From: efilingmail@tylerhost.net
To: Hamre, John G.
Subject: Notification of Service for Case: 08-2018-CV-01142, Minn-Kota Ag Products, Inc. vs. North Dakota Public Service Commission, et al. for filing Brief, Envelope Number: 3116923
Date: Friday, August 31, 2018 9:25:55 AM

Notification of Service

Case Number: 08-2018-CV-01142
Envelope Number: 3116923
Case Style: Minn-Kota Ag Products, Inc. vs. North Dakota Public Service Commission, et al.

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Document Details	
Served Document	Download Document
Filing Details	
Case Number	08-2018-CV-01142
Case Style	Minn-Kota Ag Products, Inc. vs. North Dakota Public Service Commission, et al.
Date/Time Submitted	8/31/2018 9:23 AM CST
Filing Type	Brief
Filing Description	Minn-Kota AG Products' Reply in Support of Appeal
Filed By	Sarah Bagwell
	Minn-Kota Ag Products, Inc.: Loren Hansen (loren.hansen@gpmlaw.com) Gregory Merz (gregory.merz@gpmlaw.com) Kermit Nash (kermit.nash@gpmlaw.com) Gwen Inskeep (Gwen.Inskeep@gpmlaw.com)

Service Contacts	Sarah Bagwell (Sarah.Bagwell@gpmlaw.com) North Dakota Public Service Commission: Zachary Pelham (#zepefile@pearce-durick.com) Illona Jeffcoat-Sacco (ijs@nd.gov) John Hamre (jghamre@nd.gov) Zachary Pelham (zep@pearce-durick.com) Other Service Contacts not associated with a party on the case: Public Commission (ndpsc@nd.gov) Darrell Nitschke (dnitschk@nd.gov) Otter Tail Power Company: Cary Stephenson (cstephenson@otpco.com) Dakota Valley Electric Cooperative: Kimberly Radermacher (kimrader@radermacherlaw.com)

This link is active for 30 days. If the link above is not accessible, copy this URL into your browser's address bar to view the document:
https://northdakota.tylerhost.net/ViewServiceDocuments.aspx?ADMIN=0&SID=76927fea-1f5b-4150-b53d-4aa7f4591b43

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

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

INTRODUCTION

[¶1] The North Dakota Public Service Commission's ("Commission" or "PSC") findings of fact require it, as a matter of law, to issue the Certificate of Public Convenience and Necessity ("CPC&N"), which would allow Otter Tail Power Company ("Otter Tail" or "OTP") to provide electrical service to Minn-Kota Ag Products ("Minn-Kota"). Indeed, when properly considered, nearly every factor to be considered under the Territorial Integrity Act ("TIA") weighs in favor of issuing the CPC&N. Instead, the Commission relies on the false premise that the Otter Tail solution is duplicative of Dakota Valley Electric Cooperative's ("DVEC") existing service. In so doing, the Commission ignores its own findings that the OTP solution is superior. The Commission ignores its own findings, which show the OTP solution has lower operating costs for the life of the project. Indeed, the Commission's results-driven order essentially distills a ten-factor test down to a one-factor test—wasteful

duplication—and then analyzes that one factor incorrectly. Because it did not issue the CPC&N, the Commission's order must be reversed.

[¶2] In an attempt to avoid reversal, both the Commission and DVEC suggest that Minn-Kota is not a proper party to the appeal. For purposes of appeals from an administrative agency, a "party" is an entity that participated in the administrative proceedings, is directly interested in the proceedings, and is factually aggrieved by the agency decision. Minn-Kota easily meets this three-factor test.

[¶3] The Court can and should direct the Commission to issue the CPC&N on the record that has been established. However, the Commission also committed legal error when it denied Minn-Kota's attempts to intervene in the proceeding. As such, in the alternative, the Court should remand the matter to the Commission with an order requiring the Commission add Minn-Kota as an intervener and to reopen the record for the purpose of taking Minn-Kota's evidence.

ARGUMENT

I. Minn-Kota is a party for this appeal. The court should not dismiss this appeal on procedural grounds.

[¶4] The Commission and DVEC each argue that Minn-Kota is not a party, or otherwise lacks standing to pursue this appeal. They would rather the Court not address the Commission's errors and have this appeal dismissed on procedural grounds. Minn-Kota is, however, a proper party with standing for this appeal. And this Court must address the Commission's erroneous denial of the CPC&N.

[¶5] The North Dakota Administrative Procedures Act provides that "[a]ny party to any proceeding heard by an administrative agency . . . may appeal . . ." N.D.C.C. § 28-32-42(1). The statute defines a party as "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01. Here, Minn-Kota is a proper "party" under the statute for this appeal.

[¶6] As an initial matter, the definition of "party" under the statute "should be liberally construed to accomplish the purpose of that provision." *Application of Bank of Rhame*, 231 N.W.2d 801, 803 (N.D. 1975)[1]. In *Application of Bank of Rhame*, the North Dakota Supreme Court held that "narrow or limited construction should not be placed on statutory provisions governing who may be party for purposes of appeal of review" and that "[a]ny doubt on the question of standing involving a decision by an administrative body should be resolved in favor of permitting the exercise of the right of appeal by any person aggrieved in fact." *Id.* at 808. Under the relevant standard, Minn-Kota is certainly a proper party for this appeal.

[¶7] The test for standing remains the one articulated in *Application of Bank of Rhame*. A person or entity has standing if it: (1) participates in the proceeding before an administrative agency, (2) is directly interested in the proceeding, and (3) is factually aggrieved by the agency's decision. *Application of Bank of Rhame,* 231 N.W. 2d 801, 808. *Shark v. U.S. West Communications, Inc.*, 545 N.W.2d 194 (1996); *In re Juran and Moody,*

[1] With respect to its analysis of the meaning of "party" for appeal, *Application of Bank of Rhame* remains good law. The evidentiary standard used in *Application of Bank of Rhame*, when discussing the merits was superseded as stated in *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692 (N.D. 1978).

Inc., 613 N.W.2d 503, 508 (2000); *North Dakota Fair Housing Council, Inc. v. Peterson,* 625 N.W.2d 551 (ND 2001). Minn-Kota easily meets all three parts and is therefore a proper party for this appeal.

1. Minn-Kota participated in the proceeding before the Commission.

[¶8] The Court in *Application of Bank of Rhame* addressed the question of "participation" in administrative agency proceedings. It observed that "generally, parties to an action or proceeding are set out in the title of the action or proceedings . . . such entitlement does not serve as an aid in determining who is a party, except for the applicant, on which there is no question." *Application of Bank of Rhame,* 534 N.W.2d at 808. "The question of who are parties to the proceedings must be determined from the record rather than from the entitlement of the proceedings. The information as disclosed by the record constitutes the basis upon which a determination can be made as to who are parties to the proceeding." *Id.* Here, Minn-Kota certainly "participated" in the proceedings for at least three reasons.

[¶9] First, OTP applied for the CPC&N to serve the Minn-Kota facility. In support of its Application, OTP filed an Appearance by Customer, executed by Minn-Kota and stating Minn-Kota's desire to receive electric service from OTP. CR Ex. 1. That alone is sufficient "participation" under the liberal construction of the definition of party. *See Application of Bank of Rhame,* 534 N.W.2d at 803. Second, a Minn-Kota employee offered limited testimony at the hearing in this proceeding. Third, Minn-Kota attempted to intervene in this matter. Simply put, Minn-Kota "participated" for purposes of standing.

[¶10] Moreover, the policy behind the standing doctrine also strongly supports including Minn-Kota as a party for appeal. As the Court in *Application of Rhame* stated, "[w]e are also mindful that our judicial process is designed for, employs, and relies heavily upon the adversary system for its administration of justice." 534 N.W.2d at 807. The Commission denied Minn-Kota's Petition to Intervene on the basis that its interests were being represented by Otter-Tail. The Commission found that "there is more than sufficient alignment between the interests of Otter Tail Power and Minn-Kota regarding the arguments that have already been presented and that the interests of Minn-Kota have been adequately represented in front of the commission both at the hearing and in the work session subsequent to the hearing." CR 77 (Order Denying Petition to Intervene) at p. 2. However, to simultaneously admit that Minn-Kota has an interest in the adversarial proceeding and to deny it the opportunity to appeal simply because it was not named in the caption of the proceedings is not sound public policy. Permitting Minn-Kota's intervention would advance the public interest in assuring that the Commission's decisions are firmly based on a robust record reflecting the input of all parties with a significant interest in the outcome. The adversary system is not furthered by the exclusion of Minn-Kota from this proceeding and appeal on the basis of a previous determination that its interests were once represented.

[¶11] Although both Minn-Kota and OTP both advocated for the same result – that OTP's application for a CPC&N be granted – OTP did not adequately represent Minn-Kota's interest. As discussed in Minn-Kota's opening brief, OTP's stakes in the outcome of this case were more limited, given that Minn-Kota was but one of many OTP

customers and given OTP's status as a party that is regulated by, and must regularly appear before, the Commission. Minn-Kota Ag Products' Memorandum in Support of Appeal ("Minn-Kota's Opening Brief") at ¶32. This point is further highlighted by the fact that OTP chose not to appeal from the Commission's decision or to participate in this appeal. Thus, the Commission correctly noted the Minn-Kota has an interest in the outcome of this proceeding, but plainly erred in concluding that that interest was adequately represented by OTP.

[¶12] For its part, the Commission appears to confuse the question of "participation" with "appearing" or being a named party. *See* Brief of Appellee North Dakota Public Service Commission ("Commission Brief") at ¶¶ 23-25. But the North Dakota Supreme Court long ago held that mere status as a named party to the proceeding is not the proper test. *Application of Bank of Rhame*, 231 N.W.2d at 808. For purposes of this appeal, Minn-Kota clearly "participated" in the underlying Commission proceeding.

2. Minn-Kota is directly interested in the proceedings before the administrative agency.

[¶13] Neither the Commission nor DVEC argue that Minn-Kota fails to meet this prong of the three-part test. Indeed, any attempt to do so would strain credulity. Minn-Kota is investing $20 million in rural North Dakota. And if the Commission's determination is allowed to stand, it will be required, contrary to its unequivocally expressed preference, to partner with DVEC rather than OTP. There is no doubt that Minn-Kota is directly interested in the proceedings.

3. The Commission's decision factually aggrieves Minn-Kota.

[¶14] While the Commission does not attempt to argue that Minn-Kota fails standing on this factor, DVEC asserts in conclusory fashion that "Minn-Kota is not aggrieved in fact." Dakota Valley Electric Cooperative, Inc.'s Appellee Brief ("DVEC Brief") at ¶ 41. The record shows that DVEC is wrong, and that Minn-Kota is aggrieved in fact. For the purposes of appeal, a party is "factually aggrieved" if a decision has enlarged or diminished such party's interest. *Washburn Public School Dist. No. 4 of McLean County v. State Bd. of Public School Educ.*, 338 N.W.2d 664 (N.D. 1983). Put another way, for an appeal from an administrative agency, a party constitutes a party under the statute if its interest would be prejudicially affected by modification or reversal, regardless of whether party appeared as plaintiff, defendant, or intervenor. *Pederson v. North Dakota Workers Compensation Bureau*, 534 N.W.2d 809 (1995).

[¶15] The Commission's decision undoubtedly aggrieves, or prejudicially affects, Minn-Kota. The Commission acknowledged that the service provided by Otter Tail offered greater reliability to the Minn-Kota facility. CR Ex. 82 (Order, ¶¶ 19, 20, 22). Moreover, the Commission also inherently recognized that OTP's rates will likely result in a savings to Minn-Kota over time. *See* CR Ex. 82 (Order) at ¶¶34, 35 (showing lower annual costs for power from OTP as opposed to DVEC). In short, the Commission acknowledged that Minn-Kota will have inferior electric service and incur more cost over the life of the Facility with DVEC. Minn-Kota's interests are certainly diminished by the Commission's decision.

[¶16] Because Minn-Kota qualifies as a party under the statute, the Court may not dismiss this appeal on procedural grounds.

II. The Commission erred by failing to allow Minn-Kota to intervene. At a minimum, this court should remand this matter to the Commission for further proceedings and allow Minn-Kota to present its case.

[¶17] The Commission committed legal error when it denied Minn-Kota's petition to intervene.

[¶18] As an initial matter, without any citation, the Commission asserts that the determination of whether "good cause" exists is discretionary and only reversible when there has been an abuse of discretion. Commission Brief at ¶ 18. After a thorough review of North Dakota law, the standard of review with respect to "good cause" for an intervention in an agency proceeding does not appear to be addressed in any North Dakota cases. However, in Minnesota, "good cause" determinations by administrative agencies are legal questions and reviewed de novo. *See Averbeck v. State*, 791 N.W.2d 559, 560–61 (Minn. Ct. App. 2010) (describing the good-cause standard as a legal question); *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289–90 (Minn. Ct. App. 2010) (good-cause determination is reviewed de novo). This Court should adopt a similar approach and review the Commission's denial of intervention as legal question and conduct a de novo review. As stated in Minn-Kota's opening brief, the Commission committed legal error by not allowing Minn-Kota to intervene.

[¶19] However, even if the "good cause" required for an intervention after the hearing were discretionary, the Commission abused that discretion. Indeed, its denial of Minn-Kota's intervention is arbitrary and capricious when compared against allowing the

City of Fargo to intervene in the TransCanada Keystone Pipeline ("Keystone") case. Both the Commission and DVEC attempt to distinguish the Keystone proceedings; but neither do so persuasively.

[¶20] First, the Commission incorrectly asserts, "this issue and argument was not raised by Minn-Kota at the administrative level and has been waived." Commission Brief at ¶ 21. Minn-Kota, in fact, did cite the Keystone proceedings and orders in its petition to reconsider intervention. CR 78 (Minn-Kota Brief for Reconsideration) at ¶ 11. Minn-Kota simply attached the order to as Exhibit A to its opening brief for the court's convenience. Moreover, by arguing "the record is closed" (Commission Brief at ¶ 21), the Commission seemingly misunderstands that the order is legal authority and not part of the factual record. *See, e.g., State ex rel. Halverson v. Simpson*, 49 N.W.2d 790, 793-94 (N.D. 1951) ("it is well settled that a court will take judicial notice of its own records in the immediate case or proceeding before it and of all matters patent on the face of such records . . .") The Commission's order in the Keystone pipeline proceeding may certainly be considered.

[¶21] Second, DVEC also errs in its recitation of the proceedings. DVEC argues that the Keystone intervention was "not even remotely analogous to the facts of this case." DVEC Brief at ¶ 38. DVEC then asserts without any citation that "the City of Fargo alleged that it did not receive direct notice of the hearings held in that matter." *Id.* While perhaps the City alleged that, the record does not indicate so. Rather, the November 7, 2007 Order in the Keystone proceedings indicates that "the City of Fargo was legally provided notice of the hearings pursuant to N.D.C.C. §49-22-13 . . ." and

"[i]n addition to the legal notice, the news media covered the hearings [on radio, television, and newspapers]." Exhibit A (Nov. 7. 2007 Order at p.3). In any event, the Commission in the Keystone proceeding allowed the City to intervene well after the hearings because there was good cause to do so, not because Fargo allegedly did not have notice of the original hearing.

[¶22] Third, both the Commission and DVEC argue, in essence, that the instant matter is distinguishable from the Keystone proceedings because the City of Fargo had a public interest and Minn-Kota is simply a private entity. *See* Commission Brief at ¶22; DVEC Brief at ¶38. Both repeatedly trivialize Minn-Kota's substantial economic investment and impact. Not only is Minn-Kota investing $20 million in this facility, it is employing workers in the region, and improving prices for the area's producers. *See generally* CR 86 (hearing transcript) at pp. 175-195 (Minn-Kota's George Schuler IV testifying). Minn-Kota is a private entity, but the benefits of its investment reach the entire community and benefit the State.

[¶23] Finally, DVEC invites the court to consider Title 4 of the North Dakota Administrative Code when interpreting Title 69. *See* DVEC Brief at ¶ 36. But the "good cause" standard applied in human resources grievances in the Office of Management and Budget is inapposite. DVEC offers no authoritative support for its attempt to cherry pick a standard from an entirely different situation. And indeed, it would not make sense to do so. As already stated, the Commission has addressed "good cause" in the Keystone proceedings. If Title 4's definition had any persuasive value, it certainly would have been addressed there. It was not.

[¶24] At base, Minn-Kota should have been allowed to intervene and allowed to make a complete record. The Commission committed legal error by denying Minn-Kota's intervention.

III. The Commission erred in its conclusions of law based on the record before it. This court should reverse the Commission and direct it to issue the CPC&N.

[¶25] As fully set forth in Minn-Kota's opening brief, the Commission erred in its legal conclusions based on the facts it found. In short, the Commission failed to properly analyze the factors and instead placed inordinate weight on one—wasteful duplication. The Commission's legal error was exacerbated by its flawed analysis of wasteful duplication. Based on the record before it, the Commission should have issued the CPC&N as a matter of law. Because it did not, this Court can and should reverse the Commission and direct it to issue the CPC&N.

1. The Commission committed legal error in its analysis of the number of customers served by the two companies within the vicinity of Minn-Kota's facility.

[¶26] One of the factors considered under the Territorial Integrity Act is which of the two competing providers will better advance the goal of orderly development of electric service. *Capital Elec. Co-op, Inc. v. Pub. Serv. Comm'n*, 534 N.W.2d 587, 590 (N.D. 1995) ("*Capital Electric I*"); *Capital Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n* (*Capital Electric II*), 877 N.W.2d 304, 307 (N.D. 2016). In concluding that this factor favored DVEC, the Commission relied solely on evidence showing that DVEC served more customers within a two-mile radius of Minn-Kota's facility, while ignoring scores of customers served by OTP just outside that radius. *See* CR Ex. 26 (OTP-1); CR Ex. 82 (Order at ¶17).

[¶27] As explained in Minn-Kota's opening brief, the use of a two-mile radius as a bright line constitutes legal error. Minn-Kota Opening Brief at ¶45. To that end, 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). Looking to the larger area makes sense where, as here, the location to be served is just outside the municipal limits of the utility's service territory. Indeed, in the Commission's initial formulation of the issues, the question to be determined was: What customers are served by electric suppliers within *at least* a two-mile radius of the location to be served? CR Ex. 18 (emphasis added). This more flexible test, which was consistent with previous decisions of the North Dakota Supreme Court applying the Territorial Integrity Act, evidently went by the wayside in the Commission's final decision. Neither DVEC nor the Commission address Minn-Kota's argument that the two-mile radius relied on by the Commission represents the wrong legal standard.

2. OTP is able to serve Minn-Kota more economically while still earning an adequate return on its investment.

[¶28] In connection with its analysis of the economics of the two proposals, the Commission found that under the estimates provided by both OTP and DVEC, OTP would provide Minn-Kota with a substantial savings in its annual energy costs. CR Ex. 82 (Order at ¶29). The Commission states Minn-Kota argues that it is "essentially more comfortable with a rate regulated utility because its rates are subject to review by the

Commission." Commission Brief at ¶40. This misstates Minn-Kota's position. Although the fact that OTP is a rate-regulated utility will provide Minn-Kota with greater certainty in the future, Minn-Kota's selection of OTP as its preferred provider is the product of OTP's ability to provide more reliable service at a lower cost – a preference that is both eminently reasonable and fully supported by the facts found by the Commission, albeit not its ultimate conclusion to deny OTP's application for CPC&N. *See Capital Elec. I*, 877 N.W.2d at 308 (N.D. 2016) ("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.")

[¶29] DVEC argues that, because of the differences in rate structure, attempting to compare rates of an investor-owned utility and a cooperative is difficult and something the Court should avoid. DVEC Brief at ¶49. However, in order to apply the statutory test as established by the North Dakota Supreme Court, it is necessary to make this comparison. In determining the advantages of OTP's lower rates was essentially off-set by the greater cost that it would incur to build a substatation to serve Minn-Kota, the Commission committed legal error and failed to take into account the important reliability benefits that OTP's greater investment would provide. *See* Minn-Kota's Opening Brief at ¶¶46-48.

3. The Commission erred in its analysis of reliability as a matter of law.

[¶30] The Commission's error on this factor is highlighted by its analogy — the purchase of a family vehicle. The Commission takes the position that either a Cadillac or a Chevy will do. Commission Brief at ¶ 37. Respectfully, this analogy is not apt.

Minn-Kota is investing $20 million in a state-of-the-art grain handling facility, it employs scores of people, and it handles the grain for many of the farmers in the area. This is not a simple family of four. The question on this $20 million project cannot be distilled down to what family vehicle might be reliable. Rather, the Commission should have--and this Court must—evaluate what is necessary to load 120 train cars per eight-hour shift. At one train car every four minutes, even a 30-second power failure results in a major set-back for the operation. The set-back includes shut down, clean up, and restart time that results in hours of delay, which puts the facility behind and causes expensive rail delays and other associated costs. These delays and resulting costs negatively impact not only Minn-Kota and its employees but also the area's producers. Contrary to the Commission's and DVEC's arguments, Minn-Kota needs the most robust system available not just something that is "good enough" for a family of four.

[¶31] Further, the Commission's argument on appeal that DVEC's proposal was "good enough" ignores the Commission's own factual finding that:

> Engineering 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. In this context, Otter Tail's plan to extend service to Minn-Kota has less risk of voltage fluctuations, service interruptions, and outages than does Dakota Valley's plan.

CR Ex. 82 (Order ¶22). This concern about the potential for adverse impact on other DVEC customers is exacerbated by DVEC's proposal to conditionally waive its standard requirements for soft start engines. *See* CR Ex. 87 (12/20/17 Working Session Tr. at p. 6, l. 13-p. 7, l. 3); *see also* Minn-Kota's Opening Brief at ¶¶40-42. The

Commission's findings demonstrate that the greater reliability provided by the OTP proposal will inure to the benefit, not only of Minn-Kota, but to the general public.[2]

[¶32] In its order, Commission recognized that the OTP solution is the technically better solution. CR Ex. 82 (Order, ¶¶ 19, 20, 22). In its brief, the Commission concedes "OTP's service would be more reliable." Commission Brief at ¶ 38.[3] As such, the Commission should have held that this factor weighed in favor of issuing the CPC&N. Instead, however, the Commission highlights its legal error admitting that reliability really does not matter because it perceived the OTP solution as "wasteful duplication." Commission Brief at ¶ 38. By disregarding reliability and the other factors, the Commission has turned its ten-factor test into a one-factor test. This is legal error.

4. The Commission erred in its analysis of wasteful duplication as a matter of law.

[¶33] The Commission's factual findings do not support its conclusion that the OTP solution is either "wasteful" or "duplicative." Moreover, the Commission overly emphasizes the importance of "wasteful duplication."

---

[2] DVEC characterizes the issue relating to the use of soft start engines and its implications for overall reliability as "truly out of left field." DVEC Brief at ¶47. Contrary to this claim, the issue was the subject of testimony at the hearing, discussed by the Commission in detail at its December 20 working session, and referred to in the Commission's Order. CR Ex. 86 (Hrg. Tr. p. 38, l-p. 39, l. 24, p. 228, l. 21-p. 229, l. 5); CR Ex. 87 (12/20/17 Working Session Tr. at p. 3, l. 12-p. 4, l. 1, p. 5 l. 15-p. 7, l. 3) CR Ex. 82 (Order at ¶9).

[3] DVEC, in its brief, takes issue with the Commission's determination that OTP's proposal provided greater reliability. *See, e.g.*, DVEC Brief at ¶45 ("[F]or Minn-Kota to argue that Dakota Valley's service would be less reliable than Otter Tail's is a misnomer . . . .") DVEC has not taken an appeal from the Commission's decision and, accordingly, should not be heard now to contend that the Commission's findings regarding the greater reliability of the OTP proposal are erroneous.

[¶34] As an initial matter, the OTP solution is only "duplicative" if one accepts the Commission's flawed premise that reliability is binary —a solution is either reliable or it is not. Here, the Commission already found that the OTP solution is a better solution. CR Ex. 82 (Order, ¶¶ 19, 20, 22). Put another way, it is not a "duplicative" solution.

[¶35] In any event, the Commission's conclusion that the OTP solution is "wasteful" is not supported by the record. The only fact cited by the Commission for the proposition that the technically better solution is "wasteful" is that OTP "will require construction of a new substation while the existing [DVEC] Mooreton substation is fully capable of serving the facility." CR Ex. 82 (Order, ¶ 43). As already stated, the DVEC solution is not as reliable and, therefore, not "fully capable."

[¶36] DVEC argues that the OTP extension is wasteful because the up-front cost is three times more than DVEC's cost. DVEC at ¶ 44. To the extent that the Commission was considering costs to provide service, it is true that the cost for OTP to install the new substation and provide service is approximately $142,230 more up-front investment than the DVEC extension. *See* CR Ex. 82 (Order, ¶¶ 25, 26). That up-front cost, however, is only 0.7% of the $20 million investment that Minn-Kota is making. When confronted by the importance of the reliability and considered in the context of the investment, that higher installation cost is not wasteful. Moreover, all parties estimate that the OTP solution will be more cost efficient throughout the life cycle of the facility. *See* CR Ex. 82 (Order, ¶¶ 34, 35, 36). As such, the additional up-front cost of the OTP solution is mitigated by its overall operating expenses. The OTP solution is not duplicative and it certainly is not wasteful.

[¶37] Finally, the Commission and DVEC over-emphasize the importance of the "wasteful duplication" factor. The Commission asserts that "[t]he primary purpose of the TIA is to keep wasteful duplication of capital-intensive utility services and conflicts between providers to a minimum." Commission Brief at ¶ 29 (citing *Northern States Power Co v N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990); *Cass County Elec. Co-op v. Northern States Power Co.* 419 N.W.2d 181 (N.D. 1988)). While the cited cases do include references to the concept that the avoidance of wasteful duplication *was* a primary purpose, both cases recognize that the process for doing so is an analysis of all of the factors. Indeed, the Court in *Northern States Power* expressly recognized that "it may not always be possible to prevent some of the actual duplication . . ." 452 N.W.2d at 344. The Commission committed legal error by distilling its analysis down to this one factor, and exacerbated its error by concluding that the OTP solution would be wastefully duplicative.

[¶38] Finally, neither the Commission nor DVEC make a serious attempt to distinguish the facts here from those in *Capital Electric II*, the North Dakota Supreme Court's most recent and analogous case on the TIA. *See 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*"). In its brief, the Commission simply ignores the case altogether. DVEC states that case is "largely distinguishable," but makes no effort to distinguish it. DVEC Brief at ¶ 44. The Commission and DVEC would have the Court ignore this precedential case because it requires that this Court reverse the Commission in this proceeding and that a CPC&N be issued to Otter Tail Power. *See Capital Electric II*, 877 N.W.2d at 305.

CONCLUSION

[¶39] The Commission's order denying Otter Tail Power Company's application for a CPC&N is not in accordance with the law. On the record as it stands, the Commission must be reversed and the CPC&N should be issued. The facts, even as determined by the Commission, weigh decisively in favor of OTP. Alternatively, the Commission erred by denying Minn-Kota's intervention. Accordingly, the matter should be remanded for further proceedings with Minn-Kota as an intervener.

Dated: August 31, 2018

s/ Loren L. Hansen
Loren Hansen (ND Bar # 08233)
Gregory Merz (Admitted pro hac vice, ND. Bar #P01258)
Kermit J. Nash (ND Bar # 06513)

Gray, Plant, Mooty, Mooty & Bennett
80 South 8th Street, Suite 500
Minneapolis, MN 55402
Telephone: 612-632-3000
Fax: 612-632-4389
Loren.Hansen@gpmlaw.com
Gregory.Merz@gpmlaw.com
Kermit.Nash@gpmlaw.com

Attorneys for Minn-Kota Ag Products, Inc.

GP:4835-3527-1536 v1