

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

Capital Electric Cooperative, Inc.	)	
	)	
Complainant,	)	
	)	
vs.	)	<b>Case No. PU-05-551</b>
	)	
Montana-Dakota Utilities, Inc., a	)	
Division of MDU Resources Group,	)	
Inc.	)	
	)	
Respondent.	)	

**CAPITAL ELECTRIC COOPERATIVE, INC.'S  
SUPPLEMENTAL BRIEF  
ON  
THE COMMISSION'S MOTION FOR CONTINUANCE**

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**ATTORNEYS FOR CAPITAL ELECTRIC COOPERATIVE, INC.**

Capital Electric Cooperative has filed a Complaint under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) against Montana-Dakota Utilities Co. complaining of MDU's extension of service in a rural area inside the corporate limits of Bismarck, interfering with Capital's existing services and system. The parties are referred to as Capital and MDU. This disputed area is known as Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge). After hearing MDU's renewed Motion to Dismiss and holding an evidentiary hearing, the Commission has acted on its own motion to "continue" the hearing, to postpone the decision-making process mandated by N.D.C.C. 28-32-39. Capital has moved for a hearing on the Commission's proposed continuance.

### **Chronology of the Boulder Ridge dispute**

Capital has provided electric service in the northwest Bismarck area under its franchise granted by the City of Bismarck 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 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 into 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 from the City of Bismarck. MDU's Answer also requested dismissal, alleging that Capital is not authorized to serve in Boulder Ridge and that the PSC does not have jurisdiction. (Answer, paragraphs 6, 12 and 13.)

On November 14, 2005, the Board of Bismarck City Commissioners issued "Findings, Conclusions, Decision and Order 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 14<sup>th</sup> Order.)

On November 23, 2005, MDU moved the Commission 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 renewed 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 for its regular meeting for that day.

On March 6, 2006, Capital moved the PSC for hearing on its continuance Order.

On March 7, 2006, the PSC withdrew a continuance order that had been placed on its agenda for that day and “suspended” the briefing schedule on its own motion.

On March 13, 2006, the PSC issued its Notice of Hearing to consider the proposed continuance of this proceeding. That hearing is scheduled for March 23, 2006.

### **Argument**

On this hearing, Capital not only argues to the PSC, as if engaged in a debate with MDU, Capital is in the unusual (and frankly uncomfortable) position of arguing with the PSC, against the PSC. Against the PSC’s proposal that this proceeding should be indefinitely postponed, against that proposal made by the PSC on its own motion, to itself, not to the parties, a proposal apparently prejudged, pre-approved and ready for adoption without consideration of the parties’ interest in having their case decided, not until Capital filed its Motion for a hearing on the Commission’s proposal. Neither Capital nor MDU requested a continuance of the February 9, 2006 hearing, suspension of the briefing schedule, or other postponement.

Capital is not arguing against an adversary’s motion and brief. Capital argues against the PSC’s March 7, 2006 agenda (published on March 3, 2006) and an internal staff memorandum released on March 6, 2006 after the PSC’s receipt of Capital’s Motion for a hearing on the proposed continuance. Capital filed its Motion after Commissioner Wefald appeared before the State Legislature’s Electric Industry Competition Committee on February 28, 2006 and presented written testimony to update the committee on electric issues that have recently come before the PSC. She reported, “At a recent work session the Commission asked staff to draw up an order

continuing this proceeding for an indefinite period of time. The continuance is based on evidence presented at the hearing and legal arguments of counsel that a threshold issue is the determination of which companies or company has the right under franchise from the City of Bismarck to provide electric service. The question of franchise rights is not one that can be determined by the Commission. That issue is presently before the District Court.”

The Commission’s staff later filed a Brief in Support of Continuance (on March 16, 2006). Commission Staff’s (“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, and “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.” (Staff brief, pages 3 and 5)

In this supplemental brief, Capital argues to the PSC against the Staff position. (The Staff position and brief apparently reflect the Commission’s position adopted on February 10, 2006, as indicated by the Staff’s March 6, 2006 memo and the March 13, 2006 Notice of Hearing signed by the Commissioners, explaining the background of the March 23, 2006 hearing.)

Regarding “good cause”, where did the notion of a “threshold” issue come from? What legal arguments of counsel was Commissioner Wefald referring to in her February 28, 2006 statement? Evidently, the day after the evidentiary hearing the Commission decided this:

1) MDU is right in its counsel's argument 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 on Motion to Dismiss, pages 2 & 3.) (Evidently, the Commission's Staff agrees with MDU. See Staff brief, pages 3 and 4.)

2) The Commission should await the outcome of the district court action to determine whether the complaining party, Capital, does or does not hold a franchise, before the Commission decides either Capital's Complaint or MDU's Motion to Dismiss Capital's Complaint.

According to the staff memo of March 6, 2006, "The Commission believes the franchise issue is a threshold issue that needs to be determined prior to the Commission issuing a decision in this case. The Commission has no authority to determine the franchise issue. Therefore, it is not possible for the Commission to issue a decision until the franchise issue is determined."

The franchise issue is not a "threshold" issue. Determination of the franchise issue is not preliminary to, not a prerequisite to, the Commission's decision whether to dismiss Capital's Complaint on the grounds asserted by MDU. Determination of the franchise issue is not preliminary to, not a prerequisite to, the Commission's decision on Capital's Complaint against MDU. The franchise issue is not an issue that "needs to be determined prior to the Commission issuing a decision in this case." It is not "not possible for the Commission to issue a decision until the franchise issue is determined."

For purposes of considering whether the franchise issue is a threshold issue that “needs” to be determined prior to the Commission issuing a decision in this case or whether the Commission should continue or otherwise postpone the performance of its responsibility to decide this case, assume the district court and the Supreme Court sustain the November 14<sup>th</sup> Order. Or assume the court action had not been commenced. Now, there is nothing to wait for. The so-called “threshold” issue has been decided by the November 14<sup>th</sup> Order.

After MDU filed its Motion in the PSC proceeding challenging the Commission’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 proceeding explains why Capital started the district court action for judicial review of the City’s November 14<sup>th</sup> Order. The Commission had received MDU’s November 23, 2005 Motion to Dismiss, asserting the City’s November 14<sup>th</sup> Order effectively deprived the Commission of jurisdiction. The Commission seemed poised to embark on the same path it chose in Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (N.D. 1988). 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.

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 proceedings by utility challenging PSC's jurisdiction; PSC's jurisdiction sustained.) The declaratory action is collateral to the PSC proceeding, but does not attack the PSC or its jurisdiction. Capital's action for a declaratory judgment supports the PSC's jurisdiction.

If the court rules in Capital's favor, that might help the Commission see the invalidity of MDU's reliance on its claims that the City Commissioners have greater authority than the PSC. If the court does not rule in Capital's favor, if it sustains the City Commissioner's action, that does not deprive the PSC of its jurisdiction under N.D.C.C. Chapter 49-03. In either event, no matter what the district court or the Supreme Court decides about the validity of the City Commissioners' action, MDU's Motion to the Commission to dismiss Capital's Complaint remains to be decided by the PSC.

Or look at it this way. If Capital had not commenced the court action on November 30, 2005, the PSC would still be faced with MDU's November 23, 2005 Motion to Dismiss and MDU's reliance on the November 14<sup>th</sup> Order. For the PSC to accept MDU's "threshold" argument is to accept MDU's argument that resolution of 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 Bismarck City Commissioners, as a matter of law, constitutional law. That is a decision the PSC cannot make! A final decision in the court action might be helpful but it is not necessary. If Capital had not commenced the court action, the PSC would still be faced with MDU's Motion to Dismiss. (If Capital had not commenced the court action, would the Commission now be saying something like this: We are stymied. We perceive the franchise issue as a

threshold issue and we suggest Capital and/or MDU commence a proceeding in court to help us with the franchise issue. Or would the Commission have considered commencing its own court action, asking for help in determining the franchise issue?) The franchise issue is not a preliminary (“threshold”) issue in the proceeding before the PSC; it is the central issue presented by MDU’s Motion to Dismiss. It is an issue the Commission must address, on its own, within its authority, and not acting outside the scope of its authority, and not expecting any advance directive from any court.

The separate court case against the City of Bismarck is not over yet, not one way or the other. The court action is Capital’s challenge to the City Commissioner’s assumption of power to act like a little public service commission, deciding which of two franchise holders it prefers to serve Boulder Ridge. When that case is over, it will not resolve the issue whether the City, claiming power and acting like a little psc, actually has power -- constitutional power -- superior to the Legislature’s power or the PSC’s jurisdiction to enforce N.D.C.C. 49-03-01.3.

The court action does not challenge the PSC’s jurisdiction, or assert its inferiority to the City Commissioners’. No party to the court action, not Capital, not MDU, not the City of Bismarck, and not the Public Service Commission, has asked the court to make a preliminary, threshold determination of the Commission’s jurisdiction. The only challenge to the Commission’s jurisdiction under N.D.C.C. Chapter 49-03 is MDU’s Motion to the Commission to dismiss Capital’s Complaint, a motion that remains to be decided, decided by the PSC.

As MDU’s Motion to Dismiss is grounded on its arguments of constitutional law, the Motion must now be considered and decided, but not as a preliminary “threshold”

issue. The motion must be denied, not because MDU is wrong about the Constitution, but as a matter of routine because the Commission has no jurisdiction to decide whether MDU is right or wrong about the Constitution. The Commission 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). If architectural terms are to be employed, the Commission should not stop Capital at the threshold of the Commission’s hearing room; it should send MDU upstairs. “We reserve the issue of constitutionality to the first court to which the agency decision is appealed.” Johnson v Elkin, 263 N.W.2d at 127.

The PSC’s concern that “two governmental entities are at odds with each other” (Staff brief page 4) is understandable. But that concern is not “good cause” for the PSC to refrain from making a decision. It is not cause because the incongruity of two governmental entities at odds with each other is not the PSC’s responsibility to resolve. (The PSC will find no similar expression of discomfort by the Bismarck City Commission in its November 14 Order, no feeling that it should be timid about asserting its claim to power and issuing its edict after the PSC proceeding was commenced.) Remember, the City did not intervene in the PSC proceedings, nor did the City challenge the Commission’s jurisdiction in the court action. Where the City has made no claims against the PSC in either forum, there is no basis for the Commission to now be sensitive to or protective of the City’s claim to power or for the PSC to be reluctant to be decisive, assertive, and pro-active about its own. The Commission (and Staff) should be more concerned about the City’s encroaching on the Commission’s jurisdiction, more concerned than the other way around. As stated, the jurisdictional conflict, the question

of which governmental entity has the superior power is an issue of constitutional law, an issue the PSC has no jurisdiction to address other than to pass the franchise issue to the courts via the appeal process.

As MDU's Motion to Dismiss is based on concepts of local governing bodies displacing the PSC's jurisdiction, the motion must be denied because MDU lacks standing. MDU cannot assert the self-government interests of the City of Bismarck to defeat the PSC's authority over MDU's activities. OTP 1990, 451 N.W.2d at 98. Indeed, if there is any preliminary "threshold" issue in this case, this is it! The PSC should not stop Capital at the threshold of its hearing room from complaining about MDU's actual factual interference. It should stop MDU (and Staff) from arguing about the franchise issue as if MDU (or the Commission's Staff) were representing the City of Bismarck and claims that the City has powers superior to the PSC's.

As MDU's Motion to Dismiss is grounded on the statute under which the Commission operates, there is nothing in Chapter 49-03 supporting the notion that the franchise issue asserted by MDU is a preliminary issue, a threshold issue, a barrier that blocks the Commission from exercising its jurisdiction under Section 49-03-01.3 to police electric public utilities' extensions of facilities within the corporate limits of municipalities. On the contrary, there is a history of precedents, 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 South Pointe cases.

Capital's Complaint to the PSC against MDU is like Cass's Complaint against NSP in the South Pointe cases. This case is fundamentally no different from the South

Pointe cases. The South Pointe cases stand as precedent for the PSC to proceed rather than dismiss this case on preliminary motions that challenge the PSC's jurisdiction.

The Supreme Court said the PSC should not take a narrow view of its jurisdiction. The PSC must determine whether extension of MDU's services to Boulder Ridge would unreasonably duplicate existing capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d 181, at 187.

The PSC has taken a small step away from the course of the South Pointe cases. It has held an evidentiary hearing to elicit the facts of the Boulder Ridge dispute. It has not yet done what it should do to complete compliance with the course set by the South Pointe cases: Determination whether or not MDU's extension interferes with and would constitute an unreasonable duplication of investment and available facilities and services provided by Capital.

Now, with a "continuance" order under consideration on its own motion, and with the support of Staff, the PSC seems poised to embark on a worse course than it chose in the South Pointe cases. Don't assert or deny jurisdiction. Don't decide whether real facts show real interference and real duplication of capital-intensive facilities. Don't decide anything. Delay indefinitely.

Based on the PSC's action on February 10 and 22 and March 7 of 2006, its March 6, 2006 internal memo, its public pronouncement on February 28, 2006, and the Staff brief of March 16, 2006, it appears the Commission has already adopted an official do nothing policy, rather than follow the precedence of the Supreme Court. The Commission seems ready to ignore the procedure established by Johnson v Elkin and

the admonition of the South Pointe cases that the Commission should not take a restrictive view of its jurisdiction but should instead proceed to determine the interference issue.

When a party to a PSC proceeding raises an objection to the PSC's jurisdiction, the PSC is not temporarily disabled from proceeding until its jurisdiction is resolved. The PSC should proceed one way or the other and the jurisdiction question will be addressed on appeal, as exemplified by the South Pointe cases and Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 (N.D. 1995). When the objection to jurisdiction is based on constitutional arguments, like MDU's arguments in its Motion to Dismiss, the PSC is not temporarily disabled from proceeding until its jurisdiction is resolved in a collateral proceeding. 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 "threshold" 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 rule that all statutes are presumed to be constitutional.

The Commission (and Staff) are assuming too much responsibility as it considers whether to indefinitely postpone the exercise of its limited responsibility to address the issues presented by Capital's Complaint and MDU's Motion to Dismiss. Whereas the Commission and Staff might perceive some "confusion and uncertainty," (Staff brief, page 5) it is not the PSC's responsibility to invent a procedure for the issues to be finally resolved. As there is no disagreement "that the question of franchise rights is not one that can be determined by the Commission," (Staff brief, page 3), so also there should be no disagreement that the limitations on the PSC's jurisdiction prevent it from declining to follow the procedure established by Johnson v Elkin and the South Pointe cases. 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).

If the PSC did have the responsibility to establish a procedure for the array of issues to be resolved, the course it has set -- so far -- is a prime example of the maxim that justice delayed is justice denied. The Commission and Staff want to do nothing while the franchise issue is litigated in court under municipal government law. The district court action will be appealed, possibly remanded, re-tried, appealed again, finally decided. All the while Capital's Complaint to the PSC, and MDU's Motion to Dismiss -- and life and commerce in Boulder Ridge -- all remain in limbo as a consequence of the PSC's reluctance to act on Capital's Complaint or MDU's Motion to Dismiss. Following the course of delay is an abuse of discretion.

Staff's speculation (March 16, 2006 brief, page 5) that the appeal process affecting the City's November 14<sup>th</sup> decision -- not at all involving N.D.C.C. Chapter 49-03 -- will produce some advisory guidelines or directives affecting 49-03 is wrong. No advisory guidelines or directives to the PSC will be produced as Capital's litigation with the City of Bismarck goes through the litigation and appeal processes. If the PSC "continues" or otherwise postpones or delays deciding Capital's Complaint or MDU's Motion, when the franchise litigation is over, months or years from now, the PSC will still have before it Capital's Complaint and MDU's Motion to Dismiss, a motion based on MDU's theories of constitutional law, issues the PSC cannot decide, now or in the future. All that will have been accomplished by the PSC's postponement in deciding is delay, nothing else.

For the PSC to accomplish its stated purpose to find and to follow the best and most appropriate course action, PSC needs to decide, not to delay deciding either Capital's Complaint or MDU's Motion to Dismiss.

That is the PSC's responsibility. It is not the responsibility of any party to obtain a decision or guidelines or directives from any court before the Commission makes its decision. See Otter Tail 1990 (Collateral proceedings by utility challenging PSC's jurisdiction; PSC's jurisdiction sustained) and Johnson v Elkin ("We reserve the issue of constitutionality to the first court to which the agency decision is appealed.") 263 N.W.2d at 127.

According to the Commission's Staff's internal memo of March 6, 2006 (not reflected in its March 16, 2006 brief) the Commission is seeking the "best course of action" and "the most appropriate course of action" in this proceeding. Also missing

from the Staff brief is the March 6, 2006 memo's reference to N.D.C.C. 28-32-19, the statutory imposition of the Commission's duty to decide without delay. The Commission and Staff will find the right course in N.D.C.C. 28-32-19 and the decisions of the State Supreme Court. They will recognize they erred in concluding "it is not possible for the Commission to issue a decision until the franchise issue is determined." (Words taken from the Commission's staff's March 6, 2006 memorandum). It is not only possible, it is prescribed by law. To delay rather than decide is an abuse of discretion.

The best course, the appropriate course, is the course set by N.D.C.C. 28-32-19 and the Supreme Court, not the course urged by MDU's suggestion and Staff's brief that the franchise issue is a preliminary "threshold" issue that must be determined outside the PSC before the PSC looks at the evidence and makes a decision.

It is more than possible, it is necessary, mandatory, for the PSC to issue a decision denying MDU's Motion to Dismiss grounded on constitutional claims, under Johnson v Elkin.

It is more than possible, it is appropriate and necessary for the Commission to issue a decision denying MDU's Motion to Dismiss based on issues of local self government, because MDU lacks standing to assert those issues in its defense.

It is more than possible, it is appropriate and necessary for the PSC to issue a decision denying MDU's Motion to Dismiss grounded on MDU's interpretation of N.D.C.C. Chapter 49-03, under the holding of the South Pointe cases that the PSC should not take a restrictive view of its jurisdiction.

It is possible, it is appropriate for the PSC to lay aside MDU's Motion to Dismiss, to consider the Motion to Dismiss last, not as a preliminary matter. Consider the parties' proposed findings of fact. Formulate your own findings of fact.

It is possible and appropriate for the PSC to look at the uncontroverted evidence -- and the lack of any evidence presented by MDU --, to apply the statute under which it operates, to determine the interference issue under all the precedents, all the law preceding the Boulder Ridge dispute, particularly the South Pointe cases. Then consider the Motion to Dismiss and MDU's arguments and Capital's counter-arguments. Look at the exhibit offered to support MDU's Motion, the Bismarck City Commissioner's November 14<sup>th</sup> Order. (Don't assume a power to affirm or reverse the November 14<sup>th</sup> Order.) Then ask the question: Is the PSC persuaded it has no jurisdiction under N.D.C.C. 49-03 to decide whether MDU's extension of service into Boulder Ridge violates North Dakota Century Code Chapter 49-03-01.3? Is the Commission persuaded its statewide jurisdiction conferred by the legislature in the exercise of its constitutional powers, the PSC's jurisdiction exercised with attention to economic factors affecting all the state's consumers of electric energy, is this is a power and responsibility now displaced by a balkanized non-system, bereft of any rationale? Perform the obligation to give effect to all provisions of Chapter 49-03. Avoid a narrow view of the PSC's jurisdiction. Then answer the question. That is the PSC's responsibility. The PSC should not await guidance from any court before the Commission makes its decision.

When the PSC recognizes that the franchise issue is wrapped up in MDU's arguments about the Constitution's effect on the Commission's jurisdiction, the

Commission must recognize the franchise issue is not a “threshold” issue, not a preliminary issue to be decided by the Commission before the Commission decides the interference issue, not an issue to be decided by any court before the Commission decides the interference issue, not a preliminary issue to be decided by the Commission or by any court before the Commission decides MDU’s Motion to Dismiss. Johnson v Elkin provides the best, the appropriate, the necessary and the only possible course of action. Skip over the so-called threshold issue because the Commission has no authority to decide upon the constitutionality of the statutes under which it operates. That is an issue reserved to courts in the appeal process, not to be resolved in any separate collateral proceeding.

The Commission’s decision will likely be appealed, no matter what it decides. When the Commission’s decision about the Boulder Ridge dispute gets to the Supreme Court -- not if but when -- the Court will resolve the issue raised by MDU: Where resides the superior governmental power applied to MDU with respect to its extension of its facilities to Boulder Ridge? With the Bismarck City Commission, or with the Public Service Commission exercising its delegated authority under North Dakota Century Code Chapter 49-03? Where resides the superior power, at the State Capital or at City Hall, or dispersed among many City Halls? The Commission cannot answer these questions. And no court will answer these questions before the Commission answers the questions that it can answer.

The Commission must answer the questions it can answer. Deny MDU’s Motion to Dismiss. Look at the evidence. The evidence is uncontroverted. Apply the statute under which the PSC operates. Determine the interference issue. For the Commission

to find and to follow the best and most appropriate course action requires the Commission to decide, not to delay deciding either Capital's Complaint or MDU's Motion to Dismiss. That is appropriate and possible, the best course of action under the statute and all the precedents.

Dated this 21 day of March, 2006.

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