

(Decision No. C87-950)

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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IN THE MATTER OF THE APPLICATION OF )	
UNION RURAL ELECTRIC ASSOCIATION, )	
INC., TO REOPEN THE PROCEEDINGS )	
RESULTING IN DECISION NO. 63322 )	APPLICATION NO. 37131
AND FOR AN ORDER MODIFYING THAT )	
DECISION SO THAT UNION IS ISSUED A )	COMMISSION INITIAL ORDER GRANTING
CERTIFICATE OF PUBLIC CONVENIENCE )	JOINT MOTION FOR ORDER
AND NECESSITY TO EXCLUSIVELY SERVE )	AMENDING PRIOR DECISION NO. 63322
ALL CUSTOMERS WITHIN ITS EXCLUSIVE )	AND DISMISSING APPLICATION
TERRITORIES REGARDLESS OF ANNEXATION) )	NO. 37131 WITH PREJUDICE
OF ANY PART OF THOSE TERRITORIES )	
TO A MUNICIPALITY SERVED BY PUBLIC )	
SERVICE COMPANY OF COLORADO UNDER )	
A FRANCHISE. )	

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July 8, 1987  
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STATEMENT AND FINDINGS

BY THE COMMISSION:

On July 22, 1985, Application No. 37131 was filed by Union Rural Electric Association, Inc. (Union), with a motion for an interim order. Public Service Company of Colorado (Public Service) filed an objection to the motion for interim order on July 26, 1985.

Petitions to intervene were filed by: the Colorado Municipal League (League) on August 1, 1985; the City and County of Denver on August 2, 1985; the City of Aurora on August 29, 1985; Intermountain Rural Electric Association (Intermountain) on September 5, 1985; City of Brighton on September 5, 1985; Poudre Valley Rural Electric Association (Poudre Valley) on September 5, 1985; Tri-State Generation and Transmission Association, Inc. (Tri-State), on September 6, 1985; the Colorado Rural Electric Association (Colorado Rural) on September 6, 1985; and the City of Broomfield on September 6, 1985. Public Service filed a protest and motion to dismiss the application on September 6, 1985. The cities will be referred to as Cities, or by their individual names.

The Commission issued notice of the application on August 7, 1985. On August 27, 1985, the Commission issued Decision No. C85-1097 denying Union's motion for interim order.

Hearing on the application was originally set for December 11, 1985. Public Service filed a motion to vacate and a request to schedule a prehearing conference. A request to vacate and reset application for a prehearing conference was also filed by Union.

Decision No. R85-1344-I was issued on October 30, 1985, which denied the motion to dismiss filed by Public Service, vacated the hearing scheduled for December 11, 1985, and scheduled the matter for a prehearing conference on October 7, 1985. After the prehearing conference, various pleadings, stipulations, and interim orders were filed or issued.

A procedural hearing was held on March 25, 1986, and Decision No. R86-353-I was issued on March 27, 1986, as the consequence of this hearing. This decision vacated the scheduled hearings, and rescheduled the hearing dates to April 21, 22, 23, 24, 25, 29, and 30; May 1, 8, and 9, 1986. Decision No. R86-440-I was issued on April 17, 1986. This decision ordered that certain portions of the written prefiled testimony of Public Service witness Richard Speer and J. H. Ranninger would be stricken.

Hearing commenced on April 21, 1986, and continued through April 22, 23, 24, 25, 29, 30; May 1, 8, 9, and 19, 1986. During the course of the hearing, various exhibits were marked for identification and admitted into evidence.

At the conclusion of the hearing on May 19, 1986, it was ordered that all parties could file statements of position or briefs on or before July 11, 1986, and that reply statements of position or briefs could be filed on or before August 8, 1986. The subject matter was then taken under advisement. Statements of position or briefs were filed by Union, Public Service, the Colorado Rural Tri-State, Poudre Valley and jointly by Aurora, Broomfield, and Denver. Reply briefs or statements of position were filed by Union, Public Service, Poudre Valley Tri-State, Colorado Rural and Aurora.

On February 2, 1987, Hearings Examiner Robert E. Temmer issued Recommended Decision No. R87-149 (R87-149) finding that paragraphs 5 and 6 of Article 1 contained in the agreement of April 20, 1964, between Public Service and Union should be eliminated so that the service area of Union would remain fixed instead of being subject to change. It was also found in R87-149 that the annexation provision in the April 20, 1964, agreement acts contrary to the doctrine of regulated monopoly and creates unnecessary duplication to the detriment of the public interest. Accordingly, R87-149 recommended that Decision No. 63322 issued on July 20, 1964, in Application No. 20427 and Application No. 20428 be amended to disapprove paragraphs 5 and 6 of Article 1 of the agreement of April 20, 1964.

After the issuance of R87-149, the following pleadings were filed by the following parties:

<u>Party</u>	<u>Pleading</u>	<u>Date Filed</u>
Broomfield and League	Exceptions to R87-149	2/23/87
Union	Motion to establish effective date	2/20/87
Tri-State and Colorado Rural	Exceptions to R87-149	2/23/87
Union	Exceptions to R87-149	2/23/87
Union	Response to exceptions of Broomfield and League	2/27/87
Broomfield, League	Response to exceptions	3/4/87
Tri-State, Colorado Rural	Letter	3/2/87
Public Service	Motion to set aside a portion of Decision No. R86-91-I	3/16/87
Public Service	Combined response to exceptions and response to motion to establish effective date of recommended decision	3/16/87
Public Service	Exceptions to R87-149	3/16/87
Public Service	Motion to allow exceptions to exceed 30 pages	3/16/87
Tri-State and Colorado Rural	Letter in response	3/23/87
Poudre Valley	Motion for Extension of time to file response to exceptions	3/25/87
Union	Response to motion to set aside	3/30/87
Poudre Valley	Amended motion for extension time to file responses to exceptions	4/6/87
Union	Motion for indefinite extension of time to file response to exceptions	5/13/87

Union and Public  
Service

Joint motion for order amending  
prior Decision No. 63322

6/2/87

Colorado Rural  
and Tri-State

Response to joint motion for  
order amending prior Decision  
No. 63322

6/17/87

On June 2, 1987, Union and Public Service filed the joint motion above for order amending prior Decision No. 63322 and, upon the entry of the order, for termination of the proceedings with prejudice. By this motion, Union and Public Service requested that Decision No. 63322 be amended so that paragraphs 5 and 6 of Article 1 of the April 20, 1964, agreement between them be deleted, so that the certificated service areas of Union and Public Service would not be reduced by any annexation of a municipality served by the other which was not finally effective as of February 2, 1987. Union and Public Service requested that the Commission enter its amending order as an initial and final decision based upon the record and on this motion, without regard to R87-149, and that the Commission not adopt, reject, or modify the recommended decision. A copy of the of April 6, 1987, agreement between Public Service and Union was attached to the joint motion for order amending prior Decision No. 63322.

The Commission finds that it has reviewed the findings of fact and conclusions thereon and order contained in R87-149, and that for purposes of clarity, the Commission will enter its own findings, conclusions, and order after review of the record of this proceeding, and after considering the joint motion for order amending prior Decision No. 63322 and the response to the joint motion filed by Colorado Rural and Tri-State on June 17, 1987.

FINDINGS OF FACT  
AND CONCLUSIONS THEREON

Based upon the evidence of record, the following facts are found and conclusions are drawn:

1. Union is a non-profit cooperative Colorado corporation whose articles of incorporation and amendments are on file with this Commission. Union is in the business of purchasing, transmitting, distributing, and selling electric energy to its members and customers in portions of the counties of Adams, Boulder, Gilpin, Jefferson, and Weld in Colorado. It is a public utility and is subject to the jurisdiction of this Commission for some purposes.

2. This application is a request by Union that Decision No. 63322 be modified so that Union will have the exclusive right to provide electric service in portions of its service territory designated as areas A, B, and C regardless of annexation, or that the agreement approved by Decision No. 63322 be modified to delete the annexation provisions contained in the agreement.

3. Decision No. 63322 was issued by this Commission on July 20, 1964. A copy of the decision was admitted in this proceeding as Exhibit 9. It was entered in Applications No. 30427 and No. 20428. Those were applications filed by Public Service and by Union for certificates of public convenience and necessity to render electric service, and for an order authorizing exchange of certain electric facilities pursuant to an agreement entered into between them. Decision No. 63322 approved the April 20, 1964, agreement of the parties in its entirety, and incorporated the agreement into the order. A copy of the agreement was admitted into evidence in this proceeding as Exhibit 5.

4. Decision No. 63322 granted a certificate of public convenience and necessity to Public Service to render electric service within areas D and E-1. It granted Union a certificate of public convenience and necessity to render electric service within areas A, B, and C. The order in that decision also states that the Commission retains jurisdiction to make further orders as necessary.

5. The portions of the agreement of April 20, 1964 (Exhibit 5), that are central to this proceeding are paragraphs 5 and 6 of Article 1. Those paragraphs are on pages 6 and 7 of the agreement and provide:

5. In the event any portion of Area A, B or C or any portion of Area E within which Union is supplying service to customers pursuant to paragraph 5 a of Article II hereof becomes annexed to any City or Town within which Public Service is, at the time of such annexation, supplying electric service under the terms of a franchise granted by said City or Town, Union shall sell to Public Service its electric distribution facilities within such annexed area and thereafter shall cease serving its then existing customers being served by such distribution facilities. As compensation for any sale and transfer made pursuant to this Paragraph 5, Public Service shall pay to Union the original cost of the facilities transferred less depreciation accrued thereon at the rate of three (3) percent per annum, plus an amount equal to the revenue received by Union from its customers located within such annexed area during the twelve (12) month period next preceding the date of such sale and transfer. Union shall not serve any new customers in any such annexed areas. The term "city" or "town" as used herein shall apply to any city or town

within the meaning of such term under the Constitution or laws of the State of Colorado, but shall not apply to any quasi-municipal corporation, district, super-district, super-municipality, or other type of community created for a special purpose and of limited municipal powers, or which may consist of one or more cities and towns with each retaining its respective corporate identity.

6. In the event any portion of Area D, E or E-1 becomes annexed to any City or Town within which Union is, at the time of such annexation, supplying electric service under the terms of a franchise granted by said City or Town, Public Service shall sell to Union its distribution facilities. As compensation for any such sale and transfer made pursuant to this Paragraph 6, Union shall pay to Public Service the original cost of the facilities transferred less depreciation accrued thereon at the rate of three (3) per cent (sic.) per annum, plus an amount equal to the revenue received by Public Service from its customers located within such annexed area during the twelve (12) month period next preceding the date of such sale and transfer. Public Service shall not serve any new customers in any such annexed areas. The term "city" or "town" as used herein shall apply to any city or town within the meaning of such term under the Constitution or laws of the State of Colorado, but shall not apply to any quasi-municipal corporation, district, super-district, super-municipality, or other type of community created for a special purpose and of limited municipal powers, or which may consist of one or more cities and towns with each retaining its respective corporate identity. (Emphasis added.)

These paragraphs allow portions of areas certificated to or served by Union or Public Service to be transferred to the other utility upon annexation by a city or town. The relief requested in this proceeding is to have these provisions eliminated from the agreement so that the service areas of Union will remain fixed, rather than be subject to change.

6. Public Service is a Colorado corporation engaged in the generation, purchase, transmission, distribution, and sale of electricity in a number of areas of Colorado. It is the successor company of a number of mergers and acquisitions, several of which are relevant to this proceeding. Public Service acquired the Arvada Electric Company in 1954. That company had held several certificates of public convenience and necessity and franchises in the Arvada and Westminster area. Colorado Central Power Company was merged into Public Service Company in 1962. Colorado Central had provided electric service in areas north of Denver and particularly around Brighton.

7. The April 20, 1964, agreement which was approved by the Commission in Decision No. 63322 came about as a consequence of litigation between Union and Public Service before this Commission, culminating in the decision of the Colorado Supreme Court in Public Service Company v. Public Utilities Commission, 142 Colo. 135, 350 P.2d 543 (1960) (cert. denied 364 U.S. 8). By this decision, the Colorado Supreme Court affirmed and reversed the Commission in various respects. The Commission entered Decision No. 55544 on December 9, 1960, amending and modifying Decision No. 47074 to conform to the opinion of the Supreme Court. Public Service and Union then began negotiations to attempt to settle the boundary dispute between them, as neither was satisfied with the results of the litigation. Negotiations resulted in the agreement of April 20, 1964, which was approved by the Commission in Decision No. 63322.

8. The Commission, in Decision No. 63322 stated about the April 20, 1964, agreement between Union and Public Service:

The agreement . . . between Public Service and Union marks the culmination of many years of territorial disputes between the two utilities. Much litigation has been engaged in between the parties before this Commission, various district courts in the State of Colorado, the Supreme Court of the State of Colorado, and an application for Writ of Certiorari to the Supreme Court of the United States was denied. After many years of controversy and litigation, the parties have resolved their differences and have presented to this Commission for its approval . . . the agreement setting forth the terms and conditions of the compromise and settlement entered into between the parties. This Commission looks with favor upon the voluntary settlement of such territorial disputes so long as the terms of settlement are in the public interest, and will not withhold its approval of such an agreement, if the same is in the public interest.

9. Union and Public Service have operated under the agreement and the approvals granted by this Commission since 1964. The annexation provisions of the agreement did not cause concern until the late 1970s when Erie, a city in area B, annexed over 900 acres. This area had been served by Union and had to be transferred to Public Service under the agreement. Then, in the early 1980s, some cities began using flagpole annexations to reach out significant distances to annex territory. These annexations caused Union to become concerned. Union has performed studies that caused it to conclude that the annexation provision could result in significant losses of its exclusive territories B and C.

10. Between 1964 and 1986, Union experienced growth of about 7,700 customers. In 1986, Union had slightly over 13,000 customers. Public Service experienced significant growth, labeled "phenomenal," in the areas that were assigned to it by the agreement. The record shows that municipalities have become aggressive in annexation and competition exists between cities for territory with various tactical methods of annexation being used, including flagpole annexations. The dramatic expansion of municipal boundaries could not have been foreseen in the early 1960s. Under circumstances as they existed at the time of hearing in 1986, it appears that cities will continue to annex significant amounts of territory, and there are strong incentives for development to occur within the boundaries of a city. Further, which electric utility is serving a particular area to be annexed is not a major consideration in determining whether annexation will be completed or not.

11. Annexations are now pending in Union's certificated areas B and C, including approximately 4,600 acres. If the annexation provisions of the agreement are allowed to operate, this territory will be lost to Union and transferred to Public Service. Also, Denver has proposed the relocation of its airport, to an area within Union's certificated area C. If the annexation provision operates, Union will lose many thousands of acres and the airport's electric load when the area of the new airport is annexed to Denver. Union will also lose major portions of its certificated areas B and C through the operation of the annexation provision in the future if the annexation provision continues to operate.

12. Union, at the time of hearing, was the only electrical utility serving in its certificated areas A, B, and C, except where Public Service had extended its facilities into areas that have been annexed by cities. Union had lost about 100 customers at the time of hearing as a direct result of annexations. Approximately 20 percent of Union's customers and resultant revenues are in areas subject to being annexed in the not-too-distant future.

13. The April 6, 1987, agreement between Public Service and Union, in summary, provides:

- a. Public Service will present to Union's board a firm offer to purchase substantially all the assets of Union, free and clear of all liens and encumbrances, on or before May 8, 1987, at a price to exceed \$60 million.
- b. The firm offer will provide for the serving of Union's customers under Public Service's effective filed retail rates, and the employment of Union's employees.
- c. Public Service will agree to enter into a contract to purchase power and energy from Tri-State in the same amount and under the terms and conditions comparable to those under which Union currently purchases from Tri-State, for all present and future customers in Union's areas A, B, and C as they exist on February 2, 1987.
- d. Public Service will agree to contract with Tri-State to purchase, under agreed terms, power and energy equivalent to that needed for the proposed new Denver airport.
- f. Whether or not the parties ultimately agree on the price and other terms of the sale, Union's board will vote upon the sale at an agreed-upon price or on the price and other terms last offered by Public Service.
- g. The annexation provisions contained in the April 20, 1964, agreement ceased to operate as of February 2, 1987. Union and Public Service have applied to the Commission for approval of the deletion of the annexation provisions. Upon approval by the Commission of the deletion of these provisions, Case No. 37131 will be dismissed.
- h. The site for the new Denver airport and adjacent area now located in Union's exclusive service area will become a part of Public Service's exclusive service territory.
- i. Public Service's Platte Valley District, including the Cities of Brighton, Fort Lupton, Hudson, and Keenesburg shall become a part of Union's service territory.

- j. Upon consummation of the above exchanges, Union shall transfer to Public Service all of its right to serve existing customers in area E, not covered by the modification above.
- k. The exchanges above of service territory stated above are contingent upon Denver's new airport being located within Union's exclusive service territory. The exchanges will be effectuated one year from the beginning of construction of the new Denver airport terminal.

14. The joint motion merely requests that the Commission amend Decision No. 63322 by deleting paragraphs 5 and 6 of Article 1 of the April 20, 1964, agreement, and upon entry of this order, that this proceeding (Application No. 37131) be terminated. The Commission finds that the relief requested in the joint motion will resolve the territorial conflict between Union and Public Service appropriately. Moreover, the annexation provisions of the April 20, 1964, agreement now operates so as to rapidly erode Union's exclusive service territory, in violation of the concept of regulated monopoly. Accordingly, the annexation provisions of this agreement no longer serve the public interest and they should be deleted.

15. The Commission concludes that an order should be entered deleting paragraphs 5 and 6 of Article 1 of the agreement of April 20, 1964, and that Application No. 37131 should be terminated with prejudice as requested. Additionally, all pending exceptions, motions, and other pleadings not previously resolved by the Commission will be dismissed as moot.

15. It is stated in the joint motion that certain aspects of the April 6, 1987, agreement are subject to Commission approval. Public Service and Union also state that they will submit appropriate pleadings requesting required approvals, at the appropriate times. The Commission finds that it will be necessary for the parties to institute appropriate proceedings, file appropriate documents, and take all steps necessary to obtain prior Commission approval of all aspects of this transaction. For example, the transfer of Union's assets to Public Service, the transfer of service areas between these utilities, and the purchase power agreements proposed between Public Service and Tri-State, must all be reviewed and must receive prior Commission approval. The Commission does not intend that the list above is exhaustive, but demonstrates some of the areas which will require prior Commission oversight and approval in this transaction.

THEREFORE THE COMMISSION ORDERS THAT:

1. The joint motion for order amending prior Decision No. 63322, and the termination of these proceedings with prejudice, filed

on June 2, 1987, by Union Rural Electric Association, Inc., and Public Service Company of Colorado is granted.

2. Commission Decision No. 63322, issued July 20, 1964, is amended, so as to delete paragraphs 5 and 6 of Article 1 of the agreement between Public Service Company of Colorado and Union Rural Electric Association, Inc., dated April 20, 1964.

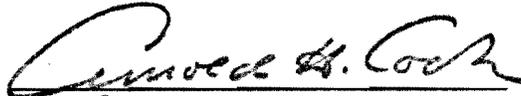
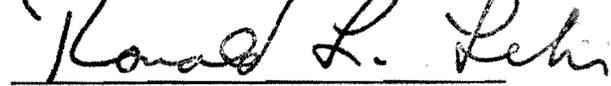
3. Application No. 37131, In the Matter of the Application of Union Rural Electric Association, Inc., is dismissed with prejudice, and all pending exceptions, motions, and other pleadings are dismissed as moot.

4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration begins on the first day after this Decision and Order is mailed.

5. This Order shall be effective 30 days from issuance.

DONE IN OPEN MEETING the 8th day of July 1987.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

  
  
  
Commissioners