

**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 SUPPLEMENTAL  
BRIEF

**Introduction**

Pursuant to Administrative Law Judge Nolan Moser's Ruling dated April 10, 2019, Umatilla Electric Cooperative ("UEC") submits this Supplemental Brief. Columbia Basin Electric Cooperative, Inc. ("CBEC") filed its Complaint on January 13, 2017, alleging that UEC is unlawfully providing utility service to Willow Creek Dairy ("Willow Creek") because UEC's electric service includes service to six existing crop circles in CBEC's allocated service territory

protected by ORS 758.450, with plans to provide service to a seventh crop circle in CBEC's territory.

After testimony and briefing in this matter were completed, Mr. te Velde, Willow Creek's owner, filed a voluntary petition for relief under Title 11 of the United States Bankruptcy Code and the underlying property and assets were sold.<sup>1</sup> All UEC electrical accounts for Willow Creek have now been transferred to Easterday Farms, the new operator of the entire agricultural farming operation that previously belonged to Mr. te Velde ("Farm"). The Farm consists of all the developed crop circles on the property. By order of the bankruptcy court, all trees associated with the Boardman Tree Farm ("BTF")<sup>2</sup> are being removed from the property on an expedited basis to provide additional farm land. The cattle and dairy operations have been temporarily or permanently discontinued.

While some facts have changed since the Complaint was filed, such as the addition of one planned crop circle in CBEC's territory, the sale of the property, and discontinuation of the dairy operation, these changes have a limited impact on the analysis of the underlying dispute in this matter and do not change the outcome. The evidence shows that the agricultural farming operation of te Velde, and now Easterday Farms, both in terms of property and electric load, remains geographically centered in UEC's service territory. The Public Utility Commission of

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<sup>1</sup> Order Granting Motion By Chapter 11 Trustee to Sell Real and Personal Property Free and clear of Liens and Interests, Doc ID 1607 at 3, *In re te Velde*, No. 18-11651 A-11 (Bankr. E.D. Cal. Feb. 11, 2019).

<sup>2</sup> Mr. te Velde developed Willow Creek in phases, installing portions of the operations as BTF (the prior owner of the property) harvested stands of trees that had reached maturity. This arrangement was spelled out in the Agricultural Lease Agreement ("BTF Lease") that was a condition of the property transaction between Mr. te Velde and BTF. WCD/100, Aylett/2. Under the BTF Lease, Willow Creek allowed BTF to continue using certain portions of the property while the younger stands of trees continued to mature, after which time BTF would harvest the trees and vacate that portion of the property. Once the trees were harvested, Willow Creek would use the cleared areas for the next phases of its agricultural development, until all of BTF's trees have been harvested and the entire property would be used for Willow Creek's agricultural operation. The BTF Lease was modified in the te Velde bankruptcy and the trees are being removed on an expedited basis.

Oregon (“Commission”) can issue an order based on the evidentiary record in this docket as modified by the record in the te Velde bankruptcy proceeding. Based on those records, CBEC has failed to demonstrate a violation of the Territory Allocation Law and its Complaint should be dismissed.

### **Standard of Review**

This is a complaint proceeding under ORS 756.500. CBEC as the complainant has the burden of proof.<sup>3</sup> CBEC therefore bears the burden of proving its claim, that the facts asserted are more probable than not, and that relief should be granted.<sup>4</sup> CBEC has not met that burden.

### **Relevant Facts**

The relevant facts are substantively the same even after taking into account the te Velde bankruptcy, the changes to the operation, and the new owner/operator of the Farm. The complaint arose because UEC was serving te Velde’s entire agricultural and dairy operation, which had six (out of 49 planned)<sup>5</sup> irrigated crop circles located in CBEC’s territory.<sup>6</sup> All the facilities UEC owns, operates, and maintains are located in UEC’s service territory.<sup>7</sup> UEC provides electric service to the Farm’s crop circles located in CBEC’s service territory via a point of interconnection in UEC’s service territory.<sup>8</sup> It was, and remains, undisputed that the vast

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<sup>3</sup> *In re Application of Portland General Electric Co.*, Docket No. UM 989, Order No. 01-152 (Feb. 2, 2001).

<sup>4</sup> *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").

<sup>5</sup> Willow Creek Dairy/100, Aylett/2.

<sup>6</sup> WCD/100, Aylett/2; A 7<sup>th</sup> crop circle was planned in CBEC’s territory, and this area has now been cleared of BTF trees and developed. Accordingly, the portion of the Farm located in CBEC’s service territory is or soon will be fully developed and integrated into the agricultural operation.

<sup>7</sup> Staff/100, Gibbens-Rossow/6.

<sup>8</sup> Staff/100, Gibbens-Rossow/6.

majority of the electrical load, majority of the operation, and majority of the property is located in UEC's service territory.<sup>9</sup>

On April 26, 2018, after the parties filed testimony and briefed the issues, Mr. te Velde filed a voluntary petition for relief under Title 11 of the United States Bankruptcy Code.<sup>10</sup> Based on the public records in Mr. te Velde's bankruptcy: (a) the property was sold by public auction to Canyon Farm, LLC;<sup>11</sup> (b) the dairy cows have been sold separately from the property;<sup>12</sup> (c) a clean-up must occur on portions of the property;<sup>13</sup> (d) the trees associated with BTF are being removed on an accelerated basis so that the land can be used for the agricultural operation;<sup>14</sup> and (d) the dairy portion of the operation (i.e. non-agricultural portion) has been discontinued, at least temporarily.<sup>15</sup>

After the bankruptcy court issued an order approving the sale of the te Velde property, representatives of Canyon Farm, LLC contacted UEC and asked to transfer all electric accounts serving the property from Mr. te Velde to the operator, Easterday Farms, including the account and meter that serve the now seven crop circles located in CBEC's service territory.<sup>16</sup> All of the electric service to Easterday Farms therefore serves a single customer that will continue the

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<sup>9</sup> UEC/100, Lankford/3.

<sup>10</sup> Voluntary Petition for Individuals Filing for Bankruptcy, Doc ID 1, *In re te Velde*, No. 18-11651 A-11 (Bankr ED Cal Apr. 26, 2018).

<sup>11</sup> Order Granting Motion to Sell Real Property, *supra* note 1, at 4.

<sup>12</sup> Order Granting Trustee's Motion for Order Authorizing Sale of Lost Valley Farm Livestock Herd by Public Auction Free and Clear of Liens and to Pay Auctioneer's Commission and Expenses, Doc ID 1119, *In re te Velde*, No. 18-11651 A-11 (Bankr ED Cal Nov. 14, 2018).

<sup>13</sup> Exhibit 1, Order and Mutual Agreement (Lost Valley Farm) at 10-18, Exhibits to Declaration of Randy Sugarman in Support of Motion for Order Authorizing Compromise of Controversy with Oregon Department of Agriculture, Doc ID 1477, *In re te Velde*, No. 18-11651 A-11 (Bankr ED Cal Jan. 22, 2019).

<sup>14</sup> Motion for Order Authorizing Compromise of Controversy with Boardman Tree Farm, LLC, Doc ID 1585 at 3-4, *In re te Velde*, No. 18-11651 A-11 (Bankr ED Cal Feb. 27, 2019).

<sup>15</sup> Exhibit 1, Order and Mutual Agreement, *supra* note 13, at 10-18 (terminating the CAFO permit).

<sup>16</sup> UEC's Notice of Contact from Buyer of Willow Creek Dairy (Mar. 7, 2019).

agricultural portion of the operation, including any future agricultural developments on the property. As explained in more detail below, whether or not the cattle and dairy return as part of the operation in the future is immaterial to the underlying dispute.

The evidence presented to the Commission demonstrated that whether Willow Creek's load was measured by actual usage or installed capacity, more than 95 percent of the load was located in UEC's service territory.<sup>17</sup> The evidence also demonstrated that a similar outcome occurred if the agricultural operations were analyzed separately from the rest of Willow Creek's operation.<sup>18</sup> For example, the evidence showed that the six irrigation pivots in CBEC's territory were only twelve percent of the total number of irrigation pivots. Each pivot has a similar load, meaning that 88 percent of the load from the pivots was located in UEC's service territory.<sup>19</sup> Now that there are seven crop circles, approximately 14 percent of the farm's load is in CBEC's territory, with 86 percent of the load remaining in UEC's territory. And this is a conservative estimate taking into account only the load associated with the irrigation 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.<sup>20</sup> When that load is taken into account, the portion of the load in CBEC's territory associated with the agricultural operation is even lower.

### **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

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<sup>17</sup> UEC/100, Lankford/3.

<sup>18</sup> UEC/100, Lankford/3-4.

<sup>19</sup> UEC/100, Lankford/4.

<sup>20</sup> UEC/100, Lankford/3-4.

customers in that territory.”<sup>21</sup> In general, once territory is allocated to a particular utility, ORS 758.450(2) prohibits other persons from providing “utility service” in that territory. As applied to the facts in this proceeding, CBEC has not established a violation of the Territory Allocation Law.

**A. CBEC Failed to Demonstrate a Violation of ORS 758.450(2)**

Once the Commission allocates a service territory, 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 required 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 below, whether 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 may be straddling the line between two service territories, the Commission exercised its authority to provide that clarity and adopted the “geographic load center test”.<sup>22</sup> Under that test, no violation of ORS 758.450 has been established.

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<sup>21</sup> *Columbia Basin Electric Cooperative, Inc. v. PacifiCorp*, Docket No. UM 1670, Order No. 15-110 at 4.

<sup>22</sup> *See In the Matters of NW. Nat. Gas Co. Mechanism for Recovery of Env'tl. Remediation Costs (UM 1635) & Request for Determination of the Prudence of Env'tl. Remediation Costs for the Calendar Year 2013 & the First Quarter of 2014 (UM 1706)*, 319 PUR4th 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.*

Second, CBEC has not met its burden of demonstrating that UEC's service to the Farm 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 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."

This language has already been interpreted by the Oregon Court of Appeals, which 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."<sup>23</sup> 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 customer. Therefore, there is no violation of ORS 758.450(2).<sup>24</sup>

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*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).

<sup>23</sup> *NW Natural Gas Co. v Oregon Public Utility Commission*, 195 Or App 547, 558 (2004).

<sup>24</sup> Commission Staff's previous Reply Brief contains a thorough analysis of the Territory Allocation Law using the guidelines articulated by *PGE v. BOLI* and *State v. Gaines*. *PGE v. BOLI*, 317 Or 606 (1993); *State v. Gaines*, 346 Or 160 (2009). Applying that law to the facts in this case, Staff concluded that CBEC failed to demonstrate a violation of ORS 758.450. Staff Reply Brief, at 6.

## **B. The Geographic Load Center Test**

In its Complaint, CBEC claims it has the right to serve the portion of the Farm in its territory even though only a very small percentage of the operation is in CBEC's territory. This is, however, inconsistent with prior orders of the Commission. Indeed, the Commission 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."<sup>25</sup> In resolving another case involving CBEC, 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."<sup>26</sup>

After reviewing how different jurisdictions resolved these situations, and analyzing the text, context, 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...."<sup>27</sup> 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.<sup>28</sup>

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<sup>25</sup> Docket No. UM 1670, Order 15-110 at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 7.



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.”<sup>29</sup> 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.”<sup>30</sup>

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 customer exists, the Commission weighs a variety of factors to determine if an operation is integrated such that there is a unified load.<sup>31</sup> Based on those factors, UEC is the predominant utility and is authorized to serve the entire load.

### **C. Application of the Geographic Load Center Test to the Farm**

The Farm 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 for the Farm lie in UEC’s service territory. The record demonstrates that the small portion of the load associated with the seven irrigation pivots in CBEC’s territory is part of the Farm’s unified load.

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<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.*

<sup>31</sup> 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. *Id.* at 5-6.

The prior owner's farm manager explained that Willow Creek included multiple components, each of which were part of a "closed loop" system.<sup>32</sup> The agricultural portion of the operation was used to grow crops, and this remains true for the Farm. Now that the cows and dairy are no longer part of the operation, and the trees associated with the BTF Lease are being removed, the analysis is simplified. There is simply no evidence in the record that the seven crop circles in CBEC's territory are not part of a unified agricultural operation that includes the rest of the agricultural operation within UEC's service territory.

The only evidence in this case regarding the nature of Willow Creek's operations came initially from Willow Creek's farm manager, and that information has now been modified by the record in the bankruptcy proceeding. CBEC has not carried its burden of showing that the Willow Creek's former load, and now the Farm's load, is not unified.

The factors the Commission considered previously all support a finding that the Farm load is unified. First, there is no real dispute in this case that the constituent electrical loads of the Farm all share a common ownership. The entire Willow Creek operation was owned by Mr. te Velde as a sole proprietorship. The real property is now owned by Canyon Farm, LLC, but the Farm, including the constituent electrical loads, is operated, managed and controlled by Easterday Farms under a long-term lease.

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 Willow Creek operation was a sole proprietorship owned 100% by Mr. te Velde, which includes the real property in both UEC and

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<sup>32</sup> In the Willow Creek operation, the crops were used as feed for the cows, which were cared for and milked in facilities on the property. As part of that process, the cows generated a large amount of manure. The liquid from the manure was then sent back to the agricultural operations where it was used for irrigation and fertilizer for growing crops, where the loop starts over again. WCD/100, Aylett/1.

CBEC's service territory.<sup>33</sup> Now the entire property is owned by Canyon Farm, LLC, which is leasing the land to the operator, Easterday Farms.<sup>34</sup> While BTF continues to have a temporary property interest associated with the BTF Lease, there is simply no evidence that any other individual or entity owns or operates any enterprise on the property, and the trees are being removed in an expedited fashion by order of the bankruptcy court. To the extent BTF's activities are relevant to the analysis, all remaining trees now lie solely within UEC's service territory because the seventh crop circle in CBEC's territory has been cleared of trees and developed. Thus, any future conditions relating to BTF's clearing will only increase the amount of the Farm's load in UEC's territory as the cleared areas are developed, and the maximum amount of electric load that will be in CBEC's service territory is what currently exists.

Third, all electrical facilities at issue that are not owned by UEC were owned by Mr. te Velde and now Canyon Farm, LLC. Easterday Farms is the operator of and responsible for any electric facilities owned by Canyon Farm, LLC.<sup>35</sup> The same holds true for the ownership/control of other facilities, buildings, and maintenance equipment that are part of the Farm.

Fourth, the management authority over the Farm and its electrical load is unified—it is operated and managed by Easterday Farms. Easterday Farms is the name on the UEC account and has contracting authority related to the electrical loads.<sup>36</sup>

Because all constituent parts of the Farm'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

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<sup>33</sup> CBEC/104, Wolff/1.

<sup>34</sup> See Order Granting Motion to Sell Real Property, *supra* note 1, at 4; see also UEC's Notice of Contact from Buyer of Willow Creek Dairy (Mar. 7, 2019).

<sup>35</sup> UEC's Notice of Contact from Buyer of Willow Creek Dairy (Mar. 7, 2019).

<sup>36</sup> *Id.*

located. The dispute in this case involves only seven of the Farm's irrigation pivots, which draw a small electrical load, and which are located in CBEC's service territory. For example, the evidence showed that the six irrigation pivots in CBEC's territory were only twelve percent of the total number of irrigation pivots. Each pivot has a similar load, meaning that 88 percent of the load from the pivots were located in UEC's service territory when there were six pivots.<sup>37</sup> The percentage of the load in CBEC's territory associated with the Farm's now seven irrigation pivots is approximately 14 percent. And this is a conservative estimate taking into account only the load associated with the irrigation 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.<sup>38</sup> When that load is taken into account, the portion of the load in CBEC's territory associated with the agricultural operation is even lower.

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.<sup>39</sup>

CBEC's arguments are largely moot now. For example, CBEC argued that Willow Creek 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

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<sup>37</sup> UEC/100, Lankford/4.

<sup>38</sup> UEC/100, Lankford 3-4.

<sup>39</sup> Staff/100, Gibbens-Rossow/8.

load center test.”<sup>40</sup> While this issue was refuted by UEC (in part because there was no electrical load associated with BTF) and Staff in their initial response briefs, the BTF Lease has since been modified in the te Velde bankruptcy and the trees are being removed on an expedited basis. Accordingly, even assuming the BTF Lease was relevant before, that is no longer the case.

CBEC also claimed that UEC provided service to Willow Creek under approximately 30 different points of service and meters, and that the use of multiple points of service and meters means the operation is not a unified load.<sup>41</sup> Presumably, CBEC will make this same argument about the Farm. CBEC’s argument is without merit and this issue was thoroughly briefed by UEC and dismissed by Staff.

CBEC has also argued 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.”<sup>42</sup> This statement, for which CBEC provides no citations to the record, was directly counter to the credible testimony provided by Willow Creek’s farm manager. That testimony described in detail how the irrigated crop circles were integrated with the rest of Willow Creek’s loads. That testimony included a description of how the agricultural operations were connected to the dairy components of the operations. Now that the dairy components have been suspended, the analysis is even simpler because the Farm contains only an agricultural operation with no need to determine its relationship to other operations. Nothing in the record suggests that the agricultural operation would be any different now that Easterday Farms is in control of the operation.

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<sup>40</sup> CBEC Opening Brief at 15.

<sup>41</sup> CBEC Opening Brief at 16.

<sup>42</sup> CBEC Opening Brief at 16.

Finally, CBEC asserted that the future development of Willow Creek was “too speculative” to be part of the geographic load center test.<sup>43</sup> This argument is no longer relevant because of the accelerated removal of the trees under the BTF Lease. Neither UEC nor the Farm needs to rely on the development of future loads to satisfy the geographic load center test. Further, regardless of the timing of the Farm’s plans, and whether or not the new owners pursue a dairy operation in addition to the existing agricultural operation, a final development of the Farm in the future will only act to decrease the percentage of the Farm load that is in CBEC’s service territory. Even if the Farm completely abandoned its plans for future development in UEC’s territory, only 14 percent of the Farm’s load would be in CBEC’s territory, without taking into account the large electrical load needed to pump water for the agricultural operations, which occurs in UEC’s service territory.<sup>44</sup>

**D. CBEC’s Collateral Attack on the Commission’s Prior Order**

Despite submitting testimony indicating that the only disputed issue in this case was whether Willow Creek’s load was a unified load, CBEC abandoned that approach at the briefing stage and claimed that the Commission is without legal authority to use the geographic load center test. CBEC further claims that this is now one of the “primary issues of this proceeding.”<sup>45</sup>

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.<sup>46</sup> The Commission carefully reviewed the Territory Allocation Law, as well as how

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<sup>43</sup> CBEC Opening Brief at 16-17.

<sup>44</sup> UEC/100, Lankford/3.

<sup>45</sup> CBEC Opening Brief at 18; CBEC’s Request for Certification of Ruling and Official Notice at 3.

<sup>46</sup> After concluding that the Caithness wind project consisted of three separate customers - Shepherds Flat Central, Shepherds Flat North, and Shepherds Flat South<sup>46</sup> – the Commission then analyzed where the load for each of those

other jurisdictions handle situations where a customer straddles adjoining service territories, to determine which utility had the right to serve Shepherds Flat Central, a portion of the Caithness project straddling the line between CBEC's and PacifiCorp's territories. In the end, the Commission adopted the geographic load center test and determined that PacifiCorp had the right to serve Shepherds Flat Central.<sup>47</sup>

Notably, the Commission adopted the geographic load center test in a case that directly involved CBEC, and CBEC mounted no challenge to the Commission's authority as part of that decision. Following the Commission's determination in UM 1670, PacifiCorp filed a motion for clarification. In 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."<sup>48</sup> 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

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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, that was not the case for Shepherds Flat Central. Docket No. UM 1670, Order No. 15-110 at 6.

<sup>47</sup> The Commission stated that "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." Docket No. UM 1670, Order No. 15-110 at 8.

<sup>48</sup> Docket No. UM 1670, CBEC Response to PacifiCorp's Motion for Clarification at 2.

heard to complain, and the case ought not to be reversed because of it.”<sup>49</sup> 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 also determined CBEC had a right to serve Shepherd’s Flat South, a different portion of the Caithness project PacifiCorp was attempting to serve. Based on the portion of the Commission’s decision adverse to CBEC, 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 reward 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.

**E. 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. This issue was fully briefed by UEC in its response brief and is incorporated by reference herein.<sup>50</sup>

**F. CBEC’s Misplaced Reliance on Case Law from Other Jurisdictions**

As described in UEC’s Response brief, the case law CBEC relies on to challenge the geographic load center test are not controlling, and in fact undermine CBEC’s arguments.<sup>51</sup> UEC

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<sup>49</sup> *Hatley v. Umatilla County*, 256 Or App 91, 112 (2013) (internal citations omitted) (also acknowledging the doctrine of invited error applies in administrative proceedings).

<sup>50</sup> UEC Response to CBEC Opening at 16-18.

<sup>51</sup> UEC’s Response to CBEC’s Opening Brief at 19-21.



will not restate those arguments here but incorporates them by reference into this Supplemental Brief.

### **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.

Dated this 1st day of May 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "Chad M. Stokes" followed by a flourish.

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