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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

MAR 29 2005

SOUTH DAKOTA 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 )

STAFF'S POST HEARING  
BRIEF

EL04-032

PRELIMINARY STATEMENT

COMES NOW Commission Staff, by and through one of its attorneys, and hereby submits its post hearing brief. For convenience throughout this brief, Petitioner's, Dakota Turkey Growers, will be referred to as "DTG." Intervenors, NorthWestern Western Energy, will be referred to as "NorthWestern." The Staff of the South Dakota Public Utilities Commission will be referred to as "Staff." The South Dakota Public Utilities Commission will be referred to as "Commission." References to the hearing transcript will be referred to as "TR\_\_\_." References to exhibits will be referred to as "EXH\_\_\_."

JURISDICTIONAL STATEMENT

Dakota Turkey Growers filed a Petition to receive electrical service from Dakota Energy Cooperative, Inc. (Dakota Energy) on October 18, 2004. Dakota Energy supported the petition by filing an Affidavit of Joinder. NorthWestern intervened on November 3, 2004. The Commission held a public hearing in this matter in Huron, South Dakota on February 17, 2005. The Commission has

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

### **STATEMENT OF THE LEGAL ISSUE**

Whether DTG's petition requesting the Commission to allow Dakota Energy to be the electrical supplier to DTG's plant and office should be granted based on the factors set forth in SDCL 49-34A-56.

### **STATEMENT OF THE CASE & FACTS**

On October 18, 2004, DTG filed a petition requesting the Commission to allow Dakota Energy the right to supply them electrical service. The petition requests that the Commission assign Dakota Energy as the electrical supplier to DTG. DTG is a turkey processing plant that is being constructed at site in the NE Quarter of Section 4, Township 110 North, Range Sixty-One West, in Beadle County, South Dakota. The site is approximately one and a half miles east of Huron, South Dakota on the east side of Highway 14. The proposed construction site for DTG is located within the territory that NorthWestern serves. When operational and running, DTG will need substantially more than a contracted minimum of 2,000 kilowatts to sustain operations.

On November 3, 2004, NorthWestern petitioned the Commission to intervene in this matter. NorthWestern's petition for intervention was granted on November 30, 2004.

On January 12, 2005, NorthWestern filed a Motion for Summary Disposition. NorthWestern requested that DTG's petition be dismissed because DTG was not constructing its facility at a "new location" as required by SDCL 49-34A-56. Both DTG and Staff filed a response to NorthWestern's motion. DTG

filed a brief in opposition to NorthWestern's Motion for Summary Disposition on February 3, 2005. Staff filed a response on February 8, 2005. The Commission heard oral arguments on the motion on February 9, 2005. The Commission voted unanimously to deny NorthWestern's Motion for Summary Judgment.

In a public hearing on February 17, 2005, the Commission held an evidentiary hearing in this matter. At the close of the one-day hearing the Commission requested all of the parties to submit post hearing briefs.

### **BURDEN OF PROOF**

South Dakota law allows an electric utility the exclusive right to provide electric service to the customers located within its service territory. SDCL 49-34A-42. There is an exception to this law for new large load customers. SDCL 49-34A-56. The statute for the new large load customer's exception states:

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.

Id. From the plain reading of the statute it is clear that DTG has the burden of proving Dakota Energy can meet the statutory requirements.

NorthWestern has raised the argument that the burden of proof in SDCL 49-34A-56 requires a balancing test. NorthWestern asserts that each of the competing electric utilities should submit evidence that supports the six enumerated factors in SDCL 49-34A-56. NorthWestern submits that it is then up to the Commission to balance those factors and choose the best electrical supplier for the new large load customer. See NorthWestern's Memorandum of Law in Support of Summary Disposition. This argument is without merit. There is no mention of a balancing of factors in SDCL 49-34A-56. Also, there is no direct precedent that has been handed down indicating that the burden of proof in SDCL 49-34-56 should be a balancing test between the two competing utilities.

DTG has the burden of proof. It is DTG's burden to present evidence to the Commission that Dakota Energy can meet the criteria set forth in SDCL 49-34A-56. It is Staff's position that DTG has met its burden and Dakota Energy is a suitable supplier of electricity to the DTG plant and office building.

## ARGUMENT

Whether DTG's petition requesting the Commission to allow Dakota Energy to be the electrical supplier to DTG's plant and office should be granted based on the factors set forth in SDCL 49-34A-56.

### **I. New Customer/New Location Criteria**

In order to benefit from the exception SDCL 49-34A-56 provides, DTG must be a new customer in a new location which has developed after March 21, 1975, and which has a contracted minimum of at least 2,000 kilowatts. It is clear that DTG is a new customer.

Kenneth Rutledge, chief executive officer of DTG, stated in his testimony that DTG is a newly formed LLC. TR 18. "It was officially formed in August of 2003." TR 19. Mr Rutledge also testified that DTG is a new customer to this area in South Dakota and has never been an electric customer of NorthWestern. Id. The evidence shows that DTG has satisfied the new customer criteria in SDCL 49-34A-56.

DTG must also be at a new location which develops after March 21, 1975. SDCL 49-34A-56. The Commission has heard arguments on this issue already. NorthWestern filed a Motion for Summary Disposition on January 12, 2005, arguing that the DTG facility is not a new location. This issue was briefed by all parties. The Motion was also orally argued in front of the Commission on February 9, 2005. The Commission denied NorthWestern's Motion for Summary Disposition. Staff will briefly discuss this issue.

Mr. Rutledge provided testimony about the DTG site. The DTG facility is located on a portion of a 110-acre piece of property formerly owned by Jeff and

Teresa Decker of Huron. TR 21. Mr. and Ms. Decker sold the 110-acre parcel of property to the City of Huron. Id. The City of Huron in turn sold the property to Greater Huron Development Corporation and they then sold the property to DTG. Id.

The testimony shows that when the Decker's owned the property they purchased two separate pieces of land, a ten-acre portion known as Decker Outlot 1 was purchased and contained the house and some buildings. It is to this piece of land Northwestern provided electrical service. The second piece was 100 acres purchased under a contract for deed. TR. 233-234.

In contemplation of selling the property to the City of Huron, the Decker's originally had wanted to keep the ten-acre Decker Outlot 1 on which their home was located. TR 237. However, in the end the Decker's decided to move their home to a new piece of land four miles down the road. Id. Prior to moving, at the request of the City of Huron, the Decker's had their land replatted. TR 242.

The Decker's sold their property to facilitate DTG locating in Huron. Prior to selling their property the Decker's had electrical service provided to their home by NorthWestern. The Decker's had their electrical service with NorthWestern disconnected when they moved their house. TR 243. This disconnection was done in preparation of the property for the new owners. New temporary electrical service for the construction of DTG was then put in place by NorthWestern. DTG will use this temporary electrical service through the completion of construction of the facility.

In looking at the plain reading of SDCL 49-34A-56 “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.” Hub City, 560 NW2d at 928. It is clear the legislature wanted electrical providers to be able to compete for new large load customers. Both Dakota Energy and Northwestern have been competing to provide electrical service to DTG, a new large load customer, it appears the spirit of the statute is alive in this proceeding.

In its post hearing brief DTG summarizes two South Dakota cases dealing with the interpretation of “new location.” The first is, 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 second case is, 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 2004). Staff agrees with DTG’s analysis of these two South Dakota cases.

In the Hub City case, the Commission found that a division of a manufacturer who built an addition on to an existing manufacturing plant who met the large load requirements was in fact a new customer at a new location. Later, another issue arose surrounding the Hub City case and found its way to the Supreme Court. However, in that proceeding, the Commission’s decision surrounding whether the new plant addition met the requirements of SDCL 49-34A-56 remained intact. 560 NW2d at 925.

DTG is a new customer. Service to the location where the DTG facility is being constructed was disconnected. New service was installed to provide power for the construction of the DTG facility. Clearly DTG is a new customer at a new location.

The Black Hills Power case is less persuasive authority. While the Black Hills Power case defines "location," it does not define it in terms of SDCL 49-34A-56. 675 NW2d at 222. The Supreme Court stated that, "'location' denotes a place where something is or could be located; a site." Black Hills Power, 675 NW2d at 230. However, the Supreme Court in that case was defining the word "location" in terms of SDCL 49-34A-42. Id.

Staff submits that the Commission should uphold the plain reading and intent of the statute. DTG is a new customer in a new location which has a contracted minimum of at least 2,000 kilowatts.

## **II. DTG's Electrical Load**

A factor to be considered in determining whether a new large load customer can be served by an electric service provider outside the territory they are located in is load. According to SDCL 49-34A-56, the electric service demanded by the new large load customer must be for a "contracted minimum demand of two thousand kilowatts or more."

DTG's electrical load is above the contracted minimum demand of 2,000 kilowatts. To satisfy this element of the statute, DTG offered the testimony of Kenneth Rutledge at the hearing on February 17, 2005. Mr. Rutledge testified



that DTG's electrical load will actually be between 4,000 and 5,000 kilowatts. TR 26.

Staff also offered testimony as to this element. Staff Analyst Michele Farris stated that based on the information filed in the petition and the testimony given the electrical load for DTG would exceed the contracted minimum demand of 2,000 kilowatts. TR 266. It is Staff's opinion that DTG has satisfied the electrical load requirement set forth in SDCL 49-34A-56.

### **III. Adequate Power Supply**

Another factor the Commission must look at is whether Dakota Energy has an adequate power supply available to serve DTG. SDCL 49-34-56(2). DTG had James Edwards, assistant general manager of East River Electric testify as to the adequacy of DTG's power supply. TR 123.

Mr. Edwards testified that "East River is a power supplier to Dakota Energy." TR 124. He stated that the power Dakota Energy needs to supply the DTG project will come from Basin Electric, a very reliable source. TR 125; EX DTG 18.

Staff witness, Michele Farris also stated that based on the testimony given staff agrees that East River has an adequate power supply through Basin Electric. TR 266. It is Staff's belief that DTG has satisfied the adequate supply factor in SDCL 49-34A-56.

### **IV. Development or Improvement to Dakota Energy's Electric System**

The Commission must also consider the developments or improvements that Dakota Energy needs to make to its existing infrastructure. Dakota Energy

will need to make improvements to its system to provide the necessary electrical service to DTG. John Dalager a professional power engineer provided testimony about the upgrades to the transmission and distribution systems that Dakota Energy and East River Electric will need to make. TR 93.

The upgrades to Dakota Energy's current infrastructure for the DTG project include two separate lines running in a standard loop feed to DTG to ensure redundancy to the project. TR 99-101. Also included are four transformers with a fifth transformer stored at Dakota Energy's headquarters for back-up. TR 100. The two lines coming into the facility will be fed from a meter at a substation. TR101; see also EX DTG13-18.

East River Electric, Dakota Energy's power supplier, also has to make improvements to their existing infrastructure to accommodate DTG. East River has plans to tap off its existing 69kv transmission line that is approximately three miles from the DTG project site and build a new 69kv transmission line directly to DTG. TR 127. East River plans to construct a new substation adjacent to the DTG site and also make improvements to its Morningside substation. Id.

Staff asserts that the upgrades that Dakota Energy and East River plan to make to their existing infrastructures are reliable and will provide an adequate power supply to DTG. DTG has met its burden on showing the "developments or improvements of the electric system of the utility seeking to provide the eclectic service. . . ." SDCL 49-34A-56.

## **V. Proximity of Dakota Energy**

The location of Dakota Energy's facilities to DTG must be looked at. Specifically, the Commission must look at "[t]he proximity of adequate facilities from which electric service of the type required may be delivered." SDCL 49-34A-56. Not only does Dakota Energy have adequate facilities close to the DTG site, its headquarters are close to DTG as well. Bob Rademacher, general manager and CEO of Dakota Energy, testified that Dakota Energy's headquarters are directly across the road (South Dakota Highway 14) from the DTG plant site. TR 72-73.

Staff's witness, Michele Farris agreed that Dakota Energy facilities are in close proximity to the DTG plant site. TR 266. Staff would submit that DTG has successfully fulfilled the proximity requirement in SDCL 49-34A-56.

## **VI. DTG's Preference**

A final consideration the Commission must look at is the customer's preference. Who does DTG want as an electrical service provider? The testimony overwhelmingly shows that DTG prefers Dakota Energy as their electrical service provider. Kenneth Rutlege, the CEO of DTG, testified that DTG wants Dakota Energy to supply power to its new location. TR 36. Staff witness, Michele Farris also testified that although she has no personal knowledge as to DTG's preference, as she understood the evidence and testimony at the hearing, DTG prefers to have Dakota Energy provide its electrical service.

It is clear that DTG wants Dakota Energy to provide electrical service to its plant and office building. Had DTG wanted NorthWestern to provide its electrical

service, it would not have filed a petition initiating this matter. The Commission must therefore consider the wishes and wants of DTG, which is to have Dakota Energy provide power to its facility.

## **VII. Other Considerations**

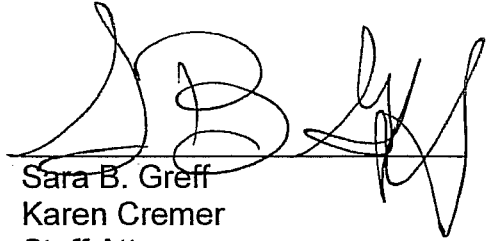
The law allows the Commission to look at “Any and all pertinent factors affecting the ability of the utility to furnish adequate electrical service to fulfill the customers’ requirements.” SDCL 49-34A-56. There are other factors the Commission may want to consider when making a determination in this matter.

For instance Staff witness, Michele Farris testified that Dakota Energy “has the capabilities of providing personnel to respond to emergency situations.” TR 267. Another additional factor to consider, as pointed out by Staff is that Dakota Energy has East River’s resources available to them for transmission issue. Id. These additional factors only reinforce Staff’s position that Dakota Energy is a suitable supplier for DTG.

## **CONCLUSION**

Wherefore, Staff respectfully requests that the Commission grant Dakota Energy’s Petition to provide electrical services only to the plant and office building of DTG.

Respectfully submitted this 29<sup>th</sup> day of March, 2005.

A handwritten signature in black ink, appearing to read 'Sara B. Greff', written over a horizontal line.

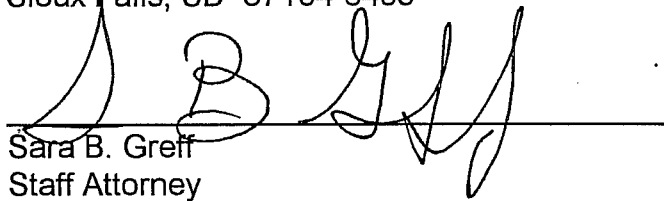
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CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Post Hearing Brief 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 29th day of March, 2005.

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