STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative, Inc.	)	
	)	**BRIEF OF**
vs.	)	**MONTANA-DAKOTA UTILITIES CO.**
	)	**IN SUPPORT OF MOTION TO**
Montana-Dakota Utilities Co.	)	**DISMISS**
	)	
Complaint	)	Case No. PU-05-551

SUMMARY

Capital Electric Cooperative, Inc. ("CEC") did not and cannot prove the allegations of its complaint and therefore its complaint should be dismissed. CEC did not prove that Boulder Ridge Subdivision is within its service area or that Montana-Dakota Utilities Co.'s ("Montana-Dakota") extension of facilities into Boulder Ridge unreasonably interferes with or duplicates CEC's services. Because CEC is prohibited as a matter of law from providing service within Boulder Ridge, Montana-Dakota's extension of service under its franchise is not an unreasonable interference with or duplication of CEC's services.

1. CEC failed to prove the allegations of its complaint.

This is a complaint proceeding brought by CEC pursuant to N.D.C.C. § 49-03-01.3.[1] N.D.C.C. § 49-03-01.3 was part of the 1965 Territorial Integrity Act ("TIA") amendments to N.D.C.C. Chapter 49-03. As pertinent to this proceeding, the section states:

[1] Although CEC's complaint also asserts a claim of interference under N.D.C.C. § 49-03-01, the Supreme Court has determined that N.D.C.C. § 49-03-01.3 is the operative statute for complaints against a public utility alleging interference arising from an extension of facilities within a municipality. Cass County Electric Co-op v. NSP, 419 N.W.2d 181, 186 (N.D. 1988)

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

CEC's claim under this section is found in the allegations of paragraphs VI and X of its complaint:

> VI. When territory is annexed into the City such territory stands just as any other property within the City, subject to the Area Service Agreement, and CEC's franchise. On April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City," hereafter "Boulder Ridge," was annexed to the City of Bismarck. Pursuant to the grant of franchise incorporating the Area Service Agreement, Boulder Ridge is located in CEC's service area. See attached Exhibit A. [Emphasis Added]
>
> . . . .
>
> X. MDU's construction into CEC's franchised service area violates and threatens to violate the provisions of N.D.C.C. § 49-03-01 and 49-03-01.3.

In its prayer for relief, CEC requested 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. In addition to the restraint imposed, that the Commission prescribe such other terms and conditions as it shall deem reasonable and proper.

None of the evidence introduced by CEC at the hearing before the Commission proved the allegations of its complaint. Rather, CEC abandoned its allegations and now pursues an argument that the existence of a franchise from the affected municipality is irrelevant under N.D.C.C. Chapter 49-03. CEC urges the Commission to issue an order restraining Montana-Dakota from providing electric distribution service within its

franchised service area with the perverse result that there would be no authorized electric service provider for customers within Boulder Ridge. Not only are CEC's arguments incorrect, they are irrelevant to the allegations of its complaint and outside the scope of the issues set forth in the Commission's Notice of Hearing:

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.

The underlying determination for the Commission under both CEC's complaint and the Commission's Notice of Hearing is whether Boulder Ridge lies within CEC's franchised service area. On this issue, the evidence is uncontroverted. CEC provided no evidence that it has authority under its franchise to serve Boulder Ridge. Contrary to CEC's arguments that Montana-Dakota offered no evidence in this proceeding, Montana-Dakota offered without objection, Exhibits MDU 1 and 2 which are Montana-Dakota's requests for admissions and CEC's responses thereto. In its responses, CEC acknowledges that the documents attached to the requests for admission are authentic and genuine copies of: (1) the unlimited franchise issued to Montana-Dakota by the City of Bismarck dated May 12, 1987; (2) the limited franchise issued to CEC by the City of Bismarck on May 25, 1993; and (3) the Findings, Conclusions Decision and Order adopted by the Bismarck Board of City Commissioners on November 14, 2005 interpreting those franchises and concluding that Boulder Ridge is not within the scope of CEC's limited franchise and that Montana-Dakota is the authorized franchise holder to provide electric distribution service to Boulder Ridge. Montana-Dakota further

requests the Commission to take official notice under N.D.C.C. § 28-32-24(7) of the Order of the South Central District Court dated March 14, 2005 in Civil Case No. 05-C-2303 affirming the Order of the City Commission.

Section 10-11-01 of the City of Bismarck Ordinances provides that a corporation or utility may not place or maintain its facilities for the transmission or distribution of electric service in, over, upon, or under any street or public place without a franchise to do so from the City. Accordingly, the uncontroverted evidence is that Boulder Ridge is not within CEC's service area, franchised or otherwise.

This is not a novel issue but one that was decided by the Supreme Court in Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971). The facts in that case are similar to this proceeding. Montana-Dakota held an unlimited franchise to provide electric service within the City of Crosby "as now or hereafter constituted." Id. at 727 The REC provided electric service in the rural area outside the City of Crosby and the Divide County School District owned land contiguous to the City upon which the REC provided service to a yard light approximately 10 feet outside the then existing city limits. The City of Crosby, which had an ordinance prohibiting construction or maintenance of any electric facilities within the corporate limits of the City without a franchise, annexed the land belonging to the school district. The REC subsequently applied for a franchise to serve the annexed area where a high school was to be built. Although Montana-Dakota's franchise was non-exclusive, the City denied the REC a franchise to serve the school property. Nonetheless, the REC signed a service agreement to provide electric service to the new high school. Montana-Dakota responded with a lawsuit to prohibit the REC from providing the

proposed service. The REC acknowledged it did not have a franchise from the City but alleged its construction and operation of electric facilities at the location prior to annexation allowed it to continue service to the area even without a franchise. Id. at 728. The Supreme Court rejected the REC's argument. The Court held that a person residing within a city cannot be served by an electric provider without a franchise when the city has an ordinance prohibiting service in the absence of a franchise. Id. at 730. The Court also held the REC's right to furnish electricity to the school district was vested only until the area became annexed to the City of Crosby at which time the REC's right to furnish electric energy to the school district terminated by operation of law. Id. The Court further held that if an REC is unable to obtain a franchise from the annexing city, it may continue to operate its existing facilities within the area until the electric facilities are purchased or condemned by the public utility. Id. at 733. It is worth noting that the Divide County case was decided after enactment of the 1965 TIA amendments to Chapter 49-03 and therefore the case was decided under the current TIA statutes.

Contrary to CEC's suggestion, the holding in Divide County has not been overruled.[2] The validity of the holding was later recognized in Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 794 (N.D. 1974). In Cass County Electric Cooperative, Inc. v. N.S.P., 419 N.W.2d 181, 187 (N.D. 1988), (South Pointe I) the Supreme Court distinguished Tri-County from the facts in South Pointe I. The Court noted that in Tri-County, the public utility held the only franchise to supply electricity within the City of Jamestown which was not the situation in South Pointe:

[2] The Court's holding regarding cooperative membership was disavowed in Cass County Electric Cooperative, Inc. v. Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1977). The Court did not overturn the holding in Divide County regarding the prohibition of a cooperative to provide service in an area annexed by a city in which the public utility was the sole franchise holder.

> The court was not confronted with a situation where an agreement between the cooperative and the city allowed the cooperative to serve new customers after annexation, as in this case.

Id.

In summary, the uncontroverted evidence establishes that Boulder Ridge is part of Montana-Dakota's franchised service area and CEC does not have a franchise to serve Boulder Ridge. CEC failed to prove the allegations of its complaint that Boulder Ridge is part of its franchised service area and the complaint should be dismissed. Montana-Dakota's evidence shows Boulder Ridge is part of Montana-Dakota's service area and therefore Montana-Dakota's extension of its facilities to provide service to an area that CEC is legally prohibited from serving cannot be construed as an unreasonable interference with or duplication of CEC's services.

2. The TIA does not override a municipality's determination of service areas under its franchise authority.

Recognizing it did not prove Boulder Ridge is part of its franchised service area, CEC argues the Commission should override the determination of electric service areas by the City of Bismarck. Because this contention is outside the allegations of CEC's complaint and outside the issues stated in the Commission's Notice of Hearing, Montana-Dakota objects to the Commission's consideration of CEC's latest position. Nonetheless, Montana-Dakota is addressing CEC's incorrect argument in the event the Commission overrules Montana-Dakota's objection.

CEC effectively asks the Commission to use N.D.C.C. § 49-03-01.3 to override the Bismarck City Commission's determination that Boulder Ridge is within Montana-Dakota's franchised service area and not CEC's. Faced with N.D. Const. art. VII, § 11 providing that a city's power to franchise shall not be abridged by the Legislature, and

N.D.C.C. § 49-03-06(8) providing that nothing within N.D.C.C. Chapter 49-03 can limit the authority of a city to exercise its franchise authority, CEC embarks on a twisted journey of statutory construction to reach a conclusion 40 pages later that the Commission should ignore N.D. Const. art. VII, § 11 because the PSC has "no authority to decide upon the constitutionality of the statutes that it applies" and likewise the Commission should ignore N.D.C.C. § 49-03-06(8) "because the PSC should not take a narrow view of its jurisdiction under N.D.C.C. 49-03." CEC analogizes its interpretation of N.D.C.C. Chapter 49-03 and N.D. Const. art. VII, § 11 to a board game. Actually, its analysis is more akin to a shell game in which, through a combination of fast talk and sleight of hand, CEC attempts to make the plain language of two troublesome statutory and constitutional provisions disappear. In attempting to lead the Commission through CEC's interpretative game, however, CEC overlooks fundamental rules of statutory construction.

A critical issue in this proceeding, as recognized by the Commission's Notice of Hearing, is whether Boulder Ridge is within the service area of Montana-Dakota or CEC. This issue begs the question of who determines electric service areas inside a municipality. Does CEC, an unregulated cooperative, through the TIA determine service areas for annexed areas by the location of its lines prior to annexation, or does the Bismarck City Commission determine service areas for annexed areas through its franchise authority?

It is important for the Commission to recognize it does not determine service areas within a municipality under N.D.C.C. § 49-03-01.3. Rather, its responsibility is limited to preventing interference by a public utility with the service areas of a

cooperative. Therefore, the Commission must necessarily determine whether CEC or the City of Bismarck determines service areas within the annexed area of Boulder Ridge. The answer to that question is found in N.D. Const. art. VII, § 11 and N.D.C.C. § 49-03-06(8).

CEC dismisses the provisions of N.D. Const. art. VII, § 11 based upon the holding of the Supreme Court in Johnson v. Elkin, 263 N.W.2d 123, 126 (N.D. 1978) that administrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. Montana-Dakota, however, does not ask the Commission to declare N.D.C.C. § 49-03-01.3 unconstitutional. Rather, this is a strawman argument invented by CEC to support its statutory construction analysis that the Commission should ignore, N.D. Const. art. VII, § 11.

Although the Commission does not have authority to declare the statutes under which it operates unconstitutional, it cannot ignore applicable constitutional provisions in the exercise of its statutory authority. Rather, the Commission must harmonize the interpretation of statutes under which it operates with relevant provisions of the North Dakota Constitution. N.D.C.C. § 1-02-38; City of Bismarck v. Nassif, 449 N.W.2d 789, 794 (N.D. 1989), Grand Forks Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987). To determine the public policy of the State, the Commission must look first to the State Constitution. See Continental Casualty Company v. Kinsey, 499 N.W.2d 574, 580 (N.D. 1993). Under N.D.C.C. § 1-02-38, it is presumed that the Legislature intended to comply with the Constitution in the enactment of a statute. Because N.D. Const. art. VII, § 11 prohibits legislation that interferes with a municipality's power to

franchise, the Commission must construe N.D.C.C. Chapter 49-03 consistent with that constitutional limitation and public policy.

Based on CEC's interpretation, N.D.C.C. § 49-03-01.3 would allow CEC to establish its own service areas and thereby override or prevent enforcement of the City's franchise authority. Such an interpretation is clearly contrary to N.D. Const. art. VII, § 11 and therefore should be rejected by the Commission. Instead, N.D.C.C. § 49- 03-01.3 should be interpreted so the Commission's consideration of claims of *unreasonable interference or duplication of services* is based on the service areas determined by the City under its franchise authority. This is the only interpretation consistent with N.D. Const. art. VII, § 11 and the Supreme Court's holding in Montana-Dakota Utilities Co. v. Divide County School District #1, supra, which is binding precedent on the Commission.

This interpretation is also consistent with the recently enacted N.D.C.C. § 49-03-06(8) providing that nothing in Chapter 49-03 can limit the authority of a city to exercise its franchise authority. CEC seeks to emasculate this provision by arguing that N.D.C.C. § 49-03-06(8) is either a general statute and therefore does not control other provisions of Chapter 49-03 which CEC construes to be specific provisions, or alternatively that N.D.C.C. § 49-03-06(8) is only a limitation on N.D.C.C. § 49-03-06 rather than the entirety of Chapter 49-03.

The primary purpose of statutory interpretation is to ascertain the intent of the Legislature. Legislative intent is first sought from the language of the statute. Id. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 833 (N.D. 1995). When statutory language is clear and unambiguous, it cannot be disregarded as

legislative intent is presumed to be clear from the face of the statute. In interpreting a statute, words must be given their plain, ordinary and commonly understood meaning, and consideration should be given to the ordinary sense of statutory words, the context in which they are used, and the purpose which prompted their enactment. Caldwell Banker-First Realty, Inc. v. Meide and Son, Incorporated, 422 N.W.2d 375, 379 (N.D. 1980). Meaning and effect must be given to every word and sentence of a statute and it is presumed the Legislature did not intend an unreasonable result. Wheeler V. Gardner, 2006 N.D. 24, ¶ 11, 708 N.W.2d 908, 911.

> The language of N.D.C.C. § 49-03-06(8) could not be clearer:
>
> Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under § 40-05-01.

The statute unambiguously prohibits construing the remaining provisions of Chapter 49-03 in the manner sought by CEC such that a determination of interference by the Commission under N.D.C.C. § 49-03-01.3 would trump the franchise authority of a city by either precluding a public utility from exercising its franchise authority or by allowing a cooperative to provide service in an area without a franchise.

The interpretation that Chapter 49-03 does not override the City's determination of service areas under its franchise authority was not recently invented by Montana-Dakota as argued by CEC. The interpretation is consistent with precedent of the Supreme Court regarding the relationship between a municipality's franchise authority and the right of a public utility or cooperative to provide service within the municipality. See Montana-Dakota Utilities Co. v. Divide County School District #1, supra; Tri-County

Electric Cooperative v. Elkin, supra; Cass County Electric Cooperative, Inc. v. Northern States Power Company, supra.

Montana-Dakota's interpretation is also consistent with the position stated repeatedly by the North Dakota Association of Rural Electric Cooperatives regarding the relationship between Chapter 49-03 and a municipality's franchise authority. On July 16, 2002, Harland Fuglesten, General Counsel and Government Relations Director of the North Dakota Associations of RECs, presented written testimony before the Electric Industry Competition Committee of the North Dakota Legislature. (Copy attached) Mr. Fuglesten noted the RECs' concern that proposed amendments to the TIA under SB 2418 introduced during the 2001 Legislative session would have violated a city's right to franchise public utilities under N.D. Const. art. VII, § 11. Mr. Fuglesten stated the position of the RECs that the State could not, through legislative action, effectively revoke municipal franchises. Mr. Fuglesten's position is completely contrary to the interpretation of the TIA offered by CEC in this proceeding:

> Not only did SB 2418 suffer from a constitutional defect, the bill sought to solve a legal problem that doesn't even exist. Contrary to IOU claims that the Territorial Integrity Act stymies IOU growth in and around cities, there is nothing in the present law that even requires a city to grant franchise rights to an REC. Jamestown, Wahpeton and Williston are just a few of the cities that have not franchised REC electric service. In these *cities, as the city grows, the IOU has the exclusive right to serve* customers in areas previously served by the rural electric cooperative. [Emphasis Added]

Mr. Fuglesten reaffirmed the REC's position in written testimony provided to the House Industry, Business and Labor Committee of the North Dakota Legislature on February 5, 2003 regarding House Bill 1454. (Copy attached) In his testimony, Mr. Fuglesten recited the history of Chapter 49-03 and noted that even before enactment of the TIA

amendments in 1965, cooperatives could not serve within the corporate limits of a city without city approval, even if the city expanded its borders to include areas previously served by the cooperative. He testified that the legal restriction continues to exist under Chapter 49-03 after enactment of the TIA amendments:

> As the cities grew out into rural areas after 1965, co-ops sought to continue serving areas where they had facilities. To do so, they needed approval from city governing boards. Some cities such as Fargo, West Fargo, Grand Forks, Bismarck and Mandan granted franchises that either designated service areas or included procedures for deciding which utility served where. In many other communities, however, co-ops did not obtain franchises. In these cities, the IOUs get all the growth. For example, because Montana-Dakota has the only franchise to serve the city of Williston, the local electric co-op sells its lines to MDU as the city expands into areas where the co-op has facilities. . . .What this all means is the current North Dakota law does not favor one type of utility over another. Instead, it provides for orderly development of expensive electric facilities while maintaining local control of electric service decisions. [Emphasis Added]

The amendments to Chapter 49-03 adopted during the 2005 Legislative session are primarily embodied in N.D.C.C. § 49-03-06 which allows public utilities and rural electric cooperatives to negotiate area service agreements subject to the approval of the Public Service Commission. These are the only substantive amendments to the TIA upon which the investor owned utilities and the rural electric cooperatives could agree. The legislation was carefully reviewed by the interested parties and the language in N.D.C.C. § 49-03-06(8) that nothing in Chapter 49-03 could be construed to limit a municipality's franchise authority was not an oversight or a drafting error as suggested by CEC. The language made clear that area service agreements adopted by the affected providers and approved by the Public Service Commission were nonetheless subordinate to the franchise authority of a municipality to determine service providers within its corporate limits. The language also made clear that municipalities remained

the authoritative body for determining service areas within their corporate limits consistent with the North Dakota Constitution, the precedent of the North Dakota Supreme Court, and the position repeatedly stated by the North Dakota RECs.

CEC's argument that the limitation of N.D.C.C. § 49-03-06(8) is only applicable to area service agreements under N.D.C.C. § 49-03-06 is precisely the argument the language of subsection 8 was intended to prevent. The application of subsection 8 to the entirety of Chapter 49-03 was intended to prevent an argument that the limitation only applied to area service agreements under N.D.C.C. § 49-03-06 and therefore, by implication, the other provisions of Chapter 49-03 were not limited by a municipality's franchise authority. Subsection 8 did not introduce a new principle but reaffirmed previous interpretations, as well as the enactment of N.D. Const. art. VII, § 11, that a municipality's authority to franchise is a limitation upon all the provisions of Chapter 49-03.

This principle is also reflected in N.D.C.C. § 49-03-02 relating to the Commission's authority to issue Certificates of Public Convenience and Necessity for a utility to initiate electric service in a municipality. Even in this section, where the PSC is making a determination of service areas for a public utility, the determination is conditioned on the public utility having secured a franchise from the municipality. In other words, even where the Commission is given the authority under Chapter 49-03 to approve or establish service areas within a municipality, that authority cannot be *exercised without the approval of a municipality* under its franchise authority.

CEC's interpretation of Chapter 49-03 also ignores another rule of statutory construction. It is presumed under N.D.C.C. § 1-02-38 that the Legislature intended to

reach a just and reasonable result by enactment of a statute.[3] An inescapable result of CEC's interpretation and the relief sought by CEC in this proceeding is a situation where CEC is prohibited from providing service in Boulder Ridge under Bismarck city ordinances because it does not have a franchise to serve the area and, at the same time, Montana-Dakota is prohibited from providing such service by the Commission under Chapter 49-03. Consequently, neither provider is legally able to provide electric service within the subdivision and consumers do not have access to electric power. Certainly such a result is neither just nor reasonable and yet the Commission has no way to avoid the result since it does not have authority to force a municipality to issue a franchise to CEC. CEC conveniently ignores the unreasonableness of the confrontational interpretation it seeks the Commission to adopt.

The only relevant precedent offered by CEC in support of its arguments are the decisions in Cass County Electric Cooperative, Inc. v. Northern States Power Company, 419 N.W.2d 181 (N.D. 1988) and Northern States Power Company v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990) (South Pointe II). If CEC had proven the allegations of its complaint that Boulder Ridge was part of CEC's franchised service area, then CEC's arguments would have a hint of merit. There are two major distinctions, however, between the circumstances relied upon by the Court in the South Pointe cases and the circumstances of this case.

First, the question of whether an order prohibiting NSP from providing service in South Pointe conflicted with the City of Fargo's franchising authority was not discussed or decided by the Court in either South Pointe case. Accordingly, the South Pointe

[3] See also N.D.C.C. § 1-02-39 requiring the Commission to consider the consequences of a particular statutory construction.

cases are not precedent for the issue before the Commission in this case, and certainly not precedent for the interpretation of N.D.C.C. § 49-03-01.3 advanced by CEC. Indeed, the Court in South Pointe I specifically noted that it was confronted with a situation where an agreement between the cooperative and the city allowed the cooperative to serve new customers after annexation. 419 N.W.2d at 187. Those are not the facts of this case.

Another major difference between the South Pointe cases and this proceeding is that in South Pointe, Cass County Electric Cooperative made significant investment specifically to serve the annexed territory after the area was annexed and became part of a service agreement with the City of Fargo. In this case, the only facilities constructed by CEC after annexation specifically to serve Boulder Ridge were facilities built after it learned Montana-Dakota intended to serve the area and after Montana-Dakota began installing its facilities. (Tr. 119) As will be discussed later, the CEC facilities for which it claims duplication and interference were not built to serve Boulder Ridge.

While CEC attempts to manufacture an argument to fit within the South Pointe precedent, the facts of this case do not support CEC's argument.

3. Montana-Dakota's extension does not interfere with existing CEC services or unreasonably duplicate CEC's services.

N.D.C.C. § 49-03-01.3 allows a public utility to extend its facilities within a municipality where it has lawfully commenced operations provided: (1) the extension does not interfere with existing services provided by a cooperative within the municipality; and (2) duplication of services is not deemed unreasonable by the Commission. CEC did not show that Montana-Dakota's extension of facilities and

services into Boulder Ridge interferes with any existing services provided by CEC. Nor could it make such a showing. All of the substations and other facilities described by CEC in its testimony are being used exactly the way they have always been used to provide the same services for which they were constructed. (Tr. 129) CEC's only existing services within the vicinity of Boulder Ridge prior to its annexation were two street lights and a CATV booster station located in the road right of way. (Tr. 99, 126) CEC's only other customer located within Boulder Ridge prior to annexation was a pasture well for which CEC abandoned its facilities prior to annexation. (Tr. 127) The City of Bismarck in its order of November 14, 2005 specifically determined that Montana-Dakota's franchise was subject to the right of CEC to retain these existing customers. In other words, the City left the door open for CEC to seek an amendment of its limited franchise to serve its existing customers within Boulder Ridge. To this date, however, CEC has not sought an amendment of its franchise to serve those customers. Montana-Dakota assumes that upon completion of this proceeding and an appeal of the City Commission's decision, CEC will seek such an amendment and therefore, Montana-Dakota has respectfully not sought to extend its lines to serve these existing customers.

CEC relies primarily upon the second proviso of N.D.C.C. § 49-03-01.3. CEC urges the Commission to deem Montana-Dakota's extension of facilities approximately 2,000 feet through a subdivision within CEC's franchised service area and crossing of CEC's line along 43rd Avenue to reach Boulder Ridge an unreasonable duplication of services. (Tr. 95, 97, 103)

N.D.C.C. § 49-03-01.3 does not prohibit all duplication of services but only unreasonable duplication of services. The determination of reasonableness is a question of fact which must be supported by evidence. Northern States Power Company v. North Dakota Public Service Commission, supra at 345. Although a frequently stated purpose of the TIA is to keep to a minimum wasteful duplication of capital intensive utility services and conflicts between suppliers of electricity, the TIA's implementing statutes do not guarantee accomplishment of that purpose. Northern States Power Company v. Public Service Commission, supra at 344. This was aptly demonstrated in Capital Electric Cooperative v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995) when CEC constructed a 1,450 foot line to provide service to a head bolt heater located 250 feet from Montana-Dakota's facilities.

CEC argues that it constructed its facilities in north Bismarck based upon its interpretation of an area service agreement that was cancelled in June 2003 and its interpretation of the limited franchise issued to CEC by the City of Bismarck in 1993. Obviously, Montana-Dakota does not agree with CEC's expansive self-serving interpretations of either the area service agreement or CEC's limited franchise.[4] More importantly, the City of Bismarck did not agree with CEC's interpretation of either document. Investments made by CEC based upon a self-serving and mistaken interpretations of either the area service agreement or its limited franchise cannot be

[4] CEC frequently misstates the language of the area service agreement when it argues CEC was to be the principal electric provider in the area outside the area service agreement line. Although the area service agreement provided the area outside the line would be the "principal service area of the cooperative" it did not provide CEC would be the "principal provider" within this area let alone the "exclusive provider" within the area. The language simply indicates that CEC's primary (principal) service area would be outside rather than inside the service area line. CEC also conveniently ignores other provisions of the agreement not favorable to its position such as paragraph I that stated Montana-Dakota was to be the principal supplier of electricity within the City of Bismarck and paragraph II that stated the agreement was to be modified to provide for future development and growth for both organizations. (Ex. C-1)

used to prevent Montana-Dakota from extending its facilities within its franchised service areas.

CEC indicates its long range plan was to serve the entire area outside of the old area service agreement line. (Tr.107) CEC apparently planned to be the exclusive supplier for this area despite the plain language of the agreement that it could be cancelled on 12 months notice. (Exhibit C-1) Even after CEC received notice from Montana-Dakota in June 2002 cancelling the area service agreement effective in June 2003, CEC obliviously or arrogantly planned to exclusively serve everything outside the old area service line. (Tr. 113-114) Over half of the entire investment which CEC alleges it made to serve customers in northwest Bismarck is related to a $4.5 million substation which CEC and WAPA started to construct in 2005 – three years after Montana-Dakota sent notice cancelling the area service agreement. (Tr. 115)

Contrary to its assertions, however, the facilities which CEC contends were duplicated or interfered with by Montana-Dakota were not built by CEC to serve Boulder Ridge nor were they built in reliance on either the area service agreement or its limited franchise. First, Montana-Dakota's extension of an underground three-phase feeder line through French's Addition to serve Boulder Ridge did not unreasonably duplicate or interfere with CEC's facilities in French's Addition which are single-phase distribution lines constructed and used exclusively to serve customers in French's Addition. (Tr. 94-95, Ex. C-6) While CEC has feeder facilities which gave it the ability to serve Boulder Ridge, it did not have distribution facilities actually being used to serve customers within Boulder Ridge. CEC's facilities along 43rd Avenue that were crossed by Montana-Dakota were built before 1973 to tie together two of CEC's substations. (Tr. 124) CEC

acknowledges that the crossing of those facilities by Montana-Dakota's underground service to Boulder Ridge did not affect CEC's use of the line as it continues to use the line in the same manner it has over the last 20 years. (Tr. 124) Similarly, CEC's line along north Washington Street was built before 1973 and is also used to tie together two substations. (Tr. 125) CEC acknowledges Montana-Dakota's facilities in Boulder Ridge don't interfere with CEC's use of the Washington Street line as it continues to use that line in the same manner it has used the line for the last 20 years. (Tr. 125)

The Public Service Commission previously recognized the cancelled area service agreement had no relevance in the Commission's determination of an application for a Certificate for Public Convenience and Necessity for a customer location outside the corporate limits of Bismarck particularly when CEC did not rely on the area service agreement in constructing a feeder line it proposed to use to serve the customer location. Montana-Dakota Utilities Co. Application for Convenience and Public Necessity to serve Corey Botner, Case No. PU-04-560 (June 8, 2005). Similarly, the cancelled area service agreement has no relevance for determining duplication and interference for service areas within the City of Bismarck after cancellation of the area service agreement particularly where the City of Bismarck has determined the subdivision is within the franchised service area of Montana-Dakota.

CEC's alleged reliance on the area service agreement and limited franchise is particularly specious since its lines in the vicinity of Boulder Ridge, along both Washington Street and 43rd Avenue, were built before 1973. (Tr. 124-125) CEC entered into the area service agreement with Montana-Dakota and obtained its first limited franchise from the City of Bismarck in 1973. Prior to 1973, CEC had neither an

area service agreement nor a franchise. (Exhibit MDU-1) Therefore, CEC's argument that it planned and constructed the facilities in the vicinity of Boulder Ridge in reliance on either the area service agreement or the limited franchise is blatantly false.

CEC's suggestion that it planned and built facilities to serve Boulder Ridge is also without merit because CEC had no information about the development plans for Boulder Ridge until it was annexed in 2005. (Tr. 116) Prior to that time, CEC had no idea if, when or how the property would be developed. It had no knowledge of whether the area would remain agricultural or be used for high density residential or commercial development. (Tr. 117-118) CEC's actions after it learned of the development plans for Boulder Ridge were the typical planning activities that any electric provider does in preparing the layout of a distribution system for a new subdivision. (Tr. 118) CEC acknowledges this was essentially the same planning activities that Montana-Dakota undertook to serve Boulder Ridge. (Tr. 119) CEC was aware at the time it began installing its facilities that Montana-Dakota was also claiming the right to serve the subdivision and was in fact installing facilities in the subdivision at the same time CEC began installing facilities. (Tr. 119) In some instances, Montana-Dakota had already installed its facilities when CEC installed its facilities at Boulder Ridge, and therefore, it was CEC that was duplicating facilities. (Tr. 120)

CEC's only witness agreed with Montana-Dakota's position that line extensions that parallel or cross another provider's facilities do not duplicate or interfere with the other provider's services if the extensions do not serve customer locations within the other provider's service area. (Tr. 111-112) CEC acknowledges there are places both within and outside the City of Bismarck where CEC facilities cross or parallel pre-

existing facilities of Montana-Dakota. (Tr. 121) CEC does not consider those facilities interference with or duplication of Montana-Dakota's services because CEC is not using the facilities to serve customers within Montana-Dakota's service areas. (Tr. 121-122) In those instances, CEC's facilities do not affect Montana-Dakota's ability to use its facilities to serve customers. (Tr. 121)

> Q. How about in south Bismarck, are there situations down there where your lines parallel MDU lines that were there before?
>
> A. That's correct.
>
> Q. And there are situations there where your lines cross MDU lines that were there before?
>
> A. I'm sure.
>
> Q. Do you consider that duplication and interference?
>
> A. No.
>
> Q. Why is that?
>
> A. Because we don't serve anything there. I mean it's not - -
>
> Q. Are there situations where you do serve in south Bismarck where you cross facilities of MDU to make that service?
>
> A. Yeah. I'm sure there is down in Tatley, I'm sure, because you guys serve.
>
> Q. And do you consider that duplication and interference?
>
> A. Well, no. I guess - - you can say that it is, but, no, to me it isn't.
>
> Q. And why not?
>
> A. Well, because we got designated service area and then our lines serve that, and you guys have designated service area and you serve that, so, okay, we cross. . . .

Q. So make sure I understand. Your position is if you have to cross an area that's been your - - if you have to cross an MDU line to get to an area that's designated as your service area, that's not interference, is it?

A. I wouldn't say so, no.

Q. And its not duplication, is it? If you have to cross our facilities to get to an area that you're authorized to serve, that's not duplication, is it?

A. No, because we can serve it.

. . . .

Q. You just described for me a situation, Mr. Lipp, in south Bismarck where you have to cross MDU facilities, but you don't consider that interference or duplication because you're reaching an area that is your service area and not MDUs; is that correct?

A. That's correct.

Q. If Boulder Ridge is designated by the city to be within the franchise of MDU and not within the franchise service area of Capital Electric, then is MDU's crossing of your facilities on 43rd Avenue still interference and duplication?

A. If you guys - - if it's your service area, no, I would say. (Tr. 121-124)

While CEC sought to discredit the testimony of its witness in response to Montana-Dakota's cross examination by stating that he was testifying on issues of interference and duplication as an engineer rather than from a legal standpoint, the same disqualification must then apply to the witness' direct testimony on issues of interference and duplication. (Tr. 95, 97, 139-140) Moreover, there is no unique legal standard for interference and duplication under N.D.C.C. § 49-03-01.3 that differs from an engineering standard as words in a statute are given their plain, ordinary, and commonly understood meaning unless defined in the code. Kim-Go, H.K. Minerals, Inc. v. J. P. Furlong Enters, Inc., 460 N.W.2d 694 (N.D. 1990)

This case is fundamentally no different than if Montana-Dakota filed a complaint to prevent CEC from extending facilities in the vicinity of an existing Montana-Dakota

line located outside the city. In that instance, CEC would no doubt argue Montana-Dakota's petition was without merit if Montana-Dakota did not hold a Certificate of Public Convenience and Necessity to serve the customer location to which CEC was extending its facilities. Montana-Dakota, however, would be prohibited from obtaining a Certificate of Public Convenience and Necessity to serve such location if the customer did not request an extension of Montana-Dakota's facilities. In such an instance, the Supreme Court has held an extension of facilities by CEC is not prohibited by the TIA even it results in duplication of the public utility's facilities. Capital Electric Cooperative, Inc. v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995)

Finally, CEC notes that Montana-Dakota had no facilities north of 43rd Avenue prior to the annexation of Boulder Ridge. The reason, of course, that Montana-Dakota had no facilities north of 43rd Avenue is because the TIA effectively prevented extension of Montana-Dakota's facilities outside the City of Bismarck. CEC has encircled the City of Bismarck with its facilities and would have the Commission interpret N.D.C.C. Chapter 49-03 to prevent Montana-Dakota from ever extending its facilities outside CEC's fence even when new areas are annexed to the City. By this interpretation, CEC would forever become the exclusive provider of electric distribution service in virtually all future areas annexed by the City of Bismarck while Montana-Dakota's ability to extend service within the City for which it is the general franchise holder and for which it or its predecessors have provided electric service since 1895 would end. This was the position advocated by CEC in support of its interpretation of its limited franchise before the Bismarck City Commission. CEC's interpretation would have made CEC, a cooperative without any regulatory oversight, the primary if not the exclusive provider of

electric service in newly annexed areas to the City of Bismarck. Obviously, the City Commission was neither impressed with nor receptive to this interpretation. Not only should CEC's expansive interpretation of N.D.C.C. Chapter 49-03 cause similar concern to the PSC, the interpretation is also inconsistent with the purpose and limitations that the Legislature has prescribed for rural electric cooperatives. N.D.C.C. Chapter 10-13 governs the organization of rural electric cooperatives and provides the purpose of such cooperatives is to furnish electric service to persons in rural areas who are not receiving central station service. Central station service is available to customers of Boulder Ridge and other newly annexed areas through Montana-Dakota as the authorized franchise provider. Although N.D.C.C. § 10-13-05 allows cooperatives to provide service to a limited number of persons who are not eligible for cooperative membership because they do not reside in rural areas, even this non-member limitation is a clear indication of legislative intent that CEC was not intended to become the primary service provider in the State's second largest urban area.

Even based on the testimony offered by CEC, the extension of Montana-Dakota's facilities to serve its franchised service area of Boulder Ridge did not unreasonably duplicate or interfere with the services of CEC. Accordingly, CEC did not meet its evidentiary burden to support a factual determination that Montana-Dakota's extension of service to Boulder Ridge was an unreasonable duplication of or interference with CEC's services.

CONCLUSION

CEC has not proven the allegations of its complaint. Boulder Ridge is not part of CEC's franchised service area within the City of Bismarck and therefore Montana-

Dakota's extension of facilities is neither interference with existing services provided by CEC nor unreasonable duplication of CEC's services. CEC essentially seeks to use N.D.C.C. § 49-03-01.3 to override the decision of the City of Bismarck that electric distribution service within Boulder Ridge is to be provided by Montana-Dakota under its franchise and not by CEC. CEC's attempt to use § 49-03-01.3 in this manner is in direct conflict with both constitutional and statutory provisions prohibiting interference with a municipality's right to franchise. CEC's proper method to obtain review of the City Commission's decision is through the courts. CEC is currently pursuing such review and if it is successful in those judicial efforts, it can re-file its complaint with the PSC. In the meantime, because CEC is not authorized to provide electric distribution service to Boulder Ridge, and because Montana-Dakota's extension of facilities does interfere with or unreasonably duplicate CEC's services, CEC's complaint is without merit and should be dismissed.

Dated this 27th day of April, 2006

Respectfully submitted,

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Testimony of Harlan Fuglesten
North Dakota Association of Rural Electric Cooperatives
Before the Electric Industry Competition Committee
July 16, 2002

Mr. Chairman and members of the committee. My name is Harlan Fuglesten, General Counsel and Government Relations Director for the North Dakota Association of RECs. I have been asked to visit with the committee about SB 2418, the bill promoted last session by the investor-owned utilities to change the state's Territorial Integrity Act. In my remarks, I want to talk about how this bill would have affected our co-ops, how the bill attacked local government franchise rights, and why it would have been in violation of North Dakota's Constitution. Finally, I want to offer a bill draft, not to change the Territorial Integrity Act, but to focus the debate on what is really important, which is to give cities more choices when it comes to electric utility service.

I want to begin my remarks by looking at the language of SB 2418.

Beginning on page 1, line 12, the bill would have removed the law's prohibition against "interference" with or "unreasonable duplication" of existing electric facilities. Section 2 on page 2, starting on line 21, would have also amended current provisions of the Territorial Integrity Act to eliminate any right to seek injunctive relief from the Public Service Commission for interference with the system or service of an IOU or REC within any city.

You should be aware that long before the adoption of the Territorial Integrity Act in 1965, North Dakota law prohibited unreasonable interference with the service of another utility. So this bill represents a major departure from the state's historic concern about avoiding unreasonable interference and wasteful duplication of expensive electric infrastructure.

This should continue to be an important public policy goal. As the President/CEO of the Ramada Plaza Suites Hotel. Robert Leslie of Fargo, wrote in a letter to Senators in opposition to SB 2418: "As a developer, I firmly believe that while competition is good, duplication of services is usually detrimental to the market place. This bill goes even further by severely restricting rural electric cooperatives from future growth."

By prohibiting co-ops from serving any new customer locations in cities over 2,500, SB 2418 would have given cities two choices. First, they could force the co-ops out of town completely so as to avoid unnecessary duplication between the utilities, or second, they could allow the IOUs to overbuild and crisscross existing REC facilities to serve all new customer locations. SB 2418 provided for the sale or trade of facilities by the IOUs and RECs, but with the law giving all new service rights to the IOUs, the RECs would have had nothing with which to bargain. The most likely scenario would have been forced sale of REC facilities to the IOU at bargain prices.

The heart of this bill is found on page 1, lines 15-24, which contains all new language. It is important to understand that this language has nothing to do with the current Territorial Integrity Act, but rather it was intended to limit local control by cities over electric service in order to guarantee IOU electric growth at the expense of the RECs. Specifically, the IOUs would have received the right to serve all new customer locations in cities over 2,500 that were not being served by an REC on July 31, 2001.

Let's look at the legal and practical problems this bill would have created. As noted, the bill would have restricted the franchise options of cities over 2,500 people. In this respect, it is my opinion that this bill, had it passed, would have been found

unconstitutional. The North Dakota Constitution, Article VII, section 11 states this clearly:

> "The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly."

Not only would SB 2418 have abridged the right of cities to franchise their public utilities, it would have revoked several existing franchises cities have with electric cooperatives that are in conflict with the terms of the bill. While the cities themselves can revoke these franchises, the state cannot, in my judgment, constitutionally break these agreements.

Not only did SB 2418 suffer from a constitutional defect, the bill sought to solve a legal problem that doesn't even exist. Contrary to IOU claims that the Territorial Integrity Act stymies IOU growth in and around cities, there is nothing in the present law that even requires a city to grant franchise rights to an REC. Jamestown, Wahpeton and Williston are just a few of the cities that have not franchised REC electric service. In these cities, as the city grows, the IOU has the exclusive right to serve customers in areas previously served by the local electric cooperative.

A number of cities, however, have recognized that it is advantageous to have more than one electric supplier. This bill would directly challenge these local decisions. Let me use two examples to illustrate my point. The City of Bismarck first granted a limited franchise to Capital Electric Cooperative in 1973. The agreement specified the areas in which Capital Electric and MDU would serve as the city expanded. MDU and Capital determined these areas through negotiations that resulted in a Service Area

Agreement between the parties. This agreement included large areas for MDU to serve as the city expanded. Capital's franchise was renewed in 1993 for another 20 years. Also in 1993, the parties agreed that should the Service Area Agreement be cancelled, all the rights and obligations of that agreement would continue during the term of either MDU's or Capital's franchise with the city. Under its franchise with the City of Bismarck, MDU has enjoyed and continues to enjoy substantial growth in customers and electric sales. By promoting SB 2418, however, MDU wanted to deny Capital any right to grow with the city, even though Capital has waited patiently for almost 30 years for major development to reach its service area, meanwhile investing in these areas to prepare for growth. You will recall that the Bismarck City Attorney testified before this committee during the last interim. He explained the service area agreement and city franchises and said they had worked well, with only one dispute in the last 30 years that required resolution by the city council.

The next example is the City of Minot where Verendrye Electric Cooperative received a franchise in 1972. The franchise was renewed in 1992. Under this franchise, Verendrye and NSP (Xcel Energy) were each granted rights to grow into areas of future annexation. In fact, since 1972, about 60 percent of all areas annexed to the City of Minot have become part of NSP's service territory. This committee heard from the Director of Finance for the City of Minot. He testified that the franchises worked well, and that there had never been a disagreement between the utilities that reached the city council.

These are only examples of how the current Territorial Integrity Act and city franchise law works to help define who provides electric service where in the state. The

fact is that not one city official has testified before this committee or the legislature asking for changes in city franchise authority or the Territorial Integrity Act.

If SB 2418 had been adopted, cities with both IOU and REC electric service might have allowed the local REC to continue to serve its present customer locations for a time. However, as new properties and customer locations were developed, the bill required the IOUs to build in new facilities to serve them – even though it would interfere with orderly development and result in costly duplication of facilities already built by an REC.

This problem was highlighted in the testimony of Brad Schlossman of West Acres Development in Fargo who testified at the hearing in opposition to SB 2418. He noted that when West Acres Shopping Center first opened, wheat fields surrounded the property, and customers had to travel for nearly a mile on a gravel road to get there. He said few utilities made any effort to provide service, with Cass County Electric Cooperative being a notable exception. He said the co-op "stepped up to the plate and made a huge investment necessary to serve the area at the time."

At the time of the hearing, Mr. Schlossman explained that West Acres Mall was undergoing an expansion and a separate property, West Acres Business Park, was over 75 percent sold. He expressed deep concern that passage of SB 2418 would prevent new tenants from getting service from the co-op which already had the infrastructure in place to serve these locations. Instead, he said that under the terms of SB 2418, Xcel would be required to build in completely new infrastructure to complete these developments. He asked rhetorically: Who may I ask, is ultimately going to pay for this unnecessary duplication?"

At the last meeting of this committee, Dennis Boyd of MDU said this about SB 2418: "We thought that bill was a reasonable request on our part which would have preserved all of the existing REC territory within a city's limits and allowed investor-owned utilities to serve only the new, undeveloped properties at the time of annexation." This statement is incorrect in two respects. First, as noted previously, **the bill provided that all future customer locations must be served by the IOU.** That is why Mr. Leslie and Mr. Schlossman had such concern that the bill would require duplication of facilities in areas that are not completely developed. In short, there is nothing in the bill that protects current REC territory in cities. Under the bill, the REC, at best, could only continue to serve its existing customer locations, not adjacent properties that are not yet hooked up for service. So, Mr. Boyd is wrong in his first characterization of the bill's impact.

Second, his statement to this committee indicated that the IOU would serve "only those new, undeveloped properties at the time of annexation." Similarly, during the debate on SB 2418, some proponents of the bill suggested that co-ops would be entitled to serve all existing customers they were serving at the time of future city annexations. The plain language of the bill, however, does not support this claim. Under the express terms of SB 2418, a city could only franchise an electric cooperative to serve "existing customer locations it was serving within the municipality on July 31, 2001". There was nothing in the bill granting the city the authority to franchise an electric cooperative to continue to serve customers it was serving at the time of later municipal annexations.

In other words, this bill would have forced co-ops to give up customers in newly annexed areas they may have served for decades, and would have discouraged co-ops

from making investments to serve any areas that could potentially be annexed in the future. By default, these areas, too, would have gone to the IOUs. In this regard, an important question to ask is this: Would the IOUs want to serve these areas for five or ten or twenty years before annexation? And how far out would they be willing to go to serve new customer locations? A half mile? A mile? Five miles? Passage of SB 2418 would have created the real possibility that no one would be available to provide new electric service in areas surrounding cities without the customers having to make the full upfront investment. It's really the same old story. The IOUs want the co-ops to provide service until the IOU decides the time is right to profit from the co-op's investment. To use a baseball analogy, our co-ops serve a lot of farms, but we are not a farm system for the IOUs. We do not intend to develop areas until they are ready for "big league" IOU service. With the billions of dollars the co-ops have spent to provide an abundant power supply to the region, we too provide big league service.

During the past five years that this committee has been in existence, we have heard over and over again from representatives of the investor-owned utilities that something has to be done for them because they need to grow their business. Almost unmentioned is the fact that many electric cooperatives have suffered far more from lack of growth. Looking back over the last decade, each of the state's three investor-owned utilities increased their annual electric sales by over 20 percent. By comparison, 10 of North Dakota's 17 electric distribution cooperatives grew by less than 20 percent, and four cooperatives actually sold less electricity last year than they did a decade ago. While a few co-ops had growth rates equal to or better than the IOUs during the past 10 years, overall the IOUs had a larger increase in total electric sales than did the electric

cooperatives. Frankly, it gets a little tiresome to hear some IOU representatives complain that their companies cannot grow, and the only solution they offer is a legislative scheme to force co-ops to give up territory and facilities.

If an IOU wants to serve in a growth area that a co-op has served for decades, there is a better way to achieve that, and it's a business, not a legislative solution. The IOU can make an offer to the co-op to purchase the co-op's facilities, subject to the approval of the PSC and the local franchising authority. State law does not restrict an IOU's right to serve in cities of any size. Additionally, IOU's can serve in rural areas with PSC and customer approval.

By contrast, state law limits the rights of co-ops to provide electrical service. Specifically, under the REC Enabling Law, chapter 10-13 of the North Dakota Century Code, an electric co-op is primarily limited to serving customers in rural areas who are not receiving central station electric service. A "rural area" is defined to mean any area not included within the boundaries of a city having a population of more than 2,500 people at the time the co-op began serving the area. The law further specifies that no later change in the population of the area changes its status as a rural area for purposes of co-op electric service. NDCC 10-13-04. What this means is that an electric co-op, if granted a city franchise, can continue to provide service in its traditional service territory even after city annexation. The enabling act, however, severely limits the power of a cooperative to serve urban customer locations that were receiving electrical service prior to the co-op's formation. It does this by restricting a co-op's right to serve non-members, and under the law, only customers living in rural areas are eligible for co-op membership.

The legislation we propose today would allow electric cooperatives an unlimited right to serve in urban areas and to make urban customers co-op members, provided that the co-op purchases or otherwise acquires the electric facilities from another utility on a willing buyer-willing seller basis. Just as with a sale of co-op property to an IOU, such a sale by an IOU to a co-op would be subject to approval by the PSC and the local franchising authority.

At the present time, we are unaware of any negotiations or proposals by the IOUs to sell property to the RECs. Perhaps this legislation will never be needed or not needed for several years. But, it seems to us that it would be prudent to give the investor-owned utilities as many potential buyers as possible should they choose to sell their facilities in small or large communities. I want to emphasize that this proposed legislation is only permissive. It does not mandate anything. It does not force cities or investor-owned utilities to do anything differently. It would only be useful in the event that an existing utility wanted to sell their facilities to another utility.

By providing more options for local electric service, rather than less, we feel that we are presenting to this committee a positive proposal for change that recognizes that the electric industry is a business, and this territorial issue should be resolved through negotiation, not restrictive legislation.

I would be happy to answer any questions at this time.

Harlan Fuglesten
Testimony on HB 1454
Before the House Industry, Business & Labor Committee
February 5, 2003

Mr. Chairman and committee members. My name is Harlan Fuglesten, General Counsel and Government Relations Director for the North Dakota RECs. I rise in opposition to HB 1454. There are many reasons why we oppose this bill. The most important reason is that this bill is about self-interest, not the public interest. Very simply, it is designed to benefit investor-owned utilities (IOUs) at the expense of North Dakota consumers.

To understand the problems with this bill, it's important to explain why the legislature passed the Territorial Integrity Act in the first place. Before 1965, there were frequent territorial battles between the IOUs and the co-ops. These battles usually took place in rural areas outside of cities served by the IOUs. Then as now, co-ops could extend lines in rural areas without PSC approval. In fact, as borrowers from the REA, they also had an obligation to provide "area coverage" to all consumers, large or small, profitable or not. IOUs refused to serve in rural areas generally, but did want to occasionally serve loads that were profitable or convenient. The pre-1965 law allowed IOUs to extend service within their franchised cities, and also gave them the right to serve areas "contiguous" to areas they already occupied so long as the areas were not receiving similar service from another utility. This created "cherry picking" opportunities for IOUs, and caused many disputes over whether areas were "contiguous" or were already being served by another utility with similar service.

The legislature passed the Territorial Integrity Act in 1965 to end these disputes and to promote orderly development. Under this law, co-ops could continue to extend facilities without PSC approval in rural areas where they had the obligation to serve. Likewise, IOUs could extend facilities without PSC approval in cities where they were franchised. Outside the franchised territories, however, IOUs were required to obtain PSC approval before extending service. By the same token, co-ops could not serve within the corporate limits of a city without city approval, even as the city expanded its borders to include areas being served by the co-op.

Since passage of the Territorial Integrity Act, IOUs have sought PSC approval to serve rural accounts about 3,000 times. In about 95 percent of the cases, their requests have been approved without objection from the local co-op. If there is a dispute, the PSC considers a number of factors to decide which utility is best positioned to serve new rural customers. These factors include customer preference, proximity of existing lines, reliability and cost of service, probability of city annexation, and avoidance of wasteful duplication. When the PSC grants approval for IOU service in rural areas, it issues a Certificate of Public Convenience and Necessity. As the name implies, decisions on utility service are based on the public interest, not what is best for any particular utility.

As cities grew out into rural areas after 1965, co-ops sought to continue serving areas where they had facilities. To do so, they needed approval from city governing boards. Some cities such as Fargo, West Fargo, Grand Forks, Bismarck and Mandan granted franchises that either designated service areas or included procedures for deciding which utility served where. In many other communities, however, co-ops did not obtain franchises. In these cities, the IOUs get all the growth. For example, because

MDU has the only franchise to serve the city of Williston, the local electric co-op sells its lines to MDU as the city expands into areas where the co-op has facilities. Last summer, an Otter Tail Power Company spokesman testified before the Electric Industry Competition Committee that Otter Tail gets "more than 90% of the new customers who build in and around the city limits" of Jamestown, Devils Lake, and Wahpeton. What this all means is that current North Dakota law does not favor one type of utility over another. Instead, it provides for orderly development of expensive electric facilities while maintaining local control of electric service decisions. HB 1454 would undermine both of these concepts, and would return us to the old days of constant utility battles.

Some legislators have told me they hope passage of this bill would end territorial fighting between utilities. It will do no such thing. In my view, it will guarantee continuing battles before the legislature, the PSC and the courts.

I would like to now go through some parts of HB 1454 to show you why this bill is harmful to the public interest.

Section 1 sets forth the scope of the bill. It applies to the extraterritorial zoning limits of cities of 10,000 or more within Metropolitan Statistical Areas (MSAs) as those areas may be expanded from time to time. The expansive nature of this bill has been described by one of its proponents as being "evergreen", apparently because, like an evergreen, it will continue to grow out at the tips. How this would work is unclear.

The bill can be interpreted in two different ways. The first interpretation would be that the initial agreement on service areas should address what happens to areas that are beyond a city's current extraterritorial zoning but will likely be included in the future. This interpretation could lead to utilities and the PSC planning for future service area

allocations many miles from the city. How could such allocations be made on any fair or reasonable basis? And, if such allocations were made, when would the IOUs agree to begin serving new customers in these outer-ring areas? Would the co-ops be required to continue investing in these areas knowing they will eventually be turned over to an IOU? Why would the co-ops want to create future duplication and expense? On the other hand, why would the IOUs want to build lines to serve a few customers miles from where they currently have facilities? Such uncertainties could lead to cases where customers are left without service unless they are willing to pay up front the full cost of such line extensions.

The second interpretation would be that the initial agreement relates only to a city's current extraterritorial zoning boundaries and does not address this outer-ring of future extraterritorial zoning. Under this interpretation, new agreements would be required to divide up additional territory after each zoning extension. As each new area was divided up, a confusing checkerboard of utility service areas would arise. Meanwhile, the co-ops would still have to deal with how to serve these outer-ring areas, half of which they will lose in the future. This uncertainty about which utility will serve where would be very detrimental to utility planning, customer service, and reliability.

No matter how one interprets this bill, it seems to me it leads to the same old story – The IOUs want the co-ops around to serve what they don't want to serve until it is profitable for the IOUs to take it away.

A couple other concerns I would like to note about Section 1. There is absolutely no guidance given to the PSC in approving or establishing service areas. Reasonably equal growth potential for utilities is the standard, but the bill also says the PSC must act

in the public interest. What happens when the public interest conflicts with the requirement of equal growth opportunities? Duplication of existing facilities, for example, is not in the public interest, but will be inevitable under this bill.

Another question. How do you determine reasonably equal growth opportunities? Must the PSC consider the timing of likely development so that each utility gets reasonably equal growth over similar time periods? After all, growth tomorrow is much more valuable than the same growth ten years from now. Where will the PSC get its crystal ball for making such projections?

Section 2 of the bill raises more problems. Section 2 establishes exclusive service territories for utilities, "even if a portion or all of the electric service area is incorporated into the corporate limits of a city." Section 2, (subsection 1). This is contrary to other provisions of North Dakota law granting cities the right to grant revocable, non-exclusive franchises. See NDCC 40-05-01(57); 40-05-05. More importantly, this bill appears to directly violate Article 7, section 11 of the North Dakota Constitution which states:

> "The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly."

That is exactly what HB 1454 does. In the process, it replaces local control with state mandates.

Section 3 raises one of the most troubling aspects of the bill. This section authorizes assignments and exchanges between utilities. But it does more. It gives the affected utilities the option to "temporarily or permanently waive the right to serve an electric service location. . ." Electric co-ops understand that the right to serve carries with

it an obligation to serve. But do the IOUs? This bill seems to be another example of the IOUs wanting to have their cake and eat it too. Instead of customer choice, the IOUs want utility choice – the right to determine who, where, and when they will serve customers based on their corporate bottom line, not on the public interest.

Sections 4, 5 and 6 of the bill include the proverbial exception that swallows the rule. These sections claim to keep the law's prohibition against interference and unreasonable duplication of existing electric facilities, but create an exception in the very areas that most need this protection. If this bill becomes law, it will be okay to unreasonably interfere or duplicate the facilities of another utility in the growing areas around our major cities, but it will be unlawful to interfere in remote rural areas where such interference is most unlikely.

HB 1454 changes the focus of state law from concerns about rational utility planning, consumer protection, safety and cost, to a concern about guaranteeing private utility growth. It is very bad public policy. It will cost North Dakota consumers millions of dollars in duplicate utility investment. It is not fair to the electric cooperatives, but more importantly, it's not fair to North Dakota consumers. I urge a DO NOT PASS on HB 1454.

Thank you.