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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative, Case No.
Inc. vs. Montana-Dakota PU-05-551
Utilities Co. Complaint

TRANSCRIPT OF
HEARING

Taken At
State Capitol
600 East Boulevard
Bismarck, North Dakota
February 9, 2006

BEFORE JUDGE AL WAHL
-- HEARING OFFICER --

Transcript of Hearing.txt
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COMMISSIONERS PRESENT:

COMMISSIONER TONY CLARK
COMMISSIONER SUSAN E. WEFALD
COMMISSIONER KEVIN CRAMER

MR. WILLIAM E. BINEK
General Counsel
Public Service Commission
State Capitol
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Bismarck, North Dakota 58505

FOR THE PUBLIC
SERVICE COMMISSION.

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FOR THE RESPONDENT.

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RON LIPP

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9 MOTION EXHIBITS:

10	No.	Description	Off'd	Rec'd
11	1	Montana-Dakota's Requests for Admission	11	13
12	2	Capital Electric Cooperative's Response to Montana-Dakota's Requests for Admissions	11	13

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15 COMPLAINANT'S EXHIBITS:

16	C-1	February 8, 2005, letter to Randall Bakke from Dennis Schlenker, with attachments	69	70
17	C-2	Map of City Limits, Service Agreement, and CEC Distribution/ Transmission Facilities in 1973	75	75
18	C-3	Map of City Limits, Service Agreement, and CEC Distribution/ Transmission Facilities in 1993	79	82
19	C-4	Map of City Limits, Service Agreement, and CEC Distribution/ Transmission Facilities in 2005	79	82
20	C-5	Map of CEC Service Area Boulder Ridge Area	79	82

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1 C O N T E N T S (continued)

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3 COMPLAINANT'S EXHIBITS:

4	No.	Description	Off'd	Rec'd
5	C-6	CEC Service Area North Bismarck Area	79	82

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1 (The proceedings herein were had and made
2 of record, commencing at 9:02 a.m., Thursday,
3 February 9, 2006, as follows:)

4 JUDGE WAHL: Ms. Larson, are you ready?

5 MS. LARSON: Yes, I am, sir.

6 JUDGE WAHL: Mr. Kuntz, are you ready?

7 MR. KUNTZ: I am.

8 JUDGE WAHL: All right. Let's go to
Page 4

9 work. Good morning. I am Al Wahl, the
10 administrative law judge designated by the Office
11 of Administrative Hearings pursuant to the request
12 of the Public Service Commission to act as the
13 procedural hearing officer for the hearing of the
14 complaint of Capital Electric Cooperative, Inc.,
15 against Montana-Dakota Utilities Co., a division of
16 MDU Resources Group, Inc.

17 Before proceeding with the hearing, I will
18 ask the commissioners for their comments and any
19 directions for the hearing. Commission President
20 Tony Clark.

21 COMMISSIONER CLARK: Good morning. I'd
22 just like to welcome everyone here today. I look
23 forward to a good hearing.

24 One thing that I will mention -- it's one
25 that I've mentioned in a previous case between MDU

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6

1 and Capital Electric -- is just to note that I
2 would be open to -- if "open" is the right word,
3 but if you have any objections to my being a,
4 quote/unquote, member of Capital Electric. It is a
5 little bit of a -- oh, I suppose a strange instance
6 that happens where, of course, utility
7 commissioners under state law cannot have any
8 ownership in any investor-owned utility, but my
9 residence is served by Capital Electric, so I
10 suppose in one sense that does make me,

11 quote/unquote, a member/owner of one of the parties
12 that's here before the Commission. In the previous
13 case neither party had a problem with me sitting in
14 on the case. I do plan to sit in on the hearing
15 today, however. If there is any objection to that,
16 just please note it on the record and I'll make a
17 decision at that time. Thank you.

18 JUDGE WAHL: Commissioner Wefald.

19 COMMISSIONER WEFALD: Good morning.

20 welcome to everyone here. I have spent some time
21 in the past few days looking over the record that
22 has already been given to the Commission in this
23 case. What I noted was that there's a lot of
24 documents that relate to the City of Bismarck case
25 that's being appealed to the District Court, but

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1 that we don't have a lot yet that has been filed
2 with the Commission as far as prefiled testimony in
3 this case, et cetera, that sometimes has occurred
4 in past cases. So I'm very anxious to hear the
5 information that's going to be put on the record in
6 this case before us today and looking forward to
7 good presentations by both parties. Thank you.

8 JUDGE WAHL: Commissioner Cramer.

9 COMMISSIONER CRAMER: Thank you. And
10 welcome, good morning to everyone. I, too, have
11 spent quite a little time reading through the file
12 -- in fact, multiple times -- and agree with
13 Commissioner Wefald, of course, that most of the

14 paper that we've received to this point has to do
15 with the City of Bismarck case. However, it is not
16 irrelevant to what we're doing here, either. And
17 you all know -- and I expect in terms of some
18 direction, I guess, Judge, what I would say is I
19 certainly look forward and hope that we will have a
20 thorough discussion on the motion to dismiss,
21 especially a discussion in light of Judge Haskell's
22 opinion and memorandum where he, without any
23 vagueness, gives some direction to the Public
24 Service Commission. Now, he acknowledges, and I
25 do, as well, that we may wish to disagree -- we may

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8

1 disagree, but, nonetheless, he was quite thorough
2 and clear in his direction. So I hope we have a
3 thorough discussion early on from both sides on
4 that subject. I choose not to ignore his opinion
5 out of hand. So with that I look forward to a
6 good, full day.

7 JUDGE WAHL: Thank you, Commissioners.
8 The record will show that it is a little past 9:00
9 a.m., February 9, 2006, the time and the date
10 noticed for the rescheduled hearing of the
11 complaint of Capital Electric Cooperative, Inc.,
12 against Montana-Dakota Utilities Co., a division of
13 MDU Resources Group, Inc., under North Dakota
14 Century Code Sections 49-03-01 and 49-03-01.3.
15 This is the Commission's Case No. PU-05-551.

16 Capital Electric filed its complaint with
17 the Commission September 29, 2005, alleging
18 essentially that Montana-Dakota Utilities Co.
19 intends to provide electrical service to a
20 development in Capital Electric's service area and
21 that such service will unreasonably interfere with
22 the service or system of Capital Electric.

23 On October 18, 2005, pursuant to the
24 motion of the Commission, a notice of hearing was
25 issued for a hearing of the complaint on December

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9

1 13, 2005.

2 On October 20, 2005, Montana-Dakota filed
3 its answer to Capital Electric's complaint,
4 requesting the dismissal of the complaint and a
5 counterclaim seeking the Commission's determination
6 that Capital Electric is prohibited from providing
7 electric distribution service within part of
8 Boulder Ridge First Addition to the City of
9 Bismarck and requesting the order of the Commission
10 restraining and enjoining Capital Electric from
11 interfering with the service of Montana-Dakota
12 Utilities within that subdivision.

13 On November 10, 2005, Capital Electric
14 filed its reply to Montana-Dakota's counterclaim
15 requesting that the counterclaim be dismissed.

16 On November 23, 2005, Montana-Dakota filed
17 its motion to dismiss or, in the alternative, its
18 motion for a continuance.

19 Capital Electric responded to the motion
20 on November 30, 2005, to resist the motion to
21 dismiss, but not resisting the motion for a
22 continuance.

23 On November 30, 2005, the Commission
24 granted Montana-Dakota's motion for a continuance
25 of the hearing and continued the hearing

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10

1 indefinitely pending the advice of the parties.

2 Upon the advice of counsel for the parties
3 and pursuant to the Commission's motion on December
4 30th, 2005, a notice of rescheduled hearing for the
5 hearing of Capital Electric's complaint was duly
6 issued and served for the hearing today.

7 The issues specified for the rescheduled
8 hearing, as they were for the notice of hearing
9 are:

10 First, whether the Public Service
11 Commission has jurisdiction to award the relief
12 requested by the complainant.

13 Second, whether respondent should be
14 restrained and enjoined from constructing or
15 extending its lines, plant or system into
16 complainant's franchised service area.

17 And, third, whether respondent should
18 remove all of its facilities in the complainant's
19 service area.

20 Ms. Larson, will you please state your

21 appearance for the record?

22 MS. LARSON: Yes, Your Honor. My name is
23 Carol Larson. I am an attorney with Pringle &
24 Herigstad in Minot, North Dakota, and today I have
25 the privilege of representing Capital Electric in

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11

1 this matter.

2 JUDGE WAHL: Mr. Kuntz.

3 MR. KUNTZ: Dan Kuntz, assistant general
4 counsel, MDU Resources Group, appearing on behalf
5 of Montana-Dakota Utilities Company.

6 JUDGE WAHL: Mr. Binek, for the record,
7 please, and also identify each member of the
8 Commission staff who will participate in the
9 hearing.

10 MR. BINEK: My name is William Binek. I'm
11 chief counsel for the Commission. Commission staff
12 is appearing here today not as an advocate, but
13 rather as advisers to the Commission. Seated to my
14 right is Jerry Lien, public utility analyst, and to
15 Jerry's right is Annette Bendish, who is also a
16 public utility analyst, and with Annette is
17 Zachary. Annette commented earlier that Zachary is
18 a ways away from the rule of 85.

19 JUDGE WAHL: Thank you, counsel. Counsel,
20 do we have any preliminary matters?

21 MR. KUNTZ: Yes, Your Honor.

22 JUDGE WAHL: Mr. Kuntz.

23 MR. KUNTZ: Off the record we had offered
Page 10

24 -- or marked Exhibits 1 and 2 of Montana-Dakota
25 Utilities Co. Exhibit 1 is a request for

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1 admissions, and Exhibit 2 are Capital Electric's
2 response to MDU's request for admissions.

3 The request for admissions essentially
4 have three main documents. One is Montana-Dakota's
5 franchise from the City of Bismarck. There's also
6 Capital Electric's franchise from the City of
7 Bismarck. And then, probably most importantly, is
8 the order that was issued by the City Commission on
9 November 14th, determining that Montana-Dakota was
10 the proper franchise holder for Boulder Ridge First
11 Addition, which is -- I would like to offer for the
12 record those exhibits at this time as an
13 introduction to my motion I would like to renew.

14 JUDGE WAHL: Ms. Larson.

15 MS. LARSON: Your Honor, I have no
16 objection to the receipt of the exhibits offered by
17 Montana-Dakota. Capital Electric, similarly, has
18 an exhibit that has been premarked as a C --
19 Complainant's Exhibit 1, which is an authenticated
20 copy of the franchise documents, the minutes and
21 the resolution of Capital Electric's franchise with
22 the City of Bismarck that we would also like
23 offered and received.

24 JUDGE WAHL: All right. Let's deal, Ms.
25 Larson, with just the motion at this time, please.

1 For the record, Montana-Dakota's requests
2 for admission and the attached documents, which are
3 identified as Exhibits 1, 2 and 3, it appears,
4 those are together marked as Motion Exhibit 1, and
5 Capital Electric Cooperative's response to
6 Montana-Dakota's requests for admissions are marked
7 as Motion Exhibit 2. Those exhibits are both
8 received. Mr. Kuntz.

9 MR. KUNTZ: Thank you, Your Honor.
10 Commissioners, I thought it was interesting that
11 the commissioners referenced the order of the
12 District Court in that case that's going on. The
13 exhibits that I handed out to you today include the
14 City Commission's order of November 14th, which
15 determined that Capital Electric's franchise did
16 not incorporate Boulder Ridge Subdivision and that
17 MDU is the proper franchise holder for that
18 subdivision.

19 I think it's important for the Commission
20 to note that that order has not been stayed. That
21 order is in effect today. Capital Electric
22 Cooperative does not have a franchise or any
23 authority to provide service within Boulder Ridge
24 subdivision.

25 The court order, and Capital Electric is

1 challenging that order of the City Commission
2 through its District Court proceeding. They made
3 this Commission a party to that proceeding
4 specifically so that you would be bound by the
5 District Court's orders. Well, that cuts both
6 ways. And as the Commission has noted, the Court
7 was very explicit in its order that it believes
8 that this proceeding is premature, and I couldn't
9 agree any more.

10 At this particular point, as long as there
11 is an order by the City Commission that MDU is the
12 proper franchise holder, there can be no
13 interference. If Capital Electric is successful in
14 reversing the City Commission's order through its
15 District Court proceeding, then there might be
16 another basis for Capital Electric to bring their
17 action based upon that determination, but that has
18 not happened at this point.

19 So I think it's entirely proper that this
20 case should be dismissed, albeit without prejudice,
21 until such time as the District Court proceeding is
22 determined, and if at that time the City
23 Commission's decision is reversed and Capital
24 Electric wishes to pursue its complaint at that
25 time, assuming that MDU would not follow or that

□

1 the result would be that Montana-Dakota would not

2 be authorized to provide service to Boulder Ridge,
3 then we could come back to the Commission to
4 resolve that dispute under the TIA and determine if
5 it would have jurisdiction under those
6 circumstances.

7 But under the circumstances that exist
8 today, with the City Commission's order having not
9 been stayed, I believe it's entirely appropriate
10 that this proceeding should be dismissed without
11 prejudice.

12 This complaint is being brought under
13 Chapter 49-03, Section 1 and Section 01.3 of the
14 TIA. Effectively, what Capital Electric is seeking
15 to do is use the TIA to reverse the City
16 Commission's decision. The District Court order
17 has made it very clear that the city has the
18 authority to interpret its franchises. That
19 decision is well supported by the North Dakota
20 Constitution, Article 7, Section 11, which says
21 that the city's power to franchise shall not be
22 abridged by the legislature, as well as even a more
23 recent enactment of a statute in the 2005
24 legislative session 49-03-06, I believe it's
25 subpart 8. Nothing in Chapter 49-03 can limit the

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1 authority of the city to exercise its franchise
2 authority.

3 So that's a very recent directive from the
4 North Dakota Legislature saying that nothing in the

5 TIA can be used to limit the city's authority to
6 exercise its franchise authority. Both that
7 constitutional provision and that statute were
8 enacted after the TIA was passed and, therefore, to
9 the extent there's any kind of seemingly conflict
10 between the two, those more recent enactments
11 control.

12 Capital Electric's complaint basically is
13 asking this Commission to act contrary to both that
14 statutory and constitutional provision. Moreover,
15 the entire premise of Capital Electric's complaint
16 does not exist. They filed this complaint before
17 the City Commission's decision was issued. The
18 complaint is based upon the fact and it alleges the
19 fact they have a franchise to serve Boulder Ridge.
20 Well, we now know that they don't. That issue has
21 been determined by the City Commission, which has
22 the authority to make that decision.

23 The City Commission's -- I want to
24 reference page 10 of Capital Electric's response to
25 the city's motion to dismiss for a more definite

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17

1 statement in the District Court proceeding, which
2 the Commission is a party, and, therefore, I think,
3 the Commission can take administrative notice. I
4 think it's important that you keep this in mind
5 today when you hear the presentation of Capital
6 Electric, because I think we're going to hear all

7 kinds of -- see all kinds of maps and arguments,
8 and so forth, arguing that somehow the City
9 Commission's decision was wrong.

10 But let me quote from the brief of Capital
11 Electric in that District Court proceeding. The
12 PSC's powers do not include the power to review,
13 affirm or reverse action of a municipality, nor
14 does the PSC have authority to independently
15 interpret or enforce the franchise granted by the
16 city to Capital considered a contract.

17 I could not agree more with Capital
18 Electric's determination that the PSC does not have
19 authority to interpret the city's franchise or
20 enforce the city's franchise. I could not agree
21 more that the Commission does not have authority to
22 interpret contracts, although I probably disagree
23 with whether a franchise is actually a franchise or
24 rather a legislative enactment by the city. But in
25 either case I don't think it's within the

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1 jurisdiction of this Commission to try to reverse
2 the actions of the city with respect to its
3 franchise.

4 without a franchise by Capital Electric to
5 serve Boulder Ridge, there can be no interference
6 by Montana-Dakota to provide service within that
7 area. They have no authority to install or operate
8 facilities within Boulder Ridge without a
9 franchise.

10 That question was decided a long time ago
11 in the Divide County School case at 193 NW2d 723,
12 and that holding in that case has been strengthened
13 by the constitutional and statutory enactments that
14 I referenced earlier that were both passed after
15 the Divide County School case, but are consistent
16 with the holding and the result in that case.

17 I realize there's been some suggestion and
18 perhaps musings that this is very similar to the
19 South Pointe case that was decided in about 1990 in
20 Fargo between NSP and Cass County Electric
21 Cooperative, but there's some very important
22 distinctions.

23 In the South Pointe case no one ever
24 raised the constitutional question of whether the
25 Commission's action in that case would have

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19

1 interfered with NSP's franchise to the City of
2 Fargo, so we don't have any direction in that case
3 as to how the TIA interacts in that situation. But
4 more importantly in that particular case, Cass
5 County Electric Cooperative had a franchise in the
6 sense of an area agreement with the City of Fargo
7 to serve South Pointe. The entire case was
8 premised on the fact that Cass County Electric
9 Cooperative had an agreement with the City of Fargo
10 to be the franchise provider of South Pointe.

11 That is entirely different than the

12 situation that we have here before us. If we had
13 that same situation before us today, then I think
14 we would come down to a question as to what is the
15 Commission's authority if you have two franchise
16 holders under the TIA to even act, but that's not
17 the situation we have here because we have only one
18 franchise holder in Boulder Ridge.

19 Consider for a moment, if you will, what
20 would be the effect if the Commission were to grant
21 the relief that Capital has asked for today and
22 that Montana-Dakota could not provide service in
23 Boulder Ridge. You would have a situation, on one
24 hand, where you had a city that has indicated that
25 Capital Electric does not have a franchise, does

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20

1 not have authority to provide service in that
2 subdivision, and you have a Public Service
3 Commission order saying that MDU could not provide
4 service in that subdivision. In other words, the
5 customers in that subdivision would not have access
6 to an electric provider since the city said Capital
7 Electric couldn't provide it and the Commission
8 would say MDU couldn't provide it. I think
9 obviously that's a situation that cannot result.

10 Finally, this is obviously a bifurcated
11 proceeding. The Commission, again, has been a
12 party to the District Court proceeding essentially
13 seeking the exact same relief, to prevent MDU from
14 providing service in Boulder Ridge. You can juggle

15 it any way you want, but at the end of the day the
16 relief is exactly the same in both proceeding,
17 they're trying to do the same thing, and that's
18 reverse the effect of the City Commission's
19 decision.

20 The court cases are very clear in North
21 Dakota. The Supreme Court has said in a number of
22 cases that it does not favor bifurcated
23 proceedings, one in the administrative front and
24 one in the district court front, trying to
25 accomplish the same thing. Just because they've

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1 rearranged the parties a little bit by including
2 the City and the Commission in the court case does
3 not change the fact of what the result that they're
4 seeking to accomplish.

5 Your Honor, that completes my argument on
6 the renewal of my motion to dismiss. At this time
7 I would also move to dismiss without prejudice our
8 counterclaim in this case. It wasn't clear that
9 the Commission had accepted our counterclaim
10 because it wasn't included within the admissions
11 that we received before. We hadn't had formal
12 notice that the counterclaim had been accepted by
13 the Commission. We have made --

14 JUDGE WAHL: Mr. Kuntz --

15 MR. KUNTZ: Yes.

16 JUDGE WAHL: -- can I interrupt you? I

17 would do these separately so that we maintain the
18 record. I think it would be easier for the
19 Commission to use these tapes for review if they do
20 that if we keep these matters separate.

21 MR. KUNTZ: That would be fine.

22 JUDGE WAHL: We now have pending before
23 the Commission Montana-Dakota's renewed motion to
24 dismiss for lack of jurisdiction. Ms. Larson, your
25 response.

□

22

1 MS. LARSON: Thank you, Your Honor. MDU
2 has mentioned one statutory basis for its motion to
3 dismiss, one sentence that they rely on in the new
4 section of Chapter 49-03 which was just recently
5 enacted in 2005. There are two problems with this
6 argument. First, they offer a conclusion that's
7 unsupported by any analysis under precedence in
8 statute about statutory construction.

9 For example, in the first South Pointe
10 case that was addressed by this Public Service
11 Commission in the Supreme Court, that case states
12 the principle that courts need to construe all
13 statutes relating to the same subject matter so as
14 to harmonize them, if possible, and to give full
15 force and effect to all of these statutes. MDU's
16 motion is devoid of appropriate argument. They
17 simply state the self-serving conclusion that no
18 effect should be given to one section of the
19 statute that they don't like, which is, of course,

20 the Territorial Integrity Act. Our posthearing
21 brief will in detail apply the rules of statutory
22 interpretation to harmonize the statutes that are
23 at play in this case.

24 Secondly, and more important, the statute
25 to which they refer to includes the word

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23

1 "franchise," which implicates MDU's constitutional
2 argument. And as we have previously stated with
3 citation to Supreme Court decisions, MDU has no
4 standing to assert these issues, and the Public
5 Service Commission does not have jurisdiction to
6 decide constitutional issues. The Commission
7 should deny the motion to dismiss because it's
8 bound to presume that all of Chapter 49-03 is
9 constitutional.

10 From the very beginning of the territorial
11 dispute over Boulder Ridge, MDU has asserted that
12 the Bismarck City Commission's authority under
13 Chapter 40-05 overrides this Commission's authority
14 under Chapter 49-03 to enforce the specific
15 provisions of 49-03-01.3 that prohibit
16 interference. Capital disagrees. In our view, a
17 local franchise is not a license that permits MDU
18 to violate the state law that prohibits
19 interference. In our view, this case is
20 fundamentally no different than the South Pointe
21 cases except for one thing. The South Pointe cases

22 have already been decided. They provide a
23 precedent for this Commission to proceed rather
24 than to dismiss this case prematurely.

25 The Supreme Court has advised the

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24

1 Commission to not take a narrow view of its
2 jurisdiction. The Commission is charged with
3 looking at the existing electric facilities that
4 Capital and MDU have in place and make a
5 determination of whether extension by MDU, their
6 services into Boulder Ridge, would constitute an
7 unreasonable duplication of capital-intensive
8 facilities and services that are already provided
9 by Capital. And we would cite you to Cass Electric
10 v. NSP at 419 NW2d 181.

11 Capital knows -- or excuse me. MDU knows
12 this case is fundamentally no different than the
13 South Pointe cases, but they have manufactured one
14 cosmetic difference, they have enlisted the City of
15 Bismarck, the Bismarck City Commission as their
16 ally.

17 As the Commission knows, Capital has
18 initiated a court action against the City of
19 Bismarck and, as MDU has stated, the Court has
20 issued a preliminary opinion that does seem to
21 support MDU's argument. But the Court's own words
22 recognize that this Commission might have a
23 different opinion, and we expect that the
24 Commission's own legal counsel will advise the

25 Commission's that the Court's remarks about Chapter

□

25

1 49-03 are just dicta and are not in any way binding
2 on this decision.

3 And I would also point out that that
4 decision that was rendered by Judge Haskell in the
5 District Court was in response to a motion for a
6 more definite statement. As the Court is well
7 aware, Capital has responded to that, has provided
8 a more definite statement, and in fact has filed as
9 a matter of right against the City of Bismarck an
10 amended complaint. So the issue of the
11 jurisdiction of the PSC or the interplay between
12 the district -- the decision and jurisdiction of
13 the District Court was not in front of the judge.
14 The judge did not have the benefit of any
15 evidence. There are some assumptions and
16 conclusions that he jumps to in that decision that
17 were not part of the record, and they couldn't be
18 part of the record. That case is only at its
19 pleading state. Capital has on the table an
20 amended complaint. There is a motion for leave to
21 amend against the Public Service Commission and
22 Montana-Dakota Utilities because they had
23 previously filed an answer in Capital's declaratory
24 judgment.

25 So that decision is just that, is dicta,

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26

1 and we are here under the Territorial Integrity
2 Act. The Court in that case did not interfere with
3 the Commission's jurisdiction to proceed with
4 today's hearing, and under the Administrative
5 Agencies Practice Act, any decision that this
6 Commission, the PSC, might render can be appealed
7 to the District Court. However, no District Court
8 has jurisdiction to prevent you from holding the
9 hearing today and making your own decision. The
10 separate case against the City of Bismarck is not
11 over one way or the other. It has just started.
12 The Commission will rule on the motion to dismiss
13 and your decision will be subject to appeal after
14 your decision is made. And there are many reasons
15 why Capital thinks that you should deny that
16 motion.

17 MDU claims constitutional support for its
18 motion to dismiss. In effect, it claims that the
19 statute that prohibits interference violates the
20 State Constitution, and that's not a reason to
21 grant their motion to dismiss. And that's a reason
22 to deny their motion. It's fundamental that all
23 statutes are presumed to be constitutional. NDCC
24 Section 1-02-38 states that premise. And one of
25 the many cases reciting this principle is the first

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1 case that was heard under the Territorial Integrity
2 Act, and that was MDU versus Johanneson, and all of
3 Chapter 49-03, including 49-03-01.3 under which
4 Capital is proceeding today, are presumed to be
5 constitutional. And we would suggest that you not
6 form an opinion about the constitutional issues as
7 the basis for your ruling on this motion. You
8 should deny this motion because administrative
9 agencies have no authority to decide upon the
10 constitutionality of the statutes under which you
11 operate. And that premise is cited in Johnson v.
12 Elkin at 263 NW2d 173.

13 According to that Johnson case, when a
14 constitutional issue arises in an administrative
15 agency proceeding, the agency should not attempt to
16 resolve the constitutional issue. The agency
17 should proceed with the hearing because the agency
18 is obliged to presume the constitutionality of the
19 statutes under which you operate. Any
20 constitutional issues will be raised on appeal.
21 And that's the orderly way that the Supreme Court
22 has advised us to deal with MDU's constitutional
23 claims under Johnson v. Elkin and under the
24 Administrative Agencies Practice Act.

25 we have said that this case is

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1 fundamentally no different from the South Pointe
2 cases, but there is one other similar case that was

3 decided in 1990, and that case is Application of
4 Otter Tail Power Company, and that case is cited at
5 451 NW2d 95. And that case involved the power
6 company's proposed extension of service onto an
7 Indian reservation.

8 Otter Tail asserted that the assumption of
9 jurisdiction by the Public Service Commission would
10 unlawfully interfere with the tribe's sovereign
11 rights of self-government, and the Court concluded
12 that Otter Tail had no standing to advance the
13 tribe's self-government interests.

14 Take these quotes and change the names of
15 the characters to fit this case and it reads like
16 this, MDU asserts that assumption of jurisdiction
17 by the PSC would unlawfully interfere with the City
18 of Bismarck's sovereign rights of self-government.
19 MDU has no standing to advance the city's
20 self-government interests.

21 Other observations can be made about the
22 impact of that case. In the Otter Tail case, the
23 Public Service Commission followed the admonition
24 of the South Pointe cases. It did not take a
25 narrow view of its jurisdiction. The Public

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1 Service Commission asserted that it had
2 jurisdiction in that case. The Public Service
3 Commission rejected the arguments that local
4 self-government concepts preempted the Commission's
5 jurisdiction. The Public Service Commission's

6 assertion of jurisdiction was upheld by the Supreme
7 Court.

8 Against that background, the presumption
9 of the constitutionality of 49-03-01.3 is
10 reinforced. The decision in the Otter Tail case
11 concluding that the state's interests in regulating
12 a public utility outweighs the minimal burden on
13 tribal self-government indicates the final outcome
14 of the dispute over Boulder Ridge.

15 There is one additional case that supports
16 Capital's position that MDU's motion to dismiss
17 should be denied and this case should move on to
18 hearing. We suggest the Commission should adopt in
19 this case the procedure it adopted at MDU's urging
20 in Capital Electric versus the Public Service
21 Commission back in 1995. In that case one party
22 asserted jurisdiction, the other moved to dismiss
23 on jurisdictional grounds. You did not dismiss.
24 You proceeded to hearing and decision, not taking a
25 narrow view of your jurisdiction. On appeal the

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1 District Court and the Supreme Court addressed the
2 jurisdiction issue. We can think of no better
3 example of an orderly procedure to follow than the
4 procedure that you established in that case.

5 Under Cass v. NSP and Johnson v. Elkin,
6 and paraphrasing the Court's words, the Commission
7 should deny the motion to dismiss. It should not

8 take a narrow view of its jurisdiction,
9 particularly in view of the presumption of the
10 constitutionality of the statutes under which you
11 operate. Evidence on all issues should be
12 presented at the hearing. You need to look at our
13 existing facilities and the existing facilities
14 that Capital and MDU have in place and make a
15 determination of whether or not extension of MDU's
16 services to Boulder Ridge would constitute an
17 unreasonable duplication of capital-intensive
18 facilities and services that are already provided
19 by Capital.

20 I would also like to point out that MDU
21 asserts that the city is empowered to regulate
22 franchises, which is not a constitutional right,
23 but a statutory right that was granted to the city
24 in 40-05-01.

25 Under Mini Mart versus Minot, the Court

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1 held that the city must reserve its legislative
2 grant through the use of written criteria which
3 both adequately inform applicants of the standards
4 and the policies to be contemplated by the
5 municipality and adequately guide the licensing
6 authority in arriving at its decision. Aside from
7 any constitutional considerations, the Court found
8 in Mini Mart that fundamental fairness would seem
9 to require nothing less.

10 And going back to this Public Service

11 Commission case decision in the Baker Electric
12 case, the Court found that the state's interest in
13 regulating suppliers of electricity in furtherance
14 of the public good is substantial and it ranks, and
15 I'm quoting, the most important functions
16 traditionally associated with the police power of
17 the state. Because electric service is capital
18 intensive, state regulation designed to avoid
19 wasteful duplication of facilities between
20 competing electric suppliers benefits all consumers
21 of electricity. In Baker, the Court found that the
22 state's regulatory interest will be particularly
23 substantial if the state can point to
24 off-reservation effects that necessitate state
25 intervention. The Court noted that the electric

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1 supply system of Otter Tail and Baker were not
2 confined to the reservation, but extended to a
3 large portion of the state and, thus, the economic
4 impact of operations within the reservation can
5 adversely affect nonreservation customers of those
6 electric suppliers.

7 Just as we have in this case, it's not
8 just the citizens of Bismarck that will be affected
9 by unreasonable duplication of services. Capital
10 has members who are not citizens of Bismarck, who
11 have invested a great deal of money, millions of
12 dollars, to serve the area in north Bismarck. The

13 Court -- we would request that this Commission take
14 judicial notice of the fact that the City of
15 Bismarck in their city ordinances have enacted only
16 one ordinance that deals with the regulation of
17 electricity, and that case -- or that ordinance
18 states that the city -- excuse me. That ordinance
19 is 10-05-08 that deals with where you can place
20 your poles in the right-of-way.

21 So as in Baker, the City of Bismarck did
22 not reserve the right to regulate. The City of
23 Bismarck was made aware that Capital had invoked
24 the jurisdiction under the Territorial Integrity
25 Act. The city has not chosen to intervene in this

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1 case to advance its own rights of self-government.
2 And it appears in this case the city has acquiesced
3 to the jurisdiction of the Public Service
4 Commission in the regulation of electric
5 utilities.

6 We would respectfully request that the
7 motion be denied.

8 JUDGE WAHL: Comment, Mr. Binek?

9 MR. BINEK: No.

10 JUDGE WAHL: Rebuttal.

11 MR. KUNTZ: Thank you, sir. First, make
12 it clear, we are not -- no one is asking the
13 Commission to declare any statute unconstitutional
14 or the TIA unconstitutional. What you're being
15 asked to do is construe your authority under the

16 TIA consistent with the statutory provisions within
17 the TIA, itself, which says that you shouldn't
18 interfere with the city's franchise authority, as
19 well as the constitutional provision that makes it
20 clear that the city is the ultimate determination
21 of its franchises. You interpret that consistently
22 with the TIA, which says that you determine whether
23 or not a utility is unreasonably interfering and
24 duplicating services of Capital Electric.
25 well, if Capital Electric does not have

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1 authority to provide service in Boulder Ridge, then
2 it's not unreasonable interference for MDU to
3 provide that particular service. It's as simple as
4 that. That's all you're doing, is reconciling the
5 TIA in terms of what you're asked to do and
6 constitutes interference with the city commission's
7 determination that Capital Electric does not have
8 authority to provide service within that
9 subdivision.

10 The situation would be different if the
11 city commission had determined that Capital
12 Electric indeed had the authority to serve a
13 particular subdivision and MDU did not and MDU
14 nonetheless went and extended its facilities and
15 duplicated Capital Electric's facilities in a
16 subdivision, indeed similar to what Capital
17 Electric did in this case. Then there would be a

18 basis for that complaint, because in that case
19 where they had authority from the city to provide
20 service and MDU duplicated and interfered with that
21 service, there would be a basis for the complaint.
22 But that's not the situation here. Capital again
23 talks about the precedent in South Pointe. Yes,
24 that's interesting precedent because in that
25 particular case, South Pointe, Cass County Electric

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1 Cooperative had the authority from the city to
2 provide service in that subdivision. Big
3 difference from what exists in this particular
4 case.

5 They talk about the investment that
6 Capital Electric has made. If Capital Electric
7 made investment to serve Boulder Ridge Subdivision
8 without a clarification of its franchise or the
9 assumption that that was within their franchise,
10 they did that at their own risk. This Commission
11 does not have the authority to deny MDU its right
12 to exercise its service under its franchise simply
13 because Capital Electric made some assumptions it
14 was going to get to serve something that wasn't
15 within the scope of its franchise.

16 They talk about Judge Haskell's order
17 being mere dicta and that it was in response to a
18 motion for a more definite statement. Actually, it
19 was in response to two motions. One was a motion
20 to dismiss and the other was an alternative motion

21 for a more definite statement. Judge Haskell's
22 decision about the authority of the city commission
23 to interpret its franchise clearly went to the
24 question of the motion to dismiss. And what Judge
25 Haskell was saying is that if Capital Electric's

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1 complaint against the city was based upon an
2 argument that the city did not have authority to
3 interpret its franchise, he saw no merit in that
4 particular case and would dismiss it.
5 Alternatively, he said that if Capital wanted to
6 treat this as an appeal of the city commission's
7 decision under an arbitrary and capricious
8 standard, then he would consider it. But if the
9 intent of Capital Electric is to say that the city
10 doesn't have authority to interpret its own
11 franchises, then he's essentially saying I'm going
12 to dismiss that particular complaint. And, again,
13 that's the real effect and that's the piece -- you
14 know, this Commission is a party to that particular
15 order. Capital Electric made you a party to that
16 particular proceeding.

17 So this case is no different than the
18 Divide County case that existed even before the
19 constitutional provision and the current statutory
20 provisions were passed. I don't know if you
21 remember the facts in the Divide County School
22 case, but that was a situation where the city

23 annexed some school property that was adjacent to
24 the city that the coop in that particular case had
25 been serving. Once it was annexed, the city

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1 refused to give the cooperative a franchise to
2 serve that property. The Court in that case held
3 that in absence of that, without that franchise,
4 they had no authority to serve and they had to
5 either discontinue service or sell their service to
6 MDU in that particular case.

7 That was even before these constitutional
8 provisions were enacted, so that's why I'm saying,
9 you don't have to determine the constitutionality
10 of the TIA. It's already been interpreted
11 consistently with what our arguments are here today
12 and the constitutional provisions that recognize
13 the right of the cities to franchise their
14 providers of electricity within their borders
15 simply strengthens that particular holding in that
16 case. Thank you.

17 JUDGE WAHL: Thank you, counsel. Mr.
18 President, I wonder -- this is perhaps a little
19 irregular, but perhaps considering the really
20 thorough, indeed almost exhaustive, argument which
21 has been presented, I wonder if it would be useful
22 to allow the Commission questions. Do the
23 commissioners have questions?

24 COMMISSIONER CLARK: I do.

25 COMMISSIONER CRAMER: I would sure

1 appreciate that.

2 JUDGE WAHL: All right. Let's begin.

3 Let's do it this way. I'll begin with Commissioner

4 Clark, and I would just ask the commissioner to

5 direct the question to counsel as you think and

6 then I will allow opposing counsel to respond.

7 Beginning then with Commissioner Clark.

8 COMMISSIONER WEFALD: I have a question on

9 the process today.

10 JUDGE WAHL: Please.

11 COMMISSIONER WEFALD: I'm just wondering

12 what's happening today, and that would be helpful

13 for me to understand that.

14 JUDGE WAHL: All right.

15 COMMISSIONER WEFALD: Are we hearing first

16 arguments on the case to dismiss, and then I

17 understand there's another motion to dismiss that

18 will be argued after this one, and then if the

19 Commission chooses not to make a decision today on

20 the dismissal issue, but wishes to be able to study

21 the arguments in more detail before it makes a

22 decision, are the parties prepared then to move

23 forward to argue -- to give us information about

24 the public hearing issues that are noticed today?

25 I don't know the answer to those questions.

1 JUDGE WAHL: Commissioner Wefald, let me
2 address this. This hearing proceeded a little
3 differently than I think is typical, at least in my
4 experience. What we are dealing with now are what
5 I had referred to as preliminary matters. And as
6 the initial preliminary matter, Montana-Dakota has
7 renewed its motion to dismiss for lack of
8 jurisdiction. That's really what -- that's all
9 we're talking about at this moment.

10 COMMISSIONER WEFALD: Yes.

11 JUDGE WAHL: The way that this would
12 proceed ordinarily is that in accordance with the
13 notice of hearing which the Commission has issued,
14 which calls for the consideration of not only the
15 question of jurisdiction, which is being addressed
16 by this motion to dismiss now, but also calls for
17 consideration of the merits of Capital Electric
18 complaints, then I would take the motion and I
19 would take it under advisement for further
20 consideration by the Commission. Now, that's not
21 necessary. That is the way that I would proceed
22 upon the Commission's notice of hearing. But it is
23 possible -- the Commission may, within its
24 authority, simply grant this morning -- as you sit
25 here, you could come to a conclusion and say, we

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1 are granting the motion to dismiss.
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2 COMMISSIONER CRAMER: What if we had an
3 indefinite continuance? Could we do that?

4 JUDGE WAHL: That is, rather than taking
5 it --

6 COMMISSIONER CRAMER: Rather than dismiss
7 without prejudice if we didn't want --

8 COMMISSIONER WEFALD: If we took it under
9 advisement?

10 JUDGE WAHL: We're taking -- we're taking
11 -- dismiss -- an indefinite continuance for what?

12 COMMISSIONER CRAMER: For the rest of the
13 hearing.

14 JUDGE WAHL: Oh, I see. Yes, I think you
15 could do that. I think you could do that. I think
16 you could, on your motion, continue the hearing to
17 consider the motion to dismiss and then deal with
18 that. If the Commission grants the motion to
19 dismiss, obviously the rest of the -- the rest of
20 the proceedings are moot.

21 COMMISSIONER CRAMER: Right. I guess
22 that's my --

23 COMMISSIONER CLARK: Considering the lead-
24 up to this, which was the Commission made the offer
25 to have a hearing just on this issue, and it was

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1 presented to both parties and both parties said,
2 no, we'd rather do both of them at the same time, I
3 would hope we would consider just moving forward

4 with the hearing today.

5 COMMISSIONER CRAMER: I recall that that
6 was Capital's position, but the one thing I would
7 say and what I'm struggling a little bit with is
8 that since that time a District Court has ruled
9 and --

10 COMMISSIONER WEFALD: They haven't ruled.

11 COMMISSIONER CRAMER: Or has given
12 tremendous direction, we are a party to it, albeit
13 a nominal party to the case, but we are a party to
14 the case --

15 COMMISSIONER WEFALD: They have given --

16 COMMISSIONER CRAMER: -- and it is not
17 irrelevant. And so I guess I'm struggling a little
18 bit and I'm convinced that -- you know, that the
19 notice is everything in this situation.

20 COMMISSIONER WEFALD: well, I would -- my
21 feelings are that I would like to take the
22 information about the -- that we're being presented
23 on the motion to dismiss under advisement and to
24 continue with the hearing as noticed for today and
25 get the other information on the record as

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1 noticed. But that's my --

2 COMMISSIONER CLARK: I would tend to
3 agree. If both parties are ready to present a case
4 today, everyone is here in the room today, we may
5 as well get the record and, you know, we can decide
6 on the motion to dismiss at a later time and maybe

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7 that becomes a threshold issue depending on how we
8 decide it. But both parties are ready to proceed.
9 My preference would be just to go ahead and hear
10 those issues that have been noticed.

11 COMMISSIONER CRAMER: Of course, we
12 haven't exhausted our questions for the dismissal.

13 COMMISSIONER CLARK: No.

14 COMMISSIONER WEFALD: No, we haven't.
15 That's right.

16 JUDGE WAHL: And I think --

17 COMMISSIONER CRAMER: We're not prepared
18 to even have an opinion.

19 JUDGE WAHL: And that's the way this
20 hearing is now structured. So, Commissioner
21 wefald, to answer the rest of your questions, I
22 would proceed to complete the hearing, so to speak,
23 Montana-Dakota's motion to dismiss for lack of
24 jurisdiction. Then I'm informed that
25 Montana-Dakota has a second motion, which will be,

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1 I expect, a routine motion, a motion that I will
2 deal with as a procedural matter. We will then
3 take up that motion and deal with that. And then
4 as the third step in the process of this hearing
5 today, we would then proceed with the hearing on
6 Capital Electric's complaint. That's the way that
7 I envision this hearing moving forward depending,
8 of course, upon what develops as we proceed.

9 COMMISSIONER WEFALD: I would just like to
10 -- with Commissioner Cramer with his concerns.
11 Commissioner Cramer, my understanding is that
12 taking a motion to dismiss under advisement does
13 not mean that we make any determination today.
14 COMMISSIONER CRAMER: Certainly.
15 COMMISSIONER WEFALD: But the motion to
16 dismiss, and we would make that determination then
17 when we had an opportunity to consider the whole
18 record, all the information that's before us, and
19 then we would make that determination.
20 COMMISSIONER CRAMER: I understand that.
21 I guess I'm trying to be prudent and practical, as
22 well as legal. And I'm not saying that I've
23 decided one way or the other. I want to ask some
24 questions because I'm still searching for answers.
25 COMMISSIONER WEFALD: And I think that's

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1 fine. I'm fine with asking questions.
2 COMMISSIONER CRAMER: My only point is
3 that there's a matter of prudence, there's a matter
4 of resources, there's a matter of threshold. And I
5 realize we don't have to make a decision, but I do
6 want to ask a couple questions.
7 COMMISSIONER WEFALD: I have no problems
8 with that whatsoever.
9 JUDGE WAHL: All right. Let's proceed
10 with the Commissioner's questions then.
11 Commissioner Clark.

12 COMMISSIONER CLARK: Thank you. The first
13 one I'll address to Mr. Kuntz, and it just gets to
14 the idea of how broadly MDU views the franchise
15 rights of cities. Clearly, the Constitution, if
16 you just read it on its face, is a pretty broad
17 granting of powers to cities. But, I mean, at the
18 same time, to what degree could a city -- let's get
19 away from this particular case -- but could a city
20 write into a franchise agreement things that would
21 somehow be contrary to other parts of state
22 statute? For example, could a city as part of a
23 franchise say, you know, we don't like PSC
24 regulation of rates or there's something in this
25 tariff that the PSC has approved that we don't like

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1 -- could individual cities as part of a franchise
2 process try to nullify rate actions of the
3 Commission, other tariff provisions of the
4 Commission, things like that? Could a city
5 commission say, you know, we want to be fair to
6 both companies, we'll create a checkerboard
7 throughout our city, so every other block -- as
8 absurd as this might sound -- every other block
9 will be served by a different company? Is
10 theoretically that possible under too broad an
11 interpretation of city franchise rights?

12 MR. KUNTZ: Commissioner, I think that's
13 an interesting observation, and I don't have an

14 answer to that. You know, that's probably a
15 question for another day. I think the more
16 interesting question as it relates to this case is,
17 as the Commission is probably aware, Montana-Dakota
18 has an unlimited franchise in the City of Bismarck,
19 which basically authorizes them to serve wherever
20 throughout the entire city. Capital Electric has a
21 limited franchise designated to certain geographic
22 areas. Montana-Dakota has respected those areas, I
23 think consistent with the city's direction,
24 although not explicit with MDU's franchise, that
25 where the city has given Capital Electric a

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1 franchise within its geographic areas, MDU has
2 respected that and not extended service into those
3 particular areas where Capital Electric's franchise
4 exists. What would happen if the city said
5 basically we're going to franchise both of you or
6 maybe five of you in this particular city? I think
7 that would be an interesting question where -- you
8 know, so far the state statutes kind of envision
9 that there will be single providers, and, indeed,
10 the city, I think, has indicated they believe that
11 that's the way it should be, as well, within
12 certain areas.

13 But that's not the question before us.
14 The question before us here, I think, is clearly
15 the city's authority within its franchise to decide
16 who can provide service within its boundaries.

17 Certainly its most basic principle of franchising
18 is that, is the authority to determine who is going
19 to be the franchise provider within its
20 boundaries.

21 Now, you know, in terms of imposing
22 conditions beyond that on those providers and how
23 they provide service and what they can charge, you
24 know, I'm afraid we're going to have to save that
25 question for another day because I don't have an

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1 answer to it.

2 JUDGE WAHL: Ms. Larson.

3 MS. LARSON: Well, I guess my feeling is
4 that the status that we have is that the city
5 granted a franchise to Capital and granted a
6 franchise to MDU, and I don't see anywhere in the
7 city's own ordinances where the city assumed the
8 power to interpret what those franchises mean in
9 the future. They did not enact any ordinances that
10 would have put Capital on notice as to how the city
11 intended to proceed in hearing this petition, in
12 how the city -- or what criteria the city was going
13 to use to construe Capital's franchise and MDU's
14 franchise. And I think the Commission can know by
15 reviewing those -- the petition that was before the
16 city, it was not a petition to grant to MDU a
17 franchise, and, again, in the city's regulations it
18 says that they grant franchises by resolutions.

19 Capital has a resolution, MDU has a resolution for
20 a franchise.

21 Capital had enacted the jurisdiction of
22 the Public Service Commission before that hearing,
23 and so the question of what does our franchise mean
24 and what does their franchise mean, does the city
25 have the ability to act in a quasi-judicial

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1 capacity in determining what the parties meant or
2 what the language of the contract meant, those are
3 issues that are going to be looked at and
4 determined by the District Court in terms of how
5 that's applied.

6 So what we have today here is the road map
7 for how the Public Service Commission proceeds on
8 territorial integrity questions and we would
9 certainly assert that under the service agreement
10 among electric providers in 49-03-06. 49-03-06 was
11 a statute that was designed to provide electric
12 utilities another way to help them resolve their
13 dispute. It was not designed to take away
14 jurisdiction of the Public Service Commission under
15 the Territorial Integrity Act. This statute is --
16 neither party -- neither Capital nor MDU have
17 asserted that we have a service agreement that
18 complies with new 49-03-06. We don't. To the best
19 of my knowledge, the Public Service Commission
20 hasn't had the opportunity to address any service
21 agreements under 49-03-06 that was just recently

22 enacted. So to read that enactment which allows --
23 it does allow electric providers to enact or to
24 come to terms with an area service agreement, but
25 it continues with the state's policy in regulating

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1 utilities by requiring the approval of the Public
2 Service Commission. And for that basis, and on
3 that basis, it is our position that whatever
4 regulatory role the City of Bismarck might have
5 under its statutory grant, that they do need to
6 enact ordinances that are reasonably going to put
7 the public on notice as to what their criteria is
8 going to be for how they're going to exercise that
9 regulatory authority.

10 It's our contention there was no
11 regulation of our franchise with the extent that if
12 you read through the city's decision, I challenge
13 that you will not find one sentence where the city
14 considered what Capital's investment or Capital's
15 facilities were in north Bismarck and what
16 facilities MDU had and how it would exercise its
17 regulatory authority in this capital-intensive area
18 and determine -- and at least consider whether the
19 way it interpreted the franchise was -- or
20 regulated the franchise was going to constitute
21 unreasonable duplication of services.

22 COMMISSIONER CLARK: To follow up on that,
23 although the city may or may not have had good or

24 bad reasons -- who knows -- it's really for us as a
25 commission not a role to second-guess a city

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1 commission as far as what they do -- in a lot of
2 ways. We can't order them to grant a franchise if
3 they don't want to. Don't we have a problem if the
4 PSC does follow through on the course that you're
5 recommending we do, we dismiss MDU's motion, we
6 hold the hearing, let's say hypothetically we agree
7 a hundred percent with Capital that there's some
8 interference? If we end up in that situation but
9 the City of Bismarck continues to say we don't
10 believe you have a franchise, we've granted the
11 franchise in this area to MDU, where are we at?

12 MS. LARSON: Well, Mr. Commissioner, I
13 think you're in no different position than you were
14 when you were confronted with the Baker Electric
15 case. In that case where we had tribal
16 jurisdiction, the tribe in that case had enacted a
17 -- it's not an ordinance -- I'm sorry, I'm at a
18 loss for the right word -- where they in exercising
19 their determination determined that Otter Tail had
20 the right to serve and they had this right of
21 sovereign jurisdiction and self-government. You
22 know, we don't expect that you ignore the city. I
23 mean, there is a fact that there's a decision out
24 there by the city. That's a fact. But what
25 happens to that decision is under the jurisdiction

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1 of the Court. It's not your job, and you're not
2 challenged with the responsibility for interpreting
3 what our franchise says and what their franchise
4 says and what that order means and whether they had
5 authority to issue it and whether it's binding.
6 The city doesn't have authority to issue injunctive
7 relief. You know, that's only a court that has
8 that authority. The city didn't set up a mechanism
9 for statutory appeals and how it would handle
10 issues of regulating its franchise. Again, those
11 are all issues for another venue.

12 what the legislature has said and what the
13 Supreme Court has said is you're the folks who are
14 charged with regulating utilities. You're the ones
15 who look out -- this Commission is the body that
16 has been given power by the legislature to make the
17 determination as to whether or not the provisions
18 under the Territorial Integrity Act are met.
19 There's no other -- there's no other body that has
20 been given the power and the jurisdiction over that
21 issue than this Commission.

22 COMMISSIONER CLARK: So just to follow up
23 before Mr. Kuntz responds, your recommendation
24 would be that the Commission only look at the issue
25 of this interference complaint as it relates to the

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1 TIA? Other things -- franchise where the city
2 granted it or not and what its franchise rights are
3 and everything else stays with the Court?

4 MS. LARSON: I absolutely believe that to
5 be the case. And with respect to the procedural
6 question and the due process or the -- you know,
7 conserving resources, when this Commission noticed
8 the interference case today, the two issues,
9 Capital Electric spent time and money preparing for
10 that case, and we don't think that this case should
11 be decided in a vacuum. We do think that you are
12 charged with the responsibility to look at the
13 facilities, to make a determination about, in your
14 view, whether or not it would constitute
15 unreasonable interference. And if you choose to
16 comment on other areas, we don't think those
17 comments will be binding, but, you know, if you
18 want to comment, they said you can comment on
19 constitutional questions if you choose to, it's not
20 binding, you can comment on what you think the
21 state of our franchise is, we don't think that will
22 be binding on Capital or MDU, that the District
23 Court will make that decision.

24 But we are asking you to hear this case
25 under the basis on which it was brought under the

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1 Territorial Integrity Act and look at our
2 facilities, look at the existing facilities and
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3 make a determination as to whether or not service
4 by MDU will constitute unreasonable interference
5 with our system.

6 JUDGE WAHL: Mr. Kuntz.

7 MR. KUNTZ: Just I want to clarify
8 something from the beginning here, is that the
9 hearing officer has referred to our motion as a
10 motion to dismiss for lack of jurisdiction. It's a
11 motion to dismiss, period, not just for lack of
12 jurisdiction. Because even if the Commission
13 accepts jurisdiction here, what we're saying is we
14 now have a city commission decision who's
15 determined who has the authority to provide service
16 to Boulder Ridge, and that contrary to the entire
17 premise of Capital Electric's complaint which says
18 it has the franchise and that this is part of its
19 service area, we now have an order from the
20 decisionmaker, which, again, has not been stayed,
21 it's still in effect, which says, no, this is MDU's
22 service area. This is not Capital Electric's
23 service area. So if they don't have a right to
24 serve the area, as a matter of law, how can there
25 be interference with that nonexistent service? I

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1 mean, that's the basic premise of this motion to
2 dismiss. Even if you have a jurisdiction under the
3 TIA to look at this question, the look is pretty
4 quick when you've got a city commission decision

5 saying they don't have any authority to provide
6 service over here. It's as simple as that and
7 that's where we're at.

8 COMMISSIONER CLARK: Just one last
9 question for Ms. Larson and it has to do with the
10 arguments you were making regarding the Commission
11 not making constitutional interpretations.
12 Couldn't it just be if we decided, say, that in
13 this case, you know, the franchise has been granted
14 by the City of Bismarck and lacking a franchise, we
15 don't have really any jurisdiction to hear the case
16 on Capital's behalf, that we're not making a
17 constitutional interpretation of the franchise
18 rights of cities, but instead we're just
19 interpreting statute to say, you know, look, as we
20 look at the statute, apparently this type of
21 complaint can't be brought in this particular
22 situation not because of constitutional matters,
23 but just for a statutory reason, this statute
24 applies where you have two or more entities that
25 have overlapping franchises within a city, in which

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1 case apparently South Pointe would indicate to us
2 that we do have jurisdiction to hear that complaint
3 case, or it happens to apply outside of the city
4 limits, but not inside the city limits where only
5 one entity has a franchise?

6 MS. LARSON: Well, I guess my response to
7 that goes back to dealing with the Baker Electric

8 case. In that case there was a tribal resolution
9 that designated Otter Tail Power Company to serve.
10 And in this case we have an order, I guess you
11 might call it, in response to a petition, but it's
12 not a resolution, it's not a franchise. It's an
13 order from a legislative body.

14 COMMISSIONER CLARK: Just a followup,
15 isn't Baker different in that the Constitution
16 doesn't grant to tribes and state statute doesn't
17 grant to tribes the authority to franchise, but it
18 does to municipalities?

19 MS. LARSON: And, again, our argument is
20 that we do have a franchise. What we have is an
21 order that's purporting to interpret the franchise,
22 which I think is a horse of a different color. So
23 we have an Indian tribe asserting sovereign rights
24 over its own self-government making a determination
25 who it wants, and this Commission said that, you

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1 know, the government's interest -- the state
2 government's interest in regulating gave to you the
3 jurisdiction -- even assuming that if they had a
4 concurrent right, that you had jurisdiction to
5 proceed. And we would argue that that is the case,
6 that nothing in this new statute takes away or
7 limits your jurisdiction under the TIA.

8 JUDGE WAHL: Mr. Kuntz.

9 MR. KUNTZ: Addressing the Baker

10 situation, it's been a long time since I looked at
11 that case, and, as I recall, there were a series of
12 cases that went back and forth on that whole
13 question, but basically there that case dealt with
14 the conflict between, on the one hand, a tribe
15 having sovereign immunity, on the other hand, still
16 being part of the overall governmental regulations
17 in part of the state in trying to determine whether
18 -- what you always have to do in tribal
19 jurisdictional cases is whether the state's
20 exercise of power in a particular area is an
21 infringement on the tribe's sovereign immunity, and
22 the court apparently -- again, not looking at that
23 case for a long time, but accepting Ms. Larson's
24 interpretation -- determined, no, we think the
25 state can still exercise jurisdiction here in its

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1 economic regulation of utilities without
2 interfering with the sovereign immunity of the
3 tribe. Right or wrong, that's what the decision
4 was.

5 As Commissioner Clark correctly pointed
6 out, there's nothing in the TIA that makes an
7 exception for Indian tribal determination of
8 providers on the reservation. Again, big, big
9 distinction. The TIA was fundamentally passed to
10 deal with conflicts outside cities. That's why it
11 was passed, to prevent utilities from extending
12 service outside cities without getting a

13 certificate of public convenience and necessity.
14 The piece inside the city basically is kind of
15 giving -- clarifying the fact that the utilities
16 have the authority to extend service wherever they
17 want inside a franchised city as long as they're
18 not interfering with the service of an existing
19 coop in that service. And, again, the underlying
20 premise of that is that the coop has authority to
21 provide service in that city. That was the
22 situation that existed in South Pointe. That's not
23 the situation here.

24 COMMISSIONER CLARK: Although, you -- so
25 you would agree that within a city where both

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1 entities have coextensive ability to serve, that in
2 that case the --

3 MR. KUNTZ: I would have agreed with that,
4 Commissioner Clark, prior to enactment in 1982 of
5 that constitutional provision, and I think we have
6 -- I think we have an interesting argument that
7 may or may not arise at some day in the future.

8 COMMISSIONER CLARK: So your argument is
9 South Pointe didn't address that issue?

10 MR. KUNTZ: It didn't address that issue.

11 COMMISSIONER CLARK: They allowed the case
12 to go forward?

13 MR. KUNTZ: They allowed it to go
14 forward. I'm not going to -- the issue is not in

15 front of us. I'm not going to try to guess how
16 that decision would come down if it were before the
17 Supreme Court today.

18 COMMISSIONER CLARK: Thank you. That's
19 all I have.

20 JUDGE WAHL: Commissioner Wefald.

21 COMMISSIONER WEFALD: My questions, I
22 believe, in thinking about this relate to the facts
23 of the case versus legal arguments, and so since we
24 are going to proceed today with facts of the
25 matter, I'm going to leave my questions until

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1 later.

2 JUDGE WAHL: All right. Commissioner
3 Cramer.

4 COMMISSIONER CRAMER: Well, Commissioner
5 Clark got to kind of the heart of my questions. I
6 appreciate that. Forgive me for being so simple
7 and practical, but what of the -- well, let me ask
8 about the Baker case because I'm not familiar with
9 it. Were you dealing at that time with a rural
10 area? And does that matter?

11 MS. LARSON: We were -- in the Baker case
12 they were dealing with the provision of electric
13 service on the reservation. Both Baker Electric
14 and Otter Tail had facilities within the area and
15 were serving within and without the reservation.

16 COMMISSIONER CRAMER: Is there -- is there
17 a conceivable action by this Commission that would

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18 interfere or impact the other case, the city case,
19 which should prevent us from at least deciding on
20 the other matters prior to -- as Judge Haskell put
21 it, prior to the horse getting ahead of the cart?

22 MS. LARSON: I guess I disagree with his
23 view --

24 COMMISSIONER CRAMER: I understand that.

25 MS. LARSON: -- which case is the cart and

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1 which case is the horse because I really think they
2 are different. This Commission is the body -- the
3 legislative body that has given authority to look
4 at duplication and territorial integrity
5 protection.

6 There isn't -- there isn't a dispute that
7 the city was granted statutory rights of
8 regulation. The dispute is whether or not the City
9 of Bismarck has ever exercised those rights, which
10 will be addressed again by the District Court.

11 But, you know, you are allowed to -- I mean, the
12 Bismarck city ordinances are published records and
13 are available, but I would challenge you to find
14 any ordinances other than the one that I referred
15 to where the city has enacted any ordinances to
16 govern the regulation of utilities. And to that
17 degree, I think the city has acquiesced any power
18 of regulation that it might have to you. I mean,
19 you are the people who have the knowledge, the

20 information, the resources, the staff to address
21 the issues. The city was made aware that we had
22 invoked your jurisdiction prior to its hearing,
23 prior to rendering its decision. The city has not
24 chosen to become a party to this action. So I'm
25 not sure if that fully answers your question --

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1 COMMISSIONER CRAMER: It's helpful.
2 MS. LARSON: -- but I do feel that what --
3 your jurisdiction is limited, but within your
4 jurisdiction you should take a broad view. And I
5 would ask you to consider if you don't look at
6 duplication, who is going to? Because the city did
7 not. Whatever that process was, that 20-minute
8 hearing that we were afforded, I challenge you to
9 look at that opinion and see if you can find one
10 sentence where they looked at our facilities and
11 MDU's facilities and made any consideration of the
12 state's interest in protecting. And, again, I
13 challenge you to consider, does the city's exercise
14 of that regulation -- does that extend to people
15 that aren't citizens of Bismarck? And, again, I
16 assert to you that it does. And that that is why
17 this body is the appropriate forum to make the
18 decision about interference. And if you decide
19 that service by MDU will unreasonably interfere, as
20 we believe the evidence -- we believe that when we
21 get to the evidence, you will not find a more
22 egregious example of interference because they

23 virtually have no facilities in north Bismarck. If
24 you don't look at it, nobody will.

25 So my belief is that you make your

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1 decision as you always do on the interference
2 issues. You leave to the Court the issue to decide
3 the interplay of constitutional provisions of
4 statutory interpretation, of reviewing what
5 authority the city did or didn't have under the
6 procedure that it utilized to make that decision
7 that it rendered, because that's not within your
8 jurisdiction.

9 COMMISSIONER CRAMER: Did the city
10 acquiesce then by not being part of this?

11 MR. KUNTZ: No, Commissioner. Let me
12 point out and emphasize again, Ms. Larson keeps
13 repeating that somehow the city's order is flawed
14 because it didn't have the right ordinances or it
15 didn't do this or it didn't consider that. The
16 point is that order is in effect. It's being
17 appealed, but it has not been reversed, it has not
18 been stayed. It's not for this Commission to try
19 to judge the validity of the city commission's
20 order. It's for this Commission to recognize the
21 fact that that order is out there and what it
22 says.

23 Capital Electric presented these same
24 arguments to the city commission that the city

25 commission should consider all of the investment

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1 that they had made in north Bismarck and that
2 Capital Electric basically should be the provider
3 of every new subdivision that comes into the City
4 of Bismarck for hereinafter because they had the
5 facilities in all these rural areas and if these
6 rural areas are annexed, darn it, they belong to
7 Capital Electric because we made that investment
8 and that they -- that the city was not the
9 appropriate body to determine who should serve
10 these particular areas. The city wasn't
11 impressed. The city issued its order. So the city
12 -- they had all the opportunity that they had
13 today to make these same arguments, to present
14 these same decisions, and a lot of them were made
15 there, a lot of them were presented and, frankly,
16 the city didn't buy it.

17 JUDGE WAHL: Anything further?

18 COMMISSIONER CRAMER: No.

19 JUDGE WAHL: Any further followup by the
20 commissioners? Mr. Binek.

21 MR. BINEK: There's been a lot of
22 discussion about this Baker Electric case, and I
23 just wanted to point out that there was also a
24 federal case that related to the issues on that
25 reservation and the tribe's right to designate

1 Otter Tail Power Company as a supplier of
2 electricity on the reservation. So I just wanted
3 to point that out. I wasn't expecting to hear a
4 lot about that.

5 COMMISSIONER CRAMER: I was actually
6 curious about that point.

7 MR. BINEK: But there is -- not only was
8 there a state proceedings, but there were also
9 proceedings in the federal court under Devils Lake
10 Sioux Tribe.

11 COMMISSIONER CLARK: Bill, as I recall,
12 the last time we reviewed it was in relation to the
13 Tribal Telecommunications Utility Commission on
14 Standing Rock.

15 MR. BINEK: Right. I just wanted to bring
16 that point out.

17 JUDGE WAHL: All right. I deem the motion
18 exhausted, I think. Accordingly, the Commission
19 will take the motion under advisement.

20 Mr. Kuntz, you have a second matter, I
21 believe.

22 MR. KUNTZ: Yes. As I started to say
23 earlier, we had filed a counterclaim along with our
24 answer to the complaint in this matter. For
25 whatever reason, I never saw the reply to that

1 particular counterclaim that Capital Electric filed
2 with the Commission. The Commission never formally
3 accepted the counterclaim. It wasn't included in
4 the issues for hearing. I was under the assumption
5 it was not going to be considered. We have filed
6 basically the same counterclaim in District Court,
7 which I think has jurisdiction to consider it.
8 Consistent with the Supreme Court's determination
9 that we should not have bifurcated proceedings on
10 these issues and try to be consistent with my own
11 arguments, I'm going to move to dismiss that
12 counterclaim without prejudice.

13 JUDGE WAHL: It's been a while since I've
14 had this question. I have the vague thought that
15 the defendant to an action that requested relief
16 must -- or has the right -- must consent to the
17 dismissal of the -- of, in this case, the
18 counterclaim. Assuming that's the case, I assume
19 that Capital Electric consents to the dismissal of
20 the counterclaim?

21 MS. LARSON: To the extent that consent is
22 necessary, we do consent.

23 JUDGE WAHL: Accordingly, the motion is
24 granted. The counterclaim of Montana-Dakota is
25 dismissed without prejudice.

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1 Are there any further preliminary matters,
2 counsel -- Mr. Kuntz?

3 MR. KUNTZ: No.

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4 JUDGE WAHL: Ms. Larson, any preliminary
5 matter?

6 MS. LARSON: No, sir.

7 JUDGE WAHL: All right. Then let's
8 proceed to hear Capital Electric's complaint
9 against MDU. Ms. Larson, you may proceed when
10 you're ready.

11 MS. LARSON: Your Honor, would it be
12 appropriate if we took a five-minute break here? I
13 really need some water.

14 JUDGE WAHL: Then let's be in recess for
15 ten minutes.

16 COMMISSIONER WEFALD: Till 10:30.

17 MS. LARSON: Thank you. I appreciate
18 that.

19 JUDGE WAHL: Until 10:30. All right.

20 COMMISSIONER WEFALD: Thank you.

21 (Recess taken at 10:19 a.m. to 10:35 a.m.)

22 JUDGE WAHL: All right. Ms. Larson, are
23 you ready?

24 MS. LARSON: Yes, I am.

25 JUDGE WAHL: Mr. Kuntz, are you ready?

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1 MR. KUNTZ: Yes.

2 JUDGE WAHL: All right. Ms. Larson, you
3 may proceed when you're ready.

4 MS. LARSON: Thank you. I would just like
5 to make a brief opening statement.

6 JUDGE WAHL: You may.
7 MS. LARSON: This case is one of a
8 continuing series of territorial disputes between
9 rural electric cooperatives and electric public
10 utilities, and this case involves Capital's
11 complaint under the Territorial Integrity Act
12 complaining of MDU's extension of service in a
13 rural area that is inside the corporate limits of a
14 municipality, and the case involves an area that is
15 known as Boulder Ridge First Addition to the City
16 of Bismarck.
17 Under 49-01-01 and 49-01-01.3 and
18 precedence of the Commission and the North Dakota
19 Supreme Court, an electric public utility's
20 unreasonable duplication of investment and
21 available services provided by a rural electric
22 cooperative in a rural area that has been annexed
23 to a municipality constitutes interference that is
24 prohibited by law. The question of which electric
25 supplier's facilities are actually duplicative or

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1 wasteful is one of fact for the Commission to
2 determine.
3 In making that determination, the
4 Commission considers which utility is better able
5 to serve the area due to the nature and extent of
6 existing facilities in the area and whether the
7 electric public utility's extension into the area
8 would constitute an unreasonable duplication of

9 capital-intensive facilities and services that are
10 already provided by the rural electric
11 cooperative. And the Commission also determines
12 which utility would best promote orderly and
13 economic service. I have nothing further.

14 JUDGE WAHL: All right. Mr. Kuntz, will
15 you make an opening statement at this time?

16 MR. KUNTZ: No.

17 JUDGE WAHL: All right. You may proceed,
18 Ms. Larson.

19 MS. LARSON: Thank you, Your Honor. At
20 this time I call Ron Lipp.

21 JUDGE WAHL: Mr. Lipp, as you may be
22 aware, your testimony is required to be under oath
23 and I'm required by law to advise you regarding
24 perjury before administering the oath. Perjury is
25 a false statement of fact material which you do not

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1 believe to be true; in other words, generally
2 speaking, a lie. In North Dakota perjury is a
3 Class C felony, punishable by a fine up to \$5,000,
4 imprisonment for a period of up to five years, or
5 both. Will you raise your right hand, please?

6 (Witness sworn.)

7 JUDGE WAHL: Ms. Larson.

8 MS. LARSON: Thank you. Your Honor, I at
9 this point would like to offer an authenticated
10 copy of Capital's franchise and the related

11 resolution and minutes and acceptance of Capital's
12 franchise under Rule 902. An original and eight?

13 JUDGE WAHL: Just go ahead and
14 distribute. Give the original to Mr. Kuntz and
15 distribute your copies to the commissioners. I
16 guess you have one for me, too.

17 MS. LARSON: I do.

18 MR. KUNTZ: I don't need the original.

19 JUDGE WAHL: I'm only giving it to you to
20 look at, Mr. Kuntz.

21 MR. KUNTZ: Okay.

22 JUDGE WAHL: Mr. Kuntz.

23 MR. KUNTZ: I have no objection to
24 foundation. I object to the relevance of these
25 documents, and I would note that they include more

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1 than just the franchise of Capital Electric
2 Cooperative.

3 JUDGE WAHL: The objection is overruled.
4 The Exhibit C-1 is received.

5 MS. LARSON: Thank you, Your Honor.

6 RON LIPP,
7 being first duly sworn, was examined and testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MS. LARSON:

11 Q. Mr. Lipp, would you please state your
12 name?

13 A. My name is Ron Lipp.

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14 Q. And where do you live, Mr. Lipp?

15 A. In Bismarck.

16 Q. And could you please tell the Commission
17 about your background and education?

18 A. I went to Bismarck High, graduated in '71,
19 went to BJC, and then I went on to NDSU in Fargo
20 and got my electrical engineering degree.

21 Q. And what is your present employment?

22 A. I work at Capital Electric. I'm the
23 manager of engineering and operations.

24 Q. How long have you worked at Capital
25 Electric?

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1 A. Seventeen years.

2 Q. And did you have any prior experience in
3 engineering before you commenced your work at
4 Capital?

5 A. Yeah. Out of school I went to work for
6 Finley Engineering. I went to Aberdeen. And then
7 from there I worked at SS&R. They're a consulting
8 firm that works with cooperatives. And they
9 transferred me to Bismarck and I have been here
10 ever since.

11 Q. Mr. Lipp, are you familiar with the area
12 service agreement that MDU and Capital Electric
13 entered into in 1973?

14 MR. KUNTZ: Objection, relevance.

15 JUDGE WAHL: Overruled.

16

THE WITNESS: Yes, I am.

17

Q. (MS. LARSON CONTINUING) And in -- was

18

that area service agreement incorporated into

19

Capital Electric's franchise with the City of

20

Bismarck?

21

A. Yes, it was.

22

MR. KUNTZ: Objection, outside the scope

23

of this witness's expertise to interpret a

24

franchise in the City of Bismarck and what was

25

incorporated into it. The franchise speaks for

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itself. The Commission is perfectly capable of

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looking at the franchise without this witness

3

interpreting what's incorporated in a franchise.

4

JUDGE WAHL: Ms. Larson.

5

MS. LARSON: Complainant's Exhibit C-1 has

6

attached to it the area service agreement that is

7

referred to and as reflected by the authenticated

8

copy of Dennis Schlenker, the investment finance

9

officer with the City of Bismarck. It is part of

10

the record with the City of Bismarck.

11

JUDGE WAHL: Well, I'll overrule the

12

objection, but I agree that it's probably reaching

13

a bit, but go ahead.

14

Q. (MS. LARSON CONTINUING) Are you familiar

15

with the area service agreement?

16

A. Yes. Yes, I am. I'm familiar with the

17

lines.

18

Q. Okay. And just in general terms, when

19 Capital Electric received its first franchise with
20 the City of Bismarck, there was an area service
21 agreement in place between Capital and MDU; is that
22 correct?

23 A. That's correct.

24 Q. And in your capacity as engineer for
25 Capital Electric, did you identify and become

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1 familiar with the area service line that was
2 identified in that service agreement?

3 A. Yes. You have to, you know, to design
4 your facilities.

5 Q. And has Capital Electric designed its
6 facilities to provide service in north Bismarck to
7 the areas that are outside that area service line?

8 A. That's correct.

9 JUDGE WAHL: Mr. Lipp, I would bet you
10 would be more comfortable if you just forgot about
11 that microphone.

12 THE WITNESS: Okay.

13 JUDGE WAHL: If you talk to me -- if you
14 talk -- if you answer your questions as if you were
15 talking to me, your voice will be loud enough for
16 everybody to hear and you will be more comfortable.

17 THE WITNESS: Okay. Sounds good.

18 MS. LARSON: At this time I would like to
19 have Mr. Lipp refer to and identify two -- five
20 exhibits that Mr. Lipp and his engineering

21 department have prepared that identify Capital
22 Electric's service area, but, more importantly, the
23 facilities that Capital Electric has in the area in
24 north Bismarck. And would it be possible for the
25 witness to --

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1 JUDGE WAHL: He may.

2 MS. LARSON: All right. Thank you.

3 Q. (MS. LARSON CONTINUING) Mr. Lipp, I would
4 like you to look at Complainant's Exhibit C-2.

5 A. Yeah. Right here.

6 Q. And would you please identify what that
7 exhibit is?

8 A. Sure. This is our best recollection on
9 our facilities in 1973. Okay. The red line is the
10 Bismarck city limits, so everything south of the
11 red line. You can see I-94 going east to west on
12 the map. Here is Highway 83 going north. Okay.
13 And then the service area agreement that we -- MDU
14 versus Capital Electric is the black line.

15 Q. So the red line was the city limits in
16 1973 and the black line is the area of -- the area
17 service line from the area service agreement?

18 A. That's correct.

19 Q. Okay.

20 A. Then our facilities in 1973, you can see
21 -- like we've got a dashed line. There would be
22 Century Avenue. And I don't think Century Avenue
23 went this far, but this is -- we have an

24 underground three-phase, then we've got some
25 single-phase in the green, we've got some

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1 three-phase lines, you know, up here, and then a
2 single-phase line down here. So, yeah, this is in
3 1973.

4 Q. And does that map accurately, to the best
5 of your knowledge and information, set out the
6 Bismarck city limits, the area service line and
7 Capital Electric's facilities on the map?

8 A. Yeah. Right. That's correct. To the
9 best of our ability, that we kind of went back in
10 time and came up with -- you know, contacted the
11 city, they gave us their maps, and the line hasn't
12 changed, but, you know, the city limits expanded.
13 But, yeah, in 1973 this is the best that we could
14 come up with.

15 Q. Which identifies your electric facilities?

16 A. Our electric facilities are in the black
17 and the green.

18 MS. LARSON: We would offer Exhibit C-2.

19 MR. KUNTZ: Objection, relevance.

20 JUDGE WAHL: Overruled. Exhibit C-2 is
21 received.

22 Q. (MS. LARSON CONTINUING) Mr. Lipp, now I
23 would like you, and perhaps you did, but it is
24 difficult for the commissioners to see the detail
25 of Exhibit C-2, so if you could just outline -- you

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1 know, point to and outline what Capital's
2 facilities are and how those facilities are
3 identified on the key to Exhibit C-2?

4 A. Okay. Well, we've got the green. That's
5 our single-phase line. And we've got the black,
6 which is a three-phase line, and our dashed black
7 is an underground line -- three-phase underground
8 line. So here is Century Avenue. Here is 83.
9 Here is Washington Street. So we have a
10 three-phase line up here, and here is Highway 1804
11 going east and west, the intersection of 1804 and
12 83.

13 Q. And the area that is the subject of this
14 dispute, Boulder Ridge, is that in Section 16 of
15 Hay Creek, and could you identify that on the map?

16 A. Yeah. Here's Section 16. Here's --
17 Boulder Ridge would be in this area.

18 Q. And Boulder Ridge is essentially the west
19 half of Section 16, isn't it?

20 A. That's correct. 16 is this whole mile by
21 mile.

22 Q. And Boulder Ridge encompasses all of the
23 west half of the southwest quarter and then a
24 little bit -- it goes outside of that a little
25 bit?

□

1 A. Yeah. It's in this corner.

2 Q. Is this 92.27 acres in Boulder Ridge?

3 A. Yeah. I think it's about 170 lots.

4 Q. In 1973, did Capital have any facilities
5 in the area of Boulder Ridge?

6 A. Yeah. We have a three-phase line along
7 43rd and then a three-phase line going north on
8 Washington Street.

9 Q. And were you serving any locations within
10 the west half of the southwest -- or, excuse me --
11 yes, of the southwest of Section 16?

12 A. Yeah, we had one house here, right in the
13 southwest corner.

14 MS. LARSON: Judge, how would you like me
15 to -- do you want me to pass out the exhibits as
16 they're offered or should I pass them out now?

17 JUDGE WAHL: You know, I would rather have
18 -- as soon as you start working with an exhibit, I
19 would like the commissioners and Mr. Kuntz to have
20 them in hand.

21 MS. LARSON: Point well taken.

22 JUDGE WAHL: I didn't realize you had
23 copies. That's good.

24 MS. LARSON: In fact, to expedite, I have
25 five total maps. Should I just hand them all out

□

1 now?

2 JUDGE WAHL: Go ahead.

3 Q. (MS. LARSON CONTINUING) Mr. Lipp, I'm
4 going to just for the purposes of foundation
5 discuss the remaining four maps that your
6 department has prepared, and that would be C-3, 4,
7 5 and 6. Exhibit C-3, is that a map of your -- of
8 Capital Electric's facilities in the area north
9 Bismarck as they existed in 1993?

10 A. That's correct.

11 Q. And, again, you have outlined on that map
12 the Bismarck city limits, as well as --

13 A. Is in the red.

14 Q. -- the service area line and Capital's
15 facilities?

16 A. Right. Just like the other one, but this
17 is a '93 map.

18 Q. Then I'll just have you lift up and look
19 at Exhibit C-4, and is that a map of Capital
20 Electric's facilities in north Bismarck as they
21 existed in 2005, again, with reference to the
22 current city limits of Bismarck, as well as the
23 area service line?

24 A. That's correct.

25 Q. And Exhibit C-5, is that a map which shows

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1 in more detail the area in dispute that's known as
2 Boulder Ridge?

3 A. Yep. That's correct.

4 Q. Again, with the same frame of reference,
Page 72

5 the red being the Bismarck city limits and the
6 black line being the area service line and the
7 facilities that would surround Boulder Ridge?

8 A. Yes.

9 Q. And then Exhibit C-6, is that a map of --
10 it looks like we're going to have to turn that one
11 on its side. Is that a map of the entire area of
12 north Bismarck that would include the area service
13 line, the city limits of Bismarck in 2005 and
14 Capital's entire system for the areas covered by
15 that map?

16 A. That's correct.

17 Q. And were all of these maps prepared under
18 your direction and supervision?

19 A. Yes, they were.

20 Q. And to the best of your knowledge, do they
21 accurately reflect the Bismarck city limits, the
22 area service line and Capital Electric's
23 facilities?

24 A. Yes, they do.

25 MS. LARSON: Your Honor, we would offer

□

80

1 Exhibits C-3, 4, 5 and 6.

2 JUDGE WAHL: Mr. Kuntz.

3 MR. KUNTZ: A question for the witness.

4 JUDGE WAHL: You may.

5 MR. KUNTZ: Mr. Lipp, I notice on these
6 maps there's areas -- shaded areas in yellow

7 designated as Capital Electric's service areas and
8 areas in gray designated as areas served by MDU.

9 THE WITNESS: Yes.

10 MR. KUNTZ: Who made that determination as
11 to what was going to be shaded yellow and what was
12 going to be shaded gray?

13 THE WITNESS: The line, the area service
14 area agreement.

15 MR. KUNTZ: And inside the city limits? I
16 see -- what color did you shade Boulder Ridge
17 subdivision?

18 THE WITNESS: Let me look. Our color.

19 MR. KUNTZ: Yellow. And who made that
20 determination that that should be shaded yellow?

21 THE WITNESS: I probably did.

22 MR. KUNTZ: And, in fact, MDU is serving
23 Boulder subdivision, is it not?

24 THE WITNESS: I think we've got four
25 services there.

□

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1 MR. KUNTZ: And MDU is serving all the
2 rest; correct?

3 THE WITNESS: That's correct.

4 MR. KUNTZ: And the city commission has
5 issued an order determining that that was part of
6 MDU's service franchise?

7 THE WITNESS: That's correct.

8 MR. KUNTZ: We would object to these
9 documents as incorrect and relevance.

10 JUDGE WAHL: Ms. Larson.

11 MS. LARSON: Your Honor, the maps are not
12 offered as evidence of whether or not Capital has
13 the right to serve that area. They are offered as
14 demonstrative exhibits that show what they purport
15 to show, which is the Bismarck city limits, the
16 area service line, the area where Capital has
17 electric distribution facilities, which it does in
18 Boulder Ridge. Obviously we recognize that the
19 Commission is hearing the issue today of whether
20 interference is, and MDU will certainly be given an
21 opportunity to discuss what service they have in
22 Boulder Ridge and what facilities they have.

23 JUDGE WAHL: The exhibits are Capital
24 Electric's exhibits and may be expected to reflect
25 Capital Electric's view of the world, and with that

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1 understanding, the exhibits -- the objection is
2 overruled. The exhibits are each received, that
3 is, Exhibits C-3, C-4, C-5 and C-6.

4 MS. LARSON: Thank you, Your Honor.

5 Q. (MS. LARSON CONTINUING) All right. Let's
6 take a look now at Exhibit C-3. And as compared to
7 Exhibit C-2, Mr. Lipp, Exhibit C-2 showed a
8 significant area that was outside the red line,
9 inside the black line. And I will provide you a
10 copy of Exhibit C-2 for your reference. And under
11 Capital's interpretation of its franchise and its

12 agreement with the City of -- or with MDU -- excuse
13 me -- the area that is within the black line,
14 outside of the red line, would you describe how
15 that area was treated by Capital?

16 A. Well, that was not in our area, so we
17 didn't -- you know, I guess we didn't look at
18 that. I mean, we have some existing consumers that
19 were grandfathered in, but we didn't extend any of
20 our facilities south of the black line.

21 Q. So by way of explanation then, under the
22 service area agreement, those were areas that
23 MDU --

24 MR. KUNTZ: Objection, leading. There's
25 no question here.

□

83

1 JUDGE WAHL: Sustained.

2 Q. (MS. LARSON CONTINUING) Did Capital in
3 its long-range plan consider the areas within the
4 black line as being areas that MDU had a right to
5 serve?

6 A. Yes.

7 Q. And did Capital extend its facilities
8 inside the black line?

9 A. No. You know, I think we updated this --
10 you know, inside the black line we updated this tie
11 line to go over to this other subdivision, but, no,
12 we didn't.

13 Q. Not for purposes of serving inside the
14 black line?

Transcript of Hearing.txt

15 A. No.

16 Q. Okay. So comparing map 2 then to map 3,
17 that shows the growth of the area that MDU was
18 serving from 1973 to 1993; is that correct?

19 A. That's correct.

20 Q. And then the map shows the areas outlined
21 in the light green where Capital had added --

22 MR. KUNTZ: Objection, leading. Ask the
23 witness a question, Your Honor.

24 JUDGE WAHL: Well, at the same time, these
25 questions are preliminary and foundational to the

□

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1 explanation of the maps, and I will allow them for
2 that purpose and in the interest of moving the
3 hearing along.

4 Q. (MS. LARSON CONTINUING) The areas that
5 are identified in light green that are now within
6 the expanded -- or, excuse me. Let me withdraw and
7 say, did the city limits of Bismarck change and
8 expand from 1973 to 1993?

9 A. Yes, they did.

10 Q. And did Capital serve those areas that
11 were annexed into the city that were outside the
12 black line?

13 A. Yes, and we still are.

14 Q. Okay. Thank you. Now, I'd like to have
15 you identify then the areas and the electric
16 distribution facilities that Capital has on Exhibit

17 C-3 as they existed then in 1993.

18 A. well, okay. we have a Ward Substation
19 that's up on 1804 by -- I don't know what that
20 waste management place is, but we have a substation
21 there, so we have a three-phase line that comes
22 straight south to serve this Country West
23 Division. we have a delivery here with MDU --
24 that's a transmission delivery of 41.6-kV that
25 comes up and serves this Ward Substation. Then we

□

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1 have a three-phase line along Century Avenue, like
2 I showed before, that goes over to another
3 substation. And we have a three-phase line where
4 -- coming down Washington Street and then going
5 over to 83. And then the rest is -- you know,
6 serves -- single-phase lines serving the housing
7 developments, hence this line here.

8 Q. The area, again, where Boulder Ridge is in
9 the West Half of the Southwest of 19 --

10 A. 16.

11 Q. 16. I'm sorry. Thank you. Does Capital
12 Electric have facilities south of Boulder Ridge
13 that it was serving then in 1993?

14 A. Yes. we have Nelson's Quonset here and we
15 have a house here in French's, and then we have KMK
16 people that are west of Washington Street.

17 Q. So what is the subdivision that is south
18 of what is now known as Boulder Ridge? What's the
19 name of that subdivision?

Transcript of Hearing.txt

20 A. I think it's French's -- French's First.
21 There's a church here.

22 Q. And does Capital Electric have facilities
23 in French's First Addition?

24 A. Yes, we do.

25 Q. And those were installed then prior to

□

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1 1993?

2 A. Yep. That's correct.

3 Q. All right. Moving on to Exhibit C-4, does
4 Exhibit C-4 -- again, with the same foundation, it
5 shows the black line which was the area service
6 agreement and the red line which is the new
7 boundaries of the city limits of Bismarck in 2005;
8 is that correct?

9 A. That's correct.

10 Q. And the areas that are shaded in green,
11 what do they represent?

12 A. They're Capital Electric's area inside the
13 city limits.

14 Q. Those were areas that were annexed into
15 the City of Bismarck?

16 A. That's correct.

17 Q. And who serves those new annexations?

18 A. Well, we serve the ones that are in the
19 light green.

20 Q. Okay. So Capital has served the new areas
21 annexed into the City of Bismarck since -- from

22 2003 to 2005?

23 A. That's correct.

24 Q. Okay. Now, I'd like you to identify your

25 -- Capital's facilities then as it existed then in

□

87

1 northwest Bismarck in 2005.

2 A. Okay. We added a new substation over by
3 Horizon Middle School to give -- you know, so we
4 can have some power over here, and we added another
5 three-phase line south of our ward sub into our
6 Horizon sub, and then we added a heavy three-phase
7 line along Ash Coulee Drive over to the corner of
8 Washington Street and 43rd. And then we still have
9 our delivery.

10 Q. Okay. And what facilities does MDU have
11 north of the black line?

12 A. I don't know. I know they came through
13 French's to --

14 Q. Let's say prior to this case being filed
15 with the PSC.

16 A. I don't know. I don't think they have
17 any, but maybe they do.

18 Q. You're not aware of any?

19 A. Right.

20 Q. So that shows then a system of
21 substations, three-phase, overground and
22 underground, and distribution lines; is that
23 correct?

24 A. That's correct.

25 Q. And is this an integrated electric system?

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1 A. Yeah, just, you know -- you need -- you
2 need these substations to serve the load, and you
3 need the three-phase tie lines to -- in case
4 there's an outage and you need the transmission
5 line coming out of our delivery -- or MDU and us
6 delivery to serve the substations. And we're
7 actually building a new delivery substation up here
8 northeast of our ward distribution sub.

9 Q. And is there anybody else involved in that
10 delivery substation?

11 A. Western Area Power. We're tapping their
12 230 line.

13 Q. What was the investment -- what was the
14 cost of building and constructing that ward
15 delivery station?

16 A. Well, we've got about 4,500,000 into it
17 and then WAPA has got some money into it. I don't
18 what, but pretty substantial. But that will help
19 -- that will help north Bismarck tremendously.

20 Q. And from the perspective of an engineer --
21 and have you been involved in designing Capital
22 Electric's system since 1993?

23 A. Yes.

24 Q. In fact, since when?

25 A. '87.

1 Q. Okay. And in designing that system, did
2 you believe that you had a franchise with the City
3 of Bismarck?

4 A. Yes.

5 Q. Your franchise was in fact renewed in
6 1993?

7 A. That's correct.

8 Q. And when you designed your electric
9 distribution system, did you rely on the franchise
10 for having facilities to serve the areas that could
11 possibly be annexed into the City of Bismarck?

12 A. Yes.

13 Q. And prior to the issue arising in Boulder
14 Ridge, did MDU ever -- or the City of Bismarck
15 indicate to you that you did not have a right to
16 serve the areas that had been annexed into the
17 city?

18 A. No.

19 Q. And is there a process that you go through
20 for obtaining approval from the city to install
21 electric service to people who live in Bismarck?

22 A. Well, any time inside the city limits, in
23 order for MDU or Capital Electric to put a meter
24 in, we need the city okay, so the city calls us
25 with the city okay or they tag the meter socket and

Transcript of Hearing.txt

1 then we can put a meter in -- anything inside the
2 city.

3 Q. So after an annexation has occurred,
4 before you install service, you get permission from
5 the city?

6 A. That's correct. Inside the city limits,
7 that's correct.

8 Q. For a temporary permit?

9 A. For a temporary. If they're building a
10 house, we need city okay for a temporary, then
11 after they move the meter to the house permanent
12 service, we also need a city okay.

13 Q. And for every installation that you have
14 in the area that is identified in green --

15 A. Once it's annexed, right. Once it's in
16 the city limits, anything new we have to have a
17 city okay.

18 Q. And assuming that it's true that MDU is
19 serving some -- having some service currently in
20 Boulder Ridge, with respect to the services that
21 Capital Electric has within Boulder Ridge, did you
22 have permission from the city to install those?

23 A. Yes.

24 Q. And did you have permission for both
25 temporary and permanent?

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1 A. That's correct. well -- okay. Yes, we
2 did.

3 Q. How would you describe -- what do you
4 consider to be the backbone or the framework of the
5 system?

6 A. Well, between our substations. We have
7 our ward distribution, we have our Horizon, and
8 then we have a substation that you can't see over
9 here, and we're building a new one, so, you know,
10 you build your backbone between substations. You
11 have three-phase feeders between each one in case
12 -- you know, in case the transformer fails at one
13 of these substations, I can backfeed it through my
14 other substations. So we only load them, you know
15 -- each engineer is different, but we load ours to
16 about 75 percent, so if this one goes down and it's
17 a hot day, we can backfeed it through this one --
18 our new one and our one over here. So that's the
19 way we design it. They look kind of close, but
20 I'll tell you, the linemen like it in case there's
21 a -- in case we have a major outage.

22 Q. Is that what is referred to as looped
23 service?

24 A. Yeah. Well, yeah, it's looped through our
25 three-phase lines through our substations, that's

□

1 correct. And then if you have a single-phase
2 subdivision, we loop it, you know, in case there's
3 a -- a car hits a pole here, you can -- you know,
4 you can loop it within the subdivision. But
5 between our substations we have it looped with our

6 three-phase lines.

7 Q. And, again, Mr. Lipp, are you aware of any
8 facilities that MDU has, with the exception of its
9 facilities in Boulder Ridge, north of the black
10 line?

11 A. No.

12 Q. Let's move on then to map C-5. And map
13 C-5 you previously identified is more of a close-up
14 view of the area surrounding Boulder Ridge; is that
15 correct?

16 A. That's correct.

17 Q. And would you just identify for everybody
18 here where Boulder Ridge is located?

19 A. Okay. Here's Washington Street north and
20 south. Here's 43rd from Washington Street going
21 east, and 83 is over here. Here's Ash Coulee.
22 Here's Horizon Middle School.

23 Q. And so basically Boulder Ridge is the west
24 half of the southwest of Section 16; is that
25 correct?

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93

1 A. Yeah. That's correct. Right. That's
2 what we said before, but this is just a blown-up
3 version of it.

4 Q. Okay. And I believe you previously
5 testified that the subdivision to the immediate
6 south of Boulder Ridge is an area known as French's
7 First Addition; is that correct?

8 A. That's correct.
9 Q. And that had been annexed in and was part
10 of Capital's service area back prior to 1993?
11 A. That's correct. Yeah, he subdivided it
12 for some reason, but he never built anything there.
13 Q. Okay. So it's got a plat there --
14 A. Right.
15 Q. -- but we're not seeing any of your little
16 green facilities, so there's not -- there's not a
17 whole bunch of houses in French's First; is that
18 correct?
19 A. No. That's correct.
20 Q. After you filed -- or Capital filed its
21 complaint for interference, did MDU extend its line
22 from just south of French's First Addition into
23 Boulder Ridge?
24 A. Yes.
25 Q. And where did that -- where did MDU break

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1 out, so to speak, from its gray area, if you could
2 identify that on the map?
3 A. Okay. To the best of my knowledge -- I'm
4 not -- they came from Versailles Avenue, paralleled
5 our line up here, then went through -- there's a
6 dedicated utility easement through French's up here
7 to 43rd, and then followed 43rd, crossed our
8 three-phase line and then went into the
9 subdivision.
10 Q. So going again -- looking at that map

11 then, in the southeast two-thirds approximately of
12 French's First Addition there is, I guess I'll call
13 it, a dark purple or dark blue line on the map; is
14 that correct?

15 A. That's correct.

16 Q. And that is your understanding of the
17 route that MDU took to get from its service area as
18 identified on the map that is in gray to Boulder
19 Ridge?

20 A. That's correct. They had -- yeah, they
21 had to have a source there.

22 Q. Okay. So the area then that is
23 immediately on the south point of that blue or
24 purple extension, there is a green line, and would
25 you just identify what that green line is that ends

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95

1 up being within the blue line?

2 A. Oh, that green line, there's a house here
3 that -- I don't know what date it was, but that was
4 in our service area, so we had to trench, we had to
5 follow the easement across these lots, and then we
6 put some future enclosures there because this is
7 north of the line, so we figured we'd serve it,
8 then we came over here and served this house right
9 in this corner there.

10 Q. In that little jag there --

11 A. Right.

12 Q. -- that little square, there's a dot.

13 That's the house that Capital had been serving
14 prior to '93?

15 A. That's correct.

16 Q. So MDU's facilities then going north and
17 slightly east parallel Capital's existing
18 facilities?

19 A. Yeah. Right in here.

20 Q. Is that then necessarily a duplication of
21 services?

22 A. Yes.

23 Q. And then it goes back to a westerly
24 direction slightly north for a -- it looks like
25 approximately one lot; is that correct?

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1 A. That's correct, right here.

2 Q. And does that also parallel --

3 A. Parallels our, yeah.

4 Q. Okay. And then as we go north, you said
5 they went through an easement that existed for the
6 development of French's First till they reached
7 43rd Avenue; is that correct?

8 A. That's correct.

9 Q. And where are Capital's facilities that
10 run along 43rd Avenue?

11 A. We have an overhead line on the north side
12 of 43rd, and then we go -- when we hit Washington
13 Street, we go north on the east side of Washington
14 Street and then we'll go south, I think there's
15 four, five spans of three-phase because the church

Transcript of Hearing.txt

16 needs three-phase, and then we go south down to
17 Century Avenue single-phase.

18 Q. Okay. So their extension then to the east
19 to the edge of French's First Addition, that runs
20 south of 43rd and your facilities run parallel
21 along the north; is that correct?

22 A. That's correct.

23 Q. Okay. When they took -- got to the edge
24 of French's First Addition, was MDU -- to get into
25 Boulder Ridge, did MDU need to cross 43rd Avenue?

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1 A. Yes.

2 Q. And when they crossed 43rd Avenue, did
3 they go overground or underground?

4 A. They went underground.

5 Q. And did they cross your line?

6 A. Yeah, they crossed it on the north side of
7 43rd, then they went parallel until they got into
8 the substation.

9 Q. And crossing your line would be, again, an
10 example of duplication of your services?

11 A. That's correct.

12 Q. And then they ran it east to get back to
13 the public easement; is that correct?

14 A. That's correct.

15 Q. So at the time -- I believe you testified
16 that you have three-phase running -- I'm sorry,
17 overhead running along the south side of Boulder

18 Ridge along 43rd Avenue.

19 A. Along 43rd, that's correct.

20 Q. And then you have three-phase running

21 along the west edge along North Washington;

22 correct?

23 A. That's correct.

24 MR. KUNTZ: Objection, Your Honor. We're

25 well beyond the preliminary stages and the attorney

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1 is doing all the testifying here. Every question

2 is a leading question. I think we're entitled to

3 proper examination.

4 JUDGE WAHL: The criticism, Ms. Larson,

5 has some merit. On the other hand, Mr. Kuntz, we

6 really can get this information in on the basis of

7 the maps. We're not into opinion testimony. I

8 really want to see this thing move quickly.

9 Otherwise, we're going to be here tomorrow yet.

10 MR. KUNTZ: She could simply ask the

11 witness to describe what the facilities have. In

12 fact, I think she has about three, four times. The

13 maps are already in that show the facilities.

14 We're just repeating and repeating and Ms. Larson

15 is attempting to testify here rather than ask

16 proper direct examination.

17 JUDGE WAHL: Well, the objection is

18 overruled in the interest of efficiency. I don't

19 see the harm here. But at the same time, Ms.

20 Larson, you might be able to just take Mr. Lipp and

Transcript of Hearing.txt

21 let him run with it and tell us -- ask him to
22 explain the salient features of the map, however.
23 But you are leading, of course. Go ahead.
24 MS. LARSON: Thank you.
25 Q. (MS. LARSON CONTINUING) Mr. Lipp, when

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1 was Boulder Ridge annexed into the City of
2 Bismarck?
3 A. Within the last two years.
4 Q. 2003.
5 A. Okay. I guess I don't know that.
6 Q. Did you have facilities -- did Capital
7 Electric have facilities in Boulder Ridge at the
8 time of annexation?
9 A. Yes, we did.
10 Q. Where?
11 A. We had -- Midcontinent Cable, they have a
12 booster station in the corner, then we have two
13 streetlights -- the Bismarck city has two. Because
14 this is such a busy intersection, they wanted two
15 MV lights there, so we put two lights there and put
16 a meter there for them.
17 Q. And do you know when the city installed
18 their facility?
19 A. No.
20 Q. But prior to -- I'm sorry. The annexation
21 just took place last summer, didn't it, 2005?
22 A. That's correct.

23 Q. Okay. Prior to annexation you were
24 serving the City of Bismarck?
25 A. That's correct.

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1 Q. And what about Midcontinent?
2 A. Yes, same. I think they were like two
3 years apart or whatever. I think in '95 or '96.
4 Q. And previous to that were you serving
5 another location in Boulder Ridge prior to
6 annexation?
7 A. Yeah, but there was a house up there -- I
8 don't know where, about right in here -- a
9 farmhouse and then there was an abandoned -- I know
10 the haunted house was there a couple years ago, and
11 then the guy had cows in here so there was a
12 pasture well there.
13 Q. And how long had you served that location
14 within Boulder Ridge?
15 A. Well, since whenever that house was
16 there. A long time.
17 Q. 1949?
18 A. Okay. Is that when -- okay. In 1949.
19 whenever that farmhouse was there, we've been --
20 MR. KUNTZ: Objection, Your Honor.
21 JUDGE WAHL: Well --
22 MR. KUNTZ: The witness said he didn't
23 know, so Ms. Larson puts in the testimony, do you
24 agree.
25 MS. LARSON: Your Honor, the point is well

1 taken, but there is an exhibit that is going to be
2 offered that is already part of the City of
3 Bismarck's proceeding that indicates that that line
4 was put in -- well, in 1948, converted. Mr. Kuntz
5 is well aware of this information, but the point is
6 taken.

7 JUDGE WAHL: All right. Let's go on.

8 Q. (MS. LARSON CONTINUING) Was any
9 facilities removed prior to annexation? Were any
10 of Capital's facilities removed prior to
11 annexation?

12 A. Well, we removed that farmhouse, that
13 pasture well, because they took all the -- you
14 know, the grass and stuff out for the cows so,
15 yeah, we removed that little tap there.

16 Q. And were you aware that there was going to
17 be development going on in that?

18 A. Yes.

19 Q. Now, with respect to the facilities that
20 you have available, how many access points do you
21 have for serving Boulder Ridge?

22 A. We got -- like I said, we have this
23 three-phase line coming south on Washington Street,
24 we have the three-phase line going west on Ash
25 Coulee, we've got the three-phase line going east

1 on 43rd, and we have this Horizon Substation over
2 here that we can feed, we have our Ward Substation
3 up here that we can feed, we have our Grandview
4 Pine Substation over here that we can feed. And
5 our north Bismarck -- actually, we could come
6 through a different way to feed that. But we have
7 it -- you know, we have it on two sides. But we
8 can -- those two sides we can backfeed through
9 different substations.

10 Q. And I guess we'll talk a little more about
11 that when we get to the next exhibit, but how far
12 did Capital need to extend services from its
13 existing facilities to serve Boulder Ridge?

14 A. Zero. We could just hang a transformer
15 and a loop right here and serve that house there.

16 Q. And did you have any access along
17 Washington that you could have -- that you could
18 serve?

19 A. Sure. We tapped our three-phase line and
20 went in, but if this is commercial, we'll just have
21 this overhead line and go that way.

22 Q. And what facilities prior to MDU -- excuse
23 me. Withdraw.

24 Do you know what kind of a line that is
25 that MDU has installed from its service area up

□

1 into Boulder Ridge?

Transcript of Hearing.txt

2 A. This -- it's an underground three-phase
3 line, I think. I know there's a three-phase
4 enclosure here, so I'm thinking it's three-phase.

5 Q. And prior to MDU extending that line from
6 the gray area up into Boulder Ridge, did MDU have
7 any facilities in the area of Boulder Ridge?

8 A. Not to my knowledge.

9 Q. And do you know the approximate distance
10 that MDU had to go to extend from the gray area to
11 Boulder Ridge?

12 A. It's about 2,000 feet, approximately.

13 Q. And is that approximately a half-mile?

14 A. Yep.

15 Q. Okay. Now, referring to map C-6, and you
16 previously identified that map C-6 is a map showing
17 Capital Electric's distribution system north of the
18 -- north of the black line covering north and east
19 Bismarck; is that correct?

20 A. That's correct. The same -- you know, we
21 got the black line with the service area agreement,
22 a red line as the city -- city limits, and then we
23 actually made a two-mile radius around. We used
24 Boulder Ridge approximately right in the middle and
25 made a two-mile radius around the Boulder Ridge

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1 area.

2 Q. And the green area, again, identifies
3 areas that have been annexed into the City of

4 Bismarck that are currently served by Capital
5 Electric; is that correct?

6 A. That's correct.

7 Q. And since 2003 when MDU sent a letter
8 saying they were going to cancel the service
9 agreement, were any additional subdivisions annexed
10 into the City of Bismarck from 2003 to 2005?

11 A. I would think so. Yes.

12 Q. And those subdivisions are served by
13 Capital Electric?

14 A. That's correct.

15 Q. And without objection by the city or MDU;
16 is that correct?

17 A. That's correct.

18 Q. Okay. So, again, just briefly, I'd like
19 you to just outline the framework then of the
20 electric distribution system that Capital has in
21 place.

22 A. Okay. This kind of shows better where our
23 substations are, but we have a north Bismarck
24 substation down here by the golf dome. We have our
25 Grandview Pines over here on the bypass on 43rd and

□

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1 the loop that goes around. This one isn't -- we're
2 in the process of building this one. We have our
3 ward distribution substation and our Horizon
4 distribution substation, and then this is the
5 delivery we share with MDU, and then our ward
6 delivery. So we have one, two, three, four

Transcript of Hearing.txt

7 substations that can serve this Boulder Ridge area,
8 but -- you know, then like I said, we have our
9 three-phase lines, our tie lines that go -- you
10 know, we have one from north Bismarck that goes up
11 to 83, over to 43rd, you know, to tie in. Then we
12 have a three-phase 500-MCM line that goes along Ash
13 Coulee from Horizon. We've got another 500 line
14 coming down from our ward to Horizon in case this
15 one -- you know, like I said, 75 percent of our
16 loading, so we can pick up any of our substations
17 if the transformer goes down.

18 Q. And all of these facilities then would
19 come about as a consequence of your long-range
20 planning; is that correct?

21 A. That's correct, yeah.

22 Q. Can you just briefly tell us about how you
23 -- how does Capital do its long-range planning?

24 A. Well, we do a 20-year long-range plan, and
25 the 20 years, it's good up in Sheridan County, but

□

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1 around Bismarck we have to redo it about every five
2 years, and according to RUS we have to -- and then
3 we do a work plan that goes along with our
4 long-range plan to get RUS funding. So then we
5 have to -- you know, we just don't build a
6 substation. We've got to justify it, that -- you
7 know, why do we need that through our banker. So
8 we do the long-range plan, we do the work plan, and

9 then if it gets approved, we do the environmental
10 report and then we build it.

11 Q. And so then the initial plan is you're
12 trying to look out over 20 years; is that correct?

13 A. That's correct.

14 Q. And you're trying -- are you trying to
15 anticipate what your need is going to be?

16 A. Right. Well, we just take, you know, our
17 previous 10 and then we anticipate what the growth
18 is going to be north of the line -- or outside the
19 line.

20 Q. And do you participate in the process that
21 involves Basin Electric and MDU?

22 A. Yeah. We all got together up there -- you
23 know, we got together. That's what justified us
24 spending that big money for this delivery sub.

25 Q. I'm sorry. What justified it? Would you

□

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1 please explain?

2 A. Well, we got together with MDU, Basin,
3 WAPA, Capital Electric just to see, you know,
4 because you just don't plunk a big substation like
5 that. We've got to -- you know, we get all the
6 utilities involved.

7 Q. And as part of your long-range plan, did
8 Capital plan its system to serve all of the area
9 that was outside the black line?

10 A. That's correct.

11 Q. And do you know approximately in dollars

Transcript of Hearing.txt

12 what your investment is in serving this area?

13 A. Well, we went through the map -- you know,
14 it was a pain to do, but we went way back when,
15 since the first work orders. We took from 83 north
16 to -- I think there was another section up here and
17 from our service area north and we came up with
18 about \$7.7 million investment in this -- from 83
19 north to -- it was a section above the ward
20 delivery because we threw that in and then -- so
21 about a little over -- 7.7 million we came up with.

22 Q. And that would be the area west of -- it
23 wouldn't include your facilities east of 83?

24 A. No. No.

25 Q. And does Capital with its facilities -- do

□

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1 you have the ability to serve Boulder Ridge?

2 A. Oh, big time. Yeah. Like I said through
3 my whole testimony, we've got substations plus
4 we're building another one.

5 Q. And if you could just identify, which
6 substations here are available to serve Boulder
7 Ridge?

8 A. Okay. We've got Horizon. That's about a
9 mile away. We've got Ward. These are miles, so we
10 got one, two, three miles away. We've got
11 Grandview Pines one, two, three miles away.
12 Hopefully, that's in service this June, so we've
13 got one, two, three miles away. So we got all

14 kinds of backup for that area.

15 Q. So if you lose in one area, do you have
16 the ability to serve then?

17 A. Yes. Yes, we do.

18 Q. And just within Boulder Ridge, itself, if
19 you lost distribution power within Boulder Ridge,
20 what points would you have to serve it?

21 A. Yeah, in case a car ran into this line, we
22 could open the cutouts, close these and feed it
23 this way, so, yeah, we've got -- and then it's all
24 looped inside.

25 Q. And if MDU lost its line in the blue

□

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1 somewhere, does it have the ability to serve it?

2 A. No. They'd have to fix it.

3 Q. That's all with the maps. I'm offering
4 you -- or showing you what's marked as Exhibit
5 C-7. Would you just briefly identify that
6 document? You can sit down.

7 A. Oh, okay. It's a picture -- a picture of
8 someone standing on the Ash Coulee and Washington
9 Street looking east-northeast, and you can see the
10 pedestals there for -- I'm sure it's cable TV and
11 US West, and then you can see the streetlights that
12 are on that corner for safety for the people that
13 go to Horizon School.

14 Q. And that would show what your facilities
15 were in this area along Boulder Ridge back in the
16 fall of 2005; is that correct?

17 A. That's correct. Yeah, you can see our
18 three-phase overhead line, yeah.

19 MS. LARSON: We would offer Exhibit C-7.

20 MR. KUNTZ: Objection, relevance.

21 JUDGE WAHL: The objection is overruled.
22 Exhibit C-7 is received.

23 Q. (MS. LARSON CONTINUING) And, Mr. Lipp,
24 does Exhibit C-7 also show the work that Capital
25 had done in upgrading its line that runs along

□

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1 North Washington?

2 A. Just -- it shows our line that goes east
3 and west, and, you know, we upgraded it so you can
4 see our stub pole there, because you need that
5 pole. Right next to the transformer pole -- I
6 don't know if you guys know what the transformer
7 pole is, but that's a stub pole, and we need that
8 to guide back because our wire is so heavy on our
9 overhead line, you've got to have a stub pole with
10 three arms. But that shows our line along 43rd on
11 the north side.

12 MS. LARSON: All right. Thank you. I
13 have nothing further.

14 JUDGE WAHL: Mr. Kuntz.

15 CROSS-EXAMINATION

16 BY MR. KUNTZ:

17 Q. Mr. Lipp, I've read somewhere, I think it
18 was authored by Mr. Nygren, that in the 50 sections

19 of land within the two miles outside the City of
20 Bismarck, that Capital Electric had facilities in
21 every one of those sections. Would you agree with
22 that?

23 A. Outside where now?

24 Q. Outside the city limits of Bismarck,
25 there's approximately 50 sections of land in the

□

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1 two-mile radius outside the City of Bismarck and I
2 believe Mr. Nygren made a statement in a particular
3 document that Capital Electric had facilities in
4 every one of those sections. Does that seem
5 correct to you?

6 A. We've got a lot of facilities, but I'd
7 have to -- I'm not -- I can't answer that, but I
8 would say 90 percent of them.

9 Q. And is it Capital Electric's position that
10 if MDU is to extend service in any of those
11 sections, they would be interfering and duplicating
12 Capital Electric's facilities?

13 A. Outside the black line?

14 Q. Right. Outside the city limits, if they
15 were ever annexed.

16 A. It would have to be outside the black line
17 that I've been following since I started there, the
18 service area agreement.

19 Q. But it's Capital Electric's position that
20 if MDU extends service in any of those sections,
21 they would be interfering and duplicating Capital

22 Electric's facilities in those sections?

23 A. No. Like I said, if the section is within
24 that line, no, we don't have any objection.

25 Q. So then it's not an interference if it's

□

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1 -- if we extend lines or cross your lines if
2 they're inside the black line, but if they're
3 outside the black line, then it's interference; is
4 that correct?

5 A. That would be my interpretation of it.

6 Q. And it's Capital Electric's position that
7 you've planned -- or that it's planned to serve
8 every one of the -- all the area outside the black
9 line forevermore into the future; is that correct?

10 A. No, that's not correct.

11 Q. That's not correct. Okay. Which areas
12 did you not plan to serve outside the black line?

13 A. Down south.

14 Q. You don't have intentions to serve down
15 south?

16 A. No. That's inside the black line.

17 Q. I'm talking outside the black line. Are
18 there any areas --

19 A. Oh.

20 Q. -- outside the black line that you didn't
21 plan to serve?

22 A. No.

23 Q. And were you aware that the area service

24 agreement could be canceled on 12 months' notice?
25 You weren't aware of that?

□

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1 A. No. I was aware of the letter that you
2 sent.
3 Q. Okay. But prior to that were you aware
4 that the area service agreement could be canceled
5 on 12 months' notice?
6 A. No.
7 Q. And you became aware that MDU sent a
8 letter canceling the area service agreement in June
9 2002, did you not?
10 A. That's correct.
11 Q. And even after Capital Electric got that
12 letter by Montana-Dakota canceling the area service
13 agreement, did you still continue to plan to serve
14 everything that was outside the previous black
15 line? Is that correct?
16 A. That's correct.
17 Q. The letter that MDU sent you canceling the
18 area service agreement didn't change your planning
19 in any respect?
20 A. No. Because it was -- no, not to mine.
21 Q. And Capital Electric's investment that you
22 mentioned of 7.7 million in that northwest quadrant
23 of Bismarck, was that made on the assumption that
24 Capital Electric was going to serve all those areas
25 after they were annexed to the city?

1 A. Yes.

2 Q. And that was based upon Capital Electric's
3 interpretation of its franchise at the time that it
4 did its planning; is that correct?

5 A. That's correct.

6 Q. Over what period of time was that \$7.7
7 million made?

8 A. From the beginning of where -- from the
9 start.

10 Q. From the beginning of Capital Electric's
11 existence?

12 A. Right. We went back through all our old
13 -- you know, that's way before my time, but we
14 went through all the work. Every time we have a
15 job we have a work order.

16 Q. And how much of that investment was made
17 after Montana-Dakota sent a notice to Capital
18 Electric that it was canceling the area service
19 agreement in 2002?

20 A. I just went -- what we did, we went by
21 section, so I don't know.

22 Q. So you didn't by time. So was part of
23 that investment made after Montana-Dakota sent
24 notice that it was canceling the area service
25 agreement?

Transcript of Hearing.txt

1 A. I'm sure it was.

2 Q. In fact, you mentioned the substation --
3 the \$4.5 million substation. Is that included in
4 that 7.7 million?

5 A. Yes.

6 Q. So that substation alone is over half of
7 that particular investment. And when was that
8 investment made?

9 A. That was -- it's still being made. I
10 mean, we're still working on it.

11 Q. So did you make any of that investment
12 prior to Montana-Dakota --

13 A. Sure.

14 Q. How much of it was made before MDU sent
15 the notice in 2002?

16 A. I don't know. I know we bought the land
17 before that and we had all our negotiations.

18 Q. When did construction start?

19 A. Construction started last year.

20 Q. 2005?

21 A. That's correct.

22 Q. Three years after MDU sent a notice it was
23 canceling the area service agreement?

24 A. We had some land before that, and the land
25 was a big chunk, and we had an archaeology study,

□

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1 so, yeah.

2 Q. Was it more than a hundred thousand
Page 106

3 dollars?

4 A. For the land, yeah.

5 Q. More than 500,000?

6 A. I'm thinking about that, half a million.

7 Q. When did Capital Electric first learn of
8 the development plans for Boulder Ridge?

9 A. Last year.

10 Q. 2005, about the time it was annexed?

11 A. Probably.

12 Q. And how did you learn about what was
13 planned for that subdivision?

14 A. Well, Knudson -- I mean, we get the plans
15 like you guys do, you know, through the city
16 planning, and we get a preliminary one and we get
17 the final one, and then after -- I suppose after
18 they told us to retire that line, that we knew
19 something was up.

20 Q. And what was your understanding once you
21 learned that this area was planned for some
22 development of how it was going to be developed?

23 A. We just get the plot and we get together
24 with US West and cable TV and figure out where
25 we're going to put our lines.

□

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1 Q. And had you learned at that time that it
2 was planned for primarily single-family development
3 in Boulder Ridge; is that correct?

4 A. Well, yeah. I guess there's some big

5 lots, too.

6 Q. There's some commercial development in the
7 southwest corner; correct?

8 A. That's correct.

9 Q. And the rest of it would all be primarily
10 residential; is that correct?

11 A. Well, okay. I guess.

12 Q. And prior to that you didn't know what the
13 plans were for developing that, did you?

14 A. No.

15 Q. Capital Electric didn't know how it was
16 going to be developed, did you?

17 A. No.

18 Q. You didn't know if it was going to be
19 residential or commercial? You have to answer out
20 loud, Mr. Lipp.

21 A. No, I didn't.

22 Q. You didn't know what the density was going
23 to be, did you?

24 A. No.

25 Q. You didn't know if it would be developed

□

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1 industrial, did you?

2 A. No.

3 Q. In fact, prior to its annexation, wasn't
4 that property zoned agricultural?

5 A. I suppose it's for tax purposes, yeah.

6 Q. And once you learned that this area was
7 going to be annexed and developed as residential

8 and commercial property, what planning activities
9 did you undertake at that time?

10 A. Well, we got the plot, and then we --
11 because we knew we had a three-phase backbone on
12 both sides, so, you know, we figured we could tap
13 this one and tap this one and loop it altogether
14 and then we just figured out, like we always do,
15 okay, there's two lots here, we can put one
16 transformer to serve two lots.

17 Q. It would be your typical planning that you
18 would do the layout of distribution system in any
19 substation, wouldn't it?

20 A. That's correct.

21 Q. Figure out where the feeder systems are
22 going to be, where the transformers are going to
23 be, pretty routine sort of thing?

24 A. That's correct.

25 Q. And pretty similar what you expect

□

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1 Montana-Dakota would have done to serve the same
2 subdivision in terms of where they would have to
3 run their lines; is that correct?

4 A. That's correct.

5 Q. And you were aware -- do you know exactly
6 when you started installing your facilities?

7 A. No. The exact date, no.

8 Q. Were you aware at the time when you were
9 installing them that Montana-Dakota was claiming

10 that they had a right to serve this subdivision?

11 A. Yes.

12 Q. And, in fact, was Montana-Dakota in the
13 process of installing its facilities at the same
14 time that Capital Electric was installing its
15 facilities?

16 A. That's correct.

17 Q. And you were aware that Montana-Dakota had
18 filed a petition with the city to determine who was
19 the proper franchise owner at the time that you
20 installed your facilities, did you not?

21 A. No, we didn't know -- I didn't know that.

22 Q. You didn't know that at the time?

23 A. No. No. No. Okay. Forget it. What
24 happened is that we were -- you know, we always go
25 joint -- we always go joint with the gas and we go

□

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1 joint with telephone and we go joint cable TV so
2 all of us are in the same trench. Okay. What
3 happened, we called for locates, and then all of a
4 sudden MDU is up there with their plow and -- you
5 know, six in the morning and we had to wait because
6 telephone didn't have their cable yet. So we
7 always wait for them, so we waited for, I suppose,
8 a day or something before we started because we
9 were waiting for them to go in the same trench.
10 Q. Okay. But at the time you put your
11 facilities in had MDU filed its petition with the
12 city?

Transcript of Hearing.txt

13 A. That I don't know.

14 Q. Okay. So the facilities that you
15 installed in Boulder Ridge basically parallel the
16 facilities that Montana-Dakota installed in Boulder
17 Ridge?

18 A. Vice versa. They're paralleling us.

19 Q. Who was in there first?

20 A. We were in some places and they were in
21 some places.

22 Q. Where they were in first, were you
23 duplicating their facilities?

24 A. I guess you can say that.

25 Q. Are there other locations in the City of

□

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1 Bismarck or outside the City of Bismarck where
2 Capital Electric has crossed the facilities of MDU?

3 A. Along Century Avenue, I believe -- I know
4 because we've got -- we don't serve anything there,
5 but we have to run a tie line to a big, heavy
6 feeder to serve consumers outside of our -- or in
7 our area.

8 Q. So you cross in or over their lines; is
9 that correct?

10 A. Well, we try not to, but, sure -- I'm sure
11 we do.

12 Q. Do you consider that an interference of
13 their facilities?

14 A. No, because we don't serve anything.

15 Q. And it doesn't affect their ability to use
16 those facilities, does it?

17 A. Our facilities?

18 Q. No. MDU's facilities. They can still use
19 them the way they've always used them?

20 A. That's correct.

21 Q. How about in south Bismarck, are there
22 situations down there where your lines parallel MDU
23 lines that were there before?

24 A. That's correct.

25 Q. And there's situations there where your

□

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1 lines cross MDU lines that were there before?

2 A. I'm sure.

3 Q. Do you consider that duplication and
4 interference?

5 A. No.

6 Q. Why is that?

7 A. Because we don't serve anything there. I
8 mean, it's not --

9 Q. Are there situations where you do serve in
10 south Bismarck where you cross the facilities of
11 MDU to make that service?

12 A. Yeah. I'm sure there is down in Tatley,
13 I'm sure, because you guys serve.

14 Q. And do you consider that duplication and
15 interference?

16 A. Well, no. I guess -- you can say that it
17 is, but, no, to me it isn't.

Transcript of Hearing.txt

18 Q. And why not?

19 A. Well, because we got designated service
20 area and then our lines serve that, and you guys
21 have designated service area and you serve that,
22 so, okay, we cross. You know, okay, if we have an
23 outage, we'll have to make damn sure that ours
24 is --

25 Q. So make sure I understand. Your position

□

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1 is if you have to cross an area that's been your --
2 if you have to cross an MDU line to get to an area
3 that's designated as your service area, that's not
4 interference, is it?

5 A. I wouldn't say, no.

6 Q. And it's not duplication, is it? If you
7 have to cross our facilities to get to an area that
8 you're authorized to serve, that's not duplication,
9 is it?

10 A. No, because we can serve it.

11 Q. So if MDU has the franchise to serve
12 Boulder Ridge and Capital Electric doesn't, is that
13 interference if it has to cross your facilities to
14 get into Boulder Ridge?

15 MS. LARSON: Objection, goes beyond the
16 scope of this witness's -- that's for the
17 Commission to determine.

18 JUDGE WAHL: Overruled.

19 THE WITNESS: Okay. What's the question?

20 Q. (MR. KUNTZ CONTINUING) You just described
21 for me a situation, Mr. Lipp, in south Bismarck
22 where you have to cross MDU facilities, but you
23 don't consider that interference or duplication
24 because you're reaching an area that is your
25 service area and not MDU's; is that correct?

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1 A. That's correct.

2 Q. If Boulder Ridge is designated by the city
3 to be within the franchise of MDU and not within
4 the franchise service area of Capital Electric,
5 then is MDU's crossing of your facilities on 43rd
6 Avenue still interference and duplication?

7 A. If you guys -- if it's in your service
8 area, no, I would say.

9 Q. And those facilities along 43rd, when were
10 they installed?

11 A. Oh, wow, way back, 19 -- before 1973, I
12 guess. It was before my time and then we upgraded
13 them.

14 Q. And do you know, why were they put in back
15 in -- whenever it was?

16 A. For tie lines -- for our tie lines for our
17 substations.

18 Q. So they tie your two substations together?

19 A. Right.

20 Q. And when MDU went under that line with its
21 underground service, did it affect your ability to
22 use that line to tie your substations?

Transcript of Hearing.txt

23 A. No.

24 Q. You're still able to use it now the same
25 way you have for the last 20 years; is that

□

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1 correct?

2 A. That's correct.

3 Q. And, likewise, the line along Washington
4 Street, when was that built?

5 A. That was before '73, too, but, like I
6 said, we updated the conductor size and we made the
7 clearances a little higher.

8 Q. And is that to tie in your substations,
9 too?

10 A. It's the same line, but because our loads
11 grew, we upgraded the conductor size.

12 Q. And the facilities that Montana-Dakota has
13 in Boulder Ridge don't interfere with your ability
14 to use that line to tie those two substations, do
15 they?

16 A. No.

17 Q. You're still using it the same way you've
18 used it for the last 20 years; is that correct?

19 A. That's correct.

20 Q. Prior to August of 2005, what facilities
21 did Capital Electric have within Boulder Ridge
22 specifically to serve customers within Boulder
23 Ridge Subdivision? You mentioned a house; is that
24 correct?

25 A. within --

□

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1 Q. within that area.

2 A. Okay. Then we have -- like I said, we
3 have the feed point for the two streetlights and
4 the booster station.

5 Q. Okay. And those are kind of right in the
6 road right-of-way there, aren't they?

7 A. Well, yeah, according to the picture, they
8 look like it.

9 Q. And you're still serving those?

10 A. As far as I know.

11 Q. And you also served at one point was a
12 house --

13 A. Yeah.

14 Q. -- along Boulder Ridge Subdivision?

15 A. That's correct.

16 Q. And actually Boulder Ridge Subdivision
17 doesn't look kind of the way you've shaded it
18 there? That whole area hasn't been annexed yet,
19 has it?

20 A. Yeah. To the best of my knowledge, it
21 has.

22 Q. The entire yellow area that you've shaded
23 there you believe has been annexed?

24 A. Right.

25 Q. And you also show a little stub here in

1 Boulder Ridge that shows your facilities. Are you
2 sure you have facilities there?

3 A. To the best of my knowledge, yes.

4 Q. This little stub coming right off of 43rd
5 you believe you have transformers and facilities?

6 A. Well, yeah. Right.

7 Q. And do you know, when was that house
8 removed that was in what is now Boulder Ridge
9 subdivision?

10 A. I don't know when the house was removed.
11 I think the house was removed before Boulder Ridge
12 and then they just had the transformer and loop for
13 the pasture well.

14 Q. There was a little pasture well there that
15 you served for a while before the annexation; is
16 that correct?

17 A. That's correct.

18 Q. And before the annexation then, you
19 abandoned that particular line because the pasture
20 well was discontinued, as well?

21 A. Yeah. The guy that owns it gives us a
22 letter then we can retire it.

23 Q. So at the time that Boulder Ridge was
24 actually annexed, the only two services that you
25 had that were active were the streetlight and the

1 repeater box or whatever it is for Midcontinent?
2 A. Booster station.
3 Q. You mentioned that Montana-Dakota had not
4 objected to any of Capital Electric's extension of
5 service in any annexations during 2003 to 2005.
6 You're aware, of course, they objected to your
7 extension of service to Boulder Ridge; is that
8 right?
9 A. Yeah, that's correct.
10 Q. And you mentioned that the city gives you
11 a permit in order to provide temporary service.
12 A. City okay they call it through the --
13 Q. A what?
14 A. A city okay they call it.
15 Q. A city okay. And isn't it true, Mr. Lipp,
16 that that's really to make sure that it complies
17 with code?
18 A. Well, that's what they tell us, yeah.
19 Q. It's got nothing to do to determine
20 whether or not you're in the franchise or outside
21 the franchise, does it?
22 A. Yeah. But anything inside the city we
23 need one. Outside the city we just get a
24 certificate.
25 Q. And then you gave -- a couple times in

□

1 response to Ms. Larson's question, you described
2 Capital Electric's looped service and the location
3 of all your substations and how that backfeeds and
Page 118

4 serves each other. Has the provision of
5 distribution service by Montana-Dakota in Boulder
6 Ridge interfered with your ability -- your looped
7 service in any regard?

8 A. No.

9 Q. You still backfeed the areas you could
10 always backfeed? Those substations are still used
11 for the same thing they were always used for; is
12 that correct?

13 A. That's correct.

14 MR. KUNTZ: I have no further questions
15 for this witness.

16 JUDGE WAHL: Mr. Binek.

17 MR. BINEK: Yes, I have a few.

18 EXAMINATION

19 BY MR. BINEK:

20 Q. Talking about these -- the city okay, you
21 said, before you can install meters, is that for
22 electrical safety? Is that the reason for it?

23 A. Well, part of that, and then like he said,
24 I think before we put one in on a mobile home, they
25 make sure that the skirting is on and that's their

□

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1 device that says, hey, you know, I'm not going to
2 give you a city okay to put a meter in until you
3 meet some requirements, so we kind of work with the
4 city, and the same with MDU.

5 Q. And the city's okay would give any

6 supplier the authority to hook up?

7 A. If it meets their requirements, yes. And,
8 like I said, that's just inside the city.

9 Q. I assume that you've read the order that's
10 been issued by the City of Bismarck regarding the
11 franchise to serve this part of Boulder Ridge First
12 Addition to the City of Bismarck.

13 A. Yes, I have.

14 Q. Do you agree that there is an obligation
15 for either Capital Electric or MDU to provide
16 electric service to this particular area?

17 A. Yes.

18 Q. Do you also agree -- I believe you do --
19 that this area or at least a part of it has been
20 annexed by the City of Bismarck?

21 A. That's correct.

22 Q. Do you agree that in order to provide
23 electric service to that area, the company
24 providing service must hold a franchise from the
25 City of Bismarck?

□

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1 A. Yes.

2 Q. Do you agree that MDU holds the general
3 franchise from the City of Bismarck to provide
4 electric service within the City of Bismarck?

5 A. Yes.

6 Q. Do you agree that the City of Bismarck by
7 virtue of the decision issued on November 14th
8 determined that part of Boulder Ridge First

9 Addition to the City of Bismarck is properly served
10 by MDU under its franchise subject to Capital
11 Electric retaining any existing customers?

12 MS. LARSON: Objection, goes beyond the
13 scope of this witness. That decision speaks for
14 itself.

15 JUDGE WAHL: Overruled.

16 THE WITNESS: Yes.

17 MR. BINEK: I believe you answered.

18 Q. (MR. BINEK CONTINUING) Do you agree that
19 the Public Service Commission has no authority to
20 determine franchise rights of either party to
21 provide electric service within the City of
22 Bismarck?

23 MS. LARSON: Objection, goes beyond the
24 scope of this witness's knowledge and information.

25 JUDGE WAHL: Well, Mr. Binek, that's a

□

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1 long reach. That's even further than the last
2 one. Sustained.

3 MR. BINEK: I'll take it as far as I can.

4 JUDGE WAHL: Sustained. The objection is
5 sustained. It's probably beyond his expertise,
6 too.

7 Q. (MR. BINEK CONTINUING) Assuming for the
8 moment that the November 14, 2005, decision issued
9 by the City of Bismarck is correct and is valid,
10 which company, MDU or Capital Electric, has the

11 obligation to provide electric service to Boulder
12 Ridge Subdivision?

13 MS. LARSON: Objection, goes beyond the
14 scope of this witness's expertise. He's an
15 engineer.

16 JUDGE WAHL: Well, the question is, can he
17 answer the question. State your question again,
18 Mr. Binek, please.

19 Q. (MR. BINEK CONTINUING) Assuming for the
20 moment that the November 14, 2005, decision issued
21 by the City of Bismarck is correct and is valid,
22 which company, MDU or Capital Electric, has the
23 obligation to provide electric service to Boulder
24 Ridge Subdivision?

25 MR. KUNTZ: Your Honor, as much as I'm

□

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1 somewhat curious to hear Mr. Lipp's answer, I think
2 it calls for a legal conclusion.

3 JUDGE WAHL: Well, the objection is
4 sustained. It's really beyond the scope.

5 MR. BINEK: I think that covers my
6 questions.

7 JUDGE WAHL: It's awfully close to the
8 noon hour, but, nevertheless, as this is all fresh
9 in commissioners' minds, I would proceed with the
10 Commission's questions.

11 COMMISSIONER CLARK: I don't have any
12 questions.

13 JUDGE WAHL: Commissioner wefald.
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14 COMMISSIONER WEFALD: I have a couple.

15 JUDGE WAHL: All right.

16 COMMISSIONER WEFALD: What month did

17 annexation to the city take place in 2005?

18 MR. KUNTZ: I believe it was April.

19 MS. LARSON: I believe it's April 26th,

20 2005.

21 COMMISSIONER WEFALD: Thank you.

22 EXAMINATION

23 BY COMMISSIONER WEFALD:

24 Q. Were any objections lodged to Capital

25 serving customers in this area at that time?

□

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1 A. Not to my knowledge.

2 Q. Did you as of April 26th, 2005, then
3 include the area in your long-range plans?

4 A. Yes. Yes.

5 Q. You were -- were you aware personally that
6 the annexation to the city had taken place on April
7 26th of 2005 as an engineer for the company of
8 Capital Electric Cooperative?

9 A. Well, I can't --

10 Q. Or shortly thereafter?

11 A. It was in the summer of 2005, yeah. I
12 guess I don't know the exact dates, because we get
13 the plots from the city.

14 Q. When you laid your lines -- you said in
15 your testimony that you put your lines in trenches

16 along with the other utilities in Boulder Ridge; is
17 that correct? Did you lay your lines in trenches
18 with the other utilities in Boulder Ridge
19 throughout the subdivision or only in parts?

20 A. Well, the other utilities, meaning US West
21 and cable TV, yes, we put in -- to my knowledge, I
22 think we went through the whole subdivision with
23 them.

24 Q. The whole subdivision.

25 A. Except for, you know, the part, like Dan

□

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1 said, over here we don't have any facilities.

2 Q. And I don't know if you can answer this
3 question or not, but where are the MDU lines? If
4 theirs weren't put in a trench, how were their
5 lines stretched throughout the subdivision? Were
6 their lines trenched, as well?

7 A. Some of them. Most of them were plowed in
8 because they have the gas, also, so gas and
9 electric went together.

10 Q. So they trenched theirs in with the gas
11 lines?

12 A. Well, they plowed it in.

13 Q. Some were plowed in. What's the
14 difference between plowing lines and trenching
15 lines in?

16 A. A plow is where you trench -- it's a
17 trencher that takes the dirt out and piles it on
18 one side. A plow they just put it on a -- they put

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19 a shoe behind a Cat and it vibrates and it goes
20 down to the right depth and it vibrates, you know,
21 the electric and gas in.

22 Q. So MDU plowed their lines in with gas --
23 with their natural gas lines?

24 A. That's correct.

25 COMMISSIONER WEFALD: Okay. Thank you.

□

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1 That's all the questions I have right now.

2 JUDGE WAHL: Commissioner Cramer.

3 COMMISSIONER CRAMER: All of mine are from
4 staff.

5 JUDGE WAHL: All right. We'll recess --

6 MS. LARSON: Excuse me. Do I have an
7 opportunity to --

8 JUDGE WAHL: After recess.

9 MS. LARSON: Okay. Thank you. I just
10 want to make sure.

11 JUDGE WAHL: We'll recess for lunch until
12 one o'clock.

13 (Recess taken at 12:02 p.m. to 1:00 p.m.)

14 JUDGE WAHL: Ms. Larson, are you ready?

15 MS. LARSON: I am. Thank you, sir.

16 JUDGE WAHL: Mr. Kuntz?

17 MR. KUNTZ: Yes.

18 JUDGE WAHL: All right. Ms. Larson, you
19 may continue with redirect.

20 MS. LARSON: Thank you. Prior -- go ahead

21 and sit down, Ron, but I did want to correct the
22 date that I gave to the Commission earlier. And
23 just for a frame of reference, the Boulder Ridge
24 was annexed April 12th, 2005. I think I might have
25 stated the 26th. June 26th of 2002 is the date MDU

□

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1 sent Capital the letter with the one-year
2 cancellation of the area service agreement to go
3 into effect June 26 of 2003. So that's where I --
4 yeah, to cancel part of the area service
5 agreement. So I just wanted to clarify those dates
6 for the record since I misstated that earlier.

7 COMMISSIONER WEFALD: Thank you.

8 REDIRECT EXAMINATION

9 BY MS. LARSON:

10 Q. Mr. Lipp, in planning your engineering for
11 Capital's system, you indicated that you had relied
12 on the service -- the area service agreement to
13 establish the line for Capital's service; is that
14 correct?

15 A. That's correct.

16 Q. And were you aware that within Capital's
17 franchise with the City of Bismarck, that it
18 addressed the situation of what would happen if the
19 service agreement was canceled by either party?

20 A. Yes.

21 Q. And what was your understanding about that
22 service agreement?

23 A. That our franchise would still be in

24 effect till 2013, and that's because we renewed it
25 in 1993.

□

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1 Q. So when --

2 A. It's a 20-year.

3 Q. So when you received that -- or Capital --
4 it's not you as an engineer, but when your
5 management received the letter from MDU in 2002,
6 did you think that had any effect on your
7 engineering plans?

8 A. No.

9 Q. Because you understood that to continue
10 throughout --

11 MR. KUNTZ: Objection, leading.

12 JUDGE WAHL: Sustained.

13 Q. (MS. LARSON CONTINUING) And since MDU has
14 indicated that the service agreement was canceled
15 effective June 26 of 2003, have there been -- were
16 there other areas annexed into the City of
17 Bismarck?

18 A. Yes. Yeah, I think we went through that.
19 In our statement there -- we went through them
20 since we got the letter, that's correct.

21 Q. You assisted management in preparing
22 answers to interrogatories proposed by MDU about
23 annexations that had occurred after June 26, 2003,
24 that we considered to be in our service area; is
25 that correct?

□

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1 A. That's correct.

2 Q. And were there 15 annexations?

3 A. That's correct.

4 Q. And who serves those annexations?

5 A. We do.

6 Q. Did MDU indicate to you -- or to Capital
7 that they had any objection to our serving those
8 areas that had been annexed in after June 26, 2003,
9 with the exception of Boulder Ridge?

10 A. Not to my knowledge.

11 Q. And so, again, did you get permission from
12 the city to install facilities within those newly
13 annexed areas?

14 A. Well, yeah, I guess they didn't object,
15 but we get the city okay or whatever. That's just
16 as we have been doing it for a long time.

17 Q. So you continue to serve those areas?

18 A. That's correct.

19 Q. You use the same procedure you did before
20 June 26, 2003?

21 A. Yes.

22 Q. Okay. When you were asked some questions
23 about whether crossing the line would constitute
24 interference, were you speaking from the point of
25 view of an engineer?

□

1 A. Yes.

2 Q. Do you have the knowledge or the ability
3 -- do you know what the legal significance of
4 interference is as defined by case law and the
5 Public Service Commission's obligations with
6 respect to interference?

7 A. No, I don't believe I do.

8 MS. LARSON: You would leave that up to
9 the Commission to decide. Thank you. I have
10 nothing further.

11 JUDGE WAHL: Mr. Kuntz.

12 MR. KUNTZ: Thank you.

13 RE-CROSS-EXAMINATION

14 BY MR. KUNTZ:

15 Q. Mr. Lipp, prior to our break at lunch
16 Commissioner Wefald asked you a question about
17 whether you included Boulder Ridge in your long-
18 term plans after it was annexed in April of 2005.
19 What long-term plans were you referring to when you
20 answered yes to that question?

21 A. Well, just our load flow studies. I mean,
22 you know, we go through a -- when we do a
23 long-range plan, we see what the last 10 years,
24 what the city is planning, you know, so we just
25 project our load so -- and we projected it north.

□

1 Q. Did you build any new facilities other

2 than the distribution facilities within the
3 boundaries of Boulder Ridge as a result of the
4 annexation of Boulder Ridge?

5 A. Okay.

6 Q. Let me rephrase. Did you build any new
7 distribution facilities after annexation of Boulder
8 Ridge in April of 2005 to serve the Boulder Ridge
9 subdivision other than those that are internal to
10 the Boulder Ridge subdivision?

11 A. No. Just that we're building our new
12 substation.

13 Q. And you mentioned the fact that you
14 continued to believe that you would have -- Capital
15 Electric continued to believe that they would have
16 the right to serve all the areas outside of the old
17 area service agreement even after cancellation, but
18 that was based upon your interpretation of the
19 franchise; correct?

20 A. That's correct.

21 Q. And you understand the city commission has
22 issued an order that's different than what your
23 interpretation was prior to that time; is that
24 correct?

25 A. That's correct.

□

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1 Q. And indeed the city commission's
2 determination was that you did not have a franchise
3 to serve any of the areas that were annexed after
4 2003; is that correct?

5 MS. LARSON: Objection. It's already part
6 of the record. It goes beyond the scope of my
7 redirect.

8 JUDGE WAHL: Sustained.

9 Q. (MR. KUNTZ CONTINUING) And then you
10 mentioned the city has okayed your installation of
11 service into these subdivisions that were annexed
12 after 2003. When you say "okay," you're referring
13 to that meter check that you talked about with Mr.
14 Binek and I; is that correct?

15 A. That's correct.

16 MR. KUNTZ: That's all the questions I
17 have.

18 JUDGE WAHL: Mr. Binek.

19 FURTHER EXAMINATION

20 BY MR. BINEK:

21 Q. I just have one question that staff would
22 like to have information on regarding the voltage
23 of those three-phase lines, the tie lines. Do you
24 know what the voltage is?

25 A. It's 7,200 volts -- or 12,470 volts --

□

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1 12,470 down to 7,200. 7,200 is single-phase.
2 12,470, you know, is three-phase. And our
3 transmission line is 41-6, it steps it down to
4 7,200, then we ship it out on our lines.

5 MR. BINEK: That's all I have.

6 JUDGE WAHL: All right. Does the

7 Commission have any followup?
8 COMMISSIONER CLARK: I don't.
9 JUDGE WAHL: Commissioner Wefald, anything
10 further?
11 COMMISSIONER WEFALD: No.
12 JUDGE WAHL: Commissioner Cramer?
13 COMMISSIONER CRAMER: No.
14 JUDGE WAHL: Any followup, Ms. Larson?
15 MS. LARSON: No, sir.
16 JUDGE WAHL: Your next witness. Thank you
17 very much, Mr. Lipp.
18 MS. LARSON: Capital rests, Your Honor.
19 JUDGE WAHL: All right. Mr. Kuntz.
20 MR. KUNTZ: Can we take a ten-minute
21 break?
22 JUDGE WAHL: We may. We will be in recess
23 for ten minutes.
24 (Recess taken at 1:10 p.m. to 1:16 p.m.)
25 JUDGE WAHL: Mr. Kuntz, are you ready?

□

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1 MR. KUNTZ: Yes.
2 JUDGE WAHL: Ms. Larson, are you ready?
3 MS. LARSON: Yes, sir.
4 JUDGE WAHL: All right. Mr. Kuntz.
5 MR. KUNTZ: We once again renew our motion
6 to dismiss, and with that Montana-Dakota rests, as
7 well.
8 JUDGE WAHL: All right. No rebuttal
9 then. So we're left with the question of

10 briefing. Does counsel request briefs?

11 MS. LARSON: Yes, Your Honor.

12 JUDGE WAHL: And does the Commission --
13 the Commission would like to see findings, I
14 expect.

15 MR. BINEK: Right.

16 JUDGE WAHL: All right. So are counsel
17 prepared to offer a briefing schedule, or can I
18 leave that to counsel?

19 MR. KUNTZ: We might as well get it
20 resolved today while we're here.

21 JUDGE WAHL: All right. Ms. Larson. Are
22 you offering responsive briefs? Is that what's
23 being called for here? What's counsel's wishes?
24 Ms. Larson.

25 MS. LARSON: I guess I would like leave to

□

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1 address the jurisdiction issue, the motion to
2 dismiss, if I determine necessary once I review the
3 transcript. So I guess I would like to have the
4 ability to do that, Your Honor.

5 JUDGE WAHL: All right. Well, Mr. Kuntz,
6 were you intending to brief the motion?

7 MR. KUNTZ: I guess I was looking towards
8 commission counsel in terms of what commission
9 counsel would like to see to further fill out this
10 record. I've already briefed the motion to dismiss
11 twice and I've argued it today pretty extensively.

12 I'll brief it again if that's the Commission's
13 wishes and I'll draw up proposed findings if that's
14 the Commission's wishes. I guess I'm looking for
15 direction as to what the Commission would like.

16 JUDGE WAHL: Mr. Binek.

17 MR. BINEK: I think -- yeah, I would like
18 to see the whole package put together.

19 JUDGE WAHL: Okay. Let's do it this way,
20 counsel. Unless I have a strong point otherwise
21 from Mr. Binek, I think the Commission would be
22 benefited by responsive briefs on the motion to
23 dismiss, and let's treat that separately. That is,
24 brief the motion to dismiss separately so the
25 Commission can have a separate issue, a separate

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1 pile of paper to work with. I think that will be
2 helpful. So --

3 COMMISSIONER CLARK: When we say "pile,"
4 we're not encouraging --

5 MR. KUNTZ: Quality, not quantity.

6 JUDGE WAHL: Okay. Mr. Kuntz, you would
7 lead on the motion. When will you submit your
8 brief?

9 MR. KUNTZ: Fifteen days.

10 JUDGE WAHL: That's fine with me. Ms.
11 Larson, your reply brief then?

12 MS. LARSON: Fifteen days.

13 JUDGE WAHL: All right. And then --

14 MR. KUNTZ: Then may I have five?

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15 JUDGE WAHL: You may have a rebuttal, five
16 days, ten days?

17 MR. KUNTZ: Five should be fine.

18 JUDGE WAHL: All right. Five.

19 MR. KUNTZ: I better make it ten because
20 I'm not sure where that's going to fall.

21 JUDGE WAHL: Five days is overnight. Ten
22 days for rebuttal. At least for -- when those
23 briefs are for me, my advice is that a rebuttal
24 brief is not required. If you think a rebuttal
25 brief is not necessary, just a letter saying I have

□

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1 nothing further to add, we'll close the record.

2 Okay.

3 Then, Ms. Larson, you have the laboring
4 oar on the complaint. So when will you submit your
5 -- I'm assuming you're going to brief that and
6 prepare findings, so when will you submit those?

7 MS. LARSON: I would like to have 30 days
8 after receipt of the transcript. We've been trying
9 to nail that date down.

10 JUDGE WAHL: Mr. Kuntz, is that acceptable
11 to you?

12 MR. KUNTZ: Yeah. I'm not sure we need
13 the transcript for the findings relevant to this
14 case, but if that's what counsel wants.

15 JUDGE WAHL: Mr. Binek, is that acceptable
16 to the Commission?

17 MR. KUNTZ: Would that be simultaneous
18 then -- proposed findings? I don't think we need
19 to rebut.
20 JUDGE WAHL: I'm sorry. I should have
21 asked that. Simultaneous briefing, if that's fine
22 with counsel, is good with me. So that's the
23 proposal then. Thirty days from the receipt of the
24 transcript with findings, of course. Mr. Binek,
25 have I overlooked anything?

□

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1 MR. BINEK: I don't believe so.
2 JUDGE WAHL: All right. All right.
3 Counsel, anything further for the record? Ms.
4 Larson?
5 MS. LARSON: Would there be any
6 opportunity for a reply to the simultaneous briefs
7 or not?
8 JUDGE WAHL: I don't typically do that.
9 Are you requesting it?
10 MS. LARSON: It's my first time here. I'm
11 not --
12 JUDGE WAHL: Well, it's what you want.
13 Are you asking for it?
14 MS. LARSON: I guess I would like to
15 reserve that right -- or ask for that right.
16 JUDGE WAHL: Mr. Kuntz? So then where do
17 you -- well, of course, that's fine. Mr. Kuntz,
18 any objection?
19 MR. KUNTZ: If counsel wants to request
Page 136

20 the right to reply, I'm probably not going to
21 object to that. We can do it quickly. Proposed
22 findings are proposed findings. They're not
23 argument -- hopefully not argument. The argument
24 will be in the motion to dismiss. But if counsel
25 wants to reserve the right to request it, I don't

□

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1 have a problem with it.
2 JUDGE WAHL: And Capital has the burden.
3 All right. Ten days?
4 MS. LARSON: That's fine.
5 JUDGE WAHL: Ten days after -- after
6 the --
7 MS. LARSON: And, again, if we feel no
8 need, we'll notify you.
9 JUDGE WAHL: Right. Well, direct your
10 advice to the Commission, please.
11 MS. LARSON: Sorry.
12 MR. KUNTZ: Just a clarification. I think
13 this briefing schedule would provide the
14 opportunity, if the Commission should so choose, to
15 rule on the motion to dismiss before we went
16 through the exercise depending upon when the
17 transcript gets here of completing our proposed
18 findings and stuff. So if the Commission would
19 issue an order obviously granting a motion to
20 dismiss, I assume that would relieve us from the
21 burden of doing proposed findings.

22 JUDGE WAHL: I would assume that would
23 moot the rest of the proceedings. I wouldn't
24 assume anything else, however.
25 MR. KUNTZ: No, I don't. Just the

□

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1 opportunity.
2 JUDGE WAHL: All right. Again, anything
3 further for the record, Ms. Larson?
4 MS. LARSON: No.
5 JUDGE WAHL: Mr. Kuntz?
6 MR. KUNTZ: No.
7 JUDGE WAHL: Mr. Binek?
8 MR. BINEK: No.
9 JUDGE WAHL: Commissioners, anything
10 further for the record? Commissioner Clark?
11 COMMISSIONER CLARK: No. Just thank you
12 for an interesting hearing.
13 JUDGE WAHL: Commissioner Wefald?
14 COMMISSIONER WEFALD: Thank you. In this
15 particular case the legal arguments are as
16 interesting as the facts that were placed on the
17 record, and I know the Commission has noted both
18 sets of arguments very carefully, and there was a
19 lot of information presented here this morning in a
20 very concise format, and I appreciate that very
21 much. However, I know that I'm going to need to
22 look at the record, as well, because I'll want to
23 go back and take a look at some of the cites that
24 you were going over so quickly with us and have a

25 chance to go back and refer to some of those cases,

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1 et cetera. So thank you for giving us a lot to
2 think about this morning and I know we'll ponder it
3 carefully.

4 JUDGE WAHL: Commissioner Cramer.

5 COMMISSIONER CRAMER: Just thank you to
6 everyone for a good hearing.

7 JUDGE WAHL: All right. This hearing is
8 closed. Thank you, counsel.

9 (Concluded at 1:24 p.m., the same day.)

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1 CERTIFICATE OF COURT REPORTER

2

3 I, Denise M. Andahl, a Registered

4 Professional Reporter,

5 DO HEREBY CERTIFY that I recorded in

6 shorthand the foregoing proceedings had and made of

7 record at the time and place hereinbefore

8 indicated.

9 I DO HEREBY FURTHER CERTIFY that the

10 foregoing typewritten pages contain an accurate

11 transcript of my shorthand notes then and there

12 taken.

13 Bismarck, North Dakota, this 28th day of

14 February, 2006.

15

16

17 _____
Denise M. Andahl
Registered Professional Reporter

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