

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF THE PETITION
FOR DECLARATORY RULING OF
NORTHWESTERN PUBLIC SERVICE
COMPANY WITH REGARD TO ELECTRIC
SERVICE OF HUB CITY, INC.

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CIV. 95-043

MEMORANDUM DECISION

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

CASE HISTORY

In 1977, Safeguard Metal Castings Division ("SCD") constructed a new foundry near Aberdeen, South Dakota, located within Northwestern Public Service's ("NWPS") assigned service area. After a hearing, the Public Utilities Commission ("PUC") permitted the SCD foundry to be served electrical power by Northern Electric Cooperative ("NEC") under the "large-load" provision of SDCL 49-34A-56. SCD entered into a contract with NEC for a minimum demand of 2,000 kilowatts per month at a specified rate. The contract provided that the agreement would remain in effect for five years and thereafter, until terminated by either party upon 12 months' written notice to the other.

In 1986, SCD ceased operating the foundry as a foundry. The foundry was used as a warehouse from 1986 to 1993.

In 1989, SCD sold the foundry site to Hub City, Inc. Beginning in 1993, Hub City, Inc., moved a portion of its

production facilities into the foundry. In June of 1993, the manager of Hub City, Inc., wrote the manager of NEC requesting that NEC coordinate with NWPS the removal of NEC service from the SCD foundry building as Hub City, Inc., had determined that all electric service shall be from the same source. According to the affidavit of Hub City, Inc.'s, manager, NEC then informed Hub City, Inc., that the termination clause of the contract required a 12-month period of notice. In March of 1994, Hub City, Inc.'s, manager sent a letter to NEC notifying them that electric service from NEC would be terminated effective June of 1994.

On May 23, 1994, NWPS petitioned the PUC for a declaratory ruling regarding the furnishing of electrical services to Hub City, Inc. On May 26, 1994, NEC petitioned to intervene. NWPS, NEC and Hub City, Inc., signed a written stipulation of facts that was submitted to the PUC.

On January 3, 1995, in a 2 to 1 decision, the PUC filed its declaratory ruling allowing Hub City, Inc., to terminate its contract with NEC and to receive electric service from NWPS.

NEC applied for and received an order staying the PUC's declaratory ruling and appealed the PUC's decision to the circuit court. Briefs were filed with the circuit court by NEC, NWPS and the PUC and the circuit court heard oral arguments regarding the matter on August 24, 1995.

ISSUES:

ISSUE NO. 1:

IS AN ASSIGNMENT OF A LARGE-LOAD CUSTOMER MADE PURSUANT TO SDCL 49-34A-56 A PERMANENT ASSIGNMENT OF SUCH TERRITORY WHICH MAY NOT BE MODIFIED UNLESS AN ADEQUATE SHOWING HAS BEEN MADE PURSUANT TO SDCL 49-34A-58?

ISSUE NO. 2:

DID THE PUBLIC UTILITIES COMMISSION ACT IN EXCESS OF ITS STATUTORY AUTHORITY WHEN IT INTERPRETED AND ENFORCED A WRITTEN CONTRACT ENTERED INTO BETWEEN A RURAL ELECTRIC COOPERATIVE ("NEC") AND ITS CUSTOMER?

DECISION

STANDARD OF REVIEW

The circuit court's standard of review of an administrative agency's decision is set forth in SDCL 1-26-36, which reads as follows:

§1-26-36. Weight given to agency findings - disposition of case - grounds for reversal or modification - findings and conclusions - costs.

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the Agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence.

- in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in Chapter 15-17.

Generally, when an issue in an administrative appeal is a question of fact, the courts apply a "clearly erroneous" standard. In the Matter of Northern States Power Supply Company, 489 NW2d 365 (S. D. 1992). Questions of law are fully reviewable. *Id.* at 368. When reviewing findings based on deposition, stipulation, or documentation, we do not apply the "clearly erroneous" rule but review the matter de novo, as though presented before the Court for the first time. First National Bank of Biwabik, Minnesota v. Bank of Lemmon, 535 NW2d 866 (S. D. 1995). In the instant case, the PUC's decision and findings of fact were based upon the written stipulation entered into by and between the parties and the "clearly erroneous" standard of review is not applicable and the Court must consider whether the Agency made a mistake of law.

ISSUE NO. 1:

IS AN ASSIGNMENT OF A LARGE-LOAD CUSTOMER MADE PURSUANT TO SDCL 49-34A-56 A PERMANENT ASSIGNMENT OF SUCH TERRITORY WHICH MAY NOT BE MODIFIED UNLESS AN ADEQUATE SHOWING HAS BEEN MADE PURSUANT TO SDCL 49-34A-58?

From a historical standpoint, prior to 1965, the electric

utilities in South Dakota were primarily regulated by municipalities, rather than the State. In 1965, the South Dakota legislature passed the State's first attempt at governing electric service disputes between electric utilities. (1965 Session Laws: Chapter 254 - Senate Bill No. 250). This Act set up an Electric Mediation Board to resolve disputes between electric suppliers over service territory and customers in South Dakota. The Act limited rural electric cooperatives to serving rural areas except as otherwise specifically provided for in the Act. Rural areas were defined to include those areas within boundaries of towns of not more than 1500 inhabitants. Rights to serve existing customers within towns and within three miles from the towns were locked in as they existed on March 17, 1965.

The South Dakota Supreme Court in December of 1968 held the 1965 Act unconstitutional on the grounds that by making a circuit court judge one of seven members of the Mediation Board was a violation of the Separation of Powers Doctrine of Article V §35 of the South Dakota State Constitution. Application of Nelson, 163 NW2d 533 (S. D. 1968).

In 1970, the South Dakota legislature enacted House Bill 540, Chapter 261 of the 1970 Session Laws which reenacted the old Electric Mediation Board with a modification in the Board's composition. This Act remained in effect until 1975 when, as a result of negotiations and joint efforts on the part of all segments of the industry, a new rate regulation and territory

integrity law was passed. (Senate Bill 261 - Chapter 283 - 1975 Session Laws). That law is now codified at SDCL 49-34A and is generally known as the "South Dakota Territorial Integrity Act."

SDCL 49-34A-42 provides:

Each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area. No electric utility shall render or extend electric service at retail within the assigned area of another electric utility unless such other electric utility consents thereto in writing and the agreement is approved by the Commission consistent with section 49-34A-55.

SDCL 49-34A-1(1) defines "assigned service area" to include large-load assignments made pursuant to SDCL 49-34A-56. The PUC in 1977, after a hearing on the merits, granted SCD's application for permanent service and assigned the SCD "foundry" to NEC pursuant to SDCL 49-34A-56.

The underlying purpose of the 1975 South Dakota Territorial Integrity Act was to require every public utility to furnish adequate, efficient and reasonable service. SDCL 49-34A-2. The South Dakota Supreme Court has stated that the primary reason for passing the electrical territorial boundary legislation was for the elimination of duplication and wasteful spending in all segments of the electric industry. In the Matter of Establishing Certain Territorial Electric Boundaries (Willrodt) v. Northwestern Public Service, 281 NW2d 65 (S. D. 1979). In that same case our Supreme Court said that it is readily apparent that the franchises

described under 49-34A-42 are exclusive; however, the statute does not explicitly make the franchise irrevocable because 49-34A-58 authorizes the PUC to assign service areas to other utilities if the utility presently serving an area does not provide adequate service. Id. at pages 70 and 71. Because the franchise granted under 49-34A is not an irrevocable franchise, it does not violate South Dakota Constitution Article VI §12.

All parties to this appeal cite the case of Interstate Telephone Cooperative, Inc., v. Public Utilities of South Dakota and Brookings Telephone Company, 518 NW2d 749 (S. D. 1994), as authority for each of their positions. In the Interstate Telephone case the PUC and the Telephone Cooperative urged the Court that the doctrine of res judicata prohibited any change in position by either the PUC or the Court. The Supreme Court said that the doctrine of res judicata serves to prevent re-litigation of issues actually litigated or which could have been raised and determined in a prior action.

In the instant case, the PUC did determine the issue of who was to serve the "foundry" site with electrical power in 1977, that being NEC. The PUC's decision in 1977 was not appealed to a higher court, and therefore its ruling became the final ruling.

It is true that the Court in Interstate Telephone did hold that administrative agencies are not bound by stare decisis as it applies to previous agency decisions; however, the Court further said that:

under different facts and circumstances "consistent with both the legislative intent and the underlying policy considerations of the statutes for balancing the competing interests involved," the PUC's definition ... may have changed. Id. at 753.

The purpose of enacting the Territorial Integrity Act (SDCL 49-34A) and establishing electric boundaries was for the "elimination of duplication and wasteful spending in all segments of the electric industry." In The Matter of Establishing Certain Territorial Electric Boundaries, (Willrodt) v. Northwestern Public Service, 281 NW2d 65 (S. D. 1979) and West River Electric v. Black Hills Power and Light, 719 F.Supp. 1489 (D. S. D. 1989), Cass County Electric Coop, Inc., v. Northern States Power Company, 419 NW2d 181 (N. D. 1988).

Generally, the courts have recognized that consumer preference would, if controlling, defeat orderly assignments. West River Electric v. Black Hills Power and Light, 719 F.Supp. 1489 (D. S. D. 1989), Cass County Electric Coop v. Wold Properties, Inc., 249 NW2d 514 (N. D. 1976).

Hub City, Inc.'s predecessor who owned the "foundry" had made an election expressing its choice of power supplier, and the PUC approved the same under the "large-load" provision of our statute. NEC then spent considerable sums for capital improvement in order to adequately serve the foundry site. Should the current customer that now owns the foundry site be permitted to switch suppliers? In order to serve the foundry, NWPS would have to install a new computer system and 300 foot of distribution line at

a cost of about \$5,400. Should NWPS serve the foundry, then NEC would strand approximately \$39,600 worth of its facilities and in addition NEC would incur fixed load costs of \$9,500 per year to East River Electric Cooperative for a period of 4.25 years and the total expenditure or loss to NEC would then be approximately \$80,000. This type of financial loss and duplication of services is exactly what the statute was intended to prohibit. Switching back and forth from one supplier to another as rates become more advantageous will foster duplication of service and create waste of facilities and will promote inefficiency in the electric utilities which is specifically contrary to the intent and purpose of the Territorial Integrity Act itself. SDCL 49-34A-43.

Once a large-load customer has made an election of its electric supplier and that election has been approved by the PUC, then that electric supplier shall thereafter have the exclusive right to continue serving such premises. Public Service Company of Colorado v. PUC of Colorado, 765 P.2d 1015 (COL 1988); City of LaGrange v. Georgia Power Company, 363 SE2d 288 (Georgia 1987). That right to serve shall continue until the PUC determines the supplier can no longer provide adequate service, at which time a new supplier could be authorized. SDCL 49-34A-58. The Territorial Integrity Act was intended to be complete in itself. West River Electric v. Black Hills Power and Light, 719 F.Supp. 1493 (D. S. D. 1989). To allow the PUC to go back and reopen every prior case they decided on territory assignment would

create utter chaos and provide for instability in the electric utility industry rather than stability. Stability and efficiency was the purpose of the Act itself.

The order of the PUC in permitting Hub City, Inc., to switch suppliers at the foundry site is in violation of the law, as it is contrary to the express intent and purpose of the Territorial Integrity Act and not based upon the statutory grounds for a change of supplier as set forth in the Act under 49-34A-58, which is the inability of the current supplier, which would be NEC, to provide adequate service.

ISSUE NO. 2:

DID THE PUBLIC UTILITIES COMMISSION ACT IN EXCESS OF ITS STATUTORY AUTHORITY WHEN IT INTERPRETED AND ENFORCED A WRITTEN CONTRACT ENTERED INTO BETWEEN A RURAL ELECTRIC COOPERATIVE ("NEC") AND ITS CUSTOMER?

The PUC interpreted and enforced the contract made by and between NEC, a rural electric cooperative, and SCD and based its declaratory ruling on the PUC's interpretation of that contract.

What authority does the PUC have over a rural electric cooperative?

SDCL 49-34A-1(12) defines "public utility" to exclude a rural electric cooperative for the purposes of 49-34A-2 to 49-34A-4, inclusive, 49-34A-6 to 49-34A-41, inclusive, and 49-34A-62.

Therefore, the PUC has no jurisdiction over a rural electric cooperative (NEC) for rates, records, policies, etcetera as it

does over a public utility (NWPS). The PUC only has authority over a rural electric cooperative for purposes of determining adequacy of service issues and to make initial territorial assignments. 49-34A. The initial territorial assignment of the "foundry" site was made to NEC in 1977 and the parties in their written stipulation have agreed that both NEC and NWPS are capable of providing adequate service to the customer. There then is no issue as to adequacy of service before the PUC.

If the PUC has no jurisdiction over rural electric cooperatives as to their rates, they have no jurisdiction over a contract the rural electric cooperative enters into with a customer dealing with those rates. The contract the PUC is relying upon is primarily a service and rate contract. The contract specifies the type of service, i.e., three phase, three wire delta, 60 cycles, 12470 volts; it specifies a minimum billing of 2,000 kilowatts (demand charge) for each month plus a monthly charge for electricity actually consumed; and, among other things, a termination clause. The PUC has based their decision to allow NWPS rather than NEC to serve the foundry site upon their interpretation that the written contract between NEC and its customer, because it refers to a "termination clause," allows SCD to terminate NEC as a supplier rather than terminate its obligation to pay a minimum monthly bill (demand charge).

While it is apparent to the Court that the reason SCD may have negotiated a provision in a contract to terminate the

contract after six years was because SCD did not want to be obligated in perpetuity to pay a monthly minimum bill (demand charge) if for some reason the facility wasn't using electricity at some point in the future; however, the PUC apparently didn't consider that reason. Irrespective of that fact, the PUC simply does not have jurisdiction over a contract dispute between NEC and SCD's successor in interest (Hub City, Inc.). The circuit court of the State of South Dakota would have jurisdiction over that matter. In the case of In the Matter of the Application of City of White, 294 NW2d 433 (S. D. 1980), our Supreme Court said that the PUC did not have jurisdiction to determine the amount of compensation, if any, due Otter Tail Power for its service contracts with residents within the municipal limits of the City of White. The Court went on to say that nothing foreclosed Otter Tail from pursuing any action it deemed appropriate in circuit court.

There may be various disputes between NEC and SCD's successor in interest regarding the written contract and Hub City, Inc., who's not even a named party in these proceedings and who did not intervene would certainly be an indispensable party necessary to any "declaratory judgment" rendered by a court of proper jurisdiction, regarding a dispute over the written contract.


This Court finds that the PUC does not have jurisdiction over a contract dispute involving NEC and SCD's successor in interest, Hub City, Inc., as that contract dispute had nothing to do with

adequacy of service issues; and therefore, the PUC's declaratory ruling dated January 3, 1995, is void and the decision of the PUC is hereby reversed and NEC is ordered to be the electric supplier to Hub City, Inc., at the foundry site.

Counsel for NEC shall prepare the appropriate documents for the Court's signature.

Dated this 20th day of November 1995.

BY THE COURT:



Jack R. Von Wald,
Circuit Court Judge

ATTEST:

Clerk of Courts