

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

IN THE MATTER OF THE COMPLAINT)	
OF SIOUX VALLEY SOUTHWESTERN)	CE06-002
ELECTRIC COOPERATIVE, INC., DBA.,)	
SIOUX VALLEY ENERGY AGAINST)	SOUTH DAKOTA RURAL
NORTHERN STATES POWER COMPANY,)	ELECTRIC ASSOCIATION'S
DBA., XCEL ENERGY, FOR PROVISION)	BRIEF IN OPPOSITION TO
OF ELECTRIC SERVICE TO MYRL AND)	XCEL'S MOTION TO DISMISS
ROY'S PAVING)	THE COMPLAINT

In opposition to the Motion of Northern States Power Company, dba, Xcel Energy ("Xcel") to Dismiss the Complaint filed by Sioux Valley Southwestern Electric Cooperative, Inc. ("Sioux Valley"), South Dakota Rural Electric Association ("SDREA"), offers the following argument and authorities stated in this Brief.

FACTS

Sioux Valley filed a Complaint with the South Dakota Public Utilities Commission ("Commission") requesting a hearing pursuant to SDCL 49-34A-59. This request is based upon notification received by Sioux Valley from Myrl and Roy's Paving ("Myrl and Roy's") that Myrl and Roy's would be expanding its operations into Sioux Valley's electric service territory. Sioux Valley was also informed that when the new equipment is installed and operating, a majority of the load to Myrl and Roy's will be located in Sioux Valley's territory. Based upon this notification, Sioux Valley requested in its Complaint that it be awarded the exclusive right to provide electric service to Myrl and Roy's.

Xcel filed a Motion to Dismiss the Complaint of Sioux Valley based upon its belief that Sioux Valley's Complaint fails to state a claim upon which relief can be granted.

ISSUE

SHOULD SIOUX VALLEY BE AWARDED THE RIGHT TO PRESENT FACTUAL EVIDENCE TO THE PUBLIC UTILITIES COMMISSION THAT THE MAJORITY LOAD OF MYRL AND ROY'S WILL BE LOCATED IN SIOUX VALLEY'S ELECTRIC SERVICE TERRITORY?

ARGUMENT AND AUTHORITIES

SDREA asserts that the Motion to Dismiss filed by Xcel should be denied because 1) there are still factual issues which need to be determined in reference to the location of the majority of the load and 2) the issue of whether the Commission retains the power to re-assign the load to Sioux Valley based upon the "majority load test" or another appropriate test, appears to be an issue of first impression in South Dakota, can only be resolved after accurate facts have been determined.

According to the petition of Sioux Valley, Myrl and Roy's had informed them that they would be adding new equipment, which will be located in Sioux Valley's territory and that when this equipment is installed and operating, the majority of the load will be located in Sioux Valley's territory. (Paragraph 11 of Sioux Valley's Complaint.) In the Petition to Intervene of Myrl and Roy's, they stated that it is not known exactly where the majority of Myrl and Roy's power load will be located. Thus, it appears that there is a factual question that has yet to be resolved and Sioux Valley should be entitled to discovery on whether or not the operation will indeed be moved into Sioux Valley's territory.

Upon the completion of discovery, if it is determined that the majority of the load will be in Sioux Valley's territory, SDREA believes that this factual situation presents an issue of first impression. Once the facts have been determined, the Commission may determine if it retains the authority to exercise its discretion and reassign the electric load.

In the Matter of Northern States Power Company, 490 NW2d 365 (1992), the Court specifically noted that there was no statutory provision which applied to the facts in the first Myrl and Roy case. The Supreme Court held that because the Commission is vested the authority to regulate public utilities, they were delegated considerable discretion in attaining the statutory goals where there are no specific statutes which control a situation such as the one presented in that case.

The Supreme Court affirmed the decision by the Commission to apply a “majority load test” (“MLT”) to determine which electric utility would be awarded the right to serve the customer when the customer straddled two service territories. At that time, based on the present location of the Company’s equipment, the evidence established that fifty-nine percent of the electric load was to be consumed in NSP’s territory, and forty-one percent was to be consumed in Sioux Valley’s territory. Based on that factual situation, the Commission assigned the territory to the provider who at that time had a majority of the electric load, which was NSP. Id at 370.

In a footnote of that opinion the Court agreed it was not the Commission’s position to speculate as to how Myrl and Roy’s load will change in the future and when a majority of the load will be in Sioux Valley’s assigned area. According to the information received by Sioux Valley, the Commission will not need to speculate because that day has apparently arrived, and if that is the case, then this Commission must revisit the issue of expansion of Myrl and Roy’s load into Sioux Valley’s assigned service area.

The crux of Xcel’s argument is that the Northern States Power Company holding implies that a load increase does not enable a customer or electric provider to request a

change in service. However, the Court said nothing on whether a geographical expansion of service, which shifts the majority, would afford the opportunity to change electrical providers. This is a legitimate question that, as yet, has not been considered by the Commission or the Courts, and was not foreseeable when the legislature drafted the Territorial Integrity Act, as evidenced by its failure to provide statutory relief when a customer is located within two or more territorial zones. Thus, consideration should now be given to this question.

CONCLUSIONS

For the foregoing reasons and the arguments cited by Sioux Valley, SDREA urges the Commission to deny Xcel's Motion to Dismiss.

Respectfully submitted this 12th day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the PETITION OF SDREA TO INTERVENE was served via the method(s) indicated below, addressed to:

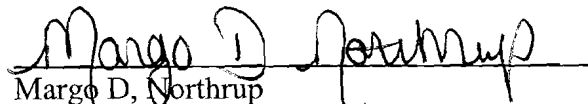
Sara B. Greff () First Class Mail
South Dakota Public Utilities Commission () Hand Delivery
500 East Capitol Avenue () Facsimile
Pierre, South Dakota 57501 () Overnight Delivery
() E-Mail
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David A. Gerdes () First Class Mail
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Dated this twelfth day of June, 2006.


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