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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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February 8, 2005

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Mr. Alan D. Dietrich
Vice President - Legal Administration
and Corporate Secretary
NorthWestern Energy
125 South Dakota Avenue
Sioux Falls, SD 57104-6403

Re: 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 EL04-032

Dear Counsel:

Enclosed each of you will find a copy of Staff's Response to Motion for Summary Disposition of NorthWestern Corporation with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Karen E. Cremer
Staff Attorney

KEC:dk
Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION FOR)	STAFF'S RESPONSE TO
ELECTRICAL SERVICE BY DAKOTA TURKEY)	MOTION FOR SUMMARY
GROWERS, LLC TO HAVE DAKOTA ENERGY)	DISPOSITION OF
COOPERATIVE, INC. ASSIGNED AS ITS)	NORTHWESTERN
ELECTRIC PROVIDER IN THE SERVICE AREA)	CORPORATION
OF NORTHWESTERN ENERGY)	EL04-032

COMES NOW Commission Staff, by and through one of its attorneys, and hereby responds to the Motion for Summary Disposition of NorthWestern Corporation filed on January 12, 2005. NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern), has moved the Commission for summary disposition of the Petition of Dakota Turkey Growers, LLC (DTG) pursuant to SDCL 1-26-18 and ARSD 20:10:01:02.04. DTG filed a Memorandum of Law in Opposition to Motion for Summary Disposition and an Affidavit on February 3, 2005.

SUMMARY DISPOSITION

SDCL 1-26-18, set forth below, addresses the factors the Commission shall consider when determining whether or not to grant NorthWestern's motion for summary disposition.

1-26-18. Rights of parties at hearings on contested cases--Summary disposition of certain cases. Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

- (1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law; or
- (2) At the close of the evidence offered by the proponent of the defense or claim if it determines that the evidence offered by

the proponent of the defense or claim is legally insufficient to sustain the defense or claim.

A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf. (emphasis added).

The administrative procedure of summary disposition available to agencies and the circuit court's procedure of summary judgment are similar. Case law addressing the issue of when summary judgment may be granted is quite clear, "[I]n reviewing a grant or denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party." *Thorton v. City of Rapid City, South Dakota*, 2005 SD 15 ¶ 4, ___ NW2d ___, ___ (citations omitted). "[S]ummary judgment will be affirmed 'only when there are no genuine issues of material fact and the legal questions have been correctly decided.'" *Olesen v. Town (City) of Hurley*, 2004 SD 136 ¶ 8, ___ NW2d ___ (citations omitted).

The motion for summary disposition shall be granted if NorthWestern has shown through pleadings, answers to interrogatories, and admissions on file, together with affidavits, that there is an absence of any genuine issue of material fact and that as the moving party it is entitled to summary disposition as a matter of law. See SDCL 1-26-18. Here, NorthWestern has filed its motion along with affidavits and a supporting brief alleging that DTG does not meet the qualifying requirements of SDCL 49-34A-56 and

therefore NorthWestern is entitled as a matter of law to have its motion for summary disposition granted. DTG, as the nonmoving party, alleges in its memorandum that it is a new customer at a new location in NorthWestern's territory. DTG further alleges that there are genuine issues of material fact and has filed affidavits setting out its facts which differ from that of NorthWestern.

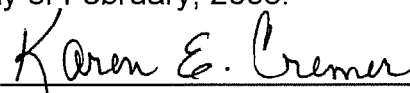
The Commission, if it believes that the issues of fact raised by DTG regarding the re-platting of the site and the facility's location are not in fact "genuine issues of fact," can grant NorthWestern's Motion for Summary Disposition. However if the Commission, after hearing the oral arguments of the parties, believes that there are facts which are "genuine issues of fact" that need to be explored further through direct and cross-examination, it should deny the Motion for Summary Disposition as the evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party.

Should the Commission deny the Motion for Summary Disposition and hear the matter in its entirety, it will determine whether DTG may receive electric service from Dakota Energy, even though it is located within the assigned service territory of NorthWestern. In making that determination, the Commission will consider whether DTG is a "new customer;" whether the site of DTG's plant is a "new location;" whether DTG's site is located outside municipalities as the boundaries thereof existed on March 21, 1975; and, whether DTG's plant will require electric service with a contracted minimum demand of two thousand kilowatts or more. See SDCL 49-34A-56. If DTG meets the foregoing criteria, the Commission will also consider the electric service requirements of the load to

be served; the availability of an adequate power supply; the development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto; the proximity of adequate facilities from which electric service of the type required may be delivered; the preference of the customer; and, any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements. *Id.*

Therefore, it is up to the Commission to determine whether there are genuine issues of fact still lingering in this matter or are the facts firmly rooted in what has been set forth by the parties in their affidavits and all that remains is a question of law.

Respectfully submitted this 8th day of February, 2005.



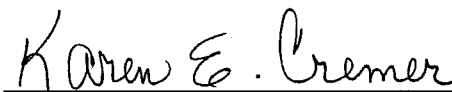
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CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Response to Motion for Summary Disposition of NorthWestern Corporation were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 8th day of February, 2005.

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