

BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

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CE06-002 In the Matter of the Complaint filed
by Sioux Valley Southwestern Electric Cooperative,
Inc., d/b/a Sioux Valley Energy against Northern
States Power Company, d/b/a/ Xcel Energy,
Regarding Provision of Electric Service to Myrl
and Roy's Paving,

2205 Career Place/USDSU Building
Sioux Falls, South Dakota
June 13, 2006
2:30 p.m.

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M E E T I N G

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PUBLIC UTILITIES COMMISSION:
Chairman Bob Sahr
Commissioner Gary Hanson
Commissioner Dustin Johnson

STAFF ATTORNEYS:

Mr. John Smith
Mr. Greg Rislov
Ms. Sara Greff

ORIGINAL

Mr. David A. Gerdes
May, Adam, Gerdes & Thompson
P.O. Box 160
Pierre, South Dakota 57501-0160

for Xcel Energy;

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JUN 30 2006

Mr. Alan F. Glover
Glover & Helsper, P.C.
415 8th Street South
Brookings, South Dakota 57006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

for Sioux Valley Energy;

1 APPEARANCES: (Continued)

2 Ms. Meredith Moore
3 Cutler & Donahoe
4 100 N. Phillips Avenue, #901
5 Sioux Falls, South Dakota 57104

6 for Myrl and Roy's Paving;

7 Ms. Darla Pollman Rogers
8 Riter, Rogers, Wattier & Brown
9 P.O. Box 280
10 Pierre, South Dakota 57501-0280
11 for SDREA.

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1 COMMISSIONER JOHNSON: With that we will
2 proceed with the main event. Under consumer
3 complaints, CE06-002, in the matter of the
4 complaint filed by Sioux Valley Southwestern
5 Electric Cooperative doing business as Sioux
6 Valley Energy against Northern States Power
7 Company, doing business as Xcel Energy,
8 Regarding Provision of Electric Service to Myrl
9 and Roy's Paving. The question for the
10 commission today is shall the commission grant
11 the motion to dismiss, and I believe the motion
12 to dismiss is made by Xcel. As the moving
13 party Xcel has the floor.

14 MR. GERDES: Members of the commission. My
15 name is Dave Gerdes. I'm a lawyer from Pierre
16 and I represent Xcel Energy in this matter. Is
17 it agreeable to the commission if I speak from
18 here as opposed to coming closer?

19 COMMISSIONER JOHNSON: That would be fine.

20 MR. GERDES: Xcel has made a motion to dismiss
21 the complaint on the basis that it fails to
22 state a claim upon which relief can be granted
23 as a matter of law; that is, we're saying that
24 the law simply does not contemplate the relief
25 which Sioux Valley is asking for in its

1 complaint.

2 When this first came up, just by way of
3 background, when I opened my file I entitled it
4 "Myrl and Roy Revisited" because of course it
5 all stems from the Myrl and Roy case, which is
6 a 1992 case, decided by this commission which
7 went up to the South Dakota Supreme Court, and
8 which this commission's decision was affirmed
9 in. And the question was -- it was kind of a
10 unique situation but -- and I won't bore the
11 commission because I'm sure you're familiar
12 with the facts. But there's a quarry that is
13 in both service territories, Sioux Valley's and
14 Xcel's. Xcel's is the northern half of a
15 quarter section and -- excuse me, Xcel's is the
16 northern half of a quarter section and Sioux
17 Valley's is the southern half of the quarter
18 section.

19 This commission ruled that in 1992 -- or
20 before the 1992 Supreme Court decision that
21 Sioux Valley could not deliver electricity into
22 then NSP, now Xcel's territory through a
23 private line that was constructed by Myrl and
24 Roy. And they ruled that under the majority
25 load test that in fact the load that was coming

1 in was that of Xcel's, and that Xcel should
2 provide service to that location.

3 I want to talk about the word location,
4 and I want to talk about the concept of
5 retained right. Those are both concepts that
6 have come up in cases of the South Dakota
7 Supreme Court since the first Myrl and Roy
8 case.

9 You'll note that in the Myrl and Roy case
10 the South Dakota Supreme Court says this: "We
11 feel constrained to point out that what we have
12 not held. This decision does not hold that the
13 majority load test" -- the MLT test they call
14 it -- "is required in every contested
15 territorial case. PUC may conclude under a
16 different set of facts that a different test
17 such as point of use test or point of delivery
18 test is more appropriate for consideration and
19 application in a subsequent case."

20 Now, they're not talking about a retrial
21 of the Myrl and Roy case. They're talking
22 about other cases under similar circumstances
23 in that quote. And the point I want to make is
24 that the Supreme Court has in subsequent cases,
25 and specifically in what I call the Hub City

1 case, it's the Northwestern Public Service case
2 involving the old Hub City Iron property in
3 Aberdeen where the REC was granted the right to
4 serve that location under the majority load --
5 excuse me, under the large load statutes in our
6 code. And the customer and Northwestern at a
7 later time concluded that there had been a
8 change in circumstances and that we had to go
9 back, and they had a retained right to go back
10 and ask that that be revisited, and that
11 because of the change in circumstances reassign
12 it to Northwestern Public Service rather than
13 NEC, which was the rural electric carrier. And
14 the South Dakota Supreme Court said very
15 specifically that there is no such thing as a
16 retained right under South Dakota law.

17 Once a service territory is assigned it's
18 assigned. That's it. And the only way it can
19 be changed is pursuant to a statute passed by
20 the legislature. And the legislature did not
21 contemplate a situation where there had been a
22 change in circumstances.

23 In other words, once assigned the
24 territory is assigned. And it can't change
25 except for some very limited circumstances that

1 applied neither to the Hub City case nor that
2 apply to this case.

3 And the major reason that the courts have
4 assigned for this rule is what they have talked
5 about as being the fundamental reason that the
6 Territorial Integrity Act was passed, and, that
7 is, that the South Dakota Territorial Integrity
8 Act exists to eliminate duplication and
9 wasteful spending in all segments of the
10 electric utility industry. The court has said
11 that many times, especially in its more recent
12 decisions.

13 Now, if we -- if this commission wants to
14 go back and revisit Myrl and Roy, what's going
15 to happen is that Sioux Valley is going to have
16 to construct a whole new system of poles and
17 wires and transformers, and the rest, to
18 deliver the same load that Northwestern -- or
19 that Xcel is now delivering, plus some because
20 of course there's a proposed expansion involved
21 here. And that is why the legislature in its
22 wisdom in 1975 passed an act that said once the
23 service area is assigned it's assigned and
24 that's it. And the Supreme Court in the Hub
25 City case -- in the Northwestern Public Service

1 case said there is no statutory means to change
2 the law by virtue of a retained right to go
3 back and revisit the decision that was made
4 previously. That is the same thing that Sioux
5 Valley is to trying to do in this -- in this
6 complaint here because back in the original
7 Myrl and Roy case the commission used the
8 majority load test to determine which utility
9 should serve that situation.

10 Now, Sioux Valley will tell you, no, this
11 isn't a retained right. We think it was --
12 we're going back because of the majority load
13 test and we think we have a right to
14 recalculate the majority load. Well, isn't
15 that retained right except using another name?
16 I would submit that it is. And that's the
17 whole point of the position that Xcel is taking
18 in this case, and, that is, the Supreme Court
19 clearly said in the Hub City case that there is
20 no basis in statute to make the change that
21 they want to do in the Hub City case. We would
22 contend there's no basis in statute to make the
23 change to revisit the assignment of the
24 territory that was made in the original Myrl
25 and Roy case. And the only way that that can

1 occur is for the legislature to go back and
2 amend the law, and that has not occurred.

3 Now, I also want to point out, because
4 there's another reason -- these are both new
5 cases new to the Myrl and Roy case. The one I
6 just talked about, the Hub City case, is new,
7 more recent. And then there's the most recent
8 one, and that's the West River Electric case
9 out in Rapid City. And, again, the Supreme
10 Court said that a location, is a location, is a
11 location.

12 Once a location is served you can't change
13 the utility that provides service to that
14 location. What do we have here? We have a
15 quarry. We had a quarry back in 1992 and we've
16 got a quarry right now. Who is serving it?
17 Xcel. You cannot change the service provider
18 on -- the Supreme Court said in the West River
19 Electric case you can't change the provider
20 simply because of a change in load, either
21 reduction or increase in the load. Whoever is
22 providing that service will continue to provide
23 that service.

24 Another thing that's kind of interesting,
25 and I'm about ready to get to the end, and I

1 apologize for waxing so eloquently here, at
2 least I think it's eloquent, some may not. But
3 the other thing that's interesting is that way
4 back in the Myrl and Roy case, Myrl and Roy
5 won. They talk about the fact that it is --
6 the point of connection is viewed by the
7 industry to be the place where the service is
8 established.

9 They said, well, the record indicates that
10 it is an industry practice to treat the point
11 of connection as the point of delivery of
12 service. And that's true today. That's the
13 way the industry views it. Well, where is the
14 point of connection in the Myrl and Roy case?
15 It's in Xcel's territory. And so for at least
16 three reasons, not the least of which is that
17 there's no retained right to go back and
18 recalculate all this. We submit that the
19 motion to dismiss should be granted.

20 And I want to say one last thing, and,
21 that is that the SDREA filed a brief that I got
22 about -- fortunately I was at the office at
23 5:46 last night because that's when it came --
24 but SDREA says, well, there are fact issues.
25 There isn't a fact issue that affects what I've

1 talked about. We have admitted every
2 allegation in the complaint that's relevant to
3 what I just got done saying. They're saying,
4 well, there's a fact issue as to where the
5 majority load is. We're saying there is no
6 issue about the majority load because the
7 location has already been assigned. We don't
8 have to worry about the majority load.

9 Commissioners, you can consider the
10 majority load to be in Sioux Valley's territory
11 for all I care because we say it's not
12 relevant. And the same is true under the West
13 River Electric case. Whether the load goes up
14 and down or where it is in the location, it
15 doesn't make any difference because whoever is
16 serving the location is entitled to continue
17 the location. So whether you view it under the
18 Myrl and Roy case, under the Hub City case, or
19 under the West River Electric case we would
20 submit that the petition should be dismissed.
21 Thank you. And I apologize for going along so
22 long. And I'll be happy to answer any
23 questions when the time comes.

24 COMMISSIONER JOHNSON: Thank you, Mr. Gerdes.
25 Now from my count there were three parties

1 filing briefs in opposition to the motion to
2 dismiss. Is there a particular order that was
3 agreed upon? Mr. Glover and Ms. Moore?

4 MS. GREFF: Sioux Valley should go first.

5 COMMISSIONER JOHNSON: We'll go with Sioux
6 Valley first.

7 MR. GLOVER: Thank you.

8 COMMISSIONER JOHNSON: Followed by Myrl and
9 Roy, followed by SDREA, followed by staff, if
10 that's amenable to everyone.

11 MR. GLOVER: Thank you. I'm Al Glover,
12 attorney from Brookings, South Dakota. I
13 represent Sioux Valley Energy. And, by the
14 way, I've represented Sioux Valley Energy when
15 we were up here on the first Myrl and Roy's
16 case. And so I'm quite familiar with it. And
17 I think it's interesting to draw some
18 distinctions though.

19 As a matter of fact, I had quite a finger
20 in the development of the territorial law in
21 the first instance. I was one of the original
22 drafters. Not that that gives me any greater
23 eloquence when I'm speaking to it, as opposing
24 counsel would say, but I think that I am
25 familiar with it. And I think that the two

1 instances, of course, that were cited as the
2 major cases by Mr. Gerdes in this case, he
3 referred to one as the Black Hills or the West
4 River case. That was a case where that
5 customer was assigned by virtue of the law as
6 it was drafted. It was part of the original
7 assignment of customers. And it was -- you
8 know, the old thing where he was an existing
9 customer but it was in the West River's
10 territory. And so what we are arguing about is
11 as that customer's load and his development
12 expanded, what ultimately it did is it just
13 kept going more and more and more into that
14 territory, and that's where we got into the
15 issue of location. And basically it was ruled
16 that once that was assigned under the
17 Territorial Act that we weren't going to change
18 it. And it gave a very broad definition to
19 location.

20 The one in Aberdeen is an example of the
21 exact same -- of a different exception. It was
22 in our law. And that's the large load
23 exception. And basically that -- once our
24 courts have said, yes. Once that exception is
25 made and the customer's awarded, that we're not

1 going to permit any changes. So if there's
2 any, the Public Utilities Commission has no
3 authority or no power to make that correction.

4 Now, I would submit that there may come a
5 time where some development -- I'm not even
6 going to go there, but I will talk about the
7 distinction in this case.

8 In this particular case that territorial
9 line was drawn and agreed to by both parties.
10 NSP got that -- got the north half of that
11 quarter and Sioux Valley got the south half.
12 It's split right through the quarry. At the
13 time, of course, it wasn't Myrl and Roy's. It
14 was some other company that was doing that.
15 And they were providing their own electricity
16 for the projects.

17 Ultimately Sioux Valley was provided --
18 providing electricity to their trailer until
19 the point in time when Myrl and Roy's decided
20 that they wanted some three-phase power at that
21 site. And I think it's interesting that
22 counsel would argue that we had -- the point of
23 connection was a criteria in the initial Myrl
24 and Roy's case because they ignored that,
25 because the point of connection in the initial

1 Myrl and Roy's case was in Sioux Valley's
2 territory. That's where we connected to the
3 load.

4 We were arguing, of course, that Myrl and
5 Roy chose to take it from that point in
6 connection, and he was running his own wires
7 over to run some of his equipment was in --
8 which was in their territory. But we lost on
9 that point. The point of connection
10 technically did not rule.

11 So we had a situation in the first Myrl
12 and Roy's where we had a customer that was
13 straddling the line. They were serving --
14 operating in both Sioux Valley's territory.
15 Their location, so to speak, was in Sioux
16 Valley's territory and in NSP's territory.

17 And PUC -- there's no law -- that
18 territory law did not deal with that situation.
19 It was only the Public Utilities Commission
20 that dealt with that situation. They took it
21 upon themselves to say we've got some inherent
22 powers here to resolve these issues based upon
23 a number of standards and so we're resolving
24 it. We're adopting the load -- the majority
25 load test and we're going to do it.

1 And when they did that I thought their
2 comments were interesting. They said we don't
3 -- because I argued that. I said, What's going
4 to happen if that load grows into Sioux
5 Valley's territory? They said, Well, we think
6 that that's a real possibility. It didn't
7 happen as quickly as we projected it might, but
8 they said at the time if that's the case we're
9 not going to deal with that now. That's not
10 before us. We'll deal with it if and when that
11 comes up.

12 Well, it's happened. It's happened now.
13 But they had no statutory authority to make
14 that decision. That was their inherent power.
15 And that is different than either of the
16 cases -- of the two cases cited. And our
17 Supreme Court has gone on and said where there
18 is, and I cited that in my brief, it says,
19 Where there is no statutory authority we have
20 to rely upon the inherent power and knowledge
21 of the PUC to deal with these topics.

22 In this particular case when they adopted
23 the majority load test, I think that has since
24 been the only one that we've ever seen where
25 that's come up. But to say that that can never

1 be modified based upon the load growth I think
2 is presumptuous and I don't think that the
3 other cases hold that under these unique
4 circumstances. Because under these unique
5 circumstances we've got a customer that was
6 awarded by a decision of the PUC that was not
7 statutory-backed, so to speak, and now we have
8 this customer who has -- in fact, the PUC said
9 one of the exceptions where a customer can
10 choose. That was one of the big issues because
11 Myrl and Roy wanted to choose. And they said
12 the only way that a customer can choose is by
13 moving his load into another customer's
14 territory.

15 Basically it's one of the ways a customer
16 gets to choose who's going to be his provider.
17 Well, Myrl and Roy -- what if Myrl and Roy
18 moved all of their load into our territory now?
19 And that's a possibility that could happen. As
20 they're developing that quarry everything is
21 developing to the south. And as they continue
22 to develop it we could very well have one
23 hundred percent of the load in Sioux Valley's
24 territory.

25 Now, we then would have the unique

1 circumstances where we are absolutely -- which
2 I say would be in violation of the law because
3 we would have another utility serving a
4 customer who is located in our territory
5 entirely.

6 So why would you not be able to go back
7 and say under the majority load test, at least
8 evaluate to see what would be the good reasons
9 for doing that. I think it's presumptuous to
10 argue at this point in time that because we
11 don't really know what the facts and
12 circumstances are as to whether or not it would
13 be wasteful. I know there would be some
14 duplication. But that's a subjective matter
15 determination that can be determined by way of
16 hearing as to how much -- how much duplication
17 or waste might take place.

18 The fact is is that -- that's only one
19 standard. The other standard that you've got
20 to consider is who's going -- somebody's going
21 to be serving a customer that's located in our
22 territory now, and what standard are you going
23 to adopt? Are you going to now eliminate and
24 say we're no longer going to apply the majority
25 load test once we've decided it? You're all

1 done. That's what you're being asked to do.
2 And I think that that's -- I don't think that
3 that's what was ever intended by our
4 legislature. Thank you.

5 COMMISSIONER JOHNSON: Mr. Glover, thank you.
6 Ms. Moore?

7 MS. MOORE: Thank you, Commissioner Johnson.
8 Meredith Moore appearing on behalf of Myrl and
9 Roy. We would obviously rely upon our brief
10 for the majority of our issues, but for
11 purposes of elucidating some of the arguments
12 that have already been expressed I would concur
13 in Mr. Glover's statement that to rely upon the
14 1997 Hub City case as well as the 2004 West
15 River Electric Cooperative case would make bad
16 law, frankly, because the decisions of those
17 cases are constrained to their facts. And the
18 1992 case which involved Myrl and Roy's is also
19 premised upon a very unique set of facts, and a
20 set of facts which since 1992 has never been
21 addressed again by the South Dakota Supreme
22 Court. And I think that it's very well pointed
23 out in the South Dakota Supreme Court's
24 decision, specifically at footnote six, which
25 is effectively a recitation of the PUC's ruling

1 at the time which specifically said, "Under the
2 record as established in this case the majority
3 of Myrl and Roy's electric power is currently
4 consumed in NSP's assigned service area, and,
5 therefore, NSP has the exclusive right to serve
6 the entire load."

7 At no point was there necessarily a
8 distinction granted that it would be exclusive
9 territory or a redefinition of territory for
10 the future. Therefore, it was essentially
11 contemplated by the South Dakota Supreme Court
12 that this issue could in fact be revisited if
13 the facts justified such a revisitation. And
14 they do in this particular instance. And we're
15 not simply talking about the point of
16 connection or being able to move that from one
17 particular side of the dividing line to the
18 other, but we're also talking about a customer.

19 Myrl and Roy's contemplating a very
20 significant increase in the electric load which
21 it will require almost doubling in size, and
22 because of that there are numerous factual
23 issues which I appreciate under the standard of
24 review for a motion to dismiss cannot
25 necessarily be reviewed by this commission at

1 that time, but which are certainly relevant to
2 a determination of what the law in fact is.
3 And because of that a motion to dismiss is
4 premature.

5 Perhaps a motion for summary judgment in
6 the future following discovery or following
7 essentially an opportunity to further develop
8 the facts of this case might be appropriate,
9 but a motion to dismiss for failure to state a
10 cause of action is simply not appropriate under
11 the facts. And when referencing some of the
12 territorial concerns that were effectively
13 dealt with by the Territorial Act of 1975 as
14 well as the subsequent case law and decisions
15 of this commission, there was concern about
16 unnecessary duplication of facilities. The
17 customers being required to absorb revenue
18 shortfalls, those sorts of things.

19 It's my basic understanding that in this
20 case there would likely be construction
21 required by either Xcel or by Sioux Valley in
22 order to properly serve the entirety of the
23 increased load anticipated by Myrl and Roy's.
24 And because of that you're not dealing with
25 those same types of territorial concerns.

1 You're dealing with two companies which would
2 likely both have to engage in some sort of
3 construction, both engage in some sort of up
4 front capital expenditure which certainly would
5 not be imposed upon a customer base by any
6 means. Nor are we talking about the
7 duplication of services, because, again, it
8 doesn't appear at least at this point in time
9 that either one of the companies would
10 necessarily be in the perfect position to
11 continue to provide power.

12 And so, again, I think that the facts of
13 this case as applied to the law of the 1992
14 case would require that the motion to dismiss
15 at this time be denied, and we would request
16 that the commission deny that motion. Thank
17 you.

18 COMMISSIONER JOHNSON: Thank you, Ms. Moore.
19 Ms. Rogers, I presume you're representing
20 SDREA?

21 MS. ROGERS: Did you ask for my comments?

22 COMMISSIONER JOHNSON: Yes. Sorry. I didn't
23 have the mike on. I was speaking in a mute as
24 well. Ms. Rogers, I presume you're
25 representing SDREA?

1 MS. ROGERS: Yes. That's correct. Thank you.
2 I feel a little bit like a new kid on the block
3 because I was not involved in any of the past
4 litigation concerning this case, and I'm also
5 the last one to intervene so I'm probably not
6 as well-versed in all of the cases that have
7 been cited so far.

8 I believe that SDREA's position is
9 consistent with Sioux Valley's and also with
10 Myrl and Roy's, and, that is, and what we tried
11 to point out in our brief, this motion to
12 dismiss is premature. As Mr. Gerdes stated,
13 the law does not contemplate the relief
14 requested by Sioux Valley. And I'm not
15 convinced at this stage that that is
16 necessarily a true statement. In fact, I think
17 it's not a true statement.

18 What I did when I looked at these cases
19 and reviewed the West River case and the Hub
20 City case, I kind of went back and diagramed
21 the territorial issues in each one. So, for
22 example, in the West River case you have West
23 River Electric's territory and you had the
24 Black Hills territory. And because of SDCL
25 49-34(a)-42, Black Hills was allowed to

1 continue to provide service to a customer that
2 it had already served that was located then in
3 the West River area. And so that was a factual
4 situation. And the basis of granting West --
5 or Black Hills' authority continued to serve
6 that customer was strictly in statute. And, in
7 fact, the Supreme Court in West River said, "A
8 resolution of this case requires statutory
9 construction."

10 So then when the case came back in front
11 of the Supreme Court when that load expanded,
12 the Supreme Court said because the initial
13 service and right to serve that customer was
14 based on the statute, that's where you have to
15 look at if you're going to revisit the issue,
16 and they said there is no statute that
17 authorizes changing what was established in the
18 initial statutory 49-34(a)-42, which is the
19 Territorial Act.

20 The same way in Hub City. You had two
21 separate territories, and you have a foundry
22 then that was established in Northwestern
23 Public Service area, but that through customer
24 choice and SDCL 49-34(a)-56, which is the large
25 load statute. So it's a statutory right to

1 have an electric service provider outside the
2 Northwestern service area territory provide
3 service to that customer.

4 And so, again, when the customer -- the
5 foundry closed, there was a change in
6 circumstances, the customer wanted to go back
7 to Northwestern Public Service, the court once
8 again looked at the statute.

9 The basis for assigning that customer to
10 that particular area in the first case was the
11 statute -- you had to look to the statute to
12 change it.

13 The current case appears to me to be
14 different. What you have is you have two
15 service areas, and you have the business in the
16 middle so it's basically split between two
17 areas.

18 So this commission in the prior
19 litigation looked at the statute, could find no
20 guidance in the statute as to who should be
21 allowed to serve that customer because in fact
22 there isn't any.

23 So then the commission exercised its
24 discretion as a commission and said we're going
25 to adopt the majority load. That's not a

1 statutory basis for assigning a service. It's
2 discretionary with this commission.

3 And so now we come to the situation where
4 the facts that governed discretion exercised by
5 the commission at that time may have changed.
6 And, in fact, I think that the commission --
7 this commission even contemplated that in the
8 first -- when it exercised its position -- or
9 its discretion in applying the majority load
10 test. And the footnote alluded to by
11 Ms. Moore, the commission went on to say, "The
12 commission will not speculate as to how Myrl
13 and Roy's load will change in the future and
14 when a majority of the load will be in Sioux
15 Valley's assigned area."

16 So clearly I think that this commission
17 has the same discretion as they had to assign
18 it in the first place. They utilized their
19 discretion because there was no statutory
20 guideline. Likewise now if it can be shown
21 that facts and circumstances have changed I
22 think that this commission retains that
23 discretion to make whatever changes or not make
24 changes that the commission deems appropriate
25 after you have once again reviewed the facts.

1 And I think that's what the Supreme Court
2 upheld in the prior Myrl and Roy's cases -- Roy
3 cases, and that is your discretion to act and
4 to revisit it. That's why I am -- in our brief
5 we tried to point out that this petition -- or
6 this motion to dismiss is premature. We
7 believe that you need to look at the facts, and
8 apparently from the petition to intervene there
9 may be some dispute in the facts that are out
10 there, but I think that you as a commission
11 initially need to look at those facts and then
12 make a determination is there a different
13 discretionary -- discretionary measure that you
14 want to employ now that would be more
15 appropriate to what you see factually in front
16 of you at this point.

17 I think you deserve that right, and that's
18 clear in the Supreme Court cases, and so that's
19 why we are urging you to deny the motion to
20 dismiss. Thank you.

21 COMMISSIONER JOHNSON: Thank you, Ms. Rogers.
22 My plan for -- the game plan would be to ask
23 staff, Mr. Gerdes some rebuttal and then open
24 up to commissioner and advisor questions.
25 Unless there are any concerns with that,

1 Ms. Greff?

2 MS. GREFF: Thank you, Commissioner Johnson.

3 Staff would first like to rely on their

4 comments in their brief as to their position in

5 this matter and echo the eloquent sentiments of

6 Xcel. Kind of taking these arguments to the

7 extreme by Sioux Valley Energy, and Myrl and

8 Roy's, and SDREA, if the commission were to

9 revisit the majority load test, in essence they

10 would be allowing Myrl and Roy's to jump back

11 and forth between providers whenever they

12 wanted to. They could simply move their load

13 across this dividing line in between Xcel and

14 Sioux Valley's territory. And I really don't

15 think that that is what the founders of the

16 1975 act would have, I guess, allowed or liked

17 to happen. The act is clear that it does not

18 want -- or wants to prevent the duplication of

19 services -- or services to territories, and

20 that's why they came down with what they came

21 down with.

22 Since then, since the 1992 case the

23 Supreme Court has provided us guidance as to

24 how to handle this matter. They have come down

25 with the Hub City case and the West River case,

1 giving us definitions as to this retained right
 2 that Mr. Gerdes referred to and the definition
 3 of location. And that's why it's important to
 4 look at those precedence that have been handed
 5 down and apply them to the facts of this case
 6 today. Xcel had been given the retained right
 7 to serve Myrl and Roy's as it exists at that
 8 location. That right should exist with Xcel
 9 and should continue to exist with Xcel, and
 10 that is why staff feels that the motion to
 11 dismiss should be granted and allow Xcel to
 12 continue.

13 COMMISSIONER JOHNSON: Thank you, Ms. Greff.
 14 Mr. Gerdes, did you want an opportunity to
 15 rebut?

16 MR. GERDES: Very briefly, Mr. Chairman. I,
 17 too, was around with Mr. Glover when this was
 18 written although I was in the back room working
 19 on the draft. My partner, Warren May, was on
 20 the front line with the bill.

21 So in any event, I couldn't say it any
 22 better than Ms. Greff said it. Back in -- this
 23 quote is in most cases on this subject. And
 24 this is the Wilrod case back in 1979 when the
 25 Supreme Court said, "An individual has no

1 organic, economic or political right to service
2 by a particular utility merely because he deems
3 it advantageous to himself." The purpose of
4 the Territorial Act is to assign service
5 territories, and if I'm in Sioux Valley's
6 service territory that's where the service is.

7 Once the territory is assigned, it's
8 assigned. And there's no way to change it
9 except there are a few statutory ways to change
10 it that are not here relevant.

11 Ms. Greff hit the nail right on the head.
12 If we were to adopt the position that's being
13 advocated by our loyal opposition, Myrl and Roy
14 could flip-flop every five years and try to
15 negotiate with the other provider. Well, we'll
16 move our load over here now so you give me a
17 better deal. Well, we're move our load over
18 here now so you give me a better deal. That is
19 not what is contemplated by the Territorial
20 Act.

21 What I'm saying, and have been saying is
22 this: That Myrl and Roy -- the first Myrl and
23 Roy case has been overruled by implication by
24 the Supreme Court of South Dakota in these
25 latter two cases that we've been talking about.

1 And that's what -- that's what the Supreme
2 Court was talking about in the first Myrl and
3 Roy case when they said we're not going to
4 speculate about what's going to happen if the
5 load shifts. They've pronounced the answer,
6 and the answer is we don't go back and revisit
7 the majority load test. The service territory
8 is assigned.

9 I mean -- and, lastly, Mr. Glover talked
10 about the West River case and how this was
11 different somehow because it was a stranded
12 location. The Supreme Court doesn't say one
13 word about it ever having been a stranded
14 location. They say we're talking about a
15 location, and they use that term expansively.

16 When location is established it's
17 established unless there's some statutory way
18 to change it, and there's no statutory method
19 of changing it that's relevant to this
20 proceeding.

21 COMMISSIONER JOHNSON: Thank you, Mr. Gerdes.
22 I'd look quickly to the other parties to see if
23 they have anything quickly before moving to
24 commissioner and advisor questions.

25 MR. GLOVER: I would only state that there's

1 been a lot of discussion on the customer not
2 choosing, and I would cite briefly that one
3 paragraph, one sentence from the initial
4 decision that was cited by the Supreme Court in
5 Myrl and Roy's when they first talked about the
6 customer not having a right to choose. And
7 then they said -- this is the quote -- "A
8 customer with a mobile load may as a practical
9 matter choose its electrical provider if it
10 relocates its equipment to the company's
11 territory of its choice."

12 COMMISSIONER JOHNSON: Ms. Moore, Ms. Greff,
13 Ms. Rogers, anything further?

14 MS. MOORE: I would add one additional brief
15 comment. Mr. Commissioner, it's certainly not
16 the desire of Myrl and Roy's in this case to
17 jump back and forth between providers. And we
18 believe that to be a very extreme extension of
19 the argument that has been advanced.

20 However, under the circumstances of this
21 case, with the type of increase in power that
22 would be required in order to properly
23 accommodate the needs of the quarry expansion,
24 we do take on some of the same concerns that
25 are expressed in the large load statute.

1 Obviously, we do not fall within the
2 definition of new customer or new location
3 under the terms of those statutes. However,
4 equitably we believe that there are concerns
5 which can and need to be addressed in order to
6 insure that Myrl and Roy's receives power in a
7 timely manner, in the most effective manner,
8 and to insure that either carrier can
9 effectively provide the necessary power. And
10 given that there is construction anticipated by
11 both parties, again, it would appear to be
12 premature to dismiss this matter as a matter of
13 law. Thank you.

14 COMMISSIONER JOHNSON: Ms. Greff, Ms. Rogers,
15 anything further?

16 MS. ROGERS: Nothing further. Thank you.

17 MS. GREFF: I guess I would just briefly touch
18 on Ms. Moore's comments as to her concerns
19 under the factors of the large load customers.
20 There do exist other remedies for Myrl and
21 Roy's do they find that -- if they find that
22 Xcel cannot or has not been providing them or
23 in the future will not be able to provide them
24 adequate service. The commission is equipped
25 with adequacy of service statute that Myrl and

1 Roy's would be able to come back to at a later
2 date if they find that their service is not
3 adequate and then request switching of
4 providers.

5 COMMISSIONER JOHNSON: Thank you, Ms. Greff.

6 At this point we would move to commissioner and
7 advisor questions. I have one for Mr. Glover.
8 Mr. Glover, on page 6 of your brief you do note
9 that under Xcel's theory of this case if Myrl
10 and Roy's moved their entire load into Sioux
11 Valley's territory, Xcel would still be
12 entitled to continue servicing them. I
13 understand some concerns about that. Do you
14 have any response to the concerns raised by
15 staff and by Xcel about what I envision as the
16 teeter-totter ability of a customer to move
17 their load in order to choose their provider on
18 more than one occasion?

19 MR. GLOVER: Well, I actually can expand that a
20 little bit more. The thing that concerns me is
21 we're not looking at a large load factor here.
22 Let's say you got another customer that wants
23 to build right on a boundary line. He has the
24 ability at that time if he wants -- if he wants
25 to do it he can set -- if he wants to set up

1 the majority load test again he can effectively
2 put the majority of his load on that, very
3 little load, but make it the majority on that
4 side of the customer he wants. If he's under
5 the belief that once it's done, once I've done
6 it, nobody ever can change it again. So he can
7 effectively do that by picking it up, moving it
8 right on his line, putting a little bit more
9 than 52 percent on this side, 48 on this side,
10 and then go on with it.

11 I think that this commission should retain
12 the jurisdiction to rule on that. I don't
13 think that that's going to be a problem with
14 somebody -- with somebody jockeying back and
15 forth as long as -- and if it does you
16 certainly have got the inherent power to make
17 exceptions to that.

18 In other words, if you say no, we're --
19 we're not going to let you just -- five years
20 they come back, Myrl and Roy comes back and
21 says now we're moving all of our stuff back
22 over to the east side because we got a lot
23 better deal. That might be a point in time
24 where you can say this is enough of this. This
25 is enough of this. We're not going to

1 entertain this. We're not going to permit you
2 to do that back and forth, but you have to
3 weigh that against the criteria that's
4 happening if you followed the argument of
5 counsel. In this particular case they've
6 essentially got -- we have territory that is
7 not our territory. Basically it's -- and it
8 was assigned to us. And it could be that he'll
9 have 100 percent of his customer in our
10 territory. That's fine if we'd agreed to that,
11 but we never agreed to it.

12 COMMISSIONER JOHNSON: Mr. Glover, your
13 comments seem to place quite a bit of
14 importance on customer preference. And I may
15 be wrong on that, please correct me, but the
16 statute allows so few exceptions for customer
17 preference.

18 MR. GLOVER: I agree with that. And I have
19 heard that. If I'm leaving that impression
20 with you I don't want to because I fully
21 understand that the purpose of our territorial
22 law and the rulings of this commission and our
23 Supreme Court over the years have essentially
24 said customer preference has no place in our
25 territorial law. And I agree with you. I

1 think that is a broad and accurate statement,
2 and I don't think we want to kind of get into
3 the position where we're permitting a customer
4 to choose.

5 COMMISSIONER JOHNSON: Thank you. Mr. Glover,
6 you note in your brief on page 4, the court --
7 and you quote from the court ruling -- "The
8 customer with a mobile load may as a practical
9 matter choose its electric provider as it
10 relocates its equipment to the company's
11 territory of its choice." And you've mentioned
12 that a couple of times today to support the
13 idea of the majority load, that if the
14 circumstances change, that if the customer
15 moves their load into somebody else's service
16 territory that they can in effect -- that the
17 commission in effect can select a different
18 provider. But my reading of this, I presume
19 the court was very clearly talking about a
20 customer moving their load to a new location.
21 Do you think I'm reading that portion of the
22 ruling incorrectly?

23 MR. GLOVER: If you were to take out the word
24 mobile load that might be true. But I think if
25 you get any meaning to the word a customer with

1 a mobile load, I think then you're talking
2 about a situation where they're talking about a
3 customer that's got a load that he can move.
4 Essentially a mobile load is not a structure,
5 so to speak. That's what I'm referring to in
6 that case. And it's very unique circumstances
7 in this case. So it's not the general rule.
8 It's one exception.

9 COMMISSIONER JOHNSON: Thank you, Mr. Glover.
10 Other commissioner or advisor questions?

11 COMMISSIONER HANSON: I have some.

12 COMMISSIONER JOHNSON: Yeah. Commissioner
13 Hanson.

14 COMMISSIONER HANSON: Thank you. Mr. Gerdes,
15 just a couple of curiosity points. You used a
16 date on the -- stated that the legislature
17 passed a law stating that once a territory is
18 assigned it remains assigned. Was that 1975?

19 MR. GERDES: Yes. That was the year that the
20 Territorial Act was adopted.

21 COMMISSIONER HANSON: And I have another
22 question for you. And forgive me, I'm not
23 going to be able to articulate very well
24 because I was listening to other things as I
25 was jotting just a couple of words to remind

1 myself of it, and while you're looking for it I
2 may ask some other questions.

3 You stated that in the South Dakota
4 Territorial Integrity Act that the Supreme
5 Court had made a statement pertaining to the
6 inability, the sanctity, I guess I will say, of
7 that act. And do you recall -- it was towards
8 the beginning of your remarks. Do you recall
9 what you had said on that? While you're
10 looking for that I'm going to ask a couple of
11 other questions. I hope that they don't cause
12 you consternation as you're trying to look for
13 that.

14 Ms. Moore, just a point of clarification
15 for me. As I understand it these properties
16 are all contiguous. Is that correct?

17 MS. NOHR: Yes. We haven't added onto any
18 property. It's all property we've already had.

19 COMMISSIONER JOHNSON: Could you state your
20 name for the record?

21 MS. NOHR: Sure. My name is Patty Nohr, and
22 I'm with Myrl and Roy's Paving. We've not
23 added on any more property. It's all still the
24 same property we had. We have new equipment
25 that's going further south.

1 COMMISSIONER JOHNSON: Okay. The name one more
2 time?

3 MS. NOHR: Patty Nohr, N-O-H-R.

4 COMMISSIONER JOHNSON: Thank you, Patty.
5 Appreciate it.

6 MS. MOORE: Excuse me. I wanted to defer to
7 Ms. Nohr as a representative to ensure I didn't
8 make a factual misstatement.

9 COMMISSIONER HANSON: That's great. We
10 appreciate that. Thank you. One other
11 question for you. Is this in any way a mobile
12 load?

13 MS. MOORE: To a certain extent, yes. However,
14 this is a multi-million dollar expansion and
15 requires significant amounts of new materials
16 which is in and of itself extremely expensive
17 and which will be placed in the appropriate
18 place once the final plans are drawn up. And
19 it is my understanding based on speaking with
20 Ms. Nohr as well as other representatives of
21 Myrl and Roy's because of some of delays in
22 construction at this point that it has not yet
23 been determined exactly where all of this
24 equipment is going to go in order to best serve
25 the area of the quarry in which they're

1 currently working. So it is to a certain
2 extent a mobile load. However, because it is
3 that multi-million dollar expansion it
4 certainly doesn't make any economic sense for
5 Myrl and Roy's to constantly juggle the
6 location of this type of very burdensome,
7 heavy, expensive equipment.

8 COMMISSIONER HANSON: So for the most part once
9 it's placed it's likely to remain at that
10 location with the exception, I'm going to
11 guess, that as the quarry expands or changes
12 there may be a relocation of that equipment?

13 MS. MOORE: I believe that would be a fair
14 statement, yes.

15 COMMISSIONER HANSON: In the future when there
16 is a relocation of that equipment is there a
17 potential for it to end up back into Sioux
18 Valley's territory?

19 MS. MOORE: Quite frankly I would defer to
20 Ms. Nohr on that because again she would better
21 be able to describe the nature of the quarrying
22 endeavors they undertake.

23 MS. NOHR: Some of the new equipment is going
24 to the south on the property, and there's going
25 to be new equipment on the north side, too. So

1 it's still quite -- hasn't been determined yet.
2 Not everything is, you know, is moving out of
3 Xcel's property, but not -- so there's still
4 going to be some straddling across that line, I
5 guess, and it's not really been determined how
6 much is going to be where.

7 COMMISSIONER HANSON: Thank you. And just for
8 the record, as I recalled, you're president of
9 the company. Is that correct? What is your
10 position?

11 MS. NOHR: I'm one of the owners, and my sister
12 is the president.

13 COMMISSIONER HANSON: Okay. Thank you.

14 COMMISSIONER JOHNSON: Mr. Gerdes, would you
15 like to respond to Commissioner Hanson's
16 question?

17 MR. GERDES: Yes. What I was referring to,
18 Commissioner Hanson, was the South Dakota
19 Supreme Court has on numerous occasions when
20 it's been deciding territorial issues has a
21 quote, and that is, "That the purpose of the
22 South Dakota Territorial Integrity Act was to
23 eliminate duplication and wasteful spending in
24 all segments of the electric utility industry,"
25 and the cases pretty much support the

1 proposition that that is the guiding light that
2 should be used in interpreting these statutes.
3 In other words, the purpose of assigning
4 service territories was to eliminate
5 duplication of services by competing utilities
6 on both sides of the dividing line, so to
7 speak. And that's the point we were trying to
8 make here is that you could end up with a
9 flip-flop situation where both companies are
10 duplicating services -- or excuse me,
11 equipment, and that's not what's contemplated
12 by the act. And that was our point.

13 COMMISSIONER HANSON: I appreciate that. And I
14 thought I had seen it in a brief. I wasn't
15 certain whether I had or not. I think it was
16 in your brief.

17 MR. GERDES: I wouldn't be surprised if it's in
18 my brief.

19 COMMISSIONER HANSON: It seems to explain, at
20 least it's -- surprisingly the Supreme Court
21 can say things better than I can, but I was
22 struggling with this. And as I struggle with
23 it I really truly wanted to maintain the
24 integrity of territories as much as possible.
25 And at the same time we have this situation

1 where at one time it was on one side of the
2 fence and now it's on the other side of the
3 fence, and there's discussion about it going
4 back to the other side of the fence. It's a
5 struggle for me because I wished to maintain it
6 as much as possible, and I don't want to get
7 into a conclusive statement here, but I think
8 that helped me with the best that I could
9 articulate my thoughts.

10 And there is some concern, Mr. Gerdes,
11 what if -- by myself -- what if 100 percent of
12 the load eventually migrated over to the Sioux
13 Valley service territory?

14 MR. GERDES: If 100 percent of the load
15 migrated over to Sioux Valley service territory
16 Xcel would still be able to serve that load
17 under the West River case because the West
18 River case talks about a location. And once a
19 location is established -- and that's a perfect
20 example. That is -- the West River case
21 involves a sewage treatment plant that is
22 totally in West River's service area, but Black
23 Hills Power serves it. And it's because of the
24 fact that it was originally served. And, I
25 mean, they are all kinds of exceptions. We try

1 to eliminate them, but there are all kinds of
2 exceptions. As an example I know there's a
3 school building in the southern part of
4 Sioux Falls where just one corner of it is in
5 Xcel's territory and the rest of it's in one of
6 the local cooperative's territories, but Xcel
7 has the service because it's got the point of
8 connection.

9 So there's all kinds of examples of that.
10 But there has to be some consistency, and
11 that's why we're saying once the location is
12 established -- and that's why we're saying
13 that's what West River said -- once the
14 location is established it is a location. And
15 unfortunately our legislature in its wisdom did
16 not provide a statutory mechanism for changing
17 that.

18 COMMISSIONER HANSON: Thank you. And I don't
19 know that Commissioner Johnson needs me to be
20 running to his defense in any fashion
21 whatsoever. He's quite capable by himself.
22 But knowing Myrl and Roy's as long as I have,
23 and having done business with them even years,
24 many, many, many years ago, I recognize fully
25 well, Ms. Moore, that they would not play the

1 game of jumping back and forth just to try and
2 game the system. At the same time I think that
3 Commissioner Johnson's statements were more
4 towards the precedent that this would set as
5 opposed to meaning to imply in any fashion that
6 Myrl and Roy's would do that.

7 MS. MOORE: And I appreciate your comments in
8 that regard, Commissioner.

9 COMMISSIONER HANSON: Thank you, Commissioner.

10 COMMISSIONER JOHNSON: Mr. Chairman, sir, any
11 questions coming from you?

12 COMMISSIONER SAHR: I have no questions or
13 comments at this point.

14 COMMISSIONER JOHNSON: Advisors?

15 MR. SMITH: I have one, and maybe you can all
16 address this. I regret to say I picked up the
17 wrong Northern State's Power case as I was
18 scrambling to get ready. I've got one that has
19 no relevance to this in my folder here. I
20 recall, though, in doing the brief in the West
21 River case a statement in the opinion to the
22 effect of nothing in the act giving a customer
23 the right to be served by two utilities.

24 MR. GERDES: That's correct.

25 MR. SMITH: Maybe, could you guys maybe address

1 whether -- I couldn't quite discern the logic
2 of that really when I read the original case,
3 but maybe address that and how that might
4 relate to the issue of stranding if we were to
5 do what the complainants are requesting us to
6 do.

7 MR. GERDES: The quote is on page 5 of the
8 version of the act that I have, and it's under
9 subheading two called -- it's subheading two,
10 Exclusive Service. It's paragraph 8 in the
11 numbered opinion. And it says, "There is no
12 statutory provision which would allow both NSP
13 and Sioux Valley to service the company. Thus,
14 PUC applied the majority load test to determine
15 whether NSP or Sioux Valley should serve the
16 company's electrical needs. Sioux Valley
17 argues PUC has no statutory authority which
18 would allow it to adopt the majority load
19 test." At that time the commission adopted the
20 majority load test as a way of assigning the
21 territory. And they assigned the territory and
22 now it's assigned. And that's the way I read
23 this. There's nothing in this decision or any
24 other decision that says you can go back and
25 rework the majority load test every time a load

1 moves around. And I guess that's the point I'm
2 trying to make.

3 MR. SMITH: Well, and what about service by two
4 utilities?

5 MR. GERDES: It says there is no statutory
6 provision which would permit both service.

7 MR. SMITH: Let me ask you this: It says
8 there's no statutory provision which would
9 require that.

10 MR. GERDES: It says allow.

11 MR. SMITH: Allow. Okay.

12 MR. GERDES: And there isn't. There isn't any
13 statutory provision that permits two companies
14 to serve the same location that I'm aware of in
15 the Territorial Act.

16 MR. SMITH: I believe I understand the
17 implication, you know, with the discussion on
18 the duplication of services and all of that,
19 but is it then the position of Xcel that if the
20 commission were, because of the load, majority
21 of the load passing to the south end of the
22 property, would assign it now to Sioux Valley,
23 that there would be a stranding or that we
24 would result in a wasting and then duplication
25 of investment out there.

1 MR. GERDES: Well, yes. Because what you would
2 end up doing was any service that -- any
3 improvements that NSP or Xcel has would have to
4 be abandoned. They would be useless. And of
5 course then Sioux Valley would have to build
6 new equipment to serve the load, and so that's
7 exactly what the territorial law is talking
8 about avoiding. And, I mean, there's no
9 stranding in the sense of stranding a company,
10 because, again, that's answered in the West
11 River case which talks about a location, and
12 once a location is established it's always a
13 location.

14 MR. SMITH: Will your facilities be stranded if
15 Myrl and Roy is to be served by Sioux Valley?

16 MR. GERDES: Yes. Yes.

17 MR. SMITH: Okay. I'm not arguing that this is
18 a grandfathering, you know, issue here. But
19 what I'm asking is if -- I'm asking, I guess,
20 if this is a genuine issue, if this is a
21 genuine case where that phrase duplication of
22 facilities and waste is at issue.

23 MR. GERDES: We would say yes.

24 MR. SMITH: And I think it is. And the reason
25 is because your facilities out there then would

1 be stranded?

2 MR. GERDES: Yes, they would become useless.

3 MR. SMITH: Is that an issue of fact in this
4 case or is it absolute?

5 MR. GERDES: I don't think it's an issue of
6 fact as it relates to the law. And I think
7 that's why we brought the motion to dismiss
8 because the facts are irrelevant whether or not
9 it's stranded or not because of the operation
10 of the two cases, the Hub City case and the
11 West River case. I mean, the law says that
12 once a location is established it's a location.
13 And that location was established in the first
14 Myrl and Roy case. And that's the point we're
15 making. There's no point to going any further.

16 COMMISSIONER JOHNSON: Other questions from
17 commission advisors? Mr. Glover, did you want
18 to respond?

19 MR. GLOVER: Just one point. I think that the
20 point is well made. John makes it. Is that
21 the commissioners have already asked some
22 issues about factual issues that may very well
23 be relevant were this to go further. But if we
24 restrict this, strictly given the assumptions,
25 the only issue we're talking about here is what

1 issue he's raising in his motion, and that is
2 simply do you have the power to change the
3 customer under any circumstances, inherent
4 power to do? We know two of them you don't,
5 that one location in the Rapid City case and
6 the other one in the Hub City case, but we've
7 argued, and I think it's there, that you do
8 have. When you argue the stranded -- or not
9 the stranded, but the duplication of services,
10 I only wanted to remind you that one -- if the
11 companies couldn't agree under the statute --
12 if the companies could not agree upon the
13 territory back in 1975, then it was up to the
14 Public Utilities Commission to assign the
15 territory in a contested case situation.
16 Duplication of facilities was only one of the
17 criteria, statutory criteria that they had when
18 they make that decision. It was one of them --
19 of I think there was five or six criteria that
20 the commission could use in deciding who should
21 get a customer, and duplication of service was
22 only one of them. It is not the only criteria
23 to be considered by the commission.
24 COMMISSIONER JOHNSON: Thank you, Mr. Glover.
25 Other commission, advisor questions,

1 commissioner questions?

2 MR. SMITH: I might have one.

3 COMMISSIONER JOHNSON: Mr. Smith, go ahead.

4 MR. SMITH: One more. And, again, Meredith, I
5 regret to say I couldn't find your petition to
6 intervene here, and I think it's probably stuck
7 in one of my other files frankly. But are you
8 in -- I can't remember whether you did or
9 didn't and whether that's relevant here. Is
10 Myrl & Roy's alleging that Xcel either is not
11 now or cannot or will not in the future provide
12 adequate service?

13 MS. MOORE: I don't believe that allegation has
14 been made. The primary justification advanced
15 in the petition to intervene was based on
16 insuring that service would be provided in a
17 timely manner, and that either party would
18 essentially be able to accommodate the
19 increased load that is anticipated will be
20 required to service the quarry expansion. So
21 in that regard it wasn't certainly the desire
22 of Myrl & Roy's to become the object of desire,
23 so to speak, between two companies, but to
24 insure that in that fight it would be allowed
25 the opportunity to advancing facts or any

1 circumstances which it believed needed to be
2 addressed in order to best flesh out the
3 arguments and in order to insure that it was
4 able to obtain the power it needs.

5 MR. SMITH: I have one other question, if I
6 may. It may be relevant in the wake of the
7 West River case, probably is, but are the
8 facilities here discrete loads or are they all
9 an integrated load that would be serviced
10 through one transformer and one set of
11 facilities, or do you know that? Has that
12 design level been done?

13 MS. MOORE: I don't believe I know the answer
14 to that question at this point.

15 MR. GLOVER: And I don't. John, I might also
16 mention only you talked about stranded load. I
17 go back to the original Myrl and Roy's. There
18 was stranded load back then, too. Sioux
19 Valley's load -- once Xcel was permitted to
20 connect, all of our load to that site was
21 stranded.

22 MR. GERDES: We're not aware of the nature of
23 the load. We have one transformer and one
24 feeder and we don't know how it's broken down.

25 MR. SMITH: Thank you. That's all I have.

1 COMMISSIONER JOHNSON: Question for Ms. Greff
2 and staff, and Mr. Gerdes may want to chime in
3 as well. Mr. Glover and I have had some
4 discussions about what the court meant when it
5 talked about a customer with a mobile load
6 being able to choose its electric provider. Do
7 you have any comment on the way I view that as
8 opposed to the way Mr. Glover has laid out his
9 case?

10 MS. GREFF: If I remember correctly that was in
11 the original Myrl and Roy's case in 1992 where
12 they talked about the mobile load and it being
13 able to be switched back and forth. Since
14 then, since 1992 we have gotten two other cases
15 come down. The Hub City case and the Black
16 Hills case that have further given us direction
17 as to how to view this mobile load. One is in
18 the retained right case in the Hub City case
19 where the retained right exists with the
20 current provider, and also the word location.
21 Once a location is established, and that was in
22 the Black Hills case, once a location is
23 established that location is its location is
24 its location. It can't be switched back and
25 forth. So, yes, there was this mobile load

1 back in 1992 in the first Myrl and Roy's case,
2 but since then the court has directed us that
3 once this is established and once a customer is
4 being served by a utility a customer cannot.
5 There is no mechanism for a customer to jump
6 back and forth between providers. That's how
7 staff would feel about it.

8 COMMISSIONER JOHNSON: Thank you, Ms. Greff.
9 Mr. Gerdes?

10 MR. GERDES: And I would add, I read in context
11 I read this quote as saying this was the
12 problem that the PUC and the court were trying
13 to solve. They're not saying you can do this.
14 They're saying this is the situation that we
15 were faced with.

16 COMMISSIONER JOHNSON: I see. All right. If
17 there are -- unless there are any other
18 commissioner or advisor questions it seems as
19 though there are three options for the
20 commission to take at this point. One would be
21 to rule at this point from the bench. One
22 would be to take a short recess for the
23 purposes of deliberating and returning today to
24 make a ruling, and the third would be to take
25 this information under advisement and take no

1 action today. I'll look to Commissioner Hanson
2 and Chairman Sahr as to your preferences. I'm
3 prepared to do any of the three.

4 COMMISSIONER HANSON: I'm prepared to make a
5 ruling today. If you feel the need to have a
6 short conference that's fine, too.

7 COMMISSIONER JOHNSON: Mr. Chairman, we could
8 certainly patch you in via phone in a private
9 conference if you're so inclined.

10 COMMISSIONER SAHR: Well, I'm certainly
11 prepared to act as well today, so certainly I
12 can do so with or without the conference so
13 whatever my fellow commissioners would like to
14 do I would be more than happy to accommodate
15 that.

16 COMMISSIONER JOHNSON: I haven't heard any need
17 for a recess and deliberation, unless I'm
18 reading either of you wrong. If no one wants a
19 deliberation then I think a commission action
20 is in order. Does anyone have a motion?

21 COMMISSIONER HANSON: I will move that the
22 commission grant the motion to dismiss.

23 COMMISSIONER JOHNSON: And I would second that.

24 COMMISSIONER SAHR: And I dissent.

25 COMMISSIONER JOHNSON: The motion by a two-one

1 vote, the motion to dismiss has been granted.
2 I believe that concludes the commission's
3 actions today, although there are a few
4 announcements.
5 (End of Proceeding.)

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STATE OF SOUTH DAKOTA)
 :SS CERTIFICATE
COUNTY OF MINNEHAHA)

I, Pat L. Beck, Registered Merit Reporter and
Notary Public within and for the State of South Dakota:

DO HEREBY CERTIFY that I took the proceedings of
the foregoing Public Utilities Commission Meeting, and the
foregoing pages 1-57, inclusive, are a true and correct
transcript of my stenotype notes.

I FURTHER CERTIFY that I am not an attorney for,
nor related to the parties this action, and that I am in no
way interested in the outcome of this action.

In testimony whereof, I have hereto set my hand
and official seal this 28th day of June, 2006.

Pat L Beck

Pat L. Beck, Notary Public
Expiration Date: June 11, 2011
Iowa CSR Number: 1185