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## SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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June 9, 2006

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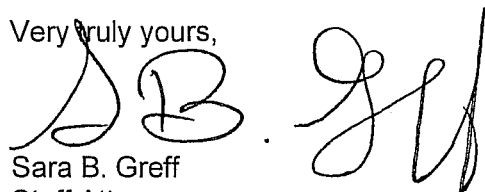
Ms. Darla Pollman Rogers  
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Re: In the Matter of the Complaint filed by Sioux Valley-  
Southwestern Electric Cooperative, Inc. d/b/a Sioux  
Valley Energy against Northern States Power Company  
d/b/a Xcel Energy Regarding Provision of Electric  
Service to Myrl and Roy's Paving  
Docket CE06-002

Dear Counsel:

Enclosed each of you will find a copy of Staff's Response to Xcel's Motion to Dismiss with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

  
Sara B. Greff  
Staff Attorney

SBG:dk  
Enc.

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

<b>IN THE MATTER OF THE COMPLAINT FILED )</b>	<b>STAFF'S RESPONSE TO</b>
<b>BY SIOUX VALLEY-SOUTHWESTERN )</b>	<b>XCEL'S MOTION TO</b>
<b>ELECTRIC COOPERATIVE, INC. D/B/A SIOUX )</b>	<b>DISMISS</b>
<b>VALLEY ENERGY AGAINST NORTHERN )</b>	
<b>STATES POWER COMPANY D/B/A XCEL )</b>	<b>CE06-002</b>
<b>ENERGY REGARDING PROVISION OF )</b>	
<b>ELECTRIC SERVICE TO MYRL AND ROY'S )</b>	
<b>PAVING )</b>	

COMES NOW Commission Staff, by and through one of its attorneys, and hereby responds to the Motion to Dismiss of Xcel Energy filed on May 15, 2006. Northern States Power Company d/b/a Xcel Energy (Xcel), has moved the Commission for dismissal of the Complaint of Sioux Valley-Southwestern Electric Cooperative, Inc. d/b/a Sioux Valley Energy (Sioux Valley).

**FACTS**

The majority of the facts in this matter are not in dispute. Myrl and Roy's Paving (Myrl and Roy's) is a quarrying and rock crushing operation located in Minnehaha County, South Dakota. Specifically, Myrl and Roy's is located in the SE $\frac{1}{4}$  of Section 27, Township 101 North, Range 48 West of the 5<sup>th</sup> P.M. in Minnehaha County, South Dakota. This location is unique in that the N $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 27 is in Xcel's assigned service area and the S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 27 is in Sioux Valley's assigned service area. These service areas were assigned based on service area agreements reached between the parties and later approved by the South Dakota Public Utilities Commission (Commission) back on June 19, 1976. The line running east and west separating Xcel's and Sioux Valley's territory is the 16<sup>th</sup> line and it cuts through the center of Myrl and Roy's quarry and rock crushing operations.

Sioux Valley provided electrical service to Myrl and Roy's prior to June 12, 1991. On June 12, 1991, this Commission in Docket EL91-003 made a determination that Xcel was entitled to provide service to Myrl and Roy's. The Commission based its 1991 decision on the majority load test. The Commission found that 59% of Myrl and Roy's electrical load was in Xcel's territory and 41% of Myrl and Roy's electrical load was in Sioux Valley's territory, thus giving Xcel the majority of the load and the right to serve Myrl and Roy's. The Commission's decision in EL91-003 was

ultimately upheld by the South Dakota Supreme Court in the case of *Northern States Power Company Against Sioux Valley Empire Electric Association*, 48 NW2d 365 (SD 1992).

Sioux Valley now contends and Xcel does not dispute that Myrl and Roy's will be adding new equipment to its quarry and rock crushing operation. The equipment when installed will be located in the SE¼ of Section 27, which happens to be Sioux Valley's territory. Sioux Valley claims and again Xcel does not dispute that once the equipment is installed the majority of the electrical load will now rest in Sioux Valley's territory.

Sioux Valley is now asking this Commission to revisit the majority load test and award Sioux Valley the right to serve Myrl and Roy's. Sioux Valley is also asking the Commission to compel Xcel to remove its lines and facilities from the premises. Xcel filed a Motion to Dismiss on May 15, 2006, opposing the award of Myrl and Roy's to Sioux Valley.

#### **STANDARD OF REVIEW**

Xcel's Motion to Dismiss challenges the legal sufficiency of Sioux Valley's complaint. *Vitek v. Bon Homme County Board of Commissioners*, 650 NW2d 513, 516 (SD 2002); *Schlosser v. Northwest Bank South Dakota*, 506 NW2d 416, 418 (SD 1993). Under SDCL 15-6-12(b)(5), a motion to dismiss tests the law of a plaintiff's claim, not the surrounding facts which support it. *Thompson v. Summers*, 567 NW2d 387, 390 (SD 1997). The Commission may grant Xcel's Motion to Dismiss only if it believes beyond a doubt that Sioux Valley's Complaint sets forth no facts to support a claim for relief. *Schlosser*, 506, NW2d at 418. Finally, allegations must be viewed in a light that is most favorable to the complainant or Sioux Valley in this matter. *Id.*

#### **ANALYSIS**

Xcel raises two issues in its Motion to Dismiss. They are:

- 1) Whether a service provider or the customer retains the right to request a change of service once a service area is established.
- 2) Whether once a service area provider is established for a location does the law provide a mechanism to change service area providers.

## ISSUE ONE

Xcel argues that neither a service provider nor the customer has the right to request a change of service once a service area has been established. Xcel cites to *In the Matter of Northwestern Public Service Company*, 1997 SD 35, 560 NW2d 925, to support its argument. In the *Northwestern* case, the South Dakota Supreme Court decided that there exists no statutory provision for a change in provider where there has merely been a change in circumstances regarding ownership, preference, load, rate reduction or expiration of a service agreement. *Id.* This holding is significant to the facts present in this matter.

The South Dakota legislature in 1975 took it upon itself to enact the "South Dakota Territorial Integrity Act" (Act), SDCL 49-34A. The goal behind the passage of the Act was to eliminate the duplication and wasteful spending in all areas of the electric utility industry. *Id. citing Matter of Certain Territorial Elec. Boundaries (Mitchell Area)*, 281 NW2d 65, 70 (SD 1979). As a means to accomplish its goal, the legislature established exclusive territories or "assigned service areas," and assigned each utility to an area. *Id.*, 560 NW2d at 927. Each utility was given the exclusive right to "provide electric service at retail to each and every present and future customer in its assigned service area." *Id. citing SDCL 49-34-42.*

Statutorily there exist only certain provisions where electrical consumers may have their provider changed. Those provisions are, SDCL 49-34A-38 through SDCL 49-34A-59. Neither Sioux Valley nor Myrl and Roy's have claimed that any of those statutory exceptions apply. The South Dakota Supreme Court has also stated there exists no express language giving the customer a "retained right" to change electrical service providers. "To subscribe to the 'retained right' theory ... would be to ascribe an intent to the legislature contrary to the policy underlying the Act." *Id.* at 928.

In this instance, Xcel and Sioux Valley were both given their assigned service areas and have the exclusive right to provide service to customers in their assigned service areas. The customer in question, Myrl and Roy's, happens to be located in both Xcel and Sioux Valley's assigned service areas. In 1991, the exclusive right to serve Myrl and Roy's was awarded to Xcel.

There is no express statutory provision that would permit Myrl and Roy's to switch electrical service providers. Staff would submit that even though there has been a change in circumstances today, the South Dakota Supreme Court is clear, simply because a change in circumstances exists, there is no statutory remedy available that gives you the right to request a change in providers.

## ISSUE TWO

Xcel argues that once a service area provider for a location is established under the Territorial Act, there is no mechanism for change that exists under the act to fit the facts of this matter. Xcel cites to *In the Matter of West River Electric Association, Inc.*, 2004 SD 11, 675 NW2d 222, to support its argument. In the West River case, the South Dakota Supreme Court again reiterated the importance of the history surrounding the 1975 Territorial Act and it also defined the word "location" in terms of SDCL 49-34A-42. The Supreme Court stated that, "'location' denotes a place where something is or could be located; a site." *Id.*, 675 NW2d at 230.

In the *West River* matter it was concluded that the legislative intent of "location" was to be understood in a geographical sense. 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." 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.* at 229. The basic principles surrounding the Territorial Act of 1975 and this geographical sense of the definition of location can be applied to the facts of this matter.

Since 1975, an electric utility has the exclusive right to serve each and every present and future customer at every location in its assigned service territory. The location of Myrl and Roy's presents a unique situation in that it lies within the service territories of two separate electric utilities.

However, in 1991, the Commission and ultimately the South Dakota Supreme Court granted Xcel the exclusive right to serve Myrl and Roy's. That exclusive right exists today and there is no

statutory authority to take that right away from Xcel. Therefore, Staff submits the Commission has given Xcel the exclusive right to provide service to Myrl and Roy's location. The simple change in circumstances surrounding the addition of new machinery at the Myrl and Roy's location should not sever Xcel's exclusive right to provide that service.

**CONCLUSION**

Wherefore, Staff respectfully submits that Myrl and Roy's should remain a customer of Xcel Energy.

Dated at Pierre, South Dakota, this 9<sup>th</sup> day of June, 2006



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Sara B. Greff  
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**CERTIFICATE OF SERVICE**

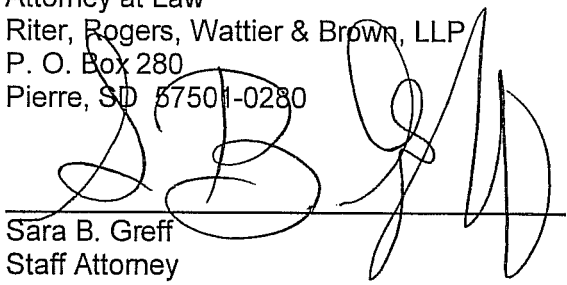
I hereby certify that copies of Staff's Response to Xcel's Motion to Dismiss were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 9th day of June, 2005.

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