

1952

Utah Power & Light Company and Telluride Power Company v. Public Service Commission of Utah and Nephi City : Brief of Petitioner

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

H. R. Waldo; W. Q. Van Cott; Clifford L. Ashton; Attorneys for Plaintiff;

Recommended Citation

Brief of Appellant, *Utah Power & Light Co. v. Public Service Comm. Of Utah*, No. 7803 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1698

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
Supreme Court of the State of Utah

**UTAH POWER & LIGHT COMPANY
and TELLURIDE POWER COM-
PANY,**

Plaintiffs,

vs.

Case No.
7803

**THE PUBLIC SERVICE COMMIS-
SION OF UTAH and NEPHI CITY,**

Defendants.

**BRIEF FOR PLAINTIFF
TELLURIDE POWER COMPANY**

FILED

H. R. WALDO,
APR 1 1952 W. Q. VAN COTT,
CLIFFORD L. ASHTON,

Clerk, Supreme Court, Utah Attorneys for Plaintiff,

Telluride Power Company

INDEX

	Page
EXPLANATORY NOTES	1
STATEMENT OF FACTS	2
STATEMENT OF ERRORS UPON WHICH PETITIONER WILL RELY TO SET ASIDE THE ORDER OF THE PUBLIC SERVICE COMMISSION	6
ARGUMENT	8
I. THE PUBLIC SERVICE COMMISSION VIOLATED THE LAW IN FAILING TO PROTECT TELLURIDE POWER COMPANY FROM COMPETITION IN AN AREA TO WHICH IT HAD DEDICATED ITS PROPERTY FOR RENDITION OF SERVICE AND IN WHICH PUBLIC CONVENIENCE AND NECESSITY DID NOT REQUIRE ADDITIONAL SERVICE ..	7, 8
II. PUBLIC SERVICE COMMISSION VIOLATED THE LAW IN ORDERING THE INVASION OF TELLURIDE TERRITORY WITH CONSEQUENT SERIOUS DAMAGE WITHOUT ANY EVIDENCE AND WITHOUT MAKING ANY FINDING THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRES ANY SUCH, OR ANY OTHER REASON THEREFOR, BUT ON THE CONTRARY WITH A FINDING THAT EXISTING FACILITIES ARE IN ALL PARTICULARS ADEQUATE ..	7, 16-17
III. THE ORDER SHOULD BE SET ASIDE BECAUSE PUBLIC SERVICE COMMISSION PROCEEDED THROUGHOUT UPON AN ERRONEOUS CONCEPTION OF THE LAW, THAT NEPHI HAD AN ABSOLUTE RIGHT TO BUY POWER FROM UTAH POWER	7, 19-20

INDEX—Continued

Page

IV. PUBLIC SERVICE COMMISSION VIOLATED THE FEDERAL AND UTAH CONSTITUTIONS IN ORDERING UTAH POWER & LIGHT COMPANY TO RENDER SERVICE IN AN AREA TO WHICH IT HAS NOT DEDICATED ITS PROPERTY	7, 23
---	-------

STATUTE CITED

Section 76-4-24, U. C. A. 1943	17
--------------------------------------	----

CASES CITED

Bamberger Electric Railroad Company v. Public Utilities Commission, 59 Utah 351, 204 Pac. 314	20
In re Bayles, et al., P. U. R. 1926 A 731	10, 12
Re Belmont and Pleasant View Telephone Company, P. U. R. 1918 A 491	12
Borough of Butler v. New Jersey Power and Light Company, 78 P. U. R., N. S., 448	13
Interstate Commerce Commission v. Oregon-Washington Railroad Navigation Company, 288 U. S. 14, 77 L. Ed. 588, 53 S. Ct. 266	23-24
Mulcahy v. Public Service Commission, 101 Utah 245, 117 Pac. (2d) 298	8, 17, 18, 20
Nicoma Park Telephone Company v. State, 69 P. U. R., N. S., 521, 180 P. (2d) 626	14
Oklahoma Natural Gas Company v. Corporation Commission, 88 Okl. 53, 211 Pac. 401	24
Oklahoma Natural Gas Company v. W. H. Scott, 115 Okl. 8, 241 Pac. 164	25
In re Streeper, P. U. R. 1924 B 392	11
Union Pacific R. Co. v. P. S. C., 102 Utah 465, 132 Pac. (2d) 128	8
The Union Telephone Company v. Tipton Telephone Company, P. U. R. 1933 c. 285	8

In the Supreme Court of the State of Utah

UTAH POWER & LIGHT COMPANY
and TELLURIDE POWER COM-
PANY,

Plaintiffs,

vs.

THE PUBLIC SERVICE COMMIS-
SION OF UTAH and NEPHI CITY,

Defendants.

Case No.
7803

BRIEF FOR PLAINTIFF TELLURIDE POWER COMPANY

EXPLANATORY NOTES

Exhibit 1, Exhibit 10 and all the evidence on the subject shows that the Utah Power & Light lines extend only as far south as the south line of Township 11 South, Range 1 East, and that Telluride lines extend southerly therefrom. The south line of Township 11 is a short distance south of Mona. For convenience the witnesses did and this petitioner will refer to the south line of the Utah Power Company's transmission lines and the north line of Telluride Power Company's lines as being at Mona.

Nephi City will be referred to as Nephi. The Public Service Commission of Utah will be referred to as P. S. C. The Utah Power & Light Company will be referred to as Utah Power. Telluride Power Company will be referred to as Telluride.

All emphasis is added.

STATEMENT OF FACTS

Although the parties differ as to the legal conclusions to be drawn from the facts, the facts themselves are undisputed and indisputable.

Nephi City, since 1903, has owned and operated hydroelectric generating plants and a distribution system by which it distributes electric energy to itself and generally to its inhabitants (R. 43). These plants have generating capacity during low water season of approximately 125 KW and maximum capacity during high water season of 250 KW (R. 43). It is not possible for Nephi City to increase the capacity of its hydroelectric plants (R. 43). The peak load requirement of the system is now approximately 500 KW (R. 43). In order to provide this amount of electric energy, Nephi must purchase energy or construct new Diesel electric or steam electric generating plant (R. 43). For the past several years this problem has been solved by purchasing energy from Telluride Power Company, pursuant to its regular schedule of rates and the approval of the Public Service Commission.

No complaint is made by Nephi or any of its customers of the service or rates of Telluride (R. 1-3). Telluride has adequate facilities to meet all requirements of Nephi (R. 45).

Telluride Power Company for many years has been a public utility, supplying electric energy by means of generating plants and transmission and distribution lines to the inhabitants of portions of Sanpete, Sevier, Piute, Garfield, Juab, Millard and Beaver Counties. The area served is 15,000 to 20,000 square miles, about 200 miles long and 100 miles wide (R. 186). Three of its transmission lines cross mountains at elevations above 10,500 feet (R. 186). Total population in the area served by Telluride is only about 45,000. Population in areas served by Utah Power is over 10 times that amount.

Telluride purchases substantial quantities of electric energy from Utah Power & Light Company (R. 198) and such energy is delivered through a switchrack of Utah Power & Light Company located on the property of Thermoid Rubber Company near Nephi. Telluride is also interconnected with and takes energy from and distributes energy to Manti City, Ephraim City, Mount Pleasant, Beaver City, Garkane Power Association, Incorporated, Big Springs Power Company and Southern Utah Power Company (R. 188).

By means of its own generating capacity and purchase of energy from the sources mentioned above, Telluride has adequate power and other facilities to meet all the requirements of Nephi City for electric energy (R. 45). Telluride for many years has served exclusively the area south from

Mona (which is 7 miles north of Nephi) including all the area around Nephi City. Utah Power & Light Company has never served the area south of Mona, nor has it manifested any desire to do so (R. 101). Nor has it facilities to do so (R. 110-113). It has a certificate of convenience and necessity to serve the area now being served by it which does not include territory south of Mona (R. 110-113). Utah Power has no facilities south of Mona (R. 109, 110-113). Utah Power has never served south of Mona (R. 119). It has appealed from the order of the Commission (R. 62).

Telluride has a certificate of convenience and necessity to serve the area south of Mona (R. 45).

Neither one has a certificate to serve any of the area served by the other. Utah Power & Light Company serves the Thermoid plant, 2000 feet north of Nephi, (R. 218) pursuant to special permission by the Public Service Commission. All parties, including Telluride, agreed. The Public Service Commission in finally permitting the extension in 1947, treated it as an exception and stated that the authority granted "shall not be construed to authorize Utah Power & Light Company to serve any other customer in the territory now being served by Telluride Power Company" (R. 305, 306, Exhibit 19). The two lines from Mona to Thermoid switchrack are owned by Telluride (R. 116, Exhibit 1). They are leased to Utah Power (R. 109, 110). They are for the exclusive use of Thermoid and Telluride (R. 116). For Utah Power to serve Nephi as ordered by P. S. C. there would have to be constructed a new transmission line from

Mona to Nephi and new switching facilities at Mona where connection would be made with Utah Power facilities (R. 110-113). Such new facilities would cost about \$100,000.

Utah Power & Light Company, with some relatively minor municipal exceptions, serves power to the entire area extending from Mona along the western slope of the Wasatch mountains to the Utah-Idaho boundary line, including Salt Lake, Ogden and Provo. It has nothing to do with any lines south of Mona (R. 114). From an electric power standpoint, it is by far the best area in the State of Utah. Telluride, on the other hand, operates in comparatively barren areas where power users are relatively small in numbers but the distances required for transmission lines are very great.

Due to these natural differences, the rates charged by the schedules of the Utah Power & Light Company are substantially less than the rates of the Telluride Power Company. The rates of both companies have been approved by the Public Service Commission. As stated, no complaint is made in this case by Nephi City or any of its customers as to rates charged by Telluride.

The sole objective of Nephi City is to secure from Utah Power & Light Company power at its rate which is lower than the Telluride rate, but this desire for economy is not advanced as a reason by P. S. C. for its order.

The order of the Public Service Commission complained of here holds that Nephi City has this right without P. S. C. order. The order so provides although there are no existing facilities for delivering the electric energy from Mona,

which is the point on the Utah Power & Light Company system nearest to Nephi. The existing two lines serving Thermoid and Telluride are not part of the interconnecting Utah Power & Light System (R. 107). It will be necessary both to construct a new transmission line 7 miles in length and to construct some new connecting facility (R. 110-113).

Utah Power & Light Company has never held itself out or dedicated its property to furnishing electric energy to any area south of Mona (R. 117). Nevertheless, the order of the Commission is that Utah Power & Light Company "shall offer to furnish and deliver to Nephi City such electric energy as Nephi City may need—". Thus the Commission's own order recognizes that it is requiring the Power Company to extend its profession of public service.

The loss of revenue to Telluride from this order in 1949 would have been \$21,171.07 (R. 158).

STATEMENT OF ERRORS UPON WHICH PETITIONER WILL RELY TO SET ASIDE THE ORDER OF THE PUBLIC SERVICE COMMISSION.

I.

THE PUBLIC SERVICE COMMISSION VIOLATED THE LAW IN FAILING TO PROTECT TELLURIDE POWER COMPANY FROM COMPETITION IN AN AREA TO WHICH IT HAD DEDICATED ITS PROPERTY FOR RENDITION OF SERVICE AND IN WHICH PUBLIC CONVENIENCE AND NECESSITY DID NOT REQUIRE ADDITIONAL SERVICE.

II.

PUBLIC SERVICE COMMISSION VIOLATED THE LAW IN ORDERING THE INVASION OF TELLURIDE TERRITORY WITH CONSEQUENT SERIOUS DAMAGE WITHOUT ANY EVIDENCE AND WITHOUT MAKING ANY FINDING THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRES ANY SUCH, OR ANY OTHER REASON THEREFOR, BUT ON THE CONTRARY WITH A FINDING THAT EXISTING FACILITIES ARE IN ALL PARTICULARS ADEQUATE.

III.

THE ORDER SHOULD BE SET ASIDE BECAUSE PUBLIC SERVICE COMMISSION PROCEEDED THROUGHOUT UPON AN ERRONEOUS CONCEPTION OF THE LAW, THAT NEPHI HAD AN ABSOLUTE RIGHT TO BUY POWER FROM UTAH POWER.

IV.

PUBLIC SERVICE COMMISSION VIOLATED THE FEDERAL AND UTAH CONSTITUTIONS IN ORDERING UTAH POWER & LIGHT COMPANY TO RENDER SERVICE IN AN AREA TO WHICH IT HAS NOT DEDICATED ITS PROPERTY.

I

THE PUBLIC SERVICE COMMISSION VIOLATED THE LAW IN FAILING TO PROTECT TELLURIDE POWER COMPANY FROM COMPETITION IN AN AREA TO WHICH IT HAD DEDICATED ITS PROPERTY FOR RENDITION OF SERVICE AND IN WHICH PUBLIC CONVENIENCE AND NECESSITY DID NOT REQUIRE ADDITIONAL SERVICE.

P. S. C. has entirely disregarded this protective principle and has thus acted unlawfully, arbitrarily, capriciously and failed to exercise its authority according to law. Its order should be annulled.

Mulcahy v. P. S. C., 101 Utah 245, 117 Pac. (2) 298;

Union Pacific R. Co. v. P. S. C., 102 Utah 465, 132 Pac. (2d) 128.

This is a matter of great importance to Telluride. Not only would it reduce its income for 1949 to the extent of \$21,171.07 but it also serves as a precedent for other municipal utilities to follow as a result of which the Telluride system could be very seriously damaged. As revenues are lost, costs would increase and rates would have to follow. The action of P. S. C. is both short sighted and unlawful.

In an Indiana case, *The Union Telephone Company v. Tipton Telephone Company*, P. U. R. 1933 c. 285, a large company sought to serve patrons within a territory served by a smaller company. They were not permitted to do so. The Public Service Commission granted a rate increase to the Union Telephone Company, which adjoined territory served by the Tipton Telephone Company. Following this

rate increase several customers of the Union Telephone Company requested the Commission for permission to remove their telephones and seek service from the Tipton Telephone Company, which served the town of Tipton where most of their business and social life was carried on. The Public Service Commission denied the application of the complaining customers but the people made their own connection with the Tipton Company. The Union Telephone Company petitioned the Service Commission to stop service by the Tipton Company.

On pages 291 and 293 the Commission said:

“A portion of the prayer of petitioner in this cause is that certain subscribers located in the controverted territory be required to take service, if any, from the Ekin exchange of the Union Telephone Company. The Commission is of the opinion that it does not have the power to direct individuals to take service at all, or to take service from any particular company, but that it does have power to protect a public utility, which has dedicated its property to the service of a particular territory and which is ready and willing to serve all within that territory on the same terms, from invasion of its territory by another utility rendering a like service.

* * * * *

“The Commission is of the opinion that the territorial limits of telephone companies must not be encroached upon by adjoining telephone companies; that *the Commission has the power and it is its duty to preserve these rights and prevent such encroachment; that the interests of all the parties concerned are better served by enforcing the territorial rights of each.*

“The Commission is of the opinion that it would not be in the interest of either of these companies to

allow the patrons, one by one, to be taken away from the company entitled to the territory where such patrons reside. By doing so it would necessarily cripple the company which loses such patrons and cause an increase of rates to those who remain with such company. It would mean that the larger company would sooner or later bankrupt the smaller one; it would seem that if the Commission permits the Tipton Telephone Company to enter the territory of the Union Telephone Company at Ekin, that other adjoining companies would have to be extended the same privilege if demanded; thus the Ekin exchange of the Union Telephone Company could be made to lose all its territory and patrons; and in this way would be forced to abandon and lose its property."

This same principle and protection were extended by P. U. C. of Utah to an electric utility in *In re Bayles, et al.*, P. U. R. 1926 A 731. Bayles and eighteen other individuals petitioned the Public Utilities Commission of Utah for an order permitting the construction of an electric power line from their various farms in Parowan Valley to the northwest corner of Parowan City, so that they could buy power from Parowan City at 50% less than from Dixie Power Company, which served that area. The Commission denied their petition.

In discussing the disastrous effect on the entire system of the Dixie Power Company of such an order, the Commission said:

"While the lower rate offered by Parowan to Bayles and others, would have inured to its advantage for the present, the Commission is compelled to take into consideration the effect that granting this petition would have upon the users of power and light in the balance of the territory occupied by the Dixie Power Company.

"The loss of the income now derived by the power company in the vicinity of Parowan, together with the capital loss entailed by the enforced removal of the existing transmission lines, would ultimately have to be borne by the users in St. George, Cedar City, Hurricane, Washington, Summit, and various other communities and industries now served by it."

In still another case the Public Utilities Commission of Utah has announced the fundamental principle that utilities must be protected in their designated fields of service. *In re Streeper*, P. U. R. 1924 B, 392, applicant petitioned for a certificate of convenience and necessity to operate a truck line between Salt Lake and Ogden. Protestants were the established carriers. The Commission denied the application. On page 398, the Commission said:

*"Aside from the express limitations of the statute forbidding the issuance of certificates to applicants, unless 'the present or future public convenience and necessity require,' we are forced to the conclusion that it is for the best interests of the general public that public service agencies operating in a given field should be stabilized rather than be subjected to the ruinous hazard of competition. This principle seems to be in accord pretty generally, if not universally, with the conclusions arrived at by the Commissions of other states having jurisdiction over public utilities * * *."*

On pages 298 to 299, the Commission quoted with approval the following statement of the law from the Supreme Court of Illinois:

"It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is, that through regulation of an established carrier occupying a given field and

protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory * * * Where one company can serve the public conveniently and efficiently it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may receive a fair return on the money invested and cost of operation * * * Whether the public convenience and necessity require the establishment of a new transportation facility is not determined by the number of individuals who may ask for it. The public must be concerned as distinguished from any number of individuals."

The authority of the *Bayles* case remains unimpaired, yet the P. S. C. in the case at bar didn't even discuss it.

In a Wisconsin case, *Re Belmont and Pleasant View Telephone Company*, P. U. R. 1918 A, 491, the Belmont Telephone Company asked permission to extend telephone lines to some customers then served by LaFayette Telephone Company, which protested because the proposed extension would duplicate their existing lines. LaFayette rates were lower and Belmont subscribers desired the Belmont Company to extend its service to them. The Public Service Commission denied their applications and said that the mere fact that the Belmont Company service is cheaper cannot justify a duplication of equipment. On page 492 the Commission said:

"The duplication of equipment which the proposed extension would bring about, together with the probable loss of five or more subscribers by the La-

Fayette company, calls for a strong showing of public convenience and necessity in order to justify the competitive condition. The fact that the proposed service would be somewhat less expensive does not, of course, affect the matter at all, so far as the necessity for a competing line is concerned.

* * *

In a New Jersey case decided in 1949, *Borough of Butler v. New Jersey Power and Light Company*, 78 P. U. R., N. S., 448, Butler for many years operated its own municipal electric system and since 1926 served the adjoining town of Kinnelon. Under New Jersey law, municipal systems are public utilities subject to Commission regulation. The New Jersey Power and Light Company began serving customers in Smoke Rise, which was a new housing development within the limits of the town of Kinnelon. The users at Smoke Rise preferred service from the New Jersey Power. Butler objected to this service and petitioned the Commission for an order to restrain New Jersey Power Company from serving Smoke Rise, alleging that its territory was being invaded.

The Commission granted Butler's petition on the grounds that Smoke Rise was within the area served by Butler. The Commission stated that there is no allegation that the rates charged by the Borough of Butler are unreasonable or excessive and that even if such an accusation had been made, the proper remedy would be by a complaint before the Commission on the question of rate. The Commission on page 460 said:

"In view of these considerations, the matter of comparative rates will not be considered as determinative of the basic issue in this case * * *."

In an Oklahoma case decided in 1947, *Nicoma Park Telephone Company v. State*, 69 P. U. R., N. S. 521, 180 P. (2d) 626, Nicoma Company, a small telephone company, and the Bell Telephone Company owned adjoining systems, the small exchange serving Nicoma Park, a suburb of Oklahoma City and the large exchange serving Oklahoma City. The Public Service Commission ordered boundaries of service areas to be changed so that the large Bell Telephone Company could take over some of the service theretofore performed by the Nicoma Company. This would deprive Nicoma of approximately 10% of its revenue. The Supreme Court of Oklahoma reversed the order of the Commission. The court said that the effect of allowing Bell to enter the Nicoma territory would be to destroy the value of Nicoma's franchise and much of the value of its equipment.

On page 630 the court said:

“* * * The action appears to be one of attempting to satisfy the residents of the area wanting to communicate with Oklahoma City without paying a toll service charge, even though it be at a financial loss to both companies which, eventually, would have to be passed on to their other subscribers in the form of increased exchange rates.”

If the order by the Public Service Commission should be affirmed, Telluride will lose a revenue from Nephi City, and certain equipment and facilities dedicated to the service of Nephi as a part of the Telluride system would be rendered useless and the territory in which Telluride, pursuant to law and the orders of the Public Service Commission, has been furnishing electrical service as a public utility to all persons desirous thereof, including Nephi City, will be impaired.

Utah Power & Light Company and Telluride Power Company, Plaintiffs, vs. The Public Service Commission of Utah and Nephi City, Defendants. Case No. 7803.

Additional authorities supporting Point I for benefit of Plaintiffs.

For insertion on page 14 of Plaintiff's brief after line 23.

United Fuel Gas Company v. Public Service Commission, 103 W. Va. 306, 138 S. E. 388. Huntington, West Virginia, was being served by Huntington Development and Gas Company. Huntington Brick and Tile Company was served by the Huntington Development and Gas Company. No complaint was made of the service but it desired to be served by the United Fuel Gas Company because the rates of the latter were lower. On page 390 the court said:

“* * * That petitioner made complaint, not because of any failure of service by the intervening company, but for the sole purpose of getting the service at a lower rate, to which the United Fuel Gas Company had been limited by the commission.
* * * If, as is admitted, the only purpose of the complainant was to get cheaper gas, why was the application not made to the commission to compel the intervenor to reduce its rates? * * *”

On page 391 the court said:

“The disposition of patrons of public utilities to reach out for duplicate service by others is opposed to the general principles controlling such public service. With reference to this subject, an able writer says:

“The commissions are constantly denying applications for extensions into occupied territory where the established company is furnishing adequate service at reasonable rates. It has even been held that a commission cannot establish general rules and regulations governing

the extension of water mains in new localities, since the necessity of the extension must be determined from the facts of each case.' 1 Spurr's Guiding Principles of Public Service Regulation, p. 118."

Marr v. City of Glendale, 181 P. 671, 40 Cal. App. 748. Plaintiff sought to have Glendale required to serve her with water which would necessitate construction of additional facilities. A private water company with adequate water and facilities was at her door. The court held that the Commission properly refused the order. On page 673 the court said:

"* * * It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality.
* * *"

City of Olive Hill v. Public Service Commission, 305 Ky. 248, 203 S. W. (2d) 68. The City of Olive Hill had been serving electricity to patrons outside the city limits and this was held to be legal under Kentucky law. The Commission issued certificates of convenience and necessity to two other electric companies to duplicate this service. This was held to be unlawful. On page 71 the court said:

"The manifest purpose of a public service commission is to require fair and uniform rates, prevent unjust discrimination and unnecessary duplication of plants, facilities and service and to prevent ruinous competition. The courts generally deny the right of utilities to duplicate service. * * *"

Re Roscoe Electric Company, P. U. R. 1925 A, 176. The Beloit Electric Company was serving the town of Beloit and the Rock Electric Company was serving the town of Rock. The Roscoe Electric Company sought a certificate of convenience and necessity to duplicate service. On page 177 the Commission said:

“There is nothing in the testimony or evidence which would justify a finding that the electric companies now operating in said towns of Beloit and Rock under indeterminate permits are incapable or unwilling to provide reasonably adequate service at reasonable rates to the residents of said towns. Should the utilities fail in this duty, there is ample remedy for the interested patrons through the channels of this Commission. It is the evident policy of the public utility law that there should be no competition in utility service unless unusual conditions prevail which make the entrance of a second utility necessary for public convenience. If the application in this case were granted, there is reason to believe that instead of promoting public convenience, it might impair the same in some respects by depriving the more remote rural districts of the benefits which might be derived from the development of the more thickly settled portions by the same company.”

Fleetwood & Kutztown Electric Light, Heat & Power Company v. Topton Electric Light & Power Company, P. U. R. 1924 A, 353. These two electric power companies rendered service in different parts of Maxatawny township. The Topton Company sought to invade the territory of the Fleetwood Company. The Commission held that it should not be permitted. On page 356 the Commission said:

“The equities of the situation are with the complainant, but aside from this the Commission finds

and determines, from all the relevant and material facts in evidence, that it would be detrimental to the public interest to permit the Tipton Company to enter into competition with the Fleetwood & Kutztown Company in that part of Maxatawny township adjacent to the borough of Kutztown, and in which it is now and for twenty years last past has been rendering reasonably adequate service, and that such competition would not only be unjust to this company, but it would be injurious to the public, and that for the accommodation, convenience, and safety of the public, Complaint No. 4736 should be sustained. * * *

Virginia v. Appalachian Electric Power Company, 89 P. U. R. New Series 21. The town of Salem in Virginia operated a municipal electric plant which served both Salem and also outside consumers including consumers at South Salem wherein Moore and fourteen other users were located. Moore, et al. desired to be served by Appalachian Electric Power Company in spite of the fact that no complaint was made of service or rates.

Appalachian was not seeking to enter the South Salem territory and the Town of Salem was not subject to the regulation of the Public Service Commission.

The Commission considered that it would not be in the public interest to grant the petition and thus bring about a duplication of facilities with consequent destruction of the property of the town. On page 25 the court said:

“* * * The legislature has specifically authorized the Town to furnish service in this area and the Town has acquired an adequate and efficient system to perform that service. Why duplicate this

service to the ruination and destruction of this property? * * *

“If the question presented in this case were presented in a case involving two public service corporations, rather than a public service corporation and a municipality, could there be any doubt as to what the Commission’s decision would be? Certainly the Commission would not order one public service corporation to invade the territory served by another merely because some customers, without justifiable reason or grounds, prefer to be served by one company rather than the other. If it did, its decision would not long stand up in the courts.

* * *”

An order such as the one in question issuing from the Public Service Commission would constitute a precedent which would enable other cities south of Nephi now served by Telluride to petition and receive from the Public Service Commission authority to connect with the Utah Power & Light lines and would thus facilitate the impairment and eventual destruction of Telluride's operations in the State of Utah.

P. S. C. was arbitrary and capricious in wholly disregarding the devastating effects of the order on the Telluride system and business.

Under the order, Nephi City, by either building a transmission line or furnishing connecting facilities, may secure from Utah Power electric energy at a price less than other subscribers of Telluride. The reasoning of the P. S. C. is that Nephi, like any other person or corporation, has the right to buy power from the Utah Power Company by complying with its tariffs and schedules and that Utah Power Company is obligated to serve all applicants regardless of its profession.

The devastating results of such a situation on the rate structure and customers of Telluride requires no imagination. If Nephi can do it so can Manti, so can Ephraim, so can Mount Pleasant, so can Beaver City, so can Garkane Power Association, so can any large industrial consumer. All they have to do is to provide either a transmission line or connecting facilities and they are given the benefit of a lesser rate than other like customers in Telluride territory. This would seem to be a most violent discrimination. Those of Telluride's customers who find it economical to make the

“that present or future public convenience and necessity does or will require such construction.”

With respect to this requirement the Supreme Court of Utah in *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. (2d) 298, held that if the Commission found that public convenience and necessity did not require further public service in the territory that the application should be denied. On page 304 the court said:

“* * * While evidence pertinent to any question involved in the application may be presented on the hearing, the commission’s determinations would proceed as follows: *Does the public convenience and necessity require further, new or additional common carrier service in the territory proposed to be served? If not, the application should be denied.*”

On page 305 the court said:

“An applicant desiring to enter a new territory, or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. He must also show that the public welfare would be better subserved if he rendered the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement.
* * *

Thus, P. S. C. proceeded contrary to law in two particulars. First, it ordered an extension of facilities without any finding that the public convenience and necessity required the same. Second, it made such an order although finding that all facilities required for such service were adequate.

In substance there is a finding that public convenience and necessity do not require the invasion. The Commission affirmatively finds that the Telluride service and rates are and have been satisfactory (R. 45). Moreover, the P. S. C. in its original order found that public convenience and necessity would be best served by purchase by Nephi from Utah Power (R. 22). On Petition for Rehearing it was pointed out that there was no evidence to support this finding (R. 30). P. S. C. eliminated the finding in the amended report (R. 42-47).

Clearly the above justifies the inference that P. S. C. doesn't think that public convenience and necessity would be benefited? In fact gives no reason at all (R. 42-47). It merely says that Nephi has the right to buy power from Utah Power (R. 46, 47). The failure to give a reason is significant because in the original report lower rates were relied on as a reason (R. 21, 22).

III.

THE ORDER SHOULD BE SET ASIDE BECAUSE PUBLIC SERVICE COMMISSION PROCEEDED THROUGHOUT UPON AN ERRON-

EOUS CONCEPTION OF THE LAW, THAT
NEPHI HAD AN ABSOLUTE RIGHT TO BUY
POWER FROM UTAH POWER.

An order of P. S. C. should be annulled if it is based in a material particular upon an erroneous conception of the law.

Mulcahy, et al. v. Public Service Commission,
101 Utah 245, 117 P. (2d) 298;

Bamberger Electric Railroad Company v. Public Utilities Commission, 59 Utah 351, 204 Pac. 314.

The Commission proceeded throughout upon an erroneous conception of the law. The Commission correctly concluded that the Public Service Commission has no control over a municipality engaged in public service but incorrectly concluded that the Public Service Commission “should not attempt by indirection to regulate Nephi by restricting the source from which it can purchase power, to Telluride Power Company” (R. 22). The Commission also stated in the amended order—“it (Nephi City) has the same right to purchase power from Utah Power & Light Company as (Telluride) and others who are purchasing power for resale from Utah Power & Light Company so long as it conforms to the rules and regulations of the published schedules of Utah Power & Light Company” (R. 47).

A reading not only of these excerpts but of the Commission’s report and order clearly discloses that it had the erroneous idea that because Nephi City is not subject to control by the Public Service Commission as a public utility

that it therefore can purchase power from Utah Power & Light Company entirely regardless of established rights of Telluride Power Company, entirely regardless of service areas established by the Commission for the two regulated companies, Utah Power & Light Company and Telluride Power Company, and free from any control whatever except compliance with the Utah Power & Light Company tariffs.

The law is that although a municipality engaged in public service is not subject to regulation by a public service commission that nevertheless if such a municipality desires to make purchases from regulated companies, it must do so within the laws and orders regulating such companies.

It is unnecessary to cite authorities to this effect. Nephi City concedes that it is so. At R. 313, Nephi City made the following statement: "It (the municipality) can purchase its power anywhere it is available, except that it must get the approval of the P. S. C. if it attempts to purchase from a regulated utility." Again, Nephi City said at R. 313: "The only restriction on the purchase of power by Nephi that the P. S. C. or anyone else can place is that if it purchases power from a regulated utility the P. S. C. must approve." Again at R. 313, Nephi City said: "This regulation of the P. S. C. in the case of a purchase of power from a regulated utility has nothing to do with city boundaries. That permission would be necessary even if the regulated utility were generating power within the city. It is equally true if it were generating power outside the city.

The important thing is that it is a regulated utility and not where it is located."

The written words of Nephi City above set forth were indeed hardly necessary. The acts of Nephi City speak louder than its words. Nephi City filed this application with the Public Service Commission and thus appealed to its discretion. If Nephi City had had the absolute right to buy power from the Utah Power & Light Company, as stated by the Commission, no petition to the Public Service Commission need have been made. It would only have been necessary to bring an action to compel Utah Power & Light Company to perform its clear legal duty.

This misconception of the law could not but profoundly and adversely affect its decision. It would be one thing merely to decide that Nephi City had the absolute right to purchase power from Utah Power & Light Company, and an entirely different thing to consider all elements of the case on their merits and decide whether in the exercise of its discretion the Commission should or should not order Utah Power & Light Company to invade the territory of the Telluride Company.

The fallacy in the Commission's amended report that Nephi has a right to buy power from Utah Power Company is based upon Nephi City's contentions.

At R. 315 in its rely brief intervenor made the statement: "We readily confess that if we were an unincorporated area within Telluride area seeking to buy power from Utah Power & Light Company the Commission would be compelled to deny that application." According then to

Nephi's contention every body or group of bodies has the absolute right to purchase power wherever they please, but only *incorporated* areas. This, of course, is based in Nephi's thinking that under Utah Constitution municipalities can engage in public service without regulation by the P. S. C.

The above statement, however, directly conflicts with the statements made by Nephi that although Nephi can engage in public service without regulation that if it chooses to buy power from a regulated company that it must comply with the principles applicable to utility regulation (R. 313).

Utah Power & Light Company and Telluride Power Company, Plaintiffs, vs. The Public Service Commission of Utah and Nephi City, Defendants. Case No. 7803.

Additional authority supporting Point III for benefit of Plaintiffs.

For insertion on page 23 of Plaintiff's brief after line 23.

United Fuel Gas Company v. Public Service Commission, 103 W. Va. 306, 138 S. E. 388. The facts in this case are stated under Point I. On page 391 the court said:

“* * * And as declared here in the cases cited, we may review the judgment of the commission when ‘based on a mistake of law,’ or when it acted arbitrarily and unjust without evidence to support it, or when its authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow has determined the validity of the exercise of the power, the rule declared also in *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541, 547, 32 S. Ct. 108, 56 L. Ed. 308, and followed by us in the cases already cited. * * *

The important thing is that it is a regulated utility and not where it is located."

The written words of Nephi City above set forth were indeed hardly necessary. The acts of Nephi City speak louder than its words. Nephi City filed this application with the Public Service Commission and thus appealed to its discretion. If Nephi City had had the absolute right to buy power from the Utah Power & Light Company, as stated by the Commission, no petition to the Public Service Commission need have been made. It would only have been

Nephi's contention every body or group of bodies has the absolute right to purchase power wherever they please, but only *incorporated* areas. This, of course, is based in Nephi's thinking that under Utah Constitution municipalities can engage in public service without regulation by the P. S. C.

The above statement, however, directly conflicts with the statements made by Nephi that although Nephi can engage in public service without regulation that if it chooses to buy power from a regulated company that it must comply with the principles applicable to utility regulation (R. 313). There is an irreconcilable conflict of principles. That conflict in turn is based upon a complete misconception of the Constitutional nature of a municipality's right to engage in public service. Nephi regards it as complete sovereignty, coextensive with municipal boundaries and contends that anything a city chooses to do within those boundaries or in connection with things in those boundaries are free of regulation. Of course that is not true. There are many things that municipalities cannot do within municipal boundaries. They are all subject to the police power of higher governmental authority including the exercise of the police power involved in the regulation of utilities other than the city itself.

IV.

**PUBLIC SERVICE COMMISSION VIOLATED
THE FEDERAL AND UTAH CONSTITUTIONS
IN ORDERING UTAH POWER & LIGHT COM-
PANY TO RENDER SERVICE IN AN AREA**

TO WHICH IT HAS NOT DEDICATED ITS PROPERTY.

Interstate Commerce Commission v. Oregon-Washington Railroad Navigation Company, 288 U. S. 14, 77 L. Ed.

588, 53 S. Ct. 266. The Union Pacific was ordered by I. C. C. to build a railroad approximately 185 miles long, extending from Burns, Oregon to Crescent Lake, Oregon. Union Pacific had not theretofore served that area although it did have extensive railroads in Oregon. The court held that an order of the I. C. C. ordering it so to do was the taking of property without due process of law, in violation of the Federal Constitution. On page 274 the court said:

“* * * The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship. State courts have uniformly held that to require extension of existing lines beyond the scope of the carrier’s commitment to the public service is a taking of property in violation of the Federal Constitution. * * *”

The same principle was applied by the Supreme Court of Oklahoma in *Oklahoma Natural Gas Company v. Corporation Commission*, 88 Okl. 53, 211 Pac. 401. The Gas Company distributed gas to various towns in Oklahoma, but not to the town of Chickasha which was four and a half miles from a connection. The Chickasha Gas and Electric Company, which served the town, had already extended its lines four and one-half miles to within a few feet of where

a connection could easily be made. The Commission ordered the Gas Company to serve Chickasha. The court held that the Commission had no power to compel the Gas Company to extend its service to a city it had not undertaken or professed to serve and that an order requiring the Gas Company so to do would be the appropriation of private property for public use, and an interference with the managerial discretion of the Company. On page 402 the court said:

“But the appellant has not undertaken or professed to serve the city of Chickasha, neither does it profess to serve the state at large. The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. This duty is not to all men, but to a certain public limited by its profession. Wyman on Public Service Corporations, § 344; and, while the Corporation Commission may within constitutional and reasonable limitations compel appellant to extend its service within the boundaries of those cities it is now serving, or those it may undertake to serve, it is without power or authority to compel appellant to serve a city not included within its profession of service. To compel the appellant to extend its service to a city, town, or community it has not undertaken or professed to serve, and which it does not desire to serve, is tantamount to an appropriation of private property for public use without just compensation. * * *”

In *Oklahoma Natural Gas Company v. W. H. Scott*, 115 Okl. 8, 241 Pac. 164, the court reversed the Commission for ordering the Gas Company to serve territory that was merely on the other side of the highway from the Gas Company's existing lines. This was because the Gas Company had not

professed or undertaken to serve that area. On page 167 the court said:

“An examination of the Chickasha Case, supra (88 Okl. 53, 211 P. 402), discloses that the opinion is based upon the legal principle that the company had not obligated itself to furnish the city of Chickasha with gas.

“The controlling element in the instant cases is that the company has not undertaken to serve these complainants, and has not obligated itself to serve them.”

The P. S. C. has violated this elementary, fundamental and unquestioned principle of law. The Utah Power & Light Company has professed to serve as far south as Mona, but not farther. It has now been ordered to extend its service 7 miles to furnish electricity to Nephi.

Utah Power & Light Company of course has just right to complain of such an order and is doing so. However, every other utility in the state, especially electric power companies, must complain of such an unwarranted assumption of authority in order to protect their property from taking without due process of law.

It is respectfully submitted that the order of the Public Service Commission should be set aside.

Respectfully submitted,

H. R. WALDO,
W. Q. VAN COTT,
CLIFFORD L. ASHTON,
Attorneys for Plaintiff,
Telluride Power Company