

E-132, 299/SA-92-86 ORDER AFTER RECONSIDERATION GRANTING INTERIM
SERVICE RIGHTS TO CITY OF ROCHESTER

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: February 25, 1993

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

ORDER AFTER RECONSIDERATION
GRANTING INTERIM SERVICE RIGHTS
TO CITY OF ROCHESTER

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 (1992) 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 That proceeding, known as the "996" docket, involves both service area and compensation issues. 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 996 case.

On August 31, 1992 the Commission issued an Order rejecting the City's claim that it held permanent service rights to the area and denying the City's petition for interim service rights. On September 21, 1992 the City filed for reconsideration of that Order. On October 9, 1992 the Commission granted reconsideration for purposes of tolling the 20-day deadline for acting on reconsideration petitions, to ensure adequate time for careful review of the City's claims.

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.

The Commission's Order denying the City interim service rights to the mall was based on the assumption that compensation for permanent service rights to the area was yet to be determined in the 996 docket. On August 7, 1992, however, the Commission issued an Order in the 996 docket determining compensation for many areas previously in dispute. In that Order (the "Laches Order"), the Commission determined that co-op claims for compensation for areas annexed before April 24, 1984 on which there were no co-op customers or facilities on the date of the annexation were barred by the doctrine of laches.

On December 17, 1992 the Commission issued an Order requiring expedited filings on the effect of the Laches Order on this case. In filings under the December 17 Order the City and the co-op agreed that parts of the mall, including part of an anchor tenant, Sam's Club, were in an annexation for which the City owed no compensation under the Laches Order.

The co-op continued to argue against granting the City interim service rights, saying if the City ultimately chose not to purchase service rights to the rest of the mall, customer confusion and service disruptions could result. The co-op also argued it would be inappropriate to allow the City to serve on the basis of the Laches Order, since the Order had not yet been subjected to judicial review. The Department of Public Service agreed with the co-op.

The City argued it should not be prevented from serving an area the Commission had found it could serve without compensation, that the public interest favored allowing one utility to serve the entire mall, and that that utility should be the City.

The matter came before the Commission on February 18, 1993.

FINDINGS AND CONCLUSIONS

II. The Legal Standard

The service area statute allows a municipal utility to acquire the right to serve any area within its city limits upon payment of appropriate compensation to the displaced utility. The statute also allows the Commission to permit the municipal utility to serve new customers in the area at issue while compensation is being determined, if the Commission finds that new service extensions by the assigned utility would not be in the public interest. Minn. Stat. § 216B.44 (1992).

III. Commission Action

In determining the public interest in interim service cases, the Commission has to balance the risks and benefits of leaving service rights with the assigned utility against the risks and benefits of allowing the municipal utility to serve new customers. Until the Laches Order determined that the City could serve part of the mall without paying compensation, this public interest analysis favored leaving service rights with the co-op. The Laches Order, however, changed the elements of the public interest equation and tipped the balance in favor of allowing the City to serve.

It did this primarily by shifting the balance between the two utilities on the issue of the risk that the City would ultimately choose not to acquire service rights to the mall. The original Order dealt with that risk as follows:

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.

ORDER REJECTING CLAIM TO PERMANENT SERVICE RIGHTS AND DENYING PETITION FOR INTERIM SERVICE RIGHTS, this docket (August 31, 1992), at 7-8.

The Commission believes that the Laches Order, by holding that the City need not pay compensation for approximately half of the mall area, substantially reduced the risk that the City would not eventually acquire service rights to the entire mall. This reduction in risk, together with the advantages of allowing mall tenants to deal with their permanent utility from the start, and the benefits of avoiding any confusion or service disruption from changing utilities later, all point to granting interim service rights to the City.

The Commission acknowledges the co-op's concerns about granting interim service rights on the basis of an Order that is not yet subject to judicial review. The Commission recognizes that the 996 docket, of which the Laches Order is one part, will not be concluded and appealable for approximately another year. That does not make this interim service determination unusual,

however. Interim service determinations are just that, interim determinations, reflecting the Commission's best judgment on the basis of available information pending the completion of an ongoing compensation proceeding. Because of their interim nature, these determinations are not appealable.

Of course there is a possibility that the Laches Order will not survive judicial review, just as there was (and is) a possibility that the City will not in the end acquire permanent service rights to the mall. In interim service determinations the Commission weighs possibilities and makes an interim judgment on where the public interest lies. In this case, the Commission believes the public interest lies in allowing the City to serve the 55th Street Mall. The Commission will so order.

ORDER

1. The City of Rochester's petition for interim service rights to serve the 55th Street Mall is granted.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)