

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

<b>IN THE MATTER OF THE PETITION BY</b>	)	<b>STAFF’S BRIEF IN</b>
<b>LEOLA DATA CENTER LLC TO HAVE</b>	)	<b>RESPONSE TO JOINT</b>
<b>MONTANA-DAKOTA UTILITIES CO., A</b>	)	<b>MOTION TO COMPEL</b>
<b>SUBSIDIARY OF MDU RESOURCES GROUP</b>	)	<b>DISCOVERY</b>
<b>INC., ASSIGNED AS ITS ELECTRIC</b>	)	
<b>PROVIDER IN THE SERVICE AREA OF FEM</b>	)	<b>EL24-027</b>
<b>ELECTRIC ASSOCIATION INC.</b>	)	

STATEMENT OF THE CASE

On August 5, 2024, the South Dakota Public Utilities Commission (Commission) received a petition from Leola Data Center, LLC (LDC) to have Montana-Dakota Utilities Co. (MDU) assigned as its electric provider in the service area of FEM Electric Association Inc. (FEM) (Petition). In the Petition, LDC requested the Commission to allow MDU to serve LDC’s facility near Leola, South Dakota pursuant to SDCL § 49-34A-56 (commonly referred to as the “large-load statute”). The proposed facility to be served is a data center located adjacent to MDU’s “Leola substation at 11641 358<sup>th</sup> Avenue, Leola, South Dakota” within the service area of FEM. LDC Petition, pg. 1. MDU, FEM, East River Electric Power Cooperative, Inc. (East River), and Basin Electric Power Company (Basin), each petitioned to intervene and were granted intervention on August 29, 2024.

The parties, including LDC, MDU, FEM, East River, Basin and Commission staff (Staff), have been participating in discovery from the opening of this Docket through the date of this filing. On November 7, 2024, LDC filed a Motion for Summary Judgement (MSJ), to which MDU filed a Joinder on November 13, 2024. On November 13, 2024, the Commission issued a Notice of Hearing on Motion for Summary Judgement, setting a hearing on the Motion for

December 17, 2024. On November 25, 2024, Intervenors filed a Joint Motion for Continuance of the MSJ, in part citing the need for more time to resolve a discovery issue. On December 2, 2024, the Parties filed a Joint Motion for Continuance, which was granted by the Commission.

On January 9, 2025, FEM, East River and Basin (Intervenors) filed a Joint Motion to Compel Discovery along with a supporting Joint Brief (Intervenors Brief) regarding a number of data requests sent to LDC and MDU.

### LEGAL STANDARD

The matter before the Commission in this Docket is whether the Commission should grant LDC's request to be assigned MDU as an electric service provider in the service territory of FEM, pursuant to SDCL 49-34A-56. This statute provides:

new customers at new locations which develop after March 21, 1975, located outside municipalities as the boundaries thereof existed on March 21, 1975, and who require electric service with a contracted minimum demand of two thousand kilowatts or more shall not be obligated to take electric service from the electric utility having the assigned service area where the customer is located if, after notice and hearing, the Public Utilities Commission so determines after consideration of the following factors:

- (1) The electric service requirements of the load to be served;
- (2) The availability of an adequate power supply;
- (3) The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto;
- (4) The proximity of adequate facilities from which electric service of the type required may be delivered;
- (5) The preference of the customer;
- (6) Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

As Staff explained in its Brief in Response to the MSJ, the preliminary issues the Commission must determine in this Docket are:

1. Whether LDC is a new customer at a new location;
2. Whether the proposed facility is located outside municipalities as the boundaries thereof existed on March 21, 1975; and
3. Whether the proposed LDC will require electric service with a contracted minimum demand of two thousand kilowatts or more.

If the Commission determines each of these elements have been met, the statute then requires the Commission to consider six specific factors, but the Commission is free to weigh each factor in the manner the Commission sees fit. See Staff Brief Pg. 4-5.

ARSD 20:10:01:41 and 20:10:01:43 govern requests for confidential treatment of information by a submitting party and establish a process for requests to access that information. When a party identifies information as confidential, the Commission treats that information as confidential. If a request for access is made, the Commission shall issue a protective order it determines to be confidential, including procedures for handling information and controlling access until a determination can be made as to whether the information is not confidential. In practice, this means a submitter does not need to seek an order of protection in order for information to be held in a confidential manner. The procedure also establishes an in-camera type review for confidentiality as well as the opportunity for the owner of the information to appeal any Commission determination prior to information being released.

Under SDCL 15-6-26(b), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

However, when justice requires to protect a party, SDCL 15-6-26 (c) provides that the court may, for good cause shown, issue a protective order that the information not be disclosed, or that the information be disclosed only in a designated way, including for “(7) That a trade secret or other confidential research, development, or commercial information.”

SDCL 15-6-26(c) authorizes a court to grant a protective order upon a showing of good cause. Good cause is established on a showing that disclosure will work a clearly defined and serious injury. *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir.1973). The injury must be shown with specificity. *Id.* Broad allegations of harm will not suffice. *Id.*

*Bertelsen v. Allstate Inc. Co.*, 796 N.W. 2d 685, 704 (SD 2011).

Upon objection based on a privilege such as proprietary, confidential or trade secret information:

the burden rests on the party opposing discovery to show that the information is a trade secret or other confidential commercial information and that disclosure would be harmful to that party's interest in the information. *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1032 (8th Cir.1991). Once the party opposing discovery makes that showing, "the burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial." *Id.* (citation omitted). If the party seeking discovery shows both relevance and need, a court must weigh the injury that disclosure might cause against the need for the information. *Id.* (citation omitted). A court may issue a protective order to safeguard the rights of the parties if both satisfy their respective burdens of proof. *Id.*

*Bertelsen v. Allstate Inc. Co.*, 796 N.W. 2d 685, 705 (SD 2011).

Applying these standards, for the Commission to grant Intervenors' Motion to Compel, Intervenors must show that the information sought is relevant to the specific issues in question under SDCL 49-34A-56 in this Docket. Further, if MDU and LDC can show that the information sought is proprietary, confidential, or a trade secret, and disclosure to Intervenors would be harmful to that party's interest, Intervenors must show the information is necessary to prepare the case for the hearing. If these showings are both made, the Commission must then weigh the potential injury from disclosure against the need for injury, applying protective orders as appropriate to protect the rights of both parties.

### ANALYSIS

#### **1. Interrogatory 21**

Interrogatory 21 to LDC asks whether LDC has been required to post a performance bond or other form of security for MDU's provision of service to LDC. LDC claims this request seeks irrelevant information not reasonably calculated to lead to admissible evidence. See Intervenors' Brief at 4.

Intervenor claims this information is relevant because any bond posted by LDC is "relevant because of Data Center's future viability." *Id.* at 7. Staff disagrees with this assessment since not one factor included in SDCL 49-34A-56 mentions the financial viability of the customer. Because this information has no bearing on any factor or issue to be considered by the Commission in this Docket, it is clearly irrelevant and the Motion to Compel regarding Interrogatory 21 should be denied.

## **2. Request for Production 4**

The Request for Production 4 to LDC requests production of all contracts and all agreements of any kind presently in place/being negotiated that in any way relates to the ESA. LDC objected to this request with a reference to “see Objection for Request for Production of Documents 2.” *Id.* at 4. Intervenors did not include the specific objection claimed in Request 2, so the Motion to Compel does not clearly state what basis LDC relies on for this objection impeding analysis of the Intervenors’ Motion to Compel. Since Intervenors filed the Motion and have failed to provide sufficient and necessary information for analysis, the Motion, as it relates for the Request for Production 4 should be denied.

Staff was able to review the “Objection for Request of Production of Documents 2” on page 7 of Exhibit B of the Intervenors’ Joint Opposition to Leola Data Center’s Motion for Summary Judgement, filed January 9, 2025. The basis for LDC’s objection is the request seeks irrelevant information not reasonably calculated to lead to the discovery of admissible information and seeks information subject to Docket EL24-028. See Exhibit B at page 7.

LDC has not responded to the Intervenors’ Motion to Compel to make a showing of a specific injury associated with production of these contracts and agreements. However, based on the nature of the ESA and the information contained therein, which Staff has reviewed in full, it is clear based on Staff’s experience regulating electric utilities that a portion of the information contained in the related contracts and agreements would likely be considered proprietary. Given the Intervenors include an electric co-operative that has been and will be in competition with MDU for large new customers in the region, it is clear that releasing the ESA without specific

designated protections could result in economic injury to MDU. Intervenors claim information “related to Data Center’s contracts... are relevant because of Data Center’s future financial viability.” *Id.* at 6.

Staff disagrees with this assessment since not one factor included in SDCL 49-34A-56 mentions the financial viability of the customer. Because this information has no bearing on any factor or issue to be considered by the Commission in this Docket, it is clearly irrelevant and the Motion to Compel regarding Request for Production 4 should be denied.

### **3. Data Request 1-1**

In Data Request 1-1, Intervenors requested LDC provide all data requests and responses from other parties. LDC objected on the basis the request seeks information that otherwise would not be relevant and not obtainable in Docket EL24-028 and that responses contained proprietary and confidential trade secret information. *Id.* at 4. On January 6, 2025, LDC filed responses to Staff’s First and Second Sets of Data Requests to LDC in the Docket. Staff issued two sets of data responses to LDC. All of those questions and responses, except for question 1-5.(a), Exhibit 1-1b (confidential) and Exhibit 1-5 (Confidential) are currently available to the public on the Docket webpage.

Staff would note that it is not clear why the question to Staff’s DR 1-5 is redacted. Staff does not view the question as containing confidential information, and therefore would suggest LDC review this redaction and provide a reason for the redaction or refile the document without redacted content. In regard to response Exhibit 1-1b (Confidential), Staff has reviewed the public

and confidential versions and Staff suggests LDC review the document and identify the reason for the confidential version, or withdraw the Exhibit 1-1b (confidential) from the Docket.

At this point, LDC has not responded to the Intervenors' Motion to Compel showing how disclosure of Exhibit 1-5 would injure MDU. However, Staff has reviewed this response in full and it is clear based on Staff's experience regulating electric utilities that the redacted portion of LDC's response to Data Request 1-5, including Exhibit 1-5 is clearly proprietary in nature. Given the fact that Intervenors include an electric utility that is a competitor of MDU for large new customers in the region, it is clear that releasing Exhibit 1-5 would result in economic harm to MDU.

Intervenors provided no argument as to why these responses are relevant to the subject matter in this Docket. Because the risk of injury to MDU is so great if this information were to be provided to Intervenors, and because Intervenors offered no relevancy argument, the Motion to Compel regarding production of LDC's responses to Intervenors' Data Request 1-1 should be denied.

#### **4. Data Request 1-4**

Data Request 1-4- requests LDC provide a copy of the ESA between LDC and MDU. LDC objected on the basis that the request seeks irrelevant information, is not reasonably calculated to lead to the discovery of admissible information, seeks information subject of EL24-028, and portions of the ESA contain proprietary, confidential and trade secret information. *Id.* at 5. At this point, LDC has not responded to the Intervenors' Motion to Compel to make a showing of a



specific injury associated with production of the ESA. However, based on the nature of the ESA and the information contained therein, which Staff has reviewed in full, it is clear based on Staff's experience regulating electric utilities that a portion of the information contained in the ESA is clearly proprietary. Coupled with the fact that Intervenors include an electric cooperative that has been and will be in competition with MDU for large new customers in the region, it is clear that releasing the ESA without specific designated protections could result in economic injury to MDU.

Intervenors claim the ESA is relevant and demand an unredacted copy of the ESA on the basis that it, along with the lease, the ESA "will answer most of the outstanding discovery request and at least confirm details related to electric usage provided in writing." *Id.* at 6. While this may be true, the risk of economic injury from releasing this type of data to an electric utility in a competitive position with MDU is significant. This is particularly true when confirmation of the minimum 2MW load can likely be confirmed through alternative documentation already provided in this Docket via Darcy Neigum's prefiled testimony that LDC will be served on MDU's Rate 45 tariff is only open to customers with an expected demand of at least 10,000 Kw. See Neigum Prefile at page 4. The request to obtain the entire unredacted ESA seems overly broad and does not seem reasonably calculated to lead to admissible information, especially if the intent is to merely confirm details related to electric usage provided in writing.

If providing the ESA in response to Data Request 1-4 is the only manner in which confirmation of the 2MW minimum load can be verified, in order to protect against the risk of economic harm to MDU, a protective order specifying the ESA is to be disclosed on an

attorney's eyes only basis and that all information identified as proprietary, confidential and trade secret in the ESA is redacted, except for that information specifically referencing the minimum contracted load should be included as a condition to any Order to compel.

### **5. Data Request 1-5**

Data Request 1-5 requested LDC provide a copy of the Contribution in Aid of Agreement with MDU. LDC objected on the basis that the request seeks irrelevant information is not reasonably calculated to lead to the discovery of admissible information, seeks information subject of EL24-028, and portions of the ESA contain proprietary, confidential and trade secret information. *Id.* at 5. LDC has not provided a response to the Intervenors' Motion to Compel showing that the information is trade secret or identifying a specific injury due to disclosure of this information, so a full analysis is not possible at this point. However, given Staff's experience in relation to regulation electric utilities, it is clear this information is proprietary and that releasing specific terms of contracts for service such as a Contribution in Aid of Agreement, to an electric service provider in the area in direct competition with MDU for large load could result in economic injury to MDU.

It is unclear to Staff how this document is relevant to the subject matter at issue for Intervenors in this Docket. Intervenors did not provide specific information explaining how this document is relevant. Without such a showing, the Intervenors' Motion to Compel LDC to respond to Data Request 1-5 to LDC should be denied.

### **6. Data Request 1-6**

Intervenors requested in Data Request 1-6 that LDC produce a copy of the lease with the DeRaads. LDC objected on the basis that the request seeks irrelevant information, is not reasonably calculated to lead to the discovery of admissible information, seeks information subject of EL24-028, and portions of the lease contain proprietary, confidential and trade secret information. *Id.* at 5. LDC has not provided a response to the Intervenors' Motion to Compel showing that the information is trade secret or identifying a specific injury due to disclosure of this information, so a full analysis is not possible at this point. However, as mentioned previously, based on Staff's experience in regulation of electric utilities, and based on the Intervenors' position as an electric provider in the region likely to compete for future large load customers, it seems clear that disclosure of the full, unredacted lease may provide Intervenors with specific economic data that could be used to compete with MDU for future customers.

Intervenors claim, "[t]he details of construction, lease term, land use, and other land reclamation requirements are all relevant to the criteria in SDCL 49-34A-56." *Id.* at 6. Staff fails to see how any of the redacted data contained in this lease is relevant to the Commission's determination as to whether LDC qualifies for a large load exception, nor relevant to any of the six factors the Commission is to consider in issuing a decision in this Docket. Without better justification, Intervenors' Motion to Compel LDC to Respond to Data Request 1-6 should be denied.

## **7. Data Request 1-13**

In Data Request 1-13 to LDC, Intervenors ask who will serve LDC's electric needs upon termination of ESA. LDC objected on the basis the question calls for a hypothetical response.

*Id.* at 5. While Staff agrees this is a potential question in this Docket and therefore relevant, the response to this question is speculative and is not likely to lead to admissible evidence.

Therefore, Intervenors' Motion to Compel LDC to respond to Data Request 1-13 should be denied.

### **8. Data Request 1-1 to MDU**

In Data Request 1-1 to MDU, Intervenors Request MDU provide a copy of all data requests received from any party. MDU provided Intervenors with a number of responses, but objected to production of a number of responses because the responses contained trade secret or business secrets and are confidential. *Id.* at 6. The Responses withheld based on the objection are responses 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.

On January 3, 2025, MDU filed public responses to Data Requests 1-4, 3-8, 3-24 and 3-28. For this reason, Intervenors' request to compel these responses appears moot.

MDU also filed a public redacted response to Data Request 1-5 confirming "LDC will fund all costs of related to Montana-Dakota's extension of service." Staff agrees the specific redacted numbers associated with this response are proprietary in nature and are not relevant to the subject matter at issue in this Docket.

Regarding Responses to 1-3, 3-1, 3-2, 3-6,3-7, 3-10, 3-11, 3-16, 3-17, 3-20, 3-21, 3-22 and 3-27. Staff issued these data requests to MDU and can attest that each of the specified

questions in these requests, along with MDU's responses, contain information Staff considers proprietary, confidential and trade secret in nature and disclosure of this information to Intervenors is likely to injure MDU, particularly because Intervenors include an electric utility in the position to compete with MDU for new large load customers in the region.

Staff does not consider the information contained in these questions or responses to be relevant to the subject matter in front of the Commission in this Docket, nor likely lead to the discovery of relevant information to this Docket. Staff is in an unusual position in this Docket because the electric utility LDC seeks service from is a rate regulated investor-owned utility. This is significant because Staff and the Commission have regulatory responsibilities that extend beyond the legal determination to be made pursuant to SDCL 49-34A-56. In order to ensure ratepayers are protected as it relates to MDU's actions and commitments in PUC filings, it is necessary for Staff, to questions of an IOU during discovery that may not be relevant under the law to the specific filing in front of the Commission.

Because these questions and responses contain proprietary and confidential information, and because the information is not relevant to the subject matter to be determined in this Docket, Intervenors' Motion to Compel Regarding Responses to 1-3, 3-1, 3-2, 3-6,3-7, 3-10, 3-11, 3-16, 3-17-20, 3-21, 3-22 and 3-27 should be denied.

### CONCLUSION

In responding to this Motion, Staff attempted to provide a relevant standard and a preliminary analysis for the Commission to consider in determining whether to grant

Intervenors' Motion to Compel from LDC and MDU. This analysis was based on the information and arguments presented in the record, but it is significant that LDC and MDU's responses to the Motion may provide additional information to the discussion and therefore Staff reserves the right to provide additional comment at the Hearing on the Motion to Compel.

Dated this 17<sup>th</sup> day of January, 2025

/s/Amanda M. Reiss

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