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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION OF
MONTANA-DAKOTA UTILITIES CO. FOR APPROVAL
TO PROVIDE ELECTRICAL SERVICE FOR THE NEW EL06-011
NORTH CENTRAL FARMERS ELEVATOR TO BE
LOCATED NEAR BOWDLE, SOUTH DAKOTA

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Transcript of Proceedings
August 8, 2006

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BEFORE THE PUC COMMISSION

Chairman Robert Sahr
Vice-Chair Dusty Johnson
Commissioner Gary Hanson

COMMISSION STAFF

John Smith
Sara Greff

APPEARANCES

DARLA POLLMAN ROGERS,
RITER, ROGERS, WATTIER & BROWN, Attorneys at Law,
319 South Coteau, Pierre, South Dakota 57501,
appearing on behalf of FEM;

DAVID A. GERDES,
MAY, ADAM, GERDES & THOMPSON, Attorneys at Law,
503 South Pierre St., Pierre, South Dakota 57501,
appearing on behalf of Montana-Dakota Utilities.

Reported by Carla A. Bachand, RMR, CRR

ORIGINAL

1 TUESDAY, AUGUST 8, 2006

2 CHAIRMAN SAHR: EL06-011, in the matter of the
3 petition of Montana-Dakota Utilities Company for approval to
4 provide electrical service for the new North Central Farmers
5 Elevator to be located near Bowdle, South Dakota. And the
6 question today is, shall the commission grant FEM's motion for
7 summary disposition? Being that FEM is the moving party, I
8 will ask their attorney to make appearances and proceed. Thank
9 you, and good afternoon.

10 MS. ROGERS: Thank you. Good afternoon. Mr. Chair,
11 members of the commission, my name is Darla Pollman Rogers and
12 I represent FEM in this case. I would also like to point out
13 that the manager of FEM, Paul Erickson, is present here in
14 person. I believe you had called his name on the phone
15 earlier, and so I wanted to point that out, that he is present.

16 You referred to FEM and SDREA as being on detention
17 because we got moved to the bottom. I guess I would prefer to
18 characterize it as saving the best till the last.

19 CHAIRMAN SAHR: Even better, thank you.

20 MS. ROGERS: I would like to just briefly review the
21 facts that have brought us to this point today. North Central,
22 which is North Central Farmers Elevator, is opening a new
23 facility that we have referred to in the pleadings as the
24 Bowdle facility. It will be located near Bowdle, South Dakota.
25 It is a new grain handling multitrain loading facility and it

1 is located, the new Bowdle facility is located within the
2 service territory of FEM. FEM and North Central and the Bowdle
3 facility entered into an electric service agreement, so the
4 customer in this case, the Bowdle facility, has chosen to have
5 its electricity provided by FEM.

6 Shortly after, in fact very shortly after that
7 agreement was entered into between the parties, MDU, a
8 competing electric service provider, filed a petition with this
9 commission pursuant to SDCL 49-34A-56, which is the large load
10 statute. So that's kind of the brief factual setting that puts
11 us where we are today.

12 I would state first of all that on behalf of FEM, we
13 do rely upon the arguments and authorities as cited in our
14 briefs filed with the commission. And I think what I would
15 like to ask you to do today is focus your attention on a couple
16 of the points that we did attempt to make in our briefs.
17 Number one, the Bowdle facility is located within the assigned
18 service territory of FEM, not MDU. That means that pursuant to
19 SDCL 49-34A-42, FEM has the exclusive right to serve the Bowdle
20 facility.

21 Now, the question becomes what can change that right?
22 And it's our position that what can change that right is if the
23 customer chooses to have a provider other than the one where
24 the facility is located serve its electrical needs. That
25 option, however, we believe applies only if then the

1 circumstances of SDCL 49-34A-56 are met. So the real issue
2 here I think when you slice down to the chase, so to speak, is
3 who exercises the option to have an alternative service
4 provider. We believe that the statute and case law support our
5 position that it is the customer that exercises that option.
6 To interpret the statute in any other way renders the
7 underlying premise of the territorial act meaningless. If the
8 commission allows competing providers to come in and try to
9 cherry pick the large customers in another electric provider's
10 service area, SDCL 49-34A-42 becomes meaningless.

11 Furthermore, what is to prevent more than one
12 competitive provider to petition for a large customer? That
13 converts the statute into a contest among providers with the
14 commission as the judge. I do not believe that that was the
15 intent of the legislature when the territorial act was passed.
16 Nowhere in fact in the act itself or in case law is there
17 support for that interpretation. The choice is that of the
18 customer, not the competitor.

19 We would urge the commission, then, to look not just
20 at the language of the statute, but also at the role of case
21 law, because that can give you some guidance as you make your
22 decision. We believe that the Hub City case that we have cited
23 in our briefs is instructive in this regard. No less than
24 three times in that opinion does the court articulate that it
25 is the customer who exercises the option to utilize an

1 alternative provider.

2 That leads me, then, to the second point that I think
3 it is extremely important for you to focus on. The customer in
4 this case is the Bowdle facility, North Central and their
5 Bowdle facility, and that customer has made its choice and
6 clearly communicated that choice to MDU. MDU states in its
7 brief that Mr. Hainy, who is the manager of North Central,
8 called Larry Oswald of MDU on April 11th, 2006, telling him
9 that North Central had chosen FEM to serve the new plant.

10 In addition, FEM and North Central entered into a
11 contract dated April 10, 2006, whereby FEM is to serve all of
12 the electric service needs of the new facility. Based upon
13 that, this game should be over. North Central has not
14 exercised the option it may have done or it has under SDCL
15 49-34A-56, they didn't exercise that option. They didn't
16 choose an alternative electric service provider, depending or
17 assuming that the other conditions of the statute are met.

18 Since North Central has chosen FEM, then the size of
19 the load really is not a material issue. What's happening here
20 is that MDU is attempting to engage the commission in
21 interfering in the contractual rights between FEM and its
22 customers by attempting to invoke an exception to the
23 territorial act that is clearly reserved only to the customer.
24 Under the Hub City case, interference by the commission in a
25 contract between a co-op and its customer exceeds the authority

1 of this commission. You are told in that case that you should
2 not interfere in a contractual relationship between the co-op
3 and its customers, and by trying to use this back door attempt,
4 MDU is urging you to do something that the case law clearly
5 says you should not.

6 For these reasons and for the additional reasons set
7 forth in our briefs, FEM respectfully requests this commission
8 to grant its motion for summary disposition.

9 CHAIRMAN SAHR: Thank you very much. I think what we
10 will do next is go to MDU and see staff's position and come
11 back for questions, so thank you very much. Mr. Gerdes, are
12 you representing MDU?

13 MR. GERDES: I am. Mr. Chairman, members of the
14 commission, my name is Dave Gerdes. I'm a lawyer from Pierre
15 and I represent Montana-Dakota Utilities Company in this
16 proceeding. First of all, I want to thank the commission for
17 the little spot of lunch that we got. I was afraid I was going
18 to run out of gas, but I think I can get through this argument.

19 CHAIRMAN SAHR: I should point out, I think Tina
20 Douglas personally paid for that, so if anyone enjoyed it
21 enough where they want to help her out a little bit, there
22 certainly wouldn't be anything wrong with that. We would like
23 to take the credit, but unfortunately LRC limits us, the
24 legislature limits us to water and coffee.

25 MR. GERDES: Then we will contact Tina. Thank you for

1 that information. This case arises in a slightly
2 unconventional way, but it nonetheless involves a question that
3 has been with electric service providers in South Dakota for
4 many years, and that is how to apply the large load statute
5 49-34A-56 in all of its facets. If you read the briefs of the
6 parties, we agree on many things. One of the things that we
7 agree on is that the South Dakota Supreme Court has repeatedly
8 said that the underlying purpose of the South Dakota
9 Territorial Integrity Act that was passed in 1975 is the
10 elimination of duplication and wasteful spending in all
11 segments of the electric utility industry. The idea was to
12 assign territories and those territories -- and within those
13 territories, that was where you took your power and that
14 eliminated the fighting that had been going on over territory
15 before 1975.

16 So the three players in the industry, the REAs, the
17 municipalities and the investor-owned utilities sat down at the
18 table and hammered out this act and came up with the solution
19 to the problem that they had had before 1975. As the court
20 said in the Hub City act, there are very few exceptions to the
21 concept that the territorial act is inviolate. One of those
22 exceptions is the large load act and the court in the Hub City
23 act recognized that exception, but they overturned the lower
24 court in the Hub City case because the parties, this body, had
25 a wrong view of the law. And in the Hub City case they were

1 trying to say that the customer had the retained right to
2 change providers once a provider, an electric service provider
3 had been chosen under the large load statute, and the Supreme
4 Court said no, once you change that provider under the large
5 load statute, that becomes part of that provider's electric
6 service territory and thus inviolate under the territorial act
7 unless some other provision in the territorial act permits it
8 to be changed.

9 And this retained right concept that had been advanced
10 to change providers, the Supreme Court said, no, they said once
11 that section of the law, the large load statute, has been
12 implicated, that then becomes the assigned service territory of
13 that electric service provider. So the first thing that we
14 have to keep in mind is that the large load statute is an
15 exception to the territorial act.

16 The other thing that we have to keep in mind is that
17 the Supreme Court has been consistent in all of the cases they
18 have decided in saying the overriding purpose of this
19 territorial act was to give some predictability to service
20 areas and to eliminate duplication and wasteful spending.
21 Those were the overriding purposes of the act. And if you read
22 the Supreme Court cases, what they do is they use that analysis
23 in virtually all of the recent cases as to what is best for the
24 infrastructure as a whole. Are we wasting money by doing it
25 this way rather than by doing it this way? That's one of the

1 main features of the Supreme Court cases.

2 Let's take the law, this statute, and apply it to the
3 facts in this case. We have a situation where MDU and North
4 Central began talking to each other in January of 2006. Now,
5 Ms. Rogers said that MDU was told in April that North Central
6 had selected FEM. Between January and April, the facts will
7 show there was this back and forth. Well, MDU, what kind of a
8 deal are you going to give us? Well, FEM, what kind of a deal
9 you going to give us? It was North Central going back and
10 forth talking to two separate providers under the assumption
11 that the large load statute applied to this situation. And all
12 the people in that situation recognized that this was a
13 potential large load application.

14 As a matter of fact, there was a conversation, the
15 evidence will show, between Paul Erickson and Bruce Brekke in
16 January of 2006 where Paul asked Bruce Brekke how MDU
17 interpreted the large load statute and whether or not they
18 thought it was applicable, and at that time Bruce said, well,
19 we'll get back to you on that. And then there continued a
20 dialogue. On January 20th of 2006, Bruce Brekke then called
21 the manager of North Central and asked what is the load for
22 this site, and Keith Hainy, the manager of North Central,
23 referred Bruce to Logan Electric. And so the exhibits that are
24 attached to our brief came from Logan Electric at the
25 suggestion of North Central's manager, and the materials in

1 that, those documents, showed, Logan Electric's documents
2 showed that it was a load of greater than 2,000 kilowatts.

3 The second source of information for MDU in this
4 period of January to April was in fact a letter that they had
5 received from the electric service provider, East River
6 Electric, and East River also assumed that there was a greater
7 than 2,000 kilowatt load that was applicable to this site. So
8 everybody was treating this thing as a large load petition
9 until we got down to April and somebody said, well, no, it's
10 really going to be less than 2,000, and oh, by the way, we
11 selected FEM. Well, where did everything change? I don't
12 know, but I submit to you that summary judgment is
13 inappropriate in this case because there are lots of factual
14 issues out there that have yet to be resolved as to whether or
15 not it is in fact a candidate for the large load statute.

16 So let's look at this statute. Now, Ms. Rogers, I
17 have to congratulate her because finally on the sixth page of
18 her second brief she really states their position and that is
19 she says, in essence, FEM's position is that the commission has
20 jurisdiction to allow a change in electric service providers
21 only when a customer chooses to exercise the large load
22 exception. Now, think about that in the light of the
23 overriding purpose of the territorial act, and that is to
24 eliminate costly duplication in the infrastructure. Think
25 about that.

1 Let's say that my brother-in-law is the manager of the
2 local REA and I want to put in an ethanol plant in a location
3 that is right across the road from a fully developed
4 infrastructure of let's say MDU, but the other side of the road
5 is the REC's area and the REC has to spend twice as much to
6 bring the same service to me as it would for MDU because MDU is
7 right across the road. And so I, using Ms. Rogers' theory, can
8 control this by choosing FEM, even though, because he's my
9 brother-in-law and I want to do business with him, even though
10 it's a ripe candidate to save money in the infrastructure, the
11 electric infrastructure that applies to situations like this
12 because it's right across the street from MDU's location. That
13 I would submit really flies in the face of the overriding
14 purpose of the large load statute and of the territorial act.

15 Let's go through the statute, and I set it forth in
16 full in our brief. The large load statute says,
17 notwithstanding the assignment of electric service areas, new
18 customers at new locations located outside municipalities and
19 who require electric service with a contracted minimum demand
20 of 2,000 kilowatts or more shall not be obligated to take
21 electric service from the electric utility having the assigned
22 service area where the customer is located. But then it says,
23 if, if the Public Utilities Commission so determines after
24 considering the six factors.

25 Now, I submit to you there's nothing in that language

1 that says that the customer has to file the petition. I would
2 submit to you that any interested party, any party interested
3 in the outcome of the scenario has an equal right to file a
4 petition under this language. This statute does not say who
5 files the petition. It simply says that that customer is not
6 obligated, is not obligated to take the service from the
7 incumbent carrier. But it doesn't say who files the petition
8 to make this decision.

9 Now, let's go back to the facts that we have in front
10 of us. We have everything the same as any other garden variety
11 large load petition case that you get, except that the customer
12 didn't file the petition, the jilted suitor, if you will, filed
13 the petition. Now, I would submit to you everything else is
14 the same and unless there is a clear -- and the other thing is,
15 based upon what we think the evidence will show, MDU does have
16 the superior application. It has better redundancy and better
17 ability to serve the load.

18 Now, that's something that this commission has to
19 decide based upon hearing the evidence, but I would submit that
20 the commission should hear the evidence and that there's
21 nothing in any rule or statute that suggests that it's the
22 customer that controls, all of a sudden trumps the overriding
23 purpose of the territorial act. And for that reason, we
24 believe that the motion should be denied.

25 CHAIRMAN SAHR: Thank you. Staff.

1 MS. GREFF: Thank you, Chairman Sahr. First of all,
2 staff would like to agree with MDU in the contention that there
3 are several facts in contention in this matter and the summary
4 judgment should not be granted for that purpose.

5 However, staff would point to another issue that the
6 commission should consider in granting summary judgment on this
7 matter, and that is standing. How can MDU even get here to
8 bring this petition? Standing is stated in general -- I'm
9 going to read a quote for you and it says, in general, standing
10 is established if a party shows that he personally has suffered
11 some actual or threatened injury as a result of putatively
12 illegal conduct of the defendant. How has MDU been harmed in
13 this matter? What conduct of FEM or of North Central, what
14 illegal conduct of those two parties have caused MDU some harm
15 in this matter? Staff would say nothing, they have done
16 nothing wrong and MDU does not have standing to bring this
17 matter before the commission.

18 Just as Mr. Gerdes had you look at the statute, staff
19 would also have you look at the statute, and in it it says,
20 notwithstanding the establishment of assigned service areas for
21 the electric utilities provided for, new customers at new
22 locations, that doesn't say jilted suitors of new customers at
23 new locations, it says new customers at new locations can
24 request alternative providers if they meet the 2,000 KW
25 requirement.

1 Staff would again rest on its brief but suggest that
2 the commission should look at standing in that MDU does not
3 have standing to bring this petition before the commission.
4 Thank you.

5 CHAIRMAN SAHR: Thank you. I think at this point in
6 time, Ms. Rogers, why don't we give you a chance for response
7 and then we will go to questions. Thank you.

8 MS. ROGERS: Thank you. I have just a few brief
9 comments. As Mr. Gerdes points out, there are few exceptions
10 to the territorial act and the general rule found in SDCL
11 39-43A-42 that says that the local service provider has the
12 exclusive right to serve existing and future customers within
13 the service territory. One of those few exceptions is the
14 large load statute. We don't disagree with that. But once the
15 choice is made, then that determines how the large load statute
16 applies.

17 So in this situation, we have a customer who has
18 chosen. Now, this customer had two options. The fact that the
19 customer negotiated with different providers would suggest to
20 me that the statute is doing exactly what it was intended to
21 do. It's the business customer's decision as to whether or not
22 they want to go with the provider that is serving within their
23 area or whether they want to accept service, try to accept
24 service from a provider that is outside of the service
25 territory.

1 Now, if the customer makes that choice and that option
2 that is granted, under 56 also sets forth a procedure. So it's
3 not that FEM is saying customer choice trumps everything in the
4 territorial act. That's not true. What we are saying is the
5 customer has the option. If the customer chooses an electric
6 service provider outside of the service territory, then the
7 customer petitions this commission and all of the statutory
8 criteria that are in SDCL 49-34A-56 then have to be established
9 in front of this commission. So we are not saying the customer
10 trumps, we are saying that the choice, the option, the actual
11 exception to the territorial act is extended to the customer.

12 We believe that this commission, like I said, can look
13 not only at the statute itself, but we believe that the
14 interpretation that we are making of the statute definitely
15 supports what we have said here. We also believe that the case
16 law does give you some guidance. Nowhere in, for example, the
17 Hub City case, does it give the jilted suitor the option. What
18 the case said is the plain language of the statute, and we are
19 referring to SDCL 49-34A-56, indicates the legislature intended
20 it to do nothing more than provide a large load customer at a
21 new location an option to be exercised prior to receipt of
22 service. So what has happened here is exactly what the
23 legislature intended and it shows that the statute is working.

24 In essence, Mr. Gerdes and MDU is asking you to put
25 the cart before the horse and determine the factors and the

1 facts under the criteria in the statute prior to the customer
2 having made the choice to receive service from an alternative
3 provider. We believe that that choice of the customer needs to
4 be made first and it has been made here and the choice of the
5 customer is to receive service from FEM. Therefore, we believe
6 that our motion is appropriate and you should grant our motion
7 for summary disposition.

8 CHAIRMAN SAHR: Thank you very much. I have a
9 question for Mr. Gerdes. I think staff and Ms. Rogers make
10 some pretty good arguments. In looking at 49-34A-56, it reads
11 new customers at new locations, and I'm skipping forward, shall
12 not be obligated to take electric service, and then it goes on
13 to the factors and I'm sure you are probably familiar with
14 that. To me it seems pretty obvious that the statute is
15 constructed in a way that allows the customer to make the
16 decision whether or not to pursue someone who is outside the
17 service territory, and then if they do so, the requirements
18 kick in and I just -- we have had some cases on it as of late.
19 I have read the case law and I just have a really hard time not
20 seeing that this isn't -- I know there's other factors in
21 there, Dave, but I have a hard time, based on statutory
22 construction and also just the way the criteria is set up and
23 common sense, not looking at this as being some sort of
24 customer-driven standard. And certainly I would say just
25 because someone is considering another option certainly doesn't

1 seem to me to thrust them into this statute or in fact this
2 chapter. I'm curious to see how you respond to that because it
3 seems to me to be pretty straightforward that it's customer
4 driven under these laws.

5 MR. GERDES: Mr. Chairman, speaking specifically to
6 the language that you are saying, it simply states a negative.
7 It says they are not obligated to take electric service from
8 the electric utility having the assigned service area, and if
9 they want to change that, they have to comply with the six
10 factors. They have to file a petition. But it does not say
11 that this is the only -- in other words, it does not say
12 that -- let me find my note here, if I may. It gives the
13 customer an option, but it doesn't say -- it says an option,
14 not the option, if you follow what I'm saying. They are given
15 an option.

16 This is a quote from the Hub City case. The Hub City
17 case said the plain language of the statute indicates the
18 legislature intended it to do nothing more than provide a new
19 large load customer at a new location an option, an option to
20 be exercised, one of several options. It's not the option,
21 it's an option. And so it's our position that based on this
22 location, excuse me, based upon this language, if you read the
23 statute in the way that is suggested by Ms. Rogers, you are
24 then giving the customer the same right that the Willrodt case
25 said the individual doesn't have. Because the Willrodt case

1 says an individual has no organic, economic or political right
2 to service by a particular utility merely because he deems it
3 advantageous to himself.

4 And so what I'm saying is that in order to make this
5 work, they are not obligated to take it, but they have to
6 comply with the statute. Otherwise, if they pursue the
7 potential rights that they have under 56, then I would submit
8 that it's the overriding goal of the territorial act to say
9 that you have to pick the provider that best suits these six
10 criteria.

11 CHAIRMAN SAHR: And I admire you for finding
12 particular phrases and parsing the cases, but I still think you
13 gotta come back to the basic statute.

14 MR. GERDES: I agree.

15 CHAIRMAN SAHR: When I said -- when you said, well, it
16 doesn't just say the only way to get here is by the customer,
17 I'm looking for the jilted suitor language in this. I don't
18 see where -- I don't mean that in a flip way. I don't see
19 anything saying that because MDU wants to serve it or Oahe
20 Electric wants to run a line up there and serve it that they
21 can just sort of plop themselves into this and bring in an
22 unwilling customer. Where does it say anywhere in the chapter
23 that that's the case?

24 MR. GERDES: Where does it say anywhere in the large
25 load statute that anybody has to file a petition, anybody has

1 to sign a petition? It doesn't.

2 CHAIRMAN SAHR: The language I'm looking at is that
3 new customers can drive the commission to move forward on this,
4 and with an unwilling customer, I don't see how you fit
5 yourself within the statutory criteria. The other point I
6 would ask you is with the Willrodt case, that wasn't a large
7 load case, was it?

8 MR. GERDES: No, it wasn't. But just to carry that
9 forward, it talks about new customers at new locations, but if
10 you read the sentence, and I won't bore you by going through
11 the entire sentence the way I did at the outset, but if you
12 read the whole sentence, it leads down to if, if the Public
13 Utilities Commission so determines after considering these six
14 factors. The language new customers leads all the way down to
15 the colon, which says that you have to consider the six
16 factors. That's what I was trying to show when I read through
17 the statute at the outset and perhaps I wasn't clear there.

18 CHAIRMAN SAHR: Thank you.

19 VICE-CHAIR JOHNSON: Mr. Gerdes, everybody involved in
20 the case seems to quote the Hub -- in this docketed item seems
21 to quote the Hub City case. It is awfully tough for me to get
22 around the court saying that the plain language of the statute
23 indicates the legislature intended it to do nothing more than
24 provide a new large load customer at a new location an option.
25 I understand the difference between an option and the option,

1 but to do nothing more, that sort of seems to preclude any
2 other options, doesn't it?

3 MR. GERDES: I would submit not, no. Because that's
4 an option. Another option would be for that customer -- would
5 be for that customer to take the service from the incumbent
6 provider if it was less than the 2,000 kilowatts.

7 VICE-CHAIR JOHNSON: This specifically talks about a
8 large load customer.

9 MR. GERDES: Right. If you are a large load customer,
10 you have an option of trying to get another -- trying to get
11 another carrier, another utility to join in.

12 VICE-CHAIR JOHNSON: I may be reading the case wrong
13 or the excerpts of the case, but to me when the court says that
14 the legislature had a sole intention with passing that law and
15 that the sole intention was to provide an option to the
16 customer, that seems very clear, doesn't it?

17 MR. GERDES: Not to me.

18 VICE-CHAIR JOHNSON: Thank you.

19 COMMISSIONER HANSON: I'm so tempted to beat a dead
20 horse or a sleeping dog or whatever. Dave, I don't want to
21 continue to go over the customer, but would you not agree that
22 it states that it gives the customer an option, it gives the
23 customer; it doesn't give the utility, correct?

24 MR. GERDES: It gives a new customer at a new
25 location, and with these other things.

1 COMMISSIONER HANSON: But doesn't it give --

2 MR. GERDES: An option, if the commission decides
3 these six things.

4 COMMISSIONER HANSON: But doesn't it give the
5 customer? It doesn't say it gives the utility an option.

6 MR. GERDES: It gives the customer the option if the
7 utility decides these six things. So seriously, you can't take
8 the first part -- you can't cut the first part of the statute
9 off and not read the second part. It's a continuing thought
10 all the way through from the first word to the last word.
11 Otherwise it doesn't apply. And that's my point.

12 COMMISSIONER HANSON: But then there's no customer
13 preference.

14 MR. GERDES: No, there isn't any customer preference,
15 I would agree with that, and that was not part of the purpose
16 of the territorial act.

17 COMMISSIONER HANSON: In this particular case the
18 customer is saying that they are going to be less than the
19 2,000 kilowatt load?

20 MR. GERDES: Yeah, but that's a question of fact which
21 has to be decided by seeing all the evidence.

22 COMMISSIONER HANSON: It's going to be controlled by
23 the customer. Okay. Thanks anyway.

24 VICE-CHAIR JOHNSON: It seems to me that the way you
25 are using an option is almost like an obligation if the

1 commission determines. To me an option indicates choice or an
2 opportunity to trigger, to exercise that option on the part of
3 the customer.

4 MR. GERDES: Because that option doesn't exist unless
5 these six criteria are met. So it's an option, assuming these
6 six things are proven. It's not an option if they are not.

7 VICE-CHAIR JOHNSON: I understand where you are coming
8 from on that. I'm not convinced.

9 MR. GERDES: That's fine.

10 VICE-CHAIR JOHNSON: Thanks.

11 CHAIRMAN SAHR: Any other questions? Seeing none, I
12 will move that we grant FEM's motion for summary disposition.

13 COMMISSIONER HANSON: Second.

14 VICE-CHAIR JOHNSON: I concur.

15 CHAIRMAN SAHR: Thank you, and that ends the regular
16 commission meeting.

17 (Whereupon, the proceedings were concluded at 2:30
18 p.m.)

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STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 16th day of August 2006.

Carla A. Bachand

Carla A. Bachand, RMR, CRR
Freelance Court Reporter
Notary Public, State of South Dakota
Residing in Pierre, South Dakota.

My commission expires: June 10, 2012.