

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150227
Burleigh County District Court 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.

BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

**APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, STATE OF NORTH DAKOTA**

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I. PRELIMINARY STATEMENT

[¶ 1] The decision issued by the North Dakota Public Service Commission (“Commission”) was not a unanimous decision and therefore reference to the Commission’s decision will be to the majority decision of the Commissioners. Furthermore, because this proceeding involves a territorial dispute between two electric suppliers the Commission’s brief will, for the most part, be limited to the discussion of the Commission’s rationale for its decision in this case. Factual and legal arguments will be primarily left to Montana-Dakota Utilities Co. (“Montana-Dakota”) and Capital Electric Cooperative, Inc. (“Capital Electric or Capital”).

II. STATEMENT OF THE ISSUES

[¶ 2] Whether the Commission properly decided that public convenience and necessity reasonably required granting a Certificate of Public Convenience and Necessity to Montana-Dakota to extend electric service to the Menards Site near the community of McKenzie in Burleigh County, North Dakota.

III. STATEMENT OF THE CASE

[¶ 3] Montana-Dakota commenced this case by submitting an application with the Public Service Commission under N.D.C.C. ch. 49-03 to extend electric service to Menards, Inc. (“Menards”) at a location adjacent to the unincorporated community of McKenzie in Section 33, Township 139N, Range 77W, Burleigh County, North Dakota (“Menards Site”). Appellant Appendix 9 (“App.”). Capital filed a protest and request for hearing on the application. App. 5. On February 26, 2014, the Commission issued a Notice of Hearing scheduling a public hearing to be held on Friday, May 2, 2014. App. 8. 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 the applications result in wasteful duplication of investment or service?
9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?
10. Will service by either of the electric suppliers in the area unreasonably interfere with the system of the other?

App. 17.

[¶ 4] 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. App. 7. On June 19, 2014, Capital Electric filed an objection to Montana-Dakota's request. App. 7. On June 25, 2014, the Commission granted Montana-Dakota's request for oral arguments 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. App. 7. 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. App. 42. Commissioner Brian Kalk issued a Dissenting Opinion. App. 52.

[¶ 5] Capital Electric appealed the Commission's Order to the Burleigh County District Court. App. 1. On June 3, 2015, the District Court affirmed the Commission's Order. App. 73, 73a. Capital Electric now appeals the District Court's decision. App. 74.

IV. STATEMENT OF FACTS

[¶ 6] 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. App. 9.

[¶ 7] Montana-Dakota's application included an appearance form signed by Menards indicating it desires electric service at the Menards Site from Montana-Dakota. App. 14. Steve Manor, General Manager of Distribution Center Maintenance for Menards testified that Menards is developing a manufacturing and distribution center at the Menards Site. Doc. ID # 59, PSC Doc. # 114, at 103-04 (Administrative Hearing Transcript)("Tr."). The Center requires three-phase electric service at each of the 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. Tr. at 97, 106, 111.

[¶ 8] Mr. Manor testified that Menards 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 Menards as Menards plans to install customer-owned stand-by generation for backup supply. Tr. 109-10, 123. Mr. Manor testified Capital does not currently offer demand control programs. Tr. 108-09. 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 Menards

Site. Tr. 112. Finally, Menards prefers to receive its electric service from a provider whose rates and services are subject to regulatory oversight. Tr. 108, 110.

[¶ 9] Montana-Dakota and Capital Electric are the only electric suppliers operating in the general area of the Menards Site. Tr. 107. 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. App. 26-36; Tr. 60. Capital Electric provides single-phase service to rural customers adjacent to the site. Tr. 35, 186-87.

[¶ 10] 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. App. 18; Tr. 19. 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 service to its customers in McKenzie and the surrounding area. Tr. 20. The prior transmission line serving the community of McKenzie and the surrounding area was constructed by Montana-Dakota’s predecessor in 1945. Tr. 19.

[¶ 11] Capital Electric operates a transmission line located on the south side of I-94 that connects substations at Menoken and Sterling. App. 39; Tr. 183, 191. Capital Electric proposed to serve the Menards Site from the Menoken Substation which is located approximately eight (8) miles west of McKenzie. Tr. 189-90. 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 Menards Site at which point it goes above ground to serve customers in the area. Tr. 183-186. The previous distribution line was an aboveground distribution line built in 1948 and crosses Montana-Dakota's 1945 line. Tr. 185-86;

[¶ 12] Both electric suppliers will need to construct extensions from existing three-phase electric supply lines to serve the Menards Site. Montana-Dakota would serve the Menards 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, then extending that converted line underground for a distance of approximately 1,800 feet to the Menards Site. App. 18-20, 25; Tr. 25, 53, 194. Capital Electric would serve the Menards Site by converting about a mile of single-phase line to three-phase line between its existing three-phase line and the Menards Site. App. 39; Tr. 191-92.

[¶ 13] Montana-Dakota serves twenty-nine (29) customers within a two-mile radius of the Menards Site and twenty-eight (28) of those customers are located within a one-mile radius of the Menards Site. App. 18; Tr. 23. Capital Electric serves eleven (11) customers within a two-mile radius of the Menards Site and four (4) of those customers are located within a one-mile radius of the Menards Site. App. 39; Tr. 200.

[¶ 14] Montana-Dakota would serve the Menards 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 service to the Menards Site. Tr.

30-31, 39. Montana-Dakota has experienced five (5) outages on this circuit since January 1, 2000. Doc. ID # 35, PSC Doc. ID # 28; Tr. 33.

[¶ 15] Capital Electric would serve the Menards Site over approximately nine (9) miles of distribution line from its Menoken Substation including an upgrade of approximately one mile of underground single-phase radial line to three-phase radial line. Tr. 189, 209. Capital Electric has experienced four (4) outages since 2009 on its existing three-phase line that would be used to serve the Menards Site. Doc. ID # 55, PSC Doc. ID # 58.

Capital Electric states it could improve the reliability to serve the Menards Site if Central Power Cooperative upgrades its Sterling Substation, which does not currently have the capacity to serve the entire load planned at the Menards Site. Tr. 203-04, 209-10, 242. The costs of such an upgrade were not included in Capital Electric's proposed costs to serve the Menards Site. Tr. 209-10.

[¶ 16] Montana-Dakota provided the results of the study showing that the voltage drop between the McKenzie substation and the primary side of the fifth building of the Menards Site with a total 1.1 MW Menards Site load would be less than 2.0 percent. Doc. ID # 34, PSC Doc. ID # 27. Capital Electric provided the results of a study showing a voltage drop between the Menoken substation and the entry point at the Menards Site of approximately 2.5 percent with a total 1.0 MW load. Doc. ID # 102, PSC Doc. ID # 119.

[¶ 17] Either supplier would be able to serve the Menards Site with sufficient reliability. However, Montana-Dakota's substation is located closer to the Menards Site, which could provide increased reliability because there would be less voltage drop and less line length upon which a fault could occur. App. 18, 39; Tr. 31-32. Capital Electric would have to rely upon Central Electric Cooperative to upgrade its Sterling substation to serve

the Menards Site should it lose electric supply to Capital Electric's Menoken substation, whereas Montana-Dakota's McKenzie Substation has a looped supply. Tr. 209-10.

[¶ 18] The estimated electric consumption for the Menards Site is approximately 7 million kWh per year. Tr. 106-07. The annual cost to provide secondary electric service to the Menards Site by Montana-Dakota for the estimated consumption under its current cost-based rates is \$513,669.84. Doc. ID # 36, PSC Doc. ID # 29. The annual cost to provide secondary electric service to the Menards Site by Capital Electric for the estimated consumption under its current rates is \$575,883.84. Id.

[¶ 19] After adjusting Montana-Dakota's estimated annual revenue from providing service to the Menards Site by: (1) \$27,872 for the annual revenue 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. Doc. ID # 36, PSC Doc. ID #29, at 3. 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 Menards Site; therefore, the Commission found that Montana-Dakota will be able to serve the Menards Site location more economically and still earn an adequate return on its investment. App. 48, 50.

[¶ 20] Montana-Dakota is the electric provider within the incorporated community of McKenzie. App. 18, 26-37; Tr. 51-52. 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. App. 26-37; Tr. 51-52. The northwest corner of Menards Site is

immediately adjacent to the southeast corner of McKenzie. App. 18. Montana-Dakota serves more customers within both a two-mile and a one-mile radius of the Menards Site than does Capital Electric. App. 18, 39; Tr. 23-24, 200.

[¶ 21] The Commission found that service by Montana-Dakota to the Menards Site is a natural extension and continuation of the existing electric service it has provided the unincorporated community of McKenzie for 86 years. App. 44, 48. Montana-Dakota's substation and distribution facility upgrades to serve the Menards Site will result in an upgrade of the three-phase system serving the community of McKenzie. App. 48. Though McKenzie is unincorporated, with no evidence of plans to incorporate, the additional capacity on Montana-Dakota's system would accommodate any new load anticipated as a result of employment created at the Menards Site. App. 48-49. Service by Montana-Dakota would benefit not only development of the Menards Site, but also the orderly and economic development of electric service to the community of McKenzie. App. at 48, 50.

[¶ 22] Both electric suppliers will need to construct extensions or upgrades to existing facilities to serve the Menards Site. App. 49. Montana-Dakota's proposed line extension would cross Capital Electric's single-phase line located west of the Menards Site, which is not capable of serving and is not proposed by Capital Electric for use to serve the Menards Site. Capital Electric's three-phase line that feeds this single-phase line already crosses Montana-Dakota's three-phase line service McKenzie. App. 49.

[¶ 23] 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. App. 49. For all the above described facts, as set forth in its order, the Commission

found that public convenience and necessity reasonably requires extension of electric service to the Menards Site by Montana-Dakota. App. 50.

V. STANDARD OF REVIEW

[¶ 24] Courts exercise limited review in appeals from administrative agency decisions under 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, 785 N.W.2d 707.

This Court will not reverse an agency decision 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.

N.D.C.C. § 28-32-46; Dakota Res. Council v. N. D. Pub. Serv. Comm'n, 2012 ND 72, ¶ 5, 815 N.W.2d 286. When determining this issue, the Appellate Court must “look to the law and its application to the facts.” Plante v. N.D. Workers Comp. Bureau, 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, the 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

could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” *Id.* at ¶31; see also, Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979) and North Central Elec. Coop. v. N.D. Pub. Serv. Comm’n, 2013 ND 158, ¶ 7, 837 N.W.2d 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., 2007 ND 128, ¶31, 736 N.W.2d 788.

[¶ 25] Additionally, since this issue’s subject matter is of a “highly technical nature,” the Commission’s “expertise” is “entitled to appreciable deference.” Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm’n, 413 N.W.2d 308, 312 (N.D. 1987). Although the Court’s review is limited to the record before the administrative agency, “the district court’s analysis is entitled to respect if its reasoning is sound.” Rist v. N.D. Dep’t of Transp., 2003 ND 113, ¶ 6, 665 N.W.2d 45.

VI. LAW AND ARGUMENT

A. The North Dakota Public Service Commission properly decided that public convenience and necessity reasonably required granting a Certificate of Public Convenience and Necessity to Montana-Dakota Utilities Co. to extend electric service to the Menards Site near the community of McKenzie in Burleigh County, North Dakota.

[¶ 26] The Territorial Integrity Act (“TIA”) requires a public utility, before extending its service lines outside of the corporate limits of a municipality, to obtain a certificate that public convenience and necessity require such extension. N.D.C.C. §§ 49-03-01, 49-03-01.1; Application of Otter Tail Power Co., 169 N.W.2d 415, 417 (N.D. 1969). The authority to make such a decision is vested in the Commission. Application of Otter Tail Power, 169 N.W.2d at 417. To guide the Commission, this Court outlined a number of factors which must be considered in determining whether a certificate of public

convenience and necessity should be granted. In addition to customer preference, these factors include:

[T]he 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. at 418. In making its determination, no special preference is given to the rural electric cooperative or public utilities. Cass Cnty. Elec. Coop. v. Northern States Power Co., 419 N.W.2d 181, 186 (N.D. 1988). Each application is case specific, and in evaluating the issues, “a certain amount of judgment and discretion must be allowed the Commission in making this decision.” Application of Montana-Dakota Utilities Co., 219 N.W.2d 174, 180 (N.D. 1974).

[¶ 27] Capital Electric correctly states the primary purpose of TIA is to keep wasteful duplication of capital-intensive utility services and conflicts between providers to a minimum. Northern States Power Co. v. N.D. Pub. Serv. Comm’n, 452 N.W.2d 340, 344 (N.D. 1990); Cass Cnty. Elec. Coop., 419 N.W.2d at 187. However, in light of the current regulatory constructs, “it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems,” and the question of which facilities are duplicative and wasteful “is one of fact for the PSC to determine.” Northern States Power Co. 452 N.W.2d at 344-345.

[¶ 28] Customer preference, while not controlling, is one of the factors to be considered. Cass Cnty. Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514, 521 (N.D. 1976). However, “[i]t cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice.” Tri-County Elec. Coop. v. Elkin, 224 N.W.2d 785, 792 (N.D. 1974). This is to prevent unregulated customer preference from resulting in wasteful duplication of facilities. Wold Properties, Inc. 249 N.W.2d at 521. The fact that it is not a controlling consideration does not mean that 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 at 181. In the case at hand, Capital Electric notes that customer preference is not a significant factor, which is a correct assessment of weight given to it by the Commission. See Tri-County Elec. Coop., 224 N.W.2d at 792 (“In rural areas . . . customer preference is a minor consideration.”). The customer’s preferred supplier was simply one of ten issues addressed in the Commission’s Order and was of minimal significance to the outcome of the current case.

[¶ 29] Capital Electric appears to oppose the ten (10) issues identified in the Notice of Hearing, including, “what customers are served by electric suppliers within at least a two-mile radius of the location to be served.” App. 17. However, there were no objections to these issues prior to, or during the hearing. Furthermore, these issues all have a direct relation to the Otter Tail factors, statutory language, and the primary purpose of the TIA. See generally N.D.C.C. ch. 49-03 (“[U]nreasonably interfere with . . . service or system” and “corporate limits of municipality” are in statute.); see also Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969). Capital Electric and this Court are familiar with these considerations. Since receiving the Otter Tail factors in 1969, aside from a

slight variation of these issues, they have been consistently noticed by the Commission in TIA cases. See PSC App. 1-4 (Showing the issues noticed for PSC Case No. 9844, 9847, 9688; and PSC Case No. 7962, 7885, 8030. The notice for the 1970 TIA case requested supply lines and customers served within five miles.)

[¶ 30] Montana-Dakota serves twenty-nine (29) customers within a two-mile radius of the Menards Site and twenty-eight (28) of those customers are located within a one-mile radius of the Menards Site. App. 18; Tr. 33. Capital Electric serves eleven (11) customers within a two-mile radius of the Menards Site and four (4) of those customers are within a one-mile radius of the Menards Site. App. 39; Tr. 200. What customers and the number of customers in the near vicinity are an issue that requires examination, not only for capacity requirements, but also as it directly relates to orderly development of electrical service and the reducing duplication of capital intensive facilities and service.

[¶ 31] In finding that Public Convenience and Necessity requires the granting of a certificate of Public Convenience and Necessity to Montana-Dakota, the Commission evaluated the supply lines, upgrades, and length of extensions required to serve the Menards Site in finding that, “[t]he 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.” App. 50. Capital Electric contends that the Commission’s evaluations of the extensions are not supported by the preponderance of the evidence and that “Capital’s proposed 5,280 feet of three phase construction is shorter than MDU’s total proposed three phase construction of 8,700 feet.” Appellant Brief at 17, ¶ 48. However, this was not lost on the Commission. The extensions by both suppliers were expressly evaluated in its findings:

Both electric suppliers will need to construct extensions to existing three-phase electric supply lines to serve the Menard Site. Montana-Dakota would serve the Menard 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 Delta to Wye configuration, converting approximately 1,200 feet of single-phase line to three-phase Wye and then extending that converted line underground for a distance of approximately 1,800 feet to the Menard Site. Capital Electric would serve the Menard Site by converting about a mile of single-phase line to three phase-line between its existing three-phase line and the Menard Site.

App. 45. As the District Court correctly observed, “It is clear from this finding that the PSC was not concluding that the total length of the proposed additions and upgrades were shorter, but solely that an extension of Montana-Dakota’s currently existing three phase system would be shorter than an extension of Capital Electric’s three phase system.”

App. 65.

[¶ 32] The Menards Site requires Wye three-phase service to properly run their machinery. An upgrade to the 5,700 feet of existing Delta three-phase line requires Montana-Dakota to install an additional neutral wire. Tr. 29. On the other hand, the conversion of single phase line to a three phase line for 5,280 feet proposed by Capital Electric requires the addition of two additional phases to the line. Tr. 190. To describe this as “physically” smaller, may be misleading. Further, the upgrades and additional neutral wire to the already existing three-phase service anticipates the load requirements of McKenzie. See App. 47, ¶ 18 (The upgrade will help to serve any additional load request “likely to result in the community of McKenzie.”);Tr. 160.

[¶ 33] Among the Otter Tail factors favoring Montana-Dakota, the Commission determined that Montana-Dakota will be able to serve the area more economically and

still earn an adequate return on its investment. Capital contends that its proposed extension to the Menards Site is \$82,000 less than Montana-Dakota's and therefore should weigh in favor of Capital. Brief for Appellant at 18, ¶ 47. However, Montana-Dakota's cost of proposed extension benefits more than just a single customer and includes upgrades that are anticipated to be needed to meet Montana-Dakota's load obligation under its existing certificate of public convenience and necessity in the community of McKenzie. Tr. 155, 160, 173.

[¶ 34] This can be more easily illustrated by reviewing the costs separately as specified in the Commission's Order. The order specifies costs for Montana-Dakota are:

“\$192,671, which includes the extension from the existing system to the Menards 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 Menards Site (\$66,039).” App. 47. Of the costs listed in the Commission's order, the cost of extension from the existing system to the Menards Site (\$32,619) is solely for the benefit of a single customer, Menards. This is further demonstrated by the Commission's decision not to assign any costs of the fully depreciated transformer upgrade to the Menards extension as it is anticipated to be needed regardless of whether Montana-Dakota serves the Menards Site.

[¶ 35] Additionally, Montana-Dakota demonstrated that the economic benefits would extend beyond the community of McKenzie. At the hearing, evidence was presented that there would be a net economic benefit to the entire Montana-Dakota system. Tr. 155. It was presented that the service to Menards would create a net contribution of \$296,658 per year expected toward common system costs. Doc. ID # 36, PSC Doc. ID #29, at 3.

Capital Electric did not provide information or analysis of the amount of revenue Capital Electric would require to derive an adequate return on its incremental investment to serve the Menards Site.

[¶ 36] The Commission also looked beyond these considerations, and at the total costs of serving the location, including the cost to provide electricity through electric distribution, transmission, and generation, as reflected in the provider's rates for service. The annual cost for Montana-Dakota to provide firm secondary electric service for Menards estimated consumption levels, as reflected in regulated cost-based rates set by the Commission, is \$513,669.84, while Capital Electric's annual costs of service under its current rates is \$575,883.84. Doc. ID # 36, PSC Doc. ID # 29. Therefore, Montana-Dakota's annual cost to serve the Menards Site is estimated to be 11 percent lower and therefore, more favorable as a supplier. App. 46, ¶ 21.

[¶ 37] It is the public convenience and necessity, not the convenience to a single customer or supplier, which makes Montana-Dakota the preferred supplier to this location. The extension is not merely an economic benefit to Menards, as Capital would have this Court believe. There were benefits to the Montana-Dakota system, the community of McKenzie for the growth anticipated from the addition of "240 to 250 employees," Tr. 106, ln. 5, and to the Menards location. Montana-Dakota demonstrated that they could serve the area more economically, and that the benefit extended to other customers, including the broader public.

[¶ 38] Absent from Capital Electric's discussion are the benefits from the development of electric service to the community of McKenzie. Montana-Dakota's extension would naturally upgrade the existing service to McKenzie, while providing additional capacity

for new load that can be anticipated as a result of the new Menards distribution center. A study by Montana-Dakota showed a voltage drop of less than 2.0 percent from the McKenzie substation to the Menards Site. Doc. ID # 34, PSC Doc. ID # 27; Tr. 83.

Further, Montana-Dakota's substation is located closer to the Menards Site, which would provide increased reliability due to less line length upon which a fault could occur.

Capital presented an exhibit that showed a voltage drop between the Menoken substation of approximately 2.5 percent and would be serving from a substation approximately nine (9) miles from the Menards Site. Doc. ID # 102, PSC Doc. ID # 119; Tr. 189, 209.

Capital Electric testified that it could increase its reliability by improving the substation located in Sterling, which is not currently owned by Capital Electric, and not included in Capital Electric's proposed costs. App. 46, ¶15; Tr. 203-04,209-10.

[¶ 39] Based on the evidence presented to the Commission, a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record and that public convenience and necessity requires Montana-Dakota to provide service to the Menards Site.

B. Questions of municipal law and invalidating long-standing contracts are not for the Commission to decide.

[¶ 40] Capital alleges that the Commission erred as a matter of law in considering Montana-Dakota's franchise agreement granted by the McKenzie Township and further pursues that the McKenzie Township and the Menards Site are not adjacent to each other. Brief for Appellant at 15, ¶ 41. In the matter at hand, Montana-Dakota was granted a franchise by the township of McKenzie most recently in 2008. App. 37. 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. App. 26.

[¶ 41] As this Court previously found, "a franchise is a contract," and the interpretation of a written contract to determine its legal effect is a question of law for a court to decide. City of Moorhead v. Bridge Co., 867 N.W.2d 339, 343 (N.D. 2015); Capital Elec. Coop., 2007 ND 128, ¶ 14, 736 N.W.2d 788. Limited by its jurisdiction, the Commission is an improper venue in which to decide a claim against the long-standing contract McKenzie has with Montana-Dakota. Therefore, the Commission must operate as if the contract was valid unless a court of law has reviewed and makes a finding to the contrary. On review, the District Court determined that the franchise and contract was valid. App. 61-62, ¶ 23-24. In making this determination, the court stated:

North Dakota Century Code § 58-03-01 states, "[e]ach township is a body corporate and has capacity: . . . [t]o make such contracts . . . as may be necessary for the exercise of its corporate or administrative powers." N.D.C.C. § 58-03-01(3). Under N.D.C.C. § 58-06-01, the board of township supervisors has the power "[t]o grant any person the right of way for the erection of telephone lines, electric light systems, water and 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). Therefore, a township through its board of supervisors is capable of granting a franchise.

App. 61-62.

[¶ 42] In addition to the disputed franchise agreement, Montana-Dakota and its predecessor received a Certificate of Public Convenience and Necessity from the Board of Railroad Commissioners to provide electric service to McKenzie in 1928. App. 27. No additional evidence was presented showing that the Certificate has been revoked, or

that the certificate has been abandoned. As presented, the evidence shows the utility holds an unrevoked certificate of public convenience and necessity and has a right to serve the community of McKenzie. Cass Cnty. Elec. Coop. v. Wold Properties, Inc., 249 N.W.2d 514, 522 (N.D. 1976)(An unrevoked certificate precludes another supplier from providing service); See also Skornsby Truck Line, Inc., v. Elkin, 325 N.W.2d 271, 275 (N.D. 1982)(Revoking a certificate requires notice and opportunity to be heard).

[¶ 43] Capital also asserts that the community of McKenzie is not directly adjacent to the Menards Site. Brief for Appellant at 15, ¶ 41. However, at the hearing Montana-Dakota testified that they believed the maps to show the plat of McKenzie. Tr. 270-71. No objection to the testimony regarding the plat of McKenzie was raised by Capital during this line of questioning. Nor was an objection raised by Capital when the exhibits showing the boundary of the township were admitted into evidence. Tr. 17-18, 22, 24, 34-35 (Repeatedly, “No objection”). In dismissing these contentions, the District Court noted the franchise accompanying the admitted Certificate of Public Convenience and Necessity for McKenzie, defined McKenzie’s borders as the Southeast ¼ of Section 29 and the Southwest ¼ of Section 28, Township 139N, Range 77W. App. 62, ¶ 26. The described borders are directly adjacent to the undisputed Menards Site.

[¶ 44] Capital Electric had recourse to move the Commission to consider additional evidence concerning the plat of McKenzie, but never did so. Capital had the opportunity to offer rebuttable 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 timing for

objecting to the admission of the evidence has passed. “In failing to object [to evidence] at the administrative level, [Capital] has failed to properly bring the question” before this Court.” Grambling v. N.D. Workmen’s Comp. Bd., 303 N.W.2d, 327 (N.D. 1981).

[¶ 45] 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, 707 N.W.2d 449. There were no objections raised by Capital on the record. The remaining reason for raising the issue on appeal would be for this Court to substitute its own judgment for that of the Commission.

C. Public Convenience and Necessity require Montana-Dakota to receive a certificate of public convenience and necessity to supply service to the Menards Site.

[¶ 46] The Commission’s order focused on public convenience and necessity, as opposed to the electric 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. Coop., 224 N.W.2d at 792. Evidence presented by Montana-Dakota focused on how its distribution and transmission system would benefit from this load, and how the public would in turn benefit from improved electric service to the adjacent community to McKenzie. Whereas testimony from Capital’s witnesses stated this is a “huge” load for Capital Electric and that “hopefully” Capital Electric’s members would receive a more competitive rate “in the future.” Tr. 208, 213, 226, and 234. Capital Electric’s comparative costs and infrastructure built would be only to serve a single customer, Menards. Tr. 213, 226. No evidence or testimony was presented on Capital Electric’s behalf as to the benefits to the public beyond Menards and Capital Electric.

[¶ 47] Capital Electric points to simply the crossing of lines as an indication of wasteful duplication of facilities; however, as stated above, “in light of the current regulatory situation,” some duplication and crossing of lines cannot be prevented “when cooperatives extend their existing electrical systems.” Northern States Power Co., 452 N.W.2d at 344. Just as in Northern States Power Co., Montana-Dakota’s three-phase extension crossing Capital’s single-phase line is an indication of the “imperfections” that occur under this comprehensive regulatory scheme. Id. at 345. Nonetheless, the question of “‘which electric suppliers’ facilities are actually duplicative or wasteful’ is one of fact for the PSC to determine.” Id. at 345.

[¶ 48] When viewed with TIA’s intent to keep wasteful duplication of capital-intensive utility services to a minimum, Montana-Dakota is best suited to provide service to the Menards Site. Montana-Dakota is anticipated to upgrade their substation and three-phase distribution to provide service to McKenzie due to the growth from the Menards Site, while Capital Electric intends to extend three-phase service solely to serve the Menards customer. Due to the additional load requests likely to result in the community of McKenzie and Montana-Dakota’s obligation under its current Certificate of Public Convenience and Necessity to serve, Capital Electric’s upgrades would likely result in duplicative growth of three-phase service in the area.

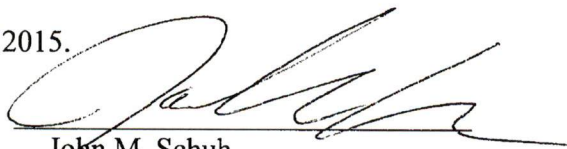
[¶ 49] What Capital Electric is asking this Court to find, is precisely what the North Dakota Supreme Court has repeatedly refused to do, namely, “that rural electric cooperatives are given a preference by the TIA to serve patrons in rural areas.” Wold Properties, Inc., 249 N.W.2d at 520; Capital Elec. Coop., Inc. v. N.D. Pub. Serv. Comm’n., 534 N.W.2d 587, 590 (N.D. 1995). In the case at hand, the Commission

considered the evidence and testimony presented, and properly weighed them to the guidance laid out by this Court in the Otter Tail Power factors. The Commission is “entitled appreciable deference” in its analysis and application of “highly technical” matters in such cases. Montana-Dakota Utilities Co., 413 N.W.2d at 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 the weight of the evidence from the entire record.” Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788.

VII. CONCLUSION

[¶ 50] 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 Menards Site.

Dated this 11th day of December, 2015.



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Commission

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150227
Burleigh County District Court 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.

**APPENDIX OF APPELLEE NORTH DAKOTA PUBLIC SERVICE
COMMISSION**

**APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, STATE OF NORTH DAKOTA**

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PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA

In the matter of the application of Montana-Dakota Utilities Co. for authority to extend electric service to Elmer Sperling, Lehr, North Dakota.)	CASE NO. <u>9844</u>

In the matter of the application of Montana-Dakota Utilities Co. for authority to extend electric service to Eugene Aman, Lehr, North Dakota.)	CASE NO. <u>9847</u>

In the matter of the application of Montana-Dakota Utilities Co. for authority to extend electric service to the City of Zeeland, North Dakota.)	CASE NO. <u>9688</u>

NOTICE OF HEARING

Montana-Dakota Utilities Co. having submitted applications to serve the above mentioned parties, and

Protests having been received from KEM Electric Cooperative, Inc. requesting a public hearing on the above numbered cases,

NOW, THEREFORE, PLEASE TAKE NOTICE that a hearing on the above numbered cases will be held in the offices of the Public Service Commission, 12th Floor of the Capitol Building, Bismarck, North Dakota, and will commence at 9:30 a.m., CDT, on the 27th day of October, 1978.

The question in these proceedings is whether public convenience and necessity require the issuance of certificates to the applicant, Montana-Dakota Utilities Co. The issues to be considered in reaching that determination are:

1. What is the customer's preference with regard to the matter?
2. What electric suppliers are operating in the general area?
3. What electric supply lines are in place within at least a 2-mile radius of the area in question and where were they constructed?
4. What, if any, customers are being served by electric suppliers within at least a 2-mile radius of the area in question?
5. What is the difference, 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 area in question more economically and still earn an adequate return on its investment?
7. Service by which electric supplier will best conduce to the orderly and economic development of electric service in the general area?
8. May the application be granted without wasteful duplication of investment or service?
9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?

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

Dated at Bismarck, North Dakota, this 28th day of September, 1978.

(S E A L)

PUBLIC SERVICE COMMISSION


Secretary

PUBLIC SERVICE COMMISSION

STATE OF NORTH DAKOTA

In the Matter of the Application of Otter Tail Power Company for an Order and Certificate to extend service to Johnnie Walch, Jamestown, North Dakota.	CASE NO. 7862 ✓

In the Matter of the Application of Otter Tail Power Company for an Order and Certificate to extend service to Lester Naatus, Jamestown, North Dakota.	CASE NO. 7885

In the Matter of the Application of Otter Tail Power Company for an Order and Certificate to extend service to Bucks Feed Lots, Inc., Carrington, North Dakota.	CASE NO. 8730

NOTICE OF HEARING

The Otter Tail Power Company having submitted applications to serve the above mentioned parties,

And protests having been received from Tri-County Electric Cooperative requesting public hearings in the above numbered cases,

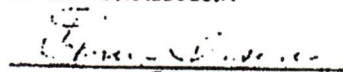
NOW, THEREFORE, PLEASE TAKE NOTICE that a hearing will be held in the above numbered cases in the State Capitol at Bismarck, North Dakota, in Hearing Rooms G-5 and 6 on ground floor and will commence at 9:30 A.M., Central Standard Time, on the 24th day of November, 1970.

The question in these proceedings is whether public convenience and necessity require the issuance of certificates to the Applicant, Otter Tail Power Company. The issues to be considered in reaching that determination are:

1. What is the customer's preference with regard to the matter?
2. What electric suppliers are operating in the general area in which the load is located?
3. What electric supply lines are in place within at least a five mile radius of the load in question and when were they constructed?
4. What, if any, customers are being served by electric suppliers within at least a five mile radius of the load in question?
5. What is the difference, if any, between the electric suppliers available to serve the load with respect to reliability of service?
6. Which of the available electric suppliers will be able to serve the load in question more economically and still earn an adequate return on its investment?
7. Service by which electric supplier will best conduce to the orderly and economic development of electric service in the general area?
8. May the application be granted without wasteful duplication of investment or service?
9. Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?
10. Will service by either of the electric suppliers in the area reasonably interfere with the service or system of the other?

Dated at Bismarck, North Dakota, this 24th day of November, 1970.
(S E A L)

BY THE COMMISSION:


Secretary

BUY NORTH DAKOTA PRODUCTS

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA

In the Matter of the Application of)
Otter Tail Power Company For an Order)
and Certificate to Extend Service to)
Johnnie Walch)
at Jamestown , North Dakota.)

CASE NO. 7962

CONDITIONAL ORDER AND CERTIFICATE

Upon the Application of Otter Tail Power Company for an Order and Certificate of Public Convenience and Necessity to extend service to Johnnie Walch, at a point located in N/2 RR/4 in Section 24, Township 140 N, Range 64 W, Stutsman County, North Dakota and Applicant's waiver of hearing herein, and upon the written Appearance by the Customer waiving Notice of Hearing or a hearing upon said Application, and it appearing from the matters presented to the Commission that the Customer is in need of immediate electric service as requested and for the reasons stated in the Application and in the Appearance by the Customer, and it appearing that Tri-County Electric Cooperative, a rural electric cooperative corporation, has objected to the proposed extension and that a hearing will be required upon the merits of the Application, and it appearing to the Commission that this is a proper case for the issuance of this Temporary Order and Certificate, subject to the conditions made a part hereof as hereinafter stated:

NOW, THEREFORE, IT IS HEREBY ORDERED, DETERMINED AND CERTIFIED, that the public convenience and necessity require that permission be given to make the required extension and to serve the Customer, as set forth in the Application and in the Appearance herein by the Customer, and authority is hereby granted to Otter Tail Power Company to immediately extend such lines and to serve said customer at said location, and any successor at said location, subject, however, to the following conditions, which are made a part of this Temporary Order and Certificate, to-wit:

- (a) The Applicant will abide the final determination of the Application; and, as a part thereof, in the event the Application is not granted, and Applicant is, therefore, not authorized to serve the Customer at said location, Applicant has agreed to and will remove whatever facilities have been constructed to furnish the service to the Customer under this Temporary Order and Certificate, and charge the cost thereof to surplus.
- (b) In the event that the Application is granted upon final determination thereof, this Temporary Order and Certificate of Public Convenience and Necessity shall become final without the entry of any further Order or Certificate. In the event that the Application is denied upon final determination thereof, this Temporary Order and Certificate will be thereby cancelled and rescinded.

Dated at Bismarck, North Dakota, this 20 day of July, 1970.

PUBLIC SERVICE COMMISSION:

(SEAL)

ATTEST:

E. Imber O'Brien
Secretary

RICHARD A. ELKIN Richard A. Elkin
Commissioner

HEN J. WOLF Hen J. Wolf
Commissioner

Commissioner Bruce Hagen dissenting for the same reasons stated in Case No. 7973.

BRUCE HAGEN Bruce Hagen
President

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150227
Burleigh County District Court 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.

AFFIDAVIT OF ELECTRONIC SERVICE

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action, and, on the **11th day of December 2015** she electronically filed with the Clerk of the North Dakota Supreme Court the following:

Brief of Appellee North Dakota Public Service Commission
Appendix of Appellee North Dakota Public Service Commission

And served the same electronically as follows:

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Attorney for Capital Electric Coop., Inc.
molson@pringlend.com

Paul Sanderson
Attorney for Montana-Dakota Utilities Co.
psanderson@esattorneys.com

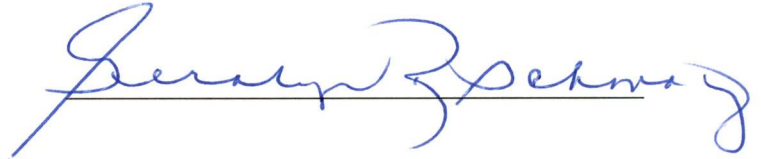
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supclerkofcourt@ndcourts.gov

Each address shown is the respective addressee's last reasonably ascertainable electronic address.



Subscribed and sworn to before me
this **11th** day of **December 2015**.



Notary Public

SEAL

