

E-017/M-89-436 REQUIRING NEW TARIFF AND CONTRACT FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
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In the Matter of Otter Tail Power Company's
Request for Approval of Two New Contracts
on its Bulk Interruptible Service Tariff

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In the Matter of Otter Tail Power Company's
Request for Approval of a Modification of its
Bulk Interruptible Service Tariff

ORDER REQUIRING NEW TARIFF AND
CONTRACT FILINGS

In the Matter of Otter Tail Power Company's
Request for Approval of Renewal of an
Amended Bulk Interruptible Service Contract

PROCEDURAL HISTORY

On June 9, 1989 Otter Tail Power Company (Otter Tail or the Company) filed a request for approval of two contracts for service under its bulk interruptible service tariff, a flexible rates tariff available to customers with access to alternative energy sources. The two customers with whom the Company had contracted were Perham Ag Processing and Research Center, and Quadrant Company.

On July 17, 1989 the Company filed a request for approval of three revisions to its bulk interruptible service tariff. The proposed revisions would reduce the installed capacity necessary to qualify for bulk interruptible rates; provide for monthly, instead of semi-annual, adjustments in the energy rate; and introduce a time-of-use rate differential.

On December 12, 1989 the Company filed a request to modify and renew its bulk interruptible service contract with Mid-America Dairymen, Inc.

Initial Comments

The Department of Public Service (the Department) intervened and initially recommended disapproval of all three filings on two grounds: 1. The Commission lacked the authority to approve flexible electric rates. 2. The Company's record in administering its bulk interruptible service tariff demonstrated an inability or unwillingness to conform with Commission requirements applicable

to such tariffs.

To support its claim of improper administration of the bulk interruptible service tariff, the Department pointed to the following facts: Although the Order permitting bulk interruptible service required prior Commission review and approval of all contracts,¹ the Company did not file the first contract signed for two years, until the Department discovered it. Similarly, the two contracts filed on June 9 had been executed seven and nine months before filing, and performance had already begun. The contracts also contained two terms at variance with those permitted under the tariff, time-of-use rate differentials and monthly adjustment of energy rates. Finally, neither of the two contracts contained required language apprising customers that contract rates were subject to the Commission's ratemaking authority and could be changed in a general rate case.

The Residential Utilities Division of the Office of the Attorney General (RUD-OAG) intervened and filed initial comments on January 26, 1990. The RUD-OAG urged the Commission to defer action on all three filings until the Legislature had acted on proposed competitive electric rate legislation then before it.

Legislative Action and Subsequent Comments

On March 29, 1990 the Governor signed new legislation, now codified at Minn. Stat. § 216B.162 (1990), permitting competitive electric rates and specifying the terms and conditions under which they may be offered. The Commission solicited supplementary comments from all parties in light of this legislative action.

The Company claimed the new legislation should have no effect on the three filings at issue, for the following reasons:

¹ In the Matter of the Petition of Otter Tail Power Company, Fergus Falls, Minnesota for Authority to Offer Bulk Interruptible Service to Certain Customers within the State of Minnesota, Docket No. E-017/M-83-118, ORDER APPROVING FILING (April 1, 1983).

1. The Commission allegedly retained the inherent authority to approve competitive tariffs inconsistent with the statute, as long as those tariffs were just, reasonable, and not unduly discriminatory.
2. Application of the new statute to these three filings would violate the constitutional prohibition against ex post facto laws.
3. Application of the new statute to these three filings would constitute retroactive ratemaking.
4. Application of the new statute to these three filings would violate Minn. Stat. § 645.21 (1988), which creates a presumption against retroactive application of new statutes.
5. The delay in processing these filings violates constitutional due process guarantees and therefore requires application of the law at the time of filing, even if the new statute could otherwise be applied.

The Department filed comments withdrawing its opposition to competitive rates as such. The Department and the RUD-OAG both filed comments recommending that the Company be required to amend all three filings to meet the requirements of the new statute. They also denied that applying the new statute to these filings constituted ex post facto enforcement, retroactive ratemaking, violation of Minn. Stat. § 645.21 (1988), or deprivation of due process of law.

The matter came before the Commission on September 26, 1990.

FINDINGS AND CONCLUSIONS

The Commission finds that the new competitive rates statute does apply to these three filings and that the Company should refile them after bringing them into compliance with its provisions. The Commission also finds that all competitive electric rates approved in the future must comply with the requirements of the new statute.

The Commission Cannot Approve Competitive Rate Schedules which Do Not Comply with Minn. § 216B.162 (1990)

The Company maintained that the Commission had inherent authority to approve competitive rates apart from the provisions of the new statute, and could therefore approve rates and tariffs which did not meet its requirements. The Commission disagrees. The Commission believes that it acted within its authority in approving competitive rates in the past, but that the Legislature has now provided policy guidance which must be followed.

The new competitive rates statute does not present its requirements as options available to

supplement those already available to the Commission. Instead, it requires that all competitive rate schedules approved by the Commission incorporate its provisions:

When the commission authorizes a competitive rate schedule for a customer class, it shall set the terms and conditions of service for that schedule, which must include:

...

Minn. Stat. § 216B.162, subd. 4 (1990), emphasis added.

The Commission therefore rejects the Company's contention that it would be permissible to approve competitive rate filings which do not comply with the terms of the 1990 statute.

Applying the 1990 Statute to the Three Filings Does Not Violate the Constitutional Prohibition Against Ex Post Facto Laws

The Company contended that the three filings at issue must be examined in terms of the law as it existed at the time of filing, to avoid violating the Constitutional prohibition against ex post facto laws. The Commission disagrees. As the Department and the RUD-OAG have pointed out, Constitutional prohibitions against ex post facto laws apply only in the criminal context. Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869 (1955).

Applying the 1990 Statute to the Three Filings Does Not Constitute Retroactive Ratemaking

The Company claimed that applying the 1990 statute to its 1989 filings would constitute retroactive ratemaking. The Commission disagrees. The prohibition against retroactive ratemaking, also known as the filed rate doctrine, "bars the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 578, quoting City of Piqua, Ohio v. FERC, 610 F.2d 950, 954 (D.C. Cir. (1979)).

In this case, the Commission is not considering changing a rate which has already been charged or collected. Any rate established as a result of this proceeding will apply prospectively only. The prohibition against retroactive ratemaking therefore does not apply.

Applying the 1990 Statute to the Three Filings Does Not Violate Minn. Stat. § 645.21 (1988)

Minn. Stat. § 645.21 (1988) provides as follows: "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." The Company argued that applying the new competitive rates statute to filings made before its passage would constitute retroactive construction and application. The Commission disagrees.

Whatever action the Commission takes on these three filings will be prospective only. The Commission is not seeking to change the terms of any rate schedule already approved; it merely

seeks to apply existing law to rate filings currently before it.² This is good regulatory policy and is consistent with standard judicial practice.

The Delay in Processing these Filings Does Not Require the Commission to Ignore the Passage of the 1990 Competitive Rates Statute

The Company contended that if the Commission had acted promptly on these filings, they would have been approved under the old "just, reasonable, and not unduly discriminatory" standard, and that the Commission therefore has an obligation to apply that standard now. The Commission disagrees.

First of all, much of the delay in this case is attributable to the Company, which has not previously demonstrated concern about prompt Commission action on competitive rate tariff filings. The two contracts submitted for approval on June 9 had been executed seven and nine months prior to filing. Performance had already begun. It appears that if the Company had filed these contracts promptly, they would have reached the Commission before the Legislature began considering competitive rates legislation, and they would have been evaluated under the old standard. The Company's own actions, then, resulted in the delay to which it objected.

Furthermore, the Commission believes it was appropriate to defer action on the filings once it was clear that legislative guidance on the policy issues they raised was imminent. The Commission has a legislative function under the law and does not hesitate to fulfill its policymaking responsibilities. Minn. Stat. § 216A.02 (1988). At the same time, however, the Legislature is the state's pre-eminent policymaker. Commission policies must conform with legislative policies in letter and in spirit. It is therefore appropriate and desirable for the Commission to defer major policy decisions when necessary to ensure consistency between its decisions and those of the Legislature. As the Commission has noted before, this delay is preferable to sending misleading or inconsistent signals to members of the public and participants in the regulatory process.³

The Commission concludes that the delay in acting on these filings does not require application of the old standard in evaluating them.

Commission Action

The Commission will require the Company to file a new bulk interruptible service tariff which conforms with the requirements of Minn. Stat. § 216B.162 (1990). All contracts for bulk

² The Commission makes no finding on the permissibility of requiring existing, approved competitive tariff schedules to conform with the new statutory requirements.

³ See, In the Matter of the Petition for Extended Area Service from Iron Trail United Communities, Docket No. P-407, P-421/CP-87-747, ORDER VARYING TIME REQUIREMENTS AND DEFERRING CONSIDERATION OF PETITION AND VARIANCE REQUESTS (February 2, 1989).

interruptible service which have not been approved by the Commission, including those at issue, must conform with the new tariff, once it has been approved.

In the future, contracts for bulk interruptible service shall be filed promptly, before service under the contract begins. Because of past difficulties with prompt filing and reporting, the Commission will require a filing which lists all customers currently receiving bulk interruptible service, the size of each customer's load, the source of effective competition for each customer, the expiration date of each contract, and all customers the Company considers eligible for bulk interruptible rates.

Approved contracts for bulk interruptible service currently in effect may continue until their expiration, to minimize disruption of established service arrangements.

ORDER

1. Within 30 days of the date of this Order, the Company shall file, for Commission approval, a new bulk interruptible service tariff which conforms with the requirements of Minn. Stat. § 216B.162 (1990). All contracts for bulk interruptible service which have not been approved must conform with the new tariff.
2. Within 30 days of the date of this Order, the Company shall make a filing which lists all customers currently receiving bulk interruptible service, the size of each customer's load, the source of effective competition for each customer, and the expiration date of each customer's contract.
3. Within 30 days of the date of this Order, the Company shall make a filing which lists all customers the Company considers eligible for bulk interruptible rates.
4. Commission-approved contracts for bulk interruptible service currently in effect may continue until their expiration.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)