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July 22, 2014

Executive Secretary
North Dakota Public Service Commission
State Capital – Department 408
600 East Boulevard Avenue
Bismarck, ND 58505-0480

Re: Application Montana-Dakota Utilities Co. for a Certificate of Public Convenience and Necessity for Menard, Inc.
Case No. PU-13-871

Enclosed for filing on behalf of Montana-Dakota Utilities Co. are the original and seven copies of its Brief in Support of Application in the above referenced proceeding. An electronic copy of the document was previously sent to you for electronic filing.

Sincerely,



Daniel S. Kuntz
Associate General Counsel

DSK/djv

Enclosure

cc: Matthew H. Olson
Tamie Aberle
Wade C. Mann
Illona Jeffcoat-Sacco
Ryan Norrell

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-13-871

**Montana-Dakota Utilities Co.'s
BRIEF IN SUPPORT OF APPLICATION**

The Applicant, Montana-Dakota Utilities Co. ("Montana-Dakota"), submits the following brief in support of its application to provide electric service to the proposed Menard development site near McKenzie.

1. Customer Preference.

The first of the Commission's ten considerations is customer preference. The evidence establishes that Menard prefers its electric service from Montana-Dakota. Nonetheless, comments were made discounting this preference based upon a dislike of "rate shopping." Because public utility rates are approved by the Commission and published, and public utilities cannot discriminate in their provision of service or charges, public utilities are disadvantaged in rate shopping when potential customers use the prices of another provider in an attempt to obtain price concessions. This is different from "rate comparison" in which customers naturally compare prices as one of their considerations in determining a service provider in the same manner that customers compare prices of other significant purchases. Although Menard testified that Montana-Dakota's favorable pricing is one of the reasons it prefers Montana-Dakota as a service provider, there is no evidence that Menard requested any price concessions from Montana-Dakota from its published tariff. Moreover, Menard testified

the price difference was only one of the reasons for its preference of Montana-Dakota. Menard also favored Montana-Dakota because of Menard's favorable experience as a customer at its Bismarck location; because of reliability considerations in providing electric service to the McKenzie site; because Montana-Dakota offers demand response programs which CEC does not; because Montana-Dakota was more responsive to Menard's requests and needs than CEC; and because Montana-Dakota's status as a regulated utility provides protection to Menard as a customer on rate and service issues that would be unavailable from the unregulated rural electric cooperative ("REC"). These are all legitimate considerations supporting Menard's preference for Montana-Dakota in addition to the significant price advantage for its service. It is clear that Menard prefers Montana-Dakota even if there was no price difference between the providers.

Comment was made that the costs of electric service from a public utility will always be less than that from an REC because of the longer length of the REC's lines between customers. There is no evidence supporting such a conclusion. Even if there was evidence establishing that the average line length between customers for RECs is greater than that for public utilities, it would not support a justification for higher rates for RECs. Rather, rural customers would likely have greater average electric usage offsetting some or all of any additional distribution lines length to serve those customers. In addition, the cost of installing a mile of distribution line in a rural area will likely be less expensive than a similar length of line in a more congested area. RECs and their generation and transmission affiliates are also eligible for subsidized grants, loans, and energy to support the provision of service to rural customers and to offset the cost of

serving such customers. RECs also do not pay the state and federal income taxes which add significantly to a public utility's cost of service. Rather than the length of distribution lines driving REC costs, such costs can also be driven by construction of duplicative facilities or facilities with over capacity such as the Menoken substation. See Capital Electric v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995). REC prices can also be reflective of pricing decisions in which certain customers, such as space heating customers, are offered discounted rates or other incentives to compete with other heating fuels such as natural gas. Finally, REC prices can be reflective of rate design decisions to subsidize certain customer classes at the expense of large commercial and residential customers rather than reflecting the efficiencies of serving large customers in their rates. These are all legitimate concerns that Menard has in its preference for a regulated service provider whose rates are subject to review by an independent agency rather than a board of directors elected by other customers.

Although the Supreme Court has stated the customer preference is not a controlling consideration in deciding a certificate of public convenience and necessity, it is nonetheless a consideration that cannot be summarily dismissed and should be weighed along with the other issues stated in the Commission's Notice of Hearing.

2. Differences with respect to reliability of service.

Montana-Dakota agrees that it and CEC operate relatively reliable systems as does every other public utility and REC in the State of North Dakota. That, however, is not the issue as stated in the Commission's Notice of Hearing. Instead, the notice requires the Commission to consider "the differences, if any, between electric suppliers. . . with respect to reliability of service." The evidence establishes that

Montana-Dakota had only one outage on its McKenzie three phase system over the last 14½ years; an average outage rate of .07 outages per year. In comparison, CEC experienced five outages on its existing three phase line in a period of six years; an average outage rate of .833 outages per year, or nearly 12 times greater than the historic average outage rate for Montana-Dakota's three phase system. Without an upgrade to the Sterling substation, which is not planned, CEC essentially proposes to serve the Menard site through approximately eight miles of radial line from the Menoken substation since the Sterling substation is not adequate to serve the Menard load, let alone the Menard load plus the existing CEC load. In comparison, the length of Montana-Dakota's radial line to the Menard site is approximately a mile and a half. The Commission has recognized that the length of radial line to a proposed service location is indicative of differences in reliability of service. Similarly, the Commission has recognized that the distance between the respective substations and the location to be served is also indicative of reliability. See Montana-Dakota Applications for Public Convenience and Necessity, Consolidated Case Nos. PU-08-345, PU-08-346, PU-08-347 and PU-08-693.

In addition to the effect on outage history, the distance between the service location and the substations means the level of voltage drop between Montana-Dakota's substation and the Menard site will be lower than that between the CEC substation and the Menard site. As was testified, outages and voltage drop are particularly important considerations for a large industrial customer such as Menard.

Although Montana-Dakota and CEC operate relatively reliable systems, the differences between the suppliers in their proposed service to the Menard site

demonstrate that Montana-Dakota can be expected to provide more reliable service than CEC. Therefore, this consideration favors Montana-Dakota's application.

CEC testified the reliability of its system could be improved to make it more comparable with the reliability of Montana-Dakota's three phase system by upgrading the Sterling substation owned by Central Power. The cost of such an upgrade, however, was not included in CEC's cost to serve the Menard site. CEC cannot claim equal reliability with Montana-Dakota's three phase system unless the Sterling substation is upgraded in which case the cost of the upgrade should have been included in its costs.

CEC also argued in its proposed order that Montana-Dakota's service to the Menard site would be interrupted if there were a failure at the McKenzie substation. The same argument can be made for a failure at the Menoken substation unless the Sterling substation is upgraded, which is not planned and which is not included in CEC's costs to serve the Menard site.

3. Cost of service and return on investment.

The Commission's notice asks which of the suppliers "will be able to serve the location in question more economically and still earn an adequate return on its investment." The cost of serving a location is not limited to the cost of extending wires and poles. Rather, the economics of serving a location includes the total capital and operating costs of generation, transmission and distribution to meet the customer's electric service needs. These total costs are reflected in the provider's rates as well as the incremental cost of the service extension. The Commission has previously recognized that the annual charges to the customer, as reflected in the rates of the

providers, are part of the determination of which provider can serve the location more economically. See Montana-Dakota Utilities Co. Application for Certificates of Public Convenience and Necessity Consolidated Case Nos. Pu-08-345, PU-08-346, PU-08-347 and PU-08-693. If the cost of extending wires was the sole consideration, the distance for Montana-Dakota to extend its three phase system of approximately 1800 feet at a cost of \$32,619 is less than the distance of approximately one mile, and cost of \$44,527, for CEC to extend its three phase system to the Menard site.

Montana-Dakota recognizes that system upgrades behind its line extension, including a conversion of its McKenzie substation and distribution system from a Delta to a Wye three phase system, are appropriate considerations in the cost for Montana-Dakota to serve the location in question. The capital costs of both extending Montana-Dakota's lines to and within the Menard location, as well as the upgrades to the McKenzie substation and the distribution system, are \$192,671 or an annual incremental cost to serve the location of \$27,872. (Exhibit MDU-10) On a comparable basis, CEC's capital costs to extend its lines to and within the Menard site are \$110,223. This would result in an annual incremental cost to CEC of approximately \$9,500 using a comparable cost to capital without gross up for income taxes. The annual incremental difference between CEC's cost to extend lines to and within the Menard site and Montana-Dakota's cost to extend lines to and within the Menard site, plus the cost of upgrades at the McKenzie substation and distribution system, is approximately \$18,370. (See MDU-10, page 46) Even if the entire incremental cost of Montana-Dakota's line extension and system upgrades were charged directly to the

customer, Montana-Dakota's total annual costs to the customer to provide service would still be significantly less than CEC's.

Montana-Dakota provided evidence that even with the annual rate of return associated with the capital cost to serve the Menard site, it will meet all its incremental costs to serve the site plus provide a net contribution to the common system costs of \$296,658 per year which provides a net benefit to other customers. In comparison, CEC did not provide information or analysis on the amount of revenue that would be required for it to receive an adequate return on its capital investment to serve the Menard site other than nonsensical testimony and argument in its proposed findings that because CEC's rates are higher than those of Montana-Dakota, its return on investment will be higher. Return on investment is dependent upon the marginal difference between revenues and cost of service and not the size of the customer's monthly bill. Revenues received from the new customer that exceed the marginal costs of providing service to that customer provide a return on the investment associated with extending service to the customer and ideally a contribution to all common costs. The Commission cannot determine return on investment to serve a location unless it receives evidence regarding the margins on the cost of providing such service. CEC provided absolutely no evidence on what its margins will be to serve this site even with its higher rates. Thus, there is no evidentiary basis to determine what, if any, return on investment would be realized by CEC. There is simply no evidence to support a finding by the Commission that CEC can serve the site more economically and earn an adequate return of investment.

4. Orderly and economic development of electric service in the general area.

The question presented by this issue is not whether future development can be expected to occur in the general area of the location to be served, but rather if such development occurs, which of the suppliers' extended service would best serve orderly and economic development of electric service in the general area. While it is not the Commission's role to speculate if development will actually occur in the general area, the Commission must consider which of the suppliers is in a better position to provide more orderly and economic development of electric service if such development does occur. Montana-Dakota is that electric supplier in this case.

CEC provided no evidence that its extension of service to the Menard location would be used to benefit service to other existing or potential customers in the area. In contrast, Montana-Dakota's extension of service, and corresponding the upgrades to its McKenzie substation and distribution system, improves the capacity of the McKenzie distribution system and Montana-Dakota's ability to provide service to new and existing customers within McKenzie. As previously stated, Montana-Dakota has substantially more customers within both two miles and one mile of the Menard site which is indicative of an orderly development determination. The Menard witness testified that the employment associated with its proposed facility, along with the related support vendors, typically results in ancillary businesses such as convenience stores being located near the distribution center. A new convenience store generally requires Wye three phase service which would require Montana-Dakota to make the necessary McKenzie substation and distribution upgrades. The completion of these upgrades in conjunction the extension of service to the Menard site contributes to the orderly and

economic development of electric service, not only to the Menard site, but to the general McKenzie area.

The evidence establishes that Montana-Dakota and its predecessors have held a franchise continuously from McKenzie Township to provide electric service to the entire town site of McKenzie which includes platted undeveloped areas. In addition to the franchises, Montana-Dakota holds a certificate of public convenience and necessity issued by this Commission in 1928 to serve McKenzie which makes the unincorporated village the exclusive service area of Montana-Dakota. With the employment and other activity associated with the Menard site, a significant portion of this undeveloped platted area can be developed as housing by Menard employees. If even five percent of the Menard employees build or purchase homes in the undeveloped area of McKenzie, it would add 10-12 new homes within this area. This additional development would also require conversion of Montana-Dakota's distribution system from a Delta to a Wye system as new home developers and owners desire underground rather than overhead distribution lines to their homes. As was testified at the hearing, an underground distribution system, including pad mount transformers, requires a Wye distribution system. Service by Montana-Dakota to the Menard site fosters this conversion for orderly and economic development of McKenzie.

Comment was made during a working session that Montana-Dakota must have realized the Menard location was within CEC's service territory, otherwise Montana-Dakota would not have applied for a certificate of public convenience and necessity. This is incorrect. Rural areas are not the exclusive service territory of RECs. Indeed, the North Dakota Supreme Court has never said the TIA gives cooperatives even a

preference for electric service in rural areas. Capital Electric Cooperative v. Public Service Commission, 534 NW 2d 587, 590 (ND 1995). Although RECs have the legal authority to provide service within a rural area, public utilities have the legal authority to serve both rural areas and municipal areas. The difference between a public utility's and a REC's ability to serve a rural area is that the public utility is regulated and the REC is not. Therefore, RECs are allowed to extend their systems in rural areas based simply upon a customer request for service with little regard to duplication of facilities of a public utility or other considerations of public convenience and necessity. See Capital Electric Cooperative v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995). In contrast, a public utility must show the extension of its system is consistent with public convenience and necessity under the considerations set forth in the Commission's Notice of Hearing. Accordingly, Montana-Dakota's application for a certificate of public convenience and necessity to serve the Menards load was not a recognition that the location was within the service area of CEC, but rather was made in compliance with the legal requirements for it to serve a customer in a rural area.

The Commissioners have expressed frustration that this proceeding was not resolved through a Service Area Agreement ("SAA"). As demonstrated by the Commission's records, Montana-Dakota has aggressively pursued SAAs with its REC neighbors. That success, however, has been largely limited to a sharing of anticipated new electric load growth within areas annexed, or likely to be annexed, by cities historically served by Montana-Dakota under franchises from the City. In exchange, the REC receives a franchise from the City to serve its designated areas within the SAA. In that regard, the Commission took administrative notice, pursuant to N.D.C.C. Section

28-32-24 and N.D.Admin.C. Subsection 69-02-05-08, of the Bismarck SAA between the Parties. Pursuant to paragraph 20, the Bismarck SAA provides both Parties with a reasonable opportunity to share the undeveloped potential electric growth annexed to the City of Bismarck during the term of the SAA.

For a variety of reasons, there are relatively few opportunities for Montana-Dakota to obtain certificates of public convenience and necessity to extend its services in the vicinity of its lines outside of Bismarck and the other towns currently served by Montana-Dakota in Burleigh County. The Commission can take official notice of its records showing that not a single certificate of public convenience and necessity was issued to Montana-Dakota in Burleigh County during all of 2013 and the first six months of 2014. The Commission can also take official notice of the building permit records from the City of Bismarck and Burleigh County showing the number of permits issued for the City of Bismarck (and therefore subject to the sharing arrangement under the Bismarck SAA) and the number of permits issued for Burleigh County, including the City of Lincoln, which are not subject to the SAA and generally served by CEC in the absence of a certificate of public convenience and necessity issued to Montana-Dakota or Otter Tail Power. These numbers demonstrate the difficulty in attempting to reach a SAA other than in areas within, or immediately adjacent to, communities with significant growth already served by the public utility. Most RECs are generally unwilling to concede service to a public utility in areas outside these growth communities because the RECs are currently receiving most, if not all, of any new load growth in the rural areas and the public utilities have little leverage to negotiate service areas for unidentifiable sporadic growth in proximity to their lines. Although CEC testified it is

willing to negotiate a SAA in conjunction with the Menard site, it is unrealistic to believe that CEC would be willing to agree to a service area designation for Montana-Dakota in a rural area of Burleigh County that is comparable to the Menard load. Moreover, Montana-Dakota does not believe it would be appropriate to concede service to CEC for the Menard location at the expense of the customer.

Because extension of service and corresponding system upgrades by Montana-Dakota will foster orderly and economic development of electric service in the general area, this issue supports Montana-Dakota's application.

5. Wasteful duplication of investment or service.

The Commission has held in prior proceedings that crossing a distribution line with an extension of service to a new site is an indication of wasteful duplication of service. In each of those cases, however, the line being crossed would have been used to serve the new site. That is not the case here. CEC's overhead single phase line that will be crossed by Montana-Dakota's underground extension of service to the Menard site is not adequate to serve the Menard site and CEC does not propose that its line would be used to serve the site. Accordingly, Montana-Dakota's extension to the Menard site is not a wasteful duplication of this line.

CEC argued that Montana-Dakota's service to the Menard site would be a wasteful duplication of investment because Montana-Dakota will need to upgrade its McKenzie substation while CEC's Menoken substation has excess capacity available to serve the site. Because of the likely ancillary electric demand and growth associated with development of the Menard site, it is inevitable that Montana-Dakota will need to upgrade the McKenzie substation. The upgrade in conjunction with extension of service

to Menard is therefore, not a wasteful investment. The Commission should also consider why CEC's Menoken substation currently has excess capacity. Either the substation was substantially overbuilt, which itself was a wasteful investment, or it was built for anticipated growth other than the Menard site. In any regard, Montana-Dakota's upgrade of the McKenzie substation should not be considered a wasteful investment if CEC's substation was intentionally overbuilt or will be needed to serve other anticipated growth in the area.

Finally, CEC cannot serve the Menard site with the same degree of reliability as Montana-Dakota's system without an upgrade of the Sterling substation. The relevant comparison therefore is not whether the upgraded McKenzie substation is duplicative of the Menoken substation, but rather whether the upgraded McKenzie substation is duplicative of the existing Sterling substation. Because an upgrade of either substation would be necessary to reliably serve the Menard site, an upgrade of Montana-Dakota's McKenzie substation is not a wasteful investment. Indeed, because an upgrade of McKenzie substation is inevitable, an upgrade of the Sterling substation to serve the Menard site would be a wasteful duplication of investment.

6. Unreasonable interference with service or system.

Neither party has argued that an extension of service would interfere physically or operationally with the service or system of the other supplier. Instead, CEC argues that extension of service by Montana-Dakota would deny CEC the economic benefit of the revenues from serving the Menard site to recoup investment that CEC has incurred in providing service in the rural areas. The same argument, however, can be made in support of Montana-Dakota's investment to serve the area; particularly the investment

that will be needed to upgrade the McKenzie substation and distribution system. Essentially, CEC argues that it should be awarded service to the Menard site notwithstanding that it already receives approximately 50 percent of the new growth in the City of Bismarck and nearly all the new growth outside of the City of Bismarck. As noted previously, CEC is eligible for governmental support for service to the rural areas. Montana-Dakota's extension of service to an industrial site is not interference with the service or system for which CEC was created. In contrast, the Menard site is the logical extension of the service and system created by Montana-Dakota and its predecessors to serve McKenzie. Denial of the application would unreasonably interfere with the economic expansion of Montana-Dakota's electric service and systems serving McKenzie.

Conclusion

As shown in the attached chart, the consideration set forth in the Commission's Notice of Hearing either favor Montana-Dakota or neither of the two suppliers. Based upon the weight of the evidence on all the considerations identified in the notice of hearing, Montana-Dakota's application should be granted. In particular, in this proceeding where the customer brings 250 jobs supporting the economic development and growth of the area and the future of those jobs is dependent upon the sustainability of the customer's development, customer preference should be given additional weight beyond that normally provided in considering an application for public convenience and necessity. Both the State of South Dakota (S.D.C.L. §49-34-A-56) and State of Montana (M.C.A. §69-5-106) have specific exceptions in their Territorial Integrity Acts for extensions of service to large customers. These states have recognized that the

public convenience and necessity is not served if regulation is a deterrent to job creation and economic development.

Respectfully submitted this 22nd day of July, 2014.

Montana-Dakota Utilities Co., a Division of MDU
Resources Group, Inc.

By: 

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Application of Montana-Dakota Utilities Co.
for Certificate of Public Convenience and Necessity to Serve Menard, Inc.
Case No. PU-13-871

ISSUE	MDU	CEC	NEITHER
1. From whom does the customer 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?	✓		

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-13-871

AFFIDAVIT OF SERVICE BY REGULAR MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that she is over the age of 18 years and not a party to this action and, on the **22nd day of July, 2014**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

**Montana-Dakota Utilities Co.'s
Brief in Support of Application**

The envelope was addressed as follows:

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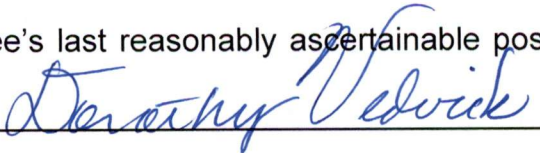
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Each address shown is the respective addressee's last reasonably ascertainable post office address.



Subscribed and sworn to before me this **22nd day of July, 2014**



Notary Public

SEAL

