

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT)	CE06-002
OF SIOUX VALLEY SOUTHWESTERN)	
ELECTRIC COOPERATIVE, INC., DBA,)	
SIOUX VALLEY ENERGY AGAINST)	XCEL'S BRIEF SUPPORTING
NORTHERN STATES POWER COMPANY,)	MOTION TO DISMISS
DBA, XCEL ENERGY, FOR PROVISION)	
OF ELECTRIC SERVICE TO MYRL AND)	
ROY'S PAVING.)	

In support of its motion to dismiss the complaint of Sioux Valley Southwestern Electric Cooperative, Inc., ("Sioux Valley") Northern States Power Company d/b/a Xcel Energy ("Xcel") offers the argument and authorities stated in this brief.

FACTS

Sioux Valley conducts business in South Dakota as an electric utility, and Xcel conducts business in South Dakota as a public utility, both as defined in SDCL § 49-34A-1. Both are subject to the provisions of Chapter 49-34A concerning the jurisdiction of the Commission to enforce assigned service areas established by statute.

Myrl & Roy's Paving has a quarry in the southeast quarter of Section 27, Township 101 North, Range 48 West, Minnehaha County,

South Dakota. Of the foregoing quarter section of land, the north half of the southeast quarter is located in Xcel's service territory and the south half of the southeast quarter is located in Sioux Valley's assigned service area.

These assigned service areas were adopted pursuant to a service area agreement between the parties which was approved by the Commission in accordance with SDCL § 49-34A-44. The Commission maintains a map certifying the exclusive service areas of the parties.

At all times relevant, Myrl & Roy's Paving has conducted a quarrying and rock crushing operation in the southeast quarter of Section 27. The 16th line running east and west separating Xcel's assigned service area from Sioux Valley's assigned service area runs through the approximate center of the quarry and rock crushing operations.

Prior to June 12, 1991, Sioux Valley provided electric service to the Myrl & Roy location. Pursuant to a petition filed in early 1991 by Xcel challenging Sioux Valley's right to serve the Myrl & Roy quarry site, this Commission in docket EL91-003 determined that based on the location of the equipment being served Xcel was entitled to provide service to the Myrl & Roy location. In doing

so, the Commission adopted the majority load test and found that 59 percent of the load was in Xcel's service area and 41 percent of the load was in Sioux Valley's service area. Both the Circuit Court and the South Dakota Supreme Court upheld this decision on appeal.

The Myrl & Roy quarry continues to operate with electrical service provided by Xcel. Based upon what Sioux Valley characterizes as a request from Myrl & Roy that it provide service, Sioux Valley has requested that Xcel relinquish Myrl & Roy as a customer. Xcel has declined to do so.

Sioux Valley contends, apparently by virtue of a retained right, that it is entitled to revisit the majority load test and undertake to provide service should the majority of the load now be found to reside in Sioux Valley's territory.

Attached are the following exhibits:

- Exhibit A. A map of Xcel's service area in the Rowena area. The Myrl & Roy Quarry is located approximately one mile west of Rowena.
- Exhibit B. A 1991 photograph map of the Myrl & Roy Quarry. The 1/16th line between the company service areas is the black line identified with the tag reading 2,713.96.

- Exhibit C. A "Google Earth" aerial photo of the Myr & Roy Quarry take from the internet in May, 2006.

QUESTIONS PRESENTED

1. Does either Myrl & Roy or Sioux Valley retain the right to request a change of service area provider under a showing of changed circumstances, or for that matter under any circumstance?
2. Once the service area provider for a location is established under the Territorial Act, does a mechanism for change exist in Chapter 49-34A?

ARGUMENT AND AUTHORITIES

1. Neither the service provider nor the customer retains the right to request a change of service once a service area is established.

In Matter of Northwestern Public Service Company, 560 NW2d 925, 1997 SD 35, the South Dakota Supreme Court decided that after Northern Electric Cooperative ("NEC") was assigned to serve the Safeguard Metal Casting Division ("Division") of the Safeguard Automotive Corporation located in the Aberdeen Industrial Park, Division and its successors did not retain the right to be assigned to another utility's service area upon a determination of change to

circumstances by the Commission. In arriving at this conclusion, the court made significant holdings material to this motion.

Analyzing the 1975 legislative act known as the "South Dakota Territorial Integrity Act" ("Act") codified at SDCL Ch. 49-34A, the court stated:

The policy underlying the Act was "elimination of duplication and wasteful spending in all segments of the electric utility industry." [Citation omitted] To accomplish that end, exclusive territories designated "assigned service areas," were established for each utility. [Citation omitted] To ensure the integrity of a territory, the legislature granted each utility the exclusive right to "provide electric service at retail . . . to each and every present and future customer in its assigned service area." SDCL § 49-34A-42. Id., 560 NW 2d at 927, ¶ 15.

The court then went on to list the only manner in which customers may have their provider changed. SDCL §§ 49-34A-38 through 49-34A-59.

Reference is made to these provisions as establishing assigned service areas within which the new provider has exclusive service rights at SDCL 49-34A-1(1) and SDCL 49-34A-42. SDCL 49-34A-1(1) defines "assigned service area" as "the geographical area in which the boundaries are established as provided in §§ 49-34A-42 to 49-34A-44, inclusive, and §§ 49-34A-48 to 49-34A-59, inclusive." (emphasis added) The last paragraph of SDCL 49-34A-42, the "exclusive right" provision of the act, states that "the Commission shall have the jurisdiction to enforce the assigned service areas established by §§ 49-34A-42 to 49-34A-44, inclusive, and §§ 49-34A-48 to 49-34A-59, inclusive. (emphasis added) [emphasis in original] Id., 560 NW2d at 928, ¶ 16.

Against the contention by the PUC and NWPS that after NEC was assigned to serve and service was extended, Division and its successors retained a right to be assigned to the service area of NWPS upon the PUC's determination of changed circumstances, the court held that ". . . it is clear that the PUC's action in 1977 established the Hub City location as part of the assigned service area of NEC. Concomitantly, NEC acquired the exclusive right to provide retail electric service at that location." Id., 560 NW 2d at 926, ¶ 19.

The court expressly rejected the contention that a "retained right" was granted by these statutes, stating:

There is no express language establishing such a right in the customer. Nor does that provision yield such a right when read in conjunction with the other provisions of the act. The plain language of the statute indicates the legislature intended it to do nothing more than provide a new large load customer at a new location an option to be exercised prior to receipt of service. The successful exercise of the option does not beget another option. Id., at 560 NW 2d at 928, ¶ 28.

The court then articulated a bright line standard which it has followed through all territorial questions under the act.

To subscribe to the "retained right" theory of the PUC and NWPS would be to ascribed an intent to the legislature contrary to the policy underlying the act. The result: duplication of service and wasteful spending, the precise evils the act was designed to

avoid. In this case NEC lines would be stranded. NWPS would incur the expense of extending lines to the site.

Id.

The same analysis applies to this case.

The court also made it clear that only the express provisions of the statutory process permit changes in the exclusive territories established by the act. One of these, the large load exception at SDCL § 49-34A-56, was discussed by the court. The other two statutory provisions available have no application to the facts of this case, voluntary territorial trades by suppliers (SDCL 49-34A-55) and reassignment of service area from a utility that could no longer provide adequate service (SDCL 49-34A-58).

2. Once the service area provider for a location is established under the Territorial Act, no mechanism for change exists under the act to fit this case.

Stated simply, in Matter of West River Electric Association, Inc., 675 NW2d 222, 2004 SD 11, the South Dakota Supreme Court clearly established that a location, is a location, is a location. That is, the court held that a "location" is a geographical based concept and, thus, an electric utility having the statutory right to serve a customer's "location" is entitled to provide increased load at that location as well as any future service at that

location. Again, the court emphasized the history of the Territorial Integrity Act as being to reduce wasteful spending and the duplication of services in the industry. This case involved a stranded location in 1975 when the Territorial Act became law. That is, it was a location that was served by Black Hills but located in territory ultimately assigned to West River Electric. In reaching its conclusion that Black Hills was entitled to serve the location notwithstanding its growth, the court specifically relied on language of the statutes to conclude that "location" was intended by the legislature to be understood on a geographically centered basis. The court stated

We have also noted that SDCL 49-34A includes "no provision for change of provider where there's been a change of ownership or the customer changes its preference, or *there's a load reduction.*" [citing Matter of Northwestern Public Service, supra] (emphasis added) If therefore, the act does not contemplate a change in provider for a load reduction, the legislature could not have intended a change in provider where there is a load increase caused by an increase in the needs of an existing customer. As then Chief Justice Wollman observed in another case in 1979, SDCL 49-34A-42 includes "no express or implied exceptions based upon the nature of the customer or the extent or duration of the service provided prior to March 21, 1975." Id., 675 NW 2d at 229, ¶ 23.

Sioux Valley will likely contend that the result of the West River case is limited because it involved a stranded customer.

However, this was not the basis of the court's ruling. The court ruled with respect to locations generally. The court's ruling, fairly read, means that once a "location" is established, statutory means exist to change that location. Since the entirety of the Myrl & Roy location became a "location" to be served by Xcel, its character as an Xcel location cannot be changed by shifting the whereabouts of the load within the "location."

Moreover, the Supreme Court in the first Myrl & Roy case, Matter of Northern States Power Company, 489 NW2d 265 (SD 1992), recognized that it is industry practice to treat the point of connection as the point of delivery of service. Under this analysis as well the point of delivery of service is in Xcel's territory, thus furnishing yet another reason that service must stay with Xcel.

Finally, Sioux Valley contends in its pleading that customer preference should be given special weight. The Supreme Court rejected that contention in the first Myrl & Roy case as well:

Sioux Valley additionally suggests that based on the intersection of the 16th line with company's property, company should be allowed to chose its electric service provider. We addressed a similar argument in Willrodt vs. Northwestern Public Service Co., 281 NW2d 65, 72 (SD 1979), wherein we stated: "An individual has no organic, economic or political right to service by a particular

utility merely because he deems it advantageous to himself." Id., 489 NW 2d at 369.


The need to maintain the integrity of the statutory framework established by the Territorial Act, of necessity, exalts the system above the rights of the individual in order to honor the underlying purpose of the act, to eliminate duplication and wasteful spending in all segments of the electric utility industry.

CONCLUSION

It was the majority load test that solidified Xcel's ability to serve its customer in its territory where the location was bisected by the territorial division. Once that location was established under the settled law of this state, it cannot now be changed. Neither customer preference, nor the retained right, nor the majority load test is relevant. Under settled law, once assigned, a location, is a location, is a location.

Dated this 15th day of May, 2006.

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 15th day of May, 2006, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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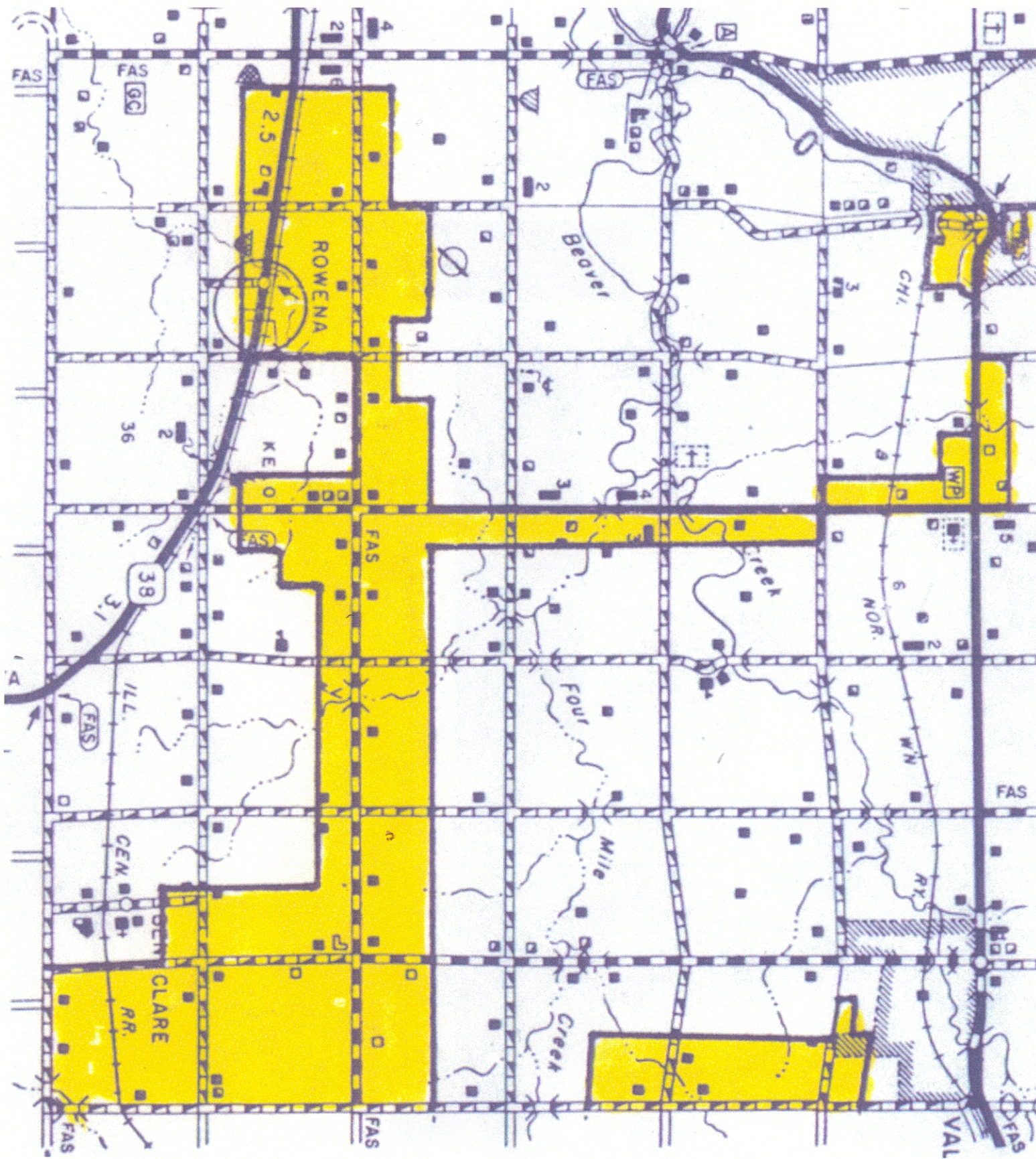


EXHIBIT A



EXHIBIT B

Pointer 43°31'08.88" N 96°34'51.35" W elev 1332 ft



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Eye alt 6328 ft

EXHIBIT C