Dustin Johnson, Chair
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May 25, 2007

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol
Pierre, SD 57501

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
Supreme Court Appeal #24448

Dear Clerk Jameson-Fergel:

Enclosed you will find original and 14 copies of Brief of Appellee South Dakota Public Utilities Commission with reference to the above captioned matter.

Thank you very much.

Very truly yours,

John Smith
Assistant Attorney General

Enc.

Dustin Johnson, Chair
Gary Hanson, Vice Chair
Steve Kolbeck, Commissioner

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May 25, 2007

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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
Supreme Court Appeal #24448

Dear Counsel:

Enclosed you will each find two copies of Brief of Appellee South Dakota Public Utilities Commission with reference to the above captioned matter. This is intended as service upon you by mail.

Thank you very much.

Very truly yours,

John Smith
Assistant Attorney General

Enc.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

*****

NO. 24448

*****

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

*****

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

*****

THE HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING

*****

BRIEF OF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

*****

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*****

NOTICE OF APPEAL FILED FEBRUARY 21, 2007

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OF THE
STATE OF SOUTH DAKOTA

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

24448

REFERENCES

Petitioner and Appellant, Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc., will be referred to as "MDU." Appellee South Dakota Public Utilities Commission will be referred to as the "PUC" or "Commission." Intervenors and Appellees North Central Farmers Elevator, FEM Electric Association, Inc. and South Dakota Rural Electric Association will be referred to respectively as "North Central," "FEM" and "SDREA." References to the administrative record will be with the letters "AR" followed by the page number(s) to which reference is made.

JURISDICTIONAL STATEMENT

MDU appeals from the Judgment of Affirmance entered by Judge Anderson, Circuit Judge, Sixth Judicial Circuit on January 31, 2007, affirming the Final Decision and Order Granting Summary Disposition issued by the PUC in Docket EL06-011 on August 24, 2006. MDU filed its Notice of Appeal on February 21, 2007.

STATEMENT OF ISSUES

1. **WHETHER SDCL 49-34A-56 AFFORDS A RIGHT TO AN ELECTRIC UTILITY TO COMPEL A NEW LARGE LOAD CUSTOMER, AT A NEW LOCATION OUTSIDE SUCH UTILITY'S ASSIGNED SERVICE TERRITORY, TO TAKE ITS ELECTRICAL SERVICE FROM SUCH NON-ASSIGNED UTILITY?**

The Commission decided this issue in the negative on a Motion for Summary Disposition and denied MDU's Petition for Large Load Electrical Service. The Circuit Court affirmed the decision of the Commission. *Matter of Northwestern Public Service Co. with Regard to Electric Service to Hub City*, 1997 SD 35, 560 N.W.2d 925, 927 (1997); SDCL 49-34A-56; SDCL 49-34A-42.

2. WHETHER SUMMARY DISPOSITION WAS PROPERLY GRANTED PURSUANT TO SDCL 1-26-18 WHEN THERE WAS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING AN ESSENTIAL ELEMENT OF MDU'S CLAIM AND NORTH CENTRAL AND FEM WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW?

The Commission decided this issue in the affirmative and granted summary judgment to FEM and North Central. The Circuit Court affirmed the decision of the Commission. *Kobbeman v. Oleson*, 1998 SD 20, 4, 574 N.W.2d 633, 635 (1998); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Heib v. Lehrkamp*, 2005 SD 98, 704 N.W.2d 875; *Hahne v. Burr*, 2005 SD 108, 705 N.W.2d 867; SDCL 1-26-18; SDCL 49-34A-56.

STATEMENT OF THE CASE AND FACTS

This appeal is from the Judgment of Affirmance entered on January 31, 2007 by Judge Anderson, Circuit Judge of the Sixth Judicial Circuit, affirming the Final Decision and Order Granting Summary Disposition issued by the PUC in Docket EL06-011 on August 24, 2006 (attached as Appendix A). AR 129-132.

On April 12, 2006, MDU filed a Petition for Large Load Electrical Service ("Petition") with the PUC. AR 1-6. The Petition requested that the PUC assign to MDU the right to provide electrical service to a new grain handling facility ("Facility") to be constructed by North Central near Bowdle. The Petition states that MDU is the assigned electric utility in the city of Bowdle, but that the Facility will be located outside of the municipal boundaries one half mile west of

MDU's assigned service area. The Petition alleges that the Facility will be a new customer at a new location with a contracted minimum demand of 2,000 kilowatts and goes on to allege facts intending to show that MDU would better meet each of the six factors set forth at the end of SDCL 49-34A-56, except for subdivision "(5) The preference of the customer."

FEM filed a Petition to Intervene on May 1, 2006, North Central filed a Petition to Intervene on May 1, 2006, and the South Dakota Rural Electric Association filed a Petition to Intervene on May 15, 2006. On June 5, 2006, the Commission issued its Order Granting Intervention to FEM, North Central and SDREA. AR 11-24.

On June 22, 2006, FEM filed a Motion for Summary Disposition pursuant to SDCL 1-26-18 ("Motion"), the supporting Affidavit of Keith Hainy, North Central's General Manager and a Memorandum in Support of Motion for Summary Disposition. AR 27-41. On June 29, 2006, North Central filed a Joinder in Motion for Summary Disposition. AR 42-44. On July 14, 2006, the PUC Staff filed Staff's Response to FEM's Motion for Summary Judgment. AR 45-71. On July 17, MDU filed a Brief Opposing Motion for Summary Disposition and the supporting Affidavits of Bruce Brekke, Mobridge District Manager of MDU, and Larry Oswald, Customer Energy Consultant for MDU. AR 72-94. On August 7, 2006, FEM filed a Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition. AR 95-105. The PUC heard the Motion at its regular meeting on August 8, 2006, and voted unanimously to grant the Motion.

In its Final Decision and Order Granting Summary Disposition (see Appendix A; AR 129-132), the Commission found, based upon uncontroverted affidavit evidence or the absence of allegations in pleadings, that there were no genuine issues of fact regarding the following facts:

1. North Central is planning to build a new grain handling facility near Bowdle, South Dakota (Facility). The Facility will be located in the assigned electric service territory of FEM. Hainy Aff., 1.

2. North Central is a current customer of FEM, as is North Central's grain handling plant located in Craven, South Dakota. Hainy Aff., 2.

3. MDU's Petition does not allege that the location where the Facility will be located is a location where it was serving a customer as of March 21, 1975.

4. As a current FEM customer, it is North Central's desire to expand its current business relationship with FEM by having FEM provide electric service to the Facility. Hainy Aff., 3.

5. North Central entered into an agreement for electrical services to the Facility on or about April 13, 2006. Hainy Aff., 5.

6. North Central's clear and stated preference is to have FEM as its electric service provider for the Facility. North Central's execution of this Electric Service Agreement evidences this preference. Hainy Aff., 8.

7. North Central did not petition the Commission for approval of an alternative electric service provider pursuant to SDCL 49-34A-56. Hainy Aff., 8. North Central did not file a complaint pursuant to SDCL 49-34A-59 alleging that FEM will not be able to provide adequate electric service to it under SDCL 49-34A-58.

Based on these Findings of Fact, the Commission concluded that North Central had not requested relief under SDCL 49-34A-56 from its "obligation" to receive electrical service from FEM, that MDU lacked standing to request relief from this obligation on behalf of North Central and that SDCL 49-34A-56 does not afford a utility the right or power to compel a customer to take service from such utility outside of its assigned service area. The Commission accordingly concluded that FEM and North Central were entitled to judgment as a matter of law and that MDU's Petition should be denied.

ARGUMENT AND AUTHORITIES

A. STANDARDS OF REVIEW

The standard of review of an agency's decision is governed by SDCL 1-26-36 and ordinarily requires de novo review of questions of law and clearly erroneous review of findings of fact. *Horn v. Dakota Pork*, 2006 SD 5, 709 N.W.2d 38 (2006); *Brown v. Douglas School Dist.*, 2002 SD 92, 650 N.W.2d 264 (2002). When factual determinations are made on the basis of documentary evidence, however, the Court reviews the matter de novo, unhampered by the clearly erroneous rule. *Id.* Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of material fact. SDCL 15-6-56(c); *Hockett v. LaPointe*, 2006 SD 49, 716 N.W.2d 475; *Thornton v. City of Rapid City*, 2005 SD 15, ¶ 4, 692 N.W.2d 525, 528-29. All evidence must be viewed in a light most favorable to the nonmoving party. *Id.* The Court must also determine whether the law was correctly applied. *Phen v. Progressive N. Ins. Co.*, 2003 SD 133, ¶ 5, 672 N.W.2d 52, 54. The interpretation of a statute is a question of law subject to de novo review. *MGA Ins. Co. v. Goodsell*, 2005 SD 118, ¶ 9, 707 N.W.2d 483, 485. Under the standard of review in summary judgment cases, the Court decides whether a genuine issue of material fact exists and whether the law was correctly applied. If any legal basis exists to support the ruling, the Court will affirm. *Kobbeman v. Oleson*, 1998 SD 20, 4, 574 N.W.2d 633, 635 (1998). When the material facts are undisputed, review is limited to determining whether the law was correctly applied. *Kobbeman, supra*. Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labor, Unemp. Ins. Div.*, 411 N.W.2d 113, 119 (S.D. 1987). "Statutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review." Whether a party has standing is a legal conclusion, which the Court

reviews under the de novo standard. *H & W Contracting, L.L.C. v. City of Watertown*, 2001 SD 107, ¶ 9, 633 N.W.2d 167, 171; *State v. $1,010.00 in American Currency*, 2006 SD 84, 722 N.W.2d 92; *Chapman v. Chapman*, 2006 SD 36, 10, 713 N.W.2d 572, 576 (citing *State v. Anderson*, 2005 SD 22, 19, 693 N.W.2d 675, 681 (quoting *Block v. Drake*, 2004 SD 72, 8, 681 N.W.2d 460, 463)). The Supreme Court has stated that "SDCL ch. 49-34A evidences a legislative intent for PUC to have broad inherent authority in matters involving utilities in this state." *In the Matter of Northern States Power Co.*, 489 N.W.2d 365, 370. (S.D. 1992).

B. DISCUSSION OF ISSUES PRESENTED

1. SDCL 49-34A-56 does not afford a right to an electric utility to have the Commission compel a new large load customer at a new location that is not within such utility's assigned service territory to take its electrical service from such non-assigned utility against the wishes of the customer.

The legal context of this dispute is described in *Matter of Northwestern Public Service Co. with Regard to Electric Service to Hub City*, 1997 SD 35, 560 N.W.2d 925, 927 (1997) ("*Hub City*"):

> In 1975 the legislature enacted the "South Dakota Territorial Integrity Act" (Act), now codified at Chapter 49-34A. The policy underlying the Act was "elimination of duplication and wasteful spending in all segments of the electric utility industry." *Matter of Certain Territorial Elec. Boundaries (Mitchell Area)*, 281 N.W.2d 65, 70 (S.D.1979). To accomplish that end, exclusive territories designated "assigned service areas," were established for each utility. See *Matter of Clay-Union Elec. Corp.*, 300 N.W.2d 58, 60 (S.D.1980). To ensure the integrity of a territory, the legislature granted each utility the exclusive right to "provide electric service at retail ... to each and every present and future customer in its assigned service area." SDCL 49-34A-42.

The Court in *Hub City* went on to emphasize that the exclusive service area mandate of SDCL 49-34A-42 could only be avoided by coming within one of the three statutorily expressed exceptions to the Act.

This case turns on the Commission's construction of SDCL 49-34A-56. The heart of the matter is stated in the Commission's Conclusion of Law 5 (see Appendix A):

> The essential language of the statute provides: "[N]ew 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 Commission finds satisfactory compliance with the six factors. We do not reach the conditional "if" factors in this case because relief from the customer's "obligation" to take service from the assigned utility has not been requested by the customer, North Central.

Here, the undisputed facts show that the customer did not seek to avail itself of the relief that SDCL 49-34A-56 affords from the "obligation" imposed by the Act. MDU contends on pp. 8 and 9 of its brief that "SDCL 49-34A-56 does not contain one word identifying who may or may not invoke the statute." The Commission contends, however, that the language "new customers at new locations . . . shall not be obligated" is clear and unambiguous in identifying the class of persons whose "obligation" may be avoided by invoking the statute. "Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Holscher v. Valley Queen Cheese* Factory, 2006 SD 35, ¶ 33, 713 N.W.2d 555, 565; *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611. The Commission properly concluded that the intent of SDCL 49-34A-56 is to afford a new large load customer the right to seek approval from the Commission to take its electric service from the non-assigned utility.

Furthermore, as the Court stated in *Hub City, supra*, SDCL 49-34A-56 is an exception to the general rule of the Territory Act which is set forth in SDCL 49-34A-42:

> Each electric utility has the exclusive right to provide electric service at retail . . . to each and every present and future customer in its assigned service area. No electric utility shall render or extend electric service at retail within the assigned

> service area of another electric utility unless such other electric utility consents thereto in writing and the agreement is approved by the commission consistent with § 49-34A-55. (emphasis supplied).

As an exception to the general statutory mandate, SDCL 49-34A-56 should be narrowly construed. *Olsen v. City of Spearfish*, S.D., 288 N.W. 2d 497 (1980); *Peters v. Spearfish ETJ Planning Com'n*, 567 N.W.2d 880 (S.D.1997).

Invoking more general judicial pronouncements concerning the purpose of the Act, however, which MDU refers to in its brief as the "Prime Directive," MDU contends SDCL 49-34A-56 goes farther than this and is intended to subject every new large load situation to a contest between the assigned and non-assigned utilities, to be decided, not by the customer based upon its desires, due diligence and negotiations with the competing utilities, but by the Commission on the basis of its administrative determination of which of the competing utilities better meets the six factors set forth in the statute. To the knowledge of the Commission, no utility has ever before made such a filing with the Commission or advocated such a proposition. The Commission does not believe such a role was contemplated for it here, and the Commission has never so construed the statute in any recent case coming before it. The Commission rather believes that when a new large load customer wishes to obtain its service from a non-assigned provider, the Commission's review of the customer's proposal against the six factors is intended as a check to ensure that adequate service will be provided and that system effects on the proposing utility will not be unreasonable or imprudent.

A decade ago, the Commission did venture into a more expansive interpretation of the statute, albeit not with respect to the precise issue presented here. The Commission had decided that when read in connection with the other provisions of the Act and the judicial pronouncements concerning its general purpose, more was implied in SDCL 49-34A-56 than

what its literal language seemed to state. The Commission concluded it could undertake the kind of relative merit assessment role between utilities that MDU advocates it should undertake here. This attempt was struck down by the Court in *Hub City, supra*. Writing for a unanimous Court, Judge Timm succinctly described the intent of SDCL 49-34A-56 as follows:

> The plain language of the statute indicates the legislature intended it 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. (Emphasis supplied). *Hub City, supra*, at 928.

What MDU is asking of the Commission is certainly something more.

The principal authority to which MDU looks for support of its more expansive interpretation of 49-34A-56 is *Matter of Certain Territorial Elec. Boundaries (Mitchell Area)*, 281 N.W.2d 65 (S.D.1979), customarily referred to as the *Willrodt* case ("*Willrodt*"), a case challenging the Act's constitutionality from the early days following its passage. In particular, MDU points to two excerpts from *Willrodt*, which are quoted on page 10 of MDU's Brief. The PUC contends that neither of these passages is even particularly apposite to the case at hand and that the Court's later interpretation in *Hub City*, specifically addressing the extent of the exception provided by 49-34A-56, is the more appropriate and persuasive authority to apply to the issues in this case.

The first of the *Willrodt* Court's statements cited by MDU is taken from that portion of the decision dealing with the Willrodts' claim that the Act effected a taking of their property because it compelled them to take their service from the more expensive of the two utilities in their area.[1] In addressing this constitutional challenge, the Court stated:

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1 The Court similarly dealt with this general issue involving legislative power over utility service rights *vis a vis* the utilities' franchise rights themselves in *Matter of Certain Territorial Elec. Boundaries (Aberdeen City Vicinity)*, 281 N.W.2d 72 (S.D. 1979).

> An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. 281 N.W.2d at 72.

The issue to which this passage was addressed had nothing to do with SDCL 49-34A-56 at all and certainly did not offer guidance as to the precise meaning of the statute. In this case, the Court is not called upon to evaluate what the Legislature could do in a general sense constitutionally in enacting a statute such as the Territorial Integrity Act; it is rather called upon to interpret what it did do precisely in enacting 49-34A-56.

The second reference in *Willrodt* relied upon by MDU is taken from that part of the decision dealing with the Willrodts' claim that SDCL 49-34A-56 violates the equal protection clause of the Constitution because it affords new large load customers rights of choice that are not afforded to new small load customers. Again, the applicability of the passages quoted by MDU to the instant case is questionable. Nowhere does the *Willrodt* Court undertake an analysis of the application of 49-34A-56 to a particular set of facts because none were before it, and nowhere does the Court state that a utility not assigned to a service area may compel a large load customer to take its service from it. The context of the Court's statements concerning 49-34A-56 was merely to demonstrate that the Legislature had a rational and permissible basis to make a class differentiation between new large load and new small load customers and that it treated all members of the defined classes equally. The following is a portion of the passage quoted by MDU:

> Allowing it to serve the large new customer would promote efficiency to both customers and suppliers. *Willrodt*, *supra*, at 71.

Note the Court's use of the word "allow." This statement is perfectly compatible with the Commission's decision in this case. Without question, under SDCL 49-34A-56, the Commission

may allow a utility outside an assigned area to serve a new large load customer — provided the requirements of the statute are met. There is also no question that the same standard applies to all such customers and utilities. MDU has the same rights under the statute as any other utility.

Based largely upon the general statements of the Court in *Willrodt*, *supra*, MDU then questions the Court's choice of the word "option" in *Hub City*, *supra*, to describe what the statute affords the customer. MDU offers the word "opportunity" as a better word to describe the customer's right. MDU has it backwards. Although the customer's right to seek relief from its obligation under the statute is subject to Commission approval and might therefore present only an "opportunity" in the sense that its option is only conditional until approved by the Commission, the word "opportunity" is more appropriately applied to the right that the statute affords the non-assigned utility. In its operational effect, the statute does indeed afford the non-assigned utility the right to compete to serve the load, that is, the "opportunity" to make a proposal to the customer and, if accepted, to seek the Commission's approval for the right to serve the load. This right and opportunity is afforded on a non-discriminatory basis to all electric utilities in South Dakota.

In the Circuit Court, MDU argued that inclusion of the "preference of the customer" as factor (5) of the six factors to be considered by the Commission in approving a request for relief under 49-34A-56 undermines the apparent customer-centric orientation of the body of the statute. Although MDU did not address this issue in its brief before the Court, we briefly address it here in the event MDU addresses it in its reply brief or argument. The Commission submits that the inclusion of customer preference in the enumerated factors is not at all inconsistent with the Commission's interpretation of the statute. It is the PUC's position that it was included to make it clear that once the Commission has determined that the threshold items in the body of the

statute have been met (e.g. new customer, new location, 2000kW load, etc.), the Commission is not to then consider the five system factors in disregard of the customer's preference but is to specifically consider the customer's preference along with the system factors in deciding whether to allow a deviation from the assigned service areas. This interpretation is completely compatible with the plain language of the body of the statute and supported by the Court's holding in *Hub City, supra.*

MDU challenges the Commission's Conclusion of Law 6 which states:

> MDU has no standing to assert legal rights or contest legal obligations on North Central's behalf, and MDU has no standing to assert North Central's right under SDCL 49-34A-56 to relief from its obligation to take service for a new facility from the assigned service provider.

In its Brief on page 8, MDU concedes that MDU has no standing to assert legal rights on North Central's behalf. MDU, however, then asserts that it "has standing in its own right to ask for relief under the large load statute. Nothing in the Territorial Act suggests that only the customer may utilize the statute." Nothing, that is, except the plain language of the statute itself and the second sentence of 49-34A-42 which states the general rule that utilities are prohibited from extending service outside their assigned service areas. In *Sioux Falls Argus Leader v. Miller*, 2000 SD 63, 610 N.W.2d 76, 28 Media L. Rep. 1833, the Court set forth the elements for determining a party's standing to bring an action as follows:

> Standing requires that a party allege (1) a personal injury in fact, (2) a violation of his or her own, not a third-party's rights, (3) that the injury falls within the zone of interests protected by the constitutional guarantee involved, (4) that the injury is traceable to the challenged act, and (5) that the courts can grant redress for the injury. (emphasis supplied).

The same principals apply to standing to assert statutory rights. See *Lewis & Clark Rural Water System, Inc. v. Seeba*, 2006 SD 7, 709 N.W. 2d 824. See also *Otter Tail Power Co. v. Sioux*

Valley Empire Elec. Ass'n, 81 S.D. 99, 131 N.W. 2d 111 (1964). The Commission did not conclude that MDU has no standing to assert rights under SDCL 49-34A-56. Indeed, the Commission hears numerous cases each year in which a non-assigned utility petitions the Commission under 49-34A-56 to demonstrate its right to serve a large load customer outside its service area. See e.g. *In the Matter of the Petition for Electrical Service by Dakota Turkey Growers, LLC to have Dakota Energy Cooperative, Inc. Assigned as its Electric Provider in the Service Area of NorthWestern Energy*, Docket No. EL04-032, Final Decision and Order (May 23, 2005) (attached as Appendix B). What the Commission did conclude is that MDU lacks standing to assert rights on behalf of North Central against its wishes and seek relief on North Central's behalf from its obligation to receive service from the assigned utility.

The standing issue really comes down to the same issue of statutory construction discussed above. Again, it appeared to the PUC that the statutory language "new customers at new locations . . .shall not be obligated to take electric service from the electric utility having the assigned service area" afforded a right to the customer to seek relief from the obligation to take service from the assigned utility. The Commission simply does not find language in the statute that would afford a similar right to MDU to seek relief from its territorial boundaries on its own behalf, and it lacks standing to assert the right afforded the customer in plain language.

In making its decision in this case, the Commission believed both that it was bound by the Court's construction of SDCL 49-34A-56 in *Hub City* and that such construction was and remains correct. If the Court now determines that the statement concerning the plain meaning of the statute in *Hub City* was either incorrect or was improperly applied by the Commission to limit the reach of the statute to its apparent literal meaning, the Court of course is free to so instruct the Commission in this appeal, and we will so apply the statute in the future. The

Commission, however, felt constrained in this case to follow the unambiguous judicial interpretation of the statute set forth in *Hub City*. See AR 121-126. The Commission would urge the Court to uphold the *Hub City* Court's and the Commission's plain meaning interpretation of the statute and not subject either new large load customers or utilities in this state to the much more governmentally intrusive interpretation urged by MDU.

2. Based upon the Commission's construction of SDCL 49-34A-56, there remains no genuine issue of material fact germane to the decision in this case, and summary judgment was properly granted.

MDU argues that genuine issues of material fact remain unresolved involving the contracted minimum demand of the Facility and the utilities' respective strengths measured against the six factors of 49-34A-56. The Commission contends these facts are not at issue because an essential prerequisite to relief under the statute has not been demonstrated, namely, that a customer seeks relief under the large load exception of SDCL 49-34A-56 from its obligation to take service from the utility assigned to serve the location.

The Commission found that there were no genuine issues with respect to the material facts that FEM is the utility assigned to serve North Central's proposed Facility location, that North Central desires to receive service to the Facility from FEM, the assigned utility, and that North Central has not sought relief under either SDCL 49-34A-56, the large load exception, or SDCL 49-34A-58, the inadequate service exception. MDU does not contest these findings. When there is no genuine issue of material fact that an essential element of a cause of action has not been fulfilled, summary judgment as to such claim is appropriate. "The moving party will be entitled to judgment as a matter of law when the nonmoving party has failed to 'make a sufficient showing for an essential element of [their] case with respect to which [they] have the burden of proof.' *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265

(1986)." *Heib v. Lehrkamp*, 2005 SD 98, 704 N.W.2d 875; *Hahne v. Burr*, 2005 SD 108, 705 N.W.2d 867.

CONCLUSION

For the reasons stated above, the Commission respectfully requests the Court to affirm the Circuit Court's Judgment of Affirmance and the Commission's Final Decision and Order Granting Summary Disposition in Docket EL06-011.

Dated this 25th day of May, 2007.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of Brief of Appellee South Dakota Public Utilities Commission were served on the following by mailing the same to them by United States first class mail, postage thereon prepaid, at the address shown below on this the 25th day of May, 2007.

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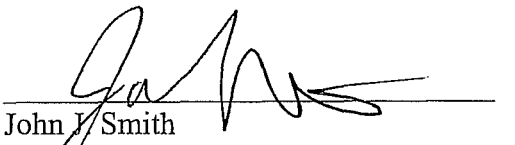

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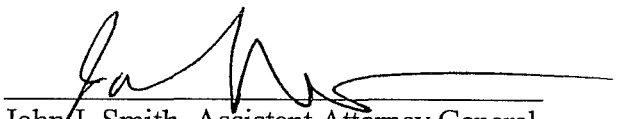
CERTIFICATE OF COMPLIANCE

John J. Smith, attorney for the Commission, hereby certifies that the foregoing Brief of Appellee South Dakota Public Utilities Commission complies with the page and type volume limitations established by SDCL 15-26A-66(b). Proportionally spaced Times New Roman font was used in this Brief. Excluding the cover pages, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, the Commission's Brief contains 4,650 words or 23,485 characters and 15 pages. Microsoft Word was the program used in preparing this Brief.

Dated this 25th day of May, 2007.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION



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APPENDIX

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APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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	)))))	FINAL DECISION AND ORDER GRANTING SUMMARY DISPOSITION AND NOTICE OF DECISION EL06-011

On April 12, 2006, the Commission received a Petition for Large Load Electrical Service (Petition) from Montana-Dakota Utilities Co, (MDU) for the right to provide electrical service to a new grain handling/multi-unit train loading facility to be operated by North Central Farmers Elevator (North Central) near Bowdle in Edmunds County, South Dakota. The Petition requests that the Public Utilities Commission assign MDU as the supplier of electrical service to the North Central facility. The Petition states that the site of the proposed facility is within the assigned service area of FEM Electric Association, Inc. (FEM), that it will require electrical service of substantially more than a contracted minimum demand of 2,000 kilowatts and that MDU is best suited to provide such electrical service. On April 14, 2006, the Commission electronically transmitted notice of the filing and the intervention deadline of April 27, 2006, to interested individuals and entities. On May 1, 2006, the Commission received Petitions to Intervene from North Central and FEM. On May 15, 2006, the Commission received a Petition to Intervene from South Dakota Rural Electric Association (SDREA). At a regularly scheduled meeting of May 23, 2006, the Commission voted unanimously to grant the interventions, and on June 5, 2006, the Commission issued an Order Granting Intervention to North Central, FEM and SDREA.

On June 22, 2006, FEM filed a Motion for Summary Disposition pursuant to SDCL 1-26-18 (Motion), a Memorandum in Support of Motion for Summary Disposition and Affidavit of Keith Hainy in support of the Motion for Summary Disposition. On June 29, 2006, North Central filed a Joinder in Motion for Summary Disposition. On July 14, 2006, the Commission received Staff's Response to FEM's Motion for Summary Disposition. On July 17, 2006, MDU filed a Brief Opposing Motion for Summary Disposition and the Affidavits of Bruce Brekke and Larry Oswald. On August 8, 2006, FEM filed a Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition.

The Commission has jurisdiction in this matter pursuant to SDCL Chapter 49-34A, particularly 49-34A-56.

FEM's Motion for Summary Disposition came on for hearing before the Commission at its regular meeting on August 8, 2006. The Commission voted unanimously to grant the motion.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto, the affidavits filed by the parties and the oral arguments of the parties at the hearing, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

APPENDIX A

FINDINGS OF FACT

The Commission finds that there is no genuine issue of fact regarding the following facts and accordingly makes the following findings of fact:

1. North Central is planning to build a new grain handling facility near Bowdle, South Dakota (Facility). The Facility will be located in the assigned electric service territory of FEM. Hainy Aff., ¶ 1.

2. North Central is a current customer of FEM, as is North Central's grain handling plant located in Craven, South Dakota. Hainy Aff., ¶ 2.

3. MDU's Petition does not allege that the location where the Facility will be located is a location where it was serving a customer as of March 21, 1975.

4. As a current FEM customer, it is North Central's desire to expand its current business relationship with FEM by having FEM provide electric service to the Facility. Hainy Aff., ¶ 3.

5. North Central entered into an agreement for electrical services to the Facility on or about April 13, 2006. Hainy Aff., ¶ 5.

6. North Central's clear and stated preference is to have FEM as its electric service provider for the Facility. North Central's execution of this Electric Service Agreement evidences this preference. Hainy Aff., ¶ 8.

7. North Central did not petition the Commission for approval of an alternative electric service provider pursuant to SDCL 49-34A-56. Hainy Aff., ¶ 8. North Central did not file a complaint pursuant to SDCL 49-34A-59 alleging that FEM will not be able to provide adequate electric service to it under SDCL 49-34A-58.

CONCLUSIONS OF LAW

1. Except in a few limited circumstances, under the South Dakota Territorial Integrity Act, codified as SDCL 49-34A-1(1), 49-34A-42 through 49-34A-44, and 49-34A-48 through 49-34A-59, ". . . each electric utility has 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 each and every present and future customer in its assigned service area." SDCL 49-34A-42.

2. The Petition does not allege that MDU was providing service to the location of the Facility as of March 21, 1975, and MDU is therefore not afforded the right under this provision to provide electric service to the facility.

3. The Facility will be located in the assigned service area of FEM, and FEM accordingly has the exclusive right to provide service at such location unless one of the exceptions to the exclusive right to serve is demonstrated. *Matter of Northwestern Public Service Co. with Regard to Electric Service to Hub City*, 1997 SD 35, 560 N.W.2d 925 (1997) (*Hub City*).

4. The exception asserted by MDU which it argues would, if proven, permit it to provide service to the Facility is SDCL 49-34A-56. MDU argues that it can demonstrate that it will better meet five of the six factors set forth in SDCL 49-34A-56 other than "(5) The preference of the customer. . . ," and that this accordingly will afford it the right to serve the Facility.

5. The flaw in MDU's position is that the conditional factors in SDCL 49-34A-56 only come under consideration if the fundamental prerequisites of the statute set forth in the body of the statute are first fulfilled. That is not the case here. The essential language of the statute provides: "[N]ew 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 Commission finds satisfactory compliance with the six factors. We do not reach the conditional "if" factors in this case because relief from the customer's "obligation" to take service from the assigned utility has not been requested by the customer, North Central.

6. MDU has no standing to assert legal rights or contest legal obligations on North Central's behalf, and MDU has no standing to assert North Central's right under SDCL 49-34A-56 to relief from its obligation to take service for a new facility from the assigned service provider.

7. MDU essentially argues that if a utility other than the assigned utility can demonstrate a superior performance of the conditional factors, SDCL 49-34A-56 then obligates the customer to take its service from such non-assigned utility. This position is unsupported by either logic or precedent and turns the statute on its head. In *Hub City*, the Court succinctly stated: "The plain language of the statute indicates the legislature intended it 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." *560 N.W.2d at 928.*

8. SDCL 49-34A-56 does not afford a non-assigned utility the right or power to compel a customer to take service from such non-assigned utility.

9. Based upon the Commission's Findings of Fact concerning which there are no genuine issues, the Commission concludes that SDCL 49-34A-56 does not afford MDU a right to serve the Facility, that FEM's Motion for Summary Disposition should be granted and that MDU's Petition should be denied.

It is therefore

ORDERED, that FEM's Motion for Summary Disposition is granted and that MDU's Petition is denied.

NOTICE OF DECISION

PLEASE TAKE NOTICE that this Final Decision and Order Granting Summary Disposition and Notice of Decision (Decision) constitutes a final decision and order in this case. Pursuant to SDCL 1-26-32, this Decision will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Decision. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Decision to the appropriate Circuit Court by serving and filing notice of appeal of this Decision in the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 24th day of August, 2006.

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: Delaine Kolbo

Date: 8/25/06

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

ROBERT K. SAHR, Chairman

DUSTIN M. JOHNSON, Commissioner

GARY HANSON, Commissioner

APPENDIX B

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION FOR ELECTRICAL SERVICE BY DAKOTA TURKEY GROWERS, LLC TO HAVE DAKOTA ENERGY COOPERATIVE, INC. ASSIGNED AS ITS ELECTRIC PROVIDER IN THE SERVICE AREA OF NORTHWESTERN ENERGY	))))))	FINAL DECISION AND ORDER DETERMINING RIGHT TO RECEIVE SERVICE; NOTICE OF ENTRY EL04-032

PROCEDURAL HISTORY

On October 18, 2004, the Public Utilities Commission (Commission) received a Petition for Electrical Service (Petition) from Dakota Turkey Growers, LLC (DTG). The Petition requests that the Commission assign Dakota Energy Cooperative, Inc. (Dakota Energy) as the supplier of electrical service to the proposed DTG turkey processing facility within the assigned service area of NorthWestern Energy (NorthWestern) pursuant to SDCL 49-34A-56. Simultaneously with DTG's filing of the Petition, Dakota Energy filed an Affidavit of Joinder joining in the Petition. On October 21, 2004, the Commission electronically transmitted notice of the filing and the intervention deadline of November 5, 2004, to interested individuals and entities. On November 3, 2004, the Commission received a Petition to Intervene and Objection from NorthWestern. At its regularly scheduled meeting on November 30, 2004, the Commission granted intervention to NorthWestern. On January 12, 2005, the Commission received a Motion for Summary Disposition from NorthWestern. On January 13, 2005, the Commission issued its Order for and Notice of Hearing setting the matter for hearing on February 17, 2005, in Huron. On February 2, 2005, the Commission received a Stipulation to Amend Petition signed by DTG and NorthWestern. On February 3, 2005, the Commission received a Memorandum of Law in Opposition to Motion for Summary Disposition from DTG. On February 8, 2005, the Commission received Staff's Response to Motion for Summary Disposition of NorthWestern Corporation. At its duly noticed February 9, 2005, meeting, the Commission heard oral arguments and voted unanimously to deny NorthWestern's Motion for Summary Disposition. On February 17, 2005, the hearing in this matter was held as noticed. On February 24, 2005, the Commission issued an Order Establishing Briefing Schedule. Briefs were submitted by DTG/Dakota Energy, NorthWestern and Staff. At its regular meeting on April 26, 2005, the Commission voted unanimously to approve DTG's Petition with respect to DTG's own facilities, including at a minimum, the proposed plant and office building and future expansions of either of these, but not to approve service at this time with respect to the truck stop.

The Commission has jurisdiction over this matter pursuant to SDCL 49-34A-42, 49-34A-56, 49-34A-58 and 49-34A-59.

Having considered the evidence of record and applicable law, the Commission makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. DTG was organized as a newly formed limited liability company on August 19, 2003. DTG was organized by turkey growers located primarily in South Dakota in order to undertake to build a processing facility and begin to market their own product to add value to the live product coming through the facility. DTG has never been an electric customer of either NorthWestern or Dakota Energy. DTG will be a new customer of either Dakota Energy or NorthWestern. TR 18-19, 81.

2. DTG will be a "new customer" within the meaning of SDCL 49-34A-56.

3. On August 26, 2004, DTG acquired a parcel of property outside of the city of Huron from the Greater Huron Development Corporation (GHDC) for purposes of constructing the processing facility (Plant), an office building (Office), associated facilities and potentially a truck stop. TR 22-24; DTG Exs 1 and 21. GHDC had in turn acquired the property from the city of Huron who in turn had acquired the property from Jeff and Teresa Decker. TR 21.

4. The property acquired by DTG from GHDC was located outside the boundaries of Huron at the time it was acquired by DTG. TR 46. There was no evidence presented and it was not asserted by any party that the property was within the boundaries of any municipality as they existed on March 21, 1975.

5. At the time the Deckers purchased the property, they purchased it as two separate parcels. TR 234. The Deckers had the portion of the property where their home and associated homestead buildings were located replatted as a separate 10 acre parcel from the remainder of Outlots 1 and 2 so that they could qualify to borrow money through South Dakota Housing for the house. TR 234. The remainder of the property was purchased from the sellers through a contract for deed. TR 235.

6. The Plant and Office are currently under construction on the portion of the property which the Deckers had acquired on contract for deed. There are no buildings located on this portion of the property where the Plant and Office are being constructed. TR 24. There was no evidence presented that buildings other than possibly a seasonal fireworks stand had ever been located on this portion of the property. TR 241. There was never any electric service to the building sites of the Plant and Office. TR 241.

7. The DTG Plant and Office are being constructed from the ground up on land that was previously undeveloped farm land. TR 20, 24.

8. NorthWestern is currently providing power to the DTG construction facilities on a temporary basis. When DTG's contractor leaves the site, these services will be removed. TR 67.

9. The Commission finds that the Plant and Office are a "new location which develops after March 21, 1975."

10. Also proposed for possible development on the DTG property is a truck stop. TR 23-24. The property on which the proposed truck stop would be primarily located is the separate 10 acre parcel which the Deckers caused to be separately platted. TR 242. The Decker home and farmstead buildings were located on this parcel of property. TR 43. NorthWestern provided electric service to the Decker farmstead prior to the Deckers' property being purchased by the city of Huron. TR 241. Following the Deckers' sale of the property, their electric service was disconnected and temporary service was installed by NorthWestern to serve DTG's contractor. TR 63-67. Other than the evidence concerning the possible seven to eight days of temporary service to a fireworks stand back in the 1970s and the temporary service to DTG's contractor, this was the only evidence presented of prior electric service to the 10 acre Decker farmstead parcel. TR 241.

11. The truck stop would be under different ownership than the Plant and Office. TR 43. Development of the truck stop is on hold. TR 23.

12. The Commission finds that there is insufficient evidence at this time to find that the truck stop will in fact be a part of DTG as a "customer" and entitled to be included within the territorial assignment exception carved out by SDCL 49-34A-56 or that the truck stop will otherwise be a "new customer."

13. The Commission accordingly does not reach the issue of whether the 10 acre parcel may be properly included with the remainder of the DTG property as part of a "new location" within the meaning of SDCL 49-34A-56. At such time as development is actually proposed on this parcel, the parties will have the opportunity, if they wish, to bring before the Commission the issue of whether such development meets the standards for inclusion within DTG's "location" as set forth by the Court in *Matter of Northwestern Public Service Co.*, 1997 SD 35, 560 N.W.2d 925, Util. L. Rep. P 26,600 (1997) (*Hub City*).

14. With respect to factor (1) of SDCL 49-34A-56, the anticipated demand for electric service for the DTG facilities will exceed 2000 kilowatts and is expected to be about 5000 kilowatts. TR 25-26; 95. This projected demand does not include the truck stop. TR 49. DTG executed an Electric Service Agreement (ESA) with Dakota Energy for the provision of electric service to the DTG facilities. DTG Conf Ex 5. Paragraph 2. of the ESA provides that DTG agrees to purchase and receive from Dakota Energy all of the electric power and energy requirements of the DTG facilities. Paragraph 6.c. of the ESA provides that the minimum contracted demand for billing purposes for the DTG facilities will not be less than 2000 kilowatts regardless of DTG's actual demand or energy requirements for any billing period. DTG Conf Ex 5.

15. DTG facilities will require electric service with a contracted minimum demand of 2000 kilowatts or more.

16. With respect to factor (2) of SDCL 49-34A-56, East River Electric Cooperative (East River) will supply Dakota Energy with the power to be delivered to DTG under its power supply agreements with East River. The power will be generated by Basin Electric Cooperative. East River's power sources are very reliable. TR 124-125. Basin has adequate generation resources to supply the DTG load. TR 124.

17. The transmission and distribution upgrades to be installed by East River and Dakota Energy to serve DTG, together with their existing facilities, will be a reliable energy source for DTG. TR 81, 107, 143.

18. Dakota Energy, through its own existing and planned distribution facilities and those of its generation and transmission suppliers, will have an adequate supply of power available to serve DTG's needs, including expansions to the facilities. TR 124, 122-128, 193, 266.

19. With respect to factor (3) of SDCL 49-34A-56, Dakota Energy will need to upgrade its system to provide the power necessary to operate the plant. The board of Dakota Energy has committed to making these improvements. TR 104. The design includes an upgrade to both the distribution system and the transmission system. TR 82.

20. The distribution system is a standard loop feed with two separate lines coming into the facility. DTG Ex 17. This provides redundancy to assure a continuous power source. TR 101. The improvement costs are set forth in DTG Conf Ex 19. TR 110-111.

21. East River has also committed to upgrade its facilities. TR 111. East River currently has a line about three miles east of the DTG Plant. It plans to tap off the existing line and build a line about three to three and one-half miles to DTG. East River will then put in a three-way motorized switch and existing line with basic tap in and build down about three miles to a substation located adjacent to the DTG Plant. This will provide an on-site substation immediately adjacent to the Plant. The substation will have a remote monitoring control system or SCADA to monitor power quality, loading and other data. TR 127-129; DTG Ex 13. East River will also provide an alternate feed that will come from the Morningside substation. With the improvements, the Morningside substation will

be used for backup or emergency situations. The costs to East River were given in DTG Conf Ex 19.

22. The energy to be supplied to DTG by Dakota Energy will be provided to Dakota Energy through East River from Basin Electric's fossil fuel generation resources. Dakota Energy will not provide DTG with WAPA power under its preference power allocation, and DTG's use will not dilute Dakota Energy's customers' share of their WAPA allocation. TR 85-86.

23. The rates that Dakota Energy will charge DTG are sufficient to recover its costs associated with serving the DTG load and will provide a margin above costs that will benefit the members of the cooperative. TR 83. Dakota Energy's and East River's costs to serve DTG will not be an economic detriment to their customers and are anticipated to be beneficial in the long run for the members. TR 82-83, 90-91, 142-143. Dakota Energy does not anticipate that service to DTG will result in increased rates for its other customers. TR 82, 91.

24. Dakota Energy's electric system will be enhanced and improved by the improvements made to provide electric service to the DTG Plant and Office and such service will benefit the cooperative and its members economically and will not raise rates for other customers.

25. With respect to factor (4) of SDCL 49-34A-56, Dakota Energy's headquarters is located right across Highway 14 from the DTG property. TR 28, 71. East River's transmission facilities from which it will supply the DTG facilities are located approximately three to three and one-half miles east of the DTG site. TR 127.

26. Although there is evidence in the record that NorthWestern has facilities that are closer to the DTG site than the East River facilities, the Commission finds that the distance to be constructed by East River to serve DTG is not significant enough for the Commission to deny DTG's request for service from Dakota Energy on that basis.

27. With respect to factor (5) of SDCL 49-34A-56, several of DTG's members, and particularly the colony members of DTG that are served by DTG, had fairly strong feelings that if the offers of Dakota Energy and NorthWestern were competitive, DTG should choose Dakota Energy. TR 34.

28. DTG's unambiguous preference is to be served by Dakota Energy. TR 36. DTG was aware that this election, if approved by the Commission, would in all likelihood be irrevocable and permanent under the holding of *Hub City*. TR 277; DTG Conf Ex 5, Paragraph 7.c.

29. With respect to factor (6) of SDCL 49-34A-56, the Commission finds that most of the pertinent factors have been addressed in the findings pertaining to factors (1) - (5). Two other factors merit mention. Dakota Energy has had previous experience successfully serving large loads. TR 71-72. East River and Dakota Energy have access to financing to cover the cost of constructing the facilities needed to serve DTG from either the USDA's Rural Utility Service or the National Rural Utilities Cooperative Finance Corporation. TR 138-139, 141-142.

30. NorthWestern's evidence also demonstrated that it would have an adequate power supply to serve DTG, that its system would be enhanced thereby, that it could serve the DTG load at a competitive price without expected rate effects on other ratepayers, that its distribution facilities were already in close proximity to DTG and that it had rapidly dispatchable generation in close proximity to the DTG facilities. TR 163-174, 189-193.

31. NorthWestern offered evidence of several advantages of its proposed service over that of Dakota Energy. It would have only 5.46 miles of transmission line exposure to fault interruption

compared with 76 miles of exposure on Dakota Energy's line. TR 169-171. Dakota Energy's redundant short term transmission line, totaling approximately 50 MW will have 44.5 miles of exposure. TR 172. NorthWestern has two gas fired generators located in close proximity to the Plant that are capable of black start operation and could very rapidly return power to the DTG Plant in the event of a transmission outage. TR 189-192. Lastly, the system improvements required for NorthWestern's service to the Plant would be less costly than those of Dakota Energy and East River. TR 134-136, 176-177; DTG Conf Ex 11 and 19.

32. NorthWestern, however, cannot meet factor (5) of SDCL 49-34A-56 at all since DTG has expressed an unambiguous preference for Dakota Energy.

33. Despite NorthWestern's asserted advantages, we find that DTG should be allowed to receive its service for the Plant and the Office from Dakota Energy as it has requested. We do not find, based upon the record in this proceeding, that the incumbent supplier's service offering is necessarily irrelevant under SDCL 49-34A-56, as it offers a comparison against which the competitor's service adequacy and the other factors can be measured. We do find, however, that the customer's preference deserves to be shown significant deference and that the deficiency of the selected utility's offering should be clearly demonstrated to override the customer's preference.

34. That is not the case here. No pronounced deficiency was shown to exist in Dakota Energy's proposed service. Dakota Energy demonstrated that it can provide adequate and reliable service, as NorthWestern's own witness admitted. Although NorthWestern's improvement costs were lower, the rates offered by both utilities were comparable. DTG Conf Ex 3. Both Dakota Energy and NorthWestern clearly have the capability to provide the required power to the DTG facilities. TR 32. The differentiating factor is the customer's preference, which in this case was grounded upon professional analysis of the utilities' offerings by a highly qualified construction management firm and the simple yet meaningful desire of DTG's members to receive their electric service from the cooperative utility and its transmission cooperative in which many of them also have an ownership interest. TR 20, 34-36.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL 49-34A-42, 49-34A-56, 49-34A-58 and 49-34A-59.

2. DTG will be a new customer of Dakota Energy.

3. There is insufficient evidence in the record to conclude that the proposed truck stop will be owned or otherwise sufficiently connected to DTG for it to be considered part of DTG's new customer facilities at this time. At such time as additional developments are in the actual implementation phase, DTG may request a ruling from the Commission as to its right to receive electric service from Dakota Energy under the principles set forth in *Hub City*.

4. DTG's Plant and Office and associated facilities are a new location which develops after March 21, 1975.

5. DTG's Plant and Office and associated facilities will have a contracted demand of at least 2000 kilowatts.

6. DTG's preference as the customer is to receive its electric service from Dakota Energy.

7. In considering the six factors set forth in SDCL 49-34A-56, the Commission concludes that it may consider evidence of NorthWestern's proposed service offering in evaluating Dakota

Energy's service for adequacy and the other five factors. The Commission further concludes, however, that the primary inquiry is into the preferred utility's service and its capabilities with respect to the six factors.

8. The Commission has considered the six factors set forth in SDCL 49-34A-56 and concludes that DTG has a need for highly reliable electric service of up to 5000 kilowatts or more, that Dakota Energy has an adequate and reliable power supply to provide such service, that being permitted to serve DTG will result in beneficial improvements to Dakota Energy's electric system and to its customers without burdening its existing customers, that Dakota Energy through its transmission cooperative East River has facilities in reasonable and technically and economically feasible proximity to DTG, that DTG's preference is to receive its electric service from Dakota Energy, that Dakota Energy has had prior experience in successfully serving large load customers and that Dakota Energy has access to financing resources to complete its proposed system improvements.

It is therefore

ORDERED, that Dakota Turkey Growers, LLC shall be permitted to receive its electric service for its turkey processing plant, its headquarters office building and the associated facilities and expansions thereto from Dakota Energy Cooperative, Inc.; and it is further

ORDERED, that the truck stop referenced in the proceeding and other developments not owned by DTG or part of the DTG plant and office facilities are not approved to receive electric service from Dakota Energy at this time.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Final Decision and Order was duly entered on the 23rd day of May, 2005. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 23rd day of May, 2005.

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: Melanie Kalbo

Date: 5/23/05

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

GARY HANSON, Chairman

ROBERT K. SAHR, Commissioner

DUSTIN M. JOHNSON, Commissioner