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HAND DELIVER

Patricia Van Gerpen
Executive Director
Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

RECEIVED
2006 JUL 17 10:30
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

RE: MONTANA-DAKOTA UTILITIES COMPANY; NORTH CENTRAL LARGE LOAD
PETITION, BOWDLE, SOUTH DAKOTA
Our file: 0069
Docket No: EL06-011

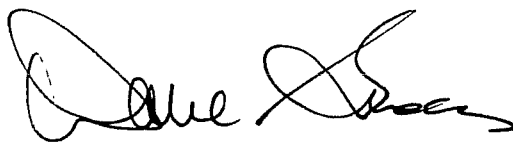
Dear Patty:

Enclosed are original and 10 copies of Montana-Dakota's brief opposing North Central's Motion for Summary Disposition. Also enclosed are original and 10 copies of the Affidavit of Bruce Brekke and of the Affidavit of Larry Oswald. Please file these materials in the docket.

I have mailed copies of the enclosures to the service list as well as forwarding them electronically to the service list.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAG:mw

Enclosures

cc/enc: Paul Erickson, Keith Hainy, Carlyle Richards, Darla Pollman Rogers, Margo D. Northrup, Sarah Greff, Martin Bettmann/Nathan Solem and Don Ball

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED

JUL 17 2006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF) DOCKET NO. EL06-011
MONTANA-DAKOTA UTILITIES CO.)
FOR APPROVAL TO PROVIDE ELECTRICAL)
SERVICE FOR THE NEW NORTH CENTRAL) BRIEF OPPOSING MOTION
FARMERS ELEVATOR TO BE LOCATED) FOR SUMMARY DISPOSITION
NEAR BOWDLE, SOUTH DAKOTA)

Montana-Dakota Utilities Co., ("Montana-Dakota"), a division of MDU Resources Group, Inc., by its undersigned counsel, opposes the motion for summary disposition of FEM Electric Association, Inc., ("FEM") dated June 21, 2006, as follows:

SUMMARY OF ARGUMENT

FEM attempts to rewrite the law to support its contention that the Commission lacks jurisdiction because (1) the "contracted load" is less than 2,000 kilowatts and (2) the operative statute confines those who can petition under SDCL § 49-34A-56 to the new customer seeking service. Contrary to FEM's assertion, information received from Logan Electric, the customer's contractor, and from East River Electric which would wheel the power indicate the need for a contracted minimum demand in excess of 2,000 kilowatts. Secondly, when read in full context nothing in the statute nor in relevant court decisions supports FEM's contention that the large load

statute requires only a customer petition. Material facts as to the size of the load and interaction with North Central's manager showing interest in Montana-Dakota's service preclude summary judgment.

FACTS

Discussions among Bruce Brekke of Montana-Dakota, Paul Erickson, Manager of FEM Electric, and Keith Hainy, Manager of North Central Farmers Elevator, over the Bowdle project began in January of 2006. A first contact between Brekke and Erickson was an inquiry from Erickson as to whether MDU considered itself to be eligible to furnish the electrical load to the new Bowdle prospect under SDCL § 49-34A-56. On January 27, 2006, Brekke and Hainy discussed service by Montana-Dakota and contacts between them continued until Hainy telephoned Larry Oswald of Montana-Dakota on April 11, 2006, telling him that North Central would prefer to have FEM serve the new plant. Both Hainy and Erickson were aware of Montana-Dakota's position that customer preference is not the overriding criterion under the large load statute and that Montana-Dakota viewed itself as having the superior proposal.

FEM asserts as fact that it ". . . has served the site continuously for many years including service prior to March 21,

1975." Based upon its best information, Montana-Dakota believes it is accurate to say that prior to October 20, 2005, there were no other buildings than a roadside park on the Southwest Quarter of Section 20, and that since that time an office building and other construction has occurred for North Central, the new customer. The load prior to that time consisted of a roadside park. Montana-Dakota believes that the facts will show that the load delivered to the roadside park does not represent the same customer or the same location as the Bowdle facility.

STANDARD OF REVIEW

Montana-Dakota agrees with the standard of review cited by FEM in its brief. Summary disposition is appropriate when there is no genuine issue of material fact and the moving party is entitled to dismissal as a matter of law. The Commission is bound to review the evidence in the light most favorable to Montana-Dakota, the nonmoving party.

THE STATUTE

The large load statute SDCL § 49-34A-56 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.

ARGUMENT AND AUTHORITIES

Montana-Dakota believes that FEM has missed the point of the Hub City case, Matter of NorthWestern Public Service Company, 560 NW2d 925, 1997 SD 35, where the South Dakota Supreme Court decided that after Northern Electric Cooperative (NEC) was assigned to serve the Safeguard Metal Casting Division (Division) of the Safeguard Automotive Corporation located in the Aberdeen Industrial Park, Division and its successors did not retain the right to be

assigned to another utility's service area upon a determination of change in circumstances by the Commission.

Analyzing the 1975 legislative act known as the "South Dakota Territorial Integrity Act" ("Act") codified at SDCL Ch. 49-34A, the court stated:

The policy underlying the Act was "elimination of duplication and wasteful spending in all segments of the electric utility industry." [Citation omitted] To accomplish that end, exclusive territories designated "assigned service areas," were established for each utility. [Citation omitted] To ensure the integrity of a territory, the legislature granted each utility the exclusive right to "provide electric service at retail . . . to each and every present and future customer in its assigned service area." SDCL § 49-34A-42. Id., 560 NW2d at 927, ¶ 15.

The court then went on to list the only manner in which customers may have their provider changed. SDCL §§ 49-34A-38 through 49-34A-59.

Reference is made to these provisions as establishing assigned service areas within which the new provider has exclusive service rights at SDCL 49-34A-1(1) and SDCL 49-34A-42. SDCL 49-34A-1(1) defines "assigned service area" as "the geographical area in which the *boundaries are established as provided in §§ 49-34A-42 to 49-34A-44, inclusive, and §§ 49-34A-48 to 49-34A-59, inclusive.*" (Emphasis added) The last paragraph of SDCL 49-34A-42, the "exclusive right" provision of the act, states that "the Commission shall have the jurisdiction to enforce the *assigned service areas established by §§ 49-34A-42 to 49-34A-44, inclusive, and §§ 49-34A-48 to 49-34A-59, inclusive.*" (Emphasis added) [emphasis in original] Id., 560 NW2d at 928, ¶ 16.

Against the contention by the PUC and NWPS that after NEC was assigned to serve and service was extended, Division and its successors retained a right to be assigned to the service area of NWPS upon the PUC's determination of changed circumstances, the court held that "... it is clear that the PUC's action in 1977 established the Hub City location as part of the assigned service area of NEC. Concomitantly, NEC acquired the exclusive right to provide retail electric service at that location." Id., 560 NW2d at 926, ¶ 19.

The court expressly rejected the contention that a "retained right" was granted by the applicable statutes, stating:

There is no express language establishing such a right in the customer. Nor does that provision yield such a right when read in conjunction with the other provisions of the act. The 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. The successful exercise of the option does not beget another option. Id., 560 NW2d at 928, ¶ 28.

At page 4 of its brief, in suggesting that only the customer is entitled to petition under the large load statute, FEM misquotes the statute. In pertinent part the statute in fact reads: "[n]otwithstanding the establishment of an assigned service areas for electric utilities ... new customers at new locations

... located outside municipalities ... and who require electric service with a contracted minimum demand of 2,000 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" This language simply states that the customer is not obligated to take power from the incumbent utility where four conditions exist: a new customer, a new location, a location outside a municipality and contracted minimum demand of 2,000 kilowatts or more. It says nothing about who petitions the commission. Nor is the "option" absolute. The utility ultimately providing service must prevail under the six evaluative criteria later in the statute.

Nor does the statute, or any other portion of Ch. 49-34A, provide for consumer preference. Our Supreme Court decided that in the Willdrodt case: "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Willrodt vs. Northwestern Public Service Co., 281 NW2d 65, 72 (SD 1979). Customer choice is recognized only as stated in the large load statute, that is, it is one of six factors of co-equal importance. Nothing in the statute exalts customer preference over the other five factors.

FEM's argument would make a mockery of the plain meaning of the statute. Montana-Dakota has worked in good faith with North Central since January over a proposal to provide service superior to that of FEM to the new Bowdle facility. To permit the customer then to refuse to sign a petition on behalf of the provider with the superior proposal would not only eviscerate the large load statute, it would fly in the face of the underlying policy of the act, quoted by both parties, to eliminate duplication and wasteful spending in all segments of the electric utility industry. The large load statute addresses this in the other five subparagraphs.

At page five of its brief, FEM attempts to twist the language of the Hub City case to justify FEM's position that only the customer is entitled to petition the Commission, tailoring the quotation to be read expansively. As discussed above, the context of the Hub City case dealt with the question of whether any party had a retained right to change service once the service area was established under the large load statute. In holding that there is no retained right under those circumstances, the South Dakota court stated restrictively in the full quotation of the language: "The 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.”

(Emphasis supplied to identify FEM's omission) Hub City at 925.

FEM argues that because its contract allegedly requires less than 2,000 kilowatts the statute does not apply. This involves a factual issue. Attached is a copy of Montana-Dakota's response to staff's data request asking it to explain in detail why Montana-Dakota believes the contracted minimum demand is greater than 2,000 kilowatts. As the attachment will disclose, two highly credible sources, North Central's contractor and East River Electric which would wheel the power, place the load at 2.5 megawatts (2,500 kilowatts).

CONCLUSION

As to the size of the load, at the very least a genuine issue of material facts exists. Montana-Dakota was interacting with the customer from January to April, 2006. It takes very little imagination for the parties to write the contract at or slightly below the statutory threshold in an attempt to avoid Commission jurisdiction. FEM points out that the size of the load is one of the three¹ jurisdictional predicates to the filing of a petition, with which Montana-Dakota agrees. However, the Commission needs to

¹Actually, there are four. See p. 7 of this brief.

hear all the evidence on that subject. As to the identity of the petitioner, nowhere in law or rule is the identity of the petitioner specified. The large load statute stands and speaks for itself. Accordingly, the motion should be denied.

Dated this 17th day of July, 2006.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAVID A. GERDES

Attorneys for Montana-Dakota
Utilities Company

P.O. Box 160

Pierre, South Dakota 57501-0160

Telephone: (605)224-8803

Telefax: (605)224-6289

CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 17th day of July, 2006, he mailed by United States mail, first class postage thereon prepaid, and via telecopier a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

Martin Bettmann/Nathan Solem
Staff Analysts
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

Sara Greff
Staff Attorney
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

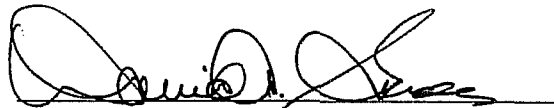
Paul Erickson
Manager
FEM Electric Association Inc
P.O. Box 468
Ipswich, SD 57451-0468

Keith Hainy
Manager
north central farmers elevator
P.O. Box 366
Ipswich, SD 57451-0366

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David A. Gerdes

**MONTANA-DAKOTA UTILITIES CO.
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF
FIRST DATA REQUEST
DATED MAY 2, 2006
DOCKET NO. EL06-011**

Request No. 1

Explain in detail why you believe the contracted minimum demand is greater than 2,000 kilowatts.

Response:

Montana-Dakota believes that the contracted minimum demand is greater than 2,000 kW due to information provided to Montana-Dakota by Logan Electric, the electrical contractor for the new terminal, and information provided to Montana-Dakota by East River Electric Power Cooperative. Given this information, Montana-Dakota's proposed service contract requires a contracted demand minimum of 2,000 kW per month.

As shown in Attachment A on a facsimile from Logan Electric dated January 17, 2006 the total design motor horsepower is expected to be 2,674 for the current plant size and an additional 949 motor horsepower is expected for future expansion. Using the standard conversion factor of 0.746 horsepower per kW the connected load would be 1,995 kW and 708 kW respectively. This connected motor load does not include any power requirements for other end use devices such as, but not limited to lighting, computers, and miscellaneous building load.

Also shown in Attachment B is a letter dated February 21, 2006 from East River Electric Power Cooperative to Montana-Dakota requesting an interconnection with Montana-Dakota on the Glenham to Bowdle 41.6 kV transmission line to serve the new Bowdle Terminal. As stated in the letter, East River estimated the peak load for the Bowdle Terminal to be 2.5 MW (2,500 kW) from October to January/February and 1.5 MW (1,500 kW) the remaining months of the year.

Bid # 1

sheet 2 of 4

NCFE BOWLDE

2 H
Reel

60 HP Pile Fill Conveyor

200 HP Load-out Leg/(Soft Starter)

15 HP Hydraulic Pump

400 A Breaker/Dryer 260 HP

30 A Breaker/Sampler

40 HP Transfer (Pit) Conveyor

150 HP East Receiving Leg/(Soft Starter)

150 HP West Receiving Leg/(Soft Starter)

75 HP Wet Leg/(Soft Starter)

40 HP Pile Reclaim

5 HP Screener Fill Conveyor

5 HP ~~VFD~~ Screener Unload

60 HP Dry Leg 3/5

40 HP East Top Fill 10,000

100 HP East Top Fill 20,000/(Soft Starter)

30 A Breaker/Manlift 10 HP

10 HP Wet Bin Unload Conveyor

60 HP East Bottom Unload Belt 5/5

75 HP West Bottom Unload Belt/(Soft Starter)

30 A Breaker/Gates- 2-Ways

**IEC Self-Protected Starters 32A, Reversing, Without Isolator,
With Overload Module, 110VAC Coil, Not Switchgear mounted,
Shipped Seperate (4 3/4 HP) (21 1/2 HP)**

15 A Breaker/Distributor #1

15A Breaker/Distributor #2

100 HP West Top Fill 20,000/(Soft Starter)

50 HP West Top Fill 10,000

25 HP West Pit Conveyor (Receiving)

20 HP ~~VFD~~ East Pit Conveyor (Receiving)

20 HP Wet Bin Fan #1

20 HP Wet Bin Fan #2

100 A Breaker/XFMR

100 A Breaker (Roof Fans)

**IEC Intregal Self-Protected Starters 32A, Non Reversing, Without
Isolator, With Overload Module, 110VAC Coil, Not Switchgear
Mounted, Shipped Seperate, 22 - 2HP Total (Roof Fans)**

10 HP Scalper

50 HP 90' Bin Bottom Fan #1

50 HP 90' Bin Bottom Fan #2

50 HP 90' Bin Bottom Fan #3

50 HP 90' Bin Bottom Fan #4

50 HP 90' Bin Bottom Fan #5

sheet 3 of 4

Bid # I can't.

60 hp -
SOLL

- 50 HP 90' Bin Bottom Fan #6
- 50 HP 90' Bin Bottom Fan #7
- 50 HP 90' Bin Bottom Fan #8
- 50 HP 90' Bin Bottom Fan #9
- 50 HP 90' Bin Bottom Fan #10
- 50 HP 90' Bin Bottom Fan #11
- 50 HP 90' Bin Bottom Fan #12
- 50 HP 90' Bin Bottom Fan #13
- 50 HP 90' Bin Bottom Fan #14
- 50 HP 90' Bin Bottom Fan #15
- 50 HP 90' Bin Bottom Fan #16
- 50 HP 90' Bin Bottom Fan #17
- 50 HP 90' Bin Bottom Fan #18
- 50 HP 90' Bin Bottom Fan #19
- 50 HP 90' Bin Bottom Fan #20

2,674 Total HP
Plus Dry 50 KVA XFMR

1.99

2-190-mk

20-240-

8000 or more

16' x 2



TOTAL P.04

Bid #2

sheet 4 of 4

**NCFE BOWDLE
FUTURE EXPANSION**

- 30A Breaker (Electric Gates)
- 60 Top Pile Conveyor
- 40 Bottom Pile Reclaim
- 100 Top Conveyor 20,000/(Soft Starter)
- 50 Top Conveyor 10,000
- 75 Bottom Bin Reclaim/(Soft Starter)
- 50 Bottom Fans #1
- 50 #2
- 50 #3
- 50 #4
- 50 #5
- 50 #6
- 50 #7
- 50 #8
- 50 #9
- 50 #10
- 50 #11
- 50 #12
- 60 A Breaker (Top Fans)

949 Total HP

77 kW

2.7 kW

130 kW -
on P-R



EAST RIVER

ELECTRIC POWER COOPERATIVE

121 Southeast First St.
Madison, SD 57042

P.O. Box 227
Telephone (605) 256-4536

February 21, 2006

Mr. Henry Ford
Electric Transmission Manager
Montana-Dakota Utilities
400 North Fourth Street
Bismarck, ND 58501-4092

Subject: Proposed New Interconnection with Montana Dakota Utilities
Glenham to Bowdle 41.6 kV Transmission Line

Dear Mr. Ford:

As we discussed during our telephone conversation on February 3, a new grain handling/multi-unit train loading facility is currently under construction one mile west of Bowdle, South Dakota in the electric service territory of FEM Electric. FEM Electric is a member system of East River Electric Power Cooperative (East River). East River is responsible for providing the necessary transmission facilities and interconnections for FEM Electric to serve this new electric load.

In order to serve this new facility, East River is requesting an interconnection to Montana-Dakota Utilities' (MDU) 41.6 kV Glenham to Bowdle transmission line under the Interconnection and Common Use Agreement between MDU and Basin Electric Power Cooperative. As a member/owner of Basin Electric, East River is a participant in this Agreement.

The peak load for the new facility is estimated to be 2.5 MW during the months of October through January/February and 1.5 MW the remaining months of the year. The largest motor at the facility is a 260 HP motor. All motors larger than 50 HP are to have soft start capabilities. The facility is scheduled to begin operation in the fall of 2006.

As shown on the attached drawing, the site of this new facility is adjacent to MDU's 41.6 kV Glenham to Bowdle transmission line in Section 20, Township 123 North, Range 73 West, Edmunds County, South Dakota.

To serve the facility, East River is proposing to build approximately one half mile of 41.6 kV transmission line from MDU's 41.6 kV line to a new 5 MVA 41.6 to 12.47 kV East River substation. The substation would have revenue quality metering on the low-side bus of the substation. The new transmission line and substation would be constructed

Mr. Henry Ford

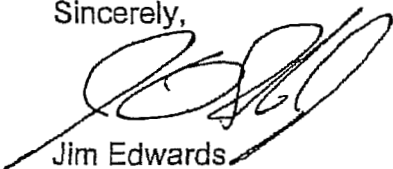
-2-

February 21, 2006

by East River personnel and would be at East River's expense. East River is presently working on a proposed design for interconnecting to MDU's 41.6 kV line. Once the proposed design is completed, East River will forward the engineering drawings and specifications on to you for MDU's review and approval.

If there are any questions or additional information is required in order for MDU to proceed with this request for a new interconnection, please contact either myself at (605) 256-8002 or jedwards@eastriver.coop or Dan Wall, East River's Manager of Transmission and Engineering Services at (605) 256-8005 or dwall@eastriver.coop. I greatly appreciate your prompt attention to this request.

Sincerely,

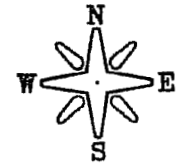
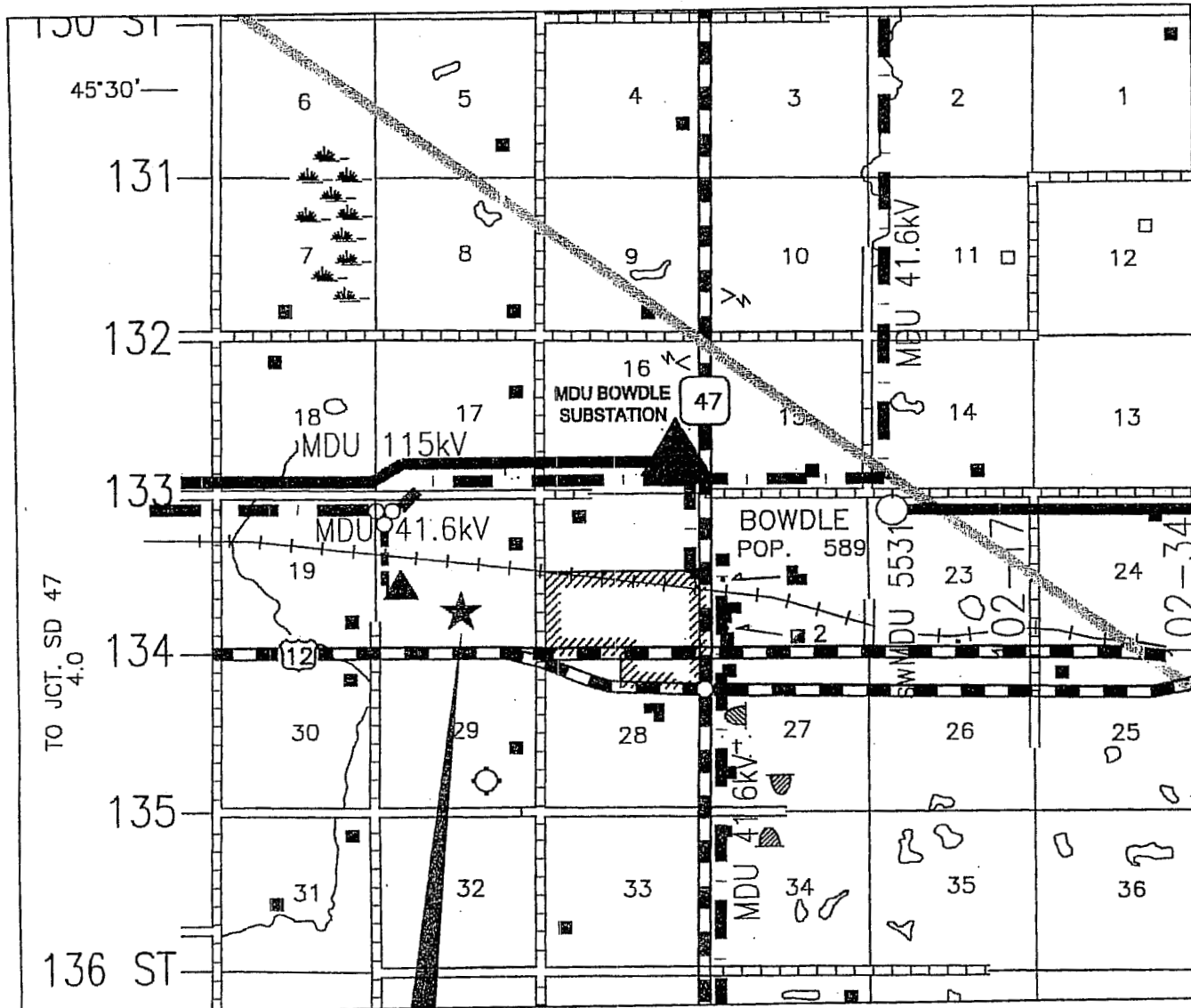


Jim Edwards
Assistant General Manager Operations

JE/jc

Enc.

cc: Dan Wall
Ken Booze
Larry DeKramer
Paul Erickson, FEM Electric
Mike Risan, Basin Electric



LEGEND

- EAST RIVER 115/69KV SUBSTATION
- EAST RIVER 69/12.47KV SUBSTATION
- NEW EAST RIVER 41.6/12.47KV SUBSTATION
- EXISTING EAST RIVER - 41.6KV LINES
- NEW EAST RIVER 69KV LINE
- NEW THREE WAY LINE SWITCH
- NORTH CENTRAL FARMERS ELEVATOR
- W.A.P.A. 115KV SUBSTATION
- BASIN 230KV SUBSTATION
- W.A.P.A. - 115KV LINE
- W.A.P.A. - 230KV LINE
- BASIN - 230KV LINE
- BASIN - 345KV LINE
- BASIN - 500KV LINE



Your Touchstone Energy® Cooperative

**NORTH CENTRAL FARMERS
GRAIN HANDLING FACILITY**

**NORTH CENTRAL FARMERS
GRAIN HANDLING FACILITY**