

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

In the Matter of the Petition for Electrical Service by Dakota Plains Ag Center, LLC to have Northwestern Energy Assigned as its Electric Provider in the Service Area of Bon Homme Yankton Electric

**Motion for Continuance Pending Completion of Discovery Pursuant to SDCL 15-6-56(f) by Bon Homme Yankton Electric Association, Inc.  
Docket EL16-013**

Bon Homme Yankton Electric Association, Inc. (“Cooperative”) moves the Commission pursuant to SDCL § 15-6-56(f) for an order continuing the hearing scheduled for June 7, 2016 on cross motions for summary judgment made by Cooperative and Dakota Plains Ag Center, LLC (“Dakota Plains”).

The Cooperative objects to submitting briefs and conducting oral arguments on the parties’ cross motions for summary judgment at this time because the discovery schedule in this matter has been substantially shorter than that generally applied to the discovery process. Not only has the schedule been expedited, but perhaps more importantly, it has not yet been completed. See *Affidavit of Nicholas G. Moser*, ¶ 2. Specifically, neither party has yet had the opportunity to take any depositions. *Id.* at ¶ 3. These depositions likely will reveal key answers to material facts that are essential for the Commission to determine whether or not summary judgment is proper. In addition, Dakota Plains has made several objections to relevant and critically important discovery requests and has refused to provide requested information. *Id.*, Exhibit 1.

Pursuant to the current schedule, the Commission will hear arguments on Dakota Plains’ Motion to Quash and Motion in Limine on the same day as it will hear oral arguments on the parties’ cross motions for summary judgment. Since Dakota Plains has refused to provide information that is both easily ascertainable and highly relevant, the Cooperative was forced to submit its brief in support of summary judgment without the benefit of that information. *Id.* at ¶ 5-6. This is particularly prejudicial to the Cooperative since Dakota Plains was the party pushing for an expedited scheduling order, is the only party who has access to this critical information, and can now hold that information back until after summary judgment. *Id.* at ¶ 7. This is not an advantage that one party would be permitted to enjoy under standard rules of civil procedure. At the very least, motions to compel would be heard and decided prior to deadlines for submittal of summary judgment documents.

Additionally, since the discovery motions will be heard on the same day as the summary judgment motion, even if the Cooperative successfully resists Dakota Plains’ discovery motions – a likely outcome given that the scope of discovery is extremely broad – it will not have the benefit of being able to examine and effectively use that information at the summary judgment hearing that will occur immediately thereafter.

Full and fair discovery is essential for the Cooperative to effectively resist Dakota Plains’ motion for summary judgment. SDCL 15-6-56(f) “provides that a party opposing a motion for

summary judgment is entitled to conduct discovery when necessary to oppose the motion.” *Peters v. Great Western Bank, Inc.*, 2015 S.D. 4, ¶ 17. “Under that rule, the facts sought through discovery must be ‘essential’ to opposing summary judgment.” *Dakota Indus., Inc. v. Cabela’s .Com, Inc.*, 2009 S.D. 39 ¶ 6. “This requires a showing how further discovery will defeat the motion for summary judgment.” *Id.*

Dakota Plains alleges that “when all facilities are operating at the same time, the usage of the customer at this location will be approximately 2.280 megawatts.” *Dakota Plains Ag Center, LLC’s Statement of Material Facts*. Showing that the proposed facility has a contracted demand of 2,000 kilowatts or more (2.0 megawatts) is a threshold requirement in order for the Commission to even consider Dakota Plains’ petition under SDCL 49-34A-56. If there is a genuine dispute as to whether or not the proposed facility will require electrical demand of 2,000 kilowatts, then Dakota Plains’ motion for summary judgment should be denied. Therefore, it is essential that Dakota Plains provide estimates of the maximum demand the proposed facility will require, but it refuses to do so.

For example, Cooperative appropriately requested the following information from Dakota Plains:

9. What is the maximum estimated fifteen (15) and thirty (30) minute electrical demand in KW for the entire Facility for each month of the calendar year? See *Bon Homme Yankton Electric Association, Inc.’s Interrogatories and Requests for Production of Documents (First Set)*, #9.

Dakota Plains responded that the information requested was not relevant and refused to provide a response. *Dakota Plains Ag Center, LLC Answers to Bon Homme Yankton Electric Association, Inc.’s Interrogatories and Request for Production of Documents (First Set)*, #9. Not only is this information clearly relevant, but it is perhaps the most relevant information Dakota Plains could possibly provide. Without an opportunity to evaluate this important information, Cooperative cannot respond to Dakota Plains’ motion for summary judgment.

Not only does Cooperative need estimated demand information for the proposed facility, but it also needs to be able to depose Dakota Plains’ engineers and design team in order to understand how those estimates were reached and whether or not they are credible. Since the Cooperative has not yet been permitted to take these depositions, it cannot properly respond to Dakota Plains’ motion for summary judgment. Dakota Plains can literally allege its own facts without any possibility for Cooperative to either resist those facts or to outright disprove them.

Importantly, the requested data and depositions have a strong likelihood to uncover information that will defeat Dakota Plains’ motion for summary judgment as a matter of law. Specifically, further discovery will allow Cooperative to prove, without dispute, that the proposed operation will not require 2,000 kilowatt demand. Certainly, this is the reason Dakota Plains has so strongly resisted providing this clearly relevant information.

For the foregoing reasons, the Cooperative respectfully requests that the scheduling order provided for by this petition be amended so that the Commission can rule on the Cooperative’s

motion to compel Dakota Plains to provide an answer to the discovery requests it has objected to and so that deposition can be taken of Dakota Plains' project engineer, as well as staff from Northwestern Energy and Muth Electric. Only after that discovery has been completed will the parties be able to adequately respond to each other's motion for summary judgment.

Dated this 31<sup>th</sup> day of May, 2016.

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