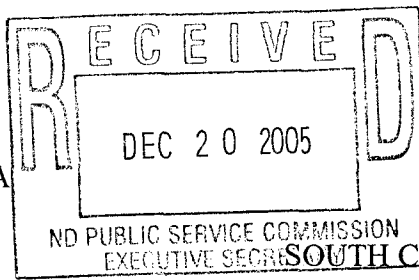


STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH



IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc., )  
)  
Plaintiff, )  
)  
vs. )  
)  
The City of Bismarck, North Dakota )  
)  
and )  
)  
Montana-Dakota Utilities, Inc., a Division )  
of MDU Resources Group, Inc. )  
)  
and )  
)  
The Public Service Commission of North )  
Dakota, )  
)  
Defendants. )

**DEFENDANT CITY OF BISMARCK'S  
BRIEF IN SUPPORT OF MOTION TO  
DISMISS OR, IN THE ALTERNATIVE,  
FOR A MORE DEFINITE STATEMENT**

\*\*\*

\*\*\*

\*\*\*

**I. INTRODUCTION**

Plaintiff Capital Electric Cooperative, Inc. [hereinafter "Capital"] initiated an action against defendants via summons and complaint dated November 30, 2005. Capital's complaint alleges the Court has jurisdiction pursuant to N.D.C.C. ch. 32-23 (Declaratory Judgments) and Capital is requesting the court to declare its rights under a "franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." Complaint at p. 4 (copy attached as Exhibit A). The City requests Capital's complaint be dismissed for failure to state a claim under N.D.R.Civ.P. 12(b)(vi) and for failure to exhaust administrative remedies. Alternatively, pursuant to N.D.R.Civ.P. 12(e), the City of Bismarck ["Bismarck"] requests the

Court order Capital to provide a more definite statement regarding the relief sought.

## **II. RELEVANT FACTS**

Capital has brought a complaint against the City, Montana-Dakota Utilities [“MDU”], and the Public Service Commission [“PSC”] requesting the Court “declare[e] its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993.” Complaint at p. 4 (copy attached as Exhibit A). Capital alleges it filed a complaint with the PSC regarding MDU’s alleged extension of facilities into CEC’s service area which will “unreasonably interfere or is about to unreasonably interfere with” Capital’s service or system. Complaint at ¶ VII. Capital also alleges MDU filed a Petition to Declare Franchise Rights with the Board of City Commissioners of Bismarck. Complaint at ¶ IX. Capital Alleges that the City Commissioners granted MDU’s petition. Complaint at ¶ X.

From Capital’s complaint, it is impossible to determine whether it is seeking a declaration of its rights in regards to providing electric distribution services to Part of Boulder Ridge First Addition; whether it is seeking some broader declaration of its franchise rights; or whether it is seeking a declaration which may be within the purview of the PSC. Further, it is impossible to determine what conduct by the City in relation to its recent decision Capital alleges was improper. There are no specific facts or conduct alleged by Capital which would permit the City to properly defend itself and there is no legal or evidentiary basis asserted by Capital for its lawsuit against the City. In addition, Capital’s requested relief is too broad, vague, and ambiguous for Bismarck to frame a responsive pleading. It is impossible for Bismarck to determine the appropriate method of responding to Capital’s complaint without knowing the extent of the declaratory relief sought. Bismarck requests that Capital’s complaint be dismissed, or alternatively, an order that Capital be required to provide a more definite statement regarding

the cause of action alleged as to the City and as to the relief requested. It may be that the City's conduct, if any, is not at issue in this matter and therefore, the City may not be a necessary party in this matter. However, the City cannot make such a determination based on Capital's complaint.

### **III. APPLICABLE LAW AND ARGUMENT**

When a party requests declaratory relief, the district court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

N.D.C.C. § 32-23-01. Any person "whose rights, status, or other legal relations are affected by a . . . franchise, may have determined any question of construction or validity arising under the . . . franchise and may obtain a declaration of rights, status, or other legal relations thereunder."

N.D.C.C. § 32-23-02.

The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination....

In order to present a justiciable controversy under the declaratory judgments act, the complaint must allege facts upon which the court can render a judgment or decree that will terminate the controversy or remove an uncertainty....

Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing litigants. Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy. Although complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner.

In the Interest of Mullen, 470 N.W.2d 196, 198-99 (N.D. 1991) (quoting Iverson v. Tweeden, 78 N.D. 132, 48 N.W. 2d 367, 370-71 (1951)) (emphasis added). “A court’s authority to grant declaratory relief, however, requires exhaustion of administrative remedies.” Tooley v. Alm, 515 N.W.2d 137,139 (N.D. 1994).

**A. Capital’s Complaint should be Dismissed.**

Capital’s complaint should be dismissed for failure to exhaust administrative remedies and/or for failure to state a claim upon which relief can be granted.

**1. Capital has failed to exhaust its administrative remedies.**

Capital’s complaint alleges that it has “filed a complaint with the [PSC] . . . alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. § 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital’s service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.” Complaint at ¶ VII. This allegation, along with the inclusion of the PSC as a defendant, indicates that Capital has not exhausted its available administrative remedies regarding this matter. The PSC complaint is still proceeding and involves issues related to the allegations in the complaint in this matter. Compare, District Court Complaint (Civil No. 05-C-2303) (Nov. 30, 2005) with PSC Complaint (Case No. PU-05-551) (Sep. 28, 2005) (attached as Exhibit B). The North Dakota Supreme Court has stated:

“We do not favor or encourage, nor can we sustain, bifurcated self-induced or self-initiated procedures, one in the administrative process and one in the judicial process covering the same legal questions.

“If such bifurcated procedures were encouraged or sustained, it would create duplication, and uncertainty, and waste manpower and money, with no appreciable result, and all without improving the administration of justice. If one

side of a proceeding were permitted to proceed both in the administrative channels and the judicial channels at the same time the other side could also resort to the same procedure. The result would be endless confusion, which we can ill afford.”

Transp. Div. of the Fargo Chamber of Comm. v. Sandstrom, 337 N.W.2d 160, 163 (N.D. 1983) (quoting Shark Bros., Inc. v. Cass County, 256 N.W.2d 701, 705, 706 (N.D. 1977)); see also Tooley, 515 N.W.2d at 139. By initiating this declaratory judgment action without first exhausting its administrative remedies, Capital has done precisely what the Court forbade in Sandstrom. Capital is still pursuing its administrative complaint, see Letter from Carol Larson to PSC (Dec. 14, 2005) (attached as Exhibit C), while attempting to bring this separate action in district court. Capital’s complaint should, therefore, be dismissed for failure to exhaust its available administrative remedies. Further, exhaustion of administrative remedies is necessary considering the relief requested by Capital City in its complaint is so non-specific that it is impossible to determine whether the relief is within the realm of the PSC’s jurisdiction or not.

Further, pursuant to N.D.Const. Art. VII, § 11, the governing board of the City has the power to franchise any public utility within the City and no law takes away the power of the City’s governing board to exercise its franchise authority. See N.D.C.C. § 49-03-06(8). The governing body of a city has the power “[t]o grant franchises or privileges to persons, associations, corporations, or limited liability companies, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same.” N.D.C.C. § 40-05-01(57). Franchises granted are “not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.” Id. To the extent Capital is seeking a broad declaration of any of its franchise rights, its claim fails because it should present those arguments to the City first. The City has only made a decision, under its constitutional and statutory authority, in regards to the right to electric distribution services to

part of Boulder Ridge Addition. Capital cannot bypass the regulatory powers of the City by bringing an overly broad declaratory action.

2. **Capital's complaint should be dismissed for failure to state a claim.**

“In order to present a justiciable controversy under the declaratory judgments act, the complaint must allege facts upon which the court can render a judgment or decree that will terminate the controversy or remove an uncertainty.” Mullen, 470 N.W.2d at 198-99. Capital has not alleged facts upon which the court can render declaratory relief which will terminate the controversy and therefore, its complaint fails to state a claim. Capital has broadly alleged the basic underlying procedure of this matter and is seeking broad relief, requesting “judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993.” Complaint at p. 4. From this allegation, it is impossible to determine whether Capital is seeking a declaration of its rights under any and all circumstances, which would not be ripe for review and would be an impossible endeavor; whether Capital is requesting the Court declare its rights in regards to an area in which the PSC could possibly have authority; or whether it is seeking a declaration of its rights solely in regards to providing electric distribution services to part of the Boulder Ridge Addition. Any person “whose rights, status, or other legal relations are affected by a . . . franchise, may have determined any question of construction or validity arising under the . . . franchise and may obtain a declaration of rights, status, or other legal relations thereunder.” N.D.C.C. § 32-23-02. However, rather than presenting a “question of construction or validity arising under” its franchise, Capital has apparently sought a broad declaration of any rights it may have under the franchise. Such a broad declaration is not allowed pursuant to the statute, and would be impossible without application to a particular situation. Therefore, Capital’s complaint fails to

state a claim upon which relief can be granted and should be dismissed.

By requesting such broad relief and failing to allege specific facts, the claim fails to indicate whether the parties' interests are adverse and whether all the parties have a legal interest in the controversy. Further, it is impossible to determine whether the controversy is ripe for review and whether it is even justiciable. As a result of its overbroad nature (specifically in regards to the requested relief), Capital's complaint fails to state a claim upon which declaratory relief can be granted pursuant to N.D.C.C. ch. 28-32 and Mullen, supra.

**B. Alternatively, Capital should be Ordered to Provide a More Definite Statement**

Alternatively, the City requests the Court order Capital to provide a more definite statement so that the City can prepare a responsive pleading. See N.D.R.Civ.P. 12(e). If Capital is seeking the Court to declare its rights in regards to the electric distribution services to "Part of Boulder Ridge First Addition to the City of Bismarck", Capital should plead that as the relief sought. However, from the Complaint, it is impossible to determine whether Capital is seeking broad, and possibly unavailable, declaratory relief in regards to any and all rights under its franchise agreement; whether it is seeking a specific declaration in regards to the Boulder Ridge addition; or whether it is seeking relief that may be under the jurisdiction of the PSC. Without knowing what Capital is seeking, Bismarck is unable to adequately respond and determine how to proceed in the action. If Capital is seeking a declaration of any and all of its rights under its franchise, such relief would not present a justiciable controversy as the relief could not possibly be granted without some application to a specific factual scenario. Further, without further clarification regarding what relief Capital is requesting, it is impossible to determine whether Capital has exhausted its administrative remedies, although it appears with the concurrent PSC

matter proceeding that Capital has failed to exhaust administrative remedies. Certain relief may be more appropriately determined by the PSC, which has not yet made a decision on the complaint filed by Capital with the PSC. Without knowing the precise relief sought, it is impossible to determine whether a declaratory judgment action is sustainable.

If Capital is indeed seeking a declaration of its rights in regards to providing electric distribution services to “Part of the Boulder Ridge First Addition to the City of Bismarck,” it should clarify that in the complaint so that the City (and the other parties) are aware of the scope of Capital’s complaint. Therefore, if the Court does not dismiss the complaint, Bismarck requests an order from the Court requiring that Capital provide a more definite statement in its complaint so the City is aware of the extent of relief sought by Capital. Bismarck cannot determine the appropriate response without knowing the extent of the declaration of rights sought by Capital. The case law is clear that one seeking declaratory relief must present a justiciable controversy in its complaint. As Capital’s complaint presently stands, it is impossible to evaluate whether a justiciable controversy exists. See Iverson, 48 N.W.2d at 371 (“the complaint [for declaratory relief] must allege facts upon which the court can render a judgment or decree that will terminate the controversy or remove an uncertainty”).

Capital has requested an overbroad declaration of its rights under the franchise. There has to be some specific relief sought by Capital in order to evaluate its complaint in conjunction with specific facts. Without knowing the scope of relief sought, the City is unable to prepare a responsive pleading.

### **III. CONCLUSION**

For the foregoing reasons, Bismarck requests Capital’s lawsuit be dismissed for failure to state a cause of action and/or for failing to exhaust its administrative remedies, or in the

alternative that Capital be ordered to provide a more definite statement regarding what rights it seeks to declare.

Dated this 19th day of December, 2005.

SMITH BAKKE OPPEGARD PORSBORG WOLF

By: *Randall J. Bakke*

Randall J. Bakke  
116 North Second Street  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
ND State Bar ID No. 03898

Attorneys for Defendant,  
City of Bismarck

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANT CITY OF BISMARCK'S BRIEF IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT** was on the 19th day of December, 2005, mailed to the following:

**ATTORNEYS FOR PLAINTIFF:**

Carol K. Larson  
Attorney at Law  
P.O. Box 1000  
Minot, ND 58702-1000

**ATTORNEY FOR DEFENDANT MONTANA DAKOTA UTILITIES:**

Daniel S. Kuntz  
MDU Resources Group, Inc.  
P. O. Box 5650  
Bismarck, ND 58502-5650

ATTORNEY FOR DEFENDANT PUBLIC SERVICE COMMISSION:

William W. Binek  
Public Service Commission  
State Capitol  
Bismarck, ND 58505-0480

By   
RANDALL J. BAKKE

Brief-Motion-Dismiss-Definite Statement

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

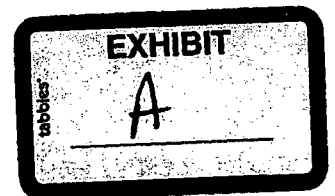
Capital Electric Cooperative, Inc. )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
The City of Bismarck, North Dakota )  
 )  
and )  
 )  
Montana-Dakota Utilities, Inc., a )  
Division of MDU Resources Group, )  
Inc. )  
 )  
and )  
 )  
The Public Service Commission of )  
North Dakota )  
 )  
Defendants. )

**SUMMONS**

Docket Number \_\_\_\_\_

THE STATE OF NORTH DAKOTA TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to appear and defend against the Complaint in this action, which is herewith served upon you, by serving upon the undersigned an Answer or other proper response within twenty (20) days after the service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.



Dated this 20<sup>th</sup> day of November, 2005.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )  
Division of MDU Resources Group, )  
Inc. )

and )

The Public Service Commission of )  
North Dakota )

Defendants. )

**COMPLAINT**

**Docket Number** \_\_\_\_\_

I.

Plaintiff (herein "Capital") is a cooperative organized and operated under North Dakota Century Code Chapter 10-13 providing electric energy in North Dakota.

II.

The Defendant City of Bismarck (herein the "City") is a city under North Dakota Century Code Title 40.

III.

The Defendant Montana-Dakota Utilities, Inc. a division of MDU Resources Group,

Inc. (herein "Montana-Dakota") is a business corporation providing electric energy in North Dakota.

IV.

The North Dakota Public Service Commission (herein "Commission") is a constitutional body under Article V, Section 2 of the North Dakota Constitution and under North Dakota Century Code Title 49.

V.

Montana-Dakota holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 12, 1987.

VI.

Capital holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 23, 1993.

VII.

On September 28, 2005, Capital filed a complaint with the Commission under N.D.C.C. 49-03-01, -01.4 and -05, alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital's service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.

VIII.

On October 20, 2005, Montana-Dakota filed an answer and counterclaim to Capital's complaint, asserting Capital "... is not authorized by law or franchise to provide

electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck."

IX.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a "Petition to Declare Franchise Rights" requesting the Board "to determine that: "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005; and 2. CEC [Capital] is not authorized under its franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005."

X.

On November 14, 2005, the President and City Administrator of the City executed a document titled "Findings, Conclusions Decision and Order" "In the matter of a Petition to Declare Franchise Rights Filed by Montana Dakota Utilities Co.," wherein "the Board of City Commissioners Orders that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to the City of Bismarck."

XI.

The Board of Commissioners of the City of Bismarck performs the legislative functions of the city.

XII.

The North Dakota Public Service Commission is a constitutional body under Article

V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise.

XIII.

The district court has judicial power and original jurisdiction of all causes including the power to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, section 27-05-06 and chapter 32-23.

XIV.

Capital is a person whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract or franchise with respect to the provision of electric power services within the City of Bismarck.

Therefore, Capital requests judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993.

Dated this 30 day of November, 2005.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson  
Carol K. Larson - #04406  
Attorneys for Capital Electric Cooperative, Inc.  
Pringle & Herigstad, P.C.  
2525 Elk Drive  
PO Box 1000  
Minot, ND 58702-1000  
(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )  
Inc. )

and )

The Public Service Commission of )

North Dakota )

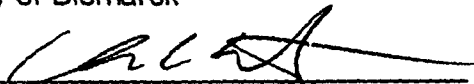
Defendants. )

**ADMISSION OF SERVICE**

**Docket Number** \_\_\_\_\_

The City of Bismarck, by and through their attorney, Charles C. Whitman, hereby admits service of the Summons and Complaint this 1st day of December, 2005.

City of Bismarck



By: Charles C. Whitman, Attorney

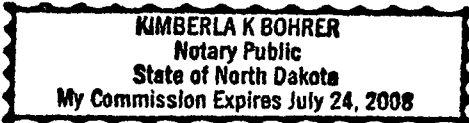
Subscribed and sworn to before me this 1st day of December, 2005.



Notary Public

For the State of North Dakota

My commission expires: 7-24-08



DONALD A. NEEGAARD  
JAMES E. NOSTDAHL  
CAROL K. LARSON  
DAVID J. HOGUE  
REED A. SODERSTROM  
BRENT M. OLSON  
DEBRA L. HOFFARTH  
SCOTT M. KNUDSVIG  
ERIKA L. SLEGER  
RYAN D. SANDBERG



LAW OFFICES OF  
**PRINGLE & HERIGSTAD, P.C.**

2525 ELK DRIVE  
POST OFFICE BOX 1000  
MINOT, NORTH DAKOTA 58702  
(701) 852-0381  
FAX (701) 857-1361  
E-mail: pringle@srt.com

OF COUNSEL  
HERBERT L. MESCHKE

RETIRED  
THOMAS A. WENTZ  
MARK F. PURDY  
JAN M. SEBBY

KENNETH G. PRINGLE  
(1914-1983)  
MITCHELL H. MAHONEY  
(1929-1996)  
ROGER O. HERIGSTAD  
(1919-2003)

November 30, 2005

Charles C. Whitman, City Attorney  
City of Bismarck  
221 North 5<sup>th</sup> Street  
Bismarck, ND 58501

**DECLARATORY JUDGMENT**

Dear Charlie:

Enclosed please find a Summons and Complaint, and an Admission of Service, in connection with the Declaratory Judgment action initiated by Capital Electric. Please sign the enclosed Admission of Service and return same to our office in the envelope provided.

Yours truly,

Carol K. Larson  
lat

**RECEIVED**

DEC 01 2005

Kramer Agency

# ACORD™ GENERAL LIABILITY NOTICE OF OCCURRENCE CLAIM

DATE (MM/DD/YYYY)

12/2/2005

PRODUCER PHONE (A/C, No, Ext): (701) 255-4502	NOTICE OF OCCURRENCE	DATE OF OCCURRENCE AND TIME	AM	DATE OF CLAIM	PREVIOUSLY REPORTED
Kramer Agency 123 East Broadway Avenue P O Box 1318 Bismarck, ND 58502-1318	<input checked="" type="checkbox"/> NOTICE OF CLAIM	11/30/2005		11/30/2005	YES <input checked="" type="checkbox"/> NO
EFFECTIVE DATE	EXPIRATION DATE	POLICY TYPE		RETROACTIVE DATE	
8/1/2005	8/1/2006	<input checked="" type="checkbox"/> OCCURRENCE <input type="checkbox"/> CLAIMS MADE			
COMPANY	NAIC CODE:	MISCELLANEOUS INFO (Site & location code)			
	ND Insurance Reserve Fund				
CODE:	SUB CODE:	POLICY NUMBER	REFERENCE NUMBER		
AGENCY CUSTOMER ID: BISMCI-01		GL317403			

INSURED		CONTACT		CONTACT INSURED
NAME AND ADDRESS	SOC SEC # OR FEIN:	NAME AND ADDRESS	WHERE TO CONTACT	
City Of Bismarck		Charles Whitman		
221 N 5th St Bismarck, ND 58501-4028			WHEN TO CONTACT	
RESIDENCE PHONE (A/C, No)	BUSINESS PHONE (A/C, No, Ext)	RESIDENCE PHONE (A/C, No)	BUSINESS PHONE (A/C, No, Ext)	
	(701) 222-6570		(701) 222-6570	

**OCCURRENCE**

LOCATION OF OCCURRENCE (include city & state)	AUTHORITY CONTACTED
Insured received Summons & Complaint - Capital Electric Cooperative, Inc. vs The City of Bismarck and Montana Dakota Utilities, Inc and The Public Service Commission of North Dakota. Summons and Complaint attached.	

**POLICY INFORMATION**

COVER AGE PART OR SEE ATTACHED ADDITIONAL COVERAGES AND FORMS & ENDORSEMENTS OVERFLOW FORMS (insert form #s and edition dates)

GENERAL AGGREGATE	PROD/COMP OP AGG	PERS & ADV INJ	EACH OCCURRENCE	FIRE DAMAGE	MEDICAL EXPENSE	DEDUCTIBLE	PD
		2,000,000	2,000,000		1,000		BI
UMBRELLA/EXCESS	UMBRELLA	EXCESS	CARRIER:	LIMITS:	AGGR	PER CLAIM/OCC	SIR/DED

**TYPE OF LIABILITY**

REMISES: INSURED IS	OWNER	TENANT	OTHER:	TYPE OF PREMISES
OWNER'S NAME ADDRESS (if not insured)				OWNERS PHONE (A/C, No, Ext):
PRODUCTS: INSURED IS	MANUFACTURER	VENDOR	OTHER:	TYPE OF PRODUCT
MANUFACTURER'S NAME & ADDRESS (not insured)				MANUFACT PHONE (A/C, No, Ext):
HERE CAN PRODUCT BE SEEN?				
OTHER LIABILITY INCLUDING COMPLETED OPERATIONS (Explain)				

**JURED/PROPERTY DAMAGED**

NAME & ADDRESS (Insured/Owner)	PHONE (A/C, No, Ext)		
SEX Occupation	EMPLOYER'S NAME & ADDRESS	PHONE (A/C, No, Ext)	
CRIBE INJURY	WHERE TAKEN	WHAT WAS INJURED DOING?	
<input type="checkbox"/> FATALITY			
CRIBE PROPERTY (e.g., model, etc)	ESTIMATE AMOUNT	WHERE CAN PROPERTY BE SEEN?	WHEN CAN PROPERTY BE SEEN?

**FINESSES**

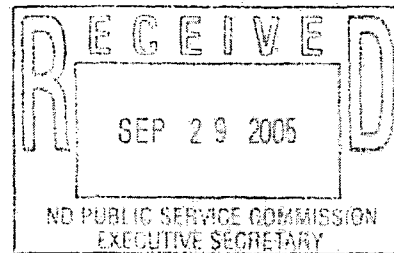
NAME & ADDRESS	BUSINESS PHONE (A/C, No, Ext)	RESIDENCE PHONE (A/C, No)

**MARKS**

REPORTED BY	REPORTED TO	SIGNATURE OF INSURED	SIGNATURE OF PRODUCER
Charles Whitman	Carol Mohl		<i>Carol Mohl</i>

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc. )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 Montana-Dakota Utilities, Inc., a )  
 Division of MDU Resources Group, )  
 Inc. )  
 )  
 Respondent. )



COMPLAINT

Case No. \_\_\_\_\_

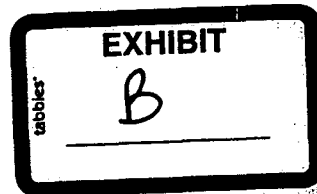
Complainant, hereafter "CEC", is a rural electric cooperative organized under Chapter 10-13 of the North Dakota Century Code. Respondent, hereafter "MDU", is a North Dakota public utility.

Complainant alleges:

I.

CEC holds a twenty (20) year franchise with the City of Bismarck for an electric distribution system dated May 25, 1993, which grant of authority states in pertinent part as follows:

"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 street, 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. (emphasis added)

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted 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."

II.

After the grant of franchise, CEC and MDU entered into a letter agreement amending the Area Service Agreement between CEC, and MDU on June 3, 1993. This amendment incorporated into the Area Service Agreement the franchise requirement that if the Area Service Agreement was "canceled by either Capital Electric Cooperative, Inc.

or Montana-Dakota Utilities Co. during the term of either party's existing franchise with the City of Bismarck, North Dakota, that all of the privileges, rights, obligations, and restrictions as contained in such July 5, 1973, Service Agreement, as amended, shall, notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co."

### III.

Since the renewal of CEC's franchise in 1993, additional property contained in the Area Service Agreement has been annexed by the City of Bismarck. Electric distribution service has been provided to the annexed territories by MDU and CEC in accordance with the Area Service Agreement. Both parties have relied upon the grant of franchise, and upon the Area Service Agreement, with respect to investment, building of facilities, installation, and provision of electric distribution services to new city residents.

### IV.

MDU sent a letter to CEC dated June 26, 2002, to be effective June 26, 2003, purporting to cancel the Area Service Agreement for all areas outside the City of Bismarck. However, the terms of the franchise, as well as terms of the Area Service Agreement, as amended, provides that all of the privileges, rights, obligations, and restrictions as contained in the Service Agreement, as amended, shall notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both CEC and MDU. The grant of authority in CEC's franchise agreement expressly provides that the franchise applies to the ". . . public grounds of the City as now,

or hereafter constituted". . . (emphasis added). The eventuality of annexation was expressly provided for in CEC's franchise grant.

V.

MDU alleges that CEC's service area was "frozen" in 2003 when they purported to cancel a portion of the service agreement. However, since June 26, 2003, fifteen (15) subdivisions have been annexed to the City of Bismarck in CEC's service area, and have been, and are served by CEC, pursuant to its franchise. There has been no prior objection to CEC providing service by either MDU or the City.

VI.

When territory is annexed into the City such territory stands just as any other property within the City, subject to the Area Service Agreement, and CEC's franchise. On April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City", hereafter "Boulder Ridge", was annexed to the City of Bismarck. Pursuant to the grant of franchise incorporating the Area Service Agreement, Boulder Ridge is located in CEC's service area. See attached Exhibit A.

VII.

CEC had previously provided electric service to a location in what is now known as Boulder Ridge since April 23, 1949. In preparation for the development of Boulder Ridge, CEC pulled the meter on March 17, 2005, and retired the service on April 8, 2005. CEC has a signed customer request to provide service within Boulder Ridge.

VIII.

MDU has indicated its intention to serve Boulder Ridge. Such service by MDU will

unreasonably interfere, or is about to interfere unreasonably, with the service or system of CEC. On September 27, 2005, MDU requested an underground facility located in French's 1<sup>st</sup> Addition to the City of Bismarck. This is a subdivision located directly south of Boulder Ridge, also in CEC's service area. It is believed that MDU intends to infiltrate CEC's territory by a half-mile of line to tie their system into Boulder Ridge, which ultimately requires them to cross CEC's power line. CEC's facilities are the only facilities located on the property to be served, prior to MDU's infiltration, the subject of this dispute. MDU has never provided electric service to this area. MDU's closest existing facility is approximately one-half (½) mile (2,800 feet) from Boulder Ridge. CEC is able to extend service to the site through a shorter extension at a lower cost, which is a primary consideration of orderly and economic development. Service by CEC is a natural extension of service from its existing facilities and will not result in checker boarding customers served by MDU and CEC.

#### IX.

CEC has built its distribution system in reliance upon the franchise granted by the City of Bismarck, which grant incorporates the terms of the Area Service Agreement. With respect to Boulder Ridge specifically, original construction of 1-phase line was completed in 1948. The line was converted to 3-phase in 1970, and the 3-phase was rebuilt and upgraded, adding more capacity in 1997. The 3-phase circuit in Boulder Ridge taps the CEC line and the circuit is ready to be energized by CEC. In addition, CEC and WAPA have invested \$7 million in construction of the Ward Delivery Substation to provide transmission service to North Bismarck. This Delivery Substation is expected to be

completed in January, 2006. See attached Exhibit B, consisting of four photographs of CEC's facilities.

X.

MDU's construction into CEC's franchised service area violates and threatens to violate the provisions of Section 49-03-01 and 49-03-01.3 N.D.C.C.

WHEREFORE the Complainant requests that the NDPSC to issue an order:

1. Restraining and enjoining MDU from constructing or extending its interfering lines, plant, or system, into CEC's franchised service area;
2. Requiring immediate removal of all of MDU's facilities in CEC's service area;  
and
3. In addition to the restraint imposed, that the Commission prescribe such other terms and conditions as it shall deem reasonable and proper.

Dated this 20<sup>th</sup> day of September, 2005.

PRINGLE & HERIGSTAD, P.C. *CHK*

By: *Carol K. Larson*

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

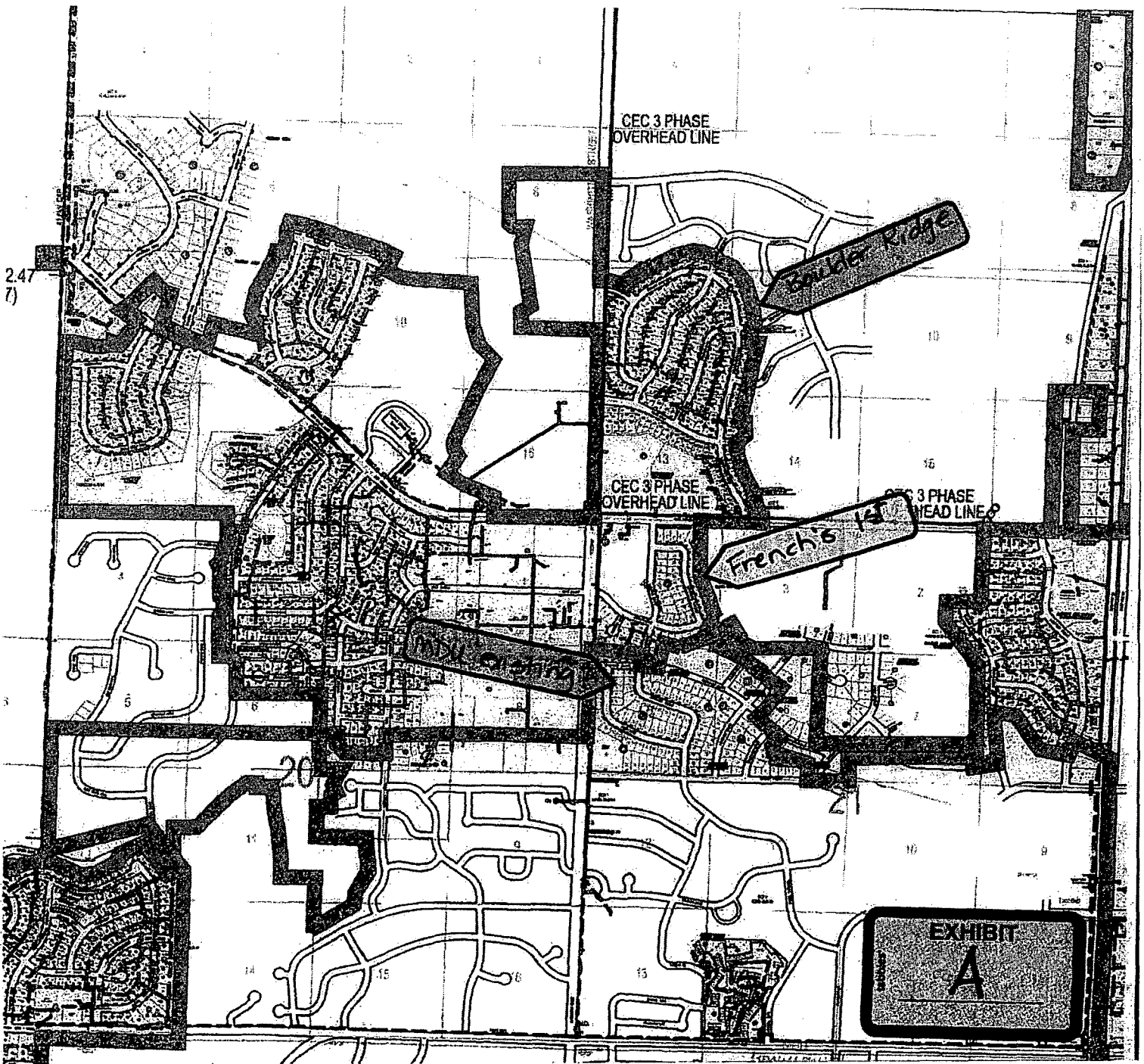
(701) 852-0381

# LEGEND



**——** BISMARCK CITY  
LIMITS BOUNDARY

**——** CEC/MDU SERVICE  
AGREEMENT BOUNDARY



December 14, 2005

Ms. Ilona A. Jeffcoat-Sacco  
Executive Secretary  
PUBLIC SERVICE COMMISSION  
600 E Boulevard Avenue, Department 408  
Bismarck, ND 58505-0480

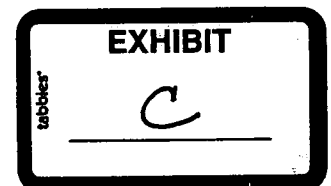
**CAPITAL ELECTRIC COOPERATIVE, INC. V. MONTANA-DAKOTA UTILITIES, INC.  
CASE NO. PU-05-551**

We respond further to Montana-Dakota's Motion to Dismiss dated November 23, 2005 and its brief of December 12, 2005.

Capital's and Montana-Dakota's dispute over Boulder Ridge, like Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990), involves a dispute about electric service in a rural area that has been annexed to a municipality. Montana-Dakota seeks to avoid the import of those cases where an electric public utility was restrained from interfering with a rural electric cooperative's service and system in a rural area that had been annexed to a municipality.

Capital resists Montana-Dakota's Motion. Capital does not pretend to misunderstand Montana-Dakota's arguments. Capital disputes all Montana-Dakota's theories, including but not limited to its interpretation of certain provisions of the North Dakota Constitution, its claims that the Board of Commissioners of the City of Bismarck has bestowed on Montana-Dakota immunity or exemption from the Territorial Integrity Act, and the unspoken suggestion that the City Board's opinion is the final word.

In Capital's view, neither Montana-Dakota's theories nor the City Board's adoption of Montana-Dakota's arguments avoids the Territorial Integrity Act's prohibition of an electric public utility's interference with a rural electric cooperative's service in a rural area that has been annexed to a municipality. Montana-Dakota's basic theory - that the Board of Commissioners of the City of Bismarck has the power and has exercised the power to grant to Montana-Dakota a license to engage in conduct that is prohibited by State law - is untenable in any form and any forum.



The dispute is not limited to disagreement about legal theories. "The question of which electric supplier's facility is duplicative or wasteful is a question of fact for the Public Service Commission to determine." (Findings, Conclusion and Order in Case No. PU-04-560, finding # 30, citing Northern States Power Co. v Public Service Commission, supra.)

Evidently, Montana-Dakota hopes to avoid and evade the PSC's investigation whether Montana-Dakota's invasion of Capital's service area inside the municipal limits of Bismarck amounts to prohibited interference. Perhaps Montana-Dakota does not want to defend its crossing the facilities of Capital (a practice recently criticized by the Commission in its Case No. PU-04-560), particularly when the crossing involved is a one-half mile leapfrog maneuver. (See Capital's Complaint Paragraph VIII and Montana-Dakota's admission in its Answer Paragraph 8.)

Montana-Dakota's Motion should be denied so the Commission can exercise its jurisdiction to determine whether in fact and in law Montana-Dakota's extension of facilities in Boulder Ridge is or is not prohibited interference. The electric customers of Montana-Dakota and Capital are entitled to the protection of the Public Service Commission to avoid wasteful duplication of facilities.

In our earlier response to Montana-Dakota's Motion to Dismiss, we referred to a related pending court action and suggested that the Commission can proceed to exercise its jurisdiction and determine whether Montana-Dakota's action amounts to prohibited interference with Capital's service and system, after the court determines the issues. That was suggested as a possibility, recognizing that the Commission may decide to proceed to hear and determine whether Montana-Dakota's extension of facilities in Boulder Ridge is or is not prohibited interference, without waiting for the outcome of the court action.

Yours truly,

Carol K. Larson  
lat

cc William W. Binek  
Daniel S. Kuntz