

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative, Inc.

Complainant,

vs.

Case No. PU-05-551

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

Respondent.

**COMPLAINANTS' PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

APPEARANCES

Commissioners Tony Clark, Susan E. Wefald, and Kevin Cramer.

Daniel S. Kuntz, Senior Attorney, MDU Resources Group, Inc., PO Box 5650, Bismarck, ND 58506-5650, appearing on behalf of Montana-Dakota Utilities Co.

Carol K. Larson, Pringle & Herigstad, PO Box 1000, Minot, ND 58702-1000, appearing on behalf of Capital Electric Cooperative, Bismarck, North Dakota.

Al Wahl, Office of Administrative Hearings, 1707 North 9th Street, Bismarck, ND 58501-1882, appearing as Hearing Examiner.

PRELIMINARY STATEMENT

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. This case involves a rural electric cooperative's complaint under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about an electric public utility's extension of service in a rural area that is inside the corporate limits of a

municipality. This case involves an area known as part of Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge).

On September 28, 2005, Capital Electric Cooperative, Inc. (Capital) filed a complaint alleging that Montana Dakota Utilities Inc., a division of Montana-Dakota Resources Group, Inc. (MDU) intends to extend its facilities to Boulder Ridge in violation of N.D.C.C. Sections 49-03-01 and 49-03-01.3, and alleging that MDU's extension will unreasonably interfere, or is about to unreasonably interfere, with Capital's existing service or system.

On October 20, 2005, MDU filed an Answer and Counterclaim. MDU admits Capital's allegation that MDU intends to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. MDU admits it extended its facilities to provide electric distribution services in Boulder Ridge. MDU denies its service will interfere with service or facilities of Capital. MDU's Answer also asserts the Complaint should be dismissed on grounds the Public Service Commission (PSC) does not have jurisdiction to restrain or enjoin MDU from exercising its franchised authority to provide electric distribution services in the City of Bismarck, including Boulder Ridge.

On November 23, 2005, MDU filed a Motion to Dismiss Capital's Complaint, repeating the assertion that the PSC does not have jurisdiction and also asserting that Capital is not authorized to provide service within Boulder Ridge and therefore MDU cannot, as a matter of law, interfere with the services of Capital.

On October 18, 2005, the PSC issued a Notice of Hearing for December 13, 2005. On November 30, 2005, that hearing was continued. On December 30, 2005, the PSC issued a Notice of Rescheduled Hearing for February 9, 2006. The notice identified the following issues to be considered:

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.

On February 9, 2006, a public hearing was held as scheduled in the Commission hearing room, State Capitol, Bismarck, North Dakota.

At the hearing, MDU renewed its Motion to Dismiss and withdrew its counterclaim. The parties argued MDU's Motion for Dismissal.

At the hearing, Capital presented evidence consisting of testimony and documentary evidence. MDU cross-examined Capital's witness. MDU presented no evidence.

MDU's Motion for Dismissal is grounded on Article VII Section 11 of the North Dakota Constitution. Article VII Section 11 of the Constitution provides:

"The power of the governing body 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."

MDU asserts the PSC has no authority under N.D.C.C. 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. In effect, MDU claims that N.D.C.C. 49-03-01.3 violates the North Dakota Constitution's provisions for local government.

The City of Bismarck did not appear or participate in these proceedings in any manner. Under Application of Otter Tail Power Co, 451 N.W.2d 95 (N.D. 1990), an electric

public utility has no standing to assert that assumption of jurisdiction by the Public Service Commission's would unlawfully interfere with rights of local self-government.

All statutes are presumed to be constitutional. N.D.C.C. 1-02-38. All of Chapter 49-03, including 49-03-01.3, has been the subject of litigation and found to be constitutional. If the PSC were to grant MDU's Motion to Dismiss Capital's Complaint, the PSC would be assuming a power to overrule the Supreme Court's decision in Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (1967). The PSC has no such power. Public Service Commission v City of Williston, 160 N.W.2d 534 (N.D. 1968) “. . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate.” Johnson v Elkin, 263 N.W.2d 123 at 126. Under Johnson v Elkin, when a constitutional issue arises in a PSC proceeding, the Commission should not attempt to resolve the constitutional issue. The PSC should proceed with the hearing because the Commission is obliged to presume the constitutionality of the statutes under which it operates. Any constitutional issue may be decided on appeal, under Johnson v Elkin and under the Administrative Agencies Practice Act, N.D.C.C. 28-32-46.

MDU also argues that N.D.C.C. 49-03-06, enacted in 2005, authorizing area service agreements between electric service providers, limits the PSC's jurisdiction to enforce the provisions of N.D.C.C. 49-03-01.3. Applying the rules of statutory interpretation under N.D.C.C. Chapter 1-02, and decisions of the North Dakota Supreme Court interpreting the provisions of N.D.C.C. 49-03, the Commission's jurisdiction to restrain interference under 49-03-01.3 is unaffected by N.D.C.C. 40-05-01 or 49-03-06.

Under the general provisions of N.D.C.C. 49-03-01 and 49-03-01.3, 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, but a new certificate is not required for each and every extension of its electric distribution lines within the corporate limits of a municipality within which it has lawfully commenced operations. However, under the special provision of 49-03-01.3, an electric public utility's extension shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality.

Under N.D.C.C. 49-03-01.3 and precedents of the PSC and the North Dakota Supreme Court, the PSC should not take a narrow view of its jurisdiction, particularly in view of the presumption of the constitutionality of the statutes under which it operates. Under N.D.C.C. 49-03-01.3 and precedents of the PSC and the North Dakota Supreme Court, an electric public utility's unreasonable duplication of investment and available services provided by a rural electric cooperative in a rural area that has been annexed to a municipality, constitutes interference that is prohibited by the statute. The question of which electric suppliers' facilities are actually duplicative or wasteful is one of fact for the PSC to determine. In making the determination, the PSC considers which supplier is better able to serve the area due to the nature and extent of existing facilities in the area, whether the electric public utility's extension into the area would constitute an unreasonable duplication of capital intensive facilities and services already provided by the rural electric cooperative, and which would best promote orderly and economic development of electric service. 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 constitute an unreasonable duplication of capital intensive facilities and services already provided by Capital. Cass County Electric Cooperative v Northern States Power Co., 419

N.W.2d 181 (N.D. 1988), and Northern States Power Co. v Public Service Commission, 451 N.W.2d 340 (N.D. 1990), affirming the order of the Commission in Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (1988).

Having heard and considered this matter, the Commission makes its:

FINDINGS OF FACT

1. Capital is an electric cooperative corporation organized under N.D.C.C. Chapter 10-13. (N.D.C.C. 49-03-01.5 subd 4).

2. MDU is an electric public utility, a privately owned supplier of electricity offering to supply or supplying electricity to the general public. (N.D.C.C. 49-03-01.5 subd 2).

3. Boulder Ridge is a subdivision in northwest Bismarck in Section 16 of Township 139 North, Range 80 West, Haycreek Township in Burleigh County. The entire area of Boulder Ridge is 92.27 acres, subdivided into more than 170 lots. Boulder Ridge is bounded on the west by North Washington Street and on the south by 43rd Avenue. Part of Boulder Ridge was annexed to the City of Bismarck on April 12, 2005. *[Complaint, paragraph VI; Answer, paragraph 6; Tr. Pp.76-77; Exhibit C-5.]*

4. MDU admits Capital's allegation that MDU intends to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. MDU admits it extended its facilities to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. *[Complaint, paragraph VIII; Answer, paragraph 8.]* MDU extended its facilities at its own risk after

Capital filed its Complaint. *[Tr. 87; 93-97; 108-09 Exhibits C-4, C-5, C-6.]*

5. Both Capital's and MDU's pleadings claim franchises granted by the City of Bismarck. MDU offered no evidence in support of its pleading. MDU admitted that Capital has a franchise. Capital's franchise was offered and received in evidence. *[Complaint, paragraphs I and II; Answer, paragraph 1; Exhibit C-1]*

6. Capital has a three-phase framework around the area of Capital's northwest Bismarck service area, served from 4 different substations. Capital's facilities nearest to Boulder Ridge are three phase facilities immediately contiguous to Boulder Ridge along the west side of Section 16 (east of Washington Street) and along the south side of Section 16 (North of 43rd Avenue) of Haycreek Township. Capital's three phase facilities were in place before Boulder Ridge was platted and before part of Boulder Ridge was annexed to the City of Bismarck, and before MDU extended its facilities to provide electric distribution services in Boulder Ridge. *[Tr. Pp.77, 87, 91-108; 93-103; Exhibits C-2, C-3, C-4; C-5 and C-6.]*

7. In 1973, Capital and MDU made an "area service agreement" under which it was agreed "The principal service area of the Cooperative will be that area which lies outside the heavy black line [on a map attached to the agreement]." Haycreek Township, where Boulder Ridge is located, is in the area designated as "The principal service area of the Cooperative [Capital]" under the agreement. The area service agreement was amended in 1993, coincident with the City of Bismarck's grant of a franchise to Capital. The 1973 agreement as amended is referred to in the franchise granted by the City of Bismarck to Capital on May 25, 1993. MDU abandoned part of the agreement on June 26,

2003. *[Complaint, paragraphs I, II, and IV; Answer, paragraphs 2 and 4; Transcript . 104; Exhibit C-1]*

8. Regardless of limitations on the Commission's authority to interpret or enforce Capital's or MDU's claims under the 1973 agreement or under franchises granted by the City of Bismarck, it is an uncontroverted fact that the corporate limits of Bismarck have expanded since 1973 and it is an uncontroverted fact Capital's facilities and services in the corporate limits of Bismarck have developed in accordance with the 1973 Area Service Agreement between Capital and MDU. *[Complaint paragraph III; Answer, paragraph 3; Exhibits C-1, C-2, C-3, C-4, C-5 and C-6.]*

8a. Section 16 of Haycreek Township, where Boulder Ridge is located, is in the area designated as "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement. Before Boulder Ridge was platted and annexed to the City of Bismarck, Capital was the only provider of electric service in the part of Haycreek Township now named Boulder Ridge. Capital provided electric service to a location in Section 16 since 1949 until 2005, when that service extension was removed in preparation for the development of Boulder Ridge. Capital had other services in Section 16, since the mid-1990s, still in place in 2005. Capital had three-phase lines along the west and south sides of Section 16 since 1973, still in place in 2005. *[Tr. Pp.77; 99-102; Exhibits C-1, C-2, C-3, C-4; C-5.]*

8b. The southerly boundary of the part of Boulder Ridge that was annexed to the City of Bismarck is contiguous to the pre-existing corporate limits, an area of Bismarck known as French's 1st Addition, a subdivision of Section 21 of Haycreek Township. The northerly part of French's 1st Addition is in the area designated as

“The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement. Capital has facilities in French’s 1st Addition contiguous to the part of Boulder Ridge annexed to the City of Bismarck. *[Transcript P 93; Exhibits C-1, C-2, C-3, C-4 and C-5.]*

8c. MDU has facilities approximately ½ mile south of the southerly boundary of Boulder Ridge, in the southerly part of French’s 1st Addition. The boundary between Capital’s and MDU’s service areas in French’s 1st Addition is the boundary between their respective service areas established by their 1973 Area Service Agreement. *[Exhibits C-1, C-3, C-4 and C-5.]*

8d. Capital is the only provider of electric service in other subdivisions of Bismarck that are in the area designated as “The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement and near to Boulder Ridge. Neither MDU nor the City of Bismarck has objected to Capital’s service in these contiguous subdivisions. *[Tr. Pp. 89 and 104; Exhibits C-4, C-5 and C-6.]*

8e. Capital has substantial facilities within the corporate limits of Bismarck and within a two mile radius of Boulder Ridge and in the area designated as “The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement. MDU has no facilities within the corporate limits of Bismarck and within a two mile radius of Boulder Ridge and in the area designated as “The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement, excepting only MDU’s extension of its facilities to Boulder Ridge after Capital filed its Complaint in this proceeding. Capital is the only provider of electric service in areas outside the corporate limits of Bismarck within a two mile radius of Boulder

Ridge. *[Exhibit C-6.]*

9. Capital included “The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement in its long range plans and has made substantial investments to serve it. Capital has invested in excess of 7 million dollars in the area northwest of Bismarck, west of Highway 83, including Boulder Ridge. These facilities were planned and constructed to provide an electric system for new developments, such as Boulder Ridge. *[Transcript, p.104-08; 113-16 Exhibits C-4, C-5 and C-6]*

10. Capital’s framework is a reliable system of substations and distribution lines that can be operated in a looped fashion. In the event of an outage, Capital can provide looped service to Boulder Ridge. Capital’s three-phase framework in the area northwest of Bismarck, west of Highway 83, is supplied from 4 different substations, the closest of which is within one mile of Boulder Ridge. Capital’s system includes a 5th delivery substation under construction. *[Transcript pp. 87, 91, 104-08; Exhibits C-4 and C-6.]*

11. When Capital filed its Complaint, MDU had no facilities in Boulder Ridge or in any area of Bismarck contiguous to Boulder Ridge. MDU’s facilities nearest to Boulder Ridge are in the southerly part of French’s 1st Addition, approximately ½ mile from the southerly boundary of Boulder Ridge. It is off these facilities that MDU extended its facilities to Boulder Ridge, at its own risk, after Capital filed its Complaint. MDU has no other facilities closer to Boulder Ridge. MDU’s facilities in Boulder Ridge cannot be operated in a looped fashion in the event of an outage. *[Tr. Pp 87, 93-97, 108-09; Exhibits C-4, C-5, C-6.]*

12. One factor to be considered in determining whether duplication of facilities has occurred is whether construction of service to a customer from one supplier exceeds

the cost to extend service to that same customer from a second supplier. In this case, MDU's cost to extend its facilities approximately ½ mile through French's 1st Addition and across 43rd Avenue to Boulder Ridge exceeds Capital's cost to extend service "zero" feet from its existing facilities in Boulder Ridge. MDU's cost to extend service to Boulder Ridge would be greater than Capital's cost because its existing facilities are approximately ½ mile further from Boulder Ridge and MDU would need to cross 43rd Avenue to make the extension. *[Tr. Pp. 93-97; 102-03; Exhibit C-5]*

13. Another factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross or "leapfrog" the facilities of another supplier. The PSC has consistently held that one electric supplier crossing the line of another electricity supplier to provide service to a customer indicates wasteful duplication of facilities. MDU's extension of its facilities to Boulder Ridge crossed Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge, and MDU's extension of its facilities ran parallel to Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge. *[Tr. Pp 93-97; 102-03; Exhibit C-5.]*

14. Another factor considered in determining duplication of service is whether a supplier's extension of facilities would create a "checkerboard" of service areas. Boulder Ridge is entirely surrounded by areas served by Capital. MDU's extension of its facilities to Boulder Ridge, an area not contiguous to MDU's existing service areas, would create a checkerboard of service areas. *[Exhibits C-4, C-5 and C-6.]*

15. Another factor to be considered is reliability of service. There is a significant difference between Capital and MDU with respect to reliability of service to Boulder Ridge.

MDU's extension of its facilities into Boulder Ridge is a one-way route, not supported by a looped network. Capital's existing facilities include a looped network of distribution lines and several substations to sustain service. *[Transcript Pp. 87, 91, 104-08; Exhibits C-4 and C-6.]* MDU's one-way extension of electric facilities provides significantly less reliable service than the reliable service available from Capital's looped system. MDU's extension of its facilities into Boulder Ridge cannot be operated in a looped fashion in the event of an outage. *[Tr. Pp 93-97, 108-09; Exhibits C-4, C-5, C-6.]* MDU's one-way extension of electric facilities is disorderly development, uneconomic, wasteful, and an unreasonable duplication of both investment and service.

16. MDU's extension of its facilities crossing and running parallel to Capital's facilities in the northerly part of original French's 1st Addition and crossing 43^d Avenue into Boulder Ridge, and crossing and running parallel to Capital's facilities on the north side of 43rd Avenue, interferes with and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital.

17. The PSC finds that service by Capital would best promote and serve orderly and economic development of electric service in the general area of northwest Bismarck, including the area designated by Capital and MDU as "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement and including Boulder Ridge. Capital is able to extend service to Boulder Ridge through a shorter extension at a lower cost, which is a primary consideration of orderly and economic development. Service by Capital to Boulder Ridge is a natural extension of service from Capital's existing facilities and will not result in checkerboarding of customers served by MDU and Capital.

18. Capital is best able to serve Boulder Ridge economically due to the nature

and extent of its investment in plant, facilities, framework and system within its northwest Bismarck service area.

19. MDU's extension of its electric distribution lines into Boulder Ridge First Addition interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital.

20. There is no evidence in the record upon which to base a decision that MDU can serve the Boulder Ridge area without wasteful duplication of investment or service.

From the foregoing Findings of Fact, the Commission makes its:

CONCLUSIONS OF LAW

1. The PSC has jurisdiction over the parties and the subject matter of this proceeding. Capital is a "rural electric cooperative" under N.D.C.C. 49-03-05.1. MDU is an "electric public utility" under N.D.C.C. 49-03-05.1. The Commission has jurisdiction under N.D.C.C. 49-03-01.4 to hear and determine the Complaint of Capital alleging MDU's extension of its electric distribution lines to Boulder Ridge is a violation of N.D.C.C. 49-03-01.3.

2. The PSC's jurisdiction is limited to matters delegated to it by the State Legislature under N.D.C.C. Title 49. The PSC does not have jurisdiction to consider or to grant MDU's Motion to Dismiss under the Constitution of the State of North Dakota. MDU's Motion to Dismiss under Article VII Section 11 of the Constitution must be denied. Johnson v Elkin, 263 N.W.2d 123.

3. The PSC is obliged interpret N.D.C.C. Chapter 49-03 as a whole, to give full force and effect to each part, to not interpret its jurisdiction narrowly. Applying these principles, MDU's Motion to Dismiss under N.D.C.C. 49-03-06 must be denied.

4. The essence of MDU's Motion to Dismiss is that the PSC's exercise of its authority over MDU conflicts with self-government interests of the City of Bismarck under the North Dakota Constitution and N.D.C.C. Section 49-03-06. Under Application of Otter Tail Power Co., 451 N.W.2d 95, MDU lacks standing to assert the self-government interests of the City of Bismarck to defeat the PSC's authority over MDU's activities, and therefore its Motion to Dismiss must be Denied.

5. MDU's extension of its electric distribution lines into Boulder Ridge, through French's 1st Addition, and across 43rd Avenue and across Capital's facilities interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, under N.D.C.C. 49-03-01.3, precedents of the PSC, and the North Dakota Supreme Court. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181, and Northern States Power Co. v Public Service Commission, 451 N.W.2d 340, affirming the order of the PSC in Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (1988). There is no evidence in the record upon which to base an ultimate decision that MDU can serve the Boulder Ridge area without wasteful duplication of investment or service. Tri-County Electric Cooperative v Elkin, 224 N.W.2d 785 at 793.

6. Under N.D.C.C. 49-03, MDU should cease and desist from providing electric services to Boulder Ridge Addition.

7. Under N.D.C.C. 49-03-01.4, the PSC may prescribe reasonable terms and conditions in addition to the restraint imposed. It is reasonable and proper to require Capital to purchase from MDU and to require MDU to sell to Capital, at book value, the distribution facilities currently located in and used by MDU to serve part of Boulder Ridge

First Addition, to the extent not duplicated by and compatible with Capital's system.

From the foregoing Findings of Fact and Conclusions of Law, the PSC makes its:

ORDER

THE COMMISSION ORDERS:

1. MDU shall cease and desist from providing electric service to Boulder Ridge First Addition to the City of Bismarck and from further extending its electric service in that area.
2. MDU shall offer to sell to Capital, and Capital shall purchase from MDU, at book value, the distribution facilities located in and used by MDU to serve Boulder Ridge First Addition, to the extent compatible with Capital's system and not constituting an unnecessary duplication of Capital's facilities.
3. So that users of electricity in Boulder Ridge First Addition shall not be without service, MDU may continue to provide service until Capital can begin providing service.
4. MDU's Motion to Dismiss Capital's Complaint is DENIED.

Dated this _____ day of March, 2006.

Tony Clark

Susan E. Wefald

Kevin Cramer