STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF BURLEIGH — SOUTH CENTRAL JUDICIAL DISTRICT

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

Appellant,

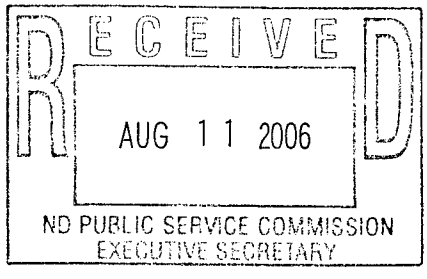
vs.

North Dakota Public Service Commission and Capital Electric Cooperative, Inc.

Appellees

CIVIL NO. 06-C-1177

APPELLANT'S BRIEF



INTRODUCTION

This is an appeal from an order of the North Dakota Public Service Commission ("PSC" or "Commission") directing Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("MDU"), to cease and desist providing electric distribution service within part of Boulder Ridge First Addition to the City of Bismarck (Boulder Ridge), to offer to sell certain of its facilities in Boulder Ridge to Capital Electric Cooperative, Inc. ("CEC"), and to provide service in part of Boulder Ridge subdivision until CEC can provide service. (Certificate of Record ("COR") #168.) The order was issued on a complaint filed by CEC with the PSC under North Dakota's Territorial Integrity Act ("TIA") alleging that MDU's extension of service to Boulder Ridge interfered with and unreasonably duplicated CEC's franchised services. MDU moved to dismiss the complaint on grounds that CEC does not have a franchise from the City of Bismarck to provide electric service within Boulder Ridge and therefore is prohibited from providing services within the subdivision. Accordingly, MDU's provision of service in Boulder Ridge cannot constitute an unreasonable duplication or interference with CEC's

services. The PSC denied MDU's motion to dismiss determining that it could not, without direction from the courts, reconcile a city's constitutional and statutory right to franchise public utility services with the PSC's authority to prevent duplication of services under the TIA. Notwithstanding CEC's lack of a franchise to provide services in Boulder Ridge, the PSC determined that because MDU's service line crossed CEC's line and because CEC said that it planned to serve the area, MDU's extension of service interfered with and unreasonably duplicated CEC's services. MDU appeals the Commission's order.

SCOPE OF REVIEW ON APPEAL

An administrative agency's order should be reversed when: (1) the order is not in accordance with the law; (2) the agency did not comply with the Administrative Agencies Practice Act; (3) the agency's findings of fact are not supported by a preponderance of the evidence; and (4) the agency's findings of fact do not sufficiently address the evidence presented by the appellant. N.D.C.C. § 28-32- 46.

ISSUES

MDU raises the following issues for review in this appeal:

1. Was the PSC's failure to consider the City's right to franchise utility services in accordance with the law?

2. Did the PSC apply the correct standards for determining interference and unreasonable duplication of services?

3. Did the PSC comply with the Administrative Agencies Practice Act when it did not decide the case on the allegations presented in the complaint and the issues stated in the Commission's notice of hearing.

4. Are the PSC's findings of fact supported by a preponderance of evidence?

5. Did the PSC's findings sufficiently address the evidence presented by MDU?

FACTUAL BACKGROUND

MDU is a public utility as defined at N.D.C.C. § 49-03-01.5. MDU holds a general unlimited franchise from the City of Bismarck that was most recently issued on May 12, 1987. Certificate of Record ("COR") #95-Exhibit 1. The franchise authorizes MDU to use the streets, alleys and public grounds of the City, as now or hereafter constituted, for constructing, maintaining and operating an electric distribution system. The franchise also obligates MDU to "maintain an efficient distribution system for furnishing electric energy for public and private use at such reasonable rates as may be approved by the Public Service Commission . . ." Id. In contrast, CEC, a rural electric cooperative ("REC") organized under N.D.C.C Chapter 10-13 for the purpose of providing electric service to its members in rural areas not receiving central station electric service, holds a limited franchise issued by the City of Bismarck on May 25, 1993 that authorizes operation of an electric distribution system to serve a limited geographic area of the City that was described in a 1973 Area Service Agreement between MDU and CEC. COR #96. This Area Service Agreement was cancelled by MDU for areas outside the City on June 26, 2002. By the terms of the Agreement, the cancellation became effective on June 26, 2003. COR #95-Exhibit 2-City Commission Finding #5.

Disregarding the cancellation of the Area Service Agreement and the limited scope of its franchise, CEC took an expansive and self-serving interpretation that its limited franchise authorized it to be the exclusive provider of electric distribution service in essentially every newly annexed area to the City of Bismarck. In April 2005, Boulder

Ridge was annexed to the City and Montana-Dakota subsequently filed a petition with the Bismarck Board of City Commissioners asking the City to interpret and declare the franchise rights of MDU and CEC to serve Boulder Ridge. COR #95-Exhibit 5. Following written submissions and public hearing, the Commissioners issued Findings, Conclusions, Decision and Order on November 14, 2005 determining Boulder Ridge was not within CEC's limited franchise and further that the subdivision was properly served with electricity by MDU subject to CEC retaining its existing customers. Id. CEC previously served a customer in the vicinity of Boulder Ridge but service to that location was abandoned prior to annexation. (Tr. 127) CEC's only remaining existing services in the area of the subdivision were to two street lights and a cable television booster station. Tr. 99, 126) In its Conclusions of Law, the City Commission determined in pertinent part:

> The intention of the parties in the Area Service Agreement and by extension, the intention of the City when it awarded a franchise to CEC, was for MDU to remain the main provider of electric services within the City, except for CEC's existing customers and any other customer's or service areas conceded to CEC by MDU [by amendment to the Area Service Agreement].

CEC challenged the City's order by a declaratory action that was subsequently considered an appeal in Capital Electric v. City of Bismarck, et al, Burleigh County Civil No. 05-C-2303. By order dated March 14, 2006, the District Court, the Honorable Bruce B. Haskell, denied CEC's appeal. The Court determined the City's order was based on a rational mental process and supported by evidence in the record.

In the fall of 2005, MDU extended its underground three-phase electric lines into Boulder Ridge from a supply source about 2000 feet south of the subdivision. Transcript ("Tr") 103. In extending the line, MDU crossed below CEC's overhead line located

along 43rd Avenue which borders the southern edge of Boulder Ridge. Shortly after MDU started constructing facilities in the subdivision, CEC began extending its facilities into the subdivision. CEC filed its complaint against MDU with the PSC on September 29, 2005. COR #1.

LEGAL BACKGROUND

Prior to 1965, public utilities such as MDU were allowed to extend facilities and service without a certificate of public convenience and necessity ("PC&N") to areas within a city, as well as to areas outside a city if the latter was contiguous to an area already served by the utility and not receiving similar service from another utility or electric cooperative. See Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508, 518 (N.D. 1956). All other extensions of service outside a municipality required the public utility to obtain a certificate of PC&N from the PSC under N.D.C.C. Chapter 49-03. In contrast, RECs which operate electric distribution networks to serve their members in rural areas, and not the public generally, are not subject to regulation by the PSC and can extend their facilities without obtaining any regulatory approval.

Amendments to Chapter 49-03 were enacted in 1965, (1965 N.D. Laws, ch. 319) that became known as the TIA. The TIA was adopted at the urging of the RECs to provide "territorial protection" for RECs and to prevent public utilities from "pirating" rural areas. Capital Electric v. Public Service Commission, 534 N.W.2d 587, 589 (N.D. 1995). Although the legislative history on the TIA is sparse, it includes a reference that attorney Alfred Thompson testified on behalf of the RECs before the House General Affairs

Committee that "the R.E.A.'s are not asking to go into towns but they ask that the public utilities do not go into the rural areas".[1] Appendix 1.

As a result of the amendments, a public utility currently cannot extend its facilities to serve any location outside a municipality without a certificate of PC&N. N.D.C.C. § 49-03-01.1. The TIA contains an exception, found at N.D.C.C. § 49-03-1.3, that continues to allow public utilities to extend service within a city without a certificate of PC&N if the extension does not interfere with existing services or unreasonably duplicate the services of an REC:

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

1. **The PSC's failure to consider constitutional and statutory provisions regarding a City's authority to franchise utility services was not in accordance with the law.**

a. A city's franchise authority controls the provision of utility services within the city.

In its complaint, which was filed with the PSC under § 49-03-01.3 before the City Commission issued its order of November 14, 2005, CEC alleged that MDU's extension of services in Boulder Ridge interfered with and duplicated CEC's services within its franchised service area. COR #1. Throughout the PSC's proceeding, MDU maintained the determination of which company holds a franchise from the City of Bismarck to

[1] The TIA not only removed the exception that allowed public utilities to extend facilities to contiguous areas outside a city without a certificate of PC&N, it also included a provision that the PSC could not grant such a certificate of PC&N to a public utility unless the nearest REC consented in writing to the extension. This latter prohibition was found to be an unconstitutional delegation of authority. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, (N.D. 1967)

provide electric services within Boulder Ridge was a threshold determination in the PSC's consideration of CEC's complaint. MDU argued its extension of service to Boulder Ridge could not be interference with or unreasonable duplication of CEC's services because CEC did not have a franchise to serve the area and therefore was prohibited under City ordinance from providing services in the subdivision. Section 10-11-01 of the Bismarck City Ordinance (Appendix 2) provides:

> 10-11-01. Franchises Required. Except as otherwise provided by law, a person, firm, corporation or utility may not place or maintain any permanent or semi permanent fixtures, including poles, wire, cable, conduit, or any other medium used to transmit or transport electric or electronic signals, natural gas or other materials, in, over, upon or under any street or public place without a franchise to do so from the city. A franchise may be granted by resolution of the Board of City Commissioners.

MDU's position that the City Commission's franchise authority controls which electric service supplier can provide utility services within a city is supported by Montana-Dakota Utilities Co. v. Divide County School District No. 1., 193 N.W.2d 723 (N.D.1971), in which the Supreme Court was presented with a territorial dispute similar to that involved in this appeal. In that case, MDU held a general franchise to provide electric services within the City of Crosby "as now or hereafter constituted." Id. at 727. The REC provided electric service in the rural area outside the City of Crosby and the Divide County School District owned land contiguous to the City upon which the REC provided service to a yard light approximately 10 feet outside the then existing city limits. The City of Crosby, which had an ordinance prohibiting construction or maintenance of any electric facilities within the corporate limits of the City without a franchise, annexed the land belonging to the school district. The REC subsequently applied for a franchise to serve the annexed area where a high school was to be built.

The City denied the REC a franchise to serve the school property. Nonetheless, the REC signed a service agreement to provide electric service to the new high school. MDU responded with a lawsuit to enjoin the REC from providing the proposed service. MDU alleged its franchise from the City of Crosby was a property right and the furnishing of electricity within the City by the REC without a franchise was illegal and would cause MDU irreparable injury and damage. The REC acknowledged it did not have a franchise from the City but alleged its construction and operation of electric facilities at the location prior to annexation allowed it to continue service to the area even without a franchise. Id. at 728. The Supreme Court rejected the REC's argument. The Court held a person residing within an annexed area of a city cannot be served by a REC without a franchise when the city has an ordinance prohibiting service in the absence of a franchise. Id. at 730. It is noteworthy that the majority in Montana-Dakota Utilities Co. v. Divide County School District No. 1, did not accept Justice Paulson's dissenting opinion that N.D.C.C. § 49-03-01.3 allowed a REC to continue its existing services within an annexed area without securing a franchise from the City. Rather, the majority held the REC's right to furnish electricity to the school district was vested only until the area became annexed to the City at which time the REC's right to furnish electric energy to the school district terminated by operation of law. Id.

Based on this judicial precedent, which the PSC was required but failed to follow, CEC's complaint should have been dismissed because it could not provide services within Boulder Ridge.

b. The PSC's order and application of the TIA is contrary to the North Dakota Constitution.

The PSC's order directing MDU to cease and desist from providing electric services in Boulder Ridge, without considering the City's authority to grant or prohibit the provision of utility services in the subdivision under its franchise authority, is in direct conflict with North Dakota Constitution Article VII, § 11:

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

Moreover, the PSC's interpretation of its authority under the TIA to direct MDU to sell its facilities in Boulder Ridge to CEC for the purpose of providing electric services within the subdivision is also in conflict with North Dakota Constitution Article XII, § 10 which, as recognized in City of Grafton v. Otter Tail Power Company, 86 N.W.2d. 197, 204 (N.D. 1957), requires consent from the City of Bismarck before CEC can use the City's streets and rights of way to provide utility services:

> 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.

CEC has argued a City's franchise authority cannot limit the PSC's authority granted by the Legislature under the TIA. CEC is incorrect and the history of Article VII, § 11 shows a clear understanding that the City's franchise authority controls over anything to the contrary in the TIA.

Article VII, § 11 originated from the North Dakota Constitutional Convention which was being held as Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra, was making its way through the courts. One of the Committee recommendations to the Convention was to repeal section 139 of the Constitution

(currently Article XII, §10) which restricts the right of the Legislature to franchise utilities without permission of the cities. The Committee proposed adoption of an updated constitutional provision to remove what it felt was archaic language in the existing section. Appendix 3 – Debates of the North Dakota Constitutional Convention of 1972 (Debates), pp. 694-695. The Committee representative described the proposal:

> 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 that this is an important right that should be reserved to them.

Debates, pp. 694-695. As expressed during the debates, the proposal was opposed by the RECs essentially 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 No. 1, supra:

> DELEGATE AUBOL . . . But I think that one of the objections that the RECs have to this provision is 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 and that they have developed. And I think there was an occasion that just recently stemmed a concern of this section.

Debates, p. 697.

> 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 with the framework of the Constitution.

Debates, p. 698. Delegates recognized the proposed amendment would limit protection to the RECs under the TIA:

> 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 also offered an interesting hypothetical in light of the facts of this proceeding:

> 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 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.

Debates, p. 1109. The contrary argument was offered by Delegate Nething that territorial disputes within a city were best resolved by the city:

> 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 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.

Debates, p. 1109. Ultimately, the Convention recommended adoption of the amendment and it was presented to the voters in a revised form as Article VII, § 11 of the Proposed 1972 Constitution. Appendix 4. Although the proposed constitution was defeated, various sections were subsequently presented to the voters and approved. During the 1979-1980 Legislative interim, the Judiciary Committee of the Legislative Council recommended a resolution creating a new article to the constitution relating to political subdivisions based on Article VII of the 1972 proposed constitution. Appendix 5. The 1982 Legislative Session approved Senate Concurrent Resolution 4002 that called for creation of a new Article VII. This resolution was approved by the electorate including § 11.

In its response to MDU's motion for a stay in this appeal, CEC argued that MDU misstated the history of N.D. Const. art. VII, § 11 because CEC observed the title and language of the section does not mirror the title and language of the proposed constitutional amendment that was the subject of the Constitutional Convention debates and that former § 139 was never repealed. CEC's observation is correct, however, its conclusion is not.

After the Convention approved adoption of the original form of the amendment, the amendment was referred to the Convention's Style and Redrafting Committee which recommended the amendment be reworded and included in a proposed article dealing with political subdivisions rather than in a new article dealing with public utilities. Debates, p. 1452, 1461 The debates indicate the revised language was not intended as a substantive change from the prior proposal or a deviation from the result reached by

the Supreme Court in Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra, which was decided while the convention was in session.

> DELEGATE WALLIN: . . . I did check with the Attorney General's office on this. And Mr. Paul Sand's opinion was that there wasn't any substantive change in this. He did say that the way this is written now, that the legislative assembly would never be able to change this or abridge the right of the city.

Debates, p. 1464.

> DELEGATE SANSTEAD: . . . After the committee had noted the new language, and at the suggestion of Delegate Devine, who you will recall worked very hard on this section, the original section, I did contract the REC people who had originally been very unhappy with Article 17. And they indicated – I talked to a couple of their – I suppose you'd say managerial and legal experts, but they suggested they did not feel this was any change, either; it was just as obnoxious as the old language.

Debates, p. 1464.

> DELEGATE WALLIN: . . . Mr. Sand did check this against the recent court decision, **MDU** v. **REA**, in Crosby. This decision came out December 17th. And he said that this reading here will not in any way be changed by that question.

Because voters did not adopt the 1972 proposed constitution in 1972, § 139 of the Constitution was not repealed at that time. When Article VII was subsequently approved in 1982, § 139 was not among the repealed sections and instead has been renumbered as Article XII, § 10.

CEC argued to the PSC that it had no jurisdiction based on Johnson v. Elkin, 263 N.W.2d 123, 126 (N.D. 1978) to decide the constitutionality of the TIA and therefore, the PSC should decide the issue of duplication and interference under the TIA without regard to the constitutional provisions regarding the city's franchise authority. The PSC, apparently adopting CEC's arguments, chose not to consider the constitutional authority of the City to determine franchise service areas. Although the

Commission acknowledged CEC did not have a franchise to construct facilities in Boulder Ridge and that Bismarck City Ordinance 10-11-01 prohibits a company from operating electric facilities without a franchise, the PSC nonetheless concluded it would decide which company was best able to serve the area without regard to the City's determination of which company should serve Boulder Ridge. The concurring opinion of Commissioner Clark is particularly enlightening. Commissioner Clark acknowledged the Commission's order separates the issue of the franchise from the issue of duplication and interference. He also mistakenly offers that an administrative agency such as the PSC cannot make constitutional interpretations and therefore reconciliation of the constitution and the TIA must be made by the courts.

It is important to recognize that despite CEC's arguments to the contrary, MDU did not ask the PSC to declare N.D.C.C. § 49-03-01.3 unconstitutional. This was simply a strawman argument invented by CEC to support its position that the PSC should ignore N.D. Const. art. VII, § 11 in its analysis of interference and duplication. MDU recognizes the Commission does not have authority to declare the statutes under which it operates unconstitutional, however, the PSC also cannot ignore applicable constitutional provisions in the exercise of its statutory authority. Rather, the Commission must harmonize the interpretation of those 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 Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

To determine the public policy of the State, the Commission was required to look first to the State Constitution. See Continental Casualty Company v. Kinsey,

499 N.W.2d 574, 580 (N.D. 1993). Because N.D. Const. art. VII, § 11 and art. XII, § 10 prohibit legislation that interferes with a municipality's power to franchise, these constitutional provisions are a limitation on the operation of N.D.C.C. Chapter 49-03. Accordingly the TIA must be construed consistent with that constitutional limitation.

Based on the PSC's application of the TIA without consideration of the City's franchise authority, N.D.C.C. § 49-03-01.3 would allow the PSC to override or prevent enforcement of the City's franchise authority. Such an application is clearly contrary to N.D. Const. art. VII, § 11 and art. XII, § 10 and therefore incorrect. Instead, N.D.C.C. § 49- 03-01.3 should be interpreted so the PSC's consideration of claims of interference or unreasonable duplication of services is based on the service areas established by the City under its franchise authority. The PSC had both the authority and constitutional obligation to consider the City's franchise in determining whether an extension of service to a franchised area is unreasonable. This is the only interpretation consistent with N.D. Const. art. VII, § 11 and art. XII, § 10.

c. The RECs recognize that a city's franchise authority controls the territorial provision of electric utility service within a city.

Even the North Dakota Association of Rural Electric Cooperatives recognizes that the relationship between the TIA and a municipality's franchise authority does not operate in the manner applied by the PSC in this proceeding. Although the RECs opposed adoption of Article VII, § 11 because it would limit application of the TIA within a municipality, the RECs now acknowledge and advocate that this constitutional provision controls the determination of electric service areas within a city. On July 16, 2002, Harland Fuglesten, General Counsel and Government Relations Director

of the North Dakota Association of RECs, presented written testimony before the Electric Industry Competition Committee of the North Dakota Legislature. Appendix 6. 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 testified on behalf 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]

Mr. Fuglesten repeated the REC's position in written testimony provided to the House Industry, Business and Labor Committee of the North Dakota Legislature on February 5, 2003 regarding House Bill 1454. Appendix 7. Mr. Fuglesten recited the history of Chapter 49-03 and noted that even before enactment of the TIA amendments in 1965, RECs could not serve within the corporate limits of a city without city approval, even if the city expanded its borders to include areas previously served by the cooperative. He testified this legal restriction continues to exist under Chapter 49-03 after enactment of the TIA amendments:

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

> example, because Montana-Dakota has the only franchise to serve the city of Williston, the local electric co-op sells its lines to MDU as the city expands into areas where the co-op has facilities. . . .What this all means is the current North Dakota law does not favor one type of utility over another. Instead, it provides for orderly development of expensive electric facilities while maintaining local control of electric service decisions. [Emphasis Added]

Mr. Fuglesten's testimony is also consistent with the statutory powers granted to RECs which allow a REC to use streets and rights of way for the construction and operation of its lines only with the consent of the local authority having control over such streets and rights of way. N.D.C.C. § 10-13-03(6).

d. The PSC cannot exercise its jurisdiction over MDU in a manner that interferes with a City's franchise authority.

The PSC's order implies that its jurisdiction under the TIA allows it to exercise regulatory authority over MDU as a public utility even if that regulatory action impacts MDU's franchise from the City of Bismarck. For 85 years, the North Dakota Supreme Court has consistently held the PSC cannot assert its jurisdiction to regulate public utilities in a manner that interferes with a city's right to franchise those utilities.

In Western Electric Co. v. City of Jamestown, 47 N.D. 157, 181 N.W. 363, (N.D. 1921) the Court held:

> This Public Utilities Act (chapter 192, Laws 1919) grants to the Board of Railroad Commissioners regulatory rate-making powers over public utilities such as the plaintiff. It does not deprive a city of its powers and privileges in creating or enforcing a franchise granted for the use of its streets or highways by a public utility.

The holding was reaffirmed in Chrysler Light & Power Co. v. City of Belfield, 58 N.D., 33, 224 N.W. 871, 874 (N.D. 1929) and again in Public Service Commission v. City of Williston, 160 N.W.2d 534 (N.D. 1968) in which the Court reversed an order of

the PSC fixing the rate MDU could charge the City of Williston for electric service under its franchise.

It is also important to note that in each of the above cited cases, the Court limited application of the Commission's rate authority without declaring the statute delegating such authority unconstitutional. Instead, the Court interpreted and applied the rate authority in a manner consistent with the City's constitutional franchise authority.

Although the above cases involved the Commission's rate authority the principle is the same with regard to the PSC's authority over extensions of service. In either instance, the PSC cannot exercise its jurisdiction over a utility in a manner that circumvents the Constitutional provision giving the City the right to franchise public utility service. See City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197 (N.D. 1957). With the exception of the PSC's decision in this case, every application of the TIA within a city has recognized the City's franchise of the electric service within the city. See Montana-Dakota Utilities Co. v. Divide County School District #1, supra; Tri-County Electric Cooperative v. Elkin, supra; Cass County Electric Cooperative, Inc. v. Northern States Power Company, supra.

The PSC only has such powers as have been conferred upon it by the Legislature. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197, 202 (N.D. 1957). The Legislature cannot confer authority on the PSC to act in a manner in which the Legislature itself is prohibited from acting and the PSC erroneously failed to recognize this limitation upon its authority under the TIA. Because the Legislature is prohibited from interfering with a City's right to franchise utility service, the PSC likewise must exercise its authority derived from the Legislature in a manner that does not

interfere with the City's franchise authority. Instead of accepting CEC's argument that the PSC should broadly interpret its authority under the TIA, the PSC must narrowly construe its authority when it encroaches on the affairs of another governmental entity, particularly in an area where the Constitution has given the other entity exclusive authority. See City of Grafton v. Otter Tail Power Company, supra at 198, 203.

e. The TIA required the PSC to recognize the City's franchise authority to determine electric services.

The 2005 Legislative Session adopted amendments to N.D.C.C. Chap. 49-03 which included enactment of N.D.C.C. § 49-03-06 which allows for service area agreements between public utilities and RECs subject to review and approval of the PSC. The new section includes language at subsection 8 providing that nothing in Chapter 49-03 can limit the authority of a city to exercise its franchise authority. While Commissioner Clark's concurring opinion explains the PSC's position that it has no authority to interpret and reconcile constitutional provisions, his opinion and the PSC's order are both conspicuously silent regarding this specific statutory limitation on the very law the PSC was attempting to apply.

The primary purpose of statutory interpretation is to ascertain the intent of the Legislature. Legislative intent is first sought from the language of the statute. Id. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 833 (N.D. 1995). When statutory language is clear and unambiguous, it cannot be disregarded as legislative intent is presumed to be clear from the face of the statute. The language of N.D.C.C. § 49-03-06(8) could not be clearer:

> Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under § 40-05-01.

The statute unambiguously prohibits application of Chapter 49-03 as done by the PSC in the instant case where it determined the PSC under N.D.C.C. § 49-03-01.3 can trump the franchise issued by the City of Bismarck by either precluding MDU from exercising its franchise authority or by allowing CEC to provide service in the area without a franchise. The Commission's failure to recognize this limitation upon its authority under the TIA is unexplainable.

Finally, the PSC's application of Chapter 49-03 ignores a principal rule of statutory construction. It is presumed under N.D.C.C. § 1-02-38 that the Legislature intended to reach a just and reasonable result by enactment of a statute.[2] An inescapable result of the PSC's order is that CEC is prohibited from providing service in Boulder Ridge under Bismarck city ordinance because it does not have a franchise to serve the area and that MDU is prohibited from providing such service by the PSC under Chapter 49-03. Consequently, if neither provider is legally able to provide electric service within the subdivision, consumers do not have access to electric power. A result in which consumers are denied access to electric service on a rationale that the result prevents interference and unreasonable duplication of services is not just and reasonable.

f. The South Pointe cases do not support the PSC's order.

CEC urged the PSC to ignore the constitutional and statutory provisions regarding the City's right to franchise electric services and instead render its decision

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

solely upon the precedent of two Supreme Court opinions regarding a territorial dispute to provide electric service to a Fargo subdivision known as South Pointe. In Cass County Electric Cooperative, Inc. v. Northern States Power Company, 419 N. W. 2d 181 (N.D. 1988) and the companion opinion Northern States Power Company v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990), the PSC and the Supreme Court were presented for the first time with a complaint made by a REC under N.D.C.C. Chap. 49-03 that a public utility's extension within a municipality interfered with the economic viability of the REC's system. Id. at 185. In that case the REC complained that Northern States Power Company ("NSP") interfered with the REC's facilities and service when NSP extended its facilities across 32nd Avenue in Fargo to provide electric service to South Pointe. Although the Supreme Court ultimately affirmed a PSC determination on remand that the extension was an unreasonable duplication of service under N.D.C.C. § 49-03-01.3, the REC had an agreement with the City of Fargo to be the electric provider for South Pointe and therefore no constitutional issues regarding the city's franchise authority were raised or decided. Indeed, in distinguishing a prior decision, the Court specifically noted the earlier "court was not confronted with a situation where an agreement between the cooperative and the city allowed the cooperative to serve new customers after annexation, as in this case." 419 N.W.2d at 187.

Therefore, contrary to this case, the REC was authorized by the City to be the electric service provider for South Pointe. The South Pointe cases do not support the PSC's order which failed to address the threshold issue of which of the parties was the authorized provider of services under the City's franchise authority.

2. The PSC's application of PC&N standards for determining interference and unreasonable duplication was not in accordance with the law.

In Application of Otter Tail Power Company, 169 N.W.2d 415, 418 (N.D. 1969), the Supreme Court delineated four factors to be considered by the PSC for issuing certificates of PC&N:

> These factors include: the location of the lines of the suppliers; the reliability of the service which will be rendered by them; which of the proposed suppliers will be able to serve the area more economically and still earn an adequate return on its investment; and which supplier is best qualified to furnish electric service to the site designated in the application; and which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.

Since that decision, the PSC has supplemented this list of factors by also considering location of customers and whether the area will be included in the corporate limits of municipality in the foreseeable future.

In determining whether MDU's extension of facilities to Boulder Ridge constituted interference and unreasonable duplication, the Commission made its decision based on this same set of factors. See Commission Findings of Fact #'s 16-28. Using these factors, there was no difference in the factors the PSC uses for determining whether to issue a certificate of PC&N for a public utility to serve a location outside a city and the factors it used to determine interference and unreasonable duplication of services for an extension of facilities by MDU inside a city. Chapter 49-03, however, clearly contemplates the application of different standards in those determinations as N.D.C.C. § 49-01-01.3 exempts a public utility from the requirement of obtaining a certificate of PC&N for extensions inside a municipality in the absence of interference with existing services and unreasonable duplication of services.

The Commission's application of the PC&N factors for determining interference and unreasonable duplication denied MDU the benefit of this statutory exception as the PSC's order effectively required MDU to show it was entitled to serve the area based on PC&N factors. This is clearly inconsistent with the intent of this exception. The PSC's application of PC&N factors was particularly egregious because it conveniently ignored a factor that favored MDU – likelihood of incorporation into a city – which recognizes that public utilities are the preferred electric providers inside a municipality and that RECs are organized for the purpose of serving members in rural areas not receiving central station power. N.D.C.C. §10-13-01; Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra.

MDU recognizes that the Supreme Court stated as dictum in a footnote in Cass County Electric Co-op v. NSP, 419 N.W.2d 181, 188 (N.D. 1988) that it did not imply that the PC&N factors are irrelevant in the determination of unreasonable duplication. It is one thing, however, to determine such factors may not be irrelevant; it is quite another to make the factors the deciding criteria to the exclusion of other considerations – most particularly which supplier has the franchise to be the provider of services in the area. Even in its subsequent consideration on remand in Cass County Electric Co-op v. NSP, the PSC made this latter determination when it found South Pointe was part of the REC's service area under its right of way agreement with the City of Fargo. NSP v. Public Service Commission, supra at 343. The PSC failed to consider this critical threshold factor in its determination of interference and unreasonable duplication regarding service to Boulder Ridge.

The PSC's use of the PC&N factors to determine interference and unreasonable duplication within a newly annexed area of a city is prejudicial to a public utility such as MDU because the TIA prohibits extension of facilities and service by a public utility outside a city without a certificate of PC&N whereas a REC is allowed to build its unregulated network of facilities wherever it chooses outside the city. Accordingly, when an area is annexed to a city, the REC will almost always have existing facilities and customers within or near the annexed area. The public utility will frequently be required to cross and duplicate to some extent the REC facilities in order to extend service to the annexed area. The TIA exception that allows a public utility to extend service within a city without a certificate of PC&N assumes the REC may have services in the area but nonetheless limits the PC&N exception only when the public utility's extension **interferes with existing** services or **unreasonably duplicates** the REC's services.

Unlike a proceeding to determine PC&N for service by a public utility in a rural area, the question presented to the PSC in a complaint proceeding is not which electric provider is best able to serve the annexed area, but rather whether the public utility's extension of service interferes with the REC's existing services or unreasonably duplicates the REC's services. In this manner, the TIA prevents situations where the REC has a franchise to provide service within the annexed area and the public utility attempts to duplicate services already provided by the REC in areas as small as a city lot as described by the Supreme Court in Cass County Electric Co-op v. NSP, supra at 187.

The TIA should be interpreted to complement the city's franchise authority when a public utility interferes with the service area of a REC designated by a city under its franchise authority. Those were the allegations of CEC's complaint which it was unable to prove. Although the PSC can not determine which supplier should be issued a franchise, it can determine to whom the City has issued a franchise and exercise its TIA authority in a manner that protects the integrity of that franchise. The TIA and the Constitution prohibit application of the TIA to supplant a City's franchise or to allow the PSC to encroach upon the City's authority by substituting its judgment for that of the City in determining which electric supplier is best able to serve an annexed area.

The Commission erred in applying PC&N factors to determine interference and unreasonable duplication without considering which company held a franchise from the City's governing body to provide services. As a matter of law, MDU was not only the best but the only supplier able to serve the area. The Commission's determination of PC&N rather than interference and unreasonable duplication of services for Boulder Ridge was prejudicial to MDU and should be reversed.

3. The PSC's failure to decide the case based on the allegations of the complaint and the issues stated in the notice of hearing did not comply with the Administrative Agencies Practice Act.

Section 28-32-21 of the North Dakota Administrative Agencies Practice Act requires that a complaint filed with an administrative agency must contain "a concise statement of the claims or charges upon which the complaint relies." The same section requires the agency to serve a notice of hearing on the respondent. Due process requires that a respondent in an administrative hearing be given notice of the allegations against it and the questions to be addressed at the hearing so it is

adequately prepared to present evidence and arguments on those questions. Cybrcollect, Inc. v. North Dakota Department of Financial Institutions, 2005 N.D. 146, ¶ 32, 703 N.W.2d 285, 297 (N.D. 2005).

CEC's complaint filed with the Commission alleged as follows at paragraph VI:

> When territory is annexed into the City such territory stands just as any other property within the City, subject to the Area Service Agreement, and CEC's franchise....Pursuant to the grant of franchise incorporating the Area Service Agreement, Boulder Ridge is located in CEC's service area.

As relief, CEC requested an order:

1. Restraining and enjoining MDU from constructing or extending its interfering lines, plant, or system, into CEC's franchised service area;

2. Requiring immediate removal of all of MDU's facilities in CEC's service area.

In its notice of hearing, the Commission set forth the following issues to be considered:

1. Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant.

2. Whether Respondent should be restrained and enjoined from constructing or extending its lines, plant, or system into Complainant's franchised service area.

3. Whether Respondent should remove all of its facilities in the Complainant's service area.

Neither CEC's complaint nor the Commission's specifications of issues were amended. At the hearing, MDU introduced the City Commission's order of November 14, 2005 determining that Boulder Ridge was not part of CEC's franchised service area. COR #95-Exhibit 5. CEC offered no evidence to the contrary to support the allegations of its complaint.

Although the Commission's notice of hearing specified the issue of whether MDU should be enjoined from extending service into CEC's franchised service area, the PSC

never made a specific finding of whether Boulder Ridge was or was not within CEC's franchised service area. Based on the uncontroverted evidence, the question should have been answered in the negative with the only rational result that MDU not be restrained from extending services to Boulder Ridge. Instead, and notwithstanding the plain statement of issues in the notice of hearing, and despite the determination of the Bismarck City Commission that MDU and not CEC held the franchise to serve Boulder Ridge, and despite recognizing that Bismarck City Ordinance 10-11-01 prohibited construction and operation of an electric distribution system within the City without a franchise, the Commission determined it did not have jurisdiction regarding the franchise and proceeded to decide the case based on its determination of which company was best able to serve the area under the PC&N factors which were not specified in the notice of hearing or CEC's complaint. The concurring opinion of Commissioner Clark notes that the Commission's order keeps separate the issues of enforcement of the TIA and the City's right to franchise. In other words, the order keeps separate and does not consider the very issue stated in the notice of hearing of whether Boulder Ridge is part of CEC's franchised service area.

As disturbing as the PSC's disregard of the due process requirement to decide the case based on the issues stated in its Notice of Hearing, Commissioner Clark's concurring opinion stated that MDU effectively conceded that MDU's service to Boulder Ridge violates the spirit of the TIA by not presenting any evidence to the contrary. MDU presented evidence on the issues set forth in the Commission's notice of hearing and unequivocally proved that Boulder Ridge was not within CEC's franchise service area and accordingly MDU's extension of service within its franchised service area was

neither interference with nor unreasonable duplication of CEC's services. As stated in Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508, 524 (N.D. 1956):

> It is, of course, elementary that even in an administrative hearing the issues are limited to those raised by the pleadings and a hearing should be confined to the points of issue.

The Commission's decision based on issues not set out in the complaint and notice of hearing did not comply with the Administrative Agencies Practice Act and was a denial of due process.

4. The Commission's Findings of Fact are Not Supported by a Preponderance of the Evidence.

An order of an administrative agency can not be affirmed on appeal if the findings of fact underlying the order are not supported by a preponderance of the evidence. N.D.C.C. § 28-32-46.

In its finding of fact #5, the PSC found that in 1987 the City of Bismarck "issued Montana-Dakota a general limited franchise to construct and maintain an electric transmission and distribution system within the City of Bismarck for a period of 20 years." The PSC's determination that MDU was issued a "general limited" franchise is inconsistent. MDU was issued a general franchise and in contrast to the franchise issued to CEC, MDU's franchise contains no geographic or other limitations. COR #95-MDU Exhibit 1.

In finding of fact #20, the PSC found that under the 1973 Area Service Agreement, CEC invested $7 million in the area northwest of Highway 83 including Boulder Ridge and that these facilities were planned and constructed to provide an electric system for new developments such as Boulder Ridge. The PSC recognized

and found that MDU had canceled the Area Service Agreement in 2002 effective in 2003. Finding of Fact # 7. Over half of the entire investment that CEC alleged it made to serve Northwest Bismarck is related to construction of a $4.5 million substation that CEC and the Western Area Power Administration started in 2005, three years after MDU sent notice canceling the Area Service Agreement. (Tr. 88, 115) Accordingly, CEC did not make this investment based on the Area Service Agreement. Similarly, CEC's lines along 43rd Avenue and Washington Street, which border Boulder Ridge, were both built before 1973 to tie together substations at other locations. (Tr. 124-125) Therefore any finding that CEC built these facilities in reliance on the 1973 Area Service Agreement is incorrect.

Nor did CEC make any investment to serve the Boulder Ridge subdivision. While CEC may have made investment to serve new developments **such as** Boulder Ridge, it has made no investment to serve Boulder Ridge. Investment to serve developments other than Boulder Ridge have no relevance and are no basis to support a determination of interference and duplication of services in Boulder Ridge. CEC had no information about the development plans for Boulder Ridge until it was annexed in 2005. (Tr.116) Prior to that time, CEC had no idea if, when or how the property would be developed. It had no knowledge of whether the area would remain agricultural or be used for high density residential or commercial development. (Tr. 117-118) CEC was aware at the time it began installing its facilities that MDU was also claiming the right to serve the subdivision and was in fact installing facilities in the subdivision at the same time CEC began installing facilities. (Tr. 119) CEC's actions after it learned of the development plans for Boulder Ridge were simply the typical planning activities that any

electric provider does in preparing the layout of a distribution system for a new subdivision. (Tr. 118) CEC acknowledges this was essentially the same planning activities that MDU undertook to serve Boulder Ridge. (Tr. 119)

In Finding of Fact #22, the Commission found that MDU's facilities crossed CEC's facilities in two places—in French's First Addition and on the north side of 43rd Avenue. Although MDU's underground facilities did cross below CEC's overhead line along 43rd Avenue, there is no evidence supporting the PSC's finding that MDU crossed CEC's facilities in French's Addition. Tr. 93-96.

In Findings of Fact #25 and 29, the PSC found MDU's extension of facilities into Boulder Ridge interfered with and constituted an unreasonable duplication of investment and services provided by CEC. The Commission made this finding based on its determination that CEC had more and closer facilities in the area which made CEC better able to serve Boulder Ridge. As discussed in the following section, the PSC's determination ignored the evidence offered by MDU that CEC was legally prohibited by Bismarck city ordinance from providing services in Boulder Ridge. Since CEC could not provide services in Boulder Ridge, MDU's extension of facilities could not interfere with CEC's existing services nor unreasonably duplicate CEC's services. Because it applied an incorrect standard for determining interference and unreasonable duplication of service, the Commission ignored the preponderance of the evidence discussed below that MDU's extension neither interfered with nor unreasonably duplicated CEC's services.

The evidence shows that MDU's extension of services to Boulder Ridge did not interfere with CEC's existing services. CEC's only existing services within the vicinity of

Boulder Ridge at the time of annexation were to two street lights and a CATV booster station located in the road right of way. (Tr. 99, 126) CEC's only other customer located within Boulder Ridge prior to annexation was a pasture well for which CEC abandoned its facilities prior to annexation. (Tr. 127) All of CEC's substations and other facilities described its testimony are being used exactly the way they have always been used to provide the same services for which they were constructed. (Tr. 129) The City of Bismarck in its order of November 14, 2005 determined that MDU's franchise was subject to the right of CEC to retain its existing customers. In other words, CEC can continue to serve its existing customers if it can do so without use of the public rights of way or CEC obtains an amendment to its limited franchise to use the public rights of way to serve its existing customers within Boulder Ridge. There is no evidence that MDU's lines interfere with service to these existing customers.

Nor does the evidence support a determination that MDU's extension of facilities unreasonably duplicated CEC's services. MDU's extension of an underground three-phase feeder line through French's Addition to serve Boulder Ridge did not unreasonably duplicate CEC's facilities in French's Addition which are single-phase distribution lines constructed and used exclusively to serve customers in French's Addition. (Tr. 94-95, Ex. C-6) While CEC has feeder facilities which give it the ability to serve Boulder Ridge, it did not have distribution facilities actually being used to serve customers within Boulder Ridge. CEC's facilities along 43rd Avenue that were crossed by MDU were built before 1973 to tie together two of CEC's substations. (Tr. 124) CEC acknowledges that the crossing of those facilities by Montana-Dakota's underground service to Boulder Ridge did not affect CEC's use of the line as it continues to use the

line the same way it has over the last 20 years. (Tr. 124) Similarly, CEC's line along North Washington Street was built before 1973 to tie together two substations. CEC continues to use the line in the same way it has used the line for the last 20 years. (Tr. 125)

CEC's only witness, Ron Lipp, agreed on cross examination that line extensions that parallel or cross another provider's facilities do not duplicate or interfere with the other provider's services if the extensions do not serve customer locations within the other provider's service area. (Tr. 111-112) Mr. Lipp acknowledged there are locations both within and outside the City of Bismarck where CEC facilities cross or parallel pre-existing facilities of MDU. (Tr. 121) Mr. Lipp does not consider CEC's facilities to interfere with or unreasonably duplicate MDU's services because CEC is not using its facilities to serve customers within MDU's service areas and CEC's facilities do not affect MDU's ability to use its facilities to serve customers. (Tr. 121-122)

> Q. Are there situations where you do serve in south Bismarck where you cross facilities of MDU to make that service?
>
> A. Yeah. I'm sure there is down in Tatley, I'm sure, because you guys serve.
>
> Q. And do you consider that duplication and interference?
>
> A. Well, no. I guess - - you can say that it is, but, no, to me it isn't.
>
> Q. And why not?
>
> A. Well, because we got designated service area and then our lines serve that, and you guys have designated service area and you serve that, so, okay, we cross. . . .
>
> Q. So make sure I understand. Your position is if you have to cross an area that's been your - - if you have to cross an MDU line to get to an area that's designated as your service area, that's not interference, is it?

A. I wouldn't say so, no.

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

A. No, because we can serve it.

. . . .

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

A. That's correct.

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

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

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

Using a correct legal standard and a preponderance of the evidence, the PSC should have found the extension of MDU's facilities to serve its franchised service area of Boulder Ridge did not interfere with or unreasonably duplicate the services of CEC. Because the PSC's findings of fact upon which its order is based are not supported by a preponderance of the evidence, the Commission's order must be reversed.

5. **The PSC's findings of fact do not sufficiently address the evidence presented to the PSC by MDU.**

An order of an administrative agency should not be affirmed if its findings of fact do not adequately address evidence offered by the appellant or sufficiently explain the inconsistencies between that evidence and the agency's findings of fact. N.D.C.C. § 28-32-46; Naumann v. North Dakota Workers Compensation Bureau, 545 N.W.2d 184 (N.D. 1996).

The Commission's Notice of Hearing stated the issues for consideration as whether MDU should be restrained and enjoined from constructing or extending its lines into CEC's franchised service area and whether MDU should remove all of its facilities in CEC's service area. MDU submitted evidence that contrary to the allegations of CEC's complaint, Boulder Ridge was within MDU's and not CEC's franchised service area. The Commission recognized at Conclusions of Law #s 2 and 3 that the City of Bismarck is the franchising authority for both CEC and MDU within the City of Bismarck and that Bismarck City Ordinance prohibits operation of a utility system in the City's public places without a franchise from the City. Although the Commission recognized at Findings of Fact # 8-12 that the City determined that MDU and not CEC was the franchised service provider for Boulder Ridge, the Commission nonetheless, decided it would not consider the City's franchise and instead made an implied determination that Boulder Ridge was within CEC's service area.

Because Bismarck City Ordinance provides that a company may not place or maintain its facilities for the transmission or distribution of electric service upon any public place without a franchise to do so from the City, the uncontroverted evidence is that Boulder Ridge is not within CEC's service area- franchised or otherwise. Neither

CEC through the location of its lines prior to annexation, nor the PSC under the TIA, can define utility service areas inside a city differently from what the city has defined them through the exercise of its constitutional and statutory franchise authority.

The Commission failed to sufficiently address evidence offered by MDU that Boulder Ridge was within MDU's franchise service area as determined by the only governing body with authority to determine such service areas. Furthermore, the PSC failed to reconcile its implied finding that Boulder Ridge is within CEC's service area with the evidence presented by MDU that the Bismarck City Commission determined Boulder Ridge was within MDU's franchised service area.

CONCLUSION

In failing to recognize the constitutional authority of the City of Bismarck to franchise utility service areas, the Commission improperly exercised its jurisdiction under the TIA. The PSC's order should be reversed and the matter remanded to the PSC for dismissal of CEC's complaint.

Dated this 10th day of August, 2006.

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

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APPENDIX

1. Legislative History for 1965 N.D. Laws, Ch. 319.
2. Bismarck City Ordinance 10-11-01.
3. Debates of the North Dakota Constitutional Convention of 1972 (selected pages)
4. Proposed 1972 North Dakota Constitution (partial).
5. 1979-1980 North Dakota Legislative Council Minutes of Judiciary "C" Committee.
6. Testimony of Harlan Fuglesten to the Electric Industry Competition Committee – July 16, 2002.
7. Testimony of Harlan Fuglesten to the House Industry, Business and Labor Committee – February 5, 2003.

TEA Legislative History

GENERAL AFFAIRS MINUTES FEBRUARY 5, 1965

House Bills 724, 726 and 727 were discussed primarily together and most speakers spoke on all three bills. Statements are attached for the following speakers who spoke in favor of the bills: Mr. James Grahl, Leon Birdsall, E.M. Arntson, Herlof Huso, Clarence Welander.

Bruce Hagen, Public Service Commissioner spoke saying that he felt some legislation was needed in this area. He did not speak for the Commission on this and did not speak in behalf of any particular legislation. He did state on behalf of the commission that in House Bill 727 that should it pass, the commission would prefer that on line 15: the wording "hearing" be changed to "notice of opportunity of hearing". He said that on several minor cases there is no reason for a hearing unless someone protests.

Rep. Lang, Burleigh County spoke in favor of these bills. He stated that there had been many territorial headaches. He spoke particularily in favor of 724.

Henry Lundene, representative, and Director of Nodak Electric Cooperative spoke in favor of these bill and especially 724. He is a sponsor of these bills. He stated that neither the power plants nor the cooperatives could afford these constant fights.

Mr. Alfred Thompson, Attorney for the R.E.A. spoke on these bills. He stated that 724 did not eliminate the possibility of private contracts. On 726 he stated that special rates were being given by public utilities. He stated that this bill was merely inserting the Sherman Anti Trust Act language. He also spoke in favor of the Bill 727. He stated that the R.E.A.'s are not asking to go into towns but they ask that the public utilities do not go into the rural areas.

Those speaking against these measures are a s follows:

Wm. Pearch, Attorney Montana Dakota, stated that the public utilities do not want to see the R.E.A.'s go broke. They want them to serve their customers and we want competition however he feels that HB 724 does not provide for a referree and that it is impossible to say that a law can settle all disputes that may arise in the next 6 mos., 6 years or 60 years and a referree must be provided and that he feels that the Public Service Commission is now serving as a referee.

Burt Wheeler, attorney for Northern States Power spoke against these measures. He stated that he did not feel that the Public Utilities had an advantage because the R.E.A.'s paid no taxes. Public Utilities pay 10% to the State of North Dakota. He stated that in order to bring power to a fire works stand a hearing would have to be held in the same manner as is necessary for a large power hookup. He questioned why municipal utilities were not included in this bill.

Bob Nygaard spoke against these bills. He is from Ottertail Power Company.

Frank S. Schumacker spoke briefly on that the fact that the R.E.A.'s were grass roots people and had worked hard to get where they were and needed this legislation

Harold Anderson, Attorney Montana Dakota stated that the piracy is not just a one way street and that the R.E.A.'s are also guilty. He sighted a case of a school in Sterling and Driscol where the R.E.A.'s had come in and brought to the schools.

The Committee on Industry, Business and Labor met at 9:15 A.M., Thursday, February 25th in Room G-2. All members were present with the exception of Senator Baeverstad.

House Bill No. 724, relating to certificates of public convenience and necessity and complaints thereto and for limitations on electric public utilities serving customers in designated areas was taken up and Senator Forkner moved we dispense with the reading; seconded by Senator Strinden; motion carried. Rep. Ted Lang appeared stating this legislation was introduced to take care of territorial problems. Rep. Henry Lundene, Walsh County, Vice President of a rural electric coop at Grand Forks appeared for the bill. He stated he also was a sponsor of this legislation which he feels is long overdue in North Dakota; many coops have had territorial disputes with other power companies and believe this will put an end to some of these disputes. He further stated some have established reasonable, workable agreements. He further stated the coops will continue to serve the rural area and the purpose of this bill is to hold on to the rural areas that are rightfully theirs.

Senator George Rait also appeared for the bill stating that as a board member of a coop he is very much concerned with the bills before the committee; rural electric needs some designation as to where they can serve; have developed these areas and feel they should be allowed to stay in these areas; at the time the rural electric coops started there was no problem as far as territory service because it was just farmers they served and no power company was available. He added this bill is trying to define these areas where the rural electric coops should serve; only serve 1 2/10 customer per mile in the State of North Dakota, 1 5/10 in Montana and South Dakota, 2 6/10 in Minnesota; cost of building a line in 1940 to serve three customers was $720.00 per mile, this had risen to $1900.00 by 1950; concluded by saying these three bills are needed in North Dakota.

Also appearing in support of the bill was Mr. Lloyd Ernest, Basin Electric, Mr. Clifton Odegard, Rural Electric Coop. Assn. of Grand Forks, Mr. Ray Schaff, Capital Electric Coop who read testimony prepared by Mr. Ingvald Eide, Mr. Robert Potts, Burke-Divide Electric Coop from Columbus, Mr. E. M. Arntson, Tri-County Electric Coop of Carrington, and Mr. Clarence Welander, Chairman of the North Dakota Assn. of Rural Electric Coops. A prepared statement by each of these individuals is attached herewith.

Mr. Alfred A. Thompson, an Attorney from Bismarck representing the North Dakota Rural Electric Cooperatives also appeared for the bill. He stated this bill was introduced for the purpose of enabling the Public Service Commission to act as an autonomous body; section 2 was added to put teeth into the present law; are attempting to remove from the law those provisions that will allow the power company to operate under what is called the grandfather clause; unless they are already operating in the area they cannot pick up territory outside of where they have served. Section 3 limits power to provide the utility to go before the Public Service Commission to request certification of convenience and necessity from the Commission without the consent of the rural electric cooperative; this language does not inhibit the growth of the private power company; the private power company can continue to grow but the cooperative cannot be forced to remove its lines from that area of growth; we do not in any manner attempt to affect those agreements as they may presently exist but if the power company refuses to enter into an agreement the intention is to create if necessary forced agreements. Mr. Thompson had a chalk-talk and the committee members then asked various questions about the sketches he drew as examples of what this bill will prevent if passed.

Mr. Leon Birdsell and Mr. Melford Hanson appeared for the bill and elaborated on many of the situations which have occurred using a large scale map on the City of Minot and surroundin territory.

Mr. William R. Pearce, Bismarck Attorney representing Montana-Dakota Utilities Co. opposed the bill stating the private power company in a great many ways assisted the coops and still assists them where they do not own a transmission line; the coop no longer is a group of people furnishing electricity to themselves but have grown to an electric supplier; distinction between a private company and a coop is getting finer and finer; disputes are inevitable when you have two suppliers competing for service of urban areas; do not think the legislature is on either side but are on the side of the public and that is as it should

The Committee on Industry, Business and Labor met at 9:45 A.m., March 3rd in Room G-2 for an executive session. All members were present except Senator Baeverstad.

House Bill No. 611. Senator Mutch moved for indefinite postponement, seconded by Senator Forkner, motion carried, 3 voting nay.

House Bill No. 613. Senator Sinner moved that we amend the bill (copy of amendments attached hereto), motion was not seconded. Senator Mahoney moved indefinite postponement, seconded by Senator Forkner, motion carried. A divided report was asked for. Those for indefinite postponement were Senators Hernett, George, Forkner, Strinden and Mahoney. Those for amending and do pass were Senators Sinner, Witteman and Ecker.

House Bill No. 639. Senator Forkner moved indefinite postponement, seconded by Senator George, motion carried, 2 voting nay and a divided report was called for. Those voting for indefinite postponement were Senators Hernett, George, Forkner, Strinden and Mahoney. Those for amend and do pass were Senators Sinner, Witteman and Ecker.

House Bill No. 703. Senator Sinner moved for indefinite postponement for the reason that if this bill passes along with Senate Bill 300 there will be conflicting laws resulting, seconded by Senator George, motion carried, 1 nay.

House Bill No. 753. Senator Mahoney moved to amend the bill (copy of amendments attached) seconded by Senator Strinden, motion carried. Senator Mahoney moved the bill do pass as amended, seconded by Senator Strinden, motion carried unanimously.

House Bill No. 754. Senator Sinner moved to amend the bill (copy of amendments attached) seconded by Senator Mahoney, motion carried. Senator Sinner moved the bill on a do pass as amended, seconded by Senator Mahoney. No vote was taken as a substitute motion was made for indefinite postponement, seconded by Senator Forkner (motion made by Senator Strinden) motion carried and a divided report was called for. Those voting for amend and do pass were Senators Hernett, Sinner, Ecker, Mahoney and Witteman. Those for indefinite postponement were Senators Forkner, Strinden, Mutch and George.

House Bill No. 724. Senator Strinden moved the bill be amended (copy of report attached herewith) seconded by Senator Mutch, motion lost, 4 ayes and 5 nays. A substitute motion was made for indefinite postponement by Senator Strinden, seconded by Senator Mutch and the motion carried and a divided report was called for. Those voting for indefinite postponement were Senators Forkner, Mutch, Hernett, Strinden and Mahoney. Those voting for an amend and do pass report were Senators Sinner, George, Ecker and Witteman.

House Bill No. 726. Senator Sinner moved a do pass, seconded by Senator Ecker. Senator Strinden moved a substitute motion for indefinite postponement, seconded by Senator Mutch, motion carried and a divided report called for. Those voting for indefinite postponement were Senators Hernett, Forkner, George, Strinden and Mahoney. Those voting for a do pass were Senators Witteman, Ecker and Sinner.

House Bill No. 727. Senator Mutch moved for indefinite postponement, seconded by Senator Forkner, motion carried, 4 voting nay. A divided report was not called for.

House Bill No. 589. This bill had been laid over one day and was amended further at this time (copy of report attached). Senator Sinner moved the amendments, seconded by Senator Mahoney. Action taken Saturday, February 27th was rescinded. Senator Mutch moved that the bill be indefinitely postponed, seconded by Senator Forkner, motion carried, a divided report was called for. Those voting for the report to amend and do pass were Senators Sinner, Mahoney, Ecker and Witteman. Those voting for indefinite postponement were Senators Hernett, Forkner, Strinden, Mutch and George.

The committee adjourned at 12:30 P.M.

Lois Scherr, Clerk

CHAPTER 10-10. CIVIC CENTER

10-10-01. Control of Civic Center. The civic center is under the supervision and control of the board of city commissioners and is subject to such regulations as the board shall from time to time direct.

10-10-02. Alcoholic Beverages. The board may, pursuant to the provisions of Chapter 5-01, issue a license to a qualified person for the sale of alcoholic beverages at the Civic Center. Otherwise, alcoholic beverages may be sold or dispensed pursuant to special permits for sale of alcoholic beverages at designated locations issued by the board.

CHAPTER 10-11. FRANCHISES

10-11-01. Franchises Required. Except as otherwise provided by law, a person, firm, corporation or utility may not place or maintain any permanent or semipermanent fixtures, including poles, wire, cable, conduit, or any other medium used to transmit or transport electric or electronic signals, natural gas or other materials, in, over, upon or under any street or public place without a franchise to do so from the city. A franchise may be granted by resolution of the Board of City Commissioners.

10-11-02. Term. An exclusive, perpetual or irrevocable franchise may not be granted. A franchise may not be granted for a term exceeding twenty years.

10-11-03. Public Hearing. Before any franchise is granted, the Board of City Commissioners shall hold a public hearing. Notice of the hearing must be published at least once in the official newspaper not less than ten days prior to the date of hearing.

10-11-04. Renewals and Extensions. A franchise may not be extended, but shall expire at the end of the term for which granted. A franchise may be renewed only in the same manner and with the same limitations applicable to the grant of a new franchise, except that cable franchises may be renewed subject to the provisions of applicable federal law, as provided by section 10-11-08.

10-11-05. Application Required; Fees. Before any franchise is granted, the applicant shall file with the city auditor an application containing such information as may be necessary and helpful to act on the application. All applications for a franchise must be accompanied by a non-refundable application fee of $500.00. A reasonable franchise fee for use of public streets, rights-of-way and other public

grounds and other costs may be assessed at the discretion of the Board of City Commissioners. Any franchise fee must be fair and uniform for all franchises of the same class or category.

10-11-06. Cable Communications System - Definition. Cable system means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include: (a) a facility or combination of facilities that serves only to retransmit the television broadcast stations; (b) a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way; (c) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or (d) any facilities of any electric utility used solely for operating its electric utility system.

10-11-07. Cable Franchise Required; Term. Except as otherwise provided by law, a person, firm or corporation may not place or maintain any permanent or semipermanent fixtures, in, over, upon or under any street or public place, for the purpose of operating a cable system, without a franchise to do so from the city. A franchise must be in compliance with applicable federal and state law. Every resolution granting a franchise shall contain all of the terms and conditions of the franchise, except as otherwise provided herein. A cable communication system franchise may not be for a term exceeding fifteen years.

10-11-08. Procedure for Granting Cable Franchises; Renewal.

1. The city reserves the right to solicit proposals from all interested persons to provide cable service within the city. The city shall seek to ensure that any existing services do not lapse, in order that subscribers and other users will have continuous service. The following process shall apply:

   a. The City shall solicit proposals to provide cable service through a request for proposals which shall be available for response by any interested party.

   b. Prior to the solicitation of proposals, the Board of City Commissioners shall approve all required

Debates

of the

North Dakota Constitutional Convention

of 1972

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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 recided 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.

Delegate 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

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NORTH DAKOTA

CONSTITUTIONAL CONVENTION

of 1972

Two Volumes

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WILLISTON

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Stanley Saugstad, *2nd Vice President*

MINOT

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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 electrics 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:

CHIEF CLERK GILBREATH: Style and Drafting Redraft Proposal No. 5-7, introduced by Committee on Style and Drafting, which proposal is a redraft of Committee Proposals Numbered 1-12 and 1-101:

"Be it resolved by the North Dakota Constitutional Convention that a new article to the constitution of the state of North Dakota which pertains to political subdivisions, be created.

"SECTION 1.) A new article to the constitution of the state of North Dakota is hereby created to read as follows:

"ARTICLE —
"POLITICAL SUBDIVISIONS

"Section 1. PURPOSE.

"The purpose of this article is to provide for maximum local self-government by all political subdivisions with a minimum duplication of functions."

DELEGATE UNRUH: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Unruh.

DELEGATE UNRUH: Mr. President:

I now move that in line 6 on page 1 the Roman numeral "VII" be inserted.

VICE PRESIDENT SAUGSTAD: Is there a second?

DELEGATE TUDOR: Second.

VICE PRESIDENT SAUGSTAD: Second by Dr. Tudor — Delegate Tudor.

We are on the motion of Delegate Unruh to insert the Roman numeral "VII" after the title "ARTICLE" in line 6 on Proposal 5-7.

I will now put the question. All in favor signify by saying "aye;" opposed "no." The "ayes" have it. The motion carried, and the amendment is adopted.

We shall now — any further discussion?

Hearing none, we shall go to Section 2.

CHIEF CLERK GILBREATH: **"Section 2. POLITICAL SUBDIVISIONS.**

"The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law."

VICE PRESIDENT SAUGSTAD: Any discussion?

Hearing none, we shall go to Section 3.

CHIEF CLERK GILBREATH: **"Section 3. COUNTIES.**

"The several counties of the State of North Dakota as they now exist are hereby declared to be counties of the State of North Dakota."

VICE PRESIDENT SAUGSTAD: Any discussion?

Hearing none, we shall go to Section 4.

CHIEF CLERK GILBREATH: **"Section 4. COUNTY SEATS.**

"The legislative assembly shall provide by law for relocating county seats within counties, but it shall have no power to remove the county seat of any county."

VICE PRESIDENT SAUGSTAD: Any discussion

Hearing none, we shall move to Section 5.

CHIEF CLERK GILBREATH: **"Section 5. BOUNDARIES.**

"Methods and standards by which all or any portion of a county or counties may be annexed, merged, consolidated, reclassified or dissolved shall be as provided by law. No portion of any county or counties shall be annexed, merged, consolidated or dissolved unless a majority of each affected county voting on the question so approve."

VICE PRESIDENT SAUGSTAD: Any discussion?

Hearing none, we shall move to Section 6.

CHIEF CLERK GILBREATH: **"Section 6. HOME RULE.**

"The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any county or city until submitted to the electors thereof and approved by a

DELEGATE AUBOL: Section 9 refers to — refers back to Section 6. Talks about home rule, refers back to Section 7 which talks about optional forms of government, it refers back to Section 8 which talks about the structure of a county government as we now know it.

Now in Section 8 we have specifically provided that the Legislature will set up referendums and elections two years after this Constitution is adopted and every ten years thereafter. But in Section 6 and Section 7 we do not specify how a question of home rule will be put on the ballot, or Section 7 we do not specify how a question of optional forms will be put on the ballot. And so by adding that sentence at the end of Section 9 we are saying that the Legislature can provide by law for the question of home rule being put on the ballot or for the question of optional forms to be put on the ballot. We did not feel, I don't think, that "as otherwise provided by law" had anything to do with the Legislature's power to increase the number of petition signatures required. Am I correct, Chairman Longmire?

VICE PRESIDENT SAUGSTAD: I believe Delegate Engelter and then Delegate Pearce.

DELEGATE ENGELTER: Mr. President, Fellow Delegates:

I think what Clare has stated is in essence correct. My feeling with regard to the committee action was that there would be two ways referendum or the county commissioners could place something on the ballot or the people could petition. And there are many other ways for getting things on the ballot. And this is the manner of placing questions on the ballot, is what the Legislature would be dealing with here. If they felt a different method would be used, they could provide a different method. But what we wanted to do in this section is at least guarantee these two ways to placing questions on the ballot.

VICE PRESIDENT SAUGSTAD: Delegate Pearce.

DELEGATE PEARCE: Mr. President:

I offer a free legal opinion. Free legal opinions are reputedly worth zero. As I see it, these two first — the word "or" in line 12 makes it a complete alternative. And whatever the Legislature did would not destroy the efficiency of lines 6 through 11. If instead of the words "or as" you said "unless", then the Legislature could eliminate the first paragraph as we have it. So my opinion, therefore, is that as presently phrased you have not in any way jeopardized the provisions provided in the paragraph up to that point even if, as Delegate Engelter says, the Legislature gives you some other alternative, you still have this one.

VICE PRESIDENT SAUGSTAD: Any further discussion?

Hearing none, we will move on to Section 10.

CHIEF CLERK GILBREATH: "**Section 10. SERVICE AGREEMENTS.**

"Agreements, including those for cooperative or joint administration of any powers or functions, may be made by any political subdivision with any other political subdivision, with the state or with the United States, unless otherwise provided by law or home rule charter. A political subdivision may transfer to the county in which it is located any of its powers or functions unless prohibited by law or home rule charter, and may in like manner revoke the transfer."

VICE PRESIDENT SAUGSTAD: Any discussion?

Hearing none, we will move on to Section 11.

CHIEF CLERK GILBREATH: "**Section 11. MUTUAL SERVICES.**

"State agencies or political subdivisions may enter into mutually beneficial service arrangements with Indian tribes."

VICE PRESIDENT SAUGSTAD: Any discussion?

DELEGATE LONGMIRE: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Longmire.

DELEGATE LONGMIRE: I want to move an amendment, and then I'll try to explain all of the ramifications why this led up to it and why a copy is not at the desk.

This is a very simple amendment. And after the word "tribes" on line 24, the Style and Drafting Proposal, insert the words "without infringement on the sovereignty of the tribes".

VICE PRESIDENT SAUGSTAD: Second by Delegate Nicholas.

Now Delegate Longmire has asked that the Rules be suspended so that we might adopt a substantive amendment. Now because this requires a two-thirds vote, I shall have the Clerk open the board so that you may register your vote. Saugstad says "aye".

Has everyone voted? Does anyone wish to change his vote? If not, the board will be closed. We will take the record.

How does Dawson vote?

DELEGATE DAWSON: "Aye."

VICE PRESIDENT SAUGSTAD: Dawson votes "aye".

CHIEF CLERK GILBREATH: Would you flip his key?

VICE PRESIDENT SAUGSTAD: The motion prevails, 82 "ayes". So the motion to suspend the Rules has been adopted.

Now, Delegate Longmire, did you include in your motion the adoption of this amendment, or do you want to move now for the adoption of the amendment?

DELEGATE LONGMIRE: I included it in there. I don't think the secretary got it all, but it was in my motion that way.

CHIEF CLERK GILBREATH: We got it.

VICE PRESIDENT SAUGSTAD: Included in Delegate Longmire's motion is that on page 3, line 24, following the word "tribes" insert the following: "without infringement on the sovereignty of the tribes". And that is on the Redraft Proposal 5-7, Section 11.

Now Delegate Longmire.

DELEGATE LONGMIRE: Mr. President:

In order that there be no technical question on this, I move for the adoption of this amendment as indicated.

VICE PRESIDENT SAUGSTAD: Yes. I believe this would be a separate motion. And we are now on the motion of Delegate Longmire, I believe this is seconded by Delegate Nicholas, that this body adopt the proposed amendment.

Is there any further discussion? We are now on the main question of the adoption of this proposed amendment. All in favor signify by saying "aye;" opposed "no." The Chair rules the "ayes" have it. And the amendment is adopted. And the new language then will be inserted in Section 11.

DELEGATE UNRUH: Mr. Chairman.

VICE PRESIDENT SAUGSTAD: Delegate Unruh.

DELEGATE UNRUH: I didn't hear if you put a comma in place of the period. If he didn't, I'm going to have to move it. Put a comma in the place of the period at the end of line 24.

CHIEF CLERK GILBREATH: We never took the period out.

DELEGATE LONGMIRE: No.

CHIEF CLERK GILBREATH: He just moved, said: "Indian tribes without infringement on the sovereignty of the tribes."

DELEGATE UNRUH: Period.

CHIEF CLERK GILBREATH: Then the period.

VICE PRESIDENT SAUGSTAD: Next, if there is no further discussion, we will next have under consideration Section 12.

CHIEF CLERK GILBREATH: **"Section 12. UTILITY FRANCHISES.**

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

DELEGATE LONGMIRE: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Longmire.

DELEGATE LONGMIRE: We have just a little minor amendment on that; certainly nothing substantive.

CHIEF CLERK GILBREATH: Proposed amendment to Redraft Proposal 5-7.

On page 3, line 26, delete the word "body" and insert in lieu thereof "board".

VICE PRESIDENT SAUGSTAD: Is there a second to that motion?

DELEGATE LITTEN: Second.

VICE PRESIDENT SAUGSTAD: Delegate Litten.

Any further discussion?

DELEGATE PETERSON: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Peterson.

DELEGATE PETERSON: No, I don't want to speak on the amendment.

VICE PRESIDENT SAUGSTAD: All right. Delegate Baker.

DELEGATE BAKER: Mr. President:

There are some governing bodies of cities which are not called "boards".

VICE PRESIDENT SAUGSTAD: Delegate Longmire.

DELEGATE LONGMIRE: Mr. President:

The committee agrees wholeheartedly with Delegate Baker. However, in these sections throughout we have been referring to it now as "board" rather than "body", and we thought that as a matter of uniformity, why, we should continue to use that language.

VICE PRESIDENT SAUGSTAD: Is there any further discussion?

We are on the motion of Delegate Longmire to further amend in Section 12, line 26, to delete the word "body" and insert the word "board", I believe. Yes.

Hearing no further discussion, I will now put the question. All in favor signify by saying "aye;" opposed "nay." The "ayes" have it, and the motion carried, and the amendment is adopted.

Now Delegate Longmire.

DELEGATE LONGMIRE: Mr. President:

As the delegates will note, this section was not originally in our article. The Style and Drafting Committee put it in there. We felt it was a good decision. And in grouping these sections this probably was the place where it would fit in better than in other sections. However, our committee has not given the close study to this that the Education and Public Lands Committee has given. We approved this for style and drafting only. We feel that it would be up to the Drafting Committee to give us some light on whether or not there are substantive changes in this section as it came from the committee in the first place. And so we yield to that committee for that purpose.

VICE PRESIDENT SAUGSTAD: Delegate Meidinger.

DELEGATE MEIDINGER: Mr. President:

The Committee on Education took a vote and moved that the Style and Drafting Committee did not substantially change the meaning of what we had done previously. There was a difference of opinion, and I could illustrate it something like this: The politician who was running for office said on a certain issue he was asked how he felt about it and he said, "Well, I will tell you, about half of my friends are for it and half are against it. And, doggone it, I'm for my friends."

VICE PRESIDENT SAUGSTAD: Delegate Peterson.

DELEGATE PETERSON: Mr. President:

I don't — I wasn't at the committee meeting, but it was my understanding that when Style and Drafting do something they just merely change a few commas and probably a word or two. And in my opinion this section, Section 12, is considerably changed. I think they've made a substantial change from 101. And when you look at 101 and you look at Section 12 and you look at 139 in the old Constitution and then you also realize that at one time on the floor we deleted it completely, I'm becoming increasingly confused. And I definitely feel that it has certainly been changed. I would like to ask the Style and Drafting what their explanation is.

VICE PRESIDENT SAUGSTAD: Anyone from the Style and Drafting Committee who will answer Delegate Peterson's question?

DELEGATE UNRUH: Delegate Peterson, Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Unruh.

DELEGATE UNRUH: We felt that in reading the language as is in your pink sheet, 101, it was confusing to read. You start off by saying, "No law shall be passed" and then at the tail end of it you say, "without asking the consent of the governing board". And the committee felt that this was in a way asking that the city apply to the Legislature before they passed a law. And this was our feeling; that it was a confusing way of writing what we really felt was the statement that we came out with in Section 12 on your green sheet where we put it positively giving the city a right to franchise within city limits. Really that's what the whole measure speaks to. I think it is stated clearly, and I don't think we've monkeyed with the aspect of it that the city does have the right. But we did feel that the language as originally came through the body was confusing. That's why we did it. It was no attempt at all to make a substantive change.

VICE PRESIDENT SAUGSTAD: Any further discussion?

Delegate Cart.

DELEGATE CART: Mr. President:

I want to reiterate what Delegate Unruh has stated. When you go back to old Section 139 in the original Constitution, that did spell out certain utilities that were then in existence in 1889. Now the committee, before it comes to Style and Drafting, had eliminated that language and had broadened it to cover all the public utilities and probably any that will be developed. And we just rearranged that wording and kept the responsibility for issuing a franchise at the local level where it has always been.

DELEGATE OMDAHL: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Omdahl.

DELEGATE OMDAHL: I think there has been the revolutionary change in the concept here that it's not very readily discernible. But when you read the new Section 12, "The power of the governing body of a city to franchise . . . shall not be abridged . . ." —

DELEGATE PETERSON: Right.

DELEGATE OMDAHL: — it suggests the concept of inherent power in the political subdivisions which is accepted in the courts of only a couple of states. The political subdivisions are creatures of the State. And, of course, cities are less creatures than the counties and the townships, but nevertheless they are creatures and they derive their powers from the Constitution or the legislative assembly. And so we sort of have the cart backwards here. And I think that the original language in 101 is much more direct, and it doesn't suggest to the courts that there is such a thing as inherent power in the political subdivision. Because it says, "No law shall be passed by the legislative assembly". Suggesting — suggesting that it is the legislative assembly that's being restricted here. And I would think that the original language would be much better to preserve. And I don't really see where it is very confusing, because the Legislature would pass a general law and the law would be effective only when the city would give its consent whenever it wanted to utilize the law. And so it isn't a matter of the city saying, "Yes, Legislature, you can do this." The Legislature just passes a general law and cities that want to use it must comply in a certain fashion. I think that there's been a major substantive change, and I would hate to have the Constitution suggest to the courts that there is such a thing as inherent power in the political subdivisions.

And it pains me, after my lecture of yesterday, to suggest that we spend eleven dollars to vote on this separately, but I do think that we should vote on this separately, Section 12, that because of the substantive change. And I think that we should keep in mind that we are not voting for or against the concept, we are only voting to reject the report of the Committee on Style and Drafting on that one section and replacing it then with the old language that they changed. I would ask that the Section 12 be separated.

VICE PRESIDENT SAUGSTAD: That request shall be granted, that Section 12 will be voted on separately.

Delegate Wallin.

DELEGATE WALLIN: Mr. President:

I did check with the Attorney General's office on this. And Mr. Paul Sand's opinion was that there wasn't any substantive change in this. He did say that the way this is written now, that the legislative assembly would never be able to change this or abridge the right of the city.

DELEGATE SANSTEAD: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Sanstead.

DELEGATE SANSTEAD: Mr. President.

After the committee had noted the new language, and at the suggestion of Delegate Devine, who you will recall worked very hard on this section, the original section, I did contact the REC people who had originally been very unhappy with Article 17. And they indicated — I talked to a couple of their — I suppose you'd say managerial and legal experts, but they suggested they did not feel this was any change, either; it was just as obnoxious as the old language.

VICE PRESIDENT SAUGSTAD: Delegate Wallin.

DELEGATE WALLIN: Mr. President:

Mr. Sand did check this against the recent court decision, **MDU** v. **REA,** in Crosby. This decision came out December 17th. And he said that this reading here will not in any way be changed by that question.

DELEGATE DEVINE: Question.

VICE PRESIDENT SAUGSTAD: Is there any further discussion?

DELEGATE LONGMIRE: No question on this — no discussion. However, on the matter of procedure I would suggest that we vote on the Sections 1 through 11 of this and handle it in the customary manner, and then we could come to Section 12 and vote on that. As I understand it, that question has been separated.

VICE PRESIDENT SAUGSTAD: We're waiting for a motion from Delegate Unruh.

DELEGATE UNRUH: Mr. Chairman:

I now move that Sections 1 through 11 of Style and Drafting Redraft Proposal No. 5-7 be deemed properly re-engrossed and placed on the eleventh order.

VICE PRESIDENT SAUGSTAD: Is there a second?

DELEGATE STANTON: Second.

VICE PRESIDENT SAUGSTAD: Second by Delegate Stanton.

We are on the motion of Delegate Unruh that Section 1 through Section 11 be deemed properly reengrossed and they be placed on the eleventh order for second passage.

Delegate Unruh, the desk force suggests that you include Section 12 in having it deemed properly reengrossed.

DELEGATE UNRUH: Thank you. I thought you had severed it. But I think it would be better to include 1 through 12. Thank you.

VICE PRESIDENT SAUGSTAD: That's approved by your second.

Delegate Burke, did you wish the floor before we vote on this motion?

DELEGATE BURKE: Mr. President:

I would like to, if I may, go back to Section 9. Because I don't believe the intent has yet been brought up on this floor. And I believe that it may be of concern to those who wish to preserve the form of government in the county or the offices. This is of vital concern; not particularly to me, but it is to a lot of people. And if you wish to limit the methods, then perhaps "or as otherwise provided by law" could be changed to "or as otherwise provided in this article", which would definitely limit the means by which this could be done. Because as it is now we'll have to go home and explain that this is wide open, that the Legislature may do and propose practically anything on the form of government or the elimination of county offices.

VICE PRESIDENT SAUGSTAD: Delegate Longmire.

DELEGATE LONGMIRE: Well, Mr. President, the committee agreed wholeheartedly with the observations that were made by Delegate Pearce in their discussion of it. We're talking here strictly about one thing: The referendum; how

to get these questions of whether or not a county shall do this or that or eliminate some of its officers or some of its services or home rule to the people. And we agree with Delegate Pearce that we have provided two ways they can get it on for a vote; the Legislature could provide a third way or a fourth way if they want to, the way this is set up. What we are wanting to do, what our intent was, was to make it easy for counties to change their services, to change their territory, or to annex others or to eliminate certain offices and so forth. We don't think that this "as provided by law" has anything to do with the number of signatures required if we go that route. And we put an easy way there where the people could go that route. And we think they can always go that route even though this "or as provided by law" is included. We feel that if the Legislature puts in a third route and say that they can get it on the ballot this way, fine. That's up to them. But the people will still have this route that they have to get fifteen percent signers and put it on the ballot. I don't think we need to do anything in regard to this wording myself because we — we don't want to limit the way the people can get this on for a vote.

DELEGATE LITTEN: Question.

DELEGATE OMDAHL: Mr. Chairman.

VICE PRESIDENT SAUGSTAD: Delegate Omdahl.

DELEGATE OMDAHL: I've decided I'd rather save eleven dollars and I withdraw my request for a division.

VICE PRESIDENT SAUGSTAD: Does that meet with your — no, that was just a personal request. Then at the request of Delegate Omdahl — Omdahl has withdrawn his request that Section 11 be voted on separately.

DELEGATE ROSENDAHL: Mr. Chairman.

VICE PRESIDENT SAUGSTAD: Delegate Rosendahl.

DELEGATE ROSENDAHL: Does that mean that we are going to be voting on the whole document then as one?

VICE PRESIDENT SAUGSTAD: Yes.

DELEGATE ROSENDAHL: Then I would like to ask a request that we vote on it separately. Because I definitely can go along with all of that proposal, but that last one, I cannot vote for that one. Because that is just discriminatory, and I can't go along with it.

VICE PRESIDENT SAUGSTAD: That request then will be granted, that Section 12 will be voted on separately.

We are on the motion of Delegate Unruh.

Now Delegate Lander. Delegate Lander.

DELEGATE LANDER: Mr. President:

I was going to wait, but just in case I don't get it out fast enough afterwards, I will do it now.

Very reluctantly, because of the cost, I would like to request a division on Section 11 for the reason that those of us who did not approve of the substantive change will otherwise have had no opportunity in this Convention to have a recorded vote on our thought on that particular substance which was reintroduced this morning.

VICE PRESIDENT SAUGSTAD: At the request of Delegate Lander, Section 11 will be voted on separately.

Now we're back on the motion of Delegate Unruh that Proposal 5-7 be deemed properly re-engrossed and be placed on the eleventh order for second passage.

All — I'll put the motion. All in favor signify by saying "aye;" opposed "nay." The "ayes" have it.

And now we have before us Proposal 5-7. And we will be — the first time we vote we will vote on Sections 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

Is there any discussion? Hearing none, the board will be opened, you may record your vote. Saugstad votes "aye".

Has everyone voted? Does anyone wish to change their vote? If not, the board will be closed and the Clerk will take the record.

The record discloses 94 "ayes," 1 "nay," three absent and not voting. And, therefore, Proposal 5-7, Sections 1 through 10, inclusive, has been adopted.

Next we shall have under consideration Section 11 of Proposal 5-7.

DELEGATE LITTEN: Question.

DELEGATE KWAKO: Question.

VICE PRESIDENT SAUGSTAD: Hearing no discussion, the board will be opened and you may record your vote. Saugstad votes "aye".

Has everyone voted? Does anyone wish to change their vote? If not, the board will be closed. The Clerk will take the record. The record discloses 75 "ayes," 19 "nays," four absent and not voting. Therefore, Section 11 of Proposal 5-7 has been adopted.

Next we shall have under consideration Section 12 of Proposal 5-7.

Delegate Hendrickson.

DELEGATE HENDRICKSON: Mr. Chairman:

May I ask a question? If this is voted down as proposed by Style and Drafting, it comes back to Style and Drafting, doesn't it? And then do we get another chance to try to make it less obnoxious? I know one of the delegates mentioned it is equally as obnoxious as when it started; do we get another chance at it to see if we can fix it up?

VICE PRESIDENT SAUGSTAD: The consensus of opinion is that should this be voted down, this is Section 12, that the — the original — then we would be back on the original form of Section 12, I think, which is 1-101. You see, we have adopted, we have passed, Section — Committee Proposal 1-101.

Any further discussion? The key will be opened and you will record your vote. Saugstad votes "aye".

Has everyone voted? Does anyone wish to change their vote? If not, the board will be closed, and the Clerk will take the record. The record discloses 60 "ayes," 35 "nays," three absent and not voting. Therefore, Section 12 of Proposal 5-7 has been adopted.

Are there any announcements?

DELEGATE HAUGEN: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Haugen.

DELEGATE HAUGEN: I would like to remind the members of the Finance and Tax Committee of the meeting immediately following recess. We're all supposed to grab something to eat and bring it with us.

DELEGATE BYRNE: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Byrne.

DELEGATE BYRNE: I wll remind the Committee on Coordination and Transition we have a luncheon meeting in Room G-5 and G-6 immediately after recess.

VICE PRESIDENT SAUGSTAD: Delegate Dawson.

DELEGATE DAWSON: Ballot committee will be meeting in the west balcony during recess.

VICE PRESIDENT SAUGSTAD: There is an announcement from the desk.

CHIEF CLERK GILBREATH: Would you please turn in your vote on alternate proposals either to the pages or up at the desk so we can get them all in up to the committee?

Delegate Warner would like to announce that he has three members af the Richland County Board of County Commissioners; John Lingen, John Hintz and Arthur Johnson in the gallery today.

VICE PRESIDENT SAUGSTAD: Any further announcements?

We will now stand recessed until 1:30.

(The Session recessed at 12:32 P.M. until 1.30 P.M., the same day.)

AFTERNOON SESSION

(The Plenary Session continued at 1:40 P.M., Thursday, February 10, 1972, as follows:)

PRESIDENT WENSTROM: The Convention will please come to order.

Has everyone voted? Does anyone wish to change their vote? If not, the board will be closed and the Clerk will take the record.

The record indicates 80 "ayes," 9 "nays," nine absent and not voting. Therefore, Alternate Proposal 4-1 has been passed on second reading or second passage.

DELEGATE RUNDLE: Mr. President, did my vote show? It's so seldom I vote that way, I'd like to have it show.

VICE PRESIDENT SAUGSTAD: I'll ask.

DELEGATE RUNDLE: It didn't light up.

CHIEF CLERK GILBREATH: No. It shows absent and not voting.

DELEGATE RUNDLE: I voted "yea."

VICE PRESIDENT SAUGSTAD: I'm sorry, but — had you pushed the — had you pushed your switch, Delegate Rundle?

DELEGATE RUNDLE: Yes. And then I reached over and pushed the other guy's switch and my switch went off. (Laughter)

VICE PRESIDENT SAUGSTAD: Did you get the message? (Laughter)

Unless you would request a — that we vote over — it's too late to ask that at this point.

DELEGATE LONGMIRE: Mr. President.

VICE PRESIDENT SAUGSTAD: Delegate Longmire.

DELEGATE LONGMIRE: It's so seldom that Delegate Rundle votes green. I would like to request that we vote over, to give him that privilege.

DELEGATE OMDAHL: Second.

VICE PRESIDENT SAUGSTAD: Delegate Longmire, and seconded by Delegate Omdahl, has moved that we vote over. All in favor signify by saying "aye;" opposed "nay." The "ayes" have it. The board will be opened and we will cast our votes again. If you vote "aye," you're voting for. Saugstad votes "aye." Wenstrom votes "aye."

Has everyone voted? Does anyone wish to change their vote? If not, the board will be closed and the Clerk will take the record.

The record discloses 83 "ayes," 10 "nays," five absent and not voting. Therefore, Alternate Proposal 4-1 passed on second reading — second passage.

Are there any immediate announcements? We're about to take a short recess.

The Calendar Committee, including Delegates Dawson — Chairman Dawson and Unruh will meet in President Wenstrom's office. There's one announcement from the desk.

CHIEF CLERK GILBREATH: The State Treasurer's office will be open Wednesday from 8:30 to 12:00 Noon for the cashing of checks for the convenience of the delegates.

VICE PRESIDENT SAUGSTAD: We will now take a ten-minute recess.

(The Session recessed at 5:05 P.M. until 5:28 P.M., the same day.)

PRESIDENT WENSTROM: Will the Convention please come to order? The Convention will be in order.

The Chair will recognize Delegate Unruh.

DELEGATE UNRUH: Mr. President.

PRESIDENT WENSTROM: Delegate Unruh.

DELEGATE UNRUH: I didn't hear your question. (Laughter)

PRESIDENT WENSTROM: I believe you had a motion relative to some numbers.

DELEGATE UNRUH: Yes. I gave it to Clerk Gilbreath. Please read it for me.

CHIEF CLERK GILBREATH: The Style and Drafting Committee recommends no further action on the following proposals for the reason that each proposal has now been incorporated in a Style and Drafting Redraft Proposal now passed by the Convention on second passage; that further reconsideration on amendment on any proposal passed on first reading be limited to consideration of said proposal as it is now incorporated in the Redraft Proposal passed on second reading.

That the proposals on which no further action shall be taken are as follows:

Committee Proposals Numbered 1-1, 1-10, 1-11, 1-12, 1-13, 1-14, 1-15, 1-16, 1-18, 1-19, 1-20, 1-23, 1-25, 1-26, 1-27, 1-28, 1-29, 1-30, 1-32, 1-33, 1-34, 1-36, 1-37, 1-38, 1-39, 1-40, 1-43, 1-44, 1-45, 1-46, 1-47, 1-48, 1-49, 1-53, 1-57, 1-58, 1-59, 1-60, 1-62, 1-63, 1-64, 1-65, 1-66, 1-67, 1-68, 1-70, 1-71, 1-72, 1-73, 1-74, 1-75, 1-76, 1-77, 1-78, 1-79, 1-80, 1-82, 1-85, 1-87, 1-89, 1-91, 1-92, 1-96, 1-97, 1-98, 1-99, 1-100, 1-101, 1-102, 1-104, 1-105, 1-106, 1-107, 1-108, 1-109, 1-110, 1-111, 1-112, 1-113, 1-115, 1-116, 1-118, 1-119, 1-120, and Delegate Proposals Numbered 2-23 and 2-26.

PRESIDENT WENSTROM: Do we have a second.?

DELEGATE GEELAN: Second.

PRESIDENT WENSTROM: Seconded by Delegate Geelan.

DELEGATE UNRUH: Mr. President, I attempted to say "Bingo!" but I don't think it would go too well this evening. (Laughter)

Mr. President and Delegates: This is a reworking of what we were attempting to do yesterday, where we used the words "indefinite postponement," and quite a bit of opposition was generated, and what we're doing now is not indefinitely postponing these — just recommending no further consideration be given to these numbers by the old proposal number and, hence, you will be referring to the Redraft 5-1, 2 through 15. That's the only thing when you go to amending those, will be the areas that you will refer to, rather than to the original committee proposals. It's a housecleaning resolution only, and it needs to be done.

PRESIDENT WENSTROM: Any further discussion?

The question is on the adoption of the motion as offered by Delegate Unruh and seconded by Delegate Geelan. Because of the nature of this particular qustion and in that we do now wish to have a complete record on what happened to these particular proposals and the numbers thereof, I'm going to ask that we have a recorded vote, so we'll tie it all together. So the Clerk will open the key. Delegate Hendrickson.

DELEGATE HENDRICKSON: Now is this the step we're taking to make all our proposals into one document?

PRESIDENT WENSTROM: This is — from here on in, any action that we take, we will be not referring to these committee proposal numbers; we will be referring to the number as it is now in the Redraft Proposals.

DELEGATE HENDRICKSON: I understand that; but is this our first step to make them all into one document, instead of having separate proposals before us?

PRESIDENT WENSTROM: No, I don't believe it is, Delegate Hendrickson. I think that step was taken several days ago when we first started to work. As we determined it at that time, the green sheets — remember? That came out of Style and Drafting, and at that time is the time that we started consolidating and coming out with the articles that we have been considering. So I think that was the time that we started in summary.

So the question is on the adoption of the motion as offered by Delegate Unruh.

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

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

Roll call discloses 96 "ayes," there were no "nays," and two delegates absent and not voting. So the vote on the motion as recommended by Delegate Unruh and seconded by Delegate Geelan has passed.

DELEGATE UNRUH: Mr. President.

PRESIDENT WENSTROM: Delegate Unruh.

DELEGATE UNRUH: Delegates, in the very front of your books are the pink engrossed redrafts of what used to be the green sheets. Remember yesterday we mentioned that there were some coming in. We didn't know what color they were going to be. But they're now pink, and you will notice it starts with 5-1 and 5-2, and still in the margin on the left it indicates the committee proposal number, in case you get lost somewhere along the way. But these are the ones. If we're going to do any amending or reconsidering, and so on, these are the pages that you will be referring to. And we have one further amendment or motion.

CHIEF CLERK GILBREATH: The Style and Drafting Committee recommends that the Convention take no further action on the following proposals for the reason that each proposal, as passed on final reading, calls for repeal of a part of the present North Dakota Constitution, and all of these repealing proposals will be incorporated in a general repeal of the present North Dakota Constitution, which repeal will be effective should the new Constitution be adopted by the electors:

Committee Proposals Numbered 1-4, 1-22, 1-24, 1-50, 1-52, 1-54, 1-55, 1-56, 1-88, 1-93, 1-94, 1-95, and 1-103.

Delegate Unruh, Chairman.

Delegate Unruh moves that the report be adopted.

PRESIDENT WENSTROM: The question is on the adoption of the Report of the Committee on Style and Drafting. Do we have a second?

DELEGATE LITTEN: Second.

PRESIDENT WENSTROM: Seconded by Delegate Litten.

Is there any discussion? This now is the repealer sections that have gone through, and they are being — Delegate Sinner.

DELEGATE SINNER: Well, Mr. President, is it my understanding that there's an intent to combine all these into one proposal? Is that —

PRESIDENT WENSTROM: Into one repealer.

DELEGATE SINNER: Well, in the transition — according to the transition schedule that we just adopted, there is a sentence which reads: "Except as may be otherwise established by this schedule, the provisions of this Constitution shall become effective on July 1, 1973, and the provisions of the Constitution of 1889 as amended shall be repealed and of no further force and effect." And I wonder if that doesn't take care of it.

PRESIDENT WENSTROM: Well, it may, Delegate Sinner. However, we have these repealers dangling out here, that they are the result of being left out in the Committee in Style and Drafting when they were no longer incorporated into the redrafts. So, in order to take care of them and take them out of that Committee and put them in the permanent files of the Convention, why we felt that we had to have something to show what happened to all of the repealers. So that is really the purpose of this particular motion and, for the same reason that we had a roll call on the previous one, I would like to ask for a roll call on this — this repealer section, also. So, if there's no further discussion and no questions, 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.

Roll call discloses 96 "ayes," no "nays," two delegates absent and not voting. So the repealer sections have been removed on the motion offered by Delegate Unruh and seconded by Delegate Litten.

The Chair will recognize Delegate Saugstad.

DELEGATE SAUGSTAD: Fellow Delegates: The Calendar Committee has had, I think, at least three meetings today, some of which have been rather lengthy, in trying to determine the schedule for our remaining time here. At the present time, it appears that this will be — or this is tentatively what we feel will be our schedule for our remaining time:

We are going to recess very shortly and come back again this evening to continue this day's work. Now, what remains to be done today and which must be completed today is any and all reconsiderations that involve any substantive changes. We know that there are a number of pending reconsiderations. Now, we have also another — we'll have to have some further discussion on Alternate Proposal 4-1. That will be the first order of business to be taken up following our reconvening after our recess, at which time we will have eaten. Following that, when we reconvene, the first order of business will be that. Following that then, there will be — the floor is going to be open for reconsideration.

Now, the reason for limiting reconsiderations, for making substantive changes today, and it must be handled today, is that this material then, if any changes are made, must go through the Style and Drafting Committee so they can prepare and

I'm very worried about the possibility of creating a situation that either the Indian nations don't want or we don't want by having this situation in our Constitution, and I urge you to support the reconsideration.

VICE PRESIDENT SAUGSTAD: We're now on the question of the reconsideration. Because this will require a minimum of 50 votes to reconsider, I'm going to ask that the Clerk open the key so that you may record your vote.

If you vote "aye," you're voting to reconsider.

The Clerk will open the key. Saugstad votes "nay."

Has everyone voted? Does anyone wish to change their vote?

The board will be closed and the Clerk will take the ballot.

The motion to reconsider failed by a vote of 44 "ayes," 47 "nays."

Are there any announcements? We're about to declare a short recess.

We'll declare a recess for ten minutes.

(The Session recessed at 9:57 P.M. until 10:18 P.M., the same day.)

PRESIDENT WENSTROM: The Convention will please be in order.

May we have order in the Convention?

The Chair will recognize Delegate Lerberg.

DELEGATE LERBERG: Mr. President, I rise to a point of personal privilege.

PRESIDENT WENSTROM: State your privilege.

DELEGATE LERBERG: Mr. President and Fellow Delegates:

This document that we are drafting is a good document, and no one has ever heard me say, nor will I now say it, that I will not support it; however, by your failure to reconsider and express our arguments on this section which is in it, which had very little debate the other day, you have really deprived four or five thousand non-Indian citizens of the State of North Dakota of a state. I have lived in a judicial no-man's land since March of 1970. The State has no civil jurisdiction in it. The State has withdrawn their Highway Patrolmen from the area. The State does not enforce traffic regulations within the area. A State District Judge has issued an injunction against the city officials of the City of New Town, which is in this area, from enforcing any City regulations or ordinances against Indian people. There are two cities, two small communities, and twenty organized townships in this area, almost a hundred percent made up of the patent land dating back to 1912. These people, for all intents and purposes, by the failure to allow a debate on this, are people in a no-man's land, without a state.

DELEGATE GIPP: Mr. President.

PRESIDENT WENSTROM: Delegate Gipp.

DELEGATE GIPP: I'm sure we can discuss the matter here all evening. It's a highly complex — it's a highly complex—

PRESIDENT WENSTROM: Delegate Gipp, we have no question before the Convention at this time. Would you like to rise on a personal privilege?

DELEGATE GIPP: Yes, Mr. President.

PRESIDENT WENSTROM: State your privilege.

DELEGATE GIPP: I certainly, if, indeed, it is the desire to reconsider this, I'm not going to stand in the way. There's some feeling that there are things that have been said with respect to this recent section that we voted on previously, but the matter of jurisdiction, the matter of sovereignty, again, is one of those things when we talk of the reservations — Indian reservations — is one that must be dealt with, and I think it is being dealt with in the courts, by federal opinions, and so forth.

Now, it is true about the statement that was said about a no-man's land. I think the point, when we talk about jurisdiction, the point to remember, when we talk about reservations, is that there is jurisdiction over — on reservations by State and civil authorities representing the State and its political subdivisions on reservations. There is jurisdiction over those non-Indians who live in these areas and there is another jurisdiction over those people who live on the reservation within the confines of the recognized areas of a reservation, under a federal reservation. I think that this recent section that we discussed, again, does not address itself to this problem. It does not set a precedent with respect to sovereignty or jurisdiction. It does provide for some ways in which groups of people may possibly, if they wish, pursue living

DELEGATE HAUGEN: Mr. President.

PRESIDENT WENSTROM: Delegate Haugen.

DELEGATE HAUGEN: I wonder if there isn't a difference of opinion about the motion. I believe the motion was to reconsider.

PRESIDENT WENSTROM: The question is not on the — the 66 votes, Delegate Haugen, is not on the question to reconsider. The 66 is on the motion to suspend the Rules.

DELEGATE HAUGEN: Are we wrong in believing that we still are operating under that Rule that says in the last two days we could suspend the operation of the Rules by a majority vote?

PRESIDENT WENSTROM: Well, we have a Rule that says we can only reconsider once, and we have done that, and that failed. Now we are moving to reconsider a second time.

DELEGATE HAUGEN: We are still operating under the Rule that says on the last two days we can reconsider — or on the last two days we can suspend the Rules by a majority vote.

DELEGATE LANDER: Rule 37, the last —

DELEGATE PAULSON: Rule 36.

PRESIDENT WENSTROM: We can suspend them.

DELEGATE HAUGEN: Yes. The wording is to suspend the Rules by a majority vote on the last two days.

DELEGATE KELSCH: Page 46, Mr. President — 42. Pardon me. Page 42.

PRESIDENT WENSTROM: Page 42. You're correct. The Chair is in error. I'm sure glad I announced it.

Then it will require 50 votes and the Clerk will open the key and you will indicate your wishes. Those in favor of the motion will vote "aye;" those opposed will vote "nay."

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

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

The motion to reconsider has passed. There were 56 "ayes," 36 "nays," with six delegates absent. Redraft 5-7 is before the Convention.

DELEGATE AUBOL: Mr. President.

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: Would I now be in order to move that Redraft 5-7, Section 11, be referred to the Committee on Judicial Functions and Political Subdivisions for consideration tomorrow morning and action on that issue on the last day of the Convention? I do not think whatever changes they make is going to make a substantive difference in the Style and Drafting's problem with the document.

PRESIDENT WENSTROM: It will be in order.

DELEGATE AUBOL: I so move.

DELEGATE THOMPSON: Second.

PRESIDENT WENSTROM: And it's been seconded by Delegate Thompson that Redraft No. 5-7 be re-referred to the Committee on —

DELEGATE AUBOL: Political Subdivisions.

PRESIDENT WENSTROM: — Political Subdivisions — Judiciary and Political Subdivisions. Now, the question —

DELEGATE PAULSON: Mr. Chairman, you haven't got any time for committee action. I don't want to start redrafting the Constitution on the final day of this Convention. I move to amend the motion that Redraft Proposal 5-7 be placed on the tenth order for further action.

DELEGATE MEIDINGER: Second.

PRESIDENT WENSTROM: Delegate Paulson moves to amend the motion so that Redraft 5-7 be placed on the tenth order for final action. And that was seconded by Delegate Meidinger. Now, is there any discussion?

DELEGATE ENGELTER: Mr. President.

PRESIDENT WENSTROM: Delegate Engelter.

DELEGATE ENGELTER: I request a ruling on that. I think that's a substitute motion.

PRESIDENT WENSTROM: That is not a substitute motion. It's an amendment to the motion. He moved that it be referred to the Committee, and the substitute motion says that it be placed on tenth order for further action, and when it gets on tenth order, the amendments will remain right here on the floor.

The question is on the motion as offered by Delegate Paulson. Delegate Aubol.

DELEGATE AUBOL: Mr. President, may I speak just one more time on it? I think there are a lot of angles this thing can take, and we can handle them very well in the Committee, if people just will come down and talk about it, and I think we'll save an awful lot of time on the floor here tonight and we'll be able to discuss the thing in some logical manner if the Paulson amendment is defeated and my amendment carries and it's referred back to the Committee.

PRESIDENT WENSTROM: Any further discussion?

The question is on the amendment as offered by Delegate Paulson that the motion be amended and that this Proposal be placed on the tenth order for action here on the Convention floor.

If there's no further discussion, as many as are in favor of the motion to amend will say "aye;" those opposed "no." The Chair is in doubt.

We will open the key. Those in favor of the motion to amend will vote "yes." Those opposed will vote "nay."

The Clerk will open the key. You will indicate your choice.

Has every delegate voted? Does any delegate wish to change his vote?

DELEGATE KNUDSON: Knudson votes "aye."

PRESIDENT WENSTROM: Knudson votes "aye." The vote is closed.

The amendment is adopted; 51 "ayes," 43 "nays," and four absent.

We are now on the motion as offered by Delegate Aubol and as amended.

The question is to place the Proposal 5-7 on the tenth order. Those in favor of the motion will say "aye;" those opposed "no." The "ayes" have it and the motion is before us on tenth order.

DELEGATE LERBERG: Mr. President.

PRESIDENT WENSTROM: Delegate Lerberg.

DELEGATE LERBERG: Are we ready for debate on the matter?

PRESIDENT WENSTROM: We are ready for debate.

DELEGATE LERBERG: I have an amendment at the desk. The amendment — will the Clerk read it?

CHIEF CLERK GILBREATH: Proposed amendment to Redraft Proposal 5-7, Section 11:

Delete Section 11 of Article VII, shown on lines 22 through 25, inclusive, on page 3 of engrossed Redraft Proposal 5-7.

PRESIDENT WENSTROM: Delegate Lerberg.

DELEGATE LERBERG: Mr. President. I think — and renumber the lines?

CHIEF CLERK GILBREATH: Yes, and renumber accordingly.

DELEGATE LERBERG: I move the proposal.

PRESIDENT WENSTROM: May we have a second to the proposal?

DELEGATE FALLGATTER: Second.

PRESIDENT WENSTROM: Delegate Fallgatter. Delegate Lerberg.

DELEGATE LERBERG: I think this is probably the preferable situation in which to handle this. True, it could be sent back to the Committee, but as the Committee has already indicated, they have already discussed this at length. I think the sentence came out in the Committee Proposal and in deference to Delegate Gipp, who has been a very fine delegate at this Convention and who has come up with some very fine ideas, and I think the sentence came out in deference to him and his wishes, and I think it had very little opposition. Then, of course, when it was made known in public, apparently some of the Indian people, who Delegate Gipp indirectly

DELEGATE HAUGEN: Mr. President.

PRESIDENT WENSTROM: Delegate Haugen.

DELEGATE HAUGEN: Yes, Delegate Thompson is right. We're not going to have taxation without representation because we're going to dissolve ourselves from that school and it's going to be a bad situation for our white students and it's going to be a bad situation for the Indian students.

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: Mr. President: Once again, this issue continues to hinge around the amendment that was offered on the floor the other day that has to do with sovereignty. I can't for the life of me figure out why we can't somehow remove that amendment and still keep in this a simple statement about mutually-beneficial agreements, and it pains me no end to have to vote for deletion of this section; but if we can't get that final amendment that was offered the other day out, I'm afraid there are just too many questions that we have that are not answered.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Lerberg. Any further discussion?

Hearing none, as many as are 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 say "aye;" those opposed will say "nay." The "ayes" have it and the amendment is adopted.

Delegate Lerberg.

DELEGATE LERBERG: Is this the proper place for the motion that the Rules be suspended and this be deemed re-engrossed and put on the calendar for first passage?

PRESIDENT WENSTROM: Delegate Lerberg moves that the Rules be suspended, that it be deemed properly re-engrossed and placed on the calendar for first passage as amended.

I hear someone calling!

DELEGATE GIPP: Mr. President.

PRESIDENT WENSTROM: Delegate Gipp.

DELEGATE GIPP: I was going to ask for a division. Is it too late to request it?

PRESIDENT WENSTROM: Oh, we'll grant a division.

The question is requesting a division. Will five delegates stand? That is sufficient.

Those in favor of adopting the amendment will vote "aye;" those opposed will vote "nay." The Clerk will open the key and you will indicate your preference.

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

The tally indicates 55 "ayes," 39 "nays," and four delegates absent and not voting.

Now Delegate Lerberg moves that the Rules be suspended, that Redraft Proposal No. 5-7, Section 11, be deemed properly re-engrossed and placed on the head of the calendar for passage. Delegate Paulson.

DELEGATE PAULSON: Mr. Chairman, the amendment eliminated Section 11.

PRESIDENT WENSTROM: I agree wholeheartedly; however, we are going to have to dispose of this and get it back to the Committee on Style and Drafting, and I don't know how it's going to do it.

DELEGATE UNRUH: We don't want it, Mr. President.

(Laughter)

PRESIDENT WENSTROM: I don't believe it's a question of choice. I believe it's a question of rule. And the Rule requires — this isn't the bad part. As soon as you pass this, you're going to have to move it to the eleventh order of business in order not to have to bring to back again on the day after tomorrow for third action. So the question before the Convention is on the first passage on the tenth order of Redraft No. 5-7 as amended.

Those in favor of adopting will vote "aye;" those opposed will vote "no."

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

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

Roll call discloses 63 "ayes," 32 "nays," and three delegates absent and not voting. Redraft No. 5-7, Section 11, has passed.

Delegate Lerberg moves that the Rules be suspended, that Redraft No. 5-7 be deemed properly re-engrossed and placed on the eleventh order for passage. Do I have a second?

DELEGATE STANTON: Second.

PRESIDENT WENSTROM: Seconded by Delegate Stanton.

As many as are in favor of the motion will say "aye;" opposed "no." The "ayes" have it and the proposal is again before the Convention on eleventh order.

The question is on the second passage, and those in favor will vote "aye;" opposed will vote "nay." The Clerk will open the key and you will indicate your vote.

Does any delegates wish to change his vote?

Has every delegate voted? The vote is closed.

The roll call discloses 69 "ayes," 25 "nays," four delegates absent and not voting. Redraft No. 5-7 has been passed and is referred to the Committee on Style and Drafting.

DELEGATE DECKER: Mr. President.

PRESIDENT WENSTROM: Delegate Decker.

DELEGATE DECKER: Mr. President, at this time I would like to make a motion we suspend the Rules and consider the action by which Section 22 of Article I was passed on the tenth order and as now incorporated in Redraft Proposal 5-9, only for the purpose of amending on page 4, line 18.

PRESIDENT WENSTROM: Delegate Decker, would you repeat those numbers again?

DELEGATE DECKER: 5-9, page 4, line 18.

PRESIDENT WENSTROM: Delegate Decker moves that the Rules be suspended, that we reconsider our action on Redraft No. 5-9 in the section — on page 4, line 18. Do we have a second?

DELEGATE OMDAHL: Second.

PRESIDENT WENSTROM: Do we have a second to the motion? Seconded by Delegate Omdahl.

DELEGATE DECKER: Mr. President, the motion is included only for the purpose of amending page 4. If you would include that in the motion.

PRESIDENT WENSTROM: I have it written down here. Maybe I didn't repeat it. Now, do we have some discussion?

DELEGATE DECKER: Mr. President and Fellow Delegates:

Someplace — I think it was today — it seems like last week, it was so long ago — somebody referred to the Attorney General and some higher meeting, and we had a communication from the person who tells the Attorney General what to do. Judge Erickstad sent a communique and was talking to some of the people today about this proposal, and I have an amendment which is on the desk and also the delegates have it, and it would add two words to this proposal, and when it's read, I would like to move to amend with these two words, only.

PRESIDENT WENSTROM: The question is on the proposal to reconsider the action.

DELEGATE LANDER: Mr. President.

PRESIDENT WENSTROM: Delegate Lander.

DELEGATE LANDER: Mr. President, in the engrossed one, is it not line 20, rather than line 18 now?

CHIEF CLERK GILBREATH: Line 20.

PRESIDENT WENSTROM: Line 20?

CHIEF CLERK GILBREATH: Line 20 in the engrossed proposal.

DELEGATE DECKER: I must have looked at the wrong color.

Mr. President, I would like to change my motion then to state line 20. I guess I was working off the wrong color.

APPENDIX A

CONSTITUTION OF THE STATE OF NORTH DAKOTA

Adopted on the seventeenth day of February, one thousand nine hundred seventy-two, by the Second Constitutional Convention at the State Capitol in the City of Bismarck.

PREAMBLE

We, the people of North Dakota, grateful to Almighty God and desiring to secure the blessings of civil and religious liberty for ourselves and our posterity, do ordain and establish this constitution.

ARTICLE I

DECLARATION OF RIGHTS

Section 1. INALIENABLE RIGHTS.

All people are endowed with certain inalienable rights; among these are life, liberty and the pursuit of health and happiness.

Section 2. PURPOSE OF GOVERNMENT.

All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.

Section 3. RELIGIOUS FREEDOM.

The free exercise of religious belief and worship shall be forever guaranteed in this state.

Section 4. FREEDOM OF SPEECH.

Freedom of the press and of all individuals to write, speak and publish their opinions on all subjects is guaranteed, and each must be responsible for the abuse of these freedoms.

Section 5. FREEDOM TO ASSEMBLE.

The right of the people peaceably to assemble and to petition or address the government shall never be abridged.

Section 6. SEARCHES AND SEIZURES.

All people have the right to be secure in their persons, houses, papers and other possessions against unreasonable search, seizure, invasion of privacy or unreasonable interception of communications by artificial sensory device. No warrant shall be issued but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Section 7. TRIAL BY JURY.

The right of trial by jury shall be secured to all and shall remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases.

Section 8. OPEN COURTS.

Courts shall be open to all, and every person shall have remedy by due process of law for any injury to his lands, goods, person, privacy or reputation. Right and justice shall be administered without denial or delay.

Section 9. RIGHT TO KEEP ARMS.

The right of the citizens to keep arms for self defense, lawful hunting, recreational use and other lawful purposes shall not be abridged, but nothing herein shall be held to permit the unlawful carrying of concealed weapons.

Section 10. INDICTMENT OR INFORMATION.

No person shall be proceeded against for a felony other than by indictment or information, except in cases arising in the military forces. In misdemeanor cases, offenses may be prosecuted by indictment, information or complaint. The legislative assembly may change, regulate or abolish the grand jury system.

Section 11. SPEEDY TRIAL.

In criminal prosecutions in any court whatever, the party accused shall have

Supreme court justices and district court judges shall be citizens of the United States and residents of this state, shall be admitted to the bar in this state, and shall possess any additional qualifications prescribed by law. Judges of other courts shall be selected for such terms and shall have such qualifications as may be prescribed by law.

Section 10. RESTRICTIONS.

No supreme court justice or district court judge shall engage in the practice of law or hold any public office, elective or appointive, not judicial in nature.

Section 11. DISQUALIFICATIONS.

When any justice or judge is interested in any way in a pending cause or is unable to sit in court because he is physically or mentally incapacitated, the supreme court shall assign a judge, or retired justice or judge, to hear the cause.

Section 12. REMOVAL.

The legislative assembly shall establish by law a procedure for removal of justices and judges for misconduct in office or inability to perform the duties of office, whether willful or because of physical or mental disability or incompetency. Except for impeachment proceedings, the supreme court shall have original, exclusive and final jurisdiction in judicial removal proceedings. A supreme court justice being proceeded against shall be disqualified from acting in the proceedings, and a district court judge selected by the remaining justices shall act in his stead.

Section 13. RETIREMENT.

The legislative assembly may provide by law for the retirement of supreme court justices, district court judges and judges of other courts.

Section 14. VACANCIES.

A judicial nominating committee shall be established by law. Any vacancy in the office of supreme court justice or district court judge shall be filled by appointment by the governor from a list of candidates nominated by the committee, unless the governor calls a special election to fill the vacancy for the remainder of the term. An appointment shall continue until the next general election, when the office shall be filled by election for the remainder of the term.

Section 15. CONFIRMATION.

If no candidate other than the incumbent supreme court justice or district court judge has been nominated for that office, the ballot at the general election shall contain the question: "Shall (name of justice or judge) be retained in the office of (supreme court justice or district court judge?" Unless a majority of votes cast on the question are affirmative, the office shall be deemed vacant at the end of the term and shall be filled as provided in this article.

SECTION VII
POLITICAL SUBDIVISIONS

Section 1. PURPOSE.

The purpose of this article is to provide for maximum local self-government by all political subdivisions with a minimum duplication of functions.

Section 2. POLITICAL SUBDIVISIONS.

The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.

Section 3. COUNTIES.

The several counties of the State of North Dakota as they now exist are hereby declared to be counties of the State of North Dakota.

Section 4. COUNTY SEATS.

The legislative assembly shall provide by law for relocating county seats within counties, but it shall have no power to remove the county seat of any county.

Section 5. BOUNDARIES.

Methods and standards by which all or any portion of a county or counties may be annexed, merged, consolidated, reclassified or dissolved shall be provided by law. No portion of any county or counties shall be annexed, merged, con-

solidated or dissolved unless a majority of the electors of each affected county voting on the question so approve.

Section 6. HOME RULE.

The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any county or city until submitted to the electors thereof and approved by a majority of those voting thereon. In granting home rule powers to cities, the legislative assembly shall not be restricted by city debt limitations contained in this constitution.

Section 7. OPTIONAL FORMS.

The legislative assembly shall also provide by law for optional forms of government for counties, but no optional form of government shall become operative in any county until submitted to the electors thereof at a special or general election, and approved by a majority of those voting thereon.

Until one of the optional forms of county government is adopted by any county, the fiscal affairs of the county shall be transacted by a board of county commissioners as provided by law.

Section 8. COUNTY SERVICES.

Each county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services and any other governmental services or functions as may be provided by law.

All elective county offices or any combinations thereof as they now exist shall continue to be elective county offices with four-year terms; however, any such county office or offices may be eliminated either by adoption of a home rule charter, or at a county-wide referendum by a majority of the electors voting on the question.

A referendum on elimination of county offices shall be provided for by law, and shall be mandatory in each county at the first statewide election held not less than two years after the effective date of this constitution and at least every ten years thereafter.

Whenever an office is eliminated, the county governing board may provide for any service rendered by that office.

Section 9. REFERENDUM.

Questions on the form of government to be adopted by any county or on the elimination of county offices may be placed upon a referendum ballot either by a two-thirds vote of the members of the county governing board or by a petition of electors of the county equal in number to fifteen percent of the votes cast in the county for the office of governor at the preceding general election, or as otherwise provided by law.

Section 10. SERVICE AGREEMENTS.

Agreements, including those for cooperative or joint administration of any powers or functions, may be made by any political subdivision with any other political subdivision, with the state or with the United States, unless otherwise provided by law or home rule charter. A political subdivision may transfer to the county in which it is located any of its powers or functions unless prohibited by law or home rule charter, and may in like manner revoke the transfer.

Section 11. UTILITY FRANCHISES.

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.

ARTICLE VIII
EDUCATION

Section 1. PUBLIC EDUCATION.

The legislative assembly shall provide for a uniform system of free public education.

The legislative assembly shall take other steps necessary to prevent illiteracy and to provide for special education and vocational education.

Schools and institutions so established shall be free from sectarian control. No

Introduced by Committee on Legislative Functions and referred to Committee on Legislative Functions, 430

Reported back:
Do pass, 664

Floor amendments:
1139 Not adopted, 1142
1142 Not adopted, 1144

First passage:
1144 Ayes, 75; nays, 19; absent, 4

No further action, 1694

Committee Proposal No. 1-100

Incorporated into Style and Drafting Redraft Proposal No. 5-13

Committee Proposal No. 1-100. Be it resolved by the North Dakota Constitutional Convention that two new sections to the constitution of the state of North Dakota, both of which pertain to the executive branch of government, be created.

Introduced by Committee on Executive Functions and referred to Committee on Executive Functions, 430

Re-referred (portions passed and paragraph (b) of section 1) to Executive Functions, 800

Reported back:
Do pass, 667
Amended, 1029

Amendments adopted, 1047

Floor amendments:
1150 Not adopted on division vote, 1151

Proposal moved to head of calendar, 775, 1144

Question divided, 798

First passage:
799 Excluding paragraph (b) of Section 1
Ayes, 94; nays, 3; absent, 1
1152 Excluding Section 1 (a) Section 2
Ayes, 77; nays, 18; absent, 3

No further action, 1694

Committee Proposal No. 1-101

Incorporated into Style and Drafting Redraft Proposal No. 5-7

Committee Proposal No. 1-101. 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.

Introduced by Committee on Education, Resources and Public Lands and referred to Committee on Education, Resources and Public Lands, 430

Reported back:
Do pass, 484

Floor amendments:
695 Not adopted, 697
701 Adopted on division vote, 701
1108 Adopted on division vote, 1114
1111 Amendment to amendment adopted, 1111
1112 Amendment to amendment not adopted, 1114
1115 Not adopted, 1116

Motion to place at foot of calendar failed, 700

Rules suspended, properly engrossed, placed on first passage, failed, 701

Rules suspended, properly re-engrossed, placed on first passage, 1114-1115

First passage:
1116 Ayes, 63; nays, 32; absent, 3

No further action, 1694

Remember to

VOTE

Special Election

April 28th 1972

PROPOSED 1972 CONSTITUTION

Final Draft of the Constitutional Convention as presented Thursday, February 17, 1972 to the Plenary Session.

BISMARCK TRIBUNE 32616

"Buy North Dakota Products"

Section 11. UTILITY FRANCHISES.
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.

ARTICLE VIII
EDUCATION

Section 1. PUBLIC EDUCATION.

The legislative assembly shall provide for a uniform system of free public education.

The legislative assembly shall take other steps necessary to prevent illiteracy and to provide for special education and vocational education.

Schools and institutions so established shall be free from sectarian control. No money raised for support of public schools of the state shall be appropriated to or used for support of any sectarian school.

Section 2. BOARD OF PUBLIC EDUCATION.

The state board of public education shall supervise a uniform system of elementary and secondary public education. The board shall perform other duties as provided by law.

The board shall consist of nine members, with staggered seven-year terms, appointed by the governor and confirmed by the senate in a manner provided by law.

The board shall appoint an executive officer, whose term and duties shall be prescribed by the board.

Section 3. BOARD OF HIGHER EDUCATION.

The state board of higher education shall have full power, responsibility and authority to supervise, operate and control state institutions of higher learning. The board shall perform other duties as provided by law.

The legislative assembly may authorize tuition, fees and service charges to assist in financing state institutions of higher learning.

The board shall consist of nine members, with staggered seven-year terms, appointed by the governor and confirmed by the senate in a manner provided by law.

The board shall control the expenditure of all funds belonging to and appropriated to state institutions of higher learning and shall present a single unified budget request to the legislative assembly. Appropriations for all the institutions and for the board shall be contained in one legislative measure. The legislative assembly shall not reduce appropriations by the amount of any gift.

The budget and appropriation measure for the agricultural experiment stations and their substations and the cooperative extension divisions may be separate from that of the state educational institutions.

The board shall have the power to delegate to its employees details of administration of the institutions under its control.

The board shall appoint an executive officer, whose term and duties shall be prescribed by the board.

Section 4. OPEN MEETINGS.

All meetings of the board of public education and the board of higher education shall be open and public unless a person whose rights are being considered requests that the meeting be closed

ARTICLE IX
TRUST LANDS

Section 1. PUBLIC SCHOOL TRUST.

All lands granted by the United States for the support of elementary and secondary public schools of the state, and the proceeds from the sale of those lands, the proceeds of property that falls to the state by escheat and all other property acquired for the schools, except gifts and donations otherwise appropriated or qualified, shall be and remain a perpetual trust fund for the maintenance of the elementary and secondary public schools of the state.

The principal of this fund shall be retained and devoted to the trust purpose. The interest and income of this fund shall be used and applied each year for the benefit of the elementary and secondary public schools, apportioned as provided by law.

Section 2. INSTITUTIONAL TRUSTS.

All lands granted by the United States for the support of educational or other public institutions of the state, and the proceeds from the sale of those lands, shall be and remain a perpetual trust fund for the maintenance of each institution, and may be commingled with similar funds for the same institution only, in a manner provided by law. The public institutions which received lands by the enabling act of Congress approved on February 22, 1889, shall retain such lands, but the trust fund of any institution which the state ceases to operate shall be apportioned among other existing educational or public institutions within the provisions of the enabling act.

The principal of these funds shall be retained and devoted to the trust purpose. The interest and income of each institutional trust fund held by the state shall be appropriated by the legislative assembly to the exclusive use of the institution to which the fund was allocated.

Section 3. SALE OR LEASE.

The legislative assembly shall provide for the sale or lease at public auction of all properties held by the state in the school or other institutional trust funds, except that lands needed for public use may be sold at public sale for their fair market value. No interest in trust lands may be created by adverse possession or by occupation in the nature of adverse possession. In the sale of trust lands, the minerals, including but not limited to oil, gas, coal, cement materials, sodium sulphate, sand and gravel, road material, building stone, chemical substances, metallic ores, uranium ore and colloidal or other clays, shall be reserved and excepted to the state. Leases may be executed by the state for the extraction and sale of such materials in the manner and upon conditions which the legislative assembly may provide. The proceeds of all sales and mineral leases shall be credited to the trust fund from which the property was removed for sale purposes. Any trust lands may be exchanged for lands of the United States, or of the State of North Dakota or its political subdivisions, as provided by law.

Section 4. PROTECTION.

The legislative assembly shall provide for the investment, safekeeping, transfer and disbursement of these trust funds.

ARTICLE X
FINANCE AND PUBLIC DEBT

Section 1. RAISING OF REVENUES.

The legislative assembly shall provide for raising revenue

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

JUDICIARY "C" COMMITTEE

Meeting of Monday and Tuesday, October 29-30, 1979
Room G-1, State Capitol
Bismarck, North Dakota

Representative William Kretschmar, Chairman, called the Judiciary "C" Committee meeting to order at 9:30 a.m. on Monday, October 29, 1979, in Room G-1, State Capitol, Bismarck. The following persons listed as present attended all or a portion of the meeting:

Members present: Representatives William Kretschmar, Pat Conmy, LeRoy Erickson, Joe Leibhan, Burness Reed
Senators Raymon Holmberg, Bonnie Miller Heinrich, Lester Schirado, Jens Tennefos

Members absent: Representative Charles Scofield
Senators Duane Mutch, I. E. Solberg

Others present: Clifton Rodenburg, Gackle, Johnson and Rodenburg, Fargo
Tom Disselhorst, Bismarck
Pat Seaworth, Legal Assistance of North Dakota, Bismarck
Max Rosenberg, Lundberg, Conmy, Nodland, Rosenberg, Lucas and Schulz, Bismarck
Clyde Hardesty, Darryl Balerud, Bill Worthington; Collection Bureau, Inc., Bismarck
Ray Walton, Dick Bresnahan; Public Service Commission, Bismarck
Bernie Carlson, Transamerica Insurance Company, Minneapolis, Minnesota
F. H. Mueller, The Mill Mutuals, Chicago, Illinois
Clare Aubol, Rob Nelson, Jerry Peterson, Keith Kiser; Motor Vehicle Department

IT WAS MOVED BY REPRESENTATIVE REED, SECONDED BY REPRESENTATIVE LEIBHAN, AND CARRIED THAT THE READING OF THE MINUTES OF THE PREVIOUS MEETING BE DISPENSED WITH AND THAT THE MINUTES BE APPROVED AS DISTRIBUTED.

GARNISHMENT STUDY

Committee counsel presented a bill draft prepared by the Legislative Council staff for the committee. He said the bill draft which would substantially revise the garnishment procedure currently found in Chapter 32-09, was based on Senate Bill No. 2292, which was introduced in the 1979 Legislative Session but failed to pass.

The committee recessed at 4:45 p.m. and reconvened at 9:05 a.m. on Tuesday, October 20.

CONSTITUTIONAL REVISION

The chairman asked if any committee members had proposals for constitutional revision.

Senator Holmberg said the proposal in the last session which would have changed the terms of various state officials had some merit but was presented in such a way as to make it a highly partisan issue. He said he would like the committee to look at a proposal to provide for the election of a Governor and Lt. Governor to two-year terms in 1984 with a return to four-year terms in 1986.

Representative Conmy said such a proposal may be helpful in increasing voter turnout on off-Presidential election years. Senator Miller Heinrich said that the political implications of such a proposal will not be overcome by consideration of a Legislative Council committee. She said most of the political implications will depend on which party controls the Governor's office after the next election. Senator Miller Heinrich also said she would like to see some statistics on voter turnout in states that have and do not have off-year gubernatorial elections.

IT WAS MOVED BY SENATOR HOLMBERG, SECONDED BY SENATOR TENNEFOS, AND CARRIED THAT THE COMMITTEE COUNSEL BE DIRECTED TO PREPARE A CONSTITUTIONAL AMENDMENT TO PROVIDE FOR THE ELECTION OF THE GOVERNOR AND LT. GOVERNOR TO TWO-YEAR TERMS IN 1984 AND TO PROVIDE FOR ELECTION OF GOVERNOR AND LT. GOVERNOR TO FOUR-YEAR TERMS IN 1986 AND EVERY FOUR YEARS THEREAFTER.

The chairman directed committee counsel to prepare a memorandum discussing the effect of similar provisions on voter turnout in other states.

Representative Conmy said the committee might wish to take some action to publicize the constitutional amendments which will be on the ballots in 1980. Senator Holmberg said the best action might be to inform the individual members of the committee on the measures. Representative Erickson added that it is very difficult to prepare any information which does not at least appear to be biased.

Representative Kretschmar said he and several other members of the committee had served on the 1972 Constitutional Convention. He said several constitutional provisions from the document drafted by that convention have been adopted in North Dakota, particularly the judicial branch article, the initiative and referendum provisions, and the election article. He said the executive branch article and the legislative branch article will both be on the ballot in 1980. Representative Kretschmar said he would like the committee to look at the constitutional provisions

relating to local government, particularly the provisions listing all county officials, and state institutions. He requested committee counsel to prepare memoranda on these issues for the next meeting.

Senator Miller Heinrich said she felt it was important to get some information on the measures which will be voted on in 1980. Senator Tennefos suggested that any information received by committee members should also be distributed to all legislators. The chairman directed committee counsel to prepare a memorandum describing the constitutional issues which will be on the ballots in the 1980 primary and general elections.

Representative Erickson said perhaps the committee should look at the constitutional areas relating to taxation and property assessment. He said if some of the current assessment problems are the result of constitutional provisions, this committee should propose some amendments.

IT WAS MOVED BY REPRESENTATIVE ERICKSON AND SECONDED BY REPRESENTATIVE REED TO DIRECT THE COMMITTEE COUNSEL TO PREPARE A MEMORANDUM ON THE CONSTITUTIONAL ISSUES OF PROPERTY ASSESSMENT AND TAXATION.

The chairman ruled the motion was procedural. On a voice vote, THE MOTION CARRIED.

MOTOR VEHICLE TITLING AND REGISTRATION

The chairman called on committee counsel to review a bill draft prepared by the Legislative Council staff relating to motor vehicle titling. Committee counsel said the bill was basically a redraft of Senate Bill No. 2246 which was introduced in the 1979 Session. That bill, he explained, had 18 sections when it was introduced but contained only two sections when it was passed. The proposed bill draft, he said, contains those sections which were not approved by the 1979 Legislature.

The committee reviewed the bill on a section-by-section basis.

In response to a question from Representative Conmy, Mr. Keith Kiser, Motor Vehicle Department, said the salvage certificate of title contained in Section 5 of the bill is intended to address concerns relating to stolen vehicles and parts. He said scrap dealers will not accept a vehicle unless there is some proof of ownership, and the salvage certificate would provide the necessary proof of ownership. Senator Tennefos said testimony before the standing committee during the 1979 Session indicated that salvage dealers do not want to use a salvage certificate but would rather use the original title as proof of ownership.

In response to a question from Senator Holmberg, Mr. Kiser said under the proposed bill draft anyone who turns in a title to get a salvage certificate of title would still be eligible to receive a refund for the unused portion of the title fee.

NORTH DAKOTA LEGISLATIVE COUNCIL

Tentative Agenda

JUDICIARY "C" COMMITTEE

Meeting of Wednesday and Thursday, January 23-24, 1980
Room G-1, State Capitol
Bismarck, North Dakota

Wednesday, January 23

9:30 a.m. Call to order
Roll call
Minutes of previous meeting

9:45 a.m. Comments by representatives of the Associated General Contractors of North Dakota concerning the licensing requirements for and definition of special mobile equipment

10:15 a.m. Consideration of the second draft of a bill relating to garnishment

12:00 noon Luncheon recess

1:15 p.m. Comments by Mr. Alfred Schultz concerning the Uniform Condominium Act

1:45 p.m. Consideration of a bill draft relating to the use of blank pistol cartridges in athletic events

2:00 p.m. Presentation by committee counsel of a memorandum concerning the requirement of the consent of the father prior to the adoption of an illegitimate child

2:15 p.m. Presentation by committee counsel of memoranda concerning the following constitutional revision items:

1. Voter Turnout in the United States - Factors Affecting Its Decline and the Effect of Holding Gubernatorial Elections in Nonpresidential Election Years
2. Constitutional Provisions Relating to Political Subdivisions
3. Constitutional Authority for Public Institutions in North Dakota
4. Taxation and Assessment Problems in North Dakota
5. Proposed Constitutional Amendments to be Submitted to the Electorate in 1980

3:45 p.m. Committee consideration of constitutional revision items

4:30 p.m. Recess

(over)

Senator Miller Heinrich asked if an initial six-year term rather than the initial two-year term had been considered. Senator Holmberg said he believes the office of Governor is too important to have a term of six years. The committee discussed the possibility of providing some limitation on terms.

On a voice vote, THE MOTION CARRIED.

Committee counsel presented a memorandum entitled "Constitutional Provisions Relating to Political Subdivisions." That memorandum compares the present provisions relating to political subdivisions and the provisions of the 1972 proposed Constitution as they relate to political subdivisions.

Representative Kretschmar said he would like the committee to consider the provisions of Article VII of the 1972 proposed Constitution. Senator Solberg said he saw a great need for reevaluation of the current county system of government. He noted that originally there were 13 counties in North Dakota and there are now 53 counties. Senator Solberg said new county lines were drawn by simple election and some new counties were created only because certain cities wanted to be county seats.

IT WAS MOVED BY SENATOR SOLBERG, SECONDED BY REPRESENTATIVE ERICKSON, AND CARRIED TO HAVE THE LEGISLATIVE COUNCIL STAFF A PREPARE A CONCURRENT RESOLUTION TO PROPOSE THE REPEAL OF THE CURRENT CONSTITUTIONAL PROVISIONS RELATING TO POLITICAL SUBDIVISIONS AND THE CREATION OF A NEW ARTICLE RELATING TO POLITICAL SUBDIVISIONS BASED ON ARTICLE VII OF THE 1972 PROPOSED CONSTITUTION.

The chairman directed committee counsel to notify the North Dakota Association of Counties, the League of Cities, and other interested groups or persons and invite them to attend and participate in the next meeting.

Committee counsel presented a memorandum entitled "Constitutional Authority for Public Institutions in North Dakota," which briefly describes the current constitutional provisions relating to public institutions, describes the various procedures for altering the terms of those sections, and describes the approach which would have been taken by the proposed 1972 Constitution.

Senator Holmberg requested committee counsel to present a synopsis of State ex rel. Walker v. Link and its effect if a constitutional amendment eliminating the constitutional mandate for the various institutions were passed. Representative Kretschmar said eventually the state of North Dakota is going to have to face the problem of eliminating some state institutions. He said the approach of the 1972 proposed Constitution would enable the state legislature to address those problems. Senator Holmberg said he disagreed and said if the legislature thinks a certain institution should be closed, the proper approach is to put the question of eliminating that institution on the ballot. Representative Reed noted that many people are afraid to vote "yes" on any constitutional amendment.

NORTH DAKOTA LEGISLATIVE COUNCIL

Tentative Agenda

JUDICIARY "C" COMMITTEE

Meeting of Monday, April 28, 1980
Room G-1, State Capitol
Bismarck, North Dakota

9:30 a.m.	Call to order Roll call Consideration of minutes of previous meeting
9:45 a.m.	Consideration of two alternative drafts of concurrent resolutions proposing constitutional amendments to provide for the election of the Governor and Lieutenant Governor in nonpresidential election years
11:00 a.m.	Consideration of a draft of a concurrent resolution proposing a constitutional amendment to provide a new article relating to political subdivisions
11:45 a.m.	General discussion relating to constitutional revision duties
12:00 noon	Luncheon recess
1:15 p.m.	Consideration of the first draft of a bill relating to motor vehicle titling and registration (NOTE: This bill draft combines the provisions of two bill drafts considered previously by the committee)
3:00 p.m.	Consideration of the second draft of a bill relating to the use of blank cartridge firearms
3:15 p.m.	Consideration of the first draft of a bill relating to the consent required of an unwed father prior to the adoption of an illegitimate child
3:30 p.m.	Consideration of the second draft of a bill relating to the nonrenewal of teacher contracts
4:00 p.m.	Discussion of miscellaneous statutory revision items
4:30 p.m.	Adjourn

POLITICAL SUBDIVISIONS ARTICLE

Committee counsel reviewed the first draft of a concurrent resolution calling for a new political subdivisions article to the State Constitution. He noted that this concurrent resolution would call for the repeal of the current constitutional provisions relating to municipal corporations, the election of a superintendent of schools for each county, and county and township organization. The major changes which would result upon the adoption of this article, he said, would be the extension of home rule to county government and the elimination of the constitutional status of county officials. He said the proposal would retain the current elected county officials but would provide for a referendum in each county to determine whether the offices should be retained.

In response to a question from Representative Conmy, committee counsel said the proposed article does not provide for the reinstatement of an office once eliminated by referendum. In response to a question from Senator Miller Heinrich, committee counsel said the intent of the referendum section is to put the question of retention of each office on the ballot in each county.

Representative Scofield noted that on page 3, line 28, the word "general" is probably incorrect since the Governor is not elected at every general election.

The chairman called on Mr. Ron Soderberg, Association of Counties, for his comments. Mr. Soderberg said the Association of Counties has not adopted a formal position on this proposal. He said Section 8, relating to the officer referendums, would receive the most scrutiny by county officials. He also said the county home rule provision probably would not be widely used.

Representative Erickson said if the people can eliminate an office by referendum they should also be allowed to reinstate that same office. Representative Conmy said the proposal would apparently allow every county office, including the offices of county commissioner, to be eliminated. The result, he said, would be no county government. He suggested that the resolution be amended to limit the referendum to all offices other than the county commissioners.

The chairman asked Representative Erickson, Vice Chairman, to assume the duties of the chairman. Representative Erickson then called on Representative Kretschmar for his comments.

Representative Kretschmar said this proposal, which is basically the political subdivisions article from the 1972 ConCon, was prepared at his instigation. He noted that he served on the Political Subdivisions Committee of the 1972 Convention and said that committee had two basic goals. Those goals were to allow maximum local control and to provide flexibility to the legislature. Representative Kretschmar said Section 2 caused the most concern in debate in the committee and the committee decided to leave it up to the counties to keep or eliminate county offices as they see fit.

In response to a question from Representative Scofield, committee counsel said township officers are provided for by statute and those offices would not be affected by this proposed constitutional amendment.

In response to a question from Senator Miller Heinrich, Representative Kretschmar said the proposed amendment would not have any effect on existing agreements between counties to combine functions such as law enforcement but instead would provide even greater flexibility for intergovernmental sharing of powers and functions.

Representative Kretschmar resumed the role of chairman and called on Mrs. Eileen Mack, Burleigh County Superintendent of Schools, for her comments. Mrs. Mack said Burleigh County has 11 graded elementary and one-room rural schools and three high school districts. Her office, she said, is responsible for such duties as evaluating teachers, participating in nonrenewal hearings, setting up in-service workshops, and so forth. Mrs. Mack said her office employs two full-time people and said there is a substantial workload which would have to be assumed by another office if the office of county superintendent of schools is eliminated.

In response to a question from Senator Miller Heinrich, Mrs. Mack said she believes that it would be advantageous for counties with all high school districts to share the services of a county superintendent of schools as permitted by Section 150 of the Constitution.

In response to a question from Representative Conmy, Mrs. Mack said she was not familiar with the workload of county superintendents in smaller counties but that she assumed that it was considerably less than the workload in Burleigh County.

In response to a question from Senator Tennefos, Mrs. Mack said her only duties with regard to the Bismarck public schools are the handling of the annual foundation aid and transportation reports. She also said her office is responsible for supervising five nonpublic schools in Bismarck.

Representative Leibhan said many older people do not have birth certificates and need school records for Social Security purposes. He said it is important for these records to remain at the county level in the county superintendent of schools' office.

In response to a question from Senator Solberg, Mrs. Mack said any proposal which would tie foundation aid payments to high school districts would effectively dissolve the 11 graded elementary and one-room rural schools she now supervises.

Senator Holmberg said it was important to realize this proposal would not allow the legislature to repeal the office of the superintendent of schools but would only allow the people of the counties to eliminate the office through an electoral process.

Mr. Soderberg said the proposal does not limit the transfer of powers or functions by a political subdivision to the county. He said this could result in counties being assigned extra duties by relinquishment but not having any way to raise the necessary revenues to perform those duties.

NONRENEWAL OF TEACHERS' CONTRACTS

Committee counsel reviewed the second draft of a bill relating to the nonrenewal of teacher contracts. He noted that the first draft had been amended to allow the attendance of a spouse or other family member at a hearing on a discharge for cause in addition to a hearing on a proposed nonrenewal and also said language had been added to make it clear that the procedural requirements of subsection 5 of Section 15-47-38 take precedence over the good faith language of that subsection.

Representative Conmy noted that the judicial system operates in a public forum without a need for executive sessions and questioned whether there is any need for executive sessions for nonrenewal hearings. In response to a question, Mr. Willis Heinrich, North Dakota Education Association, said that about 90 percent of the time the teacher requests an open hearing but he estimated that 75 percent of those requests are denied by the school boards.

In response to a question from Representative Erickson, Mr. Heinrich said occasionally the spouses are called to testify in nonrenewal hearings but usually the spouse would be present for moral support only and would not participate in the hearing.

IT WAS MOVED BY REPRESENTATIVE CONMY AND SECONDED BY REPRESENTATIVE REED TO APPROVE THE SECOND DRAFT OF THE BILL RELATING TO THE NONRENEWAL OF TEACHERS' CONTRACTS AND RECOMMEND IT TO THE LEGISLATIVE COUNCIL FOR ADOPTION. On a roll call vote, Representatives Kretschmar, Conmy, Erickson, Leibhr , Reed, and Scofield; and Senators Holmberg, Miller Heinrich, Schirado, Solberg, and Tennefos voted "aye." There were no "nay" votes. THE MOTION CARRIED.

The committee recessed at 11:55 a.m. and reconvened at 1:15 p.m.

MOTOR VEHICLE TITLING AND REGISTRATION

Committee counsel reviewed the first draft of a bill relating to motor vehicle titling and registration. He said this bill combines the provisions of two bills considered previously by the committee. He noted that Section 1, relating to the definition of a "used vehicle," is new and said that definition had been removed from Section 39-05-01 and placed in Section 39-01-01 of the North Dakota Century Code. Committee counsel also described other amendments which had been made as a result of the last committee meeting.

On a voice vote, THE MOTION CARRIED.

Representative Reed said she has considered proposing a constitutional amendment to allow more than five county commissioners in the larger counties. Committee counsel said the proposed political subdivisions article would allow the number of county commissioners to be set by law and also said it would be possible to amend the specific constitutional provision relating to county commissioners.

The chairman said he anticipated two more committee meetings and said any proposal for constitutional revision would have to be made no later than the next meeting.

IT WAS MOVED BY REPRESENTATIVE ERICKSON, SECONDED BY SENATOR SCHIRADO, AND CARRIED TO AMEND THE FIRST DRAFT OF THE CONCURRENT RESOLUTION CALLING FOR A CONSTITUTIONAL AMENDMENT RELATING TO POLITICAL SUBDIVISIONS TO PROVIDE THAT THE OFFICE OF COUNTY COMMISSIONER MAY NOT BE REFERRED AND TO PROVIDE THAT ANY OFFICE MAY BE REINSTITUTED BY THE ELECTORATE OF THE COUNTY ON A TWO-THIRDS VOTE. On a voice vote, THE MOTION CARRIED.

MISCELLANEOUS MATTERS

Committee counsel reviewed a bill draft relating to the consent required of an unwed father prior to the adoption of an illegitimate child. He said a committee of the National Conference of Commissioners on Uniform State Laws is currently considering this same problem and may be proposing amendments to the Uniform Adoption Act in the near future.

IT WAS MOVED BY SENATOR TENNEFOS, SECONDED, AND CARRIED TO TAKE NO ACTION ON THE BILL DRAFT RELATING TO THE CONSENT REQUIRED OF AN UNWED FATHER TO THE ADOPTION OF AN ILLEGITIMATE CHILD PENDING RECOMMENDATION OF POSSIBLE AMENDMENTS BY A COMMITTEE OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS. On a voice vote, THE MOTION CARRIED.

Committee counsel reviewed a memorandum forwarded to the committee by the Court Services Committee, relating to possible conflicts and inconsistencies between statutes and rules promulgated by the Supreme Court. The chairman said his initial reaction was that the inconsistencies were not so serious that they had to be resolved immediately. He said the Court Services Committee, of which he is a member, would be meeting again prior to the last committee meeting, and he said at that time perhaps the Court Services Committee can either recommend to the Supreme Court that it introduce a bill on its own or make specific recommendations to this committee.

The chairman reviewed a letter he had received from Representative Roy Hausauer, Chairman of the Legislative Council, relating to North Dakota Supreme Court opinions which contain suggestions to the Legislative Assembly or the Legislative Council. He said any future suggestions by the court would be brought to the attention

NORTH DAKOTA LEGISLATIVE COUNCIL

Tentative Agenda

JUDICIARY "C" COMMITTEE

Meeting of Wednesday, June 25, 1980
Room G-1, State Capitol
Bismarck, North Dakota

9:30 a.m.	Call to order Roll call Minutes of previous meeting
9:45 a.m.	Presentation by committee counsel of concurrent resolution drafts calling for constitutional amendments relating to the calling of special sessions of the legislature
10:00 a.m.	General testimony and discussion of the proposed constitutional amendments relating to the calling of special sessions of the legislature
10:30 a.m.	Consideration of the second draft of a concurrent resolution calling for a constitutional amendment to create a new political subdivisions article
11:00 a.m.	Presentation by Ms. Kathy Wheeler, Legislative Council staff, of the first draft of a bill entitled the Technical Corrections Act of 1981
11:30 a.m.	Presentation by Mr. Jay Buringrud, Code Revisor, of a proposal for renumbering the Constitution of North Dakota
12:00 noon	Luncheon recess
1:15 p.m.	Presentation by committee counsel of a memorandum discussing Sections 14-09-09.1 through 14-09-09.5 of the North Dakota Century Code, relating to wage assignments and liens to enforce child support orders
1:30 p.m.	Presentation by committee counsel of a memorandum relating to Section 15-47-10 of the North Dakota Century Code, requiring the posting of the Ten Commandments in classrooms
1:45 p.m.	Presentation by committee counsel of a bill draft relating to the definition of motor vehicle owner for purposes of the no-fault insurance laws
1:50 p.m.	General testimony and discussion

(over)

The chairman called on committee counsel to review the second draft of a concurrent resolution to create a new political subdivisions article to the Constitution of the state of North Dakota. Committee counsel said the first draft of the concurrent resolution had been amended to provide that the offices of county commissioners may not be removed at a countywide referendum and that any other county office eliminated by referendum could also be reinstated at a countywide election by a two-thirds majority. He also said if the committee decides to retain the repeal of Section 150, providing for a county superintendent of schools, the draft should also amend Section 157 of the Constitution to delete the reference to the county superintendent of schools as a member of a county board of appraisal.

The chairman called for testimony on the proposed political subdivisions article. Mr. Ernie Halverson, North Dakota County Auditors Association, said that while he supports the idea of home rule in county government he does not support this proposal. He said the provision requiring a referendum election every 10 years constitutes a state mandate which destroys home rule. Mr. Halverson said he was also concerned with a provision which allows two-thirds of the members of the board of county commissioners to place a referendum of any county office on a ballot. He said the smaller counties usually have three county commissioners and this would allow two people to place the question of referring a county office on the ballot. Since the county auditor is the chief financial officer of the county, he said, the county auditor may be placed in a situation of having to tell the commissioners that their contemplated action is not within the county budget. He said the State Auditor has taken the position that the county auditor can refuse to sign a check if a payment is illegal. Mr. Halverson said allowing two members of the board of county commissioners to place the office of county auditor on a referendum ballot would give them too much power over the county auditor. Mr. Halverson said in his opinion questions for the change of form and government or the elimination of any office should be initiated only by a petition of the people.

In response to questions from Representative Conmy, Mr. Halverson said that while he trusts the electorate, the accountability of the county commissioners to the electorate is not necessarily a sufficient safeguard. He said it may be quite easy to eliminate a county office in a primary election where voter turnout is quite small. Representative Conmy said it was important to remember that the county commission's power is simply the power to put the question to the people and that they cannot eliminate an office by their own action.

Mr. Ron Soderberg, North Dakota Association of Counties, said that in his conversations with county officials across the state, he has found that very few county officials approve of this proposal. He also objected to the provision of the proposal which would allow a political subdivision to transfer any of its powers or functions to the county in which it is located.

Representative Conmy said under the current county government system there is a lack of ultimate responsibility to the people. As an example, Representative Conmy said, if a person complains to the county commission about law enforcement in the counties, the commissioners' response may be that the only thing they can do is to cut off funds since the sheriff is an elected official. On the other hand, he said, the sheriff's response may be that he can do nothing since the county commission did not adequately fund his office. Representative Conmy asked Mr. Soderberg for his philosophical reaction to a government structure where there is a single board with ultimate responsibility for county government. Mr. Soderberg said he did not feel that eliminating elected county officials would increase the responsibility of the county commissioners to the people.

In response to a question from the chairman, Mr. Soderberg said he had talked to only one county commissioner who liked the proposed constitutional amendment. Mr. Soderberg said the fear of putting the questions of referral of offices to the people may be a factor in the county officials' opposition to the proposal.

In response to a question from the chairman, Mr. Soderberg said his objection to Section 10 of the bill would be lessened if on page 4, line 5, the words "unless prohibited" were removed and the words "as provided" were inserted.

In response to questions from Senator Tennefos, Mr. Halverson and Mr. Soderberg said there is not a lot of discussion about consolidation of counties.

Mr. Don Klingensmith relayed to the committee the history of ancient Greece. He stated that the Greek word for commissioner is tyrant and said there is only one way to get rid of tyrants. He also said no one in North Dakota had heard of marijuana until schools were centralized.

The chairman called on Ms. Kathy Wheeler, Legislative Council staff, to present a bill draft entitled "Technical Corrections Act of 1981." Ms. Wheeler said the Technical Corrections Act contains 64 sections, the majority of which correct obsolete statutory references. She said in some instances the statutes contain references to statutes which had been repealed and for which there is no comparable provision. In those instances, she said some discretion had been used in the bill draft. Ms. Wheeler reviewed those sections of the bill which do things other than correct obsolete statutory references. She noted that Section 64 of the bill contains the repeal of Sections 31-03-09 and 33-12-24, both of which have been superseded by Supreme Court rules. She said statutes which have been superseded should not be repealed and suggested that the repeal of those two sections be deleted from the bill draft.

In response to a question from Senator Tennefos, Mr. Jay Buringrud, Code Revisor, said the Legislative Council office does not

The chairman called on committee counsel to review a letter from Mr. Bernard Haugen relating to a prosecution of juveniles for misdemeanor traffic offenses. He said under the current law adult court does not have jurisdiction over any person under the age of 16 and the juvenile court does not have jurisdiction over any traffic offenses other than negligent homicide and manslaughter. Committee counsel said the probable intent of the 1977 Legislature was to place all traffic offenses except negligent homicide and manslaughter in adult court.

IT WAS MOVED BY SENATOR TENNEFOS AND SECONDED BY REPRESENTATIVE ERICKSON TO HAVE LEGISLATIVE COUNCIL STAFF PREPARE A BILL DRAFT TO PLACE JURISDICTION OVER ALL MISDEMEANOR TRAFFIC OFFENSES EXCEPT NEGLIGENT HOMICIDE AND MANSLAUGHTER IN ADULT COURT. On a voice vote, THE MOTION CARRIED.

Committee counsel reminded the committee that it has not made a decision of the Uniform Condominium Act. Senator Tennefos said he had requested that the committee defer action so that he would have more time to discuss the Act with real estate developers. However, he said, the developers have not been back in contact with him and he feels there was probably no need for the Uniform Condominium Act at this time.

The chairman stated that he would like the committee approve the political subdivisions article at some future meeting.

IT WAS MOVED BY REPRESENTATIVE CONMY, SECONDED BY SENATOR SCHIRADO, AND CARRIED TO AMEND THE CONCURRENT RESOLUTION DRAFT PROVIDING FOR A NEW POLITICAL SUBDIVISIONS ARTICLE TO DELETE THE WORDS "UNLESS PROHIBITED" ON PAGE 4, LINE 5, AND TO INSERT IN LIEU THEREOF THE WORDS "AS PROVIDED."

IT WAS MOVED BY REPRESENTATIVE CONMY, SECONDED BY REPRESENTATIVE REED, AND CARRIED TO ADJOURN. The meeting adjourned at 3:05 p.m.

John W. Morrison
Committee Counsel

NORTH DAKOTA LEGISLATIVE COUNCIL

Tentative Agenda

JUDICIARY "C" COMMITTEE

Meeting of Monday, September 22, 1980
Room G-1, State Capitol
Bismarck, North Dakota

9:30 a.m. Call to order
Roll call
Minutes of previous meeting

9:45 a.m. Presentation by committee counsel of two alternative drafts of a concurrent resolution calling for a constitutional amendment to create a new political subdivision article

10:15 a.m. Consideration of the second draft of a constitutional amendment to Section 172 relating to boards of county commissioners

10:40 a.m. Presentation by committee counsel of a draft of a concurrent resolution calling for a constitutional amendment to Section 161 relating to the leasing of lands granted to the state for educational and charitable purposes

10:45 a.m. General testimony concerning Section 161

11:00 a.m. Presentation by committee counsel of drafts of concurrent resolutions calling for amendments to the Constitution to deal with obsolete references:

1. Sections 160 and 164
2. Section 216
3. Article 24
4. Article 94

11:30 a.m. Presentation by committee counsel of a bill draft to amend Section 54-27.1-01 of the North Dakota Century Code, relating to the designation of the Lt. Governor as Federal Aid Coordinator

11:45 a.m. Presentation by committee counsel of a bill draft to repeal Chapter 44-07 of the North Dakota Century Code, providing for the appointment of a commissioner of deeds

12:00 noon Luncheon recess

(over)

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

JUDICIARY "C" COMMITTEE

Meeting of Monday, September 22, 1980
Room G-1, State Capitol
Bismarck, North Dakota

Representative William Kretschmar, Chairman, called the Judiciary "C" Committee meeting to order at 9:30 a.m. on Monday, September 22, 1980, in Room G-1, State Capitol, Bismarck. The following persons listed as present attended all or a portion of the meeting:

Members present: Representatives William Kretschmar, LeRoy Erickson, Joe Leibhan, Charles Scofield
Senators Raymon Holmberg, Lester Schirado, I. E. Solberg, Jens Tennefos

Members absent: Representatives Pat Conmy, Burness Reed
Senators Bonnie Miller Heinrich, Duane Mutch

Others present: Ron Soderberg, North Dakota Association of Counties, Bismarck
Bill Tillottson, Bismarck Tribune
Donna Wright, KBMR, Bismarck
Jeff Baenen, Associated Press, Bismarck
Lt. Governor Wayne Sanstead, Federal Aid Coordinator Office
Jim Kummer, Stan Petz; Motor Vehicle Department
Tom Tuntland, Morton County State's Attorney, Mandan
Greg Wallace, Supreme Court
Phyllis Ratcliffe, Social Service Board
Richard Lommen, John Morrison; State Land Department
Gary Endicott, Jay Buringrud; Legislative Council

IT WAS MOVED BY SENATOR HOLMBERG, SECONDED BY REPRESENTATIVE ERICKSON, AND CARRIED THAT THE READING OF THE MINUTES OF THE PREVIOUS MEETING BE DISPENSED WITH AND THAT THE MINUTES BE APPROVED AS DISTRIBUTED.

POLITICAL SUBDIVISION ARTICLE

The chairman called on committee counsel to present two alternative drafts of a concurrent resolution calling for a constitutional amendment to create a new political subdivision article. Committee

counsel explained that the first draft was amended to allow a political subdivision (other than a county) to transfer to the county in which it is located any of its power or functions only as provided by law or home rule charter. The draft had previously allowed the political subdivision to do so unless such a transfer was prohibited.

Committee counsel said that the second alternative was based on the first draft with amendments suggested by Representative Kretschmar. The chairman explained that the two major changes in the alternative draft included (1) deletion of language which required a referendum on the elimination of county offices every 10 years and (2) Section 9 was amended to provide that the form of government or elimination or reinstatement of elective county offices could be placed on the ballot only by a petition of electors of the county equal in number to 25 percent of the votes cast in the county for the office of Governor at the preceding gubernatorial election. The first draft allowed those questions to be placed on the ballot by a two-thirds vote of the members of the county governing board, by petition signed by 15 percent of the number of county voters who voted for Governor at the preceding gubernatorial election, or as otherwise provided by law.

The chairman said he had presented the first alternative to the North Dakota Association of Counties and the amendments he was suggesting were in response to difficulties they had with that draft. In response to a question from Representative Erickson, the chairman said he thought it was a good idea to delete the provision "as otherwise provided by law" because it provided for more local control by the people.

The chairman also said this draft would allow the register of deeds and the county judge to retain separate offices should the population of the county fall below 6,000 people. The Constitution presently requires that the two offices be combined under those circumstances. In response to a question from Senator Tennefos, the chairman expressed his belief that the counties would not be required to consolidate the two offices before this amendment became effective.

The chairman asked Mr. Ron Soderberg, North Dakota Association of Counties, for his comments on the alternative draft. He said that he thought it was a much better alternative and that it removes his initial objections to the bill draft. One problem, he said, found in both alternatives, was the fact that a person could be on the ballot for election to an office at the same time as the question of whether to eliminate the office was before the voters. Representative Erickson commented that the constitutional issue could be voted upon at the primary election.

IT WAS MOVED BY REPRESENTATIVE ERICKSON AND SECONDED BY SENATOR SCHIRADO TO APPROVE THE KRETSCHMAR ALTERNATIVE OF THE CONCURRENT RESOLUTION CALLING FOR A CONSTITUTIONAL AMENDMENT TO CREATE A NEW

POLITICAL SUBDIVISION ARTICLE (LC NO. 223.01) AND TO RECOMMEND IT TO THE LEGISLATIVE COUNCIL FOR ADOPTION. On a roll call vote, Representatives Kretschmar, Erickson, Leibhan, and Scofield; and Senators Holmberg, Schirado, Solberg, and Tennefos voted "aye." There were no "nay" votes. THE MOTION CARRIED.

BOARDS OF COUNTY COMMISSIONERS

At the request of the chairman, committee counsel explained that the only change to the second draft of the concurrent resolution, calling for a constitutional amendment which allows larger boards of county commissioners in larger counties, was to require that an odd number of commissioners be elected. The draft had previously allowed either an even or odd number of commissioners up to nine.

Senator Holmberg explained that he had talked to the county commissioners in his district and they saw no need for this amendment.

Mr. Soderberg commented that he had discussed this draft with the board of directors of the County Commissioners Association and in a straw vote they voted against it. He said, however, they did not feel strongly about it either way. He said that personally he thought that a board larger than five members would be quite cumbersome and that increasing the size would not necessarily increase representation on the board. In response to a question from Senator Schirado, Mr. Soderberg said he thought that population was an acceptable criteria for determining the size of the county commission allowed in each county.

Senator Tennefos said he thought this option should be available to the people.

IT WAS MOVED BY SENATOR TENNEFOS AND SECONDED BY REPRESENTATIVE ERICKSON TO APPROVE THE CONCURRENT RESOLUTION TO AMEND THE CONSTITUTION TO ALLOW LARGER COUNTIES TO HAVE SEVEN- AND NINE-MEMBER BOARDS OF COUNTY COMMISSIONERS (LC NO. 142.02) AND TO RECOMMEND IT TO THE LEGISLATIVE COUNCIL FOR ADOPTION. On a roll call vote, Representatives Kretschmar, Erickson, Leibhan, and Scofield; and Senators Schirado and Tennefos voted "aye." Senators Holmberg and Solberg voted "nay." THE MOTION CARRIED.

LEASING OF STATE LANDS

The chairman called on committee counsel to present the draft of a concurrent resolution calling for a constitutional amendment to Section 161 relating to the leasing of lands granted to the state for educational and charitable purposes. Committee counsel explained the present language, which limits the length of the lease and restricts the purposes for which the land may be leased, is deleted. She explained that the draft provides the land may be leased for such purposes, periods, and upon such terms and conditions as the Legislative Assembly may provide. Committee counsel pointed out that the provisions of this draft would be effective July 1, 1983.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.