

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

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**IN THE MATTER OF THE PETITION  
FOR TEMPORARY 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 COOPERATIVE INC.**

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**MOTION TO DISMISS**

**EL16-014**

COMES NOW, Staff (Staff) of the South Dakota Public Utilities Commission (Commission) and hereby files this Motion to Dismiss. Staff moves the Commission to dismiss the Petition for Temporary Electrical Service by Dakota Plains AG Center, LLC (Dakota Plains) for failure to state a claim upon which relief can be granted, pursuant to SDCL 15-6-12(b)(5).

**I. Background**

On April 1, 2016, the Commission received a filing from Dakota Plains requesting temporary electric service from NorthWestern Energy (NWE) during construction of a grain terminal at a location which overlaps the service territories of NWE and Bon Homme – Yankton Electric Cooperative, Inc. (B-Y).<sup>1</sup>

No electric service is currently being rendered to the area in question. The terminal will be built within B-Y's service territory. Dakota Plains has requested the Commission to authorize NWE to furnish temporary electric service to the entire property during the construction phase.<sup>2</sup>

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<sup>1</sup> These service territories were approved by the Commission in Docket No. EL14-043.

<sup>2</sup> In a separate docket, Dakota Plains has requested permanent service from NWE under the large load exception provided by SDCL 49-34A-56.

## **II. Legal Standard**

A motion to dismiss for failure to state a claim tests the legal sufficiency of the pleading, not the facts which support it. *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 SD 34, ¶9 731 NW2d 184. “In determining whether to grant a motion under SDCL 15-6-12(b)(5), the [Commission] considers the complaint’s allegations and any exhibits which are attached and accepts the pleader’s description of what happened along with any conclusions which may reasonably be drawn therefrom.” *Eide v. E.I. Du Pont De Nemours & Co.*, 1996 SD 11, ¶8, 542 NW2d 769, 771 (quoting *Schlosser v. Norwest Bank N.A.*, 506 N.W.2d 416, 418 (S.D.1993).

## **III. Argument**

### **a. Statute does not provide for a grant of temporary service.**

Dakota Plains filed its petition for temporary service under SDCL 49-34A-58, which relates to adequacy of service. This statute makes no mention of a grant of temporary service as a remedy for inadequate service.<sup>3</sup> In fact, no statute exists authorizing the Commission to grant temporary electric service to one utility within the territory of another.

Furthermore, even if the Commission were to rule in favor of Dakota Plains and find that B-Y failed to provide adequate service, pursuant to SDCL 49-34A-58, B-Y would have to first fail to remedy the inadequate service before the Commission could authorize NWE to provide service. That statute provides, in relevant part, “[i]f the electric utility so ordered to correct such failure fails to comply with such order, the commission may authorize another electric utility to furnish retail service to such customer.”

Thus, the petition fails to state a claim upon which relief can be granted and should be dismissed.

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<sup>3</sup> Staff does not take a position at this time as to whether or not B-Y has failed to provide adequate service.

**b. Dakota Plains is not a customer of B-Y.**

In addition, SDCL 49-34A-58 addresses adequacy of service to a *customer*. Dakota Plains is not a *customer* of B-Y. It is unknown to Staff, but can be inferred based upon the petitions in this docket and Docket No. EL16-013, that Dakota Plains has not entered into a service agreement or otherwise signed a contract with B-Y. SDCL 49-34A-1(3) defines a customer as “any person contracting for or purchasing gas or electric service from a utility.”

From the filings, it is apparent that Dakota Plains is not a *customer* of any utility at this point. Therefore, it is legally impossible for Dakota Plains to argue that B-Y failed to adequately serve them as a customer.

**IV. Conclusion**

While it is the hope of Staff that the parties will work together to provide for the best interest of the potential customer, temporary service simply is not authorized by statute. Staff certainly sympathizes with the need to obtain finality for the potential customer in order to move forward with construction. However, that issue can be more appropriately addressed in Docket No. EL16-013. Therefore, Staff requests this petition be dismissed. Staff requests this Motion be heard at the Commission’s regularly scheduled meeting on April 27, 2016.

Dated this 11<sup>th</sup> day of April, 2016.



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Kristen N. Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501