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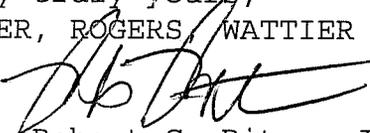
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Re: In the Matter of the Petition of Montana-
Dakota Utilities Co. for Approval to Provide
Electrical Service for the new North Central
Farmers Elevator to be located near Bowdle,
South Dakota
Appeal No.: 24448

Dear Folks:

Enclosed herewith to each of you please find two
copies of Brief of Appellees, FEM Electric Association, SD
Rural Electric Association and North Central Farmers
Elevator. This is intended as service upon you by mail.

Very truly yours,
RITER, ROGERS, WATTIER & BROWN,
LLP

By: 

Robert C. Riter, Jr.

RCR Jr-wb
Enclosure
Cc: Carlyle Richards

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RECEIVED

MAY 29 2007

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

* * * * *

Appeal # 24448

* * * * *

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * * *

HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING

* * * * *

**BRIEF OF APPELLEES, FEM ELECTRIC ASSOCIATION, SD
RURAL ELECTRIC ASSOCIATION AND NORTH CENTRAL FARMERS
ELEVATOR**

* * * * *

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OF THE
STATE OF SOUTH DAKOTA

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

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NOTICE OF APPEAL FILED FEBRUARY 21, 2007

TABLE OF CONTENTS

Jurisdictional Statement1

Legal Issues.....1

1. Did the Circuit Court and the Commission Err in holding that the large load statute may only be invoked by the customer?1

2. Did the Circuit Court and the South Dakota Public Utilities Commission err in holding that Montana-Dakota lacked Standing to initiate a proceeding under the large load Statute, SDCL §49-34A-56?1

3. Did the Circuit Court and the Commission err in holding that summary disposition by the Commission was appropriate?.....2

Statement of the Case and Facts2

Argument and Authorities.....4

 A. Standard of Review4

 B. Policy of Territorial Law5

I. The lower court correctly ruled that the large load statute may only be invoked by a customer.6

 A. Plain reading of the statute supports the lower court’s decision.6

 B. Six statutory factors are not meaningless under FEM’s Petition.14

 C. Policy considerations support the view of FEM.15

II. The Circuit Court property held that Montana Dakota lacks standing to initiate a proceeding under the SDCL §49-34A-56.17

III. Summary Disposition was proper because the load to be served on behalf of the Bowdle Facility is not a large load as defined by SDCL §49-34A-56.19

Conclusion23

APPENDIX.....App. 1 –
App. 14

TABLE OF AUTHORITIES

CASELAW

Beck vs. Lapsley, 1999 SD 49, ¶ 3, 593 NW2d 410,6

Blenner v. City of Rapid City, 2003 S.D. 121,
670 NW 2d 50811

Egemo v. Flores, 470 NW 2d 817 (S.D. 1991).....13,14

Estate of Chilton, 520 NW 2d 910 (S.D. 1994).....10

Halls v. White, 2006 SD 47, 715 NW2d 577.....2,21

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, 560 NW 2d 9251,5,6,11,12,
13,14,15,21,
22

Kehn v. Hoeksema, 524 NW 2d 879 (S.D. 1994).....18

Lamp vs. First Nat’l Bank of Garretson, 496 N.W. 2d 581
(S.D. 1993).....5

Lewis & Clark Rural Water System, Inc. v. Seeba, 2006 S.D. 7,
709 NW 2d 83618

Loewen v. Hyman Freightways, Inc., 1997 S.D 2, 557 NW
2d 764.....11

Matter of West River Electric Association, Inc., 2004 S.D. 11,
674 NW 2d 2224

Miessner v. All Dakota Ins. Associates, Inc., 515 NW2d 198
(SD 1994)2,4

Olsen v. City of Spearfish, 288 NW 2d 497 (S.D. 1980)9,10

Otter Tail Power v. Sioux Valley Electric, 131 NW 2d 111
(S.D. 1964).....2,18

Waddell vs. Dewey Cnty. Bank, 471 N.W. 2d 591
(S.D. 1991).....4,5

<u>Wang v. Wang</u> , 393 NW 2d 771 (S.D. 1986).....	19
<u>Wilcox Electric, Inc. v. FAA</u> , 119 F. 3 rd 724 (8 th Cir. 1997).....	19
<u>Willrodt vs. Northwestern Public Service Co.</u> , 281 NW2d 65 (SD 1979).....	13,14,17
<u>Wilson vs. Great N. Ry. Co.</u> , 157 N.W. 2d 19 (1968).....	5

STATUTES

SDCL §1-26-18(1).....	5
SDCL §15-6-56(c).....	4
SDCL §49-34A-38 through SDCL §49-39A-59	12
SDCL 49-34A-42.....	5,7,8
SDCL §49-34A-43.....	20
SDCL §49-34A-44.....	20
SDCL §49-34A-55.....	5
SDCL §49-34A-56.....	1,3,5,6,7,8 9,10,11,13 14,15,16,17, 18,19,20,21, 22
SDCL §49-34A-58.....	6

MISCELLANEOUS

Territorial Integrity Law of the State of South Dakota.....	5
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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

Appeal # 24448

JURISDICTIONAL STATEMENT

Appellees concur with the jurisdictional statement provided by Montana
Dakota Utilities Co.

LEGAL ISSUES

- 1. DID THE CIRCUIT COURT AND THE COMMISSION ERR IN HOLDING THAT THE LARGE LOAD STATUTE MAY ONLY BE INVOKED BY THE CUSTOMER?**

The Commission correctly concluded that SDCL §49-34A-56 does not afford MDU a right to petition to serve North Central's new facility as such request may only be invoked by the customer. SDCL §49-34A-56; 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.

- 2. DID THE CIRCUIT COURT AND THE SOUTH DAKOTA PUBLIC UTILITES COMMISSION ("COMMISSION") ERR IN HOLDING THAT MONTANA-DAKOTA LACKED STANDING TO INITIATE A PROCEEDING UNDER THE LARGE LOAD STATUTE, SDCL § 49-34A-56?**

The Circuit Court and the Commission correctly concluded that MDU has no standing to assert North Central's right under SDCL §49-34A-56 for requesting relief from

its obligation to take service for a new facility from the assigned service provider. SDCL §49-34A-56. Otter Tail Power v. Sioux Valley Electric, 131 NW 2d 111 (S.D. 1964).

3. DID THE CIRCUIT COURT AND THE COMMISSION ERR IN HOLDING THAT SUMMARY DISPOSITION BY THE COMMISSION WAS APPROPRIATE?

The Commission and the Circuit Court correctly concluded that there were no genuine issues of material fact that precluded summary disposition. Miessner v. All Dakota Ins. Associates, Inc., 515 NW2d 198 (SD 1994). Halls v. White, 2006 SD 47, ¶ 7, 715 NW2d 577.

STATEMENT OF THE CASE AND FACTS

FEM Electric Association, Inc. (“FEM”), an electrical distribution cooperative headquartered in Ipswich, South Dakota, South Dakota Rural Electric Association (“SDREA”), and North Central Farmers Elevators (“North Central”) by and through its attorneys, Darla Pollman Rogers and Margo D. Northrup of Riter, Rogers, Wattier & Brown, LLP, and Carlyle Richards of Richards & Oliver, hereby submit this Brief of those Appellees in response to Montana-Dakota Utilities Co., (“MDU”) Brief on Appeal and request that the Court affirm the Final Decision and Order of the South Dakota Public Utilities Commission Granting Summary Disposition, dated August 24, 2006 and the Circuit Court’s Order of Affirmance dated January 31, 2007 in this matter.

On April 12, 2006, MDU filed a Petition with the Commission to be designated as the service provider for North Central’s new facility. (Reference to the Chronological Index of the Public Utilities Commission shall be by “PUC” followed by the page number.) (PUC pp. 1-6) North Central is constructing a new grain

handling/multi-unit train loading facility (“Bowdle Facility” or “Facility”) to be located near Bowdle, South Dakota. MDU filed a petition with the Commission claiming it was authorized to so proceed pursuant to SDCL §49-34A-56. The Petition was unique because it was filed by a competitive electric service provider, rather than the 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 SDREA filed a Petition to Intervene on May 12, 2006. FEM, SDREA, and North Central were all granted intervention. (PUC p. 24) All three of these parties objected to the Petition of MDU to be designated as the electric supplier for the Bowdle Facility and collectively file this Brief in response to MDU’s Brief on Appeal.

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 into an Electric Service Agreement, which provides that FEM will provide all of the electric energy requirements of the Facility. (PUC pp. 55-64) A copy of that Agreement is attached hereto as Appendix 1.

MDU has alleged in its Petition that the Bowdle Facility will have requirements of a contracted minimum demand of 2,000 kilowatts or more. In the Petition to Intervene by FEM and the Petition to Intervene by North Central, both parties asserted that this project does not have electric service requirements with a contracted minimum demand of 2,000 kilowatts. (PUC pp. 15-19 and 11-14) This is evidenced by

the Electric Service Agreement which does not have a contracted peak load minimum demand of 2,000 kilowatts or more for the new Facility. (PUC pp. 27-29) The Affidavit of Keith Hainy is attached hereto as Appendix 2.

The Commission granted Summary Disposition of this case on August 24, 2006. MDU filed an appeal to the Circuit Court, Sixth Judicial Circuit. The Honorable James W. Anderson affirmed the decision of the Commission on January 31, 2007. A copy of that decision is attached hereto as Appendix 3.

ARGUMENT AND AUTHORITIES

A. Standard of Review

These Appellees agree that the issues presented in Issues I and II involve questions of law which can be reviewed de novo. Matter of West River Electric Association, Inc., 2004 S.D. 11, ¶14, 674 NW 2d 222, 226.

In reviewing a grant or a denial of summary judgment under SDCL §15-6-56(c), the Court must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the non-moving party and reasonable doubts should be resolved against the moving party. The non-moving party, however, must present specific facts showing that a genuine, material issue for trial exists. The task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper. Miessner vs. All Dakota Ins. Associates, Inc., 515 N.W. 2d 198, 200 (S.D. 1994); Waddell vs. Dewey

Cnty. Bank, 471 N.W. 2d 591, 593 (S.D. 1991). (citations omitted). Lamp vs. First Nat'l Bank of Garretson, 496 N.W. 2d 581, 583 (S.D. 1993); Wilson vs. Great N. Ry. Co., 157 N.W. 2d 19, 21 (1968). It appears the same standard would apply to summary disposition discussed in Issue III herein, pursuant to SDCL §1-26-18(1).

B. Policy of Territorial Law

MDU sought to bring its Petition pursuant to SDCL §49-34A-56, which is part of the Territorial Integrity 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. 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, 560 NW2d 925. MDU has referred to this as the “Prime Directive” of the territorial act. MDU Brief at 10. However, the true prime directive under the statutory framework was the assignment to a particular utility of the exclusive right to provide electric service with a particular territory, subject to limited exceptions. SDCL §49-34A-42. The exceptions are: 1) Where the utilities modify the assigned area with commission approval (SDCL §49-34A-55); 2) Where a new large load customer at a new location seeks a new provider (SDCL §49-34A-56); and 3) Where the Commission, after hearing, concludes the current provider does not render adequate

service. (SDCL §49-34A-58). See, also, NWPS, supra, at p. 927. The exception sought to be utilized by MDU herein related to new large load customers at a new location.

I. THE LOWER COURT CORRECTLY RULED THAT THE LARGE LOAD STATUTE MAY ONLY BE INVOKED BY A CUSTOMER.

A. Plain reading of the statute supports the lower court's decision.

MDU filed its 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. According to the statute, MDU is unable to bring an action on behalf of a customer who has not chosen to be relieved of its obligation 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. It appears to be without legitimate contention otherwise that the purpose of SDCL §49-34A-56 is to allow large new customers an opportunity to exercise their option to request a non-designated supplier. It provides an avenue wherein if the new customer elects, it may seek relief from its obligation 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.

MDU is arguing that interpretation of the statute in accordance with the lower court's decision – i.e. SDCL §49-34A-56 which affords the customer the right to seek to be relieved of its obligation to take service from an incumbent provider, “flouts the overriding purpose of the Act” by forcing wasteful spending and duplication. To support its position, MDU has attempted to manufacture a creative new procedure under SDCL §49-34A-56 to enable it to cherry-pick a potential large load customer.

The Commission and the Circuit Court properly rejected MDU's attempt to cherry-pick North Central and dismissed its Petition. Contrary to MDU's contentions, it is MDU's attempt to incorrectly interpret the statute that leads to evisceration of the goals of the Territorial Act.

As MDU's rather interesting, albeit unavailing history notes, pre-1975 attempts to regulate utilities were largely unacceptable. And as MDU's suggested history further acknowledges, the delineation of assigned service areas for each electric service provider was a “significant part” of the Territorial Act. The final product, or statute, controlling assigned service areas is found in SDCL §49-34A-42.

This statute clearly gave exclusive service rights to an incumbent service provider. This statute also defines the obligations and responsibilities of the providers and the customers: If a customer is within the assigned service area of Utility A, said customer is obligated to take service from Utility A, and Utility A has the right to provide service to said customer. This applies to present and future customers.

In the current case, North Central's Bowdle Facility is located within FEM's assigned service territory. SDCL §49-34A-42 dictates the rights and duties of the parties: North Central is obligated to take service from FEM, and FEM is not only obligated to serve North Central, but has the right to do so. To the extent that MDU argues that the customer has no right to service by a particular utility within this context, FEM concurs. North Central has no right to choose an alternative provider - - FEM has the right to serve North Central. MDU has no rights or obligations to serve North Central, and claims none under SDCL §49-34A-42, because North Central is undisputedly within FEM's service territory.

The question becomes, how does SDCL §49-34A-56 affect the rights and obligations of the parties, and does the large load statute supersede the provisions of SDCL §49-34A-42 and confer rights upon MDU it does not otherwise have, in absence of a request or petition by the customer. MDU's assertion flies in the face of the plain language of the statutes themselves, and also is contrary to settled South Dakota case law.

Starting with the premise that SDCL §49-34A-42 establishes the rights and obligations of the parties with regard to service by the incumbent service provider, SDCL §49-34A-56 must be interpreted in such a manner as to be consistent with SDCL §49-34A-42. As noted above, Section 42 provides that North Central is obligated to take service from FEM, and FEM has the right to serve North Central, because North Central is within FEM's service territory. Section 56, then, provides a limited

exception to the rights and obligations that exist between the customer and the service provider in whose territory the customer resides:

Notwithstanding the establishment of assigned service areas for electric utilities . . . new customers at new locations . . . 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 . . . SDCL §49-34A-56 (emphasis added).

The potential exception to the rights and obligations between customers and providers that exist as a result of the establishment of assigned service areas is afforded to the customer, and may affect the obligation of the customer to take service from the incumbent carrier. SDCL §49-34A-56 does not confer rights upon a competing carrier, such as MDU, to interfere with the statutorily defined rights and obligations between a customer and its assigned carrier, in absence of the customer petitioning the Commission to change its existing obligations, upon a requisite meeting of the statutory factors. To interpret SDCL §49-34A-56 as requested by MDU would elevate the limited exception therein to override the general rule of the assigned service area statutes, which flies in the face of the clear and concise language of the statutes.

Clearly, under South Dakota law the Court should determine the legislative intent of a statute and give effect to it. Olsen v. City of Spearfish, 288 NW 2d 497, 499 (S.D. 1980). In Olsen this Court considered certain statutes as they related to the City of Spearfish. The Court was considering exceptions from general provisions of a statute. In considering those exceptions, the Court recognized the principle of statutory construction is that:

Exceptions, as a general rule, should be strictly, but reasonably, construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception. (citation omitted) Id., at p. 500.

In the present case, the general rule provided by the territorial act is that each electric utility has the exclusive right of service in its assigned area. The exceptions to that right, which are enumerated above, must be reasonably construed and shall only extend as far as their language fairly warrants. This Court has also recognized: “. . . all doubt should be resolved in favor of the general provision rather than the exception.” (Citation omitted) Estate of Chilton, 520 NW 2d 910, 913 (S.D. 1994).

In the present case, MDU cannot point to any language in the statute to support its strained interpretation. For example, MDU claims it has standing in its own right to ask for relief under the large load statute. But MDU is not under any obligation to take service from FEM - - North Central is. That is the reason SDCL §49-34A-56 affords the “relief” to the customer. MDU further claims it has standing because it is a public utility with whom the proposed customer had “significant contacts”. . MDU brief at 8. MDU fails to point to any authority in statute or case law to support its contention. If, indeed, the customer communicated with and negotiated with a non-incumbent provider, and failed to file a petition pursuant to SDCL §49-34A-56, it is obvious that said customer does not want to be relieved of its obligation to receive service from the provider in whose territory the customer is located. There is nothing within the language of the statute that extends the right to petition pursuant to SDCL §49-34A-56 to anyone other than the new large load customer.

If MDU's argument is taken at face value, it would allow any utility in South Dakota to petition to be the assigned carrier under the "large load" statute and would allow individuals or entities opportunities to petition the PUC to change the designated provider. Neither result, of course, is supported by statute nor by prior decisions of this Court. It is, however, reflective of the extreme result which could occur if this Court does not affirm that the legislature has only granted the customer the right to initiate a request under SDCL §49-34A-56.

The operative language in the pertinent statute relates to "new customers at new locations . . . 'shall not be obligated to take electric service from the electric utility handling the assigned service area' . . ." This Court has often recognized that one must determine the operative language or precipitating event of a statute. See, e.g., Blenner v. City of Rapid City, 2003 S.D. 121, ¶29, 670 NW 2d 508, and Loewen v. Hyman Freightways, Inc., 1997 S.D. 2, ¶14, 557 NW 2d 764. Per SDCL §49-34A-56, the customer's petition is the precipitating event and accordingly, the operative language of the statute.

The decision of the Commission and the Circuit Court in this case and FEM's interpretation of the statute is supported by the Hub City case. The facts in that case showed that Division (the customer) had petitioned the Commission to allow Northern Electric Cooperative ("NEC") to provide electric service to its large load foundry, pursuant to SDCL §49-34A-56. The foundry was located in Northwestern Public Service's ("NWPS") territory. The Commission granted Division's petition and assigned the foundry to NEC. Years later, after the foundry closed and changed

ownership, the new owner, Hub City, wished to be served by NWPS. NWPS petitioned the Commission for a declaratory ruling on whether Hub City should be allowed to terminate its agreement with NEC and receive electric service from NWPS. The Commission authorized the switch, justifying its decision on a significant change in circumstances and on Hub City's contractual right to terminate the agreement with NEC.

This Court reversed the ruling of the Commission, concluding that a significant change of circumstances was insufficient under the Act to authorize a change of providers. Hub City at 930. The Court also found that the Commission exceeded its statutory authority by interpreting and enforcing the contract between NEC and its customers. Id.

This case has very significant language which supports FEM's position. First of all, in this case, it was the customer who petitioned the Commission to receive service from NEC. "However, due to a rate advantage offered by NEC, Division petitioned the PUC for relief from its obligation to take service from NWPS." Hub City at 926. Further the case states, "The Act contains several provisions whereby electrical consumers may have their provider changed. SDCL §49-34A-38 through §49-39A-59." Id. at 928, (emphasis added). The Court went on to note in ¶ 17, that "[i]n 1977 Hub City's predecessor (i.e. Division, the customer) availed itself of one of these provisions, SDCL § 49-34A-56. It (the customer) elected to seek authorization from the PUC to receive electric service from NEC rather than NWPS, the utility within whose assigned service area it would have been located." Id. at 928. Other language of that case

supports FEM's interpretation that it is the customer who exercises the option to select an alternative provider.

The plain language of the statute indicates the legislature intended it (SDCL §49-34A-56) 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. Id. at 928.

All of these references in the Hub City case support FEM's position that the option is for the customer, not a competing electric provider.

MDU has cited Willrodt vs. Northwestern Public Service Co., 281 NW2d 65 (SD 1979) to support its interpretation of the statute and for the proposition that a competing electric provider can cherry pick a large load customer from another service area. This case stems from an electric customer who was a new small electric user. This customer alleged that it was arbitrarily discriminated against and that SDCL §49-34A-56 violated the equal protection clause because the Commission was not authorized to take into consideration its preference as a small electrical customer. The Court ultimately held that an allowable classification was made between small users and large users and that the choice provided exclusively to large load customers did not violate equal protection. Id. at 71.

The case does not however, lend any legal support to the interpretation of SDCL §49-34A-56 urged by MDU. The Court only upheld the validity of the classification between small customers and large load customers, and the right of choice of provider afforded to large load customers.

This Court consistently looks to its most recent decision on a general issue, when considering the applicability of our law to a set of facts. See, e.g. Egemo v.

Flores, 470 NW 2d 817, 821 (S.D. 1991). In this case this Court should accordingly consider its language in Hub City, rather than Willrodt as reflective of the intent of SDCL §49-34A-56. This is especially true because Hub City specifically discussed the operation of that statute.

B. Six statutory factors are not meaningless under FEM's Petition

FEM's position is that the Commission has jurisdiction to allow a change in electric service providers only when a customer chooses to exercise the large load exception. MDU has implied that there is a flaw with this interpretation and that it would make a mockery of the plain meaning of SDCL § 49-34A-56, because customer choice would then be meaningless and the customer would have what amounts to a "veto" under the statute. MDU at p 11. MDU's contention seems to be founded upon its belief that customer preference will be the overriding factor if FEM prevails. FEM's position does not, however, escalate or favor customer preference. Rather, it is FEM's position that the Commission need not address the six statutory factors unless and until it receives a petition from a large load customer for service from an alternative provider.

The large load statute sets forth six factors to guide the Commission in its decision whether to grant a variance in service providers. None of these factors, including customer preference, should weigh more heavily on the Commission's decision than the others. That is MDU's conclusion, and FEM agrees. "The plain language of the statute indicates the legislature intended it [the statute] 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." Hub City at 928. Even if FEM or North Central concedes that North Central

qualifies as a large load customer, which they do not, according to the Hub City case only North Central, the new customer, would possess the option to petition the Commission for a change in providers.

MDU has argued that the utility ultimately providing service must prevail under the six evaluative criteria under the large load statute. Clearly, the statute was intended to facilitate that process. However, neither case law nor the large load statute indicates that an electric service provider may be the petitioning party under SDCL §49-34A-56. To the contrary, the statute and case law supports FEM's position that the six evaluative criteria are not properly before the Commission in absence of a petition from a large load customer.

The Court may then ask, "Why is customer preference included as one of the six factors?" If a qualifying large load customer wants relief from its obligation to take service from the incumbent provider, it is important for the Commission to determine if this really is the preference of the customer, and if it is in the public interest to allow a change of providers. The Commission must evaluate customer preference and give it the same weight as all other factors enumerated in SDCL §49-34A-56.

C. Policy considerations support the view of FEM

There are also important policy considerations behind allowing the customer to file for a change in electric service provider, rather than 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 the 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 outside 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.

MDU is claiming FEM's interpretation of SDCL §49-34A-56 is contrary to the Act because it will cause duplication of service. 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. If FEM is already providing service to the facility, allowing a competitive provider to come in and build new facilities to one customer within another provider's area would create rather than prevent duplication of services. FEM's interpretation of the Act and the Commission's ruling prevents duplication of services.

II. THE CIRCUIT COURT PROPERLY HELD THAT MONTANA DAKOTA LACKS STANDING TO INITIATE A PROCEEDING UNDER THE SDCL §49-34A-56.

As stated, upon passage the Territorial Act assigned service areas to various electric providers. 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 the exclusive right to serve the Bowdle Facility because the Facility is located in FEM's assigned service area. In other words, North Central is obligated to take service from FEM subject to other provisions in the law. As cited by MDU, "an individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself." MDU brief at 10 citing Willrodt vs. North Western Public Service Co., 281 NW2d 65, 72 (SD 1979) However, the Territorial Act further

provided certain limited exceptions to this general rule, including that of SDCL §49-34A-56, the large load exception. But for this exception, North Central has no right to be served by a utility other than the one in whose territory it is located.

MDU seems to suggest that an adjoining utility has some preferential treatment. The pertinent statutes, however, grant MDU no greater authority than any other utility or citizen in the State of South Dakota.

Also, neither of the cases MDU cites provide it any support (MDU Brief p. 9) In Lewis & Clark Rural Water System, Inc. v. Seeba, 2006 S.D. 7, ¶38, 709 NW 2d 836, this Court recognized that when a statute cannot be invoked by a party, it lacks standing. At p. 836-837. Also, in Kehn v. Hoeksema, 524 NW 2d 879 (S.D. 1994), this Court did find standing existed only because the party had a legal interest in the outcome. At p. 880-881. In the present case, however, the pertinent statute gives MDU no right to invoke a proceeding regarding it, nor does it provide MDU some undescribed legal right which can be enforced.

In a case involving electric utilities this Court, recognized similarly. Otter Tail Power v. Sioux Valley Electric, 131 NW 2d 111 (S.D. 1964). In that case an investor owned power company which had no franchise to serve a particular farm, commenced a proceeding for injunctive relief requesting that it be declared the proper supplier of electric energy to the particular farm involved. Otter Tail claimed certain rights under a federal statute and the general authority to assert rights to question the propriety of a rural electric service provider. This Court held that an investor owned utility has no standing to complain of others providing electric energy to a farm. While

two utilities were authorized to serve the same rural territory customer, this Court recognized that it was the customer who could initiate the effort to change providers. It found that the utility had not shown it had any protectible franchise, statutory or contractual right, the enforcement of which could be sought under such circumstances. While this Court did recognize that an electric provider could seek to enjoin “unlicensed, illegal or unauthorized competition” of another, those circumstances were not alleged nor found in that case. At p. 115. Hence, the Court concluded a lack of standing for a utility who wished to serve a customer, but had no corresponding right to provide that service.

MDU is no different than a disappointed bidder who failed to receive a governmental contract. That bidder could bring an action to challenge the contract if it was entered into in an illegal manner, but it has no standing to complain of a third party receiving a bid which it would have liked to receive itself. See, e.g., Wilcox Electric, Inc. v. FAA, 119 F. 3rd 724, 727-728 (8th Cir. 1997). See, also Wang v. Wang, 393 NW 2d 771 (S.D. 1986), wherein this Court recognized that lack of standing can mean the individual is not the real party in interest and thus, lacks standing to raise certain claims before the Court. At p. 775.

Hence, a clear reading of the statutes involved confirm MDU has no standing to assert its claim. The statutes grant it no right over and above the right any party would have to question the legality of a public contract or agreement, which is not an issue raised by MDU herein.

III. SUMMARY DISPOSITION WAS PROPER BECAUSE THE LOAD TO BE SERVED ON BEHALF OF THE BOWDLE FACILITY IS NOT A LARGE LOAD AS DEFINED BY SDCL §49-34A-56.

MDU's petition was claimed to have been 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 & 49-34A-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 have been 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 has argued 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, and MDU states the load is above 2,000 kilowatts.

MDU's assertion is immaterial, however, because if a term appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. Halls v. White, 2006 SD 47, ¶ 7, 715 NW2d 577, 580-581. Thus, 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 could have been included.¹ The contract is supported by the filed Affidavit of the North Central Manager Keith Hainy which states, the contracted minimum load was not included because the peak electric requirements will be below 2,000 kilowatts. (Appendix 2)

In this case, an electric service provider outside the customer's assigned service area brought a petition to force the customer to use its services. This provider then conducted its own investigation in an attempt to demonstrate that the customer hypothetically qualifies as a large load. Surely, the Legislature, in drafting SDCL §49-34A-56, did not intend that providers would conduct independent discovery to

¹ 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."

demonstrate that a prospective customer qualifies as a large load, or that the provider would then petition the Commission to require the customer to use its services. Instead, these actions should be reserved for a new customer at a new location located outside a municipality requiring a minimum of 2,000 kilowatts of electricity.

In addition, FEM would also point out that FEM and North Central have entered into an Agreement for services, and that the Agreement is controlling, regardless of size of the load. See Appendix 1. The contract between the parties in the current case does not include a minimum demand of any electric service. It is within the purview of an electric cooperative and its customer to enter into such an agreement, without interference from the Commission or a competing provider. MDU has not been harmed by the Electric Service Agreement because MDU does not have an exclusive right to provide service. In fact, MDU has no right to provide service unless the customer meets the statutory requirements of SDCL §49-34A-56 and chooses to contract with MDU for more than 2,000 kilowatts.

According to the Hub City case, the Territorial Act “does not include contract interpretation as an authority or power of the PUC.” Hub City at 930. The Supreme Court held that the Commission “exceeded its statutory authority by interpreting and enforcing the contract between rural cooperative, NEC, and its customer.” Id. Likewise, MDU as a competing provider should not be allowed to force the Commission to interfere in the contractual relationship between FEM and North Central by means of an improperly initiated petition under SDCL §49-34A-56. Such actions clearly go beyond the boundaries of the statute itself and applicable case law.

CONCLUSION

FEM, SDREA, and North Central requests that this Court affirm the Final Decision and Order Granting Summary Disposition dated August 24, 2006, and the Judgment of Affirmance dated January 31, 2007 by the Honorable James W. Anderson, Circuit Court Judge, Sixth Judicial Circuit, and affirm that MDU has no standing to petition the Commission to assign this customer to any other electric service provider.

Dated this 25 day of May, 2007.

Riter, Rogers, Wattier & Brown, LLP

By: 

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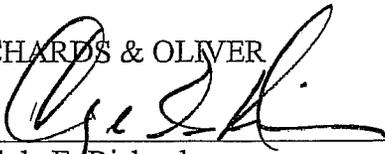
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P. O. Box 114

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(605) 225-1200

Attorney for Appellee,

North Central Farmers

Elevator

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of Appellees was served via the method(s) indicated below, on the 25th day of May, 2007, addressed to:

Kara Van Bockern
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

- First Class Mail
- Hand Delivery
- Facsimile
- Overnight Delivery
- E-Mail
- Electronic Delivery

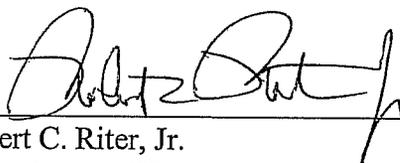
John Smith
South Dakota Public Utilities Commission
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- Hand Delivery
- Facsimile
- Overnight Delivery
- E-Mail
- Electronic Delivery

Dated this 25th day of May, 2007

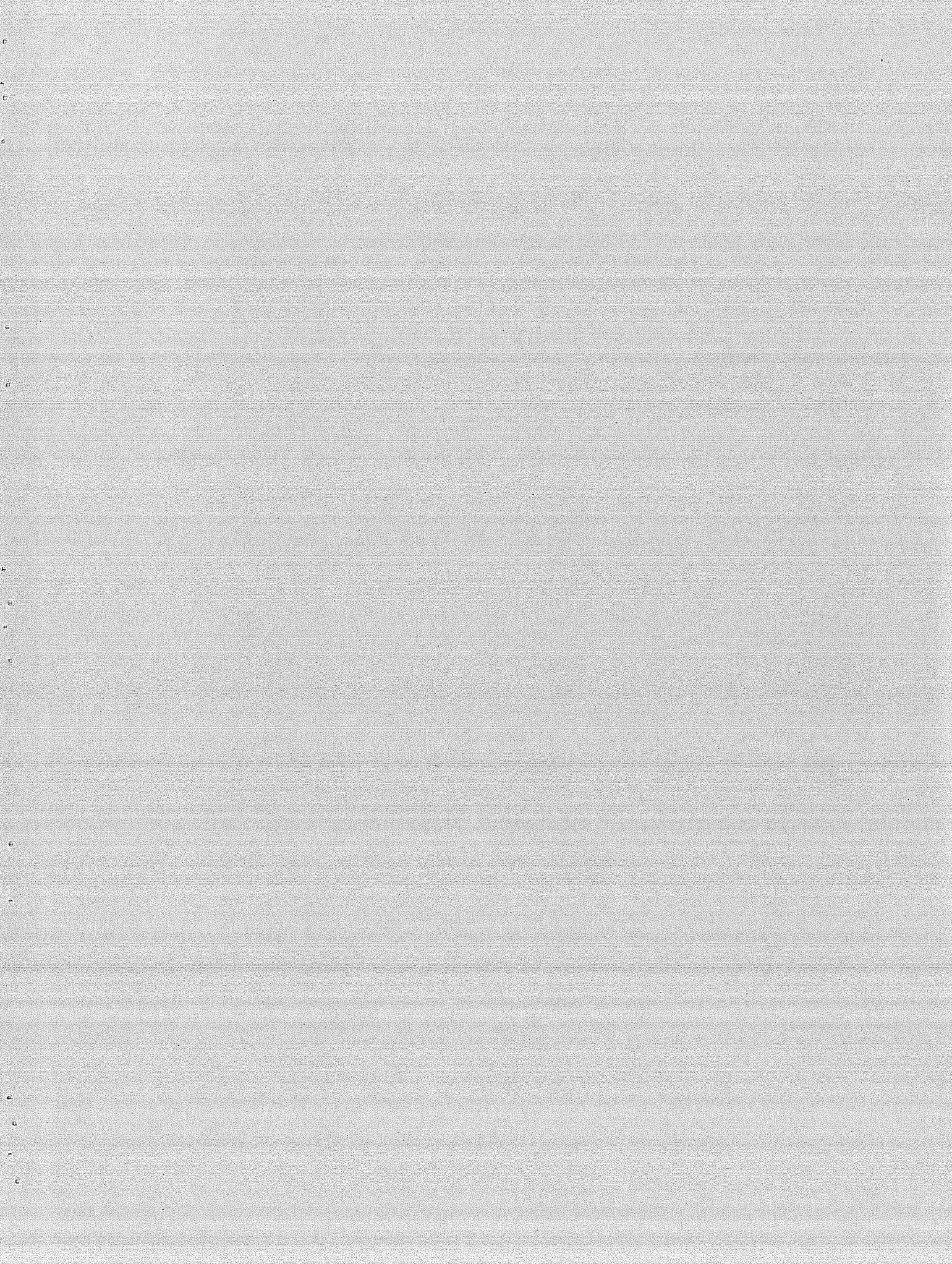


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APPENDIX

TABLE OF CONTENTS

Electric Service Agreement	APP. 1-10
Affidavit of Keith Hainy	APP. 11-13
Judgment of Affirmance	APP. 14



ELECTRIC SERVICE AGREEMENT

This Agreement made and entered into April 13, 2006, by and between FEM Electric Association, Ipswich, South Dakota (hereinafter called the Cooperative) and North Central Farmers Elevator, Ipswich South Dakota (hereinafter called the Customer).

WITNESSETH:

WHEREAS, the Customer is constructing a grain handling facility located in Edmunds County, South Dakota (hereinafter called the Facility); and

WHEREAS, the Customer desires to have the Cooperative provide all of the electric power and energy requirements of the Facility and the Cooperative is willing and able to provide these requirements.

NOW, THEREFORE, in consideration of the mutual promises, covenants, and conditions contained herein, the Cooperative and the Customer agree as follows:

1. Description of Facility:

The Facility shall include the Customer-owned grain handling facility, multi-unit train loading facility and related facilities located in Section 20, Township 123N, Range 73W, Edmunds County, South Dakota.

2. Agreement to Sell and Purchase:

The Cooperative hereby agrees to sell and deliver to the Customer and the Customer agrees to purchase and receive from the Cooperative all of the electric power and energy requirements of the Facility upon the terms and conditions hereinafter provided.

3. Service Characteristics:

- a. Service Delivery. Service hereunder shall be provided at multiple service locations at the Facility, consisting of two - 2000 kVA 12,470-277/480V transformers. The Cooperative shall install or cause to be installed, operated, and maintained 3/4 miles of 41.6 kV transmission line, a 41.6/12.47 kV substation, 2 - 2,000 kVA padmount transformers, approximately 1 (one) mile of 15 kV underground distribution line, and associated distribution switchgear.
- b. Capacity. The Cooperative shall provide the Facility with up to 4,000 kVA of electrical service capacity. Service to loads above 2,500 kVA shall require an amendment to this Agreement.

- c. Interruptible Service. Service hereunder shall be interruptible as described in the attached Rate Schedule. Power interruptions may also occur as the result of planned and coordinated maintenance and circumstances beyond the control of the Cooperative as provided for in Section 4i of this Agreement.

4. **Service Conditions and Requirements:**

- a. Cooperative-Owned Facilities. The Cooperative will furnish or cause to be furnished, installed, and maintained all electric equipment and facilities required to deliver electric power and energy to the Customer for the Facility to the point of connection. The point of connection shall be the secondary terminals of the Customer's transition cabinets. Electric service equipment furnished, installed, operated, and maintained by the Cooperative, as identified in Section 3a, on the property of the Customer shall remain the property of the Cooperative and may be removed upon termination or retirement of service.
- b. Customer-Owned Facilities. The Customer shall be solely responsible for the design, installation, maintenance, and safety of any and all Customer-supplied electric facilities or equipment. The Customer shall provide and maintain the necessary protection equipment to protect its own facilities from harm from any electrical cause as well as to protect the Cooperative's equipment and members from any damages, interruption of service, or faulty service due to faults or operations of the Customer's equipment.
- c. Customer-Owned Generation. Customer-owned generators shall be operated only during periods (1) of load control as signaled by the Cooperative; (2) when electric service from the Cooperative is not available; (3) to safeguard against potential power interruptions; or (4) for the required testing and maintenance of the Customer's electric facilities and equipment. Except during load transfers between the Customer's generators and the Cooperative's electric system, the generators shall not be operated in parallel with the Cooperative's system. Specific interconnection requirements will be consistent with Cooperative policy.
- d. Location of Cooperative Facilities. The Customer will provide to the Cooperative suitable locations for the installation of electric facilities on the property of the Customer. The Customer shall provide the Cooperative or its power supplier, at no cost, a Warranty Deed for the substation property and permanent easements for all electric power supply facilities located on site, including but not limited to, in and out transmission and distribution lines to permit multiple use of said facilities, on-site distribution lines and distribution transformer/switchgear sites. The Customer will provide site grading for the substation at no cost to the Cooperative and further will provide a concrete pad for all distribution transformers and switchgear in accordance with specifications provided by the Cooperative.
- e. Accessibility to Cooperative Facilities. Duly authorized representatives of the Cooperative shall be permitted to enter on the property of the Customer to the

extent necessary to maintain and service electric facilities at all reasonable times in order to carry out the provisions of this Agreement.

- f. Operation of Cooperative Equipment. The Customer will not interfere with the operation of any Cooperative-owned electric equipment or facilities, including any metering or communication equipment. The Customer shall advise the Cooperative as soon as possible if the Customer discovers any apparent problem with the condition or functioning of the Cooperative's equipment or facilities.
- g. Operation of Customer Equipment. The Customer's electric service, electric facilities, and load characteristics will conform to the National Electric Code and National Electric Safety Code, IEEE/ANSI standards, and Prudent Utility Practice. If the operation of any of the Customer's equipment causes power quality or operational problems to the Cooperative's electric system, the Customer shall promptly correct or remove the cause of the problem. If the Customer does not eliminate the problem, the Cooperative can correct or remove the problem from the electric system and the Customer will be responsible for the costs. The Customer shall notify the Cooperative immediately if the Customer discovers that the condition or operation of any of the Customer-supplied electric equipment or facilities may pose a risk to any persons or property.
- h. Cooperative Membership. The Customer shall be a member of the Cooperative.
- i. Hold Harmless. If the supply of electric power and energy provided by the Cooperative should fail or be interrupted, or become defective, through (a) compliance with any law, ruling, order, regulation, requirement or instruction of any federal, state or municipal governmental department or agency or any court of competent jurisdiction; (b) Customer action or omissions; or (c) acts of God, fires, strikes, embargoes, wars, insurrection, riot, equipment failures, operation of protective devices, or other causes beyond the reasonable control of the Cooperative, the Cooperative shall not be liable for any loss or damages incurred by the Customer or be deemed to be in breach of this Agreement. The Customer acknowledges that the delivery of electric power and energy may at times be subject to interruption by causes beyond the control of the Cooperative, including weather conditions, vandalism, accidents, and other interruptions, and that the Customer assumes the risk of those potential interruptions. The Cooperative will use its best efforts to return the interrupted electric service in the shortest reasonable time under the circumstances.

5. **Metering:**

- a. Point of Metering. Metering will measure the demand and energy of the total Facility and will be located on cooperative facilities, either inside or outside the substation.

- b. Metering Responsibility. All meters shall be furnished, installed, maintained, and read by the Cooperative or its power supplier.
- c. Meter Testing Procedure. The metering shall be tested at least once every two years for accuracy. If any test discloses the inaccuracy of said meters to the extent of more than two percent (2%) fast or slow, an adjustment in billing, according to the percentage of inaccuracy found, shall be made for the period elapsed subsequent to the date of the last preceding test.
- d. Meter Failure. Should the metering equipment at any time fail to register proper amounts or should the registration thereof be so erratic as to be meaningless, the capacity and energy delivered shall be determined by the Cooperative from the best information available.

6. **Rates and Payment:**

- a. Rate Schedule Application. The Customer shall pay the Cooperative for service rendered hereunder at the rates and upon the terms and conditions set forth in the Rate Schedule attached to and made a part of this Agreement and any revisions thereto or substitutions thereof adopted by the Cooperative's Board of Directors.
- b. Payment Arrangements. All charges for service shall be paid to the Cooperative by electronic funds transfer, which will be initiated by the Cooperative on the day when the billing is completed for the preceding month's electric bill. If said transfer is rejected (or the Cooperative is unable to complete it for any reason), the Customer will be notified and the Cooperative may discontinue service to the Customer upon giving eight (8) days written notice to the Customer of its intention to do so, provided, however, that such discontinuance of service shall not relieve the Customer of any obligations under this Agreement. During the term of this Agreement, the parties may negotiate alternative payment arrangements that are agreeable to both parties.
- c. Disputed Bills. The Customer shall pay all bills for services and/or energy in a timely manner and in accordance with billing procedures established by the Cooperative even though said charges may be disputed. If it is determined that the Customer is entitled to a refund or credit for a disputed bill, the Cooperative shall, in addition to the principal amount refunded or credited, pay interest on said amount at the rate authorized for interest on judgments in the State of South Dakota. Neither party shall be obligated to settle disputes by arbitration or mediation without the mutual consent of the parties.

7. **Commencement and Termination:**

- a. Commencement Date. This Agreement shall be in effect as of the date executed and the Customer's obligation to purchase electric service hereunder shall

commence upon the startup of the commercial operation of the Facility but no later than _____, 2006, whichever occurs first.

- b. Minimum Facilities Charge Obligation. In the event that this Agreement is terminated and the Customer ceases to use the facilities described in Section 3a, the Customer agrees to pay to the Cooperative the equivalent of ten years (120 months) of facilities charges that the Customer would have paid if the agreement would have remained in effect for the first ten years, less facilities charge payments already made by the Customer prior to termination.
- c. Default and Termination. The Customer shall be in default if it fails to timely pay for service under this Agreement, if it breaches any other of its obligations to the Cooperative, or if it becomes the subject of bankruptcy or insolvency proceedings. If the Customer fails to cure that default within ten (10) days after the Customer receives written notice of default from the Cooperative, the Cooperative may, at its sole option, suspend or terminate its further performance under this Agreement, disconnect electric service to the Customer, terminate this Agreement, or take other action to address the Customer's default. This provision shall not limit the Cooperative's right to take immediate action to suspend services if the Customer's act or omission interferes with the safe and efficient operation of the Cooperative's electric system, nor shall it limit the Cooperative's right to pursue any other or further remedy available to it by law.

8. Security Agreement for Customer Obligations:

To secure the Customer's performance of its obligations to the Cooperative under this Agreement, the Customer hereby grants the Cooperative a security interest in any of the Cooperative's patronage capital credits owned or hereafter accrued by the Customer. The Customer agrees to sign and deliver a Uniform Commercial Code (UCC) financing statement and such other and further documents, as the Cooperative shall reasonably request to perfect and continue this security interest.

9. Patronage Capital Credits:

Service under the rates provided for in this Agreement is subject to a special allocation of capital credits to the Customer by the Cooperative. This will take into account the reduced cost allocation associated with the rates that are included in this Agreement. Based on this special allocation, Capital Credits will be minimal. For the purpose of this Agreement, the Customer acknowledges that they are not a natural person under South Dakota law.

10. Disclaimer of Warranty and Limitation of Liability:

Each party shall be responsible for its own facilities and personnel provided or used in the performance of this Agreement. Neither the Cooperative nor the Customer shall be responsible to the other party for damage to or loss of any property, wherever located,

unless the damage or loss is caused by its own negligence or intentional conduct or by the negligence or intentional conduct of that party's officers, employees, or agents, in which case the damage or loss shall be borne by the responsible party. The Cooperative shall not be responsible or liable to the Customer or to any other party for any indirect, special or consequential damages, or for loss of revenues from any cause.

11. **Indemnification:**

The Customer agrees to indemnify and holds the Cooperative harmless from and against any liability for any claims or demands arising out of property damage, bodily injury, or interruptions to the Customer's electric service caused by electric equipment or facilities owned by the Customer, or the Customer's possession, use, or operation of electric equipment or facilities.

12. **General:**

- a. Governing Law. This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with and shall be governed by the laws of the State of South Dakota.
- b. Notices. All notices under this Agreement shall be given in writing and shall be delivered personally or mailed by first class U.S. mail to the respective parties as follows:

To Customer:

Mr. Keith Hainy, Manager
North Central Farmers Elevator
P. O. Box 366
Ipswich, South Dakota 57451

To Cooperative:

Paul Erickson, Manager
FEM Electric Association, Inc.
PO Box 468
Ipswich, South Dakota 57451

- c. No Waiver. No course of dealing nor any failure or delay on the part of a party in exercising any right, power or privilege under this Agreement shall operate as a waiver of any such right, power or privilege. The rights and remedies herein expressly provided are cumulative and not exclusive of any rights or remedies, which a party would otherwise have.

- d. Entire Agreement/Amendment. This Agreement represents the entire Agreement between the parties with respect to the matters addressed in this Agreement, except as provided in the Cooperative's bylaws, rules, and regulations applicable to similarly situated customers, which are incorporated herein. This Agreement may be changed, waived, or terminated only by written agreement signed by both parties as set forth herein.
- e. Assignment. The Cooperative may assign this Agreement to an affiliate or affiliates of the Cooperative, to a partnership(s) in which the Cooperative or an affiliate has an interest, or to any entity which succeeds to all or substantially all the Cooperative's assets by sale, merger or operation of law. The Customer may not assign this Agreement without the written consent of the Cooperative, which consent will not be unreasonably withheld.
- f. Severability. Should any part, term or provision of this Agreement be, by a court of competent jurisdiction, decided to be illegal or in conflict with any applicable law, the validity of the remaining portions or provisions shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives, all as of the day and year first above written.

Attest:

FEM ELECTRIC ASSOCIATION, INC.

By: _____

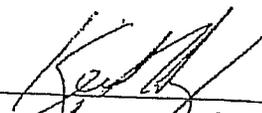
Title: _____

Title: _____

Attest:

NORTH CENTRAL FARMERS ELEVATOR



By: 

Title: Brock Koepel

Title: General Manager

RATE SCHEDULE
North Central Farmers Elevator Bowdle Facility

AVAILABILITY

Available to the North Central Farmers Grain Handling Facility located in the Section 20, Township 123N, Range 73W, in Edmunds County, South Dakota, for commercial operation of the facility. This schedule is not available for startup or construction power and is subject to the established rules and regulations of the Cooperative.

This rate is subject to an interconnection agreement with MDU.

TYPE OF SERVICE

Multiple deliveries of alternating current, 60 cycle, 277/480 volt three-phase.

MONTHLY RATE

The Customer shall pay the Cooperative for service hereunder at the following rates and conditions. The following is the Rate Components schedule through the year 2010.

	2006	2007	2008	2009	2010
	Guaranteed	Guaranteed	Guaranteed	Guaranteed	Estimated
Non-coincident Demand Charge Above 3,200 kW (kW per month)	\$12.00	\$12.00	\$12.00	\$12.00	\$12.00
Coincident Demand Charge (kW per month)	\$12.00	\$12.00	\$12.00	\$12.00	\$12.00
Monthly Facilities Charge	\$8,000	\$8,000	\$8,000	\$8,000	\$8,000
Energy Charge (kWh per month)	\$.02580	\$.02580	\$.02580	\$.02580	\$.03200

RATE GUARANTEE

The monthly demand, facilities and energy charges specified above are guaranteed to remain unchanged for the years 2006 through 2009. If the Cooperative makes additional investments in the electric transmission, substation or distribution facilities serving the Facility during the term of this rate guarantee, the rate shall be adjusted accordingly. However, the rates may be adjusted at any time by the amount of any new or increased level to current local, state, or Federal taxes or fees.

The form of the rate is guaranteed through 2016. The rate form shall be a monthly facilities charge, an energy charge, and demand charges if applicable as described under the Billing Demand section which follows this section.

BILLING DEMAND

The billing demand shall be equal to the Customer's contribution to the monthly billing demand from the Cooperative's power supplier, as determined by a demand meter or otherwise, and adjusted for power factor.

The Customer is required to follow the load management strategy under the 5/7 Interruptible Rate. The Customer's total load must be removed from East River's billing peak in the months of January, February, June, July, August, November and December of each year when called to do so via East River's load management signal. In the other five months, the Customer will be credited its half-hour demand coincident with East River's billing peak. Failure to shed load when called to do so will result in a charge for all the Customer's on peak demand coincident with East River's billing peak, and a "strike." For any strike the Customer receives that results in an accumulation of three or more strikes in any 24-month rolling period, the demand charge will be tripled for the Customer's demand coincident with East River's billing peak.

The Customer is limited to 2,500 kW non-coincident peak in any billing period. Demands above 2,500 kW are subject to a demand charge.

MINIMUM BILLING DEMAND

None

FACILITY CHARGE

The facility charge shall be \$8,000 per month, totaling \$96,000 per year. There is no required minimum energy usage.

The facility charge is based on the Customer being the only electric load being served from the facilities being constructed as set forth in Section 3.a. In the event, additional customers are provided service from these facilities, the Cooperative will review the facility charge to the Customer and will make any appropriate adjustments.

POWER FACTOR ADJUSTMENT

The Customer agrees to maintain unity power factor as nearly as practicable. The demand charge may be adjusted to correct for average power factors less than five percent (5%) unity (lagging) or greater than five percent (5%) unity (leading) by increasing the measured demand one percent (1%) for each one percent (1%) by which the average power factor is less than five percent (5%) unity (lagging) or more than five percent (5%) unity (leading).

STATE AND MUNICIPAL TAXES

All applicable state and municipal sales tax and any other non-ad valorem taxes imposed on electric energy sales shall be applied to monthly bills rendered under this rate schedule unless the consumer is exempt from said tax or taxes.

TERMS OF PAYMENT

In the event the current monthly bill is not paid in accordance with the payment dates indicated on the bill, a late payment penalty in effect at the time shall apply.

EFFECTIVE: _____, 2006

4. Montana Dakota Utilities Company ("MDU") will provide natural gas to the Bowdle Facility. MDU asked to be allowed to submit a bid for electric service to the Bowdle Facility, which MDU assumed was a large load.

5. I did not take any action on MDU's proposal. Instead, I entered into an agreement for electrical services to the Bowdle Facility with FEM on or about April 13, 2006. In this Electrical Service Agreement, there is not a specified contracted minimum load of over two thousand kilowatts.

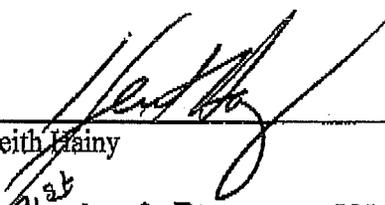
6. It is my opinion, based upon North Central's analysis and previous experience, that the Bowdle Facility will not require a minimum demand of 2,000 kilowatts. I base this opinion on the electric utility requirements of the Craven Elevator. In 2005, Craven Elevator loaded more BNSF shuttle trains than any other handling facility in South Dakota. Craven Elevator, it uses less than 1,500 kilowatts of power. The Bowdle Facility is not anticipated to handle the volume of grain that the Craven Elevator handles. Thus, I do not believe that the Bowdle Facility will have an electrical demand of more than 2,000 kilowatts.

8. In addition to not being a large biddable load under SDCL § 49-34A-56, it is North Central's clear and stated preference for FEM to be the electric service provider of the Bowdle Facility, which is evidenced by the Electric Service Agreement between the parties. Because the Bowdle Facility is within FEM's service territory, no Commission action is necessary, and North Central did not petition the Commission for approval of an alternative electric service provider.

9. Time is of the essence for construction of the electrical sub-station to serve the Bowdle Facility, and it is a great hardship to my company to be involved in unnecessary

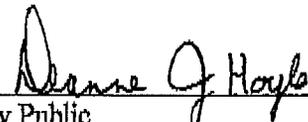
litigation improperly initiated by a competing electric service provider. I request that the Commission dismiss the petition of MDU because 1) this load is not over 2,000 kilowatts, and 2) it is North Central's preference to have FEM serve the Bowdle Facility.

DATED this 21st day of June, 2006.



Keith Rainy

Subscribed and sworn to before me this 21st day of June, 2006.



Notary Public
My commission expires: 4-3-2011
Notary Print Name: Deanne J. Hoyle

(SEAL)

STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

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

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CIV 06-372

**JUDGMENT OF
AFFIRMANCE**

This action came on for oral argument before the Court on January 31, 2007 at 1:30 p.m., the Honorable James W. Anderson, Circuit Court Judge presiding. The Court having read and considered the record in the case submitted by the agency and the briefs submitted and oral arguments made by counsel for each of the parties and the Court having found therein good and sufficient cause to render a judgment affirming the final agency decision that is the subject of this appeal, it is

ORDERED ADJUDGED AND DECREED that the Final Decision and Order Granting Summary Disposition in Docket EL06-011, issued by the South Dakota Public Utilities Commission and dated August 24, 2006, is hereby affirmed.

Dated at Pierre, South Dakota, this 31 day of Jan, 2007.

BY THE COURT:


Circuit Court Judge
STATE OF SOUTH DAKOTA
Sixth Judicial Circuit Court

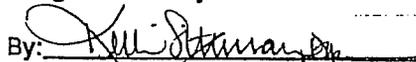
ATTEST:


Clerk of Courts

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

JAN 31 2007

Judy Feddersen
Hughes County Clerk of Courts

By: 

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

JAN 31 2007

 Clerk
By: _____ Deputy