

E-132, 299/SA-92-86 ORDER REJECTING CLAIM TO PERMANENT SERVICE RIGHTS AND DENYING PETITION FOR INTERIM SERVICE RIGHTS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner
Norma McKanna	Commissioner

In the Matter of the Petition by
the City of Rochester to Provide
Interim Electric Service to the
New 55th Street Mall

ISSUE DATE: August 31, 1992

DOCKET NO. E-132, 299/SA-92-86

ORDER REJECTING CLAIM TO
PERMANENT SERVICE RIGHTS AND
DENYING PETITION FOR INTERIM
SERVICE RIGHTS

PROCEDURAL HISTORY

I. Proceedings to Date

On January 31, 1992 the City of Rochester filed a petition for interim authority under Minn. Stat. § 216B.44 (1990) to provide electric service to a new retail mall scheduled for construction in the spring of 1992. The mall, known as the 55th Street Mall, is within the Rochester city limits. The City claimed the mall was also within its assigned service area, but believed the merits of that claim might not be resolved until the conclusion of an ongoing contested case proceeding between itself and a neighboring utility, People's Cooperative Power Association.¹ The City sought interim service authority to allow it to serve the mall while service area boundaries and appropriate compensation were being determined in the contested case.

On February 19, 1992 People's Cooperative Power Association (People's or the co-op) filed a response claiming the mall was within its service area and opposing the City's interim service request. On March 4, 1992 the Department of Public Service (the Department) filed initial comments recommending denial of the City's petition.

¹ In the Matter of the Application of the City of Rochester, Minnesota to Adjust its Service Area Boundary with People's Cooperative Power Association, Inc., Docket No. E-132, 299/SA-88-996, OAH Number 9-2500-4051-2.

On March 19, 1992 the Commission issued its ORDER REQUIRING FURTHER FILINGS. The Order required both utilities to make filings detailing the facts surrounding the 1982 service territory transaction on which Rochester based its claim to permanent service rights. The Order also required both utilities to provide detailed information about how they would serve the mall and at what rates.

The utilities duly filed affidavits and comments in response to the March 19 Order. The Department filed comments on both the permanent and interim service issues. The Department contended the permanent service issue had already been decided in favor of People's in the ongoing contested case proceeding. The Department recommended denying the City's petition for interim service rights on grounds that the public interest did not require transferring service rights before compensation had been determined.

The matter came before the Commission on June 10, 1992.

FINDINGS AND CONCLUSIONS

II. The Permanent Service Issue

A. Factual Background

The assigned service areas of these two utilities were set by agreement in 1975. At that time the utilities also filed with the Commission their agreement to use a 1970 agreement to determine compensation when the City decided to serve portions of People's' service area within its city limits. (The service area statute allows a municipal utility to acquire the right to serve any area within its municipal boundaries upon payment of appropriate compensation to the displaced utility.)

From 1975 until 1988, neither People's nor Rochester asked the Commission to change their official service area boundaries or to determine compensation for any service territory acquisition. During that time, however, the City extended service to approximately 1,700 customers in portions of People's' service territory annexed in some 70 separate annexation proceedings. In some of these cases the City paid compensation under the terms of the 1970 agreement. In others, the City paid nothing, believing nothing was due. Both utilities were slow to recognize the magnitude of the service area problems that were developing.

People's began filing service area complaints in 1987. In 1988 Rochester filed a petition asking the Commission to change the official service area maps to transfer to the City all portions of People's' service area within Rochester's current municipal boundaries. The City claimed it had acquired the right to serve

these areas by operation of law or under compensation agreements between itself and the co-op. The City also asked the Commission to determine appropriate compensation for any areas within the city limits to which the Commission determined service rights had not already passed to the City.

The Commission found evidentiary hearings necessary to determine the validity of the City's claims and to calculate any appropriate compensation. The Commission referred the petition to the Office of Administrative Hearings for contested case proceedings. That proceeding, which is ongoing, is entitled In the Matter of the Application of the City of Rochester to Adjust its Service Area Boundary with People's Cooperative Power Association, Inc., Docket No. E-132, 299/SA-88-996 (the 996 docket).

At the prehearing conference at the beginning of the 996 proceeding, the parties and the Administrative Law Judge agreed that the most efficient way to proceed would be to conduct evidentiary hearings in two phases. Phase I would determine the original service area boundaries of the two utilities, any service territory transfers that have occurred since then, and whether the circumstances of any unauthorized service extensions warranted a referral for penalty proceedings. Phase II would determine appropriate compensation for the City's acquisition of all portions of People's' service territory remaining within the Rochester city limits.

Phase I of the proceeding has been completed. On December 28, 1990 the Commission issued its INTERIM ORDER DETERMINING 1975 SERVICE AREA BOUNDARIES, DETERMINING SERVICE AREA CHANGES SINCE 1975, AND REFERRING SERVICE AREA VIOLATION TO THE ATTORNEY GENERAL. Phase II is in progress.

B. The Area at Issue

The mall site to which the City claims permanent service rights is located on property that was once part of a farmstead owned by Clarence and Elizabeth Hoffman. In 1977 the Hoffmans sold their farm to a real estate development firm, Cordul Establishment, Inc. Cordul did not begin development immediately, but instead leased the tillable acreage and the buildings to tenants. Cordul was still leasing the land and buildings in 1982, when the City and the co-op entered into a major service territory agreement. As part of this agreement the City purchased the right to serve the "Hoffman farm account."

The utilities have dramatically different interpretations of what the term "Hoffman farm account" means. The City argues that it refers to all the land in the original Hoffman farmstead, saying it is common in the Rochester area to refer to land long farmed by a specific family as the "farm" of that family, even after the land is sold to a developer. Since the mall will be located

within the boundaries of the original Hoffman farm, this interpretation would give the City permanent service rights to the mall.

The City also argues that it has service rights to the entire area annexed with the mall site in 1976, based on the Commission's interpretation of the 1982 service area agreement in its Order in Phase I of the 996 docket. In that Order the Commission agreed with the Administrative Law Judge that the 1982 agreement transferred to the City service rights to annexed areas where the City purchased all co-op customers and facilities.² The City argues that in 1982 it tried to purchase, and believed it had purchased, all accounts in the area annexed with the former Hoffman farm. However, the Commission's Order in Phase I of the 996 docket adopts the Administrative Law Judge's list of areas where service rights have passed to the City, and neither the original Hoffman farm nor the 1976 annexation which included it are listed. The City argues that this was an oversight on the part of the Administrative Law Judge and the parties.

People's disagrees. The co-op claims the City purchased only one residential account in the annexed area, the residential account corresponding to the service address of the former Hoffman residence and outbuildings. The co-op claims it continued to serve at least three accounts in the area and assumed the City was aware of that. The co-op states its understanding in 1982 was that the City wanted to acquire the Hoffman farm account as part of a larger effort to acquire all accounts in the right of way for streets scheduled for construction. The three accounts in the annexed area the co-op continued to serve were not in the right of way.

The City claims that to the extent the co-op continued serving accounts in the area, it served without authority and without the City's knowledge. The City claims the co-op failed in its obligation to give the City a complete list of accounts at the time of the 1982 transaction and the City should not bear the consequences of the co-op's negligence.

C. Commission Action

The Commission's December 28, 1990 Order in the 996 docket accepted and adopted the Administrative Law Judge's findings on which areas entered the City's assigned service area as a result of the 1982 transaction and which did not. The Order did not find the annexation at issue or the old Hoffman farmstead to be areas transferred under the 1982 agreement.

² 996 docket, INTERIM ORDER DETERMINING 1975 SERVICE AREA BOUNDARIES, DETERMINING SERVICE AREA CHANGES SINCE 1975, AND REFERRING SERVICE AREA VIOLATION TO THE ATTORNEY GENERAL (December 28, 1990) at p. 5.

The December 28 Order did not address the issues raised by the City in this case because they were not raised in the 996 docket. The City argues that this was an oversight, that it should have raised them then, and that the Commission should consider them now. The Commission disagrees.

The 996 docket has been in progress since 1988. The parties and the Administrative Law Judge agreed that Phase I would determine which portions of People's' original service territory, if any, had passed to the City by operation of law or agreement between the parties. They agreed that Phase II would determine compensation issues. The Administrative Law Judge conducted evidentiary and public hearings on Phase I issues and submitted a comprehensive report to the Commission. The Commission made its decision on Phase I issues based on the extensive evidentiary record developed in those hearings. That decision was issued on December 28, 1990. Phase II has been in progress since that time.

The Commission believes the 996 proceeding has reached a stage at which it would be unproductive and unfair to reopen Phase I to consider the issues raised by the City in this case. Justice and efficiency require that those issues be treated as settled. The 996 case is so complex and multi-faceted it is not surprising that Phase I issues continue to occur to the parties. It would be surprising if they did not. Reconstructing the facts surrounding some 70 separate annexations over the course of 10 years is difficult. Separating interrelated service area and compensation issues is difficult, too. If the 996 proceeding is to proceed in an orderly way, however, and if it is ever to end, Phase I must be viewed as closed. The Commission concludes that the issues raised by the City in this case do not merit reopening Phase I and that service rights remain where the Phase I Order placed them, with the co-op.

III. The Interim Service Rights Issue

A. The Legal Standard

Under Minn. Stat. § 216B.44 (1990), a municipal utility may acquire the right to serve any area within its city limits upon payment of appropriate compensation to the displaced utility. The statute also provides that the Commission may allow the municipal utility to serve new customers in the area at issue if the Commission finds that new service extensions by the assigned utility would not be in the public interest. Otherwise, the assigned utility is to continue serving old and new customers until compensation has been determined and paid.

B. The City's Claims

The City stated it intends to exercise its statutory right to expand its assigned service area to include the mall and will therefore be the permanent service provider. In light of this intention, the City based its petition for interim service rights on the following claims:

1. It would be more convenient for the mall's tenants to deal with their permanent service provider from the outset;
2. The co-op appears to lack sufficient feeder or substation capacity to serve the mall's projected load, and the City should not be expected to compensate People's for equipment and facilities acquired solely for the purpose of providing interim service to the mall;
3. Integrating the two utilities' facilities when service rights are transferred to the City will involve expense and inconvenience that could be avoided by granting the City interim service rights;
4. If the City serves the mall's two anchor customers, Sam's Club and Walmart, from the date they first take service, the City can offer them reduced rates under its wholesale provider's Economic Development tariff.

C. Commission Action

The Commission has examined the City's claims individually and as a whole and concludes they do not support a finding that interim service by the co-op would contravene the public interest. The co-op should therefore continue providing service to the area, including new points of delivery, while compensation is being determined. Minn. Stat. § 216B.44 (1990). The City's claims are examined individually below.

1. Customer Convenience

The City stated that the energy needs of commercial customers, especially those as large as Sam's Club and Walmart, are best met through long range planning conducted jointly by the customer and its permanent service provider. The City gave the following examples of factors to be considered in long range planning: 1. customer liability for installation and excess construction costs; 2. any need for customer-owned voltage regulation equipment; 3. any need for customer-owned single phase protection equipment; 4. any need for customer-owned power surge protection equipment; 5. any need for customer-owned backup generation; 6. any rate or reliability advantages available through customer ownership of its own transformer.

The City said that if the co-op provides service, mall tenants might wish to consider purchasing equipment to protect themselves against voltage swings, single phasing on three phase equipment, and power surges, and might consider purchasing backup generators. The implicit claim was that People's would provide lower quality service than Rochester, requiring mall tenants to make higher investments in internal electric equipment. The City provided no dollar figures, except to say that customer-owned transformers adaptable to both utilities' systems would cost 10% more than standard transformers.

People's filed affidavits showing that it has adequate capacity to serve the mall's projected load and that it is in the middle of major line construction projects, pursuant to long range plans developed in 1979, that will reduce or eliminate the potential service quality problems identified by the City. Upon review of these affidavits, the Department concluded service quality and customer convenience do not pose barriers to allowing the co-op to serve while compensation is being determined. The Commission agrees.

2. Insufficient Feeder and Substation Capacity

The City stated the co-op appeared to have insufficient feeder and substation capacity to serve the mall without making new investments. The City feared it would be asked to compensate the co-op for these investments when it acquired permanent service rights. Again, however, People's filed affidavits stating existing equipment, together with system upgrades planned before the mall was proposed and necessary in any case, will allow it to provide adequate service to the mall. The Commission concludes People's' substation and feeder capacity do not cut in favor of granting the City interim service rights.

3. Integration Expense and Inconvenience

The City argued it should be granted interim service rights to avoid the expense and inconvenience of integrating People's' facilities with its own when it acquires permanent service rights. The City provided no cost figures. The Commission has rejected this argument in the past and continues to believe integration does not pose significant technical difficulties. In this case, as before, People's states it is willing to work with the City in designing and constructing the distribution system to serve the mall. This cooperation should ensure a design that will meet the City's needs and minimize integration costs.

Furthermore, although the City's commitment to serve every resident of the City of Rochester may eventually be fulfilled, it is inappropriate to proceed as if that were an absolute certainty. The firmest intentions can be frustrated by economic realities. The process of determining compensation for service

rights to co-op territory within the city limits has not yet been completed. Once actual acquisition costs are known, the City could decide to adopt a gradual approach to service territory acquisitions, or even to defer certain acquisitions indefinitely. In short, the City's acquisition of permanent service rights is not sufficiently certain or immediate to justify granting the City interim service rights.

4. Economic Development Rates

Finally, the City claimed it should be granted interim service rights because its wholesale supplier would allow it to offer economic development rates to the mall's two largest tenants if they were City customers on their first day of service. The City claimed economic development rates could save Sam's Club \$966,405 over its first five years of operation, and Walmart \$314,055 over its first three years. Rates for the other tenants would be approximately the same regardless of which utility served.

The co-op stated it, too, could offer substantially discounted rates to the two largest tenants, under its negotiated rates tariff. The co-op challenged the City's estimates of the mall tenants' savings, saying they were based on exaggerated load projections. The co-op also challenged the City's statement that it was powerless to secure rate discounts for the tenants if it did not furnish interim service, pointing out that the City holds a majority ownership interest in its wholesale association.

The Commission finds that the \$966,405 and \$314,055 savings amounts calculated by the City are inaccurate, since they are based on standard co-op rates that would not apply if the City is correct in its load projections. There is not enough detail in the record, or enough certainty about load size at this point, to calculate any actual difference that might exist between the City's economic development rates and the co-op's negotiated rates. The Commission sees no need for greater specificity, however, since both utilities can offer discounted rates to the same tenants, the other factors considered above do not support the City's petition, and strong public policy considerations counsel against allowing rate differences to play a major role in service area determinations.

The Commission has long held that rate differences do not by themselves constitute good cause for adjusting service rights. Utility rates vary according to complex and interrelated factors, such as economic conditions at the time major investments were required, rates of growth in the utility's service area, fuel source proximity, and other factors. These factors affect utilities in different ways at different times, making rate discrepancies normal. Over time, every utility's rates will vary in relation to those of other utilities.

To adjust service area rights to reflect these rate differences would be self-defeating. It would cause rates to be even higher for displaced utilities, which would have fewer customers from whom to recover their fixed costs. It would be unfair to the captive customers remaining on their systems. It would cause frequent disruptions in established service arrangements, since the identity of the utility with the lowest rates would constantly change. For these reasons, the Commission has long believed normal variations in rates should be given little weight in service area determinations. Instead, the Commission focuses on the broad public interest in promoting coordinated statewide electric service, avoiding unnecessary duplication of facilities, and ensuring economical, efficient, and adequate service.

The Commission concludes the potential difference between People's' and Rochester's rates for the two largest mall tenants does not require granting interim service rights to the City.

ORDER

1. The City of Rochester's request that the Commission re-examine its December 28, 1990 decision on the effect of the 1980 agreement on People's' and Rochester's assigned service areas is hereby denied.
2. The City of Rochester's petition for interim service rights to serve the 55th Street Mall is hereby denied.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)