STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6333

Petition of EHV-Weidmann Industries, Inc. for a	)
declaratory ruling for confirmation that a	)
relocation of its metering point into the service	)
territory of the Village of Lyndonville Electric	)
Department will entitle it to receive electric	)
service from that utility	)

Order entered: 12/15/2000

Introduction

This proceeding arises out of a petition for a declaratory ruling filed by EHV-Weidmann Industries, Inc. ("EHV"). In its petition, EHV requests confirmation that it has the right to elect to receive its electric service from the Village of Lyndonville Electric Department ("LED") should EHV relocate its metering point from a section of its property that is located within the service territory of Central Vermont Public Service Corporation ("CVPS") onto a section of its property that is located within LED's service territory.[1]

Both CVPS and the Vermont Department of Public Service ("Department") oppose this request. CVPS asserts that EHV's petition should be dismissed because it involves the same parties and the same issues that were, or should have been, considered in Docket No. 6180.[2] CVPS further asserts that, even if consideration of this petition is not barred by the principles of res judicata and collateral estoppel, EHV's request should be denied because 30 V.S.A. §251(d) prohibits a utility from serving a customer of another utility "without the serving utility's consent or a finding by the Board that the serving utility's service is inadequate and will not be likely to be

1. Petition for Declaratory Ruling, 3/12/3/99 at 1.

2. In that docket, the Public Service Board ("Board") determined that the fact that EHV's premises span the service territories of two different electric utility companies (CVPS and LED) does not, in and of itself, entitle EHV to select its electric service provider.

made adequate."[3] Similarly, the Department asserts that EHV's request should be denied because 30 V.S.A. §§ 249, 250 and 251 "comprise a comprehensive statutory scheme which does not allow a customer who is currently receiving adequate service to switch providers."[4]

The undisputed facts pertaining to this petition are as follows:

1. In July of 1970, EHV submitted an "Application for Temporary Electric Service" to CVPS. CVPS has provided electric service to EHV since EHV began operations, and EHV presently receives its electric service from CVPS.

2. The physical premises of EHV has expanded and contracted at various times over the years, as EHV acquired or sold various contiguous properties. At all times however, some of EHV's real property has been located in the service territory of CVPS and some of EHV's real property has been located in the service territory of LED.

3. The main plant on the EHV premises is known as Fab West. EHV expanded Fab West in 1972.

4. The Public Service Board established the relevant portions of the current boundary between CVPS and LED in Docket No. 3756, Order of 1/24/74. The Board's records of Docket No. 3756, now on microfilm in the archives in Middlesex, contain no transcripts of hearings or pleadings of the parties. The Board's Order indicates, however, that no customers attended the final hearing.

5. The CVPS/LED boundary line cuts through the Fab West building.

6. In 1986, EHV acquired a building which is now known as Fab North.

7. The CVPS/LED boundary line runs through the Fab North building.

8. The sole current metering point for EHV is located in CVPS service territory.

9. EHV does not allege in its petition that CVPS is providing inadequate service.[5]

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3. Reply of Central Vermont Public Service Corporation to the Petition of EHV-Weidmann, Industries, Inc., 2/7/00 at 3.

4. Responsive Memorandum of Department of Public Service, 3/14/00 at 3.

5. In Docket No. 6180, EHV made the undisputed assertion that "A portion of the real estate on which the EHV facilities are situated, and a portion of one of the buildings on the premises, are located in the service territory of LED, and the remainder of the real estate and physical structures are located in the service territory of CVPS." Docket No. 6180, Petition for Declaratory Ruling, 11/12/98 at 1-2; *see also*, Docket No. 6180, Order of 9/29/99 at 1-2. In this Docket, EHV has provided detailed maps of the property, and, accordingly, now asserts that the CVPS/LED service territory boundary line intersects two of EHV's buildings.

The Preclusion Issue

Res Judicata

CVPS has asserted that, in Docket No. 6180, EHV "asked the Board to grant it the right to switch between CVPS and LED for the provision of electric utility service," but that EHV failed to timely raise the metering point issue as part of that request.[6] CVPS further maintains that the September 29, 1999, Order in Docket No. 6180 was adjudicative in nature.[7] Thus, CVPS reasons that the principle of res judicata (also called "claim preclusion") bars the Board from considering the petition for declaratory relief which is the subject of this docket.

Both EHV and the Department have asserted that the principle of res judicata does not bar consideration of the petition in this docket. EHV maintains that the Board's determination in Docket 6180 was made pursuant to the Board's legislative (as distinguished from its adjudicative) function, thereby rendering the res judicata doctrine inapplicable here.[8] The Department argues that the petition here presents a different cause of action than that presented in Docket 6180; it characterizes EHV's request in Docket 6180 as a limited claim by EHV that it was entitled to choose between CVPS and LED merely because EHV's premises straddled the CVPS/LED service territory boundary line.[9]

As a general principle, res judicata bars the litigation of a claim or defense if there exists a final judgment in an earlier litigation in which the parties, subject matter, and causes of action are identical or substantially identical; and, it bars litigation of claims or causes of action which should have been raised in the former litigation.[10] However, the application of res judicata in a

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6. Reply of Central Vermont Public Service corporation to the Petition of EHV-Weidmann, Industries, Inc., 2/7/00, at 7.

7. *Id.*

8. Res judicata (claim preclusion) applies to administrative decisions only when an administrative agency is acting in a judicial capacity. *Lamb v. Geovjian*, 165 Vt. 375, 381 (1996). Because the discussion of res judicata that follows reaches the conclusion that res judicata does not preclude consideration of the metering point issue in this docket, it is not necessary to resolve the question of legislative versus judicial function here, and I do not do so.

9. Responsive Memorandum of Department of Public Service, 3/14/00 at 3.

10. *Lamb v. Geovjian*, 165 Vt. at 379-80, citing *Berlin Convalescent Ctr., Inc. v. Stoneman*, 159 Vt. 53, 615 A.2d 141, 143 (1992); *State v. Dann*, 167 Vt. 119, 124-125 (1997) citing *Berisha v. Hardy*, 144 Vt.136, 138, 474 A2d. 90, 91 (1984); *Agway, Inc. v. Gray*, 167 Vt. 313, 316 (1997) citing *State v. Dann*, 167 Vt. at 125 (quoting *Cold Springs Farm Dev., Inc. v. Ball*, 163 Vt. 466, 472, 661 A.2d 89, 93 (1995).

"When a plaintiff obtains a judgment in his favor, his claim 'merges' in the judgment; he may seek no

(continued...)

declaratory judgment proceeding differs from its application in other types of cases. The effect of a declaratory judgment is to bar litigation of only matters actually declared by the judgment.[11] Consequently, the rule that res judicata bars claims or causes of action which should have been raised in the former litigation does not apply automatically to all declaratory judgment actions. Rather, res judicata bars only those matters that were within the scope of the declaration.[12]

Thus, at the outset, it is necessary to understand the scope of the Board's declaration in Docket No. 6180. EHV's petition in that docket clearly framed the particular issue on which a declaration was sought: "This petition, and the memorandum offered in support of it, seek a declaratory ruling that EHV's geographic location in the service territories of LED and CVPS entitles EHV to select LED as its electric service provider."[13] In response to this request, the Board determined that "a customer whose premises span the service territories of more than one electric utility company, and who already is receiving electric service from a particular company, does not have a per se legal right to choose its electric service provider."[14]

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10. (...continued)
further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a 'bar.' (Citations omitted). Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." *Kaspar Wire Works, Inc., v. Leco Engineering and Machine, Inc.*, 575 F.2d 530, 535 (5th Cir 1978).

11. Restatement (Second) of Judgments § 33 (1980) and comments (a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced); E.H. Schopler, Annotation, *Extent to Which Principles of Res Judicata Are Applicable to Judgments In Actions For Declaratory Relief*, 10 A.L.R. 2d 782 (1950); *Ganaway v. Shelter Mut. Ins.Co.*, 795 S.W. 2d 554, 562 (1990)(A declaratory judgment is res judicata only as to those matters actually declared, and not to those matters that could have been, but were not presented for adjudication.)

12. Restatement (Second) of Judgments § 33 (1980) and comments; E.H. Schopler, Annotation, *Extent to Which Principles of Res Judicata Are Applicable to Judgments In Actions For Declaratory Relief*, 10 A.L.R. 2d 782, §3 (1950); *See, State ex. rel. Liberty Mutual Insurance Co. v. Gum*, 904 SW2d 447, 452 (1995).

In addition, "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." 12 V.S.A. § 4718. Thus, for example, although conclusive as to matters declared, the effect of a prior declaratory judgment is <u>not</u> to merge in the judgment a subsequent claim for coercive relief arising out of the same cause of action; and, declaratory action may be employed to clarify the meaning or scope of a prior declaratory judgment. *See*, Restatement (Second) of Judgments § 33 (1980) and comments, and E.H. Schopler, Annotation, *Extent to Which Principles of Res Judicata Are Applicable to Judgments In Actions For Declaratory Relief*, 10 A.L.R. 2d 782, §3 (1950).

13. Docket No. 6180, Petition for Declaratory Judgment, 11/12/98 at 2.

14. Docket No. 6180, Order of 9/29/99 at 7.

This declaration by the Board does not specifically address the question of the relationship between a customer and its electric service provider as a result of the relocation of the customer's metering point from within the service territory of one electric utility company into the service territory of a different electric utility company. And, at no point in its order did the Board state or suggest that it was doing any more than providing a specific answer to EHV's specific question. Moreover, the Board did not regard resolution of the metering point relocation question as necessary to a determination about whether EHV has the right, as a matter of law, to choose its electric service provider solely because of its geographic location in the service territories of LED and CVPS.[15] Accordingly, I conclude that the meter relocation issue was not within the scope of the Board's declaration in Docket No. 6180, and that, consequently, consideration of the meter relocation issue is not barred by the principle of res judicata in this declaratory judgment proceeding.[16]

Collateral Estoppel

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15. This is evidenced by the fact that the Board declined to make a specific ruling concerning the metering point relocation issue as part of the resolution of Docket No. 6180. Order of 9/29/99 at 8.

16. In conjunction with this conclusion, two additional points are worthy of discussion.

First, in this docket, CVPS has asserted that "[i]n Docket No. 6180, EHV asked the Board to grant it the right to switch between CVPS and LED for the provision of electric utility service" and, on that basis, CVPS has questioned whether EHV's prior declaratory ruling request "fundamentally raised" the meter relocation issue. CVPS's characterization of EHV's request is only partly correct in that it fails to acknowledge the specificity of the question presented by EHV in its prior declaratory judgment petition.

And second, the 9/29/99 Order in Docket No. 6180 includes two conclusions that make specific reference to the customer's metering point: (1) in light of the provisions of 30 V.S.A. §§ 249, 250 and 25l, EHV did not have a "legal right to choose its electric service provider, notwithstanding the geographic location of its metering point, solely because its premises span two abutting service territories"; and (2) "a customer who already is receiving electric service from a particular company, and whose metering point (or proposed metering point) is located within the service territory of that company, may receive electric service from a different provider under only two conditions" -- if the current utility service provider consents to a change or if the service being provided by the current utility service provider is inadequate. Neither of these conclusions expands the particular question presented by EHV to encompass the meter relocation issue; these conclusions simply describe application of the law to the facts as presented in Docket No. 6180. Furthermore, given the Board's express declination to address the metering point relocation issue on the ground that the issue had not been raised prior to issuance of the proposal for decision, it would be inconsistent to now conclude that statements within the 9/29/99 Order purport to resolve that issue.

CVPS also has urged the Board to find that further review of EHV's petition in this docket is precluded by the principle of collateral estoppel (also called "issue preclusion").[17]

The doctrine of collateral estoppel prevents a party from relitigating an issue that was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.[18] Accordingly, preclusion on the basis of collateral estoppel cannot depend upon an issue or claim that "should have been raised" in the prior litigation. It is applicable to administrative agency determinations regardless of whether the proceeding is adjudicative or legislative/policy-making in nature.[19]

As discussed above, the metering point relocation issue was neither litigated nor decided in Docket No. 6180. And, even if that issue had been litigated and decided, collateral estoppel would not operate to preclude its litigation here because, as discussed above, it was not an issue necessary to the resolution of the prior declaratory judgment proceeding.[20] Therefore, I conclude that review of EHV's petition concerning metering point relocation in this docket is not precluded by the principle of collateral estoppel.[21]

The Metering Point Relocation Issue

In this docket, EHV has petitioned the Board for "a declaratory ruling confirming the right of EHV to elect to receive its electric service from Lyndonville Electric Department ("LED") should EHV relocate its metering point onto a section of its property that is located within LED's service

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17. Reply of Central Vermont Public Service Corporation to the Petition of EHV-Weidmann, Industries, Inc., 2/7/00 at 11.

18. *Longariello v. Windham Southwest Supervisory Union*, 165 Vt. 573, 574 (1996); *Agway, Inc. v. Gray*, 167 Vt. at 316, citing *Cold Springs Farm*, 163 Vt. at 468; *Berlin Convalescent Center v. Stoneman*, 159 Vt. 53, 56, 615 A.2d 141, 143 (1992).

19. See, *In re Vermont Power Exchange*, 159 Vt. 168, 180-181, (1992)(collateral estoppel invoked in challenge to Board order that regulated utilities bear part of VPX's costs of operation) and *Berlin Convalescent Center, Inc. v. Stoneman*, 159 Vt. 53 (1992)(collateral estoppel invoked in challenge to recalculation of Medicaid rates).

20. *See, In Re Application of Carrier*, 155 Vt. 152, 157 (1990).

21. Although I have concluded that consideration of the metering point issue in this Docket is not precluded as a matter of law, I am concerned about the piecemeal approach taken in connection with the request for an interpretation of Vermont law as it applies to EHV's circumstances. While it is commendable for a party to present a petition that is well focused, a proceeding on such a petition need not be so narrow in scope as to exclude from consideration matters that appropriately could be addressed, such as permutations on the focused request.

territory."[22] In support of this request, EHV has relied on language in 30 V.S.A. § 251 and has maintained that when a customer's premises span the service territories of more than one electric utility company, the geographic location of the customer's metering point is the controlling factor in determining the company from which service is to be taken.[23] In addition, EHV has asserted that the location of a metering point anywhere on a customer's premises is within the sole discretion of the customer.[24] Thus, EHV has reasoned that a customer whose premises span the service territories of more than one electric utility company may choose its service provider for the whole of its property, at will, by locating or relocating its metering point.

Both CVPS and the Department maintain that EHV may not become entitled to take electric service from LED simply by relocating its metering point within LED's service territory. CVPS asserts that 30 V.S.A. §§ 251(d) and (e), and not § 251(b), control in this case. CVPS then reasons that since metering point location is not a factor to be considered pursuant to §§ 251 (d) and (e), metering point relocation cannot determine who shall be the service provider in this case.[25] The Department suggests that the language in § 251(b) relating to metering point does not mean that a customer may choose its service provider at will simply by locating or relocating its metering point. Rather, the Department asserts that 30 V.S.A. §§ 249, 250 and 251 comprise a comprehensive statutory scheme which does not allow a customer who already is receiving adequate service to switch providers at will. The Department reasons that, because EHV already has an established metering point in CVPS' service territory and because CVPS already is serving EHV, § 251(b) should be construed to provide that CVPS is entitled to serve EHV's premises regardless of whether EHV relocates its metering point to a location within LED's service territory.[26]

30 V.S.A. §§ 249, 250 and 251 confer upon the Board specific jurisdiction to establish, alter, and regulate electric utility service territories. Together, these provisions comprise a

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22. Petition for Declaratory Ruling, 12/3/99 at 1.
23. Memorandum in Support of Declaratory Ruling Petition, 12/31/99 at 3.
24. *Id*.
25. Reply of Central Vermont Public Service Corporation to the Petition of EHV-Weidmann, Industries, Inc., 2/7/00 at 13-14.
26. Responsive Memorandum of Department of Public Service, 3/14/00 at 3-4.

statutory scheme ("the § 249 statutory scheme") that contemplates a system where electric utility companies have designated geographic areas in which they have the exclusive authority and entitlement to serve customers. 30 V.S.A. § 250 recognizes an exception to the § 249 statutory scheme -- in those situations where establishment of an exclusive service territory is impracticable, the Board is empowered to authorize more than one company to serve in that same geographic area.[27] And, 30 V.S.A. § 251 sets out the process applicable to matching customers with utility companies in those instances where more than one company has been authorized to serve the same geographic area. In addition, § 251 establishes the process applicable to matching customers with utility companies in those instances where (1) no electric utility company has been designated for a particular geographic area, or (2) one utility company wishes to extend its service into the otherwise exclusive territory of another utility company. At no place in the § 249 statutory scheme is there special provision for customers whose premises span more than one exclusive service territory.[28]

Metering point location has limited application within the § 249 statutory scheme. 30 V.S.A. §§ 251(b) and (c) are the only sections within the § 249 statutory scheme that make reference to the customer's metering point as a factor to be used in determining which company will serve a customer, and these sections are themselves of limited application: § 251(b) applies only "in the event service is requested for premises in an area in which two or more companies distributing electrical energy are authorized to serve," and § 251 (c) applies only "in the event service is requested for premises not within the service territory of any company." Metering point is not a factor in § 251(a), which applies when customers are "presently served" by a company. Nor is it a factor in § 251(d), which specifies the circumstances under which one electric utility company may provide service within the exclusive service territory of a different electric utility company.

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27. For example, both Central Vermont Public Service Corporation and Vermont Electric Cooperative, Inc. were authorized to serve a particular portion of the Town of Windham. *See*, Docket No. 4219, Order of 7/6/77 at 5.

28. It is well established that when the legislature creates an exception to a statutory scheme, no other exceptions will be implied in the absence of a contrary legislative intent. *State v. Ely*, 168 Vt. 614, 615 (1998).

Moreover, as explained in Docket No. 6180, "30 V.S. A. §§ 251(b) and (c) provide that the geographic location of the metering point determines which utility company has the right to provide electric service, subject to the other applicable provisions of § 251" (emphasis added).[29] Therefore, I conclude that, under the § 249 statutory scheme, the location of a customer's metering point is not per se the controlling factor in determining which utility company has the right to provide electric service to that customer.

Analyzing the facts presented in this Docket in light of the § 249 statutory scheme, as well as the specific statutory provisions within that scheme, I conclude that EHV may not choose its electric service provider for the whole of its property, at will, as a consequence of locating or relocating its metering point within the service territory of a particular electric utility company.

EHV's real property spans two distinct exclusive service territories, one designated to CVPS, and the other designated to LED. There is no part of EHV's real property that is situated in a geographic area where the Board has authorized both CVPS and LED to serve simultaneously, and, there is no part of EHV's real property that is situated in a geographic area where no electric utility is authorized to serve. Thus, I conclude that, in this docket, the provisions of 30 V.S.A. §§ 251(b) and (c), and the metering point provisions contained therein, do not apply to EHV's real property.

EHV's buildings straddle the distinct exclusive service territories of CVPS and LED. Under the § 249 statutory scheme, this fact, in and of itself, does not necessarily mean that both CVPS and LED are simultaneously authorized to serve the whole of those buildings. Rather, the statutory language could be construed to provide that CVPS and LED each are authorized and entitled to serve that portion of each building which is situated within its respective service territory. In that circumstance, the provisions of 30 V.S.A. §§ 251(b) and (c), and the metering point provisions contained therein, would not apply to EHV's buildings.

Furthermore, EHV's existing buildings already are receiving electric service from CVPS. 30 V.S.A. § 251(a) provides:

> In any area which two or more companies distributing electrical energy are authorized to serve, a company shall not construct or extend its facilities or furnish or offer to furnish its

29. Docket No. 6180, Order of 9/29/99 at 5.

> service to any person or property presently served by another public utility without the written consent of the other public utility, or unless the public service board, after notice and hearing, finds and determines that the service rendered by the serving public utility is inadequate and is not likely to be made adequate. (Emphasis added).

By contrast, 30 V.S.A. § 251 (b) governs those circumstances in which service is requested for "premises to be served" -- a future occurrence. Hence, I conclude that, even if EHV's existing buildings were determined to be in an "area which two or more companies distributing electrical energy are authorized to serve," it is 30 V.S.A. § 251(a) that would govern a change in service provider. Metering point location is not a factor to be considered when applying § 251(a). Consequently, I conclude that, given the facts presented in this docket, metering point relocation is not the overriding factor that can determine which electric utility company has the authority and entitlement to serve EHV's existing buildings.[30]

For the foregoing reasons, I conclude that, given the facts presented in this docket, EHV may not choose its electric service provider for the whole of its property, at will, as a consequence of locating or relocating its metering point within the service territory of a particular electric utility company. Accordingly, I recommend that the Board deny EHV's request for a declaratory ruling confirming the right of EHV to elect to receive its electric service from LED should EHV relocate its metering point onto a section of its property that is located within LED's service territory.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

The Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

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30. The foregoing analysis of the application of the § 249 scheme to the facts in this case is consistent with prior Board resolution of cases where a customer wanted a single utility company to serve its whole property even though the whole property spanned two distinct exclusive service territories. *See, Petition of Mrs. Noel Perry requesting permission to obtain electric service from Barton Village, Inc., instead of from Vermont Electric Cooperative, Inc.,* Docket No. 4147, Order of 9/1/76, and *Petition of Howard Rock requesting permission to obtain electric service from Green Mountain Power Corp. instead of from Washington Electric Cooperative, Inc.,* Docket No. 4704, Order of 10/8/82. In those cases, the customer's chosen metering point location was not dispositive of which utility company would serve the whole of his or her property. Rather, the Board determined whether a single utility could serve the whole of the property, and which utility that would be, by applying the provisions of 30 V.S.A. §§ 251 (d) and (e).

DATED at Montpelier, Vermont, this 2nd day of October, 2000.

s/David C. Coen
David C. Coen
Hearing Officer

Board Discussion

EHV has urged us to conclude that, because its property spans the service territories of two electric utility companies, it has ongoing discretion to choose which of those two companies will be its electric service provider simply by locating or relocating its metering point. As the basis for its position, EHV has relied upon the language in 30 V.S.A. Section 251(b) and has characterized itself as having premises "in an area which two or more companies distributing electrical energy are authorized to serve" by virtue of its owning property that spans the service territories of more than one company. We are not persuaded by this interpretation of Vermont law.

30 V.S.A. Section 251(b) itself does not provide a definition for the phrase "an area which two or more companies distributing electrical energy are authorized to serve." Therefore, in order to determine the meaning of this phrase we must apply principles of statutory construction. In construing statutes, our primary objective is to give effect to the intent of the legislature. To that

end, we first must look to the plain meaning of the words, and then, we must read the operative section of the statute in context, and construe all parts of the statute together.[31]

30 V.S.A. Section 251(b) was adopted as part of a single legislative act (now in effect as 30 V.S.A. Sections 249-252) that empowered the Board to establish and alter service territories for companies engaged in the distribution of electrical energy.[32] The stated legislative policy underlying this statutory scheme is to "eliminate or prevent conditions leading to unnecessary duplication of service and economic waste in the distribution of electrical energy."[33] Consistent with that policy, Section 250 directs the Board to establish exclusive discrete service territories, and Section 251 prohibits a company from furnishing service in the service territory of another company without first obtaining the other company's consent or the Board's approval to do so. Also consistent with that policy, Section 250 gives the Board authority to assign multiple companies to a particular service territory (or portion of a service territory) in those instances where it is impracticable for only one company to be so assigned; i.e., the Board may designate an area which two or more companies distributing electrical energy are authorized to serve.[34]

EHV's suggested interpretation of Section 251(b) is not consistent with either the language of the statutory scheme applicable to this case, or the legislative policy underlying it. The statutory scheme consistently speaks of exclusive service territories established by the Board based on its consideration of the factors enumerated in Section 249. A customer's property boundary is not one of those factors, and there is no other place in the statutory scheme where a customer's property boundary defines a geographic area that is entitled or subject to any specific type of treatment. Rather, the only part of the statutory scheme that allows for "an area which two or more companies are authorized to serve" is Section 250, by which the Board is enabled to assign multiple companies to simultaneously serve the same geographic area.

In addition, EHV's suggestion that Section 251(b) allows it to exercise unrestricted discretion to choose (and re-choose) its service provider is not in harmony with the legislature's declaration of policy to "eliminate or prevent conditions leading to unnecessary duplication of

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31. *T. Copeland & Sons, Inc., et al., v. Kansa General Insurance Co., et al.*, No. 98-505, slip op. at 4-5 (Vermont Supreme Court, April 14, 2000); *Galkin v. Town of Chester*, 168 Vt. 82, 87 (1998).

32. P.A. No. 257 (1969 Vt., Adj. Sess.).

33. P.A. No. 257, Section 2 (1969 Vt., Adj. Sess.).

34. For example, both Central Vermont Public Service Corporation and Vermont Electric Cooperative, Inc. were authorized to serve a particular portion of the Town of Windham. *See*, Docket No. 4219, Order of 7/6/77 at 5.

service and economic waste in the distribution of electrical energy."[35] In order for a customer to change its electric service provider, facilities must be extended to and installed for that customer's premises by the new service provider. Hence, if a customer is authorized to change service providers at will, the door is opened for development of twice as many facilities as are needed to serve that customer.[36] Such a result would run afoul the stated legislative policy underlying the establishment of discrete service territories.

Reading Section 251 in the context of the statutory scheme pertaining to service territories, and considering the legislative policy applicable to that statutory scheme, we conclude that the Section 251 phrase "in an area which two or more companies distributing electrical energy are authorized to serve" means an area to which the Board (pursuant to Section 250) has assigned more than one utility company the simultaneous entitlement to provide distribution service to customers. Because EHV's premises do not lay within a service territory to which multiple companies have been assigned, the provisions of 251(b) relating to metering point location are inapposite to EHV's circumstances. Accordingly, we must deny EHV's request for a declaration confirming that it may change its electric service provider by relocating its metering point.[37]

We recognize that our conclusion about the meaning of the phrase "in an area which two or more companies distributing electrical energy are authorized to serve" does not, in and of itself, clarify how the legislature intended to treat situations where a customer's property spans more than one exclusive service territory. That broad question is not posed in this declaratory judgement proceeding. Nevertheless, we observe that the statutory scheme pertaining to service territories enables the Board to alter service territories and to resolve disputes concerning the matching of customers with service providers.[38] And, we note that, on two prior occasions, relying on the provisions of Sections 249 and 251, the Board has authorized a single company to serve the whole of a customer's property

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35. P.A. No. 257, Section 2 (1969 Vt., Adj. Sess.). Also consistent with this policy is Section 251(a)'s prohibition against a customer who is in an area which multiple companies are authorized to serve, and who is already receiving service, changing service providers without the consent of its current provider or an order of the Board.

36. See discussion at tr. 10/4/00, pp. 38-44.

37. Even if we accepted EHV's interpretation of the phrase "an area which two or more companies distributing electrical energy are authorized to serve," we would deny EHV's metering point relocation request in this docket because 30 V.S.A. Section 251(a) would then govern. That statute precludes a change in service providers absent the consent of the present service provider or the approval of the Board. (See the discussion at page 9 of this order.) Thus, under EHV's interpretation of the phrase "an area which two or more companies distributing electrical energy are authorized to serve," it is not entitled to change its service provider simply by relocating its metering point.

38. 30 V.S.A. Sections 249 and 251.

notwithstanding the fact that such property spans two distinct exclusive service territories.[39] Thus, we believe that the legislature has provided a process by which customers in EHV's circumstances may have their concerns addressed.

We also wish to comment on two additional matters. First, the Department contends that the record in this docket lacks evidence pertaining to whether more than one electric utility company actually has facilities available for service to EHV's property, as required to trigger the metering point provisions of Section 251(b).[40] We recognize that the actual availability of facilities by multiple companies is prerequisite to a determination about which facilities are closest to the customer's metering point. However, having determined that EHV's premises are not in a service territory assigned to multiple utilities, we are able to resolve the question posed in EHV's petition without reaching the factual issue relating to the actual availability of facilities.

Finally, as we did in Docket No. 6180, we clarify that our decision here should not be read as a comment upon the merits of either the benefits or the costs of retail choice in the electricity supply market. EHV's request in this docket sought choice in the provision of both generation *and* distribution services. While we have recognized that choice relative to generation service can be desirable, we have been presented with no evidence that distribution is a non-competitive service, or that it would be desirable to promote redundant facilities for distribution services.

ORDER

IT IS HEREBY ORDERED ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions and recommendation of the Hearing Officer are hereby adopted.

2. Consideration of EHV-Weidmann Industries, Inc.'s ("EHV's") petition for a declaratory judgment is not precluded by the principles of either res judicata or collateral estoppel.

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39. See, *Petition of Mrs. Noel Perry requesting permission to obtain electric service from Barton Village, Inc., instead of from Vermont Electric Cooperative, Inc.,* Docket No. 4147, Order of 9/1/76, and *Petition of Howard Rock requesting permission to obtain electric service from Green Mountain Power Corp. instead of from Washington Electric Cooperative, Inc.,* Docket No. 4704, Order of 10/8/82. We also reiterate that these cases do not stand for the proposition that a customer may choose its electric service provider at will. Docket No. 6180, Order of 9/29/99, pp. 6-7.

40. Tr. 10/4/00 at 30. The Department originally agreed that no evidentiary hearing was required in this case, but now appears to believe that the filed stipulation of facts failed to present evidence upon this specific point. We conclude that, for this case, we do not need evidence upon this point because it would not effect the result.

3. EHV's request for a declaratory ruling confirming the right of EHV to elect to receive its electric service from the Village of Lyndonville Electric Department ("LED") should EHV relocate its metering point onto a section of its property that is located within LED's service territory is denied.

DATED at Montpelier, Vermont, this 15th day of December, 2000.

s/Michael H. Dworkin	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
	)	

OFFICE OF THE CLERK

Filed: December 15, 2000

Attest: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.