

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of)
INDIANA MICHIGAN POWER COMPANY,)
d/b/a AMERICAN ELECTRIC POWER,)
against MIDWEST ENERGY COOPERATIVE.)
_____)

Case No. U-13764

At the April 20, 2004 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On March 26, 2003, Indiana Michigan Power Company, d/b/a American Electric Power (I&M), filed a formal complaint against Midwest Energy Cooperative (Midwest), alleging that Midwest had violated Rule 411 of the Commission’s rules governing services supplied by electric utilities, 1983 AACS, R 460.3411 (Rule 411)¹ by extending electric facilities and service to the South County Golf Development, L.L.C. (SCGD), and the South County Residential

¹Rule 411 was amended by 1996 MR 4, R 460.3411. However, that amendment did not alter Rule 411 in any respect material to the issues in this case.

Development, L.L.C. (SCRD), (collectively, the Development)² in the Village of Vicksburg, Michigan. Midwest filed its answer on May 5, 2003.

Pursuant to due notice, a prehearing conference was held before Administrative Law Judge Mark E. Cummins (ALJ) on June 26, 2003. I&M, Midwest, and the Commission Staff (Staff) participated in the proceedings. In accordance with the schedule established at the prehearing conference, an evidentiary hearing was conducted on November 19, 2003. The record consists of 202 pages of transcript and 27 exhibits, all of which were received into evidence. Each of the parties filed briefs and reply briefs on December 9, and 23, 2003, respectively.

On January 26, 2004, the ALJ issued his Proposal for Decision (PFD) in which he concluded, among other things, that Midwest violated Rule 411 and that I&M should be allowed to serve the Development instead of Midwest. Midwest and the Staff filed exceptions to the PFD on February 9, 2004, and I&M, Midwest, and the Staff filed replies to the exceptions on February 19, 2004.

II.

FACTUAL BACKGROUND

The dispute in this case centers around which utility can properly serve the electric load for the Development located in the Village of Vicksburg. In addressing this dispute, the Commission finds the following facts supported by the record.

The property at issue began as part of Robert and Jill Thompson's farming operation (namely, Fertile Prairie Farms, Inc.), which was combined with land they purchased from the Fox River

²The SCGD is a golf course and the SCR D is a residential development, which was proposed in July 2002. Construction on the golf course began in March 2003.

Paper Company (Fox River) after it closed,³ for the proposed Development. On February 10, 2003, Mr. and Mrs. Thompson deeded: (1) a portion of their farmland in Section 23 and all the land they purchased from Fox River within Section 24 (lying inside the border depicted in green on Exhibit C-1) to the SCGD,⁴ and (2) the remaining portion of their farmland in Section 23 to the SCRD.

For at least 30 years, I&M operated a single-phase line to a Fox River storage building that was located in Section 24 (see, Tr. 36 and 127), which is now part of the Development's golf course (but not on property tax parcel No. 24-105-015). The storage building has subsequently been torn down and Mr. Thompson requested I&M to de-energize and remove its line in mid-2003. Additionally, I&M has operated electric lines along the western and southern boundaries of the land now owned by the SCGD and the SCRD. See, Tr. 35-36.

Prior to the Thompson land transfer to the Development and in anticipation of providing adequate water and sewer services to the SCRD, the Thompsons also requested that the Development property, which was previously in Schoolcraft Township, be annexed to the Village of Vicksburg. The annexation became effective on July 2, 2002. Exhibit C-15, pp. 7-21. Only I&M has a certificate of public convenience and necessity to serve the Village of Vicksburg, (although the village did grant Midwest a franchise in November 2003, eight months after it began construction of electrical facilities and five months after it began providing electrical service to the Development).

Mr. Thompson also contacted I&M and Midwest regarding the location and cost of extending electrical service to the Development. On February 26, 2003, Mr. Thompson requested 3-phase

³The Development corresponds approximately to the property in Sections 23 and 24, outlined in green on the map admitted as Exhibit C-1.

⁴See, Exhibits C-20 and C-21.

service from Midwest for an irrigation pump the SCGD was planning to install on tax parcel No. 24-105-015. Because I&M had distribution facilities within one mile of the requested extension, Midwest issued a 10-day notice to extend facilities [as required by Rule 411(10)] on March 11, 2003 and began construction on March 24th, even though I&M filed an objection to the proposed extension on March 20th. See, Tr. 37 and Ex. C-24. Midwest completed construction of the 3-phase facilities on April 15, which were energized on June 13, 2003. Subsequently, Midwest constructed an underground single-phase line to provide service to the SCRD's proposed home sites in Section 23.

III.

POSITIONS OF THE PARTIES

All parties agree that the outcome of this dispute is controlled by Rule 411 and Rule 102(k):

R 460.3411 Extension of electric service in areas served by 2 or more utilities.

Rule 411. (1) As used in this rule:

(a) "Customer" means the buildings and facilities served rather than the individual association, partnership, or corporation served.

(2) Existing customers shall not transfer from one utility to another.

(7) Prospective customers for 3-phase service that are located more than 300 feet, but within 2,640 feet, from the 3-phase distribution facilities of 1 or more utilities shall be served by the closest utility.

(8) Prospective customers for 3-phase service that are located more than 2,640 feet from the 3-phase facilities of any utility shall have the service of their choice, subject to the provisions of subrule (10) of this rule

(10) The extension of distribution facilities, . . . where an extension will be located within 1 mile of another utility's distribution facilities, shall not be made by a utility without first giving the commission and any affected utility 10 days notice of its intention by submitting a map showing the location of the proposed new distribution facilities, the location of the prospective customers, and the location of the facilities of any other utility in the area. If

no objections to the proposed extension. . . are received by the commission within the 10-day notice period, the utility may proceed to construct the facilities. If objections are received, the determination of which utility will extend service may be made the subject of a public hearing and a determination by the commission, upon proper application by any affected party.

(11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.

(13) Nothing contained in these rules shall be construed to circumvent the requirements of Act No. 69 of the Public Acts of 1929, as amended, being §460.501 et seq. of the Michigan Compiled Laws, or to authorize a utility to extend its service into a municipality then being served by another utility without complying with the provisions of Act No. 69 of the Public Acts of 1929, as amended.

In addition, the parties concur that the following definition of "premises," which is set forth as Rule 102(k), will affect the outcome of this case:

Premises means an undivided piece of land that is not separated by public roads, streets or alleys.

1996 AACCS, R 460.3102(k). Although the parties agree that the above rules govern this dispute, they have differing opinions of how Rule 411 and the definition of premises should be applied to the facts of the case.

I&M

As stated in the complaint, I&M contends that it, and not Midwest, is the appropriate service provider for the Development's single-phase and 3-phase load. I&M offers two theories in support of that contention.

First, I&M reasons that only it has the lawful authority to provide electrical service to the Development because only it has a certificate of public convenience and necessity, as required by Act 69, to serve the electrical needs of customers within the Village of Vicksburg. I&M maintains that Midwest does not have the requisite certificate, although it has, subsequent to providing

service to the Development, received a franchise from the village, which is necessary prior to requesting a certificate.

Second, I&M asserts that even if Midwest had the requisite authority to serve the Development, the Development constitutes an existing I&M customer that, pursuant to Rule 411(11), must take service solely from I&M. I&M claims that (1) for over 30 years, it has continuously and exclusively served the Fox River property (which only recently became part of the Development's golf course) and (2) only discontinued service after Midwest began the construction of facilities and provision of electricity to the premises. I&M says it never relinquished its entitlement to serve the premises, as can be seen from the fact that it filed a timely objection to Midwest's construction of facilities on the premises and only ceased service at the request of Mr. Thompson. I&M also construes Rule 411 to preclude Midwest from constructing facilities once I&M objected to the construction.

Further, I&M believes that the assignment of new tax numbers to various portions of the Development has not divided the premises nor has the creek divided it for the purposes of Rule 411. I&M urges the Commission to find that the Development is a single, undivided whole and a preexisting customer of I&M.

Regardless, I&M asserts, even if the Development were deemed to be a prospective (as opposed to an existing) utility customer, it would prevail over Midwest under the application of the distance-based criteria set forth in Rule 411(7). According to I&M, its nearest 3-phase line is 2,482 feet from the new facility whereas Midwest's nearest 3-phase line is 10,830 feet away. Because I&M is the only utility within 2,640 feet, I&M concludes that only it has the right to serve the Development's load.

Midwest

Midwest argues that I&M did not raise the lawful authority issue in its complaint or testimony and should, therefore, be precluded from raising this argument in its briefs. Regardless, Midwest opines, it sought to obtain a franchise once it had learned of the Development's transfer from Schoolcraft Township to the Village of Vicksburg. Further, it says, I&M had failed to reply to Mr. Thompson's request for service to the Development.

In addition, Midwest construes that the placement of its 3-phase line on tax parcel No. 24-105-015, not tax parcel No. 24-330-015 where Fox River had its storage building, defeats I&M's claim that the Development was an existing customer. Midwest offers that the premises had been divided legally with differing tax numbers and that tax parcel No. 24-105-015 was divided from the rest of the property by a creek. There had been no previous buildings on tax parcel No. 24-105-015; therefore, it was a prospective customer within the meaning of Rule 411. Finally, Midwest claims that the Development's new 3-phase line is only 2,704 feet from its nearest 3-phase line.

Staff

The Staff concurs with I&M and agrees that Midwest has violated Rule 411(13) by providing service to the Development without a certificate of public convenience and necessity and that Midwest's excuse for not obtaining the certificate must fail.

Further, the Staff points out that the Development is an undivided piece of land that is not separated by public roads, streets, or alleys, and that contrary to Midwest's arguments, a creek or tax identification number does not divide the property according to Rule 411. In addition, the Staff believes that because I&M was the first to serve the storage building on the Fox River property, I&M retains the right to serve the Development's entire electric load even after the

property was transferred to the SCGD. To conclude otherwise, the Staff contends, would preclude the orderly application of Rule 411.

In addition, the Staff urges the Commission to find that once a Rule 411 objection has been filed by a competing utility, no construction of facilities should begin until the Commission has made a determination as to which utility may serve the load requirements of the premises.

IV.

DISCUSSION

Resolution of this dispute focuses on two issues. The first is whether the Development constitutes an existing customer of I&M, which entitles it to service the entire electric load of the premises, and whether Midwest had the lawful authority to provide service to the Development. Rule 411(11) entitles the first utility serving a customer to serve “the entire electric load on the premises of that customer,” and Rule 102(k) defines premises as an “undivided piece of land that is not separated by public roads, streets, or alleys.” The ALJ found that the premises were undivided and that I&M had previously supplied electricity to the premises, therefore, I&M was entitled to serve the entire electric load of the Development. The ALJ further found that Midwest lacked the legal authority to provide services to the Development. The Commission concurs with the ALJ’s findings and concludes that both issues should be resolved in favor of I&M.

Development’s “Existing Customer” Status

The undisputed evidence shows that I&M began providing electric service to the Fox River property over 30 years ago. This service continued when the Fox River property was sold to the Thompsons. The Fox River property, together with other Thompson property, was then transferred to the SCGD, and I&M continued to serve the property until Mr. Thompson requested

that the original single-phase service line be removed and the storage shed be demolished.

Therefore, the Commission concludes that the Development was an existing customer of I&M.

Midwest maintains that because the original building was demolished and a new 3-phase line was installed in a different portion of the premises, the Development then became a prospective customer. Midwest maintains that the location of the new facilities was not on the same premises, because the Development was not an “undivided piece of land, that is separated by public roads, streets, or alleys.” R 460.2102(k). Midwest reasons that the premises had been divided by different tax identification numbers and that the new facility was on a parcel of land with a different tax number than where the original facility was located. Further, Midwest opines that the new facility was separated from the original facility by a creek.

The Commission agrees with I&M and the Staff that the Thompsons’ commingled property acquisitions, which were subsequently transferred to the SCGD, constitute the premises of the Development because public roads, streets, or alleys had not separated it. Rule 102(k) does not provide that the premises become divided either legally by tax numbers or by a creek running through the property.

Rule 411(2) clearly provides that existing customers shall not transfer from one utility to another. Further, Rule 411(11) also dictates that the first utility serving a customer, in this instance I&M, is entitled to serve the entire electric load on the premises of the customer.

Moreover, the evidence shows that the Development property is an existing customer as that term is defined in the rule. Rule 411(1)(a) defines “customer” as the building and facilities served, rather than the individual, association, partnership, or corporation taking service. Therefore, a change in ownership does not allow the new owner to be considered a prospective customer. Here, I&M was the first and only utility to provide electric service to any of the parcels that

became part of the Development. I&M continued to provide service for over 30 years (even after Midwest constructed its facilities and began providing service), until the customer requested that its original line be removed. I&M continues to maintain 3-phase energized facilities on the southern and western edge of the property and its electric service on the Development property was discontinued only at the request of the property owners, not because of any action by I&M.

The evidence shows that at no time did I&M waive its right to continue serving the customer on the property.⁵ It never abandoned the facilities, because the facilities remained, and I&M was prepared to provide electric service. The Commission finds that considering that: (1) the definition of “customer” in Rule 411(1)(a) is the buildings and facilities served; (2) I&M was the first utility to service the premises, an undivided piece of land; and (3) existing customers shall not transfer from one utility to another, I&M is the utility entitled to serve the entire electric load of the Development. See, In re Complaint of Consumers Energy Company, 255 Mich App 496 (2003).

Lawful Authority

Finally, Rule 411(13) provides that “nothing in these rules shall be construed to circumvent the requirements of Act No. 69 of the Public Acts of 1929, as amended, being §460.501 et seq. of the Michigan Compiled Laws.” MCL 460.502 requires that:

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency to engage in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain

⁵See, Rule 411(12), which permits a utility to waive its rights to serve a customer if another utility is willing and able to provide service and the Commission is notified and has no objection.

from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

Michigan law requires that Midwest have a certificate of public convenience and necessity prior to construction and operation of its business in the Village of Vicksburg. Because no such certificate exists, it is legally prohibited from providing electrical service to the Development located within the Village of Vicksburg. The Commission has no authority to override the Legislature in this regard.

Finally, the Staff believes that Commission rules require that, in the event that a utility objects to the filing of another utility stating that it has the right to serve a particular customer, then no utility should begin to serve the customer until the Commission resolves the dispute. In the alternative, if the Commission disagrees with the Staff's interpretation, the Staff requests that the Commission, in future Rule 411 disputes, immediately review the situation and issue an interim order that decides which utility may temporarily serve the customer pending resolution of the dispute by the Commission through the contested case process.

Because of due process concerns, the Commission declines at this time to commit to issuing immediate interim orders in future Rule 411 disputes without a full and fair discussion of the issues. However, the Commission agrees with Staff that issuance of interim orders might prevent unnecessary customer disruptions and would entertain such a motion in the appropriate setting.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. Pursuant to MCL 460.502 and Rule 411, Midwest is improperly providing service to the Development in the Village of Vicksburg.

THEREFORE, IT IS ORDERED that:

A. Midwest Energy Cooperative shall abandon or remove its facilities serving the South County Golf Development, L.L.C., and the South County Residential Development, L.L.C., in the Village of Vicksburg, or negotiate their transfer to Indiana Michigan Power Company, d/b/a American Electric Power.

B. Midwest Energy Cooperative shall cease providing electric service to the South County Golf Development, L.L.C., and the South County Residential Development, L.L.C. once Indiana Michigan Power Company, d/b/a American Electric Power, is physically able to serve the customer.

C. Midwest Energy Cooperative shall hold South County Golf Development, L.L.C., and South County Residential Development, L.L.C., harmless for all costs associated with the transition to the appropriate service provider.

D. Midwest Energy Cooperative shall cease and desist from all future violations of Rule 411.

E. All distribution facilities extended by Midwest Energy Cooperative for the purpose of providing electric service to the South County Golf Development, L.L.C., and the South County Residential Development, L.L.C., including those leading to, but not located on the premises, are stub lines,⁶ unavailable for use as future measuring points for purposes of Rule 411.

⁶A stub line is a dead-end extension of a facility constructed for no useful purpose.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

By its action of April 20, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

By its action of April 20, 2004.

Its Executive Secretary

In the matter of the complaint of)
INDIANA MICHIGAN POWER COMPANY,)
d/b/a AMERICAN ELECTRIC POWER,)
against **MIDWEST ENERGY COOPERATIVE.**)
_____)

Case No. U-13764

Suggested Minute:

“Adopt and issue order dated April 20, 2004 authorizing Indiana Michigan Power Company, d/b/a American Electric Power, to serve the electrical needs of the South County Golf Development, L.L.C., and the South County Residential Development, L.L.C., in the Village of Vicksburg and finding Midwest Energy Cooperative in violation of Rule 411, as set forth in the order.”