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RE: **MONTANA-DAKOTA UTILITIES COMPANY; NORTH CENTRAL FARMERS  
ELEVATOR NEAR BOWDLE, SOUTH DAKOTA**  
Our file: 0069

Dear Counsel:

Enclosed is a copy of the transcript which I have ordered in this proceeding for the appeal. I received it on March 7. I calculate that my brief is due within 45 days after March 7. It is my hope to have the brief completed sooner.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAG:mw

Enclosure

cc/enc: Don Ball

Dan Kuntz

RECEIVED

MAR 27 2007

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

1           THE COURT: We'll be in session in the  
2 matter of the Petition of Montana Dakota  
3 Utilities, et cetera. This is the time set for  
4 oral argument.

5           Before we get to that, and I've read the  
6 briefs of the parties but, Ms. Northrup, your  
7 brief appears to represent the three entities, FEM  
8 Electric, South Dakota Rural Electric Association,  
9 and North Central Farmers Elevator. But I got a  
10 letter from Carlyle Richards the other day saying  
11 that he represents the North Central Farmers  
12 Elevator, or does he normally represent them or  
13 what?

14           MS. NORTHRUP: Your Honor, he's their  
15 corporate counsel and we've been doing all the  
16 arguments and the briefing in this matter on their  
17 behalf. And I think he said that he's adopted our  
18 position in this case.

19           THE COURT: And you must be Mr. Smith; is  
20 that correct?

21           MR. SMITH: I am. Thank you, Your Honor.

22           THE COURT: Mr. Gerdes, you may proceed.

23           MR. GERDES: May it please the Court,  
24 Counsel, I apologize to the Court. I've acquired  
25 one of those seasonal colds that we sometimes get,

1 so I'll ask the Court's indulgence as I speak and  
2 I hope I don't go into a coughing fit here.

3 Your Honor, you said that you've read the  
4 briefs and I believe that the issues before the  
5 Court are well stated in the briefs, and that is  
6 simply this. Is the factual situation covered  
7 by -- the situation of the parties in this case  
8 covered by the large load exception to the South  
9 Dakota Territorial Act?

10 We believe, Montana-Dakota believes that  
11 its position is well taken here, or at the very  
12 least, that the Commission should have proceeded  
13 to hearing in this matter. As the Court knows,  
14 this matter was decided on a standing issue and  
15 the Court -- or the Commission concluded that  
16 Montana-Dakota did not have standing to pursue  
17 this matter, even though Montana-Dakota is in fact  
18 a public utility governed by the statutes of the  
19 state, and specifically by Chapter 49-34A. It's  
20 our position, Your Honor, that the statute in  
21 question, 49-34A-56, does in fact contemplate the  
22 situation that we have here.

23 And as the Court is aware from reading the  
24 briefs, the situation is that North Central  
25 Farmers Elevator sought to locate a new load at a

1 new location for a grain handling facility for  
2 train cars. And in the process of leading up to  
3 that construction, Keith Hainy, the North Central  
4 manager, did contact MDU and inquired about gas at  
5 first. And secondly, a conversation occurred  
6 between Keith Hainy and Bruce Brekke, the Mobridge  
7 district manager, and later Larry Oswald, who was  
8 also involved in some of these discussions. But  
9 the point being that among these people it became  
10 known that North Central was in fact shopping this  
11 project.

12 At one point, according to one of the  
13 affidavits that we attached, Mr. Hainy told them  
14 that FEM was taking prices -- or excuse me -- that  
15 North Central was taking prices from both FEM and  
16 Montana-Dakota.

17 So we have here a situation where had North  
18 Central signed a Petition saying that they wanted  
19 MDU as a customer -- or excuse me -- as a  
20 supplier, we would not be talking about -- we  
21 wouldn't be here today. Or had North Central  
22 signed a Petition saying that they wanted FEM to  
23 be the customer, and had the Commission held the  
24 hearing, it's our position that at that hearing  
25 the factors under the statute would have tipped

1 the scales in favor of Montana-Dakota and  
2 Montana-Dakota would be, in fact, furnishing power  
3 to this load.

4 Basically, both of the parties in this  
5 matter contend that somehow the customer has a  
6 veto here; that if the customer refuses to sign a  
7 Petition for Montana-Dakota, for instance, over  
8 FEM, that that is the end of it.

9 There's nothing in the statute, there's  
10 nothing in Section 56 nor is there anything in any  
11 of the other statutes in Chapter 49-34A that talks  
12 about who can invoke what statute as it relates to  
13 the service -- or excuse me -- as it relates to  
14 the large load exception to the territorial law.  
15 So we are left in the dark here.

16 But if you look at the way the chapter is  
17 written, and if you look at the context of the  
18 sections, it's our position that -- and if you  
19 look at the grammar of Section 56, one is left  
20 with the inescapable conclusion, we believe, that  
21 in fact any party to the proceeding is entitled to  
22 petition the Commission. That's the only way this  
23 thing works.

24 Secondly, the only way this thing works, we  
25 submit, is if the six factors, if it's contested,

1 if the six factors are examined. Why, for  
2 instance, would one say that you can -- that the  
3 customer can short-circuit the operation of  
4 Section 56 simply by not signing a Petition or not  
5 agreeing to bring the matter before the Commission  
6 once they have, we believe, invoked the statute by  
7 shopping a load that comes within the terms of the  
8 statute? And for that reason, Montana-Dakota  
9 filed a Petition in this matter.

10 Clearly, the overriding purpose of the  
11 Territorial Act was to address a situation that  
12 existed in the industry back in the early 1970's.  
13 And Your Honor, I didn't mean to bore the Court  
14 with putting some historical facts in my brief,  
15 but I believe it's important to understand the  
16 background to the 1975 Act when the '75 Act was  
17 passed, because they had already gone through two  
18 or three different regimes that didn't work.

19 They had the Consumers Council and they had  
20 the Territorial Board that was found  
21 unconstitutional, and they had to reconfigure that  
22 and none of that worked. And so the three parties  
23 in the industry in South Dakota sat down at the  
24 table and hammered this out.

25 This was something that was done for the

1 benefit of the utilities and for the benefit --  
 2 for the overall benefit of the citizens of South  
 3 Dakota to make sure that there was an elimination  
 4 of duplication and wasteful spending in all  
 5 segments of the electrical utility industry. I  
 6 mean, our Supreme Court has mentioned that time  
 7 and time again in deciding cases. That is, as I  
 8 called it, the prime directive. That is what  
 9 governs everything else.

10 Now, as an example, the Commission in its  
 11 brief cites this language from the Hub City case,  
 12 which I'm sure the Court has read as well, which  
 13 says, "The plain language of the statute indicates  
 14 the Legislature intended to do nothing more than  
 15 provide a new large load customer at a new  
 16 location an option to be exercised prior to the  
 17 receipt of service."

18 Well, you have to understand that this  
 19 quotation has to be used in the context of the  
 20 Hub City case. And the Hub City case involved a  
 21 situation where the Commission and the customer  
 22 were contending that the customer somehow had a  
 23 retained right to change back to some other  
 24 provider of service.

25 And of course, the Court, I think properly

1 ruled, said that the Section 56, the section we're  
2 talking about here now, is just another way of  
3 assigning a service territory. But once a service  
4 territory is assigned, that's it. It stays with  
5 whomever it was. So that was the context of this  
6 quotation that we have.

7 And even to embellish on that, let's listen  
8 to what the Court said in the sentence before and  
9 the sentence after that quotation. In the  
10 sentence before that quotation the Court said,  
11 "The retained right alluded to by the PUC and  
12 Northwestern Public Service is elusive when  
13 reading Section 56. There's no express language  
14 establishing such a right in the consumer, nor  
15 does that provision yield such a right when read  
16 in conjunction with the other provisions of the  
17 Act."

18 And then following that quotation, "To  
19 subscribe to the retained right theory of the PUC  
20 and Northwestern Public Service would be to  
21 ascribe an intent to the Legislature contrary to  
22 the policy underlying the Act. The result,  
23 duplication of services and wasteful spending, the  
24 precise evils the Act was designed to avoid."

25 Now, let's take that quotation and put it



1 in the facts of this case. This is the same kind  
2 of a case. This case was shopped around, looked  
3 for prices. And the prices to do the work or to  
4 provide the service are \$650,000 for North  
5 Central, at least, because there are some  
6 questions about that, but let's just call it  
7 \$650,000, and \$243,000 for Montana-Dakota. Now,  
8 that has to mean something.

9 And if we do in fact have a prime  
10 directive, we then have to interpret the statute  
11 within the context that the prime directive is  
12 imposed upon all three segments of the industry.

13 And it's our position that once the large  
14 load statute is invoked, that the only way that  
15 you get to a final resolution of the question of  
16 which utility serves is to go through the six  
17 factors.

18 If the customer can short-circuit the  
19 process and has a so-called veto by refusing to  
20 sign the Petition, why should that customer be  
21 entitled to go against the purpose of the Act and,  
22 in effect, impose the most expensive alternative  
23 upon the parties?

24 We believe that that simply does not make  
25 sense. And it does not square with what the

1 purpose of the Act was, considering the history  
2 behind the -- excuse me -- the history behind the  
3 need for the law.

4 So, Your Honor, we believe that it's clear  
5 that based on the history behind the law and based  
6 upon what the Supreme Court has said on many  
7 occasions, we believe that the prime directive  
8 does in fact apply to this section of the law.

9 And we believe that there was standing on  
10 the part of Montana-Dakota because Montana-Dakota  
11 was a candidate, a suitor, if you will, to provide  
12 service under this statute. And there's no  
13 question at all that Montana-Dakota was eligible  
14 to provide the service but for the interpretation  
15 of the statute by the Commission saying that no,  
16 it's only the consumer that can sign the Petition,  
17 that can initiate the Act.

18 There's nothing in the statute that says  
19 that. There's nothing in any other statute that  
20 says that. Any interested party, I would submit,  
21 can seek redress from the Commission, and that's  
22 basically our position, Your Honor.

23 And I'll stand by for questions.

24 THE COURT: Who among the Appellees wants  
25 to speak first?

1 MS. NORTHRUP: Your Honor, I will be  
2 starting the argument. I think that John Smith  
3 also wanted to reserve some time at the end. And  
4 Darla Rogers is also here for any specific  
5 questions or additional items, if need be, but  
6 I'll go ahead and start.

7 Your Honor, my name is Margo Northrup. I'm  
8 an attorney at Riter, Rogers, Wattier & Brown here  
9 in Pierre. I also, like I said, have Darla Rogers  
10 and John Smith from the Public Utilities  
11 Commission at my table.

12 We are here today on behalf of FEM Electric  
13 Association, who is an electric cooperative in  
14 Ipswich, South Dakota. We are also here on behalf  
15 of the South Dakota Rural Election Association  
16 which is a statewide association, and North  
17 Central Farmers Elevator. They could not be here  
18 today so we will be representing their interests  
19 in this hearing as well.

20 The facts in this case is that North  
21 Central has already built a grain handling  
22 multi-unit train loading facility in the Bowdle  
23 area. It's my understanding that the construction  
24 has been completed. And although they're not  
25 fully functional because this electric issue

1 hasn't been decided, they are up and running.

2 And based on that, I wanted to thank you  
3 for agreeing to hear this case. We believe that  
4 there is a timeliness issue and we really  
5 appreciate it.

6 In April of last year FEM and North Central  
7 entered into an Electric Service Agreement. This  
8 was a contract that they entered. In that  
9 contract FEM is going to be the exclusive provider  
10 of electric service.

11 After that Electric Service Agreement was  
12 made, MDU filed a Petition stating that, in  
13 essence, they should be the ones that are allowed  
14 to serve the North Central facility.

15 At the end of the day what we are going to  
16 be asking from you is to affirm the decision by  
17 the Public Utilities Commission that determined  
18 that FEM is the one that has the right to serve,  
19 that the customer is the one that has the right to  
20 petition under the statute, and that MDU has no  
21 standing in this case.

22 I think that the position that we have is  
23 supported by statutory construction and also by  
24 the case law, specifically, the Hub City case.  
25 The fact of the matter is, under the Territorial

1 Act, FEM is the service provider that has the  
2 exclusive right to this territory.

3 There's no dispute that the facility is  
4 going to be in this facility, so that is really  
5 the end of the question there except for, is there  
6 an exception that can be applied? One of the  
7 things that we look at as far as the exceptions  
8 are concerned is the large load statute. And the  
9 dispute that arises specifically in this case, is  
10 when is the large load statute triggered?

11 It's undisputed that the large load is an  
12 exception. And in that exception there are  
13 certain, I think three, possibly four criteria  
14 that a customer must meet before they can invoke  
15 their rights under that statute and petition the  
16 Commission for a change in the electric service  
17 provider which they are obligated to take.

18 The first one, in this situation, is a new  
19 customer which develops after March 21st of 1975.  
20 That's not in dispute. This is clearly a new  
21 customer.

22 The second is whether this is a new  
23 location. It's very clear that this is a new  
24 location.

25 The last part is a contract minimum demand

1 of 2,000 kilowatts or more. I think that in the  
2 brief of MDU they said this was a disputed fact  
3 and one of the reasons that summary judgment  
4 should be -- or not granted. But we do not think  
5 that is the case because the criteria under the  
6 statute had not been met and, therefore, we don't  
7 get to that question. But even if we do, you need  
8 to look at the language of the contract, which  
9 clearly does not include a contracted minimum of  
10 2,000 kilowatts or more.

11 So now we need to look at the specific  
12 facts in this case, and a different scenario under  
13 how this statute works and how it's worked in the  
14 past. In this situation the customer chooses a  
15 location. Once they choose a location, they  
16 purchase the property. They find out who their  
17 service provider is. Under the territorial law,  
18 that is the service provider that has the right to  
19 serve them.

20 The next step that they would take is to  
21 determine if there is an exception to that rule,  
22 and whether or not they determine that they are a  
23 large load.

24 In this situation, North Central did that  
25 and determined that they did not want to be

1 relieved of their obligation to take service from  
2 the service provider in whose territory they are  
3 in.

4 But if they had decided that they did meet  
5 the three criteria and that they wanted MDU to  
6 serve, what would have happened is they would have  
7 filed a Petition in front of the Public Utilities  
8 Commission. And the PUC would have looked at the  
9 six factors in the statute to determine if the  
10 rights of FEM should be taken away, so to speak,  
11 and MDU be allowed to serve this plant.

12 If they -- in this situation, once they  
13 chose which provider they wanted, that should be  
14 the end of the story. MDU, the jilted suitor, we  
15 don't think in the statute allows a provision  
16 where they can come in and try to invoke the  
17 statute and try to meet the criteria and have the  
18 Commission balance which position is better.

19 The way that MDU looks at this statute, in  
20 essence, what they're asking you to do is ignore  
21 that initial business decision that the customer  
22 made initially.

23 They're also asking you to put the  
24 Commission in the position in every large load  
25 situation to determine which electrical provider

1 is better. And we don't think that that was the  
2 intent of the statute or the way that they have  
3 treated or should treat large load customers.

4 To support the position of Mr. Gerdes and  
5 MDU, the statute would need to be changed to say  
6 the Commission is not obligated to assign new  
7 customers at new locations. And that's not what  
8 it says. It says that it's the customer who shall  
9 not be obligated, and I think that's a very  
10 important determination.

11 One of the -- the case that we have that is  
12 the most, the best indication of how this Court  
13 has looked at this is the Hub City case. We  
14 referred in our brief on page nine, three separate  
15 instances in that Hub City case where they state  
16 it's the customer's preference, it's the customer  
17 that invokes the statute, not another service  
18 provider.

19 The other thing, the other cases that  
20 Mr. Gerdes cited, specifically the Willrodt case  
21 and the North Dakota case, I don't think are on  
22 point. The Willrodt case does not talk about a  
23 large load customer, and the North Dakota case is  
24 saying -- or the Commission is the one in this  
25 state that makes the final decision so that



1 distinguishes the North Dakota case, which we've  
2 stated in our brief.

3 One of the things that Mr. Gerdes has said  
4 in his argument is that the way that we're  
5 interpreting this, the customer has a veto right  
6 under the statute. I don't think that's a fair  
7 characterization.

8 What we're actually saying is that they  
9 have the right not to be obligated to take service  
10 from the person that's been directed to them if  
11 these six other factors have been met. I think  
12 what he's asking you to do is look at the six  
13 criteria, then determine whether that choice  
14 should be made. And what I think the statute says  
15 is you should look at the three criteria and if  
16 those are met and the customer does want to change  
17 his provider, then you look at the six criteria.

18 In essence, what we're asking is for you to  
19 affirm what the Public Utilities Commission has  
20 done in this matter. And I will let Mr. Smith add  
21 any other comments that he wanted to. And I'm not  
22 sure if Darla had any either, but we're also  
23 available for questions.

24 MR. SMITH: Thank you, Your Honor. John  
25 Smith representing the South Dakota Public

1 Utilities Commission.

2 You know, I think we got the point across,  
3 what our position is pretty well in the brief and  
4 so I'm not going to go on and on here. I mean I  
5 think the case really boils down to the cardinal  
6 principle of statutory construction, and that's  
7 the plain meaning rule. And the bottom line is  
8 that when a statute -- oh, oh. That's my cell  
9 phone. Pardon me. Should I shut it off?

10 THE COURT: Just don't answer it, all  
11 right?

12 MR. SMITH: I apologize for that. At any  
13 rate, basically that rule states that if the  
14 meaning of a statute can be determined from its  
15 own language, from the plain meaning of its own  
16 language, you need not look any farther.

17 You don't need to apply any fancy things,  
18 like Mr. Gerdes is recommending, that we take  
19 generalized language that's somewhere else in the  
20 statute and plug it in here. We don't need to do  
21 that here. We can look at this statute and tell  
22 what it means.

23 And that's what the Court, that's what  
24 Judge Timm in Hub City said. He said we can look  
25 at that language and what it says is pretty darn

1 simple. It gives a customer the right to opt out  
2 of his assigned service provider under the rest of  
3 the criteria that are set forth in the statute.  
4 And really, I think the case is that simple.

5 Just maybe for the edification of the  
6 Court, I'd call your attention to some pages of  
7 the Commission's oral arguments on the case just  
8 to see how they actually looked at it. I think it  
9 would be edifying to the Court to see what they  
10 saw.

11 One of them is a lawyer, Chairman Sahr, and  
12 the other two aren't, and yet they took a look at  
13 the statute and the briefs in the case and  
14 immediately focussed on the idea that this statute  
15 means what it says. And I'll cite you the pages  
16 there in the record, our settled record, pages 121  
17 through about 126 or so.

18 On settled record page 124, that's  
19 transcript page 19, here's what Vice Chair Dusty  
20 Johnson says in asking a question of Mr. Gerdes.  
21 He says, "It's awfully tough for me to get around  
22 the Court" -- meaning the Hub City court --  
23 "saying that the plain language of the statute  
24 indicates the Legislature intended it to do  
25 nothing more than provide a large load customer at

1 a new location an option. It doesn't compel the  
2 customer to do anything. It affords him an  
3 option, and I think Judge Timm got it right."

4 The next page, Vice Chair Johnson again.  
5 He says, "I may be reading the case wrong or the  
6 excerpts of the case. But to me when the Court  
7 says that the Legislature had a sole intention  
8 with passing that law, and that the sole intention  
9 was to provide an option to the customer, that  
10 seems pretty clear, doesn't it?"

11 You know, again, Dusty Johnson isn't a  
12 lawyer, but I think he got pretty close to the  
13 heart of the matter right there. That's  
14 definitely what the Commissioners believed and in  
15 the end that's the way they voted. And that's  
16 what the decision says when you look at it.

17 In terms of the reference Mr. Gerdes makes  
18 to the language that's repeated in all of these  
19 cases of avoiding duplication, preventing waste  
20 and promoting efficiency in the electric sector, I  
21 would state that that exact type of argument is  
22 what was going on in Hub City.

23 The PUC had taken those generalized policy  
24 statements like that and had attempted to expand  
25 out its authority under that section. Again the

1 factual context was a little different. That was  
2 one where they had earlier granted an exception  
3 under the Act and the idea that the PUC believed,  
4 well, based on this expansive interpretation, we  
5 can go back and dig up these six factors again and  
6 we can change that.

7 And the Court said no, the statute is  
8 plain. It means what it says and that's not what  
9 it says. And so I think it was definitely the  
10 Commission's idea, based on that very clear  
11 statement in Hub City, that the Court did not  
12 believe the Legislature meant for this to be that  
13 kind of loose, expansive interpretation of the  
14 statute.

15 Secondly, I'd like to emphasize one other  
16 thing that's been said here and that is, and the  
17 Hub City case is very clear on this, too. The  
18 general rule is stated in 39-34A-42. And that is  
19 that a utility has no right to extend service  
20 outside of its territory unless it meets one of  
21 the statute exceptions, and there's basically  
22 three of those. That's Section 55, which is by  
23 agreement; Section 56, which is the customer large  
24 load section; and Section 58, which is inadequacy  
25 of service proceeding.

1           Neither of the other two pertain here. We  
2 do not have an agreement between the two utilities  
3 and the customer did not petition the Commission  
4 on the basis of inadequacy of service. And you'll  
5 note the Commission makes Findings of Fact in that  
6 regard.

7           I would call the Court's attention to  
8 Section 55. In there, that's the section under  
9 which the Commission can approve agreements  
10 between utilities to switch territory. In order  
11 to do that, the Legislature says the Commission  
12 has to do this. "The factors to consider shall  
13 include the elimination or avoidance of  
14 unnecessary duplication of facilities, providing  
15 adequate electric service to all areas and  
16 customers affected and the promotion of the  
17 efficient and economical use and development of  
18 the electric systems of the contracting electric  
19 utilities."

20           My point in calling that to your attention  
21 is that when the Legislature wanted to insert that  
22 kind of language into a statute, they knew how to  
23 do it. In fact they did it. And to then say  
24 we're going to take that kind of generalized  
25 language and say the Legislature must have meant

1 to have that kind of language in a statute that it  
2 didn't put it in? I don't think that washes.

3 Lastly, I'd like to address the issue of  
4 summary judgment and whether it was properly  
5 granted. I cite some cases in my brief. But I  
6 think the bottom line is that if an essential  
7 element of Petitioner's case, a cause of action is  
8 demonstrated not to be met and that there's no  
9 genuine issue of fact involving that, it's case  
10 over. You know, that's true in any legal  
11 proceeding.

12 If you have even one essential element that  
13 is not met and there is no issue of fact  
14 concerning that, and we know that, at that point  
15 summary judgment is proper. That's what the case  
16 law says and it's also common sense.

17 In this case, the factor that was not met  
18 is that the customer did not seek relief from its  
19 obligation to take its service from the assigned  
20 utility. And the Commission held that MDU had no  
21 standing to assert rights that are clearly  
22 afforded to the customer in the statute. And I  
23 really think that's all that I really have.

24 Mr. Gerdes raised the issue of there's no  
25 express language, or whatever, that precludes a

1 utility from petitioning under this statute for  
2 that kind of relief. The problem is there's no  
3 express language at all that says they can.

4 And that's really what Hub City is all  
5 about. It says that -- in that case the issue  
6 they were looking at was this retained right the  
7 Commission thought they had. And the Court just  
8 looked at that and said it doesn't say anything  
9 about retained right in there. It's not in there.

10 And the same thing, you will not find in  
11 this statute anything that says a utility other  
12 than the utility having the right to serve that  
13 area can petition the Commission and come in here  
14 and force a customer to take its service from it.  
15 It's not in there.

16 And we would submit it's not in there  
17 intentionally. That's what the Legislature meant  
18 to say. They said what they meant. And the  
19 Commission appropriately granted summary judgment  
20 in this case and we would respectfully request  
21 that you affirm the Commission. Thank you, Your  
22 Honor.

23 THE COURT: Ms. Rogers, did you want to  
24 present anything?

25 MS. ROGERS: I would just maybe respond to



1 one point that Mr. Gerdes made in his argument.  
2 It may be because I've been working in front of  
3 the Legislature recently, but I like to think in  
4 terms of pictures. And the picture that I see in  
5 this case and what it all boils down to is what  
6 invokes Section 56. I think that's the bottom  
7 line.

8 And there's a difference between the  
9 parties as to what that is, but the picture that I  
10 see in this case is a service area of FEM and then  
11 a service area of MDU. And it's undisputed that  
12 this new facility is located in FEM's service  
13 territory.

14 And under the statute, as Mr. Smith alluded  
15 to, SDCL 49-34A-42, I believe it is, in this  
16 service territory of FEM's, FEM is allowed and has  
17 the right to serve any current customers in that  
18 area and any future customers. The same thing is  
19 true in MDU's service territory.

20 So now you have a customer here that may or  
21 may not fall under the large load statute. And so  
22 the exception, the possible exception that's  
23 provided in 56 is if that customer says to the  
24 Commission, Commission, I want to be relieved of  
25 the obligation to take service from the territory

1           where I'm located.

2                     That didn't happen here. The customer did  
3 not invoke that right but that's where the right  
4 is invoked. And in absence of that, we have no  
5 proceeding in front of the Commission.

6                     The Commission made the right decision in  
7 granting summary judgment. Thank you very much.

8                     THE COURT: Mr. Gerdes, do you have a  
9 response?

10                    MR. GERDES: Thank you, Your Honor. In  
11 taking the last point first, Ms. Rogers made that  
12 same eloquent argument, I think, in front of the  
13 Commission. And while it makes some -- that's not  
14 the right word -- but while it resonates, quite  
15 frankly, if you look at the nuts and bolts of how  
16 this chapter operates, and the fact that there are  
17 only three exceptions, as Mr. Smith said, this is  
18 a very unique situation. And to say that it is  
19 exempted from what I've called the prime  
20 directives simply flies in the face of logic  
21 because -- and this case is a perfect example of  
22 that.

23                    If you interpret this statute the way the  
24 Appellees would interpret it, it completely  
25 eviscerates the very purpose for the Territorial

1 Act, and that is to eliminate duplication and  
2 wasteful spending, and it can't mean that.

3 As I've said in my brief, the fact that the  
4 customer shall not be obligated to take electrical  
5 service doesn't occur until, as I said in my last  
6 brief, we get to the "if." When you get to the  
7 "if," then the PUC has to go through and analyze  
8 these six points based upon evidence before it.  
9 And it's only if the "if" is satisfied, and that  
10 is that the Commission finds in favor of the  
11 incumbent utility in these particular six blocks  
12 of decision, or it would go to the other carrier.  
13 And that's what I said in my reply brief.

14 You have to read grammatically the entire  
15 section. Yes, it's awfully nice to stop and say  
16 that the customer shall not be obligated. But the  
17 "shall not be obligated" is modified by the "if."  
18 And we have to think of the "if" and we have to  
19 make sense of that, too, taking Mr. Smith's  
20 comment about how we have to utilize the plain  
21 meaning of the statute.

22 And the Supreme Court also says in  
23 interpreting statutes we have to give effect to  
24 every part of the statute and we have to read the  
25 statutes in the light of their -- what the

1           Legislature is attempting to accomplish.

2           Mr. Smith made the comment that it's not in  
3           there that the utility can petition. Well, it's  
4           really not in here that the customer can petition,  
5           either. But this was -- but traditionally, that's  
6           the only way these things have started over the  
7           past. I'll certainly concede that. I haven't  
8           seen one that's been started by anybody else's  
9           petition but the customer.

10           That doesn't mean that an interested party,  
11           if you look at the definition of standing, and  
12           that's the way we got kicked out of court was  
13           based on standing -- or kicked out of the  
14           Commission, excuse me -- if you look at standing,  
15           it has to be an interested party.

16           Well, certainly the Montana-Dakota being a  
17           utility that was shopped for to provide service in  
18           this matter, was an interested party and had an  
19           interest in the outcome of the matter.

20           And as I said before, I don't think there's  
21           anybody that suggests that had North Central gone  
22           to MDU and said, yeah, we want to do business with  
23           you, we'll sign the Petition, and assuming that we  
24           made it through the six subparagraphs, that MDU  
25           would in fact be providing the service.

1           And so again, the whim of the customer all  
2 of a sudden is now permitted to violate the prime  
3 directive. And I'd submit that that simply is not  
4 what the Supreme Court has said that territorial  
5 law means.

6           For all of these reasons, Your Honor, we  
7 would ask that the decision of the Commission be  
8 reversed. And we, of course, rely on our briefs  
9 and arguments in our briefs as well. Thank you.

10           THE COURT: Well, I hate to be simplistic  
11 because I get paid enough where I shouldn't be,  
12 but it seems to me in this case that the statute  
13 says just exactly what the Appellees and the PUC  
14 said. If the customer petitions, then they have  
15 to look at the six factors. If not, then the  
16 territorial directive is what applies.

17           I find that the PUC is correct in all  
18 respects and affirm their summary disposition of  
19 the case in favor of the Appellees. And there  
20 probably should be an order for the Court's  
21 signature. That's all.

22           MR. SMITH: I have an order here, Your  
23 Honor, if you'd like it take care of it right now.  
24 Do you want to look at it, if I can find it?

25           THE COURT: You may want to file this with

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the Clerk of Courts.

We'll be in recess then.

(Proceedings concluded.)

1 STATE OF SOUTH DAKOTA)  
 2 COUNTY OF HUGHES ) SS CERTIFICATE

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I, Mona G. Weiger, Registered Professional Reporter and Official Court Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Hearing contained on the foregoing pages was reduced to stenographic writing by me and thereafter transcribed; that said proceedings commenced on the 31st day of January, 2007, in the Courtroom of the Hughes County Courthouse, Pierre, South Dakota, and that the foregoing is a full, true and complete transcript of my shorthand notes of the proceedings had at the time and place set forth above.

Dated this 7th day of March, 2007.

COPY

\_\_\_\_\_  
 Mona G. Weiger, RPR  
 Official Court Reporter