

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

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

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). With this Petition, LDC is asking 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 358th Avenue, Leola, South Dakota” within the service area of FEM. LDC Petition, pg. 1. Accordingly, FEM petitioned to intervene in this docket. East River Electric Power Cooperative, Inc. (East River), who delivers wholesale power to FEM, and Basin Electric Power Company (Basin Electric), who “sells and delivers capacity and energy requirements to East River for resale by East River to its member distribution cooperatives”, also petitioned to intervene. *Id.* FEM, East River, and Basin Electric were granted intervention on August 29, 2024. The parties, including Commission staff (Staff), have been participating in discovery from the opening of this docket through the date of this filing.

On October 30, 2024, MDU filed Pre-filed Direct Testimony of Darcy J. Neigum. On November 4, 2024, LDC filed Pre-filed Direct Testimony of Bill Connors. On November 7,

2024, LDC filed a Motion for Summary Judgment; Memo in Support of Motion for Summary Judgment; Statement of Undisputed Facts; Affidavit of William Van Camp; and Affidavit of William Connors. On November 13, 2024, the Commission issued a Notice of Hearing on Motion for Summary Judgment. On December 2, 2024, the parties filed a Joint Agreement for Continuance of Motion for Summary Judgment. On December 4, 2024, the Commission issued an Order Approving Joint Agreement for Continuance; Notice of Hearing on Motion for Summary Judgment which scheduled a hearing for January 28, 2025, set a January 9, 2025 deadline for responsive pleadings, and set a January 17, 2025 deadline for the Petitioner to reply.

The remainder of this brief provides Staff's analysis on LDC's motion for summary judgment (hereinafter "Motion").

LEGAL STANDARD

LDC's Motion is rooted in SDCL § 15-6-56(c) and SDCL § 1-26-18. SDCL § 15-6-56(c) states, in relevant part:

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(emphasis added). Likewise, SDCL § 1-26-18 states, in relevant part:

[E]ach agency, upon the motion of any party, may dispose of any defense or claim . . . [i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law[.]

The standard for granting or denying a motion for summary judgment is well-established in South Dakota case law. The South Dakota Supreme Court has described the matter as such:

Two questions must be asked in analyzing whether summary judgment is proper. First, are there "genuine issues as to any material fact?" SDCL 15-6-56(c). Second, is the moving party "entitled to a judgment as a matter of law?" *Id.* The moving party has the burden of proof. *Hamaker v. Kenwel-Jackson Machine, Inc.*, 387 N.W.2d 515 (S.D. 1986). The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. *Wilson v. Great Northern Ry. Co.*, 83 S.D. 207, 157 N.W.2d 19 (1968); *Trapp v. Madera Pacific, Inc.*, 390 N.W.2d 558 (S.D. 1986). Thus, summary judgment is appropriate to dispose of legal, not factual questions. *Hamaker, supra.*

Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 164 (S.D. 1987). If a non-moving party wishes for a summary judgment motion to fail, that party "must present specific facts showing that a genuine, material issue for trial exists." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 836-37 (S.D. 1990) (citing *Pickering v. Pickering*, 434 N.W.2d 758, 760-61 (S.D. 1989)).

In making its determination, the Commission must apply the aforementioned framework to the following statute:

49-34A-56. Large new customers not required to take service from assigned utility--Notice and hearing by commission--Factors considered.

Notwithstanding the establishment of assigned service areas for electric utilities provided for in §§ 49-34A-43 and 49-34A-44, 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.

SDCL § 49-34A-56.

For ease of understanding, Staff believes the following summation is an accurate portrayal of how the Commission must decide this matter. In order to grant the motion, the Commission, after consideration of the pleadings, testimony, interrogatories, admissions, and affidavits on file, must find no genuine issue of material fact exists that:

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

If the Commission finds that a genuine issue of material fact exists as to any one of these three requirements, the Commission must deny the motion. If the Commission finds no such issue regarding those three requirements, the Commission must then determine whether any issues of

material fact exist regarding the six factors laid out in SDCL § 49-34A-56. Staff notes that this statute merely directs the Commission to ‘consider’ every one of the six factors. The statute does not provide instructions on how the Commissioners are to weigh each of the factors. This lack of direction in statute suggests to Staff that the Commission is free to weigh each factor in a manner the Commission sees fit. If the Commission finds that a genuine issue of material fact exists as to a factor that would influence the Commission’s overall determination of the factors, Staff believes the Commission may appropriately deny the motion for summary judgment.

ANALYSIS

Staff presents the following analysis of the information submitted by the movant and MDU for the Commission’s consideration in this matter.

1. New customer at new location

The first issue to be discussed under this requirement is whether LDC is a ‘new customer’ as required by the large load statute. Neither the large load statute nor case law provide a clear definition of what constitutes a ‘new customer’ in the context of a large load exception. However, because LDC is not an existing customer of MDU or FEM, LDC’s Statement of Undisputed Material Facts, p. 1, Staff believes LDC would necessarily fall under any definition of ‘new customer’ that is used for these purposes.

The next issue to be discussed is whether the proposed location of the data center is a ‘new location.’ This term also does not have a clear definition in statute or case law. In support of the argument that LDC is a new customer at a new location, LDC states that the proposed site has no existing utility services. *Id.* Staff believes that fact is relevant towards determining whether this location is a ‘new location.’ For one to argue that LDC is not a ‘new location,’ it seems evident to Staff that, as a fundamental prerequisite, they would first have to establish some

sort of existing utilities at the described location. There are no such utility services at the proposed location. *Id.* In FEM’s Response to Staff’s Data Request 2-1, FEM stated that it does not dispute that LDC is a new customer. In FEM’s Response to Staff’s Data Request 2-3, FEM stated that it believes LDC will be a new location but reserves the right to supplement the answer upon completion of discovery. FEM’s response to Staff Data Request 1-1a, that it would have the same distance as MDU to build power lines in order to service LDC, makes clear to Staff that this is a ‘new location.’

2. Located outside municipalities as the boundaries thereof existed on March 21, 1975

In response to Staff’s data requests, LDC stated that the location of the facility would be within FEM territory approximately 5 miles from the municipality of Leola (the nearest municipality). LDC’s Response to Staff’s Data Request 2-1. LDC reviewed the South Dakota Electric Service Territory Map found on the Commission’s website in order to make this determination. It is evident to Staff that the proposed facility will be located outside municipal boundaries as they existed on March 21, 1975.

3. Contracted minimum demand of two thousand kilowatts or more

According to this requirement, LDC must have a contracted minimum demand of two thousand kilowatts or more in order to qualify for the large load statute. In the LDC Petition, LDC explains that LDC and MDU are negotiating an Electric Service Agreement (ESA) which “has a contracted minimum demand in excess of two thousand kilowatts.” Pages 1-2. Additionally, the pre-filed testimony of Darcy J. Neigum states that MDU entered into an ESA with LDC “to serve between 10 and 50 MWs of electric power as part of the Company’s Rate 45 Tariff approved by the South Dakota Public Utilities Commission.” Page 3, 15-17. Tariff Rate 45 requires an expected demand of at least 10 MW. *See* Montana-Dakota Utilities Co. Electric

Rate Schedule – Section No. 3, Original Sheet No. 20, pg. 1. Further, in response to Staff’s data requests, MDU stated its firm demand will be 2.5 MWs. MDU’s Response to Staff’s Data Request 3-28. MDU has stated it expects LDC’s load factor to be approximately 90 percent while LDC has stated that its expected load factor is greater than 95 percent. MDU’s Response to Staff’s Data Request 1-4; LDC’s Response to Staff’s Data Request 1-4a. The conditional use permit in this docket shows the project will be comprised of 12,288 servers, each with a load of 4,050 watts. McPherson County Application for Conditional Use Permit, p. 1. This equates to 49,766,400 watts, or roughly 50 MWs.

While Staff has no concerns with LDC meeting this requirement, Staff notes that the referenced contract (containing the contracted minimum demand) is not available as evidence in this docket. LDC relies on the pre-filed testimony of Darcy J. Neigum and Bill Connors in support of this claim. The Commission must determine, after reviewing the facts in the light most favorable to the non-movants (or Intervenors), whether or not any issue of material fact exists regarding this claim.

Next, Staff presents the following analysis of the six factors that must be considered pursuant to the large load statute. Staff will not provide an ultimate recommendation based on these factors as that is a determination for only the Commission to make.

1. The electric service requirements of the load to be served;

As stated in earlier paragraphs, MDU witnesses Darcy J. Neigum and Bill Connors both testify that the LDC load is well in excess of the 2,000 kilowatt requirement. The testimony of Darcy J. Neigum further states that MDU and LDC formed an ESA in which MDU will serve LDC between 10 and 50 MWs. Page 3, 15-17. As mentioned earlier, MDU stated its firm demand will be 2.5 MWs. MDU’s Response to Staff’s Data Request 3-28.

To Staff's knowledge, the electric service requirements of LDC would not change based on who provides service.

2. The availability of an adequate power supply:

Staff's First Data Request to MDU 1-7 and the response are relevant to this factor. When asked to explain in detail the adequacy of MDU's power supply to serve LDC, MDU responded:

LDC will be consider [sic] an interruptible load (load modifying resource (LMR)) for the majority of their capacity requirements. Being a registered LMR with MISO, will be self-supplying the majority of their capacity requirements plus planning reserve margin. Any amount of additional capacity for LDC's designated firm load requirement will be separately purchased by Montana-Dakota from either the MISO Capacity Auction or a bi-lateral purchase, or sold from Montana-Dakota's excess capacity to meet LDC's remaining obligations.

Id.

Additionally, LDC's Statement of Undisputed Material Facts cites to the following testimony: "The Leola Transmission Substation is serviced from a radial 115kV transmission line which runs from Montana-Dakota's Ellendale Transmission Substation to Leola. This 115kV transmission line and Leola Transmission Substation are owned by Montana-Dakota and are part of the MISO transmission system." Pre-filed Testimony of Darcy J. Neigum, p. 3, 12-15. As further support for this factor, MDU has stated, "Montana-Dakota has completed a study request, and received approval from a [sic] MISO, for the ability to service this load from the MISO transmission system. No additional upgrades to the MISO transmission system are needed with this service request." MDU's Response to Staff's Data Request 1-10.

Through January 7, 2025, the only information Staff finds in the docket regarding the availability of an adequate power supply on the part of FEM, East River, and Basin Electric comes from FEM's Response to Staff's Data Request 1-7. It states, "FEM has the same ability

and would use the same resources to serve the Leola Data Center at the selected location.” *Id.* FEM did not elaborate further on this point.

3. *The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto;*

Addressing this factor, LDC’s Memo in Support of its Motion for Summary Judgment states the following:

Montana-Dakota is seeking to provide the utility service in this docket. Not the Adverse Intervenors. It seeks to do so under its previously approved Rate 45 tariff. The Data Center is immediately adjacent to the Leola Substation of Montana-Dakota. Buildout will be minimal. There are no existing utilities on the Data Center property. This factor is easily met.

Page 4 (internal citations omitted). Staff would also point back to MDU’s Response to Staff’s Data Request 1-10 in which MDU stated that the proposed project has received approval from MISO and that no upgrades to the MISO transmission system are necessary with the project.

Although the Motion did not include all of this information, Staff presents the following information (gathered through Staff’s data requests) for consideration as we feel it is relevant to factor (3). MDU has stated that LDC’s business will not be housed in portable containerized units. MDU’s Response to Staff’s Data Request 3-15. LDC will fund all costs related to MDU’s extension of service. *Id.* DR 1-5. MDU has received the initial contribution in aid of construction (CIAC) from LDC. *Id.* DR 3-8. MDU has stated that at no point will MDU incur project costs that exceed the total accumulated CIAC, and if MDU projects to incur costs greater than the CIAC, it will request additional funds from LDC. *Id.* DR 3-9.

Similar to what was written about factor (2), Staff does not have corresponding information on the part of FEM, East River, or Basin for which Staff could present an analysis

on this point. However, FEM has stated that it would have the same distance as MDU to build power lines in order to service LDC.

4. The proximity of adequate facilities from which electric service of the type required may be delivered;

In the Petition, LDC states that the data center will be located adjacent to MDU's Leola substation at 11641 358th Avenue, Leola, South Dakota. Page 1. Additionally, Bill Connors states in his pre-filed testimony that MDU "(1) controls 50 MW of load interconnection rights at the Leola Substation; (2) owns the Leola Substation; and (3) has the capability to provide firmed and shaped energy to the data center at a reasonable cost." Pre-filed Direct Testimony of Bill Connors, p. 4, 49-51.

FEM, on this point, stated that it would have the same distance as MDU to build line. FEM Response to Staff Data Request 1-1. FEM further stated "[t]he Leola MDU substation is part of the MISO . . . which allows MISO participants equal access to the Leola Substation." *Id.* When asked to explain the adequacy of FEM's power supply to serve this data center, FEM responded that it was without sufficient information to answer this question and reserved the right to supplement the answer upon completion of discovery. *Id.* DR 1-4.

5. The preference of the customer;

It is clear that LDC prefers for MDU to provide service rather than FEM.

6. Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

On this point, LDC's Memo in Support of Leola Data Center LLC's Motion for Summary Judgment states:

Montana-Dakota has represented, and will continue to represent to the Commission in this docket that it has the ability to serve the

needs of Data Center. LDF @ 8. The Commission further must, in Docket EL24-028, approve the electric service agreement under Rate 45 between Data Center and Montana-Dakota. This factor is also met.

Page 4. Included in that quote is a citation to LDC’s Statement of Undisputed Material Facts Paragraph 8, which states “MDU has available to it an adequate power supply as well as the ability to provide for the electrical needs of Data Center.”

As for corresponding information on the part of FEM, FEM has stated it “has the same ability and would use the same resources to serve the Leola Data Center at the selected location.” FEM’s Response to Staff’s Data Request 1-7. The docket does not contain further information for Staff to elaborate on regarding this point.

CONCLUSION

While Staff could form conclusions regarding the prerequisites of SDCL § 49-34A-56—that is, being a new customer at a new location, being located outside municipal boundaries, and requiring service of at least 2,000 kilowatts—Staff will not draw conclusions at this point as to whether the Commission should or should not grant the motion. The Commission has authority by statute to consider the six factors and the applicable statute does not provide guidance as to how the factors are to be weighed. At this phase, it is important for the Commission to view the Motion for Summary Judgment through the criteria that has been established by the courts of South Dakota. Staff would point back to its summation provided on pages 4-5 as Staff feels it is proper guidance for the Commission’s decision in this matter.

Dated this 9th day of January, 2025



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