

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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THE WESTERN COLORADO POWER COMPANY,)
a corporation, Montrose, Colorado,)

Complainant,)

vs.)

COLORADO-UTE ELECTRIC ASSOCIATION,)
INC., a cooperative association,)
P. O. Box 178, Montrose, Colorado,)

CASE NO. 5215

and)

DELTA-MONTROSE RURAL POWER LINES)
ASSOCIATION, a cooperative association,)
121 East 12th, Delta, Colorado,)

Defendants.)
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May 25, 1962

Appearances: Sidney G. Baucom, Esq.,
Salt Lake City, Utah,
for Western Colorado
Power Company;
Loesch and Kreidler, Esqs.,
Montrose, Colorado, for
Western Colorado Power
Company;
Moses and DeSouchet, Esqs.,
Alamosa, Colorado, and
J. A. Hughes, Esq., Montrose,
Colorado, for Colorado-
Ute Electric Association;
Roderick N. Stewart, Esq.,
Delta, Colorado, for Delta-
Montrose Rural Power Lines;
Paul M. Brown, Denver, Colo-
rado, for the Staff of
the Commission.

STATEMENT, FINDINGS OF FACT, AND CONCLUSIONS

By the Commission:

This is an action arising out of a Complaint filed by
The Western Colorado Power Company, against Colorado-Ute Electric
Association, Inc., and Delta-Montrose Rural Power Lines Association,
alleging that Respondents entered into an agreement on the 28th day

of April, 1955, providing that Respondents will not, without written consent of Complainants, furnish or extend their facilities for the purpose of furnishing electric power or energy for sale or distribution within the corporate limits of any city or town where electric service is being furnished by Complainant; that they will not furnish electric power or energy for distribution to or use on premises where such service is being furnished by the Complainant, or whose premises are capable of being served by the existing facilities of Complainant without extension of its distribution system, other than by the construction of lines not exceeding three hundred feet in length.

Complainant further alleges that Colorado-Ute Electric Association has commenced, or is about to commence to construct, an electric power line which will extend to and serve the premises of Colorado-Ute Electric Association within three hundred feet of, and capable of being served by, existing facilities of Complainant, and that Respondent, Delta-Montrose Rural Power Lines proposes to supply electric power and energy to said premises over the line, and that Respondents are without certificates of public convenience and necessity in Montrose County, Colorado.

The Answer of Respondents pleaded the general denial, and as a second defense, alleges that Colorado-Ute Electric Association requested the Complainant to wheel power for Colorado-Ute's use in its new Headquarters Building, but that Complainant refused to do so; that the point at which service should be delivered to Colorado-Ute's Headquarters Building is more than three hundred feet from Complainant's own lines; that Delta-Montrose Rural Power Lines Association is not supplying any electrical power or energy to the premises; that Colorado-Ute does not propose to serve the public from said line, and will not do so, and that the use of said line is for the sole purpose of serving itself, and that the Complainant has waived terms and conditions of the contract providing restriction of service within three hundred feet.

Complainant adduced evidence in support of its Complaint on its case in chief by cross-examination of the Managers of Colorado-Ute Electric Association and Delta-Montrose Rural Power Lines Association, called as adverse witnesses, and from testimony by the General Manager of The Western Colorado Power Company.

At the conclusion of Complainant's case in chief, the Respondents moved for dismissal of the Complaint, on the grounds that the Complainants had failed to prove facts upon which this Commission could grant relief.

The Motion was taken under advisement, and the matter continued until further Order of this Commission.

Evidence adduced at the hearing established that approximately in the Spring of 1961, and several times thereafter -- probably in July, 1961, and February, 1962 -- conversations were had between representatives of The Western Colorado Power Company and Colorado-Ute Electric Association, regarding the service of power to the new Headquarters Building of Colorado-Ute, which is being constructed a short distance beyond the City Limits of Montrose, Colorado.

Colorado-Ute proposes to utilize power -- not only for lighting, and in the operation of such motors and appliances as are normally used in buildings of this type -- but likewise proposes to heat by electricity. On the basis of this broad use, Colorado-Ute requested Western Colorado for a rate for heating, which was not provided in the tariffs of Western Colorado. Western Colorado declined to make a special rate for this purpose. Thereupon, Colorado-Ute requested that Western Colorado wheel power over its lines for the use of Colorado-Ute. This Western Colorado declined to do, and on the threat that Colorado-Ute would construct its own line, Western Colorado informed Colorado-Ute that it would oppose any such action.

When Colorado-Ute commenced its construction, Western Colorado immediately notified Colorado-Ute of its intentions to oppose; requested Colorado-Ute to desist, and that the actions of Colorado-Ute were allegedly in violation of law.

This notice was disregarded by Colorado-Ute, and construction was commenced. Thereupon, Western Colorado instituted a Civil Action in the District Court of Montrose County, and filed its Complaint with this Commission, which is the subject matter of this hearing.

It was established that Delta-Montrose owns and operates a 12.5 kv line, that generally parallels the eastern boundary of Section 35, in Township 49-North, Range 9-West of the New Mexico Principal Meridian. This line extends southerly for a mile and one-half, and then proceeds due west for a mile, north one-half mile, and westerly slightly over one and one-fourth miles. This line likewise extends westerly along the mid-point of Section 35 one-fourth of a mile. By arrangement with Colorado-Ute, when Colorado-Ute determined to furnish its own power, the entire line was converted from a single-phase to a three-phase line, at a cost of slightly in excess of \$1,000, all of which was borne by Colorado-Ute, as contribution in aid of construction. From the three-phase connection thus constructed, Colorado-Ute extended its line directly west along the centerline of Section 35 and into the eastern one-half of Section 34, by the construction of a 12.5 kv three-phase line designed to serve the new Colorado-Ute Headquarters Building, which is being constructed in the vicinity of Montrose, at a cost of in excess of \$200,000.

The Headquarters Building will house all of the headquarters operations of Colorado-Ute. Delta-Montrose, however, will be leased one room as an office for its operation; otherwise, the building will be restricted exclusively to the use of Colorado-Ute, and no part thereof will be rented on any long-term basis as a public building.

Colorado-Ute, incidentally, is a generating and transmission cooperative, which generates and transmits electricity for a number of cooperative distribution companies who are qualified borrowers from Rural Electrification Administration. Included among these owners of Colorado-Ute is Delta-Montrose Rural Power Lines Association.

With reference to the provisions of the contract, Colorado-Ute adduced evidence that it supplied power and energy to its own sub-stations at Happy Canyon, and at Durango, claiming that Western Colorado had facilities within three hundred feet to serve these sub-stations, but that Colorado-Ute was permitted to serve itself, and that therefore the provisions of the contract contained in the Complainant's Complaint had been waived.

Western Colorado countered, on the other hand, with testimony that there were no three-phase lines within three hundred feet of these two installations, and that thus there was no waiver, and that in addition, the utilization of power in a sub-station was of an entirely different nature than the utilization of power in an office building, such as the Headquarters Building of Colorado-Ute, and that it was a standard custom, in all instances, to utilize the power flowing through the sub-station.

Efforts were made, on cross-examination, to establish the interpretation of the contract by Western Colorado Power Company, wherein Western Colorado furnished power to a customer within the three-hundred-foot limitation of the contract, but that the customer thereafter extended lines on his own property to points considerably more distant than three hundred feet, to render domestic service to himself, at his home, although the power initially was furnished for an out-door theater.

It was also established that the determination of the three-hundred-foot distance, which is within the purview of the limitations of the contract, is measured to the point of delivery of the service.

Western Colorado operates a three-phase line west of the Headquarters Building of Colorado-Ute, which, to the front of the building, is 296.5 feet; to the rear of the building, however, where the meter is located, and which would be the point of service, the distance would be somewhat greater.

Another line of Western Colorado circumscribes the building on the north and east, which is, at one point, 203 feet from the north

end of the Colorado-Ute Building, and 237 feet from the east side of the building, which is known as the back of the building, which is the point of service delivery to Colorado-Ute. This line, however, is a single-phase line, and would require complete reconstruction and conversion to three-phase. It was asserted by Western Colorado that this line, however, has been, and will be, three-phase, in order to render proper service to a church located southeast of the Colorado-Ute Electric Association, Inc. Building.

As we view the pleadings and the facts in this case, it appears to us that there are two principal issues: First is whether or not the actions of Colorado-Ute in construction of a line to render service to itself constitutes a violation of the Public Utility Law of the State of Colorado, as an extension into territory certificated to Western Colorado. The second question presented is based upon the terms of the contract entered into between Colorado-Ute and Western Colorado, as to whether or not there has been a violation of the terms of that agreement.

There can be no doubt that The Western Colorado Power Company is a public utility, certificated to render service in the area. Parenthetically, it is noted that Delta-Montrose Rural Power Lines Association has pending before this Commission an application for a certificate of public convenience and necessity, hearing upon which has been concluded, and Decision upon which is imminent.

In disposing of the first question, this Commission is impressed with specific assertions made by both Managers of Colorado-Ute and Delta-Montrose, reiterated by their counsel, in statements to the Commission, that the facility of Colorado-Ute is considered by Colorado-Ute as a private facility -- not dedicated to the public use -- and that both Colorado-Ute and Delta-Montrose, by virtue of the existence of that line, do not claim the right to expand therefrom, or to possess any preemptive or paramount right to render service therefrom to the general public, and that the Commission could impose any restriction to that effect that it desired.

Thus, with this assertion by the Respondents, we are not faced with the situation of a utility enlarging its facilities for utility service; rather, we are presented with a situation of private facilities being enlarged to serve a private purpose. To hold otherwise is to state that a person capable of rendering service to himself is prohibited from doing so. A searching scrutiny of the Public Utility Laws of the State of Colorado in no wise discloses such inhibitions in our statutes.

It was conceded by Western Colorado that Delta-Montrose has the right and authority, without reference to the Commission, to convert its single-phase to a three-phase line. Delta-Montrose likewise has authority to render service from that line.

It was also conceded that Western Colorado could have taken service from that line. Thus, the actions of Delta-Montrose in converting to three-phase, and in rendering service thereon, are not illegal, per se, and could become so only if their actions were tainted by its connection with the Colorado-Ute construction.

The Colorado-Ute construction, however, is not a public facility, but rather, a private facility, solely and exclusively for the use and benefit of Colorado-Ute itself. Whether such a line would ever be considered utility property, and an integral part of rate-base in a rate case, is a question not to be considered here. The fact is that this line is a private line -- not a facility of a utility dedicated to public use. It is our view that under the law, any person has the absolute right to render utility service to himself.

With reference to the provisions of the contract, it is conceded by all parties that the contract, although filed with the Public Utilities Commission, has never been presented to the Commission for an Order of approval. At the time of entering into this contract, neither Colorado-Ute nor Delta-Montrose operated as a utility under the jurisdiction of this Commission. Whether or not they were utilities, in fact, and should have been under the jurisdiction of this Commission, is not a question that is presented in this case.

Thus, in either event, the contract is an agreement between a utility and private parties, as of the date hereof, or it is an agreement between utilities, that does not have the sanction of this Commission.

This Commission, under the law, has authority to compel observance of the Public Utility Law, and to enforce its own Orders implementing that law. Agreements, however, that have not had the prior approval of this Commission, are at least in the nature of private contracts. As such, this Commission has no authority to interpret or enforce private contracts, since the Commission is not a judicial body, having no judicial power, and any attempt to do so by this Commission would be a violation of Article III of the Constitution of the State of Colorado. People vs. Swena, (31, 88 Colo. 337, 296 Pac. 271). Under this provision of the Constitution, this Commission, as a quasi-judicial, quasi-legislative body, may no more invade the province of the Courts than the Courts may invade the fact-finding powers of this Commission. We must hold, therefore, that the interpretation and enforcement of the respective rights of the parties under this contract is not within the province of the powers of this Commission. So holding, it becomes unnecessary, therefore, for us to make specific findings with regard to any evidence relating to the three-hundred-foot rule, and the interpretation of the contract.

We do specifically find, however, that the construction of the line by Colorado-Ute is the construction of a private facility, not dedicated to the public use, to be used solely and exclusively to supply service by Colorado-Ute to itself.

We further find that the actions of Delta-Montrose in so rendering such service is acting legally, within its powers.

We further find that said line, as a private facility, does not, and will not, create any paramount or preemptive right in either Colorado-Ute or in Delta-Montrose, as a distributing company, for expansion by virtue of the existence of this line, and that such a restriction should be included in the Order herein.

We must further take official notice of the fact that Delta-Montrose Rural Power Lines Association has pending before this Commission an application for a certificate of public convenience and necessity, in which Western Colorado is an intervener, and that the territories for the respective utilities may be delineated in such an Order. Any right, duties, or obligations that may arise by virtue of this Order shall be subordinate to and controlled by our Decision in that case, save and except our finding herein that the Colorado-Ute line does not violate the Public Utility Act.

This Commission is thus of the opinion that the Complaint of The Western Colorado Power Company should be dismissed, and that these proceedings should be terminated.

In so doing, we must observe that all utilities, including cooperatives, who have now been declared by the Legislature to be vested with a public interest, and subject to the jurisdiction of this Commission, should move carefully in the exercise of their rights. They should not seek to construct new facilities with cavalier abandon, without reference to the legal limitations and inhibitions that may be imposed upon them not to duplicate facilities, not to invade territories of other utilities, and not to do such other acts that may be economically wasteful, redounding to the disadvantage of the customers which they serve.

We admonish all utilities that, wherever there is a question of doubt, the utilities should file their applications with the Commission for authority to perform the acts they seek to perform.

O R D E R

THE COMMISSION ORDERS:

That Motion of Respondents, Delta-Montrose Rural Power Lines Association, and Colorado-Ute Electric Association, Inc., be, and the same hereby is, granted, and the Complaint be, and the same hereby is, dismissed.

That this Case be, and the same hereby is, terminated.

That neither Delta-Montrose Rural Power Lines Association nor Colorado-Ute Electric Association, Inc. shall extend any service to any other customer by virtue of the existence of the said line of Colorado-Ute, nor shall said Respondents, or either of them, claim any preemptive, paramount, or prior right to render such service, by virtue of the existence of said line.

This Order shall become effective twenty-one (21) days from the date hereof.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO




Commissioners.

Dated at Denver, Colorado,
this 25th day of May, 1962.

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