1970

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

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY, a corporation, *Plaintiff*,

vs.

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

Case No. 12042

DEFENDANTS' BRIEF

Appeal from an Order of the Public Service Commission of Utah

ELLIOTT LEE PRATT of
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah
Attorney for Empire Electric Association, Defendant

H. WRIGHT VOLKER
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Public Service Commission of Utah, Defendant

SIDNEY G. BAUCOM
ROBERT GORDON
Utah Power & Light Company
1407 West North Temple
Salt Lake City, Utah
Attorneys for Utah Power & Light Company, Plaintiff

INDEX

INDEX OF AUTHORITIES

Cases Cited:

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY, a corporation, *Plaintiff*,

vs.

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

Case No. 12042

DEFENDANTS' BRIEF

STATEMENT OF ADDITIONAL FACTS

Empire Electric Association, Inc., a non-profit rural electric cooperative, was incorporated in Colorado in 1939. (R. 311; Ex. 1) At this time it commenced furnishing electric service to its members in southwestern Colorado. In 1952, Empire began serving areas in San Juan County, Utah. (R. 313, 314; Exs. 3. 4)

In 1957, Empire amended its Articles of Incorporation in order to serve the public generally; i.e.,

members and non-members. (R. 311; Ex. 1) Empire presently serves both members and non-members. (R. 47-49) Membership is not a condition of receiving service, but rather each consumer has a choice of becoming a member or merely being a non-member consumer. (R. 47; Ex. 10) The only difference between a member and a non-member is the member's right to participate at annual meetings. (R. 48)

Empire has continued to expand its service throughout San Juan County, as the public need dictated in areas not served by any other utilities. (R. 18-24, 97, 100, 102) Empire now furnishes electric power to approximately 150 consumers, including individuals, industrial corporations, County, State and Federal agencies, and other utilities including Utah Power & Light Company. All of these consumers are in the area certificated to Empire. (R. 356-362; Ex. 9)

The distribution lines serving these consumers in Utah are shown by the solid black line on the system map. (Ex. 3) The entire system of Empire covering 5, 700 consumers is shown on Exhibit 33.

In 1955, plaintiff, Utah Power & Light Company, was granted a franchise by San Juan County which authorized plaintiff

> "to construct, maintain and operate in, along, upon and across the present and future roads, highways and public places in San Juan County . . . over which said Board has authority, electric light and power lines, together with all the neces-

> sary or desirable appurtenances, for the purpose of transmitting and supplying electricity to said county . . ." (R. 394; Ex. 27)

In the same year, Utah Power was granted a Certificate of Convenience and Necessity, No. 1118, by the Utah Public Service Commission which authorized it

> "to exercise the rights and privileges conferred by franchise ordinance dated January 13, 1955, granted by San Juan County, Utah." (R. 448)

The Certificate did not grant to plaintiff any described or exclusive area. In contrast the Certificate awarded to Empire was exclusive and did cover a definite territory, described by metes and bounds, excluding the consumers of plaintiff. (R. 449-451)

Since 1955, in the area certificated to Empire, Utah Power & Light has only served two inhabitants and one wholesale connection to the City of Monticello. (R. 26) In fact, one of the inhabitants was connected as late as 1966. (Findings of Fact, R. 446) (R. 26, 129, 13-25) All other lines constructed by Utah Power running through this particular area are transmission lines serving areas and substations beyond and outside of the subject area. (R. 288, 292-295, 299, 300-303) Most of Utah Power's investment in San Juan County is for transmission lines serving areas outside San Juan County. There is some distribution investment for the area Certificated to Empire. (Exs. 29, 32)

The Empire system is engineeringly sound, is in good repair, has ample capacity to serve all present

and future customers and is well maintained. R. 121, 124) Empire is financially capable of serving its present and future customers (R. 96, 97; Exs. 3, 4, 22) The Company has an adequate source of power and is in all respects capable of serving the territory granted to it. (Exs. 6a, 7, 16, 17, 18, 19, 21) There is a public need for Empire's service, (R. 99, 100) and there is no other utility to serve. (R. 102-104) (R. 446, 447)

ARGUMENT

POINT I

THE COMMISSION MADE A PROPER FINDING OF FACT ON THE ISSUE OF PLAINTIFF'S FAILURE TO FULFILL ITS UTILITY OBLIGATION.

Plaintiff argues in its Point I, that without having the issue properly before it, the Commission, in effect, "de-certificated" plaintiff. Although the word "de-certification" is more demonstrative than accurate, nevertheless whatever result there may be, certainly came from a complete evidentiary presentation to this Commission by both parties, pursuant to notice and proper pleading.

A. THE SUFFICIENCY OF PLAINTIFF'S UTILITY PERFORMANCE WAS RAISED AND FULLY DEVELOPED BY PLAINTIFF.

Plaintiff placed in issue its own performance as a utility in San Juan County. Empire filed its Application for a Certificate of Convenience and Necessity and claimed therein:

1. That it has served and is serving the particularly described area involved.

2. That there is no other utility serving that area; and

3. That there is a public need for Empire to serve electricity to the area, which area was described by a definite boundary. (R. 404-408)

The published notice (R. 408) and the notice mailed to plaintiff, clearly set forth the definite boundaries of the area to be certificated and summarized the claim of Empire,

> "That there was no other utility available or willing and able to service the area in which it commenced its operation and is now serving; and that there is no utility at the present time serving said area or which will suffer interference or duplication in any way by reason of the service rendered by Applicant to this area by reason of the granting of the Certificate sought herein." (R. 409)

Therefore, with notice of Empire's complete claim and the area to be certificated, Utah Power filed its protest wherein it claimed:

1. That it had a county franchise;

2. That it had a Certificate from the Commission;

3. That it was fully meeting all requirements of a

utility thereunder and was serving the area properly;

4. That there was no need to grant any Certificate to Empire and that such Certificate would result in duplication of facilities;

5. That the granting of such a Certificate would be restrictive to Utah Power and result in a substantial loss and damage to Utah Power; and

6. That there was no present or foreseeable future need for the granting of such a Certificate. (R. 437-439)

Therefore, the factual and legal issues in the case were clearly joined and the matter went to trial. Empire put on its evidence to sustain the allegations of the application. (R. 4-248, 304-307; Exs. 1-23, 33) Utah Power put on its evidence in support of its allegations. (R. 261-303; Exs. 24-32) Quite obviously the Commission had to make Findings of Fact on these issues, and just as obviously such Findings were likely to favor one party over another, and they did. The Commission found the Facts in favor of Empire's Application for a Certificate and against Utah Power's allegations in protest thereto, on the very issues raised by plaintiff. (R. 442-449)

Obviously, Utah Power's claim that under its Certificate of Convenience and Necessity it had adequately performed and so there was no need for any other utility to be certificated in the area, was inconsistent with Empire's claim that it was serving the area, and

there was need for its service to be certificated since no other utility was serving the area.

Certainly it is not unreasonable for either party coming into this contested hearing claiming contradicting positions, to anticipate and realize that its claims may not be sustained. There was full and complete notice, pleading and trial of the very issues set forth in plaintiff's Point I. One of the main issues raised by the protest was whether or not Utah Power under its Certificate was serving the public in the area sought to be certificated by Empire. The proof clearly showed that Utah Power was not serving the area. The Commission so found. (R. 448)

B. PLAINTIFF'S UTILITY RIGHTS AND OBLIGATIONS UNDER ITS CERTIFICATE #1118 ARE CORRECTLY DETERMINED IN THE FINDINGS OF FACT.

The Commission after having discussed the evidence and made Findings relative to Empire's position in this hearing (R. 442-448) then passed on to a discussion of and Findings on the evidence submitted by the plaintiff. Although, plaintiff now apparently argues that the Commission should not have made Findings on any of the Exhibits and testimony placed in the record by plaintiff as protestant, nevertheless, we believe the comments and Findings of the Commission (R. 448, 449) concerning Utah Power's position are appropriate, reasonable and supported by the evidence.

The Commission states with reference to the Certificate and the franchise

> "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 Company to use the County's streets and public ways for the construction and operation of its utility system." (R. 448)

It is apparent from an examination of Plaintiff's franchise and its Certificate that the above statement of the Commission is a statement of an obvious fact. It would be difficult to state the matter more simply and clearly. In effect, the Commission is rightly saying that the franchise and the Certificate do not grant to plaintiff an exclusive general authority over the entire County. Such a statement is entirely proper, since plaintiff had argued continually to the contrary. (R. 430-432) From the Certificate's limited wording it is plain that plaintiff merely obtained the certificated right to use the streets for the placing of its poles and lines as a utility. There is no general grant of authority by this Commission to serve vast areas of the County in which there are no County roads and streets. (R. 448) (R. 394; Exs. 27, 28)

The foregoing Finding is certainly appropriate in view of the following Finding:

> "Further, it is clear that since 1955, Utah Power has not performed utility obligations or rendered utility service in the area sought to be certificated herein except for wholesale service to Monticello and two inhabitants of the County, to wit: one whose service was connected in 1966, just south of Monticello, Utah, and another at the mine shown as Climax Uranium (Wilson Shaft) near the Colorado border. Throughout the area sought to be certificated herein the only other lines which Utah Power has constructed since 1955 are the transmission lines shown in blue on Exhibit 3 . . ." (R. 448)

In other words, since 1955 plaintiff has made no effort to serve the area to be certificated herein. Thus, the Commission has correctly enunciated in its Findings of Fact the rights and obligations accruing under the Certificate No. 1118.

C. THE COMMISSION HAS AUTHORITY TO DETERMINE THE PLAINTIFF'S UTILITY OBLIGATIONS AND SUFFICIENCY OF SERVICE.

Plaintiff argues about the Commission language quoted on page seven of its brief ,that:

> " . . . 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 . . . (and that) the Commission's action in de-certificating plaintiff in San Juan County, as aforesaid, is erroneous and unlawful and contrary to Utah law."

Such an argument on the part of plaintiff seems to unreasonably and unnecessarily attempt to reach a harsh result for itself ,through an unrealistic interpretation of the language used by the Commission. Additionally, the argument is wrong as a matter of law and fact:

1. The evidence is clear and uncontroverted that since 1955, the plaintiff, in the area certificated to Empire, has only furnished wholesale power to the municipal system owned and operated by Monticello (R. 295) and retail power to two other customers. (R. 299, 300) (Findings of Fact R. 448) In this circumstance, the Commission is authorized to require another Certificate where a utility has not functioned under one previously granted. Section 54-4-25, (2), UCA, provides,

> "No public utility of a class specified in subsection (1) hereof shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted, but not heretofore actually exercised or the exercise of which has been suspended for more than one year, without first having obtained from the Commission a Certificate that public convenience and necessity require the exercise of such right or privilege . . ."

Also Section 54-7-13, UCA, which has been cited by plaintiffs, permits the Commission to exercise its regulatory powers in amending or otherwise modifying any certificate previously issued.

2. On Page 11 of its brief, plaintiff also seeks to bring upon itself this self-imposed penalty by alleging that it is now prevented from serving the entire San Juan County. Such an argument looks at the Commission's Findings completely out of context. Clearly the Commission's Findings are to be considered in terms of the area in question. The Commission found the following:

a. "The Cerftificate 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 utility's operations* . . . " (italics added) (R. 448)

b. "Further, it is clear that since 1955 Utah Power has not performed utility obligations or rendered utility service *in the area sought to be certificated* . . ." (italics added) (R. 448)

c. "*Throughout the area sought to be certificated herein* the only other lines which Utah Power has constructed since 1955 are the transmission lines shown in blue on Exhibit 3. . . . " (italics added) (R. 448-449)

d. "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 a granting of this additional authority . . . " (italics added) (R. 449)

e. "Obviously, therefore, protestant's position, *at least in so far as the area of San Juan County here sought to be certificated to Empire is* concerned, has no validity . . . " (italics added) (R. 448)

The above Findings obviously are to be taken in the context written. That is, they relate to the question of service, or lack thereof, in the area to be certificated. Portions of sentences should not be extracted as plaintiff has attempted to do, in order to attempt to make reversible error affecting Empire and its certificated area.

3. Finally, but, in no way of less importance is the fact that this Commission made no Order whatsoever requiring Utah Power & Light to come before this Commission in order to serve other portions of San Juan County. The Conclusions of Law and the Order of the Commission relate completely to Empire's Certificate and to the rights and obligations of Empire thereunder. Assuming arguendo that the status of plaintiff's Certificate and its performance thereunder were beyond consideration of this Commission in this hearing, then such statements concerning such matters are more in the form of dicta. Without authority of a proper Order of this Commission, they would not have the serious consequence which plaintiff is striving for in this Appeal.

Finally, under Point I, plaintiff cites the rule and authorities on Pages 10, 11 and 12 to the effect that

before any established right of a certificated utility can be amended, there must be a showing that the utility is unable or unwilling to meet its utility obligation, or that the existing service is otherwise inadequate. This Commission in its Findings of Fact, Report and Order has met the requirements of this "well-defined" rule and made the appropriate Findings. Yet, plaintiff throughout the brief objects to Findings by this Commission and claims that the Commission should not make such Findings. Plaintiff might better consider the rule and the cases cited thereunder as supporting the Commission's Findings, Report and Order in this case. For example, plaintiff cites *W. S. Hatch Co. v. Public Service Commission of Utah, et al.,* 3 Utah 2d 7, 277 P2d 809 (1954), for the proposition that the interpretation of a Certificate presents a question of law only. That may be true. However, the Hatch case further indicates that the extent of the authority of any utility is found within the wording of the Certificate itself. Since there is no uncertainty in plaintiff's certificate there is no need for interpretation. Rather, this Commission under its regulatory authority has determined what it wants done in the interest of public convenience and necessity. This Supreme Court recently in *Reaveley vs. Public Service Commission,* 20 Utah 2d 237, 436 P. 2d 797, quite clearly reaffirmed the principle that administrative bodies such as the Public Service Commission, continue to regulate and are not bound by any principle of stare decisis. The Court said,

> "Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires. This does not necessarily mean that we think the defendant Commission has changed its mind in this case."

Our Commission in the subject case has determined that in the interest of public convenience and necessity Empire should serve the area in question. It has further determined that Utah Power & Light Company has not adequately served the area and, at least in the Findings of Fact, has stated that Utah Power & Light should come before this Commission in the event that it seeks to serve additional customers. Such determination is neither an interpretation of the old original Certificate, an attack against it, nor a deprivation of the rights thereunder. See *Town of Fountain v. Public Utilities Commission,* 447 P.2d 527, (Colo. 1968) The evidence of failure to serve the area certainly justifies any position which this Commission may take in the interest of protecting the public. There is no concept of law, statutory or otherwise, which supports plaintiff's position that once a certificate is granted, said utility need never come before the Commission again. Yet this extreme position seems to be the one taken by plaintiff in this Appeal.

POINT II

PLAINTIFF HAS NOT BEEN DEPRIVED OF ANY RIGHTS WITHOUT DUE PROCESS OF LAW.

Plaintiff's Point II is incorrect in two respects:

1. The plaintiff has not been deprived of any valuable property right; and

2. No due process of law has been violated.

A. PLAINTIFF HAS NOT BEEN DEPRIVED OF A VALUABLE PROPERTY RIGHT

Whether or not a Certificate of Convenience and Necessity is a valuable property right, as is so strongly urged by plaintiff, is beside the point. It is clear that any Certificate of Convenience and Necessity has implicit in it regulation by our Public Service Commission. Our Supreme Court in *Union Pacific Railroad Company, et al, vs. Public Service Commission,* 103 Utah 459, very clearly enunciated this rather fundamental principle. The Court stated,

> "The discretionary power granted the Commission by the act, to grant or withhold certificates, negatives the idea that it was intended to grant and maintain a monopoly in any field. The fact that the act provides that the Commission may grant a certificate when it determines that public convenience and necessity requires such services recognizes that regulated competition is as much within the provisions of the act as is regulated

monopoly. In the exercise of its powers to grant or withhold certificate of convenience and necessity, questions of impairment of vested or property rights cannot very well arise. No one can have a vested right to be free from competition, to have a monopoly against the public. And, unless some justifiable question arises, unless some point is judicially present, this Court will not substitute its judgment for that of an administrative tribunal, charged by law with carrying out matters of non-judicial character."

Each Certificate of Convenience and Necessity is therefore, impregnated with the concept that it must be for the public convenience and necessity. This public convenience and necessity is the sacred charge of the Public Service Commission. To preserve the public convenience and necessity this Commission has the right to grant, amend, alter, modify any and all certificates and has the continuing regulatory power and duty in connection therewith. See *Reaveley vs. Public Service Commission, supra.*

It is difficult, therefore, to determine just what "property right" has been taken away from plaintiff. The above decision of the Utah Supreme Court puts at rest the concept of these "vested property rights", notwithstanding plaintiff's citation of various Colorado cases, which appear to be to the contrary. And an examination of the Colorado cases, however, shows that the utilities involved enjoyed exclusive territories circumscribed by definite boundaries. This is not our case with plaintiff.

The Colorado cases cited by plaintiff, however, do not help in this case for two reasons:

1. The State of Colorado seems to be dedicated to the concept of the "regulated monopoly", which concept is discussed in almost all of the cases cited by plaintiff; and

2. The utilities with prior certificates enjoyed exclusive and definitely described areas which were thereupon reduced. The cases also are materially distinguishable on their facts. The distinguishing features are discussed below.

The *Mountain View Electric* case cited at Page 14 of plaintiff's brief involved a situation where the most recently certificated area inadvertently and without knowledge of anyone included a five acre tract which previously had been certificated exclusively to the City of Colorado Springs. The Court upheld the prior certificate because the accidental taking was without due process. Significantly, however, the Supreme Court did imply a different result had it not been for the fact that

> "The decision of the Commission does not contain any language that could be construed to be a Finding of Fact that Colorado Springs had abandoned or through its activity or non-activity created a basis for the taking away of any portion of its Certificate."

The *Grand Valley* case cited at Page 16 merely involved the interpretation of rather specific language found in the Certificate in question. The Court did

hold, however, that the Commission was the proper authority to interpret the application of its own Certificate.

In several of plaintiff's cases, including the *Grand Valley* case, *Western Colorado Power vs. Public Utility Commission,* 428 P. 2d 922, (Colo.) is cited. This case however, involves an exclusive area certificate and held

> "Therefore, to the extent that the PUC Order superseded any previous certificates expressly granting Western the exclusive right to serve in specifically described areas, the Order was invalid and must be vacated."

It is significant that the *Western* case did not involve any question of inadequacy of service.

The *Trico Electric Cooperative* case cited at Page 17 of plaintiff's brief involved a consolidated hearing at which each of the opposing parties merely petitioned the Commission to define by a metes and bounds description the areas which the Commission had previously awarded to each utility. The Commission, contrary to the petitions of both parties changed the areas and awarded a portion of one utility's area to the other utility. The Supreme Court held that neither party had gone into the hearing with any notice that the areas would be modified.

Plaintiff's reliance upon *Public Service Company of Colorado vs. Public Utilities Commission,* which plaintiff calls the "Union case" can only be considered an attempt on the part of plaintiff to reargue and re-

assert the traditional investor-owned utilities' opposition to the small rural electric cooperative. The "Union Case" was decided before the passage of the Colorado statute bringing cooperatives public utility status, and is outdated and old by any standards of the Colorado cases and statutes. It is, of course, particularly inapplicable in Utah because of the amendments to the Utah statute enacted in 1965, wherein the rural electric cooperatives were brought under regulation of the Utah Public Service Commission as public utilities. See *Section* 54-4-25, UCA, as amended.

The *Home-Light and Power Company* case cited on Page 19 of plaintiff's brief again is of little help here since the only portion quoted by plaintiff involves a certificated area wherein the prior certificated utility was granted an exclusive area described in metes and bounds. Again the Colorado Court reaffirms the doctrine of regulated monopoly. It is well to point out that the *Home-Light* case involves a myriad of conflicting certificate situations, causing the Colorado Supreme, Court to attempt to set up some ground rules, quite irrelevant to our case.

Plaintiff indicates that the extent of its property right, which it apparently claims has been taken away, bears some relationship to a total investment of approximately $2,900,000. An examination of the evidence and particularly the testimony of Mr. Boehmer and Mr. Shill (R. 286-290, 293-298, 299, 301, 302) indicates that said extensive investment for San Juan

County is actually limited to the substation for Monticello and approximately 17 miles of distribution line to serve the two customers. All other investments are to transmit power to areas outside of San Juan County or to other remote portions of the County quite unrelated to the area in question.

Finally, it is clear that nothing has been taken away under this Commission's order. The plaintiff's service in the area to be certificated remains as an exception to the Certificate granted to Empire. There is no evidence of present or prospective service in any of the other portions of the County being eliminated and no order or other testimony to indicate that plaintiff is not able to serve. Any lines which have been built for future loans involve areas beyond the certificated area. (R. 299) The Order of the Commission in no way deletes any of the area. The Finding of Fact instead suggests and reaffirms the statutory requirement, based upon regulatory authority of the Commission, that plaintiff must, in the interest of public convenience and necessity come to the Commission for further approval if plaintiff desires to once again assume its utility obligations by serving additional customers.

B. NO DUE PROCESS OF LAW HAS BEEN VIOLATED.

The Colorado cases cited by plaintiff involve rather clear instances of surprise, failure to plead or submit evidence, or clear invasions of legally described exclu-

sive area certificates without proper notice. In our case, however, as we have previously set forth in Point I above, the very issues involving the right to serve certain areas, the sufficiency of service in these areas as well as the status of plaintiff's franchise were all raised in the pleadings, well supported by conflicting evidence on the part of both parties and were subjected to extensive argument during the hearing (R. 249-260, 264-266) and in the briefs submitted by the parties. (R. 412-435)

The question involving alleged vested rights has, however, been resolved by our Utah Supreme Court in the *Union Pacific Railroad Company vs. Public Service Commission* case, supra. Additionally, in as much as plaintiff has cited and relied on various Colorado cases, inapplicable as they may have been, we should examine the most recent Colorado Supreme Court case which is more nearly in point than are any of the plaintiff's cases. Plaintiff did not mention this case.

In *Town of Fountain vs. Public Utilities Commission*, 447 P.2d 527 (Colo. 1968) the Supreme Court discussed the due process problem as it related to the Colorado regulated monopoly concept. In that case, the facts were substantially the same as are the facts here. The Town of Fountain enjoyed an area certificate covering a substantial territory but during the last twenty years had failed to serve more than a relatively small portion thereof. Mountain View Electric, a rural electric cooperative, filed an Application for a Certificate cover-

ing an area which it was serving, which area included a majority of the area previously certificated to the Town of Fountain. After extensive hearing and evidence adduced on both sides, the Public Service Commission awarded the area to Mountain View. The Town of Fountain appealed assigning as error that due process was not satisfied in the situation where its previously certificated area was reduced in this type of an Application hearing. The Supreme Court, however, held that due process was satisfied where the area was reduced, if there was substantial evidence in the record to support a Finding that the certificated utility was unable or unwilling to serve its certificated area and that public convenience and necessity required the change. The facts to support the above findings were simply that the Town of Fountain had not served the area, and the Mountain View Electric Cooperative had gradually expanded into and served the area at the request of consumers and members needing service. The Court also held in that case that its decision was in no way to be considered an attack on the prior certificate granted to the Town of Fountain. Plaintiff in our case has argued that the prior certificate was being attacked by the Commission.

On Page 22, plaintiff claims that the certificate granted to Empire does not serve public convenience and necessity, but on the contrary obstructs it. This point is raised for the first time on appeal, not having been set forth in plaintiff's petition for rehearing and reconsideration. It is, therefore, barred under Section

54-7-15. Furthermore, the Findings of Fact relative to public convenience and necessity are final and will not be disturbed by this Court. See Section 54-7-16. See *Salt Lake Transfer Company vs. Public Service Commission,* 11 Utah 2d, 121, 35 P.2d 706, and *Lewis vs. Wycoff Company, Inc.,* 18 Utah 2d, 255, 420 P.2d 264.

The Certificate granted to Empire in this case is not a certificate such as Utah Power & Light obtained in Certificate No. 1118 merely authorizing the exercise of the rights and privileges conferred by the San Juan County Ordinance. Rather, the Certificate grants Empire the rights to operate as a public utility in a definitely described territory of San Juan County. This service, however, will be subject to the terms, provisions and conditions of the franchise. There are other areas in San Juan County over which the County would have no control; there are areas in which Federal lands are involved; and, of course, at the present time the Commission has determined in accordance with Section 54-4-25 that the ordinance granted by San Juan is sufficient. If at some future date the ordinance becomes insufficient, then the regulatory procedures open to the Commission could very well remedy the problem.

SUMMARY

Plaintiff has not been deprived of any prior certificated rights in San Juan County. It has failed over the years since 1955 to serve the County as a public utility should serve. Over this period of time it has watched the development of Empire Electric and the expansion of the Empire system to serve the portions of the County which plaintiff apparently has had no desire to serve. Plaintiff was not granted an exclusive right to hold the entire County regardless of its failure to adequately serve. Instead, plaintiff was merely granted a Certificate to do the things which San Juan County permitted it to do, to wit: to use the public ways, much as a right-of-way for the construction and installation of its poles and lines. Public Convenience and Necessity does not permit a utility to pick and choose its customers. Plaintiff has chosen the wholesale customer of Monticello, a uranium mine and a customer practically under plaintiff's transmission line. All other customers have been ignored.

The Commission has clearly and necessarily stated to plaintiff that plaintiff has failed in its utility obligations. Plaintiff now cannot avail itself of its own dereliction by searching out a phrase uttered by this Commission, taking it out of context, and attempting to embelish it and give it status as an Order of the Commission "de-certificating" plaintiff—all in order to try to establish some basis for reversal.

Defendants respectfully urge that the Commission's Findings of Fact, Report and Order be affirmed.

Respectfully submitted,

ELLIOTT LEE PRATT of
CLYDE, MECHAM & PRATT
H. WRIGHT VOLKER
ASSISTANT ATTORNEY GENERAL

Attorneys for Defendants

By .....
Elliott Lee Pratt