

Decision No. R04-0140

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
DISMISSING COMPLAINT**

Mailed Date: February 5, 2004

Appearances:

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

Kent L. Singer, Esq., Denver, Colorado, and Sisto J. Mazza, Esq.,
Trinidad, 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.

2. On July 3, 2003, the Commission issued an Order to Satisfy or Answer. On the same date, an Order Setting Hearing and Notice of Hearing was issued. The hearing was scheduled for August 21, 2003.

3. On August 7, 2003, San Isabel filed an Answer to the Complaint.

4. The hearing was continued to October 17, 2003 at the request of Aquila, with the agreement of San Isabel.

5. The hearing was held on October 17, 2003. Testimony was received from witnesses and 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.

6. Aquila's opening Statement of Position was filed on November 17, 2003. San Isabel's Statement of Position was filed on December 8, 2003. Aquila's reply was filed on December 16, 2003.

7. 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

8. Aquila is a public utility authorized to provide electrical energy to its customers in portions of southern Colorado.

9. San Isabel is a cooperative electric association providing electrical energy to seven counties in southern Colorado.

10. The Commission has jurisdiction over the subject matter and over the parties.

11. On July 3, 2003, Aquila filed a complaint alleging that San Isabel is illegally providing electric utility service to customers located within Aquila's certificated service territory, located in Pueblo West, Colorado. Aquila alleged that San Isabel was unlawfully

providing electric service to commercial/industrial properties located at 892 Enterprise Drive, 716 Industrial Boulevard, and 90 Laser Drive. Aquila also complained that San Isabel was improperly serving eight residences located at 22 Golfview Drive, 28 Golfview Drive, 34 Golfview Drive, 40 Golfview Drive, 46 Golfview Drive, 52 Golfview Drive, 58 Golfview Drive, and 70 Golfview Drive. Aquila requested that the Commission enter an order requiring San Isabel to disclose each location to which it provides electric service within Aquila's certificated service territory; requiring San Isabel to notify the customers that it is improperly providing service to said customers, and notifying the customers that it will transfer their electric service to Aquila within 30 days; ordering San Isabel to immediately cease and desist from contacting any customers or property owners within Aquila's certificated territory for the purpose of providing electrical service; awarding Aquila compensation for revenues unlawfully diverted from Aquila and its predecessors, pre-judgment interest, attorneys' fees and costs of this action before the Commission; and ordering San Isabel to offer to sell to Aquila at net book value its plant and facilities located within Aquila's service territory.

12. San Isabel, in its answer denies that it is illegally providing electric service to the 11 customers, and asserts affirmative defenses of estoppel, laches, statute of limitations, acquiescence of Aquila and its predecessors allowing San Isabel to serve the 11 customers, and that the complaint is barred by invasion agreements between Aquila and San Isabel. San Isabel requests that the Commission deny and dismiss the complaint.

13. Aquila and San Isabel provide electric service to customers located in Pueblo West, Colorado under their certificates granted by the Commission in Decision No. 76421 (December 9, 1970). *See* Exhibit No. 1. In this decision, Aquila's predecessor, Southern Colorado Power Company, a Division of Central Telephone and Utilities Corporation was

granted a certificate of public convenience and necessity (CPCN) as is relevant herein to serve customers located in the northern portion of Pueblo West as shown in Exhibit No. 2. This part of Pueblo West contains commercial, industrial and residential buildings. The Commission in its decision also granted a CPCN to San Isabel as is relevant herein, granting generally the territory in the southern portion of Pueblo West, which is primarily a residential area. The service territories of the two utilities are adjacent to each other and both utilities have facilities located within the other's service territory in order to provide service to its customers. In paragraph No. 8 of the Commission's decision, the Commission stated:

...nothing contained herein shall be interpreted to preclude a utility from traversing an area certificated to another utility with transmission or distribution feed lines or from locating substations or other needed facilities therein.

14. Pueblo West is an unincorporated area located approximately six miles west of Pueblo, Colorado. The development, which is primarily residential, was started in the late 1960s and early 1970s. The residences located primarily south of U.S. Highway 50 are located within San Isabel's certificated electric service territory, and they are served by San Isabel. The commercial, business, and industrial portion of Pueblo West is located primarily in Aquila's certificated territory. Aquila also provides electric service to residences within its certificated area. (See Exhibit No. 2)

15. San Isabel's headquarters building, built in 1974 is located at 893 E. Enterprise Drive in Pueblo West. (Exhibit No. 9) The headquarters building is located to the north of U.S. Highway 50 and it is within the certificated service territory of Aquila. Aquila's predecessor, Southern Colorado Power provided service to the headquarters from 1974 to 1976. In 1976, San Isabel asked Southern Colorado Power to remove its facilities and to cease providing electric service to San Isabel's headquarters so that San Isabel could provide the

service to its building. Southern Colorado Power acquiesced to the request and San Isabel has been serving its headquarters building since that time.

16. The property located at 716 Industrial Boulevard was purchased by San Isabel in 1993. San Isabel uses this property as a warehouse. (Exhibit No. 7) This building is also located in Aquila's certificated service territory. Aquila or its predecessor served this building until San Isabel requested that Aquila remove their facilities so that San Isabel could serve its own warehouse. Aquila agreed to remove its facilities and San Isabel began to provide three phase electric service to its warehouse.

17. In 2003, San Isabel obtained an industrial property located at 90 Laser Drive. This building is being used as a propane facility of San Isabel Services, a wholly-owned subsidiary of San Isabel. (Exhibit No. 6) This building is also located in Aquila's certificated territory, and was served by Aquila at the time of its purchase. In 2003, San Isabel requested that Aquila remove its electric facilities and to stop service to the building since San Isabel wanted to provide service to this facility. Aquila declined to stop providing service to the building because it is located in Aquila's certificated service territory. Both Aquila and San Isabel provide electric service to the propane facility. Aquila provides single phase electric service to the building and San Isabel provides three phase electric service.

18. The San Isabel lines serving the three commercial/industrial buildings owned by San Isabel are private lines and are not used for service to any other customers. The lines to these three buildings are used exclusively to serve San Isabel, or in the case of the propane facility, San Isabel's subsidiary.

19. The eight residences in question are located in Pueblo West south of U.S. Highway 50. (See Exhibit Nos. 4 and 8.) The eight residences located on Golfview Drive have been, and are currently served by San Isabel. Aquila and San Isabel disagree as to whether the residences are located in the certificated territory of Aquila or San Isabel. Both utilities believe that the residences are within their respective certificated territories based on the Commission decision delineating the service territories (Exhibit No. 1, Appendices A and B). The two utilities believe that by using the metes and bounds description contained in the Appendices to the decision, and applying the descriptions to the land, the eight residences are located within their respective territories. The eight residences have been served by San Isabel since 1994.

20. Aquila contends that San Isabel's improper incursions into its certificated territory and unlawful service to the 11 customers diverted revenues that Aquila is entitled to collect. Aquila contends that the total amount of diverted compensation due to the invasions is \$862,963.36 (Exhibit No. 10). This figure represents lost revenues. It does not account for avoided costs. Aquila contends that it is entitled to compensation for diverted revenues. Aquila asserts that neither it, nor its predecessors consented to San Isabel's alleged invasions. Aquila also contends that there is no agreement between the parties and that there is no basis in fact or law which would authorize San Isabel to serve these properties. Aquila has the facilities necessary to serve the 11 properties, including the ability to provide three phase service to the commercial buildings. Aquila stands ready to serve the properties.

21. Aquila argues that under the doctrine of regulated monopoly, a certificated public utility has the exclusive right to provide service within its certificated territory. Aquila states that the three commercial properties owned by San Isabel and the eight residences are within Aquila's

certificated territory under the description of its service territory of its certificate, contained in Commission Decision No. 76421 Appendix B. Aquila contends that since San Isabel illegally invaded the exclusive service territory of Aquila, San Isabel should be ordered to cease providing service and that it should be ordered to pay the unlawfully diverted revenues that it has received while serving the 11 properties.

22. San Isabel argues that it is legally entitled to provide electric service to its buildings, the headquarters building, the warehouse, and the propane facility. San Isabel concedes that the three buildings are located within the certificated service territory of Aquila. However, San Isabel asserts a right to self serve its facilities under the case of *Western Colorado Power Company v. Colorado-Ute Electric Association, Inc.*, 44 PUR 3d 113 (Colo. P.U.C. 1962); Commission Decision No. 58653, a 1962 Colorado Public Utilities Decision. San Isabel argues that under this case, it has the right to provide service to its buildings for private purposes. San Isabel states that the electric lines serving its three properties are serving the San Isabel properties exclusively and are not used for the purpose of providing service to any other customers.

23. San Isabel contends that the eight residences served by San Isabel are located within the San Isabel certificated service territory authorized by Commission Decision No. 76421, Appendix A. Witnesses for San Isabel testified that they determined that the eight residences are within its service territory after inspecting the San Isabel track book and using the metes and bounds description contained in the its certificate.

III. DISCUSSION AND CONCLUSIONS OF LAW

24. The Commission regulates public utilities in the State of Colorado under the doctrine of regulated monopoly. *Western Colorado Power v. PUC*, 159 Colo. 262, 411 P.2d 785 (1966). Under this doctrine, a public utility has the exclusive right to provide service to customers within its certificated territory. No other public utility can serve in this area unless authorized by the Commission. Once a public utility has been certified to provide service, it maintains a monopoly to provide service within its certificated territory until it is shown that the incumbent utility is either unwilling or unable to serve existing or new customers. *Public Service Company v. Public Utilities Commission*, 483 P.2d 1337, 1339 (Colo. 1971).

25. The Commission in its Decision No. 76421 in 1970 delineated the exclusive service territories of Aquila and San Isabel, which is applicable to the electric service in the Pueblo West area. The Aquila and San Isabel service territories are described by metes and bounds in Appendices A and B of this Decision.

26. The evidence of record establishes that notwithstanding the metes and bounds description of the respective utility service territories, the utilities have had considerable difficulty in determining the precise boundary lines, particularly with respect to the eight residences in this case. The witnesses for both Aquila and San Isabel acknowledge this difficulty in applying the metes and bounds description of the Commission decision to the geographical territory in Pueblo West. Witnesses for both utilities testified about this difficulty, however, each utility is confident that its boundary lines, as applied to the eight residences in this case, are accurate.

27. It is clear from the evidence of record that the three commercial properties owned by San Isabel or its subsidiary, namely the headquarters building, the warehouse, and the propane

facility are located within the exclusive service territory of Aquila. Both Aquila and San Isabel agree. San Isabel contends, however, that under the authority of the *Western Power* case, it has the right to provide private service exclusively to its buildings.

28. In the *Western Power Company* case, the Commission ruled that a utility has an absolute right to render utility service to itself. In this case, the Commission found that Colorado-Ute Electric Association, Inc., had the right to provide private service to its building even though it was located within the service territory of Western Colorado Power Company. The Commission stated in its decision that:

Thus, with this assertion by the respondents, we are not faced with the situation of a utility enlarging its facilities for utility service; rather, we are presented with a situation of private facilities being enlarged to serve a private purpose. To hold otherwise is to state that a person capable of rendering service to himself is prohibited from doing so...

It is our view that under the law, any person has the absolute right to render utility service to himself. *Id.* at 117

29. Aquila argues that the *Western Power* case is not controlling since the facts of the instant case can be distinguished from the facts in the *Western Colorado Power* case, and that the Commission is not bound by the doctrine of *stare decisis*.

30. Notwithstanding the argument of Aquila, the facts in this case are similar to the facts in the *Western Power* case. In the instant case, San Isabel owns the buildings and it desires to continue to serve itself. The Commission in the *Western Power* case established an exception to the exclusive right to serve doctrine permitting a public utility to serve itself. The evidence of record establishes that San Isabel in good faith relied on this Decision to extend its private lines for the purpose of serving its three buildings. The evidence establishes that the lines serve only

the three buildings and no other customers. It is thus found and concluded that San Isabel is legally providing service to its three facilities.

31. The question of whether Aquila or San Isabel is legally entitled to provide electric service to the eight residences in question is problematic. The evidence establishes that both utilities applied the metes and bounds description contained in the certificates authorized by Decision No. 76421. Although the metes and bounds description appears to be clear in the description of the specific territory authorized to be served by the respective public utilities in Decision No. 76421, the boundaries drawn by Aquila and San Isabel do not agree. The testimony of witnesses for both Aquila and San Isabel testified concerning the difficulties of applying the metes and bounds description of their respective certificates to the actual land. Aquila's witness Milton VanDerwalker testified about the difficulty in determining whether the eight residences were within the certificated boundary of Aquila. He stated that he reviewed the track and plat maps on file with Pueblo County and by comparing the track and plat maps with the metes and bounds description, he drew the boundary of service territory shown on his map, Exhibit No. 4. The evidence of record also establishes that San Isabel's witnesses Randy Bryant and William Wood in applying the metes and bounds description of its certificate and by using San Isabel's track book, they reached the opposite conclusion of Aquila, namely that the eight residences are located in San Isabel's service territory. Although the conclusions reached by the witnesses for Aquila and San Isabel, based on their interpretation of the respective certificates, appear to be reasonable, the evidence produced at the hearing lacks precision in order for the finder in fact to make a determination of whether the eight residences lie within Aquila's or San Isabel's service territory. Since Aquila as the Complainant in this case has the burden to establish by substantial and competent evidence that the eight residences are located within

Aquila's service territory, and not within San Isabel's, it is found and concluded that Aquila has failed to meet its burden to establish that San Isabel is not legally entitled to serve the eight residences.

32. Based on the evidence of record, it is recommended that the Commission dismiss the complaint, and deny the relief requested.

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

IV. ORDER

A. The Commission Orders That:

1. The complaint of Aquila, Inc., doing business as Aquila Networks-WPC, v. San Isabel Electric Association, Inc., Docket No. 03F-282E is dismissed.

2. 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.

3. 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.

4. 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