

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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) CASE NO. EA-87-159
system for the public in most of the service territory of)
its former subsidiaries.)

In the matter of the application of Platte-Clay Electric)
Service Company for permission, approval and a certificate)
of convenience and necessity authorizing it to construct,) CASE NO. EA-88-124
install, own, operate, control, manage and maintain an)
electric distribution system for the public located in Clay,)
Ray, Clinton and Caldwell Counties of Missouri.)

In the matter of the application of St. Joseph Light & Power)
Company for a certificate of convenience and necessity au-)
thorizing it to install, own, acquire, construct, operate,)
control, manage and maintain electric plant and facilities,)
including an electric transmission and distribution system) CASE NO. EA-89-80
and to furnish electric service to the public in a service)
area which includes Atchison, Nodaway and Worth Counties,)
Missouri, and portions of Holt, Gentry, DeKalb and Clinton)
Counties, Missouri.)

APPEARANCES: Paul A. Agathen, General Attorney and David C. Linton,
Attorney at Law, 1901 Gratiot Street, P. O. Box 149,
St. Louis, Missouri 63166, for Union Electric Company.

Rodric A. Widger, Attorney at Law, Stockard Andereck, Hauck,
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for Platte-Clay Electric Service Co. and 48 Rural Electric
Cooperatives.

James C. Swearengen, Attorney at Law, and Mark W. Comley,
Attorney at Law, Hawkins, Brydon, Swearengen & England, P.C.,
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Light & Power Company.

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Kansas City, Missouri 64105, for Kansas City Power & Light Company.

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Counsel and the Public.

Charles Brent Stewart, Assistant General Counsel, and Robert Hack,
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 June 8, 1987, in Case No. EA-87-159, Union Electric Company (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.

By an application filed October 23, 1987, in Case No. EA-88-124, Platte-Clay Electric Service Company (PCESCO) seeks a certificate of public convenience and necessity to provide electric service to the public in portions of Ray, Clinton and Caldwell Counties. Because the areas sought by PCESCO overlapped the area sought by UE in parts of each of the mentioned counties, the Commission consolidated the two applications for hearing.

On December 8, 1987, the Commission suspended these proceedings pending the outcome of a Petition Of 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 challenges the lawfulness of Boone Electric Service Company, which was created and exists under the same conditions as PCESCO. Due to unexpected delays in the resolution of the Quo Warranto proceedings, the Commission resumed the instant proceedings.

By an application filed October 25, 1988, St. Joseph Light & Power Company (SJLP) seeks a certificate of public convenience and necessity authorizing it to provide electric service to the public in portions of seven Missouri Counties in the northwest portion of the state. Since the applications of PCESCO and SJLP to some extent overlap, all three of the instant applications were consolidated for hearing. Areas sought by UE and SJLP do not overlap.

Briefs have been filed by PCESCO, UE, SJLP, the Commission Staff, the Office of Public Counsel and by a group of intervenor Rural Electrification Administration cooperatives.

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:

PCESCO's Application

By the instant application PCESCO seeks authority to render electric service in a portion of the present service territory of Platte-Clay Electric Cooperative (Cooperative).

PCESCO is a general business corporation formed in June, 1986, and is a wholly-owned subsidiary of the Cooperative.

Under its present, and proposed, method of operation PCESCO will have no employees and all of the services necessary to run a utility are to be provided by Cooperative pursuant to a contract. Pursuant to another agreement Cooperative will transfer PCESCO's entire earnings to the Cooperative in exchange for receiving all necessary operating services.

The general manager of the Cooperative will be the general manager of PCESCO; the board of directors of Cooperative will be the board of directors of PCESCO; the rate structure of the Cooperative will be adopted by PCESCO; and the headquarters building of the Cooperative will become the headquarters building of PCESCO. Also under a third contract, PCESCO will be required to purchase its entire power supply from the Cooperative. The power purchase arrangement has been criticized by the Commission Staff and the Office of Public Counsel because it will preclude PCESCO from shopping for least cost power.

PCESCO plans to finance its operations with loans obtained from the Cooperative, which in turn have been secured from the National Cooperative Services Cooperation (NCSC) and the National Rural Utilities Cooperative Finance Corporation (CFC). If for any reason loans from the Cooperative were to become unavailable,

PCESCO would have no financing because there is no other proposed method of securing funds. The record indicates that there have been no commitments from the proposed lenders to provide funds under PCESCO's proposed method of operation. To the contrary, the evidence shows and it is conceded in PCESCO's brief that "it is an open question whether or not the Cooperative may continue to borrow from the Rural Electrification Administration (REA) for PCESCO investment and services to Rural Electrification Act beneficiaries...."

No potential customer testified in support of the PCESCO application. The PCESCO witnesses are unaware of any prospective customers in the proposed service area not able to receive electrical service from either the Cooperative, UE or SJLP.

The only public need established by the evidence in this matter is the need of PCESCO or of the parent Cooperative. The testimony of PCESCO's witnesses establishes that the primary purpose for which the application was filed was to avoid or bypass the statute prohibiting cooperatives extending service to new customers in communities with a population in excess of 1,500.

The second purpose expressed is alleged to be the avoidance of wasteful duplication of facilities. PCESCO seeks a nonexclusive certificate which authorizes service to a prospective customer by the provider having the closest facility. This "closer to" framework is urged by PCESCO as a substitute for the traditional obligation to serve requirement normally imposed on all regulated utilities. However, the unregulated Cooperative will continue to exist and will serve a substantial number of electric customers in the proposed service area.

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 Public Counsel and the Commission Staff oppose the application of PCESCO for a number of reasons. Primary in the list of objections is the serious question concerning the relationship between PCESCO and its parent. It is the contention of the Public Counsel and Staff 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 in the Circuit Court of Boone County, Missouri.

Another reason for the opposition to the PCESCO application is the contention that the purposes stated in the application thwart the intentions of the Legislature of Missouri in enacting Chapter 394, RSMo which intended to facilitate the provision of electrical energy in rural areas not served by investor-owned electric utilities.

Public Counsel, Staff and UE also allude to a number of potential flaws in the rate structure of PCESCO since the proposed method of operation provides for the adoption of the rate structure of the 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. Parent Cooperatives' costs

include lobbying expenses, promotional practices, charitable and civic contributions, and advertising. PCESCO'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 finds that the proposed method of operation would make it virtually impossible to effectively regulate PCESCO, particularly in the area of ratemaking. In order to exclude the enumerated prohibited cost elements, it would be necessary to audit the records of the parent Cooperative, its power supplier, and Associated Electric Cooperative, in addition to the books and records of PCESCO. Because of the various power purchase agreements, PCESCO, as well as its parent, are precluded from shopping for lower cost power which would not include those cost elements generally disallowed. The proposed rates may also need to be adjusted because Cooperative's rates currently do not include costs that will be added if PCESCO becomes a regulated public utility. Examples of those additional costs are associated with the payment of income taxes and PSC assessments, among others.

The Commission's authority to inspect the records of the Cooperative, its supplier, or of Associated is unclear. The manager of the parent Cooperative stated a willingness to make his records available, but the Commission may lack the power to enforce this oral representation if withdrawn. By the same token we lack the authority to make the necessary inspection of the records of the Cooperative's supplier and Associated, whose costs are the real foundation for PCESCO's proposed rates. Since it is virtually impossible to regulate only one portion of what amounts to an integrated network, meaningful regulation of PCESCO by the Commission would be to a large extent illusory.

All opponents point out that one serious deficiency in the PCESCO application is the absence of a showing of public need or convenience. As recited in some of the briefs, this Commission has traditionally required a showing that

additional service will be an improvement justifying its cost, and that the inconvenience to the public resulting from the lack of the utility is sufficiently great as to amount to a necessity. The Commission finds that such need has not been demonstrated.

The application of PCESCO is generally attacked by the other parties on the grounds of the inadequacy of the proposed financing. The Commission has traditionally required that an applicant have adequate financing to engage in the proposed operations. In the instant case there is such an indefinite showing of the existence of that level of financing that the Commission finds that it would be improper to grant the proposed authority. The application of PCESCO is resisted by many of its opponents contending that the proposed method of financing is illegal. Although this Commission is not empowered to judge the legal merits of this argument, we must be aware of the consequences of a resolution of that issue adversely to PCESCO. If the parent is unauthorized to be a conduit for loans secured from NCSC or CFC, PCESCO has no source of funds and cannot operate as proposed.

For all the foregoing reasons, the Commission determines that PCESCO has failed to prove that the public interest would be served by granting PCESCO's application.

UE and SJLP Applications

UE is a Missouri corporation duly qualified and authorized to operate as a 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 and has existing facilities throughout portions of the proposed service area. In recent years UE has been subject to a number of complaints concerning extensions under its line authority. 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 policy that it is desirable to convert line certificates into area certificates in the Report and Order in *Sho-Me Power Company et al.*, 29 Mo. P.S.C. (N.S.) 415, 420 (1988).

SJLP 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). SJLP holds an area certificate for a portion of the areas sought as well as approximately 189 line certificates in the Counties of Atchison, Nodaway, Worth, Gentry, DeKalb, Clinton and Holt. SJLP filed the instant application for the purpose of consolidating its line certificates and seeking a specific definition of the service area in which it may serve the public. SJLP, with the exception of one county, already has in place existing facilities generally adequate to serve the areas sought.

The Commission Staff does not question the ability of either UE or SJLP to undertake the proposed service. Certain limitations are proposed, however, based upon a perceived absence of public need in a portion of the proposed service area. The evidence establishes that most of the new customers anticipated by UE will be in and around the incorporated areas of Excelsior Springs, Kearney, and Plattsburg south from Plattsburg toward Liberty. It is the Staff's recommendation that a granting of an area certificate which includes sections containing UE's facilities as well an area up to one mile beyond the existing distribution lines is consistent with Commission policy set forth in *Sho-Me Power*. The Commission finds that Staff's recommendation is reasonable, is consistent with past Commission policy, and that UE should file a map of its newly certificated area as described in Staff witness Ketter's testimony.

The Staff also proposes a limitation on a certificate to be granted to SJLP by virtue of the fact that the company has facilities only in the southwest corner of Gentry County and a small area in the northcentral part of the County. The Commission finds that the Staff's recommendation is reasonable, is consistent with past Commission policy, and any certificate granted to SJLP should be limited to the metes and bounds description proposed by Staff witness Washburn.

For all the foregoing reasons, the Commission determines that UE and SJLP have proved that the public interest would be served by granting their respective applications to the extent such applications have been modified herein.

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 to secure a certificate of public convenience and necessity 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 v. Public Service Commission*, 600 S.W.2d 147, 153 (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 PCESCO'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 PCESCO's parent Cooperative, UE, SJLP, or some other cooperative. Adding yet another supplier, such as PCESCO, 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. *Sho-Me Power Company, 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 Empire District Electric Company*, 9 Mo. P.S.C. (N.S.) 349 (1960).

However, the authority of UE and SJLP to provide service in their respective proposed service areas has been presumed for years through existing line certificates and existing facilities. In recent times the existence of that authority has been questioned. The UE and SJLP applications have been filed only to resolve any potential doubts about their authority to perform the service in which they are actively engaged, such as those raised in *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 289 (Mo. App. 1989). UE's and SJLP's applications also have 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. Even so, the Commission is reluctant to grant authority far beyond the utility's existing facilities. *Sho-Me*, at 421-22.

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 be denied. *In re: Miller Communications*, 25 Mo.P.S.C. (N.S.) 339 (1982). While the adequacy of UE's and SJLP's financing clearly has been shown, such is not the case with PCESCO.

Several of the parties urge rejection of the application of PCESCO under the contention that some of the activities of PCESCO 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. The 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 the 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 PCESCO 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 the 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 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 all 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 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 PCESCO.

For all of the foregoing reasons, the application of PCESCO should be denied, and the applications of UE and SJLP should be granted in substantial part as hereinafter ordered.

It is, therefore,

ORDERED: 1. That the application of Platte-Clay Electric Service Company in this matter be, and the same is, hereby denied.

ORDERED: 2. The application of Union Electric Company, filed herein on June 8, 1987, is granted in part and denied in part. Union Electric is hereby granted a certificate of convenience and necessity authorizing it to own, control, manage and maintain an electrical power system for the public in an area more particularly described herein.


ORDERED: 3. That the application of St. Joseph Light & Power Company, filed herein on October 25, 1988, seeking a certificate of convenience and necessity

to own, control, manage and maintain an electric power system for the public is hereby granted to the extent shown in the area described in Appendix A attached hereto.

ORDERED: 4. That within thirty (30) days from the effective from this Report and Order Union Electric Company and St. Joseph Light & Power 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: 5. 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.

All of Atchison County

All of Nodaway County

All of Worth County

Remainder of Holt County not certificated in Case #10,751

Clinton County: Beginning at the northeast corner of Section twenty-four, Range thirty-two west, Township fifty-seven north, then south approximately 4 miles to the southeast corner of Section one, Range thirty-two west, Township fifty-six north, then west approximately 2 miles to the southwest corner of Section two, Range thirty-two west, Township fifty-six north, then south approximately 8 miles to the southeast corner of Section fifteen, Range thirty-two west, Township fifty-five north, then west approximately 3 miles to the southeast corner of Section eighteen, Range thirty-two west, Township fifty-five north, then northeasterly approximately 1 1/2 miles in a straight line to the southeast corner of Section eight, Range thirty-two west, Township fifty-five north, then north approximately 7 miles to the southeast corner of Section five, Range thirty-two west, Township fifty-six north, then east approximately one mile to the southeast corner of Section four, Range thirty-two west, Township fifty-six north, then north approximately 4 miles to the northeast corner of Section twenty-one, Range thirty-two west, Township fifty-seven north, then east along the Clinton DeKalb county line approximately 3 miles to the point of beginning.

DeKalb County: Beginning at the southeast corner of Section thirteen, Range thirty-two west, Township fifty-seven north, then north 3 miles to the northeast corner of Section one, Range thirty-two west, Township fifty-seven north, then northwesterly along a straight line approximately 6 miles to the northwest corner of Section sixteen, Range thirty-two west, Township fifty-eight north, then north 7 miles to the northeast corner of Section eight, Range thirty-two west, Township fifty-nine north, then northeasterly along a straight line approximately 9 miles to the northeast corner of Section eight, Range thirty-one west, Township sixty north, thence west along the DeKalb, Gentry County line a distance of approximately 11 miles to the DeKalb, Andrew County line, thence south along the DeKalb, Andrew, Buchanan County line, DeKalb, Clinton County line, a distance of approximately 20 miles, thence east along the DeKalb, Clinton County line, a distance of approximately 9 miles to the point of beginning.

Gentry County: Beginning at the southeast corner of Section thirty-six, Range 32W, Township sixty-one north, then west along the Gentry, DeKalb County line, a distance of approximately 8 1/2 miles to the Gentry, Andrew County line, thence north along the Gentry, Andrew County line to the Nodaway County line, a distance of approximately 6 miles, then east along the township line of township 61N and 62N a distance of approximately 8 1/2 miles to the northeast corner of section one, Range 32W, Township 61N, thence south along a line between Range 32W and Range 31W, a distance of approximately 6 miles, to the point of beginning.

Beginning at the northeast corner of section 4, Range 31W, Township 64N, thence south to the southeast corner of section 28, Range 31W, Township 64N, a distance of approximately 5 miles, thence West to the southwest corner of Section 25, Range 32W, Township 64N, a distance of approximately 4 miles, thence north to the northwest corner of section 1, Range 32W, Township 64N, a distance of approximately 5 miles, thence east along the Worth, Gentry County line a distance of approximately 4 miles, to the point of beginning.

EA-87-159
EA-88-124
CASE NO. EA-89-80

[Signature]
Chairman

GG
Commissioner

AKR
Commissioner

IKM
Commissioner

RZR
Commissioner

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*Recirculated 4/5/90
4/25/90*

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original
on file in this office and I do hereby certify the same to
be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service
Commission, at Jefferson City, Missouri, this 27th
day of April, 1990.

[Signature]

Harvey G. Hubbs
Secretary