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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE REQUEST EL12-040
FOR A DECLARATORY RULING REGARDING
THE ELECTRIC SERVICE TERRITORY
BOUNDARY BETWEEN NORTHWESTERN ENERGY
AND CODINGTON-CLARK ELECTRIC
COOPERATIVE, INC.

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Transcript of Proceedings
August 14, 2012

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BEFORE THE PUBLIC UTILITIES COMMISSION,
CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Karen Cremer
Kara Semmler
Ryan Soye
Greg Rislov
Brian Rounds
Chris Daugaard
Nathan Solem
Joshua Williams
Ross Pedersen
Patrick Steffensen
Matthew Tysdal
Brittany Mehlhaff
Deb Gregg
Sherry Dickerson
Tina Douglas

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, 500 East Capitol Avenue, Pierre, South Dakota,
4 on the 13th day of August, 2012, commencing at 9:30 a.m.

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1 CHAIRMAN NELSON: EL12-040, In the matter of the
2 request for a declaratory ruling regarding the electric
3 service territory boundary between NorthWestern Energy
4 and Codington-Clark Electric Cooperative, Inc.

5 And I think the way we will do this is we will
6 take testimony from NorthWestern first and then go to
7 Codington-Clark and then Watertown and then staff and
8 then see where we need to go from there.

9 So with that I will turn it over to
10 NorthWestern. We do have a court reporter with us for
11 this particular docket only, and so speak slowly,
12 clearly, and all of those things. Thank you.

13 MS. GRAHAME: Let me just make sure this works.
14 Am I coming through clearly?

15 Okay. Good morning, Chair Nelson and
16 Commissioners Fiegen and Hanson. My name is
17 Heather Grahame. I'm general counsel for Northwestern
18 Energy.

19 And with me at counsel table is Mr. Ron Gogolin,
20 who is a specialist in right of way and land acquisition
21 with Northwestern Energy, as well as Mr. Mike Seidel,
22 who is the general manager for our South Dakota and
23 Nebraska operations. And with us in the hearing room as
24 well is Ms. Dori Quam, who is a parallel in the legal
25 department with Northwestern Energy.

1 I'd like to thank the Commissioners and the
2 staff for giving us this opportunity to present our
3 petition for declaratory ruling in person. And our
4 request is that you agree with our requested service
5 territory description in the City of Watertown's recently
6 annexed area.

7 And our petition is supported by well
8 established surveying authorities as well as not only one
9 but two Affidavits by Mr. Gogolin.

10 As you know from the Pleadings filed in this
11 case, Mr. Gogolin has worked in the field of surveying
12 for approximately 50 years. 17 of those years was with a
13 surveying firm, and for the past 32 years or so he's
14 continued his surveying work with Northwestern Energy in
15 the context of his right of way and land acquisition
16 work.

17 And as his Affidavit provides, a service
18 territory boundary follows a land line unless, in his
19 experience with Northwestern Energy, there is a deviation
20 noted on the service territory map filed with the
21 Commission, and there's no deviation here.

22 And the positions and arguments presented by our
23 commenters to this proceeding do not warrant a different
24 result.

25 One argument raised, and you can see this in the

1 maps, is that there's a fence line and there has been a
2 suggestion by one of the parties that the fence line
3 should be the adopted service territory line. We don't
4 think that that's the case.

5 A fence line is simply where a homeowner or
6 landowner chooses to separate uses of their land. It's
7 movable. And a fence typically simply denotes the
8 separating line between an area where livestock is kept
9 versus crops. It is certainly not an official service
10 territory boundary.

11 A second argument has been raised by the
12 City of Watertown suggesting that the appropriate line is
13 what is called the eighth-of-the-mile line. And we don't
14 think that that argument carries any weight either, and
15 we think that for two reasons.

16 The first is that, as Mr. Gogolin states in his
17 second Affidavit, there is no such thing as an
18 eighth-of-the-mile line. It is not an established
19 surveying measurement, and that is because a section
20 can't be divided into eight equal tracts or as I, a
21 nonsurveying expert, likes to think of a square, four
22 equal sides.

23 The second problem is that the City of
24 Watertown's map that is attached to its second filing is
25 measured or its eighth-of-the-mile line measurement is

1 measured from the north, and that violates well
2 established surveying practices which provide that
3 townships are measured from the south to the north and
4 not the north to the south.

5 The third argument raised concerns the pencil
6 lines on the Commission's maps delineating our service
7 territory. Now please keep in mind there are two maps in
8 this case and not just one. And the two maps do vary
9 slightly in terms of where the pencil line is involving
10 the affected territory here.

11 But a pencil line is simply representative of
12 the real line. A pencil line, of course, varies by
13 thickness of a pencil. So the pencil line itself can't
14 be the official line. It's simply representative of the
15 actual line.

16 And the point here is let's get it right. And
17 getting it right in this context means going back to the
18 original deal and map, which Mr. Gogolin has done, which
19 is attached as Exhibit B to our opening petition for a
20 declaratory ruling.

21 Finally, the fourth comment raised notes that
22 there is a home served currently by Codington-Clark
23 Co-op, and it has been served by the co-op since
24 approximately 1977. We agree that that home has been
25 served by Codington-Clark, and we further agree that it

1 should continue to be served by Codington-Clark.

2 We do take the position that it is -- that an
3 inappropriately served home doesn't relinquish service
4 territory.

5 So, in conclusion, these are the authorities and
6 principles upon which we ask that you agree with our
7 proposed service territory boundary. We thank you, and
8 if you have any questions, Mr. Gogolin is here as well as
9 Mr. Seidel, and they're available to answer any
10 questions.

11 CHAIRMAN NELSON: Questions from the Commission.
12 Commissioner Hanson.

13 COMMISSIONER HANSON: Thank you for the synopsis
14 that you just gave us. Appreciate that. And my
15 questions certainly can be answered by any one of you.
16 I'm not particular.

17 Who prepared the map?

18 MS. GRAHAME: Which map?

19 COMMISSIONER HANSON: The one that was referred
20 to by I believe Mr. Gogolin in his -- I think it was the
21 meets and bounds one. Wasn't there a -- in Exhibit B I
22 think.

23 MS. GRAHAME: Correct. I'm going to ask
24 Mr. Gogolin to answer that.

25 MR. GOGOLIN: The map I've always had in my

1 file. I'm not sure who prepared it, but I believe it was
2 prepared by the PUC that has the meets and bounds
3 description on it that deviates from the territory by
4 Parkston.

5 COMMISSIONER HANSON: Okay. And thank you.
6 Meets and bounds as you're referring to is a
7 recognized -- is it still recognized as a method by which
8 to establish boundaries?

9 MR. GOGOLIN: It is. You can do meets and
10 bounds surveys and have a meets and bounds description.
11 In South Dakota you usually survey it and have a record
12 plat if you're going to transfer property. But if it's
13 just a survey, you can do meets and bounds. It's a
14 recognized surveying practice.

15 COMMISSIONER HANSON: It still is.

16 MR. GOGOLIN: It still is. A lot of states
17 still have that for transferring property. Nebraska,
18 Texas. Several states do.

19 COMMISSIONER HANSON: You refer to the fact that
20 a fence can be moved -- or your counsel has referred to
21 the fact, and I believe you have in your testimony
22 referred to the fact that a fence can be moved. Trees
23 and rocks, large rocks are used in meets and bounds.
24 Sometimes piles of rocks are used in meets and bounds.

25 Those can be moved pretty easily as well, can

1 they not?

2 MR. GOGOLIN: Yes, they can.

3 COMMISSIONER HANSON: So the argument saying
4 that a fence can be moved, is that really substantial
5 enough for us to make our determination on?

6 MR. GOGOLIN: I believe so. Because when they
7 did their original surveys they didn't have the stuff
8 that we did so they'd use rocks or trees or whatever was
9 there or creeks because that's what they had when it was
10 done in 1872.

11 Now that was all done before you had a fence,
12 and now somebody comes in and puts in a fence to separate
13 their wheat field from their livestock. That fence does
14 not then become a property line. The property lines were
15 established prior to that fence.

16 So it would not be recognized as a meets and
17 bounds description unless it was used in one of the
18 original surveys done when they came out here through the
19 Bureau of Land Management.

20 COMMISSIONER HANSON: You argue that an eighth
21 of a -- excuse me. That an eighth of a mile is not a
22 regular -- and I agree it's not a usual separation, but
23 an eighth of a mile can be measured pretty easily, can it
24 not?

25 MR. GOGOLIN: You can measure an eighth of a

1 mile. But when you talk about section lines and quarter
2 lines you're talking about the total section. A quarter
3 line, which to you would be a half a mile line, divides a
4 section into four parts. A sixteenth line then divides a
5 quarter of that -- a quarter of that section or divides
6 the section into 16 parts. A sixty-fourth line divides a
7 section into 64 parts.

8 You cannot do that and divide it into eight
9 parts and have equal tracts or squares. You can have an
10 eighth mile line. You can drive an eighth of a mile and
11 you can measure an eighth of a mile but that is not a
12 land line.

13 COMMISSIONER HANSON: But it can still be
14 measured.

15 MR. GOGOLIN: It can be measured. Yes.

16 COMMISSIONER HANSON: Thank you. I believe
17 that's all I have at this time.

18 Thank you, Mr. Chairman.

19 CHAIRMAN NELSON: Any other questions?

20 MS. GRAHAME: Chair Nelson with the Commission's
21 permission, I'd like Mr. Gogolin to identify where each
22 of the maps came from that are attached to our opening
23 petition.

24 And the reason for that is I believe
25 Commissioner Hanson referenced Exhibit B, but Exhibit B I

1 believe came from the BLM and not our maps. So for
2 clarity of the record, I'd like to walk through that.

3 CHAIRMAN NELSON: Thank you. Please.

4 MS. GRAHAME: So, Mr. Gogolin, I'm looking at
5 Exhibit B to Northwestern Energy's petition for
6 declaratory ruling. It's a two-sided map. I'm going to
7 hand it to you. I'd like you to identify where this came
8 from.

9 MR. GOGOLIN: This map is the original -- this
10 map is the original township plat of this township. The
11 36 sections. And the map came from the Bureau of Land
12 Management. They have all the records of all of these
13 maps. There's a map like this for every township in
14 South Dakota.

15 And I got this off of the internet from the
16 Bureau of Land Management, which they have on the web
17 now. It used to be you had to write in to get the maps
18 from them, but now you can get them off the web.

19 MS. GRAHAME: And now turning to Exhibit C,
20 which is also a two-page document, could you please
21 identify where this came from?

22 MR. GOGOLIN: Those maps came from the Public
23 Utilities Commission. I don't know -- okay. The maps
24 you're referring to comes from the Public Utilities
25 Commission that shows the different service territories

1 and different colors. I'm not sure when they were made
2 or who made them.

3 And they were done in 1971. Well, the date on
4 the map does not necessarily mean that's when the map was
5 made. That means that's when the base map was presented.
6 Because what it is is a copy of a 7-minute quad map
7 that's put out by the Bureau of Land Management. The
8 date is just a date of the map, not the date that the
9 colored lines were put on it.

10 MS. GRAHAME: And then, finally, Mr. Gogolin,
11 Exhibit D attached to NorthWestern's petition for a
12 declaratory ruling, could you please tell us where that
13 came from.

14 MR. GOGOLIN: That map came from NorthWestern
15 Energy now. Was made by NorthWestern Energy. And it's
16 just an enlargement of the smaller map. We put in just
17 single pages so we could give them to our people out in
18 the field to help them determine service territory when
19 people were asking for service. But it's just a smaller
20 replica of the colored map that we have on our file.

21 And that was done in -- 1998 is when the map was
22 made that's in --

23 MS. GRAHAME: Thank you very much.

24 CHAIRMAN NELSON: If I could ask a follow-up
25 question, Ms. Grahame, I believe you said that there were

1 two different territory maps.

2 Did you make that statement?

3 MS. GRAHAME: Yes.

4 CHAIRMAN NELSON: And I'm obviously seeing
5 Exhibit C as being one of those. What is the second one
6 that you were referring to?

7 MS. GRAHAME: I think what I was referencing are
8 the two maps attached to the staff's statement of the
9 case. The staff's statement of the case has Exhibits A,
10 B, C, and D. A and B are -- B is an enlargement of A. D
11 is an enlargement of C.

12 And those are the two maps -- I would leave to
13 Mr. Soye a description of those two maps, but my
14 understanding is that the Public Utilities Commission
15 prepared what it believed were identical maps, but
16 they're not.

17 CHAIRMAN NELSON: Thank you. I will save those
18 questions.

19 Other questions from the Commission?

20 Seeing none, thank you. And we will move to
21 Codington-Clark.

22 MR. BURNS: Thank you, Commissioners. My name
23 is Tom Burns. I'm appearing on behalf of Codington-Clark
24 Electric. Certainly don't have any testimony to offer,
25 but I do have some observations to offer.

1 Of course, the line we're talking about was
2 originally drawn in I think '75 and moved by NorthWestern
3 Energy -- I guess it was Northwest Public Service at that
4 time and Codington-Clark. And it puts the line north of
5 the lot line or the quarter line. It's pretty clear from
6 the way that's done that it's north of that. I think
7 when the staff originally interpreted this they came up
8 with approximately 610 feet or something like that.

9 Now it's suggested that this line should be
10 redrawn to go down to the south boundary line of the
11 government lots, which is about 1,027 feet, and a little
12 more on the west end, as compared to the approximately
13 610 feet, which is where the line appears to be drawn.

14 And the rationale, as I understand it to be, is
15 that when we interpret lines we ought to favor the lot
16 lines and the quarter lines and so on. But there is
17 really nothing magical about lot lines or quarter lines.

18 It's perfectly acceptable, for instance, to
19 convey the north 610 feet of Lots 1 and 2. Actually if I
20 was doing the conveyance, I would say Lots 1 and 2 less
21 the south 427 or whatever that tends to be.

22 We do this all the time, and it's perfectly
23 acceptable to any Register of Deeds if you filed a
24 conveyance like that.

25 Now if the line as it's actually drawn is close

1 to the lot line or the quarter line, maybe it's
2 reasonable to say, okay, we're going to favor that lot
3 line or the quarter line. But we shouldn't use this
4 thumbnail rule to fly in the face of the way the line is
5 really originally drawn and that the parties signed off
6 on. Especially when it conflicts with the probably
7 intent of the parties when they drew the line.

8 I'm not going to tell you there's anybody at
9 Codington-Clark that remembers when this line was drawn.
10 We don't think NorthWestern claims that either. We could
11 just go by the record to try to determine that.

12 Before the territorial act Northwest Public
13 Service served the farm site that's located on the south
14 side of Highway 212. And the line is obviously drawn to
15 include that farm sight but not the rest of the northwest
16 quarter. The rest of the northeast quarter was to go to
17 Codington-Clark. There weren't any sites actually being
18 served in that northeast quarter other than the farm site
19 at this time.

20 But the way the line was drawn and signed off on
21 tends to indicate that's what they want to do is make
22 sure they preserve the site they're serving.

23 And the parties were all happy with that line.
24 And I suggest to you that in 1977 or '78 when
25 Codington-Clark began serving a new site that was in

1 Government Lot 1, I guess it is, that that was not a
2 mistake, and we weren't outside of our territory. We
3 were in our territory. Because that's the way the line
4 was drawn.

5 And nobody came in and hollered about it at that
6 time, and there was no secret about that site being
7 there. It was obviously there, and there was no
8 objection. There was no objection because everybody knew
9 the line was north of there.

10 But the problem Codington-Clark has with this is
11 not really about that farm site. It's about giving up
12 400 some feet of territory that was assigned to
13 Codington-Clark and should be there as it's a site that
14 could have future development and it's not right to
15 simply take it away.

16 And I just want to say a few words to kind of
17 put the thing in perspective and wonder why we are here.
18 And we're here because that farm site went out of
19 business some years ago. And an implement dealership has
20 bought the property, and they're going to develop a
21 pretty significant load there in this area. And, of
22 course, Watertown has annexed the area.

23 The tract that's been annexed encompasses that
24 property that NorthWest was serving and the line as it
25 was originally drawn on the, map but it goes south of

1 that into Codington-Clark's territory.

2 Now, of course, Codington-Clark and the city
3 have a territorial agreement so there's no compensation
4 going to be paid to Codington-Clark for any territory
5 taken by the city in this, and we don't expect any. We
6 made that agreement. We're happy to live with it.

7 But, of course, NorthWest doesn't have that
8 agreement, and they're going to have to be paid for their
9 site. And I don't know all the particulars of it and how
10 that's going to be done. I don't get much into that
11 annexation compensation because it doesn't matter to
12 Codington-Clark. Codington-Clark's on agreement with the
13 city.

14 And maybe the thought is the city will put the
15 meter on the old Codington-Clark territory and not pay
16 any compensation. I don't know if that's the plan. Or
17 that we're going to draw the line so at least we reduce
18 the compensation.

19 Well, if that is some kind of injustice that
20 NorthWestern thinks the PUC should correct, the way to
21 correct it is not by taking territory from somebody else.
22 We're not in that beef. So let's not try and cure what
23 might be seen as an injustice with another injustice.
24 And that's our position.

25 CHAIRMAN NELSON: I do have a couple of

1 questions. NorthWestern's Exhibit C attached to their
2 original filing -- and I'll just hold it up if this is a
3 recollection for you.

4 MR. BURNS: I've got it in front of me.

5 CHAIRMAN NELSON: Do you have any doubt but what
6 this is an accurate territory map?

7 MR. BURNS: No. We don't question it.

8 CHAIRMAN NELSON: Thank you. The second
9 question I've got -- and now I'm referring to the map the
10 Watertown Utilities prepared and submitted on August 3,
11 and I'll just hold it up. It's maybe a little hard to
12 see, but it's the one that they submitted where they've
13 put all of the different pertinent lines on here so we
14 can make the comparisons and see the layout and see where
15 the farm sites are.

16 MR. BURNS: Okay.

17 CHAIRMAN NELSON: My question is do you have any
18 doubt about what their rendering of where the south
19 boundary of the government lot lines is, is accurate?

20 MR. BURNS: I have no reason to question it. I
21 didn't try to measure it out.

22 CHAIRMAN NELSON: Okay. That's the only
23 questions I have.

24 Other questions?

25 MR. BURNS: I guess I would say too Exhibit A I

1 think is the one that everybody signed off on.

2 CHAIRMAN NELSON: Okay.

3 Commissioner Hanson.

4 COMMISSIONER HANSON: Mr. Burns, how long
5 have -- I'll use you as all encompassing, if I may. How
6 long have you been serving the customer in the area of
7 dispute?

8 MR. BURNS: The farmstead, other than the one
9 that NorthWestern --

10 COMMISSIONER HANSON: The customer of
11 NorthWestern --

12 MR. BURNS: I believe it was 1977. May have
13 been '78. I'm within a year or two there.

14 COMMISSIONER HANSON: I don't recall reading
15 that.

16 Would you agree that meets and bounds,
17 regardless of whether it's still being used or not, is a
18 pretty archaic method of surveying?

19 MR. BURNS: It is, but this is not meets and
20 bounds.

21 COMMISSIONER HANSON: Using a fence line?

22 MR. BURNS: Using a fence line could be meets
23 and bounds, but I guess I'm not advocating for the meets
24 and bounds description. Certainly when you talk about
25 Lot 2, west of south 427, that's not a meets and bounds.

1 Meets and bounds is where you say starting at
2 the section line and going north so many feet and so on.
3 And that is archaic and a lot of places they'll make
4 the -- plat that sort of description.

5 COMMISSIONER HANSON: I believe that's all I
6 have, all the questions I have.

7 CHAIRMAN NELSON: Other questions.

8 MR. SMITH: I have one.

9 CHAIRMAN NELSON: John.

10 MR. SMITH: Mr. Burns, when you use the phrase
11 "that line" what are you talking about?

12 MR. BURNS: The original line the way it was
13 drawn on the map.

14 MR. SMITH: And are we talking staff's
15 Exhibit A? Is that what we're talking about?

16 MR. BURNS: I guess I don't remember the
17 exhibit. Yes. Exhibit A is the one that everybody
18 signed off on. Right.

19 MR. SMITH: Okay. And what you see on Exhibit B
20 then, Staff's Exhibit B, that's a blowup of that. And
21 would you agree that's an accurate depiction of what
22 you're characterizing as that line, meaning the original
23 1976 line?

24 MR. BURNS: I'm sure it is.

25 MR. SMITH: Thank you.

1 CHAIRMAN NELSON: Other questions?

2 Seeing none, thank you.

3 MR. BURNS: Thank you.

4 CHAIRMAN NELSON: Watertown.

5 MR. LEHNER: Chairman Nelson, Commissioner
6 Hanson, Commissioner Fiegen, thank you for allowing us
7 the opportunity to speak today.

8 I'm Steve Lehner, general manager of Watertown
9 Municipal Utilities, and today I have with me Todd
10 Chambers. He's the director of operations. Todd has
11 done most of the investigation to the service territory
12 issue here in front of you today with Ryan and Ross.
13 I'll let him answer any of the technical questions.

14 I just have two comments. When I look at the
15 exhibit that's posted on the PUC's website for territory
16 and that's I believe Exhibit C and I look at the other
17 exhibits, to me the service territory line that's posted
18 on all of those maps is a shorter service territory line
19 than the territory lines that are in NorthWestern's
20 service 2 and 3 miles east of there, which appear to be
21 on the quarter line.

22 In our testimony we said the eighth line. It's
23 an eighth of a mile. The sixty-fourth line. I'm not a
24 surveyor. I'm an engineer. So I'm not particular with
25 the exact wording of surveying terms. That would be one

1 comment.

2 The only other comment I would have is this
3 morning before we left I pulled up other service
4 territory maps of NorthWestern Energy on the PUC website,
5 particularly Beadle County around Huron. And there are
6 lots of different areas in NorthWestern's service
7 territory that they have that deviate from quarter lines
8 or eighth lines or half miles that appear to be just
9 little slivers.

10 I don't know if those are all described on file
11 with the PUC Commission because I don't have that
12 information in front of me, but I would encourage the --
13 either staff or the Commission to look through some of
14 the other service territory that NorthWestern has for
15 those deviations.

16 Some of them are rivers. Some of them appear to
17 be railroads. Some of them are other things. Those
18 would be the only comments I would have, and we'd stand
19 by for any questions.

20 CHAIRMAN NELSON: Questions from the Commission.

21 I think the only question I have, and maybe it's
22 already obvious from Mr. Burns's testimony, but what is
23 your City of Watertown's interest in this case?

24 MR. LEHNER: Well, I believe we're annexed.
25 We've annexed the piece of property and Watertown

1 Municipal Utilities is going to serve it. We do have an
2 agreement, and our only interest in it is basically where
3 is the line and that's up to the Commission to decide.

4 But there are other pieces of property along
5 here that we believe fall on what would be the eighth
6 line, the sixty-fourth line, or what we had depicted in
7 our maps and that's -- basically it's Codington-Clark's
8 territory and not necessarily NorthWestern's.

9 We'd hate to see that line moved back another
10 quarter of a mile back to -- or eighth of a mile back to
11 the quarter line where Codington would lose what service
12 territory they have.

13 CHAIRMAN NELSON: Is it correct that the amount
14 of compensation that you may receive is going to be
15 dependent on where this line goes?

16 MR. LEHNER: We won't receive any compensation.
17 The compensation laws and territory laws are for us to
18 pay -- when we annex a piece of land we have to pay the
19 incumbent utility or whoever has the service territory.
20 And state statute actually allows us to pass that on to
21 the customer.

22 I don't know if we'll do that or not because we
23 haven't really talked about it at board level yet. We're
24 just interested in where the line is.

25 CHAIRMAN NELSON: Okay. But the amount that you

1 might have to pay would be dependent on where the line
2 goes.

3 MR. LEHNER: Potentially. It would dependent on
4 where the service interests of the building is in
5 conjunction to the territory line. That's correct. And
6 that's -- that's common in utilities all over.

7 I remember several years ago when NorthWestern
8 put an ethanol plant on the northwest side of town the
9 service entrance was right in NorthWestern's service
10 territory just by a few feet, and they actually served
11 it. So it's common.

12 CHAIRMAN NELSON: Okay. Thank you.

13 Other questions?

14 Thank you.

15 We will turn to staff.

16 MR. SOYE: Thank you, Mr. Chairman,
17 Commissioners. This is Ryan Soye and Ross Pedersen on
18 part of staff.

19 As indicated in the Responsive Brief and
20 recommendation filed by staff on July 13, staff's review
21 of this docket consisted of performing measurements of
22 all available hardcopy and digital mapping information
23 available for the area in question.

24 Staff believes the results of this review
25 indicate the NorthWestern Energy Codington territory

1 division falls on the southern borders of government
2 Lots 1 and 2 or what's also been referred to the parties
3 as the north quarter section line of Section 3.

4 Staff's conclusion is based on its understanding
5 that the territory divisions -- territory divisions do
6 most often follow established land lines. We agree that
7 they do sometimes follow river lines and whatnot as was
8 mentioned by Watertown, but these river lines also most
9 often represent county lines which would also be an
10 established line under South Dakota Law.

11 All of the measurements obtained by staff in its
12 review were within an acceptable range in our view and
13 all fell in very close proximity to the southern borders
14 of government Lots 1 and 2.

15 Conversely, no measurements performed by staff
16 led us to believe that the territory division was located
17 on the distance suggested by Codington or Watertown.
18 Even our most conservative measurements set the territory
19 line as indicated on our maps nearly 400 feet south of
20 what is suggested by Watertown. When we're looking at a
21 total area in the northern half of this fractional
22 section, which is approximately 2,500 feet, 400 foot
23 discrepancy from our measurements just simply wasn't
24 supported.

25 As for the suggestion that this may have -- the

1 fence line may be the proper territory division, staff
2 doesn't believe in its experience through RGS mapping
3 project, at least to my knowledge we have never seen a
4 territory division based on such a movable, you know,
5 land feature.

6 And the fact of the matter is we don't have any
7 specific knowledge of when that fence line was even
8 constructed.

9 As for the fact -- well, more on the fact of
10 what land features were present when this was
11 established, the home that was mentioned was constructed
12 two years after the territory divisions were put in
13 place. And, again, we have no specific knowledge when
14 hardly any of these features were constructed.

15 So we imagine that any territory divisions were
16 based on knowledge that was held at the time in 1975,
17 1976 and, as far as we know, that was limited to the
18 established land lines or section lines.

19 As such, staff recommends that the Commission
20 rule in favor of NorthWestern Energy in this docket and
21 determine that the territory division is located on the
22 southern border of Government Lots 1 and 2 or the quarter
23 section line of -- north quarter section line of
24 Section 3. And we are available for any questions the
25 Commission might have.

1 CHAIRMAN NELSON: Thank you. Questions from the
2 Commission.

3 Commissioner Hanson.

4 COMMISSIONER HANSON: Tell me, you said -- I
5 believe you said in regards to the boundary lines that
6 one of the reasons you came to the conclusion you did was
7 that most often -- I think that was the two words you
8 used. Most often the lines are not the way that they
9 were shown here. Most often they were another way.
10 Forgive me for not writing it down.

11 Does that mean we should just -- if we establish
12 a precedent here based on that argument, doesn't that
13 mean that we should change them all?

14 MR. SOYE: No. And that's why staff is being
15 really careful what it says. Most often and not always.
16 Because throughout the RGS mapping project we have found
17 instances where territory divisions are based on, I
18 recall, a gravel road that has since disappeared.

19 The subject utilities in that agreement wanted
20 to change that because it was, you know, growing grass on
21 it, wasn't used anymore so it didn't serve as an adequate
22 territory division any longer. We do see it deviate from
23 land lines, but most often we have found it to follow the
24 established land lines when it's appropriate.

25 COMMISSIONER HANSON: Did you take into

1 consideration your recommendation on -- from a standpoint
2 that we are likely to get a number of these and
3 consistency is going to be important for us?

4 I spoke to a likelihood of a precedent being set
5 here. Are you comfortable that this is the same
6 position -- I'll just throw a couple of questions at you,
7 that in the future when these come at us again you're
8 going to be consistent in your position?

9 MR. SOYE: Absolutely. And I believe especially
10 in the rural areas. You know, I realize there are homes
11 here, but at one point there weren't or there were less
12 homes.

13 We've seen simply that most of these lines are
14 based on land lines. Once you get into more highly dense
15 populated areas, we do see it deviating on streets and
16 those types of features which we've seen in the
17 Sioux Falls area, Minnehaha, Lincoln County area, which
18 we had a previous docket on. But as far as in our
19 experience it's been primarily based on county lines and
20 land lines.

21 COMMISSIONER HANSON: Thank you.

22 CHAIRMAN NELSON: John.

23 MR. SMITH: Yeah.

24 Mr. Soye, with respect to that curvy gravel
25 road, right, I mean, it was pretty darn obvious what the

1 physical boundary was in that case, was it not?

2 MR. SOYE: Yeah. It was. When we have an issue
3 of where the specific territory line might be based, you
4 know, we perform these measurements on all available, you
5 know, data.

6 And, like I mentioned here, we do have slight
7 discrepancies based on whether or not we're using
8 hardcopy, digital mapping, BLM versus our ARC map
9 software. But other than that, it's pretty consistent
10 that you can tell if it is based on a land line or a dirt
11 road.

12 CHAIRMAN NELSON: Other questions?

13 I've got a question regarding maps. It was the
14 two that NorthWestern referred to. Their Exhibit C and
15 Staff's Exhibit B.

16 Can you help me understand, are these both
17 official maps, or which one takes precedence? How do
18 they both come to be?

19 MR. SOYE: NorthWestern's exhibit is a copy of
20 the official map on the PUC website. However, this isn't
21 the agreement, territory agreement, that was signed by
22 the parties. Staff was able to locate those and inserted
23 them as our Exhibits A and C.

24 So staff would assume that when this official
25 map was originally created it was based off of the signed

1 agreements between NorthWestern Energy and Codington.
2 And the reason it was created, because there was a lot of
3 changes in the territory, and instead of using the signed
4 agreements and changing two maps each time, they created
5 one official map, which was supposed to conform to those
6 two signed agreements and simply updated that map as time
7 went on.

8 CHAIRMAN NELSON: It doesn't appear to me that
9 there's a discrepancy between the two maps in this
10 particular area, but if there were a discrepancy between
11 those two maps, which one would take precedence?

12 MR. SOYE: Well, actually that -- I agree --
13 staff agrees with you that we don't feel that this
14 specific area shows a discrepancy. It might be, like was
15 stated earlier, a thick pen mark. But directly to the
16 east there is a very clear discrepancy between the
17 territories shared by these two parties.

18 And in that case because the two agreements
19 signed by the parties were signed by both parties on the
20 same day, that might be more of an issue of contract law
21 versus interpretation of this map.

22 CHAIRMAN NELSON: Thank you. Any other
23 questions?

24 Is there any need for rebuttal?

25 NorthWestern.

1 MS. GRAHAME: Yes. Thank you very much.

2 I think as the comments here have indicated, you
3 know, we have pencil lines. We have varying maps. And
4 NorthWestern has gone to the effort in this case that it
5 has gone to by going back to the original BLM map and by
6 asking Mr. Gogolin to prepare Affidavits and by relying
7 on sound traditional surveying authorities in order to
8 get it right.

9 We want to get it right in this case, and we
10 know you want to get it right. And that's why we've gone
11 to the effort that we have.

12 And so we believe we've supported our position
13 with sound authority and with facts and at least as
14 applied to this case we believe that the Commission
15 should adopt our proposed service territory
16 description.

17 Thank you.

18 CHAIRMAN NELSON: Thank you. Any other comments
19 from Codington or Watertown?

20 Okay. Any questions?

21 Commissioner Fiegen.

22 COMMISSIONER FIEGEN: Do you mind if I ask a
23 question to Tom -- is it Burns?

24 MR. BURNS: Yes.

25 COMMISSIONER FIEGEN: A quick question on your

1 surveying authorities and how -- did you really go from
2 the north to the south, or did you go to the principles
3 that most people use going from the south to the north?

4 MR. BURNS: Well, you can -- it's acceptable to
5 do a description either way, but ordinarily you'd go from
6 the south because that's where the quarter lot line is.

7 COMMISSIONER FIEGEN: Right. When you did yours
8 did you go from the north to the south instead of the
9 south to the north?

10 MR. BURNS: I think I suggested the north half
11 so I guess it could be measured either way.

12 COMMISSIONER FIEGEN: Okay. Thank you.

13 CHAIRMAN NELSON: Any other questions?

14 Seeing none, is there a motion?

15 I will move that in EL12-040 that the Commission
16 adopt staff's recommendation to establish the territory
17 line as the southern boundary of Government Lots 1 and 2
18 and that Codington-Clark be granted a territory exception
19 to continue serving the particular location that they are
20 serving today.

21 Discussion on the motion.

22 If I might elaborate on why I've made the
23 motion, I think I probably went about this the same way
24 that staff did. Although obviously independent of what
25 they did.

1 I took NorthWestern's Exhibit C, the official
2 territory map, and did the measuring, and then I took and
3 matched that against the map that Watertown Municipal
4 Utilities prepared that they submitted on August 3 that
5 shows where they believe the southern boundary of
6 Government Lots 1 and 2 is and the measurements were
7 identical.

8 There is no question in my mind whatsoever that
9 the lines shown on the official territory map, Exhibit C,
10 falls exactly where the southern boundary of Government
11 Lots 1 and 2 is. I can't make any argument otherwise.
12 That's what the measurements showed me.

13 And based on that and the fact that we know that
14 the official territory map has to take precedence when
15 we're making these decisions, that's where my decision
16 has to come down to.

17 Other discussion.

18 Commissioner Hanson.

19 COMMISSIONER HANSON: Well, I cannot fault your
20 argument that the territorial -- that the map should take
21 precedence, priority over where the lines should be
22 drawn.

23 I've been wrestling with this for quite a while
24 because of the amount of -- the length of time. And we
25 do have a requirement that when there's a concern

1 regarding a line that has been drawn, that response needs
2 to come within a certain period of time.

3 And I wrestle with that on a basis that they've
4 been serving a customer for many years, 35 years or so.
5 And so it's troubling that it comes to us now, and I
6 wonder just how many of these are going to come to us
7 that seem to be rather dilatory.

8 You make very good arguments. And on previous
9 ones I've made my determination based upon the maps
10 because I think those do take priority. I think that
11 it's easily ascertained by looking at a map where the
12 line is, whether it's -- I know that the width of a
13 pencil mark can be 300 feet wide when you look at it on a
14 map. So it's difficult from that perspective.

15 But everything supports it being on -- the way
16 you said. And I've been wrestling with it up until just
17 a few minutes ago, that I was very close to siding with
18 Codington-Clark on the basis that they've been serving
19 the customer as long as they have and thought it should
20 have been done some time ago.

21 But I think that we need to look at it from the
22 standpoint of the maps. I think the maps are very clear,
23 and I agree with your motion.

24 CHAIRMAN NELSON: Further discussion?

25 Commissioner Fiegen.

1 COMMISSIONER FIEGEN: I think the goal of the
2 Commission is always just to try to get it right and it's
3 going to take time and our goal during this mapping
4 process is to get our boundaries right and to use
5 surveying techniques that are to the 20th Century or the
6 21st Century now.

7 So, unfortunately, I think we have to look at
8 the maps and the techniques, and I will be supporting
9 NorthWestern's.

10 CHAIRMAN NELSON: Additional discussion?

11 Commissioner Hanson.

12 COMMISSIONER HANSON: I would like to say that I
13 want us to be consistent. I know that that's a desire by
14 the other two Commissioners as well. And we look at each
15 one of these on an individual basis. At the same time we
16 need to have some consistency in our rulings. We need
17 to -- well, I'll leave it at that.

18 I don't want entities to feel that we're going
19 to look at everything based on a standpoint of, I don't
20 know, trying to right the world or something of that
21 nature. We've got to follow the law, and the law
22 prescribes how we must rule. And you've explained that,
23 articulated that, in the process of your argument of why
24 we should vote for your motion.

25 I just want to let everyone know it's a

1 challenge to get to that point of making certain that
2 we're consistent on the way in which we rule.

3 Thank you.

4 CHAIRMAN NELSON: Other discussion.

5 Seeing none, all of those in favor of the motion
6 will vote aye. Those opposed, nay.

7 Commissioner Hanson.

8 COMMISSIONER HANSON: Aye.

9 CHAIRMAN NELSON: Commissioner Fiegen.

10 COMMISSIONER FIEGEN: Fiegen votes aye.

11 CHAIRMAN NELSON: And Nelson votes aye.

12 Motion carries.

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 14th day of
11 August, 2012, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 23rd day of
14 August, 2012.

15

16

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18

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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