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STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.

Appellant,

vs.

North Dakota Public Service Commission and Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.,

Appellees.

APPELLANT CAPITAL ELECTRIC COOPERATIVE, INC.'S BRIEF

Case No. 08-2014-CV-02349

Brief of Appellant
Capital Electric Cooperative, Inc.

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TABLE OF CONTENTS

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
Capital Electric Cooperative, Inc. Appellant, vs. North Dakota Public Service Commission and Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., Appellees.	**APPELLANT CAPITAL ELECTRIC COOPERATIVE, INC.'S BRIEF** Case No. 08-2014-CV-02349

I. INTRODUCTION

¶1 This is an appeal from the North Dakota Public Service Commission's (herein "Commission") September 17, 2014 "Findings of Fact, Conclusions of Law and Order" (herein "Decision") wherein a divided Commission issued to Montana-Dakota Utilities Co. (herein "MDU") Certificate of Public Convenience and Necessity No. 5845, authorizing MDU to provide electric distribution service to a location in the NE1/4 of Section 33, Township 139N, Range 77W, Burleigh County, North Dakota (herein "Menard Site"). The majority misapplied the law, erred in its findings, made findings that do not support the conclusions of law, and failed to properly address the evidence. The majority sanctioned MDU's pirating of a large, rural electrical load, which will have far reaching implications on the Territorial Integrity Act moving forward. Therefore, Appellant Capital Electric Cooperative, Inc. (herein "CEC") appeals to this Court for redress.

II. PROCEDERAL HISTORY

¶2 This matter came before the Commission on application of MDU to serve the Menard Site. This three-phase electrical load would be provided to Menard, Inc. (herein "Menards"). The application for service was dated November 25, 2013.

¶3 On December 18, 2013, the Commission issued a Notice of Opportunity for Hearing. A protest was filed by CEC. The Commission issued a Notice of Hearing dated February 26, 2014; the notice set forth the ten (10) factors that the Commission would consider.

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 suppliers in the area unreasonably interfere with the service or system of the other?

Evidence was presented at the May 2, 2014 hearing.

¶4 The Commission held three working sessions – May 30, June 12, and June 20, 2014. Before the June 20th working session, MDU requested oral arguments. 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 argument. Oral argument was held on July 28, 2014.

¶5 On September 17, 2014, a divided Commission, 2 to 1, issued the Decision finding that public convenience and necessity requires approval of MDU's application. Commissioner Kalk issued a Dissenting Opinion opining that the Commission's Decision contradicts the Territorial Integrity Act's two primary purposes – keeping to a minimum both (1) wasteful duplication and (2) conflicts between electric suppliers. Doc. ID #56, pg. 11-12. Commissioner Kalk unabashedly pronounced that his colleagues' Decision resulted in wasteful duplication evidenced by MDU's additional costs to extend service to the Menard Site especially in light of the fact that CEC already has the capacity to serve the Menard load when MDU will have to upgrade its substation to accommodate the new load. Id. This fact alone, in Kalk's mind, "would be wasteful duplication while [CEC] has more than enough existing capacity at its [substation]." Id. Additionally, Commissioner Kalk has grave concerns that the Commission's Decision will foster additional conflicts between the electrical suppliers. Id.

¶6 CEC has appealed from the Commission's Decision.

III. FACTS

A. Community of McKenzie

¶7 This appeal concerns three-phase electrical service to the Menard Site. The Menard Site is southeast of the community of McKenzie. Doc. ID #27, 28, 29, and 30. The location of the Menard Site in relation to the community of McKenzie is of utmost importance, especially in light of the Commission's Decision. The four maps (Doc. #27, 28, 29, and 30) that MDU entered into evidence are attached hereto as Exhibits 1, 2, 3, and 4 for the Court's convenience since these maps are

repeatedly referred to herein.[1] These four maps will be referred to herein either as Exhibits 1, 2, 3, and 4 or MDU Exhibits 1, 2, 3, and 4.

¶8 The Menard Site is southeast of the community of McKenzie; approximately 1,800 feet separates the Menard Site and the community of McKenzie. Tr. 37 and 38, Exhibits 3 and 4 (herein "Ex."). The community of McKenzie and the Menard Site are not adjacent to each other. Ex. 4. McKenzie is an unincorporated city and there are no plans for it to be incorporated. Tr. 44, 63, 153, and 159. MDU did not introduce the plat of McKenzie into evidence, but Lars Nygren, CEC's general manager, did testify that McKenzie was platted in 1902. Tr. 237. MDU has 28 customers who live in the community of McKenzie. Tr. 23. MDU's Exhibits 1, 3, and 4 depict streets that are east of Avenue B, but there are no streets east of avenue B – the only rationale given is that this information is from MDU's GIS (geographical information system) information that may be related to "existing platting that is out there." Tr. 61.

¶9 The residents of the community of McKenzie have rural water, but have no sewer service. Tr. 172. The community of McKenzie has seen no recent growth and MDU has not received any other applications for service in the community of McKenzie. Tr. 33, 44, 67, 68, and 174. The only testimony about any possible growth was from Steve Manor, a Menards' representative, who stated that ancillary growth can occur around Menards' sites. Tr. 112. Manor did not state where the growth would occur beyond that growth "surrounds our sites." Tr. 112.

¶10 MDU argued, and the Commission agreed, that MDU has a franchise to serve the community of McKenzie, which was given to MDU by and through the McKenzie township board. Tr. 153; Doc. ID #37. MDU believes that it has a franchise to serve the entire platted area of McKenzie,

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1 MDU's exhibits 1-4 were colored maps and Exhibits 1-3 were much larger than standard 8x11.5 documents. CEC's counsel is mailing to the Clerk of Court and the parties copies of the exhibits in the original format because the copies (Doc. ID# 27-30) in the Odyssey system are in black and white. These maps are crucial to understand this

which would include the farmland east of Avenue B over to the property that is just kitty-corner, adjacent, and immediately northwest of the Menard Site. Tr. 62 and 160; Ex. 1 and 3. MDU presented an exhibit that contained a March 2008 Franchise allegedly 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. Doc. ID #37, pg. 8-12. The minutes and the ordinance refer to McKenzie as a city, which it is not. Id. Both the minutes and the ordinance call for a seal of a municipality, which McKenzie is not. Id. McKenzie is not a city, nor is it a municipality. Both MDU and CEC agree that McKenzie is an unincorporated city. Both CEC and MDU agree that the Menard Site will not be annexed to a city.

¶11 MDU's Exhibit 1 and 3 make it appear that the community of McKenzie is directly adjacent and immediately northwest of the Menard Site. Ex. 1 and 3. This is not the case. Both MDU Exhibits 1 and 3 contain a box making the community of McKenzie look nearly four times its actual size, both maps show a box or "McKenzie Limits" depicting the community of McKenzie to be directly adjacent to the Menard Site. This too is not accurate. As stated above, there are no city or town limits because McKenzie is unincorporated. MDU's Exhibit 4 gives an accurate representation of where the community of McKenzie is actually located. Tr. 37; Ex. 4. Nearly the entire community of McKenzie is south of McKenzie Street and west of Avenue B. On MDU's Exhibit 3, except for one house adjacent to Avenue B, everything east of Avenue B is farmland; Craig Lohstreter, MDU's region electric superintendent, admitted this fact. Tr. 37 and 38. There was no testimony of who farms east of Avenue B, who owns the farmland, or if that person is willing to sell the farmland for future development. MDU's nearest electrical facility (and customer) from the

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case. MDU's exhibit 4 in black in white make the map illegible.

Menard Site is approximately 1,800 feet away; MDU's nearest customer to the Menard Site is directly adjacent to Avenue B in the community of McKenzie. Tr. 38; MDU Ex. 4.

¶12 The Commissioners who ruled in MDU's favor failed to grasp the location of the community of McKenzie in relation to location of the Menard Site, for they found that the community of McKenzie is "immediately north[west] and adjacent to [the Menard] site."[2] As described above, the community of McKenzie and the Menard Site are separated by 1,800 feet. Farmland is the only property that is immediately northwest and adjacent to the Menard Site. MDU Ex. 4; Tr. 37. The fact that this area directly northwest and adjacent to the Menard Site may have been platted in 1902 does not change the fact that the property is used only for agricultural purposes and nothing more.

B. Menard, Inc. – the customer.

¶13 In October 2013, Menard, Inc. (herein "Menards") requested service from CEC for CEC to serve the Menard Site. Tr. 180; Doc. ID #38. At or around the same time, Menards requested the same service from MDU. Doc. ID #42.

¶14 Menards requested CEC's current rates, which CEC gave Menards. Tr. 247 and 250. After CEC gave Menards its rates, CEC did not hear from Menards. Tr. 250. Steve Manor, the Menard's representative, admitted that he did not have additional conversations with CEC on issues related to reliability because CEC's rates were higher. Tr. 138. Menards never informed CEC that Menards was interested in an interruptible rate or that it needed three-phase interruption. Tr. 123. Lars Nygren's (the general manager for CEC) impression was that Menards wanted CEC and MDU to get into a bidding war as to the rates. Tr. 250. This was substantiated when Steve Manor, the Menards' representative, admitted that he asked CEC if they had "wiggle room" on their pricing. Tr. 138.

2 The majority Decision had a typographical error by stating "northeast" rather than "northwest."

¶15 At the hearing, Steve Manor, the Menards' representative, expressed his preference that MDU serve the Menard Site because of the current annual savings that Menards would receive. Tr. 108. He testified that MDU had incentive programs that CEC did not have at the time MDU requested service. Tr. 109. In the period between MDU's initial application and the hearing, CEC consolidated with Central Power Cooperative, Inc., so CEC, at the time of the hearing, had access to an interruptible rate. Tr. 241. Menards had never made CEC aware that Menards was looking at having complete stand-by generation onsite, so, now that CEC was aware of that fact, CEC would work with Menards on an interruptible rate if that is what Menards, in fact, wants. Tr. 241.

¶16 Because of the motors that Menards uses at its site, Manor testified that it was imperative that Menards receive a three phase interrupter from its electricity provider. Tr. 111.

C. MDU and CEC's current rates and facilities and required upgrades/extensions to serve the Menard Site.

¶17 Based upon the current electrical rates, MDU's rates are currently more favorable than CEC's rates. Doc. ID #36, pg. 1. Based on the current rates, MDU's total annual rate cost to Menards would be $513,669.88 while CEC's total would be $575,883.84. Tr. 145-46. This is a difference of approximately $62,000. MDU cannot guarantee that its rates will stay the same and admitted that its rates may be increased and that there is the possibility, albeit small, of CEC's rates, in five years, being less than MDU's. Tr. 162.

¶18 Both MDU and CEC operate in the general area of the Menard Site and both provide service within a two-mile radius of the site. MDU has twenty-nine (29) customers within a two mile radius of the Menard Site, twenty-eight (28) of which are located in the community of McKenzie. Tr. 23; Ex. 1 and 2. MDU's nearest customer is approximately 1,800 feet away from the Menard Site. Tr. 38; Ex. 3. CEC has eleven (11) customers within a two mile radius of the Menard Site and four (4)

within a one mile radius, three (3) of which surround and are directly adjacent to the Menard Site. Tr. 185-88; Doc. ID #39.

¶19 Both CEC and MDU have electric 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 Interstate 94 and CEC's line being closer to the Menard Site because its transmission line is to the south of the interstate. Tr. 18, 182, and 183. Ex. 1; Doc. ID #39. Unlike MDU whose facilities are 1,800 feet away from the Menard Site, CEC has single phase service that literally surrounds the site on three sides – the north, the west, and the south. Tr. 185-88; Doc. ID #39. CEC serves customers immediately northwest of the Menard Site (farmstead), immediately west of the Menard Site (farmstead), and immediately south of the Menard Site (railroad signal). Tr. 186-88; Doc. ID #39.

¶20 In order for MDU to serve the Menard Site, MDU must cross CEC's facilities. Tr. 235; Ex. 4. On the other hand, if CEC serves the site, CEC does not have to cross MDU's facilities. Doc. ID #39.

¶21 Although CEC and MDU both require some level of upgrades or extensions to their electrical facilities in order to supply three phase service to the Menard Site, MDU's upgrades are substantial while CEC's upgrades are minimal.

¶22 As stated above, CEC has single phase service surrounding the Menard Site on three sides. The Menard Site needs three-phase service; therefore, because CEC's nearest three-phase system is one mile north, CEC simply needs to add two additional phases to its single-phase line for 1 mile (5,280 feet) in order to provide three phase service to the Menard Site. Tr. 192; CEC Ex. 3. This one mile extension would cost CEC $44,527.31. Doc. ID #40. This dollar amount is CEC's total all-in cost to provide electrical service to the Menard Site. Tr. 192.

¶23 MDU, on the other hand, must make three different upgrades/extensions for 8,700 feet in order to provide three phase service to the Menard Site. MDU's three upgrades/extensions will be addressed in turn:

1. MDU's McKenzie substation, which is directly north of Interstate 94 and just over a mile north of McKenzie, 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 a 1958 transformer from another location.[3] Tr. 78 and 85; Doc. ID #33, Part A.

2. MDU's three-phase line from its substation to the community of McKenzie is a delta system, which is useless as it relates to Menards' needs at the site; therefore, MDU needs to convert its delta three-phase system to a wye three-phase system for 5,700 feet. Additionally, MDU must also convert 1,200 feet of single phase overhead to three phase. Tr. 40 and 79; Doc. ID #33, Part B. MDU admitted that its three-phase line, which is 1,800 feet from the Menard Site, is no different than CEC's single phase line that surrounds the site, for both MDU's three-phase line and CEC single-phase line are unable to serve the Menard Site. Tr. 49. MDU admitted that this delta to wye conversion likely would not be done anytime soon because historically there has not been load growth in the McKenzie area that the delta to wye conversion would only possibly be done if the load growth would change significantly. Tr. 30. The current delta system "was, and is" adequate to serve the needs of the community of McKenzie and no upgrade is needed. Tr. 29.

3. MDU must extend from its current facilities to the Menard Site, which requires MDU install 1,800 feet of three-phase line from the community of McKenzie to the Menard Site for a cost of $32,619.00. Tr. 73; Doc. ID #31.

MDU's all-in cost to provide electric service to the site is $126,632.00, which is $82,104.69 more than CEC's costs. Tr. 73, 74, and 77-79; Doc. ID #31, 33, and 40.[4]

¶24 On the other hand, 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. Tr. 197 and 223. As set forth

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[3] MDU justifies a cost of $0 to the old transformer that is being proposed to be used at its McKenzie substation because it has been totally depreciated to tax purposes. MDU admits that a new transformer would cost approximately $115,000.00. Tr. 100-01.

4 Both MDU and CEC submitted costs for each supplier to extend service within the site – MDU's costs on site were $66,039.00 and CEC's costs were $65,696.30; throughout this brief, CEC does not include these costs in the all-in costs because the estimates for both CEC and MDU are with a few hundred dollars. Doc. ID #32 & 41. When

above, Menards needs the three phase interruption service by its electrical provider. CEC already has the three phase interrupter at its Menoken substation; CEC would merely need to go hook it up as a three phase interrupter and this could be done at no extra cost. Tr. 194-95. 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 online. Tr. 203-04. MDU, even after all of its proposed upgrades, cannot provide any redundancy to the Menard Site because MDU does not have an alternate substation to feed the Menard Site.

¶25 Both MDU and CEC provided voltage drop calculation studies and both studies provided results that were within the acceptable limits in the industry. Tr. 82 and 200-02; Doc. ID #34 and 54. CEC's voltage study was done on its Menoken substation and current configuration. Commissioner Kalk expressed his concerns regarding MDU's study because it was based on a simulation of MDU's potential upgraded substation and not the actual substation. Tr. 82; Doc. ID #56, pg. 11 and 12.

¶26 From CEC's perspective, interference results if MDU serves the load because MDU must cross CEC's facilities. Tr. 237. Additionally, MDU would economically interfere "from the standpoint that [CEC has] established single-phase in the area...[and CEC should not] be relished as being this provider of last resort to railroad signals and then denied the privilege to serve a large load" that is surrounded by its system. MDU being granted this site will result in a checkerboard effect which would not best serve the orderly and economic development of service in the area. Tr. 235. CEC can extend services to the Menard Site for $82,000 less than MDU and CEC's rates, at this current time, are slightly more than MDU, thereby CEC can earn at adequate rate of return. Tr. 234-35.

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discussing the facts, either in this FACTS section or the LAW section below, CEC, when discussing total costs or all-

IV. TERRITORIAL INTEGRITY ACT (HEREIN "TIA")

A. This is not a typical TIA conflict.

¶27 "[T]he typical conflict between a public utility and an electric cooperative arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish." Cass Co. Elec. Co-op. v. Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1976). Here, no edge of a city is involved because no city is near the site, nor does MDU have a franchise to serve the community of McKenzie. Therefore, this is not the typical TIA case.

¶28 The majority's Decision erred in treating this like a typical case in concluding that a township board can grant a franchise to an area of land where a grouping of people happen to live in a concentrated area that happens to be platted. This error is critical warranting reversal.

B. History of the TIA.

¶29 The majority of the Commission neglected prior jurisprudence when it issued its Decision, for the majority's Decision, at worst, stripped the TIA of any significance and, at best, inadvertently misapplied the TIA. The majority's Decision, if allowed to stand, will have long lasting implications as it relates to the application of the TIA in future disputes between public utilities and cooperatives. The TIA is meant to minimize conflicts, but here, the majority issued a Decision that will spark future conflict.

¶30 In 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), the North Dakota Supreme Court gives a primer on the TIA:

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in costs is referring to the costs to extend serve to the Menard Site and not for extensions within the Site.

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**).

V. SCOPE OF REVIEW

¶31 An administrative agency's order should be reversed when: (1) the order is not in accordance with the law; (2) the agency's conclusions of law and order are not supported by its findings of fact; (3) the agency's findings of fact are not supported by a preponderance of the evidence; and (4) the agency's findings of fact do not sufficiently address the evidence presented by the appellant. N.D.Cent.Code § 28-32-46. If the order of the Commission is not affirmed, the order must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court. Id.

¶32 "Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision." Bjerklie v. Workforce Safety and Ins., 2005 ND 178, ¶ 9, 704 N.W.2d 818.

¶33 "In determining whether an agency's findings of fact are supported by a preponderance of the evidence, the standard of review is whether a reasoning mind could reasonably have determined the factual conclusions were supported by the weight of the evidence." Knudson v. North Dakota Dep't of Transp., 530 N.W.2d 313, 316 (N.D.1995).

¶34 The majority, in their Decision, misinterpreted and misapplied the law to the evidence presented, which this reviewing Court reviews de novo. At other times, the Commission made findings that are not supported by the weight of the evidence and, at times, made findings that are contradicted by the evidence. The facts of this matter and the proper interpretation and application of the law require that the majority's Decision be reversed.

VI. LAW

¶35 The majority of the Commission made numerous errors, which include, but are not limited to, the following: 1) concluding that MDU has a franchise to serve a community; 2) finding that growth

is going to occur and that it is going to occur in an area in which MDU automatically gets to serve because of a non-existent franchise; 3) finding that the community of McKenzie is directly northwest and immediately adjacent to the Menard Site; 4) make customer preference the key factor; 5) finding that no duplication resulted when MDU's costs were $82,000 more than CEC costs and when MDU must duplicate the electrical capacity that CEC already has in place; 6) concluding that a certificate must be issued to MDU because it found that MDU's three phase is closer than CEC's three phase when this factor does not support the conclusion to grant MDU a certification of public convenience and necessity. The result of the majority's Decision is that the TIA is effectively stripped of any significance, for its two primary purposes have been ignored by the majority.

¶36 Each of these errors, in isolation, warrant a reversal directing the Commission deny MDU's request for a Certificate of Public Convenience and Necessity. A review of the totality of all errors in the aggregate make a reversal a necessity, for the majority of the Commission eviscerated the TIA and such a Decision will open the flood gates for public utilities to wage war against rural cooperatives every time there is a large load in a rural area where the public utility happens to have a presence.

A. MDU does not have a franchise to serve the community of McKenzie or the hypothecated growth in the community of McKenzie or the platted areas of McKenzie that is farmland.

¶37 The majority erred as a matter of law in concluding that MDU has a franchise to serve the community of McKenzie. One of the main themes throughout the majority's Decision is that MDU has a franchise to serve the community of McKenzie and the surrounding areas that are platted but currently farmed. The second theme that follows the first is that growth is going to occur (apparently east of Avenue B which is platted but is and has always been farmland) and that it is going to occur in the area where MDU holds a franchise thereby justifying MDU's $82,000 in additional costs to

upgrade its system (compared to CEC's costs), which includes upgrading MDU's substation to duplicate the capacity that CEC already has in place. The problem with the majority's rationale is two-fold: 1) MDU does not have a franchise and 2) there was no evidence of where growth would occur if it, in fact, occurs.

i. The township board, by law, is unable to grant a franchise to MDU; therefore, the Commission erred in concluding that MDU holds a franchise to the community of McKenzie.

¶38 The majority concluded that MDU has a franchise to serve the community of McKenzie (the occupied area of the plat south of McKenzie Street and west of Avenue B) as well as the platted area of McKenzie east of Avenue B that is farmland. This is an error as a matter of law.

¶39 The Commission, during the May 2nd hearing and the working sessions, was concerned about the uninhabited area of the platted area of McKenzie east of Avenue B that is farmland. Commissioner Fedorchak wanted to make crystal clear which electrical supplier could serve the area that is currently farmland which is directly kitty-corner, immediately northwest, and adjacent to the Menard Site. MDU's witness answered that MDU would be the electrical supplier because of MDU's franchise to serve McKenzie. Tr. 62. This simply is not true. The law is directly the opposite.

¶40 Townships are unable to grant franchises. Pursuant to the TIA and related statutes, CEC is able to serve the area east of the community of McKenzie that is kitty-corner from the Menard Site that happens to be platted and that is currently being farmed (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.D.C.C. Chapter 49-03.

¶41 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.

¶42 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.

¶43 Therefore, to acquire 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. In this case, this would be for any new service in the area east of the community of McKenzie that is currently farmland (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 State 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").[5]

¶44 "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 (**emphasis added**). N.C.C.C. § 40-05.1-06(1) also authorizes home rule cities to "grant and regulate franchises" for utilities.

¶45 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).

¶46 MDU entered into evidence March 2008 Franchise granted by the township board of

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5 The North Dakota Supreme Court has been reluctant to say that rural electric cooperatives are given preference by the TIA to serve patrons in rural areas, but at the same time the Court has stated that it is "a fact" that rural electric cooperatives may automatically serve customers in rural areas unless the electric public utility applies for and receives a certificate of public convenience and necessity by the public service commission. Cass Co. Elec. Co-op. v. Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1976). It is in this sense that CEC states that it, as a rural cooperative, is the presumptive provider because it can serve rural area (including the property directly northwest of the Menard Site that happens to be platted) automatically and that MDU can only serve that area after it receives a certificate from the public service commission.

McKenzie to MDU, Doc. ID #37, pg. 8-12. 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. Id. The minutes and the ordinance refer to McKenzie as a city, which it is not. Id. Both the minutes and the ordinance call for a seal of a municipality, which McKenzie is not. Id. McKenzie is not a city, nor is it a municipality. It is an unincorporated community that happens to have a recorded plat where approximately twenty-eight (28) homes are located.

¶47 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, MDU did not present evidence that this was done. With that being said, 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 in the platted area of McKenzie that is directly kitty-corner and adjacent to the site. Under the TIA, CEC could serve such a customer and MDU would not be able to object. If MDU wanted to serve a new customer east of Avenue B, MDU would need to make an application to the Commission for a certificate of public convenience and necessity.

¶48 The implications that would follow if township boards could grant franchises are far reaching and would render the TIA completely meaningless because townships cover every square inch of the State of North Dakota. Township boards could grant franchises to public utilities for any property they desired stripping the TIA of any authority. The fact that there is a plat of McKenzie does not change the analysis, for it is still an unincorporated community and nothing more.

¶49 Therefore, the Commission, as a matter of law, erred in concluding that MDU has a franchise to serve the community of McKenzie as well as the undeveloped platted area of McKenzie, which

includes the farmland directly northwest, kitty-corner, and immediately adjacent to the Menard Site that was platted in 1902. This error is an undercurrent in the majority's entire Decision, for the Commission, when discussing growth in the area of McKenzie, assumes wrongly that MDU will be the recipient of that growth, which simply is not accurate. The majority issued a Certificate of Public Convenience and Necessity to MDU because of MDU's non-existent franchise. This error, by itself, warrants reversal. CEC requests that this reviewing Court determine, as a matter of law, that township boards are unable to grant franchises and reverse the Decision of the Commission in light of the actual state of the law.

¶50 Understanding this error is crucial because the Commission relied on this error when it discussed the future growth in the community of McKenzie, which is discussed next.

ii. There was no evidence of growth or where growth will happen; therefore, the Commission erred throughout its Decision when it found that MDU's extension will not only benefit the Menard Site but also the growth that MDU will serve in the community of McKenzie.

¶51 All MDU and CEC witnesses spoke in unison that there has been no growth in and surrounding the area of McKenzie. Tr. 33, 44, 67, 68 and 174. Additionally, MDU has not received any other applications for service in the McKenzie area. Id. The only testimony about any possible growth was from Steve Manor, a Menards' representative, who merely stated that growth can occur around Menards' sites. Tr. 112. Manor did not state where the growth would occur beyond that growth "surrounds our sites." Tr. 112.

¶52 The majority, in their Decision, used Manor's vague and general statement to find that, as a result of the Menard Site, additional growth will occur in the community of McKenzie and in the undeveloped, currently farmed, and platted area east of Avenue B and that MDU, because of their franchise, will serve that new load thereby justifying the Commission's majority Decision to give

MDU the Menards' load. More specifically, the Commission used Manor's statement to find the following:

1. "[MDU] has held a franchise since 1928 to serve the community of McKenzie, which is immediately north[west] and adjacent to the site." Doc. ID #56, ¶ 7.

2. "This [delta to wye conversion] will upgrade and increase the capacity of [MDU's] existing three-phase system sufficiently to serve the Menard Site and any additional load requests likely to result in the community of McKenzie." Doc. ID #56, ¶ 18.

3. "[MDU's] substation and distribution facility upgrades to serve the Menard Site will also result in an upgrade of the three-phase system serving in the community of McKenzie and provide additional capacity on that system for new load that can be anticipated as a result of employment created at the Menard Site. Service by [MDU] would benefit not only development of the Menard Site but also the orderly and economic development of the community of McKenzie." Doc. ID #56, ¶ 24.

4. "The Commission finds that service by [MDU] to the Menard Site best serves the community of McKenzie." Doc. ID #56, ¶ 26.

5. "[MDU's] proposed addition of a larger transformer and conversion to a Wye system will improve Montana-Dakota's electric service within the community of McKenzie and help meet potential growth resulting from approximately 240 new jobs." Doc. ID #56, ¶ 29.

6. The Commission finds that public convenience and necessity reasonably requires approval of Montana-Dakota's application because "[MDU's] extension of service would best serve the community of McKenzie ..." Doc. ID #56, ¶ 34.

¶53 During the hearing, there was no testimony of growth beyond Manor's general statement and there was no testimony that growth would only occur in McKenzie, yet the majority discussed growth as if it was a foregone conclusion, made findings that McKenzie was going to see growth as a result of the Menard Site, and made the determination that MDU was going to get the increased electrical load, all of which are not supported by the evidence. The Commission used this flawed reasoning to justify allowing MDU to duplicate what CEC already has in place.

¶54 The portion of McKenzie that is east of Avenue B that is directly adjacent and immediately northwest from the Menard Site is farmland and no testimony was presented about who farms it, who owns it, or if the owner would be willing to sell. Tr. 37 and 38; Ex. 4. As described in the previous

section, CEC is the presumptive provider of electricity in this rural area because MDU, by law, cannot have a franchise to serve a rural area.

¶55 If, in fact, growth is going to occur surrounding the Menard Site, there is the same possibility that growth will occur west of the Menard Site, north of the Menard Site, northwest of the Menard Site, or east of the Menard Site, which is not located in the platted area of McKenzie. Ex. 1, 2, and 4. As said above, no one testified that growth would happen in McKenzie. Additionally, even if growth did occur directly kitty-corner to the northwest of the Menard Site in the platted area of McKenzie that is farmed, CEC, as set forth in the above section, would serve the electrical load unless MDU properly came before the Commission and was granted a Certificate of Public Convenience and Necessity to serve the rural area.

¶56 The majority erred making findings that growth is going to occur in McKenzie because absolutely no evidence was presented regarding growth in McKenzie and further erred by assuming that MDU would get the electrical load resulting from the speculated growth – the Commission's findings regarding growth and MDU's ability to automatically serve the growth are not supported by the law, nor are the findings supported by the weight of the evidence. Knudson v. North Dakota Dep't of Transp., 530 N.W.2d 313, 316 (N.D.1995). Therefore, this Court should reverse the majority's Decision based on the facts that were actually presented at the May 2, 2014 hearing.

B. The Commission's finding that the community of McKenzie is immediately northwest and adjacent to the Menard Site is not supported by the evidence.

¶57 In paragraph 7 of the Decision, the Commission finds that the community of McKenzie is "immediately north[west] and adjacent to the [Menard Site]." Doc. ID #56. In discussing which supplier's service would best serve orderly and economic development of electric service in the general area, again, the Commission found that "northwest corner of the Menard Site is immediately

adjacent to the southeast corner of McKenzie." Doc. ID #56, ¶ 23.

¶58 MDU presented two maps, MDU Exhibits 1 and 3, that make it appear that McKenzie has city limits and that the community of McKenzie is directly adjacent to the Menard Site. The evidence does not support a finding that the community of McKenzie is directly adjacent to the Menard Site and MDU's own witnesses admitted this fact. Tr. 37 and 38, Ex. 4. The community of McKenzie is south of McKenzie Street and west of Avenue B as depicted on MDU's Exhibit 3. The community is approximately 1,800 feet away from the Menard Site. Tr. 38, MDU's Ex. 4. MDU's Exhibit 4 is an overhead satellite picture showing that the community is not directly adjacent and immediately northwest of the Menard Site. Craig Lohstreter, MDU's region electric superintendent, admitted that the only property directly adjacent to and immediately northwest from the Menard Site is agricultural land or open country (i.e. farmland). Tr. 37 and 38.

¶59 MDU or the Commission may argue that the community of McKenzie is directly adjacent to and immediately northwest of the Menard Site because that area may be platted. This argument is disingenuous. First, MDU never presented the plat of McKenzie, so the location of the platted area is unknown. Second, the fact that McKenzie may have been platted in 1902 does not change the fact that the land east of Avenue B is farmland and does not change the fact that McKenzie is not a city; therefore, the boundaries on the plat mean nothing. Anyone, as long as he or she goes through the proper channels, can plat land, but that does not make it a community or a city by the very nature of the act of platting. Here, the uncontroverted evidence was that the land directly adjacent and immediately northwest from the Menard Site is farmland and that the community of McKenzie is 1,800 feet away from the Menard Site and the facts, as presented, do not support the Commission's finding that the community of McKenzie and the Menard Site are directly adjacent and kitty-corner to each other. Tr. 37 and 38; Ex. 4.

¶60 This flawed finding by the Commission caused further error regarding so-called growth, regarding an alleged franchise to serve a community, regarding which supplier will serve said growth, and regarding other factors, such as the factor that deals with which supplier serves orderly and economic development of electric service in the area. This faulty finding caused error in each of these other areas because the Commission started its analysis with the flawed determination that was not supported by the evidence, for the community of McKenzie and the Menard Site are not directly adjacent to each other. Rather, the community and the site are separated by 1,800 feet of farmland and CEC's facilities, albeit single phase, are already in the southeast corner of this farmland. Tr. 37 and 38; Doc. ID #39.

¶61 The finding that the community of McKenzie and the Menard Site are directly adjacent to each other is not supported by the weight of the evidence. This requires a reversal of the Decision.

C. The majority erred by misapplying the law in determining that MDU's extension of electrical service would best serve orderly and economic development of electric service in the general area.

i. The majority ignored its prior precedent.

¶62 The Commission rightly stated that "[a] primary consideration of which supplier would best serve orderly and economic development in these cases is whether a **supplier's cost** to provide service to a customer exceeds the cost to provide service to that same customer from a second supplier." Doc. ID #56, ¶ 25 (**emphasis added**). The Commission's Decision, in a footnote, cited to a previous case, MDU Resources Group, Inc., December 17, 2008 Findings of Fact, Conclusions of Law, and Order, Case No. PU-08-345, 346, 347, and 693 (collectively referred to as "Doco Subdivision Case"), wherein this Commission did analysis under this factor. Ex. 5, ¶ 29-31. (This Decision is attached hereto as Exhibit 5.) This factor refers to a "supplier's cost" and not to a customer's costs through rates. The TIA is concerned about duplication of facilities, making it

evident that this factor is dealing with costs of extension of a supplier's electric facilities, because this fact has a direct bearing on duplication, which the TIA is meant to minimize. Using rates to make a finding on this factor undermines the primary purposes of the TIA, for such a factor, if misapplied to look at rates, rather than the supplier's costs to extend will encourage a customer to rate shop, which, if authorized by the commission, will result in conflict and wasteful duplication.

¶63 Here, the commission wrongly applied the law and found that this factor favors MDU because MDU's current rates result in an annual savings of approximately $62,000 to the customer, Menards. In the Doco Subidvision Case, after stating the primary consideration, the Commission discussed that public utility's costs to extend service are significantly less than the cooperative's cost to extend, thereby finding that the factor favored the public utility. Here, on the other hand, the Commission ignored the fact that CEC's costs (the supplier's cost) to extend service are $82,000 less than MDU's costs and instead focused on rates. This goes directly against the purpose of the TIA, which is to minimize wasteful duplication. This is reversible error, for it is CEC's extension of electrical service that would best serve orderly and economic development of electric service in the general area.

ii. The majority erred by consuming itself with the community of McKenzie, rather than the development of electric service in the general area.

¶64 The commission found that the MDU's extension of facilities to the Menard Site best serve orderly and economic development of electric service in the general area. Doc. ID #56, ¶ 26. The problem is that the commission misapplied the law. The commission, in analyzing this factor, was fixated upon which supplier's extension, whether MDU or CEC, "best serves the community of McKenzie." Id. Three of the four paragraphs that the commission devoted to this factor deal with the community of McKenzie, the speculated growth around McKenzie (that the commission wrongly

assumes will be automatically served by MDU because of a non-existent franchise), and justifying how MDU's upgrades will contribute to the "orderly and economic development of the community of McKenzie." Id.

¶65 This factor is concerned with the orderly and economic development of electric service, which, if reviewed properly will help the Commission continually remember the primary purposes of the TIA, which is to "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). Here, the Commission flipped this factor on its head and, in doing so, ignored the two primary purposes of the TIA, which is discussed later. The Commission committed error by focusing all of its attention on a platted, unincorporated community 1,800 feet away, rather than looking to the development of the "electric service" in the general area.

D. The Commission's finding that convenience and necessity reasonably requires approval of MDU's application because the "proposed extension of [MDU's] three-phase system to serve the site is shorter than the proposed extension of [CEC] three phase system" does not support the Conclusion of Law that MDU should be granted a Certificate of Public Convenience and Necessity.

¶66 The majority, in making their Conclusion to grant MDU the electrical load, made the finding that the "proposed extension of [MDU's] three-phase system to serve the site is shorter than the proposed extension of [CEC] three phase system." Doc. ID #56, ¶ 34. This finding is flawed and does not support the majority's ultimate conclusion.

¶67 CEC's single phase line is directly adjacent and surrounds the Menards Site on three sides – the north , west, and south. Tr. 186-92. CEC must add two phases for one mile for CEC to provide three phase service to the Menard Site. Id.

¶68 It is technically accurate to state that MDU's current three-phase line is closer to the Menard Site (it is 1,800 feet away opposed to CEC's three-phase, which is 5,280 feet away), but MDU's

three phase line is completely and utterly useless as-is, because MDU must add a neutral line to convert its three-phase line from a delta to a wye system. MDU's own witness stated that MDU's current three phase line, which is 1,800 feet away from the Site, is not any better than CEC's single phase line that surrounds the site, for both need upgrades. Tr. 49. Not only is MDU's current delta three-phase system worthless, the facts, as presented, establish that even with MDU upgrading its three phases system to a wye system, this conversion, by itself, does not allow MDU to serve the Menard Site – its electrical facilities are still worthless and are unable to serve the site, for MDU must upgrade its substation and extend its facilities 1,800 feet for costs that exceed CEC's costs by over $82,000. Tr. 40, 49, 73, 78, and 79. To serve the Menard Site, MDU must upgrade its substation, convert 5,700 feet of three-phase line to a wye system, and extend its facilities 1,800 feet.

¶69 The facts established that MDU is currently 1,800 feet away from the site and that MDU must upgrade its system for 8,700 feet for a total cost of $126,632.00. Tr. 73, 74, 77-79; Doc. ID #31, 33, and 40. CEC, on the other hand, has single phase service that surrounds the site and must upgrade its system for 5,280 feet for a cost of $44,527.31. Doc. ID #40. All in all, MDU must make upgrades and extensions for 8,700 feet at costs that exceed CEC's by over $82,000.00; therefore, the Commission's finding that MDU's current and useless three phase system is closer than CEC's three-phase system does not support the Commission ultimate conclusion of law to give MDU the electrical load. The majority's reliance on this finding, which does not support its conclusion, is further proof that the Commission misapplied the law and did not properly weigh the evidence, which warrants a reversal of the Commission's Decision.

E. The majority's Decision misapplied the law by making the "customer preference" the key factor.

¶70 "[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).

¶71 CEC does not take issue with the majority's finding of fact that Menards preferred MDU because of MDU's current and favorable rates, for this is not in dispute. The problem lies in the fact that this factor, under the TIA, is to carry little weight because unregulated customer preference would result in the TIA being rendered meaningless. Id. See generally Cass County Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514, 521 (N.D. 1976) (discussing how customer preference leads to checker boarding of a territory, which is something the TIA is meant avoid). The majority, in their Decision, used Menards' preference and MDU's more favorable rates in each of the following factors:

> Factor One – From whom does the customer prefer electric service?
>
> Factor Six – Which of the available electric suppliers will be able to serve the location in question more economically and still earn an adequate return on investment?
>
> Factor Seven – Which supplier's extended service would best serve orderly and economic development of electric serve in the general area?

The majority, in making the finding that public convenience and necessity reasonably requires approval of MDU's application, gave six bullet points with various facts to support its finding. Doc. ID #56, ¶ 34. Three of the six bullet points rely on Menards' preference or annual cost savings that Menards will receive because of current rates. Id. This paragraph (paragraph 34), by itself, shows that the Commission erred in relying too heavily on customer preference in violation of prior jurisprudence that minimizes customer preference.

¶72 The majority's overreliance on customer preference is error, for the TIA recognizes that customer preference is the least significant factor because unregulated customer preference leads to the obliteration of the TIA. The majority's Decision will result in rate-shopping by customers, for human nature generally wants to pay less for a commodity if two competitors offer the same product. The problem here is that the TIA is meant to prohibit rate shopping because the TIA is to minimize conflict; the TIA sets boundaries and gives rural cooperatives rural areas because rural cooperatives spent money and took the risk in bringing electricity to the prairie, something that public utilities refused to do.

F. The majority, in their Decision, made additional errors, for under other factors, the Commission misapplied the law and made findings that are not supported by the weight of the evidence.

¶73 The Commission found that MDU can serve the Site more economically and still earn an adequate return on investment based (1) on MDU's more favorable rates and (2) MDU's rate of return study. Here, the Commission ignored that CEC's cost to extend service to the Site are sixty-five percent less than MDU's costs ($44,527.31 v. $126,632). Therefore, CEC certainly can provide serve the site more economically than MDU. The cost to extend service usually is the primary factor that the Commission takes into account. Further, Lars Nygren, CEC's general manager, testified that this load would have a great impact on CEC members, for their rates are slightly higher than MDU's and CEC's cost to extend service are $82,000.00 less than MDU's costs, which would allow the costs to be spread out over more kilowatt hours thereby giving more benefits to existing customers Tr. 234-35. The Commission erred by finding that this factor favored MDU because the Commission ignored the fact that CEC's costs to extend are 65% less than MDU's costs and CEC's rates are currently slightly higher, which establishes that CEC's return will be greater. See Tri-County Elec. Coop. v. Elkin, 224 N.W.2d 785, 792-93

(N.D. 1974) (holding that an adequate rate of return was "obvious" from the facts that an additional customer would improve the economic feasibility of the system).

¶74 The Commission erred by finding that either extension – either by MDU or CEC – will not interfere with the other supplier's system or service. Here, the Commission's Decision results in MDU crossing CEC facilities and will result in the territory being checker boarded by MDU and CEC, since CEC facilities surround the Menard Site and MDU must extend 1,800 feet into CEC's territory when CEC already surrounds the Menard Site with its facilities. See generally Cass County Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514, 521 (N.D. 1976) (discussing how the checker boarding of a territory is a something to be avoided under the TIA). Additionally, allowing MDU to serve the Site economically interferes with CEC's system, for CEC has spent money extending its facilities in the area and CEC should not be "relished as being this provider of last resort to railroad signals and then denied the privilege to serve a large load." Tr. 237.

¶75 In both of these factors, the Commission misapplied the law and made findings that are not supported by the weight of the evidence, which warrants reversal.

G. The majority's Decision contradicts the two primary purposes of the TIA.

¶76 The primary purposes of the TIA are to keep to a minimum 1) wasteful duplication of capital-intensive utility services and 2) 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).

i. The Commission's Decision sanctioned MDU's duplication of CEC's electric facilities.

¶77 One of the two primary purposes of the TIA is "to keep to a minimum wasteful duplication of capital-intensive utility services." Id. Wasteful duplication of investment or service is also the 8th

factor that was considered by the Commission in rendering its Decision.

¶78 In this instant matter, the Commission's Decision endorses wasteful duplication. CEC already has the capacity to serve the Menard Site and any future growth in areas served by the Menoken substation. Tr. 197 and 223. MDU does not. Tr. 78 and 85; Doc. ID #33, Part A. MDU needs to upgrade its McKenzie substation and, by doing so, duplicates the capacity that CEC already has in place. This is exactly what the TIA is meant to stop.

¶79 In the Doco Subdivision Case, the Commission looked at two considerations to determine whether or not duplication was going to result if the Commission granted a certificate of public convenience and necessity to the public utility. First, the Commission looked to see if one of the supplier's extension of facilities had to cross the other supplier's facilities to serve the site in question. Ex. 5, ¶ 35. Second, the Commission looked to see if one supplier's costs to extend exceeded the other supplier's costs. Ex. 5, ¶ 35.

¶80 Here, MDU must cross CEC's facilities to serve the Menard Site. Tr. 235; Ex. 4. CEC, to serve the Menard Site, does not need to cross MDU's facilities. Doc. ID #39. The Commission, in their Decision, skirted the issue by stating that "both suppliers currently cross or would cross each other's lines in the area." Doc. ID 36, ¶ 28. The Commission stated this because CEC had stated that they had, in the past, crossed MDU's lines because there are times, because of facilities moving throughout the countryside, it is necessary for public utilities and cooperatives to cross each other's lines. The problem is that the Commission's own precedent specifically directs the Commission to look at whether or not the extension in question requires one supplier to cross the other supplier's line and not whether or not a crossing of lines has ever occurred in the past. Here, MDU's must cross CEC's facilities to serve the Menard Site, which, under the Commission's own precedent, indicates wasteful duplication.

¶81 The costs of CEC and MDU's upgrades were discussed at length above, so those numbers will not be reproduced in total here. The only thing that needs to be repeated is that MDU's upgrades will cost $82,447.39 more than CEC's upgrades. Doc. ID #31, 33, and 40. 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.

¶82 The majority found that MDU's proposed upgraded substation and delta to wye conversion will not result in wasteful duplication because the upgrades will improve MDU's electric service within the community of McKenzie and will help meet potential growth resulting from approximately 240 jobs. Doc. ID #56, ¶ 29 and 30. This finding is not supported by the evidence. As set forth above, there was a lack of evidence of growth at the May 2, 2014 hearing and, even assuming that growth is going to occur, no evidence was presented establishing where the growth would actually occur (the Commission assumed growth will occur in the platted area of McKenzie and that MDU would serve the growth because of its non-existent franchise). Craig Lohstreeter, MDU's regional electric superintendent, admitted that MDU's current facilities are adequate to serve community of McKenzie. Tr. 29 and 30.

¶83 The majority's finding is not supported by the weight of the evidence, for the evidence clearly established that MDU must duplicate what CEC already has in place – which is the capacity to serve the Menard Site. Further, the majority, as a matter of law, misapplied the TIA given the facts of this case and, in the end, endorsed wasteful duplication of electric facilities, which violates one of the primary purposes of the TIA. Therefore, the majority's Decision must be reversed.

ii. The majority's Decision encourages future conflict.

¶84 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). The majority's Decision guarantees that future conflict will result because of its Decision.

¶85 Here, CEC and MDU both have electrical systems that are sufficiently reliable, for the Commission made this finding in its Decision. Doc. ID #56, ¶ 17. CEC, the rural cooperative, has electric facilities, albeit single phase, that surrounds the Site on three sides. Tr. 185-188, Doc. ID #39. CEC, the rural cooperative, has a substation with sufficient capacity to serve the Site and no upgrades to their substation is needed. Tr. 197 and 223. CEC's only upgrade to serve the site is the installation of two additional phases for one mile – 5,280 feet – for a cost of $44,527.31. Tr. 192; Doc. ID #40.

¶86 On the other hand, MDU, the public utility, has to upgrade its system for 8,700 feet, for it must add additional capacity by upgrading its substation, convert its useless three-phase delta system to a wye system for 5,700 feet and convert 1,200 feet of single phase to three phase and then extend its facilities 1,800 feet to get to the Menard Site; MDU's total cost is $126,632.00, $82,000 more than CEC's costs.

¶87 What does this ruling tell MDU in the future or other similarly situated public utilities? It gives them the green light to go after large loads in rural areas in the face of a rural cooperative who already has capacity and who has facilities surrounding this site, which will have the necessary result of encouraging future conflicts between electric suppliers. The TIA was meant to minimize such conflict; here, unfortunately, the Commission will further encourage future conflict directly violating the second primary purpose of the TIA, which requires reversal of the Commission's Decision.

¶88 A reversal of the majority's Decision will encourage proper application of the TIA and will cause MDU, and public utilities, in the future to pause and to properly evaluate the facts (e.g., what capacity does the cooperative have in the area, does the cooperative have a presence surrounding the

site, what supplier has to spend more money upgrading facilities, will the public utility have to duplicate what the cooperative already has in place) before applying for a Certificate of Public Convenience and Necessity thereby starting a conflict.

VII. CONCLUSION

¶89 The Commission erred in its findings of facts and conclusions of law when it issued the Certificate of Public Convenience and Necessity to MDU. More specifically, the Commission erred when it determined that MDU has a franchise to serve McKenzie, erred when it found that growth will occur in the platted area of McKenzie, erred when it found that MDU, because of its so-called franchise, will serve the growth, and further erred in finding that there is not wasteful duplication, for the majority Decision, by giving the Menard Site to MDU, has authorized MDU to duplicate CEC's capacity, which CEC already has in place at its Menoken substation. The Commission, as a matter of law, erred when it misapplied the law, for the majority's Decision ignored both primary purposes of the TIA. For all these reasons contained herein, CEC respectfully requests that this reviewing Court reverse the Decision of the Commission.

Dated this 23rd day of January, 2015.

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