

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)
FRUIT BELT ELECTRIC COOPERATIVE)
against **INDIANA MICHIGAN POWER COMPANY**) Case No. U-11514
relative to the provision of electric service to 64th)
Avenue in Antwerp Township, Van Buren County.)
_____)

At the July 24, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

History of Proceedings

On September 2, 1997, Fruit Belt Electric Cooperative (Fruit Belt) filed a complaint against Indiana Michigan Power Company (I&M), alleging that I&M violated Rule 411 of the Commission's rules governing services supplied by electric utilities, 1996 AACS, R 460.3411, by extending electric facilities and service to a new customer. On October 28, 1996, Administrative Law Judge Theodora M. Mace (ALJ) conducted a prehearing conference encompassing this case as well as two other Rule 411 complaints between the same parties in Cases Nos. U-11512 and U-11513. The Commission Staff (Staff) participated. On January 14, 1998, the ALJ conducted evidentiary hearings on separate records in each of the three cases. Thereafter, in this case, the parties filed

briefs, and Fruit Belt and I&M filed reply briefs. The ALJ issued a Proposal for Decision (PFD) on May 1, 1998.

Summary of the Record

This dispute concerns I&M's extension of single-phase service to a residential customer whose premises are located on the north side of 64th Avenue in Antwerp Township. Both I&M and Fruit Belt had distribution facilities running parallel to 64th Avenue, although I&M's facilities stopped short of the front of the customer's premises.

I&M provided temporary service to the customer's construction site from October 1994 to January 1995. When the customer requested that I&M provide permanent service in January 1995, I&M accommodated the request by extending its lines northward from the end of its distribution facilities on 64th Avenue. The extension required 124 feet of primary and 120 feet of secondary overhead line proceeding directly north and, from that point, 207 feet of underground line running in a northeast direction to the customer's premises. A map of the facilities admitted as Exhibit C-1 depicts the north and northeast line extensions as forming an obtuse angle, with I&M's preexisting facilities at the south end of the north line and the customer's premises at the far end of the northeast line. In extending the line north of 64th Avenue, I&M crossed 3-phase underground facilities belonging to Fruit Belt.

The record does not specify the distances measured as a straight line from the customer's premises to each utility's facilities at the time that the customer requested service. Mark A. Stallons, Fruit Belt's Vice President of Sales and Service, testified that Fruit Belt's facilities were positioned closer, as depicted in Exhibit C-1. Tr. 9. When asked how much closer, Mr. Stallons stated that he did not know the exact distance, but he estimated that Fruit Belt's facilities were

between two and five feet closer. Tr. 15-16. I&M witness Ronald D. Cotant did not contradict Mr. Stallons' testimony, but he also did not attempt to measure the distances. Tr. 36-37.

After I&M commenced permanent service to the customer, Fruit Belt disputed I&M's actions under Rule 411. In response, I&M moved the customer's meter from the house to a service pole located at the juncture of the obtuse angle created by the line extensions, which is approximately 240 feet from I&M's distribution facilities, as they existed prior to the customer's request for service. The reason noted in I&M's work documentation for moving the meter (dated November 1995) was "DUE TO MPSC SERV EXTENSION RULE." Ex. C-6.

Rule 411 Standard

This dispute is controlled by the following provisions of Rule 411:

(3) Prospective customers for single-phase service that are located within 300 feet of the distribution facilities of 2 or more utilities shall have the service of their choice.

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

1996 AACRS, R 460.3411(3), (4). In addition, the complaint in this case raises the issue of how to measure distance. In this regard, Rule 411(1)(b) provides that distance shall be "determined by direct measurement from the closest point of a utility's existing distribution facilities to the customer's meter location" and not by "the circuit feet involved in any extension."

PFD

The ALJ recognized that the initial determination is whether subrule (3) or (4) applies. If both utilities' preexisting facilities were within 300 feet of the customer's meter, subrule (3) would permit the customer to choose which utility would provide service. If they were between 300 and 2,640

feet away, subrule (4) would require the closer of the two to provide the service. The ALJ found that the record is silent on the exact distances. She recommended that the Commission dismiss the complaint on the ground that Fruit Belt did not meet its burden of proof. PFD at 7-8.

The parties also disputed the propriety of I&M's relocation of the meter after Fruit Belt objected to its service. The relocation had the effect of moving the meter to a point that was clearly within 300 feet of I&M's preexisting facilities. Although it did not alter her recommendation to dismiss the case, the ALJ did find that I&M's relocation was not a valid basis for measuring the distance between its facilities and the customer's meter. Rather, she noted, the February 8, 1993 order in Case No. U-10116 holds that the circumstances existing at the time that the customer requests service are the basis for applying Rule 411. PFD at 8-9.

Fruit Belt and I&M filed exceptions and replies to exceptions.

Discussion

Fruit Belt argues that the ALJ erred in recommending dismissal of its complaint on the ground that it did not meet its burden of proof regarding the utilities' relative distances from the customer's meter. Fruit Belt contends that because it demonstrated on the record, without contradiction, that its facilities were closer than I&M's and that I&M's closest measuring point was 451 (circuit) feet away, the burden under Rule 411 shifted to I&M to invoke Rule 411(3) by proving that both utilities' facilities were within 300 feet of the customer. Fruit Belt also suggests that I&M's relocation of the meter to a point closer to its preexisting facilities is a tacit admission that Rule 411(3) did not otherwise apply.

Although Fruit Belt concedes that the record does not contain a measurement of the distances, Fruit Belt contends that it is possible to deduce the distances by triangulating from the north and

northwest line extensions that form an obtuse angle. Using this approach and assuming a 118° obtuse angle, Fruit Belt calculates a direct distance of 387 feet. Fruit Belt adds that, even if it assumed that the angle was a right angle, the direct distance from I&M's facilities to the customer would be no less than 320 feet. Thus, Fruit Belt says, the record proves that I&M's facilities were more than 300 feet from the customer's meter, making Rule 411(3) inapplicable and giving Fruit Belt, as the closest utility, the right to provide service under Rule 411(4).

I&M asserts two lines of response to Fruit Belt's exception. First, I&M notes that Fruit Belt's argument assumes that the customer's meter must be located on the house, when in fact I&M moved the meter to a point 240 feet from its facilities by relocating it on the service pole marking the obtuse angle of the line extension. The ALJ rejected this argument, which the Commission will address in conjunction with I&M's exception later in this order.

Second, I&M argues that Fruit Belt failed to meet its burden of proof by not providing direct measurements between the two utilities' preexisting distribution facilities and the customer's meter location, as required in Rule 411(1)(b). I&M says that the showing that its line extension totaled 451 circuit feet (124 feet of primary overhead + 120 feet of secondary overhead + 207 feet of underground) is not enough to meet this burden. I&M also objects to Fruit Belt's use of trigonometry to infer the direct distance. I&M says that Fruit Belt did not introduce its mathematical computations as evidence on the record, but withheld them until it filed its exceptions. Moreover, I&M says, the computations assume, without any foundation in the record, that the configuration of the line extensions forms a perfect triangle and that one angle is either a right angle or 118° .

Determining the direct distance between two points should be a simple matter. The difficulty in this case is that neither party attempted to provide direct measurements on the record. Notwithstanding this omission, the Commission is persuaded by Fruit Belt's application of mathematical

principles that the record is adequate to find that the direct distance between I&M's distribution facilities and the original meter located at the customer's house was more than 300 feet.

Exhibit C-1, the map of the distribution facilities, shows that I&M's line extension consists of one line segment of 244 feet (124 feet of primary overhead + 120 feet of secondary overhead line) and another of 207 feet (underground line). The two line segments meet at a service pole and form an obtuse angle. A line drawn to connect the two endpoints completes a triangle, and the length of that line can be mathematically inferred. The Commission finds that the map adequately depicts this configuration and provides an adequate basis for Fruit Belt's mathematical computations of the direct distance.

An obtuse angle is by definition between 90° (a right angle) and 180° (a straight line). The mathematical relationship between the two line segments forming the angle and the third side of a triangle is also well known: as the angle widens (and its degree increases), the length of the opposite side of the triangle also increases. Thus, if the angle were 90° , the third side of the resulting right triangle (i.e., the hypotenuse) would provide the minimum possible distance. By adopting the right angle assumption as the minimal assumption (which is clearly incorrect-- Exhibit C-1 shows that the angle is wider than 90°), Fruit Belt computes a direct distance of 320 feet. If, on the other hand, the two line segments formed a 180° angle (i.e., a straight line), the distance would be 451 feet (244 feet + 207 feet).¹

Thus, it is reasonably apparent that the distance between I&M's facilities and the customer was more than 320 feet. Moreover, I&M's subsequent efforts to correct its mistake by relocating the

¹The issues in this case would have been easier to resolve if Fruit Belt's computations applying these mathematical principles had appeared on the record. However, the Commission finds that the principles are subject to official notice pursuant to 1992 AACCS, R 460.17327, and MCL 24.277; MSA 3.560(177).

meter to a point 240 feet away is a clear indication that the original location was beyond 300 feet. As such, Rule 411(3) is inapplicable. The Commission finds that Rule 411(4) is controlling in this case.

As Fruit Belt contends, the testimony of its witness that its facilities were closer than I&M's was not contradicted. Under the criteria of Rule 411(4), the closest utility has the right to provide the service.

To avoid this outcome, I&M argues that the relocated meter is the correct measuring point and that this places its distribution facilities within 300 feet and makes Rule 411(3) controlling. I&M takes exception to the ALJ's finding that the original meter location was the proper point to use for making a Rule 411 measurement. According to I&M, the customer requested service for a new load, without a preexisting meter. I&M says that the placement of the original meter was the result of I&M's and the customer's agreement, that their mutual belief was that the customer had the right to choose I&M's service under Rule 411, and that the subsequent relocation corrected any mistake on their part. Thus, in I&M's view, the holding in Case No. U-10116 that "the appropriate time to determine whether a utility has the right or obligation to serve is the time the utility receives the request for service" does not apply to this case, given that there was no meter location at the time of the request. February 8, 1993 order at 7. Moreover, I&M explains Case No. U-10116 as addressing changes in circumstances only when the circumstances are beyond the utility's control, not, as in this case, when the utility decides where to locate a meter.² I&M argues that Rule 411 should

²In Case No. U-10116, the customer requested that Consumers Energy Company (Consumers) serve a residence located on the same premises as a campground that Consumers already served. The residence was closer to the distribution facilities of Western Michigan Electric Cooperative, which would have had the right to provide the service if the residence had been treated as a separate "customer" under Rule 411. After the customer requested service, but before Consumers extended its facilities to the residence, the property owner subdivided the parcel, separating the premises of the campground from the residence. The Commission held that the circumstances at the time that the customer requested service were controlling and that Consumers, as the utility first serving a portion of the customer's load, was entitled to serve the entire load (campground and residence) on the same premises under Rule 411(11).

facilitate a customer's ability to choose his or her service provider, as the Commission recognized in the March 27, 1997 order in Cases Nos. U-11015 and U-11071, at 10.³

With respect to the issue of customer choice, I&M argues that the ALJ erred in striking testimony by Mr. Cotant regarding the customer's expression of a preference for I&M's service over Fruit Belt's. I&M contends that the customer's statements are not hearsay within the meaning of MRE 801(c) because they were not offered to prove the truth of the matter asserted. Rather, according to I&M, the statements provide a context for I&M's actions in response to the customer's statements and explain why I&M later relocated the meter. I&M also argues that, even if the statements were hearsay, they should have been admitted as statements of the declarant's state of mind pursuant to MRE 803(3).

In reply, Fruit Belt asserts that the order in Case No. U-10116 establishes that the circumstances at the time of the request for service, including the proposed meter location, govern rights under Rule 411. Fruit Belt says that I&M should not be able to assert a mistake on the part of itself and the customer to excuse a violation of the distance-based criteria of Rule 411.

Fruit Belt also argues that the ALJ properly struck portions of Mr. Cotant's testimony on hearsay grounds. Fruit Belt says that customer choice is irrelevant under the distance-based criteria

³In Cases Nos. U-11015 and U-11071, Fruit Belt provided service to a customer's security gate, at the customer's request, prior to extending service to the building itself, which was under construction. Fruit Belt relied on Rule 411(7) in extending service to the gate, which was closer to Fruit Belt's facilities than to I&M's. The Commission upheld Fruit Belt's right to serve the entire premises, including the building, under Rule 411, noting:

The Commission recognizes that when a new customer is located near two utilities, there may be options for designing the layout of buildings or facilities on the property that allow the customer to effectively choose which utility will serve. As long as the customer complies with the language of Rule 411, the customer may exercise that choice.

March 27, 1997 order at 10.

of Rule 411(4), that offering the customer's statement to prove his choice is hearsay, and that the customer's state of mind is also irrelevant in this case.

The Commission agrees with the ALJ's determination that I&M's subsequent relocation of the meter did not improve or alter its rights under Rule 411. Rule 411(1)(b) measures distance with reference to "the customer's meter location." The purpose for using distance-based criteria is to provide certainty as to multiple utilities' competing rights to serve a nearby load at the time that one of the utilities receives a request for service. The purpose could be subverted, if not entirely defeated, if a utility could subsequently move the location of a meter as a means of retroactively curing a violation of Rule 411. The import of the rule is that the meter, once located as part of the initial service request, should serve as a fixed measuring point. In this case, I&M did not cite any operational reason for relocating the meter, except as a means of bolstering its claim of right to serve the customer under Rule 411. Moreover, it is unusual for a utility to relocate a residential meter from a house to a service pole located 207 feet away, absent some legitimate explanation, e.g., those related to facilitating the utility's operations or making allowances for incompatible activities on the customer's premises. Under these circumstances, the Commission finds that the original meter location should be the measuring point for Rule 411 purposes.

The Commission need not decide whether the ALJ's evidentiary ruling striking part of Mr. Cotant's testimony was correct. As Fruit Belt argued, customer choice is not at issue once it is established that the facts of this case must be addressed under the distance-based criteria of Rule 411(4). In the March 27, 1997 order in Cases Nos. U-11015 and U-11071, the Commission acknowledged that customer choice may play an important role in resolving Rule 411 issues and would be honored "[a]s long as the customer complies with the language of Rule 411." Order at 10. In this case, the customer and I&M did not comply.

Because Fruit Belt is the closest utility under Rule 411(4), it holds the exclusive right to provide service to the customer. Therefore, I&M must discontinue its service to the customer as soon as Fruit Belt has facilities in place to provide service without disrupting service to the customer. I&M shall also hold the customer harmless for any costs associated with the transition of service to Fruit Belt.

Fruit Belt argues that I&M also violated Rule 411(10) by not giving advance notice of its intention to extend service. Because the extension of facilities did not comply with subrules (3) or (4) of Rule 411, it follows that I&M's failure to give notice also violated subrule (10).

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. I&M's extension of service to a customer located on 64th Avenue in Antwerp Township and failure to give notice of the extension violated Rule 411(4) and (10).

THEREFORE, IT IS ORDERED that Indiana Michigan Power Company shall cease providing service to the customer identified in the complaint as located on 64th Avenue in Antwerp Township once Fruit Belt Electric Cooperative is physically able to provide electric service to the customer. Indiana Michigan Power Company shall hold the customer harmless for all costs associated with the transition of service to Fruit Belt Electric Cooperative.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ John G. Strand
Chairman

By its action of July 24, 1998.

/s/ John C. Shea
Commissioner

/s/ Dorothy Wideman
Its Executive Secretary

/s/ David A. Svanda
Commissioner

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_____)

Case No. U-11514

Suggested Minute:

“Adopt and issue order dated July 24, 1998 granting relief on a complaint filed by Fruit Belt Electric Cooperative against Indiana Michigan Power Company alleging a violation of Rule 411, as set forth in the order.”