

**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.

EL 24-027

**JOINT OPPOSITION OF FEM
ELECTRIC ASSOCIATION, INC., EAST
RIVER ELECTRIC POWER
COOPERATIVE, INC., AND
BASIN ELECTRIC POWER
COOPERATIVE TO LEOLA DATA
CENTER’S MOTION FOR SUMMARY
JUDGMENT**

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 jointly request that this Commission deny Leola Data Center’s (“Data Center”) Motion for Summary Judgment. To date, Data Center has refused to respond to many of the discovery requests served upon it, thus making it difficult, if not impossible, for the Intervenors to evaluate whether Data Center’s Petition meets substantive factual and legal requirements. Moreover, there are parallel proceedings relating to the permitting of Data Center’s project pending before McPherson County, which proceedings will materially impact the viability of the proposed Data Center. Data Center’s Motion should be denied entirely until a hearing on the merits can be scheduled or, at a minimum, held in abeyance pending resolution of the outstanding Motion to Compel and parallel county permitting proceedings.

FACTUAL AND PROCEDURAL 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”). On August 8, 2024, in a companion docket to EL 24-027, Montana-Dakota filed with this Commission a request for approval of an electric services agreement. *See generally* EL 24-028. In that docket, MDU seeks approval of an electrical service agreement between it and Data Center to provide electric service in FEM’s assigned territory.

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, but denied the Intervenors’ requests in EL 24-028.

On October 4, 2024, FEM, East River, and Basin served joint discovery requests on Data Center (the “Joint Discovery Requests”). Those Requests specifically sought information related to the factors set forth in SDCL § 49-34A-56. Among other requests, the Joint Discovery Requests sought information regarding Data Center’s electrical service requirements for its planned Data Center and related facilities, including peak, monthly usage, and other projections. The discovery requests also sought Data Center’s lease, construction of the facility, and the electrical service agreement (“ESA”) between Data Center and Montana-Dakota. *See* Rule 56(f) Affidavit at Exhibit A, a true and correct copy of Leola Data Center LLC’s Answers to East River Electric Power Cooperative, Inc’s, Basin Electric Power Cooperative’s and FEM Electric Association, Inc.’s Joint Discovery Requests.

On November 4, 2024, Data Center submitted pre-filed testimony from Bill Connors, its Managing Director. The filing consisted of testimony only; no exhibits were referenced in or filed with the testimony.

On November 7, 2024, Data Center served its objections and responses to the Joint Discovery Requests. In its responses, Data Center either relied on the pre-filed testimony of Bill Connors or objected wholesale to the requests on the basis of relevancy or confidentiality; no

documents were produced. On that same date, Data Center filed a Motion for Summary Judgment, arguing a hearing on its Petition was unnecessary because it satisfied all statutory criteria set out in SDCL § 49-34A-56 based on the testimony of Bill Connors.

Because of the discovery issues and impending summary judgment deadlines, on December 2, 2024, all parties and Staff filed a Joint Agreement for Continuance of the Motion for Summary Judgment. As part of the Joint Agreement, the parties agreed they would respond to additional discovery requests within 10 days or as otherwise agreed, taking into consideration the expected scheduling constraints and challenges that accompany the holidays and end-of-year matters.

Before and after approval of the Joint Agreement, Counsel for East River, consistent with the obligation to meet and confer in good faith to resolve discovery disputes, continued to engage in communications with Data Center's counsel regarding the discovery deficiencies. Intervenors also served discovery on Montana-Dakota on December 3, 2024, and additional discovery on Data Center on December 11, 2024, in efforts to narrow the scope of the outstanding issues. Data Center responded on December 26, 2024, and Montana-Dakota responded on January 6, 2025. Both Data Center and Montana-Dakota continued to object to the Intervenors' requests on the basis of relevancy and confidentiality. Data Center produced a heavily redacted version of its ESA¹ with Montana-Dakota. *See* Rule 56(f) Affidavit at Exhibit D, a true and correct copy of Data Center's Responses to Intervenors' Second Data Requests. 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

¹ 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.

redacted in full.² Intervenors have thus filed a separate Motion to Compel.

ARGUMENT AND ANALYSIS

In its Petition, Data Center urges this Commission to name Montana-Dakota as its alternate service provider in FEM's territory. Data Center claims it is entitled to this relief as a *matter of law, without need for hearing*. To do otherwise would, in Data Center's opinion, render SDCL § 49-34A-56 meaningless. However, simply saying it irrefutably meets all statutory criteria does not make it so, particularly based on the record presently before this Commission, as well as parallel proceedings occurring in McPherson County relating to Data Center's permitting. For these reasons, summary judgment is unsupported and premature.

I. Summary Judgment Standard.

A party is entitled to entry of summary judgment in its favor when that party can establish an absence of genuine issues of material fact. *See generally* SDCL § 15-6-56. The moving party bears the burden. "All reasonable inferences from the evidence [must be viewed] in a light most favorable to the nonmoving party." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 29, 916 N.W.2d 151, 159 (citing *Estate of Elliott ex rel. Elliott v. A&B Welding Supply Co., Inc.*, 1999 S.D. 57, ¶ 15, 594 N.W.2d 707, 709-710). Any doubts must also be resolved against the moving party. *See Hanson*, 2018 S.D. 60 at ¶ 29, 916 N.W.2d at 159 (citing *Gades v. Meyer Modernizing Co., Inc.*, 2015 S.D. 42, ¶ 7, 865 N.W.2d 155, 158). "Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 9, 817 N.W.2d 395, 399 (quoting *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762).

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

A party opposing summary judgment must establish the existence of a disputed fact. “A disputed fact is not ‘material’ unless it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party.” *W. Nat. Mut. Ins. Co. v. Gateway Bldg. Sys., Inc.*, 2016 S.D. 85, ¶ 11, 887 N.W.2d 887, 890 (quoting *Robinson v. Ewalt*, 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126 (quoting *Gul v. Ctr. for Family Med.*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633)).

Under the Rules of Civil Procedure “a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion.” *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 50, 980 N.W.2d 251, 264–65 (quoting *Stern Oil Co. v. Border States Paving, Inc.*, 2014 S.D. 28, ¶ 26, 848 N.W.2d 273, 281). Rule 56(f) specifically states that if a party “cannot for reasons stated present by affidavit facts essential to justify his opposition [to summary judgment], the court may refuse the application for judgment or may order a continuance” to conduct further discovery. The affidavit required by Rule 56(f) must include identification of “the probable facts not available and what steps have been taken to obtain” those facts, “how additional time will enable [the nonmovant] to rebut the movant’s allegations of no genuine issue of material fact[.]” and “why facts precluding summary judgment cannot be presented” at the time of the affidavit. *Stern Oil Co.*, 2014 S.D. 28 at ¶ 26, 848 N.W.2d at 281–82 (alterations in original) (quoting *Anderson v. Keller*, 2007 S.D. 89, ¶ 32, 739 N.W.2d 35, 43 (Zinter, J., concurring)).

II. Summary Judgment is Inappropriate and Premature.

This Commission regulates which utility can or will provide service to a customer. The South Dakota Territorial Act vests within this Commission the authority to assign service territories, with the stated goal being the avoidance of duplicative services and wasteful spending. *See In re Montana-Dakota Utilities Co.*, 2007 S.D. 104, ¶ 7 740 N.W.2d 873, 876 (citing *In the*

Matter of Establishing Certain Territorial Elec. Boundaries, 281 N.W.2d 65, 70 (S.D. 1979)). The Legislature codified exceptions which allow a customer to obtain service from a company other than the assigned provider in that customer's territory. See SDCL § 49-34A-56. The relevant statute sets forth six factors to be considered when determining whether an alternate service provider should be assigned to the territory and customer. Those criteria are:

1. The electric service requirements of the load to be served;
2. Availability of adequate power supply;
3. The development or improvement of the electric system of the utility seeking to provide service, including economic factors;
4. The proximity of adequate facilities from which electric service may be delivered;
5. Customer preference; and
6. Any and all other pertinent factors affecting the ability of the utility to furnish adequate service to fulfill customer needs.

Id. Intervenor's submit that Data Center has presented insufficient evidence of these factors for the Commission's consideration. Moreover, while Intervenor's believe they may have a legitimate basis to dispute certain of the facts as alleged by Data Center, they have been deprived of the discovery that will allow them to do so.

A. The record lacks sufficient evidence of the statutory criteria; hearing is required.

Generally speaking, Data Center has offered some evidence that Intervenor's do not dispute. Data Center has expressed its preference that Montana-Dakota serve its proposed facility, which Intervenor's do not dispute. *If* Data Center obtains the necessary permitting to build its facility, Intervenor's do not dispute that Data Center will be a new customer. However, herein lies the problem plaguing Data Center's claimed facts: they are presumptive, not definite.

First, if Data Center does not obtain necessary local permitting from McPherson County, the project may not be built. Data Center's application for a conditional use permit for the data center came before the McPherson County Zoning Board of Adjustment on December 10, 2024.

The Board of Adjustment approved a moratorium on data center conditional use permits until an ordinance could be adopted. The Board later approved a one mile set back requirement and discussed a data center template ordinance. According to Data Center's application, there are at least two dwellings 800 feet and 1,355 feet away from the proposed data center. It was reported that the Board of Adjustment would discuss the data center ordinance again on January 14, 2025. *See* Rule 56(f) Affidavit, Exhibit E, a true and correct copy of the Minutes of Proceedings before the McPherson County Zoning Board and Board of Adjustment for December 10, 2024 (Unapproved). Depending upon the court of action the Board takes, the Data Center may not be built, in which case, Data Center's request for relief would be rendered moot.

Moreover, the remainder of the factors have either not been addressed at all or addressed in only conclusory fashion. For example, other than pre-filed testimony, which has not yet been subject to cross-examination, little evidence has been offered regarding the electrical service requirements of the Data Center, nor the specific facilities to be constructed. The statements made by Data Center about its needs are superficial at best. Data Center has also indicated it has entered into a five-year lease for 20-acres of bare ground and requested that Montan-Dakota serve all of it; however, the facility itself will occupy only 2-acres. Attempts to obtain information regarding the size of the facility and the use of the remainder of the property following the conclusion of the lease have been met with little substantive information, although Data Center has admitted that it has no current plans for the remaining 18-acres. *See* Rule 56(f) Affidavit at Exhibit D, response to Data Request 1-8.

The statutory criteria contemplate discussion of the customer's electric needs and load and the plans for serving those needs. Simply indicating that it meets the large-load exception is

insufficient to allow an alternate provider the right to provide service in the territory of an existing provider. Data Center has not met its legal burden at this stage of the proceedings.

B. Intervenorors have been denied access to standard and expected discovery.

FEM, East River, and Basin were granted party status on the basis each has a substantial right and financial interest impacted by the relief sought by Data Center. They have a right to conduct discovery and evaluate whether the statutory criteria are met for assignment of an alternate provider. However, their attempts to do so have been met with objections and wholesale refusals to provide information that has a direct bearing on certain of the factors. Intervenorors sought information related to each of the statutory factors, serving two sets of discovery. In those requests, Intervenorors requested the following:

1. Copies of Data Center's responses to Staff's Data Requests;
2. Data Center's contracted minimum demand that Montana-Dakota will serve, with supporting documentation;
3. Data Center's demand and energy requirements;
4. The Electrical Service Agreement between Data Center and Montana-Dakota;
5. The Contribution in Aid of Agreement entered into between Data Center and Montana-Dakota, i.e., the estimated interconnection upgrade costs;
6. The Lease referred to in Data Center's McPherson County Application for Conditional Use ("CUP Application");
7. Details related to the project removal/reclamation requirements referred to in the CUP Application.

See Rule 56(f) Affidavit, Exhibit D, a true and correct copy of East River's, Basin's and FEM's First Set of Data Requests to Leola Data Center, LLC. In response to these requests, Data Center referred Intervenorors to the Conditional Use Permit Application it filed with McPherson County, referenced "expected" demand, produced heavily redacted documents, and indicated it would not produce certain data absent a motion to compel. It otherwise indicated it could not provide the documents because of confidentiality considerations. Finally, it indicated that because Intervenorors were denied party status in EL24-028, they have no right to see the ESA or the estimated

interconnection upgrade costs because the Commission determined Intervenors would not be impacted by it.³ *See* Rule 56(f) Affidavit at Exhibit D, a true and correct copy of Data Center's responses to Intervenors' Second Set of Data Requests.

There is nothing that Intervenors sought in discovery that was inappropriate, beyond the scope of permissible discovery, or irrelevant. *See generally* Intervenors' Brief in Support of Motion to Compel. Valid discovery objections cannot hinge on confidentiality as the Rules of Civil Procedure specifically allow for the use of confidentiality or non-disclosure agreements to allow parties to protect such information from public disclosure. Data Center bears the burden of proving legal entitlement to the relief sought in its Petition. It cannot refuse to provide the discovery necessary for Intervenors to determine whether Data Center meets its legal burden.

C. Granting Data Center's requested relief without an adequate record will have a precedential effect on future dockets.

Granting Data Center's Petition on this record, and without any limitation or modification, would make Montana-Dakota the service provider for the entirety of the 20-acre parcel Data Center intends to lease, even though it will not use the entirety of that parcel. Both SDCL § 49-34A-56 and the case law analyzing it indicate these criteria should be considered based on evidence presented by the petitioning customer *at hearing*. Any decision made without a full and meaningful opportunity for all to be heard will have a precedential effect on how the statutes at

³ In EL 24-028, Data Center and Montana-Dakota seek Commission approval of their ESA. In their argument in support of intervention in EL 24-028, FEM, East River and Basin asserted that the prerequisite to approval of the ESA is a determination that Data Center's Petition in this matter is legally sufficient. Montana-Dakota and Data Center objected to the Intervenors' request for party rights in EL24-028. This Commission agreed. Data Center and Montana-Dakota now seek to use the Commission's denial as a basis to deny access to discovery in this docket, a docket in which the Intervenors were deemed to have a direct and financial interest in the outcome of the proceedings. Given the circular nature of Data Center and Montana-Dakota's arguments, and refusal to produce relevant discovery, Intervenors reserve their respective rights to renew their requests to intervene in EL24-028.

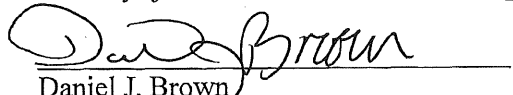
play should be interpreted and applied. This is particularly important given existing case law establishing that an alternate provider granted a right to serve a customer outside of its assigned territory will essentially be vested with exclusive rights to the territory in which that petitioning customer is situated. The relevant statute was intended to create efficiencies when addressing large loads, but not to allow expansion of an alternate provider's territory without meaningful opportunity for all impacted parties to be heard.

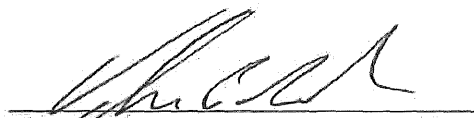
CONCLUSION

For the reasons stated herein, in addition to those addressed in the companion Motion to Compel, Intervenor respectfully request that Data Center's Motion for Summary Judgment be denied, or at a minimum, held in abeyance pending completion of discovery.

Dated this 9th day of January, 2025.


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