



offer an argument that either N.D.C.C. § 49-03-01 or 49-03-01.3 authorizes the Commission to override the Board of City Commissioners' determination of franchise rights for Boulder Ridge in light of Article VII, Section 11 of the North Dakota Constitution and subsection 8 of N.D.C.C. § 49-03-06. In short, CEC offers no legal or factual support for its complaint.

CEC's statement that has invoked the jurisdiction delegated to the Commission by the North Dakota Legislature begs the question. Contrary to CEC's position, the Legislature has specifically stated at subsection 8 of N.D.C.C. § 49-03-06 that nothing in N.D.C.C. Chapter 49-03, the chapter upon which CEC asserts its claim of interference, gives the Commission jurisdiction to limit the authority of the governing board of a city to exercise its franchising authority under N.D.C.C. § 40-05-01. Even the case cited by CEC of Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956) is contrary to CEC's position that the Commission has no power to decide jurisdictional issues. In Williams, the Commission determined it did not have jurisdiction to decide the contract issues raised by the cooperative's complaint. Id. at 515. That determination was affirmed by the Supreme Court (" . . . the Public Service Commission correctly determined that it was without jurisdiction.") Id. at 518.

CEC's argument that the Commission should follow the procedure outlined in Williams Electric Cooperative v. Montana-Dakota Utilities Co., Id., is also misplaced. The issue in Williams was an allegation of interference for an extension of service outside a city. The case provides no authority to address interference claims for service areas within a city where the complaining cooperative does not hold a franchise. The Commission cannot decide a claim of interference within a city without making a threshold determination that the complaining party holds a franchise within the city to

serve the affected service area. This preliminary issue can be decided as a matter of law without an evidentiary hearing in this proceeding where the Board of City Commissioners has issued its order determining the franchise rights of the parties.

The Commission not only has the power to decide if it has jurisdiction to address CEC's complaint, it has an obligation to do so. The Commission is obligated to comply with the mandates of the North Dakota Constitution and the laws of the State of North Dakota. N.D.C.C. § 44-01-05. Both the North Dakota Constitution and statutes specifically provide that the Commission is not authorized to act in a manner that interferes with the franchising authority of a city. The Commission is required to recognize this limitation on its statutory authority in addressing CEC's complaint.

Essentially conceding that the Commission has no jurisdiction to address CEC's complaint of interference within the City of Bismarck, CEC notes that it has commenced an action in North Dakota District Court for a determination of franchise rights. CEC suggests that after the court determines these threshold issues, the Commission can proceed to exercise jurisdiction and determine whether Montana-Dakota's provision of service in the Boulder Ridge Subdivision is a prohibited interference. CEC's argument further supports Montana-Dakota's position that this complaint should be dismissed. In the unlikely event the court action somehow establishes that CEC has a franchise to serve Boulder Ridge Subdivision contrary to the City Commission's determination, CEC can refile its complaint with this Commission. CEC's mere filing of the complaint with the District Court does not allow the Commission to proceed or hold in abeyance a complaint for which it has no jurisdiction to consider.

In conclusion, CEC offers no authority or argument that the Commission has jurisdiction to consider CEC's complaint in light of Article VII, Section 11 of the North

Dakota Constitution and subsection 8 of N.D.C.C. § 49-03-06. CEC also does not dispute that the Board of the City Commissioners of the City Commission has determined that CEC's limited franchise for the City of Bismarck does not extend to the Boulder Ridge Subdivision. Montana-Dakota renews its request that CEC's complaint be dismissed as a matter of law on the grounds that CEC is not authorized to provide service within Boulder Ridge and 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.

Dated this 12<sup>th</sup> day of December, 2005.

Respectfully submitted,  
Montana-Dakota Utilities Co., a Division of  
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By: 

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:

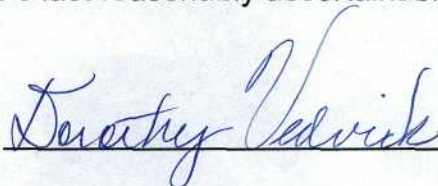
she is over the age of 18 years and not a party to this action and, on the **12<sup>th</sup> day of December, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with fully prepaid, securely sealed and containing a copy of:

Reply Brief In Support Of Motion To Dismiss

The envelope was addressed as follows:

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

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

  
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Subscribed and sworn to before me  
this **12<sup>th</sup> day of December, 2005**.

  
\_\_\_\_\_  
Notary Public

