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Steve Kolbeck, Vice Chair
Dustin Johnson, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.puc.sd.gov

Capitol Office
(605) 773-3201
1-866-757-6031 fax

Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

August 28, 2008

E-Filing
Patty Van Gerpen
SDPUC
500 East Capitol
Pierre SD 57501

**RE: EL08-020 - In the Matter of the Petition of East River Electric Power Cooperative, Inc.
for a Declaratory Ruling on 115 kV Transmission Line Design.**

Dear Ms. Van Gerpen:

Enclosed please find staff's response to East River's River Petition for a Declaratory Ruling along with the Certificate of Service.
Should you have any questions please contact me.

Sincerely,

/s/ Karen E. Cremer
Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission

KEC: amg

Enclosure

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

IN THE MATTER OF THE PETITION OF))	STAFF'S RESPONSE TO EAST
EAST RIVER ELECTRIC POWER))	RIVER'S PETITION FOR A
COOPERATIVE, INC. FOR A))	DECLARATORY RULING
DECLARATORY RULING ON 115 kV))	
TRANSMISSION LINE DESIGN))	EL08-020

COMES NOW Commission Staff (Staff), by and through its attorney, Karen E. Cremer, and hereby responds to East River Electric Power Cooperative, Inc.'s Petition for Declaratory Ruling filed on July 7, 2008.

OVERVIEW

East River Electric Power Cooperative, Inc. (East River) has requested a Declaratory Ruling with regard to its construction of a 115 kV transmission line. The Petition for Declaratory Ruling states the issue as follows:

Does a 115 kV transmission line generally running parallel to the road right-of-way and designed to site the poles in two locations, i.e., on the private side and on the public side alongside the road right-of-way line, with the poles located to generally touch the road right-of-way, meet the standard of "following" section lines, property lines, roads, highways or railroads contained in SDCL 49-41B-2.1(2)?

East River is seeking a ruling on the appropriate interpretation of the phrase "follow section lines, property lines, roads, highways or railroads" when, as described in its Petition, the transmission line "follows" the road in that the transmission line is generally parallel to the road center line and runs alongside and generally touches the road right-of-way. The project, as described in the Petition filed by East River, consists of a new 115 kV overhead electric transmission line that is not a reconstruction or modification of existing transmission lines. The transmission line will run parallel to, or generally parallel to the center line of county or township roads for its route, except for portions at the beginning and end of the route where the transmission line commences and terminates. The pole structure is single pole design except

for locations where a different structure design is needed, like two or three pole design, due to special engineering circumstances such as crossing under an existing transmission line. When placed in the ground, the poles are approximately two feet in width at or near the surface level. The total distance of the beginning and end portions of the transmission line which do not follow county or township roads (or section lines, property lines, roads, highways or railroads), plus the segments that have two or three pole design, will total less than one mile in length. Except for the beginning and end portions of the transmission line and where two or three pole design is used, East River will locate the transmission line and poles on the private side of the right-of-way or the public side of the right-of-way and will follow the edge of the road right-of-way.

East River believes the exception to SDCL 49-41B-2.1(2) is met and the transmission line does not require Commission siting approval therefore East River need not obtain a permit to construct from the Commission prior to construction and operation of its facilities. East River seeks a Declaratory Ruling from this Commission to affirm such an interpretation of the applicable statutes.

ARGUMENT AND AUTHORITIES

Pursuant to SDCL 49-41B-1, the Legislature has found that energy development in South Dakota significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. To ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and its citizens, the Commission was given permitting authority for many types of facilities, including transmission lines, as defined in SDCL 49-41B-2. Further, SDCL 49-41B-4 requires all utility companies to first obtain a permit issued by the Commission before it may begin construction of a facility in South Dakota on or after July 1, 1979.

A transmission facility is defined in SDCL 49-41B-2.1(1) and (2). The statute defines a transmission facility as either (1) an electric transmission line and associated facilities with a

design of two hundred fifty kilovolts or more; (2) an electric transmission line and associated facilities with a design of one hundred fifteen to two hundred fifty kilovolts, if more than one mile in length of the transmission line does not follow section lines, property lines, roads, highways or railroads, or is not reconstruction or modification of existing transmission lines and existing associated facilities located on abandoned railroad rights-of-way.

East River is seeking a ruling on the interpretation of the phrase “follow section lines, property lines, roads, highways or railroads.” The Commission addressed this issue in Docket EL98-004, *In the Matter of the Petition for Declaratory Ruling Filed by the City of Pierre Regarding a Transmission Line*; and Docket EL00-030, *In the Matter of the Petition for Declaratory Ruling of West River Electric Association, Inc. on Whether a Proposed Transmission Line Meets the Definition of SDCL 49-41B-2.1*. (See also *In the Matter of the Petition for Declaratory Ruling by the Mayor of the City of Flandreau on Whether a Proposed Transmission Line Meets the Definition of SDCL 49-41B-2.1*, Docket EL99-010 wherein the Commission found that the proposed project was exempt from the Commission’s siting jurisdiction as the entire line was to be installed within the existing right-of-way with the exception of the guying equipment.) In the *City of Pierre and West River* dockets, the Commission required the applicants to obtain siting permits for 115 kV electric transmission lines. In the *City of Pierre* case, the exact number of feet the proposed transmission line would be from a property or section line had not been determined. In its Conclusions of Law No’s. 4, 5, and 6, the Commission stated:

4. In order to decide whether the proposed transmission line falls within the exception to the siting statute, the Commission must interpret the word "follows." The Commission finds that a reasonable interpretation of the word "follows" as it pertains to section lines means that the transmission line must be located within the section line public highway. Existing along every section line is a public highway that extends 33 feet on each side of the section line. SDCL 31-18-1. The Commission finds that since every section line has an already existing public highway 66 feet wide, it is reasonable to expect that following a section line means it must be located within these 66 feet. It is also reasonable to expect that a person who owns property that borders a section line will be aware that

utilities, such as transmission lines, may be located within the 66 foot section line public highway.

5. The Commission similarly finds that following roads or highways means the transmission line must be located within the easement or right-of-way of the road or highway. Again, it is reasonable to assume that a person who owns property that borders a highway or road is aware of the possibility that utilities, such as transmission lines, may be placed within the road or highway easement.

6. The Commission further finds that following property lines means the transmission line must be located on the property line. The Commission finds this is a reasonable interpretation because, generally, a person's property line does not have an existing easement running on the line. Placing a 115 kV transmission line even 12 feet from someone's property line could have a detrimental effect on that property especially if there were a house located near that property line. The City should be required to prove that the construction of a 115 kV transmission line which could be up to 20 feet from a property line will not pose a threat of serious injury to the social and economic condition of inhabitants in the siting area. See SDCL 49-41B-22(2). The affected inhabitants should be given the opportunity to voice their concerns to the Commission.

In East River's case, the transmission line is, except for the beginning and end of the route, at all times running alongside and the poles are located to generally touch or, recognizing occasional minor variances that result during construction, be within inches of touching, the road right-of-way.

In the *West River* case, the Commission required siting for a proposed 115 kV transmission line. The Commission based this on a finding that "the proposed transmission line would be 19 feet outside of the existing 66 foot road right-of-way." This 19 foot design is significantly different than East River's plans to run the line alongside the road right-of-way.

The language in the statute of "following section lines, property lines, roads, highways or railroads" was most likely left vague by the South Dakota legislature given the physical impracticality of locating transmission lines physically "on" the relevant section lines, roads, highways or railroads. Terms such as "close to," "nearby," "generally follow," or "as close as practical and reasonable," appear in similar statutes and case law on the issue in other states. All these terms support the conclusion that "following" does not mean literally "on" the section lines, roads, highways or railroads.

The Commission does not have siting jurisdiction if the transmission line is placed in the public right-of-way, whether it be following section lines, roads or highways, so long as less than 1 mile of the transmission line is outside of the public right-of-way. See *City of Pierre* Conclusions of Law 4 and 5.

There are two questions that remain unanswered however. One pertains to a transmission line that runs parallel to section lines, roads or highways for more than a mile on private land. Staff believes that a common sense approach would be to find that a reasonable interpretation of the word “follows” in this case means that the transmission line must be located in close proximity to the outer edge of the public right-of-way.

The second question deals with what it means to follow a property line. As noted in the *City of Pierre* matter, generally a person's property line does not have an existing easement running on the line. Placing a 115 kV transmission line anywhere other than right on the property line could have a detrimental effect on that property especially if there were a house located near that property line. The applicant should be required to prove that the construction of a 115 kV transmission line that is not placed on the property line will not pose a threat of serious injury to the social and economic condition of inhabitants in the siting area. See SDCL 49-41B-22(2). The affected inhabitants should be given the opportunity to voice their concerns to the Commission. See Conclusion of Law 6.

CONCLUSION

The orderly development of energy facilities in South Dakota is clearly the impetus for SDCL 49-41B-2.1. The need for regulatory oversight of transmission lines is required so that the public's interests are protected. Staff recommends that based on the statutory language of SDCL 49-41B-2.1(2), the Commission should find that a reasonable interpretation of the word “follows” means a transmission line placed in the public right-of-way, whether it be following section lines, roads or highways, that the Commission does not have siting jurisdiction so long

as less than 1 mile of the transmission line is outside of the public right-of-way. As for a transmission line that runs parallel to section lines, roads or highways for more than a mile on private land, Staff recommends that the word “follows” means that the transmission line must be located in close proximity to the outer edge of the public right-of-way. And finally, Staff recommends that when siting a transmission line to follow a property line that the applicant be required to prove that the construction of a 115 kV transmission line that is not placed on the property line will not pose a threat of serious injury to the social and economic condition of inhabitants in the siting area.

Dated this 28th day of August, 2008.

/S/ Karen E. Cremer
Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that a copy of Staff’s Response to East River’s Petition for Declaratory Ruling was served on the following by sending the same to him electronically on this the 28th day of August, 2008.

Mr. Robert K. Sahr
bsahr@eastriver.coop

/S/ Karen E. Cremer
Karen E. Cremer
Staff Attorney