing utility service to the Dairy which includes six irrigated crop circles located in CBEC’s territory. As explained in this Response Brief, CBEC has failed to demonstrate a violation of the Territory Allocation Law and the Public Utility Commission of Oregon (“Commission”) should dismiss the Complaint.

Standard of Review

This is a complaint proceeding under ORS 756.500. Accordingly, CBEC as the

complainant has the burden of proof.¹ CBEC bears the burden of proving its claim, that the facts asserted are more probable than not, and that relief should be granted.²

Relevant Facts

The relevant facts in this proceeding are largely uncontested. While CBEC's Opening Brief tries to portray the Dairy operation as overly complicated and comprising separate and distinct operations, the facts in this case are straightforward and show that the Dairy is one unified operation.

On November 12, 2015, Gregory te Velde acquired real property from the Boardman Tree Farm ("BTF") on which to develop and operate the Dairy.³ Using the assumed business name Willow Creek Dairy, Mr. te Velde, applied for membership with UEC on January 14, 2016.⁴

The Dairy operation is a sole proprietorship owned 100% by Mr. te Velde. Mr. te Velde decided to discontinue the use of the assumed business name Willow Creek Dairy and now uses the assumed business name Lost Valley Farm.⁵

The Dairy consists of approximately 5,700 acres of land with a capacity of up to 30,000 head of cattle and a large associated agricultural operation.⁶

Portions of the Dairy's operations are located in both UEC's service territory and CBEC's service territory, but the vast majority of the operation is in UEC's service territory. As summarized by Staff, "[o]f the 17 cluster stations, 15 are to be located in Umatilla territory, as

¹ *In re Application of Portland General Electric Co.*, Docket No. UM 989, Order No. 01-152 (Feb. 2, 2001).

² *See Jackson v. U.S. West Communications, Inc.*, Docket No. UC 373, Order No. 99-040 at 4 (Complainant "bears the burden of proving that the relief requested should be granted. The burden of proof must be met by the preponderance of the evidence, that is, by establishing that the fact[s] asserted [are] more probably true than not").

³ CBEC/104, Wolff/1.

⁴ CBEC/106, Wolff/1.

⁵ Staff/100, Gibbens-Rossow/4.

⁶ *Id.* at 3.

well as all of the booster stations and pump stations. Approximately 84 percent of the irrigation circles will reside entirely in Umatilla’s service territory.”⁷

The Dairy is still under construction. Mr. te Velde has developed the Dairy in phases, installing portions of the operations as BTF (the prior owner of the property) harvests stands of trees that have reached maturity. This phased approach is spelled out in the Agricultural Lease Agreement (“BTF Lease”) that was a condition of the property transaction between Mr. te Velde and BTF.⁸ Under the BTF Lease, the Dairy allows BTF to continue using certain portions of the property while the younger stands of trees continue to mature, after which time BTF will harvest the trees and vacate that portion of the property. Once harvested, the Dairy will use those areas for the next phases of its development.⁹ Eventually, when all of BTF’s trees have been harvested, the entire property will be used for the Dairy’s operation.

Plans for the Dairy include having 49 irrigation circles.¹⁰ Seven of the pivots associated with those irrigation circles are, or will be, located in CBEC’s exclusive service territory.¹¹ Currently, the portion of the Dairy’s property in CBEC’s service territory is fully developed and integrated into the Dairy’s operation with one exception—one of the seven planned irrigation crop circles contains BTF’s trees. The Dairy is anticipating that those trees will be removed in the very near future.¹²

UEC provides electric service to the entire Dairy. That service began with service only to those facilities located entirely within UEC’s service territory.¹³ As the Dairy installed new equipment in CBEC’s service territory as part of its integrated operations, UEC’s service

⁷ Staff/100, Gibbens-Rossow/8.

⁸ CBEC/105, Wolff/1.

⁹ *Id.*

¹⁰ WCD/100, Aylett/2.

¹¹ WCD/100, Aylett/2.

¹² WCD/100, Aylett/3.

¹³ Staff/100, Gibbens-Rossow/6-7.

included service used by the new equipment. All the facilities UEC owns, operates, and maintains are located in UEC's service territory.¹⁴ UEC provides electric service to the Dairy's six circles located in CBEC's exclusive service territory via a point of interconnection in UEC's service territory.¹⁵

Argument

Oregon's Territory Allocation Law sets out a process by which a utility may be allocated a service territory, "thus providing that utility with the exclusive right, and obligation, to serve customers in that territory."¹⁶ In general, once territory is allocated to a particular utility, ORS 758.450(2) prohibits other persons from providing utility service in that territory. However, the Territory Allocation Law does not operate as an outright prohibition on all services by one utility within the service territory of another utility.

A. The Geographic Load Center Test

The Commission, as the agency charged with interpreting the Territory Allocation Law,¹⁷ has previously determined that the "Territory Allocation Law is unclear as to which utility has the right to serve a customer that straddles adjoining service territories."¹⁸ In resolving another case in which CBEC was unwilling to reach contract agreement, the Commission noted that ORS 758.410 allows adjoining utilities to enter into a contract to transfer territory, customers, and facilities, but that the "statute is silent, however, as to the legality of service to that customer where the utilities are not able to reach a negotiated resolution."¹⁹ This is precisely the scenario presented again to the Commission by CBEC's Complaint.

¹⁴ Staff/100, Gibbens-Rossow/6.

¹⁵ Staff/100, Gibbens-Rossow/6.

¹⁶ *Columbia Basin Electric Cooperative, Inc. v. PacifiCorp*, Docket No. UM 1670, Order No. 15-110 at 4.

¹⁷ See Docket No. UM 1670, Order No. 15-229 at 4.

¹⁸ Docket No. UM 1670, Order 15-110 at 7.

¹⁹ *Id.*

The Commission previously analyzed three different tests used by other jurisdictions for these unique situations: (1) the point of service test; (2) the geographic load center test; and (3) the point of use test.

Consistent with the intent and purpose of the Territory Allocation Law, the Commission determined that it would use the geographic load center test for customers that straddle adjoining service territories because it “best furthers the purpose of the Territory Allocation Law....”²⁰

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.²¹

In adopting that test, the Commission determined that 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” and that it “precludes a customer from manipulating delivery points and running transmission lines across boundaries to obtain service from a neighboring utility.”²² Further, and consistent with ORS 758.405, the geographic load center test helps “avoid the duplication of facilities by accepting the reality that a customer’s facilities may cross a service area boundary and allowing the predominate utility to service the customer’s entire load.”²³

As described by the Commission, the geographic load center test applies only to the electrical load of a single integrated customer. To determine whether a single integrated

²⁰ *Id.* at 8.

²¹ *Id.* at 7.

²² *Id.* at 8.

²³ *Id.*

customer exists, the PUC weighs a variety of factors to determine if an operation is integrated such that there is a unified load.

Factors the PUC previously considered when determining if an electric load is “unified” included: (1) the commonality of ownership of constituent electrical loads; (2) the commonality of ownership of land where the constituent electrical loads are located; (3) the commonality of ownership of any related electrical facilities such as collector substations or lines; (4) the commonality of ownership of other facilities and maintenance equipment; (5) the extent to which there is a corporate entity that has unified management authority over the electrical load; (6) the extent to which a corporate entity or management authority exercises a contracting authority related to the electrical loads; and (7) the extent to which constituent electrical loads are permitted under the same regulatory permits.²⁴

B. Application of the Geographic Load Center Test to the Dairy

The Dairy is a unified load belonging to a single, integrated customer and the vast majority of the permanent electric loads which have been or which will be installed lie in UEC’s service territory. The record demonstrates that the load associated with the six existing irrigation pivots and the one planned irrigation pivot in CBEC’s territory is part of the Dairy’s unified load.

As explained in the Testimony of Jeddie Aylett, farm manager for the Dairy, the Dairy includes multiple components, each of which are part of a “closed loop” system. The agricultural portion of the operation is used to grow crops. Those crops serve as feed for the Dairy cows. The Dairy then cares for and milks those cows in facilities on the property. As part of that process, the cows generate a large amount of manure. The liquid from the manure is then sent back to the

²⁴ *Id.* at 5-6.

agricultural operations where it is used for irrigation and fertilizer for growing crops, where the loop starts over again.²⁵

The only evidence in this case regarding the nature of the Dairy's operations comes from the testimony of Mr. Aylett. Mr. Aylett explains that every aspect of the Dairy operation is highly coordinated with every other aspect. When parts of the system are operating, other parts need to be operating at the same time. Further, if part of the system goes down, all parts of the system should go down together.²⁶

Based on the testimony of Mr. Alyett alone, CBEC has not carried its burden of showing that the Dairy's load is not unified. Even if the Commission determines that more evidence is needed, the factors the Commission considered in UM 1670 all support a finding that the load is unified.

First, there is no real dispute in this case that the constituent electrical loads of the Dairy all share a common ownership. The entire Dairy operation is owned by Mr. te Velde as a sole proprietorship.

Second, there is no real dispute in this case that the land on which the constituent electrical loads are located share a common ownership. The Dairy operation is a sole proprietorship owned 100% by Mr. te Velde, which includes the real property in both UEC and CBEC's service territory.²⁷ The evidence in the record is that the title to the property is under the name of only Mr. te Velde.²⁸ UEC does not dispute that BTF has a temporary property interest associated with the BTF Lease, but there is simply no evidence that any other individual or entity owns the property.

²⁵ WCD/100, Aylett/1.

²⁶ WCD/100, Aylett/5.

²⁷ CBEC/104, Wolff/1.

²⁸ CBEC/104, Wolff/1.

Third, all related electrical facilities not owned by UEC are owned by Mr. te Velde. The same holds true for the ownership of other facilities, buildings, and maintenance equipment that are part of the Dairy.²⁹

Fourth, the management authority over the Dairy and its electrical load is unified—it is owned and operated by Mr. te Velde. As the owner of the Dairy, Mr. te Velde would have contracting authority related to the electrical loads.³⁰

Finally, the Dairy obtained a permit from the Oregon Department of Environmental Quality (“DEQ”). That permit is issued only to the Dairy and CBEC has not provided or cited to any evidence that other permits obtained by other individuals or entities are needed or associated with the Dairy’s electrical load. Indeed, the DEQ permit covers the entirety of the Dairy’s operations, including the agricultural portions.³¹ For example, that permit requires the Dairy to take soil samples from the farm fields that are irrigated with manure.

Because all constituent parts of the Dairy’s load are part of a unified operation and unified load, the geographic center of that load then informs in which territory that load is actually located. The dispute in this case involves only six of the Dairy’s irrigation pivots, which draw a small electrical load, and which are located in CBEC’s service territory. Whether the load drawn by the Dairy’s facilities is measured by actual usage or installed capacity, more than 95 percent of the Dairy’s load is located in UEC’s service territory. A similar outcome occurs even if the Commission makes the determination that the Dairy’s agricultural operations have a load distinct from the rest of the Dairy. For example, the six irrigation pivots are only twelve percent of the total number of irrigation pivots. Each pivot has a similar load, meaning that 88%

²⁹ See generally WCD/100, Aylett/1-8.

³⁰ WCD/100, Aylett/3-7.

³¹ Staff/105, Gibbens-Rossow/1.

of the load from the pivots is located in UEC's service territory. Even when the seventh pivot is added, the pivots will comprise only 14% of the total number of pivots and the geographic center of that load remains in UEC's service territory.³² Staff's testimony supports this conclusion:

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. Of the 17 cluster stations, 15 are to be located in Umatilla territory, as well as all of the booster stations and pump stations. 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.³³

CBEC's arguments in its Opening Brief consist largely of straw men aimed at refuting "defenses" that were never raised in this proceeding. For example, CBEC first argues that the Dairy and BTF are different entities which constitute independent loads and therefore "all of the loads on the Willow Creek Dairy property cannot be viewed as one unified load under the geographic load center test."³⁴ No party has asserted otherwise. Similarly, CBEC states that the "crux" of the issue "is whether the load of the six irrigation circles in Columbia Basin's service territory is unified with the rest of the load on the Willow Creek Dairy property."³⁵ CBEC goes on to say "[a]pplying the Commission's analysis in Order No. 15-100, as discussed previously, it does not appear that the load to the BTF is unified with the Willow Creek Dairy load..."³⁶ These statements each miss the mark. As Staff recognized, "[a] portion of the land is being utilized under a lease, however, this distinction does not change the geographic load center, and

³² This is a conservative estimate taking into account only the load associated with the pivots. The agricultural operations rely heavily on the water used for irrigation, which also requires a large electrical load, and there is no dispute that load is in UEC's service territory. When that load is taken into account, the portion of the load in CBEC's territory associated with the Dairy's agricultural operations is even lower.

³³ Staff/100, Gibbens-Rossow/8.

³⁴ CBEC Opening Brief at 15.

³⁵ *Id.* at 16.

³⁶ *Id.*

performing analysis based on a temporary property user is questionable.”³⁷ In other words, it is irrelevant that there may be more than one distinct load somewhere on the property. The only relevant issue is whether the permanent load associated with irrigation pivots in CBEC’s service territory is part of the rest of the Dairy’s load centered in UEC’s service territory. The load associated with BTF’s operations (or its use of the property) is not part of the Dairy’s operation, has no bearing on the contours of the Dairy’s load, and is not part of CBEC’s Complaint over service to the six irrigation circles.

CBEC also claims that UEC provides service to the Dairy under approximately 30 different points of service and meters and that the use of multiple points of service and meters means the Dairy is not a unified load.³⁸ CBEC’s argument is without merit. As explained in the testimony of Mr. Aylett, the reason for the different points of service, meters, and rate schedules is because of how the Dairy is being developed. Mr. te Velde bought property that already had facilities on it, including water and electric facilities. As the Dairy has been developed, it is building some new facilities, but is also trying to make use of the existing facilities. If the Dairy were starting from scratch, it may have taken a different approach, such as using a master meter at UEC’s system, but that did not make economic sense in light of the existing facilities that were already on the property.³⁹ Additionally, CBEC’s argument would mean that, as a matter of law, a unified load could never exist where there is more than one meter. The Commission should reject such an argument because there are likely other types of operations that, for business reasons, choose to install multiple meters associated with serving different types of loads supporting a single operation.

³⁷ Staff/100, Gibbins-Rossow/8.

³⁸ CBEC Opening Brief at 16.

³⁹ WCD/100, Aylett/6.

Further, the type of rate schedule each meter is on has no impact on the actual operation being served. Again, the Dairy is building its system in part by using facilities that are already in place. Depending on the type of power that flows through a particular transformer or meter, UEC determines what rate schedule is appropriate for that meter and its associated load. The rate schedules themselves are not determinative of the process or processes that are occurring behind the meter. Further, the type of rate schedule each meter is on has no impact on the actual operation being served. The Dairy's testimony explains why this is the case:

Take for example Canal Station 6A. The pump at that canal station takes water from the canal that eventually goes to the six crop circles in Columbia Basin's area. The meter at the canal station uses rate schedule 49A, and the meter at Cluster 608 that runs the pivots is on rate schedule 48A. Now compare that to Canal Station 4A, which carries water to pivots that are served by the same meter as the 406/410 Booster pump. Canal Station 4A takes service under rate schedule 48A, and the pivots take service under rate schedule 47A. So, the same process – canal pumps carrying water to center pivots – happens under different rate schedules simply because of the location they happen to be in. The rate schedules themselves are therefore not determinative of the process or processes that are occurring in that location and the number and type of rate schedules we have is irrelevant.⁴⁰

CBEC also makes the argument that “[t]he operation of the six irrigation circles is not integrated in any manner with the rest of the loads on Willow Creek Dairy property.”⁴¹ This statement, for which CBEC provides no citations to the record, is directly counter to the testimony provided by the Dairy's farm manager. That testimony described in detail how the irrigation circles are integrated with the rest of the Dairy's loads. CBEC attempts to refute that evidence with a bare claim that operational efficiencies only “may occur.”⁴² The Dairy manager's testimony, however, does not describe operational efficiencies in such speculative

⁴⁰ WCD/100/Aylett/7

⁴¹ CBEC Opening Brief at 16.

⁴² CBEC Opening Brief at 18:5.

terms. Instead, he describes operational efficiencies that do occur and that serve as the entire basis of structuring the system in the way it was structured. The Commission cannot rely on bare allegations in CBEC's brief over the actual evidence in the record.

Finally, CBEC asserts that the future development of the Dairy is "too speculative" to be part of the geographic load center test.⁴³ This argument, too, misses the mark. First, the BTF Lease establishes that the future development is not speculative. As CBEC acknowledges, the geographic load center test does permit future loads to be considered.⁴⁴ Specifically, the Commission's definition of the test is that the test considers "the location of the permanent electric loads which have been or which will be installed within a reasonable time as part of existing plans."⁴⁵ Even so, the fact that the geographic center of the load is in UEC's service territory is demonstrated by the facilities that already exist. Neither UEC nor the Dairy needs to rely on the development of future loads to satisfy the test. Further, regardless of the timing of the Dairy's plans, the final development of the Dairy in the future will only act to decrease the percentage of the load that is in CBEC's service territory. Even if the Dairy completely abandoned its plans for future development in UEC's territory, but still decided to complete the seventh irrigation circle in CBEC's territory, the percentage of the load associated with just the Dairy's irrigation circles would increase only from 12% to 14% in CBEC's territory.

Notwithstanding the foregoing, CBEC's argument also fails because it is based only on its assertion that the period for future development is "too long." The Commission's standard is that future loads must be installed within a reasonable time.⁴⁶ Whether something is reasonable is a determination of fact for which CBEC bears the burden of proof. CBEC's testimony does

⁴³ CBEC Opening Brief at 16-17.

⁴⁴ *Id.* at 16.

⁴⁵ Docket No. UM 1670, Order 15-110 at 7 (emphasis added).

⁴⁶ *Id.*

not explain why the time period contained in the BTF Lease is too long under these circumstances. The testimony from the Dairy, in contrast, explains why the time period for development was chosen – which was to allow tree stands that had already been planted to reach maturity before clearing the land. CBEC’s only counter to that fact is that the timeframe “could easily be modified.”⁴⁷ That is the case with any plan. However, the testimony in this record does not support that conclusion and, instead, demonstrates that the timeline is more likely to be shorter than is planned. For example, the Dairy’s farm manager testified that some stands of trees were harvested sooner than the schedule originally contemplated, and that he expected other stands to be harvested in 2018 ahead of schedule.⁴⁸

Based on the foregoing, CBEC’s claim that there are multiple loads that cannot be a unified load should be dismissed.

C. CBEC’s Collateral Attack on the Commission’s Prior Order

For the first time in this proceeding, CBEC claims in its Opening Brief that the Commission is without legal authority to use the geographic load center test. CBEC, remarkably, claims that this is now the “primary issue of this proceeding.”⁴⁹ As described in the testimony submitted by CBEC, the only disputed issue in this case was whether the Dairy’s load is a unified load.⁵⁰ In fact, CBEC’s witness stated that the rules are ambiguous and, when asked to elaborate, expressly stated that “the Commission adopted the geographic load center test to determine which utility was entitled to serve a unified load that straddles a service-territory boundary” but “did not provide much guidance as to what constitutes a unified load.”⁵¹ Now, at

⁴⁷ CBEC Opening Brief at 17.

⁴⁸ WCD/100, Aylett/3.

⁴⁹ CBEC Opening Brief at 18.

⁵⁰ *See, e.g.*, CBEC/100, Wolff/14-16.

⁵¹ CBEC Response to UEC Data Request 23.

the eleventh hour, CBEC is abandoning that approach and attacking the Commission’s authority to rely on that test at all.

The Commission adopted the geographic load center test in Docket UM 1670, where PacifiCorp and CBEC had a dispute over which utility had the right to serve the Caithness wind project. After concluding that the Caithness wind project consisted of three separate customers - Shepherds Flat Central, Shepherds Flat North, and Shepherds Flat South⁵² – the Commission then analyzed where the load for each of those customers was situated and, therefore, which utility had the right to serve each of those separate loads. While the question of service for Shepherds Flat North and Shepherds Flat South was straightforward, the Commission carefully reviewed the Territory Allocation Law, as well as how other jurisdictions handle situations where a customer straddles adjoining service territories, to determine which utility had the right to serve Shepherds Flat Central. In the end, the Commission adopted the geographic load center test and determined that PacifiCorp had the right to serve Shepherds Flat Central, because “the record indicates that a majority of the Shepherds Flat Central turbines and the collector substation are in PacifiCorp’s service territory” and, therefore, “[w]e determine that this constitutes a majority of the load, and thus find that PacifiCorp may serve all of Shepherds Flat Central.”⁵³

What is particularly noteworthy about the decision in UM 1670 is that the Commission adopted the geographic load center test in a case that directly involved CBEC’s interests in its exclusive service territory, and CBEC mounted no challenge to the Commission’s authority as part of that decision. Indeed, CBEC expressly supported the Commission’s authority. Following the Commission’s determination in UM 1670, PacifiCorp filed a motion for clarification. In

⁵² Docket No. UM 1670, Order No. 15-110 at 6.

⁵³ Docket No. UM 1670, Order 15-110 at 8.

response to that motion, CBEC argued, among other things, that the Commission’s Order, which included the adoption of the geographic load center test, “rests on findings of fact and conclusions of law grounded in statutory language and case law.”⁵⁴ Now, CBEC is attacking that very order because it claims it is not grounded in statutory language and case law.

By asserting now that the Commission does not have the authority to use the geographic load center test, CBEC is, at best, admitting that it engaged in “invited error” and, at worst, is mounting a collateral attack on the Commission’s earlier decision. Under the invited error doctrine, “a party who was actively instrumental in bringing about an alleged error cannot be heard to complain, and the case ought not to be reversed because of it.”⁵⁵ To be clear, the portion of the Commission’s decision that PacifiCorp could serve Shepherd’s Flat Central was adverse to CBEC, because the facility was partly in CBEC’s service territory, but a portion of the decision was also beneficial to CBEC because it confirmed its right to serve Shepherd’s Flat South. Based on the adverse portion of the decision, CBEC had an incentive to appeal the decision to correct the legal error CBEC now claims the Commission made. By instead arguing to the Commission that its decision was lawful and grounded in the statute, which served to urge the Commission to affirm the portions of its decision that were beneficial to CBEC, CBEC invited the Commission and other parties to rely on that outcome in future cases. The Commission should not tolerate CBEC’s approach of making legal arguments in one docket where doing so results in a net benefit to CBEC and then making the opposite legal argument in a different docket to avoid a detriment that is the natural result of its arguments.

⁵⁴ CBEC Response to PacifiCorp’s Motion for Clarification, Docket No. UM 1670, at 2.

⁵⁵ *Hatley v. Umatilla County*, 256 Or. App. 91, 112 (2013) (internal citations omitted) (also acknowledging the doctrine of invited error applies in administrative proceedings).

D. Consistency of the Geographic Load Center Test with the Territory Allocation Law

Contrary to CBEC’s claims, the Commission’s adoption of the geographic load center test for customers that straddle two service territories is consistent with the Territory Allocation Law. ORS 758.450 provides that “[e]xcept as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.”

There are four elements to prove a violation of ORS 758.450: (1) the entity must be a “person” or “persons” as defined in ORS 758.400(2); (2) the arrangement must involve “utility service” as defined in ORS 758.400(3); (3) the utility service must be in an allocated territory; and (4) none of the exemptions in ORS 758.450(4) can apply. While UEC is a person as defined in ORS 758.400(2), and none of the exemptions in ORS 758.450(4) apply, there is no violation here because there is no utility service being offered in the allocated territory of CBEC.

First, as explained above, whether a utility service is being provided “in” an allocated territory depends on the location of the load requiring the service. Because the express terms of the statute do not provide clarity on how to determine the location of a load, especially when the load is straddling the line between two service territories, the Commission adopted the geographic load center test to make that determination. In other words, the geographic load center test fills in a gap in the statute. If the Legislature had intended to define the location of a load in the Territory Allocation Law, it could have done so. Because it did not, however, the Commission was within its authority to make that determination.⁵⁶

⁵⁶ See *In the Matters of Nw. Nat. Gas Co. Mechanism for Recovery of Envtl. Remediation Costs (UM 1635) & Request for Determination of the Prudence of Envtl. Remediation Costs for the Calendar Year 2013 & the First Quarter of 2014 (UM 1706)*, 319 P.U.R.4th 154 (Feb. 20, 2015) (noting that where the legislature has imposed not “particular structure” for implementing a statute, Commission has broad discretion. See also *Chase Gardens, Inc. v. Oregon Pub. Util. Comm’n*, 131 Or. App. 602, 605, 886 P.2d 1087, 1089–90 (1994) (confirming PUC has authority to interpret statute when it has authority delegated to it to enforce the statute).

Second, CBEC has not met its burden of proof demonstrating that UEC's service to the Dairy constitutes "utility service" under the statute. That term is defined in the statute as:

service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or 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. ORS 758.400.

To find a violation of a service territory, the Commission must therefore determine that any service provided by a person: (1) is for the "distribution of electricity to users;" and (2) that distribution must occur through a "connected and interrelated distribution system." Thus, a legal determination must first be made regarding whether the arrangement constitutes "distribution" of electricity to "users." If the Commission determines that distribution service to users is provided, the Commission must then determine if the distribution to users occurs through a "connected and interrelated distribution system."

The meaning of this statutory language has already been interpreted by the Oregon Court of Appeals. The Court determined that "it is the physical act of distribution to more than one user of electricity or more than one consumer of natural gas that constitutes utility service."⁵⁷ Here, there is no physical act of distribution of electricity to more than one user because the user in UEC and CBEC's territory is the same.

CBEC claims that the "plain language of the statutes implies that the point of use test is the only test the Commission can apply and use under the Oregon territory allocation laws"⁵⁸ and that the Commission has exceeded its statutory authority in adopting the geographic load center test. But either the plain language speaks for itself, or the language is ambiguous. The very fact

⁵⁷ *NW Natural Gas Co. v Oregon Public Utility Commission*, 195 Or. App. 547, 558 (2004).

⁵⁸ CBEC Opening Brief at 11.

that CBEC argues what the language “implies” means the statute requires interpretation. Here, there is a gap in the statute, and the legislature did not define where utility service occurs when a single customer straddles the service territories of two utilities. And as the agency charged with interpreting the Territory Allocation Laws, that is exactly what the Commission set out to do when it adopted the geographic load center test.

Further, the geographic load center test is consistent with the purpose of the Territory Allocation Law. Oregon courts have recognized that “statutes and rules often contain statements of general policy” and “[s]uch expressions can serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can.”⁵⁹

The Territory Allocation Law articulates its intended purpose in ORS 758.405:

[T]he elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote the 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 all persons and entities providing utility services.

The Commission specifically determined that the geographic load center test “helps avoid the duplication of facilities by accepting the reality that a customer’s facilities may cross a service area boundary and allowing the predominate utility to serve the entire load.”⁶⁰ Further, Staff determined that there is no duplication of utilities facilities under the facts presented in this proceeding.⁶¹ It would lead to a ridiculous result to require all customers facing this situation to take service from different utilities if one utility does not cooperate.

⁵⁹ *DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997), *rev den* 327 Or 620, 971 P2d 412 (1998).

⁶⁰ Docket No. UM 1670, Order 15-110 at 8.

⁶¹ Staff/100, Gibbens-Rossow/10.

E. CBEC's Misplaced Reliance on Case Law from Other Jurisdictions

The cases CBEC relies on to challenge the geographic load center test are not controlling, and in fact undermine CBEC's arguments. CBEC first relies on *Public Service Co. of Colorado v. Public Utility Comm' of the State of Colorado*, 765 P.2d 1015 (1984) ("PSC. V. CPUC"). *PSE V. CPUC* is based on a completely different set of statutes and facts, and more importantly, was a case this Commission reviewed and discussed in its order adopting the geographic load center test. Furthermore, CBEC's description of the holding in this case is selective and misleading.

The court in that case did not rule, as CBEC suggests, that the geographic load center test is prohibited in all cases under Colorado law. In fact, the court noted "[a]s a general rule, the PUC may elect to apply either the point of use test or the geographic load center test in order to determine which utility should serve a particular facility."⁶² Based on the specific facts presented in that case, which are distinguishable from the facts here, the court found that the point of use test must be applied.⁶³ However, the court went on to say:

We wish to emphasize what we have not held. We have not held that the point of use test is required by the doctrine of regulated monopoly in every case. The PUC may, in the future, conclude that the point at which electricity is delivered should be the focal point in determining the legality of a utility actions. We have also not held that the geographic load center test may never be used. We express no opinion as to the appropriate test where a single facility straddles two service areas, where separate yet interconnected facilities are situated within two service areas, or where a previously unserved facility requires electric service. The PUC, in its discretion, may decide that the geographic load center test would be appropriate in these situations.⁶⁴

⁶² *Public Service Co. of Colorado v. Public Utility Comm' of the State of Colorado*, 765 P.2d 1015, 1022 (1984).

⁶³ *Id.*

⁶⁴ *Id.*

Accordingly, the holdings of *PSE v. CPUC* in no way support CBEC's argument that this Commission is precluded from applying the geographic load center test under the facts presented in this proceeding and, in fact, state the exact opposite.

CBEC also cites to *Nishnabotna Valley Rural Electric Cooperative v. Iowa State Commerce Commission*⁶⁵ for the proposition that the geographic load center test cannot be used where a utility commission lacks statutory authority or the discretion to unilaterally modify exclusive service territories. Although the court rejected the geographic load center test in that particular case, CBEC's characterization of the case is misleading and overbroad. The court limited its holding to an interpretation of the plain meaning of "point of delivery," a technical term specific to the Iowa Code, which provided:

No public utility shall construct or extend its facilities or furnish or offer to furnish electric service to the point of delivery to any customer already receiving electric service from another public utility. No public utility shall construct or extend facilities or furnish electric service to a prospective customer not presently being served unless its existing service facilities are nearer the proposed point of delivery than the service facilities of any other utility.⁶⁶

The Iowa State Commerce Commission ("ISCC") had previously ruled that the term "point of delivery" was not defined and designated the point of delivery as the "geographical load center or center of electrical distribution of the site or proposed site to be served."⁶⁷ The ISCC applied that ruling in a service dispute where two competing utilities were seeking to serve a new meat packing plant. On appeal, the court determined the ISCC's decision was in error because the:

[p]roposed point of delivery has an ordinary meaning. We hold the phrase means the point at which the customer proposes to take

⁶⁵ 161 NW 2d 348 (1968).

⁶⁶ *Id.* at 350 (emphasis added).

⁶⁷ *Id.* at 352.

delivery of the merchandise; in this case, electricity. Substitution of ‘center of electrical distribution’ would insert a technical phrase to establish 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’. If this highly technical meaning and process had been intended by the legislature it surely would have used language other than ‘proposed point of delivery.’⁶⁸

The holding in this case centers around technical phrases and language that are not contained under Oregon law and are unrelated to this Commission’s interpretation of an entirely different statute.

Conclusion

Based on the foregoing, CBEC has failed to demonstrate a violation of the Territory Allocation Law. UEC respectfully requests that the Commission dismiss CBEC’s Complaint and take no action against UEC.

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Respectfully submitted,

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⁶⁸ *Id.* at 352-353.