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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
BY NORTHERN STATES POWER
D/B/A XCEL ENERGY AGAINST
SOUTHEASTERN ELECTRIC COOPERATIVE,
INC. FOR A VIOLATION OF THE
SERVICE TERRITORY LAWS

EL11-025

=====

Transcript of Recorded Proceedings
March 27, 2012

ORIGINAL

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

COMMISSION STAFF
John Smith

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Reported By Cheri McComsey Wittler, RPR, CRR

TRANSCRIPT OF RECORDED PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, 500 East Capitol Avenue, Pierre, South Dakota,
on the 27th day of March, 2012.

1 CHAIRMAN NELSON: EL11-025, In the matter of the
2 Complaint by Northern States Power d/b/a Xcel Energy
3 against Southeastern Electric cooperative for violation
4 of the service territory laws.

5 This obviously is not the first time that we've
6 heard this particular matter. When we concluded last
7 time Commissioner Hanson filed a letter asking both
8 parties to submit some maps. And we've got maps. And so
9 we appreciate both parties doing that.

10 At the same time, as the parties know, I also
11 filed a letter with some of my thoughts, and I just want
12 to maybe expound not on the letter but why I did that.

13 Essentially, the day after that meeting I
14 thought, you know, these are the things that I wish I
15 would have said at that meeting so that both parties knew
16 what my thought process was and I hadn't said it at the
17 meeting. I thought, you know, I'm just going to put it
18 in writing so everybody knows, you know, what my thoughts
19 were, what I would have said if I had had them collected
20 quickly enough at that meeting. Hence, the reason for my
21 letter.

22 I don't intend to take testimony from either
23 side today. But what I would like to do is open it up
24 for Commissioner questions based on the submissions that
25 we've had from both sides and get our questions answered

1 and see where we go from there.

2 So with that, I'd open it up for Commissioner
3 questions.

4 Seeing none, I'll start off. The first question
5 that I had for Mr. Wilcox -- and I want to ask a couple
6 of questions relating to the maps that you've submitted.

7 And my question is we've gotten this letter from
8 Scott Gilbert, the Whispering Woods Development manager.
9 And my question is the specific lots that he's
10 immediately concerned with, where do they fall on the map
11 that you've submitted? In whose territory?

12 MR. WILCOX: I don't know, Mr. Commissioner. I
13 haven't seen the letter that you're talking about.

14 CHAIRMAN NELSON: Okay. It is part of the
15 Docket. Mr. Schardin, do you know the answer to that
16 question?

17 Well, then we're going to swap out. And
18 Mr. Schardin.

19 MR. SCHARDIN: All right. Good morning,
20 Commissioner.

21 CHAIRMAN NELSON: Good morning.

22 MR. SCHARDIN: Mr. Gilbert's map on the most
23 recent ones that he has requested, I'm not sure which map
24 you have in front of you, I guess.

25 CHAIRMAN NELSON: Well, let's -- we can work off

1 of --

2 MR. SCHARDIN: Work off of yours then, Jim.

3 On the map that Mr. Wilcox has here in the red
4 area they would be the -- right off of -- you take
5 Westwind Avenue going north-south there and then you get
6 to East Tree Top Street where it turns. It would be the
7 top lot on that corner there. And then he skips three
8 lots, and then it would be the bottom three -- or the
9 next three in there.

10 CHAIRMAN NELSON: So it would -- ultimately it
11 would all be in the area that Mr. Wilcox is proposing be
12 Southeastern's territory if this were to be approved.

13 MR. SCHARDIN: Yep. In the red block and then
14 below that one. You're right, Commissioner.

15 CHAIRMAN NELSON: Okay. The second question
16 that I've got -- and Mr. -- for Mr. Schardin, can you
17 find this particular map?

18 MR. SCHARDIN: I think that one's right on the
19 back of Jim's here too. I believe right there. That one
20 right there? Yep.

21 CHAIRMAN NELSON: Exactly. If we were to adopt
22 this proposal, how much of the existing infrastructure
23 that you have installed would not be usable for your
24 purposes?

25 MR. SCHARDIN: For serving off starting on East

1 Tree Top Street there where we drop south, we have that
2 section line in the middle there over to this piece over
3 here. Essentially Commissioner, Mr. Chairman, we would
4 be just serving our way through to the west side of
5 that.

6 CHAIRMAN NELSON: And am I correct you've got a
7 three-phase underground distribution line running through
8 there; correct?

9 MR. SCHARDIN: That is true. All the way down
10 through there, yep.

11 CHAIRMAN NELSON: So but you don't have any
12 feeders coming off of there yet?

13 MR. SCHARDIN: No. They were put in -- a
14 conduit piece there, and they were stubbed up eventually.
15 So you would hook up a single phase line off that.
16 They're --

17 CHAIRMAN NELSON: Okay. So those conduits and
18 those stubs, that would be lost to you in that area.

19 MR. SCHARDIN: Yep. Yep.

20 CHAIRMAN NELSON: I think that's all the
21 questions I've got. I do have one for Mr. Wilcox, and
22 then we'll see if other Commissioners have questions.

23 Looking at that same map, as I was counting up
24 the number of lots that you were proposing trading, if
25 you will, and obviously the map that you put together was

1 in keeping with the thoughts that I had publicly
2 portrayed and yet you were kind of going a little
3 different direction in making sure that there was a
4 minimal amount of Southeastern's infrastructure that
5 would be stranded and that's exactly what I wanted to
6 hear.

7 But in counting up the number of lots traded it
8 appeared to me that Southeastern ended up short about
9 three lots. And so my question is on this particular
10 map -- and I'm going to -- if I could hold it up, right
11 in this particular area -- and I'm just going to hold it
12 around so people can see what I'm talking about.

13 It's in the area where we've got this caption
14 that says Territory Line As Per Official 1976 PUC Line.
15 And you've kind of angled your proposed boundary line
16 there so that it follows the lot line directly, and we
17 appreciate that.

18 If I were to propose moving that up three lots
19 so that the number of lots are equal, would that be
20 acceptable?

21 MR. SCHARDIN: Yes.

22 CHAIRMAN NELSON: Thank you. That is all the
23 questions that I've got.

24 Other Commissioner questions? Commissioner
25 Hanson.

1 MR. WILCOX: Mr. Chairman, I would just add that
2 there are three lots that come on the Southeastern side
3 of that orange line and those lots, as I understand, have
4 already been stubbed up. And maybe -- you know, houses.
5 Then that's why that was drawn that way originally.

6 But to go back to your first question,
7 Xcel Energy would have no problems with three more lots.

8 CHAIRMAN NELSON: Thank you. Appreciate that
9 clarification.

10 Commissioner Hanson.

11 COMMISSIONER HANSON: Mr. Wilcox, aren't you at
12 all uncomfortable sitting here attempting to come before
13 us here and redesign a development that's under
14 development at the present time?

15 I mean, we have houses going up. We have --
16 shouldn't plans of this nature be done well in advance of
17 the construction phase? It's like swapping cards or
18 something.

19 MR. WILCOX: Certainly. Well, Mr. Commissioner,
20 historically we've had situations like this where we've
21 had developments that sort of fall on top of the -- on
22 top of the existing territory boundary, and we have
23 worked cooperatively with our friends at the various
24 co-ops to sort of gerrymander isn't the right word but
25 change the territory boundaries so as to accommodate lots

1 so we aren't cutting through, you know, lots or maybe
2 even through blocks. So we have some history and
3 experience with doing that.

4 Now certainly would we have liked to have done
5 that a couple -- you know, last year before the
6 construction season began? I think we had an honest
7 disagreement and an honest misunderstanding of, excuse
8 me, where the territory boundary was. And so now we just
9 try to remedy this as best we can I think is where we're
10 at.

11 COMMISSIONER HANSON: Isn't that exactly what
12 Southeastern's offer was to you? Didn't they have a
13 offer to divide this property in a sensible fashion where
14 it ran right down the middle of the street instead of
15 cutting through lots and things of that nature?

16 MR. WILCOX: I don't recall an offer by
17 Southeastern. I made an offer to Southeastern Co-op just
18 prior to the hearing in December.

19 COMMISSIONER HANSON: The one that they
20 presented to us? The one that we have before us here?
21 Didn't Southeastern present a compromise?

22 MR. WILCOX: I apologize, Commissioner.

23 COMMISSIONER HANSON: It's part of the -- excuse
24 me. It's part of the exhibits that we have.

25 MR. WILCOX: I will apologize. This is not a

1 very good explanation, but I will say I've been on jury
2 duty for four weeks and this is my first week of not
3 sitting on a jury so I am behind.

4 COMMISSIONER HANSON: You've got lots to do. I
5 understand. We all do. I appreciate the challenges that
6 you have there.

7 You're sitting before us right now, and you just
8 brought up there's four lots that are stubbed in or
9 something of this nature. This is a lot more complicated
10 than just moving some extension cords from one spot to
11 the next. I mean, I've been involved in developments,
12 and it's -- there's a lot involved there. We're
13 affecting a lot of folks.

14 And I know from personal experience of owning
15 properties the challenges of one party next door has --
16 for instance, Sioux Valley, the other one next door has
17 Xcel, the one has Southeastern. It just creates some
18 unique challenges in the community to do that, even when
19 it's municipal versus -- and you have commercial
20 properties operated by someone else.

21 I just -- I'm really concerned about simplicity
22 here and the consumer and the challenge of I don't want
23 to be sitting here trying to design a development. And
24 so I'm uncomfortable with -- I became really
25 uncomfortable when you said, well, there's four over

1 here --

2 You know, how are we going to be totally
3 comfortable when we have a letter before us from a
4 developer that says that they have already five lots to
5 the east that have offers to purchase on them?

6 And I'm just really uncomfortable with that.
7 I'm surprised that Xcel did not accept the offer that was
8 presented by Southeastern and I'm even more surprised
9 that you're not aware of it but that to me as I looked at
10 it it seemed like a very sensible way to resolve this
11 whole thing. Didn't even need to involve the Commission
12 on it.

13 It seems like Xcel's trying to get two bites out
14 of the apple here because -- and I'll let you comment on
15 this and that's why I'm not saying it later on during a
16 Motion process because Southeastern makes an offer to
17 Xcel and Xcel doesn't apparently negotiate on that offer
18 and takes the Complaint to the Commission. Now you're
19 negotiating from basically using Southeastern's position
20 as your base position on negotiations.

21 Southeastern is, in essence, negotiating against
22 itself. I think it puts a real chill on negotiations
23 when one side makes an offer and then the other side
24 apparently ignores that, comes to the Commission, and
25 with a Complaint because you can always fall back on the

1 offer that was presented by Southeastern so there's
2 nothing to lose. And I'm concerned about that.

3 MR. WILCOX: Mr. Chairman. Well, I may begin, I
4 guess, by saying -- it's kind of out of order, I suppose,
5 but map 3 with the orange lines was just my idea of how
6 we might rearrange the territory boundary to accommodate,
7 you know, an equitable solution.

8 Now I am embarrassed that I was not aware of
9 this offer by Southeastern Co-op. Evidently they made an
10 offer to us through the Commission in the last week, and
11 I apologize. I do not know of that.

12 CHAIRMAN NELSON: Actually it was dated
13 February 17.

14 MR. WILCOX: Okay. I have not seen that offer,
15 and I'm not aware of it. And that's my fault.

16 CHAIRMAN NELSON: Mr. Smith.

17 COMMISSIONER HANSON: Thanks, Jim. I don't mean
18 to be harsh.

19 MR. WILCOX: No. It's a fair question, and it's
20 my fault. I missed it.

21 COMMISSIONER HANSON: I've been involved in
22 these things on ground level, and I know that we're
23 looking forward to having developers and homeowners and
24 everybody else and the potential for us to make an error
25 here is --

1 MR. WILCOX: I was not given a copy of the offer
2 directly. Apparently it was part of the record and
3 posted on the Commission website, and I understand that.
4 But the offer was not made directly to us.

5 COMMISSIONER HANSON: All right. Thank you.

6 CHAIRMAN NELSON: Mr. Smith.

7 MR. SMITH: Thank you. Maybe a point of
8 clarification here. Because, as I understand it, based
9 on the explanation, Brad, given in your filing, this was
10 a -- Jim, at the time this happened I think the
11 confusion -- as I understand it, it was when you guys
12 were kind of doing some posthearing negotiations, is it
13 not, Brad, when that happened?

14 You're not up there, Jim.

15 And I think the offer was made verbally, and
16 then what Brad did here with this filing is put it in a
17 pictorial form. If I understand right. Maybe I'm
18 misunderstanding. But --

19 CHAIRMAN NELSON: Is that a question or a
20 comment?

21 MR. SMITH: Well, maybe just -- I was going to
22 see if that jogged anything with Jim, but also maybe to
23 have Brad explain what that was. Because it was
24 referenced at our last meeting as well. And that's what
25 Commissioner Hanson asked; right?

1 You know, he made his Motion and then there was
2 some discussion about maps and maybe we should see
3 exactly what we're talking about. And that was my
4 understanding of what went down there. Yep.

5 MR. SCHARDIN: I can't speak for Jim
6 specifically. I'll tell you from Southeastern's
7 perspective and my perspective, Jim and I met on the 9th
8 of September at this site. I made the verbal offer at
9 that point in time to split just as the map that I've
10 provided the PUC here.

11 I've also e-mailed Jim prior to the PUC
12 Complaint being filed to Mr. Wilcox our offer of this
13 nature here to split on East Tree Top Street across and
14 up over in that area.

15 When Commissioner Hanson provided the
16 opportunity to the PUC to give you what our offer was,
17 that's what I provided you is the same thing that I
18 verbally offered on the September 9 that I offered before
19 the December filing and that I put in the records for the
20 September -- or February 17 or 21st, whatever that date
21 was, Chairman Nelson.

22 Also the items that Jim has here was an item
23 that Jim and I verbally discussed at a meeting at Jim's
24 office sometime between September 9 and the filing date
25 for the PUC Complaint. And I said at that point in time

1 in our meeting at your office, Jim, I indicated that, no,
2 I don't think that was acceptable to Southeastern
3 Electric Co-op. So I think that's getting to the
4 questions that you had there, counselor.

5 CHAIRMAN NELSON: Thank you. Additional
6 Commissioner questions?

7 Commissioner Fiegen.

8 COMMISSIONER FIEGEN: If you can just jog our
9 memory, so at Section 12 there was a swap from the 1976
10 Territory Act where Xcel Energy thought they were
11 swapping, but they actually gave you territory; correct?

12 And they are not -- and Xcel Energy has decided
13 to forego Section 12, even though they've lost territory
14 over there?

15 MR. SCHARDIN: I believe that's Xcel's position
16 on that, yes. You know, and in those discussions, you
17 know, I relied on Tim Chance, our operations manager, to
18 work with the Xcel Energy people and we got those and we
19 got that filing. That started in '07.

20 We brought it through Xcel to the Commission in
21 '09. And we felt that changed that area with a map that
22 was applied to that area. And then the wording we
23 felt -- and I know, Chairman Nelson, you had asked our
24 attorney last month or whatever it's been on that. I
25 didn't know how to disagree with his comment made to you,

1 but we felt that also changed in Section 7. So that's
2 why we did our construction work plan and made our plans
3 to go forward at that point in time with our '08 to '12
4 construction work plan in which we began that
5 construction in Section 7 in June of 2011 and made our
6 first connects in August of 2011.

7 COMMISSIONER FIEGEN: So in 2009 it appears on
8 my view anyway that there was a mistake made on behalf of
9 Southeastern and behalf of Xcel. And Section 12 Xcel has
10 foregone that territory that they lost in Section 12 in
11 this dispute.

12 Is that how you understand it?

13 MR. SCHARDIN: Yeah. I would understand it that
14 way, Commissioner.

15 COMMISSIONER FIEGEN: So then in Section 7,
16 that's the one we're looking at.

17 MR. SCHARDIN: Yep.

18 COMMISSIONER FIEGEN: And I believe the PUC
19 Commission had misinformation or not all the information
20 in 2009 when they made that decision. So, you know, it's
21 hard because the first thing I looked at was the number
22 of lots and how it was swapped and all of that. And then
23 I went like number of lots?

24 Xcel Energy just gave up a lot more than just
25 three or four -- I mean, they gave up a lot in

1 Section 12 also. So Section 7 is what we're looking at
2 today.

3 And I have one more question and I think is this
4 one your map? Is this yours that was attached to
5 Nelson's map?

6 MR. SCHARDIN: As a response to --

7 COMMISSIONER FIEGEN: Or Nelson's --

8 MR. SCHARDIN: Yeah. I believe that is mine.
9 Is that the same one right there?

10 COMMISSIONER FIEGEN: Probably. We have so many
11 maps.

12 MR. SCHARDIN: Hard to see.

13 COMMISSIONER FIEGEN: I have some questions.
14 Way over on the right there are these houses -- or it
15 looks like there's lots and there's three blue lots and
16 two green lots?

17 MR. SCHARDIN: Yep.

18 COMMISSIONER FIEGEN: Is that something that's
19 been swapped but was not approved by the Commission?

20 MR. SCHARDIN: That is where I would say this
21 whole dispute began after everything was approved in
22 2009. Because operations manager Tim Chance was dealing
23 with an Xcel Energy person as far as getting service to
24 those three blue lots in which, Chairman, your
25 question -- those are already being served by Xcel

1 Energy.

2 That's where we began with these discussions
3 because the two green boxes, Commissioner Fiegen, to the
4 right of that was request for service for us. So we had
5 to figure out how to get service to those two green boxes
6 in that June-July time frame of 2011.

7 That's probably more than your question asks.
8 Sorry about that.

9 COMMISSIONER FIEGEN: So then with those five
10 lots it appears that that's a different territory line
11 than the 1976 territory line.

12 MR. SCHARDIN: The red line that you're --

13 COMMISSIONER FIEGEN: Well, the blue -- I don't
14 know how you draw a line when you have three blue homes
15 there. So was there a swap that was approved by the
16 PUC?

17 MR. SCHARDIN: No. We have -- those are still
18 three services that we believe are in Southeastern's
19 territory per the 1976 Agreement.

20 COMMISSIONER FIEGEN: So then Xcel Energy
21 continues to serve those, we need a formal document
22 sometime that is a swap agreement on those three homes?

23 MR. SCHARDIN: Well, I guess that's why we made
24 the offer we did, to try and include that into the area
25 with splitting it on East Tree Top Street and going all

1 the way over to the street going to the right.

2 COMMISSIONER FIEGEN: Oh, okay. I see it.

3 Good. Thank you.

4 MR. SCHARDIN: Yep.

5 CHAIRMAN NELSON: Additional Commissioner
6 questions.

7 Yep. Go ahead, Mr. Smith.

8 MR. SMITH: Brad, maybe one last question. And
9 that is if the Commission were to accept Xcel's proposal
10 for resolution here, can you explain your point of view
11 on what economic consequences that would have to your
12 co-op members, please.

13 CHAIRMAN NELSON: If I could ask for
14 clarification on the question, are we talk being about
15 economics of simply the infrastructure that's already
16 been put in that would not be utilized, or are we talking
17 the broader picture for lost revenue?

18 MR. SMITH: I guess the bigger concern would be
19 stranding, I guess. I guess I would be to some extent
20 interested in both but primarily whether or not that
21 would allow -- you would retain sufficient service to be
22 able to keep members whole in terms of amortizing the
23 cost of the facility.

24 MR. SCHARDIN: I am trying to find my map
25 from -- oh, here it is right here. I thought that was

1 Jim's.

2 I guess our -- getting to your question on that,
3 counselor, our concern with this is obviously we have
4 built the service to serve both to the north and to the
5 south in that area. So some of these lots in this area
6 which were part of the economics of putting that line in
7 there will be lost as a result of that.

8 We're going to be -- we work from the outside in
9 on all the growth in these areas. We're a different
10 scenario than being able to work from the inside out. So
11 when we build in services we have to work our way through
12 these areas.

13 I think the most -- the issue that's been
14 brought to my attention most by our operations group is
15 we end up getting to be a little bit of an island. We've
16 got this side and we've got this side and we've got our
17 one line running through it.

18 The economics, obviously, if we were to serve,
19 you know, the additional -- I guess as per Xcel's filing
20 here, I think it was 50 some lots, if I remember right.
21 24 and 23 so that's 47 lots more.

22 Obviously, that utilizes that cable better. I
23 did not go and look at an economic analysis to see where
24 it's at. We will still be utilizing that cable that can
25 go across Xcel's territory. We understand that.

1 But I guess as per Mr. Gilbert's report and
2 discussion, they built their facilities to where we were
3 at. We built our facilities to meet the rest of the
4 needs, and that's the way we designed it to begin with in
5 '08 and '09.

6 MR. SMITH: Does this line extend then across
7 into Section 12, or is that the terminus of it?

8 MR. SCHARDIN: No. It goes into Section 12 and
9 serves over in that area too. It's a main feeder line,
10 and we branch off of that.

11 MR. SMITH: So there's a significant amount of
12 additional service on the Section 12 side off that line.

13 MR. SCHARDIN: Right.

14 MR. SMITH: Okay. Thank you.

15 CHAIRMAN NELSON: Additional questions?
16 Commissioner Fiegen.

17 COMMISSIONER FIEGEN: Mr. Wilcox, so in your
18 proposal, this proposal -- so if I'm reading the lots
19 right, the three homes that you currently serve that
20 would be in your territory in this proposal.

21 So there's these three homes in the blue on
22 Southeastern's map, but it appears to me that in your map
23 those three homes are now in your territory in your
24 proposal.

25 MR. WILCOX: Mr. Chairman, could I have a minute

1 to ask Brad a question?

2 CHAIRMAN NELSON: Certainly.

3 MR. WILCOX: Mr. Chairman, I'm sorry.

4 CHAIRMAN NELSON: If I could maybe just ask the
5 specific questions. I think I understand, but in the
6 area in question we've got the three south lots that are
7 just immediately north of East Tree Top Street, those
8 three south lots. Those are in Southeastern's territory.

9 Nobody is considering moving them out of
10 Southeastern's territory. And those are the three lots
11 that you've already got service to, Brad? Is that
12 correct?

13 It would be these three lots.

14 MR. SCHARDIN: We do not have service in those
15 three lots. Nobody there.

16 CHAIRMAN NELSON: Nobody there. So my question,
17 in these three lots there's no service there either?

18 MR. SCHARDIN: I believe it is, and Xcel is
19 serving that.

20 CHAIRMAN NELSON: These three?

21 MR. SCHARDIN: (Inaudible).

22 CHAIRMAN NELSON: See my problem is because on
23 this you're not showing anything. You're not showing
24 anything here.

25 MR. SCHARDIN: This may be a (Inaudible) as to

1 the north-south line, that boundary line.

2 (Inaudible) the front edge of that (Inaudible).

3 CHAIRMAN NELSON: Right.

4 MR. SMITH: Here's your line, Jim, right here.

5 MR. SCHARDIN: That's where he would be at.

6 That's where his zigzags.

7 CHAIRMAN NELSON: Let me ask a second question.

8 These two lots here, you're showing is this

9 infrastructure that's already there or proposed?

10 MR. WILCOX: I believe it's there.

11 CHAIRMAN NELSON: We don't know. Okay.

12 Okay. Additional Commissioner questions?

13 I'm going to take just a moment. I want to look

14 at some of the maps from the original hearing exhibit.

15 Take just a few moments.

16 Okay. I think I'm ready to move forward.

17 Commissioners, do you need anymore time to look or

18 review?

19 Okay. With that, are there motions?

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Are there three motions?

22 Well, I would like the Commission to consider a

23 number of items, and I guess perhaps some discussion is

24 in order before I propose a Motion. And perhaps you'd

25 like to have some discussion and then propose your own

1 Motion.

2 But my concern here is, number one, I think that
3 there was a legitimate attempt to compromise with -- as I
4 stated before, with Xcel, and I really would have liked
5 to have seen Xcel and Southeastern work this out.
6 Because that is really the best way.

7 I don't want to get in -- I've worked on
8 designing enough electric utilities and water lines in
9 municipal government and working back and forth, and it's
10 just -- there are a lot of challenges to that. So I'm
11 concerned about creating additional ones.

12 The matter is that a Complaint was brought
13 before us by NSP Xcel stating that Southeastern had
14 violated the service territory laws. And I cannot in
15 good conscience state that Southeastern violated the
16 territory laws if that is the ultimate question in fact
17 is they did not. And I don't think they should be
18 punished basically because of that. In the effort of
19 resolving this matter before us they offered a legitimate
20 compromise.

21 Xcel, when we look at this, prepared the map.
22 They prepared the maps that are to govern the entire
23 process. Those are what Southeastern relied upon. The
24 decision by the Commission in EL09-021 definitely
25 adopted the -- through verbiage, those maps, the language

1 of the approved agreement, the order, the attached
2 revised territory maps all speak to the territory being
3 exactly as it has been treated by Southeastern.

4 Southeastern from a standpoint of other
5 compromise, frankly, I was uncomfortable with their
6 compromise because I know in the designing of a
7 development when a development is designed it's designed
8 on a basis to provide for the most cost-effective method
9 and most reliable way in order to service the customers.
10 And ultimately we need to be held responsible by the
11 citizens.

12 And when we start looking at it from the
13 standpoint of that design alone, it means if that design
14 is changed, it means the Southeastern customers
15 regardless of what we try to do here are going to be
16 harmed eventually. Even if it's a minute amount, they
17 are going to end up paying more money.

18 It also means a confusion in the future on who
19 do you call to service on your electric bill? There's a
20 lot of folks who don't know who their service provider
21 is. And the lights go out but the lights aren't out next
22 door but -- you know, it's just -- we're asking for a lot
23 of challenges here. And that concerns me greatly.

24 I have a lot of notes and I'm not going to go
25 over all of them but I did speak to the fact that I think

1 that when we set a precedent of this nature my -- for
2 instance, if we were to rule in Xcel's favor, we are
3 saying that a utility can negotiate to a point and even
4 if the other side is the only one that's giving offers,
5 they can come before us and then negotiate using the
6 compromise offer from the other party as being the base
7 from which to negotiate.

8 Our order plainly stated Section 12 and
9 Section 7, that the boundary line was a half-mile north
10 of 69th. The joint request for service territory
11 boundary change that was presented, prepared by Xcel,
12 plainly stated in both sections a half-mile north, that
13 on section -- both sections it's just counterintuitive to
14 me to arrive at a different conclusion other than
15 Southeastern did nothing wrong.

16 They did not violate the service territory
17 agreement, and so I would -- ultimately there's two ways
18 to go. One is either to rule in favor of Southeastern,
19 or the other is to discuss the potential for accepting
20 Southeastern's compromise. And I think Xcel should have
21 done that.

22 So from my particular standpoint all I can do at
23 this juncture is offer that those are the only two
24 methods that I could possibly support is either
25 Southeastern's compromise is -- is the acceptable

1 compromise or that I will rule in favor of Southeastern.
2 And really it's very difficult for me to say that we
3 should be ruling in favor of a compromise because that,
4 in essence, is saying that Southeastern may have violated
5 the service territory laws, and I see that they have done
6 nothing wrong in this process.

7 Thank you, Mr. Chairman. I'm not making a
8 Motion at this juncture. I'm going to provide
9 opportunity for other Commissioners to discuss their
10 positions and possibly offer a Motion if they wish.

11 CHAIRMAN NELSON: Very good. I appreciate that.
12 Other comments? Well, let me weigh in, and I'll address
13 Commissioner Hanson's comments about, you know, the
14 failure to negotiate.

15 I think when we left here last time I think we
16 were all in agreement that we were hoping both sides
17 could actually sit down and come to us with a joint map,
18 and obviously that didn't happen.

19 And so what that tells me is then it's our job
20 as the Commission to find what is the right answer.
21 Because the negotiations didn't happen.

22 As to the point about, you know, folks right
23 next to each other or across the street from each other
24 being served by different providers, you know, the lights
25 are on on one side of the street, off on the other side

1 of the street, certainly not an ideal situation in a
2 development. But that situation is going to occur --
3 would have occurred if this issue had never come before
4 us. Given no matter where the '76 line was, that line
5 was going right through the middle of this development.
6 And so that situation was going to occur irregardless of
7 what we decide or if this had never come before us.

8 And so in trying to find the right answer, and I
9 think my comments I put together in my letter of
10 February 16 I think we're all in agreement that
11 Section 12 is something that we will not be changing.
12 That was a deal. It was a done deal. We don't want to
13 go back and revisit that.

14 Section 7 then, the issue is did the 2009
15 Commission Order change the line in Section 7? That
16 became the question. And I got conflicting information
17 from Southeastern. Their witness, Mr. Chance, testified
18 to one thing. Their attorney, when he filed their Reply
19 Brief, said exactly the opposite. And I'm going to quote
20 his statement.

21 Mr. Peterson said "The swap did not include
22 territory in Section 7, and the parties simply reiterate
23 where the boundary was in that section." That was
24 Southeastern's position from their attorney.

25 So then I go back to where was that boundary in

1 the '76 -- on the '76 map territory agreement? And
2 obviously the map takes precedence, and it was very clear
3 to me in looking at that map that the line is through the
4 center of the section. It's not at the half -- it's not
5 a half-mile north. It's through the center of the
6 section. There's no other way a person can look at that
7 map other than to arrive at that conclusion.

8 And so given that and given Mr. Peterson's
9 position that 2009 did not change that line, I arrive at
10 the line in the southern boundary.

11 So then the question becomes what do we need to
12 do to make sure the infrastructure Southeastern has
13 already put in -- and certainly not faulting them. There
14 was certainly a misunderstanding here to where the line
15 was. But wanting to make sure that that infrastructure
16 is not stranded or minimally stranded. And so I made a
17 map proposal based on what I understood the
18 infrastructure to be at the time.

19 And apparently I wasn't understanding that
20 correctly. And Mr. Wilcox has come back with a different
21 map that does a much better job of laying that out. And
22 based on the testimony today, Mr. Schardin has said, you
23 know, we're going to be able to use that three-phase line
24 but there's some conduit stubs along East Tree Top Street
25 that we won't be able to use. And so that's certainly

1 stranded.

2 And so the direction that I would be going --
3 I'm not going to make a Motion because I want to hear
4 from the third Commissioner before we go that direction.
5 But the direction I would be going is adopt Mr. Wilcox's
6 map with the provision that Xcel reimburse Southeastern
7 for any of that stranded conduit and stubs along
8 East Tree Top Street.

9 Commissioner Fiegen.

10 COMMISSIONER FIEGEN: You know, you always want
11 to get it right. And in 2009 I feel like the Staff, the
12 Commissioners, and both parties had the wrong
13 information. And there was a mistake made, and today we
14 are just going to try to get it right. And that's not
15 always easy when we do that.

16 Section 12 is already gone. And that has been
17 swapped, and we're not dealing with that today. We're
18 dealing with Section 7.

19 So I continue to look at Xcel Energy's proposal.
20 It's still not perfect, but it's as good as I feel like
21 we can do today. And it will bring us to the future to
22 make sure that these lots have service and that it
23 doesn't sound like Southeastern has a lot of stranded
24 capacity out there. Maybe some caps, but not a lot of
25 stranded capacity which can also serve in Section 12.

1 So I am in favor of Xcel Energy's proposal and
2 it's not perfect but it tries to remedy the mistakes that
3 were made in 2009.

4 CHAIRMAN NELSON: With that, motions?

5 And I will move that in EL11-025 that the
6 territory boundary in question be the boundary as
7 proposed by Xcel. And I'm going to use this particular
8 map. It's the one with the orange outline because I
9 think it is the most detailed.

10 Now earlier I had asked Mr. Wilcox about trading
11 out three lots, but now I understand that Xcel's probably
12 already built into those and so I'm just going to leave
13 that issue alone. So I readily admit that there's
14 probably three lots that Southeastern is shorted if we
15 were to make sure the lots were equal, but, you know,
16 given the infrastructure that we think might be there,
17 I'm just going to leave that issue alone.

18 And so I would move that we adopt this map and
19 also require Xcel to reimburse Southeastern for their
20 actual expenses for any of those conduits and stubs along
21 East Tree Top Street that they will not be able to use
22 because that territory will now be in Xcel's territory.

23 Discussion.

24 COMMISSIONER FIEGEN: Do you mind if you just
25 give me a couple of minutes to study that map? Because I

1 was studying's map number 2.

2 CHAIRMAN NELSON: Not at all. Yep. I want
3 everybody to be comfortable.

4 COMMISSIONER FIEGEN: Okay. Mr. Chairman, I
5 have studied the map, and it correlates with map number
6 2.

7 CHAIRMAN NELSON: Excuse me. I'm sorry.

8 COMMISSIONER FIEGEN: It appears that map number
9 3 correlates with number 2, and I just wanted to check
10 that before I voted.

11 CHAIRMAN NELSON: Thank you. Further
12 discussion?

13 Commissioner Hanson.

14 COMMISSIONER HANSON: Thank you, Mr. Chair.
15 Just a clarification and it's not -- when I spoke of
16 lights out challenges, things of that nature, it was not
17 just across the street. It was creating islands with
18 lots and things of that nature.

19 Xcel, I believe, did a really good job of
20 explaining that a mistake was made and we were to take
21 them at their word that a mistake was made.

22 But it's their mistake. It's obvious it's going
23 to be a 2-1 vote, and I'm comfortable with that. But the
24 fact is that the question before us is Xcel's Petition
25 stating that Southeastern violated the service territory

1 act, which they did not do.

2 The mistake clearly was by -- all of the
3 evidence clearly shows in writing, by the maps, by
4 testimony, even by testimony by Xcel, that the mistake
5 was made by Xcel. And I just am totally uncomfortable
6 with rewarding Xcel for making a mistake that has
7 created --

8 You know, you can never give time back to
9 Southeastern for the amount of time that they spent on
10 this project. Southeastern's attorney may very well have
11 misspoke. I don't know. But I think we need to also be
12 consistent. What is good for Section 12 is also good for
13 Section 7.

14 And on a heavier note, at the time Xcel's filing
15 in this case we were beyond the one-year period for
16 seeking relief for a judgment on the grounds of a mistake
17 under South Dakota Codified Law 15-6-60(1). And there's
18 nothing in South Dakota Law that I could find in
19 49-34A-59 or elsewhere, that territory act, that gives us
20 the authority to alter a boundary in the absence of an
21 agreement filed in accordance with South Dakota Codified
22 Law 49-34A-55.

23 So I just simply cannot support the Motion for
24 that reason. I can only support a ruling in favor of
25 Southeastern.

1 Thank you, Mr. Chair.

2 CHAIRMAN NELSON: Thank you. Additional
3 comments.

4 Commissioner Fiegen.

5 COMMISSIONER FIEGEN: Commissioner Hanson.

6 (Inaudible). Yeah. I do believe Xcel Energy made a
7 mistake, but I think there are more parties that made
8 mistakes in the ruling of 2009 because they didn't have
9 the accurate information.

10 Southeastern and Xcel Energy looked at that line
11 together, and I believe they made that mistake together.
12 So can I say that for sure? No. Because I wasn't there
13 in 2009. But I think there were several mistakes made in
14 2009.

15 CHAIRMAN NELSON: Additional discussion.
16 Commissioner Hanson.

17 COMMISSIONER HANSON: No. Just turning on my
18 mic ready to vote.

19 CHAIRMAN NELSON: Seeing no additional
20 discussion, all those in favor will vote aye. Those
21 opposed will vote nay.

22 Commissioner Hanson.

23 COMMISSIONER HANSON: No.

24 CHAIRMAN NELSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.

1 CHAIRMAN NELSON: Commissioner Nelson votes aye.
2 Motion carries.

3 And I do want to thank both parties for working
4 this through with us.
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1 STATE OF SOUTH DAKOTA)

2 :SS

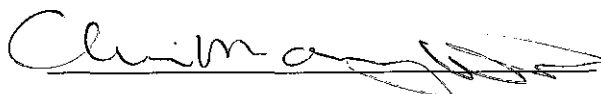
CERTIFICATE

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 transcribed the recording of the
10 foregoing proceedings.

11 Dated at Pierre, South Dakota this 10th day of
12 May, 2012.

13
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15
16 

17 Cheri McComsey Wittler,
18 Notary Public and
19 Registered Professional Reporter
20 Certified Realtime Reporter
21
22
23
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25

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