

## Hamre, John G.

---

**From:** Ryan Norrell <rmnorrell@ndwaterlaw.com>  
**Sent:** Monday, February 09, 2015 11:25 AM  
**To:** Hamre, John G.  
**Subject:** FW: Accepted Filing Notification for Case No. 08-2014-CV-02349 ( Capital Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al. )

John, see below.

Thanks

---

**From:** Sara Gilbertson  
**Sent:** Friday, February 6, 2015 4:59 PM  
**To:** Ryan Norrell  
**Subject:** FW: Accepted Filing Notification for Case No. 08-2014-CV-02349 ( Capital Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al. )

Brief and Certificate of Service were both accepted by the Clerk.

**From:** [no-reply@tylerhost.net](mailto:no-reply@tylerhost.net) [<mailto:no-reply@tylerhost.net>]  
**Sent:** Friday, February 6, 2015 4:37 PM  
**To:** Sara Gilbertson  
**Subject:** Accepted Filing Notification for Case No. 08-2014-CV-02349 ( Capital Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al. )

This is an accepted filing notification for Case No. 08-2014-CV-02349, Capital Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al..  
Case:(Capital Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.)

Filing Code:(Brief)  
Filing Type:(EFileAndServe)  
Date Submitted: 2/6/2015 4:21:54 PM  
Date Accepted: 2/6/2015 4:36:30 PM

[View Document](#)

This link will remain active for 30 days.

If the link above is not accessible, copy this URL into your browser's address bar to view the document:  
<http://northdakota.tylerhost.net/ViewDocuments.aspx?FID=a2422c92-abfe-4de2-81be-230840f95792>

This message was automatically generated using Odyssey File & Serve; do not reply to this email.

For assistance, contact the North Dakota Court's Information Technology Department at 701.328.4218. Support is available 8 a.m. to 5 p.m. CT, Monday through Friday.

---

No virus found in this message.  
Checked by AVG - [www.avg.com](http://www.avg.com)  
Version: 2015.0.5645 / Virus Database: 4281/9068 - Release Date

**102** **PU-13-871** Filed: 2/6/2015 Pages: 20  
**APPEAL – e-file to Court - Brief of Appellee, North Dakota Public Service Commission**

Public Service Commission

Ryan Norrell, SAAG

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., )  
 )  
 Appellee. )

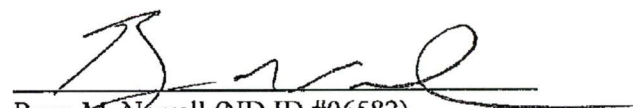
Case No.: 08-2014-CV-2349

APPELLEE NORTH DAKOTA PUBLIC  
SERVICE COMMISSION'S BRIEF

**Brief of Appellee**

**North Dakota Public Service Commission**

**DWYER LAW OFFICE, PLLC**



Ryan M. Norrell (ND ID #06582)  
 Special Assistant Attorney General  
 Attorney for Public Service Commission  
 1605 East Capitol Avenue  
 P.O. Box 2599  
 Bismarck, ND 58502  
 Phone: (701) 223-4232  
 Facsimile: (701) 223-4645  
[rmnorrell@ndwaterlaw.com](mailto:rmnorrell@ndwaterlaw.com)

**TABLE OF CONTENTS**

STATEMENT OF THE ISSUES .....1

STATEMENT OF THE CASE .....1

STATEMENT OF FACTS.....2

STANDARD OF REVIEW.....8

LAW AND ARGUMENT.....9

CONCLUSION .....16

## STATEMENT OF THE ISSUES

[¶ 1] Whether the North Dakota Public Service Commission properly decided that public convenience and necessity reasonably required to grant a Certificate of Public Convenience and Necessity to Montana-Dakota Utilities Co. to extend electric service to the Menard's Site near the community of McKenzie in Burleigh County, North Dakota.

## STATEMENT OF THE CASE

[¶ 2] Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., ("Montana-Dakota") commenced this case by submitting an application with the Public Service Commission (Commission) under N.D.C.C. § 49-03 to extend electric service to Menard, Inc. ("Menard's") at a location adjacent to the unincorporated community of McKenzie in Section 33, Township 139N, Range 77W, Burleigh County, North Dakota ("Menard's Site"). Doc. #1. Capital Electric Cooperative, Inc. ("Capital Electric") filed a protest and request for hearing on the application. Doc. #5. On February 26, 2014, the Commission issued a Notice of Hearing scheduling a public hearing to be held on Friday, May 2, 2014. Doc. #9. The notice identified the following issues, as laid out by the North Dakota Supreme Court, 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 the applications result in wasteful duplication of investment or service?
9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?

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

See *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 418 (N.D. 1969).

¶ 3 On May 2, 2014, a public hearing on the application was held as scheduled. The Commission held work sessions on May 30, June 12 and June 20 of 2014. On June 13, 2014, Montana-Dakota filed a request for oral argument before the Commission. Doc. #12. On June 19, 2014 Capital Electric filed an objection to Montana-Dakota's request. Doc. #43. On June 25, 2014, the Commission granted Montana-Dakota's request for oral argument and requested briefs. On July 14, 2014 the Office of Administrative Hearings issued a Notice of Oral Argument and Pre-Argument Order scheduling the argument setting parameters for briefing and argument. Doc. #52. On July 28, 2014, oral argument was held as scheduled. On September 17, 2014 the Commission, divided two to one, issued its Findings of Fact, Conclusions of Law and Order. Commissioner Brian Kalk issued a Dissenting Opinion. Doc. #30.

#### STATEMENT OF FACTS

¶ 4 Montana-Dakota is an investor owned electric utility providing electric service to customers in North Dakota. Capital Electric is a rural electric cooperative providing electric service to its members in North Dakota.

¶ 5 Montana-Dakota's application included an appearance form signed by Menard's indicating it desires electric service at the Menard's Site from Montana-Dakota. Steve Manor, General Manager of Distribution Center Maintenance for Menard's testified that Menard's is developing a manufacturing and distribution center at the Menard's Site. The center 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 with estimated annual consumption of approximately 7 million kWh.

[¶ 6] Mr. Manor testified that Menard's expects to realize an annual savings of approximately \$62,000 by receiving electric service from Montana-Dakota and that Montana-Dakota offers rate schedules for interruptible service and demand response programs that provide further opportunities for cost savings to Menard's. Mr. Manor testified Capital Electric does not currently offer demand control programs. Testimony was presented regarding the fact that Montana-Dakota's ability to provide service with less voltage drop is important to the operation of equipment at the Menard's Site. Finally, Menard's prefers to receive its electric service from a provider whose rates and services are subject to regulatory oversight.

[¶ 7] Montana-Dakota and Capital Electric are the only electric suppliers operating in the general area of the Menard's Site. Montana-Dakota has held both a franchise and Certificate of Public Convenience and Necessity to serve the community of McKenzie since 1928, which is immediately northeast and adjacent to the site. Capital Electric provides single-phase service to rural customers adjacent to the site.

[¶ 8] 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 Interstate 94 ("I-94") providing transmission service for a number of communities served by Montana-Dakota, including the community of McKenzie. The transmission line is a two-way or looped supply source for Montana-Dakota's substation located north of McKenzie, which in turn supplies Montana-Dakota's distribution system serving its customers in McKenzie and the surrounding area. The prior transmission line serving the community of McKenzie and the surrounding area was constructed by Montana-Dakota's predecessor in 1945.

[¶ 9] Capital Electric operates a transmission line located on the south side of I-94 that connects substations at Menoken and Sterling. Capital Electric proposed to serve the Menard's Site from the Menoken Substation which is located approximately eight (8) miles west of McKenzie. Capital Electric has an underground three-phase distribution line which runs from the Menoken Substation along the south side of I-94, and an underground single phase distribution line which runs south from I-94 for approximately one mile to the area of the Menard's Site at which point it goes above ground to serve customers in the area. The previous distribution line was an above-ground distribution line built in 1948 and crosses Montana-Dakota's 1945 line.

[¶ 10] Both electric suppliers will need to construct extensions to existing three-phase electric supply lines to serve the Menard's Site. Montana-Dakota would serve the Menard's Site by adding a neutral wire to convert approximately 5,700 feet of existing three-phase overhead line currently providing electric service to McKenzie from a Delta to Wye configuration, converting approximately 1,200 feet of single phase line to three-phase and then extending that converted line underground for a distance of approximately 1,800 feet to the Menard's Site. Capital Electric would serve the Menard's Site by converting about a mile of single phase line to three-phase line between its existing three-phase line and the Menard's Site.

[¶ 11] Montana-Dakota serves twenty-nine (29) customers within a two-mile radius of the Menard's Site and twenty-eight (28) of those customers are located within a one-mile radius of the Menard's Site. Capital Electric serves eleven (11) customers within a two-mile radius of the Menard's Site and four (4) of those customers are located within a one-mile radius of the Menard's Site.

[¶ 12] Montana-Dakota would serve the Menard's Site over approximately 8,700 feet of radial distribution line from the McKenzie Substation including an upgrade to three-phase Wye configuration for approximately 6,900 feet and an underground extension of approximately 1,800 feet from its current three-phase system to the Menard's Site. Montana-Dakota has experienced five (5) outages on this circuit since January 1, 2000.

[¶ 13] Capital Electric would serve the Menard's Site over approximately nine miles of distribution line from its Menoken Substation including an upgrade of approximately one mile of single-phase radial line to three-phase radial line. Capital Electric has experienced four (4) outages since 2009 on its existing three-phase line that would be used to serve the Menard's Site. Capital Electric states it could improve the reliability of its three-phase line between the Menoken and Sterling Substations to serve the Menard's Site if Central Power Cooperative upgrades its Sterling Substation, which does not currently have capacity to serve the entire load planned at the Menard's Site. The costs of such an upgrade were not included in Capital Electric's proposed costs to serve the Menard's Site.

[¶ 13] Montana-Dakota provided the results of a study showing that the voltage drop between the McKenzie substation and the primary side of the fifth building of the Menard's Site with a total 1.1 MW Menard's Site load would be less than 2.0 percent. Capital Electric provided the results of a study showing a voltage drop between the Menoken substation and the entry point at the Menard's Site of approximately 2.5 percent with a total 1.0 MW load.

[¶ 14] Either supplier would be able to serve the Menard's Site with sufficient reliability. However, Montana-Dakota's substation is located closer to the Menard's Site, which could provide increased reliability because there would be less voltage drop and less line length upon which a fault could occur. However, Capital Electric would have to rely upon Central Electric

Cooperative to upgrade its Sterling substation to serve the Menard's Site should Capital Electric's Menoken substation go down.

¶ 15] Montana-Dakota's estimated total cost to extend secondary service to the Menard's Site is \$192,671. Montana-Dakota's annual revenue requirement associated with the total incremental investment associated with the proposed extension is \$27,872. Capital Electric's estimated cost to extend secondary service to the Menard's Site is approximately \$110,223. Capital Electric did not provide the Commission with annual revenue requirements for recovering the cost of its proposed extension.

¶ 16] The estimated electric consumption for the Menard's Site is approximately 7 million kWh per year. The annual cost to provide secondary electric service to the Menard's Site by Montana-Dakota for the estimated consumption under its current rates is \$513,669.84. The annual cost to provide secondary electric service to the Menard's Site by Capital Electric for the estimated consumption under its current rates is \$575,883.84.

¶ 17] After adjusting Montana-Dakota's estimated annual revenue from providing service to the Menard's 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. Capital Electric did not provide information or an analysis of the amount of revenue Capital Electric would require to derive an adequate return on its incremental investment to serve the Menard's Site, therefore the Commission found that Montana-Dakota will be able to serve the Menard's Site location more economically and still earn an adequate return on its investment.

[¶ 18] Montana-Dakota is the electric provider within the unincorporated community of McKenzie. Montana-Dakota and its predecessors have held a franchise from the McKenzie Township Board and a Certificate of Public Convenience and Necessity from the Board of Railroad Commissioners to provide electric service to McKenzie since 1928. The northwest corner of the Menard's Site is immediately adjacent to the southeast corner of McKenzie. Montana-Dakota also serves more customers within both a two mile and a one mile radius of the Menard's Site than does Capital Electric.

[¶ 19] The Commission found that service by Montana-Dakota to the Menard's Site is a natural extension and continuation of the existing electric service it has provided the unincorporated community of McKenzie for 86 years. Montana-Dakota's substation and distribution facility upgrades to serve the Menard's Site will also result in an upgrade of the three phase system serving the community of McKenzie. Though McKenzie is unincorporated, with no evidence of plans to incorporate, the additional capacity on Montana-Dakota's system could accommodate any new load as a result of employment created at the Menard's Site. Service by Montana-Dakota would benefit not only development of the Menard's Site but also the orderly and economic development of the community of McKenzie.

[¶ 20] Both electric suppliers will need to construct extensions or upgrades to existing facilities to serve the Menard's Site. In this case, both suppliers cross each other's lines in the area. Montana-Dakota's proposed line extension would cross Capital Electric's single phase line located west of the Menard's Site, which is not capable of serving and is not proposed by Capital Electric for use to serve the Menard's Site. Capital Electric's three phase line that feeds this single-phase already line crosses Montana-Dakota's three phase line serving McKenzie.

[¶ 21] The Commission found that extension of service by either supplier would not interfere physically or operationally with the service or system of the other supplier. For all the above described facts, as set forth in its Order, the Commission found that public convenience and necessity reasonably requires extension of electrical service to the Menard's Site by Montana-Dakota. Doc. #60.

#### STANDARD OF REVIEW

[¶ 22] Courts exercise limited review in appeals from administrative agency decisions under N.D.C.C. Chapter 28-32, the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. *Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 5, 795 N.W.2d 707.

A district court must affirm a Commission order under N.D.C.C. §28-32-46, unless:

1. The order is not in accordance with the law.
- ....
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.

N.D.C.C. § 28-32-46; *Dakota Res. Council v. N.D. PSC*, 2012 ND 72, ¶ 5, 815 N.W.2d 286. When determining this issue, an Appellate Court must "look to the law and its application to the facts." *Plante v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, this Court does not substitute its judgment for that of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Commission's findings of fact, the Court determines "only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by weight of the evidence from the entire record." *Id.*, at ¶31 (see also,

*Power Fuels, Inc. v Elkin*, 282 N.W.2d 214, 220 (N.D. 1979) and *North Central Electric Cooperative, Inc. v N.D. Public Service Commission, Otter Tail Power Company, and Turtle Mountain Band of Chippewa Indians*, 2013 ND 158, ¶6-7, 837 N.W. 138). The Court does “not reweigh or reevaluate the evidence...[or] function as a super board and second guess the PSC’s findings.” *Capital Elec. Coop.*, ¶35 (2007).

¶23] Additionally, since this case’s subject matter is of a “highly technical nature,” the Commission’s “expertise” is “entitled to appreciable deference.” *Montana-Dakota Utilities Co. v. Public Service Commission*, 413 N.W.2d 308, 312 (N.D. 1987).

#### **LAW AND ARGUMENT**

¶24] Commission respectfully asks this Court to affirm its Order granting a Certificate of Public Convenience and Necessity authorizing Montana-Dakota to provide electric distribution service to the Menard’s Site. Based on the evidence presented to the Commission in the case at hand, the Commission did not err in holding that public convenience and necessity reasonably required extension of electrical service by Montana-Dakota.

¶25] Applications for Certificates of Public Convenience and Necessity fall under the Territorial Integrity Act (“TIA”) which grants the Commission the authority to determine whether public convenience and necessity reasonably require the granting of a certificate to a public utility desiring to extend service into contiguous territory. N.D.C.C. §§ 49-03-01, 49-03-01.1. Appellant correctly states that “the purpose of the Act is to keep to a minimum wasteful duplication... and conflicts between suppliers of electricity.” *Cass County Elec. Co-op., Inc. v. Northern States Power Co.*, 419 N.W.2d 181, 185 (N.D. 1988). However, this is not a bright-line rule which controls TIA analysis, as each application is case-specific. In order to help the Commission determine whether wasteful duplication or conflict between suppliers could arise,

the North Dakota Supreme Court has set out a ten-part analysis in *Application of Otter Tail Power Co.* which has governed the Commission's evaluation of each application and has been the standard by which the Supreme Court has measured the Commission's decisions. *Capital Elec. Co-op., Inc v. Pub. Serv. Comm'n of State of N.D.*, 534 N.W.2d 587, 591 (N.D. 1995).

[¶ 26] In the case at hand, Appellant Capital Electric first alleges that Montana-Dakota does not have a franchise to serve the community of McKenzie and objects to the platted areas of McKenzie being considered as part of the community of McKenzie.

[¶ 27] A franchise is a "general privilege...frequently granted...[to] electric light...and other public utilities to place and operate their rails, poles and pipes upon or along the streets." *McPhee & McGinnity Co. v. Union P.R. Co.*, 158 F. 5, 12 (8<sup>th</sup> Cir. 1907). The North Dakota Century Code grants Townships the authority to permit "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. The franchise granted by the Township Board for McKenzie provides Montana-Dakota "the right and franchise to occupy now and use the streets, alleys and public grounds of the Municipality as now, or hereafter constituted, for the purpose of constructing, maintaining, and operating, within, upon, in and under the same, an electric distribution system..." and therefore within its statutory authority Doc. #30, Ex. 11.

[¶ 28] A franchise is also a contract, and the interpretation of a written contract to determine its legal effect is a question of law for a court to decide. *Capital Elec. Co-op.*, at ¶15 (2007). "Contracts are construed to give effect to the parties' mutual intention 'at the time of contracting.' *Id.*, at ¶25, citing N.D.C.C. §9-07-03. Appellant asks this court to nullify the contract made between Montana-Dakota and the McKenzie Township Board of Supervisors.

The case before this Court is an appeal from a Commission decision and this is an improper venue in which to bring a claim regarding the long-standing contract McKenzie has with Montana-Dakota. Ruling on the validity of the contract is beyond the jurisdiction of the Commission and this Court upon appeal. Further, one of the parties to that contract, Township of McKenzie, is not a party to the case at hand and stands to lose substantial rights, namely electric distribution to the community of McKenzie, should this Court or the Commission find the contract to be invalid.

[¶ 29] In the matter at hand, Montana-Dakota was granted a franchise by the township of McKenzie most recently in 2008. Doc. #30, Ex 11. This recent franchise, however, is the latest in a long line of franchises dating back to 1928, when the Village of McKenzie (then organized under the laws of the State of North Dakota which acknowledged Villages as a form of municipal government) granted a franchise to and entered into a contract to provide electric service with Montana-Dakota's predecessor, Doc. #30, Ex 11.

[¶ 30] When a franchise is granted to place and operate utilities on streets, alleys or highways, the platted portion of the community to be served is of utmost importance, lest the utility be bound to serve only currently inhabited portions of the community, with no opportunity to expand its base of customers. Appellant asserts that Montana-Dakota never established the plat of McKenzie on the record and therefore the boundaries on the Exhibits submitted by Montana-Dakota mean nothing. Brief of Appellant, ¶ 59. However, Montana-Dakota witnesses testified that they believed the maps showed the plat of McKenzie. Tr. 270-271. No objection to the testimony regarding the plat of McKenzie was raised by Appellant during this line of questioning. Nor was an objection raised by Appellant when the exhibits were admitted into

evidence; “No objection.” Tr. 17-18, “No objection.” Tr. 22, “No objection.” Tr. 24, “No objection.” Tr. 34-35.

[¶ 31] Capital Electric had recourse to move the Commission to consider additional evidence concerning the Plat of McKenzie, but never did so. Appellant had the opportunity to offer rebuttal evidence showing the error of Montana-Dakota’s exhibits, or that the plat had been vacated (if this is the case), but did not do so. Capital’s own witness testified that he had researched the plat of McKenzie and did not testify that the plat was contradictory to what had been submitted in the Exhibits. Tr. 237. The time for objecting to admission of the evidence has passed. “In failing to object [to evidence] at the administrative level, [appellant] has failed to properly bring the question” before this Court. *Grambling v. North Dakota Workmen’s Compensation Board*, 303 N.W.2d 323, 327 (N.D. 1981). The Rules of Evidence and case law routinely point out that objections to evidence must be timely and failure to object generally waives the party’s right to complain on appeal about the admission of evidence. N.D.R. Ev. 103(a), *State v. Hernandez*, 2005 ND 214, ¶ 12. See *Kinney v. Brotherhood of American Yeomen*, 15 ND 21, 29, 106 NW 44, 47 (N.D. 1905). Appellant raised no objection on the record, and is not alleging an abuse of discretion on appeal. The remaining reason for raising the issue on appeal would be for this Court to substitute its own judgment for that of the Commission, which is beyond the scope of the review in this matter.

[¶ 32] Notably absent from Appellant’s discussion of the case at hand is the fact that Montana-Dakota does possess a valid Certificate of Public Convenience and Necessity (“Certificate”) to serve the community of McKenzie, and has since August 16, 1928. Doc. #30, Ex 11. Certificate Number 86 was granted to Northern Power and Light (NP&L), a predecessor to Montana-Dakota, and is conditional upon NP&L “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.* NP&L had done just that in securing a franchise in a resolution and ordinance granted May 29, 1928. *Id.* At that time, McKenzie was organized as a Village, which was a legal form of municipal government in the state of North Dakota prior to 1967. See N.D.R.C. 1943, §40-0101. In 1967, the *Transition of Villages to Cities Act* did away with the Village form of government. N.D.S.L. 1967, ch. 323, §§ 99, 112, 283, 285. McKenzie evidently did not opt to exercise the powers of a city and has not sought to so since. However, when the 1967 Act was passed, Montana-Dakota or its predecessor had been serving McKenzie for nearly 40 years. The Certificate was, and is, a property right which cannot be taken without due process of law. *Hentz Truck Line v. Elkin*, 294 N.W.2d 774, 779 (1980). Determining the legal effect upon a Certificate due to the changing status of McKenzie from a village to an unincorporated municipality in 1967 is far beyond the scope of the Commission's jurisdiction and scope of this appeal.

[¶ 33] Montana-Dakota holds a Certificate to serve the community of McKenzie, and has since 1928. The Commission determined the Certificate encompassed not just where structures are currently located, but the platted portions of the community. No evidence was presented in the record that the Certificate had been revoked or suspended, nor was evidence presented that the streets, alleys, highways and public grounds upon which Montana-Dakota has been granted authority to operate an electric transmission and distribution system are anything other than platted boundaries of the unincorporated community of McKenzie as presented. Therefore the Commission did not err in relying upon the evidence presented on the record as to determining the location of the community of McKenzie or Montana-Dakota's authority to serve the same.

[¶ 34] The Commission's order focused on public convenience and necessity, not the electric service provider's convenience and necessity. "It is the Public convenience and necessity, after all, with which the Commission is concerned, not private preference." *Tri-County Elec. Co-op., Inc. v. Elkin*, 224 N.W.2d 785, 792 (N.D. 1974). Evidence presented by MDU focused on how its distribution and transmission system would benefit from the addition of this load and how the public would in turn benefit, including the adjacent community of McKenzie. Whereas testimony from Capital Electric's witnesses stated this is a "huge" load for Capital Electric, that only customer realizing a benefit from Capital Electric's extension would be the Menard's Site (*Id.* 213, 226) and that "hopefully" Capital Electric's members would receive a more competitive rate "in the future." Tr. 208, 213, 226, and 234. No evidence or testimony was presented on Capital Electric's behalf as to the benefits to the public beyond Menards and Capital Electric.

[¶ 35] Though Capital Electric objects to the Commission's findings regarding the benefit to orderly and economic development of the general area as well as the ability to earn a rate of return on investment, Capital Electric presented no evidence on these factors. Thus, the Commission found by a preponderance of the evidence presented in a proceeding that these factors favored Montana-Dakota. Doc. #60.

[¶ 36] Capital Electric also objects to the Commission's findings regarding unreasonable interference of the system of either provider in the area if electrical service is extended by the other. Doc. #60. Neither Capital Electric nor Montana-Dakota presented evidence that their respective systems would experience unreasonable interference by the other. The issue was mentioned briefly in both parties' testimony, however no definitive statements or evidence were presented regarding the issue. Tr. 35, 36, 95, 237, 238. The time to raise this issue is not upon

appeal and Capital Electric had opportunity to present evidence of interference before the Commission and in accordance with the dictates of N.D.C.C. §28-32 but did not do so.

[¶ 37] Finally, Appellant asserts that “customer preference” was a “key factor” in the Commission’s decision, however the Commission’s Order only considers this as one of ten factors and grants no determinative value to it. “Customer preference is a factor, albeit not controlling, in determining a Public Convenience and Necessity case.” *Tri-County Elec. Co-op.*, 792. The fact that it is not a controlling consideration does not mean it customer preference is granted no weight, but that it “does not govern the Commission in its decision.” *Application of Montana-Dakota Utilities Co.*, 219 N.W.2d 174 (N.D. 1974). North Dakota case law is full of examples where a customer preferred service contrary to the public convenience and necessity and it is clear that customer preference is merely one factor among many to be considered. *Tri-County Elec. Co-op.*, 793; *Application of Otter Tail Power Co.*, 418; *Cass County Elec. Co-op. v. Wold Properties, Inc.*, 249 N.W.2d 514 (N.D.1976).

[¶ 38] What Appellant is asking this Court to find, is precisely what the North Dakota Supreme Court has repeatedly refused to do, namely, “that rural electric cooperatives are given a preference by the TIA to serve patrons in rural areas.” *Cass Co. Elec. Co-op.*, 520 (1976); *Capital Elec. Co-op., Inc. v. Public Service Commission of State of N.D.*, 534 N.W.2d 587 (1995). To do so would render the TIA meaningless. All the Commission would have to do is look at a plat of a community and determine whether the proposed load would be inside or outside the boundaries of a municipality. Under such an analysis, the Commission would deny any application made for a Certificate made by a public utility, regardless of any evidence pointing to public convenience and necessity. In fact, there would be no need for a Certificates,

because there would be no extension of service by public utilities into contiguous territory under a Cooperative-Preferred analysis of the TIA.

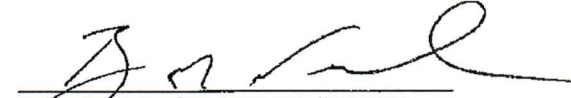
[¶ 39] The Territorial Integrity Act does not grant rural electric cooperatives a preference to provide electric service in rural areas. *Capital Elec. Co-op., Inc.*, 590 (1995). Rather, the law simply requires a public utility to obtain a certificate of public convenience and necessity before it extends facilities in a rural area. *Id.* The Commission has been granted the authority to determine whether public convenience and necessity reasonably require the granting of a Certificate to a public utility desiring to extend service into contiguous territory. N.D.C.C. §§ 49-03-01, 49-03-01.1. In the case at hand, the Commission considered the evidence and testimony presented, and properly weighed them against the *Application of Otter Tail Power Co.* factors set out in the notice. The Commission is “entitled to appreciable deference” in its analysis and application of “highly technical” matters in such cases. *Montana-Dakota Utilities Co.*, 312. Absent a reweighing of the evidence or substitution of the Court’s judgment for the Commission’s, the Commission respectfully requests that this Court find that a “reasoning mind reasonably could have determined that the factual conclusions reached were proved by weight of the evidence from the entire record.” *Capital Electric. Coop.*, ¶31, (2007).

#### CONCLUSION

[¶ 40] In light of the evidence presented on the record to the Commission, the Commission’s findings of fact are supported by the evidence, the Commission properly applied the law to the facts and addressed the evidence presented by the appellant in the case at hand. For these reasons, the Commission respectfully requests that this Court affirm its Order granting a Certificate of Public Convenience and Necessity authorizing Montana-Dakota to extend electric distribution service to the Menard’s Site.

[¶ 41] Dated this 6<sup>th</sup> day of February, 2015.

DWYER LAW OFFICE, PLLC



Ryan M. Norrell (ND ID #06582)  
Special Assistant Attorney General  
1605 East Capitol Ave  
P.O. Box 2599  
Bismarck, ND 58502  
Phone: (701) 223-4232  
Facsimile: (701) 223-4546  
[rmnorrell@ndwaterlaw.com](mailto:rmnorrell@ndwaterlaw.com)

Attorney for North Dakota Public Service Commission