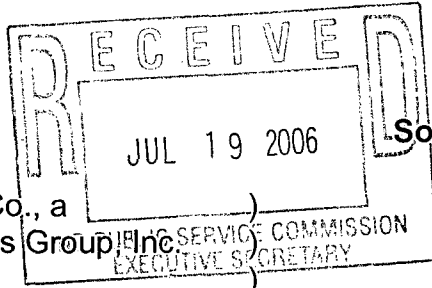


State of North Dakota
County of Burleigh



In District Court
South Central Judicial District

Montana-Dakota Utilities Co., a
Division of MDU Resources Group, Inc.

CIVIL NO. 06-C-1177

Appellant,)
vs.)
)
)
North Dakota Public Service Commission)
and Capital Electric Cooperative, Inc.)
)
Appellees.

**REPLY BRIEF OF
MONTANA-DAKOTA UTILITIES
CO. IN SUPPORT OF MOTION
FOR A STAY**

Montana-Dakota Utilities Co. ("MDU") submits the following reply brief in support of its motion for a stay of the Public Service Commission's ("PSC or Commission") order of June 22, 2006 which is the subject of this appeal.

MDU is likely to prevail on the merits of its appeal.

In its brief in opposition to a stay, Capital Electric Cooperative ("CEC") argues that MDU has not shown it is likely to prevail on the merits of its appeal and notes that typically the judiciary is restrained in its review of an administrative agency decision. This is not an appeal from a typical administrative agency decision. Rather, the PSC acknowledged its decision was based solely upon N.D.C.C. § 49-03-01.3 of the Territorial Integrity Act ("TIA") without regard to the City of Bismarck's right to franchise electric service areas. Certificate of Record (COR) #168, p. 8. The PSC concluded it could not interpret constitutional provisions regarding the franchise authority of the City and therefore did not consider MDU's authority or CEC's lack of authority to provide service within Boulder Ridge under their respective franchises. Commissioner Tony Clark in his concurring opinion noted the Commission could not reconcile seemingly conflicting provisions of the TIA and the North Dakota Constitution without direction from

the courts. COR #168. With many of the critical questions presented to the Court in this appeal being questions of law, most of which were not addressed by the PSC and specifically deferred to the Court, this is not an administrative appeal in which the Court defers to the expertise of the administrative agency. Instead, the Court is being asked to reconcile the TIA with statutory and constitutional provisions regarding the right of a city to declare franchise service areas within the corporate limits of a municipality. Fortunately, there is considerable authority to guide the Court.

The relevant authority is not the precedent offered by CEC. The South Pointe cases cited by CEC (see Cass County Electric Coop v. NSP, 419 N.W.2d 181 (N.D. 1988) and NSP v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990)) involved a situation in which the complaining rural electric cooperative had an franchise agreement from the City of Fargo to provide electric service for the area in dispute. Cass County Electric Coop v. NSP, supra at 187. That is not the situation in this appeal. In its order of November 14, 2005, the Bismarck Board of City Commissioners determined CEC's limited franchise from the City of Bismarck does not allow the provision of service in Boulder Ridge. COR #95. As recognized by the PSC, the City Commission's order was affirmed on appeal by the South Central District Court in Case No. 05-C-2303.¹ COR #168. Accordingly, the South Pointe cases are inapplicable under the facts of this case.

The relevant judicial precedent on the issue before the Court is Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 723, 730 (N.D. 1972) in

¹ The affidavit of Lars Nygren submitted by CEC in support of its brief states that CEC has a franchise from the City of Bismarck to serve customers within Boulder Ridge. This statement is directly contrary to both the City of Bismarck's order and the order of the South Central District Court in Case No. 05-C-2303. The affidavit is a knowingly misstatement of the uncontroverted facts in this proceeding.

which the court held that a cooperative was prohibited from continuing service to customers within an annexed area of the city in the absence of a franchise when city had in existence an ordinance prohibiting such service without a franchise. This is precisely the situation presented by this appeal.

The plain language of applicable statutory and constitutional provisions provide further authority that MDU is likely to prevail on the merits of its appeal. First, N.D.C.C. § 49-03-06(8) provides in pertinent part:

Nothing in this chapter shall be construed to limit the authority of a governing body of a city to exercise its franchise authority under § 40-05-01. [Emphasis added]

The PSC made no attempt to reconcile this unambiguous limitation on the TIA and the PSC's authority under N.D.C.C. § 49-03-01.3 with its order prohibiting MDU from exercising its franchise to provide electric distribution service in Boulder Ridge. Similarly, CEC brushes aside this statute without credible argument that the Commission was entitled to disregard this obvious limitation on the operation of the TIA.

Second, N.D. Const. art. XII, § 10 provides:

No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes.

This constitutional provision prohibited the Commission, under the guise of the TIA, from requiring MDU to sell its public utility facilities to CEC or from directly or indirectly allowing CEC to operate such facilities within Boulder Ridge without a franchise from the City of Bismarck. To the extent CEC's brief and argument suggest

the PSC's order entitles CEC to provide service within Boulder Ridge without a franchise, the above constitutional provision clearly establishes the contrary.

Finally, N.D. Const. art. VII, § 11 establishes the TIA cannot operate to *infringe* on the City's power to determine franchise service areas within the corporate limits of the City:

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.

This constitutional provision originated with the North Dakota Constitutional Convention of 1972 and was adopted by that body as Montana-Dakota Utilities Co. v. Divide County School District #1, *supra*, was making its way through the courts. Contrary to CEC's argument, the people of North Dakota, through this state constitutional provision, gave municipal governing bodies powers that can not be superseded by acts of the state legislature. The debates of the constitutional convention show this was precisely the intent:

DELEGATE DEVINE: . . . Basically the committee looked at this section as one that reserves the power to local cities, one that will give them the veto power over the operation of utilities within a city. We feel this is an important right that should be reserved to them.

Debates of the North Dakota Constitutional Convention of 1972 (hereafter "Debates") p. 694-695. (Attachment 1) As expressed during the debates, the proposal was opposed by the RECs because it would confirm on a constitutional basis the result reached by the trial court in Montana-Dakota Utilities Co. v. Divide County School District #1, *supra*.

DELEGATE SANSTEAD: I think the real answer to the question raised by Delegate Kelsch is the fact that the recent Crosby case, which was a serious case as far as the RECs were concerned and which will be appealed very shortly as their spokesman told us, that very case left the decision more to the cities. And as a result of that the RECs would rather

take their chances in the courts rather than have something like this specified within the framework of the Constitution.

Debates, p. 698. The convention delegates clearly recognized the proposed constitutional amendment would limit the protection provided to the RECs under the section of the TIA relied upon by CEC and the Commission in its order:

DELEGATE SINNER: . . . In 1965, when we had the bitter, bitter territory fight in the Legislature, part of the language of that legislation granted electric cooperatives the right to continue to serve customers that they were serving in territory that was annexed to a city. For example, if a farmsite alongside of Grand Forks was served by an electric cooperative and industrial development developed along that area, all of which was served by a cooperative, this territory would be subsequently annexed to Grand Forks and the City of Grand Forks, the commission, voted to not allow that electric cooperative to continue to serve those customers and would force them to abandon all of their facilities because the City Commission voted that way, the Legislature by this language would be unable to protect that cooperative from that sort of action.

Debates, p. 699. Delegate Sinner later provided an interesting hypothetical that shows the delegates envisioned the city's franchise authority would control over any conflicting authority of the TIA:

DELEGATE SINNER: . . . If an area west of Bismarck - a traditionally rural area - is served by a rural electric cooperative, and the city expands into that area, the city may then say to the REA, "I'm sorry. You can't serve anymore. You have to take your - pull out your poles, get your services out, because we can't franchise you because we're larger than 2,500 citizens and the law prohibits us to franchise you," and the Legislature can't protect them because, under this language, we would give the city council veto power over the Legislature.

Debates p. 1109.² Other delegates noted, however, that RECs are not regulated by the PSC and therefore the cities should have the right to control if and where the cooperatives operate in their cities. Debates p. 1113. Ultimately, arguments in favor of

² It is worth noting that the City Commission order of November 14, 2005 did not require Capital Electric to remove its existing facilities or discontinue service to its existing customers.

local rather than legislative control as summarized by Delegate Nething prevailed in the adoption of the amendment:

DELEGATE NETHING: . . . It seems to me that the only thing we should be concerned about here is whether or not we believe that the cities should control the franchising ability that we currently have. Now, as a legislator, it seems rather ridiculous for me to sit and determine what's good for the City of Bismarck or the City of Fargo or Minot or Ellendale – any one of them. Those people in that city are the ones that know what's the best for them, and that's why we've reserved this right of franchising to the cities, and I think that, since its their business, they're the ones that should have the say – not a legislator, like myself, from Jamestown, because I don't know anything about the problems of that city; those people know them. I think we should adopt the amendment.

Debates p. 1110. The legislative history to N.D. Const. art VII, § 10 could not be clearer that MDU is likely to prevail in its argument that the City of Bismarck's franchising authority prevails over conflicting language of the TIA to determine electric service areas within the City of Bismarck.

Since adoption of N.D. Const. art. VII, § 10, even the North Dakota Association of Rural Electric Cooperatives has recognized a city's right to franchise controls the determination of electric service areas and electric service providers within the corporate limits of the city. 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. (Attachment 2) 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.

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]

CEC argued before the PSC that it had no authority, based upon Johnson v. Elkin, 263 N.W.2d 123, 126 (N.D. 1978), to decide the constitutionality of the TIA. MDU, however, did not ask the PSC nor does it ask this court to declare N.D.C.C. § 49-03-01.3 unconstitutional. This was a strawman argument advanced by CEC to support its position that the Commission should ignore N.D. Const. art. VII, § 11 in its analysis of interference and duplication. Although MDU disagrees with the Commission's determination that it does not have authority to consider the Constitution in its interpretation of the TIA, there is no question the Court has the authority to harmonize interpretations of statutes 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 Trill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

To determine the public policy of the state, the Court must first look to the state constitution. See Continental Casualty Company v. Kinsey, 499 N.W.2d 594, 580 (N.D. 1993). Because N.D. Const. art. VII, § 11 prohibits legislation that interferes with a municipality's power to franchise, the court must construe N.D.C.C. § 49-03-01.3 consistent with that constitutional limitation and public policy. Accordingly, N.D.C.C. § 49-03-01.3 should be interpreted such that CEC's claim of interference and unreasonable duplication of services are determined based on the service areas

established by the city under its franchise authority. This is the only interpretation consistent with N.D. Const. art. VII, § 11; N.D. Const. art. XII; § 10, N.D.C.C. § 49-03-06(8); and Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra.

Indeed, CEC's witness agreed with this interpretation:

Q. (MR. KUNTZ CONTINUING) 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 MDU's; 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 in your service area, no, I would say.

(Tr. 123-124)

Finally, CEC notes the Supreme Court has stated that one of the primary purposes of the TIA is to keep to a minimum wasteful duplication of capital intensive utility services and conflicts between suppliers of electricity. Cass County Electric Coop. v. NSP, 419 N.W.2d 181, 184-185 (N.D. 1988) CEC neglects to mention, however, that the Supreme Court has also stated the TIA's implementing statutes do not guarantee the accomplishment of that purpose. NSP v. North Dakota Public Service Commission, 452 N.W.2d 340, 344 (N.D. 1990) Perhaps the most notorious example of wasteful duplication of investment that was nonetheless permitted under the TIA was CEC's 1,405 foot electric line extension to serve a headbolt heater in a storage shed located within 335 feet of MDU's existing lines. Capital Electric Cooperative, Inc. v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995). Contrast CEC's extension

of service in that case with its claim that a comparable extension of service by MDU to serve 170 residential and commercial lots was unreasonable.

Although MDU has raised a number of other issues in its Specifications of Error, based upon the Commission's failure to interpret N.D.C.C. § 49-03-01.3 consistent with North Dakota's constitutional and statutory provisions limiting the operation of the TIA within a city, it cannot be seriously doubted that MDU is likely to prevail on the merits of its appeal.

Montana-Dakota will be irreparably harmed by a denial of its request for a stay.

CEC argues MDU will not be irreparably harmed by a denial of a stay because the PSC directed MDU to sell its facilities to CEC and MDU can reinvest the proceeds of the sale in other business undertakings. The Commission's order, however, did not require CEC to purchase all of MDU's facilities. More importantly, simple return of MDU's investment will not prevent MDU from being irreparably harmed. The revenue received from the provision of electric service in Boulder Ridge provides not only a return on its investment in lines to serve Boulder Ridge but also provides recovery of other common costs incurred in the operation of its utility system. This is why the outcome of this case is important to not only MDU's investors but also to its existing customers. The ability to participate and providing electric service to new growth areas within its franchise service areas enables MDU to spread its common plant investment and operational costs over a larger customer base thereby lowering the overall cost of providing service to all customers and controlling future price increases. MDU has no ability to recover these lost revenues from either CEC or the PSC if a stay is denied.

In addition to lost revenue, MDU will be irreparably harmed if it is prevented from exercising the franchise rights granted to it by the City of Bismarck. Even when the authority to exercise those franchise rights is restored after completion of this appeal, the Court is unable to award damages to MDU to compensate for any interim loss of or infringement on those rights. Although CEC argues that it will be equally harmed by a loss of revenue if it is unable to provide service in Boulder Ridge, CEC has not made a comparable investment to provide service in Boulder Ridge and more importantly, does not have a franchise to provide service in Boulder Ridge. CEC cannot be irreparably harmed by being unable to provide a service that it is precluded from providing by Bismarck City Ordinance and order of the Bismarck City Commission. While CEC notes that it has appealed the order of the Bismarck City Commission that determined CEC's franchise does not include service within Boulder Ridge, CEC has taken no action to allow it to provide service without a franchise pending the outcome of its appeal.

Granting of a stay is consistent with the public interest.

In support of its motion for a stay, MDU asserted a stay was consistent with the public interest because a stay assured continuation of electric service to customers within Boulder Ridge pending this appeal. CEC replies the PSC order provides CEC with the ability to commence electric service when MDU complies with the PSCs cease and desist order. Any interpretation of the PSC order that CEC contends allows it to provide service in Boulder Ridge without a franchise is incorrect and clearly contrary to N.D. Const. art. XII, § 10. The PSC cannot authorize CEC to provide service in Boulder Ridge without a franchise from the city and Commissioner Clark acknowledged as much in his concurring opinion. COR #168.

CEC is also incorrect that MDU's claim that CEC has no right to serve Boulder Ridge without a franchise was not a claim before the PSC and therefore, is not before this court on appeal. MDU argued before the PSC that CEC's inability to serve Boulder Ridge because of a lack of franchise was the threshold issue in the PSC's determination of whether MDU's extension of service to the area was an unreasonable duplication and interference of service. This is one of the issues on appeal before this court. The City Commission's order of November 14, 2005 is part of the record in this proceeding and the Commission recognized that CEC's challenge to the City's order was dismissed by the South Central District Court, the Honorable Bruce Haskell, in Case No. 05-C-2303. COR #s 95 & 168.

The public interest is served not only by the customers of Boulder Ridge continuing to receive electric service but also by such electric service be legally provided by a franchised provider in accordance with Bismarck City Ordinance 10-11-01.

Conclusion

MDU has met the requirements for issuance of a stay of the Public Service Commission's order pending appeal.

Dated this 18th day of July, 2006.

Respectfully submitted,

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Debates
of the
North Dakota Constitutional Convention
of 1972



PUBLISHED BY AUTHORITY
of the
NORTH DAKOTA
CONSTITUTIONAL CONVENTION
of 1972

TWO VOLUMES
VOL. I & VOL. II

FRANK WENSTROM, *President*
WILLISTON

WILLIAM PEARCE, *1st Vice President*
BISMARCK

STANLEY SAUGSTAD, *2nd Vice President*
MINOT

LOIS VOGEL, *Secretary*
FARGO

do not want to cut off anybody in offering amendments to the proposal. And for that reason we certainly would not oppose his motion.

PRESIDENT WENSTROM: The question before the Convention is that Committee Proposal No. 1-12 be placed at the foot of the calendar.

As many as are in favor of the motion will say "aye;" opposed "no." The "ayes" have it. It will be — 1-12 will go to the foot of the calendar.

Next for consideration of the Convention is Committee Proposal No. 1-101.

Is there any discussion? Just a moment, the Clerk will read it.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-101, introduced by Committee on Education, Resources and Public Lands:

"Be it resolved by the North Dakota Constitutional Convention that section 139 of the constitution of the state of North Dakota be repealed; and that Article XVII to the constitution of the state of North Dakota be created, both of which pertain to public utilities.

"SECTION 1. REPEAL.) Section 139 of the constitution of the state of North Dakota is hereby repealed.

"SECTION 2.) Article XVII to the constitution of the state of North Dakota is hereby created to read as follows:

**"ARTICLE XVII
"PUBLIC UTILITIES**

"Section 1. No law shall be passed by the legislative assembly granting the right to construct or operate any public utility or similar service within a city without requiring the consent of the governing body of that city."

PRESIDENT WENSTROM: Is there any discussion?

DELEGATE DEVINE: Mr. President.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President, Fellow Delegates:

Committee Proposal 1-101 is the committee's version of an updated Section 139. And it is the same as Section 2 of Committee Proposal No. 1-20 prior to amendment. Committee Proposal No. 1-20 was the one dealing with corporations. And we amended it to remove any sections on which there were questions. And we have done so.

Basically Section 139 provides now that: "No law shall be passed by the legislative assembly pertaining to right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes." And a street railroad isn't too big of an issue any more. The committee decided to bring this section up to date and recognize modern technology. We have made several changes which I do not feel have changed the basic intent of the section. We have changed the enumerated public utilities to the general term "public utilities or similar service". It was our intent that this term would not only include telephone and telegraph but would include such things as natural gas systems, water systems, cable TV and other things that may not even be dealt with at this time.

We included the term "or similar service" so that the Legislature could not evade this section by calling the horse a different name.

We have also changed the term "local authority" having control of the street or highway which will be occupied for such purposes to the "governing body of that city". The intent of this change would be to clear up any problems pertaining to a section. What would be the significance when you have a street that runs through the city that is always a state highway or part of it, a county highway or farm-to-market road for part of it and the city street? To avoid this problem we have just amended the reference to local authority.

We also amended the reference to occupying streets and highways and just made reference to "within any city". At this time to occupy — to operate a public utility within a city you would ordinarily have to put poles on the streets. In the years ahead we don't know if this will necessarily be true; as witness a demonstration of a telephone in use on a TV show. Basically the committee looked at this

section as one that reserves the power to local cities, one that will give them the veto power over the operation of utilities within a city. We feel that this is an important right that should be reserved to them.

PRESIDENT WENSTROM: Any further discussion?

Delegate Peterson.

DELEGATE PETERSON: I have an amendment which I believe is at the desk.

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101.

On page 1, delete lines 12 through 15, inclusive, and insert in lieu thereof the following:

"Section 1. No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes."

PRESIDENT WENSTROM: Do we have a second to the proposed amendment?

DELEGATE MEIDINGER: Second.

PRESIDENT WENSTROM: Seconded by Delegate Meidinger.

Any discussion?

DELEGATE PETERSON: I want to — Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: As you can see, the amendment is the original Section 139. And in order to bring this to the attention of the delegates, where they stand, of the Rural Electric Cooperatives to the attention of the delegates, I brought it in as an amendment. And I would like to read their position. They firmly believe that Proposal 1-101 does not belong to any state constitution and certainly not in the new constitution for North Dakota.

"We believe, and has so testified before the Committee on Land, Resources and Education, that the proposed language constitutes unnecessary and restrictive legislation. And delegates to this most important convention, legislation simply has no place in our new constitution. No significant reason has been offered to us why this language should be included. Conversely, if included, it would seem only to clutter and confuse our governing document and place a further burden upon our citizenry by virtue of a potential flood of litigation. Statute law now exists covering the concerns which were expressed by members of the committee. We all share in a common concern for the people's rights. It's our sincere belief that the proposal is not in the best interests of the people."

And then one more point, I want to call your attention to the LRC study of 1965 regarding 139. And they say:

"This is a needless restriction on the legislature because the legislature could not grant any right to utilities to build and operate in a city."

PRESIDENT WENSTROM: Any further discussion?

DELEGATE LANDER: Mr. President.

PRESIDENT WENSTROM: Delegate Lander.

DELEGATE LANDER: Yes. I would rise to speak in opposition to the amendment, which then too, as you know, has been explained to replace the existing section with the one proposed here. I am a bit confused because we debated the whole issue for hours on end all through the summer and fall and again since we've been here as to whether there ought to be any in there at all. And one of the main reasons that we have anything in here was because Delegate Peterson's concern was shared by some of the rest of us that we really ought to maintain the veto power of the city.

We tried in reworking this to have a statement which would at least be relevant and relate to what is true today. It would seem to me that the most important choice here is between adopting 101 as proposed or simply repealing 139. If you do not desire to have any statement at all, please do not go back to the archaic old wording.

PRESIDENT WENSTROM: Any further discussion?

Delegate Kelsch.

DELEGATE KELSCH: I wonder if Delegate Peterson, who is suggesting the return of the old language, could point out where they differ?

DELEGATE PETERSON: Well, actually, as far as the REC's are concerned, they prefer deletion. And probably there is—in my estimation the only difference as far as I was concerned at the time that we worked on this was that I wanted the words "local authority" retained. And other than that I—I myself am not taking a specific position. I'm speaking mostly for the REC position.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: One more question. Do I understand that the Rural Electric Co-ops are opposed to cities having the power to decide whether or not—when and how their streets may be used?

DELEGATE PETERSON: Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: I read the statement that they gave. And I can give a copy to you if you want what I read.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: To answer Delegate Kelsch's question, I believe her statement was prepared before or without the realization that Section 139 was even in the constitution. Because when they came in with a prepared statement and we pointed out that Section 139 was there, they couldn't understand why we were addressing ourselves to this subject. They were seemingly unaware of Section 139.

To answer your specific question, I asked them that. They said, "No." They said the cities should have the franchise power.

DELEGATE SANSTEAD: Mr. President.

PRESIDENT WENSTROM: Delegate Sanstead.

DELEGATE SANSTEAD: Well, Mr. President, as a member of the committee also, I was a little dubious about this. And I would say that the REC's came back after the initial submission of this twice on occasion and said they were still opposed to the inclusion of this specific article, particularly from a point of view that the consent of the governing body in that city could well extend far beyond the streets and highways operation as the language was now worded. And I would just agree and say that the entire franchise thing—I disagree with Delegate Devine in the sense that I believe that we have extended over into the entire franchising possibilities in cities. And I realize that was the intent of the committee. But at the same time I think it might be leading to a great deal of struggle, and a great deal of difficulty outside of the realm of courts and maybe within the courts, particularly in regard to the fact that the governing body of that city shall make these decisions. And when you get into this kind of a struggle, which might be a struggle between a private utility and a cooperative, you know, of course, what could happen to that governing body. I can imagine all the luncheons, dinners, meals, trips and everything that could well be involved in the decision of a city governing body making this kind of a decision. And I think really legislating has been indicated in the Constitution by changing just the provisions proposed and cites to the franchise provision. And I, while not wanting to return certainly, Delegate Lander, to the archaic language which the committee dealt with, I am going to vote "no". Because I don't think we ought to interject ourselves into this kind of situation.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Peterson.

DELEGATE CART: Mr. President.

PRESIDENT WENSTROM: Delegate Cart.

DELEGATE CART: This is kind of a unique question before the assembly. All that I can see that this new proposal by the committee does is to broaden the area from the few that were enumerated in the original Constitution. It takes in all public utilities.

I would like to comment further, though, in regard to what Delegate Peterson has said, that the REA or the Rural Electric Association or REC's are not public

utilities. They have a right under the statute as passed in 1937 to serve those who desire their services in the rural areas. And they have also the right by the management of the REC's to refuse service whenever they so desire. That has all been tested out in court in the *Williams County v. The Board of Railroad Commissioners, Public Service Commission*, way back in 1954-55, where the District Court pointed these things out. And it was affirmed on appeal to the Supreme Court. So you have a unique situation here where they are wanting to stop the cities from having control over their own streets and alleys, and the franchising of a public utility within the city. For what purpose, I'm just at a loss to understand.

PRESIDENT WENSTROM: Any further discussion?

Delegate Aubol.

DELEGATE AUBOL: Mr. President, I think that the proposal before us would include REC's. It says "public utility or similar service". Now I didn't appear before this committee and I haven't heard their arguments. But I think that one of the objections that the REC's have to this provision is that they think it is statutory to a certain degree. And also because in a recent court decision that has affected their operation in North Dakota. If I recall correctly this — what they are afraid of is that they can work in a rural area or around a town, outskirts, put up their lines and serve the area and this provision leaves it wide open for the city to go out and include them within the city limits by extending the city limits and then telling the REC that they cannot operate in that area that they have developed. And I think there was an occasion just recently that stemmed a concern of this section. But somebody on the committee knows more about this than I.

PRESIDENT WENSTROM: Delegate Fritzell.

DELEGATE FRITZELL: Mr. President: I don't know if I can clarify some of this a little. I was on the committee. And I certainly — I don't feel to strongly about including this one way or the other. But we were trying to rework 139. And I certainly hope you don't — I am against the amendment of going back to the archaic language. But we did have some legal advice on this, and they told us that there was nothing that would prevent the city from giving two franchises under this particular proposal. But the REC's definitely did come in and were definitely against the proposal. And as I see it now they would prefer to work under 139 which they didn't know was in the Constitution until — until during our committee meetings and then they would work under our present proposal 101. But, as I said, I have no strong feelings about leaving either one of them in the Constitution.

PRESIDENT WENSTROM: Any further discussion?

The question before the Convention is —

DELEGATE DEVINE: Mr. President.

PRESIDENT WENSTROM: — on the adoption of the amendment as offered by Delegate Peterson.

Delegate Devine.

DELEGATE DEVINE: Just a short statement. The League of Municipalities did appear. They are in favor of this. I feel that there is a basic right here. This is why I would like to see it personally included in the Constitution. Should we reserve this power to the cities? I believe that we should reserve as many powers to local government as is possible.

PRESIDENT WENSTROM: Any further discussion?

The question is on the adoption of the amendment as offered by Delegate Peterson.

Those that will favor it will vote "aye," and those that will oppose it will vote "no." As many as are in favor of the motion to adopt the amendment will say "aye;" those opposed vote "no." The "noes" have it, and the amendment lost.

Now we are back on Committee Proposal No. 1-101.

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: I decided I'd be in order because I really want to address the thing before us rather than talk previously. I think we should understand the history of why this kind of a section is in a constitution written in 1889.

It was a custom back at that time in the latter part of the eighteen hundreds for legislatures to be wined and dined and sold on the idea of legalizing franchises for different public utilities within specific cities. And so we had a lot of special and local legislation.

Now we have before us the Report of the Constitutional Revision Commission that met in the sixties. And it recommended that 139 be repealed. And because, as Delegate Peterson said, this is a restriction on the Legislature. And it pointed out that in the legislative article there is language prohibiting special and local legislation. And this language is in Proposal 1-85, which if we have not passed already we will be passing in the near future. And so we will carry forward the prohibition against local and special laws.

Now since the REC's have decided that this is a matter of concern, and since the questions of territorial status of the private utilities and the REC's is in flux, I think that in view of the recommendation that this section be deleted by previous study, and in view of the fact that the REC's will feel that this is a legislative matter, and they feel it is a matter of concern to them now, I think the subject really should be left to the Legislature and let them fight out the battles between the private utilities and the REC's rather than us try to be the Legislature here. So I would urge the Convention to vote "no" and defeat this proposal.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: If I could understand the reason for the concern I would go along with Delegate Omdahl. What bothered me about his argument is that he's urged on the one hand that the Legislature does not have the power to pass local or special laws relating to the city affairs, and yet you're urging that the matter should be left to the Legislature. Now either this is a question, it seems to me, of home rule of the cities or it isn't. Now I might want to agree with Delegate Omdahl it doesn't need to be in the Constitution if we have a home rule provision in our Constitution that does leave the matter of home rule to the cities. But I think the issue at stake here, as I think we've all probably decided, if we adopt the later section which we will come to, the Legislature shall not grant franchises to municipalities, the Legislature cannot pass local laws, then we are saying this is not a matter that should be left to the city. So if I could see a real reason — now it seems to me that either this — there is territorial rights or dual franchises or single franchises be granted, this is a problem that anybody that wants — has that problem is going to have to face in dealing with the city. And I don't think it should be a legislative question. I agree it shouldn't be a legislative question. But if I could see any real reason why I think it should be in the Constitution — I don't think it should be in there — if I could see any reason they fear its presence in the Constitution. I'm really at a loss to understand what their reasoning is.

DELEGATE SANSTEAD: Mr. President.

PRESIDENT WENSTROM: Delegate Sanstead.

DELEGATE SANSTEAD: I think the real answer to the question raised by Delegate Kelsch is the fact that the recent Crosby case, which was a serious case as far as the REC's were concerned and which will be appealed very shortly as their spokesman told us, that very case left the decision more to the cities. And as a result of that the REC's would rather take their chances in the courts rather than have something like this specified within the framework of the Constitution. And I think that's very understandable from their point of view.

The whole question, as my colleague here has said, putting 76 is dynamite into the Constitution at this point. It reminds me a little bit of a recent play I saw in Chicago called "Hair". There's something in it to insult everybody. And I think we are getting pretty close to that in some of these kinds of decisions when, in effect, we could just as well leave it alone and do as other people recommended, leave this section out of the Constitution. Because it is not a serious question at the present time except the courts work a decision between the REC's who have worked into some city areas and who do have poles sticking into places like Bonanza here in Bismarck and other places. I think those places are essentially that kind of decision. And we ought not to specify it by including this new wording in the Constitution.

PRESIDENT WENSTROM: Any further discussion?

Delegate Diehl.

DELEGATE DIEHL: Mr. President, members of this assembly:

I have conferred with the REC's on this matter. But I am a little bit confused or a little bit concerned about the language here changing "to construct or operate". Originally it was "construct and operate". I'm concerned about those Rural Electrics who are already in the cities. And this, as I understand it, would not allow them to continue to operate. So it puts them in kind of a precarious position. Maybe we wouldn't have any trouble, but in my particular co-op around Grand Forks we're in the city in areas. And we would run into some problems. Presently we're trying to get a franchise to continue to operate, which of course we will do, I believe. And this is not unusual to have more than one utility of one kind or another operating within one city. Twin Cities, I think, has at least six franchises to different utilities — the same kind of electric utilities. And that is my only concern about this. I really think it is a legislative matter myself and probably shouldn't be in the Constitution.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President: I would like to attempt to ask — answer a couple questions that have been raised on the floor.

First of all, I do not view this section as an REC versus public power proposition. I happen to be a member of a law firm that represents an REC, and I certainly don't view it as that type of situation.

The second proposition is a reference that's been made a couple times to a Williston case. The case I think that they are referring to is a proposition where the REC's were serving some people that were later annexed into the city. The court initially at this point and time has said that the city then has the right to control the service after the annexation. This particular case was not decided on Section 139. The case, as I understand it, did not refer to 139 as it now exists. It was decided on statutory law.

So I would like to see that particular case or particular problem held outside of the discussion of this section. Plain and simple question before the body is should the city have the right to control utility or similar type services within their boundaries.

PRESIDENT WENSTROM: Delegate McIntyre.

DELEGATE MCINTYRE: Mr. President. It seems to me that most of the discussion has dealt in line with the REC position and that it should either be repealed or new language, as stated in 101, be adopted. Now we voted down the amendment to go back to the old section. But I don't understand why, if this is the question, why an amendment hasn't been made to repeal this section. Overtures from both the committee and from the floor here this morning have told us this. Now if we vote "no" on 101, we — and that prevails — we go back to the old language. So I have no alternative but to vote "yes".

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President: I have to confess that I'm confused, I think with a lot of other people, but as I read this section what it really says is that the Legislature does not have power over the political subdivisions, particularly cities. In 1965, when we had the bitter, bitter territory fight in the Legislature, part of the language of that legislation granted electric cooperatives the right to continue to serve customers that they were serving in territory that was annexed to a city. For example: If a farmsite alongside of Grand Forks was served by an electric cooperative and industrial development developed along that area, all of which was served by a cooperative, this territory would be subsequently annexed to Grand Forks and the City of Grand Forks, the commission, voted to not allow that electric cooperative to continue to serve those customers and would force them to abandon all of their facilities because the City Commission voted that way, the Legislature by this language would be unable to protect that cooperative from that sort of action.

And, Mr. President, the political subdivisions are creatures of the state and they are to be governed by the policy board of the state. And are we to disinvolve the state with this kind of language and not let them govern the political subdivisions? I think, Mr. President, I think we should move, and I do move, that this be moved to the bottom of the calendar.

PRESIDENT WENSTROM: Delegate Sinner moves that Committee Proposal No. 1-101 be placed at the foot of the calendar.

Do we have a second?

DELEGATE KWAKO: Second.

PRESIDENT WENSTROM: Second by Delegate Kwako.

The question is on Delegate Sinner's motion that Committee Proposal No. 1-101 be placed at the foot of the calendar.

As many as are in favor of the motion say "aye;" those opposed "no." The "noes" have it and the motion lost.

Delegate Aubol.

DELEGATE AUBOL: Mr. President: May I inquire of possibly one of the committee members if they considered any amendment that might — it appears that the REC's have expressed their situation, and I'm sure it would also be expressed by a private utility if it were placed in the same situation that the REC's have found themselves in up in Crosby.

PRESIDENT WENSTROM: Will one of the committee members answer Delegate Aubol's question?

DELEGATE DEVINE: Delegate Aubol, one question raised was this particular problem. And I am referring to my notes at the time they appeared. And my question to them is what to do when the city annexes territory concerning an REC, because I was concerned that this may be an unfair type situation. Their answer was that they are protected. I don't know what the nature of the protection is. This was their plain and simple — their people, their attorney was there, and they told me they are protected. Because I was thinking of putting in a specific provision to protect REC's and this type of thing. So that they don't lose something that they have, their investment if nothing else, in serving an area that later was annexed. And they came back plain and simple with their explanation that they were protected.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: We may have a tempest in a teapot, I don't know. But I do think that in response to Delegate Sinner's question, the Legislature will always retain the power, and it does exercise the power, to specify how territory will be annexed to cities. It is a rather controversial problem in the Legislature, but they do have that power. I don't know if the present annexation laws govern that to protect a utility that's now serving an area. I think they should be. I don't think that their property should be forfeited. But I think that the basic issue is are we prepared to say that cities — that this is a question for cities to decide who will use their streets or not or should the Legislature get in the act? And I don't imagine the Legislature really cares to get in this act. But I do think that they have the power. I think all the Supreme Court said in that case, if I'm not mistaken, is the cities have the power to decide who should use the streets. It didn't say it couldn't grant 55 franchises if they want to. It is up to the city. You have got a problem of new territory if someone's already there. No reason why the city couldn't say you could stay in the new territory.

PRESIDENT WENSTROM: Delegate Meidinger.

DELEGATE MEIDINGER: Mr. President: In partial answer to Delegate Aubol, these people did appear before us and objected to the language that we had. We then put off further consideration for four or five or six days and they again appeared before us. They offered no satisfactory amendments to the committee. And that was the result of it.

PRESIDENT WENSTROM: Delegate Sinner, did you wish the floor?

DELEGATE SINNER: Mr. President: After Delegate Kelsch's statement, I think that we prohibit the granting of franchises to electric cooperative in cities over 2500. And by that sort of combination of circumstances and combination of laws, the city could not grant that franchise. And this is all new to me, this whole discussion. But I was deeply involved in that other issue in '65 and I know that it's a very complex question. And I'd hate to see us by sheer oversight here do something that we didn't intend to do at all.

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: I have to agree with Delegate Kelsch. I think we do have a tempest in a teapot. And I don't think it was the intent of the committee to change the meaning of 139. I arrived at the conclusion that 139 was extraneous language without regard to the REC's. And I still think Section 139 is extraneous language. And I have an amendment at the desk which would leave the language in 1 and 2 that Section 139 of the Constitution of the State of North Dakota be repealed. And which would strike the rest of that title and leave Sections 6 and 7, which would merely repeal Section 139. I would like to move that amendment at this time.

PRESIDENT WENSTROM: It has been moved — Delegate Omdahl moves an amendment to Committee Proposal 1-101.

Would you read it from the desk?

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101. In line 2, following the word "repealed" delete the balance of the line.

Delete lines 3 and 4.

Delete lines 8 through 15, inclusive.

And renumber the lines accordingly.

PRESIDENT WENSTROM: Now do we have a second?

DELEGATE PETERSON: Second.

PRESIDENT WENSTROM: Seconded by Delegate Peterson.

Now any discussion? Any discussion?

Hearing none, the question is on the adoption of the amendment as offered by Delegate Omdahl. As many as are in favor of the motion will say "aye;" those opposed "no." The Chair is in doubt. Those that are in favor will vote "yes," those opposed will vote "no." The key will be opened, you will record your preference.

Has every delegate indicated his choice? Any wish to change? Hearing none, the vote is closed.

Roll call discloses 50 "ayes," 43 "nays," five delegates absent and not voting. The amendment is adopted.

Now we are back on Committee Proposal No. 1-101 as amended.

DELEGATE LONGMIRE: Question.

CHIEF CLERK GILBREATH: Suspend the rules and deem it properly engrossed.

PRESIDENT WENSTROM: Can't do it.

DELEGATE HAUGEN: Mr. President.

PRESIDENT WENSTROM: If there is no further discussion — Delegate Haugen.

DELEGATE HAUGEN: I believe a motion to suspend the rule and consider it properly engrossed is in order, and I do so move.

PRESIDENT WENSTROM: Delegate Haugen moves that the rules be suspended; that Committee Proposal No. 1-101 be deemed properly re-engrossed; that it be placed on the calendar for first passage as amended. Do we have a second?

DELEGATE LONGMIRE: Second.

PRESIDENT WENSTROM: Seconded by Delegate Longmire.

Delégate Baker.

DELEGATE BAKER: I resist the motion to suspend the rules on the grounds that now we have a whole new ballgame. And I think we better check it out a little more.

PRESIDENT WENSTROM: Any further discussion?

The question is on the suspension of the rules; that the proposal be deemed properly re-engrossed; that it be placed on the calendar for first passage as amended.

As many as are in favor of the motion will say "aye;" those opposed "no." The "noes" have it and Committee Proposal No. 1-101 will be on the tenth order of business tomorrow.

Debates
of the
North Dakota Constitutional Convention
of 1972



PUBLISHED BY AUTHORITY
of the
NORTH DAKOTA
CONSTITUTIONAL CONVENTION
of 1972
TWO VOLUMES
VOL. I & VOL. II

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WILLIAM PEARCE, *1st Vice President*
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FARGO

PRESIDENT WENSTROM: Delegate Cart, did you have a question?

DELEGATE CART: No. It would be the same answer they got.

PRESIDENT WENSTROM: I believe Delegate Birkeland wanted the floor.

DELEGATE BIRKELAND: It's been answered.

PRESIDENT WENSTROM: It's been answered.

The question before the Convention is on the first passage of Committee Proposal 1-96. No further discussion?

Those in favor of passage will vote "aye," those opposed will vote "nay."

The Clerk will open the key. You will record your vote.

Has every delegate voted? Any delegate wish to change his vote? The vote is closed.

The roll call discloses 69 "aye" votes, 27 "nays," two delegates absent and not voting. Committee Proposal No. 1-96 is passed.

Next for consideration, Committee Proposal No. 1-101.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-101, introduced by Committee on Education, Resources and Public Lands:

"Be it resolved by the North Dakota Constitutional Convention that section 139 of the constitution of the state of North Dakota be repealed.

"SECTION 1. REPEAL.) Section 139 of the constitution of the state of North Dakota is hereby repealed."

PRESIDENT WENSTROM: Any discussion?

DELEGATE LITTEN: Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: Mr. President. Fellow delegates, I have an amendment. I'll appreciate having it read at the desk. It's been distributed to everybody's desk, incidentally, fellow delegates.

PRESIDENT WENSTROM: Will you read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to Proposal 1-101:

On page 1, line 2 of the title, delete the period and insert in lieu thereof the following: "; and that article XVII to the constitution of the state of North Dakota be created, both of which pertain to public utilities."

On page 1, line 6, add the following new section:

"SECTION 2.) Article XVII to the constitution of the state of North Dakota is hereby created to read as follows:

"ARTICLE XVII

"PUBLIC UTILITIES

"Section 1. No law shall be passed by the legislative assembly granting the right to construct or operate any public utility or similar service within any city without requiring the consent of the governing body of that city."

PRESIDENT WENSTROM: Do we have a second to the proposed amendment?

DELEGATE DECKER: Second.

PRESIDENT WENSTROM: Delegate Decker seconded.

Delegate Litten.

DELEGATE LITTEN: Fellow delegates, you recognize immediately, of course, this proposed amendment restores the Committee Proposal which we discussed on, I believe it was, either Wednesday or Thursday of last week, and we turned it right back to where the Committee on Resources, Education and Public Lands was when we made our original presentation. I can't put this discussion in any better terms than Delegate Miller did here a few moments ago when he said that — when he was talking about consideration on the previous proposal having to do with the fact that it boiled down to personal philosophy, and that's exactly what 1-101 does; it boils down to personal philosophy.

We can visit about the problems with reference to the fringe area. We can talk about race. We can talk about the problems of the REC's. But you can't escape the fact that what we're really talking about is the very simple problem or proposition having to do with the home rule and the rights of our cities in North Dakota.

Now, very simply, this amendment is going to accomplish three very salient points that our Committee has discussed at great length. In the first place, it is going to preserve the concept of Section 139 of our present Constitution. Secondly, this amendment is going to prohibit the Legislature from usurping the authority that justifiably belongs to our cities. We're hearing a lot about home rule these days and we are rather enthusiastic about it; but when we start talking about public utilities or similar services, for some strange reason we think that this concept belongs in another ballpark.

And then thirdly, fellow delegates, and probably the most important point of all, is that this amendment and this Proposal from our Committee reserves the exclusive rights to the cities to franchise, and we submit to you, Mr. President and fellow delegates, that without a doubt and no question at all, the cities of North Dakota deserve the right to guide their own destinies within the boundaries of their respective cities. This is the amendment.

PRESIDENT WENSTROM: Any further discussion?

DELEGATE SINNER: Mr. President.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: If you look in Section 6 of Committee Proposal C-12, which we passed just a short time ago, which establishes the home rule concept that Delegate Litten has just spoken of — pardon me — Committee Proposal 1-12 — you will find the language "The legislative assembly shall provide . . ."

Are we now to give the cities veto power over the Legislature? Because that's what Committee Proposal 1-101 would say, if we were to put this language back in. We have already established the concept that the Legislature shall provide for the concept of home rule. Are we now saying that the cities shall have veto power over the Legislature in its effort to protect the rights of citizens and citizen groups in the exercise of that home rule concept? This is simply what this section means and can mean, and without trying to hide any of it, this is what it's all about. If an area west of Bismarck — a traditionally rural area — is served by a rural electric cooperative, and the city expands into that area, the city may then say to the REA, "I'm sorry. You can't serve any more. You have to take your — pull your poles, get your services out, because we can't franchise you because we're larger than 2500 citizens and the law prohibits us to franchise you," and the Legislature can't protect them because, under this language, we would give the city council veto power over the Legislature. If in my town, which has been served by Otter Tail Power, the City decided to franchise an REA, the Legislature would have no way, under this language, to protect the property of the Otter Tail Power Company in my town.

Now, Mr. President, what's basically wrong here is that it denies to the Legislature the right to protect the property of the citizens. It gives to city government veto power over the duties of the Legislature to protect those rights.

Secondly, the language of the amendment is not the same as the language of old 139. The language of 139 was bad enough; but a neat little replacement has been made. The word "and" in line 2 has been substituted by the word "or" — pardon me — the word "or". Under the old language, the Legislature could at least allow an existing utility in a newly-franchised area, which did not include that earlier utility, the Legislature could at least allow them to operate. Under this language, the Legislature could not even do that. Mr. President, the amendment that we adopted the other day when we repealed both of these sections and presented that language as it is now before us, without this amendment, is the right approach because it preserves for the Legislature the right to protect the property and the property rights of all its citizens.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President and Fellow Delegates:

I'd like to make three points, and that is the amendment as is proposed is not granting a new right to the cities. Section 139 contains essentially the same provisions as to utilities, telephones, telegraphs and street railroads. Now, we have broadened it. We are not denying that. We're taking into consideration such things as cable TV. So we're not creating a new right. What we're trying to do is preserve the existing rights of cities to franchise.

Point No. 2.: There was some discussion that we have home rule — that this

takes care of it. No, it does not. Some of the cities will not exercise the home rule provision. This amendment as proposed will preserve those cities who do not exercise this provision the franchise right. I think this is important — that the cities who stay with the the form of government that we now have will still have their existing rights as they do under Section 139.

And, No. 3, I won't be as definite about this, but I checked on the word — the impact of the word "or" as against "and," as suggested by Delegate Diehl, and I was told by the Public Service Commission that in law it has no law or effect, and now that's relaying an opinion that was expressed to me and is not my opinion.

PRESIDENT WENSTROM: Further discussion? Delegate Nething.

DELEGATE NETHING: Mr. President and Fellow Delegates:

It seems to me that the only thing we should be concerned about here is whether or not we believe that the cities should control the franchising ability that they currently have. Now, as a legislator, it seems rather ridiculous for me to sit and determine what's good for the City of Bismarck or the City of Fargo or Minot or Ellendale — any one of them. Those people in that city are the ones that know what's the best for them, and that's why we've reserved this right of franchising to the cities, and I think that, since it's their business, they're the ones that should have the say — not a legislator, like myself, from Jamestown, because I don't know anything about the problems of that city; those people know them. I think we should adopt the amendment.

DELEGATE DOBSON: Mr. President.

PRESIDENT WENSTROM: Delegate Dobson.

DELEGATE DOBSON: Mr. President. Frankly, I don't see the need for the amendment. Under Section 21 of the Committee Proposal 1-75, which has passed, the Legislature is forbidden to pass local or special laws. It seems to me that this covers the situation, and that the amendment would simply be extraneous.

PRESIDENT WENSTROM: Further discussion?

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: It seems to me that this Convention is getting taken into an area which is purely legislative in character. The other night, when I was looking through my big yellow book here that has the recommendations from the 1965 Constitutional Study Commission, and I found that they had recommended that this section be deleted from the Constitution, and I took it at face value and thought "Why should we put it in the Constitution?" The next day it was up on the calendar and we got into all kinds of discussions on the floor that surprised me; and then, after the discussion, I noted a number of lobbyists lurking about the outer chambers for the private companies, and then in the afternoon came a number of lobbyists lurking again, except from the REC's. And so we've had lobbyists lurking about as though we're in the Legislature's business, and I'm sorry to suspect that we are getting into the Legislature's business. I have no objection to the Legislature considering this matter of the territorial integrity and the battle between the REA's and the private power companies, and I think battle between the REA's and the private power companies should be sent to the Legislative Assembly, and if we would kill this amendment and just repeal Section 139 and be silent on the matter, then the Legislature can continue to deal with the question of territorial integrity, as they have for the last few years.

PRESIDENT WENSTROM: Any further discussion?

DELEGATE SIMONSON: Mr. President.

PRESIDENT WENSTROM: Delegate Simonson.

DELEGATE SIMONSON: Would Delegate Litten yield to a question?

DELEGATE LITTEN: Yes, I will.

DELEGATE SIMONSON: Would this apply to counties, too?

DELEGATE LITTEN: I'm just looking here. Pardon me, Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: I don't have a line number, delegates, but the next-to-the-last line applies to cities — "within any city without requiring the consent of the governing body of that city." It has no bearing on the counties.

PRESIDENT WENSTROM: Delegate Rundle.

DELEGATE RUNDLE: Well, Mr. President and Ladies and Gentlemen:

I don't like foxiness and I feel that I was had in this argument before, because we didn't come out in the open when we voted on it. I didn't know quite what it was. Now I don't know that this requires an answer or not, but someone asked the question about the one word being changed from the old Constitution, and I would like to know if there's any reason for that word "and operate" to have been changed to "or". Delegate Litten, could you explain that?

DELEGATE LITTEN: Well — Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: Delegate Rundle, I think I should yield to Delegate Devine, because he's the one that talked to the attorney having to do with these two words.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President. Delegate Rundle, no; this came in in the drafting procedure. As far as I know, there was no special intent given to it, and I would object to amending it back. The reason we didn't amend it back was because I checked with this guy, and we didn't want to foul up the issue any more.

Does that answer your question?

DELEGATE RUNDLE: Yes, it answers my question. Now I would like you do that then, that you amend it back. We have been getting along after a fashion under the old Constitution, and I do not want to be confused any further. If there isn't any significance, I would like — will you move it?

DELEGATE DEVINE: I'll second it.

DELEGATE RUNDLE: I'll move that the "or" on line 13 be changed to "and."

PRESIDENT WENSTROM: Delegate Rundle, you are offering an amendment to the amendment; is that right?

DELEGATE RUNDLE: Yes.

CHIEF CLERK GILBREATH: Do you want — after the words "to construct," you want to strike the word "or" and insert the word "and"?

DELEGATE RUNDLE: Yes.

PRESIDENT WENSTROM: And Delegate Devine seconded the proposed amendment.

Any discussion? The question is on the adoption of the amendment to the amendment — that we strike the word "or" following the word "construct" in the amendment and as distributed, and insert the word "and."

So it would read "construct and operate".

As many as are in favor of adopting the proposed amendment will say "aye," those opposed "no."

The "ayes" have it and the amendment is adopted.

Now we're back on the amendment as offered by Delegate Litten.

Any further discussion?

DELEGATE AUBOL: Mr. President.

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: I have only one question, and it's similar to the technicality which was brought up by Delegate Rundle.

The old Section 139 requires the consent of the local authorities having the control of the streets or highways supposed to be occupied for such purposes. Under the proposed amendment, you set up local authorities having controls of the street or highway. It refers to the governing body of that city. So my question is: What's the difference between the old 139 and the proposed amendment?

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President, if I may answer the question.

By way of explanation, we first just put the city, and the reason we changed from local authorities was the problem of concurrent jurisdiction of a street going through a town — that maybe part of it may be a state highway, part of it might be a county farm-to-market road, part of it a city street. Who would the local authorities

having the jurisdiction be? And for this reason, we're dealing with cities. We just simplified it to "cities" to get away from this problem of checking with one, two, three or four different governing groups to get the permission. We felt the intent of the provision was to give the franchise power to the cities; so we addressed it to that specifically.

PRESIDENT WENSTROM: Delegate Chase.

DELEGATE CHASE: Just a brief comment.

I think we are being drawn into a utilities-REC Convention fight here in this Convention, which, I feel, has no place in this Convention. It seems to me the Legislature can and should and will pass a law protecting the cities' right to franchise. Now, I'm from a city and I fully agree that that should be in there. As Delegate Omdahl mentioned the '65 Commission recommended we delete this, and I think it should be deleted and we should not be drawing or dividing ourselves in favor or against public or private utilities. I don't think it has anything in there at all.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President. Delegate Simonson and I were talking about the question of why only cities? We've provided the machinery for home rule for counties. Is there a legitimate reason for your language leaving out counties, and would you object to an amendment to include it? I have one ready, but I don't want to move it through the machinery if there's some strong objection.

PRESIDENT WENSTROM: Delegate Devine, do you have an answer?

DELEGATE DEVINE: Were you asking a question that you wanted answered by the Committee? Speaking as to my opinion why the Committee amended this: You get into other political subdivisions, townships and counties. Basically, they're not franchising — staying out of this public power-REC thing that caused all the smoke last time, and, I think, caused the defeat of the Committee Proposal — and this is in answer to the question: We looked at the section and said, "What does it do?" And we felt it gave the cities the franchise right and effectively it gave it only to the cities. You get out into the country and you get into all these problems of concurrent jurisdiction — township, county, state and what not. It comes down to the nitty-gritty — should the city have the franchise right? And we addressed ourselves to that question.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President, I'm going to move the amendment at the desk. If I can get a second, I'll explain why.

DELEGATE SIMONSON: Second.

PRESIDENT WENSTROM: Would you read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to the amendment is as follows:

Under Article XVII, Public Utilities, Section 1., following the words "any city" insert "or county" and following the words "that city" insert the words "or county".

PRESIDENT WENSTROM: The proposed amendment was seconded by Delegate Simonson.

DELEGATE SINNER: Mr. President.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President, I wish, too, that the problems between the investor-owned utilities and the consumer-owned utilities would go away; but, however, much as I wish it, they won't. And for all of the controversy and turmoil that existed in the 1965 session dealing with territorial integrity, the real question was: Do the REC's have a right to a rural franchise? It was the franchise question in the country. And we've been willing to say for years that the cities have a right to grant franchises to investor-owned utilities, and the question in 1965 was will we grant a right for a franchise to a consumer-owned utility in the country?

Now, Mr. President, it seems strange to me that we are willing to grant to a city a veto power over the Legislature that we are unwilling to grant to the county. I think there's every bit of logic on the side of granting the same veto power to the counties. I hope you will support the amendment.

PRESIDENT WENSTROM: Delegate Cart.

DELEGATE CART: Well, Mr. President, I'd like to review a little bit of REA history in the State of North Dakota.

In 1937, when the Federal Attorney came up here to Bismarck to promote the adoption of the statute under which these electric companies operate, he sat down with the then Public Service Commission, which included S. S. McDonald, Ben Larkin and myself, and our attorney, and we went over this from beginning to end. He got everything exactly as he wanted it, with a minor exception that was on standards of construction, and the Commission insisted that they would have to observe those standards. Even the private line, if someone builds their own line, has to observe that. That means clearance above ground, crossing a — going over crossings and streets and attachment to homes or buildings. Those are safety things and their lines are just as dangerous as those owned by the Montana-Dakota or the Northern States Power, because if you come in contact with it, you generally get killed. So, with that exception, they got everything exactly as they wanted it, which was a permissive right to serve in rural areas — not an exclusive right — and he didn't want that, because then he would have been up against the problem of regulation. That's why you have regulation — is when you give some company an exclusive right. So they got a permissive right, exactly as they wanted it, and they have the right to discontinue services as the corporation sees fit. Now there's your differences between those two services.

PRESIDENT WENSTROM: Further discussion?

DELEGATE BAKER: Mr. President.

PRESIDENT WENSTROM: Delegate Baker.

DELEGATE BAKER: Mr. President, I'm curious about how Delegate Sinner would suggest that such a constitutional provision be implemented. As I'm sure you know, counties do not now have any ordinance-making authority — any legislative authority. Counties operate under state law. Would you suggest that each of the counties then adopt home rule provisions, including the legislative authority?

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President.

Delegate Baker, I'm only suggesting they have the same veto power over the Legislature that this amendment would give to the cities.

PRESIDENT WENSTROM: Delegate Aas.

DELEGATE AAS: Mr. President and Fellow Delegates:

I would resist the amendment. It's clear that the cities have had the power to issue franchises to authorized franchisees. The county has not had this. The cities do want this for the future. There's no reason to have this in here for any subsequent laws or in this Constitution, and I think it's — it should be clear that if we want to regulate both the REC's and the private power companies, they should all be under the Public Service Commission, and that is when we can stop regulating them. Until that time, the cities need their right, which they have under the present 139, and they will need it in the future. They are disturbed by this, and there is no reason to have the counties in here. It will clutter up the issues. The cities need it and the counties don't have it at the present time and, therefore, I would urge the defeat of this amendment.

PRESIDENT WENSTROM: Delegate Knudson.

DELEGATE KNUDSON: Mr. President, I also oppose the proposed amendment. I see it as an attempt to further cloud the issue.

I'll reiterate what other members of the Committee have said: All we are attempting to do is continue to permit cities to have a right which they have historically had — the right to grant franchises.

PRESIDENT WENSTROM: Delegate Lerberg.

DELEGATE LERBERG: I think, under the circumstances, I would oppose the amendment, too, because I feel, as the former delegate has, that it's just muddying up the situation. The counties now have no franchise right or ordinance right, and I personally have never been involved in a rural area problem in terms of this situation; but if you have — I think those of you who have will recognize that this is a fairly basic right and one that probably shouldn't be changed. I have been an attorney for an REA telephone for about 17 years. The REA telephones are under the jurisdiction of the Public Service Commission and have had relatively little boundary prob-

lems under this jurisdiction. The REA electricians are not under the Public Service Commission and they and the investor-owned power companies have had a multitude of boundary problems and have been continually in the Legislature, and until this matter is resolved, I would say that we better leave this section alone for the protection of the cities.

PRESIDENT WENSTROM: Delegate Nething.

DELEGATE NETHING: Mr. President and Fellow Delegates:

I am against this amendment, just as I am for the original amendment. It seems rather foolish to me to have the city first grant a franchise to somebody and then have that same group have to go to the county for the authority for that franchise which the city has already given them, which this amendment would provide. After all, all cities lie within counties; so the counties are, in effect, again controlling the cities, and I think the cities know more of their own problems and should have control of this lone business — not the county commissioners that run the counties.

PRESIDENT WENSTROM: Any further discussion?

The question before the Convention is on the adoption of the amendment as offered by Delegate Sinner.

Those that are in favor will vote "aye;" those opposed will vote "nay."

As many as are in favor of adopting the amendment will say "aye;" those opposed "nay."

The "nays" have it and the amendment lost.

Now we're back on the amendment as — no. We passed that. Okay.

Then we are back on 1-101 — the amendment as offered by Delegate Litten and amended by Delegate Rundle.

So now we are back on the amendment as amended.

The question is on the adoption of the amendment as offered by Delegate Litten.

DELEGATE PETERSON: Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: I guess I was the one that got this thing back on the floor in the first place. I definitely am speaking for the REC's and myself and for 1,000 farmers when I feel that they feel that this is not good, and I feel it should be out of here. I think it should be deleted as it was passed last time, and I very much oppose having it restored, and we did not discuss it in Committee after the last vote, so I don't know whether the Committee has changed its position in any way. But as far as I'm concerned, if I can't have the old one, I definitely would like to see this one deleted.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Litten — the amendment as it is now amended.

Those in favor will vote "aye;" those opposed will vote "nay." As many as are in favor of adopting the amendment will say "aye;" those opposed "no."

The Chair will rule the "ayes" have it.

DELEGATE SINNER: Let's have a division.

PRESIDENT WENSTROM: A division has been requested. A division is granted.

Again, those in favor will vote "aye;" those opposed will vote "nay."

The Clerk will open the key. Any questions? You will record your vote.

Has every delegate voted? Any delegate wish to change? Hearing none, the vote is closed.

The vote indicates 59 "ayes," 36 "nays," three delegates absent and not voting. The amendment has been adopted.

DELEGATE LITTEN: Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: With your permission, Mr. President and Fellow Delegates, I would like to move that the rules be suspended, that Committee Proposal 1-101 be deemed properly re-engrossed and placed on the calendar for first passage.

DELEGATE STANTON: Second.

PRESIDENT WENSTROM: The motion was seconded by Delegate Stanton, and the motion before the Convention is that the rules be suspended and that Committee Proposal No. 1-101 be deemed properly re-engrossed, to be placed on the calendar for first passage as amended.

As many as are in favor of the motion will say "aye;" those opposed "no." The "ayes" have it and the amendment — or the motion is adopted and Committee Proposal 1-101 is before the Convention for first passage.

The question — Delegate Sinner.

DELEGATE SINNER: Mr. President, I couldn't help resist this one parting shot:

The other day, when we were debating the merits of Committee Proposal 1-89, I heard Delegate Pearce make a statement that was repeated sometime later in the debate, in which he said "Eminent Domain must be under the sovereignty of the State." And it seems to me that that's in large part what we're dealing with here, and I hope that this Convention does not now vote to give the cities veto power over the Legislature.

PRESIDENT WENSTROM: The question — Delegate Aubol.

DELEGATE AUBOL: Mr. President, I have an amendment at the desk that's being prepared; but before that is done, I still have a question on this governing body thing, and if I could direct a question to Delegate Devine —

PRESIDENT WENSTROM: Does Delegate Devine yield?

DELEGATE DEVINE: Mr. President, Delegate Devine yields.

DELEGATE AUBOL: If I recall, you said that you have now given the city board authority to grant this franchise. Now, what happens if this franchise is also going to be involved with county property or state property, such as a highway, and the states say, "No, we don't want this franchise running across our property"?

DELEGATE DEVINE: Mr. President. Delegate Aubol. I'm not sure — you mean if, in order to construct and operate a utility, it will be necessary to — going across on a state highway, for example, the person requesting to design or operate would need an easement. If the property is property of the State of North Dakota, it would need an easement from the State of North Dakota. This does not — if I can go just one step further. Like most other things, if they have to occupy private property, they would have to obtain easements.

PRESIDENT WENSTROM: Delegate Larsen.

DELEGATE LARSEN: Fellow Delegates: Mr. President.

We've heard a lot of argument, but there is one statement that I question a little bit. Sometime ago it was said that people of the city did not and should not have any say in county government. Now, in our county, the people of the city, if they vote properly, they can control the county commissioners — they vote for them — and because of that statement, I'm in very much favor of supporting Delegate Peterson in her statements. I feel that this Section 139 should definitely be left up to the Legislature.

PRESIDENT WENSTROM: Further discussion?

The question before the Convention — Delegate Aubol.

DELEGATE AUBOL: Mr. President. There is an amendment being prepared at the desk, which I would like an opportunity to offer.

PRESIDENT WENSTROM: The Clerk will read the amendment.

CHIEF CLERK GILBREATH: Proposed amendment to Proposal 1-101:

In the re-engrossed Committee Proposal, after the words in the last line "that city" insert the following "provided, however, that no public utility or similar service shall have its property taken without receiving just compensation for the loss of business and for the loss in physical facilities."

PRESIDENT WENSTROM: Could we have a second to the proposed amendment?

DELEGATE BASSINGTHWAITE: Second.

PRESIDENT WENSTROM: Delegate Bassingthwaite.

DELEGATE LANDER: Mr. President, could we have that repeated, please?

PRESIDENT WENSTROM: Delegate Lander, you wish the amendment repeated?

DELEGATE LANDER: Please.

PRESIDENT WENSTROM: Will you re-read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101:

In the last line of the re-engrossed Committee Proposal, after the words, "that city" insert the following: "provided, however, that no public utility or similar service shall have its property taken without receiving just compensation for the loss of business and for the loss in physical facilities."

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: Mr. President, this question came up the last time we debated this issue, and I toyed with this idea and I talked to some people, and they thought it had some merit. Now, I didn't pursue this thing very far, except we have given the city a lot of power to grant franchises and say who is going to be operating in their city. By the same token, I think we have given the city the power now to say, "Okay, MDU, we don't want you in. Leave!" And the same would be true of REC's. And so I think that both public utilities and similar services should have some protection as to property rights, and it for that reason I offer this amendment.

DELEGATE PEARCE: Mr. President.

PRESIDENT WENSTROM: Delegate Pearce.

DELEGATE PEARCE: I have intentionally stayed out of this debate; but I must point out two things: I suppose a nonprofit corporation could have no damages for lost businesses; and, secondly, I'm not sure who's to pay.

PRESIDENT WENSTROM: The question — can someone answer the question as raised by Delegate Pearce?

The question before the Convention is on the adoption of the amendment as offered by Delegate Aubol. Those in favor will vote "aye;" those opposed will vote "nay."

Delegate Sinner.

DELEGATE SINNER: Mr. President, I'd ask Delegate Pearce who he thinks should pay.

DELEGATE PEACE: Mr. President.

PRESIDENT WENSTROM: Delegate Pearce.

DELEGATE PEARCE: How long have we got? (Laughter)

I would only say, since I am intimately acquainted with the utility business, anyone who operates on a franchise basis stands to lose his property if his franchise runs out. That's one of the risks of business that you take. Now, if the city gives a franchise to someone other than the one already operating, if they're going to pay for the one that's ousted, if you should pay at all, what should you do? — require the competitor who now has the franchise to pay? That might be impossible. Or ask the public to pay? Equally so. I don't think it could be either one. I think anyone who operates on a temporary-permit basis, which is what a franchise is, whether it's for twenty years or ten, he takes the risks if he loses that franchise.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Aubol. Those in favor of adopting the amendment will vote "aye;" and those opposed will vote "nay."

As many as are in favor of adopting the amendment will vote "aye;" those opposed vote "nay."

The "nays" have it and the amendment lost.

We're back on first passage of Committee Proposal No. 1-101 as amended.

As many as — those in favor of passage will vote "aye;" those opposed to passage will vote "nay."

The Clerk will open the key and you will record your vote.

Has every delegate voted? Does any delegate wish to change his vote? The vote is closed.

The roll call discloses 63 "ayes," 32 "nays," three delegates absent and not voting. Committee Proposal No. 1-101 has passed.

Next for consideration, Committee Proposal No. 1-57.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-57, introduced by Committee on Preamble, Bill of Rights and Suffrage:

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.