STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1006

In the Matter of the Application of the City of Buffalo to
Extend its Assigned Service Area into the Area Presently Assigned to
Wright-Hennepin Cooperative Electric Association.

Filed May 13, 2008
Affirmed
Kalitowski, Judge

Minnesota Public Utilities Commission
File No. E-221, 148/SA-03-989

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Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

On appeal in this utility-service-area dispute, relator City of Buffalo (city) challenges respondent Public Utilities Commission's (commission) refusal to grant the city's requests to (1) receive an offset for customer payments received by respondent Wright-Hennepin Cooperative Electric Association (cooperative) during the pendency of the compensation proceedings and (2) redefine the scope of "existing customers," for purposes of determining the cooperative's loss-of-revenue compensation award. The city also argues that the commission erred in assigning the city the burden of proof and by applying the manifest-injustice legal standard to evaluate the city's requests for modification. We affirm.

D E C I S I O N

Because an administrative agency has specialized knowledge, training, and experience, its decisions "enjoy a presumption of correctness" when reviewed on appeal. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted). But when agency decisions turn on questions of statutory interpretation, we will review such questions of law de novo. *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). And although we are not bound by an agency's conclusions of law, the manner in which an agency has construed a statute is nonetheless "entitled to some weight when the statutory language is technical in nature and the agency's interpretation is one of longstanding application." *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996); *see also Carlson v. Augsburg*

College, 604 N.W.2d 392, 394 (Minn. App. 2000); *In re Excess Surplus Status*, 624 N.W.2d at 278.

A "party seeking review on appeal has the burden of proving that the agency has exceeded its statutory authority or jurisdiction." *Lolling*, 545 N.W.2d at 375. And our review of the commission's 2007 compensation order is governed by the Administrative Procedure Act, Minn. Stat. §§ 14.63-.69 (2006). *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 300-01 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). Pursuant to this Act, administrative agency decisions "will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence." *CUP Foods v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001); *see also* Minn. Stat. § 14.69 (2006). Substantial evidence is "1. [s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. [m]ore than a scintilla of evidence; 3. [m]ore than some evidence; 4. [m]ore than any evidence; and 5. [e]vidence considered in its entirety." *White v. Minn. Dep't of Natural Res.,* 567 N.W.2d 724, 730 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). An agency's conclusion is arbitrary and capricious if there is no rational connection between the facts and the agency's decision. *In re Excess Surplus Status*, 624 N.W.2d at 277.

I.

The city contends that the commission erred as a matter of law in failing to grant an offset to the ten-year loss-of-revenue compensation award for customer payments received by the cooperative during the pendency of these proceedings. We disagree.

As discussed above, we extend special deference to an agency's interpretation of statutes that it is charged with administering and enforcing. *In re Excess Surplus Status*, 624 N.W.2d at 278. And when reviewing service-territory acquisition cases such as this case, we have specifically held that the commission's decisions regarding questions of loss-of-revenue compensation are entitled to deference. *In re Application by Rochester for Adjustment of Service Area Boundaries*, 556 N.W.2d 611, 615 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997); *see also In re Application of Grand Rapids Pub. Utilities Comm'n*, 731 N.W.2d 866, 870-71 (Minn. App. 2007) (deferring to the commission's expertise on compensation matters involving policy considerations and value judgments).

In Minnesota, the legislature has established a system whereby electric utilities are assigned an exclusive right to provide electric services to present and future customers within a specific geographic territory of the state. Minn. Stat. §§ 216B.37, .39 (2006). But because municipal growth sometimes necessitates adjustment of these service areas, the statute sets forth a procedure by which municipalities may acquire parts of other utilities' service areas within their city limits by paying "appropriate" compensation to the assigned utility. Minn. Stat. § 216B.44 (2006). When parties cannot agree on the terms of payment, the commission has the authority to determine the "appropriate value" of the service area by taking into consideration "the original cost of the property, less depreciation, loss of revenue to the utility formerly serving the area, expenses resulting from integration of facilities, and other appropriate factors." Minn. Stat. § 216B.44 (b) (2006).

Here, the city argues that the commission's decision to deny its offset request was contrary to the requirements of Minn. Stat. § 216B.44, contending that the commission's order allowed the cooperative to be "paid twice" for lost revenue – once by the city and once by its customers. We disagree.

Initially, we note that although the commission's 2005 compensation order ratified the administrative law judge's (ALJ) recommendation for a ten-year loss-of-revenue compensation period, the city did not challenge the time period when it petitioned the commission for reconsideration of the order or made its first appeal to this court. Thus, because the city did not raise this issue in 2005, the commission could have deemed the issue waived. *See* Minn. Stat. § 216B.27, subd. 2 (2006). But because the commission subsequently addressed the city's offset argument, we will review the commission's determination. And we conclude that nothing in the plain language of the statute requires the commission to reduce the loss-of-revenue portion of its compensation award by the monies received by the cooperative from its customers during the course of these proceedings. *See* Minn. Stat. § 216B.44.

In addition, precedent has established that the compensatory goal of Minn. Stat. § 216B.44, putting the cooperative in the position it would have occupied but for the city's acquisition of service rights to the annexed areas, requires that the cooperative be paid lost revenue for a ten-year period commencing on the date that service rights are transferred. *See Grand Rapids*, 731 N.W.2d at 869. In *City of Rochester*, this court awarded a cooperative ten years of loss-of-revenue compensation, reasoning that ten years was the "planning horizon" used by an electric cooperative to prepare and revise its

long-range plans. 556 N.W.2d at 615-16. In those areas where the City of Rochester was granted the right to provide interim service, the commission determined that the ten-year loss-of-revenue compensation period should begin on the day that the interim service order was issued. *Id*. at 615. But for those areas where no interim service rights were granted, the commission decided that the ten-year loss-of-revenue compensation period did not begin until the date that service rights were ultimately transferred, even though almost two years lapsed during the course of the proceedings. *Id*. (reasoning that commencing the compensation period on the date that the interim service order was issued was fair because the interim order (1) absolved the utility of its responsibility to provide service to any new customers in the annexed areas and (2) virtually guaranteed that the city would acquire permanent service rights in those areas).

Here, the commission denied the city's request to obtain interim service rights to the annexed areas, and thus the cooperative retained service rights and responsibilities throughout the course of these proceedings. The cooperative remained responsible for providing service to any new customers in those areas, as well as planning and investing in those areas as if it were going to serve them perpetually. *See* Minn. Stat. § 216B.44(c) (2006). Moreover, throughout the course of these proceedings the city had no obligation to take over and serve these areas, and in fact could have abandoned its proposed annexation up until the parties' compensation agreement received final written approval from the commission. *See* Minn. Stat. § 216B.48, subd. 3 (2006) (explaining that no contract or agreement "is valid or effective unless and until the contract or arrangement has received the written approval of the commission"). Thus, it was reasonable for the

commission to determine that the ten-year time period for loss-of-revenue compensation should not commence until the cooperative's service rights to the annexed areas are transferred to the city.

We reject the city's argument that the commission's decision was contrary to Minnesota caselaw regarding mitigation of damages in other legal contexts. Since 1974, determination of damages for utility property has been governed solely by Minn. Stat. § 216B.44 (2006). If the legislature had intended to require the commission to allow for an adjustment to compensation awards for customer payments received by the cooperative during the pendency of compensation proceedings, it would have so provided. Here, because title to the service territories had not yet passed to the city, there was not yet any damage or taking of property to provide the basis for the city's requested offset.

In sum, because the commission's decision was consistent with precedent and the requirements of Minn. Stat. § 216B.44, had substantial evidentiary support in the record, and was not arbitrary or capricious, we conclude that the commission did not err as a matter of law in denying the city's offset request.

II.

The city argues that the commission erred as a matter of law in failing to redefine the scope of "existing customers" for purposes of loss-of-revenue compensation. We disagree.

Since the statutory scheme governing municipal acquisition of public utilities does not define "existing customer" and "future customer" for purposes of loss-of-revenue

compensation, the commission must determine the scope of these terms on a case-by-case basis. *See* Minn. Stat. §§ 216B.44, .40 (2006) (stating that "each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer"). And when the commission "issues a decision that is legislative in nature, balancing public policies and private needs and making choices among public policy alternatives, we will affirm, unless we are presented with clear and convincing evidence that the decision exceeds [the commission's] statutory authority or is unjust, unreasonable, or discriminatory." *City of Rochester*, 556 N.W.2d at 613.

Here, the ALJ's findings of fact limited "existing customers" to those being served when the city filed its petition. The city took no exception to this finding of fact when it petitioned for reconsideration of the 2005 order, and even repeated this finding in its initial petition for writ of certiorari to this court. Because redefining the scope of "existing customers" was not an issue raised by the city in proceedings in 2005, the commission could have deemed it waived. *See* Minn. Stat. § 216B.27, subd. 2.

But because the commission addressed this issue, we will address it on appeal. We conclude that the city's argument fails. There is substantial evidence in the record to support the commission's decision to limit "existing customers" to the ten customers who were served by the cooperative when the city first filed its petition for annexation of the cooperative's service areas in 2003.[1]

[1] Although the specific number of customers that were in place at the time the city filed to serve the annexed areas varies from eight to ten throughout the record, we adopt the number ten, as this was the number of existing customers that was used by the experts for both the city and the cooperative to calculate the appropriate mill rate.

At a contested-case hearing before the ALJ in 2003, the city's own expert testified that he was defining existing customers as "[t]he customers that were in place at the time the city filed to serve the annexed areas." Additionally, experts for both the city and the cooperative based their calculations of the appropriate mill rate for existing customers on the usage and expected lost revenue of those ten specified customers. The record indicates that both parties and their experts projected that use by future customers would be primarily residential, whereas usage by those identified as existing customers was largely commercial in nature. Because residential usage is markedly more profitable than commercial usage, applying the lower, existing-customer mill rate to new customers added during the pendency of these proceedings would be inconsistent with the record and would result in inadequate compensation of the cooperative.

The city argues that it is inconsistent for the commission to construe the facilities-less-depreciation compensation factor as requiring updated figures up until the date of transfer, while not requiring such updated information regarding who constitutes an existing customer for purposes of determining the loss-of-revenue factor. But the city cites no authority in support of this assertion. Moreover, there is no inconsistency between the commission's decisions on payment for facilities and payment for loss-of-revenue because these awards are intended to compensate the cooperative for two separate and distinct losses. *See* Minn. Stat. § 216B.44. Whereas payment for actual facilities compensates the cooperative for investments it made prior to the transfer, payment for loss of revenue compensates the cooperative for lost revenue that it will incur after the transfer.

We conclude that the commission's decision to limit the scope of "existing customers" to those who were receiving service from the cooperative at the time the city filed its petition was unaffected by any error of law, was supported by substantial evidence in the record, and was not arbitrary or capricious.

III.

The city argues that the commission erred in applying the manifest-injustice legal standard to evaluate the city's requests to modify the commission's 2005 compensation order. We disagree.

A party seeking to modify a prior order of the commission bears the burden of proof. Minn. Stat. § 216B.56 (2006). Here, although the city did not expressly request to modify the commission's 2005 compensation order at the compliance proceeding, the city's requests to (1) receive an offset for customer payments received by the cooperative during the pendency of these proceedings and (2) redefine the scope of "existing customers" for purposes of loss-of-revenue compensation would have required modification of the order and its determinations. Accordingly, the commission did not err in assigning the city the burden of proving that its requests for extraordinary relief were legally and factually justified.

Furthermore, caselaw supports application of the manifest-injustice legal standard to evaluate the city's requests for extraordinary relief from an agency's decisions. *See In re Application of Peoples Natural Gas Co.*, 413 N.W.2d 607, 615 (Minn. App. 1987); *Ellis v. Minneapolis Comm'n on Civil Rights*, 295 N.W.2d 523, 525 (Minn. 1980); *see also Red Owl Stores, Inc. v. Comm'r of Agriculture*, 310 N.W.2d 99, 104 (Minn. 1981).

Applying the manifest-injustice standard here, the commission held that the city failed to show that the 2005 compensation order was rendered unjust as a result of the time that passed during the course of these proceedings.

Appellant argues that, because the 2005 compensation order relied on projected data to calculate the ten-year loss-of-revenue award, this speculative data should be replaced with the actual data now available from the last four years that elapsed during the pendency of these proceedings. But since we have determined that the ten-year compensation period does not begin until service rights are transferred from the cooperative to the city, there is still no actual data on the cooperative's loss-of-revenue for this upcoming time period. By its very definition, awarding loss-of-revenue compensation for a forthcoming time period requires reliance on projected data.

Moreover, the model years used to project the value of lost revenue at the time of the evidentiary hearing were the best information available at that time. Although there is an inevitable lag between when an evidentiary hearing takes place and the time at which an agency issues its final decision, this lapse did not result in manifest injustice, especially in light of the city's responsibility for the protracted nature of these proceedings. And even though the city alleged that it had new data to support its requests to modify the order, it failed to provide any factual information or evidence to substantiate its requests.

The commission correctly determined that it would be required to reopen an evidentiary hearing in order to examine new evidence. Minn. Stat. §§ 14.60, subd. 2, 14.61 (2006); Minn. R. 1400.7800. Because the city failed to show that the

determinations set forth in the 2005 compensation order resulted in manifest injustice, we conclude that the city was not entitled to a new evidentiary hearing to analyze the updated compensation data.

Affirmed.