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.

BRIEF OF REDWOOD ELECTRIC COOPERATIVE

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2008 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Table of Contents

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

ISSUES 7

SCOPE OF REVIEW 7

ARGUMENT 7

I. The Commission's decision awarding the Cooperative five years of compensation for serving the Ponds is supported by substantial evidence 7

II. The Commission's decision contained no errors of law 12

III. The Commission correctly calculated the power cost adjustment factor in determining the Cooperative's avoided purchase power expenses 16

CONCLUSION 18

Table of Authorities

Minnesota Statutes **Page**

Minn. Stat. § 216B.37 ..... 8, 9

Minn. Stat. § 216B.38 ..... 4, 8

Minn. Stat. § 216B.39 8

Minn. Stat. § 216B.40 ..... 8, 9, 12, 13

Minn. Stat. § 216B.41 8

Minn. Stat. § 216B.42 8

Minn. Stat. § 216B.43 8

Minn. Stat. § 216B.44 ..... 8, 13, 15

Minn. Stat. § 216B.45 8

Minn. Stat. § 216B.46 8

Minn. Stat. § 216B.47 8

Cases

Application of the City of Lake Crystal, et al., Docket No. E-104, 262/SA-01-755 (November 16, 2001) 16

Petition by Northern States Power Co. For an Exchange of Service Area With Dakota Electric Association, MPUC Docket No. E-002/SA-89-1040, Order Approving Changes In Assigned Service Areas (June 15, 1990) 9

STATEMENT OF THE CASE

Respondent Redwood Electric Cooperative concurs in the Statement of the Case set forth in Respondent Minnesota Public Utilities Commission's Brief.

STATEMENT OF FACTS

The City of Redwood Falls' (City) Statement of Facts is selective and omits relevant facts that support the Commission's decision. The City's Statement of Facts ignores the events that led to the Redwood Electric Cooperative (Cooperative) extending service to the Ponds in 1996. The City's Statement of Facts ignores information indicating that the City was aware or should have been aware that the Cooperative would be extending service to the Ponds, then located in the service territory of Northern States Power Company (NSP) which the City was in the process of acquiring. The City's Statement of Facts does not recognize evidence that the City sanctioned the Cooperative's continued service to the Ponds, after formally acquiring NSP's service territory in early 1998. The City's Statement of Facts erroneously states that the Cooperative violated its own procedures dealing with service territory acquisitions or exchanges and providing service to customers in another utility's service territory. These additional facts are grouped below by subject matter:

1) Cooperative's Service to the Ponds

A chronology of the events that led to the Cooperative's service to the Ponds is important. The City, through Curt Weber, its Director of Public Utilities, approached the Cooperative sometime prior to June 11, 1996 about providing service to the Ponds. Tr., Vol. I, pp. 194-196. The City was then in the process of consolidating with the City of North Redwood Falls. This consolidation meant that the City would need to expand its waste water treatment capacity to accommodate the additional North Redwood Falls customers that would be added as a result of the consolidation. Since this consolidation

was going to be effective at the end of 1996, City Ex. 25, Commission Order, p. 1, Mr. Weber wanted the Cooperative to install service as soon as possible. Tr., Vol. I, p. 202.

The Ponds were in NSP's service territory. NSP's nearest distribution facility of the kind required for service to the Ponds, however, was one-half to three-quarters of a mile away. Tr., Vol. 1, p. 199. On the other hand, the Cooperative had a three phase line approximately one-quarter mile away from which additional facilities of the kind required to serve the Ponds could be extended. Cooperative Ex. 11, p. 2. Because of the distance involved, it would obviously have been be cheaper for the Cooperative to extend service to the Ponds than for NSP to do so.

Contemporaneously with its consolidation with the City of North Redwood Falls, the City had been negotiating to acquire NSP's service territory in and around the City of North Redwood Falls. These negotiations apparently stalled, and the City filed a Petition with the Commission on July 26, 1996 to acquire NSP's service territory which included the Ponds. Very likely, because of the distance involved to provide the facilities and because its service rights to the area were short lived, NSP consented to the Cooperative's service to the Ponds. Tr., Vol. I, pp. 194-196. NSP's consent was not in writing.

In response to the City's request, the Cooperative built three phase service to the area of the Ponds on June 6, 1996. Ex. 11, RH-1. Sometime later, the City's contractor requested temporary service from the Cooperative to begin construction of the Ponds. City Ex. 12. On September 5, 1996 Mr. Weber called the Cooperative's office with instructions to put the account for the Ponds under the City's name. Ex. 11, RH-3. The contractor completed construction of the Ponds sometime during the winter of 1996-97, and the City's account was changed from temporary to permanent service on or about February 28, 1997. City Ex. 12.

There is no evidence from Mr. Weber or anyone else from the City to suggest that the Cooperative's service to the Ponds contained any time limitation. Had the City suggested any time limitation on service, the Cooperative may have decided either not to serve the Ponds at all, or to serve them under different financial arrangements. The Cooperative granted, and the City accepted, the same regular customer status that the Cooperative has with all of its other regular customers. That status, among other things, includes membership in the Cooperative and the entitlement to an allocation of capital credits. Ex. 11, p. 4.

2) City Aware of Ponds in NSP's Service Territory

The City was aware, or should have been, that the Ponds were located in NSP's service territory when the City requested that the Cooperative extend service to them. The City's counsel elicited confirming testimony from Cooperative witness, Ron Horman, concerning the arrangements made at the time to serve the Ponds. Mr. Horman had consulted with the Cooperative's engineering firm, MEI Engineering, with respect to the Cooperative's extension of service to the Ponds. In response to the City counsel's questions, Mr. Horman testified as follows:

> "Q. Okay. How about MEI Engineering, have you spoken with MEI about this issue?
>
> A. Yes. He remembers meeting with Curt Weber from the utility, Redwood Utility; but he does not know who the contact for NSP was at that time, and he doesn't remember any written documents either.
>
> Q. Does he remember any oral communications at that time?
>
> A. With Curt Weber and Dennis Trom, yes, both.
>
> Q. And what has he conveyed to you in that regard?
>
> A. That we were allowed to build the service from NSP, they told us we could build the service in there, and that the City of Redwood Falls requested it and wanted us to build it as soon as possible. That's what – what I can remember from our conversation." Tr., Vol. 1, pp. 201-202.

Mr. Horman's testimony indicates that a meeting was held between MEI, Mr. Weber from the City, Mr. Trom from the Cooperative, and an NSP person. At that meeting, all parties recognized that the Ponds were in NSP's service territory; that NSP consented to the Cooperative's service to the Ponds; and that the City wanted the Cooperative to build that service as soon as possible. This testimony, while hearsay, was credible, unchallenged, and clearly supports a finding that the City was aware at the outset that the Ponds, which the City wanted the Cooperative to serve, were located in NSP's service territory.

The City states that it was merely a customer at the time that the Cooperative extended service to the Ponds and that it could not be expected to know which utility service territory the Ponds were located in. City Brief, pp. 6, 7 and 9. But the City was not an ordinary retail electric customer who may not know which utility's service territory he/she resides in. Ordinary retail customers have nothing to do with the establishment or implementation of utility service territories. The City, however, is an electric utility per Minn. Stat. § 216B.38, subd. 5. The City entered into service territory agreements with its neighboring utilities in 1974-1975 which were filed and approved by the Commission. The Commission approved the service territory map adapted by NSP and the Cooperative in the 1974-1975 time period. City Ex. 25, Purchase Agreement dated December 1, 1997 between NSP and the City, Ex. A, Detail of Service Area. The map shows that the Ponds located at Highways 101 and 25 would be located in NSP's service territory. As an electric utility, besides being a customer in this instance, the City is presumed to know in which service territory its customer facilities like the Ponds are located. Obviously, there would have been no reason in 1996 for the Cooperative to secure NSP's consent for extending service to the Ponds, if the Ponds were not in NSP's service territory.

3) City Ratification of Cooperative's Service to the Ponds

The facts are that the City knew or should have known since late 1997 or early 1998 that the Ponds were in the service territory which it acquired from NSP. The City initiated proceedings to acquire NSP's service territory on July 26, 1996. The parties executed a Purchase Agreement for this acquisition on December 1, 1997. Exhibit A to the NSP/City Purchase Agreement is the Cooperative/NSP service territory map which the Commission approved in 1975. A review of this map would clearly indicate that the Ponds were in the NSP service territory that was being acquired by the City. The City's Curt Weber was an attesting party to this Purchase Agreement. City/NSP Purchase Agreement dated December 1, 1997, p. 12. Mr. Weber was aware of the history leading up to the Cooperative's extension of service to the Ponds in 1996. Mr. Weber himself may have personally inspected the service territory that the City was acquiring from NSP. Tr., Vol. 2, p. 66. In addition, Mr. Weber also "hired someone to go in and do an analysis of how many customers existed and the type of customers and what facilities that NSP had in that particular territory." Tr., Vol. 2, p. 67. This all occurred before the City and NSP closed on the acquisition. Such due diligence would have had to indicate to the City that the Ponds were in NSP's service territory.

There is further factual corroboration of this point. By Section 1.1 of the December 1, 1997 Purchase Agreement, NSP transferred to the City "the electric distribution lines and related facilities used and useful in serving NSP's retail customers located in the portion of the NSP service area which prior to consolidation with Redwood Falls constituted the City of North Redwood..." (Emphasis added.) There is no mention of the Ponds in this Agreement. Since the Cooperative was serving the Ponds, and the City was the Cooperative's retail customer, it is clear that NSP could not have transferred any

service rights to the Ponds and related distribution facilities which it did not own. NSP had already consented to the Cooperative serving the Ponds in its service territory. Obviously, the City had to know at that time that the Cooperative was serving the Ponds in what had previously been NSP's service territory before the transfer. The City raised no objection to the Cooperative's continued service to the Ponds.

The City states that the Cooperative intervened in the City/NSP service territory proceedings and did not assert a right to serve the Ponds. The only purpose of the Cooperative's Petition to Intervene was to secure the continued use of a power line that the Cooperative had under an agreement with NSP. The Petition was never ruled upon. The City agreed to allow the Cooperative the continued use of that power line. Exhibit 25, City/NSP Purchase Agreement dated December 1, 1997, Exhibit E. As a result, the purpose of the intervention was satisfied. There was no other indication that the City wanted any change in its customer relationship with the Cooperative.

The City/NSP Purchase Agreement clearly excludes the Ponds from the customers and facilities that NSP transferred to the City. Had NSP intended to reserve any future service rights to the Ponds, the Purchase Agreement would certainly have enunciated them. By its authorization for the Cooperative's service to the Ponds in 1996, as well as by the terms of the City/NSP Purchase Agreement, NSP and the Cooperative had an agreement that the Cooperative would provide service to the Ponds indefinitely.

4) Cooperative Violation of its Procedures

The City states that the Cooperative did not follow its own procedures pertaining to the acquisition or exchange of service territory with another utility or for serving a customer outside of its service territory. City Brief, pp. 7-9. In this instance, the Cooperative is not purchasing nor exchanging service territory with another utility, where

the cost of providing service and potential revenues from an acquired or exchanged service territory were relevant. Only one customer was involved, the Ponds. NSP consented to the Cooperative's service to the Ponds; the Cooperative agreed to extend the service; and the City agreed to pay for the service. Any violation of Cooperative procedures was either harmless or immaterial. Neither the Administrative Law Judge nor the Commission made any findings on this issue in any event. While Tom Malone, the Cooperative's General Manager, acknowledged that a formal exception for the Ponds should have been filed with the Commission, he also testified that the fact that an exception was not filed should not deprive the Cooperative of compensation for the acquisition of the Ponds by the City. R.App. 321.

ISSUES

1. Was there substantial evidence to support the Commission's decision awarding the Cooperative five years of compensation for the acquisition of the Ponds?

2. Did the Commission's decision contain errors of law?

3. Was there substantial evidence to support the Commission's calculation of the power cost adjustment factor?

SCOPE OF REVIEW

Respondent Redwood Electric Cooperative concurs in the Statement of the Case set forth in Respondent Minnesota Public Utilities Commission's Brief.

ARGUMENT

I. The Commission's decision awarding the Cooperative five years of compensation for serving the Ponds is supported by substantial evidence.

It is important to remember what the issue is here. The issue is this: What amount of compensation should the Cooperative receive for responding to the City's request to

extend electric service to the Ponds which were located in NSP's service territory at the time of the extension of service, and which the Cooperative has served for the last ten years without objection from the City? It may be conceded that the standard commercial world formalities were not observed: the City's written request for proposals (RFP) for service from the utilities; the Cooperative and NSP's submission to the City of written proposals for service; the City's written evaluation of the service proposals that it received; the execution or written contract for service between the City and the Cooperative; NSP's written agreement for the Cooperative to serve the Ponds in its service territory, which was being acquired by the City; and all the rest of the written representations, warranties, damage limitations, and other provisions which lawyers spend much time discussing, drafting, and revising in negotiating commercial contracts.

These were three parties that knew each other well. They had past experience working together. They all wanted the same thing, namely, that the Cooperative promptly extend service to the Ponds. So they decided to make that happen, and they did. For the last ten years the Cooperative has served the Ponds without interruption or objection from the City. The City did not pay NSP any compensation for the Ponds when acquiring NSP's service territory in 1997-1998 because the Ponds were not NSP's customer. The City now contends that it should not have to pay the Cooperative any compensation for the Ponds which have been the Cooperative's customer for the last ten years. Nothing in the policies contained in Minn. Stat. §§ 216B.37-216B.47 regarding the regulation of utility service territories justifies this outcome.

The City contends that the Commission erred in finding the existence of an exception agreement between NSP and the Cooperative for service to the Ponds. The City claims that the evidence was insufficient to establish the elements of an enforceable

contract, i.e., offer, acceptance, meeting of the minds, consideration, uncertain terms, etc. The City makes far too much, however, of the very simple statutory requirement for recognizing an exception customer.

Minn. Stat. § 216B.40 states in relevant part that "...no electric utility shall render or extend electric service at retail within the assigned service area of another utility unless the electric utility consents thereto in writing..." (emphasis added). Simply put, all that was required for the Cooperative to serve the Ponds located in NSP's service territory in 1996 was NSP's written consent – nothing more. This written consent could have been expressed in one sentence. The various aspects of a formal contract like offer, acceptance, consideration and the rest as cited by the City are unnecessary to satisfy the statute. NSP's consent was not in writing, but the Commission reasonably found, under the facts of the case as well as its past precedents, that NSP's unwritten consent was not fatal to the Cooperative's compensation claim.

The Commission often informs utilities that they should put exception arrangements in writing. But the Commission has never denied exception status to a customer designated as such by the utilities. The purpose of the statutory scheme is to provide coordinated retail electric service in Minnesota (Minn. Stat. § 216B.37), and that purpose is served when utilities agree that it is preferable in certain instances to have one utility serve a customer in the other utility's service territory. Technical violations should not stand in the way of achieving the purposes of the service territory provisions. In Petition by Northern States Power Co. For an Exchange of Service Area With Dakota Electric Association, MPUC Docket No. E-002/SA-89-1040, Order Approving Changes In Assigned Service Areas (June 15, 1990), both utilities were serving numerous customers in each other's service territories without written consents. Nonetheless, the Commission

approved the exception status of all of these customers anyway. In this instance there was only one exception customer, the Ponds.

Even accepting the City's argument that all the attributes of a formal contract must exist to satisfy the written consent requirement, the evidence would even sustain that finding.

Offer: After the City requested that the Cooperative serve the Ponds, the Cooperative made an offer to NSP to serve the Ponds located in NSP's service territory. The Cooperative's Operation Manager, Dennis Trom, asked NSP for authorization to extend this service.

Acceptance: Since NSP's service territory was being acquired by the City, and since the Cooperative's facilities were considerably closer to the Ponds than NSP's, NSP accepted the Cooperative's offer to serve the Ponds. If NSP had not accepted the Cooperative's offer, NSP would have had to provide this service.

Meeting of the Minds: The parties were certainly of the same mind concerning the objective of their contract, i.e., that the Cooperative would serve the Ponds as requested by the City. The Cooperative carried out that objective by building the necessary facilities.

Consideration: The consideration to the Cooperative was the financial benefit from serving the Ponds. The consideration to NSP was the forbearance of the costs that it would have incurred to serve the Ponds, when its service territory was being acquired by the City. Forbearance is the voluntary assumption of an obligation by one party as a result of a voluntary act or forbearance by the other party.

Contract Term: The available evidence, reasonably interpreted, shows that NSP's consent to the Cooperative's service to the Ponds was permanent and irrevocable. First, at the time that the City requested that the Cooperative extend service to the ponds, the City

and Northern States Power Company (NSP) were negotiating the terms of the City's acquisition of NSP's service territory in the City of North Redwood Falls. Since NSP was being bought out, it would have had no reason to place any time limitation nor other condition on the Cooperative's service to the ponds. NSP would not be serving the ponds in the future in any event.

Second, Curt Weber, the City's Public Utilities Director, contacted the Cooperative by telephone on September 5, 2006 and directed the Cooperative's staff to put the account for service to the ponds in the name of the City. Nothing in Mr. Weber's phone call suggested that service was to be on any short term basis, and the City presented no evidence that the service arrangements to the ponds were to be other than permanent. In addition, the City then had six other accounts that the Cooperative was serving on a permanent basis. Indeed, the nature and cost of the facilities that the Cooperative installed for service to the ponds was for permanent, not temporary, service purposes. City Exhibit 12 confirms that this service was permanent in duration.

Third, NSP and the City executed a Purchase Agreement on December 1, 1997 in which NSP transferred to the City all of its distribution facilities used to serve retail customers in the City of North Redwood Falls. Obviously, since NSP had no facilities in use for service to the ponds, this conveyance could not have limited any service rights to the ponds. Nor would there have been any point to addressing service rights to the ponds, since NSP had already consented to the City's request that the Cooperative serve the Ponds.

Why would NSP try to retain some future right to serve the Ponds, when its entire surrounding service territory was being taken over the by the City? If NSP intended to attach conditions to the Cooperative's service to the Ponds, why was there no reference to

such conditions in the NSP/City 1997 Purchase Agreement? If the City in 1996 had intended that the Cooperative's service to the Ponds be temporary, why did its Director of Public Works, Curt Weber, tell the Cooperative staff to place the Pond account in the City's name, without informing the Cooperative that its service to the Ponds was to be for two years, or four years, or six years? If the City intended that service to the Ponds was time limited, why did it pay the bill for electric service for ten years, without ever discussing that issue with the Cooperative?

The Cooperative's Petition for Reconsideration contended that the Commission should have awarded the customary ten years of compensation based on the evidence. The Cooperative did not cross-appeal the time period for compensation.

II. The Commission's decision contained no errors of law.

The City contends that the Commission has no statutory authority to grant compensation in this case when NSP's consent to the Cooperative's service to the Ponds was not in writing. Minn. Stat. § 216B.40. The fact that NSP's consent was not in writing is immaterial. The purpose of the written consent provision in Minn. Stat. § 216B.40 is to protect a utility from encroachments in its service territory by the adjacent utility. The purpose of the written consent provision of the statute is satisfied, where as here, NSP was both aware of and authorized the Cooperative to extend service to a customer in its service territory. There is no requirement in Minn. Stat. § 216B.40 that a written consent between utilities to serve a customer be filed with the Commission. Nor is there any requirement that such filed written consents must be approved by the Commission as a condition of their validity. The purpose of the written consent provision in the statute is not to enable a utility to escape paying appropriate compensation because of a technical omission to

generate a document to define a service arrangement that all parties had to agree to in the first place.

The City argues that if the written consent provision of Minn. Stat. § 216B.40 is not enforced, the Commission's decision awarding monetary compensation becomes the dispensation of non-statutory equity relief. The City's jurisprudence is badly flawed. The issue is whether the NSP's unwritten consent for the Cooperative's service to the Ponds should enable the City to acquire the Ponds without paying any compensation to the Cooperative. The Commission's decision that the City should pay five years loss of revenue for the Ponds is not equitable relief like specific performance or injunctive relief. Rather, the Commission is simply discharging its statutory duty under Minn. Stat. § 216B.44 to determine what compensation should be paid when a municipal utility acquires another utility's exception customer in its service territory. That is the statutory business of the Commission. The City states that there is no provision in Minn. Stat. § 216B.44 for a municipal utility to acquire a customer in its own service territory. If that is the case, then the City's Petition to acquire the Ponds should be dismissed and the Cooperative will continue to serve them.

The City maintains that when NSP transferred its service territory to the City, this transfer included the right to serve the Ponds. City Brief, p. 6, fn. 2. If that were true, it is strange that the Cooperative continued to serve the Ponds for another eight years, before the City filed this Petition with the Commission. The service territory transfer did not and could not include facilities and customers which NSP did not own and had no right to transfer, i.e., the Cooperative's facilities for service to the Ponds.

In the world of transfers of title to property, a bona fide purchaser for value takes title free and clear of the claims of third parties. A party does not qualify as a bona fide

purchaser for value, however, if it knows that other parties have an interest in the property being purchased. The City well knew that the Cooperative served the Ponds under an exception arrangement with NSP. Thus the title that the City acquired when it purchased NSP's service territory was subject to the Cooperative's right to serve the Ponds.

The City asserts that, contrary to the Cooperative's arguments, laches cannot apply in this case. City Brief, p. 31. While the Commission's decision had nothing to do with a laches argument, the Cooperative will respond to the City's argument in this regard anyway.

According to the City, case law requires the consideration of four factors for laches to apply. These factors are (1) the nature of the action; (2) the reasons for delay; (3) prejudice; and (4) policy considerations. As to the nature of the action, the evidence is clear that the City asked the Cooperative to provide service to the Ponds. The Cooperative obtained NSP's consent to do so and installed the necessary facilities. The City has paid the Cooperative's bill for service for ten years. There is no difference in the status of the Ponds as a customer of the Cooperative than there is any other regular customer of the Cooperative. The issue of whose service territory the Ponds are located in is irrelevant in terms of the status of the Ponds as a customer of the Cooperative.

As to the reasons for the delay, that responsibility rests clearly with the City. The City knew or should have known in 1996 when the Cooperative connected service to the Ponds that they were in NSP's service territory. If the City was unaware of this in 1996, it certainly was or should have become aware of it in 1998 when it closed on its acquisition of NSP's service territory. Any prudent buyer would inspect the product that it was purchasing. Curtis Weber of the City may have inspected the facilities and customers located in the NSP service territory that the City was purchasing. He also hired a third

party to perform this "due diligence" function. At no time did the City make any claim that the Cooperative was improperly serving the Ponds and that the City wanted to serve them. The plain fact is that the City knew that the Cooperative was serving the Ponds and wanted that service to continue. It was not until the City filed its Petition initiating this proceeding that it announced that the Cooperative had no authority to serve the Ponds. A ten year delay in raising this issue is the City's fault.

As to prejudice, the Cooperative invested in facilities to serve the Ponds at the City's request. The City has paid the electric bill since service began. The revenues that the Cooperative receives covers the expenses associated directly with service to the Ponds as well as general system operating expenses. The Cooperative surely would be prejudiced if it were not compensated for the loss of the Ponds, as it would be if not compensated for the other 19 customers that the City is acquiring. The City argues that the Cooperative has recovered its entire investment and has even profited from serving the Ponds. This is not so. The Cooperative has not yet recovered its investment. There remains $9,636.00 of unrecovered investment directly attributable to the Ponds. There is also the loss of the revenues that will defray its ongoing, residual costs of operation. The "loss of revenues" factor in the statute looks forward, not backward.

As to policy considerations, the basic policy in Minn. Stat. § 216B.44 is that a city must pay for what it takes. The City is a customer in this instance, but that makes no difference for purposes of determining the loss of revenue for a customer acquired under Minn. Stat. § 216B.44. That policy deserves to be honored. The City argues that laches cannot be applied to a City when acting in a sovereign, as opposed to a proprietary, capacity. The City's operation of an electric utility business is not a governmental function like the exercise of policy power, the conduct of elections, or the issuing of zoning and

land use regulations. The City of Lake Crystal advanced that argument in a service territory case involving Blue Earth-Nicollet-Faribault Cooperative Electric Association. Application of the City of Lake Crystal, et al., Docket No. E-104, 262/SA-01-755 (November 16, 2001). The Commission held, nevertheless, that the City of Lake Crystal was bound to its standstill agreement with the Cooperative.

III. The Commission correctly calculated the power cost adjustment factor in determining the Cooperative's avoided purchase power expenses.

The City conceded during the hearings that the purpose of a PCA is to insulate a utility from increases or decreases in wholesale power costs which it does not control. Tr. Vol. 2, pp. 149-150. If the PCA is properly developed and managed, it allows the utility to track increases and decreases in the cost of purchased power, so that it neither gains nor loses revenues from changes in purchased power costs above or below the base PCA set in the utility's retail rates. The base power cost in the Cooperative's retail rate was 30 mills/kWh.

The City's calculation of the PCA fails, however, to fully recover purchased power expense. The Cooperative's loss of revenue is correspondingly understated. Mr. Berg, the City's expert witness, calculated the Cooperative's avoidable purchased power cost to be $16,379.00, which a properly functioning PCA should fully reflect. Mr. Berg's PCA recovered $12,109.00, which represented the 30 mill purchased power cost contained in the Cooperative's base rates. The additional PCA recovered from Mr. Berg's PCA factor above 30 mills recovers only $1,974.00, i.e., $440.00 from Rate Class A customers and $1,534.00 from Rate Class B customers. Ex. 31, DAB-1 rev. 1 (8-30-06), p. 4. The total PCA revenues recovered from Mr. Berg's calculations are $14,083.00 ($12,109.00 +

$440.00 + $1,534.00), which is $2,296.00 less than his avoidable purchased power expense of $16,379.00. Tr. Vol. 2, pp. 150-162.

Consequently, there is a mismatch between Mr. Berg's expense and revenue numbers, and the Cooperative's gross revenue loss is understated to that extent. The test of a valid PCA is to recover increases and decreases in wholesale power costs. Mr. Berg's PCA does not do that. His PCA shortchanges the Cooperative's revenues by $2,296.00. The Commission's Order demonstrates the flaw in the City's argument with respect to the PCA. "[T]he issue is not how the cooperative allocates and reflects purchased power costs and its rate schedule, but how the loss of actual customers to the city will actually affect its purchased power costs." Order, p. 12.

In further explanation, the Commission stated:

> "Failing to reflect these actual costs in calculating the Power Cost Adjustment component of gross revenues nullifies the effect of the reflecting them in the avoided cost calculation. Since the purpose of the compensation award is to put the displaced utility in the same position it would have occupied but for the municipal utility's acquisition, both the Power Cost Adjustment component of gross revenues and the avoided cost calculation should reflect the costs the cooperative will actually shed and those that will actually remain, not the average costs currently allocated among customers through its rate schedule." Order, p. 12.

The Cooperative's calculation of the PCA factor exactly matches the revenues and expenses associated with awarded purchased power costs. Ex. 2, pp. 10-13.

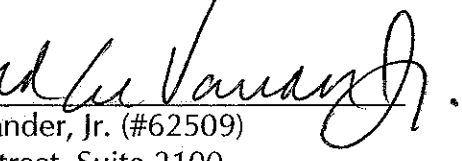
CONCLUSION

The Commission's decision should be affirmed.

Dated: January 14, 2008

Respectfully submitted,

FELHABER, LARSON, FENLON & VOGT, P.A.



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