

STATE OF NEW MEXICO
COUNTY OF SOCORRO
SEVENTH JUDICIAL DISTRICT

FILED
7th JUDICIAL DISTRICT COURT
Socorro County
12/9/2019 11:57 AM
CLERK OF THE COURT
Rachel Gonzales

THE SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff/Petitioner,

v.

No. D-725-CV-2019-00234

CITY OF SOCORRO,

Murphy, Mercedes C.

Defendant/Respondent.

**COMPLAINT FOR DECLARATORY JUDGMENT, ANTICIPATORY
BREACH OF AGREEMENT AND FOR PERMANENT INJUNCTIVE RELIEF**

Plaintiff/Petitioner The Socorro Electric Cooperative, Inc. ("SEC") files this complaint against Defendant/Respondent City of Socorro ("City") for a declaratory judgment affirming the validity of the 1999 franchise agreement between SEC and the City, known as "Electric Cooperative - 99-4-19, an Ordinance Granting to The Socorro Electric Cooperative, Inc., a Franchise to Construct, Acquire, Operate, and Maintain an Electric System in The City of Socorro, New Mexico" (the "Agreement"), for a finding of an anticipatory breach of the Agreement and for permanent injunctive relief to prevent the City from interfering with SEC's delivery of its services to its customers during the pendency of the Agreement. In support of this complaint, SEC states:

1. SEC is a public utility as defined in the New Mexico Public Utility Act, NMSA 1978, §§ 62-3-1 to -5 ("PUA") and an electric cooperative constituted pursuant to the Rural Electric Cooperative Act, NMSA 1978, Sections 62-15-1 to -37 (1939 as amended through 2019).

2. SEC's principle place of business is in Socorro County, New Mexico and it provides electric utility service to approximately 8,502 consumers and has 12,727 meters in Catron, Cibola, Sierra, Socorro and Valencia Counties in New Mexico.

3. The City is located in Socorro County, New Mexico.

4. Venue is proper in this Court because the Agreement deals with property located in Socorro County, New Mexico.

5. This Court has jurisdiction over the parties.

6. This Court has subject matter jurisdiction over the parties.

7. This complaint is brought in part pursuant to the Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15.

8. On May 17, 1999, the parties entered into the Agreement. *See* Exhibit 1, attached hereto.

9. As part of the Agreement, the parties stipulated that SEC "may enter upon the streets, alleys, bridges, public grounds, and place of said City and make such excavations, erect such poles and fixtures, and lay such pipes as maybe necessary and convenient, provided that such work shall be done in a manner as to cause as little inconvenience as possible to the public and will not interfere with the sewers, water mains, gas lines, sidewalks, pipes or hydrants on the street of said City. . . ." Section 2 of Exhibit 1.

10. The Agreement has not been renewed.

11. The Agreement continues in effect until at least 25 years from the date of execution if the Agreement is not renegotiated between the parties, or until at least 2024.

12. In October 2014, the City commissioned the University of New Mexico Bureau of Business and Economic Research (“BBER”) to perform an independent report to determine if it was feasible for the City to provide electric services to certain customers and members of SEC.

13. On April 18, 2016, the City enacted an ordinance with the stated purpose of creating a municipally owned electric utility, to be responsible for the planning, development, production, purchase, sale, transmission and distribution of electricity-related services by the City to the industrial park or others, as may be required. Socorro Code of Ordinances, adopted on April 18, 2016 by Ord. No. 16-03-21b § 90-3 (the “Ordinance”).

14. As part of this process and pursuant to the Ordinance, the City is empowered to sell its products and services to the residents, both public and private, of the City and others as may be permitted by law; to construct and operate generating plants, transmission, distribution, and other electric facilities; to set electric rates and service policies and regulations; to purchase real property and personal property; and to enter into contracts, leases, and agreements in furtherance of its powers and duties. *Id.* at § 90-4.

15. SEC is obligated by the Agreement, until at least 2024, to continue to provide electric power to its customers and members of SEC to which the City intends to deliver the same electric power once the Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system is completed pursuant to the Ordinance.

16. SEC currently performs the same services, delivering electric power to its customers and members of SEC to which the City, under the Ordinance, anticipates it will provide.

17. On August 30, 2018, the City issued a request for proposals (“RFP”) seeking competitive sealed bids for long term power supply, scheduling services and capital financing.

18. On July 8, 2019, the City Council awarded a contract, based on the RFP to Guzman Energy to construct a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system.

19. As of the date of the filing of this complaint, the City is in negotiations with Guzman Energy to construct a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system.

20. By requesting proposals from bidders, proceeding to receive them and evaluate them, awarding the contract and negotiating with Guzman Energy, the City is in anticipatory breach of the Agreement, if the parties do not renegotiate that Agreement or if the City decides to construct a transmission line in the City to deliver alternative electric service.

21. The City has unequivocally indicated its intention to breach the Agreement by taking steps to solicit bids, soliciting such bids and acting to award a contract for a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system to Guzman Energy.

22. In July 2007, SEC entered into a Wholesale Electric Service Contract with Tri-State Generation and Transmission Association, Inc. (“Tri-State”), which remains in effect until December 31, 2050.

23. If the City is permitted to build a transmission station and begin providing power to the same customers and members of SEC, SEC will be irreparably harmed because it entered into a contract with Tri-State to provide electric service which it will no longer need and cannot pay for.

24. On March 13, 2018, counsel for the City threatened SEC that, after January 1, 2020, SEC “shall be considered in trespass on that right-of-way located within the City’s industrial corridor” which corridor is designated to be one of the certain customers and members of SEC to which the City intends to deliver electricity. *See* letter from Nann Winter, attached as Exhibit 2, dated March 13, 2018.

25. The City has not indicated a willingness to extend or renegotiate the Agreement with SEC.

26. The New Mexico Public Regulation Commission (“PRC”) is the responsible administrative body for regulating the delivery of electric service in the State of New Mexico excluding municipal owned electric delivery systems.

27. Pursuant to NMSA 1978, Section 62-9-5. Abandonment of service:

No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility; provided, however, that ordinary discontinuance of service or use of facilities for nonpayment of charges, nonuser or other reasons in the usual course of business shall not be considered as abandonment. In considering the present and future public convenience and necessity, the commission shall specifically consider the impact of the proposed abandonment of service on all consumers served in this state, directly or indirectly, by the facilities sought to be abandoned.

28. SEC is a public utility as defined by the PUA, Sections 62-3-1 to -5 and is subject to the provisions of Section 62-9-5.

29. SEC has not given the PRC notice that it seeks to abandon any portion of its facilities or services rendered by such facilities and has no current intention of doing so.

30. SEC has not sought to obtain permission and/or approval from the PRC to withdraw and/or abandon its facilities or delivery of its services and has no current intention of doing so.

31. Because the City is not a utility, it has no standing to give notice pursuant to NMSA 1978, Section 62-9-5 that SEC intends to abandon any part of its service.

FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT

32. The foregoing allegations are incorporated herein by reference and made part of this first claim for relief.

33. SEC seeks a declaration from the Court that the Agreement will remain in effect until at least 2024, if the parties do not mutually agree to renegotiate or terminate the Agreement.

34. The validity of the franchise may be determined either before or after the breach of the Agreement.

35. SEC requests that this Court declare that SEC has the right and obligation to provide electric power to these certain customers and members of SEC until at least 2024.

36. If the Court declines to enter a declaratory judgment, SEC will suffer irreparable harm due to the contract between SEC and Tri-State.

SECOND CLAIM FOR RELIEF
ANTICIPATORY BREACH OF CONTRACT

37. The foregoing allegations are incorporated herein by reference and made part of this second claim for relief.

38. The parties entered into the Agreement in 1999.

39. The franchise was for SEC to construct, acquire, operate, and maintain an electric system in the City.

40. In exchange for the promise of SEC to provide this service to the citizens and businesses within SEC's service territory, the City received the electric services.

41. The Agreement was supported by consideration.

42. The damages that SEC will suffer were foreseeable by the actions of the City in soliciting bidders and awarding the contract for Guzman Energy to provide Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system meant to forcibly remove SEC from its ability to serve customers in the same geographic territory.

43. The damages were contemplated by the parties at the time of entering into the Agreement.

44. The damages arise naturally, according to the usual course of things, from such anticipatory breach of the Agreement.

45. SEC is entitled to the benefit of its bargain if the City breaches the Agreement.

REQUEST FOR PERMANENT INJUNCTION

46. The foregoing allegations are incorporated herein by reference and made part of SEC's request.

47. Unless the City is restrained from declaring SEC to be considered in trespass on the right-of-way located within the City's industrial corridor and entering into a contract with Guzman Energy or any other provider for building a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system, SEC will be unable to continue to offer its electric services to its customers.

48. SEC will suffer immediate and irreparable injury, loss or damage that will result to it if the City is not restrained from declaring SEC to be considered in trespass on the right-of-

way located within the City's industrial corridor and negotiating for a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing.

49. SEC has no remedy at law to prevent the City from declaring SEC to be considered in trespass on the right-of-way located within the City's industrial corridor and entering into negotiations with Guzman Energy or any other bidders for providing a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system.

50. If the City is not restrained from declaring SEC to be a trespasser and from contracting with Guzman Energy, delivery of electric services to SEC's customers could be interrupted.

WHEREFORE, SEC prays for the Court to grant the following relief:

A. Declare that the Agreement remains in full force and effect until at least 2024 or until the parties renegotiate the Agreement.

B. Hold that the City breached the Agreement by issuing a RFP and accepting bids on that RFP and awarding the contract to Guzman Energy to provide a Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system.

C. Declare that SEC cannot be considered in trespass on the right-of-way located within the City's industrial corridor;

D. Grant SEC its attorneys' fees and the costs of this action.

E. Grant such other and further relief as the Court deems necessary and proper.

WIGGINS, WILLIAMS & WIGGINS
A Professional Corporation

Electronically Filed

By /s/ Lorna M. Wiggins

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