

ISSUE DATE: August 13, 1996

DOCKET NO. E-130/SA-95-1262

ORDER DENYING PETITION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
Joel Jacobs
Marshall Johnson
Dee Knaak
Don Storm
Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Inland Steel Mining Company and Northern Electric Cooperative Association for Approval of the Purchase and Sale of Electricity at Retail

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PROCEDURAL HISTORY

I. The Petition

On November 15, 1995 Inland Steel Mining Company (Inland) and Northern Electric Cooperative Association (NECA or the co-op) filed a joint petition for Commission approval of an electric service agreement. Under the agreement Inland would buy from NECA that portion of its electric service requirements it was not bound by contract to buy from its present provider, Minnesota Power and Light Company (Minnesota Power or MP).

The agreement would take effect on November 1, 1997, when an all-requirements contract between Inland and MP expired, and would run through October 31, 2001. During this time Inland would still be under contract to buy its first 18,000 kW of electricity per year from MP and its second 18,000 kW as well, if MP could match the lowest competing bid. NECA would supply Inland's remaining needs of 10,000-12,000 kW; NECA also expected to underbid MP for the right to provide the second 18,000 kW.

The petitioners asked the Commission to find that NECA was entitled to serve Inland, per the electric service agreement, under the terms of the Commission's 1975 Orders setting NECA's service area boundaries. In the alternative, they asked the Commission to find that NECA could serve Inland, per the electric service agreement, under Minn. Stat. § 216B.42, a statutory provision allowing large customers located outside municipalities to choose their utility under specified circumstances.

II. Replies; Comments Solicited

On December 1, 1995 Minnesota Power (MP), the Department of Public Service (the Department), and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) filed replies to the petition.

MP opposed the petition on grounds that the 1975 Orders placed Inland within MP's service area and that it was too late to seek reconsideration of those Orders. In the alternative MP opposed the petition on grounds that petitioners did not seek a "service extension" as defined in Minn. Stat. § 216B.42, that allowing NECA to serve would undermine important public

policies embodied in the Public Utilities Act, and that the NECA/Inland agreement did not meet the statutory test set forth at Minn. Stat. § 216B.42 for allowing a customer to choose service from a provider other than the one assigned.

The RUD-OAG argued that the 1975 Orders clearly placed Inland within MP's assigned service area, not NECA's, and that it was unclear from the existing record whether Inland could choose its utility under Minn. Stat. § 216B.42.

The Department stated the issues were complex, far-reaching, and required further development. The Department recommended soliciting comments from all potentially interested parties.

On December 1, 1995 Cooperative Power Association, a generation and transmission cooperative, filed comments and a petition to intervene in the proceeding under Minn. Rules, part 7829.0800. Petitioners challenged the intervention petition.

On December 28, 1995 the Commission issued an Order granting Cooperative Power's intervention petition, asking interested persons to file comments, and listing specific issues and questions those comments should address. ORDER ESTABLISHING COMMENT PERIOD AND GRANTING PETITION TO INTERVENE, this docket.

III. Commenting Parties

The following parties filed comments in this proceeding:

Inland Steel Mining Company and Northern Electric Cooperative Association, represented respectively by Robert S. Lee and Joanne H. Turner, MACKALL, CROUNSE & MOORE, PLC, 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, Minnesota 55402, and Delmar R. Ehrich and Sally A. Johnson, FAEGRE & BENSON, 2200 Norwest Center, Minneapolis, Minnesota 55402;

Minnesota Power, represented by David J. McMillan, Minnesota Power Legal Department, 30 West Superior Street, Duluth, Minnesota 55802 and Samuel L. Hanson and Michael J. Kane, BRIGGS & MORGAN, 2400 IDS Center, Minneapolis, Minnesota 55402.

Minnesota Department of Public Service, represented by Jeff Oxley, Assistant Attorney General, Suite 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130;

Residential Utilities Division of the Office of the Attorney General, represented by Sara J. DeSanto and Joan C. Peterson, Assistant Attorneys General, Suite 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130;

Cooperative Power Association, represented by John E. Drawz and Jay M. Quam, FREDRIKSON & BYRON, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402-3397;

Northern States Power Company, represented by Jeffrey C. Paulson, Northern States Power

Company Law Department, 414 Nicollet Mall, Minneapolis, Minnesota 55401.

Otter Tail Power Company, represented by Katherine E. Sasseville and Todd J. Guerrero, Otter Tail Power Company Law Department, 215 South Cascade Street, P.O. Box 496, Fergus Falls, Minnesota 56538-0496;

United Power Association, represented by Delmar R. Ehrich and Sally A. Johnson, FAEGRE & BENSON, 2200 Norwest Center, Minneapolis, Minnesota 55402;

Interstate Power Company, represented by Christopher B. Clark, Interstate Power Company Law Department, 1000 Main Street, P.O. Box 769, Dubuque, Iowa 52004-0769;

Minnesota Municipal Utilities Association, represented by Andrew J. Shea, MCGRANN SHEA FRANZEN CARNIVAL STRAUGHN & LAMB, CHARTERED, 2200 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402-2041;

Minnesota Energy Consumers, represented by James J. Bertrand, LEONARD, STREET AND DEINARD, 150 South Fifth Street, Suite 2300, Minneapolis, Minnesota 55402;

Dairyland Power Cooperative, represented by Niles Berman and Jeffrey L. Landsman, WHEELER, VAN SICKLE & ANDERSON, S.C., 25 West Main Street, Suite 801, Madison, Wisconsin 53703-3398.

FINDINGS AND CONCLUSIONS

IV. Factual and Statutory Background

In 1974 the Minnesota Legislature determined that the orderly development of economical statewide electric service required granting electric utilities exclusive service rights within designated service areas:

It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.

Minn. Stat. § 216B.37.

The Commission was required to establish assigned service areas for all electric utilities by April 12, 1975. The statute set guidelines for drawing service area boundaries and established a handful of exceptions, including one for large customers (2,000 kW) located outside municipalities. These customers were not obligated to take service from the assigned utility if the Commission, after notice and hearing, agreed. In deciding whether to allow the customer

to take service from a non-assigned utility, the Commission was to consider the following factors:

- (a) the electric service requirements of the load to be served;
- (b) the availability of an adequate power supply;
- (c) the development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto;
- (d) the proximity of adequate facilities from which electric service of the type required may be delivered;
- (e) the preference of the customer;
- (f) any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

Minn. Stat. § 216B.42.

In the proceeding that established assigned service areas for Minnesota Power and Northern Electric Cooperative Association, Minnesota Power was authorized to serve Inland.¹ The Orders in that case do not explicitly state the statutory basis for the assignment, which was uncontested. (NECA at first opposed allowing Minnesota Power to serve Inland, but ultimately agreed, subject to clarification that the assignment was limited to Inland's then-current location, the one at issue here.)

V. Positions of the Parties

A. Inland/NECA

Inland and NECA argued that Minnesota Power had been granted authority to serve Inland under the "large customer" exception of Minn. Stat. § 216B.42, that NECA remained the assigned provider, and that Inland could revert to using its assigned provider as of right, subject to fulfilling any contractual obligation to its § 42 provider.

These parties pointed out that the Commission could rescind, alter, or amend any Order, including its 1975 service area Orders, at any time, under Minn. Stat. § 216B.25. Finally, they argued that, in approving the tariff rider and contract obligating Inland to take only part of its service requirements from Minnesota Power, the Commission was tacitly acknowledging that Inland could receive service from more than one provider.

B. Minnesota Power

Minnesota Power maintained that the 1975 Orders placed Inland within its assigned service

¹In the Matter of the Establishment of Assigned Service Areas of Electric Utilities in Aitkin, Carlton, Cook, Itasca, Koochiching, Lake, and St. Louis Counties, Minnesota, Pursuant to Chapter 429, Laws of Minnesota, 1974, Docket No. USA-14-1, PROPOSAL FOR DECISION (May 20, 1975) and ORDER AFTER ORAL ARGUMENT (September 24, 1975), in this Order referred to as "the 1975 Orders."

area and that it served the plant under a general grant of service area authority, not under the large customer exception of § 42. Inland had no § 42 rights to invoke at this point, since the section applied to new service extensions only. The service at issue was existing service, not a new service extension, especially given petitioners' intention to use MP's transmission facilities to serve Inland.

Even if Inland were a § 42 customer, it could not change providers once it had been assigned a provider under that section. Finally, even if it were possible to change providers now, the NECA/Inland contract did not merit approval under the public interest considerations set forth in Minn. Stat. § 216B.42.

Minnesota Power also emphasized it had made massive investments in plant and equipment to meet the energy needs of Inland and the other taconite producers it was assigned to serve. If Inland left MP's system, the cost of these facilities would remain and would ultimately have to be recovered through higher rates for remaining customers. These higher rates could drive other customers with energy alternatives off the system, leaving fewer and smaller customers with significantly higher rates.

C. The Department of Public Service

The Department read the 1975 Orders as placing the Inland plant within MP's assigned service area and argued that MP was serving the plant under general service area authority, not under § 42. The Department believed large customers could change providers under § 42 in a proper case, however, and urged the Commission to begin contested case proceedings to develop the facts necessary to evaluate Inland's request. Inland's contract with MP was no barrier to relief, in the Department's view, since a large customer could receive service from more than one provider under § 42.

D. Residential Utilities Division of the Office of the Attorney General

The RUD-OAG believed that MP served Inland under a general grant of service area authority, not under § 42, but that Inland, as a large customer outside a municipality, could petition for a change in provider under § 42 at any point. The agency maintained that Inland could not have part of its load served by MP and part by NECA; service assignments under §42 were exclusive. Finally, the agency contended that contested case proceedings would be necessary for the Commission to determine whether the Inland/NECA contract met the public interest requirements of § 42.

E. Cooperative Power Association

Cooperative Power argued that stable, exclusive service area assignments are critical if utilities are to provide safe, reliable, and affordable electric service, especially in rural Minnesota. Any movement away from exclusive service arrangements should be incremental and should occur only after careful analysis and extensive public debate. That analysis and debate are taking place in the Commission's proceeding to examine the structure of Minnesota's electric utility industry.² The Inland/NECA petition should be rejected as an attempt to pre-empt that debate.

Cooperative Power also contended that § 42 does not apply to existing electric loads and does not allow large customers to receive service from more than one provider.

F. Dairyland Power Cooperative

Dairyland concurred in the arguments of Cooperative Power Association. Dairyland argued that granting the petition would undermine longstanding public policies favoring service area stability, confuse customers and utilities, increase the number of service area disputes, and frustrate the careful consideration of competitive issues in the restructuring docket.

G. Minnesota Municipal Utilities Association

The MMUA urged the Commission to consider deferring the issues raised by the Inland/NECA petition to the restructuring docket. The Association pointed out the Commission's § 216B.25 authority to rescind, alter, or amend Orders at any point, believed a customer could receive service from more than one provider under § 216B.42, and argued MP's investment in facilities to serve Inland would be a determinative factor in any evaluation of Inland's request to take service from NECA.

H. United Power Association

UPA contended that whether Minnesota Power was serving Inland under the large customer exception of § 42 or under a general grant of service area authority, Inland could exercise its § 42 right and ask the Commission for permission to switch providers. UPA believed § 42 permits customers to receive service from more than one provider.

I. Interstate Power Company (Interstate)

Interstate believed the Inland/NECA petition raised significant issues of public policy that could only be resolved in a comprehensive, industry-wide proceeding. The company recommended deferring consideration of these issues to the restructuring docket.

J. Northern States Power Company (NSP)

²In the Matter of an Investigation into Structural and Regulatory Issues in the Electric Utility Industry, Docket No. E-999/CI-95-135, referred to in this Order as "the restructuring docket."

NSP took no position on the specifics of the dispute between Inland/NECA and Minnesota Power. The company stated, however, that it read Minn. Stat. § 216B.42 to exempt large customers outside municipalities from the exclusive service area requirements of the Public Utilities Act and to introduce retail competition for that small subset of customers.

K. Otter Tail Power Company (Otter Tail)

Otter Tail read Minn. Stat. § 216B.42 to apply only to customers taking service for the first time after assigned service areas were first established. The company also read the statute to prohibit any change in provider once one was assigned. In the company's view, any other reading would be inconsistent with the plain meaning and purpose of the Public Utilities Act.

L. Minnesota Energy Consumers

The Minnesota Energy Consumers saw Minn. Stat. § 216B.42 as a customer choice provision. They believed § 42 permitted customers with 2000 kW loads located outside municipalities to choose their energy provider and to change providers at will.

VI. Issues Overview

This case presents a cluster of interrelated and often interdependent issues. The threshold question is whether it is permissible, even in theory, for Inland to take service from more than one provider, given the Public Utilities Act's emphasis on exclusive service arrangements.

If the answer to that question is yes, the next question is whether the "large customer exception" of Minn. Stat. § 216B.42 would allow Inland to shift part of its load from Minnesota Power to NECA. This could depend on whether Minnesota Power is serving Inland under the large customer exception or under the general service area provisions of the Public Utilities Act.

If Minnesota Power is serving under the § 42 large customer exception, the question is whether § 42 operates as a one-time tool for making permanent service assignments or as a permanent mechanism for large rural customers to obtain the most economical energy available. If Minnesota Power is serving under the general service area provisions of the Public Utilities Act, the question is whether § 42 gives large customers at least one chance to bypass their assigned provider after original service assignments have been made.

Finally, if the Commission decides under either scenario that § 42 could provide a legal basis for Inland to shift part of its load to NECA, the Commission must determine whether the proposed shift from Minnesota Power to NECA meets the public interest criteria set forth in § 42.

VII. Commission Action

A. Summary

The Commission finds that allowing Inland to take service from more than one supplier would violate the plain meaning of the Public Utilities Act and undermine the public policies it was designed to implement. The petition will be denied.

B. Statutory Language

The Public Utilities Act makes it clear that exclusive service arrangements are to be the norm in Minnesota. Section 216B.37 begins the statutory discussion of service area and customer assignments as follows:

It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.

Minn. Stat. § 216B.37, emphasis added.

This statute establishes two things: (1) utilities are to have service areas within which they have an exclusive right to provide service, and (2) utilities are to provide service to individual customers on an exclusive basis.

The Act goes on to establish a handful of exceptions to the prohibition against one utility serving in another's assigned service area. A non-assigned utility may serve with the assigned utility's consent, for example, and utilities may serve their own utility property and facilities.³ Municipal utilities may expand their service areas to include any customer within their city limits, and they may serve such customers before formally acquiring the service area, with the consent of the Commission.⁴ As this case makes clear, large customers located outside municipalities may be assigned to utilities other than the ones in whose service area they are located. Minn. Stat. § 216B.42.

These exceptions, however, are narrow exceptions to a utility's right to be the sole provider in a geographic area. The Act establishes no exceptions to the right to be the sole provider to an individual customer. The § 42 exemption, for example, could have been written to state that exempted large customers need not "take all their electric service" from the assigned utility; instead it states that these customers need not "take service" from the assigned utility. Clearly,

³Minn. Stat. §§ 216B.40; 216B.42, subd. 2.

⁴Minn. Stat. § 216B.44.

the statute views providing electric service to an individual customer as an all or nothing proposition.

C. Commission Precedent

In administering the Act over the past two decades, the Commission has found it necessary to make exceptions to the one customer-one utility standard in only a handful of cases.

The Commission is aware of one case in which it ordered dual service to effectuate the service area agreement between two utilities⁵, one case in which it permitted dual service by agreement of the parties⁶, and one case in which it termed dual service a “viable option” in which both utilities had acquiesced.⁷ Apart from this handful of cases, the one customer-one utility standard has prevailed.

Furthermore, all of these dual service cases involved utility agreement to or acquiescence in dual service, lacking here. One involved property straddling the service area boundary, not at issue here. One involved an original inter-utility service area agreement, not present here. In short, multiple provider situations have arisen so rarely, and have been so idiosyncratic factually, that it is difficult to generalize helpfully about them.

In any case, none of the earlier cases bear any resemblance to this one, in which the customer and a neighboring utility seek dual service for their mutual economic benefit. The Commission has consistently upheld exclusive service arrangements, because the statute and the public policies the statute articulates require it.

Finally, the Commission should clarify that it was not anticipating, let alone tacitly approving,

⁵In the Matter of the Petition of the Kandiyohi Cooperative Electric Power Association Regarding Electric Service to Farm Service Elevator by the Willmar Municipal Utilities Commission, Docket No. E-118,329/SA-88-379, ORDER REQUIRING COMPENSATION (July 11, 1989). In this case the utilities had agreed that future load growth by a specific customer would be served by a different utility than the one originally assigned.

⁶In the Matter of the Complaint of Minnesota Power & Light Company Against Itasca-Mantrap Electric Cooperative Alleging a Violation of MP&L’s Assigned Service Area, Docket No. E-015,E-117/SA-84-578, ORDER DISMISSING COMPLAINT (March 11, 1985). The dual service situation in this case arose when the original utility chose not to contest a neighboring utility’s request to serve a new building which one of the original utility’s customers built on the neighboring utility’s side of the service area boundary. Dual service was already a fact when the case arose.

⁷In the Matter of a Request by Ronald Vesely to Receive Electric Service from Northern States Power Company Instead of Minnesota Valley Electric Cooperative, Docket No. E-002,124/SA-90-255, ORDER DENYING REQUEST (November 30, 1990). In this case the customer ultimately rejected dual service on convenience grounds.

service by multiple utilities when it approved the tariff rider and contract obligating Inland to take only part of its service requirements from Minnesota Power. The Commission understood the partial requirements feature of the rider and contract to address large customers' desire for flexibility should retail competition become a reality during the contract term. By approving the contract and rider, the Commission merely permitted the parties to address that contingency; it did not promise to treat that contingency as a reality.

D. Underlying Public Policies

Exclusive service arrangements have long been required in Minnesota for compelling public policy reasons. The Legislature has found them necessary to encourage the development of coordinated statewide electric service, to eliminate or avoid unnecessary duplication of utility facilities, and to promote economical, efficient, and adequate electric service to the public. Minn. Stat. § 216B.37.

The contribution of exclusive service arrangements to avoiding duplication of facilities and to promoting coordinated electric service is obvious. Less obvious, but even more important, is their contribution to ensuring reliable and adequate service throughout the state.

The generation, transmission, and distribution of electricity is an extremely capital-intensive business. To meet the needs of their customers, utilities must be willing and able to commit large amounts of capital to building and maintaining the facilities necessary to deliver power throughout their service territories and to all their customers. Since power plants require years of planning and construction, utilities must also be willing to commit these resources years in advance of actual need.⁸ They do this in reliance on carefully drawn long range plans.

Without exclusive service arrangements, long range planning by utilities would be meaningless. They would have little incentive to commit current resources to meet future need, and the public would have little right to expect or require it. Historically, exclusive service arrangements have been the *quid pro quo* for utilities' obligations to build, buy, or lease the capacity necessary to serve all comers. That is why the Legislature considered exclusive service arrangements essential to the development of reliable and adequate electric service throughout the state.

In sum, there are strong public policy concerns underlying the exclusive service areas and exclusive service arrangements required under Minn. Stat. §§ 216B.37-44.

E. Industry Restructuring Docket

The Commission is of course aware that wholesale generation and wholesale transmission are being made competitive enterprises at the federal level and that many states are exploring the potential for beneficial competition at the retail level. The Commission itself has opened an

⁸ See Minn. Stat. § 216B.04, requiring public utilities to provide service within 90 days of any application for service.

investigation to explore the potential for beneficial competition in Minnesota.⁹

One of the major issues being addressed in that investigation is whether there are workable and equitable strategies for dealing with the stranded investment that could result from allowing large customers to change utility providers. That, of course, is one of the concerns underlying Minnesota's longstanding commitment to exclusive service areas and service arrangements. It is also one of the issues raised by this petition.

It is conceivable that service arrangements like the one sought in this petition will be allowed in the future as a result of this investigation. It is also conceivable that such arrangements will be rejected as inconsistent with the broad public interest. The Commission cannot prejudge the outcome of its investigation or foretell the future.

For now, however, the Commission affirms and is bound by the exclusivity requirements of the Public Utilities Act and the public policies it is designed to serve. The Commission will continue to uphold exclusive service areas and exclusive service arrangements unless and until the Legislature provides further guidance or direction.

F. Conclusion

For all the reasons set forth above, the Commission will reject the petition.

ORDER

1. The petition is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-1200 (TDD/TTY) or 1 (800) 657-3782.

⁹In the Matter of an Investigation into Structural and Regulatory Issues in the Electric Industry, Docket No. E-999/CI-95-135.