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CONSTITUTIONAL AND OTHER CONSIDERATIONS REGARDING IMPOSING A MEGAWATT PER HOUR TAX ON MUNICIPAL POWER SYSTEMS

This memorandum discusses the constitutionality of the state imposing a megawatt per hour tax on electricity generated and distributed by municipal power systems. The Constitution of North Dakota Article X, Section 18, provides in part that "any . . . city may make internal improvements and may engage in any industry, enterprise or business." Thus, it is clear that cities may engage in the generation, transmission, and distribution of electricity. However, this section does not provide a tax exemption to that business or enterprise and does not attempt to prohibit the state from taxing that business or enterprise.

The Constitution of North Dakota Article X, Section 5, provides that "property of the state, county, and municipal corporations, to the extent immunity from taxation has not been waived by an act of the legislative assembly . . . shall be exempt from taxation." It appears that a megawatt per hour tax on electricity generated, transmitted, or distributed by a municipal power system would not run afoul of this constitutional provision for at least two reasons. First, this section exempts property of municipal corporations and a megawatt per hour tax would be more in the nature of a tax on electricity distributed rather than a tax on property. Secondly, the exemption applies only to the extent immunity is not waived by an act of the Legislative Assembly. It appears that even if a megawatt per hour tax is viewed as a form of property taxation, the Legislative Assembly could waive the constitutional exemption granted a municipal corporation so the tax could apply to electricity generated, transmitted, or distributed by a municipal power system.

The Constitution of North Dakota Article VII, Section 11, provides that "[t]he power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly." Although this section has not been interpreted by the North Dakota Supreme Court it could be argued that by enacting a megawatt per hour tax on electricity distributed by a municipal power agency, the state has abridged the power of a city to franchise a public utility. There appear to be no cases from other jurisdictions which interpret language similar to Section 11 of Article VII as prohibiting the taxation of a municipal power agency. In *Schermerhorn v. Local 1625 of Retail Clerks Intern. Ass'n, AFL-CIO*, 141 So.2d 269, 276 (Fla. 1962), the Supreme Court of

Florida stated that "to abridge" is to deprive, to cutoff, to diminish, curtail. In *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964), the federal district court for the Southern District of Mississippi said that "abridge" means to diminish or curtail, to deprive or cut off. In *Jolicoeur v. Mihaly*, 96 Cal. Rptr. 697, 700; 488 P.2d 1, 5 C.3d 565 (1971), the Supreme Court of California said "abridge" means diminish, curtail, deprive, cut off, or reduce. It does not appear that a tax uniformly applied to all electricity distributed would diminish authority of cities to franchise public utilities. It appears that only if such a tax was discriminatory in some manner would it diminish city authority to franchise public utilities. It is also significant to note that the constitutional provision restricts interference with the franchise of a public utility and not the operation of the public utility.

North Dakota Century Code (NDCC) Chapter 40-33 authorizes cities to operate municipal utilities. This chapter does not contain any prohibition on taxing municipal utilities such as electricity distribution systems. However, Section 40-33-10 should be amended if the Legislative Assembly were to enact a megawatt per hour tax that is applicable to municipal power systems or agencies. This section provides that "[a]ll money received by a municipality for the service of any utility owned and operated by the municipality, and all money, receipts, and returns received from any investments of the earnings of such utilities, shall be paid into the treasury of the municipality and kept in a fund known as the municipal utilities fund. All of the moneys, earnings, and receipts deposited in such fund shall be kept separate and distinct from all other funds of the municipality until used. The fund shall be used only for the purposes and disbursed only in the manner provided by this chapter." This section should be amended to make clear that a portion of the moneys collected by a municipal power system may be remitted to the state in the form of a megawatt per hour tax.

In conclusion, except for a possible argument concerning the constitutional prohibition on the abridgment of a municipality's power to franchise a public utility, there are no serious constitutional impediments to the Legislative Assembly enacting a megawatt per hour tax on electricity generated, transmitted, or distributed by municipal power systems or agencies. However, NDCC Section 40-33-10 may need to be amended to facilitate such a tax.