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AUG 07 2006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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August 4, 2006

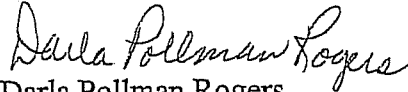
Patty Van Gerpen
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: IN THE MATTER OF THE PETITION FOR DESIGNATION OF MONTANA-
DAKOTA UTILITIES CO. AS ELECTRIC SERVICE PROVIDER FOR THE
NEW NORTH CENTRAL FARMERS ELEVATOR LOCATION IN BOWDLE,
SOUTH DAKOTA, AS A LARGE LOAD CUSTOMER.

Dear Patty:

Please find enclosed for filing the original and ten (10) copies of the Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition together with Certificate of Service, in the above referenced dockets:

Sincerely,



Darla Pollman Rogers
Attorney at Law

DPR/ea

Enclosures

cc Dave Gerdes
Carlyle Richard

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AUG 07 2006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

<p>IN THE MATTER OF THE PETITION FOR DESIGNATION OF MONTANA-DAKOTA UTILITIES CO. AS ELECTRIC SERVICE PROVIDER FOR THE NEW NORTH CENTRAL FARMERS ELEVATOR LOCATION IN BOWDLE, SOUTH DAKOTA, AS A LARGE LOAD CUSTOMER.</p>	<p>DOCKET NUMBER EL06-011</p>
	<p>Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition</p>

FEM Electric Association, Inc. ("FEM"), by and through its attorney, Darla Pollman Rogers of Riter, Rogers, Wattier & Brown, LLP, hereby submits this Reply Memorandum in Response to the Brief of Montana-Dakota Utilities Co. ("MDU") opposing FEM's Motion for Summary Disposition.

FACTS

FEM relies on the facts submitted in its original Motion for Summary Disposition and supporting Memorandum and Affidavit. FEM would also clarify a couple of the factual allegations contained in MDU's Brief. The purpose of the initial contact between Paul Erickson (FEM Manager) and Bruce Brekke of MDU was to discuss a tap into MDU's transmission line. Mr. Erickson does not recall any specific discussions concerning SDCL § 49-34A-56, but anything said pertaining to large loads was coincidental to the primary discussion concerning tapping in to MDU's transmission line. Also, although seemingly insignificant to the Motion at hand, FEM responds to the facts alleged by MDU concerning what existed on North Central Farmers Elevator's ("North

Central”) Bowdle Facility site previously and asserts to its knowledge, there has been no other building than a roadside park on the location in question and that the Bowdle Facility is a new customer.

ARGUMENTS AND AUTHORITIES

Issue I: Who is an appropriate “Petitioner” under SDCL § 49-34A-56?

A review of the arguments and authorities cited by all parties in this action indicates several points of agreement. All parties agree that in 1975, the South Dakota Legislature passed the “South Dakota Territorial Integrity Act (“Integrity Act” or “Act”), SDCL ch. 49-34A, the goal of which was to eliminate duplication and wasteful spending in all areas of the electric utility industry.¹ This premise is clearly articulated in the Hub City case, cited by all parties. Matter of Northwestern Public Service Co. (Hub City), 560 NW2d 925, 927 (SD 1997).

The parties also appear to agree that the statute itself and supporting case law gives each utility the exclusive right to “provide electric service at retail to each and every present and future customer in its assigned service area”. Id. at 927, quoting from SDCL § 49-34A-42. It is important to note another undisputed fact: the Bowdle Facility is located within FEM’s service territory. This means that without taking the size of the load or any other factor into consideration, FEM has the exclusive right to serve the Bowdle Facility. In other words, North Central is obligated to take service from FEM: it has no choice. As cited by MDU, “an individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself.” Willrodt vs. Northwestern Public Service Co., 281 NW2d 65, 72 (SD 1979). Therefore, in absence of any other provisions of law, FEM has the exclusive right to

¹ See Page 3 of FEM’s Memorandum, Page 5 of Staff Response, and Page 5 of MDU’s Brief.

provide electric service to the Bowdle Facility, as a “future customer in its assigned service area.” SDCL § 49-34A-42.

The parties further agree that there are only limited exceptions to the general rule contained in SDCL § 49-34A-42. One of those is the large load exception, found at SDCL § 49-34A-56. It is the application of this exception, however, that is the essential difference between the positions of MDU and FEM.² For this Commission to accurately apply the large load exception the Commission can look for guidance not only in the language of the statute itself, but also in the manner in which our state Supreme Court has interpreted and ruled upon the appropriateness of applying the statute.

Looking first of all at the statutory language itself, it is FEM’s position that it is the large load customer’s exercise of the statutorily granted option that triggers the exception to the assigned electric service provider having the exclusive right to service all future customers in its area. This exception provides that “new customers at new locations ... shall not be obligated to take electric service from the electric utility having the assigned service territory.” SDCL § 49-34A-56. Under the statute, a prospective large load customer is not obligated to accept service from the electric service provider within the assigned service area. However, the customer is required to petition the Commission in order to receive service from an electric provider not within the assigned territory. Presumably, this requirement is based upon the intention of the statute, which is the elimination of duplication and wasteful spending in the electric utility industry. Hub City at 927. Thus, by requiring a prospective large load customer to petition the Commission for a large load variance, the Legislature ensured that customers would not

² Staff supports the position of FEM by concluding that “MDU does not have standing to bring the current action.” Staff Response at pg. 5

have the unfettered ability to pick and choose providers based solely upon economic factors. Instead, the Commission is given the right to determine, upon petition by the customer, whether a customer's preference would in fact assist in eliminating duplication and wasteful spending. If the customer's preference is made without regard to the six factors set forth in the statute, the Commission would likely turn down its petition. If the customer's preference would support the efficiency of the industry by eliminating duplicative and wasteful spending, the Commission would likely accept the variance in providers. Nonetheless, the exception was clearly intended to be utilized by a potential large load customer and not a service provider.

FEM's interpretation of the statute is supported by the *Hub City* case. Contrary to MDU's contention, FEM has not missed the point of the *Hub City* case. In fact, MDU and FEM appear to concur on the ultimate ruling of the Court. The facts in that case showed that Division (the customer) had petitioned the Commission to allow Northern Electric Cooperative ("NEC") to provide electric service to its large load foundry, pursuant to SDCL § 49-34A-56. The foundry was located in Northwestern Public Service's ("NWPS") territory. The Commission granted Division's petition and assigned the foundry to NEC. Years later, after the foundry closed and changed ownership, the new owner, Hub City, wished to be served by NWPS. NWPS petitioned the Commission for a declaratory ruling on whether Hub City should be allowed to terminate its agreement with NEC and receive electric service from NWPS. The Commission authorized the switch, justifying its decision on a significant change in circumstances and on Hub City's contractual right to terminate the agreement with NEC.

The South Dakota Supreme Court reversed the ruling of the Commission, concluding that a significant change of circumstances was insufficient under the Act to authorize a change of providers. Hub City at 930. The Court also found that the Commission exceeded its statutory authority by interpreting and enforcing the contract between NEC and its customers. Id. As noted above, there does not appear to be a disagreement between the parties as to the actual ruling of the Court in the *Hub City* case.

Where the parties do not appear to agree is on what guidance the *Hub City* Court gives in its opinion on the interpretation and application of the Territorial Laws, including the large load statute. MDU ignores the significance of some of the language contained in the Court's opinion and that MDU itself quotes with regard to who exercises the option for an alternate service provider. It was, in the first instance, the customer who petitioned the Commission to receive service from NEC. "However, due to a rate advantage offered by NEC, Division petitioned the PUC for relief from its obligation to take service from NWPS." Hub City at 926.

MDU quotes from ¶ 16 of page 928 of the *Hub City* case, but neglects to include the first sentence of the paragraph: "The Act contains several provisions whereby electrical consumers may have their provider changed. SDCL § 49-34A-38 through § 49-39A-59." Id. at 928, (emphasis added). The Court went on to note in ¶ 17, that "[i]n 1977 *Hub City*'s predecessor (i.e. Division, the customer) availed itself of one of these provisions, SDCL § 49-34A-56. It (the customer) elected to seek authorization from the PUC to receive electric service from NEC rather than NWPS, the utility within whose assigned service area it would have been located." Id. at 928.

FEM also does not disagree with MDU's assertion about "retained rights" of customers. The current case, however, is not about retained rights – it is about a customer exercising an initial option for an alternative electric service provider, pursuant to SDCL § 49-34A-56. FEM did not twist the language of the *Hub City* case. In fact, it is not necessary to do so, because the language itself supports FEM's interpretation that it is the customer who exercises the option to select an alternative provider.

The plain language of the statute indicates the legislature intended it (SDCL § 49-34A-56) to do nothing more than provide a new large load customer at a new location an option to be exercised prior to receipt of service. *Id.* at 928.

All of these references in the *Hub City* case support FEM's position that the option is for the customer, not a competing electric provider.

In essence, FEM's position is that the Commission has jurisdiction to allow a change in electric service providers only when a customer chooses to exercise the large load exception. MDU has implied that there is a flaw with this interpretation and that it would make a mockery of the plain meaning of SDCL § 49-34A-56. MDU's contention seems to be founded upon its belief that customer preference will be the overriding factor if FEM prevails. FEM's position does not, however, escalate or favor customer preference. Rather, it is FEM's position that the Commission need not address the six statutory factors unless and until it receives a petition from a large load customer for service from an alternative provider.

The large load statute sets forth six factors to guide the Commission in its decision whether to grant a variance in service providers. None of these factors, including customer preference, should weigh more heavily on the Commission's decision than the others. That is MDU's conclusion, and FEM agrees. As MDU has pointed out,

“the plain language of the statute indicates the legislature intended it [the statute] to do nothing more than provide a new large load customer at a new location an option to be exercised prior to receipt of service.” MDU Brief p. 8 & 9, *citing* Hub City at 928. Even if FEM or North Central concedes that North Central qualifies as a large load customer, which they do not, according to the *Hub City* case only North Central, the new customer, would possess the option to petition the Commission for a change in providers.

MDU further states that the utility ultimately providing service must prevail under the six evaluative criteria under the large load statute. MDU Brief, p. 7. Clearly, the statute was intended to facilitate that process. However, neither case law nor the large load statute indicates that an electric service provider may petition the Commission to begin with. To the contrary, the statute and case law supports FEM’s position that the six evaluative criteria are not properly before the Commission in absence of a petition from a large load customer.

MDU also cites the *Willrodt* decision, holding that, “an individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself.” MDU Brief, p. 7; *citing* Matter of Certain Territorial Elec. Boundaries (Mitchell Area) F-3105, 281 NW2d 65, 72 (SD 1979). FEM agrees that this is good law, and that is precisely why customer preference is only one of six factors to be given equal consideration under the statute. Nonetheless, it is still the customer who has the option of bringing the petition forward.

Issue 2: What is the significance of the potential load size?

FEM relies on its previous arguments with regard to the size of the load. In the present case, neither the prospective customer nor the assigned service provider foresees

the customer using the required minimum demand of 2,000 kilowatts. The agreement contemplated by the parties thus far does not include a contracted minimum demand. However, an electric service provider outside the customer's assigned service area brought a petition to force the customer to use its services. This provider then conducted its own investigation in an attempt to demonstrate that the customer hypothetically qualifies as a large load. Surely, the Legislature, in drafting SDCL § 49-34A-56, did not intend that providers would conduct independent discovery to demonstrate that a prospective customer qualifies as a large load, or that the provider would then petition the Commission to require the customer to use its services. Instead, these actions should be reserved for a new customer at a new location located outside a municipality requiring a minimum of 2,000 kilowatts of electricity.

In addition, FEM would also point out that FEM and North Central have entered into an Agreement for services, and that the Agreement is controlling, regardless of size of the load. The contract between the parties in the current case does not include a minimum demand of any electric service. It is within the purview of an electric cooperative and its customer to enter into such an agreement, without interference from the Commission or a competing provider. MDU implies that this interpretation would allow parties to these agreements to cheat the statute by writing a contract at or slightly below the statutory threshold in an attempt to avoid Commission jurisdiction. Even if this was true, which FEM denies, MDU is not harmed because MDU does not have an exclusive right to provide service. In fact, MDU has no right to provide service unless the customer meets the statutory requirements and chooses to contract with MDU for more than 2,000 kilowatts.

According to the *Hub City* case, the Territorial Act “does not include contract interpretation as an authority or power of the PUC.” Hub City at 930. The Supreme Court held that the Commission “exceeded its statutory authority by interpreting and enforcing the contract between rural cooperative, NEC, and its customer.” Id. Likewise, MDU as a competing provider should not be allowed to force the Commission to interfere in the contractual relationship between FEM and North Central by means of an improperly initiated petition under SDCL § 49-34A-56. Such actions clearly go beyond the boundaries of the statute itself and applicable case law.

CONCLUSION

FEM requests the Commission grant its Motion for Summary Disposition with respect to the following issues (1) based on a plain reading of SDCL § 49-34A-56, MDU has failed to state a claim upon which relief can be granted because MDU is not the proper party to bring a petition under this statute; and (2) the contracted load is less than 2,000 kilowatts, which is the threshold for a large load found in SDCL § 49-34A-56.

Summary disposition is proper because there are no genuine issues of material fact regarding this matter, and FEM is entitled to judgment as a matter of law pursuant to SDCL § 15-6-12(b), SDCL § 1-26-18 and ARSD 20:10:01:02.4.

Dated this 4th day of August, 2006.

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CERTIFICATE OF SERVICE

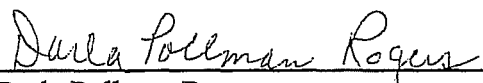
I hereby certify that a true and correct copy of the Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition was served via the method(s) indicated below, on the 4th day of August, 2006, addressed to:

Sara B. Greff	<input checked="" type="checkbox"/>	First Class Mail
South Dakota Public Utilities Commission	<input type="checkbox"/>	Hand Delivery
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Pierre, South Dakota 57501	<input type="checkbox"/>	Overnight Delivery
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Dated this 4th day of August, 2006.



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