

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

IN THE MATTER OF THE PETITION OF LEOLA DATA CENTER LLC TO HAVE MONTANA DAKOTA UTILITIES CO., A SUBSIDIARY OF MDU RESOURCES GROUP INC., ASSIGNED AS ITS ELECTRIC PROVIDER IN THE SERVICE AREA OF FEM ELECTRIC ASSOCIATION INC.	<b>EL 24-027</b>  <b>JOINT BRIEF IN SUPPORT OF FEM ELECTRIC ASSOCIATION, INC., EAST RIVER ELECTRIC POWER COOPERATIVE, INC.'S AND BASIN ELECTRIC POWER COOPERATIVE MOTION TO COMPEL DISCOVERY</b>
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COME NOW FEM Electric Association, Inc. (“FEM”), East River Electric Power Cooperative, Inc. (“East River”), and Basin Electric Power Cooperative (“Basin Electric”) (collectively, the “Intervenors”), by and through their counsel of record, and respectfully request an Order from this Commission compelling Leola Data Center LLC (“Data Center”) and Montana Dakota Utilities Co. (“Montana-Dakota”) to respond to those specific discovery requests identified herein. The responses of Data Center and Montana-Dakota are either incomplete, non-responsive, or non-existent. Following attempts to meet and confer in good faith pursuant to SDCL § 15-6-37(a)(2), Data Center and Montana-Dakota have advised that no further responses will be forthcoming, thus necessitating this Motion and the Commission’s intervention.

**FACTUAL BACKGROUND**

On August 5, 2024, Data Center filed its Petition for Electric Service to have Montana-Dakota Utilities Co. (“Montana-Dakota”) assigned as its Electric Provider in the Service Area of FEM (the “Petition”). In late August 2024, FEM, East River, and Basin sought to intervene in both dockets. This Commission determined that each of FEM, East River, and Basin demonstrated good cause for intervention in EL 24-027. The requests of the Intervenors for party status in the companion docket of EL 24-028, which sought approval of the electrical service agreement (“ESA”) between Data Center and Montana-Dakota, was denied.

On October 4, 2024, FEM, East River, and Basin served joint discovery requests on Data Center. The discovery requests sought information related to the factors set forth in SDCL § 49-34A-56. Intervenors requested information regarding Data Center’s electrical service requirements for its planned facility, including peak, monthly usage, and other projections. They also requested Data Center’s real estate lease, construction plans for the facility, and the electrical service agreement (“ESA”) between Data Center and Montana-Dakota.

Data Center responded to the discovery requests on November 7, 2024, and provided additional supplementation on November 25, 2024. *See* Rule 56(f) Affidavit, ¶¶4-5 at Exhibits A and D. While Data Center did provide the Application for Conditional Use Permit that it filed with McPherson County, it did not provide any other documents, instead relying largely on the six-pages of pre-filed testimony of Bill Connors, Data Center’s Managing Director. *Id.* It otherwise objected to providing much of the information, including the ESA, on the basis of relevancy and confidentiality. None of the discovery information provided was sufficient to allow Intervenors to fully evaluate the criteria of SDCL § 49-34A-56 and withdraw any potential objection to allowing Montana-Dakota to provide service in FEM’s territory.

In an effort to narrow the scope of the issues, and consistent with the obligation to meet and confer in good faith regarding discovery disputes, Counsel for East River engaged in communications with Data Center’s Counsel regarding the scope of discovery and offered execution of a confidentiality agreement or non-disclosure agreement to address the concerns of proprietary information. *Id.* at ¶¶ 6-8. Intervenors also served discovery on Montana-Dakota on December 3, 2024, and additional discovery on Data Center on December 11, 2024. *Id.* at ¶ 6. Data Center responded to the requests on December 26, 2024, and Montana-Dakota responded on

January 6, 2024. Data Center produced a heavily redacted version of its ESA<sup>1</sup> with Montana-Dakota. *Id.* In response to the discovery requests served on it, Montana-Dakota provided only its responses to Staff’s Data Requests, albeit in redacted form, with not only portions of the responses to Staff redacted, but some of Staff’s questions themselves redacted in full.<sup>2</sup> *Id.* at ¶ 8. Generally speaking, both parties continued to object to the Intervenors’ requests based on relevancy and confidentiality.

### LEGAL STANDARD

The appropriate standard for ruling on a motion to compel discovery is whether the information sought is “relevant to the subject matter involved in the pending action . . . .” SDCL § 15-6-26(b)(1). This implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17 (S.D. 1989) (citing 8 C. Wright and A. Miller, *supra*, § 2008). Unless otherwise privileged, all relevant information is generally discoverable. *See* SDCL § 15-6-26(b); *Maynard v. Heeren*, 1997 S.D. 60, ¶12, 563 N.W.2d 830, 835. For purposes of discovery, “[r]elevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy . . . encompass[es] ‘any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’” *Signature Dev., LLC v. Mid-Continent Gas. Co.*, No. Civ. 11-5019-JLV, 2012 WL 4321322, at \*7 (D.S.D. Sept. 18, 2012). If a party fails to respond to a request or make an adequate response

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<sup>1</sup> The version of the ESA produced in discovery redacts the majority of the sections related to construction of required facilities, power utilization, and term. Most of the unredacted language is standard contract boilerplate. *See* Rule 56(f) Affidavit at Exhibit D.

<sup>2</sup> Intervenors are unaware of any rule of discovery that allows Data Center and Montana-Dakota to provide their responses to Staff’s Data requests in redacted form. This would be tantamount to requesting an in camera review of certain information without making an appropriate request for such treatment.

to a request submitted pursuant to SDCL § 15-6-33 or SDCL § 15-6-34, a party may make application for an order compelling a response. *See* SDCL § 15-6-37(a).

#### ANALYSIS

##### **A. Interrogatories and Requests for Production.**

For the purpose of this Motion, Intervenors will limit the scope of their Motion to the discovery requests and responses set forth below. These include discovery requests served on both Data Center and Montana-Dakota. While other responses are also deficient, it is Intervenors' intention to focus on the requests and related information most likely to facilitate a fair and complete analysis of the statutory criteria.

The requests and responses applicable to Data Center are:

Interrogatory No. 21: Has Montana-Dakota required Leola Data Center, LLC to post any performance bond or other form of security for the electrical service to be provided, the facilities to be constructed, equipment to be installed or other expenditures by Montana-Dakota related to service to the Data Center?

**Answer:** Objection. This request seeks irrelevant information and is not reasonably calculated to lead to the discovery of admissible information. It further seeks information that is the subject of Docket EL24-028 in which East River, Basin and FEM were denied party status as they are not subject to the ESA nor are they impacted by it if ultimately approved by the Commission.

Request for Production 4: Produce a true and accurate copy of all contracts and all agreements of any kind presently in place or being negotiated between you or any affiliated entity or person and others that in any way relate to the above-referenced Electric Service Agreement.

**Answer:** See Objection to request for production of documents 2.

1-1) Please provide a copy of all data requests LDC received from any party and LDC's responses to the data requests. This should be considered a continuing request.

**Response:** Objection. Seeks to obtain information that otherwise would not be relevant and not obtainable by the non-party cooperatives in Docket EL24-028. Further, the information seeks to obtain confidential and proprietary trade secrets. Without waiving the foregoing objections, see the

attached which are the first and second responses of LDC to Commission Staff data requests with objectionable matters redacted pending an order to compel the release of the information by the Commission.

- 1-4) Produce a copy of the electric service agreement entered into between LDC and (“MDU”).

**Response:** Objection. As objected previously, this request seeks irrelevant information and is not reasonably calculated to lead to the discovery of admissible information. It further seeks information that is the subject of Docket EL24-028 in which East River, Basin and FEM were denied party status as they are not subject to the ESA nor are they impacted by it if ultimately approved by the Commission. Without waiving the foregoing objections, please see the attached electric service agreement with the proprietary, confidential and trade secret information redacted.

- 1-5) Produce a copy of the Contribution in Aid of Agreement entered into between LDC and MDU.

**Response:** Objection. See response to 1-4. The estimated interconnection upgrade costs, to be fully paid by LDC, are included in the Electric Service Agreement.

- 1-6) Produce a copy of the lease you refer to in the McPherson County Application for Conditional Use (“CUP Application”) from Derek and Laura DeRaad.

**Response:** Objection. Seeks to obtain confidential and proprietary information. Without waiving the foregoing objection, see the attached redacted Lease Agreement, First Amendment to Lease Agreement, and Assignment and Assumption.

- 1-13) Who will serve LDC’s electric needs upon termination of the electric service agreement with MDU?

**Response:** Objection. Calls for a hypothetical response. Without waiving the foregoing objection, LDC would suppose if MDU is unable to service its electrical needs at some point in the future LDC would need to reapply for service from a third party provider if it met the threshold of SDCL 49-34A-56 as then constituted or seek service from FEM or its successor holding statutory authority to service the location of LDC.

*See Rule 56(f) Affidavit, Exhibit D.*

The requests and responses applicable to Montana-Dakota are:

- 1-1) Please provide a copy of all data requests MDU received from any party and MDU's responses to the data requests. This should be considered a continuing request.

**Response:** Objection, the data request calls for responses from Montana-Dakota which constitute trade or business secrets and are thus confidential in nature. Staff sent three sets of data requests to Montana-Dakota. Those were answered timely and Montana-Dakota claimed confidential treatment for the following answers.

Those DR's were 1-3, 1-4, 1-5, 3-1, 3-2, 3-6, 3-7, 3-8, 3-10, 3-11, 3-16, 3-17, 3-20, 3-21, 3-22, 3-24, 3-27 and 3-28.

Without waiving the objection, see responses to Staff DR's attached hereto.

*See Rule 56(f) Affidavit, Exhibit C.*

In its responses, Montana-Dakota asserted that certain of the data requests from Staff sought confidential information. While Montana-Dakota identified those requests by number, it did not provide either the substance of the request made by Staff or the response, in any form. It simply did not respond. As such, it is impossible for Intervenors to know what was asked by Staff and how Montana-Dakota responded.

Intervenors anticipate that unredacted versions of the ESA and lease will answer most of the outstanding discovery requests and at least confirm details related to electric usage provided in writing, but without any documentary support. The requested ESA is clearly relevant. It includes details about the construction of required facilities, power utilization, term, and the estimated interconnection upgrade costs to be fully paid by LDC; however, all those sections have been redacted. Data Center and Montana-Dakota have each refused to produce an unredacted version on the basis that Intervenors were denied party status in EL24-028, the companion docket seeking approval of that ESA. Intervenors have also sought an unredacted version of Data Center's land lease. The details of construction, lease term, land use, and other land reclamation requirements are all relevant to the criteria in SDCL § 49-34A-56. Additionally, information

requested by Intervenors related to Data Center's contracts (*see* Exhibit A at Request 21) and any bond posted by Data Center (*see* Exhibit A at Interrogatory No. 4) are relevant because of Data Center's future financial viability, assuming it receives necessary permitting from McPherson County. Again, it cannot be understated that this is a facility for which construction has not yet commenced, which has a short-term lease, and which seeks to use two-acres of a twenty-acre lease for construction. If granted, the outcome of Data Center's Application to this Commission results in designation of an alternate service provider as the electrical service provider in existing territory of FEM.

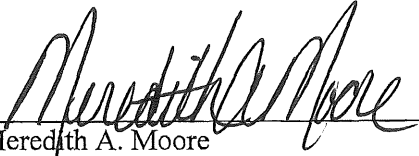
Intervenors are parties to this docket and therefore have full rights to participate in the discovery process. The outcome of this proceeding will have a direct financial impact on them. Intervenors have requested information relevant to the criteria for consideration of Data Center's Petition as set forth in SDCL § 49-34A-56. Their discovery requests seek relevant information, within the scope of discovery, and reasonably tailored to lead to the discovery of admissible evidence. The responses provided are deficient at best, with some information having been withheld entirely on the basis that it is confidential or trade secret. There is no basis in statute or case law to refuse to provide confidential information that can be adequately protected through use of a confidentiality agreement or an attorney's-eyes only designation. In fact, by statute, specifically SDCL § 15-6-26(c), it is incumbent upon the party seeking to resist or limit discovery to seek a protective order. Intervenors should not be forced to compel the information.

#### **CONCLUSION**

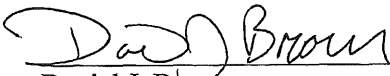
Unfortunately, Intervenors have no choice but to ask this Commission to intervene and resolve the outstanding discovery dispute. While the law allows for parties to designate information as

confidential and protect it appropriately, a party cannot refuse to produce information pertaining not only to its service needs but to the details of the very deal it struck with the alternate service provider it has requested. Intervenors respectfully request that this Commission issue an Order compelling responses to the discovery requests contained on pages 4-5 of this Brief.

Dated this 9th day of January, 2025.



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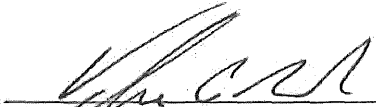


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