

## MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer  
PUD

FROM: Bill Binek

DATE: August 26, 2003

RE: Need for Certificates of Public Convenience and Necessity, Harvey to Rugby, Case No. PU-401-99-586 and Rugby to Canadian Border, Case No. PU-2280-00-200.

On July 17, 2003, the Director of the Commission's Public Utilities Division sent a letter to NSP and Otter Tail requesting that they provide the Commission with a written explanation why neither company applied for a certificate of Public convenience and Necessity (CPCN) prior to construction of the captioned transmission lines. Both companies filed timely responses to the request.

Otter Tail stated that it has not previously interpreted the Territorial Integrity Act (N.D.C.C. §§ 49-03-01 and 49-03-01.1 to require a CPCN for facilities unless they resulted in a change to a company's electric service territory. Otter Tail stated that it is in agreement with the legal memorandum submitted by NSP in response to the Commission's request.

NSP submitted a legal memorandum asserting that N.D.C.C. Chapter 49-03, as interpreted by the North Dakota Supreme Court, would require a CPCN for a new electric transmission facility constructed by a public utility to extend retail electric service outside of the limits of a municipality where it is authorized to provide service, but that those Supreme Court opinions indicate that the CPCN statute does not apply to an electric transmission facility constructed to improve regional reliability. NSP states that this interpretation is consistent with at least two prior Commission orders approving construction of electric transmission lines outside the NSP retail electric service territory for purposes of improved reliability where no party ever asserted that a CPCN was required.

The Supreme Court cases cited by NSP dealt strictly with disputes between a rural electric cooperative (REC) and an investor owned utility (IOU). NSP correctly points out that there are no North Dakota Supreme Court cases or other court opinions expressly ruling on the relationship between N.D.C.C. Chapter 49-03 and the construction of an electric transmission line by a public utility outside its retail service area for grid reliability, or for that matter, any purpose.

Public Service Commission Case No. 10,158 cited by NSP related to an "up-rating" of one line from 115kV to 230 kV. The Commission would likely have assumed that the existing transmission line was under a CPCN. Case No PU-400-88-122 cited

by NSP was another “up-rating” of an existing line from 115 kV to 230 kV using existing route and pole structures wherever possible. The Commission would likely have made the same assumptions as in Case No. 10,158.

NSP concludes from these above two Commission cases that the Commission has interpreted the North Dakota Century Code to require only a Corridor Certificate and/or Route Permit for new transmission projects that do not result in an extension of retail electric service by a public utility. NSP’s conclusion is wrong. On February 19, 1986, in Case No. 10,683, the Commission denied an Application of Montana-Dakota Utilities Co. (MDU) for a Certificate of Public Convenience and Necessity for the construction and operation of a 230 kV transmission line and associated facilities in McKenzie and Williams Counties, North Dakota. The issues in that case were: (1) whether public convenience and necessity will be served by the construction and operation of the proposed transmission line and associated facilities; and (2) whether Montana-Dakota is fit, willing and able to provide such service. MDU’s application was denied because MDU did not demonstrate that public convenience and necessity would be served in the foreseeable future by the construction and operation of the proposed 230 kV transmission line and associated facilities.

North Dakota law does not support the position of NSP and Otter Tail. N.D.C.C. §49-03-01.1 provides:

**49-03-01.1. Limitation on electric transmission and distribution lines, extensions and service by electric public utilities.** No electric public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation, nor shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, nor shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer.

N.D.C.C. §49-03-01.1 has distinct and separate provisions. The first part of the law provides a clear general statement that that no electric public utility is to begin construction or operation of a plant or system without first obtaining a CPCN. That first prohibition or requirement stands alone. Then the law provides “**nor** shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, **nor** shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, . . .” The first prohibition or requirement of the law is a general obligation covering all construction and operations of the public utility system and extensions of that system. The

subsequent requirements or prohibitions are specific requirements to protect territorial rights. Then N.D.C.C. §49-03-01.3 specifically provides that an electric public utility is not required to secure a CPCN for an extension of the electric distribution lines within the corporate limits of any municipality where it has lawfully commenced operations.

The word “nor” is key to the interpretation of N.D.C.C. §49-03-01.1. Webster’s Third New International Dictionary 1045 (1969) states that the word “nor” is “used to introduce the second member or second and each following member of a series of two or more items of which each is negated.” That is exactly what occurs in N.D.C.C. §49-03-01.1. That section of law contains a series of requirements or prohibitions, and each stands alone.

NSP states in its legal memorandum that applying this law to reliability upgrades could lead to absurd results. Under NSP’s theory, N.D.C.C. §49-03-01.1 would require no CPCN for construction of any transmission line except for those needed to extend retail electric service in rural areas. NSP’s interpretation would also lead to the conclusion that no CPCN is required for the construction by an electric public utility of a power plant or supporting facilities. Clearly that is not the purpose of N.D.C.C. Chapter 49-03 as is evidenced by the Commission’s decision in Case No. 10,683 cited previously. Staff suggests that an interpretation of the law following NSP’s theory would lead to disastrous results.