

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative :
Inc. vs. Montana-Dakota : Case No. PU-05-551
Utilities Co. Complaint :

TRANSCRIPT OF
HEARING

Taken At
State Capitol
Bismarck, North Dakota
March 23, 2006

BEFORE JUDGE AL WAHL
-- HEARING OFFICER --

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1 A P P E A R A N C E S

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3 COMMISSIONERS PRESENT:

4 COMMISSIONER TONY CLARK
COMMISSIONER SUSAN E. WEFALD
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Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505

FOR THE PUBLIC SERVICE
COMMISSION.

MS. CAROL K. LARSON
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FOR THE COMPLAINANT.

MR. DANIEL S. KUNTZ
Assistant General Counsel
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1200 West Century Avenue
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Bismarck, North Dakota 58506-5650

FOR THE RESPONDENT.

1 (The proceedings herein were had and made
2 of record, commencing at 10:00 a.m., Thursday,
3 March 23, 2006, as follows:)

4 JUDGE WAHL: Good morning. I'm Al Wahl,
5 the administrative law judge designated by the
6 Office of Administrative Hearings pursuant to the
7 request of the Public Service Commission to act as
8 the procedural hearing officer for the hearing to
9 be held pursuant to the Commission's notice of
10 hearing dated March 13, 2006.

15 February 9, 2006, hearing in this proceeding, the
16 Commission held a work session for the purpose of
17 discussing the best course of action for the
18 Commission taking into consideration the pending
19 action before the District Court regarding
20 franchise issues. The Commission decided that the
21 most appropriate action would be to continue the
22 proceeding for an indefinite period of time until
23 the issue of the parties' city franchise rights is
24 finally determined.

25 The Commission proposed issuing a

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1 continuance order on its February 22, 2006,
2 Commission meeting agenda. The agenda item was
3 held over to the Commission's March 7, 2006,
4 meeting and was later withdrawn from the agenda.

5 On March 6, 2006, Capital Electric
6 Cooperative, Inc., filed a motion and brief
7 requesting a hearing of the Commission's proposal
8 to continue the proceeding upon Capital Electric's
9 complaint.

10 On March 13, 2006, the Commission issued a
11 notice of hearing for a hearing to be held March
12 23, 2006, beginning at 10:00 a.m. in the Commission
13 hearing room of the State Capitol.

14 The issue specified for the hearing is
15 whether the Commission has authority to issue an
16 order continuing the proceeding for an indefinite
17 period of time until the issue of city franchise
18 rights is finally determined.

19 Ms. Larson, will you please state your
20 appearance for the record?

21 MS. LARSON: Yes. My name is Carol
22 Larson. I represent Capital Electric, and I am
23 with the law firm of Pringle & Herigstad in Minot.

24 JUDGE WAHL: Mr. Kuntz.

25 MR. KUNTZ: Daniel Kuntz with

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1 Montana-Dakota Utilities.

2 JUDGE WAHL: Mr. Binek, for the record,
3 please, and also identify each member of the
4 Commission staff who will participate in the
5 hearing.

6 MR. BINEK: My name is William Binek. I'm
7 counsel for the Public Service Commission. Seated
8 to my right is Jerry Lien, public utilities
9 division analyst, and to his right is Annette
10 Bendish, also a public utilities division analyst.

11 JUDGE WAHL: All right. Ms. Larson, you
12 may proceed when you're ready.

13 MS. LARSON: Thank you, Your Honor. The
14 hearing today concerns whether or not the PSC has
15 authority to grant an indefinite continuance of
16 Capital's interference complaint under the
17 Territorial Integrity Act. The rules under which
18 the PSC operates require a liberal construction to
19 secure just, speedy and inexpensive determination
20 of the issues. And the code should only -- the
21 rule should only be suspended where the public
22 interest and the interests of any party to a

23 proceeding will not be substantially affected.

24 In this case, it's my view that the public

25 interest and the interests of the parties will be

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1 substantially affected by a delay in this case.

2 Growth and development in commerce does continue in

3 north Bismarck. Capital is in the process, as you

4 heard in the hearing, of completing the

5 construction of another substation to serve in the

6 north Bismarck area. There are plans before the

7 city and plans with developers to continue to

8 develop north Bismarck and areas that will be later

9 annexed into the city, and it is our feeling that

10 there will be substantial harm to the public

11 interest, as well as to the parties, if this case

12 is continued indefinitely.

13 It is our belief that the course -- or the

14 best course of action has already been laid out for

15 the Commission primarily in three cases. In the

16 Johnson versus Elkin case in 1978, the Supreme

17 Court decided that the Public Service Commission

18 has -- lacks the power, does not have the power to

19 decide constitutional questions; but the Supreme

20 Court in that case also indicated that if the

21 Public Service was concerned or another

22 administrative agency was concerned about

23 constitutional questions -- and in this case if

24 this Public Service Commission is concerned,

25 bothered or perhaps even persuaded that the

1 franchise issue is an important issue, the language
2 in Johnson versus Elkin allows you to state your
3 views and express your concern and recognizing that
4 those views on that constitutional or on those
5 issues that are outside of your jurisdiction will
6 not be binding on the Court that does have
7 jurisdiction to decide that case.

8 So the record in this case is complete.
9 The evidence was put into place to show that
10 Capital has an extensive and elaborate system
11 prepared and ready to serve Boulder Ridge. MDU put
12 in no evidence opposing -- evidence of its system
13 that could in any way indicate that service by MDU
14 would not be unreasonable interference.

15 There is further direction to this
16 Commission in 1988 when the Supreme Court of North
17 Dakota decided the first South Pointe case, which
18 is Cass Electric versus NSP, and in that case the
19 Supreme Court advised the Commission and the
20 residents of North Dakota that 49-03-01.3 is
21 applicable in the facts in this case. And that the
22 PSC in 1988 did err in construing its jurisdiction
23 too narrowly, and the Court mandated at that time
24 that it was the Public Service Commission's
25 responsibility to look at the existing facilities

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1 and to determine whether extension of services by
2 the electric utility -- in that case NSP, in this

3 case MDU -- would constitute an unreasonable
4 duplication of capital-intensive facilities.

5 Now we have the issue raised by MDU in
6 this case, which is which governmental entity has
7 the superior power, the Bismarck city commissioners
8 or the state as with its delegated responsibility
9 to the Public Service Commission.

10 The Baker Electric case versus the Public
11 Service Commission, which is also known as the
12 Otter Tail 1990 case, again clearly sets out the
13 state's position and states that the State of North
14 Dakota's constitutional power to regulate utilities
15 under its police powers is superior to local
16 government interests. And the state's interest,
17 its comprehensive regulatory scheme, does prevail
18 over municipalities' powers of self-government.
19 And that case also stands for the proposition that
20 any inherent regulatory power that the tribe, or in
21 this case the city, might have might be voluntarily
22 surrendered by the city. And that case does go on,
23 again, to discuss in great detail the authority of
24 the Public Service Commission over electric
25 utilities. And the public policy is outlined.

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1 The state -- the Supreme Court adopted a
2 quotation, and I'm quoting now from the Baker
3 Electric case, The regulation of utilities is one
4 of the most important of the functions
5 traditionally associated with the police powers of
6 the states. That case goes on to state, In the

7 exercise of its police power, the legislature has
8 given to the PSC broad authority to regulate
9 electric utilities engaged in generation and
10 distribution of light, heat or power, and the
11 authority of the PSC over electric utilities is
12 extensive. And prominent among the powers granted
13 to the PSC is the authority to control an electric
14 public utility's construction and extension of its
15 plant or system pursuant to Chapter 49-03, and more
16 specifically, 49-03-01.1, 49-03-01.3, 49-03-01.4,
17 and 49-03-01.5, which are known as the Territorial
18 Integrity Act, through the issuance of certificates
19 of public convenience and necessity.

20 And, again, the primary purpose of the
21 Territorial Integrity Act was to keep to a minimum
22 wasteful duplication of capital-intensive utility
23 services and reduce conflicts between suppliers of
24 electricity.

25 And in our view, those three cases clearly

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1 tell this Commission what you do have jurisdiction
2 over and what you don't have jurisdiction over,
3 what you have the responsibility and obligation to
4 decide, which is which facilities would constitute
5 unreasonable duplication, and which issues you
6 don't have jurisdiction to decide.

7 This Commission in its -- in the paperwork
8 that's been filed has acknowledged that it doesn't
9 have the jurisdiction to decide the franchise
10 issue, but you do have the jurisdiction to decide

11 the interference case, even if you are bothered or
12 troubled or concerned by the franchise issue.

13 There is no reason to delay fulfilling the
14 responsibility that the State of North Dakota
15 through its legislative body in 1965 granted to
16 this Commission. You have the power. You are the
17 elected officials who are charged with the
18 responsibility of avoiding wasteful duplication of
19 these services for the benefit of not only the
20 members of Capital Electric, but the members and
21 the citizens of the City of Bismarck, of the City
22 of Washburn, Minot, Carrington. That is your
23 responsibility. That is your charge.

24 And these other issues, again, while you
25 may be concerned, while you may want to express

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1 your view or express your concern, they are not for
2 you to decide. The record is complete. The facts
3 are undisputed. You can look at the exhibits that
4 were received into evidence on February 9th, and
5 you have all the information you need to decide
6 Capital's complaint under the Territorial Integrity
7 Act. There is no reason to delay making that
8 decision. There is no reason to avoid making that
9 decision.

10 And I would ask you, if you are concerned
11 by the November 14th order, read it again and try
12 to look in that order and see if you can find
13 anyplace where the Bismarck city commissioners
14 looked at the existing facilities and services that

15 Capital and MDU had in place to serve Boulder
16 Ridge. Look and see if the Bismarck City
17 Commission used any of the factors or considered
18 any of the factors that the Supreme Court and the
19 legislature in the Territorial Integrity Act has
20 required of this Commission to look at when
21 considering and making its findings under the
22 Territorial Integrity Act.

23 Capital filed this complaint with the
24 Commission on September 29th, 2005. We think we've
25 waited long enough. The hearing was held. You

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1 gave us the opportunity to present the evidence
2 about our system, and that evidence is
3 uncontroverted. MDU chose to put in no evidence of
4 their system outside of what we all know as the
5 area service line and, quite frankly, because they
6 have no system.

7 You can see -- the evidence again is
8 uncontroverted -- that Capital's extensive system
9 in north Bismarck has grown in accordance with the
10 area service agreement, has grown and developed in
11 accordance with the grant of franchise that Capital
12 holds with the City of Bismarck. Capital has a
13 franchise. That franchise was received into
14 evidence on February the 9th, 2005, certified by
15 the City of Bismarck on, I believe, February 8 --
16 excuse me -- 2006, certified by the City of
17 Bismarck on February 8th, 2006. Capital has a
18 franchise.

19 what the franchise says or doesn't say
20 about MDU's right is not an issue that this
21 Commission is ever going to be able to decide. The
22 jurisdiction you have, while it is limited
23 jurisdiction, is powerful jurisdiction. You are
24 charged with the responsibility of protecting the
25 citizens of North Dakota, of keeping the costs down

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1 on electric distribution. Nobody else has that
2 responsibility or nobody else has taken that
3 responsibility. But the legislature has delegated
4 that responsibility to you and has told you -- has
5 told this Commission on more than one occasion to
6 not take a narrow view of the jurisdiction that was
7 delegated to it by the state and the state
8 legislature.

9 In my view, granting an indefinite delay
10 is worse than granting MDU's motion to dismiss
11 because it avoids the question. The record is
12 complete. Answer the question that you can answer,
13 the one question that you can answer, which is
14 which facility would constitute an unreasonable
15 duplication of service. That's all that the state
16 legislature asks you to decide. It doesn't ask you
17 to decide between conflicting statutes, it doesn't
18 ask you to decide between conflicting governmental
19 entities, it doesn't ask you to decide
20 constitutional questions.

21 The state in the Johnson versus Elkin case
22 has acknowledged that an administrative agency not

23 only lacks the power to decide constitutional
24 questions, but it is, and I'm quoting, often
25 presided over by persons who are undoubtedly well

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1 versed in regulatory matters, but lack any
2 expertise in constitutional law. And that case
3 again, goes on to say, and I'm quoting, The
4 administrative agency may, if it wishes, indicate
5 its views as to constitutionality, but such views
6 are not to be considered as binding.

7 I would assert to you that granting MDU's
8 motion implicitly by failing to decide this case is
9 an abuse of discretion. You have authority to
10 suspend the rules when doing so does not
11 substantially affect the public interest or the
12 interests of the parties, but this Commission is
13 well aware, because of the evidence received, that
14 there have been many areas in north Bismarck that
15 were in Capital's service territory that have been
16 annexed into the City of Bismarck and that have
17 been and are being served by Capital Electric
18 without objection by the city, without objection by
19 MDU. You cannot ignore that fact. Those are real
20 facts, and this Commission is charged with the
21 responsibility of looking at those facts and
22 deciding the one question that is within its
23 jurisdiction and leaving the other questions that
24 are not within its jurisdiction to those that have
25 the authority to make the decisions.

1 we would respectfully ask that this
2 Commission reinstate the briefing schedule. At the
3 conclusion of the hearing on February 9th, I recall
4 Commissioner Wefald concluded the hearing with a
5 comment that I was in complete agreement with, it's
6 an interesting case. I'm interested in reading the
7 cases that are cited to us. And I think that you
8 need to do that. You need to read those cases, you
9 need to give MDU the opportunity to file its brief.
10 Capital has taken its opportunity and has filed its
11 brief in accordance with the schedule that the
12 administrative law judge established with the
13 consent of the parties at the hearing. MDU,
14 likewise, should have the opportunity to respond,
15 further supplement their brief on their motion to
16 dismiss. Clearly, MDU has made their arguments
17 about their feelings about the Constitution, about
18 their feelings about the power of the city.

19 MDU doesn't lose those arguments if you
20 decide the issue that's within your jurisdiction.
21 MDU gets to take those arguments with them, as
22 indicated by Johnson versus Elkin, and address that
23 to the District Court or the Supreme Court that has
24 the jurisdiction to decide those questions.

25 So we ask that you do what you are charged

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1 to do, to not view -- to implicitly grant MDU's
2 motion to dismiss by delay sends a message that you
3 view your position as weak, that you view your role

4 in regulating electric utilities as subservient to
5 the cities in the State of North Dakota, that we
6 will have mini PSCs all over the state within the
7 city which would violate the State of North
8 Dakota's stated public policy that the Territorial
9 Integrity Act was designed to prevent, which is the
10 wasteful duplication of these capital-intensive
11 services. For over 40 years the legislature has
12 charged you with that responsibility, and we would
13 respectfully ask that you reinstate the briefing
14 schedule, give due consideration to the parties'
15 arguments, and then decide the issue that you are
16 charged with deciding. Thank you.

17 JUDGE WAHL: Do any of the Commissioners
18 have any questions?

19 COMMISSIONER WEFALD: I do.

20 JUDGE WAHL: Commissioner Wefald.

21 COMMISSIONER WEFALD: You mentioned --
22 would you just clarify your remarks about the
23 status of your franchise with the city? You said
24 something about 2005 or 2006.

25 MS. LARSON: I apologize.

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1 COMMISSIONER WEFALD: So I don't quite
2 know what you're referring to.

3 MS. LARSON: Thank you. I appreciate that
4 opportunity. Our franchise with the City of
5 Bismarck was initially granted in 1973. It was
6 renewed in 1993. At the hearing on February the
7 9th, we introduced Exhibit C-1, which was

8 Complainant's Exhibit C-1, which was a
9 certification by the City of Bismarck and included
10 the 1973 minutes of the Commission which concern
11 the area service agreement, a '90 letter amending
12 the agreement, the '93 copy of the city minutes
13 calling for a public hearing, and the May 25, 1993,
14 copies of the city resolution holding the public
15 hearing, and the 1993 copy of the resolution
16 granting the franchise, and then Capital's
17 acceptance of the franchise. So we have a
18 franchise with the City of Bismarck. We have a
19 dispute over what that franchise means and it's
20 going to be decided, but we have a franchise that
21 was offered and received into evidence.

22 COMMISSIONER WEFALD: Thank you. You've
23 referred to the South Pointe cases, and in those
24 cases one fact in the record -- just one fact was
25 who held the franchise for the area that was in

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1 question. In none of your briefs that I've had a
2 chance to read do you ever mention the fact that
3 that was one fact that the Supreme Court and the
4 Commission considered as it made its decision.
5 would you like to comment on that?

6 MS. LARSON: Well, in the South Pointe
7 cases there were a number of facts that the Court
8 looked at. One of them similar to the Capital and
9 MDU situation was that NSP and Cass had an area
10 service agreement that was abandoned, but the fact
11 was that the area had grown in accordance with the

12 -- had grown in accordance with the area service
13 agreement even though it was abandoned. That was a
14 fact. The fact was that the system was there.

15 In our case the fact exists that we have a
16 franchise. Now, whether the city would like to
17 choose MDU over Capital to exercise service to a
18 particular area, in our view, is a thinly disguised
19 customer service argument, doesn't get, again, to
20 the requirement that the public -- in the public
21 interests that we avoid wasteful duplication of
22 services. So the undisputed fact is that we do
23 have a franchise.

24 The disputed fact, I guess, is between the
25 two franchised utilities. MDU holds a franchise,

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1 Capital holds a franchise. Between those two
2 disputed utilities, who, in the city's view, would
3 the city like to serve? But we believe the
4 Territorial Integrity Act does require you to look
5 at the actual facilities.

6 COMMISSIONER WEFALD: Thank you. If the
7 Commission were to -- you're suggesting that you
8 would prefer the Commission dismiss the case. You
9 said that you would rather the Commission dismiss
10 the case rather than to have a continuance --
11 there's three options that you noted -- that you've
12 stated. I heard you say that rather than the
13 Commission issue a continuance, you would rather
14 that we dismiss the case. Is that your feeling?

15 MS. LARSON: It's my feeling that you
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16 should deny the motion to dismiss because I believe
17 that under the law you do have jurisdiction, you
18 are mandated to decide and address our interference
19 claim; but if after reviewing all of the cases, the
20 arguments of counsel, and the briefs, if you in
21 your heart and in your -- using your intellect and
22 your common sense and your assistants, if you
23 believe in your heart that your power is weaker and
24 subservient to the City of Bismarck's, then, yes,
25 you should grant the motion to dismiss.

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1 COMMISSIONER WEFALD: why would I make
2 that assumption? why would I make that assumption?
3 Because -- why does the Commission's authority,
4 which we're talking about here, do we have the
5 authority to issue a continuance -- why does that
6 have anything to do with how I view another
7 agency's power?

8 MS. LARSON: Because you are delaying
9 fulfilling your mandated responsibilities because
10 of that concern, and that in my view says you
11 think --

12 COMMISSIONER WEFALD: But you're assuming
13 that's my concern.

14 MS. LARSON: I think under the facts of
15 this case that's the only logical assumption there
16 is, because the evidence of interference was
17 uncontroverted. There's no evidence put forth by
18 MDU of their system, so you are probably never
19 going to be faced with a more egregious case of

20 interference than what the record already shows.
21 And if you delay -- indefinitely continue -- that
22 indefinite continuance could be two years -- I
23 think there's no other logically or intellectually
24 honest way of dealing with that other than making
25 that assumption that you do feel that the city's

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1 power is greater than yours. It's the only way
2 that I can reconcile that.

3 And, again, I can appreciate that your --
4 I can appreciate your concern. I can appreciate
5 the Commission's questioning about where does the
6 franchise issue come in, how does the issue of
7 granting franchises by cities interplay with the
8 Territorial Integrity Act. They are interesting,
9 challenging, complicated facts, but you're presumed
10 to -- you're required -- excuse me -- to presume
11 the constitutionality of the statutes under which
12 you operate, which is the Territorial Integrity
13 Act. You are presumed that the legislature can
14 reconcile all of those statutes, and I believe we
15 can. We've certainly argued that thoroughly in our
16 motion to dismiss, and, therefore, I -- again,
17 under Johnson v. Elkin express the concern that you
18 have, but decide the issue that you can decide.

19 Actually, I think you're in probably the
20 best position for all of us. You don't have to
21 decide between the city and you. That is going to
22 be for a court to decide. But the Supreme Court
23 has told you on more than one occasion to not take

24 a narrow view of your jurisdiction. And I would
25 urge you today to not take a narrow view and decide

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1 the issue that's within your jurisdiction. And MDU
2 has clearly made its arguments, they take those
3 arguments with them. They are not abandoned. They
4 can make those arguments and those arguments will
5 give direction in the future one way or the other,
6 but you will have fulfilled your role, your piece
7 to this puzzle, by deciding the interference
8 question and letting others handle the really
9 difficult question, which is the interplay between
10 the city and the Territorial Integrity Act and the
11 constitutionality of those statutes. The
12 Territorial Integrity Act has already withstood
13 constitutional challenge. We think it will again.

14 COMMISSIONER WEFALD: Thank you.

15 MS. LARSON: Thank you.

16 JUDGE WAHL: Any further questions from
17 the Commission?

18 COMMISSIONER CLARK: No.

19 COMMISSIONER CRAMER: I'm afraid I'd just
20 start talking. Thank you.

21 JUDGE WAHL: Mr. Kuntz.

22 MR. KUNTZ: Thank you. The notice of
23 hearing listed only one issue in this argument and
24 that was whether or not the Commission has
25 authority. Most of Ms. Larson's argument is

1 centered around a second issue as to whether or not
2 the Commission should grant a continuance. I'm
3 going to try to address both of them, as well,
4 since apparently there's some interest in the
5 second.

6 But before I do that, I want to make sure
7 the record is clear because the briefs that Capital
8 Electric has filed in this motion has suggested
9 that it didn't learn of the Commission's intent to
10 suspend the briefing schedule and continue this
11 hearing until Commissioner Wefald apparently made
12 some comments at a legislative committee meeting
13 some weeks after the Commission's work session.
14 Nothing could be further from the truth. I believe
15 Capital Electric was alerted to the fact that the
16 Commission was having a work session the day after
17 the hearing. In fact, it's my recollection that
18 Ms. Larson was on the telephone at the time of that
19 work session. There was no objection voiced then
20 to the Commission's action, albeit that was a work
21 session, but certainly there was nothing filed
22 immediately following or immediately before to
23 alert the Commission to Capital's complaint.

24 I don't know that that makes any
25 difference to this motion, but I don't want the

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1 suggested record to be muddied with some argument
2 that somehow Capital Electric was denied some due
3 process by the fact that it was considering

4 continuing the case without advising Capital
5 Electric, because clearly they were well aware of
6 what the Commission was considering.

7 On the question of your authority, I think
8 there are two things you can look at. Certainly
9 there's a statute that addresses this in the
10 Administrative Practices Act, it's the only statute
11 that I can find on the point that basically says
12 that the Commission has 30 days after the receipt
13 of evidence and briefs and arguments to issue its
14 decision, if possible. I think there's clearly
15 discretion there with respect to the Commission.
16 If you want to suspend the briefing schedule, if
17 you want to hold the record open awaiting the
18 outcome of any final court action on the franchise
19 issue, there's certainly authority within that
20 section that would allow you to do that.

21 Also, your own rules of 69-02-04-03
22 specifically provide for continuances of your
23 proceedings and also provide for a continuance on
24 the basis of the Commission's own motion. So if
25 the Commission believes that the outcome of these

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1 court proceedings involving the franchise are a
2 consideration that is going to enter into its final
3 decision or could enter into its final decision,
4 then I think there's reason for the Commission to
5 continue it, and I think you're certainly within
6 your authority to do that on that particular basis.
7 I don't think there could be really any serious

8 question here about whether the Commission has the
9 authority to continue this case while it awaits the
10 outcome of the court proceedings.

11 I think probably the better question is
12 the one that Ms. Larson has been arguing, whether
13 you want to continue it or not, and I think that's
14 really the question because I think clearly you
15 have the authority.

16 I don't think there was any question that
17 it's Montana-Dakota's preference that this case be
18 dismissed. We've made two written motions to that
19 effect before the hearing, we renewed the motion at
20 the hearing.

21 That being said, we understand the
22 Commission's position -- or at least its tentative
23 position based on the work session that if --
24 certainly if the city commission's decision were
25 reversed on appeal, it might have an impact on your

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1 decision, and that rather than based upon the
2 record as exists right now, that the franchise is
3 decided based upon the city commission's decision,
4 you would want to wait until all the court
5 proceedings on that issue are decided, you know, we
6 can understand that. I mean, again, our preference
7 would be the case be dismissed, but if the
8 Commission believes it would be appropriate to wait
9 until all the court proceedings on that question
10 are decided, I think that's appropriate.

11 I don't think there could be any question

12 that the issue -- the franchise issue is a
13 threshold issue even in this particular complaint.
14 Capital Electric now seems to say that almost that
15 it's irrelevant, it doesn't make any difference
16 whether it has a franchise. It says it has a
17 franchise in the City of Bismarck, but it totally
18 ignores the fact that the city has said that
19 franchise does not extend to Boulder Ridge, which
20 is what we're talking about and which is what the
21 basis on which Capital Electric filed its
22 complaint. They could have just as well had a
23 franchise to serve the City of Fargo. It's about
24 as much relevance to the question of fact that
25 they've got a franchise for some other part of

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1 Bismarck to the question of whether or not they're
2 authorized to serve Boulder Ridge.

3 This is a complaint brought under 49-03 or
4 4 for interference with service or facilities.
5 There can't be an interference with service if you
6 are not authorized to provide service in the area.
7 That's the threshold determination. If you're not
8 authorized to provide service under your franchise
9 with the city, how can there possibly be
10 interference with that service? That is the issue
11 before the Commission.

12 with respect to interference with
13 facilities, Capital Electric's witness testified to
14 the fact that MDU's service to Boulder Ridge is not
15 interfering with the use of its facilities in that

16 area the way it's historically used them and for
17 the reason that they were built. There's no
18 interference with their facilities. They're using
19 them the same way that they've always used them.
20 Contrary to Ms. Larson's argument that the evidence
21 is uncontroverted, we put in evidence in this case
22 showing that we are the franchiseholder based upon
23 the city commission's decision.

24 Since that hearing, of course, the
25 Commission is aware, because you're a party to that

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1 case, the District Court has affirmed the city
2 commission's decision in that matter, so we're one
3 step further along.

4 But it's not just me saying that this is a
5 threshold issue. Look at Capital Electric's
6 complaint in this particular case. The first three
7 pages of that complaint are spent talking about its
8 franchise and its area service agreement, and then
9 you get to paragraph VI, Pursuant to the grant of
10 the franchise incorporating the area service
11 agreement, Boulder Ridge is located in CEC's
12 service area. That's its allegation in this case.
13 That's what it was claiming, that it was the
14 franchise provider of service in Boulder Ridge and
15 that MDU was interfering with that franchise by
16 virtue of its extension of service into that area.

17 If that were correct, if Capital Electric
18 had proven that allegation, then we would have a
19 South Pointe case. It didn't prove that

20 allegation. The other place to look is look to
21 what it asked for in its prayer for relief. It
22 asked for two things, restraining and enjoining MDU
23 from constructing or extending its interfering
24 lines, plant or system into CEC's franchise service
25 area; number two, requiring immediate removal of

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1 all of MDU's facilities in CEC's service area; and,
2 three, I guess they asked for such other further
3 relief. Their entire complaint is based upon the
4 assumption that Boulder Ridge is their service area
5 pursuant to their franchise from the City of
6 Bismarck. I think we can say it's pretty well
7 controverted in this record that MDU has put in
8 evidence this is not part of Capital Electric's
9 franchise area -- service area under the franchise
10 from the City of Bismarck.

11 If the outcome of the court action is
12 irrelevant, that Capital Electric thinks it's
13 entitled to serve Boulder Ridge regardless of what
14 the franchise says, then why did Capital Electric
15 start the District Court action? Why did it join
16 the PSC to the court action? Why has it said
17 publicly that it intends to appeal the District
18 Court action? Certainly the District Court has
19 said that its determination and the city's
20 determination of what's relevant -- or where the
21 franchise -- who holds the franchise is relevant to
22 the Public Service Commission's consideration in
23 this case. I don't know how you cannot come to a

24 conclusion that that is a threshold consideration
25 here.

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1 Ask yourself, if the Supreme Court -- if
2 Capital Electric appeals the District Court
3 decision on the franchise and the Supreme Court
4 reverses the city and says that Capital Electric is
5 the franchiseholder, does it change what your
6 conclusion might be in this case? I think
7 obviously it does. It changes all kinds of
8 considerations in this case. And I can tell you
9 the first person who would bring that decision to
10 your attention would be Capital Electric saying
11 that it should influence the decision in this case.

12 well, if it would influence your decision,
13 if it's a consideration that you would like to know
14 before you reach the final decision, then I think
15 there's a reasonable basis for the Commission's
16 decision that says that we would like to wait and
17 see the outcome of that. If Capital Electric says
18 the outcome is irrelevant to this particular case,
19 then why doesn't it simply stipulate that it won't
20 appeal the District Court case and we can get on?
21 You've got a final court decision at that point
22 from the District Court and you can make your
23 decision based upon the District Court and the
24 city's decision.

25 I would also suggest, as the Commission, I

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1 think, realized when it discussed this at its work
2 session, if the District Court case is appealed,
3 there's like -- there could very well be guidance
4 on this question by the Supreme Court. Capital
5 Electric has argued before the District Court the
6 fact that the city did not have authority to decide
7 this question, this franchise dispute in Boulder
8 Ridge, that that is exactly the PSC's decision, the
9 same kind of -- essentially the same argument it's
10 making here. If they continue to make that
11 argument before the Supreme Court -- it wasn't
12 precisely addressed by the District Court outside
13 of its initial decision, but if they continue to
14 make that argument to the Supreme Court, then I
15 think there's a fair chance that the Supreme Court
16 may well provide some guidance on that question in
17 its final decision that the Commission might find
18 useful.

19 Clearly, the franchise is a threshold
20 issue to deciding whose service area this is.
21 Capital Electric's complaint acknowledges this.
22 You would have to resolve conflict between
23 49-03-06, sub 8, which says the TIA does not
24 interfere with the city's right to franchise, you
25 have to resolve that, versus Capital Electric's

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1 position in this case.

2 I think, most importantly, if the
3 Commission were to adopt Capital Electric's
4 position, we have a real interesting situation

5 because, on one hand, the Public Service Commission
6 is telling MDU we can't provide service in Boulder
7 Ridge and, on the other hand, you've got the city
8 telling Capital Electric they can't provide service
9 in Boulder Ridge, so we've got a group of citizens
10 in Bismarck who aren't going to get electric
11 service for six months while these appeals are
12 pending, and I think that's absolutely ridiculous.

13 I think clearly the franchise issue is
14 threshold to determine whose service area this is.
15 We believe that threshold issue has been decided by
16 the city, by the District Court, albeit there could
17 be an appeal that could change that decision. We
18 think it's either a case of dismissing this based
19 upon that determination of franchise or certainly
20 if the Commission wants to continue it while it
21 determines whether the court cases should change
22 the outcome of that service area determination, I
23 think that's reasonable, as well, and it's clearly
24 within the Commission's authority.

25 JUDGE WAHL: Questions by the Commission.

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1 Commissioner Clark.

2 COMMISSIONER CLARK: Let me ask a question
3 and preface it with a concern that I have about the
4 word "threshold." It's one that's nagged me for
5 some time. And that is, does a utility -- let's
6 step back from this case, but if you had a true
7 what you would consider interference claim -- you
8 said that you don't believe this case happens to

9 meet the common definition of interference, but
10 let's say you had a true interference, a technical
11 interference with a system, would a utility have to
12 have a franchise to file a complaint in front of
13 this Commission?

14 MR. KUNTZ: Would a utility or would a
15 co-op?

16 COMMISSIONER CLARK: Either. Would a
17 utility, be it incorporated as a co-op or
18 investor-owned utility?

19 MR. KUNTZ: One of the problems with the
20 TIA is it allows co-ops to file complaints against
21 the utility, but it doesn't have a reciprocal right
22 of a utility to file a complaint against a co-op
23 for interference. And the old case, the Johaneson
24 case, that first discussed the constitutionality of
25 the TIA, there's discussion in there in the Court

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1 that there was authority for a utility to file a
2 complaint against a cooperative, but presumably
3 that complaint would have to be done at the
4 district court level rather than before the Public
5 Service Commission.

6 COMMISSIONER CLARK: Although --

7 MR. KUNTZ: So that's an interesting
8 question, but that's how they resolved the equal
9 protection arguments and under the TIA was saying,
10 well -- because the IOUs we're saying, hey, they
11 can file complaints against us, we've got no
12 ability to file against them, the Court said, well,

13 you can file against them in district court if you
14 need a place to file against them.

15 COMMISSIONER CLARK: Was that with regard
16 to the issue of the certificate of public
17 convenience and necessity, or was that --

18 MR. KUNTZ: That was on the interference
19 question.

20 COMMISSIONER CLARK: The second half of
21 that 49-03?

22 MR. KUNTZ: That's my recollection, it was
23 on the interference question.

24 Now, back to your question, could the
25 co-op file a complaint against a utility for true

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1 interference. Let's say that the City of Bismarck
2 had said that north Bismarck is Capital Electric's
3 franchise, south Bismarck is MDU's, MDU wants to
4 serve an industrial load that's on the north side
5 of Main Street and they look at the TIA and say,
6 the TIA says I can extend my facilities inside the
7 city, I'm going to run my line across into the
8 area, that is the franchise -- they're into Capital
9 Electric's service area -- franchised service area,
10 that would be the basis for a complaint. That was
11 the South Pointe case. They would have a basis to
12 come into the Commission and say, Listen, we've got
13 a franchise to serve north Bismarck, they don't,
14 they're running a line into north Bismarck, that's
15 an interference with our system and our facilities.
16 That was the South Pointe case. Clearly, that's

17 within your jurisdiction.

18 But that's where the threshold
19 determination comes in inside the city, is you have
20 to look and see, based upon the franchises, whose
21 service area is this, and that initial
22 determination is made by the city, then if a public
23 utility is interfering with somebody else's area --
24 franchised area, then you've got the right to step
25 in and say, wait a minute, you can't do that.

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1 COMMISSIONER CLARK: Although, couldn't
2 the legislature in that statute have simply
3 written, a franchiseholder within a municipality
4 has the right to bring a complaint as opposed to if
5 a public utility in constructing or extending its
6 line unreasonably interferes with or is about to
7 interfere unreasonably with the service of a system
8 of another electric public utility or any electric
9 cooperative corporation, so on and so forth? If
10 they wanted to limit it to only franchiseholders,
11 wouldn't they have said that?

12 MR. KUNTZ: They could have, but I think
13 the clarification in the last legislative session
14 to Section 06 in 49-03, Subsection 8, that nothing
15 in this chapter -- nothing in the TIA shall
16 interfere with a city's right to franchise was
17 clearly intended to make sure the TIA wasn't used
18 in the way that Capital Electric wants to use it in
19 this case, is try to trump the city commission's
20 franchise authority. I mean, we can go back --

21 there's all sorts of ways. We could write the TIA
22 and it could be in a better statute and a more
23 clear statute and we wouldn't have had the last 30
24 cases before the Supreme Court if that statute were
25 crystal clear. I think the Commission -- not

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1 necessarily this Commission, but the Commission has
2 struggled over the years trying to get on the same
3 page as what the legislature intended with the TIA
4 and has been reversed a couple, three times in the
5 process.

6 COMMISSIONER CLARK: I think it's fair to
7 say all Commissions have had that issue over the
8 years.

9 MR. KUNTZ: Yeah. So I concur with the
10 fact that that statute is less than crystal clear,
11 it could have been written a little better. I
12 would concede with that.

13 COMMISSIONER CLARK: I don't have any more
14 at this point.

15 JUDGE WAHL: Any further questions from
16 the Commission? Commissioner Cramer.

17 COMMISSIONER CRAMER: Mr. Kuntz, what
18 would you see as the ramifications of the
19 Commission deciding on the interference case, but
20 opining our concern about the threshold issue,
21 which, I guess, is what Ms. Larson was suggesting
22 earlier? I'm not sure what --

23 MR. KUNTZ: I think what she was talking
24 about was with respect to saying that you can't

25 decide constitutional issues, but you can opine on

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1 them. No one is asking you to declare the TIA act
2 unconstitutional. What we're simply asking you is
3 to interpret the TIA consistent with the
4 constitutional provision that says that the cities
5 are the determinants of who has the service areas
6 within the city. You are to determine if there's
7 an interference with the service area. The
8 underlying assumption of who makes the
9 determination of whose service area is whose within
10 the city is first the city's. Once they make that
11 decision, then if somebody wants to come in and
12 file a complaint saying they're interfering with my
13 service area, that's where you step in. But inside
14 the city, the city gets to decide whose service
15 area is whose. Outside the city, that's your call
16 under the TIA. Inside the city you first have to
17 look at them. And this isn't just a constitutional
18 issue. This is now written into the TIA statute
19 saying that inside the city, the city makes the
20 call of whose service area it is, you consider that
21 before you determine whether there's been an
22 interference. So I don't think you even need to
23 opine on any constitutionality because we're not
24 asking you to declare the TIA unconstitutional.
25 we're just saying you've got to look at all these

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1 things when you figure out whose service area is
2 it.

3 COMMISSIONER WEFALD: Would you agree
4 there's other facts that the Commission may
5 consider at that time, as well?

6 MR. KUNTZ: Once you determine whose
7 service area it is, but I don't know how you can
8 determine there's been an interference with someone
9 else's service area inside a city if they can't
10 provide you with a franchise showing you that
11 that's their service area. I mean, that was a
12 consideration in South Pointe. That was the basis
13 for the South Pointe decision, was the fact that
14 Cass County Electric pursuant to the city
15 commission's direction had declared that was their
16 service area, there had been no objection by NSP,
17 and it had gone on for some period of time, and
18 that based upon that indication that this was going
19 to be Cass County Electric's franchised area, they
20 built facilities based on that particular franchise
21 determination. That was the underpinnings of the
22 South Pointe case. We don't have that.

23 JUDGE WAHL: Any further questions from
24 the Commission? Mr. Binek.

25 MR. BINEK: Thank you. A lot of what I

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1 have to say has already been said. I apologize if
2 I duplicate some of that again.

3 As has been noticed, the issue before the
4 Commission at this hearing is whether the

5 Commission has authority to issue a continuance for
6 an indefinite period of time until the issue of the
7 city franchise rights is finally determined. The
8 Commission clearly has that authority. North
9 Dakota Administrative Code Section 69-02-04-03
10 provides that after hearings are scheduled,
11 continuances may be granted by the Commission for
12 good cause, and it also provides that the
13 Commission may effect a continuance upon its own
14 motion. The case does not end at the hearing and
15 the rule doesn't provide, as suggested by Capital,
16 that continuances can only be granted after
17 hearings are scheduled but before hearings are
18 completed. Continuances may be granted by the
19 Commission at any point in the proceeding after a
20 hearing has been scheduled under this rule.

21 And if the Commission has any doubt about
22 its authority to grant a continuance under that
23 rule, the Commission has the authority under
24 69-02-01-11 to suspend upon its own motion any
25 rule, procedure or any part thereof. The

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1 Commission also has the authority to continue the
2 proceeding on its own motion without notice to the
3 parties. Under the rules notice is required if it
4 wants to exercise its rights to suspend compliance
5 with the rule. That is no longer an issue because
6 a notice has been scheduled.

7 It's Capital that has chosen the course of
8 action that has resulted in what I refer to as the

9 untenable situation. Rather than following through
10 with the process that was initiated before the
11 city, Capital chose to initiate a complaint before
12 this Commission alleging interference, then Capital
13 initiated another proceeding for declaratory
14 judgment in the District Court. It's
15 understandable that Capital doesn't want to deal
16 with the franchise issue at this point because the
17 decisions have not been in Capital's favor.
18 However, the issue of franchise rights is basic to
19 the right to provide electric service within the
20 City of Bismarck. It is a threshold issue, whether
21 Capital wants to believe it or not.

22 I believe that this is an issue that the
23 Commission has to deal with. Capital argues that
24 the franchise issue -- it's interesting, I admit.
25 They argue that the Commission must address this

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1 issue on its own within its authority and not
2 acting outside the scope of its authority and not
3 expecting any advance directive from any court.
4 For the Commission to proceed as suggested by
5 Capital, I think, would be irresponsible.

6 The Commission is well aware that an
7 electric provider must have a franchise from the
8 City of Bismarck in order to provide electric
9 service within the city. The Commission is also
10 aware that the City of Bismarck has determined that
11 MDU has the franchise to provide electric service
12 to the Boulder Ridge Subdivision. The Commission

13 is also well aware of the fact that the District
14 Court has denied Capital's appeal of the franchise
15 issue, and, therefore, the city's decision on the
16 franchise issue stands.

17 A decision by this Commission prior to a
18 final decision on the franchise issue, I believe,
19 would be premature. The Commission would be
20 well-advised to -- would be ill-advised to address
21 the franchise issue as Capital suggests on its own
22 within its authority and not acting outside the
23 scope of its authority and not expecting any
24 advance directive from any court. That's not a
25 responsible or advisable course of action for the

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1 Commission to take.

2 Capital seems to suggest that while the
3 Commission is concerned that two governmental
4 entities are at odds with each other is
5 understandable, that it's not good cause for the
6 PSC to refrain from making a decision in this case.
7 Capital apparently suggests that the Commission
8 should ignore that fact because it's not in the
9 Commission's responsibility to resolve. Capital
10 stated the PSC will find no similar expression of
11 discomfort by the city commission in its November
12 14th order, no feeling that it should be timid
13 about asserting its claim to power, and issue an
14 edict after the PSC proceeding was commenced.

15 There really isn't a conflict between the
16 PSC and the City of Bismarck regarding authority

17 here. Clearly, the franchise authority is within
18 the City of Bismarck's power. The PSC does not
19 have that authority and the PSC is not claiming to
20 have that authority. There's no concern about
21 encroachment on the city's or PSC's jurisdiction.
22 However, the franchise issue needs to be resolved
23 in order for a final resolution in this case in
24 general to be resolved.

25 Capital argues that the Cass Electric

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1 South Pointe cases provide all the precedent needed
2 by the Commission to decide this case. One fact
3 that Capital chooses to ignore is that there was no
4 franchise dispute in the Cass Electric cases, so
5 there's no precedent to follow regarding that issue
6 or what consideration must be given to that issue
7 in determining interference under Chapter 49-03.

8 Any decision made in this case under these
9 circumstances will lead to further litigation
10 because no matter what the decision is, it will be
11 appealed. The city franchise decision has already
12 been appealed to the District Court. A decision
13 has been issued in that case. That case is ripe
14 for appeal to the Supreme Court where determination
15 on the franchise rights will need to be made. The
16 franchise issue must be addressed by the courts
17 through the appeal process.

18 Capital argued that the PSC's
19 responsibility is to decide this case now. It
20 argues that it is not the responsibility to obtain

21 any decision or guidelines from any court in making
22 its decision. That course of action, I think,
23 would be irresponsible.

24 As far as harm, I stated in a brief that I
25 filed with the Commission that no harm will result

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1 from continuing this case. Capital talked about
2 the duplication of facilities. It's my
3 understanding based on the hearing that we had in
4 this case that facilities are already in place. I
5 believe Capital is already providing service to
6 some customers, MDU has its lines in the area, so I
7 don't see where any great deal of harm is going to
8 occur to either party.

9 Ms. Larson also made a comment about
10 common sense. I think common sense dictates, as
11 well, that it would be prudent for the Commission
12 to continue this case until there is resolution of
13 the franchise issue. I think that the decision
14 from the Supreme Court on the franchise issue will
15 provide a great deal of insight for the Commission
16 in going forward. I don't believe that the
17 Commission is taking a narrow view of its
18 jurisdiction by taking this course of action. I
19 think it's taking a realistic view of the entire
20 situation. Thank you.

21 JUDGE WAHL: Questions from the
22 Commission? Commissioner Clark.

23 COMMISSIONER CLARK: wouldn't common sense
24 also dictate, though, that you don't have to hold a

25 utility franchise to file a complaint that your

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1 system is being interfered with?

2 MR. BINEK: Pardon me.

3 COMMISSIONER CLARK: Wouldn't common sense
4 also dictate in just sort of a plain reading of the
5 statute that you don't have to hold a franchise to
6 file legitimately a complaint before the
7 Commission, regardless of whether the Commission
8 ultimately decides that the complaint has merit or
9 not?

10 MR. BINEK: Sure. I think to comply with
11 the complaint.

12 COMMISSIONER CLARK: But they wouldn't
13 have standing to have it heard?

14 MR. BINEK: Well, we've already heard the
15 complaint.

16 COMMISSIONER CLARK: But simply by virtue
17 of their not holding a franchise, it's to be
18 dismissed?

19 MR. BINEK: I'm not suggesting dismissal
20 at this point. That's the reason for continuance
21 so we don't have to reach that decision and we will
22 have the benefit of the Court's determination on
23 the franchise issue of which party has the right to
24 provide service in that area.

25 COMMISSIONER CLARK: But it gets back to

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1 my concern about that word "threshold" because that

2 does imply that if the Court says that Capital
3 doesn't have a franchise, then there's -- simply by
4 virtue of the fact they don't have a franchise the
5 case is decided, regardless of whether there's
6 interference or not. Isn't that the implication of
7 putting the word "threshold" in that?

8 MR. BINEK: I think that franchise -- the
9 franchise issue is an issue that has to factor into
10 a final determination by the Commission. I think
11 that that's where the Supreme Court decision will
12 assist the Commission in its determination in this
13 case, how much relevance is franchise. They may
14 say both parties have a franchise, and then you
15 look at that situation. If they say Capital
16 doesn't have a franchise, then hopefully they will
17 provide some indication of how this seemingly
18 irreconcilable situation between a city franchise
19 and interference can be resolved.

20 That's the dilemma we face in this case,
21 and I think it just makes good sense to wait some
22 time for the Court to decide that franchise issue
23 so the Commission will have some guidance, some
24 directive on how to deal with that in this case.

25 COMMISSIONER CLARK: If the franchise

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1 issue, though, is separate from the interference
2 issue, will the Court -- would the Court be giving
3 us any guidance on the interference issue because
4 it's not before them?

5 MR. BINEK: well, we don't know at this
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6 point. The franchise issue has never been before
7 the Court. It wasn't before the Court in the Cass
8 Electric case, the South Pointe cases. That's the
9 problem that we face in this case, is we don't have
10 any directive from the Court as to how to deal with
11 the franchise issue. The Court is well aware of
12 the proceeding -- or will be well aware of the
13 proceedings that are going on. They're not going
14 to be in the dark and not have knowledge that
15 there's a complaint before the PSC alleging
16 interference, so I believe we are going to get some
17 direction from the Court on that issue. To move
18 forward at this point without any directive I don't
19 think makes good sense.

20 JUDGE WAHL: Anything further from the
21 Commission?

22 COMMISSIONER CRAMER: I have a couple.

23 JUDGE WAHL: Commissioner Cramer.

24 COMMISSIONER CRAMER: Bill, why not
25 dismiss it after everything that you've just said?

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1 MR. BINEK: I'm not prepared to give any
2 recommendation on dismissing it or not dismissing
3 at this point. If that's going to be a
4 consideration for the Commission, then I think you
5 need to set a briefing schedule, and Ms. Larson
6 already has filed a brief, MDU should be provided
7 the opportunity to file its brief, and then you
8 look at the dismissal.

9 COMMISSIONER CRAMER: I have one other

10 question then. Is MDU's contention that
11 conflicting decisions -- we decide one for one
12 party on the complaint and the city decides for the
13 other party and that's upheld -- is it reasonable
14 to expect then that those homes that have been
15 built and are being built would be without power
16 until this is totally resolved, or is there another
17 way to ensure that they receive -- I mean, the
18 lights are currently on I noticed when I drove by
19 last night so somebody has got power, but is it
20 reasonable to expect that they wouldn't be able to
21 if there were conflicting decisions and we're going
22 on parallel tracks out there for the next year or
23 two?

24 MR. BINEK: well, both MDU and Capital
25 apparently have service lines in the area, so I

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1 think that power can be provided. There can be
2 temporary authority given by the Commission to
3 provide power, so I don't think people will go
4 without power while this process moves through the
5 courts.

6 JUDGE WAHL: Anything further from the
7 Commission? Rebuttal, Ms. Larson.

8 MS. LARSON: well, I think that
9 Commissioner Clark raises an excellent and critical
10 point. Nothing in Chapter 49-03-01 or .3 or .4
11 requires that there be a franchise. And if the
12 legislature had intended that as a threshold
13 requirement, it certainly would have stated that.

14 I mean, the statute is very clear.

15 You know, there's two purposes of the
16 Territorial Integrity Act. One is the avoidance of
17 the wasteful duplication. The second is to provide
18 protection to rural electric cooperatives'
19 territory. There's two purposes. And without
20 looking at those two purposes in reading Chapter
21 49-03, it is clear that a franchise is not
22 required.

23 Now, Capital argues and believes it has a
24 franchise. It did what -- you know, what the City
25 of Bismarck has requested, and the service area was

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1 agreed to by the City of Bismarck and MDU and
2 Capital's 1993 franchise states specifically that
3 if the area service agreement is canceled, that
4 Capital will continue to enjoy the rights,
5 obligations and privileges that it was granted
6 under the area service agreement. So we have a
7 franchise, but it is true that it is our position
8 that without a franchise, we still have the
9 protection and our members and the citizens of
10 Bismarck still have the protection of the
11 Territorial Integrity Act under the state's
12 comprehensive regulatory scheme and authority
13 delegated to the Public Service Commission.

14 The order from the City of Bismarck does
15 state that, you know, it's the intention of the
16 parties and by extension the intention of the city
17 when it awarded a franchise that MDU is to remain

18 the main provider of electric services except for
19 Capital's existing customers and any other
20 customers or services conceded to Capital by MDU.
21 One could read that to say that if this Commission
22 determined that there was unreasonable duplication,
23 then, therefore, this area is conceded to Capital,
24 whether it's voluntarily or involuntary, but that
25 Capital does extend, but there is no requirement

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1 for a franchise. We have a franchise, but the
2 Territorial Integrity Act does not require the
3 franchise as the threshold determination of
4 protection against unreasonable duplication and
5 interference.

6 And we would assert that the evidence is
7 clear and that the Commission should reinstate the
8 briefing schedule and proceed to decide this case.
9 Thank you.

10 JUDGE WAHL: Any last questions for Ms.
11 Larson from the Commission?

12 COMMISSIONER CRAMER: I just have one.
13 This doesn't go to rebuttal, but your previous
14 statement, and I guess Bill addressed it to some
15 degree. The fact that you have two political
16 bodies or two subdivisions -- political
17 subdivisions as they're sometimes called or an
18 agency and a city -- that have separate and
19 different authorities, does that necessarily mean
20 one is subservient to the other? I guess I found
21 that choice of words somewhat odd.

22 MS. LARSON: Well, I mean, maybe there are
23 different or better ways to state it. You know,
24 the city has the right to grant franchises, the
25 city exercised that right, it granted a franchise

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1 to MDU, it granted a franchise to Capital. It has
2 not chosen to establish a comprehensive regulatory
3 scheme, it hasn't hired people, it doesn't pretend
4 to look at the facilities, and so there is a
5 hierarchy. The state has the primary interest in
6 its police powers of regulating utilities. It's an
7 important police power and it has delegated that
8 responsibility here.

9 So the city has a multitude of functions.
10 The city does carry out the legislative authority
11 for the city, but it's not the judiciary and it's
12 not a regulatory body and it's not an
13 administrative agency, so it did find in its
14 legislature authority that Capital should be
15 granted a franchise, and the legislature has
16 granted -- or delegated authority of enforcement of
17 the Territorial Integrity Act to this body.

18 COMMISSIONER CRAMER: You continue to say
19 that Capital has a franchise, but we're talking
20 about Boulder Ridge and Capital, I don't believe,
21 does have a franchise in Boulder Ridge, or is there
22 something I've missed?

23 MS. LARSON: Well, if you look at the city
24 and how the city says it grants franchises, this
25 was a petition that was filed to determine between

1 two franchised utilities who has the right to serve
2 a particular area. It was not a petition to amend
3 or change the franchise. Capital's franchise with
4 the city didn't allow the city to change it, didn't
5 allow Capital to change its franchise without the
6 city's permission. So, yes, I will continue to say
7 that we have a franchise.

8 And what the city did in deciding between
9 its two franchised utilities was not an exercise of
10 its legislative authority. It was picking and
11 choosing very similar to customer preference
12 between its two utilities. In fact, I think that
13 there was a quote from Judge -- Mayor Warford that,
14 you know, they were in the difficult position of
15 picking between two favored children. And, that in
16 my view, is not the exercise of its legislative
17 authority in granting a franchise.

18 So we do not dispute that the city has the
19 right to grant a franchise. We have a franchise.
20 You have a copy of the franchise. That copy of the
21 franchise incorporates the area service agreement.
22 The facts are our system has developed in
23 accordance with our franchise, with our obligation
24 to provide service to our rural members.

25 There are lots of rural folks in north

1 Bismarck who have not chosen to become citizens of

2 Bismarck, areas who have not been annexed. So we
3 are in the position of making long-range investment
4 to serve what the city agreed to us that we would
5 serve and what MDU agreed to serve. And, I think,
6 again, common sense will tell you that MDU made no
7 investment to serve in north Bismarck because it
8 didn't believe it had the right. You know, now
9 it's got a different theory and, you know, it's got
10 the opportunity to have that theory heard, but
11 under the Territorial Integrity Act the issue of
12 franchise is not a threshold issue.

13 JUDGE WAHL: Commissioner Clark.

14 COMMISSIONER CLARK: I do have a question,
15 and it gets back to Mr. Kuntz's point about
16 49-03-06, subsection 8, the section that was just
17 adopted in the last legislative session. Doesn't
18 he have a good point that maybe the Commission
19 doesn't need to get into issues of -- under that
20 subsection 1 whether you have to have a franchise
21 or not under the sort of constitutional law that
22 the legislature when they drafted that subsection
23 said it's not unclear and it doesn't necessarily
24 have to deal with the rest of that particular
25 subsection, but they didn't say nothing in this

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1 chapter -- nothing in this section shall be
2 construed to limit the authority of the governing
3 board. They said nothing in this chapter shall be
4 construed to limit the authority of the governing
5 board. How are we to take the new, most recent

6 enactment of the legislature into consideration?

7 MS. LARSON: Again, if the Commission
8 would reinstate the briefing schedule, Capital has
9 filed a very detailed brief addressing that very
10 issue of how the new chapter, which is a new way to
11 resolve, it's a new way for electric companies to
12 cooperate and work together with the guidance of
13 the city and the Public Service Commission, that we
14 are not looking at that situation here today.

15 COMMISSIONER WEFALD: Haven't you already
16 filed a brief addressing that issue?

17 MS. LARSON: Yes, I have.

18 COMMISSIONER WEFALD: I read it.

19 MS. LARSON: And, so, again, give MDU the
20 opportunity to address that issue, as well. But it
21 is -- it's a complicated process that you go
22 through in interpreting and reconciling statutes
23 and we have provided that for the Commission, and I
24 think that we have done it absolutely as honestly,
25 intellectually with the cases and the statutes and

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1 that that is -- the correct result is that those
2 statutes can be reconciled, that you can give
3 effect to the new way of doing things if and when
4 you're confronted with an area service agreement
5 under the new statute, but that that does not take
6 away from the old way, which is addressing these
7 conflicts under the Territorial Integrity Act under
8 the interference complaints.

9 JUDGE WAHL: All right. Any further

10 questions from the Commission? If not --

11 MR. KUNTZ: Might I be heard on a couple
12 points that come up in this round after my
13 argument?

14 JUDGE WAHL: You may, Mr. Kuntz.

15 MR. KUNTZ: Thank you.

16 JUDGE WAHL: With the understanding that
17 Capital may rebut.

18 MR. KUNTZ: I will keep it short.

19 JUDGE WAHL: Very briefly, please, in the
20 interest of covering this material thoroughly.

21 MR. KUNTZ: Commissioner Clark, it's
22 threshold from the standpoint not of your
23 jurisdiction of who holds the franchise, but it's
24 threshold to the determination of whose service
25 area it is. You're brought with a complaint saying

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1 someone is interfering with my service area. It's
2 threshold for you in deciding that complaint is
3 determining whose service area is it, and I think
4 that's where inside the city you look to the city
5 to determine through its franchise authority in
6 determining franchises and service areas rather
7 than the standard factors that you use outside the
8 city. So that's why we use the term "threshold."

9 In order to determine whether there's
10 interference, you first have to define whose
11 service area is it, and inside the city you look to
12 the city's franchising authority for that answer.

13 Capital Electric says that there has been

14 no investment by MDU in north Bismarck. There's no
15 investment in MDU outside the city limits because
16 the TIA prevents it from building its facilities
17 outside the limits. What Capital Electric wants
18 you to believe is that they can build a ring around
19 the city, which essentially they've done, and then
20 say, when those areas come into the city, MDU can't
21 serve them and the city can't franchise them to
22 MDU.

23 That's not the way it works. And that's
24 not been the mantra of the RECs for the last ten
25 years. If you go back and read the legislative

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1 history on bills that have come before the
2 legislature in the last ten years, the mantra of
3 the RECs says there's nothing to fix inside the
4 city, the cities have the sole right to determine
5 who's the provider and they can kick out the RECs
6 any time they want. That's the testimony that the
7 RECs have given time after time after time before
8 the legislative sessions saying why there's nothing
9 to resolve on the TIA because the area inside the
10 cities is for the cities to serve, that's
11 traditionally been the public utilities, the areas
12 outside the cities are the RECs.

13 The city did not take away a franchise of
14 Capital Electric. If you read the city
15 commission's decision, they did two things. Number
16 one, they interpreted Capital Electric's franchise
17 to say that it didn't include any areas that were

18 annexed after 1993, and, second, it said with
19 respect to Boulder Ridge, which was one of those
20 areas that was annexed after 1993, we are
21 determining with respect to that area that MDU
22 should be the service provider. That's where Mayor
23 warford was making his statement they were picking
24 between two favored children.

25 Once he determined it wasn't part of

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1 Capital Electric's existing franchise, they then
2 had to determine who are we going to give it to,
3 and they determined that it was included within
4 MDU's existing facilities and we were not going to
5 extend Capital Electric's franchise to include it.
6 So I wanted to correct on that.

7 with respect to the issue of temporary
8 power, yeah, you could have temporary power if we
9 go out and get a stay of the Commission's decision
10 pending appeal of that, but think of the logical
11 consequences of a determination, on one hand, if
12 you assume both of these decisions are upheld, you
13 have an irreconcilable conflict, on one hand, the
14 city saying you can't provide power in this city
15 without a franchise and telling that to Capital
16 Electric, and, on the other hand, the Public
17 Service Commission saying, MDU, you can't provide
18 power under your franchise because it would
19 interfere with some facilities of Capital Electric.
20 If that ultimate decision is upheld, you've got an
21 irreconcilable conflict there.

22 Now, yes, there's ways of providing
23 temporary power through getting stays, and so
24 forth, to get those resolved, but think about that.
25 I mean, that's the logical outcome of the decision

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1 that Capital Electric is asking this Commission to
2 make.

3 I think clearly the TIA is very clear by
4 the section that was added at the last session, if
5 there was any question before, that the TIA can't
6 be used to trump the city's franchise authority,
7 and that's exactly what Capital Electric is asking
8 you to do in this case.

9 JUDGE WAHL: Ms. Larson, you have the last
10 word. Mr. Binek, I'll come back to you, but, Ms.
11 Larson, next, please.

12 MS. LARSON: Thank you. The position
13 stated by MDU is contrary to the facts. The facts
14 are that Capital has provided service to the areas
15 within its service area, the areas outside the
16 service line under its franchise since 1973. They
17 have served those areas, they have continued to
18 serve those areas under its franchise after those
19 areas have been annexed into the city, and they
20 have done so without objection by the city or MDU.
21 Those are the facts which you can't ignore. And,
22 again, I will refer you to our brief with respect
23 to the reconciling of the old statute and the new
24 statute and will not belabor that point.

25 JUDGE WAHL: Does the Commission have any

1 questions of -- I'm sorry. Let me -- Mr. Binek,
2 I'm assuming you have nothing further to add.

3 MR. BINEK: I have nothing.

4 JUDGE WAHL: Does the Commission have any
5 questions -- any last questions for counsel?

6 COMMISSIONER WEFALD: No.

7 JUDGE WAHL: If not, the hearing will be
8 closed. Thank you, counsel.

9 MS. LARSON: Thank you.

10 (Concluded at 11:23 a.m., the same day.)

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1 CERTIFICATE OF COURT REPORTER

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3 I, Denise M. Andahl, a Registered
4 Professional Reporter,
5 DO HEREBY CERTIFY that I recorded in
6 shorthand the foregoing proceedings had and made of
7 record at the time and place hereinbefore
8 indicated.

9 I DO HEREBY FURTHER CERTIFY that the
10 foregoing typewritten pages contain an accurate
11 transcript of my shorthand notes then and there
12 taken.

13 Bismarck, North Dakota, this 6th day of
14 April, 2006.

15
16 _____
17 Denise M. Andahl
18 Registered Professional Reporter
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