
NO. A07-1957

State of Minnesota
In Court of Appeals

In the Matter of the Application of the City of Redwood Falls to
Extend Its Assigned Service Area Into the Area Presently Assigned
to Redwood Electric Cooperative

City of Redwood Falls,

Relator,

vs.

Minnesota Public Utilities Commission and
Redwood Electric Cooperative,

Respondents.

REPLY BRIEF OF RELATOR CITY OF REDWOOD FALLS

McGRANN SHEA ANDERSON CARNIVAL
STRAUGHN & LAMB, CHARTERED
Kathleen M. Brennan (#256870)
Carl S. Wosmek (#300731)
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
(612) 338-2525

Attorneys for Relator City of Redwood Falls

FELHABER, LARSON, FENLON
& VOGT, P.A.
Harold LeVander, Jr. (#62509)
2100 UBS Plaza
444 Cedar Street
St. Paul, MN 55101-2136
(651) 312-6005

Attorneys for Respondent Redwood Electric Cooperative

STATE OF MINNESOTA
Kari Valley Zipko (#330413)
Karen Hammel
Assistant Attorney General
Office of Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2131
(651) 282-5700

*Attorneys for Respondents Minnesota
Public Utilities Commission*

January 28, 2008

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| Table of Authorities..... | ii |
| Response to Respondents' Statement of Facts..... | 1 |
| Summary of the Argument..... | 4 |
| Argument | 6 |
| I. THE COMMISSION ERRED IN AWARDING DAMAGES FOR THE PONDS | 6 |
| A. THE COMMISSION FAILED TO FOLLOW THE LEGAL REQUIREMENTS TO AWARD DAMAGES..... | 7 |
| B. ON THIS RECORD, THE COMMISSION ERRED IN AWARDING DAMAGES..... | 8 |
| C. THE COMMISSION FAILED TO FOLLOW ITS PRECEDENT | 14 |
| D. THE COMMISSION EXCEEDED ITS JURISDICTION IN AWARDING DAMAGES..... | 16 |
| II. THE COMMISSION ERRED IN APPLYING A FICTIONAL PCA, RATHER THAN ACTUAL DATA..... | 17 |
| Conclusion..... | 20 |
| Index to Relator's Addendum | 21 |

*

TABLE OF AUTHORITIES

State Statutes and Regulations

Minn. Stat. § 14.69(b) 16

Minn. Stat. § 216B.37 8, 10

Minn. Stat. § 216B.40passim

Minn. Stat. § 216B.44passim

Minn. Stat. § 216B.47 10

Minn. Stat. § 216B.50 2

Minn. R. 1400.7300 12

State Cases

Cable Communications Bd. v. Nor-West Cable, 356 N.W.2d 658 (Minn. 1984) 8

Cardinal Consulting Co. v. Circo Resorts, 297 N.W.2d 260 (Minn. 1980) 18

Citizens Nat’l Bank of Madelia v. Mankato Implement, Inc., 441 N.W.2d 483, 485 (Minn. 1989) 12

In re City of White Bear Lake’s Request for an Elec. Util. Serv. Area Change, 443 N.W.2d 204 (Minn. App. 1989) 14

In re Complaint Regarding the Annexation of a Portion of the Serv. Territory of People’s Coop. Power Ass’n by the Ciyt of Rochester (North Park Additions), 470 N.W.2d 525, 528 (Minn. App. 1991), *rev. denied* (Minn. July 24, 1991) 18

Dullard v. Minnesota Depart. of Human Servs., 529 N.W.2d, 438 (Minn. App. 1995) 9

In re Expulsion of E.J.W. from Indep. Sch. Dist. No. 500, 632 N.W.2d 775 (Minn. App. 2001) 12

Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980) 9

Minnegasco v. Minnesota Public Util. Comm’n, 549 N.W.2d 904 (Minn. 1996) 17

Minnesota Ctr. for Env’tl. Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 466 (Minn. 2002) 12

People's Nat. Gas v. Minnesota Pub. Util. Comm'n, 342 N.W.2d 348 (Minn. App. 1983),
rev. denied (Minn. Apr. 24, 1984) 16

State ex rel. Indep. Sch. Dist. No. 276 v. Department of Educ., 256 N.W.2d 619 (Minn.
1977) 12

Administrative Decisions

*In re Complaint by Kandiyohi Coop. Elec. Power Ass's Against Willmar Mun. Util.
Comm'n for Extending Elec. Facility into Part of Section 26, Township 119, Range 35,
Order Requiring Cessation (October 23, 1989)(MPUC Add. 7) 8*

*In re Pet'n of Kandiyohi Coop. Elec. Power Ass'n Regarding Elec. Serv. Farm Serv.
Elevator by Willmar Mun. Util. Comm'n, Order Requiring Compensation (July 11,
1989)(MPUC Add. 4) 8*

*In re Petition by Mr. L.D. Wright to be Released as a Customer of Meeker Coop. Light &
Power Ass'n and Served by Litchfield Pub. Util. (MPUC Add. 15) 14*

*In re Petition from N. Star Elec. Coop. to Change a Portion of its Service Territory
Boundary with Roseau Elec. Coop. near the City of Warroad, Order Approving Changes
in Assigned Service Areas (Dec. 12, 1990) (MPUC Add. 18) 15*

*In re Petition by Northern States Power Company for an Exchange of Service Area
with Anoka Electric Cooperative, Order Approving Changes in Assigned Service Areas,
MPUC No. E-101, 002/SA-89-213 (June 15, 1990)(R.Add. 5) 14-15, 16*

*In re Petition from Tri-County Elec. Coop. and Interstate Power Co. to Change a Portion
of their Mutual Serv. Territory Boundary Near the City of St. Charles, Order Approving
Changes in Assigned Service Areas (March 22, 1991)(MPUC Add. 23) 15*

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

Relator City of Redwood Falls (the "City") must correct two items raised by the Respondents. First, the City's 1998 agreement with NSP transferred the electric service territory rights for the entire area referenced in the Purchase Agreement, including the Wastewater Treatment Ponds (the "Ponds"). Second, the only evidence presented by the Cooperative concerning its claimed service-by-exception agreement with NSP was hearsay.

First, it is undisputed that the service territory including the Ponds was transferred from NSP to the City. The Purchase Agreement itself stated that the legal description of the service area being transferred to the City was "all as reflected in the map attached hereto as Exhibit B, (the 'Service Area') ***including the assignment of the right to provide electric service within the Service Area***, as referenced in Section 1.5 below. . . ." Ex. 25, Agreement, at 2 (§ 1.1) (emphasis added). The Agreement also stated that if there were a conflict between the legal description and the map, "the map shall control." *Id.* Section 1.5, in turn, stated that both parties "jointly, will request the Commission to assign the Service Area to Redwood Falls, which Service Area is depicted on the map identified in Exhibit B attached hereto" *Id.* at 3 (§ 1.5).

Exhibit B to the Purchase Agreement depicted the entire area marked "NSP" (above the City's service territory labeled "municipal"). Ex. 25. Exhibit A to the Purchase Agreement provided a more detailed map of that same area. *Id.* It is undisputed that the Ponds are included within the "Service Area" included in Exhibits A and B to the Purchase Agreement and transferred to the City. R.App. 131-132, 135-6;

Ex. 27 (Thies pre-filed testimony) at 7-8, 10, STP-1; R.App. 2 (Petition, ¶ 5); R.App. 6 (Petition, Ex. A); Ex. 11 (Horman pre-filed testimony) at 4 (“Q. In whose service territory are the ponds now located? A. The City of Redwood Falls since 1998, when the City acquired NSP’s service territory in the area following the merger of North Redwood Falls and Redwood Falls in approximately 1997.”).

Moreover, the Commission’s order approving the transfer of the “Service Area” from NSP to the City expressly ordered that “NSP may transfer to the City the electric service area” and that the “official service area maps will be adjusted to conform with the revised service area maps filed by the parties. . . upon the filing of an affidavit of closing by the parties.”¹ Ex. 25, Order (Feb. 4, 1998) at 3. The Affidavit of Closing stated that the parties had satisfied all conditions of the Purchase Agreement and attached as Exhibit B the revised official service area map to effectuate the transfer of service territory to the City. Ex. 25, Affidavit of Closing at 2, Ex. B (R.Add.14).

It is simply incorrect to claim that the Ponds “were not included” within the Purchase Agreement between NSP and the City. They were expressly transferred by the agreement and approved by the Commission. No provision of the Purchase Agreement excluded the Ponds from the transfer. By the Cooperative’s own admission, since 1998, the Ponds have been in the City’s exclusive service territory. Ex. 11 at 4.

Second, the only evidence presented as to the claimed service-by-exception agreement was hearsay. The only witness called by the Cooperative on this issue was Ron Horman. Mr. Horman was a journeyman lineman in 1996. Ex. 11 at 1. Even in his

¹ Any claim that the Commission could not address the facilities transfer is misguided. The Order stated that “[t]he Commission therefore approves the transaction under § 216B.50 as well as under the assigned service area statutes.” *Id.*

pre-filed testimony, Mr. Horman presented no personal knowledge of how the Cooperative was authorized to serve the Ponds. Instead, his knowledge relied on hearsay: that Curt Weber (the City's utilities superintendent, now deceased) contacted Dennis Trom (then the Cooperative's manager). Ex. 11 at 2 ("Curt Weber contacted Dennis Trom, who was then Manager of Operations for the Cooperative."). As for any contact with NSP, Mr. Horman offered only speculation: "NSP had no objection to the Cooperative serving the Ponds." *Id.*

The documents attached to Mr. Horman's pre-filed testimony are also hearsay. Ex. 11, RH-3 (handwritten remarks of "Cindy" noted "Curt Weber, Red Public Utilities . . . stated it was OK to put this location under the City of Red"). Cindy was not called to testify at trial. Mr. Horman provided no foundational testimony for the document. The Cooperative provided no document created by NSP authorizing service nor by the City requesting service to the Ponds. The City presented testimony that any such call was likely to correct a billing address, rather than authorize service. R.App. 103. The document purportedly demonstrating the initial request for service refers to an electrical contractor, not the City. Ex. 11, RH-4; *see also* R.App. 104.²

At the contested case hearing, Mr. Horman continued to rely upon hearsay and provided no personal knowledge as to any claimed agreement between the Cooperative and NSP authorizing the Cooperative to serve the Ponds. Mr. Horman did not participate in any discussions between Mr. Trom and Mr. Weber from the City regarding the Ponds. R.App. 226-227. Mr. Trom merely told Mr. Horman that the Cooperative would be installing service to the Ponds. R.App. 226. Mr. Horman did not know whose responsibility on behalf of the Cooperative it was to negotiate with NSP regarding

² The Commission's argument that the City provided no explanation as to the Ponds is incorrect.

acquiring such a customer located outside of the Cooperative's exclusive service territory. R.App. 220-221. Mr. Horman admitted that he had no personal knowledge as to any negotiations, let alone any final understanding with NSP:

Q. [D]o you have any information about negotiations that took place pursuant to the cooperative's procedure back in 1996 relative to the Ponds?

A. No. R.App. 230.

Although it bore the burden of proof, the Cooperative did not call Mr. Trom, the general manager in 1996 for the Cooperative, nor any business agent responsible for establishing new services, nor any representative of NSP to testify at trial. Commissioner Reha noted her concern with the state of the record, and ultimately voted against the majority as to the Ponds. "I think you've got to look at who has the burden of proof. . . . I don't think there's sufficient factual evidence in which to determine appropriate compensation for the lost revenues for the Lagoons. . . . I just don't think it would hold up on appeal. . . . And plus the statute specifically says it's supposed to be in writing." R.App. 652-53.

The Administrative Law Judge correctly found that "[t]here is only hearsay evidence, Mr. Horman's testimony, that the City had requested that the Cooperative (as opposed to NSP) provide service." R.App. 495. The Commission did not challenge or address this finding in its order.

SUMMARY OF THE ARGUMENT

The Commission ordered the City to pay the Cooperative nearly \$70,000 in "loss-of-revenue" damages for the City's own service territory of the Ponds. Section 216B.44 requires a transfer of service territory resulting in loss-of-revenue damages. But the

Cooperative failed to establish that it held legal title to the service territory to merit damages from a “transfer” to the City. Instead, it was undisputed that the service territory for the Ponds fell within the City’s exclusive service territory.

Although the Cooperative argued that it held title under a service-by-exception agreement with NSP, section 216B.40 requires such a service-by-exception agreement to be in writing. The Cooperative provided no written consent from NSP. The Cooperative’s efforts to provide evidence of even an oral agreement failed to specify the critical terms of an agreement. Because the Cooperative failed to satisfy the plain language of section 216B.40 to demonstrate legal title to the service territory, the Commission had no basis to award damages for a “transfer” of service territory under section 216B.44. The Commission’s order is contrary to law.

The Commission also erred in awarding damages based upon the evidence in the record. The Cooperative provided no testimony by persons with direct knowledge of any such agreement. In short, the Cooperative failed to satisfy its burden of proof. The Commission acknowledged that no definitive terms could be determined on this record, yet it awarded damages. The Commission’s decision was not supported by substantial evidence, and constituted agency whim, rather than reasoned decision-making. The record provided no basis for finding five years of lost revenues – it was an arbitrary number, without support in the record.

Although the Commission and the Cooperative have cited to cases in which the Commission acted on service-by-exception agreements and at times proceeded without a written document, the Respondents missed the key difference in the present case. In the present case, the very terms or existence of any service-by-exception agreement is

disputed. In the other cases, the parties agreed to the service-by-exception, and the Commission enforced the parties' agreement. Moreover, the Commission has never awarded damages based upon a claimed oral service-by-exception agreement. The Commission's decision in the present case to impose damages under these circumstances constituted arbitrary and capricious action.

The Commission's order in awarding loss-of-revenue damages for the Ponds also exceeded its jurisdiction. No statute authorized the Commission to find a service-by-exception agreement without any writing and without any knowledge of its terms. No statute authorized the Commission to award damages without a transfer of service territory. And no statute authorized the Commission to use equity to create an enforceable *quasi*-contract. The Commission acted without authority, and its decision must be reversed.

As for the power cost adjustment issue, the Commission erred in ignoring known, actual revenues data for the affected customers and instead adopting a fictional – and much higher—power cost adjustment revenues number. This approach is contrary to black-letter law that damages may not be speculative. And rather than putting the Cooperative in the same position but for the City's acquisition, the Commission's action resulted in a windfall for the Cooperative by disregarding quantifiable savings to the Cooperative.

ARGUMENT

I. THE COMMISSION ERRED IN AWARDING DAMAGES FOR THE PONDS.

This Court must reverse a decision that is affected by legal error. Minn. Stat. § 14.69(d). The Commission awarded damages by assuming that the Cooperative had

legal title to the Ponds' service territory. But the Cooperative failed to satisfy the legal requirements to demonstrate title. The record did not support a finding of title. And the Commission violated its own precedent in awarding damages under these circumstances. The decision constituted legal error, unsupported by substantial evidence, and arbitrary and capricious agency action.

A. THE COMMISSION FAILED TO FOLLOW THE LEGAL REQUIREMENTS TO AWARD DAMAGES.

The Commission conceded, as it must, that damages for electric service territory arise only when a municipal utility acquires the service territory of another utility. Minn. Stat. § 216B.44 (“the commission shall determine appropriate terms for an exchange, or in the event no appropriate properties can be exchanged, the commission shall fix and determine the appropriate value of the property within the annexed area, and the transfer shall be made as directed by the commission.”). In short, there must be a “transfer” of electric service territory to merit damages.

In the present case, it was undisputed that since 1998, the Ponds have been in the City's exclusive service territory. Ex. 11 at 14. The Commission approved the transfer of service territory from NSP to the City, and revised the official service maps. Ex. 25. No exception was made (either in the parties' Purchase Agreement, the Commission's Order, or the revised official maps), that excluded the Ponds from the transfer to the City.

The Cooperative's only argument for damages from the Ponds was that it had entered into an agreement with NSP called a “service by exception” agreement. Such an agreement may indeed create service territory rights, but those rights are necessarily determined by the terms of the agreement itself. For example, a service-by-exception

agreement may involve a permanent transfer of service territory rights, a transfer for a fixed period of time, or a transfer that is revocable at will by the assigned utility. Indeed, the Commission has narrowly construed service-by-exception agreements according to their specific terms.³

The Legislature defined express statutory purposes for exclusive service territories. Minn. Stat. § 216B.37 (“the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.”). The express language concerning the exclusive nature of service territories is absolute. Minn. Stat. § 216B.40 (“each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility”). The exception to this absolute and exclusive territory, as section 216B.40 continues, is “unless the electric utility consents thereto in writing”. *Id.* The Legislature allowed utilities to agree to have another utility serve within its exclusive service territory, but the unambiguous requirement was written consent thereto.

Reversal is required when the agency deviated from statutory language. See *Cable Communications Bd. v. Nor-West Cable*, 356 N.W.2d 658, 667-78 (Minn. 1984)

³ *In re Complaint by Kandiyohi Coop. Elec. Power Ass's Against Willmar Mun. Util. Comm'n for Extending Elec. Facility into Part of Section 26, Township 119, Range 35*, Order Requiring Cessation (October 23, 1989), MPUC Add. 4 (“In this case, the utilities defined the nature of the exception to which they were agreeing in some detail. The exception was for one residential customer at the location specified on the map. The exception does not entitle the owner of the property to add additional residential customers, to receive commercial service from the City, or to extend commercial service to other portions of the property, whether the owner is the original owner or a successor in interest.”); see also *In re Pet'n of Kandiyohi Coop. Elec. Power Ass'n Regarding Elec. Serv. Elevator by Willmar Mun. Util. Comm'n*, Order Requiring Compensation (July 11, 1989), MPUC Add. 7 (“There has been no showing that the City and Kandiyohi agreed to transfer the elevator from Kandiyohi to the City.”).

(agency policy inconsistent with regulations, statutes invalidated by court); *Dullard v. Minnesota Dept. of Human Servs.*, 529 N.W.2d, 438, 447 (Minn. App. 1995) (holding agency rule invalid as in conflict with “a facial reading of the federal and state statutes”).

Here, it is undisputed that there was no written consent from NSP for the Cooperative to serve the Ponds starting in 1996. Although the Cooperative has argued that even “one sentence” would satisfy section 216B.40, the Cooperative has not produced even one such sentence from NSP authorizing service. Section 216B.40 does not allow for an oral understanding, nor does it allow any equitable piecing together of an agreement based upon the underlying circumstances. Only “written consent” thereto was authorized by the Legislature in section 216B.40. Accordingly, the Commission erred in awarding damages for a “transfer” of service territory in section 216B.44 absent any documented service-by-exception agreement. No statutory authority allowed the Commission to award damages in these circumstances. The City (through the written transfer from NSP) held exclusive rights to serve the Ponds.

Curiously, the Commission and the Cooperative have argued that there is no “penalty” for violating section 216B.40. Such an argument ignores that there is no statutory authority to act if the plain language of the statute is not satisfied. *See infra* at 16. Nonetheless, the appropriate standard if no penalty is stated is that of a directory statute. *Minneapolis v. Wurtele*, 291 N.W.2d 386, 391 (Minn. 1980). Violating directory statutes results in invalidation of the action unless the violation is merely *de minimus*, such that substantial compliance is accomplished. *Id.* (technical defects in compliance that do not (a) reflect bad faith, (b) undermine the purpose of the procedures, or (c) prejudice the rights of those intended to be protected by the procedures, will not suffice

to overturn governmental action).

In the present case, violating section 216B.40 cannot be considered *de minimus*. It cannot seriously be disputed that a primary purpose of the writing requirement of section 216B.40 was to avoid precisely the present dispute about consent. It ensured a minimum evidentiary assurance of certainty in a transfer of a valuable statutorily-created property interest that is expressly subject to Minnesota condemnation law. Minn. Stat. § 216B.47. And it enforced the exclusive nature of assigned service territories established by the Legislature. Minn. Stat. § 216B.37. In this case, when consent itself was disputed, the purpose of the statute is defeated because there is no evidentiary assurance of certainty.

In addition, the rights of those intended to be protected by section 216B.40 are prejudiced. The City is clearly intended to be protected by the writing requirement, which serves as a safeguard to the statutory consent requirement. In this case, because there was: (a) no writing, and (b) no oral agreement evidencing any important terms of duration, consideration, or termination, the City is prejudiced by the Commission's disregard of the writing requirement. Without the statutorily mandated writing evidence, the Cooperative is allowed to receive title to property that is every bit as valued by the Legislature as real property, only without a deed, without a recording, or without any other contract that is required by Minnesota law in analogous cases of real property transfers.⁴ Such a relaxation of transfer evidence standards was not what

⁴ The Cooperative argued that the City was not a "bona fide purchaser for value." But this argument ignores that due to the Cooperative's own negligence, there was no written agreement, and no agreement filed with the Commission —both of which would have entirely prevented this dispute, and both of which prevent equity from saving the Cooperative from its admitted legal failures of preserving proper "legal notice" to prospective "bona fide purchasers for value." Indeed, the ALJ found that "[t]here is no evidence showing that the City knew that

the Legislature intended. Because the Commission's disregard of section 216B.40 cannot be considered as *de minimus*, it must be invalidated.

The Commission erred as a matter of law in awarding damages for the Ponds under section 216B.44 when no "transfer" from the Cooperative to the City occurred. Moreover, the evidence presented to the Commission was wholly insufficient to award damages for the Ponds.

B. ON THIS RECORD, THE COMMISSION ERRED IN AWARDING DAMAGES.

It is undisputed that the Cooperative bore the burden of proof as to its damages in this case. R.App. 670. As argued above, as a matter of law, the Commission could award damages only if the City acquired electric service territory from the Cooperative holding legal title thereto. And as a matter of fact, the Cooperative failed to establish such legal title. The Commission's awarding damages based on the record was therefore unsupported by substantial evidence, and constituted arbitrary and capricious action.

Not only did the Cooperative fail to produce any written agreement or consent from NSP, but also, the Cooperative presented only hearsay evidence to support its claim for damages. No one with personal knowledge from the Cooperative, its outside engineering firm, or NSP testified as to any definite terms of any oral agreement. Indeed, the ALJ specifically found that only hearsay evidence supported the Cooperative's claims for damages. R.App. 495.

The Commission's decision, which rejected the ALJ's disregard of the Cooperative's hearsay evidence, was not supported by substantial evidence.

the [Ponds] were in an area that was to be subsequently acquired by the City. R.App. 494 (emphasis added).

Substantial evidence is defined as: (1) such relevant evidence as a reasonable mind might accept to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety. *Minnesota Ctr. for Env'tl. Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). The Cooperative failed to present any witness with personal knowledge of the facts and circumstances surrounding – let alone the definitive terms of – any service-by-exception agreement with NSP. This failure is fatal to the Cooperative's claim, as it bore the burden of proof.⁵

To be sure, hearsay evidence may be admissible in an administrative contested case hearing. Minn. R. 1400.7300, subp. 1. (2007). The Commission's argument that the City did not object to the hearsay evidence overlooks that point. The City's concern is not that hearsay evidence was admitted, as it is admissible in these administrative proceedings, but that hearsay evidence cannot form the sole basis for an ultimate decision. In fact, under Minnesota law, an agency cannot rely solely upon hearsay evidence. *State ex rel. Indep. Sch. Dist. No. 276 v. Department of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977) (noting general rule); *In re Expulsion of E.J.W. from Indep. Sch. Dist. No. 500*, 632 N.W.2d 775, 782 (Minn. App. 2001) (reversing agency decision). Based upon the evidence in the record, the Commission's conclusion that "[t]he Cooperative has met its burden on the existence of the agreement" was unsupported.

⁵ The Commission's reliance on *Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 485 (Minn. 1989) is misplaced. First, in the *Citizens* case, the requirement of a writing modifying a security agreement could be orally waived under Minnesota common law. But here, the writing requirement arose from the plain language of section 216B.40. And the Respondents failed to establish that violating section 216B.40 was *de minimus*. Second, the Cooperative's hearsay evidence was insufficient to switch the initial burden of persuasion to show an agreement supporting a non-terminable right to serve the Ponds for more than 15 years. These two definite terms of even an oral agreement would be necessary to find a common law "waiver" sufficient to switch the initial burden of persuasion.

R.App. 670-671.

Moreover, even accepting, for purposes of argument, that all of the hearsay evidence was true, the Cooperative still failed to satisfy its burden of proof to identify an enforceable agreement. Under the hearsay evidence, NSP orally allowed the Cooperative to serve the Ponds. But even this oral argument lacked vital precise terms. There was no definite term as to the length of the service allowed. There was no definite term as to whether the service authority was intended to be permanent. And there was no definite term as to whether NSP could revoke this oral authorization at any time. Indeed, the Cooperative's version of facts would allow it to acquire the right to serve the Ponds at no cost. By contrast, the City paid \$340,000 to acquire unencumbered title to NSP's service territory, including the Ponds. Ex. 25. Accordingly, the Commission's order would require the City to pay a second time to acquire the same service territory rights. In short, even accepting the Cooperative's version of events, definite terms cannot be established to support the Commission's legal finding that there was a non-terminable agreement extending five years beyond these proceedings.

Indeed, in its order, the Commission acknowledged that no definitive terms could be established. R.App.667 ("the absence of a writing and the passage of time have made it impossible to reconstruct the precise terms of the agreement, which could have been time-limited or otherwise subject to conditions no longer discernible."). Accordingly, the result should have been that no award for damages could be made to the Cooperative upon unknown terms when the Cooperative had the burden of proof. The Commission's selection of a five-year term for lost revenues simply has no support

in the record. The Commission could just as easily have ordered two or eight years of damages. Five years was an arbitrary number. Indeed, the decision to provide any damages based on the record in this case was unsupported by the record and was an arbitrary and capricious action.

C. THE COMMISSION FAILED TO FOLLOW ITS PRECEDENT.

In its brief, the Commission cited to a number of cases involving service-by-exception – authority absent from the Commission's order. But the Commission failed to recognize the key difference in the present case. The Commission has never awarded damages for a transfer of electric service territory based upon a claimed oral service-by-exception agreement.

Moreover, the very authorities cited by the Commission and the Cooperative, in which the Commission upheld the claimed service-by-exception, the parties agreed upon the terms of the service-by-exception agreement. See *In re City of White Bear Lake's Request for an Elec. Util. Serv. Area Change*, 443 N.W.2d 204, 207-208 (Minn. App. 1989) (no question whatsoever in this case about whether one utility consented to another utility permanently providing service in another utility's exclusive electric service territory); see also *In re Petition by Mr. L.D. Wright to be Released as a Customer of Meeker Coop. Light & Power Ass'n and Served by Litchfield Pub. Util.*, MPUC Add. 15, 17 ("In this case, although there has been no memorialized consent, both utilities agree there was actual consent, and have consistently conducted themselves in accordance with that understanding. Under these circumstances, the Commission will recognize a service exception without writing.")(emphasis added); *In re Petition by Northern States Power Co. for an Exchange of Service Area with Anoka Elec. Coop.*, Order Approving

Changes in Assigned Service Areas (June 15, 1990), MPUC Add. 21 (NSP “filed a petition requesting approval of an agreement it had reached with Anoka Electric Cooperative” and reasoning “[n]o customer would change utilities under [this] agreement, which would merely formalize existing service arrangements.”); *In re Petition from N. Star Elec. Coop. to Change a Portion of its Service Territory Boundary with Roseau Elec. Coop. near the City of Warroad*, Order Approving Changes in Assigned Service Areas (Dec. 12, 1990), MPUC Add. 18 (“[b]oth utilities propose to modify their service area boundaries to allow the utility with closer facilities to serve the areas at issue.”); *In re Petition from Tri-County Elec. Coop. and Interstate Power Co. to Change a Portion of their Mutual Serv. Territory Boundary Near the City of St. Charles*, Order Approving Changes in Assigned Service Areas (March 22, 1991), MPUC Add. 23 (“In this case Tri-County began serving customers outside its assigned service area by mistake. Both utilities agree it would serve the interests of all concerned for Tri-County to continue this service.”)(emphasis added). The Cooperative and the Commission provided no authorities in which the fundamental question of a dispute arose about the existence of an agreement itself.

In addition, this case is different than the cases cited by the Commission and the Cooperative because here, the utility that the legislature intended to protect by section 216B.40 was ordered to pay damages to another utility that has unquestionably already profited from providing the extra-territorial service. R.App. 252, Ex. 31 at 18. In the Respondents' cited cases, the Commission was merely agreeing to re-draw the official service territory map to conform to agreements between the utilities, which agreements already accomplished any matters of compensation or damages thought to be important

to all concerned parties. By contrast, in the present case, the City was not only ordered to conform to the terms of an agreement to which the Commission admitted it is ignorant, but also the City was ordered to pay damages based upon the Commission's outright speculation that, (a) the term of such agreement must have been at least fifteen years, (b) such agreement was not terminable for fifteen years, and (c) such agreement contained adequate consideration under Minnesota law to support at least a 15-year contract.

Moreover, contrary to the Respondents' argument that only "written consent" was required, without Commission action, the Commission's past precedent required it to approve a permanent transfer of service territory rights. "The Commission reminds both utilities that service by exception must be preceded by a written agreement and that ***permanent changes in assigned service areas require Commission action.***" *In re Petition by Northern States Power Co.*, No. E-002, 111/SA-89-1040 (emphasis added) R.Add. 7-8.

The Commission provided no explanation or authority for departing from its past precedent. "An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *People's Nat. Gas v. Minnesota Pub. Util. Comm'n*, 342 N.W.2d 348, 353 (Minn. App. 1983), *rev. denied* (Minn. Apr. 24, 1984). The Commission's decision must be reversed.

D. THE COMMISSION EXCEEDED ITS JURISDICTION IN AWARDING DAMAGES.

This Court must reverse an agency decision that exceeded the agency's jurisdiction. Minn. Stat. § 14.69(b). Section 216B.44 provides the basis upon which the

Commission may award damages for a transfer of electric service territory.⁶ The Cooperative provided no written agreement to support its theory of service-by-exception as to the Ponds, and it failed to show that its disregard of the statute was merely *de minimus*. Accordingly, it failed to meet its burden of proof to establish the legal right to provide service under section 216B.40. Therefore, the Commission, as a creature of statute, possesses only the authorities specifically authorized by statute. *Minnegasco v. Minnesota Public Util. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) (“The MPUC, as a creature of statute, only has the authority given it by the legislature.”). The Commission exceeded its statutory jurisdiction in awarding loss-of-revenue damages to the Cooperative for the Ponds.

II. THE COMMISSION ERRED IN APPLYING A FICTIONAL PCA, RATHER THAN ACTUAL DATA.

This Court must reverse agency decisions that are contrary to statutes or are otherwise “affected by other error of law.” Minn. Stat. § 14.69(d). The Commission’s order setting damages relied upon the formula result calculated by the Cooperative’s expert. That result, in turn, relied upon certain assumptions, including a “revenue” number for the power cost adjustment (“PCA”). It is undisputed that the PCA used by the Cooperative was fictional; no customer in the Annexed Areas was actually paying the PCA relied upon by the Cooperative. R.App. 93. Moreover, that fictional PCA was significantly higher – by six mills – than the actual PCA paid by the affected customers. R.App. 468; Tr. 2 at 162; Ex. 31 (Berg Rebuttal) at DAB-1 at 5 (actual PCA at 4.9 mills). The Commission erred in adopting a damages result that relied upon inaccurate revenue assumptions.

⁶ Although the Commission has argued that it did not act in equity in this matter, it has provided no statutory basis authorizing its decision.

The City's expert, Mr. Berg, testified the Cooperative would be made whole by applying the actual PCA revenues, rather than creating a fictional number. "[I]f the average PCA goes down because the average power cost goes down, what does that mean for the remaining customers? It means their bills would be less than they would have been prior to the acquisition. A lower PCA adjustment if you are a retail customer means a lower bill. . . . Well, the City should not be giving the Cooperative money so that the bills of the remaining customers can be lower than they would have been before." R.App. 218-219.

In other words, the Commission adjusted the revenues sharply upward from the actual revenues received from these customers. Neither Respondent responded to the City's authorities and argument that courts prefer actual data to hypothetical calculations, particularly when, as here, the actual data was available. R.App. 444, 468. This issue is not a question of deferring to an administrative agency on a complex issue; it is a question of actual data versus speculative, hypothetical data. "The controlling principle is that speculative, remote, or conjectural damages are not recoverable." *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 267 (Minn. 1980).

The Commission's reasoning to accept this higher-than-actual revenue number is misguided and resulted in a windfall for the Cooperative. The Commission determined that the goal of the damages calculation was to put the Cooperative in the same position it would hold but for the City's acquisition. *In re Complaint regarding the Annexation of a Portion of the Serv. Territory of People's Coop. Power Ass'n by the City of Rochester (North Park Additions)*, 470 N.W.2d 525, 528 (Minn. App. 1991), *rev. denied* (Minn. July 24, 1991); Commission brief at 44. But the Commission's

adjustment, in accepting the fictional and higher-than-actual PCA revenue, instead put the Cooperative in a better position.

The remaining Cooperative customers benefit from the acquisition because the Cooperative will purchase more of the lower-cost WAPA power in relation to the higher-cost GRE power. Tr. 2 at 188; T. at 65. In other words, the remaining customers will enjoy lower power costs, with a lower PCA cost. *Id.*

The mathematical example cited in the Commission's brief did not proceed far enough to illustrate the impact on the remaining Cooperative customers. Brief at 46-47. In the Commission's example, the Cooperative had 100 customers, with 70kWh from WAPA at \$0.01/kWh and 30 kWh at \$0.02/kWh from GRE. Before the acquisition, all customers paid a composite PCA based on a blended cost of \$0.013/kWh. In the example, the Cooperative lost 20 customers to the City.

But the Commission's example did not consider the impact to the remaining 80 Cooperative customers. After the acquisition by the City, the blended wholesale power cost for the remaining 80 customers would decrease from the \$0.013/kWh to \$0.01125/kWh.⁷ This change would result in a lower PCA and lower resulting retail bills for all remaining customers. Accordingly, after the acquisition, remaining customers are in a better financial position, rather than the same position.⁸ In other words, there was no reason for the Commission to interfere with and artificially inflate the revenues from

⁷
$$\frac{(70 \text{ kWh} * \$0.01/\text{kWh}) + (10 \text{ kWh for remaining customers} * \$0.02/\text{kWh})}{80 \text{ kWh (total remaining sales)}} = \$0.01125/\text{kWh}$$

⁸ If the Cooperative believed it was at a financial disadvantage due to a claimed mismatch between lost revenues (based on a blended power cost) and avoided expenses (based on GRE costs only), it could easily raise the PCA for remaining customers back to the pre-acquisition level to recoup additional revenue. This result satisfies both goals of adequately compensating the Cooperative and leaving remaining Cooperative customers in the same position as they were before the acquisition.

the PCA because the Cooperative can use the PCA after the acquisition to automatically return the Cooperative and its customers to the position they held before the acquisition. The reliance on a fictional and inflated PCA only generates a windfall for the Cooperative, contrary to the stated purpose of the damages calculation.

As a result, the Commission's decision in adopting the Cooperative's damages model was contrary to the evidence, based upon speculative data, failed to explain its departure from the ALJ's findings, and reflected agency whim. Accordingly, the Commission's order should be reversed.

CONCLUSION

The City respectfully requests that this Court, (1) order the ALJ's recommended loss-of-revenue compensation of a mill rate of 21.28 mills/kWh for all areas except the Prairie Knoll Addition and the Ponds be awarded in this case, or alternatively remand this issue for further findings consistent with the Court's Order, (2) reverse the award of loss-of-revenue compensation for the Wastewater Treatment Ponds, and (3) grant such other and further relief that the Court deems just and equitable.

Dated: January 28, 2008

**MCGRANN SHEA ANDERSON CARNIVAL
STRAUGHN & LAMB, CHARTERED**

By: 

Kathleen M. Brennan (#256870)
Carl S. Wosmek (#300731)
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
Telephone: (612) 338-2525
Fax: (612) 339-2386

*Attorneys for Relator City of Redwood
Falls*