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IN DISTRICT COURT, COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA

| | | |
|------------------------------------|---|---------------------------------|
| Minn-Kota Ag Products, Inc. |) | |
| |) | Case No. 08-2018-cv-01142 |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | MINN-KOTA AG PRODUCTS' |
| North Dakota Public |) | MEMORANDUM IN SUPPORT OF |
| Service Commission, |) | APPEAL |
| Otter Tail Power Company, |) | |
| Dakota Valley Electric Cooperative |) | |
| |) | |
| Appellees. |) | |

ORAL ARGUMENT REQUESTED

[¶1] Pursuant to North Dakota Rules of Court, Rule 9.1, Minn-Kota requests oral argument in this matter.

INTRODUCTION

[¶2] This is an appeal under the Administrative Agencies Practice Act from a decision of the North Dakota Public Service Commission (“Commission” or “PSC”) made pursuant to the Territorial Integrity Act (“TIA”). Minn-Kota Ag Products, Inc. (“Minn-Kota”), received proposals from Otter Tail Power Company (“Otter Tail” or “OTP”), an investor-owned utility, and Dakota Valley Electric Cooperative (“Dakota Valley” or “DVEC”), a rural electric cooperative, to provide electric power for a new grain handling facility that Minn-Kota is building just outside Barney, North Dakota (the “Facility”). Based on a careful review of the competing proposals, Minn-Kota selected Otter Tail’s proposal as the one that best met its needs. In particular, because of the

harm that could potentially result in the event of an interruption of electric power, Minn-Kota had a heightened need for reliable service and determined that Otter Tail offered far greater reliability at significantly lower cost.

[¶3] Accordingly, as required by the TIA, Otter Tail applied to the Commission for a certificate of public convenience and necessity (“CPC&N”) for authorization to provide service outside the municipal limits of Barney. Ultimately, the Commission denied the CPC&N without allowing Minn-Kota to intervene in the matter. The Commission erred: 1) in denying Minn-Kota’s petition to intervene; 2) in failing to consider or appropriately weigh the technical aspects of the competing plans for electric service at the Facility which demonstrated substantial benefits to be derived from Otter Tail’s service proposal; 3) in evaluating the economic factors to be considered when deciding whether to grant a CPC&N; and, 4) in determining that granting Otter Tail’s application would result in wasteful duplication. The Commission’s decision must be reversed and remanded, and the CPC&N should ultimately be issued.

STANDARD OF REVIEW

A. Review Pursuant to the Administrative Agencies Practice Act

[¶4] The North Dakota’s Administrative Agencies Practice Act sets forth the following grounds, among others, for reversal of an agency decision: 1) The order is not in accordance with the law; 2) The rules or procedure of the agency have not afforded the appellant a fair hearing; 3) The findings of fact made by the agency are not supported by a preponderance of the evidence; 4) The conclusions of law and order of the agency are not supported by its findings of fact; 5) The findings of fact made by the

agency do not sufficiently address the evidence presented to the agency by the appellant. N.D.C.C. §28-32-46. This standard of review requires the Court to determine: (1) if the agency's findings of fact are supported by a preponderance of the evidence; (2) if the agency's conclusions of law are sustained by the findings of fact; and, (3) if the agency decision is supported by the conclusions of law. *Montana-Dakota Utilities Co. v. Public Service Comm'n*, 413 N.W.2d 308, 310 (N.D. 1987). If the Court does not affirm the Commission's order, it must modify or reverse the order and remand the matter to the Commission for disposition in accordance with the Court's decision. *Id.*

[¶5] In reviewing the agency's factual findings, the Court may not substitute its judgment for that of the agency, but rather, must determine whether "a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Roberts v. North Dakota Workmen's Compensation Bureau*, 326 N.W.2d 702, 707 (N.D. 1982) (affirming district court's reversal of a decision of the Workmen's Compensation Bureau on the ground that the agency's decision denying a workmen's compensation claim was not supported by a preponderance of the evidence); *Tri-Cty. Elec. Co-op., Inc. v. Elkin*, 224 N.W.2d 785, 792 (N.D. 1974) (affirming the district court's reversal of the Public Service Commission's order because the Commission's findings were not supported by substantial evidence).

[¶6] Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision. *Barnes v. Workforce Safety and Ins.*, 2003 ND 141, ¶ 9, 668 N.W.2d 290; *Guthmiller v. Director, North Dakota Dept. of Transp.*, 2018 ND 9, ¶1, 906 N.W.2d 75, 75; see also *HIT, Inc. v. North Dakota Department of Human Services*,

2013 ND 51, 828 N.W.2d 792 (holding that it was reversible error for the administrative law judge to defer to the agency's interpretation of an unambiguous regulation); *Dahly v. Anderson*, 2012 ND 183, ¶¶ 18-19, 820 N.W.2d 719, 725-26 (reversing and remanding an agency's decision because the "Department erred as a matter of law").

B. Factors for Consideration Under the Territorial Integrity Act

[¶7] Under North Dakota's Territorial Integrity Act, a public utility seeking to provide service to a location that is outside the corporate limits of a municipality that it serves must first obtain a certificate from the Public Service Commission that public convenience and necessity require the extension of service. N.D.C.C. §49-03-01.1; *Capital Elec. Co-op, Inc. v. Pub. Serv. Comm'n*, 534 N.W.2d 587, 590 (N.D. 1995) ("*Capital Electric I*"). The North Dakota Supreme Court long ago rejected the idea that the statute is intended to create a preference in favor of the service provided by co-ops. *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 418 (N.D. 1969). Rather, the Commission must consider customer preference, which "has long been recognized as a proper consideration for the Commission in deciding whether a certificate of public convenience and necessity should be issued." *Capital Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2016 ND 73, ¶ 7, 877 N.W.2d 304, 307 (N.D. 2016) ("*Capital Electric II*") (collecting cases). Additionally, the Commission must consider:

the location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application and which also can best develop electric service in the

area in which such site is located without wasteful duplication of investment or service.

Id. (quoting *Capital Electric I*, 534 N.W.2d at 591; *Application of Otter Tail Power Co.*, 169 N.W.2d at 418). Here, the Commission erred in its conclusions of fact and law.

STATEMENT OF FACTS

A. Description of Minn-Kota and its Barney Grain Handling Facility

[¶8] Minn-Kota Ag Products is a grain elevator and agriculture supply business located the southern Red River Valley. Minn-Kota has locations in Wyndmere, Barney, and Wahpeton, North Dakota, and in Kent and Breckenridge, Minnesota. CR Ex. 86 (October 23, 2017 Hearing Transcript (“Hrg. Tr.”) at p. 174, l. 16-21). It is a fourth generation family-owned business. CR Ex. 86 (Hrg. Tr. at p. 174, l. 1-4).

[¶9] This case concerns a grain handling facility that Minn-Kota is building near Barney (“Barney Facility” or “Facility”). Minn-Kota will invest more than \$20 million in capital in order to construct a state-of-the art facility that, when completed, will be the largest in Minn-Kota’s network. CR Ex. 86 (Hrg. Tr. p. 177, ll. 11-18; p. 183, ll. 17-21). The Facility will operate year round, with irregular and unpredictable peak demand requirements. CR Ex. 86 (Hrg. Tr. p. 177, l. 22-p. 179, l. 3); CR Ex. 65 (Otter Tail Post Hearing Argument at p. 2). The Facility will have in-bound operations for receiving grain from grain producers, and out-bound operations for loading grain onto railcars. CR Ex. 86 (Hrg. Tr. p. 176, ll. 4-6). Minn-Kota expects that the Facility will be completed in time to commence operations in July 2018 and will have an operational life of 40 years. CR Ex. 86 (Hrg. Tr. at p. 177, ll. 19-22; p. 179, l. 25-p. 180, l. 4). The Facility will

replace a much smaller elevator that Minn-Kota had owned and operated in Barney for over 60 years until it sold the elevator to a local farmer. CR Ex. 86 (Hrg. Tr. at p. 206, l. 16-p. 207, l. 5).

[¶10] With respect to its in-bound operation, the Facility will have three dump pits for receiving grain, each with a capacity of 20,000 bushels, or 20 semi loads per hour. CR Ex. 86 (Hrg. Tr. at p. 175, ll. 11). Trucks will dump grain into the dump pits and a conveyor will carry the grain from the dump pit to a leg. The leg will carry the grain up to a distributor and from there a conveyor will take the grain to a bin. CR Ex. 86 (Hrg. Tr. p. 179, ll. 4-14). The Facility will have a total capacity of 2.9 million bushels. CR Ex. 86 (Hrg. Tr. p. 176, ll. 11-12).

[¶11] With respect to its out-bound operations, a conveyer beneath the bin will carry the grain to the load-out legs, which will carry the grain to be screened, cleaned and weighed before being loaded onto BNSF railcars. CR Ex. 86 (Hrg. Tr. at p. 179, l. 15-19). The Facility is designed to load grain onto 120-car trains at a maximum load-out capacity of 80,000 bushels per hour. CR Ex. 86 (Hrg. Tr. at p. 175, l. 22-p. 176, l. 16). The Facility will provide area grain producers with a competitive advantage because it will be able to offer discounted freight rates that are lower than rates offered by smaller elevators that are only capable of shipping two or three railcars at a time. CR Ex. 86 (Hrg. Tr. at p. 176, l. 20-177, l. 10).

[¶12] Electric motors will power the conveyors and legs that move the grain around the Facility, with a connected load of approximately 5,000 horsepower, which is 3.7 megawatts. CR Ex. 86 (Hrg. Tr. at p. 179, ll. 22-24 (George Schuler describing

operations); p. 24, ll. 20-24 (Otter Tail engineer describing required service); *see also* CR Ex. 65 (Otter Tail Post Hearing Argument at p. 2). Accordingly, access to reliable, affordable electricity will be critical to the Facility's success. Trains that receive grain at the Facility will operate on a strict schedule. Once a train arrives, Minn-Kota will have only a limited amount of time to complete loading. If loading is not completed in the allotted amount of time, Minn-Kota will have to pay a penalty, resulting in higher shipping costs. CR Ex. 86 (Hrg. Tr. p. 177, l. 23-p. 178, l. 178). Additionally, a service interruption would require Minn-Kota to shut down the Facility for as much as a day to a day and a half in order to clean grain out of the legs before getting the Facility up and running again. CR Ex. 86 (Hrg. Tr. at p. 186, ll. 1-23) An interruption of the Facility's electric service that occurs during harvest season or when Minn-Kota has a train to load could have huge implications for Minn-Kota. CR Ex. 86 (Hrg. Tr. at p. 186, ll. 1-23).

B. Otter Tail Power's Proposal to Provide Service to the Minn-Kota Facility

[¶13] Otter Tail Power proposed to provide three-phase electric service to Minn-Kota by tapping an overhead 41.6 kV transmission line that runs east and west along Highway 13, adjacent to Minn-Kota's property. CR Ex. 86 (Hrg. Tr. at p. 22, l. 16-p. 23, l. 3, p. 25, l. 6-p. 26, l. 4); CR Ex. 27 (OTP-2). This same 41.6 kV transmission line provides power to Dakota Valley's Mooreton substation. CR Ex. 86 (Hrg. Tr. p. 232, ll. 5-8). The 41.6 kV line would feed a distribution substation to be constructed by Otter Tail Power on Minn-Kota's property. The transmission line would be connected to the substation by a 200 to 300 foot overhead tap. Otter Tail Power would then extend a 1,000 foot underground three phase distribution line from the substation to Minn-Kota's point of

service. CR Ex. 86 (Hrg. Tr. at p. 25, l. 17- p. 27, l. 11). Otter Tail Power projected its cost to extend service to Minn-Kota to be approximately \$231,000. CR Ex. 86 (Hrg. Tr. at p. 33, ll. 14-16); CR Exs 28 and 29 (OTP-3 and OTP-4).

[¶14] The estimated all-in (i.e., including base charges and riders) annual cost to Minn-Kota to receive service from Otter Tail Power, based upon Otter Tail Power's Commission-approved tariff, ranges from \$271,981.05 to \$251,136.70, depending on the load factor used. CR Ex. 34 (OTP-9). Otter Tail Power will not impose any additional charge on Minn-Kota for the cost of extending facilities necessary to provide service, but rather, will recover that cost through its regular recurring energy charges. CR Ex. 86 (Hrg. Tr. at p. 134, ll. 2-16). After accounting for Otter Tail Power's Commission-approved rate of return, annual charges to Minn-Kota are anticipated to provide a net contribution to the Otter Tail Power system of \$158,234 to \$172,705 per year. CR Ex. 35 (OTP-10); CR Ex. 86 (Hrg. Tr. at p. 134, l. 13-p. 135, l. 6).

C. Dakota Valley's Proposal to Provide Service to the Minn-Kota Facility

[¶15] Dakota Valley would serve Minn-Kota's Facility from an existing three-phase distribution cabinet located on Highway 13 to the west of Minn-Kota's property that is connected to Dakota Valley's Mooreton substation via approximately 3.7 miles of three phase underground cable. CR Ex. 86 (Hrg. Tr. at p. 229, l. 1-p. 232, l. 4); CR Ex. 39 (DVEC-3). Dakota Valley would construct approximately 4,000 feet of three-phase underground cable from the existing cabinet to Minn-Kota's point of service. CR Ex. 86 (Hrg. Tr. at p. 229, l. 1-p. 232, l. 4); CR Ex. 39 (DVEC-3). Dakota Valley estimates the

cost of new facilities to provide service to Minn-Kota will be \$93,640. CR Ex. 86 (Hrg. Tr. at p. 235, l. 18-p. 236, l. 13, 241, ll. 3-6); CR Ex. 51 (DVEC-16).

[¶16] Dakota Valley provided Minn-Kota with a rate proposal under which it would charge \$316,160.97 per year for electric service and Minn-Kota would receive an incentive discount in a total amount of \$226,970.62 over the course of nine years, with the amount of the discount declining each year. CR Ex. 86 (Hrg. Tr. p. 248, l. 25-p. 254, l. 9); CR Ex. 45 (DVEC-9). Like Otter Tail Power, Dakota Valley would not charge Minn-Kota for cost of extending service to the Facility. CR Ex. 86 (Hrg. Tr. at p. 241, ll. 19-22). Dakota Valley projects that, after its costs and a rate of return of 3.19%, charges to Minn-Kota will produce a net annual contribution of \$16,728. CR Ex. 45 (DVEC LF-3).

D. Minn-Kota's Preference for Otter Tail Power as its Provider of Electric Service for the Barney Grain Handling Facility

[¶17] Based on a careful evaluation of the proposals it received from Otter Tail Power and Dakota Valley, Minn-Kota chose Otter Tail Power as its preferred provider. CR Ex. 86 (Hrg. Tr. at p. 180, ll. 9-12, p. 181, l. 11-p. 188, l. 1). Minn-Kota based this decision on the fact that the proposal from Otter Tail Power offered more reliable service at lower cost. CR Ex. 86 (Hrg. Tr. at p. 181, l. 11-p. 188, l. 1). Indeed, Dakota Valley's service would cost approximately \$70,000 to \$110,000 more annually than Otter Tail Power's service. CR Ex. 34 (OTP-9). Not only was the estimated cost significantly less under the Otter Tail Power proposal, Otter Tail Power offered to construct a substation on Minn-Kota's property to provide greater reliability. CR Ex. 86 (Hrg. Tr. at p. 187, ll. 19-25). Additionally, because Otter Tail Power is a rate-regulated utility, Minn-Kota could be

assured that Otter Tail Power would have to go through a regulatory process in order to raise its rates, thus providing a greater degree of predictability than would be the case with Dakota Valley, whose rates are not regulated by the Public Service Commission. CR Ex. 86 (Hrg. Tr. at p. 188, ll. 17-23). Having Otter Tail Power provide electric service will facilitate Minn-Kota's ability to re-invest in, and expand, its Barney Facility. CR Ex. 86 (Hrg. Tr. at p. 184, ll. 11 - 25 (George Schuler testifying that the Otter Tail plan would allow flexibility); *see also* p. 91, l. 19- p. 92, l. 4 (Otter Tail engineer testifying that the system could serve an "industrial park.")).

[¶18] Even more importantly, however, the nature of the Facility's operations made the reliable availability of electric power a prime concern and the Otter Tail proposal offered significantly better reliability. CR Ex. 86 (Hrg. Tr. at p. 185, l. 2 - p. 187, l. 1). Large loads, like the Facility, can often cause voltage drops and other types of disruptions on the system. CR Ex. 86 (Hrg. Tr. at p. 37, l. 19- p. 39, l. 3). Because Otter Tail would construct a new substation on Minn-Kota's property that would initially serve only the Facility, this would eliminate the concern that the amount of power needed to start up the large electric motors that power the Facility might cause disruptions. *Id.* Dakota Valley, in contrast, would serve multiple customers, in addition to the Facility, from a power source much further away. Additionally, Dakota Valley's proposal would provide service via substantially more underground cable than Otter Tail's design (i.e., more than four miles compared with 1000 feet), which takes longer to repair than overhead cable. CR Ex. 86 (Hrg. Tr. at p. 40, ll. 11-22). As a result,

in the event of an outage, the amount of time to restore service would likely be greater under the Dakota Valley proposal than would be the case for Otter Tail.

[¶19] Minn-Kota's choice was further supported by the experiences it had had with the two providers. Otter Tail Power provides service to Minn-Kota's facility in Wyndmere and previously provided service to Minn-Kota's former facility in Barney and Minn-Kota was consistently satisfied with Otter Tail Power's service. CR Ex. 86 (Hrg. Tr. at p. 180, l. 13-p. 181, l. 5). Otter Tail Power has been very flexible in working out any issues that have arisen and outages have been few and short-lived. CR Ex. 86 (Hrg. Tr. at p. 180, l. 13-p. 181, l. 5). Dakota Valley, on the other hand, provides electricity to Minn-Kota's facility in Wahpeton. Minn-Kota's experience there has been that it has had to limit its operations at its Wahpeton facility by reducing the number of fans in operation in order to avoid being charged Dakota Valley's very high demand charge. CR Ex. 86 (Hrg. Tr. at p. 182, l. 23 – p. 183, l. 16). By selecting Otter Tail Power as its electricity provider for its Barney Facility, Minn-Kota intended to avoid similar constraints on its ability to operate the Barney Facility at peak performance. CR Ex. 86 (Hrg. Tr. at p. 183, l. 17-p. 184, l. 6).

E. Proceedings Before the North Dakota Public Service Commission

[¶20] On February 27, 2017, Otter Tail Power filed with the PSC its Application for Permanent Authority, requesting a Certificate of Public Convenience and Necessity in order to serve Minn-Kota's Barney grain handling facility. CR Ex. 1. Along with its Application, Otter Tail Power filed an Appearance by Customer, executed on behalf of Minn-Kota, that confirmed that Minn-Kota wished to receive electric service from Otter

Tail Power and admitting the allegations contained in Otter Tail Power's Application. CR. Ex. 1. On March 15, 2017, the PSC issued its Notice of Opportunity for Hearing, finding that Otter Tail Power had made a prima facie showing that it should be permitted to serve Minn-Kota and directing that any written objections to the Application be filed by April 11, 2017. CR. Ex. 3. On March 31, 2017, Dakota Valley filed a Protest and Request for Hearing objecting to Otter Tail Power's Application. (CR. Ex. 6.)

[¶21] At the PSC's request, an Administrative Law Judge was assigned to serve as procedural judge presiding over proceedings convened for the purpose of determining Otter Tail Power's Application. (CR Exs. 8 and 11.) On July 26, 2017, the PSC issued a Notice of Hearing that identified the following issues to be considered in determining whether to grant Otter Tail Power's Application:

1. From whom does the customer 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 unreasonable interfere with the service or system of the other?

(CR Ex. 18.)

[¶22] An evidentiary hearing was held on October 23, 2017, at which time the PSC admitted witness testimony and exhibits into the record. CR. Ex. 23; *see also* CR Ex. 86 (10/23/17 hearing transcript). Testifying in support of the Application were Richie Wolf, Otter Tail Power's area engineer who is responsible for designing electricity distribution systems, Chris Waltz, Otter Tail Power's conservation sales manager, and George Schuler IV, who is Minn-Kota's grain division and logistics manager, as well as a member of its board of directors and a minority owner. Testifying in opposition to the Application were Seth Syverson, who is an engineering manager for Dakota Valley and Northern Plains Electric, and Bruce Garber, general manager of Dakota Valley and Northern Plains Electric.

[¶23] The PSC convened a work session on December 20, 2017. At that time, the Commissioners met, along with Jerry Lein, the PSC's technical expert, and Zach Pelham, the PSC's legal counsel and reviewed the evidence in light of the identified issues to be considered. CR Ex. 87 (12/20/17 working session transcript). During that work session, the Commissioners expressed their preliminary view regarding how the factors to be considered in determining Otter Tail Power's application for a Certificate of Public Convenience and necessity should be weighed.

[¶23] On February 1, 2018, Minn-Kota filed with the Commission its Petition to Intervene and Request to Present Oral and Written Comments. CR Ex. 72. In support of its Petition, Minn-Kota stated:

Good cause exists to allow Minn-Kota's intervention at this time. Minn-Kota believes that it has a unique perspective on many of the issues before the Commission and that its written and oral comments will be helpful to the Commission in its consideration, in particular, of issues that were the focus of discussions at the most recent working session, held on December 20, 2017. At that time, the Commission had extensive discussion regarding, in particular, whether granting OTP's application would result in wasteful duplication of facilities and the impact of the Commission's decision on the public interest.

CR Ex. 72 (Petition to Intervene at ¶10). Minn-Kota's Petition summarized the additional information it wished to present and how that information would bear on the Commission was to consider. Otter Tail Power filed comments in support of Minn-Kota's request to intervene and Dakota Valley opposed the request. CR Ex. 73 (DVEC's objection to intervention petition); CR Ex. 75 (OTP's response to intervention petition). On February 5, 2018, the Commission convened a working session where the Commissioners discussed Minn-Kota's intervention request. *See* CR Ex. 88 (transcript of 2/5/18 working session). At that working session, the Commission took no position on the merits of the request and, instead, referred the issue to the ALJ for a determination. On February 19, 2018, the ALJ issued an Order Denying Petition to Intervene. CR Ex. 77.

[¶24] On March 5, 2018, Minn-Kota requested reconsideration of the decision denying its petition to intervene. CR Ex. 78. In its reconsideration request, Minn-Kota provided more detail regarding the arguments and evidence that it would offer if permitted to

intervene, thus enabling the Commission to make a decision of such great importance to Minn-Kota on a more complete record. By way of an offer of proof, Minn-Kota submitted with its request for reconsideration a letter from a North Dakota Registered Professional Engineer that reviewed, from a technical perspective, the pros and cons of the competing Otter Tail Power and Dakota Valley proposals. CR Ex. 78. The Commission took no action on Minn-Kota's request. However, on March 13, 2018, the ALJ issued an order denying the reconsideration request and also ordering that all but the first two introductory paragraphs of Minn-Kota's request, as well as the exhibits filed in support of the request, be stricken. CR Ex. 80.

F. The Public Service Commission's Decision

[¶25] The Commission issued its Findings of Fact, Conclusions of Law and Order denying Otter Tail Power's application on March 29, 2018. CR Ex. 82 (Order). In the section of the Order concerning the balancing and weighing of factors, the PSC expressly addressed six of the ten factors. It concluded that two of those factors (reliability, economy) favored neither party, one factor (customer preference) favored OTP, and three factors favored DVEC (customers and supply lines within one and two miles of the location to be served, orderly and economic development, wasteful duplication of investment). CR Ex. 82 (Order ¶48).

ARGUMENT

[¶26] The Commission erred as a matter of law in at least four respects. First, the Commission failed permit Minn-Kota to intervene and failed consider evidence that Minn-Kota sought to offer that was directly relevant to the issues before the

Commission. Second, the Commission erred as a matter of law in finding that reliability and economy were neutral factors, when in fact they favored the Otter Tail Power plan. Third, the Commission erred in its conclusions that several factors favored Dakota Valley's plan. Fourth, the Commission erred in failing to consider the substantially greater reliability of Otter Tail Power's plan, together with Minn-Kota's heightened need for reliable electric service, in concluding that the Otter Tail Power plan would result in "wasteful duplication."

I. The Commission's Denial of Minn-Kota's Intervention Petition Prevented Minn-Kota from Receiving a Fair Hearing.

[¶27] The Commission erred in failing to permit Minn-Kota to intervene in the proceeding; and, therefore, precluded Minn-Kota from an opportunity to, among other things, petition the Commission to reopen the proceeding for the purpose of taking additional evidence pursuant to North Dakota Administrative Code, Section 69-02-06-01. Fundamentally, this left Minn-Kota – the most impacted party – unrepresented, and unable to present its best position. It also prevented the Commission from making a decision critical to the success of Minn-Kota's Barney Facility on a full and complete record.

[¶28] Minn-Kota is in the process of constructing a state-of-the-art grain handling facility located on Highway 13, two miles east of Barney, North Dakota. The Facility represents a significant investment (approximately \$20,000,000) in an economically depressed area of the state. When the first phase of the Facility is completed, it will have ten steel bins with a capacity of 2.9 million bushels, it will have a load out capacity

of 80,000 bushels per hour, which will enable 120 rail cars to be loaded in less than eight hours. This will benefit the area's grain producers and overall economy.

[¶29] Under the Commission's Rules, a petition to intervene "must be filed at least ten days prior to the hearing, but not after except for good cause shown." N.D. Admin Code § 69-02-02-05(2). It is undisputed that Minn-Kota's petition fell outside that window of time. However, Minn-Kota has good cause to intervene. "Good cause" is not defined in the applicable section of the Administrative Code, nor is it defined in the Administrative Agencies Practice Act. However, "good cause" to intervene has been shown where a non-party's interests may be "substantially affected" by the action being considered by the Commission. *TransCanada Keystone Pipeline, LP*, Case No. PU-06-421, Order on Motions to Intervene and Reopen, Dkt. No. 250 (Nov. 7, 2007) attached hereto as Exhibit A.

[¶30] In the TransCanada proceeding, the Commission held a hearing on September 5, 2007. See *TransCanada Keystone Pipeline, LP*, Case PU-06-421, 2008 WL 10590490 (N.D.P.S.C. Feb 21, 2008) (Findings of Fact Conclusions of Law and Order). Despite having notice of the hearing, the City of Fargo did not intervene before the hearing. See *TransCanada Keystone Pipeline, LP*, Case No. PU-06-421, Order on Motions to Intervene and Reopen, Dkt. No. 250 (Nov. 7, 2007) attached hereto as Exhibit A. Rather, the City of Fargo moved to intervene on October 23, 2007, more than a month and a half after the hearing. *Id.* In that matter, similar to the instant matter, the party opposing the intervention argued that Fargo's petition was not timely and that its interests had been adequately represented at the hearing. *Id.* The Commission, however, found that Fargo

had good cause to intervene because it had “interests that may be substantially affected” by the proceeding. *Id.* Here, Minn-Kota certainly has interests that will be “substantially affected” by the proceeding.

[¶31] Indeed, Minn-Kota’s \$20,000,000 investment depends on having reliable and affordable power. The Otter Tail Power solution meets that need, and the Dakota Valley solution does not. As Minn-Kota attempted to show in its Petition to Intervene, there were significant technical deficiencies with DVEC’s proposal that were not present in the Otter Tail Power solution. CR Ex. 78 (Minn-Kota’s Petition to Reconsider, at Ex. 2).

[¶32] Moreover, while Otter Tail Power and Minn-Kota have some overlapping interests in this matter, Otter Tail Power does not adequately represent Minn-Kota’s interests nor is it completely aligned with Minn-Kota. Indeed, Otter Tail Power has a number of interactions with the Commission. For Otter Tail Power, this is one of many matters; and, undoubtedly its overall strategy as a company is informed by these many interactions. This one application for a Certificate of Public Convenience and Necessity is likely not material to Otter Tail’s business. For Minn-Kota, however, this application is critical. Minn-Kota, therefore, has every incentive to make sure that the record is complete and that all of the relevant evidence has been properly considered. CR Ex. 78 (Minn-Kota’s Petition for Reconsideration).

[¶33] It is beyond dispute that Minn-Kota will be “substantially affected” by the outcome of this proceeding. As such, good cause existed for Minn-Kota’s intervention, but it was denied. CR Exs. 78 (Order Denying Petition to Intervene) and 80 (Order

Denying Reconsideration). Minn-Kota's intervention was denied *only* because the ALJ found that Minn-Kota's petition to intervene was untimely. *Id.* What both the ALJ and the Commission failed to recognize is that Minn-Kota would be the *only* party adversely affected by delay. The stakes are sufficiently high for Minn-Kota that it was (and is) more important to get the decision "right" than to get the decision "right now."

[¶34] In adopting, implicitly, the ALJ's ruling on Minn-Kota's petition to intervene, the Commission erred in failing to consider evidence – and struck evidence – offered by Minn-Kota to establish good cause for its intervention and in support of Otter Tail Power Company's petition, thus denying Minn-Kota the opportunity for a fair hearing. That evidence would have shown: *i.* The significance Minn-Kota's investment in the Facility and the benefits that Facility would bring to area farmers and the region, generally; *ii.* Minn-Kota's specific need for reliable electric service for the Facility; *iii.* The risk of harm to Minn-Kota in the event of an interruption in electric service to the Facility, as well as the potential for harm to area farmers and the region generally; *iv.* The ways in which the proposal from Otter Tail Power Company to provide electric service would better meet the requirements for operations of the Facility, including but not limited to substantially greater reliability and lower cost service; *v.* The risk to Minn-Kota and also to other DVEC customers posed by DVEC's unproven proposal to conditionally waive DVEC's standard requirements regarding the use of "soft start" electric motors; and, *vi.* How granting Otter Tail Power Company's petition for a CPC&N would facilitate Minn-Kota's plans for expanding the Facility in the future,

thereby contributing to economic development in the area. *See* CR Ex. 78 (Minn-Kota’s Petition to Reconsider its Petition to Intervene).

[¶35] By denying Minn-Kota’s petition to intervene, and its subsequent motion for reconsideration, the Commission fundamentally deprived Minn-Kota of the right to make its best record and failed to consider a complete record. *See* N.D.C.C. §28-32-46 (grounds for reversal including “[t]he rules or procedure of the agency have not afforded the appellant a fair hearing” and “[t]he findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.”) For this reason, the Commission’s decision must be reversed and remanded.

II. The Commission Erred in its Analysis of Reliability

[¶36] The error of the Commission’s refusal to allow Minn-Kota to intervene is exacerbated by its failure to properly analyze the reliability of the DVEC and Otter Tail solutions, finding that this factor favored neither because both would provide “sufficient reliability.” CR Ex. 82 (Order, ¶48c). The Commission’s analysis of reliability of the two competing proposals was simplistically premised on the unfounded assumption that “reliable” is a bipolar quality: Either service is reliable or it is not. However, the Commission’s own factual findings acknowledge that the two proposals were not equal in terms of reliability, as the Commission’s conclusion suggests. Rather the Commission’s findings reflect that the Otter Tail Power proposal offered greater reliability, both for Minn-Kota and for other customers, than did the Dakota Valley proposal. CR Ex. 82 (Order, ¶¶ 19, 20, 22). The Commission’s conclusion that both proposals would provide sufficient reliability failed to take into account,

indeed, was contrary to, the Commission's findings regarding the relative reliability of the two proposals and the undisputed evidence regarding the benefits that would derive from the greater reliability provided by Otter Tail.

[¶37] *First*, the Commission found that Otter Tail's 1,000 feet of distribution line offered less distribution line exposure than DVEC's approximately four-mile distribution network. CR Ex. 82 (Order at ¶ 19). The Commission, however, makes no factual findings that support the conclusion that the four-mile network (21 times as long) that Dakota Valley proposed to build would be sufficiently reliable for this project. This is especially troubling because the Commission expressly acknowledged that the "[e]ngineering evidence presented at the hearing indicates that the risk of service, voltage fluctuations, outages, and the length of outages generally increases with the length of distribution line serving or connected to a customer." CR Ex. 82 (Order at ¶ 20). The Commission's conclusion is also directly contradictory with its conclusion in *Capital Electric II*. In that matter "[t]he proposed extension of [public utility's] three-phase system to serve the site is shorter than the proposed extension of [electrical coop's] three-phase system" supported issuing the CPC&N. *Capital Electric II*, 877 N.W.2d at 306. The Commission's contrary conclusion here is legal error.

[¶38] *Second*, the Commission also recognized that "[e]ngineering testimony presented at the hearing indicates that voltage fluctuations, interruptions and outages at service points fed from a transformer feeder can negatively affect electric service to other customers fed from that same feeder." CR Ex. 82 (Order at ¶ 22). And that Otter Tail's plan was better in this regard. *Id.* This is, of course, supported by the fact that Otter

Tail's proposal had only 1,000 feet from the feeder to the customer, which would serve only one customer – Minn-Kota. CR Ex. 82 (Order at ¶¶ 19, 21). In contrast, the DVEC plan requires the construction of 3,960 feet of additional distribution line to connect the Barney Facility to DVEC's Mooreton substation, and adds to the existing four-miles of distribution in the area. CR Ex. 82 (Order at ¶¶ 14, 19). This, alone, should weigh heavily in favor of granting the CPC&N to Otter Tail Power. *Capital Electric II*, 877 N.W.2d at 306 & 309 (recognizing that “[public utility’s] substation is located closer to the [Customer] Site providing less voltage drop and less line length on which a fault could occur.”) Here, the Commission simply ignored the facts that demonstrate the substantial reliability benefits of OTP’s plan to provide service that required a much shorter feeder to a to-be-constructed substation in concluding that both OTP and DVEC offered “sufficient reliability.”

[¶39] *Third*, the Commission expressly acknowledged that “Otter Tail’s proposal to serve Minn-Kota’s large motor load on a dedicated circuit from a dedicated substation it will have to construct may offer a higher level of reliability.” CR Ex. 82 (Order at ¶ 24). This finding, too, fails to support its conclusion that both Otter Tail and DVEC would be equally reliable. *Id.* The Commission’s findings do not support its conclusion that both providers would be “sufficiently reliable.”

[¶40] The Commission’s conclusion that reliability did not favor either OTP or DVEC was also contrary to the Commission’s findings and the evidence regarding “soft start” motors. When there is a sudden draw of a large amount of current, this can cause brownouts and other service disruptions for customers served by the same circuit. CR

86 (Hrg. Tr. p. 39, ll. 17-24); CR 87 (12/20/17 Working Session Tr. at p. 3, l. 12 – p. 4, l. 1). So-called “soft start” motors, which are more expensive, mitigate this concern by starting the motor more gradually, thus reducing the sudden draw of current. CR 86 (Hrg. Tr. at p. 38, l. 16 – p. 39, l. 7 (Otter Tail engineer describing “soft start”); p. 313, l. 20 – p. 314, l. 4 (DVEC engineer testifying that “soft start” costs more); CR 87 (12/20/17 Working Session Tr. at p. 3, l. 12 – p. 6, l. 19 (Commission technical expert discussing cost and performance of “soft start”); The evidence showed that, because of the close proximity of the substation to the Facility, Otter Tail’s system could sustain a larger initial current draw without affecting reliability. Thus, Otter Tail’s proposal required that motors producing 100 horsepower or greater be soft start motors. In contrast, Dakota Valley’s standard policy is to require soft start motors at 30 horsepower or greater. CR 86 (Hrg. Tr. at p. 38, l. 16-p. 39, l. 16; Hrg. Tr. at p. 228, l. 21 – p. 229, l. 5). The Commission acknowledged that the proposed Facility would have a large electric load and that DVEC ordinarily requires “soft start” motors for those with more than 30 horsepower. CR Ex. 82 (Order at ¶ 9). The Commission, however, brushed away any concern about the need for soft start engines based on testimony from DVEC testified that it may not enforce the requirement. CR Ex. 82 (Order at ¶ 9).

[¶41] However, as the Commission’s own technical expert recognized, DVEC’s offer to “waive” the soft start requirement for engines greater than 30 horsepower was not unequivocal. CR 87 (12/20/17 Working Session Tr. at p. 5, l. 15 – p. 6, l. 3); *see also* CR 66 (DVEC Closing Argument at ¶4 (DVEC waiver of soft start requirements depends on Minn-Kota’s willingness to “assume some risk” for putting in non-soft starting engines);

CR Ex. 86 (Hrg. Tr. at p. 293, ll. 14-16) (DVEC engineer explaining that waiver was on the “caveat, if [DVEC does] start experiencing issues on [its] distribution, that [the customer] will fix the issue, the member that would fix that.”). What this means, as a practical matter, is that DVEC cannot provide any assurance that its waiver proposal would not result in the degradation of service for Minn-Kota or for other DVEC customers served by that same part of the electricity grid. If it is determined that the waiver of the soft start requirement results in an undue amount of disruption of service to other customers, Minn-Kota may, sooner rather than later, be required to retrofit the Facility with soft start motors – resulting in unnecessary expense and disruption of Minn-Kota’s business – and/or to pay DVEC’s expenses to augment the grid to enable it to provide sufficiently stable service.

[¶42] The Commission erred in failing to consider or give appropriate weight to evidence regarding the risk to Minn-Kota – and also to other DVEC customers – posed by DVEC’s unproven proposal to conditionally waive DVEC’s standard requirements regarding the use of “soft start” electric motors. The Commission then exacerbated its error when it struck evidence offered by Minn-Kota that showed that DVEC’s proposal was unmodeled and less robust than the Otter Tail system. CR Ex. 78 (Petition for Reconsideration at Ex. 2). The Otter Tail system offers better reliability and should weigh in favor of granting the CPC&N.

III. The Commission's conclusions of law regarding the factors required to be considered by the TIA are not supported by its findings of fact on several factors, including economy, customers and supply lines within one and two miles of the location to be served, orderly and economic development.

[¶43] In *Capital Electric II*, the Commission issued the CPC&N to Montana-Dakota Utilities, an investor owned utility. *Capital Electric II*, 877 N.W.2d at 305. There, the Commission held that a CPC&N was necessary based on the following facts, which are nearly identical to the instant case:

- 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 [Customer] 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 [Electrical Coop's] three-phase system.
- Montana-Dakota will serve the [Customer] 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 . . . and realize significant cost savings to [Customer] therefore best serving orderly and economic development of the area.

Id. at 305-306. The reliability factors, which are nearly identical, have already been discussed. With respect to the other factors considered in *Capital Electric II*, the

Commission found almost the same facts in this matter, but reached the opposite legal conclusion. As such, the Commission's instant decision must be reversed.

[¶44] *First*, the Commission found that Minn-Kota preferred Otter Tail because of Otter Tail's "rate structure" CR Ex. 82 (Order at ¶ 6) and "approximately \$100,000 less in annual electric charges." CR Ex. 82 (Order at ¶ 7). Minn-Kota further preferred Otter Tail because of its "reliability and outage restoration performance. CR Ex. 82 (Order at ¶ 8). *See Capital Electric II*, 877 N.W.2d at 305 ("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.") These findings support the issuance of a CPC&N.

[¶45] *Second*, the Commission found that both suppliers operated in the area. CR Ex. 82 (Order at ¶ 12). While the Commission correctly found that DVEC served 16 more customers in the two-mile radius than Otter Tail Power, CR Ex. 82 at ¶ 17, that rigid (and arbitrary) two-mile test understates Otter Tail's presence in the area. *See* CR Ex. 26 (OTP-1) (showing scores of Otter Tail customers just outside of the two-mile radius.) While the two-mile radius has been used by the Commission in the past, it is not a rigidly prescribed test. Instead, in affirming the Commission in *Capital Electric II*, the Court stated that "the number of customers served by electric suppliers in the *larger vicinity* should be considered for assessing capacity requirements in determining the orderly development of electrical service." *Id.* at 307-308 (emphasis added). The Court held that "[e]ven if [rural electric cooperative] serves customers closer to the [proposed customer's] site, this does not preclude the Commission from considering the number of customers served in *the larger area* for the purpose of examining duplication of

services.” *Id.* at 308 (emphasis added). Here, the Commission committed legal error by simply ignoring the scores of customers served by Otter Tail in the larger area. As did the investor-owned utility in *Capital Electric II*, Otter Tail serves more customers in the larger area. CR Ex. 26. And this supports an issuance of the CPC&N. *Capital Electric II* at 307-308.

[¶46] *Third*, the Commission was required to consider which of the providers would be able to serve Minn-Kota more economically while still earning an adequate return on investment. The Commission concluded that this factor favored neither party because “Dakota Valley would extend service more economically while Otter Tail’s ongoing costs of providing service would be more economical.” CR Ex. 82 (Order at ¶37; *see also* ¶48(d)). The Commission found that, under Otter Tail’s projections Minn-Kota would save \$108,743 annually with Otter Tail and under DVEC’s projections Minn-Kota would save \$66,607 annually with Otter Tail. (*Id.* at ¶ 29). Yet the Commission effectively cancels out the undisputed economic benefit of Otter Tail’s proposal with its finding that the Otter Tail solution would be more costly. In giving the on-going costs to the customer of the service equal weight with the cost to the provider of extending service, the Commission committed legal error.

[¶47] This statutory factor, as defined by the North Dakota Supreme Court, poses the question: which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment? *Capital Electric II*, 877 N.W.2d at 307. This factor, in balancing the economic cost of service against return on investment shows that the phrase “more economically” is concerned with how the

supplier will recover its investment (i.e., how much the customer will pay), not the cost of facilities to provide the service. Charging a new customer too little for service could adversely impact the provider's investment return and reduce the resources available to adequately develop and maintain necessary facilities. This factor is intended to ensure that the provider does not win the business by undercharging for service to the proposed location such that the provider does not earn a sufficient return and the cost of providing the service has to be subsidized in some way.

[¶48] Here, DVEC is investing less in facilities needed to extend service, but charging the customer more, producing, after a relatively small rate of return of 3.19%, only a nominal a net annual contribution of \$16,728. CR 82 (Order ¶36); see also CR 86 (Hrg. Tr. at p. 256, l. 16-p. 257, l. 5). These projections leave DVEC with little margin for error and suggest a very real possibility, if not likelihood, that DVEC will end up increasing Minn-Kota's rates, a step that it would be able to take without oversight by the Commission. That DVEC's investment cost will be less is not a factor in DVEC's favor if it is going to charge more for the service. OTP, in contrast, although charging less, will, after investment return, realize an annual net contribution to the OTP system of \$158,234 to \$172,705 per year. CR 82 (Order ¶35); see also CR Ex. 35; CR 86 (Hrg. Tr. at p. 134, l. 13-p. 135, l. 6). In other words, the undisputed evidence establishes that not only will OTP's service be less expensive, the charges that Minn-Kota pays for that service will provide a greater benefit to the public by making a greater contribution to OTP's overall system costs.

[¶49] *Fourth*, the Commission here erred when it found that DVEC would best serve the “orderly and economic development of the area.” (CR 82 at ¶ 48(e)). A proper analysis of this factor includes considering the evidence of the economic impact on the customer and the surrounding community. *Capital Electric II*, 877 N.W.2d at 311. As previously stated, the Commission recognized that the Otter Tail solution would provide significant savings to the customer, Minn-Kota. As to the community, the Commission found that both Otter Tail and DVEC operated in the area for decades. (CR Ex. 82 at ¶ 38.) The Commission noted that DVEC’s extension would “benefit Dakota Valley’s System and further expansion in the area” but ignored the fact the Otter Tail Power was building a substation to provide distribution in the area, which provide greater benefits. *Compare* CR Ex. 82 (Order ¶¶ 39-41) *with* CR Ex. 82 (Order at ¶ 19).

[¶50] Effectively, the Commission’s decision creates a preference in favor of the electric cooperative simply because it had a distribution substation already in the arbitrary two-mile radius. This is not proper. *See Application of Otter Tail Power Co.*, 169 N.W.2d 415, 418 (N.D. 1969). Indeed, shortly after the TIA was adopted, the North Dakota Supreme rejected the idea that cooperatives “are the preferred supplies of electrical energy in all rural areas of the State, and that a public utility may not enter a rural area unless it is physically and economically impractical for a cooperative to furnish electric service in such area.” *Id.* The Commission’s failure to account for Otter Tail’s expansion in its analysis of the economic impact on the community is legal error. *See Capital Electric II* at 306 (“extension of service would best serve the community . . . and realize significant cost savings to [Customer] therefore best serving orderly and economic development of

the area”). This legal error is especially magnified given that the Otter Tail Power solution would better serve Minn-Kota, CR Ex. 82 at ¶¶ 19, 20, 22, and allow for other expansion in the area. CR Ex. 86 (Hrg. Tr. at p. 91, l. 19- p. 92, l. 4).

[¶51] The economic factors, therefore, all support the issuance of a CPC&N.

IV. The Commission Committed Legal Error in Concluding that Granting Otter Tail’s Application for a CPC&N Would Result in “Wasteful Duplication”

[¶52] Finally, one of the factors to be considered is whether there is “wasteful duplication.” *Capital Electric II*, 877 N.W.2d at 307. As the North Dakota Supreme Court recognized, “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.” *N. States Power Co. v. Pub. Serv. Comm’n*, 452 N.W.2d 340, 344 (N.D. 1990). The correct analysis is whether the duplication is “wasteful.” *Capital Electric II*, 877 N.W.2d at 307, 311-312. When considering whether there is wasteful duplication, the Commission should consider both whether the service or investment is “wasteful.” *Id.* at 311-312. In concluding that the Otter Tail plan would result in “wasteful duplication,” the Commission here failed to take into account the substantial advantages offered by the Otter Tail proposal in terms of reliability, lower cost, and public benefits. Thus, the Commission committed reversible error when it focused on what it perceived to be duplication – a perception driven by the fact that DVEC provides service in the rural area outside the Barney municipal limits – without considering whether any such duplication was, in fact, “wasteful.” See CR. Ex. 82 at ¶¶ 43-44.

[¶53] With respect to the potential duplication of service, the Commission’s technical expert observed that the service proposed by Otter Tail was “stronger.”

As the Commission’s technical expert observed:

But my point with the -- with the soft start, bringing them up, is the underlying circuits, Otter Tail’s is stronger and that’s why it doesn’t need those soft starts earlier and there’s no other customers on there to be affected. Otter Tail’s straight off of that 41.6kV line and the co-op’s is going through a distribution system.

And that’s where I go back to the duplication, whether it’s wasteful. . .

So if you’re looking at it, the duplication gives the customer a stronger service coming straight off of that 41.6 and it gives them stronger service for less money.

CR 87 (12/20/17 Working Session Tr. at p. 6, l. 13 – p. 7, l. 3). In *Capital Electric II*, the Commission recognized that the public utility’s solution would provide some duplication, but it recognized that the solution was not wastefully duplicative in part because the service provided by the public utility was a better fit for the customer’s use. *Id.* at 311-312. The same is true here. As such, the Otter Tail solution is not wasteful duplication of service.

[¶54] There is also not a wasteful duplication of investment. As was the case in *Capital Electric II*, both electric suppliers here would need to invest to construct extensions or upgrade facilities to serve the customer. *See Capital Electric II*, 877 N.W.2d at 311. And just like the situation in *Capital Electric II*, the overall cost to the customer would be less with the public utility. *Id.* at 306. Given that the Otter Tail solution would ultimately provide better service – as admitted by the Commission’s technical expert – and that the overall cost to the customer would be less, the Commission should have held that

there was no wasteful duplication and counted this factor in favor of the issuance of the CPC&N. *Capital Electric II* at 312.

CONCLUSION

[¶55] The Commission's order denying Otter Tail Power Company's application for a CPC&N is not in accordance with the law and must be reversed and remanded to the Public Service Commission for issuance of the CPC&N.

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s/ Loren L. Hansen

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