

1952

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

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH  
**FILE**

APR 23 1951

Clerk, Supreme Court

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

*Plaintiffs,*

— vs. —

THE PUBLIC SERVICE COM-  
MISSION OF UTAH and NEPHI  
CITY,

*Defendants.*

Case No.  
7803

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**Brief of Defendant Nephi City**

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CITY,

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## Brief of Defendant Nephi City

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### NATURE OF THE CASE

Nephi City applied to the Public Service Commission of Utah for an order directing the Utah Power & Light Company to sell power to the city of Nephi. The point where Nephi was to take the power was at the nearest point where Utah Power's facilities were adequate to serve Nephi. Utah Power did not file any protest to this application, nor did it raise any objection at the hearing. The Telluride Power Company intervened and protested. After the P.S.C. ordered Utah

Power to sell to Nephi, both Utah Power and Telluride filed petitions for rehearing. As a result of these petitions for rehearing, an amended order directing Utah Power to sell to Nephi was entered. Both Telluride and Utah Power instituted these proceedings to have the correctness of the order reviewed by this court.

## STATEMENT OF FACTS

The statements of fact by Telluride and Utah Power are adequate to reflect the nature of the controversy. They do, however, contain erroneous assertions, two of which involve the focal point of the case. The first erroneous assertion is that Utah Power has never devoted any of its facilities to furnishing power for distribution south of Mona. This is directly contrary to the evidence. Telluride purchases roughly half of all the power distributed by it from Utah Power. (R. 198-200, 209.) It has been connected to Utah Power's system since 1929. (R. 97.) The power from Utah Power is being distributed in Nephi today and at the time of the hearing and for many years prior thereto it was so distributed. The only change in this regard which would be brought about by affirming the Commission's order is that the power would be purchased at Mona by Nephi instead of being purchased at Mona by Telluride. In both instances the power will come from Utah Power, and in both cases the power so purchased will be distributed south of Mona.

There is considerable evidence in the record from the manager of Telluride (R. 198-200, 209) and from Mr.

Irvine of Utah Power (R. 96-102) concerning the facilities for delivering electrical energy from Utah Power to Telluride for distribution south of Mona. Mr. Irvine testified that Utah Power operates a 44 k.v. substation in Santaquin, Utah. This is connected directly with the Olmsted Hydro-electric Plant and the Hale Steam Plant near Provo, Utah. These plants have a combined capacity of approximately 70,000 k.v. Two 44 k.v. transmission circuits extend from the Provo plants to the Santaquin substation and then extend south to Mona, Utah, which is the south boundary of Utah Power distribution system. At Mona, the two 44 k.v. transmission circuits continue southward but they are owned by Telluride, and the power is taken south for distribution in Telluride's territory. Utah Power constructed these two 44 k.v. transmission circuits to Mona for the express purpose of selling large quantities of power to Telluride for distribution throughout Southern Utah. (R. 97 and 98.) They come to a dead end insofar as Utah Power's system is concerned (Ex. 1). The lines were thus designed and built to interconnect with Telluride's system, which distributes throughout Southern Utah. The assertion that Utah Power has never devoted any of its facilities to generate and deliver power for consumption in the Nephi area is thus directly contrary to the evidence. The only change contemplated will be that Nephi must construct a new line from Nephi to Mona, and Nephi will purchase direct from Utah Power, rather than to have the power sold to Telluride and thence to Nephi. It is admitted that Utah Power has adequate facilities to serve any load which may be required by the city. (R. 107.)

The second erroneous assertion is that Nephi City is the territory of Telluride. Nephi City is a municipal corporation, which has availed itself of its constitutional and statutory right to build a municipal power plant. It has not sufficient generating capacity to generate all the power which it needs, and throughout the years it has purchased additional power from various sources. For the ten year period from 1924 to 1934, it purchased power under contract from the town of Levan. (R. 127.) At a later date (1934-1941) it purchased power from the Big Springs Power Company (R. 128), at Fountain Green, Utah, and during the past ten years it has purchased power from Telluride. (R. 129.) Its purchase from the town of Levan did not make it Levan's territory, nor did its purchase from Big Springs Power Company make it the territory of that company. Telluride did not hesitate in 1941 to take over this business from Big Springs Power Company, nor did it apparently consider it was invading Big Springs' territory. Since 1903 Nephi has had its own plant. (R. 129.) During the first 39 years it made no purchases from Telluride, although Telluride was in business in adjacent territories. Then in 1941, Nephi made a contract with Telluride. (R. 129.) Petitioners would have the court believe that this contract converted Nephi into Telluride territory. The city of Nephi is not the territory of any utility. By electing to build its own plant, (as the cases demonstrate) Nephi is in legal contemplation as far removed from Telluride's territory as if it were located in another state. Its contract to purchase power from Utah Power will not convert it into the territory of either. It is a municipality with power to build its



own generating plant and distribution facilities. No power company could force its way into the city. The question is simply one of where it must buy its power. Telluride is insisting that it must buy its power from Telluride, (1) because it has been doing so for a period of ten years, and (2) Telluride is closer to Nephi than is Utah Power. The argument to follow will demonstrate that the contentions simply are not sound.

Perhaps one additional fact should be noted. Telluride asserts at page 8 of its brief that its income has been reduced to the extent of \$21,171.07. This is misleading, although we think immaterial. The figure given is a gross reduction in revenue. From this figure must be deducted its service costs and the amount which Telluride would have paid to Utah Power for the power it would have purchased for resale to Nephi. The net loss is less than \$5,000.00. (R. 159.) We do not think, however, that this has any materiality to the case. Additional facts will be developed in connection with the law argument.

## ARGUMENT

POINT I. NEPHI, IN THE EXERCISE OF ITS POWER TO OPERATE AND MAINTAIN ITS OWN POWER SYSTEM, IS NOT SUBJECT TO THE CONTROL OR SUPERVISION OF THE PUBLIC SERVICE COMMISSION.

Section 29, Article VI of the Constitution of the State of Utah provides as follows:

“The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.”

The foregoing constitutional provision has been construed by the Supreme Court of Utah in the case of *Logan City v. Public Utilities Commission*, 72 Utah 536, 251 Pac. 961. In that case an attempt was made by the Public Utilities Commission of Utah to fix the rates charged by the City of Logan to its inhabitants for electric power, provided by their municipally owned plant. The Supreme Court of Utah held that a municipality has the right to operate its power facilities for the use and benefit of its inhabitants without interference or supervision by the Public Utilities Commission. The court said at page 565 of the Utah Reports:

“We think it clear that the undoubted purpose of the constitutional provision is to hold inviolate the right of local self-government of cities and towns with respect to municipal improvements, money, property, effects, the levying of taxes, and the performance of municipal functions . . .

“There is still a further constitutional provision (Sec. 4, Art. 14) of some relevancy to the matter in hand, which places a limit of indebtedness on cities and counties not exceeding 4 per centum of the value of the taxable property therein, with a proviso, however, that any city or town may incur a larger indebtedness, not exceeding 4 per centum additional, ‘for supplying such city or town with water, artificial lights or sewers, when the works

for supplying such water, lights and sewers *shall be owned and controlled by the municipality.*' (Italics added) Such, we think, contemplates that such utilities as there enumerated shall not only be owned, but also controlled, by the municipality, and as indicative of a policy in harmony with the other constitutional provisions referred to, to hold inviolate the right and power of a municipality to do so, and that to delegate a power to a commission or other agency to supervise, regulate and control the business of such a municipally owned utility, disapprove contracts, purchases, and expenditures of the municipality with respect thereto, and substitute others in lieu thereof, fix rate and charges under which the utility may be operated; and to permit the commission to do what it here in effect did, determine the means or source by or from which the operating expenses and bonded indebtedness of the plant or works must be met, constitute unauthorized interference with the control of the utility by the municipality. "We are thus of the opinion that the order made by the commission, insofar as it affects Logan City, is beyond the power and jurisdiction of the commission, and therefore is annulled and vacated."

The Logan City case was reaffirmed by the Utah Supreme Court in the case of *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878, and reaffirmed and distinguished in the more recent case of *Provo City v. Department of Business Regulation*, 218 P. (2d) 675, page 678.

In view of the foregoing constitutional provision and of the cases construing it, it is clear that the P.S.C. has no jurisdiction to regulate a municipally-owned power plant. To do what petitioners now contend (make

Nephi buy from Telluride by prohibiting any other company from selling to Nephi) would by indirection do that which the constitution would not permit the Commission to do directly.

POINT II. NEPHI IS NOT THE "TERRITORY" OF  
TELLURIDE AND THE COMMISSION HAS NO  
JURISDICTION TO COMPEL NEPHI TO PUR-  
CHASE POWER FROM TELLURIDE.

It is asserted by Telluride that Utah Power has been ordered to invade Telluride's "territory". It is also asserted that Utah Power could only sell to Nephi if the public convenience and necessity required it. Since Telluride can buy all the power Nephi needs from Utah Power, it can sell Nephi all the power Nephi needs. Thus it is argued the P.S.C. should compel Nephi to let Telluride broker the power to Nephi forever; its ten-year contract to sell power to Nephi makes Nephi Telluride's exclusive territory and supersedes all the constitutional provisions which give to Nephi "self-rule" in this field.

The cases simply do not support any such proposition. Were we dealing with an unincorporated area under the direct control of the P.S.C. (as in cases cited by Telluride) there would be an exclusive franchise area which could not be invaded by a second utility unless the first utility could not render adequate service. Here, however, Nephi is not the territory of Telluride. There is no way Telluride could force its way into Nephi. The P.S.C. could not grant either Telluride or Utah Power

the right to distribute power in Nephi. Nor could the P.S.C. regulate Nephi. Nephi could build its own generating plants and not buy power from either. It could buy power from the Town of Levan or the city of Provo and the P.S.C. would have absolutely no jurisdiction over the contract between the cities. Its only concern here is to see that other customers of Utah Power are not given *inadequate service* by reason of sales to Nephi. The P.S.C. could not order Utah Power to sell to Nephi if Utah Power did not have the facilities, or could only sell to Nephi by depriving its other customers of adequate service. Here, the power going to Nephi will come from Utah Power, in any event. Telluride has not constructed substantial new generating facilities for over thirty years. (R. 176.) It could only supply Nephi by continuing to purchase from Utah Power. Thus, it will not interfere with Utah Power's service to other customers to continue selling power to Nephi. In fact, Mr. Irvine testified that Utah Power has adequate facilities to furnish all the power Nephi needs or wants. (R. 107.)

- (a) THE CASES HOLD THAT NEPHI NEED NOT BUY POWER FROM THE NEAREST UTILITY, NOR PERPETUATE THE EXISTING CONTRACT.

Fortunately, we are not here "breaking new ground". This problem has been before several commissions and the results have been uniform in upholding our position.

In a very recent case, *In re Union Electric Company of Missouri*, 1951 P. U. R. (N.S.) 428, this identical prob-

lem was presented to the Missouri Commission. There the city of Rolla had for a number of years been purchasing power from Sho-Me Power Company. Its contract had been terminated and was no longer in effect. It desired to purchase power from Union Electric Company. Sho-Me protested, saying that its service to Rolla was adequate, and that the loss of revenues would seriously injure Sho-Me. Missouri, like Utah, permits cities to engage in supplying electricity to their inhabitants free from regulation by the State Commission. Practically every contention made by Telluride here was made by Sho-Me in the Missouri case. It had for a number of years had a contract just as Telluride has had a contract here. The contract had ended as Telluride's has ended. Its service was adequate, as Telluride contends that its is. The loss of revenues was assured and the consequences were equally as serious as are presented here. The Missouri Commission held exactly as our Utah Commission has held, and in so holding said:

“The Supreme Court in *Columbia v. State Public Service Commission*, 1931, 329 Mo. 38, 43 S.W. (2d) 813, has held that this Commission does not have authority under the law to regulate municipally owned electric light plants. Since the law allows municipalities to own and operate electric plants and systems for the purpose of serving its inhabitants, and as such are not subject to regulation by this commission, to refuse to permit a utility under our jurisdiction, able and willing to contract with the municipality to furnish service thereto on the sole ground that it would injure or harm another utility furnishing service to said municipality, would in effect be doing indirectly

what the law will not permit us to do directly—that is, exercising jurisdiction over the territory within the exclusive control of the municipality. In order for one utility to invade the territory of another, it would be necessary for said utility to enter and serve territory belonging to the other. The City of Rolla and the inhabitants thereof are as far removed from the territory of Sho-Me as though lying in another state. *MacKay Light & Power Company v. Ashton & St. Anthony Power Company (Idaho) P.U.R. 1920B, 4.*

“The Commission has no authority to pass on the decision of the city of Rolla to cease purchasing its energy requirements from Sho-Me.

“However, in this case, it can not be said that the city of Rolla is within the allotted service area of either Sho-Me or the applicant. By virtue of other provisions of our statutes, the city, by its authorized action, has placed itself beyond the service area of any utility, since it has elected to own and operate its own electric system for the service of the public within its corporate limits.”

The identical problem was also presented to the Idaho commission in the case of *MacKay Light & Power Company v. Ashton & St. Anthony Power Company*, P.U.R. 1920 B, page 4.

In that case the complainant, MacKay Light & Power Company, had been granted a certificate of public convenience and necessity authorizing it to build a transmission line from its plant near MacKay, Idaho, to the Village of Arco, and to furnish electrical energy to said village and territory adjacent to its transmission line. However, the Village of Arco desired to purchase power

from the Ashton & St. Anthony Power Company. That company had adequate power to serve the Village of Arco without in any way interfering with its ability to serve its present and prospective customers. The Village of Arco owned and maintained a small power plant operated by a gas engine and such plant was inadequate and unsatisfactory to meet the needs of the village; and the people of the village had voted municipal bonds for the purpose of constructing an electric transmission line from a connection with the village system across MacKay Light & Power Company's territory to the system of St. Anthony.

In upholding the right of the village of Arco to construct a transmission line through the territory of the MacKay Light & Power Company, and to purchase its electric energy from the latter company, the Public Service Commission of Idaho stated:

“Complainant insists that defendant, by extending its lines to meet or connect with the transmission line of the village of Arco, even though such extension is entirely within territory allotted to defendant by the Commission, is invading or attempting to invade the territory covered by the certificate of complainant, thus doing or attempting to do, indirectly what it cannot lawfully do directly; that since there is no demand for electric energy for use within defendant's territory to be delivered at the point where complainant desires to connect its proposed transmission line with the defendant's, any action taken by defendant with the intent and purpose of assisting the village of Arco in securing electric energy to be used within the territory covered by complainant's certificate



is an unlawful invasion of said territory. On the other hand, it may be argued that since the law allows municipalities to own and operate electric plants and systems and specifically exempts them from the jurisdiction of the commission, the commission, by refusing to permit defendant to furnish electric energy to the village of Arco on the ground that such energy is to be used within the complainant's territory, is doing indirectly what the law says it may not do directly—that is, exercising jurisdiction over the territory within the exclusive control of the municipality. On the broad grounds that the best interests of the public generally in the regard of territories allotted to complainant and defendant by the Commission, will best be served by requiring that all the demand for electric energy in such territory be supplied by the utility authorized to operate in that field or territory, it would appear that the Commission might refuse to permit any current to be carried without the limits of the territory which the Commission, in the exercise of its judgment, has assigned to a particular utility. We cannot, however, escape the conclusion that the legislature, in exempting municipalities from the jurisdiction of the Commission intended to remove the territory within the municipality from control of the commission as completely and effectively as if it had taken such territory bodily and set it down without the confines of the other.”

The Commission, therefore, held:

“That the defendant should not be restrained and enjoined from entering into a contract to furnish or sell and deliver to the village of Arco electric energy at any point within territory covered by the certificate of convenience and necessity issued to said defendant by the Commission,

to be carried over a transmission line owned by said village for the exclusive use of said village within its corporate limits.”

We have quoted rather extensively from the case involving the Village of Arco, because it so perfectly parallels the situation here. The Idaho Public Service Commission confirmed the right of the Village of Arco to by-pass the closest utility and to go clear through its territory to acquire power from the Ashton & St. Anthony Power Company. For the same reasons and considerations, the city of Nephi has the right to by-pass the Telluride Power Company and purchase the power it needs from the Utah Power & Light Company.

Another case equally in point is *Village District of Belmont v. LaConia Gas and Electric Co.* (New Hampshire) P.U.R. 1925 C, page 349. There a city had been buying power from the Tilton Electric Light Company. The city board decided, when its contract expired, to buy power from LaConia Gas & Electric Co. The latter company refused to sell to the city, because Tilton had been serving the town, and Tilton had adequate facilities to continue so to do. Tilton intervened and proved that the loss of revenue would be serious, and that it was willing and anxious to continue to serve the town. Again we have a direct parallel, in that there was an existing contract with the first utility, it was rendering adequate service and the loss of revenues would be serious. The second utility (like Utah Power) did not want to serve the town. Still, the Commission required the second utility to render service to the town.

See also *Town of Kearny v. Passaic Consolidated Water Company*, 1925 B P.U.R., page 437. There a town had by contract purchased water from the New Jersey Suburban Water Company. Its contract expired. The town desired to discontinue purchasing from that company and to commence purchasing from Passaic Consolidated Water Company. Both the first and the second companies were regulated utilities. The facts showed that the New Jersey Suburban Water Company was buying water from Passaic and reselling it at an increased price to the town. By making the purchase and resale, New Jersey Suburban Water Company was able to render adequate service. It had a big investment in facilities which were constructed to permit delivery of the water to the town. The loss of the town as a customer would greatly lessen the value of the facilities. Nevertheless, the Commission held that the town was not required to continue to buy from New Jersey Suburban Water Company, which desired to continue to serve the town. The Commission, therefore, ordered Passaic to permit the connection.

All of these cases are in point with the decision of the P.S.C. here. It is not possible to spell out any substantial difference in any one of them. They are in harmony with the Utah Supreme Court ruling which accords to Nephi the right to operate its own electrical distribution system, free from the control of the Public Service Commission. If the Commission is permitted to shut off every other available source of electrical energy, it can compel by indirection the purchase of power from Tellu-

ride. It could thus in violation of the constitution award Nephi to Telluride. Telluride asks the Court to do this, because Telluride allegedly needs the revenues.

(b) THE NEED OF TELLURIDE FOR ADDITIONAL REVENUES  
IS IMMATERIAL TO THE ISSUES INVOLVED IN THIS CASE.

The cases cited above under subdivision (a) hereof have uniformly held that the loss of revenues by a particular utility has no bearing whatsoever on the question of whether a town or city can buy from a different source. If Nephi elected to build its own generating plant, it could do so without Public Service Commission approval. See cases under Point I. Telluride would thus lose the revenue and no agency would have any power to do anything about it. Telluride could not force its way into Nephi City. If Telluride really needs the business, and this is grounds for the Public Service Commission to indirectly regulate cities, Telluride's weak financial position should be bolstered by letting it broker power to some of the other cities in the state too. The P.S.C. has no authority to make any city subsidize Telluride. Telluride has no vested right to broker power to Nephi or Provo or any other city in the state. It would, of course, be serious as far as public utilities are concerned if all of the cities of the state elected to go into the electrical power business. Utah Power would be seriously injured if Salt Lake City made that decision. Still, the constitution would permit Salt Lake City to do so, notwithstanding the consequent loss of power revenues to Utah Power. If every city and town in the state took advantage of its

constitutional powers, it might well be that all utilities in the state would "fold up", but this still does not change the fact that the constitution has placed this right in all cities and towns, as was pointed out by the court in the *Logan City* case, supra. The matter of public convenience and necessity is not controlling insofar as cities are concerned. The only reason that this matter is before the P.S.C. at all is that Nephi is seeking to purchase from a regulated utility. If a sale by that utility would seriously impair its ability to serve present and prospective customers, the P.S.C. should prohibit the connection. In the relatively recent case of *North Salt Lake v. St. Joseph Water & Irrigation Company*, (Utah) 223 P. (2d) 577, the court upheld a restriction by the P.S.C. on new connections, even within the franchise area of St. Joseph. Under that case Utah Power could even be prohibited from connecting one new customer in the very heart of its territory if its existing customers could not be adequately served with the company's existing capacities. Therefore, no regulated utility could be required to sell to any new customer either within or without its territory, if a sale to such additional customer would impair its ability to serve its existing customers. This is the only consideration for the P.S.C. In this case the record would permit no other conclusion than the one reached by the P.S.C. That is, that Utah Power has ample facilities to supply Nephi City. (R. 107.) In fact, even if petitioners prevail, Nephi's power will come from Utah Power through Telluride to Nephi. Since it will not impair Utah Power's ability to serve its existing or potential customers, the P.S.C. should not attempt to

prohibit Utah Power from selling to any city and to thereby compel the city to buy from Telluride or some other source. As the Missouri Commission said in the *Union Electric Co.* case, Nephi is in legal contemplation as far removed from Telluride's territory as if it were in another state.

See also *Alabama Power Co. v. Guntersville*, 117 So. 332, 114 A.L.R. 181, 193, and *People v. City of Loveland*, (Colo.) 230 P. 399, which holds that a city can not be deprived of its power to control its own affairs by the fact that a regulated utility has invested large sums in supplying facilities to serve the city. The court said:

“To hold contrary would assert that no competition in the furnishing of light, power, gas, water and kindred matters, should be allowed once a plant has been provided to supply any of them.”

(c) THERE CAN BE NO QUESTION CONCERNING THE POWER OF A CITY TO BUILD ITS LINES TO POINTS BEYOND ITS CITY LIMITS.

It has been already held by the Utah Supreme Court that a city may construct lines and build generating equipment beyond its city limits. The problem was squarely raised in the case of *Muir v. Murray City*, 55 Utah 368, 186 Pac. 433. In that case the city of Murray borrowed money from Muir for the purpose of constructing an electric transmission line from Murray to the community of Granite, which was about seven miles beyond the Murray city limits. The city attempted to avoid paying the obligation, by contending that it did

not have the right to incur an obligation for that purpose. In holding to the contrary the court said:

“In the case at bar the city had the power to establish an electric light plant and transmission line beyond its boundaries, if necessary, for the purpose of supplying light for itself and inhabitants. Com. Laws of Utah 1917, Section 570x2. It had the power to purchase water rights for that purpose and pay in cash or by furnishing power in exchange therefor.”

Also, in *North Salt Lake v. St. Joseph Water & Irrigation Company*, supra, 223 P. (2d) 577, the court upheld the right of the Town of North Salt Lake to condemn the water system of St. Joseph. St. Joseph was a regulated utility with water rights and facilities in part beyond the city limits.

### POINT III. THE PUBLIC SERVICE COMMISSION DID NOT REQUIRE UTAH POWER TO RENDER SERVICE IN AN AREA TO WHICH IT HAS NOT DEDICATED ITS PROPERTY.

Both Utah Power and Telluride have contended that Utah Power has been required to dedicate its facilities to serve an area which it has never served and does not desire to serve. This is wrong as a factual matter, because the record shows that Utah Power has constructed facilities for delivering power to Mona from whence it can be transmitted to others for use throughout Southern Utah. It is wrong as a legal matter, because the P.S.C. order contemplates that Nephi will come to Utah Power's lines for its connection.

(a) UTAH POWER HAS DEDICATED ITS FACILITIES FOR GENERATING AND TRANSMITTING POWER TO MONA FOR USE IN SOUTHERN UTAH.

Whether a public utility has professed to serve a given area is a question of fact, rather than a question of law; see *United Fuel v. P.S.C.*, 105 West Virginia 603, 144 S.E. 723.

In view of Mr. Irvine's testimony, there can be little merit to this contention by Utah Power. Mr. Irvine testified that in an agreement with Telluride executed on July 3, 1929, Utah Power constructed an interconnecting transmission line from the Santaquin substation of Utah Power to the Gunnison substation of Telluride. Utah Power has supplied Telluride power through these lines since November 1, 1929. (R. 98.) On August 5, 1949, Telluride purchased a portion of the line. Another transmission line between the Hale and Olmsted plants, near Provo, and Mona was constructed by Utah Power to meet and connect with Telluride's lines at Mona for the purpose of supplying additional power to Telluride. (R. 98.) At that time Telluride was serving Nephi. (R. 146.) It is thus clear that Utah Power constructed two 44 k.v. lines to Mona for the express and sole purpose of supplying power to territories in Utah south of Mona, including consumption by the inhabitants of Nephi. There is no substation at Mona, (R. 103) and distribution would not be made direct to houses enroute from a 44 k.v. line. Both petitioners desire to have this court assure to Telluride the continued right to serve Nephi with power purchased from Utah Power. No new transmission lines are going



to be built by Utah Power. The connection is going to be made in Utah Power's territory. The power is going to go south to Nephi, as it has done since 1941, except that now Nephi will have its own transmission line, rather than use Telluride's. There is no difference whatever in principle between giving Telluride a connection with Utah Power's territory and giving Nephi a connection in Utah Power's territory.

Throughout Utah Power's brief it talks about where it has "served" in the past. It says it has never served the territory south of Mona. If the word "served" is used in its technical sense, Utah Power is correct. It has generated electrical energy and transmitted it to Mona for use throughout Southern Utah, but it has not served the territory south of Mona. Power generated by Utah Power has been distributed to Nephi, but Utah Power has not "served" the inhabitants of Nephi. Its service ends at Mona, where it delivers the electrical energy to Telluride, or where it will deliver to Nephi as said by the Commission in *Wis. State R.E.A. vs. Wis. Gas & Electric Co.*, 17 P.U.R. N.S. 31, "The company's obligations end when it delivers the energy." Nephi serves its own inhabitants, and Telluride serves its territory with power purchased from Utah Power in Utah Power's territory. The cases cited by Utah Power and Telluride do not prohibit or even suggest that Nephi can not come to Utah Power's territory and purchase power. Utah Power has surplus electrical energy for sale. It will deliver the same within its own territory as it is now doing. The only change will be that it has changed customers. Its obliga-

tions in regard to this electrical energy will end at the point where it delivers the energy to Nephi. This point will be well within its territory. It is not being required to extend its lines or to construct new lines into new territories. If Nephi were attempting to compel Utah Power to build a seven mile transmission line to Nephi, and in addition to build a retail distribution system throughout Nephi and to read the meters, hire employees, to service and maintain the lines, etc., then Utah Power might complain that it was being required to extend service into new territories. Here, however, it is simply being required to deliver electrical energy at Mona where it presently is in business and where it presently is selling to one customer. There is no logical reason why, if it has the facilities to do so, it should not also sell to a second or a third customer. Not a single case cited by either petitioner is contrary to this proposition.

#### POINT IV. THE PETITIONERS' AUTHORITIES

The court will instantly recognize the basic distinction between the present case and all of the cases cited by petitioners. Here Nephi is not in fact or legal contemplation the territory of either Telluride or Utah Power. It is a city which has been placed by our constitution beyond the territory of either. It is in the language of the cases an "island" or "no man's land". It was this consideration which led the Missouri Commission to hold in the case of *In re Union Electric Company of Missouri*, supra, 1951 P.U.R. (N.S.) 428, that:

“ . . . It cannot be said that the city of Rolla is within the allotted service area of either Sho-Me or the applicant. By virtue of other provisions of our statutes, the city, by its authorized action, has placed itself beyond the service area of any utility. . . .”

The same distinction was noted in the *MacKay Light & Power Company v. Ashton & St. Anthony Power Company*, P.U.R. 1920 B, page 4, where the Commission said:

“ . . . We cannot, however, escape the conclusion that the legislature, in exempting municipalities from the jurisdiction of the Commission intended to remove the territory within the municipality from control of the commission as completely and effectively as if it had taken such territory bodily and set it down without the confines of the other.”

See also *Behnke v. Wisconsin Gas & Electric Co.*, 1936, 15 P.U.R. (N.S.) 217, wherein the Commission ordered a utility into a “no man’s land” to serve a territory which was not the admitted territory of either utility.

There is not a single case cited by petitioners which involves a similar principle. Each one involves two regulated utilities with allotted territories, and the courts and commissions have correctly held that one utility may not invade the allotted territory of a second utility. If Nephi were attempting to purchase power for resale beyond its city limits in Telluride’s territory, we think a similar holding would have to be reached here. But where Nephi is going to resell only to its own inhabitants, it is distributing the power in its own territory

and is not infringing Telluride's territory at all. For example, in *Mulcahy v. P.S.C.*, 101 Utah 245, 117 P. (2d) 298, (cited at page 8 of Telluride's brief) the Fuller-Toponce Truck Co. was granted a certificate to operate as a common motor carrier between Salt Lake City and Logan. Mulcahy, representing the Utah Idaho Central Railroad Company, and other transportation companies, objected to the issuance.

The Indiana case also cited on page 8 deals with two public utilities, with one attempting to enter the territory served by the other.

In the *In re Bayles* case, cited by Telluride on page 10, eighteen individuals wanted an operating permit to operate in the territory allotted to Dixie Power Company. They were going to buy their power from Parowan City for distribution and consumption outside the city limits and in the territory of the Dixie Power Company. So again there is an attempt on the part of one group (not a city) to obtain an operating permit in the allotted territory of another. *In re Streeper*, cited on page 11 of Telluride's brief, one truck company wanted to compete with other carriers between Salt Lake City and Ogden. This again is an attempt by one utility to operate in the allotted territory of another. We could go on through each other case cited by Telluride, but they can perhaps be equally well covered by the statement that in each one of them an established territory of one regulated utility was intended to be invaded by another regulated utility. The whole basis of the petitioner's argument is

that Nephi is Telluride's allotted territory. Petitioners fail completely to tell the court who allotted Nephi to Telluride, or how Nephi became Telluride's territory. It is clear from the record that prior to 1941 Telluride had no interest whatever in Nephi. As early as 1903 Nephi was generating electrical energy and distributing the same to its inhabitants. (R. 129.) No agency has ever made any order allotting Nephi to Telluride. Its only right in connection with Nephi came to it by contract in 1941. Its rights are purely contractual, not vested or inalienable. The rights having come to it by contract, expired when the contract expired. There are, of course, situations where rights are superimposed by statute upon individuals by reason of their having made a contract. For example, the obligations of workmen's compensation are imposed on the employer-employee contract. We, thus, recognize that from certain contractual obligations there arise other duties over and beyond those covered by the contract. In those instances, however, there is a statute which operates on the contractual arrangement. In the instant case, the petitioners do not point to any statute which expressly, or by implication, or at all, says that once a city has purchased power from a utility the city becomes the territory of that utility. In fact, no such statute could be constitutionally enacted.

In short, the petitioners simply assume that because Nephi once made a contract to purchase power from Telluride, Telluride acquired certain inalienable and vested rights, which did not expire when the contract expired. Having once had a contract with Nephi, it forever has

the inalienable and vested right to sell power to Nephi. The legal procedures or theories establishing this principle are not listed at all by either petitioner. Apparently, petitioners operate upon the theory that if asserted often enough, the proposition will become sound. Once there is stripped from their argument the premise that Nephi is Telluride's territory, the entire argument must fall. There is not a single case cited by either petitioner to show that Nephi is Telluride's territory. There is not a single authority cited to support the proposition that this contract which has expired gave Telluride vested and inalienable rights.

## CONCLUSION

Under the constitution of the State of Utah, Nephi may undertake to furnish and distribute electrical energy to its inhabitants. Nephi has availed itself of this constitutional right. It has since 1903 been furnishing power to its people, some through its own generating facilities and some through purchase from the town of Levan, from the Big Springs Power Company, and from Telluride. Its contract to purchase electrical energy from third parties did not abrogate its right to serve its own territory. Its purchase contracts did not give Telluride a certificate of convenience and necessity to operate in Nephi City. The city is free to build its own generating plant or to purchase power wherever power is available. Telluride's rights are purely contractual—not inherent or inalienable. Its contract has expired and Telluride's right expired with it.

The cases all hold that Nephi has no obligation to renew its contract with Telluride, nor to purchase its power from the nearest utility. The loss of revenue to Telluride by the expiration of its contract is of no concern. Prior to 1941 it did not have these revenues and no right to have the P.S.C. compel Nephi to contract with it. Its rights came into existence by contract in 1941, and expired with the contract in 1951. Utah Power is in business as a public utility offering to serve all customers within its territory. Nephi, as a separate legal entity and a customer like any other municipality in Utah Power's entire territory, and like Telluride, wants to connect to Utah Power's system within Utah Power's territory. Utah Power's obligation will end the moment it delivers the power to Nephi. It would not be required to service Nephi's lines, to read meters in Nephi City, or to do anything else beyond the point where it delivers energy to Nephi. That point will be on Utah Power's existing system within its existing territory. It will simply be selling to two customers at Mona, instead of one. Both of its customers will take power purchased at Mona south for distribution and service in their respective territories. Nephi will serve within the city limits of Nephi and Telluride will serve its franchise area. There is no additional burden placed on Utah Power. It will not be required to generate any more power, the power generated will not go in any different direction. It has ample facilities to connect this new customer to its system. It can serve this new customer without in any way impairing its service to others. There is no legal ground whatever for its refusing to do so. Were this court to hold otherwise it

would be directing the P.S.C. to unconstitutionally regulate Nephi's affairs. The P.S.C. could not by any direct order compel Nephi to do business with Telluride. It must not by indirection do that which the constitution forbids.

The brief of Telluride advances the proposition that Nephi City and all of the cities of Southern Utah, within the area served by it, must forever and a day pay to it or some brokerage power company its twenty-five per cent commission for buying and distributing electrical energy from Utah Power. For over twenty-five years within the memory of counsel said cities in Southern Utah have cried for some industrial development. Today as for the past twenty-five years Nephi City and said cities of Southern Utah are met with the answer by new industries seeking to locate here, "Your power costs are too high", we shall have to locate within the area served by Utah Power. And that industry has done. Thus, at least in part, have the commercial streams of community building been turned from the doors of Southern Utah. Nephi City feels it is grossly unjust that it, and other adjacent cities of Southern Utah, have thus been sentenced to serve a withering, drying up life process. We feel we are entitled to make the best arrangement which can be made to aid Nephi City to grow, and to obtain cheaper, more reliable power is one of the important musts to permit it to grow. Without the granting of the petition it can not compete with its neighboring cities on the north.



We respectfully submit that the order of the P.S.C. should be affirmed, and that Nephi should be awarded its costs against both petitioners.

Respectfully submitted,

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