

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

IN THE MATTER OF THE COMPLAINT)	Docket No. EL11-025
FILED BY XCEL ENERGY REGARDING)	
A VIOLATION OF THE TERRITORY LAW)	
BY SOUTHEASTERN ELECTRIC)	SOUTHEASTERN ELECTRIC
COOPERATIVE, INC.)	COOPERATIVE'S POST-
)	HEARING BRIEF

Southeastern Electric Cooperative, Inc., [hereinafter referred to as "Southeastern Electric"] by and through its attorneys of record, submits this brief in support of its position following the hearing of this matter that was conducted on December 6, 2011. Please note that Hearing Transcript page references are based upon page numbers noted in the left-hand margins of each page of the condensed transcript.

This dispute involves the right to serve a portion of newly developing electrical service areas in the southeast portion of Sioux Falls, SD. Northern States Power Co., now known as Xcel [hereinafter referred to as "Xcel"], serves much of the city of Sioux Falls and the immediately surrounding areas. Southeastern Electric is a rural electric cooperative serving several counties in Southeastern South Dakota including those areas adjacent to the southern borders of Sioux Falls. The parties border each other as to defined service territories and regularly discuss, compromise, swap, and sometimes contest each other's territories.

In 2007, Xcel personnel approached Southeastern Electric personnel about initiating a territorial swap in the southeastern portion of Sioux Falls in an area near what is known as Oxford Estates. HT page 52, line 1. Southeastern Electric agreed to

participate in discussions concerning the potential territorial swap and, after negotiations, the parties submitted a joint request for Commission approval of a swap in 2009.

Southeastern Electric's Operations Manager, Tim Chance, became actively involved and led the negotiations on behalf of Southeastern Electric. Xcel made its first overture concerning the swap of this territory by Pam Osthus, its Customer Service Representative. However, the actual negotiation was primarily conducted on behalf of Xcel by Rollie Heidebrink, the Customer Service/Field Supervisor for Xcel. HT page 52, line 11. Neither Osthus nor Heidebrink was called by Xcel to offer testimony. While Xcel Manager James Wilcox submitted the joint request, the language of the agreement was approved by Xcel representative Larry Crosby. Crosby was not called to testify to the Commission either. Wilcox was not involved in the negotiations. HT page 19, lines 7-8; page 28, lines 10-18. He admits he has no idea of the understanding of the people that negotiated the agreement. HT page 35, lines 10-19. The Commission is necessarily left with the testimony of only Tim Chance as an active participant in the negotiations.

Chance has been involved with the operations of Southeastern Electric and its predecessors for over thirty-five years. He indicated that he was aware of the PUC's interpretation of the territorial boundary between Xcel and SEE arising from the 2000 litigation, reflected in PUC Docket EL00-026. HT page 66, line 8 and following.

Pursuant to that Decision and Order, he understood that the Commission concluded that in the corrective sections in dispute in 2000, the territorial division would be a line an equal distance between the north and south section lines of the parcel in question.

Because of that litigated ambiguity in the past, Chance was particularly careful in his

discussions with Heidebrink to make sure that any territorial description of this new area of development now in dispute would be precise and remove any ambiguity in the difference between center points as discussed in surveying terms and the center line as defined in the 2000 PUC Decision. See discussion beginning at HT page 52 through page 56, line 4.

At the hearing, the Commissioners heard Chance describe that he and Heidebrink specifically referred to and consulted a surveyor's map. SEE Exhibit 8. This map, dated May of 2006, identifies a specific location marked "center." Chance and Heidebrink specifically negotiated that the territorial line in what is now referred to as the "Whispering Woods Addition" would be from a point on Southeastern Avenue, which is one-half mile north of 69th Avenue, extending east to the corner of the identified Southwest Quarter of Section 7 as shown on SEE Exhibit 8. It is important to note that the language that the Xcel representative and Chance adopted specifically removed the ambiguity addressed in the PUC's 2000 Decision. Exhibit B to Staff Exhibit 10 at item 104 incorporated the language previously determined to be ambiguous. It refers to "the center point of Section 12." The parties to this dispute agreed to remove that potentially ambiguous language and define the divisions by a specific measurement of where the territorial line would be. They used the map that would be the most accurate portrayal of the area. HT page 79, lines 4-17. Following the negotiations, the parties jointly reduced the agreement to writing.

On October 23, 2009, the Xcel Manager, Wilcox, after specifically asking his staff if the information concerning the identified "existing boundary line" was correct,

submitted the joint proposal to the PUC. HT page 39, lines 9-17; HT page 42, lines 11-15. His letter acknowledges a number of things. First, this agreement is a request to “modify existing service territory boundaries.” Second, Wilcox provided a map that, once adopted, permanently amended the map involved in the 1976 initial territorial division. His letter specifically notes that the map has a green line depicting “the existing service territory boundary line.” While Wilcox would now offer the PUC a different explanation that somebody must have been mistaken, there is no question that the green line drawn on Exhibit A (page 3) to the joint request marked as Exhibit Staff 10 extends straight east from the identified existing boundary line. Following this initial 2009 submission, the PUC staff asked Wilcox to clarify the measurements involved in the joint request. HT page 31, line 24 to page 32, line 22. Wilcox, on behalf of Xcel, complied providing exact measurements, as well as providing an expanded version of the map. See SEE Exhibit 3. His second map submission to the PUC does two things. First, it once again confirms his understanding of the “existing boundary line” between the territories of these two providers. Furthermore, it extends the line, this time apparently in yellow as opposed to green, straight east of the existing boundary line into Section 7, now being disputed. Both of the maps submitted were generated and submitted by Xcel.

As noted, an additional map was used by the negotiators to the agreement. SEE Exhibit 8 is not a map that Southeastern Electric prepared. It was prepared by a surveyor known to both Xcel and SEE. SEE Exhibit 8 was specifically used and discussed by the parties during the negotiation. Chance described that he knows the difference between the geographic centers of a plat of land, as opposed to the corners of a section. The

geographic point identified by the parties as the northwest corner of the Southeast Quarter of a section must by definition also be the northeast corner of the Southwest Quarter. There can only be one corner point shared by the quarters of a section no matter what the dimensions of the section are.

Following the joint submission, the PUC implemented the parties' exact request in its Order in Docket EL09-021. HT page 28, line 20 to page 29, line 14. By reference to the maps submitted to the PUC with the joint request (Staff Exhibit 10, page 3, SEE Exhibit 3, and SEE Exhibit 8), there really is no ambiguity as to the intent of the parties that actively negotiated this agreement. While Wilcox now comes forward and indicates he thinks somebody must have been mistaken, he was not involved in the negotiations and admits he knows nothing of those negotiations. He is simply not a competent witness on the topic because of a lack of knowledge to effectively discuss the negotiations between the parties. Wilcox did testify that he consulted with his staff and was assured that this was the correct agreement negotiated and the maps correctly reflected the parties' intent. No one from Xcel who had any role in the negotiations appeared before the PUC to dispute the correctness of the negotiated language.

The actions of the representatives of the parties following the 2009 submission demonstrate that all, perhaps other than Wilcox, understood the intent of the joint stipulation. Following the entry of the Order, Xcel developed its electrical service to the area. See Xcel Exhibit 3. That map identifies Xcel's construction in the agreed upon area based on the 2009 submission. The red lines indicating Xcel's installation

demonstrate that Xcel has constructed circuits that serve the area north of the identified “agreed territorial line.”

Similarly Southeastern Electric acted in reliance on the agreement and Order. Southeastern Electric has developed its electrical facilities to serve the portion of this now disputed territory that it understood it was authorized to serve. See SEE Exhibit 6. Chance indicated that major distribution lines, as well as stub-ins, have been put in place to serve the northern tier of the now disputed area. Houses are currently being served by Southeastern Electric. At this point, Southeastern Electric has invested approximately \$95,000.00 to provide that service. HT page 58, line 16 to page 59, line 19.

This dispute is largely factual. Chance, as the only person actually involved in the negotiations, has testified that the territorial line is as Southeastern Electric understood it to be and the language describes it to be. The language was jointly drafted by the parties, and there can be no presumption against Southeastern Electric as to the accuracy of that language. On the other hand, the maps were generated and submitted by Xcel. If there is any adverse inference to be drawn, it needs to be drawn against the person providing those maps. Quite frankly, they do represent exactly what Southeastern Electric understood to be the agreement, and Southeastern Electric acted in reliance upon the Commission’s Order, based on agreement initiated by Xcel and submitted by Xcel. The agreement and maps submitted identify a border line between the point one half-mile north of 69th Street and the surveyor’s “center point” and not at the middle dividing line of the irregular section. Southeastern Electric believes that the PUC’s Order Docket

EL09-021 permanently amends the 1976 agreement by description and the mapping submitted.

If Xcel's actions were indeed a mistake, it is a unilateral mistake. Southeastern Electric was not mistaken. While a party may be relieved of a unilateral mistake caused by fraud or duress or some other special facts creating equity on the mistaken party's behalf, where the other party's action did not induce the mistake, any mistake made should not provide hardship on the party reasonably relying upon an agreement. See *Dolan v. Hudson*, 83 S.D. 144, 156 N.W.2d 78 (1968). The equities in this situation call for the Commission to reject the Petition of Xcel and recognize that the territorial line in Range 7 has properly been established to run from the point on Southeastern Avenue or 476th Avenue, one-half geographical mile north of 69th Avenue, continuing straight east to the point identified on SEE Exhibit 8 as the surveyor's center point of the section which would be the northwest corner of the Southeast Quarter or alternatively described as the northeast corner of the Southwest Quarter as identified on SEE Exhibit 8.

Dated this 3rd day of January, 2012.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2012, I electronically filed the foregoing **Southeastern Electric Cooperative's Post-Hearing Brief** with the South Dakota Public Utilities Commission and certify that I sent a copy of the same by first class mail, postage prepaid, to:

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relative to the above-entitled matter.

/s/ R. Alan Peterson
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