

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

IN THE MATTER OF THE PETITION OF) MONTANA-DAKOTA UTILITIES CO. FOR) APPROVAL TO PROVIDE ELECTRICAL) SERVICE FOR THE NEW NORTH CENTRAL) FARMERS ELEVATOR TO BE LOCATED) NEAR BOWDLE, SOUTH DAKOTA)	FINAL DECISION AND ORDER GRANTING SUMMARY DISPOSITION AND NOTICE OF DECISION EL06-011
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On April 12, 2006, the Commission received a Petition for Large Load Electrical Service (Petition) from Montana-Dakota Utilities Co, (MDU) for the right to provide electrical service to a new grain handling/multi-unit train loading facility to be operated by North Central Farmers Elevator (North Central) near Bowdle in Edmunds County, South Dakota. The Petition requests that the Public Utilities Commission assign MDU as the supplier of electrical service to the North Central facility. The Petition states that the site of the proposed facility is within the assigned service-area of FEM Electric Association, Inc. (FEM), that it will require electrical service of substantially more than a contracted minimum demand of 2,000 kilowatts and that MDU is best suited to provide such electrical service. On April 14, 2006, the Commission electronically transmitted notice of the filing and the intervention deadline of April 27, 2006, to interested individuals and entities. On May 1, 2006, the Commission received Petitions to Intervene from North Central and FEM. On May 15, 2006, the Commission received a Petition to Intervene from South Dakota Rural Electric Association (SDREA). At a regularly scheduled meeting of May 23, 2006, the Commission voted unanimously to grant the interventions, and on June 5, 2006, the Commission issued an Order Granting Intervention to North Central, FEM and SDREA.

On June 22, 2006, FEM filed a Motion for Summary Disposition pursuant to SDCL 1-26-18 (Motion), a Memorandum in Support of Motion for Summary Disposition and Affidavit of Keith Hainy in support of the Motion for Summary Disposition. On June 29, 2006, North Central filed a Joinder in Motion for Summary Disposition. On July 14, 2006, the Commission received Staff's Response to FEM's Motion for Summary Disposition. On July 17, 2006, MDU filed a Brief Opposing Motion for Summary Disposition and the Affidavits of Bruce Brekke and Larry Oswald. On August 8, 2006, FEM filed a Reply Memorandum in Response to MDU's Brief Opposing FEM's Motion for Summary Disposition.

The Commission has jurisdiction in this matter pursuant to SDCL Chapter 49-34A, particularly 49-34A-56.

FEM's Motion for Summary Disposition came on for hearing before the Commission at its regular meeting on August 8, 2006. The Commission voted unanimously to grant the motion.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto, the affidavits filed by the parties and the oral arguments of the parties at the hearing, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

The Commission finds that there is no genuine issue of fact regarding the following facts and accordingly makes the following findings of fact:

1. North Central is planning to build a new grain handling facility near Bowdle, South Dakota (Facility). The Facility will be located in the assigned electric service territory of FEM. Hainy Aff., ¶ 1.

2. North Central is a current customer of FEM, as is North Central's grain handling plant located in Craven, South Dakota. Hainy Aff., ¶ 2.

3. MDU's Petition does not allege that the location where the Facility will be located is a location where it was serving a customer as of March 21, 1975.

4. As a current FEM customer, it is North Central's desire to expand its current business relationship with FEM by having FEM provide electric service to the Facility. Hainy Aff., ¶ 3.

5. North Central entered into an agreement for electrical services to the Facility on or about April 13, 2006. Hainy Aff., ¶ 5.

6. North Central's clear and stated preference is to have FEM as its electric service provider for the Facility. North Central's execution of this Electric Service Agreement evidences this preference. Hainy Aff., ¶ 8.

7. North Central did not petition the Commission for approval of an alternative electric service provider pursuant to SDCL 49-34A-56. Hainy Aff., ¶ 8. North Central did not file a complaint pursuant to SDCL 49-34A-59 alleging that FEM will not be able to provide adequate electric service to it under SDCL 49-34A-58.

CONCLUSIONS OF LAW

1. Except in a few limited circumstances, under the South Dakota Territorial Integrity Act, codified as SDCL 49-34A-1(1), 49-34A-42 through 49-34A-44, and 49-34A-48 through 49-34A-59, ". . . each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area." SDCL 49-34A-42.

2. The Petition does not allege that MDU was providing service to the location of the Facility as of March 21, 1975, and MDU is therefore not afforded the right under this provision to provide electric service to the facility.

3. The Facility will be located in the assigned service area of FEM, and FEM accordingly has the exclusive right to provide service at such location unless one of the exceptions to the exclusive right to serve is demonstrated. *Matter of Northwestern Public Service Co. with Regard to Electric Service to Hub City*, 1997 SD 35, 560 N.W.2d 925 (1997) (*Hub City*).

4. The exception asserted by MDU which it argues would, if proven, permit it to provide service to the Facility is SDCL 49-34A-56. MDU argues that it can demonstrate that it will better meet five of the six factors set forth in SDCL 49-34A-56 other than "(5) The preference of the customer. . . ." and that this accordingly will afford it the right to serve the Facility.

5. The flaw in MDU's position is that the conditional factors in SDCL 49-34A-56 only come under consideration if the fundamental prerequisites of the statute set forth in the body of the statute are first fulfilled. That is not the case here. The essential language of the statute provides: "[N]ew customers at new locations. . . shall not be obligated to take electric service from the electric utility having the assigned service area where the customer is located if . . ." the Commission finds satisfactory compliance with the six factors. We do not reach the conditional "if" factors in this case because relief from the customer's "obligation" to take service from the assigned utility has not been requested by the customer, North Central.

6. MDU has no standing to assert legal rights or contest legal obligations on North Central's behalf, and MDU has no standing to assert North Central's right under SDCL 49-34A-56 to relief from its obligation to take service for a new facility from the assigned service provider.

7. MDU essentially argues that if a utility other than the assigned utility can demonstrate a superior performance of the conditional factors, SDCL 49-34A-56 then obligates the customer to take its service from such non-assigned utility. This position is unsupported by either logic or precedent and turns the statute on its head. In *Hub City*, the Court succinctly stated: "The plain language of the statute indicates the legislature intended it to do nothing more than provide a new large load customer at a new location an option to be exercised prior to receipt of service." 560 N.W.2d at 928.

8. SDCL 49-34A-56 does not afford a non-assigned utility the right or power to compel a customer to take service from such non-assigned utility.

9. Based upon the Commission's Findings of Fact concerning which there are no genuine issues, the Commission concludes that SDCL 49-34A-56 does not afford MDU a right to serve the Facility, that FEM's Motion for Summary Disposition should be granted and that MDU's Petition should be denied.

It is therefore

ORDERED, that FEM's Motion for Summary Disposition is granted and that MDU's Petition is denied.

NOTICE OF DECISION

PLEASE TAKE NOTICE that this Final Decision and Order Granting Summary Disposition and Notice of Decision (Decision) constitutes a final decision and order in this case. Pursuant to SDCL 1-26-32, this Decision will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Decision. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Decision to the appropriate Circuit Court by serving and filing notice of appeal of this Decision in the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 24th day of August, 2006.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: *Aileen Kalbo*

Date: 8/25/06

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Dustin M. Johnson
DUSTIN M. JOHNSON, Commissioner

Gary Hanson
GARY HANSON, Commissioner