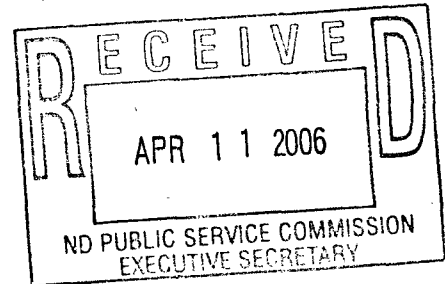


STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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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A P P E A R A N C E S

COMMISSIONERS PRESENT:

COMMISSIONER TONY CLARK
COMMISSIONER SUSAN E. WEFALD
COMMISSIONER KEVIN CRAMER

MR. WILLIAM E. BINEK
General Counsel
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505

FOR THE PUBLIC SERVICE
COMMISSION.

MS. CAROL K. LARSON
Pringle & Herigstad, P.C.
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P.O. Box 1000
Minot, North Dakota 58702-1000

FOR THE COMPLAINANT.

MR. DANIEL S. KUNTZ
Assistant General Counsel
MDU Resources Group, Inc.
1200 West Century Avenue
P.O. Box 5650
Bismarck, North Dakota 58506-5650

FOR THE RESPONDENT.

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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.
 11 Before proceeding with the hearing, I will
 12 ask the commissioners for their comments and for
 13 any directions for the hearing. Commission
 14 President Tony Clark.
 15 COMMISSIONER CLARK: I'd just like to
 16 welcome everyone this morning, look forward to the
 17 hearing.
 18 JUDGE WAHL: Commissioner Susan Wefald.
 19 COMMISSIONER WEFALD: Good morning. This
 20 is the hearing, of course, on the continuance and
 21 we've already had a great deal of material to
 22 review, which we have reviewed, and I'm looking
 23 forward to a good hearing.
 24 JUDGE WAHL: Thank you. Or I'm sorry.
 25 Commissioner Tony Cramer.

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1 COMMISSIONER CRAMER: That would be Kevin
 2 Clark. Welcome everyone, good morning.
 3 JUDGE WAHL: All right. The record will
 4 show that it is a little after 10:00 a.m., March
 5 23, 2006, the time and date noticed for the hearing
 6 of the question whether the Commission has
 7 authority to issue an order continuing the
 8 proceeding upon the complaint of Capital Electric
 9 Cooperative, Inc., against Montana-Dakota Utilities
 10 Co. for an indefinite period of time until the
 11 issue of the parties' city franchise rights is
 12 finally determined. This is the Commission's Case
 13 Number PU-05-551.
 14 . On February 10, 2006, following the
 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

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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.

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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
 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

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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

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 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

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

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 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

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

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 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

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

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
 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 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

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

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 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

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

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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 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 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

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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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 _____
 Denise M. Andahl
 17 Registered Professional Reporter

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