

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint and Request for )  
Agency Action by Micron Technology, Inc., )  
against PacifiCorp for Discrimination )

DOCKET NO. 01-035-16

ORDER

ISSUED: June 1, 2001

By The Commission:

This matter was heard before the Commission on May 25, 2001. Appearing for Micron Technology, Inc. (Micron), were F. Robert Reeder and Sandra Weeks, Parsons Behle & Latimer; appearing for PacifiCorp (PacifiCorp or Company) were Edward A. Hunter and David Mortensen, Stoel Rives; appearing for the Division of Public Utilities (Division) was Michael Ginsberg, Assistant Attorney General, Utah Attorney General's Office; and appearing for the Committee of Consumer Services (Committee) was Douglas Tingey, Assistant Attorney General, Utah Attorney General's Office.

BACKGROUND AND POSITION OF THE PARTIES

This Docket originated with Micron's May 1, 2001, Complaint and Request for Agency Action (Complaint) against PacifiCorp. Micron supported its Complaint through a Memorandum and affidavit filed May 7, 2001. Micron alleges that, pursuant to a contract expiring June 3, 2001 (1996 Contract), PacifiCorp provides electricity for Micron's facilities located in Lehi, Utah (Micron Plant). PacifiCorp and Micron are unable to resolve their dispute concerning the terms and conditions upon which PacifiCorp may provide continued electric service after the 1996 Contract's June 3<sup>rd</sup> expiration date. PacifiCorp's position is that, if no replacement agreement is reached, PacifiCorp will cease providing electric service to the Micron Plant. Micron requests that the Commission order PacifiCorp to provide electric service to the Micron Plant pursuant to PacifiCorp's Utah tariff Schedule 9 service after the 1996 Contract's expiration. Micron argues that PacifiCorp, as a certificated public utility, is required to provide electric service pursuant to Schedule 9 for a customer who qualifies. Micron further argues that it qualifies for such service.

In a Memorandum in Opposition, filed May 17, 2001, PacifiCorp notes that the Micron Plant is located in the service territory of Lehi City's municipal electric power system. PacifiCorp argues that its service responsibilities are determined by the 1996 Contract and that those service responsibilities will end on the June 3<sup>rd</sup> expiration date. PacifiCorp argues that because the Micron Plant is located in Lehi City, within the municipal power company's service area, PacifiCorp has no public utility duty to serve the Micron Plant. PacifiCorp maintains that Micron does not qualify for electric service under Schedule 9 because the Micron Plant is located in Lehi City's municipal power service territory where Lehi City has the obligation to serve the Micron Plant.

On May 22, 2001, the Division and the Committee filed their Memoranda. The Committee opposes Micron's position and arguments. The Committee argues that the circumstances for electric service for the Micron Plant appear to be unique, in that Micron is able to obtain electric service from either Lehi City or PacifiCorp. The Committee argues that acceptance of Micron's position would permit Micron to switch between the two providers, playing each provider off of the other in order for Micron to obtain its most advantageous electric power rate. The Committee argues that this switching ability is contrary to the regulatory compact whereby a public utility has a duty to provide service concomitant with a customer's duty to obtain service only from that utility. The Committee also argues, as does PacifiCorp, that allowing Micron to switch between Schedule 9 service and service from another power supplier potentially imposes significant costs upon PacifiCorp that would not be recovered through the revenues received through Schedule 9 rates. These costs likely would be borne by PacifiCorp, and the remaining PacifiCorp customers, if Micron were to come and go as a PacifiCorp tariff customer.

The Division's position is similar to that of PacifiCorp and the Committee. The Division notes the unique circumstances surrounding Lehi City's annexation of the area in which the Micron Plant is located. Micron can be served by two electric service providers. The Division also notes the unique circumstance surrounding the execution of the 1996 Contract and operations under that agreement. The 1996 Contract and the effects, if any, the Lehi City annexation may have on customer and public utility relationships were never previously presented to the Commission. The Division cautions that there are several public policy issues that could be affected in resolving Micron's Complaint.

To appreciate the parties' positions and to understand the Commission's resolution of the complaint, further detail of the factual background is useful. In 1995, Micron purchased land in Utah County, just beyond the boundaries of Lehi City. Micron proposed to build the Micron Plant to manufacture computer chips. At the time of purchase, the land for the Micron Plant was located in the service territory of PacifiCorp. The land, however, was vacant. PacifiCorp had not placed any facilities for the provision of electric service since there were no customers there. It was anticipated that manufacturing computer chips at the Micron Plant would create a demand for electric power at the facility that might reach 200 MWs. On June 13, 1995, Lehi City annexed the land upon which the Micron Plant was to be constructed. Lehi City then operated, and continues to operate, a municipal electric power system whereby it provides electric power service within its municipal boundaries.

Also on June 13, 1995, Lehi City and Micron entered into an Electric Service Agreement (ESA). The ESA required Lehi City to adopt an ordinance granting PacifiCorp a nonexclusive franchise to provide electric service within Lehi City's boundaries, but only for electric service that might be provided to the Micron Plant and for that plant's operations. The ESA required Lehi City to provide electric power service for Micron's use during the construction of the Micron Plant. The ESA also provided that Micron would be able to enter into a separate electric power service agreement with either PacifiCorp or Lehi City for all electric power needs associated with the anticipated manufacturing operations of the Micron Plant. Lehi City extended facilities to serve the Micron Plant area during construction and Lehi City began providing electric service.

Micron began negotiations with Lehi Power and PacifiCorp to obtain the manufacturing power supply agreement, referenced in the ESA, for the Micron Plant's expected operations. Soon thereafter, however, the computer chip market soured, such that Micron determined that it would not manufacture computer chips at the Micron Plant. Micron determined that it would complete construction and hold the facility for future use, when market conditions would warrant chip manufacturing. While manufacturing operations could require approximately 200 MWs of power, Micron's revised plant operations changed its power needs. The Micron Plant has limited use. Apparently it is now used for testing purposes, and its need for electric power is significantly less than the 200 MWs originally contemplated. Its actual use now is approximately 11 MWs. Micron does not believe that the Micron Plant's electric power needs will exceed 15 MWs in the near future.

In early 1996, PacifiCorp informed the Division of PacifiCorp's intent to file, for regulatory review, a power supply special contract for electric service for the Micron Plant. Special contracts usually contain unique compensation rates to serve a load as large as originally expected for the Micron Plant. On June 3, 1996, Micron and PacifiCorp executed the 1996 Contract. The 1996 Contract provides specific terms and conditions upon which PacifiCorp would extend its facilities and serve the Micron Plant, for a term of sixty months. It also incorporates, by reference, the provisions of PacifiCorp's Schedule 9. Rather than the anticipated special contract, apparently with the greatly diminished electric supply demands for the Micron Plant, Micron and PacifiCorp determined that a unique rate for electricity provided to the Micron Plant was not needed. The parties agreed to use PacifiCorp's Schedule 9 rate of compensation for the electric power supplied by PacifiCorp to the Micron Plant. The 1996 Contract was neither submitted to the Division, nor was it ever filed with the Commission for Commission approval.

In preparation to provide service pursuant to the 1996 Contract, PacifiCorp negotiated a franchise agreement with Lehi City. PacifiCorp and Lehi City executed a February 4, 1997 franchise agreement (Franchise Agreement), establishing the terms and conditions under which PacifiCorp could supply electric power, within Lehi City's boundaries, to the Micron Plant under the 1996 Contract and pursuant to the ESA required city ordinance issued in June 1996. The Franchise Agreement specifies that "[t]he parties acknowledge and agree that such [1996 Contract] agreement with [Micron] shall fulfill the statutory duty of [Lehi] City to [Micron] per Utah Code Ann. § 10-2-401(4) for supply of electric service."

PacifiCorp's service to the Micron Plant under the 1996 Contract was uneventful until the contract's expiration date neared. In February 2001, PacifiCorp sent a letter to Micron noting the pending expiration of the 1996 Contract and expressing PacifiCorp's desire to negotiate a new contract. Again, on March 26, 2001, PacifiCorp corresponded with Micron on the need for a new contract, indicating that PacifiCorp would end service upon the 1996 Contract's expiration, unless a new contract was negotiated. Micron responded, by letter dated March 28, 2001, indicating interest in continuing service with PacifiCorp, and negotiating a fair and reasonable power supply agreement with PacifiCorp. Micron took issue, however, with PacifiCorp's position that the Micron Plant was not within PacifiCorp's certified service territory, making tariff service unavailable, so that a new contract would be necessary. Micron claimed that it could take service under existing PacifiCorp tariff provisions. Micron further claimed that it believed that the Commission could compel PacifiCorp to provide such service if Micron were willing to accept the terms and conditions contained in PacifiCorp's tariff. On April 20, 2001, PacifiCorp responded to Micron's March 28th letter, claiming that PacifiCorp had no public utility duty to provide electric service to the Micron Plant. PacifiCorp contended that this duty was Lehi City's and the 1996 Contract had simply been the means by which Lehi City fulfilled that duty. The correspondence between the parties evidences that the differing views concerning service obligations to the Micron Plant was not a new subject. The parties are unable to agree upon the terms and conditions upon which PacifiCorp might provide electric service to the Micron Plant after the 1996 Contract's June 3, 2001 expiration date. Micron filed its Complaint, seeking a Commission resolution.

### DISCUSSION

The Commission agrees with the Division that resolution of the dispute between PacifiCorp and Micron raises important public policy concerns. The Commission concludes that those concerns have been previously addressed by the Utah Legislature, in enacting various statutory provisions of Utah law, and by the Utah Constitution. We also conclude that the Utah Supreme Court has ruled on how that legislative and constitutional direction has application in resolving this dispute.

At the core of the dispute are the parties' opposing views of whether PacifiCorp has a public utility duty to provide electric power service to the Micron Plant located within Lehi City's municipal boundaries. Micron argues that: a public utility duty exists; PacifiCorp refuses to fulfill that duty; and PacifiCorp must be compelled to perform its duty by order of the Commission. PacifiCorp argues that: the location of the Micron Plant within Lehi City, which operates a municipal electric power system, extinguishes any public utility duty of PacifiCorp to provide service to the Micron Plant; PacifiCorp's service obligation to the Micron Plant originates by virtue of contractually imposed terms, mutually agreed upon in contracts between Micron and PacifiCorp and between Lehi City and PacifiCorp, not by any public utility duty; and, unless another mutually agreed upon contract is made, its service obligation ends June 3, 2001.

In *Strawberry Electric Service District v. Spanish Fork City*, 918 P.2d 870 (Utah 1996) (*Strawberry Electric*), the Utah Supreme Court held that "a municipality providing electric utility service to existing residents must provide that service to consumers in annexed areas." *Id.*, 918 P.2d at 876. In that case, a certificated public utility provided electric power service to customers in its service territory. Some time after the public utility had provided service to customers, part of its service territory was annexed by Spanish Fork City. Although Spanish Fork City operated a municipal electric power system, it began to provide electric service to some, but not all, of the utility's customers located in the annexed area. Spanish Fork also required that all new customers locating in the annexed area obtain service from the municipal power system, rather than from the public utility. Spanish Fork's constricted service of serving some, but not all, was calculated to permit the city to avoid having to compensate the public utility for its facilities located in the annexed area. The public utility objected to the city's strategy, arguing that if the city provided any service in the annexed territory, it had to serve all customers and compensate the public utility for the utility's facilities located in the annexed area. If the city did not want to compensate the public utility for its facilities, the city could not serve any customer in the annexed area - an all or none proposition.

In analyzing Spanish Fork's "some but not all" position and the public utility's "all or none" position, the *Strawberry Electric* court concluded that the legislature intended that a municipality provide its services in newly annexed areas. *Id.*, 918 P.2d at 876. The court determined that Spanish Fork's attempt to provide some service, but not all of the electric power service for the annexed area, contravened that legislative policy. The court agreed with the public utility. Where a public utility has extended facilities into an area to serve customers, which area is subsequently annexed by a city which

also provides municipal electric power service, the court held that the city can only provide electric service in the annexed area under either one of two conditions: the city has obtained the public utility's consent or the city has compensated the public utility for the fair market value of the utility's facilities located in the annexed area. *Id.*, 918 P.2d at 878, 879. The court reiterated its conclusion that when a municipal power system complies with either of these requirements, the public utility's exclusive right to serve in the annexed area ends. *Id.*, 918 P.2d at 882.

Utah's Constitution gives Utah's municipalities the right to provide utility service within their confines through their own utility systems. Utah Constitution, Article XI, Section 5.<sup>(1)</sup> Utah statutory provisions also provide municipalities with the authority to operate utilities and provide utility service within their boundaries. Utah Code Ann. § 10-8-14 (1999 Replacement).<sup>(2)</sup> The Utah Supreme Court has determined that a municipality's provision of utility service, pursuant to these powers, is not subject to the regulation or control of this Commission. *E.g.*, *Barnes v. Lehi City*, 74 Utah 321, 279 P. 878 (1929). It has also determined that the intent or purpose of Utah's public policy with regard to the provision of utility service is that "there should be only one such utility serving in any area." *City of St. George v. Public Service Commission*, 565 P.2d 72, 73 (Utah 1977). It is clear from *Strawberry Electric, supra*, that a municipal electric power system has the responsibility or duty of providing electric service in annexed areas.<sup>(3)</sup> The municipal power system's duty to extend and provide such utility service is conditioned only if preexisting utility service is being provided to customers in the annexed areas by another utility. *Strawberry Electric* also clearly holds that this condition inhibiting the municipality's extension of utility service into the annexed area is extinguished when the city either obtains the preexisting utility's consent to provide service or compensates the preexisting utility for its facilities used to provide service to customers in the annexed area.

The Utah Code sections which the *Strawberry Electric* court addressed in making its holding, §§ 10-2-401 and -424, were in force and unmodified at the time of Lehi City's annexation of the Micron Plant area. They impose the duty to serve the Micron Plant area upon Lehi City since it had its own municipal power system. In 1997, the Utah Legislature repealed and reenacted the Code's annexation provisions. Section 10-2-424 (addressing the municipality's need to obtain consent or compensate) was reenacted as Section 10-2-421. Section 10-2-401 (indicating that annexed areas should receive services as soon as possible, subject to the consent or compensation requirements of the other section) was not reenacted. We conclude that this 1997 repeal and reenactment does not evidence an intent by the legislature to alter Lehi's duty to serve the Micron Plant area. A review of the code provisions repealed and reenacted shows that the legislature undertook only a change in the process by which municipalities may expand and annex areas. The legislature did not intend to change a city's duties or obligations in the annexed areas through the 1997 amendments. *See*, Utah Code Ann. § 10-2-413 (1999 Replacement) (requiring annexation feasibility studies to assume that the to-be-annexed areas receive the same level and quality of services as provided in the city).

When Lehi City extended its municipal power system's facilities to provide electric power in the Micron Plant area in 1996, it did so consistent with *Strawberry Electric's* holding. It met at least one of the two independent conditions, if not both. There is no clear evidence that Lehi obtained PacifiCorp's consent. It is possible to conclude that consent was obtained. There is evidence that PacifiCorp was aware of Lehi's municipal power system's extension into the area and its provision of electric service. There is no evidence that PacifiCorp objected to the extension and service. Consent likely was obtained, actually or by implication. Lehi could also enter and begin service in the Micron Plant area without PacifiCorp's consent. Lehi simply needed to compensate PacifiCorp for PacifiCorp's facilities in the area which were being used to provide PacifiCorp service to customers in the annexed area. But the evidence establishes that PacifiCorp had no facilities used to serve any customers in the Micron Plant area. Because there was no compensation obligation to meet, Lehi could enter the area and begin service.

Micron's, PacifiCorp's, and Lehi City's execution of the 1996 Contract and the Franchise Agreement also comport with the *Strawberry Electric* allowance that Lehi City could meet its duty to provide electric power service to the annexed Micron Plant area through contract with another service provider. The Franchise Agreement specifically identifies the 1996 Contract as the means by which Lehi was meeting its duty to provide electric power service for the Micron Plant's operations. We construe Utah law as prohibiting us from interfering with Lehi City's decisions concerning how Lehi City will meet its duty to provide electric power service to its citizens, including those in annexed areas like the Micron Plant area. This is so even when it contracts with a public utility, certificated by this Commission, to fulfill that duty. We have no authority to substitute our judgment for that of Lehi City on what constitutes appropriate utility service

within Lehi City's boundaries. The parties concluded that the 1996 Contract was an appropriate discharge of Lehi's duty. Where Micron, Lehi City, and PacifiCorp entered into contracts, which they believed were adequate even though those contracts did not provide for how the Micron Plant would obtain electric power after the 1996 Contract's expiration, we cannot alter their contracts.

We also conclude that we cannot accept Micron's invitation to step into the breach where a municipality's course of conduct, to meet citizens' power needs, do not meet with a city resident's expectations of how its electric power demands will be met by the municipal power system. Acceptance of the invitation assumes that the Commission may apply Commission authority, and jurisdiction, and affect the provision of utility service within the confines of a municipality which has elected to exercise its right and authority to operate a municipal electric power system. Utah law effectively maintains a barrier around such a municipality which we cannot penetrate.

### CONCLUSION

Wherefore, based upon the foregoing, we conclude that Micron's Complaint should be dismissed. We have no authority to alter Lehi City's discharge of its duty to provide electric power service to the Micron Plant, located within Lehi City's municipal boundaries. The relief Micron requests is beyond the authority conferred upon the Commission and would intrude upon the authority and rights which Utah has conferred upon Utah municipalities operating their own utility systems.

### ORDER

Micron's May 1, 2001 Complaint and Request for Agency Action is dismissed. This Order constitutes final agency action on the Complaint and Request for Agency Action. Pursuant to U.C.A. § 63-46b-13, an aggrieved party may file, within 20 days after the date of this Order, a written request for reconsideration by the Commission. Pursuant to U.C.A. § 54-7-12, failure to file such a request precludes judicial review of this Order. If the Commission fails to issue an order within 20 days after the filing of such request, the request shall be considered denied. Judicial review of this Order may be sought pursuant to the Utah Administrative Procedures Act (U.C.A. §§ 63-46b-1 et seq.).

DATED at Salt Lake City, Utah, this 1st day of June, 2001.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary