F-R&O Binders

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

White River Valley Electric Cooperative, Inc.,

Complainant,

v.

The Empire District Electric Company,

Respondent.

Case No. EC-84-231

APPEARANCES: Eugene E. Andereck, Attorney at Law, and Rodric A. Widger, Post Office Box 1280, Jefferson City, Missouri 65102, for White River Valley Electric Cooperative, Inc.

Joseph W. Adams, Attorney at Law, 213 West Atlantic, Branson, Missouri 65616, for White River Valley Electric Cooperative, Inc.

Gary W. Duffy, Attorney at Law, Post Office Box 456, Jefferson City, Missouri 65102, for The Empire District Electric Company.

Linda K. Malinowski, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REPORT AND ORDER

On May 7, 1984, White River Valley Electric Cooperative, Inc. (Complainant) filed a complaint against The Empire District Electric Company (Respondent) alleging a violation of Section 393.106, R.S.Mo. (Supp. 1984). The Commission gave notice of the complaint. The Empire District Electric Company on June 6, 1984, answered the complaint, generally denying the allegations. On June 18, 1984, Complainant amended the complaint by changing the prayer for relief. Respondent filed an answer to the amended complaint generally denying the complaint. Respondent moved to dismiss the complaint for lack of jurisdiction, which the Commission denied.

On July 20, 1984, the Commission issued an order setting the matter for hearing. The case was finally heard on November 1, 1984. A briefing schedule was set. Commission Staff filed a motion to reopen the record for additional evidence on December 4, 1984. The Commission denied Staff's motion. The reading of the transcript was not waived by the parties.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Complainant, White River Valley Electric Cooperative, Inc., is a rural electric cooperative as defined by Chapter 394, R.S.Mo. 1978. Complainant is authorized to serve certain portions of Taney County, Missouri. Included in Complainant's service area is Holiday Hills Resort (Holiday Hills). Holiday Hills is located across Highway 76 from the Complainant's main office in Taney County. Holiday Hills is a 278-acre tract of land in an unincorporated area of Taney County on which is located a golf course. Construction of condominiums began on the property in 1984.

Respondent, The Empire District Electric Company, is a Kansas corporation authorized to do business in the State of Missouri as a public utility. Respondent is an electric corporation as defined in Section 386.020, R.S.Mo. 1978. Respondent is authorized to provide electric service in Taney County to an area which includes the 278 acres of Holiday Hills.

In 1941 Complainant began providing service to a golf cart recharge station located at the north end of the 278 acres of Holiday Hills. In 1964 Complainant began providing electric service to a well pump located near the golf cart recharge station at the north end of the 278 acres. In 1966 Complainant began providing electric service to a pro shop located near the golf cart recharge station on the north end of the 278 acres. Complainant provided separate meters for each of the three service connections.

Complainant was supplying electric service at these three metering points on August 13, 1982. Complainant has supplied uninterrupted service to these three metering points since August 13, 1982. (These three metering points will be referred to as the "three existing meters" throughout this order.) In addition, in 1963 Complainant built a three-phase line into the golf course. The line extended approximately across the center of the 278 acres. The three-phase line is approximately 600 yards from the three existing meters. This three-phase line served no customers on August 13, 1982. The line was built in anticipation of further development of the 278 acres.

Complainant's line serving the three existing meters can be seen on Exhibit 15 as a line intersected by capital E's. There are two such lines on the exhibit. Complainant's line is the one on the lower half of the page running just above the golf course.

Complainant's three-phase line running through the center of the 278 acres can be seen on Exhibit 16. It is depicted by a line intersected by capital E's and ends near the eighth green on the golf course.

On February 15, 1984, Jake Reddekopp applied to Complainant for electric service to be provided at two points on the 278-acre Holiday Hills property. Two meters were to be set to provide service. One meter was for a sales office and the second was for a visitor center. The two meters only required 50-foot service lines from Complainant's three-phase line. Both applications for new electric service and the applications for membership in the cooperative were signed by Jake Reddekopp, Holiday Hills Resort, P.O. Box 6, Kimberling City, Missouri 65686.

Application information forms supplied by Complainant were also filled out on February 15. On those forms there is a question, "Is Temporary Power needed for buildings?" On both forms the word "yes" is written in the blank provided. Service was connected to the two points on March 8, 1984. Larry Frazier, general manager of Complainant, testified that the temporary power question on the forms was for internal purposes and did not indicate the service was only for a limited duration. Frazier testified temporary power meant temporary meters should be furnished until construction was completed and permanent meters could be installed. Reddekopp was constructing the buildings on this site.

Frazier also testified that a Mr. McIver talked to him about providing service to the new development planned on the 278 acres. Frazier testified McIver showed him plans for the development and asked questions about Complainant's ability to provide service. Frazier testified he indicated to McIver that Complainant could provide the service required.

Katherine Dowler, Complainant's office supervisor, testified McIver came into Complainant's office on March 1, 1984, and asked that the billing for the three existing meters at the north end of the golf course be changed. McIver at this time told Dowler there was a new owner of Holiday Hills. Dowler gave McIver the forms for changing customers for existing service. The forms were for the three existing meters: the cart recharge station, the well pump and the pro shop. Prior to March 1, 1984, the bills for the service to the three existing meters went to Holiday Hills Country Club, c/o Jim Barker, Branson, Missouri. After March 1, 1984, the bills were sent to Ozark Mountain Resort, P.O. Box 6, Kimberling City, Missouri. Dowler then testified that the billing address for the three existing meters again changed in August 1984 once the office on the 278 acres was completed. She testified the new address was Route 3, Branson. Dowler testified the latest address for the billing of the three existing meters was Ozark Mountain Resort, Route 3, Branson.

Respondent objected to any testimony by Dowler concerning the change of address for the customer billing of the three existing meters made in August 1984. Respondent objected because it had asked for this information in its interrogatories to Complainant and Complainant had not supplied the change of address forms for

August 1984. Complainant responded to the objection by stating the failure to update the interrogatory answer was not done intentionally and that the Commission should not strike the testimony.

The Commission has considered Complainant's failure to update the interrogatories and Respondent's objection. The Commission does not believe the failure to provide the address to Respondent was intentional, nor can the Commission find any prejudice to Respondent. The witness later testified to the current billing address for the three existing meters without objection. Respondent's objection is therefore overruled and its motion to strike is denied.

On March 8, 1984, Complainant began providing service through the meters at the points applied for by Reddekopp. Complainant supplied electric service at these two points until May 16, 1984, when the meters were removed at the customer's request.

On April 13, 1984, Respondent signed an agreement with Resort Vacations International's executive vice president, Donald P. Herzog, to provide electric service to the new buildings on the 278 acres. The first meters were set at the completed buildings where the two meters requested by Reddekopp from Complainant were placed. Respondent began constructing lines across the 278 acres sometime after April 13, 1984, and started providing electric power to the sales office and two condominiums on May 1, 1984. The testimony indicated the two condominiums are the buildings referred to by Reddekopp as the visitor center.

Respondent at the time of the hearing had 11 meters on the 278 acres. These included the meters at the sales office and two condominiums, and meters at the north end of the property providing service to a registration building, another building and a water well. Raymond W. Wilson, Respondent's district manager, testified that Respondent expected to provide service to all buildings on the property as the buildings were constructed.

Respondent built approximately one-half mile of electric power line both above and below ground to reach the point where service is being provided at the sales office and the two condominiums. These meters provide service to the buildings constructed by Reddekopp. Respondent's district manager testified he did not know of Complainant's two meters supplying power for Reddekopp when Respondent began its construction. Complainant's electric lines were never connected to the internal wiring of any of the buildings. Wilson testified that Resort Vacations International is Respondent's customer, although Exhibit 17 shows the owner of Holiday Hills Resort to be Freedom Financial Corporation. Respondent introduced the Registration Of Fictitious Name certificate from the Missouri Secretary of State's office, which shows that Holiday Hills Resort is owned by Freedom Financial Corporation of Dallas, Texas.

The basic facts in this case are not in dispute. There is no dispute that Complainant was providing service to three existing meters on the north end of the 278 acres known as Holiday Hills on August 13, 1982. There is no dispute that no service was being provided or supplied to any person at any other metering points on the 278-acre tract on August 13, 1982, by any supplier of electric energy.

There is no dispute that Complainant's electric power lines have been running across the 278 acres since 1963. There is no dispute Complainant supplied power through two meters for construction of two condominiums and a sales office on the southern portion of the 278 acres from March 8, 1984, to May 16, 1984. There is no dispute Respondent on May 1, 1984, began supplying power to the sales office and two condominiums which were constructed using Complainant's electric power.

Since there is no dispute over the basic facts in this case, the Commission is faced with interpretation and application of Section 393.106, R.S.Mo. (Supp. 1984) and Section 394.315, R.S.Mo. (Supp. 1984), to resolve the issues in this complaint. Those sections read as follows:

> 393.106. ... Every electrical corporation and joint municipal utility commission shall be entitled to continue to supply retail

electric energy to persons at metering points at which service is being provided on August 13, 1982. Notwithstanding any other provision of law to the contrary, no electrical corporation or joint municipal utility commission shall be permitted or required to supply retail electric energy to any person at a location where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier of electric energy. Provided, however, that the commission may order otherwise after a finding that a change of suppliers is in the public interest for a reason other than a rate differential. Except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing corporations pursuant to this chapter.

394.315. ... Every rural electric cooperative shall be entitled to continue to supply retail electric energy to persons at metering points at which service is being provided on August 13, 1982. Notwithstanding any other provision of law to the contrary, no rural electric cooperative shall be permitted or required to supply retail electric energy to any person at a location where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier of electric energy. Provided, however, that the public service commission may order otherwise after a finding that a change of suppliers is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section. Except as provided herein, nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any such cooperative, and except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing cooperatives pursuant to this chapter.

Complainant suggests that the legislative intent in enacting Sections 393.106 and 394.315 was not to limit the choice of consumers but to prevent the unnecessary and wasteful duplication of electric distribution lines. Complainant asserts the legislature enacted the statutes to avoid waste of resources and this intent should guide the Commission's application to these facts. Complainant then gives a history of the Commission's jurisdiction in this area to support its position concerning the proper interpretation of the statutes. Complainant contends the two sections were passed to give the Commission jurisdiction over line duplication situations other than those involving questions of safety. The Commission has jurisdiction over the safety of electrical lines under Chapter 393 and Section 394.160, R.S.Mo. 1978. Complainant contends further that the statute presumes that the electric supplier which is presently providing service at a location is best situated to continue that service. This presumption, Complainant argues, is controlling unless there is an absence of service for 60 days or unless the Commission determines that a change of suppliers is in the public interest.

Respondent argues that since Complainant had no customers on the southern portion of the 278-acre tract, there were no metering points to bring that area within the entitlement of Section 394.315. Respondent contends Complainant must necessarily be claiming a violation of the second sentence of Section 393.106. That sentence prevents an electrical corporation from supplying electricity to "any person at a location where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier."

indicates that the statutes can be read independently

Respondent contends this language only prevents a change in supplier where the same person and same location is involved and there has not been a 60-day lapse of service. Respondent contends both person and location must be identical for the statute to apply. Respondent in its brief states: "Therefore, an electrical corporation is permitted under the statutes to supply a different person at the same location, the same person at a different location, or, carrying it to a logical conclusion, a different person at a different location." Respondent concludes that the law was meant only to prevent the same person from switching suppliers at the same location at the customer's whim.

Since this case was heard, the Missouri Supreme Court has issued a decision in a case cited by both parties. Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc., No. 66830 (Mo. Sup. Ct. November 21, 1985). The facts in the MoPub case are very similar to the facts in this complaint. In that case, Platte-Clay Electric Cooperative (Platte-Clay) had been supplying retail electric service to an 80-acre farm for many years. The farm was annexed into the city limits of Kansas City, Missouri, in 1962. Missouri Public Service Company (MoPub) was given a franchise to provide electric service within the Kansas City corporate limits, which included the 80-acre farm. In December 1981 the farm was sold to a dairy research and marketing company. The property was not subdivided. On August 13, 1982, Platte-Clay was supplying electricity to the new owner at the farmhouse and garage on the 80-acre farm. In October 1982, Platte-Clay installed a three-phase line to the 80-acre farm where the new owner had constructed a new home and dairy testing facility. MoPub filed suit for an injunction against Platte-Clay to prevent Platte-Clay from serving the new home and dairy testing facility. MoPub argued it had exclusive right to serve all land within its franchise area.

The circuit court ruled that this Commission had original jurisdiction over this matter pursuant to Sections 393.106 and 394.315, R.S.Mo. (Cum. Supp. 1984). The Court of Appeals, Western District, reversed. The Missouri Supreme Court granted transfer of the case and issued its decision on November 21, 1985.

The Supreme Court held that Sections 393.106 and 394.315, not prior case law, determines which supplier of electric energy may serve a particular customer under these circumstances. The Supreme Court held that the language of Sections 393.106 and 394.315 was not ambiguous and should be followed. The court held there was no distinction in the statutes based upon the kind of retail electric energy supplied on August 13, 1982. The court held that the statutes entitled the supplier who was supplying retail electric energy at metering points on August 13, 1982, the right to continue to serve those points. The court went on to say that the metering point did not change when it was moved from the original farmhouse to the new home and dairy testing facility. The court held that "persons at metering points" was synonymous with "person at a location" and that "a metering point, then, is a unitary tract of land served by a supplier of retail electric energy." Based upon the Missouri Supreme Court's decision, the Commission finds that the three metering points served by Complainant include the entire 278-acre tract of land known as Holiday Hills Resort.

The facts presented by this complaint present an additional question concerning the proper interpretation of Sections 393.106 and 394.315. Respondent has argued that if the person taking the electric service changes, the statute no longer prevents a change in suppliers. The Supreme Court decision in MoPub, supra, did not reach this question since the same customer was being served by Platte-Clay on August 13, 1982, and thereafter. In this case, a new owner purchased Holiday Hills after August 13, 1982. The question presented, then, is whether this change in person, i.e., customer, taking service allows the new person, customer, to take service from a different supplier. The Commission is of the opinion this is not the correct interpretation of the two statutes.

The Commission finds that the word "persons" in "persons at metering points" does not limit a supplier's right to provide service at that location. The Commission has determined that since the intent of the statutes was to guarantee the existing supplier the right to serve meters existing on August 13, 1982, that right would not be abrogated if the customer, or person, taking service at the metering point changed. The word "persons" merely means anyone taking service at that meter.

Following the interpretation of "persons at metering points", the Commission finds that the words "any person" in the phrase "any person at a location" do not mean the same person but rather whatever person is taking service at the location. The words "said person" refer back to "any person" and have the same meaning, whatever person. Any other interpretation would negate the intent of the statutes. To allow a new supplier to provide service if the person taking service changed would create chaotic situations and make the protection afforded by the statute almost nonexistent. A simple example should suffice to demonstrate this situation. Owner 1 sells his house to another, Owner 2. Owner 2 has a new meter installed from a different electric supplier and the old meter removed. Owner 2 sells to Owner 3. Owner 3 decides to switch back to the original supplier and has Owner 2's meter removed and a new meter installed. Under Respondent's interpretation of the statute, this could continue to occur every time the owner of the property changed. In fact, under that interpretation only the person who was the customer need change for this continued switching to occur.

The Commission does not find it reasonable that the legislature meant this result. If any time the person taking service at the location changes the electric supplier may be changed, the law only protects a very limited amount of a supplier's service and creates waste as meters are installed and removed based upon each new person's self-interest. Since electric cooperatives and electric public utilities are required to provide service within their respective service areas, neither could refuse to provide the new service. The Commission is of the opinion these statutes were to protect the suppliers from this result and to prevent the waste of resources inherent in competing for these customers. The legislature removed the service requirement with language in the second sentence of the sections. That language removes the statutory requirements that the electric cooperative or the electric corporation provide service to all persons in its service area when any person is receiving electric service at a location, or has received service within 60 days, from another supplier. Taken as a whole, the second sentence removes the requirement to provide service while prohibiting the provision of service where service is already being provided, thus preventing the switching of suppliers by customers at locations where service is being received. The commission also noted that the statutes ~~did not do not~~ make no distinction btw the ~~type~~ kind of service (e.g. temp vs permanent) supplied. further supported by MoPub.

helps Co-op

Based upon the Supreme Court's holding concerning "metering points" and the Commission interpretation of the term "persons", the Commission has determined that the Complainant is entitled to supply retail electric energy to the entire 278-acre tract known as Holiday Hills. Complainant had metering points on this "unitary tract of land" on August 13, 1982, and has continued to supply electric energy to those metering points since that date. Since Complainant is entitled to supply retail electric energy to the entire 278-acre tract, Respondent has violated Section 393.106 by supplying retail electric energy to sites on the 278-acre tract. Section 393.106

obviously

prohibits Respondent from supplying electric energy to any location on the 278-acre tract known as Holiday Hills. The Commission has determined further that it would not be in the public interest to allow a change in suppliers to the 278-acre tract.

Complainant's prayer for relief in this matter sought an order directing the Commission's General Counsel to commence an action in the Circuit Court of Taney County for injunctive relief and to tax costs of the complaint proceeding to Respondent. The Commission does not consider it a necessary or appropriate remedy to order its General Counsel to seek injunctive relief against Respondent. The Commission has determined that Respondent is violating Section 393.106. The Commission therefore expects that Respondent will either cease providing service to this location or will obtain a stay from the appropriate court of the Commission's decision. Either action would obviate any need for an injunction. The Commission cannot assess costs and so denies that part of Complainant's prayer.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions.

The Commission has jurisdiction over the matters in this complaint pursuant to Section 393.106 and 394.315, R.S.Mo. (Supp. 1984). The Commission has found that Complainant was supplying retail electric energy to metering points on the 278-acre tract of land known as Holiday Hills Resort on August 13, 1982. The Commission has determined that Complainant was entitled to supply all retail electric energy to the entire 278-acre tract. The Commission has found that Respondent began supplying retail electric energy to metering points on the 278-acre tract and there was no 60-day lapse in service by Complainant. Section 393.106 does not permit Respondent to supply retail electric energy under these circumstances, and the Commission therefore concludes Respondent has violated Section 393.106.

It is, therefore,

ORDERED: 1. That The Empire District Electric Company has violated Section 393.106, R.S.Mo. (Supp. 1984), by supplying retail electric energy to persons on the 278-acre tract of land known as Holiday Hills Resort where Complainant was entitled to supply retail electric energy.

ORDERED: 2. That The Empire District Electric Company cease and desist from providing retail electric energy to meters on Holiday Hills Resort.

ORDERED: 3. That this report and order shall become effective on the 3rd day of January, 1986.

BY THE COMMISSION

Harvey G. Hubbs

Harvey G. Hubbs
Secretary

(S E A L)

Musgrave, Mueller and Fischer, CC.,
Concur and certify compliance with
the provisions of Section 536.080,
R.S.Mo. 1978.
Steinmeier, Chm., Not Participating.
Hendren, C., Absent.

Dated at Jefferson City, Missouri,
on this 10th day of December, 1985.