

E-118, 329/SA-89-502 DENYING RECONSIDERATION ON THE MERITS AND ACCEPTING AMENDED ANSWER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
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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: October 19, 1989

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

ORDER DENYING RECONSIDERATION  
ON THE MERITS AND ACCEPTING  
AMENDED ANSWER

PROCEDURAL HISTORY

On August 9, 1989 the Commission issued its ORDER REQUIRING CESSATION OF PROVISION OF ELECTRIC SERVICE in the above-captioned complaint proceeding. That Order found that Kandiyohi Cooperative Electric Power Association (Kandiyohi) was entitled to serve all customers within the Westwind Estates portion of its assigned service area, despite the area's recent annexation by the City of Willmar. The Order required the Willmar Municipal Utilities Commission to immediately cease providing service to customers within the area, unless and until the City complied with statutory procedures to acquire the right to serve.

On August 29, 1989 the City filed a petition for reconsideration and rehearing. Kandiyohi and the Department of Public Service (the Department) filed responses opposing the petition.

Under Minn. Stat. § 216B.27, subd. 4 (1988), any application for rehearing not granted within 20 days of filing is deemed denied. On September 15, 1989 the Commission granted the City's petition for purpose of affording it adequate review, stating such review would require more than the 20-day statutory period.

The petition came before the Commission on the merits on September 27, 1989.

## FINDINGS AND CONCLUSIONS

In requesting reconsideration and rehearing, the City made five new claims: 1) The district court's decision enjoining Kandiyohi from serving the disputed area was binding on the Commission under principles of res judicata and collateral estoppel; 2) The Commission violated its procedural rules by requiring the City to answer Kandiyohi's Complaint in fewer than 20 days; 3) The Commission jeopardized the City's appeal rights by failing to convene a contested case proceeding; 4) The Order of August 9 lacks a sound evidentiary basis; 5) The Commission misunderstood the facts regarding Kandiyohi's ability to serve the disputed area and consequently failed to recognize the need for a contested case proceeding. Each claim will be examined in turn.

### **The Res Judicata/Collateral Estoppel Claim**

As the August 9 Order notes, the Commission's decision in this case results in conflicting determinations by the Commission and the Kandiyohi County District Court. The City has argued that the Commission must conform its decision to that of the district court, under principles of res judicata or collateral estoppel. The Commission does not agree.

The Commission intervened in the district court action to assert that it has jurisdiction in service area matters, and the Commission maintains that position on appeal. The Commission has jurisdiction because of the need for uniform state-wide service area policies and consistent enforcement of those policies. This need for uniformity in service area matters also prevents the application of res judicata and collateral estoppel in this case.

As the Department has pointed out, res judicata and collateral estoppel are not absolute rules of law which must be applied regardless of their consequences. These doctrines exist to promote judicial economy and can be relaxed for reasons of equity or public policy. As the Supreme Court explained in AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295 (Minn. 1984):

"Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy \* \* \* ."

AFSCME at 299, quoting Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125, 128 (6th Cir. 1971); cited with approval in Johnson v. Consolidated Freightways, 420 N.W.2d 608, 613-14. (Minn. 1988).

In this case, overriding public policy considerations prevent the application of res judicata or collateral estoppel. Adopting the position of the district court would disrupt the ongoing operation of a state-wide regulatory scheme mandated by the legislature and essential to the delivery of electric service throughout the state. It would require the Commission to apply a different rule here than it has applied in at least fourteen other cases involving municipal expansion into other utilities' assigned service areas. It would undermine the integrity of the decisions reached in those cases and the service arrangements adopted in reliance on them. It would place the Commission in an untenable position in deciding future municipal expansion cases. Such developments would clearly be contrary to the public interest, and the Commission will therefore decline to adopt the position of the district court.

### **The Procedural Rules Issue**

The City's petition for reconsideration alleged that, by requiring the City to answer Kandiyohi's complaint in fewer than 20 days, the Commission violated its own procedural rules and issued an Order based upon unlawful procedure. This allegation is misguided, because in this case the Commission followed procedures established by statute for the resolution of service area disputes.

The City is correct in stating that the Commission's general procedural rules establish a 20-day answer period for cases involving formal complaints. Minn. Rules, part 7830.1900. The statutes regarding assigned service areas, however, require that service area disputes be considered within an expedited time frame. This is no doubt because service area disputes generally involve a customer waiting for electric service or a utility constructing or installing facilities another utility believes should be removed. Obviously, such disputes need to be addressed as quickly as possible.

The statute establishing time frames for dealing with service area disputes provides as follows:

Upon the filing of an application under section 216B.42 [pertaining to customers located outside municipalities and having connected loads exceeding 2,000 kilowatts] or upon complaint by an affected utility that the provisions of sections 216B.39 to 216B.42 have been violated [the situation in the present case], the commission shall hold a hearing, upon notice, within 15 days after the filing of the application of complaint, and shall render its decision within 30 days after said hearing.

Minn. Stat. § 216B.43 (1988).

Clearly, Minn. Rules, part 7830.1900 is superseded by the statute, and the statutory time frames control.

Furthermore, prior to its petition for reconsideration, the City made no objection to filing its answer sooner than 20 days from the filing of the complaint. The City has alleged and suffered no prejudice from application of the statutory time frames. The Commission concludes it properly followed the time frames of Minn. Stat. § 216B.43 (1988) in deciding this matter and that its August 9 Order was

not made upon unlawful procedure.

### **The Appeal Rights Issue**

The City's petition for reconsideration alleged that the City's appeal rights were jeopardized by the Commission's failure to convene a contested case proceeding. This is not the case. All final Commission Orders are subject to appeal under Minn. Stat. § 216B.52 (1988), which provides as follows:

Any party to a proceeding before the commission or any other person, aggrieved by a decision and order and directly affected by it, may appeal from the decision and order of the commission in accordance with chapter 14.

Minn. Stat. 216B.52 (1988).

Many Commission decisions not based on contested case proceedings have been appealed to the courts. See, for example, a consolidated service area case recently reviewed by the Court of Appeals, In the Matter of City of White Bear Lake's Request for an Electric Utility Service Area Change Within its City Limits and In the Matter of the Petition of Northern States Power Company for an Electric Utility Service Area Change Within the City of White Bear Lake, 443 N.W.2d 204 (Minn.App. 1988), cert. denied, No. C4-89-59 (Sup. Ct. September 21, 1989). The Commission concludes that it did not jeopardize the City's appeal rights by failing to convene a contested case proceeding.

### **The Evidentiary Basis/Factual Misunderstanding Claims**

The City claimed that the Commission misconstrued its answer, misunderstood the facts regarding Kandiyohi's ability to serve the disputed area, and consequently issued an Order lacking a valid evidentiary basis. The Commission does not agree.

As the August 9 Order explains, the service area statutes require municipal utilities wishing to expand into areas receiving service from another utility to first compensate the other utility. Minn. Stat. 216B.44 (1988). Municipal utilities may not begin serving such areas until compensation has been arranged, unless the Commission awards the municipality interim service rights after a hearing. To ensure orderly transitions and to protect the integrity of the assigned service area system, the Commission has interpreted "receiving service" to mean having facilities in place capable of serving the area. The City maintained that there was a genuine issue of material fact as to whether or not Kandiyohi had in place facilities capable of providing service to the disputed area.

This claim is without merit. It was and is undisputed that Kandiyohi has two electric lines running along the south end of the lot in question. One is an overhead distribution line of the sort normally used to serve residential customers. The other is a three phase distribution line capable of delivering higher grade power, but also capable of serving residential customers. The only customer currently in the disputed area is a residential customer.

In its amended answer<sup>1</sup>, the City dealt with these facts as follows:

4. Denies the allegations contained at paragraph 4 and affirmatively asserts that KCEPA has an overhead distribution line which runs along the south line of Lot 1, Block 1, Westwind Estates, but that this overhead distribution line has not, upon information and belief, been outfitted with a transformer permitting it to provide electric service to Lots 1-4, Block 1, Westwind Estates.

5. Denies the allegations contained at paragraph 5 and affirmatively asserts that while Kandiyohi has a three phase electric line located at the south boundary of Lot 1, Block 1, Westwind Estates, and while this three phase electric line has adequate capacity to provide electric service to this lot, to other lots in the subdivision and elsewhere in Kandiyohi's service territory, it is not currently capable of providing electric service to retail customers in Lot 1, Block 1, Westwind Estates, to other lots in the subdivision and elsewhere in Kandiyohi's assigned service area.

The City claimed Kandiyohi's capability of providing service is at issue for two reasons: 1) the poles of the distribution lines running along the border of the property are not outfitted with transformers; and 2) the Commission has not conducted an inquiry thorough enough to ensure that the lines have the capacity to provide service to the area. Each contention will be addressed in turn.

**The Significance of Transformers in Determining Ability to Provide Service** -- The City claimed there was a genuine issue of material fact regarding whether the overhead distribution line and three phase line could be characterized as capable of providing service when their poles had not been outfitted with transformers. The Commission rejected this argument initially and continues to reject it as unreasonable.

Installing transformers on utility poles is a routine, inexpensive, and speedy procedure. It would not be reasonable to require a utility to show transformer-equipped poles to demonstrate its ability to serve an area. To do so would require utilities either to burden ratepayers with the expense of installing unnecessary transformers throughout their service areas or to subject ratepayers to the financial risks of over-capacity when areas included in long range planning were transferred without compensation to municipal utilities. The Commission concludes the absence of transformers on the utility poles at issue does not create a genuine issue of material fact.

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<sup>1</sup>At oral argument on July 17 the City clarified its position on Kandiyohi's ability to serve the disputed area. The City stated it intended to file an amended answer incorporating the clarification, and did so on July 20. The Commission's August 9 Order was based on the clarification presented at oral argument and set forth in the amended answer. The Order inadvertently failed to note formal acceptance of the amended answer, however. For purposes of clarification, the Commission hereby accepts the amended answer.

**The Adequacy of the Overhead Distribution and Three Phase Electric Lines** -- The City also claimed that there was a genuine issue of fact as to whether the overhead distribution line and three phase electric line bordering the property of the only customer in the disputed area could provide adequate service to the area. The Commission rejects this contention as well.

The City's amended answer admitted that the three phase line has adequate capacity to serve retail customers in the annexed area:

. . . this three phase electric line has adequate capacity to provide electric service to this lot, to other lots in the subdivision and elsewhere in Kandiyohi's service territory

. . .

Amended Answer, paragraph 5.

Nevertheless, the City stated that, in order to find Kandiyohi's facilities capable of providing service to the disputed area, the Commission must receive evidence on each line's current capacity, current load, and projected future load; on the foreseeable electric needs of the annexed area; on Kandiyohi's current and future capacity needs; and on what Kandiyohi's plans for each line had been at the time of installation. The Commission does not agree.

For purposes of determining the initial issue of whether a municipal utility may provide electric service within the assigned service area of another utility without first addressing the issue of compensation, the relevant question is whether the displaced utility has facilities in place capable of serving the area. Answering this question does not require an examination of either utility's long term capacity needs or of the long term service needs of the area in question. The only issue is whether the utility the municipality seeks to displace can provide service to the area in the near term, while compensation issues are being resolved. Even the City has not suggested that Kandiyohi cannot serve the residential customer currently in the area or other residential customers who may locate in the housing development while compensation issues are being resolved.

The far-reaching questions raised by the City are relevant and important, of course, in determining compensation. It is certainly correct that, if Kandiyohi will soon need both the overhead distribution line and the three-phase electric line whether it serves Westwind Estates or not, it may well be entitled to less compensation than if the lines were necessary primarily to serve Westwind Estates. Issues of present and future capacity and present and future need are examined in detail in compensation proceedings. The City, however, has refused to negotiate with Kandiyohi regarding compensation, to initiate a compensation proceeding, or to request interim service rights while compensation issues are resolved.

Therefore, the only issue currently before the Commission is whether Kandiyohi has in place facilities capable of providing service to the area in the near term. The answer to that question is clearly affirmative. Kandiyohi is therefore entitled to serve the disputed area until the issue of compensation has

been resolved, or until the City presents a proper petition for interim service rights and demonstrates that the public interest requires allowing the City to serve while compensation issues are being resolved.<sup>2</sup> The Commission will so order.

ORDER

1. The Commission grants the City's motion to amend its answer and accepts the amended answer filed on July 20, 1989.
2. The Commission denies the City's petition for reconsideration and rehearing on the merits.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen  
Executive Secretary

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<sup>2</sup>As the Commission stated on page 5 of its August 9 Order, its determination that the City was required to discuss the terms of its acquisition of Westwind Estates prior to providing service presupposes no finding regarding the value of any facilities the City might be required to purchase. Perhaps no compensation will ultimately be payable. Since Kandiyohi had facilities in place to serve the area, however, the City was obligated to discuss terms of acquisition, and, in the event of an impasse, to seek Commission resolution of the issue, before providing service to the area.