

E-118, 329/SA-89-502REQUIRING CESSATION OF PROVISION OF ELECTRIC SERVICE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

In the Matter of the Complaint by Kandiyohi  
Cooperative Electric Power Association  
Against Willmar Municipal Utilities  
Commission for Extending Electric Facilities  
in and Adjacent to Westwind Estates

ISSUE DATE: August 9, 1989

DOCKET NO. E-118, 329/SA-89-502

ORDER REQUIRING CESSATION OF  
PROVISION OF ELECTRIC SERVICE

PROCEDURAL HISTORY

On July 3, 1989 Kandiyohi Cooperative Electric Power Association (Kandiyohi or the co-op) filed a complaint alleging that the Willmar Municipal Utilities Commission (Willmar or the City) had extended electric service to a customer within Kandiyohi's exclusive service area in violation of Minnesota's assigned service area statutes, Minn. Stat. §§ 216B.37 et seq. (1988). Kandiyohi asked the Commission to issue an Order requiring the City to discontinue providing service to the customer.

The City filed an answer and an amended answer admitting the extension of service and alleging that the City had a right to serve the customer under Minn. Stat. § 216B.44 (1988), because the customer was within the Willmar city limits. The City also alleged that the Commission lacked subject matter jurisdiction over the complaint by virtue of a July 14, 1989 decision of the Kandiyohi County District Court. That decision enjoined Kandiyohi from providing electric service within the City of Willmar until the cooperative had secured a utility franchise from the City.

The Department of Public Service (the Department) filed comments indicating that, if Willmar had in fact extended service to the customer in question, it had done so in violation of the assigned service area statutes.

The matter came before the Commission on July 17, 1989.

FINDINGS AND CONCLUSIONS

## **Factual Background**

In 1974 the legislature directed that the state be divided into geographical areas, called assigned service areas, in which electric utilities would have exclusive service rights. The legislature believed exclusive service territories were necessary to encourage the development of coordinated statewide electric service, to avoid unnecessary duplication of electric facilities, and to promote the provision of economical, efficient, and adequate electric service throughout the state. Minn. Stat. § 216B.37 (1988). The Commission was to set the boundaries of these assigned service areas within twelve months of enactment of the legislation. Minn. Stat. § 216B.39, subd. 2 (1988).

Assigned service areas were established for the City and Kandiyohi by Commission Orders dated April 3 and August 28, 1975 in Docket No. USA-7, In the Matter of the Establishment of Assigned Service Areas of Electric Utilities in Kandiyohi, McLeod, Meeker, and Renville Counties, Pursuant to Chapter 429, Laws of Minnesota, 1974. In those Orders the Commission adopted the service areas proposed by the two utilities and approved their agreement that each would continue serving existing customers within what had become the other's assigned service area. The City reserved the right to acquire Kandiyohi customers within its municipal boundaries upon payment of compensation, and the two utilities agreed to negotiate a formula for determining compensation in such cases. On May 31, 1978 the Commission approved the two utilities' agreement setting forth procedures for determining compensation when either of them acquired the customers or facilities of the other. Docket No. E-118, 239/SA-78-698.

Both utilities agree that the following facts are correct: The customer at issue is located within the service area assigned to Kandiyohi in the 1975 Commission Orders. The City annexed the land on which the customer is located in April 1989. At the time of annexation, there were no customers in the area. There is now one customer in the area, and that customer is receiving electric service from the City. There will soon be other customers; the annexed area is the site of a housing development known as Westwind Estates.

Kandiyohi has not consented to service by the City. A Kandiyohi overhead distribution line with adequate capacity to serve this and other customers runs over the property. The City has offered Kandiyohi no compensation for facilities it may have placed in service in the expectation of serving this or any other customer in the annexed area.

## **Commission Action**

**The City's Position** -- The City argued that it was entitled to serve the customer in question for the following reasons: 1. Its annexation of the area gave it the right to serve the customer under Minn. Stat. § 216B.44 (1988). 2. It was entitled to serve under the 1975 Orders once it extended its city limits to include the area. 3. The co-op could not serve within the city limits because it lacked a franchise. 4. The co-op had allowed similar customer acquisitions without compensation in the past. The City also claimed the Commission lacked subject matter jurisdiction over the case, given the involvement of the district court. Each argument will be discussed in turn.

**The Effect of the Annexation Under the Statute** -- Minn. Stat. § 216B.44 (1988) provides in pertinent part as follows:

Notwithstanding the provisions of sections 216B.38 to 216B.42 [forbidding infringements on other utilities' assigned service areas], 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 those 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. . . .

The statute goes on to establish a procedure for Commission determination of the compensation payable to the displaced utility if the two utilities are unable to agree on compensation. Factors to be considered include "the original cost of the property, less depreciation, loss of revenue to the utility formerly serving the area, expenses resulting from integration of facilities, and other appropriate factors."

The City claimed that, since annexation occurred prior to either utility's delivery of service to customers in the area, the City was free to extend service, the compensation provisions of the statute did not apply, and the City had no obligation to discuss compensation with the co-op beforehand. The Commission has consistently rejected this position as an unreasonably narrow construction of the statute. The Commission continues to do so.

The City's position rests on the statutory language authorizing a municipal utility to serve a newly annexed area "unless the area is already receiving electric service from an electric utility." The City then looks to the definition of "electric service" at Minn. Stat. § 216B.38, subd. 3 (1988), "electric service furnished to a customer at retail for ultimate consumption . . ." and reasons that, since no customer was receiving retail service, there was no electric service to the area.

This interpretation is unworkable from the standpoint of sound utility regulation. As the Commission has stated on many occasions, the coordinated delivery of reliable, affordable electric service throughout the state requires a high level of certainty regarding each utility's territorial boundaries. Utility managers must know exactly where their service territories are and must be prepared to deliver electricity in any part of those territories, including areas where there are no current customers. This requires long term planning and the placement of facilities to meet anticipated, as well as actual, need. For this reason, the "actual customer" test proposed by the City is unreasonable. Such a test would allow a utility to make substantial investments to meet the identifiable future needs of its service area, only to have that investment stranded by a municipality's eleventh hour decision to annex and assert its right to provide electric service to an area the utility had arranged to serve.

For this reason, the Commission has consistently interpreted the statutory phrase "the area is already receiving electric service" to include those situations in which the assigned utility has in place facilities capable of serving the area. See, for example, In the Matter of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester, Docket No. E-132, 299/SA-88-

660, ORDER AFTER RECONSIDERATION CLARIFYING ORDER (February 21, 1989). This interpretation is consistent with the purposes of the Public Utilities Act, specifically the purposes of accommodating utilities' needs to construct facilities to meet the needs of their service areas, of avoiding unnecessary duplication of facilities, and of minimizing disputes between utilities. Minn. Stat. § 216B.01 (1988).

Finally, the Commission does not believe this interpretation conflicts with the § 216B.38 definition of "electric service," since that definition speaks only to those situations in which it is customers who are receiving service. Since § 216B.44 speaks in terms of an area receiving service, different considerations apply.

Therefore, the Commission continues to believe that an area is "receiving electric service" within the meaning of the statute when the utility to whom the area is assigned has facilities in place capable of providing it with service. In this case, the overhead distribution line constitutes such a facility. The City of Willmar was therefore not free to proceed as if the area were not receiving service, but was required to negotiate with Kandiyohi for the acquisition of any facilities designated to serve the area.

In reaching this conclusion the Commission makes no finding regarding the value of any Kandiyohi facilities the City might be required to purchase before serving the annexed area. The overhead distribution line may be necessary to serve other Kandiyohi customers; perhaps no compensation will ultimately be awarded. The fact that Kandiyohi had facilities to serve in place, however, obligated the City to discuss terms of acquisition with Kandiyohi and, in the event of an impasse, to seek Commission resolution of the issue, before providing service to the area.

**The Effect of Annexation Under the 1975 Orders** -- The City argued that, since the 1975 Orders establishing the City's assigned service area attempted to make it contiguous with its corporate boundaries, the annexed area automatically became part of the City's assigned service area upon annexation. This argument fails because those Orders also provided that Kandiyohi would continue to serve its existing customers within the City's assigned service area until the two utilities had agreed to terms for their transfer to the City.

Similarly, in 1978 the Commission approved an agreement between the City and Kandiyohi setting forth procedures for determining compensation when either of them acquired the customers or facilities of the other. Docket No. E-118, 239/SA-78-698, Order dated May 31, 1978. Clearly, neither the Commission nor the parties have ever contemplated that the City could defeat the compensation provisions of these Orders and the statute by annexation alone.

**The Effect of the Franchise Requirement** -- The City argued that the co-op could not serve the customer at issue because the City's corporate charter forbids the provision of utility service unless the provider has a franchise from the City. The City also noted that it could not grant Kandiyohi a franchise because the bonds financing the municipal utility prohibit the City from issuing electric utility franchises.

The Commission will not require the co-op to file a futile application for a franchise to serve the newly annexed territory. Furthermore, the City cannot nullify the provisions of the Public Utilities Act and Commission Orders thereunder by annexing Kandiyohi's assigned service area and then denying the co-op's compensation claim on grounds that it needed a franchise to claim any right to serve the annexed area.

**The Estoppel Claim** -- The City argued that Kandiyohi was estopped to claim compensation for the acquisition in question because the co-op had agreed to two similar acquisitions in the past without compensation. Kandiyohi claimed that those two acquisitions had not involved facilities in place ready to provide service and that no compensation had been necessary.

The Commission finds that Kandiyohi's conduct in the past does not prevent the co-op from claiming compensation in this case. The statute encourages utilities to stipulate to compensation in municipal acquisition cases whenever possible. The Commission, too, believes such agreements should be encouraged and would be loath to find a utility which had entered into such an agreement estopped to bring future disputes before the Commission.

Furthermore, every municipal acquisition involves facts specific to that particular situation. It is difficult, if not impossible, to draw useful conclusions about a utility's position on any specific acquisition by examining its position on a previous acquisition. The City does not allege that the two utilities entered into any comprehensive agreement on how such acquisitions would be treated in the future. The Commission concludes that the co-op is not estopped to request Commission action on its complaint that the City has violated its assigned service area.

**Subject Matter Jurisdiction** -- The City argued that the Commission lacked subject matter jurisdiction over this matter by virtue of the Kandiyohi County District Court Order enjoining Kandiyohi from providing service within the City of Willmar until the co-op had obtained a utility franchise from the City. The Commission does not agree.

The Commission has been granted broad authority to set assigned service areas for all electric utilities within the state, to resolve disputes regarding assigned service areas, and to set compensation when one utility exercises a right to expand its assigned service area at the expense of another. Minn. Stat. §§ 216B.37-216B.465 (1988). This dispute falls squarely within the Commission's statutory authority. The Commission finds that it has jurisdiction over this matter and should proceed.

The Commission regrets that today's decision results in inconsistent determinations by the two tribunals which have considered the matter. The Commission believes, however, that the Commission was and is the proper forum for the resolution of service area disputes. This being the case, the Commission cannot deny Kandiyohi the relief it seeks.

ORDER

1. Kandiyohi Cooperative Electric Power Association is entitled to serve all customers in the newly annexed Westwind Estates area of the City of Willmar who are located within its assigned service area as established in Docket No. USA-7, In the Matter of the Establishment of Assigned Service Areas of Electric Utilities in Kandiyohi, McLeod, Meeker, and Renville Counties, Pursuant to Chapter 429, Laws of Minnesota, 1974.
2. Willmar Municipal Utilities Commission shall forthwith cease providing electric service to all customers in Westwind Estates who are located within the service area assigned to Kandiyohi Cooperative Electric Power Association in Docket No. USA-7, In the Matter of the Establishment of Assigned Service Areas of Electric Utilities in Kandiyohi, McLeod, Meeker, and Renville Counties, Pursuant to Chapter 429, Laws of Minnesota, 1974, and shall allow Kandiyohi Cooperative Electric Power Association to serve such customers.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen  
Executive Secretary

(S E A L)