DOE/CS/20289-35

STUDY OF THE IMPACTS OF REGULATIONS AFFECTING THE ACCEPTANCE OF INTEGRATED COMMUNITY ENERGY SYSTEMS

PRELIMINARY BACKGROUND REPORT

Public Utility, Energy Facility Siting and Municipal Franchising Regulatory Programs in North Dakota

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CLIFFORD L. WEAVER
KEVIN C. GALLAGHER
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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
under Contract No. DE-AC02-78CS20289

ABSTRACT

This report is one of a series of preliminary reports describing the laws and regulatory programs of the United States and each of the 50 states affecting the siting and operation of energy generating facilities likely to be used in Integrated Community Energy Systems (ICES). Public utility regulatory statutes, energy facility siting programs, and municipal franchising authority are examined to identify how they may impact on the ability of an organization, whether or not it be a regulated utility, to construct and operate an ICES.

This report describes laws and regulatory programs in North Dakota. Subsequent reports will (1) describe public utility rate regulatory procedures and practices as they might affect an ICES, (2) analyze each of the aforementioned regulatory programs to identify impediments to the development of ICES and (3) recommend potential changes in legislation and regulatory practices and procedures to overcome such impediments.

CHAPTER 1

INTRODUCTION

One response to current concerns about the adequacy of the nation's energy supplies is to make more efficient use of existing energy sources. The United States Department of Energy (DOE) has funded research, development and demonstration programs to determine the feasibility of applying proven cogeneration technologies in decentralized energy systems, known as Integrated Community Energy Systems (ICES), to provide heating, cooling and electrical services to entire "communities" in an energy conserving and economic manner.

The relevant "community" which will be appropriate for ICES development will typically consist of a combination of current energy "wasters" -- i.e., installations with large energy conversion facilities which now exhaust usable amounts of waste heat or mechanical energy -- and current energy users -- i.e., commercial or residential structures which currently obtain electricity and gas from a traditional central utility and convert part of it on customer premises to space heating and cooling purposes.

In most current applications, energy conversion facilities burn fuels such as coal, oil or natural gas to produce a single energy stream, such as process steam or electricity, for various industrial processes or for sale to other parties. However, the technology exists to produce

more than one energy stream from most energy conversion processes so that the input of a given amount of fuel could lead to the production and use of far more usable energy than is presently produced. This technology is the foundation of the ICES concept. Current examples of the technology can be found on university campuses, industrial or hospital complexes and other developments where a central power plant provides not only electricity but also thermal energy to the relevant community.

It is generally assumed by DOE that ICES will be designed to produce sufficient thermal energy to meet all the demands of the relevant community. With a given level of thermal energy output, an ICES generation facility will be capable of producing a level of electricity which may or may not coincide with the demand for electricity in the community at that time. Thus, an ICES will also be interconnected with the existing electric utility grid. Through an interconnection, the ICES will be able to purchase electricity when its community's need for electricity exceeds the amount can be produced from the level of operations needed to meet the community's thermal needs. In addition, when operations to meet thermal needs result in generation of more electricity than necessary for the ICES community, the ICES will be able to sell excess electricity through the interconnection with the grid.

ICES may take a variety of forms, from a single owner-user such as massive industrial complex or university campus where all energy generated is used by the owner without sales to other customers, to a large residential community in which a central power plant produces heat and electricity which is sold at retail to residents of the community. Since successful operation of an ICES presupposes that the ICES will be able to use or sell all energy produced, it can be anticipated that all ICES will at some point seek to sell energy to customers or to the electric utility grid from which the electricity will be sold to customers. By their very nature ICES are likely to be public utilities under the laws of many, or even all, states.

The Chicago law firm of Ross, Hardies, O'Keefe, Babcock & Parsons has undertaken a contract with the Department of Energy to identify impediments to the implementation of the ICES concept found in existing institutional structures established to regulate the construction and operation of traditional public utilities which would normally be the suppliers to a community of the type of energy produced by an ICES.

These structures have been developed in light of policy decisions which have determined that the most effective means of providing utility services to the public is by means of regulated monopolies serving areas large enough to permit economies of scale while avoiding wasteful

duplication of production and delivery facilities. These existing institutional structures have led to an energy delivery system characterized by the construction and operation of large central power plants, in many cases some distance from the principal population centers being served.

In contrast, effective implementation of ICES depends to some extent upon the concept of small scale operations supplying a limited market in an area which may already be served by one or more traditional suppliers of similar utility services. ICES may in many instances involve both existing regulated utilities and a variety of non-utility energy producers and consumers who have not traditionally been subject to public utility type regulation. It will also require a variety of non-traditional relationships between existing regulated utilities and non-regulated energy producers and consumers.

Ross, Hardies, O'Keefe, Babcock & Parsons is being assisted in this study by Deloitte Haskins & Sells, independent public accountants, Hittman Associates, Inc., engineering consultants, and Professor Edmund Kitch, Professor of Law at the University of Chicago Law School.

The purpose of this report is to generally describe the existing programs of public utility regulation, energy facility siting and municipal franchising likely to relate to the development and operation of an ICES, and the construction of ICES facilities in North Dakota. Attention is

given to the problems of the entry of an ICES into a market for energy which has traditionally been characterized by a form of regulated monopoly where only one utility has been authimplementation of the ICES concept and a series of recommendations for responding to those impediments. orized to serve a given area and to the necessary relationships between the ICES and the existing utility. In many jurisdictions legal issues similar to those likely to arise in the implementation of the ICES concept have not previously been faced. Thus, this report cannot give definitive guidance as to what will in fact be the response of existing institutions when faced with the issues arising from efforts at ICES implementation. Rather, this report is descriptive of present institutional frameworks as reflected in the public record.

Further reports are being prepared describing the determination and apportionment of relevant costs of service, rates of return and rate structures for the sale and purchase of energy by an ICES. Impediments presented by existing institutional mechanisms to development of ICES will be identified and analyzed. In addition to identifying the existing institutional mechanisms and the problems they present to implementation of ICES, future reports will suggest possible modifications of existing statutes, regulations and regulatory practices to minimize impediments to ICES.

This report is one of a series of preliminary reports covering the laws of all 50 states and the federal government. In addition to the reports on individual states, Ross, Hardies, O'Keefe, Babcock & Parsons is preparing a summary report which will provide a national overview of the existing regulatory mechanisms and impediments to effective implementation of the ICES concept and a series of recommendations for responding to those impediments.

CHAPTER 2
REGULATION OF PUBLIC UTILITIES IN NORTH DAKOTA

The North Dakota Public Service Commission (PSC) is a constitutional body[1/] responsible for the regulation of all public utilities. The PSC is composed of three elected commissioners who serve for six year terms. Section 83 of the state's Constitution gives the legislature the power to prescribe the powers and duties of the PSC. Pursuant to this authorization, the legislature adopted Title 49 of the North Dakota Century Code prescribing the jurisdiction as well as the powers and duties of the PSC. It also prescribes various rules and regulations pertaining to electric, gas and other public utilities. All authority over public utilities is vested in the PSC. Local governments, except for the powers inherent in their franchising and zoning authority, are not given any control over utility regulation.

I. JURISDICTION OF THE REGULATORY AGENCY

A. Utilities Covered

Title 49 specifies that the PSC has jurisdiction over the following:

1. Contract and common carriers for the transportation of persons and property;
2. Telegraph and telephone companies engaged in the transmission of messages of conversation;
3. Pipeline companies for the transportation of gas, oil, coal and water;

4. Electric light companies for the purpose of generating and distributing light, heat or power;

5. Gas companies for the manufacture or distribution of gas, natural or artificial;

6. Water companies for the storage and distribution of water for domestic or other beneficial use;

7. All heating companies for the distribution of heat;

8. Warehouse, packing and cold-storage companies for the marketing, storage or handling of food and other agricultural products;

9. Stockyard companies engaged in the business of caring for, feeding and watering livestock; and

10. All other public utilities engaged in business in this state or in any county, city, township, village or other political subdivision of the state.2/

A public utility is defined in the statute as "any association, person, firm, corporation or agency engaged or employed in any business enumerated in this title."3/ Although the statute does not specifically refer to steam or cold, an ICES providing steam or air conditioning service to the public would probably be subject to jurisdiction as a heating company or "other" public utility.4/

The statute does not require a sale or the receipt of compensation for the function to be subject to jurisdiction. Neither does it explicitly provide that the service must be offered to the "public," although the epithet "public"

repeatedly appears before the word "utility" throughout the statute. No judicial interpretation of the law has been found dealing with the issue of what constitutes a "public" utility. Similarly, nowhere in the public utility law does there appear a definition of the term. Some PSC decisions have discussed this issue and Mr. Ray Walton, Commerce Counsel for the PSC, has acknowledged there must be some public element before the PSC will assert jurisdiction. He suggested that the utility must, at a minimum, be serving retail customers before it is amenable to regulation.[5/]

In an administrative decision, the PSC declined to assert jurisdiction over a coal gasification company seeking a certificate of public convenience and necessity. The company sought to construct and operate a coal gasification plant manufacturing substitute natural gas from lignite coal for resale in interstate commerce. In a memorandum opinion, the Commission corroborated the opinion of Mr. Walton stating that "should the applicant . . . engage in the distribution and sale of its products at retail within the State of North Dakota, all of the applicant's activities would then be subject to PSC regulation."[6/] It should be noted, that though the Commission decided it did not have jurisdiction to issue a certificate of public convenience and necessity, it acknowledged that it did have jurisdiction over the

siting of the plant pursuant to the North Dakota Plant Siting and Transmission Line Routing Act.[7]

B. Utilities Exempt From Regulation

The North Dakota Century Code provides the following exemption:

> Nothing in this chapter shall authorize the commission to make any order affecting rates, contracts, services rendered, adequacy or sufficiency of any facilities, or the rules or regulation of any public utility owned and operated by the state or by any city, county, township or other political subdivision of the state or any public utility that is not operated for profit, but all other provisions herein shall apply to such utilities.[8]

The exemption of not-for-profit utilities is designed principally to cover cooperatively-owned and operated utilities. While a utility owned and operated by a political subdivision of the state or operated on a not-for-profit basis is exempt from a substantial portion of the PSC's jurisdiction, such utility must still obtain the required certificate of public convenience and necessity before commencing operation. (See generally, the discussion in Part IV of this chapter.)

II. POWERS OF THE PSC

The powers of the PSC are listed generally in chapter 49-02 of the North Dakota Century Code. Various other specific responsibilities are enumerated throughout Title 49. Some of the more general powers of the PSC include the power to supervise the rates of all public utilities;[9]

prescribe a system of accounts;[10] value utility property;[11] regulate the sale or lease of property;[12] authorize the construction or siting of new plants or the expansion of existing plants;[13] authorize the extension of service to new customers;[14] control the transfer of franchises or property;[15] issue certificates of public convenience and necessity;[16] and establish and regulate standards of service.[17]

The PSC also has the power to resolve service area disputes between parties. Presumably, this would occur only where one utility attempts to provide service in an area without having obtained a certificate of public convenience and necessity. In such a case, the PSC is empowered, after complaint, notice and hearing, to enjoin the utility from operating or otherwise doing business in a particular area.[18] The language of the particular sections indicates that all public utilities - whether publicly, cooperatively or investor-owned - are subject to PSC's authority in this regard.

The PSC also has control over the abandonment of services. The statute places a utility under a duty to furnish, provide and maintain service to patrons.[19] Similarly, a 1977 enactment states that no public utility shall dispose of or encumber any part of its system necessary or useful in the performance of its duties without first having secured from the PSC an order authorizing it to

do so.[20] Prior to the enactment of this provision, a utility could be ousted by a municipality without the consent of the PSC.[21] Today, however, a utility may not withdraw from an area without first having obtained approval from the Commission.

IV. AUTHORITY TO PROVIDE SERVICE IN A GIVEN AREA

A. Generally

A public utility in North Dakota may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system, without first obtaining from the Commission a certificate stating that public convenience and necessity require or will require such construction and operation.[22]

Although the statute provides that a certificate is required to extend existing facilities, there are limited exceptions. No certificate is required for a public utility which extends its facilities, or for an electrical utility which extends its electric distribution lines, within the corporate limits of any municipality where it has lawfully commenced operations.[23] No authorization for the extension is required provided such exclusion does not interfere with existing services supplied by another utility and provided any duplication of services which results is not deemed unreasonable by the PSC.

The issuance of a certificate is not an exclusive grant of authority allowing a single utility to operate in a

given area. According to counsel for the PSC, the purpose of requiring certificates is to avoid wasteful duplication and to protect a satisfactory supplier, not necessarily to enhance the monopolistic position of the first utility to provide service. Competitors have been and will be given authorization to provide similar services in the same service area. If an ICES were subject to jurisdiction, it would have to show good cause before being granted a certificate impinging on an already established supplier.[24/] The specific factors considered prior to issuing the second certificate are discussed below.

B. Certification Procedures

The North Dakota Century Code outlines the procedures to be followed when making an application for a certificate of public convenience and necessity. The articles of incorporation or charter of the utility must first be filed with the PSC.[25/] Evidence must be submitted showing that the "applicant has received the consent, franchise, permit, ordinance or other authority of the proper municipality or other public authority, if required, or has or is about to make application therefor."[26/] In addition, a non-electrical public utility must submit "a financial statement, a description of the type of service to be offered, a map and description of the area to be served, and a list of all other public utilities providing similar service in the area."[27/]

Once an application is complete, notice is to be given to all utilities operating in the area proposed to be served by the applicant and to all other interested parties as determined by the PSC. A hearing follows after which the PSC makes its determination. If no interested party requests a hearing, the PSC may grant a certificate without a hearing. 28/

No particular procedure is outlined by the legislature for the transfer of a certificate to another utility. The statute only requires that the prior approval of the PSC be obtained for a transfer. 29/

C. Factors Considered Regarding Issuance of Certificate

Both the statutory and case law of North Dakota outline various factors to be considered before issuing a certificate of public convenience and necessity. The North Dakota statutes, in dealing with non-electric public utilities, directs the Commission to consider the:

1. Need for the service,
2. Fitness and ability of the applicant to provide service,
3. Effect on other public utilities providing similar service,
4. Adequacy of proposed service,
5. Proposed rates,
6. Proposed design, and
7. Such other information as the Commission may deem appropriate. 30/

While these factors are contained in a section relating to non-electric utilities, counsel for the PSC opined that these factors are also applicable to electrical utilities. (Telephone conversation with Ray Walton, Commerce Counsel, June 19, 1978).

The case law of North Dakota has also developed certain guidelines to be considered before issuing a certificate of public convenience and necessity. Included are concerns for:

1. Reliability and capacity of the supplier,
2. The most efficient and economical supplier, and
3. Avoidance of wasteful duplication.31/

Another case has pointed to concerns for:

1. Existence of reasonable necessity,
2. Avoidance of economic waste and public burdens, and
3. Duplicate facilities jeopardizing existing structures.32/

The preference of individual customers is given little, if any, consideration. Indeed, the North Dakota Supreme Court has remarked that customer preference is not to be a controlling factor in determining extensions of services by public utilities, but rather the public convenience and necessity should be the paramount concern of the PSC.33/

V. APPEALS OF REGULATORY DECISIONS

After the PSC has made a final determination on any matter, the aggrieved party is entitled to appeal according to the procedures outlined in chapter 28-32 of the North Dakota Century Code.[34] Although the chapter allows for a petition for rehearing, the North Dakota Supreme Court has held that an aggrieved party is not required to request a rehearing as a condition precedent to an appeal to the district court.[35]

The aggrieved party may first appeal, within thirty days, to the district court designated by law. A subsequent appeal may then be taken to the North Dakota Supreme Court if filed within sixty days of the district court's decision.[36] An appeal to the district court is based on the record as certified to the court by the PSC.[37] The court will not, generally, hear new evidence. Rather, if new, material evidence is presented, the court may direct the agency to reopen the hearing and reconsider its decision in light of the new evidence.[38]

Chapter 28-32 also provides that the court shall affirm the decision of the agency unless it shall find that any of the following are present:

1. The decision or determination is not in accordance with the law.

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

3. The provisions of Chapter 28-32 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 and decisions of the agency are not supported by its findings of fact.39/

FOOTNOTES

1. N.D. Const. §82.

2. N.D. Cent. Code §49-02-01.

3. N.D. Cent. Code §49-01-01.

4. §49-02-01(7)). The cooling capabilities of an ICES could possibly be subject to regulation under the provision reaching pipeline companies transporting water. N.D. Cent. Code §49-02-01(3). The latter point is obviously less clear and no cases have dealt with the issue.

5. Telephone conversation of June 19, 1978.

6. Emphasis added. In re ANG Coal Gasification Co., Hearings Before the Public Service Commission of North Dakota, Case No. 9173, mimeo p. 4, (1975).

7. Id. at 3, 4. See ch. 3 infra.

8. §42-02-011. Emphasis added.

9. §49-02-02.

10. §49-02-12.

11. §49-06-02 et al.

12. §49-09-10.

13. §49-22-07-17.

14. §49-03-01, §49-03.1-01.

15. §§49-04-05,06.

16. §49-03-01, §49-03.1-0

17. §§49-02-04, 11.

18. §§49-03-01.4, 49-03.1-08.

19. §49-04-01. Emphasis added.

20. §49-04-05.

21. See, e.g., In Re First Farmers Telephone Assoc., 1930B Pub. U. Rep. 115, discussed in ch. 4, infra.

22. §§49-03-01, 49-03.1-01. For the purpose of the statutory provisions dealing with the issuance of certificates of public convenience and necessity, "electric public utility" means "a privately owned supplier of electricity offering to supply or supplying electricity to the general public." §49-03-01.5(1). "Public utility" includes any party engaged or employed in furnishing "its product or services to the public generally and subject to the jurisdiction of the commission" but does not include an electric public utility. §49-03.1-02(2). For purposes of this report, the term public utility includes electric public utilities as well as public utilities.

23. §§49-03-01, 49-03-01.3.

24. Telephone conversation with Ray Walton, Commerce Counsel, June 17, 1978.

25. §§49-03-02, 49-03.1-05.

26. §§49-03-02, 49-03.1-05.

27. §49-03.1-03.

28. §§49-03-02, 49-03.1-05.

29. §49-04-05.

30. §49-03.1-04.

31. Tri-County Elec. Cooperative Inc. v. Elkin, 224 N.W.2d 785 (1974).

32. Eckre v. Public Service Commission, 247 N.W.2d 656 (1976).

33. Tri-County Elec. Co-op Inc. v. Elkin, 224 N.W.2d 656 (1976).

34. §49-05-12.

35. In Re Wheatland, 77 N.D. 194, 42 N.W.2d 321 (1950).

36. §§28-32-21, 49-05-15.

37. §28-32-17.

38. §28-32-18. Notwithstanding the provision that the district court is limited to the record certified to it by the administrative agency, case law prior to 1977 had established that on an appeal from a decision by the PSC, a trial de novo was required. In Re Midwest Motor Express, 23 N.W. 2d 49 (1946). However, a 1977 modification of the statute has reaffirmed that the "evidence considered by the court shall be confined to the record filed with the court." §28-32-19.

39. §28-32-19.

CHAPTER 3
SITING OF ENERGY FACILITIES IN NORTH DAKOTA

I. PUBLIC AGENCIES REGULATING SITING

A. Public Service Commission and Siting Act

North Dakota has recently enacted a comprehensive siting statute which could affect many ICES developments. The statute[1/] provides for the issuance by the PSC of a certificate of site compatibility for an energy conversion or transmission facility.

Under the statute the PSC has siting jurisdiction over an "energy conversion facility" if that facility is designed for or capable of:

a. Generating 50,000 kilowatts or more of electricity;

b. Manufacturing or refining one hundred million cubic feet or more of gas per day;

c. Manufacturing or refining fifty thousand barrels or more of liquid hydrocarbon products per day; or

d. Enrichment of uranium materials.[2/]

Jurisdiction is given to the PSC to site an "energy transmission facility" if that facility is:

a. An electric transmission line and associated facility designed for one hundred fifteen kilovolts or more;

b. A gas or liquid transmission line or associated facilities designed for or capable of transporting coal, gas or liquid hydrocarbon products; or

c. A liquid transmission line or associated facilities designed for or capable of transporting water from or to an energy conversion facility.3 /

There has been no case or administrative interpretation discussing whether a steam pipeline falls within the purview of the siting statute. However, it is the opinion of the head of the Siting Division of the PSC that a steam pipeline would be covered because the statute is intended to be as broad as possible.4/

The ownership of the energy conversion or transmission facilities is immaterial to the jurisdiction of the PSC with respect to siting. All utilities operating such facilities are covered regardless of whether they are publicly, cooperatively or investor-owned, for a utility is very broadly defined and includes any party involved with energy generation or transmission.5/

The express language of the statute provides that no "utility shall begin construction . . . or exercise the right of eminent domain . . . without first having obtained a certificate of siting compatibility . . . ."6/ After acquiring the siting certificate, a utility may proceed to construct or improve the site for the intended purposes. However, if the construction or improvement commences more than four years after issue of the siting certificate, the utility must certify that the site continues to meet the conditions which were the basis for the original authorization.6a/

An extension of an existing facility requires a siting certificate unless such extension was contemplated in the original certificate for the facility. Thus, the PSC always has jurisdiction over conduct altering the status quo. This is consistent with the statutory policy that siting jurisdiction should extend to the location, construction and operation of energy facilities to assure that they "will produce minimal adverse effects on the environment."[7/]

The statute provides that a facility shall be constructed, operated and maintained in conformity with any terms and conditions contained in the certificate of site compatibility.[8/] Furthermore, the PSC has the right to revoke a certificate if any conditions are violated.[9/] Hence, the PSC's authority over siting extends to a limited extent to the operation of a sited facility.

The PSC is authorized to promulgate rules and regulations.[10/] Such rules have recently been adopted and codified in the North Dakota Administrative Code.[11/] The rules and regulations, while echoing the procedural formalities outlined in the siting statute, also enumerate criteria to be considered when evaluating a proposed site.[12/]

Since the adoption of the siting statute in 1975, there have been no court cases testing the PSC's jurisdiction or interpreting the statute. However, the PSC apparently

perceives its jurisdiction as quite comprehensive and it has asserted control over most utility projects.[13/]

B. Other Agencies with Role in Siting

The PSC's siting jurisdiction is not exclusive and does not preempt or supercede the authority of other agencies to approve various aspects of the construction of a facility subject to the siting act. However, state agencies are bound by the decision of the PSC with respect to the site designation of a facility. A utility must still obtain permission from other concerned authorities before constructing or operating facilities at a site.[14/] In addition, the statute specifically provides, "no site or route shall be designated which violates state agency regulations."[15/] The following is a brief description of some of the major agencies which may have authority over one or another aspect of an ICES project which is subject to the siting law.

1. Air Pollution Control Agency - Department of Health

The Air Pollution Control Act[15a/] authorizes the State Department of Health, along with an advisory council, to promulgate such rules as are necessary to control the quality of the air. The Act requires a person to obtain a permit before constructing any source "capable of causing or contributing to air pollution."[16/] The department is responsible

for issuing permits and otherwise administering the provisions of the Air Pollution Control Act.

2. Water Pollution Control Agency

The State Department of Health is responsible for administering the North Dakota water pollution control laws.[17] A ten member water pollution control board assists and advises the department in development of water pollution control programs. Authority is conferred on the Department of Health to establish any plans or rules and regulations that are necessary to conserve the waterways and prevent pollution. Permits are required "to discharge sewage, industrial wastes, or other wastes into state waters . . . ."[18]

3. State Planning Division

The State Planning Division is authorized to prepare plans for the physical development of the state and to coordinate the planning activities of local agencies. The enabling statute states that its purpose is "to advise", consult, coordinate, assist and contract with or on behalf of the various planning agencies in the state in developing and harmonizing the planning activities of this state."[19] Although the statute allows the division to "exercise all powers necessary and proper for the dischrage of its duties,"[20] it does not require that a utility obtain the Division's approval prior to constructing an industrial facility.

4. Soil Conservation Program

A Soil Conservation Law[21] creating a Soil Conservation Committee, and authorizing the establishment of local soil conservation districts has been adopted, among other things, to conserve the soil and soil resouces of the state, to control soil erosion, and to preserve the state's natural resources.[22] The State Soil Conservation Committee is empowered to coordinate the programs of local districts, to provide assistance to districts in carrying out their responsibilities, to encourage the formation of districts, to conduct studies and alalyses of programs of districts as they relate to other districts and state programs, and to develop policy guidelines for districts to follow.[23]

The districts are established by petition to the state committee.[23a] Among other things, each district has the power:

> To develop comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion within the district, which plans shall specify in such detail as may be possible the acts, procedures, performances and avoidances which are necessary or desirable for the effectuation of such plans including the specification of engineering operations . . .[23b]

In addition, districts have authority to formulate and submit to qualified electors in the district regulations "governing the use of lands within the district in the interest of conserving soil and soil resources and preventing and

controlling soil erosion."[23c] Such regulations may include:

> 1. Provisions requiring the carrying out of necessary engineering operations, including the construction of terraces, terrace outlets, check-dams, dikes, ponds, ditches, and other necessary structures;
>
> * * *
>
> 5. Provisions for such other means, measures, operations, and programs as may assist conservation of soil and water resources and prevent or control soil erosion in the district, having due regard to the declaration of policy set forth in section 4-22-01.[23d]

District supervisors are empowered to enforce the regulations[23e] and to seek appropriate court orders to compel compliance by a defendant or to permit the supervisors to perform any necessary work at the expense of the defendant.[23f]

5. Little Missouri River Commission

This Commission is given the power and duty to promulgate management policies coordinating all activities within the confines of the Little Missouri River.[24] The statute expressly prohibits the diversion of any water from the Little Missouri River or its tributaries for any purpose other than agricultural or recreational purposes. Thus, an ICES development could not rely on the Little Missouri River for diversion of cooling or other water.

6. Local Agencies

The energy facility must also comply with county or city land use, zoning or building regulations. However, an exception may be allowed with respect to energy transmission facilities. A permit from the PSC for the construction of a transmission facility in a designated corridor may supercede and preempt local land use, zoning or building regulations if, and only if, the PSC finds "that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers . . . ."[25/]

Listed below are the various local authorities having control over the location of an energy facility.

a. County Zoning

The Board of County Commissioners is granted authority to regulate and restrict the location and use of buildings and structures within the county.[26/] A general plan is required to be filed in the Office of the County Auditor. The county zoning authority does not apply within a municipal district having its own zoning power.[27/]

The statute permits the county to require an entity to obtain approval from the county prior to commencement of construction.[28/] If construction is

commenced in violation of the zoning plan, the Commission, or any affected citizen, may institute legal action to prevent or restrain further construction.[29/]

b. Municipal Zoning

Chapter 40-48 confers upon municipalities the broad power to develop master plans for their future growth. The plan shall, inter alia, include the municipal recommendations concerning the "general location and extent of public utilities and terminals whether publicly or privately owned."[30/]

Once a master plan is adopted, no " . . . structure shall be constructed or authorized in the area shown on the master plan until the location, character, and extent thereof shall have been submitted to and approved by the planning commission."[31/] However, the governing body may overrule the planning commission by a two-thirds vote and directly authorize the construction.

II. CERTIFICATION PROCESS

A. Applicant's Duties

A party owning or operating, or intending to own, operate or construct, a facility subject to the siting law is required annually to prepare and submit a ten year plan to the PSC setting forth the following:

1. A description of the general location, size, and type of all facilities to be owned or operated by the utility during the ensuing ten years, as well as those facilities to be removed from service during the ten-year period.

2. An identification of the location of the tentative preferred site for all energy conversion facilities and the tentative location of all transmission facilities on which construction is intended to be commenced within the ensuing five years and such other information as may be required by the Commission. The site and corridor identification shall be made in compliance with the inventory published by the Commission pursuant to section 49-22-05.1.

3. A description of the efforts by the utility to coordinate the plan with other utilities so as to provide a coordinated regional plan for meeting the utility needs of the region.

4. A description of the efforts to involve environmental protection and land use planning agencies in the planning process, as well as other efforts to identify and minimize environmental problems at the earliest possible stage in the planning process.

5. A statement of the projected demand for the service rendered by the utility for the ensuing ten years and the underlying assumptions for the projection, with such information being as geographically specific as possible, and a description of the manner and extent to which the utility will meet the projected demands.

6. Any other relevant information as may be requested by the Commission.32/

One year prior to seeking to construct a facility requiring a certificate of site compatibility, a party is required to file a letter of intent with the PSC containing a description of the facility and area to be served, a map

of the proposed site or corridor, a projected construction and operation schedule and an estimate of the cost of construction.[33/]

An application for site certification must be filed with the PSC setting forth the following information:

a. A description of the size and type of facility;

b. A summary of any studies which have been made of the environmental impact of the facility;

c. A statement explaining the need for the facility;

d. An identification of the location of the preferred site for any energy conversion facility.

e. An identification of the location of the preferred corridor for any transmission facility.

f. A description of the merits and detriments of any location identified, and a comprehensive analysis with supporting data showing the reasons why the preferred location is best suited for the facility;

g. Such other information as the applicant may consider relevant or the Commission may require.[34/]

An application fee in the amount of $500.00 for each one million dollars of investment in a proposed energy conversion site and/or $5,000 for each one million dollars of investment in a proposed energy transmission site is required.[35/]

B. Public Service Commission's Duties

The PSC is required to serve notice of the filing of an application upon:

1. The chairman of the board of the relevant county commissioners;

2. The chief executive officer of each relevant city;

3. The head of each government agency charged with protecting the environment in the relevant area;

4. The twenty-three additional state agencies enumerated in N.D. Admin. Code §65-06-01-05.[36]

In addition, copies of the application are to be provided to the above enumerated parties upon their request.

Public hearings are required to be held prior to the issuance of a certificate of site compatibility.[37] Notice shall be given by mail to the parties listed above in addition to publication in the official newspaper of each county affected.[38] Costs of such notice are to be borne by the applicant.[39] Consultation with other agencies occurs at these hearings where agencies may present their views for consideration by the PSC.

The PSC is under a time constraint to act upon the applications. The Code provides that "the designation shall be made in a timely manner no later than six months after the filing of a completed application for a certificate requesting designation of a [energy conversion] site or no later than three months after the filing of a completed appliction for a certificate requesting designation of a [transmission line] corridor.[40] These limitations may be

extended for just cause. However, the statute also provides that the "failure of the Commission to act within the time limits provided . . . shall not operate to divest the Commission of jurisdiction in any certification proceeding."[41/]

C. Appeal

The siting statute provides that any party aggrieved by a decision may request a rehearing by the PSC.[42/] Furthermore, a right of appeal to the district court is given following any adverse ruling by the PSC.[43/] As discussed more fully in chapter 2, the statute allows appeals to the district court followed by a subsequent review in the supreme court. Appellate review is based on the record as certified to the district court by the administrative agency. The court is empowered to reverse the agency's decision if it is not in accordance with the law, if it is in violation of the constitutional rights of the appellant, or if the findings of fact are not supported by a preponderance of the evidence.

D. Waiver of Procedure and Time Schedules

The statute provides for a waiver of the otherwise applicable procedures and time schedules for siting certification.

> Any utility which proposes to construct an energy conversion facility with a design not in excess of one hundred thousand kilowatts or a transmission facility within the state may make an application

> to the Commission for a waiver of any of the procedures set forth in this chapter. The Commission, after hearing and upon a finding that the proposed facility is of such length, design, location, or purpose that it will produce minimal adverse effedts, may issue an order waiving specified procedures and time schedules required by this chapter, including but not limited to applications, notices, and hearings, and may forthwith issue a certificate of site compatibility, a route permit, or both, with such conditions as the Commission may require. The proposed facility shall thereafter be constructed, operated, and maintained in compliance with this chapter. 43a/

There is some indication from the policy criteria adopted by the PSC as well as from the statutory factors to be considered by the PSC that an energy conserving facility such as an ICES would be looked upon favorably. Thus, a waiver may prove to be more readily available to an ICES than to other facilities.

III. CERTIFICATION STANDARDS

North Dakota has been quite explicit in codifying factors to be considered during site evaluation. The statement of policy introducing the siting act provides that "sites shall be chosen which minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion." 44/

The statute then proceeds to enumerate twelve broad considerations, including problems or issues raised

by federal, state or local agencies, to be used in the evaluation of a proposed site:

1. Evaluation of research and investigation relating to the effects of energy conversion facilities and transmission facilities on land, water, and air resources and the effects of water and air discharges from such facilities on public health and welfare, vegetation, animals, materials, and aesthetic values, including baseline studies, predictive modeling, and monitoring of the water and air mass at proposed sites and sites of operating energy conversion facilities, evaluation of new or improved methods for minimizing adverse impacts of water and air discharges, and other matters pertaining to the effects of energy conversion facilities on the water and air environment.

2. Environmental evaluation of energy conversion facility sites and transmission facility corridors and routes proposed for future development and expansion and their relationship to the land, water, air, and human resources of the state.

3. Evaluation of the effects of new energy conversion and transmission technologies and systems designed to minimize adverse environmental effects.

4. Evaluation of the potential for beneficial uses of waste energy from proposed energy conversion facilities.

5. Evaluation of adverse direct and indirect environmental effects which cannot be avoided should the proposed site, corridor or route be accepted.

6. Evaluation of alternatives to the proposed site, corridor or route.

7. Evaluation of irreversible and irretrievable commitments of resources should the proposed site, corridor, or route be approved.

8. Analysis of the direct and indirect economic impact of proposed energy conversion facilities and transmission facilities.

9. Analysis of existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.

10. Evaluation of the effect on existing scenic areas, historic sites and structures, or archaeological sites at or in the vicinity of the proposed site, corridor, or route.

11. Evaluation of the effect on areas unique because of biological wealth or because they are habitats for rare and endangered species at or in the vicinity of the proposed site, corridor, or route.

12. Where appropriate, consideration of problems raised by federal agencies, other state agencies, and local entities.45/

One of the most significant considerations for an ICES is the directive that the PSC weigh "the potential for beneficial uses of waste energy from proposed energy conversion facilities."46/

The PSC has expanded on the considerations suggested by the legislature by enumerating certain exclusion areas, avoidance areas, selection criteria and policy criteria to guide participants in siting hearings.

Exclusion areas are those excluded from consideration for energy conversion or transmission sites.47/ These include areas designated or registered by federal or state authorities as parks, landmarks, historic sites, wilderness or scenic areas, preserves, refuges, forests and the like;

other public parks or woodlands; prime and unique farmland; irrigated land or other areas critical to threatened or endangered plant or animal species.[48/] There has been some suggestion that the PSC may ease its restriction on prime farmland; but no action has yet been taken.[49/]

Avoidance areas are defined as those removed from consideration "unless it is shown that under the circumstances there are no reasonable alternatives."[50/] Such areas generally encompass municipalities, woodlands, wetlands, floodplains, geologically unstable areas and areas of historical, archeological, recreational or paleontological significance which are not within the exclusion category. In determining whether to permit construction in an avoidance area, the PSC:

> may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone shall not justify approval of these areas.[51/]

If a proposed area is not eliminated by the exclusion and avoidance criteria, it is then evaluated using a detailed list of selection criteria. These criteria, with respect to energy conversion facilities, include:

A. The impact upon agriculture:

(1) Agricultural production.

(2) Family farms and ranches.

(3) Land which the owner demonstrates has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.

(4) Surface drainage patterns and ground water flow patterns.

(5) The agricultural quality of the crop land.

B. The impact upon the availability and adequacy of:

(1) Law enforcement.

(2) School systems and education programs.

(3) Governmental services and facilities.

(4) General and mental health care facilities.

(5) Recreational programs and facilities.

(6) Transportation facilities and networks.

(7) Retail service facilities.

(8) Utility services.

C. The impact upon:

(1) Local institutions.

(2) Noise sensitive land uses.

(3) Rural residences and businesses.

(4) Aquifers.

(5) Human health and safety.

(6) Animal health and safety.

(7) Plant life.

(8) Temporary and permanent housing.

(9) Temporary and permanent skilled and unskilled labor.

D. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.52/

The list of selection criteria for transmission facilities is somewhat shorter but of a similar nature.53/ All the above criteria, incorporating the gamut of environmental concerns, are applied and considered by the PSC before issuing a certificate of site compatibility. See, e.g. Hearings before the Public Service Commission, In Re ANG Coal Gasification Co., Docket No. 9174 and 9433, mimeo at 15-23 (1977) and In Re Basin Electric Power Co-op, Docket No. 9661 and 9692, mimeo at 15-25 (1977).

In addition to evaluating the foregoing considerations, the PSC may give preference to an applicant who conforms to certain policy criteria.54/ Of significance to an ICES, it should be noted that "recycling of the conversion by-products and effluents" and "energy conservation through location, process and design" are two criteria applicable to energy conversion facilities which should benefit an ICES developer.55/

While the standards specified by the legislature and by the PSC are applied to facilities (i.e. energy conversion and transmission) covered by the siting statute, reports and testimony received from other agencies are also considered though not necessarily binding on the PSC. No

particular weight is assigned to such other agency input though in practice the inputs of other agencies are evaluated as part of the selection criteria.

The statute does provide, however, that "no site or route shall be designated which violates state agency regulations."[56/] Nor shall a site "be designated which violates local land use, zoning, or building rules, regulations or ordinances" unless, in the case of a permit for construction of a transmission facility, the PSC finds such local provisions "unreasonably restrictive."[57/] In addition, state agencies may indirectly veto the approval of a site by failing to issue a needed permit for reasons other than the site designation.

FOOTNOTES

1. No. Dakota Century Code, ch. 49-22 (1975).
2. §49-22-03(5).
3. §49-22-03(11).
4. Telephone conversation with Gary Anderson, Department Head, Siting Division, North Dakota PSC, June 20, 1978.
5. §49-22-03(12).
6. §49-22-07 (Emphasis added).

6a. §49-22-17.

7. §49-22-02.
8. §49-22-07.
9. §49-22-20(2).
10. §49-22-18.
11. N.D. Admin. Code, Article 69-06.
12. See part III, infra.
13. Telephone conversation with Mr. Anderson, June 19, 1978.
14. §49-22-16.3.
15. §49-22-16(4).

15a.

16. §23-25-04.1.
17. §61-28-04.
18. 61-28-04(18).
19. 54-34.1 (1963).
20. §54-34.1-04(7).
21. Ch. 4-22.
22. §4-22-01.

23. §4-22-06.

23a. §4-22-08.

23b. §4-22-26(8).

23c. §4-22-27.

23d. §4-22-30.

23e. §4-22-33.

23f. §4-22-34.

24. §61-29-05.

25. §49-22-16(2).

26. Chapter 11-33.

27. §11-33-20.

28. §11-33-18.

29. §11-33-17.

30. §40-48-08 (1943).

31. §40-48-12.

32. §49-22-04, §49-22-06.

33. §49-22-07.1, N.D. Admin. Code §69-06-03.

34. §49-22-08.

35. §49-22-22.

36. §49-22-08(2) and N.D. Admin. Code §69-06-04(3).

37. §49-22-13.

38. N.D. Admin. Code §69-06-01-02(2).

39. §49-22-13.

40. §49-22-10.

41. Ibid.

42. §49-22-19.

43. All administrative appeals are governed by Chapter 28-32 of the N.D. Cent. Code. See Chapter 2, supra.

43a. §49-22-07.2.

44. §49-22-02.

45. §49-22-09.

46. §49-22-09(4).

47. N.D. Admin. Code §69-06-01-01(7). See Appendix A for detail.

48. N.D. Admin. Code §§69-06-08-01(1), 02(1).

49. Land Use Planning Report, Nov. 21, 1977, p. 373.

50. N.D. Admin. Code §69-06-08-01.2,-02.2).

51. N.D. Admin. Code §§69-06-08-02(2), 02(2). See Appendix A for detail.

52. N.D. Admin. Code §69-06-08-01(3).

53. N.D. Admin. Code §69-06-08-02(3). See Appendix A for detail.

54. N.D. Admin. Code §§69-06-08-01(4), 02(4). See Appendix A for detail.

55. Id. at §69-06-08-01.4.a and b.

56. §49-22-16.4.

57. §49-22-16.7.

CHAPTER 4
FRANCHISING OF PUBLIC UTILITIES IN NORTH DAKOTA

I. AUTHORITY TO GRANT FRANCHISE

Local control over the franchising of utilities in North Dakota is protected by the state constitution. Though the constitution does not specifically grant the municipalities the power to confer franchises, it does provide that:

> No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village without requiring the consent of the local authorities . . . N.D. Const. §139

The extent to which this restricts the state from granting a franchise is discussed in Part IV(C) below.

The specific grant of franchising power to municipalities is found in §40-05-01.57 of the North Dakota Century Code which provides that the governing body of a municipality shall have the power:

> To grant franchises or privileges to persons, associations, or corporations . . . to extend for a period of not to exceed twenty years and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body;

The words "persons, associations or corporations" indicate that a franchise may be given to anybody, with no limitations on the type of entity or service. Likewise, the

statute confers this power on all municipalities. There have been no cases testing the limits of the franchising power conferred by this statute and, hence, it may be interpreted as broadly as the language permits. An additional statute authorizes municipalities to "grant the right of way for the construction and operation of a railway, telephone line, electric light system, or a gas or oil pipeline system . . . ."[1/]

Notwithstanding the constitutional provision requiring the consent of local government to certain state authorized franchises and the otherwise broad grant of franchising power to local authorities, it appears that the state has preempted a limited area of franchising: The right to lay, maintain and operate pipeline carriers.[2/] A common pipeline carrier is defined in the statute as any person who is in any way connected with the ownership, operation or management of any part of any pipeline within the state involved in the transportation of crude petroleum or gas, or any person producing natural gas which is transported through pipelines.[3/]

II. PROCEDURES FOR GRANTING FRANCHISES

The North Dakota legislature, in delegating almost complete authority to the local government to grant franchises, has also left the promulgation of procedural provisions to municipal control. A party need not obtain any type of

certification from the state as a prerequisite to applying for a franchise. Indeed, the issuance of a certificate of public convenience and necessity by the PSC is made contingent upon the utility having applied for or received a valid franchise.[4/]

An exception exists in the case of common pipeline carriers. Because the state has virtually preempted this aspect of franchising, directly granting the right to lay, maintain, and operate pipelines along, across, or under any public stream or highway to all common pipeline carriers, it has specified certain procedural prerequisites. To avail itself of this automatic right, a common pipeline carrier must file "with the [Public Service C]ommission an acceptance of the provisions of this chapter, expressly agreeing in writing that in consideration of the rights so acquired, the applicant shall be and become a common pipeline carrier, subject to the duties and obligations conferred or imposed in this chapter."[5/]

The legislature has not enacted specific franchising procedures except for the franchising of common pipeline carriers. As a result, the general procedures for adopting ordinances are applicable. These general procedures require that a proposed ordinance be read twice, the second reading commencing not less than one week after the first.[6/]

To pass the proposed ordinance, a majority of all of the members of the governing body must concur.[6a/] Approval by the mayor is required in those cities operating under the council form of government, although a two-thirds vote will be effective to override the mayor's veto.[7/] Once passed, an ordinance "shall be published in one issue of the official paper of the municipality."[8/] The ordinance becomes effective at the time of publication unless otherwise provided.[9/]

There are no judicial decisions which add to the general procedural requirements disucssed above.

III. CRITERIA APPLIED TO REQUESTS FOR UTILITY FRANCHISES

The enabling clause conferrring on municipalities the power to grant franchises is very broad and unspecific. A franchise or privilege may be granted to any "persons, associations, or corporations" with no limitation that the franchise serve or otherwise accommodate the public.[10/] There have been no judicial decisions interpreting or limiting this seemingly broad statutory authorization.

Indeed, counsel for the PSC has confirmed that the municipal franchising power is virtually without restrictions. While he opined that a franchise may be granted to a private investor for private distribution, he also noted that the more usual case involves a utility selling to the general public.[10a/]

It follows from this braod grant that there are no requirements that the franchise be awarded to the highest bidder, that the franchisee first obtain a certificate of public convenience and necessity, or that the franchise meet any specified standards.

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The statute restricts the duration of a franchise granted by a municipality to a maximum period of twenty years.[11/] Once a franchise is granted, it will generally continue throughout the designated period. However, any grant of a franchise which does not strictly conform to state law will render the franchise null and void.

In Re Montana-Dakota Utilities Co.,[12/] the utility, having obtained a franchise from certain North Dakota communities to serve natural gas, failed to comply with a state statute regulating the sale of gas. The statute required that a franchise to furnish natural gas must contain a reservation therein that a percentage of native natural gas will be used by the franchisee when it is available.[12a/] At a hearing before the PSC, the utility sought to obtain a certificate of public convenience and necessity in order to extend its distribution system into those communities from which it had obtained franchises. Instead of granting

the certificate, the PSC found the franchise invalid on its face, stating that "the public convenience and necessity require this commission to prohibit the exercise of these franchise rights unless and until their provisions conform to North Dakota" law.[13/]

Generally, a franchise will end at its expiration date. However, the city must give adequate notice to the utility before it may oust the company. An implied consent or agreement to remain is deemed to arise at the termination of a franchise unless clearly refuted by the city. To terminate this implied agreement, "a reasonable notice is necessary on the part of the city to the . . . company and some affirmative act taken by the city to show the decision to terminate such implied agreement and to oust the . . . company" is required.[14/]

B. Exclusivity

In addition to placing a time limit on the duration of a franchise granted by a municipality, the legislature has expressly prohibited the granting of an exclusive franchise.[15/]

C. Other Characteristics

Neither the statutory nor the case law limits the franchising authority to particular utilities or provides for the abandonment of a franchise. However, approval of

the PSC is required for the sale or transfer of a franchise to another utility.[16] There is no provision for a mandatory franchise tax to be paid to a municipality.

A municipality may, however, impose conditions as an incident to granting the franchise. It may, for example, require the utility to sell to the city at a rate less than that established by the PSC. Thus, the PSC may not interfere with or regulate the contract rates between a city and a utility if agreed as to part of the franchise.[17] D. Buchanan, a past member of the legal staff of the Public Service Commission, has reviewed the Western Electric case and the related case of Chrysler Light & Power Co. v. Belfield, 58 N.D. 33, 224 N.W. 871 (1929) in 49 N.D.L. Rev. 41 (1972) and has concluded that the courts tend to favor the municipal power to franchise over the state's power to regulate. Although no case directly on point has been found, it appears that this preference for municipal authority may permit a municipality to prevent the operation of a utility certificated by the PSC by denying the utility a local franchise.

This conclusion is supported by the North Dakota Supreme Court's decision in Montana-Dakota Utilities Co. v. Divide County School Dist. No. 1.[18]

In an earlier case, Grafton v. Otter Tail Power Co.,[19] even though utility service within the city was provided

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FOOTNOTES

1. 49-04-16 (1943).

2. 49-19-09 (1943).

3. 49-19-01 (1963).

4. §§49-03-02, 49-03.1-02.

5. §49-19-09. For an enumeration of the rights, duties and conditions affecting a common pipeline carrier see Chapter 49-19.

6. §40-11-02.

6a. Ibid

7. §40-11-05.

8. §40-11-06.

9. §40-11-07.

10. §49-05-01.57.

10a. Telephone conversation with Ray Walton, Commerce Council, June 19, 1978.

11. §49-05-01.57.

12. 11 PUR 3d 352 (N.D. PUC 1952).

12a. §49-19-04.

13. 11 PUR 3d at 360.

14. In Re First Farmers Telephone Assoc., 1930B Pub. U. Rep. 115, 118.

15. §49-05-01.57.

16. §49-04-05.

17. Western Elec. Co. v. Jamestown, 47 N.D. 157, 181 N.W. 363 (1921).

18. 193 N.W.2d 723 (N.D. 1971).

19. 86 N.W.2d 197 (N.D. 1957).