

E-132, 299/SA-88-660 DENYING PETITION FOR RECONSIDERATION OF ORDER AFTER  
REMAND

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

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

ISSUE DATE: June 4, 1990

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

ORDER DENYING PETITION FOR  
RECONSIDERATION OF ORDER AFTER  
REMAND

**PROCEDURAL HISTORY**

On September 29, 1988, People's Cooperative Power Association, Inc. (People's) filed a complaint with the Commission alleging that the City of Rochester was constructing electric distribution facilities within People's exclusive assigned service territory.

On October 28, 1988, the Commission issued its ORDER FINDING CONDUCT IN VIOLATION OF LAW AND REFERRING MATTER TO THE ATTORNEY GENERAL AND ASSIGNING INTERIM SERVICE RIGHTS. In addition to determining that the City had violated People's service area, the Commission assigned interim service rights to the City of Rochester upon completion of the annexation process.

On February 21, 1989, the Commission issued its ORDER AFTER RECONSIDERATION CLARIFYING ORDER reaffirming the decisions reached in the October 28 Order but explaining that the area was receiving service from People's at the time of annexation and that the Commission had properly determined interim service rights after notice and hearing pursuant to Minn. Stat. §216B.44.

On October 18, 1989, the Minnesota Court of Appeals reversed and remanded the Commission's decision, stating that a contested case hearing was required before displacing an assigned utility from its exclusive service territory when material facts were in dispute.

The Commission subsequently issued a notice allowing parties to supplement or amend their pleadings. No party did so.

On March 13, 1990, the Minnesota Department of Public Service (Department) filed comments noting that the issue of interim service was not before the Commission and that People's original complaint should be acted upon. The Commission met on this matter on April 3, 1990.

On April 25, 1990, the Commission issued its ORDER AFTER REMAND. In it, the Commission

determined that it had erred in assigning interim service rights when no petition for such rights was before it. It determined that the facts surrounding the original complaint were clear and undisputed, that the area was receiving service from People's at the time of annexation, and that the City had violated the Cooperative's service area in constructing the line. The Commission ordered the City to cease and desist from providing service within the area, and to coordinate with the Cooperative for an orderly transfer of service to the affected customer, Victory Baptist Church. It further found the City in violation of the service area statutes and referred the matter to the Office of the Attorney General for possible penalties.

On May 14, 1990, the City filed a petition for reconsideration of the Commission's ORDER AFTER REMAND.

On May 22, 1990, the Department replied to the City's petition recommending that the petition be denied.

On May 31, 1990, the Commission met to consider this matter.

### **FINDINGS AND CONCLUSIONS**

In its Petition for Reconsideration of Order After Remand, the City of Rochester (City) made two general assertions:

1. That the Commission's order requiring the City to terminate electric service to Victory Baptist Church was arbitrary, capricious, unreasonable, unsupported by the evidence, in derogation of the public interest, and in excess of the Commission's authority because the City has served this particular customer for a period in excess of 18 months and because the area in question is included in a proceeding that Rochester has had pending before the Commission for over one year to adjust its assigned service area and to determine appropriate compensation as a result of that adjustment; and
2. That the Commission's order violated the City's rights to due process of law and violated the mandate of the Court of Appeals.

The City's first general assertion falls because the two bases cited for it by the City are unsound:

1. First, the fact that the City has served Victory Baptist Church for 18 months pursuant to the Commission's October 28, 1988 Order does not give the City a right to continue to serve that customer indefinitely. The Commission has the authority under

Minn. Stat. § 216B.25 to rescind, alter or amend any order at any time for any reason. In ordering the City to terminate its service to Victory Baptist Church, the Commission properly rescinded its October 28, 1988 order granting the City interim service rights to Victory Baptist Church.

Indeed, the Commission's action was dictated by mandate of the Court of Appeals. The Court of Appeals determined that the Commission's decision to allow the City to serve Victory Baptist Church in the first place without conducting a contested case hearing was an error. In the Matter

of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester, 447 N.W.2d 11 (Minn. Ct. App. 1989), cert. denied January 8, 1990.

The Court of Appeals noted that the provisions of Minn. Stat. § 216B.40 provide that a utility (in this case People's) has exclusive rights to serve all customers within its assigned service area (including, in this case, Victory Baptist Church). The Court of Appeals further clarified that Minn. Stat. § 216B.44 requires that, even though the City has annexed the territory in question, the displaced utility (People's) is entitled to extend service to additional points of delivery within the annexed area pending the Commission's finding, after notice and hearing, including a contested case hearing if material facts are in dispute, that People's extension of service to that additional point is not in the public interest.

In light of this analysis, it is clear that the Commission's ORDER AFTER REMAND requiring the City to cease serving the church and to coordinate with People's initiation of service to the church was the logical and correct application of the Court of Appeals decision and the statutes cited.

2. Second, the City's factual allegation that its petition for adjustment of its service area and determination of compensation has been pending before the Commission for over a year is misleading. The City's petition has been referred, with the City's approval, to the Office of Administrative Hearings for contested case hearing. That office currently has jurisdiction over the matter. The parties are setting the timeline for the compensation case by mutual agreement, and have elected to delay much of the proceeding until the initial decision has been reached in Docket E-132/SA-88-270 (North Park 1 & 2). Furthermore, People's filed its complaint against the City long before the City filed its petition for adjustment. In light of these facts, fairness requires prompt resolution of the complaint independent of the adjustment proceedings.

The City's second general assertion in its petition for reconsideration was that the Commission violated the City's rights to due process and the mandate of the Court of Appeals because it issued its ORDER AFTER REMAND without further hearing in this matter. The City's contention is without merit.

Court of Appeals Mandate: The Court of Appeals did not find that the City was entitled to a contested case hearing regarding People's complaint against the City. Rather, the Court addressed the issue of interim service rights and found that because this issue involved disputed material facts a contested case hearing must be held before the Commission could issue an order to displace the co-operative from its assigned service area. In the Matter of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester, 447 N.W.2d 11, 13 (Minn. Ct. App. 1989), cert. denied January 8, 1990.

Due Process: The City has not filed a petition to determine the interim service rights to Victory Baptist Church. Therefore, it has not initiated the first step toward becoming entitled to a contested case hearing on that issue. In its ORDER AFTER REMAND, the Commission addressed the only issue properly before it, People's complaint against the City under Minn. Stat. § 216B.43. Regarding that complaint, there were no material facts in dispute and the City does not assert that there were material facts in dispute. In such circumstances, due process did not require the method of trial. 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, No. C-89-2025, slip op. at 11 (Minn. Ct. App. filed May 2, 1990). See also Costle v. Pacific Legal Foundation, 445 U.S. 198, 214 (1980) and Jones v. Minnesota State Board of Health, 301 Minn. 481, 483-84, 221 N.W.2d 132, 134-35 (1974).

To summarize: the Commission finds that the City's petition for reconsideration raises no new issues, offers no new evidence and identifies no issues requiring further consideration by the Commission. The Commission will deny the petition.

**ORDER**

1. The City of Rochester's petition for reconsideration and rehearing is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster  
Executive Secretary

(S E A L)