

1952

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

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

Reply Brief, *Utah Power & Light Co. v. Public Service Comm. Of Utah*, No. 7803 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1700

This Reply Brief 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

FILE
MAY 26 1952

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

**REPLY BRIEF FOR PLAINTIFF
TELLURIDE POWER COMPANY**

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

I N D E X

	Page
STATEMENT OF FACTS	1
NEPHI MAKES MANY MISSTATEMENTS, EXAGGERATIONS AND HALF TRUTHS	1
STATEMENT OF POINTS DISCUSSED	4
I. THE FACT THAT TELLURIDE BUYS POWER FROM UTAH POWER & LIGHT COMPANY IS ENTIRELY IMMATERIAL	4, 5
(a) <i>All electric power sold by Telluride to Nephi City is the property of Telluride and Telluride is solely responsible for its availability and delivery</i>	5
(b) <i>The fact that Utah Power sells power to Telluride for resale does not constitute a dedication by Utah Power of its property to serve areas where that power may be resold.</i> ..	8
II. NEPHI CITY DID NOT SECEDE FROM UTAH BY GOING INTO THE ELECTRIC POWER BUSINESS IN 1903. THE STATE RETAINS ALL SOVEREIGN POWERS EXCEPT THAT IT MAY NOT DELEGATE THE RIGHT TO REGULATE NEPHI IN THE CONDUCT OF ITS ELECTRICAL POWER BUSINESS	4, 5, 9
III. NONE OF THE CASES CITED BY NEPHI HOLD THAT P. S. C. CAN SUBJECT TELLURIDE TO THE HAZARDS OF COMPETITION UNLESS SERVICE IS UNSATISFACTORY . . .	5, 16

INDEX—Continued

	Page
CASES CITED	
Lehi City v. Meiling, 87 Utah 237, 48 P. (2d) 530 . .	11
Logan City v. Mountain States Telephone and Telegraph Company, 77 Utah 442, 296 Pac. 1006 . 4, 7, 10, 20	
Provo City v. Department of Business Regulation, 218 P. (2d) 675	13
Riggins v. District Court of Salt Lake County, 89 Utah 183, 51 P. (2d) 645	12

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

**REPLY BRIEF FOR PLAINTIFF
TELLURIDE POWER COMPANY**

STATEMENT OF FACTS

**NEPHI MAKES MANY MISSTATEMENTS,
EXAGGERATIONS AND HALF TRUTHS.**

On page 4 Nephi states that Telluride claims Nephi City
as part of its territory. What Telluride claims is that it

serves retail all around Nephi and wholesale to Nephi. It does not retail electric energy in Nephi and never has. It doesn't claim the right to do so although the Public Service Commission could grant to Telluride a certificate to do so.

Nephi on page 2 challenges Telluride's statement that Utah Power has never devoted any of its facilities to furnishing power for distribution south of Mona. This is said to be directly contrary to the evidence. This accusation is based not upon evidence but upon a legal theory that Utah Power Company dedicated itself to serve Nephi and other southern cities because it sells power to Telluride which in turn distributes to such places. As shown in Telluride's original brief the uncontradicted evidence is that Utah Power Company has no facilities for rendering service south of Mona (R. 110-113).

There is a fundamental lack of understanding of the power business running through Nephi's brief. It assumes that the cost of transmission facilities is the only expense involved in rendering service by an electric power company. It urges that since Nephi will build its own transmission line from Mona to Nephi that the Commission's order imposes no expense on Utah Power. But when a power company holds itself out as willing to serve, or is ordered to serve or offer to serve, a certain area with electric power, it assumes or has thrust upon it the obligation to have that power available which involves the greatest item of expense incident to rendering the service. If it is necessary in order to construct new generating facilities it must do so. When the P.S.C. orders Utah Power Company to offer to sell electricity to Nephi City, there is a great deal more

involved than the mere words of offer. Utah Power Company must have the necessary power available and keep it available. It must fulfill the obligation to render that service, although it has never professed to serve it.

Nephi on pages 21 and 22 argues that even though Utah Power has not dedicated its property to rendering service to Nephi City, yet it should have no objection because Nephi is going to build its own transmission line and that therefore Utah Power & Light will merely be selling to Nephi the same power which it has been selling to Telluride. This statement is inconsistent with the record and disregards an elementary principle of electric power utility law. In the first place, it assumes that all power sold by Telluride to Nephi is purchased from the Utah Power, which, as shown under I, is not true. In the second place, it assumes incorrectly that the obligation which it would have to Nephi City would be the same as the obligation which it has to Telluride. They are entirely different. The obligation to Telluride is controlled by the contract between Telluride and Utah Power, Exhibit 8, (R. 258) which provides that Utah Power only has to furnish power to Telluride if it has an excess, and only to the extent of that excess. Of course under the Commission's order directing Utah Power to offer to render service to Nephi City, Utah Power would have to make good a full obligation to render service as an electric power utility.

On pages 8 and 9 Nephi states that neither Telluride nor Utah Power could under any circumstances secure the right to distribute power in Nephi. The only truth in this is that Nephi could refuse a franchise to use its streets.

Otherwise P. S. C. could grant either one or both of them a certificate of convenience and necessity to sell power retail. Merely because a municipality is engaged in the power business within its corporate limits does not mean that it is without the possibility of competition. As a matter of fact, Utah Power & Light Company continued to serve electric power in competition with Logan City for 8 years after the decision in the *Logan City Power* case in November, 1928.

On page 3 Nephi states that Utah Power constructed the two transmission circuits to Mona for the express purpose of selling large quantities of power to Telluride for distribution throughout Southern Utah. There is no such evidence. These lines are used to render service to the Thermoid Company Plant about two thousand feet north of Nephi and to deliver power purchased by Telluride (R. 99, 100). They were not for the purpose of distributing power to Southern Utah. The power was sold by Utah Power to Telluride for whatever purposes Telluride desired to use it.

STATEMENT OF POINTS DISCUSSED

I.

THE FACT THAT TELLURIDE BUYS POWER FROM UTAH POWER & LIGHT COMPANY IS ENTIRELY IMMATERIAL.

II.

NEPHI CITY DID NOT SECEDE FROM UTAH BY GOING INTO THE ELECTRIC POWER BUSINESS IN 1903. THE STATE RETAINS

ALL SOVEREIGN POWERS EXCEPT THAT IT MAY NOT DELEGATE THE RIGHT TO REGULATE NEPHI IN THE CONDUCT OF ITS ELECTRICAL POWER BUSINESS.

III.

NONE OF THE CASES CITED BY NEPHI HOLD THAT P. S. C. CAN SUBJECT TELLURIDE TO THE HAZARDS OF COMPETITION UNLESS SERVICE IS UNSATISFACTORY.

I.

THE FACT THAT TELLURIDE BUYS POWER FROM UTAH POWER & LIGHT COMPANY IS ENTIRELY IMMATERIAL.

Throughout its brief Nephi lays much emphasis and bases many of its arguments upon the circumstance that Telluride purchases part of its power requirements from Utah Power. Analysis will demonstrate that the circumstance is entirely immaterial—*just as immaterial as the circumstance that Nephi sells power to Telluride* (R. 134).

(a) *All electric power sold by Telluride to Nephi City is the property of Telluride and Telluride is solely responsible for its availability and delivery.*

In the statement of facts and throughout the brief, Nephi City repeatedly states as a major premise to its arguments that the power distributed by Telluride to Nephi is fifty per cent from Utah Power. On page 17 Nephi makes

the extreme statement that even if the plaintiffs prevail, all of the power delivered by Telluride to Nephi is from Utah Power. There is no evidence in the record to sustain these reckless statements of Nephi. On the contrary, they are refuted by the uncontradicted evidence in the case. Exhibit 10 (R. 279) is a map of the Telluride Power system and shows its extent from Mona through Nephi, westerly to the Delta area and southerly to Richfield, Marysvale, Milford, Panguitch.

The power generated by Telluride in four hydroelectric plants (R. 188) constitutes about fifty per cent of what it distributes (R. 188, 209). The balance is purchased by it from interconnections. It interconnects with Nephi, Beaver, Manti, Ephraim, Mount Pleasant, Utah Power & Light, Big Springs Power Company, Gar-Kane Electric Association, and Southern Utah Power Company (R. 188). All of these companies buy and sell from each other (R. 188). Telluride buys from Utah Power (R. 189) and sells to Utah Power (R. 206). The Power Interchange Agreement is Exhibit 8 (R. 258). Specifically, Telluride buys from each of the municipal plants above named and sells to each of the municipal plants named (R. 188). Specifically, Nephi sells power to Telluride (R. 134). Specifically, Telluride sells to Southern Utah Power Company (R. 207).

Page 86 of the Telluride annual report for 1949, which was made part of the record (R. 198) shows that in 1949 Telluride bought and sold from and to Nephi, Southern Utah Power Company, Manti City, Big Springs Power Company, Beaver City, Mount Pleasant and Ephraim City.

There are certain insinuations in the record and in the Nephi brief that there is something inefficient about Telluride buying power from other companies. No more hydroelectric power is available in the area (R. 216). It is therefore the duty of Telluride to secure power in order to meet its obligations as a public service company either by steam plants or by purchasing from others, whichever is cheaper (R. 200). It is a well recognized principle of the electric power industry that a steam plant is economical only if there is a big enough demand for the power and that in any area such as the Telluride area it would be uneconomical and wasteful (R. 166). For Telluride to manufacture electric power in a steam plant at greater expense than it could be purchased from others would, of course, be a violation of its duty as a public utility.

Logan City v. Mountain States Telephone and Telegraph Company, 77 Utah 442, 296 Pac. 1006.

Accordingly, Telluride has entered into this pooling arrangement in which any of the participants requiring more power can secure it and any of them having excess power can sell it. It is an efficient and economical way of conducting the business. It is freely admitted that Telluride has plenty of power at all times to fulfill its obligation to render service (R. 231).

So also Utah Power & Light interconnects at the south with Telluride and at the north with Idaho power and Montana power (R. 115). Those companies in turn interconnect with Oregon and Washington power companies. The

result is that Utah power may be used as far in the northwest as Washington and Washington power may be used as far southeast as Utah, Nephi, Richfield, Marysvale and Panguitch.

Title to the power purchased and sold passes at the point of delivery (R. 218). As between Telluride and Utah Power & Light this is at Mona, as stated by Nephi City in its brief. The responsibility of Utah Power & Light Company ceases at that point and that of the Telluride Company commences. All of the power sold by Telluride to anyone is Telluride power. At times it consists exclusively of power manufactured by Telluride (R. 217). At times that power is mixed with power from the municipalities (R. 188). Telluride does not resort to Utah Power until it has exhausted the excess power of the municipalities because the rate is higher. All of the power manufactured or drawn into its system by Telluride form its system-wide pool (R. 207). None of the power is earmarked. All of it has lost its identity. It is all Telluride power from the instant of delivery.

(b) *The fact that Utah Power sells power to Telluride for resale does not constitute a dedication by Utah Power of its property to serve areas where that power may be resold.*

On page 2 and elsewhere in Nephi's brief it is argued that Utah Power has devoted its facilities to furnishing power south of Mona. This is contrary to the uncontradicted evidence in the case (R. 101, 110-113, 119). It is based upon an erroneous legal theory that when Utah Power sells power to Telluride, and Telluride sells power to Nephi, that Utah Power has thereby dedicated its property to serve Nephi.

The argument carries Nephi City much too far. If that is true of Nephi City, it would also be true of Milford, Marysvale, Delta, Panguitch, Cedar City, Idaho, Montana, Oregon, Washington. It would mean that Utah Power could be compelled by the Commission, as it was compelled in the case at bar, to render service to people in Kanab, Cedar City, Panguitch, etc. etc.; and that Southern Utah Power would have to render service to Salt Lake.

II.

NEPHI CITY DID NOT SECEDE FROM UTAH BY GOING INTO THE ELECTRIC POWER BUSINESS IN 1903. THE STATE RETAINS ALL SOVEREIGN POWERS EXCEPT THAT IT MAY NOT DELEGATE THE RIGHT TO REGULATE NEPHI IN THE CONDUCT OF ITS ELECTRICAL POWER BUSINESS.

On page 4 Nephi states that Telluride is trying to get the court to believe that the contract with Nephi converted Nephi into Telluride territory. No reliance is placed by Telluride on that contract. It is like any other contract made by a public utility corporation. The reliance is upon the dedication of its property by Telluride to the area including Nephi, of furnishing power for retail and for resale.

On page 8, Nephi states that P. S. C. has no jurisdiction to compel Nephi to purchase power from Telluride. It seems to forget that this action was brought by Nephi to secure an order from the Commission requiring Utah Power

to sell electricity to Nephi. In other words, Nephi has invoked the jurisdiction of the Commission, conceding not only that the Commission has jurisdiction but that the Commission can say "Yes" or "No" and can exercise a proper discretion.

Nephi City makes the argument that the Nephi City area is withdrawn from all regulation the same as if it had been transplanted to another state. A moment's reflection rejects such an extreme statement. Merely because Logan City went into the power business and was not subject to regulation, as decided by this court, did not oust the Utah Power & Light Company from its business of retailing electricity in Logan. It carried on that business for 8 years after the Supreme Court decision. It discontinued the retail service only after it became convinced that it could not compete with the city, which charged rates so low as to cause a deficit, which was made up by taxes. If the Utah Power & Light Company had had similar power of taxation it would probably be operating there still.

On page 5, et seq., Nephi cites the constitution and quotes lengthily from *Logan City v. Public Utilities Commission* as if Telluride were contending contrary to the decision of the Supreme Court of Utah in the *Logan Power* case. Of course Telluride recognizes the full force of that case. Telluride understands thoroughly that Nephi is not subject to regulation by the Commission with respect to its electric power business. Telluride understands that the Commission cannot do indirectly what it cannot do directly. This was all conceded at the trial. But inasmuch as Nephi is

seeking to have the P. S. C. exercise its discretion to require Utah Power to sell power to Nephi, according to the words of Nephi's own counsel (R. 313), Nephi must submit and indeed has submitted to the jurisdiction of the P. S. C.

Nephi must not only appeal to the jurisdiction of P. S. C. to permit it to secure power from Utah Power, but in many other ways it must comply with the Public Utilities Law. If Nephi City ships freight for its electric power plant by rails or trucks from Salt Lake City it must pay the freight rate established by the schedules filed with and approved by the Public Service Commission. It cannot make a separate contract for a lesser rate.

If Nephi has need of supplies to be brought from Salt Lake City and desires them carried by a common carrier it must deal with the common carrier having a certificate of convenience and necessity to move freight from Salt Lake City to Nephi. Nephi cannot make a special contract with a common carrier, say, who operates between Salt Lake City and Price, Utah.

Nephi has not seceded from Utah. It is subject to the police power of the state in all particulars.

In *Lehi City v. Meiling*, 87 Utah 237, 48 P. (2d) 530, our court upheld the constitutionality of the Metropolitan Water District Act in spite of Article VI, Section 29 of the Constitution. On page 535 the court said:

"It is contended the act is unconstitutional as an attempt to unlawfully delegate the power of taxation to a special commission and to interfere in city and town affairs in violation of the provisions

of article VI, § 29, which reads 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 power of control vested in the board of directors is over the property, improvements, money, and effects of the district, and not that of any of the cities or towns whose territorial boundaries may be coincidental with that of the district or included therein. The powers of the board are limited by the act to the levying of taxes for the public purposes mentioned therein.

"None of the municipal functions of the component cities or towns is conferred on or delegated to the Metropolitan Water District. Each of such cities and towns will possess and may continue to exercise every municipal function it now has. There need be no friction between the two, but the closest cooperation is contemplated and should result."

Riggins v. District Court of Salt Lake County, 89 Utah 183, 51 P. (2d) 645. The Liquor Control Act authorized the State Liquor Commission to regulate the sale of alcoholic beverages within municipalities. It was contended that this offended Article 6, Section 29. The court held it did not. On page 656 the court said:

"* * * The state's authority to regulate and control the sale of light beer becomes a municipal function when, and only when, the state divests itself and invests a municipality with such powers. A municipality acquired such authority, if at all, by

an act of the Legislature. No such power is conferred upon counties, cities, or towns within the state by the Constitution. The state having, as it does, plenary power to either grant to or withhold from municipalities the right to control the manufacture, sale, and use of intoxicating liquors, it follows that the state may confer limited authority upon municipalities and retain to itself all control not so granted. * * *

Provo City v. Department of Business Regulation, 218 P. (2d) 675. The Public Service Commission made an order that public convenience and necessity did not require the opening of Ninth South Street across the yards of the Rio Grande in Provo. It was contended by Provo City that Article 6, Section 29, prohibited the Commission from in any way affecting the public roads in Provo. On page 678 the court said:

“Article VI, Section 29, of the Constitution of this State, which is the Section relied upon by the city, restricts the legislature from delegating power to commissions to interfere with local self-government of cities. * * *

* * * * *

“From the provisions of this section it is apparent that the framers of the constitution intended that control over railroads operating within this state should rest with the legislative department of the state. Such an intent is consistent with the nature of the operations and problems of railroads. For the most part, their activities are the concern of the general public rather than of the individual communities they serve.

“Under the constitutional provision quoted above, the legislature has, in turn, delegated certain

powers to the cities and other powers to the commission. * * *

In considering the Logan City case, it must be borne in mind that the Utah Power & Light Company was not required by the decision in the Supreme Court to discontinue the rendition of electric energy public service in Logan. The court held only that the Commission did not have jurisdiction to regulate the rates of Logan City. Utah Power continued to operate in Logan for 8 years after November, 1928, the date of the Logan Power decision, until it learned that it could not compete for business in Logan because Logan fixed its rates so low that they were noncompensatory and in fact lost money which was made good from the payment of taxes. But so far as the law was concerned the Utah Power & Light Company had the right to continue to render service in Logan and it did so for 8 years.

Nephi argues from the case of *Mackay Light & Power Company v. Ashton & St. Anthony Power Company*, that Nephi, by serving the public with electric power, removed its territory from the control of the P. S. C. as completely and effectively as if such territory had been bodily taken and moved into some other state. If so, why did Nephi invoke the jurisdiction of the P. S. C. in this very case.

Nephi's argument and the order of the Commission are based upon this misconception of the law. Nephi did not secede from Utah in 1903 by going into the electric power business. The only effect was that it is not subject to regulation by the Public Service Commission as to the

conduct of that particular business. In all other particulars Nephi is subject to regulation like all other municipalities. If Nephi purchases power from a company regulated by the P. S. C. it must comply with the regulations of the P. S. C.

Nephi City has admitted this throughout the case.

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 acts of Nephi City speak even louder than its words. Nephi City filed this application with the Public Service Commission and thus appealed to its jurisdiction and discretion. If Nephi City had had the absolute right to buy

power from the Utah Power & Light Company, as stated by the Commission, (R. 47) 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.

III.

NONE OF THE CASES CITED BY NEPHI HOLD THAT P. S. C. CAN SUBJECT TELLURIDE TO THE HAZARDS OF COMPETITION UNLESS SERVICE IS UNSATISFACTORY.

Nephi relies most strongly on two cases, *Union Electric Company of Missouri* on pages 9, 18 and 24, and *Mackay Light & Power Company v. Ashton & St. Anthony Power Company* on pages 11-14. Neither case supports Nephi's contention.

The following fundamental and elementary differences in the facts of the Missouri case make it inapplicable:

1. At page 431 the Commission says that the evidence showed that the Sho-Me east line could not be relied upon for maintaining proper voltage and that evidence was introduced to show dissatisfaction of the city and its residents with the service received. In the Telluride case no dissatisfaction was shown or suggested.

2. In the Missouri case neither utility possessed a certificate of convenience and necessity to render any service within the City of Rolla or its immediate vicinity. See page 432. Telluride, on the other hand, does possess a certificate of convenience and neces-

sity to sell power wholesale to Nephi and also to serve retail outside the city limits of Nephi.

3. On page 433 the Missouri Commission stated that it could not be said that the City of Rolla was within the allotted service area of either the Sho-Me or the Union. In the Telluride case the area in question is within the allotted service area of Telluride and not Utah Power & Light Company.

4. In the Missouri case the utility corresponding to Utah Power & Light Company was the applicant for a certificate authorizing it to render service to the municipality. Utah Power & Light Company, on the contrary, is resisting the effort of Nephi City.

On pages 11-14 defendant relies heavily on *Mackay L. & P. Co. v. Ashton & St. Anthony Power Company*, vehemently stating that it involved the "identical problem" and that it "perfectly parallels" the case at bar, and that the Idaho Commission *confirmed the right of the village of Arco to bypass the Mackay Company to acquire power from the Ashton Company*. We commend this case to the careful reading of the court. Nephi not only misstates the facts but misstates the decision of the Commission. The actual holding of the case was that the Commission disapproved a proposed contract between Arco and the Ashton Company for the construction of transmission lines so that power of the Ashton Company could be used by Arco. See page 12.

The Mackay Company was granted a certificate of convenience and necessity by the Commission on June 13, 1919 (see page 8).

The Ashton Company had been granted a certificate of convenience and necessity on February 11, 1915, to operate in a certain territory which included the point to which Ashton proposed to construct a transmission line to connect with a transmission line to be constructed by Arco. The contract covering this proposed transaction was the one under discussion in the case. The town of Arco was not even a party to the action.

The language quoted by defendant on pages 12 to 14 of its brief was pure dictum. The Commission was of the opinion that the Ashton Company, which was subject to regulation, was hiding behind the village of Arco, which was not subject to regulation, to do something that it would not otherwise have the right to do. The contract was therefore condemned. On page 11 the Commission said:

“The Ashton & St. Anthony Power Company, being a utility under the control of the Commission, will not be permitted to invade the territory of a rival utility by hiding behind the law exempting municipal corporations from the jurisdiction of the Commission. Some of the provisions of the contract between said defendant Ashton & St. Anthony Power Company and the village of Arco, introduced as an exhibit in this case, indicate that said defendant is attempting, by means of said contract, to acquire for itself some advantage other than serving the village of Arco, in the territory covered by the certificate of complainant. Also the wording of said contract indicates that said village of Arco contemplates the securing, under said contract, of electric energy in excess of its needs for use within the municipality, and that it proposes to sell and distribute such excess in territory adjacent to, and

outside of, the village limits under the provisions of § 3971, Idaho Compiled Statutes.

“The Commission does not approve such contract, and will not approve any provision by which the village of Arco gives or attempts to give to said defendant, Ashton & St. Anthony Power Company, any right to own or operate any electric transmission line or equipment, or any interest therein, or any exclusive right to purchase same, or any interest therein, or any advantage at all, in territory covered by the certificate of complainant herein outside the corporate limits of said village of Arco, unless it is expressly predicated upon the securing of a certificate of convenience and necessity from the Commission by said defendant, Ashton & St. Anthony Power Company, authorizing it to enter said territory.”

Thus it is evident that defendant's statement that this case confirmed the right of Arco to bypass the Mackay Company and acquire property from the Ashton Company is incorrect. On the contrary, the Commission refused to approve such contract.

On pages 14-15, Nephi cites *Town of Kearney v. Passaic Consolidated Water Company* and *Village District of Belmont v. La Conia Gas & Electric Company*. Neither case is in point.

In the *Kearney* case the supply of water served by the New Jersey Suburban Water Company was inadequate to the needs of the Town of Kearney. In the case now before the Utah Public Service Commission, no one claims that Telluride cannot serve all the needs of Nephi City.

In the *Belmont* case, both the La Conia Gas & Electric Company and the Tilton Electric Light & Power Company had certificates to serve the Town of Belmont. Tilton had been serving for several years and Belmont desired to change and purchase from the La Conia Power Company. The New Hampshire Public Service Commission permitted a change and said:

“The La Conia Company has general authority to operate as a public utility in the Town of Belmont. Since it has this privilege the law imposes upon it the duty to serve, upon reasonable terms, anyone in Belmont desiring service.”

In the case at bar Utah Power & Light Company has no operating authority to serve south of Mona, whereas in the New Hampshire case the La Conia Power had general authority to serve in the area of the Town of Belmont.

On pages 17 and 19, Nephi cites the case of *North Salt Lake v. St. Joseph Water¹ & Irrigation Company*. Plaintiff is unable to understand what pertinency this case has. It merely holds that the Public Service Commission has jurisdiction over the number of connections made by a water company.

On page 18 Nephi cites the cases of *Alabama Power Co. v. Guntersville*, from Alabama. The case merely holds that an electric power utility corporation established in a city does not have a constitutional right of monopoly and that the municipality may enter the electric power business. The case is the same as the *Logan City Power* case and recognizes the right of Alabama Power Company to continue in business in competition with the municipality.

On page 18 Nephi cites the case of *People v. Loveland*, from Colorado. This case merely holds that under the Colorado constitution a city has the right to go into the electric power business.

In summary, Nephi has not cited a single case wherein a Public Service Commission has permitted a utility serving a neighboring area under a certificate limiting its service to that area to invade, directly or indirectly, the area adequately served by a neighboring utility, also operating under a limited geographical certificate.

It is respectfully submitted that the Commission's order should be set aside as illegal.

Respectfully submitted,

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