

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT
OF SIOUX VALLEY SOUTHWESTERN
OF SOUTH DAKOTA ELECTRIC
COOPERATIVE, INC., DBA,
SIOUX VALLEY ENERGY AGAINST
NORTHERN STATES POWER
COMPANY, DBA, XCEL ENERGY, FOR
PROVISION OF ELECTRIC SERVICE
TO MYRL AND ROY'S PAVING.

Docket No. CE 06-002

**BRIEF OF MYRL AND ROY'S
PAVING, INC. REGARDING MOTION
TO DISMISS OF XCEL ENERGY**

COMES NOW, Myrl and Roy's Paving, Inc., by and through its undersigned counsel, and respectfully submits this Brief for consideration in this Commission's determination of the Motion to Dismiss the Complaint of Sioux Valley Energy for the Provision of Electric Service to Myrl and Roy's Paving, Inc. ("Myrl and Roy's") filed Northern States Power Company, dba Xcel Energy ("Xcel Energy").

PRELIMINARY STATEMENT

Myrl and Roy's currently has planned a significant expansion of its quarry operation, which expansion will necessitate the provisioning of a significant increase in electric power in order for the expanded quarry to achieve full operation. Because of ongoing changes in the plan for the construction and placement of the new and enlarged facilities and equipment included in the quarry expansion, as well as recent delays in construction, it is not yet known exactly where the majority of Myrl and Roy's power load will be located. As expressed in its Petition for Intervention, Myrl and Roy's desired to be a part of this proceeding in order to minimize the potential for confusion of the underlying facts surrounding the expansion of its quarry. Significantly, Myrl and Roy's seeks to ensure that any factual determinations will not negatively impact the timeliness of service of electric power, the cost associated therewith, and the ability of

the ultimate electric service provider to adequately serve Myrl and Roy's current and future increased electric power needs.

STANDARD OF REVIEW

The standard of review utilized by circuit courts in determining a motion to review is instructive in this case. A motion to dismiss tests the legal sufficiency of the pleading, along with any conclusions reasonably drawn therefrom, and not the facts that support it. See SDCL § 15-6-12(b). As such, all facts properly pled in the complaint must be treated as true and all doubts must be resolved in favor of the pleading party. See Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 226 (S.D. 1988). Pleadings should not be dismissed merely because there is doubt as to whether the pleader will prevail in the action as this is a matter of proof, not pleadings. See Thompson v. Summers, 1997 S.D. 103, 567 N.W.2d 387, 390. "The question is whether in the light most favorable to the [pleader], and with doubt resolved in his or her behalf, the complaint states *any valid claim of relief*. The court must go beyond the allegations for relief and 'examine the complaint to determine if the allegations provide for relief on *any possible theory*.'" Id. (citation omitted). Motions to dismiss are viewed with disfavor and are rarely granted. Id.

ANALYSIS

In 1992, following an adversarial hearing seeking a determination of whether Xcel Energy or Sioux Valley Energy had the right to provide electric service to the entirety of Myrl & Roy's quarry operation, this Commission, based on application of the majority load test, determined that Xcel Energy had the right to provide electric service to the whole of the quarry because the majority of the electric load was to be consumed in Xcel Energy's service territory. This Commission's decision was affirmed by the Circuit Court, County of Hughes, Sixth Judicial Circuit and ultimately by the South Dakota Supreme Court in the matter styled as *Northern*

States Power Company v. Sioux Valley Empire Electric Association, 489 N.W.2d 365 (S.D. 1992).

Northern States Power Company v. Sioux Valley Empire Electric Association presented an issue of first impression for the South Dakota Supreme Court. The Court was tasked with the responsibility of determining whether this Commission's decision to resolve a contested territorial case by applying the majority load test was appropriate. Notably, in affirming the decision of this Commission, the South Dakota Supreme Court made no definitive ruling that Xcel was to be granted the exclusive right to serve the quarry indefinitely. See id. at 371. While the Supreme Court stated that NSP or Xcel, as it is now known, had the exclusive right to serve Myrl and Roy's quarry, it did so pursuant to the application of the majority load test. Id. In effect, the Supreme Court's decision left open the opportunity to revisit the facts of the majority load test should such an appropriate situation arise.

The facts have not changed materially since the Supreme Court made its decision in the above-referenced case in 1992. Myrl and Roy's continues to operate a quarry, which is located in the southeast quarter of Section 27, Township 101 North, Range 48 West, Minnehaha County, South Dakota. The southeast quarter of Section 27 is divided in half by the 16th line, which line runs through the center of the quarry operation, and which line represents the division between the exclusive assigned electric service territory of Xcel Energy and Sioux Valley Energy as defined and recognized by this Commission in 1976.

At no time since the Supreme Court's 1992 decision has it been presented with an identical set of facts as those at issue in this case. Cf. Matter of West River Elec. Assoc., Inc., 2004 S.D. 11, 675 N.W.2d 222 (addressing a customer's expansion into the territory of a different electric service provider and applying the law as set forth in SDCL § 49-34A-32); In the Matter of Northwestern Publ. Svc. Co., 1997 S.D. 35, 560 N.W.2d 925 (applying SDCL § 49-

34A-56). While other cases have modified and clarified the law as it relates to the provisioning of electric service and territorial concerns, there is no case which is dispositive of those issues raised by Sioux Valley Energy in its Complaint so as to justify dismissal of the docket as a matter of law.

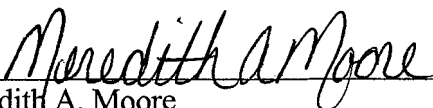
Significantly, at the time of the Supreme Court's decision, it affirmed this Commission's use of the majority load test and specifically held that this Commission possessed the authority, expertise and discretion to adopt and use the majority load test in contested territorial cases. See Northern States Power Co., 489 N.W.2d at 370. That same discretion and authority remains with this Commission today. Moreover, the facts of this case are not yet decided and there are material questions of fact. As such, any decision as to whether the majority of the power load shall be within the territory of Xcel Energy or Sioux Valley Energy is premature at this point and could result in a misstatement of the facts and potential misapplication of the appropriate law.

CONCLUSION

The legal sufficiency of Sioux Valley Energy's Complaint is sound. Accordingly, Myrl & Roy's Paving, Inc. respectfully requests that this Commission deny Xcel Energy's Motion to dismiss.

Dated this 9th day of June, 2006.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9 th day of June, 2006, I served a true and correct copy of the Petition to Intervene of Myrl and Roy's Paving, Inc., via e-mail and regular United States mail, first class postage prepaid, to:

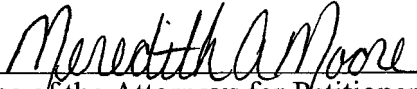
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