1970

Utah Power & Light Company v. Public Service Commission of Utah, Et Al, And Empire Electric Association, Inc. : Brief of Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY,
a Corporation,
Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF UTAH, et al, and EMPIRE ELECTRIC ASSOCIATION, INC., a corporation,
Defendants.

Case No. 12042

BRIEF OF PLAINTIFF
UTAH POWER & LIGHT COMPANY

Appeal from an Order of the
Public Service Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY, a Corporation,

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PUBLIC SERVICE COMMISSION OF UTAH, et al, and EMPIRE ELECTRIC ASSOCIATION, INC., a corporation,

Defendants.

Case No. 12042

BRIEF OF PLAINTIFF

UTAH POWER & LIGHT COMPANY

STATEMENT OF THE NATURE OF THE CASE

Defendant, Empire Electric Association, Inc., filed an application with the Public Service Commission of Utah to obtain a Certificate of Convenience and Necessity permitting said defendant to operate as a public utility supplying electric service in an area of San Juan County, State of Utah.

DISPOSITION OF THE CASE

The Public Service Commission of Utah granted defendant, Empire Electric Association, Inc., Certificate of Convenience and Necessity No. 1682 authorizing it to operate as a public utility rendering

electric service in an area of San Juan County, Utah, the boundaries of which area were established by the Commission, and said Certificate was made subject to the conditions and limitations contained in the franchise granted by said County to said defendant.

Petition for Rehearing and Reconsideration was timely filed by plaintiff and said Petition was denied by the Commission without hearing thereon.

RELIEF SOUGHT ON APPEAL

This appeal seeks to have the lawfulness of the Report and Order of the Commission inquired into and determined and that this Honorable Court thereupon enter its Order setting aside and nullifying said Report and Order.

PRELIMINARY MATTERS

For purposes of brevity in this brief the plaintiff, Utah Power & Light Company, will be referred to as "Utah Power"; defendant, Public Service Commission of Utah, et al., as "Commission"; and defendant, Empire Electric Association, Inc., as "Empire". Reference to the record of the proceedings will be (R.).

STATEMENT OF FACTS

In June of 1969 Empire filed an application with the Commission for a Certificate of Convenience and Necessity permitting it to operate as a pub-

lic utility in a described area of San Juan County, Utah. Utah Power filed a protest to said application.

Hearing on the application commenced on September 3, 1969 and continued at various intervals thereafter until conclusion on October 1, 1969. The parties thereafter filed briefs and on January 12, 1970 the Commission issued its Report and Order.

Empire presented a number of witnesses and introduced Exhibits 1 through 23 in support of its application. Empire is a Colorado corporation duly qualified to engage in business in the State of Utah. It is an "electrical corporation" and a "public utility" as those terms are defined in Chapter 2, Title 54, Utah Code Annotated, 1953, as amended, and as such its business within the State of Utah is subject to the jurisdiction of the Commission.

Empire for a number of years has furnished electric service to its members in portions of San Juan County, Utah and for that purpose has established and maintained an electrical system in said County. Empire furnishes electrical service only to its members in San Juan County pursuant to a right-of-way easement granted in April of 1955 by San Juan County. Said document, Exhibit 5, (R. 315), construed by the Commission as a "franchise" (R. 444), authorized Empire to erect and maintain upon the public highways such poles and wires as may be necessary to enable it to supply electric power to "its member-consumers within said County of San

Juan." The testimony of Empire's manager he ulterson, was that Empire's electric serv ion in County is supplied only to its member-c it w (R. 181).

Empire presented evidence relative t , electrical system, power supply, financial st us, and the need for electric service by its member-consumers.

Utah Power, in support of its protest to the application, presented testimony of several witnesses and introduced Exhibits 24 through 32.

Utah Power's Exhibit 27 (R. 394), is an ordinance from San Juan County dated January 13, 1955 granting to Utah Power a county-wide franchise for a period of fifty (50) years to construct, maintain and operate on present and future roads, highways and public places in San Juan County, electric light and power lines and necessary appurtenances "for the purpose of transmitting and supplying electricity to said County, the inhabitants thereof, and persons and corporations beyond the limits thereof, for light, heat, power and other purposes".

Utah Power's Exhibit 28 (R. 395) is an Order of the Commission dated April 28, 1955 granting Certificate of Convenience and Necessity No. 1118 to Utah Power "to exercise the rights and privileges conferred by franchise ordinance dated January 13, 1955, granted by San Juan County, Utah". Exhi-

(R. 397) represents the investment made by Empire in San Juan County in electrical facilities to supply service to consumers in said County pursuant to said franchise and Certificate of Convenience and Necessity.

Subsequent to the closing of the record and submission of written briefs, the Commission on January 12, 1970 issued its Report and Order (R. 441) which granted a Certificate of Convenience and Necessity to Empire. Said Certificate was made subject to the conditions and limitations contained in the San Juan County franchise (one such limitation being the furnishing of electric service only to member-consumers) and was further limited to the described area established by the Commission and set forth in such Report and Order. The Report and Order contained further language relative to Utah Power's existing authority in San Juan County and imposed certain requirements upon Utah Power in the future exercise of such authority.

ARGUMENT

POINT I

THAT THE COMMISSION'S REPORT AND ORDER IS ERRONEOUS, UNLAWFUL AND ARBITRARY IN THAT THE COMMISSION HAS MADE A DETERMINATION THEREIN OF AN ISSUE NOT PROPERLY BEFORE IT IN THE INSTANT PROCEEDING.

The subject hearing before the Commission was held pursuant to an application filed by Empire for

a Certificate of Convenience and Necessity. The ultimate issue to be determined by the Commission in such hearing was whether or not the applicant was entitled to the authority sought.

The Commission's Report and Order, in addition to determining that the applicant was entitled to a Certificate of Convenience and Necessity, proceeded beyond that point to restrict, limit and modify plaintiff's existing authority to operate as an electrical public utility in San Juan County, even in those areas not involved in Empire's application.

The Commission's Report and Order stated that plaintiff's Exhibits 27 and 28 "shows that Utah Power is presently certificated to provide electric service in all of San Juan County pursuant to a franchise granted by said County on January 19, 1955 for a period of 50 years." (R. 448). The Report and Order then states: (R. 448).

> "But said franchise merely permits Utah Power to construct, maintain and operate its lines along and across the roads, highways, and public places of San Juan County for the purpose of transmitting and supplying electricity to the County, its residents, and persons and corporations beyond the limits thereof. The certificate of Utah Power (No. 1118 issued April 28, 1955) thus limited by these purposes, constitutes no authority to operate as a public utility throughout the entire county of San Juan, particularly in areas involving other electric utility and municipal utilities operations. It merely authorizes Utah Power & Light Com-

> pany to use the county's streets and public ways for the construction and operation of its utility system."

Following this construction of plaintiff's existing franchise and certificate, the Report and Order contained the following language: (R. 449)

> "If protestant, Utah Power, now seeks to serve San Juan County after having failed to serve it at least in the portions for which Empire seeks certification, it cannot assume such a position unless Utah Power obtains from this Commission a certificate indicating that the public convenience and necessity warrants the granting of this additional authority."

The conclusion to be reached from the foregoing language is that although plaintiff has been duly certificated since 1955 to supply electric service to consumers of San Juan County and pursuant thereto has supplied such service and has made the necessary investment in dedicated facilities to do so, it cannot now render service in said County without obtaining from the Commission the additional authority of another Certificate of Convenience and Necessity.

Plaintiff's franchise from San Juan County (R. 315, Exhibit 27) provides in Section 1 thereof as follows:

> "That there is hereby granted to Utah Power & Light Company, its successors and assigns (herein called the "Grantee"), the right, priv-

> ilege, or franchise until January 12, 2005, to construct, maintain and operate in, along and across the present and future roads, highways, and public places in San Juan County, and its successors, over which said Board of County Commissioners has authority, electric light and power lines, together with all the necessary or desirable appurtenances (including underground conduits, poles, towers, wires, transmission lines, and telegraph and telephone lines for its own use), *for the purpose of transmitting and supplying electricity to said County, the inhabitants thereof, and persons and corporations beyond the limits thereof, for light, heat, power and other purposes.*" (Emphasis added.)

Certificate of Convenience and Necessity No. 1118 (R. 395, Exhibit 28), granted to plaintiff by the Commission, provides in part as follows:

> "IT IS ORDERED, That Utah Power & Light Company be and is hereby granted Certificate of Convenience and Necessity No. 1118 authorizing it to exercise the rights and privileges conferred by franchise ordinance dated January 13, 1955, granted by San Juan County, Utah."

Said franchise and said certificate are unrestricted in scope and do not impose any conditions on plaintiff's right and obligation to supply electric service to consumers in San Juan County. The language above quoted from the Commission's Report and Order, however, disregards plaintiff's rights inherent in such franchise and certificate and now require that the future exercise of same any-

where in San Juan County is contingent upon obtaining additional authority from the Commission. The effect of such interpretation by the Commission on plaintiff's existing certificated authority in San Juan County is to decertificate plaintiff in such County and invalidate Certificate of Convenience and Necessity No. 1118 granted by the Commission to plaintiff. The situation created, therefore, is that although the Commission determined in 1955 that all elements of convenience and necessity were present entitling plaintiff to an award of Certificate No. 1118 to provide service in San Juan County, the Commission has now determined, in a proceeding not involving the issue, that such Certificate is not sufficient and plaintiff must obtain additional authority to provide service anywhere in that County.

The Commission's action in decertificating plaintiff in San Juan County, as aforesaid, is erroneous and unlawful and contrary to Utah law. Section 54-7-13, Utah Code Ann. 1953 provides:

> "The Commission may at any time, upon notice to the public utility affected and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions."

The terms of the Report and Order in the instant proceeding clearly "rescinds, alters or amends"

the prior Order of the Commission in granting Certificate of Convenience and Necessity No. 1118 to plaintiff.

The necessity for providing due notice and hearing in matters involving rescission or revocation of a utility's certificated rights was succinctly stated by the Arizona Supreme Court in *Application of Trico Electric Cooperative, Inc.*, 92 Ariz. 373, 377 P. 2d 309 (1962).

The applicable Arizona statute, 40-252, Ariz. Revised Statutes, is virtually identical to that of Utah quoted above, and the Court there stated:

> "Quite aside from statutory requirements the rescission or revocation of all or a portion of a certificate of public convenience and necessity requires strict compliance with the procedural prerequisites of notice and hearing. The Commission's power to grant, amend or cancel certificates of convenience and necessity is limited to that expressly granted by the Constitution and laws of Arizona."

Aside from the lack of statutory procedural requirements to enable the Commission to rescind, alter or amend plaintiff's existing certificated rights, as noted above, the rule is well defined that a showing must be made before modifying any established rights that the certificated utility is unable or unwilling to meet its utility obligation in its certificated area or that existing service is otherwise inadequate. Among the many cases which have pro-

nounced this rule are *Salt Lake Transfer Company v. Public Service Commission*, 11 Utah 2d 121; 355 P. 2d 706 (1960); *Idaho Power & Light Company v. Blomquist*, 26 Ida. 222, 141 P.1083 (1914); *Peoples Telephone Exchange v. Public Service Commission*, 186 S.W. 2d 531 (Mo.); *Denver & Rio Grande Western Railroad Company v. Public Utilities Commission of the State of Colorado*, 351 P.2d 278 (1960), and *Ephraim Freightways, Inc. v. Public Utilities Commission*, 380 P.2d 228 (Colo. 1963). The controversies in these cases involve specific areas or routes and the right to provide service in such areas or over such routes as between competing carriers or utilities. The effect of prior certificated rights was therefore properly at issue as a basic element of the case. In the instant proceeding plaintiff's certificated area, pursuant to its franchise and Certificate of Convenience and Necessity, is San Juan County. The area in question, that sought by Empire, is only a portion of the County. Service to the vast remaining areas of the County was not an issue before the Commission but, as noted hereinabove, the Commission nevertheless erroneously undertook to determine plaintiff's rights under its existing, long-standing Certificate, not only in the area sought by Empire but in all of San Juan County. The burden is thereby wrongfully imposed on plaintiff, compelling it to obtain additional certificates of convenience and necessity from the Commission, disregarding the authority granted under Certificate No. 1118, in order to serve San Juan County even in an area

that may be contiguous to its own lines and far removed from that certificated to Empire.

A decision of this Court in a carrier case involved an issue, among others, analogous to the question presented on this appeal. In that case *W. S. Hatch Co. v. Public Service Commission of Utah*, et al., 3 Utah 2d 7, 277 P.2d 809 (1954), Hatch applied for a Certificate of Convenience and Necessity to transport acids throughout the State. Guy Prichard appeared as a protestant claiming that a certificate previously issued to him included rights to haul acid in several counties which would result in a duplication of service in those counties if Hatch was also certificated therein. There was some question regarding Prichard's authority to haul acid under the wording of the certificate granted to him several years prior to the controversy. The Commission acknowledged that it had serious doubts whether or not his authority did in fact include the right to transport acids, but the Commission nevertheless determined that such right was included in his authority. Hatch's application was therefore denied. This Court set aside the Commission's Order and determined that Prichard's certificate did not include authority to haul acid. Regarding that issue of the case, the Court stated at Page 811:

> "The interpretation of the Certificate presents a question of law only. The extent of Prichard's authority must be as found within the four corners of the Certificate and the rights thereunder must be such as are fairly under-

> stood from the import of its language. Unless there is some uncertainty or ambiguity in the Certificate there is no basis for interpretation or clarification. Operating rights may not be extended by interpretation, and Prichard's authority could not be augmented in this proceeding wherein he appeared only as a protestant."

The Court's reasoning in the Hatch case is equally applicable to the instant proceeding. The conclusion is apparent that if Prichard's operating rights could not be extended by interpretation and his authority could not be augmented in a proceeding wherein he appeared as a protestant, then likewise plaintiff's rights herein could not be reduced by interpretation and its existing authority could not be restricted in this proceeding wherein plaintiff appeared only as a protestant.

Plaintiff did not have notice that any issue affecting its County-wide certificated rights would be considered and determined by the Commission in Empire's certificate application hearing and plaintiff did not have an opportunity to be heard thereon, contrary to decisions of this Court and the provisions of the Utah statute quoted hereinabove.

POINT II

THAT THE COMMISSION'S REPORT AND ORDER HAS UNLAWFULLY DEPRIVED PLAINTIFF OF A VALUABLE PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW CONTRARY TO THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF THE STATE OF UTAH, AND UTAH LAW.

The principle is well established that a Certificate of Convenience and Necessity is a valuable property right. It is equally well established that the owner of such a Certificate cannot be deprived of same without due process of law. The protection of such property right is, of course, guaranteed by the Constitution of the United States, Amendment XIV, Section 1, and by the Constitution of the State of Utah, Article I, Section 7, the "due process" provisions.

Two recent decisions of the Colorado Supreme Court in cases involving utilities adhere to this principle. Although not involving factual situations identical to the instant case, the question of due process afforded a certificate holder was a paramount issue in both cases. In *Mountain View Electric Association, Inc. v. Public Utilities Commission of Colorado*, 446 P. 2d 424 (1968), Mountain View, a cooperative association, applied for and received in 1958 a Certificate of Convenience and Necessity authorizing it to supply electric service to consumers in an area near Colorado Springs. The City of Colorado Springs in 1941

had applied for and received a Certificate of Convenience and Necessity authorizing it to supply electric service to certain territory outside its city limits, including a portion of the area later certificated to Mountain View. Thereafter a territorial dispute occurred between the cooperative and the City culminating in a proceeding before the Commission, instigated by Mountain View, wherein it sought an Order from the Commission directing the City to remove its facilities within the area certificated to Mountain View. The hearing resulted in an Order which deleted from Mountain View's service territory that area that had previously been certificated to the City. In upholding that Order, the Supreme Court of Colorado, Page 466, stated:

> "A certificate of public convenience and necessity is a property right which cannot be taken from the owner without due process of law."

Regarding the matter of notice, the Court concluded at page 467:

> "The record discloses that at no time did the commission or Colorado Springs have reason to believe that the removal of the disputed territory from the certificate of Colorado Springs was involved, and therefore no notice was given in respect to such an issue; nor was evidence adduced to support such a finding; nor was such a finding of fact ever made."

A subsequent decision by the Colorado Supreme Court in *Public Utilities Commission of Colorado v.*

Grand Valley Rural Power Lines, Inc., 447 P.2d 27 (1968), also involved the due process issue. In that case Public Service Co. of Colorado constructed an extension to provide electric service to a new motel. Grand Valley filed a complaint alleging that such extension was unlawfully constructed. The certificate of Public Service Co., granted in 1946, authorized it to make extensions to its present lines except where such extensions would conflict with the rights of Grand Valley serving designated rural areas, but even in that instance Public Service could extend to serve any customer whose needs were in excess of 100 kilowatts and such customers were to be exclusively served by Public Service. The motel requirements were in excess of 100 kilowatts. The Colorado Commission held that the extension had been lawfully made. Grand Valley attacked this decision on the complaint, among others, that the Commission "could not have intended the 1946 certificate to grant Public Service a permanent right to serve those customers with greater than a 100 kilowatt need, especially in light of the changed conditions since 1946." Regarding this contention, the Court stated at Page 28:

> "Grand Valley cites no authority, and we are not aware of any, that a portion of the order of the Commission becomes unlawful by the mere operation of time. It must be remembered that the proceeding before the Commission was not one to reopen the decision granting the 1946 certificate. Since rights granted under a certificate of authority are property rights, due process requires a full hearing if

anything granted in the certificate is to be taken away."

Another interpretation of the vested property right of an existing certificate holder was set forth by the Arizona Supreme Court in *Application of Trico Electric Cooperative, Inc., supra.* That case involved conflicting service areas of Trico, a cooperative, and Tucson Gas and Electric. Trico entered into a contract with a subdivider to supply electric service to a new development and commenced a proceeding to have the contract approved by the Arizona Corporation Commission. Trico was authorized to serve the subject area under its certificate. Prior to the hearing, Tucson extended its lines into the area to be subdivided. At the hearing the Commission disapproved the cooperative's contract and, in a consolidated proceeding pending before the Commission involving conflicting applications of the two utilities, it established the respective operating areas of each and issued amended certificates of convenience and necessity to each. The area involved in Trico's contract with the subdivider was deleted from Trico's area and awarded to Tucson. The Court, in determining that the Commission had exceeded its authority, said at Page 315:

> "In the performance of its duties with respect to public service corporations the Commission acts as an agency of the State. By the issuance of a certificate of convenience and necessity to a public service corporation the State in effect contracts that if the certificate holder will make adequate investment and render

> competent and adequate service, he may have the privilege of a monopoly as against any other private utility. Trico's right to maintain its distribution lines in the area of its certificate, and to make extensions therefrom to customers resulting from the development of the area served by it is a vested property right protected by (the constitution)."

Another case of significance is that of *Public Service Company of Colorado v. Public Utilities Commission of the State of Colorado*, 350 P.2d 543 (1960), commonly known as the "Union Case." This case involved a cooperative, Union, seeking to displace existing certificated utilities within the cooperative's service area and to itself obtain a certificate for the area. This decision contains an informative review of a typical situation, common to Utah utilities as well as those of Colorado, regarding the background, development, and growth of an REA-financed cooperative and the subsequent conflicts that arose between the established regulated public utilities and cooperatives when the latter acquired the same regulated status. Union's lines, prior to becoming a regulated utility, paralleled many of the lines of the certificated utilities as well as extending beyond same to serve sparsely populated areas. The Colorado Commission granted Union the certificate sought except for some incorporated areas that were franchised and certificated to others. The Supreme Court of Colorado, in part, affirmed the Commission's award to Union of a certificate but only insofar as same granted to Union authority to render service to its then members and customers. The Court, regarding

the right of the investor-owned utilities to extend their service into the Union area, said:

> "Public Service and Central should be permitted to extend their lines in the area in order that they may perform their duty to the public, utilize their property for the purposes to which it has for years been dedicated, and without restrictions by the PUC predicated on alleged rights of Union claimed by it to have been acquired during its operations prior to gaining public utility status.
>
> "As a necessary corollary to the above, PUC has no authority to grant to Union any rights of extension in the area except upon application and proof of the fact that adequate service is not readily available from Public Service or Central and that public convenience and necessity requires that Union render the service requested."

The Colorado Supreme Court further indicated that the private utilities having at great expense acquired valuable rights to serve the area in conformity with law and with approval of the PUC, the PUC could not later deprive them of these rights or curtail or limit them in exercising their rights to extend and expand their services in the area so long as such expansion did not impair or endanger service to others entitled to same.

The question of protection of prior certificated rights was considered in still another Colorado case, *Public Utilities Commission of the State of Colorado v. Home Light and Power Company*, 428 P.2d 928

(1967). This case involved an application for a Certificate of Convenience and Necessity filed by Poudre Valley Cooperative and counter applications filed by Home Light and Power Company and Public Service Company of Colorado. Poudre Valley also filed a formal complaint against the other two utilities. All matters involved the same disputed service area and were therefore consolidated for hearing. Among numerous issues involved was that of the rights of existing certificate holders in the disputed areas. In that regard, the Colorado Supreme Court stated:

> "But we feel constrained to note that once an area has been *certificated* to one utility, it and it alone has the right to serve the future needs of that area provided it can do so. This is essential to the doctrine of regulated monopoly in Colorado. See, Colorado Transp. Co. v. Public Util. Comm., 158 Colo. 136, 405 P.2d 682. This does not mean, however, that Public Service (or any other utility) may not seek to serve the user if it appears in the future that a certificated utility is either *unwilling* or *unable* to serve any existing or newly developing load (industrial or otherwise) within its certificated territory at rates approved by the P.U.C. See, Denver & R. G. W. R. R. v. Public Util. Comm., 142 Colo. 400, 351 P.2d 278."

The extent of plaintiff's "property right", inherent in its Certificate of Convenience and Necessity No. 1118, is evident from plaintiff's Exhibit 20 (R. 397) indicating a total investment of nearly $2,900,000 in electric facilities to provide service to con-

sumers in San Juan County. The testimony of Mr. Boehmer (R. 286-7) and Mr. Shill (R. 298) related in part to further facilities being constructed in San Juan County to enable plaintiff to supply the future electrical needs of consumers in that County. There is no evidence in the record that plaintiff has failed or refused to meet its utility obligation in San Juan County. It is significant that no evidence was presented in that regard because the question of plaintiff's right to provide electric service to consumers in said County as a whole was not an issue in the instant proceeding.

It is apparent from the foregoing decisions, among others, that the Courts readily recognize the valuable property right inherent in a Certificate of Convenience and Necessity and the decisions are clear that one cannot be deprived of such a right without due process of law. The appearance by Utah Power in this proceeding was solely as a protestant to an application seeking authority involving electric service in a portion of San Juan County. It had no reason to believe that in such proceeding it would be deprived of its long standing certificated rights in the whole of said County. No notice was given in respect to such an issue, no evidence was adduced in that regard, and it did not have an opportunity to be heard thereon. The essential elements of "due process" were clearly absent and there was no basis, therefore, to warrant any determination by the Commission regarding the future exercise of Utah Power's long standing certificated rights in San Juan County

and particularly in the vast area of the County not involved in Empire's application.

A final factor of significance is that the Commission's determination affecting plaintiff's existing certificate rights not only deprives plaintiff of a valuable property right without due process of law, but is also inconsistent with the requirements of public convenience and necessity. The Commission's 1955 award to plaintiff of Certificate of Convenience and Necessity No. 1118, authorizing the exercise of the rights and privileges conferred by the San Juan County ordinance, was a determination by the Commission that public convenience and necessity warranted the granting of such Certificate. The certificate granted herein to Empire does not authorize it to supply electric service to the general public in the area awarded to it, but authorizes the supplying of such service only to its members in that area. Consumers in such area who are not members of the cooperative could not therefore be served by Empire because of its limited franchise and certificate, and likewise could not be served by plaintiff unless plaintiff first secured additional certificate authority as required by the Commission's Report and Order. Such result does not serve the public's convenience and necessity but, on the contrary, obstructs it. Plaintiff submits that its existing authority should properly entitle it, as the only certificated "public" utility in San Juan County, to serve any consumer in that County desiring its service, and this authority should apply even in the area awarded to Empire

if a consumer therein desires electric service but determines for any reason that he does not choose to become a member of the cooperative.

CONCLUSION

The Report and Order of the Commission has erroneously altered and adversely affected plaintiff's prior certificated rights in San Juan County and those areas thereof not in controversy in this proceeding; such action on the part of the Commission has deprived plaintiff of a valuable property right without due process of law and is arbitrary, capricious and contrary to the provisions of Utah law and the Constitutions of the United States and the State of Utah and should therefore be annulled, vacated, and set aside.

Respectfully submitted,

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