

 **MDU RESOURCES**
GROUP, INC.

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November 23, 2005

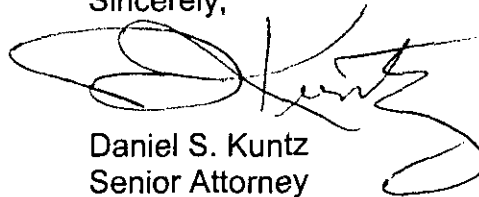
Ms. Illona Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
State Capital – Department 408
600 East Boulevard Avenue
Bismarck, ND 58505-0480

Re: Capital Electric Cooperative v. Montana-Dakota Utilities Co.
Case No. PU-05-551

Dear Ms. Jeffcoat-Sacco:

Enclosed for filing are the original and seven copies of the Motion to Dismiss or in the Alternative Motion for Continuance of Montana-Dakota Utilities Co., in the above referenced proceeding. Also enclosed is an extra copy of the Motion to Dismiss or in the Alternative Motion for Continuance. Please date stamp the extra copy for our files.

Sincerely,


Daniel S. Kuntz
Senior Attorney

DSK/djv

Enclosure

cc: Carol K. Larson
Donald Ball
Patrick Durick
Frank Morehouse
Dave Goodin

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)	
)	
Complainant,)	
)	
vs.)	Motion to Dismiss or in the
)	Alternative Motion for Continuance
)	
Montana-Dakota Utilities Co., a)	Case No. PU-05-551
Division of MDU Resources Group, Inc.))	
)	
Respondent.)	

The respondent, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), moves the Commission to dismiss the complaint of Capital Electric Cooperative ("CEC"). In the alternative, Montana-Dakota moves the Commission for a continuance of the hearing in this proceeding.

MOTION TO DISMISS

In its complaint, Capital Electric Cooperative alleges that pursuant to the grant of a franchise from the City of Bismarck, the area known as "part of Boulder Ridge First Addition to the City of Bismarck" ("Boulder Ridge") is located within CEC's service area. CEC further alleges that Montana-Dakota's intention to provide Boulder Ridge with electric utility service will unreasonably interfere with the service of CEC. CEC requests an order restraining Montana-Dakota from interfering with CEC's franchised service area.

On November 14, 2005, the Bismarck Board of City Commissioners entered its Findings, Conclusions, Decision and Order on the petition of Montana-Dakota to declare the franchise rights of Montana-Dakota and CEC to serve Boulder Ridge. A copy of Findings, Conclusions, Decision and Order of the Board of City Commissioners is attached hereto. The Board of City Commissioners concluded that Boulder Ridge is properly served by MDU under its franchise subject to CEC retaining any existing

customers at the time Boulder Ridge was annexed on April 12, 2005. CEC has not applied to amend its franchise to include any existing customers served by CEC at the time of the annexation of Boulder Ridge. In its complaint in this proceeding, CEC acknowledges that it retired its previous service to this area on April 8, 2005 and therefore had no existing customers at the time of annexation. Accordingly, CEC does not hold a franchise to serve any areas or customers within Boulder Ridge. As a matter of law, Boulder Ridge is not part of CEC's service area.

Capital Electric filed its complaint in this proceeding under N.D.C.C. §§ 49-03-01 and 49-03-01.3 based on allegations that it was seeking to prevent interference by Montana-Dakota with services provided by CEC at Boulder Ridge. Because CEC is not authorized to provide service to Boulder Ridge, there can be no such interference by Montana-Dakota. The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck. Article VII, Section 11 of the North Dakota Constitution provides that the power of the City of Bismarck to franchise the operation of a public utility shall not be abridged by the legislative assembly. Subsection 8 of N.D.C.C. § 49-03-06 provides that nothing in Chapter 49-03 shall be construed to limit the authority of the governing board of the City to exercise its franchising authority under N.D.C.C. § 40-05-01. Accordingly, the Commission has no authority under either N.D.C.C. § 49-03-01 or 49-03-01.3. to limit the determination of the Board of City Commissioners that Montana-Dakota is entitled to provide electric utility service within Boulder Ridge under its franchise with the City of Bismarck.

CEC's complaint should be dismissed on the grounds that CEC is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a

matter of law, interfere with the services of CEC. CEC's complaint should also be dismissed on grounds that the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge.

ALTERNATIVE MOTION FOR CONTINUANCE

In the event the Public Service Commission determines not to dismiss the complaint of CEC, Montana-Dakota requests the hearing in this matter scheduled for December 13, 2005 be continued. The undersigned counsel for Montana-Dakota as well as Montana-Dakota's Assistant Vice President of Regulatory Affairs are scheduled to appear at a proceeding before the South Dakota Public Utilities Commission involving a number of parties that has been set for hearing for December 13-16, 2005. Because of the significant importance of both of these proceedings, Montana-Dakota requests a short continuance of the hearing in this matter to allow participation of its representatives in both proceedings.

Dated this 23rd day of November, 2005.

Respectfully submitted,
Montana-Dakota Utilities Co., a Division of
MDU Resources Group, Inc.

Daniel S. Kuntz (ID# 03490)
Senior Attorney
MDU Resources Group, Inc.
918 East Divide Avenue
P.O. Box 5650
Bismarck, ND 58506-5650
(701)222-7612

By: 

Bismarck

City Administration



November 15, 2005

Dan Kuntz
Montana Dakota Utilities
400 North Fourth Street
Bismarck, ND 58501

Lars Nygren
Capital Electric Cooperative
4111 State Street
Bismarck, ND 58503

Dear Mr. Kuntz and Mr. Nygren:

The Board of City Commissioners met in special session on Monday, November 14, 2005 and further deliberated your request for approval of a Petition to Declare Electric Franchise Rights. The petition requested that the commission decide whether Montana-Dakota Utilities or Capital Electric Cooperative is authorized to service "Part of the Boulder Ridge First Addition to the City of Bismarck" subdivision.

The Board considered the request and granted franchise rights to Montana Dakota Utilities for Boulder Ridge Subdivision and adopted the Findings, Conclusions, Decision and Order as presented by the City Attorney. The Findings, Conclusions, Decision and Order are available in the Office of City Administration for review.

Sincerely,

Dennis Schlenker
Investment/Finance Officer

DS/lfb

Enclosure



BISMARCK BOARD OF CITY COMMISSIONERS

IN THE MATTER OF A
PETITION TO DECLARE FRANCHISE
RIGHTS FILED BY MONTANTA
DAKOTA UTILITIES CO

**FINDINGS, CONCLUSIONS
DECISION AND ORDER**

The Bismarck Board of City Commissioners considered the matter of a Petition to Declare Franchise Rights filed by Montana Dakota Utilities Co. (MDU). MDU and Capital Electric Cooperative (CEC) were notified by letter dated September 14, 2005, of a hearing to be held October 11, 2005 and of their opportunity to submit written materials and information regarding this matter by October 5, 2005. A hearing before the Board of City Commissioners was held on October 11, 2005 to determine the franchise rights of the parties and in particular the franchise rights of the parties with respect to part of Bolder Ridge subdivision in Bismarck. At the hearing, Daniel Kuntz, representing MDU, appeared and presented information and evidence on behalf of MDU's Petition. Carol Larson, representing CEC, appeared and presented information and evidence on behalf of CEC. The Commission again took up deliberation of the Petition at a special meeting held November 14, 2005. After reviewing the information submitted by both parties and hearing the information submitted and after due consideration, the City Commission makes the following:

FINDINGS OF FACT

That as a result of information presented by the parties, the City Commission finds:

1. That MDU holds a Franchise to operate an electric distribution system over, on and under all of the public ways of the City of Bismarck, dated May 12, 1987, for a term of 20 years. CEC holds a Franchise to operate an electric distribution system over, on and under the public ways, dated May 25, 1993, for a term of 20 years. CEC's Franchise contains a geographic limitation not contained in MDU's Franchise.

2. CEC originally approached the City in the early 1960s in an attempt to secure a limited franchise to operate within the City of Bismarck. At that time, CEC stated that their request was limited to permission to retain existing customers currently within the City; to serve existing customers outside the City when they are annexed to the City and permission to serve certain units of state or local governments when requested to do so all with the

understanding that CEC would not build any new lines within the City without the City's explicit permission. Information submitted by MDU indicates that CEC had long sought a service agreement with MDU to enable CEC to obtain a City franchise. The intent of the parties during those discussions appears to have been to allow CEC a limited presence in the City with MDU to be the primary supplier of electric services within the City.

3. In 1973, MDU and CEC entered into an Area Service Agreement in an attempt to reduce service conflicts between them and plan for orderly growth for each utility. The intent of the agreement was to regulate the service areas of the two utilities and to avoid conflicts that might occur if CEC was granted a franchise to operate within the City. The Area Service Agreement sets out geographic service areas for each utility and also a framework for cooperation in the event of conflicts that might arise in areas of over-lap or areas where it is more economic for one of the utilities to provide electric service. The signing of the Area Service Agreement coincided with the City's award of a limited franchise to CEC. The Area Service Agreement appears to have removed MDU's objections regarding a franchise award to CEC.

a. The Area Service Agreement contains a map, as an attachment, that describes the respective service areas of both of the utilities as agreed to by them in 1973.

b. The Area Service Agreement contains a provision in which the parties agree that as Bismarck grows and conditions change, the Area Service Agreement would be revisited at least every 5 years and the parties would in good faith review the agreement for modifications that "may be desirable to more efficiently carry out the intent of both parties." This intent was more explicitly stated in the CEC proposal to the City (1961) wherein CEC proposed that the boundary would be modified as the City grew. This was MDU's stated understanding of how the Area Service Agreement would work.

c. The franchises of both MDU and CEC are similar except that the CEC Franchise incorporates the provisions of the Area Service Agreement. The CEC Franchise contains the following provision:

Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the streets, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for

transmitting and distributing electric energy for public and private use.

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted to Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990 and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution.

4. That the Area Service Agreement was amended by a Letter of Agreement between MDU and CEC dated October 25, 1990. That Letter of Agreement describes a certain service areas of the parties but does not include Boulder Ridge First Addition to the City of Bismarck. The Area Service Agreement was amended in June of 1993, by a letter agreement signed by both of the parties. The letter agreement amended the Area Service Agreement by adding the language regarding the parties' rights upon cancellation of the Area Service Agreement during the term of either franchise. The language added by the amendment is similar to language contained in Article II, Paragraph 1 of CEC's franchise, as stated above. The Area Service Agreement may also have been amended by writings or by oral agreements between the parties that the City Commission is unaware of.

5. By letter dated June 26, 2002, MDU cancelled the Area Service Agreement. By the terms of the Area Service Agreement, the cancellation was effective June 26, 2003.

6. That in April of 2005, part of Boulder Ridge First Addition to the City of Bismarck was annexed and became a part of the City. Boulder Ridge First Addition is located outside the bold line on the map attached to the Area Service Agreement. Both MDU and CEC claim the right to serve this new subdivision.

CONCLUSIONS OF LAW

1. That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City. Pursuant to Article 3, Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck City Commission is the franchising authority for both MDU and CEC for all public areas within the City of Bismarck and the City Commission has the authority to decide questions regarding the franchises issued by it.

2. MDU and CEC have offered differing opinions regarding the meaning and interpretation of the CEC Franchise. MDU and CEC have offered differing opinions regarding the meaning, interpretation and application of the Area Service Agreement as it is incorporated into the CEC Franchise. The Area Service Agreement is ambiguous and the Commission may consider extrinsic evidence to interpret the provisions of the Area Service Agreement and related provisions of the CEC Franchise.

3. That both MDU and CEC have valid franchises to operate electric power distribution systems over, on and under the public ways within the City. CEC's Franchise is limited by the language of Article II of that Franchise, which incorporates the Area Service Agreement between MDU and CEC. The intention of the parties in the Area Service Agreement and by extension, the intention of the City when it awarded a franchise to CEC, was for MDU to remain the main provider of electric services within the City, except for CEC's existing customers and any other customers or service areas conceded to CEC by MDU. It was not the intention of the parties or of the City, that the map attached to the Area Service Agreement would be in place for 40 years without amendment but rather that it would be amended as the City grew to allow for healthy efficient growth for both utilities. It was not the intent of the City that CEC would become the exclusive electric power supplier for all new areas of the City outside the line shown in the Area Service Agreement. It was the City's intent, in including the Area Service Agreement in the CEC Franchise, that the line on the Area Service Agreement map would move outward as the City grew.

4. That pursuant to the terms of the CEC Franchise, at Article II, the CEC Franchise includes areas within the City "as now or hereafter constituted" but is "subject to the conditions herein". The CEC Franchise is specifically limited in scope. In Paragraph 1 of Article II, it is stated that

In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted to Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990 and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. (emphasis added)

5. CEC's Franchise is limited to those areas within the City that are described in the Area Service Agreement or any amendments thereto. The areas "within the City" described in the Area Service Agreement are as shown on the Area Service Agreement map outside the bold line and within the City. The "areas within the City" would also include any areas later annexed to the City that were named by an amendment to the Area Service Agreement. Customers of CEC within the City in 1973 and any other customers specifically consented to by MDU would also be included under the express terms of the Area Service Agreement. CEC's Franchise does not grant the authority to serve all new areas of the City that are outside the bold line on the map without amendment to the Area Service Agreement. The ability of the parties to execute new amendments ended on June 26, 2003, the effective date of cancellation of the Area Service Agreement by MDU.

6. That the hearing was properly noticed and that all parties had opportunity to appear and present evidence.

DECISION AND ORDER

Based upon the Findings and the Conclusions, the Board of City Commissioners concludes that electric power service to part of Bolder Ridge First Addition to the City of Bismarck is properly served by MDU, subject to CEC retaining any existing customers. The Board of City Commissioners strongly urges MDU and CEC to meet and agree on a new service agreement for the future development and provision of electric services within the City of Bismarck as it now exists or exists in the future and submit such agreement to the Board of City Commissioners for their approval pursuant to NDCC Section 49-03-06(8).

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative vs.
Montana-Dakota Utilities Co.
Complaint

Case No. PU-05-551

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **23rd day of November, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with fully prepaid, securely sealed and each containing an original of:

Motion to Dismiss or in the Alternative Motion for Continuance

The envelope was addressed as follows:

Carol K. Larson
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702

Each address shown is the respective addressee's last reasonably ascertainable post office address.



Subscribed and sworn to before me
this **23rd day of November, 2005**.



Notary Public

