

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

IN THE MATTER OF THE COMPLAINT FILED)	FINDINGS OF FACT AND
BY REX AND LORI CALDWELL, SPEARFISH,)	CONCLUSIONS OF LAW;
SOUTH DAKOTA, AGAINST BLACK HILLS)	NOTICE OF ENTRY OF
POWER AND LIGHT COMPANY REGARDING)	ORDER
EASEMENT AND REIMBURSEMENT ISSUES)	CE01-001

On April 26, 2001, the Public Utilities Commission (Commission) received a complaint filed by Rex and Lori Caldwell, Spearfish, South Dakota, against Black Hills Power and Light Company (BHPL) regarding easement and reimbursement issues.

On April 30, 2001, the complaint was faxed to BHPL. Pursuant to ARSD 20:10:01:09, BHPL was notified that it must satisfy the complaint or file an answer in writing with the Commission by May 21, 2001. On May 21, 2001, the Commission received a letter response from BHPL.

The hearing was held as scheduled on June 20, 2001, in Room 412 of the State Capitol Building. Following the hearing, briefs were submitted by the parties.

At its September 7, 2001, meeting, the Commission considered this matter. With respect to the admission of the affidavit filed after the hearing by Tom Berry, the Commission denied its admission. With respect to the merits of the complaint, the Commission voted to deny the relief requested by the Caldwells.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On April 26, 2001, the Commission received a complaint filed by Rex and Lori Caldwell, Spearfish, South Dakota, against BHPL regarding easement and reimbursement issues.
2. Pursuant to BHPL's tariff, customers are responsible to provide all trenching for residential underground extensions. BHPL Tariff, Section No. 5, Second Revised Sheet No. 28, Section 803.1(E)(2)(c). When the Caldwells requested service, they discussed with BHPL how to bring electric service to their new home. TR. at 8-9. Instead of using the existing easement for utilities, BHPL suggested a different route. Id.; Exhibit 11 One of the reasons for using the different route was that it would result in cheaper trenching costs for the Caldwells. TR. at 9. Another reason was that the different route would allow BHPL to construct a loop to connect the upper valley of Spearfish to the lower valley of Spearfish some time in the future. Id.

3. The Caldwells hired a contractor to do the trenching at a cost of \$1,188.72 and a transformer was placed on their property. Exhibit 2; TR. at 10. The Caldwells were told by a BHPL employee that if BHPL ever connected another customer to the transformer in the future, the Caldwells could be reimbursed for their costs. TR. at 10.

4. In September of 2000, a new homeowner in their development stated that he would be trenching across the Caldwells' yard to connect to the transformer on their property. TR at 10. The Caldwells told the new homeowner and Tom Berry, a BHPL employee, that BHPL did not have an easement. TR. at 10-11. Shortly thereafter, the new homeowner trenched across the Caldwells' lawn. TR. at 11. In December, the Caldwells discovered that the new homeowner had been hooked up to the transformer. Id.

5. At the hearing, the Caldwells requested the following relief: (1) require BHPL to disconnect the new homeowner and provide the new homeowner service by using existing easements available in the development; (2) require BHPL to buy an easement for \$3,500.00; or (3) require BHPL to lease the easement from the Caldwells for \$300.00 per month. TR. at 14-15. The Caldwells' first preference was for BHPL to disconnect. TR. at 15. In their brief following the hearing, the Caldwells requested that BHPL pay them \$3,500.00 for trenching costs. Post Hearing Responsive Brief at 11. In the alternative, if BHPL failed to pay the \$3,500.00, the Caldwells requested that BHPL be ordered to disconnect the new homeowner from the transformer. Id. The Caldwells further requested costs and expenses of \$1,506.54 plus attorneys fees. Id.

6. Stuart Wevik, BHPL's Director of Customer Service, testified that if the Caldwells' underground electric line had followed existing easements, the line would have been longer and more expensive. TR. at 47-48. In addition to increased trenching costs, the Caldwells may have been required to pay a deposit for part of the costs of the installation. TR. at 48. When a customer pays a deposit, the deposit, or a portion of it, may be refundable under certain circumstances. BHPL Tariff, Section No. 5, Second Revised Sheet No. 26, Section 803(D)(1). For example, a customer may receive a refund if additional line extensions are constructed from the facilities that were partially financed by the customer. Id. The Caldwells were not required to pay a deposit when they received electric service so the refund provisions do not apply. TR. at 47. Mr. Wevik stated that he did not believe that BHPL had reimbursed any customers for trenching costs in the 16 years he had worked for BHPL. TR. at 88.

CONCLUSIONS OF LAW

1. The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-34A, specifically 49-34A-2, 49-34A-2.1, 49-34A-3, 49-34A-9, 49-34A-10, 49-34A-26, 49-34A-27, 49-34A-39, 49-34A-40, and 49-34A-58.

2. The South Dakota Supreme Court has stated that an electric utility's approved tariff has the force of law. In re One-Time Special Underground Assessment, 2001 SD 63, ¶

8, citing, City of Auburn v. Qwest Corp., 247 F.3d 966, 2001 WL 410043, *4 (9th Cir. 2001).

3. Pursuant to BHPL's tariff, once a customer accepts service, the customer is subject to BHPL's rules and regulations. BHPL Tariff, Section No. 5, First Revised Sheet No. 8, Section 201.

4. With respect to easements, customers are required to provide right-of-way for BHPL's lines that are "necessary and incidental to the furnishing of service to customer and for continuing or extending said lines over and across the property owned or controlled by customer. . . ." BHPL Tariff, Section No. 5, First Revised Sheet No. 13, Section 310. For residential underground lines, the applicant for service is required to "[p]rovide the necessary easements as specified by the Company." BHPL Tariff, Section No. 5, Second Revised Sheet No. 28, Section 803.1(E)(2)(a).

5. Pursuant to BHPL's tariff, customers are responsible to provide all trenching for residential underground extensions. BHPL Tariff, Section No. 5, Second Revised Sheet No. 28, 803.1(E)(2)(c).

6. BHPL's tariff also addresses the issue of adding customers to line extensions. Under the tariff, "[t]he Company reserves the right at all times to add customers to an extension, and to make new extensions to any existing extension, under the provisions of these rules, without procuring the consent of any customer (Applicant) or customers contributing to the original construction costs." BHPL Tariff, Section No. 5, Second Revised Sheet No. 24, 802(15).

7. At the hearing, the Caldwells asked that BHPL be required to purchase an easement for \$3,500.00. TR. at 14. After the hearing, the Caldwells asked that BHPL be required to reimburse them for trenching costs in the amount of \$3,500.00. Post Hearing Responsive Brief at 11. The Commission finds that neither request can be granted due to the provisions of BHPL's. Under the express terms of the tariff, a customer is required to provide all necessary trenching which is necessary to receive electric service from BHPL. BHPL Tariff, Section No. 5, Second Revised Sheet No. 28, 803.1(E)(2)(c). In addition, as expressly provided by the tariff, the customer is required to provide the necessary easements for underground residential lines. BHPL Tariff, Section No. 5, Second Revised Sheet No. 28, Section 803.1(E)(2)(a).

8. As an alternative to purchasing an easement or paying for trenching costs, the Caldwells requested that BHPL be required to disconnect the new homeowner and provide the new homeowner service by using existing easements available in the development. Post Hearing Responsive Brief at 11; TR. at 15. The Commission finds that, under the express terms of the tariff, BHPL has the right to add customers to an extension without the consent of the customer which contributed to the original construction costs. BHPL Tariff, Section No. 5, Second Revised Sheet No. 24, 802(15).

9. The Commission recognizes that BHPL does not have an easement. However, under the terms of the tariff, once the Caldwells requested and received electric service, the Caldwells were subject to the tariff provisions which allowed the placing of the electric service on their property, and the subsequent hooking up of new customers to the transformer located on their property. The Caldwells were also subject to the requirement to procure the right-of-way for BHPL's electric facilities.

10. Even though the Caldwells stated that they were told by a BHPL employee that if BHPL ever connected another customer to the transformer in the future, the Caldwells could be reimbursed for their costs, such a promise would conflict with BHPL's tariff and, therefore, cannot be enforced. TR. at 10. Under the filed rate doctrine a utility is bound by its tariff. As the United States Supreme Court has stated "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." AT&T Co. v. Central Office Telephone, 524 U.S. 214, 222, (1998), citing Kansas City S. R. Co. v. Carl, 227 U.S. 639, 653 (1913). The Supreme Court further noted that the filed rate doctrine is not limited to rates, but also relates to the provisioning of service. AT&T Co. v. Central Office Telephone, 524 U.S. at 223-224.

It is therefore

ORDERED, that the relief requested by the Complainants is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 2nd day of October, 2001. Pursuant to SDCL 1-26-32, this Order 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 2nd day of October, 2001.

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>Hildene Kaelo</u>
Date:	<u>10/2/01</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner