BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition for a Declaratory Ruling Determining if South Dakota Law Would Allow Petitioner to Develop and Own its Own Renewable Energy Generation System	)))))	DOCKET NO. EL18-061 **INTERVENOR CHARLES MIX ELECTRIC ASSOCIATION, INC.'S BRIEF**

COMES NOW Charles Mix Electric Association, Inc. ("CME" herein), by and through its attorney of record and submits the following brief in support of its position that the proposed renewable energy system of Randall Community Water District ("RCWD" herein) represents an unlawful intrusion into the assigned service area of CME. This unlawful intrusion includes both RCWD and its "Development Entity".

FACTS

CME was organized under S.D.C.L. Chapter 47-21 in 1948 (Restated Articles of Incorporation dated April 23, 1948). CME is a small rural electric distribution cooperative serving 1,818 member-consumers located in Charles Mix County, South Dakota. RCWD was initially organized in 1974 under S.D.C.L. Chapter 46-16 [transferred to S.D.C.L. 46A-9]. RCWD serves residents in Charles Mix and Douglas Counties and portions of Aurora, Brule, Bon Homme, and Hutchison Counties.

RCWD has been a member of CME since September 23, 1976. It has numerous metered services / accounts with CME as shown on Exhibit A attached hereto and incorporated herein by this reference. Further, RCWD is CME's largest power consumer. The water district's electrical services span three different rate classifications, including single-phase / non-demand, three-phase / non-demand, and three-phase / demand. RCWD's four largest services use approximately 4.5 million kWh in a typical 12-month period as shown on Exhibit B attached hereto and incorporated herein by reference. Revenues from those four services, based on kWh usage and demand, exceed $400,000 annually.

CME's exclusive assigned service area encompasses all RCWD's metered services in Charles Mix County. The water district is seeking to develop a renewable energy source within CME's service area to supplant the retail power it currently purchases from CME. RCWD does not specify the capacity of its intended renewable energy source; nor does the Petition identify

the kind of renewable energy source (i.e., solar, wind, geothermal, biomass, etc.). Nonetheless, from RCWD's past usage, the proposed small power production facilities must have a capacity of approximately one thousand kilowatts at peak demand to power the four largest services mentioned above. See attached Exhibit B.

RCWD's Petition indicates that the water district will contract with an unidentified "Development Entity" for funding, design, and construction of the proposed project. RCWD's "supplemental letter" states that the water district "would be the sole owner of the facilities at the time they come into operation". According to RCWD's Petition, the "Development Entity" would have "no influence [over] the control, operation, maintenance, and/or production of any of the renewable energy systems". In short, RCWD will enter into a "third-party purchase power agreement" with its unidentified developer and the water district will assume ownership of the facility after completion of construction.

Over past decades, CME has developed and operated its distribution system so as to provide safe, reliable, and affordable power to its member-consumers. RCWD, as CME's largest power consumer, figured prominently in CME's energy plan. With due consideration for the needs of RCWD, CME has upgraded and improved its plant as follows:

1995 – White Swan Substation Project

- East River Electric G&T and Western Area Power Administration coordinated to build and energize the White Swan Substation near Pickstown, SD, ¼ mile from the RCWD Treatment Plant and less than 1 mile from the RCWD's Pickstown Intake.
- CME built distribution feeders to the Pickstown intake and treatment plant to ensure ultimate reliability and provide a loop feed capability, thereby increasing the available capacity and reliability for the RCWD Pickstown services.

2002 – Trans Booster Number 1 Project

- Installation of 3 phase service for booster pump located 6 miles North and 1 mile West of Lake Andes, SD.

2004 – Pickstown Intake Upgrade Project

- Replacement of underground services to increase reliability to RCWD's intake service
- Replacement and upgrade of transformers and service for increased capacity.

2006 – Wagner to White Swan Tie-Line Conversion Project

- Replacement of overhead distribution line with 5 miles of underground distribution line to create a robust two-way feed capability between the Wagner Substation and the White Swan Substation for a reliable back feed to RCWD's facilities.

2007 – Pickstown Treatment Plant Project

- Replacement and upgrade of the transformer and service for increased capacity.
- Reconfiguration of tie points to create 2-way feed capabilities.

2014 – Riverview Substation Project

- East River Electric G&T built the Riverview Substation to provide increased capacity and reliability to RCWD's Platte Treatment Plant.
- East River Electric built 8 miles of 69 kv transmission line to provide power to the Riverview Substation.
- CME replaced and upgraded RCWD's Platte Treatment transformer and service for increased capacity.
- CME built 2 miles of 4/0 distribution circuit to improve reliability and two-feed capability going west of Riverview Substation in order to increase reliability to RCWD's Platte Treatment Plant.
- CME installed 4 miles of underground distribution line to create two-way feed capabilities between the Riverview and Geddes Substations for reliability purposes.

2017 – White Swan North Circuit Conversion Project

- CME replaced 9 miles of overhead distribution line with underground distribution line to create a robust two-way feed capability between the White Swan Substation and the Geddes Substation for a reliable back feed to RCWD's facilities.

2018 – North Point Area two-way feed Project

- Installation of 2.5 miles of underground distribution line to provide two-way feed capability to RCWD's Pickstown Intake, improving reliability.

2018 – 2019 Platte Intake Upgrade Project

- CME has reconfigured the overhead distribution line to accommodate the construction of the new Platte intake facilities.
- CME purchased a larger capacity transformer, underground conductors, and service equipment to provide power to RCWD's new Platte intake site.

These and other system improvements required significant financial investment. Accordingly, CME has undertaken $17 million in RUS, FFB, and CFC loans. Clearly, the loss or reduction of CME's largest commercial load will adversely affect CME's power requirements, rates, stability, members, minimum coverage ratios, debt service, and recovery of plant investment.

Beginning in 1976, and continuing for years thereafter, RCWD submitted 41 written applications for electric services to CME, each of which stated that:

> The Applicant [RCWD] will, when electric energy becomes available**, purchase from the Cooperative all electric energy used on the premises**… and will pay therefor monthly at rates to be determined from time to time in accordance with the bylaws of the Cooperative…. (Emphasis added.)

An example of such "Application for Additional Service Connection for Electric Services" is attached hereto as Exhibit C and fully incorporated herein by reference. CME was entitled to, and did, in fact, rely upon RCWD's promise to purchase all electric energy from CME. Over the years, when RCWD's demand and usage changed or increased, CME met the water district's requirements by modifying its distribution system and power requirements. Changes in demand and usage by the water district also affected CME's relationship with its power suppliers, East River Electric Cooperative and Basin Electric Power Cooperative. Understand that the complex relationship between a distribution cooperative and its G&Ts ultimately stands upon the shoulders of the member-consumers. What happens "behind the meter" impacts more than just the consumer.

ISSUE

RCWD has identified the "precise issue" in this matter as whether the **Development Entity** is subject to the provisions of S.D.C.L. § 49-34A-42. However, the water district has also petitioned the Commission "to issue a declaratory ruling determining if South Dakota law would preclude **RCWD** from developing and owning its own renewable energy generation system…." Petition for Declaratory Ruling, Docket EL18-061, p. 1, ¶ 1. Although the Commission has sought clarification from the Petitioner, an effort will be made in this brief to cover both statements of the issue.

RELEVANT STATUTES

S.D.C.L. § 49-34A-42 provides:

> 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. No electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless such other electric utility consents thereto in writing and the agreement is approved by the commission consistent with § 49-34-55. However, any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

> The commission shall have the jurisdiction to enforce the assigned service areas established by §§ 49-34A-42 to 49-34A-48, inclusive, and 49-34A-48 to 49-34A-59, inclusive.

In order to construe the foregoing statute, certain statutory definitions must be considered, including the following:

> **"Electric service"**, is defined as "electric service furnished to a customer for ultimate consumption, but not including wholesale electric service furnished by an electric utility to another electric utility for resale". S.D.C.L. § 49-34A-1(6).
>
> **"Electric utility"** is defined as "any person operating, maintaining, or controlling in this state, equipment or facilities for providing electric service to or for the public including facilities owned by a municipality. S.D.C.L. § 49-34A-1(7).
>
> **"Person"** is defined as a "natural person, a partnership, a private corporation, a public corporation, a limited liability company, a municipality, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, any of the federal, state, and local governments, including any of their political subdivisions, agencies, and instrumentalities, or two or more person having joint or common interest". S.D.C.L. § 49-34A-1(11).

Thus, the statutory construct frames the legal issue in the following manner:

Are RCWD and the unidentified "Development Entity":

- "persons" (as defined by statute)
- operating, maintaining, or controlling equipment or facilities
- for furnishing electric service to a customer for ultimate consumption
- to or for the public
- within the exclusive assigned service area of CME?

"Person". RCWD is clearly a "person" within the statutory definition. A Certificate of Approval was duly granted to RCWD as a "water user district" pursuant to S.D.C.L. Chapter 46-16 (SDCL 1967) by the South Dakota Board of Natural Resource Development on July 11, 1974. That Certificate was transmitted to the South Dakota Secretary of State on July 12, 1974, and RCWD thereby became authorized as a political subdivision to conduct business within the boundaries of the district as set forth in its organizational documents. The unidentified "Development Entity" is less clearly a "person" within the statutory definition. This is so because RCWD's Petition does not disclose the identity of the entity. Without identifying the "Development Entity", the Commission cannot be assured that the entity is not a competing electric utility, or a surrogate thereof.

"Operating, Maintaining, or Controlling Equipment or Facilities. In its Petition for Declaratory Ruling, RCWD states:

> RCWD would like to build one or more renewable energy generation systems at RCWD locations to provide energy to the buildings, operations, systems, etc. at the respective locations(s). RCWD does not have the requisite skill, expertise or know-how to develop such renewable energy generation system and would look to contract with another entity to provide that service (hereinafter "Development Entity"). The Development Entity would design, build and fund the project. The agreement would be limited to a financing arrangement wherein RCWD will have ownership interest in the renewable energy generation system(s) once the terms of the agreement are fulfilled. *The Development Entity would have no influence on the control, operation, maintenance and/or production of any of the renewable energy generation systems that would be constructed at RCWD's locations*. RCWD would consume all generated energy itself and would not offer any generated energy to any other entity or consumer for use or for sale. Petition for Declaratory Ruling, Docket No. EL18-061, p. 2, ¶ 2.

Conspicuously absent from RCWD's Petition is any clear statement regarding operation, maintenance, and control. While the Petition asserts that the unidentified "Development Entity" would have no influence over control, operation, maintenance, or production, it fails to disclose exactly who *would* perform those functions. Thus, the water district Petition omits essential information necessary for resolution of the issue.

As to "equipment or facilities", RCWD describes its proposed facility as "a renewable energy source", but never specifies the nature, character, or capacity of that source. The Commission is left to speculate whether the "renewable energy source" is one or more of the renewable energy resources defined by state and federal law. See S.D.C.L. § 49-34A-94 and 42 U.S.C. § 15852(2).

The Petition fails to address details that are essential to any fair determination of the legal issues presented in this case. Is the Commission supposed to enter a declaratory ruling not knowing: (a) the identity of the "Development Entity"; (b) the particulars of capacity; (c) the specifics of operation, maintenance, control, and production; or (d) the type or kind of "renewable energy source"? In order to address the ultimate issue (intrusion into exclusive assigned service area), RCWD must provide more details.

"Furnishing Electric Service to a Customer for Ultimate Consumption". RCWD's Petition states that, "RCWD would consume all generated energy itself and would not offer any generated energy to any other entity or consumer for use or sale". Petition for Declaratory Ruling, Docket No. EL18-061, p.2, ¶ 2. Although this statement is obviously intended to exempt

RCWD from the definition of "electric utility", it cannot be avoided that the water district intends to provide electric service to itself "for ultimate consumption". Since RCWD is a customer of CME with a significant load or demand, the proposed facility would certainly be "furnishing electric service to a customer for ultimate consumption".

"To or for the Public". RCWD may argue that neither it or the "Development Entity" is an "electric utility" within the purview of S.D.C.L. § 49-34A-42 because the proposed facility will not provide any of its self-generated energy "to or for the public". That argument is only partially correct. Certainly, if the "Development Entity" does not actually own, operate, maintain, or control the proposed generation facility, it would not be considered an "electric utility" as defined by statute. However, in this case, the "Development Entity" seeks to fully replace an electric utility servicing a customer in a protected service area. Further, RCWD is a political subdivision comprised of thousands of consumers, i.e., "the public". The energy generated by the proposed facility would provide electric service for equipment, pumps, and water treatment facilities that ultimately serve the water district's many customers. To the extent that RCWD, a political subdivision, furnishes electric energy to itself for the benefit of its member-consumers, it also serves "the public".

RCWD is unquestionably engaged in a business or service which supplies its consumer-members with a commodity (potable water) that is of public consequence and need. The correct interpretation of "to or for the public" is better stated in terms of whether the residents of the community (i.e. "the public") are *directly or indirectly impacted* by the proposed facility in such a manner as to require regulation. Here, many members of RCWD are also members of CME. If those members are burdened with *both* the cost of paying for the small power production facility and offsetting CME's shortfall in revenues, those members face a "double whammy" --- increased rates for water and electricity. Under federal law, CME must service its debt and maintain minimum coverage ratios. See 7 C.F.R. § 1710.114. If CME's largest commercial power consumer is abruptly removed from the distribution grid, the loss (including fixed costs) will be passed through to and paid by all remaining consumer-members. Such a result is not in the public interest.

"Within the Exclusive Assigned Service Area of CME". S.D.C.L. § 49-34A-42 begins with a statement of exclusive rights: "*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." The South Dakota Supreme Court has determined that this language provided two specific types of protection. "First, it assured that each utility would be granted all future service rights within its designated service area; and second, it protected individual service existing at the time the franchise was granted". *In re Clay-Union Elec. Corp*., 300 N.W.2d 58, 61-62 (S.D. 1980) and *In re West River Elec. Association, Inc*., 675 N.W.2d 222, 227, 2004 S.D. 11, ¶16-17. The public policy served by the statute includes (among other factors) elimination and prevention of duplication of lines and facilities. *Id.*, 228. See also S.D.C.L. § 49-34A-44.

In the present proceeding, RCWD seeks to carve out an exception to the vested exclusive right of CME to serve existing and future services within its territory.[1] In doing so, RCWD pays no deference to the undisputed fact that the proposed facility would clearly duplicate existing electric services. To accomplish RCWD's goal, the vested rights assured in the first sentence of the statute must be ignored, and undue emphasis placed on the second sentence prohibiting only another "electric utility" from encroaching upon the protected territory. However, the rules of statutory construction require that conflicting provisions should be interpreted to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. *Id.* Here, the statute states unequivocally that the exclusive "right to serve" runs to **"each and every location"** previously served in the assigned service area. The water district's argument disregards the plain language of the statute and the express legislative intent of eliminating and preventing duplication of facilities. If RCWD's strained interpretation of the statute prevails, nothing prevents a competing electric utility acting through a surrogate from "cherry-picking" large commercial loads from the protected service territory of another utility, all under the guise of "distributed generation".

CASE LAW

Neither the South Dakota Supreme Court nor the legislature has dealt directly with the issue presented in this case. Other state appellate courts, however, have wrestled with similar matters and produced varying opinions.

In *SZ Enterprises, LLC d/b/a Eagle Point Solar v. Iowa Utilities Board*. 850 N.W.2d 441 (Iowa 2014), Eagle Point Solar ("Eagle Point" herein), a manufacturer of photovoltaic (PV)

[1] As to the vested nature of the rights, see *Matter of Certain Territorial Elec. Boundaries (Aberdeen City Vicinity)*, 281 N.W.2d 72, 76 (S.D. 1979).

electric power systems, petitioned the Iowa Utilities Board ("IUB" herein) for a declaratory ruling interpreting "public utility" and "electric utility" under the Iowa Code in connection with Iowa's exclusive service territory statutes. Eagle Point proposed a third-party purchase power agreement (PPA) with the City of Dubuque whereby Eagle Point would finance, design, install, operate, monitor, and own a PV generation system that would supply a portion of the electric energy needed for a particular city building. The city would purchase all the electricity generated by the Eagle Point system on a per kilowatt hour basis and the city would share in the energy credits and tax benefits. At the conclusion of the agreement, Eagle Point would transfer all ownership rights of the PV generation system to the city. The city would remain connected to the electric grid and continue to purchase electric power from Interstate Power. However, the building was located within the exclusive service area of Interstate Power and Light Company.

After an extensive hearing involving the parties and numerous intervenors, the IUB ruled that, under the PPA, Eagle Point would be acting as a public utility under the Iowa Code and that Iowa's exclusive territorial statutes were enacted to ensure that utilities do not duplicate each other's facilities nor make existing facilities unnecessary. Because Eagle Point would be selling electricity to the city, the IUB concluded that the city was not engaged in "self-generation" and, therefore, not exempt from regulation. The IUB held that Eagle Point was prohibited from providing electric energy to the city building under Iowa's exclusive "right to serve" statute.

Eagle Point appealed to the Iowa district court. The district court did not extend deference to the IUB decision but rather considered the case *de novo*.

The district court found that the threshold issue was whether Eagle Point was a "public utility" under the Iowa Code and focused on the meaning of "to the public". It applied an eight-factor test borrowed from the Arizona Supreme Court decision in *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 70 Ariz. 235, 219 P.2d 324, 325-26 (1950). Those factors seek to determine whether a business is "clothed with a public interest" such that regulation as a public utility is justified under the facts of the case. Those eight factors are:

1. What the corporation actually does.
2. A dedication to public use.
3. Articles of incorporation, authorization, and purposes.
4. Dealing with the service of a commodity in which the public has been generally held to have an interest.
5. Monopolizing or intending to monopolize the territory with a public service commodity.

6. Acceptance of substantially all requests for service.
7. Service under contracts and reserving the right to discriminate.
8. Actual or potential competition with other corporations whose business is clothed with public interest.

See also *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 161 N.W.2d 111, 115 (Iowa 1968).

The district court applied the *Serv-Yu* factors and considered Iowa's legislative policies supporting energy conservation and renewable energy development. The district court held that Eagle Point did not furnish electricity "to the public" and was not a "public utility". It also determined that Eagle Point was not an "electric utility" as that term is used in the exclusive service territory statutes. Accordingly, the district court reversed the IUB decision. Interstate Power, the intervenors, and the IUB appealed to the Iowa Supreme Court.

The Iowa appellate court examined all lower proceedings, reviewed Iowa case law, and analyzed decisions from other states including Florida, Arizona, New Mexico, Delaware, and New Jersey. In *SZ Enterprises*, the Iowa Supreme Court considered that:

- the statutory definitions of "public utility" and "electric utility" are not so specialized or complex as to require the expertise of the IUB;
- the decision of the IUB was not entitled to deference;
- there is a public policy favoring deregulation and promoting alternate energy sources;
- decentralized retail generation "on the customer's side of the meter" is encouraged as a public policy supported by state and federal law;
- the critical issue is whether a third-party PPA is regarded as furnishing or supplying electricity "to the public";
- the phrase "to the public" has been given different meanings by diverse decisions, but the preferred analysis is that set forth in the eight factored *Serv-Yu* test;
- the essence of the issue is whether the PPA developers were sufficiently "clothed with the public interest" to justify regulation;
- PPAs were only providing a supplemental service;
- the public had no "legal right" to demand and receive services from the PPA developer;
- the IUB's concern that Eagle Point could "cream skim" or "cherry pick" large commercial customers and upset the settled expectations of Interstate Power were overstated and not supported by the record;

- Eagle Point is not providing electricity to a grid accessible by the public;
- if Eagle Point decides not to engage in a PPA transaction with a customer, the customer is not left high and dry, but may seek another vendor;
- Eagle Point does not seek to replace the traditional electric supplier, but merely attempts to reduce demand;
- third-party PPAs have the ability to convert their business arrangements into conventional leases which are outside the scope of regulation; and
- behind the meter solar facilities tend to generate electricity during peak hours and are thus consistent with consumer programs meant to encourage energy efficiency and the use of renewable energy sources.

In conclusion, the court in *SZ Enterprises* held that Eagle Point was not a "public utility" or "electric utility" so as to be prohibited from serving customers within the exclusive service territory of Interstate Power.

The dissent in *SZ Enterprises* strongly disagreed with the majority. Justice Mansfield, writing for the dissent, pointed out that the majority appeared to be substituting their expertise on utility regulations for that of the IUB. Further, the dissent highlighted the following IUB findings:

- Eagle Point would be selling electricity on a per kilowatt hour basis to multiple customers;
- The electricity provided by Eagle Point would displace electricity provided by the public utility required to serve the territory;
- The PPA arrangement would undermine the trade-off whereby the local regulated utility has an obligation to serve every customer that wants service but in return receives an exclusive territory;
- Interstate Power has made long-term investments based on projections of customer demand and Interstate Power is authorized to recover those long-term investments. Consequently, other ratepayers could be forced to make up the difference;
- The IUB decision was entitled to deference regarding its interpretation of "a substantive term within the special expertise of the agency", (i.e., "public utility");

- "To the public" means sales to sufficient members of the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination;
- Statutory provision of exclusive territories to traditional electric utilities underscores the legislative determination that there should not be duplication of services;
- If the legislature intends to exclude small-scale competitive suppliers of electricity, it may enact law accordingly;
- "Public utility" includes any entity owning or operating facilities for furnishing electricity to the public for compensation;
- The majority's "practical approach" to defining "public utility" circumvents the statutory definition and features the majority's sundry observations on economics and energy.

The minority in *SZ Enterprises* is not alone in its criticism of the majority opinion. One commentator suggests that the majority failed to use the proper standard of review, did its own research on the potential of PV generation, and manipulated the law to create a work around so third-party PPAs are not subject to exclusive service territories. Natalie Glinty, *SZ Enterprises v. Iowa Utilities Board: Impact on Rural Iowa*, 20.3 Drake Journal of Agricultural Law 413, 421-424 (2016).

Regardless of the holding of the majority or the criticism of the minority, *SZ Enterprises* does not resolve the issues in the present instance. Here, RCWD has signed 41 applications which promise that RCWD will purchase "all electric energy used on the premises" from CME. Now, the water district proposes to displace CME with a "behind the meter" facility that will:

- disrupt the cooperative's distribution plan;
- alter purchase power requirements;
- undermine recovery of plant investments;
- increase the rates of all other member-consumers; and
- encroach upon the statutorily protected assigned service area of CME.

Other jurisdictions have suggested a different approach to determining whether an entity is a "public utility" for the purposes of regulation. In *Eastern Shore Natural Gas Co. v. Delaware Public Service Commission*, 635 A.2d 1273 (Del. 1993), the court rejected the "bright-line" test where the issue turned on whether the entity refused to hold itself out indiscriminately to serve an indefinite public. *Id*. p. 1279. Instead, the court held that, "It is clear that, regardless of what

test is applied when construing the term 'for public use', the central issue that must be answered is whether the activities in question may have or not have a significant impact on the public interest the commission was designed to protect." *Id*. p. 1280. Similarly, the Superior Court of New Jersey in *The Petition of the South Jersey Gas Co.*, 226 N.J.Super. 327, 544 A.2d 402, 95 P.U.R.4th 525 (N.J. 1988), held that, "It is clear that the statutory obligation cast upon the [Board of Public Utilities Commissioners] requires that it be concerned with the economic impact of cream-skimming transactions such as that practiced here by SunOlin on the regulated activities of public utilities". *Id*. p. 408, citing *Associated Gas Distributors v. FERC*, 824 *F*.2d 981 (D.C.Cir.1987), *cert*. den. *sub nom*. *Interstate Natural Gas Ass'n of America, et al. v. Federal Energy Regulatory Comm'n, et al*., 485 *U.S.* 1006, 108 *S.Ct.* 1468, 99*L.Ed*.2d 698 (1988).

In *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 98 P.U.R.4th 533 (Fla. 1988), the Supreme Court of Florida addressed the issue of whether the sale of electricity to a single customer makes the provider a public utility. According to the court, the decision hinges on the meaning of the phrase "to the public"[2]. In *PW Ventures*, the court, deferring to the Florida Public Service Commission, held that the legislative scheme directed the PSC to exercise its powers to avoid uneconomic duplication of generation, transmission, and distribution facilities. *Id*. p. 283. In this case the court stated that,

> "What PW Ventures proposes is to go into an area served by a utility and take one of its major customers…. the effect of this practice would be that revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This revenue would have to be made up by the remaining customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced." *Id*.

Public utility commissions in other jurisdictions have struggled with the difficult problem posed by developers who own and operate distributed generation (DG) systems on host premises and who sell electricity solely to the host. Depending on statutory scheme, PUCs have fashioned rules considering various factual scenarios. Where a developer owns one or more DG systems on a single host's property and transports electricity from one location to another using an existing public utility's distribution lines, the developer is a "public utility". *In the Matter of Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, NMPRC Docket 09-

[2] Note the relevant Florida statute actually uses the phrase "to or for the public" in its definition of "public utility". See § 366.02(1), Florida Statutes (1985).

00217-UT, Recommended Decision, October 23, 2009, at 27-8. Here, CME provides a network of distribution lines serving RCWD's 41 metered services. The water district does not indicate in its Petition whether it intends to use CME's distribution lines to transport its electricity from the proposed facility to the numerous metered sites. However, if RCWD plans to utilize CME's distribution lines, there are safety and interconnection concerns that need to be addressed.

CONCLUSION

RCWD's Petition lacks the specificity necessary for the Commission to enter a declaratory ruling in this case. The Petition fails to: (a) identify the "Development Entity"; (b) provide the particulars of proposed distribution and capacity; (c) disclose the specifics of operation, maintenance, control, and production; and (d) describe the type of "renewable energy source". The Commission cannot render a decision in a vacuum. S.D.C.L. § 49-34A-42 assures CME that it has the exclusive right to provide electric service at retail to 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. This vested right is underscored in the present case where RCWD has signed 41 applications for service promising to "purchase from the cooperative all electric energy used on the premises" as a condition of service. CME has, over several decades and at great expense, upgraded and improved its plant to accommodate and serve RCWD. CME is entitled to rely upon the contract formed by accepting the applications and to recover its substantial investment through reasonable rates. The proposed facility threatens CME's electric distribution system by "cherry picking" the cooperative's largest power consumer. It can only do so by displacing the sole electric utility authorized by law to serve the assigned territory in which RCWD's numerous services are located. Neither RCWD nor its "Development Entity" may strip CME of it statutorily guaranteed rights by playing semantics with the statutory definition of "electric utility". Both RCWD and its "Development Entity" operate "to or for the public" in the factual context of this case.

The undersigned Intervenor urges the Public Utilities Commission to deny RCWD's Petition for Declaratory Ruling; or in the alternative, to rule that RCWD's proposed renewable energy system unlawfully intrudes into the assigned service area of CME.

Dated this 29th day of January, 2019.

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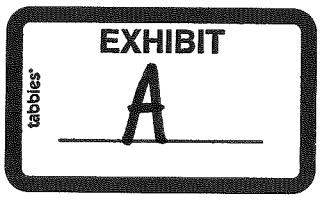
Acct/Serv/	Rate Schdl	Serv Map Loc	Service Description	Single or Three Phase	Installed Transformer Capacity	RCWD Service Connect Date
4788101 -	1	96.66.12.2.01	MONUMENT HILL	1	10.0	9/23/1976
4788103 -	20	95.65.04.4.02	Pickstown Plant	3	750.0	11/9/1976
4788104 -	20	95.65.05.4.02	PICKSTOWN INTAKE	3	500.0	1/20/1977
4788105 -	1	96.65.36.3.00	GROUND STORAGE-PII	1	10.0	1/20/1977
4788106 -	1	96.62.14.1.01	Powers Tank (Wagner Standpipe)	1	10.0	3/29/1977
4788107 -	1	94.64.26.3.01	GREENWOOD	1	10.0	3/29/1977
4788108 -	20	98.68.19.2.00	Platte Plant	3	750.0	4/11/1977
4788109 -	20	98.69.36.4.02	PLATTE INTAKE	3	300.0	4/11/1977
4788110 -	1	98.68.15.4.00	Ground Storage - PIII	1	25.0	8/81977
4788111 -	4	100.71.12.3.00	Olson Booster	3	30.0	8/8/1977
4788112 -	1	99.69.20.1.00	Platte West Tank	1	10.0	8/8/1977
4788114 -	4	100.69.30.1.00	Booster 2 NW of Platte	3	30.0	8/8/1977
4788117 -	1	96.65.24.3.04	Payer Booster	1	5.0	9/19/1979
4788118 -	1	94.62.19.2.01	CARDA TANK	1	10.0	6/20/1980
4788119 -	1	97.62.32.4.01	BATTERMAN TANK	1	3.0	7/23/1981
4788120 -	1	96.63.28.1.25	NORTH WAGNER TANK	1	25.0	7/23/1981
4788121 -	1	100.69.19.3.00	ACADEMY PRV	1	3.0	6/25/1982
4788124 -	1	98.68.18.4.01	FRANSSEN PRV	1	3.0	6/25/1982
4788125 -	1	98.68.06.1.00	DYK PRV	1	3.0	6/25/1982
4788126 -	1	98.67.30.2.01	DEHAAN FEED YARD PRV	1	3.0	6/25/1982
4788130 -	1	99.66.31.2.01	Geddes Booster	1	25.0	5/17/1991
4788132 -	4	96.63.11.2.01	DELMONT NEW BOOSTER	3	30.0	10/16/1995
4788133 -	4	99.69.27.1.03	BOOSTER 1 WEST OF PLATTE	3	30.0	11/30/1996
4788134 -	1	94.63.13.3.01	ZACH'S PRV	1	10.0	8/6/1998
4788135 -	1	95.64.33.3.64	NEW MARTY VAULT	1	3.0	12/8/1998
4788136 -	1	96.66.03.2.00	WHITE SWAN BOOSTER	1	10.0	8/15/2000
4788138 -	1	94.62.14.2.00	Jerke Tank	1	1.5	7/19/2002
4788139 -	1	95.65.03.3.04	Pickstown MM	1	25.0	9/20/2002
4788140 -	20	97.65.17.2.01	Trans Booster 1 (Stluka)	3	300.0	9/19/2002
4788141 -	1	95.62.16.2.01	Jerke Control Vault	1	10.0	11/14/2002
4788142 -	1	95.62.27.1.02	BURMA PNEUMATIC	1	15.0	4/26/2006
4788144 -	1	97.64.36.2.00	UECKER PRV	1	10.0	8/24/2009
4788145 -	20	98.67.15.3.01	Trans Booster 3 (Bovee)	3	112.5	12/2/2009
6801956 -	1	95.62.03.2.00	Wagner Booster - New	1	15.0	9/16/2011
6802399 -	1	94.63.14.2.00	Zolnowsky Booster	1	15.0	8/28/2013
6802750 -	1	95.64.04.2.01	Irwin PRV	1	10.0	6/1/2015
6802754 -	1	96.64.33.3.00	Juran PRV	1	10.0	6/1/2015
6803170 -	1	98.68.23.2.01	VanderPol Booster	1	10.0	7/24/2017
6803212 -	1	96.64.31.4.00	East Casino Tank	1	10.0	10/24/2017
6803215 -	4	95.65.03.3.05	Pickstown Shop	3	45.0	12/13/2017
6803356 -	1	100.68.22.4.00	North Platte Booster	1	10.0	8/16/2018
				Totals	**3,197.00** KVA	



Randall Community Water District

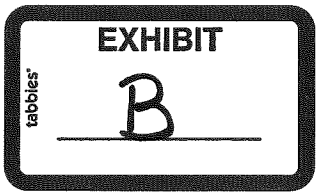
	Service Description				
	Pickstown Intake	**Pickstown Treatment**	**Platte Intake**	**Platte Treatment**	**Total of 4 Services**
911 Address	38292 SD Hwy 46	29726 Prairie Dog Bay	36199 284th Ave.	28240 362nd Ave.	
City, State Zip	Pickstown, SD 57356	Pickstown, SD 57356	Platte, SD 57369	Platte, SD 57369	
CME Map Location	95.65.05.4.02	95.64.04.4.02	98.69.36.4.02	98.68.19.2.00	
Transformer Capacity	500 kVA	750 kVA	500 kVA[(a)]	750 kVA	2500kVA
Highest 1 month Demand (kW) between Jan '18 and Dec '18	256.24	375.76	160.4	185.68	978.08
[(1)] Usage in kWh	1,298,400	1,742,240	855,280	613,920	4,509,840
[(1)] Total Demand (kW)	2,747.12	3,832.72	2,747.12	2,051.80	11,378.76
[(1)] Usage (KWh) Revenue	$86,275.33	$116,018.79	$57,142.77	$42,982.42	$302,419.31
[(1)] Demand (KW) Revenue	$27,022.45	$43,688.61	$20,766.47	$19,365.98	$110,843.51

Notations:

[(1)] Billing months used in this report reflect January 2018 thru December 2018; however, usage reflects kWh from December 2017 thru November 2018, inclusive.

[(a)] Currently a 300 kVA Transformer, will be increasing to 500 kVA in Spring 2019

kWh references kilowatt hour
kW references kilowatt
kVA references kilo-volt-ampere



18-25E-5-4,2 Pumping Station

4788104

APPLICATION FOR ADDITIONAL SERVICE CONNECTION FOR ELECTRIC SERVICE

The undersigned (hereinafter called the "Applicant") hereby applies for one (1) additional service connection in and agrees to purchase electric energy from Charles Mix Electric Association, Inc. (hereinafter called the "Cooperative"), upon the following terms and conditions:

5.00 Pd.

1. The Applicant will pay to the Cooperative the sum of $ 5.00 which, if this application is accepted by the cooperative, will constitute the Applicant's fee for one (1) additional service connection.

2. The Applicant will, when electric energy becomes available, purchase from the Cooperative all electric energy used on the premises described below and will pay therefor monthly at rates to be determined from time to time in accordance with the bylaws of the Cooperative, it being understood that all amounts paid by Applicant in excess of operating costs and expenses of the Cooperative properly chargeable against the furnishing of such electric energy are furnished by him as capital, provided, however, that the Cooperative may limit the amount of electric energy to be furnished for industrial uses. The Applicant will pay a bill of at least $ _____ per month, regardless of the number of kilowatt hours consumed.

3. The Applicant will cause his premises to be wired in accordance with wiring specifications approved by the Cooperative. The Applicant's house is approximately _____ feet from proposed distribution line and _____ feet from the nearest public road.

4. The Applicant will comply with and be bound by the provisions of the charter and bylaws of the Cooperative, and such rules and regulations as may from time to time be adopted by the Cooperative.

5. The Applicant, by paying one (1) additional service connection fee, assumes no personal liability or responsibility for any debts or liabilities of the Cooperative, and it is expressly understood that under the law his private property is exempt from execution for any such debts or liabilities.

dk 1C 4/3/11

The acceptance of this application by the Cooperative shall constitute an agreement between the Applicant and the Cooperative, and the contract for electric service shall continue in force for one year from the date service is made available by the Cooperative to the Applicant, and thereafter until canceled by at least 30 days' written notice given by either party to the other.

Notwithstanding anything herein contained, the Applicant expressly agrees that the Cooperative may, prior to the acceptance of this application, use the $ 5.00 for the development of a rural electrification project. If the Cooperative is unable to obtain a loan from the Rural Electrification Administration to finance the construction of such a project, the Applicant agrees that only so much of the $ 5.00 as has not been expended for development expenses will be returned to him. If the Cooperative suceeeds in establishing a rural electrification project but is unable to furnish service to the Applicant, the sum of $ 5.00 will be returned to the Applicant.

Dated Jan. 3, 19 77

Witness Norman A Anderson

x Rosdall Community Water Dist.
Applicant
By Ken Dvorak chm.
Applicant *

* Husband and wife should both sign if the original membership is joint.

Lake Andes S Dak.
Post Office Address

The above application for one (1) Additional Service Connection accepted this 20 day of January, 19 77.

CHARLES MIX ELECTRIC ASSOCIATION, INC.

By Floyd A Rasmussen
President

Land Description	TITLE STATUS	Ownership (check)
NE¼ of SE¼		Applicant--
Sec. 5 twp. 95 Range 65		Is Owner ____
Owner ____		Has Contract ____
Address ____		Has Undivided Interest ____
		Has Joint Interest ____
		Has Representative Interest ____
		Is Renter ____

EXHIBIT C