

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

In the matter of the application of Consolidated
Electric Service Co. for permission, approval and
a certificate of convenience and necessity
authorizing it to construct, install, own,
operate, control, manage and maintain an electric
distribution system for the public located in
Audrain County, Missouri, and including parts of
the incorporated area of the City of Mexico.)

CASE NO. EA-87-85

In the matter of the application of Union Electric
Company for permission, approval and a certificate
of convenience and necessity authorizing it to
construct, install, own, operate, control, manage
and maintain an electric distribution system for
the public in part of Audrain County, Missouri,
including the incorporated City of Mexico.)

CASE NO. EA-87-123

APPEARANCES: Rodric A. Widger, Attorney at Law, Stockard, Andereck,
Hauck, Sharp & Evans, P. O. Box 1280, Jefferson City,
Missouri 65102, for Consolidated Electric Service Co.
and Consolidated Electric Cooperative Association, Inc.

Debra H. Janoski, Paul A. Agathen, and Katherine C. Swaller,
Attorneys at Law, 1901 Gratiot Street, St. Louis, Missouri
63166, for Union Electric Company.

Carol L. Bjelland, Assistant Public Counsel, P. O. Box 7800,
Jefferson City, Missouri 65102, for the Office of the Public
Counsel and the Public.

Cecil I. Wright, Assistant General Counsel, P. O. Box 360,
Jefferson City, Missouri 65102, for the Staff of the Missouri
Public Service Commission.

REPORT AND ORDER

By an application filed February 2, 1987, in Case No. EA-87-85,
Consolidated Electric Service Co. (CESCO) seeks a certificate of public convenience
and necessity to provide electric service to an area in Audrain County, Missouri,

including the eastern portion of the incorporated City of Mexico, Missouri, and the incorporated City of Vandiver Village. The timely application to intervene filed on behalf of Union Electric Company (UE) was granted.

By an application filed April 27, 1987, in Case No. EA-87-123, UE seeks a certificate of public convenience and necessity to provide electric service to an area in Audrain County, including all of the Cities of Mexico and Vandiver Village, Missouri. The area sought by the UE application seeks all of the area contained in the CESCO application. The timely application to intervene of Consolidated Electric Cooperative Association, Inc., (Cooperative) was granted.

Since the two applications seek authority to provide electric service in substantially the same area, the applications were consolidated for hearing on July 13 and 14, 1987. Simultaneous initial briefs and simultaneous reply briefs have been filed by all parties.

On November 25, 1987, the Staff of the Public Service Commission filed its Motion To Stay Deliberation And Decision. The Motion recited that on November 16, 1987, a Petition In Quo Warranto was filed against Boone Electric Cooperative in the Circuit Court of Boone County, *State ex rel. the City of Springfield v. Boone Electric Cooperative*, Docket No. 427463. That case challenged the lawfulness of Boone Electric Service Company, which was created and exists under the same conditions as CESCO. The Motion requested that prior to judicial resolution of the legal issue as to whether or not CESCO may have been formed for an illegal purpose, the Commission should refrain from issuing a decision in the application. On December 11, 1987, the Commission issued its Order Staying Deliberation And Decision in this matter.

Because a resolution of the Petition In Quo Warranto filed against the Boone Electric Cooperative has yet to be forthcoming, the Commission has determined it appropriate to issue its decision herein without further delay.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

CESCO's Application

CESCO is a wholly-owned subsidiary of Cooperative and was formed in July, 1986, to sell and distribute electric energy to the public as a regulated public utility under the jurisdiction of this Commission.

Cooperative is a Rural Electrification Administration (REA) financed cooperative organized under Chapter 394, RSMo 1986. For many years Cooperative has been engaged in distributing electricity to its members throughout the entire area considered in this consolidated case less the greater part of the City of Mexico. CESCO was granted a franchise to operate as an electric utility in the City of Mexico at an election held April 7, 1987. It is generally conceded by all of the parties that Chapter 394 permits a cooperative to continue to render service to customers in areas which have become incorporated into municipalities with more than 1,500 persons, but that no new customers may be added by the cooperative in those incorporated areas. Because of the statutory limitations, Cooperative is unable to provide electric service to new customers within the City limits of Mexico.

The evidence shows that CESCO was formed and incorporated by Cooperative in response to these statutory limitations. The chief executive officer for CESCO and Cooperative acknowledged that the only purpose for CESCO's incorporation was to avoid the statutory prohibition against expansion by REA Cooperatives in nonrural areas.

Under CESCO's proposed method of service, Cooperative will transfer its entire electrical system to CESCO in exchange for 100 percent of CESCO's stock. CESCO will have no employees and all of its earnings will be transferred to Cooperative. The general manager of Cooperative will be the general manager of CESCO; the board of directors of Cooperative will be the board of directors of CESCO;

the rate structure of Cooperative will be adopted by CESCO; and the headquarters of CESCO will be the headquarters of Cooperative. Under a contract between Cooperative and CESCO, Cooperative will provide all operating services for CESCO in exchange for CESCO's agreement to purchase its entire power requirements from Cooperative.

Under the proposed method of service, it was originally intended that CESCO would obtain its financing from the National Cooperative Services Corporation (NCSC) and the National Rural Utilities Cooperative Finance Corporation (CFC). During the course of the hearing, however, it was established by the testimony of a CFC witness that CFC would not loan funds directly to CESCO because of CESCO's nonexistent credit and financial history. CESCO's only apparent source of financing, therefore, would be funds furnished by the parent Cooperative which have previously been secured from CFC or NCSC for that purpose.

The evidence shows that there is no known person in CESCO's proposed service area not presently able to receive electrical service from either the parent Cooperative or from UE. No prospective customer or customer representative testified in support of CESCO's application. In 1986 the number of customers being served in the proposed CESCO area was 430. It is expected that five customers would be added in 1987; seven more in 1988; and ten customers would be added in 1989.

The portion of the City of Mexico in which CESCO proposes to serve was annexed by the City in 1974. The value of the facilities to be transferred within the City is approximately \$775,000 and represents 14 percent of the Cooperative's assets. Cooperative also has invested a substantial sum of money to serve a Japanese wire plant located within the city limits of Mexico. At the time of the hearing the Cooperative had spent approximately \$79,595 to serve the plant and an additional \$288,000 would be spent by Central Electric Cooperative, the owner of the Cooperative transmission system, to enable CESCO to serve the plant. Although the additional facilities would be built by Central Electric Cooperative, the Cooperative will ultimately pay for the facilities through extra costs included in wholesale rates.

It is CESCO's intention to honor its commitment to purchase its entire power requirement from the parent Cooperative even though the Commission Staff advocates the policy of requiring all regulated utilities to shop for least cost power. The Commission Staff also objected to the terms of a proposed Qualifying Industrial Rate as being discriminatory and in violation of the Commission's current utility promotional practices rule. Under the Qualifying Industrial Rate, CESCO proposes to give a reduced rate for five years to any large commercial or industrial customer which is either a new customer establishing a new place of business, or an existing customer which significantly expands the size of its facilities. CESCO resists removing the requirement that qualification for the industrial rate requires the customer to be new. That language is required by the wholesale power supplier since the existing customers of the Cooperative will not be considered new customers for system demand purposes when they become CESCO customers.

CESCO's original application proposed to employ a "closer to" framework in lieu of the traditional obligation to serve requirement normally imposed on all regulated utilities. The "closer to" principle recognized the present duplication of CESCO and UE facilities in the involved area. CESCO's proposal was to extend service to applicants for new service only when its existing facilities were closer to the customer, and to refuse service when the facilities of UE or of another provider were closer to the prospective customer.

The Commission Staff objected to the "closer to" principle and originally intended to file maps showing proposed boundaries for each utility where lines are in close proximity to each other. When this proposal was attempted to be implemented, however, Staff had to modify its position since the facilities of UE and Cooperative were so intermingled that the proposed area distinctions were impossible.

The "closer to" principle is no longer at issue since CESCO abandoned that position and has accepted the recommendation of the Commission Staff. Within the area requested by CESCO, Staff recommends that it be granted an exclusive

certificate. Staff also recommends that UE should keep the existing structures they are serving on the effective date of any order to be issued. Any new structure within CESCO's service area would be served by CESCO unless UE's lines were within 200 feet of the metering point of the new structure. In that case, the customer would be allowed to choose which supplier of electrical service it desires.

The Commission Staff advocates that the Commission adhere to its policy of only allowing one utility to provide similar service within the delineated area so long as the utility was providing adequate service. The Staff, in its brief, cites substantial precedent in which the Commission has granted authority to a single provider of service to ensure that the interests of the public were protected from destructive competition.

Public Counsel also advocates the position that a certificate of public convenience and necessity granted under Section 393.170, RSMo contemplates a single provider of service to serve an entire area on an exclusive and all encompassing basis. It is contended that the granting of a exclusive certificate serves the objective of certificate proceedings before the Commission to serve the public convenience and necessity. The Commission has recently reaffirmed its belief that the practice of allowing one franchised utility to serve within an area rather than dividing the area between suppliers best serves the public interest. *Cuivre River Electric Service*, 28 Mo. P.S.C. (N.S.) 176 (1986). We are of the opinion, and so find, that a system of awarding electric certificates on the basis of regulated monopoly rather than regulated competition still best serves the public interest. The goal of exclusive certificates is to eliminate wasteful duplication and destructive competition. The Commission recognizes that in the instant case an unavoidable amount of duplication already exists and cannot be eliminated.

In considering similar allegations in a prior application for a certificate by a cooperative, the Commission expressed difficulty in seeing how the proposal could achieve the stated goal of avoiding duplication.

The Commission's jurisdiction over the cooperatives is limited to safety matters pursuant to Section 394.160, RSMo 1986, as amended, and the settling of change of supplier disputes pursuant to Sections 393.106 and 394.315, RSMo 1986, as amended. The Commission lacks the jurisdiction necessary to prevent the cooperatives from duplicating facilities in order to compete for prospective customers unless in so doing the cooperatives violate safety rules or the change of supplier statutes. Section 386.310(2), RSMo 1986, as amended. Sho-Me's General Manager, John Davis, admitted under cross-examination that Sho-Me's proposal provided for no restriction on cooperatives to refrain from extending distribution lines to gain the advantage of being closer to a prospective customer. Therefore, whether or not this certificate is granted, the cooperatives will be free to duplicate facilities in order to compete with other regulated providers there, provided they do so safely. *Application of Sho-Me Power Corporation et al.*, 29 Mo. P.S.C. (N.S.) 415, 418 (1988).

The Commission recognizes that the General Assembly statutorily has allowed competition between and among cooperatives, regulated utilities and municipalities. In fact, the General Assembly again acknowledged such competition with the passage of Section 394.312, RSMo (Cum. Supp. 1989). The Commission finds that granting CESCO's request herein would only compound destructive competition.

In the Commission's previous grant of authority to Cuivre River Electric Service Company, *supra*, the presumed ability of the service company to finance was given considerable weight. In that case a witness from the National Rural Utilities Cooperative Finance Cooperation (CFC) expressed the opinion that the service company applicant could secure financing from CFC and the National Cooperative Services Corporation (NCSC). In the instant case, however, testimony of the same CFC witness established that funds would not be loaned directly to CESCO because of CESCO's nonexistent credit and financial history. As such, CESCO's only apparent source of financing will be funds furnished by the parent cooperative from CFC or NCSC for that purpose.

In addition, we agree with the concerns of the Public Counsel that CESCO will have no employees and will not actually be providing the various aspects inherent in the provision of utility service, but to the contrary will merely be

functioning as a virtually nonexistent conduit for the activities of its unregulated parent.

Based upon the foregoing findings, the Commission determines that CESCO has failed to prove that the public interest would be served by granting CESCO's application.

UE's Application

Applicant UE is a Missouri corporation duly qualified and authorized to operate as a regulated public utility within the meaning of Section 386.020(29), RSMo (Cum.Supp. 1989). UE, or its predecessors, have been providing service to customers in and around Mexico, Missouri, for many years. The Mexico Electric Light, Heat and Power Company was engaged in the electric business in the City of Mexico since approximately 1887. By subsequent mergers and acquisitions, that Company's interests were assumed by Missouri Power & Light Company which was merged into UE pursuant to an order of this Commission issued in Case No. EM-83-248. UE's predecessor received its initial franchise from the City of Mexico in 1905. UE has a current franchise from the City of Mexico and also has received authority to engage in the electric business in the rural portions of Audrain County, from the Audrain County Commission.

UE has always assumed that it had grandfather rights for the rendering of electric service in the City of Mexico, including the expansion of service into areas annexed by the City. UE has always assumed authority to render electrical service in the rural portions of Audrain County by virtue of the existence of several line certificates issued to its predecessors by this Commission. It is generally conceded by all parties to the proceeding that transmission line authority includes the authority to render service to customers situated within reasonable distances from the transmission lines. Only in recent times has any serious concern been expressed about UE's authority to expand service in the City of Mexico or the rural areas of Audrain County without first obtaining an area certificate for either territory. UE filed its application to resolve any differences of opinion concerning its authority

to render service and to protect its interests from the competing application of CESCO.

Within the area embraced by its application, UE already renders service to approximately 5,858 customers with only approximately 400 of those customers being located outside the City of Mexico. Like CESCO, UE expects little growth in the area since only 60 new meters were set in the proposed service area in 1986. A UE witness indicated that the new meter settings resulted in little or no net increase in customers since many of the meter settings represented existing customer relocations. The purpose of the UE filing was to protect what it considers a substantial investment to provide safe and reliable service to existing and future customers within the area involved and to protect against the loss of some of the future or existing customers to CESCO.

UE has recently successfully completed one of the most formidable financial undertakings of any utility in the development of the economic resources necessary to build its Callaway Nuclear Generating Plant. UE employs a vast network of generation, transmission and distribution facilities in the rendering of electric service to large segments of the population in a substantial area of this State. The record shows that the service provided by UE is adequate and reliable and that UE's financial status is sound. No evidence to the contrary has been presented.

Finally, the Commission Staff proposed a resolution of the conflicting applications herein by awarding a certificate on the basis of a "first to file" principle when all other factors are equal between the applicants. It is advocated by the Staff that the CESCO application should be granted, with certain exceptions, since both applicants are qualified to render the proposed service and CESCO filed the earliest application. The Staff's exceptions would result in the granting of authority to UE to serve in two areas in which UE has line certificates, and in the third area in which UE presently serves all customers.

The Public Counsel's brief criticizes the Staff's position on the grounds that all conditions other than the time of the filing of the applications are not equal. The Commission agrees and finds that the simple expedient of determining certificate controversies on the basis of the first to file, while perhaps administratively attractive, would not fulfill the Commission's responsibility to judge the merits of individual certificate applications.

For all of the above reasons, the Commission determines that UE has proved the public interest would be served by granting UE's application.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions:

The instant applications are governed by Section 393.170, RSMo 1986, which requires an electrical corporation secure a certificate of authority from this Commission prior to construction and operation of an electric plant. The applicable section grants the Commission the discretion to award a certificate if, after hearing, the Commission determines that the requested authority is necessary or convenient for the public service. *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147 (Mo. App. 1980).

Convenience and necessity of the public is of paramount importance and the needs of the applicant utility are "only of secondary importance." *Public Water*, at 156. In CESCO's case, the actual need has been demonstrated to be that of the applicant service company or of its parent Cooperative and no prospective user of the service has supported the application. To prove "public need" or "necessity", an applicant must show that the additional service would be an improvement to justify its cost and that the inconvenience to the public resulting from the lack of the utility's proposed service is sufficiently great as to amount to a necessity. *State ex rel. Beaufort Transfer Company v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973). To the contrary, the evidence establishes that all prospective users of electric service

can secure that service from either CESCO's parent cooperative or from UE. Adding yet another supplier such as CESCO will not diminish, and will only promote, destructive competition. The Commission further concludes that adoption of the "closer to" framework in lieu of the traditional obligation to serve requirement is not in the public interest and is contrary to long-standing practice. *Application of Sho-Me Power Corporation, et al.*, 29 Mo. P.S.C. (N.S.) 415, 418 (1988).

This Commission has denied applications for certificates of convenience and necessity by a regulated utility in the absence of requests for the utility's service even when the available alternatives were unregulated municipal utilities and rural electric cooperatives. *In the matter of The Empire District Electric Company*, 9 Mo. P.S.C. (N.S.) 349 (1960). However, UE's instant application is predicated on the existence of authority which it has presumed to have for many years through existing line certificates and existing facilities. UE's application has been filed only to resolve any potential doubts about its authority to perform the service in which it is actively engaged, such as those raised in *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 283 (Mo. App. 1989). UE's application also has been filed in response to the Commission's stated view that it is sound public policy for regulated utilities to convert line certificates into area certificates which more explicitly delineate the geographic territory in which the utilities are authorized to serve. *Sho-Me*, at 420.

In determining whether or not to grant a certificate of public convenience and necessity the Commission has consistently required the applicant to demonstrate the adequacy of its financing to permit conduct of the operations contemplated. If the applicant is unable to demonstrate sufficient financial strength, the proposed certificate should not be granted. *Miller Communications, Inc.*, 25 Mo. P.S.C. (N.S.) 339 (1982). While the adequacy of UE's financing clearly has been shown, such is not the case with CESCO.

Some of the parties urge rejection of the CESCO application under the contention that some of the activities of CESCO and some of its contemplated activities are unlawful. This Commission has no power to declare or enforce any principle of law or equity. *Lightfoot v. City of Springfield*, 236 S.W.2d 348 (1951). For that reason we conclude that it would be improper for us to attempt to resolve numerous legal issues inherent in the attacks contained in the briefs of the parties. While we decline to attempt to resolve those issues, the Commission nevertheless cannot simply ignore their potential resolution against CESCO as one of the many factors inherent in a public interest determination under Section 393.170, RSMo 1986.

Finally, the Commission concludes that a grant of authority which would be instrumental in diverting activities and resources of REA cooperatives from their traditional rural role would be an assumption of authority not granted the Commission by the General Assembly. This Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and the powers reasonably incidental to those expressly conferred powers. *State ex rel. and to use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044 (1943). The General Assembly of this state created the Public Service Commission for the expressed purpose of regulating public utilities. Subsequently, the General Assembly enacted Chapter 394 of the statutes of the State of Missouri, thereby creating rural electric cooperatives for the purpose of rendering electric service in rural areas not generally served by public utilities. The General Assembly is well aware of the coexistence of the regulated and the unregulated suppliers of electricity and of the competition such coexistence engenders. The Commission notes that the General Assembly recently enacted Section 394.312, RSMo (Cum. Supp. 1989), wherein it provided the alternative of territorial agreements among suppliers to displace destructive competition. While such agreements clearly are voluntary, the Commission encourages the Applicants herein to earnestly explore this newly-created option. The Commission notes further that Section 386.310, RSMo (Cum. Supp. 1989), precludes the

Commission from allocating territory or granting territorial rights among suppliers based on safety reasons. In the absence of a legislative mandate for the Commission to assign protected service territories among all providers of regulated and unregulated providers of electric service on a statewide basis, the Commission declines to do so on a piecemeal basis under the scheme proposed herein by CESCO.

For the reasons recited herein, the application of CESCO should be denied and the application of UE should be granted.

It is, therefore,

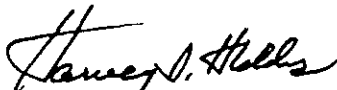
ORDERED: 1. That the application of Consolidated Electric Service Co., filed herein on February 2, 1987, seeking a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain an electric distribution system for the public located in Audrain County, Missouri, and including parts of the incorporated area of the City of Mexico, be, and the same is, hereby denied.

ORDERED: 2. That the application of Union Electric Company, filed herein on April 27, 1987, seeking permission, approval and a certificate of convenience and necessity authorizing it to install, acquire, build, construct, own, operate, control, manage and maintain an electric distribution system for the public within an area of Audrain County, Missouri, including the incorporated City of Mexico, more fully described by metes and bounds on Appendix A attached hereto, be, and is, hereby granted.

ORDERED: 3. That within thirty (30) days from the effective date of this Report and Order Union Electric Company shall file for Commission approval proposed tariffs containing a metes and bounds description of the service area herein involved and a service area map in compliance with 4 CSR 240-2.060(2)(A)(7).

ORDERED: 4. That this Report and Order shall become effective on the
30th day of May, 1990.

BY THE COMMISSION


Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch, McClure
and Letsch-Roderique, CC., Concur and
certify compliance with the provisions
of Section 536.080, RSMo 1986.

Dated at Jefferson City, Missouri,
on this 27th day of April, 1990.

METES AND BOUNDS DESCRIPTION OF PROPOSED SERVICE AREA

Beginning at the Northwest corner of Township 51 North, Range 9 West, Audrain County, Missouri, said point also being the Northwest corner of Section 6 of said Township 51 North, Range 9 West; thence East along the North line of Sections 6, 5, 4, 3, 2 and 1 of said Township 51 North, Range 9 West to the Northeast corner of said Section 1, said point also being the Northwest corner of Section 6, Township 51 North, Range 8 West; thence continuing East along the North line of said Section 6 to the Northeast corner of said Section 6; thence South along the East line of Sections 6 and 7 of said Township 51 North Range 8 West, to the Southeast corner of said Section 7, said point also being the Northwest corner of Section 17 of said Township 51 North, Range 8 West; thence East along the North line of Sections 17, 16 and 15 of said Township 51 North Range 8 West to the Northeast corner of said Section 15; thence South along the East line of Sections 15, 22, 27 and 34 of said Township 51 North, Range 8 West to the Southeast corner of said Section 34, said point also being the Northeast corner of Section 3, Township 50 North, Range 8 West; thence continuing South along the East line of Sections 3 and 10 of said Township 50 North, Range 8 West to the Southeast corner of said Section 10; thence West along the South line of Sections 10, 9, 8 and 7 of said Township 50 North, Range 8 West to the Southwest corner of said Section 7, said point also being the Northeast corner of Section 13, Township 50 North, Range 9 West; thence South along the East line of Sections 13 and 24 of said Township 50 North, Range 9 West to the Southeast corner of said Section 24; thence West along the South line of Sections 24, 23, 22 and 21 of said Township 50 North, Range 9 West to the Southwest corner of said Section 21; thence North along the West line of Sections 21 and 16 of said Township 50 North, Range 9 West to the Northwest corner of said Section 16, said point also being the Southeast corner of Section 8 of said Township 50 North, Range 9 West; thence West along the South line of Sections 8 and 7 of said Township 50 North, Range 9 West to the Southwest corner of said Section 7; thence North along the West line of Sections 7 and 6 of said Township 50 North, Range 9 West to the Northwest corner of said Section 6, said point also being the Southwest corner of Section 31, Township 51 North, Range 9 West; thence continuing North along the West line of Sections 31, 30, 19, 18, 7 and 6 of said Township 51 North, Range 9 West to the Northwest corner of said Section 6 and the point of beginning containing in all 82 square miles, more or less.

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