Decision No. R21-0225

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0243E

UTILITIES BOARD OF THE CITY OF LAMAR,

COMPLAINANT,

V.

SOUTHEAST COLORADO POWER ASSOCIATION,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE CONOR F. FARLEY GRANTING THE CLAIMS IN THE COMPLAINT, DENYING THE FIRST COUNTERCLAIM AND GRANTING-IN-PART AND DENYING-IN-PART THE SECOND COUNTERCLAIM, ORDERING SECPA TO CEASE AND DESIST FROM PROVIDING SERVICE TO WELL NO. 7, AMENDING DECISION NO. 76027, AND CLOSING PROCEEDING

Mailed Date: April 16, 2021

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A. The Commission Orders That: 40

I. STATEMENT

1. On June 2, 2020, the Utilities Board of the City of Lamar (LUB) filed a formal complaint (Complaint) against Southeast Colorado Power Association (SECPA).

2. On June 4, 2020, the Commission scheduled the Complaint for an evidentiary hearing to be held on August 17, 2020 starting at 9:00 a.m. On the same date, the Commission served the Order Setting Hearing and Notice of Hearing and other documents on LUB.

3. Also, on June 4, 2020, the Commission served on SECPA the Complaint, the Order Setting Hearing and Notice of Hearing, and an Order to Satisfy or Answer.

4. On June 10, 2020, the Commission referred this proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

5. On June 24, 2020, SECPA filed its Answer and Counterclaims.

6. On July 14, 2020, LUB filed its Reply to SECPA's Counterclaims.

7. On July 17, 2020, the ALJ issued Decision No. R20-0528-I that converted the in-person hearing into a remote hearing and provided instructions.

8. On July 22, 2020, LUB and SECPA filed a Joint Request to Vacate the Hearing and Schedule a Prehearing Conference (Joint Request). In the Joint Request, LUB and SECPA proposed a prehearing schedule and hearing dates.

9. On July 29, 2020, the ALJ issued Decision No. R20-0547-I that granted the Joint Request, vacated the remote hearing scheduled for August 17, 2020, and scheduled a remote prehearing conference for August 7, 2020 at 9:00 a.m.

10. On August 7, 2020, the ALJ held the prehearing conference.

11. On August 13, 2020, the ALJ issued Decision No. R20-0595-I that established the prehearing schedule, scheduled the remote hearing for November 9 and 10, 2020, and provided instructions for filing testimony and exhibits and participating in the remote hearing.

12. On November 4, 2020, the parties filed a Joint Motion to Vacate Hearing Date and for Waiver of Response Time (Joint Motion). In the Joint Motion, the parties request that the remote hearing be vacated due to a death in the family of one of the attorneys of record in this proceeding. Due to the death, the attorney will not be able to participate in the remote hearing if it goes forward on November 9 and 10, 2020.

13. On November 6, 2020, the ALJ granted the Joint Motion in Decision No. R20-0786-I.

14. Also, on November 6, 2020, the Colorado Association of Municipal Utilities (CAMU) filed a Motion for Leave to Participate as Amicus Curiae.

15. On November 17, 2020, the parties filed a Joint Request for a Scheduling Conference to reschedule the hearing.

16. On November 18, 2020, the ALJ granted the Joint Request and scheduled a scheduling conference for November 23, 2020 at 9:00 a.m. in Decision No. R20-0813-I.

17. On November 23, 2020, the scheduling conference took place.

18. On December 14, 2020, the ALJ rescheduled the hearing for January 25 and 26, 2021 and granted CAMU's Motion for Leave to Participate as Amicus Curiae in Decision No. R20-0889-I.

19. On December 28, 2020, the Colorado Rural Electric Association (CREA) filed a Motion for Leave to Participate as Amicus Curiae.

20. On January 20, 2021, the ALJ granted-in-part and denied-in-part CREA's Motion for Leave to Participate as Amicus Curiae.in Decision No. R21-0038-I.

21. On January 25 and 26, 2021, the hearing took place. The following witnesses testified on behalf of LUB: Douglas A. Thrall, Scott Wilson, and Houssin Hourieh. The following witnesses testified on behalf of SECPA: Jack S. Johnston, Rick A. Jones, and Mark Hall. The following exhibits (including attachments) were admitted into the evidentiary record: 100, Rev. 2; 101, Rev. 2; 102, Rev. 2; 103; 104; 105, Rev. 1; 106, Rev. 1; 107, Rev. 1; 300; 301, Rev. 1; 302, Rev. 2; 303; 304; 305; 306; 311; and 400. At the end of the hearing, the ALJ closed the evidentiary record.

22. On February 8, 2021 and March 16, 2021, Las Animas Municipal Light & Power and City of La Junta Utility Board filed comments, respectively. Both support LUB's position.

23. On February 16, 2021, LUB and SECPA each filed a Statement of Position and CAMU and CREA filed their amicus briefs.

II. BURDEN OF PROOF

24. LUB bears the burden of proving the claims, and SECPA bears the burden of proving the counterclaims, by a preponderance of the evidence.[1] The evidence must be "substantial evidence," which is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one

[1] Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1200 of the Rules of Practice and Procedure, 4 *Colorado Code Regulations* (CCR) 723-1.

of fact for the jury."[2] A party has satisfied its burden under this standard when the evidence, on the whole, tips in favor of that party.

III. FINDINGS OF FACT

A. LUB and SECPA

25. LUB is a municipal electric utility created in 1962 pursuant to Article VII of the Home Rule Charter of the City of Lamar as a separate unit of the City government that is granted exclusive jurisdiction, control, and management of the Lamar electric utility system. LUB serves all electric customers in the City of Lamar and other electric customers in certain areas of the surrounding Bent and Prowers Counties. It is undisputed that LUB is a public utility.

26. SECPA is a not-for-profit cooperative electric utility that provides retail electric distribution service in all or parts of 11 southeast Colorado counties, including portions of Bent and Prowers counties. It is undisputed that SECPA is a public utility.

B. May Valley Water Association

27. May Valley Water Association (May Valley) is a non-profit supplier of potable water services to primarily agricultural customers located in the Counties of Prowers and Bent. May Valley was originally formed in 1963. In 1965, May Valley owned 6 wells and had a storage capacity of 420,000 gallons, but it has grown and presently has 9 treatment plants and a storage capacity of 820,000 gallons, as well as over 600 water meters. May Valley's service territory is approximately 100 square miles, extending from the Arkansas River North to the Ft. Lyon Canal and from Bent County Road 32 East to Prowers County Road 13.

[2] *City of Boulder v. Pub. Utils. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Pub. Utils. Comm'n*, 949 P.2d 577, 585 (Colo. 1997)).

28. In total, May Valley owns 13 water facilities that are separately metered for purposes of electricity supply.[3] Before the dispute in this proceeding arose, LUB supplied electricity to ten of May Valley's facilities, including Well No. 7, which is the facility at issue in this proceeding, and SECPA provided electricity to three.[4] LUB started serving these ten May Valley facilities in the 1960s.[5]

C. Decision No. 76027

29. LUB, and its predecessors, received several certificates of public convenience and necessity (CPCNs) to serve customers in Bent and Prowers Counties in the first half of the 20th century.[6] Those CPCNs were consolidated into a single CPCN in Decision No. 21392 that granted an application filed by LUB for, among other things, consolidation. SECPA opposed the application on the ground that SECPA was adequately serving Bent and Prowers Counties and LUB was not. As support, SECPA contended that LUB had a small number of customers in Bent and Prowers Counties and was unable to provide electrical service to many of the residents of those counties.[7] In Decision No. 21392, the Commission rejected SECPA's arguments and granted LUB's application.[8]

30. SECPA has also been serving electric customers in certain portions of Bent and Prowers Counties since approximately 1937.[9] However, it never sought a CPCN from the Commission before the 1960s because it did not consider itself a public utility before 1961. In

[3] Hearing Exhibit 301, Rev. 1 at 3:9-20 (Direct Testimony of Mr. Jones).
[4] *Id*. at 3:21-4:5.
[5] Hearing Exhibit 102, Rev. 2 at 3:14-4:12 (Direct Testimony of Mr. Hourieh); LUB's SOP at 2.
[6] *See* Decision No. 21392 issued on September 27, 1943 at 1-2.
[7] *Id*. at 2-3.
[8] *Id*. at 9-12.
[9] *See id*. at 3 (noting that SECPA filed its Articles of Incorporation in 1937).

that year, the General Assembly adopted § 40-1-103(2)(a), C.R.S., which deemed "[e]very cooperative electric association" a public utility.[10]

31. Thereafter, SECPA filed applications for CPCNs to provide electric service in the areas in which it was then providing service. SECPA filed such an application on June 20, 1969 for a CPCN for the areas of Bent and Prowers Counties in which it was then providing service (1969 Application).[11] LUB intervened and opposed the 1969 Application.[12]

32. In considering the 1969 Application, the Commission found that:

> [SECPA] now provides electric service to a number of customers in Bent and Prowers Counties including areas which have been previously certificated to [LUB]. This situation arose generally prior to the time [SECPA] became a public utility by an Act of the Legislature in 1961, and [SECPA] had a perfect legal right at that time to provide such service to its own members wherever located. Thus in large areas previously certificated to [LUB], the customers are served almost exclusively by [SECPA]. In the late 1930s and early 1940s extensions by [LUB] into such areas were economically prohibitive because of the large contributions in aid of construction involved.[13]

The Commission then listed the areas of Bent and Prowers Counties in which LUB was then providing electric service and found that "[i]n the balance of the areas previously certificated to [LUB] extensions of electric service are practically nonexistent, and [LUB] has abandoned its certificate as to such area."[14]

33. Based on the foregoing, the Commission concluded that:

> public convenience and necessity requires and will require that [SECPA] be issued a certificate of public convenience and necessity to provide electric service

[10] § 40-3-102(2)(a) ("Every cooperative electric association, or nonprofit electric corporation or association, and every other supplier of electric energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.").

[11] Decision No. 76027 issued on October 6, 1970 at 1.

[12] *Id*.

[13] *Id*. at 3 (¶ 6).

[14] *Id*. at 9 (¶ 8).

> in the area previously certificated to [LUB] and which has been abandoned by [LUB] . . .; that [LUB's] certificate of public convenience and necessity should be redefined to include only that area wherein the certificate has not been abandoned . . .; and that existing customers of either utility in the area certificated to the other utility should be frozen as provided in the Order hereinbelow.[15]

As to the freezing of existing customers of each public utility, the Commission further stated:

> [SECPA] be, and hereby is, authorized to continue service to its present customers located in areas certificated to [LUB] until such time as there is a substantial change in the nature of the service. Likewise, that [LUB] be, and hereby is, authorized to continue service to its present customers located in the areas certificated to [SECPA] until such time as there is a change in service. The two utilities are urged to negotiate towards an eventual exchange of customers where feasible to eliminate service by one utility in the area certificated to the other.[16]

D. Post-Decision No. 76027

34. LUB serves at least ten customers located in SECPA's service area and SECPA serves at least two customers located in LUB's territory.[17] According to Mr. Johnston,

> Some of these customers are among those originally described by the Commission in 1970 but which were not identified at that time. Others are customers that the two utilities have, over the years, mutually agreed to allow the other to serve pursuant to what is commonly referred to as an "invasion agreement."[18]

There have been no agreements between LUB and SECPA that allowed the certificated utility to take over service to any of these customers served extraterritorially by the other utility. As a result, the customers served extraterritorially since Decision No. 76027 have remained "frozen" to the extraterritorially-serving utility since 1970.[19]

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[15] *Id*. at 23 (¶ 11).

[16] *Id*. at 25 (Ordering ¶ 3).

[17] Hearing Exhibit 300 at 8:19-24; *Id*., Attach. JSJ-5. *See also* 1/26/2021 Hearing Transcript at 32:22-35:6 (Mr. Johnston shows a lack of confidence in the accuracy of these numbers because of inaccuracies in the map created by LUB of the service territories based on Decision No. 76027).

[18] *Id*. at 9:1-5.

[19] *See id*. at 9:11-21.

35. As noted above, the parties have entered into "invasion agreements" since 1970 to allow LUB or SECPA to serve individual customers in areas certificated to the other. As a general matter, these agreements have resulted when a customer's cost of extending the certificated utility's service to the customer's location exceeded the cost of extending the non-certificated utility's service. In at least some such circumstances, the certificated utility has allowed the non-certificated utility to provide the service to the customer pursuant to an invasion agreement.[20] In at least some of the agreements permitting LUB to serve customers in SECPA's certificated territory, it is specified that the service will "revert[] back" to SECPA if the customer disconnects the service, or the "service is disconnected," from LUB.[21]

36. As noted above, LUB started serving ten May Valley facilities in the 1960s.[22] Of the ten, five are wells that are located in SECPA's certificated territory, including Well No. 7.[23] Combined, these five wells are LUB's fourth or fifth largest customer. Well No. 7 represents approximately one-third of the load of the five wells served by LUB.[24] If Well No. 7 switched to SECPA, it would have "a big impact on LUB."[25]

E. Well No. 7

1. Background

37. As noted above, Well No. 7 is a water treatment facility located in SECPA's certificated territory, but LUB served Well No. 7 since it was first placed into service in the mid-

[20] *Id*. at 9:22-10:12.

[21] *Id*. at 10:13-18, Attach. JSJ-6.

[22] Hearing Exhibit 102, Rev. 2 at 3:14-4:12 (Direct Testimony of Mr. Hourieh); LUB's SOP at 2.

[23] 1/25/2021 Hearing Transcript at 25:18-26:5; Hearing Exhibit 102, Rev. 2 at 4:3-12 (Direct Testimony of Mr. Hourieh).

[24] 1/25/2021 Hearing Transcript at 26:6-28:15.

[25] 1/25/2021 Hearing Transcript at 26:6-15.

1960s until February 13, 2020.[26] Well No. 7 is one of the facilities that Decision No. 76027 permitted LUB to continue serving even though the well is in SECPA's territory. Well No. 7 currently receives water from two deep wells and is located near the center of May Valley's service territory.[27] Well No. 7 received water from only one well until 1984 at which time SECPA added the second well.[28]

38. However, one of the wells at Well No. 7 sat idle from approximately 2010 to February 2019 due to May Valley's "business plans."[29] May Valley asserts that Well No. 7 was placed back into service in February 2019 because "it was required to support the overall system integrity."[30] May Valley also contends that Well No. 7 is "a critical facility for the service May Valley provides because of its importance in keeping the system water pressure at the standards set by the [Colorado Department of Public Health and Environment] and the United States Environmental Protection Agency" and because it "provides the largest portion of water in May Valley's system compared to the other facilities."[31] For this reason, May Valley states that "it is essential that Well No. 7 receives reliable electric service."[32]

39. LUB provided service to Well No. 7 via a radial distribution line. No other LUB customer receives service from LUB's radial line that served Well No. 7.[33] The radial line is a three-phase line that delivers a primary voltage of 14.4/24.9 kV and a secondary voltage of

[26] Hearing Exhibit 301, Rev. 1 at 5:7-12 (Direct Testimony of Mr. Jones); Hearing Exhibit 304 at 2:24 (Answer Testimony of Mr. Jones); SECPA's SOP at 3.

[27] Hearing Exhibit 301, Rev. 1 at 4:8-17 (Direct Testimony of Mr. Jones).

[28] Hearing Exhibit 304 at 4:10-12 (Answer Testimony of Mr. Jones).

[29] 1/25/2021 Hearing Transcript at 140:1-15, 141:16-142:2.

[30] *Id*. at 4:12-14.

[31] Hearing Exhibit 301, Rev. 1 at 4:23-5:4 (Direct Testimony of Mr. Jones).

[32] *Id*. at 5:5-6.

[33] Hearing Exhibit 302, Rev. 1 at 5:14-17 (Direct Testimony of Mr. Hall).

277/480V. LUB states that it could increase the voltage on the line with transformer adjustments.[34]

2. SECPA's Road PP Distribution Line

40. SECPA has a distribution line that runs along Colorado Road PP and passes in close proximity to Well No. 7 (Road PP Distribution Line). The Road PP Distribution Line is a three-phase loop line that delivers a primary voltage of 14.4/24.9 kV and a secondary voltage of 277/480V. As it is a loop line, the Road PP Distribution Line is tied into SECPA's distribution system on both ends.[35] SECPA constructed the Road PP Distribution Line sometime between 1970 and 2000. Due to a lack of records and institutional memory, SECPA cannot provide a more precise construction date.[36]

3. Events Leading Up to May Valley's Disconnection from LUB

41. Rick Jones has worked for May Valley for almost 32 years. Currently, he is the superintendent of May Valley and he has held that position since December 2018. Prior to that, he was an Operator/Field Technician for May Valley.[37]

42. Mr. Jones believes that he first saw the Road PP Distribution Line approximately five years ago. In early December 2019, May Valley received a utility line locate request relating to a proposed installation of service from the Road PP Distribution Line to a farm approximately 200 yards to the east of Well No. 7.[38] As a result of that request, Mr. Jones spoke with an individual involved in the installation and confirmed that the electric service to be installed

[34] Hearing Exhibit 106, Rev. 1 at 3:16-21 (Rebuttal Testimony of Mr. Hourieh).

[35] Hearing Exhibit 302, Rev. 1 at 6:8-21 (Direct Testimony of Mr. Hall); Hearing Exhibit 106, Rev. 1 at 3:16-21 (Rebuttal Testimony of Mr. Hourieh).

[36] 1/25/2021 Hearing Transcript at 183:20-185:13 (Testimony of Mr. Hall).

[37] 1/25/2021 Hearing Transcript at 99:10-25 (Testimony of Mr. Jones).

[38] *Id*. at 145:9-147:20. *See also* Hearing Exhibit 301, Rev. 1 at 7:20-8:8 (Direct Testimony of Mr. Jones).

would be supplied by SECPA via the Road PP Distribution Line. This caused Mr. Jones to wonder whether Well No. 7 could be served by SECPA via the same Road PP Distribution Line.[39]

43. On December 5, 2019, Mr. Jones contacted Mr. Hall of SECPA to determine whether SECPA could provide service to Well No. 7.[40] Mr. Hall is the Chief Operations Officer of SECPA and has held this position since August 1, 2019.[41] During the initial conversation, Mr. Hall told Mr. Jones that he needed to confirm whether Well No. 7 is in SECPA's service territory.[42] Mr. Hall also told Mr. Jones that, if Well No. 7 was in SECPA's territory, SECPA would not be able to provide service to Well No. 7 without first obtaining a written disconnect notice from LUB.[43]

44. Next, Mr. Hall consulted SECPA's service area maps and determined that Well No. 7 is in SECPA's service area. To confirm his conclusion, and to avoid conflict with LUB concerning service to Well No. 7, Mr. Hall called Mr. Hourieh.[44] Mr. Hourieh does not remember speaking with Mr. Hall concerning Well No. 7 on December 5, 2019,[45] but the evidence establishes that two relatively brief phone calls took place on that day between Messrs. Hall and Hourieh.[46] While Mr. Hall believed that Mr. Hourieh agreed during the phone calls to effectively transfer the service to Well No. 7 to SECPA, the evidence establishes that there was a miscommunication between Messrs. Hall and Hourieh during these phone calls and

[39] 1/25/2021 Hearing Transcript at 146:12-147:8 (Testimony of Mr. Jones); Hearing Exhibit 301, Rev. 1 at 8:4-8 (Direct Testimony of Mr. Jones).

[40] Hearing Exhibit 305 at 4:3-6 (Rebuttal Testimony of Mr. Johnston).

[41] Hearing Exhibit 302, Attach. MH-1 (Direct Testimony of Mr. Hall).

[42] Hearing Exhibit 301, Rev. 1 at 8:9-14 (Direct Testimony of Mr. Jones); Hearing Exhibit 302, Rev. 1 at 7:17-24 (Direct Testimony of Mr. Hall).

[43] Hearing Exhibit 302, Rev. 1 at 7:4-19 (Direct Testimony of Mr. Hall).

[44] *Id*. at 7:17-24.

[45] 1/26/2021 Hearing Transcript at 92:4-10, 96:7-15, 96:7-11.

[46] *Id*. at 86:6-8, 89:6-91:15; 1/25/2021 Hearing Transcript at 179:13-183:5.

Mr. Hourieh did not understand the significance of the information conveyed by Mr. Hall.[47] Further, it is undisputed that SECPA did not follow-up the December 5, 2019 calls with a written communication confirming the information that was conveyed during the phone calls.[48] Based on the evidence, the ALJ finds that Mr. Hourieh did not understand from the phone calls on December 5, 2019 that May Valley had requested SECPA to provide service to Well No. 7 or that LUB's service to Well No. 7 could be terminated in the near future.

45. On January 6, 2020, Mr. Jones, on behalf of May Valley, executed several legal documents necessary to obtain service from SECPA. These included: (a) an Application for Electric Service from SECPA;[49] (b) an Agreement for Electric Service from SECPA;[50] (c) an Application for Membership in SECPA;[51] (d) an Agreement granting SECPA an easement on May Valley's property;[52] (e) and an Agreement to hold SECPA harmless for damages resulting from the installation and maintenance of electric facilities on May Valley's property.[53] On the same day, SECPA created a work order to install a new pole on May Valley's property to serve Well No. 7, run a line from the new pole to the Road PP Distribution Line, and install a meter on the new pole, each of which was necessary for SECPA to provide service to Well No. 7.[54] SECPA completed this work on January 15, 2020.[55]

[47] *Id*. at 91:16-95:18.
[48] *Id*. at 95:8-13.
[49] Hearing Exhibit 104, Attach. HH-12 (Answer testimony of Mr. Hourieh).
[50] *Id*., Attach. HH-13.
[51] *Id*., Attach. HH-15.
[52] *Id*., Attach. HH-16.
[53] *Id*., Attach. HH-17.
[54] *Id*., Attach. HH-14. *See also* Hearing Exhibit 302, Rev. 1 at 8:13-19.
[55] Hearing Exhibit 104, Attach. HH-18.

46. The only work that remained to finalize the switch of electric service for Well No. 7 from LUB to SECPA was to disconnect the meter loop from LUB's pole and transfer it to SECPA's new pole.[56] May Valley hired Warman Electric to connect the meter loop to SECPA's new pole and install a generator to provide "bridge" power during the period after LUB's service had been disconnected and before connection of SECPA's service.[57]

4. May Valley's Disconnection from LUB

47. On February 13, 2020, Mr. Jones called Mr. Wilson, who is a lineman for LUB, to disconnect the meter loop from LUB's pole.[58] Mr. Jones did so on the same day and Warman Electric transferred the meter loop to SECPA's new pole on the same day.[59] Warman set up May Valley's generator to provide bridge power during the transition from LUB to SECPA. In the course of disconnecting the meter loop from LUB's pole, Mr. Wilson came to understand that May Valley intended to switch its service permanently to SECPA. He asked Mr. Jones about this, who said that Mr. Hourieh had approved the switch.[60] Mr. Wilson instructed Mr. Jones that May Valley would have to complete a written permanent disconnect request from LUB.[61]

48. Upon his return to LUB's office, Mr. Wilson told Mr. Hourieh about his experience at Well No. 7, including Mr. Jones' statement that Mr. Hourieh had approved the transfer of service from LUB to SECPA. Mr. Hourieh disputed that he had so agreed and directed Mr. Wilson to return to Well No. 7, reinstall LUB's meter, and attach a seal to the meter.

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[56] Hearing Exhibit 104 at 7:3-22.

[57] Hearing Exhibit 104 at 9:1-7 (Answer Testimony of Mr. Jones); 1/25/2021 Hearing Transcript at 106:1-19.

[58] Hearing Exhibit 301, Rev. 1 at 8:20-23 (Direct Testimony of Mr. Jones).

[59] *Id*. at 8:21-9:2 (Direct Testimony of Mr. Jones).

[60] Hearing Exhibit 105, Rev. 1 at 3:22-4:3 (Rebuttal Testimony of Mr. Wilson).

[61] Hearing Exhibit 301, Rev. 1 at 9:4-12 (Direct Testimony of Mr. Jones); Hearing Exhibit 101, Rev. 2 at 3:1-14 (Direct Testimony of Mr. Wilson).

Mr. Wilson did so on February 13, 2020, attaching LUB's meter to the new pole installed by SECPA.[62] Soon thereafter, SECPA personnel cut the seal on LUB's meter, removed the meter from the pole, and left it on the ground.[63]

49. After learning of the events at Well No. 7 on February 13, 2020, Mr. Hall went to Mr. Hourieh's office. During the meeting, Mr. Hourieh denied that he had approved the transfer of Well No. 7 from LUB to SECPA.[64] Messrs. Hall and Johnston then instructed SECPA personnel to take no further action with respect to Well No. 7 until further notice.[65]

50. Mr. Wilson returned to Well No. 7 on February 14, 2020 and found LUB's meter with the cut seal lying on the ground near SECPA's new pole.[66] Under Mr. Hourieh's supervision, Mr. Wilson reinstalled LUB's meter in the deenergized meter loop on SECPA's new pole with a padlock to secure it.[67]

51. As a result of the foregoing, starting on February 13, 2020, May Valley relied on its own generator to supply power to Well No. 7.[68]

5. February 25, 2020 Meeting

52. On February 25, 2020, Mr. Hall, Mr. Johnston, and Mr. Jones attended LUB's regular public board meeting. They had been invited to the meeting by Mr. Hourieh on February 20, 2020.[69] At the meeting, Mr. Jones requested that LUB either provide a rate

[62] Hearing Exhibit 101, Rev. 2 at 3:15-19 (Direct Testimony of Mr. Wilson).

[63] Hearing Exhibit 302, Rev. 1 at 9:13-23 (Direct Testimony of Mr. Hall).

[64] *Id*. at 10:7-12.

[65] Hearing Exhibit 300 at 11:16-24 (Direct Testimony of Mr. Johnston); Hearing Exhibit 302, Rev. 1 at 9:13-23 (Direct Testimony of Mr. Hall).

[66] Hearing Exhibit 302, Rev. 1 at 9:13-23 (Direct Testimony of Mr. Hall).

[67] Hearing Exhibit 101, Rev. 2 at 3:15-4:2 (Direct Testimony of Mr. Wilson); Hearing Exhibit 302, Rev. 1 at 9:13-23 (Direct Testimony of Mr. Hall).

[68] Hearing Exhibit 300 at 12:1-4 (Direct Testimony of Mr. Johnston).

[69] Hearing Exhibit 301, Rev. 1 at 10:8-14 (Direct Testimony of Mr. Jones).

reduction for not only Well No. 7, but also May Valley's Well No. 11, or allow Well Nos. 7 and 11 to transfer to SECPA. As justification, Mr. Jones stated that SECPA's rates were lower than LUB's. LUB rejected May Valley's request to transfer Well Nos. 7 and 11 to SECPA, and countered that it would allow all ten of May Valley's wells served by LUB to receive service under a different LUB tariff that would result in savings of approximately 17 percent. Mr. Jones responded that he would discuss the offer with May Valley's board.[70]

53. On February 26, 2020, Mr. Jones told Mr. Hourieh that May Valley rejected LUB's offer. On the same day, May Valley submitted to the Lamar City Clerk an order to disconnect Well No. 7 from LUB.[71]

6. Failure of May Valley's Generator

54. The diesel generator used by May Valley to operate Well No. 7 began to fail on February 18, 2020.[72] On February 28, 2020, Mr. Jones called Mr. Hourieh and asked whether May Valley could borrow a diesel generator because the generator used by May Valley was failing. Mr. Hourieh responded that LUB did not have any generators, but he offered to reconnect Well No. 7 to LUB's service, which would not take much time because the facilities necessary to do so were in place. Mr. Jones declined Mr. Hourieh's offer.[73]

55. May Valley rented a replacement diesel generator and connected it to the Well No. 7 load on February 29, 2020.[74] SECPA paid for the rental generator.[75]

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[70] Hearing Exhibit 102, Rev. 2 at 7:1-18 (Direct Testimony of Mr. Hourieh); Hearing Exhibit 102, Rev. 2, Attach. HH-3.

[71] Hearing Exhibit 102, Rev. 2 at 7:18-21 (Direct Testimony of Mr. Hourieh).

[72] Hearing Exhibit 301, Rev. 1 at 12:6 (Direct Testimony of Mr. Jones).

[73] Hearing Exhibit 104 at 8:8-15 (Answer Testimony of Mr. Hourieh).

[74] Hearing Exhibit 301, Rev. 1 at 12:8-9 (Direct Testimony of Mr. Jones).

[75] *Id*. at 12:10-12.

7. March 4, 2020 LUB-SECPA Meeting

56. LUB and SECPA agreed to meet on March 4, 2020 to discuss the situation. On March 3, 2020, LUB learned that SECPA had installed a second pole and mounted its feeder line and meter to the second pole, which effectively bypassed LUB's meter mounted on the first pole installed by SECPA and secured with a padlock. With the second pole and equipment installed on the second pole, SECPA was ready to serve Well No. 7's load.

57. On the way to the meeting on March 4, Mr. Hourieh received a telephone call informing him that SECPA had commenced providing service to Well No. 7.[76] Mr. Hourieh felt that SECPA's commencement of service to Well No. 7 on the same day as the March 4, 2020 meeting demonstrated a lack of good faith by SECPA.[77] Mr. Thrall believed that SECPA commenced service to Well No. 7 to gain leverage in the March 4, 2020 negotiations.[78] Nevertheless, Messrs. Hourieh and Thrall went forward with the meeting.

58. In addition to Messrs. Hourieh and Thrall, an attorney for LUB (Mr. Steerman), and the mayor *pro tern* and *ex officio* member of LUB (Kirk Crespin) attended the meeting on behalf of LUB (Mr. Crespin attended by telephone). Mr. Johnston and an attorney for SECPA (Corlin Pratt) attended on behalf of SECPA.[79]

59. Mr. Hourieh testified that, during the meeting, he asked Mr. Johnston how SECPA was able to offer to May Valley rates that are significantly lower than LUB's rates. According to Messrs. Hourieh and Thrall, Mr. Johnston responded that "SECPA's rates are set so the

[76] Hearing Exhibit 102, Rev. 2 at 8:1-13 (Direct Testimony of Mr. Hourieh).

[77] *Id*. at 8:21-9:2.

[78] Hearing Exhibit 100, Rev. 2 at 7:11-22 (Direct Testimony of Mr. Thrall).

[79] Hearing Exhibit 102, Rev. 2 at 8:14-17 (Direct Testimony of Mr. Hourieh); Hearing Exhibit 303 at 9:3-5 (Answer Testimony of Mr. Johnston).

residential class of customers subsidizes irrigation customers."[80] Mr. Johnston has not denied this allegation, but instead testified that SECPA has not done anything wrong in setting its rates and "has fulfilled its fiduciary responsibility to its member-customers in meeting revenue requirements, debt covenants, and appropriate cost allocations on behalf of its membership."[81]

60. In the March 4, 2020 meeting and follow-up negotiations, both parties sought to negotiate a general agreement that would apply not only to the transfer of Well No. 7, but also to the future transfer of similarly frozen ratepayers under Decision No. 76027.[82] The negotiations were unsuccessful because the parties could not agree on the basis for compensating LUB for the transfer of Well No. 7 to SECPA.

61. LUB believed that it should be compensated for ten years of lost net revenue resulting from transferring Well No. 7 to SECPA and that the amount of the compensation should be determined up-front. The amount of lost net revenue should be calculated by multiplying Well No. 7's 2019 usage times the applicable net rate (excluding LUB's wholesale power costs, electric commodity adjustment, and customer charge) over ten years and then discounting the product to present value by using a "discount rate appropriate to the current low interest rate environment, which is expected to continue for at least several years due to the Federal Reserve policy to assist economic recovery from the pandemic."[83] The resulting discounted net lost

[80] Hearing Exhibit 102, Rev. 2 at 8:21-22 (Direct Testimony of Mr. Hourieh); Hearing Exhibit 100, Rev. 2 at 7:17-8:2 (Direct Testimony of Mr. Thrall).

[81] Hearing Exhibit 303 at 8:23-9:1 (Answer Testimony of Mr. Johnston).

[82] Hearing Exhibit 100, Rev. 2 at 8:3-8 (Direct Testimony of Mr. Thrall); Hearing Exhibit 102, Rev. 2 at 9:2-4 (Direct Testimony of Mr. Hourieh); Hearing Exhibit 303 at 9:3-21 (Answer Testimony of Mr. Johnston).

[83] Hearing Exhibit 107, Rev. 1 at 5:23-6:2 (Rebuttal Testimony of Mr. Thrall).

revenue would be paid in a lump sum or installments.[84] The discount rate proposed by LUB was 2 percent.[85]

62. In contrast, SECPA proposed to compensate LUB for its "net margin loss" over five years. The compensation would not be determined up-front based on the 2019 "base year" or any other "base year," but instead on the actual monthly kilowatt-hour usage of Well No. 7, which would be multiplied times the "retail rate less power cost, operating expenses, capital expenses, and Charter Appropriation fees."[86] According to Mr. Johnston, "[t]he per kilowatt-hour rate to be paid was equivalent to LUB's Energy Cost Adjustment, which Mr. Hourieh informed me was their true net margin."[87] In addition, SECPA offered to assist in retiring LUB's service plant supporting Well No. 7.[88]

63. Because the parties could not agree on the methodology for determining LUB's compensation, the negotiations ended unsuccessfully.

8. SECPA's Decision to Provide Service to Well No. 7

64. As noted above, SECPA began providing service to Well No. 7 on March 4, 2020, the same day as the last meeting between the parties to discuss how to resolve the dispute in this proceeding. Mr. Johnston testified that he believed SECPA "had a legal and moral obligation to begin providing service to a customer located within [SECPA's] certificated territory rather than

[84] *Id*. at 4:11-6:4.
[85] Hearing Exhibit 303 at 10:22-11:2 (Answer Testimony of Mr. Johnston).
[86] Hearing Exhibit 303 at 12:1-7 (Answer Testimony of Mr. Johnston).
[87] Hearing Exhibit 303 at 12:8-9 (Answer Testimony of Mr. Johnston).
[88] Hearing Exhibit 303 at 12:9-10 (Answer Testimony of Mr. Johnston).

further delaying while we continued to try to an agreement with LUB."[89] The source of the "legal obligation" was SECPA's CPCN that Mr. Johnston believed required SECPA to provide service to a "customer . . . without firm power service asking for our service in our certificated territory."[90] Mr. Johnston felt a moral obligation to provide service to Well No. 7 based on May Valley's claimed

> voltage concerns . . . in relation to [May Valley's] self-generation, and specifically, to the diesel generators, that their voltage levels were low and it jeopardized the system of potable water that serviced, you know, hundreds – or 600 to 700 potable water users. And I just didn't feel that I could leave them exposed to that potential of not receiving that potable water.[91]

65. As noted above, SECPA's commencement of service to Well No. 7 on the same day, but prior to, the March 4, 2020 negotiations led Mr. Hourieh to believe that SECPA was not acting in good faith and Mr. Thrall to conclude that SECPA was attempting to gain leverage in those negotiations.[92]

9. Alleged Reasons for May Valley's Switch to SECPA

66. Before the hearing, Mr. Jones identified differences in the cost, quality, and reliability of the power supplied by LUB and SECPA as the reasons for May Valley's decision to switch from LUB to SECPA. At the hearing, Mr. Jones identified another reason – that May Valley wanted to achieve a better balance of power suppliers as a reason for the switch. Each identified reason is discussed in more detail below.

[89] Hearing Exhibit 300 at 12:18-21 (Direct testimony of Mr. Johnston).

[90] 1/26/2021 Hearing Transcript at 36:22-37:5.

[91] *Id*. at 38:18-25.

[92] Hearing Exhibit 100, Rev. 2 at 7:11-22 (Direct Testimony of Mr. Thrall); Hearing Exhibit 102, Rev. 2 at 8:21-9:2 (Direct Testimony of Mr. Hourieh).

a. Differences in Cost

67. As noted above, before the dispute in this proceeding arose, LUB supplied electricity to ten of May Valley's facilities and SECPA provided electricity to three.[93] According to Mr. Jones,

> Based on May Valley's experience as a customer of both utilities, we have concluded that the rates of [SECPA] are significantly lower than those of LUB. For example, if Well No. 7 is served by [SECPA], May Valley will reduce the electricity bill for this site by roughly 50 percent, saving approximately $2,000 per month. For a small potable water provider, these savings are a significant benefit for May Valley and its customers.[94]

According to Messrs. Hourieh and Thrall, Mr. Johnston stated that SECPA's rates are considerably lower than LUB's because "SECPA's rates are set so the residential class of customers subsidizes irrigation customers."[95] SECPA does not dispute this evidence.

68. Accordingly, the ALJ finds that the difference in the cost of supplying power to Well No. 7 between LUB and SECPA was the reason that May Valley switched service to Well No. 7 from LUB to SECPA.

b. Alleged Differences in Quality of Power

69. Mr. Jones also testified that he has "noticed a difference in [] the quality of the power provided by LUB . . . compared to what May Valley receives from [SECPA]."[96] Specifically, Mr. Jones states that the average voltage supplied by LUB and SECPA has been 480 and 493 volts, respectively. According to Mr. Jones, "[t]he higher voltage keeps the pump

[93] Hearing Exhibit 301, Rev. 1 at 3:21-4:5 (Direct Testimony of Mr. Jones).

[94] *Id*. at 6:18-23.

[95] Hearing Exhibit 102, Rev. 2 at 8:21-22 (Direct Testimony of Mr. Hourieh); Hearing Exhibit 100, Rev. 2 at 7:17-8:2 (Direct Testimony of Mr. Thrall).

[96] Hearing Exhibit 301, Rev. 1 at 5:19-21 (Direct Testimony of Mr. Jones).

motors cooler which, over time, will support the integrity of the motors and reduce maintenance costs."[97]

70. To generate these numbers, Mr. Jones reviewed maintenance logs that went back to at least 1996 and identified the instances in which May Valley personnel made notations concerning voltage in the course of conducting maintenance.[98] Mr. Jones conducted this exercise for all of May Valley's facilities.[99] The data concerning voltage in the maintenance logs is limited. For example, there are three voltage notations each for May Valley Site 9 (supplied by LUB) and Site 10 (supplied by SECPA).[100] Mr. Jones calculated the average of the limited number of voltage notations for each site over the almost 25-year span of the maintenance logs and then averaged the averages for the sites supplied by LUB and SECPA.[101]

71. As noted, Mr. Jones' calculations showed that LUB had been delivering an average of 480 kV during the period covered by the maintenance logs. That is the same as the voltage SECPA committed to delivering in the New Customer Agreement it entered into with May Valley.[102] In addition, May Valley understood that based on past experience, LUB could, and was willing to, adjust the voltage in its transformers.[103] Finally, both LUB and SECPA delivered three-phase power to May Valley, and May Valley never complained to LUB about the quality of the power it received from LUB.[104]

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[97] *Id*. at 5:24-6:2.

[98] 1/25/2021 Hearing Transcript at 129:15-135:6, 154:15-155:20. *See also* Hearing Exhibit 106, Attach. HH-22 at 00000111 (showing notation from "5-8-96").

[99] 1/25/2021 Hearing Transcript at 129:15-135:6.

[100] Hearing Exhibit 106, Attach. HH-22 at 00000112, 00000113.

[101] 1/25/2021 Hearing Transcript at 132:19-133:15.

[102] Hearing Exhibit 104, Attach. HH-12 (Answer Testimony of Mr. Hourieh).

[103] 1/25/2021 Hearing Transcript at 138:12-139:1.

[104] *Id*. at 136:12-138:9.

72. Based on the foregoing, the ALJ finds that alleged differences between the quality of the electricity delivered by LUB and SECPA did not play a role in May Valley's decision to switch service to SECPA.

c. Alleged Differences in Reliability

73. Mr. Jones testified that concerns regarding the differences in the reliability of the delivery in service between LUB and SECPA also played a role in his decision to switch to SECPA. As noted above, while LUB provided service to Well No. 7 via a radial distribution line,[105] SECPA's Road PP Distribution Line is a loop line that is tied into SECPA's distribution system on both ends.[106] Mr. Jones testified that SECPA's service to Well No. 7 is less likely to be impacted by a localized outage as SECPA can supply power to the Road PP Distribution Line via either end of the line. In contrast, LUB's radial line receives power from only one end so LUB cannot supply power to Well No. 7 if an outage knocks out power to the end that ties in with LUB's distribution system.[107]

74. May Valley also produced evidence concerning power failures involving both LUB and SECPA. Mr. Hourieh conceded that SECPA's loop line may, in theory, allow it to restore power to Well No. 7 faster than LUB in an extended outage.[108] He also testified, however, that the power failure data produced by SECPA shows that the reliability of LUB's and SECPA's service "appears to be similar, if not better with LUB's service."[109]

[105] Hearing Exhibit 302, Rev. 1 at 5:14-17 (Direct Testimony of Mr. Hall).

[106] Hearing Exhibit 302, Rev. 1 at 6:8-21 (Direct Testimony of Mr. Hall); Hearing Exhibit 106, Rev. 1 at 3:16-21 (Rebuttal Testimony of Mr. Hourieh).

[107] Hearing Exhibit 301, Rev. 1 at 7:9-17 (Direct Testimony of Mr. Jones).

[108] Hearing Exhibit 106, Rev. 1 at 7:8 (Rebuttal Testimony of Mr. Hourieh).

[109] *Id*. at 7:8-12.

75. Finally, May Valley admitted that it never raised with LUB concerns about multiple power outages or priority of power restoration after service outages prior to this proceeding.[110]

76. Based on the foregoing, the ALJ finds that the evidence, taken as a whole, does not establish that either LUB or SECPA provides more reliable service.[111] It also does not support the conclusion that May Valley switched service to SECPA based on differences in the reliability of service provided by LUB and SECPA.

d. Alleged Balancing of Power Suppliers

77. Mr. Jones contends that he also told LUB at the February 25, 2020 meeting that May Valley sought to transfer Well Nos. 7 and 11 to SECPA because May Valley wanted to "balance its power suppliers." Mr. Jones explained that this was an approach to hedging May Valley's risk against a long-term outage. By having LUB and SECPA provide power to May Valley's facilities, there would be a greater chance of maintaining pressure within May Valley's system during a prolonged outage.[112]

78. However, LUB's witnesses do not remember anybody from May Valley presenting this reason for switching to SECPA at the February 25, 2020 meeting or at any other time before the hearing in this proceeding.[113] In fact, Mr. Jones did not address this alleged reason in his direct or answer written testimony filed before the hearing. Instead, he presented it for the first time on cross-examination at the hearing.[114] Finally, Mr. Jones presented a less than

[110] Hearing Exhibit 106, Attach. HH-21 (Rebuttal Testimony of Mr. Hourieh).

[111] *See* 1/25/2021 Hearing Transcript at 118:14-123:2.

[112] 1/25/2021 Hearing Transcript at 113:6-116:18, 149:18-153:5.

[113] Hearing Exhibit 100, Rev. 2 at 5:5-11 (Direct Testimony of Mr. Thrall); Hearing Exhibit 102, Rev. 2 at 6:21-7:21 (Direct Testimony of Mr. Hourieh); 1/26/2021 Hearing Transcript at 102:4-104:8.

[114] 1/25/2021 Hearing Transcript at 113:6-116:18.

persuasive argument supporting the theory that May Valley wanted to switch Well Nos. 7 and 11 to SECPA to "balance its power suppliers."[115] Accordingly, the ALJ finds that the balancing of power suppliers was not a reason that May Valley switched service to SECPA.

IV. CONCLUSIONS OF LAW

A. LUB's Claims and Requested Relief

79. LUB asserts that SECPA violated both Ordering Paragraph No. 3 in Decision No. 76027 and Rule 3103(a).[116] Each will be addressed in turn.

1. Alleged Violation of Decision No. 76027

a. Interpretation

80. As described above, Ordering Paragraph No. 3 of Decision No. 76027 uses different words to state the circumstances in which LUB can commence serving customers previously frozen to SECPA and vice versa. Specifically, Ordering Paragraph No. 3 states that SECPA and LUB can serve frozen customers "until such time as there is a change in service." In contrast, Ordering Paragraph No. 3 states that SECPA can serve frozen customers "until such time as there is a substantial change in the nature of the service."[117]

(1) LUB

81. LUB argues that the two sentences in Decision No. 76027 defining the circumstances in which LUB and SECPA can take over customers frozen to the other should be interpreted to mean the same thing, and that is "a substantial change in the nature of the service." In other words, LUB advocates using the language stated for the transfer of frozen customers

[115] *Id*. at 149:18-153:5.

[116] 4 CCR 723-3 of the Rules Regulating Electric Utilities.

[117] Decision No. 76027 at 25 (Ordering ¶ 3) (underlining added to show difference in language used for LUB and SECPA standards).

from SECPA to LUB for both transfers of frozen customers from SECPA to LUB and from LUB to SECPA.[118] LUB's argument would thus add the underlined words above to the language used by the Commission in stating the circumstances in which customers frozen to LUB would be transferred to SECPA. According to LUB, such an outcome would: (a) "treat both [LUB and SECPA] equitably, probably comport with the Commission's original intent, and be just and reasonable;"[119] and (b) provide "more guidance" because "'change in service' . . . is so vague as to lend itself to multiple interpretations and conflicts."[120]

(2) SECPA

82. SECPA does not expressly address LUB's argument summarized above. However, in its testimony and SOP, SECPA argues that "change in service" should be interpreted to mean, "[a] change in the nature of the service," "[a] significant change in the customer's demand," "[a] significant change in the infrastructure required to serve the customer's demand," and "[a] permanent termination of service by a customer for a 'frozen' property."[121] Thus, like LUB, SECPA effectively argues that the degree of change required to terminate the right to provide service to frozen customers under Ordering Paragraph No. 3 must be significant or substantial. SECPA also effectively argues that the same standard should be applied to the termination of the right to provide service to all frozen customers (*i.e.*, from LUB to SECPA and vice versa).

[118] LUB's SOP at 14.

[119] *Id*. at 14.

[120] *Id*. at 15.

[121] SECPA's SOP at 11-12 (quoting Hearing Exhibit 305 at 6:7,11,17; 7:3 (Rebuttal Testimony of Mr. Johnston) (emphasis added)).

(3) Analysis

83. The ALJ concludes that further defining the circumstances described in Decision No. 76027 in which frozen customers should be transferred to the certificated utility is unnecessary. As explained more fully below, whether the standard is "a change in the service," "a substantial change in the nature of the service," or "a significant change in the nature of the service," the ALJ finds and concludes that the circumstances justifying a transfer of Well No. 7 from LUB to SECPA do not exist in this proceeding.

84. However, the ALJ agrees that the differing language used in Ordering Paragraph No. 3 of Decision No. 76027 to describe the circumstances in which frozen customers become unfrozen depending on the utility to which the customers are frozen, creates confusion and uncertainty. The confusion and uncertainty are exacerbated by the fact that there is nothing in Decision No. 76027 justifying or explaining the differences, if any, between the differently-worded standard(s). In fact, there is no apparent recognition in Decision No. 76027 that the wording in Ordering Paragraph No. 3 could be interpreted as establishing two different standards depending on whether a customer is frozen to LUB or SECPA. For this reason, and because the parties seemingly agree that the change must be significant or substantial in order to satisfy the standard, the ALJ concludes that Ordering Paragraph No. 3 should be amended as follows (with underlining showing the changes):

> [SECPA] be, and hereby is, authorized to continue service to its present customers located in areas certificated to [LUB] until such time as there is a substantial change in the nature of the service. Likewise, that [LUB] be, and hereby is, authorized to continue service to its present customers located in the areas certificated to [SECPA] until such time as there is a <u>substantial</u> change in <u>the nature of the</u> service.

85. The changes make clear that the same standard is used to determine when the right to serve frozen customers by LUB and SECPA has terminated. They also underscore that

the change must be significant. In other words, not just any change will do. The ALJ concludes that these changes to Ordering Paragraph No. 3 best capture the intent of the Commission in defining the limited circumstances in which the right to serve frozen customers terminates and provides increased clarity to the parties and their customers.

b. Application

(1) LUB's Argument

86. LUB asserts that the facts in this proceeding do not satisfy the standard for terminating the right to provide frozen service in Decision No. 76027 because "there was no change in the nature of the load, no difference in the parameters of service provided by LUB and SECPA, no new or upgraded facilities needed to serve the load, and no claim that LUB's service was inadequate."[122] LUB further contends that May Valley and SECPA engaged in "opportunism" in pursuing a "jointly prepared" plan to transfer service to May Valley from LUB to SECPA.[123] Finally, LUB argues that the Colorado Supreme Court's decision in *Public Serv. Co. of Colo. v. PUC*, 765 P.2d 1015 (Colo. 1988) (*Public Service*) prohibits the type of "'choose your utility' tactics" allegedly engaged in by May Valley here.[124]

(2) SECPA's Argument

87. SECPA argues that a "change in service" took place justifying the transfer of service to SECPA under Decision No. 76027 for three reasons. First, May Valley's exercise of its right to "permanently" disconnect Well No. 7 from LUB constituted a "change in service."[125] Second, the addition of a second deep well at the site of Well No. 7 in 1984 also represented a

[122] *Id*. at 15.
[123] *Id*. at 6-7. *But see id*. at 15 (asserting that the "plan" was merely "facilitated by SECPA").
[124] *Id*. at 16.
[125] SECPA's SOP at 13-14.

"change in service" because it substantially changed Well No. 7's role in May Valley's system and electricity demand.[126] Finally, LUB has made investments in its distribution system to support its service to Well. No. 7 that "arguably constituted a 'change in service."[127]

(3) Analysis

(a) The Addition of the Second Deep Well in 1984

88. The ALJ concludes that the addition of the second deep well at Well No. 7 in 1984 does not serve as the basis to trigger the transfer clause in Decision No. 76027. There is no direct evidence in the record concerning the magnitude of the change in 1984 when May Valley added the second deep well and whether it represented a significant enough change at that time to justify the transfer under Decision No. 76027. SECPA concedes this point, and instead relies on evidence from 2008 through 2020 regarding the electricity usage of Well No. 7.[128] That evidence establishes that May Valley took the second well offline from 2011 to 2019, and that in 2010 (the last full year before May Valley took the second well offline) and 2012 (the first full year that Well No. 7 operated without its second well) the electricity usage by Well No. 7 was 269 MWh and 67 MWh, respectively, which constitutes a 75 percent reduction. SECPA contends that "a similar impact can be extrapolated to when the second well was first installed in 1984."[129] And, based on that extrapolation, SECPA concludes that "the change in the Well No. 7 load in 1984 as a result of the addition of the second well caused a 'significant "instantaneous"

[126] *Id*. at 14-15.
[127] *Id*. at 15-16.
[128] SECPA's SOP at 14-15 (citing Hearing Exhibit 106, Attach. HH-20).
[129] *Id*. at 15.

load change'"[130] that triggers the termination of the right to provide frozen service in Decision No. 76027.

89. The ALJ finds this argument unpersuasive. SECPA recognizes that a significant load change that occurs over time is insufficient to trigger the transfer clause in Decision No. 76027. Specifically, SECPA has proposed that a load change must be "significant" and "instantaneous" to justify a transfer under Decision No. 76027.[131] SECPA thus recognizes that electricity usage by a ratepayer, particularly a load the size of Well No. 7, does not remain constant but changes over time due to a variety of factors. Because such changes are normal and expected, they cannot be the type that the Commission intended to serve as the basis for a transfer under Decision No. 76027.[132] Thus, requiring a change to be "significant and instantaneous" to trigger the transfer language of Decision No. 76027 rules out the normal changes of usage that occur over time.

90. This conclusion derives from the language of Decision No. 76027, which allows the non-certificated utility to continue service "until such time as" a change in service justifying a transfer takes place. This language rules out the type of normal change that occurs over time, no single instance of which is significant but that can add up to significant change in terms of an increase of electricity usage over time. The ALJ agrees with SECPA that Decision No. 76027 rules out such relatively gradual change as a basis for triggering the termination of the right to provide frozen service pursuant to Ordering Paragraph No. 3.

[130] *Id*.

[131] SECPA's SOP at 15 (quoting Hearing Exhibit 305 at 6:11-16 (Rebuttal Testimony of Mr. Johnston)).

[132] *See* Hearing Exhibit 305 at 6:11-16 (stating that "significant 'instantaneous' load change, as opposed to gradual load growth, would be a different load that what was 'frozen' in 1970") (Rebuttal Testimony of Mr. Johnston.

91. Here, as noted above, there is no evidence of electricity usage of Well No. 7 from 1984 (when May Valley added the second well to Well No. 7) until 2007. In addition, while there is evidence of electricity usage from 2008 to 2011 when May Valley took the second, newer well offline and after February 2019 when May Valley placed the second well online, there is no evidence about how much of the usage during those periods was attributable to each of the two wells that comprise Well No. 7.[133] There is also evidence that May Valley changed Well No. 7's output (and thus electricity usage) as May Valley's "business plan" evolved "regarding how Well No. 7 should operate within the totality of [May Valley's] system."[134] As a result, the ALJ cannot conclude that the decrease in usage in 2011 (when May Valley took the second well offline) and the increase in 2019 (when may Valley brought the second well back online) is solely or largely attributable to the second well. Another plausible conclusion from this evidence is that "[t]he magnitude of usage [by Well No. 7] apparently varies with MVWA business plans and customer requirements."[135]

92. Finally, while the ALJ does not conclude that action to terminate the right to provide frozen service under Decision No. 76027 must be undertaken within any period of time after an alleged "change of service," the risks of waiting are underscored in this proceeding. As noted above, there is no direct evidence in this record of the significance of the addition of the second well in 1984. Presumably, such evidence has been lost in the 36 years that have elapsed since that change took place. Moreover, to the extent that LUB upgraded its infrastructure to serve any new load resulting from the addition of the second well, May Valley and SECPA failed to undertake timely action that would have placed LUB on notice to consider whether such

[133] *See* Hearing Exhibit 106, Attach. HH-20.

[134] 1/25/2021 Hearing Transcript at 141:16-23.

[135] Hearing Exhibit 106, Rev. 1 at 4:19-20 (Rebuttal Testimony of Mr. Hourieh).

investment would be in the interest of its remaining ratepayers if Well No. 7 transferred to SECPA.

93. Accordingly, based on the foregoing, the evidentiary record does not establish that the addition of the second well in 1984 represented a sufficiently significant change to qualify as a "change in service" or a "substantial change in the nature of the service" as required by Ordering Paragraph No. 3 of Decision No. 76027.

(b) LUB's Investments in Distribution System

94. SECPA concedes that "there is no record evidence identifying the scope of [any] investments" made by LUB to its "distribution system to support its service to Well No. 7."[136] SECPA nevertheless argues that

> [r]ather than LUB making further investments in infrastructure to serve a load outside of its certificated territory, these investments could have been avoided by arranging for Well No. 7 to be served by Southeast which it was able to do. This action would have accomplished the Commission's goals of gradually eliminating the duplication of facilities and providing service to customers by the utility in whose certificated territory they are located.[137]

SECPA concludes that "[t]o the extent that LUB made system upgrades to support its service to Well No. 7, those investments arguably constituted a 'change in service'" that terminates the right to provide frozen service under Decision No. 76027.[138]

95. The ALJ is unconvinced. The evidence cited by SECPA addresses improvements made by LUB to its "West End Feeder" into which the radial line that serves Well No. 7 ties. The West End Feeder provides service not only to Well No. 7, but also to other ratepayers, including those in the Towns of Wiley and McClave. Mr. Hourieh testified that LUB has made

[136] SECPA's SOP at 15.
[137] *Id.*
[138] *Id.*

upgrades to the West End Feeder for the benefit of all of its ratepayers that receive service via the West End Feeder, not just Well No. 7.[139]

96. Mr. Hourieh's testimony on this subject is at a high level. There is no detail whatsoever concerning LUB's investment into the West End Feeder. Nor is there any evidence that would serve as the basis for determining how much of the investment could have been avoided, if any, if Well No. 7 had not been served by LUB.

97. Accordingly, the ALJ concludes that the evidence does not support the conclusion that investment made by LUB to support Well No. 7 was a "change in service" or a "substantial change in the nature of the service" under Ordering Paragraph No. 3 of Decision No. 76027.

(c) May Valley's Disconnection from LUB

98. Finally, the ALJ concludes that May Valley's disconnection of service from LUB does not trigger the transfer clause of Decision No. 76027. The Colorado Supreme Court's decision in *Public Service* provides the reasoning supporting this conclusion.

99. In *Public Service*, Morning Fresh Farms, Inc. (Morning Fresh) operated an egg, pullet, and poultry waste production facility on a contiguous half-section of land in Weld County. The northern two-thirds of Morning Fresh's property lay within the exclusive service territory of Public Service Company of Colorado (Public Service), and the southern one-third lay within the certificated territory of Union Rural Electric Association, Inc. (Union). Prior to the development of the dispute that culminated in the *Public Service* decision, Public Service and Union provided service to Morning Fresh's facilities located within their respective exclusive territories.

[139] 1/25/2021 Hearing Transcript at 33:6-34:20, 44:25-46:16.

100. Public Service provided lower rates to Morning Fresh, which provided a financial incentive for Morning Fresh to transfer the service provided by Union to Public Service. To do so, Morning Fresh constructed an electric distribution system that integrated all of its buildings and facilities located in the service territories of both Public Service and Union into a single distribution system and located a single point of interconnection to the new distribution system within Public Service's territory. Morning Fresh then disconnected from Union's service and connected its distribution system to Public Service. As a result, Public Service supplied electricity to all of Morning Fresh's facilities from that point forward, including those previously served by Union in Union's exclusive territory.[140]

101. Union filed a formal complaint with the Commission, alleging, among other things, that Public Service unlawfully interfered with its exclusive right to serve the Morning Fresh facilities within its certificated territory. Public Service denied the allegations, contending that it properly delivered electricity to Morning Fresh at a point within Public Service's exclusive service territory, and that it could not control what the customer did with the electricity after delivery.[141]

102. The Commission concluded that Public Service's provision of such service was inconsistent with the doctrine of regulated monopoly, which is designed to protect the public as a whole by preventing the inefficient duplication of services by competing utilities that would result if ratepayers were permitted "to pick and choose between utilities."[142] The Commission also rejected a "point-of-service" test that "focuses on the point at which electricity is delivered

[140] *Public Service*, 765 P.2d at 1017.
[141] *Id*.
[142] *Id*. at 1024

rather than on the point at which it is consumed."[143] According to the Commission, approval of that test

> would allow large customers to bolt from one utility's system by extending their own line to another utility's service territory. Low use customers (i.e. residential and small commercial) who could not afford privately to extend transmission lines to another utility's service area would be left with the responsibility for the fixed costs previously spread to the larger customer base. The use of this test would also allow large firms to abandon high-cost utilities to get lower costs and would thus leave unused plant, further driving up costs to remaining customers. This test could also lead to subterfuge as to land purchase, lease, or right of way acquisition by large consumers to cross certificated boundaries.[144]

The Commission concluded that adopting the "point-of-service" test, and thereby approving the transfer of service to Morning Fresh's facilities located in Union's territory from Union to Public Service, was not in the public interest.[145]

103. The Colorado Supreme Court upheld the Commission's decision.[146] In so doing, the Court stated:

> [t]he doctrine of regulated monopoly is designed to protect the interests of the public as a whole. The doctrine was not designed to protect the needs of the individual consumer. . . . Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the [Commission].[147]

104. Here, as found above, there are five May Valley wells located in SECPA's territory that are "frozen" to, and thus served by, LUB pursuant to Decision No. 76027, including Well Nos. 7 and 11. If treated as a single customer, the combined load of these five wells would be LUB's fourth or fifth largest customer. As a result, it is reasonable to conclude that May

[143] *Id*. at 1019.
[144] *Id*. at 1019-1020.
[145] *Id*. at 1020.
[146] *Id*. at 1025.
[147] *Id*. at 1025 (quotation marks and citations omitted).

Valley has a significant financial incentive to transfer all five of the wells to SECPA to take advantage of SECPA's lower rates compared to LUB.

105. If the Commission were to conclude, therefore, that Well No. 7 must transfer to SECPA based on the facts of this proceeding, there is a risk that such a decision would be viewed as a roadmap for May Valley to secure the transfer to SECPA of one or more of the remaining four wells served by LUB. Such an outcome would leave LUB's other customers "with the responsibility for the fixed costs previously spread to the larger customer base."[148] It might also lead to "subterfuge" by May Valley and/or SECPA in attempting to secure the transfer of one or more of the remaining four wells to SECPA. Based on *Public Service*, the ALJ concludes that such an outcome would not be in the public interest.[149]

106. As in *Public Service*, "larger policies are at stake here than [May Valley's] self-interest, and those policies must be enforced and safeguarded."[150] For that reason, and the other reasons stated above, the ALJ concludes that May Valley's disconnection of service from LUB was not a "change of service" or a "substantial change in the nature of the service" under Ordering Paragraph No. 3 of Decision No. 76027.

2. Alleged Violation of Rule 3103(a)

107. Rule 3103(a) states in relevant part that "[a] utility shall not extend . . . any service . . . not in the ordinary course of business without authority from the Commission."[151]

[148] *Id*. at 1019.

[149] In their comments, the City of La Junta Utility Board and Las Animas Municipal Light & Power both state that they worry about the implications of a decision allowing SECPA to retain Well No. 7 for their ability to retain their customers who reside outside of their municipal boundaries.

[150] *Public Service*, 765 P.2d at 1025.

[151] 4 CCR 723-3.

Here, SECPA's extension of service to Well No. 7 was not in the ordinary course of business and SECPA undertook the extension without permission from the Commission. Accordingly, the ALJ concludes that SECPA violated Rule 3103(a).[152]

3. LUB's Requested Relief

108. LUB requests three forms of relief for SECPA's violation of Ordering Paragraph No. 3 of Decision No. 76027 and Rule 3103(a): (a) an order to SECPA to cease and desist from providing service to Well No. 7; (b) an order authorizing LUB to offer May Valley the option to reconnect Well No. 7 to LUB's service; and (c) a finding that LUB is entitled to compensation from SECPA for the revenue LUB "lost" from March 4, 2020 until SECPA disconnects Well No. 7.[153]

109. The ALJ will grant the first two forms of relief requested by LUB. The Commission has the authority to order SECPA to cease and desist from violating Decision No. 76027 and LUB's exclusive right to provide service to Well No. 7.[154] As a result, given the findings and conclusions above, it is appropriate to order SECPA to cease and desist from providing service to Well No. 7 and authorize LUB to offer May Valley the option to reconnect Well No. 7 to LUB's service.

[152] *Id*.

[153] LUB's SOP at 17.

[154] *See also* SECPA's SOP at 23 ("if the Commission finds that there was no 'change in service' at Well No. 7, it may order Southeast to disconnect from that load").

110. The Commission does not, however, have jurisdiction to address damages.[155] LUB states that it "is not seeking an award of damages from the Commission at this time. . . . [but only] the Commission's views and guidance on the appropriate measure to facilitate negotiations with SECPA."[156] Likewise, SECPA requests the Commission to "provide additional guidance as to whether and when compensation may be required when a 'frozen' customer reverts to the certificated utility and how the amount of such compensation should be determined."[157] While the ALJ appreciates that the parties have reached an impasse in their negotiations "towards an eventual exchange of customers where feasible to eliminate service by one utility in the area certificated to the other,"[158] the ALJ will not issue an advisory opinion on an issue over which the Commission has no jurisdiction.[159]

B. SECPA's Counterclaims and Requested Relief

111. SECPA asserts two counterclaims. The first seeks a declaratory order that LUB's authority to serve Well No. 7 pursuant to Decision No. 76027 terminated because there was a "change of service," SECPA complied with Decision No. 76027 and Rule 3103(a) in serving Well No. 7, and "to the extent any compensation is found to be appropriate, SECPA's proposed

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[155] *See*, *e.g.*, Decision No. C17-0750 issued in Proceeding No. 15A-0589E on September 14, 2017 at 121-22 (¶ 217) ("Nor does the Commission possess the authority . . . to provide redress in the form of monetary damages for claims that are founded in an alleged violation of Public Utilities Law or a tariff, Commission decision, or of Commission rules."); Decision No. R14-0369 issued in Proceeding No. 13F-0110EG on April 9, 2014 at 17-18 (¶ 40) ("the Commission does not have authority to award monetary damages in complaint cases brough pursuant to § 40-6-108, C.R.S."); Decision No. C02-1363 issued in Proceeding No. 01F-530E on December 5, 2020 at 15 (¶ 4.d) ("We agree that a request for damages for Public Service's past conduct (*e.g.*, having provided electric service to customers in Willow Trace since May 2000 until it ceases service there) is properly in the District Court."); Decision No. R00-125 issued in Proceeding No. 99F-404T on February 7, 2000 at 14 (¶ L) ("This Commission has no jurisdiction over damages at all.").

[156] LUB's SOP at 18.

[157] SECPA's SOP at 30.

[158] Decision No. 76027 at 25 (Ordering Paragraph No. 3).

[159] *See People v. Trupp*, 51 P.3d 985, 986 (Colo. 2002) ("a court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe, or to decide a case on speculative, hypothetical, or contingent set of facts"); Decision No. C15-0979 issued in Proceeding No. 13A-0686EG on September 8, 2015 at 2 (¶ 3) (citing *Trupp* in declining to issue an advisory opinion).

methodology for compensating LUB for the transfer of May Valley's service is just, reasonable, and not unduly discriminatory or preferential."[160] SECPA's second counterclaim requests a declaratory order that:

> (a) SECPA's and LUB's authority to serve customers located in the certificated territory of the other utility is limited by Decision No. 76027; (b) such authority is not permanent and terminates at such time as there is a change in service to such customers; and (c) upon such change in service, and absent an agreement to the contrary between SECPA and LUB, the exclusive right and obligation to serve such customers reverts to the utility in whose certificated territory the customer is located.[161]

112. Based on the findings and conclusions above, SECPA's first counterclaim is denied. The second counterclaim will be granted-in-part and denied-in-part. Specifically, the ALJ will issue a declaratory order that: (a) SECPA's and LUB's authority to serve customers located in the certificated territory of the other utility is governed by Decision No. 76027; (b) Ordering Paragraph No. 3 of Decision No. 76027 (as amended above) governs the circumstances in which such authority terminates; and (c) upon such termination, and absent an agreement to the contrary between SECPA and LUB, the exclusive right and obligation to serve such customers reverts to the utility in whose certificated territory the customer is located.

V. ORDER

A. The Commission Orders That:

1. The first and second claims of the Complaint filed by the Utilities Board of the City of Lamar, Colorado (LUB) are granted.

[160] SECPA's Answer and Counterclaim at 13-14 (¶ 33). In its *Amicus* Brief, CAMU argues that, if SECPA retains Well No. 7, SECPA's compensation methodology should not be employed because it is not just and reasonable. Instead, the Commission is to employ the methodology in § 40-9.5-204, C.R.S., if SECPA retains Well No. 7., and in its *Amicus* Brief, CREA asserts that, if SECPA is permitted to retain Well No. 7, LUB is not entitled to any compensation.

[161] *Id*. at 15 (¶ 41).

2. Southeast Colorado Power Association (SECPA) shall cease and desist from providing service to Well No. 7 that is owned and operated by May Valley Water Association (May Valley). LUB is authorized to offer May Valley the option to reconnect Well No. 7 to LUB's service.

3. The first and second counterclaims filed by SECPA are denied and granted-in-part and denied-in-part, respectively. Consistent with the discussion above, the Commission declares that: (a) SECPA's and LUB's authority to serve customers located in the certificated territory of the other utility is governed by Decision No. 76027 that issued on October 6, 1970; (b) Ordering Paragraph No. 3 of Decision No. 76027 (as amended below) governs the circumstances in which such authority terminates; and (c) upon such termination, and absent an agreement to the contrary between SECPA and LUB, the exclusive right and obligation to serve such customers reverts to the utility in whose certificated territory the customer is located.

4. Consistent with the discussion above, Ordering Paragraph No. 3 of Decision No. 76027 is amended pursuant to § 40-6-112(1), C.R.S., to state the following:

> Southeast Colorado Power Association be, and hereby is, authorized to continue service to its present customers located in areas certificated to Lamar until such time as there is a substantial change in the nature of the service. Likewise, that Lamar be, and hereby is, authorized to continue service to its present customers located in the areas certificated to Southeast Colorado Power Association until such time as there is a substantial change in the nature of the service. The two utilities are urged to negotiate towards an eventual exchange of customers where feasible to eliminate service by one utility in the area certificated to the other.

5. Proceeding No. 20F-0243E is closed.

6. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

7. As provided by §40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the Recommended Decision shall become the decision of the Commission and subject to the provisions of §40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director