

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)
)
 _____)
)
PSC Case No. PU-05-551)
 _____)

CIVIL NO. 06-C-1177

**APPELLEE BRIEF
NORTH DAKOTA PUBLIC SERVICE
COMMISSION**

PRELIMINARY STATEMENT

The decision issued by the North Dakota Public Service Commission (“Commission”) was not a unanimous decision and therefore further reference to the Commission with regard to the decision will be to the majority decision of the Commissioners. Furthermore, because this decision is not a unanimous decision and because this proceeding involves a territorial dispute between two electric suppliers and because the Public Service Commission staff did not take an adversarial position in the case, the Commission’s brief will be limited to a discussion of the Commission’s rational for its decision in this case. Factual and Legal arguments will be left to the parties.

ARGUMENT

The Commission’s authority in this proceeding is under Chapter 49-03 of the North Dakota Century Code. The Legislature and the courts have given the Commission explicit directives regarding its role in deciding a complaint case brought by a rural electric cooperative

against an electric public utility for interference with existing services of the rural electric cooperative caused by the extension of electric distribution lines of an electric public utility. The Commission is the governmental body that has been given the authority to determine whether or not the provisions of the Territorial Integrity Act (“TIA”) have been violated.

N.D.C.C. §49-03-01.3 allows an electric public utility to extend its electric distribution lines within the corporate limits of a municipality where it has lawfully commenced operations “provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative . . . within such municipality; and provided duplication of services is not deemed unreasonable by the commission.” N.D.C.C. §49-03-01.4 provides that “[i]f any electric public utility violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric cooperative, the commission, after complaint, notice, and hearing . . . shall make its order restraining and enjoining said electric public utility from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe such terms and conditions as it shall deem reasonable and proper.”

The Commission recognizes that a city has the right to issue franchises. The Commission does not believe that the right to grant franchises can be construed so as to compel public utilities to circumvent or violate state laws that are designed to prevent an electric public utility from interfering with the service or system of another electric provider and to prevent the wasteful duplication of capital intensive facilities. The North Dakota Supreme Court determined in Cass County Electric Cooperative, Inc. v. Northern States Power Company, 419 N.W.2d 181,184 (N.D. 1988) (“Cass County Electric”), that the primary purpose of the TIA was to keep to a minimum the wasteful duplication of capital-intensive utility services.

Montana-Dakota Utilities Co. (“MDU”) asserts that the Commission 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. MDU states that with the exception of the Commission’s decision in the present case, every application of the TIA within a city has recognized the city’s franchise of electric service within the city. MDU cites as authority for its statement Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971) (“Divide County”), Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974) (“Tri-County”) and Cass County Electric Cooperative, Inc. v. Northern States Power Company, supra.

MDU places its reliance on the constitutional rights of cities to grant franchises and ignores the legislature’s mandate against interference and wasteful duplication of facilities. MDU also relies heavily on the precedent established in Divide County. The Divide County case is readily distinguishable from the present case. Divide County was not a complaint case before the Commission under Chapter 49-03, and therefore questions of interference and wasteful duplication were not issues considered in the case. Divide County, was not a situation where a rural electric cooperative had built extensive facilities to serve the general area where the annexed property was situated. In Divide County, unlike the present case, the city refused to grant the electric cooperative even a limited franchise. Divide County simply says that an electric supplier must have a franchise before serving within a city. The Court did not order the city to either give or not give a franchise, and the Court did not say anything about what happens when the effect of a city’s decision is to cause a violation of separate state laws.

Tri-County involved a case before the Commission under Chapter 49-03 regarding an area not annexed to the city. The question before the Commission was whether a certificate of public convenience and necessity should be issued to the investor owned utility to serve the customer in question. The only discussion concerning a franchise related to a possible

eventuality that the area could some day be annexed to the city of Jamestown, and the Court observed that the city could give the cooperative a franchise to continue to serve the customers it was serving.

Both Divide County and Tri-County were decided prior to the decisions in Cass County Electric, supra and Northern States Power Company v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990) (collectively referred to as “South Pointe”). The South Pointe cases, like the present complaint case, were complaint cases brought before the Commission under Chapter 49-03. The only real difference between the South Pointe cases and the present case is that in South Pointe both Northern States Power Company (“NSP”) and Cass Electric Cooperative, Inc. (“Cass”) had general franchises from the city of Fargo to provide electric service in the annexed area, so the question of general franchise vs. limited franchise was not addressed.

In Cass County Electric, the Court found that Tri-County did not preclude cooperatives from serving new customers within an annexed area. Cass County Electric, supra at 187. The Court further found that the Commission interpreted N.D.C.C. §49-03-01.3 too narrowly. Id. The Court directed that in complaint cases brought under that section of law the Commission must look at the existing electric facilities that both electric suppliers have in place in the area to determine if extension of the public utility’s service into the annexed area would constitute an unreasonable duplication of capital-intensive facilities and services already provided by the electric cooperative. Id. The Court remanded the case to the Commission directing the Commission to determine whether the public utility’s extension of service interferes with and would constitute an unreasonable duplication of investment and available facilities and services provided by the electric cooperative. Id. at 188. In Northern States Power Company v. North Dakota Public Service Commission, supra at 345, the Court determined that the question of

which electric suppliers' facilities are duplicative and wasteful is one of fact for the Commission to determine.

MDU contends that the Commission had no authority to make its decision under Chapter 49-03 because N.D.C.C. 49-03-06(8) states that nothing in Chapter 49 limits the authority of a city to exercise its franchise authority. The specific language of N.D.C.C. §49-03-06(8) conflicts with the general language of N.D.C.C. §49-03-06 which authorizes service area agreements to encourage harmony and operational efficiency among electric providers and to discourage the unreasonable duplication of electric facilities. It also conflicts with the general language of N.D.C.C. §49-03-01.3 which prohibits interference and unreasonable duplication of services. Whenever the general provision of one statute conflicts with a special provision in the same or in another statute, the two must be construed if possible to give effect to both provisions. N.D.C.C. §1-02-07.

The Legislature enacted N.D.C.C. §49-03-06 during the 2005 legislative session to encourage service area agreements between electric public utilities and rural electric cooperatives primarily in areas around municipalities. The stated purpose is "to encourage harmony and operational efficiency among electric providers, promote safety, discourage unreasonable duplication of facilities, assure adequate and reliable service for all consumers and territories within the state, and provide antitrust immunity to electric providers that negotiate service area agreements in accordance with this section." Subsection 8 recognizes the right of a city to exercise its franchise authority, but the exercise of that authority is meant to facilitate service area agreements and not to prohibit such agreements. The purpose of section 49-03-06 is to discourage the very type of checkerboarding that MDU's position in the present case promotes.

The Commission has no authority under Chapter 49-03 to interpret the franchises, but the Commission does have the statutory authority to regulate electric public utilities under Title

49 of the North Dakota Century Code and to determine interference and unreasonable duplication of services under Chapter 49-03. The Commission cannot ignore its statutory responsibilities. The evidence in the case does not permit a decision by the Commission that favors MDU. The evidence is overwhelming in favor of the position of Capital Electric Cooperative, Inc. ("CEC"). Not only would a decision favoring MDU violate Chapter 49-03, it would also violate the Commission's regulatory responsibilities under Title 49, because it would permit MDU to build duplicative facilities that would be added to MDU's regulated ratebase and would be paid for by MDU's ratepayers.

The record reflects that the actions by the City of Bismarck up to this time not only encouraged but required CEC to build facilities to serve new annexed areas. The City of Bismarck regularly up until this time allowed CEC to serve new annexed areas under CEC's existing franchise as evidenced by the testimony of CEC's witness, Ron Lipp. (Tr. 86).

Q. All right. Moving on to Exhibit C-4, does Exhibit C-4 -- again, with the same foundation, it shows the black line which was the area service agreement and the red line which is the new city limits of Bismarck in 2005; is that correct?

A. That's correct.

Q. And the areas that are shaded in green, what do they represent?

A. They're Capital Electric's area inside the city limits.

Q. Those were areas that were annexed into the City of Bismarck?

A. That's correct.

Q. And who serves those new annexations?

A. Well, we serve the ones that are in the light green.

Q. Okay. So Capital has served the new areas annexed into the City of Bismarck since -- from 2003 to 2005?

A. That's correct.

MDU's position effectively sets up cities as a fourth branch of government with powers above all other branches of government so long as those powers are derived through the franchising process. This leads to the ability of cities to potentially nullify state laws that were enacted for the protection of the general public including state labor laws, tax laws, environmental laws, electric safety laws, and laws prohibiting wasteful duplication of electric services. This is a direct attack on the constitutional powers expressly granted to the legislative, executive and judicial branches of state government.

MDU's threshold argument implies that in order to have standing to bring a complaint for interference under Chapter 49-03, an electric supplier must have a franchise from the city. Nowhere does the TIA restrict the filing of a complaint to franchise holding electric suppliers. Although the present case is about economic duplication, the law exists also to protect against interference generally including, for instance, interference that affects another supplier's service reliability. The plain reading of the law is that is that the existence of a franchise is not a threshold requirement under the TIA. The Legislature could have placed such a limitation in the law, but chose not to do so.

The franchising laws and the TIA laws are separate and distinct, and each has a separate and distinct purpose. The primary purpose of the TIA is to prevent wasteful duplication of electric facilities and services. The only reason for the Commission to consider the franchise issue is in how the franchise or lack of a franchise could cause a duplication of service. The Supreme Court directives in Divide County and Tri-County concerning the need for a franchise are not directives for the Commission to consider the existence or lack of a franchise as being something similar to customer preference where the city is expressing a preference over electric providers. Instead, the Commission believes that consideration of the franchise issue in a Chapter 49-03 complaint case is to aid in a determination of what a city's action will have on the issue of duplication. A city exercising its franchising authority in a

manner that results in checkerboarding causes wasteful duplication of electric systems which Chapter 49-03 prohibits. In summary, the TIA is all about preventing unreasonable and wasteful duplication of facilities and services and the protection of ratepayers from excessive charges resulting from such wasteful duplication. The TIA is not about new thresholds that do not exist in statutes, and it is not about the Commission having to weigh the preferences of cities.

The right of a city to grant a franchise is not a fiat for cities to force utilities to violate state law. In decisions issued by the Supreme Court, the Court has not ordered a city either to give or not give a franchise and has not commented on what happens when the effect of a city's decision causes a violation of separate state laws. The Commission's decision, like the Court's decision in Divide County, puts the ball in the city's court. The city can either authorize service by the electric supplier that is in the best position to provide service to customers, or it can issue franchises in such a way that electric suppliers do not violate state laws. Both of these alternatives would recognize both the City's constitutional and statutory franchise rights and the TIA which exists to protect all of the consumers of MDU and CEC from wasteful duplication of services. Any court decision to the contrary will likely force the Commission to allocate those wasteful costs to the ratepayers within the city that forced the wasteful duplication in order to protect ratepayers in other locations from wasteful investment that was created by the actions of the city.

CONCLUSION

The Commission carefully considered in its decision its obligations under Chapter 49-03 and the mandates set forth by Legislature and the North Dakota Supreme to minimize wasteful duplication of capital-intensive electric facilities. The Commission correctly exercised its authority under the law in issuing its decision. The decision of the Commission should be affirmed.

Dated this 29th day of August 2006.

Respectfully Submitted,
North Dakota Public Service Commission

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