

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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IN THE MATTER OF THE PETITION FOR
ELECTRICAL SERVICE BY DAKOTA TURKEY
GROWERS, LLC TO HAVE DAKOTA ENERGY
COOPERATIVE, INC. ASSIGNED AS ITS
ELECTRIC PROVIDER IN THE SERVICE AREA
OF NORTHWESTERN ENERGY

EL04-032

=====
Transcript of Proceedings
February 9, 2005

ORIGINAL

=====
BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF

John Smith
Rolayne Ailts Wiest
Karen Cremer
Greg Rislov
Harlan Best
Keith Senger
Dave Jacobson
Michele Farris
Tina Douglas
Heather Forney
Pam Bonrud
Steve Wegman
Martin Bettmann

APPEARANCES

Alan Dietrich, NorthWestern Energy
Darla Pollman Rogers, Riter, Rogers,
Wattier & Brown
Margo Northrup, Riter, Rogers, Wattier & Brown

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING

L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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5 ELECTRICAL SERVICE BY DAKOTA TURKEY
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36 Alan Dietrich, NorthWestern Energy
37 Darla Pollman Rogers, Riter, Rogers,
38 Wattier & Brown
39 Margo Northrup, Riter, Rogers, Wattier & Brown
40
41 Reported By Cheri McComsey Wittler, RPR, CRR

1 ALSO PRESENT 2
2 Warren Lotensburg
3 Jeff Decker
4 Jay Morris
5 Jeff Nelson
6 Audrey Ricketts
7 Nettie Meyers
8 Robert D. Rademacher
9 -----
10 TRANSCRIPT OF PROCEEDINGS, held in the
11 above-entitled matter, at the South Dakota State
12 Capitol, Room 468, 500 East Capitol Avenue, Pierre,
13 South Dakota, on the 9th day of February 2005,
14 commencing at 2:30 p.m.
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1 3
2 CHAIRMAN HANSON: This is Wednesday,
3 February 9, 2005, and it is at or past 2:30 p.m.
4 This is the State Capitol Building, Room 468,
5 Pierre, South Dakota. This is the South Dakota
6 Public Utilities Commission hearing on EL04-032.
7 There is no one joining us by phone this afternoon
8 that we are aware of. I am Commissioner Gary
9 Hanson. I am joined by Commissioners Johnson and
10 Commissioner Sahr.
11 The Commission granted an intervention to
12 NorthWestern at its November 30, 2004 meeting.
13 NorthWestern filed a Motion for Summary Disposition
14 of NorthWestern Corporation on January 1, 2005. A
15 Stipulation to Amend Petition was submitted by both
16 parties on February 2, 2005. On February 3, 2005
17 Dakota Turkey Growers filed a Memorandum of Law in
18 Opposition of Motion for Summary Disposition.
19 The question before the Commission today is
20 shall the Commission grant the Motion for Summary
21 Disposition.
22 This is the time and place scheduled for the
23 argument in consideration of said Motion. And I
24 believe everyone's represented by attorneys.
25 Are there any preliminary matters that we need
to go over before we begin that either party wishes

1 4
2 to bring up at this time? If not, seeing your
3 inquisitive looks, we will begin with NorthWestern.
4 Mr. Dietrich.
5 MR. DIETRICH: Thank you, Chairman
6 Hanson, Commissioners. The drawing that I have
7 here is a somewhat larger view of the exhibit that
8 we included with one of the affidavits in our
9 Motion, and I can move it a little closer if it
10 helps for illustrative purposes, but I believe in
11 the documents you have that exhibit is included as
12 well.
13 As we look at the determination of our Motion
14 and the facts that were laid out in the Affidavits
15 and my Memorandum of Law, I think it's important
16 that the Commission look at the precise language of
17 the statutes in question. And I'll refer to
18 statutes 49-34A-56 and 49-34A-42 during our
19 argument as Sections 42 and Section 56 just for
20 simplicity sake.
21 Section 56 is a special exception given to the
22 assigned service area of law that allows a new
23 customer at a new location with a 2 megawatt
24 connected demand to petition the Commission for
25 consideration of service by other than the assigned
service provider. And in this particular instance

1 NorthWestern is the assigned service provider --
 2 you can tell that from the pleadings in the case,
 3 both the Petition and our Response -- and the
 4 Dakota Turkey Growers is indeed a new customer and
 5 for the purposes of this Motion we are not
 6 challenging the fact that they will have a
 7 2 megawatt load. What we are challenging is that
 8 they are a new customer at a new location.

9 The word "location" is used in two sections in
 10 the electric territorial law provisions contained
 11 in Chapter 49-34A. Those two places are Section 42
 12 and Section 56. And it's NorthWestern's position
 13 that this same definition should be used for that
 14 word in the same chapter of the South Dakota Code.
 15 And that definition means as announced by our
 16 South Dakota Supreme Court about a year ago the
 17 word "location" would mean the geographical area
 18 served by the electric utility. If the Legislature
 19 had intended for a different interpretation, all it
 20 would have needed to say was a customer -- a new
 21 customer with a 2 megawatt load can petition for
 22 service in the assigned service area of another.
 23 But it went beyond that and said a new customer at
 24 a new location.

25 Dakota Turkey's position is that it is a new

1 customer, therefore, any location in which it
 2 receives service is a new location for it. But it
 3 is our position that location must be used in the
 4 more general term consistent with the use of the
 5 word in the statute.

6 And despite the objection that they raised, I
 7 don't believe this renders Section 56 meaningless
 8 or without application. It just merely means that
 9 a customer who is a new large customer who's
 10 seeking service must be seeking that in a place
 11 where electric service has not been rendered. In
 12 other words, a place where an existing utility has
 13 not already made an investment to serve customers
 14 at that location. And if it were, if it's anywhere
 15 else in the assigned service area where service has
 16 not been provided, it would be appropriate,
 17 provided the other qualifying measures are met.

18 The Commission should give the plain meaning
 19 to the words in the statute, and the words "new
 20 location" are a further qualifying phrase beyond
 21 new customer. As evidenced in the Affidavits,
 22 Jeffrey Decker and his wife were receiving service
 23 from NorthWestern at the location and his
 24 predecessors entitled to the farmland that he owned
 25 were also receiving service from NorthWestern. So,

1 in other words, we've been serving this location
 2 since the territorial law was enacted in 1975.

3 Now the drawing shows the areas in question
 4 here, and Dakota Turkey has raised the issue of
 5 whether there's a genuine issue of fact in this
 6 case, arguing that there's some question as to
 7 where the customer -- where the plant is going to
 8 be located. For the purpose of our Motion,
 9 NorthWestern will admit that Mr. Decker's home
 10 occupied land in the northeast area of this tract
 11 of land and that the exact footprint of the plant
 12 to be constructed is not in the same area where his
 13 house and other buildings were located or that the
 14 footprint is going to be somewhere in the lower, as
 15 they said in their Affidavit, southeast portion of
 16 this land.

17 So it isn't precisely the same piece of the
 18 farmland. However, this whole farmland area has
 19 been owned by the same persons for 30 years -- by
 20 persons in the same exact ownership size and shape,
 21 the fact that it may have been replatted once or
 22 replatted again, it was always owned together as
 23 one site, one farm site that was utilized by
 24 farmers. A farm does not just consist of the exact
 25 physical presence where the building is located. A

1 farm consists of the legal description or the farm
 2 acreage that that farmer holds. And Mr. Decker and
 3 his wife as well as their predecessors have owned
 4 exactly the land that was transferred to
 5 Dakota Turkey and exactly that land upon which
 6 they're putting their plant and for which
 7 Mr. Decker's house was removed and the electric
 8 service to that would then not be served in the way
 9 that it was before.

10 The Black Hills case gives the Commission
 11 guidance to what location means under the
 12 territorial law. South Dakota Supreme Court in
 13 this decision announced just a year ago January --
 14 made it clear that location does not mean a level
 15 of electric service but instead means a
 16 geographical area. Therefore, even a much larger
 17 use of electricity that may be present in the
 18 future does not change the right of an electric
 19 service provider based on the past service to a
 20 location. And the Supreme Court noted various
 21 criteria to be used when assigning service areas;
 22 prevention of duplication of distribution lines and
 23 facilities, willingness and good-faith intent of
 24 the electric utilities to provide accurate service,
 25 reasonable opportunity for future growth, and so

1 forth, and the very reasons that they rely upon for
 2 an initial assignment are the same reasons why
 3 NorthWestern should continue to be able to service
 4 it's assigned service area.

5 We've been there for 30 years. The purpose of
 6 this law was to prevent duplication of lines and
 7 facilities, and because of that we shouldn't have
 8 to roll up our lines and go away so that they can
 9 put a new service into an existing location. The
 10 Supreme Court concluded that location denotes a
 11 place where something is or could be located, that
 12 is a site.

13 In that case Black Hills had been serving what
 14 they call a frozen customer, a customer in another
 15 utility service area that existed at the time the
 16 territorial law went into effect and essentially
 17 grandfathered that customer to be served in the
 18 future. And, despite that, the court said that
 19 Black Hills had the continuing right to serve the
 20 larger load and, in fact, it said as that
 21 customer's usage of electricity expands and
 22 requires additional service at new service points
 23 within that location, Black Hills should be allowed
 24 to serve those new service points.

25 Our argument would be despite the fact that it

1 connections within the other's assigned service
 2 area. But if you look back to the Commission's
 3 initial decision, that would have provided that
 4 they would have been entitled to serve it.

5 And, in fact, the Supreme Court, even though
 6 it upheld the reversal of that decision, said that
 7 the contract took away the right that the utility
 8 would have had to have continued to serve the
 9 location had it not been for that contract. So, in
 10 other words, the Supreme Court recognized that even
 11 a larger service that may have expanded into new
 12 plots of land would have provided the right for the
 13 co-op to continue to serve this new load.

14 The South Dakota case is cited by Dakota
 15 Turkey in its opposition, has been discussed in our
 16 memorandum. They also cited a couple of
 17 nonjurisdictional cases. In the City of La Grange
 18 case from Georgia a city was seeking to be allowed
 19 permanent service rights based upon temporary
 20 construction service to a site. That's not the
 21 issue that we have here. We're not talking about
 22 the temporary rights to construction. We're asking
 23 that it is not -- it is based upon our permanent
 24 30 years of service upon the -- in that assigned
 25 service area on that -- to this location.

1 may be located in a different place on this site,
 2 it is still just a new service point within the
 3 same tract of land upon which we have been
 4 providing service. And in this case not only are
 5 we saying because we've been serving there but also
 6 because it is our assigned service area.

7 The Commission's decision in a Clay-Union
 8 matter many years ago which was cited in our
 9 memorandum provided service -- Clay-Union at the
 10 time had provided service to a farmhouse which was
 11 then going to be replaced with an aluminum
 12 extruding factory that was not only going to buy
 13 the tract of land upon which the farm had been
 14 based but a much larger portion of land as well
 15 including additional tracts of land, and at the
 16 time this Commission said we think that this is
 17 service -- that the grandfathered service rights of
 18 Clay-Union should be upheld and they should get to
 19 serve the aluminum extruding factory.

20 This case was reversed on appeal to the
 21 Circuit Court and then upheld by the Supreme Court
 22 but upon entirely different grounds and on the
 23 appeal the Court said you are further restricted by
 24 the service area agreement that the parties entered
 25 into which restricted you from making any new

1 And the Rural Electric Convenience Cooperative
 2 case from Illinois that was cited the Court entered
 3 a finding directly contrary to the Black Hills
 4 Decision by our South Dakota Supreme Court. In
 5 other words, they felt that a co-op -- the fact
 6 that a co-op was serving a farm did not provide it
 7 with the rights to serve a new customer. But
 8 that's entirely opposed by the Black Hills result.
 9 So this Commission should come up with a different
 10 Decision contrary to what the finding was in
 11 Illinois.

12 Dakota Turkey's argument is that it is a new
 13 location because it's a new location for them.
 14 Essentially they're saying if you were to buy a
 15 used car on a car lot because it's a new car to you
 16 that makes it a new car. It doesn't make it a new
 17 car. It's still a used car. When the location is
 18 the location of service, not just the location for
 19 the customer, any new customer could argue anywhere
 20 I go is a new location. In other words, their
 21 position would be anywhere in our assigned service
 22 territory they could come and put a new customer
 23 and petition and say this is a new customer, it is
 24 a new location for that customer, therefore, it
 25 doesn't matter that you've been serving there, that

1 you have customers there or have had customers
2 there. We're entitled to petition under
3 Section 56.

4 The Legislature could have written this to
5 have included language that would have made that
6 possible. They did not. They say it has to be a
7 new customer in a new location. To do otherwise
8 would be contrary to the purpose of the assigned
9 service territory laws and the integrity of our Act
10 and they -- Dakota Turkey could have acquired a
11 site and been served by Dakota Turkey in either of
12 two ways; located in their assigned service area,
13 or locating it in NorthWestern's assigned service
14 area where we aren't already serving the customer.

15 Neither of those things have happened, and
16 this situation does not qualify for Section 56
17 Petition. We'd ask the Commission to grant our
18 Motion to Dismiss this Petition.

19 Any questions?

20 CHAIRMAN HANSON: Thank you,
21 Mr. Dietrich. I have a few, but I'll ask one and
22 then perhaps the other Commissioners have some.

23 It seems as if you're saying that the load
24 then doesn't matter, that the exception for the
25 2000 kilowatt shouldn't matter if there's a --

1 what's the purpose of having assigned territories?
2 What's the purpose of having an exception to that,
3 if in fact you cannot have service to someone who
4 has a higher load, if load doesn't matter?

5 MR. DIETRICH: Load matters in a
6 couple of senses. First of all, in order to
7 qualify at all under Section 56 a customer must be
8 large enough to qualify. It must be -- you know,
9 NorthWestern submits that it must meet three
10 qualifying criteria. It must be a 2 megawatt
11 demand load. It must be a new customer. A
12 customer couldn't just grow larger and say now that
13 I've hit 2 megawatts I decided I want service from
14 someone else. And it must be at a new location.
15 By saying new location that implies that it's not
16 only a new customer but is it a place where someone
17 hasn't already been serving.

18 Now I guess the first part of your question,
19 what was the purpose of the assigned service areas,
20 it was to prevent duplication of facilities,
21 prevent the race to see who could get there first
22 to have double transmission lines, double
23 distribution lines. And the assigned territorial
24 law has worked well. In 30 years since it was
25 enacted we have had I'm sure less than 25 cases of

1 any kind that have come to the Commission for a
2 determination and very few that have gone on appeal
3 to courts. And those cases have been boundary line
4 disputes or, you know, other disputes with specific
5 circumstances.

6 The exception under Section 56 is still
7 available, but in order to take advantage of it,
8 the customer should look to see is this a place
9 where electric service is already being rendered by
10 someone? If it is not a place where electric
11 service is being rendered, then if I meet the other
12 qualifying things, I can apply or petition to be
13 served by someone other than the service provider.
14 But generally to maintain that integrity and to
15 allow the first utilization of investments already
16 made by an electric utility, they should not be
17 allowed to come into a location and kick another
18 provider out.

19 CHAIRMAN HANSON: But isn't all of
20 the land in South Dakota owned by someone?

21 MR. DIETRICH: It's certainly owned
22 by someone, but it may not have been served yet.
23 If it was a real green field site, that is a site
24 upon which electricity is not provided -- and there
25 are such sites in the vicinity of some of the

1 communities. Most of the growth of these large
2 customers is going to be either areas within an
3 industrial park or just outside of a city or areas
4 that might be annexed into the city but aren't part
5 of the city or on the outskirts of the cities are
6 where the larger customers are going to locate and
7 in some of those areas there is no service.

8 CHAIRMAN HANSON: Couldn't we carry
9 your example here that you've given us -- someone
10 that has a 5,000 acre ranch, he or she has a farm
11 building and some wells, some spot, and a home. Is
12 that entire area then an existing location?

13 MR. DIETRICH: Is the customer
14 planning to buy that entire site, or is he only
15 going to buy a portion of it? Essentially here
16 Dakota Turkey has displaced this customer, has said
17 we're buying the entire site that you have had. I
18 don't think they're going to buy 5,000 acres, but,
19 you know, here's a 100-acre site that's being
20 acquired in its entirety for whatever purpose.

21 If the building is only going in the southern
22 portion, you know, they've still acquired the whole
23 site, and they have essentially removed the
24 existing customer and the existing service.

25 CHAIRMAN HANSON: Thank you.

17

1 VICE CHAIRMAN SAHR: Good afternoon,
 2 Mr. Dietrich. Is it the Deckers? Is that who the
 3 property owners were?
 4 MR. DIETRICH: The last farm owners
 5 were the Deckers.
 6 VICE CHAIRMAN SAHR: Could you point
 7 again to where their house -- is it a house or --
 8 I've driven by there.
 9 MR. DIETRICH: It was. It's not
 10 there any longer, but it was. It was located in
 11 this northeast quadrant (Indicating).
 12 VICE CHAIRMAN SAHR: Okay. Could
 13 you point to where you believe the proposed site is
 14 going to go?
 15 MR. DIETRICH: According to the
 16 Affidavit filed by Dakota Turkey, the footprint of
 17 the plant building itself is going to be in the
 18 southeastern portion of this property (Indicating).
 19 VICE CHAIRMAN SAHR: The
 20 Black Hills - West River case in my mind factually
 21 is significantly different, and here's one of the
 22 things that I would look at. If the Deckers would
 23 have been building an addition onto their house, I
 24 would have said that looks a lot like what I felt
 25 was going on at the Waste Water Treatment Center

18

1 out in the Rapid City area because it was taking
 2 place on that same site.
 3 I was concerned in that case, though, and I
 4 have stated publicly concerns about expanding this
 5 concept of location so wide, so large that you end
 6 up, I think, thwarting what the intention of this
 7 law is. And I think in that case you were looking
 8 at expansion of an actual building or groups of
 9 buildings and facilities. To me here I think it's
 10 clearly distinguishable.
 11 I mean, you may have other merits within your
 12 arguments, but I think this particular instance is
 13 distinguishable from that West River - Black Hills
 14 case. And, for instance, I had mentioned that I
 15 thought in that case if they had, in fact, gone out
 16 to a different part of that plot of land that was
 17 owned by the City, that I would have thought -- I
 18 probably would have leaned towards awarding it to
 19 West River under those circumstances. And that
 20 seems to be more along the lines of what is
 21 happening here. It's not as if we are expanding or
 22 adding on to that particular location. In my mind
 23 I think we're getting to another location here.
 24 MR. DIETRICH: Well, if I could
 25 respond, if they had purchased the western half of

19

1 this property and allowed the electric service to
 2 continue for the customer, I think that conclusion
 3 may be easier to come to than the fact that they
 4 are essentially saying, Mr. Decker, you own all of
 5 this land, we want it all. And what we were
 6 serving, if there would have been any other uses of
 7 electricity on this site, they would be ours as the
 8 assigned service provider. And the fact that they
 9 elected, first of all, to acquire a site where we
 10 were already providing electricity and then to
 11 acquire the entire site as opposed to saying this
 12 particular customer can remain, you know, the home
 13 can remain, he's going to have to give up his
 14 farmland because we'll need that, but he can remain
 15 and we will coexist, you know, I think that's a
 16 different situation than what we have here.
 17 What we have here is essentially,
 18 NorthWestern, your customer goes away, roll up your
 19 lines, we're going to come in and serve now in your
 20 service area.
 21 VICE CHAIRMAN SAHR: Do you know
 22 historically did NorthWestern build for -- with
 23 future expansion in that particular area in mind?
 24 MR. DIETRICH: Well, we certainly
 25 built lines with the idea of serving --

20

1 infrastructure to serve the entire service area,
 2 and, you know, this isn't on the record here but of
 3 course we had a packing plant on the east side of
 4 Huron that we served for many years that closed for
 5 which we had constructed substations and other
 6 lines and transmission and distribution lines. So
 7 essentially there was another packing plant a
 8 little closer to the city that we served for a long
 9 time that closed a number of years ago and at the
 10 time our infrastructure was such that we could
 11 provide that service.
 12 VICE CHAIRMAN SAHR: See, my
 13 recollection in the Black Hills - West River case
 14 is that the lines were built clearly contemplating
 15 upgrades to that particular location, that
 16 particular facility. And I'm just trying to get a
 17 feel for whether that sort of -- we should be
 18 concerned about waste and duplications, but it
 19 doesn't seem to rise to the same level as it did in
 20 that case, in my mind, if those sort of investments
 21 really weren't foreseeable other than maybe some
 22 day we'll expand it throughout the area.
 23 I mean, there clearly you have significant
 24 dollars spent on a line and with the idea of
 25 serving future loads. And I'm not sure that you

1 could say -- at that particular location. I'm not
2 so sure you could say the same thing here. I
3 certainly -- if you have thoughts otherwise, I
4 would appreciate those.

5 MR. DIETRICH: Well, certainly, our
6 service area around the communities we serve is
7 limited because after you go a few miles outside
8 the city limits we run into rural electric service
9 areas, primarily areas that weren't served. But we
10 built a transmission -- or a line along the
11 highway. This is Highway 14 east of Huron, and the
12 co-op service area is on the north side of the
13 highway. Ours is on the south side. And, you
14 know, we have built lines to serve the customers
15 that we have.

16 We have a 60 megawatt generating station
17 within a quarter of a mile of this particular
18 location.

19 VICE CHAIRMAN SAHR: But you didn't
20 build that 60 megawatt generator just to serve this
21 guy's farmhouse and that particular piece of land,
22 and I think to a large extent that line
23 Black Hills had was going out to serve that
24 particular customer in that particular location --
25 I don't want to say exclusively because I certainly

1 could be proven wrong on that, but I do think if
2 we're going to consider the issues of waste and
3 duplication, I think while I'm not minimizing some
4 of your arguments, I do think it's clearly
5 distinguishable on the facts the differences
6 between the West River - Black Hills case and the
7 ones we're presented here today.

8 MR. DIETRICH: While those facts may
9 be different, that neither Dakota Energy or
10 NorthWestern Energy contemplated a turkey
11 processing plant in precisely this location or
12 precisely -- you know, or animal slaughter
13 operations were going to return to the Huron area,
14 in fact, they were considering other sites besides
15 Huron in recent months as they were planning this
16 plan.

17 But I think we need to go back to look at
18 really what the law -- what the court said in the
19 Black Hills case, and that was location has a
20 meaning and our position is the same meaning should
21 apply whether it was an investment to serve a
22 farmhouse or an investment to serve a factory and
23 that the investment just as in the Clay-Union case
24 this Commission said -- and I recognize none of the
25 current Commissioners were here at that time, but I

1 was and I sat through that hearing and all of the
2 appeals and the second time it came back to the
3 Commission and a Section 56 application and this
4 Commission said in the first instance this -- the
5 service to that farmhouse is service -- grandfather
6 service to a location.

7 And the Supreme Court said that the only thing
8 that took that away was the fact that this contract
9 was more restrictive.

10 VICE CHAIRMAN SAHR: Thank you.

11 COMMISSIONER JOHNSON: Mr. Chairman
12 Mr. Dietrich, I'm trying to get my mind around a
13 little bit more of your legal argument of what
14 constitutes location. Getting back to Chairman
15 Hanson's hypothetical about the large ranch, is it
16 your contention that purchasing 99 acres of the
17 ranch would allow for somebody to have this
18 selection but to purchase 100 acres if that
19 additional marginal 1 acre had a well on it, that
20 would remove somebody's option of choosing a
21 different provider?

22 MR. DIETRICH: Well, I think each
23 case needs to be looked at individually, but in
24 this case I think it clearly is a farm property
25 that has been entirely purchased by the new

1 provider, new proposed plan. As I said, if they
2 had purchased the western half -- and we can make
3 all kinds of arguments as to, you know, what
4 portion of that, but certainly NorthWestern would
5 have continued to have been able to utilize a
6 portion of its investment if they had carved out
7 even that northeast quadrant that was replatted to
8 be just part of the general description.

9 You know, it was initially platted as
10 Decker Outlot 1, even though he also purchased the
11 other properties, but whereas here they're buying
12 the whole thing, you know, I think it -- it's tough
13 for me to deal in hypotheticals as to exactly what
14 size no longer is a single location, but whereas
15 here this farmland has been owned by one farmer or
16 another in its entirety for the entire duration of
17 the electric territorial law and served by
18 NorthWestern, it seems we have a location.

19 COMMISSIONER JOHNSON: Yeah. I
20 understand your reticence to want to talk about
21 hypotheticals. You know, I certainly share -- I
22 mean, in this situation, I mean, is it your
23 contention if they executed a sale of everything
24 except the homestead area on day 1 and on day 2
25 executed the sale of the homestead area and still

1 allowed it to have NorthWestern lines, that the
 2 remaining -- the initial sales area would be able
 3 to make an election of service provider?
 4 MR. DIETRICH: They would have
 5 purchased the other part?
 6 COMMISSIONER JOHNSON: Uh-huh. In
 7 two separate transactions.
 8 MR. DIETRICH: I think we could
 9 still make the argument that our investment that we
 10 made to serve that customer and the lines that we
 11 had there were intended to provide service, you
 12 know, to the whole assigned service area that we
 13 had. But I think our argument would be weaker if
 14 they had not displaced the homeowner. I think we
 15 may still be able to make the argument, but I think
 16 it would be a tougher sell.
 17 COMMISSIONER JOHNSON: Thank you.
 18 CHAIRMAN HANSON: Just one little
 19 clarification. When you gave the three criteria,
 20 the two megawatts, the new customer, the new
 21 location, could that also be read as two criteria,
 22 2 megawatts, the second one being a new customer at
 23 a new location?
 24 MR. DIETRICH: Well, certainly, you
 25 know, you have to meet all of these elements to do

1 it. I'm not certain what tying them together
 2 means.
 3 CHAIRMAN HANSON: Well, it would
 4 mean that --
 5 MR. DIETRICH: If it's an existing
 6 customer but he's looking for service to a new
 7 location --
 8 CHAIRMAN HANSON: It would be the
 9 example that we have the present situation where
 10 you do have a new customer that is locating to a
 11 new location for them and that is opposed to the
 12 new location of someone adding on, the example that
 13 if they were here presently and they were using
 14 1 megawatt and -- or increasing to 4 or something
 15 of that nature.
 16 MR. DIETRICH: They would not be a
 17 new customer then.
 18 CHAIRMAN HANSON: Correct.
 19 MR. DIETRICH: If we accept
 20 Dakota Turkey's argument that a new customer -- it
 21 is determined whether it's a new customer's new
 22 location anywhere, the fact that it's a new
 23 customer means, you know, it's a customer that
 24 hasn't existed and anywhere they go is going to be
 25 a new location to them. But it's not a -- I think

1 we have to read the word "new location" in terms of
 2 the service territorial law, not just the
 3 subjective determination of that customer that this
 4 is a new car to me even though it's a 1998 Taurus.
 5 It's a new car to me. It's not a new car.
 6 CHAIRMAN HANSON: Okay. Thank you.
 7 John.
 8 MR. SMITH: Alan, in terms of the
 9 diagram up there and the chart and the Affidavit,
 10 is that line around the edge, which my eyes are so
 11 bad I can barely see it, but is that the
 12 description that's in the Amended Complaint?
 13 MR. DIETRICH: This, yes. This is
 14 now Dakota Turkey Growers Outlots 1, which is all
 15 of the land here except -- and then Dakota Turkey
 16 Growers Outlot 2 is this little square here and
 17 then this part where the dotted line was previously
 18 deeded away so it is not part of this outlot.
 19 MR. SMITH: Okay.
 20 MR. DIETRICH: But the property that
 21 is described in the NorthWestern Motion is -- in
 22 the Affidavit in NorthWestern's Motion, the
 23 Affidavit of Jay Morris is Dakota Turkey Outlots 1
 24 and 2 and, you know --
 25 MR. SMITH: That's what that is.

1 MR. DIETRICH: That includes what
 2 was Decker Outlot 1. There's also some other
 3 vacated outlots, small vacated outlots here that
 4 were all rolled into Dakota Turkey Growers
 5 Outlot 1. So essentially everything north of the
 6 railroad tracks south of the highway between this
 7 quarter section line and 403 Avenue with this
 8 little carve out is what is the subject matter of
 9 this proceeding and which was the property that has
 10 been acquired by Dakota Turkey Growers.
 11 MR. SMITH: That's the description
 12 that's now in the Amended Complaint. Is that the
 13 same thing? There was an amendment, right? There
 14 was a typo?
 15 MR. DIETRICH: The amendment was
 16 just to correct a typographical error in the legal
 17 description of the range, I believe. Because it
 18 had been previously explained -- the Petition
 19 itself refers to the land in a general nature as
 20 land in the northeast quarter of Section 4. But
 21 the only change has been the description of -- the
 22 only correction was just a typographical correction
 23 which counsel had asked if we were okay correcting
 24 that because it obviously was not range 6, and I
 25 indicated that that was acceptable to NorthWestern.

1 MR. SMITH: And that legal
 2 description describes what we're looking at there.
 3 MR. DIETRICH: In the Petition?
 4 MR. SMITH: In the Amended Petition.
 5 All that did was correct a -- turn 6 into a 61,
 6 right, in the range?
 7 MR. DIETRICH: Right. It's a more
 8 general nature description in the petition. It
 9 does not contain the specificity of the exact legal
 10 description of the site. But I guess you'd have to
 11 ask counsel about the Petition.
 12 MR. SMITH: Okay. Thank you.
 13 MR. DIETRICH: Anything further?
 14 CHAIRMAN HANSON: Any questions? If
 15 not, thank you.
 16 MR. DIETRICH: Thank you very much.
 17 CHAIRMAN HANSON: Dakota Turkey
 18 Growers.
 19 MS. POLLMAN ROGERS: Good afternoon,
 20 members of the Commission. The thought occurred to
 21 me as I was coming up here no matter how many times
 22 one takes this position, whether it's in the
 23 Legislature or in front of the body like yourself,
 24 you still sort of feel like you're in a hot spot.
 25 I apologize for being late getting here. I

1 got tied up in a meeting, and as I was leaving they
 2 had some questions about interpretation of bylaws
 3 which I had to stop and clarify for them. I
 4 appreciate your indulgence in waiting for me today.
 5 My name is Darla Pollman Rogers, for the
 6 record. I am the attorney for Dakota Turkey
 7 Growers, and I will probably refer to them
 8 affectionately as DTG. That's how we refer to
 9 them. And I have also filed a Notice of Appearance
 10 for Dakota Energy in this case. They joined in the
 11 initial Petition with an Affidavit of Joinder and
 12 their interests are similar in the case.
 13 The issue before the Commission today is
 14 NorthWestern's Motion for Summary Disposition. DTG
 15 would urge the Commission to deny that Motion and
 16 essentially for two reasons. The first reason is
 17 that the issue of new location, which is raised in
 18 NorthWestern's Petition, is based on an analysis
 19 and determination of facts. And since that is the
 20 case we do not believe under the rules of the
 21 Commission and also under the rules of South Dakota
 22 Law that it is appropriate for summary disposition.
 23 We further believe that if there is going to
 24 be a summary disposition, the party moving for it
 25 is entitled to a judgment on the merits as a matter

1 of law. In this case I do not believe that
 2 NorthWestern has met that burden and, in fact, if
 3 there's going to be an entitlement to judgment on
 4 the merits as a matter of law, it would weigh on
 5 the side of Dakota Turkey, DTG.
 6 Let's look, first of all, at the factual
 7 distinction if we could. In this case the facts as
 8 to a new customer appear not to be in dispute. In
 9 fact, NorthWestern admitted that. The facts as a
 10 large load also do not appear to be in dispute at
 11 least at this juncture.
 12 The facts as to a new location or the
 13 interpretation of the facts to arrive at the
 14 conclusion of what constitutes a new location are
 15 disputed. And if you look at the Affidavits that
 16 have been filed, you have to look at exactly what
 17 facts are in dispute.
 18 The Affidavit of Jay Morris states that
 19 NorthWestern Public Service has served this
 20 location, and then he refers to the entire location
 21 on the map. In the Affidavit of Jeffrey Decker he
 22 states that the entire location was occupied by
 23 their family since 1997. Now there's approximately
 24 122 acres in that location.
 25 The Affidavit of Ken Rutledge says the

1 facility is located on a portion of the 122 acres.
 2 And, in fact, according to his Affidavit the site
 3 where the facility is being located is bare pasture
 4 land. It's on the southeast corner as opposed to
 5 the farm site was on the northeast corner.
 6 So those are factual disputes, and they are
 7 important in your consideration of what constitutes
 8 a new location because it's -- I mean, I'm having a
 9 hard time understanding how a family could occupy
 10 an entire 122 acres. I don't believe that's
 11 possible. And I don't think that that's what the
 12 facts have established. And I also don't believe
 13 that the facility that DTG is going to construct is
 14 going to occupy the entire 122 acres. So those
 15 factual differences are important in your
 16 consideration.
 17 And I believe because you do need to consider
 18 all of the facts that have been submitted to date,
 19 and as further facts come in in this case I do not
 20 believe a Summary of Disposition Motion is
 21 appropriate.
 22 In fact, NorthWestern would not, I don't
 23 think, dispute that because in NorthWestern's
 24 Motion for Summary Disposition they asked, first of
 25 all, that you dismiss upon the information filed by

1 NorthWestern Public Service or in the alternative
 2 if the facts filed herewith are contested by DTG,
 3 the Commission should schedule an evidentiary
 4 hearing.

5 The facts as submitted by NorthWestern are
 6 disputed by DTG in the Affidavit in everything that
 7 has been filed to date, and, therefore, we don't
 8 believe that a Summary Disposition here is
 9 appropriate for that reason.

10 But the second reason to deny a Motion for
 11 Summary Judgment is that has the moving party shown
 12 that it is entitled to judgment on the merits as a
 13 matter of law? And we would submit that, no, DTG
 14 has not done that.

15 NorthWestern is asking you to interpret new
 16 location in a very unique manner, in my opinion,
 17 and I think that it is contrary to the basic words
 18 of the statute. Like Mr. Dietrich, I will be
 19 referring to the statutory code sections as
 20 Section 56 and Section 42 for ease of reference.
 21 But, in essence, I think it comes down to this:
 22 You have a plat of land, whether it's this plat or
 23 the 99 versus 100 acres, whatever it is. You have
 24 a piece of land. And you have -- it's in someone's
 25 assigned service area because all the land is.

1 There's another distinction here, and that is
 2 DTG did not displace the current customer. And I
 3 think that was implied in the other argument. The
 4 Deckers sold the land to the City. The City then
 5 sold it to the development corporation, and that's
 6 who DTG acquired the land from. So it's not a
 7 situation where DTG as a new customer comes in and
 8 displaces the current occupant. That's not what
 9 happened here. It went through several changes of
 10 hands. So when actually DTG acquired it Deckers
 11 didn't own that land anymore. They had already
 12 conveyed it to someone else, and I'm sure they did
 13 so because it was very financially advantageous for
 14 them to do so.

15 The only way I believe to interpret new
 16 location under Section 56 in a manner that makes
 17 sense and that supports the true purpose of the
 18 large load exception is to define location from the
 19 perspective of the new customer because that's what
 20 the statute says. It doesn't say new customers at
 21 a new location. It says new customers at new
 22 locations which develop after March 21, 1975. Then
 23 it goes on to say with a large load.

24 That's exactly what we have here with Dakota
 25 Turkey. DTG is a new customer. They have not

1 Now the question becomes if the current
 2 provider is providing service to one piece of that
 3 entire location to one point then there could never
 4 be a new location on that piece of land under
 5 Section 56. I do not believe that that is the
 6 intent of that law. If it doesn't make the statute
 7 meaningless, it certainly limits it to a point that
 8 it is really hard to interpret, and it makes it a
 9 not very reasonable application.

10 We could all sit here and speculate how we
 11 could have crafted this statute to be a little bit
 12 clearer. The statute does not state, for example,
 13 that new customers at new locations never served by
 14 the current utility. It doesn't say that. Or new
 15 customers at a new location that is bare ground,
 16 although even if it said that, Dakota Turkey would
 17 fit into that category.

18 But that is what NorthWestern is arguing here.
 19 So if, for example, DTG had caused this property to
 20 be replatted in such a way that the Decker farm
 21 site, the old Decker farm site was excluded, would
 22 we be here today on this Motion? If they go out
 23 now and sell off that piece of property, would we
 24 be here? I don't think that that's the intent of
 25 the statute.

1 previously been served by NorthWestern. To my
 2 knowledge they haven't been served by Dakota Energy
 3 or anyone else. They are building a new site from
 4 the ground up at a new location. This site, which
 5 they have acquired and which is now a brand new
 6 place and they're building it on bare ground from
 7 the ground up, that's exactly what's contemplated
 8 here at new locations which develop after
 9 March 21, 1975. They're developing a new location.
 10 The load -- they exceed the load requirement, the
 11 2000 kilowatt requirement in this statute.

12 All of those factors are met by DTG. DTG was
 13 not located at this site prior to starting the
 14 property. It acquired this property for the
 15 purposes of constructing a plant at this new
 16 facility. DTG followed all of the steps of a
 17 person or entity that is moving to a new location.
 18 They acquired title from the current owner, which
 19 happened to be the City and then the development
 20 corporation. They caused it to be replatted. They
 21 started the construction process. Those are all
 22 the indices of a new location. That is exactly
 23 what is meant by new location under Section 56.

24 What the statute provides is in those
 25 circumstances then the new customer is not

1 obligated to take service from the utility having
2 the assigned service area. And, again, that's
3 talking about the assigned service area. I think
4 you need to read the whole statute and what is
5 accorded a new large load customer in this section.

6 Furthermore, even if you accept NorthWestern's
7 strained interpretation under Section 56, you need
8 to look at the specific facts in the case, and in
9 this case they negate the argument because the site
10 is not the same site as the farm. And I believe
11 also in a case law cited by NorthWestern the
12 replatting issue is significant.

13 I do not believe that case law in South Dakota
14 supports NorthWestern's argument either. One of
15 the cases cited in my brief was what I call the Hub
16 City case. It was in the matter of NorthWestern.
17 And I think that case really supports DTG's
18 interpretation of the statute. You have to recall
19 that in the original Petition filed with this
20 Commission, not specifically this Commission but
21 with the Commission at the time, and Northwest
22 intervened and they had a full hearing on it, that
23 Petition was granted. There was a new customer.

24 It was a division at a new location that was
25 actually an add on to a manufacturing plant there

1 with a large load. It was a foundry. And this
2 Commission allowed that new customer at that new
3 location with that large load facility to choose
4 its provider.

5 Now the actual later Supreme Court case was
6 whether that choice could be reversed. But in the
7 initial Petition that's the exact issue that you
8 looked at and that is controlling law in this case.

9 The most -- obviously the most significant
10 change in the status of case law is the Black Hills
11 case that we have talked about today. I would
12 submit that that case is not controlling in the
13 current case. I believe that there are important
14 legal and factual distinctions between that case
15 and this case. Probably the most significant is
16 the issue presented to the Court.

17 That case did not at all involve Section 56.
18 It was not an interpretation of 56. They were
19 talking about the same customer, the same location.
20 Those are important factual distinctions. I
21 believe that -- and the case also was looking at
22 again just location as opposed to the words in
23 Section 56 are "new location". It's new.

24 We believe that the other factual distinctions
25 that we have pointed out also apply in this case.

1 I think that actually Black Hills tried to get the
2 Supreme Court to go farther in its ruling and, in
3 fact, to go all the way to the point of saying any
4 customer in that area would not be -- Black Hills
5 would be entitled to serve that customer. But
6 remember the Court specifically declined to find
7 that holding. They did not make that ruling. They
8 did not go so far under an interpretation of
9 Section 42 to make that finding.

10 This is an interpretation of Section 56, and
11 for sure there is not that -- they did not go that
12 far to make a finding in this case, which is,
13 again, a different factual and statutory
14 interpretation.

15 I believe that the other cases that we cited
16 in our brief, even though they are from another
17 jurisdiction, provide much more guidance because
18 they are dealing with the same issues that we have
19 here. You have a farm site. That farm site is no
20 longer there. You have a new customer coming onto
21 that location. That is a new customer at a new
22 location, regardless of the prior owner.

23 So we believe that the Commission in this
24 case -- and we would urge you to deny the Motion,
25 first of all, because of the factual disputes

1 between the parties and, second of all, because DTG
2 has met the statutory requirements of a new
3 customer at a new location with a large load under
4 any interpretation of the facts and the law.
5 NorthWestern is not entitled to judgment on the
6 merits as a matter of law in this case.

7 I will try to answer any questions. Thank
8 you.

9 CHAIRMAN HANSON: Thank you,
10 Ms. Rogers. You stated during your testimony that
11 the property was not acquired from the Deckers,
12 that there was a number of changes of ownership
13 that took place.

14 Didn't NorthWestern continue to provide
15 electricity, including a three-phase service for
16 the construction of the facility? So haven't they
17 in essence -- regardless of the changing of hands,
18 haven't they continued to provide electricity
19 throughout the entire period of time?

20 MS. POLLMAN ROGERS: To my knowledge
21 they are providing electricity to the construction
22 site, but they are entitled to do that because the
23 large load is not up and running until the facility
24 has actually started running and is, in fact, a
25 large load.

1 CHAIRMAN HANSON: But they have
 2 continued serving this particular location.
 3 MS. POLLMAN ROGERS: Yeah. I don't
 4 know whether it's continuous but, I mean, whether
 5 there was any break in there, I guess I don't know
 6 that for sure.
 7 CHAIRMAN HANSON: Okay. How can
 8 this be a service to a new location, not
 9 withstanding your arguments you've articulated here
 10 today, if, in fact, NorthWestern still provides
 11 electricity to the location?
 12 MS. POLLMAN ROGERS: Because under
 13 Section 56 when you have a new customer coming into
 14 a new location with a large load, that new customer
 15 is not obligated to take service from the electric
 16 utility that has that assigned service area.
 17 That's the exception that's granted to the
 18 exclusive service rights of the territorial laws.
 19 CHAIRMAN HANSON: The location is
 20 new to the customer, but it's not new to the
 21 provider, the electrical provider.
 22 MS. POLLMAN ROGERS: The logical
 23 explanation of that is there would be no new
 24 location for that electric provider unless it was
 25 just a bare ground so it would be all right to

1 locate anywhere but there.
 2 CHAIRMAN HANSON: Exactly.
 3 MS. POLLMAN ROGERS: So you want a
 4 developer to come in and sell off that one piece or
 5 not acquire it or checkerboard acquire it?
 6 CHAIRMAN HANSON: That's not what I
 7 want. It's what I'm asking.
 8 MS. POLLMAN ROGERS: Yes. I mean
 9 that would be -- yes.
 10 CHAIRMAN HANSON: Okay. So if they
 11 were to locate on half of that property, as opposed
 12 to the entire property, would your argument be
 13 different?
 14 MS. POLLMAN ROGERS: No. I believe
 15 they are a new customer at a new location.
 16 CHAIRMAN HANSON: Thank you.
 17 COMMISSIONER JOHNSON: Ms. Rogers,
 18 really you're asking the Commission to interpret
 19 new customer, new location for that customer.
 20 MS. POLLMAN ROGERS: That's correct.
 21 COMMISSIONER JOHNSON: Wouldn't the
 22 statute be the same if it just said a new customer
 23 at a location? I mean, you're basically asking the
 24 Commission to act as though the word "new" as
 25 regards to location shouldn't be there, doesn't

1 matter.
 2 MS. POLLMAN ROGERS: I believe that
 3 the examples that we've discussed before would be
 4 the restrictions on the application of this
 5 particular statutory section. If I went in and
 6 purchased the Decker farm site, I would not be
 7 entitled to choose my provider unless I had a large
 8 load, even though I would be a new customer in a
 9 new location, but I wouldn't fit under this
 10 statutory section.
 11 If Deckers would have expanded their site and
 12 made it into a large load, then I think that's a
 13 closer question and that becomes --
 14 COMMISSIONER JOHNSON: They wouldn't
 15 have been a new customer.
 16 MS. POLLMAN ROGERS: They wouldn't
 17 have been a new customer, which is similar to the
 18 Black Hills case.
 19 COMMISSIONER JOHNSON: I guess what
 20 I'm asking, is there any difference between your
 21 interpretation of new customer at a new location
 22 and the statute that would say just new customers
 23 at a location? Would there be any difference?
 24 I guess it seems to me -- I'll tell you where
 25 I'm coming from. It seems to me you're arguing the

1 word "new" in front of location doesn't mean
 2 anything. And would the Legislature have done
 3 that? Would it have put in an adjective that
 4 wouldn't have any meaning?
 5 MS. POLLMAN ROGERS: I think
 6 actually what the statute says is new locations
 7 which develop. I think this statute was intended
 8 for the development of plants or sites such as
 9 this, and so I think you have to read it all
 10 together. And I think it modifies exactly -- I
 11 mean, it addresses exactly this type of situation.
 12 COMMISSIONER JOHNSON: You're also
 13 asking the Commission to interpret location in 42
 14 different from location in 56. Why would the
 15 Legislature have used those two words if they
 16 didn't want them to mean the same thing?
 17 MS. POLLMAN ROGERS: I'm not sure
 18 that I am asking the Commission to interpret them
 19 differently. I do not believe that their -- the
 20 Supreme Court's interpretation in the Black Hills
 21 case is necessarily contradictory to what we're
 22 asking for in 56. I think there's a factual
 23 distinction in the sense of the way you consider
 24 it. But I don't think that the two are necessarily
 25 contradictory.

1 COMMISSIONER JOHNSON: Okay. Thank
 2 you.
 3 CHAIRMAN HANSON: John.
 4 MR. SMITH: Just quickly, Darla. On
 5 the map that's behind you there that reflects the
 6 legal description and then Al -- NorthWestern's,
 7 excuse me, Motion, how does that differ from --
 8 does that differ from what's in the Petition, the
 9 Amended Petition?
 10 MS. POLLMAN ROGERS: The Amended
 11 Petition did not contain the exact location
 12 description, but in our -- either in our responses
 13 in Interrogatories or our Affidavit I believe it's
 14 the same. I'm not sure if I compared word for
 15 word, but I believe it's the same location as --
 16 MR. SMITH: So there's no dispute
 17 that that description that's in the Motion and that
 18 map there do describe the property we're talking
 19 about.
 20 MS. POLLMAN ROGERS: I believe that
 21 it describes the property in question, yes.
 22 MR. SMITH: Okay. Thank you.
 23 That's all.
 24 CHAIRMAN HANSON: Any other
 25 questions?

1 VICE CHAIRMAN SAHR: Well, I don't
 2 know if it would be a question but a question about
 3 new customer at new location. I think in your
 4 argument you do have new customer at new location.
 5 You're using that entire phrase. Because if
 6 someone came in and just bought the house, I don't
 7 think we'd be sitting here today having this
 8 discussion.
 9 In this case it is -- we're not just talking
 10 about the northeast corner. I mean, we're talking
 11 about a different piece of a parcel of land. And
 12 so I do think your argument is using both new
 13 location and new customer. That's my understanding
 14 of it.
 15 MS. POLLMAN ROGERS: That's what
 16 I've attempted to do, yes. Thank you.
 17 MR. SMITH: And if I also
 18 understand, in your view at least that phrase
 19 "which develops" is a distinction between this
 20 particular statute and Section 42, the use of the
 21 word "location" in Section 42.
 22 MS. POLLMAN ROGERS: I believe that
 23 there is a distinction there, yes.
 24 CHAIRMAN HANSON: Any other
 25 questions? If not -- did you have anything, Karen?

1 MS. CREMER: I do.
 2 CHAIRMAN HANSON: Excuse me.
 3 Ms. Cremer.
 4 MS. CREMER: I do. Thank you. Good
 5 afternoon. Karen Cremer from staff. Like all of
 6 you, I have read the pleadings and sat here this
 7 afternoon listening to the arguments of the parties
 8 and, you know, basically is NorthWestern correct
 9 that there is no genuine issue of fact and they're
 10 entitled to the grant of the Motion for Summary
 11 Disposition, or are the disputed facts raised by
 12 DTG -- you know, could they be termed as merely red
 13 herrings or are they the type of issues that need
 14 to be explored through the hearing process thereby
 15 ensuring that due process has been served.
 16 I can't really answer that for you because if
 17 the answer were that obvious, we wouldn't be here
 18 this afternoon. The issue falls into a gray area.
 19 Without a doubt the Territorial Act was enacted to
 20 eliminate duplication and wasteful spending in all
 21 segments of the electric utility industry. To
 22 accomplish that utilities were given assigned
 23 service areas, which has been referred to as
 24 Section 42. However, the Act also provided for
 25 exceptions to these assigned service areas, and one

1 of those exceptions is Section 56 which is intended
 2 for large load customers to choose their provider.
 3 Staff believes that a company such as DTG is
 4 exactly the type of customers that the drafters had
 5 in mind when they enacted this legislation. They
 6 are a large load customer that would be a boon to
 7 either of these utilities. They should be allowed
 8 to have the two companies bid for their services
 9 and then whichever one gives them the best deal in
 10 DTG's mind should be the one allowed to serve them.
 11 The problem of course here is what is a new
 12 customer and a new location. And the question came
 13 up is that two criteria or is that one.
 14 And I think someone used the example earlier,
 15 and I think that's a very good example. I think
 16 the purpose of saying a new customer in a new
 17 location is so that a company could not grow so big
 18 that they merely -- and then they decide, well, I
 19 don't really like the rates of my present utility,
 20 I think I'll change my name, therefore I am now a
 21 new customer but you don't go to a new location. I
 22 don't think that's what the statute had in mind.
 23 And so I think they threw in the term "new
 24 location" to avoid that very situation.
 25 Here I think everyone agrees DTG is without a

1 doubt a new customer. It's also a new location if
2 you're DTG. In NorthWestern's mind, you know, it's
3 location. They are not a new location. I think if
4 you believe or buy into NorthWestern's position
5 that's a very narrow reading of the statute, making
6 it practically meaningless.

7 Staff believes that the legislative grant of
8 essentially monopoly privileges to the electric
9 utilities was for the promotion of the public
10 interest and not for the benefit of the utilities.
11 Therefore, staff's position is that this is an
12 exception to 42, that DTG does meet the threshold
13 of a new large load customer in a new location and
14 that the Motion should not be granted.

15 Thank you.

16 CHAIRMAN HANSON: Thank you. Any
17 questions?

18 Seeing none, Mr. Dietrich, we will give you an
19 opportunity to attempt to refute any information or
20 provide any clarification that needs to be done.

21 MR. DIETRICH: Okay. I guess I'd
22 just like to make two small points. First of all,
23 with regard to genuine issue of fact, I think the
24 parties have essentially in their Affidavits now
25 and with the concessions that we make for the

1 purpose of this Motion said exactly the same thing.
2 The footprint of the home of the Deckers is not
3 exactly the same as the footprint of the building
4 that Dakota Turkey is going to construct. It is
5 our position that that doesn't necessarily make it
6 a new location.

7 And, secondly, I think essentially what staff
8 and DTG are saying is providing this requirement
9 that it must be an area not served before renders
10 56 meaningless, I disagree with. I think we have
11 to read Section 42 and Section 56, not either of
12 which trumps the other, but Section 56 provides an
13 exception under narrowly defined terms, and this
14 situation doesn't fit those narrowly defined terms.

15 And I think these two sections can be read in
16 harmony to give full value to the Section 42
17 assigned service rights and the recognition of the
18 use of a facilities already in place and the
19 assigned service lines and give effect to the new
20 large load customer exception in those
21 circumstances where the customer is seeking service
22 in a new area.

23 And so, you know, I think it does not destroy
24 this -- this is the correct interpretation. It
25 does not destroy the use of Section 56. It narrows

1 it to situations where service is not already
2 provided.

3 Thank you.

4 CHAIRMAN HANSON: Thank you very
5 much, Mr. Dietrich. Are there any questions?

6 If not, the Commission is going to take a
7 10-minute and hopefully less than 10-minute
8 executive meeting. We will go off the record at
9 this time.

10 VICE CHAIRMAN SAHR: We should
11 probably have a Motion for that. I would move that
12 we go into executive session.

13 COMMISSIONER JOHNSON: Second.

14 CHAIRMAN HANSON: I concur.

15 (A short recess is taken at which time the
16 Commission meets in executive session)

17 CHAIRMAN HANSON: I have a Motion to
18 read. In the matter of ELO4-032, Petition for
19 electrical service by Dakota Turkey Growers to have
20 Dakota Energy Cooperative assigned as its electric
21 provider in the service area of NorthWestern
22 Energy, a Motion: I move that we deny
23 NorthWestern's Motion for Summary Disposition based
24 upon the status of the record as it stands today
25 and the Affidavits, briefs, and arguments of the

1 parties. I do not feel that we can rule as a
2 matter of law that there is no genuine issue of
3 material facts regarding Dakota Energy's right to
4 serve the facility. It seems that Northwestern's
5 construction of the phrase "new location" in
6 SDCL 49-34A-56 simply does not reflect what seems
7 to be the clear intent of the statute. It could be
8 that after hearing all of the evidence in the case
9 my opinion would change, and NorthWestern is free
10 to present argument at that time as to why we
11 should rule in its favor.

12 At this time, however, I am not comfortable
13 with deciding this case on anything less than a
14 full record after hearing. That's the Motion.

15 VICE CHAIRMAN SAHR: And I will
16 second.

17 COMMISSIONER JOHNSON: I'll concur.

18 CHAIRMAN HANSON: The Motion
19 carries. That concludes this hearing. Thank you
20 all very much for your attendance.

21 (The hearing concluded at 4 o'clock p.m.)
22
23
24
25

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF HUGHES)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

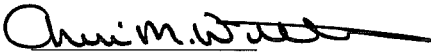
8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 9th day of
11 February 2005, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 16th day
14 of February 2005.

15

16

17



18 Cheri McComsey Wittler,
19 Notary Public and
Registered Professional Reporter

20

21

22

23

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25

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