

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

IN THE MATTER OF THE COMPLAINT FILED)	ORDER GRANTING MOTION
BY SIOUX VALLEY-SOUTHWESTERN)	TO DISMISS AND NOTICE
ELECTRIC COOPERATIVE, INC. D/B/A SIOUX)	OF DECISION
VALLEY ENERGY AGAINST NORTHERN)	
STATES POWER COMPANY D/B/A XCEL)	CE06-002
ENERGY REGARDING PROVISION OF)	
ELECTRIC SERVICE TO MYRL AND ROY'S)	
PAVING)	

On May 8, 2006, the Public Utilities Commission (Commission) received a complaint filed by Sioux Valley-Southwestern Electric Cooperative, Inc. d/b/a Sioux Valley Energy (Sioux Valley Energy) against Northern States Power Company d/b/a. Xcel Energy (Xcel) regarding provision of electric service to Myrl and Roy's Paving (Myrl and Roy's).

On May 10, 2006, the Commission received an answer from Xcel. On May 11, 2006, the Commission electronically transmitted notice of the filing to interested individuals and entities. On May 15, 2006, the Commission received Xcel's Motion to Dismiss the Complaint. On May 17, 2006, the Commission received a Petition to Intervene of Myrl and Roy's. At a regularly scheduled meeting of May 23, 2006, the Commission granted intervention to Myrl and Roy's. On June 1, 2006, the Commission received a Petition to Intervene from South Dakota Rural Electric Association (SDREA). At a regularly scheduled meeting of June 6, 2006, the Commission granted intervention to SDREA. On June 8, the Commission received Sioux Valley's Brief in Opposition to Northern States Power Company dba Xcel's Motion to Dismiss the Complaint. On June 9, 2006, the Commission received Staff's Response to Xcel's Motion to Dismiss and Brief of Myrl and Roy's Regarding Motion to Dismiss of Xcel Energy. On June 12, 2006, the Commission received SDREA's Brief in Opposition to Xcel's Motion to Dismiss the Complaint.

The Commission has jurisdiction in this matter pursuant to SDCL Chapter 49-34A, particularly 49-34A-42 and 49-34A-59.

At a regularly scheduled meeting on June 13, 2006, the Commission considered this matter. The Commission voted by majority to grant Xcel's Motion to Dismiss. Chairman Sahr dissented.

For purposes of ruling on the Motion to Dismiss, the Commission makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The allegations contained in Sioux Valley's Complaint are:

"1. SIOUX VALLEY conducts business in South Dakota as an electric utility or person as these terms are defined in South Dakota Statutes 49-34A-1 for the purpose of 49-34A-42 to 49-34A-57 inclusive.

"2. XCEL conducts business in South Dakota as an electric public utility as defined in South Dakota Statutes 49-34A-1 (the Utility Act).

"3. MYRL AND ROY'S PAVING has a quarry in the SE¼ of Section 27, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota.

"4. The area designated as the N½SE¼ of Section 27 is XCEL's assigned service area.

"5. The area designated as the S½SE¼ of Section 27 is SIOUX VALLEY's assigned service area.

"6. The above described service areas were arrived at pursuant to a Service Area Agreement between NSP and SIOUX VALLEY on January 19, 1976, which was approved by the Commission in accordance with SDCL 49-34A-44. The Commission issued a map certifying such exclusive service areas to SIOUX VALLEY and NSP (XCEL) as described above.

"7. At all times relevant, MYRL AND ROY'S PAVING of Sioux Falls, South Dakota, is conducting a quarrying and rock crushing operation on a portion of the SE¼ of Section 27. The sixteenth line running east and west separating XCEL's assigned service area from SIOUX VALLEY's assigned service area runs through the approximate center of such quarrying and rock crushing operations.

"8. Prior to June 12, 1991, SIOUX VALLEY was providing electric service to MYRL AND ROY's at this location. In 1991, NSP filed a Complaint with this Commission challenging SIOUX VALLEY's right to serve MYRL AND ROY's electric service at the quarry site. On June 12, 1991, in Case #EL 91-003, this Commission determined that based on the location of the equipment being served, NSP was entitled to provide service to MYRL AND ROY's. In doing so, the Commission adopted the majority load test and found that 59% of the load was in NSP's territory and 41% was in SIOUX VALLEY's territory.

"9. The decision of the Public Utilities Commission in EL 91-003 was appealed to the Circuit Court, Sixth Judicial Circuit, Hughes County, which upheld the decision of this Commission and the matter was subsequently appealed to the Supreme Court [sic] NORTHERN STATES POWER COMPANY against SIOUX VALLEY EMPIRE ELECTRIC ASSOCIATION No. 17793 (489 N.W. 2d 365). The Supreme Court upheld the decision of the Public Utilities Commission and the Circuit Court.

"10. MYRL AND ROY'S PAVING continues to operate its quarry in the SW [sic] ¼-27-101-48 and this load is presently served by XCEL ENERGY.

"11. MYRL AND ROY's has informed SIOUX VALLEY as part of their mining operation they will 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 to MYRL AND ROY's mining operation in the SE¼-27 will be located in SIOUX VALLEY's territory.

"12. SIOUX VALLEY is ready, able and willing to extend service to MYRL AND ROY's quarry operation in the SE¼-27. Premised on the majority load test previously adopted by this Commission, SIOUX VALLEY is entitled to provide such service.

"13. SIOUX VALLEY has requested XCEL to relinquish this customer so that SIOUX VALLEY can provide exclusive service to MYRL AND ROY's, but they have failed and refused to do so."

CONCLUSIONS OF LAW

1. "A motion to dismiss tests the legal sufficiency of the pleading; for purposes of the pleading, the court must treat as true all facts properly plead in the complaint." *Richards v. Lenz*, 539 N.W. 2d 80, 82 (S.D. 1995). The Commission accordingly treats the facts plead by Sioux Valley in its Complaint as true for purposes of ruling on Xcel's Motion to Dismiss.

2. The Commission, however, concludes that the entirety of paragraph 5, the phrases "in SIOUX VALLEY's territory" in paragraph 11 and the last sentence of paragraph 12 of Sioux Valley's Complaint are not pleadings of evidentiary fact but rather legal conclusions and statements of the ultimate facts at issue in this case that are not appropriately treated as true for purposes of ruling on the Motion to Dismiss.

3. In Docket EL91-003, the Commission was faced with the situation where Myrl & Roy's service "location" straddled the originally established territorial boundary between Sioux Valley and Xcel. The Commission was called upon in that case to determine whether to assign the right to serve to either or both of Xcel and Sioux Valley. Employing the majority load test, the Commission in Docket EL91-003 held:

(5). . . [U]nder the record as established in this case, the majority of Myrl and Roy's electric power is currently consumed in NSP's assigned service area and therefore, NSP has the exclusive right to serve the entire load. The Commission will not 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.

.....
(7) To allow both utilities to serve the customer's respective load on their side of the line would lead to unnecessary duplication of facilities, and would be an inefficient and uneconomical use of the electrical systems of the two companies. SDCL 49-34A-43 and 49-34A-44 prohibit such a result.

In *Matter of Northern States Power Company*, 489 N.W.2d 365 (S.D. 1992) (*Myrl & Roy*), the Supreme Court upheld this decision of the Commission.

4. In *Matter of the Petition for Declaratory Ruling of Northwestern Public Service Company*, 560 N.W.2d 925 (S.D. 1997) (*Hub City*), the Supreme Court overturned a decision of the Commission which had determined that a different utility could be afforded the right to serve a customer whose service provider had previously been established by the Commission under SDCL 49-34A-56, when a change of circumstances had occurred. The Court characterized the Commission's prior decision assigning service rights under SDCL 49-34A-56 as follows:

By reading SDCL 49-34A-56 in pari materia with SDCL 49-34A-1(1) and SDCL 49-34A-42, it is clear that the PUC's action in 1977 established the Hub City location as part of the assigned service area of NEC. Concomitantly, NEC acquired the exclusive right to provide retail electric service at that location. 560 N.W.2d 925, 928. (Emphasis supplied).

Relying on SDCL 49-34A-1(1), the last sentence of 49-34A-42 and the oft repeated statement of purpose for the Territorial Integrity Act to be "the elimination of duplication and wasteful spending," the Court in *Hub City* held that Commission actions to determine the right to serve customers under any of the Territorial Integrity Act sections of Chapter 49-34A afford the assigned utility the exclusive right to provide service to the assigned location.

5. In *In re West River Elec. Ass'n, Inc.*, 2004 SD 11, 675 N.W.2d 222 (2004), the Supreme Court held that the term "location" in SDCL 49-34A-42 means "a geographical area" and that the right to serve a "location" by operation of law pursuant to the first clause of SDCL 49-34A-42 gave the serving utility the right to serve expansions at that "location." The Court reached this conclusion despite explicit findings by the Commission in Docket EL02-003 that the new facilities to be constructed were physically separated from the original grandfathered service point and would be discrete, separately metered electrical services.

6. In light of these holdings of the Supreme Court after *Myrl & Roy* was decided and the Commission's Finding 7 in the original *Myrl & Roy* case that "[t]o allow both utilities to serve the customer's respective load on their side of the line would lead to unnecessary duplication of facilities, and would be an inefficient and uneconomical use of the electrical systems of the two companies," the Commission concludes that its decision in EL91-003 to assign the right to serve *Myrl & Roy's* quarry operation was an assignment of the entirety of the *Myrl & Roy* quarry operations location to Xcel and that Xcel has the exclusive right to provide service to the *Myrl and Roy* quarry operations.

7. Neither Sioux Valley's Complaint nor *Myrl & Roy's* Petition to Intervene alleges that Xcel is either unable or unwilling to provide adequate electric service to *Myrl & Roy's* proposed expanded operations. As the Court noted in *Hub City* at p. 929, the circumstances under which the Commission can order a change in provider are limited to the very limited circumstances enumerated in the Territorial Integrity Act provisions of SDCL Chapter 49-34A. No such circumstance is alleged in the Complaint.

8. Based upon the above Findings of Fact and Conclusions of law, Xcel's Motion to Dismiss should be granted on the grounds that the facts plead in the Complaint fail to state a claim for which the Commission can afford relief.

It is therefore

ORDERED, that Xcel's Motion to Dismiss is hereby granted and Sioux Valley's Complaint is dismissed.

NOTICE OF DECISION

PLEASE TAKE NOTICE that this Order Granting Motion to Dismiss and Notice of Decision (Decision) constitutes a final decision and order in this case. Pursuant to SDCL 1-26-32, this Decision will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Decision. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Decision to the appropriate Circuit Court by serving and filing notice of appeal of this Decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 24th day of August, 2006.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melaine Kolbo</u>
Date:	<u>8/25/06</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

ROBERT K. SAHR, Chairman, dissenting

Dustin M. Johnson
DUSTIN M. JOHNSON, Commissioner

Gary Hanson
GARY HANSON, Commissioner

DISSENT OF CHAIRMAN ROBERT K. SAHR

I respectfully dissent from the majority decision and opinion. Given the difficulties presented by these Territorial Integrity Act exceptions cases, and this case in particular, and the lack of precise and comprehensive legal standards we are to employ in resolving them as laid down by the Supreme Court thus far, I simply believe it is the better decision to go forward with the case and render our decision on a complete record after hearing all of the evidence and understanding the situation fully. I therefore would deny Xcel's Motion to Dismiss and proceed with discovery and the evidentiary hearing in the case.

A handwritten signature in black ink, appearing to read "Robert K. Sahr", with a long horizontal flourish extending to the right.

Chairman Robert K. Sahr, Dissenting