

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2002-192-E - ORDER NO. 2003-635
OCTOBER 23, 2003

IN RE: South Carolina Electric & Gas Company,)	ORDER DENYING
)	AND DISMISSING
Complainant,)	COMPLAINT
)	
vs.)	
)	
Palmetto Electric Cooperative, Inc.,)	
)	
Respondent.)	

This matter came before the Public Service Commission of South Carolina (“the Commission”) on a Complaint filed by South Carolina Electric & Gas Company (“SCE&G”) against Palmetto Electric Cooperative, Inc. (“Palmetto” or the “Coop.”), seeking a determination that Palmetto was not entitled to provide service to the Walsh facility, and that Walsh was required to take service from SCE&G. A hearing was held on August 12, 2003, in the offices of the Commission, with the Honorable Mignon Clyburn, Chair, presiding. SCE&G was represented by Francis P. Mood, Esquire, Catherine D. Taylor, Esquire, and Dahli Myers, Esquire. Palmetto was represented by Val H. Steiglitz, Esquire and J. David Black, Esquire. The Commission Staff was represented by F. David Butler, General Counsel.

SCE&G presented the direct and rebuttal testimony of Kenneth L. Ackerman, III, and the rebuttal testimony of David Tempel, Jr. Palmetto presented the direct testimony of A. Berl Davis, Jr., Keith DuBose, G. Thomas Upshaw, and John Walsh. The Commission Staff did not present any witnesses in this case. The positions of the parties are summarized below.

This is a case involving corridor rights. SCE&G maintains that the Walsh facility is located in its assigned territory and that it, therefore, has the exclusive right to serve, pursuant to S.C. Code Ann. § 58-27-620 *et seq.* (1976)(the Territorial Assignment Act). SCE&G further maintains that the distribution line giving rise to the corridor upon which Palmetto claims its right to provide service does not appear on the “A-Map” for this area and, therefore, no corridor exists. While SCE&G acknowledges that the “A Map” may be incorrect, it contends that the “A Map” constitutes a “binding agreement” between the parties, such that the Commission is precluded from correcting it even if it is wrong.¹ Finally, SCE&G asserts that Palmetto should be denied the right to serve because it extended service to the Walsh facility without first obtaining Commission approval, which SCE&G contends is required by Reg. 103-304.

Palmetto acknowledges that the distribution line upon which it bases its claim of corridor rights to serve the Walsh facility was left off the “A Map” for this area. Palmetto maintains, however, that “A Maps” carry no binding legal authority, are merely illustrative of where a distribution line may or may not be located, and may (and should)

¹ At the August 12th hearing, however, SCE&G witnesses did indicate that an incorrect “A Map” should be corrected, (Tr. p. 34, lines 3-9; p. 35, lines 5-14), through “proper procedure.”

be corrected when determined to be incorrect. Palmetto asserts that the Territorial Assignment Act provides for corridors surrounding distribution lines as they existed as of the date of the Act (July 1, 1969), and not based upon whether the line appears on an “A Map” or not. Since the existence of a corridor gives a customer the right to choose suppliers, Palmetto points out that the net effect of SCE&G’s position would be to deprive Walsh – and other similarly situated electric customers – of their statutory right to take service from the provider of their choice, based purely upon a mistake in an “A Map.” Palmetto also contends that SCE&G waived any right to deny Palmetto’s corridor rights here, or is estopped from doing so, because SCE&G consented to Palmetto providing service to a mini-warehouse facility in 1994, located in the same exact territory which SCE&G now claims is its exclusive territory. In sum, Palmetto asserts that the physical footprint of the Walsh facility building is within the 300-foot corridor of a Palmetto 1965 distribution line that was mistakenly left off the “A Map” and that Palmetto has the right to serve the Walsh facility as one premises pursuant to S.C. Code Ann. § 58-27-620(1)(d)(iii) (1976). With respect to Reg. 103-304, Palmetto contends that this regulation cannot override or restrain the statutory right of a service provider to extend service to meet a customer choice in a corridor, as provided by the Territorial Assignment Act, which does not require Commission notice or approval prior to extending such service.

After careful consideration of the pleadings, the witnesses’ testimony (the entirety of the record, not just the transcript citations herein), exhibits, arguments of counsel, and

the applicable law, the Commission finds and concludes that Palmetto is entitled to serve the Walsh facility, for the reasons set forth below.

I. FACTUAL BACKGROUND

In 2002, a representative of the Jasper County Economic Development Commission contacted Palmetto about a new manufacturing facility -- Walsh Fabrication -- that was locating in Jasper County. Palmetto and Walsh then discussed the possibility of Palmetto providing electric service to Walsh. (Tr. p. 185, lines 3-10; p. 157, lines 12-16; p. 158, lines 1-15.) Thomas Upshaw, Chief Executive Officer of Palmetto, directed Palmetto staff to take measurements from a Palmetto distribution line in the vicinity of the Walsh facility to ascertain whether the Walsh facility was within the 300-foot corridor of the line, in order to determine whether Palmetto would be able to serve the premises. Palmetto line service technicians Dan Wood and Keith Dubose walked the property on different occasions and took measurements by hand. Also, Berl Davis, Palmetto's Vice-President for Engineering and Operations, directed Ward Edwards, Inc., an engineering and surveying company, to take measurements using a Global Positioning System ("GPS") device to make sure the Walsh premises was within Palmetto's 300 foot corridor. (Tr. p. 76, lines 3-21; p. 77, line 1; p. 185, lines 11-22; p. 186, lines 1-18; p. 202, lines 13-25; p. 203, lines 1-25; p. 204, lines 1-25; p. 205, lines 1-25; p. 206, lines 1-13).

After taking the GPS measurements two times, Ward Edwards, Inc., prepared a certified plat of the property illustrating the footprint of the Walsh Fabrication facility in relation to the Palmetto distribution line and also illustrating the 300-foot exclusive

corridor extending from that line. The plat was certified by Donald R. Cook, Jr., SCPLS #19010 and appears in the record as Exhibit 2. (The document attached as Exhibit 2 in the transcript was actually introduced at the hearing as Upshaw Exhibit 1. It is referred to as Exhibit 2 in this Order since that is how it is marked in the transcript). According to this exhibit, a portion of the Walsh facility is within the Palmetto 300 foot corridor. (Tr. p. 76, lines 19-20). SCE&G does not contest that the Walsh facility is within 300 feet of the Palmetto line as measured by Palmetto. (Tr. p. 45, lines 19-25; p. 46, lines 1, 13-19).

A. History of Palmetto's Distribution Line.

There is substantial evidence that the distribution line from which Palmetto's corridor was measured has been in place since 1965. (Tr. p. 77, lines 4-12). Palmetto Exhibit 3 shows that Palmetto began serving the home of Addie Graham from this line on November 16, 1965. (Tr. p. 81, lines 8-25; p. 82, lines 1-3). This exhibit, which is Mrs. Graham's cooperative membership card, lists an electric meter bearing serial number: "18-253-860." As late as April, 1994, when Keith Dubose, a Palmetto employee, had reason to check, this same meter was still attached to the Graham house. (Tr. p. 166, lines 1-12). Palmetto introduced several other exhibits substantiating the fact that it had been providing service to Mrs. Graham from this line prior to the enactment of the Territorial Assignment Act. See, Exhibit 6, (Palmetto's service record showing that Mrs. Graham's service was disconnected on August 8, 1994) (Tr. p. 84, lines 4-20); Exhibit 7, (a record showing Mrs. Graham's participation in a Palmetto credit program) (Tr. p. 84, lines 21-25; p. 85, lines 1-11); Exhibit 8, (minutes from the December 13, 1965, Palmetto board meeting approving Addie Graham as a member of the Palmetto Cooperative) (Tr.

p. 85, lines 12-25; p. 86, lines 1-7). SCE&G failed to offer any evidence that the Palmetto distribution line did not commence service to the Addie Graham residence in 1965. Therefore, pursuant to S.C. Code Ann. §58-27-620, Palmetto possesses a corridor right extending 300 feet from each side of the Addie Graham distribution line, as it existed on July 1, 1969.

Palmetto established the original position of the Addie Graham distribution line by reference to a 1965 staking sheet (Exhibit 4) (Tr. p. 82, lines 7-21). The position of this original line is reflected as the green line on Exhibit 2. (Tr. p. 92, lines 4-5). The record contains extended testimony on the staking sheet as reliably establishing the original position of the line, and, thus, the measurement of the corridor. The evidence shows that subsequent to 1965, there have been a few minor adjustments in the position of portions of the original line, both upstream and downstream of the location from which Palmetto provides service to Walsh. However, Palmetto testified that the segment of the line from which its service to Walsh extends, and from which Palmetto measured the 300 foot corridor, has not moved since the line was originally constructed. (Tr. p. 209, lines 12-22; p. 178 lines 1-17, 24-25; p. 179 lines 1-9). Therefore, any movements in the position of the line occurred at points unrelated to the point from which the corridor was measured and have no significance. There was no evidence sufficient to rebut Palmetto's evidence on the original location of the line and, therefore, the location of Palmetto's corridor and Walsh's location within the corridor. It is clear that the Walsh facility is within the corridor.

B. The “A Map” Issue.

A portion of Palmetto’s 1965 Addie Graham distribution line was inadvertently and mistakenly omitted from the “A Map.” SCE&G contended that it has maintained service in conformity with the “A Map” since it was signed in 1982. However, as noted, Palmetto has been serving the Graham residence since 1965. Palmetto also offered evidence that it has served several trailer homes near Mrs. Graham’s house from the same line. See, Exhibit 2. SCE&G has not objected to this service. Additionally, it is undisputed that Palmetto provided service from the Addie Graham line to a mini-warehouse, which is shown on Exhibit 2, since at least 1994. (Tr. p. 77, lines 13-25).

In 1994, SCE&G contacted Palmetto and questioned Palmetto’s right to serve the mini-warehouse facility. (Tr. p. 77, lines 20-21; p. 166, lines 1-12). SCE&G took the position that the mini-warehouses were within SCE&G’s exclusive assigned territory. Id. Palmetto representative Keith Dubose met SCE&G representative Kenny Ackerman at the site. DuBose showed Ackerman the Addie Graham membership card and the meter on her house. Id. The parties’ dispute whether SCE&G thereupon conceded that Palmetto had corridor rights that included the mini-warehouses. DuBose testified that Ackerman acknowledged Palmetto’s corridor rights. Ackerman testified he did not. However, it is undisputed that after the meeting between DuBose and Ackerman, SCE&G made no further complaint about Palmetto providing service to the mini-warehouses. Nor is it disputed that Palmetto’s service to the mini-warehouses has expanded since it began, growing from two lights to additional lights and a building, all without objection from SCE&G. (Tr. p. 46, lines 20-25; p. 47, lines 1-25; p. 48, lines 1-

25; p. 49, lines 1-9). SCE&G conceded that this service to the mini-warehouses was, in fact, not consistent with the “A Map.” (Tr. p. 52, lines 5-14).

In addition to the Addie Graham distribution line being left off the “A Map” at issue here, Palmetto testified that it was aware of at least one other occasion on which an “A Map” had omitted a line. (Tr. p. 114, lines 18-21).

Finally, while SCE&G asserted that the “A Map” constitutes an accurate depiction of lines in the area, both SCE&G’s witnesses acknowledged that they had no personal knowledge of the circumstances under which the “A Map” at issue here was created and had no role in preparing it. (Tr. p. 38, lines 18-25; p. 39, lines 1-25; p. 40, line 1; p. 226, lines 19-25).

The “A Maps” are not official documents of the Commission; they were not approved by Order of the Commission as were the individual state county territorial assignment maps; and there was no evidence these “A Maps” were ever filed with the Commission.

C. Palmetto Electric Cooperative’s Service to Walsh Fabrication.

After Walsh chose to receive service from Palmetto, Palmetto ran service from a portion of the existing Addie Graham distribution line – from a segment of the line that was in the same location as it was prior to 1969 – to the Walsh facility, via an overhead and underground line.

SCE&G then brought this action, seeking a ruling that this service was improper.

II. LAW AND ANALYSIS

A review of the applicable statutes and case law, as applied to the entire record in this case, shows that Palmetto is entitled to serve the Walsh facility.

A. **The 1969 Territorial Assignment Act Confers Corridor Rights Based Upon Lines As They Exist At The Time Of The Act – Not As They Are Shown On Later Maps.**

SCE&G's position on the "A Maps" amounts to asking the Commission to disregard the statute. Under the Territorial Assignment Act, SC Code § 58-27-640 (1976), the area "within 300 feet from the lines of all electric suppliers as such lines exist on the date of the assignments" constitutes a corridor through otherwise assigned territory, in which the customer has the right to choose suppliers. See, S.C. Code § 58-27-620(c) and (d).

S.C. Code § 58-27-620(1)(d)(iii) (1976) provides in part:

- (1) Every electric supplier shall have the right to serve:

If chosen by the consumer, any premises initially requiring electric service after July 1, 1969, ...

are located partially within three hundred feet of the lines of such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to §58-27-640.

It is important to note that the statute does not state that corridors arise based upon lines as they appear on the "A Maps." Rather the statute specifically provides that corridors arise based on how "such lines exist on July 1, 1969. . . ." Thus, the issue before the Commission is not whether the Addie Graham line appeared on an "A-Map."

The issues are whether the Addie Graham line existed on July 1, 1969, and then whether the Walsh facility is within the 300-foot corridor emanating from that line, and then whether Walsh chose to receive service from Palmetto. SCE&G invites the Commission to disregard the statutory language to focus on whether a line appeared on a map, which the Commission declines to do. The principle of customer choice in corridors is well-established and controls here, as per the statute.

B. SCE&G Has Failed to Provide Persuasive Evidence That the Walsh Facility is Outside the Corridor Emanating From the Addie Graham Line.

SCE&G devoted considerable effort to establishing that a portion of the Addie Graham distribution line had been moved. Palmetto agrees that small portions of the distribution line have been moved over the years. However, the point at which Palmetto made the measurement to the Walsh facility has not moved since the line's inception in 1965. (Tr. p. 178, lines 24-25; p. 179, lines 1-3; p. 209, lines 12-14). Thus, there is no persuasive evidence that the Palmetto corridor does not exist as reflected on Exhibit 2 and as testified to by Palmetto.

C. The Fact That Palmetto Upgraded the Line From Single-Phase to Three-Phase Has No Legal Significance.

SCE&G also argues that Palmetto does not have corridor rights because it upgraded its line from single-phase to three-phase for purposes of serving Walsh. (The three-phase line runs along the same path as the previous single-phase line. Tr. p. 102, lines 6-8). We believe that the upgrading of the service in that manner does not destroy the original corridor right created under the Act. A contrary view is unacceptable, since, under SCE&G's theory, a provider having corridor rights would not have the right to

upgrade its lines to serve longstanding customers whose needs increase over the years, even if the customers were located wholly within the corridor. SCE&G would seem to argue that a provider upgrading its services would lose its corridor rights. This cannot be the case. If “changes” to a line robbed the line of its ability to maintain a corridor, all corridors would eventually disappear from existence, as some change is bound to occur sooner or later with 1969 lines.

D. There is No Authority to Support SCE&G’s Argument That the “A-Map” Constitutes a Binding Contract.

SCE&G asserted that the “A Map” is a binding agreement between the parties. SCE&G provides no authority for this unique proposal. While the “A Map” was certainly an attempt to set out on paper all the lines in the particular area, it is clear that the parties were unsuccessful in this instance. SCE&G states no persuasive reason why such a document should be viewed as a binding contract. Further, the South Carolina Supreme Court does not favor an interpretation of documents in a manner that contradicts the Territorial Assignment Act. In Duke Power Company v. The Public Service Commission of South Carolina, et al., 343 S.C. 554, 541 S.E. 2d 250 (2001), the Court held that an interpretation of a Commission Order which would be in conflict with the Territorial Assignment Act was improper. Similarly, an interpretation of an “A Map” that would remove corridor rights acquired as the result of the Territorial Assignment Act is not valid. We find that the “A Map” is not a binding agreement or contract. (See also discussion in Section I.B. above.)

E. Even If the “A-Map” is Viewed as a Contract, South Carolina Law Provides for Reformation of Erroneous Contracts and Discourages Perpetuation of Mistakes in Contracts.

South Carolina law provides a mechanism for correcting mistaken or incorrect agreements in many areas. For example, errors in deeds are routinely corrected. Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981); Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937); Scates v. Henderson, 44 S.C. 548, 22 S.E. 724 (1895). “It has long been the law of this State that where a written contract does not conform to the intention of the parties, equity will reform the contract.” Shaw v. Aetna Casualty & Surety Ins. Co., 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980). SCE&G contends that the purpose of the “A Map” was to depict all the lines in the area. If it failed to do so, then it must be corrected. George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 590, 545 S.E.2d 500, 508 (2001).

At the hearing SCE&G questioned whether the Palmetto line may have been left off the “A Map” by agreement or as part of some “customer swap.” However, no evidence that this occurred was advanced, and suggestions to this effect amount to mere speculation. (Mr. Upshaw testified that it was “possible,” but “highly unlikely,” that Palmetto had agreed to leaving its line off the map and that it would never have agreed to “swap” Mrs. Graham with SCE&G.) (Tr. p. 106, lines 10-13; p. 148, lines 10-20; p. 152, line 25; p. 153, lines 1-14). Moreover, it was pointed out that had the parties swapped, Palmetto would not have been serving Addie Graham. (Tr. p. 148, lines 18-20). Clearly, the evidence before the Commission illustrates that the parties did not swap the corridor, since Palmetto has maintained and served off the distribution line since 1965.

South Carolina law also recognizes the principle of waiver. Waiver has been defined as the intentional relinquishment of a known right and may be implied from the circumstances. Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994); Steele v. Self Serve, Inc., 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999). By its actions, SCE&G previously consented to Palmetto serving customers in the exact area that it now claims is SCE&G's exclusive assigned territory. While the Commission believes that SCE&G's Complaint must be denied for the other reasons set forth in this Order, SCE&G's case would still fail because by its conduct SCE&G waived any right to prevent Palmetto from providing service from the Addie Graham distribution line. See discussion, supra, at 7.

F. It Would be Contrary to Sound Public Policy to Allow an Erroneous "A-Map" to Deprive Customers of Their Statutory Right to Choose Suppliers Because of a Mistake.

It is clear from the record that the Addie Graham line was left off the "A Map" by mistake. Customers such as Walsh, and suppliers such as SCE&G and Palmetto, have a strong interest in the accuracy of "A Maps." It would be directly contrary to the public interest to allow decisions on service to be based upon incorrect maps. The aim is to make decisions based upon the facts presented to this Commission – not to perpetuate mistakes.

G. Motions to Strike

SCE&G has filed Motions to Strike certain portions of the testimony of Palmetto witnesses G. Thomas Upshaw and A. Berl Davis, Jr., based on the allegations that the testimony is cumulative, that it is presented by witnesses with no personal knowledge, and that the testimony is hearsay. We deny the Motions. The disputed testimony relates to

a conversation allegedly held between SCE&G witness Ackerman and Palmetto witness DuBose. SCE&G objects because of the witnesses' depiction of what was allegedly said by Mr. Ackerman.

Palmetto argued that the testimony is not hearsay, in that it goes to showing and establishing the mental state and present sense impressions of Upshaw and Davis at the time that they made a decision to pursue providing service to Walsh Fabrication. See South Carolina Rule of Evidence 803(3). Palmetto also argues that the testimony is not cumulative.

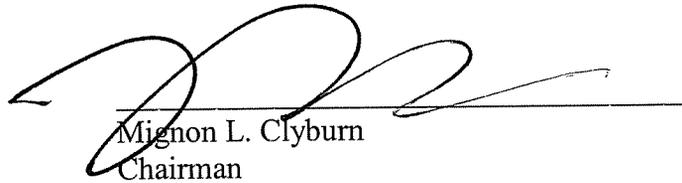
We agree with Palmetto that the testimony shows the mental state and present sense impressions of the two witnesses. We disagree with the argument that the evidence is cumulative. Finally, we disagree with the statement that the information is presented by witnesses with no personal knowledge. Obviously, both witnesses had knowledge of the conversation between Ackerman and DuBose. Accordingly, we deny the Motions to Strike. We will accept the testimony as part of the record in this case and give it whatever weight we determine to be appropriate.

CONCLUSION

After careful consideration of the entire record, the Commission rules that the service by Palmetto to the Walsh facility is permissible, that the Motions to Strike are denied, and that SCE&G's Complaint should be, and hereby is, denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Mignon L. Clyburn
Chairman

ATTEST:



Bruce F. Duke
Deputy Executive Director

(SEAL)