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APPEAL – Notification of Service - Appellant Capital Electric Cooperative, Inc.'s Reply Brief

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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 REPLY BRIEF**

Case No. 08-2014-CV-02349

I. The Commission’s reliance on MDU’s useless three-phase facilities is reversible error.

¶1 In paragraph 41, MDU continues to assert that the Commission’s finding that MDU has “closer three-phase facilities to the Menard Site” supports the Commission’s Decision. CEC, in its original brief (¶66), set forth in detail how this finding and conclusion cannot possibly survive appellate scrutiny. The Commission and MDU are, once again, disingenuous in relying on this finding.

¶2 MDU’s three-phase facilities are worthless as it relates to the Menard site and MDU’s witness admitted this fact. Tr. 49. MDU’s witness admitted that MDU’s three phase line is no different than CEC’s single-phase line that surrounds the Menard site. Tr. 49. MDU’s three-phase facilities are useless all the way back to its substation, which is 8,700 feet away from the Menard site, while CEC has operable, reliable, and functional three-phase facilities 5,280 feet away and single phase service that surrounds the site. Tr. 40, 49, 79, &186-92. The facts, as presented, establish that CEC is the provider who has sufficient and reliable three phase facilities that are closer to the Menard Site, not MDU. CEC concedes that MDU has useless three-phase’s facilities

that are closer than CEC's functioning three-facilities, but this cannot possibly be used by the Commission (or MDU) to support its Decision. The Commission's reliance on this fact is error.

¶3 For this reason, the Commission's determination must be reversed.

II. N.D.C.C. 58-06-01 does not give township boards the authority to grant franchises.

¶4 This statute only allows township boards the ability to grant right of ways. It states as follows:

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. This statute merely gives township boards the ability to grant a property right – a right of way – upon public grounds and streets, and nothing more. To argue otherwise is spurious.

¶5 North Dakota law uses specific language in granting cities the power to grant franchises to utilities, which is set forth in CEC's original brief (¶44). See N.D. Const. art. VII, § 11, N.D.C.C. § 40-05-01(57), N.D.C.C. § 40-01-01, & N.C.C.C. § 40-05.1-06(1). Township boards do not have the same power.

¶6 CEC may not have objected to the instruction of Exhibit 11 (Doc. #37) at the May 2nd hearing, but this does not mean that CEC made any concessions as to the actual legal effect of the documents. CEC had no burden that it had to meet in relation to the legal effect of these documents; rather, MDU has the burden in this entire matter.

¶7 In direct opposition to MDU's assertions in its brief, township boards, as a matter of law, cannot issue franchises to utilities. The law is clear.

¶8 In the event that the Court finds that the township board, as a matter of law, can grant franchises, which CEC does not concede, the language of the Board of Railroad Commissioner's Findings and Order is most telling. The caption of the matter describes that Northern Power & Light Company was requesting to furnish electricity "in the village" of McKenzie. The evidence presented at the hearing was that village of McKenzie covers the blocks west of Avenue B and south of McKenzie Street, and nothing more. The township board's 1928 Ordinance purportedly granted a franchise to the "Village of McKenzie" located "in that portion of the Civil Township of McKenzie situated on the southeast Quarter (SE1/4) of Section Twenty-nine (29) and the Southwest Quarter (SW1/4) of Section Twenty-Eight (28) ..." Doc. ID. #37, Pg. 4. The franchise was describing where the village was located and did not grant a franchise to the two quarters of land. In summary, the 1928 CPCN, if valid, is limited to the village where people resided and not the two quarters of land. The quarters were only listed to establish where the village was located.

¶9 MDU, in its brief, asserts that its franchise extends to the eastern boundary of McKenzie. Again, it is not clear what is meant by McKenzie. MDU presented no evidence that the village of McKenzie ever extended beyond the current location where people currently reside – which is an area consisting of only a few blocks. Rather, the presented evidence was that the area surrounding the current village was and has been farmed.

¶10 Lastly, MDU is attempting to circumvent the TIA. 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. N.D.C.C. § 49-03-01.2. 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. Id. MDU did not offer any evidence establishing that they filed maps in 1965.

¶11 Therefore, to acquire any new service outside the corporate limits of a city 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. This is true whether or not this Court finds that township boards can grant franchises, because the franchise, if found to be valid, is only to the village of McKenzie, which is where people actually reside and not the surrounding farmland. Therefore, CEC able to serve electric load east of McKenzie, which is a rural area (the farmed area that may be platted that is directly northwest and adjacent to the Menard site). 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”).

¶12 For all the above reasons, the Commission’s Decision should be reversed because township boards cannot grant franchises or, in the alternative, if the Court finds that township boards can grant franchises, the franchise is only limited to the confines of the village of McKenzie and not the farmland east of the village of McKenzie. The Commission’s reliance on MDU’s non-existent franchise throughout its Decision was error, warranting reversal.

III. Conclusion

¶13 For all of the reasons contained herein and in CEC’s original brief, the Commission’s Decision should be reversed.

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