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JUN 22 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION FOR DESIGNATION OF MONTANA-DAKOTA UTILITIES CO. AS ELECTRIC SERVICE PROVIDER FOR THE NEW NORTH CENTRAL FARMERS ELEVATOR LOCATION IN BOWDLE, SOUTH DAKOTA, AS A LARGE LOAD CUSTOMER.

DOCKET NUMBER EL06-011

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

FEM Electric Association, Inc. ("FEM"), an electrical distribution cooperative headquartered in Ipswich, South Dakota, by and through its attorney, Darla Pollman Rogers of Riter, Rogers, Wattier & Brown, LLP, hereby submits this Memorandum in Support of its Motion for Summary Disposition.

FEM requests the Commission grant its Motion for Summary Disposition with respect to the following issues (1) the contracted load is less than 2,000 kilowatts, which is the threshold for a large load found in SDCL § 49-34A-56; and (2) based on a plain reading of SDCL § 49-34A-56, Montana-Dakota Utilities ("MDU") has failed to state a claim upon which relief can be granted because MDU lacks standing to bring a petition under this statute.

Summary disposition is proper because there are no genuine issues of material fact regarding this matter, and FEM is entitled to judgment as a matter of law pursuant to SDCL § 15-6-12(b), SDCL § 1-26-18 and ARSD 20:10:01:02.4.

## I. FACTS

On April 12, 2006, MDU filed a Petition with the South Dakota Public Utilities Commission (“Commission”) to be designated as the service provider for North Central Farmers Elevator’s (“North Central”) new facility. North Central plans to construct a new grain handling/multi-unit train loading facility (“Bowdle Facility” or “Facility”) to be located near Bowdle, South Dakota. MDU filed this petition pursuant to SDCL § 49-34A-56. This Petition is unique, because it has been filed by a competitive electric service provider, rather than a large load customer. FEM filed a Petition to Intervene on April 27, 2006, North Central filed a Petition to Intervene on April 28, 2006, and South Dakota Rural Electric (“SDREA”) file a Petition to Intervene on May 12, 2006. FEM, SDREA, and North Central were all granted intervention. All three of these parties object to the Petition of MDU to be designated as the electric supplier for the Bowdle Facility and support this Motion for Summary Disposition.

The Bowdle Facility is located in the assigned service territory of FEM. FEM has served the site continuously for many years including service prior to March 21, 1975. FEM is currently servicing the temporary electric needs of the Facility during the construction phase of this project. On April 13, 2006, FEM and North Central entered an Electric Service Agreement, which provides that FEM will provide all of the electric energy requirements of the Facility.

MDU has alleged in its Petition that the Bowdle Facility will have requirements of a contracted minimum demand of 2,000 kilowatts. To the contrary, in the Petition to Intervene by FEM and the Petition to Intervene by North Central, both parties assert that this project does not have electric service requirements with a contracted minimum demand of 2,000 kilowatts. As evidenced by the Petitions to Intervene by FEM and North Central and the Affidavit of

the General Manager, Keith Hainy of North Central, (attached hereto) the peak load for the new Facility is estimated to be below 2,000 kilowatts.

## II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to dismissal as a matter of law. SDCL § 15-6-56(c); Welf vs. Senst, 2003 SD 105, ¶ 17, 669 NW2d 135, 141. The Commission must grant the Motion for Summary Disposition if it believes that MDU's Petition sets forth no facts to support a claim for relief. Schlosser v. Northwest Bank of South Dakota, 506 NW2d 416, 418 (SD 1993). When considering this motion, the Commission must view evidence in the light most favorable to the non-moving party. Welf. at ¶ 17.

## III. ANALYSIS

### A. Policy of Territorial Law

MDU has brought this Petition pursuant to SDCL § 49-34A-56, which is part of the Electric Territorial Law of the State of South Dakota (Territorial Act). The Territorial Act gives the Commission the power to assign specific service areas to each utility. The Territorial Act was set up to accurately and clearly define the boundaries of the assigned service areas of each electric utility, and to grant the right to electric providers to be the exclusive provider of electric service within said assigned service areas. The policy underlying this Act is to avoid duplication of facilities and wasteful spending in all segments of the electric utility industry.

The Territorial Act also contains limited instances whereby electric consumers can have their provider changed or, in cases of large loads, where electric customers are not obligated to take electric service from the electric utility having the assigned service area where the customer is located. SDCL §§ 49-34A-38 through 49-34A-59; In the Matter of the Petition for

Declaratory Ruling of Northwestern Public Service Company with Regard to Electric Service to Hub City, 1997 SD 35, ¶ 16, 560 NW 2d 925, 927.

B. MDU does not have standing to bring this petition on behalf of the North Central Farmers Elevator and thus this Petition should be dismissed.

As stated, the Territorial Act assigned service areas to various electric companies at the time it was adopted. As a general rule, it provided that 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. SDCL § 49-34A-42. This allows FEM to serve the Bowdle Facility because the Facility is located in FEM's assigned service area. The Territorial Act further provided certain limited exceptions to this general rule, including that of SDCL § 49-34A-56, the large load exception.

MDU has filed a Petition to provide service to the Bowdle Facility, which is outside of MDU's service area, based on the large load exception contained in SDCL § 49-34A-56. The statute provides that "a new customer is not 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 considering the following factors...".

A plain reading of the statute shows that MDU's reliance on this statute is flawed and that it has failed to bring a cause of action upon which relief can be granted. According to the statute, MDU should not be allowed to bring an action on behalf of a customer that has chosen to be served by the electric provider in whose assigned service area the customer is located. The purpose of statutory construction is to discover the true intention of the law, which is to be

ascertained primarily from the language expressed in the statutes. Beck vs. Lapsley, 1999 SD 49, ¶ 3, 593 NW2d 410, 413. The purpose of SDCL § 49-34A-56 is to allow large new customers a choice as to who will provide their electric service. It provides an avenue wherein the new customer is not obligated to take service from the electric utility serving the geographic area where it is located, if all the conditions of the statute are met. This intent is clearly spelled out in the plain language of SDCL § 49-34A-56 and is supported by South Dakota case law. “The plain language of the statute indicated the legislature intended it to... provide a new large load customer at a new location an option to be exercised prior to receipt of service”. (emphasis added) Hub City at 928. This language supports FEM’s position that it is the customer that can bring the petition, not a competing electric provider.

There are also important policy considerations behind allowing the customer to file for a change in electric service provider, not a competing electric provider. The customer is in the best position to determine which electric provider makes the best business sense for its company. This statute was designed to allow the new customer to decide if it is in its best interests to receive service from the electric service provider in the service territory in which the new customer is located, or from an electric service provider from a different location. To interpret the statute in the manner advocated by MDU would place this Commission in a position of making a business decision for the new customer. This is clearly not the intent of the large load exception. The Commission is not in a position to make such a decision: the Commission is not located in the area, nor is it familiar with the business. Furthermore, it is not within the scope of authority of this Commission to make business decisions for large load customers.

There are other important policy issues that support FEM’s position that SDCL § 49-34A-56 affords the new customer the opportunity to petition for an electric service provider out-

side of the assigned service area in which the business is to be located. In the current case, North Central has selected FEM to provide electric services to the Bowdle Facility and has already entered into a contract for those services. Allowing a competing electric service provider to petition the Commission under SDCL § 49-34A-56 forces the customer to engage in a costly regulatory hearing process. The new large load project could be placed in jeopardy because of the delays caused by the regulatory procedures triggered by a petition filed pursuant to SDCL § 49-34A-56. If the customer is the petitioner, it obviously anticipated the time required to gain regulatory approval of an alternative, out of area electric provider and made that part of the planning process. If an unanticipated petition is filed by a competitor and the new customer must defend its choice of the local service provider, this can cause harm to the new business because of the unexpected delays. That clearly flies in the face of the very purpose of SDCL § 49-34A-56, which is to provide a positive business option to the new customer. In the current case, FEM is serving the Bowdle Facility construction site. Dismissal of the current Petition will allow continued uninterrupted service to the Bowdle Facility and will assure that there will be no duplication of facilities and services or stranded investment by FEM.

C. Summary Judgment is proper because the load to be served on behalf of the Bowdle Facility will not be a large load as defined by SDCL § 49-34A-56.

MDU's petition is brought pursuant to SDCL § 49-34A-56, which states in relevant part:

Notwithstanding the establishment of assigned service areas for electric utilities provided for in §§ 49-34A-43 & 49-44A-44, new customers at new locations, which develop after March 21, 1975, located outside the 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. (emphasis added).

The statute has three qualifying factors that must be met before a customer can seek to be served by an electric service provider other than the one holding the assigned service area rights. The first of the three qualifying factors is that it must be a new customer which develops after March 21, 1975. The second qualifying factor is that it must be seeking service to a new location. Finally, the third qualifying factor is that the customer must require electric service with a contracted minimum demand of two thousand kilowatts or more.

Had this Petition been properly filed by the customer, the first two qualifying factors would be met; however, the third factor would not be met. Contrary to the position of MDU, FEM and North Central assert that a plain reading of SDCL § 49-34A-56 shows that a Petition filed pursuant to this statute and consideration of the six factors are appropriate only after the first three qualifying factors are met, one of which is when the electric service requested has a contracted minimum demand of 2,000 kilowatts or more.

MDU has asserted in its petition, without substantiation, that the Bowdle Facility is a large load under SDCL § 49-34A-56. MDU will undoubtedly argue that the size of the load is a material fact in dispute because FEM and North Central both state that the load is below 2,000 kilowatts. MDU's assertion is immaterial, however, because the contract entered by the parties speaks for itself, and the Electric Service Agreement does not require a contracted minimum demand of 2,000 kilowatts or more. In fact, there is no minimum demand stated in this Agreement. If the parties contemplated the necessary language which provides for this minimum, it would have been included.<sup>1</sup> As stated in the Petitions to Intervene of FEM and North Central and the attached Affidavit of the North Central Manager Keith Hainy, the

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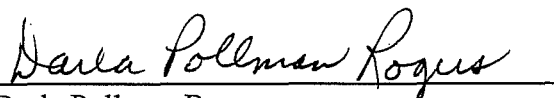
<sup>1</sup> Parties could have included language as in Northwestern Service Company, 1997, SD 35, ¶ 5, 560 NW2d 925, which states an "Agreement was entered into obligating division to purchase a minimum of 2000 kilowatts of electric power per month from NEC at a specified rate."

contracted minimum load was not included because the peak electric requirements will be below 2,000 kilowatts. This fact standing alone requires the Commission to dismiss this Petition of MDU.

**CONCLUSION**

FEM, SDREA, and North Central request that this Commission dismiss the Petition for large load electric service filed by MDU and grant this Motion for Summary Disposition. There is an electric agreement between a customer and the electric service provider having the assigned service area of that customer. It is not a contract for a large load over the amount specified in SDCL § 49-34A-56, and MDU has no standing to petition the Commission to assign this customer to any other electric service provider.

Dated this 21<sup>st</sup> day of June, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the MOTION FOR SUMMARY DISPOSITION and MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION was served via the method(s) indicated below, on the 21<sup>st</sup> day of June, 2006, addressed to:

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

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Dated this 21<sup>st</sup> day of June, 2006.

  
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