

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

IN THE MATTER OF THE COMPLAINT)	EL11-025
FILED BY XCEL ENERGY REGARDING)	
A VIOLATION OF THE TERRITORY LAW)	POST HEARING BRIEF
BY SOUTHEASTERN ELECTRIC)	
COOPERATIVE, INC.)	

COMES NOW Northern States Power doing business as Xcel Energy (Xcel Energy) and files this post hearing brief supporting its contention that there exists a violation of the Territory Law (SDCL § 49-34A-59) by Southeastern Electric Cooperative, Inc. (Southeastern).

RELEVANT STATUTES AND RULES

49-34A-42. Electric utility's exclusive rights in assigned service area--Connecting facilities in another area. Each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area. No electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless such other electric utility consents thereto in writing and the agreement is approved by the commission consistent with § 49-34A-55. However, any electric utility may 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. The commission shall have the jurisdiction to enforce the assigned service areas established by §§ 49-34A-42 to 49-34A-44, inclusive, and 49-34A-48 to 49-34A-59, inclusive.

49-34A-44. Maps of service areas to be filed by electric utilities--Boundaries assigned by commission order--Adjustment of intertwined service areas--Protest of assigned service areas. On or before January 1, 1976, or, when requested in writing by an electric utility and for good cause shown, and at a further time as the Public Utilities Commission may fix by order, each electric utility shall file with the commission a map or maps showing all its electric lines outside of incorporated municipalities as they existed on March 21, 1975. Each electric utility shall also submit in writing a list of all municipalities in which it provided electric service on March 21, 1975. Where two or more electric utilities serve a single municipality, the commission may require each utility to file with the commission a map showing its electric lines within the municipality.

On or before July 1, 1976, the commission shall, after notice and hearing, establish the assigned service area or areas of each electric utility and shall prepare or cause to be

prepared a map or maps to accurately and clearly show the boundaries of the assigned service area of each electric utility.

In those areas where, on March 21, 1975, the existing electric lines of two or more electric utilities were so intertwined that § 49-34A-43 cannot reasonably be applied, the commission shall, after hearing, determine the boundaries of the assigned service areas for the electric utilities involved. In making its decision, the commission shall be guided by the following conditions as they existed on March 21, 1975:

- (1) The proximity of existing distribution lines to such assigned territory, including the length of time such lines have been in existence;
- (2) The adequacy and dependability of existing distribution lines to provide dependable, high quality retail electric service;
- (3) The elimination and prevention of duplication of distribution lines and facilities supplying such territory;
- (4) The willingness and good faith intent of the electric utility to provide adequate and dependable electric service in the area to be assigned;
- (5) That a reasonable opportunity for future growth within the contested area is afforded each electric utility.

Any electric utility which feels itself aggrieved by reason of an assignment of a service area may protest such assignment within a ninety-day period after issuance of the map of the assigned service areas by the commission and the commission shall have the power, after hearing, to revise or vacate such assigned service area or portions thereof consistent with the provisions of this section and § 49-34A-43.

49-34A-55. Sale or exchange of rights and property allowed between municipalities and utilities. Nothing contained in §§ 49-34A-42 to 49-34A-44, inclusive, and 49-34A-48 to 49-34A-57, inclusive, prohibits electric utilities from buying, selling, or exchanging electric distribution properties, service rights and other rights, property, and assets by mutual agreement, subject to approval of the commission. Any agreement, pursuant to this section, which changes assigned service areas shall be filed and approved by the commission before it may become effective. The commission's approval of such agreements shall be based on the public interest. The factors to consider shall include the elimination or avoidance of unnecessary duplication of facilities, providing adequate electric service to all areas and customers affected, and the promotion of the efficient and economical use and development of the electric systems of the contracting electric utilities.

49-34A-59. Notice and hearing on violation of service area provisions--Time for decision. Upon the filing of an application under § 49-34A-58 or upon complaint by an affected utility that the provisions of §§ 49-34A-42 to 49-34A-57, inclusive, have been violated, the commission shall, after notice and opportunity for hearing, issue its decision within sixty days after the filing of the application or complaint. The commission may

extend the time for a decision if requested by a party to the proceeding and the commission finds good cause to grant the extension.

49-34A-61. Burden of proof on party seeking to modify or vacate commission order. In all proceedings before the Public Utilities Commission in which the modification or vacation of any order of the commission is sought, the burden of proof shall be on the person seeking such modification or vacation.

49-1-11. Rules of commission. The Public Utilities Commission may promulgate rules pursuant to chapter 1-26 concerning:

- (1) Procedures for filing and cancelling tariffs, and information required to be included in tariffs;
- (2) Procedures and requirements for filing and acting upon complaints;
- (3) Procedures and requirements for filing applications for new or revised rates or tariff changes;
- (4) Regulation of proceedings before the commission, including forms, notices, applications, pleadings, orders to show cause and the service thereof, all of which shall conform to those used in South Dakota courts;
- (5) Procedures for obtaining a declaratory ruling and action on petitions for a declaratory ruling;
- (6) Procedures and requirements for handling confidential information and determining whether information should be protected as confidential; and
- (7) Procedures for communicating with the commissioners.

15-6-60(b). Relief on ground of mistake--Inadvertence--Excusable neglect--Newly discovered evidence--Fraud. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under § 15-6-59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its

operation. Section 15-6-60 does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided by statute or to set aside a judgment for fraud upon the court.

20:10:01:01.02. Use of rules of civil procedure. Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.

FACTS

The essential facts in this matter appear to be relatively simple. In 2009, the parties submitted to the Commission a request for a change in the territory that was assigned to each other back in 1976. That request was based entirely on a mutual mistake of fact. Had the parties understood the real location of the boundary line, the request would never have been made by Xcel Energy or agreed to by the Commission. Neither party understood where the real boundary line, that found on the official Commission maps, was located.

In 1976, the predecessor entities to the parties entered into a contract which agreed upon boundaries of the service territories. T. 14, 15 and 16. The contract provides that the map, which is Exhibit A to the contract, is controlling, and that the legal descriptions which are Exhibit B to the contract, are not. In all instances of conflict between the two, the map shall be in all respects conclusive. T. 16-17.

The 1976 agreement between the parties (and the resulting official commission maps) show a boundary line, in the relevant areas of Sections 12 and 7, between Xcel Energy and Southeastern that is equidistant between 57th and 69th streets. That boundary line was mistakenly thought to be north of where it stood, by both parties to the 2009 agreement, resulting in Xcel

Energy “getting” from Southeastern territory which it already had, and Xcel Energy needlessly giving away territory to Southeastern, without getting anything in return.

The sections at issue, 7 and 12, are in the very northern tier of sections in the Sioux Falls area of Lincoln County and are fractional sections, thus they are not square. They are about three quarters of a mile from north to south. 57th St. forms the northern boundary of the sections and 69th St. forms the southern boundary. T. 17. The map attached to the agreement shows the boundary line equidistant between 57th and 69th Streets. T. 17 and 18.

Interestingly, in 2000 the Commission considered a boundary dispute between the same parties 6 miles directly west of the sections at issue here and found the line to be equidistant between the northern and southern boundaries of the sections. Docket EL00-026.

The parties to the 2009 agreement made a mistake of fact as to the location of the boundary line. T. 19 -20. The agreement itself has confusing language as to section 7. T. 23-24. The map that controls section 7 is the original territory map of the 1976 contract. T. 24. Xcel Energy has made preparations and plans to provide electrical service to the customers in the Whispering Woods Development located in Section 7. T. 24-25. The ending point for the territory swap as found in the text does not appear on the submitted map with the 2009 agreement. The land that was traded by Xcel Energy to Southeastern in the 2009 docket actually belonged to Xcel in the first place. T. 41. The 2009 document was signed by Brad Schardin for Southeastern. T. 46. His position regarding the existing boundary line being the green line was made clear at the Hearing. T. 46. Schardin testified that the existing boundary line was meant to correspond in the 1976 map. T. 48. Section 7 does not have a southwest quarter. The location where the southwest quarter would logically be is instead designated as government lots. Ex. 8,

T. 60-63. Despite checking to see whether the existing boundary line was drawn on the correct place, Mr. Chance from Southeast Cooperative failed to get it right. T. 64-65.

Ross Pederson for PUC staff created exhibits to display the graphic representations of the situation as it's found. Pederson determined that the Electric Service Territory boundary according to the 1976 map and prior to EL09-021 was a line equidistant between the northern and southern boundaries of sections 7 and 12. See staff exhibit 2. Pederson also found that the legal description in the 2009 docket is unclear and can be interpreted in different ways.

Transcript 77-78.

ARGUMENT

The official boundary line between Xcel Energy and Southeastern was equidistant between the streets. The official Commission maps on file clearly display a boundary line equidistant between 57th and 69th Streets or the northern and southern boundaries of the sections at issue. A plain viewing and understanding of the maps as they were introduced into evidence is sufficient to conclude that as a fact. However, the testimony of Jim Wilcox and Ross Pederson clearly indicate the same conclusion.

In the 2000 docket involving similar fractional sections to the west, the Commission determined similarly that the line was equidistant, and did so based on similar maps and language. The 2000 case is instructive for our purposes here especially insofar as it deals with fractional sections which are not square and are made up not of quarters but instead, government lots.

The parties to the 2009 docket clearly made a mistake as to the location of the existing boundary line. It cannot be concluded otherwise based on the maps and the testimony. The

official map based on the 1976 agreement shows an equidistant line. Despite Southeastern's claims to have checked the official maps to determine the location of the "existing boundary line" on the 2009 map, no visual understanding of the map from the 1976 agreement would provide for anything other than an equidistant location.

Yet the parties, in the 2009 docket submission, somehow put their "existing boundary line" in the wrong place. It is a mutual mistake of fact. The testimony from Xcel Energy and from Southeastern taken in concert with the documentary evidence leads to no other conclusion.

The 2009 agreement as written is ambiguous at best. Not only is the "existing boundary line" clearly in the wrong place, the language in the agreement at points 1-6 cannot be read to make sense. The parties provided a map along with the 2009 agreement purporting trade territory in section 7. However, the map does not show the terminal point of the literal language.

Custom and practice among utilities trading territory in similar size parcels as can be seen on the exhibit to the 2009 agreement. However, as the Company's witness Mr. Jim Wilcox testified, it is not in any company's best interest to simply give away territory which is the conclusion required using the arguments of Southeastern. No company would simply give away more sheer real estate than necessary in a territory swap. To read the agreement in such a way as to give territory away in section 7 makes no sense from a practical stand point given the nature of the swap in section 12 as depicted in the exhibit to the 2009 agreement. Xcel Energy maintains that no territory in Section 7 was intended to be transferred between the parties.

REMEDIES

Xcel Energy is clearly entitled to relief from the current lack of clarity surrounding this docket. There is and was no public interest in a trade of property in Sec. 7 away from Xcel

Energy to Southeastern where nothing was gained by Xcel. The parties would not have submitted any filing in 2009, nor would the Commission have approved it, with the current understanding of the facts. As is required, the agreement was filed and approved by the Commission prior to its becoming effective. No one including commission staff caught the errors contained in the 2009 docket. It is clear that there was no intention to trade or relinquish territory in Sec. 7. The question then becomes what remedy is appropriate.

The answer is that the Commission has the power to enforce the territory laws and must do so. The Commission has jurisdiction to enforce the assigned service areas established in the code. SDCL 49-34A-42. The parties submitted a request to have the boundaries changed. That request contained errors. The Commission was required to approve the request before it is effective. SDCL 49-34A-55. The approval is based on the public interest. *Id.* The factors to consider shall be based on the avoidance of unnecessary duplication of facilities, providing adequate electric service to all areas and customers affected, and the promotion of the efficient and economical use and development of the electric systems of the contracting electric utilities. *Id.*

The Commission has adopted a rule that compels the use of the rules of civil procedure as found in Title 15 of the code. ARSD 20:10:01:01.02. The Rules of Civil Procedure are codified at SDCL 15-6. Rule 60b is the operative rule. While some subsections are not relevant here due to the passage of time, it does allow for the Commission to relieve a party from the effects of an order for any other reason justifying relief from the operation of the judgment (or order). SDCL 15-6-60(b).

Additionally, our courts have recognized that administrative agencies must have the power to deal with unforeseen, specialized, and varying problems which may arise on a case-to-case basis. See, *In Re Northwestern Bell Tel. Co.* 326 N.W.2d 100, (SD 1982) citing *N.L.R.B. v. Bell Aerospace Co.* 416 U.S. 267, 94 S. Ct. 1757, 40 L Ed. 2d 134 (1974); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947).

Where the legislature prescribes a standard of guidance for the administrative agency to follow, the necessary implied authority may also be delegated to the administrative agency to carry out the specific purposes prescribed and to exercise the appropriate administrative power to regulate and control. *In re Application of Kohlman*, 263 N.W.2d 674, 678 (SD 1978).

SDCL ch. 49-34A evidences a legislative intent for PUC to have broad inherent authority in matters involving utilities in this state. *Northern States Power Co. v. Sioux Valley Empire Elec. Ass'n.* 489 N.W.2d 365, (SD 1992).

The Commission has been asked to enforce the territory laws with respect to Section 7, east of Southeastern Avenue. The extension of lines by Southeastern into the territory north of the equidistant line in section 7 is a violation of the service territory laws. Xcel Energy did not intend to trade away territory in Section 7. It may be that Southeastern's violation is unintentional, owing to the factual record here. However, the fact that a mistake has been made is clear and it should be set right by the Commission and the parties.

CONCLUSION

WHEREUPON based on the facts, points and authorities outlined above Xcel Energy prays that the Commission determine that the 2009 agreement was entered into in error and

adopted in error by the Commission and sets forth its order accordingly returning the parties to their previously held positions forth with respectfully submitted.

Dated this 5 day of January, 2012.

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CERTIFICATE OF SERVICE

5 Brett Koenecke of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 5 day of January, 2012, he electronically mailed, a true and correct copy of the foregoing in the above-captioned action to the following at her last known address, to-wit:

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