

March 2000

TERRITORIAL INTEGRITY ACT STUDY - BACKGROUND MEMORANDUM

Senate Bill No. 2389 (1999), a copy of which is attached as an appendix, requires the Electric Industry Competition Committee to study North Dakota Century Code (NDCC) Chapter 49-03 and other relevant statutes relating to the extension of electric lines and facilities and the provision of electric service by public utilities and rural electric cooperatives within and outside the corporate limits of a municipality. Senate Bill No. 2389 states that the study must specifically address and include the criteria used by the Public Service Commission under Chapter 49-03 in determining whether to grant a public utility a certificate of public convenience and necessity to extend its electric lines and facilities to service customers outside the corporate limits of a municipality and the circumstances, if any, under Chapter 49-03 and other relevant statutes under which a rural electric cooperative may provide electric facilities and service to new customers and existing customers within the municipalities being served totally or primarily by a public utility. Notwithstanding NDCC Section 54-35-18.2, the bill requires the Electric Industry Competition Committee to submit proposed legislation, if necessary, as a result of the study conducted, to the 57th Legislative Assembly.

TERRITORIAL INTEGRITY ACT

The Territorial Integrity Act was enacted by the Legislative Assembly in 1965 and is codified as NDCC Sections 49-03-01 through 49-03-01.5. These sections provide:

49-03-01. Certificate of public convenience and necessity - Secured by electric public utility. No electric public utility henceforth shall begin construction or operation of a public utility plant or system, or of an extension of a plant or system, except as provided below, without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation. This section does not require an electric public utility to secure a certificate for an extension within any municipality within which it has lawfully commenced operations. If any electric public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as

provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions.

49-03-01.1. Limitation on electric transmission and distribution lines, extensions, and service by electric public utilities. No electric public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation, nor shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, nor shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer.

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity. Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission.

Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof whose places receiving service are located outside the corporate limits of a municipality on July 1, 1965; provided, however, that within ninety days after July 1, 1965, any electric public utility furnishing service to customers whose places receiving service are located outside the corporate limits of a municipality shall file with the commission a complete map

or maps of its electric distribution system showing all places in North Dakota which are located outside the corporate limits of a municipality and which are receiving its service as of July 1, 1965. After ninety days from July 1, 1965, unless a customer whose place being served is located outside the corporate limits of a municipality is shown on said map or maps, it shall be conclusively presumed that such customer was not being served on July 1, 1965, and cannot be served until after compliance with the provisions of section 49-03-01.1.

49-03-01.4. Enforcement of act. If any electric public utility violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric cooperative, the commission, after complaint, notice, and hearing as provided in chapter 28-32, shall make its order restraining and enjoining said electric public utility from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe such terms and conditions as it shall deem reasonable and proper.

Provided, further, that nothing herein contained shall be construed to prohibit or limit any person, who has been injured in the person's business or property by reason of a violation of sections 49-03-01 through 49-03-01.5 by any electric public utility or electric cooperative corporation, from bringing an action for damages in any district court of this state to recover such damages.

49-03-01.5. Definitions. As used in sections 49-03-01 through 49-03-01.5:

1. "Electric public utility" means a privately owned supplier of electricity offering to supply or supplying electricity to the general public.
2. "Person" includes an individual, an electric public utility, a corporation, a limited liability company, an association, or a rural electric cooperative.
3. "Rural electric cooperative" includes any electric cooperative organized under chapter 10-13. An electric cooperative, composed of members as prescribed by law, shall not be deemed to be an electric public utility.

It should be noted that as enacted, the Territorial Integrity Act included a section that provided:

The public service commission of the state of North Dakota shall not issue its order or its certificate of public convenience and necessity to any electric public utility to extend its electric distribution lines beyond the corporate limits of

a municipality or to serve a customer whose place to be served is located outside the corporate limits of a municipality unless the electric cooperative corporation with lines or facilities nearest the place where service is required shall consent in writing to such extension by such electric public utility, or unless, upon hearing before the commission, called upon notice, shall be shown that the service required cannot be provided by an electric cooperative corporation. Such certificate shall not be necessary if the public service commission approves an agreement between a public utility and a rural electric cooperative serving the area which includes the station to be served in which agreement designates said station to be in an area to be served by the public utility.

In *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414 (N.D. 1967), the North Dakota Supreme Court declared this section to be an unconstitutional delegation of legislative authority.

Although the legislative history of the Territorial Integrity Act is extensive, the rationale for its enactment was summarized in *Capital Electric Cooperative Inc. v. Public Service Commission*, 534 N.W.2d 587 (N.D. 1995). In this case, it was noted that "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," and the "primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities."

Under the Act, a public utility may not begin the construction or extension of a public utility plant or system until a certificate of public convenience and necessity is obtained for the construction or extension. A public utility also may not extend transmission or distribution lines beyond the corporate limits of a municipality or serve any customer outside a municipality unless an order and a certificate of public convenience and necessity is first gained. In addition, the Supreme Court established a requirement in *Capital Electric* that a request by a new customer for electric service from a public utility must be made before the Public Service Commission may consider whether to issue a certificate of public convenience and necessity to the utility.

While the Act did not require the public utility companies to discontinue service to customers who were being served outside municipalities before the effective date of the Act, they were required to file maps within 90 days showing all such customers, or it was conclusively presumed that the customers were not being served. In this event, the customers could not be served unless authorized by the commission in accordance with those provisions of the Act relating to extensions of service.

Public utilities were allowed to make extensions of service in municipalities in which they had lawfully commenced operations without obtaining a certificate if the extension would not interfere with services already provided by a cooperative or another public utility, or result in an unreasonable duplication of services.

Certain limitations were placed on the issuance of orders and certificates of public convenience and necessity by the Public Service Commission, in that such orders and certificates were not to be issued to any private utility to allow an extension of distribution lines outside a municipality or allow the service of a new customer outside the municipality, unless the nearest cooperative had consented to the service in writing, or unless it was shown upon hearing that the cooperative could not supply the service. Certificates were not necessary for the extension of facilities if a "consent" agreement was entered between the cooperative and the public utility as to service areas, and the agreement was approved by the Public Service Commission.

Thus, the Act basically allowed cooperatives to extend service in rural areas and public utilities to extend service in municipal areas without first obtaining a certificate of public convenience and necessity from the Public Service Commission--the theory being that the delineation of service areas would allow each type of enterprise to expand within its own sphere without conflict with each other. Problems arose, however, as the public utility companies believed that by being confined to municipal areas except as provided in the Act, they were being denied a fair share of the business arising in the rural "growth" areas. As noted above, this objection to the effect of the Territorial Integrity Act culminated in *Montana-Dakota Utilities Co. v. Johanneson*, which squarely attacked its constitutionality. In *Johanneson*, the public utility companies took the position the law was an unconstitutional classification for several reasons. They contended cooperatives were given a monopoly in rural areas and were allowed to operate without Public Service Commission regulation, while the public utilities were regulated in every respect by that agency. Further, they claimed that cooperatives could infringe on the existing service areas of public utility companies in rural localities and that new customers could be gained in municipal areas only if there was no interference with cooperative services already provided in the municipality. Finally, they asserted cooperatives had a right to complain against public utilities' actions, but the utilities had no such right against actions of the cooperatives. Thus, they maintained that the Territorial Integrity Act was unfair, arbitrary, and unreasonable, and the Act discriminated against the public utility companies and the public generally.

The North Dakota Supreme Court in *Johanneson* upheld the constitutionality of the Act in all but one

respect. It was held the Act did amount to a classification in that public utilities and cooperatives were treated dissimilarly, but the classification was not objectionable, as it was based on legally justifiable distinctions. While public utilities were denied the right under the Act to complain of improper actions by cooperatives, the right remained to bring an action in the courts of the state for redress of any injury that might be suffered. Thus, the court reasoned, the public utilities did have an adequate remedy and were not prejudiced.

However, the court found otherwise with regard to Section 3 of the Act which conditioned the issuance of certificates of public convenience and necessity on the written consent of the nearest cooperative, or upon a finding a cooperative could not provide the service. Here, the court found that it was ". . . the cooperative, and not the public service commission . . . that determines whether a certificate of public convenience and necessity shall be granted to a public utility in the area outside the limits of the municipality" and that "[n]o guidelines are set out in the law to be followed by the cooperative in making such determination, and no safeguards are provided against arbitrary action . . ." Thus, the court held that where ". . . the Act attempts to delegate, to either the Public Service Commission or the cooperative, powers and functions which determine such policy and which fix the principles which are to control, the Act is unconstitutional." Likewise, the court found that the portion of the Act that permitted supplying of service without certificates if a "consent" agreement was entered by the cooperative and public utility as to service areas also was unconstitutional, as again the cooperative was permitted to determine whether a certificate should be granted.

The impact of *Johanneson* immediately became evident. Because the provisions of the Territorial Integrity Act allowing for "consent" agreements in lieu of certificates of public convenience and necessity were declared unconstitutional, it was apparent the caseload of the commission and the issuance of certificates would increase substantially. In anticipation of this increase and to reduce the delay caused by the notices and hearings necessary for the issuance of certificates, the Public Service Commission requested an opinion of the Attorney General as to whether conditional certificates could be issued without the usual full-scale hearing and determination. The Attorney General, in an opinion dated October 30, 1967, found that the issuing of conditional certificates without hearing was proper, provided the controversy was fully submitted to the commission by an interested party in such a manner so a decision could be made, and the parties waived the notice and hearing required in the issuance of a certificate of public convenience and necessity. Thus, the issuing of temporary certificates under certain conditions was allowed.

Although the primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity, a continuous series of disputes, as discussed in *Tri-County Electric Cooperative v. Elkin*, 224 N.W.2d 785 (N.D. 1974), has arisen between rural electric cooperatives and stockholder-owned utilities. The court noted that typically, these suits arise from disputes as to which supplier of electricity is entitled to serve a customer in a rural area near a municipality where the investor-owned utility holds a franchise. The court further noted that when Section 3 was declared unconstitutional, the legislative directions to the Public Service Commission were eliminated and no criteria upon which the commission could make its decisions remained. However, this deficiency was remedied by the court in *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 418 (N.D. 1969), in which the court established that in addition to customer preference, factors to be considered in determining whether an application for a certificate of public convenience and necessity should be granted include "the location of the lines of the supplier; 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 service." Thus, customer preference is not a controlling factor but only one of a number of factors that must be considered for a certificate of public convenience and necessity to be granted.

The court has established a requirement that a new customer's request for service by an electric public utility is necessary to invoke the Public Service Commission's jurisdiction to consider the public utility's application for a certificate of public convenience and necessity to extend service to an area outside the corporate limits of a municipality. *Capital Electric Cooperative Inc. v. Public Service Commission*, 534 N.W.2d 587, 592 (N.D. 1995)

PREVIOUS STUDIES

1967-68 Study

The 1967 Legislative Assembly approved House Concurrent Resolution No. "B-2" which requested a two-year study be made of the laws relating to certificates of public convenience and necessity for extensions of service by electric suppliers and the extensions of electric transmission and distribution lines of electric utilities. The resolution directed that a committee composed of three members of the House of Representatives appointed by the Speaker and two members of the Senate appointed by the President Pro Tempore meet during the succeeding biennium

with two persons representing electric public utilities and two persons representing rural electric cooperatives to study what method, if any, should be provided to resolve territorial disputes between electrical suppliers, whether more lucrative market areas were essential to the efficiency of rural electric cooperatives, and if rural electric cooperatives should be regulated in the same manner as rural telephone cooperatives. The committee was further directed to report its findings to the 41st Legislative Assembly, together with any legislation that might be proposed.

This committee reviewed the provisions of the Territorial Integrity Act which had been enacted by the Legislative Assembly in 1965. The committee received testimony from the Public Service Commission, rural electric cooperatives, and public utility companies. The public service commissioners were basically of the opinion that the present Territorial Integrity Act was beneficial and pointed out some areas where improvements could be made. The position of the rural electric cooperatives was that the Territorial Integrity Act was working and that fair and adequate guidelines were being developed by the Public Service Commission in following the interpretation placed on the law by the North Dakota Supreme Court in *Johanneson*. The cooperatives maintained any change in the law would result in considerable expense to cooperative and public utility companies alike, as interpretive measures would have to begin anew. The position of the public utility companies was that the present territorial law stifles growth and creates confusion and uncertainty as the utilities are not allowed to expand with the population move from city and rural areas into the fringe locations around cities. The public utilities were not opposed to cooperative monopoly in the far rural areas of the state but vigorously maintained in order to serve their customers economically and provide a return to their stockholders, they must also continue to grow, and the only area where growth was possible was in the metropolitan fringe area. The public utility companies pointed out that duplication of facilities in such locations is economically prejudicial to the consumer and should not be permitted. The committee made no recommendations as a result of this study.

1997-98 Study

In conducting its study of the impact of competition on the generation, transmission, and distribution of electric energy within this state, the 1997-98 Electric Utilities Committee reviewed the history and operation of the Territorial Integrity Act. The committee received testimony from representatives of the state's investor-owned utilities and the state's rural electric cooperatives.

Representatives of Montana-Dakota Utilities testified that the Territorial Integrity Act is outdated and patently unfair in fostering effective electric competition in North Dakota. They argued that it is a barrier

to giving customers throughout the state the ability to make economic energy choices and as such should be repealed and fair play rules substituted in its place for all competitors. Also, they testified if rural electric cooperatives wish to pursue loads in urban areas, in direct competition with public utilities, then it follows the rural electric cooperatives engaging in such activity should no longer qualify for subsidies such as favorable financing arrangements with the federal government, exemption from state and federal income taxes, preferential access to low-priced federal power, and potential for debt forgiveness by the Rural Utilities Service, and should be subject to the same regulatory overview as public utilities.

The committee received testimony that if a rural electric cooperative wishes to continue to enjoy its preferential treatment and operate its system within the spirit and intent of the Rural Electrification Act, it should be prohibited, by statute, from serving newly annexed areas of a city and as such, the cooperative would be ineligible to apply for a city franchise to serve new loads in the annexed area, but the city could give the rural electric cooperative a limited franchise to continue to serve customers it is serving, upon the effective date of annexation. The committee received testimony that rural electric cooperatives should not have the benefits of low-cost federal financing, tax benefits, and lack of state regulation, while competing with public utilities for the same customers. Opponents of the Territorial Integrity Act testified that cooperatives be required to exercise a choice, to serve in an urban area, with the loss of preferential treatment at least for the increment of loads served in the urban area, or to operate exclusively, except on an incidental basis, in rural areas as originally contemplated by the drafters of the Rural Electrification Act.

The committee received testimony from a representative of Otter Tail Power Company that the Territorial Integrity Act is not accomplishing what its stated objectives are--to efficiently allocate scarce resources and to minimize disputes between electric suppliers--because the Act leads to a wasteful duplication of electrical facilities and increases, rather than minimizes, the likelihood of disputes between electric suppliers.

Representatives of the state's rural electric cooperatives responded that the Territorial Integrity Act is working well and is serving the purposes for which it was enacted. The committee received testimony that the state's investor-owned utilities have exclusive territories within the state's municipalities the rural electric cooperatives cannot penetrate and that the Act avoids the costly duplication of utility infrastructure. Representatives of the rural electric cooperatives testified the Territorial Integrity Act provides for consumer choice, but this private choice must also be in the public interest. They noted there is substantial undeveloped land within the service

territories of the investor-owned utilities while there is an outmigration of population in the rural areas and a corresponding decline in electrical usage. They testified that if it were not for some larger industrial and commercial loads, and some growth around cities in areas that were previously rural, rural electric cooperatives would have experienced a substantial decline in their sales, and it makes no sense to expand investor-owned utility territorial growth at the expense of the rural electric cooperatives that have made a huge investment to serve rural North Dakota. Representatives of the rural electric cooperatives responded to the charge investor-owned utilities are competitively disadvantaged by the Territorial Integrity Act by testifying that since enactment of the territorial integrity law, investor-owned utilities have continued to grow in customers and revenue and investor-owned utilities have not lost market share to rural electric cooperatives.

Representatives of the rural electric cooperatives also argued that the Territorial Integrity Act is not responsible for rural electric cooperative expansion into urban areas; that rural electric cooperatives can continue to serve their traditional service areas even when these areas become urbanized; that the growth of the local rural electric cooperative around Fargo is overstated; and that rural electric cooperatives are not precluded from competition because they have obtained Rural Utilities Service--formally Rural Electrification Administration--loans.

1999 PROPOSED LEGISLATION

Senate Bill No. 2389 (1999), as introduced, would have revised the state's Territorial Integrity Act. The bill provided that after July 31, 1999, an electric public utility, if authorized by franchise, shall provide electric service to all customers within the corporate limits of a municipality, except that a rural electric cooperative may continue to provide electric customers it was serving within a municipality on July 31, 1999, if allowed by the municipality pursuant to a limited franchise. The bill provided that a rural electric cooperative was ineligible for a new or continued franchise that would allow the rural electric cooperative to provide electric service to any new customer within the corporate limits of the municipality after July 31, 1999. If a municipality did not allow a rural electric cooperative to continue electric service to existing customers within the municipality pursuant to limited franchise, the rural cooperative could remove its lines, plant, or system or sell its lines, plant, or system to the franchised electric public utility at an agreed upon price. The bill also brought rural electric cooperatives under the enforcement provisions of the Territorial Integrity Act and allowed the selling or trading of facilities or customers upon mutual agreement between a rural electric cooperative and an electric public utility, subject to the approval of the city if sales or trades were made within the city or subject to the approval of

the Public Service Commission if outside the corporate limits of a municipality. This bill was substantially amended and as enacted called for the study of the state's Territorial Integrity Act.

EXCLUSIVE ELECTRIC SERVICE AREA LAWS OF SURROUNDING STATES

South Dakota

South Dakota Codified Laws sections 49-34A-42 through 49-34A-44 and sections 49-34A-48 through 49-34A-59 govern exclusive electric service areas in that state. Section 49-34A-42 provides that each electric utility has the exclusive right to provide electric service at retail at each and every location where it is serving a customer on March 21, 1975, and to each and every present and future customer in its assigned service area. This section provides that an electric utility may not render or extend electric service at retail within the assigned service area of another electric utility unless the other electric utility consents thereto in writing and the agreement is approved by the South Dakota Public Utilities Commission. However, an electric utility may extend its facilities to the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area. For purposes of these provisions, an electric utility is defined as any person operating, maintaining, or controlling in South Dakota equipment or facilities for providing electric services to or for the public including facilities owned by a municipality. A person is defined as a natural person, a partnership, a private corporation, a public corporation, a municipality, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, any of the federal, state, and local governments, including any of their political subdivisions, agencies and instrumentalities, or two or more persons having joint or common interest.

Section 49-34A-43 provides that the boundaries of each assigned service area, outside of incorporated municipalities, are a line equidistant between the electric lines of adjacent electric utilities as they existed on March 21, 1975, provided that these boundaries may be modified by the South Dakota Public Utilities Commission to take account of natural and other physical barriers that would make service of electric power and energy beyond those barriers economically impracticable and must be modified to take into account existing contracts, provided further that the boundaries must also be modified by the commission to take into account orders entered before July 1, 1975, by the electric mediation board.

This section also provides that contracts between electric utilities which were executed on or before July 1, 1976, designating service areas and customers to be served by the electric utilities approved by the commission are valid and enforceable and must be incorporated into the appropriate

assigned service areas. The South Dakota Public Utilities Commission is required to approve a contract if it finds the contract eliminates or avoids unnecessary duplication of facilities, provides adequate electric service to all areas and customers affected, and promotes the efficient and economic use and development of the electric systems of the contracting electric utilities.

Finally, this section provides that where a single electric utility provided electric service within a municipality on March 21, 1975, the entire municipality constitutes a part of the assigned service area of that electric utility. However, this chapter does not modify the existing right of a municipality to establish an electric utility. Where two or more electric utilities provided electric service in a municipality on March 21, 1975, the boundaries of the assigned service areas within the incorporated municipality must be assigned pursuant to the equal distance concept as applied to lines located only within the municipal boundaries.

Section 49-34A-44 provides that on or before January 1, 1976, each electric utility was required to file with the commission a map or maps showing all its electric lines outside of incorporated municipalities as they existed on March 21, 1975. Each electric utility was also required to submit in writing a list of all municipalities in which it provided electric service on March 21, 1975. Where two or more electric utilities served a single municipality, the South Dakota Public Utilities Commission was authorized to require each utility to file with the commission a map showing its electric lines within the municipality.

This section provides further that on or before July 1, 1976, the commission was required, after notice and hearing, to establish the assigned service area or areas of each electric utility and to prepare or cause to be prepared a map or maps to accurately and clearly show the boundaries of the assigned service area of each electric utility. Finally, this section provided that in those areas where on March 21, 1975, the existing electric lines of two or more electric utilities were so intertwined that the provisions of section 49-34A-43 could not reasonably be applied, the commission was required, after hearing, to determine the boundaries of the assigned service areas for the electric utilities involved. In making its decision, the commission was required to consider the following conditions as they existed on March 21, 1975:

1. The proximity of existing distribution lines to such assigned territory, including the length of time the lines had been in existence.
2. The adequacy and dependability of existing distribution lines to provide dependable, high-quality retail electric service.
3. The elimination and prevention of duplication of distribution lines and facilities supplying such territory.

4. The willingness and good-faith intent of the electric utility to provide adequate and dependable electric service in the area to be assigned.
5. A reasonable opportunity for future growth within the contested area was afforded each electric utility.

An electric utility that felt itself aggrieved by reason of an assignment of a service area was entitled to protest the assignment within a 90-day period after issuance of the map of the assigned service areas by the commission, and the commission had the power, after hearing, to revise or vacate the assigned service area or a portion thereof. Section 49-34A-48 allows electric utilities to continue to serve areas annexed by municipalities, but section 49-34A-49 provides a procedure whereby a municipality may purchase electric facilities in annexed areas. The South Dakota exclusive electric service area law also allows municipalities and utilities to sell or exchange rights and property and to extend lines to serve a utility's or municipality's own property.

Section 49-34A-56 provides that notwithstanding the establishment of assigned service areas for electric utilities, new customers at new locations that develop after March 21, 1975, located outside municipalities as the boundaries existed on March 21, 1975, and who require electric service with a contracted minimum demand of 2,000 kilowatts or more are not obligated to take electric service from the electric utility having the assigned service area where the customer is located if, after notice and hearing, the South Dakota Public Utilities Commission determines after consideration of the following factors:

1. The electric service requirements of the load to be served.
2. The availability of an adequate power supply.
3. The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto.
4. The proximity of adequate facilities from which electric service of the type required may be delivered.
5. The preference of the consumer.
6. Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill the customer's requirements.

Minnesota

Minnesota Statutes section 216B.37 provides that it is declared to be in the public interest that, in order to encourage the development of coordinated state-wide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economically, efficient, and adequate electric service to the public, the state of Minnesota is divided into geographic service areas within which a

specified electric utility shall provide electric service to customers on an exclusive basis. For purposes of the Minnesota exclusive electric service area law, electric utility means persons, their lessees, trustees, and receivers, separately or jointly, now or hereafter operating, maintaining, or controlling equipment or facilities for providing electric service at retail and includes facilities owned by a municipality or by a cooperative electric association.

Minnesota Statutes section 216B.39 provides that on or before six months from April 12, 1974, each electric utility was required to file with the Minnesota Public Utilities Commission a map or maps showing all its electric lines outside of incorporated municipalities as they existed on April 12, 1974. This section also provides that each electric utility was required to submit in writing a list of all municipalities in which it provided electric service on April 12, 1974, and that where two or more electric utilities served a single municipality, the commission could require each utility to file with the commission a map showing its electric lines within the municipality.

This section requires that on or before 12 months from April 12, 1974, the commission must have established the assigned service area or areas of each electric utility and prepared or cause to be prepared a map or maps to accurately and clearly show the boundaries of the assigned service area of each electric utility. This section also provides that to the extent it is not inconsistent with the expressed legislative policy, the boundaries of each assigned service area, outside of incorporated municipalities, is a line equidistant between electric lines of adjacent electric utilities as they existed on April 12, 1974.

Minnesota Statutes section 216B.40 provides that, except as otherwise provided, each electric utility has the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility may render or extend electric service at retail within the assigned service area of another electric utility unless the electric utility consents thereto in writing, provided that an electric utility may extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

There are two exceptions to the exclusive service right contained in section 216B.40. Section 216B.41 provides that after April 12, 1974, the exclusion by incorporation, consolidation, or annexation of any part of the assigned service area of an electric utility within the boundaries of a municipality does not in any respect impair or affect the rights of the electric utility to continue and extend electric service at retail throughout any part of its assigned service area unless the municipality which owns and operates an electric utility elects to purchase the facilities and property of the electric utility. The other exception is

provided for large customers. Section 216B.42 provides that customers located outside of municipalities and who require electric service with a connected load of 2,000 kilowatts or more are not obligated to take electric service from the electric utility having the assigned service area where the customer is located if, after notice and hearing, the Public Utilities Commission determines after consideration of the following factors:

1. The electric service requirements of the load to be served.
2. The availability of an adequate power supply.
3. The development or improvement of the electric system of the utility seeking to provide the electric service, including the economic factors relating thereto.
4. The proximity of adequate facilities from which electric service of the type required may be delivered.
5. The preference of the customer.
6. Any and all pertinent factors affecting the ability of the utility to furnish adequate electric service to fulfill customers' requirements.

Again, as in South Dakota, Minnesota electric utilities may extend electric lines for electric service to their own utility property and facilities.

Finally, Minnesota Statutes section 216B.44 provides a procedure whereby if a municipality owning and operating an electric utility extends its corporate boundaries through annexation or consolidation or determines to extend its service territory within its existing corporate boundaries, the municipality may purchase the facilities of the electric utilities serving the area.

Montana

The Montana Territorial Integrity Act is codified at Montana Code Annotated section 69-5-101 et seq. However, it should be noted the provisions of the Act were substantially amended in the Electric Utility Industry Restructuring and Customer Act of 1997 to facilitate the implementation of that Act. Montana Code Annotated section 69-5-104 provides that each electric service facilities provider has the right to provide electric service facilities to all premises being served by it or to which any of its facilities are attached on May 2, 1997. As used in the Montana Territorial Integrity Act, a utility is a public utility regulated by the Montana Public Service Commission or a utility qualifying as an electric cooperative. An electric utility is a person, firm, or corporation other than an electric cooperative that provides electric service facilities to the public, and an electric cooperative is a rural electric cooperative or a foreign corporation admitted under the Montana cooperative statutes to do business in that state.

Section 69-5-105 provides that the electric facilities provider having a line nearest the premises shall provide electric service facilities to the premises

initially requiring service after May 2, 1997, which creates a rebuttable presumption that the nearest line is the least-cost electric service facility to the new customer. However, this section provides that a customer or another electric facilities provider may rebut the presumption, and another electric facilities provider may provide the electric service facilities if it can do so at less cost.

Section 69-5-106 concerns electric service facilities to large customers. This section provides that an electric utility has the right to furnish electric service facilities to any premises if the estimated connected load for full operation at the premises will be 400 kilowatts or larger within two years from the date of initial service and if the electric utility can extend its facilities to the premises at less cost to the electric utility than the electric cooperative cost. The estimated connected load must be determined from the plans and specifications prepared for construction of the premises or, if an estimate is not available, must be determined by agreement of the electric facilities provider and the customer. The fact that the actual connected load after two years from the date of initial service is less than 400 kilowatts does not affect the right of the electric facilities provider initially providing electric service facilities to continue to provide electric service facilities to the premises.

Section 69-5-108 allows utilities to enter into agreements that identify the geographical area to be exclusively served by each electric facilities provider that is a party to the agreement overriding the provisions of the Territorial Integrity Act. However, all agreements between electric facilities providers must be submitted to and approved by the Montana Public Service Commission. The agreement submitted must include a map and a written description of the area and the terms and conditions pertaining to the implementation of the agreement. In approving agreements the Montana Public Service Commission is required to consider the reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electric service to the existing or future ratepayers of any electric facilities provider party to the agreement and the reasonable likelihood the agreement will eliminate existing or potentially uneconomic duplication of electric service facilities.

POSSIBLE STUDY APPROACH

In conducting its study of the state's Territorial Integrity Act, the committee could solicit testimony from a number of sources. These include the Public Service Commission and its staff, representatives of the state's investor-owned utilities, and representatives of the state's rural electric cooperatives, as well as others affected by the operation of the Territorial Integrity Act.

ATTACH:1

Fifty-sixth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and ninety-nine

SENATE BILL NO. 2389
(Senators St. Aubyn, Fischer, B. Stenehjem)
(Representatives Hawken, Keiser, Timm)

AN ACT to create and enact a new subsection to section 54-35-18.2 and a new section to chapter 54-35 of the North Dakota Century Code, relating to study areas of the electric industry competition committee; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 54-35-18.2 of the 1997 Supplement to the North Dakota Century Code is created and enacted as follows:

Study chapter 49-03 and other relevant statutes relating to the extension of electric lines and facilities and the provision of electric service by public utilities and rural electric cooperatives within and outside the corporate limits of a municipality. The study must specifically address and include the criteria used by the public service commission under chapter 49-03 in determining whether to grant a public utility a certificate of public convenience and necessity to extend its electric lines and facilities to serve customers outside the corporate limits of a municipality and the circumstances, if any, under chapter 49-03 and other relevant statutes under which a rural electric cooperative may provide electric facilities and service to new customers and existing customers within municipalities being served totally or primarily by a public utility.

SECTION 2. A new section to chapter 54-35 of the North Dakota Century Code is created and enacted as follows:

Electric industry competition committee - Recommendations. Notwithstanding section 54-35-18.2, the electric industry competition committee shall submit proposed legislation, if necessary, as a result of the study conducted pursuant to section 1 of this Act to the fifty-seventh legislative assembly.

SECTION 3. EXPIRATION DATE. This Act is effective through July 31, 2001, and after that date is ineffective.