

GEORGE S. MICKELSON
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ALAN F. GLOVER
RICHARD J. HELSPER
JODY ODEGAARD SMITH

GLOVER & HELSPER, P.C.
ATTORNEYS AND COUNSELORS AT LAW

415 EIGHTH STREET SOUTH
BROOKINGS, SOUTH DAKOTA 57006
TELEPHONE: (605) 692-7775
FAX: (605) 692-4611

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

E-MAIL ADDRESSES:
afg1@brookings.net
rjh1@brookings.net
jos1@brookings.net

June 7, 2006

Patricia VanGerpen
South Dakota Public Utilities Commission
State Capitol
500 East Capitol Ave.
Pierre, South Dakota 57501-5070

RE: IN THE MATTER OF THE COMPLAINT OF SIOUX VALLEY
SOUTHWESTERN 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 CE06-002

Dear Ms. VanGerpen:

Enclosed herewith are ten originals of Sioux Valley's
response to Xcel's Motion Petition to Dismiss. I have also
forwarded copies to all parties, as indicated in my Certificate
of Service.

Thank you very much.

Sincerely,

GLOVER & HELSPER, P.C.



ALAN F. GLOVER

AFG:klb
Enclosures
cc: Don Marker

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

In opposition of the Motion of Northern States Power Company, dba., Xcel Energy ("Xcel"), Sioux Valley Southwestern Electric Cooperative, Inc. ("Sioux Valley"), offers the following argument and authorities stated in this responsive Brief.

FACTS

Sioux Valley has reviewed the facts recited by Xcel in its Brief and concurs with those facts insofar as they are consistent with the pleadings in Sioux Valley's initial Complaint and Xcel's admission of same. The Exhibits A,B and C offered by Xcel in support of its Motion are not part of any record and should not be considered in resolving this Motion.

As further background information, reference is made to the Findings of Fact and Conclusions of Law in the earlier decision (EL 91-003), wherein it is noted that Sioux Valley first began providing electric service in its assigned territory in 1985 to an office trailer used by Heiman Sand and

Gravel, Myrl and Roy's predecessor. In October, 1989, the account was transferred to Myrl and Roy's Paving. The initial dispute, which resulted in the hearing in 1991, resulted from the fact that Myrl and Roy's desired three phase power, which both Sioux Valley and NSP were willing to provide.

We believe that the facts, if presented, would provide that in 1991 when the PUC awarded the quarry to NSP, the load in question was 906 connected HP. This has grown to 1,646 connected HP by March of 2006. Myrl and Roy's is now proposing to add an additional 1,845 HP connected load, the exact location of the equipment as it relates to the territorial boundaries of the parties, has not been resolved. However, Sioux Valley was informed by Myrl and Roy's that the majority of its new load would be located in Sioux Valley's territory.

ISSUES

1. PREMISED UPON ITS INITIAL AWARDING OF THE LOAD TO NSP (XCEL) BASED UPON A "MAJORITY LOAD TEST", DOES THE PUBLIC UTILITIES COMMISSION RETAIN THE RIGHT AND POWER TO RE-ASSIGN THE LOAD TO SIOUX VALLEY IF IT IS ESTABLISHED THAT THE MAJORITY LOAD IS NOW LOCATED IN SIOUX VALLEY'S SERVICE TERRITORY?

ARGUMENT AND AUTHORITIES

The Public Utilities Commission has the power and authority to re-assign the customer load to a different utility utilizing the majority load test where it can be established that a significant majority of the load is now in the other utility's territory.

Xcel cites authority for the proposition that neither the service provider nor the customer retain the right to request a change of service once a service area is established. The second portion of their argument is that once a service area provider for a location is established under the Territorial Act, there is no mechanism for a change which exists under Chapter 49-34A.

In support of its first argument, Xcel cites in the Matter of Northwestern Public Service Company, 560 NW 2d, 925, (1997 SD 35). That case stands for the proposition that once a large load exception is granted by the Public Utilities Commission, that the Public Utilities Commission does not have the power to re-assign that load at the request of either the supplier or the customer. For the most part, we agree with counsel for Xcel's analysis of the Court's ruling in the Northwestern decision. However, we do not agree that the decision is on point. The facts in the present controversy are distinguishably different. The Myrl and Roy's load was not awarded to NSP or Xcel based on the large load exception set forth in SDCL 49-34A-56, nor was any load in existence at the time that the territories were certified to NSP and Sioux Valley in 1976.

In the Matter of Northern States Power Company, 489 NW 2d, 365, (1992), the South Dakota Supreme Court upheld the decision of the Public Utilities Commission in awarding the load to Myrl

and Roy's. The Court essentially found that Sioux Valley was extending service to a customer in NSP's territory and following its ruling, NSP would be extending service to a customer located in Sioux Valley's exclusive territory. In dealing with that issue, the Court noted that there is no statutory provision which would allow both NSP and Sioux Valley to provide service to Myrl and Roy's, and the PUC applied a "majority load test" to determine which electric utility should be awarded the right to serve the customer. The Court acknowledged that although there was no statutory provision which would allow for the majority load test, this was within the broad discretion of the Public Utilities Commission. In so doing, the Court cited the Public Utilities Commission Finding of Fact No. 5 in its opinion, to-wit:

"(5.) Electric utility customers in South Dakota do not have the right to choose their electric supplier on the basis of lower rates. Customer preference, if controlling, would defeat the orderly assignment of service areas. If customers were allowed to choose their electric utility, especially large industrial customers like Myrl and Roy's Paving, the remaining customers who have no choice would be required to cover the revenue shortfall through higher electric rates. A customer with a mobile load may, as a practical matter, choose its electric provider if it relocates its equipment to the company's territory of its choice . . ." (Emphasis added.)

The Court then went on to comment:

"This Court has previously stated that the PUC is deemed to be an administrative tribunal with expertise . . . Thus, we think it is appropriate in a situation such as this where there is no specific

statute relating to a unique set of facts or prior decisions, for the PUC to consider for this Court to defer to the PUC's expertise in matters which lie within its particular field of knowledge."

The "bright line standard" referred to by counsel for Xcel is, in fact, one of the guiding standards followed by prior Court decisions and by decisions of the Public Utilities Commission. Prior decisions give significant weight to the concept that one of the primary purposes of the Territorial Act was to divide the service territory in this state so as to eliminate as much as possible duplication of service and wasteful spending. This standard cannot, however, be the sole standard to be considered in deciding the equitable allocation of utility customers under our territorial law. Of equal, if not greater importance, is the standard that set forth in SDCL 49-34A-42, which provides in part: "Each electric utility has the exclusive right to provide electric service at retail . . . to each and every present and future customer in its assigned service area."

The "duplication of service" standard was discussed in the Northern States Power Company case also. The Commission elected, however, to give a greater weight to the "Majority Load Test" in its decision to award the customer to NSP.

The second major case and argument submitted by counsel for Xcel was in the Matter of West River Electric Association, Inc., 675 NW 2d, 222 (2004 SD 11). This was clearly a case which is distinguishable from the facts in this case. In West

River, the load and location in question was originally awarded to Black Hills as a stranded customer in the assigned service territory of West River. The extensive discussion of the Court in the West River Electric Association case was an attempt to establish guidelines on the expansion of the location which had previously been awarded by virtue of the Territorial Law in its inception. In West River, the Supreme Court gave a broad interpretation to the term "location" and essentially held that since Black Hills was serving the treatment plant on March 21, 1975, it would be able to continue serving the treatment plant no matter how far it expanded into West River's territory. The key distinction between the West River case and Myrl and Roy's decision was that Myrl and Roy's was not a frozen customer of Xcel's on March 21, 1975. The location of the customer under these circumstances is that it is in both utility's exclusive service territory, a fact not anticipated by the "Act".

Counsel for Xcel argues that the Court's ruling in West River was not limited to a "stranded customer" situation and that the Court ruled with respect to locations generally. We disagree. Counsel is taking the definition of "location" out of the context of the Court's ruling in West River. Different standards will apply depending on how the service location was established. Under Xcel's theory of this case, if Myrl and Roy's moved their entire load into Sioux Valley's territory,

Xcel would still be entitled to continue servicing them. Unfortunately, that may happen as the quarry mining operation continues to be developed into Sioux Valley's territory.

CONCLUSION

Where there is no specific statute relating to a unique set of facts and the PUC has exercised its inherent authority in assigning a customer to a utility, the PUC retains the power to re-assign the customer based upon a change of circumstances.

The Public Utilities Commission has retained the power to rule upon this issue and the right to re-assign the Myrl and Roy's load to the majority load provider.

Dated this 7th day of June, 2006.

GLOVER & HELSPER, P.C.



Alan F. Glover Attorney for
SIOUX VALLEY SOUTHWESTERN
ELECTRIC COOPERATIVE, INC.

Post Office Address:

Glover & Helsper, P.C.
415 8th St. So.
Brookings, South Dakota 57006
Tel. No. (605) 692-7775

CERTIFICATE OF SERVICE

ALAN F. GLOVER, of Glover & Helsper, hereby certifies that on the 7th day of June, 2006, he mailed by United States mail, First Class postage thereon fully prepaid, a true and correct

copy of the above captioned to the following last known addresses:

DAVID A. GERDES
Attorneys for Xcel
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160


DAVE JACOBSON
Staff Analyst
Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501

SARA GREFF
Staff Attorney
Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501

DARLA POLLMAN ROGERS
Attorney for SDREA
Riter, Rogers, Wattier & Brown, LLP
P.O. Box 280
Pierre, South Dakota 57501

MEREDITH A. MOORE
Attorneys for Myrl and Roy's Paving
Cutler & Donahoe, LLP
100 N. Phillips Ave., 9th Floor
Sioux Falls, South Dakota 57104

ALAN F. GLOVER



Alan F. Glover, Attorney at Law