

ELDD-026

In the Matter of

IN THE MATTER OF THE REQUEST BY  
XCEL ENERGY FOR A  
DETERMINATION OF ITS TERRITORY  
BOUNDARIES

Public Utilities Commission of the State of South Dakota

DATE	MEMORANDA
9/15/00	Filed and Docketed;
9/20/00	Order for and Notice of Hearing;
9/21/00	Reply Filing;
9/29/00	Xcel's Hearing Brief;
10/10/00	Transcript of Hearing held on 10/5/00;
10/16/00	Brief of Southeastern Electric Cooperative, Inc.;
10/20/00	Xcel's Reply Brief;
11/9/00	Find of Fact and Con. of Law; Notice of Entry of Order;
11/9/00	Docket Closed.
12/8/00	Petition to Reconsider as in the Alternative Petitioner's Review;
12/8/00	Affidavit of Petitioner Dr. Eich;
12/8/00	Certificate of Service;
12/20/00	Opposition to Petitioner's Review;
1/17/01	Order Denying Petitioner to Reconsider or Review;
1/17/01	Docket Closed.



Jim Wilcox, Manager,  
Government & Regulatory Services  
500 West Russell Street  
P.O. Box 988  
Sioux Falls, SD 57101-0988  
Telephone (605) 339-8350 fax 612-572-8063  
internet - james.c.wilcox@xcelenergy.com

September 15, 2000

Mr. William Bullard, Executive Director  
South Dakota Public Utilities Commission  
State Capitol Building  
500 East Capitol Avenue  
Pierre, South Dakota 57501-5070

**RECEIVED**

SEP 15 2000

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Dear Mr. Bullard:

It has come to my attention that Xcel Energy and Southeastern Coop do not agree on a service territory boundary in southwest Sioux Falls.

The area in question is known as the "Sunset Ridge Addition." It lies in northern Lincoln County just west of Interstate 29, in Section 7 of Township 100 North, Range 50 West. I am under the understanding that Southeast Coop believes the territorial boundary should be drawn at what is known as 61<sup>st</sup> Street. Xcel believes that the territorial boundary should be drawn somewhat south of 61<sup>st</sup> Street at what will be known as Bakker Park Drive.

Xcel and Southeast Coop have a territorial agreement on file in the Commission office dated January 28, 1976. That agreement also includes two exhibits. Exhibit "A" consists of a map depicting the territorial boundaries between Xcel and Southeast. Exhibit "B" is a description of those boundaries. The last sentence of the top paragraph on page three of the contract specifies that "the map shall in all respects be conclusive proof of the assigned service area of each utility." It is Xcel's opinion that the map clearly depicts the territorial boundary to be a line equidistant from the northern and southern boundaries of section 7 which we believe to be very near the planned Bakker Park Drive.

I know that the developer is anxious for someone to serve electricity to this new neighborhood sometime within the next few weeks. Xcel requests the Commission review this matter as quickly as practicable. Please consider this to be a complaint under SDCL 49-34A-59 that the service area provisions are about to be violated. Xcel requests that the commission hold a hearing within 15 days and issue its decision as provided by law.

If anyone has any questions, please call me at 339-8350

Sincerely,



Jim Wilcox

c. Mike Swenson  
Tim Chance, Southeast Coop

## Kolbo, Delaine

**From:** Bettmann, Martin  
**Sent:** Monday, September 18, 2000 8:18 AM  
**To:** Cremer, Karen  
**Cc:** Kolbo, Delaine  
**Subject:** FW: Attached is a letter of "complaint"

This is the name of the developer mentioned in Xcel's letter in Docket EL00-026. I think they should receive all notices related to this docket and be given an opportunity to intervene.

-----Original Message-----

**From:** Wilcox, James C  
**Sent:** Monday, September 18, 2000 8:14 AM  
**To:** 'Martin.Bettmann@state.sd.us'  
**Subject:** RE: Attached is a letter of "complaint"

Martin,

The developer is Jim Daniels of Daniels Construction of Tea, SD. 368-5455  
27160 470th Av, Tea, 57064

Sincerely,

Jim Wilcox

*for 368-2525*

> -----Original Message-----

> **From:** Martin.Bettmann@state.sd.us [SMTP:Martin.Bettmann@state.sd.us]  
> **Sent:** Friday, September 15, 2000 1:34 PM  
> **To:** james.c.wilcox@xcelenergy.com  
> **Subject:** RE: Attached is a letter of "complaint"

>

> Jim,

> Would you please provide us with the name and address of the developer?  
> Thank you.

>

> Martin

> -----Original Message-----

> **From:** Wilcox, James C  
> **Sent:** Friday, September 15, 2000 11:25 AM  
> **To:** 'Bullard, Bill - SD PUC Executive Director'  
> **Cc:** 'Bettman, Martin - SD PUC Pipeline Safety Program Manager'; 'Dave  
> Gerdes'; Swenson, Michael L  
> **Subject:** Attached is a letter of "complaint"

>

>

> Bill,

>

> Xcel and SE Coop have a territorial dispute. Attached is a Microsoft Word  
> document containing our petition of complaint.  
> We have met with Tim Chance of SE Coop and have not been able to come to  
> agreement.  
> I will carbon Tim with a paper version of this letter.  
> I am emailing this in an effort to expedite the inquiry as the developer  
> is  
> anxious for someone to serve electricity to this area in question.

>

> Sincerely,

>

> Jim Wilcox

> <<PetitiontoPUCLetter.doc>>



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

<b>IN THE MATTER OF THE REQUEST BY XCEL</b>	)	<b>ORDER FOR AND NOTICE</b>
<b>ENERGY FOR A DETERMINATION OF ITS</b>	)	<b>OF HEARING</b>
<b>TERRITORY BOUNDARIES</b>	)	
	)	<b>EL00-026</b>

On September 15, 2000, the Public Utilities Commission (Commission) received a request from Xcel Energy (Xcel) to determine a territorial boundary dispute. Xcel stated that Xcel and Southeastern Electric Cooperative, Inc. (Southeastern) do not agree on a service territory boundary located in southwest Sioux Falls. Xcel stated the following:

The area in question is known as the "Sunset Ridge Addition." It lies in northern Lincoln County just west of Interstate 29, in Section 7 of Township 100 North, Range 50 West. I am under the understanding that Southeast Coop believes the territorial boundary should be drawn at what is known as 61st Street. Xcel believes that the territorial boundary should be drawn somewhat south of 61st Street at what will be known as Bakker Park Drive.

The Commission has jurisdiction over this matter pursuant to SDCL 49-34A-42 through 49-34A-44, inclusive. The deadline for intervention is September 28, 2000.

A hearing shall be held on October 5, 2000, beginning at 10:00 a.m. in Room 412 of the State Capitol Building, 500 E. Capitol, Pierre, South Dakota. All persons testifying shall be subject to cross-examination.

The issue at the hearing is to determine the electric service boundary between Xcel and Southeastern in Section 7, Township 100 North, Range 50 West, in Lincoln County.

The hearing shall be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on the testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20. After the hearing the Commission will consider all evidence and testimony that was presented at the hearing. The Commission will then enter Findings of Fact, Conclusions of Law, and a Final Decision regarding this matter. As a result of this hearing, the Commission shall determine the electric service boundary between Xcel and Southeastern in Section 7, Township 100 North, Range 50 West, in Lincoln County. The Commission's Final Decision may be appealed by the parties to the state Circuit Court and the state Supreme Court as provided by law. It is therefore

ORDERED, that the hearing shall commence at 10:00 a.m., on October 5, 2000, in Room 412 of the State Capitol Building, 500 East Capitol, Pierre, South Dakota.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 20<sup>th</sup> day of September, 2000.

<b>CERTIFICATE OF SERVICE</b>	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melaine Kolbo</u>
Date:	<u>9/20/00</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION

James A. Burg  
JAMES A. BURG, Chairman

Pam Nelson  
PAM NELSON, Commissioner

Laska Schoenfelder  
LASKA SCHOENFELDER, Commissioner

# WEEKLY FILINGS

For the Period of September 14, 2000 through September 20, 2000

If you need a complete copy of a filing faxed, overnight expressed, or mailed to you, please contact Delaine Kolbo within five business days of this filing.  
Phone: 605-773-3705 Fax: 605-773-3809

## CONSUMER COMPLAINTS

**CT00-102** In the Matter of the Complaint filed by Robert E. Crow, Stephan, South Dakota, against AT&T Communications of the Midwest, Inc. and Midstate Telephone Company Regarding Delayed Disconnection.

Complainant alleges that AT&T is refusing to release him as a local and long distance customer. Complainant requests that he be disconnected from AT&T, that all bills and late charges be removed, and that he be reimbursed for travel expenses, lawyer's fees and lost pay.

Staff Analyst: Leni Healy  
Staff Attorney: Karen Cremer  
Date Docketed: 09/15/00  
Intervention Deadline: NA

**CT00-103** In the Matter of the Complaint filed by Kathy Meyer, Selby, South Dakota, against S&S Communications Regarding a Disputed Billing and Charges for Long Distance Services.

The Complainant alleges her daughter was given an 800 number to make free long distance calls. Calls were made using the number from January, 2000 to April 2000. In August, the Complainant received a phone bill for \$2020.26 for calls made using the 800 number. The complainant alleges she has requested a payment plan from the telecommunications carrier, but the company has denied this method to pay the bill. The complainant is requesting a review of the charges and an adjustment. The complainant requests to know if the telecommunications carrier (respondent) is a legal operation.

Staff Analyst: Charlene Lund  
Staff Attorney: Karen E. Cremer  
Date Docketed: 09/19/00  
Intervention Deadline: NA

## ELECTRIC

**EL00-026** In the Matter of the Request by Xcel Energy for a Determination of its Territory Boundaries.

Xcel Energy is requesting that the Commission review and hold a hearing to determine the electric service boundary between Xcel Energy and Southeastern Electric Cooperative, Inc. in Section 7, Township 120 North Range 50 West, in Lincoln County. The approximate area in question is west of Interstate 28 between 61st Street, SW, and what will be known as Bakker Park Drive.

Staff Analyst: Martin Bettmann  
Staff Attorney: Karen Cremer  
Date Docketed: 09/15/00  
Intervention Deadline: 09/28/00

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You may subscribe or unsubscribe to the PUC mailing lists at <http://www.state.sd.us/puc/>

1  
4

503 SOUTH PIERRE STREET  
P.O. BOX 160  
PIERRE, SOUTH DAKOTA 57501-0160

GLENN W. MARTENS 1881-1963  
KARL GOLDSMITH 1885-1966  
THOMAS C. ADAM  
DAVID A. GERDES  
CHARLES M. THOMPSON  
ROBERT B. ANDERSON  
BRENT A. WILBUR  
TIMOTHY M. ENGEL  
MICHAEL F. SHAW  
NEIL FULTON

September 29, 2000

OF RECORD  
WORKER 4-447  
TELEPHONE  
605 224-8000  
TELEFAX  
605 224-8000  
FAX  
605@nps.com

**RECEIVED**

SEP 29 2000

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

HAND DELIVERED

Mr. William Bullard, Jr.  
Executive Director  
Public Utilities Commission  
State Capitol  
500 East Capitol Avenue  
Pierre, South Dakota 57501-5070

RE: **XCEL ENERGY; SOUTHEASTERN ELECTRIC COOPERATIVE  
TERRITORIAL DISPUTE**  
Docket EL00-026  
Our file: 0185

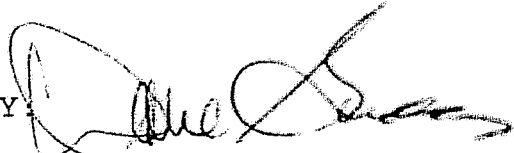
Dear Bill:

Enclosed are original and ten copies of a hearing notice in this matter.

With a copy of this letter, I am sending a copy of the notice to the service.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAG:mw

Enclosures

cc/enc: Karen Cremer  
Brad Shardin  
Jim Daniels  
Jim Wilcox

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

RECEIVED

SEP 29 2000

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE REQUEST BY  
XCEL ENERGY FOR A DETERMINATION  
OF ITS TERRITORY BOUNDARIES

EL00-026

XCEL'S HEARING BRIEF

Xcel Energy, Inc. previously known as Northern States Power Company, ("Xcel") has brought this complaint against Southeastern Electric Cooperative, Inc. ("Southeastern"), regarding the provision of electrical service to the Sunset Ridge Addition in northern Lincoln County. As shown by Xcel's attached letter of complaint (Exhibit 1), Southeastern is attempting to provide service to the Sunset Ridge Addition in violation of the service area boundaries established by SDCL §§ 49-34A-42 to 44.

On January 28, 1976, Northern States Power Company (Xcel's predecessor) and Lincoln-Union Electric Company (the prior name of Southeastern) entered a written contract setting their assigned service areas as allowed by SDCL § 49-34A-40. That contract, a copy of which is attached as Exhibit 2, was approved by the South Dakota Public Utilities Commission and established the service areas which apply to the Sunset Ridge Addition. Based on the map and land descriptions of that contract, the Sunset Ridge Addition is within the service area of Xcel. Southeastern now tries to ignore that contract to assert that it should be entitled to serve Sunset Ridge. Xcel therefore filed this complaint with the Commission pursuant to SDCL § 49-34A-39. Because the contract and map in question were adopted by Commission order, Southeastern has



the burden to prove that it is entitled to serve the Sunset Ridge Development. SDCL § 49-34A-61.

**1. THE SUNSET RIDGE ADDITION IS IN XCEL'S ASSIGNED SERVICE AREA UNDER THE TERMS OF THE CONTRACT BETWEEN XCEL AND SOUTHEASTERN.**

As the Commission well knows, electric utilities in South Dakota have assigned service areas and no electric utility may provide service in another's assigned area without written consent and Commission approval. SDCL § 49-34A-42. Utilities were free to enter contracts by July 1, 1976, setting service area boundaries between themselves; those contracts took on the status of a Commission order upon approval. SDCL § 49-34A-43. The Commission prepared maps of the assigned service areas which are the definitive statements of the assigned service areas for all electric utilities in South Dakota. SDCL § 49-34A-44.

Xcel and Southeastern set their boundaries by contract. That contract was approved by the Commission and took on the force of law. The terms of that contract clearly place the Sunset Ridge Addition within Xcel's assigned service area.

The contract language is clear; the map attached to the contract (and adopted by the Commission) definitively sets the assigned service areas for Xcel and Southeastern. The contract says that the map, ". . . clearly and accurately depicts the designated service area of each electrical utility . . . . Additionally, if there is any conflict between the written description of the assigned service areas and the map, ". . . the

map shall in all respects be conclusive proof of the assigned service area of each utility."

It is therefore clear that the service area map in this case conclusively establishes the assigned service areas for Xcel and Southeastern. A review of that map also demonstrates that the Sunset Ridge development falls within Xcel's assigned service area. Xcel is therefore entitled to prevail on its complaint.

**2. THE WRITTEN DESCRIPTION OF ASSIGNED SERVICE AREAS DEMONSTRATES THAT THE SUNSET RIDGE ADDITION IS WITHIN XCEL'S ASSIGNED SERVICE AREA.**

Although the map of assigned service areas conclusively demonstrates that the Sunset Ridge development is within Xcel's assigned service area, the written description of assigned service areas also supports that conclusion. The key to this point lies in the interpretation of the term "center point" as it applies to a short section of land in Lincoln County.

The written description of assigned service areas for Xcel and Southeastern describes the run of the boundary line of their respective areas. The boundary line begins at "the north center line of section 7, R50W, T100N." It then runs south to "the center point" of that section before turning due east. Xcel's assigned service area is to the north and east of that line (encompassing the Sunset Ridge development) and Southeastern's is to the south and west of the line. Southeastern argues that because section 7 is not a full section of one square mile that the "center point" is actually a point one half mile north of the south end of section 7



rather than the middle of section 7. This reading of the description would place the Sunset Ridge addition in Southeastern's assigned service area. This reading of the description, however, contradicts common sense and existing case law.

The plain meaning of "center point" is the one we give it every day -- the middle. In this case, it means exactly where the line is drawn on the map setting assigned service areas for the area of the Sunset Ridge development, attached to the contract setting the assigned service areas of Xcel and Southeastern. The term "center" is given that meaning in the law as well, being defined as, ". . . the middle or central point or portion of anything." Black's Law Dictionary, Sixth Edition (1950).

Southeastern argues that because section 7 is not a full mile long on its north/south axis, the "center" is actually a point one-half mile north of the south end of the section. This argument contradicts the plain meaning of "center" set forth above, however. Additionally, if a point one-half mile from the south end was intended, that could have been clearly expressed. It is interesting to note that only if the one-half mile "center" is derived from the south end of section 7 does the Sunset Ridge addition fall within Southeastern's service area; if the line is drawn from the north end it remains in Xcel's service addition. This is further support for the conclusion that the "center point" means the true center of Section 7 and not a point one-half mile from one of the borders. If the latter meaning had been intended it would have been necessary to further define the origin of the

line. Since that was not done, the parties must have intended to use the ordinary meaning of the term "center point."

The plain meaning of "center point" is also the one that has been uniformly adopted by courts addressing the issue. See e.g., Poleske vs. Jones, 185 NW 917, 918 (Iowa 1921) (center line is ascertained by intersection of diagonal lines drawn from section corners); Lunz vs. Sandmeier's Estate, 215 NW 426, 426 (Minn. 1927) (section centers are set not by government but by intersection of lines from center points of section boundaries); Runkle vs. Welty, 126 NW 139, 140 (Neb. 1910) (section center is determined by intersection of lines drawn from true corners of the section); Iverson vs. Johnson, 239 NW 757, 758 (S.D. 1931) (recognizing that center of section is determined by reference to center point of actual section boundaries). It is thus well settled that the determination of the center of a "section" is determined by reference to the actual boundaries of the parcel in question, not the uniform square mile "section" that is most common in surveying.

The fact that the section in question is "short" does not alter this approach to defining the center of that section. The existence of "short" section is contemplated by the federal law setting out the rules of survey. Each township is to be divided into sections of, ". . . as nearly as may be, six hundred and forty acres each, by running parallel lines through the same from east to west and from south to north at the distance of one mile from each other . . . ." 43 U.S.C. § 751. Each section is then marked at its

actual corners for subdivision purposes. *Id.* Those parcels consisting of less than six hundred and forty acres are then sold in their actual amounts. *Id.* Boundary determinations may then be made from "[a]ll the corners marked in the surveys . . ." or "equidistant from the corners which stand on the same line" from which the boundary is to be determined. 43 U.S.C. § 752. Boundary lines that have not actually been marked shall be determined, ". . . by running straight lines from the established corners to the opposite corresponding corners." *Id.* Half-sections are "...considered as containing the one-half...of the returned contents of the section of which they may make part." *Id.* It is clear that under the laws creating the rules for survey the "center" of any section is determined by using the actual boundary lines of the section as it is surveyed and not by reference to the one square mile model.

**3. SOUTHEASTERN IS PRECLUDED BY THE DOCTRINES OF WAIVER AND ESTOPPEL FROM ARGUING THAT THE BOUNDARY OF THE ASSIGNED SERVICE AREA IS CONTRARY TO THEIR CONTRACT WITH XCEL.**

Since 1976 the map showing the area of the Sunset Ridge development as part of Xcel's assigned service area has been part of a contract to which Southeastern is a party and an order of the South Dakota Public Utilities Commission. At no point during those intervening years did Southeastern assert that the map was incorrect. During that time, Xcel has structured its service plan under the understanding that this parcel of land was one it was

obligated to serve. Southeastern cannot now attempt to change this set of facts.

Southeastern has waived its right to challenge this boundary by acquiescing to it for over 20 years. Western Casualty and Surety Company vs. American National Fire Insurance Company, 328 NW2d 126, 128 (S.D. 1982). Because Xcel has acted in reliance on the map since 1976, Southeastern is likewise estopped from now asserting that it is in fact the proper provider of electrical service in the area now encompassing the Sunset Ridge Development. Id. Southeastern therefore cannot now pursue a claim it has failed to assert for almost a quarter century in an attempt to alter a condition upon which Xcel has relied throughout that time.

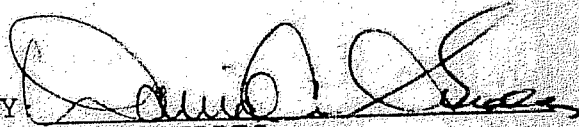
#### CONCLUSION

Southeastern is bound by its contract with Xcel and the order of this Commission adopting it. Under that contract, the Sunset Ridge development lies in the assigned service area of Xcel. This is apparent from the service area map (which is definitive under the contract) and the written description of the service areas. Additionally, Southeastern is barred from attempting to alter the status quo when it has failed to do so for over twenty years. For these reasons, Xcel requests that the Commission enter an order reaffirming the existing assigned service area boundaries and enjoining Southeastern from attempting to provide service within Xcel's assigned service area.



Respectfully submitted this 29<sup>th</sup> day of September, 2000.

MAY, ADAM, GERDES & THOMPSON LLP

BY:   
DAVID A. GERDES  
Attorneys for Xcel Energy, Inc.  
503 South Pierre Street  
P.O. Box 160  
Pierre, South Dakota 57501-0160  
Telephone: (605) 224-8803  
Telefax: (605) 224-6289

CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 29<sup>th</sup> day of September, 2000, 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:

Karen Cremer  
Staff Attorney  
Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

Jim Daniels  
Daniels Construction  
27160 470<sup>th</sup> Avenue  
Tea, SD 57064

Brad Shardin  
General Manager  
Southeastern Electric  
Cooperative, Inc.  
P.O. Box 388  
Marion, SD 57043-0388

  
David A. Gerdes



Jim Wilcox, Manager,  
Government & Regulatory Services  
500 West Russell Street  
P.O. Box 988  
Sioux Falls, SD 57101-0988  
Telephone (605) 339-8350 fax 612/573-9083  
internet - james.c.wilcox@xcelenergy.com

September 15, 2000

Mr. William Bullard, Executive Director  
South Dakota Public Utilities Commission  
State Capitol Building  
500 East Capitol Avenue  
Pierre, South Dakota 57501-5070

Dear Mr. Bullard:

It has come to my attention that Xcel Energy and Southeastern Coop do not agree on a service territory boundary in southwest Sioux Falls.

The area in question is known as the "Sunset Ridge Addition." It lies in northern Lincoln County just west of Interstate 29, in Section 7 of Township 100 North, Range 50 West. I am under the understanding that Southeast Coop believes the territorial boundary should be drawn at what is known as 61<sup>st</sup> Street. Xcel believes that the territorial boundary should be drawn somewhat south of 61<sup>st</sup> Street at what will be known as Bakker Park Drive.

Xcel and Southeast Coop have a territorial agreement on file in the Commission office dated January 28, 1976. That agreement also includes two exhibits. Exhibit "A" consists of a map depicting the territorial boundaries between Xcel and Southeast. Exhibit "B" is a description of those boundaries. The last sentence of the top paragraph on page three of the contract specifies that "the map shall in all respects be conclusive proof of the assigned service area of each utility." It is Xcel's opinion that the map clearly depicts the territorial boundary to be a line equidistant from the northern and southern boundaries of section 7 which we believe to be very near the planned Bakker Park Drive.

I know that the developer is anxious for someone to serve electricity to this new neighborhood sometime within the next few weeks. Xcel requests the Commission review this matter as quickly as practicable. Please consider this to be a complaint under SDCL 49-34A-59 that the service area provisions are about to be violated. Xcel requests that the commission hold a hearing within 15 days and issue its decision as provided by law.

If anyone has any questions, please call me at 339-8350

Sincerely,



Jim Wilcox

c. Mike Swenson  
Tim.Chance, Southeast Coop

14

**EXHIBIT 1**

CONTRACT IN THE MATTER  
OF THE ESTABLISHMENT OF AN  
ASSIGNED SERVICE AREA

THIS CONTRACT, made this 28 day of January, 1976, by and between NORTHERN STATES POWER COMPANY and LINCOLN-UNION ELECTRIC COMPANY, pursuant to SDCL 49-34A.

Recitals

The parties to this contract are each an "electric utility" as that term is defined in SDCL 49-34A-1(7).

Northern States Power Company and Lincoln-Union Electric Company acknowledge that both electric utilities operate electric systems, portions of which lie in the same general geographical area and pursuant to SDCL 49-34A agree that it is in the public interest that such electric utilities shall negotiate designated service areas and customers to be served and have prepared a map attached hereto as Exhibit "A" to accurately and clearly show the boundaries of such areas of each electric utility.

The parties hereto further agree that it is in the public interest to eliminate or avoid unnecessary duplication of electric utility facilities, to promote the efficient and economical use and development of the electric systems of the parties to this contract and to provide adequate electric service to all areas and customers affected.

The parties hereto further agree that when applicable, due consideration has been given to the conditions as set out in SDCL 49-34A-43 and SDCL 49-34A-44.

Each party to this contract specifically indicates its willingness and good faith intent to provide adequate and dependable electric service in the area to be assigned.

It is the purpose of this writing to set forth certain



basic policies which will serve to guide the parties hereto in their relationship to the designated service area as depicted by the prepared map attached hereto as Exhibit "A" and incorporated into this contract as a part hereof.

NOW, THEREFORE, the parties agree as follows:

That this contract provides for a mutually agreeable delineation of designated service area, for the area shown on Exhibit "A", involving distribution lines and does not involve transmission lines.

Exhibit "A", a map, clearly and accurately depicts the designated service area of each electric utility for the area shown in Exhibit "A".

It is understood and agreed by and between the parties hereto that irrespective of and notwithstanding the territories agreed upon by the parties hereto, each of the parties hereto shall have the exclusive right to continue providing electric service at retail to each and every location where it was serving a customer as of March 21, 1975.

This contract is made subject to all applicable rules, regulations, and orders, now or hereafter in force, of said South Dakota Public Utilities Commission.

Each person signing this contract warrants that he has the proper authority to bind his respective corporation.

It is mutually agreed and understood between the parties that this contract is not binding upon either of the parties to the contract until the contract has been approved in its present form by the South Dakota Public Utilities Commission.

It is mutually understood and agreed by and between the parties submitting this map, Exhibit "A", pursuant to SDCL 49-34A-44 that the descriptions, Exhibit "B", which are attached

to the map are not controlling if there is any conflict between the written description of areas and the map submitted. In each instance where there is a conflict between the map, Exhibit "A", and the written description, the map shall in all respects be conclusive proof of the assigned service area of each utility.

It is further understood and agreed by and between the parties hereto that nothing in this contract shall be construed to abrogate or set aside existing franchises of either of the parties to this contract, and it is further understood that notwithstanding any terms or provisions of this contract, either of the parties to this contract may extend electric lines for electric service to its own utility property and facilities as is allowed by SDCL 49-34A-57.

It is further understood and agreed by and between the parties to this contract that neither of the parties to this contract waives any right it may have to new customers as a result of the provisions of SDCL 49-34A-56.

It is further understood and agreed by and between the parties to this contract that this contract shall not in any way alter or diminish the right that each of the parties to this contract has under SDCL 49-34A-42 to, as an electric utility, extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

This contract will be submitted to the Public Utilities Commission for approval and that the territories agreed upon by the parties hereto will become the exclusive and sole territories of the respective parties following approval by the Public Utilities Commission pursuant to SDCL 49-34A-43.

Dated at SIoux FALLS, South Dakota, this 28  
day of January, 1976.

LINCOLN-UNION ELECTRIC COMPANY

By Hilmer A. Wahl  
Hilmer A. Wahl  
Its Manager

NORTHERN STATES POWER COMPANY

By Darrell D. Butterwick  
Darrell D. Butterwick  
General Manager  
Sioux Falls Division

ATTEST:

C. V. Graham  
Secretary  
Witness

ATTEST:

John D. Johnson  
Witness

Shown below is description of electric service area boundaries agreed upon by Lincoln-Union Electric Company and Northern States Power Company and as shown on the attached General Highway Map of Lincoln County, South Dakota:

1. Beginning at the north center line of section 7, R50W, T100N.
2. Then south to the center point of section 7, R50W, T100N.
3. Then east along the half mile line to the center of I29 in section 7, R50W, T100N.
4. Then south along center of I29 to Junction of Highway 229 in section 18, R50W, T100N.
5. Then northeast along Highway 229 to the section line between sections 8 and 9, R50W, T100N.
6. Then south along the section line to the north quarter mile line between sections 16 and 17, R50W, T100N.
7. Then east along quarter mile line to the west quarter mile line of section 16, R50W, T100N.
8. Then south along the west quarter mile line one-half mile to the south quarter mile line of section 16, R50W, T100N.
9. Then west along the south quarter mile line to the half mile line of section 17, R50W, T100N.
10. Then north along the half mile line to the north section line of section 17, R50W, T100N.
11. Then west along section line to the east quarter mile line of section 18, R50W, T100N.
12. Then south along the east quarter mile line to south section line of section 18, R50W, T100N.
13. Then west along the section line to the center of I29.
14. Then south on I29 to the south quarter mile line in section 19, R50W, T100N.
15. Then east along the south quarter mile line to the east quarter mile line of section 19, R50W, T100N.
16. Then south along the quarter mile line to the north quarter mile line of section 30, R50W, T100N.
17. Then west along the north quarter mile line to the center of I29 in section 30, R50W, T100N.
18. Then south along the center of I29 to the south quarter mile line of section 30, R50W, T100N.
19. Then west along the south quarter mile line to the west quarter mile line of section 25, R51W, T100N.
20. Then south along the west quarter mile line to the south section line of section 25, R51W, T100N.
21. Then west to the northwest corner of section 25, R51W, T100N.
22. Then north along the section line one-half mile to the east center of section 26, R51W, T100N.
23. Then west along the half mile line to the west quarter mile line of section 26, R51W, T100N.
24. Then north along the west quarter mile line to the north quarter mile line in section 26, R51W, T100N.
25. Then west along the north quarter mile line to the half mile line of section 27, R51W, T100N.
26. Then south along the half mile line to the center point of section 34, R51W, T100N.
27. Then east one-half mile to the east section line of section 34, R51W, T100N.
28. Then north along the section line to the northeast corner of section 34, R51W, T100N.
29. Then east along the section line one-eighth mile.

**NEXT**

**DOCUMENT (S)**

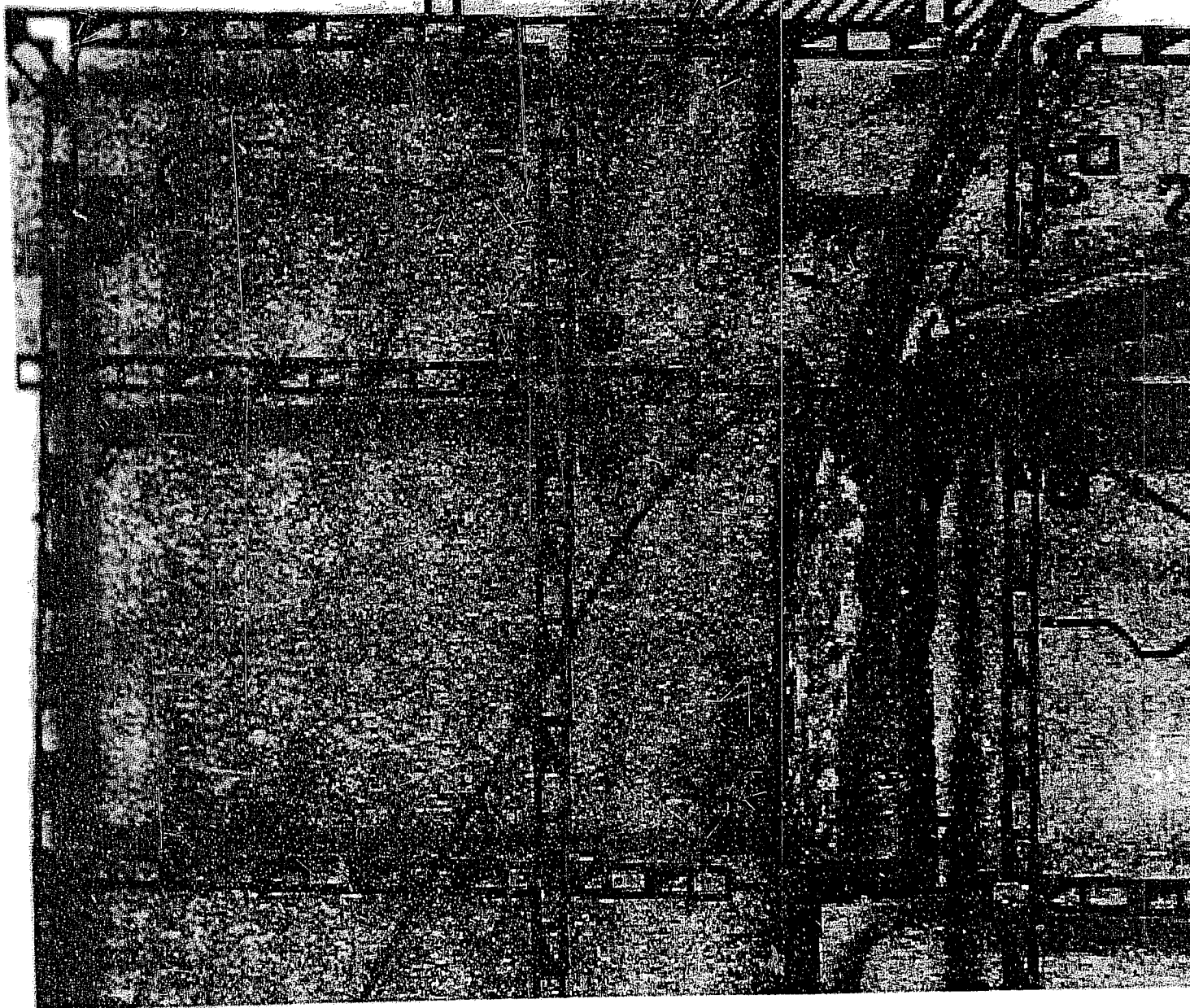
**BEST IMAGE**

**POSSIBLE**



I N N E A H

29



**Wiest, Rolayne**

---

**From:** Dave Gerdes of May, Adam, Gerdes & Thompson [dag@magt.com]  
**Sent:** Monday, October 09, 2000 4:17 PM  
**To:** 'Wiest, Rolayne Ailts'  
**Cc:** 'Christenson, Bob'; 'Wilcox, Jim'; 'Swenson, Michael L.'  
**Subject:** Xcel/Southeastern Territorial Dispute; Our file: 0185

Thank you for the opportunity to review the 6/7/76 transcript.

Xcel does not object to, and requests the Commission to take judicial notice of, the 6/7/76 transcript to the extent that it is relevant to the issues in this docket.



**RECEIVED**

**OCT 10 2000**

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

IN THE MATTER OF THE REQUEST BY XCEL ENERGY FOR DETERMINATION OF ITS TERRITORY BOUNDARIES	) ) ) ) )	EL00-026 TRANSCRIPT OF HEARING
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HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS:

October 5, 2000  
10:00 A.M.  
Room 412, Capitol Building  
Pierre, South Dakota

PUC COMMISSION:

Jim Burg, Chairman (**Not Present**)  
Pam Nelson, Vice-Chairman  
Laska Schoenfelder, Commissioner

COMMISSION STAFF  
PRESENT:

Rolayne Ailts Wiest  
Karen Cremer  
Gregory A. Rislov  
Martin Bettmann  
Sue Cichos  
Bill Bullard

Reported By:

Lori J. Grode, RPR/RMR

1 APPEARANCES:

2  
3 For Xcel:

David A. Gerdes

4 P.O. Box 160

5 Pierre, South Dakota, 57501

6  
7  
8 For Southeastern:

Mr. Robert A. Christenson

9 412 W. 9th Street, #B

10 P.O. Box 904

11 Sioux Falls, South Dakota, 57101

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P R O C E E D I N G S

(EXHIBITS NO. 1 THROUGH 14 WERE MARKED FOR IDENTIFICATION.)

VICE-CHAIRMAN NELSON: Okay. It's 10 o'clock so I think we'll get started. I will begin the hearing for Docket EL00-026, In the Matter of the Request by Xcel Energy for Determination of its Territory Boundaries.

The time is approximately 10 o'clock a.m. The date is October 5, 2000; and the location of the hearing is in Room 412 of the State Capitol Building in Pierre, South Dakota.

I'm Pam Nelson, Vice-chair, and Commissioner Laska Schoenfelder is also present. I'm presiding over this meeting. This hearing was noticed pursuant to Commission's Order for the Notice of Hearing issued September 20th, 2000.

The issue at this hearing is to determine the electric service boundary between Xcel and Southeastern in Section 7, Township 100 North, Range 50 West in Lincoln County.

All parties have the right to be present and to be represented by an attorney. All persons so testifying will be sworn in and subject to cross-examination by the parties. The Commission's final decision may be appealed to the Circuit Court and the State Supreme Court.

1           Rolayne Wiest will act as Commission counsel. She  
 2 may provide recommended rulings on procedural and  
 3 evidentiary matters. The Commission may overrule its  
 4 counsel's preliminary rulings throughout the hearing. If  
 5 not overruled, the preliminary rulings will become the  
 6 rulings.

7           At this time I will turn the meeting over to  
 8 Rolayne Wiest, and she can take appearances.

9           MS. WIEST: Who's representing Xcel?

10          MR. GERDES: May it please the Commission, my name  
 11 is David Gerdes of May, Adam, Gerdes and Thompson, Pierre,  
 12 South Dakota, and I represent Xcel.

13          MS. WIEST: And who's representing Southeastern?

14          MR. CHRISTENSON: My name is Bob Christenson. I  
 15 represent Southeastern Electric Cooperative from Marion,  
 16 South Dakota.

17          MS. WIEST: Commission staff.

18          MS. CREMER: Karen Cremer for Commission staff.

19          MS. WIEST: Before we begin, are there any opening  
 20 statements or motions? Mr. Gerdes.

21          MR. GERDES: I have no motions. I would just make  
 22 a very brief opening statement to set the stage for this  
 23 proceeding.

24          This is a proceeding under SDCL 34A-43 and 44  
 25 primarily dealing with the boundary of a service area as

1 between Xcel and Southeastern Co-op. The parties have  
 2 been unable to reach an agreement as to which utility  
 3 should serve a certain area in Lincoln County in Sioux  
 4 Falls, and so for that reason Xcel filed a petition  
 5 pursuant to 49-34A-59 asking for the Commission to hear  
 6 this matter.

7 It is Xcel's position that the official map  
 8 approved by the Commission in 1976 is, in fact, the  
 9 controlling document in this matter and that that map  
 10 shows that the area in dispute is within the service area  
 11 of Xcel.

12 MS. WIEST: Mr. Christenson, any opening?

13 MR. CHRISTENSON: Thank you. This hearing  
 14 involves the contents of the contract that was signed  
 15 really between the former NSP and now Xcel and  
 16 Southeastern about 24 years ago. And what this contract  
 17 does, it sets the boundaries of the service areas. And  
 18 the contract also in an exhibit shows, describes where the  
 19 boundary should be.

20 And also attached to the contract is a map  
 21 outlining the boundary. It's our position, Southeastern's  
 22 position, that the description for the boundary is not in  
 23 dispute. It's very clear Southeastern has followed this  
 24 description and the descriptions in this contract for  
 25 many, many years and that is not in dispute.



1           The testimony will show that an employee of  
2 Southeastern working in the field has followed this map,  
3 followed the direction of it, has never had a problem with  
4 it in 24 years. An expert testimony will show that the  
5 proper way to interpret the boundary and these  
6 descriptions according to what the federal government  
7 says, the state government says, all the regulations, is  
8 that the boundary is very clear it will be at a half mile  
9 line.

10           And there's absolutely, in our view, from our  
11 perspective, really no dispute in how to read this. And  
12 we'll have -- we'll call two witnesses, we'll have  
13 exhibits, and we fully expect to explain that. Thank you.

14           MS. WIEST: Commission staff.

15           MS. CREMER: I have nothing.

16           MS. WIEST: Mr. Gerdes.

17           MR. GERDES: Nothing further.

18           MS. WIEST: You may call your first witness.

19           MR. GERDES: We'll call Doug Berkland.

20           Your Honor, we have marked some exhibits prior to  
21 this matter, and I would ask counsel to stipulate that  
22 Exhibits 1 through 5 may be received.

23           MS. WIEST: Is there any objection to Exhibits 1  
24 through 5?

25           MR. CHRISTENSON: No, there is not.

1 MS. CREMER: I have none.

2 MS. WIEST: Okay. Then Exhibits 1 through 5 have  
3 been offered and received.

4 MR. GERDES: I think everyone has copies of  
5 Exhibits 1 and 2. This would be a copy of Exhibit 5.  
6 Exhibits 3 and 4 are simply blow-ups of that which is part  
7 of the Exhibits 1 and 2. What I'm passing out is a copy  
8 of Exhibit 5 for everyone.

9 **DOUG BERKLAND,**

10 called as a witness, being first duly sworn,  
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. GERDES:

14 Q. Would you state your name, please.

15 A. Doug Berkland.

16 Q. And where do you reside?

17 A. Sioux Falls, South Dakota.

18 Q. What is your occupation?

19 A. I'm a professional engineer and land surveyor.

20 Q. Give us your educational background, please.

21 A. I graduated from South Dakota State University  
22 with a degree in civil engineering in 1971, and since that  
23 time I've been with the firm of R.F. Sayre & Associates,  
24 consulting, engineering, land surveying firm in Sioux  
25 Falls.

1 Q. And would you outline briefly for the Commission  
2 your work experience as it relates to the issues involved  
3 in this case?

4 A. Again, I've been a land surveyor since the time  
5 that I got out of college. I immediately went to work for  
6 this firm. Part of their tasks, I guess you would say,  
7 are land surveying-related items. And with that in mind,  
8 I pursued getting a license in land surveying. And I've  
9 been working at both the engineering and land surveying  
10 since.

11 Q. Have you reviewed the contract, Exhibit 2, in this  
12 matter? Have you looked at it?

13 A. Yes, I have.

14 Q. And attached to that contract is a real estate  
15 description; is that right?

16 A. Correct.

17 Q. And then also attached to it is a map; is that  
18 correct?

19 A. Correct.

20 Q. And is it also correct that the text of that  
21 contract indicates that the map will prevail over any  
22 written description?

23 A. Correct.

24 Q. And at my request have you identified the boundary  
25 of the service area on the map that is attached to Exhibit

1 2? Have you identified the boundary?

2 A. Yes, yes.

3 Q. And would that boundary appear on Exhibit 3?

4 A. Correct.

5 Q. Would you explain what you did and why you did it  
6 in -- you prepared Exhibit 3; is that correct?

7 A. Correct.

8 Q. Okay. Would you explain what you did when you  
9 prepared Exhibit 3, please?

10 A. What we did was in order to determine the  
11 centerline, which of Section 7, which is the section in  
12 question, using the map that was furnished to us, I guess,  
13 it was to split what appears to be the section line on the  
14 north and the section line on the south to determine where  
15 that the centerline, if you use the word center, meaning  
16 equidistant from the north and from the south, where that  
17 line would go.

18 And that would be this, the southerly, or the  
19 bottom of the two dark lines that we've drawn across,  
20 which would fairly closely coincide to that heavy, dark  
21 line that separates the two different colored areas.

22 Q. All right. And then there's another darker line  
23 above that line that's labeled West 61st Street. What  
24 does that depict?

25 A. That's -- since this area has been developed, it's



1 a street that's presently exists at that location, and  
2 it's approximately a half mile to the north of the south  
3 section line.

4 Q. How did you locate what you have identified as  
5 West 61st Street on Exhibit 3? How did you determine its  
6 position?

7 A. That was determined based off the platting  
8 information that has been recorded and the subdivisions  
9 that have already been --

10 Q. And so you did measurements based upon official  
11 records of the plats; is that correct?

12 A. Correct.

13 Q. Okay. So in terms of the service area boundary,  
14 then, am I correct that you believe that the service area  
15 boundary is this lower black line on Exhibit 3; is that  
16 correct?

17 A. That's correct, using the maps that have been  
18 furnished.

19 Q. Now, you also have in front of you Exhibit 1,  
20 which has been identified as the official map on file with  
21 the Commission. You've seen that map, have you not?

22 A. I've seen -- I haven't seen this one itself. I  
23 think I've seen the blow-up of this small area.

24 Q. And this small area you're referring to is the  
25 area depicted on Exhibit 3 that you were just looking at?



1 A. Correct:

2 MR. GERDES: Your Honor, maybe just to make sure  
3 the record is clear, without calling Mr. Bettmann, can we  
4 have a stipulation that Exhibit 1 is, in fact, a copy of  
5 the Commission's official map?

6 MS. WIEST: Any objection to that?

7 MR. CHRISTENSON: No.

8 MS. CREMER: None.

9 MS. WIEST: Right, we'll have a stipulation.

10 MR. GERDES: Okay, thank you.

11 Q. And at my request, did you take a blow-up of  
12 Exhibit 1, the official map of the Commission, and place  
13 it on -- and prepare Exhibit 4?

14 A. Correct, yes.

15 Q. Would you tell us what Exhibit 4 shows us?

16 A. It shows basically we've just blown up the Exhibit  
17 1 and also at the same time have placed a large or heavy,  
18 dark line going easterly/westerly across what would be  
19 splitting the section from the south section line to the  
20 north section line, which would be the lower line of the  
21 two. And we've also placed a line where West 61st Street  
22 would go across a section as well.

23 Q. Would you tell us about your methodology in  
24 determining those two lines?

25 A. The lower of the two would be just splitting what

1 appears to be the section line. Here again, it's a  
2 photograph. So we just split the line that they have  
3 identified as supposedly the south section line and split  
4 the line that is supposedly the north section line and  
5 just using, you know, approximate methods, just by  
6 splitting those two, the distance between the two and  
7 drawing a line across and that would be the line that we  
8 have drawn, the lower of the two.

9 Q. And if I'm interpreting this Exhibit 4 correctly,  
10 that lower line is in the same place as the line which is  
11 intended to depict the service area boundary between Xcel  
12 and Southeastern on a north south -- the north/south  
13 border boundary. Would that be correct?

14 A. Correct.

15 Q. And then West 61st Street, how did you locate that  
16 on the map?

17 A. That, again, it would be off the platted  
18 dimensions that have been recorded with the Lincoln County  
19 Register of Deeds.

20 Q. So that's something that you actually measured  
21 based upon existing plats?

22 A. Existing plats.

23 Q. In the Register of Deeds's office?

24 A. Correct.

25 Q. Now, thirdly, did you also prepare Exhibit 5?

1 A. Yes.

2 Q. And for the record Exhibit 5 has been passed out  
3 to everyone. And tell us what Exhibit 5 is.

4 A. Exhibit 5 is an aerial paragraph of Section 7.  
5 The city of Sioux Falls does this regularly, yearly  
6 almost, where they fly the whole city and then you can  
7 obtain copies of aerial photos of different sections of  
8 the city. So we requested of them a copy of Section 7.

9 And what we did then was by off the aerial photo,  
10 if we have West 69th Street is located on the south part  
11 of the photo, and that's the south section line of Section  
12 7, and at the top is West 57th Street, which is the north  
13 section line of Section 7. And by splitting the  
14 difference between 69th Street and 57th Street, we then  
15 arrived at that centerline, which is a dark line that goes  
16 across the middle of the photo.

17 Q. And that's also the line that is identified as  
18 centerline?

19 A. Correct.

20 Q. Okay. And then is West 61st Street also depicted  
21 on that?

22 A. Correct, above the centerline.

23 Q. And the area that's in question here, where would  
24 that be located in terms of who provides service?

25 A. Approximately between the West 61st Street line

1 and the centerline.

2 Q. And is that the portion of the map that would be  
3 east of South Drexel Drive and north of the centerline?

4 A. It would be east of the lot line for those lots  
5 that abut Drexel Drive, and it would be north of the  
6 centerline and approximately south of the centerline of  
7 West 61st Street.

8 Q. In your opinion, then, what is the boundary -- and  
9 you may have already it said but I want you to state it  
10 clearly on the record. What is the boundary of Xcel  
11 service area in Section 7 as it relates to Exhibit 5?

12 A. All right. They would get to the -- as it relates  
13 to Exhibit 5 here, they get -- if you would relate it to  
14 the other exhibits that had been presented that identify  
15 the boundary that's been established on the photographs,  
16 they would -- their line would go to this centerline,  
17 which is virtually splitting the difference between the  
18 south section line and the north section line.

19 Q. That would be the north/south boundary of the  
20 territory area; correct? East/west?

21 A. Right.

22 Q. Dividing north and south?

23 A. Right.

24 Q. Excuse me. What would be the north/south boundary  
25 dividing east and west?



1           A.    Based on the, again on the map that the PUC has  
 2 had prepared that identifies the boundary area, it would  
 3 be -- it appears to be -- it would be the line that would  
 4 bisect also the east section line, which is Marion Road  
 5 and the west section line, which is Sundowner Avenue, and  
 6 which would appear to be the line that's, oh, where the  
 7 housing development has stopped going towards the east.

8           Q.    That would be the back lot lines of those lots  
 9 that are east of Drexel Drive; is that correct?

10          A.    Correct.

11          Q.    Okay. So in your opinion, then, that would  
 12 constitute the same service area that is depicted on  
 13 Exhibit 1; is that correct?

14          A.    Right. Exhibit 1 identifies the service area.  
 15 NSP would get everything that would be north of the  
 16 centerline of the section and to the east and northeast of  
 17 that line, I guess I could say, and east of the other line  
 18 that would bisect the east/west, or the easterly and the  
 19 westerly section lines, this area in here.

20          Q.    Okay. Now, you're aware that Southeastern  
 21 contends that the boundary is 64th Street -- excuse me,  
 22 61st Street extended to the east into that service area,  
 23 are you not?

24          A.    Correct.

25          Q.    And do you agree with that contention?



1           A.    I would disagree.  Because in the information that  
2 was furnished, it specifically states that in all respects  
3 the map will identify if there's a discrepancy between the  
4 verbiage that describes where the lines are to be and the  
5 discrepancy between where the map lines are drawn on the  
6 map; that the map drawing will take precedence.  And  
7 that's what this is.

8           Q.    And, again, just to reiterate, if you transferred  
9 the lines on Exhibit 1 to Exhibit 5, those lines would be  
10 as you have described depicting the service area of Xcel;  
11 that is the centerline to the south and the back of the  
12 lot line of the lots along Drexel Drive to the west, would  
13 that be correct?

14           A.    Correct.

15           Q.    Now, I anticipate that there will be testimony  
16 suggesting that there is a different way of determining  
17 the center point using a surveying convention that starts  
18 in the southeast corner of a section line.  Are you  
19 familiar with that surveying convention?

20           A.    Correct.

21           Q.    Would you tell us what that convention is, to your  
22 understanding?

23           A.    Well, normally if we go out and survey a section,  
24 if you split the section up and you determine what's  
25 called quarter sections where there would be a northeast

1 quarter, northwest, so on, you would measure the distance  
2 between each section corner at the northeast, northwest,  
3 southeast, southwest, measure that distance, split it in  
4 two, and then you would do the same on all four sides of  
5 it. And then you would go from those points that you then  
6 found and draw lines between those points and wherever you  
7 intersect those two lines are where the center of the  
8 section would be.

9 So in a normal section which is five, roughly  
10 5,280 feet, you know, you get a half mile to the north of  
11 the quarter line, or the midline of the section, and you  
12 would get a half mile to the south, or a half mile east,  
13 and half mile west.

14 This Section 7 is not a normal section simply  
15 because it's, again, it's at the north end of a township  
16 where because of the curvature of the earth, then there's  
17 got to be some surveying that needs to be done in terms of  
18 rectifying. Everything isn't going to be square because  
19 of the curvature of the earth.

20 So at the north end of the township, then that's  
21 where all the error is thrown in and that's what has  
22 happened in this case. There's -- this section is small  
23 because it is at the north end of the section -- of the  
24 township, rather.

25 Q. Let me get at it perhaps a little differently.

1 Let's just start pretty basic. What is a township first?

2 A. That would be just a unit of government -- I mean  
3 for in surveying terms, it would be six square miles.

4 There's township and ranges depending, you know -- again,  
5 it gets involved. And this is in township -- I forget.

6 It's on the bottom of one of these drawings. Township 100  
7 West, so it's just a method of determining how far west of  
8 a certain principal meridian in this case. I mean it's --  
9 it gets involved.

10 Q. Well, is it true that a township is 36 sections?

11 A. Correct.

12 Q. And is the township the basic surveying convention  
13 that is used to lay out and identify land in this part of  
14 the country?

15 A. Correct.

16 Q. And so when we talk about this section being  
17 Section 7, that is one of it is number seven in a 36-  
18 section township; correct?

19 A. Correct.

20 Q. And if you take one of those 36 sections, what  
21 does that one section consist of?

22 A. Normally one section would be a square mile in a  
23 normal section.

24 Q. Okay. Now, this particular township does not have  
25 36 sections in it, would that be correct?



1 A. Correct.

2 Q. As a matter of fact, it's missing the top tier of  
3 six sections, is it not?

4 A. Correct.

5 Q. And why is it, in your opinion, missing this top  
6 tier of six sections?

7 A. Because of this correction that I was just talking  
8 about of trying to correct for the curvature of the earth.

9 Q. So when the earth is curved, you end up with less  
10 land than if it were flat?

11 A. Flat.

12 Q. And Columbus, of course, teaches us this that the  
13 earth is round, so we can't survey on a flat surface;  
14 correct?

15 A. Correct.

16 Q. So and then this township, again if I'm  
17 understanding you correctly, is even shorter than 30  
18 sections? In other words, the next tier down from the  
19 first six is also short; is that correct?

20 A. Correct.

21 Q. And, again, is this part of this correction that  
22 has to be done?

23 A. Correct, yes.

24 Q. And so if I'm understanding you correctly, Section  
25 7 and all the other six sections in that tier are not a

1 full mile from south to north, would that be correct?

2 A. Correct.

3 Q. And, again, is this part of that correction that  
4 we're talking about?

5 A. Yes.

6 Q. All right. Now, does that fact -- does the fact  
7 that this is a short section tell you anything in terms of  
8 the use of the term midpoint when this contract was,  
9 Exhibit 2 was signed and the map was approved by the  
10 Commission back in 1975 or 1976?

11 A. Right. I mean when they -- I mean the language,  
12 you know, go to the centerline or center point; and, you  
13 know, as a surveyor, if a surveyor would probably have  
14 written it, it would have been written differently. It's,  
15 you know, it can be interpreted different ways.

16 And so the centerline could possibly be  
17 interpreted meaning the midpoint between two points or  
18 maybe it would mean a quarter line or whatever. So if a  
19 surveyor would have probably written it, he would have  
20 been a little more specific.

21 Q. What would the surveyor have said?

22 A. Well, if he wanted to say what has been shown on  
23 the map, that being the center point between the south  
24 section line and the north section line, he would have  
25 probably said something to the effect that instead of



1 beginning at the north centerline of which is the section  
2 line of Section 7, then south to the center point, then  
3 south to the point that bisect, you know, the section line  
4 on the south and the section line on the north, something  
5 like that that would identify, okay, you're splitting the  
6 difference. The centerline, you know, might have two  
7 different connotations to somebody.

8 Q. But you understand this to mean splitting the  
9 difference north to south? Do you understand this  
10 description to mean that?

11 A. I mean it can. Here again, it's not probably well  
12 written.

13 Q. All right. And then let me ask you the next  
14 question. Does the map Exhibit 1 split the difference  
15 however?

16 A. Yes.

17 Q. The line on the map?

18 A. Right. And that's clearly stated in the, you  
19 know, that the map shall take precedence. And because of  
20 that, then I, as a surveyor, if I had to go out and  
21 identify where that line would be, then I would physically  
22 split the difference between the south section line and  
23 the north section line with the understanding that the map  
24 took precedence and that's where that line should be.

25 Q. As a surveyor is it usual or unusual for you to

1 start with a line on a map and go find it on the ground  
2 rather than start from the ground and go to the map? Do  
3 you understand the distinction I'm drawing for you?

4 A. Right.

5 Q. If somebody hands you a map with a line on it, can  
6 you find it on the ground as a surveyor?

7 A. Depends if there's enough information on the map  
8 that identifies exactly, you know, if there's dimensions.  
9 Or in this case there aren't any dimensions but there's  
10 enough you can physically see the south section line and  
11 north section line and get a scale out. You can scale it  
12 too.

13 So it just is apparent that the person that drew  
14 that up split the difference between the two and that's  
15 where he drew his line.

16 Q. And, again, have you as a surveyor in the past  
17 performed this same function; that is, find a line that's  
18 drawn on a map and put it on the ground, so to speak?

19 A. Yes, all the time.

20 Q. Okay.

21 MR. GERDES: That's all the questions I have, Your  
22 Honor?

23 MS. WIEST: Mr. Christenson.

24 MR. CHRISTENSON: Thank you.  
25

CROSS-EXAMINATION

1  
2 BY MR. CHRISTENSON:

3 Q. Mr. Berkland, let's go to what has been marked as  
4 Exhibit No. 2. And it's my understanding that's a copy of  
5 the contract that you were talking about today?

6 A. Correct.

7 Q. Have you reviewed that contract?

8 A. Correct.

9 Q. Have you reviewed all of it?

10 A. Yes, I read through all of it.

11 Q. Are you aware that there's several pages of  
12 descriptions not included in this?

13 A. Right.

14 Q. Did you read all the descriptions?

15 A. I didn't read all of them. I read those that  
16 pertained to this section, I guess, is what you could say.

17 Q. Okay. Were you aware that the language throughout  
18 those descriptions are consistent when they use the word  
19 centerline and quarter section line and all that?

20 A. Right, quarter line, center -- I got that much out  
21 of it, quarter mile line and the half mile line, that type  
22 of thing, centerline.

23 Q. Did you actually run through the description and  
24 do it on a map?

25 A. Here again, I think the description probably

1 wouldn't necessarily be exactly what's, you know, shown on  
2 your drawing. If that's what you're -- from a surveying  
3 standpoint.

4 Q. Let's just take Exhibit No. 4. If you would,  
5 please, for the Commission, meet the description and based  
6 on your experience, would you run that out on this map?

7 A. Starting beginning at the north line of Section 7,  
8 this is the north line of Section 7, okay? Then south to  
9 the center point of Section 7. So, here again, the center  
10 of Section 7, depending on whether you're -- you know, to  
11 me, I think it's that could depict a couple things.

12 Center point normally would be then, because of the  
13 Section 7 where it's at, you would give, start at the  
14 south section line, come a half mile up, and that would  
15 establish where the quarter line would be on Section 7.

16 Q. Well, let's just go through as best you can as an  
17 expert. I want you to go through that description on this  
18 map for the Commission.

19 A. Okay. Beginning at the north centerline of  
20 Section 7. Okay, so the north centerline of Section 7  
21 would be here on the north section line of Section 7. It  
22 doesn't say the northeast corner, northwest or whatever.  
23 Then south to the center point of Section 7. Well, I mean  
24 you're going south to the center point.

25 You know, I don't know what they mean by center

1 point because we began at the north line of the north  
2 centerline. I would imagine that at that point then  
3 they're saying what you want to begin at is splitting the  
4 difference between the northeast corner and the northwest  
5 corner, the north center point meaning the north quarter  
6 corner whatever is probably how we would describe it.

7 Q. Maybe we can help explain it. What was your  
8 understanding on how the term center point was used in the  
9 rest of the descriptions when you read those?

10 A. I would probably interpret that to mean from a  
11 surveying standpoint the quarter line.

12 Q. Okay. All right. Continue.

13 A. So then the center point on the north section line  
14 would be bisecting the section line at this point. So  
15 beginning at this point then south to the center point of  
16 Section 7, so then you would go south to what would --  
17 because it's Section 7, then you would probably go in  
18 normal surveying, land surveying, you would come up and  
19 establish where that quarter line would be, a half mile up  
20 from the south section line.

21 Q. Where would that line be on this map?

22 A. That would be close to the 61st Street area.

23 Q. Okay.

24 A. Then it goes south, so the center point of Section  
25 7. So it would be half, relatively equidistant, between



1 the east line of the section and the west line of the  
2 section and then a half mile up from the south line of the  
3 section.

4 So, you know, this line that they had drawn in is  
5 pretty close to where this is shown. Okay? Then east  
6 along the half mile line to the center of I-29. So then  
7 you would go east. In this case it would be up here over  
8 the center of I-29, which is, you know, this line across  
9 here.

10 Q. So the half mile line, in your opinion, trained as  
11 a surveyor, where is the half mile line on this exhibit?

12 A. In Section 7 it would be closer to where West 61st  
13 Street would be.

14 Q. And that's based on your testimony, that's the  
15 line that Southeastern is stating that it is, is that  
16 correct?

17 A. That's right. As I understand you folks are  
18 saying that based on this legal description, this drawing  
19 is in error because this line should have been moved up.

20 Q. Well, just to make clear for the Commission your  
21 experience as a surveyor, where is the half mile line in  
22 this section?

23 A. The half mile line would be more closely to West  
24 61st Street.

25 Q. Okay. Now, Mr. Berkland, it's my understanding

1 you were educated at South Dakota State as a surveyor?

2 A. Engineer and surveyor. Most of your surveying  
3 comes from, you know, just experience working with  
4 somebody who's a surveyor.

5 Q. When you were educated, were you aware of the  
6 Manual of Surveying Instructions, 1973?

7 A. I'm sure we were shown that and among other  
8 manuals that, you know, we've been taught to use.

9 Q. Are you aware of this book?

10 A. Yes, I'm aware of it.

11 Q. Okay. Would you tell the Commission the proper  
12 way to survey a section is?

13 A. A normal section you would establish the -- I mean  
14 you establish the four corners of the section.

15 Q. Well, if you will, perhaps you may want to go up  
16 and let's just assume that this is a normal section here.  
17 How would you survey that for the half mile mark and all  
18 the other marks?

19 A. Normally we would determine the four corners of  
20 the section. We would split the difference between those  
21 four corners, here, here, here, here, split the difference  
22 here, split the difference here and connect the lines  
23 between the two of them.

24 Q. Okay. And then when you connect the lines, what  
25 significance is that?

1 A. That just established what's called the quarter  
2 lines, or the half -- I mean that will establish the  
3 northeast quarter and the southeast quarter and show on it  
4 establishes in case quarter lines and then you split it up  
5 further into sixteenth lines and whatever else. So I mean  
6 it's just a method of whittling itself down.

7 Q. So then when you find the center point, how far is  
8 it on a normal section from the southern line to this line  
9 right here?

10 A. Roughly about 2,640 feet.

11 Q. Is that a half mile?

12 A. Correct.

13 Q. Now, when you look at this, based on your  
14 experience, is this Section 7, is that a whole section or  
15 a whole section like this, or is that what's called a  
16 fractional section?

17 A. Right, it's fractional.

18 Q. Okay. What does this book say how a surveyor is  
19 supposed to survey a fraction section?

20 A. Well, then you would start -- you would give the  
21 southeast quarter its due, give them a half mile both.  
22 You would give them a half mile to the north and a half  
23 mile to the east or west.

24 Q. Are you saying you start here and go a half mile?

25 A. Right, and you would give him the southeast

1 quarter would get the full 2,640 by 2,640 that he's  
2 entitled to. And then you would work your way up there  
3 and the next party or the next property north of that  
4 would get a quarter of that and then all the area would be  
5 thrown into the government lots that would be on the  
6 outside extreme of the sections.

7 Q. So in this exhibit it's true, is it not, that the  
8 half mile line using proper government surveying  
9 techniques, the half mile line would be 61st Street?

10 A. Or thereabout.

11 Q. Or thereabouts; isn't that right?

12 A. Correct.

13 Q. Now, again, in this contract are you aware how  
14 many times the term half mile line was used?

15 A. Yeah, I mean --

16 Q. It was used?

17 A. A number of times.

18 Q. It was used a number of times, was it not?

19 A. Right, right.

20 Q. Thank you. Now, it was my understanding that you  
21 reviewed several documents to draw your opinion; is that  
22 correct?

23 A. Uh-huh.

24 Q. Did you ever look at the original government  
25 survey of this piece of property?



1 A. I didn't look at the government survey, no.

2 Q. Were you aware that the original government survey  
3 specifically depicts this quarter section here with this  
4 line being comparable to the centerline? Were you aware  
5 of that?

6 A. I mean I would expect it would, you know, based on  
7 where it's at in the township and everything.

8 MR. CHRISTENSON: I have no further questions.

9 MS. WIEST: Ms. Cremer?

10 MS. CREMER: I have nothing. Thank you.

11 MS. WIEST: Commissioners?

12 COMMISSIONER SCHOENFELDER: I have several. First  
13 of all, when you -- I don't see -- we're talking about the  
14 plats, but I don't see a plat with any measurements on it.  
15 I'm used to seeing a section that's been platted that  
16 would have footage on it.

17 THE WITNESS: Right.

18 COMMISSIONER SCHOENFELDER: And so but when you  
19 said you split 57th Street and you split 69th Street, are  
20 you sure from your -- you didn't go out and shoot this?

21 THE WITNESS: No, no.

22 COMMISSIONER SCHOENFELDER: Are you sure from the  
23 plats that 57th and 69th Street are on the section line?

24 THE WITNESS: Correct, they would be on the  
25 section lines, yes.



1           COMMISSIONER SCHOENFELDER: They would be? How do  
2 you know that?

3           THE WITNESS: Because I've surveyed enough in and  
4 around Sioux Falls to know that 69th Street is center,  
5 69th Street is the section line.

6           COMMISSIONER SCHOENFELDER: The center of the  
7 street always -- I mean the section line is a section  
8 line.

9           THE WITNESS: Right.

10          COMMISSIONER SCHOENFELDER: And we assume it runs  
11 down the center of the right-of-way, which would be 33  
12 feet on each side. I'm assuming that these streets might  
13 be wider than that.

14          THE WITNESS: Right, correct, that would be.

15          COMMISSIONER SCHOENFELDER: So then I'm a little  
16 bit interested in this size of this township. Number one,  
17 my experience tells me that correction lines on --  
18 township correction lines are all on the north side are  
19 larger usually, and I've never run into a case where there  
20 was a whole six townships that were missing.

21          THE WITNESS: Right.

22          COMMISSIONER SCHOENFELDER: Six sections in this  
23 case. I'm sorry, six sections.

24          THE WITNESS: No, this is the case in this  
25 particular --

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COMMISSIONER SCHOENFELDER: But usually the small ones are on the west, are the correction line on the west, when you're north of the Fifth principal meridian, usually the collection line on the west are the small quarters and the ones on the north of the township are the large quarters.

THE WITNESS: I don't know if they would be larger. Normally the farthest north section or the farthest north quarter would generally be smaller.

COMMISSIONER SCHOENFELDER: Well, that's not true across the state as long as you stay on this side or on the east side of the river from my experience. My experience tells me that those on the north township line are large quarters as high as almost an extra quarter in some places.

THE WITNESS: Okay. I mean you would have to look at the original survey, survey everything and everything because that would dictate, you know, how --

COMMISSIONER SCHOENFELDER: I just -- this is just interesting to me that there are whole row of sections that are missed. And trying to orient myself on this map, on one of the maps, I think it's -- I don't know what exhibit it is, but it looks to me like this is seven.

THE WITNESS: Uh-huh.

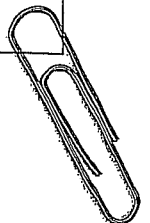
COMMISSIONER SCHOENFELDER: Then 12 over here

Continuation

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# of pages



1 would be the township adjacent so there's a township line  
2 here. Is there a correction line there?

3 THE WITNESS: There -- I mean, that would be  
4 starting so that --

5 COMMISSIONER SCHOENFELDER: That's Section 12,

6 THE WITNESS: The section next to it, that would  
7 be starting a new one.

8 COMMISSIONER SCHOENFELDER: But if this is Section  
9 12 and this is Section 7, the over tier of sections in  
10 that, in the township, it looks to me like this is to the  
11 west, if I'm reading this map correctly, and I'm not sure  
12 I am. Are those sections in that township missing on the  
13 north?

14 THE WITNESS: No, that's starting another. Then  
15 you would start out, you know, that's another here again.

16 COMMISSIONER SCHOENFELDER: It's another township  
17 but it's not another county.

18 THE WITNESS: It's another county too, right.

19 COMMISSIONER SCHOENFELDER: That answers my  
20 question. That's all I wanted to know. The map isn't  
21 clear.

22 THE WITNESS: Here maybe --

23 COMMISSIONER SCHOENFELDER: I know how you number.  
24 That much I figured out. The legal descriptions that are  
25 used in this contract do not indicate a half mile, do

1 they? The legal description here says the center point of  
2 Section 7.

3 THE WITNESS: Correct.

4 COMMISSIONER SCHOENFELDER: And these aren't  
5 necessarily metes and balance descriptions; these are sort  
6 of taking whatever the center point of Section 7 is.  
7 There's no way to know from this agreement that I can see  
8 what was determined to be the center point of Section 7.

9 THE WITNESS: I mean it's kind of a metes and  
10 bounds description is what that is the north centerline of  
11 section, or the north center.

12 COMMISSIONER SCHOENFELDER: Well, it might be kind  
13 of, but it doesn't exactly meet the metes and bounds  
14 definition.

15 THE WITNESS: It should say the north center  
16 point of Section 7, the north one quarter corner or  
17 something. I mean, here again, it's probably -- I don't  
18 know who wrote it, but I don't want to offend anybody, but  
19 it's -- you know, it could have been written better and  
20 been a lot more --

21 COMMISSIONER SCHOENFELDER: It doesn't seem to  
22 take into account that this is a smaller or large section.

23 THE WITNESS: Correct. And the person who did it  
24 probably didn't realize that.

25 COMMISSIONER SCHOENFELDER: Well, I would assume



1 that when this is an agreement, and the assumption may be  
2 terribly wrong, that everyone had a pretty good idea of  
3 where these lines were at the time this agreement was  
4 signed.

5 THE WITNESS: And as often is the case, they might  
6 have -- instead of going through that, that not very many  
7 people understand, they might have just looked at this and  
8 said, yes, that's where it is. And, here again, I wasn't  
9 at the meetings where everybody agreed to certain things.

10 But whether they had land surveyors, I would hope  
11 that if they did maybe they didn't give them good advice.  
12 But I would have told them to be a little more specific.  
13 Then they would have noticed this legal description does  
14 not match the drawing.

15 COMMISSIONER SCHOENFELDER: Mr. Gerdes, do you  
16 have another witness that's going to testify as to how  
17 long this has been in effect and how people have  
18 interpreted this line before in the past?

19 MR. GERDES: I was going to ask Mr. Bettmann a few  
20 questions on that subject, either as part of my case just  
21 as to the adoption of the --

22 COMMISSIONER SCHOENFELDER: I'm talking about how  
23 the two companies would have either acknowledged or not  
24 acknowledged the line in practice.

25 MR. GERDES: I had not intended to do so.

58

1           COMMISSIONER SCHOENFELDER: I'm looking at the  
2 date of the contract, and I'm also looking at how long it  
3 might -- if that was an accepted point of demarcation for  
4 a period of years.

5           MR. GERDES: Commissioner Schoenfelder, it's our  
6 position that the map is the primary document. The  
7 statute says that. And the contract says that. And so  
8 we're relying on the map.

9           COMMISSIONER SCHOENFELDER: That's not my  
10 question. My question is -- I'm stating it poorly, I  
11 know. But do you have a witness that's going to testify  
12 as to whether that line was an accepted demarcation point  
13 for both companies for a period of years?

14          MR. GERDES: No. I can see if we can.

15          COMMISSIONER SCHOENFELDER: I just want to know if  
16 you've been using the existing line as an agreement over a  
17 period of time or not. That's the question I'm going to  
18 have, so somebody needs to answer that.

19          MR. GERDES: Okay.

20          COMMISSIONER SCHOENFELDER: That's all I have.

21          MS. WIEST: It's your position that Exhibit 1, the  
22 official map, is consistent with the map attached to  
23 Exhibit 2; is that correct?

24          THE WITNESS: That's right, correct.

25          MS. WIEST: Any other questions?

1 MR. RISLOV: Rolayne.

2 COMMISSIONER NELSON: Greg has one.

3 MR. RISLOV: Was the term half mile line or  
4 quarter mile line used to split other short sections where  
5 there were intersecting boundaries between electric  
6 utilities within this contract?

7 THE WITNESS: Here again, I didn't follow all of  
8 the descriptions that were given, but I know quarter line  
9 and half mile line, that type of language was used  
10 throughout.

11 MR. RISLOV: I understand. But in this case it  
12 wasn't on number one and number two. And I guess my  
13 question again is were they used to split short sections  
14 between utilities within this agreement?

15 THE WITNESS: Here again, I would have to research  
16 that.

17 MR. RISLOV: You don't know?

18 THE WITNESS: No.

19 MR. RISLOV: Based on the statement -- and I'm  
20 looking at Exhibit 2, and let's see what page I'm on. I  
21 believe I'm on page five. That again shown below in  
22 description of electric service area boundaries agreed  
23 upon. Do you have that page?

24 THE WITNESS: Correct.

25 MR. RISLOV: Does statement of label number one

1 make any sense at all unless you use within number two the  
2 center point literally?

3 THE WITNESS: Right, no. That's why I say the  
4 north centerline initially when I read that as a surveyor,  
5 you know, the north centerline. It's a line, it's not a  
6 point. So the north, I assume, then they mean -- I mean  
7 it's only one section line. There's not different  
8 sections. North line of the section is what I assume the  
9 north centerline.

10 MR. RISLOV: Were you aware in 1976 of someone  
11 other than a professional surveyors developing these  
12 descriptions within this contract?

13 THE WITNESS: I wasn't aware of it. I just kind  
14 of maybe assumed that maybe somebody other than a land  
15 surveyor.

16 THE WITNESS: But you don't know that for sure?

17 THE WITNESS: No.

18 MR. RISLOV: That's all I have.

19 MS. WIEST: Any redirect?

20 MR. GERDES: Yes. Thank you.

21 REDIRECT EXAMINATION

22 BY MR. GERDES:

23 Q. I think Mr. Rislov got to the point I was going  
24 to ask you. But just to clarify, the only way you can  
25 reconcile this map with this agreement is to interpret the

1 term center point in the description on Exhibit 2  
2 literally; isn't that true?

3 A. Correct. I mean I would probably use the map and  
4 the descriptions together to decide, okay, this is what  
5 this description means. When you're saying then south to  
6 the center point of Section 7, looking at the map, then I  
7 would say there probably is based on the map.

8 But what this person is depicting is the point  
9 that's equidistant from the south section line and the  
10 north section line. That, to him, means center point.

11 Q. And then if you go to subparagraph three and that  
12 description, it says east along the half mile line. The  
13 only way that that half -- that statement can be  
14 reconciled with the map is to assume that the person  
15 writing this description didn't know it was a short  
16 section. Wouldn't that be true?

17 A. Correct. He just assumed that that center point  
18 or centerline is always described as the half mile line.

19 Q. Okay. Is it your understanding that when the  
20 Public Utilities Commission approved the official map,  
21 Exhibit 1, that there was a hearing held and that each  
22 utility was asked to identify those areas on the map and  
23 tell the Commission that that's, in fact, what their  
24 service areas were at that hearing?

25 A. I assume that. I didn't know that.



1 Q. You're not aware of that?

2 A. No, I'm not.

3 Q. Thank you. So to make the final point, there's no  
4 doubt that this description, if read by a surveyor  
5 applying surveying conventions, cannot be reconciled with  
6 the map as approved with the Public Utilities  
7 Commission -- by the Public Utilities Commission; correct?

8 A. Correct. I think a surveyor, if he was going to  
9 have to go out and survey this description, would perhaps  
10 have to sit down with the parties that wrote it to get a  
11 better understanding of just what they meant by some of  
12 this language just so that everybody understands, okay,  
13 here's where I'm going to begin, here's where we're going  
14 to go to and do that type of thing.

15 Q. But is there any doubt in your mind that the map  
16 depicts an east/west line that is the north/south boundary  
17 between the two halfway between the top of Section 7 and  
18 the bottom of Section 7?

19 A. That's very apparent that that's what the intent  
20 of the map is.

21 Q. Okay. And, again, if you look at the contract, on  
22 the third page of the contract at the top, it clearly says  
23 that the written description is not controlling and at any  
24 time?

25 A. Correct.

1 MR. GERDES: That's all I have.

2 MS. WIEST: Any further cross, Mr. Christenson?

3 MR. CHRISTENSON: Yes.

4 RECROSS-EXAMINATION

5 BY MR.

6 Q. I'm a little confused now about our prior  
7 discussion. It's my understanding you testified that you  
8 knew that this was, in your experience, this is a  
9 correctional section; is that correct?

10 A. Correct.

11 Q. And also I asked you to go down the description  
12 and you did it, did you not?

13 A. Uh-huh.

14 Q. Should we do that again? You didn't have any  
15 trouble doing that, did you?

16 A. We can do that.

17 Q. Let's do that again.

18 A. Okay. Here again, like it's saying the north  
19 centerline of -- I don't know the north centerline.

20 Q. Well, as a surveyor --

21 MR. GERDES: Just a minute, you're interrupting  
22 the witness. He was answering your question. I object.

23 MR. CHRISTENSON: Excuse me, he wasn't answering  
24 my question.

25 MS. WIEST: Go ahead, ask the question again.

1 MR. CHRISTENSON: Thank you.

2 Q. As a surveyor, what is the north centerline?

3 A. Well, I assume that by that they would mean the  
4 north quarter corner, which would split the section.

5 Q. The north quarter corner?

6 A. Right.

7 Q. You didn't have any trouble ascertaining that as a  
8 surveyor, did you?

9 A. I mean, here again, I think if a surveyor would  
10 have written it, you probably would have said something  
11 different. But looking at the drawing and everything, I  
12 can see where the north centerline, you know, the north  
13 center point on the north line or something. Maybe that  
14 would state it a little better.

15 Q. What does the document say?

16 A. The north centerline of Section 7.

17 Q. Can you find that on this map?

18 A. Well, looking at the map, I would say then the  
19 north centerline. I mean the north centerline. I mean  
20 I'm just going to say that they mean -- I mean it's a  
21 point. So but then south, then south to the center point,  
22 so I mean --

23 Q. I understand. What does this blue line represent?

24 A. That blue line would represent -- here again, what  
25 I had to do was just split this, you know, with a scale to

1 see -- and this appears to be, you know, the quarter line  
2 and then this line here up appears to be splitting the  
3 difference between the two section lines.

4 Q. Okay. Let's begin again. Go where the north  
5 centerline is and let's just run down their description.

6 A. Okay. The north centerline. Okay, we'll just  
7 assume that's the point on the north section line.

8 Q. Okay.

9 A. Then south to the center point of Section 7. So,  
10 here again, this line would probably, as we had talked  
11 about earlier, based on the next one and then half mile  
12 line, assume that person meant along the quarter line,  
13 which would be more in tune to the 61st Street line.

14 So then if that was the case, to have this map  
15 with the lines depict more closely maybe what this legal  
16 description is trying to state, then this line would in  
17 effect have been moved up here.

18 Q. Now, call number three on that description reads  
19 as what?

20 A. East along the half mile line to the center of  
21 I-29 in Section 7.

22 Q. Okay. On this fractional section where is the  
23 half mile line?

24 A. That would be closer to the 61st Street.

25 Q. And there's no dispute about that, is there?

1.6



1 A. Right, no.

2 Q. In fact, there's really no dispute about this  
3 legal description, is there?

4 A. Well, I don't think it's -- that part, that first  
5 part isn't very well written. I mean you can -- you know,  
6 if somebody -- that's why we're here because there's a  
7 dispute between I think what this is versus what is drawn  
8 on the map. The two of them don't coincide.

9 Q. But just forget about the map. You didn't have  
10 any trouble running this out, did you?

11 A. No, I think you can. It's not -- I mean it isn't  
12 as clearly as if a surveyor would have written it. You  
13 could have certainly followed it a little easier. You  
14 have to study it a little bit.

15 Q. You can do it, can't you?

16 A. Yeah.

17 Q. In fact, the matter is this same language was used  
18 throughout that contract, was it not?

19 A. Right.

20 Q. And are you aware of any other dispute in this  
21 contract?

22 A. Not that I'm aware of.

23 MR. CHRISTENSON: I have nothing further.

24 MS. WIEST: Ms. Cremer?  
25



CROSS-EXAMINATION

1  
2 BY MS. CREMER:

3 Q. If I understood what you were talking to  
4 Mr. Christenson about, the only way you can run  
5 the using the legal description, you're making a lot of  
6 assumptions because it's not written in normal surveying  
7 terms?

8 A. I think it could have been written a lot easier;  
9 that a person would have been able to -- a surveyor would  
10 have been able to look at it and been able to do it a lot  
11 easier and without what we're going through if it would  
12 have been written better.

13 Q. Right. But I guess my question is but you're  
14 making a lot of assumptions as to what is the north center  
15 point because you're not 100 percent sure of what they're  
16 talking about because it's not written like you would  
17 normally see; is that right?

18 A. I mean a lot of times we do see it like this,  
19 which makes it more complicated. Because I think there's  
20 a lot of people writing legal descriptions that don't know  
21 what they're writing, and I think that was the case here.

22 Q. Right. So you're making some assumptions, a  
23 number of assumptions from what I understood?

24 A. Yeah. I think -- I mean what the person -- if the  
25 same person who drew it wrote it, you know, if that's what

1 you're going to assume, then, you know, then you're going  
2 to assume something different than maybe what I would  
3 have.

4 MS. CREMER: Right. Thank you.

5 MS. WIEST: So if you only had the written  
6 description and had no maps, you would have put the half  
7 mile line near 61st Street; is that correct?

8 THE WITNESS: Right, correct.

9 MS. WIEST: Any other, Commissioners? Mr. Gerdes?

10 MR. GERDES: One last point.

11 FURTHER REDIRECT EXAMINATION

12 BY MR. GERDES:

13 Q. I'll show you what's been marked as Exhibit 3.  
14 And is it your understanding that's a blow-up of the map  
15 that was attached to Exhibit 2, which was part of Exhibit  
16 2, the contract that we've just been talking about for  
17 some time?

18 A. Correct.

19 Q. And is it also your testimony that the line as  
20 drawn on that map also is not consistent with the legal  
21 description?

22 A. Correct.

23 Q. But it is consistent with your conclusion that the  
24 line is at the midpoint of Section 7, not the half mile  
25 line; is that correct?

1           A.    I would say when the person who wrote this, if he  
2           said the center point, to him the center point meant the  
3           center, which you and I would then say it's equidistant  
4           from the north and the south, that's the center.

5           Q.    So, again, to answer my question, it's your  
6           conclusion, then, that Exhibit 3 and the map that was  
7           attached to Exhibit 2, the contract, cannot be reconciled  
8           with the description in the contract, would that be  
9           correct?

10          A.    Correct.

11          Q.    So we have to decide which is the correct place  
12          for the line based on something; correct?

13          A.    Right.

14          Q.    And you chose to believe the map that was attached  
15          to the contract; is that correct?

16          A.    That's what the contract says. In all cases the  
17          map would be the controlling factor.

18          Q.    And you also chose to believe the map, the  
19          official map that was adopted by the Public Utilities  
20          Commission in 1976, which also depicted the line as being  
21          the line that is equidistant between the top and bottom  
22          lines of Section 7; correct?

23          A.    Correct.

24          Q.    Are you satisfied with that conclusion based on  
25          all that you know?

1           A.     Based on what I know, because the legal  
2 description being written as it is and without being able  
3 to talk to the person who wrote it to see what his intent  
4 is. But if the same person wrote it drew the picture,  
5 then his interpretation of what the center point is and  
6 the half mile line would probably be different than what a  
7 surveyor would say.

8           Q.     So, again, I asked if you were satisfied with your  
9 conclusion?

10          A.     Right, I'm satisfied that the map is the  
11 controlling document and, therefore, it appears that he  
12 just split the difference between the two section lines.

13          Q.     Okay. And if the map is the controlling document,  
14 and if you look at Exhibit 5, the picture, then is it your  
15 opinion that the proper line is quite a bit below 61st  
16 Street and is, as a matter of fact, as depicted on Exhibit  
17 5?

18          A.     That's correct.

19               MR. GERDES: Okay. Thank you. That's all I have.

20               MS. WIEST: Any further cross, Mr. Christenson?

21               MR. CHRISTENSON: Just one.

22                               FURTHER RE-CROSS-EXAMINATION

23 BY MR. CHRISTENSON:

24          Q.     It's true, is it not, Mr. Berkland, that the only  
25 line on this map that can be derived from the legal



1 description is this one right here that says West 67th --  
2 61st Street; is that correct?

3 A. From the legal description, I would say correct.

4 Q. Thank you. And now this line you put in yourself,  
5 didn't you?

6 A. Yeah, right. We drew that in to split the  
7 difference between the top section line and the bottom.

8 Q. But the legal description clearly points to this  
9 line; isn't that correct?

10 A. Legal description, I mean, to me it isn't clear.  
11 I mean, I think it could have been written better. But if  
12 you were to wade your way through it, it probably would  
13 refer to the 61st Street as being what they interpret to  
14 be the center point.

15 Q. Or what the -- more clearly, aren't we referring  
16 to the half mile line?

17 A. The half mile line, which would be right here.

18 Q. That's in the legal description?

19 A. Right.

20 Q. Thank you.

21 MS. WIEST: Miss Cremer?

22 MS. CREMER: Nothing.

23 MS. WIEST: Commissioners?

24 Just one more question. If the contract had not  
25 said the map was controlling, would you rely on the



1 written description or the map?

2 THE WITNESS: If the contract didn't say the map?

3 MS. WIEST: Was controlling.

4 THE WITNESS: Then probably I would have wanted to  
5 sit down with the parties involved and work something out.  
6 I think that's part of a surveyor's job, too, that if you  
7 run into a dilemma, then you go out and get as much  
8 evidence as you can. And certainly part of the evidence  
9 would have been, okay, what was the intent at the time of  
10 the contract. Was the intent to go with the map? Or was  
11 the intent to go with the legal description? Was the  
12 legal description intended to mean exactly what the map  
13 shows but it was just poorly said?

14 And that's probably what I would say is whoever  
15 wrote it did a poor job of saying what he intended to say  
16 on the map because then he clarified himself and says,  
17 okay, if he didn't say it. But this is probably what you  
18 would probably interpret him to say. Okay? If my legal  
19 description is wrong in all cases, I want you to say look  
20 at the map and that's going to be the controlling lines.

21 MS. WIEST: Any further redirect?

22 MR. GERDES: I have none. Thank you.

23 MS. WIEST: Did you have one? Do you have any  
24 further witnesses?

25 MR. GERDES: I'd like to call Martin Bettmann just

1 for some background on the map, Exhibit 1.

2 **MARTIN BETTMAN,**

3 called as a witness, being first duly sworn,  
4 was examined and testified as follows:

5  
6 DIRECT EXAMINATION

7 BY MR. GERDES:

8 Q. Would you state your name, please.

9 A. My name is Martin Bettmann.

10 Q. And where do you reside?

11 A. I live in Pierre, South Dakota.

12 Q. And where do you work?

13 A. I work for the Public Utilities Commission.

14 Q. And what is your position with the Public  
15 Utilities Commission?

16 A. I'm a staff engineer.

17 Q. I've heard you described as the keeper of the  
18 maps. Would that be a correct description?

19 A. Yes, I've been called that.

20 Q. And is Exhibit 1 one of the maps that you keep, or  
21 a copy of one of the maps that you keep?

22 A. I was gone when they made the copy, but it  
23 accurately reflects the original, yes.

24 Q. And so Exhibit 1 would accurately reflect the  
25 original map which is on file in your office; is that

1 correct?

2 A. Right.

3 Q. And what does Exhibit 1 depict?

4 A. It's -- it states on there official electric  
5 territory map. I wasn't around when they were drawn, but  
6 I'm aware of how they came about.

7 Q. All right. And would you please tell us for the  
8 record how it was that this map came into being?

9 A. It was my understanding that the utility companies  
10 filed an agreement map such as you have been referring to  
11 in Exhibit 2 that was attached to Exhibit 2, I believe.  
12 The one that's up there. Those type of maps. They  
13 submitted those to the Commission. I think that's Exhibit  
14 3. They submitted those to the Commission.

15 The staff people at that time of the Commission  
16 then drew up what was the official electric territory map,  
17 and they took those to a hearing and everybody said -- you  
18 know, had a chance to observe, look at them, and they  
19 would agree yes or no. Sometimes they were amended after  
20 that and then the Commission would approve those.

21 Q. So the process that this map went through was that  
22 the electric utilities submitted maps to the Commission in  
23 1975, 1976, that area; correct?

24 A. Right.

25 Q. And then as to this specific map, Exhibit 1, there

1 would have been a hearing; is that correct?

2 A. There were hearings in half a dozen towns across  
3 the state.

4 Q. As I understand it, the Commission would have  
5 basically said to the parties take a look at this map,  
6 tell us it's correct; is that correct?

7 A. That's -- from reading the transcripts from those  
8 hearing, that's my understanding how it was done.

9 Q. All right. Then after the map was looked at and  
10 the parties said it was correct, the Commission then  
11 entered an order approving that as the map; is that  
12 correct?

13 A. That's correct.

14 Q. And that map is the map that's contemplated by  
15 SDCL 49-34A-44; is that correct?

16 A. I don't have 44 memorized, but I assume that's  
17 what you've got. Correct.

18 MR. GERDES: That's all I have.

19 MS. WIEST: Go ahead.

20 MR. CHRISTENSON: May I proceed, Your Honor?

21 MS. WIEST: Yes.

22 CROSS-EXAMINATION

23 BY MR. CHRISTENSON:

24 Q. Let's see, Mr. Bettmann, is it your -- first of  
25 all, on Exhibit 1, would you point out to the Commission



1 where on this map, if at all, it states the distances  
2 between points and how far this is and that is on this  
3 map?

4 A. There's a scale down in the lower right-hand  
5 corner. That's the only reference to distances on there.

6 Q. Okay. So the only legend on this map is in the  
7 lower right-hand corner; is that right?

8 A. Right.

9 Q. Now, is it your understanding that, for instance,  
10 all the lines, the blue lines on this map are drawn  
11 exactly to scale based on that legend there?

12 A. As close as you can draw them considering the  
13 scale. It's -- he didn't use a very sharp pencil.

14 Q. What's your understanding how accurate are these  
15 where these boundaries are supposed to be?

16 A. My experience they're -- I usually go back -- when  
17 I look at these, I always hope there's a written agreement  
18 to go along with them because they're not always what you  
19 would assume to be a quarter line or 15th line. It  
20 doesn't always scale out to that. And if there's absent  
21 an agreement, that's what you assume they are, unless  
22 without any other knowledge, that's what I would go by.

23 Q. But it's not your testimony today, is it, that  
24 these blue lines on this map are accurate, down to the  
25 foot?



1 A. Well, obviously not because of the scale.

2 Q. Yes. In fact, have you ever taken that contract  
3 and gone through this, the description, and worked that  
4 out on the map?

5 A. Yes, I did.

6 Q. Which ones did you do?

7 A. Which part as far as which sections?

8 Q. Yes.

9 A. I looked at all of them along that north tier.

10 Q. Okay. So you actually, with this map, went  
11 through the first three calls?

12 A. Right.

13 Q. Okay. And what you did, is it not, is you went to  
14 the center of the north line; is that correct, the north  
15 section line?

16 A. Yeah, right.

17 Q. Okay. And then on this map what did you do next?

18 A. That's where I got confused because it went down  
19 to the center point, and that's, you know -- but then when  
20 on the third line where it says it goes east on the half  
21 mile line, obviously looking at it, it's not a full  
22 section so it's not a half mile line in my mind.

23 Q. So this map really didn't do you any good, did it?

24 A. That's why we're here, I guess. They were asking  
25 about it. I said I'm not sure.

1 MR. CHRISTENSON: All right. I have nothing  
2 further.

3 MS. WIEST: Ms. Cremer?

4 MS. CREMER: I have nothing.

5 MS. WIEST: Commissioners?

6 COMMISSIONER NELSON: I have nothing.

7 MS. WIEST: Mr. Bettmann, is there any written  
8 Commission order approving this contract and map?

9 THE WITNESS: I'm not sure there is.

10 MS. WIEST: Would we have it?

11 THE WITNESS: Probably have it on file, in my  
12 files.

13 MS. WIEST: Would there be any -- do you have any  
14 knowledge as to whether there's any transcript of perhaps  
15 a hearing that would be held on this particular contract?

16 THE WITNESS: Probably a microfilm, it's probably  
17 on microfilm. I'm not sure we have complete transcripts  
18 of all the hearings that were held. If we do have one  
19 it's on microfilm.

20 MS. WIEST: Would there be any objection if we  
21 could get the actual Commission decision approving this as  
22 an exhibit?

23 MR. GERDES: We'd move that the Commission take  
24 judicial notice of the proceedings approving the Exhibit 1  
25 and the contract.

1 MS. WIEST: And if we assume we could, if we could  
2 get the Commission decision and give that to everyone,  
3 would there be any objection to putting that in as an  
4 exhibit?

5 MR. GERDES: None.

6 MR. CHRISTENSON: No, Your Honor.

7 MS. WIEST: Could we put that as exhibit -- or 15?  
8 So that would be the written Commission decision approving  
9 this particular contract and map.

10 THE WITNESS: It might not specifically say this--

11 MS. WIEST: May be just one.

12 THE WITNESS: If I remember the wording right and  
13 a lot of those -- I'm not specific for Sioux Falls, but a  
14 lot of times it will -- they would take a county map and  
15 they would say everybody -- you know, have everybody look  
16 at it and then ask are they in agreement. They would say  
17 yes, and then they would go to the next one, and then at  
18 the end they would approve them all.

19 So they wouldn't go map by map necessarily. It  
20 would be all the maps for that area in that, you know, the  
21 Sioux Falls they did, I think, Minnehaha, but they Turner  
22 and Lincoln and Hutchinson and whatever other counties  
23 around there. And they would approve them all in one  
24 item, not specific exhibits.

25 MS. WIEST: Can you get it today, do you think?

on

1 THE WITNESS: If I have the agreement in my files  
2 I can get it today. If it's on microfilm, it would be  
3 later in the day.

4 MS. WIEST: Right. Any other questions?

5 MR. RISLOV: Martin, did you draw the blue lines  
6 in on this map?

7 THE WITNESS: No, I didn't,

8 MR. RISLOV: Were they there? Does someone else  
9 do it?

10 THE WITNESS: I believe my predecessor, Larry  
11 Gunderson, was involved in drawing these; and I don't know  
12 who helped him with it, but he's the one I know of.

13 MR. RISLOV: So were these blue lines drawn at the  
14 culmination of the hearing which established these  
15 boundaries?

16 THE WITNESS: I'm assuming they were drawn before  
17 they took these maps to the hearing.

18 MR. RISLOV: And this is what was approved by the  
19 Commission?

20 THE WITNESS: Right.

21 MR. RISLOV: What do you believe the boundary line  
22 is?

23 THE WITNESS: Like Mr. Berkland says, depends upon  
24 if you interpret it literally or if you do it as a  
25 surveyor. You know, you've got -- I had the same problem



1 that he has. If you read it, it's poorly written, okay?  
2 I agree with him, it's poorly written. And if you, you  
3 know, literally center point, you would divide it in  
4 fours.

5 MR. RISLOV: What about the map?

6 THE WITNESS: The map, it's drawn to the center,  
7 the physical center of the section.

8 MR. RISLOV: Where do you believe the service  
9 territory boundary is?

10 THE WITNESS: Then we have to go to the agreement.  
11 If you assume the agreement says go by the map, you know,  
12 then it's the center. There's -- it -- I guess I'd have  
13 to say the physical center, you know, there's some  
14 other -- I don't know if I'm/ there's some guidance in the  
15 law on how the Commission was supposed to divide these up  
16 when the companies couldn't agree. You divide it in half.

17 It doesn't say go to the section line or half mile  
18 line. You know, when there's two lines that are -- if a  
19 company had a line on the north boundary line, and the  
20 other company had -- there's a south section line, north  
21 section line, you know, they were supposed to go halfway  
22 if they couldn't agree. And that was they tried to draw  
23 these. I'm sure that's what they tried to do in a lot of  
24 these, they went the halfway and that's what they've  
25 proposed and that's how they came up with some of these.



1 MR. RISLOV: There were questions asked before --  
2 I can't remember by whom. But how accurate are these maps  
3 with regard to scale? Do you recall those questions?

4 THE WITNESS: Yes.

5 MR. RISLOV: Well, following along that line, if  
6 you look at this line drawn, who's boundary do you believe  
7 this supports, Southeastern's or Xcel's?

8 THE WITNESS: I would support Xcel's.

9 MR. RISLOV: That's all I have.

10 MS. WIEST: Any redirect?

11 MR. GERDES: I just have one question. And this  
12 is just a follow-up to Mr. Rislov's question.

13 REDIRECT EXAMINATION

14 BY MR. GERDES:

15 Q. But if you look at the map that was attached to  
16 the contract, Exhibit 2, and if you scale out that  
17 east/west line that forms the north/south boundary, it  
18 depicts the centerline, does it not, on that map that was  
19 attached to the contract?

20 A. The physical center, yes.

21 MR. GERDES: That's all I have.

22 MS. WIEST: Any further cross?

23 MR. CHRISTENSON: Yes. I'd like Mr. Bettmann to  
24 come up to this exhibit with me and bring Exhibit 2,  
25 please.

RECROSS-EXAMINATION

BY MR. CHRISTENSON:

Q. For the Commission, would you go to the page where the calls are pertaining to this? Now, would you take the Commission through each step of that and exactly how you did it?

A. I'll have to admit I had some of the same confusion as to where the north centerline. But when you read the next one, it says south of the center point, obviously to mean you have to start at the what I would call the northeast quarter corner on the north section line. You go south to the center point, which if you scale it, you know, it's -- but it gets confusing when it then says go east along the half mile line. This since this is a short section, it's not true half mile line.

Q. Where is the half mile line on this?

A. Surveying experience, it's approximately West 61st Street.

MS. CREMER: Martin, just for the record, I think you're going to need to be more distinctive as to that top line and that bottom line because you're pointing but the court reporter, you know, well, there's a thick line on there and there's two thin lines and a top line, I mean. But when you're pointing at them, I think you guys need to be a little more specific.

1           A.    It says when you go south to the center point,  
 2 that would be down here on this thick line that is shown  
 3 here. This would be if you go by the literal description.  
 4 But then on the next line it says the east, then east  
 5 along the half mile line.

6           That, to me, this thick line is not the half mile  
 7 line based on it actually should be to the 640 feet north  
 8 of this centerline, which would be approximately 61st  
 9 Street, which is this line up here.

10          Q.    So let's just assume that that's right, this is  
 11 the half mile line. Then isn't it true that this line,  
 12 this bold line, should be from this point east; isn't that  
 13 correct?

14          A.    Where it should be, I don't know, because, you  
 15 know, I don't even know if the person who wrote this drew  
 16 the map.

17          Q.    Then you really can't testify that this favors  
 18 Xcel, can you?

19          A.    Only if you go by if you say that the contract --  
 20 where it says in the contract you have to go by the map  
 21 and forget about the written description.

22          Q.    But if you use the legal description, it's true,  
 23 is it not, that it doesn't favor Xcel; is that correct?

24          A.    That's correct, by the legal description.

25               MR. CHRISTENSON: I have nothing further.

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MS. WIEST: Ms. Cremer?

MS. CREMER: I have nothing.

MS. WIEST: Commissioners?

COMMISSIONER NELSON: I have one. Martin, you're saying -- I want to be sure I'm understanding what you say. You say, though, and I agree, that the contract says the map controls this decision. I mean two parties agree. And the contract, their agreement was that the map would rule. And if the map was the governing factor, do you believe it favors Xcel's position?

THE WITNESS: Correct.

COMMISSIONER NELSON: Thank you.

MR. GERDES: One final question.

FURTHER REDIRECT EXAMINATION

BY MR. GERDES:

Q. If a lay person was looking at the map, didn't have the written description in front of them, just was looking at the map -- and I'm talking about the one that's attached to Exhibit 2, this one -- and they didn't know Section 7 was a short section, then that description would be understandable, wouldn't it, that's in the contract? If they drew the description, if they wrote the description based upon the map, then you could understand how that description got written, couldn't you, if they didn't know that seven was a short section?



1 A. Right.

2 MS. WIEST: Any further questions? Thank you.

3 COMMISSIONER NELSON: I have one more. Martin,  
4 are you also saying that you believe that the map that the  
5 Commission approved was approved in agreement with the  
6 directives we had when we approved those maps?

7 THE WITNESS: I believe so, that's right, yes.

8 COMMISSIONER NELSON: Thank you.

9 MS. WIEST: Any further witnesses, Mr. Gerdes?

10 MR. GERDES: I have one witness very briefly. Jim  
11 Wilcox.

12 **JIM WILCOX,**

13 called as a witness, being first duly sworn,  
14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. GERDES:

17 Q. Would you state your name, please?

18 A. Jim Wilcox.

19 Q. Where do you reside?

20 A. Sioux Falls, South Dakota.

21 Q. Where do you work?

22 A. Xcel Energy.

23 Q. What is your occupation, or what is your job  
24 position?

25 A. I'm a manager of government and regulatory

1 affairs.

2 Q. Commissioner Schoenfelder asked what the practice  
3 was with respect to this, I'll just call it the area in  
4 dispute now. I refer you to Exhibit 5. What is your  
5 understanding of whether there was ever any dispute as to  
6 service to that area in the past?

7 A. I am not aware of any.

8 Q. And so as far as if there was or was not a  
9 practice of adhering to particular lines, would that be  
10 because there's no service in that area at this point, or  
11 wasn't?

12 A. I believe that to be the case, that this is a farm  
13 field that's now being developed.

14 MR. GERDES: That's all I have.

15 MR. CHRISTENSON: No questions.

16 MS. WIEST: Ms. Cremer?

17 MS. CREMER: No.

18 MS. WIEST: Commissioners?

19 MS. WIEST: So in the disputed area there's no  
20 electrical service currently in that area; is that  
21 correct, in the entire disputed area? For example, if you  
22 drew the line on the 61st Street, as I believe  
23 Southeastern is contending that entire area is unserved?

24 THE WITNESS: I'm not aware of service in that  
25 area between 61st Street and West Bakker Park Drive at the

1 moment, right.

2 MS. WIEST: Thank you.

3 COMMISSIONER SCHOENFELDER: Now, wait, you  
4 confused me. West what Drive?

5 THE WITNESS: Well, between 61st Street and West  
6 Bakker Park Drive. It follows the centerline going east.  
7 Is essentially a farm field and about to be developed.

8 COMMISSIONER SCHOENFELDER: Okay. What about up  
9 around Baneberry Avenue? Looks like there's lots there.  
10 Those are undeveloped lots that bump up against Marion  
11 Road? It looks like it's over in the northeast side of  
12 that area.

13 THE WITNESS: Commissioner, I'm not certain what's  
14 there now is what I'm saying.

15 COMMISSIONER SCHOENFELDER: But does NSP have any  
16 electrical services out there?

17 THE WITNESS: We serve north of 61st Street and  
18 have facilities, or preparing to bring facilities in to  
19 serve those.

20 COMMISSIONER SCHOENFELDER: You're preparing to be  
21 or you actually have facilities there now?

22 THE WITNESS: I don't know the answer to that  
23 question, Commissioner.

24 COMMISSIONER SCHOENFELDER: Thank you.

25 MS. WIEST: So you don't know if those are houses

1 there?

2 THE WITNESS: I do not.

3 MS. WIEST: Thank you. Any other questions?

4 COMMISSIONER SCHOENFELDER: I want -- does the  
5 surveyor know whether there are houses there along  
6 Baneberry?

7 MR. BERKLAND: In that area through the apartment  
8 complex.

9 MS. WIEST: Start all over again.

10 MR. BERKLAND: So in the area in through here  
11 there's an apartment complex that's going up.

12 COMMISSIONER SCHOENFELDER: In there where? Be  
13 more specific.

14 THE WITNESS: It would be north of 61st Street and  
15 south of 57th Street and you know --

16 COMMISSIONER SCHOENFELDER: Between Marion Road?

17 THE WITNESS: We're not doing it ourselves, but I  
18 know as I drive by there you can see there's apartments  
19 going up.

20 COMMISSIONER SCHOENFELDER: Along Baneberry Avenue  
21 when you go down and over towards Marion Road, are those  
22 developed lots or just platted lots?

23 THE WITNESS: I would assume they're platted.

24 COMMISSIONER SCHOENFELDER: That's what I need to  
25 know. Thank you.



1 MS. WIEST: Any other witnesses, Mr. Gerdes?

2 MR. GERDES: No. NSP rests.

3 Just a minute, I withdraw that rest. Your Honor,  
4 we had had a conference yesterday and you indicated that  
5 you felt that NSP had the burden of proof, and so we've  
6 participated in this hearing with that assumption.

7 Now having heard Southeastern's position in this  
8 matter, I would, for the record, suggest that according to  
9 49-34A-61, the burden of proof is on any person asking for  
10 a modification or a vacation of a Commission order.

11 We would submit that if, in fact, Southeastern is  
12 contending, as they apparently are in this case, that the  
13 Commission's official map is incorrect, then it should be  
14 their burden to prove that it is incorrect.

15 And I just I want that on the record, and I'd like  
16 the Commission to rule on that as to who has the burden of  
17 proof on that issue.

18 MS. WIEST: Do you have any response, Mr.  
19 Christenson?

20 MR. CHRISTENSON: Yes. First of all, it's our  
21 position that there's no conflict with the description.  
22 We don't need to go to the map. Secondly, we're not  
23 asking that anything be modified, an order be modified.  
24 Xcel filed a petition and here we are simply here  
25 responding to it. I think it's quite unusual in a case

1 like this that there would be any burden on us to go  
2 forward and prove Xcel's case.

3 We're not asking that, and the pleadings clearly  
4 show that. We're not asking for a modification of  
5 anything. We're simply here responding to a conflict that  
6 apparently Xcel has foreseen. So I think that the proper  
7 way is for Xcel to go forward. They've done that, and now  
8 I think it's our turn.

9 MS. WIEST: At this point I would say since NSP  
10 did file this, generally the burden of proof is on the  
11 filing party. And until such time as I hear the witnesses  
12 from Southeastern, it may be possible that I could change  
13 that ruling depending on their position, but at this time  
14 I would say the burden is still on NSP.

15 MR. GERDES: Then one other item, Your Honor, and  
16 that is simply earlier I had made a request that the  
17 Commission take judicial notice of the Commission's  
18 records as it relates to the approval of the service  
19 territory agreement, Exhibit 2, and of the official map,  
20 Exhibit 1, and we would renew that request that the  
21 Commission take judicial notice of those maps.

22 MS. WIEST: Would that be something beyond the  
23 Commission order approving it?

24 MR. GERDES: Yes, because I think we were talking  
25 about the records too.

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MS. WIEST: That would include any possible transcripts; is that correct?

MR. GERDES: Yes.

MS. WIEST: Is there any objection to that, Mr. Christenson?

MR. CHRISTENSON: I think the body here can take judicial notice of documents that are on file in a public place that are common knowledge, easily accessible to the public. So in that sense, yes, I would concur with the map, the order. I object to taking judicial notice of any testimony that isn't filed that we haven't seen first.

MS. WIEST: Yeah, I would, I guess until such time as -- I don't know even know if there is any transcript testimony on this particular area. If one of the parties, you know, finds the transcript or asks the Commission to do that, then I think they could perhaps submit that and try to get that in, but only after the other party has a chance to look at it. Anything further?

MR. GERDES: No. Xcel rests.

MS. WIEST: Mr. Christenson, you may call your first witness.

MR. CHRISTENSON: If we could perhaps have just five minutes to set up, we're going to use the overhead and view some exhibits. It may take a little while.

(AT THIS TIME A NOON RECESS WAS TAKEN.)

1 (EXHIBITS NO. 15 AND 16 WERE MARKED FOR  
2 IDENTIFICATION.)

3 VICE-CHAIRMAN NELSON: Then we can start?

4 MS. WIEST: You may call your first witness.

5 MR. CHRISTENSON: Thank you. To begin, I would  
6 just like to offer into the record Exhibits 6 through 14.  
7 Mr. Gerdes and I have previously stipulated to these  
8 exhibits.

9 MR. GERDES: I have no objection as to foundation  
10 as to Exhibits 6 through 14.

11 MS. WIEST: Ms. Cremer?

12 MS. CREMER: I have no objection.

13 MS. WIEST: Exhibits 6 through 14 have been  
14 offered and received.

15 MR. CHRISTENSON: I also would like to propose  
16 Exhibit 16, which is a partial, a portion of Exhibit B,  
17 which is reference to in the contract which is Exhibit 2.  
18 This is just -- it isn't the entire Exhibit B, but it is a  
19 portion of it which we would like to use.

20 MS. WIEST: Any objection?

21 MR. GERDES: I have no objection as to foundation  
22 as to Exhibit 16 as being a portion of the Exhibit B  
23 attached to Exhibit 2.

24 MS. WIEST: Ms. Cremer?

25 MS. CREMER: I have no objection.