

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

**MONTANA-DAKOTA'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Appearances

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

Daniel S. Kuntz, Assistant General Counsel, MDU Resources Group, Inc., P.O. Box 5650, Bismarck, North Dakota 58506-5650, appearing on behalf of Montana-Dakota Utilities Co.

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

William W. Binek, Chief Counsel, North Dakota Public Service Commission, State Capitol, Bismarck, North Dakota 58505, appearing on behalf of the Public Service Commission.

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

Preliminary Statement

On September 29, 2005, Capital Electric Cooperative, Inc., ("CEC") filed a complaint alleging that Montana-Dakota Utilities Co. ("MDU") intended to provide electric service to a subdivision known as "Part of Boulder Ridge First Addition to the City of Bismarck" ("Boulder Ridge"). CEC alleges Boulder Ridge is part of CEC's franchised service area and MDU's extension of service will unreasonably interfere with the service or system of CEC in violation of N.D.C.C. § 49-03-01 and 49-03-01.3. CEC

requests the Commission to issue an order: (1) restraining and enjoining MDU from constructing or extending its interfering lines, plant, or system into CEC's franchised service area; (2) requiring immediate removal of all of MDU's facilities in CEC's service area; and (3) such other terms and conditions as the Commission may deem reasonable and proper.

On October 20, 2005 MDU filed an answer and counterclaim to CEC's complaint. In its answer, MDU denies Boulder Ridge is within CEC's franchised service area and alleges Boulder Ridge is within the area of MDU's unlimited franchise from the City of Bismarck. In its counterclaim, MDU alleges CEC is providing electric distribution service to customers who are not eligible for membership in CEC. MDU requests the Commission to issue an order: (1) dismissing CEC's complaint against MDU; (2) declaring that CEC is prohibited from providing electric distribution service within Boulder Ridge; and (3) restraining and enjoining CEC from interfering with the service of MDU in Boulder Ridge.

The Commission scheduled a hearing for a December 13, 2005 on the complaint. On November 10, 2005, CEC filed its reply to MDU's counterclaim requesting the counterclaim be dismissed. On November 23, 2005, MDU filed a motion to dismiss the complaint, or in the alternative, a motion for a continuance. CEC filed a response to the motion to dismiss but did not resist the motion for a continuance. On November 30, 2005 the hearing was continued. The Commission issued a notice of rescheduled hearing on December 30, 2005 setting the matter for hearing on February 9, 2005 for consideration of the following issues:

1. Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant.

2. Whether Respondent should be restrained and enjoined from constructing or extending its lines, plant, or system into complainant's franchised service area.
3. Whether Respondent should remove all of its facilities in the Complainant's service area.

On February 9, 2006, a hearing was held as scheduled. At the hearing, MDU renewed its motion to dismiss CEC's complaint and also moved to voluntarily dismiss its counterclaim in view of the proceeding pending in South Central District Court captioned Capital Electric Cooperative, Inc. v. City of Bismarck, et al, Civil No. 05-C-2303. The Hearing officer granted MDU's motion to voluntarily dismiss its counterclaim.

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

Findings of Fact

1. MDU is an investor owned electric utility providing electric distribution service to customers in North Dakota under the regulatory jurisdiction of this Commission pursuant to Title 49 of the North Dakota Century Code.
2. CEC is a rural electric cooperative providing electric service to its members in North Dakota.
3. By resolution dated May 12, 1987, the Board of City Commissioners of the City of Bismarck issued MDU a general unlimited franchise to construct and maintain an electric transmission and distribution system within the City of Bismarck for a period of 20 years.
4. By resolution dated May 25, 1993, the Bismarck Board of City Commissioners issued a franchise to CEC to construct and maintain an electric transmission and distribution system within a limited geographic area of the City of

Bismarck. The franchise provides the authority granted to CEC is limited geographically to avoid duplication of facilities between CEC and other electric franchises. The geographic limits to the franchise are those that were described in an Area Service Agreement dated July 5, 1993 between CEC and MDU as modified by amendment dated October 25, 1990 and any future amendments. (Exhibits MDU 1 & 2)

5. By letter dated June 26, 2002, MDU cancelled the Area Service Agreement with CEC. By the terms of the Area Service Agreement, the cancellation became effective June 26, 2003. (Exhibits MDU 1 & 2)

6. In April of 2005, Boulder Ridge was annexed to the City of Bismarck. Both MDU and CEC asserted a right to serve Boulder Ridge with electric distribution service. (Exhibits MDU 1 & 2)

7. Both MDU and CEC extended distribution facilities to serve customer locations within Boulder Ridge. MDU constructed its distribution facilities by extending a three-phase feeder line approximately 2,000 feet from a location in French's Addition south of 43rd Avenue and east of Washington Street. CEC extended distribution facilities from its three-phase feeder lines located along Washington Street and 43rd Avenue. MDU's extension of its underground feeder line crossed CEC's overhead feeder line along 43rd Avenue. MDU was in the process of installing its facilities at the time CEC began installing its facilities. (Tr. 94-97, 102-103, 119)

8. On November 14, 2005, the Bismarck Board of City Commissioners issued Findings, Conclusions Decision and Order in response to a petition to declare franchise rights filed by MDU. The Order recites the history of the franchises issued to MDU and CEC. In its Order, the Bismarck City Commission concluded that it was the

intention of the City when it awarded a limited franchise to CEC that MDU would remain the main provider of electric services within the City. The City Commission stated:

It was not the intention of the parties or the City that the map attached to the Area Service Agreement would be in place for 40 years without amendment, but rather that it would be amended as the City grew to allow for healthy efficient growth for both utilities. It was not the intent of the City that CEC would become the exclusive electric power supplier for all new areas of the City outside the line shown in the Area Service Agreement. It was the City's intent, in including the Area Service Agreement in the CEC franchise, that the line of the Area Service Agreement map would move outward as the City grew.

(Exhibits MDU 1 & 2)

9. The Bismarck City Commission further concluded that CEC's franchise did not grant CEC authority to serve all new areas of the City that were outside the bold line of the cancelled area service map and that CEC's franchise "is limited to those areas within the City described in the Area Service Agreement" at the time CEC's franchise was issued in 1993. The City ordered that electric service to Boulder Ridge is properly provided by MDU subject to CEC retaining any existing customers. (Exhibits MDU 1 & 2)

10. At the time Boulder Ridge was annexed, CEC's service in the subdivision was limited to two street lights and a CATV booster station located in the road right-of-way along 43rd Avenue. Previous service to a pasture well by CEC within Boulder Ridge was abandoned prior to the annexation of Boulder Ridge. (Tr. 99-100, 126-128)

11. CEC's feeder lines located along 43rd Avenue and Washington Street were built prior to 1973 to tie together CEC's substations at other locations. The use of these feeder facilities has not changed in the last 20 years. Prior to 1973, CEC did not

have a franchise with the City of Bismarck or an Area Service Agreement with MDU. (Tr. 124-125, Exhibits MDU 1 & 2)

12. Prior to the annexation of Boulder Ridge, CEC did not know if, how, or when the area encompassed by Boulder Ridge would be developed. CEC did not construct any facilities specifically to serve Boulder Ridge with the exception of its distribution facilities constructed contemporaneously with the facilities installed by MDU after Boulder Ridge was annexed. (Tr. 116-119)

13. CEC's facilities along 43rd Avenue and Washington Street in the vicinity of Boulder Ridge were not planned or constructed in reliance on either the Area Service Agreement or CEC's limited franchise with the City of Bismarck because these facilities were planned and constructed before the existence of either the Area Service Agreement or CEC's first limited franchise.

14. MDU's extension of its three-phase feeder line through French's Addition did not unreasonably duplicate or interfere with CEC's facilities in French's Addition. CEC's facilities in French's Addition are single phase distribution lines used exclusively to provide service to customers within French's Addition. MDU's underground extension of its three-phase feeder line from French's Addition is not used to provide service to customers within French's Addition and therefore, it is not an unreasonable interference with or duplication of CEC's services in French's Addition.

15. There are locations within and outside the City of Bismarck where CEC's electric facilities parallel or cross pre-existing facilities of MDU. CEC does not consider its facilities to be interference with or duplication of MDU's facilities because CEC's lines

are extensions into areas where MDU does not provide service or is not authorized to provide service.

16. MDU's extension of facilities to serve Boulder Ridge is not an unreasonable interference with or duplication of CEC's facilities. CEC does not have a franchise from the City of Bismarck to serve customers within Boulder Ridge. Although the City of Bismarck in its November 14, 2005 Order stated it would allow CEC to continue service to its existing customers, CEC did not offer evidence to show that it has obtained an amendment to its existing franchise to include such existing customers. Moreover, CEC did not offer evidence showing that MDU extended electric service to customers that were receiving service from CEC when Boulder Ridge was annexed. Because CEC is prohibited by Bismarck City Ordinance from constructing and maintaining facilities in an area within the City of Bismarck for which CEC does not have a franchise, MDU's extension of facilities in Boulder Ridge to serve customers that are not within CEC's franchised service area does not unreasonably interfere with or duplicate CEC's services.

From the foregoing findings of fact, the Commission makes its:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. N.D.C.C. § 49-03-01.3 governs CEC's complaint.

2. Pursuant to Article VII, Section 11 of the North Dakota Constitution, the City of Bismarck has the power to regulate the franchises of any public utility within the City of Bismarck. Pursuant to Article 3, Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck City Commission is the franchising authority for both

MDU and CEC for all public areas within the City of Bismarck and the City Commission has the authority to decide questions regarding the franchises issued by it.

3. Section 10-11-01 of the Bismarck City Ordinances prohibits the placement or maintenance of an electric distribution system in, over, upon or under any street or public place within the City of Bismarck without a franchise granted by resolution of the Bismarck Board of City Commissioners.

4. CEC does not have a franchise from the Bismarck Board of City Commissioners to construct or maintain electric distribution facilities within Boulder Ridge and therefore CEC is prohibited from providing electric distribution service to customers within Boulder Ridge.

3. Boulder Ridge is not within CEC's service area.

4. MDU has a franchise from the Bismarck Board of City Commissioners to construct and maintain electric distribution facilities within the City of Bismarck. The Bismarck Board of City Commissioners has determined that MDU is the properly authorized franchise provider of electric distribution service within Boulder Ridge. The determination of the Board of City Commissioners has been affirmed by the South Central District Court in Civil Case No. 05-C-2303.

5. Montana-Dakota's extension of facilities to serve Boulder Ridge is not a violation of N.D.C.C. § 49-03-01.3.

On the foregoing findings of fact and conclusion of law the Commission issues
its:

Order

The Commission orders:

The complaint of Capital Electric Cooperative, Inc. is dismissed.

Public Service Commission

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner