

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)	
MIDWEST ENERGY COOPERATIVE for a)	
certificate of public convenience and necessity)	Case No. U-12179
to provide natural gas service in Texas Township,)	
Kalamazoo County.)	
_____)	

In the matter of the application of)	
MIDWEST ENERGY COOPERATIVE for a)	
certificate of public convenience and necessity)	Case No. U-12181
to provide natural gas service in Antwerp Township,)	
Van Buren County.)	
_____)	

In the matter of the application of)	
MIDWEST ENERGY COOPERATIVE for a)	
certificate of public convenience and necessity)	Case No. U-12184
to provide natural gas service in Almena Township,)	
Van Buren County.)	
_____)	

At the October 6, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On October 26, 1999, Midwest Energy Cooperative (Midwest or the co-op) filed two applications pursuant to 1929 PA 69, MCL 460.501 et seq.; MSA 22.141 et seq., (Act 69) seeking

certificates of public convenience and necessity (CPCNs) to provide natural gas service in Texas Township, Kalamazoo County (Case No. U-12179) and in Antwerp Township, Van Buren County (Case No. U-12181). On October 28, 1999, Midwest filed a similar Act 69 application concerning Alma Township, Van Buren County (Case No. U-12184).

Pursuant to due notice, a prehearing conference was held on December 8, 1999 before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ), at which time the ALJ granted a motion to consolidate the three cases. The ALJ also granted a petition to intervene filed by Consumers Energy Company (Consumers). Midwest, Consumers, and the Commission Staff (Staff) participated in the proceedings.

An evidentiary hearing was conducted on February 16, 2000, during which each of the parties presented testimony from one witness. The record consists of 115 pages of testimony and 15 exhibits, all of which were received into evidence.

On March 1 and 10, 2000, each of the parties filed briefs and reply briefs. The ALJ issued his Proposal for Decision (PFD) on May 18, 2000, in which he recommended, among other things, that the Commission grant the three CPCNs requested by Midwest.

On June 1, 2000, Consumers filed exceptions to the PFD. On June 12, 2000, Midwest and the Staff filed replies to those exceptions.

II.

TESTIMONY AND POSITIONS OF THE PARTIES

Midwest

Midwest's President of Operations and Power Supply, Mark Stallons, testified on behalf of the applicant. Mr. Stallons began by noting that Midwest is a nonprofit utility company engaged in the

sale and distribution of electric energy to 31,600 member-customers in portions of Michigan, Indiana, and Ohio. According to Mr. Stallons, competitive pressures now require Midwest to expand its business to include the distribution and sale of natural gas in all three of the townships described in its applications.

Mr. Stallons stated that, in certain parts of its service territory, Midwest competes with Consumers for new electric customers. In these areas, he noted, Consumers has been able to use the joint trenching of its electric and gas facilities--as allowed under Consumers' gas customer attachment program (CAP program)--to "significantly undercut Midwest's ability to compete" for electric customers. 2 Tr. 22. For example, Mr. Stallons testified, the developer of a subdivision in one of those areas initially expressed a preference for having Midwest provide electric service to that subdivision. However, he continued, due to the CAP program established for Consumers' gas division, the combined gas and electric utility's "charge to the customer to extend natural gas was \$48,000 if electric service was provided by Midwest but free if electric service was provided by (Consumers)." *Id.* In light of Consumers' offer to extend electric facilities for free, which was memorialized in Exhibit A-2 (a February 20, 1998 letter from Consumers to the developer), the developer ultimately selected Consumers to provide electric service to the subdivision.

Mr. Stallons went on to note that Midwest filed a complaint on January 7, 1999 alleging that Consumers' "extension of gas facilities for free if and only if it is chosen as the provider of both electric and gas service constitutes an unjust, inaccurate, and improper application of its CAP program." Exhibit A-3, p. 4 (Emphasis in original). However, following further investigation and discussions with the Staff, the co-op concluded that Consumers' CAP program had been properly approved and applied, and that the complaint should be withdrawn. At that point, Mr. Stallons continued, Midwest decided that in order "to provide meaningful customer choice for electricity,

Midwest needs to be able to provide natural gas service so that it may match [Consumers'] ability to use joint trenching and a CAP-type program to reduce customers' costs." 2 Tr. 23. Moreover, Mr. Stallons asserted, any failure to obtain CPCNs and compete for service in these areas would harm Midwest's member-customers by forcing the co-op to spread its fixed costs of providing electric service over a lesser amount of electric sales.

Regarding the co-op's plans for providing natural gas service to the townships described in its applications, Mr. Stallons testified that Midwest (1) stands ready to contract with a reliable source of natural gas supply, (2) will, following receipt of the necessary CPCNs, arrange for the transmission and distribution of that gas to its potential customers, (3) is prepared to submit to full cost-of-service based rate regulation by the Commission, and (4) will abide by all safety requirements imposed by the Commission. See, 2 Tr. 23-25, 29-31, and 35-37. Moreover, he indicated that Midwest considered "acceptable and in accordance with comparable orders recently issued by the Commission" five recommendations offered by the Staff regarding the establishment and operation of the co-op's gas service. 2 Tr. 39. Mr. Stallons went on to state that although he was "not able to testify as to whether Midwest must be allowed to connect to (Consumers') distribution system," doing so would improve the economic justification for providing gas service in the areas for which it seeks CPCNs. 2 Tr. 40. Nevertheless, he concluded, Midwest was investigating the possibility of connecting to a transmission line and constructing its own "city gate"¹ if, ultimately, it was unable to connect to Consumers' distribution system. See, 2 Tr. 65-67.

¹A "city gate" is a facility that connects a transmission line to a distribution system. Its primary purpose is to reduce and regulate the pressure of the gas entering the distribution system.

The Staff

Reginald D. Whalon, an engineer in the Commission's Gas Division, offered the Staff's testimony. According to Mr. Whalon, the Staff supported granting Midwest's applications as long as the co-op agreed to the following five conditions. See, 2 Tr. 109-110. First, the Staff asserted that each of the CPCNs should cover the entire township in which Midwest seeks to provide natural gas service. Second, it said that any gas mains or service lines constructed by Midwest should not cross or parallel competing utilities' facilities. Third, it asked that Midwest be required to give competing utilities and the Staff at least 30-days' written notice of its intent to construct natural gas facilities (including a map showing the proposed location of those facilities and a copy of the CAP worksheet). Fourth, the Staff demanded that Midwest be required to file a rate book before initiating natural gas service. Fifth, it asserted that Midwest must commit to abide by all provisions set forth in the Michigan Gas Safety Standards.

Based in significant part on Midwest's agreement to meet the five conditions discussed by Mr. Whalon, the Staff concluded that the requested CPCNs should be granted.

Consumers

Thomas J. Begin, the Director of Strategic Expansion in Consumers' Gas Division, asserted that Midwest's applications were deficient in several ways. For example, he claimed that Midwest failed to designate precise locations for the construction of its proposed gas facilities and, instead, merely pointed to three areas where new subdivisions or industrial parks would be located in the near future. Moreover, he stated that because the areas described in Midwest's applications are "well embedded within Consumers' service territory" and far removed from gas transmission lines,

“it is difficult to conceive how they could realistically get a gas supply from any transmission system.” 2 Tr. 92-93.

Mr. Begin went on to contend that Midwest failed to provide other necessary information, including (1) an estimate of Midwest’s cost of service, (2) the co-op’s gas system emergency plans, (3) its system maintenance plans, and (4) proof of its ability to comply with the Michigan Gas Safety Standards. See, 2 Tr. 93-94. Mr. Begin therefore concluded that it would be inconsistent with the public interest to issue CPCNs to a “speculative provider” like Midwest, particularly when Consumers has “adequate facilities and ample system capacity” to serve all potential customers in the areas covered by Midwest’s applications. 2 Tr. 92 and 95.

For all of these reasons, Consumers asserted that Midwest’s proposed entry into the market would result in the needless duplication of facilities and that each of the three applications must therefore be rejected.

III.

DISCUSSION

In his PFD, the ALJ disagreed with Consumers’ assertion that granting the CPCNs would result in the needless duplication of gas facilities. Specifically, he concluded that because “Midwest would provide competition and customer choice in the proposed subdivisions,” issuing the requested CPCNs is far from needless. PFD, p. 7. Moreover, the ALJ pointed out that although it has facilities “nearby and surrounding the proposed subdivisions,” Consumers has yet to install either gas mains or distribution lines in the precise areas where Midwest hopes to provide service. PFD, p. 6. Rather, he noted, Consumers would have to “extend its facilities to actually

serve the subdivisions proposed to be served by Midwest.” Id. He therefore concluded that no true duplication of facilities would result from granting the applications.

Based on those conclusions, the ALJ recommended that the Commission grant Midwest’s applications and issue CPCNs in these consolidated cases. The ALJ further recommended that Consumers be required to allow Midwest to tap into Consumers’ existing distribution facilities in the areas for which those CPCNs are granted.

Consumers excepts to those recommendations on two grounds. First, it contends that Midwest has no demonstrable expertise in supplying and selling natural gas. In support of this contention, Consumers notes that, among other things, Midwest owns no natural gas pipelines, has never operated a natural gas system, possesses no approved gas tariffs, and has yet to specify where its natural gas facilities would be constructed. Second, it asserts that Midwest can only become a gas utility by tapping into Consumers’ existing distribution system and that no legal basis exists for requiring Consumers to let Midwest do so. It therefore contends that Midwest’s requests for these three CPCNs constitute a “complete and total sham,” and must be rejected. Consumers’ exceptions, p. 2.

In response, Midwest asserts that Consumers’ exceptions represent nothing more than “a desperate attempt to maintain its monopoly status and protect its competitive position.” Midwest’s replies to exceptions, p. 9. According to Midwest, testimony provided by Mr. Stallons shows that it is serious about establishing a natural gas distribution system that will provide safe and reasonable service. Moreover, Midwest rejects Consumers’ claim that the only way it can become a gas utility is by tapping into Consumers’ distribution system. Instead, Midwest “only agrees that it would be less economical if it is forced to seek other alternatives of distribution.” Id., p. 11. It therefore argues that, in order to provide meaningful customer choice for gas and electric service in

Texas, Antwerp, and Almena townships, the Commission should grant each of the three applications. The Staff concurs with that argument.

The Commission agrees with Midwest and the Staff, and finds that it should grant the three CPCNs sought in these consolidated cases.

Although Midwest has not previously served as a natural gas utility and currently owns no facilities for conducting such business, that should not serve as a basis for permanently barring its entry into the market. As noted by the Commission's July 28, 1999 order in Cases Nos. U-11814 and U-11819:

Act 69 does not require that facilities already exist before a certificate may be granted. Such an interpretation would preclude any new gas distributor from providing gas service on the basis that it had not already done so.

Order, p. 3. The Commission must therefore determine whether the proofs support finding that, in the future, the applicant will be able to provide natural gas service in a manner that serves the public convenience and necessity. In this case, the Commission concludes that they do.

As noted by Mr. Stallons, neither the industrial park nor the proposed subdivisions mentioned in Midwest's applications currently receive natural gas service from any utility. See, 2 Tr. 23-24, 29-30, and 35-36. Thus, granting Midwest the right to serve those areas will not constitute the duplication of any existing gas facilities. Mr. Stallons goes on to note that even if Consumers elects to extend its existing gas facilities in an attempt to serve these areas, granting Midwest a CPCN for each township will--at a minimum--result in the creation of meaningful customer choice for both electric and gas service. See, 2 Tr. 24, 30, and 36.

Furthermore, the record shows that Midwest possesses significant experience in the operation of businesses that are similar to the distribution and sale of natural gas. Specifically, Mr. Stallons testified that in addition to providing regulated electric service to nearly 32,000 member-cus-

tomers, Midwest is also in the propane business. See, 2 Tr. 48. Experience gained in those ventures should, the Commission finds, make for a smoother entry into the natural gas distribution business.

The record also reflects Midwest's agreement to satisfy the Staff's five proposed conditions prior to providing natural gas service and shows that various alternatives exist from which the co-op may obtain the needed gas supply. Specifically, Mr. Stallons indicated that Midwest would (1) be willing to abide by CPCNs that cover the entire township at issue in each of its three applications, (2) eliminate or minimize the need to construct natural gas facilities that cross or parallel those of its competitors, (3) provide 30-days' advance notice of all construction activities, (4) apply for and obtain Commission approval of all necessary rates, tariffs, and rules before initiating natural gas service, and (5) structure its operations in a way that satisfies all provisions set forth in the Michigan Gas Safety Standards. Finally, he testified that Midwest has already commenced negotiations with Presque Isle Electric & Gas Co-op for natural gas supply and, after receiving the requested CPCNs, it will either secure transmission and distribution service through Consumers' system, go to an outside pipeline system, or build its own system. See, 2 Tr. 41 and 62.

The Commission therefore concludes that, based on the record assembled in this case, Midwest has satisfied the requirements of Act 69 and should be granted CPCNs to conduct natural gas service in Texas, Antwerp, and Almena townships. It further concludes that the issuance of those CPCNs should be conditioned upon (1) Midwest's satisfaction of each of the five conditions recommended by the Staff, (2) the co-op's development of a satisfactory gas system maintenance plan, and (3) its submission of a reasonable emergency plan.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1929 PA 69, as amended, MCL 460.501 et seq.; MSA 22.141 et seq.; 1909 PA 300, as amended, MCL 462.2 et seq.; MSA 22.21 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 AACRS, R 460.17101 et seq.

b. The CPCNs requested in these consolidated cases should be granted, subject to Midwest's satisfaction of all conditions discussed above.

THEREFORE, IT IS ORDERED that:

A. Midwest Energy Cooperative is granted certificates of public convenience and necessity to construct facilities and provide natural gas service in Texas Township, Kalamazoo County, and Antwerp and Almena townships, Van Buren County.

B. Midwest Energy Cooperative may not commence providing natural gas service under the certificates of public convenience and necessity granted in this order without first (1) satisfying each of the five conditions recommended by the Commission Staff, (2) developing and submitting for review by the Commission Staff both its gas system maintenance plan and its emergency plan, and (3) obtaining approval of its rates, tariffs, and conditions of service.

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/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner, dissenting in a separate opinion.

By its action of October 6, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Commissioner, dissenting in a separate opinion.

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Case No. U-12179

In the matter of the application of)
MIDWEST ENERGY COOPERATIVE for a)
certificate of public convenience and necessity)
to provide natural gas service in Antwerp Township,)
Van Buren County.)

Case No. U-12181

In the matter of the application of)
MIDWEST ENERGY COOPERATIVE for a)
certificate of public convenience and necessity)
to provide natural gas service in Almena Township,)
Van Buren County.)

Case No. U-12184

Suggested Minute:

“Adopt and issue order dated October 6, 2000 granting, with certain conditions, Midwest Energy Cooperative’s request for certificates of public convenience and necessity to provide natural gas service in Texas, Antwerp, and Almena townships, as set forth in the order.”

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DISSENTING OPINION OF COMMISSIONER ROBERT B. NELSON

(Submitted on October 6, 2000 concerning order issued on same date.)

I cannot join the majority opinion in this matter, which grants certificates pursuant to 1929 PA 69 (Act 69) to Midwest Energy Cooperative (Midwest) to operate a natural gas distribution business in three townships in Midwest’s electric service territory. I believe that granting certificates in these cases, based on this record, will negatively affect the safety, reliability and quality of the gas distribution system in Michigan. I further believe that granting the application will not serve the goals of providing competitive choices for Michigan customers. Finally, I am convinced that the application does not satisfy the requirements of Act 69 and should not be granted.

The facts of the case are adequately set forth in the majority opinion and will not be repeated here.

Midwest is purportedly entering the natural gas market for competitive purposes. Midwest argues that in key portions of its service territory it competes with Consumers to provide electric service. Midwest argues that approval of Act 69 certificates for gas operations would result in promoting competition by providing residential customers the choice of two utilities rather than only one. I disagree. If, as the record discloses, Midwest intends to either tap the distribution system of Consumers in areas of new residential development or seek a less economic way to serve customers, it may be creating a “developer’s choice” program, but it is certainly not creating a customer choice program. Once the developer signs up with Midwest and Midwest taps the distribution lines of Consumers or builds its own distribution system, the individual residential customers in that development will receive natural gas from Midwest. If customers located in this development want to choose distribution service from Consumers, they could only do so if Consumers chose to tap the line owned by or already tapped by Midwest, resulting in a duplication of facilities and the potential for the “helter-skelter” blanketing of tapped lines throughout a development. This is not the type of competition we should be promoting. We should continue to promote a customer’s choice of suppliers for gas and electricity, but such promotion does not include a customer’s or a developer’s right to require an incumbent utility to relinquish operational control of its distribution system.

The majority opinion, besides justifying its ruling in the name of what I consider false competition, avoids the critical issue presented by the application – whether it meets the requirements of Act 69.

Act 69, in pertinent part, provides:

“No public utility shall hereafter begin 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 . . . until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.” MCL 460.502 (Emphasis added)

"In determining the question of public convenience and necessity the commission shall take into consideration the service rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory." MCL 460.505.

I do not believe that Midwest has adequately demonstrated that the public convenience and necessity require the tapping of Consumers’ gas distribution facilities. In reaching this conclusion, I am persuaded by Consumers’ reliance on Consumers Power Co. v. PSC, 460 Mich 148, 167-8 (1999), wherein the Michigan Supreme Court concluded that our ability to foster competition can only go so far because we lack the “authority to order an existing utility to share its capital facilities.” Requiring Consumers to share its gas distribution facilities with a competitor is very much akin to requiring Consumers, under the then-existing statutes governing electric utilities, to provide retail wheeling. Nothing in the recent changes to the laws affecting the electric industry (2000 PA 141, 142) provides any basis for the required sharing of gas distribution facilities. Midwest’s reliance on 1929 PA 9, like the Commission’s reliance on 1929 PA 3 and 1909 PA 106 before the Supreme Court, is misplaced since the Act does not authorize the Commission to order the sharing, tapping or expropriation of another utility’s facilities.

Even if Consumers’ distribution system is not tapped, Midwest has failed to adequately address an essential element of any Act 69 certification – whether the applicant has sufficient wherewithal to conduct a utility business, in this case the business of a natural gas utility, in the subject area. This Commission has, in recent years, granted Act 69 certificates with much more

evidentiary support than this application and, even with such evidentiary support, been faced with the extension of natural gas service into areas where the economics of such service is dubious, at best. Midwest has not identified, on this record, the anticipated source of supply or a construction plan for providing natural gas service, nor how it would balance its gas purchases and receipts with a relatively small and temperature-sensitive load. Act 69 means far more than showing up at the Commission with a franchise and good intentions. It means demonstrating the public benefit of the application based on concrete plans to serve in a safe and reliable manner. Although the majority conditions its approval of certificates on compliance with certain conditions, these conditions do not require Midwest to have a financially viable plan to serve natural gas customers without burdening its electric customers with the cost of such a plan.

If Midwest's concern is with the ability of Consumers to market gas and electric service to new developers, there may be other remedies available. For example, Midwest could pursue a lawsuit in federal or state court, alleging that Consumers has "tied" the provision of natural gas service to the provision of electric service in a manner which contravenes antitrust laws (e.g., Section 3 of the Clayton Act). I offer no opinion as to the merits of such a suit, but merely suggest that this Commission is not the appropriate forum for such relief.

MICHIGAN PUBLIC SERVICE COMMISSION

Robert B. Nelson, Commissioner