

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

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In the Matter of the Complaint by Northern  
States Power d/b/a Xcel Energy against  
Southeastern Electric Cooperative, Inc. for a  
Violation of the Service Territory Laws

Docket No. EL11-025

**Commission Staff's  
Post-Hearing Brief**

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**I. INTRODUCTION**

The Staff for the South Dakota Public Utilities Commission (Staff), by and through the undersigned attorney, submits this post-hearing brief in the matter of the complaint filed by Northern States Power d/b/a Xcel Energy (Xcel) against Southeastern Electric Cooperative, Inc. (Southeastern). Throughout this document, Xcel and Southeastern will be jointly referred to as the Parties.

**II. FACTS & BACKGROUND**

On September 21, 2011, Xcel filed a Complaint with the South Dakota Public Utilities Commission (Commission) alleging that Southeastern violated South Dakota service territory laws by extending infrastructure to an area located in Xcel's service territory. The disputed area is a development known as "Whispering Woods Addition" in Section 7 of Township 100 North, Range 49 West – Springdale Township (Section 7).

On October 3, 2011, Southeastern filed a Response to Xcel's complaint asserting no service territory violation occurred as the service rights in the disputed location were transferred to Southeastern pursuant to an agreement between the Parties in Commission Docket EL09-021 (Resp. at 2). Xcel believes the EL09-021 territory exchange was inadvertently based on a territory line ½ mile north of 69th Street rather than the midpoint of Section 12 of Township 100 North, Range 50 West (Section 12) and this error was extended to Section 7. Due to this mistaken assumption, Xcel argues Section 7 was not altered by the 2009 agreement and the territory division remains controlled by the original territory agreement signed by the Parties on January 28, 1976 (Compl. at 1).

Sections 7 and 12 are located in the northernmost tier of sections in Lincoln County and mark the dividing line of Lincoln County and Minnehaha County. Like other sections in this northern tier, Sections 7 and 12 are not the standard area of one square mile. Instead, they represent fractional sections. Specifically, they measure less than one mile distance between the southern to northern borders. Xcel believes this fact led to the error in EL09-021. Southeastern disagrees any mistake was made as Xcel representatives initiated the exchange which was fully negotiated by the Parties. (Resp. at 2).

### **III. STAFF RECOMMENDATION**

Pursuant to the arguments set forth in this Post-Hearing Brief, Staff asserts the current territory boundary in the western half of Section 7 is located at a point equidistant from its northern and southern borders. Staff believes a mistake occurred in the negotiation process that led to the EL09-021 filing. Staff argues Commission approval of the EL09-021 joint filing did not alter territory in Section 7 as the Parties did not make this request, or alternatively the Parties did not properly inform the Commission of this request in the joint filing. Staff feels Xcel traded territory to Southeastern in Section 12 and has received no benefit in return as a result of the mistaken assumption in EL09-021. This mistake should not be extended to Section 7. As such, Staff recommends the Commission find in favor of Xcel in the current dispute.

### **IV. ARGUMENT**

Staff will discuss the two underlying arguments advanced by the Parties in this dispute. (1) Whether an inadvertent mistake occurred during the negotiation process of EL09-021, and (2) Whether Commission approval of the 2009 agreement in EL09-021 change the service territory boundary of Section 7.

#### ***A. Mistaken Assumption of the Existing Boundary Line***

Until 2009, the territory divisions in Sections 7 and 12 were controlled by the original territory agreement titled *Contract in the Matter of the Establishment of an Assigned Service Area*, dated January 28, 1976 (Original Agreement). Included with the Original Agreement are a map, Exhibit A (Original Map) and a legal description corresponding to the map, Exhibit B (Original Description). Xcel asserts the territory boundary in Section 7 is located at a point equidistant

from the northern and southern border pursuant to the Original Agreement. Southeastern states the Parties fully agreed the territory boundary lay ½ mile north of the southern border during 2009 negotiations.

After thoroughly reviewing the Original Map and performing physical and digital measurements with Arc Map GIS software, Staff believes the territory boundary depicted on the Original Map is clearly visible. The line representing the territory division in the eastern half of Section 12 and the western half of Section 7 of the Original Map is located at a point equidistant from the northern and southern borders. However, Staff believes the Original Description is ambiguous and is open to interpretation that does not correspond to the Original Map.

According to the testimony of Southeastern's witness, Mr. Tim Chance, if one follows standard surveyor terms, the Original Description places the territory division ½ mile north of the southern borders of Sections 7 and 12. This is due to the corrected measurements a professional surveyor applies to a fractional section. Results of the corrected measurements in Section 7 are reflected in the Subdivision Layout Map of the Whispering Woods Addition prepared by the professional consulting engineering and land surveyor company JSA (JSA Map).

In 2000, the Commission faced an issue very similar to the current dispute. Commission Docket EL00-026 involved the same Parties and was based on a disputed territory boundary in a fractional section on the northernmost tier of sections of Lincoln County. Although EL00-026 did not have the added element of the 2009 agreement, that decision is very relevant to the determination of whether an error occurred in the negotiations leading to the 2009 agreement.

In its EL00-026 Findings of Fact, the Commission found when traditional surveyor terms are applied to the Original Description, the description becomes ambiguous (Or. Pg. 2, Sec. 5). Furthermore, the Commission determined this ambiguity created conflict between the description and map. For resolution of this conflict, the Commission relied upon the Original Agreement's provision, if ever there is disagreement between the Original Map and Original Description, the Original Map will serve as controlling authority of the assigned service boundaries of the Parties (*See*, Original Agreement Pg. 2 -3).

Through the testimony of Mr. Chance, it is clear standard surveyor terms and practices were used during the 2009 negotiations to determine the existing boundaries of Sections 7 and 12 (*See* Tr. 23). In fact, the two maps relied upon by the Parties during negotiations were the JSA Map and the plat map of Oxford Addition included as Exhibit A in Docket EL09-021 (Tr. 28,

00065, 9-25). Although it appears the Parties may have reviewed the Original Map, they did not rely on it as the authority of territory division (Tr. 27, 00064, 3-5). Contrary to the specific language of the Original Agreement, the Original Description took precedent over the Original Map.

Staff does not suggest the Parties were careless in their actions, only mistaken. Clearly, the Parties relied upon credible data and made efforts to ensure proper determination of the existing boundary line. Nevertheless, even if both Parties agreed the existing territory boundary lay ½ mile north of 69th Street prior to 2009, this was an erroneous assumption. Mutual reliance on this mistaken assumption does not make it a reality, as the Original Map was the controlling authority at the time and Commission approval is required to change the territory division. As such, the Parties should have based their agreement on a territory division at a point halfway between the northern and southern borders in the eastern half of Section 12 and the western half of Section 7, and not a point ½ mile north of the southern borders.

On this issue, Staff agrees with Xcel as to the cause of this dispute being an inadvertent error in the assumed location of the existing territory boundaries of Sections 7 and 12 in the 2009 exchange agreement. The green line on the Original Map was labeled “existing territory boundary” and was meant to correspond with the territory lines prior to the 2009 territory exchange. The true territory boundary was approximately 600 feet south of the green line depicted on Exhibit A of the EL09-021 joint filing. As such, Staff believes Xcel traded territory in exchange for territory that never belonged to Southeastern and Xcel received no equivalent benefit from the exchange.

### ***B. Effect of the 2009 Agreement***

If the Commission finds the Parties mistakenly assumed the true location of the territory boundary in Sections 7 and 12 during EL09-021, then Commission approval of the 2009 agreement did not alter Section 7. If the Parties agreed the Section 7 boundary was located ½ north of 69th Street during negotiations, the Parties obviously did not intend the joint filing to serve as a request to alter that boundary to ½ mile north of 69th Street. From the testimony of Mr. Chance, it is clear the Parties did agree on this fact and the Parties had no intention that EL09-021 relate to Section 7 in any manner. Therefore, it cannot be argued the Commission's order approved this request, as the request was never made.

In addition, even if the Parties assert EL09-021 was meant to alter Section 7, Staff believes the joint filing submitted by the Parties was insufficient to inform the Commission of this request and the Commission's order cannot be said to have produced this outcome. Even a cursory review of EL09-021 shows the Parties requested only to exchange territory in the Oxford Addition of Section 12. When the joint filing is viewed as a whole, the tone is focused only on the Oxford Addition. Throughout the entirety of EL09-021, there is not a single reference to the Whispering Woods Addition.

Although the signed agreement references Section 7 in Part 6 of the legal description, Staff believes this was included only to "close" the modified boundary and return to the existing territory division. In support of this assumption, Staff points to Part 5 of the legal description, which states "[t]hen south along South Southeastern Avenue or 476th Avenue **to the existing boundary line** which is ½ north of 69th Avenue or 269th Street." (emphasis added). Although, this sentence recites the incorrect boundary location, it clearly shows the Parties intended to return to the existing boundary and did not request alteration of territory in Section 7.

The Parties included Exhibit A in EL09-021 to provide a visual depiction of the territory they intended to change. Exhibit A shows territory only of the Oxford Addition completely contained within Section 12. The Parties relied upon the JSA Map during negotiations, a plat map of the Whispering Woods Addition. It is simply unreasonable to assume they would include this map had they intended to request a change of territory in that subdivision.

Finally, Staff believes Xcel raised the most telling factor that no territory was swapped by the Parties in Section 7 during the December 6th hearing with respect to the relative sizes of territory to be traded (Tr. 9, 00020, 23-00021, 10). If one assumes the EL09-021 only altered service territory in Section 12, the traded areas appear relatively equal in size. This would pass 12 platted lots in the Oxford Addition to Southeastern in exchange for the land area relatively the same size of those 12 lots. On the other hand, if one assumes Section 7 was included in the swap under the 2009 agreement, Southeastern gains over 50 additional serviceable lots in the Whispering Woods Addition according to one map provided by Southeastern (*See* Hearing Exhibit SE #6).

Whether or not the submitting individual, Mr. Jim Wilcox of Xcel, did not participate in the negotiations of the 2009 agreement, this does not relieve the Parties of the joint obligation to submit appropriate documentation to inform the Commission of what is requested. If the cover

letter drafted by Mr. Wilcox was insufficient to properly translate the purpose of the 2009 agreement, it was the burden of both Parties to resolve this issue at the time of filing.

Dated this 3<sup>rd</sup> day of January 2012.

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