

**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.)	

**CAPITAL ELECTRIC COOPERATIVE, INC.'S
BRIEF
ON
COMPLAINT AGAINST
MONTANA-DAKOTA UTILITIES, INC.**

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1. 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).

On September 28, 2005, Capital complained to the Public Service Commission (PSC) that MDU was extending its facilities into 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's Answer requested dismissal of the Complaint, alleging that MDU is authorized to serve in Boulder Ridge, that Capital is not authorized to serve in Boulder Ridge and that the PSC does not have jurisdiction.

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

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

2. Legal background

Under 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.” After 1965, under the general terms of N.D.C.C. 49-03 and the Territorial Integrity Act, 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. 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

The Territorial Integrity Act not only regulates electric public utilities’ extensions of facilities and service “. . . beyond or outside the corporate limits of any municipality. . . [to] . . . serve any customer where the place to be served is not located within the corporate limits of a municipality. . . .” (N.D.C.C. 49-03-01.1), the Act also regulates an electric public utilities’ extensions “. . . within the corporate limits of any municipality. . . .” (N.D.C.C. 49-03-01.3). The Act prohibits interference with other electric service or systems when a public utility extends it lines within a municipality.

No electric public utility henceforth shall begin construction or operation of a public utility plant or system, or of an extension of a plant or system, except as provided below, without first obtaining from the commission a certificate that public convenience and necessity require or will require

such construction and operation. This section does not require an electric public utility to secure a certificate for an extension within any municipality within which it has lawfully commenced operations. If any electric public utility in construction or extending its line, plant or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions. NDCC 49-03-01 (Underscoring added.)

Similarly, N.D.C.C. 49-03-01.3 provides:

Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality and provided duplication of services is not deemed unreasonable by the commission. (Underscoring added.)

Though N.D.C.C. 49-03-01 and 49-03-01.3 are similar, the Supreme Court has held that 49-03-01.3 is the controlling statute, applicable to cases involving an electric public utility's extension in a rural electric cooperative's rural service area that has been annexed to a municipality. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181, at 186 (N.D. 1988).

“. . . [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 Electric

Cooperative v Public Service Commission, 534 N.W.2d 587 (N.D. 1995), 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 ". . . 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 (N.D. 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (N.D. 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 like Cass's Complaint against NSP in the South Pointe case.

3. Summary of the parties' arguments

In Capital's view, this case is fundamentally no different from the South Pointe cases. 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 v NSP, 419 N.W.2d 181, at 187

MDU's Motion to Dismiss asserts a defense not asserted in the South Pointe cases, a challenge to the PSC's jurisdiction to enforce N.D.C.C. 49-03-01.3. MDU wants the Commission to dismiss Capital's Complaint, without consideration of evidence about interference. The Motion to Dismiss is the subject of the parties' separate briefs.

In Capital's view, when the PSC looks at the existing facilities that Capital and MDU have in place, when the PSC looks at the evidence, it will determine that MDU's extension of electric services into Boulder Ridge constitutes an unreasonable duplication of the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

4. The uncontroverted evidence shows that MDU's extension of facilities into Boulder Ridge constitutes an unreasonable duplication of the facilities and services provided by Capital. MDU's extension of facilities violates N.D.C.C. 49-03-01.3.

MDU presented no evidence at the hearing on February 9, 2006, apparently relying entirely on its Motion to Dismiss. MDU shuns N.D.C.C. 49-03-01.3 so completely that it declined to present any evidence that it "has lawfully commenced operations" in Boulder Ridge. (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)) The only information provided by MDU relevant to the interference issue is its admissions in its Answer to Capital's Complaint.

"Montana-Dakota admits that it has extended its facilities and intends to provide electric distribution service to Part of Boulder Ridge First Addition to the City of Bismarck pursuant to the right and obligations of its franchise from the City of Bismarck. Montana-Dakota denies its service will interfere with service or facilities of CEC [Capital] because CEC is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck." (MDU Answer, paragraph 8).

As observed in Capital's brief responding to MDU's Motion to Dismiss, MDU argues that 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 are non-existent "as a matter of law" under MDU's theories of constitutional law.

Other facts that MDU wants the Commission to ignore, are facts of MDU's own admitted creation. In 1973, Capital and MDU entered into 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 Capital was designated to serve under the agreement. The service area 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 partially abandoned the Agreement on June 26, 2003. *[Complaint, paragraphs I, II, and IV; Answer, paragraphs 2 and 4; Transcript . 104; Exhibit C-1]*

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 to Capital and MDU by the City of Bismarck, it is an uncontroverted fact that the corporate limits of Bismarck have expanded since 1973 and it is also an uncontroverted fact that 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, and it is a fact that Capital's facilities continued to develop after MDU partially abandoned the Agreement in 2003. *[Complaint paragraph III; Answer, paragraph 3; Exhibits C-1, C-2, C-3, C-4, C-5 and C-6.]*

The uncontroverted facts are that MDU explicitly and implicitly agreed to Capital's development of its system in the northwest Bismarck area. It is also a fact that Capital's ongoing development of its system has occurred over more than 30 years with MDU's knowledge and consent, before MDU decided in 2005 to extend its facilities into the area MDU had earlier designated as "The principal service area of the Cooperative. . . ." These are facts that exist, not facts to be ignored. These are facts to be considered by the PSC. See NSP v PSC 452 N.W.2d at 344-45, note 1.

(It is appropriate to add a few comments about the area service agreement. Capital does not assert that the area service agreement is legally enforceable as a contract between Capital and MDU. Capital does not assert the PSC should enforce the agreement. Such agreements are unenforceable, easily abandoned unilaterally when one of the parties deems the agreement no longer advantageous. Though unenforceable as a contract between utilities, the agreement is evidence related to the development of electric service in the area. The agreement explains the uncontroverted

evidentiary facts as to the existing electric facilities that Capital and MDU have in place as the Commission determines whether extension of MDU's services in Boulder Ridge would constitute an unreasonable duplication of capital-intensive facilities and services already provided by Capital, under the South Pointe cases. The unenforceable agreement made in 1973 may be abandoned by MDU in 2003, but the facts that have developed before and after MDU abandoned the agreement are facts that exist, not facts to be ignored. 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 constitutes an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d 181, at 187.).

In Capital's view, under the South Pointe cases and Johnson v Elkin, 263 N.W.2d 123, 126 (N.D. 1978), the PSC must decide the interference issue presented by Capital's Complaint based on the evidence and the law, N.D.C.C. 49-03-01.3 and case precedents. 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 Commission to determine. In making the determination, the Commission considers which 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. Cass v NSP and NSP v PSC, affirming the order of the Commission in Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (1988).

A major 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 slang word "leapfrog" is not counsel's invention. This aptly picturesque term to describe proscribed conduct was used by the North Dakota Supreme Court in the first reported case affecting territorial disputes, a case that predates the Territorial Integrity Act. Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508, at 520 (N.D. 1956) (herein Williams v MDU). "Checkerboarding" is another such term, used by the PSC and repeated by the Supreme Court in Application of Otter Tail Power Co., 354 N.W.2d at 702 (N.D. 1984), and recently applied by the Commission in Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28. The area known as 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. Perhaps "gerrymandering" might be added to the phrase-book, a familiar term that fits the way the MDU seeks to carve Boulder Ridge out of "The principal service area of the Cooperative. . . ." that MDU had previously agreed to. (See exhibits C-4 and C-5).

"The Commission has consistently held that one electric supplier crossing the line of another electric supplier to provide service to a customer indicates a wasteful duplication of facilities." Montana-Dakota Utilities Co., Public Service Commission Case

No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 30 citing Cass v NSP and NSP v PSC. After Capital filed its Complaint, MDU extended its facilities to Boulder Ridge, crossing one-half mile through another subdivision of Bismarck that is in Capital's service area, crossing Capital's facilities in two places. Portions of MDU's extension run parallel to Capital's existing facilities. MDU's extension of electric service into Boulder Ridge and crossing Capital's facilities unreasonably duplicates investment and available services provided by Capital, constituting interference that is prohibited by the statute. (See exhibits C-4 and C-5).

"Reliability of service" is a factor in contested cases under the Territorial Integrity Act, but more often than not the reliability factor does not influence the decision in any case because the Commission does not find significant differences between suppliers with respect to reliability of service. See, e.g., Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Findings No. 17 and 18. This case is different. 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. (Exhibits C-4, C-5 and C-6.) These facts not only affect the reliability factor, they also affect the factors of orderly and economic development of electric service without wasteful duplication of investment or service. It is self-evident that a one-way extension of electric facilities into an area already served by a reliable looped system is disorderly development, uneconomic and wasteful, an unreasonable duplication of both investment and service.

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. See Tri-County Electric Cooperative v Elkin 224 N.W.2d 785 at 793. (N.D. 1974).

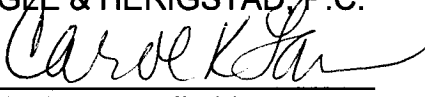
All the details of MDU's interference with Capital's service and system are stated with particularity in Capital's proposed findings, conclusion and order filed with this brief. The proposed findings were drawn with reference to the orders of the Commission in Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (1988), affirmed in NSP v PSC, and in Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005.

5. Conclusion

The evidence is uncontroverted. As in the South Pointe cases, upon reviewing the evidence in the record the Commission should find and conclude that Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework and system in its northwest Bismarck service area. Service provided by Capital would best promote orderly and economic development of electric service. MDU's extension of electric service into the Boulder Ridge addition interferes with and constitutes an unreasonable duplication of investment and available facilities provided by Capital. Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (1988), Findings No. 20, 21 and 22; NSP v PSC, 452 N.W.2d at 344.

Dated this 20 day of March, 2006.

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