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June 11, 2007

HAND DELIVERED

Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, South Dakota 57501

RE: **MONTANA-DAKOTA UTILITIES COMPANY; NORTH CENTRAL FARMERS ELEVATOR NEAR BOWDLE, SOUTH DAKOTA**
Supreme Court Appeal #24448
Our file: 0069

Dear Clerk Jameson-Fergel:

Accompanying this letter are original and 15 copies of Appellant's Reply Brief in the above-entitled matter. Please file the enclosure.

With a copy of this letter, I am sending two copies of the brief to each of counsel of record.

Thank you very much.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY:
DAG:mw
Enclosures
cc/enc: John J. Smith
Carlyle Richards
Darla Pollman Rogers

IN THE SUPREME COURT
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

* * * * *

Appeal # 24448

* * * * *

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * * *

HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING

* * * * *

REPLY BRIEF OF APPELLANT

* * * * *

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NOTICE OF APPEAL FILED FEBRUARY 21, 2007.

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IN THE SUPREME COURT
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

24448

REFERENCES

Petitioner and Appellant, Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc., will be referred to as "Montana-Dakota." Intervenor North Central Farmers Elevator will be referred to as "North Central." Intervenor FEM Electric Association, Inc., will be referred to as "FEM." The Public Utilities Commission of the State of South Dakota will be referred to as "PUC" or "Commission."

References to the Clerk's record will be by the letter "R" followed by the page number to which reference is made in the Clerk's Index. References to the administrative record will be made by the letters "AR" followed by the page number to which reference is made in the administrative record. References to the PUC transcript of proceedings will be by the letters "PUCT" followed by the page number of the administrative record to which reference is made. References to the transcript of oral argument before the Circuit Court will be by the letters "TOA" followed by the page number of the transcript to which reference is made.

FACTS

Montana-Dakota believes that the facts relevant to the issues in this appeal have been thoroughly covered by the parties, so as not to require any further recitation of the facts in this reply brief.

ARGUMENT AND AUTHORITIES

Based upon the briefs and arguments of the parties, it appears that the Court is left with this seminal question: Does this application of the large load statute constitute a legislatively intended exception in the Territorial Act from the Prime Directive? The facts in this case before the Commission clearly raise this issue before the Court. The price of North Central's choice clearly contradicts the Prime Directive.

The Commission argues that ". . . the legislature intended 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," quoting from the *Hub City* case.[1] The context of the *Hub City* case had nothing to do with the statutory application of the large load statute. The large load statute was only incidentally involved in the *Hub City* case in that the territory had been previously assigned to the out-of-territory utility, NEC. The *Hub City* case dealt with the so-called retained right advocated by the Commission and NorthWestern Public Service. In that context, the quotation makes sense. However, neither the Commission nor the Court was faced with the factual situation presented by this case.

Under the interpretation of the statute urged by the Commission and FEM, the statute may only be invoked by the customer. Under this interpretation, the customer

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[1] *Matter of NorthWestern Public Service Co. with Regard to Electric Service to Hub City*, 1997 SD 35, 560 NW2d 925, 928. PUC brief, p. 9.

alone controls whether the out-of-service area utility will have an opportunity to serve that customer, subject to the six-factor analysis of the statute. In interpreting the statute we must presume that the legislature did not intend an absurdity. If this was the intent of the legislature, why was the customer's preference included in the six evaluative statutory factors by the legislature? The Commission speculates that this was to consider the customer's preference along with the other five system factors. In practical effect, however, the customer is entitled to retain his service with the incumbent utility by doing nothing, and select the non-incumbent utility by signing a petition. This construct is haphazard at best and does not honor the Prime Directive.

In its brief, page 6, the Commission correctly observes that the Territorial Act mentions only three exceptions to the exclusive area mandate of the Territorial Act. This of course is consistent with the circumstances establishing the need for the Act itself. Given the importance of the Prime Directive to the overall operation of the Act to produce the result intended by the legislature, the courts are called upon to preserve its initial structure and intent. As the Willrodt case expressed:

> The legislature presumably found that the elimination of duplication and wasteful spending in all segments of the electric industry would promote the public interest. The courts should not override that legislative conclusion if it can be supported on any reasonable ground.

Matter of Certain Territorial Electric Boundaries (Mitchell Area), 281 NW2d 65, 70 (SD 1979); (most often referred to as the Willrodt case).

Montana-Dakota submits that the Commission makes a fundamental error in analysis by contending at page 7 of its brief that it need not arrive at the six factors stated in SDCL § 49-34A-56 to decide the issues in this case, because the customer has not

requested a change. Yet, as mentioned in Montana-Dakota's initial brief, the grammar of the section carries analysis under the section to the six factors. That is, rather than "new customers at new locations . . . shall not be obligated" clearly and unambiguously identifying the class of persons whose "obligation" may be avoided by invoking this statute, the statute goes on to require by use of the pronoun "if" an analysis of the six factors.

The Commission sees this analysis of the statute as subjecting ". . . every new large load situation to a contest between the assigned and nonassigned utilities . . .."[2] In fact, an analysis of the scenarios which are possible under the statute shows that it is the Commission's view of the statute in this case which skews it beyond its original intent, not Montana-Dakota's:

1. **Large Load, Customer of Incumbent Utility Satisfied.** Under this scenario a large load customer is satisfied with its incumbent utility, does not see a need to invoke the statute and simply contracts with the incumbent utility to provide service. One could argue that in this circumstance the Prime Directive could be frustrated by the incumbent utility if the customer chose a remote location within its territory and the installation required the incumbent utility to construct expensive facilities to serve the customer. In point of fact, there is an implicit self-policing function in this situation where expense of infrastructure becomes uneconomic, whereby the incumbent utility can cede service to an out-of-territory utility through a contractual arrangement under SDCL

[2]PUC brief, page 8.

§ 49-34A-55.[3] A company seeking to remain profitable will act in its own economic best interests, and the Prime Directive is met.

2. **Large Load, Customer of Incumbent Utility Shops Prices and Selects Non-Incumbent Utility.** In this scenario, the customer chooses to shop prices with both the incumbent utility and with an out-of-territory utility. The customer obtains the best offer from both utilities and determines that the non-incumbent utility best meets its needs. The customer, many times with the non-incumbent utility joining, petitions the Commission for relief under the large load statute. The incumbent utility decides to contest the matter. The Commission holds a hearing, considers the six factors and determines that those factors, which for the most part address operational and cost-based factors, favor the non-incumbent utility. The Prime Directive is met.

3. **Large Load, Customer of Incumbent Utility Shops Prices and Selects Incumbent Utility.** In this scenario the customer again shops prices with an out-of-territory utility and the incumbent utility. After obtaining the best offer from both utilities, the customer selects the incumbent utility, and it is clear to both utilities that the factors in the large load statute favor the selection. Knowing that the Commission will rule in favor of the customer and the incumbent utility, the non-incumbent utility acts no further. The Prime Directive is met.

4. **Large Load, Customer Shops Prices and Selects Incumbent Utility at More Expense.** This situation presents the same scenario as paragraph 3 above, except

[3]See, In the Matter of the Petition for Electrical Service by Millennium Ethanol LLC to have Southeastern Electric Cooperative, Inc., assigned as its Electric Service Provider in the Service Area of Xcel Energy, Docket EL06-022.

that the expense to provide service is far greater for the incumbent utility than for the out-of-territory utility. It could be a situation where the customer location is in a remote portion of the incumbent utility's territory, but literally across the road from adequate facilities of the non-incumbent facility. The customer has shopped both utilities and received their best offers, presumably tailored to be attractive and at the best rate possible for the customer. Yet here under the Commission's view the customer's determination carries the day because the customer need not file a petition. Yet, the Prime Directive has been violated. Again, the question must be asked why the legislature placed customer choice in the six factors in the large load statute if it intended the customer to have a veto. As can be seen by the first three examples, the Prime Directive has been honored. Yet in this last example, the situation where the Prime Directive is arguably most at risk, customer choice really isn't relevant because the customer has not chosen to petition.

As can be seen from the foregoing, the operation of the large load statute under the possible scenarios which can be presented to the Commission does not reduce every situation to a contest between assigned and nonassigned utilities as suggested by the Commission. But the Commission's interpretation frustrates honoring the Prime Directive.

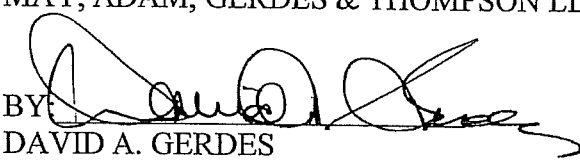
CONCLUSION

Given the overheated atmosphere which produced the Territorial Act, Montana-Dakota submits that the parties intended the Act to be interpreted according to the plain meaning of its provisions. It is submitted that the ordinary and best interpretation of the large load statute, which gives effect to every word in the statute, contemplates that in the

right circumstance a petition from a party with an economic interest in the outcome of a retail power purchase situation is necessary to give effect to all aspects of the large load statute. If the legislature had intended the customer to have a veto it could have clearly so stated. For this reason, Montana-Dakota urges the Court to reverse both the lower Court and the Commission and remand this case back to the Public Utilities Commission for hearing under a proper application of the large load statute.

Dated this 11th day of June, 2007.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of Appellant's Brief in the above-captioned action were duly served upon Appellees by mailing two true copies thereof by United States Mail, first class postage thereon prepaid, on the 11th day of June, 2007, to the following named persons at their last known post office addresses, to-wit:

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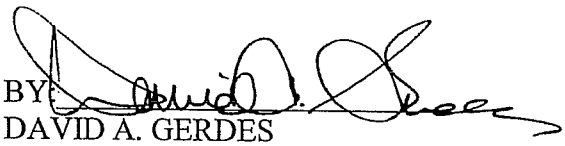
The undersigned further certifies that 15 copies of the Appellant's Reply Brief in the above-captioned action were hand delivered to Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol Avenue, Pierre, South Dakota, 57501, on the date above written.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
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CERTIFICATE OF COMPLIANCE

David A. Gerdes, attorney for Appellant, hereby certifies that the foregoing Appellant's Reply Brief complies with the type volume limitation imposed by the Court by Order. Proportionally spaced typeface Times New Roman has been used. Excluding the cover pages, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellant's Reply Brief contains 1884 words or 9982 characters and does not exceed 16 pages. Microsoft Word is the word processing software that has been used.

Dated this 11th day of June, 2007.

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