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April 8, 2005

RECEIVED

APR 11 2005

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

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 REPLY 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 (with enclosure)
Kenneth D. Rutledge (with enclosure)
Robert Rademacher (with enclosure)
Jeffrey T. Sveen (with enclosure)
Dave Blair (with enclosure)
Jeff Nelson (with enclosure)

RECEIVED

APR 11 2005

BEFORE THE PUBLIC UTILITIES COMMISSION

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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

REPLY BRIEF
OF
PETITIONER DTG

PRELIMINARY STATEMENT

This Reply Brief is submitted on behalf of Dakota Turkey Growers, LLC (“DTG”), and Dakota Energy Cooperative, Inc. (“Dakota Energy”), in response to Post-Hearing Briefs submitted by Staff and NorthWestern. Staff of the South Dakota Public Utilities Commission shall be referred to as “Staff.”

Any references in this Brief to the testimony provided at the hearing held on February 17, 2005, will be designated “TR” or “CTR” with additional references to appropriate page number(s) of the hearing transcript. Any references to exhibits admitted into evidence at the hearing will be designated as “DTG EXH” or “NorthWestern EXH” with additional reference to the appropriate page number(s). References to Post-Hearing Briefs submitted by Staff and NorthWestern will be designated as “Staff Brief” or “NorthWestern Brief.”

ARGUMENT

NorthWestern’s Brief, not surprisingly, centers around two premises, neither of which is supported by the evidence at hearing, clear statutory construction, or relevant

case precedent. The first argument concerns NorthWestern's continued incorrect interpretation of "new location" under SDCL 49-34A-56. NorthWestern's second argument also deals with statutory interpretation of SDCL 49-34A-56, in that NorthWestern urges the Commission to engage in a balancing test to ultimately determine which electric supplier should provide service to the new large load customer, in this case DTG. DTG will respond to each of NorthWestern's arguments, and as will be shown, NorthWestern's position on each point is without merit and must fail.

I. DTG's Site is a New Location

A. Service to the Entire Site.

NorthWestern first attempts to bolster its position that DTG's site is not a new location by attacking DTG's Petition. In essence, NorthWestern claims that because DTG has, through pleadings and hearings, asked that Dakota Energy be its electric service provider to the entire site, the Petition must be denied, since the site is not a new location under SDCL 49-34A-56.

This argument is flawed for several reasons. DTG has clearly demonstrated that the DTG site is a new location under SDCL 49-34A-56. Therefore, DTG is entitled to request Dakota Energy as its electric service provider to that entire site, as long as Dakota Energy can adequately serve the site. See 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). The record was replete with evidence that Dakota Energy can adequately service the entire site. TR pp. 32; 181; 265-267. DTG's Petition and stated preference of one provider to the entire site is perfectly in line with the evidence and case law precedent. As stated at the Summary Disposition hearing, the trial, and

DTG's Post-hearing Brief, DTG believes a proper interpretation of SDCL 49-34A-56 requires a determination that Dakota Energy should be allowed to serve the entire parcel of land.

NorthWestern claims DTG has attempted to "hedge" its original arguments by asking that "at a minimum" the Commission grant service to all but the ten acres upon which the Decker home was formerly located. NorthWestern Brief at p. 4. DTG disagrees with NorthWestern's characterization of DTG's position. The alternative of not including the ten acres that were formerly Decker Outlot 1 was offered in response to inquiries from the Commission. TR pp. 43-44. This does not in any way compromise or negate the Petition as presented, or the evidence as it unfolded at the hearing. DTG does not concede that its entire site is not a new location and thus entitled to customer preference. DTG offered this alternative only in response to inquiries and questions at the hearing.

NorthWestern further argues that the Commission is not able to grant a remedy that carves out the vacated ten-acre Decker Outlot 1 because DTG has not amended its initial pleading. DTG strongly disagrees with NorthWestern's interpretation of SDCL 49-34A-56, and is not willing to concede its position, which is what an amendment to its Petition would be effectively doing. Further, DTG believes it is within the authority of the Commission to fashion a remedy the Commission deems appropriate, based on its interpretation of the facts applied to legal precedent. Tvedt vs. Bork, 414 NW2d 11 (SD 1987) (holding "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the pleadings."); In the Matter of Establishing Certain Territorial Electric Boundaries with the

State of South Dakota (Aberdeen City Vicinity), 318 NW2d 188 (SD 1982) (PUC assigned approximately 29 ½ square miles of disputed territory to NEC and 20 ½ square miles to NWPS pursuant to SDCL 49-34A-44).

DTG further disagrees with Staff's recommendation that DTG be allowed to serve only the plant and office building. Staff fails in its Brief to give any reason for such a recommendation. As argued in its brief, Staff agrees with DTG's interpretation of the relevant case law concerning the interpretation of location, including DTG's analysis of Electric Association, Inc. for a Declaratory Ruling Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., 675 NW2d 222 (SD 2204); and Hub City cited in this matter, but then Staff fails to arrive at a conclusion that the entire site should be served. Furthermore, a ruling that service should only be to the plant and the office building of DTG could cause problems in the future. For example, who would serve additional buildings constructed as part of the DTG facility in the future? Grant of DTG's Petition as presented would alleviate any of these concerns. If the Commission does deem it appropriate to carve out a portion, DTG believes there needs to be a tangible way to measure the property.

B. New Location for DTG is Consistent with SDCL 49-34A-56.

NorthWestern alleges that DTG's position effectively eliminates 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's Brief at p. 6. First of all, this is a misstatement of DTG's position. DTG's facility is a new location because it is being built on bare farmland, from the ground up. The footprint of the facility will be on land that has never been served before by any electrical provider. Thus, the statement

by NorthWestern that any new customer would find a location as “new” to that customer is completely unfounded. It is obvious that if a company came in and bought DTG’s facility, it would be a new customer but not at a new location, and it would not be able to change its electrical provider. See Hub City.

Furthermore, NorthWestern ignores the plain intent and meaning of SDCL 49-34A-56, which deals exclusively with the unique characteristics of large load customers. The statute clearly states 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” It is impossible to reconcile that clear statutory dictate with NorthWestern’s argument that the location cannot be one that has already been served by an electric utility. SDCL 49-34A-56 refers to “assigned service area,” and there is no additional requirement of no service ever having been provided thereto. NorthWestern’s request that this Commission attach additional requirements to “location” when interpreting SDCL 49-34A-56 should be rejected by this Commission.

C. NorthWestern has not Previously Served the Location where the Facility is to be located.

NorthWestern also alleges that DTG has been serving the entire “site” since before the Electric Territorial Law, and that service should extend beyond where it was specifically metering electricity. Although DTG does not agree with the interpretation of NorthWestern’s view, even under its own reasoning there is no evidence that shows NorthWestern has served any more than the vacated Decker Outlot (1). The two Outlots were obtained separately. Decker Outlot 1 was purchased so Buyers could be eligible for a South Dakota Housing Authority loan, and the remainder of the property was purchased by Contract for Deed. This means that the Deckers did not acquire the deed to the second

property until five years later. TR pp. 234-235. The parcels of land were thus separate pieces of property, subdivided by the owner, and acquired at different times.

Under NorthWestern's restrictive interpretation of new location, a new large load customer could seldom be at a new location and request a different electric service provider pursuant to SDCL 49-34A-56 because all areas are assigned to an electrical utility. Therefore, if a later-acquired piece of property with no service (Decker farmground) adjoins a piece of property with service (Decker Outlot 1), and both pieces of property are subsequently acquired by a new large load customer, the entire newly acquired property is deemed "served" by the electric provider. This argument invalidates the entire purpose of SDCL 49-34A-56.

NorthWestern cites Coles-Moultrie Elec. Coop v. Ill. Commerce Comm., 394 NE2d 1068 (Ill.App. 4th 1979) in support of its definition of location by stating the court found it compelling that the property was exactly the same tract of land as previously owned. Although this is true on its face, NorthWestern failed to mention that the same court also believed that it was compelling that there had been a legal division of the property, such as platting or subdividing of the land. Coles is easily distinguished from the case at hand because in Coles the court was not making a determination of location in reference to a large load customer.¹

In its effort to distinguish controlling legal precedent, NorthWestern speculates that the result in the case of Matter of Clay Union, 300 NW 2d 58 (SD 1980), "may have been different" but for the contract. This is not supported by case law, and NorthWest-

¹ In the West River case, Black Hills Power asked the court to adopt the reasoning in Coles with regard to location, and the court refused to do so. Both Electric Association, Inc. for a Declaratory Ruing Regarding Service Territory Rights Concerning Black Hills Power, Inc. and West River Electric Association, Inc., 675 NW2d 222 (SD 2004) and Coles are distinguishable from the case at hand because neither is dealing with an interpretation of location in the context of a large load customer, pursuant to SDCL 49-34A-56.

ern's speculation is obviously wrong. The contract and the provisions of SDCL 49-34A-56 are very similar. At a minimum, the Clay Union case supports the position that there are exceptions to SDCL 49-34A-42.

NorthWestern, throughout its Brief, claims that by granting DTG's petition the Commission would be allowing a stranding of an existing investment. NorthWestern further claims the intent of the territorial laws would be thwarted if NorthWestern were forced to disconnect its wires and forfeit the area it has previously served. This is not the case and is not supported by the record. In fact, NorthWestern's testimony proves the contrary.

Once again, it is important to note that SDCL 49-34A-56 deals with large load customers. Large load customers are unique because no electric provider has the capability to serve the large load with its current facilities, since the large load is in a new location. That is why one of the criteria for the Commission to consider is "the development or improvement of the electric system" necessary to serve the load. SDCL 49-34A-56(3). Therefore, this is not a situation that is going to result in duplication or wasteful spending.

Both Dakota Energy and NorthWestern testified they could not serve the plant with their existing facilities. Both companies will have to make significant upgrades. There was no evidence presented at the hearing that suggests NorthWestern has made significant investments to this area previously. In fact, Mr. Sydow testified the estimated cost of the investment to serve the Decker farmstead was "quite low." TR pp. 187-188. NorthWestern has not built lines in contemplation of expansion of service. It has not expended enormous costs in anticipation of this type of growth. Mr. Sydow testified the

three-phase power line that goes by the Decker farmstead is part of a looped line, and it was not particularly constructed to serve the Decker farmstead. The line, as built, is utilized to serve “many, many more customers” than the one. TR pp. 187-188.

As pointed out by Commissioner Sahr:

(By Vice Chairman Sahr): Good afternoon. Mr. Sydow, do you know, is there any concern in your mind about stranding of investment? Because comparing this to the Black Hills – West River case from a couple of years ago, you had lines that were clearly built contemplating expansion of service. I don’t see that here. I don’t see that we’re going to have the same level of concern about possibly NorthWestern having some enormous sunk costs in anticipation of this type of growth. TR p. 183.

Furthermore, NorthWestern claims it should not be “forced to disconnect its wires” and forfeit the area it was serving. This statement is flawed for two reasons. First, NorthWestern was not forced to disconnect the vacated Decker Outlot 1 because of the DTG Petition. It was forced to disconnect because the Deckers moved the house from the property.

Q. (by Ms. Rogers): . . . (P)rior to moving your house did you have your electric service disconnected?

A. (by Mr. Decker): Right.

Q. So when you disconnected the service to the house, there was no electric service provided to your location in that 10 acres; is that correct?

A. For that amount of time, yes. TR pp. 242-243.

Second, even if NorthWestern was allowed to serve the DTG plant, it would have been forced to disconnect its wire. There is no testimony that NorthWestern could service the DTG facilities through the same metering point that it formerly used for the Decker farmhouse, and in fact, there was testimony to the contrary.

Q. (by Ms. Rogers): . . . it would require NorthWestern to expend substantial costs to upgrade their system if they were to service DTG?

A. (by Mr. Sydow): \$980,000.00.

Q. And you would agree that's a substantial amount?

A. I would. TR p. 187

Accordingly, NorthWestern's arguments of stranded investment must fail.

II. The Balancing Test as Proposed by NorthWestern Ignores the Plain Meaning and Legislative Intent of SDCL 49-34A-56

NorthWestern has asked the Commission to clarify the interpretation of SDCL 49-34A-56 and determine whether the balancing test is indeed appropriate. This is unnecessary because NorthWestern's interpretation is against the plain meaning of the statute. The Commission has previously acted pursuant to this statute, and it has not engaged in a balancing test. Furthermore, there is no case law to support NorthWestern's request of a balancing test. DTG's interpretation of the application of SDCL 49-34A-56 is supported by Staff and is supported by other case precedent. In fact, in Hub City, when the Commission attempted a limited balancing approach, it was overturned by the Supreme Court on appeal.

A and B. Consideration of Preferred Electric Utility's Ability to Meet Criteria.

NorthWestern attempts to redefine the process of SDCL 49-34A-56 by urging the Commission to consider the ability of both utilities to meet the statutory criteria. Once again, NorthWestern's strained argument undercuts the very meaning and intent of the statute.

SDCL 49-34A-56 grants to large load customers the option of "not [being] obligated to take electric service from the electric utility having the assigned service area where the customer is located." The procedure to be followed to achieve that option requires the Commission to determine the ability of the selected utility to provide "adequate electric service to fulfill the customers' requirements." The Commission accom-

plishes that ultimate finding by ascertaining if the selected electric supplier meets the six statutory criteria. This procedure is supported by case law. In Hub City, our Supreme Court affirmed continued service by a large load customer by the selected utility, “since it was uncontested that NEC could provide adequate service.” Hub City at 928.

NorthWestern attempts to read more into SDCL 49-34A-56 by using such words as “may refer” and “could be interpreted” to support its argument for a two utility analysis. This is a reach, at best. Contrary to NorthWestern’s argument, which seems to change with the circumstances in which it finds itself,² allowing a large load customer a preference of electric provider is a legitimate legislative purpose. The fact that customer preference is one of the statutory factors reserves to the Commission the function of determining the ability of the selected provider to supply the customer’s needs. In the event such a finding could not be made, which is clearly not the case in this docket, then the large load customer’s preference could not be honored. In that event, the electric utility in which the customer is located would have no choice but to serve the large load, and the statutory factors of SDCL 49-34A-56 would no longer be relevant.

(By Ms. Cremer) If Dakota Energy cannot serve or is not granted the petition, NorthWestern has to serve it. So whether or not you (NorthWestern) have the ability is not a question before the Commission...
TR p. 268.

² NorthWestern argues that granting a customer’s preference pursuant to SDCL 49-34A-56 if the Commission finds that the selected provider can meet the other statutory criteria turns the statute into a “customer choice” statute as opposed to a “customer preference” statute. While that may not be a meaningful distinction, NorthWestern’s position on “customer rights” is not necessarily consistent. Staff attorney Karen Cremer noted the following at the hearing: “I would also note that on September 27, 1994 in the Hub City matter, and Mr. Dietrich’s .. at his oral arguments started out saying, and I quote this from the transcript, ‘I guess I’d like to distinguish the provision of Section 56 from those of the general assigned service area, 49-34A-42. 42 is the one that speaks in terms of the electric utilities’ exclusive right to serve customers in their assigned service area. 56 does not talk about the utility’s right. It talks about a customer’s right.’ And he goes on throughout that whole argument that we had at that time that 56 is truly a customer right statute. And I note that the only thing that’s changed in 56 is what side of the fence that NorthWestern is sitting on in this case versus the last time.”

In absence of language within the statute itself requiring balancing of the factors between two vying electric providers, or clear statutory guidance, a balancing test is not appropriate. Once again, the statute affords the large load customer the opportunity to exercise a preference; it is not a contest of two competing electric providers that is determined by the Commission, regardless of the stated customer preference. Furthermore, in the current case, the evidence indicated that both electric service providers have the ability to serve the large load customer. TR p.32. When you add the weight of stated customer preference, the “balance,” even if one were applied, clearly weighs in favor of Dakota Energy.

C. Dakota Energy Meets the Six Criteria Under SDCL 49-34A-56.

NorthWestern has alleged that Dakota Energy does not meet the six criteria under 49-34A-56. Specifically, NorthWestern argues that DTG’s facilities are not within “close proximity” to the site. The evidence at hearing was contrary to this point. Staff’s witness, Michele Farris, agreed that Dakota Energy’s facilities are in fact in close proximity to the DTG plant, and additionally, to the headquarters which are directly across the road from the DTG plant site. TR pp. 266-267; Staff’s Brief at p. 11. NorthWestern makes a sweeping statement that claims it has “better fulfilled the six criteria of the statute” under a balancing approach. NorthWestern’s Brief at p. 22. However, NorthWestern conveniently omitted the customer preference factor all together when stating it better fulfills the six criteria of the statute.

NorthWestern also includes information in its Brief about a rate comparison of the two companies. TR pp. 229-230. The significance of the rates is to the customer and should not be a consideration under SDCL 49-34A-56. DTG looked at the proposals of

each company and extensively negotiated the prices. When it was time to sign the contracts, DTG determined Dakota Energy could better serve DTG's needs. The rate comparison was performed by DTG, which is appropriate.

NorthWestern claims rural electric cooperatives are taking an aggressive approach in seeking large load customers and disputes may arise in the future without clarification by this Commission. NorthWestern's Brief at p. 14. Both parties aggressively negotiated with DTG to obtain the new large load customer. NorthWestern even came back to DTG after a contract had been signed and tried to interfere with the contract by offering an additional potential energy rebate that would need to be presented to the Commission for approval. The spirit of SDCL 49-34A-56 is alive and well in this proceeding and shows additional reasons why this customer preference statute is so important to customers negotiating fair prices in South Dakota. The aggressiveness is appropriately in the negotiation process, and it applies equally to all electric suppliers, not just cooperatives.

In the final analysis, whether or not NorthWestern meets one, three, or five of the six criteria in SDCL 49-34A-56 is immaterial. As Staff noted at the Motion Hearing in this case:

Staff believes that the legislative grant of essentially monopoly privileges to the electric utilities was for the promotion of the public interest and not for the benefit of the utilities. Summary Disposition TR p. 49.

SDCL 49-34A-56 is for the benefit of DTG and other similarly situated customers, not for the benefit of NorthWestern. DTG has selected an electric service provider that can adequately fulfill its electric service needs both now and into the future. This Commission should reject NorthWestern's attempts to thwart the clear intent of the statute with its strained interpretations, and grant DTG's Petition.


CONCLUSION

DTG requests that its Petition for Electrical Service by Dakota Energy Cooperative, Inc. be granted. DTG has clearly met all the requirements of SDCL 49-34A-56, including proximity of the facilities. 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 and legislative intent of SDCL 49-34A-56, and the relevant controlling legal precedent, all support 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.

OBJECTIONS TO SPECIFIC FINDINGS

DTG objects to the proposed findings presented by NorthWestern. The proposed findings are not supported by the evidence submitted at the hearing.

DATED this eighth day of April, 2005.



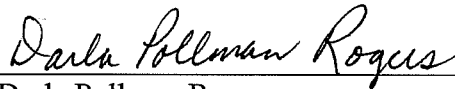
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER DTG** was served via the method(s) indicated below, on the eighth day of April, 2005, addressed to:

Original and ten copies to:	(X)	First Class Mail
Pamela Bonrud, Executive Director	()	Hand Delivery
South Dakota Public Utilities Commission	()	Facsimile
500 East Capitol Avenue	()	Overnight Delivery
Pierre, South Dakota 57501	()	E-Mail
Alan D. Dietrich	(X)	First Class Mail
Northwestern Corp.	()	Hand Delivery
125 South Dakota Ave., #1100	()	Facsimile
Sioux Falls, South Dakota 57104	()	Overnight Delivery
	()	E-Mail

Dated this eighth day of April, 2005.



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