(Decision No. C85-1131)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

UNION RURAL ELECTRIC ASSOCIATION, INC., Complainant, v. PUBLIC SERVICE COMPANY OF COLORADO Respondent.	CASE NO. 6393 INITIAL COMMISSION DECISION AND DECISION ON EXCEPTIONS

September 4, 1985

STATEMENT AND FINDINGS

BY THE COMMISSION:

On June 12, 1985, Union Rural Electric Association, Inc., (Union) filed formal complaint naming Public Service Company of Colorado (Public Service) Respondent. Union alleges that Public Service violated certain contractual provisions and Commission orders relating to the provision of electric service in portions of Weld County, Colorado and that Public Service has unlawfully taken over two large power loads previously served by Union, in violation of contract and Commission order. On June 26, 1984, the Commission issued an order to satisfy or answer to Public Service. Public Service filed its answer to Union's complaint on July 13, 1984, denying all allegations relating to any violations of contract or Commission order.

On August 3, 1984, the customer in question, Morning Fresh Farms, Inc. (Morning Fresh), filed a petition to intervene, which was granted on August 10, 1984.

The matter was heard on December 20, 1984, before Hearings Examiner Arthur G. Staliwe. At conclusion of hearing the subject matter was taken under advisement. On May 24, 1985, Hearings Examiner Arthur G. Staliwe issued Recommended Decision No. R85-705 recommending that Union's complaint be dismissed and applying the geographic load center test. This test permits a utility, where electrical usage is primarily concentrated in its territory, to provide service to customers whose land is located in the exclusive territories of two or more utilities. In applying the geographic load center test in this case, the Examiner found that the greater amount of electricity is consumed in Public Service's territory and Morning Fresh merely hooked up its lesser load in Union's territory to its dominant load in Public Service's territory.

The following pleadings have been filed:

Pleading	Date filed
Exceptions to Recommended Decision No. R85-705 filed by Union	July 8, 1985

Brief of amicus curiae in support of Union's exceptions, filed by the Colorado Rural Electric Association	July 8, 1985
Response to Union's exceptions and amicus brief, filed by Morning Fresh	Untimely filed on July 24, 1985
Response to Union's exceptions filed by Public Service	Untimely filed on July 25, 1985
Motion to Strike the response of Morning Fresh, or, in the alternative, reply to response, filed by Union	August 1, 1985
Motion to Strike the response of Public Service, or in the alternative, reply to response, filed by Union	August 2, 1985

Union's exceptions may be summarized as follows:

1. The Examiner ignored Commission Decision No. 63322 and the incorporated agreement which prohibits Public Service from providing the service in question.

2. The point of use test is required by the Colorado law of regulated monopoly. The Examiner erred in applying the geographic load center test which is not authorized by the law of Colorado, and has no application to the facts of this proceeding.

Amicus curiae, the Colorado Rural Electric Association (CREA), by its brief, supports Union's exceptions and contends that the point-of-use test is the correct test to be used in this proceeding and best comports with the doctrine of regulated monopoly. CREA also states that the geographic-load-center test is ambiguous and will promote the private interests of the customer and Public Service, but will destroy Union's exclusive certificate which it holds to serve in this case. CREA also notes that its motion for leave to appear as an amicus curiae, has not been ruled upon by the Commission. The Commission will grant the motion in the ordering portion of this Decision.

Morning Fresh, by its response to Union's exceptions and CREA's amicus brief, contends that it is improper to deprive Morning Fresh of the right to be treated the same as a customer served by a single utility, by virtue of it being caught between two quarreling utilities. Morning Fresh states that it should be allowed to choose to receive service from one utility at a favorable rate, with a single integrated system, and it is not in the public interest for it to be required to accept service from two different utilities at separate rates for its single business operation.

On July 25, 1985, Public Service filed untimely response to Union's exceptions. Public Service contends that the customer should be permitted to select service from both utilities, or from one or the other, in a circumstance where a customer's electric load is located astride the service boundary line of two utilities, and service is required in both areas. Public service states that adherence to the point-of-use test will necessarily require a customer with facilities astride a boundary line to divide its electric system, and to receive energy from each utility serving each service territory. Public Service supports the Examiner's recommended use of the geographic-load-center test and suggests that Union's exceptions should be denied.

5. As a result of investigation into comparative rates, as well as an engineering analysis, in May 1984 the management of Morning Fresh Farms installed its own electric distribution system, moving back PSCo's meter and line some three hundred feet, and completely eliminating Union Rural Electric's service to the fertilizer plant and the brooder houses. Morning Fresh Farms is now taking its large power electric load from a single PSCo meter located within PSCo territory. The competent evidence of record establishes that the reasons for doing this were two-fold: simplicity and economy.

Because of the critical need to maintain even temperatures in both the laying houses as well as the brooder houses (the fowl expire quickly if the temperature is too high), Morning Fresh Farms has its own auxiliary diesel generators to service the entire facility. With one electric distribution system they can quickly feed power to any part of their operation that needs electricity.

Regarding economy, the record establishes that while Morning Fresh Farms spent something in the vicinity of $100,000 to install their distribution system, with $30,000 attributable to the distribution system extended into Union's service territory, Morning Fresh Farms stands to save between $25,000 and $30,000 per year because it can obtain electricity from Public Service Company at a cheaper interruptible rate than any other rate it could obtain the same electricity for from Union. As noted above, with a complete diesel generator backup system, Morning Fresh Farms has no qualms about taking electricity at an interruptible rate. While the decision to install its own distribution system was made in conjunction with studies provided by Public Service Company (utilizing publicly available tariff rates for both PSCo and Union), the ultimate decision to construct its own distribution system was made by the management of Morning Fresh Farms.

As soon as it was aware of the construction of the new distribution system, Union voiced its objections to both PSCO and Morning Fresh Farms.

6. As noted earlier, the entire cost for the construction of this internal distribution system on Morning Fresh Farm's property was borne by the farm itself; no utility, either PSCo or Union, advanced any funds or contributed in any manner to the construction of this electric distribution system. The contractor who did the physical construction was Sturgeon Electric Company of Denver. Indeed, Public Service Company lost some plant in the process, since service is now provided through only one meter, a few hundred feet further away (i.e., less PSCo line than was previously in existence). The record in this matter establishes that Morning Fresh Farms at the time of the hearing was using some Public Service Company transformers pending the determination of either a rental fee or purchase price; similarly, Morning Fresh Farms is also utilizing an estimated fifty feet of Union Rural Electric cable which is physically located underneath blacktop and cement on the farm.

7. Union Rural Electric Association does not dispute the consolidation of electric service in the laying houses, especially in the

view of the fact that a single continuous conveyor belt system is utilized in the contiguous laying houses, the last two or three of which extend south into Union service territory. However, Union strongly objects to the loss of the two large power loads at the fertilizer plant and brooder houses. In Union's opinion, when Morning Fresh Farms installed their own distribution system it allowed PSCo to render service in a territory PSCo was not entitled to render service in.

DISCUSSION

This case represents another dispute between PSCo and Union, old combatants with new problems. I am reminded of the words of Justice Brady, Mississippi Supreme Court, who noted in a similar situation, "This is another foray of a combat which apparently like Tennyson's brook goes 'on forever' between two implacable utility behemoths." Capital Elec. Power Assn. v. Mississippi Power & Light Co., Miss., 218 So.2d 707, at 709 (1969).

The gravamen of Union's complaint is that PSCo is pirating Union's customers and/or electric loads under the guise of having the customers transport the electricity themselves across the service boundary between PSCo and Union, thus violating the certificated area reserved for Union. PSCo counters that it is selling electricity to a customer in its certificated territory, and that what the customer does with the electricity or where he transports it at his own expense, is not PSCo's business.

The Examiner's limited research in this area (with the able assistance of counsel for both sides) reveals three theories, or tests, for determining the legality of electricity sale:

1. Point of service test,
2. Point of use test and,
3. Geographic load center test.

The point of service test holds that the point of delivery, i.e., where the utility turns over its electricity to the customer (the meter), is determinative. If a utility turns over its electricity to a customer in its certificated territory the sale is proper, even if the customer then transports the electricity into the certificated territory of another utility for his own use. Nishnabotna Valley Rural Electric Cooperative v. Iowa Power and Light Company, Iowa, 161 N.W. 2d 348 (1968); New Ipswich Elec. Lighting Dept. v. Greenville Elec. Lighting Co., 108 N.H. 338, 235 A.2d 833 (1967). This is the theory relied on by PSCO.

Union, on the other hand, asserts the point of use test, i.e. if the electricity is to be used in the certificated territory of one utility, that utility must be afforded the right to serve. Neither the customer, nor another utility, may circumvent the service boundaries by shifting the delivery point. Capital Electric Power Assn. v. Mississippi Power & Light Co., supra; Holston River Electric Co. v. Hydro Electric Co., 17 Tenn. App. 122, 66 S.W.2d 217 (1933). The rationale behind this test is that the goal of planned electrical distribution (as accomplished through designated areas of service) should not be thwarted by having customers extend their lives to artificial points of delivery (i.e. utility shopping).

The third test, the geographic load center test, was recently upheld by the Iowa Supreme Court in O'Brien County Rural Electric Cooperative v. Iowa State Commerce Commission, Iowa, 352 N.W.2d 264 (1984). The geographic load center test is defined as a theoretical point determined by giving consideration to the location of the permanent electric loads which have been, or will be, installed within a reasonable time as part of existing plans, and then permitting the utility in whose territory the geographic load center is located to provide the service. This test was specifically designed to meet the problem of dealing with customers whose lands are located in the exclusive territories of two or more utilities, and who desire but a single service. "The effect of the geographic load center test is to locate the electrical usage where it is primarily concentrated - not where a potential customer might locate its point of delivery." O'Brien, supra, at p.268.

Since this is a case of first impression before this Commission, the policy chosen will have a large initial impact on utilities and customers alike. Were a point of service test to be adopted, it would allow large customers to bolt from one utility's system by extending their own line to another utility's service territory. Left behind would be small customers (i.e. residential) who could not afford to privately extend transmission lines to another utility's service area.

Were the point of use test adopted, customers like Morning Fresh Farms with land located in multiple service territories would be condemned to use two or more utilities. This could impair the efficient operation of businesses who straddle service boundaries, and who desire single-source service (for whatever reason). This can hardly be said to be in the public interest.

Least offensive is the geographic load center test, since it allows a customer whose land straddles service territories to utilize two or more utilities (each in its proper territory), or, if deemed necessary and at its own expense, to use one utility - the one carrying the dominant load. This seems to the Examiner to be the most equitable method of dealing with both utility and customer concerns.

Applying the geographic load center test to this case, the Examiner notes that by far the greatest amount of electricity is consumed (and was previously) in PSCo territory, principally in the laying houses. When Morning Fresh Farms constructed its own internal distribution system, it merely hooked up its lesser 33% load (from Union) to its dominant 63% load already on the PSCo system. And, since Morning Fresh Farms did this at its own expense, there is no duplicating system that other ratepayers must pay for. The prohibitions against wasteful duplication of facilities are not applicable here. Western Colorado Power Co. v. P.U.C., 163 Colo. 61,428 P.2d 922 (1967); P.U.C. v. Home Light & Power Co., 163 Colo. 72, 428 P.2d 928 (1967).

So that there is no ambiguity (or at least less), the Examiner is not ruling that a utility may extend its own lines into the territory of another utility under the geographic load center test. Rather, the Examiner is ruling that a dominant utility may hookup to a customer in its own territory, and the customer at his own expense may transport the

power about his own contiguous property, which property must straddle the service boundary of two or more utilities.

CONCLUSIONS

1. Pursuant to C.R.S. 40-4-101 et seq., this Commission has jurisdiction over the subject matter and the parties.

2. Under the geographic load center test, the conduct of both Public Service Company and Morning Fresh Farms was proper. Accordingly, the complainant should be dismissed.

3. Pursuant to C.R.S. 40-6-109, it is recommended by the Examiner that the Commission enter the following order.

ORDER

1. The complaint of Union Rural Electric Association, Inc., is hereby dismissed.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if such be the case, and is entered as of the date hereinabove set out.

3. As provided by § 40-6-109, C.R.S. 1973, copies of this Recommended Decision shall be served upon the parties, who may file exceptions thereto; but if no exceptions are filed within twenty (20) days after service upon the parties or within such extended period of time as the Commission may authorize in writing (copies of any such extension to be served upon the parties), or unless such Decision is stayed within such time by the Commission upon its own motion, such Recommended Decision shall become the Decision of the Commission and subject to the provisions of § 40-6-114, C.R.S. 1973.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Arthur G. Stalowe
Examiner

lc:0460d

21. Union's motions to strike the response of Public Service and of Morning Fresh to Union's exceptions should be denied. The Commission desires to receive input from all parties on the issues of this proceeding.

THEREFORE THE COMMISSION ORDERS THAT:

1. The complaint of Union Rural Electric Association, Inc., Case No. 6393 is granted to the extent consistent with this Decision and Order, and is otherwise denied.

2. Public Service Company of Colorado shall cease and desist, no later than 60 days from the effective date of this Decision and Order, providing that portion of electricity to Morning Fresh Farms, Inc., which ultimately serves load within the service area of Union Rural Electric Association, Inc. and which was previously served by Union. Union Rural Electric Association Inc., may immediately provide electric service to Morning Fresh Farms at its point of delivery in Weld County, Colorado upon the termination of service by Public Service Company of Colorado. Public Service Company of Colorado shall file verified certification with the Commission, that it has terminated service into the service territory of Union Rural Electric Association, Inc., within 10 days of the termination of the service by Public Service Company of Colorado.

3. The motion of the Colorado Rural Electric Association, for leave to appear as amicus curiae, filed on June 19, 1985, is granted. The motions of Union Rural Electric Association, Inc., to strike the responses of Public Service Company of Colorado and Morning Fresh Farms, Inc., to the exceptions of Union Rural Electric Association, Inc., are denied.

4. The 20-day time period provided in § 40-6-114(1), C.R.S., within which to file an application for rehearing, reargument, or reconsideration shall begin on the first day following the mailing or serving by the Commission of this Decision.

This Order shall be effective 30 days from this date.

DONE IN OPEN MEETING the 4th day of September 1985.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Edythe S. Miller

Andrea Schmidt

Commissioners

COMMISSIONER RONALD L. LEHR DISSENTING

I respectfully dissent.

The issue presented to this Commission is whether a customer (not a utility) may at his or her own expense utilize the services of one electric utility on the customer's contiguous property which straddles the territories of two electric utilities. This is not a case of one utility invading the territory of another. The examiner's recommended decision allowed the customer to use one utility rather than two within strict limitations. The majority would effectively create two tests and

apply them to Morning Fresh Farms. i.e. both a point of use test and geographic load center test. I do not believe the majority gives proper weight to the necessary balance between the interests of the customer on the one hand and the two adverse utilities, on the other.

I believe careful scrutiny will reveal that Union Rural Electric Association, Public Service Company, and this Commission have endorsed a geographic load center test by agreeing that Morning Fresh Farms can continue to use PSCo power in its laying houses which are both in PSCo territory and extend south into Union territory. The fact that the laying houses are all egg production facilities located close together and are linked by a conveyor belt system should not make any difference if a strict point of use test is adopted. Strict application of the majority's theory in this case would hold either that Union gets to serve all electric loads in its territory or that it does not. I do not discern a rational basis for the distinction between allowing PSCo to serve the laying houses which extend into Union territory while attempting to disallow service to the fertilizer plant and brooder houses. Nor can I discern any guidelines in the majority's opinion for determining when it is acceptable for a customer to have such an arrangement, and when not. It is, under the majority's theory, apparently acceptable to have one utility providing electricity in the territory of another if the facility served had its construction commence in one territory and subsequently expand into the other territory. Will that continue to hold true if the subsequent expansion results in the majority of electricity consumed being in the second territory? The problem of what to do with changing or expanding electric usage on land straddling the boundary of two utilities has not been answered by the majority's decision. I fear that the majority opinion may be internally inconsistent, and subject to reversal. Peoples Natural Gas v. PUC, _____ Colo. _____, 698 P2d 255 (1985).

I would also disagree that the doctrine of regulated monopoly compels the use of the point of use test. The various states that have adopted the three tests all have a regulated monopoly doctrine applicable to the provision of electricity. And, as noted above, this Commission itself is adopting some form of de facto geographic load center test. Accordingly, I do not agree that the doctrine of regulated monopoly a fortiori compels the test used by the majority.

I also confess to being concerned about ordering PSCo to do something that may be impossible for the company to perform. As noted in the majority opinion, the distribution system is the property of Morning Fresh Farms, constructed by the Farm with its own money, located on its own contiguous land, and serving nothing but the Farm's buildings and facilities. Morning Fresh Farm is not a public utility.

Public Service Company provides the Farm with electricity from a point in its certificated territory, as it has done for years. Once the electricity passes through the meter it is the property of the customer. And, with but one meter, PSCo can not tell what power (or how much) is being provided to Morning Fresh's facilities beyond the laying houses. What if the Farm refuses to revert to the status quo ante? Will the majority order PSCo to disconnect the Farm completely? What will become of the Farm's substantial investment? Obviously, what the majority is trying to do is dictate terms to the Farm by applying some sort of pressure on PSCo. However, I do not believe that our authority to regulate utilities similarly extends to their customers in the conduct of the customers' unregulated businesses.

I fear that a strict reading of the point of use test as adopted by the majority will require every property owner straddling a utility boundary to install two electric systems if he or she wishes to use

electricity in both parts of his or her property. This would lead to unnecessary duplication of facilities and expense by customers, which is not a result I believe this Commission has the authority to require. I cannot endorse such an end result.

Further, I am concerned with the majority's statement that they are, "...required under the doctrine of regulated monopoly to preserve the territorial integrity of each utility's load." Does it mean, for example, that if the Farm physically moved the fertilizer plant and brooder houses from Union territory to PSCo territory we would order Union to serve them to preserve the "territorial integrity of each utility's load?" I trust not, and would urge the majority to make clear how far they feel this Commission can go in dictating what a customer can do with electricity or electric load on private property.

As noted in the examiner's recommended decision, our counterparts in Iowa have wrestled with the problem of what to do with customers whose lands straddle utility boundaries. The Iowa commission's adoption of the geographic load center test was an effort to preserve utility boundaries while also giving consideration to the property owner who must bear the brunt of utility boundary disputes. O'Brien County Rural Electric Cooperative v. Iowa State Commerce Commission, Iowa, 352 N.W. 2d 264 (1984). Our examiner ruled that in order to avail himself or herself of the geographic load center test the customer (not the dominant utility) must build his or her own distribution system, and only on his or her own contiguous parcel of land. No utility would be allowed to penetrate the territory of another, nor would there be any wasteful duplication of utility facilities for which the public would have to pay through rates. Western Colorado Power Co. v. Puc., 163 Colo. 61, 428 P.2d 922 (1967); PUC v. Home Light & Power Co., 163 Colo. 72, 428 P.2d 928 (1967).

Since the Iowa geographic load center test, as modified to comply with Colorado law, fairly meets the needs of both utilities and customers straddling the boundaries, I would adopt it. For these reasons I dissent.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Ronald L. Lehr

Commissioners

nrg:0286G/jkm