MINNESOTA
PUBLIC UTILITIES COMMISSION

# Staff Briefing Papers

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| Meeting Date | **December 6, 2018** | | Agenda Item **4 |
| Companies | Lake Country Power, Minnesota Power | | |
| Docket No. | **E015, 106/SA-17-893** | | |
| | In the Matter of the Complaint by Lake Country Power Against Minnesota Power Alleging Violation of Its Exclusive Service Area By Providing Service to Canadian National Railway Company Facilities Near Hoyt Lakes, Minnesota | | |
| Issue | What procedure should the Commission use to decide this matter? | | |
| Staff | Marc Fournier | Marc.Fournier@state.mn.us | 651-201-2214 |

| ✓ **Relevant Documents** | **Date** |
|---|---|
| Commission Order Requiring Amended Complaint | May 29, 2018 |
| Amended Complaint Lake Country Power | July 19, 2018 |
| Answer to the Amended Complaint Minnesota Power | July 27, 2018 |
| Comments of the Minnesota Department of Commerce (DOC) | August 15, 2018 |
| Comment of Minnesota Power | August 17, 2018 |

| ✓ **Relevant Documents** | **Date** |
|---|---|
| Comments of Wisconsin Central Ltd. | August 20, 2018 |
| Minnesota Rural Electrification Association | August 29, 2018 |
| Reply Comments Lake Country Power | August 29, 2018 |
| Reply Comments Wisconsin Central Ltd. | August 30, 2018 |

## I. Statement of the Issue

1. What procedure should the Commission use to decide this matter?

## II. Background

On December 22, 2017, Lake Country Power (Lake Country) filed a complaint against Minnesota Power alleging that Minnesota Power violated Lake Country's exclusive service area by providing service to Canadian National Railway Company (Canadian National).

On May 29, 2018 the Commission issued an Oder Requiring Amended Complaint. In this Order the Commission required Lake Country to amend its complaint consistent with the facts as they currently stand and the relief it is currently seeking from the Commission.

On July 19, 2018, Lake Country filed an amended complaint.

On July 23, 2018, the Commission issued a Notice of Comment Period on Amended Complaint (Notice) requesting initial comments by August 20, 2018 on the following topics:

- Responses to the substance of the amended complaint.
- What laws and/or past Commission decisions are relevant to the resolution of the complaint?
- Is the record sufficient for the Commission to reach a final determination on this complaint? If not, what additional procedures and process should the Commission use (a contested case, additional comment period, or other)?

On July 27, 2018, Wisconsin Central Ltd. (Wisconsin Central) filed a Petition for Intervention. Wisconsin Central has been previously referred to in this proceeding as Canadian National Railway Company (CN).

On August 15, 2018, the Minnesota Department of Commerce filed comments on Lake Country's amended complaint.

On August 17, 2018, Minnesota Power filed comments.

On August 20, 2018, Wisconsin Central Ltd. Filed comments on the amended complaint.

On August 29, 2018, the Minnesota Rural Electric Association (MREA) filed comments. On that same day, Lake Country filed reply comments.

On August 30, 2018 Wisconsin Central Ltd. filed reply comments.

Minn. Stat. 216B.40 grants electric utilities the exclusive right to serve all present and future customers in their assigned service territory.[1]

**Lake Country Power Complaint**

Lake Country Power (LCP), a cooperative electric utility in northeastern Minnesota, alleged that Minnesota Power (MP) is serving one customer, Wisconsin Central Ltd. (Wisconsin Central), in its assigned service territory.

Wisconsin Central is in the process of adding signaling and sensing equipment along a section of railway near Hoyt Lake that crosses Minnesota Power and Lake Country Power's service territories. LCP's complaint detailed that standalone signaling equipment lies within its exclusive service territory and is receiving electrical service from MP. After obtaining a quote from LCP on the cost of providing service, Wisconsin Central decided instead to build several miles of private distribution line from a point within Minnesota Power's service territory to serve its signaling equipment within LCP's service territory. LCP's complaint alleged this constitutes as a service territory violation, and requested that the Commission:

1. Hold a timely hearing as required under Minn. Stat. §216B.43;

2. Issue an order determining MP is in violation of the exclusive service area provisions of the Minnesota Public Utilities Act; and

3. Issue an order determining that LCP has the exclusive right to extend electric service to the signaling and sensing equipment (and any additional electrical load) installed by CN (Wisconsin Central).

## III. Parties' Comments

What procedure should the Commission use to decide this matter?

**Lake Country: Responses to the substance of the amended complaint.**

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[1] **Minn. Stat. 216B.40 EXCLUSIVE SERVICE RIGHT; SERVICE EXTENSION.** Except as provided in sections 216B.42 and 216B.421, each electric utility shall have 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 shall 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 any 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.

Minnesota Power ("MP") urges implementation of a result that is contrary to law. Lake Country Power ("LCP") has the statutory right to "provide electric service to customers [within its geographic exclusive service area] on an excusive basis." The legislature has defined "electric service" to mean "electric service furnished to a customer at retail for ultimate consumption…" It is clear that by defining electric service as service furnished to a customer at retail for ultimate consumption, as opposed to where the meter is located, that the legislature has purposely intended to place relevance on the place of ultimate consumption. It is undisputed in this case that the electricity is ultimately consumed several miles inside of LCP's exclusive service territory. This is where the signaling equipment is located and where the electrons satisfy their intended purpose – powering the railroad's equipment and being consumed by the same. The plain meaning of the definition of electric service requires this conclusion.

Since the exclusive service territory laws were created in 1974, the legislature has had ample opportunity to amend the statutory definition of electric service to mean service furnished to a metering location, but it has not done so. Other jurisdiction have ruled that the place and purpose of the electricity's use was a controlling factor, not where the service was delivered.

**What laws and/or past Commission decisions are relevant to the resolution of the complaint? LCP Reply Comments (pp. 1-3)**

Consideration of customer choice is statutorily limited. The Minnesota legislature has recognized "the preference of the customer" in the limited situation where a large load (2,000 kilowatts or more) is at issue. See M.S. § 216B.42, Subd. 1(5). It is clear from the statutes that customer preference was never meant to be a consideration for service territory disputes such as the one at issue here. Since establishment of the service territory laws in 1974, the legislature could have amended the statute to include customer preference as a factor to consider in all situations, but it has chosen not to do so.

This is not a Large Load case (2,000 kW or more), as the load that Wisconsin Central is transmitting in the present case is estimated to be in the range of less than 35 kW. This is not a residential/homestead case. And as stated above, Wisconsin Central does not have an actual building that straddles the service areas. Allowing customer choice in this circumstance would be unprecedented. A summary of prior decisions hold the same:

In the Matter of a Complaint by McLeod Cooperative Power Association Against Hutchinson Utilities Commission, E-252,120/C-95-517, the boundary line between the two service areas was known, and "it does not bisect any buildings". In that matter the Commission correctly recognized that "honoring customer choice in such situations creates the potential for abuse. Customers with the means and the incentive to manipulate the system could engage in gerrymandering to obtain service from the utility of choice". This is the precise situation we have here. The boundary line between MP and LCP does not bisect any buildings. And Wisconsin Central is the poster child of a customer with the means and incentive to manipulate the exclusive service territory system. Wisconsin Central has already shown, by its actions here and in other areas that its intent is to do exactly that. Under past Commission precedent, this service territory violation by MP and Wisconsin Central must not be allowed.

Also, somewhat importantly, in the McLeod decision, it was pointed out that it was the customer that created the straddling situation, and therefore the customer was not entitled to relief from a situation of its own making. Here, to the extent that there is anything that crosses service boundaries, it is the private electrical distribution system built by Wisconsin Central. So it is Wisconsin Central that created any hint of a straddling situation in the present case. As a result, Wisconsin Central should not be entitled to relief from a situation of its own making.

In the Matter of a Request by the City of Rice for a Service Area Boundary Change Between Minnesota Power and East Central Energy, E-112,015/SA-01-696, there was yet again a scenario where the property, as opposed to any building, straddled the service areas. Importantly, this is the matter in which MP argued the exact opposite of the position it now takes here:

"MP further argued that it is only when a facility receiving service straddles a service territory boundary that the customer has a choice of its energy supplier. Customer choice does not apply in situations when it is the underlying real property ownership, and not the facility, that straddles a service territory boundary."

MP, of course, tries to spin that argument in the present case, but it is hard to escape the black and white quote of the position it has advanced in the past. In the Rice case, the Commission agreed with MP and denied the request for customer choice when it was just the property, as opposed to the building, that straddled service territories. Again, this is the precise situation we have in this matter. Under past Commission precedent, this service territory violation by MP and Wisconsin Central must not be allowed.

In the Matter of the Petition of Freeborn Mower Cooperative Services, E-115/SA-99-1619, there was a physical building, a pumping station, that straddled the service territory. In that matter, the Commission found that customer choice was permitted. This is easily distinguishable from the situation in this matter, where there is no building that straddles any service territories, and just underlying real property.

In the Matter of the Complaint of Minnesota Power & Light against Itasca-Mantrap Electric Cooperative, E-015, E-117/SA-84-578, there was a physical building, a freezer addition that straddled the service territory. In that matter, the Commission found that customer choice was permitted. This is easily distinguishable from the situation in this matter, where there is no building that straddles any service territories, and just underlying real property.

The sole situation in which the adverse parties point to in an attempt to claim that the Commission has allowed customer choice in a similar situation is the 1990 letter issued to Ruttger's Bay Lake Lodge. However, that situation is easily distinguished from the present. First, that is a letter from the PUC to Ruttgers, and not the result of any reported decision from the Commission. Second, the load in question is related to "wiring" on a customer's property (similar to a residential/homestead exception), as opposed to a commercial load being transmitted miles away through transmission infrastructure, including underground cabling, risers, and the like. It is by no means a similar situation, and by no means binding on the Commission.

It is quite clear that, when analyzed in the lens of the plain meaning of the statute and the past commission decisions, the complaint by LCP should be upheld. The Commission has never allowed customer choice under these facts. If the Commission were to allow Wisconsin Central's encroachment in the present case, it would be in direct opposition to every other Commission decision.

Finally, it is worth noting that Wisconsin Central has 124 active services within LCP's territory. As such, the Railroad is well aware of its obligation to serve its various electric loads in this territory from LCP, the assigned utility. This is evidenced by these numerous other loads and by the fact that they originally made application of LCP for service to the subject loads before it manipulated the system and began taking service from MP.

The railroad's federal preemption defense does not apply to these facts (p. 4)

Wisconsin Central suggests that this electric service territory docket is preempted by federal law. Under the Interstate Commerce Commission Termination Act (Termination Act) the Surface Transportation Board does indeed have jurisdiction over the construction, acquisition, and operation of railroad tracks and facilities. However, the STB's jurisdiction has limits and the Termination Act does not preempt all state regulation effecting transportation by rail carrier. Local governments may appropriately exercise police powers which "protect public health and safety". There is a two-part test for whether a state regulation avoids preemption. First, the regulation must not be unreasonably burdensome. Second, the regulation must not discriminate against the railroad.

Minnesota's statutory scheme of regulating electric service territories serves the public health and welfare by ensuring adequate delivery of an essential service (electricity) to residents in their specified geographic area. This regulation is also non-discriminatory because it applies to all customers residing in the geographic area. Moreover, the regulation is clearly defined, i.e. individuals and entities located in specific geographic areas are required to receive electric service from defined electricity providers. The service areas, as well as the electric providers that serve them, are well defined and the boundaries generally do not change. Requiring the railroad to receive its electricity from LCP would not cause the railroad any delays.

**Is the record sufficient for the Commission to reach a final determination on this complaint? If not, what additional procedures and process should the Commission use (a contested case, additional comment period, or other)? LCP Reply Comments (p. 4)**

For the reasons articulated in LCP's prior filings and those identified herein, the Commission must rule on the complaint in favor of LCP, disallowing MP and the railroad's breach of LCP's exclusive service territory.

**MP: Responses to the substance of the amended complaint.**

Lake Country Power attempts to limit the Commission's exception for customers whose property straddles the boundary between different utilities' service areas to only "when a recipient has a physical 'bricks and mortar' building that straddles more than one exclusive service territory".

The Commission precedent cited by Lake Country Power does not impose a "bricks and mortar" requirement and ignores other applicable Commission policy directives and decisions. The Commission has made clear that the customer may choose one utility to be the service provider for the entire property, as long as the power serving the facilities located within the other utility's service area is carried on the customer's distribution system and not on the equipment of the service provider utility. Based on this principle, Minnesota Power is the sole electric service provider because the signaling and sensing equipment in Wisconsin Central's integrated railroad system that straddles the service territories of both Lake Country Power and Minnesota Power. Wisconsin Central is carrying the power to its facilities on its own distribution system. Therefore, even accepting the factual allegations in the Amended Complaint as true, this well-established exception applies in this case.

Even taking the allegations in the Amended Complaint as true, Lake Country Power's allegations lack merit because the service area straddling exception allows Wisconsin Central to choose its service provider. Notably, Lake Country Power admits that Wisconsin Central "had constructed its own electrical distribution infrastructure along a rail corridor to the proposed location." Lake Country Power further acknowledges that Wisconsin Central "connected the distribution infrastructure to a point of service within the service territory of MP". These two assertions of fact alone satisfy the prerequisites to application of the service area straddling exception and are not nullified by Lake Country Power's asserted physical "bricks and mortar" building limitation. Wisconsin Central's integrated facility straddles Minnesota Power's and Lake Country Power's service territories with railroad tracks and signaling and sensing equipment split between both service territories. The point of delivery of power between Minnesota Power and Wisconsin Central is located within Minnesota Power's service territory and Minnesota Power's distribution lines are all within Minnesota Power's service territory. The power that is distributed to equipment within Lake Country Power's service area is carried over Wisconsin Central's distribution system along its railroad tracks. Based on these facts, the Commission's well established preference to allow customer choice of electric service provider for facilities that straddle multiple utility service areas controls.

**What laws and/or past Commission decisions are relevant to the resolution of the complaint? MP Comments (pp. 2-4)**

The Commission has definitively and consistently determined that the customer may choose its preferred service provider where its property straddles more than one utility's service territory and the customer provides its own distribution service into the other utility's territory. This determination goes back several decades. In 1990, the Commission's then-Energy Manager issued a letter to an electric service customer that had requested permission to run an electric cable from one building in Minnesota Power's territory to a building in Mille Lacs Electrical

Cooperative's service area. Commission staff and legal counsel concluded that formal Commission approval was unnecessary because "the Commission's policy is that wiring on the customer's side of an electric meter is controlled by the customer, not the utility or the Commission." The Commission's letter concluded by noting that customer wiring "must connect to an electric utility's meter in that utility's service area" (Please see Attachment A of MP's August 17, 2018 comments). This is a clear example where the Commission policy allowed for an exception to the service territory requirements was not limited to a physical "bricks and mortar" building since the customer's electric cable spanned multiple buildings and facilities.

The Commission addressed a similar situation in a dispute between Freeborn-Mower Cooperative Services ("Freeborn-Mower") and Interstate Power Company ("Interstate") in 2000 (please see page 2 of MP's August 17, 2018 Comments).

The Commission further confirmed this policy in the City of Rice service territory dispute. Notably, Lake Country Power has throughout this Docket asserted that Minnesota Power's position and the Commission's decision in the City of Rice dispute is contrary to Minnesota Power's position in this case. This is not accurate. (For further discussion please see page 3 of MP's August 17, 2018 Comments).

**Is the record sufficient for the Commission to reach a final determination on this complaint? If not, what additional procedures and process should the Commission use (a contested case, additional comment period, or other)? MP Comments (pp.7-8)**

The only relevant material facts, as previously stated, which Minnesota Power believes are undisputed, are that Wisconsin Central applied to Minnesota Power for electric service on October 3, 2016. Wisconsin Central's application stated the request for power was at approx. 5000' SE on RR Tracks from Allen Junction Rd, Hoyt Lakes, Minnesota and that Wisconsin Central was an existing customer. This point of delivery is within Minnesota Power's assigned service territory under Minn. Stat. § 216B.39. Minnesota Power began providing its customer Wisconsin Central with power at a primary metering point located in Minnesota Power's service territory on October 17, 2017. Since that date, Minnesota Power has billed Wisconsin Central for minimal usage that is equivalent to a higher usage residential customer.

If the Commission does not dismiss the complaint for the reasons provided in multiple filings in this Docket, then Minnesota Power recommends either: 1) requesting further written comments if the Commission believes more record development is necessary or 2) directing the OAH to conduct a limited contested case process. Such a limited contested case process with only verified pleadings and without public or evidentiary hearing, would be a more appropriate use of ratepayer and state agency resources that would need to be committed and expended in a full contested case process, given the limited amount of load at issue in this case.

**DOC: Responses to the substance of the amended complaint.**

The Department surmises that as a result of the seven differences between the LCP and MP positions, the common thread between all of the arguments, is whether or not "Wisconsin

Central's distribution system" is considered by the Commission to be similar to a "bricks and mortar" building. If the Commission concludes that Wisconsin Central's electric distribution system can be considered sufficiently similar to a "bricks and mortar" building, the Amended Complaint could be dismissed.

**What laws and/or past Commission decisions are relevant to the resolution of the complaint? DOC Comments (pp. 3-4)**

In previous filings in this docket, the Department, MP and LCP have provided discussion of the applicable laws and past Commission decisions relevant to this complaint. The Department will defer any additional discussion of laws and past Commission decisions to the other parties in this proceeding.

**Is the record sufficient for the Commission to reach a final determination on this complaint? If not, what additional procedures and process should the Commission use (a contested case, additional comment period, or other)? DOC Comments (p. 4)**

The Department will defer to the Commission as to whether there is a sufficient record to reach a final determination on this complaint.

**Wisconsin Central: Responses to the substance of the amended complaint.**

While the amended complaint admits true facts that are fatal to LCP's claim, it contains other factual errors. The record and positions of the parties are now well established; the Commission has the benefit of LCP's initial complaint, comments from LCP, extensive evidence from Wisconsin Central, and comments from Minnesota Power. Wisconsin Central will not repeat all of the facts established in its prior filings. Instead, these comments will briefly address key admissions, omissions, and misstatements in the Amended Complaint.

The Amended Complaint ignores the actual infrastructure constructed by Wisconsin Central. LCP claims Wisconsin Central's Intermediate Signal System Project (Project) consists of "underground cable and stand-alone cabinets widely spread across LCP's exclusive service territory, ultimately connecting to [Wisconsin Central] signaling equipment approximately four (4) miles into LCP's exclusive service territory. The Project is much more substantial than some cable and a few electrical cabinets. The Project involves construction of numerous Intermediate Signal Bungalows (Bungalows) each of which contains a battery charger, battery, radio, heater, and control box.

LCP's next error in the Amended Complaint is an assertion that the "signaling and sensing equipment near Hoyt Lakes is entirely within the service area assigned to LCP. The record demonstrates otherwise. The purpose of the Project is to install an intermediate signal system between the Allen Junction Control Point and Two Harbors, Minnesota. This is a far larger area than the limited portion of LCP's service territory crossed by Wisconsin Central's right-of-way. The Project's interconnected Bungalows are located within the service territories of Minnesota Power, LCP, and Cooperative Light and Power.

LCP's Amended Complaint incorrectly claims that Minnesota Power is providing electricity to Wisconsin Central outside of Minnesota Power's service territory. This claim is contradicted by admissions within the Amended Complaint itself. Minnesota Power provides electricity to Wisconsin Central at a point within Minnesota Power's service territory. Wisconsin Central then uses its own wiring to bring that power to the various Bungalows along the rail road tracks, all within Wisconsin Central's right-of-way.

LCP implies that Wisconsin Central created the problem currently before the Commission. The exact opposite is true. The right-of-way where the Project is located has been a railroad since at least as early as 1890. Wisconsin Central did not move into LCP's service territory and then seek to have Minnesota Power provide service to newly-acquired property. To the contrary, Wisconsin Central's property interest in its right-of-way predates the creation of Minnesota's electric utility service territories by nearly a century. No gerrymandering of the service territories has occurred.

**What laws and/or past Commission decisions are relevant to the resolution of the complaint? Wisconsin Central Comments (pp. 6-14)**

The Commission has consistently allowed a customer whose property straddles two service territory boundaries to choose the utility from which it will receive power. The Commission was asked in 2000 to determine whether Freeborn-Mower Cooperative (Freeborn Mower) or Interstate Power Company (Interstate) should serve a natural gas pump station that straddled their respective service territories. The Commission allowed the customer to select Freeborn-Mower, its preferred utility, noting that it has honored customer choice in these situations unless there were pre-existing agreements between the utilities or gerrymandering by the customer.

Wisconsin Central receives power from Minnesota Power within Minnesota Power's service territory, and then uses a private distribution system to move that power along its own property to its own facilities. Minnesota Power has not installed any equipment within LCP's service territory. Accordingly, Wisconsin Central's choice to utilize Minnesota Power should govern.

LCP incorrectly argues that Wisconsin Central's Project does not qualify for the customer choice exception because it does not constitute a "bricks and mortar" building. The fatal flaw in this argument is that the Commission does not require a physical building to straddle the service territory boundary.

The customer choice exception applies to any point on a property, not to a specific building; customers may choose the utility of their choice when the customer's "property straddles the assigned service areas of two different utilities . . . as long as the power is delivered within the assigned service area of the chosen utility and is distributed over the customer's distribution system to any part of the property within the assigned service area of the other utility." Accordingly, the exception applies to entire properties, not just a single building. The focus on property instead of a specific building is long-standing. The Commission's Energy Manager informed Ruttger's Bay Lake Lodge (the "Lodge") in 1990 that the Lodge could run a cable from

a building served by Minnesota Power to a building that was, at the time, served by Mille Lacs Electric Cooperative.

In a 1996 dispute between McLeod Power Cooperative (McLeod) and the Hutchinson Utilities Commission (Hutchinson), the Commission noted that the exception was not available to allow the customer to utilize McLeod because the customer purchased property in Hutchinson's territory after creation of the service territories. A 17.2 acre pump station property was the focus of the 2000 dispute between Freeborn-Mower and Interstate. In that matter, one of the customer's pump station buildings did straddle the border of the service territories, but the Commission ruled that the customer's choice should apply to the entire pump station, not just the building that was bisected by the border between territories. In early 2008, the Commission allowed Minnesota Power to provide electricity to an entire mine complex when it approved an electric service agreement between Minnesota Power and Mesabi Nugget Delaware, LLC. Although most of the mine operation was in LCP's territory, the Commission approved the agreement as long as the power delivery point was located within Minnesota Power's service territory and the mine operator used its own distribution system to move power on the property.

The Commission should not narrow its test to apply the customer choice exception as urged by LCP. Instead, the traditional and long-standing application of service territories and exceptions to land, not buildings, should remain the rule.

Wisconsin Central would still be entitled to utilize Minnesota Power even if the Commission decided to adopt LCP's narrow interpretation of the customer choice exception. The Project uses sensing equipment located in numerous signal Bungalows, all of which are connected to the rails on Wisconsin Central's right-of-way, to locate trains and monitor the rails. The Bungalows themselves are not insignificant in scope. Accordingly, the Project would qualify for the exception even if the Commission required a physical building on the property at issue, which it has not done in the past.

Wisconsin Central strongly believes that this matter can and should be decided under the Commission precedent. In the event the Commission disagrees, Wisconsin Central respectfully notes that federal law also provides a path to resolution. The underlying dispute between LCP and Minnesota Power involves Wisconsin Central, which is an active railroad line subject to a discrete and comprehensive federal statutory regime – the Interstate Commerce Commission Termination Act, or ICCTA. Moreover, remedy sought by LCP would result in de-activation of a track signal system, which intrudes upon the exclusive jurisdiction of the Surface Transportation Board (STB) as set forth in ICCTA. Federal and state courts and the STB alike have consistently held that state law processes that would lead to the removal, relocation, abandonment, or re-purposing of rail facilities – as LCP seeks to do here – are categorically preempted under ICCTA.

ICCTA grants the STB broad and exclusive jurisdiction over the regulation of rail transportation, such that the remedies provided therein "preempt the remedies provided under [other] Federal or State law." Moreover, ICCTA defines rail transportation "expansively to encompass any property, facility, structure or equipment 'related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.'" The

Project falls within the scope of ICCTA. ICCTA completely displaces state law claims that attempt to manage or govern rail transportation.

Applying the law to the facts makes it clear that ICCTA preemption applies here. The railroad has a large integrated signal system for which the railroad has constructed its own cabling and facilities to move electrical power along that system to ensure safe, efficient and reliable rail operations. It is clearly a rail facility and part of rail transportation as that is defined by 49 U.S.C. §10102(9). The remedy sought by LCP would force the railroad to completely reconfigure or abandon this system, and therefore LCP's remedy in this matter is preempted by ICCTA. In addition, the cost to the railroad if LCP were to prevail in this matter is so burdensome that it also runs afoul of ICCTA preemption.

Fortunately, Minnesota law and Commission precedent are clear. The Commission can resolve this dispute entirely under the rubric of prior Commission decisions. However, if the Commission believes that existing precedent is insufficient to resolve this matter, or would result in LCP's request for relief being granted, Wisconsin Central respectfully requests that the Commission then also consider the federal preemption discussed herein.

**Is the record sufficient for the Commission to reach a final determination on this complaint? If not, what additional procedures and process should the Commission use (a contested case, additional comment period, or other)? Wisconsin Central Comments (pp. 14-15)**

The amended complaint does not present any new facts or law. The facts asserted in LCP's Amended Complaint are essentially unchanged from its initial filing, and Wisconsin Central again urges the Commission to dismiss LCP's complaint without further proceedings.

LCP is not entitled to a contested case hearing and no additional information is required for the Commission to make a decision. The Commission needs to conduct a contested case hearing only when required to do so by law. The applicable rule, Minn. R. 7829.0900, only requires a contested case hearing when there are contested material facts and a right to a hearing. There are no factual disputes because LCP has admitted the material facts in this matter. LCP is entitled to a hearing under Minn. R. 7829.2100, Subp. 6, but that rule does not specify that the hearing must be a contested case proceeding. No contested case is required where, as here, there are no contested issues of material fact. Accordingly, the Commission can and should make a determination based on its own precedent and the filings already in the record.

**MREA:** LCP has asked the Commission to issue an order determining MP is in violation of state statute and that LCP has the exclusive right to extend electric service to the signaling and sensing equipment installed by Wisconsin Central. MREA believes that LCP's complaint should be upheld.

Nothing in statute or precedence gives MP or Wisconsin Central the right to extend four miles into LCP service territory. If the Commission finds in favor of MP, there may be little to stop Wisconsin Central or any other customer from purchasing electricity through an electric utility at a meter inside that utility's service territory and then distributing that power through its own distribution lines anywhere it wants, regardless of exclusive electric service territory

boundaries. A new precedent would be created that could undermine Minnesota's longstanding service territory requirements and create confusion and uncertainty long into the future. MREA believes the Commission should find in favor of LCP.

## IV. Staff Analysis

Wisconsin Central's equipment is located along and is integrated with a contiguous stretch of the Railroad's tracks that pass through the service areas of both Minnesota Power and LCP. New equipment has been added by Wisconsin Central in both utilities' service areas and only a portion is located in LCP's territory. Minnesota Power provides electric service to Wisconsin Central at a point within Minnesota Power's service territory. Wisconsin Central then uses its own wiring to bring that power to the various bungalows along the railroad tracks, all within Wisconsin Central's right-of-way.

Staff believes there are two primary approaches the Commission could take in deciding on this complaint.

Staff's first recommended approach is to dismiss the complaint without prejudice, pending further support from Lake Country. There is no disagreement that MP is providing service to a facility located within its service area. Thus, MP is offering service in accordance with its tariff, which it is required to do by law.[2] MP's tariffs, which are approved by the Commission, do not require MP to question potential customers before providing service. The Commission's policy, in fact, has always been to ensure customers requesting initial service receive that service in a timely manner once they request it. The load involved here, as MP points out, is similar to a high usage residential customer, so MP has no incentive to make extra efforts to obtain this customer.

It appears the real focus of LCP's concern is that Wisconsin Central has extended facilities into MP's service territory. The Commission generally does not have authority over utility customers and where they run distribution facilities. If Wisconsin Central did not have property rights or ROW to place those facilities where they did, then that is a matter for either local government, or possibly, as Wisconsin Central points out, something to be reviewed under the ICCTA related to placement of railroad facilities.

Staff does not believe there is anything for the Commission to decide at this point, unless LCP presents to the Commission either: 1) a decision from the proper venue stating that Wisconsin Central does not have the rights to extend distribution facilities in MP's service territory; and 2) a decision from a court with jurisdiction stating that the ICCTA does not preempt any aspect of this complaint.

A second approach would be to analyze past Commission decisions and determine whether those past decisions guide the Commission to a resolution here.

[2] See, for example, Minn. Stat. §216B.05, requiring utilities to file with the Commission all rates and terms and conditions of service in their tariffs.

The record of this proceeding contains many examples of very similar circumstances of customer's property straddling utility service areas. These examples should serve as strong precedents for a Commission decision in this matter. The first is Ruttger's Bay Lake Lodge. In this case, Ruttgers requested permission to run an electric cable from one building in Minnesota Power's territory to a building in Mille Lacs Electrical Cooperative's service area. The Commission Staff and legal counsel concluded the following:

> This matter has been reviewed by Commission staff and by the Commission's legal counsel. It is our opinion that formal approval by the Commission is not necessary. The Commission's policy is that wiring on the customer's side of an electric meter is controlled by the customer, not the utility or the Commission. It is permissible for wiring to cross service area boundaries as long as it stays on the same customer's property.
>
> Therefore, the Commission will take no action on your letter, with the understanding that you can proceed with whatever wiring is consistent with local codes. Such wiring must connect to an electric utility's meter in that utility's service area. (PUC Letter Dated: January 5, 1990)

In a second example, Freeborn-Mower filed a petition asking the Commission to determine that the co-op was entitled to provide electric service to Alliance Pipeline's new gas compressor facility that was on a 17.2 acre parcel that straddled the service area boundary between Freeborn-Mower and Interstate Power. In this matter, the Commission in its May 4, 2000 Order in Docket No. E-115/SA-99-1619:

> The Commission agrees with the Department and the Coop in this case customer choice can and should be the deciding factor in determining service rights. This is consistent with past Commission decisions, sound public policy, and basic fairness to all concerned. (Order at page 4)

The Commission goes on to conclude that:

> For all of the reasons set forth above, the Commission finds that Freeborn-Mower is entitled to provide permanent service to Alliance's Albert Lea compressor station, as long as the delivery point for that service falls within Freeborn-Mower's assigned service area. (Oder at page 5)

In a third example the Commission confirmed this policy in the City of Rice service territory dispute. the City of Rice requested that East Central Energy ("ECE") be allowed to provide service to a plant owned and operated by Virnig, which was entirely within Minnesota Power's service area boundary. Additionally, Virnig and ECE proposed that ECE would deliver the power across Minnesota Power's territory to the Virnig facility. The Commission found in its August 28, 2001 Order in Docket No. E-112,015/SA-01-696:

> The Commission will deny the City's request that ECE serve the Virnig plant. The Commission agrees with the DOC that this case is not an appropriate case in which to implement customer choice for two reasons. First, the Virnig plant site is located wholly

> within MP's service area boundary and to allow choice in this circumstance could encourage gerrymandering to obtain service from the utility of choice. Second, in cases when the Commission has allowed customer choice the Commission has required that the power be delivered within the assigned service area of the chosen utility and be distributed over the customer's distribution system to any part of the property within the assigned service area of the other utility. In the present case, ECE readily admits that this requirement cannot be met without sacrificing power and reliability, which the customer is unwilling to do. For these reasons the request for ECE to service the Virnig property will be denied.

In a fourth example, the focal point of the Commission's determination is the customer's choice along with the service delivery point. In the Commission's March 11, 1985 Order Dismissing Complaint, the Commission found that Itasca-Mantrap's service delivery was in the Co-op territory:

> The transformer to serve the freezer addition was installed within the assigned service area of Itasca-Mantrap at an expense to the Co-op of approximately $17,000. Facilities necessary for Itasca-Mantrap to serve the estimated load of the freezer addition are estimated to cost $88,000. (See Commission's Order at page 3)

The Commission ultimately identified customer choice a main factor in its determination:

> Under the facts of this case, the Commission accords weight to customer preference as one of the ways for achieving the objective of economical electric service to the public as stated in Minn. Stat.§ 216B.37. The Commission agrees with the ALJ's findings concerning customer preference, and concludes that the economical service objective is best served by authorizing Itasca-Mantrap to provide service at the rate as specified in the contract. (See Commission's Order at page 4)

A final example of Commission precedent service area determination occurred in a matter involving both Minnesota Power and LCP that was not reliant on a physical bricks and mortar building. In this docket, Minnesota Power filed a request for approval of an electric service agreement ("ESA") between itself and Mesabi Nugget Delaware, LLC ("Mesabi Nugget"). The ESA committed Mesabi Nugget to purchase electric service from Minnesota Power at a point of connection on the portion of Mesabi Nugget's property that is within Minnesota Power's service territory. From there, Mesabi Nugget would use its own wires to convey the power to its facilities, most of which are within Lake Country Power's service area. In the Commission's first ordering paragraph in its February 20, 2008 Order in Docket No. E-015/M-07-1456, the Commission ordered the following:

> The Commission hereby approves the Electric Service Agreement between Minnesota Power and Mesabi Nugget, conditioned on MP refiling the Agreement showing that the delivery point is now in MP service territory and making other updating changes to the

> Agreement to reflect the parties' current agreement, e.g., that it is no longer in the context of a proceeding under Minn. Stat. § 216B.42.

With respect to Docket No. E-252, 120/C-95-517, this complaint involved service to a training center building of Hutchinson Technologies Inc. (HTI). The building which was constructed in 1994, lies within the service territory of Mcleod Cooperative Power Association (MCPA). HTI's main building is located within Hutchinson Utilities Commission's (HUC) service territory. HTI is a major consumer of electricity, and takes service at primary voltage from HUC. HTI distributes the electricity from the HUC primary metering point to its main building, to a tooling center building constructed in 1992, and to the training center building.[3]

MCPA argued that the service to the training center building violated Minn. Stat. §216B.40, because HUC was providing electric service within MCPA's exclusive service territory. MCPA requested an order from the Commission either directing HUC to cease providing service to the training center building, or to acquire the service rights to the building and pay appropriate compensation a previously executed Settlement Agreement or as may be established by law.[4]

In the Commission's June 14, 1996 Order in Docket No. E-252,120/C-95-517 at Page 3, the Commission acknowledges it past practice in these and similar circumstances:

> The Commission has stated in its Orders that it believes customers whose property straddles the assigned service areas of more than one utility may choose their utility, as

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[3] The customer at issue is Hutchinson Technologies, Inc. (HTI), a large industrial customer occupying several acres within the Hutchinson city limits. HTI's property straddles the boundary between the assigned service areas of the City and the Co-op.

Although HTl's property has straddled the boundary line since boundaries were set, all of HTI's buildings lay within the City's assigned service area until 1991. In 1991 HTI built a tooling center within the Co-op's service area and extended its own distribution system to the building, using power supplied by the City at a delivery point within the City's assigned service area. The Co-op did not object.

In 1994 HTI built a training center within the Co-op's assigned service area and again extended City power using its own distribution system. The training center was built on a five-acre parcel of land acquired in 1987, 12 years after service area boundaries had been set. This time the Co-op objected.

[4] The Commission accepted and approved a Settlement Agreement between HUC and MCPA transferring the service territory MCPA serviced within the Hutchinson city limits to HUC in the Commission's April 10, 1998 Order Accepting Settlement, Adjusting Service area Maps, and Dismissing Contested Case with Prejudice in Docket No. E-251,120/SA-96-1103, In the Matter of the Petition of Hutchinson Utilities Commission to Adjust its Assigned Service Area Boundary with McLeod Cooperative Power Association.

long as they use their own distribution system to serve any points within another utility's assigned service area:

> The Commission notes the similarity between this situation and those in which a customer's property straddles the assigned service areas of two different utilities . In such situations the Commission has allowed the customer to receive service from the utility of his or her choice, as long as the power is delivered within the assigned service area of the chosen utility and is distributed over the customer's distribution system to any part of the property within the assigned service area of the other utility. This has proven to be a workable and reasonable approach to split-service area properties. (See June 14, 1996 Order at page 3)

However, in this proceeding, the Commission found that there were at least two unique factors at work:

> First, the customer in this case did not find itself inadvertently having to deal with two different electric utilities, as did some customers whose land was bisected when service area boundaries were originally drawn. This customer bought and built on property that was clearly outside the assigned service area of its utility after assigned service areas had been set.
>
> The Department and the Co-op are correct in noting that honoring customer choice in such situations creates the potential for abuse. Customers with the means and the incentive to manipulate the system could engage in gerrymandering to obtain service from the utility of choice.
>
> It is unnecessary to resolve this issue, however, or to reexamine or refine previously stated policies on split-service area properties, due to other factors at work in this case.
>
> The second unique factor at work in this case is that the situation at issue may have been addressed by previous agreements between the parties. While the Commission has generally stated a willingness to honor customer choice in 'straddle' cases, the Commission has also recognized that agreements between utilities can neutralize that choice.
>
> Service area stability is the central strategy in the statutory scheme for promoting 'economical, efficient, and adequate electric service' throughout the state. Minn. Stat. § 216B.37. Agreements between utilities are the favored means of setting assigned service areas and securing service area stability. Minn. Stat . § 216B.39, subd. 4. For these

reasons, the Commission has always encouraged service area agreements between utilities.

In this case the parties have argued extensively about the meaning of the original and the 1994 agreements. The merits of those arguments have not been fully developed, however, nor is this proceeding the proper vehicle for their comprehensive examination. (See Commission's June 14, 1996 Order in Docket No. E-252,120/C-95-517 at Page 4).

The circumstances of the present proceeding are significantly different from the Hutchinson proceeding Docket no. E-252, 120/C-95-517. As such, the prudential value is somewhat limited.

Staff notes all of the referenced dockets were all cited by the parties in this proceeding. The common thread in all of these dockets is the location of the service delivery point and customer choice when a customer's property straddles the assigned service areas of two different utilities. Based on the records of these proceedings (with the exception of 95-517 as noted above) if those two criterion were met, the Commission dismissed the complaint against the utility providing the service.

The present docket meets both of the criterion. The service delivery originates in Minnesota Power's territory and is distributed over Wisconsin Central's distribution system to the property within the assigned service area of LCP. In addition, the record in this proceeding reflects a very strong preference for Minnesota Power by Wisconsin Central in this circumstance.

## V. Decision Options

1. Dismiss Lake Country Power's Amended Complaint with prejudice. (MP, Wisconsin Central) OR

2. Dismiss Lake Country Power's Amended Complaint without prejudice. Lake Country Power may re-file a new complaint if and when it presents the following:

   a. A decision from the appropriate local governmental entity concluding that Wisconsin Central lacks the property rights to extend the distribution facilities at issue in this complaint; and

   b. A decision from a court of proper jurisdiction stating that the ICCTA does not preempt any aspect of this complaint.

3. Determine:

   a. MP is in violation of the exclusive service area provisions of the Minnesota Public Utilities Act; and

   b. determine that Lake Country Power has the exclusive right to extend electric service to the signaling and sensing equipment (and any electrical load) installed by Wisconsin Central.

4. Refer the matter to the Office of Administrative Hearings for Contested Case Proceeding.

## VI. Staff Recommendation