

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

RECEIVED

APR 30 1990

COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

In the matter of the application of Cuivre River)
Electric Service Co. for permission, approval and)
a certificate of convenience and necessity au-)
thorizing it to construct, install, own, operate,)
control, manage and maintain an electric dis-)
tribution system for the public located in the)
territory encompassing parts of St. Charles,)
Lincoln, Pike, Warren and Montgomery Counties.)

CASE NO. EA-87-102

In the matter of the application of Union Electric)
Company for a certificate of convenience and)
necessity authorizing it to own, control, manage,)
and maintain an electric power system for the)
public in most of the service territory of its)
former subsidiaries.)

CASE NO. EA-87-159

APPEARANCES: Rodric A. Widger, Attorney at Law, Stockard, Andereck, Hauck,
Sharp & Evans, P. O. Box 1280, Jefferson City, Missouri 65102,
for Cuivre River Electric Service Co. and Cuivre River
Electric Cooperative, Inc.

Kathrine C. Swaller, Paul A. Agathen, and James J. Cook,
Attorneys at Law, 1091 Gratiot Street, St. Louis,
Missouri 63166, for Union Electric Company.

Carol L. Bjelland, Assistant Public Counsel, P. O. Box 7800,
Jefferson City, Missouri 65102, for the Office of the
Public Counsel and the Public.

Douglas C. Walther, Assistant General Counsel, P. O. Box 360,
Jefferson City, Missouri 65102, for the Staff of the Missouri
Public Service Commission.

REPORT AND ORDER

By an application filed March 13, 1987, in Case No. EA-87-102, Cuivre River Electric Service Co. (CRESCO) seeks a certificate of public convenience and necessity to provide electric service to an area encompassing parts of St. Charles, Lincoln, Pike, Warren and Montgomery Counties. The timely application to intervene filed on behalf of Union Electric Company (UE) was granted.

By an application filed June 8, 1987, in Case No. EA-87-159, UE seeks a certificate of public convenience and necessity to provide electric service in a substantial portion of the State of Missouri in which its former subsidiaries served. The area sought by UE includes the area requested herein by CRESCO.

In response to a motion by UE the Commission severed that portion of UE's application in Case No. EA-87-159 which requests the area sought by CRESCO in Case No. EA-87-102 and joined for hearing with CRESCO's application the corresponding portion of the UE application. The hearing was conducted September 15, 1987.

On November 24, 1987, the Commission Staff filed a Motion For Stay Of Proceedings pending the outcome of a Petition in Quo Warranto filed in the Circuit Court of Boone County, *State of Missouri ex rel. the City of Springfield v. Boone Electric Cooperative*, Docket No. 427463. That case challenged the lawfulness of Boone Electric Service Company, which was created and exists under the same conditions as CRESCO. On December 18, 1987, the Commission granted the motion. On October 4, 1988, the Commission, in response to the unexpected delays in the resolution of the legal issues by the Boone County Circuit Court, issued an order setting briefing schedule. Briefs have been filed by CRESCO, UE, the Commission Staff and the Office of the Public Counsel. Reply briefs have been filed by CRESCO, UE, and the Office of the Public Counsel.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

CRESCO's Application

By the instant application CRESCO seeks authority to render electric service in parts of St. Charles, Lincoln, Pike, Warren and Montgomery Counties.

CRESCO has deleted most of incorporated areas within those counties. The remainder of the area requested by CRESCO comprises most of the current operational area of Cuivre River Electric Cooperative (Cooperative).

CRESCO is a general business corporation formed in January, 1985, and is a wholly-owned subsidiary of Cooperative. CRESCO also is a regulated public utility within the meaning of Section 386.020, RSMo (Cum. Supp. 1989).

CRESCO presently holds a certificate of public convenience and necessity to render electric service in portions of the City of Lake St. Louis granted in Case No. EA-86-13. Under its present, and proposed, method of operation CRESCO will have no employees or facilities and all services necessary to run the utility are to be provided by Cooperative under a contract.

Pursuant to agreements between CRESCO and Cooperative, Cooperative will transfer its entire electrical system to CRESCO in exchange for 100 percent of CRESCO's stock. CRESCO's entire earnings will be transferred to the Cooperative. The general manager of Cooperative will be the general manager of CRESCO; the board of directors of the Cooperative will be the board of directors of CRESCO; the rate structure of the Cooperative will be adopted by CRESCO; and the headquarters building of Cooperative will become the headquarters building of CRESCO. Also under the contract CRESCO will be required to purchase its entire power requirements from the Cooperative. This particular arrangement has been criticized by the Commission's Staff witnesses because it will preclude CRESCO from shopping for least cost power.

CRESCO plans to finance its proposed expanded operations with loans obtained from the Cooperative which in turn have been secured from the Rural Electrification Administration (REA) or the National Rural Utilities Cooperative Finance Corporation (CFC). If for any reason loans from Cooperative were to become unavailable, CRESCO would have no financing because there is no other proposed method of securing funds.

The evidence shows that there are no prospective customers in CRESCO's proposed service area not able to receive electrical service from either the Cooperative or UE. No prospective user of CRESCO's service testified in support of the application. CRESCO was originally formed to serve in portions of Lake Saint Louis, Missouri, in which the parent cooperative could not at that time extend new services because Lake Saint Louis had a population in excess of 1500. At the time of CRESCO's original application, Chapter 394, RSMo, governing rural electric cooperatives, contained a prohibition against service by REA Cooperatives being expanded in or extended to communities of more than 1500 persons. In the instant case, the CRESCO operating witness acknowledged that avoidance of that prohibition continued to be one of the purposes of CRESCO.

The second purpose for the CRESCO application herein is alleged to be avoidance of wasteful duplication. Cooperative and UE presently compete for customers in the proposed service area and in many places the two competitors have facilities quite close to each other. Since no witnesses needing service testified, the CRESCO operating witness acknowledged that the need in this case was actually the need of CRESCO and the Cooperative.

CRESCO proposes to eliminate wasteful duplication by the application of a "closer to" principle under which CRESCO would extend services to customers where it has facilities closer to the prospective customer than UE. CRESCO proposes that customer preference would rule in cases where two competing supplier's electric facilities are equally distant from the prospective customer. This "closer to" framework is urged by CRESCO as a substitute for the traditional obligation to serve requirement normally imposed on all regulated utilities. If granted, CRESCO's certificate, in effect, would be nonexclusive.

CRESCO's allegation of need is that a certificate is required to stop wasteful duplication of facilities by competing companies. The Commission recognizes

the problems created by destructive competition but finds that granting CRESCO's application will not eliminate the potential for harm. If CRESCO's application is granted, the parent cooperative will not cease to exist. An expanded CRESCO will represent a third competitor in the service area where now two exist. This is particularly true since CRESCO's application only covers a part of the parent cooperative's existing service territory.

In considering similar allegations in a prior application for a certificate by a cooperative, the Commission expressed difficulty in seeing how the proposal could achieve the stated goal of avoiding duplication.

The Commission's jurisdiction over the cooperatives is limited to safety matters pursuant to Section 394.160, RSMo 1986, as amended, and the settling of change of supplier disputes pursuant to Sections 393.106 and 394.315, RSMo 1986, as amended. The Commission lacks the jurisdiction necessary to prevent the cooperatives from duplicating facilities in order to compete for prospective customers unless in so doing the cooperatives violate safety rules or the change of supplier statutes. Section 386.310(2), RSMo 1986, as amended. Sho-Me's General Manager, John Davis, admitted under cross-examination that Sho-Me's proposal provided for no restriction on cooperatives to refrain from extending distribution lines to gain the advantage of being closer to a prospective customer. Therefore, whether or not this certificate is granted, the cooperatives will be free to duplicate facilities in order to compete with other regulated providers there, provided they do so safely. *Application of Sho-Me Power Corporation et al.*, 29 Mo. P.S.C. (N.S.) 415, 418 (1988).

The Commission recognizes that the General Assembly statutorily has allowed competition between and among cooperatives, regulated utilities and municipalities. In fact, the General Assembly again acknowledged such competition with the passage of Section 394.312, RSMo (Cum. Supp. 1989). The Commission finds that granting CRESCO's request herein would only compound destructive competition.

The Public Counsel opposes the application of CRESCO for a number of reasons. Primary in the list of objections is the serious question concerning the relationship between CRESCO and its parent. It is the contention of the Public Counsel that no certificate to an electric service company should be issued prior to

a resolution of the issues in the Petition For Quo Warranto proceeding *State ex rel. City of Springfield v. Boone Electric Cooperative*, Docket No. 427463 in the Circuit Court of Boone County, Missouri.

Central to the Public Counsel's opposition is the contention that the existence of CRESCO, for the purposes stated in this application, thwart the intentions of the General Assembly of the State of Missouri in enacting Chapter 394, RSMo and the United States Congress in enacting 7 U.S.C.A. Section 901 et seq., (The Rural Electrification Act). It is the contention of the Public Counsel that those two bodies of statutes were enacted for the purpose of providing electrical energy in rural areas not served by conventional investor-owned electric utilities. It is the Public Counsel's further contention that allowing subsidiaries of REA Cooperatives to devote a substantial portion of its efforts to serving urban areas will detract from the purposes for which the Cooperatives were created.

It is also the contention of the Public Counsel that the proposed method of service would amount to an improper diversion of low cost financing authorized by the federal government for the assistance of rural areas. It was pointed out, that in the event of a determination that the proposed method of financing is unauthorized, there is no proposed alternative for financing of the Applicant.

CRESCO's application is also attacked as being an unusual variation from the customary practice of imposing an obligation to serve all customers in the service area as a condition of receiving protected territory. The Public Counsel points out that the company has given no explanation of how the "closer to" principle and customer preference will be applied.

The Commission Staff also criticizes the unique nature of the CRESCO application in that it does not seek an exclusive certificate nor does it contemplate an obligation to serve all potential customers. The Commission Staff witnesses acknowledge that a substantial amount of duplication already exists to the extent

that it would be impossible to define areas of exclusive authorization to serve in much of the proposed service area. Staff witnesses indicate that in other areas separation of exclusive areas could be accomplished, although no evidence was offered as to how or where these exclusive lines would be drawn.

Staff witnesses also are concerned about the difficulty to regulate the Applicant's proposed method of service. It is pointed out that the Cooperative allocates expenses to CRESCO and in future rate case audits it would be necessary to audit both the books of CRESCO and its parent. The Staff also criticizes the Applicant's agreement to purchase all of its power from the parent rather than to shop for least cost power. That method of purchase would make it necessary, in future rate cases, to audit the books of the transmission and generation cooperative to establish the reasonableness of CRESCO's cost of power. Under those circumstances the Commission Staff would be required to audit the books of more than one entity not subject to the regulation of this Commission.

The Staff also points out that CRESCO presently does not maintain continuing property records uniformly required of investor-owned utilities in this state. The continuing property records system maintains a history of age and original cost of all retirements by vintage year whereas CRESCO uses a historical average unit price system to price retirement units without regard to their age. The Staff is also critical of the fact that CRESCO does not follow the Uniform System of Accounts prescribed by 4 CSR 240-20.030.

The Commission finds that the evidence in this matter does not establish that it is necessary or convenient for the public service to grant the authority sought by CRESCO. It was acknowledged that no prospective customers have asked for the services of CRESCO. CRESCO is not proposing any service that cannot presently be adequately rendered by the parent cooperative or UE. The many reservations expressed

by Staff and the Public Counsel witnesses lend additional support for denying CRESCO's application, especially the speculative nature of CRESCO's financing.

We acknowledge that CRESCO currently holds authority from this Commission to render service as a regulated public utility in the City of Lake Saint Louis. *Application of Cuivre River Electric Service*, 28 Mo. P.S.C. (N.S.) 176 (1986). CRESCO is, however, far from a typical regulated public utility. As established in *Cuivre River*, CRESCO was incorporated by its parent cooperative for the purposes of continuing electric service in Lake Saint Louis after it had become an incorporated community of 1,500 residents or more. At the time of the incorporation, the parent cooperative was the primary supplier of electricity in the Lake Saint Louis area. Pursuant to Sections 394.020 and 394.080, RSMo 1986, rural electric cooperatives could only provide service in rural areas, a rural area being defined as municipalities of 1,500 residents or less. As a result, upon incorporation, the City of Lake Saint Louis had no authorized provider of new electricity since the cooperative could no longer extend new services.

Although the Commission's Report and Order in *Cuivre River* expressed concern about the authority of a cooperative to form a wholly-owned regulated subsidiary, the authority was granted in response to an immediate need for service which no other electric provider had authority to render at that time. At the time of the original CRESCO application, UE did not have a franchise to serve Lake Saint Louis, therefore, it could not have been granted a certificate by this Commission. In the instant case, the same pressing necessity for granting operating authority to CRESCO does not exist. UE has franchises from the five counties in which it proposes to operate as well as from the municipalities. In addition, there is no person in the proposed service area unable to receive electric service from either the parent cooperative or from UE.

The Commission notes that the creation and subsequent certification of CRESCO would have been unnecessary if the 1989 amendments to Section 394.080 had occurred prior to 1986. New Section 394.080.2 authorizes cooperatives to supply electric energy in cities, towns and villages having a population in excess of 1,500 inhabitants if the cooperative previously was the predominant supplier of retail electric energy in that locality and if it has secured an appropriate municipal franchise.

For all of the foregoing reasons, the Commission determines that CRESCO has failed to prove that the public interest would be served by expanding CRESCO's service territory by granting CRESCO's application herein.

UE's Application

UE is a Missouri corporation duly qualified and authorized to operate as a regulated public utility within the meaning of Section 386.020(29), RSMo (Cum. Supp. 1989). The UE service territory involved in the instant application is a portion of the service territory of one of the Company's former subsidiaries. As successor in interest to the former subsidiary, UE holds area certificates as well as numerous transmission line certificates in the proposed service area. UE has existing facilities throughout the proposed service area and has always assumed it had the authority to render the service proposed by this application as well as the obligation to render that service. UE has planned for customer growth in part of the five counties involved in this application and has adequate facilities to serve that expected customer growth. In 1986, the last full year for which information is available prior to the hearing in this case, UE added 1,990 customers alone in the Wentzville District. At the time of the hearing UE witnesses expected the customer growth in that district to continue at the rate of approximately 2,000 per year.

Although UE has always assumed the authority and responsibility to render the proposed service, its authority to do so has been the subject of a number of

complaints concerning extensions under its line authority in recent years. In addition to these complaints, the Company's extension practices have also been subject to criticism from the Commission Staff. To eliminate any potential doubts about its authority to continue to serve, and to eliminate complaints, UE has filed the instant application. The application has also been filed in response to the Commission's suggestion that it is desirable for electric companies to convert line certificates to area certificates. *Application of Union Electric Electric Company*, 29 Mo. P.S.C. (N.S.) 415, 420 (1988).

The Commission finds there is a sufficient public need for the service provided herein by UE. The Commission finds that it is still sound public policy for a regulated company to convert a collection of line certificates to an area certificate which more explicitly describes a geographic territory, thereby, eliminating disputes. The UE application merely seeks to continue under an area certificate what it is capable of performing under its current combination of area and line certificates.

For all of the foregoing reasons, the Commission determines that UE has proved the public interest will be served by granting UE's application.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions:

The instant applications are governed by Section 393.170, RSMo 1986, which requires an electrical corporation secure a certificate of authority from this Commission prior to construction and operation of an electric plant. The applicable section grants the Commission the discretion to award a certificate if, after hearing, the Commission determines that the requested authority is necessary or convenient for the public service. *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147 (Mo. App. 1980).

Convenience and necessity of the public is of paramount importance and the needs of the applicant utility are "only of secondary importance." *Public Water*, at 156. In CRESCO's case, the actual need has been demonstrated to be that of the applicant service company or of its parent Cooperative and no prospective user of the service has supported the application. To prove "public need" or "necessity", an applicant must show that the additional service would be an improvement to justify its cost and that the inconvenience to the public resulting from the lack of the utility's proposed service is sufficiently great as to amount to a necessity. *State ex rel. Beaufort Transfer Company v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973). To the contrary, the evidence establishes that all prospective users of electric service can secure that service from either CRESCO's parent cooperative or from UE. Adding yet another supplier such as CRESCO will not diminish, and will only promote, destructive competition. The Commission further concludes that adoption of the "closer to" framework in lieu of the traditional obligation to serve requirement is not in the public interest and is contrary to long-standing practice. *Application of Sho-Me Power Corporation, et al.*, 29 Mo. P.S.C. (N.S.) 415, 418 (1988).

This Commission has denied applications for certificates of convenience and necessity by a regulated utility in the absence of requests for the utility's service even when the available alternatives were unregulated municipal utilities and rural electric cooperatives. *In the matter of The Empire District Electric Company*, 9 Mo. P.S.C. (N.S.) 349 (1960). However, UE's instant application is predicated on the existence of authority which it has presumed to have for many years through existing line certificates and existing facilities. UE's application has been filed only to resolve any potential doubts about its authority to perform the service in which it is actively engaged, such as those raised in *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 283 (Mo. App. 1989). UE's application also has been filed in response to the Commission's stated view that it is sound public policy

for regulated utilities to convert line certificates into area certificates which more explicitly delineate the geographic territory in which the utilities are authorized to serve. *Sho-Me*, at 420.

In determining whether or not to grant a certificate of public convenience and necessity the Commission has consistently required the applicant to demonstrate the adequacy of its financing to permit conduct of the operations contemplated. If the Applicant is unable to demonstrate sufficient financial strength, the proposed certificate should not be granted. *Miller Communications, Inc.*, 25 Mo. P.S.C. (N.S.) 339 (1982). While the adequacy of UE's financing clearly has been shown, such is not the case with CRESCO.

Some of the parties urge rejection of the CRESCO application under the contention that some of the activities of CRESCO and some of its contemplated activities are unlawful. This Commission has no power to declare or enforce any principle of law or equity. *Lightfoot v. City of Springfield*, 236 S.W.2d 348 (1951). For that reason we conclude that it would be improper for us to attempt to resolve numerous legal issues inherent in the attacks contained in the briefs of the parties. While we decline to attempt to resolve those issues, the Commission nevertheless cannot simply ignore their potential resolution against CRESCO as one of the many factors inherent in a public interest determination under Section 393.170, RSMo 1986.

Finally, the Commission concludes that a grant of authority which would be instrumental in diverting activities and resources of REA cooperatives from their traditional rural role would be an assumption of authority not granted the Commission by the General Assembly. This Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and the powers reasonably incidental to those expressly conferred powers. *State ex rel. and to use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044 (1943). The General Assembly of this state created the Public Service Commission for the expressed

purpose of regulating public utilities. Subsequently, the General Assembly enacted Chapter 394 of the statutes of the State of Missouri, thereby creating rural electric cooperatives for the purpose of rendering electric service in rural areas not generally served by public utilities. The General Assembly is well aware of the coexistence of the regulated and the unregulated suppliers of electricity and of the competition such coexistence engenders. The Commission notes that the General Assembly recently enacted Section 394.312, RSMo (Cum. Supp. 1989), wherein it provided the alternative of territorial agreements among suppliers to displace destructive competition. While such agreements clearly are voluntary, the Commission encourages the Applicants herein to earnestly explore this newly-created option. The Commission notes further that Section 386.310, RSMo (Cum. Supp. 1989), precludes the Commission from allocating territory or granting territorial rights among suppliers based on safety reasons. In the absence of a legislative mandate for the Commission to assign protected service territories among all providers of regulated and unregulated providers of electric service on a statewide basis, the Commission declines to do so on a piecemeal basis under the scheme proposed herein by CRESCO.

For all of the foregoing reasons the application of CRESCO should be denied, and the application of Union Electric should be granted.

It is, therefore,

ORDERED: 1. That the application of Cuivre River Electric Service Co., filed herein on March 13, 1987, seeking a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain an electric distribution system for the public located in the territory encompassing parts of St. Charles, Lincoln, Pike, Warren and Montgomery Counties be, and the same is, hereby denied.

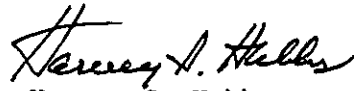
ORDERED: 2. That the application of Union Electric Company, filed herein on June 8, 1987, seeking permission, approval and a certificate of convenience and

necessity authorizing it to own, control, manage and maintain an electric power system for the public in most of the service territory of its former subsidiaries, be, and is, hereby granted.

ORDERED: 3. That within thirty (30) days from the effective date of this Report and Order Union Electric Company shall file for Commission approval proposed tariffs containing a metes and bounds description of the service area herein involved and a service area map in compliance with 4 CSR 240-2.060(2)(A)(7).

ORDERED: 4. That this Report and Order shall become effective on the 30th day of May, 1990.

BY THE COMMISSION


Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch, McClure,
and Letsch-Roderique, CC., Concur and
certify compliance with the provisions
of Section 536.080, RSMo 1986.

Dated at Jefferson City, Missouri,
on this 27th day of April, 1990.