

Decision No. R04-1204

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-282E

AQUILA, INC., DOING BUSINESS AS AQUILA NETWORKS-WPC,

COMPLAINANT,

V.

SAN ISABEL ELECTRIC ASSOCIATION, INC.,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
DETERMINING SERVICE
TERRITORY BOUNDARY**

Mailed Date: October 14, 2004

Appearances:

Steven H. Denman, Esq., Sarasota, Florida, for Aquila, Inc., doing business as Aquila Networks-WPC; and

Sisto J. Mazza, Esq., Trinidad, Colorado; and Kent L. Singer, Esq., Denver, Colorado for San Isabel Electric Association, Inc.

I. STATEMENT OF THE CASE

1. On July 3, 2003, Aquila, Inc., doing business as Aquila Networks-WPC (Aquila) filed a complaint naming San Isabel Electric Association, Inc. (San Isabel), as Respondent. Aquila alleged that San Isabel unlawfully provided electric service to residential and commercial customers within Aquila's certificated service territory in Pueblo West, Colorado.

2. On July 3, 2003, the Commission issued an Order to Satisfy or Answer.

3. The hearing was held on October 17, 2003. Exhibit Nos. 1 through 11 were marked for identification and admitted into evidence. Exhibits A, B, and D through G were marked for identification and admitted into evidence. Exhibit C was not offered.

4. On February 5, 2004, Recommended Decision No. R04-0140 was issued by the undersigned dismissing the complaint. It was found that San Isabel was legally entitled to provide electric service to three commercial buildings owned by San Isabel. It was also found that Aquila, as the Complainant, failed to sustain its burden to establish by substantial and competent evidence that eight residences served by San Isabel were in fact within Aquila's service territory established by Commission Decision No. 76421 (December 9, 1970) (Exhibit No. 1).

5. On February 25, 2004, Aquila filed exceptions to Recommended Decision No. R04-0140. At the Commission's Weekly Meeting of March 17, 2004, the Commission granted exceptions in part.

6. By Decision No. C04-0290, mailed March 2, 2004, the Commission reopened the record and ordered Aquila to file copies of Pueblo County tract maps, plat maps, and any other documents relied upon by Aquila's witness Mr. VanDerwalker to determine the service territory boundary drawn by Mr. VanDerwalker concerning eight residential customers in Exhibit No. 4.

7. On April 2, 2004, Aquila filed the documents ordered by the Commission. San Isabel after receiving these documents filed by Aquila pursuant to the Commission's order, maintained its position that the territory boundary drawn by Mr. VanDerwalker was not correct in that it did not conform to the metes and bounds description of service territory contained in Exhibit No. 1 and the county tract maps.

8. By Decision No. C04-0468 mailed on May 7, 2004, the Commission issued an order remanding the case to the undersigned Administrative Law Judge for the limited purpose of determining the service territory boundary of Aquila and San Isabel.

9. On August 19, 2004, a remand hearing was held in Pueblo, Colorado, limited to the purpose of determining the service territory boundary of Aquila and San Isabel in Pueblo West as related to the eight residences in question.

10. Testimony was received from Milton VanDerwalker, Professional Engineer and Principal Account Executive for Aquila. Remand Exhibit Nos. 1 and 2 were marked for identification. Remand Exhibit No. 2 consists of five maps, namely Pueblo West, Colorado Tract No. 343, sheet 4 of 4; Pueblo West, Colorado Tract No. 367, sheet 1 of 2; Pueblo West, Colorado Tract No. 367, sheet 2 of 3; Pueblo West, Colorado, Tract No. 367, sheet 2 of 2; and Pueblo West Colorado Tract No. 374, sheet 2 of 2. Remand Exhibit No. 2 was admitted into evidence.

11. As a preliminary matter, a motion by San Isabel to strike the testimony of Aquila's witness, Rocky Mangini and Remand Exhibit No. 1, filed by San Isabel on August 18, 2004 was addressed. San Isabel moved to strike the proffered testimony of Mr. Mangini, a surveyor, and Remand Exhibit No. 1 for the reasons that the proffered testimony of Mr. Mangini exceeded the scope of the remand hearing and that to permit the testimony and exhibit would violate basic due process since Aquila did not provide San Isabel with a copy of the new exhibit with the name of the witness until August 17, 2004, two days before the remand hearing.

12. After hearing argument by San Isabel and the reply by Aquila, San Isabel's Motion to Strike Testimony of Mr. Mangini and Remand Exhibit No. 1 was granted. It was ruled that to permit the testimony and remand exhibit would violate San Isabel's due process.

13. Aquila requested that it be permitted to make an offer of proof, and to have an exhibit marked as an offer of proof exhibit. The request was granted. Mr. Mangini's exhibit was marked as Offer of Proof Exhibit No. 1. Mr. Mangini was allowed to testify on the record as an offer of proof.

14. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding along with a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

15. Mr. VanDerwalker testified that in his determination of the territorial boundary line drawn on Exhibit No. 4, introduced at the original hearing in October of 2003, he relied upon three maps contained in Remand Exhibit No. 2, also submitted to the Commission pursuant to Commission order. These maps of Remand Exhibit 2 are: Tract No. 343, sheet 404; Tract No. 367, sheet 2 of 2; and Tract No. 374, sheet 2 of 2 (page 36 of the remand hearing transcript).

16. In determining the service territory boundary, Mr. Vanderwalker used the language contained in the Commission's Decision (Exhibit 1), pages 4 and 5 of Appendix B. In using this description, and the three Pueblo West, Colorado tract maps described above, he determined the service territory boundary contained in Exhibit No. 4.

17. The legal metes and bounds description contained in Exhibit No. 1, at the bottom of page no. 4 and top of page 5 of Appendix B as relates to this case, states:

...Abarr Drive to the easterly right-of-way of McCulloch Boulevard; thence northerly along the easterly right-of-way of McCulloch Boulevard to the northwest corner of future track 374 as shown in file no. 69 M.P.I.PC-P-10-157 date of revision September 9, 1970; thence westerly along the northerly boundary to the northwest corner of future tract 367 as shown in file no. 69 M.P.I.PC-P-10-157 date of revision September 9, 1970; thence southerly 1,516.41 feet along the east boundary of tract 343 according to Recording No. 389373 dated March 30, 1970;...

18. Mr. Vanderwalker testified that when drawing the boundary of Exhibit No. 4 he started at the northern right-of-way of Abarr Drive and the easterly right-of-way of McCulloch Boulevard. Following the description in Exhibit No. 1, Mr. VanDerwalker and his staff drew a line northerly along the easterly right-of-way of McCulloch Boulevard to the northwest corner of future Tract No. 374 at the intersection of McCulloch Boulevard and Spaulding Avenue. Then Mr. VanDerwalker stated that he went to tract map no. 367, sheet 2 of 2 (Remand Exhibit No. 2) and proceeded westerly along the northerly boundary to the northwest corner of future Tract No. 367 as shown in file no. 69 M.P.I. PC-P-10-157.¹

19. Mr. Vanderwalker, in continuing to follow the description contained in the Commission Decision, proceeded southerly along the eastern boundary of Tract No. 343.

20. Referring to Tract No. 343 sheet 4 of 4, Remand Exhibit No. 2, Mr. Vanderwalker added up the dimensions from the upper right hand side of the tract map which starts at 300 feet. He testified that by adding the dimensions as one proceeds down the boundary, it comes out to 1,516.41 feet as stated in the Commission Decision.

21. Aquila's boundary line as shown in Exhibit No. 4, places the eight residences in question in this case within the service territory of Aquila.

22. San Isabel continues to maintain that the boundary line as described in the Commission Decision (Exhibit No. 1) places the eight residences in San Isabel's service territory. Mr. VanDerwalker testified that the legal boundary description contained in Exhibit No. 1 does not conform to the boundary line as advocated by San Isabel. Mr. VanDerwalker stated that if the boundary line were drawn as San Isabel believes it should, starting at the intersection of

¹ File no. 69 M.P.I. PC-P-10-157, date of revision September 9, 1970, the actual map relied upon by the Commission to establish the metes and bounds description, no longer is available from Pueblo County. In place of the map that is not available, Aquila substituted the **actual** map of Tract No. 367, page 2 of 2.

Spaulding Avenue and Calle De Camelia the line would proceed northerly along the north boundary of Calle De Camelia, northwesterly along Calle De Camelia to the northwest corner of Tract No. 367. The boundary would continue to proceed southerly along Tract No. 350 to the north boundary of Spaulding Avenue. From this point, one would have to proceed 1516.41 feet to the end of Tract 345. Thus at the intersection of Golfview Drive and Calle De Camelia if one proceeded southerly 1,516.41 feet, one would not be able to draw a line to the north boundary of tract no. 345 as indicated in the legal description of the Commission in Exhibit No. 1. (Testimony of Milton VanDerwalker, Remand Transcript, pages 46 and 47)

23. Mr. Vanderwalker while conceding that the legal description in Exhibit No. 1 creates some confusion, (remand hearing transcript page 39 lines 3 and 4) as to how to determine the service boundary, he is reasonably certain of the accuracy of Aquila's boundary line drawn in Exhibit No. 4. Mr. Vanderwalker testified that it is Aquila's goal to obtain a clarification from the Commission as to where the boundary line lies in order to properly serve its customers.

24. Mr. Vanderwalker stated that he believes that there is some ambiguity in trying to plot the boundary line in the location of the eight residences in question since the Commission's Decision delineating the boundary line between Aquila and San Isabel describes future tracts. The available tract maps filed with Pueblo County show actual tracts. Mr. VanDerwalker believes that if the maps that the Commission used were available, that is future Tract No. 367 and future Tract No. 374, he would be able to precisely determine the boundary line. He believes that the key to interpreting the legal description in the Decision is Tract No. 343 (Remand Exhibit No. 2) since it is filed with the County and still exists in the same form as existed in 1970. (Remand Transcript, page 67) The dimensions contained in the Commission Decision correlate directly to Tract No. 343.

25. The issue to be decided in this remand hearing is to determine the relevant portion of the service territory boundary at issue in this case, described in Decision No. 76421, Appendix B. As the Complainant in this proceeding, Aquila has the burden of establishing by a preponderance of the evidence that its interpretation of the boundary contained in the Commission Decision is correct. At the initial hearing, the undersigned found that Aquila failed to meet its burden of proof. It was found and concluded in Recommended Decision No. R04-0140 at page 10 that the evidence produced by Aquila at the initial hearing lacked precision in order to determine whether the eight residences lie within Aquila's or San Isabel's service territory.

26. At the remand hearing, Aquila produced the relevant tract maps (Remand Hearing Exhibit No. 2) including Tract No. 343 map used by the Commission in its metes and bounds description of the service territory contained in its Decision. These tract maps were not offered as exhibits at the initial hearing of this case.

27. Tract Map No. 343 that was used by the Commission has been admitted into evidence at the remand hearing. However, the second map used by the Commission in drawing the boundary, namely file No. 69 M.P.I. PC-P-10-157, date of revision September 9, 1970 has not been entered into evidence by Aquila and it apparently is no longer available from Pueblo County. Since the actual map relied upon by the Commission to establish the service territory boundary between Aquila and San Isabel is no longer available, the intent of the Commission in drawing the boundary cannot be determined. In place of the missing map, Aquila offered as a substitute for future Tract No. 367 map, the actual Tract No. 367 map, Recording No. 441135, dated January 16, 1973.

28. Aquila interprets the description contained in Appendix B of Commission Decision No. 76421, pages 4 and 5: “thence westerly along the northerly boundary to the northwest corner of future tract 367 as shown in file no. 67 M.P.I. PC-P-10-157” to mean a line drawn from the southwest corner of the intersection of McCulloch Boulevard and Spaulding Avenue west along Spaulding Avenue to the northeast corner of Spaulding Avenue and Golfview Drive. On the other hand, San Isabel interprets this same language to mean a line drawn from the southwest corner of the intersection of McCulloch Boulevard and Spaulding Avenue, west to the intersection of Spaulding Avenue and Calle De Camelia, shown on Exhibit No. 4 and following along Calle De Camelia to the northeast corner of Calle De Camelia and Golfview Drive.

29. While both parties agree that the starting point should be from a point at the southwest corner of the intersection of McCulloch Boulevard and Spaulding Avenue, they disagree on the ending point. If the boundary line is drawn, as Aquila suggests, along Spaulding Avenue to the northeast corner of Spaulding Avenue and Golfview Drive, one is able to measure 1,516.41 feet southerly along the east boundary of Tract No. 343 (Golfview Drive) to the north boundary of Tract No. 345 as shown on the substitute map for future Tract No. 367. The distances and angles for the east boundary of Tract No. 343 as shown on the substitute map for future Tract No. 367 matches and agrees with those shown on the map for Tract No. 343 used by the Commission in its description of the territorial boundary in its 1970 Decision and totals a distance of 1,516.41 feet. San Isabel’s interpretation of the boundary line from the Decision requires that an additional southerly distance of 981.64 feet is required to reach the northern boundary of Tract No. 345, as shown on the substitute map for future Tract No. 367.

30. Based on the evidence of record produced at the remand hearing, it is found and concluded that the southerly distance required to reach the northern boundary of Tract No. 345 is obtainable based on Aquila's interpretation of the Commission's 1970 Decision, and more reasonably conforms to the language used by the Commission in describing the boundary in its Decision.

31. Since the actual map for future Tract No. 367 relied upon by the Commission in determining the boundary is no longer available, it is recommended that the Commission reissue the boundary description delineating the service territories between Aquila and San Isabel for the disputed portion. It is recommended that the Commission adopt the following description:

...Thence northerly along the easterly right-of-way of McCulloch Boulevard to the northwest corner of Tract 374 according to Recording No. 420084; thence westerly to the west right-of-way of McCulloch Boulevard; thence north to the center line of Spaulding Avenue as shown in Tract 367 according to Recording No. 441135; thence westerly along the centerline of Spaulding Avenue to the intersection of said centerline with the east boundary of Tract 343 (Golfview Drive) as shown in Tract 367 according to Recording No. 441135; thence southerly 1,476.41 feet...

Adoption of this boundary line description adds 40 feet of territory to Aquila on the westerly ending point of Spaulding Avenue, and removes 40 feet of territory from Aquila on the easterly starting point of Spaulding.

32. Pursuant to § 40-6-109(2), C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Aquila, Inc., has sustained its burden of proof to establish its interpretation of the relevant service territory boundary as described in Commission Decision No. 76421, Appendix B (Exhibit No. 1), shown on exhibit No. 4.

2. The boundary description delineating the service territories between Aquila, Inc., and San Isabel Electric Association, Inc., contained on pages 4 and 5 of Decision No. 76421, Appendix B is reissued in part as follows:

...thence northerly along the easterly right-of-way of McCulloch Boulevard to the northwest corner of Tract 374 according to Recording No. 420084; thence westerly to the west right-of-way of McCulloch Boulevard; thence north to the centerline of Spaulding Avenue as shown in Tract 367 according to Recording No. 441135; thence westerly along the centerline of Spaulding Avenue to the intersection of said centerline with the east boundary of Tract 343 (Golfview Drive) as shown in Tract 367 according to Recording No. 441135; thence southerly 1,476.41 feet...

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge