

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer

FROM: Bill Binek and Annette Bendish

DATE: May 25, 2006

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

Capital Electric Cooperative, Inc. ("Capital") alleged in its complaint that the Boulder Ridge Subdivision is within Capital's service area that Capital has the right to provide service pursuant its franchise from the City of Bismarck incorporating the Area Service Agreement. Capital asserts that Montana-Dakota Utilities, Co.'s ("MDU") construction into Capital's alleged service area violates the provisions of N.D.C.C. §§ 49-03-01 and 49-03-01.3.

MDU has before the Commission a Motion to Dismiss the complaint of Capital. MDU's position is that Capital is prohibited as a matter of law from providing service within the Boulder Ridge Subdivision, and therefore, MDU's extension of service under its franchise is not an unreasonable interference with or duplication of Capital's service. Capital contends that the Commission should deny MDU's Motion to Dismiss and should decide the complaint case based on the provisions of Chapter 49-03 of the North Dakota Century Code without consideration of the franchise.

The Commission's Notice of Hearing in this case sets forth the following issues to be considered in the case:

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.

In considering MDU's Motion to Dismiss, the Commission should consider the following:

1. Does the law require an electric supplier to have a franchise from the City of Bismarck in order to provide electric distribution service to customers in the Boulder Ridge Subdivision?
2. What electric supplier has a franchise from the City of Bismarck to provide electric service to customers in the Boulder Ridge Subdivision?

3. Does the Commission have the authority under Chapter 49-03 of the North Dakota Century Code to restrain or enjoin MDU from exercising its franchise authority to provide electric distribution service in the Boulder Ridge Subdivision?

In considering Capital's complaint, the Commission should consider the following:

1. Was the annexed Boulder Ridge area included in Capital's long range plans for electric service in the area north of the City of Bismarck?
2. What existing electric facilities did MDU and Capital have in place in the area at the time of annexation?
3. How many customers were being served with electric service by MDU and by Capital in the Boulder Ridge area at the time of annexation?
4. Does the extension of MDU's electric services in Boulder Ridge interfere with and constitute an unreasonable duplication of investment and available facilities and services provided by Capital?
5. Is Capital designated to serve the Boulder Ridge Subdivision area under the provisions of the "Area Service Agreement" that was canceled by MDU?
6. Does Capital have a franchise from the City of Bismarck to provide electric service in the Boulder Ridge Subdivision?
7. What consideration must be given to the existence of a franchise or lack of a franchise from the city in determining whether MDU is in violation of the provisions of N.D.C.C. Chapter 49-03 by interfering with Capital's service or system?
8. Does the Commission have the authority under N.D.C.C. Chapter 49-03 to restrain or enjoin MDU from providing electric service to the Boulder Ridge Subdivision?

The Commission has three options in this case: (1) grant MDU's Motion to Dismiss; (2) determine under N.D.C.C. Chapter 49-03 whether MDU's extension of electric service in the Boulder Ridge Subdivision interferes with and unreasonably duplicates Capital's service and system; or (3) continue the proceeding until the franchise issue is resolved.