

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc.,
Appellant,

Supreme Court No. 20150227
Burleigh County
Civ. No. 08-2014-CV-02349

v.

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

BRIEF OF APPELLANT

Appellees.

APPEAL FROM THE MEMORANDUM AND ORDER AFFIRMING THE PUBLIC
SERVICE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER DATED JUNE 3, 2015 AND JUDGMENT DATED AUGUST 19, 2015.
HONORABLE JAMES S. HILL PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of Action.

[¶1] This case – herein referred to as the “Menards’ case” – is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities under the Territorial Integrity Act. In this case the rural electric cooperative is Capital Electric Cooperative (herein “Capital”) and the electric public utility is Montana-Dakota Utilities Co. (herein “MDU”). The subject of the dispute is a service location near to the unincorporated community of McKenzie in Burleigh County (herein the “Menard Site”).

[¶2] Capital seeks reversal of the Public Service Commission’s decision and order granting MDU’s application for a certificate of public convenience and necessity to extend electric service to the Menard Site.

B. Issues presented.

[¶3] Whether the Public Service Commission (herein “Commission”) erred as a matter of law where it made its conclusion of law that that public convenience and necessity require the granting of a certificate of public convenience and necessity to MDU and ordered that MDU’s application for a certificate of public convenience and necessity to extend electric service to the Menard Site be granted.

[¶4] Whether the Commission’s erred because the findings, conclusions, and order are not supported by a preponderance of the evidence and/or do not sufficiently address the evidence presented by Capital under established principles under the Territorial Integrity Act.

C. Proceedings Below.

[¶5] This matter came before the Commission on MDU's application for authority to serve the Menard Site. After a hearing on May 2, 2014, on September 17, 2014, a divided Commission issued an Order finding that public convenience and necessity requires approval of MDU's application. Appendix 42 (herein "App."). Commissioner Kalk issued a dissenting opinion. App. 52.

[¶6] Capital appealed the Commission's Order to the district court in Burleigh County, which affirmed the Commission's Order on June 3, 2015. App. 54.

D. Relief Requested.

[¶7] Capital requests that the Commission's Order be reversed. Tri-County Elec. Coop. v. Elkin, 224 N.W.2d 785 (N.D. 1974).

II. STATEMENT OF FACTS

[¶8] This appeal concerns three-phase electrical service to the Menard Site.

[¶9] In October 2013, Menard, Inc. (herein "Menards") requested service from Capital for Capital to serve the Menard Site. Tr. 180; App. 38. At or around the same time, Menards requested the same service from MDU. App. 14.

[¶10] Menards requested Capital's current rates, which Capital gave Menards. Tr. 247 and 250. After Capital gave Menards its rates, Capital did not hear from Menards. Tr. 250. Steve Manor, the Menards' representative, admitted that he did not have additional conversations with Capital on issues related to reliability because Capital's rates were higher. Tr. 138. Lars Nygren's (the general manager for Capital) impression was that Menards wanted Capital and MDU to get into a bidding war as to the rates. Tr. 250. This

was substantiated when the Menards' representative admitted that he asked Capital if they had "wobble room" on their pricing. Tr. 138.

[¶11] At the hearing, a Menards' representative expressed Menards' preference that MDU serve the Menard Site because of the current annual savings that Menards would receive. Tr. 108. Because of the motors that Menards uses at its site, its representative testified that it was imperative that Menards receive a three phase interrupter from its electricity provider. Tr. 111.

[¶12] The Menard Site is southeast of the unincorporated community of McKenzie; approximately 1,800 feet separates the Menard Site and McKenzie. Tr. 37 and 38; App. 18, 19, 20, & 21. There are no plans for McKenzie to be incorporated. Tr. 44, 63, 153, and 159.

[¶13] MDU's hearing exhibits 1 and 3 make it appear that the community of McKenzie is directly adjacent to the Menard Site. App. 18 & 20. Both MDU Exhibits 1 and 3 make the community of McKenzie look nearly four times its actual size, for both maps show a box or "McKenzie Limits" depicting the community of McKenzie to be directly adjacent to the Menard Site. Id. These maps are misleading. There are no city or town limits because McKenzie is unincorporated. MDU's hearing exhibit 4 gives an accurate representation of where the community of McKenzie is actually located, some 1,800 feet away from the Menard Site. Tr. 37; App. 21. The property that is east of the community of McKenzie and immediately northwest and adjacent to the Menard Site was platted in 1902, but this property, to this day, remains farmland. Tr. 37, 38, & 237; App. 21.

[¶14] MDU argued, and the Commission and district court agreed, that MDU has a franchise to serve the community of McKenzie, which was given to MDU by and through

the McKenzie township board. Tr. 153; App. 26 & 61. One of MDU's representatives testified that MDU has a franchise to serve the entire platted area of McKenzie. Tr. 62 and 160; App. 18 & 20. MDU presented an exhibit that contained a March 2008 Franchise allegedly granted by the township board of McKenzie to MDU. App. 35. In the Extract of Minutes for the First and Second Reading and the Ordinance (which grants the 20-year franchise), the township attempts to grant a franchise to MDU. App. 33 - 37. The minutes and the ordinance refer to McKenzie as a city, which it is not. Id. Both the minutes and the ordinance call for a seal of a municipality, which McKenzie is not. Id. McKenzie is not a city, nor is it a municipality. Both MDU and Capital agree that McKenzie is an unincorporated city. Tr. 44, 63, 153, & 159; App. 49. Both Capital and MDU agree that the Menard Site will not be annexed to a city. Id.

[¶15] Both MDU and Capital operate in the general area of the Menard Site in a rural area outside and near the unincorporated community of McKenzie. MDU's nearest customer and facilities are approximately 1,800 feet away from the Menard Site. Tr. 38; App. 20 & 21. MDU has twenty-nine customers within a two mile radius of the Menard Site, twenty-eight of which are located in McKenzie. Tr. 23; App. 18 & 19. Capital has eleven customers within a two-mile radius and four customers are within a one mile radius, three of which surround and are directly adjacent to the Menard Site. Tr. 185-88; App. 39.

[¶16] Both Capital and MDU have electric supply lines in the two-mile radius around the Menard Site. Both have 41.6 kV transmission lines that parallel the interstate approximately one (1) mile north of the Menard Site – MDU's line being north of Interstate 94 and Capital's line being closer to the Menard Site because its transmission line is to the south of the interstate. Tr. 18, 182, and 183; App. 18 & 39. Unlike MDU, whose

facilities are 1,800 feet away from the Menard Site, Capital has single phase service that is directly adjacent to and literally surrounds the site on three sides – the north, the west, and the south. Tr. 185-88; App. 39. As already stated, Capital serves customers immediately northeast of the Menard Site (farmstead), immediately west (farmstead), and immediately south (railroad signal). Tr. 186-88; App. 39.

[¶17] In order for MDU to serve the Menard Site, MDU must build facilities that cross Capital’s facilities. Tr. 235; App. 21. If Capital serves the site, Capital does not have to cross MDU’s facilities. Tr. 191-92; App. 39.

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

[¶19] MDU must make several upgrades or extensions over a distance of 8,700 feet in order to provide three phase service to the Menard Site. MDU’s McKenzie substation - a mile north of McKenzie – is unable to serve the Menard Site. MDU would need to upgrade its McKenzie substation. Tr. 78 and 85; App. 24. MDU’s three-phase line from its substation to the community of McKenzie is a delta system, which is useless as it relates to Menard’s needs at the site. Tr. 40 and 79; App. 25. MDU admitted that its delta three-phase line, which is 1,800 feet from the Menard Site, is no different than Capital’s single phase line that surrounds the site. Tr. 49. Therefore, MDU needs to convert its delta three-phase system to a wye three-phase system for 5,700 feet. Tr. 40 and 79; App. 25.¹

¹ MDU admitted that this delta to wye conversion likely would not be done anytime soon because historically there has not been load growth in the McKenzie area that the delta to wye conversion would only possibly be done if the load growth would change significantly. Tr. 30. The current delta system “was, and is” adequate to serve the needs of the community of McKenzie and no upgrade is needed. Tr. 29.

Additionally, MDU must also convert 1,200 feet of single phase overhead line to wye three phase. Tr. 40 and 79; App. 25. In addition to converting existing lines, MDU would need to build 1,800 feet of new line from its nearest facilities located in the community of McKenzie to the Menard Site. Tr. 73; App. 22. MDU's all-in cost to provide electric service to the site and on the site is \$192,671. Tr. 73, 74, and 77-79; App. 22, 23, 24 & 25. This all-in cost does not include the cost for the transformer needed at MDU's McKenzie substation, for MDU justifies a cost of \$0 to the transformer that is being proposed to be used at its McKenzie substation because it has been totally depreciated for tax purposes. MDU admits that a new transformer would cost approximately \$115,000.00. Tr. 100-01.

[¶20] As stated above, Capital has single phase service surrounding the Menard Site on three sides. The Menard Site needs three-phase service; therefore, because Capital's nearest three-phase system is one mile north, Capital simply needs to add two additional phases to its single-phase line for 1 mile (5,280 feet) in order to provide three phase service to the Menard Site. Tr. 192; App. 39 & App. 40. Capital's costs for this extension plus the work on the Menards Site totals \$110,223. Id. Capital's Menoken substation is able to serve the Menard Site with no upgrade and, even with the new Menard load, Capital's Menoken substation will have the capacity to serve future growth in the areas served by the Menoken substation. Tr. 197 and 223. As set forth above, Menard needs the three phase interruption service by its electrical provider. Capital already has the three phase interrupter at its Menoken substation; Capital would merely need to go hook it up as a three phase interrupter and this could be done at no extra cost. Tr. 194-95.

III. SUMMARY OF ARGUMENT

[¶21] The Public Service Commission erred as a matter of law where it made its conclusion of law that public convenience and necessity require the granting of a certificate of public convenience and necessity to MDU and ordered that MDU's application for a certificate of public convenience and necessity to extend electric service to the Menard Site be granted. The Commission's findings, conclusion and order are not supported by a preponderance of the evidence and/or do not sufficiently address the evidence presented by the appellant, under established principles under the Territorial Integrity Act.

IV. LAW AND ARGUMENT

[¶22] This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities under the Territorial Integrity Act (herein "the Act"). The Act requires an electric public utility to obtain a certificate of public convenience from the Commission before extending service to a new customer where the place to be served is outside the corporate limits of a municipality. N.D.C.C. § 49-03-01.1.

[¶23] "The primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between electric suppliers." Cass County Elec. Coop. v. N. States Power Co., 419 N.W.2d 181, 184-85 (N.D. 1988). "Typically, the suits arise from disputes as to which supplier of electricity is entitled to serve a customer in a rural area near a municipality where the where the investor-owned utility holds a franchise." Tri-County, 224 N.W.2d at 787.

[¶24] The Menards' case is atypical. This dispute is not about electric service in a rural area near a municipality. This dispute is about electric service in a distinctly rural area

where the place to be served is not located within or near the corporate limits of a municipality.

A. The scope of judicial review of agency decisions is defined by statute.

On appeal from an administrative agency's determination, "the court must affirm the order of the agency unless it finds that any of the following are present:

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."

N.D.C.C. § 28-32-46.

[¶25] On appeal to the Supreme Court under N.D.C.C. § 28-32-49, the Court reviews the Commission's decision, not the district court's. Montana-Dakota Utilities Co. v. Pub. Serv. Comm'n, 413 N.W.2d 308, 309 (N.D. 1987).

B. The scope of judicial review of an agency's decision is limited.

[¶26] In reviewing an agency's findings, the court determines whether a reasoning mind could reasonably have determined that the factual conclusions reached were supported by the weight of the evidence. This principle has been applied in many cases under the Territorial Integrity Act; recently, this Court has stated:

Under our deferential standard of review of agency decisions, we conclude a

reasoning mind reasonably could have decided the PSC's findings about interference with existing services and unreasonable duplication of services were supported by the weight of the evidence from the entire record. We do not reweigh or reevaluate the evidence regarding duplication that was presented at the PSC hearing, and we do not function as a super board and second guess the PSC's findings.

Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶35, 736 N.W.2d 788, 802; see also N. States Power Co. v. Pub. Serv. Comm'n, 452 N.W.2d 340 (N.D. 1990); In re N. States Power Co., 171 N.W.2d 751 (N.D. 1969); In re Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969).

[¶27] Under N.D.C.C. § 28-32-46 and the cited cases, Capital bears a substantial burden of persuasion on this appeal. But this Court's reversal of a decision by the Commission is not unprecedented. See Tri-County, 224 N.W.2d 785; see also Cass County Elec. Coop. v. N. States Power Co., 419 N.W.2d 181; Capital Elec. Coop. v. Pub. Serv. Comm'n, 534 N.W.2d 587 (N.D. 1995).

[¶28] Under the standard of review as applied to the Menards' case, a reasoning mind could NOT reasonably conclude that the factual findings or conclusions of law made by the Commission were supported by the weight of the evidence. The testimony and exhibits presented at the hearing do not amount to substantial evidence to support the Commission's findings and conclusions that that public convenience and necessity require that MDU be granted a certificate of public convenience and necessity to extend electric service to the Menard Site.

C. An agency's determination on questions of law is fully reviewable.

[¶29] Agency decisions on questions of law are fully reviewable. Capital Elec. Coop. v. Pub. Serv. Comm'n exemplifies judicial review and reversal of the Commission's

decisions on questions of law under the Territorial Integrity Act. 534 N.W.2d 587. Tri-County exemplifies judicial review and reversal on both legal and factual issues, whether a reasoning mind could reasonably determine that the factual conclusions reached were supported by the weight of the evidence. 224 N.W.2d 785. Indeed, Tri-County is more than an example; it emphasized the fundamental criterion in cases under the Territorial Integrity Act: The applicant, MDU, has the burden to show that it can serve the location without wasteful duplication of investment or service. Tri-County, 224 N.W.2d at 793; see also In re Otter Tail, 169 N.W.2d 415.

[¶30] If the evidence in the record does not show that MDU can serve the Menard Site without wasteful duplication of investment or service, the Commission's order must be reversed. Tri-County, 224 N.W.2d at 793.

D. The Commission's Order's non-compliance with the criteria of N.D.C.C. § 28-32-46 is reversible error.

1. The Commission's Order is not in accordance with the law.

[¶31] "The primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between electric suppliers." Cass County Elec. Coop. v. N. States Power Co., 419 N.W.2d at 184-85; N. States Power Co. v. Pub. Serv. Comm'n, 452 N.W.2d at 342; Capital Elec. Coop. v. Pub. Serv. Comm'n, 534 N.W.2d at 590. The Act's comprehensive regulatory scheme prohibits a regulated utility's duplication of a rural electric cooperative's service and system, a principle established in the entire line of cases under the Act. In re Otter Tail, 169 N.W.2d 415; In re Montana-Dakota Utilities Co., 219 N.W.2d 174 (1974); Tri-County, 224 N.W.2d 785; In re Otter Tail Power Co., 354 N.W.2d 701 (ND 1984); Cass County Elec. Coop. v. N.

States Power Co., 419 N.W.2d 181; N. States Power Co. v. Pub. Serv. Comm'n, 452 N.W.2d 340, and Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788.

The Order's non-compliance with the Act's prohibition of duplication of facilities is analyzed below.

2. The findings of fact in the Commission's Order are not supported by a preponderance of the evidence, nor do the findings sufficiently address the evidence presented by Capital, the appellant.

[¶32] The findings of fact in the Commission's Order are erroneous as a matter of law because they are contrary to precedents identifying factors to be considered by the Commission in making its determinations under N.D.C.C. Chapter 49-03.

[¶33] Most of the thirty-four (34) enumerated findings of fact in the Commission's Order are not findings but are recitals of evidentiary facts. Finding 34 is the Commission's ultimate finding of fact, which states:

34. The Commission finds 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....

These causes for the Commission's decision are addressed in order.

- i. The Commission erred as a matter of law in finding 34 that public convenience and necessity reasonably requires approval of MDU's application because the customer prefers electric service from MDU, for customer preference is not a criterion of public convenience and necessity.*

[¶34] The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in In re Otter Tail, 169 N.W.2d 415.

“In Application of Otter Tail Power Co., supra, we outlined criteria for the PSC to consider in rendering a decision on an electric public utility's application for a certificate of public convenience and necessity. In that case, a customer asked an electric public utility to provide service to a rural area, and the utility applied to the PSC for a certificate. We said customer preference for service by the electric public utility was not determinative of public convenience and necessity, but should be considered along with:

‘the location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application and which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.’ Application of Otter Tail Power Co., 169 N.W.2d at 418.”

Capital Elec. Coop. v. Pub. Serv. Comm'n, 534 N.W.2d at 591.

[¶35] These criteria have been reiterated over the years with only one modification: Emphasis on “which [of the proposed suppliers] also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.” In re Otter Tail, 169 N.W.2d at 418; In re Montana-Dakota Utilities Co., 219 N.W.2d at 180; Tri-County, 224 N.W.2d at 792; Cass County Elec. Coop. v. N. States Power Co., 419 N.W.2d 181; N. States Power Co. v. Pub. Serv. Comm’n, 452 N.W.2d 340 and Capital v. Bismarck. Customer preference is not a significant factor. Quite the contrary,

In rural areas, our decisions indicate, customer preference is a minor consideration. It cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice...

In holding that customer preference was to be given weight in its determination (even more weight than in other cases because of the relatively short lines involved), the commission erred....

It is the *public* convenience and necessity, after all, with which the Commission is concerned, not private preference.

Tri-County, 224 N.W.2d at 792; see also Cass County Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514 (N.D.1977) and In re Montana-Dakota Utilities Co., 219 N.W.2d 174.

[¶36] The Commission erred as a matter of law in finding 34 “that public convenience and necessity reasonably requires approval of [MDU’s] application because the customer prefers electric service from [MDU].”

[¶37] Analysis of the evidence – including Capital’s evidence not sufficiently addressed by the Commission – demonstrates that the Commission committed additional reversible errors in finding 34 that public convenience and necessity reasonably requires approval of MDU’s application.

ii. The findings of fact in the Commission's Order regarding MDU's and Capital's numbers of customers are not supported by a preponderance of the evidence and do not sufficiently address the evidence presented by the appellant.

[¶38] The notice of hearing and the Order identified 10 “issues” addressed by the Commission, including:

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?

App. 17. Evidently, these and the other eight (8) issues are the Commission's way of re-writing the criteria established by the court in the line of cases from In re Otter Tail, 169 N.W.2d 415 (N.D. 1961) through Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788, cited above. Numbers of consumers is not a criteria in the above cited caselaw; rather it is only a make-weight issue, related to the real issues, locations of lines and duplication of facilities.

[¶39] Both MDU and Capital operate in the general area of the Menard Site and both provide service within a two-mile radius of the site. MDU has twenty-nine (29) customers within two miles of the Menard Site, twenty-eight (28) of which are located in the community of McKenzie. Tr. 23; App. 18 & 19. MDU's nearest customer is approximately 1,800 feet away from the Menard Site. Tr. 38; App. 20 & 21. Capital has eleven (11) customers within two miles of the Menard Site and four (4) within a one mile radius, three (3) of which surround and are directly adjacent to the Menard Site. Tr. 185-88; App. 39. The preponderance of the evidence does not show that MDU had more consumers than Capital near the Menard Site. It may be true that MDU has more consumers than Capital

in the arbitrary two mile radius area, but the preponderance of the evidence shows that Capital has more customers in the immediate vicinity, surrounding the Menard Site.

iii. The findings of fact in the Commission's Order regarding MDU's and Capital's locations of lines and proposed extensions are not supported by a preponderance of the evidence and do not sufficiently address the evidence presented by the appellant; likewise, the findings regarding MDU's and Capital's costs to extend service to the Menard Site are not supported by a preponderance of the evidence and do not sufficiently address the evidence presented by Capital, the appellant.

[¶40] The Menard Site is southeast of the platted unincorporated community of McKenzie. The location is illustrated by MDU's hearing exhibits 1, 2, 3, & 4. App. 18, 19, 20, & 21.

[¶41] Approximately 1,800 feet separates the Menard Site and McKenzie. Tr. 37 and 38; App. 20 & 21. The community of McKenzie as platted and as developed and the Menard Site are not adjacent to each other. App. 20 & 21 McKenzie is an unincorporated community and there are no plans for it to be incorporated. Tr. 44, 63, 153, and 159; App. 49.

[¶42] MDU's Exhibit 1 and 3 make it appear that the community of McKenzie is directly adjacent to the Menard Site. App. 18 & 19. Both MDU Exhibits 1 and 3 contain a box making the community of McKenzie look nearly four times its actual size, both maps show a box or "McKenzie Limits" depicting the community of McKenzie to be directly adjacent to the Menard Site. These maps are deceiving. There are no city or town limits because McKenzie is unincorporated. Tr. 44, 63, 153, and 159; App. 49. MDU's Exhibit 4 gives an accurate representation of where the community of McKenzie is actually located. Tr.

37; App. 21. MDU's nearest electrical facility (and customer) from the Menard Site is approximately 1,800 feet away. Tr. 38; App. 20 & 21.

[¶43] The property that is immediately adjacent to the Menard Site is farmland. Tr. 37; App. 21. The historical fact that this area adjacent to the Menard Site was platted as a townsite in 1902 does not alter the 21st century fact that the Menard Site is in a rural area, outside the corporate limits of any municipality.

[¶44] Both Capital and MDU have electric supply lines near the Menard Site. Both have 41.6 kV transmission lines that parallel the Interstate highway 94 near the Menard Site. MDU's transmission line is north of the highway. Capital's transmission line is south of the highway and closer to the Menard Site. Tr. 18, 182, and 183; App. 18 & 39. Both have lower voltage service lines near the Menard Site. MDU's service facilities are 1,800 feet away from the Menard Site. Tr. 38; App. 20 & 21. Capital's service facilities literally surround the Menard Site on three sides – north, west, and south. Tr. 185-88; App. 39.

[¶45] Capital and MDU both require upgrades or extensions to their electrical facilities in order to supply three phase service to the Menard Site. Capital's upgrades are smaller, both physically and fiscally.

[¶46] The Menard Site needs three-phase service. Capital's nearest three-phase system is one mile from the Menard Site. Capital needs only to add two additional phases to its existing single-phase line for 1 mile (5,280 feet) in order to provide three phase service to the Menard Site. Tr. 191 - 192; App. 39 & 40. Because of the motors that Menards uses at its site, Menards' needs three phase interruption service. Tr. 111. Capital already has

the three phase interrupter facilities at its Menoken substation; Capital would need only to connect existing facilities at no added cost. Tr. 194-95.

[¶47] MDU must make several upgrades or extensions over a distance of 8,700 feet in order to provide three phase service to the Menard Site. First, MDU's McKenzie substation – approximately a mile north of McKenzie – is unable to serve the Menard Site; therefore, MDU would need to upgrade its McKenzie substation. Tr. 78 & 85; App. 24. Second, MDU's three-phase line from its substation to the community of McKenzie is a delta system, which is useless as it relates to Menards' needs at the site. Tr. 40 & 79; App. 25. MDU admitted that its delta three-phase line, which is 1,800 feet from the Menard Site, is no different than Capital's single phase line that surrounds the site. Tr. 49. Therefore, MDU needs to convert its delta three-phase system to a wye three-phase system for 5,700 feet. Tr. 40 & 79; App. 25. Third, MDU must also convert 1,200 feet of single phase overhead line to wye three phase. Tr. 40 and 79; App. 25. Fourth, in addition to converting existing lines, MDU would need to install 1,800 feet of wye three-phase line from its nearest facilities in McKenzie to the Menard Site. Tr. 73; App. 22.

[¶48] Capital's proposed 5,280 feet of three phase construction is shorter than MDU's total proposed three phase construction of 8,700 feet. The preponderance of the evidence – including MDU's admissions – does not support the Commission's finding 34 that “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.”

[¶49] The evidence supports the following facts found by the Commission regarding comparative costs of service:

“18. Montana-Dakota would serve the Menard Site by extending its existing three-phase system at McKenzie and by converting that system and the McKenzie Substation from a Delta three-phase to a Wye three-phase system. The conversion of the McKenzie Substation would require replacement of existing transformers with a larger three-phase Wye transformer, voltage regulators, reclosure, and associated wiring. The transformer would be a used transformer from existing inventory. Conversion of the electric system within the community of McKenzie from Delta three-phase service to wye three-phase service requires addition of a neutral wire to the existing three-phase distribution line. This conversion will upgrade and increase the capacity of Montana-Dakota's existing three-phase system sufficiently to serve the Menard Site and any additional load requests likely to result in the community of McKenzie. Montana-Dakota's estimated total cost to extend secondary 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)”

“19. Capital Electric 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 system and the Menard Site. Capital Electric'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). .

App. 47. The difference exceeds \$82,000. According to the facts as found by the Commission, MDU's costs are 1.75 times – nearly double – Capital's costs to extend service, and this comparison does not include the value of MDU's transformer. The MDU numbers do not include the cost for the transformer because MDU would utilize a used transformer from existing inventory location. Tr. 100-01. MDU and apparently the Commission rationalize a cost of \$0 cost for the transformer proposed to be used at MDU's

McKenzie substation because it has been totally depreciated for accounting purposes. Id. MDU admits that a new transformer would cost approximately \$115,000.00, an evidentiary fact ignored by the Commission. Id.

[¶50] Whether duplication is measured by dollars (\$192,671 vs. \$110,223) or distance (8,700 feet vs 5,280), the Order’s finding 30 “that approval of the application would not result in wasteful duplication of investment or service” is not supported by the preponderance of the evidence. The preponderance of the evidence does not support the Order’s finding 34 that MDU will serve the Menard Site more economically when considering the cost to extend service.

[¶51] In order for MDU to serve the Menard Site, MDU must cross Capital’s facilities. Tr. 235; App. 21. If Capital serves the site, Capital does not have to cross MDU’s facilities. Tr. 191-192; App. 39 & 40.

[¶52] A major factor considered in determining duplication of service is whether a supplier’s extension of facilities crosses the facilities of another supplier, causing “checker boarding,” a descriptive term used in Cass County Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514 at 521, In re Otter Tail Power Co. 354 N.W.2d at 702, and in Capital Elec. Coop. v. City of Bismarck, 2007 ND 128 at ¶ 34. “The Commission has consistently held that one electric supplier crossing the line of another electric supplier to provide service to a customer indicates a wasteful duplication of facilities.” App. 96 (Order, In re Montana-Dakota Utilities Co., Public Service Commission Case No. PU-04-560); see also App. 82 (Order, Capital Elec. Coop. v. Montana-Dakota Utilities Co., Public Service Commission Case. No. PU-05-551, affirmed in Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788) (stating “[rural electric cooperative] is able to extend service to Boulder

Ridge through a shorter extension at a lower cost. Service by [rural electric cooperative] to Boulder Ridge will not result in checker boarding of customers served by [public utility] and [cooperative].”) MDU, to extend service to the Menard Site, must cross Capital’s pre-existing facilities and would cause “checker boarding.” The Order that sanctions MDU’s crossing Capital’s lines to serve the Menard Site contradicts not only court precedents but also the Commission’s own precedent. This is reversible error.

3. The Commission erred as a matter of law in considering MDU’s purported franchise granted by the McKenzie Township.

[¶53] The Territorial Integrity Act requires an electric public utility to obtain a certificate of public convenience and necessity before extending electric service outside the corporate limits of a municipality. N.D.C.C. §§ 49–03–01 and 49–03–01.1. The Commission found as one of the bases of its Order that MDU has a franchise to serve the community of McKenzie, which was given to MDU by the McKenzie township board. Tr. 153; App. 48 & 26.

[¶54] Under N.D.C.C. § 40-05-01(57), the governing body of a municipality shall have the power to grant franchises. “Municipality” includes “all cities organized under the laws of [the State of North Dakota], but shall not include any other political subdivision.” McKenzie is a township, not a city or a municipality. N.D.C.C. § 40-01-01. The powers of township boards do not include the powers to grant franchises. The power of township boards to grant rights of way over public grounds, streets or highways is not a power to grant franchises. N.D.C.C. § 58-06-01(10). The fact that the Menard Site is near a townsite platted in 1902 does not alter the 21st century fact that the Menard Site is a service location in a rural area, outside the corporate limits of any municipality. Therefore, all the

evidence about a township franchise is irrelevant and immaterial. The Commission's reliance on that evidence was reversible error. See Tri-County, 224 N.W.2d 785, and Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788.

4. The Commission erred as a matter of law in finding 34 "that public convenience and necessity reasonably requires approval of [MDU's] application because [MDU] will serve the Menard Site more economically when considering the annual costs to the customer and because [MDU'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."

[¶55] The error addressed here is multi-faceted. First, cost savings to the customer is a variation of the "consumer preference" criterion that is not a determinative factor. See argument at ¶¶ 34-37, above.

[¶56] Second, the Commission has created a new criterion, equating a single customer's economic advantage with orderly and economic development of electric service. This is a non-sequitur, unsupported by evidence or precedent.

[¶57] Third, the Commission's new criterion, "economic development of the area," is a distortion of the public convenience and necessity criterion "which [of the electric suppliers] also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service." In re Otter Tail, 169 N.W.2d at 418; In re Montana-Dakota Utilities Co., 219 N.W.2d at 180; Tri-County, 224 N.W.2d at 792; see also Cass County Elec. Coop. v. N. States Power Co., 419 N.W.2d 181; N. States Power Co. v. Pub. Serv. Comm'n, 452 N.W.2d 340; Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788. Development of electric service, not economic development, is the criterion.

[¶58] The Commission’s Order is comparable to its misadventure in Capital Electric Coop. v. Pub. Serv. Comm’n:

We decline to defer to the PSC’s recent reinterpretation of its authority, because that construction contravenes the statutory framework and purpose of the Act.

534 N.W.2d at 592; see also Pub. Serv. Comm’n v. Montana-Dakota Utilities Co., 100 N.W.2d 140, 143 (N.D. 1959) (stating “[t]he Public Service Commission is a constitutional body having only such powers and duties as are prescribed by law.”); City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197, 202 (N.D. 1958) (stating “[t]he Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter.”)

[¶59] In sum, the Commission’s Order includes numerous errors of law and of fact that are not supported by a preponderance of the evidence or which do not sufficiently address the evidence presented by the appellant.

V. CONCLUSION

[¶60] MDU might counter-argue that Capital’s arguments are a veiled attempt to persuade the court to function as a “super-board,” to re-weigh or re-evaluate the evidence or to “second guess the PSC’s determinations,” contrary to the statutory standards under N.D.C.C. § 28-32-46 and precedents such as Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788, and N. States Power Co. v. Pub. Serv. Comm’n, 452 N.W.2d 340. The rejoinder is that Capital’s arguments are entirely in line with all the precedents, notably Tri-County, 224 N.W.2d 785, where this Court held:

In rural areas, our decisions indicate, customer preference is a minor consideration. It cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice....

In holding that customer preference was to be given weight in its determination the Commission erred.....

224 N.W.2d at 792. The Commission's order is reversible error as a matter of law under the Tri-County precedent. The Commission's endeavor to resuscitate and elevate consumer preference to a controlling criteria is reversible error, under Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788.

[¶61] The Commission's multiple errors regarding the principal public convenience and necessity criteria, duplication of facilities, are so egregious in the aggregate that Capital has carried its burden of persuasion that the Order does not meet the standards of N.D.C.C. § 28-32-46 and of the Territorial Integrity Act. The Supreme Court has repeatedly held that the primary purpose of the Act is to keep to a minimum wasteful duplication of capital-intensive utility services. The Order violates the legislated purpose and judicial precedents. Capital has existing facilities closer to – indeed surrounding – the Menard Site, Capital's distance of construction is shorter, Capital's costs to extend service to the site are lower, and MDU would cross Capital's existing facilities to serve the Menard Site. The findings of fact in the Order are not supported by a preponderance of the evidence and do not sufficiently address the evidence presented by the appellant. “ ... [T]he findings of the Commission are without rational basis....” Tri County, 224 N.W.2d at 794. A reasoning mind could not reasonably conclude that the factual findings entered by the Commission were supported by the weight of the evidence. The testimony and numerous exhibits presented at the hearing show that MDU's extension of electric service to the

Menard Site would constitute an unreasonable duplication of the facilities and services provided by Capital – most notably, the distance is much shorter for Capital, the costs are much lower for Capital, and Capital’s substation, as is, can serve the Menard Site and growth while MDU’s substation must be upgraded to duplicate what Capital already has in place. Under the controlling precedents, MDU did not sustain its burden of proof that MDU CANNOT serve the Menard Site without wasteful duplication of investment or service.

[¶62] The PSC’s findings and conclusions are not supported by the evidence and are not in accordance with the law under N.D.C.C. Chapter 49-03. Capital requests that the Commission’s Order be reversed because MDU did not sustain its burden of proof. Tri-County, 224 N.W.2d 785.

DATED this 12th day of October, 2015.

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CERTIFICATE OF COMPLIANCE ON WORD COUNT

[¶63] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(7)(A); the word count is 6,944.

Dated this 12th day of October, 2015.

PRINGLE & HERIGSTAD, P.C.



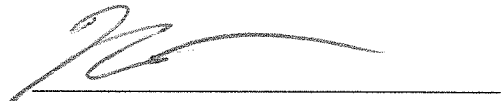
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CERTIFICATE OF WORD PROCESSING PROGRAM

[¶64] The word-processing program is Microsoft Office Word 2013.

Dated this 12th day of October, 2015.

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