BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 97-153-E - ORDER NO. 97-819

SEPTEMBER 19, 1997

√MR

IN RE: Blue Ridge Electric Cooperative, Inc., Petitioner, vs. Duke Power Company, Respondent.	ORDER GRANTING CEASE AND DESIST

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition of Blue Ridge Electric Cooperative, Inc. (Blue Ridge) for an Order of the Commission requiring Duke Power Company n/k/a Duke Power, a division of Duke Energy Corporation (Duke) to cease and desist from attempting to provide power to the Nason Corporation (Nason). Nason is located wholly within territory assigned to Blue Ridge. Duke, however, alleges that it is entitled to serve Nason by claiming corridor rights from a specific line, and from a 1972 Order of this Commission in which Duke alleges the Commission created a 600 foot wide swath of unassigned territory within territory assigned to Blue Ridge, and that Nason is partially located within that swath. According to Duke, this scenario makes

for a "customer choice" situation. Nason apparently has chosen Duke as its electric supplier.

After appropriate Notice, a hearing was held on this matter on August 14, 1997 at 10:30 AM in the offices of the Commission. The Honorable Guy Butler, Chairman, presided. Blue Ridge was represented by Steven W. Hamm, Esquire and Mary S. League, Esquire. Blue Ridge presented the testimony of C. Alan Blackmon, Barney Drake, and Charles Dalton. Duke was represented by William F. Austin, Esquire, Richard Whitt, Esquire, and Jefferson D. Griffith, III, Esquire. Duke presented the testimony of Stephen M. Mihaly, Stephen R. Goza, Mark E. Johnson, and Edward T. Connell. The Commission Staff was represented by F. David Butler, General Counsel. The Staff presented no witnesses.

Although a Motion to Dismiss the Petition had been filed by Duke and a Motion to Strike Testimony had been filed by Blue Ridge, neither Motion was heard at the request of the parties. We will therefore consider only the request of Blue Ridge for a Cease and Desist Order.

Duke contends that S.C. Code Ann. Section 58-27-620(1)(d)(iii) grants it the right to serve the Nason premises. Section 58-27-620(1)(d) defines an electric supplier's rights to serve a new premises located partially within three hundred feet of its line and partially within the service area of another electric supplier. Section 58-27-620(1)(d)(iii) then, under Duke's theory, allows an electric supplier to serve a specific premises if three conditions are met. First, the new

premises must be located partially within three hundred feet of a line of the electric supplier as it existed on July 1, 1969. (A "line" is defined as a distribution line in Section 58-27-610(3). Second, the premises must be located partially within the service area assigned to another supplier. Third, the customer must choose the electric supplier over the other supplier. Duke believes that it has satisfied all three conditions, and therefore, has the right to serve Nason.

Our review of the record, however, reveals that Duke is deficient at least as to the first condition. The testimony at the hearing showed that the presently existing 44kv line that is the subject of this matter was constructed in 1974, and serves as a transmission tie line between Westminster and Walhalla. Only one customer, Steel Huddle, is now served off this line, pursuant to its initial load of 750kw. Duke's testimony reveals that, if it were to serve Nason, that a new line would have to be built, and the plant would not be served from the existing line. We do not believe that the line in question is a distribution line under the facts of this case, but is a transmission line. Since this is the case, we do not believe that this transmission line is capable of generating corridor rights under the laws of this State. We therefore hold that there is no corridor through Blue Ridge territory in this case.

In further support of this proposition, we note that Section 58-27-620(1)(c) provides that no electric supplier may assert corridor rights from distribution lines constructed after the time

of assignment of territory. The testimony in this case revealed that, according to the birthmarks on the poles, the current "Bear Swamp" 44 kv line was constructed in 1973, during which time the former 44kv Darby transmission line was converted to a 100kv transmission line. A 100kv line by definition cannot be a distribution line, and therefore carries no corridor rights with it. Even if Duke could have claimed corridor rights with the original 44kv transmission line, this line is now clearly a 100kv transmission line. As the 1969 "Darby" 44kv line no longer exists, any corridor rights that Duke may have had no longer exist. We do not believe that Duke can assert corridor rights appurtenant to the current "Bear Swamp" 44kv transmission line as it was constructed after September 5, 1972, the date of the Order assigning the territory in question to Blue Ridge.

Nor do we think that our Order No. 16,394 designated "unassigned territory" in the area 300 feet from the specific lines as cited by Duke. There was no evidence presented at the hearing that this was ever the intent or agreement of the parties. This Order was simply a form order used by us statewide. There is no specific language or discussion in the 1972 Order that references any unassigned territory relating to any specific lines.

The language in the Order simply tracks the language in the territorial assignment enabling statute, Section 58-27-640. Duke's interpretation is in direct conflict with the corridor rights provisions established within the Territorial Assignment

Act itself. The Act addresses the ability to assert corridor rights within 300 feet of distribution lines extensively. We do not think our Order No. 16,394 was ever intended to displace the provisions of the Act.

We agree with Blue Ridge that the Territorial Assignment Act contains language maintaining a presumption against concluding that a line is a distribution line, and requires that the Commission determine that the "primary purpose and use" of a line is for the distribution of electric power. As we have already stated, we do not believe that the facts in this case support such a conclusion. The line in this case has served only a single customer in all of its years of existence. That customer is only being served pursuant to the 750kw exception, not because of any corridor rights.

In addition, we hold that the principle of "res judicata" does not come into play in this case. The current "Bear Swamp" line is not the same line as shown on Duke's Exhibit A. Also, pursuant to S.C. Code Ann. Section 58-27-620(1)(c), Duke cannot lawfully claim corridor rights from any line constructed after 1972. Since the 44kv transmission line in question was constructed in 1974, Duke's argument is unavailing.

Further, no corridor rights attach to the 100kv line under Section 58-27-610(3), as the line is not a 44kv line nor is the premise to be served wholly within 300 feet of the 100kv line. Thus, Duke's proposition is without merit.

The end result of this discussion is that the Nason plant is

located totally within Blue Ridge assigned territory. Under the Territorial Assignment Act, Blue Ridge has an exclusive right to serve Nason with electricity.

Consequently, we hereby grant the requested Cease and Desist Order against Duke. Duke shall cease and desist from its attempts to provide electric service to the Nason premises.

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

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Deputy Executive Director

(SEAL)