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MARGO D. NORTHRUP, Associate

March 17, 2005

Pamela Bonrud, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, South Dakota 57501

**RECEIVED**

MAR 17 2005

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Re: Docket EL04-032  
Our File Number 04-189

Dear Pam:

Enclosed herein please find original and ten copies of the POST-HEARING BRIEF OF PETITIONER DTG.

By copy of this letter, I am also serving Attorney Alan Dietrich with a copy of the Brief.

Sincerely yours,



Darla Pollman Rogers  
Attorney at Law

DPR/ph

Enclosures

CC: Alan D. Dietrich  
Kenneth D. Rutledge  
Robert Rademacher  
Jeffrey T. Sveen  
Dave Blair  
Jeff Nelson

RECEIVED

BEFORE THE PUBLIC UTILITIES COMMISSION

MAR 17 2005

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE PETITION  
FOR ELECTRICAL SERVICE BY DA-  
KOTA TURKEY GROWERS, LLC, TO  
HAVE DAKOTA ENERGY COOPERA-  
TIVE, INC., ASSIGNED AS ITS ELEC-  
TRIC PROVIDER IN THE SERVICE  
AREA OF NORTHWESTERN ENERGY

Docket No. EL04-032  
  
POST-HEARING BRIEF  
  
OF PETITIONER DTG

I. INTRODUCTION

The fundamental question presented in this proceeding is whether the South Dakota Public Utilities Commission ("Commission") should grant the Petition of Dakota Turkey Growers, LLC ("DTG"), a large load, new customer constructing its plant at a new location near Huron, South Dakota, to have Dakota Energy Cooperative ("Dakota Energy") provide electric service to its facilities. The statutory provision that allows a large load customer to receive electric service from an electric utility other than the utility having the assigned service area where the customer is located is SDCL 49-34A-56.

Consistent with the provisions of that statute, the Commission should grant DTG's Petition. DTG has clearly met all of the requirements of the statute, so grant of DTG's Petition is consistent with the purpose of SDCL 49-34A-56, which is to allow large load customers to choose their electric supplier.

DTG hereby submits this Post-Hearing Brief in support of its Petition to be served by Dakota Energy. Based on the prefiled documents, ruling on pre-hearing motion, and the evidence presented at the hearing in this case, DTG has demonstrated

that it satisfies all of the criteria set forth in SDCL 49-34A-56. The Commission should therefore grant DTG's Petition.

## II. PROCEDURAL BACKGROUND

This proceeding was commenced on October 18, 2004, when DTG filed a Petition requesting the Commission to assign Dakota Energy as the supplier of electrical service to its facility. The Petition was supported by an Affidavit of Joinder filed by Dakota Energy. DTG is constructing and will operate a turkey processing plant at a site located in the Northeast Quarter of Section 4, Township 110 North, Range Sixty-one West, in Beadle County, South Dakota, approximately one and one-half miles east of Huron, South Dakota, on the south side of Highway 14, more particularly described as follows:

Dakota Turkey Growers Outlots One (1) and Two (2), a part of the Northeast Quarter (NE  $\frac{1}{4}$ ) of Section Four (4), Township One Hundred Ten (110) North, Range Sixty-one (61) West of the Fifth P.M. (excepting a tract of land in the Northeast Quarter (NE  $\frac{1}{4}$ ) of Section 4, Township 110, Range 61, deeded to the City of Huron, a Municipal Corporation, described as follows: Beginning at a point on the North Right-of-Way Boundary of the Chicago and Northwestern Railroad 691 feet, S. 83 Degrees W from its Intersection with the East Boundary of Section 4, Thence S 83 Degrees W 210 feet, thence North 222.6 feet, thence East 208.44 feet, thence South 197.0 feet to the place of beginning), Beadle County, South Dakota.

The site is within the assigned service area of NorthWestern Energy ("NorthWestern"). DTG will require electrical service of substantially more than a contracted minimum demand of 2000 kilowatts and has entered into a contract for such electrical service with Dakota Energy (DTG CEx. 5).

NorthWestern intervened in the docket on November 3, 2004, and its Petition to Intervene was granted by the Commission on November 30, 2004. On January 12, 2005, NorthWestern filed a Motion for Summary Disposition, alleging DTG's Petition

should be dismissed because DTG was not constructing its facility on a new location. DTG filed a Memorandum of Law in Opposition to Motion for Summary Disposition on February 3, 2005. Staff filed a Response to NorthWestern's Motion on February 8, 2005. On February 9, 2005, the Commission heard oral arguments on the Motion. After consideration, the Commission unanimously voted to deny NorthWestern's Motion for Summary Disposition. (See Order Denying Motion for Summary Disposition, February 14, 2005, in Docket EL04-032.)

The Commission ordered a public hearing on DTG's Petition in Huron, South Dakota, on February 17, 2005. A one-day evidentiary hearing was held. DTG offered the testimony of Kenneth Rutledge, President and CEO of DTG (TR p. 17);<sup>1</sup> Barry Cranston, Assistant Director of the Greater Huron Development Corporation (TR p. 52); Corky Dillingham, Project Superintendent for The Stellar Group (TR p. 61); Robert Rademacher, General Manager and CEO of Dakota Energy (TR p. 70); John Dalager, professional engineer and President of Dalager Engineering (TR p. 93); James Edwards, Assistant General Manager of Operations for East River Electric (TR p.123); Randy Hoffman, Manager of Budget Services for East River Electric (TR p. 145); and David Blair, General Counsel for East River Electric (TR p. 277). NorthWestern offered testimony from six employees of NorthWestern, including Jeffrey Decker, former owner of the property DTG eventually purchased for the location of its plant. (TR p. 224). Staff offered the testimony of Michele Farris, Utilities Analyst. (TR p. 263).

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<sup>1</sup> DTG will cite to the transcript of the evidentiary hearing as "TR p. \_\_\_\_." Portions of the transcript that were confidential will be cited as "CTR p. \_\_\_\_." DTG's hearing exhibits will be cited as "DTG Ex. \_\_\_\_" or "DTG CEx. \_\_\_\_" for confidential exhibits. NorthWestern's exhibits will be cited as "NW Ex. \_\_\_\_."

Following the hearing, the Commission requested the parties to submit Post-Hearing Briefs to summarize the evidence and address the legal issues presented in this proceeding.

III. DTG SATISFIES ALL OF THE REQUIREMENTS OF  
SDCL 49-34A-56 AND IS THEREFORE ENTITLED TO BE SERVED  
BY DAKOTA ENERGY, ITS CHOSEN ELECTRIC SUPPLIER.

The basic policies of territorial laws for electric companies offering electrical service to customers within the state of South Dakota are found in SDCL §§49-34A-32 through 49-34A-59. These statutes gave the Commission the power to assign specific service areas to each utility, and the utility has the right to provide electric service within its assigned service areas.

The assigned service areas of utilities, however, are not absolute. There are several exceptions, one of which is found in SDCL 49-34A-56, which is the focal point of the current case:

**49-34A-45. Large new customers not required to take service from assigned utility—Notice and hearing by commission—Factors considered.** Notwithstanding the establishment of assigned service areas for electric utilities provided for in §§ 49-34A-43 and 49-34A-44, new customers at new locations which develop after March 21, 1975, located outside municipalities as the boundaries thereof existed on March 21, 1975, and who require electric service with a contracted minimum demand of two thousand kilowatts or more shall not be obligated to take electric service from the electric utility having the assigned service area where the customer is located if, after notice and hearing, the Public Utilities Commission so determines after consideration of the following factors:

- (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.

The Commission's interpretation of the requirements and application of this statute will determine the outcome of this case.

#### A. Burden of Proof

DTG recognizes that it has the burden of proof to establish that all of the factors of SDCL 49-34A-56 have been met. As will be reviewed herein, DTG has met that burden and is entitled to have its Petition granted on that basis.

Throughout the proceedings, NorthWestern argued that SDCL 49-34A-56 requires the Commission to engage in a balancing test. NorthWestern contended that each party should submit evidence on each of the six factors enumerated in SDCL 49-34A-56, and then the Commission is charged with the task of balancing those factors to determine who should supply the electrical service for the new, large load customer.<sup>2</sup>

DTG strongly disagrees with NorthWestern's interpretation of how the Commission should apply this statute. There is nothing within the statute itself that supports NorthWestern's interpretation of a "balancing test" between competing electric providers for a large load. What the statute says is that a large load customer "shall not be obligated to take electric service from the electric utility having the assigned service area where the customer is located if, after notice and hearing, the Public Utilities Commission so determines after consideration of the following factors" (SDCL 49-34A-56) (emphasis added). The clear meaning of the statute is that the Commission's duty is to

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<sup>2</sup> In its Memorandum of Law in Support of Motion for Summary Disposition, NorthWestern argued in its explanation of the application of SDCL 49-34A-56 that a large load customer "may petition the Commission, following notice and a hearing [and] the Commission will then determine the appropriate electric utility supplier, based upon six factors set forth in the statute." Memo at 13 (emphasis added).

determine if the petitioning party meets criteria 1-6, not to consider whether two providers meet the criteria and then balance the two. That completely undermines the intent of the statute.

From the evidence presented by DTG at the hearing (and all the documents in the record), the Commission considers the following:

- (1) The electric 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 Dakota Energy, including economic factors relating thereto;
- (4) The proximity of adequate facilities from which electric service may be delivered;
- (5) The preference of DTG; and
- (6) Other pertinent factors affecting the ability of Dakota Energy to furnish adequate electric service to fulfill DTG's requirements.

After consideration of these factors, the Commission must determine "the ability of the utility to furnish adequate electric service to fulfill customers' requirements" (emphasis added). It is significant that the statute refers to "the utility," rather than "the utilities." This clearly shows that the statute requires the Commission to determine the ability of Dakota Energy to service the electric needs of DTG. It does not require a balancing of the abilities of two utility companies.

DTG's interpretation of the statute is supported by the case of In the Matter of the Petition for Declaratory Ruling of Northwestern Public Service Company with Regard to Electric Service to Hub City, 560 NW2d 925 (SD 1997) ("Hub City" case). That case involved the Commission's authority to replace an electric supplier that was previously selected by a large load customer pursuant to SDCL 49-34A-56. In 1977, Hub

City's predecessor elected to seek authorization from the Commission pursuant to SDCL 49-34A-56 to receive electric service from Northern Electric Cooperative ("NEC") rather than Northwestern, the utility within whose assigned service area it was located. After hearing, in which Northwestern intervened in opposition, the Commission assigned NEC as Hub City predecessor's electric supplier. Approximately 14 years later, Hub City requested the Commission to terminate that assignment and allow it to receive electric service from Northwestern. The Commission granted the request of Hub City and Northwestern based upon the fact that, under SDCL 49-34A-56, Hub City had a "retained right" to be assigned to the service area of Northwestern, and upon the Commission's determination of "changed circumstances." Hub City at 928.

The South Dakota Supreme Court disagreed with that interpretation of the statute:

The "retained right" alluded to by the PUC and NWPS is illusive when reading SDCL 49-34A-56. There is no express language establishing such a right in the customer. Hub City at 929.

Further, the Supreme Court agreed with the Circuit Court that "changed circumstances" were not sufficient grounds for allowing Hub City to later choose Northwestern as its electric supplier:

[T]he circuit court read . . . [SDCL 49-34A-56] to grant NEC an exclusive right to serve the Hub City site, which right could only be disturbed upon determination by the PUC that NEC could no longer provide adequate service. Hub City at 928.

The Court went on to find that "since it was uncontested that NEC could provide adequate service," NEC was entitled to continue to provide electric service to Hub City. Id. at 928.



This case clearly supports DTG's interpretation of the duties of the Commission under SDCL 49-34A-56. The Commission must consider the factors for the purpose of determining Dakota Energy's ability to furnish adequate electrical service to meet DTG's needs. As was demonstrated at the hearing, Dakota Energy's ability to do so was uncontested. The Commission is not required to engage in a balancing test, but must make its determination based upon the clear language of the statute, as supported by case law.

Staff agrees with DTG's interpretation of the application of SDCL 49-34A-56. When asked if NorthWestern could also meet the five factors enumerated in the statute (excluding customer preference), Ms. Ferris responded as follows:

First, I would like to point out that my understanding of the statute did not involve weighing and balancing of the two systems. So I spent my time reviewing Dakota Energy's capabilities in order to provide adequate service. (TR pp. 269-270).

Ms. Ferris's interpretation of the focus of the Commission in the current proceeding is consistent with the Hub City ruling. If the Commission substitutes its judgment of the "appropriate" electric utility supplier, it renders the stated preference of the customer meaningless, which is contrary to the stated purpose of the statute:

The plain language of the statute (SDCL 49-34A-56) indicates the legislature intended it to . . . provide a new large load customer at a new location an option to be exercised prior to receipt of service. Hub City at 928.

That is exactly what DTG did. DTG is not an electric customer of either company. (TR p. 19). DTG sought a "bid package" from both Dakota Energy and NorthWestern, and had the bids analyzed by an electrical engineer at Stellar Group. (TR pp. 28, 30). DTG,

after negotiations and follow-up negotiations, selected Dakota Energy (TR p. 32) and entered into an electric service agreement with Dakota Energy. (TR p. 33).

Q. (By Vice Chairman Sahr): I think the statute clearly contemplates the customer's preference in negotiating a good deal. Do you feel like that you were able to go out there and find the deal that made the most sense for DTG?

A. (By Mr. Rutledge): Yes, I do. (TR p. 42).

Clearly, application of SDCL 49-34A-56 in accordance with the express language of the statute is consistent with the case law interpreting the customer preference afforded to large load customers.

Additionally, by adopting the balancing approach urged by NorthWestern, the Commission would be effectively undermining the decision and careful consideration by a CEO of a large load South Dakota business. At least in the mind of many South Dakota business people, this statute allows the large load customer to negotiate its prices. As Kenneth Rutledge said, "I think it's a marvelous thing for the State of South Dakota to be able to do that" (negotiate electrical prices). (TR p. 27). By adopting the balancing approach, the Commission would be essentially second guessing the previous decision of a CEO. This is not the Commission's duty under the statute. It is their duty to determine if the electrical supplier chosen can meet the requirements under the statute.

#### B. "New Location" Criteria

SDCL 49-34A-56 provides that in order for a customer to take service from a utility other than the utility having the assigned service area where the customer is located, the customer must be a new customer at a new location which develops after March 21, 1975, with a contracted minimum demand of two thousand kilowatts or more.

It appears to be uncontested that DTG is a new customer. The evidence revealed that DTG was a new LLC formed in August of 2003. (TR p. 18).

A. (By Mr. Rutledge) It is made up of 43 “grower owners” who banded together to undertake to build a processing facility and begin to market their own product because they were being paid extraordinarily low prices for the live turkeys that they were marketing with other companies. That’s why Dakota Turkey Growers was formed, to value add the live product for the growers coming through the facility.

Q. (By Ms. Rogers) Is DTG a new customer in this area of South Dakota?

A. Yes.

Q. Has DTG ever been an electric customer of NorthWestern?

A. No.

Q. Of Dakota Energy?

A. No.

Q. And I believe you mentioned that it is being constructed from the ground up?

A. Correct. (TR p. 19-20).

The evidence clearly and uncontrovertibly establishes that DTG is a new customer.

Another criteria for application of SDCL 49-34A-56 is that DTG must be a new customer at a new location which develop(s) after March 21, 1975. NorthWestern first challenged the new location issue in a pre-hearing Motion, which was denied, but continued to question the location issue throughout the hearing. In addition to relying on its previously articulated legal arguments as set forth in its Memorandum of Law in Opposition to Motion for Summary Judgment, which is incorporated herein by this reference, DTG would also reaffirm that the evidence at the hearing clearly supports DTG’s interpretation of “new location” within the context of SDCL 49-34A-56.

Kenneth Rutledge testified concerning DTG's acquisition of the land upon

which the facility is located:

A. . . . And the Greater Huron Development had identified another site for us, approximately 110-acre site, which is the present site that we're located on.

Q. How was the property acquired by DTG?

A. I believe Jeff and Teresa Decker sold the property to the City of Huron. The City of Huron then transferred or sold the property to Greater Huron Development Corp., and Greater Huron Development Corp. then passed or sold the property to DTG . . .

Q. And this deed which is a certified copy shows that it has been recorded so record title is in DTG?

A. Correct . . .

Q. DTG has not previously owned this property, is that correct?

A. That's correct.

Q. So is this a new location for DTG?

A. Yes. (TR pp. 21-22).

The evidence further revealed that at the time the property was purchased by the City, which was in August of 2004, it was outside of the city limits of the City of Huron, but has since been annexed by the City. (TR p. 46).

The evidence revealed that the property ultimately acquired by DTG for its new plant was previously owned by Jeffrey and Teresa Decker of Huron, South Dakota. Mr. Decker testified that he purchased the property in 1992 because he "thought it would be great to be able to raise (his kids) on a farm." (TR p. 233). He actually purchased the land as two separate parcels, which he established by replatting the land to carve out a ten-acre portion, formerly Decker Outlot 1, for purposes of a house. The ten

acres, which contained the house, all of the buildings, and the well, were financed by one entity, and the balance of the property was purchased on a contract for deed from the previous owners. (TR pp. 234-235). The bulk of the land was used as cropland and to run cow/calf pairs. (TR p. 235). While residents of the property, Deckers had electrical service to their house from NorthWestern, as the property is located within NorthWestern's assigned service area.

The Deckers ultimately abandoned their farm completely, and they did so voluntarily.

- A. (By Mr. Decker) . . . Barry . . . called looking for some information on the landowners next to me and I thought about that and I said, you know, I at least want to throw my hat in the ring and at least have an opportunity here to be in that because if this large plant is going to be right next to me, maybe I want it to be on my land, maybe I want to sell. (TR pp. 235-236).

The evidence shows that what transpired next is typical to new location development for any industrial site. DTG wanted one piece of property, cleared of all structures. Mr. Decker testified that he originally thought about keeping Decker Outlot 1 and retaining his house there, but DTG "wanted a half-mile of highway frontage and that it had to go with the whole thing." (TR p. 237). Mr. Decker then again replatted the property to conform with the needs of the new owner (TR p. 24) and sold it to the City of Huron, then he abandoned the property. The only electrical service to the property was to the ten-acre farm site (TR p. 241) and that service was disconnected when Mr. Decker moved his house.

- Q. (By Ms. Rogers) You would have to disconnect your electric service before you could move your house, wouldn't you?
- A. (By Mr. Decker) Right . . .

Q. And was the well metered as part of your electric service?

A. It was.

Q. So when you disconnected the service to the house there was no electric service provided to your location in that ten acres; is that correct?

A. For that amount of time, yes.

Q. There was no electric service there after you disconnected; is that correct?

A. Right. (TR p. 243).

In fact, there was evidence presented that the service was disconnected for approximately one week.

Q. (By Ms. Rogers) Now after you moved to the site what did you do about water supply to your construction site?

A. (By Corky Dillingham) We had a couple of choices, and we decided to hook up to the Decker well. They volunteered to let us do that since they were leaving.

Q. And so specifically what did you do?

A. We ran a water line from our trailer to the Decker well . . .

Q. Then did there come a time when there was no water to your construction site?

A. Well, when they moved the Decker house and took the power away we had to have a temporary pole set.

Q. Was there a time prior to the temporary being set up that there was no electric service to the well?

A. Yes.

Q. For approximately how long?

A. Maybe a week . . .

Q. So there was no electricity whatsoever then, other than your temporary power, provided where the Decker farm site was?

A. That's correct.

Q. And then what did you do?

A. And then we contacted – we installed the temporary pole and contacted NorthWestern to install a meter at that temporary pole so we could have power to the well.

Q. And did you order that . . . on behalf of Stellar Group?

A. Yes.

Q. And Stellar Group is paying for that power?

A. Yes.

Q. So if I understand correctly, the only electric service out there now was, number one, your original temporary line to the trailer?

A. Right.

Q. Then subsequently you had to request NorthWestern to come in and re-connect the electricity to the well which had been disconnected when the Deckers moved?

A. That's correct . . .

Q. And these are all for the purposes of construction?

A. Yes.

Q. And is it your understanding they are temporary services and will be removed when you leave the site?

A. Yes. (TR pp. 65-67).

Regardless of the duration of the disconnected services, the evidence clearly supports establishment of a new owner at a new location. The old service was disconnected and a temporary pole was installed by Muth Electric. NorthWestern installed a new meter and provided temporary electrical service for the construction company, which will be discontinued upon completion of construction. DTG then exercised its option to choose Da-

kota Energy as its supplier, who will provide electrical services to the large load facility located on DTG's property.

The focus of the current case is solely upon what constitutes a "new location" for a new large load customer under SDCL 49-34A-56. Within that framework, of what significance, if any, is Jeffrey Decker's former occupancy and use of the property ultimately acquired by DTG? In light of the guidance of statutory construction gleaned from case law, the precedent of other case law that interprets SDCL 49-34A-56, and the evidence as it unfolded at the hearing, the answer is Jeffrey Decker's prior occupancy and use of the land in the current case does not have any significance on the Commission's finding that the site is a new location for DTG for purposes of SDCL 49-34A-56.

DTG will not reiterate the arguments set forth previously in its pretrial Memorandum, but would emphasize that two of the South Dakota cases dealing with an interpretation of "new location" under SDCL 49-34A-56 both support DTG's reading of the statute. In the Hub City case, Northwestern was serving a manufacturing plant in its service area, and a division of that owner built an addition onto the plant that constituted a foundry. The foundry owner claimed to be a new customer at a new location (an addition to the manufacturing plant) and a large load customer, and opted to be served by Northern Electric Company rather than Northwestern. The Commission agreed that the foundry owner was a new customer at a new location, even though Northwestern was currently serving the manufacturing plant in the same area, and granted the foundry owner's request to be served by Northern Electric Company. Some years later, another issue arose that resulted in a proceeding that found its way to the South Dakota Supreme Court. Neither the lower court nor the Supreme Court, however, disturbed this Commis-



sion's earlier finding that the foundry was a new customer at a new location under SDCL 49-34A-56.

The case of Matter of Clay Union Electric Corporation, 300 NW 2d 58 (SD 1980), also affirms DTG's interpretation of location. A new customer purchased a farm site, removed the farmhouse, and constructed an aluminum plant. The Commission made a finding that the Alumax plant site constituted the same location as the farmhouse, but that finding was rejected as clearly erroneous on appeal. According to the South Dakota Supreme Court, the aluminum plant was a new structure and a new location (or hookup) under agreements that were similar to SDCL 49-34A-56.

While the number of South Dakota cases interpreting SDCL 49-34A-56 is limited, guidance can be derived from states with similar territorial statutes. Particularly on point is the case of Rural Electric Convenience Company vs. Illinois Commerce Commission, 371 NE2d 1143 (IL 1977). In response to Rural Electric's claim that it had the right to continue to serve a large load coal mine because it was furnishing electric service to the farmer who previously occupied the site, the Illinois Supreme Court noted:

Even if Rural Electric was in fact furnishing rural and domestic power to the section, we do not conclude that farm buildings served by low voltage distribution lines and a coal mine requiring a 34.5 kw line can be equated as the same customer at the same location . . . Id. at 1145.

NorthWestern would have the Commission believe that the case of Electric Association, Inc. for a Declaratory Ruling Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., 675 NW 2d 222 (SD 2004) dictates a change in the well-established interpretation of "new location" under SDCL 49-34A-56, but that is an inappropriate conclusion.

An important legal distinction in West River is that it was not interpreting SDCL 49-34A-56, which is the statute involved in this case. Rather, West River centered its discussion upon SDCL 49-34A-42 and interpreted that statute. Of course, SDCL 49-24A-56 is an exception to SDCL 49-34A-42. While the intent of the latter is to preserve the electrical service territories as assigned, the intent of SDCL 49-34A-56 is to allow new large load customers an option to choose their provider.

There are also important factual distinctions in this case. First of all, there are no lines currently in place to serve the DTG plant. In West River, the Court determined who had the right to provide increased electric service for an expansion of the city's waste water treatment plant. (Emphasis added). DTG is not expanding or building onto an existing site; DTG is building an entirely different site in a new location. Any electrical provider would have to build new electrical systems to service the DTG plant. Thus, there will not be duplication or waste of services. NorthWestern has not built lines contemplating upgrades for this location, nor are the existing lines capable of serving the plant. NorthWestern would have to build new lines to serve the new location.

NorthWestern's argument that it would have stranding of existing investments if not allowed to serve DTG must likewise fail, because its services were disconnected: it had no further permanent customer at that location, and no investment. The evidence at hearing demonstrated that service to a large load customer such as DTG would require NorthWestern to make significant upgrades to its current system, at a cost of approximately \$980,000.00. (TR p. 187). Mr. Sydow also admitted that no investment had been made specifically to serve the Decker farmstead:

Q. (By Commissioner Johnson) Do you have any estimate of what the investment is to serve – was to serve the Decker farmstead, that area?

- A. (By Mr. Sydow) The three-phase power line that goes by the Decker farmstead is part of a looped line so that facility wasn't particularly constructed to serve the Decker farmstead. It was the source to be able to install a transformer, cut out an arrester in service, but the line as built and utilized serves many, many more customers than the one. (TR pp. 187-188).

This is not a case of stranded investment for NorthWestern, and NorthWestern's argument of "stranded investment" as support for its interpretation of new location under SDCL 49-34A-56 must fail under the facts of the current case.

The question answered in West River was whether the word "location" was a geographically based concept, rather than a level of service concept. Id., at p. 266. Our Court went no further than that issue, inasmuch as the Appellant had based its principal argument upon the level of service question. There is nothing in West River which would indicate that either party discussed SDCL 49-34A-56.

Also, in West River the property had not been platted nor subdivided; however, in the present case a replat was filed establishing new outlots upon the property. Further, in West River, the entire location and the purposes for which it was intended to be used were served by the existing electrical provider, so there was neither a new location nor a new customer; however, that situation does exist in the present case.

SDCL 49-34-56 was obviously intended to promote new large load businesses at new locations. This new business would provide benefits for the State in the area where it commenced operation; just as will DTG now that it has selected this new location in part because of the electrical rates offered. Of necessity, every location is within an assigned service area. SDCL 49-34A-44. Accordingly, to give meaning to SDCL 49-

34A-56, one must acknowledge that it applies to a situation such as that presented herein. What purpose would that statute serve if not to authorize a request as is currently pending?

NorthWestern's suggested interpretation of SDCL 49-34A-56 would block a new large load customer from effectively soliciting competitive pricing for electrical service. This would hamper economic growth and obviously would be inconsistent with the legislature's intent reflected in its passage of SDCL 49-34A-56.

DTG would further point out that the facts at the hearing support a finding that this is a new location under SDCL 49-34A-56. In its pre-trial Motions and Affidavits, NorthWestern relied on the fact that it had served Decker or his predecessors continuously since prior to March 21, 1975, and that NorthWestern "continues to provide electric service to the location at this time . . . and continuing to serve a well on such location." Affidavit of Jay Morris. The evidence did not support these factual allegations made by NorthWestern prior to the hearing. The electric service to the Decker farm site was disconnected (TR p. 243):

Q. (By Vice Chairman Sahr) With the parcel where the Deckers lived now they vacated that parcel and service was disconnected; is that correct?

A. (By Mr. Sydow) That's correct.

Q. Do you know what is involved with disconnecting service in that type of situation?

A. Where a customer calls in and says we need you to disconnect it and we will literally send people out who will pull a meter and physically disconnect services. (TR pp. 184-185).

After a lapse of time, the service was reconnected on a temporary basis, at the request of Stellar Group, with a new meter installed. (TR pp. 65-67). This sequence of events clearly further supports the fact that the property acquired by DTG was cleared of all

electric service by NorthWestern. NorthWestern has no rights to continue to serve this site, in light of DTG's subsequent acquisition of the property and choosing of Dakota Energy as its electric supplier.

Neither the case law nor the evidence in the records supports NorthWestern's contention that DTG's facility is not on a new location. On the contrary, the evidence and clear case precedent lead to the inescapable conclusion that DTG has met the criteria of establishing its new large load at a new location. The language of the statute has been met:

The plain language of the statute (SDCL 49-34A-56) indicates the legislature intended it to . . . provide a new large load customer at a new location an option to be exercised prior to receipt of service. Hub City at 929.

Any other interpretation of new location, under the facts as presented in this case, would thwart the intent of the Statute (SDCL 49-34A-56) and the intent of the legislature by its passage.

#### IV. DTG HAS MET ITS BURDEN OF PROOF UNDER THE FACTORS OF SDCL 49-34A-56.

##### A. The Electric Service Requirement of the Load to be Served.

DTG's electrical load clearly exceeds the contracted minimum demand of two thousand kilowatts or more pursuant to SDCL 49-34A-56. (TR p. 95). Kenneth Rutledge testified the load would be between 4,000 and 5,000 kilowatts. (TR p. 26). Staff Analyst Michele Farris also testified she understood that the load would exceed the contracted minimum demand of two thousand kilowatts or more, and that she believes Dakota Energy would be able to provide the electric service requirements of the load to be served. (TR p. 266).

B. The availability of an adequate power supply.

James Edwards from East River Electric explained that East River was Dakota Energy's power supplier. East River's power source for this project will be Basin Electric. (TR p. 124; DTG Ex. 18). He testified this power supply would be adequate and reliable for DTG's facility. (TR p. 125). Additionally, this contention was not disputed by NorthWestern.

Kenneth Rutledge submitted the proposals of NorthWestern and Dakota Energy to DTG's consultants at the Stellar Group. Based on the information received from Stellar Group, he absolutely believes Dakota Energy has adequate power supply to serve the needs of DTG. (TR p. 35). Robert Rademacher of Dakota Energy testified he believed Dakota Energy could "beyond a doubt" serve DTG. (TR p. 81). Staff Analyst Michele Farris also believes Dakota Energy has an adequate power supply through its providers, East River and Basin. (TR p. 266).

C. The Development or Improvement of the Electric System of the Utility Seeking to Provide the Electric Service, Including the Economic Factors Relating Thereto.

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 p. 104). The design includes an upgrade to both the distribution system and the transmission system. (TR p. 82).

The distribution system is a standard loop feed with two separate lines coming into the facility. DTG Ex. 17. This provides redundancy to assure continuous power source. (TR p. 101). There will be five transformers, one of which would be a spare transformer stored at Dakota Energy's headquarters. (TR p. 100). The headquar-

ters or office building of DTG will be fed from the two lines coming into the facility. Both would be metered at the substation. (TR p. 101). John Dalager testified this design system would provide a reliable energy source for DTG. (TR p. 107).

Dakota Energy testified to the economic factors involved in developing the improvements of its electric system. The improvement costs were given in Confidential DTG Ex. 19. (TR pp. 110-111). This cost would not be an economic detriment to Dakota Energy's customers and in fact would be beneficial in the long run for the members of Dakota Energy. (TR pp. 82-83; TR pp. 90-91).

East River has also committed to upgrade its facilities. (CTR p. 111). East River currently has line about 3 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 3 miles to a substation located adjacent to the DTG plant. This will provide an on-site substation right adjacent to the plant. The substation will have remote monitoring control system or SCADA to monitor the power quality, loading and other data. (TR pp. 127-129; DTG Ex. 13).

East River will also provide an alternate feed that will come from the Morningside substation. With improvement the Morningside substation will be used for backup or emergency situations. The costs to East River were given in DTG CEx. 19.

D. The Proximity of Adequate Facilities from which Electric Service of the Type Required may be Delivered.

The facilities of Dakota Energy are located in close proximity to Dakota Energy. In fact, the corporate headquarters are located directly across from the DTG plant. (TR pp. 72-73). DTG also has lines currently located on the property and will

have a substation across the road from the facility. (TR p. 98). East River has a line three to three and one-half miles from DTG. There will also be a substation directly adjacent to the plant utility. Additionally, Staff Analyst, Michele Farris also testified DTG had adequate facilities available within close proximity to serve DTG. (TR p. 266).

E. The Preference of the Customer.

The evidence shows that DTG's preference for an electrical provider is Dakota Energy. DTG entertained proposals from both DTG and NorthWestern. DTG was looking for the best possible deal when choosing its electrical provider. (TR p. 34). DTG's decision was influenced by the rate differential and the members' feelings toward Dakota Energy. (TR p. 34). Additionally, Kenneth Rutlege, the CEO of DTG, testified that it was DTG's preference for Dakota Energy to be the electrical supplier at its new location. (TR p. 36). Based on this preference, DTG entered into a Service Contract with Dakota Energy. (DTG CEx. 5).

F. Any and all Pertinent Factors Affecting the Ability of the Utility to Furnish Adequate Electric Service to Fulfill Customer's Requirements.

Dakota Energy has previously served large load customers including Heartland Grain Fuels, the Wheat Growers, the Stephan School and previously a beef processing plant. (TR pp. 71-72). Dakota Energy has never experienced any problems or difficulties serving those loads. (TR p. 72).

Staff Analyst, Michele Farris, looked at other factors involved that may affect the ability of Dakota Energy to furnish adequate electric service to DTG. She believes Dakota Energy has the capabilities to provide personnel to respond to any emergency situation. This was supported by the testimony of John Dalager. (TR pp. 105,



107). If the issue is transmission related, Dakota Energy has the resources of East River to fix the problem. This was supported by the testimony of James Edwards. (TR p. 130). Dakota Energy also has spare parts available if needed. (TR p. 267). DTG met all of the requirements of SDCL 49-34A-56, and that evidence (a) was not disputed by NorthWestern and (b) was supported by Staff. Thus, DTG's Petition should be granted.

#### V. AREA TO BE SERVED

One final issue to be addressed by the Commission is whether to grant DTG's request that Dakota Energy be its electrical service provider for the entire area acquired by DTG. This Commission should grant DTG's request to serve the entire parcel because the entire parcel of ground involved should be considered as a new location under SDCL 49-34A-56. While the ten-acre Decker farm site located within the parcel had previously been served by NorthWestern, the latter never provided service to the vast majority of the parcel. Furthermore, after the sale of the parcel, NorthWestern discontinued service to the Decker farm site, save and except a temporary pole set. (TR pp. 65-67) This temporary service would certainly not prevent the former Decker farm site from being considered a "new location," just as is the rest of the parcel, inasmuch as permanent service to the farm site by NorthWestern had been terminated. See, e.g., LaGrange v. Georgia Power Co., 363 SE2d 286, 288 (GA Ct. of Appeals 1987).

In Hub City, this Commission had originally carved out an addition to the current building located on a portion of the property, as a new location under SDCL 49-34A-56. Certainly that action, which was undisturbed, would be supportive of such a decision in this case. However, unlike the situation presented herein, in Hub City the remainder of the property was still being permanently served by NorthWestern, the existing

utility. In our case, NorthWestern has ceased permanent service to even the small ten-acre parcel it had previously served. Accordingly, this situation presents an even clearer example of what our legislature intended to respond to when it adopted SDCL 49-34A-56.

Another reason the Commission should grant DTG's Petition as submitted is that such a ruling is consistent with the intent of SDCL 49-34A-56. DTG clearly articulated its choice that Dakota Energy serve its entire site:

Q. (By Ms. Rogers) Now DTG has purchased approximately I think you said 118 acres. What area are you asking that the Commission grant Dakota Energy to serve?

A. (By Mr. Rutledge) Well, I would prefer that we have a single supplier to the entire piece of ground. (TR p. 36).

The Electric Service Agreement into which DTG entered with Dakota Energy contemplated one supplier to the entire site. (DTG CEx. 5). Staff's recommendation is "that the Commission grant DTG's Petition as filed that Dakota Energy provide service to the facility," (TR p. 267), which is defined in the Electric Service Agreement to include the processing plant, office, truck depot and related facilities on the entire site. (DTG CEx. 5). It is also significant to note that DTG made its choice knowing that the decision was irrevocable. See DTG CEx. 5, ¶7(a); TR p. 277 (Testimony of David Blair).

DTG's choice of Dakota Energy to serve its entire site is supported by the Hub City case. In that case, the Supreme Court reversed the Commission's ruling that Hub City could change its electric supplier from NEC to Northwestern. In doing so, the Supreme Court noted:

[T]he circuit court read . . . [SDCL 49-34A-56] to grant NEC an exclusive right to serve the Hub City site, which right could only be disturbed upon determination by the PUC that NEC could no longer provide adequate service. Hub City at 928.

The Court went on to find that “since it was uncontested that NEC could provide adequate service,” NEC was entitled to continue to provide electric service to Hub City. Id. at 928.

That same reasoning is applicable in the current case. Before this Commission could determine the ten-acre parcel should be treated differently from the remainder of the property, NorthWestern would have to show that Dakota Energy would be unable to effectively serve that parcel of ground. Of course, it cannot, nor has it even attempted to, sustain that burden. See Hub City.

Alternatively, should this Commission decide to grant DTG’s Petition as to the processing plant and office that are currently part of the planned construction, DTG has concurred that while not its first choice, such an option would be workable:

Q. (By Vice Chairman Sahr) If we got into a situation of possibly breaking the service in this area between the two, obviously probably your first inclination is to keep it all served by one utility. If we did look at going with the office and the building to one particular provider and then looked at the proposed truck stop perhaps because of an existing meter there going to another provider, is that – although that may not be your provider, something that would be an acceptable second alternative to DTG?

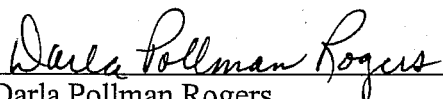
A. (By Kenneth Rutledge) It would certainly be workable. (TR p. 44).

Accordingly, DTG would request the Commission to assign Dakota Energy as the electric service provider to its entire site. At a minimum, if the Commission is inclined to exclude any portion of the site, it should carve out no more than the ten-acre old Decker farm site from its grant of this Petition.

## VI. CONCLUSION

DTG requests that its Petition for Electrical Service by Dakota Energy Cooperative, Inc. be granted. DTG has clearly met all of the requirements of SDCL 49-34A-56. NorthWestern has misconstrued the plain meaning of SDCL 49-34A-56 by a strained and unreasonable definition of "location" tied to SDCL 49-34A-42. The plain language of SDCL 49-34A-56 supports the assertion that DTG is a new large load customer at a new location pursuant to the statute. DTG requests that its petition be granted as to the entire tract of land.

Respectfully submitted this seventeenth day of March, 2005.


  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **POST-HEARING BRIEF OF PETITIONER DTG** was served via the method(s) indicated below, on the seventeenth day of December, addressed to:

Karen Cremer, Staff Attorney	( )	First Class Mail
South Dakota Public Utilities Commission	( X )	Hand Delivery
500 East Capitol Avenue	( )	Facsimile
Pierre, South Dakota 57501	( )	Overnight Delivery
	( )	E-Mail
Sara Harens, Staff Attorney	( )	First Class Mail
South Dakota Public Utilities Commission	( X )	Hand Delivery
500 East Capitol Avenue	( )	Facsimile
Pierre, South Dakota 57501	( )	Overnight Delivery
	( )	E-Mail
Michele Farris, Utilities Analyst	( )	First Class Mail
South Dakota Public Utilities Commission	( X )	Hand Delivery
500 East Capitol Avenue	( )	Facsimile
Pierre, South Dakota 57501	( )	Overnight Delivery
	( )	E-Mail
Alan D. Dietrich	( X )	First Class Mail
Northwestern Corp.	( )	Hand Delivery
125 South Dakota Ave., #1100	( )	Facsimile
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Dated this seventeenth day of March, 2005.

  
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