

TERRITORIAL INTEGRITY ACT - HISTORY AND OPERATION

This memorandum discusses the history and operation of North Dakota's Territorial Integrity Act. This law was enacted by the Legislative Assembly in 1965 and is codified as North Dakota Century Code (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 his 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" shall mean a privately owned supplier of electricity offering to supply or supplying electricity to the general public.
2. "Person" shall include an individual, an electric public utility, a corporation, a limited liability company, an association, or a rural electric cooperative.
3. "Rural electric cooperative" shall include 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 that 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." However, in *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414 (N.D. 1967), this

section was declared to be an unconstitutional delegation of legislative authority. However, the remainder of the Act was upheld.

Although the legislative history of the Territorial Integrity Act is extensive, the rationale for its enactment was summarized recently 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 Cooperative Inc. v. Public Service Commission* 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 of municipalities prior to 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 customer was not being served. In this event, the customer could not be served unless authorized by the commission in accordance with those provisions of the Act relating to the extensions of service.

Public utilities were allowed to make extensions of service in municipalities where 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 into 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 that the law was an unconstitutional classification for several reasons. They contended that 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 that cooperatives had a right to complain against public utilities' actions, but the utilities had no such right as against actions of the cooperatives. Thus, they maintained that the Territorial Integrity Act was unfair, arbitrary, and unreasonable, and 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 that the Act did amount to a classification in that public utilities and cooperatives were treated dissimilarly, but that 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 that 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 into 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 the *Johanneson* decision immediately became evident. Since 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 that 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 that the controversy was fully submitted to the commission by an interested party in such a manner so that a decision could be made, and that 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 upheld.

Although, as noted above, 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.*, 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." *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 418 (N.D. 1969). Thus, customer preference is not a controlling factor but only one of a number of factors which must be considered for a certificate of public convenience and necessity to be granted.

Finally, as noted above, 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).