

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Capital Electric Cooperative, Inc. vs
Montana-Dakota Utilities Co.
Complaint**

Case No. PU-05-551

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 22, 2006

Appearances

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

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

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

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

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

Preliminary Statement

On September 29, 2005, Capital Electric Cooperative, Inc. (Capital) filed a Complaint alleging that Montana-Dakota Utilities Co. (Montana-Dakota) (1) intends to provide electric service to a development in Complainant's service area and (2) such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital Electric.

On October 18, 2005, the Commission issued a Notice of Hearing scheduling the hearing for December 13, 2005.

On October 20, 2005, Montana-Dakota filed an Answer and Counterclaim. Montana-Dakota admitted that it intended to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. Montana-Dakota denied its service would interfere with service or facilities of Capital. Montana-Dakota

also asserted that the Complaint should be dismissed on the basis that the Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchised authority to provide electric distribution services in the City of Bismarck, including Boulder Ridge.

On November 10, 2005, Capital filed its reply to Montana-Dakota's Counterclaim requesting the Counterclaim be dismissed.

On November 23, 2005, Montana-Dakota filed a Motion to Dismiss the Complaint again asserting that the Commission does not have jurisdiction and asserting that Capital is not authorized to provide service within Boulder Ridge and therefore cannot, as a matter of law, interfere with the services of Capital.

On November 30, 2005, the December 13 hearing was continued.

On December 30, 2005, the Commission issued a Notice of Reschedule Hearing for February 9, 2006.

On February 9, 2006, the Commission held a public hearing to consider the issues identified in its Notice of Rescheduled Hearing. The issues identified for hearing were:

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.

At the hearing Montana-Dakota renewed its Motion to Dismiss and moved to voluntarily dismiss its Counterclaim in view of the proceeding in South Central District Court. The hearing officer granted Montana-Dakota's motion to voluntarily dismiss its Counterclaim.

At the hearing, Capital presented evidence consisting of testimony and exhibits. Montana-Dakota cross-examined Capital's witness. Montana-Dakota presented no direct testimony.

At the close of the hearing, the Commission set a briefing schedule. Then on February 10, 2006, the Commission held a public working session for the purpose of discussing the best course of action for the Commission. The Commission held the working session the day after the hearing so the parties would be apprised of the Commission's considerations regarding the matter. The Commission took into consideration the pending action before the District Court regarding the franchise issues. The Commission determined at the working session that the most appropriate

action would be to continue the complaint proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

An Order for Continuance was prepared and was put on the regular agenda for the February 22, 2006 Commission meeting. The agenda item was held over to consider a minor change in language. The Order for Continuance was put on the regular agenda for the March 7, 2006 Commission meeting. The agenda item was withdrawn following receipt of the Motion and Brief for Hearing on "Continuance" filed by Capital Electric on March 6, 2006.

On March 7, 2006, the Commission suspended the briefing schedule in this proceeding.

On March 13, 2006, the Commission issued a Notice of Hearing scheduling a public hearing on March 23, 2006, to hear oral arguments on the issue of whether the Commission has authority to issue an order continuing the proceeding for an indefinite period of time until the issue of the city franchise rights is finally determined.

On March 16, 2006, Commission staff filed a Brief in Support of Continuance.

On March 20, 2006, Capital filed Proposed Findings of Fact, Conclusions of Law and Order and Brief on Complaint against MDU.

On March 21, 2006, Capital Electric filed a Supplemental Brief on the Commission's Motion for Continuance.

The hearing was held on March 23 as scheduled.

On April 27, 2006, Montana-Dakota filed Proposed Findings of Fact, Conclusions of Law and Order and Brief in Support of Motion to Dismiss.

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

Findings of Fact

1. Capital is an electric cooperative organized under North Dakota Century Code Chapter 10-13 providing electric service to its members in North Dakota.
2. Montana-Dakota is an investor owned electric utility providing electric service to customers in North Dakota under the regulatory jurisdiction of the Commission under Title 49 of the North Dakota Century Code.
3. Boulder Ridge is a subdivision in northwest Bismarck in Section 16 of Township 139 North, Range 80 West, Haycreek Township in Burleigh County. The

entire area of Boulder Ridge is 92.27 acres, subdivided into more than 170 lots. Boulder Ridge is bound on the west by North Washington Street and on the south by 43rd Avenue.

4. In April of 2005, Part of Boulder Ridge 1st Addition was annexed to the City of Bismarck. Both Capital and Montana-Dakota asserted a right to serve Boulder Ridge with electric distribution service.

5. By resolution dated May 12, 1987, the Board of City Commissioners of the City of Bismarck issued Montana-Dakota a general limited franchise to construct and maintain an electric transmission and distribution system within the City of Bismarck for a period of 20 years.

6. By resolution dated May 25, 1993, the Board of City Commissioners of the City of Bismarck issued a franchise to Capital to construct and maintain an electric transmission and distribution system within a limited geographic area of the City of Bismarck. The franchise provides the authority granted to Capital is limited geographically to avoid duplication of facilities between Capital and other electric franchises. The geographic limits to the franchise are those that were described in an Area Service Agreement dated July 5, 1973 between Capital and Montana-Dakota as modified by an amendment dated October 25, 1990 and any future amendments.

7. By letter dated June 26, 2002, Montana-Dakota cancelled the Area Service Agreement with Capital. By terms of the Area Service Agreement, the cancellation became effective June 26, 2003.

8. The Complaint before the Commission was preceded by Montana-Dakota's filing with the Bismarck Board of City Commissioners a Petition to Declare Franchise Rights of Montana-Dakota and Capital Electric to provide electric service to Part of Boulder Ridge First Addition to the City of Bismarck. On November 14, 2005, the Board of City Commissioners issued its Findings, Conclusions, Decision and Order that electric power service to Part of Boulder Ridge Subdivision is properly served by Montana-Dakota, subject to Capital Electric retaining any existing customers.

9. Capital Electric initiated a Declaratory Judgment proceeding by filing a Complaint dated December 1, 2005 in the District Court, South Central Judicial District, Burleigh County, North Dakota, naming Montana-Dakota, the City of Bismarck, and the Public Service Commission as Defendants seeking a judgment declaring Capital Electric's rights under its franchise to operate an electric distribution system in Bismarck.

10. On January 30, 2006, the District Court issued its Memorandum Opinion and Order on the City of Bismarck's Motion to Dismiss or in the Alternative for a More Definite Statement and on Montana-Dakota's Motion to Dismiss. The Court stated its opinion that the question of whether Montana-Dakota is operating lawfully under its franchise is one of franchise interpretation by the City Commissioners, and that only

after the City Commissioners have decided the issue, and after resulting appeal, may the Public Service Commission determine whether Montana-Dakota is unreasonably interfering with Capital Electric's operations. The Court acknowledged that the Public Service Commission may have a different opinion concerning the matter.

11. On March 2, 2006 a hearing on the appeal of the decision issued by the City of Bismarck regarding the franchise rights for electric service to the area was held. The Order on Appeal was issued by the District Court on March 14, 2006, denying Capital Electric's appeal.

12. A second Order was issued by the District Court on May 30, 2006 granting Montana-Dakota's Motion for Dismissal of Amended Complaint.

13. Before Boulder Ridge was platted and annexed to the City of Bismarck, Capital was the only provider of electric service in the part of Haycreek Township now named Boulder Ridge. Capital provided electric service to a location in Section 16 since 1949. In 2005 that service extension was removed in preparation for the development of Boulder Ridge. Capital had other services in Section 16, since the mid-1990s, still in place in 2005. Capital had three-phase lines along the west and south sides of Section 16 since 1973, still in place in 2005.

14. At the time Boulder Ridge was annexed, Capital's service in the subdivision was limited to two street lights and a CATV booster located in the road right-of-way along 43rd Avenue. Previous service to a pasture well by Capital within Boulder Ridge was abandoned prior to the annexation of Boulder Ridge.

15. Both Montana-Dakota and Capital extended distribution facilities to serve customer locations within Boulder Ridge. Montana-Dakota constructed its distribution facilities by extending a three-phase feeder line approximately 2,000 feet from a location in French's Addition south of 43rd Avenue and east of Washington Street. Capital extended distribution facilities from its three-phase feeder lines location along Washington Street and 43rd Avenue. Montana-Dakota's extension of its underground feeder line crossed Capital's overhead feeder line along 43rd Avenue. Montana-Dakota was in the process of installing its facilities at the time Capital began installing its facilities.

16. Capital has a three-phase framework around the area of Capital's northwest Bismarck service area, served from 4 different substations. Capital's facilities nearest to Boulder Ridge are three-phase facilities immediately contiguous to Boulder Ridge along the west side of Section 16 (east of Washington Street) and along the south side of Section 16 (North of 43rd Avenue) of Haycreek Township. Capital's three-phase facilities were in place before Boulder Ridge was platted and before part of Boulder Ridge was annexed to the City of Bismarck. The facilities were also in place before Montana-Dakota extended its facilities to provide electric distribution services in Boulder Ridge.

17. Capital's feeder lines located along 43rd Avenue and Washington Street were built prior to 1973 to tie together Capital's substations at other locations. The use of these feeder facilities has not changed in the last 20 years. Prior to 1973, Capital did not have a franchise with the City of Bismarck or an Area Service Agreement with Montana-Dakota.

18. Capital has substantial facilities within the corporate limits of Bismarck and within a two-mile radius of Boulder Ridge and in the area designated as "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement.

19. Capital is the only provider of electric service in areas outside the corporate limits of Bismarck within a two mile radius of Boulder Ridge.

20. Capital included "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement in its long range plans and has made substantial investments to serve it. Capital has invested in excess of 7 million dollars in the area northwest of Bismarck, west of Highway 83, including Boulder Ridge. These facilities were planned and constructed to provide an electric system for new developments, such as Boulder Ridge.

21. Capital's framework is a reliable system of substations and distribution lines that can be operated in a looped fashion. In the event of an outage, Capital can provide looped service to Boulder Ridge. Capital's three-phase framework in the area northwest of Bismarck, west of Highway 83, is supplied from four different substations, the closest of which is within one mile of Boulder Ridge. Capital's system includes a 5th delivery substation under construction.

22. Montana-Dakota's facilities nearest to Boulder Ridge are in the southerly part of French's 1st Addition, approximately ½ mile from the southerly boundary of Boulder Ridge. It is off these facilities that Montana-Dakota extended its facilities to Boulder Ridge. Montana-Dakota has no other facilities closer to Boulder Ridge. Montana-Dakota's facilities in Boulder Ridge cannot be operated in a looped fashion in the event of an outage.

23. Montana-Dakota's extension of facilities into Boulder Ridge crossed Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge and Montana-Dakota's extension of its facilities ran parallel to Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge.

24. Boulder Ridge is entirely surrounded by areas served by Capital.

25. The Commission finds Montana-Dakota's extension of its facilities crossing and running parallel to Capital's facilities in the northerly part of original French's 1st Addition, crossing 43rd Avenue into Boulder Ridge, and crossing and running parallel to Capital's facilities on the north side of 43rd Avenue, interferes with

and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital.

26. The Commission finds that service by Capital would best promote and serve orderly and economic development of electric service in the Boulder Ridge subdivision. Capital is able to extend service to Boulder Ridge through a shorter extension at a lower cost. Service by Capital to Boulder Ridge will not result in checker boarding of customers served by Montana-Dakota and Capital.

27. The Commission finds Montana-Dakota's extension of its facility to Boulder Ridge, an area not contiguous to Montana-Dakota's existing service areas, would create a checkerboard of service areas.

28. The Commission finds Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework, and system.

29. The Commission finds Montana-Dakota's extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital.

From the foregoing Findings of Fact, the Commission makes its:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. The Commission has jurisdiction under North Dakota Century Code Section 49-03-01.4 to hear and determine the Complaint of Capital alleging Montana-Dakota's extension of its electric distribution lines to Boulder Ridge is a violation of North Dakota Century Code Section 49-03-01.3. Section 49-03-01.3 states:

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity. 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.

Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof

whose places receiving service are located outside the corporate limits of a municipality on July 1, 1965; provided, however, that within ninety days after July 1, 1965, any electric public utility furnishing service to customers whose places receiving service are located outside the corporate limits of a municipality shall file with the commission a complete map or maps of its electric distribution system showing all places in North Dakota which are located outside the corporate limits of a municipality and which are receiving its service as of July 1, 1965. After ninety days from July 1, 1965, unless a customer whose place being served is located outside the corporate limits of a municipality is shown on said map or maps, it shall be conclusively presumed that such customer was not being served on July 1, 1965, and cannot be served until after compliance with the provisions of section 49-03-01.1.

2. The City of Bismarck has the power to regulate the franchises of any public utility within the City of Bismarck under Article VII, Section 11 of the North Dakota Constitution. Article VII, Section 11 states: "The power of the governing body 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." Under Article 3, Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck City Commission is the franchising authority for both Capital and Montana-Dakota for all public areas within the City of Bismarck and the City Commission has the authority to decide questions regarding the franchises issued by it.

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

4. The Commission's jurisdiction is limited to matters delegated to it by the North Dakota Legislature under North Dakota Century Code Title 49. The Commission does not have jurisdiction regarding the franchise under Article VII, Section 11 of the North Dakota Constitution.

5. Under the general provisions of North Dakota Century Code Section 49-03-01 and 49-03-01.3, an electric public utility must obtain from the Commission a certificate of public convenience and necessity authorizing construction or operation of a public utility plant or system, but a new certificate is not required for each and every extension of its electric distribution lines within the corporate limits of a municipality within which it has lawfully commenced operations.

6. The question of which electric suppliers' facilities are actually duplicative or wasteful is one of fact for the Commission to determine. In making the determination, the Commission considers which supplier is better able to serve the area due to the nature and extent of existing facilities in the area, whether the electric public utility's extension into the area would constitute an unreasonable duplication of capital intensive

facilities and services already provided by the rural electric cooperative and which would best promote orderly and economic development of electric service. The Commission must look at the existing electric facilities that Capital and Montana-Dakota have in place and determine whether extension of Montana-Dakota's services to Boulder Ridge would constitute an unreasonable duplication of capital intensive services already provided by Capital.

7. Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, through French's 1st Addition, and across 43rd Avenue and across Capital's facilities interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, under North Dakota Century Code Section 49-03-01.3. There is no evidence in the record upon which to base an ultimate decision that Montana-Dakota can serve the Boulder Ridge area without wasteful duplication of investment or service.

8. Under North Dakota Century Code Chapter 49-03, Montana-Dakota should cease and desist from providing electric services to Boulder Ridge Addition.

9. Under North Dakota Century Code Section 49-03-01.4, the Commission may prescribe reasonable terms and conditions in addition to the restraint imposed. It is reasonable and proper to require Capital to purchase from Montana-Dakota and to require Montana-Dakota to sell to Capital, at book value, the distribution facilities currently located in and used by Montana-Dakota to serve part of Boulder Ridge 1st Addition, to the extent not duplicated by and compatible with Capital's system.

10. Under North Dakota Century Code Section 49-03-01.3 and precedents of the Commission the North Dakota Supreme Court, the Commission should not take a narrow view of its jurisdiction, particularly in view of the presumption of the constitutionality of the statutes under which it operates.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes its:

Order

The Commission Orders:

1. Within 30 days after the date of this Order Montana-Dakota shall cease and desist from providing electric service to Boulder Ridge 1st Addition to the City of Bismarck and from further extending its electric service in that area.

2. Montana-Dakota shall offer to sell to Capital, and Capital shall purchase from Montana-Dakota, at book value, the distribution facilities located in and used by Montana-Dakota to serve Boulder Ridge First Addition, to the extent compatible with Capital's system and not constituting an unnecessary duplication of Capital's facilities.


3. So that users of electricity in Boulder Ridge First Addition shall not be without service, Montana-Dakota may continue to provide service beyond the 30 days referenced in ordering paragraph 1 until Capital can begin providing service.

4. Montana-Dakota's Motion to Dismiss Capital's Complaint is DENIED.

PUBLIC SERVICE COMMISSION

Voting "Nay"

**Susan E. Wefald
Commissioner**



**Tony Clark
President** **Kevin Cramer
Commissioner**

CONCURRING OPINION
Commissioner Tony Clark

June 22, 2006

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Let me begin by stating what this decision is not. It is not a slap at the Bismarck City Commission. The City of Bismarck has the right to franchise under state law, the PSC does not. This order simply acknowledges that the PSC is charged by the legislature to enforce Title 49 of the Century Code, while the City of Bismarck has the right to franchise within its borders. This order keeps those two issues separate. What is potentially at stake in the courts, is what happens when the manner in which a city issues franchises has the effect of causing utility companies to run afoul of state laws intended to protect consumers from unreasonable and uneconomic duplication of services.

Neither is this order any sort of grandiose statement on the Territorial Integrity Act (TIA). Few issues have given rise to such intense debate in our legislative sessions the past few years. Try as some have to entice the PSC to become involved in that debate, we have steadfastly refused to do so. Frankly, if PSC orders in these contentious matters are to be regarded as unbiased by the parties and the general public, then we must remain neutral on the larger policy questions regarding the statute itself. The law is what it is, and this order is simply the result of a dispassionate interpretation of the weight of the evidence presented to us.

Now to the heart of the matter in this case. There is little doubt that MDU serving Boulder Ridge violates the spirit of the TIA. In fact, MDU effectively conceded as much by not presenting any evidence to the contrary. Rather, MDU asks the PSC to declare that holding a city franchise is a threshold, a prerequisite, to a public utility filing a valid interference complaint. In this case, Capital does not at this time hold such a franchise. But in asking the PSC to make this determination, MDU is asking us to do something we cannot. As an administrative agency, we are not to make such constitutional interpretations and reconciliations. That can only be made by our courts. The courts have previously dealt with issues of franchising, such as in the Divide County case (in which it is clear a utility must ultimately obtain a franchise if it is to operate within a city), but there is no guiding precedent given to us when we have the type of conflict presented to us in as in this case. The PSC must assume that the statutes we are charged with enforcing mean exactly what they say, and that they are constitutional. The legislature could have plainly stated that the TIA, as to be applied within municipalities, is only intended for a franchise holding utility. The legislature did not do so. I can only conclude that the legislature viewed wasteful duplication of services as a

separate issue from franchising. The decision I have come to is in no small part influenced by the guidance that the courts have given the PSC in stating that we should not go out of our way to find ways to limit too narrowly our own authority in enforcing what has been assigned to us by the legislature.

Admittedly, this leaves the situation unsettled. We now have a public utility, MDU, that is unable to provide service under state statute. Yet the provider, whose service is in accordance with state law, does not hold a valid city franchise. Again, this is an issue that is beyond the ability of the PSC to resolve, because the PSC has no authority over the manner in which cities franchise utilities. Reconciliation of these contradictions must be handled by the courts, or ultimately, the legislature.

It is entirely possible the courts will resolve the matter by simply creating a new threshold for the PSC to consider when executing our duties, specifically that a utility must first hold a franchise before the TIA applies. If this becomes the new standard, it seems apparent at this point that MDU will serve Boulder Ridge.

Or the courts could decide that the TIA stands separate from franchising. There would be any number of ways to address the outcome of such a decision if that is how the courts rule, but such speculation goes beyond the scope of this opinion.



Tony Clark, President

CONCURRING OPINION
Commissioner Kevin Cramer

June 22, 2006

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After careful and thorough review of the evidence in this case and attentive discussion with staff, I have concluded the most logical and defensible action the Public Service Commission can take is to find in favor of Capital Electric's complaint.

I believe this action, supported by a majority of the PSC, is the strongest position under the constitution and laws of North Dakota and serves as the best vehicle to advance the question of which company will serve this important growing area of Bismarck.

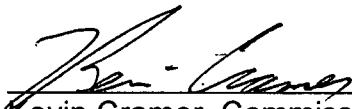
Although the "franchise" matter is still unresolved as all appeals are not yet exhausted in the courts, that is not an issue for PSC consideration as we are not authorized to decide constitutional issues.

The question in this complaint is does MDU's extension of distribution lines in Boulder Ridge interfere with and constitute an unreasonable duplication of investment and services provided by Capital? That question is easy to answer with the evidence and testimony presented by the parties. Yes it does.

Having said that, MDU's motion to dismiss on the basis of the franchise issued it by the City of Bismarck is hard to ignore. Especially following the District Court's opinion and decision upholding the city's position. Yet, I cannot reconcile that argument with the constitutional question of PSC authority without definitive direction from the courts and/or the legislature. Rather, the PSC's jurisdiction is limited to matters delegated to it by the legislature under NDCC Title 49. For the PSC to grant a dismissal based on the franchise argument seems arbitrary and capricious to me.

The motion to dismiss without prejudice is without any merit at this point in the process. It is a motion I could have and probably would have supported several months ago. But to simply act as though no hearings were ever held and no evidence presented nine months after the complaint was filed does nothing to move the issue toward resolution and diminishes the efforts of all of the parties who have invested so much in this case, including the PSC and our staff.

Whether the PSC would have granted MDU's motion to dismiss or find in favor of the complaint as we have, both are defensible positions certain to be appealed, at which time clarity will be provided by someone with the authority to provide it. I am hopeful this order will move the ball forward and resolve this dispute to the benefit of the citizens.



Kevin Cramer, Commissioner

DISSENTING OPINION
Commissioner Susan E. Wefald

June 22, 2006

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When making a determination under North Dakota Century Code Section 49-03-01.3 the Commission must give proper consideration to all four issues that are contained in this section of law.

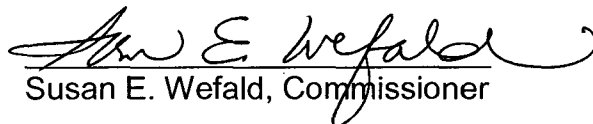
First, it has to consider whether the electric public utility is operating in the corporate limits of a municipality. The facts in this case are that in April of 2005, the service area in question was annexed to the city of Bismarck.

Second, Section 49-03-01.3 requires the Commission to determine if the electric public utility has "lawfully commenced operations." This important phrase dictates that the commission consider to which electric company the city has given a franchise. I agree that the Commission does not have jurisdiction regarding franchises under Article VII Section 11 of the North Dakota Constitution. That being said, it is important for the Commission to give the attention called for in Section 49-03-01.3 to this franchise issue. The facts in this case are that on November 14, 2005, the city of Bismarck awarded a franchise to Montana-Dakota Utilities Co. to serve the area in question in this case.

Third, Section 49-03-01.3 requires the Commission to consider whether "such extension or extensions" shall not interfere with existing services provided by a rural electric cooperative or another public utility within such a municipality. I generally agree with the Commission's findings in this order on these matters.

Finally, Section 49-03-01.4 requires the Commission to consider the following: "and provided duplication of services is not deemed unreasonable by the Commission." The Commission needs to consider all three of the preceding issues in order to come to a thoughtful conclusion to the final issue.

In this case, my fellow commissioners have given too much weight to the third issue of Section 49-03-01.3 and have failed to give enough consideration to issues one, two, and four.


Susan E. Wefald, Commissioner