

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

**CAPITAL ELECTRIC COOPERATIVE, INC.'S
REPLY BRIEF
ON
MONTANA-DAKOTA UTILITIES' MOTION TO DISMISS
AND
PROPOSED FINDINGS, CONCLUSIONS AND ORDER**

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In this reply brief, Capital responds separately to MDU's brief in support of its Motion to Dismiss and MDU's proposed Findings, Conclusion and Order.

I. **Conclusions of law and an order must be supported by its findings of fact, findings must be supported by a preponderance of the evidence, and the order must be in accordance with the law.**

MDU's proposed Findings, Conclusions and Order fail these tests: The Commission's Conclusions of Law and Order must be supported by its findings of fact, its findings must be supported by a preponderance of the evidence, and the order must be in accordance with the law. N.D.C.C. 28-32-46. See also Northern States Power Co. v Public Service Commission, 452 N.W.2d 340; (N.D. 1990) (herein NSP v PSC).

MDU's proposed conclusion 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."

Capital's reply:

Capital generally agrees with MDU's proposed conclusion #1, with an important clarification. Factors affecting public convenience and necessity where a regulated electric public utility seeks to extend its facilities in rural areas outside of municipalities also apply to proceedings under N.D.C.C. 49-03-01.3 regarding extensions of facilities in rural areas that have been annexed to municipalities. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181, at 188, note 1 (N.D. 1988) (herein Cass v NSP).

MDU's proposed conclusion of law #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.”

Capital's Reply:

The words of MDU's proposed conclusion #2 are familiar. MDU proposes the PSC should adopt not only the concept but should also use the exact words used by Bismarck's City Commission in its November 14, 2005, Findings, Conclusion, Decision and Order. (See MDU's motion exhibit 1.)

Capital refers the Commission to Capital's Brief in opposition to MDU's Motion to Dismiss and particularly the discussion about the Commission's lack of authority to decide issues of constitutional law. The Commission has no authority to decide questions about its authority under the Constitution, no authority to decide questions about the City Commission's authority, and no authority to decide which body has the superior power under the Constitution. “All parties agree that the question of franchise rights is not one that can be determined by the Commission.” (PSC Staff brief, March 16, 2006, page 3).

Although the Bismarck's City Commission's November 14th document is mentioned in MDU's proposed findings of fact 8 & 9, ostensibly supported by references to “Exhibits MDU 1 & 2,” those documents are not evidence. The documents were offered, marked and received as motion exhibits. *[February 9 hearing transcript, pages 11-13.]* MDU

presented no testimony, no exhibits, no evidence at the hearing on Capital's interference Complaint. [Tr. p. 144.] The only information provided by MDU relevant to the interference issue is its admissions in its answer to Capital's Complaint.

MDU's proposed conclusion of law #2 is not in accordance with the law, and is not supported by findings that are supported by evidence.

MDU's proposed conclusion of law #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."

Capital's reply:

MDU's third proposed conclusion of law appears to be a correct summary of Section 10-11-01 of Bismarck's Ordinances, but it is nothing more than an extension of proposed conclusion # 2, and is subject to the same criticism. The PSC administers N.D.C.C. Title 49, not the City of Bismarck's ordinances.

MDU's proposed conclusion of law # 3 is not in accordance with the law under which the Commission operates.

MDU's proposed conclusion of law #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."

Capital's reply:

MDU's "and therefore" fourth proposal requires separate responses on each side of the conjunction. The introductory words ("CEC does not have a franchise from the Bismarck Board of City Commissioners to construct or maintain electric distribution facilities within Boulder Ridge") is a factual statement, not a conclusion of law. It is a factual statement not supported by the evidence.

MDU presented no evidence at the hearing. *[Tr. p. 144.]* Capital's Complaint alleges it has a franchise granted by the City of Bismarck. MDU admitted that Capital has a franchise. Capital's franchise was offered and received in evidence. *[Complaint, paragraphs I and II; Answer, paragraph 1; Exhibit C-1J]*. The uncontroverted evidence is that Capital has a franchise.

MDU wants the Commission to accept its statement that "CEC does not have a franchise from the Bismarck Board of City Commissioners" as a matter of fact established by its motion exhibits. (See MDU's proposed findings of fact 8 & 9 and references to MDU's motion exhibits.) The motion exhibits were presented in support of MDU's Motion to Dismiss. Those exhibits are not evidence affecting any factual issue in the evidentiary hearing.

". . . therefore CEC is prohibited from providing electric distribution service to customers within Boulder Ridge," words included in MDU's fourth proposed conclusion, seem connected to its third proposal about what is prohibited by Bismarck's ordinances, and somewhat connected to MDU's brief's citation of Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (N.D. 1972). Regardless of apparent similarities to the Boulder Ridge dispute, the Divide County School case is a red herring

in the case now before the Commission. That case did not involve the Territorial Integrity Act or any other law within the jurisdiction of the Commission. “All parties agree that the question of franchise rights is not one that can be determined by the Commission.” (PSC Staff brief, March 16, 2006, page 3). The Public Service Commission administers and enforces the State’s statutes delegated to it, N.D.C.C. Title 49; it does not administer Bismarck’s ordinances.

MDU’s proposed conclusion of law #4 is not in accordance with the law under which the Commission operates and includes a factual statement not supported by the evidence.

MDU’s proposed conclusion of law #3 (sic; should be 5; MDU’s computer mixed up the numbers):

“Boulder Ridge is not within CEC’s service area.”

Capital’s reply:

This proposed conclusion is a restatement of MDU’s theory that “The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck.” (MDU’s November 23, 2005, Motion, page 2.)

Capital again refers the Commission to Capital’s brief on MDU’s Motion to Dismiss. Because the Commission lacks authority to decide constitutional issues, this proposed conclusion is not in accordance with law under which the Commission operates.

To the extent this proposed conclusion relies on MDU’s current interpretations of the Territorial Integrity Act, the proposal is not in accordance with the law in two respects. Under N.D.C.C. 49-03-01.3, as interpreted by the Supreme Court in the South Pointe cases, the Commission must not interpret its jurisdiction narrowly. Under N.D.C.C. 49-03-

01.3, as interpreted in the South Pointe cases, the Commission must look at the existing facilities that Capital and MDU have in place in the area to see whether the evidence shows an unreasonable duplication of capital-intensive facilities and services. Cass v NSP, 419 N.W.2d at 187; NSP v PSC 452 N.W.2d at 342.

When the Commission looks at the evidence as to existing facilities (see Capital's proposed findings, conclusions and order and references to the evidence), it will see that extension of MDU's services in Boulder Ridge constitutes an unreasonable duplication of capital-intensive facilities and services already provided by Capital, and it will see that MDU's fifth proposed conclusion of law is not supported by any facts that can be found in evidence.

MDU's proposed conclusion of law #4 (sic; should be 6):

"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 in 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."

Capital's reply:

Each of the three sentences in MDU's sixth proposal is a factual statement, not supported by evidence. MDU presented no evidence at the interference hearing. Its motion exhibits are not evidence.

Both Capital's and MDU's pleadings claim franchises granted by the City of Bismarck. MDU offered no evidence in support of its pleading. MDU admitted that Capital

has a franchise.

The second sentence is another restatement of MDUs theory that “The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck.” (MDU’s November 23, 2005, Motion, page 2.) Capital again refers to its brief in opposition to MDU’s Motion to Dismiss, regarding the Commission’s lack of authority to decide the constitutional issues raised by MDU. Capital again refers to the PSC Staff brief of March 16, 2006, page 3: “All parties agree that the question of franchise rights is not one that can be determined by the Commission.”

The third sentence assumes the Commission would grant MDU’s request for official notice that “The determination of the Board of City Commissioners has been affirmed by the South Central District Court in Civil Case No. 05-C-2303” (see MDU’s brief, pages 3-4). That request must be rejected. See Tri-County Electric Cooperative v Elkin, 224 N.W.2d 785, at 793 (1974). As a practical matter, the request has already been rejected, when the Commission rejected a proposal that a decision in this case be indefinitely continued until the court action is finally determined. See minutes of the Commission’s meeting of April 12, 2006.

Whether considered as a proposed conclusion of law or as a finding of fact, MDU’s sixth proposed conclusion of law is not supported by any facts that can be found under the evidence.

MDU’s proposed conclusion of law #5 (sic; should be 7):

“Montana-Dakota’s extension of facilities to serve Boulder Ridge is not a violation of N.D.C.C. 49-03-01.3”

Capital's reply:

MDU's extension of facilities to serve Boulder Ridge is a violation of N.D.C.C. 49-03-01.3, for all the reasons stated in Capital's brief in support of its Complaint and Capital's proposed Findings, Conclusions and Order.

Capital's reply to MDU's proposed findings of fact:

Objections to interrupt oral arguments are rare, but appropriate where the speaker wanders outside the evidence. Similarly, Capital objects to MDU's written arguments proposing findings of fact that are outside the evidence. "Exhibits MDU 1 & 2" referred to in support of MDU's proposed findings 4,5,6,8,9 and 11, and inferred in proposed finding 16, are not evidence. The documents were offered, marked and received as motion exhibits. *[Transcript, pages 11-13.]* MDU presented no testimony, no exhibits, no evidence.

The preponderance of the evidence supports Capital's proposed Findings, Conclusions and Order.

II. MDU's Motion to Dismiss should be denied, because the Commission has no authority to decide constitutional issues and because it should follow the South Pointe cases to restrain MDU's unreasonable duplication of existing facilities and services already provided by Capital.

MDU presented no evidence at the hearing, apparently relying entirely on its Motion to Dismiss, premised "on the grounds that CEC is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a matter of law, interfere with

the services of CEC. CEC's Complaint should also be dismissed on grounds that the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge." (MDU's November 23, 2005, Motion, pages 2 & 3.) The two grounds of MDU's motion are alternate ways of expressing a single idea: The Boulder Ridge dispute is not within the jurisdiction of the State's Public Service Commission under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of the Bismarck's City Commission, under MDU's theory.

MDU's Motion to Dismiss is based on concepts of local governing bodies displacing the Commission's jurisdiction. The motion must be denied because MDU lacks standing - a point it did not address in any of its briefs. MDU cannot assert the self-government interests of the City of Bismarck to defeat the Commission's authority over MDU's conduct of its business. Application of Otter Tail Power Co., 452 N.W.2d 95 at 98 (N.D. 1990).

MDU bolsters its arguments with a decision issued by Bismarck's City Commission responding to MDU's petition to declare franchise rights. See MDU motion exhibits 1 & 2.

MDU's petition asking for Bismarck's City Commission's help in its territorial dispute with Capital was a pre-emptive collateral attack on the Public Service Commission's jurisdiction, pre-meditated as MDU prepared to extend its facilities into Boulder Ridge, anticipating Capital would complain to the Commission, like Cass complained about NSP in the South Pointe cases. The Public Service Commission should repel MDU's attack on its jurisdiction. The Commission should not recognize Bismarck's City Commission's Order as MDU's license to engage in conduct that is prohibited by State law the Commission is responsible to enforce.

Capital has stated many times that its Complaint to the Commission against MDU's extension into Boulder Ridge is like Cass's Complaint against NSP in the South Pointe cases. MDU argues that the Boulder Ridge dispute is not like the South Pointe cases because of one distinguishing point, the franchise issue. "All parties agree that the question of franchise rights is not one that can be determined by the Commission." (PSC Staff brief, March 16, 2006, page 3). Because the question of franchise rights cannot be determined by the Commission, Capital's complaint to the Commission against MDU is exactly like Cass's complaint against NSP in the South Pointe cases.

As it administers the Territorial Integrity Act and as guided by the South Pointe cases, the Commission should not take a narrow view of its jurisdiction. The Commission must look at the existing facilities that Capital and MDU have in place in the area and determine whether extension of MDU's services to Boulder Ridge unreasonably duplicates existing capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d at 187; NSP v PSC 452 N.W.2d at 342.

The Commission has before it Capital's Complaint, MDU's Motion to Dismiss, and a record of evidence. In the process of its decision making, not taking a narrow view of its jurisdiction, the Commission should first look at the evidence -- and the lack of any evidence presented by MDU -- to determine the interference issue under all the precedents, all the law preceding the Boulder Ridge dispute, particularly the South Pointe cases. The Commission will see that the preponderance of evidence shows MDU's extension of facilities to serve Boulder Ridge unreasonably duplicates existing capital-intensive facilities and services already provided by Capital, in violation of N.D.C.C. 49-03-01.3.

As the Commission then considers the Motion to Dismiss and MDU's arguments and Capital's counter-arguments, it will look at the exhibit offered to support MDU's motion, the Bismarck City Commissioner's November 14th Order. The Commission will not decide whether the November 14th Order was right or wrong as a matter of law, or if the City Commission has legal power like a little local public service commission, or if the City Commission has greater authority than the Public Service Commission. "All parties agree that the question of franchise rights is not one that can be determined by the Commission." (PSC Staff brief, March 16, 2006, page 3).

Not taking a narrow view of its jurisdiction, looking at the evidence of MDU's extension of its facilities into Boulder Ridge and looking at the Bismarck City Commission's Order, the Public Service Commission should not recognize the City Commission's Order as MDU's license to engage in conduct that is prohibited by State law. Taking a broad view of its jurisdiction to enforce state law and to restrain MDU from engaging in conduct that violates state law, the Public Service Commission should conclude the City Commission's Order has no effect on the Public Service Commission's jurisdiction. No matter what the City Commission has said about the Boulder Ridge dispute, the State's Public Service Commission has jurisdiction conferred by the legislature in the exercise of its constitutional powers, jurisdiction to restrain MDU's unreasonable duplication of existing capital-intensive facilities and services already provided by Capital.

MDU's Motion to Dismiss is grounded on arguments of constitutional law. The Commission does not need to decide whether MDU is right or wrong about the Constitution. The Commission should deny the motion because ". . . administrative agencies have no authority to decide upon the constitutionality of the statutes under which

they operate.” . . . “We reserve the issue of constitutionality to the first court to which the agency decision is appealed.” Johnson v Elkin, 263 N.W.2d 123, 126-27 (N.D. 1978).

CONCLUSION

The Commission should deny MDU’s Motion to Dismiss that challenges the Commission’s jurisdiction. The Commission should decide Capital’s Complaint against MDU based on the evidence and applying the statutes under which the Commission operates.

Following the Supreme Court and the Commission’s own decision in the South Pointe case, the uncontroverted evidence in the record will lead the Commission to find and conclude that Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework and system in its northwest Bismarck service area. Service provided by Capital would best promote orderly and economic development of electric service. MDU’s extension of electric service into the Boulder Ridge addition interferes with and constitutes an unreasonable duplication of investment and available facilities provided by Capital. See Cass County Electric Cooperative, Inc. v Northern States Power Company, Commission Case No.10,884 (1988), Findings No. 20, 21 and 22; NSP v PSC, 452 N.W.2d at 344.

MDU’s extension of facilities to serve Boulder Ridge is a violation of N.D.C.C. 49-03-01.3, for all the reasons stated in Capital’s brief in support of its Complaint and Capital’s proposed Findings, Conclusions and Order.

Dated this 11th day of May, 2006.

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