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City of St. George v. PUBLIC SERVICE COMMISSION OF UTAH, MILLIE 0. BERNARD, OLOF E. ZUNDELL and JOSEPH C. FOLLEY, Commissioners of the PUBLIC SERVICE COMMISSION OF UTAH : Brief of Petitioner

Utah Supreme Court

G. Blaine Davis; Assistant Attorney General; Attorney for Respondents.
F. Robert Reeder; Joseph W. Anderson; Parsons, Behle, and Latimer; Attorneys for Petitioner.

14017

IN THE UTAH SUPREME COURT

FOR THE STATE OF UTAH

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CITY OF ST. GEORGE, Petitioner, vs. PUBLIC SERVICE COMMISSION OF UTAH, MILLIE O. BERNARD, OLOF E. ZUNDELL and JOSEPH C. FOLLEY, Commissioners of the PUBLIC SERVICE COMMISSION OF UTAH, Respondents.	CASE NO. 14692

PETITIONER'S BRIEF

REVIEW ON CERTIORARI OF THE
ORDER OF THE PUBLIC SERVICE COMMISSION
OF UTAH

F. ROBERT REEDER
JOSEPH W. ANDERSON
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Petitioner
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

G. BLAINE DAVIS
Assistant Attorney General
Attorney for Respondents
236 State Capitol Building
Salt Lake City, Utah 84114

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79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

G. BLAINE DAVIS
Assistant Attorney General
Attorney for Respondents
236 State Capitol Building
Salt Lake City, Utah 84114

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NATURE OF THE CASE

This is an original proceeding upon a Writ of Certiorari to review an Order of the Public Service Commission of Utah.

DISPOSITION BEFORE THE COMMISSION

The Public Service Commission dismissed for want of jurisdiction with prejudice the Complaint of the City of St. George after finding there is a present and future public convenience and necessity to be satisfied and concluding that its prior Order did not limit Dixie REA to serving only existing customers, but to the contrary, obligated Dixie REA to serve all customers, present or future coming into the area.

RELIEF SOUGHT ON APPEAL

Petitioner here seeks an Order of this Court reversing the Order of the Public Service Commission, or, in the alternative,

an Order declaring so much of the Order as increases the rights of Dixie REA of no force and effect.

STATEMENT OF THE FACTS

The City of St. George owns and operates an electric distribution system through which it provides electric service to the residents of the City. Over the past several years the City has annexed several parcels of land contiguous to its city limits and has extended its electrical distribution system into the annexed areas to provide electric service to the residents thereof. (R. 45, 46, 47.)

A part of the area annexed by the City of St. George is also included in the area described in the Order of the Public Service Commission In Dixie REA Case No. 5663. (R. 46-48, Exhibit 2 below.) Dixie REA and the City of St. George each presently service some customers within the area and each seeks to extend their lines to serve future customers. (R. 48.) The extension of electrical distribution facilities by both Dixie REA and the City of St. George into the same area results in the duplication of systems. (R. 83, 84.)

Dixie REA is a rural electric cooperative nonprofit corporation, distributing electric power and energy in certain areas in Washington County to its members and patrons and is an electric corporation subject to the jurisdiction of the Commission. (R. 100-112, 113.)

By 1965 amendments to § 54-4-25, Utah Code Annotated, 1953 rural electric cooperatives like Dixie REA were made subject

to the Public Service Commission's jurisdiction and were required to seek from the Public Service Commission certificates of convenience and necessity. The 1965 amendments broadened the definition of electrical corporations to include cooperatives serving only their members and added subsections 4 and 5 to 54-4-25.

The 1965 amendments to the Public Utility Act placed electric cooperatives on equal footing with other electric utilities and required they seek certificates of convenience and necessity. Cooperatives other than those applying for a certificate to serve only customers served on the effective date of the amendments to the Act had to prove that they were financially capable and that the public convenience and necessity required their service.

In 1965, Dixie Rural Electric Association filed with the Utah Public Service Commission an application for a Certificate of Convenience and Necessity to operate as a public utility in an area of Washington County. The Order of the Commission upon the application in case No. 5663 is at R. 311. The Public Service Commission, in Case No. 5663 by Order dated June 30, 1966, found:

> "The Commission finds that the evidence in this record does not justify the granting of a Certificate of Convenience and Necessity as requested. This finding is predicated on the lack of proof of the need or requirement of electric service in that part of the proposed service area outside of the old basic area, and the Berry Springs area, and the unsatisfactory debt ratio of Dixie."

From its findings the Commission concluded:

"From the foregoing findings the Commission concludes that the application of Dixie REA for a Certificate of Convenience and Necessity as set forth in the application and as modified and amended on this record should be denied. [Emphasis added.]

The Commission further concludes that Dixie has a statutory right and has lawfully assumed the utility obligations to serve its customers in its old basic area and in the area described as Berry Springs Extension Area or Dixie's New Area, and that for clarity and definiteness, said area should be described in certificate form with a certificate number by meets and bounds as set forth in the findings above.

From its findings and conclusions, the Commission ordered:

"That the application of Dixie REA for a Certificate of Convenience and Necessity to operate as a public utility rendering electric service in that part of Washington County as set forth in the applications and attachments thereto, and said area that is amended on this record be and the same is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that Dixie Rural Electric Association has a statutory right and has lawfully assumed the utility obligations to serve its customers in the area described as the Berry Springs Area or Dixie's New Area, and for clarity and definiteness, Certificate of Convenience and Necessity No. 1556 is hereby issued to Dixie Rural Electric Association to operate as a public utility rendering electric service in an area in Washington County delineated below."

A part of the territory described in this Order of the Commission was contiguous to the City of St. George, has now been annexed, and is now served by the City of St. George with electric power. (R. 45-48.) Because of the resulting duplication the City sought from the Public Service Commission an Order directing Dixie REA to cease and desist from extending its facilities without first obtaining a certificate from the Commission and a franchise from the City. (R. 49, 51, 84.)

Within the limits of the City of St. George, Dixie REA presently serves more than 10 but less than 20 customers. These customers include feed yards, corrals, homes and half a dozen or so pumps. (R. 136-137.)

Dixie has no franchise from the City of St. George. (R. 105.) Dixie had a franchise from Washington County that authorized use of the public highways outside of the incorporated limits of the cities and towns in Washington County. That franchise, dated June 11, 1946, expired by its terms June 11, 1976. (R. 105, R. 332.)

Dixie REA holds itself out to provide electric service to the residents of the annexed areas of the city who are also within the area described in the Order of the Commission in Dixie REA in Case No. 5663. (R. 112.) Dixie REA will, unless otherwise ordered by the Public Service Commission, continue to extend its services within the area.

Following hearing upon the complaint of the City the Commission found (R. 254):

> The Commission finds as to issue No. 2 that Dixie REA was granted a certificate of convenience and necessity No. 1556 on June 30, 1966, Exhibit 14. The area granted to Dixie REA described in metes and bounds and generally covered that portion of Washington County surrounding the City of St. George as the city boundaries then existent. The certified area includes two areas described as "the old area" and the "Berry Springs area."
>
> Dixie had assumed its responsibilities as a public utility under the appropriate section of the statute enacted in 1965, and was serving all customers coming

into said areas. At that time, there were about 45 customers, but over the years since 1966 as additional customers have moved into the area and sought service Dixie has also served them until in 1975 the customers totaled 439. In reliance on the certificate Dixie has expanded its facilities to serve the entire area, increased its plant investment from $129,530.69 in 1967 to $1,800,699.00 in 1975 and increasing its kilowatt hour usage from 628,722 in 1967 to 12,714,950 in 1975.

. . . From 1966 to present, Dixie's financial condition has steadily and substantially improved as is shown by the association's F and S records, Exhibit 9. This Commission in March, 1976, in a proceeding wherein Dixie an increase to its certificated area found that Dixie had sufficient stability and power sources to justify the added area certificate and the Commission reaffirmed its prior findings that Dixie was operating within an area of certificate serving all customers coming into the area.

Dixie has since 1966 conducted its operations in reliance upon the right and obligation to serve all customers coming into the area and has done so without opposition from any customer from the City of St. George or from this Commission. During this period Dixie has borrowed $1;500,000.00 from the REA with the approval of this Commission . . . Dixie has served all customers seeking service and continues to serve the public seeking service throughout the entire area.

The evidence shows that less than a dozen customers have been served in the overlap area by the City of St. George, but in all instances these customers were already being served by Dixie and were disconnected by the City or went to the City and did not seek service from Dixie. There is no evidence to show that Dixie has failed or refused to serve all seeking service from the area, in fact Dixie in filing its lawsuits in Washington County has sought to protect its area and to prevent the City from serving customers from within the area certified to Dixie.

Testimony indicated some duplication of facilities, but the Commission finds that these resulted from the efforts of the City of St. George in constructing lines and in serving customers in the certified area which was already being adequately served by Dixie. The Commission finds it has no authority to prevent St. George from effecting said duplication of facilities

even though such duplication is obviously wasteful and contrary to the public convenience and necessity.

The Commission finds that the Dixie certificates of convenience and necessity including No. 1556 and the two supplements thereto, Exhibit 18 and Exhibit 22, clearly do not limit Dixie to serving existing customers, but in fact to the contrary obligate Dixie to serve all customers both present and future coming into the area described in said certificate and needing electric service.

. . . .

The Commission further finds that Dixie has clearly and completely fulfilled its utility obligations under its certificates in serving the area and all customers coming into said area and that Dixie is ready, willing and fully capable of so serving all future customers in accordance with its certificate and appropriate statutory requirements. . . . The Commission finds as to issue No. 2 that Dixie does have a proper certificate of convenience and necessity authorizing it to serve new and additional customers within the limits of the City within its certified area described in Dixie's certificate.

CONCLUSIONS

. . . The Commission further concludes that Dixie's certificate No. 1556 granted in 1966 as it has been increased area wise, authorized Dixie to serve all customers both present and future coming into the certified area and that Dixie over the years has fully fulfilled its obligation under proper and adequate financing, under the proper franchise and with adequate power and facilities and that Dixie is ready, willing and capable of doing so in the future. The Commission further finds that there is a present and future public convenience and necessity to be satisfied within Dixie's certified area, and that notwithstanding the overlap of the City's annexed area, there is no factual or legal reason for this Commission to curtail Dixie's certificate or its operation with Dixie's certified area and specifically within the annexed area overlapping into Dixie's certificate area. The Commission concludes that the complaint of St. George City should be dismissed.

The Commission is aware of the basic conflicts between the parties evident in the Washington County litigation, but concludes that it has no jurisdiction or authority to resolve those many and complex issues.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the complaint of St. George City in this matter is hereby dismissed with prejudice.

I. ARGUMENTS

THE COMMISSION'S FINDINGS AND CONCLUSIONS UPON THE SCOPE OF THE AUTHORITY OF DIXIE REA WHEN DISMISSING FOR WANT OF JURISDICTION ARE IMPROPER.

The Commission's Order here under review concludes:

> The Commission concludes that the complaint of the City of St. George should be dismissed.
>
> The Commission is aware of the basic conflict between the parties evident in the Washington County litigation, but concludes that it has no jurisdiction or authority to resolve those many and complex issues. [Emphasis ours.]

In spite of its disposition of this case because of a lack of authority or jurisdiction to resolve the matters involved, the Commission found that

> "Dixie REA's certificates of convenience and necessity . . . do not limit Dixie to serving its existing customers, but in fact, to the contrary, clearly obligated Dixie to serve all customers, both present and future coming into the area described in its certificates and needing electric service there.

and concluded

> . . . that Dixie's certificate No. 1556 granted in 1966 . . . authorized Dixie to serve all customers, both present and future coming into its certified area. . . .

and

> That there is a present and future public convenience and necessity to be satisfied.

Neither these findings or conclusions with respect to the scope of the authority of Dixie REA were necessary to the disposition of this matter if the Commission was without jurisdiction or authority to "resolve the many and complex issues involved."

This Court has repeatedly instructed the Public Service Commission not to arrogate into the proceedings and pass upon matters which were not properly included and presented therein. Indeed, in Utah Power & Light Co. v. Empire Electric Association, 25 Utah 2d 264, 480 P.2d 145 (1971) where the Commission purported to redefine the authority of a protestant this Court said:

> It was not within the duty or the prerogative of the Commission to arrogate into the proceedings and pass upon matters which were not properly included and presented therein.

The Court proceeded to grant appropriate relief, stating:

> In conformity with this doctrine and upon the basis of the stipulation of the parties it is our judgment that the plaintiff should prevail to the extent that we make the following order: Insofar as the order of the Public Service Commission grants the application of Empire Electric Association to render service in accordance with the area described therein, the order is affirmed; but insofar as it may purport to go beyond the issue before it and limit or adversely affect any previously existing rights of Utah Power & Light Company to render in the rest of San Juan County, it is of no force and effect.

In an earlier case, W. S. Hatch Co. v. Public Service Commission, 3 Utah 2d 7, 277 P.2d 809 (1954), this Court held essentially the same saying: "Prichard's authority could not be augmented in this proceeding wherein he appeared only as a protestant."

In Utah Gas Service Co. v. Mountain Fuel Supply, 18 Utah 2d 310, 422 P.2d 530 (1967) this Court similarly observed that the safeguarding of the Commission's prerogatives and the public interest requires that the orders of the Commission be construed as passing only upon the issues before it. There the Court said:

> The safeguarding of the Commission's prerogatives and of the public interest requires that its orders be construed as passing only upon the issues before it; . . . so that when its authority is properly invoked it may make such subsequent orders as the public interest may require.

In the proceedings before the Commission here under review Dixie REA was a respondent. The City complained Dixie was acting in violation of the law, i.e., without authority from the Commission. The Commission dismissed the complaint of the City of St. George for lack of jurisdiction. Under such circumstances, the Commission had no duty or prerogative to define the scope of Dixie's authority. If the Commission lacked jurisdiction to "resolve those many and complex issues" then its finding and conclusion on the scope of Dixie's authority ought be of no force and effect and must not stand. As we note below, not only are these findings beyond the scope of the issue decided by the Commission, but also erroneous as a matter of law.

We submit that where the Commission concludes it has no authority or jurisdiction to resolve the issues in this matter, the Commission's findings and conclusions with respect to the scope of the authority of Dixie REA and the need for such services must be of no force and effect.

II.

THE PUBLIC SERVICE COMMISSION ERRED AS A MATTER OF LAW IN ITS FINDINGS AND CONCLUSIONS THAT THE DIXIE REA HAS THE RIGHT TO SERVE FUTURE CUSTOMERS IN THE AREA IN CONFLICT.

Quite aside from the fact that the Commission's findings and conclusions upon the scope of Dixie REA's authority was an improper arrogation, the findings and conclusion are erroneous as a matter of law.

Nonprofit electric cooperatives serving only their members were not public utilities and not subject to the jurisdiction of the Public Service Commission prior to the 1965 amendments to the Public Utility statutes. Garkane Power Co. v. Public Service Commission, 98 Utah 466, 100 P.2d 571, 132 A.L.R. 1940 (1940); San Miguel Power Association v. Public Service Commission, 292 P.2d 511, 4 Utah 2d 252 (1956). Nonprofit electric cooperatives and associations were not public utilities because their service was to members only [consumer owners] and not to the public generally. Garkane Power Co. v. Public Service Commission, supra.

By 1965 amendments to the Public Utility statutes, nonprofit electrical cooperative associations were made subject to the Public Service Commission's jurisdiction. The 1965 amendments broaden the definition of "electric corporation" to include cooperative associations serving only their members. As a result thereof, cooperatives became subject to the prohibitions

of 54-4-25(1) and were thenceforth required to have a certificate of convenience and necessity before beginning construction or operation of any plant or system. Construction or extension of an electrical plant, except under limited circumstances, required Commission authority.

The 1965 amendment also added subsections (4) and (5) to Section 54-4-25. Section 54-4-25(4) provides:

> Any supplier of electricity which is brought under the jurisdiction and regulation of the Public Service Commission by this Act may file with the Commission an application for a certificate of convenience and necessity giving the applicant the exclusive right to serve the customers it is serving in the area in which it is serving at the time of this filing, subject to the existing right of other electric corporations to likewise serve its customers in existence in said areas at said time. . . . a public hearing may be held to determine if said applicant has sufficient finances, equipment and plant to continue its existing service; and the Commission shall issue its order within 45 days after such hearing according to the proof submitted at hearing.
>
> Every electric corporation save and except those applying for a certificate to serve only the customers served by the applicant on the effective date of this act applying for such a certificate shall have established a ratio of debt capital to equity capital or will within a reasonable period of time establish a ratio of debt capital to equity capital which the Commission shall find renders the electric corporation financially stable and which financing shall be found to be in the public interest. [Emphasis ours.]

These sections of 1965 amendments to the Public Utility Act authorize the Commission to issue grandfather kind of rights to the electrical cooperative associations, i.e.: the right to serve only the customers (members) served on the effective date of the Act if the cooperative or association was financially

unstable and/or could not prove the public convenience and necessity required their service.

In 1965 Dixie REA, a nonprofit electrical cooperative, applied to the Utah Public Service Commission for a certificate of convenience and necessity to operate as a public utility in certain areas of Washington County, although at the time Dixie's Articles of Incorporation and Bylaws restricted its service to members only. The Commission found in the matter of the application of Dixie REA, case No. 5663, in its Order dated June 30, 1966, Exhibit 4 below at Record page 311 et seq, Record page 327:

> The Commission finds that the evidence in this record does not justify the granting of a certificate of convenience and necessity as requested. This finding is predicated on the lack of proof of the need or requirement for electric service in that part of the proposed service area outside the old service area and the Berry Springs area and the unsatisfactory debt ratio of Dixie.

From the foregoing Findings of Fact the Commission then concluded:

> From the foregoing Findings the Commission concludes that the application of Dixie Rural Electric Association for a certificate of convenience and necessity as set forth in the application and as modified and amended on the record should be denied. [Emphasis ours.]
>
> The Commission further concludes that Dixie has a statutory obligation and has assumed a utility obligation to serve its customers in its old basic area and in the area described as the Berry Springs extension area or Dixie's new area and that for clarity and definiteness, said area should be described in certificate form with a certificate number by metes and bounds as set forth in the following Findings.

From the foregoing Findings and Conclusions the Commission ordered:

> NOW, THEREFORE, IT IS HEREBY ORDERED, that the application of Dixie Rural Electric Association for a certificate of convenience and necessity to operate as a utility rendering electric service in that part of Washington County as set forth in the application and the attachments thereto, and said application as amended on the record be and the same is hereby denied.
>
> IT IS FURTHER ORDERED AND ADJUDGED, that Dixie Rural Electric Association has a statutory right and has lawfully assumed the utility obligations to serve its customers in its old basic area and in the area described as the Berry Springs extension area or Dixie's new area, and for clarity and definiteness, certificate of convenience and necessity No. 1556 is hereby issued to Dixie REA to operate as a public utility rendering electric service in an area in Washington County, delineated below. [Territorial descriptions omitted.]
>
> * * * * *
>
> In the Order here under review, the Commission found that:
>
> . . . Dixie REA's certificates of convenience and necessities . . . do not limit Dixie to serving its existing customers, but in fact, to the contrary, clearly obligate Dixie to serve all customers, both present and future coming into the area described in its certificates and needing electric service.

and concluded:

> . . . That Dixie's certificate No. 1556 granted in 1966 . . . authorized Dixie to serve all customers both present and future coming into its certificated area . . . .

and;

> . . . that there is a present and future public convenience and necessity to be satisfied . . . .

We submit these findings and conclusions are in light of 54-4-25(4) erroneous.

Although the Utah Supreme Court has not been called upon to interpret Section 4 to Section 54-4-25, Utah Code Ann. (1953) as amended, the statutory scheme of bringing electrical cooperatives under Public Service Commission jurisdiction is similar to that of Colorado.

In Colorado nonprofit electric corporations and electrical cooperative associations providing electric service to their members were not utilities subject to the Public Utilities Commission jurisdiction. In 1960 one nonprofit cooperative corporation, Union Electric Association, Inc., seeing its territory invaded, complained to the Public Service Commission of the invasion of certificated utilities into what it believed was its service area and applied for a certificate of public convenience and necessity. The Public Utilities Commission dismissed the complaint of Union and granted Union the authority to serve only its members and customers. The Colorado Supreme Court in Public Service Co. v. Public Utilities Commission, 142 Colorado 135, 350 P.2d 543 (1960) affirmed in part, saying with respect to the complaint:

> In view of the fact that Union had not, at the time it filed its complaint against Public Service, acquired public utility status, it was in no position to complain that Public Service was invading its service area, for, not being a public utility it had no service area.

The Public Utilities Commission issued Union a certificate of convenience and necessity to its members and customers in

some areas and the Supreme Court affirmed in part the issuance of such certificate of convenience and necessity limited to serving members, saying the rural electric associations may not expect to have an area carved out for them and are entitled to a certificate only upon proof that public convenience and necessity requires it.

In 1961 the Colorado legislature amended the Colorado Public Utility Laws to define public utilities to include every cooperative electric association or nonprofit electric corporation or association supplying electric energy to its members or to the public. As a result of the amendment, a number of applications were filed with the Public Utilities Commission by nonprofit electrical corporations and electrical cooperatives for certificates of convenience and necessity. The Colorado Supreme Court in Public Utilities Commission v. Home Light & Power Co., 163 Colorado 72, 428 P.2d 928 (1967) ruled in part upon these applications. The Colorado Supreme Court said in part in affirming the certificates:

> We have already held that a rural electric association may not expect to have a service area carved out for it from areas already certified to other utilities. Public Serv. Co. v. Public Util. Comm., 142 Colo. 135, 350 P.2d 543, cert. denied, 364 U.S. 820, 81 S.Ct. 53, 5 L.Ed.2d 50. In such areas "it must find its place from among the places that remain." In the instant case, however, we are talking about "the places that remain." While Poudre Valley should properly be limited to serving its then members and customers in prior certificated areas, yet, as to unserved and uncertificated areas it now stands on the same footing as any other public utility.

The court noted that this method used by the Public Utilities Commission was what may be called "freezing." Under this solution, the non-certified utility was upon being certificated limited to serving its existing customers on the line in question, absent proof that public convenience and necessity required more. All new customers were to be served by the certified utility.

Thus, we see that the Colorado Public Utilities Commission was freezing the service of rural electric cooperatives to their existing customers when they were not entitled to a certificate of convenience and necessity to serve the area.

The Colorado Supreme Court in Western Colorado Power Co. v. Public Utilities Commission, 163 Colorado 61, 428 P.2d 922 (1967) explained this statutory scheme and practice in another case involving yet another application by a rural electric cooperative, saying:

> We hold that the 1961 act of the legislature did not destroy the holding of this Court in Public Serv. Co. v. Public Util. Comm., 142 Colo. 135, 350 P.2d 543, cert. denied, 364 U.S. 820, 81 S.Ct. 53, 5 L.Ed.2d 50. The effect of the 1961 act was prospectively to establish electrical co-operatives as public utilities and to give them a regulated monopoly status as of that date in those areas in which they were rendering service on an exclusive basis. The legislative act, however, did not purport to affect the contractual rights between co-operatives and their members which were created at a time when the co-operatives did not enjoy the status of public utilities, and thus in the instant action Delta-Montrose may continue to serve all members who were receiving service prior to the effective date of its becoming a public utility, . . . [Emphasis ours.]

Thus, we see the legislative scheme in Colorado in declaring electric cooperatives to be public utilities was to

preserve the contractual rights between the cooperatives and their members as they had historically existed and to freeze the service to existing members, absent evidence that the public convenience and necessity required more.

The Utah legislative scheme appears to follow that of Colorado and was adopted while the Colorado courts were struggling with their Act. In Utah as in San Miguel Power Association v. Public Service Commission, supra, this Court held, as Colorado was to hold later, cooperatives were not utilities and not entitled to resist the expansion of utilities. In Colorado, nonprofit electrical cooperatives were then brought under the jurisdiction of the Public Service Commission by the amendments to the Public Utility Act. Cooperatives were given the opportunity to acquire a certificate of convenience and necessity to operate as a regulated monopoly serving an area to the exclusion of all other regulated utilities under Section (1) of Section 54-4-25, Utah Code Annotated, and cooperatives not financially stable and/or able to prove the public convenience and necessity requires their service were granted the rights to serve their historic customers--members in respect of their existing contractual rights under Section (4) of 54-4-25, Utah Code Annotated.

We submit that the scope of Dixie's authority from the Commission's Order in case No. 5663 is clear on its face. Dixie's application was denied. The rights of Dixie REA under that Order are the rights to serve only its customers existing on the

effective date of the Act and no others. The findings and conclusions of the Commission here under review that its Order in case No. 5663 did not limit Dixie to serving only existing customers are therefore as a matter of law erroneous and must not stand.

III.

THE COMMISSION ERRED AS A MATTER OF LAW IN RECEIVING AND CONSIDERING EVIDENCE OF EVENTS SUBSEQUENT TO THEIR ORDER IN CASE NO. 5663 DATED JUNE, 1966 IN INTERPRETING THE SCOPE OF DIXIE'S AUTHORITY.

The Order of which the petitioner here complains is replete with findings by the Commission of the conduct of Dixie REA since 1966. For example, the Commission found that Dixie's customers had increased from 45 in 1966 to some 439; that Dixie's investment had increased from $129,500.00 to $1,800,000.00; that Dixie's financial condition has steadily and substantially improved and further that Dixie REA had conducted its operations upon reliance upon the right and obligations to serve all customers coming into the area.

Clearly, the Commission has relied upon what Dixie REA had done since the Commission's Order in case No. 5663 to find the scope of Dixie's authority. What Dixie has done since 1966 is neither relevant nor material to the interpretation of the Order of the Commission in case No. 5663. Yet the Commission over objection received:

Exhibit No. 7, R-pg. 356, a circuit diagram for the Dixie REA system as it existed in 1967.

Exhibit No. 8, R-pg. 357, a circuit diagram for the Dixie REA system in 1967 with colored lines which depict the current scope of the Dixie system.

Exhibit No. 9, R-pg. 358, a compilation of monthly reports of Dixie REA to the United States Rural Electrification Administration for the years 1966 to 1975. These reports contain financial and statistical data.

Exhibit No. 10, R-pg. 377, a compilation of figures that allegedly show the growth of Dixie REA for the years 1966 to 1975.

Exhibit No. 11, R-pg. 378, a compilation of figures that purports to represent the number of work orders for Dixie REA for the years 1967 to 1975.

Exhibit No. 12, R-pg. 279, a compilation of figures that purports to express the Utah usage of the Dixie REA system for the years 1966 to 1975.

The receipt of evidence of the events since 1966 and reliance thereon to interpret Dixie's authority so diseases the Commission's consideration of this matter that one must conclude as a matter of law that it was error for the Commission to receive the evidence.

The extent of the authority of Dixie must be found in the statute authorizing the Commission to Act and within the four corners of the Commission's Order. The rights thereunder must be such as are fairly understood from the import of its language. W. S. Hatch Co. v. Public Service Commission, 3 Utah 2d 277 P.2d 809 (1954). The extent of the authority of Dixie REA ought not be found in the conduct of Dixie REA under the Commission's Order.

This Court has found on several occasions that unless there is some uncertainty or ambiguity there is no basis for

interpretation or clarification of a certificate, because to go back of the language of the certificate and contradict its plain meaning would create intolerable confusion and uncertainty would exist with respect to the operating rights. See Peterson v. Public Service Commission, 1 Utah 2d, 324, 266 P.2d 497 (1954). If to go back of the plain language would create intolerable confusion and uncertainty with regard to operating rights, then certainly relying on the conduct of the regulated company involved since the issuance of those rights to interpret those rights would lead to the same intolerable confusion and uncertainty. Indeed, if one's conduct under an Order of the Commission were the basis for determining the meaning of the Order of the Commission, then economic regulation would be of no significance. We submit that the Commission's receipt of Exhibits 7, 8, 9, 10, 11 and 12 and reliance thereon was error requiring reversal.

CONCLUSION

We respectfully submit that this Court must reverse the Order of the Public Service Commission or, in the alternative, declare so much of the Order as increases the operating rights of Dixie REA of no force and effect. If the Commission were without jurisdiction or authority to decide the issues in this matter, then its findings upon matters over which it had no jurisdiction to decide cannot stand.

Further, we submit that the findings and conclusions of the Commission that Dixie REA has the right to serve customers

other than those existing customers it was serving on the effective date of the 1965 amendments to the Utah Public Utility Laws are, as a matter of law, erroneous and cannot stand. Section 54-4-25(4) authorized the Commission to allow Dixie REA to continue to serve its existing customers if it was financially unfit. The Commission found Dixie REA to be unfit and by the clear meaning of its Order granted it the right to serve its existing customers. Section 54-4-25(4) requires that a financially unstable, nonprofit electric cooperative or electric corporation be frozen to their existing customers and the Commission's Order so froze Dixie.

We further submit that the Commission's consideration of this matter was so tainted by its receipt and consideration of totally irrelevant and immaterial matters relating to the operation of Dixie REA since the Commission's Order in 1966 that it must be reversed.

DATED this 15 day of October, 1976.

Respectfully submitted,

F. ROBERT REEDER
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Petitioner

MAILING CERTIFICATE

A copy of the foregoing Petitioner's Brief was mailed to G. Blaine Davis, Assistant Attorney General, attorney for respondents, at 236 State Capitol Building, Salt Lake City, Utah 84114, this 18 day of October, 1976.