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## CONSTITUTIONAL ISSUES CONCERNING IMPLEMENTATION OF A MEGAWATT PER HOUR TAX AND THE ROLE OF THE STATE BOARD OF EQUALIZATION

This memorandum discusses constitutional issues concerning implementation of a megawatt per hour tax on the distribution of electricity and the role of the State Board of Equalization. The Constitution of North Dakota Article X, Section 4, provides:

All taxable property except as hereinafter in this section provided, shall be assessed in the county, city, township, village or district in which it is situated, in the manner prescribed by law. The property, including franchises of all railroads operated in this state, and of all express companies, freight line companies, dining car companies, sleeping car companies, car equipment companies, or private car line companies, telegraph or telephone companies, the property of any person, firm or corporation used for the purpose of furnishing electric light, heat or power, or in distributing the same for public use, and the property of any other corporation, firm or individual now or hereafter operating in this state, and used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the state board of equalization in a manner prescribed by such state board or commission as may be provided by law. But should any railroad allow any portion of its railway to be used for any purpose other than the operation of a railroad thereon, such portion of its railway, while so used shall be assessed in a manner provided for the assessment of other real property.

The first sentence of Section 4 of Article X provides that all taxable property except such property as is identified in subsequent sentences must be assessed in the political subdivision in which it is situated. The section then lists various kinds of common carrier and utility property and states that this property must be assessed by the State Board of Equalization.

North Dakota Century Code (NDCC) Chapter 57-13 outlines the membership, duties, and powers of the State Board of Equalization. Section 57-13-01 provides that the State Board of Equalization is composed of the Governor, State Treasurer, State Auditor, Commissioner of Agriculture, and the State Tax Commissioner. The Governor is chairman of the board and the Tax Commissioner is the secretary. Section 57-13-02 requires the State Board of Equalization to meet annually on the first Tuesday in August to assess all the taxable property that the board is required to assess pursuant to and in

accordance with the provisions of Section 4 of Article X and the statutes of this state. Section 57-13-03 requires the State Board of Equalization to meet annually on the second Tuesday in August to examine and compare the returns of the assessment of taxable property as returned by the several counties in the state and to proceed to equalize the same, so that all assessments of similar taxable property are uniform and equal throughout the state at the full and true value thereof in money or at such percentage of the full and true value as may be required by law. Section 57-13-04 requires the State Board of Equalization to equalize the valuation assessment of property throughout the state and authorizes the board to equalize the assessment of property between assessment districts of the same county and between the different counties of the state.

North Dakota Century Code Chapter 57-06 governs the assessment and taxation of public utilities. Section 57-06-01 provides:

This chapter governs the assessment of the property of any public utility company defined in section 57-06-02, and of any other company used directly or indirectly in carrying or conveying persons or property, unless the operative property is subject to a lieu tax in place of a general property tax. This chapter does not apply to the property of any railway or street railway company, nor to the fixtures, buildings, and improvements owned by any cooperative or nonprofit corporation organized under the laws of this state and used by it to furnish potable water to its members and customers for uses other than irrigation of agricultural land, and except as otherwise provided in chapter 57-32, does not apply to the property of any express or air transportation company.

North Dakota Century Code Section 57-06-02 provides definitions for Chapter 57-06 and states that "company" includes any individual, copartnership, business trust, corporation, limited liability company, joint-stock company, or association, and "power company" means a company owning or holding, under lease or otherwise, any property in this state, and operating the same for the purpose of furnishing electric light, electric power, or steam heat, or distributing the same for public use. Section 57-06-05 requires the State Board of Equalization, at its annual meeting in August, to assess the franchises and all operative property of telephone, telegraph, power,

gas, pipeline, and other companies, covered by this chapter, with reference to the value thereof on the first day of January of that year.

In *Souris River Telephone Mutual Aid Corporation v. State*, 162 N.W.2d 685 (N.D.1968), the North Dakota Supreme Court considered the constitutionality of a state tax imposed upon the gross receipts of a mutual or cooperative telephone company based upon the number of telephone stations per mile of line with a minimum tax of 50 cents per telephone station, which was in lieu of all real or personal property taxes levied by the state or any of its political subdivisions, and distributed to the individual counties based upon the number of telephones in each county. After addressing whether the classifications used by the Legislative Assembly violated the 14th Amendment to the United States Constitution or the North Dakota Constitution, the court found the tax was not in violation of the state or the federal Constitution. Yet it is interesting to note that Section 4 of Article X is not mentioned in the *Souris River* decision, even though that section provides that the property of telephone companies must be assessed by the State Board of Equalization.

However, there is one federal district court opinion based upon Section 4 of Article X of the Constitution of North Dakota that should be noted. In 1933 the Legislative Assembly enacted a law imposing a 12 percent gross income tax on certain power companies and provided that the taxes imposed would be in lieu of all other taxes, including property taxes except motor vehicle license and fuel taxes and special assessments. A three-judge federal panel concluded that Section 4 of Article X prohibited the Legislative Assembly from assessing public utility property on a gross earnings basis or any other basis which do not

take into consideration the value of the property, and which did not leave the assessing of that value to the State Board of Equalization. If this decision found in *Montana-Dakota Power Co. v. Weeks*, 8 F. Supp. 935 (D. N.D. 1934) was to be followed, it would seem that virtually all in lieu taxes would be subject to question. However, this portion of the federal decision has never been cited in any case since. If the holding in *Montana-Dakota Power* had been followed in the *Souris River* decision, presumably the North Dakota Supreme Court would have found NDCC Chapter 57-34, which provides for a tax based on operating receipts of telephone companies in lieu of property taxes, unconstitutional. Based upon the *Souris River* decision it may be argued that since a megawatt per hour tax is not based upon the value of property, it does not appear that the tax must be assessed by the State Board of Equalization. However, if it was to be determined that the State Board of Equalization must be involved, it could be argued that the involvement could consist of the ministerial function of applying the legislative rate to the megawatts of electricity generated, transmitted, or distributed by each entity subject to the tax.

If it is determined that a megawatt per hour tax in lieu of property taxes must be assessed by the State Board of Equalization, then the Legislative Assembly could amend NDCC Chapter 57-06 to require the State Board of Equalization to assess the tax on rural electric cooperatives and municipal power systems. This was the method chosen in the 1997 legislation that substantially revised taxation of telecommunications carriers under Chapter 57-34 and provided for a gross receipts tax in lieu of all real and personal property taxes on telecommunications carrier property used directly in telecommunications operations.