

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

IN THE MATTER OF THE APPLICATION OF )	ORDER TO SHOW CAUSE
THE CITY OF VERMILLION FOR )	
DETERMINATION OF PURCHASE PRICE OF )	EL97-020
ELECTRIC FACILITIES IN ANNEXED AREAS )	

On October 20, 1997, the Public Utilities Commission (Commission) received an Application for Determination of Purchase Price of Electric Facilities in Annexed Areas (Application) from the City of Vermillion (Vermillion). In its Application, Vermillion stated that it annexed some of Clay-Union Electric Corporation's (Clay-Union Electric) service area during the time period of November 20, 1995, through April 12, 1996. On October 21, 1996, Vermillion adopted a resolution to purchase the service rights and electric utility properties from Clay-Union Electric pursuant to SDCL 49-34A-49. On October 30, 1996, Vermillion sent to Clay-Union Electric a Notice of Intent to Purchase Electric Utility Properties in Annexed Areas, with the amount to be calculated in accordance with SDCL 49-34A-50. On May 29, 1997, Clay-Union Electric informed Vermillion that it would not consent to the conditions contained in the Notice of Intent to Purchase. In its Application, Vermillion requests that the Commission determine the amount of the payment pursuant to 49-34A-50.

According to the Application, the annexed areas that are currently served by Clay-Union Electric are as follows:

The North 220 feet of the West 298 feet of the East 588 feet of the East Half of the Southeast Quarter (E $\frac{1}{2}$  SE $\frac{1}{4}$ ) of Section 12, Township 92, Range 52, West of the 5th P.M.

Beginning at the Southwest section corner of Sec. 17-92-51 thence North 2652 feet on the center line of Crawford Road to the West  $\frac{1}{4}$  corner of Sec. 17-92-51 thence East 331 feet, thence South 548.86 feet, thence West 153 feet, thence South 777.57 feet, thence East 21.83 feet, thence South 1126.43 feet, thence East 2452 feet, thence South 200 feet to the South  $\frac{1}{4}$  corner of Sec. 17-92-51 thence West 2169 feet on the center line of Main Street thence South 339 feet, thence West 285 feet, thence North 256 feet, thence East 68 feet, thence South 100 feet, thence East 126 feet, thence North 183 feet to center line of Main Street thence West 392 feet to point of beginning, all in Section 17-92-51 and 20-92-51, Clay County, South Dakota.

The West  $\frac{1}{2}$  of the NW $\frac{1}{4}$  of Section 13, Township 92 North, Range 52 West of the 5th P.M., Clay County, South Dakota, with the exception of the South 660 feet of the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  and Lot H-1 of the West  $\frac{1}{2}$  of the SW $\frac{1}{4}$ .

On January 7, 1998, Vermillion filed an Affidavit in Support of Order to Show Cause, a Motion for Order, an Order to Show Cause, and a Memorandum of Authorities in Support of Motion to Show Cause. Vermillion requested that the Commission issue an Order to Show Cause why the following relief should not be granted: (1) a civil penalty assessed against Clay-Union Electric in the amount of \$1000.00 for each violation of SDCL 49-34A-52 and 49-34A-66; (2) the assignment to Vermillion of the exclusive right to provide electric services to all electric energy consumers within each of the three areas annexed by Vermillion; (3) a finding that Vermillion is entitled to the territorial assignments and to the revenues generated from electric service therein since October 30, 1997; (4) ordering Clay-Union Electric to answer Vermillion's interrogatories and produce documents as requested for inspection and copying; and (5) awarding Vermillion other and further relief as the Commission may find is just and reasonable.

In a letter dated February 17, 1998, Clay-Union Electric affirmed that it has refused to transfer certain parts of its service territory to Vermillion. Clay-Union Electric further stated that it believed that two issues were presented by the Application that could not be answered by the Commission. The first issue is whether SDCL 49-34A is in violation of the South Dakota Constitution for failure to provide just compensation for the annexed property. The second issue is whether SDCL 49-34A is preempted by the federal legislation authorizing and funding the Rural Utilities Service. Clay-Union Electric stated that it would pursue these issues in the proper forum.

At its February 18, 1998, meeting, the Commission considered this matter. The Commission listened to the arguments made by both parties and took the matter under advisement. At its February 24, 1998, meeting, the Commission again considered this matter. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL 49-34A-42 to 49-34A-52, 49-34A-66 to 49-34A-69, and ARSD 20:10:01:45. The Commission voted unanimously to issue an Order to Show Cause.

PLEASE TAKE NOTICE that a hearing shall be held at 1:30 p.m., March 26, 1998, in Room 468, State Capitol Building, Pierre, South Dakota. At the hearing, Clay-Union Electric shall show cause why the Commission should not take any of the following actions: (1) pursuant to SDCL 49-34A-66, assess a civil penalty against Clay-Union in an amount of not less than one hundred dollars nor more than one thousand dollars for each violation of SDCL 49-34A-52 and 49-34A-66; (2) assign to Vermillion the exclusive right to provide electric services to all electric energy consumers within each of the three areas annexed by Vermillion (as listed above) which are currently served by Clay-Union Electric; (3) find that Vermillion is entitled to the territorial assignments and to the revenues generated from electric service in the annexed areas since October 30, 1997; and (4) order Clay-Union Electric to answer Vermillion's interrogatories and produce documents as requested for inspection and copying.

The hearing will be conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the decision of whether or not the relief is granted will be based on arguments and authorities presented at the hearing. A final decision may be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the arguments and authorities presented by the parties, shall decide whether any of the above listed actions shall be ordered by the Commission. A Final Decision may be appealed by the parties to the Circuit Court and the South Dakota Supreme Court as provided by law.

It is therefore

ORDERED, that a hearing on this Order to Show Cause shall be held on March 26, 1998, beginning at 1:30 p.m., in Room 468, State Capitol Building, Pierre, South Dakota; and it is

FURTHER ORDERED, that the documents filed by Vermillion in support of its request for an Order to Show Cause are hereby attached to this Order.

Dated at Pierre, South Dakota, this 11<sup>th</sup> day of March, 1998.

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>Melanie Kalbo</u>
Date:	<u>3/11/98</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg  
JAMES A. BURG, Chairman

Pam Nelson  
PAM NELSON, Commissioner

Laska Schoenfelder  
LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE  
STATE OF SOUTH DAKOTA

RECEIVED

JAN 08 1998

THE CITY OF VERMILLION, )  
a municipal corporation, )  
 )  
Applicant, )  
 )  
vs. )  
 )  
CLAY-UNION ELECTRIC CORP., )  
INCORPORATED, a corporation, )  
 )  
Respondent. )

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

AFFIDAVIT IN SUPPORT  
OF  
ORDER TO SHOW CAUSE

STATE OF SOUTH DAKOTA )  
 :  
COUNTY OF CLAY )

William J. Radigan, being first duly sworn, on his oath  
deposes and says:

I

Affiant is a resident of Vermillion, South Dakota, is  
more than 21 years of age and is the duly elected, qualified  
and acting Mayor of the City of Vermillion.

II

The City of Vermillion, Applicant herein, is a  
municipal corporation duly organized under the laws of the  
State of South Dakota, and its principal office is located  
in the municipal offices building at 25 Center Street in  
Vermillion, Clay County, South Dakota.

III

The population of the City of Vermillion exceeds 10,000  
people, and the City is an urban area.

IV

The Applicant owns and operates an electric utility  
serving customers in some areas outside of and adjacent to  
the City of Vermillion.

V

Clay-Union Electric Cooperative, the Respondent herein,  
is an electric utility company organized under the laws of  
the State of South Dakota, with its principal office located

at 1410 East Cherry Street in Vermillion, South Dakota and serves consumers in an area including portions of Clay, Union, and Yankton Counties and including territory adjacent to and within the boundaries of the Applicant City.

## VI

On the 20th day of November, 1995 the Applicant annexed a tract of real property legally described as follows:

The East Half (E 1/2) of the Southeast Quarter (SE 1/4) of Section Twelve (12), Township Ninety-two (92), Range Fifty-two (52) West of the 5TH P.M., except the West 732 feet of the North 1,475 feet thereof, Clay County, South Dakota.

Respondent currently has service rights in that portion of said annexed territory described as follows:

The North 220 feet of the West 298 feet of the East 588 feet of the East Half of the Southeast Quarter (E 1/2 SE 1/4) of Section 12, Township 92, Range 52, West of the 5th P.M.

and has installed electrical facilities to serve one consumer therein.

## VII

On the 11th day of March, 1996 the Applicant annexed a tract of real property legally described as follows:

Beginning at the Southwest section corner of Sec. 17-92-51 thence North 2652 feet on the center line of Crawford Road to the West 1/4 corner of Sec. 17-92-51 thence East 331 feet, thence South 548.86 feet, thence West 153 feet, thence South 777.57 feet, thence East 21.83 feet, thence South 1126.43 feet, thence East 2452 feet, thence South 200 feet to the South 1/4 corner of Sec. 17-92-51 thence West 2169 feet on the center line of Main Street thence South 339 feet, thence West 285 feet, thence North 256 feet, thence East 68 feet, thence South 100 feet, thence East 126 feet, thence North 183 feet to center line of Main Street thence West 392 feet to point of beginning, all in Section 17-92-51 and 20-92-51, Clay County, South Dakota.

Respondent currently has service rights to the entire annexed territory and has installed underground electric facilities serving three consumers therein.

VIII

On the 12th day of April, 1996 the Applicant annexed a tract of real property legally described as follows:

The West 1/2 of the NW 1/4 of Section 13, Township 92 North, Range 52 West of the 5TH P.M., Clay County, South Dakota, with the following exceptions: The South 660' of the SW 1/4 of the NW 1/4; and Lot H-1 of the West 1/2 of the NW 1/4; and the East 1/2 of the NE 1/4 of Section 14, Township 92 North, Range 52 West of the 5TH P.M., Clay County, South Dakota, with the following exceptions: The South 660' of the SE 1/4 of the NE 1/4; Lot H-2 of the East 1/2 of the NE 1/4.

Respondent currently has service rights in that portion of said annexed territory described as follows:

The West 1/2 of the NW 1/4 of Section 13, Township 92 North, Range 52 West of the 5TH P.M.; Clay County, South Dakota, with the exception of the South 660 feet of the SW 1/4 of the NW 1/4 and Lot H-1 of the West 1/2 of the SW 1/4.

and has installed electrical facilities along the East and South sides thereof, but serves no consumers therein.

IX

On the 21st day of October 1996, the Applicant City adopted a resolution to exercise its privilege granted by SDCL 49-34A-49 to purchase Respondent's utility properties and service rights within each of the three above mentioned annexed areas.

X

On the 30th day of October 1996, the Applicant served upon the Respondent its written offer to purchase Respondent's utility properties all in the manner provided by SDCL 49-34A-49 to 49-34A-52, inclusive.

XI

Six months later, i.e. on the 29th day of May 1997, Respondent acknowledged receipt of Applicant's offer and informed the Applicant, by letter bearing that date, that it would "not consent to the conditions set forth in the October 30, 1996 Notice of Intent"; and at all times since the 30th day of October 1996, Respondent has failed and refused to participate in any manner whatsoever with the Applicant in ascertaining the amount of the purchase price

calculated under SDCL 49-34A-50, which the Applicant is obligated to pay in exchange for its purchase.

XII

At all times since the 30th day of October 1996, the Respondent has failed and refused to "proceed to act" in giving effect to the mandatory provisions of SDCL 49-34A-52.

XIII

Because Respondent has refused "to act" as required by SDCL 49-34A-52, Applicant made and filed its application in this tribunal on the 16th day of October, 1997 and caused a copy to be served on the Respondent on the 20th day of October, 1997.

XIV

Respondent has neither answered the application nor proceeded or offered to proceed to act in any manner directed toward determining the amount to which it is now entitled pursuant to SDCL 49-34A-50.

XV

On the 16th day of November, 1997 Applicant prepared and filed in this proceeding its Interrogatories (First Set) and its Request for Production of Documents and served a copy thereof on Respondent for the purpose of discovering information necessary to determine the amount to which it is now entitled pursuant to SDCL 49-34A-50.

XVI

Respondent has now served upon Applicant its document entitled RESPONSE TO APPLICANT'S INTERROGATORIES (FIRST SET) AND RESPONDENT'S RESPONSE TO APPLICANT CITY OF VERMILLION'S REQUEST FOR PRODUCTION OF DOCUMENTS TO RESPONDENT and in said Response has refused to answer any of Applicant's Interrogatories, refused to produce any of the requested documents and has declined to furnish information in any form necessary to ascertain the amount to which it became entitled at the time Applicant purchased Respondent's utility properties and service rights within the three aforementioned annexed areas.

XVII

Respondent's refusal to act is a refusal to comply with the mandatory provisions of SDCL 49-34A-52 and constitutes a violation of SDCL 49-34A-66 by reason of which Respondent ought to be required by the order of this commission to pay

to the Applicant a civil penalty in the amount of \$1,000 for each violation.

XVIII

Applicant is, and at all times has been ready, willing and able to cooperate with Respondent in determining the sum to which it was or is entitled on transferring service rights within the three annexed areas from Respondent to Applicant and to pay said amount to Respondent.

XIX

Applicant has expended and will continue to be obligated to expend very extensive amounts of the skill, time and energies of its officers and employees in the planning, development, construction and installation of municipal improvements and infrastructure in the three above mentioned annexed areas and in those matters has expended in excess of \$1,645,912.00 and will be obligated to expend an additional sum of at least \$660,000.00 in completing its development of these three annexed areas.

XX

Applicant depends entirely on revenues from its electric utility service in the construction, maintenance and operation of its electric utility properties and electric service department and depends in substantial measure on revenues from that department for the financing of all planning, development, construction and installation of its improvements and infrastructure installed and constructed in said annexed areas; and by reason of these facts it is of great importance to the Applicant that it be granted leave to provide electric services to all consumers and potential consumers within said three annexed areas and to receive the revenues from said services beginning at earliest possible time it is by law authorized to serve the areas.

XXI

Providing for the assignment of service areas to electric utilities and granting them the exclusive right to provide electric service at retail within assigned areas is a part of the regulatory scheme uniformly applicable to all members of the class defined as "electric utility" and is a function of this Commission to be performed and administered pursuant to South Dakota Statute; and this Applicant believes it is now entitled to an order of the Commission ordering and providing:

1. That the Respondent be required to pay to the Applicant the sum of \$1,000 for each of its



information and belief, and as to those matters he believes it to be true.

William J. Radigan  
William J. Radigan

Subscribed and sworn to before me this 30<sup>th</sup> day of December, 1997.

Maureen M. Kelly  
Notary Public

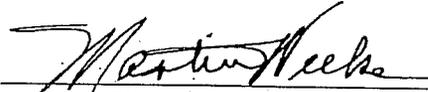
(SEAL)

My Commission Expires: Dec 11, 1998



This Motion is made and based on the annexed Affidavit of William J. Radigan, Mayor of the City of Vermillion and on all the pleadings, documents, records and files in this action.

Dated at Vermillion, South Dakota this 7<sup>th</sup> day of January, 1998.



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**Martin Weeks, City Attorney**  
**Attorney for the Applicant**  
**BOGUE, WEEKS, BILLINGS & COLLIER**  
**P.O. Box 435**  
**Vermillion, SD 57069-0435**  
**(605) 624-2619**



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

<b>THE CITY OF VERMILLION,</b>	)	
<b>a municipal corporation,</b>	)	
	)	
<b>Applicant,</b>	)	
	)	<b>MEMORANDUM OF AUTHORITIES</b>
<b>vs.</b>	)	<b>IN SUPPORT OF APPLICANT'S</b>
	)	<b>MOTION TO SHOW CAUSE</b>
<b>CLAY-UNION ELECTRIC COOP.,</b>	)	
<b>INCORPORATED, a corporation,</b>	)	
	)	
<b>Respondent.</b>	)	

**NATURE OF THIS PROCEEDING**

This is a proceeding before this Commission on the application of the City of Vermillion for the determination of the cash sum which the City of Vermillion is obligated to pay to the Respondent, Clay-Union Electric Corp. for the assignment of its utility rights and property located within three separate areas recently annexed to the City of Vermillion, pursuant to SDCL 49-34A-49 to 49-34A-53.1, inclusive.

**JURISDICTION**

Jurisdiction to determine the value of utility properties assigned pursuant to SDCL 49-34A-49, et. seq. is specifically granted to the South Dakota Public Utilities Commission. SDCL 49-34A-42 states in part, "The Commission shall have the jurisdiction to enforce the assigned service areas established by Sections 49-34A-42 to 49-34A-44, inclusive, and 49-34A-48 to 49-34A-59, inclusive; and SDCL 49-34A-51 authorizes the Commission to determine the amount of the payment in accordance with the provisions of Section 49-34A-50."

**FACTS**

The Applicant, City of Vermillion, commenced this proceeding by filing its application with the Commission on the 20th day of October, 1997. On or prior to that date, the City's application was filed with the Commission, and a copy of the application was served on the Respondent as appears from the Sheriff's Return of Service filed herein. No response was made or filed by the Respondent; and on the 14th day of November, the Applicant made and filed its Interrogatories (First Set) and its Request for the Production of Documents, both requesting the Respondent to produce information relevant to a determination of the value of the properties and rights in question. Respondent has not answered any of the questions propounded to it in the Interrogatories

and has not produced any of the documents requested in its Request for Production of Documents. Instead, it has declined to answer the Interrogatories and refused to present for copying or otherwise, any of the requested documents bearing on the question of value. Instead, Respondent has objected to the relevancy of the Interrogatories and has proposed that the matter is not properly before this Commission. Among other things, Respondent states, "Respondent declines to sell their facilities and service territory at any price."

A more detailed statement of the facts based on which Applicant's Motion for Order to Show Cause is set forth in the Affidavit of William J. Radigan, Mayor of the City of Vermillion. The Affidavit is filed herein and incorporated as a part of this fact statement by reference.

### ISSUES

The sole issue before the Commission at this time is why the Applicant should not be entitled to an Order granting it relief as follows:

1. Determining that the Respondent has refused to "act" with respect to determining the cash consideration to be paid by the Applicant with regard to service rights in any of the three annexed areas which are the subject of this proceeding, that the Respondent stands in defiance of SDCL 49-34A-52 and 49-34A-66 in each such case, and assessing in favor of the Applicant a civil penalty in the amount of \$1,000.00 for each violation in each such case.
2. Assigning, without further delay, the exclusive right to provide electric services to all electric energy consumers within each of the three areas annexed to the City of Vermillion which are the subject of this proceeding.
3. Determining that the Applicant has been entitled to the territorial assignments hereinabove mentioned and to the revenues generated from electric service therein since October 30, 1997.
4. Ordering and directing the Respondent to immediately answer fully the Applicant's Interrogatories and to produce for inspection and copying the several documents requested.
5. Awarding Applicant such other and further relief as the Commission may deem reasonable and just.

## MEMORANDUM OF AUTHORITIES

### Statutory Enactments

In 1975 the South Dakota Legislature enacted Chapter 283 of the 1975 Session Laws. This enactment is a broad statutory scheme for regulating electric and gas utilities, as the name of the Act implies. The purpose of the Act is stated to be, "An Act to amend SDCL 6-12-6, 9-35-1 and subdivision (3) of SDCL 47-21-1; and to repeal SDCL 49-41-1 to 49-41-33, inclusive; to regulate the retail rates charged by public utilities furnishing electric service or natural, manufactured or mixed gas; to establish geographic service areas for electric utilities; and to prescribe penalties for the violations of the provisions thereof." (Emphasis Supplied)

The 1975 Session Law, Chapter 283 is now SDCL 49-34A. SDCL 49-34A-42 granted each electric utility 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 and to future customers in its assigned area. The Legislature avoided the constitutional pitfall of granting irrevocable franchises (See SD Constitution, Article VI, Section 12) by granting to this body the authority to make adjustments in service areas. Among the adjustments provided for in the enactment, was a grant of authority to municipal corporations to purchase any electrical utility properties and service rights within the annexed areas owned by any electric utility and jurisdiction in this Commission to determine the value of the assignment of the area when the parties are unable to agree. (See SDCL 49-34A-49.) Under that Section, a municipality which owns and operates an electric utility has the option to serve all customers within an annexed area provided it shall notify the utility previously serving the annexed area of its decision. The City of Vermillion elected to serve the customers in the three recently annexed areas described in its Application filed herein. The City, within one year following annexation of the areas notified in writing, Clay-Union Electric Corp. of its decision to serve each of the territories and agreed to pay to Clay-Union a cash consideration calculated in accordance with the provisions of SDCL 49-34A-50. Defying the mandatory provisions of SDCL 49-34A-52, Clay-Union Electric Corp. has failed and refused to proceed to take any of that action which is compulsory under SDCL 49-34A-50 to 49-34A-53.1. Respondent's defiance of the statute has brought the City to make and file its Application for Determination by this Commission of the price to be paid for the assigned area, all as required by SDCL 49-34A-51.

### Case Authorities

The Respondent did not answer Plaintiff's Application filed herein. This being so, the factual allegations of the Application must be taken as true. In an effort to bring to light those facts necessary to determine the cash consideration to be paid to the Respondent, the Applicant prepared and served upon the Respondent its Interrogatories (First Set) and its Request for the Production of Documents (First Set). The only response to the Interrogatories and the Request for Production of Documents is Respondent's refusal to answer the Interrogatories or produce documents, coupled with

Respondent's statement at Paragraph IV that it declines to sell its facilities and service territory at any price. Counsel then mentions that Respondent believes that the controlling statutes are unconstitutional and pre-empted by the Federal Supremacy Clause and concludes with an offer to furnish all relevant information in the event that the South Dakota Statutes are held to be constitutional.

Respondent overlooks the fact that the Statutes controlling in this case have already been held to be constitutional. A public utility does not have a property interest in its service territory. Matter of Certain Territorial Electric Boundaries, etc. (SD 1979) 281 N.W.2d 65; Matter of Certain Territorial Electric Boundaries, etc. (SD 1975) 281 N.W.2d 72. Both cases originated in the Public Utilities Commission. Both were ultimately appealed to the South Dakota Supreme Court and on Page 70 of the report of the Court's decision in the first of said two cases, the Supreme Court said:

"We next turn to the question of whether SDCL 49-34A violates that part of the South Dakota Constitution, Article VI, Section 12, which reads: "No .... law ... making any irrevocable right of privilege, franchise, or community shall be passed."

The statute does not explicitly make the franchise irrevocable. SDCL 29-34A-42 does, however, provide for "exclusive service areas." This statute must be read together with others:

SDCL 49-34A-49 through 49-34A-55, permits a municipality - owned system to purchase facilities of another electric utility operating within the municipal boundaries.

Thus, it will be seen that SDCL 49-34A-49 through 49-34A-55, far from being unconstitutional, are elements that prevent the entire Chapter SDCL 49-34A from being unconstitutional. Utility service areas are privileges rather than property rights and by SD Constitution Article VI, Section 12 may not be established by irrevocable grants.

The South Dakota Court went further in the second of the two cited cases. On Page 75 of its opinion, the Court said:

We now reaffirm that franchise rights conferred upon a utility by the State are subject to control by the Legislature. Citing cases. The rights granted N.E.C. under SDCL 49-41-7 and 8 are not irrevocable franchises.

On Page 76 the court said:

We conclude that designation of boundary lines, as part of an allocation system is a regulatory procedure that utility companies accept as part of the franchise, and is not within the purview of constitutional provisions forbidding the taking of private property without compensation. Chicago and N.W. RY Company vs. Dougherty, 39 SD 147, 163 N.W. 715 (1917).

In further support of Applicant's position, we cite City of Milbank, et. al. vs. Dakota Central Telephone Company, et. al., (SD 1916) 159 N.W. 99, where the Court considered the relationship between regulatory control over a public utility and the exercise of the power of eminent domain, and held that such controls constitute a mere regulation of a public service corporation, if not under the implied power resulting from the nature of the franchise enjoyed by the Corporation, then under the police powers of the State.

Respondent next contends, without any facts or case law to support it, that the South Dakota Statutes on which the Applicant replies are pre-empted by the Federal Supremacy Clause in that the transfer of territory by the Applicant would impair the Respondent's ability to pay their federal loans and frustrate the federal purpose of a federal statutory scheme: The Rural Electrification Act (REA) found at 7 U.S.C. 901. That the transfer of territorial rights requested in this case would impair Respondent's ability to repay its federal loan and serve the remainder of its customers may not rest upon a presumption, but must be proved. The State of Minnesota does not have a statute similar to South Dakota's 1975 SL 283, but employs condemnation procedure to reach similar results in situations like that presented in this case. In that respect, the laws of the two states are different. The decision of the Minnesota Supreme Court in Rochester vs. People's Co-op Power Association, 505 N.W.2d, 621 (MN 1993) is directly in point with regards to the Federal Supremacy question, however. At Page 626 of that opinion, the Court said:

Similarly, here, we conclude a municipality's condemnation of an REA financed cooperative's property is authorized unless condemnation so seriously compromises the REA's interest, including the ability of the cooperative to pay its loans, as to be implicitly pre-empted. In the present case, the United States has not demonstrated that the City's condemnation of peoples' utility rights will compromise the REA's interests to a greater degree than any other condemnation.

See also City of Morgan City vs. South L.A. Elect. Co-op., 49 F.3d 1074 (5th Cir., 1995), where the matter of pre-emption was fully considered and where the evidence necessary in making a decision on the point was fully considered.

In Stillwell, Okl. vs. Ozarks Rural Elect. Co-op Corp., 79 F.3d 1038 (10th Cir., 1996), the Court considered the pre-emption question and made a very interesting observation:

More generally, Ozarks urges that these cases support its position that Stillwell is precluded from "skimming the cream" away from Ozarks' customer base. Essentially, this is to argue that the R.E. Act contemplates a system where rural customers are subsidized by relying on revenues

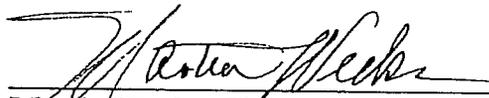
generated from urban customers. We find no such intent either express or implied in the language of the R.E. Act . The R.E. Act subsidizes rural communities by offering low interest financing, not by making available to them more lucrative markets for electric power. Citing Waubash Valley, 988 F.2d. at 1483-84.

### CONCLUSION

SDCL 49-34A-49 codified a legislative scheme for orderly transfer of utility service areas in territories annexed to municipalities. Once initiated by action of the municipality, the procedure to be followed is mandatory, and when properly followed, it is simple and direct. The City of Vermillion is entitled to serve in its annexed territories without unnecessary delay. Respondent ought not to be permitted to profit by its delay, and the Commission should forthwith shift service rights to the City and then determine the cash consideration to be paid when the Respondent is ready and willing to comply with the Act. Further, the Commission should impose the civil penalty authorized under SDCL 49-34a-66 with respect to each of the three areas by way of compensating the City for its unnecessary and additional expenses and loss of revenues.

Dated at Vermillion, South Dakota, this 7<sup>th</sup> day of January, 1998.

Respectfully submitted,



Martin Weeks, City Attorney  
Attorney for the Applicant  
BOGUE, WEEKS, BILLINGS & COLLIER  
P.O. Box 435  
Vermillion, SD 57069-0435  
(605) 624-2619

THE PUBLIC UTILITIES COMMISSION  
OF THE  
STATE OF SOUTH DAKOTA

THE CITY OF VERMILLION, )  
a municipal corporation, )  
)  
Applicant, )

vs. )

CERTIFICATE OF SERVICE

)  
CLAY-UNION ELECTRIC COOP., )  
INCORPORATED, a corporation, )  
)  
Respondent. )

Service of the following documents:

- 1) Letter from Martin Weeks, Attorney for Applicant, dated January 7, 1998 to PUC;
- 2) Affidavit in Support of Order to Show Cause;
- 3) Motion for Order;
- 4) Order to Show Cause; and
- 5) Memorandum of Authorities in Support of Applicant's Motion to Show Cause.

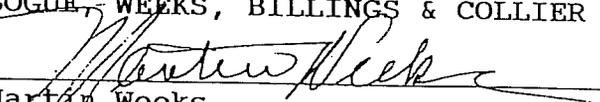
were served upon the Respondent, Clay-Union Electric Coop., Inc., by mailing true and correct copies thereof on January 7, 1998, to the attorney for said Respondent at his last known post office address, viz:

Mr. John Gors  
Attorney at Law  
P.O. Box 396  
10 Austin Avenue  
Vermillion, SD 57069

by depositing said copies in the United States Mail, with first class postage thereon prepaid, at Vermillion, South Dakota.

BOGUE, WEEKS, BILLINGS & COLLIER

BY: \_\_\_\_\_

  
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