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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the matter of the application of Boone Electric Service)
Co. for permission, approval, and a certificate of conven-)
ience and necessity authorizing it to construct, install,)
own, operate, control, manage and maintain an electric)
distribution system for the public located in the territory)
encompassing parts of Audrain, Boone, Callaway, Monroe and)
Randolph counties.)

Case No. EA-87-99

In the matter of the application of Union Electric Company)
for permission, approval, and a certificate of convenience)
and necessity authorizing it to construct, install, own,)
operate, control, manage and maintain an electric distribu-)
tion system for the public in parts of Audrain, Boone,)
Callaway and Randolph counties.)

Case No. EA-88-29

Appearances: Rodric A. Widger, Stockard, Andereck, Hauck, Sharp & Evans, Post
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Commission, Post Office Box 360, Jefferson City, Missouri 65102, for
the staff of the Missouri Public Service Commission.

REPORT AND ORDER

On March 10, 1987, Boone Electric Service Co. (BESCO) filed an application,
Case No. EA-87-99, seeking a certificate of convenience and necessity from the Com-
mission to provide electric service to the public in an area encompassing parts of
Audrain, Boone, Callaway, Monroe and Randolph counties. Notice of the application
was made and, subsequently, interventions were filed by and granted to the City of

Columbia, the City of Springfield, the City of Centralia, Union Electric Company (UE) and the Missouri Association of Municipal Utilities (MAMU).

An early prehearing conference was held and the parties filed a proposed schedule of proceedings. The parties also indicated agreement that if UE filed an application for a certificate of convenience and necessity to serve all or a portion of the same area sought by BESCO, UE's application would follow the same procedural schedule proposed for BESCO. The Commission adopted the procedural schedule as proposed.

Subsequently, UE filed its application in Case No. EA-88-29 to provide electric service in those areas sought by BESCO. The Commission on September 1, 1987, consolidated Cases No. EA-87-99 and EA-88-29 for hearing.

On December 4, 1987, the Commission suspended the proceedings in these cases 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 petition challenges the lawfulness of the relationship between Boone Electric Cooperative and Boone Electric Service Co. The Petition seeks an order dissolving BESCO and, if successful, would render BESCO's application moot.

On July 7, 1988, the Commission sought comments from the parties concerning the lifting of the stay since no decision was forthcoming in the Quo Warranto action. On September 27, 1988, the Commission again scheduled hearings in this matter and allowed for supplemental testimony to be filed. The hearings were held on December 12 and 13, 1988.

Initial briefs were filed by the City of Springfield, Commission Staff, BESCO, Public Counsel (PC), and UE. Reply briefs were filed by BESCO, UE and PC. BESCO moved to strike the City of Springfield's brief and rescind the City's intervenor status. BESCO argued that the City's brief was not in the proper form and did

not address the issues of fact or law in this case. The City of Springfield argued that although its brief was fictional, its import was factual.

The City of Springfield filed its initial brief in allegory rather than in the traditional prosaic form of addressing the facts and arguing its position as to those facts and the relevant law. Where, usually, objections are raised that briefs are fiction rather than fact, here the City contends that its brief, although fiction, is indeed fact. Leaving aside any literary criticism of Springfield's brief, the Commission cannot condone such license and has found little value in Springfield's brief in deciding this case. The Commission, though, can find no benefit from striking the brief and will deny the motion, as well as the motion to rescind Springfield's intervenor status.

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.

BESCO's Application

Boone Electric Service Co. (BESCO) is seeking authority to provide electric service to the public in parts of Audrain, Boone, Callaway, Monroe and Randolph counties, all in Missouri. BESCO has included only one incorporated municipality, Harrisburg, in the area it is seeking. The service territory excludes a band of unincorporated area adjacent to the City of Columbia which is the subject of a Commission-approved territorial agreement between Boone Electric Cooperative (Cooperative) and the City of Columbia. The area sought by BESCO corresponds with the territory served by Cooperative except for the excluded areas.

BESCO is a wholly-owned subsidiary of Cooperative. Cooperative is a rural electric cooperative organized and existing pursuant to Chapter 394, R.S.Mo. 1986. Cooperative formed BESCO as a general business corporation to acquire all of the distribution facilities of Cooperative in the areas where BESCO is seeking to serve.

Pursuant to agreements between BESCO and Cooperative, Cooperative will transfer its entire electrical system in the areas for which authority is sought in exchange for 100 percent of BESCO's stock. BESCO's entire earnings will be transferred to Cooperative. The general manager of Cooperative will be the general manager of BESCO; the Board of Directors of Cooperative will be the Board of Directors of BESCO; the rate structure of Cooperative will be adopted by BESCO. BESCO will be required to purchase all of its electrical energy from Cooperative and Cooperative will perform all maintenance, new construction, financing, accounting, engineering and record-keeping for BESCO. BESCO will have no employees. Financing for BESCO operations is proposed to be through Cooperative.

BESCO is proposing to operate as a regulated public utility subject to Commission jurisdiction, but all operations will be performed by the unregulated Cooperative. BESCO is not seeking an exclusive certificate for the areas sought and has instead proposed the Commission adopt a "closer to" framework as a substitute for the traditional obligation to serve requirement normally imposed on all regulated utilities.

UE opposes the granting of a certificate to BESCO, as does Public Counsel. Staff proposes the Commission grant BESCO exclusive authority only for that portion of the proposed service territory where UE currently does not have facilities. Staff, though, does raise concerns or reservations about the Commission's practical ability to effectively regulate BESCO's operations.

UE and Cooperative currently have facilities in all or substantial portions of the proposed area. BESCO has offered no evidence of receiving requests for service from BESCO within the regulated area. Moreover, BESCO has offered no evidence of any customer who has been denied service, is being denied service, or who might in the reasonably foreseeable future be denied service from one of the existing suppliers.

The record indicates that BESCO's reason for seeking the certificate is to attempt to protect Cooperative's sales and market area: since Cooperative is not regulated by the Commission, the Commission could not grant Cooperative a certificate or prescribe its service territory. BESCO, as a regulated utility, could receive protected service territory and could seek additional service areas within incorporated municipalities of over 1,500 persons where Cooperative is prohibited by statute from serving new customers.

The Commission finds that these reasons do not rise to the level of a public need for the service under Section 393.170, R.S.Mo. 1986. The General Assembly statutorily has allowed competition between and among cooperatives, regulated utilities and municipalities. In fact, the General Assembly again acknowledged such of competition with the passage of Section 394.312, R.S.Mo. (Cum. Supp. 1989). There is no evidence in this case that the public interest would benefit from the Commission increasing that competition by permitting an additional regulated supplier in the requested territory. Authorizing a third supplier will not result in a diminution in the duplication of facilities. Cooperative would still exist, BESCO would be authorized to exist, and UE would still exist.

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, R.S.Mo. 1986, as amended, and the settling of change of supplier disputes pursuant to Sections 393.106 and 394.315, R.S.Mo. 1986, as amended. The Commission lacks the jurisdiction necessary to prevent to 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, R.S.Mo. 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 evidence indicates further that BESCO may not be qualified to provide service since its financing proposal rests solely on its relationship with Cooperative. Cooperative would have to seek funds for BESCO through the National Rural Utilities Cooperative Finance Corporation (CFC). The CFC witness, though, testified that a direct loan to BESCO was not possible and no commitment had been made to Cooperative to fund BESCO. If the Commission would approve BESCO's application, and if CFC refused to supply the funds, BESCO would have no source for financing. This, the Commission finds, is too speculative and renders BESCO financially unqualified to provide service as a regulated public utility.

The Commission finds further that Staff's reservations concerning BESCO's operations lend additional support for denying the application. BESCO, although indicating it will comply with Staff's proposed changes in its operations, seems unsuited to become and operate as a regulated utility. Cooperative's historical and current operations are clearly distinct from those approved for public utilities regulated by the Commission. The Commission believes there is a reasonable possibility that BESCO's rates could be adversely affected by making the changes proposed by Staff. The Commission doubts the public interest would be served if BESCO were required to raise or otherwise adjust its rates to become regulated when Cooperative is meeting the needs of its customers at this time at current rates.

PC, Staff and UE allude to a number of potential flaws in the rate structure of BESCO since the proposed method of operation simply provides for the adoption of the rate structure of the unregulated parent Cooperative. Those rates are contended to be unreasonable because they include a number of elements of cost not generally allowed by this Commission for ratemaking purposes. Cooperative's costs include lobbying expenses, promotional practices, charitable and civic contributions,

and advertising. BESCO's proposed rates also include construction work in progress and fuel adjustment clauses, both of which are precluded by law in this state for regulated public utilities.

The Commission agrees that the proposed method of operation would make it virtually impossible to effectively regulate BESCO, particularly in the area of rate-making. In order to exclude the enumerated prohibited cost elements, it would be necessary to audit the records of Cooperative, Cooperative's power supplier, and Associated Electric Cooperative, in addition to the books and records of BESCO. Because of the various power purchase agreements, BESCO, as well as its parent, is precluded from shopping for lower cost power which would not include those cost elements generally disallowed. The proposed rates also may need to be adjusted because Cooperative's rates currently do not include costs that must necessarily be added if BESCO becomes a regulated public utility. Examples of those additional costs are associated with the payment of income taxes and Public Service Commission assessments, among others.

Based upon the foregoing findings, the Commission determines that BESCO has failed to prove that the public interest would be served by granting BESCO's application.

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), R.S.Mo. (Cum. Supp. 1989). Since the 1920s UE has been providing regulated electric service to customers residing in the areas covered by UE's application either by line certificate or by area certificate. UE holds a franchise from each incorporated municipality and county located within the requested area. UE also holds a certificate of convenience and necessity to provide electric service within each of the following towns covered by its application: Sturgeon, Clark, Hallsville, Renick, Ashland, Hartsburg and Rocheport. UE is seeking an area certificate in order to avoid

disputes regarding its line certificate authority and in order to obtain a clear delineation of its service territory. In addition, UE has made a substantial investment to provide electrical service to existing and future customers within the area. At the present time, UE serves approximately 2,721 customers in the requested area.

In order to meet the electric service needs of its customers, UE engages in long range planning. UE plans for potential growth in both the number of customers and the customers' demand for electricity. Since construction of generation and transmission facilities requires a long lead time, UE forecasts growth in customers and growth in demand from five to ten years in advance. For the portions of the four counties for which UE is seeking an area certificate, projections for growth in these areas have been included in UE's plans for service facilities.

The record shows that the service provided by UE in the areas covered by its application is adequate and reliable and UE's financial status has been determined repeatedly by this Commission to be sound. No evidence to the contrary has been presented.

UE now serves customers within the proposed service area through existing area certificates for the incorporated areas or by line certificates in the unincorporated areas. The Commission finds that granting to UE of an area certificate for the area sought will alleviate the need for the piecemeal granting of authority by line certificate and will remove any disagreements over UE's authority to build extensions from its existing line certificates. The Commission previously has determined that as customers request service, area certificates are more appropriate than a proliferation of line authority, provided the utility generally has existing facilities in the proposed service area. The Commission also finds that exclusive authority, combined with the traditional obligation to serve requirement, is still appropriate for the provision of electric service by regulated utilities in the state of Missouri.

The evidence is clear and UE's long history indicates it is both qualified to provide the service and is financially able to render service in the area as the need arises. UE is aware of the regulatory process and its tariffs conform to Commission orders and policies. The addition of this service area should have no adverse effect on UE's rates.

For the above 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, R.S.Mo. 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 remotely secondary. *Public Water* at 156. In BESCO'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 BESCO's parent Cooperative or from UE. Adding yet

another supplier such as BESCO 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, 420 (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 availability to serve 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 views 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, 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 BESCO.

Some of the parties urge rejection of the BESCO application under the contention that some of the activities of BESCO 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 the Commission concludes that it would be improper for the Commission to attempt to resolve the numerous legal issues inherent in the attacks contained in the briefs of the parties. While the Commission declines to attempt to resolve those issues, the Commission nevertheless cannot simply ignore their potential resolution against BESCO as one of many factors inherent in a public interest determination herein under Section 393.170, R.S.Mo. 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, R.S.Mo. (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, R.S.Mo. (Cum. Supp. 1989), precludes the Commission from allocating territory or granting territorial rights among suppliers based on safety reasons. In the absence of a clear legislative mandate for

the Commission to assign protected service territories among regulated and unregulated providers of electric service on a statewide basis, the Commission declines to attempt to do so on a piecemeal basis under the scheme proposed herein by BESCO.

For all of the foregoing reasons the application of BESCO should be denied, and the application of UE should be granted.

It is, therefore,

ORDERED: 1. That the application of Boone Electric Service Co. for permission, approval, and 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 Audrain, Boone, Callaway, Monroe and Randolph counties be, and the same is, hereby denied.

ORDERED: 2. That the application of Union Electric Company filed herein on August 26, 1987, for permission, approval, and a certificate of convenience and necessity authorizing it to construct, install, own, operate, control, manage and maintain an electric distribution system for the public in parts of Audrain, Boone, Callaway, Monroe and Randolph counties be, and the same is, hereby granted.

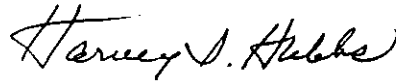
ORDERED: 3. That within thirty (30) days from the effective date of this Report And Order, Union Electric Company shall file for Commission approval proposed tariffs containing a metes and bounds description of the service area herein involved and a service area map in compliance with 4 CSR 240-2.060(2)(A)(7).

ORDERED: 4. That the motion to strike City of Springfield's brief and rescind intervenor status is hereby denied.

ORDERED: 5. That all motions or objections not ruled on in this order are hereby denied or overruled.

ORDERED: 6. That this Report And Order shall become effective on othe
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,
R.S.Mo. 1986.

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