

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

IN THE MATTER OF THE PETITION OF WEST	)	DECLARATORY RULING
RIVER ELECTRIC ASSOCIATION, INC. FOR A	)	REGARDING
DECLARATORY RULING REGARDING	)	SDCL 49-34A-42 AND RAPID
SERVICE TERRITORY RIGHTS CONCERNING	)	CITY WASTEWATER PLANT
BLACK HILLS POWER, INC. AND WEST	)	
RIVER ELECTRIC ASSOCIATION, INC.	)	EL02-003

On February 21, 2002, the South Dakota Public Utilities Commission ("Commission") received a Petition for Declaratory Ruling (Petition) from West River Electric Association, Inc. (West River) requesting the Commission to make declaratory rulings as to: (i) whether Black Hills Power, Inc. (Black Hills) is rendering or has extended service within West River's territory in violation of SDCL § 49-34A-42; and (ii) whether West River has the right to provide future electrical service to the Rapid City Waste Water Treatment Facility located within West River's assigned service area.

The deadline for intervention fixed by the Commission was March 15, 2002. On March 11, 2002, Black Hills filed a Petition to Intervene, and the Commission granted Black Hill's Petition to Intervene at its regular meeting on March 28, 2002. On February 25, 2002, West River filed its agreement to an extension of the fifteen-day hearing requirement of SDCL 49-34A-59 to thirty (30) days, as provided in ARSD 20:10:01:35. The Commission originally scheduled the petition for hearing on March 21, 2002. On March 7, 2002, prior to formal order and notice of hearing, Black Hills filed a request to reschedule the hearing to which West River agreed.

On May 10, 2002, West River and Black Hills filed a Joint Submittal of Stipulated Facts. On May 10, West River and Black Hills each also filed Additional Proposed Findings of Fact. The hearing on West River's Petition was held on May 22, 2002, at 9:00 a.m. CDT in Room 412 of the Capitol Building in Pierre, South Dakota. At the hearing, evidence was presented by West River, Black Hills and the Commission Staff. At the conclusion of the hearing, a briefing schedule was agreed to by the parties and on May 31, 2002, the Commission issued an Order Setting Briefing Schedule. Briefs were filed by West River, Black Hills and Staff and a Reply Brief was filed by West River.

The Commission scheduled the matter for decision at its regularly scheduled meeting on September 5, 2002. The Commission voted in a two-to-one vote to rule that (i) the provision of electric service by Black Hills to Rapid City Waste Treatment Facility Service Number Two is the rendering of electric service at retail within the territory of West River in violation of SDCL 49-34A-42 and that West River has the right to provide electric service to Service Number Two; (ii) that because West River has had at least official record notice of the existence of the service to Service Number Two since the filing in 1993 by Black Hills for approval of a contract with deviations covering Service Number Two, this ruling shall apply prospectively only and that the effective date on which West River's right to serve Service Number Two shall commence, shall be the date ninety (90) days from the effective date of the final decision in this case, to allow the city and the parties to construct the necessary facilities and make an orderly transition of such service; and (iii) that West River has the right under SDCL 49-34A-42 to provide future electric service to the Rapid City Waste Water Treatment Facility, including, in accordance with the ruling in (i) above, service to Service Number Two currently served by Black Hills and Services Numbers Three through Six which are currently planned for construction by the city.

Commissioner Sahr dissented from the majority votes adopting the above declaratory rulings.

Having reviewed the evidence of record, the briefs of the parties and applicable law, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Stipulated Findings of Fact

1. Findings of Fact 2 through 23, inclusive (originally numbered 1 through 22, inclusive), were filed by West River and Black Hills jointly on May 10, 2002, and were offered and admitted into the hearing record without objection by Commission Staff. Transcript at 11 and 114 (references to "Transcript" refer to the "Transcript of Proceedings, May 22, 2002"); Exhibit 28.
2. On February 21, 2002, West River initiated this proceeding by properly filing and serving its Petition for a Declaratory Ruling pursuant to SDCL § 1-26-15 and ARSD § 20:10:01:34.
3. On March 8, 2002, Black Hills properly filed and served a Petition to Intervene in this proceeding pursuant to SDCL § 1-26-17.1 and ARSD § 20:10:01:15:02.
4. The Commission has the authority and jurisdiction to render a decision as to the pending Petition.
5. On March 28, 2002, the Commission granted Black Hills's Petition to Intervene.
6. Prior to West River's filing of the Petition, the parties conducted good-faith settlement discussions as to who should provide electrical service for the 1987 expansion of the Rapid City Waste Water Treatment Facility (Sewer Plant or Plant) and the anticipated future load growth at the Plant. The parties were unable to reach an agreement.
7. West River is a cooperative, not for profit utility incorporated under the laws of the State of South Dakota and serves a Commission-assigned service territory within South Dakota. Black Hills is a for profit utility corporation incorporated under the laws of the State of South Dakota and also serves a Commission-assigned service territory within South Dakota. Exhibits 1 and 2 indicating partial service territory and SDCL § 49-34A-44.
8. The City of Rapid City (City) has owned and operated the Plant, a wastewater treatment plant which is located within West River's Commission-assigned service territory. The Plant is located on a 40-acre parcel of property purchased by the City in 1963. The City's planned expansion of the Plant will occur upon the same 40-acre parcel. The City owns an additional 80 acres of property located adjacent to the 40-acre parcel that the City purchased in 1973. Exhibits 3, 4 and aerial map Exhibit 5.
9. During the construction phase of the Plant in the mid-1960's, West River constructed and provided 3-phase electrical service for the Plant up to approximately October, 1967. Exhibit 6.
10. The location of the electric line that is provided by Black Hills to serve the Plant and the location of West River's line which is available to serve the Plant are shown on Exhibit 7.
11. Black Hills began providing electric service to the Plant in 1967 pursuant to a 1967 city council resolution and a subsequent vote of the city residents at a special city election held on July 11, 1967. Exhibits 8 and 9.
12. Black Hills provided electricity to the Plant prior to and on March 21, 1975.

13. Pursuant to SDCL Ch. 34A-42, adopted in 1975 (the "1975 Territory Act"), the Commission established the boundaries of West River's service territory in 1976 which included the land area upon which the Plant is located and the land area immediately surrounding the Plant. Black Hills provides electrical service to the Plant as a customer of Black Hills because Black Hills provided the electricity to the Plant prior to and on March 21, 1975.
14. Pursuant to the 1975 Territory Act, and the service territory the Commission established for West River and Black Hills, West River served customers located within Black Hills's service territory and Black Hills served customers located within West River's service territory.
15. There is no Commission approved agreement between Black Hills and West River related to the service of the Plant's electricity requirements.
16. Black Hills currently serves the entire Plant's electrical needs through two Large Demand Curtailable Service Agreements and the Commission's Order Approving Contracts with Deviations (Docket EL93-021). Exhibit 10.
17. Black Hills currently serves the Plant's electrical load of approximately 570 kVA. The city's proposed load growth at the Plant is anticipated to be 1,310 kVA, for a total electrical load of approximately 1,880 kVA.
18. Black Hills currently serves the electrical needs of the Plant utilizing a primary distribution line connected to two transformers and two electrical meters.
19. The City prepared specifications and has received bids for construction of new facilities and expansion of the Plant. The City's expansion plans at the Plant will require that the serving utility add four new transformers and four meters to serve the present and future growth at the Plant. Exhibit 11.
20. Black Hills proposes to provide the additional load of the Plant through the utility's transformers and meters and the same primary distribution line that has served the Plant since 1967.
21. West River proposed to serve the additional load of the Plant through the utility's transformers and meters at the Plant as described in Exhibit 10. West River is immediately adjacent to the Plant property with 3-phase electrical service and could provide the necessary electrical service to the Plant with a minimal amount of time and expense to incur.
22. The location of existing, planned and the potential future service sites are identified in Exhibit 11 and described as follows:
 - A. Service Number One. Service 1 to the Plant was installed and maintained by Black Hills beginning in 1967, when the Plant was completed. West River has never challenged Black Hills's right to maintain this service.
 - B. Service Number Two. Service 2 was installed in 1987 by Black Hills. Black Hills did not seek West River's consent to install this service.
 - C. Services Three through Five. Services 3 through 5 are the proposed service growth as indicated in City's specifications. Proposed Service 3 will serve the new sludge handling building. Service 4 will serve a new blower building, and Service 5 will serve a new administration building.
 - D. Service Number Six. Service 6 is a potential future service site at the Plant.

23. West River and Black Hills would stipulate to a post-hearing briefing schedule as determined by the Commission.

Non-Stipulated Findings of Fact

Service

24. The parties have customarily referred to customers served as of March 21, 1975 within the assigned territory of another utility as "frozen accounts." Transcript at 24.

25. In 1987, Black Hills added a second service of electricity to the Plant (Service Number Two) without consulting West River or obtaining West River's consent. Black Hills did not consult the Commission or obtain the Commission's consent either. West River Additional Proposed Finding 5; Transcript at 35; Stipulated Finding 15.

26. Service Number Two to the Plant, installed by Black Hills in 1987, involved the addition of a new primary cable from the original primary distribution lines installed in 1967, a new pad-mounted transformer and new meter. Transcript at 153.

27. Services Numbers Three through Six will have to be served through installation of new primary voltage wires and transformers. The new services cannot be extended off existing services. Transcript at 205-207.

28. The provision of electric service to Service Number Two is the rendering of electric service at retail and the provision of electric service to proposed Services Numbers Three through Six will be the rendering of electric service at retail. Transcript at 215 and 216.

29. The use of the Plant as a wastewater treatment facility has remained unchanged and will remain the same following the City's planned expansion. Black Hills Additional Proposed Finding 1; Transcript at 89 and 162.

30. West River has sufficient distribution line capacity in the vicinity of the Plant to serve Service Number Two and Services Numbers Three through Six. Transcript at 41 and 113.

31. Because it has redundant facilities in the area of the Plant, West River would be able to loop feed its service to the Plant from two separate substations, which would allow for almost instantaneous switching of service to the alternative feed in the event of an outage. Transcript at 41. This would enhance the reliability of service to the Plant. Transcript at 41.

32. West River is considering adding a heavy duty underground cable to serve the area in which the Plant is located which will improve the reliability of service to all customers in the area including the Plant and serve the growth that is expected to occur in the area. Transcript at 41 and 42.

33. The cost of constructing facilities to provide electric service to the new services at the Plant will be approximately the same for Black Hills and West River. Transcript at 102; Stipulated Findings of Fact 20 and 21.

34. Since West River's facilities are already in the immediate vicinity of the Plant, West River's provision of service to Service Number Two and new services at the Plant will not result in a duplication of facilities or wasteful spending. Transcript at 97.

35. A reasonable inference to be drawn from Findings 30-34 is that by being allowed to provide the additional service to the Plant, West River will achieve greater system consolidation in its

facilities within its service territory in the vicinity of the Plant that will enhance service and reliability for all customers in the area, including service to anticipated growth in the area.

36. Black Hills installed excess capacity in 1967 when it constructed the primary distribution line to the Plant to meet anticipated future load growth at the Plant and has made some improvements to the line since then. Transcript at 149-150 and 201. Thirty-five years have elapsed, however, since 1967 when Black Hills constructed the original primary distribution line to the Plant. A reasonable inference to be drawn from these facts is that Black Hills' current depreciated investment in such line is minimal. Furthermore, West River also installed three phase primary lines to the vicinity of the Plant prior to construction of the Plant, at least a portion of the capacity of which was also underutilized for a period of time. Transcript at 82, 100 and 203.

37. Although West River's witness, Mr. Pahl, admitted that the excess capacity on Black Hills' primary line serving the Plant would be stranded if West River is allowed to serve the post-1975 services at the Plant, this admission was not an admission that Black Hills and its customers will incur a stranding of depreciated investment in the line. Furthermore, Black Hills can continue to provide service to Service Number One and receive revenue from such service. Transcript at 113-114.

38. Differing methods and locations of metering electric usage at the Plant could have been employed by Black Hills at relatively insignificant difference in cost to Black Hills. These different methods or locations of usage metering, however, are not indicative of the nature, extent or cost of facilities required to be installed at the Plant to extend service and other factors bearing on whether the addition of facilities constitutes an extension of service to a new location in contravention of SDCL 49-34A-42. Transcript at 160-162, 169 and 203-208.

Interconnection Safety

39. In the contiguous United States, the transmission of electricity takes place over a network or grid, which consists of a configuration of interconnected generation and transmission lines that cross state lines. West River's electricity is currently transmitted over the grid commonly described as the "Eastern Interconnection." Black Hill's electricity is transmitted over the grid commonly described as the "Western Interconnection." Black Hills Additional Proposed Finding 2. Transcript at 42-43 and 163-164.

40. Black Hills-generated electricity that currently serves the Customer is transmitted over the "Western Interconnection." West River's proposed service of the Customer would occur over the "Eastern Interconnection." "Electricity transmitted over the Western Interconnection and Eastern Interconnection are of asynchronous phases that cannot be directly interconnected. Thus, electricity delivered to the Customer by Black Hills and West River may not currently be safely connected. Any service points that might be simultaneously served at the Plant could not be directly connected without causing injury to persons or property. Black Hills Additional Proposed Finding 3. Transcript at 42-43 and 163-164.

41. Although there is a theoretical risk posed by electricity being supplied from the Western and Eastern Interconnections to the Plant, that risk is remote given the separation of Services Numbers Two through Six from Service Number One. Transcript at 42-43, 163-164 and 181.

The Practice of the Parties

42. West River and Black Hills met on numerous occasions following passage of the Territorial Act, beginning at least as early as December 1975, to discuss and work out issues regarding the provision of both existing and new service to customers of each of them located within the assigned service territory of the other. Transcript at 25. As a result of these meetings, a general

understanding was reached between the two utilities at the working level as to how they would handle issues arising between them involving service to customers located within the service territory of the other because such service pre-dated the Territorial Act. West River's memoranda of these discussions are set forth on Exhibits 12 and 13. West River typically refers to this understanding as a "working agreement" and Black Hills as "guidelines." Transcript at 30, 32, 127, 156 and 177; Exhibit 24.

43. There is no evidence in the record that the working level understanding reached between the parties referenced in Finding 42 was ever reduced to a formal agreement, that any writing expressing the terms of such understanding was ever signed or otherwise formally approved by the parties or that formal approval was ever considered by the officers of the parties. Transcript at 60.

44. The understanding reached between the parties referenced in Finding 42 was employed by the parties on an informal basis at the operational level to resolve numerous issues involving service to frozen customers and the trading of load to maintain equity between the parties and "streamline service." Exhibits 14 through 23; Transcript at 44-54 and 71-78. Generally, these issues arose in connection with the addition of new service to a frozen customer. Transcript at 66. In all of the nine specific instances cited by West River, either a trade of accounts and load was accomplished to restore the frozen customer to the assigned utility or an agreement was reached to permit the non-assigned utility to continue to serve the account or accounts. Transcript at 44-54 and 71-78.

45. One of the principles employed by the parties in resolving disputes between each other states:

2. The utility certified to the territory shall have the option to serve any new service in that territory.

Exhibit 13.

46. In deciding whether to approve a trade of frozen customers, Black Hills based its decisions on the extent to which the trade would further its understanding of the objectives of the 1975 Territory Act, i.e., to avoid unnecessary duplication of facilities, to provide adequate electric service to the customers and promote the efficient use and development of Black Hills and the other utility systems. Transcript at 155 and 212-213.

47. In resolving an issue between Black Hills and Black Hills Electric Cooperative (BHEC) involving adding a new service to Stamper Black Hills Gold, a frozen customer of BHEC located within Black Hills's assigned territory, Black Hills asserted the position that it had the right to serve a new service to the facility. Black Hills in fact constructed this new service. Transcript at 138.

Prospective vs. Retrospective Application

48. West River and Black Hills discussed the "Sewer Plant load" and Black Hills curtailable rate on July 20, 1993, during one of the parties' periodic meetings. Exhibit 25, last page. This was the day following the date on which the Commission approved a contract with deviations for Black Hills service to the Plant including service to Service Number Two. Exhibit 10. Black Hills and West River discussed the service to the Plant on a number of occasions between 1987 and May of 1993. Transcript at 83; Exhibit 22. West River had knowledge of, or should have had knowledge of, Black Hills service to Service Number Two by at least July 20, 1993.

49. By June 1998, West River had definite knowledge of Black Hills's service to Service Number Two, and the parties entered into discussions concerning the parties' respective rights to provide service to the Plant, including service to Service Number Two. Exhibit 24. The parties were unable to reach agreement. Transcript at 57. Stipulated Finding 6.

50. It will take at least a few weeks for West River to be able to provide service to Service Number Two and Services Numbers Three through Five (Service Number Six is not currently active). Transcript at 40.

Effect of Order in EL93-021

51. The question of whether Black Hills's service to Service Number Two was an unlawful extension of service at retail pursuant to SDCL 49-34A-42 was not referenced or addressed in the Order in Docket Number EL93-021, approving the Large Demand Curtailable Service Agreement between Black Hills and the City, covering service to Service Number Two, and there is no evidence that this issue was raised or considered in the proceeding. Exhibit 10.

Rulings Upon West River's Additional Proposed Findings of Fact

Black Hills's Additional Proposed Findings

- Proposed Finding 1. Adopted as Finding 29.
- Proposed Finding 2. Adopted as Finding 39.
- Proposed Finding 3. Adopted as Finding 40.
- Proposed Finding 4. Rejected. The Commission's decision in this case is not based upon whether or not additional or separate metering is employed to measure service, and this proposed finding is therefore not sufficiently relevant to the ultimate findings of fact and conclusions of law to be adopted.
- Proposed Finding 5. Rejected. Proposed Finding 5 states a hypothetical premise, not a finding of fact.
- Proposed Finding 6. This proposed finding is moot. Black Hills did not propose additional proposed findings at the May 22, 2002 hearing.

West River's Additional Proposed Findings

- Proposed Finding 1. Rejected. In Findings Number 43 and 56 and Conclusion of Law 3 the Commission finds and concludes that the working agreement arrived at between the parties was not a binding agreement. The testimony presented by the two parties was conflicting as to their respective interpretations of the nature of and their reliance on the working agreement. The Commission concludes that the substance and legal effect of the parties' working agreement is best understood by direct reference to Exhibits 12 and 13 and the testimony referenced in the Findings of Fact on this issue.
- Proposed Finding 2. Rejected. Findings 42-46 and 56 and Conclusions of Law 3-5 set forth the Commission's factual findings and legal conclusions on this issue.
- Proposed Finding 3. Rejected. Findings 42-46 and 56 and Conclusions of Law 3-5 set forth the Commission's factual findings and legal conclusions on this issue.
- Proposed Finding 4. Rejected. The Commission has made general findings of fact and conclusions of law on the legal effect and significance of the parties' working agreement and course of dealing involving frozen customers and trades in Findings 42-46, 56 and 57 and Conclusions of Law 3-5. The individual

transactions referred to in West River's Proposed Finding 4 are not sufficiently essential to decision of the ultimate issues in this case to warrant specific findings on each of them.

Proposed Finding 5. Adopted as Finding 25.

Proposed Finding 6. Rejected. Findings 48-49 set forth the Commission's findings of fact on this issue.

Ultimate Findings of Fact

(References are provided for convenience to Findings and/or Conclusions that support the ultimate finding but are not intended to comprehensively list or limit such bases).

52. The provision of electric service to the Plant is the rendering of electric service at retail within the meaning of SDCL 49-34A-42. Finding 28.

53. The Plant is within the assigned service area of West River. Findings 8 and 13.

54. The type or location of the meter used by Black Hills to measure electricity usage at the Plant does not determine the "location" where Black Hills was serving the City as a customer as of March 21, 1975. Finding 38.

55. The parties in this case, and Black Hills in particular, recognized, in reconciling conflicts involving service to frozen customers, the fundamental purpose of the 1975 Territory Act to effectuate efficiencies in the provision of service and the elimination of duplication of waste through the consolidation of utilities' service within their assigned territories. Findings 44-47.

56. No binding agreement or agreements arose from the discussions of West River and Black Hills relative to procedures for dealing with the parties' respective provision of electric service at retail to customers within the service territory of the other. Finding 43.

57. Although never reduced to a formal agreement or submitted to the Commission for approval, the practice and principles employed by the parties in dealing with situations where one party was providing service within the assigned territory of the other are indicative of the parties' understanding of the meaning and practical application of SDCL 49-34A-42. Such course of dealing, if applied to the right to provide service to the Plant, would result in West River's having the right to serve Service Number Two and Services Numbers Three through Six as "new services" involving extension and installation of primary distribution facilities within West River's assigned service area. Findings 44-47.

58. It is equitable that West River be permitted to serve the post-1975 services at the Plant in light of the parties' course of dealing involving similar situations. Findings 8-9, 13, 25, 44-47, 53-54 and 57.

59. West River's provision of electric service to Services Numbers Two through Six and future expansions at the Plant will facilitate efficiency and consolidation of electric service by West River within its assigned service territory in the vicinity of the Plant and promote the underlying objective of the 1975 Territory Act of elimination of duplication and wasteful spending in the providing of electric service to customers within West River's assigned service territory in the vicinity of the Plant. Findings 8, 21, and 30-35.

60. It is in the public interest for West River to be permitted to provide the services to the Plant arising after March 21, 1975, including Services Numbers Two through Six, inclusive. Findings 52-53, 55 and 57-59.

61. The "location" served by Black Hills at the Plant as of March 21, 1975, was such service as could be provided by means of the primary distribution line and transformer installed at such time to serve Service Number One without the necessity for extending primary voltage lines. Findings 26, 27, 57-60 and Conclusions of Law 9 and 13.

62. When Black Hills installed a new primary voltage line, transformer and meter in 1987 to serve Service Number Two, Black Hills extended electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42. The continued service by Black Hills to Service Number Two is the rendering of electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42. Findings 52-53 and 61.

63. The installation of primary voltage lines and transformers to provide electric service at retail to the currently planned Services Numbers Three through Six and to future expansions at the Plant that require additional primary facilities constitutes the extending of electric service at retail within the meaning of SDCL 49-34A-42. The provision of such services by Black Hills would constitute the extending of electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42. Findings 52-53 and 61.

64. The Plant is within West River's assigned service territory and West River has the right to provide all electric service at retail to the Plant with the exception of the service provided by Black Hills to Service Number One, which Black Hills was providing as of March 21, 1975. Findings 52-53 and 61 and Conclusions of Law 9 and 13.

65. The issue of whether Black Hills's extension of service to Service Number Two was permissible service to a pre-1975 "location" was not raised in Docket Number EL93-021, and the Order in such docket does not explicitly or implicitly determine such issue. Finding 51.

66. West River had actual notice of Black Hill's service to Service Number Two at least as early as June, 1998, and was involved in discussions with Black Hills respecting the contract with deviations covering such service as early as July 20, 1993, and it would accordingly be inequitable to apply the decision in this case involving Service Number Two retroactively. Findings 48-49.

67. It will take West River several weeks to install facilities to provide service to the Plant, and the effective date of the order covering West River's right to provide service to Service Number Two should afford at least ninety (90) days to enable West River, Black Hills and the City to effectuate the change-over or make other arrangements. Finding 50.

68. Neither the extension of non-primary conductors or a change in location or capacity of a non-primary voltage service entrance is at issue in this case, and the Commission accordingly makes no finding of fact or conclusion of law on whether such events would constitute an extension of service prohibited by SDCL 49-34A-42.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL 49-34A-4 and 49-34A-59 and ARSD 20:10:01:34 and 20:10:01:35.

2. The Order in Docket Number EL93-021 did not have the effect of an adjudication of the respective rights of Black Hills and West River pursuant to SDCL 49-34A-42 to provide service to Service Number Two.

3. The informal understanding between West River and Black Hills concerning service to frozen accounts and other territorial issues was not a binding agreement between the parties.

4. The informal understanding between West River and Black Hills concerning service to frozen accounts and other territorial issues was never approved by the Commission either formally or tacitly and is not binding on the Commission.

5. The informal understanding between West River and Black Hills concerning service to frozen accounts and other territorial issues, although not determinative as to the interpretation or application of SDCL 49-34A-42 to resolve a formal dispute between the two parties over the right to provide service, is nevertheless instructive as to how the parties themselves interpreted the 1975 Territory Act and resolved service issues between themselves.

6. The fundamental principle underlying the 1975 Territory Act has been held by the South Dakota Supreme Court, in *Matter of Certain Territorial Boundaries (Mitchell Area)*, 281 N.W.2d 65 (1979) and again in *Matter of the Petition for Declaratory Ruling of Northwestern Public Service Company with Regard to Electric Service to Hub City*, 1997 S.D. 35, 560 N.W.2d 925 (1997), to be:

[E]limination of duplication and wasteful spending in all segments of the electric utility industry.

The Court further held in *Hub City* that this principle is appropriately employed in interpreting and reconciling apparently conflicting provisions of the 1975 Territory Act. This principle is appropriately applied in reconciling apparent conflicts presented by the first and second sentences of SDCL 49-34A-42.

7. The fundamental means adopted by the Legislature in the 1975 Territory Act to achieve the stated objectives of efficiency and elimination of duplication and wasteful spending in the electric industry was the assigned service territory. SDCL 49-34A-42 through 49-34A-44, inclusive. Assigned service territories promote efficiency and enhance service by, among other things, (i) consolidating the customer base to be served, (ii) removing at least one investment uncertainty - the absence of a known and reliable service area and customer base and (iii) thereby fostering an increase in the concentration and sophistication of facilities that enhance service capacity and reliability. The parties themselves embraced this objective on a practical, operational level through their efforts, under their working agreement, to reduce the number of anomalous frozen customers and consolidate service within their respective territories by means of voluntary trades.

8. The first sentence of SDCL 49-34A-42 is an exception to the 1975 Territory Act's pervasive mandate of assigned territories. The reason for this exception was history. At the time the Territory Act was passed, each utility did not operate within a nice, tidy boundary. Decisions had already been made by utilities and by customers, such as the one made in 1967 by the voters of Rapid City in this case, that resulted in certain served "locations" lying within the general service territory of another utility. The Legislature recognized this and included the first sentence of SDCL 49-34A-42 to do equity to both customers and utilities having made prior investments and to prevent the stranding and wasting of such investments and the resulting additional costs to ratepayers.

9. The first sentence of SDCL 49-34A-42, however, remains an exception to the general policy of the 1975 Territory Act of restricting electric service to the utility's assigned territory. As an exception to the general policy, this "grandfather" exception should be narrowly construed and

applied. All other things being equal, in the event of a conflict between the service right of a utility having the assigned territory and a utility basing its right on serving a grandfathered "location" within another utility's assigned territory, the assigned territory should take precedence as furthering the fundamental policy of the Territory Act of consolidating service within assigned territories. In our view, this construction will further the goals the 1975 Territory Act was enacted to achieve, namely, to encourage stability, foster the consolidation of service locations and facilities, increase the efficiency and reliability of the system for all customers within the assigned territory and minimize duplications of service and waste in the electric industry.

10. The policies underlying the 1975 Territory Act are not well served by an expansive interpretation of the term "location" in the first sentence of SDCL 49-34A-42 to necessarily mean the entirety of a contiguous tract of land owned by the customer served by a utility as of March 21, 1975. Although consideration of the customer's property boundaries may be relevant or even decisive evidence bearing on the determination of the right to serve in a particular case, a *per se* application of such a rote definition could result in consequences that are totally inconsistent with the purposes of the 1975 Territory Act. An example of this would be a pre-1975 service to an isolated customer on a large tract of land. Should the utility serving the out-of-territory customer location be afforded the right to serve all growth on the entire parcel? The Commission does not believe that such a construction of SDCL 49-34A-42 comports with the intent of the Legislature in enacting the 1975 Territory Act, and we accordingly decline to follow the holding of the Illinois Court of Appeals in *Coles-Moultrie Electric Cooperative v. Illinois Commerce Commission*, 394 N.E.2d 1068 (Ill. App. 4th 1979).

11. In the Commission's opinion, this construction is bolstered by the elapse of twenty-seven years since passage of the 1975 Territory Act. Early in the territorial consolidation process, there may have been greater justification to weigh decisions in favor of an expansive definition of "location" to enable the serving utility to avoid a stranding and wasting of an investment undertaken in good faith without knowledge of the potential stranding effect of territory assignments. As time passes, however, investments in facilities made prior to 1975 have undergone normal depreciation, and less justification eventually remains to apply an expansive reading of "location" and increase the scope of anomalous services to recover fully depreciated or almost fully depreciated costs.

12. Lastly, the Commission reads the Supreme Court's opinion in *Matter of the Petition for Declaratory Ruling Filed By Clay-Union Electric Corporation*, 300 N.W.2d 58 (S.D. 1980) as supporting the construction of SDCL 49-34A-42 that we adopt here. As the Court stated in *Clay-Union*, SDCL 49-34A-42 was intended to do the following:

First, it assured that each utility would be granted all *future service rights* within its designated service area; and second, it protected *individual service* existing at the time the franchise was granted.

300 N.W.2d 58, 62 (1980) (emphasis added). Although it may be true that this expression was dicta since the case was decided on the construction of a Commission-approved agreement between the parties governing the service, the overall tenor of the opinion, and this passage in particular, support a construction of the first sentence of SDCL 49-34A-42 as being a narrow exception to the general rule that after the effective date of the 1975 Territory Act, the utility assigned to the territory is entitled to serve all new electric service within the assigned area.

13. Applying the construction of SDCL 49-34A-42 set forth in Conclusion of Law 9 to the situation presented in this case, we conclude that the "location" served by Black Hills as of March 21, 1975, should be limited to Service Number One. The extension of service in 1987 to serve Service Number Two and the planned additional extensions to Services Numbers Three through Six are not minor relocations or capacity upgrades of service entrances but involve the extension of primary lines and transformers. These extensions of service are new service and constitute the "extension

of electric service at retail within the assigned service area of another utility" as proscribed by SDCL 49-34A-42. As the utility assigned to serve the area on which the Plant is located, West River should have the right to serve these extensions of primary service.

14. In so deciding, we are mindful and respectful of the fact that the voters of Rapid City approved Black Hills as their supplier for the Plant in 1967 in a public referendum. We also must consider, however, that this election pre-dated the Territory Act by eight years and that SDCL 49-34A-42 contains no exception permitting a utility to extend or render service in the assigned service area of another utility because the original selection of such utility to provide the out-of-territory service was approved by the vote of the utility customer's residents. Had the Legislature wanted to carve out such an exception or even to require the Commission to consider such an occurrence in rendering a decision, it would have included a statutory provision to that effect. We therefore conclude that the election held in 1967 by the voters of Rapid City to approve the selection of Black Hills to provide service to the Plant does not determine or enlarge the right of Black Hills to render or extend electric service at retail within the territory of West River pursuant to SDCL 49-34A-42.

15. We are also mindful of the fact that Black Hills installed excess capacity in its line back in 1967 with the intention of providing additional service to the Plant as it was demanded. In our view, however, this situation existed in many instances at the time of passage of the 1975 Territory Act and was, in fact, a principal reason for the passage of the act, namely, to avoid situations where two utilities would make significant investments in overlapping and intermingled facilities. At some point in time, the basic premise of the Territory Act of promoting system efficiency through assignment of service and consolidation of facilities must take precedence. We also note that Black Hills had a clear remedy available to it to avoid the situation we now face in this case. Had Black Hills intended as of 1975 to extend service in the future from its facilities at the Plant, it could have sought to have the Plant and surrounding area included within its assigned service area. The record, however, contains no evidence that this was done or attempted.

16. We therefore decide that when Black Hills installed a new primary voltage line and transformer in 1987 to serve Service Number Two, Black Hills extended electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42. The continued service by Black Hills to Service Number Two is the rendering of electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42.

17. We further decide that the installation of primary voltage lines and transformers to provide electric service at retail to the currently planned Services Numbers Three through Six and to future expansions at the Plant that require additional primary facilities constitutes the extending of electric service at retail within the meaning of SDCL 49-34A-42. The provision of such services by Black Hills would constitute the extending of electric service at retail within the assigned service territory of West River in violation of SDCL 49-34A-42.

18. We further decide that Black Hills has the right to continue to provide electric service at retail to Service Number One at the Plant, including such ordinary commercial service modifications or additions from Service Number One that involve only ordinary, non-primary commercial wiring.

19. We further decide that West River has the right to provide service within its assigned territory to Service Number Two and all subsequently installed service at the Plant (other than commercial level wiring from Service Number One as provided in Conclusion of Law 18), including but not limited to service to Services Numbers Two through Six.

20. Given West River's knowledge of the existence of Black Hills's service to Service Number Two, however, it would be inequitable to retroactively apply Conclusion of Law 19 to Service Number Two, and we decline to give retroactive effect to our decision as to Service Number Two. The parties and the City will also require time to make necessary installations and arrangements to

accommodate this decision, and we accordingly decide that the effective date of West River's right to serve Service Number Two shall be the date ninety (90) days after the date the Commission's order pertaining thereto becomes final.

21. Lastly, since neither the extension of non-primary conductors or a change in location or capacity of a non-primary voltage service entrance is at issue in this case, our decision does not reach the issue of whether such events would constitute an extension of service prohibited by SDCL 49-34A-42.

The Commission therefore

RULES AND DECLARES that Black Hills did extend and is rendering electric service at retail within the territory of West River in violation of SDCL 49-34A-42 by extending and then providing service to Rapid City Waste Treatment Facility Service Number Two and that commencing on the date ninety (90) days after the final effective date of this Declaratory Ruling, West River shall have the right to provide electric service to Service Number Two; and further

RULES AND DECLARES that Black Hills shall continue to have the right to provide electric service at retail to Service Number One, including any ordinary commercial-level service modifications or additions served from Service Number One that involve only ordinary, non-primary, commercial wiring; and further

RULES AND DECLARES that West River has the right under SDCL 49-34A-42 to provide future electric service to the Rapid City Waste Water Treatment Facility, including but not limited to Services Numbers Three through Six which are currently planned for construction by the city.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Declaratory Ruling was duly entered on the 24th day of September, 2002. Pursuant to SDCL 1-26-32, this Declaratory Ruling will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 24th day of September, 2002.

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: Nelaine Krebs

Date: 9/24/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg

JAMES A. BURG, Chairman

Pam Nelson

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner,
dissenting

COMMISSIONER SAHR'S DISSENT

I respectfully dissent from the majority opinion. While this is a challenging case and both parties did an excellent job advocating their respective positions, Black Hills Power, Inc. ("Black Hills Power") should provide the service to the City of Rapid City Waste Water Treatment Plant ("Plant") for both the 1987 addition and the planned expansion.

My position respects the will of the Rapid City voters, avoids wasting investment, minimizes safety concerns, and follows the applicable law.

1. Will of the City of Rapid City Voters

The majority opinion ignores the will of the Rapid City voters. In 1967, the voters selected Black Hills Power as the utility of their choice to serve the Plant. The vote logically should include expansions of the same facility occurring at the same location for the same purpose. Here, the voters wanted Black Hills Power, not West River Electric Association, Inc. ("West River"), to serve the Plant. The PUC should respect that decision.

2. Stranding and Wasting of Investment

The majority opinion needlessly strands and wastes Black Hills Power's investment and will prevent Black Hills Power's customers from recovering costs they have paid in advance. The South Dakota Supreme Court has given us guidance on how to interpret the 1975 territorial law, stating that the "policy underlying the Act" is:

[E]limination of duplication and wasteful spending in all segments of the electric utility industry.

Matter of Certain Territorial Boundaries (Mitchell Area), 281 N.W.2d 65 (1979); Matter of the Petition for Declaratory Ruling of Northwestern Public Service Company with Regard to Electric Service to Hub City, 1997 S.D. 35, 560 N.W.2d 925 (1997).

It is particularly troubling that the Commission is taking away service Black Hills Power has provided since 1987, and is awarding it to West River.

This case is bad precedent for the PUC. Black Hills Power's investment was designed to provide sufficient capacity to serve future growth at the Plant. The PUC should encourage forward-looking investment in infrastructure when it yields efficiency and cost-savings for the ratepayer. The company's ratepayers paid for this partially used investment with the anticipation of future load growth and related revenues. While Black Hills Power may arguably be made whole by the ratepayers, the ratepayers have not been made whole.

On the other hand, West River has been able to make use of its investments in the area. West River's own witness stated additional growth is expected in the region and plans are in the works to add capacity to serve the area even if West River is not approved to provide the expansion.

3. Safety Concerns

The majority opinion unnecessarily intermixes the eastern and western power grids. While the chance of catastrophe may be remote, the consequences would be dire. Lives could be lost, property destroyed, investment wasted, public service disrupted, and the environment damaged. There is one surefire way to avoid these problems: permit Black Hills Power to continue serving the entire Plant.

4. SDCL 49-34A-42

SDCL 49-34A-42 reads, in part: "Each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975..."

All of the service area in question was part of the "location" served by Black Hills Power as of March 21, 1975. Here, we have a wastewater treatment plant constructed for a growing city. It is logical to assume a plant built in the 1960s will grow over time. The growth is for the same purpose and is occurring on a part of the property adjacent to the existing service. The land's physical characteristics also support that it is one location (as one witness stated the property is "120 acres of flat hay field"). As evidenced by witnesses and aerial photos, the property contains no significant natural or man-made features dividing it into separate parcels.

Case law also supports this interpretation. As stated in Hub City:

It is presumed that the Legislature intended provisions of an act to be consistent and harmonious [citations omitted] [and] . . . that the Legislature did not intend an absurd or unreasonable result [citations omitted].

Hub City, Id.

The facts at hand, coupled with the "elimination of duplication and wasteful spending" principle and the "[avoidance of] absurd or unreasonable results" principle, all favor Black Hills Power continuing to provide the service to the 1987 addition and providing the service to the planned expansion.

I urge the Commission to reconsider its decision in light of the will of the Rapid City voters, the wasted investment, the safety risk, and a more reasoned interpretation of the law.


ROBERT K. SAHR, Commissioner,
dissenting

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