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	)))))	Docket No. EL16-013

BRIEF IN SUPPORT of PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, Dakota Plains Ag Center, LLC, seeks an Order from the South Dakota Public Utilities Commission pursuant to SDCL §49-34A-56 to allow it to choose NorthWestern Corporation doing business as NorthWestern Energy (herein "NorthWestern") as its provider of electrical service in the territory of Bon Homme Yankton Electric Association, Inc. There is no genuine issue as to any material fact, and Dakota Plains is entitled to an Order from the Commission as a matter of law.

FACTUAL BACKGROUND

State law provides that a new customer at a new location with a contracted minimum demand of 2,000 kW or more is not obligated to take electric service from the electric utility having the assigned service area if the Public Utilities Commission so determines after consideration of several factors. Dakota Plains has presented a Petition to the Commission demonstrating that it is indeed a new customer at a new location, which requires electric service with a contracted minimum demand of more than 2,000 kW.

Dakota Plains plans to operate a grain terminal in Yankton County, South Dakota. The new grain terminal (herein the "Terminal") will be at a site located in the following tract of land in Yankton County:

> Lot One (1), Dakota Rail Park Subdivision, located in Section Twenty-one (21), Township Ninety-four (94) North, Range Fifty-Six (56) West of the 5th P.M., Yankton County, South Dakota as per plat recorded in book S20, Page 132.

Dakota Plains is a new customer, seeking electrical service to a new location, which has developed since March 21, 1975, and such location overlaps the territorial boundaries of NorthWestern and Bon Homme Yankton, an REC, as such boundaries existed on March 21, 1975, all pursuant to SDCL §49-34A-56. NorthWestern claims the eastern half of the location and Bon Homme Yankton claims the western half, approximately.

Effective April 8, 2016, Dakota Plains executed an Electric Distribution Service Agreement with NorthWestern, which Dakota Plains believes will allow it to fill its demand for electricity and receive reliable electrical service at an economic rate and without extensive and expensive development of new facilities to provide such service. The Electric Distribution Service Agreement meets the statutory requirement of contracted minimum demand in excess of two thousand kilowatts.

Through its Petition to the Commission, Dakota Plains has demonstrated its desire to receive electrical service from NorthWestern, for all of its electrical needs at the terminal. NorthWestern is designing and constructing facilities for the Terminal to support a peak demand of 2.23MW. See Affidavit of Reed McKee at ¶ 5.

NorthWestern can more easily, more quickly, and less expensively meet the electrical service requirements of the terminal. No electric service was previously established at the site of the proposed Terminal, and NorthWestern has an adequate power supply to serve the needs of

Dakota Plains. See Affidavit of Reed McKee at ¶ 4 and 8. Serving the terminal will assist and not be a hindrance in the development and improvement of the NorthWestern electric system. Id. at ¶ 6. NorthWestern has adequate facilities in proximity to the Terminal from which electric service of the type required may be delivered. Id. at ¶ 8.

Dakota Plains has a strong preference to be served by NorthWestern. NorthWestern's cost to establish service is $671,000, id. at ¶ 7, and pursuant to the contract, NorthWestern will recover the capital investment associated with the development of the infrastructure over a period of 8 years. The cost to establish service with Bon Homme Yankton was quoted as $1,390,000 all paid up front to East River Electric Association for the construction of a substation and related transmission, and $262,000 to Bon Homme Yankton, paid ½ up front and the remainder over time. The difference in construction cost is no small consideration and is integral to the customer's choice to be served by Northwestern pursuant to statute.

ANALYSIS AND AUTHORITY

Summary judgment is appropriate "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 that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Karst v. Shur-Co.*, 2016 SD 35, ¶ 15, ___ N.W.2d ___, (quoting *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 5, 859 N.W.2d 618, 621) (citations omitted).

"Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial." *Id.* (quoting, *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149) (citations omitted). As explained below, no general issue of material fact exists in this dispute, therefore, summary judgment in favor of the Petitioner is warranted.

(1) The necessary facts regarding the contracted minimum demand are contained in the contract between Dakota Plains and NorthWestern and no other evidence is required or permissible to determine those requirements.

Dakota Plains and NorthWestern entered into a contract for the electric demand of the Terminal. The contract is subject to state statutes, and tariffs on file. The contract incorporates the tariffs. As such, the contract requires NorthWestern to supply the electric demand of the Terminal which exceeds the statutory threshold of 2mW. The contract is the only evidence required by the Commission on the question of demand. The statute requires a "contracted minimum demand" of more than 2mW. The contract meets the statute. No further inquiry is permissible or necessary or warranted. The parol evidence rule excludes evidence of the meaning of the contract and the contract itself is the only evidence required.

Contract principles govern the interpretation of a contract. See *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 21, 636 N.W.2d 459, 465. Contract interpretation is a question of law that we review de novo. *Poeppel v. Lester*, 2013 S.D. 17, ¶ 16, 827 N.W.2d 580, 584. When a contract is unambiguous and clear, we determine the parties' intent from the four corners of the document and extrinsic evidence is not needed. *In re Estate of Klauzer*, 2000 SD 7, P14, 604 N.W.2d 474, 478.

The goal of contract interpretation is to determine the parties' intent. See id. To determine intent, we look "to the language that the parties used in the contract[.]" Id. (quoting *Detmers v.*

Costner, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151). The entire instrument must be considered in determining the meaning of the contract. *Varilek v. Charles Mix Elec. Ass'n*, 409 N.W.2d 117, SD 1987. We do not, however, interpret "particular words and phrases . . . in isolation." *Casey Ranch Ltd. P'ship v. Casey*, 2009 S.D. 88, ¶ 11, 773 N.W.2d 816, 821 (quoting *In re Dissolution of Midnight Star Enters.*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337). Nor do we interpret language "in a manner that renders a portion of [the contract] meaningless." *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 14, 645 N.W.2d 841, 846 (citation omitted). Instead, we interpret the contract to give "a reasonable and effective meaning to all [its] terms[.]" *Casey Ranch*, 2009 S.D. 88, ¶ 11, 773 N.W.2d at 821 (quoting *Midnight Star*, 2006 S.D. 98, ¶ 12, 724 N.W.2d at 337).

The clear intent of the parties is that the customer's demand for electricity is to be met by NorthWestern upon demand, and that NorthWestern be prepared at all times to meet that demand, at an amount exceeding 2mW.

(2) Contracted minimum demand doesn't mean anything other than that, nor does it include concepts such as average, actual or projected use.

The statute speaks of "contracted minimum demand". It doesn't say "average annual demand" or "actual projected use" or "based on comparable facilities." "Contracted minimum demand" must be read to mean that the customer has a contract to demand power at a minimum of 2mW. There is no requirement in law that the customer demand power at 2mW for any given period of time. There is no requirement that an average or other measure of demand be met. Those words are not in the statute. The statute simply requires a contract for electricity at a demand of at least 2mW.

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 statute. *Appeal of AT&T*

Information Systems, 405 N.W.2d 24 (S.D. 1987). The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. *Id.*

Words and phrases in a statute must be given their plain meaning and effect. *Id.* When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. *Id.*

Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. *Id.* But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. Id. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over general terms of another statute. *Nelson v. School Bd. of Hill City S.D.*, 459 N.W.2d 451 (S.D. 1990). Moreover, it is presumed that the legislature does not intend to insert surplusage in its enactments. And, where possible, the law must be construed to give effect to all of its provisions. *Id.* at 455. See, *US W Communications v. Public Utils. Com'n*, 505 NW2d 115, SD 1993.

The North American Energy Regulatory Corporation (NERC) defines "demand" as:

> "The rate at which electric energy is delivered to or by a system or part of a system, generally expressed in kilowatts or megawatts, at a given instant or averaged over any designated interval of time." *Glossary of Terms Used in NERC Reliability Standards, NERC, updated to May, 2016.*

One might argue that the statute means that the customer must demand (or pay for) 2mW at all times in order to be able to utilize the statute. Such a reading however would be illogical and incorrect. No utility operates 100% of the time. Maintenance, storms, humans and other animals all act at times to cause outages. Neither does any user. Very very few installations

intend to run 24/7/365. Most businesses and plants close at night and on weekends. Reading the statute to mean that 2mW must either be used or paid for at all times would run counter to the basis for the statute, namely to encourage efficiency and avoid duplication. Requiring a customer to pay for electricity it does not or cannot use does not promote efficiency. In fact it does the complete opposite. It is almost by definition inefficient.

Reading the statute that way would also read a term into the statute which is not there. The statute has no time interval of minutes, hours, days, weeks, months or years. To conclude that a demand has to be over some period of time reads a term into the statute which is not necessary and is impermissible. There is no basis to conclude that a customer needs to or must demand (and thus use) over 2mW for any period of time. And none can be written into the statute.

The statute has to be read to mean that "contracted minimum demand of more than 2mW" is met when a customer has a contract with a utility to be able to demand more than 2mW and the utility must provide that power.

(3) The terminal is designed for and is able to use more than 2mW of electricity at any given time.

While not required by statute, a discussion of the installed capacity of the Terminal for use of electric power is helpful. The Terminal construction plans call for the installation of electrical equipment which when all in use at the same time, will be 2.280mW of demand. While it is not contemplated that all equipment will be simultaneously operating at all times, it is expected that the terminal will demand the full amount from time to time. It is legally, contractually and practically required by Dakota Plains that NorthWestern be prepared and able to serve the demand of the Terminal, at the Terminal's option. If the Terminal chooses to

demand and use its full complement of electrical equipment at any (or all of the) time, NorthWestern is obligated to be prepared to meet that demand, which is calculated at 2.280 mW of demand. In fact, a utility unable to provide service for the customer's peak demand risks running afoul of SDCL § 49-34A-58. The Terminal may choose to fully operate and demand its full capacity without regard to any regulation or consideration of the thoughts of any third party (or even its own needs) and the only effect would be that NorthWestern would send a bill for the power consumed.

(4) The statutory factors for Commission consideration all weigh in favor of the petition and do not include or permit any consideration of effects, if any, on the electric provider who is losing territory.

There is no statutory provision for a balancing of the impacts on the competing utilities. The six statutory factors don't provide for that type of analysis at all. The factors are directed at impacts on the selected utility, and decisions made by the customer. There is no factor which asks the Commission to consider the effects on the utility not selected. The natural inclination for anyone would be to consider effects on both parties where their interests are juxtaposed; but a careful reading of the statute discloses that no such consideration is either required or permitted. As shown by the Affidavit of Reed McKee, those factors all mandate granting the petition.

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 statute." *Esling v. Krambeck*, 2003 SD 59, P6, 663 NW2d 671, 675-76 (citation omitted). When interpreting a statute, we give plain meaning and effect to words and phrases. *Hay v. Bd. of Comm'r for Grant County*, 2003 SD 117, P9, 670 NW2d 376, 379 (citing *Esling,* 2003 SD 59, P6, 663 NW2d at 676 (citing *Moss v. Guttormson*, 1996 SD 76, P10, 551 NW2d 14, 17 (citations omitted))). We view the language

of the statute as a whole, "'as well as enactments relating to the same subject.'" *Moss*, 1996 SD 76, P10, 551 NW2d at 17 (quoting *U.S. West Communications, Inc.*, 505 NW2d at 122-23).

> On careful examination of SDCL 49-34A-56, we interpret this statute to give only customers the right to bring a petition. It is true that nothing in SDCL 49-34A-56 states that the customer is the sole party able to bring a petition. Written in the passive voice, the operative language of the statute leaves unsaid who in particular may bring a petition. Nonetheless, considering the statute's language and the language of its accompanying sections in SDCL Chapter 49-34A, the legislative intent appears to allow only new large load customers at new locations the right to petition the PUC for relief from the obligation to receive service from the incumbent provider. It is the customer's needs the statute seeks to accommodate: it expresses a concern, not about a provider's interest in gaining business outside its territory, but about a new customer not being "obligated" to accept the assigned provider.
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> Furthermore, in looking at the preceding section, SDCL 49-34A-55, we see the right of electric utilities to agree among themselves to change assigned service areas, subject to PUC approval, as supporting our reading that SDCL 49-34A-56 was not intended to allow open competition from outside providers for new large load customers. The purpose was to protect the public interest by "the elimination or avoidance of unnecessary duplication of facilities, [the provision of] adequate electric service to all areas and customers affected, and the promotion of the efficient and economical use and development of the electric systems. . . ." See SDCL 49-34A-55. Our interpretation reaffirms this Court's earlier statement in Hub City that "[t]he 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." 1997 SD 35, P20, 560 NW2d at 928.
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> However, simply because the customer prefers an outside provider does not necessarily mean the customer's preference will be granted. The PUC must consider the six statutory factors in SDCL 49-34A-56 before allowing an alternative utility to provide service in another utility's assigned territory. While one factor is customer preference, that cannot be read to suggest that non-customers may also bring a petition. Rather, without this factor, the PUC might consider itself compelled to ignore a customer's expressed desire when reviewing a petition.
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> SDCL 49-34A-56 was intended to make peace between competing utilities and protect a new large load customer from costly delays and time-consuming regulatory hearings when the customer prefers service from the local provider. It gives the customer the right to seek service from an outside competing utility, but it cannot be used to force the

customer to accept service from an outside provider when the assigned provider is the customer's choice. *In the matter of the Petition of Montana Dakota*, 2007 SD 104.

As the Supreme Court notes, this statute gives the choice to the Customer upon the Commission's consideration of the factors. The factors mandate a determination in favor of the Customer's choice here. There is no genuine issue of a material fact and the Customer is entitled to an Order from the Commission determining it to be so.

Dated this 27 day of May, 2016

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