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December 18, 2006

Honorable Lori Wilbur
Circuit Court Judge
P.O. Box 758
Fort Pierre, South Dakota 57532

RE: **IN THE MATTER OF THE PETITION OF MONTANA-DAKOTA UTILITIES CO. FOR APPROVAL TO PROVIDE ELECTRICAL SERVICE FOR THE NEW NORTH CENTRAL FARMERS ELEVATOR TO BE LOCATED NEAR BOWDLE, SOUTH DAKOTA**
Our file: 0069
CIV06-372

Dear Judge Wilbur:

I contacted the Hughes County Clerk's Office and was told to forward all Judge Gors' case pleadings to you at Stanley County. So enclosed you will find an original and one copy of Montana-Dakota's Reply Brief on Appeal in this matter. With this letter, I am sending a copy of the brief to counsel of record. Thank you very much.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY:
DAG:mw
Enclosure
cc/enc: Service List
Don Ball
Dan Kuntz

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE PETITION OF MONTANA-DAKOTA UTILITIES CO. FOR APPROVAL TO PROVIDE ELECTRICAL SERVICE FOR THE NEW NORTH CENTRAL FARMERS ELEVATOR TO BE LOCATED NEAR BOWDLE, SOUTH DAKOTA	)	CIV06-372
	)	**MONTANA-DAKOTA'S REPLY BRIEF ON APPEAL**

Montana-Dakota Utilities Co., ("Montana-Dakota"), a division of MDU Resources Group, Inc., by its undersigned counsel, files this reply brief in response to the briefs of FEM Electric Association, Inc., ("FEM") and the South Dakota Public Utilities Commission ("PUC").

The situation presented in this appeal involves a classic application of the large load statute to the "prime directive" of the Territorial Act, elimination of duplication and wasteful spending. That is, it can be viewed as involving a new customer, at a new location seeking delivery of a "large load," a minimum demand of 2,000 kilowatts or more. Fundamental to this appeal is the proper interpretation of the statute, SDCL § 49-34A-56, in the context of the entire Act. The PUC at page 6 of its brief says that ". . . the language 'new customers at new locations . . . shall not be obligated' is clear and unambiguous." The Commission

then goes on to quote the familiar proposition that words and phrases in a statute must be given their plain meaning and effect. And the Commission argues that is the end of story.

Montana-Dakota respectfully disagrees. Appellees are not giving the plain meaning and effect to the grammatical construction of the single sentence that forms the statute. Two things are clear to anyone reading the statute. First, the statute does not explicitly give the right to any one utility or customer, to file or sign a petition. It is silent in this regard. Second, the statute is designed to be an exception to SDCL §§ 49-34A-43 and 44, establishing exclusive assigned service territories.

It is submitted that both appellees have otherwise missed the boat in interpreting the meaning of the statute. Neither party gives proper grammatical weight to the two-letter word "if." Carried forward to that point the statute in pertinent part says that ". . . new customers at new locations shall not be obligated to take electric service from the electric utility having the assigned service area where the customer is located if . . . the Public Utilities Commission so determines after consideration of the following factors . . .." In other words, the so called "option" mentioned in the Hub City case relied on by Commission can

only occur "if" the Commission has considered the six factors (and five of them are concerned with cost and quality of service; the other with customer preference which is not addressed in the body of the act):

1. The electric service requirements of the load to be served;
2. The availability of an adequate power supply;
3. The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto;
4. The proximity of adequate facilities from which electric service of the type required may be delivered;
5. the preference of the customer;
6. Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

Contrary to the Commission's assertions, the statute works best in the overall context of the Act when it gives meaning to all its terms. The "option" is usually an either-or situation.

Service can only come from those utilities close enough to the load to pass muster under the six factors. Usually, this choice is limited to the incumbent utility and one other (although a load at a service territory junction of several utilities could present a greater variety of choices based on the six factors). The statute is designed to identify the best option and mandates that it be implemented.

MDU has recited the relative cost of the two companies, Montana-Dakota and FEM. Montana-Dakota's cost is significantly less ($243,000 versus $650,000, more than double, for FEM). Yet neither appellee even mentions this.

The Commission quotes from the Hub City Court: "The plain language of the statute indicates the legislature intended to do nothing more than provide a new large load customer at new location an option to be exercised prior to receipt of service." The existence of an option carries with it a choice. But here, the choice must be limited by the prime directive and the terms of the six factors, because the prime directive does not permit the more expensive option to be pursued and the Commission must evaluate the merits under the six factors. As the historical portion of Montana-Dakota's initial brief discloses, the territorial act was

written by utilities for the benefit of utilities and the infrastructure they must maintain. It was not written to give customers the more expensive choice. It was written to give utilities, and the Commission, tools to create an efficient, affordable electric infrastructure. Thus, the customer is obligated to take power from the assigned service provider. However, if the customer seeks to invoke one of the exceptions to the act, the proposed exception is subject to the prime directive. That is what the Willrodt act tells us and that is what the Hub City case tells us.

Montana-Dakota has standing because the customer considered proposals from both utilities and because the statute clearly, if implicitly, recognizes that another utility must be a part of the process to provide the "option". The Commission is then obligated under SDCL 49-34A-56 to determine the superior proposal. The "option", because of the "if", is contingent upon the six factors.

CONCLUSION

A proper reading of the statute states that the customer shall not be obligated to take electric service from the electric utility having the assigned service area in which the customer is located if the Commission so determines after considering the six factors.

The statute is silent concerning the party to initiate the process. Any utility brought into the process by the customer becomes under the operation of the statute a party to the process. Thereafter the "if" cannot be ignored.

Dated this 18th day of December, 2006.

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 18th day of December, 2006, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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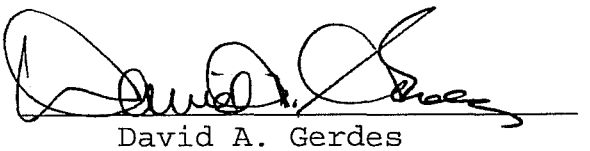

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