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July 22, 2014



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**MONTANA-DAKOTA UTILITIES CO.
MENARD INC. – BURLEIGH COUNTY, ND
PUBLIC CONVENIENCE & NECESSITY**

Please find enclosed for filing in the above named matter CEC's Brief in Opposition to MDU's Application. I have included one original and seven copies. An electronic copy of the document is also being sent to you.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Matthew H. Olson
bc

Enclosures

cc: Ordean "Lars" Nygren – Capital Electric Cooperative, Inc.
Daniel S. Kuntz – Montana-Dakota Utilities Co.
Wade C. Mann

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Montana-Dakota Utilities Co.
Menard, Inc. – Burleigh County
Public Convenience and Necessity**

Case No. PU-13-871

CAPITAL ELECTRIC COOPERATIVE, INC.'S
BRIEF IN OPPOSITION TO MDU'S APPLICATION

JULY 22, 2014

I. PRELIMINARY STATEMENT

This matter came before the North Dakota Public Service Commission (the "Commission") on application of Montana-Dakota Utilities Co. ("MDU") to serve a commercial electric load located in the NE1/4 of Section 33, Township 139 North, Range 77 West, Burleigh County, North Dakota ("Menard site"). This electric load would be provided to Menard, Inc. ("Menard"). The application for service was dated November 25, 2013

On December 18, 2013, the Commission issued a Notice of Opportunity for Hearing. A protest was filed by Capital Electric Cooperative, Inc. ("CEC"), of Bismarck, North Dakota. The Commission issued a Notice of Hearing dated February 26, 2014; the notice set forth the ten (10) factors that the Commission would consider. The hearing was held on May 2, 2014.

The Commission held three working sessions – May 30, June 12, and June 20, 2014. Before the June 20th working session, MDU requested oral arguments and CEC objected to MDU's request. The Commission granted MDU's request for oral arguments and requested briefs. On July 14, 2014, Administrative Law Judge Wade C. Mann issued a Notice of Oral Argument and Pre-Argument Order setting the parameters for the briefs and oral arguments.

The ten issues to be addressed under the TIA and this brief were set forth in the Notice of Hearing dated February 26, 2014. The issues to be considered are:

1. From whom do the customers prefer electric service?
2. What electric suppliers are operating in the general area?
3. What electric supply lines exist within at least a two-mile radius of the location to be served, and when were they constructed?
4. What customers are served by electric suppliers within at least a two-mile radius of the location to be served?
5. What are the differences, if any, between the electric suppliers available to serve the area with respect to reliability of service?
6. Which of the available electric suppliers will be able to serve the location in question more economically and still earn an adequate return on its investment?
7. Which supplier's extended electric service would best serve orderly and economic development of electric service in the general area?
8. Would approval of the applications result in wasteful duplication of investment or service?
9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?
10. Will service by either of the electric supplier in the area unreasonably interfere with the service or system of the other?

II. HISTORY OF THE TERRITORIAL INTEGRITY ACT

The history of the Territorial Integrity Act (herein "TIA") is important as the Commission decides this case. The North Dakota Supreme Court sums up the TIA as follows:

Our analysis focuses on the statutory framework for resolving electric service disputes under the Territorial Integrity Act.

In construing the Act, our duty is to ascertain the intent of the Legislature. *County of Stutsman v. State Historical Society*, 371 N.W.2d 321 (N.D.1985). Statutes must be construed as a whole to determine the legislative intent, and they must be harmonized, if possible, to give full force and effect to each provision. *Cass County Electric Coop., Inc. v. Northern States Power Co.*, 419 N.W.2d 181 (N.D.1988).

Before 1965, a rural electric cooperative was authorized to provide electric service in rural areas, *see* N.D.C.C. ch. 10–13, and an electric public utility could, without obtaining a

certificate of public convenience and necessity, extend its service into “territory contiguous to that already occupied by it and not receiving similar service from another utility, or electric cooperative.” 1959 N.D.Laws ch. 342, § 1. *See also* N.D.R.C. of 1943 § 49–0301 (1957 Supp.); *Cass County Electric Coop., Inc. v. Otter Tail Power Co.*, 93 N.W.2d 47 (N.D.1958); *Williams Electric Coop., Inc. v. Montana–Dakota Utilities Co.*, 79 N.W.2d 508 (N.D.1956). Under that law, the PSC generally did not have authority to consider an electric public utility's extension of service into a “contiguous” rural area, *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 417 (N.D.1969), and territorial disputes were usually resolved by the customer's preference. *Cass County Electric Coop., Inc. v. Otter Tail Power Co.*, *supra*.

In 1965 the Legislature enacted the Territorial Integrity Act, 1965 N.D.Laws ch. 319, to require an electric public utility to obtain a certificate of public convenience and necessity before extending electric service outside the corporate limits of a municipality. N.D.C.C. §§ 49–03–01 and 49–03–01.1. The Act was adopted at the request of the North Dakota Association of Rural Electric Cooperatives to provide “territorial protection” for rural electric cooperatives and to prevent public utilities from “pirating” rural areas. Prepared Testimony of Clarence Welander, Chairman of North Dakota Association of Rural Electric Cooperatives, February 25, 1965 Minutes of Senate Industry, Business and Labor Committee regarding House Bill 724. The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities. *Cass County Electric Coop., Inc. v. Northern States Power Co.*, 419 N.W.2d 181 (N.D.1988).

Under the Act, an electric public utility must secure a certificate of public convenience and necessity from the PSC before extending service to new customers outside the corporate limits of a municipality; however, rural electric cooperatives may extend service to new customers in rural areas without securing a certificate of public convenience and necessity from the PSC. *Cass County Electric Coop., Inc. v. Wold Properties, Inc.*, 249 N.W.2d 514 (N.D.1976); *Tri–County Electric Coop., Inc. v. Elkin*, 224 N.W.2d 785 (N.D.1974); *Montana–Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414 (N.D.1967). Although we have never said the Act gives rural electric cooperatives a preference for electric service in rural areas, it does allow cooperatives to serve customers in rural areas unless an electric public utility obtains a certificate of public convenience and necessity from the PSC. *Wold Properties, supra*; *Application of Otter Tail Power Co.*, *supra*.

As originally enacted, section 3 of the Act precluded the PSC from issuing a certificate of public convenience and necessity to an electric public utility to extend its service beyond the corporate limits of any municipality unless the rural electric cooperative nearest the proposed service area consented to the extension. 1965 N.D.Laws ch. 319, § 3. In *Johanneson, supra*, we held section 3 was unconstitutional, because it delegated legislative powers to cooperatives to determine who furnished electric service in rural areas. However, after explaining the differences between electric public utilities and rural electric cooperatives, we concluded there was a valid justification for the different treatment of public utilities and

cooperatives regarding regulation of service in rural areas. We therefore held the remainder of the Act did not unlawfully discriminate against public utilities and was constitutional. We also concluded that the unconstitutional provision, section 3, was severable from the remainder of the Act.

The Territorial Integrity Act therefore explicitly gives the PSC jurisdiction to hear and determine an electric public utility's application for a certificate of public convenience and necessity to extend service to areas outside the corporate limits of a municipality. However, the narrower issue in this case is not whether the PSC has such jurisdiction, but whether the Act requires a customer request for electric service from a public utility in order to invoke the PSC's jurisdiction.

In *Application of Otter Tail Power Co., supra*, we outlined criteria for the PSC to consider in rendering a decision on an electric public utility's application for a certificate of public convenience and necessity. In that case, a customer asked an electric public utility to provide service to a rural area, and the utility applied to the PSC for a certificate. We said customer preference for service by the electric public utility was not determinative of public convenience and necessity, but should be considered along with:

“the location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application and which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.” *Application of Otter Tail Power Co.*, 169 N.W.2d at 418.

Capital Elec. Co-op., Inc. v. Pub. Serv. Comm'n of State of N.D., 534 N.W.2d 587, 589-91 (N.D. 1995) (footnotes omitted). **The primary purpose of the TIA is “to keep to a minimum wasteful**

duplication of capital-intensive utility services and conflicts between suppliers of electricity.”

Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988) (**emphasis added**).

CEC will address each factor in turn. After the review of the factors, it is clear that the factors and the TIA dictate that CEC should prevail and the Commission should deny MDU's application.

III. TEN FACTORS

1. From whom do the customers prefer electric service?

“[C]ustomer preference, while a factor to be considered, is not controlling.” Cass County Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514, 521 (N.D. 1976). “The reason, of course, is that unregulated customer preference would result in a wasteful duplication of facilities which the Territorial Integrity Act was intended to minimize.” Id. “It is the Public convenience and necessity, after all, with which the Commission is concerned, not private preference.” Tri-County Elec. Coop. v. Elkin, 224 N.W.2d 785, 792 (N.D. 1974).

In October 2013, Menard requested electric service from CEC. Menard also requested service from MDU. At the hearing, Steve Manor (“Manor”) of Menard expressed his preference that MDU serve the Menard site because of the current annual savings that Menard would receive. Currently, MDU’s rates are lower than CEC’s rates resulting in annual savings. During the hearing, the Commission rightly pointed out that both MDU and CEC’s rates are subject to change and that there is no guarantee that MDU’s rates will be lower than CEC in the future.

This factor favors MDU, but this factor carries little weight because unregulated customer preference would result in the TIA being rendered meaningless. Id. The primary purpose of the TIA is “to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity.” Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988).

2. What electric suppliers are operating in the general area?

Both MDU and CEC operate in the general area. This factor favors neither MDU nor CEC.

3. What electric supply lines exist within at least a two-mile radius of the location to be served, and when were they constructed?

During one of the the working sessions, the Commission discussed that this factor is present so that the Commission can look at both electric supplier's system at the time of the requested service. It allows the Commission to freeze time and to make observations of the systems of each of the proposed suppliers at a certain time. This factor is especially important if one of the suppliers had made upgrades or extensions to its service after a customer request had been made or if one of the suppliers was providing temporary service, which has not occurred in this matter.

Both CEC and MDU have electric supply lines supply lines in the two-mile radius around the Menard site. Both have 41.6 kV transmission lines that parallel the interstate approximately 1 mile north of the Menard site – MDU's line being north of the interstate and CEC's line being closer because its transmission line is to the south of the interstate.

Currently, CEC's Menoken substation is able to serve the Menard site with no upgrade and, even with the new Menard load, CEC's Menoken substation will have the capacity to serve future growth in the areas served by the Menoken substation. Additionally, if CEC's Menoken substation goes down, CEC's Sterling substation would be able to serve part of the Menard site until the Menoken substation would come back on the grid. CEC testified that CEC's Sterling substation could be upgraded for a cost of \$40,000, which would result in total redundancy for the Menard site (i.e., both the Menoken and Sterling substation would each have the capacity to serve the entire

Menard load).

Currently, MDU's McKenzie substation is unable to serve the Menard site. MDU would need to upgrade its McKenzie substation, which would cost \$61,451; this cost does not include the cost for the transformer because MDU would utilize an old transformer from another location.¹ If MDU is given this load at the Menard site and upgrades its McKenzie substation and the McKenzie substation goes down, the Menard site will have no power because MDU has no alternate substation to feed the Menard site. MDU, with all of its proposed upgrades, will not have redundancy to the Menard site.

Currently, CEC has electric facilities (single phase) that surround and are directly adjacent to the Menard site on three sides – the electric services are immediately adjacent to the north, the west, and the south. CEC serves a customer just northeast of the Menard site, serves a customer directly west of the Menard site, and serves a railroad signal on the south side of the Menard site.

While CEC has facilities that surround the Menard site, MDU's electric facilities are approximately 1,800 feet from the Menard site. During the first working session, the Commission discussed that generally, in the past, the Commission has looked at which supplier has the closest three-phase lines when three-phase is required for the customer in question; the reason for this is that single-phase cannot serve a three-phase load.

Here, CEC's nearest three-phase system is one mile north, so CEC would have to add two additional phases for 1 mile (5,280 feet) in order to provide three phase service to the Menard site. Alternatively, MDU needs to upgrade its system for 1.6 miles (8,700 feet). MDU needs to convert its delta three-phase system to a wye three-phase system for 5,700 feet, convert an additional 1,200 feet

¹ MDU justifies a cost of \$0 to the old transformer that is being proposed to be used at its McKenzie

of single-phase to three-phase system, and extend 1,800 feet of three-phase line from Avenue B to the Menard site.²

MDU may argue that it has a three-phase line that is 3,000 feet from the Menard site and therefore is closer than CEC's current three-phase system, but this argument is disingenuous because MDU's current three-phase system is a delta system rendering the current three-phase line useless as it relates to the Menard site needs. Therefore, MDU must upgrade for 8,700 feet opposed to CEC's 5,280 feet. If you purely look at the closest electrical facilities, CEC is directly next to the Menard site on three sides while MDU is 1,800 feet away.

The raw data regarding the vicinity establishes that CEC is closer in proximity to the Menard site because CEC already has an electrical system, albeit single phase, that surrounds the Menard site on three sides and because it needs to extend an additional two phases for only 1 mile (5,280 feet), while MDU needs to extend lines and add an additional line (to convert its system to a three-phase wye system) for over 1.6 miles (8,700 feet).

4. What customers are served by electric suppliers within at least a two-mile radius of the location to be served?

Both MDU and CEC provide electric service within a two mile radius of the Menard site. MDU has twenty-nine (29) customers within a two mile radius of the Menard site, twenty-seven (27) of which are located in the village of McKenzie. CEC has eleven (11) customers within a two mile radius of the Menard site; three (3) of CEC's customers are directly adjacent to the Menard site.

During the working sessions, the Commission rightly opined that this factor is a draw, for this

substation because it has been totally depreciated to tax purposes.

factor is another indication of what facilities each electric supplier has in the area and the investment of each supplier in the general area. Little weight should be given to this factor because it is a matter of scale. As one of the commissioners pointed out during a working session, this factor would be a non-issue if one of the suppliers had 1,000 customers while the other had 1,018. Here, MDU has eighteen (18) more customers in the 2-mile radius, but CEC has three (3) customers directly adjacent to the Menard site.

5. What are the differences, if any, between the electric suppliers available to serve the area with respect to reliability of service?

During the working sessions, the Commissioners have discussed various factors in reliability and have rightly determined that both CEC and MDU are expected to be sufficiently reliable. The Commissioners have been reluctant to say that one supplier is more reliable than the other.

Both MDU and CEC had voltage drop calculation studies performed using the projected Menard load and the results from both studies were within the accepted limits in the industry.

CEC has reported 4 (four) outages in a three (6) year timeframe and MDU has reported five (5) outages in a fifteen (15) year timeframe. CEC's data is based on the actual Menoken substation that is currently capable of serving the Menard site. MDU's numbers are based on its McKenzie substation that will have to be upgraded to serve the Menard site, so said numbers are not an equal comparison because we do not have an outage history as it relates to actual configuration at the McKenzie substation that would serve the Menard load. MDU has testified that, if its application is granted, MDU will utilize a transformer that is decades old to upgrade its McKenzie substation, so

² The total costs for both CEC and MDU's upgrades will be discuss in later sections.

its reliability is inevitably shorter than a new transformer.

Steve Manor from Menard, during his testimony, discussed the fact that the Menard site will have a wood recycling plant that will turn material into mulch. This plant, based on his testimony, will run 350 horsepower motors. Manor also discussed that the site will have many other motors. Manor testified that if one of the three phases goes out, the motors will be adversely affected resulting in shortening the life of the motor or wrecking the motor completely; that is why, to Manor, it is imperative that all three-phases must be interrupted by a three phase interruption mechanism. Manor discussed that MDU is able to provide this three-phase interruption mechanism.

CEC representatives testify that this concern regarding three-phase interruption was never communicated to CEC, likely because Menard, after finding out that MDU's rates were cheaper, did not communicate with CEC regarding any of its needs. **Ron Lipp of CEC testified that CEC already has this three phase interruption mechanism at its Menoken substation and that CEC would merely need to make a switch at the substation with no added cost because CEC already has equipment at the Menoken substation. (Emphasis added).**

There is one glaring difference between CEC and MDU that tips the scale in favor of CEC as it relates to reliability. CEC has two substations that can serve the Menard site. Besides the Menoken substation, CEC has the Sterling substation that would give redundancy to the Menard site. If CEC's Menoken substation fails, CEC's Sterling substation would be able to provide power to part of the Menard site, creating an added layer of reliability that MDU does not have. MDU has one substation – the McKenzie substation – and if it fails, MDU will not be able to provide power to Menard site. Further, CEC can upgrade its Sterling substation for a cost of \$40,000, which would provide total redundancy to the Menard site, meaning that the entire Menard site could be served by either CEC's

Menoken substation or its Sterling substation.

Because of CEC's redundancy created by CEC's two substations, CEC is able to provide more reliable service.

6. Which of the available electric suppliers will be able to serve the location in question more economically and still earn an adequate return on its investment?

Here, again the facts are straightforward. Both CEC and MDU have to upgrade their respective facilities, but CEC can serve the Menard site more economically, primarily because MDU has to spend additional monies duplicating what CEC already has in place, which includes, but is not limited to, upgrading MDU's substation so that it has sufficient capacity when CEC currently has sufficient capacity at its Menoken substation.

To serve the Menard site, CEC would have to add two additional phases for one mile (5,280 feet) in order to provide three phase service to the Menard site; the cost for this extension would cost \$44,527.31. Within the Menard site, CEC's estimated cost for its electrical services is \$65,696.30. The total for CEC to serve the Menard site would be \$110,223.61. Currently, CEC has sufficient capacity at its Menoken substation. Even with the Menard load, CEC would continue to have sufficient capacity at the Menoken substation for additional growth.

To serve the Menard site, MDU would need to take multiple steps to serve the Menard site, which includes upgrading and extending MDU's electric system for approximately 8,700 feet. MDU's McKenzie substation is unable to serve the proposed load at the Menard site, Therefore, the first upgrade MDU would make would be to its McKenzie substation, which would cost \$61,451; this cost does not include a new transformer because MDU would utilize a decades-old transformer

that has been depreciated. Second, MDU would need to convert its delta three-phase system to a wye three-phase system for approximately 5,700 feet and convert an additional 1,200 feet of single-phase to three-phase system for a cost of \$32,562; again, MDU's cost for this upgrade does not include the cost of the transformer to convert McKenzie to 7,200 volts. Third, MDU would need to extend 1,800 feet of three-phase service to the Menard site for a cost of \$32,619. MDU must make all three upgrades in order to provide electrical service to the Menard site. Lastly, within the Menard site, MDU's estimated cost of new electrical would be \$66,039. The total cost for MDU to serve the Menard site would be \$192,671, which is \$82,447.39 more than CEC's costs.

In looking at both CEC and MDU's upgrades and proposed costs, it is clear that CEC clearly is able to serve the location more economically. As already stated, MDU would have to spend money duplicating CEC's current capacity by upgrading the McKenzie substation. Further, if CEC were to upgrade its Sterling substation for an additional \$40,000, the Menard site would have total redundancy and could be served by both CEC's Menoken and Sterling substations and CEC's costs would still be \$42,447.49 less than MDU's costs (and MDU, even with all the upgrades still would not have an alternate substation to feed the Menard site).

During the working sessions, the Commissioners were hesitant to state that this factor favored CEC because MDU is, right now, able to provide service at a lower rate.³ CEC would caution the use of current rates being used in considering this factor because rates are always subject to change and, as the Commissioners correctly pointed out at the May 2nd hearing, there is no

³ With the current rates, Menard's total annual cost with MDU would be \$513,669.84 and with CEC the total annual cost would be \$575,883.84 (see Exhibit MDU-10, page 1); the annual difference at the current rates are \$62,214.

guarantee that MDU's rates will be cheaper in the future.⁴ The above costs to extend both CEC and MDU's systems to the Menard site are static numbers that are not subject to change, which make these numbers better suited to be used in the analysis under this factor.

7. Which supplier's extended electric service would best serve orderly and economic development of electric service in the general area?

The Menard site is located immediately north of the railroad in a rural area southeast of the unincorporated village of McKenzie (herein "McKenzie"). No Area Service Agreement is relevant to this proceeding. CEC has facilities that are directly adjacent to and surround the Menard site on three sides – the north, west, and south side – and MDU would have to cross these facilities in order to serve the Menard site. Therefore, development of electric services in this area will be more orderly if this load is served by CEC. Additionally, CEC would be able to make use of its recent investment of upgrading its Menoken substation, which has the capacity to serve the Menard site and any other growth in the areas served by the Menoken substation.

Granting the request of MDU to serve this load would result in and promote a bad "checkerboarding" effect.⁵ Moving forward, if growth occurs, more checkerboarding will occur resulting in the entangling of CEC and MDU's electric facilities. Not only that, but the Commission can be assured that MDU and CEC will be back before this Commission asking the Commission to

⁴ Both CEC and MDU's rates are subject to change and said changes are based on many factors that are beyond the scope of this matter. It is true that CEC will have a harder time competing with MDU's rates if, every time a new large load is discovered in a rural area, MDU runs to said customer with its current, cheaper rates and pirates said customer away from CEC. If CEC is allowed to serve large loads like this, such loads will inevitably allow CEC's rates to compete with MDU's rates.

⁵ At the May 2nd hearing, the Commission opined that there can be a "good" checkboard if the parties can agree to the checkerboarding of services. Here, unfortunately, both suppliers want the Menard load.

again decide which supplier should get each and every piece of the checkerboard for later, potential growth. This goes directly against one of the two primary factors under the TIA, which is to minimize conflicts between electric suppliers. Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988)

During the working sessions, the Commission has had much discussion and many questions have arisen regarding what electric supplier – either MDU or CEC – is entitled to serve the part of the unincorporated village of McKenzie east of Avenue B (herein “eastern part of McKenzie” or “eastern McKenzie”) that is currently farmed. As set forth in testimony, the eastern part of McKenzie has no development and is simply farmland. There was no testimony of who owns it or whether it would be developed. The only evidence presented is that the eastern part of McKenzie is farmed. There was no testimony by MDU or CEC that either party is aware of any future planned development in the area.

There was a line of questions regarding MDU’s current delta three-phase system and whether its current facilities had the capacity to serve a gas or service station in McKenzie **if** one was to be built and was built in the village of McKenzie. (**Emphasis added**). This line of questioning was then used to argue that MDU’s upgrade would not only benefit the Menard site, but also a hypothetical gas station that may be built in the village of McKenzie. As already stated, the testimony presented was that there is no knowledge of future growth and no knowledge of a proposed gas/service station and that, as currently situated, MDU’s upgrade would not benefit any of the nineteen (19) customers in McKenzie because their present needs are currently met by MDU’s current system, which includes a delta three-phase system.

Again, it must be repeated that **no evidence** was presented that a gas station was going to be

built in, or near, or surrounding the village of McKenzie. (**Emphasis added**). The Commission must make a determination on the ten (10) factors based only on the facts as presented at the hearing and not on speculation as it relates to a hypothetical gas station or any other theoretical growth.

The Commission, during the working session, did not come to a conclusion as to who can serve the eastern part of McKenzie. Pursuant to the TIA and related statutes, CEC is able to serve the eastern part of McKenzie (or the undeveloped platted portion of western McKenzie or any new service in any part of McKenzie). MDU is able to serve those areas only if it obtains a certificate of public convenience and necessity from the Commission as allowed for in N.C.C.C. Chapter 49-03.

The TIA specifically describes how to deal with rural areas that were served by public utilities before the TIA was enacted in 1965; N.D.C.C. § 49-03-01.2 reads:

Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission.

Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof whose places receiving service are located outside the corporate limits of a municipality on July 1, 1965; provided, however, that within ninety days after July 1, 1965, any electric public utility furnishing service to customers whose places receiving service are located outside the corporate limits of a municipality shall file with the commission a complete map or maps of its electric distribution system showing all places in North Dakota which are located outside the corporate limits of a municipality and which are receiving its service as of July 1, 1965. After ninety days from July 1, 1965, unless a customer whose place being served is located outside the corporate limits of a municipality is shown on said map or maps, it shall be conclusively presumed that such customer was not being served on July 1, 1965, and cannot be served until after compliance with the provisions of section 49-03-01.1.

After the enactment of the TIA, an electric public utility could continue to serve its customers

receiving service located outside the corporate limits of a city provided that the public utility had filed a map of its system showing its system and all places receiving its services and said map had to be filed within 90 days from July 1, 1965. If a customer being served outside the corporate limits of a city was not shown on the map(s), that customer could not be served by the public utility unless the public utility complied with N.D.C.C. §49-03-01.1 and obtained a certificate of public convenience and necessity.

Therefore, any new service outside the corporate limits of a city the electric public utility (here, MDU) must obtain a certificate of public convenience and necessity by the Commission, which would be for any new service in the eastern part of McKenzie (or any new service in any part of McKenzie). Therefore, CEC is the presumed electric supplier for the eastern part of McKenzie. See Capital Elec. Co-op., Inc. v. Pub. Serv. Comm'n of N.D., 534 N.W.2d 587, 589-91 (N.D. 1995), (stating the TIA “allow[s] cooperatives to serve customers in rural areas unless an electric public utility obtains a certificate of public convenience and necessity from the PSC”).

“Municipalities possess only those powers expressly granted by constitution or statute or necessarily implied from an express grant.” Capital Elec. Co-op., Inc. v. City of Bismarck, 2007 ND 128, ¶ 12, 736 N.W.2d 788, 794. Under N.D. Const. art. VII, § 11, “[t]he power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly.” Under N.D.C.C. § 40-05-01(57), the governing body of a municipality shall have the power to grant franchises for a period of not to exceed twenty years. “Municipality” includes “all cities organized under the laws of [the State of North Dakota], but shall not include any other political subdivision.” N.D.C.C. § 40-01-01. N.C.C.C. § 40-05.1-06(1)) also authorizes home rule cities to “grant and regulate franchises” for

utilities.

The same powers (the power to franchise or regulate franchises) are **not given** to townships or township boards. (**Emphasis added**). Townships are not able to grant franchises; that power is given to organized cities. See N.D.C.C. § 40-05-01(57); see also N.D.C.C. Chapter 58-03 (townships are not given the power to grant franchise or regulate franchises in this chapter).

MDU's exhibit 11 contains a March 2008 Franchise granted by the township board of McKenzie to MDU. In the Extract of Minutes for the First and Second Reading and the Ordinance (which grants the 20-year franchise), the township attempts to grant a franchise to MDU. The minutes and the ordinance refer to McKenzie as a city, which it is not. Both the minutes and the ordinance call for a seal of a municipality, which McKenzie is not. McKenzie is not a city, nor is it a municipality. It is an unincorporated village that happens to have a recorded plat where approximately nineteen (19) homes are located.

Under N.D.C.C. § 49-03-01.2, if MDU or its predecessor timely filed (back in 1965) with the Commission a map of its electric distribution system showing its customers outside the corporate limits of a municipality, it would be able to continue to serve those customers. Here, there was no evidence that this was done. This present matter is not dealing with past customers, but future customers. CEC is the presumptive electric supplier that would provide service to any hypothetical customer that would request service east of Avenue B in McKenzie. If MDU wanted to serve new customers east of Avenue B, MDU would need to make an application to the Commission for a certificate of public convenience and necessity.

CEC believes that this above discussion (regarding which supplier can serve eastern McKenzie) is a small issue within the grand scope of this proceeding because there was no evidence

presented about growth east of Avenue B in the village of McKenzie, for that area is purely farmland. CEC wanted to briefly address this matter because the Commissioners have raised various concerns about who can serve the eastern part of McKenzie. The TIA establishes that CEC is the presumptive electric supplier of that area because MDU, if it wants to serve the area and a customer requests service, MDU must apply to the Commission for a certificate of public convenience and necessity. Under the TIA, CEC could serve a customer in the eastern part of McKenzie and MDU **would not** be able to object. (**Emphasis added**).

For all the above reasons, CEC's service to the Menard site would best serve the orderly and economic development in the area because CEC's electric facilities are already right up to the site on three sides. Granting MDU's application will result in a bad "checkerboarding" effect and will result in the Commission being called upon to address any potential growth in the area and determine which supplier gets each and every area of growth. One of the two primary purposes of the TIA is "to keep to a minimum ... conflicts between suppliers of electricity." Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988). Ruling for MDU would only foster more conflict.

8. Would approval of the applications result in wasteful duplication of investment or service?

One of the two primary purposes of the TIA is "to keep to a minimum wasteful duplication of capital-intensive utility services." Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988). As previously indicated, CEC already has the capacity to serve the Menard site and any future growth in areas served by the Menoken substation, while MDU does not, for

MDU needs to upgrade its McKenzie substation. MDU admitted that it does not need to upgrade its McKenzie substation if it does not receive the Menard load. This is exactly what the TIA is meant to stop, for, if the Commission grants MDU's application, wasteful duplication will result.

The costs of CEC and MDU's upgrades were discussed at length above, so those numbers will not be reproduced in total here. Here, the only thing that needs to be repeated is that MDU's upgrades will cost \$82,447.39 more than CEC's upgrades, and this dollar amount does not include the new transformer either at the McKenzie substation or at the village of McKenzie. This number in isolation establishes that duplication will result if MDU is given the Menard site to serve, for MDU must spend more money because they have to duplicate what CEC already has in place.

Granting MDU's application will result in both duplication of investment and service; therefore, this factor favors CEC.

9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?

There was no evidence presented that the Menard site will be in the corporate limits of a municipality in the foreseeable future. Thus, this factor favors CEC, the rural electric cooperative, because there is no evidence of the Menard site being annexed into an incorporated city.

10. Will service by either of the electric supplier in the area unreasonably interfere with the service or system of the other?

Allowing MDU to serve the site will interfere with CEC's facilities because MDU would cross CEC's facilities that already surround the Menard site. Additionally, economic interference

would result if MDU were allowed to serve the Menard site because CEC would be denied the benefits derived from revenues derived from the Menard load, which would accrue to the benefit of CEC's member-owners. This would be one of CEC's largest loads which would allow CEC to recoup much of the investment that CEC has incurred in this rural area where it has spent money on building infrastructure to serve rural homes, farmsteads, and railroad signals that are already adjacent to Menard site. Allowing MDU to serve the Menard site would deny CEC this economic benefit. Service by MDU of the Menard site will unreasonably interfere with CEC's investment in the area.

IV. CONCLUSION

The Commission must ask itself: If the Commission grants MDU its requested certificate of public convenience and necessity and allow MDU to serve the Menard site, does this foster the primary purposes of the TIA, which is (1) "to keep to a minimum wasteful duplication of capital-intensive utility services" and (2) to keep to a minimum "conflicts between suppliers of electricity"? Cass Co. Elec. Co-op., Inc. v. N. States Power Co., 419 N.W.2d 181, 185 (N.D. 1988).

The answer is clear.

If MDU serves this load, there will be wasteful duplication, for CEC already has a substation that can serve the Menard load and future growth and MDU's upgrades will cost \$82,447.39 more than CEC's needed upgrades. MDU admitted at the hearing that it would not upgrade its McKenzie substation if it were not for the Menard load. Isn't this the very definition of wasteful duplication?

If MDU is given this load by the Commission, it will necessarily result in more conflicts arising between public utilities and cooperatives, for such a decision will give public utilities ammunition to go after large loads that pop up in rural locales. Every time a large load is proposed in

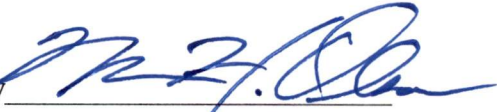
rural North Dakota and a public utility happens to be in the general vicinity with its electric facilities, that public utility will ignore the fact that the rural electric cooperative's facilities that surrounds the site (or is in closer proximity to the site), will ignore the fact that the rural electric cooperative has a substation that has capacity to serve the proposed load and any associated growth (while the public utilities does not have the capacity), and will ignore the fact that the public utility must make many more upgrades than the rural electric cooperative (and spend much more money to do so) resulting in the public utility initiating a conflict in front of this Commission to serve the site. Ruling for MDU will have the necessary result of rate shopping in the future and there is no way around this. Rather, if MDU is denied its certificate, this will cause the public utility to take a closer look at the facts before initiating a conflict if the rural cooperative has electric facilities in the area (here, the facilities already surround the site in question) and has the capacity to serve the load in question.

The 10 factors favor CEC serving the Menard site and ruling in favor of CEC furthers the primary purposes of the TIA. Another way for the Commission to look at this matter is to ask itself which order (for MDU or for CEC) has a better chance being affirmed on appeal. Here, again, the answer is easy, for a ruling in favor of CEC will be upheld on appeal because such a decision is in conformity with the primary purposes of the TIA.

Therefore, for all the above reasons, CEC requests that MDU's application be denied and that CEC be given the Menard site to serve.

Dated this 22nd day of July, 2014.

PRINGLE & HERIGSTAD, P.C.

By 

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Montana-Dakota Utilities Co., a Division of MDU
Resources Group, Inc.
Menard Inc. – Burleigh County, ND
Public Convenience & Necessity

Case No. PU-13-871

AFFIDAVIT OF SERVICE BY REGULAR MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF WARD)

Brenda J. Conejo, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age, and is not a party to nor interested in the above entitled action; that on the 22nd day of July, 2014, this Affiant served by depositing in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in the above entitled action:

1. **CAPITAL ELECTRIC COOPERATIVE, INC.'S BRIEF IN OPPOSITION TO MDU'S APPLICATION**

That said envelopes were addressed to the following person at her known address as follows:

Daniel S. Kuntz
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, ND 58502-5650

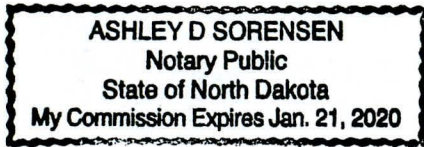
Executive Secretary
ND Public Service Commission
600 East Boulevard – Dept 408
Bismarck, ND 58505-1480


Wade Mann, Director
Office of Administrative Hearings
2911 North 14th Street –Suite 303
Bismarck, ND 58503

That the above provisions were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Brenda J. Conejo

SUBSCRIBED AND SWORN to before me this 22nd day of July, 2014.




Notary Public
For the State of North Dakota