

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.,)

Plaintiff,)

v)

The City of Bismarck, North Dakota,)

and)

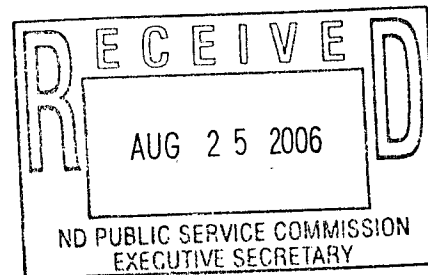
Montana-Dakota Utilities, Inc., a)

Division of MDU Resources Group, Inc.,)

and)

The Public Service Commission of)
North Dakota,)

Defendants.)
.....)



Burleigh County Civil 05-C-2303
Supreme Court Number 20060199

TRANSCRIPT OF HEARING ON APPEAL
Burleigh County Courthouse
Bismarck, ND 58501
March 2, 2006

The Honorable Bruce B. Haskell, District Judge, Presiding.

APPEARANCES:

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For the Public Service Commission

Transcript requested by Ms. Larson
Recorded/transcribed by Lisa Schmidt

1 [THE FOLLOWING PROCEEDINGS WERE HAD AND MADE OF
2 RECORD, AS FOLLOWS, on the 2nd day of March, 2006 commencing at 4:00
3 p.m.]

4 THE COURT: We'll open the record with regard to Burleigh
5 County case number 05-C-2303 entitled Capital Electric Cooperative, Inc.
6 versus The City of Bismarck and Montana-Dakota Utilities and the Public
7 Service Commission of North Dakota. Capital Electric is represented by Carol
8 Larson. The City of Bismarck is represented by Randy Bakke. Daniel Kuntz
9 and Jerome Kettleon are representing MDU. The PSC is represented by Bill
10 Binke who is not present.

11 MR. BINEK: I'm here, Your Honor.

12 THE COURT: Oh, I'm sorry. I didn't see you back there.

13 MR. BINEK: I'm at the back of the bus.

14 THE COURT: This time and place is set for hearing on the appeal
15 of Capital Electric of the determination by the City of Bismarck based on the
16 petition filed by Montana-Dakota Utilities. Ms. Larson, are you ready to
17 proceed at this time?

18 MS. LARSON: Yes, Your Honor.

19 THE COURT: All right. Go ahead.

20 MS. LARSON: Thank you, Your Honor. First of all, do you mind if
21 I sit?

22 THE COURT: That's fine.

23 MS. LARSON: Thank you. In the interest of clarification of the
24 record, there are three motions pending before this Court; the Motion to
25 Dismiss or in the Alternative a Motion for More Definite Statement, the Motion

1 for Capital's Amended Complaint, and the Motion for Reconsideration. In the
2 interest of a clean record, Capital does seek an order on the three pending
3 motions prior to proceeding to argue the case on its merits. I do understand
4 based on the Court's denial of my Motion for Continuance that the Motion for
5 Amended Complaint and the Motion for Reconsideration are scheduled and
6 will be heard on April 7th. Capital stands by its complaint and its amended
7 complaint that this case is properly pled as a declaratory judgment proceeding
8 and that Capital has a right to be afforded the procedural guidelines of the
9 Rules of Civil Procedure. Without waiving our objection, Capital is here and is
10 prepared to proceed. For the purpose of this proceeding, Capital restates and
11 incorporates herein by reference, each and every allegation of Capital's
12 complaint and proposed amended complaint dated February 3rd, 2006. Capital
13 also notes for the record that the City has consented to the Amended
14 Complaint and that MDU and the PSC have chosen not to respond to the
15 motion.

16 THE COURT: If I could interrupt you for a moment. I'm wondering
17 why you think a further order is necessary on the Motion for Amended
18 Complaint because of that and also the Motion for More Definite Statement
19 appears to be, first of all moot because of my ruling and secondly because in
20 your response, you in essence provided a more definite statement. I guess I'm
21 not sure why you think anything further needs to be done on those.

22 MS. LARSON: Well Your Honor, I think that for the purposes of
23 the record, all the parties should know which complaint is going forward – what
24 is the document, what is the pleadings.

25 THE COURT: Well for purposes of the record I thought my Order

1 made very clear that what we are doing here is I in essence dismissed your
2 complaint and I'm treating it as an appeal and that's what we're doing.

3 MS. LARSON: All right.

4 THE COURT: And I'm not sure why there's, at least on your part,
5 a misunderstanding of that but I really don't want to spend alot of time on that.
6 We've only got an hour for this hearing and I would prefer to get into the merits
7 of the appeal, so if you're prepared to proceed on that at this time.

8 MS. LARSON: I am, Your Honor.

9 THE COURT: All right. Go ahead.

10 MS. LARSON: In the absence of an appeal provided by law or an
11 appeal provided by statute, for Capital to appeal the November 14th Order,
12 declaratory judgment is an appropriate form of action to obtain judicial review
13 of the November 14th Order. Capital's complaint to the district court presents a
14 claim on which relief can be granted. The City Commission's November 14th
15 Order is not the exercise of any power under the Constitution, is not the grant
16 of a franchise under Section 40-05-01 and is not the exercise of any regulatory
17 power under any statute, under any ordinance, resolution or regulation enacted
18 or adopted by the City of Bismarck. Lacking any supporting procedures or
19 standards, the November 14th Order is arbitrary, capricious, and unreasonable.
20 As an endeavor to resolve a dispute between MDU and Capital in the manner
21 of a judiciary, it is a violation of the constitutional principle of separation of
22 government powers. MDU and the City have cited a number of cases where
23 city's governing body actions have been upheld on judicial review and in the
24 process the actions have been described as quasi-judicial and the standard of
25 review is whether the legislative body acted arbitrarily, capriciously, or

1 unreasonably, but it does not follow from any or all of these cases that the
2 November 14th Order is sustainable. Indeed, the underlying rationale of all
3 those cases is the doctrine of separation of powers. The arbitrary, capricious,
4 unreasonable standard serves to restrain courts from invading the legislative
5 province. The arbitrary, capricious, and unreasonable mantra is not a rationale
6 for any local governing body to expand its power to invade the judicial sphere.
7 There is a difference between questions about the existence of a power and
8 about the exercise of a power. As explained in the Go Committee case, versus
9 Minot, in defining the existence of municipal powers, the rule of strict
10 construction applies. See also Fry v. City of Jamestown, 548 N.W.2d, 784.
11 This case distinguishes between an illegal exercise of power and the —

12 THE COURT: Excuse me, let me interrupt you for a minute. Am I
13 understanding that the substance of your argument is that the City didn't have
14 the authority to issue its Order, so that makes it arbitrary, capricious, and
15 unreasonable?

16 MS. LARSON: That is – I do intend to elaborate on that and I do
17 intend to get into the details of why I think the Order is arbitrary, capricious,
18 and unreasonable on the facts as well as the conclusions, Your Honor. May I
19 continue?

20 THE COURT: Well I thought what was going to happen here today
21 is that you were going to present evidence that you believe supported your
22 argument, not rehash arguments you've already made or read a written
23 statement.

24 MS. LARSON: Well I do intend – I mean as the Court is aware
25 and whether that is my fault or not, I was not aware that today was going to be

1 the hearing on the appeal and if I misinterpreted the Court, then I accept that
2 responsibility but I do feel that I do need to make a record. It is my position
3 that they did not have the power. I do ask the Court's permission to make that
4 argument and then I do intend to proceed rather quickly into setting forth the
5 concerns that I have with respect to the findings and the conclusions reached
6 by the City Commission.

7 THE COURT: Well I don't want to waste alot of time on this but I
8 do want to touch on your comment about your not being aware what the scope
9 of this hearing was. When I look at my January 30th Order, at no point in that
10 Order do I say what this hearing is going to be about, as to whether this is a
11 declaratory judgment action or whether it's an appeal. I'm looking at page 5 of
12 my Order, I clearly say and I'll quote "in reviewing the Complaint, it appears
13 that CEC is simply asking this Court to declare its rights under its franchise.
14 However, when one reads CEC's Response to Motion to Dismiss it becomes
15 clear this is not so. CEC actually is challenging the City's authority to issue its
16 Order on the petition and arguing that the City's decision was wrong. Neither
17 of those are within the scope of a declaratory judgment action." I mean that
18 seems pretty clear to me. Then I go on to say that CEC has a remedy. Under
19 Century Code, CEC may appeal and then I discuss the exhaustion of
20 administrative remedies but I finish up by saying that the Court would consider
21 CEC's Complaint to be an appeal to the district court of the City's decision,
22 would allow CEC to file an appropriate pleading setting out the issue as noted
23 above and would allow the parties to address the issue at the hearing now
24 scheduled for March 2nd, 2006. I guess I thought that was pretty clear but
25 anyway, go ahead Ms. Larson.

1 MS. LARSON: Thank you, Your Honor. I guess just to respond to
2 the Court's comments, Capital filed this complaint as a declaratory judgment.
3 It still feels a declaratory judgment is appropriate. None of the parties to this
4 action raised the issue of appeal, that was raised by the Court and we've not
5 been afforded any opportunity to —

6 THE COURT: Well except for both Mr. Bakke, in the City's Motion
7 to Dismiss for Failure to State a Claim, said that declaratory judgment action
8 was not appropriate. MDU specifically said that declaratory judgment action
9 was not appropriate and I, in my ruling, said declaratory judgment action was
10 not appropriate. Furthermore, in your response, you said what we're saying
11 here is that the City didn't have authority to make its decision and that they
12 were wrong, so I had to obviously first decide did the City have the authority to
13 make the decision. I decided that in the affirmative. The second question then
14 is if you think they're wrong, what's the appropriate remedy and I said not a
15 declaratory judgment action but an appeal. I mean if you want to continue to
16 argue about a declaratory judgment action, you're free to do that but I think I
17 made the decision.

18 MS. LARSON: I appreciate that, Your Honor, and I respect that. I
19 would just like to briefly make my record and then I will move on.

20 THE COURT: All right.

21 MS. LARSON: Thank you. There is a difference between
22 questions about the existence of a power and about the exercise of a power.
23 As explained in the Go Committee v. Minot, in defining the existence of
24 municipal powers, the rule of strict construction does apply. The arbitrary,
25 capricious, and unreasonable standard does not apply to a city's claim to the

1 existence of power. A city's governing body cannot claim its action falls within
2 a range of reasonableness in the exercise of a non-existed power. No
3 municipal governing body can claim powers on an ad hoc basis if the powers
4 have not been established by ordinance. It bears repeating that Section 40-05-
5 1 does not empower and no provision by any other statute and no provision by
6 the North Dakota Constitution empowers the City Commission to adjudicate
7 conflicting claims between holders of non-exclusive franchises that the City has
8 granted. If the power were to be asserted by any ordinance or if existing
9 ordinances were aggressively interpreted to include the power to determine
10 conflicting claims, it would be rejected as invalid – a violation of the principle of
11 separation of legislative and judicial power. The Board of Commissioner's of
12 the City of Bismarck does perform the legislative function of the City. In the
13 court action, MDU has said the issuance of a franchise is a legislative function
14 of the City founded on the police power and Capital does not agree with that
15 statement – disagree with that statement. But whether considered as a power
16 under the constitution, as a power under 40-05, the power is a legislative
17 power. Under the North Dakota Constitution and its structure of separate
18 legislative, executive, and judicial branches of government, there is an implied
19 exclusion of each branch from the exercise of the functions of the others.
20 Courts are cautious to not invade the legislative process. Courts do not shrink
21 however from preserving the judiciary's ultimate responsibility to interpret
22 statutes and ordinances and the courts tend the other side of the boundary to
23 prevent local governing bodies from exercising judicial functions. MDU's
24 petition to the City did not invite the exercise of a legislative function, nor does
25 the Board's November 14th Order record the exercise of a legislative function.

1 The fact that the Order is not a legislative product is demonstrated by the
2 Order itself. The Petition and the City Board's decision document reflects an
3 assumption that the Board somehow has judicial powers. The Order is what it
4 says it is, a grant of a petition to resolve a dispute except that it is ineffective. It
5 is ineffective not only because it was an ad hoc adventure unsupported by any
6 procedures or standards under any state statute or local ordinances, it is
7 ineffective because legislative bodies are constitutionally excluded from
8 exercising judicial powers. Prior to the October 11th city meeting, Capital
9 invoked the jurisdiction of the Public Service Commission under Chapter 49-
10 3. Also under Section 49-03-01.3 that states a public utility is not required to
11 secure a certificate of public convenience and necessity within which it has –
12 within a city which it has lawfully commenced operations, provided, and I quote
13 “that such extension or extension shall not interfere with existing services
14 provided by a rural electric cooperative or another electric public utility within
15 such municipality and provide duplication of services is not deemed
16 unreasonable by the commission.” It's clear that the City intended to, by its
17 failure to enact any ordinances, regulations, or resolutions that it intended to
18 defer to the public service jurisdiction. It has failed to develop a regimen for
19 regulating electric utilities. Because electric services are Capital's —

20 THE COURT: Wait, let me stop you. You think the City's intention
21 was that the PSC was supposed to decide what these service agreements
22 meant, is that what you're saying?

23 MS. LARSON: I think that the City, by failing to enact any
24 ordinances about how the City would regulate its franchised utilities, that it was
25 deferring to the regulation set out by the State and afforded to the Public

1 Service Commission. State regulation is designed to avoid wasteful
2 duplication of facilities between competing electric suppliers and that benefits
3 all consumers of electricity. The electric supply system of Capital Electric is
4 not confined to the City of Bismarck but extends throughout a larger portion of
5 this State into several counties, thus the economic impact of Capital's
6 operations within the City can adversely affect Capital's customers who reside
7 outside the City of Bismarck.

8 In addition to the allegations stated in Capital's Complaint and
9 Capital's proposed Amended Complaint, Capital objects to the following
10 Findings of Fact as set forth in the City's November 14th decision as arbitrary,
11 capricious, and unreasonable. Capital objects to the Findings of Fact Number
12 2 which concerns the City's reliance on correspondence in the early 1960's
13 concerning Capital's desire to secure a limited franchise. Reliance on that
14 correspondence to determine the intent of Capital's 1993 franchise by referring
15 to a 1961 correspondence concerning a franchise that was not granted is
16 arbitrary, capricious, and unreasonable. The intent of the parties in 1961 is
17 irrelevant. The intent of the parties is clearly set forth in the 1973 area service
18 agreement and incorporated in Capital's 1973 and again in Capital's 1993
19 franchise. The area service agreement states – and I will not read that but I
20 would refer the Court and the parties to paragraphs 3, 4, and 5 which discuss
21 the intent of the parties in entering into the area service agreement, but I would
22 like the Court to pay particular note to paragraph 5. In the event there is any
23 need for either party to this agreement to serve a prospective customer located
24 in the area served by the other party, such service shall be supplied only with
25 the written consent of the party provided that such individual exception shall

1 not in any way alter the basic intentions of the parties, that each shall serve or
2 offer service to the new consumers within their respective service areas. It's
3 my position that that clearly and unambiguously states forth the parties'
4 intention, and for the City to rely upon 1961 correspondence is arbitrary,
5 capricious, and unreasonable. Further, the intention of the parties in 1993 was
6 to keep the service agreement in effect during both Capital's and MDU's
7 franchise, and for that point I would refer you to the 1993 franchise.

8 Capital further objects to Findings of Fact Number 3(b) as
9 arbitrary, capricious, and unreasonable. As previously stated, the intent of the
10 parties is clearly set forth in the area service agreement, that each party serve
11 or offer service to the new consumers within their respective service areas not
12 found in the 1961 correspondence. The service area agreement delineated
13 territory for each company to grow without duplication or interference by the
14 other party.

15 Capital objects to Findings of Fact Number 5 as arbitrary,
16 capricious, and unreasonable. There is no provision in the area service
17 agreement for partial cancellation of the area service agreement. Further, the
18 grant of the franchise to Capital states that Capital shall enjoy all the privileges,
19 rights, and obligations described in the area service agreement, and I'm
20 quoting, "if the area service agreement and amendments thereto are cancelled
21 by either electric supplier during the term of this franchise, all privileges, rights,
22 obligations, and restrictions as therein contained shall continue to apply to both
23 Capital Electric and Montana-Dakota." Therefore, the purported cancellation
24 by MDU had no effect on Capital's franchise. Any determination by the City to
25 the contrary is arbitrary, capricious, and unreasonable.

1 Capital objects to the following Conclusions of Law as arbitrary,
2 capricious, and unreasonable. Conclusion 1 that the City has the authority to
3 decide questions regarding the franchise issued by it. We object to that. This
4 is a case where the City has exceeded its power, wrongfully attempted to
5 invade the purview of the judiciary by purporting to determine rights between
6 franchise holders and by interpreting a contract to which the city is a party.

7 THE COURT: You didn't object to the City's authority at the
8 hearing though, did you? You objected to them altering or amending but you
9 didn't object to the authority to interpret, did you?

10 MS. LARSON: I objected to – if I can find for one minute, Your
11 Honor.

12 THE COURT: Well what you provided me in your brief when you
13 said that I went outside the evidence in determining that you didn't make an
14 objection was from the proceeding before the City where you said that your
15 objection was to the City's authority to make any alteration or amendment to
16 the agreement but you didn't provide me with anything that said that you
17 objected to them being able to consider the petition period – or to interpret the
18 franchise. I guess just briefly, as long as I'm talking about that, again, you said
19 that I went outside the record in determining that the City didn't – or that you
20 didn't object to that. What I said in my holding was that no party provided me
21 any evidence that there had been an objection and that is the case. Nobody
22 provided anything to me when I was making that decision that showed that
23 there was any objection, however in your brief, you're challenging the City's
24 authority but you didn't provide me with anything that said that you had
25 challenged that authority at the time of the hearing on the petition and then

1 subsequently you indicate that you had, in your own words, challenged the
2 City's authority to alter or amend and I don't see that this is an alteration or
3 amendment, it's an interpretation of who gets the right to serve the area.

4 MS. LARSON: Well I'm sorry, I do disagree, Your Honor. I think it
5 does alter or amend our franchise. When the course of conduct by the parties
6 for the last – since 1973 when Capital was granted a franchise and during the
7 course of the period of time that MDU has had a franchise, our franchise
8 incorporates the area service agreement. The area service agreement
9 delineated territory for MDU to grow into what was outside the city limits of
10 Bismarck but was inside the area service line and for the areas that Capital
11 would continue to serve its customers and the territory that was outside the
12 line, so I do believe that the City has the power to grant the franchise but I do
13 not and I think I did make it clear in the record, Your Honor, that we did object
14 to their interpreting the franchise and their authority. Even if we had failed to
15 object, I can't give them authority or power that the City doesn't have. The City
16 has to have power in the first instance to exercise the power and I can't give
17 the City the power.

18 THE COURT: No but just as a matter of procedure, you can't
19 come into a forum, have a hearing on a petition, then say oh we don't like that
20 – well I guess you guys didn't have the authority to do this in the first place. I
21 mean it's like raising an issue on appeal that you didn't raise below. It's the
22 same thing.

23 MS. LARSON: Well Your Honor, I would beg to differ. We filed
24 our petition with the Public Service Commission prior to the hearing that we
25 had before the City and so in that respect I think we made it clear to the City

1 that we believed that Public Service Commission was the appropriate forum
2 for regulating the franchise in terms of the wasteful duplication of services and
3 the Public Service Commission's ability to – or need and desire to regulate the
4 electric distribution systems for the State of North Dakota.

5 THE COURT: Okay.

6 MS. LARSON: Capital objects to Conclusion 2 that the area
7 service agreement is ambiguous. The area service agreement is not
8 ambiguous and the Commission should not have considered extrinsic evidence
9 to interpret the provision of the area service agreement and the related
10 provisions of Capital's franchise. Again, I would refer the Court to the area
11 service agreement and the paragraphs previously cited in 3, 4, and 5.

12 Capital objects as arbitrary, capricious, and unreasonable
13 Conclusion 3 on several points, that the intention of the parties in the area
14 service agreement, and by extension, the intention of the City when it awarded
15 a franchise to Capital was for MDU to remain the main provider of electric
16 services within the city, except for Capital's existing customers and any other
17 customers or service conceded to Capital by MDU. The plain and ordinary
18 language of the franchise and the area service agreement indicate that the
19 city's intention to provide for orderly growth of electric distribution system was
20 to delineate delivery service territory between the two electric distribution
21 providers.

22 We further object to the conclusion also in Conclusion 3 that it
23 wasn't the intention of the parties or the City that the map attached to the area
24 service agreement would be in place for 40 years without amendment, but
25 rather that it would be amended as the city grew to allow for healthy and

1 efficient growth for both utilities. The intention of the parties again was clearly
2 set forth in the franchise and the area service agreement and this interpretation
3 is arbitrary, capricious, and unreasonable. The agreement did allow for
4 amendments but specifically stated that individual exceptions by serving
5 prospective customers in the other service area was, and I'm quoting, "not in
6 any way to alter the basic intention of the parties that each serve or offer
7 service to the new consumers within their respective service areas." Again,
8 see paragraph 5 of the area service agreement.

9 Capital further objects to the Conclusion – further conclusion in
10 Number 3 that it wasn't the intent of the City that Capital would become the
11 exclusive electric power supplier for all new areas of the city outside the line
12 shown in the service area. It was the City's intent, and including the area
13 service agreement in Capital's franchise, that the line on the area service map
14 would move outward as the city grew. That interpretation is contrary to the
15 stated intention and the plain language of the area service agreement and
16 contrary to the parties' course of dealing, contrary to the parties' reliance and
17 Capital's investment of millions of dollars in its facilities in north Bismarck to
18 serve the territory that was delineated to it by the area service agreement and
19 by the franchise granted to Capital by the City of Bismarck.

20 We object to Conclusion Number 5 that our franchise is limited to
21 areas within the city and would also include areas later annexed that were
22 named by an amendment to the area service agreement. Again, the Court
23 notes that the franchise was granted to Capital in 1973 and again in 1993. The
24 history of the course of dealing and Capital's relationships with the City of
25 Bismarck has been consistent that as areas were annexed into the City of

1 Bismarck which were delineated as Capital's service territory in the area
2 service agreement and incorporated into Capital's franchise have been served
3 by Capital. The orderly development for electric services within the city has
4 followed that Capital served its rural areas that were later annexed in the city
5 as set forth in the area service agreement without amendment to its franchise.
6 In addition, since the purported cancellation by MDU of the area service
7 agreement effective in 2003, 15 subdivisions have been annexed into the city
8 and served by Capital without objection by MDU and the City. The annexation
9 of part of Boulder Ridge was the first annexation that took place after this
10 purported cancellation that MDU has objected to and indicated that they have a
11 right to serve and that Capital does not have a right to serve.

12 Capital objects to the conclusion that customers of Capital within
13 the city in 1973 and any other customers specifically consented to by both
14 MDU would also be included under the express terms of the area service
15 agreement because Capital's franchise does not grant authority to serve all
16 new areas that are outside the line without an amendment to the area service
17 agreement. The ability of the parties to execute new amendments ended June
18 26th, the effective date of cancellation. We object to that conclusion as
19 arbitrary, capricious, and unreasonable and contrary to the language of the
20 franchise and the course of conduct by the parties. We further find as
21 arbitrary, capricious, and unreasonable the conclusion that the ability of the
22 parties to execute new amendments ended on June 26th, the effective date of
23 cancellation of the area service agreement. Again, the agreement does not
24 provide for partial cancellation and further the 1993 franchise grants to Capital
25 the rights and obligations of the area service agreement throughout the term of

1 its franchise.

2 We object to the Conclusion of Law Number 6 for the reason that
3 the City was not empowered and has failed to enact resolutions, regulations or
4 ordinances and that no provision of any other statute and no provision of the
5 North Dakota Constitution empowers the City to adjudicate conflicting claims
6 between holders of none-exclusive franchises that the City has granted. If the
7 City were to assert by any ordinance or if existing ordinances were
8 aggressively interpreted to include the power to determine conflicting claims, it
9 would be rejected as invalid, a violation of the principle of separation of judicial
10 and legislative powers. The primary purpose of the grant of the franchise to
11 Capital was to avoid wasteful duplication of capital intensive facilities. The
12 failure of the City to consider the existence of Capital's facilities and its seven
13 million dollar investment in those facilities in north Bismarck and its failure to
14 consider MDU's lack of facilities in north Bismarck is arbitrary, capricious, and
15 unreasonable. We object to the procedure by the City of Bismarck as an ad
16 hoc adventure unsupported by any procedures or standards under any state
17 statute or local ordinance. It is also ineffective because legislative bodies are
18 constitutionally excluded from exercising judicial powers. It was arbitrary,
19 capricious, and unreasonable to fail to consider the parties in the City's own
20 interpretation of Capital's rights under the franchise since it was granted in
21 1993. By the undisputed evidence that 15 subdivisions have been annexed
22 since the purported cancellation, the City – and each service to those
23 annexations approved by the City, to now decide 13 years later a new and
24 different interpretation is arbitrary, capricious, and unreasonable.

25 We object to the final order that the petition of MDU is granted

1 with respect to the provision of electric power services within part of Boulder
2 Ridge, Addition to the City of Bismarck, as arbitrary, capricious, and
3 unreasonable.

4 THE COURT: All right. Well I think it's kind of interesting that you
5 spend some time talking about the separation of the powers of the judiciary
6 and the legislative but then in essence what you want me to do is step in and
7 substitute my judgment for the City and say that the City was totally wrong in
8 their conclusions. That seems like a contradictory argument to me. I mean
9 you don't want the City to do any decision-making but you want me to
10 substitute what my judgment is for the City's.

11 MS. LARSON: I think that you would be restrained from exercising
12 your judgment if the City had been asked to exercise its legislative authority but
13 in this case the City was not asked. This is not the granting of a franchise.
14 The franchises have been granted by the City.

15 THE COURT: You don't think that the wording regulating the
16 franchise, you don't think that – what do you think that means if it doesn't mean
17 interpreting the franchise? What is the meaning of that term in there?

18 MS. LARSON: I think that if the City were going to exercise its
19 right to regulate the franchise that the City would need to enact ordinances,
20 regulations, or resolutions that would allow parties some articulated criteria of
21 how this City was going to regulate the franchise. I think it's striking by its
22 absence in the city ordinances of Bismarck that it has not done so and it has
23 done that in other areas.

24 THE COURT: At this point Ms. Olson and I don't know if —

25 MS. LARSON: Excuse me, it's Larson.

1 THE COURT: I'm sorry. Nobody has submitted to me anything
2 regarding the record from the proceedings in the city. I've got a copy of the
3 decision, I've got a copy of the area service agreements but I don't have
4 anything else.

5 MS. LARSON: Your Honor, that was the City's responsibility and
6 it's my understanding that the City has filed the record.

7 THE COURT: Why is it the City's responsibility? I mean you're
8 the one that has the burden of proving that the decision was arbitrary,
9 capricious, or unreasonable.

10 MS. LARSON: Well Your Honor, the statute that I don't think
11 applies but the Court does, states that it's the City's responsibility to file the
12 record on appeal and it's my understanding they have.

13 THE COURT: Where is it, do you know? Any idea? Well I'm
14 going to assume that it's somewhere in the clerk's office.

15 MR. BAKKE: Right. The dated certificate on record, and it was
16 hand delivered and it was February 17 I believe, of this year.

17 THE COURT: That's fine. I understand what you're saying Ms.
18 Larson regarding what the statute says but it would seem to me that if you
19 want it as evidentiary value that it needs to be submitted by you, but I guess I'll
20 just leave it the way it is and review it the way it is. All right. Mr. Bakke, do you
21 want to go first?

22 MR. BAKKE: Sure. Let me address first Your Honor, the issue of
23 authority because I think that is in fact a decided issue and I think it's also a
24 moot issue and as part of the record that we did submit and pointed out in our
25 brief is the brief of October 4, 2005 submitted by Capital Electric in support of

1 its reply to the Petition to Declare an Electric Franchise Right and under the
2 jurisdiction heading – bear in mind that this is a brief submitted by Capital
3 Electric to the City Commission before the issue of franchise rights was
4 decided, they say – Capital Electric says in their brief “pursuant to N.D.C.C. 40-
5 5-01(57), the City of Bismarck has the power to grant franchises and to
6 regulate the use of the same.” How much more clear could it be that they’re
7 acceding and agreeing that the City has authority to decide the issue of
8 franchise rights. It’s hard to imagine. Basically what they’re now coming in
9 and saying is that well we don’t like the City Commission’s decision so we’re
10 going to assert, after the horse is out of the barn, that they didn’t have authority
11 and that’s just simply not allowed and it’s contradicted by what they’ve
12 submitted to the City Commission. It’s been weighed. It’s already been
13 decided. I find it interesting here that they say that they’re taking a position
14 that the PSC was the correct forum because they went to them first. As the
15 Court is aware, if someone is going to assert that a particular governing entity
16 or a court does not have jurisdiction, then rather than admitting that they have
17 authority to decide the issue, the proper procedure at that point would have
18 been to submit a brief saying to the City Commission you don’t have authority
19 or jurisdiction to decide this issue. We’ve already gone to the PSC on this
20 issue and we think they’re the governmental entity that has jurisdiction and
21 authority to decide this issue. They didn’t do that. They didn’t even preserve
22 that argument. We’re hearing that argument here today for the first time here
23 on appeal that Capital’s taking the position that the PSC is the one who had
24 authority and jurisdiction when they’ve never raised it before. Once again
25 that’s a waiver and the proper procedure would have been for them to go and

1 see the commission directly, before they presented any evidence and before
2 they agreed the City had authority and say no, you don't have jurisdiction, and
3 that didn't occur. I've heard alot of discussion here about authority but she had
4 not – Ms. Larson has not cited one case, one statute – has not discussed the
5 Home Rule Charter or any of the black letter law and bear in mind here we're
6 talking about law here from many different sources. We're talking about Article
7 7, Section 1 of the North Dakota Constitution. We're talking about the statutes
8 in North Dakota 40-05-01.57. We're talking about the Home Rule Charter, all
9 of which say —

10 THE COURT: I'm going to cut you off only because I've already
11 decided this.

12 MR. BAKKE: Okay.

13 THE COURT: And the Supreme Court may say I'm wrong and I
14 guess if they do, they do. I would prefer to focus on what I thought the issues
15 were here today, that being whether the City's decision was arbitrary,
16 capricious, or unreasonable.

17 MR. BAKKE: And I'd be happy to do that, Your Honor.

18 THE COURT: All right.

19 MR. BAKKE: Basically as I understand their position, Capital is
20 saying well simply because they made these findings of facts, conclusions of
21 law and we disagree with them, that somehow makes them arbitrary,
22 capricious, and unreasonable. First of all they started out by discussing some
23 specific findings of fact and really those findings of fact just simply lay out the
24 historical background in regards to how franchise rights have been handled
25 historically by MDU and by Capital Electric. They don't dispute the correct

1 rendition of that history. They don't claim that they're wrong. They're just
2 simply saying well we disagree with them and we don't like them, but in fact I
3 think the record supports that those are a correct historical and factual
4 rendition and really what we should be focusing on here is these Conclusions
5 of Law. I'll talk about those now because they say – number 1 they get back
6 into the authority issue when they talk about Finding of Fact Number 1.
7 They've offered nothing to dispute what we just talked about, Article 7 as being
8 a —

9 THE COURT: Are you talking about Conclusion of Law Number 1?
10 I thought you said finding of fact.

11 MR. BAKKE: I'm sorry, Conclusion of Law.

12 THE COURT: That's all right, I just wanted to make sure we were
13 on the same page.

14 MR. BAKKE: And that's the issue that I think the Court has
15 previously decided so I think that one is resolved because it's the same basis
16 that the Court has found in its January 30 as the authority for the City to decide
17 the issue. So then they talk about Conclusion of Law Number 2 that it's
18 ambiguous and let's look at the situation that the City was confronted with here
19 because what we have is historical information making it very clear that going
20 back in time to the time period when Capital Electric was granted franchise
21 rights, that it was very clear that the intent of the parties was to – we submitted
22 documentations from Capital Electric itself. I mean these are not documents
23 MDU has submitted or documents which are some interpretation that some
24 prior city commissioners put on this, these are documents submitted by Capital
25 Electric itself where they very clearly say we're not intending to obtain franchise

1 rights to any areas outside the city limits except for those areas that are
2 currently served – existing customers of Capital Electric and to the extent there
3 are Capital Electric customers in the city that are existing, those are ones we
4 want to be subject to our franchise rights. So now we're talking about a
5 situation, Boulder Ridge, an entity that never existed – that came into existence
6 in 2005 that is part of the city as of at that time being annexed into the city and
7 they're now essentially saying we want the franchise rights that MDU has and
8 it's very clear that their franchise – Capital Electric's franchise is a limited
9 franchise. There is no limitation on the MDU franchise.

10 THE COURT: Well if it's that clear, how can the City find that it's
11 ambiguous?

12 MR. BAKKE: Well I'm talking about the franchise and then they
13 talk about the area service agreement and so the City is trying to interpret
14 different documents – letters they previously sent, the area service agreement
15 which was cancelled in 2003 and then they're looking back to the franchises,
16 so the waters are somewhat muddied. But what I'm saying is when you look at
17 all of those things together it becomes clear here that Capital Electric has
18 never had the right or the franchise to get customers that were never their
19 customers to begin with, either in the city or outside the city. They're not
20 claiming here that Boulder Ridge was someone they had before. They haven't
21 presented any evidence to suggest gee, this was our area before. We were
22 serving customers in that location. That's not an argument they're making and
23 there's no evidence to suggest it. This is a completely new subdivision that no
24 one was serving before and their burden under that circumstance is to show
25 that the City's decision saying yes this is MDU's because they're going to be

1 part of the city nobody had before, it's their burden to show that that was
2 arbitrary, capricious, and unreasonable and that there wasn't substantial
3 evidence and that's just not the case here. Then they talk about these 15
4 subdivisions and once again this is something we're hearing for the first time
5 here today, not contained in prior briefs or arguments that I'm aware of, that
6 there were 15 prior subdivisions and they say they've invested thousands of
7 dollars in electrical infrastructure and so on and we would respectfully request
8 that if that's the case, that it would seem reasonable that Capital Electric – if
9 they're claiming they invested in that infrastructure for the purpose of Boulder
10 Ridge, that you'd want to make certain you had an agreement in place ahead
11 of time before you make that type of expenditure – made sure that you had the
12 franchise for that location. I suspect that infrastructure is probably for other
13 operation of theirs, including these 15 other subdivisions but I don't think
14 there's any evidence to suggest they specifically invested in infrastructure for
15 Boulder Ridge and if they did, they should have had an agreement in place
16 ahead of time.

17 THE COURT: I guess Ms. Larson can correct me if I'm wrong but I
18 understood at least part of that argument to be you guys didn't object before so
19 why are you objecting now. Well I guess it's MDU that should probably answer
20 that question, so go ahead.

21 MR. BAKKE: And then they talk about Number 6 and they say that
22 that once again gets them to their issue of power of going – power of the City
23 to decide the controversy. If you look at Conclusion of Law Number 6, it has
24 nothing to do with the power to decide the controversy. All Conclusion of Law
25 Number 6 deals with is that the hearing was properly noticed and that all

1 parties had an opportunity to appear and present evidence and that's clearly
2 the case here. They briefed the issue. They appeared, and so I don't quite
3 understand why they're arguing or suggesting that Conclusion of Law doesn't
4 support the City's decision because those things actually happened. I think
5 what we're down to here is we have black letter law from several different
6 sources, the North Dakota Constitution, statutes, the Home Rule Charter, all
7 making it clear that the City can regulate this area. They say well there isn't a
8 specific ordinance by the City to regulate this area. The City doesn't need that.
9 The City has statutes – the City has Article 7 of the Constitution that
10 specifically allows regulation of franchises. It doesn't need anything more. To
11 adopt an ordinance on something you already have statutory authority for
12 would just be superfluous. There'd be no need for that and so – and that's
13 what the case law says and we've cited those cases and so I think it's clear we
14 did have authority to regulate. They agreed we had that authority. They don't
15 like the decision but yet now they're before this Court with no evidence to
16 support their claim that it's arbitrary, capricious, and unreasonable and under
17 that circumstance, as the Court is aware, I think the decision by the City
18 Commission should be affirmed – the Conclusions of Law and Findings of
19 Fact. Unless the Court has any questions for me, I'll —

20 THE COURT: Well you said that they agreed to the City's
21 authority but they did, apparently anyway, at least according to one of Ms.
22 Larson's later filings, object to the City's authority and in their words, to alter or
23 amend the franchise or the agreement and their argument is that they believe
24 that the City altered or amended so that they did preserve their objection to the
25 authority.

1 MR. BAKKE: Well I don't know how they've done that because
2 they certainly didn't do it at the hearing and they certainly didn't do it in the
3 briefing stage. Only once the City Commission decided the issue did they start
4 this lawsuit and even then they didn't make those findings, so I think that's
5 really a decided issue and a moot issue and it simply begs the issue of their
6 burden of proof to show some conduct by the City was arbitrary, capricious,
7 and unreasonable, which as the Court has pointed out in its January 30 Order
8 is really the crux of the issue on appeal here and really what needs to be
9 addressed. They simply have no evidence on that.

10 THE COURT: All right. Thank you Mr. Bakke. Mr. Kuntz or Mr.
11 Kettleeson.

12 MR. KUNTZ: Thank you, Your Honor. The issue in front of the
13 City Commission was the interpretation of a geographic limitation inside Capital
14 Electric's franchise and if the Court doesn't have the record in front of it, I'd like
15 to just show you what we're talking about here because I think this really gets
16 to the crux. You'll find this in the record. This is from the materials that MDU
17 submitted to the City. The lines that I've highlighted there is the geographic
18 limit that's in Capital Electric's franchise and you won't find that limit in MDU's
19 franchise. I think before I talk about the interpretations the Commission was
20 faced with, I think there's a couple of things that's important about that. First of
21 all it says right there that it's doing that – placing that geographic limit to
22 prevent duplication of facilities inside the city, so the idea that somehow the
23 City was deferring to the Public Service Commission to decide which provider
24 was going to be the utility within the different parts of the city I think is just plain
25 contrary. The City was clearly taking control of the fact that it was going to be

1 the one who was going to be deciding who was going to serve what parts of its
2 city by the very geographic limitation that's contained in Capital's franchise.
3 The other thing that kind of touches upon the authority issue and whether or
4 not Capital waived it – we filed a petition asking the Commission to basically
5 interpret this language – this limitation in light of MDU's franchise, which
6 doesn't have that limitation. If you look at Capital's reply to our petition, the
7 thing that they ask – they ask the Commission the precise same thing we were
8 asking for, only for a different result. They also ask the Commission to issue
9 an order interpreting the franchise in their favor to provide service at Boulder
10 Ridge, so I don't know how on one hand they can come in and say the
11 Commission didn't have authority to interpret its franchise but at the same time
12 ask for relief for an interpretation in their favor.

13 THE COURT: Well I suppose you could interpret it as alternative
14 pleading. In other words, City, we don't think you can do this but if you're
15 going to do it, decide it our way.

16 MR. KUNTZ: You won't find that alternative pleading in their reply,
17 Your Honor. The other thing is when you get the record, there is a tape of the
18 oral arguments before the City Commission in there and in that tape, Ms.
19 Larson acknowledges the authority of the Commission to issue and regulate,
20 as I recall.

21 Now I'd like to briefly just touch upon this limitation. You look at
22 this limitation and there are at least three interpretations you can have of that
23 particular language. The first interpretation is that it includes just the areas that
24 were in the city in 1993 when the franchise was issued, or any other areas that
25 are brought in as a result of amendments to the area service agreement by the

1 parties. The second interpretation that you can have is that it includes all of
2 the areas within the city in 1993 plus any areas that are annexed to the city
3 after 1993 that are within the area service agreement until it was cancelled in
4 2003; and then there's the third interpretation, it's Capital Electric's
5 interpretation, that includes all the areas that were in the city in 1993 as well as
6 all the areas that are brought into the city thereafter, and conveniently that
7 interpretation would make Capital Electric the exclusive provider of every newly
8 annexed area to the City of Bismarck from here until the end of their franchise
9 in 2013. The City looked at that language and determined yes there's different
10 interpretations here on that basis – it's ambiguous. We've got to go back and
11 look and see what was the intent of that limitation. They went back and looked
12 at the history of Capital Electric's request to get franchises from the City of
13 Bismarck – the geographic limit, what was the reason for that geographic limit
14 and they concluded it was just pure nonsense to think that the city and
15 Montana-Dakota intended that Capital Electric was going to be the exclusive
16 provider for every single newly annexed area in the City of Bismarck. So what
17 the City determined, based upon their review of the language and this history,
18 was that interpretation number one was the correct interpretation and that is
19 that the area included within their franchise is the area that was in the city that
20 they served in 1993 plus any new areas that the two parties specifically agreed
21 to amend the area service agreement to bring into that particular franchise
22 after that. Since the parties didn't have any specific amendments to that effect,
23 they said Capital, what your franchise authorizes you today is to serve those
24 areas that you had in 1993 and basically if you want any additional areas,
25 you're going to have to come back to us and get an amendment to that

1 franchise. They didn't say they could never have any of these areas in the
2 future. They just simply said this is what you've got right now, if you want to
3 bring something else in, you're going to have to get an amendment but with
4 respect to Boulder Ridge, we believe that Montana-Dakota should be the
5 provider of Boulder Ridge. That's the sum and substance of what they
6 determined. You can go through that record, you can listen to the oral
7 arguments, Your Honor, and I think that's a very rational determination by the
8 City Commission. I don't think it's arbitrary, I don't think it's capricious. I think
9 it fits with the materials that they had in front of them. There was never any
10 objection to the procedure the City Commission was using. Both of us had full
11 opportunity to present whatever materials – whatever argument that we wanted
12 to present to the City Commission. Your Honor, we would request that the
13 Court issue an order affirming the decision of the City Commission and
14 directing Capital Electric to cease providing service in Boulder Ridge.

15 I want to touch on just one other thing briefly, Your Honor, and
16 that's the fact that the Court's treatment of this filing as an appeal raises the
17 question regarding the status of our counterclaim. We filed a counterclaim in
18 this action and the Courts' consideration of this as an appeal I think really
19 presents us with like four different options of what the Court directs us to do
20 with that counterclaim. Number one, I think we can just let the counterclaim
21 continue and you don't finalize your ruling – you issue a final judgment on the
22 appeal until the counterclaim is complete. That would be the first. The second
23 would be to issue an 54(b) certification with respect to the appeal portion and
24 let the counterclaim continue. The third I think is the Court could bifurcate the
25 appeal from the counterclaim, create two separate actions with it and then

1 issue a final judgment on the appeal portion, and then the fourth I think is the
2 Court could basically dismiss without prejudice our counterclaim and have us
3 refile it as a separate action. Basically any four of those options are
4 acceptable to us. Our preference would be to bifurcate because we've already
5 completed most of our discovery with respect to the counterclaim. I'd hate to
6 start it all over again, but in the issuance of the Court's decision on this, I just
7 want the Court to keep that in mind that I think we need to deal with that issue
8 as we move this matter forward. Thank you, Your Honor.

9 THE COURT: All right. Mr. Kettleon, anything you want to add?

10 MR. KETTLESON: No, Your Honor. Thank you.

11 THE COURT: All right. Ms. Larson, I guess one thing I didn't ask
12 you about – you had indicated that you felt that Capital Electric was denied due
13 process in the proceedings in the City and I'm curious as to what you believe
14 process was due that was denied.

15 MS. LARSON: Well again Your Honor, I think that the failure of the
16 City to enact any ordinances, resolutions, indicating how it was going to
17 exercise any authority it might have to regulate the franchises. With this
18 unarticulated criteria, we were not afforded due process as to what the
19 procedure was going to be – what issues were going to be dealt with, how the
20 City had intended to regulate, what the City intended to look at when it was
21 exercising any authority it might have with respect to regulation.

22 THE COURT: But at least according to Mr. Kuntz, and I certainly
23 have no reason to disbelieve him, you filed a response to the petition that in
24 essence asked for the same relief that MDU was asking for.

25 MS. LARSON: I did file —

1 THE COURT: Well the reason I'm asking that is it's hard for me to
2 understand how you can claim that you weren't aware of what the City was
3 intending to do and how they were going to do it if you were asking for them to
4 do the same thing.

5 MS. LARSON: Well that's a good point, Your Honor. My position
6 was more fully and I think perhaps better articulated in the brief that I filed with
7 the City and I would ask the Court to review that brief as part of the record on
8 this appeal with respect to some of the issues that were raised. They were
9 raised both in the meeting that the City held to discuss this issue and they were
10 also raised in our brief and for that point I would ask the Court to look at that
11 brief with respect to the issue of the jurisdiction. In that brief I did point out to
12 the City Commission that Chapter 49-03 did grant to the Public Service
13 Commission the responsibility to resolve conflicting claims within electric
14 service areas, including unreasonable duplication of electrical facilities within
15 municipalities. I appreciate that apparently the Court did not have that before it
16 when it was entering its decision. We told the Commission in that brief and
17 again at the hearing that a complaint had been filed seeking an order
18 restraining and enjoining MDU from constructing or extending its interfering line
19 into Capital's franchise area. We did state that the City didn't have authority –
20 or the right to amend or alter the franchise without our consent and we also
21 stated in that brief, Your Honor, that the courts have exclusive jurisdiction to
22 resolve contract disputes pursuant to North Dakota Constitution Article 6,
23 Section 8. Those issues were raised prior to the meeting on October 11th and
24 were raised again in the oral arguments. Also in that brief there were issues
25 that – Capital did raise the issue of the eventuality of annexation and how that

1 had been treated. We raised to the City that it was our understanding and that
2 the plain and clear language of the area service agreement and – amended
3 portion of the area service agreement – amending to, I apologize. Amendment
4 to the area service agreement that was embedded in our franchise that
5 required that – or allowed that service agreement to continue throughout
6 Capital's franchise, that this was the plan adopted by – for the orderly
7 development of Bismarck.

8 THE COURT: Let me interrupt you again. Mr. Kuntz basically set
9 out what he believed to be three possible interpretations of the grant of
10 authority in this case and indicated that the City in essence went back through
11 the history and the pattern of proceedings and made the determination that
12 what he set out as the first choice or the one that's in the conclusions here is
13 the appropriate one. Why is that one unreasonable compared to what the
14 other possibilities are?

15 MS. LARSON: Well I think it's unreasonable for several reasons. I
16 think it's unreasonable because the City relied on 1961 correspondence for a
17 franchise that never came into existence. The '73 franchise was not the
18 franchise that Capital was requesting in 1961.

19 THE COURT: But don't you think it's appropriate to rely on an
20 entire body of historical material to determine what parties' intents were?
21 You're saying that you just start at some point and that's it?

22 MS. LARSON: I absolutely think it is completely inappropriate. By
23 analogy, if a person was negotiating for a lease of a farm contract and you
24 weren't able to come to terms and five years later you approach the farmer
25 and try to re-negotiate the lease and you entered into a written lease and later

1 you had a dispute about it, you would be looking at the terms of that lease and
2 of that negotiation. You wouldn't be looking at what happened – what the
3 parties were discussing five years before that. I think it's absurd to —

4 THE COURT: Well although – and I don't want to get off into this
5 particular woods necessarily but if the present agreement on the lease you're
6 talking about was ambiguous, you could look at extrinsic evidence and that's
7 exactly what they're talking about here, isn't it?

8 MS. LARSON: Well you could look – if an agreement is
9 ambiguous, you'd look at extrinsic evidence but you'd look at what would be
10 appropriate extrinsic evidence to determine the meaning of that agreement and
11 if the negotiations were close in time and culminated in that lease, that would
12 be appropriate to look at as extrinsic evidence. In this case if you had – which
13 I don't think it is but if the franchise was ambiguous, first of all you'd look at
14 what was the parties' understanding – what was the parties' interpretation of
15 the contract when it determined what the agreement meant. We have 13
16 years.

17 THE COURT: But the bottom line here is both the parties have a
18 different interpretation, right? I mean we wouldn't be here today if you guys
19 interpreted it the same way, would we?

20 MS. LARSON: Well I think that's obvious that that's true, Your
21 Honor.

22 THE COURT: Well it is and I'm not saying that to be facetious but
23 that gets back to whether it's ambiguous or not.

24 MS. LARSON: Well Your Honor, I think that the parties' course of
25 dealing is a primary – the reliance on the agreement – if the City had looked at

1 our facilities, and that was raised – the facilities, the investment of facilities –
2 contrary to Mr. Bakke's comments, it was not raised for the first time today. If
3 the Court will again look at the brief that Capital filed with the City, they will see
4 that we had argued to the City that the electric distribution service had been
5 provided to annexed areas by MDU and Capital in accordance with the area
6 service agreement. Mr. Kuntz is incorrect to say that MDU – that if the
7 agreement was interpreted the way Capital believes it should be interpreted,
8 that we would be entitled to every new annexed area. That's a misstatement
9 of the facts. The facts are that when the area service agreement was entered
10 into in 1973, there was a line drawn, and the Court can look at the area service
11 map, that encompassed the city limits of Bismarck as they existed in 1973.
12 Then there was a lot of service area that was outside the City of Bismarck that
13 was delineated as being MDU's service territory and outside of that there was
14 what we call the area service line that was Capital Electric's. Capital Electric
15 had been providing electric distribution within that area outside of the line since
16 Capital Electric was developed. MDU has grown into its area – into its service
17 territory. As areas were annexed into the city that were in MDU's service
18 territory, they have been annexed in and they have been providing electric
19 distribution services. There are still areas within MDU's service territory that
20 have not been annexed into the City of Bismarck and if a developer or a
21 landowner asks the City to annex in that area, under the area service
22 agreement, MDU will have the right to provide electric service to those areas.
23 That's the way it's worked. Capital – we have not been developing our electric
24 system to serve one person.

25 THE COURT: Well if I could interrupt you. You know, you've

1 spent a long time explaining what you believe the agreement says.

2 MS. LARSON: Well that's the fact, Your Honor.

3 THE COURT: Well that's an interpretation and Mr. Kuntz has an
4 interpretation and I do need to review the record but apparently the City was
5 faced with three possible interpretations and chose one and now we need to
6 determine whether that was unreasonable or not. As I understand it, your
7 basis for saying that that particular determination was unreasonable was
8 because they relied on something that was too old.

9 MS. LARSON: That had nothing to do with the actual area service
10 agreement that was entered into. I would also want the Court to know that we
11 did argue that Capital had been providing service to this location that's known
12 as Boulder Ridge since 1949. We articulated to the City that we had original
13 construction of a one-phase line completed in 1948, that the line was
14 converted to a three-phase line in 1970 and that the three-phase line was
15 rebuilt and upgraded and added more capacity in 1997. The three-phase
16 circuit in Boulder Ridge was already there and was ready to be energized. In
17 addition, we pointed out to the City that Capital and WAPA – the Western Area
18 Power Area (sic) had invested seven million dollars in construction of a delivery
19 substation to provide transmission to north Bismarck. We provided to the City
20 information that showed that Capital had electric distribution available running
21 along two sides of the area known as Boulder Ridge and that MDU had no
22 facilities in that area – that MDU would have to run a radial line for a half a
23 mile.

24 THE COURT: Well I guess I'm going to have to interrupt you. I
25 mean basically what you're doing is arguing facts that unfortunately I haven't

1 had the opportunity to review the record and that's basically for two reasons,
2 the first is that I had not been made aware that it was even filed and secondly, I
3 had a fairly intensive trial that went the last week so I wasn't able to do that. I
4 think that I'm going to have to review that in order to address the issues you're
5 raising Ms. Larson.

6 MS. LARSON: Okay.

7 THE COURT: You know you can tell me all day this stuff – and I'm
8 not saying it's meaningless, it's just without looking at it on paper and
9 everything, it's not going to be real helpful.

10 MS. LARSON: I completely appreciate the Court's dilemma there.
11 I guess my point is that a number of these issues that have been indicated by
12 the City as not being raised were absolutely raised and the City's failure to look
13 at all at the facilities that Capital had built in reliance on its franchise and the
14 investment that Capital Electric has in those facilities makes the City's decision
15 arbitrary, capricious, and unreasonable.

16 THE COURT: All right. Well as I said, I will need to review the
17 record in order to determine the issues that are before me at this point. I will
18 address, Mr. Kuntz, the counterclaim in one way or another. I will review the
19 various options and decide which I think is the most appropriate. Again I do
20 need to apologize for not having had the opportunity to review the record prior
21 to this hearing and I'm not trying to blame anybody else but I didn't even know
22 it had been filed, to tell you the truth. I don't know if I would have had time to
23 look at it anyway but what I will do is review that and compare that with the
24 arguments on each side and with the findings and conclusions and make my
25 decision. I'll try to get it done as soon as possible. My week next week isn't

1 overly heavy so I'll maybe – maybe I can get it done by the end of the week.
2 I'm not going to make any promises. Mr. Kuntz, I'll give you your copy back
3 here.

4 MS. LARSON: Your Honor, I have requested in motions for a
5 written transcript that Capital is willing to pay for. I think that might assist the
6 Court in trying to review versus looking at three videotapes but I would ask for
7 permission to supplement the record with the transcript of the video of the
8 proceedings at the City.

9 THE COURT: I mean I guess I don't know. If you want to waste
10 your money doing that, I guess you can certainly do that. I mean it seems to
11 me that the tape itself – I mean unless there's something unintelligible on it or
12 something.

13 MS. LARSON: Well again, I think for the interest of clarification of
14 the record, Your Honor, is —

15 THE COURT: What I'm concerned with is how long it's going to
16 take to do that.

17 MS. LARSON: Well if this case was appealed by any of the
18 parties, I think that having a transcript would certainly be helpful for the record
19 itself versus trying to —

20 THE COURT: Well I'm going to do this. I'm going to look at what I
21 have now and if I am unable to find the information that I need, then I'll
22 consider your request but at this point I'd rather just rely on the record as it is.
23 Anything else counsel?

24 MR. KUNTZ: Nothing further.

25 MR. BAKKE: Your Honor, the only thing that I wanted to mention

1 is in relation to the request as to the counterclaim. Of course the City isn't
2 involved in that and so the City's preference, for what it's worth, would be that
3 some method be made available out of the laundry list that Mr. Kuntz provided
4 so that if there is going to be an appeal, it could be taken immediately and so
5 the City doesn't have to continue to be involved in a lawsuit that it has no
6 interest in in terms of the counterclaim.

7 THE COURT: All right. I'll certainly keep that in mind when I
8 decide that particular issue. Anything else?

9 MS. LARSON: No, Your Honor.

10 MR. KUNTZ: No, Your Honor.

11 THE COURT: All right. Thank you counsel, I appreciate it.

12 (Hearing concluded at 5:08 p.m.)

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CERTIFICATE

I, Lisa Schmidt, do hereby certify that I electronically recorded and transcribed into typewriting the foregoing transcript from the tape on file to the best of my ability, that the transcript, consisting of 37 pages, constitutes a full, true, and correct transcription of the proceedings of such hearing.

Dated this 24th day of August, 2006.

A handwritten signature in cursive script that reads "Lisa Schmidt". The signature is written in black ink and is positioned above a horizontal line.

Lisa Schmidt