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| Date/Time Submitted | 8/17/2018 4:35 PM CST |
| Filing Type | Brief |
| Filing Description | Dakota Valley Electric Cooperative, Inc.'s Appellee Brief |
| Filed By | Kimberly Radermacher-Lagodinski |
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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Minn-Kota Ag Products, Inc.,)
)
 Appellant,)
)
 vs.)
)
 North Dakota Public Service Commission)
 Dakota Valley Electric Cooperative, Inc., and)
 Otter Tail Power Company,)
)
 Appellees.)

**DAKOTA VALLEY ELECTRIC COOPERATIVE, INC.'S
APPELLEE BRIEF**

Case No. 08-2018-CV-01142
PSC Case No. PU-17-96

ISSUES

[1] The primary issues raised by Appellant on appeal are: 1) whether the Public Service Commission erred in denying Minn-Kota’s Petition to Intervene; and 2) whether the Public Service Commission erred in denying Otter Tail Power Company’s application for a Certificate of Public Convenience and Necessity (hereinafter “CPCN”) to extend service to Minn-Kota Ag Products, Inc. by finding that certain factors weighed in favor of Dakota Valley and not Otter Tail.

PROCEDURAL HISTORY

[2] This matter came before the North Dakota Public Service Commission (hereinafter “Commission”) on application of Otter Tail Power Company (hereinafter “Otter Tail”) to serve a commercial electric load located in the NE¼ of Sec. 10, Twp. 132N., Rge. 50W., Richland County, North Dakota (hereinafter “Minn-Kota site”). See Index #11. This electric load is sought to be provided to an elevator site being built by Minn-Kota Ag. Products Inc. (hereinafter “Minn-Kota”). *Id.* The application for permanent authority was filed with the Commission on February 27, 2017. *Id.*

[3] On February 27, 2017, the Commission issued a Notice of Opportunity for Hearing. See Index #13. On March 31, 2017, Dakota Valley Electric Cooperative, Inc., (hereinafter “Dakota Valley”) filed a protest to Otter Tail’s application for permanent authority to serve the Minn-Kota site and requested a hearing on the matter. See Index #16. On July 26, 2017, the Commission issued a Notice of Hearing to be held on October 23, 2017. See Index #28. The Notice of Hearing also identified the following ten factors to be considered at the hearing:

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 supplier in the area unreasonably interfere with the service or system of the other?

[4] On October 23, 2017, a public hearing was held. See Index #78 (Transcript of Proceedings, October 23, 2017). Present and represented by counsel at the hearing were Otter Tail, Dakota Valley and the Commission. (Tr., page 2). Also present, but not represented by counsel, was George Schuler IV, a representative of Minn-Kota. (Tr., p. 173-216). Subsequent to the hearing, Otter Tail and Dakota Valley submitted closing arguments and proposed findings for consideration by the Commission. See Index #94, #95, #97, #98.

[5] On December 20, 2017, the Commission held its first work session relative to Otter Tail’s

application for CPCN. *See* Index #79.

[6] On February 1, 2018, Minn-Kota filed a Petition to Intervene and Request to Present Oral and Written Comments. *See* Index #101. On February 2, 2018, Dakota Valley filed an Objection to Minn-Kota's Petition to Intervene and Request to Present Oral and Written Comments. *See* Index #102.

[7] On February 5, 2018, the Commission held another work session. *See* Index #80. At that time, Minn-Kota's Petition to Intervene and Request to Present Oral and Written Comments was referred to Administrative Law Judge Patrick Ward. *Id.* On February 12, 2018, Otter Tail filed a Response to Minn-Kota's Petition to Intervene and Request to Present Oral and Written Comments. *See* Index #104. On February 19, 2018, ALJ Ward issued an opinion denying Minn-Kota's Petition to Intervene and Request to Present Oral and Written Comments. *See* Index #69.

[8] On March 5, 2018, Minn-Kota filed a Petition to Reconsider its Petition to Intervene and Request to Present Oral and Written Comments. *See* Index #70. On March 12, 2018, Dakota Valley filed a response to the Petition to Reconsider and also requested that ALJ Ward strike evidence submitted by Minn-Kota in support of its Petition to Reconsider as being improper. *See* Index #71. On March 13, 2018, ALJ Ward issued an opinion once again denying Minn-Kota's untimely request to intervene and striking the improper evidence submitted by Minn-Kota in support of its Petition to Reconsider. *See* Index #72.

[9] On March 29, 2018, the Commission issued its Findings of Fact, Conclusions of Law and Order denying Otter Tail's application for a CPCN to extend service to Minn-Kota at the Minn-Kota site. *See* Index #73, 74. On April 27, 2018, Minn-Kota filed a Notice of Appeal and Specifications of Error in District Court for the County of Burleigh, State of North Dakota. *See* Index #1.

STATEMENT OF THE FACTS

[10] Otter Tail is an investor owned electric utility providing electric service to approximately 60,000 customers in North Dakota under the regulatory jurisdiction of the Commission. (Tr., p. 259, lines 5-7). Dakota Valley is a rural electric cooperative providing electric service to approximately 4200 members in southeastern North Dakota. (Tr., p. 259, lines 2-4). Minn-Kota is a grain elevator and agricultural supply business located in the southern Red River Valley with locations in Wyndmere, Barney and Wahpeton, North Dakota, and in Kent and Breckenridge, Minnesota. (Tr., p. 173, lines 17-21). The Minn-Kota site is located on the Highway 13 corridor near the communities of Barney and Mooreton, North Dakota. (Tr., p. 22, lines 6-25). The site was expected to be fully operational by July 2018. (Tr., p. 180, lines 3-4). Dakota Valley and Otter Tail are the only electric suppliers operating in the general area of the Minn-Kota site. Dakota Valley provides single-phase and three-phase service to rural customers adjacent to the site. (Tr., p. 221, lines 17-25; p. 222, lines 1-11). Otter Tail primarily provides single-phase service to the communities of Barney and Mooreton, which are both located approximately three miles from the site. (Tr., p. 225, lines 8-16).

[11] Prior to construction, Minn-Kota reached out to Otter Tail requesting that Otter Tail serve the load to the Minn-Kota site. (Tr., p. 209, lines 24-25; p. 210, lines 1-10). Because the proposed site was located in territory generally served by Dakota Valley, Otter Tail was required to file for a CPCN from the Commission. *See* Index #11; (Tr. 219, lines 10-18). On February 27, 2017, Otter Tail filed its Application for Permanent Authority, which included a customer appearance from Minn-Kota. *See* Index #11. On March 31, 2017, Dakota Valley filed a Protest to Otter Tail's Application and requested a hearing on the matter. *See* Index #16. On July 26, 2017, the Commission issued a

Notice of Hearing setting the public hearing in this matter for October 23, 2017. *See* Index #28.

[12] At the hearing, testimony was received from Richie Wolf and Chris Waltz from Otter Tail, George Schuler IV from Minn-Kota and Seth Syverson and Bruce Garber from Dakota Valley. (Tr., p. 2-3). Testimony adduced at the hearing disclosed that Otter Tail has a 41.6 kV overhead transmission line that runs east and west along Highway 13, in close proximity to the Minn-Kota site. (Tr., p. 22, lines 22-25; p. 23, lines 1-7). However, without some modification and considerable investment, this line by itself cannot service the proposed site. The 41.6 kV line also feeds the Central Power Electric Cooperative (“CPEC”)/Dakota Valley substation, known as the Mooreton substation, which is the substation that would be utilized by Dakota Valley in extending service to the site. (Tr., p. 224, lines 8-17). Otter Tail’s 41.6 kV line went into service approximately 50 years ago. (Tr., p. 23, lines 6-11). Other than this line, Otter Tail has little to no other electric supply lines within a two-mile radius of the location. To extend service to the site, Otter Tail would have to construct a new on-site substation on a 40 x 60 footprint, with a partially depreciated 2500 kVA step-down transformer fed by Otter Tail’s adjacent 41.6 kV transmission line. (Tr., p. 27, lines 7-25; There will be approximately 1,000 feet of three-phase 4/0 jacketed cable installed for distribution to the site. (Tr., p. 31, lines 16-19).

[13] Dakota Valley has both single phase and three-phase electric supply lines located throughout the two-mile radius. (Tr., p. 219, lines 19-25; p. 220, lines 1-10). Dakota Valley serves approximately 18 members within the two-mile radius, while Otter Tail serves two. (Tr., p. 24, lines 5-7; p. 221, lines 17-25; p. 222, lines 1-6). Dakota Valley has an existing three-phase cabinet and three-phase service within approximately 3,960 feet of the proposed site. *See* Index #50; (Tr., p. 222, lines 7-11; p. 223, lines 15-21). The 3-phase line comes off the Mooreton substation, which

was built in 1977 and just underwent a routine overhaul in 2017. (Tr., p. 261, lines 1-16). The three-phase line is 4/0 jacketed cable that was installed in approximately 2012. (Tr., p. 224, lines 1-7). Dakota Valley intends to extend three-phase service from the existing three-phase cabinet located just north of Highway 13 and directly east of the proposed site. *See* Index #50; (Tr., p. 237, lines 10-25). This extension would consist of approximately 3,960 feet of three-phase 4/0 jacketed cable, an additional three-phase cabinet, and up to two new 1500 kVA transformers. *Id.*

[14] At the hearing, SAIDI and CAIDI statistics, which is one way of looking at reliability, were provided for both electric suppliers. *See* Index #42, 43. In comparing SAIDI numbers, it appears that both electric suppliers are very similar. *Id.* In 2016, Otter Tail's SAIDI was 110.5, while Dakota Valley's was 130.9. *Id.* In 2015, Otter Tail's was 100.6, while Dakota Valley's was 88. *Id.* In 2014, Otter Tail was 74.2 and Dakota Valley was 75.5. *Id.* In 2013, Otter Tail was 99.7 and Dakota Valley was 91.8. *Id.* And in 2012, Otter Tail was 84.1, while Dakota Valley was 87.8. *Id.* SAIDI is based on system wide numbers, while CAIDI looks at consumer average. (Tr., p. 259, lines 2-7). Because of this and the vast difference in the number of consumers between the two electric suppliers, CAIDI would not be determinative as to the issue of reliability in this case. *Id.*

[15] Dakota Valley provided outage data specific to the Minn-Kota site for both Dakota Valley and Otter Tail. Otter Tail intends to use their Wahpeton substation to serve this load. According to Exhibit DVEC-14, between May 13, 2014, and November 18, 2016, Otter Tail's Wahpeton substation had sustained approximately 15 outages. *See* Index #61. These outages ranged in duration from less than one minute to just under two hours. According to Richie Wolf of Otter Tail, this outage report does not include scheduled maintenance. It also does not include any data for the year 2017 or any time prior to May 19, 2014. (Tr., p. 60, lines 9-25, p. 61, lines 1-18). The

reason provided for the missing data prior to 2014 was that Otter Tail had undergone metering changes during that time, which caused the specifics as to this substation to be lost. *Id.*

[16] Dakota Valley intends to use its Mooreton substation and a feeder from the substation to supply power to the Minn-Kota site. According to Exhibit DVEC-11, between 2007 and 2017, the Mooreton substation had a total of four outages. *See* Index #47. Seth Syverson of Dakota Valley testified that the outage on July 17, 2011, that was over four hours in length, was as a result of downed poles on Otter Tail's 41.6 kV line that powers the Mooreton substation. (Tr., page 269, lines 8-25; p. 270, lines 1-2). There is another outage on May 3, 2012, that also may relate to issues with Otter Tail's line. *Id.* However, given the general description of Power Supplier, Syverson was unable to say for certain if that was an Otter Tail or CPEC issue. *Id.* On Exhibit DVEC-12, Syverson pointed out that there were two outages total in seven years that would relate to the feeder that would directly serve the Minn-Kota site and those date back to 2010, prior to the new three-phase wire being installed. *See* Index #59.

[17] Syverson also testified that the miles of transmission line that would serve this area could play into reliability. Both Syverson and Wolf testified that Otter Tail would be utilizing the 41.6 kV transmission line that has at least 40 miles of exposure to serve the Minn-Kota site. *See* Index #57; (Tr. p. 264, lines 11-25; p. 265, lines 1-22; p. 266, lines 5-25). Syverson testified that Dakota Valley Mooreton substation is served by a 41.6 kV transmission line with approximately 10 miles of exposure. *Id.* Wolf indicated that Otter Tail's transmission line was approximately 50 years old and is serviced at least annually. (Tr., p. 23, lines 6-16). Syverson testified that portions of Otter Tail's 41.6 kV line do not have a static wire, which can lead to increased lightning strikes and decreased reliability. (Tr., p. 275, lines 4-25, p. 276, lines 1-4). As to Dakota Valley's existing electrical services

near the site, Syverson testified that the underground 4/0 already existing within .70 miles of this site was installed in approximately 2012 and has at least a 50-60 year life span. (Tr., p. 224, lines 1-7; p. 268, lines 23-25; p. 269, lines 1-5). The Mooreton substation was built in 1977 by CPEC and undergoes annual maintenance. (Tr., p. 261, lines 1-16). It also undergoes a major overhaul on a seven-year cycle and this just occurred in 2017. *Id.* Syverson also indicated that CPEC/Dakota Valley has other substations in this area that could be used in the event there are issues with the Mooreton substation. (Tr., p. 261, lines 19-21). Those substations include the Dwight, South Wyndmere, North Wyndmere, and Hankinson subs; although the South Wyndmere would be the substation most likely used given its closer proximity to the Minn-Kota site. (Tr., p. 261, lines 19-21; p. 262, lines 1-4).

[18] The extensions of service proposed by Otter Tail and Dakota Valley also play into the issue of reliability. Otter Tail proposes to tap its 41.6 kV transmission line and put a substation and 2500 kVA transformer onsite connected by approximately 1,000 feet of underground 4/0 cable. Wolf testified that Otter Tail “probably” was going to utilize a 2500 kVA transformer that it had in its fleet. This transformer is approximately 26 years old, added to Otter Tail’s fleet in 1991. (Tr., p. 53, lines 8-25; p. 101, lines 1-22). Wolf could not give specifics as to why the transformer was removed from service and how long it had been out of service. *Id.* Wolf could also not testify as to the maintenance of this specific transformer, although he gave a generalized idea of how maintenance on such facilities is typically handled within Otter Tail. *Id.* Dakota Valley proposes using all new cable, elbows, transformers and other incidentals to extend service to the Minn-Kota site. (Tr., p. 237, lines 10-25). The proposal by Dakota Valley included two 1500 kVA transformers in the event that Minn-Kota wanted to split up loads and/or improve reliability. *Id.* Syverson indicated that even

one 1500 kVA transformer would be sufficient to serve the load, but that depending on Minn-Kota's wishes, a 2000 kVA transformer could be utilized. (Tr. p. 237, lines 10-25; p. 238, lines 13-25; p. 239, lines 1-22). Syverson testified that the average life of a transformer is approximately 40-50 years. (Tr., p. 240, lines 3-6). Because Otter Tail intends to utilize a used transformer there are some concerns regarding reliability going forward. (Tr., p. 239, lines 8-25; p. 240, lines 1-2).

[19] Another issue that was touched on briefly at the hearing and goes to reliability is the issue of voltage drop. Syverson testified that any voltage drop experienced by Dakota Valley would fall within industry standards. (Tr., p. 274, lines 21-25; p. 275, lines 1-3). Wolf also indicated that the same would be true for Otter Tail; however, he did indicate that there would be a more significant voltage drop if the load would have to be served outside of its normal source. (Tr., p. 49, lines 8-24).

[20] Both Dakota Valley and Otter Tail would need to make some improvements and financial investment to their systems to bring electric service to the Minn-Kota site. Dakota Valley provided a detailed list of what it would cost for Dakota Valley to extend service to the Minn-Kota site. See Index #62. The proposed extension would be a logical extension of Dakota Valley's existing three-phase service in the area. (Tr., p. 233, lines 19-21). The extension would include bringing in approximately 3,960 feet of 4/0 underground cable, adding a three-phase cabinet and placing up to two 1500 kVA transformers on site. (Tr., p. 237, lines 10-25). The total cost of the Dakota Valley's proposed extension would be \$93,640.73. See Index #62; (Tr., p. 241, lines 3-5). As Syverson had testified to at the hearing, this is Dakota Valley's "worst case scenario." (Tr., p. 237, lines 21-25). Syverson indicated that based on historical data for similar facilities to the Minn-Kota site, one 1500 kVA transformer would be sufficient to serve the load. (Tr., p. 234, lines 20-24).

However, Syverson added a second 1500 kVA transformer in the event that Minn-Kota wanted to divide up the load and/or improve reliability. (Tr., p. 237, lines 21-25). Syverson indicated that if Minn-Kota wanted only one transformer, it would reduce the overall cost by \$26,450.00, and if it wanted a 2000 kVA transformer, it would add approximately \$5,000.00 to the original cost of one transformer. (Tr., p. 241, lines 3-18). This would then place the overall cost of investment by Dakota Valley between \$67,190.73 and \$72,190.73. *Id.*

[21] Otter Tail projects a total investment for extension of \$235,869.00, which utilizes exempt material, including a 1991 2500 kVA transformer. *See* Index #38, #39, #62. Wolf had indicated that Otter Tail would “probably” utilize this specific transformer for the Minn-Kota site, but could not guarantee its availability at the time of construction. (Tr., p. 53, lines 8-25). If this transformer is not used, it could increase Otter Tail’s estimated costs of extension significantly.

[22] When it comes to rates, the potential load factor for the Minn-Kota site would need to be determined in order to make an adequate comparison. Dakota Valley testified that the Minn-Kota site is closest in its proposed configuration to Dakota Valley’s Elevator 3, which has a load factor of 33%. (Tr., p. 249, lines 17-25; p. 250, lines 1-16; p. 256, lines 21-25; p. 257, lines 1-15). Schuler indicated that the Minn-Kota Barney facility will operate year-round and that it consists of two parts – inbound receiving and outbound shipping via 120 car BNSF trains. (Tr., p. 176, lines 4-13). The facility will have 3 dump pits, with the ability to unload 20,000 bushels per hour at each dump pit, for a total of 60,000 bushels per hour. *Id.* The facility will also be able to load out approximately 80,000 bushels per hour. (Tr., p. 176, lines 14-16). Total capacity at this site will be just under 3 million bushels and total investment will be in the ballpark of \$20 million. (Tr., p. 176, lines 11-13; p. 177, lines 13-14). Schuler indicated that this is not a “small town elevator,” is “state

of the art,” and will be one of the “nicest facilities in the State of North Dakota.” (Tr., p. 176, lines 17-20; p. 183, lines 19-21).

[23] Utilizing a 33% load factor, Otter Tail’s total annual energy cost relative to the Minn-Kota site would be \$271,981.05. See Index #45. Taking into account Otter Tail’s numbers for Total Energy Cost projected for Dakota Valley, less the Power Factor cost and On-Site Facilities charge that was taken into account, Dakota Valley’s total annual energy cost during the first nine years of operation would be approximately \$290,942.01. *Id.* This would result in a total difference between the two of \$18,960.92 annually for the first nine years. *Id.* However, in utilizing Dakota Valley’s updated year ten number for total energy cost set forth on page 7 of Exhibit DVEC-9 of \$306,035.75 less what Otter Tail projects is an 8% blended discount for the first nine years (which amounts to \$24,408.94 annually), Dakota Valley’s total projected annual energy cost for those nine years would be approximately \$281,626.81.¹ See Index #56. This would result in a total difference between the two of \$9,645.76 annually for the first nine years. *Id.* During year 10 and thereafter, there would be an annual difference of approximately \$34,054.66. *Id.* These numbers are presupposing that there will be no change in rates for either entity, which is highly unlikely. *Id.*

[24] Dakota Valley also testified regarding the potential for capital credits and stated that this should be taken into consideration when considering this factor. Dakota Valley’s Exhibit LF-4 sets forth the historical data on allocations and retirements made by Dakota Valley as to the entire membership. See Index #86. Based upon projected first year revenue for Minn-Kota of \$275,524.58, and using the actual allocation for 2016, Minn-Kota’s potential for capital credits in

¹ Dakota Valley had previously projected \$316,2160.97 as its total annual energy cost by year 10 during its initial assessment of this load on March 13, 2017, which is set forth on page 2 of DVEC-10. However, this number was found to be in error on October 10, 2017, and was updated accordingly.

year one could be approximately \$42,429.14. *Id.* As the economic development incentive drops off, this would increase the total revenue realized by Dakota Valley on the Minn-Kota load, which would in turn increase the dollar amount of capital credits to be received by Minn-Kota. *Id.* While the amount of capital credits Minn-Kota will earn and ultimately be allocated is subject to fluctuation, it is still a factor that needs to be taken into consideration.

[25] Based on Dakota Valley's late filed exhibits and the information provided by Otter Tail at the time of the hearing, both Dakota Valley and Otter Tail would earn an adequate rate of return on this load. Otter Tail is required to recoup its investment within a 3-year period, whereas Dakota Valley is not under those constraints. *See* Index #46; #85. Dakota Valley has historically earned a rate of return on its investments of 3-4 percent, whereas Otter Tail's mandated rate of return is 8.62 percent. *Id.*

[26] Service by Dakota Valley to the Minn-Kota site is a logical and economical extension and continuation of the existing electric service that Dakota Valley has provided to rural customers in the area since at least the 1940's. (Tr., p. 223, lines 22-24; p. 233, lines 19-21). An extension of three-phase service by Dakota Valley to the Minn-Kota site would bring Dakota Valley's service further west along the Highway 13 corridor, which would benefit Dakota Valley's system and future expansion in the area. (Tr., p. 233, lines 11-24). While Otter Tail's 41.6 kV transmission line runs directly in front of the Minn-Kota site, it cannot serve the site without substantial investment being made by Otter Tail. Otter Tail's proposed extension of service would serve only the Minn-Kota site and currently would not benefit any other Otter Tail customers in the area. Otter Tail indicated that it had no plans to extend service from the Minn-Kota site to anyone else in the area in the foreseeable future. To do so, Otter Tail would have to apply for a CPCN from the

Commission.

[27] At the conclusion of the public hearing, the Commission set deadlines for the parties to submit closing arguments, responses to closing arguments and proposed findings for the Commission's consideration. All post hearing documents were filed by November 21, 2017. The Commission then met in a work session on December 20, 2017, to discuss the facts of the case. *See* Index #79. No additional evidence or input was provided by the parties at the work session. Thereafter, on February 1, 2018, and 101 days after the evidentiary hearing, Minn-Kota sought to intervene in the proceedings. *See* Index #101. On February 2, 2018, Dakota Valley filed an objection to the intervention, claiming that the intervention was not timely filed and that good cause had not been shown for the late intervention. *See* Index #102. On February 5, 2018, the Commission met in a scheduled work session to again discuss the case. *See* Index #80. At that time, it was decided that Minn-Kota's petition to intervene should be referred to ALJ Ward for a decision. *Id.* Any party that had yet to submit a response to the petition to intervene was provided until February 12, 2018, to submit a response. *Id.* Otter Tail submitted its response on the deadline date stating it had no objection to the intervention by Minn-Kota. *See* Index #104. On February 19, 2018, ALJ Ward issued an opinion denying Minn-Kota's intervention indicating that it was not timely and good cause had not been shown for its untimeliness. *See* Index #69.

[28] On March 5, 2018, Minn-Kota filed a petition to reconsider its previously filed petition to intervene. *See* Index #70. At that time, Minn-Kota sought to introduce evidence not previously submitted at the evidentiary hearing in this matter in support of its petition. *Id.* However, none of the evidence provided established good cause for Minn-Kota's late filing; rather, it was an attempt by Minn-Kota to establish why it had good cause to intervene. *Id.* On March 12, 2018, Dakota

Valley submitted an objection to the petition to reconsider, again stating that the intervention was not timely as it was requested 111 days past the time set in statute for intervention and asked to have the improper evidence proffered by Minn-Kota in its filing stricken from the record. See Index #71. On March 13, 2018, ALJ Ward denied Minn-Kota's petition to reconsider and ordered that the evidence submitted by Minn-Kota in support of its position be stricken. See Index #72. In his opinion, ALJ Ward states "Minn-Kota Ag Products, Inc., which is not a party to this action, makes a brash attempt to insert evidence, exhibits, and argument into the record without having been granted the right to intervene in the proceeding and after the hearing in this matter has been completed and closed. I believe Minn-Kota Ag Products, Inc. has arrived much too late to the dance, and hereby Order that additional evidence or argument which Minn-Kota Ag. Products, Inc. has attempted to put forward in its Petition to Reconsider is procedurally improper and should be stricken from the record. Minn-Kota Ag Products, Inc. failed to timely intervene and has not shown good cause as to why and, therefore, the Petition for Reconsideration is DENIED." *Id.*

[29] On March 29, 2018, the Commission unanimously adopted its Findings of Fact, Conclusions of Law and Order denying Otter Tail's application for CPCN to extend service to Minn-Kota. See Index #73, #74. The Commission found that "while the customer prefers electric service from Otter Tail, customer preference is not controlling in the issue of public convenience and necessity; that Dakota Valley has more customers and electric supply lines within a one-mile and two-mile radius of the location; the evidence indicates that either electric supplier would serve the Minn-Kota site with sufficient reliability; existing cooperative distribution facilities allow Dakota Valley to extend service to the Minn-Kota site more economically, though Otter Tail's ongoing costs of service would be less depending on load characteristics and potential future capital credit distributions;

Dakota Valley’s extension would best serve the orderly and economic development of the area; and approval of Otter Tail’s application would result in wasteful duplication of investment of service.” *Id.*

[30] On April 27, 2018, Minn-Kota filed a Notice of Appeal and Specifications of Error in Burleigh County District Court. *See* Index #1. On July 20, 2018, Minn-Kota filed its Memorandum in Support of Appeal setting forth the following issues: 1) the Commission’s denial of Minn-Kota’s intervention petition prevented Minn-Kota from receiving a fair hearing; 2) the Commission erred in its analysis of reliability; 3) 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; and 4) the Commission committed legal error in concluding that granting Otter Tail’s application for a CPCN would result in “wasteful duplication”. *See* Index #127.

STANDARD OF REVIEW

[31] An appeal from a decision of the Public Service Commission is governed by the Administrative Agencies Practice Act, promulgated at N.D.C.C. Chapter 28-31. The District Court exercises a limited review in appeals from administrative agency decisions. Bergum v. North Dakota Workforce Safety & Ins., 2009 ND 52, ¶ 8, 764 N.W.2d 178. Under N.D.C.C. § 28-32-46, the District Court “shall affirm the order of the agency 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) 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; or 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 any administrative law judge."

[32] "A review of the factual basis for the agency's decision involves a three-step process to decide whether its findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, and its decision is in accordance with the law and is supported by its conclusions of law." Sletten v. Briggs, 448 N.W.2d 607, 610 (N.D.1989). "In applying the preponderance-of-evidence standard, [the courts] do not make independent findings of fact or substitute [their] judgment for that of the [agency]; rather, [they] decide only whether a reasoning mind reasonably could have decided the [agency]'s factual conclusions were proved by the weight of the evidence from the entire record." *Id.* See Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D.1979). It is not the court's function to act as a super board when reviewing decisions by an administrative agency. Skjefte v. Job Serv. N.D., 392 N.W.2d 815, 817 (N.D.1986). "In technical matters involving agency expertise...the agency decision is entitled to appreciable deference." Montana-Dakota Util. Co. v. Public Serv. Comm'n, 413 N.W.2d 308, 312 (N.D.1987). "When there is substantial evidence to support the decision of the agency, the decision must be affirmed." Application of Otter Tail Power Co., 169 N.W.2d 415, 419 (N.D. 1969).

LAW AND ARGUMENT

[33] “In 1965, the Legislature enacted the Territorial Integrity Act to require an electric public utility to obtain a certificate of public convenience and necessity before extending electric service outside the corporate limits of a municipality.” N.D.C.C. Chapter 49-03. “The Act was adopted at the request of the North Dakota Association of Rural Electric Cooperatives to provide ‘territorial protection’ for rural electric cooperatives and to prevent public utilities from ‘pirating’ rural areas.” Prepared Testimony of Clarence Welander, Chairman of North Dakota Association of Rural Electric Cooperatives, February 25, 1965, Minutes of Senate Industry, Business and Labor Committee regarding House Bill 724. “The primary purpose of the Act [is] to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities.” Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D.1988). Therefore, the law requires that any extension into rural areas by a public utility can be made only upon a showing before the Commission that public convenience and necessity require such extension. Application of Otter Tail Power Co., 169 N.W.2d 415, 418 (1969).

[34] In determining what constitutes public convenience and necessity, the Commission weighs the following ten factors:

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 supplier in the area unreasonably interfere with the service or system of the other?

Issue I: The Public Service Commission Did Not Err in Denying Minn-Kota’s Petition to Intervene.

[35] In this case, the Commission found that public convenience and necessity did not require the granting of a CPCN to Otter Tail, which resulted in this appeal. See Index #73, #74. Under N.D.C.C. § 28-32-42, “any *party* to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by [law].” (emphasis added). A party is defined as “each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party.” N.D.C.C. § 28-32-01(8). In its Notice of Appeal and Specifications of Error, Minn-Kota argues that it has the authority to appeal because it was “properly seeking and entitled as of right to be admitted as a party.” However, this claim never makes it into Minn-Kota’s brief, nor is it supported by the evidence. Under § 69-02-01-07(5) of the North Dakota Administrative Code, an intervenor is defined as “a person, other than an original party to a pending proceeding, who becomes a party under section 69-02-02-05. Admission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding.”

[36] “Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be

substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding...A petition to intervene must be in writing and must set forth the grounds for intervention, the position and interest of the petitioner in the proceeding, what the petitioner would contribute to the hearing, and whether the petitioner's position is in support of or in opposition to the relief sought...and 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. Good cause is not specifically defined under Chapter 69 of the North Dakota Administrative Code; however, it is defined elsewhere in the Code. Under N.D. Admin. Code § 4-07-20.1-04, "good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion." While this provision of law does not directly relate to intervention, it falls within the generally accepted meaning of the term "good cause".

[37] Minn-Kota filed its petition to intervene 101 days after the public hearing on October 23, 2017, and 111 days after the timing required under N.D. Admin. Code § 69-02-02-05. *See* Index #101. A petition may not be brought after that time, except for good cause shown. At no time has Minn-Kota proven or even attempted to provide that there were circumstances that reasonably and without fault on Minn-Kota's part would have prevented a timely filing of the petition to intervene. The truth is good cause simply does not exist in this case. Minn-Kota filed a customer appearance in this matter on February 27, 2017. *See* Index #11. Minn-Kota acknowledges that it was aware of Dakota Valley's protest not long after it was filed, which was March 31, 2017. *See* Index #16; (Tr., p. 187, lines 3-5; p. 210, lines 1-10). The notice of public hearing on this matter was dated July 26, 2017, which was three months in advance of the hearing. *See* Index #28. George Schuler IV, a representative of Minn-Kota, testified at the hearing in support of the CPCN on

October 23, 2017. (Tr., p. 173-216). Because Minn-Kota did not timely file its petition for intervention and failed repeatedly to show good cause as to why it did not timely file, Minn-Kota was not “properly seeking” to be admitted as a party. *See* Index #101.

[38] Furthermore, there is nothing in the intervention provisions that states an intervenor is “entitled as of right to be admitted as a party.” The Commission is vested with a great amount of discretion in granting intervention under N.D. Admin. Code § 69-02-02-05 and it did not have to grant intervention to Minn-Kota, even if its petition was timely filed. Moreover, just because the Commission has granted intervention in one case, does not mean that it has to in another. Minn-Kota cites the TransCanada Keystone Pipeline, LP case found at PU-06-421 in its brief, stating that since late intervention was granted in that case, it should also be granted here. *See* Index #127. The facts of that case are not even remotely analogous to the facts of this case. In that case, the City of Fargo alleged that it did not receive direct notice of the hearings held in that matter. Here, Minn-Kota clearly had notice of the proceedings as one of its representatives testified at the hearing. (Tr., p. 173-216). Furthermore, in the TransCanada case, the implications of granting a CPCN were far more substantial than in this case. The City of Fargo was concerned that construction of the pipeline near water sources on which the City of Fargo had water intake facilities would be detrimental and could contaminate water sources that serve in excess of 100,000 people. Here, Minn-Kota is concerned with having reliable and affordable power. While important, this issue would impact only Minn-Kota and would not have a profound effect on the environment and potentially the health of thousands of people.

[39] Furthermore, Minn-Kota alleges that 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. Minn-Kota's intervention was denied *only* because the ALJ found that Minn-Kota's petition to intervene was untimely. What both the ALJ and the Commission failed to recognize is that Minn-Kota would be the *only* party adversely affected by the delay." See Index #127. Dakota Valley would disagree. While Dakota Valley has acknowledged in the past that Minn-Kota would be an appropriate intervenor to the extent it has an interest in the outcome of the proceeding, Dakota Valley would question the extent that Minn-Kota will be "substantially affected" by Dakota Valley, and not Otter Tail, serving the load. See Index #102. Also, Minn-Kota would not be the only party affected by the delay. Had the ALJ allowed Minn-Kota to intervene and provide additional commentary, all parties involved would have been affected. The legal fees and man hours that have already been incurred by the parties is significant and to reopen the proceedings due to a late intervention without cause would have compounded that. Minn-Kota's argument that the Commission fundamentally deprived it of the right to make its best record and failed to consider a complete record is absurd. Minn-Kota deprived itself of that right by not timely filing for intervention. See Index #127. There is absolutely no reason it took Minn-Kota 111 days past the deadline for filing to seek intervention. See Index #101, #70. ALJ Ward properly denied both Minn-Kota's Petition to Intervene and Request to Present Oral and Written Comments and its Petition to Reconsider, and that decision should be upheld on appeal.

[40] If ALJ Ward properly determined that Minn-Kota should not be entitled to intervene in the proceedings, it would then call into question whether Minn-Kota can even bring this appeal as it was not named or admitted as a party, nor was it properly seeking and entitled as of right to be admitted as a party. Only a "party" may appeal under N.D.C.C. § 28-32-42 and because Minn-Kota is not a party to the proceedings, it should follow that it may not appeal the March 29, 2018,

Findings of Fact, Conclusions of Law and Order issued by the Commission. **The question then becomes - does Minn-Kota have standing to appeal?** The North Dakota Supreme Court has applied a three-part test for determining whether a person has standing to appeal from a decision of an administrative agency, which is that “any person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a ‘party’ to any proceedings for the purposes of taking an appeal from the decision.” Application of Bank of Rhame, 231 N.W.2d 801, 808 (N.D. 1975). “A party must be injured in some manner to have standing and a nominal, formal, or technical interest in the action will not suffice.” Associated General Contractors v. Local No. 580, 278 N.W.2d 393, 397 (N.D.1979). “The potential to be aggrieved is not the equivalent of being aggrieved in fact.” See Citizens State Bank of Neche v. Bank of Hamilton, 238 N.W.2d 655 (N.D.1976). Rather, a party is factually aggrieved only “if a decision has enlarged or diminished that party's interest.” Vickery v. North Dakota Workers Compensation Bureau, 545 N.W.2d 781 (N.D. 1996).

[41] Dakota Valley would argue that Minn-Kota does not meet at least two of the three prongs of the test set forth in Rhame – namely that Minn-Kota’s witness testimony did not amount to “participation” and that Minn-Kota is not “aggrieved in fact” by the Commission’s decision. (Tr., p. 173-216). While Minn-Kota filed a customer appearance and provided testimony as a witness in support of Otter Tail’s case, its involvement in the case does not amount to the level of participation Dakota Valley believes is required to meet this prong. Furthermore, there is no evidence that has been provided to show that Minn-Kota would be “aggrieved in fact” by the decision of the Commission. Minn-Kota has tried to make the Commission, and now this Court,

believe that it will be aggrieved economically by the decision due to the alleged difference in rates and reliability between Otter Tail and Dakota Valley. However, in light of the Commission's decision and the evidence presented at the evidentiary hearing, it would seem that Minn-Kota's position is without merit. There is simply not enough evidence before this Court to conclude with any certainty what rates will be, what Minn-Kota's load factor will be, what outages either electric provider may face, etc. in order to conclude that Minn-Kota would be aggrieved in fact by the decision reached by the Commission. The potential to be aggrieved simply is not sufficient to satisfy this prong. Because of this and the lack of the requisite participation in the proceedings, Minn-Kota is without standing to appeal. Based on the fact that Minn-Kota was not a party, nor was properly seeking and entitled as a right to be a party, and does not have standing to appeal, this appeal must be dismissed.

[42] Should the Court determine that Minn-Kota has standing to appeal, the other issues raised by Minn-Kota on appeal must be addressed.

Issue II: The Public Service Commission Did Not Err in Denying Otter Tail Power Company's Application for a Certificate of Public Convenience and Necessity to Extend Service to Minn-Kota Ag Products, Inc. By Finding That Certain Factors Weighed in Favor of Dakota Valley and Not Otter Tail.

[43] In its brief, Minn-Kota has this issue broken out into several issues. *See* Index #127. First, Minn-Kota argues that the Commission erred in its analysis of reliability. *Id.* Next, Minn-Kota argues that 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. *Id.* Lastly, Minn-Kota argues that the Commission committed legal error in concluding that Otter Tail's application for CPCN would result in wasteful duplication. *Id.* Although

not entirely clear, it appears that Minn-Kota is primarily arguing as its basis for appeal under N.D.C.C. § 28-32-46 that the findings of fact made by the Commission were not supported by a preponderance of the evidence and that the conclusions of law and order of the Commission were not supported by its findings of fact.

[44] The Commission did not err in its analysis and ultimate determination that both Dakota Valley and Otter Tail would provide sufficient reliability. Minn-Kota argues that because Otter Tail would be providing Minn-Kota its own designated substation that would be connected to Minn-Kota's facilities by approximately 1,000 feet of underground cable that the service would be inherently more reliable than Dakota Valley's proposed extension. *See* Index #127. This extension, however, would come at a cost of \$235,869.00, which is close to three times the cost of Dakota Valley's proposed extension, and result in wasteful duplication of services, which Minn-Kota fails to acknowledge. *See* Index #38, #39. Rather than focus on the evidence adduced at the hearing in this matter, which supports the Commission's findings on reliability, Minn-Kota would prefer to rely on findings made in Capital Electric Cooperative, Inc., v. North Dakota Public Service Commission, 2016 ND 73, 877 N.W.2d 304 (which it references in its brief as *Capital Electric II*) and statements made by Jerry Lein, an engineer and adviser for the Commission, during the two work sessions held by the Commissioners. *See* Index #127. This Court must be mindful that while the transcripts of the two work sessions made it into the record, the commentary adduced at the hearing does not amount to competent evidence upon which this Court should rely in making a determination on the merits. Second, the facts of the Capital Electric case are largely distinguishable from the case at hand and evidence that was introduced, and findings made in that case, have no bearing on what the Court can and must consider in this case.

[45] First, for Minn-Kota to argue that Dakota Valley's service would be less reliable than Otter Tail's is a misnomer, as Otter Tail's 41.6 kV line that would serve Minn-Kota's site under Otter Tail's proposed extension also feeds the Mooreton substation that Dakota Valley would be utilizing in its proposed extension. (Tr., p. 262, lines 1-14). If there would be a service disruption on Dakota Valley's end, it would most likely be a result of a problem with Otter Tail's overhead transmission facilities feeding the substation, then due to a fault in Dakota Valley's underground distribution system. (Tr., p. 55, lines 2-11). Yet, Minn-Kota argues that because Otter Tail's proposal consists of less footage of distribution line than Dakota Valley's proposal, that "this alone, should weigh heavily in favor of granting the CPC&N to Otter Tail Power." See Index #127. This argument fails to not only acknowledge that there are other factors that play into reliability, it also ignores the fact that reliability is only one factor of ten that the Commission must consider in granting a CPCN. Minn-Kota argues that the longer the distribution line, the more likely there will be risk of service voltage fluctuations, outages and length of outages. See Index #127. At the time of the hearing, Dakota Valley had in existence approximately four miles of underground line that extended from its Mooreton substation up to a point approximately 3/4ths of a mile from the Minn-Kota site. This line sustained only two outages total in seven years, with the last outage occurring in 2010 and prior to the new three-phase wire being installed. See Index #59; (Tr., p. 272, lines 1-25). Syverson also testified that he conducted voltage drop tests on this line relative to the load Minn-Kota was predicting and any voltage drop was within industry standards. (Tr., p. 274, lines 21-25; p. 275, lines 1-3). Furthermore, the substation that is proposed to be utilized by Otter Tail would require connection to Otter Tail's 41.6 kV transmission line, which is overhead and significant in length. Syverson testified that the miles of transmission line that would serve this area could play into

reliability. Both Syverson and Wolf testified that Otter Tail would be utilizing the 41.6 kV transmission line where there is at least 40 miles of exposure to serve the Minn-Kota site. See Index #57; (Tr. p. 264, lines 11-25; p. 265, lines 1-22; p. 266, lines 5-25). Syverson testified that the Dakota Valley Mooreton substation is served by a portion of the same line that only has approximately 10 miles of exposure. *Id.* Wolf indicated that Otter Tail's transmission line was approximately 50 years old and is serviced at least annually. (Tr., p. 23, lines 6-11). Syverson testified that portions of Otter Tail's 41.6 kV line do not have a static wire, which can lead to increased lightning strikes and decreased reliability. (Tr., p. 275, lines 4-25, p. 276, lines 1-4).

[46] Next, Minn-Kota argues that a dedicated substation would increase reliability and that the Commission acknowledged this. See Index #127. Yet, the Commission findings state that it "may offer a higher level of reliability" and made no finding that it would in fact be more reliable than the extension proposed by Dakota Valley. See Index #74. Furthermore, Minn-Kota argues that the findings do not support "[the Commission's] conclusion that both Otter Tail and DVEC would be equally reliable." See Index #127. The factors do not require a showing of "equal". Rather, the factor asks what the differences, if any, are between the electric suppliers available to serve the area with respect to reliability of service. See Index #28. The Commission found that both electric suppliers would provide reliable service to Minn-Kota and arrived at this conclusion by weighing all of the evidence provided at the hearing, not just the proposed extension to Minn-Kota. See Index #74. While Dakota Valley would disagree with the Commission's use of the CAIDI statistics and its conclusion that it is not measured by customer densities in support of its finding on reliability, Dakota Valley believes that the Commission ultimately reached the right conclusion. With that said, SAIDI statistics are truly more indicative of reliability when it comes to comparing the two

electric suppliers involved in this case, rather than CAIDI. CAIDI is the weighted average length of an interruption for customers affected during a specified time period and is determined by dividing the sum of customer minutes off for all sustained interruptions, divided by the total number of customers affected by the sustained interruptions. (Tr., p. 260, lines 4-17). Clearly, the larger number of customers a facility has, the lower the overall outage appears per customer. *Id.* The evidence shows that Otter Tail has over 60,000 members in North Dakota, compared to Dakota Valley's 4200. (Tr., p. 259, lines 2-7). The SAIDI statistics introduced at the hearing show that the overall systems of Dakota Valley and Otter Tail are comparable in reliability. George Schuler IV of Minn-Kota even testified that he has had no issues with Dakota Valley's reliability at its Wahpeton location. (Tr., p. 196, lines 3-11).

[47] In an attempt to further bolster its argument on reliability, Minn-Kota goes on a tangent relative to the issue of soft-start motors and Dakota Valley's "unproven proposal" that it would waive the soft-start requirement for motors over 30 horsepower. *See* Index #127. Minn-Kota surmises that waiver of this requirement may result in degradation to its and others' service and that it may have to go and retrofit its facility with soft-start motors after the fact. *Id.* This argument is truly out in left field and is not supported by the evidence. Dakota Valley was provided the motor list prepared by Minn-Kota's electrical contractor and this list was introduced into evidence at the hearing. *See* Index #49; (Tr., page 227, lines 4-23; page 228, lines 1-12). Dakota Valley indicated that it was not requiring any soft-start motors that were not already put on the list by Minn-Kota itself and this was approved and signed off on by Dakota Valley's board of directors. (Tr., p. 229, lines 6-12). Minn-Kota can "what-if" all day long, but it does nothing to prove its allegations that Dakota Valley lacks the ability to provide sufficient reliability to Minn-Kota and its

other members. The Commission reached the right conclusion on this factor and it should be upheld on appeal.

[48] Minn-Kota's next issue raised is that the Commission's conclusions of law are not supported by its finding of fact. See Index #127. The Commission's conclusions of law consist of the following two sentences: "The Commission has jurisdiction over the parties and the subject matter of this proceeding; and public convenience and necessity does not require the granting of a Certificate of Public Convenience and Necessity." See Index #74. The Commission's seven pages of findings and the entire record undoubtedly support the Commission's conclusions of law that a CPCN in this case is not warranted. *Id.* Once again, Minn-Kota attempts to use the Capital Electric case to explain why the Commission erred in this case, rather than focus on the facts, findings and conclusions actually made. See Index #127. Because the Capital Electric case went in favor of the investor owned utility, and this case did not, it is predictable that Minn-Kota would rely heavily on that case to support its position.

[49] Minn-Kota believes the Commission erred in concluding "that either supplier could earn a sufficient return on its investment to extend service to the customer. Dakota Valley would extend service more economically while Otter Tail's ongoing costs of providing service would be more economical." See Index #127. When balancing and weighing the factors, the Commission concluded that "existing cooperative distribution facilities allow Dakota Valley to extend service to the Minn-Kota site more economically, though Otter Tail's ongoing costs of service would be less *depending on load characteristics and potential future capital credit distributions.*" (emphasis added). See Index #74. Comparing the rate structure of an electric cooperative to an investor owned utility is like comparing an apple to an orange. Due to the vast difference in business

models between the two, it is difficult to make an accurate comparison and is a slippery slope this Court should avoid. This issue is further exacerbated by the fact that at the time of the hearing, Minn-Kota's facility had not been built and its energy requirements were largely speculative. (Tr., p. 180, lines 1-4). Because of this, it is truly difficult to determine with any amount of accuracy who would serve this load more economically. What is known is that the higher the load factor that Minn-Kota would have, the less of a difference there is in rates between the two electric suppliers. It would behoove Minn-Kota to estimate its load factor to be less as that favors Otter Tail and it is apparent that Minn-Kota wants Otter Tail, and not Dakota Valley, to serve this load. Based on the totality of the evidence, the Commission weighed and decided this factor appropriately and it should be upheld on appeal.

[50] Next, Minn-Kota would like this Court to take an approach that is inconsistent with the factors the Commission has been utilizing for decades when issuing a CPCN. *See* Index #28, #127. In particular, Minn-Kota would like this Court to consider the number of consumers and electrical supply lines that each electric supplier has *outside* of a two-mile radius, as it believes that the measurement being currently used is too rigid and arbitrary. *Id.* Of course, this approach would favor Otter Tail serving the load as the communities of Barney and Mooreton are within a three-mile radius of the Minn-Kota site. (Tr., p. 225, lines 8-16). As the factor stands, Dakota Valley has 18 members within the two-mile radius, compared to Otter Tail's two. (Tr., p. 24, lines 5-7; p. 221, lines 21-25). What is even more compelling is that other than its 41.6 kV transmission line, Otter Tail has less than a mile of total distribution line within two-miles of the site. *See* Index #36, #48. Dakota Valley, on the other hand, has distribution lines throughout the two-mile radius and on all sides of the Minn-Kota site. *Id.* The Commission clearly did not err in deciding this factor in favor of

Dakota Valley and it should be upheld on appeal.

[51] In paragraph 46 of its brief, Minn-Kota goes back to the issue of economy and rate of return it started addressing at paragraph 44. See Index #127. What follows thereafter is pure conjecture and is not supported by any facts introduced into evidence. This argument fails to acknowledge that Dakota Valley was providing an economic development incentive rate to Minn-Kota and that based on the Commission's calculations, Dakota Valley would realize a net *first-year* contribution to common system costs of \$16,728. See Index #74. As the economic development incentive decreases, the net annual contribution to common systems cost would increase. Furthermore, this argument fails to acknowledge that Otter Tail must have a specific rate of return, whereas Dakota Valley does not. See Index #46; #85. The 3.19 percent return that Minn-Kota eludes to is not a mandated number, but merely the rate of return Dakota Valley would realize if rates and cost of power remained constant. *Id.* Dakota Valley would not simply increase rates because the rate of return fell below 3.19 percent. *Id.* Any margins that Dakota Valley realizes must be returned to its members – the same does not go for Otter Tail. As such, the Commission did not err in finding that both electric suppliers could earn an adequate return on investment.

[52] Next Minn-Kota argues that the Commission erred in finding that Dakota Valley would best serve the orderly and economic development of the area. See Index #127. Minn-Kota alleges that the "Commission noted that DVEC's extension would 'benefit Dakota Valley's System and further expansion in the area' but ignored the fact that Otter Tail Power was building a substation to provide distribution in the area, which provide greater benefits [sic]." *Id.* According to Otter Tail, Otter Tail's proposed substation would be located on Minn-Kota's land and would be built for the sole purpose of providing electricity to Minn-Kota and *no other consumers in the area.* (Tr., p. 101,

lines 23-25; p. 102, lines 1-7). Otter Tail testified that it had no intentions of developing further beyond the Minn-Kota site. *Id.* If Otter Tail would ever need to, it clearly would require the consent and easements from Minn-Kota, whose land the substation sits on, as well as a CPCN from the Commission for any extension off of that service. *Id.* This fact goes to the heart of why this whole proposed extension is a wasteful duplication of services and does not serve the orderly and economic development of the area. This also conflicts with Minn-Kota's argument on reliability. Minn-Kota believes that the designated substation on site would increase reliability. However, would the same be true if other large loads were able to tap into that substation as part of this hypothetical economic development of the area by Otter Tail?

[53] The Commission's decision on this factor does not create "a preference in favor of the electric cooperative simply because it has a distribution substation already in the arbitrary two-mile radius." See Index #127. Truth be told, Dakota Valley does *not* have a distribution substation within the two-mile radius of the Minn-Kota site and no one other than Minn-Kota has argued that it does. The Mooreton substation is located approximately four miles from the Minn-Kota site. (Tr., p. 226, lines 20-24). Rather the Commission found that "Dakota Valley and Central Power Cooperative have made investments in the Mooreton substation and associated distribution facilities to serve the *general area*. (emphasis added). Dakota Valley's cost to extend service to the site is less than Otter Tail's because of these previous investments. An extension of three-phase service by Dakota Valley to the Minn-Kota site would bring Dakota Valley's service further west along the Highway 13 corridor, which would benefit Dakota Valley's system and future expansion in the area." See Index #74. This finding is supported by the evidence; however, Minn-Kota's argument is not. The Commission could not account for Otter Tail's future expansion in the area as

argued by Minn-Kota, because such an expansion is far too speculative and most likely, nonexistent. Again, Otter Tail specifically testified it had no intentions of expanding in the area beyond the Minn-Kota site and in order to do so, the Commission would have to find public convenience and necessity required the expansion. (Tr., p. 101, lines 23-25; p. 102, lines 1-7). An extension of service by Otter Tail to the Minn-Kota site would best serve Minn-Kota's interests, not the interests of the surrounding community. The Commission did not err in finding this factor weighed in favor of Dakota Valley.

[54] Lastly, Minn-Kota argues that the Commission committed legal error by concluding that there was wasteful duplication of services. See Index#127. The Commission found that "service by Otter Tail to the Minn-Kota facility would require construction of a new substation while the existing Mooreton substation is fully capable of serving the facility. Dakota Valley and Central Power Electric Cooperative have made investments in the Mooreton substation and associated distribution facilities to serve the *general area*. (emphasis added). Approval of Otter Tail's application to serve the Minn-Kota facility would result in wasteful duplication of service and investment." See Index #74. Otter Tail testified that it could not use one of its existing substations because the extension from those substations would be far too costly. Its closest substation and three phase line would likely be near the community of Barney, which is over three miles from the Minn-Kota site. For it to even compete with Dakota Valley on an economic extension of service, it had to come up with the proposal of providing a designated substation solely for Minn-Kota's benefit. However, even this proposed extension is close to three times more costly than the extension proposed by Dakota Valley. While there is speculation that this designated substation could provide added reliability of service to the Minn-Kota site, it would not serve the economic

development of the general area and it would logically follow that it is a wasteful duplication of services Dakota Valley already has in relative vicinity to the Minn-Kota site. Moreover, Minn-Kota's reliance on the Capital Electric case and commentary provided by Jerry Lien in a non-evidentiary meeting in support of its argument on this factor is again misplaced and in error. The evidence adduced at the public hearing, which is subsequently included in and supports the Commission's findings, are what this Court must consider in deciding whether or not to affirm the Commission's decision.

CONCLUSION

[55] Based on the foregoing, Dakota Valley respectfully requests that the Court dismiss Minn-Kota's appeal as Minn-Kota is neither a party to the action nor has standing to appeal. In the alternative, Dakota Valley requests that the Court affirm the decision of the Commission, which unanimously denied Otter Tail's Application for a Certificate of Public Convenience and Necessity in this matter.

Dated this 16th day of August, 2018.



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