Decision No. C04-1547

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.

ORDER ON EXCEPTIONS

Mailed Date: December 28, 2004
Adopted Date: December 15, 2004

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I. BY THE COMMISSION

A. Statement

1. This case centers upon a complaint filed by Aquila, Inc. (Aquila), against Respondent San Isabel Electric Association, Inc. (San Isabel). Aquila alleges that San Isabel improperly invaded its service territory by providing electric service to 11 customers, including 3 commercial/industrial properties, and 8 residences. The San Isabel lines serving the three commercial buildings are owned by San Isabel and are not used to service any other customers. These three commercial properties include its headquarters building, a warehouse, and a propane business building. The lines serving the eight residences are located in the Pueblo West subdivision, which is south of U.S. Highway 50.

2. Within the complaint, Aquila also seeks a favorable ruling: 1) ordering San Isabel to immediately cease and desist from contacting any customers or property owners within Aquila's certified service territory for the purposes of offering to provide or providing electrical service to such customers or property owners; 2) awarding Aquila compensation for revenues diverted unlawfully from Aquila and its predecessors to San Isabel in the amount of $862,963.36, interest on that amount, attorneys' fees, and costs of this action; 3) ordering San Isabel to offer to sell to Aquila at net book value, or at other value to be established by the Commission, its plant and facilities located within Aquila's certificated service territory; and 4) granting such further and additional relief as this cause and justice may require.

3. On February 5, 2004, the administrative law judge (ALJ) dismissed the complaint case in Recommended Decision No. R04-0140. The ALJ agreed with San Isabel that under the authority of the *Western Colorado Power* case, it had the right to provide private service exclusively to its own buildings. As for the eight residential customers, the ALJ concluded that

Aquila had failed to meet its burden to establish that San Isabel is not legally entitled to serve the eight residences.

4. The ALJ noted that the Commission in 1970 issued Decision No. 76421, which delineated the exclusive service territories of Aquila and San Isabel in the Pueblo West area in a metes and bounds format. However, witnesses for Aquila and San Isabel both acknowledged the difficulty in applying that metes and bounds description due to the references to "Future Tracts," and because the actual maps cited by the Commission could not be located. However, both witnesses were confident that their respective interpretations of the boundary lines, as applied to the eight residences in this case, are accurate.

5. On February 25, 2004, Aquila filed exceptions to Recommended Decision No. R04-0140. Aquila argued that the ALJ erred in relying on the *Western Colorado Power* case and in finding that Aquila did not adequately demonstrate that the eight residential customers were located within Aquila's exclusive territory. Aquila also incorporated by reference the issue of whether San Isabel must reimburse Aquila for unlawfully diverted monopoly revenue as set forth in its Opening Statement of Position.

6. On March 9, 2004, San Isabel filed a response to Aquila's exceptions. San Isabel contended that Aquila's analysis of *Western Colorado Power* was incomplete and misleading. It believed that the ALJ correctly determined that Aquila failed to meet its burden with respect to the eight residential customers.

7. On March 17, 2004, the Commission addressed the parties' exceptions and response at its Commissioners' Weekly Meeting The oral discussions and finding from the March 17, 2004 Commissioners' Weekly Meeting are hereby incorporated into this decision. We agreed with Aquila that the ALJ erred in his reliance of the *Western Colorado Power* case for the

three commercial properties. However, we found that a critical piece of information for the determination of the eight residential customers was not part of the record.

8. Beginning on page 228 of the transcript, Aquila witness VanDerwalker stated that he went to the county offices to compare the tract map with the plat map as set forth in the Commission's 1970 decision to resolve the proper service territory boundary. He stated that, based on that information, he was able to establish the service territory boundary line as drawn by Aquila on Exhibit 4. However, no copies of the county records were entered into evidence in this case regarding Aquila's interpretation of the location of Future Tracts 367 and 374. We believed that copies of the county records relied upon by Mr. VanDerwalker would enable the Commission to readily and objectively determine the service territory boundary with respect to the eight residential customers in this complaint.

9. As a result of the omitted evidence, we ordered Aquila to file a copy of the county tract maps, plat maps, and any other documents relied upon by Mr. VanDerwalker to determine the service territory boundary as drawn by Aquila in Exhibit 4 relating to the eight residential customers.[1] We also required that, within 14 days of Aquila's filing, San Isabel would file a pleading stating any objection to the admission of the above-referenced documents into the evidentiary record. That pleading would also inform us whether, after examination of the county records, San Isabel agreed or disagreed with the service territory boundary as drawn by Aquila in Exhibit 4. If San Isabel still disagreed with Aquila's position, the Commission would remand this case to the ALJ for additional hearing for the limited purpose of determining the service territory boundary relating to the eight residential customers based on the above-referenced documents. Finally, the decision stated that, following the issuance of the ALJ's recommended

[1] *See* Decision No. C04-0290.

decision on remand regarding the limited issue of the service territory boundary for the eight residential customers, we would take up all remaining issues in the case at a future Commissioners' Weekly Meeting.

10. On April 15, 2004, San Isabel filed its reply. San Isabel stated that it did not object to the tract maps filed by Aquila, but believes they were incomplete. Specifically, San Isabel noted that Aquila only provided sheet two of two of Tract 367. With its reply, San Isabel included sheet one of two of Tract 367. San Isabel contends that sheet one of two of Tract 367 supports its position that it is entitled to serve the eight residential customers in question and that further hearings are unnecessary. San Isabel did object to the hand-written comments inserted on the legal description included in the Aquila documents and believes they should be stricken. Finally, after reviewing the material provided by Aquila, San Isabel indicates it requested that the Commission make a finding that the eight residential customers in question are within its service territory.

11. On April 26, 2004, Aquila filed its response to the San Isabel reply. Aquila disputed the allegations that it intentionally omitted sheet one of two of Tract 367, as well as San Isabel's objection to the hand-written notes on the legal description included in the Aquila documents. Aquila represented that it was following the Commission's order by providing "a copy of the county tract maps, plat maps, and any other documents relied upon by Mr. VanDerwalker to determine the service territory boundary as drawn by Aquila in Exhibit 4, relating to the eight residential customers." As such, Aquila agreed it was appropriate not to include sheet one of two of Tract 367 since Mr. VanDerWalker did not rely upon it. In addition, Aquila stated that the hand-written notes were made when Mr. VanDerwalker was preparing Exhibit 4.

12. By Commission Decision No. C04-0468, issued May 7, 2004, we remanded the case back to the ALJ for the limited issue of the service territory boundary for the eight residential customers.[2]

13. On October 14, 2004, the ALJ issued his decision on remand in Recommended Decision No. R04-1204. He concluded that Aquila had sustained its burden of proof to establish that its interpretation of the relevant service territory boundary for the eight residential customers was correct. He also provided a revised meets and bounds description for the portion of the service territory in dispute based on the maps in the remand case in order to clearly delineate the service territory boundary.

II. FINDINGS

14. No exceptions were filed to Recommended Decision No. R04-1204. Thus, we memorialize our ruling as follows.

A. The *Western Colorado Power* Case

15. The first question involves the interpretation and correctness of the *Western Colorado Power* case. San Isabel relies on this 1962 Commission decision for the proposition that it is entitled to serve its own premises, even when those premises are within Aquila's service territory. The Commission in the *Western Colorado Power* case held that this was permissible because "...any person has the absolute right to render utility service to himself." According to the *Western Colorado Power* decision, the term "any person" includes a public utility. On the other hand, Aquila argues that the *Western Colorado Power* case is incorrect as a legal matter, because it is inconsistent with the principle of regulated monopoly.

[2] *See* Decision No. C04-0468.

16. The issue of whether the *Western Colorado Power* decision is correct affects three San Isabel premises located in Aquila's territory which San Isabel is now serving in reliance on the *Western Colorado Power* decision. Notably, Aquila or its predecessor agreed to allow San Isabel to serve its own properties (the headquarters and warehouse buildings).[3] As for the propane building,[4] Aquila objected to San Isabel providing service to the premises.

17. San Isabel's interpretation of *Western Colorado Power* case is correct. The 1962 decision by the Commission does say that any public utility is entitled to serve its own premises, even when those premises are located in another public utility's service territory. However, we agree with Aquila that the 1962 ruling was not correctly decided. First, the Commission's conclusion that any person is entitled to "render utility service to himself" is apparently premised on the reasoning that a person can provide service to himself without becoming a public utility subject to the Commission's jurisdiction. This is apparently what the Commission meant when it described a person's facilities serving that person as a "private line" rather than a "public facility." However, in the case of a "person" that is already a public utility, such as San Isabel, that threshold has already been crossed. That is, a public utility that is already subject to Commission jurisdiction does not enjoy the same exemption from Commission authority as a private person.

18. Second, we find that the *Western Colorado Power* reasoning is inconsistent with the doctrine of regulated monopoly. Ultimately, the purpose of the doctrine is to protect ratepayers against, for example, higher rates as a result of duplicative facilities. Allowing a public utility to serve itself in another utility's service territory can lead to higher rates for

[3] *See* Recommended Decision No. R04-0140, ¶¶ 15-16.
[4] *Id*. at ¶ 17.

ratepayers. In fact, this is what appears to have occurred with the propane business building in this case. Aquila was initially serving the San Isabel property but was forced to stop providing service when San Isabel began to serve that building.

19. We find that the conclusions of the *Western Colorado Power* decision are incorrect and therefore not binding on this Commission. We further clarify that the *Western Colorado Power* ruling will no longer be applied. However, it is important to note that Aquila voluntarily agreed to stop serving the San Isabel headquarters and warehouse buildings. These transfers occurred many years ago—approximately 27 years ago for the headquarters building and approximately 10 years ago for the warehouse building. Therefore, we find that, under a theory of estoppel or laches (unreasonable delay in asserting legal rights) or waiver, it is too late for Aquila to seek to once again provide service to these buildings. Therefore we deny Aquila's exceptions on these two properties. As for the propane building, it is unrefuted that there was a duplication of facilities serving that one location by both Aquila and San Isabel. In light of our decision that the *Western Colorado Power* decision is incorrect, we order San Isabel to remove its facilities from the propane building. We point out that this finding is not a retroactive application of a new interpretation of the *Western Colorado Power* issue because Aquila timely filed its complaint which included the propane business, and the only delay has been the time necessary for the Commission to address and rule on the complaint.

B. Award of Attorney Fees, Prejudgment Interest and the Costs Related to this Action

20. Aquila states that it has retained counsel to represent it in this matter and is obligated to pay them a fee for their services and will incur additional costs in the prosecution of the complaint. Aquila contends that such fees and costs are recoverable from San Isabel.

21. The Commission's authority to award attorneys' fees was first established by the Colorado Supreme Court in *Mountain States Tel. & Tel. Company v. Colorado Public Utils. Comm'n*, 180 Colo. 74, 502 P.2d 945 (Colo. 1972) (Mountain States I), where the Court held that it was within the jurisdiction of the Commission to award attorneys' fees. Later, in *Mountain States Tel. & Tel. Company v. Colorado Public Utils. Comm'n*, 194 Colo. 130, 576 P.2d 544 (Colo. 1978) (Mountain States II), the Court reiterated that the Commission's authority to award attorneys' fees emanates from Article XXV of the Colorado Constitution, which delegates to the Commission legislative authority and power over such matters. *Id*. at 195 Colo. 134, 576 P.2d 546. This legislative authority to award attorneys' fees has most recently been upheld by the Court in *Lake Durango Water Company, Inc. v. Colorado Public Utils. Comm'n*, 67 P.3d 12 (Colo. 2003).

22. The standard developed by the Commission in determining whether to award attorneys' fees was set out in Commission Decision No. 85817, effective October 15, 1974. There the Commission held that:

> Any Protestant-Intervenor submitting a claim [for attorneys' fees] shall disclose in its motion and be able to support by appropriate evidence at a later hearing that:
>
> > The representation of the Protestant-Intervenor and the expenses incurred relate to general consumer interests and not to a specific rate or preferential treatment of a particular class of ratepayers.
> >
> > The testimony, evidence and exhibits introduced in this proceeding by the Protestant-Intervenor have or will materially assist the Commission in fulfilling its statutory duty to determine the just and reasonable rates which [the utility] shall be permitted to charge its customers.
> >
> > The fees and costs incurred by the Protestant-Intervenor for which reimbursement is sought are reasonable charges for the services rendered on behalf of general consumer interests.

24. In order for a party to be eligible to recover attorneys' fees, it must meet all three prongs of the test. We find nothing on the record to indicate that Aquila has in fact met the three-prong test in order to be eligible to recover attorneys' fees. Although Aquila generally lists the Commission standards for the three-part test, it has failed to state with particularity how its counsel's representation relates to general consumer interests rather than to a specific rate or preferential treatment of a particular class of ratepayers. Aquila also has failed to show how the evidence and exhibits introduced in this matter materially assisted the Commission in fulfilling its statutory duty to determine just and reasonable rates. Finally, there is no showing as to the reasonableness of the fees and costs Aquila's legal counsel seeks to recover, or that such fees and costs were rendered on behalf of general consumer interests.

25. Further, and most significantly, given the considerable delay of Aquila in asserting its claims, we find that the equitable doctrine of estoppel by laches is applicable. That doctrine holds that a claimant who has unreasonably delayed or been negligent in asserting a claim does not have an equitable claim due to the prejudice that inures to the party against whom relief is sought. Aquila delayed bringing this action for years, although it knew or should have known of the service territory dispute here. Given that delay, we find it inequitable for Aquila to now recover its attorneys' fees from San Isabel. We therefore deny Aquila's request for attorneys' fees in this matter.

C. Award of Lost Revenues

26. Aquila also seeks award of the "lost revenues" for 10 customers of the 11 customers which San Isabel has diverted unlawfully from Aquila and its predecessors.[5] According to Aquila's calculation, the amount of the lost revenues is $862,963.36, as shown in

[5] Aquila does not seek any lost revenues associated with the propane business.

Exhibit 10. In contrast, San Isabel calculates the amount of revenue for the ten customers as $819,106.62, as shown in Exhibit G. The revenues associated with the headquarters building and the warehouse comprise the bulk of the money, either $816,946.09 under Aquila's calculation or $773,790.00 under San Isabel's calculation. Based on our ruling that Aquila voluntarily agreed to stop serving the headquarters and warehouse buildings and that San Isabel may continue to provide service to itself, we find that there are no lost revenues due Aquila for those two commercial properties.

27. Regarding the eight residential customers, the amounts calculated by the parties for lost revenues are similar - $46,017.27 by Aquila or $45,317.00 by San Isabel. In reviewing Exhibit G, we note that the initial connection date of many of the residential homes at issue to the San Isabel system was either in 1995 or 1996.

28. Whether or not to award lost revenues for the eight residential customers depends in part on whether Aquila was diligent in protecting its service territory boundary. While neither party was able to locate the maps the Commission cited in the its 1970 metes and bounds description with respect to "Future Tract 367" and "Future Tract 374," Aquila's predecessor should have retained a copy, since the establishment of certificated service territory is a key provision of a regulatory compact. Alternatively, we believe that Aquila's predecessors could have compared the metes and bounds boundary once the "future" tracts became platted. Had they differed, it could have filed an application with the Commission for a correction or clarification.

29. Finally, we note that Aquila did not become aware that San Isabel was serving these eight residential customers until Mr. Woods from San Isabel pointed it out to Mr. Stone from Aquila during a discussion they had regarding service to the propane business.[6]

30. We conclude that Aquila has not been diligent in protecting its service territory boundary regarding these eight residential customers. Furthermore, we find Aquila's request for lost revenues is untimely given the nearly eight to nine years that San Isabel has been serving these customers.

31. Further, to the extent Aquila seeks recovery from San Isabel in the form of damages or lost revenue, § 40-7-102, C.R.S., provides a private right of action to recover such losses or damages from a utility. That provision at subsection (1) states in relevant part:

> In case any public utility does, causes to be done, or permits to be done any act, matter, or thing prohibited, forbidden, or declared to be unlawful, or omits to do any act, matter, or thing required to be done, either by the state constitution, any law of this state, or any order or decision of the commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damage, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, the court, in addition to the actual damages, may award exemplary damages. *An action to recover such loss, damage, or injury may be brought in any court of competent jurisdiction by an corporation or person.* (Emphasis added)

The Supreme Court has determined that this subsection creates a private cause of action to compensate with money damages the injury of any person caused by the conduct of a regulated utility that violates state law or any public utilities commission order or decision. *Fawn Lake Ranch Co. v. K.C. Elec. Ass'n*, 700 P.2d 564 (Colo. App. 1985); *see also, City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198 (Colo. App. 1999). We therefore find that the proper venue for Aquila's claims for lost revenue is state district court.

[6] Hearing Transcript I, page 34.

D. Transfer of San Isabel's Assets at Net Book Value

32. Aquila also seeks an order requiring San Isabel to offer to sell to Aquila its plant and facilities located within Aquila's certificated service territory at net book value or at other value to be established by the Commission. We decline to issue such an order to San Isabel. We are concerned the facilities may not be electrically compatible with the Aquila system or that San Isabel may wish to remove and reuse the facilities elsewhere in its system.

33. The interests of the affected residential customers is of paramount importance here. Affected residential customers should not be adversely impacted with extended outages should the parties decide to replace the existing San Isabel facilities with Aquila facilities. We therefore order the parties to develop a transition plan which minimizes customer outages and landscaping impacts. If the parties determine that it is feasible and acceptable to each utility to transfer some or all of the assets, those assets shall be transferred at net book value. The Commission's past practice has been to value transferred asset at net book value. Based upon the record in this case, we do not see any unique circumstance which would require us to alter that precedent.

E. Customer Swaps Within Fremont County

34. In reviewing the first hearing transcript, we note testimony regarding customers being transferred between the two utilities because it "is in the customer's best interest" to be served by the other utility. The transcript also reveals that the parties acknowledged that they have failed to make the necessary filing with the Commission to formally approve the modifications to their respective certificated territories.[7] We are troubled by the parties lackadaisical approach to follow through on the approval process here. As this case

[7] Hearing Transcript I at pages 32, 33, 38, 56, 87, and 88.

demonstrates, had both utilities been diligent in protecting their service territory boundaries, the savings in time and money to both parties could have been significant. We direct the parties to file a joint application to formally request transfer of any customers between Aquila and San Isabel along with the associated modifications to their respective certificated service territories within 90 days from the effective date of this Decision.

III. ORDER

A. The Commission Orders That:

1. The exceptions filed by Aquila, Inc. on February 25, 2004 relating to the commercial properties are granted in part and denied in part consistent with the discussion above.

2. Aquila, Inc.'s request for the award of attorney fees, pre-judgment interest, costs associated with this action is denied.

3. Aquila, Inc.'s request for lost revenues in connection with this complaint case is denied.

4. Aquila, Inc. and San Isabel Electric Association, Inc. shall work together to ensure that the affected customers shall have minimal disruption in their service and minimal landscaping impacts when service is transferred between the two utilities.

5. Aquila, Inc. and San Isabel Electric Association, Inc. shall file a joint application to formally request the transfer of the affected Fremont County customers along with the associated modifications to their respective certificated service territories within 90 days from the mail date of this Decision.

6. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument or reconsideration shall begin on the first day after the effective date of this Order.

7. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 15, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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_____
Commissioners

COMMISSIONER CARL MILLER
NOT PARTICIPATING.