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APPEAL – notification of service – Appellee Brief

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2014-CV-02349

Capital Electric Cooperative, Inc.)
)
 Appellant,)
)
 vs.)
)
 North Dakota Public Service)
 Commission and Montana-Dakota)
 Utilities Co., a Division of MDU)
 Resources Group, Inc.,)
)
 Appellees.)

**MONTANA-DAKOTA UTILITIES
 CO., A DIVISION OF MDU
 RESOURCES GROUP, INC.'s
 APPELLEE BRIEF**

ISSUE

[1] Whether the Public Service Commission’s Order concluding public convenience and necessity require the granting of a certificate of public convenience and necessity to Montana-Dakota to extend electric service to the Menard Site was in accordance with the law.

PROCEDURAL HISTORY

[2] On November 25, 2013, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (“Montana-Dakota”) submitted an application to the North Dakota Public Service Commission (“Commission”) to extend electric service to Menard, Inc., at a location adjacent to the unincorporated community of McKenzie in the Northeast ¼ of Section 33, Township 139N, Range 77W, Burleigh County, North Dakota (“Menard Site”). Capital Electric Cooperative, Inc. (“CEC”), Bismarck, North Dakota filed a protest and request for hearing on the application on January 16, 2014.

[3] On February 26, 2014, the Commission issued a Notice of Hearing

scheduling a public hearing to be held on Friday, May 2, 2014. The notice identified the following issues to be considered:

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 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?

[4] On May 2, 2014, a public hearing on Montana-Dakota's application was held and both parties presented testimony and exhibits. The Commission held three work sessions discussing the issues of the case. On June 13, 2014, Montana-Dakota requested oral argument before the Commission on its application. Both parties submitted briefs to the Commission in support of their position on July 22, 2014, and oral argument was held on July 28, 2014.

[5] On September 17, 2014, the Commission issued its Findings of Fact,

Conclusions of Law, and Order granting Montana-Dakota a certificate of public convenience and necessity (“CPCN”) to extend electric service to the Menard Site. On September 17, 2014, the Commission issued CPCN No. 5845, authorizing Montana-Dakota to provide electric distribution service to the Menard Site.

[6] On October 15, 2014, CEC filed its Notice of Appeal and Specifications of Error.

STATEMENT OF FACTS

[7] Montana-Dakota and CEC are the only electric suppliers operating in the general area of the Menard Site near McKenzie, North Dakota. Montana-Dakota is an investor owned electric utility providing electric service to customers in North Dakota under the regulatory jurisdiction of this Commission. Montana-Dakota is the electric provider within the community of McKenzie (Docket Entry (“DE”) 19) and (Transcript of May 2, 2014, Public Hearing (“Tr.”) pg. 62, 153). Montana-Dakota serves twenty-eight customers within a one-mile radius of the Menard Site and twenty-nine customers within a two-mile radius of the Menard Site. (Tr. 23) and (DE 9).

[8] CEC is a rural electric cooperative providing electric service to its members in North Dakota. CEC provides single-phase service to rural customers adjacent to the Menard Site. (Tr. 198). CEC serves four customers located within a one-mile radius of the Menard Site and eleven customers within a two-mile radius. (Tr. 185). CEC does not have a three-phase line within a mile of the Menard Site. (Tr. 198). The evidence presented established Montana-Dakota serves more customers within both a one-mile and a two-mile radius of the Menard Site than does CEC.

[9] McKenzie, North Dakota, is immediately northeast and adjacent to the

Menard Site. (DE 12). The community of McKenzie is unincorporated. (Tr. 153). Montana-Dakota and its predecessors have held a franchise from the McKenzie Township Board of Supervisors to serve the village of McKenzie since 1928. (DE 19) and (Tr. 153). Montana-Dakota introduced evidence at the hearing in the form of a 1928 resolution and ordinance of the Board of Township Supervisors for McKenzie Township granting the franchise for an electric distribution system for the Village of McKenzie. Id. The franchise defined the boundaries of McKenzie to be the Southeast ¼ of Section 29 and the Southwest ¼ of Section 28, Township 139N, Range 77W. Id. Montana Dakota introduced maps at the hearing establishing the Southwest ¼ of Section 28 is adjacent to the Northeast ¼ of Section 33. (DE 11 and 12).

[10] In addition to the franchise, the Commission granted Montana-Dakota a CPCN to construct and operate an electric distribution system in McKenzie in 1928.¹ (DE 19) and (Tr. 154). Montana-Dakota has been providing electric service to McKenzie for 86 years pursuant to its franchise and CPCN. Id.

[11] Montana-Dakota owns and operates a 46 kV transmission line that originates at Bismarck and extends in an easterly direction along the north side of I-94 providing transmission service for a number of communities served by Montana-Dakota, including the community of McKenzie. (Tr. 50). Montana-Dakota owns and operates a substation located just north of McKenzie, which supplies Montana-Dakota's distribution system serving its customers in McKenzie and the surrounding area. (DE 11). Montana-Dakota's region electric superintendent testified the McKenzie substation can be served from either

¹ CPCN No. 86 was issued by the Board of Railroad Commissioners, the predecessor to the Public Service Commission, to Northern Power and Light Company. As part of the record in this case, Montana-Dakota introduced evidence of the assignments of franchise from Northern Power and Light Company to Montana-Dakota in 1945. (Tr. 154).

direction off the transmission line, which increases the reliability of the service. (Tr. 20). Montana Dakota's distribution line for the community of McKenzie is a three-phase primary overhead line extending south from the McKenzie substation. (Tr. 21).

[12] Central Power Cooperative operates a transmission line located on the south side of I-94 that connects substations at Menoken and Sterling. CEC proposes to serve the Menard Site from Central Power Cooperative's Menoken Substation which is located approximately 8 miles west of McKenzie. (Tr. 188-89). CEC would serve the Menard Site by converting about a mile of single-phase line to three-phase line between the existing three-phase line on the south side of I-94 and the Menard Site. (Tr. 191).

UPGRADE TO FACILITIES

[13] The evidence presented at the hearing established both Montana-Dakota and CEC would need to construct extensions to existing electric supply lines to serve the Menard Site. (Tr. 49). In order to serve the Menard Site, Montana-Dakota would need to add a neutral wire to convert the approximately 5,700 feet of existing three-phase overhead line currently serving McKenzie from a Delta to Wye configuration and convert approximately 1,200 feet of single-phase line to three-phase Wye. (DE 11) and (Tr. 24-29). Montana-Dakota would then extend the converted line underground for a distance of approximately 1,800 feet to the Menard Site. Id.

[14] Montana-Dakota would also need to upgrade its McKenzie substation from a Delta three-phase to a Wye three-phase system. Id. The conversion of the McKenzie substation would require replacement of the existing transformer with a larger three-phase Wye transformer, voltage regulators, reclosure, and associated wiring. Id. The transformer would be a used transformer from existing inventory. Id. Montana-Dakota testified its

upgrades to the substation and distribution facility to serve the Menard Site will also result in an upgrade of its three-phase system serving the community of McKenzie and provide additional capacity on that system for any new loads that can be anticipated as a result of employment created at the Menard Site. (Tr. 30, 155, 159).

[15] Montana-Dakota estimated the total cost to extend service to the Menard Site is \$192,671, which includes the extension from the existing system to the Menard Site (\$32,619), upgrades to the McKenzie substation (\$61,451), the conversion of the McKenzie distribution line to a Wye three-phase system (\$32,562), and the installation of conductors and equipment within the Menard Site (\$66,039). (DE 13 – 15). Montana-Dakota's annual revenue requirement associated with the total incremental investment associated with the proposed extension is \$27,872. (DE 18).

[16] CEC would extend service to the Menard Site by installing one mile of two new phases to its current single-phase service between its existing three-phase line and the Menard Site. (Tr. 191). CEC's estimated cost to extend secondary service to the Menard Site is approximately \$110,223, which includes the conversion of its single-phase line to a three-phase line (\$44,527) and the installation of conductors and equipment within the Menard Site (\$65,696). (DE 22 and 23). CEC testified in order to provide reliable service to its Menard Site, it would need Central Power to upgrade its Sterling substation to increase capacity. (Tr. 203-04). However, CEC did not provide any cost estimate to upgrade the Sterling substation. Id. In addition, CEC failed to introduce any evidence of its annual revenue requirements for recovering the cost of its proposed extension. (Tr. 242). CEC also testified its proposed three-phase line to provide service to the Menard Site will only benefit Menards and none of its other customers. (Tr. 213, 236).

[17] The estimated electric consumption for the Menard Site is approximately 7

million kWh per year. (Tr. 106). Consideration of the cost to serve the location includes consideration of not only the provider's cost to extend service to the Menard Site, but also the other costs of electric distribution, transmission, and generation, which are reflected in the service provider's rates for service. Montana-Dakota's annual cost to the customer to provide electric service to the Menard Site under its current rates is \$513,669.84. (DE 18). CEC's annual cost to the customer to provide electric service to the Menard Site under its current rates is \$575,883.84. Id. CEC's annual cost to the customer to provide electric service to the Menard Site is approximately \$62,214, or 11 percent, more than the annual cost to the customer under Montana-Dakota's rate schedule. Id.

[18] Montana-Dakota also presented evidence at the hearing that granting it as the electric service provider for the Menard Site would also benefit its other North Dakota customers. After adjusting Montana-Dakota's estimated annual revenue from providing service to the Menard Site by: (1) \$27,872 for the annual return requirement on its incremental investment to serve the location; and (2) \$189,140 for the annual cost of fuel and purchased power to serve the location, there will be net contribution to common system costs of \$296,658, which will provide a benefit to other customers. (DE 18) and (Tr. 145-50). CEC failed to introduce any evidence of the return it would derive from its incremental investment to serve the Menard Site. (Tr. 242).

RELIABILITY

[19] Both providers presented evidence regarding reliability of their facilities in the area. Montana-Dakota had only one outage on its McKenzie three-phase system over the last fourteen years. (Tr. 33-34) and (DE 17). In contrast, CEC experienced five outages on its existing three phase line in a period of six years. (Tr. 202).

[20] CEC testified it could improve the reliability of its three-phase line to serve the Menard Site if Central Power Cooperative upgrades the Sterling substation. (Tr. 203). The Sterling substation does not currently have capacity to serve the entire load planned at the Menard Site. Id. The costs to upgrade the Sterling substation were not included in CEC's proposed costs to serve the Menard Site. Id.

[21] Montana-Dakota provided the results of a study showing that the voltage drop between the McKenzie substation and the Menard Site, with a total 1.1 MW load, would be less than 2.0 percent. (DE 16). CEC provided the results of its study showing a voltage drop between the Menoken substation and the service entry point to the Menard Site of approximately 2.5 percent with a total 1.0 MW load. (DE 36).

MENARDS

[22] Montana-Dakota's application included an appearance form signed by Menard, Inc. ("Menards"), indicating it desires electric service at the Menard Site from Montana-Dakota (DE 1). Steve Manor, General Manager of Distribution Center Maintenance for Menards, testified at the hearing and indicated Menards preference was to have electric service from Montana-Dakota. (Tr. 103). Manor explained Menards is developing a manufacturing and distribution center at the Menard Site which will employ approximately 240 - 250 people. (Tr. 104-06). He also testified the increased 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. (Tr. 112, 118-19). The Menard Site requires three-phase electric service at each of several locations on the site and the anticipated total electric load at the site will be approximately 1.2 MW (megawatts) with estimated annual consumption of

approximately 7 million kWh (kilowatt hours). (Tr. 106).

[23] Menards sought proposals for electric service from both Montana-Dakota and CEC. (Tr. 107-08). Menards desires to receive electric service from Montana-Dakota at the Menard Site for a number of reasons. First, Menards expects to realize an annual savings of approximately \$62,000 by receiving electric service from Montana-Dakota. (Tr. 108-09) and (DE 18). Second, Montana-Dakota offers rate schedules for interruptible service and demand response programs that provide further opportunities for cost savings of up to \$150,000 to Menards, which was a significant factor as it plans to install customer-owned generation at the site. (Tr. 123, 152). Third, CEC did not offer any demand control programs to Menards, as it had no similar rate incentive plans. (Tr. 108-09, 241). Fourth, Menards determined Montana-Dakota was able to provide better quality and more reliable service due to less voltage drop, which was an important consideration due to the operation of equipment at the Menard Site. (Tr. 110-11). In addition, Menards has a previous relationship with Montana-Dakota with their Bismarck store and have been very pleased with the service provided. (Tr. 122). Finally, Menards preferred to receive its electric service from a provider whose rates and services are subject to regulatory oversight and approval by an independent agency with an opportunity for customer input. (Tr. 110). For these reasons, Menards determined Montana-Dakota was a better provider for electric service to the Menard Site.

[24] Montana-Dakota's costs of providing electric service to the Menard Site are \$62,214 less annually than CEC's costs for the same service. (DE 18). These cost savings would assist Menards in the financial viability and success of the manufacturing and distribution center and the associated employment and economic development for the general area. (Tr. 118-19, 132-33).

[25] Following the hearing, the Commission found that public convenience and necessity reasonably requires approval of Montana-Dakota's application because:

- The customer prefers electric service from Montana-Dakota as it results in more than \$60,000 in annual cost savings and better meets the customer's needs;
- Montana-Dakota has served customers in the area since 1928 and has more customers within a one-mile and two-mile radius of the location;
- Montana-Dakota's substation is located closer to the Menard Site providing less voltage drop and less line length on which a fault could occur;
- The proposed extension of Montana-Dakota's three-phase system to serve the site is shorter than the proposed extension of Capital Electric's three-phase system.
- Montana-Dakota will serve the Menard Site more economically when considering both the cost to extend service and the annual costs to the customer as reflected in rates for service;
- Montana-Dakota's extension of service would best serve the community of McKenzie and realize significant cost savings to Menard, Inc., therefore best serving orderly and economic development of the area. (DE 38)

STANDARD OF REVIEW

[26] An appeal from a decision by the Commission is governed by the

Administrative Agencies Practice Act in N.D.C.C. Ch. 28-32. North Central Elec. Coop. v. N.D. PSC, 2013 ND 158, ¶ 6, 837 N.W.2d 138. Under N.D.C.C. § 28-32-46, a district court must affirm an administrative agency order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

[27] The Commission's determination will not be disturbed on appeal unless it can be shown that such decision or determination is not in accordance with the law, or the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. In re Otter Tail Power Co., 169 N.W.2d 415, 419 (N.D. 1969). In reviewing the Commission's findings of fact, the district court does not make independent findings of fact or substitute its judgment for that of the Commission; rather, the court should decide only whether a reasoning mind reasonably could have decided the Commission's factual conclusions were proved by the weight of the evidence from the entire record. Coteau Props. Co. v. Oster, 2000 ND 23, ¶ 5, 606 N.W.2d 876. It is not a district court's function to act as a super board when reviewing decisions by an administrative agency. Id. In technical matters involving agency expertise, the Commission's decision is entitled to appreciable deference. Id.

LAW AND ARGUMENT

I. THE COMMISSION PROPERLY CONCLUDED THAT PUBLIC CONVENIENCE AND NECESSITY REASONABLY REQUIRED APPROVAL AND GRANTING OF A CPCN TO MONTANA-DAKOTA TO EXTEND SERVICE TO THE MENARD SITE.

[28] The record on appeal establishes the Commission in this case properly identified the ten issues for determining whether public convenience and necessity reasonably requires granting a CPCN for an extension of electric service. The record on appeal also establishes the Commission properly considered the evidence presented by the parties on each issue. In evaluating each issue, the Commission determined every issue either favored Montana-Dakota or did not favor either party. The Commission concluded none of the public convenience and necessity factors favored CEC in this case. CEC's argument on appeal is simply a plea to this Court to reweigh the evidence considered by the Commission. The North Dakota Supreme Court has explained the district court does not make independent findings of fact or substitute its judgment for that of the Commission. Coteau Props. Co., 2000 ND 23, at ¶ 5. The evidence presented establishes the Commission's Order granting Montana-Dakota the CPCN to extend electric service to the Menard Site was in accordance with the law.

A. The Territorial Integrity Act.

[29] The Territorial Integrity Act ("TIA") was enacted in 1965, which added subsections 01.1 through 01.5 to N.D.C.C. Chapter 49-03, governing new electric utility extensions outside of municipalities. The TIA requires public utilities to obtain a CPCN from the Commission prior to construction and operation of new electric facility extensions beyond municipal limits.

[30] The TIA provides that before a public utility shall be permitted to extend new

lines outside a municipality, it must show that public convenience and necessity reasonably requires such extension. Otter Tail Power Co., 169 N.W.2d at 418. The North Dakota Supreme Court has set forth the factors for the Commission to consider in determining whether an application for a CPCN should be granted, including:

- customer preference;
- 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.

Id.

[31] Contrary to CEC's assertion in its Brief, rural areas are not the exclusive or presumed service territory of rural electric cooperatives. The North Dakota Supreme Court has never said the TIA gives cooperatives a preference for electric service in rural areas. See Capital Electric Cooperative v. Public Service Commission, 534 NW 2d 587, 590 (N.D. 1995). The TIA provides that public utilities have the legal authority to serve rural areas, but must first receive a CPCN from the Commission. See N.D.C.C. Ch. 49-03-01.1.

[32] The present case presents the classic conflict between a public utility and rural electric cooperative under the TIA. The North Dakota Supreme Court has recognized "the 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 County Elec. Coop. v. Wold Properties, 249 N.W.2d 514, 520 (N.D. 1976)

B. The Commission properly concluded customer preference for electric service favored Montana-Dakota.

[33] The first of the Commission's considerations in determining whether public convenience and necessity supported Montana-Dakota's application is customer preference. The evidence presented at the hearing clearly established Menards prefers to receive its electric service from Montana-Dakota.

[34] Menards' General Manager of Distribution Center Maintenance testified at the hearing that it wanted Montana-Dakota to provide electric service to its new manufacturing and distribution center near McKenzie. Montana-Dakota's favorable pricing was one of the reasons Menards preferred Montana-Dakota as a service provider.

Menards would receive an annually savings of over \$62,000 from receiving its electric service from Montana-Dakota, rather than CEC. The annual savings could be upwards of \$150,000 annually if Menards participated in Montana-Dakota's demand response programs. CEC did not offer similar demand response programs to Menards.

[35] Menards testified the price difference was only one of the reasons for its preference of Montana-Dakota. Menards preferred Montana-Dakota because of Menards' favorable experience as a customer at its Bismarck location. Menards also preferred Montana-Dakota because of reliability considerations in providing electric service to the McKenzie site. Menards also testified Montana-Dakota was more responsive to Menard's requests and needs than CEC. Finally, 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. These were all legitimate considerations supporting Menards' preference for Montana-Dakota in

addition to the significant price advantage for its service.

[36] Although the Supreme Court has stated the customer preference is not the controlling factor in deciding a CPCN, it is nonetheless a consideration that cannot be summarily dismissed and should be weighed along with the other issues. The undisputed facts support the Commission's conclusion that the customer preferred service from Montana-Dakota.

C. The Commission properly concluded location of service lines favored Montana-Dakota because it had been serving customers in the area since 1928 and served more customers within a one-mile and two-mile radius of the Menard Site.

[37] The third and fourth factors the Commission considered were the location of the existing electric facilities and the number of customers served in the area. The Commission properly concluded Montana-Dakota served more customers in the immediate area, had been providing service in the area for longer than CEC, and had three-phase facilities closer to the Menard Site than CEC.

[38] Montana-Dakota and CEC are the only electric suppliers operating in the general area of the Menard Site near McKenzie. The Commission found Montana-Dakota serves more customers within both a one mile and two mile radius of the Menard Site than does CEC. The undisputed evidence presented at the hearing established Montana-Dakota serves twenty-eight customers within a one-mile radius of the Menard Site and twenty-nine customers within a two-mile radius of the Menard Site. CEC only serves four customers within a one-mile radius of the Menard Site and eleven customers within a two-mile radius.

[39] The Commission also found Montana-Dakota has been serving the area

longer than CEC. Montana-Dakota has held a franchise to serve the community of McKenzie since 1928. Montana-Dakota owns and operates a 46 kV transmission line that originates at Bismarck and extends in an easterly direction along the north side of I-94 providing transmission service for a number of communities served by Montana-Dakota, including McKenzie. The transmission line is a two-way or looped supply source for Montana-Dakota's substation located north of McKenzie. Montana-Dakota's McKenzie substation is less than one mile from McKenzie and supplies Montana-Dakota's distribution system serving its customers in McKenzie and the surrounding area. Montana-Dakota's distribution line for the community of McKenzie is a three-phase primary overhead line extending south from the McKenzie substation into McKenzie.

[40] CEC has no three-phase electric lines in the proximate area of the Menard Site. CEC proposed serving the Menard Site from the Menoken substation which is located approximately 8 miles west of McKenzie. CEC has an underground three-phase distribution line which runs from the Menoken substation along the south side of I-94. CEC would extend service to the Menard Site by installing one mile of two new phases to its current single-phase service between its existing three-phase line and the Menard Site.

[41] The Commission correctly found that MDU served more customers in the immediate area and has closer three-phase facilities to the Menard Site.

D. The Commission properly concluded Montana-Dakota could provide better reliability in service.

[42] The next factor the Commission considered in determining whether Montana-Dakota's application for a CPCN should be granted was the reliability of the service which will be rendered. The evidence presented at the hearing clearly established Montana-Dakota was able to provide more reliable electric service to the Menard Site. The

Commission properly concluded Montana-Dakota could provide increased reliability of service because there would be less voltage drop and less line length upon which a fault could occur.

[43] Both parties presented evidence of outage history of the facilities. The evidence at the hearing established Montana-Dakota had only one outage on its McKenzie three-phase system over the last 14 years, which is an average outage rate of 0.07 outages per year. In comparison, CEC testified it experienced five outages on its existing three phase line in a period of six years; an average outage rate of 0.833 outages per year, or nearly 12 times greater than the historic average outage rate for Montana-Dakota's three phase system.

[44] The length of the radial line necessary for each provider to supply electric service to the site was an important consideration for the Commission. The length of the line is an important factor because the longer the line, the greater chance of damage to the line and the increase in voltage drop. (Tr. 31). The Commission has repeatedly recognized that the distance between the respective substation and the location to be served is indicative of reliability. Voltage drop is important to a customer because it can affect the operation of their equipment. (Tr. 81). In the present case, CEC proposed to serve the Menard Site through approximately nine miles of line from the Menoken substation. In comparison, the length of Montana-Dakota's line from the McKenzie substation to the Menard Site is approximately a mile and a half.

[45] The length of the line from the substation to the location is also important because the distance between the substation and service location means the level of voltage drop will be lower. Menards testified outages and voltage drop are particularly important considerations for a large industrial customer, as it affects the performance of

machinery. Montana-Dakota introduced evidence of the results of a study showing that the voltage drop between the McKenzie substation and the Menard Site, with a total 1.1 MW load, would be 2.0 percent. In contrast, CEC presented the results of a study showing a voltage drop in the nine miles between the Menoken substation and the Menard Site, with a total 1.0 MW load, would be approximately 2.5 percent.

[46] 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. However, the cost of such an upgrade 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.

[47] 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 because there would be less voltage drop on its line and less line length upon which a fault could occur. Therefore, the Commission properly concluded the reliability of service factor favors Montana-Dakota's application.

E. The Commission properly concluded Montana-Dakota would be able to provide electrical service to the Menard Site more economically and still earn an adequate rate of return on its investment.

[48] The next factor in consideration of whether public convenience and necessity favors Montana-Dakota's application is which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment. The Commission properly concluded Montana-Dakota will be able to serve the Menard Site

more economically and still earn an adequate return on its investment.

[49] Both Montana-Dakota and CEC would need to incur capital costs to extend electric service to the Menard Site. Montana-Dakota's total estimated cost to extend secondary service to the Menard Site is \$192,671. Montana-Dakota's annual revenue requirement associated with the total incremental investment associated with the proposed extension is \$27,872. CEC's total estimated cost to extend secondary service to the Menard Site is approximately \$110,223, which did not include the costs to upgrade the Sterling substation. CEC did not introduce any evidence of the annual revenue requirements for recovering the cost of its proposed extension of service.

[50] Contrary to CEC's argument throughout its brief, the Commission properly recognized the cost of serving a location is not limited to the cost of extending wires and poles, but also includes other costs for electric distribution, transmission and generation as reflected in the service provider's rates for service. Montana-Dakota's annual rates for service to the Menard Site under its current rates is \$513,669.84, while the annual rates for CEC to provide the same service under its current rates is \$575,883.84. The annual cost to the customer for Montana-Dakota to provide service to the Menard Site is approximately \$62,214, or 11 percent, less than the annual cost to the customer under rate schedule for CEC. In addition, these savings do not reflect the potential savings Menards could receive if it participates in Montana-Dakota's demand control programs, which could result in a savings of \$150,000 annually.

[51] Montana-Dakota introduced evidence at the hearing 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 which will provide a net benefit to other customers. The Commission found

that after adjusting Montana-Dakota's estimated annual revenue from providing service to the Menard Site by: (1) \$27,872 for the annual return requirement on its incremental investment to serve the location; and (2) \$189,140 for the annual cost of fuel and purchased power to serve the location, there will be net contribution to common system costs of \$296,658, which will provide a benefit to other customers in North Dakota.

[52] 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. (Tr. 242). The Commission was unable to determine CEC's return on investment to serve the Menard Site because CEC introduced no evidence regarding the margins on the cost of providing such service. Id. Thus, there is no evidentiary basis to determine what, if any, return on investment would be realized by CEC and whether CEC can serve the Menard Site more economically and earn an adequate return of investment.

[53] Based upon all the evidence presented at the hearing, the Commission properly determined Montana-Dakota will be able to serve the Menard Site more economically and still earn an adequate return on its investment.

F. The Commission properly concluded Montana-Dakota would best serve orderly and economic development of electric service in the area without wasteful duplication of investment.

[54] The final factor in consideration of whether public convenience and necessity favors Montana-Dakota's application is which supplier is best qualified to furnish electric service to the site and which also can best develop electric service in the area without wasteful duplication of investment or service. The Commission properly concluded service by Montana-Dakota would better serve the orderly and economic development in the area

without wasteful duplication of investment or services.

[55] The Commission found Montana-Dakota is the current electric provider within the community of McKenzie. Montana-Dakota and its predecessors have held a franchise from the McKenzie Township Board and a CPCN from the Commission to provide electric service to McKenzie since 1928. The Commission also found the northwest corner of the Menard Site is immediately adjacent to the southeast corner of the boundary of McKenzie. In addition, Montana-Dakota serves more customers within both a one-mile and two-mile radius of the Menard Site than CEC. The Commission found service by Montana-Dakota would simply be an extension and continuation of its service to the McKenzie community for the past 86 years. Montana-Dakota has substantially more customers within the immediate area of the Menard Site which is indicative of an orderly development determination.

[56] In addition, the Commission found Montana-Dakota's upgrades to its substation and distribution facilities to serve the Menard Site will result in an upgrade of its three-phase system serving the community of McKenzie and provide additional capacity on that system for any new loads that can reasonably be anticipated as a result of increased employment created at the Menard Site. 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 fact, CEC testified its proposed three-phase line to provide service to the Menard Site will only benefit Menards and no other customers. (Tr. 213, 236). The Commission properly concluded service by Montana-Dakota would benefit not only development of the Menard Site, but also the orderly and economic development of the community of McKenzie.

[57] The Commission has recognized that a key consideration under this factor of

which supplier would best serve orderly and economic development 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. See the Commission's December 17, 2008, Findings of Fact, Conclusions of Law and Order in four related Montana-Dakota public convenience and necessity applications in Kidder County, ND, Case No. PU-08-345, Case No. PU-08-346, Case No. PU-08-347, and Case No. PU-08-693. Montana-Dakota's annual cost of providing electric service to the Menard Site is \$62,214 less than CEC's costs for the same service. (DE 18). Menards' annual savings assists in the financial viability and success of its manufacturing and distribution center and the associated employment and economic development for the McKenzie area. (Tr. 118-19, 132-33). This is an important consideration when determining the economic development of the area.

[58] CEC argues the Commission erred in applying this factor because it concluded future growth would occur in McKenzie. The question presented by this issue is not whether or what future development can be expected to occur in a specific area of the service location, 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. In determining this factor, the Commission must consider which of the suppliers' extension of service would best serve orderly and economic development of electric service if economic growth does occur. The completion of Montana-Dakota's upgrades to its facilities necessary for 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 also to the general McKenzie area. In contrast, CEC testified its extension of three-phase line to the Menard Site would not benefit any other customers. (Tr. 213)

[59] Because extension of service and corresponding system upgrades by Montana- Dakota will foster orderly and economic development of electric service in the general area, the Commission properly determined Montana-Dakota's extension of service best serves orderly and economic development of electric service in the area.

[60] The Commission also determined granting a CPCN to Montana-Dakota would not result in wasteful duplication of investment or services. The Commission specifically found that both parties would need to construct extensions and upgrades to their facilities to provide service to the Menard Site. While CEC had facilities adjacent to the site, these were single-phase lines that would not be used in providing service to the Menard Site. (Tr. 35).

[61] The Commission identified that a factor in determining whether wasteful duplication of investment will occur is if a provider must cross the facilities of another in order to provide service. However, in cases in which the Commission has concluded crossing a distribution line with an extension of service to a new site is an indication of wasteful duplication of service, the line being crossed would have been used to serve the new site. Those are not the facts in the present case. In resolving this issue, the Commission correctly found that both Montana-Dakota's and CEC's lines cross the other's lines in this area. The Commission found that CEC's three phase line crosses Montana-Dakota's three-phase line serving McKenzie. (Tr. 237, 247). Montana-Dakota's underground extension to the Menard Site would cross CEC's overhead single-phase line west of the site. However, CEC's overhead single-phase line that will be crossed by Montana-Dakota's underground line is not adequate to serve the Menard Site and CEC does not propose that this line would be used to serve the site. (Tr. 35, 199). Moreover, the evidence established Montana-Dakota's crossing of CEC's line would not interfere with

the service of that single-phase line. (Tr. 34-35). CEC's General Manager, Lars Nygren, also conceded Montana-Dakota's underground crossing of CEC's overhead line would not result in any physical interference, as the parties do cross each other's lines on occasion. (Tr. Pg. 237). For these reasons, the Commission properly concluded Montana-Dakota's service to the Menard Site would not result in wasteful duplication of investment or service.

[62] After considering all the factors, the Commission properly concluded public convenience and necessity required the granting of a CPCN to Montana-Dakota to extend electric service to the Menard Site.

II. CEC'S ARGUMENTS ON APPEAL ARE WITHOUT MERIT.

[63] CEC makes numerous arguments on appeal which it claims supports reversal of the Commission's granting of a CPCN to Montana-Dakota in this case. The crux of CEC's arguments is that Montana-Dakota does not have a valid franchise to serve McKenzie and McKenzie is not adjacent to the Menard Site. CEC's arguments are based upon its misinterpretation of the critical facts in this case and the law of North Dakota. Moreover, CEC's entire brief blindly ignores the critical fact that Montana-Dakota has a valid CPCN from the Commission to serve McKenzie. For the reasons set forth below, CEC's arguments on appeal are without merit.

A. Montana-Dakota has held a valid CPCN from the Commission to serve McKenzie since 1928.

[64] Montana-Dakota has a CPCN issued by the Commission in 1928 granting it permission to construct and operate an electric distribution system in McKenzie, North Dakota. Montana-Dakota introduced CPCN No. 86 which granted to its predecessor permission for the construction and operation of an electric distribution system at

McKenzie, North Dakota. (DE 19) (which also includes assignment of the franchise to MDU). The CPCN, dated August 16, 1928, was conditioned upon securing the “consent, franchise, permit, ordinance, or other authority of the proper municipal or other public authority for the exercise of the rights and privileges granted herein.” Id. Montana-Dakota also introduced a resolution and ordinance of the Board of Township Supervisors for McKenzie Township granting a franchise to Montana-Dakota’s predecessor for an electric distribution system for the Village of McKenzie. Id. Montana-Dakota also introduced the documents assigning the franchise for McKenzie from its predecessor to Montana-Dakota. Id. In addition, Montana-Dakota introduced evidence of the ordinances from the Board of Township Supervisors for McKenzie Township granting Montana-Dakota an electric franchise in 1948 and the most recent franchise in 2008. Id. None of the evidence introduced by Montana-Dakota regarding its CPCN and franchise was objected to at the hearing by CEC. Nor did CEC offer any evidence contradicting Montana-Dakota’s valid CPCN.

[65] CEC conveniently omitted the fact that Montana-Dakota has a valid CPCN from the Commission to provide electric service to McKenzie in its Brief. As the Commission found, Montana-Dakota has been providing electric service in McKenzie for the past 86 years. Moreover, the CPCN provides for service to the eastern boundaries of McKenzie. (Tr. 160). While a CPCN is not necessarily permanent, in order for the Commission to rescind a CPCN it must follow a formal procedure. See N.D.C.C. § 49-05-09; see also Cass County Electric v. Wold Properties, 249 N.W.2d 514, 521-522 (N.D. 1976) (concluding a public utility had the right to serve the customer to the exclusion of the rural electric cooperative because the utility held an unrevoked CPCN). The fact Montana-Dakota possesses a valid CPCN to serve McKenzie, and that it has continuously served

the community with electric service since 1928, renders invalid CEC's argument that Montana-Dakota has no right to serve McKenzie.

[66] CEC also erroneously argues Montana-Dakota does not possess a valid franchise to serve McKenzie because the township board does not possess the power to grant a franchise. The evidence presented at the hearing established Montana-Dakota possesses a valid franchise to serve McKenzie.

[67] CEC incorrectly asserts in its Brief that township boards do not have the power to grant franchises. CEC's argument is contrary to North Dakota law. Section 58-06-01(10), N.D.C.C., governs the powers of board of township supervisors and specifically provides:

58-06-01. General powers and duties of board of township supervisors.

The board of township supervisors has the following powers and duties:

* * * * *

10. To grant to any person the right of way for the erection of telephone lines, electric light systems, water or wastewater systems, or gas or oil pipeline systems over, under, or upon public grounds, streets, alleys, or highways.

N.D.C.C. § 58-06-01(10). The North Dakota Supreme Court in Williams Bros. Pipe Line Co. v. Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968), cited Black's Law Dictionary defining a franchise as "A special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right". Pursuant to North Dakota law, a board of township supervisors has the power to grant a franchise to any entity for the erection of an electric system on public grounds and utilize public right of way. See N.D.C.C. § 58-06-01(10); see also Grafton v. Otter Tail Power Co., 86 N.W.2d 197, 204 (N.D. 1957) (recognizing a franchise gives the utility the right to use public right of way for the installation and operation of its facilities).

[68] In the present case, Montana-Dakota introduced the valid ordinances from the Board of Township Supervisors for McKenzie Township in Burleigh County, North Dakota, granting to Montana-Dakota the following franchise:

[I]t is hereby granted a right-of-way for the erection of an electric light system, and is hereby authorized, empowered and granted the right to erect, construct, extend, operate and maintain an electric transmission and distribution system, including poles, wires, guys, fixtures, sub-stations, appliances and appurtenances, thereto, upon, over and across those certain streets, alleys, highways and public grounds which are under the care and supervision of this Board, situated in the Township of McKenzie, County of Burleigh, State of North Dakota

(DE 19). This grant of a franchise for electric service was within the statutory authority for the Board of Township Supervisors for McKenzie Township. See N.D.C.C. § 58-06-01(10). Again, CEC did not object to the introduction of this evidence. No evidence refuting this ordinance was introduced by CEC. For these reasons, the Commission's finding that Montana-Dakota has held a franchise since 1928 to serve McKenzie was supported by a preponderance of the evidence.

B. The boundaries of McKenzie are adjacent to the Menard Site.

[69] CEC also erroneously argues the Commission erred in concluding McKenzie is adjacent to the Menard Site. CEC's argument appears to be founded on its mistaken belief that because a portion of McKenzie is not developed, it does not fall within its boundaries. The undisputed evidence presented by Montana-Dakota at the hearing establishes the boundary of McKenzie is adjacent to the Menard Site.

[70] There is no dispute the Menard Site has a physical property description of the Northeast ¼ of Section 33, Township 139N, Range 77W, Burleigh County. Montana-Dakota introduced into evidence the franchise granted to it by the Board of Supervisors for McKenzie Township. (DE 19). The franchise granted to Montana-Dakota defined the

boundaries of McKenzie to be the Southeast ¼ of Section 29 and the Southwest ¼ of Section 28, Township 139N, Range 77W. Id. Montana Dakota introduced a map at the hearing establishing the Southwest ¼ of Section 28 is adjacent to the Northeast ¼ of Section 33. (DE 12). In fact, since all townships are laid out in the same fashion, any township map will establish that the Southwest ¼ of Section 28 is adjacent to the Northeast ¼ of Section 33. The undisputed evidence supports the Commission's finding that McKenzie is adjacent to the Menard Site.

[71] CEC's argument appears to be based upon its misguided belief that because the eastern part of McKenzie is not developed, it should not be considered part of McKenzie and therefore not within the scope of the Montana-Dakota franchise. CEC cites no legal authority for its position. Contrary to CEC's argument, Montana-Dakota introduced evidence that the undeveloped eastern portion of McKenzie had been platted for development. (DE 12) and (Tr. 61). CEC confirmed during the hearing that McKenzie had been platted. (Tr. Pg. 237). The fact that a portion of the property contained within the boundary of McKenzie is undeveloped does not change the classification of that property. The Commission's finding that the extra boundary of McKenzie, even the undeveloped area, is reasonable and is supported by the evidence in the record. Moreover, CEC again conveniently ignores that Montana-Dakota holds a CPCN to serve McKenzie and the Commission found that the Menard Site is immediately adjacent to the undeveloped southeast corner of McKenzie, the same McKenzie for which Montana-Dakota holds a CPCN.

C. The Commission's Order in this case is the correct application of long-standing North Dakota law.

[72] Throughout CEC's Brief, it threatens that if the Commission's order granting

the CPCN to Montana-Dakota is affirmed, it will open the floodgate for future litigation in other TIA disputes. CEC's "the sky is falling" argument has no merit. There is no evidence that the Commission's Order in this case will impact any future litigation.

[73] The TIA has been in effect for roughly fifty years. During that time, the factors the Commission must consider before a public utility shall be permitted to extend its lines into certain areas has not changed. See Otter Tail Power Co., 169 N.W.2d at 418. In the present case, the Commission evaluated each of those same factors and determined they weigh in favor of Montana-Dakota as the service provider for the Menard Site. The Commission's determination is in accordance with the long-standing purview of the TIA.

[74] CEC's argument is premised upon its misinterpretation of the TIA. CEC erroneously believes a rural electric cooperative should have preference as the electric service provider in rural areas under the TIA. The error in CEC's argument is that there is no provision in the TIA granting rural electric cooperatives any preference, nor has the Supreme Court ever determined they are entitled to any preference. See Capital Electric Cooperative, 534 N.W.2d at 590. All that is required under the law is that the Commission weigh each factor to determine whether public convenience and necessity favors service by the public utility. In the present case, the Commission properly applied the law in determining public convenience and necessity supported the granting of a CPCN to Montana-Dakota to extend electric service to the Menard Site.

CONCLUSION

[75] Montana-Dakota respectfully requests this Court affirm the Commission's Order granting of a certificate of public convenience and necessity to Montana-Dakota to extend electric service to the Menard Site. The record on appeal establishes the

Commission in this case properly identified the ten issues for determining whether public convenience and necessity reasonably requires granting Montana-Dakota's application for a CPCN to extend electric service to the Menard Site. In evaluating the issue, the Commission determined public convenience and necessity reasonably required Montana-Dakota to provide electric service to the Menard Site. All of the Commission's findings of fact were supported by a preponderance of the evidence and its conclusions of law were supported by its findings of fact. The Commission's Order granting Montana-Dakota the CPCN to extend electric service to the Menard Site was in accordance with the law.

Dated this 6th day of February, 2015.

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