

E-132, 299/SA-88-660AFTER RECONSIDERATION CLARIFYING ORDER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Darrel L. Peterson	Commissioner

In the Matter of a Complaint of People's
Cooperative Power Association, Inc. Against
the City of Rochester

ISSUE DATE: February 21, 1989

DOCKET NO. E-132, 299/SA-88-660

ORDER AFTER RECONSIDERATION
CLARIFYING ORDER

PROCEDURAL HISTORY

On October 28, 1988, the Minnesota Public Utilities Commission (the Commission) issued its ORDER FINDING CONDUCT IN VIOLATION OF LAW AND REFERRING MATTER TO THE OFFICE OF THE ATTORNEY GENERAL AND ASSIGNING INTERIM SERVICE RIGHTS in this matter. In that Order the Commission found that the City of Rochester (City) had violated People's Cooperative Power Association, Inc.'s (People's) exclusive service area contrary to Minn. Stat.

§ 216B.40 and referred the matter to the Attorney General pursuant to Minn. Stat. § 216B.54 for appropriate legal action. Also, the Commission ordered the City to stop further construction in the disputed area until annexation was completed, ordered the City not to serve anyone within the disputed area until annexation was completed, and authorized the City to serve the area following annexation. Finally, the Commission ordered the City to refrain from violating Minn. Stat. § 216B.40 in the future.

On November 16, 1988, the Commission received a Petition for Reconsideration from the Department of Public Service (DPS or Department). In its Petition, the DPS argued that the portion of the October 28, 1988 Order that granted the City authority to extend service to any new annexation before compensation is determined without notice and hearing violates Minn. Stat.

§ 216B.44 and public policy. Further the Department argued that the public interest is best served by allowing People's to continue service to the disputed area.

On November 17, 1988, People's filed a Petition for Reconsideration and Vacation of Order Assigning Interim Service Rights. In its Petition, People's argued that the Commission had failed to give proper notice and hearing on the issue of interim service rights and that the Commission erred in interpreting the relationship between municipal annexation of property and changes to the municipal utility's electric service territory.

The DPS filed a Response to People's Petition on November 28, 1988. The Department's Reply to People's Petition stated that the DPS Petition did not mean to imply that the Commission did give proper notice and hold a hearing on the matter of interim service right.

On November 29, 1988, the City filed a Response to the Petitions of the DPS and People's. The City argued that the DPS had taken a position contrary to the language of Minn. Stat. § 216B.44 in arguing that People's has certain rights to notice and hearing before the City may extend its facilities to serve newly annexed areas. Further the City maintained that the DPS request that People's be allowed to continue to serve the area until compensation is determined is contrary to Minn. Stat. § 216B.44. Regarding People's petition, the City argued that the Commission's Order does not and need not speak to the issue of interim service. The City recommended that the petitions for reconsideration be denied.

On December 6, 1988, the Commission issued its ORDER GRANTING PETITIONS FOR RECONSIDERATION.

The Commission met on January 12, 1989 to consider the positions of the parties.

FINDINGS AND CONCLUSIONS

The Commission will first discuss the notice and hearing issues raised in the Petitions.

The Commission finds that Minn. Stat. § 216B.44 governs the issues raised here. It provides that when a municipality which owns and operates an electric utility extends its corporate boundaries through annexation or consolidation, or extends its service territory within its existing boundaries the municipality shall thereafter provide electric service to these areas unless the area is already receiving electric service from an electric utility. If so, the municipality may purchase the facilities of the electric utility serving the area. The statute sets guidelines for the purchase and sale of the facilities. Further, if the municipality and the utility cannot agree on a purchase price, the statute provides that either can petition the Commission to determine the appropriate terms for the sale. The statute provides that after notice and hearing the Commission can determine the terms of the sale. The law lists factors for the Commission to consider in making its determination. Minn. Stat. 2 §16B.44 then states in relevant part:

Until the determination by the commission, the facilities shall remain in place and service to the public shall be maintained by the owner. However, the electric utility being displaced, serving the annexed area, shall not extend service to any additional points of delivery within the annexed area if the commission, after notice and hearing, with due consideration of any unnecessary duplication of facilities, shall determine that the extension is not in the public interest. (Emphasis supplied.)

In its October 28, 1988 Order, the Commission found that it had provided the parties to this matter

with notice and a hearing as required by Minn. Stat. § 216B.44 on the issue of who would serve the area in dispute until a decision on compensation could be made. The Commission reaffirms that finding.

The Procedural History section of the Commission's October 28, 1988 Order states that the Commission held meetings on October 4 and October 11, 1988 to address the issues raised by People's Complaint of September 29, 1988. The Complaint sought an immediate Order from the Commission to prevent the City from extending electric service to the disputed area or proceeding with any related construction until the City either:

- 1) presented the Commission with a negotiated agreement with People's or
- 2) until the City had petitioned the Commission for a change in boundary and paid adequate compensation to People's pursuant to a Commission Order or a written negotiated settlement.

The Commission scheduled a meeting for October 4, 1988 to consider the Complaint and the immediate relief requested. Commission staff notified representatives of the City and People's by telephone on September 30, 1988 that a Commission meeting addressing the Complaint would be held on

October 4, 1988. Representatives of the City and People's attended the Commission's October 4, 1988 meeting. At that meeting, the Commission requested that all interested parties submit comments by October 7, 1988 suggesting ways to resolve this dispute. The Commission deferred consideration of this matter until October 11, 1988 so that parties could have adequate time to prepare comments. The October 11, 1988 meeting was noticed in the Commission's weekly published calendar of October 7, 1988.

Actual notice to all parties was received as evidenced by the parties' presence and participation at the hearings. Any issue of due process and notice was effectively waived by the parties' actual participation in the hearing and further by not raising the notice issue at the time of the Commission's hearing.

The hearing held by the Commission was adequate to determine that there were no material facts in dispute. That being so, there was no reason to order a contested case proceeding and the Commission could address the ultimate question of what was in the public interest when resolving the issue of interim service rights in this case. The issue of interim service rights, the right to serve the area for the period following annexation by the City until the determination of compensation, is clearly within the scope of People's Complaint. Minn. Stat. § 216B.44 provides that "notice and hearing" is required, but does not specifically require that contested case proceedings be ordered as suggested by the parties.

Where no material facts are in dispute, the Commission is not required to hold a contested case proceeding under Minn. Stat.

§ 216B.44. Minn. Stat. § 14.57 of the Minnesota Administrative Procedure Act provides that a contested case proceeding shall be initiated only when one is required by law. Where the legislature has intended that a contested case is to be required, the legislature has so stated. See Matter of Deregulation of Inside Wiring, 420 N.W.2d 650, 655 (Minn.Ct.App. 1988). Here, the legislature does not require a "contested case hearing" under Minn. Stat. § 216B.44. The Commission can properly determine that a contested case proceeding is not necessary upon finding that there are no material issues of fact in dispute and that further trial type proceedings would be of no further assistance in resolving the issues of interim service rights. The Commission has so determined and reaffirms that decision.

Finally, the parties have exhaustively argued their positions orally and in writing on the right to serve an area prior to annexation by a municipality, following annexation, and in the future following hearings on compensation. The Commission concludes that the parties have been given the notice and hearing required by law and that their due process rights have been protected.

The Commission will next address the nature of the relationship between a municipality's annexation of property and its rights to provide electric service to that property.

The Commission finds that Minn. Stat. § 216B.44 evidences an eventual statutory preference for a municipality which owns or operates an electric utility to serve persons within that

municipality's corporate boundaries. However, that eventual preference is not immediate. Minn. Stat. § 216B.44 states:

Notwithstanding the provisions of sections 216B38 to 216B.42, whenever a municipality which owns and operates an electric utility (a) extends its corporate boundaries through annexation or consolidation, or (b) determines to extend its service territory within its existing corporate boundaries, the municipality shall thereafter furnish electric service to these areas unless the area is already receiving electric service from an electric utility, in which event, the municipality may purchase the facilities of the electric utility serving the area. (Emphasis supplied.)

The threshold question, thus, is whether the annexed area is receiving electric service from an electric utility. In this case, the annexation took a small portion of the assigned service area of People's, an area in which there was no existing customer. Rochester maintained that the annexed area was not receiving electric service from an electric utility because there was no customer.

The Commission finds that the geographic area in dispute, a building site with a future customer, was within the assigned service territory of People's, and People's was willing and able to provide service to new customers within the disputed area through facilities which were in place. The Commission concludes that People's was providing service to the area even though the specific narrow area annexed by Rochester had no existing customer. The Commission will clarify its Order of

October 28, 1988, by this explicit recognition that a utility in circumstances like People's is providing service to an area if the area is within its assigned service territory and if facilities are in place to provide service to new customers, even when the actual annexed area contains no existing customers.

As stated earlier, the statute provides procedures for the purchase and sale of the displaced utility's facilities.

When a municipality expands its territory through annexation of property, the statute provides that the existing owner (the owner of the right to serve the area prior to the annexation) may presumptively continue to serve the area until a determination of compensation has been made. The statute states: "Until the determination [of compensation] by the commission, the facilities shall remain in place and service to the public shall be maintained by the owner". Minn. Stat. § 216B.44.

This presumption is not absolute, however. The statute further provides:

However, the electric utility being displaced, serving the annexed area, shall not extend service to any additional points of delivery within the annexed area if the commission, after notice and hearing, with due consideration of any unnecessary duplication of facilities, shall determine that the extension is not in the public interest.

This is precisely what happened here. Based on the specific facts of this case, after notice and hearing, the Commission decided that it is not in the public interest to allow the electric utility being displaced (People's) to extend service to an additional point of delivery within the annexed area.

At page 4 of its October 28, 1988 Order the Commission stated that it would: "not aggravate any possible duplication of service that may have occurred here by authorizing People's to serve the new customers. Under the circumstances here, a building site with a future customer, allowing the City to serve will avoid customer confusion and alleviate unnecessary transition complications." The Commission also noted the City's willingness to pay reasonable compensation to People's.

The Commission reaffirms these findings. In summary, the Commission recognizes that a municipality's right to serve a newly annexed area does not automatically flow from the act of annexation if another utility is already serving the newly annexed area. While the Commission recognizes an eventual statutory preference for a municipality which owns or operates a utility to serve within its corporate boundaries, that preference rises when just compensation has been made to a utility that is being displaced by the municipal utility. During the time that compensation is being determined, either by the parties or by the Commission at the request of one of the parties, the law provides that the utility that is being displaced continues to serve the area and may extend service to the area in dispute unless the Commission after notice and hearing determines that it is not in the public interest for the displaced utility to do so. The Commission reaffirms its earlier conclusion that authorizing People's to continue serving the disputed area is not in the public interest.

ORDER

1. The Petitions for Reconsideration filed by People's and the Department of Public Service are hereby denied.
2. The Commission's Order of October 28, 1988 in this docket is clarified as explained above.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen

Executive Secretary

(S E A L)