

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

IN THE MATTER OF THE PETITION OF) NORTHWESTERN PUBLIC SERVICE) COMPANY FOR A DECLARATORY RULING) REGARDING ELECTRIC SERVICE TO HUB) CITY, INC., ABERDEEN, SOUTH DAKOTA)) DECLARATORY RULING) ALLOWING HUB CITY TO) RECEIVE ELECTRIC) SERVICE FROM) NORTHWESTERN PUBLIC) <u>SERVICE COMPANY</u>) EL94-015
--	---

On May 23, 1994, Northwestern Public Service Company (NWPS) filed with the Public Utilities Commission (Commission) a Petition for Declaratory Ruling. In the Petition, NWPS requests that the Commission "allow Hub City to terminate its electric agreement with Northern Electric Cooperative (NEC) in order that NWPS service the whole Hub City plant." On May 26, 1994, NEC filed a Motion to Intervene.

At its regularly scheduled June 2, 1994, meeting, the Commission granted intervention to NEC. On August 15, 1994, the Commission received a Stipulation of Facts signed by NEC and NWPS. The Commission issued an Order for and Notice of Procedural Schedule on August 22, 1994. By Order dated September 15, 1994, the Commission issued an Order for and Notice of Amended Procedural Schedule.

The procedural schedule was as follows:

NWPS and NEC shall file initial briefs on or before September 2, 1994;

Both parties may file simultaneous reply briefs and Staff may file a brief or comment and recommendation to be received by the Commission not later than Friday, September 23, 1994; and

The Commission shall make a final decision in this matter at a Commission meeting to be held on Tuesday September 27, 1994, in the Commission's conference room at the State Capitol, Pierre, South Dakota.

On September 1, 1994, the Commission received NEC's initial brief. On September 2, 1994, the Commission received NWPS' initial brief. On September 22, 1994, the Commission received Staff's Comment and Recommendation. On September 23, 1994, the Commission received NWPS' and NEC's reply briefs.

On September 27, 1994, the Commission heard oral arguments from the parties. Attorney Alan Dietrich appeared on behalf of NWPS; Harvey Oliver appeared as attorney for NEC; and Gus Jacob appeared as attorney for Commission Staff. At the meeting, the Commission received from NEC the affidavit of Dennis Maloney. The Commission allowed

NWPS 10 days to respond to the affidavit. On October 6, 1994, the Commission received from NWPS the affidavit of Herbert L. Brosz.

On October 24, 1994, at its regularly scheduled meeting, the Commission made its final decision. The Commission voted to 2-1 to allow NWPS to serve the Hub City facility in question. (Commissioner Burg, dissenting)

The parties have stipulated to the following facts:

FINDINGS OF FACT

1. Hub City, formerly known as Safeguard Automotive Corporation, has a manufacturing plant in the Aberdeen Industrial Park, located within NWPS's assigned electric service territory.
2. NWPS was serving Hub City at such plant location on March 21, 1975, and has been providing electric service since that time.
3. Safeguard Metal Casting Division ("SCD"), representing itself to be a separate corporate entity from Hub City, petitioned the Commission on March 17, 1977, to have its proposed foundry served by NEC even though the proposed foundry was in the assigned service territory of NWPS.
4. SCD was planning to construct an addition onto the Hub City plant, and in such addition the foundry was to be located. SCD's petition was based upon SDCL 49-34A-56.
5. Following SCD's petition, NWPS filed a petition to intervene and objection, requesting that the Commission deny SCD's petition and order that service be provided to SCD by NWPS.
6. A hearing was held on July 18, 1977, after which the Commission issued its Decision and Order approving SCD's petition.
7. SCD ceased operating the foundry addition as a foundry in 1986. For purposes of clarity, that addition will continue to be referred to as "foundry" throughout the remainder of this Stipulation.
8. Beginning in 1986 until about the beginning of 1993, the foundry was utilized as a warehouse.
9. Through several corporate changes, the foundry and other assets of SCD were sold to Hub City in 1989.
10. Beginning in 1993, Hub City began moving a portion of its production facilities into the foundry.
11. NEC has served electricity to the foundry since the Commission's Decision and Order.

12. Both NWPS and NEC are willing to serve Hub City's production processes in the former foundry addition, and, with regard to the electric load in such former foundry addition, both NWPS and NEC:

- a. Can meet the electric service requirements of the load to be served;
- b. Have adequate power supply available;
- c. Would develop and improve their electric systems through service to the load; and
- d. Have adequate facilities in proximity to the load from which electric service of the type required by the customer may be delivered.

13. In order to serve the plant and foundry, NWPS would install an MV90 computer system utilizing a primary meter and sub-meters. Approximately 300 feet of distribution line would be constructed. The anticipated cost to NWPS would be \$5,400.00. Should the electric demand at the foundry sub-meter reach 2000 KW, this installation would be able to serve such load.

14. If NWPS were to serve the foundry, approximately \$39,593 worth of NEC's facilities to serve the foundry would be stranded, unless NWPS and NEC would enter into an agreement to sell such facilities to NWPS for utilization in service to the foundry. Additionally, NEC would continue to incur \$9523 per year in fixed load charges to East River Electric for a period of 4.25 years resulting in an additional cost to NEC over the next 4.25 years in the amount of \$40,472.

15. With the addition now part of the Hub City plant operations, Hub City has notified NEC by two letters that it wishes its electric service agreement with NEC to be terminated so that it can receive electric service for its whole plant from NWPS.

16. The electric demand in the addition is not 2,000 kilowatts.

17. NWPS would serve the additional load under its Option I for increased electric usage by an existing customer. The additional load would be that load acquired by a change in the power supplier from NEC to NWPS, not additional plant expansion.

18. Based upon the electric load and consumption information for Hub City for the twelve-month period from June 1993 through May 1994, the attached Exhibit A shows the cost of electricity for Hub City both as it was billed by the two electric suppliers during such period and as it would be billed if Hub City was served only by NWPS.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-34A, specifically 49-34A-42, 49-34A-56, and 49-34A-58.

2. The Commission finds that due to the significant changes in circumstances that formed the bases for the Decision and Order in Docket F-3171 the Commission shall allow NWPS to serve the Hub City foundry. The circumstances underlying the 1977 Decision and Order have changed substantially or been entirely eliminated, removing the bases for the earlier Decision and Order.

3. Hub City now prefers to have its entire electric load served by NWPS. The 1977 Decision gave great weight to the preference of the customer; this Commission shall also give great weight to the customer's preference. Therefore, Hub City shall be allowed to now receive service from NWPS since the foundry is located in NWPS' service territory.

4. The 1977 Decision is the only instance where the Commission has applied SDCL 49-34A-56. This statute is designed to override assigned territorial boundaries. SDCL 49-34A-56 gives the Commission authority to approve a service provider other than the rightful territorial provider. When the 1977 Commission applied SDCL 49-34A-56, it is obvious that it was considering competition when it allowed NEC to serve SCD. The facts show that SCD is located in the midst of NWPS' service territory, NWPS is a much larger utility than NEC, and NWPS was certainly quite capable of serving the load. However, NWPS also wanted to charge more for the service. Thus, NEC's lower offered rate was compelling for both SCD and the 1977 Commission. SCD wanted the competitive alternative offered by NEC. The 1977 Commission granted the SCD request with authority conferred by SDCL 49-34A-56. NEC and SCD subsequently signed a contract that characterizes the nature of both parties to base their relationship on competitive considerations.

5. The Commission finds that the contract entered into by SCD and NEC requires the allowance of SCD's successor to that contract, Hub City, to change electrical suppliers to NWPS. The Commission will not interfere with or attempt to override the clear terms of a contract freely entered into by both parties. Pursuant to that contract, Hub City was given the right to terminate service with NEC upon a year's notice and has complied with all terms of the contract.

6. The contract is not ambiguous. It is evident from the plain language of the contract that NEC did not intend to bind SCD to permanently receive service from NEC. By the termination clause, NEC contractually agreed that either NEC or SCD would be able to terminate the contract after six years. Hub City, as SCD's successor, has lived up to the terms of the contract; NEC must now do the same. Therefore, Hub City shall now be allowed to receive service for the foundry from NWPS.

7. Although NEC has alleged a property right, no property right has been infringed by this Order. It is clear from the contract that NEC assumed the risk that SCD could terminate the contract upon proper notice. It is apparent from the termination clause that NEC had no expectation that SCD would be a permanent customer. Given that knowledge, it was incumbent upon NEC to protect its own economic interests and investment through the terms of the contract.

8. Although the parties stipulated that approximately \$40,000 of NEC's investment will be stranded if NWPS is allowed to serve the foundry, there is no indication whether this

amount took into account the original cost of investment used to serve the SCD load or the depreciation practices used by NEC in the intervening 17 years. With respect to the fixed load charges, it is notable that the foundry ceased operation in 1986, which led to a reduction in load, and the stipulated facts are silent as to what load remains and what the incremental cost is connected to losing the current load.

It is therefore

ORDERED, that Hub City is allowed to terminate its contract with NEC and to receive service from NWPS as the electric supplier in whose assigned service area Hub City's foundry is located; and it is

FURTHER ORDERED, that NEC shall continue to serve the foundry for a period not exceeding thirty (30) days from the date this Order becomes effective. At the end of that thirty day period, Hub City shall have the right to receive service from NWPS. During the first ten (10) days following the date this Order becomes effective, NEC and NWPS may enter into negotiations as to whether a voluntary agreement can be entered into between the parties providing for the purchase by NWPS of NEC's electrical facilities which currently serve the foundry. NEC is not obligated to sell such facilities, nor is NWPS obligated to purchase such facilities by reason of this Order. If no agreement can be reached in the ten (10) day period, the remaining twenty (20) days are allowed for construction of new facilities by NWPS to the foundry. The parties shall structure the change in electrical providers in such a manner that ensures there is minimal interruption of service to the foundry.

Pursuant to SDCL 1-26-32, this Order becomes effective ten days after date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 3rd day of January, 1995.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.
By: <u>Paul L. Waldner</u>
Date: <u>January 3, 1995</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Laska Schoenfelder
LASKA SCHOENFELDER, Chairman

Kenneth Stofferahn
KENNETH STOFFERAHN, Commissioner

JAMES A. BURG, Commissioner
DISSENTING

Commissioner Burg, dissenting

The statutes clearly provide that when the Commission allows a large new customer at a new location to take service from an electric utility other than the utility in the assigned service area pursuant to SDCL 49-34A-56, that large new customer is permanently assigned to that utility. First, under SDCL 49-34A-56 there is no language that allows the Commission to change the electrical supplier of a large new customer back to the electric utility in the assigned service area. The majority opinion relies heavily on the changes in circumstances that have occurred since the 1977 Decision. However, these changes in circumstances are irrelevant. If the legislature had intended that the electric utility could be changed after an assignment had been made under SDCL 49-34A-56 then it would have stated under what conditions that could occur. It did not do so.

Instead, the legislature provided that an assignment made pursuant to SDCL 49-34A-56 is permanent by listing that statute in SDCL 49-34A-1 and 49-34A-42. SDCL 49-34A-1, subsection one, defines the term "assigned service area." An "assigned service area" is defined as a geographical area in which the boundaries are established under specified statutes. The definition lists SDCL 49-34A-56 as one of the statutes that sets assigned service areas. In addition, under SDCL 49-34A-42, the Commission is given the authority to enforce assigned service areas established by a list of statutes. Again, one of those listed statutes is SDCL 49-34A-56. It is difficult to imagine how the legislature could have made it any more apparent that an assignment made pursuant to SDCL 49-34A-56 is a permanent assignment.

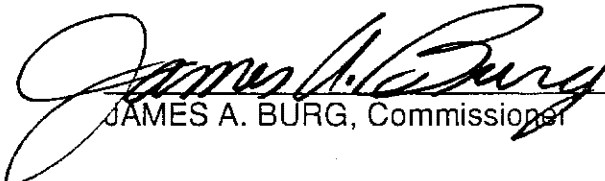
The reasons why the legislature intended that the assignment be permanent can be discerned from the purposes and intent of the territorial laws contained in SDCL Chapter 49-34A. One of reasons the legislature established assigned service areas was to prevent the costly duplication of facilities that would inevitably lead to higher rates. The legislature also recognized, however, that there could be instances where a large new customer could not be adequately served by the electric utility in the assigned area of the new facility. Thus, the legislature designed SDCL 49-34A-56 to allow the Commission to consider the impacts a large new customer would have on the utility in that assigned service area and whether another utility would be in a better position to serve the new large customer.

In making that decision, the legislature set forth six factors to be considered by the Commission. Based on those six factors the Commission could allow another utility to serve that new customer. That utility would then build its facilities to the new customer and plan its future power needs on the basis of serving that new customer. Allowing the customer to later change its mind and now prefer the utility in its assigned service area only promotes duplication of facilities and interferes with the orderly planning of power needs. The costly duplication of facilities and stranded investment is exactly what the territorial laws were designed to prevent, not encourage.

Notably, the majority opinion fails to state its interpretation of SDCL 49-34A-56. Instead it appears that the majority is carving out some sort of limited exception based on

the facts presented in this case. The majority's argument that since it believes the 1977 Commission gave great weight to the customer preference then this Commission must do likewise fails on two grounds. The first is that there is no evidence that customer preference was the controlling reason why the 1977 Commission allowed NEC to serve the foundry. The Commission's 1977 Decision specifically addressed the other factors it needed to consider pursuant to SDCL 49-34A-56. Second, even if customer preference was a significant factor in the 1977 Decision, that does not mean that the 1977 Commission would have found customer preference controlling when the customer now wanted service from NWPS. A better reading of that decision supports the opposite conclusion. The 1977 Decision made numerous findings on how NEC's system would be improved by allowing it to serve SCD. Moreover, the 1977 Decision stated that SCD's application for permanent service was granted. In any event, nothing in the 1977 Decision could obligate this Commission to ignore its own statutes that clearly provide that an assignment pursuant to SDCL 49-34A-56 is permanent.

Finally, the contract entered into by NEC and SCD does not, in any way, bind this Commission. The Commission is bound by its statutes, not by contracts entered into between private parties. Moreover, the fact that there was a termination clause in the contract does not mean that the parties intended the assignment to be temporary. Common sense would dictate that a contract with a minimum demand of 2000 kilowatts would need a termination clause in the event that the demand changed or the foundry ceased to operate. Therefore, the invoking of the termination clause would not mean that SCD would be free to choose another power supplier, it would just allow SCD to enter into another contract with NEC that accurately reflected the foundry's electrical power needs at that time or, in the alternative, NEC could provide service to SCD based on its tariffs. Thus, the majority's interpretation of the termination clause is flawed, as is its decision to allow NWPS to now serve the foundry.


JAMES A. BURG, Commissioner

HUB CITY INC
2914 INDUSTRIAL AVE.

AS BILLED - INCLUDING SALES TAX

<u>MONTH</u>	<u>NWPS KWH</u>	<u>KW DEMAND</u>	<u>AMOUNT</u>	<u>KWH</u>	<u>NEC KW DEMAND</u>	<u>AMOUNT</u>	<u>TOTAL AMOUNT</u>
MAY 1994	523,000	998	\$ 22,281.03	69,000	165	\$ 3,993.74	\$ 26,274.77
APR 1994	556,000	1,006	22,945.01	81,000	174	4,472.32	27,417.33
MAR 1994	541,000	996	23,606.28	75,000	171	4,264.92	27,871.20
FEB 1994	555,000	1,010	24,157.14	90,000	174	4,733.91	28,891.05
JAN 1994	536,000	1,007	24,624.33	72,000	168	4,204.76	28,829.09
DEC 1993	510,000	1,018	24,076.63	75,000	165	4,268.73	28,345.36
NOV 1993	556,000	1,007	21,675.53	75,000	159	4,107.69	25,783.22
OCT 1993	540,000	985	23,001.47	66,000	153	3,870.04	26,871.51
SEP 1993	482,000	1,018	23,094.82	54,000	147	3,435.98	26,530.80
AUG 1993	509,000	1,027	23,659.56	63,000	144	3,659.62	27,319.18
JUL 1993	550,000	985	23,655.49	60,000	138	3,493.41	27,148.90
JUN 1993	515,000	975	22,001.52	66,000	153	3,846.66	25,848.18
TOTAL	6,373,000		\$278,778.81	846,000		\$48,351.78	\$327,130.59

KW AND KWH COMBINED (no diversity computed in demand) SALES TAX INCLUDED

<u>MONTH</u>	<u>KWH</u>	<u>KW DEMAND</u>	<u>AMOUNT</u>	<u>DISCOUNT OPTION I</u>	<u>OPTION I NET AMOUNT</u>
MAY 1994	592,000	1,163	\$ 25,582.32	\$ 575.20	\$ 25,007.12
APR 1994	637,000	1,180	26,504.61	647.10	25,857.51
MAR 1994	616,000	1,167	27,232.44	592.12	26,640.32
FEB 1994	645,000	1,184	28,131.18	664.02	27,467.16
JAN 1994	608,000	1,175	28,285.15	536.53	27,748.62
DEC 1993	585,000	1,183	27,710.31	659.79	27,050.52
NOV 1993	631,000	1,166	24,831.53	587.89	24,243.64
OCT 1993	606,000	1,138	26,169.70	469.46	25,700.24
SEP 1993	536,000	1,165	25,956.14	500.28	25,455.86
AUG 1993	572,000	1,171	26,701.10	609.03	26,092.07
JUL 1993	610,000	1,123	26,572.82	348.02	26,224.80
JUN 1993	581,000	1,128	25,112.62	427.17	24,685.45
TOTAL	7,219,000		\$318,789.92	\$6,616.61	\$312,173.31