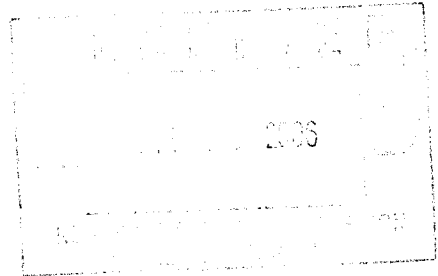


STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-05-551



CAPITAL ELECTRIC COOPERATIVE, INC.'S
BRIEF
ON
MONTANA-DAKOTA UTILITIES CO'S
MOTION TO DISMISS

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I. INTRODUCTION

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. Capital Electric Cooperative complains under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about Montana-Dakota Utilities Co.'s extension of service in a rural area inside the corporate limits of a municipality. The parties are referred to as Capital and MDU. This disputed area is known as part of Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge).

A. Chronology of the Boulder Ridge dispute

In 1987, the City granted a twenty-year franchise to MDU; in 1993, the City granted a twenty-year franchise to Capital. Both franchises are non-exclusive. Capital provided electric service in the northwest Bismarck area before the Boulder Ridge dispute erupted in the late summer of 2005.

On August 30, 2005, MDU petitioned the Board of City Commissioners of the City of Bismarck to "Declare Electric Franchise Rights" to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge.

On September 28, 2005, Capital complained to the Public Service Commission (PSC) that MDU was extending its facilities to Boulder Ridge in violation of N.D.C.C. 49-03-01 and 01.3, and that MDU's extension will unreasonably interfere with Capital's existing service and system.

On October 20, 2005, MDU answered admitting it had extended its facilities for electric distribution services in Boulder Ridge and intended to provide electric distribution services there. MDU alleged that action was taken pursuant to the rights

and obligations of its franchise with the City of Bismarck. MDU's answer also requested dismissal, alleging that Capital is not authorized to serve in Boulder Ridge and that the Public Service Commission does not have jurisdiction. (Answer, paragraphs 6, 12 and 13.)

On November 14, 2005, the Board of Bismarck City Commissioners (herein City Commission) issued "Findings, Conclusions, Decision and Order" that ". . . Order[ed] that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck." (herein the November 14th Order.).

On November 23, 2005, MDU moved the PSC to dismiss Capital's Complaint.

On November 30, 2005, Capital began an action in District Court under N.D.C.C. 32-23, seeking a declaration of its rights under its twenty-year franchise granted by the City in 1993. The principal defendant in that action is the City of Bismarck. MDU and the PSC are also named as parties but not as wrongful actors.

On February 9, 2006, the PSC heard oral arguments on MDU's Motion to Dismiss and held an evidentiary hearing on Capital's Complaint. At the close of the hearing, the administrative judge established a briefing schedule.

On February 10, 2006, the PSC held an informal meeting, on its own motion, to consider whether this proceeding should be indefinitely continued.

On February 22, 2006, the PSC held over a continuance order that had been placed on its consent agenda.

On March 6, 2006, Capital moved the PSC for a hearing on its proposed continuance order.

On March 7, 2006, the PSC withdrew a continuance order that had been placed on its agenda for its regular meeting.

On March 7, 2006, the PSC "suspended" the briefing schedule on its own motion. The PSC has scheduled a hearing on its proposed continuance order on March 23, 2006.

B. Territorial Integrity Act

Under N.D.C.C. Chapter 49-03, first enacted in 1927, an electric public utility must obtain from the PSC a certificate of public convenience and necessity authorizing construction or operation of a public utility plant or system. Chapter 49-03 was amended in 1965 by enactment of the "Territorial Integrity Act."

Before 1965, an electric public utility with a certificate of public convenience and necessity was permitted to extend its system into any area "contiguous" to areas already served by the company. 49-0301 N.D.R.C. 1953 Supp. As the old law was interpreted, almost any area was "contiguous." See Cass County Electric Cooperative v Otter Tail Power Co., 93 N.W.2d 47 (N.D. 1958); and Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956).

In 1965, the North Dakota Legislature amended Chapter 49-03, enacting N.D.S.L. 1965, Ch. 319, commonly called the "Territorial Integrity Act," codified as N.D.C.C. 49-03-01 through 49-03-01.5. The "electric public utilities" regulated by the 1965 law are privately owned suppliers of electricity. Rural electric cooperatives are not regulated by the Territorial Integrity Act. Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 (N.D. 1995) (herein Capital v PSC); Northern States Power Co. v Public Service Commission, 452 N.W.2d 340; (N.D. 1990) and Montana-

Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (N.D. 1967) (herein MDU v Johanneson).

After 1965, under the general terms of N.D.C.C. 49-03, the Territorial Integrity Act, an electric public utility must obtain from the Commission a certificate of public convenience and necessity authorizing construction or operation of a public utility plant or system. A certificate is required for every extension beyond or outside of the corporate limits of any municipality. A new certificate is not required for each and every extension of its electric distribution lines within the corporate limits of a municipality where it is lawfully operating. However, under the special terms of 49-03-01.3, an electric public utility's extensions shall not interfere with existing services of a rural electric cooperative or another electric public utility within that municipality.

“. . . [T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Electric Cooperative v Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1977). See also Capital v PSC, the Supreme Court's most recent decision under the Territorial Integrity Act, where the court reiterated, "The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities," and again referred to ". . . the purposes of the Act to minimize conflicts between electric public utilities and rural electric cooperatives and to provide territorial protection for rural electric cooperatives." 534 N.W.2d at 590 and 592.

This dispute over Boulder Ridge seems atypical because it is not a situation where an electric public utility seeks to serve customers in a rural area outside the corporate limits of a municipality. This dispute is about electric service in a rural area that has been annexed to a municipality.

Though it may seem atypical, this dispute is not unprecedented. It has an antecedent in Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990). (The two cases are referred to herein as Cass v NSP and NSP v PSC, respectively, and collectively as the "South Pointe cases.") The South Pointe cases settled a dispute in the Fargo area substantially the same as this one between Capital and MDU over Boulder Ridge in Bismarck. Capital's Complaint to the PSC against MDU is similar to Cass's Complaint against NSP in the South Pointe case.

C. Summary of the parties' arguments

In Capital's view, this case is fundamentally no different from the South Pointe cases. Except for one thing. The South Pointe cases have been decided and stand as precedent for the PSC to proceed rather than dismiss this case prematurely. The Supreme Court mandated the PSC should not take a narrow view of its jurisdiction. The PSC must look at the existing electric facilities that Capital and MDU have in place and determine whether extension of MDU's services to Boulder Ridge would unreasonably duplicate Capital's existing capital-intensive facilities and services. Cass v NSP, 419 N.W.2d 181, at 187.

1. MDU's position: PSC has no jurisdiction

MDU's Motion to Dismiss adds one more twist: MDU has asserted a defense not asserted in the South Pointe cases. MDU's Motion to Dismiss is premised "on the

grounds that [Capital] is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a matter of law, interfere with the services of [Capital]. [Capital's] Complaint should also be dismissed on grounds that the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge." (MDU's November 23, 2005, Motion, pages 2 & 3. The Motion essentially repeats the allegations of paragraphs 6, 12 and 13 of MDU's Answer, and is repeated again in its December 12, 2005, Reply Brief.)

The two grounds of MDU's Motion are alternate ways of expressing a single idea: The Boulder Ridge dispute is not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of the City Commission, as a matter of law under the State Constitution. According to MDU's legal theory:

Because CEC [Capital] is not authorized to provide service to Boulder Ridge, there can be no such interference by Montana-Dakota. The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck. Article VII, Section 11 of the North Dakota Constitution provides that the power of the City of Bismarck to franchise the operation of a public utility shall not be abridged by the legislative assembly. Subsection 8 of N.D.C.C. Section 49-03-06 provides that nothing in Chapter 49-03 shall be construed to limit the authority of the governing board of the City to exercise its franchising authority under N.D.C.C. 40-05-01. Accordingly, the [PSC] has no authority under 49-03-01 or 49-03-01.3 to limit the determination of the Board of City Commissioners that Montana-Dakota is entitled to provide electric utility service within Boulder Ridge under its franchise with the city of Bismarck.

(MDU's November 23, 2005, Motion, page 2.) According to MDU's theory, N.D.C.C. 49-03-01.3 is unconstitutional under Article VII Section 11 of the State Constitution, and for that reason the PSC has no jurisdiction.

MDU has insinuated into 49-03-01.3 the notion that "existing services provided by a rural electric cooperative" includes not only physical facilities for electric services, but also includes "franchise." A regulated utility is prohibited from interfering with the existing services of a rural electric cooperative within the municipal limits of a municipality, if and only if the rural electric cooperative has a franchise, according to MDU. If the cooperative does not have a franchise and the regulated utility does have a franchise, then the utility's franchise permits it to interfere with the exiting services of the cooperative, according to MDU.

This is not the first time MDU has asserted a municipal governing body's exercise of franchise powers to support MDU in a territorial dispute. It did so with brief success in Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (N.D. 1972), a case that did not directly involve the PSC or N.D.C.C. Chapter 49-03. One of MDU's current problems is that case stands discredited by the South Pointe cases, Cass v NSP, 419 N.W.2d at 186-87. In its effort to resuscitate its theory that it is prohibited from interfering with the existing services of a rural electric cooperative within a municipality only if the rural electric cooperative has a franchise, MDU discovered Article VII Section 11 of the Constitution, adopted in 1982.

But MDU still has another problem in reviving that theory. Capital is not in the same situation in 2005-06 as the rural electric cooperative in the 1972 case. Capital has a franchise, a twenty-year franchise granted by the City of Bismarck in 1993.

No problem, MDU thought. All it needed to do was ask Bismarck's Commissioners to declare Capital has no franchise rights in Boulder Ridge. After the City Commissioner's decision on November 14, 2005, Capital has no services or system in Boulder Ridge "as a matter of law." Wrap this up in the Constitution, and

MDU is entitled to extend its service into Boulder Ridge, free to interfere with Capital's existing service and system. So says MDU.

MDU seems to promote a legal fiction of its own composition: The facts of its interference with Capital's service and system are facts to be ignored as if those facts did not exist because (MDU argues) Capital's service and system that exists in the real world is non-existent "as a matter of law" under MDU's theories of constitutional law.

MDU's defense against Capital's complaint to the PSC is very simple: The Bismarck City Commission has bestowed on MDU a constitutional immunity or exemption from the PSC's jurisdiction to enforce the Territorial Integrity Act. MDU wants to invent a legalistic loophole in the Territorial Integrity Act. A truck-sized loophole of constitutional proportions.

2. Capital's position: PSC has jurisdiction

Capital contests MDU's assertion ". . . that the [PSC] does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge." Capital asserts that a local franchise is not a constitutional right or license that permits MDU to violate the State law that prohibits interference with Capital's service, whether or not Capital has a franchise.

In Capital's view, the PSC (and courts on appeal) should conclude that N.D.C.C. 49-03-01.3 is an integral ingredient of the Territorial Integrity Act's comprehensive regulatory scheme to accomplish a legislative policy and purpose to keep to a minimum wasteful duplication of capital-intensive utility services, to minimize conflicts between suppliers of electricity, and to provide territorial protection for rural electric cooperatives. The comprehensive policy and regulatory regimen of the Act applies to the entire state

of North Dakota. It is a legislated regulatory policy sustained by the Legislature's constitutional police powers, a policy and a power that apply throughout the State of North Dakota without regard to the vagaries of municipal boundaries or of local governing bodies. The legislature's policy and power prevail over claims of municipal sovereignty. Further, a utility regulated by the Act lacks standing to assert claims of municipal sovereignty as a defense to enforcement of the Act.

The PSC should assert its jurisdiction under Chapter 49-03, deny MDU's Motion to Dismiss, and decide whether MDU's actions interfered with Capital's service or system in violation of N.D.C.C. Chapter 49-03. Cass v NSP. The PSC should deny the Motion because ". . . administrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123, 126 (N.D. 1978). And MDU lacks standing. Application of Otter Tail Power Co. 452 N.W.2d 95 (N.D. 1990). The grounds of MDU's motion to dismiss presents the PSC with no alternative. The motion to dismiss must be denied.

II. LAW AND ARGUMENT

A. The collateral proceeding does not affect PSC jurisdiction

On November 30, 2005, (after MDU's Motion in the PSC proceeding challenged the PSC's jurisdiction), Capital began an action in District Court under N.D.C.C. 32-23, seeking a declaration of its rights under its twenty-year franchise granted by the City in 1993.

MDU's defensive claim in the PSC explains why Capital sued in District Court for judicial review of the City's November 14th Order. The PSC had received MDU's motion to dismiss asserting the City's November 14th Order effectively deprived the PSC of jurisdiction. The PSC seemed poised to embark on the same path it chose in the South

Pointe cases. Deny jurisdiction. Don't hold a hearing. Don't decide whether real facts show real interference and real duplication of capital-intensive facilities. Wait for the parties to take their arguments through the appeal process for the jurisdiction question to be resolved before an evidentiary hearing.

The principal defendant in that action is the City of Bismarck. MDU and the PSC are named as defendants, but not as wrongful actors. MDU and the PSC are there because N.D.C.C. 32-23-11 requires persons who might be affected by declaratory relief to be made parties. Because Capital's action against the City of Bismarck challenges the City Commission's November 14th Order to grant MDU's Petition, it is clear from N.D.C.C. 32-23-11 that MDU must be a party to that action. It is not so clear, but the PSC might be "affected" also because MDU has alleged the City Commission's November 14th Order as the basis for its Motion to Dismiss this proceeding at the PSC.

Capital began the declaratory action as a "helpful" collateral proceeding. See Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) (herein Otter Tail 1984) (A collateral action may be helpful to resolve questions of jurisdiction.) See also Application of Otter Tail Power Co., 452 N.W.2d 95 (N.D. 1990) (herein Otter Tail 1990) (Collateral proceeding by utility challenging PSC's jurisdiction; PSC's jurisdiction sustained).

Capital's collateral action for a declaratory judgment does not challenge the PSC's jurisdiction. The action for declaratory relief supports the PSC's jurisdiction. Notice that MDU has not made any cross-claim against the PSC to challenge the PSC's jurisdiction, or to collaterally attack the PSC's jurisdiction invoked by Capital's complaint to the PSC.

The PSC's institutional self-interest in sustaining its own jurisdiction is reflected by its pleading in the declaratory action. The PSC's Answer in the court action alleges Capital's Complaint fails to state a claim against the PSC. (PSC Answer, paragraph 1). The PSC is certain about its jurisdiction under the specific statutes applicable to Capital's Complaint to the PSC. (PSC Answer, paragraph 5.) Capital agrees with the PSC's allegations in the court action. The PSC should proceed to decide this case.

The PSC should not anticipate any court's decision in a collateral action to affect the PSC's jurisdiction in advance of the PSC's decision. Where that has been attempted, the PSC's jurisdiction has been sustained. Otter Tail 1990 and Otter Tail 1984. Where jurisdiction is challenged on constitutional grounds, the issues are to be resolved in the appeal process, not in collateral proceedings. Although Otter Tail 1984 remarked that a collateral proceeding might be helpful, the court followed the Johnson v Elkin procedure: "We reserve the issue of constitutionality to the first court to which the agency decision is appealed." 263 N.W.2d at 127 (that is, appealed from a PSC decision under the Administrative Agencies Practice Act).

Having completed its hearing on Capital's Complaint, the PSC should proceed with the decision-making process mandated by N.D.C.C. 28-32-39, by the South Pointe cases, and by Johnson v Elkin.

B. The PSC has the duty and the power to prevent duplication

1. The PSC must not construe its jurisdiction too narrowly

MDU's reasoning process for its Motion to Dismiss goes like this:

- a. Municipalities have the power to grant franchises under N.D.C.C. 40-05-01.

- b. The PSC has jurisdiction to restrain a public utility from interference with and unreasonable duplication of another electric service and system in a municipality where it has lawfully commenced operations under N.D.C.C. 49-03-01.3.
- c. There is an apparent conflict between N.D.C.C. 49-03-01.3 and 40-05-01.
- d. The conflict is resolved by Subsection 8 of N.D.C.C. 49-03-06: "Nothing in this chapter shall be construed to limit the authority of the governing board of a city to exercise its franchise authority under Section 40-05-01."
- e. Subsection 8 of Section 49-03-06 is a statutory repetition of Article VII, Section 11 of the North Dakota Constitution that states, "The power of the governing board of a city to franchise the construction and operation of a public utility within the city shall not be abridged by the legislative assembly."
- f. The constitutional declaration prevails. N.D.C.C. 49-03-01.3 abridges the franchise power of the governing boards of municipalities, so 49-03-01.3 is unconstitutional.
- g. Bismarck's City Commission exercised its constitutional franchise power when it granted franchises to MDU and Capital in 1987 and 1993, AND exercised the same power when it issued its November 14th Order. That order granted MDU's petition that the City Commissioners determine that MDU is authorized under its franchise for electric service in Boulder Ridge and Capital is not authorized under its franchise for electric service in Boulder Ridge.
- h. Therefore, the PSC has no authority under N.D.C.C. Chapter 49-03 to restrain MDU's extension of facilities in Boulder Ridge because the City Commission exercised a constitutional power superior to the PSC's power when it ordered that MDU is franchised and Capital is not for service within Boulder Ridge. The

City Commission bestowed on MDU a constitutional privilege and immunity from N.D.C.C. 49-03-01.3 and the PSC's powers of enforcement.

We will address MDU's assertion Article VII Section 11 limits the PSC's jurisdiction, and also cover the PSC's lack of authority to interpret the Constitution later. First, we address MDU's arguments under N.D.C.C. 49-03-06.

It is commonly acknowledged that the jurisdiction of the PSC is limited (See, e.g., Capital v PSC and City of Grafton v Otter Tail Power Co, 86 N.W.2d 197 (N.D. 1958): "The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." (Court Syllabus No. 6.) Yet, there is no doubt about the PSC's authority to interpret the statutes that it enforces, i.e. N.D.C.C. Title 49. Thus, the PSC needs to consider MDU's arguments under N.D.C.C. 49-03-06, and Capital's counter-arguments.

As the PSC considers whether or how N.D.C.C. 49-03-06 affects its jurisdiction in this effort to enforce 49-03-01.3, it will be aware that the conclusion it reaches will be reviewed as a matter of law on appeal.

The issue in this case is whether the PSC properly interpreted the provisions of the Territorial Integrity Act, Chapter 49-03, N.D.C.C. in determining in essence that it had no authority to act under the circumstances. This issue presents a question of law and consequently the PSC's determination on the matter is fully reviewable by this Court.

Cass v NSP, 419 N.W.2d at 184. So, the PSC should address the interpretation of N.D.C.C. 49-03-01.3 and 49-03-06 in exactly the manner of a court, in an effort to produce a decision that will be sustained on appeal, a decision that is consistent with the Court's decision in Cass v NSP: ". . . that the PSC interpreted the statute too narrowly. The PSC must look at the existing facilities that Cass [Capital] and NSP

[MDU] have in place in the area and determine whether extension of NSP's services in South Pointe would constitute an unreasonable duplication of capital-intensive facilities and services already provided by Cass." 419 N.W.2d at 187.

We agree that North Dakota law authorizes governing bodies of municipalities to grant and regulate franchises under N.D.C.C. 40-05-01, Subsection 57. We also agree that the PSC has jurisdiction to restrain a public utility from interference with and unreasonable duplication of another electric service and system in a municipality where it has lawfully began operations, under N.D.C.C. 49-03-01.3. We also agree that the 2005 amendment to the Territorial Integrity Act adding Section 49-03-06 included the sentence: "Nothing in this chapter shall be construed to limit the authority of the governing board of a city to exercise its franchise authority under Section 40-05-01." Article VII, Section 11 of the North Dakota Constitution directs that "The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly." Though these pieces of MDU's argument are true, other pieces are untrue, important pieces are missing, MDU's reasoning is defective, and its conclusion is false. The reasoning process presented by MDU is flawed because it does not comply with North Dakota's established rules of interpretation of the State's statutes.

2. Statutes are construed together to harmonize them

The correct result is the PSC does have jurisdiction under N.D.C.C. Chapter 49-03 to restrain MDU from interfering with and duplicating Capital's existing service and system in its rural service area that has been annexed to the City of Bismarck.

Capital presents the following analysis under North Dakota's established rules of interpretation. Capital's approach and purpose are consistent with the Court's

approach and purpose -- to harmonize all the statutes. See Capital v PSC and Cass v NSP.

a. All statutes are presumed to be constitutional

Although the PSC's authority to consider constitutional issues is strictly limited, it should not lose sight of the principles that all statutes are presumed to be constitutional, and a challenged statute is construed with a purpose to sustain its constitutionality. Exactly these principles have been applied in sustaining the Territorial Integrity Act! See MDU v Johanneson.

In this legal battle over Boulder Ridge, both contestants rely on the Territorial Integrity Act. Capital relies on N.D.C.C. 49-03-01.3, the prohibition on an electric public utility's interference with a rural electric cooperative's existing service and system in a rural area that has been annexed to a municipality. MDU relies on one sentence in Subsection 8 of N.D.C.C. 49-03-06 (enacted in 2005) that says nothing in this chapter shall be construed to limit the authority of the governing board of a city to exercise its franchise authority under N.D.C.C. 40-05-01. The apparent conflict pits N.D.C.C. 49-03-01.3 on one side against 40-05-01 and Subsection 8 of Section 49-03-06 on the other.

b. Chronology of enactment is not a major consideration

MDU seems to assume a rule of statutory interpretation that the more recent enactment always prevails to resolve a conflict, solely because it is more recent. But chronology of enactment is not a major consideration in statutory interpretation. The fundamental principle of statutory interpretation is to harmonize, to reconcile and to give effect to all related statutes, without regard to date of enactment. N.D.C.C. 1-02-08 delegates only a limited role for chronology in statutory interpretation. In cases of a

conflict between clauses in a statute, the clause last in order of date or position shall prevail only if: a) the clauses are irreconcilable, and b) except as otherwise directed by the rules of interpretation in N.D.C.C. 1-02-07. For both reasons, Capital asserts the rule of 1-02-08 does not apply.

c. A multi-step process resolves statutes in conflict

Case law and the statutory rules of interpretation, N.D.C.C. Chapter 1-02, describe a multi-step process to resolve an apparent conflict between clauses in statutes. First, the court determines whether there is a conflict. See Cass v NSP, 419 N.W.2d at 185 (“We are required to construe together all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent.”), and Capital v PSC, 534 N.W.2d at 589 (Statutes must be construed as a whole to determine the legislative intent, and they must be harmonized, if possible, to give full force and effect to each part.).

Second, if the court finds a conflict, it applies the rules of interpretation in N.D.C.C. Chapter 1-02, beginning with 1-02-07 and the question whether the conflicting statutes are different in character: Is one “general” and the other “special”?

Third, if the two statutes are different in character, the Court endeavors to reconcile them, to construe them, if possible, to give effect to both.

Fourth, if the statutes are irreconcilable, then the Court will apply the rule of N.D.C.C. 1-02-07: “. . . the special provision must prevail and must be construed as an exception to the general provision. . . .”

Fifth, before the special statute’s prevalence is final, the general one gets a second look. Was the general statute enacted later than the special one and is it “the manifest legislative intent that such general provision shall prevail?”

Sixth, and last, if several clauses in the same statute are irreconcilable and the conflict is not resolved under 1-02-07, “the clause last in order of date or position shall prevail.” N.D.C.C. 1-02-08. This is the only rule of statutory construction that remotely supports MDU’s claim that 49-03-06 deprives the PSC of jurisdiction to enforce 49-03-01.3.

MDU has both a maze and a gauntlet to navigate before it can successfully invoke N.D.C.C. 1-02-08 for its claim that N.D.C.C. 49-03-06 Subsection 8 (enacted in 2005) has opened the loophole for MDU to avoid and evade the long-standing prohibition of N.D.C.C. 49-03-01.3 as applied in the South Pointe cases. It’s like a board game. When one lands on the square that resolves the conflict, it means game over; all the other steps can be skipped. MDU should never get to the square marked 1-02-08.

And do not forget, MDU has no standing in the PSC case. It doesn’t even reach square #1 to assert the City’s rights of self-government. The City has not appeared in the PSC case to assert its possible rights under 49-03-06 and 40-05-01. (After we complete our analysis of statutory interpretation, we address the question whether the statute infringes upon a constitutional standard.).

Here is Capital’s analysis:

Step one. Is there a conflict between N.D.C.C. 49-03-01.3 vs. 49-03-06, Subsection 8 and 40-05-01? Or is the problem to harmonize statutes relating to the same subject? Capital believes the statutes are in harmony.

N.D.C.C. 40-05-01 comes into play because it is referred to in Subsection 8 of N.D.C.C. 49-03-06. The word “franchise,” appearing in Subsection 8 of N.D.C.C. 49-

03-06, indicates the object of the cross reference is Subsection 57 of 40-05-01 that gives the governing body of a municipality the power to grant franchises.

d. The PSC can harmonize statutes within its authority

A comprehensive approach to harmonizing N.D.C.C. 40-05-01 and 49-03-01.3 should not be attempted, because to do so involves application and interpretation of parts of Title 40 and case precedents affecting the powers of governing bodies of municipalities, a field of law the PSC should not enter. However, the PSC can and should harmonize the statutes within its bailiwick.

Under the general terms of N.D.C.C. 49-03-01 and 49-03-01.3 and 49-03-03, a new certificate is not required for each and every extension within a municipality where a public utility has been granted both a franchise and a certificate of public convenience and necessity. However, under the special terms of N.D.C.C. 49-03-01.3, a public utility's extension of its service into a rural area that has been annexed to the municipality is not automatically sanctioned by its previously granted certificate. Under N.D.C.C. 49-03-01.3, a regulated utility's certificate of public convenience and necessity does not authorize extensions that interfere with the service of a rural electric cooperative, even though the utility holds a franchise. Under 49-03-01.3, the public utility is not entitled to exercise the right or privilege it claims under the franchise where the same action is not sanctioned by a certificate of public convenience and necessity. Can this be harmonized with N.D.C.C. 40-05-01?

Since 1927, it has been the law of the State that a regulated utility's franchise cannot be exercised without a certificate of public convenience and necessity. N.D.C.C. 49-03-03. Harmony between the statutes is established by acknowledging an electric public utility regulated under N.D.C.C. 49-03 might hold a franchise issued

under 40-05-01, but that franchise cannot be exercised without compliance with N.D.C.C. 49-03; that franchise cannot be exercised if to do so amounts to an interference with the service and system of a rural electric cooperative.

N.D.C.C. 49-03-01.3 and 49-03-06 can also be harmonized, but that is accomplished under step 3, the first instance of the board game metaphor after step 2.

At the end of step 1, it should be concluded there is no conflict. Effect may be given to all these statutes, the PSC's jurisdiction under N.D.C.C. Chapter 49-03 to restrain interference that violates 49-03-01.3 does not conflict with, and is unaffected by, N.D.C.C. 40-05-01 or 49-03-06.

STEP 2. After step 1, it might be declared: Game over; there is no conflict; the statutes can be harmonized. Or the process might continue to the second step, given MDU's insistence that N.D.C.C. 49-03-06 somehow conflicts with 49-03-01.3.

At the second step, the competing statutes are compared to determine if they are different in character. Is one "general" and the other "special"? This is the approach taken by the Supreme Court in Cass v NSP.

Following its recognition that courts are required to construe together all statutes relating to the same subject and to harmonize them, if possible, the Supreme Court went on to determine that N.D.C.C. 49-03-01.3 was "special", because ". . . 49-03-01.3 specifically addresses the interference prohibited when a public utility extends its lines within a municipality." 419 N.W.2d at 186.

Half-way through step 2 and without extended argument, relying on the Supreme Court's decision in Cass v NSP, it is clear N.D.C.C. 49-03-01.3 is a special provision.

The second half of step two is: What about the statute on the other side of the apparent conflict, N.D.C.C. 49-03-06 and its reference to 40-05-01? Is the sentence in

Subsection 8 of N.D.C.C. 49-03-06, "Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under Section 40-05-01," a general or special one?

The sentence of Subsection 8 of N.D.C.C. 49-03-06, relied on by MDU, is a "general" law for a combination of reasons indicated by the Court's approach in Cass v NSP.

1. Under N.D.C.C. 1-02-07, a "special" law is an exception. The portion of Subsection 8 of N.D.C.C. 49-03-06 relied on by MDU does not use words that create an exception, but N.D.C.C. 49-03-01.3's prohibition of interference is introduced with the legally significant words "provided however."
2. Section 40-05-01, referred to in Subsection 8 of N.D.C.C. 49-03-06, is itself a general law, enacted under former Section 130 of the Constitution: "The legislative assembly shall provide by general law for the organization of municipal corporations." (Following revision of the Constitution, this former Section 130 is now encompassed in Article VII Section 2 of the Constitution.)
3. The entire Section 49-03-06 was newly enacted in 2005. MDU's out-of-context emphasis on one sentence of Subsection 8 of N.D.C.C. 49-03-06 does not convert that sentence to a special provision. Subsection 8 was enacted as a subsection, not as a new and independent section to N.D.C.C. Chapter 49-03. It is clear from reading the sentence in the context of the new Section 49-03-06 that that single sentence was not a special or exceptional part of 49-03-06, and so it cannot be considered as "special" in relation with all the pre-existing terms of Chapter 49-03.

So at the end of step 2, we submit it should be concluded: N.D.C.C. 49-03-01.3 is a special law, 40-05-01 is a general one, and the sentence of Subsection 8 of N.D.C.C. 49-03-06 is not a special part of the general terms of N.D.C.C. 49-03-06.

STEP 3. Step 3 takes us back to step 1. If the statutes that seem to be in conflict are determined to be “special” on one side (49-03-01.3) and “general” on the other, (49-03-06) then another attempt is made to reconcile (the statutory verb) and to harmonize (the judicial verb) the two parts, so that effect may be given to both.

N.D.C.C. 49-03-01.3 can be given the same effect after the 2005 enactment of N.D.C.C. 49-03-06, that it had before 2005, and N.D.C.C. 49-03-06 can be given effect without being hindered by anything in N.D.C.C. 49-03-01.3. This seems plainly evident from the words of N.D.C.C. 49-03-06 and from all the history of the Territorial Integrity Act before it was amended by enactment of 49-03-06.

e. Section 49-03-06 is a new way to resolve disputes

Before the enactment of N.D.C.C. 49-03-06, territorial disputes were addressed on a case-by-case basis. Electric providers' endeavors to arrange by private agreement for orderly development of service without unreasonable duplication of capital-intensive facilities were sometimes made, but were ineffective because they were unreliable, unreliable because they were unenforceable, easily abandoned unilaterally when one of the parties deemed the agreement no longer advantageous. Litigation ensued. Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508; Montana-Dakota Utilities Co. v Williams Electric Cooperative, 263 F.2d 432 (8th Cir 1959).

That is the background of the Territorial Integrity Act, and the same pattern of conduct persisted after the Act was enacted in 1965. See Cass v NSP, 419 N.W.2d at

183 and NSP v PSC, 451 N.W.2d at 341. That is also the factual background of the Boulder Ridge dispute. (See Capital's Complaint and MDU's Answer, and the November 14th Order.).

The legislature made a change in 2005, but not everything changed. What was changed was an addition to N.D.C.C. 49-03, a new way to resolve disputes, with no subtraction from the old ways. The new addition is N.D.C.C. 49-03-06, beginning with a plainly declared legislative purpose integral to the statute.

49-03-06. Service agreements among electric providers

1. This section authorizing service area agreements is intended to encourage harmony and operational efficiency among electric providers, promote safety, discourage unreasonable duplication of electric facilities, assure adequate and reliable electric service for all consumers and territories within the state, and provide anti-trust immunity to electric providers that negotiate service area agreements in accordance with this section.

The new section specifies in Subsections 2 through 7 what is required for a service area agreement to accord with the section, including its required submission to the Public Service Commission for a determination whether the agreement complies with the section and is in the public interest. The last Subsection says:

8. The governing board of a city may require approval or disapproval of a service area agreement between electric providers to the extent the agreement encompasses service locations within the city. Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under Section 40-05-01.

In other words, Subsection 8 says the City has a voice in this new alternative process.

This step 3, the process to reconcile and to harmonize 49-03-01.3 and 49-03-06 so that effect may be given to both, is bound to succeed.

Where electric providers are able to negotiate a service area agreement under N.D.C.C. 49-03-06, including gaining governmental approvals of the agreement, "the

agreement shall be valid and enforceable” (using the exact words of Subsection 6). This new statute, establishing a new way to resolve disputes, can be given full effect. New service area agreements can be negotiated and approved, unaffected by the special terms of N.D.C.C. 49-03-01.3 that covers situations where the parties were unable to settle their disputes by agreements, necessitating a hearing and decision by the PSC. And conversely, the special terms of N.D.C.C. 49-03-01.3 requiring the PSC to resolve disputes can be given effect, independent of the general provisions of N.D.C.C. 49-03-06 that authorize an entirely different way to resolve disputes.

Because the statutory provisions claimed to be in conflict can be harmonized and reconciled to give effect to both, N.D.C.C. 49-03-01.3, requiring the PSC to resolve disputes, can be given full effect independent of the terms of N.D.C.C. 49-03-06, authorizing area service agreements.

What about harmonizing the general terms of N.D.C.C. 40-05-01 and the special terms of 49-03-01.3? That has already been achieved under step 1.

To return to the board game metaphor, it's game over.

Step 4. Alternative arguments are always appropriate. If the court were to consider that the statutes claimed to be in conflict cannot be harmonized and reconciled under step 3, then it must apply the mechanical rule of N.D.C.C. 1-02-07: “. . . the special provision must prevail and must be construed as an exception to the general provision. . . .” The special terms of N.D.C.C. 49-03-01.3 must prevail over the general terms of N.D.C.C. 40-05-01 and 49-03-06. See also Cass v NSP.

Step 5. If the rules of statutory interpretation do not produce a final answer by the end of step 3, the answer produced by step four -- a special statute's prevalence -- is re-examined. Under step 5, the general statute gets a second look. Was the

general statute enacted later than the special one and is it “the manifest legislative intent that such general provision shall prevail?” N.D.C.C. 1-02-07. Research discloses no North Dakota cases interpreting statutes where a general statute prevailed over a special statute.

The general terms of N.D.C.C. 40-05-01 predate the special terms of 49-03-01.3, enacted in 1965, so 40-05-01 does not get a second look.

The general terms of N.D.C.C. 49-03-06 were enacted in 2005, after the special terms of 49-03-01.3, enacted in 1965, so 49-03-06 does get a second look. Considering the declared legislative intent of N.D.C.C. 49-03-06, not only to install a system of enforceable service area agreements as a method to resolve territorial disputes, but also declaring and reinforcing the long standing policy “. . . to discourage unreasonable duplication of electric facilities. . . ,” Capital asserts: There is no “manifest legislative intent” that the new statute’s general reference to a city’s exercise of its franchise authority overrides or impliedly repeals N.D.C.C. Chapter 49-03’s long standing method to resolve territorial disputes and to restrain unreasonable duplication of electric facilities, under the special terms of N.D.C.C. 49-03-01.3.

Step 6. The last possible step, the part of N.D.C.C. 01-02-08 that says “the clause last in order of date or position shall prevail” becomes operative only “if in the same statute, several clauses are irreconcilable . . . except as otherwise provided in Section 1-02-07.” Therefore, the last in order rule of N.D.C.C. 01-02-08 is inoperative.

Chronology of enactment is not a major consideration in statutory interpretation. The fundamental principle of statutory interpretation is to harmonize, to reconcile, and to give effect to all statutes without regard to chronology of enactment. As demonstrated above, the apparent conflict between 49-03-01.3 and 49-03-06 is both

reconcilable and resolved under Section 1-02-07. **The PSC's power under N.D.C.C. 49-03 to restrain interference that is prohibited by 49-03-01.3 is unaffected by N.D.C.C. 49-03-06.**

**f. Other general rules of statutory interpretation support
PSC jurisdiction**

Our conclusions are supported by other general rules of interpretation elsewhere in chapter 1-02.

1. "The entire statute is intended to be effective." N.D.C.C. 1-02-38, Subsection 2. The analysis under step 3, above, shows how Chapter 49-03 is entirely effective, including both N.D.C.C. 49-03-01.3 and 49-03-06.
2. "A just and reasonable result is intended." N.D.C.C. 1-02-38, Subsection 3. The analysis under steps 1 through 6, above, shows how the apparent conflict between statutes is both reconcilable and resolved, producing a just and reasonable result.
3. "A result feasible of execution is intended." N.D.C.C. 1-02-38, Subsection 4. The analysis under step 3, above, shows how both N.D.C.C. 49-03-01.3 and 49-03-06 can be effective and feasibly executed as alternate forms of dispute resolution.
4. "Public interest is favored over any private interest." N.D.C.C. 1-02-38, Subsection 5. MDU is a privately owned supplier of electricity, defined under N.D.C.C. 49-03-01.5 Subsection 2, one that is regulated by the Territorial Integrity Act in the public interest. See also Tri-County Electric Cooperative v Elkin, 224 N.W.2d 785 at 792 (1974) ("It is the *public* convenience and necessity, after all, with which the Commission is concerned, not private

preference.”), The analyses under N.D.C.C. 1-02-07 and 1-02-38 show how the apparent conflict between 49-03-01.3 versus 49-03-06 is both reconcilable and resolved, that all those sections can be effective and feasibly executed in the public interest, even though that result may be regarded as disadvantageous to MDU’s private interests.

5. N.D.C.C. 1-02-39, in several subsections, aids construction of ambiguous statutes. No purpose would be served by considering N.D.C.C. 49-03-01.3 as if it were ambiguous. It has a well established meaning under the South Pointe cases. While Capital does not believe N.D.C.C. 49-03-06 is ambiguous, the process of interpretation may as well be exhausted.

g. Section 49-03-06 is not ambiguous

N.D.C.C. 1-02-39 begins with the conditional “if” a statute is ambiguous and with a repetition of the court’s obligation to determine the intent of the legislation, and then lists other matters that “may” be considered in the process. “If” and the permissive “may” mean the court is not obliged to regard a statute as ambiguous and to find its meaning outside its plain words. The court is not to search for ambiguity or spiritual intent contrary to a statute’s plain words. See N.D.C.C. 1-02-05.

If the statute is ambiguous, “The object sought to be attained” may be considered. N.D.C.C. 1-02-39, Subsection 1. The object sought to be attained is declared in N.D.C.C. 49-03-06, Subsection 1, to authorize service area agreements. There is no indication of a legislative objective to change the PSC’s jurisdiction to resolve territorial disputes that are not the subjects of service area agreements reached under N.D.C.C. 49-03-06.

If the statute is ambiguous, "The circumstances under which the statute was enacted" may be considered. N.D.C.C. 1-02-39, Subsection 2. "The legislative history" may be considered. N.D.C.C. 1-02-39, Subsection 3. "The common law or former statutory provisions, including laws upon the same or similar subjects" may be considered. N.D.C.C. 1-02-39, Subsection 4. These three subsections are so related they can be addressed together.

As noted above, before the enactment of N.D.C.C. 49-03-06, territorial disputes were addressed on a case-by-case basis. Electric providers' endeavors to resolve territorial disputes by private agreement were sometimes made, but were ineffective because they were unenforceable. All this background was explained to the legislature's committees that considered the bill that added N.D.C.C. 49-03-06 to Chapter 49-03. March 25, 2005, Minutes of Senate Political Subdivisions Committee regarding Senate Bill 2412; March 31, 2005, Minutes of House Industry, Business and Labor Committee regarding Senate Bill 2412. All the background is unambiguously consistent with the statement of legislative intent in Subsection 1 of N.D.C.C. 49-03-06. All the background explains the legislature's decision to make an addition to N.D.C.C. 49-03 for a new way to resolve disputes. Nothing in the background indicates a legislative intent to subtract from the PSC's jurisdiction to resolve territorial disputes where there is no enforceable agreement in effect.

If the statute is ambiguous, "The consequences of a particular construction" may be considered. N.D.C.C. 1-02-39, Subsection 5. MDU's theory -- "The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck." (MDU Motion to Dismiss) -- runs 180 degrees contrary to the Territorial Integrity Act's "comprehensive regulatory

scheme.” NSP v PSC, 452 N.W.2d at 344-45. The Act specifically includes a prohibition of a public utility’s interference with and duplication of a rural electric cooperative’s service and system within the corporate limits of any municipality. N.D.C.C. 49-03-01.3 and South Pointe cases. Territorial disputes typically arise on or near the edge of cities served by public utilities under franchises but within rural areas served by rural electric cooperatives. “It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed.” Cass County Electric Cooperative v Wold Properties, Inc., 249 N.W.2d 514 at 520.

If MDU’s theory was to be adopted, such controversies that arise in rural areas that have been annexed to municipalities would not be settled under the Act’s comprehensive regulatory scheme, as in the South Pointe cases. Instead of such controversies being settled by the PSC under the Territorial Integrity Act, those controversies that arise in rural areas that have been annexed to municipalities would be entirely removed from the jurisdiction of the PSC. Those controversies would instead be subjected to a newly discovered municipal power that excludes the Territorial Integrity Act’s comprehensive regulatory scheme. In effect, by the process of annexation of rural areas, any city -- not only Bismarck’s, but any city’s governing body -- would have the power to remove from the Territorial Integrity Act the very territories whose integrity the Act was intended to protect. If MDU’s theory is adopted, then the Act’s comprehensive regulatory policy of territorial integrity and avoidance of wasteful duplication would be repealed and replaced by a balkanized and disintegrated non-system. MDU’s theory would make N.D.C.C. 49-03-01.3 meaningless, an interpretation the court will not abide. Cass v NSP, 419 N.W.2d at 186.

If a statute is ambiguous, "Administrative construction of the statute may be considered." N.D.C.C. 1-02-39, Subsection 6. In this case, there is no history of administrative construction of the new statute.

If a statute is ambiguous, "The preamble" may be considered. N.D.C.C. 1-02-39, Subsection 7. The preamble to 2005 N.D.S.L. Chapter 394, enacting the new section, N.D.C.C. 49-03-06, is of little or no use in determining the intention of the legislature, because the general legislative intent is expressed in N.D.C.C. 49-03-06 itself, in Subsection 1. There is no ambiguity that might be resolved by resort to the preamble. Even so, one can imagine MDU's claiming some support in the words of the preamble identifying Chapter 394 as an act "relating to the jurisdiction of the public service commission." Perhaps MDU might suggest these words in the preamble show a legislative intent to limit the jurisdiction of the PSC with MDU's interpretation of the statute.

The flaw in that strained interpretation (aside from the absence of any ambiguity) is the part of 49-03-06 relied on by MDU, Subsection 8 and one sentence in that subsection, says absolutely nothing about the jurisdiction of the PSC. On the other hand, all the other subsections (excepting only the statement of intent in Subsection 1) of 49-03-06 do address the PSC's jurisdiction. Subsections 2, 3, 4, 5, 6, and 7 are all related to the PSC's jurisdiction in the administration of the new alternate way of resolving territorial disputes. Subsection 8 should be interpreted the same way.

Additionally, 2005 N.D.S.L. Chapter 394 amended not only Chapter 49-03, but also N.D.C.C. 49-02-01.1. Before the 2005 amendment of that section, the PSC's jurisdiction over rural electric cooperatives was limited. In order for the new way of resolving territorial disputes by governmentally sanctioned agreements to be fully

effective, it was necessary not only to install many details in the several subsections of the new Section 49-03-06. It was also necessary to modify Section 49-02-01.1 to empower the PSC with limited jurisdiction over rural electric cooperatives for regulation of service area agreements reached under the new section of Chapter 49-03. The point of this observation is this: Where the legislature was so attentive to this detail, amending pre-existing provisions of 49-02-01.1 to increase the PSC's jurisdiction, it is incredible for MDU to argue that the same legislation decreased the PSC's jurisdiction under 49-03-01.3, where there is no similar detail in Chapter 394 specifically amending any other pre-existing sections of Chapter 49-03.

2005 N.D.S.L. Chapter 394 does not include any statutory language specifically decreasing the PSC's jurisdiction under 49-03-01.3, as applied in the South Pointe cases. Moreover, the absence of any amendment in all the years after the South Pointe decisions in 1988 and 1990 shows legislative approval. See Public Service Commission v City of Williston and Montana Dakota Utilities Co., 160 N.W.2d 534 (N.D. 1968). See also Capital v PSC, 534 N.W.2d at 592.

3. MDU's theory contradicts long standing public utility regulation

MDU's theory not only contradicts 49-03-01.3, it also contradicts a long-standing part of Chapter 49-03. This entirely undermines MDU's theory that a city's power exceeds the power of the PSC.

No public utility henceforth shall exercise any right or privilege under any franchise or certificate hereafter granted, or under any franchise or certificate heretofore granted, the exercise of which as been suspended or discontinued for more than one year, without first obtaining from the commission a certificate that public convenience and necessity require the exercise of such right or privilege.

N.D.C.C. 49-03-03. Surely it does not take extended argument to conclude that this statute means what it says. Though a public utility might be granted a franchise by a municipality's governing body, it may not construct and operate an electric distribution system under that franchise unless it has also been granted a certificate of public convenience and necessity, and unless it complies with N.D.C.C. Chapter 49-03, including 49-03-01.3.

The disintegration of the Territorial Integrity Act would be the clear consequence of MDU's theory. Therefore, the consequences are so extreme and revolutionary that the result cannot be considered to have been intended by the legislature. Such a result could not have been intended in the absence of a clear and unambiguous legislative intent.

4. The PSC should restrain MDU's duplication of services

The PSC's power under N.D.C.C. 49-03 to restrain interference under 49-03-01.3 is unaffected by N.D.C.C. 40-05-01 or 49-03-06. The PSC must not interpret N.D.C.C. 49-03 too narrowly. The PSC must look at the existing facilities that Capital and MDU have in place in the area and determine whether extension of MDU's services in Boulder Ridge would unreasonably duplicate Capital's capital-intensive facilities and services. Cass v NSP, 419 N.W.2d at 187.

C. The PSC has no authority to decide the constitutionality of statutes

Though MDU is clearly wrong in its assertion that N.D.C.C. 49-03-06 deprives the PSC of its jurisdiction to enforce 49-03-01.3, there remains to be addressed MDU's contention that N.D.C.C. 49-03-01.3 conflicts with the State Constitution. MDU argues that Article VII, Section 11 of the Constitution deprives the PSC of its jurisdiction to

enforce 49-03-01.3, so that resolution of the Boulder Ridge dispute is not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03. According to MDU's theories in its Motion to Dismiss, "The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck" as a matter of constitutional law.

1. The existence of a franchise is not a threshold issue

When MDU's Motion to Dismiss was filed in November, 2005, Capital's responsive brief argued the motion should be denied and speculated that the PSC might regard MDU's claim about franchises as a "threshold" issue that should be resolved before the PSC proceeded to determine whether MDU's action amounts to prohibited interference with Capital's service and system. (Capital's December 14, 2005 - Brief, page 3). MDU asserted, "The Commission cannot decide a claim of interference within a city without making a threshold determination that the complaining party holds a franchise with the city to serve the affected service area." (MDU's December 12, 2005, Brief, pages 2 & 3).

MDU's Motion to Dismiss was re-argued at the evidentiary hearing on February 9, 2006. At the close of the hearing a briefing schedule was established. The PSC convened an informal work session on February 10, 2006. The PSC acknowledged it has no authority to determine the franchise issue. The PSC opined that the franchise issue needs to be determined prior to issuing a decision. The PSC proposed this proceeding be continued for an indefinite period until the franchise issue is finally determined.

Later, the PSC's posted agenda for its meeting of February 22, 2006, included a continuance order in this case. When minutes of the meeting were posted, the

continuance order was reported to be held over. The continuance order was again on the PSC's March 7, 2006, meeting agenda.

On March 6, 2006, Capital filed a Motion for a hearing on the continuance. At the March 7, 2006, meeting, the continuance order was withdrawn, the PSC adopted a motion to "suspend the briefing schedule established on February 9." By adopting the motion to "suspend" instead of to "continue," the PSC changed the form but not the substance of its action, to postpone action in this proceeding. The PSC took this action in the absence of a request by either party to continue, suspend, or otherwise delay or postpone action on either Capital's Complaint or MDU's Motion.

Only MDU has argued that the determination of the franchise issue is a "threshold" issue. Capital has consistently asserted that the PSC should deny the Motion to Dismiss and proceed to a decision on the interference issue. Evidently, based on Commissioner Wefald's February 28, 2006, report to the Legislature's committee, and the PSC's "suspension" of the post-hearing briefing schedule, the PSC regards MDU's Motion to Dismiss as one the PSC might grant, rather than follow the guidance of the Supreme Court in the South Pointe cases.

2. The PSC has no authority to determine the franchise issue

Truly, the Commission has no authority to determine the franchise issue. But it is not true, as asserted by MDU, that "The Commission cannot decide a claim of interference within a city without making a threshold determination that the complaining party holds a franchise with the city to serve the affected service area." (MDU's December 12, 2005, Brief, pages 2 & 3). MDU's statement is untrue because it suggests the PSC should make the determination whether the complaining party holds a franchise, the very question the PSC has now acknowledged it cannot determine.

The reason the PSC cannot determine the question of franchise rights is that question is one and the same as the constitutional question presented by MDU's motion to dismiss, whether N.D.C.C. 49-03-01.3 is unconstitutional under Article VII Section 11. Because the franchise issue is the constitutional issue, the PSC erred when it concluded at its February 10, 2006, work session that it is not possible for the PSC to issue a decision until the franchise issue is determined.

MDU claims that the statute that prohibits interference, N.D.C.C. 49-03-01.3, violates Article VII Section 11 of the State Constitution: "The power of the governing board of a city to franchise the construction and operation of a public utility within the city shall not be abridged by the legislative assembly." That argument is not a reason to grant MDU's Motion to Dismiss, or to abstain from deciding by a continuance order. That argument is the reason that the PSC must deny the Motion.

The PSC should deny the Motion because ". . . administrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123, 126 (N.D. 1978). According to Johnson v Elkin, when a constitutional issue arises in an administrative agency proceeding that challenges the PSC's authority, the PSC should not attempt to resolve the constitutional issue, or wait for it to be resolved in a collateral proceeding.

When a party to a PSC proceeding (such as MDU) raises a constitutional objection to the PSC's jurisdiction, the PSC is not temporarily disabled from proceeding until its jurisdiction is resolved. The PSC should proceed with the decision in this case because it is obligated to presume the constitutionality of the statutes that it enforces. Any constitutional issues will be decided on appeal. "We reserve the issue of constitutionality to the first court to which the agency decision is appealed." 263 N.W.2d

at 127 (that is, appealed from a PSC decision under the Administrative Agencies Practice Act). That is the orderly way to deal with MDU's constitutional claims under Johnson v Elkin and under the Administrative Agencies Practice Act, N.D.C.C. 28-32-46.

The PSC must not explicitly grant MDU's Motion to Dismiss. Nor should the motion be implicitly granted by a continuance or suspension or other postponement or delay (by any other label) in proceeding to a decision. For the PSC to grant MDU's Motion, explicitly, or implicitly, would give MDU's argument more respect than it is entitled to and give the Legislature's enactment of the Territorial Integrity Act less respect than is its due under the fixed rule that all statutes are presumed to be constitutional. N.D.C.C. 1-02-38; MDU v Johanneson!!

For the PSC to explicitly or implicitly grant MDU's Motion on claimed grounds of constitutional limitations on the PSC's jurisdiction would transgress the rule that administrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. For the PSC to explicitly or implicitly grant MDU's Motion to any degree would contradict the mandates of the South Pointe cases and Johnson v Elkin. It would also usurp a judicial power by over-ruling those cases and MDU. v Johanneson's upholding the constitutionality of the Territorial Integrity Act. It would ignore the hierarchy of the institutions of government, and the superiority of the Supreme Court. It should not be necessary, but it is possible to cite authority that the PSC has no authority to over-rule the Supreme Court. Public Service Commission v City of Williston and Montana-Dakota Utilities Co., 160 N.W.2d 534 (N.D. 1968).

3. Section 49-03-01.3 has been declared constitutional

MDU's arguments ignore the status of N.D.C.C. 49-03-01.3 under the Constitution. N.D.C.C. 49-03-01.3 is not an orphan of doubtful legitimacy; it is the product of the State Legislature's exercise of its constitutional powers. N.D.C.C. 49-03-01.3 is not only presumed to be constitutional in relation to Article VII Section 11; the Territorial Integrity Act is more than presumptively constitutional. It has been the subject of rigorous litigation and found to be a constitutional exercise of the Legislature's comprehensive police power.

It cannot be successfully maintained that the Legislature does not have the power to regulate public utilities under the police powers of the State. The plaintiffs make no such contention. It is conceded, we believe, that the power to regulate includes the power to eliminate competition.

MDU v Johanneson, 153 N.W.2d at 420-21. Now, nearly 40 years later, MDU may find it convenient to ignore the status of all of the Territorial Integrity Act as more than presumptively constitutional. But the PSC cannot ignore or over-rule MDU v Johanneson and the PSC cannot determine that N.D.C.C. 49-03-01.3 is unconstitutional!

MDU might argue that Article VII Section 11 was adopted in 1982, and that it supersedes the 1967 decision in MDU v Johanneson, upholding the constitutionality of the Territorial Integrity Act. Capital disagrees. Capital does not argue the constitutional issues for the PSC to decide. The PSC cannot resolve that issue.

D. MDU has no standing

There is one additional reason to deny MDU's motion. Application of Otter Tail Power Co. 452 N.W.2d 95 (N.D. 1990) (herein Otter Tail 1990) dealt with regulated utility's proposed extension of service onto an Indian reservation. "Otter Tail asserted that assumption of jurisdiction by the PSC under N.D.C.C. 49-03 would unlawfully

interfere with the Tribe's sovereign rights of self-government." The Court concluded ". . . Otter Tail had no standing to advance the Tribe's self-government interests." 452 N.W.2d at 97. Take those quotes and change the names to fit this case, and it reads like this: MDU asserts that assumption of jurisdiction by the PSC would unlawfully interfere with the City of Bismarck's sovereign rights of self-government under Article VII Section 11 of the Constitution. MDU has no standing to advance the City's self-government interests.

The PSC should assert its jurisdiction under Chapter 49-03, deny MDU's Motion to Dismiss, and decide whether MDU is interfering with Capital's service and system in violation of N.D.C.C. Chapter 49-03. The grounds of MDU's Motion -- a challenge to the constitutional authority of the PSC -- presents the PSC with no alternative. The motion to dismiss must be denied. After the PSC has denied MDU's Motion to Dismiss, the PSC should proceed to decide the interference issue on the evidence before it under the Territorial Integrity Act and all its precedents.

Capital is entitled to an order restraining MDU's extension of facilities into Boulder Ridge. There is no good reason for the PSC to assume responsibility for MDU's theories of constitutional law and municipal government law as superseding the Territorial Integrity Act. The PSC should follow the laws that it operates under, and leave MDU's arguments where they are, in MDU's briefcase that it can carry to a higher tribunal.

Whether MDU argues about the City's franchise powers as a matter of constitutional law under Article VII Section 11, or as a matter of statutory law under N.D.C.C. 40-05-01, in either case the city's powers are not MDU's rights; it has no standing.

III. CONCLUSION: The PSC must deny the Motion to Dismiss and decide this case on its merits

A. The case is ready for decision

Capital's Complaint to the PSC and MDU's motion to dismiss are ready for the PSC to act. An evidentiary hearing has been held. MDU's motion to dismiss has been denied once, argued, and a post-hearing round of briefs is underway. This case is ready for decision under N.D.C.C. 28-32-39. There was no good cause to suspend the briefing schedule.

The PSC is constrained by Johnson v Elkin and Otter Tail 1990 to deny MDU's Motion to Dismiss. The Motion to Dismiss should be denied, not for the reason MDU is wrong about the Constitution. The motion to dismiss should be denied as a matter of routine because the PSC should not consider, has not jurisdiction to decide, whether MDU is right or wrong about the Constitution. The PSC cannot decide the constitutional issues raised by MDU, and MDU lacks standing to raise the issues.

The PSC is constrained by Johnson v Elkin, Otter Tail 1990, Otter Tail 1984 and the South Pointe cases to proceed, unaffected by collateral proceedings in district court.

Under the South Pointe cases, the PSC must not interpret its jurisdiction narrowly. Under rules of statutory interpretation, harmonizing and giving full force and effect to all of N.D.C.C. Chapter 49-03, the PSC must conclude it has jurisdiction to restrain MDU from interfering with and duplicating Capital's existing service and system in its rural service area that has been annexed to the City of Bismarck.

The PSC must look at the existing facilities that Capital and MDU have in place and determine whether extension of MDU's services in Boulder Ridge would

unreasonably duplicate capital-intensive facilities and services already there. Cass v NSP, 419 N.W.2d at 187. When a complaint is filed under the Territorial Integrity Act, the question of which electric suppliers' facilities are actually duplicative or wasteful is one of fact for the PSC to determine. NSP v PSC, 452 N.W.2d at 345. Under the South Pointe cases, the PSC must make its determination based on real facts, the uncontroverted evidence presented at the hearing on February 9, 2005.

Whether Capital's facilities and service are to be ignored as if they did not exist "as a matter of law" -- constitutional law under MDU's theories of municipal sovereignty and supremacy -- is not for the PSC to decide under Johnson v Elkin.

B. Delay violates the presumption of constitutionality

After the South Pointe cases, and informed by Johnson v Elkin, Otter Tail 1984, and Otter Tail 1990, the PSC should not repeat the disastrous course of the South Pointe case: Deny jurisdiction. Wait for the parties to take the jurisdiction issue through the appeal process. Wait for the Supreme Court to remand the case for a determination by the PSC whether MDU's extension interferes with and would be an unreasonable duplication of investment and available facilities and services by Capital. Expect another appeal. Multiplicity of legal proceedings is another form of wasteful duplication. Delay violates the presumption of constitutionality.

There is one more case that supports Capital's position that MDU's motion to dismiss should be denied and this case should move on to a decision on the evidence, as instructed by the South Pointe cases and Johnson v Elkin. The PSC should adopt in this case the procedure it adopted -- at MDU's urging -- in Capital v PSC, 534 N.W.2d 587. In that case, one party asserted jurisdiction, the other moved to dismiss on jurisdictional grounds. The PSC did not dismiss and proceeded to hearing and

decision, not taking a narrow view of its jurisdiction. On appeal the district court and the Supreme Court addressed the jurisdiction issue. There is no better example of responsible and orderly procedure than the procedure the PSC employed in Capital v PSC.

Paraphrasing the Court, the PSC should deny the Motion to Dismiss, because it has no authority to decide upon the constitutionality of the statutes it applies, and because the PSC should not take a narrow view of its jurisdiction under N.D.C.C. 49-03. The PSC must proceed to look at the existing electric facilities that Capital and MDU have in place and determine whether extension of MDU's services to Boulder Ridge unreasonably duplicated Capital's facilities and services.

Dated this 10th day of March, 2006.

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