(Decision No. 21392)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

***

IN THE MATTER OF THE APPLICATION OF CITY OF LAMAR, A MUNICIPAL CORPORATION, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.) APPLICATION NO. 5913

September 27, 1943.

Appearances: Arthur C. Gordon, Esq., Lamar, Colorado, for the City of Lamar;
Wilkie Ham, Esq., Lamar, Colorado, for Southeast Colorado Power Association;
Thomas J. Murray, 547 Bolton Bank Bldg., St. Louis Missouri, for Rural Electrification Administration;
E. T. Tengdin, Kansas City Kansas, for Inland Utilities Company.

S T A T E M E N T

By the Commission:

On May 6, 1942, the City of Lamar, a municipal corporation, herein referred to as "applicant", filed with this Commission its application for a certificate of public convenience and necessity to authorize it to furnish electrical current for lighting, heating, and power purposes in certain territory in Prowers and Bent Counties, Colorado, described in said application.

On June 6, 1942, the applicant filed an amendment to its application, by which the applicant applied for a certificate to furnish electrical current for lighting, heating, and power purposes in additional territory described therein.

During the year 1919, applicant purchased the plant, distribution system, and appurtenances of the privately owned public utility,- which prior thereto, had been furnishing electrical energy for lighting, heating and power purposes, to the inhabitants of said city,- from the owners thereof, and since that time has continuously operated said municipally owned system.

Subsequent thereto, in Application No. 1276, Decision No. 2347, this Commission authorized applicant to operate, construct, and extend its transmission lines and distribution system for the purpose of furnishing electric current for lighting, heating, and power purposes, to and within the following towns: Wiley, Hartman, and Granada (incorporated); McClave and Bristol (unincorporated); and the stations of Big Bend, May Valley, Kornman Junction, and Millwood; all situate, lying, and being on the line of the Arkansas Valley Branch of The Atchison, Topeka & Santa Fe Railway, in Prowers and Bent Counties, Colorado.

In Application No. 1494, Decision No. 2946, this Commission authorized applicant to construct and extend its line and electric light and power service to Hasty, Colorado.

In Application No. 4188, by Decision No. 10751, this Commission authorized applicant to construct a 22 kv., three-phase transmission line from Millwood, Prowers County, Colorado, to the northwest corner of the incorporated limits of the town of Holly, Prowers County, Colorado, along the County highway or highways, a distance of approximately six miles, and serve the Inland Utilities Company with electric current at wholesale, as well as to serve individuals desiring electric service in the territory adjacent to the aforementioned transmission line between Millwood and Holly, said transmission line to extend from Millwood approximately two miles east, thence south approximately three and one-half miles to Holly.

In the application in this proceeding and the amendment to the application, applicant prays that all of the above certificates of public convenience and necessity heretofore issued to it be consolidated into one certificate, to-wit, a certificate of public convenience and necessity for the furnishing and supplying of the area described in this application as amended with electrical energy for domestic, commercial, and industrial purposes.

The applicant alleged that it is the owner of the only power plant in that area capable of generating sufficient electrical energy to supply said area with electricity for domestic, commercial, and industrial purposes; that the applicant has served and is now serving, the area described in the abovementioned decisions of this Commission; that to its best information, belief, and knowledge, there is no person, firm, or corporation claiming to be a public utility or holding any certificate of convenience and necessity ready, willing, or able, or desirous of serving said area or any part thereof; that the granting of the certificate prayed for would not be in conflict with the natural development of any other public utility holding any certificate of convenience and necessity.

At the hearing, the Southeast Colorado Power Association, herein referred to as the "Association," filed its petition for intervention, wherein it alleged that it is a cooperative association, organized under Chapter 41, 1935 C. S. A., and the Rural Electrical Act of 1936, enacted May 20, 1936, 49 St. at L., page 432, 7 U.S.C.A. 901, etc., Articles of Incorporation having been filed August 14, 1937, and asked that its petition be treated as an answer to the application herein; that the application for a certificate of public convenience and necessity be denied, except as to such certificate of convenience and necessity as would amount to a consolidation of previous certificates granted to the applicant and under which the applicant is now rendering service in accordance with said certificates; and that the certificate of necessity to the applicant to construct a line from McClave to Hasty be denied.

The Association alleged that it has 1500 members in Prowers, Bent, Otero, Crowley, and Pueblo Counties, and that each consumer is a member of said Association; that, through the aid of the Rural Electrification Administration, it had constructed several hundred miles of electric lines, construction work being started in November, 1937; that all property of said Association is pledged to the United States to secure payment of

funds advanced association; that a contract was entered into between the applicant and the Association for the furnishing of electric current to the Association by applicant; that the system of the Association was energized on June 22, 1938, by energy furnished under said contract with the applicant; that the Association has extended its lines until, at the time of the filing of its petition, it was serving 682 customers who reside from two miles west of the Kansas Line in Prowers County to one-half mile west of the east line of Range 50 in Bent County, Colorado; that one of its consumers is the Caddoa Constructors and another is the U. S. Engineer's Office at Caddoa; that the vast majority of the consumers of electrical energy from the Association's system are farmers; that the Association has subscribers in the towns of Hasty and Caddoa; that prior to the commencement of construction by the Association, the communities of Wiley, McClave, Hartman, Bristol, and Granada, and others, were not adequately served; that only a comparatively small portion of the lines of the applicant was available for rural use or is now available for rural use; that, in the territory mentioned, the applicant does not have over 100 consumers; that the lines operated by applicant are inadequate to serve the community for which applicant seeks a certificate; that the cost of making connections with the transmission lines for a farm is prohibitive; that the territory west of McClave is not served at all by the applicant; that the Association is adequately serving the territory covered by this application; that it does not solicit customers of the applicant, seeking only to serve those who are not and were not served by applicant; that any person along the line of the Association is eligible to membership and to receive electrical service; that the applicant has not constructed the extension for which a certificate of convenience and necessity was granted by this Commission by Decision No. 2946 in Application No. 1494; that the applicant is unable to procure material to construct lines to serve the community described in the application; that the present and

future public convenience or necessity does not require additional construction by the applicant.

At the commencement of the hearing, the applicant objected to the petition of intervention filed by the Association on the ground that the Association, which is a customer of the applicant, does not claim to be a public utility, but on the contrary, claims to be a private corporation which has constructed its lines under a contract to obtain power from the applicant. The Association further contended that 70 or 80 percent of the people in the communities described in the application are not receiving service through the Association but can receive such service if they want to, and that the territory which applicant claims to be ready, able, and willing to serve is territory which the Association is now serving; that additional service is not needed.

At the hearing, the attorney for the Association stated that he could not tell whether the Association is a public utility or not, and that their membership is open to anyone who wants to join and become a member.

It also appeared that applicant has a 23,000 volt transmission line extending to Crowley, to Wiley, and McClave, and to Holly; that it has no lines west of McClave nor south of the Arkansas River running west of Lamar to the Town of New Caddoa; that at Holly, it sells electric energy under contract to the Inland Utilities Company, which serves the Town of Holly; that it maintains and operates distribution lines and serves the inhabitants of the towns of Wiley, Bristol, and Hartman; that the Town of Granada owns its distribution system and purchases electric energy from the applicant; that it is serving the communities of Kornman and May Valley; that it also serves at least four hay mills which are operating in the territory covered by the application; that under the contract between the applicant and the Association and its predecessors, the applicant is selling to the Association electricity at approximately 23,000 volts, to serve the Caddoa or John Martin Dam, and supplies the same voltage for rural distribution system of the Association; that its generator capacity is 5,000 kw.

and firm capacity of system is 3,000 kw. with its largest turbine out of service, the estimated demand being 900 kw. for the City of Lamar, which serves 1605 domestic and commercial customers in Lamar, 1,000 kw. for Caddoa Dam, 1,200 kw. for Granada, the Inland Utilities Company, and commercial and industrial users in McClave, Wiley, Bristol, and Hartman, and in the rural areas, and 460 kw. for the Association, exclusive of the Caddoa Dam; that applicant has sufficient finances to enable it to construct the facilities necessary to serve the territory described in the application and the amendment thereto.

Applicant's superintendent testified that the present application calls for a description of applicant's territory by township and sections, rather than by a description of the lines, and the object is to tie in with a reasonable border on each side of applicant's existing lines, and that applicant is not extending transmission lines into new territory, but is expressing its willingness to serve the territory for which the plant was designed; that is, apparently it now desires to serve an area, rather than along its specific lines as constructed; that he does not know of any plan of the applicant to build a line from McClave to Hasty, and that the applicant does not intend to build the line unless ordered to do so by this Commission; that the applicant does not serve any customers between Hartman and Holly, although some years ago they served a mill and one or two small customers at Millwood; that, in addition, it also served 150 consumers along its lines; that on the average, customers of applicant are situated not over one mile from applicant's lines.

On July 11, 1938, applicant filed with this Commission its Application No. 4650, for authority to extend its system into the following territory:

> "Beginning at the town of McClave and running thence to the southwest corner of Township 22 in Range 48 west, in Bent County, Colorado; thence along said section lines two miles west; thence south two miles to the Santa Fe Trail; thence west one and one-half miles along said Santa Fe Trail; thence south one

mile; thence west two and one-half miles; thence south two and one-half miles; thence south one mile along the west line of Section 31 in Township 23 South, Range 49 West of the 6th P.M."

The Association's predecessor filed its petition in intervention and objections to the granting of that application, and prayed that that application for permission to invade an area already occupied and satisfactorily served by said Association's predecessor, be denied, and that the Association be allowed to continue to provide service for that area.

The application was set for hearing at various times, but the hearings were vacated at applicant's request, and that application has not been disposed of.

Application No. 4650 was made by the applicant for the purpose of serving the Caddoa Constructors, and the Caddoa Dam after it was completed. After various negotiations between the applicant and the officers of the Association, the applicant agreed to permit the Association to serve the Caddoa Constructors and the adjacent territory.

On December 5, 1938, the Association, by its president and secretary, entered into a stipulation with the applicant, which was given the title of Application No. 4650 but not filed with us, in which the Association withdrew its petition of intervention in Application No. 4650 and agreed that the petition of the applicant for a certificate of public convenience and necessity might be granted. It was stated therein that the applicant and the Association had entered into an agreement settling all controverted questions upon which the petition of intervention was based, and that upon due investigation and research, and upon settling the matters referred to in Paragraph 1 of contract of January 19, 1938, of which said stipulation was made a part, said Association agreed that grounds no longer existed for the petition of intervention.

The Mayor of Lamar testified that the applicant would be serving this territory were it not for the fact that the applicant per-

mitted the Association, as a customer, to serve that territory.

After the execution of the contract between the applicant and the Association on December 5, 1938, the applicant enlarged its plant. This enlargement cost $210,000, of which the applicant paid $135,000 and obtained the balance from the Public Works Administration. This enlargement was done largely to supply the Association with energy for its members and Caddoa Dam.

It is the contention of the applicant that it is now serving the territory covered by protestant's transmission lines through its customer, the Association. On the other hand, it is the contention of the Association that it is serving the territory by means of its system, the electric current for which is purchased from the applicant.

The Association has never filed with this Commission any application for a certificate of public convenience and necessity authorizing it to construct any of its lines or to commence operations. And, as heretofore stated, of record contends that it is not a public utility. If it is a public utility and were here asking for a certificate of public convenience and necessity, the situation would be similar to that in Hatmaker v. Public Service Commission (Pa. S. Ct.), 193 Atl. 123, 20 P.U.R. (NS) 148. There, the Telephone Company furnished telephone service to a number of patrons, without having secured a certificate of public convenience and necessity. That service had been furnished since 1919. In 1934, Hatmaker obtained from the Commission a certificate evidencing its approval of services he had been rendering without a certificate, also since 1919. Hatmaker filed a complaint with the Commission, alleging that the owner of the Telephone Company was illegally furnishing service without a certificate. The Telephone Company appeared and admitted operating without a certificate, and at the same time applied for a certificate. The Commission issued its certificate to the Telephone Company, authorizing the service it had theretofore been illegally rendering. The Pennsylvania Court found that, even though it would be advantageous to have the two small telephone

service lines consolidated, the Commission could not compel consolidation. It also held that the Commission could not deny the certificate to the Telephone Company and thus work the practical confiscation of the one by the other. But here, we do not believe that the Association is in a position to object. It does not claim to be a public utility, and it is not asking for a certificate. While under the rule announced in Public Utility Commission vs. Loveland, 87 Colo. 556, 289 Pac. 1090, it is the duty of the Commission and the courts to protect a public utility from competition by one invading its territory, that rule does not require us to deny a certificate to one seeking to serve as a public utility because the territory it proposes to serve, in part, may be served by a non-utility or because some residents of the territory may be serving themselves through an individually, or cooperatively, owned system.

The facts show, and the Commission finds, that the public convenience and necessity require the furnishing of electric current for domestic, industrial and commercial users, as well as purchasers at wholesale, in the territory covered by this application; that applicant has adequate generating capacity to serve the territory in question, and pecuniarily, and otherwise, is able, willing and qualified to furnish the proposed service; that the present and future public convenience and necessity require the granting of the certificate of public convenience and necessity requested by applicant and described in the Order following, and that certificate of public convenience and necessity should issue, as prayed for in the application.

O R D E R

IT IS ORDERED:

That the petition for intervention filed by the Association is denied and its objections to the granting of the certificate sought herein are overruled.

That the several certificates heretofore issued to the applicant in Application No. 1276, Decision No. 2347, Application No. 1494, Decision

No. 10751, be, and the same hereby are, consolidated into this one certificate, and the applicant is authorized to furnish electrical current for lighting, heating, and power purposes, to commercial, industrial, and domestic users in the territories described therein, which territories are a part of the territory hereinafter described.

That the present and future public convenience and necessity requires the proposed extended service of applicant, and the construction of the distribution and transmission lines contemplated by it to furnish electrical current for lighting, heating, and power purposes in the following described territory:

> "All that area bounded by a line described as follows: Beginning at the Southwest corner of Section Six (6), Township Twenty-three (23) South, Range Forty-six (46) West of the Sixth P.M., and running East along the section lines from this point Sixteen (16) miles to the Southwest corner of Section Two (2) in Township Twenty-three (23) South, Range Forty-four (44) West of the Sixth P.M.; thence South on the West section lines of Sections Eleven (11) and Fourteen (14) in said Township and Range to the Southwest corner of said section Fourteen (14); thence East on the section lines Nine (9) miles to the Southeast corner of Section Eighteen (18), Township Twenty-three (23) South, Range Forty-two (42) West of the Sixth P.M.; thence North on the east line of said Section Eighteen (18) one mile, to the Northeast corner of said Section Eighteen (18); thence east one mile to the Southeast corner of Section Eight (8) in said Township and Range; thence North on the section lines to the Northeast corner of Section Thirty-two (32), Township Twenty-two (22) South, Range Forty-two (42); thence West one mile to the Northwest corner of said Section Thirty-two (32); thence North one mile to the Northeast corner of Section Thirty (30) in said Township and Range; thence West one mile to the Northwest corner of said Section Thirty (30); thence North one mile on the range line to the Northeast Corner of Section Twenty-four (24), Township Twenty-two (22) South, Range Forty-three (43) West of the Sixth P.M.; thence West eight miles on the section lines to the Southeast corner of Section Fifteen (15), Township Twenty-two (22) South, Range Forty-Four (44) West of the Sixth P.M.; thence North one mile on the section line to the Northeast corner of said Section Fifteen (15); thence West on the Section lines a distance of nine miles to the Northwest corner of Section Seventeen (17) in Township Twenty-two (22) South, Range Forty-five (45) West of the Sixth P.M.; thence North on section lines to the Northeast corner of Section Seven (7) in said Township and Range; thence West four miles on the section lines to the Southeast corner of Section Four (4) in Township Twenty-two (22) South, Range Forty-six (46) West of the Sixth P. M. thence North four miles on section lines to the Northeast corner of Section Twenty-one (21) in Township

Twenty-one (21) South, Range Forty-six (46) West of the Sixth P. M.; thence West on section lines six miles to the Northeast corner of Section Twenty-one (21) in Township Twenty-one (21) South, Range Forty-seven (47) West of the Sixth P.M.; thence North on section line to the Northeast corner of Section Sixteen (16) in said Township and Range; thence West on section lines a distance of six miles to the Northwest corner of Section Fifteen (15), Township Twenty-one (21) South, Range Forty-eight (48) West of the Sixth P.M.; thence South four miles to the Southwest corner of Section Thirty-four (34), Township Twenty-one (21) South, Range Forty-eight (48); thence West five miles on section lines to the Northwest corner of Section Two (2), Township Twenty-two (22) South, Range Forty-nine (49); thence South two miles on section lines to the Northwest corner of Section Fourteen (14) in said Township and Range; thence West one mile on section line to the Northwest corner of Section Fifteen (15) in said Township and Range; thence South one mile on section line to the Southwest corner of said Section Fifteen (15) in said Township and Range; thence West four miles to the Northwest corner of Section Twenty-four (24) in Township Twenty-two (22) South, Range Fifty (50); thence South six (6) miles on section lines to the Southwest corner of Section Thirteen (13) in Township Twenty-three (23) South, Range Fifty (50) West of the Sixth P.M.; thence East on section lines five miles to the Southeast corner of Section Fifteen (15) Township Twenty-three (23) South, Range Forty-nine (49); thence North one mile on section line to the Northeast corner of said section; thence East on section lines a distance of five miles to the Southeast corner of Section Nine (9), Township Twenty-three (23) South, Range Forty-eight (48) West of the Sixth P.M.; thence north one mile on Section line to the Northeast corner of said Section Nine (9); thence East on section lines a distance of nine miles to the point of beginning," and

"Beginning at a point which is the Southwest corner of Section Six (6) in Township Twenty-three (23) South, Range Forty-six (46) West of the Sixth P.M., in Prowers County, Colorado, thence South on the west boundary line of Range Forty-six (46) to a point which is the Southwest corner of section Seven (7), Township Twenty-five (25) South, Range Forty-six (46) West; thence East to the Southeast corner of Section Twelve (12) in Township Twenty-five (25) South, Range Forty-six (46); thence North on the east boundary of Range Forty-six (46) to a point which is the Southeast corner of Section One (1), Township Twenty-three (23) South, Range Forty-six (46); thence west to the point of beginning,"

and that the applicant is hereby authorized to construct and extend its transmission and distribution line or lines and to furnish electrical

current for lighting, heating, and power purposes to commercial, industrial, and domestic users in said territory; and that this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

That all of the applicant's tariffs now on file with this Commission governing the schedules, rates, charges, rules, and regulations of the applicant for the service which it is now rendering in said territory shall be applicable to service therein under this certificate of public convenience and necessity.

That this decision shall become effective twenty (20) days from the date hereof.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners.

Dated at Denver, Colorado,
this 27th day of September, 1943.