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March 29, 2005

Ms. Pamela Bonrud, Executive Director
South Dakota Public Utilities Commission
State Capitol
500 E. Capitol
Pierre, SD 57501

Re: Commission Docket EL04-032

Dear Ms. Bonrud:

Enclosed please find an original and 10 copies of the Post-Hearing Brief of NorthWestern Corporation, doing business as NorthWestern Energy in this matter. A copy of this brief has been sent by email today and is being mailed by first class mail to the service list in this matter.

Sincerely yours,

Alan D. Dietrich
Vice President – Legal Administration &
Corporate Secretary

STATE OF SOUTH DAKOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION

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** **POST-HEARING BRIEF OF NORTHWESTERN CORPORATION, DOING BUSINESS AS NORTHWESTERN ENERGY**

STATEMENT OF THE CASE

Dakota Turkey Growers, LLC ("DTG"), on October 18, 2004, filed a Petition for electric service (the "Petition") with the South Dakota Public Utilities Commission (the "Commission") requesting that the Commission assign Dakota Energy Cooperative, Inc. ("DEC") as the supplier of electrical service to a "turkey processing plant, office, truck depot, and related facilities" to be constructed east of Huron, South Dakota, and in the assigned service area of NorthWestern Corporation, doing business as NorthWestern Energy ("NorthWestern"). References to the DTG Petition in this brief shall be by paragraph number as (DTG Petition ___). At the same time, DEC filed an Affidavit of Joinder to join in DTG's Petition, stating DEC was "ready, willing, and able" to serve DTG and urging the Commission to grant the Petition. NorthWestern filed a Petition to Intervene and Objection (the "Intervention Petition") on November 3, 2005, within the Commission's time period for intervention. In its Intervention Petition, NorthWestern stated that the proposed DTG plant was within NorthWestern's exclusive assigned service territory; NorthWestern had continuously served the site for many years including service prior to March 21, 1975; NorthWestern had been serving the site with temporary service for the DTG plant's construction and serving electrical equipment on the site; NorthWestern was willing to furnish

adequate and reliable electric service to the plant with minimal construction of facilities; NorthWestern has a combustion turbine generating plant of 65 MW capacity within one-half mile of the plant site for additional reliability; and NorthWestern could furnish electrical service to the plant under favorable rates. In addition, NorthWestern stated that it did not believe that the proposed DTG plant would be located at a new location because NorthWestern had served the geographical area for many years and was continuing to serve such area. By its Order Granting Intervention, dated December 10, 2004, the Commission granted NorthWestern's Intervention Petition.

NorthWestern filed a Motion for Summary Disposition (the "NorthWestern Motion") on January 12, 2005, pursuant to SDCL 1-26-18 and Commission Rule 20:10:01:02.04, alleging that DTG did not meet the qualifying requirements of SDCL 49-34A-56 for a hearing on whether it should be allowed to take electric service from an electric utility other than the electric utility having the assigned service area for the location because the proposed site for the plant and related facilities was not a "new location" as required by the statute. NorthWestern included the affidavits of Jay I. Morris and Jeffrey J. Decker, as well as a Memorandum of Law as part of and in support of the NorthWestern Motion.

On January 13, 2005, the Commission issued its Order for and Notice of Hearing, setting February 17, 2005, as the date for the hearing on DTG's Petition, with the hearing to be held in Huron, South Dakota.

On February 3, 2005, DTG filed a Memorandum of Law in Opposition to the NorthWestern Motion, and on February 8, 2005, the Commission Staff's Response to Motion for Summary Disposition was filed. Oral arguments were presented to the Commission at a hearing held on February 9, 2005, at the conclusion of which the Commission orally voted to deny the

NorthWestern Motion, with the understanding that the issue could be raised at the hearing on the Petition on February 17, 2005. On February 14, 2005, the Commission entered its Order Denying Motion for Summary Disposition.

On February 17, 2005, a hearing was held (the "Hearing"), and, at the conclusion of the evidence, the Commission advised the parties that a briefing schedule would be established. References to the transcript of the Hearing in this brief shall be by page number as (TR ___), and references to exhibits filed at the Hearing shall be by reference to the offering party and by number as (DTG Exh ___ and NW Exh ___), respectively. Pursuant to that schedule, DTG's brief was served upon the other parties on March 17, 2005. References to DTG's brief in this brief will be by page number as (DTG Brief ____). This brief is submitted by NorthWestern, pursuant to ARSD 20:10:01:25.

ABSTRACT OF THE EVIDENCE

NorthWestern is including specific references and quotes from the evidence presented at the Hearing, as well as in Affidavits filed to accompany other pleadings in this case, in the Arguments section of this brief below.

ARGUMENTS

I. DTG's Site is Not a New Location

A. DTG Petition and Agreement with DEC Seek Service to the Entire Site

In its Petition, DTG requested the Commission to authorize it to receive electrical service from DEC for its Facility, consisting of "a turkey processing plant, office, truck depot and related facilities" (DTG Petition I). DTG acquired the following described land east of Huron, South Dakota (hereinafter referred to at the Site):

> Dakota Turkey Growers Outlots One (1) and Two (2), a part of the Northeast Quarter (NE¼ of Section Four (S4), Township One Hundred Ten North (T110N), Range Sixty-One (R61) West of the 5th P.M., (excepting a tract of

> land in the NE¼ 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 North Western 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 N 222.6 feet, thence E 208.44 feet, thence S 197.0 feet to the place of beginning), Beadle County, South Dakota.

At the Hearing, DTG President and Chief Executive Officer Kenneth Rutledge repeatedly maintained that it was DTG's position that the Petition was intended to apply to the entire tract of land acquired, i.e. the Site (TR 36, 38-39, 48-49, 50-51). While Mr. Rutledge, at the suggestion of Commission Vice Chairman Sahr, indicated that "carving out" the northeast corner (which is the proposed location of the truck stop) from the area to be served by DEC would be "workable" (TR 44), DTG has continued to assert that the Petition is seeking service to the entire Site (TR 48-49, 154-155; DTG Brief 9-20, 25-26). Although, in its brief, DTG attempts to hedge this argument by alternatively arguing that "at a minimum" the Commission should grant it the right to serve all but the northeast ten acres upon which the Decker home was formerly standing (TR 26), it reiterates its position that the Petition is seeking "the entire parcel of ground involved" (DTG Brief 24).

DTG has not, however, moved to amend its Petition to limit the area for which it is seeking DEC to serve it under SDCL 49-34A-56, even though NorthWestern made it known early and often in this proceeding (see NorthWestern's Intervention Petition at page 2 and that document's accompanying Affidavit of Jay Morris; the NorthWestern Motion and its accompanying Affidavits of Jay Morris and Jeffrey Decker and Memorandum of Law; and NorthWestern's questioning of Mr. Rutledge at the Hearing, referenced above) that NorthWestern had been serving the Site, and therefore it was not a "new location."

The Electric Service Agreement, dated September 21, 2004 (DTG Exh 5), executed by DTG and DEC (the "DEC Agreement"), specifically describes the DTG "Facility" as:

> The Facility shall include the Customer-owned turkey processing plant, office, truck depot and related facilities located in the NE ¼ of Section 4, Township 110N, Range 61W, Beadle County, South Dakota (DTG Exh 5 at paragraph 1).

In the DEC Agreement, DEC agrees to "sell and deliver" and DTG agrees to "purchase and receive" "all of the electric power and energy requirements of the Facility." (DTG Exh 5 at paragraph 2). Thus the DEC Agreement and the Petition both related to service to the entire Site, not a portion of it. Mr. Rutledge agreed that the Agreement requires all electrical usage on the Site to be served by DEC (TR 49).

The Commission should not *sua sponte* amend the Petition to allow DTG to move forward under SDCL 49-34A-56. DTG had the opportunity not only to file its Petition for a more limited area, but also to amend its Petition when it became clear that the "location" was already served by NorthWestern and therefore could not be a "new location." The Commission's rules expressly allow a party to amend its pleading, including a petition. ARSD 20:10:01:16 provides:

> Amendments may be allowed to any petition, complaint, application, or answer by stipulation of the parties or upon application of a party and at the discretion of the commission.

DTG did not move to amend its Petition after NorthWestern filed its Intervention Petition, after the filing or arguments on the NorthWestern Motion, after NorthWestern presented its evidence at the Hearing regarding the facts in this case, or even after Vice Commissioner Sahr's suggestion that it may be an alternative; in fact, DTG rested its case with the Petition and its request to serve the entire Site intact. DTG's failure to seek to seek to amend its Petition under

the above Commission rule or under SDCL 15-6-15(a) presents the Commission with solely one issue:

> As the Petition is filed and presented, is DTG entitled to proceed under SDCL 49-34A-56? NorthWestern submits that the answer is No.

B. New Location for DTG Does Not Mean a "New Location" Under SDCL 49-34A-56

DTG argues that because **it** has never had a presence on the Site, the Site is a new location (TR 22; DTG Petition IV; DTG Brief 10-11), although Commission Staff Witness Michele Farris correctly answered a question on this topic by stating that such determination was "a legal question" (TR 265-266). In fact, DTG's position would effectively eliminate the language "new location" from SDCL 49-34A-56 as a qualifying factor because **any** new customer would find a location as "new" to that customer. NorthWestern submits that the Commission needs to conduct a different analysis, i.e. is this "new customer" seeking service to a "location" that **has already been served by an electric utility**. The only other statute in the Territorial Law that uses the term "location" is SDCL 49-34A-42, which provides:

> 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. 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. However, any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

The South Dakota Supreme Court in Matter of Northwestern Public Service Co., 560 N.W.2d 925 (S.D. 1997), expressly recognized that SDCL 49-34A-56 requires a customer to demonstrate three qualifying factors before it can proceed, stating:

> [d]ivision's petition was based on SDCL 49-34A-56, the new customer, new location, large load provision of the South Dakota Territorial Integrity Act.

The Court further noted, in that case, that "[t]he 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." Thus the Court specifically recognized that the statute does not merely refer to a new customer with a large load, but that the third factor must also be met. This use of the "plain meaning" of the words used in a statute is also required by SDCL 2-14-1, which states that words used in statutes should "be understood in their ordinary sense" unless a different express meaning is provided by statute; See also Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).

DTG's interpretation that the Site is **new to DTG** effectively eliminates this third qualifying factor. NorthWestern's interpretation, that one was also to look at whether electric service has been provided at such Site is consistent both with the plain language of the statute and with the Supreme Court's interpretation of the word "location" as used in SDCL 49-34A-42 and the intent of the Territorial Law, as discussed further below.

C. NorthWestern Has Been Serving the Site

The evidence is undisputed that NorthWestern was serving Jeffrey Decker and his farm on the Site, as well as his predecessors in ownership of the Site since prior to March 21, 1975, the effective date for the Electric Territorial Law establishing exclusive assigned service areas included in SDCL 49-34A-42 through 49-34A-59 (the "Territorial Law") (TR 233-235; Affidavits of Morris and Decker accompanying NorthWestern Motion). Mr. Decker and his wife owned the entire Site and transferred the entire site to the City of Huron (which Site was eventually transferred to DTG) (TR 233). As Mr. Decker explained, the replatting of the property when he first acquired it was only for the purpose of his financing of the purchase, and he acquired the entire Site at the same time (TR 240-241).

DTG argues in its brief that the Deckers "abandoned" their farm, and that because they sold the land, any rights that NorthWestern had to serve the Site were also lost (DTG Brief 12-14). This argument ignores not only the rights that NorthWestern holds under the Territorial Law, and, in particular, SDCL 49-34A-42, but also the purpose of the Territorial Law.

The Site is exactly the same geographical area as that owned by the Deckers (TR 233). NorthWestern served the Site on March 21, 1975, the operative date of the Territorial Law (and, in fact, served the location prior to that time), and served it continuously since March 21, 1975 (TR 240-241; Affidavits of Morris and Decker accompanying NorthWestern Motion).

There is very recent South Dakota Supreme Court guidance on the definition of the word "location" as it appears in the Territorial Law. In a case decided by the Supreme Court in January 2004, Electric Association, Inc. for a Declaratory Ruling Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., 2004 S.D. 11, 675 N.W.2d 222 (S.D. 2004), the Supreme Court was faced squarely with an electric territorial issue whose outcome depended upon the meaning of the word "location" in the Territorial Law. In that case, the Court rejected an argument by West River Electric Association that "the protected right to serve pre-existing 'locations' should be viewed as a 'narrow exception' to a 'general rule' prohibiting the extension of service." Instead, the Court held that the word "location" in the Territorial Act did not mean a "level of electric service," but should mean the "geographical area." In other words, even if an electrical supplier was serving a smaller load at a location, that still qualifies as service to that location. The Court in the Black Hills case went on to recite several other examples in which that Court had recognized the "geographically centered basis" of the Territorial Act and further:

> We conclude that the plain meaning of the phrase "the exclusive right to provide electric service at retail at each and every location where it is serving a

> customer" contains no restriction that limits that right to only provide a level of electric service under some type of distribution system that the PUC identifies today. Rather, "location" denotes a place where something is or could be located; a site. It gives BHP the right to provide service to Service Numbers One through Six, as well as any future service at that location. Electric Association, Inc. for a Declaratory Ruling Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., supra.

Based upon this timely and controlling precedent, the mere fact that the DTG electrical needs will be much greater than the use by the Deckers for their farm does not change the fact that NorthWestern has been serving the location. As the South Dakota Supreme Court noted, in citing an earlier decision, In re Certain Territorial Electrical Boundaries (Aberdeen City Vicinity), 281 N.W.2d 72, 78 (S.D. 1979), the Territorial Law includes "no express or implied exceptions based upon the nature of the customer or the *extent* or duration of the service provided." The DTG Site includes the entire Decker farm, not only where the Deckers were specifically metering electricity from NorthWestern, but also every other place in such geographical area where service could have been (and will) be delivered.

The South Dakota Attorney General, in an opinion issued shortly after the Territorial Law was approved, Attorney General Opinion No. 75-135, similarly defined "location" in terms of a geographical area. Under a territorial law similar to South Dakota's in the State of Illinois, the construction of the term "location" was considered by the Illinois State Appellate Court, which, in Coles-Moultrie Elec. Coop. V. Ill. Commerce Comm., 394 N.E.2d 1068 (Ill.App. 4th 1979), held that the term must be construed to mean a geographic area. The Illinois Court in Coles-Moultrie found it compelling that the property was exactly the same tract as that previously owned. In further support of the "geographical area" definition, SDCL 49-34A-1(1) defines the term "assigned service area" as "the geographical area in which the boundaries are established as provided in 49-34A-42 . . ." Based upon the rulings of the South Dakota Supreme Court,

particularly the ruling in the Black Hills case, NorthWestern submits that the DTG Site is a location served by NorthWestern and not a "new location" under SDCL 49-34A-56.

A case came before the Commission, and eventually the South Dakota Supreme Court, Matter of Clay Union Electric Corporation, 300 N.W.2d 58 (S.D. 1980), involving the issue of service to a farmhouse at a location upon which a larger commercial customer was seeking service in a case involving NorthWestern and a rural electric cooperative. That case involved a customer receiving service from the REA ("Clay Union") in NorthWestern's assigned service area, based on service prior to March 21, 1975. In its decision in the Clay Union case, this Commission found that provision of single-phase service to a farmhouse allowed the same utility to provide service to a new aluminum extruding plant located partially on the land **formerly owned** by the previous homeowner and on additional lands acquired by the business, all within another utility's (NorthWestern's) assigned service area. The fact that the homeowner had sold the land for the proposed aluminum plant did not establish that the prior REA service had been "abandoned."

The Sixth Circuit Court (which reversed the Commission's ruling in the case) and the Supreme Court (which affirmed that Circuit Court opinion) held that NorthWestern should serve the plant, not because of a finding that it was a "new location" but because the Commission-approved contract between Clay Union and NorthWestern further limited the rights of Clay Union with regard to service to "new connections" in the NorthWestern assigned service area. In Clay Union, the Court held that, while the cooperative would have had the right to continue to serve a "location" under SDCL 49-34A-42 for which it was serving a customer when the Territorial Law was enacted, i.e., March 21, 1975, the limiting agreement entered into by Clay Union and NorthWestern further limited Clay Union's rights within NorthWestern's assigned

service area. Under that agreement either electric utility could continue to "service existing structures and outlets" but could make no "new connections or hookups." Because the new business was not an existing structure or outlet, Clay Union could not serve it within NorthWestern's assigned service area. The Court noted specifically:

> [t]his agreement **took away the right** the utilities had under SDCL 49-34A-42 where they were allowed to serve present and future customers in the assigned service area, Matter of Clay Union Electric Corporation, supra (emphasis supplied).

Thus, the Court clearly recognized that the "location" rights would exist under the statute, absent a contrary contractual provision, and contrary to DTG's assertion in its brief that the Court found the aluminum plant to be a "new structure and a new location," the Court found that the aluminum plant was a "new connection," a much more restrictive term than it "location," and without the contract between NorthWestern and Clay Union, the result in that case may have been different.

In this circumstance, when the initial assigned service areas were determined in 1976, pursuant to the Territorial Law, no service area agreement was submitted to the Commission, pursuant to SDCL 49-34A-43 (see the Commission Decision and Order in Docket F-3104, dated July 1, 1976, In the Matter of Establishing Certain Territorial Electric Boundaries with the State of South Dakota (Pierre Area), attached to NorthWestern's Memorandum of Law accompanying the NorthWestern Motion) by Beadle Electric Cooperative (DEC's predecessor) and NorthWestern, and the two electric utilities' assigned service areas were determined by the Commission based upon the proposed maps submitted by the parties. Therefore, the rights of NorthWestern and DEC are those expressly provided by statute in SDCL 49-34A-42, including NorthWestern's right to serve at retail "each and every location where it is serving a customer as of March 21, 1975," in its assigned service area.

The Supreme Court has further stated that, if there is a contradiction between statutes, "[i]t is our duty to reconcile any such apparent contradiction and to give effect, if possible, to all of the provisions under consideration, construing them together to make them harmonious and workable," In re Certain Territorial Electrical Boundaries (Aberdeen City Vicinity), supra, quoted favorably in Matter of Clay Union Electric Corporation, supra. The Commission should reconcile the provisions of SDCL 49-34A-42 and SDCL 49-34A-56. In doing so, NorthWestern submits, the Commission should recognize the grant of assigned service areas, including the right to serve all present and future customers in SDCL 49-34A-42, with the **limited exception** in SDCL 49-34A-56, and, at the same time, the Commission should recognize that the terms used in such statutes should be given the same meaning. The word "location" is used in both statutes, and it should be given the same meaning in interpreting both.

A determination that a geographic area served is not a location is not only inconsistent with the Supreme Court's holding in Electric Association, Inc. for a Declaratory Ruling Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., supra, it also is inconsistent with the policy underlying the Territorial Law, and would result in a stranding of existing investments with no alternative future use for that investment. NorthWestern's position in this matter is stronger than Black Hills' in that case. In this case, the Decker farm was not an existing customer within the DEC assigned service area, it was a customer served by NorthWestern in its own assigned service area. Furthermore, contrary to DTG's assertion in its brief that the replatting of the property in this matter should somehow lead to a different result than in the Black Hills case (DTG Brief 18), the Commission must keep in mind that, despite how the lands may have been platted and replatted over the years, the entire tract has consistently been owned by a single owner at one time, and DTG insisted upon this

entire tract, the Site, being transferred to it (TR 236-237). To allow DTG to treat this geographical area as a "new location" ignores the plain meaning of the word "location" and is contrary to the Territorial Law policy of avoiding duplication of facilities in areas already served.

The South Dakota Legislature, in including SDCL 49-34A-56 in the Territorial Law, provided for a specific classification of electric utility customers special rights, and such classification has been ruled by the Supreme Court as constitutional, Matter of Certain Territorial Electric Boundaries (Mitchell Area), supra. The statute does have three qualifying factors before a customer can seek to be served by an electric utility different from the electric utility holding the assigned service area rights. Those three qualifying factors are: (1) it must be a "new customer," (2) it must be seeking service to a "new location," and (3) it must require electric service with a contracted minimum demand of two thousand kilowatts or more. If it meets all three factors, it may petition the Commission, and following notice and a hearing, the Commission will then determine the appropriate electric utility supplier, based upon six factors set forth in the statute. NorthWestern submits that DTG has failed to meet the second qualifying factor because the location for the proposed Plant is the Decker farm site (not a new location).

In 1975 the South Dakota Legislature enacted the Territorial Law, finding that "the elimination of duplication and wasteful spending in all segments of the electric industry would promote the public interest," Matter of Certain Territorial Electric Boundaries (Mitchell Area), 281 N.W. 2d 65 (S.D. 1979). The Territorial Law provided a process in which assigned service areas would be established for each electric utility: investor-owned, rural electric and municipal, and each electric utility was given the "exclusive right to 'provide electric service at retail . . . to each and every present and future customer in its assigned service area.'" Matter of NorthWestern Public Service Co., 560 N.W.2d 925 (S.D. 1997). As the Supreme Court stated

further in that case, "[t]he standard of guidance under SDCL 49-34A is the 'elimination of duplication and wasteful spending' in all segments of the electric utility industry."

The requirement within SDCL 49-34A-56 for the first two qualifying factors is the same reason that the Territorial Law was approved, i.e., to eliminate duplicate and wasteful spending by electric utilities. The customer must be a new customer, because if it is an existing customer, an investment has already been made to serve that customer by an electric utility, and disconnecting that electric utility's lines in order to reconnect the lines of another electric utility would be a duplication and provide for a wasteful spending of funds by both. As made clear in the Supreme Court's ruling in Matter of NorthWestern Public Service Co., supra, the customer only has the right to petition to be served by another electric supplier, different from the electric supplier to whom the geographical area is assigned, when it first obtains electric service. Once a geographical area is served by the electric utility for whom the area has been assigned, that utility is entitled to serve all present and future customers within that geographical area.

In the same way, a customer must be seeking service to a new location. Where an electric utility already serves the location, that utility should not be forced to disconnect its wires and forfeit that geographical area it has been serving. The Territorial Law was intended to protect existing investments by electric utilities, and forcing NorthWestern to lose its long-time investment in facilities at this location is contrary to the intent of the Territorial Law and would result in duplication and wasteful spending by both utilities.

DTG's Petition is not seeking service to a new location, but rather to a location that has already been receiving electrical service from NorthWestern. In addition, the Petition should not be amended to allow DTG to serve a portion of the Site. The Petition should be viewed as it has been presented and argued, and as the DEC Agreement provides, that DTG is seeking DEC

service to the entire Site. As such, and because this is not a new location, the DTG Petition should be denied.

II. The Commission Should Define the Requirements to be Shown Under SDCL 49-34A-56

The operative statute in this matter is SDCL 49-34A-56, which provides as follows:

> 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.

In the event that a customer meets the three qualifying factors to have its petition considered under this statute (see discussion above), the Commission is required to consider six factors. How the Commission is to consider those six factors was an issue raised and discussed at length in this matter, and because of the language used in the statute, in the event that the Commission deems it appropriate to allow DTG to proceed to have the Commission undertake such consideration, NorthWestern requests that the Commission clarify which interpretation is proper.

First, it has been argued (TR 154-155, 158-159, 269-270; DTG Brief 5-6) that the only analysis for the Commission to undertake is to determine whether the electric utility for which the customer has expressed a preference (by filing a petition under the statute) meets the six criteria. For example, Commission Staff Witness Farris stated:

> [I] spent my time reviewing Dakota Energy's capabilities in order to provide adequate service (TR 269-270).

The other interpretation that could be applied to the statute is that the Commission should consider how both the electric utility for which a preference was shown and the electric utility in whose assigned service area the customer is located could meet such criteria, and, in addition, balance the general public interest (TR 156-157).

The language of the statute does not clearly demonstrate that either interpretation should prevail. The following two sections of this brief will outline the two positions.

A. Consideration of Solely the "Preferred" Electric Utility

DTG argues in its brief that the use of the singular words "electric system of the utility" in subsection (3) and "ability of the utility" in subsection (6) of the statute "clearly shows that the statute requires the Commission" to solely determine the ability of the preferred electric utility to meet the criteria (DTG Brief 6). DTG also argues that the language in the statute preceding the listing of the six factors that the customer "shall not be obligated to take electric service from the electric utility having the assigned service area" implies that the ability of the electric utility for whom the customer has expressed a preference to meet the criteria is the only matter to be determined, and that to do otherwise would "undermine the intent of the statute" (DTG Brief 5-6). As noted above in this brief, the Commission Staff stated its concurrence in this interpretation at the Hearing (TR 158-159, 269-270).

DTG further argues that the Commission should not substitute its judgment for that the customer's preference, quoting language from the South Dakota Supreme Court's opinion in the Matter of Northwestern Public Service Co., supra, which states that it was the statute's intent to allow a qualifying customer to have "an option to be exercised" (DTG Brief 8). Of course, the "option" referred to by the Court could mean the option to file a petition under the statute, as opposed to DTG's interpretation that effectively makes the decision determinative, unless the electric utility cannot meet the six criteria. If this interpretation is to prevail, the statute becomes a "customer choice" statute as opposed to a "customer preference" statute.

B. Consideration of Both Utilities' Ability to Meet the Criteria

The contrary analysis for the Commission is to have the Commission look at the ability of both electric utilities to meet the six criteria and to determine what is in the public interest. Naturally, the preference of the customer would be one of the factors to be considered; it is one of the six criteria, subsection (5). The language of the statute can also be interpreted to support this conclusion.

The language quoted above concerning "the utility" in subsections (3) and (6) may refer to either electric utility. By opposing the customer's petition under the statute, the electric utility in whose assigned service area the customer is located would be a "utility seeking to provide the electric service," subsection (3), and "[a]ny and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements," subsection (6), would also be pertinent to the Commission's determination of which electric utility should serve. In other words, the language in subsections (3) and (6) of the statute could be interpreted either to support the two utility analysis.

As noted above, the argument that the language preceding the six criteria concerning the customer not being forced to receive service from the assigned utility requires an interpretation in favor of the sole utility analysis really begs the question – what is the legislative intent of the statute? Had the Legislature intended to make customer choice determinative, it would not have been necessary to include the six criteria at all, and it certainly would not have been necessary to include "customer preference" as one of the criteria. The fact that customer preference is listed among such criteria supports an interpretation that it is only one of the factors to be considered, and that such customer preference would not be the sole determination. Clearly, the customer would not be before the Commission unless it had a preference for a utility other than the one in whose assigned service area the proposed facility would be constructed.

To determine the legislative intent, one must look at the Territorial Law as a whole and determine how this statute fits into such regulatory scheme. As part of that underlying legislative intent, the South Dakota Supreme Court, in the case In re Certain Territorial Electrical Boundaries (Aberdeen City Vicinity), supra, stated that the Court saw "a legislative intent that pioneering investment should be favorably considered." There is thus a recognition that investment in existing electric lines is to be favored. Thus, ignoring the investment made by the electric utility to whom the area has been assigned would undermine that legislative intent.

C. Determination of Six Criteria of SDCL 49-34A-56

NorthWestern submits that under either interpretation of SDCL 49-34A-56, discussed above, DTG has failed to demonstrate that it should be served by DEC. Even if the statute is interpreted to have the Commission consider solely the application of these six criteria to DEC alone, the evidence presented at the Hearing does not support service by DEC. In particular, the need for DEC's transmission supplier to construct 3½ miles of transmission line and a substation

to serve the load (TR 127; DTG Exh 2, 3, 13; NW Exh 4) does not a support a conclusion that DEC has "proximity of adequate facilities from which electric service of the type required may be delivered." While DTG stressed at the Hearing and in its brief that DEC has its office just north across Highway 14 (TR 28-30, 71; DTG Brief 22), and that DEC has an electric line along the side of the Site (DTG Brief 22-23), neither of those provides adequate facilities in close proximity to DTG because the service required by DTG cannot be provided from those existing electrical facilities (TR 186-187). In other words, DTG has failed to provide evidence to meet subsection (4) of SDCL 49-34A-56, and therefore its Petition should be denied. As noted above, the prevention and avoidance of duplication and recognition of existing investments are the basis for the Territorial Law, and to allow construction of miles of needless facilities is contrary to such legislative intent. While Commission Staff Witness Farris (TR 270) was unwilling to specify what "close proximity" means in SDCL 49-34A-56, the Commission should make a determination in this matter, both to resolve this dispute and to guide future similar matters.

If SDCL 49-34A-56 is interpreted to allow consideration of the six criteria with respect to both NorthWestern and DEC, NorthWestern submits that the uncontested evidence presented at the Hearing demonstrates that (1) NorthWestern can serve the electric service requirements of the DTG load to be served, (2) NorthWestern has an adequate power supply available, (3) service by NorthWestern to DTG would further the development and improvement of NorthWestern's electric system, including economic factors relating thereto, (4) NorthWestern has adequate facilities in close proximity from which electric service of the type required by DTG may be delivered, (5) DTG has noted that NorthWestern can adequately and dependably serve it with competitive rates, and (6) NorthWestern has demonstrated other pertinent factors related to its furnishing adequate electric service to fulfill DTG's requirements.

NorthWestern established, through the testimony of Michael Sydow, general manager of operations for Nebraska and South Dakota, that it has experience and is particularly qualified to serve large load customers like DTG (TR 161-162, 179), that it has outlined a plan to provide reliable service to DTG with backup circuits included so that any interruptions to DTG will be minimized or eliminated (TR 163-169; NW Exh 2, 3), which, in fact, provides a "superior design" to that proposed by DEC because there would be significantly less "line miles of exposure" on NorthWestern's lines than the lines of DEC (5.46 miles as compared to 76 miles) that would likely produce reduced outages for DTG (TR 169-173; NW Exh 4). Mr. Sydow also explained how the costs for NorthWestern to provide this enhanced service to DTG would total $980,000 as compared to the costs for DEC and its transmission supplier, East River Electric Cooperative, Inc. ("East River") of $1,390,000 to $1,500,000 (TR 176-177; DTG Exh 11, 19; TR 134-136); that NorthWestern would be able to serve DTG without acquiring land, without building transmission facilities, and without constructing a new substation (TR 177); and that NorthWestern's emergency personnel and back-up equipment would all be located in Huron (TR 178-179) as compared to the East River's personnel residing in Miller and Madison (TR 139). As noted above, NorthWestern's adequate electric facilities are in very close proximity to DTG, and significantly closer than those of DEC and East River.

NorthWestern witness Dennis Wagner, general manager of production and generation, explained that, in addition to having ample power supply available to serve DTG and NorthWestern's other customers, the Huron gas turbine plant provides power supply "within a mile" of DTG, virtually preventing any outage time for DTG (TR 189-191).

Curtis Pohl, NorthWestern's vice president of distribution operations, testified concerning the importance of the assigned service areas to NorthWestern. He stated as follows:

> Now having said that, our service territory in South Dakota is limited. These were defined service territories back when the law was enacted in the '70s and, quite frankly, one of the concerns that we have is by having the limitations of the service territories we are very limited in growth. So it's extremely important for us to take advantage of growth opportunities as they come about so that we can maximize the infrastructure that we do have within our service territories (TR 248).

Mr. Pohl demonstrated, through copies of service territory maps of the Huron area (NW Exh 10) and Aberdeen area, the limited assigned service area that NorthWestern serves, as compared to the much larger areas of the surrounding rural electric cooperatives, and noted how service to new large customers, like DTG, is crucial to the development of NorthWestern's system, particularly given the 1% revenue growth in its service area (TR 249-251). In addition, Mr. Pohl noted NorthWestern's ability to serve large loads and to do so in a very reliable fashion (TR 250-251). Finally, both Mr. Pohl (TR 254-255) and Roger Schrum, NorthWestern's vice president of human resources and communications (TR 261-262) stated that NorthWestern has the capital necessary to carry out its plans to serve DTG without the need to access Federal moneys or otherwise borrow to construct the necessary facilities, as opposed to the funds that would need to be obtained by DEC and East River (TR 139, 141).

Jeffrey Decker, regulatory specialist for NorthWestern, presented a comparison of the rates to be charged DTG by DEC under the DEC Agreement (DTG Exh 5) and NorthWestern's proposed service to DTG, showing both a comparison using NorthWestern's rates in effect in August 2004 and rates in effect in February 2005, and demonstrating that NorthWestern's charges to DTG would be less, even without the potential energy charge rebate that NorthWestern had agreed to present to the Commission for approval (TR 229-230; NW Exh 8), and, as Jay Morris, NorthWestern's Huron Area Manager, testified, NorthWestern would be

asking the Commission to consider a contract with deviations if given the opportunity to serve DTG (TR 203-204, 218; NW Exh 6).

Considering together all of these aspects of NorthWestern's proposed service to DTG, it is clear that NorthWestern has demonstrated that its proposed electric service better fulfills the six criteria of the statute, and even Commission Staff Witness Farris (TR 270) and DTG's consultant, Stellar Group's project superintendent Corky Dillingham (TR 68-69), both admitted that they were confident that NorthWestern could provide service to DTG. If balancing service by the two electric utilities under SDCL 49-34A-56, the closer proximity of adequate facilities, the more reliable plan to serve the customer, and the lower energy charges for the customer all support a Commission conclusion that the statute favors service by NorthWestern.

In summary, NorthWestern submits that under either interpretation of SDCL 49-34A-56, NorthWestern is the appropriate electric utility to serve DTG, rather than DEC. To guide future potential applications under the statute, NorthWestern recommends that the Commission provide its interpretation of the manner in which such applications should be considered. With respect to the instant matter, NorthWestern submits that DTG's Petition should be denied.

CONCLUSION

A customer must meet the three criteria of SDCL 49-34A-56 before it can qualify for consideration of its petition to be served by another utility. It must be (1) a "new customer," (2) seeking service to a "new location," and (3) with an electrical load of thousand kilowatts or higher. If it meets all three criteria, a customer has an opportunity to have the Commission consider six factors in determining the proper electrical supplier for that customer. Without meeting all three criteria, the six factors should never be heard.

The Territorial Law was designed, and has been interpreted by the Commission and the South Dakota Supreme Court to eliminate and avoid duplication and wasteful spending by electric utilities. The DTG Site is the former Decker farm site, and NorthWestern has served the Site since prior to March 21, 1975. Because of such existing NorthWestern service, the Site is not a "new location," and therefore DTG does not qualify to file a petition under SDCL 49-34A-56. Upon such grounds, the Commission should deny DTG's Petition.

If the Commission **does not** determine that DTG is precluded from proceeding under SDCL 49-34A-56, NorthWestern submits that the Commission should, in its decision, state its conclusion as to the determination that should be made under the statute. That is, the Commission should determine whether, in a petition under the statute, its analysis is just whether the electric utility for which the customer has expressed a preference can fulfill the six criteria, or whether the Commission should determine which of the two competing electric utilities can better fulfill such criteria. As new customers at new locations who may exceed a two thousand kilowatt demand arise, it is important for both such customers and the electric utilities in this State to know what analysis the Commission is going to undertake in resolving potential disputes. Particularly with the aggressive approach being taken by rural electric cooperatives in seeking to serve new large load customers, there will likely be a number of such disputes in the near future. NorthWestern submits that, through an explanation of the Commission's interpretation of the statute in this matter, at least a portion of such disputes may be avoided.

NorthWestern submits that the evidence presented at the Hearing demonstrates that DEC is not the proper electric supplier for DTG, under either interpretation of the meaning of SDCL 49-34A-56. DTG's Petition should be denied, and NorthWestern should be allowed to serve DTG as a new customer in its assigned service area.

REQUEST FOR SPECIFIC FINDINGS

NorthWestern submits the following proposed Findings for consideration by the Commission in its Decision in this matter;

1. While Dakota Turkey Growers, LLC is a new customer with a contracted minimum demand in excess of two thousand kilowatts, in its Petition for Electrical Service by Dakota Energy Cooperative, Inc. in the Assigned Service Area of NorthWestern Energy, it is not seeking service to a new location, as required by SDCL 49-34A-56, because NorthWestern Energy has been providing electric service to such location.

2. NorthWestern Energy can better provide electric service to of the type required by the Dakota Turkey Growers' Plant, based upon the following factors: the availability of an adequate power supply; the development or improvement of its electric system, including the economic factors relating thereto; the proximity of adequate facilities from which electric service of the type required may be delivered; and any and all other pertinent factors affecting its ability to furnish adequate electric service to fulfill the customer's requirements, including the reliability and cost of such electric service.

Respectfully submitted this 29th day of March, 2005.

NORTHWESTERN CORPORATION,
doing business as NorthWestern Energy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a an original and ten copies of this Brief of NorthWestern Corporation, doing business as NorthWestern Energy have been served by United States Postal Service first class mail, postage prepaid to Pamela Bonrud, Executive Director, S. D. Public Utilities Commission, 500 East Capitol, Pierre, SD 57501, and that a true and correct copy of this Motion for Summary Disposition was served by United States Postal Service first class mail, postage prepaid to the following parties to this proceeding this 29th day of March, 2005 and sent by email to Ms. Bonrud and to the following:

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