IN THE SUPREME COURT

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.	)	Supreme Court Case No. 20190127 District Court No. 08-2018-CV-01142

NORTH DAKOTA PUBLIC SERVICE COMMISSION'S APPELLEE BRIEF

Appeal From The District Court on Order, dated March 11, 2019,
Affirming a Decision by the North Dakota Public Service Commission

South Central Judicial District
Burleigh County, North Dakota
The Honorable David E. Reich

ORAL ARGUMENT REQUESTED

PEARCE DURICK PLLC
ZACHARY E. PELHAM, ND #05904
N.D. Special Assistant Attorney General
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
Efile: #zepefile@pearce-durick.com

Attorney for Appellee North Dakota Public Service Commission

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STATEMENT OF THE ISSUES

[¶1] The Public Service Commission ("Commission") is the constitutional agency that determines whether to grant an investor owned utility a Certificate of Public Convenience and Necessity to extend electric service outside a municipality. Otter Tail Power Company sought to provide electric power to Minn-Kota Ag Products, Inc. at a location in rural Richland County. A hearing before the PSC was held after Dakota Valley Electric Cooperative protested Otter Tail's CPCN. The Commission determined the Certificate should be denied. There are three issues:

> First, did the district court properly affirm the denial of Minn-Kota's motion to intervene. Second, did the district court properly determine Minn-Kota lacked standing to appeal? Third, alternatively, was the district court's decision to affirm the PSC's denial of the CPCN the process of rational application of the facts to the law?

STATEMENT OF THE FACTS

A. Procedural Background

[¶2] On February 27, 2017, Otter Tail Power Company ("OTP") filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to extend electric service to Minn-Kota Ag Products, Inc. ("Minn-Kota") at a point located in NE ¼ of Section 10, T132N, R50W (Barney Township), Richland County. Also submitted with the application was a statement from the customer stating it desires OTP to provide electric services at the requested location. Appellant's Appendix ("App.") 12-14; 46.

[¶3] On March 15, 2017, the Commission issued the affected cooperative a Notice of Opportunity for Hearing, which provided until April 11, 2017, for filing written

objection based on the issue of public convenience and necessity. App. 46. On March 31, 2017, Dakota Valley Electric Cooperative ("DVEC") filed its Protest and Request for Hearing. *Id.* On July 26, 2017, the Commission issued a Notice of Hearing scheduling a public hearing to be held on October 23, 2017, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck. *Id.* at 47.

[¶4] On October 23, 2017, a public hearing was held as scheduled. Testimony was presented by both OTP and DVEC. *Id.* OTP called three witnesses to support its case: Richie Wolf, Chris Waltz, and George Schuler. Hearing Transcript (October 23, 2017) ("PSC Tr."), District Court Docket Number ("Dkt. No.") 78, at pp. 19, 111, 173. Mr. Wolf is an engineer with OTP and testified as to technical aspects of the proposed OTP line as compared to the proposed DVEC line. *Id.* at p. 19-110. Mr. Waltz is a conservation sales manager with OTP and testified generally as to the economic aspects of the proposed lines of OTP and DVEC. *Id.* at pp. 111-172. Mr. Schuler is the grain division and logistics manager of Minn-Kota and part owner. He testified in support of OTP's proposed line. *Id.* at pp. 173-214. DVEC called two witnesses to support its case: Seth Syverson and Bruce Garber. *Id.* at pp. 216, 333. Mr. Syverson is the engineering manager for DVEC and testified as to technical aspects of the proposed DVEC line as compared to the proposed OTP line. *Id.* at pp. 216-333, 360-367. Mr. Garber is the general manager of DVEC and testified as to the economic aspects of the proposed lines of OTP and DVEC. *Id.* at pp. 333-360.

[¶5] OTP and DVEC presented closing briefs to the Commission. Dkt. Nos. 94, 95, 97, 98. Late-filed exhibits were also filed with the Commission by both parties. The

Commission held work sessions to discuss the case on December 20, 2017, and February 5, 2018. Dkt. Nos. 79-80.

[¶6] Three months after the public hearing was held, on February 1, 2018, Minn-Kota filed a Petition to Intervene and Request to Present Oral and Written Comments. App. 17-24. On February 1, 2018, Dakota Valley served its Objection to Petition to Intervene and Request to Present Oral and Written Comments. App. 18-24. The Commission held its second and final work session on the case on February 5, 2017. Dkt. No. 80. On February 12, 2018, Otter Tail filed its Response to Petition to Intervene and Request to Present Oral and Written Comments. Dkt. No. 104. On February 19, 2018, the Administrative Law Judge denied Minn-Kota's Petition to Intervene. App. 25-29. On March 5, 2018, Minn-Kota filed a petition to reconsider, which was objected to by Dakota Valley on March 12, 2018. Dkt. Nos. 78-79. The Administrative Law Judge denied Minn-Kota's Petition to Reconsider on March 13, 2018. App. 44-45.

[¶7] The Commission issued its Findings of Fact, Conclusions of Law and Order on March 29, 2018. App. 46-55. Minn-Kota served a notice of appeal and specification of error to the district court on April 27, 2018. App. 56-62. OTP did not appeal the Commission's decision, but filed a document indicating it supported Minn-Kota's appeal. Dkt. No. 130. Oral argument on the appeal was held on November 26, 2018, before the district court. See Transcript of Oral Argument, N.D. Supreme Court Docket No. 10. The district court issued its order on March 11, 2019. App. 73-77. The district court held that Minn-Kota's intervention motion was properly denied, Minn-Kota lacked standing to appeal, and the PSC's decision to deny the CPCN was based on the product of rational thought. *Id.* Minn-Kota appealed to this Court on April 18, 2019. App. 78-29.

B. The Parties

[¶8] OTP is an investor owned electric utility providing electric service to customers in certain service territories in North Dakota. DVEC is a rural electric cooperative providing electric service to its members in the area at issue in this case. App. 48.

C. The Site and Proposed Infrastructure

[¶9] Minn-Kota is a family-owned corporation that is constructing a twenty-million-dollar grain handling facility outside of Barney in Richland County (the "Site"). The facility is designed to received 20,000 bushels of grain per hour. The facility will have a storage capacity of approximately 3 million bushels and is specifically designed to load 120 car unit trains. Minn-Kota plans to start operating the new facility in June 2018. App. 48.

[¶10] OTP owns and operates a 41.6 kV transmission line adjacent to the Site. This transmission line is fed from Wahpeton's transmission substation and was put into service in approximately 1970. OTP would service the Site by tapping its 41.6 kV transmission line. This tap would feed a distribution substation with a partially depreciated transformer (used transformer, as opposed to a new transformer) to be constructed by OTP on the Site. OTP would then extend three-phase 12.5 kV underground jacketed distribution cable approximately 1,000 feet from the new substation to the Site's point of service. App. 49-50.

[¶11] DVEC's Mooreton distribution substation is fed by the *same* 41.6 kV transmission system owned and operated by OTP. DVEC would extend three-phase service from its existing three-phase cabinet that is served from its Mooreton substation

located approximately three miles south and east of the cabinet. This extension would consist of approximately 3,960 feet of new underground three-phase jacketed cable, an additional three-phase cabinet to accommodate potential future growth or to extend the line to other potential customers, and up to two new 1500 kVA transformers. *Id.*; PSC Tr. (Dkt. No. 78), p. 233, ll. 7-10.

D. The Dispute

[¶12] Both OTP and DVEC provided a good description of what the dispute is and what is at stake in their briefs to the PSC. Dkt. Nos. 94, 95, 97, 98. From the Commission's perspective, it weighed the evidence presented by both parties and considered the arguments presented in formulating its decision. The below argument section highlights the factors the Commission considered in reaching its decision. The testimony presented at the hearing will not be restated here. But suffice it to say both OTP and DVEC had the opportunity to, and did, present their respective points to the Commission.

[¶13] The dispute, boiled down, is whether OTP or DVEC should serve Minn-Kota's power needs for its new facility. The Territorial Integrity Act (TIA) sets the boundaries for the Commission's consideration of the case. The Commission's Notice for the hearing provided ten factors to be considered at the hearing consistent with past precedent of the North Dakota Supreme Court:

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?

App. 47.

STANDARD OF REVIEW

[¶14] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. *Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 5, 785 N.W.2d 707. This Court will not reverse an agency decision unless:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46; *Voigt v. N.D. Public Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. When determining this issue, the Court must "look to the law and its application to the facts." *Plante v. N.D. Workers Comp. Bureau,* 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, the Court does not substitute its judgment for that of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Commission's findings of fact, the Court determines "only whether a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.*; *see also Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979); *North Central Elec. Coop. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, ¶ 7, 837 N.W.2d 138. The Court does "not reweigh or reevaluate the evidence . . . [or] function as a super board and second guess the PSC's findings." *Capital Elec. Coop.*, 2007 ND 128 at ¶31. Additionally, the subject matter here is of a "highly technical nature," the Commission's "expertise" is "entitled to appreciable deference." *Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm'n,* 413 N.W.2d 308, 312 (N.D. 1987).

[¶15] The standard of review on standing is *de novo*. *Washburn Pub. School Dist. No. 4 v. State Bd. of Public School Educ.*, 338 N.W.2d 664, 666 (N.D. 1983) (standing).

[¶16] A mixed standard of review applies to the review of an Administrative Law Judge's denial of a motion to intervene brought under N.D.A.C. § 69-02-02-05. *See, e.g., In re Juran and Moody, Inc.*, 2000 ND 136, ¶¶ 22-24, 613 N.W.2d 503 (applying a deferential standard of an ALJ's factual findings; applying a *de novo* standard of an ALJ's legal conclusions). The Commission, however, legally adopted the denial of the intervention in its final order denying OTP's petition for a CPCN, causing the deferential standard of review to apply to denial of the intervention request. *Id.* at ¶ 25.

LAW AND ARGUMENT

A. Intervention

[¶17] The Commission referred Minn-Kota's motion to intervene to the administrative law judge for decision. The administrative law judge issued a decision denying the intervention request that plainly sets forth why intervention was inappropriate. The Commission accepted the administrative law judge's decision. And, on appeal, the Commission takes the position the administrative law judge's decision was appropriate for all the reasons stated by the administrative law judge. App. 25-27; 44-55.

[¶18] Minn-Kota has no one to blame for its intervention motion being denied but itself. Minn-Kota chose not to timely intervene. It clearly was aware of the case—one of its owners testified as a witness in support of OTP at the hearing. The issues of reliability and economic benefit, which appear to be the bulk of Minn-Kota's arguments in its brief, were all covered at the hearing by all the witnesses *and* by Mr. Schuler himself. Clearly, OTP's interests were aligned with Minn-Kota's interests. That there may have been nuances in each company's respective positions is inherent, of course. But, again, Minn-Kota is a sophisticated company and chose not to intervene before or at the hearing but

waited more than three months after the hearing. Indeed, Minn-Kota still does not give a rational explanation as to why it did not intervene prior to, or at, the evidentiary hearing it was aware of.

[¶19] Minn-Kota had to provide "good cause" as to why it should have been allowed to intervene. Our administrative code provides in relevant part:

> 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. The commission may impose conditions and limitations on an intervention to promote the interests of justice.
>
> 1. Contents of petition to intervene. 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.
> 2. When filed. A petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause shown.

N.D.A.C. § 69-02-02-05 (emphasis added).

[¶20] Minn-Kota failed to provide "good cause." This factor is necessarily discretionary with the Commission. This Court does not second-guess administrative agency's discretionary authority. Barring an abuse of discretion—the decision to deny the motion to intervene should be affirmed.

[¶21] The decision to deny the motion to intervene was sound. DVEC and OTP presented their evidence at the hearing and the Commission asked questions of those witnesses who testified. DVEC and OTP presented their closing arguments by brief to the Commission. And the Commission began its process for deciding the case at its first work session in December 2017. Then, and only then, did Minn-Kota choose to try to intervene

and provide additional evidence that could have been made available at the hearing had Minn-Kota chose to timely intervene. In effect, Minn-Kota seeks an advantage over the parties by waiting until evidence and arguments presented by the parties during the proceeding was known. This "wait and see attitude," even if unintentional, creates a distinct advantage to a litigant in a contested case—to *know* what one's opponent *has* argued is simply unfair to those parties who followed the rules. And once the evidence has been presented, there is no putting it back in the proverbial bottle. This may seem a bit sanctimonious. But if the rule exists, it ought to be followed. And if the rule exists and provides for an exception, application of the exception should not come at the expense of those parties that followed the procedures and played by the rules. Bottom line—Minn-Kota had all the tools at its disposal to timely and appropriately intervene. Instead, Minn-Kota chose to ride the coattails of OTP until such no longer served Minn-Kota.

[¶22] With that said, it is not as if the same issues raised by Minn-Kota in its brief were not argued at the hearing. While Minn-Kota was not a party to the case, the issues it has raised were subject to intense dispute between DVEC and OTP at the hearing and were all considered by the Commission. As noted by the administrative law judge in his decision: "the issues have been substantially and thoroughly laid before the Commission and the Commission can make a reasoned and intelligent decision on the certificate of public convenience and necessity as to the appropriate provider of electric service of this Minn-Kota facility." App. 26.

[¶23] The Commission's decision in an unrelated pipeline siting case involving dissimilar facts and circumstances from the matter at hand is not persuasive. *See* App. 63-72. The decision by the Commission in a separate case, involving distinct issues and

arguments presented to it, does not bind the Commission to a prior decision. It is noteworthy the decision by the Commission in the TransCanada decision was not unanimous. App. 71-72. The Commission, in a 2-1 vote, did determine good cause existed to grant the City of Fargo's petition to intervene two months after a hearing. The rationale of the decision was based on *public safety*; a crude oil pipeline was to be sited near the City of Fargo and would potentially impact the city's water supply. Good cause? The Commission thought so under a separate analysis from a case more than ten years ago. This decision bears no relevance to the analysis of Minn-Kota's intervention motion. And the TransCanada decision certainly is not mandatory precedent for the Commission. As with every case, all are unique. The standard for intervention was properly reviewed and applied to the instant case irrespective of how other circumstances may have played out in other unrelated cases.

[¶24] The Commission is entitled to deference in its decision to deny the intervention motion. The decision was supported by facts and realities of this case. After all, Minn-Kota's purpose for attempting to intervene was but an attempt to support its private interests.

B. Standing

[¶25] If it is determined intervention was properly denied, the appeal was properly dismissed by the district court because Minn-Kota lacks standing. Minn-Kota did not appear at the hearing as a party. While Mr. Schuler is a part owner of Minn-Kota, this Court holds that a corporate entity cannot appear in a legal proceeding *pro* se. *See Wetzel v. Schlenvogt*, 2005 ND 190, ¶¶ 11-13, 705 N.W.2d 836 (explaining corporations must be represented by attorneys in legal proceedings and that Cenex "never appeared at the hearing

because it was not represented by a lawyer"). With that said, the Commission's administrative rules would allow a corporation's officer or authorized employee to appear in a proceeding. N.D.A.C. § 69-02-01-05. Regardless, Mr. Schuler was at the hearing only as a witness for OTP and did not appear at the hearing as a party. To the extent Minn-Kota would argue that the physical presence of Mr. Schuler at the hearing *as a witness* for OTP was an appearance of Minn-Kota, that must be rejected because this Court holds that a corporation cannot appear in legal proceedings unless represented by an attorney, the Commission's rules would require an individual to identify their capacity, and Mr. Schuler did not claim to be representing Minn-Kota by providing testimony in his capacity as a witness for OTP's case. *Id.; see also Blume Const., Inc. v. State ex. rel. Job Service North Dakota*, 2015 ND 285, ¶ 21, 872 N.W.2d 312 (explaining corporations must act through an agent and legal documents signed and filed by a non-attorney in a legal proceeding are void).

[¶26] The appellant must meet the requisite statutory requirements pursuant to N.D.C.C. § 28-32-42 and the three-part standing requirement to appeal an administrative agency's decision. *See Shark v. U.S. West Communications, Inc.*, 545 N.W.2d 194, 196 (N.D. 1996) ("[L]imits of judicial power to review agency and executive action are marked by several doctrinal boundaries, including the concept of standing"); *In Re Juran and Moody, Inc.*, 2000 ND 136, ¶ 16, 613 N.W.2d 503 (A person has standing if the person: 1) participates in the proceeding before an administrative agency; 2) is directly interested in the proceedings; and 3) is factually aggrieved by the agency's decision). In *O'Connor v. Northern States Power Co.*, the Court held that an electric ratepayer who did not participate in the proceeding at the PSC could not contest the resulting rate increase in the courts. 308

N.W.2d 365, 371 (N.D. 1981). Likewise, the *Shark* Court denied the parties judicial review because both parties failed to meet the three-part standing test. 545 N.W.2d at 200.

[¶27] Minn-Kota fails to meet the first requirement that it participated in the proceeding before the Commission. While Minn-Kota's Mr. Schuler testified as a *witness* for OTP in support of OTP's case, Minn-Kota was not a party to the case and did not appear.[1] The North Dakota Supreme Court has made it clear that a party must satisfy the standing requirement to seek judicial review of an administrative order. *Application of Bank of Rhame,* 231 N.W.2d 801, 806 (N.D. 1975). Not only does the failure to participate by Minn-Kota mean it does not have standing, but its arguments regarding the Commission's alleged errors regarding the evidence were waived due to the failure to raise them below.

[¶28] Minn-Kota's appeal should be dismissed as a matter of law because it lacks standing to appeal.

C. In the alternative, the North Dakota Public Service Commission properly decided that public convenience and necessity did not require granting a Certificate of Public Convenience and Necessity to Otter Tail to extend electric service to the Minn-Kota Site near the community of Barney in Richland County, North Dakota.

[¶29] The Territorial Integrity Act ("TIA") requires a public utility, before extending its service lines outside of the corporate limits of a municipality, to obtain a certificate that public convenience and necessity require such extension. N.D.C.C. §§ 49-

[1] The Commission concedes Minn-Kota made a limited appearance when it moved to intervene. Minn-Kota was not a party to the proceeding when intervention was denied and all of the exhibits Minn-Kota attempted to file were stricken. App. 44-45. Minn-Kota cannot boot-strap standing to appeal upon a failed motion to intervene in a case it did not otherwise appear. Minn-Kota has limited standing to appeal from the Commission's denial of its motion to intervene—but that is it.

03-01, 49-03-01.1; *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 417 (N.D. 1969). The authority to make such a decision is vested in the Commission. *Application of Otter Tail Power*, 169 N.W.2d at 417. To guide the Commission, this Court outlined a number of factors which must be considered in determining whether a certificate of public convenience and necessity should be granted. In addition to customer preference, these factors include:

> [T]he location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application and which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.

Id. at 418.

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

[¶31] The primary purpose of the TIA is to keep wasteful duplication of capital-intensive utility services and conflicts between providers to a minimum. *Northern States Power Co. v. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990); *Cass Cnty. Elec. Coop.*, 419 N.W.2d at 187. Considering the current regulatory constructs, "it may not always be possible to prevent some of the actual duplication of distribution facilities

which may occur in practice when cooperatives extend their existing electrical systems," and the question of which facilities are duplicative and wasteful "is one of fact for the PSC to determine." *Northern States Power Co.*, 452 N.W.2d at 344-45.

[¶32] The Commission considered the following ten bolded factors in reaching its decision. App. 47.

[¶33] **From whom do the customers prefer electric service?** App. 48-49. Customer preference, while not controlling, is one of the factors to be considered. *Cass Cnty. Elec. Coop. v. Wold Properties, Inc.*, 249 N.W.2d 514, 521 (N.D. 1976). However, "[i]t cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice." *Tri-County Elec. Coop. v. Elkin*, 224 N.W.2d 785, 792 (N.D. 1974). This is to prevent unregulated customer preference from resulting in wasteful duplication of facilities. *Wold Properties, Inc.*, 249 N.W.2d at 521. Put plainly, customer preference "does not govern the Commission in its decision." *Application of Montana-Dakota Utilities Co.*, 219 N.W.2d at 181. Customer preference is not a significant factor. *See Tri-County Elec. Coop.*, 224 N.W.2d at 792 ("In rural areas . . . customer preference is a minor consideration"). Here, the Commission considered Minn-Kota's preference for OTP. It is undisputed that the "minor" customer preference factor was in favor of OTP. App. 48-49; 54.

[¶34] **What electric suppliers are operating in the general area?** App. 49. Only OTP and DVEC are operating in the general area and this consideration was neutral as to both OTP and DVEC. *Id.*

[¶35] **What electric supply lines exist within at least a two-mile radius of the location to be served, where were they constructed, and what customers are served**

by electric suppliers within at least a two-mile radius of the location to be served? App. 49-50. OTP serves two (2) customers within a two-mile radius of the Site. DVEC serves eighteen (18) customers within a two-mile radius of the Site. *Id.* DVEC supplies three-phase power to one customer within the two-mile radius and has a three-phase junction box in the general area. *Id.* at 49; PSC Tr. (Dkt. No. 78), p. 222, ll. 3-11. What customers and the number of customers in the near vicinity is an issue that requires examination, not only for capacity requirements, but also as it directly relates to orderly development of electrical service and the reducing duplication of capital intensive facilities and service. This factor favored DVEC. App. 49-50, 54.

[¶36] **What are the differences between the electric suppliers available to serve the area with respect to reliability?** App. 50-51, 54. Both suppliers can serve the area reliably as set forth in the Commission's Order. *Id.* Conflicting testimony was provided by the witnesses as to which supplier's design would be reliable. The Commission took all of the evidence presented by Mr. Syverson and Mr. Wolf and determined that each supplier offered reliable power to the Site. *See, generally*, R. Wolf and S. Syverson testimony, PSC Tr. (Dkt. No. 78), pp. 19-110, 216-333, 360-367.

[¶37] As to overhead lines vs. underground lines, OTP's claim that overhead is more reliable is without support and OTP even admits it is unaware of any underground issues of faults in DVEC's underground lines. *Id.*, p. 64, ll. 7-11. DVEC does not build overhead anymore "due to issues related to weather, farming operations, and difficulty of obtaining easements as far as setting poles in fields." *Id.*, p. 266, ll. 14-25. As to repair of underground facilities, DVEC has technology that locates the near precise location of the fault so it can be repaired. *Id.*, p. 267, ll. 1-25. Outages from underground cable are "fairly

rare" and most of DVEC's outages are from above-ground poles or lines being struck by farm equipment. *Id.*, p. 268, ll. 14-22. As to new jacketed cable installed, which would be utilized to serve Minn-Kota, DVEC expects to get at least 50-60 years out of it. *Id.*, p. 269, ll. 23-25 to p. 270, ll. 1-7.

[¶38] Mr. Syverson testified that DVEC "has the stiffest backbone and the capacity to adequately serve a load like this." *Id.*, p. 226, ll. 17-24. Mr. Syverson testified that the Mooreton substation can handle the additional load for the Minn-Kota facility. *Id.*, p. 240, ll. 20-21. Testing regarding voltage drop was done and Mr. Syvertson testified it was within DVEC's limits and he did not see any issues regarding the load to be served. *Id.*, p. 274, ll. 21-25 to p. 275, ll. 1-3. Reliable? The Commission was convinced.

[¶39] To the extent one supplier has more reliability, OTP's proposal may offer more reliability as noted by the Commission. App. 51 at ¶ 24. But the Commission cannot ignore why. The only reason that OTP's proposal may offer more reliability is OTP proposes to supply the Site by constructing a new substation directly adjacent to the Site. Whereas DVEC proposes to extend its existing three-phase underground jacketed cable to a new cabinet to serve the Site from its Mooreton substation 3.7 miles from the Site. Certainly, if DVEC were to build a new substation across from the Site then DVEC's service would be equally reliable as OTP. After all, the source power of DVEC is from OTP's 41.6 kV lines. But constructing a new substation in an area of low population density with no identifiable prospects of future development cannot be ignored by the Commission. To put it plainly, OTP proposes to serve the Site with a Cadillac system when a Buick system will do nicely. While a Cadillac may be bit nicer than a Buick, both are reliable. Indeed, OTP concedes it cannot economically extend service to the Site

without constructing a new substation. PSC Tr. (Dkt. No. 78), p. 89, ll. 18-24 (explaining OTP cannot serve from an existing substation "[b]ecause of cost estimates and the distance....").

[¶40] The Commission considered this factor and determined that both suppliers would provide reliable service to the Site. App. 50-51, 54. The Commission did consider that OTP's service may be more reliable, but only because OTP would construct a new substation at the Site. While this factor would seem to be in favor of OTP, it militates against OTP in the end because the increased reliability is premised solely upon wasteful duplication (discussed below).

[¶41] **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?** App. 51-52, 54. The Commission determined that this factor supported both OTP and DVEC equally—it was effectively a tie. In other words, both suppliers would be able to serve the location economically and with an adequate return on investment. The specific factors that went into the Commission's decision will not be repeated here. Suffice it to say, the Commission provided a detailed analysis and provided support for its finding on this factor. *Id.*

[¶42] Indeed, the two suppliers' business models are very different—as the Commission openly discussed at its first work session. Dkt. No. 79, pp. 20-24, 29-30. Each supplier is unique, and the Commission cannot ignore the unique business structures and purposes of each competing supplier. To hold, for example, that DVEC should be penalized because it is not a rate regulated utility subject to review by the Commission is inappropriate because such would belie the very purpose of a cooperative's structure that

is part of North Dakota law. Minn-Kota's argument that it is essentially more comfortable with a rate regulated utility because its rates are subject to review by the Commission ignores how rates are reviewed by member controlled and owned cooperatives. In each scenario Minn-Kota would have a seat at the table as to electric rates.

[¶43] DVEC and OTP hotly disputed what the load factor that the new facility would use would be. Load factor is the ratio between the energy used and the demand. PSC Tr. (Dkt. No. 78), p. 255, ll. 15-20. In some sense, this is a speculative analysis because it is a new facility and the precise load factor will not be known until operation begins. DVEC presented evidence of a similar type of facility and its load factor. OTP relied on what Minn-Kota told it. Load factor was important in factoring the cost of service to Minn-Kota.

[¶44] The Commission adequately reviewed and considered this factor in making its decision. The Commission weighed the testimony and exhibits presented by both suppliers. While the suppliers may disagree with each other on some aspects of this factor, ultimately both suppliers can supply the Site economically and still achieve an adequate rate of return on its investment. App. 51-52, 54.

[¶45] **Which supplier's extended electric service would best serve orderly and economic development of electric service in the general area?** App. 53-54. The Commission applied this factor in favor of DVEC. Put plainly, DVEC has more presence in the general area, outside of the municipalities of Barney and Mooreton. DVEC's organic development of its three-phase line along the Highway 13 corridor is logical in that it provides those customers adequately and as demand for the service is needed. Mr. Syverson agreed that the extension of the line along Highway 13 was "just a logical

extension of existing three phase service already along [Highway] 13." PSC Tr. (Dkt. No. 78), p. 233, ll. 19-21. DVEC already has three-phase customers to the east. *Id.* at ll. 22-24. The inorganic placing of a new substation in an area OTP has no distribution capacity, but for the proposed construction of a new substation, does not support orderly development of the general area. Nor is there evidence construction of a new substation would stimulate any further economic development of the general area. If a new substation were built by OTP, a CPCN would have to be sought every time OTP sought to provide power to a hypothetical customer. Whereas, the "as-needed" extension of reliable three-phase underground electric cables to future customers by DVEC would best serve the general area and provide economic development as-needed in the public interest. DVEC's argument was accepted by the Commission. App. 53-54.

[¶46] **Would approval of the applications result in wasteful duplication of investment or service?** App. 53-54. Put simply, yes. A new substation is not necessary to supply the Site. It is wasteful duplication of capital-intensive utility services. *Northern States Power*, 452 N.W.2d at 344 (N.D. 1990); *Cass Cnty. Elec. Coop.*, 419 N.W.2d at 187. Ultimately, the question of whether facilities are wasteful duplication "is one of fact for the PSC to determine." *Northern States Power Co.*, 452 N.W.2d at 344-345. A new substation is only necessary for OTP to serve the Site. The evidence presented at the hearing makes it clear that DVEC's three-phase cable system can be economically extended while maintaining reliability to serve the Site. DVEC's system will extend three-phase service along the Highway 13 corridor. On the other hand, OTP's new substation would serve one customer. While it is possible that Minn-Kota will expand its Site or that other customers in the area could utilize a newly constructed substation, no evidence was presented that

these possibilities are likely to occur. Evidence was presented that DVEC can serve the Site sufficiently from its existing Mooreton substation for much less than OTP.

[¶47] As to the previously discussed reliability factor, the possibility of increased reliability comes only because of wasteful duplication of building a costly new substation directly adjacent to the Site. The Commission determined that it could not ignore possible increased reliability in OTP supplying the Site came at the expense of building a new substation to serve one customer when DVEC serves multiple customers from its existing infrastructure that requires only a 4000-foot extension of three-phase cable to the Site. App. 53-54.

[¶48] **Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future?** App. 53. This consideration was given no weight by the Commission because both parties agreed the Site would not likely be included within the corporate limits of a municipality in the foreseeable future.

[¶49] **Will service by either of the electric suppliers in the area unreasonably interfere with the system of the other?** App. 54. The parties agreed that this factor did not apply to either supplier and the Commission gave this factor no weight.

[¶50] The Commission weighed the above factors and its decision more than satisfies N.D.C.C. § 28-32-46. The Commission did this while considering all the factual evidence that was presented. The Commission actively participated in the full-day evidentiary hearing, reviewed the evidence presented from the parties, and held two work sessions to discuss the case before issuing its Order. The Commission's decision was premised upon the TIA statutory framework and the relevant case law interpreting the TIA.

The Commission's decision was not arbitrary or capricious. The Commission considered this case and the circumstances of this case in applying the factors to reach its decision. The Commission's decision is supported by the facts presented. Finally, the Commission's decision is entitled to deference by the Court.

[¶51] In the end, it is the *public* convenience and necessity, not the convenience to a single customer or supplier, which makes DVEC the preferred supplier to this location. "It is the Public Convenience and Necessity, after all, with which the Commission is concerned, not private preference." *Tri-County Elec. Coop.*, 224 N.W.2d at 792. The OTP extension serves no other interest, public or private, but the interest of Minn-Kota. Based on the evidence presented to the Commission, a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record and that public convenience and necessity does not favor OTP to provide service to the Minn-Kota Site.

[¶52] The Commission requests oral argument. Oral argument will assist the Court in reaching its decision and clarify any questions it may have.

CONCLUSION

[¶53] The Court should affirm the denial of Minn-Kota's intervention motion. The motion came more than three months after the hearing occurred and more than eight months after Minn-Kota signed its letter of support for Otter Tail's application. The "good cause" aspect is wholly absent and has not been explained to the Commission, the district court, or this Court. To reverse the decision on intervention would encourage parties to take a "wait and see" stance—that is, watch the parties to an administrative matter "duke it out" at a public evidentiary administrative hearing, watch how the Commission discusses

the case at a public work session, then, and only then, decide whether the "tea leaves" favor a bold attempt to try and intervene after all parties have poured out their arguments to the Commission and the Commission has begun its thought process in evaluating evidence and arguments. Such is unacceptable. A bulwark must be set for the administrative procedural process. Indeed, it would be unthinkable for a district court to ever grant intervention after conclusion of a bench trial. Could it ever be that a witness to a bench trial would be permitted to intervene three months after the parties to a bench trial rest their case? Preposterous! The same rationale applies to the administrative process. Intervention was appropriately denied and the Commission's decision should be affirmed.

[¶54] In affirming the intervention denial, Minn-Kota lacks standing to appeal. The Court should affirm the district court's dismissal of Minn-Kota's appeal because it lacks standing.

[¶55] Alternatively, if the Court determines Minn-Kota has standing, considering the evidence presented on the record to the Commission, the Commission's findings of fact are supported by the evidence and satisfy N.D.C.C. § 28-32-46. Indeed, the issues raised by Minn-Kota (on appeal and after the public hearing on this matter) were considered by the Commission. The Commission considered hours of testimony and reviewed numerous exhibits when it properly applied the law to the facts in making its unanimous decision. Absent a reweighing of the evidence or substitution of the Court's judgment for the Commission's, the Commission respectfully requests that this Court find that a "reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Capital Elec. Coop.*, 2007 ND 128

at ¶ 31. For these reasons, the Commission respectfully requests that this Court affirm its Order denying OTP's application for a CPCN.

CERTIFICATE OF COMPLIANCE

[¶56] This twenty-eight page brief complies with N.D.R.App.P. Rule 32(a)(8).

Dated this 16th day of August, 2019.

Zachary E. Pelham, ND #05904
Special Assistant Attorney General
Pearce Durick PLLC
314 E. Thayer Ave.
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
Efile: #zepefile@pearce-durick.com

Attorneys for Appellee, North Dakota Public Service Commission