

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Capital Electric Cooperative, Inc. vs  
Montana-Dakota Utilities Co.  
Complaint**

**Case No. PU-05-551**

**BRIEF IN SUPPORT OF CONTINUANCE**

On September 29, 2005, Capital Electric Cooperative, Inc. (Capital Electric) filed a Complaint alleging that Montana-Dakota Utilities Co. (MDU) (1) intends to provide electric service to a development in Complainant's service area and (2) such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital Electric. MDU filed an Answer and Counterclaim, and also filed a Motion to Dismiss the Complaint.

The Complaint before the Commission was preceded by MDU's filing with the Bismarck Board of City Commissioners a Petition to Declare Franchise Rights of MDU and Capital Electric to provide electric service to Part of Boulder Ridge First Addition to the City of Bismarck. On November 14, 2005, the Board of City Commissioners issued its Findings, Conclusions, Decision and Order that electric power service to Part of Boulder Ridge Subdivision is properly served by MDU, subject to Capital Electric retaining any existing customers.

Capital Electric initiated a Declaratory Judgment proceeding by filing a Complaint dated December 1, 2005, in the District Court, South Central District, Burleigh County, North Dakota naming MDU, the City of Bismarck, North Dakota and the Public Service Commission as Defendants seeking a judgment declaring Capital Electric's rights under its franchise to operate an electric distribution system in Bismarck.

On January 30, 2006, the District Court issued its Memorandum Opinion and Order on the City of Bismarck's Motion to Dismiss or in the Alternative for a More Definite Statement and on MDU's Motion to Dismiss. The Court stated its opinion that the question of whether MDU is operating lawfully under its franchise is one of franchise

interpretation by the City Commissioners, and that only after the City Commissioners have decided the issue, and after resulting appeal, may the Public Service Commission determine whether MDU is unreasonably interfering with Capital Electric's operations. The Court acknowledged that the Public Service Commission may have a different opinion concerning the matter.

On February 9, 2006, the Commission held a public hearing to consider the issues identified in its Notice of Rescheduled Hearing issued on December 30, 2005. The issues identified for hearing were:

1. Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant.
2. Whether Respondent should be restrained and enjoined from constructing or extending its lines, plant, or system into Complainant's franchised service area.
3. Whether Respondent should remove all of its facilities in the Complainant's service area.

At the close of the hearing, the Commission set a briefing schedule. Then on February 10, 2006, the Commission held a public working session for the purpose of discussing the best course of action for the Commission taking into consideration the pending action before the District Court regarding the franchise issues. The Commission held the working session the day after the hearing so the parties would be apprised of the Commission's considerations regarding the matter. The Commission determined that the most appropriate action would be to continue the complaint proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

An Order for Continuance was prepared and was put on the regular agenda for the February 22, 2006 Commission meeting. The agenda item was held over to consider a minor change in language. The Order for Continuance was put on the regular agenda for the March 7, 2006 Commission meeting. The agenda item was

withdrawn following receipt of the Motion and Brief for Hearing on “Continuance” filed by Capital Electric on March 6, 2006. On March 7, 2006, the Commission suspended the briefing schedule in this proceeding. On March 13, 2006, the Commission issued a Notice of Hearing scheduling a public hearing to be held March 23, 2006, to hear oral arguments on the issue of whether the Commission has authority to issue an order continuing the proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

Commission Staff (“Staff”) position is that a threshold issue to a determination by the Commission of the issues relating to interference is the determination of which company, MDU or Capital Electric, has the right under franchise from the City of Bismarck to provide electric service to Part of Boulder Ridge First Addition. All parties agree that the question of franchise rights is not one that can be determined by the Commission. That issue is presently before the District Court.

There presently is an appeal of the decision issued by the City of Bismarck regarding the franchise rights for electric service to the area. A hearing on the appeal was held on March 2, 2006. The Order on Appeal was issued by the District Court on March 14, 2006, denying Capital Electric’s appeal.

Capital Electric has chosen a course of action that has resulted in simultaneous proceedings occurring in state district court and before the Commission, an administrative agency.

The issues involved in both proceedings involve the right to provide electric service in Part of Boulder Ridge Subdivision. The basic issue before the District Court is which electric provider has the city franchise right to provide electric service to the area. The franchise right to provide service to the area is a critical component to an electric provider’s ability to provide electric service to the area and is a factor that Staff believes must be considered in determining under N.D.C.C. § 49-03-01 whether an electric provider is interfering or is about to interfere unreasonably with the service or system of any other electric provider. North Dakota law clearly gives municipalities the authority to issue franchises to providers of electric service and to require an electric

provider to obtain a franchise prior to providing electric service within the municipality. It is also clear under the law that only the municipality can decide who should have a franchise.

The present situation is untenable in that it puts two governmental entities at odds with each other. What Capital Electric is asking the Commission to do is issue a decision that may be at odds with the action taken by the City of Bismarck. The apparent position of Capital Electric is that the Commission should ignore the fact that the City of Bismarck has decided that MDU has the franchise right to provide electric service to Part of Boulder Ridge Subdivision, and that the Commission should determine under N.D.C.C. § 49-03-01 that MDU, in constructing or extending its line, plant, or system, unreasonably interferes or is about to interfere unreasonably with Capital Electric's service or system.

A decision by the Commission under N.D.C.C. §§ 49-03-01 and 49-03-01.4 is premature. The franchise issue is a critical component of this proceeding and is a threshold issue. No matter what the Commission may consider regarding infrastructure that is in place or other factors that pertain to a determination of interference under N.D.C.C. § 49-03-01, Capital Electric must have a franchise from the City of Bismarck to provide service to the area. To issue a decision regarding interference under N.D.C.C. §§ 49-03-01 and 49-03-01.4 before the franchise issue is resolved would, as suggested by District Court Judge Bruce Haskell in his January 30, 2006 Memorandum Opinion and Order in the District Court proceeding, be putting the cart before the horse.

Capital Electric objected to the Commission's proposed continuance because the Commission did not offer the parties an opportunity for hearing on the Motion for Continuance. Capital Electric contends that a continuance on the Commission's motion is out of order because the hearing in this case was commenced and completed. N.D. Admin. Code § 69-02-04-03 provides that "[a]fter hearings are scheduled, continuances may be granted by the commission for good cause." The rule also provides that "[t]he commission may effect a continuance upon its own motion." Contrary to what Capital Electric argues, the rule does not prohibit continuances after a hearing has been completed. The rule simply provides that continuances may be granted for good cause

after hearings are scheduled. In order to prohibit continuances after a hearing has been completed, the rule would have to provide language to the effect that continuances may be granted for good cause after hearings are scheduled but before hearings are completed.

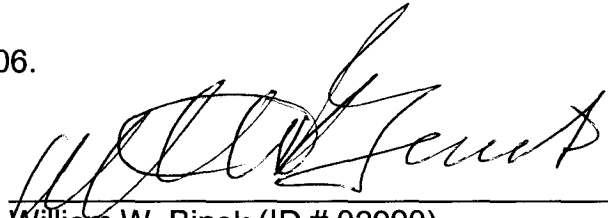
Capital Electric does concede that even if N.D. Admin. Code § 69-02-04-03 can be interpreted to prohibit granting of continuances after a hearing has been held, N.D. Admin. Code § 69-02-01-11 reserves to the Commission the right to suspend compliance with any rule upon due notice to the parties. As noted above, the Commission has issued a Notice of Hearing at Capital Electric's request to hear oral arguments on the issue of whether the Commission has authority to issue an order continuing the proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

Good cause exists for the Commission to continue this proceeding for an indefinite period of time until the issue of city franchise rights is finally determined. As noted previously, a decision by the Commission under Chapter 49-03 of the North Dakota Century Code is premature. The District Court has denied Capital Electric's appeal so the status of the city franchise issue is unchanged and the decision issued by the City of Bismarck that MDU has the franchise to serve Part of Boulder Ridge Subdivision is upheld. The District Court's decision will likely be appealed to the North Dakota Supreme Court. It is conceivable that a Supreme Court decision may contain guidelines or directives relating to city franchises for electric service and what consideration or weight a city franchise or lack of a city franchise may or should be given in a determination of interference under Chapter 49-03 of North Dakota Century Code.

Nothing worthwhile can be gained by having the Commission issue a decision at this time. The only result will be more litigation, confusion and uncertainty in an already confusing and uncertain proceeding. Conversely, much can potentially be gained by delaying a decision until the city franchise issue is finally resolved. Furthermore, neither party will likely be harmed by the Commission delaying its decision until the courts resolve the franchise issue because any decision issued by the Commission under the

present circumstances would likely be appealed resulting in even more delay and uncertainty.

Dated this 16th day of March, 2006.

A handwritten signature in black ink, appearing to read "William W. Binek", written over a horizontal line.

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