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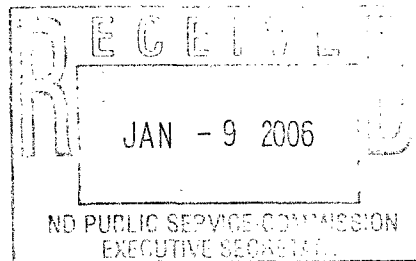
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January 6, 2006

CLERK OF DISTRICT COURT
BURLEIGH COUNTY COURTHOUSE
PO BOX 1013
BISMARCK, ND 58502-1013



**CAPITAL ELECTRIC COOPERATIVE, INC. vs.
THE CITY OF BISMARCK, and
MONTANA-DAKOTA UTILITIES, INC., A DIVISION OF MDU RESOURCES GROUP,
INC., and THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA
DOCKET NUMBER 05-C-2303**

Enclosed for filing in connection with the above referenced matter are the following:

1. Plaintiff's Response to Motion to Dismiss or for More Definite Statement, together with exhibits; and
2. Affidavit of Service by United States Mail.

If you have any questions on the enclosed, please do not hesitate to contact me.

Yours truly,

Carol K. Larson

lat

Enclosures

cc w/ encl: Lars Nygren
Daniel S. Kuntz
William W. Binek
Randall J. Bakke

STATE OF NORTH DAKOTA

IN DISTRICT COURT

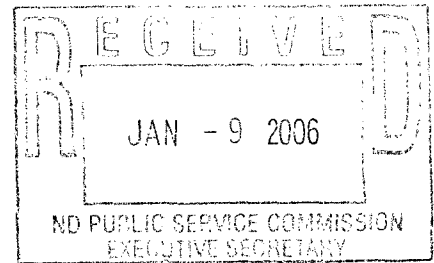
COUNTY OF BURLEIGH

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.)

**PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS OR FOR
MORE DEFINITE STATEMENT**

Docket Number 05-C-2303



This action for a declaratory judgment involves a territorial dispute between Capital Electric Cooperative (Capital) and Montana Dakota Utilities (MDU) over an area known as Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge).

One of the Defendants, the City of Bismarck, has presented alternative motions to dismiss or for a more definite statement "regarding its alleged cause of action as to the City and as to the relief requested." According to the City's brief in support of its motion, "Without knowing the scope of the relief sought, the City is unable to prepare a responsive pleading." (Page 8).

Capital's complaint includes the following allegations of fact:

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 (sic) 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.

MDU has answered and has filed a brief in support of the City's motion to dismiss. Notably, MDU did not find Capital's complaint too indefinite to prepare a responsive pleading. MDU's answer admits the allegations of Capital's complaint quoted above.

Capital concedes that a more definite statement will facilitate the City's preparation of a responsive answer. The more definite statement further demonstrates that the motion to dismiss should not be granted.

I.

Responding to the City's request for a more definite statement "as to the relief requested," Capital states that it seeks a judgment declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding.

II.

Responding to the City's request for a more definite statement "regarding its alleged cause of action as to the City," and understanding that request as inquiring about Capital's legal theories, Capital responds as follows. (The following is a precis of arguments expected to be made at greater length in the course of litigation. These abbreviated arguments also respond to the City's alternative motion to dismiss.)

Capital contends:

A) That the City Commission's decision and order of November 14, 2005, exceeds the scope of the Commission's authority; and

B) That the City Commission's position as stated in its decision and order is wrong under applicable law.

Responding to MDU's brief in support of the City's motion, that Capital's complaint "does not challenge the validity of the determinations made by the Board of City Commissioners in its order issued November 14, 2005," Capital states that it does indeed challenge the validity of the determinations made by the City Commission. The determinations were not only wrong, they were made outside the scope of the City Commission's legislative authority.

A.

Capital's action in this court complains of the Bismarck Board of City Commissioners' assumption of power to declare Capital's franchise rights. Capital's action invokes the court's power of judicial review of the Commission's action and invokes the court's jurisdiction under N.D.C.C. 32-23 to declare Capital's franchise rights. The declaratory judgment statute provides:

"Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and may obtain a declaration of rights, status, or other legal relations thereunder." N.D.C.C. 32-32-02

As the words used in any statute are to be understood in their usual sense unless a contrary intention plainly appears (N.D.C.C. 10-02-02), it is plain from the words of N.D.C.C. 32-23 that it provides the appropriate procedure for Capital to obtain judicial

review of the City Commission's action and a declaration of Capital's rights, status, or other legal relations under its franchise.

It cannot be seriously claimed that the action of the City Commission is final, immune from judicial review. See Mini-Mart, Inc. v City of Minot, 347 N.W.2d 131 (N.D. 1984) and Munch v City of Mott, 311 N.W.2d 17 (N.D. 1981). Judicial review of a city's action sometimes takes the form of an action for mandamus (Mini-Mart, Inc. v City of Minot, supra) or an action for an injunction (Munch v City of Mott, supra), or an action for declaratory judgment (City of Fargo v Harwood Township, 256 N.W.2d 694 (N.D.1977)).

Under N.D.C.C 40-05.1-00.1, subd 3, the Board of Commissioners of the City of Bismarck "performs the legislative functions of the city." Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (N.D. 1969). Just as courts do not exercise legislative functions, Murphy v City of Bismarck, 109 N.W.2d (N.D. 1961) so also legislative bodies do not exercise judicial functions, Fradet v City of Southwest Fargo, 59 N.W.2d 871 (N.D. 1953). MDU's brief in support of the City's motion to dismiss makes the same point, citing additional authorities. On this point, Capital and MDU agree: The grant of a municipal franchise is a legislative function.

MDU's petition to the City Commission did not invite the exercise of a legislative function, nor was the Commission's consequent action of November 14, 2005, the exercise of a legislative function. The petition and City Commission's decision reflect an assumption the Commission has judicial powers to adjudicate conflicting claims between

holders of non-exclusive franchises that the City has granted in its legislative function. The City Commission's title of its response to MDU's petition, "Findings, Conclusion and Order" is a judicial label, and the words employed in that document indicate the City Commission made its findings, reached its conclusion and issued its order in the fashion of a panel of judges deciding the conflicting claims of litigants. "... 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." (See exhibit A.)

There is no disputing the City Commission's power to grant non-exclusive franchises under N.D.C.C. 40-05-01, subd. 57, or 40-05.1-06 subd. 10. But neither of those provisions, and no other provision of any statute or charter - and no provision of the North Dakota Constitution - empowers the City Commission to breach the wall of separation between the legislative and judicial branches of government and to adjudicate conflicting claims between holders of non-exclusive franchises that the City has granted in its legislative function.

The impropriety of the City Commission's assumption of a judicial role to decide Capital's and MDU's dispute over electric service in Boulder Ridge is also indicated by the nature of the City's relationships with franchisees. It is common to consider a franchise as akin to a permit granted by a governmental entity to engage in a regulated enterprise. But a franchise is different from, more than, a permit such as might be granted to a liquor store. A franchise is a contract by which a state or city commissions a non-governmental entity to provide an essential service to the public. See Northwestern Telephone Exchange

Company v Anderson, 98 N.W. 706 (N.D. 1904); see generally 36 Am.Jur.2d Franchises.

The status of a franchise as a contract is also indicated by the City's document granting a franchise to Capital, a resolution expressed in contractual verbiage of rights and obligations. (See exhibit B.)

Considering the relationship between Capital and the City as parties to a contract, the City Commission's assumption of power to judge its own case and to decide Capital's rights and obligations under its contractual franchise cannot be sustained. The authority to interpret contracts and to resolve disputes under contracts where one of the contracting parties is a governmental entity is a function of the judicial branch of government. See Seher v Woodlawn School District, 59 N.W.2d 805 (N.D. 1953).

The City's first argument for dismissal, "Capital has failed to exhaust its administrative remedies" is erroneous, because there is no administrative remedy available for Capital to seek.

The City and MDU suggest that the City itself is the administrative agency which Capital should approach for relief. They suggest that Capital should seek some action from the City Commission contrary to its previous action, in lieu of this action for judicial review of the City's previous action. See City's brief, page 5 ("It [Capital] should present those arguments to the City first.") and MDU's brief, pages 4 & 5. In effect, the City and MDU suggest that Capital should adopt the procedure invented by MDU when it "petitioned" the City Commission to "declare franchise rights," the same defective procedure that is challenged in this court action. However, there is no administrative remedy available from the City. See Mini-Mart, Inc. v City of Minot, supra 347 N.W.2d at

136. (A municipal government is not an administrative agency for purposes of the administrative agencies practice act.)

Neither the City nor MDU asserts that the PSC is an agency that might have jurisdiction to address the legal issues presented by Capital's complaint in the court action, but the court might ask whether it should abstain from exercising its jurisdiction, in lieu of the PSC's consideration of the issues. Capital has considered the question and asserts 1) the franchise issue is not within the subject matter jurisdiction of the PSC but is within the jurisdiction of the Court under N.D.C.C. 32-23; and 2) the City is not a party to the PSC proceeding but it is the principal defendant in the court action for a declaratory judgment. For these reasons, the two cases - Capital's complaint to the PSC about MDU's interference and Capital's Complaint to the Court about the City's purported decision and order affecting Capital's franchise - present separate legal issues.

Capital complains of the City Commission's wrongful action, the wrongful assumption of judicial powers, and erroneous conclusions produced in that venture. MDU and the PSC are named as defendants, but not as wrongful actors. MDU and the PSC are named as defendants in the court action because N.D.C.C. 32-23-11 requires persons who might be affected by declaratory relief to be made parties. It appears that MDU and the PSC might be affected because MDU has alleged the City Commission's purported decision of November 14, 2005, affects a separate pending proceeding before the PSC that also involves the territorial dispute between Capital and MDU over Boulder Ridge. The City is not a party to the PSC proceeding. (See exhibit C.)

"The same legal question" is the foundation of the principle of judicial administration

that courts disfavor "bifurcated" procedures covering the same legal question. In Shark Bros., Inc. v Cass County, 256 N.W.2d 701 (N.D. 1977), the court authored its now cited formulation, "We do not favor or encourage, nor do 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." The court was careful to preface that statement with the premise "...the same legal question is involved in both proceedings." (256 N.W.2d at 705). That is not the situation now before the court. The same legal question is not involved in both the PSC proceeding and the declaratory judgment action in court. The same legal question is not involved because the parties are not the same and the jurisdiction of the PSC and jurisdiction of the court are not the same.

Capital has no remedy available from the PSC as an alternative to the action for declaratory judgment. The jurisdiction of the PSC is limited. The PSC has only the powers and duties conferred upon it by the Legislature. North Dakota Constitution, Article V, Sections 12 and 13; Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 (ND 1995); Public Service Commission v Montana Dakota Utilities Co., 100 N.W.2d 140 (N.D. 1959); Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956); City of Grafton v. Otter Tail Power Co, 86 N.W.2d 197 (N.D. 1958). ("The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." Court Syllabus No. 6.)

North Dakota precedents about bifurcation have sustained courts' abstention from proceeding only where there was no doubt about the alternative administrative agency's

jurisdiction to address the same legal question. Tooley v Alm, 515 N.W.2d 137 (N.D. 1994); Transportation Division of Fargo Chamber of Commerce v Sandstrom, 337 N.W.2d 160 (N.D. 1983); and Shark Bros, Inc. v Cass County, supra. As noted by the Court in Tooley, citing In Interest of McCullen, 470 N.W.2d 196 (N.D. 1991), declaratory relief is available to resolve an issue which is not subject to administrative determination.

The PSC's powers do not include power to review, affirm or reverse action of a municipality. Nor does the PSC have power to independently interpret or enforce the franchise granted by the City to Capital considered as a contract. Williams Electric Cooperative v. Montana-Dakota Utilities Co., supra. The City and MDU have impliedly conceded these points as to the unavailability of remedies from the PSC, as neither has asserted that the PSC is an administrative agency from which Capital might obtain authoritative adjudication of the franchise issues. (Similarly, MDU's counterclaim in the court action indicates its implied agreement that the Court and not the PSC is the appropriate forum to consider the franchise issues.)

The City's second argument for dismissal, "Capital's complaint should be dismissed for failure to state a claim" has already been implicitly addressed. Capital claims that the City Commission overreached its authority, breached the constitutional wall of separation between legislative and judicial functions and usurped a judicial power when it presumed to entertain MDU's "Petition to Declare Franchise Rights" adverse to Capital.

The City Commission's purported "Decision and Order" of November 14, 2005, has been asserted by MDU as affecting the Public Service Commission's exercise of its jurisdiction in the pending administrative proceeding between MDU and Capital. The

combination of the City's action and MDU's assertions in the PSC proceeding indicate the presence of a justiciable controversy, ripe for judicial scrutiny under declaratory judgment procedures.

B.

In the course of this action for a truly judicial determination of Capital's rights under its franchise, it is to be expected the City Commission would advocate that it correctly interpreted Capital's franchise when it issued its order on November 14, 2005. Capital does not dispute the City Commission's option to take a position and to argue that position in the pending action for a judicial determination and declaration of franchise rights.

As stated, Capital contends the City Commission's position as stated in its November decision and order is wrong under applicable law, the law applicable to the interpretation of Capital's franchise considered as a legislative enactment and considered as a contract. Now it is appropriate to assert that pleadings should not be extended as presentations of evidence or as briefs as to applicable law. For the purposes of a more definite statement to facilitate the City's preparation of a responsive pleading, it seems sufficient to definitely state: Capital asserts its franchise granted to it by the City of Bismarck on May 25, 1993, properly interpreted under applicable law, includes rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding.

CONCLUSION

The foregoing response provides a more definite statement that will facilitate the

City's preparation of a responsive answer to Capital's complaint.

Capital's complaint states a claim upon which relief can be granted, and there is no administrative remedy available as an alternative to relief in the form of a declaratory judgment. Accordingly, the motion to dismiss should be denied.

Dated this 10th day of January, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

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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).

RESOLUTION

A Resolution granting to Capital Electric Cooperative, Inc., a corporation, its successors and assigns, the franchise and right to construct, maintain and operate, within and upon, in and under the streets, alleys and public grounds of the City of Bismarck, North Dakota, an electric distribution system for transmitting and distributing electric energy for public and private use.

WHEREAS, pursuant to law the City has the power to grant a non-exclusive franchise for a term of no more than twenty years; and

WHEREAS, pursuant to city ordinance the City may grant a franchise, by resolution, following public hearing; and

WHEREAS, on the 25th day of May, 1993, a public hearing was held by the Board of City Commissioners; and

WHEREAS, it is in the public interest that a franchise be granted to Capital Electric Cooperative, Inc., for an electric distribution system.

NOW, THEREFORE, BE IT RESOLVED by the Board of City Commissioners of the City of Bismarck, North Dakota:

Article I. Definitions. As used herein, the following words and terms are defined as follows:

1. "City" means the City of Bismarck, North Dakota.
2. "Franchise" means all of the rights and obligations extended by City to Grantee herein.
3. "Grantee" means Capital Electric Cooperative, Inc.

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 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.

Article III. Grantee's Obligations. Grantee shall maintain an efficient distribution system for furnishing electric energy for public and private use at such reasonable rates as may be approved by and under such orders, rules or regulations as may be issued by any federal or state agency having or obtaining jurisdiction thereof.

Article IV. Non-Exclusive Grant. This franchise shall not be exclusive and shall not be construed to prevent the City from granting to any other party the right to use the streets, alleys and public grounds of the City for like purposes.

Article V. Compliance With Laws and Ordinances. Grantee shall at all times during the life of this franchise comply with all applicable laws and ordinances of the City.

Article VI. Reservation of Rights. City reserves any right it may have, under its police power, or otherwise, to control or regulate the use of the streets, alleys and public grounds by Grantee, and to enact all ordinances necessary and proper in the exercise of that power. City also reserves the right, pursuant to state laws and rules and regulations of the Public Service Commission and the City's Home Rule Charter, as such charter may be amended from time to time, and City ordinances as such ordinances may be amended from time to time, to impose, by ordinance, a reasonable franchise tax for revenue purposes applicable to all franchises of like kind.

Article VII. Conditions on Street Occupancy.

1. All transmission and distribution structures, lines and equipment erected by the Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places. Wherever feasible and practical, new transmission lines, and existing lines whenever they are modernized, upgraded or extensively rehabilitated, shall be placed underground, or they shall be constructed in a manner that causes minimum interference with the landscape or appearance of the city.

2. In case of any disturbance of pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the City Engineer, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good

condition as before said work was commenced, and shall maintain the restoration in an approved condition for a period of six years.

3. In event that at any time during the period of this franchise the City shall lawfully elect to alter, or change the grade of, any street, alley or other public way, the Grantee, upon reasonable notice by the City, shall remove, relay and relocate its poles, wires, cables, underground conduits, manholes and other fixtures at its own expense.

4. The Grantee shall not place poles or other fixtures where the same will interfere with any electric light, water hydrant or water main, or in such a manner as to interfere with the usual travel on said streets, alleys and public ways.

5. The Grantee shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than forty-eight hours advance notice to arrange for such temporary wire changes.

Article VIII. Insurance and Indemnification. Grantee shall maintain, at all times during the term of the franchise, liability insurance, insuring Grantee and the City against any and all damages, losses or claims of any nature arising out of Grantee's operations under the franchise, in the minimum amount of \$500,000. A copy of the policy shall be filed with the City at the time of acceptance of the franchise, along with evidence of payment of required premiums and copies of endorsements, and notices of cancellation or non-renewal, during the term of the franchise. Grantee agrees to protect and save harmless the City from any claims for damages or injuries resulting from Grantee's operations under the franchise, and to defend and indemnify the City against all claims, actions, proceedings, costs, damages and liabilities, including attorneys fees.

Article IX. Assignment. Grantee may assign this franchise to another party or corporation, subject to all obligations of the Grantee hereunder, with the consent of the City, which may not be unreasonably withheld.

Article X. Acceptance. Within thirty days after Grantee is notified of adoption of this Resolution, Grantee shall file with the City Auditor its written acceptance of this franchise, subject to all of its terms and conditions.

Article XI. Term. This franchise shall continue and remain in full force and effect for a period of twenty years from the date upon which it is accepted by the Grantee.


Adopted this 25th day of May, 1993.

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I, Dan Dahlgren, do hereby certify that I am duly appointed and qualified to execute contracts and certify documents on behalf of the City of Bismarck, North Dakota, and that the attached is a full, true and correct copy of the Resolution adopted by the Board of City Commissioners at its meeting of May 25, 1993.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the City of Bismarck, North Dakota, this 26th day of May, 1993.

(S E A L)



Dan Dahlgren, City Coordinator
Bismarck, North Dakota

R2/CAPIT

AREA SERVICE AGREEMENT

93-27
L. M. ...

The Montana-Dakota Utilities Co., (hereinafter referred to as the Company) and Capital Electric Cooperative, Inc., (hereinafter referred to as the Cooperative), in an earnest and sincere effort to avoid misunderstanding and disagreement over areas to be served by each party and to further avoid unnecessary and costly duplication of facilities, agree to the following general conditions:

1. Since the Company is and has been the principal supplier of electricity to the area encompassing the city of Bismarck, both parties agree that the Company should continue to serve this area and new areas contiguous to the city as further stipulated and identified in this agreement.
2. The Cooperative organized under the laws of the state of North Dakota to supply electricity to consumers in rural areas who are not receiving central station service as identified by law, thereby, both parties agree the Cooperative should continue such service in rural areas and other areas that are stipulated and identified in this agreement.
3. The parties hereto, recognize their obligation to avoid any duplication of facilities in order to provide electric service as efficiently and economically as possible to the public and to the Cooperative's members.
4. It is agreed that the interests of the consumer can best be met by providing that the Company serve those consumers within the area bounded by the heavy dashed black line on the attached map, which shall be made a part of this agreement, as well as any new consumers who come into that area and that the Cooperative will continue to serve its present consumers within the heavy dashed black line and will serve new consumers within the heavy dashed black line only under conditions further stipulated in this agreement. The principal service area of the Cooperative will be that area which lies outside the heavy dashed black line. The agreement shall apply only to area described by the map.
5. In the event there is need for either party to this agreement to serve a prospective consumer located in the area served by the other party, such service shall be supplied only with the written consent of the other party, provided that such individual exception shall not in any way alter the basic intentions of the parties, that each shall serve or offer service to the new consumers within their respective service areas.
6. In the event it becomes necessary or desirable to trade or sell electric facilities owned by either party, the selling price for such facilities shall be an amount equal to three times the gross annual revenue received from the property during the highest revenue year of the past 5 years. Only the existing facilities of value in serving customer by purchasing party shall be sold. Balance of facilities shall be disposed of as enumerated in Section 7.
7. It is mutually agreed that in the event that either party will terminate service to a consumer or consumers which it has served and it is necessary that one party remove its facilities from such an area, the other party will share the removal costs of direct labor, plus 25% and only in an amount equal to one-half the total labor costs for removing such facilities.

8. It is mutually agreed by both parties that each will continue to serve customers it now has within the boundaries of the other party as stipulated and identified in the agreement. Such customer identification shall be from the books and records of each of the parties as of date of signing of this agreement. If an exchange of customers can be agreed upon by both parties and to the satisfaction of the consumer or consumers, such an exchange can be made.

9. This agreement will in no way affect the Company's or Cooperative's needs or plans to construct transmission line facilities for the purpose of providing adequate electric power for the consumers in the area it serves.

10. This agreement is subject to approval, order, and other actions of the Public Service Commission of North Dakota or any other governmental agencies or bodies having jurisdiction over transactions and service herein covered.

11. It is realized that the foregoing instrument will not cover all conditions which may arise, but if followed in good faith by both parties, will serve as a guide to future developments and growth for both organizations, thus it is mutually agreed that this agreement will be reviewed at least once every five years for the purpose of evaluating its operation and to discuss possible modifications which may be desirable to more efficiently carry out the intent of both parties.

12. This agreement shall remain in force from the date hereof until cancelled by either party by giving twelve month's written notice to the other party of such cancellation.

5. MONTANA-DAKOTA UTILITIES CO.

K. D. M. Corbett
President

CAPITAL ELECTRIC COOPERATIVE, INC.

Clara R. Manning
President

ATTEST:

A. H. Larson
Secretary

July 5, 1973
Date

(SEAL)

ATTEST:

E. Bert Hillen
Secretary

June 22, 1973
Date

(SEAL)

LETTER AGREEMENT
AMENDING SERVICE AREA AGREEMENT
BETWEEN
CAPITAL ELECTRIC COOPERATIVE, INC.
AND
MONTANA-DAKOTA UTILITIES CO.

It is intended by the parties hereto to amend the July 5, 1973, Area Service Agreement, as amended, between Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co., which agreement sets forth and describes the service areas in the City of Bismarck, North Dakota, to be served by Capital Electric Cooperative, Inc., and describes the service areas in the City of Bismarck, North Dakota, to be served by Montana-Dakota Utilities Co.

It is agreed and understood that in the event that the said Service Agreement of July 5, 1973, as amended, is 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.

AGREED TO and made a part of the 1973 Area Service Agreement this

3rd day of June, 1993.

CAPITAL ELECTRIC COOPERATIVE, INC.

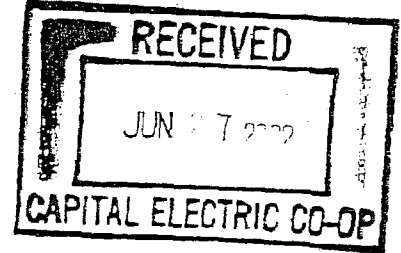
MONTANA-DAKOTA UTILITIES CO., a
division of MDU RESOURCES GROUP, INC.

Quane Lasher

Owen Vinger

 **MONTANA-DAKOTA**
UTILITIES CO.
A Division of MDU Resources Group, Inc.

400 North Fourth Street
Bismarck, ND 58501
(701) 222-7900



June 26, 2002

Capital Electric Cooperative, Inc.
PO Box 730
Bismarck, ND 58502-0730

Re: Area Service Agreement Dated July 5, 1973 and Amendments

Gentlemen:

Pursuant to paragraph 12 of the Area Service Agreement dated July 5, 1973 and amendments thereto between Montana-Dakota Utilities Co. and Capital Electric Cooperative, Inc., relating to electric service at Bismarck, North Dakota, Montana-Dakota hereby give 12 months written notice from the date hereof of Agreement cancellation for all areas covered by the Agreement outside the city limits of Bismarck and thereby not covered by Capital Electric's limited electric franchise from the City of Bismarck.

Sincerely,

A handwritten signature in cursive script that reads "C. Wayne Fox".

C. Wayne Fox
President

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 1st 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 costs, 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 28th day of September, 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

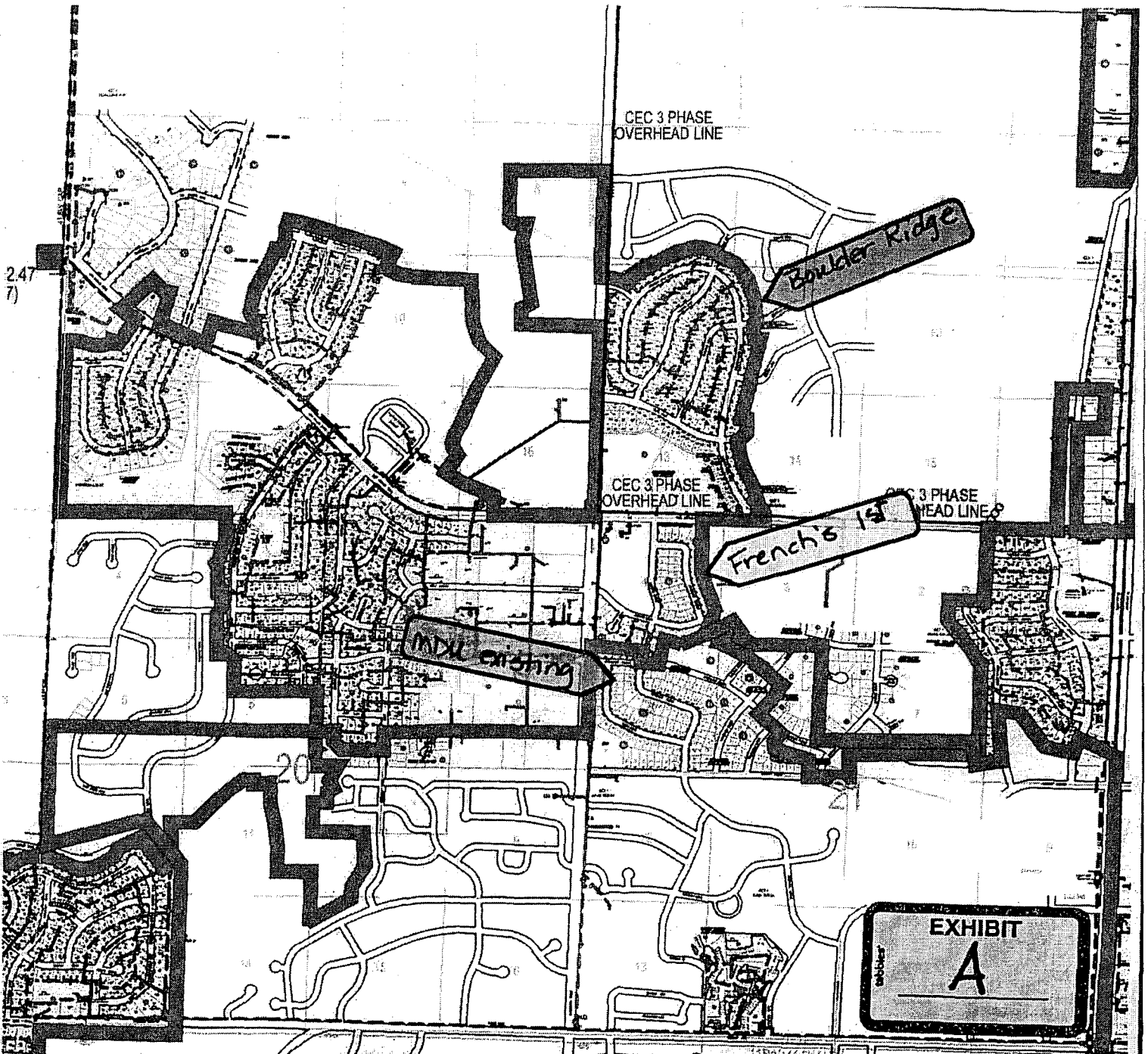
(701) 852-0381

LEGEND



—— BISMARCK CITY
LIMITS BOUNDARY

—— CEC/MDU SERVICE
AGREEMENT BOUNDARY



Capital Electric Cooperative

North Washington Street & 43rd Avenue

3-phase Distribution Line

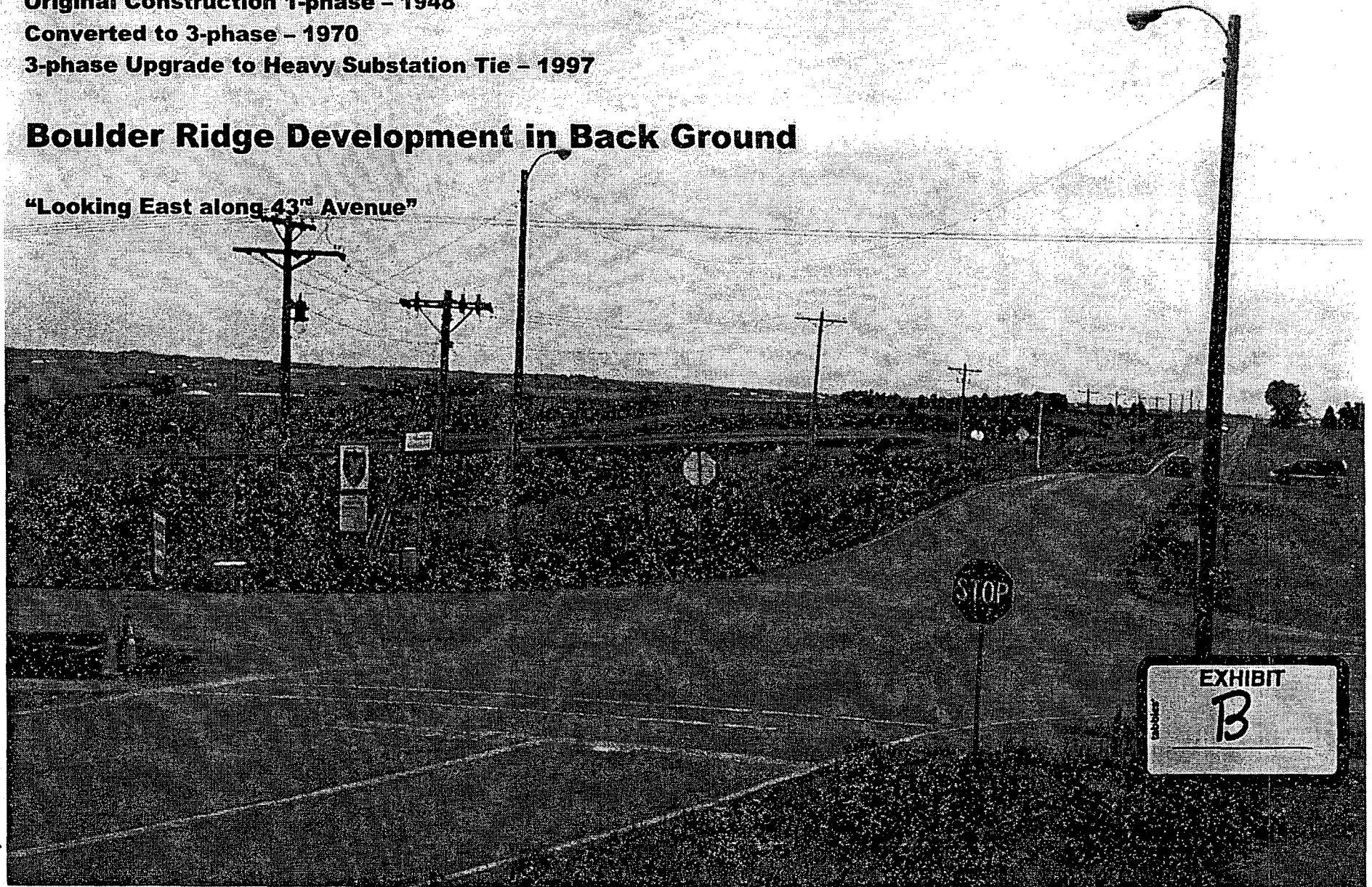
Original Construction 1-phase - 1948

Converted to 3-phase - 1970

3-phase Upgrade to Heavy Substation Tie - 1997

Boulder Ridge Development in Back Ground

"Looking East along 43rd Avenue"



Capital Electric Cooperative

North Washington Street

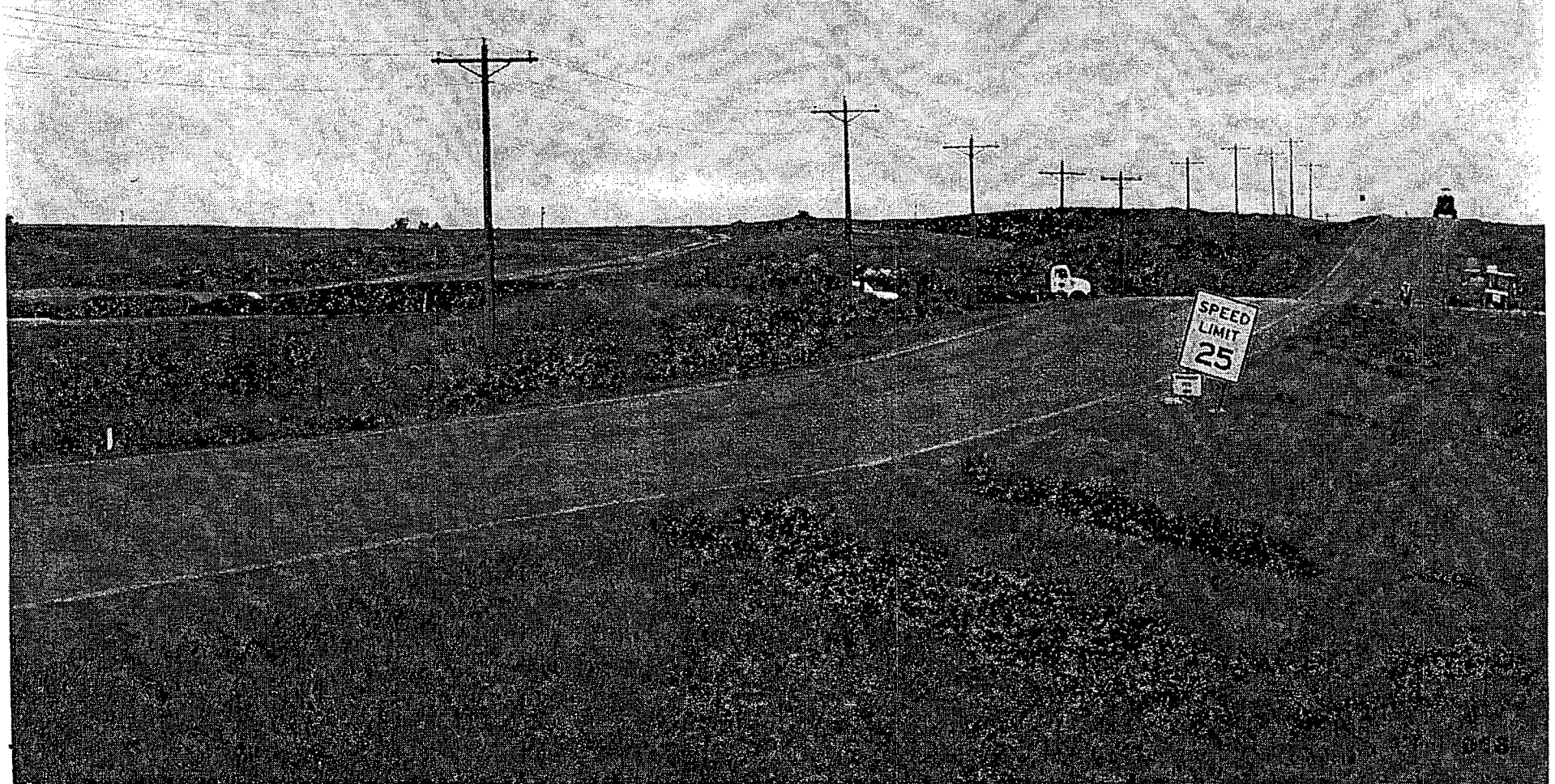
3-phase Distribution Line

Original Construction 1-phase - 1948

Converted to 3-phase - 1970

3-phase Upgrade to Heavy Substation Tie - 1997

Boulder Ridge Development in Back Ground





Capital Electric Cooperative

43rd Avenue East of Washington Street

3-phase Distribution Line

Original Construction 1-phase - 1948

Converted to 3-phase - 1970

3-phase Upgrade to Heavy Substation Tie - 1997

Boulder Ridge Development in Back Ground

**"3-phase circuit into Boulder Ridge taps CEC line, circuit
ready to energize"**

Capital Electric Cooperative

Ward Delivery Substation (9-15-05)

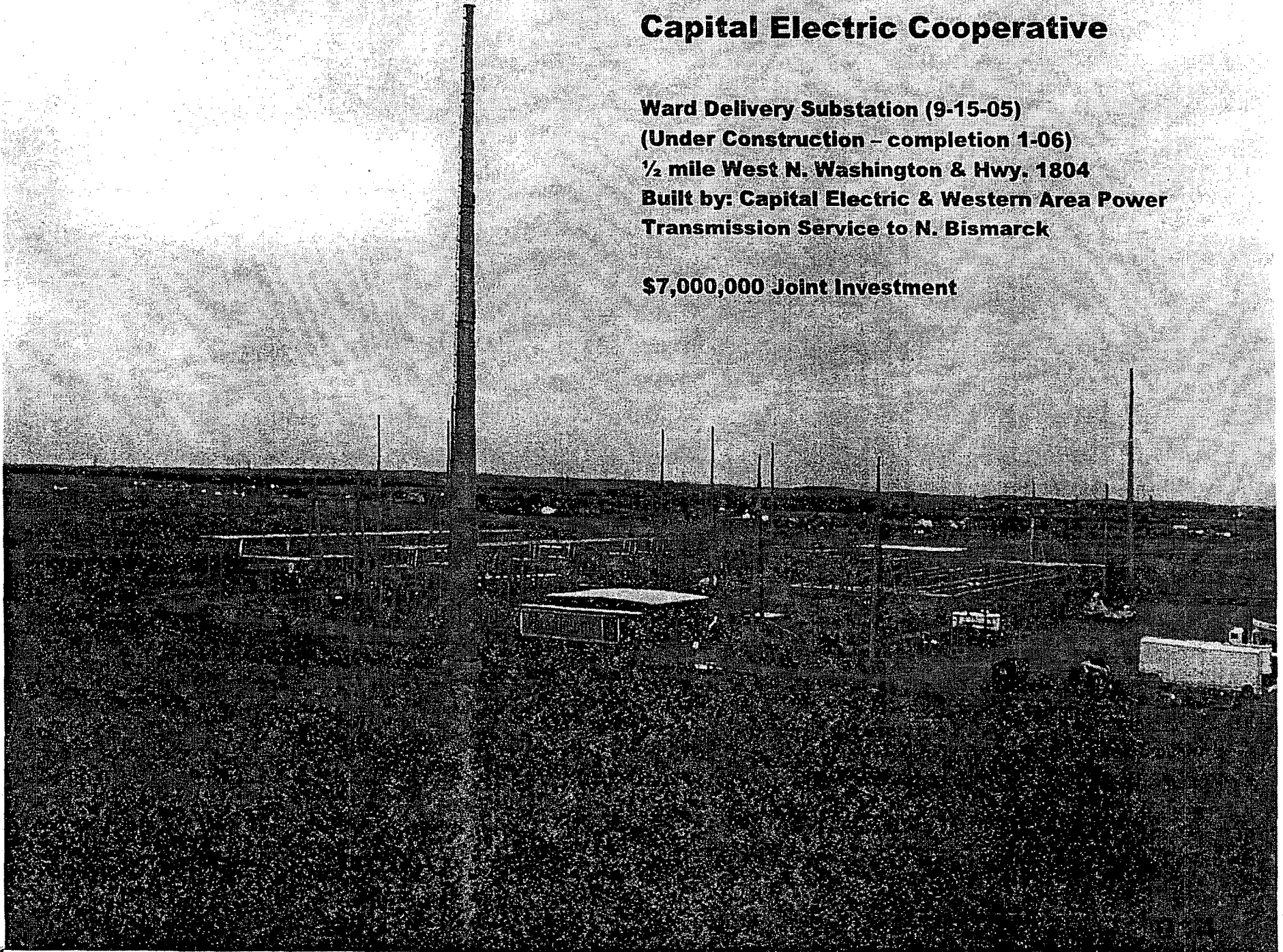
(Under Construction - completion 1-06)

½ mile West N. Washington & Hwy. 1804

Built by: Capital Electric & Western Area Power

Transmission Service to N. Bismarck

\$7,000,000 Joint Investment



BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)	
)	
Complainant,)	
)	
vs.)	ANSWER AND COUNTERCLAIM
)	
Montana-Dakota Utilities Co., a)	Case No. PU-05-551
Division of MDU Resources Group, Inc.))	
)	
Respondent.)	

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), for its Answer and Counterclaim to the Complaint of Capital Electric Cooperative ("CEC") alleges and states as follows:

ANSWER

1. Answering paragraph I of the Complaint, Montana-Dakota admits CEC holds a franchise adopted by the Bismarck Board of City Commissioners on May 25, 1993. Montana-Dakota alleges the franchise is a limited franchise and refers the Public Service Commission to the franchise for its complete terms.

2. Answering paragraph II of the Complaint, Montana-Dakota admits that it and CEC entered into an amendment dated June 3, 1993 to an Area Service Agreement dated July 5, 1973. Montana-Dakota alleges the amendment has no applicability for areas outside the City of Bismarck and refers the Public Service Commission to the amendment for its complete terms.

3. Montana-Dakota admits the allegation of paragraph III of the Complaint for property annexed to the City of Bismarck between May 25, 1993 and June 26, 2003. Montana-Dakota denies the allegations of paragraph III of the Complaint to the extent it

alleges the parties relied upon the Area Service Agreement for provision of service to areas outside the City of Bismarck after June 26, 2003.

4. Answering paragraph IV of the Complaint, Montana-Dakota admits it cancelled the Area Service Agreement effective June 26, 2003 for all areas outside the City of Bismarck. Montana-Dakota denies the allegations of paragraph IV of the Complaint to the extent it alleges the Area Service Agreement could not be cancelled for areas outside the City of Bismarck. Montana-Dakota denies that CEC's franchise extends to all annexed areas of the City of Bismarck. Montana-Dakota alleges that CEC's franchise rights to serve annexed areas is expressly subject to the geographic limits of CEC's limited franchise.

5. Answering paragraph V of CEC's Complaint, Montana-Dakota admits that by virtue of the cancellation of the Area Service Agreement for areas outside the City of Bismarck, property annexed to the City after that date was not subject to the Area Service Agreement and was not part of Capital Electric's limited franchise without an amendment to include the annexed property within the geographic limits of the franchise. Montana-Dakota admits on information and belief, that CEC is serving customers annexed to the City of Bismarck after June 26, 2003 without a franchise. Montana-Dakota denies that it was obligated to object in some form or manner to CEC's service without a franchise and alleges it was CEC's affirmative duty to obtain an amendment to its franchise to include the areas annexed after June 26, 2003.

6. Montana-Dakota admits the allegation of paragraph VI of the Complaint that on April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City" was annexed to the City of Bismarck. Montana-Dakota denies the remaining

allegations of paragraph VI of the Complaint and states that Part of Boulder Ridge First Addition to the City of Bismarck is not within the scope of CEC's limited franchise but is within Montana-Dakota's franchise from the City of Bismarck.

7. Montana-Dakota is without sufficient information to admit or deny the truthfulness of the allegations of paragraph VII of the Complaint and therefore denies the same and puts the Complainant to its proof thereon.

8. Montana-Dakota admits that it has extended its facilities and intends to provide electric distribution service to Part of Boulder Ridge First Addition to the City of Bismarck pursuant the rights and obligations of its franchise from the City of Bismarck. Montana-Dakota denies its service will interfere with service or facilities of CEC because CEC is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck.

9. Answering paragraph IX of the Complaint, Montana-Dakota denies that CEC built its distribution system in reliance on its limited franchise or the Area Service Agreement. Montana-Dakota is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph IX and therefore denies the same and puts the Complainant to its proof thereon.

10. Montana-Dakota denies the allegations of paragraph X of the Complaint. Montana-Dakota holds an unlimited franchise to provide electric distribution service within the City of Bismarck.

11. Part of Boulder Ridge First Addition to the City of Bismarck is within the scope of Montana-Dakota unlimited franchise.

12. 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 North Dakota Century Code section 49-03-06 provides that nothing in Chapter 49-03 shall be construed to limit the authority of the governing board of a city to exercise its franchising authority under section 40-05-01.

13. The Complainant's Complaint should be dismissed on grounds the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority to provide electric distribution services in the City of Bismarck including Part of Boulder Ridge First Addition to the City of Bismarck.

14. The Complainant's Complaint should be dismissed on grounds that it fails to state a claim upon which relief can be granted.

15. The Public Service Commission does not have jurisdiction to interpret or enforce an Area Service Agreement between Montana-Dakota and CEC entered into prior to April 12, 2005.

16. CEC breached the Area Service Agreement between CEC and Montana-Dakota by its refusal to agree to modifications to the agreement to carry out the intent of the parties that Montana-Dakota should serve future developments and growth areas contiguous to the city of Bismarck.

17. The Complainant's Complaint against Montana-Dakota should be dismissed because CEC is barred by operation of law and its bylaws from serving customers within Part of Boulder Ridge First Addition to the City of Bismarck.

COUNTERCLAIM

18. CEC has submitted itself to the jurisdiction of the Public Service Commission regarding the provision of service in Part of Boulder Ridge First Addition to the City of Bismarck by the filing of its Complaint in this matter.

19. Montana-Dakota holds a 20 year unlimited franchise accepted May 29, 1987 from the City of Bismarck to provide electric distribution service within the City of Bismarck as then or thereafter constituted.

20. Customers within Part of Boulder Ridge First Addition had central station power available to them pursuant to Montana-Dakota's franchise upon annexation of Part of Boulder Ridge First Addition to the City of Bismarck.

21. Part of Boulder Ridge First Addition of the City of Bismarck was not a rural area, as defined under North Dakota Century Code section 10-13-04, after its annexation to the City of Bismarck.

22. Customers within Boulder Ridge First Addition to the City of Bismarck are not eligible for membership in CEC after annexation of Boulder Ridge First Addition to the City of Bismarck.

23. There were no electric distribution customers within Boulder Ridge First Addition to the City of Bismarck at the time of its annexation.

24. CEC's bylaws do not allow for the provision of electric distribution service to non-members.

25. CEC's extension of electric distribution facilities within Part of Boulder Ridge First Addition to the City of Bismarck and its intent to provide electric distribution

service within Part of Boulder Ridge First Addition to the City of Bismarck interferes with or threatens to interfere with the service of Montana-Dakota.

Therefore, Montana-Dakota requests the Public Service Commission to issue an order:

1. Dismissing the Complaint of CEC against Montana-Dakota;
2. Declaring that CEC is prohibited from providing electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck;
3. Restraining and enjoining CEC from interfering with the service of Montana-Dakota in Part of Boulder Ridge First Addition to the City of Bismarck by offering electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck.

Dated this 30th day of October, 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

Pearce & Durick
Patrick W. Durick (ID# 03141)
Jerome C. Kettleon (ID# 03095)
314 East Thayer
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

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 CERTIFIED MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that:

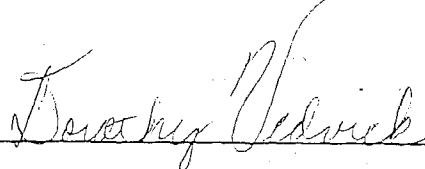
she is over the age of 18 years and not a party to this action and, on the 20th day of October, 2005, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

**Answer and Counterclaim and
Interrogatories and Requests Production to Complainant**

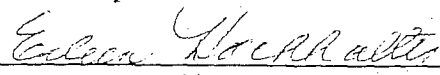
The envelope was addressed as follows:

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

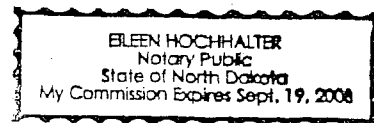
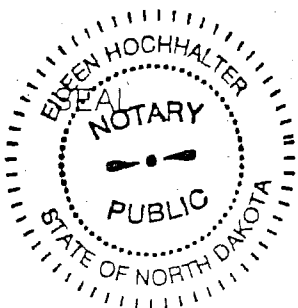
Each address shown is the respective addressee's last reasonably ascertainable post office address.



Subscribed and sworn to before me
this 20th day of October, 2005.



Notary Public



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: 

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:

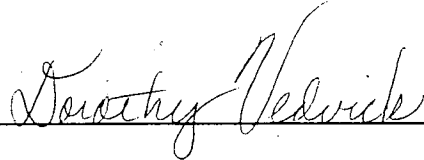
she is over the age of 18 years and not a party to this action and, on the **23rd day of November, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with fully prepaid, securely sealed and each containing an original of:

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

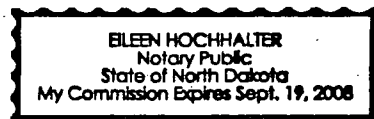
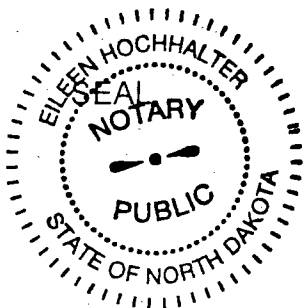
Each address shown is the respective addressee's last reasonably ascertainable post office address.



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



Notary Public



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.)

**AFFIDAVIT OF SERVICE BY
UNITED STATES MAIL**

Docket Number 05-C-2303

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF WARD)

LaRae A. Thomas, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age, and is not a party to nor interested in the above entitled action; that on the 6th day of January, 2006, this Affiant served by depositing in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in the above entitled action:

- 1. Plaintiff's Response to Motion to Dismiss or for More Definite Statement.**

That said envelopes were addressed to the following person at his known address as follows:

Daniel S. Kuntz, Senior Attorney
918 East Divide Avenue
PO Box 5650
Bismarck, ND 58502-5650

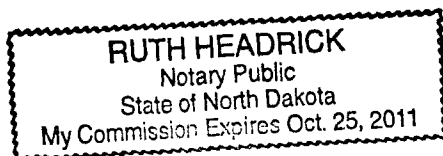
William W. Binek
PUBLIC SERVICE COMMISSION
600 E Boulevard Avenue, Department 408
Bismarck, ND 58505-0480


Randall J. Bakke
Smith Bakke Porsborg & Schweigert
116 North 2nd Street
Bismarck, ND 58501

That the above provisions were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


LaRae A. Thomas

SUBSCRIBED AND SWORN to before me this 6th day of January, 2006.




Notary Public
For the State of North Dakota
My Commission expires: 10-25-11