

1 STATE OF NORTH DAKOTA
2 COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

3
4
5 Capital Electric Cooperative, Inc.,)
6 Appellant,)
7 vs.)
8 The City of Bismarck, North Dakota,)
9 and)
10 Montana-Dakota Utilities, Inc., a Division of)
11 MDU Resources Group, Inc.,)
12 and)
13 The Public Service Commission of North)
14 Dakota,)
15 Appellees

17 **CITY COMMISSION MEETING**
18 **Tom Baker Meeting Room, City and County Office Building**
19 **221 North Fifth Street, Bismarck, North Dakota 58506**
20 **September 13, 2005**

21 **APPEARANCES:**

22 Mayor John Warford
23 City Commissioners:
24 Sandra Tabor
25 David Jensen
26 Connie Sprynczynatyk
27 H. Bryce Hill
28
29 City Attorney:
30 Charlie Whitman

1 (THE FOLLOWING PROCEEDINGS WERE HAD AND MADE OF RECORD AS
2 FOLLOWS, on the 13th day of September, 2005, commencing at _____ p.m.)

3 -----
4 MAYOR WARFORD: This is to consider approval of the petition to declare Electric
5 Franchise Rights for Capital Electric or MDU.

6 COMMISSIONER TABOR: Mr. Chairman.

7 MAYOR WARFORD: Commissioner Tabor.

8 COMMISSIONER TABOR: Ahh, it would seem that before we actually do anything
9 with this Petition we might want some more information. Ahh, I think, ahh, Charlie and I have
10 had some discussions and we, if we choose to move forward on this I guess we might want to
11 set the ground rules tonight and then set a date certain for a hearing if you will. Ahh, with that
12 in mind I would suggest that if it's our decision to move forward on this request that we would
13 ask for a briefs to be submitted to Charlie, to Bill, ahh, by the 30th of September and then hold
14 a hearing on the first meeting in October. I say that only because I'll be gone the last meeting
15 in September and I would like to be part of this process. So, I can make that motion.

16 COMMISSIONER SPRYNCZYNATYK: I'll second it.

17 MAYOR WARFORD: Okay. We have a motion then to have a hearing in or first
18 meeting in October with briefs filed by the 30th, that's the Wednesday prior.

19 COMMISSIONER TABOR: Well, the last Friday ...

20 MAYOR WARFORD: The last Friday.

21 COMMISSIONER TABOR: Whatever that Friday is. What's the last Friday?

22 MAYOR WARFORD: Is this enough time so they will be published in the Agenda.

23 CHARLIE WHITMAN: What we would like to do is have the briefs due prior to the
24 Agenda deadline prior to that meeting in October.

25 COMMISSIONER TABOR: So that would be Wednesday.

CHARLIE WHITMAN: The Wednesday prior to that October 11th date so that would
be the ...

COMMISSIONER TABOR: Fifth? Okay, that's fine.

1 CHARLIE WHITMAN: The other issue the Commission might take up is a tentative
2 schedule for the hearing so you can give the Petitioner and Respondent some idea of what
3 sort of presentation time they'll be looking at, at that hearing.

4 MAYOR WARFORD: Commissioners I'd like to look at that 20-25 minutes range.

5 COMMISSIONER TABOR: Right out of my mind. I was thinking 20 minutes.

6 COMMISSIONER HILL: I was thinking more of five. Want to compromise?

7 COMMISSIONER JENSEN: I would say no more than 10 because after 10 they're
8 gonna lose it. They're wasting their time.

9 COMMISSIONER SPRYNCZYNATYK: Oh no, let's stick with it Commissioner.

10 COMMISSIONER TABOR: Oh, no.

11 MAYOR WARFORD: No, this is a pretty complex issue.

12 COMMISSIONER HILL: This is a very complex issue.

13 COMMISSIONER SPRYNCZYNATYK: This is an important issue.

14 COMMISSIONER JENSEN: They can present it in 10 minutes.

15 COMMISSIONER SPRYNCZYNATYK: Twenty.

16 COMMISSIONER HILL: Twenty – Twenty-five.

17 COMMISSIONER SPRYNCZYNATYK: Each.

18 COMMISSIONER TABOR: John, my motion would include 20-minute limits on
19 presentations.

20 COMMISSIONER SPRYNCZYNATYK: That would be my second.

21 MAYOR WARFORD: Okay. So we have a motion and a second for the as I
22 previously mentioned and included in that motion is a 20-minute time limit before I hold up the
23 card, right? Commissioner Hill.

24 COMMISSIONER HILL: I'm just wondering if there isn't an opportunity to get these
25 two parties together and give em two weeks to try to come up with a solution. I know that in
some instances this is, ahh I know the Legislature had some kind of bill passed that would
facilitate some discussion and maybe rather than getting to the hearing if we can say hey, you
got to sit down here and try to work this out.

1 MAYOR WARFORD: I feel I somewhat agree with you. It is, has been kinda a long
2 standing issue. Ahh, I would support the motion for the hearing but I would really encourage if
3 there is some way, ahh, for the parties to get together beforehand that would be certainly
4 wonderful. Any further discussion on this motion? Bill, please call the roll.

5 COMMISSIONER SPRYNCZYNATYK: Yes.

6 COMMISSIONER HILL: Yes.

7 COMMISSIONER TABOR: Yes.

8 COMMISSIONER JENSEN: No.

9 MAYOR WARFORD: Yes.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



October 11, 2006
Meeting

1 CITY COMMISSION MEETING
Tom Baker Meeting Room, City and County Office Building
2 221 North Fifth Street, Bismarck, North Dakota 58506
3 October 11, 2005

4 APPEARANCES:

5 Mayor John Warford Dan Kuntz
6 City Commissioners: Attorney for Montana-Dakota Utilities
Sandra Tabor
7 Connie Sprynczynatyk
H. Bryce Hill Carol Larson
8 City Attorney: Attorney for Capital Electric Cooperative, Inc.
Charlie Whitman

9 (THE FOLLOWING PROCEEDINGS WERE HAD AND MADE OF RECORD AS
10 FOLLOWS, on the 11th day of October, 2005, commencing at _____ p.m.)

11 -----
12 MAYOR WARFORD: We will now have regular agenda. This is a hearing as Item #3.
13 This is a hearing on a Petition to declare Montana-Dakota Utilities and Capital Electric
14 Cooperative Electric franchise rights. Before we get started Commissioners, ahh,
15 Commissioner Tabor wanted to bring up a comment with regard to conflict of interest and ah,
16 Commissioner.

17 COMMISSIONER TABOR: Commissioners, ahh, I guess what I'd like to do given that
18 probably all of us either have MDU stock or are members of Capital Electric's REC or/are
19 both, I guess what I'd move is that we waive the conflict and if someone has an additional
20 issue beyond those two things then they can declare it but otherwise I would just move that we
21 waive it. The conflict.

22 COMMISSIONER HILL: Second it.

23 MAYOR WARFORD: Motion seconded. Any discussion? I will state you know I
24 agree with that. I'm actually a member of both.

25 COMMISSIONER SPRYNCZYNYATYK: And Mayor this precedes you but the last time
we had a similar issue come to the Commission we had the same situation everybody was
either a member and/or stockholder so ...

1 MAYOR WARFORD: I certainly can state that any of our deliberations or decisions
2 that we've made would certainly not have, you know, any gain that I can perceive for any of us
3 on this group so ... Okay, seeing and hearing no further comments, please call the roll on that
4 motion.

5 COMMISSIONER SPRYNCZYNATYK: Yes.

6 COMMISSIONER HILL: Yes.

7 COMMISSIONER TABOR: Yes.

8 MAYOR WARFORD: Yes. Motion carries. The hearing is now open and I think as
9 we indicated at the last meeting ahh we would like to have the limit on from MDU and from
10 Capital Electric Cooperative to 20 minutes.

11 ATTORNEY DAN KUNTZ: Thank you Mr. Mayor, Commissioners, I'm Dan Kuntz,
12 attorney for Montana-Dakota Utilities. MDU filed the Petition with the Commission last month
13 requesting the Commission to declare respective franchise rights to the two companies to
14 serve a subdivision that I call part of Boulder Ridge First Addition was annexed to the City
15 earlier this year. Before I get to the, the substance of that Petition I'd like to briefly address an
16 item that was raised by Capital Electric Cooperative in it's brief and response to petition and
17 that's whether this City has jurisdiction to decide the issue of the franchise. The question
18 before the Commission is an interpretation of your franchise. Both the North Dakota
19 Constitution and the North Dakota Statutes give the Commission the jurisdiction, in fact the
20 inclusive jurisdiction to decide this issue. The North Dakota Constitution says that the power
21 of the governing board of a City Commission to franchise the construction and operation of a
22 public utility shall not be abridged by the Legislative Assembly. The Legislature has
23 recognized that and in the North Dakota Century Code has said that nothing in the Territorial
24 Integrity Act which is the act which the Public Service Commission has its jurisdiction, to, ahh
25 resolve territorial disputes shall be construed to limit the authority of a governing board of a
city to exercise its franchise authority. So, this is your franchise, you clearly have the authority
to interpret it in a manner in which you believe it was intended to be followed when it was

1 enacted. Ahh, there was also an argument made by Capital Electric that its franchise can't be
2 altered. That argument frankly begs the question. We're not asking for Capital Electric's
3 franchise to be altered. We're asking you to determine in the first instance whether that
4 franchise allows it to serve this particular subdivision in North Bismarck. And you know,
5 Capital Electric was first issued a limited franchise to serve a portion of the City of Bismarck in
6 1973 and that franchise was tied to a 1973 area service agreement that was entered into by
7 MDU and Capital Electric about the same time. The purpose of that area service agreement
8 and the limited franchise was to allow Capital Electric to serve the customers and to continue
9 to provide service or the facilities that it installed prior to annexation of certain areas as the
10 City started to grow and basically start annexing some subdivisions that are customers that
11 Capital Electric had served in the past. Without this limited franchise, Capital Electric would
12 have had to turn over its facilities and its customers to MDU. In the Area Service Agreement,
13 basically was an agreement between the parties that kind of drew a line around the City and
14 basically says you serve the area inside the line and we'll primarily serve the area outside the
15 line with respect to Capital Electric. That line, however, was never intended to be a
16 permanent demarcation that everything outside that line was going to be Capital Electric's
17 forever. In fact, there's a provision in that fran...in that Area Service Agreement at Paragraph
18 11 that recognizes that if its followed in good faith, times are going to change, and there would
19 have to be modifications to the agreement. In fact it specifically provided that the parties were
20 suppose to meet every five years and discuss modifications to reflect the intent of the parties.
21 And the intent of the parties is, um, contained in Paragraphs 1 and 2 of that Area Service
22 Agreement that was adopted by the Commission when they included it as part of the
23 franchise. Paragraph 1 of the Area Service Agreement recognized that Montana-Dakota had
24 traditionally provided electric service to the City of Bismarck and that it should continue to
25 serve the City of Bismarck in the growth areas around the City of Bismarck. It also recognized
that Capital Electric was a rural electric cooperative that had been formed in the late 1940's for
the purpose of serving rural areas that weren't getting and didn't have available to it public
utility service and that therefore its primary service area should continue to be those rural

1 areas as well as those areas now that it had served in the past those customers that were
2 being annexed into the City. That franchise was a 20-year franchise. In 1993 it was renewed
3 and again it a contained limitation, a geographic limitation, that was again tied to that Area
4 Service Agreement and I would just like to refer to a couple of sentences within that limitation
5 in the 1993 franchise. I'm not sure if that's readable from that distance but what I want to point
6 out is language in Paragraph 1 that says "The authority granted Capital Electric under this
7 franchise is limited geographically to the areas within the City described in the Area Service
8 Agreement dated July 5, 1973." It had nothing to do with the area outside the City. It was
9 simple saying for those areas that are within the City that it's, the Area Service Agreement,
10 going to apply with respect to whose going to serve those. That same paragraph touched on
11 what's going to happen in the event the Area Service Agreement was cancelled because the
12 Area Service Agreement contained a provision that it could be cancelled by either party. And
13 it says "that the Area Service Agreement and the amendments thereto are cancelled by either
14 electric supplier during the term of this franchise all privileges, rights, obligations and
15 restrictions as therein stated shall continue to apply to both Capital Electric Cooperative and
16 Montana-Dakota Utilities Co." The purpose of that provision was that in the event the parties
17 cancelled the Area Service Agreement, the areas with inside the City that had previously been
18 part of that Service Area Agreement, the parties would continue to respect the respect of
19 service areas inside the City so you didn't have a situation where the parties would go out and
20 start duplicating each other's service inside the City. It was not the intent, I believe, of the City
21 to determine what would happen, who was going to be the service provider in those areas that
22 were outside the City, or what would happen in the event that the Area Service Agreement
23 was cancelled and then areas that came into the City, ah, were not subject to the Area Service
24 Agreement. It was not the intent, I don't believe, for the City to designate that Capital Electric
25 was gonna be the exclusive provider of those particular areas. Certainly it was not the, the
position of Montana-Dakota that was going to happen and at the same time that this 1993
renewal was made with this particular language, Montana-Dakota and Capital Electric
Cooperative entered into an amendment to the Area Service Agreement that basically

1 repeated that same language except if you read the preface to that language it's again talking
2 about an Area Service Agreement for areas inside the City of Bismarck. This was not
3 intended to apply outside the City of Bismarck in the event that the Area Service Agreement
4 was cancelled. Well, as you know the Area Service Agreement was cancelled. Montana-
5 Dakota cancelled the Service Agreement in 2002 effective June 26, 2003. After that date
6 there was no Area Service Agreement outside the City limits and therefore when any areas
7 were annexed into the City after June 26, 1993, or 2003, they were not subject to any Area
8 Service Agreement. Therefore they are not part of Capital Electric's franchise unless they
9 come to the City and ask for an amendment to that particular franchise. They have not done
10 that and therefore because Montana-Dakota's franchise is an unlimited franchise and Capital
11 Electric's franchise did not extend to these areas, we believe that Montana-Dakota has the
12 exclusive right to serve the Boulder Ridge subdivision and that's the interpretation that we
13 would request of the Commission. If Capital Electric's position is correct that the Area Service
14 Agreement continues to apply to areas outside the City then the entire agreement has to be
15 enforced and not simply the boundary line and the entire agreement includes Paragraph 11
16 which says that this line is supposed to be modified from time to time to reflect the growth of
17 the City and the intent of the parties. That hasn't happened. As you may recall we had a map
18 attached to our Brief, Paragraph ahh Exhibit 13. That map shows some green areas attached
19 to it. Those green areas are the only areas within the original boundary line that still have not
20 been annexed to the City and therefore those are the only areas under Capital Electric's
21 argument that Montana-Dakota would be able to expand its facilities now and into the future.
22 As you can see there are very, very few of those areas. The largest area actually is in the
23 southwest-eastern part of the City and includes United Tribes Technical College, which is
24 actually served by Capital Electric Cooperative and Lincoln-Oakes Nursery, which is likely not
25 to be developed into, ah, commercial or residential development any time in the foreseeable
future. So as you can see that line has not been modified as was originally envisioned under
the Area Service Agreement. That's also indicated by the information that we provided the
Commission in our Brief regarding the building permits that have been issued by the

1 Commission over the last two years. In 2004 of the 366 building permits that were issued
2 inside the City limits MDU provided electric service to only about half of those particular
3 permits. For the extra-territorial zone outside the City, Montana-Dakota didn't serve any of
4 those. So if you look basically to the growth of the City as reflected inside the City limits and
5 extra-territorial zone, Montana-Dakota last year only served about a third of those new
6 customers. I certainly don't think that that reflects the intent of the original Area Service
7 Agreement and the situation's gotten worse. If you look at 2005 year-to-date through about
8 the 20th of September, 20th of September of the 214 commercial and residential permits that
9 were issued inside the City, Montana-Dakota's only extended electric service to 30% of those
10 customers. Capital Electric has extended it to 70% and I think that reflects the growth of the
11 new subdivisions. When you add in the extra-territorial zoned area, Montana-Dakota is able
12 to extend service to less than 18% of the new growth in and around the City of Bismarck.
13 Again, I don't think that reflects the intent of the Area Service Agreement or the Limited
14 Franchise that was issued to Capital Electric Cooperative back in 1973 and renewed in 1993.
15 We request that the Commission interpret the franchise the way it was intended to be
16 interpreted. We believe that in that manner which we request that both of the suppliers will
17 have an opportunity to equitably participate in the growth of residential and commercial
18 development in and around the City and we believe that that was the intent of the Commission
19 when it issued these franchise. Thank you and I'd be happy to answer any questions.

18 MAYOR WARFORD: Commissioners any questions? Commissioner Tabor?

19 COMMISSIONER TABOR: Thank you. Ahh, Dan, I've got kind of a series so do you
20 mind if I just rock n'roll?

21 MAYOR WARFORD: Um-mmm.

22 COMMISSIONER TABOR: Ahh, one of the questions that just popped into my mind
23 when you were going through your tables again and I look at the inside City limits 149 for
24 Capital Electric, 65 for MDU, what authority do you think Capital Electric had to extend that
25 service under than your argument?

ATTORNEY KUNTZ: Outside, ahh.

1 COMMISSIONER TABOR: This is inside City's limits.

2 ATTORNEY KUNTZ: Well, inside the City, the table for inside the City limits?

3 COMMISSIONER TABOR: That's the one I'm looking at.

4 ATTORNEY KUNTZ: To the extent that these were areas that had been annexed to
5 the City before June 26 of 2003, and are simply new permits in those subdivisions and I
6 assume that they're some of those, that would have been included, we believe, within the
7 limited franchise to the extent these are subdivisions that were annexed.

8 COMMISSIONER TABOR: Can I interrupt you?

9 ATTORNEY KUNTZ: Sure.

10 COMMISSIONER TABOR: Because they're already serving them?

11 ATTORNEY KUNTZ: No, because they were ... at that point if they were annexed
12 before 2003 as they came into the City they would have been subject to the Area Service
13 Agreement and therefore we believe the franchise would have allowed them, ahh, to continue
14 to serve at least those new areas, arguably that were being annexed before then. But
15 certainly after that date, any new areas were not, that came in, were not subject to an Area
16 Service Agreement and therefore they did not have any authority, ahh, franchise authority
17 from this City to serve those new areas and I haven't broken down a ... how many of these
18 permits inside the City would have, would have fall within those subdivisions.

19 COMMISSIONER TABOR: Okay. Ahh, the other question I have is about the line,
20 the amendments to the area service boundary. You mentioned that, that, that boundary hasn't
21 been amended but in fact you, Capital Electric and Prairie Rose have agreed to who's going to
22 serve where outside of that line, right?

23 ATTORNEY KUNTZ: There have been some minor modifications to the line over the
24 years but more in the nature of we'll swap you this block if, you know if you swap us that
25 block. Not the type of significant, ahh, modifications I think would be necessary in order to
reflect the intent of the parties under the agreement.

COMMISSIONER TABOR: If ... I were going to ask you a question about the limited
geographical franchise language in Capital Electric's agreement, ahh if I'm understanding

1 what you're saying ... you don't Is it your argument that, that that language doesn't limit
2 they're _____ border in which they get to serve? In other words, ahh, if something outside of
3 that border comes in, if I heard what you, if I understood what you were just saying correctly,
4 you think that, that under the franchise and even though it's geographically limited, that they
5 would still have the ability to serve that area?

6 ATTORNEY KUNTZ: I'm not sure I understand what...

7 COMMISSIONER TABOR: Within the boundary...

8 ATTORNEY KUNTZ: Right.

9 COMMISSIONER TABOR: Outside the boundary is Capital Electric's?

10 ATTORNEY KUNTZ: Under the Area Service Agreement?

11 COMMISSIONER TABOR: Right.

12 ATTORNEY KUNTZ: Under the Area Service Agreement we agreed not to extend
13 service beyond that line without their permission is what the Area Service Agreement provided
14 for.

15 COMMISSIONER TABOR: And you think the franchise is consistent with that and the
16 intent of the franchise?

17 ATTORNEY KUNTZ: That's my understanding of the intent of the franchise was to
18 adopt that particular boundary line as the service area of the parties. That inside that
19 particular line Montana-Dakota, ahh, would serve its customers and outside that line Capital
20 Electric would serve customers within the City as well as some customers that were kind of
21 spill-overs if you will, kinda grandfathered in, that they, the companies have been providing
22 service before, ahh, the Area Service Agreement was put into place. But once the Area
23 Service Agreement was full, was cancelled, that basically froze the line inside the City of what
24 Capital Electric's franchise was. Any new areas that came into the City after it was cancelled
25 would not be a part of the franchise because they weren't part of the Area Service Agreement
any longer.

COMMISSIONER TABOR: Well, I guess what I... Another question I have then
because I'm a little confused about the intent. When I went through all of the ... and I read the

1 Eighth Circuit case and the read the case in '57, which is in essence really put Capital Electric
2 in a bad position in my humble opinion and they were servicing people. They had services
3 into homes and based on those two decisions courts basically said so bad, too sad. And, and
4 as I understand the intent of all of this franchise for Capital Electric was that they wanted the
5 City to allow them to continue servicing those people who they were serving before an
6 annexation.

7 ATTORNEY KUNTZ: That's my reading of the documents that kind of precede the
8 issuance of that franchise as well as the court cases that were issued prior to that.

9 COMMISSIONER TABOR: Okay. Then, then let's go back to the intent because
10 when I question about intent is when I was looking through everything I guess I was basing it
11 on that original intent and so with that in mind there's a question in my mind exactly what
12 limited geographically means because the intent would seem to me that if they were servicing
13 them before it was annexed it's fair game for them to continue. If they weren't then I'm not
14 sure that I understand how they get an extension.

15 ATTORNEY KUNTZ: The extension areas.

16 COMMISSIONER TABOR: That's exactly right.

17 ATTORNEY KUNTZ: Well, if you look back at the '73 franchise ...

18 COMMISSIONER TABOR: Um-mmm.

19 ATTORNEY KUNTZ: It talks about them having the geographic limit being to certain
20 subdivisions. It specially names the subdivisions.

21 COMMISSIONER TABOR: Uh-huh.

22 ATTORNEY KUNTZ: And I interpret that to basically mean that you can serve those
23 subdivisions and that would include not only your existing customers in those particular
24 subdivisions but probably the guy next door between the two houses that you are serving. I
25 would assume that that was the intent of the City when they specifically named those
subdivisions and then it goes on to talk about as well as the areas within that Area Service
Agreement. So, you know I think there's a gray area there with respect to what was intended
with respect to those other areas that are kinda annexed that were in, that were outside the

1 boundary line of the Area Service Agreement, but as a practical matter I think that's how it was
2 interpreted. Ahh, is that they were allowed to serve those, those particular areas as they were
3 brought into the City. So, I have to assume that you know that that was the way it was
4 intended during that period of time, although I think you certainly, Commissioner, could make
5 the argument that the only customers they were suppose to serve was the customers or the
6 lots and blocks that they had been serving prior to annexation.

7 COMMISSIONER TABOR: Well, I think, I think it would be hard to argue that that
8 wasn't the original intent 'cause it's very clear in all the documentation that that was the
9 original intent.

10 ATTORNEY KUNTZ: And certainly that was, that was what they had originally asked
11 for, for a franchise and that's what the courts were suggesting the most, the most that they
12 would be allowed to serve.

13 MAYOR WARFORD: Commissioner Sprynczynatyk?

14 COMMISSIONER SPRYNCZYNATYK: Well, I'd like to follow-up on Commissioner
15 Tabor's question because that is at least one of them is essentially my question. You've
16 talked about the '73 document and, and like everybody else I'm sure I read all of it cover-to-
17 cover, and didn't fall asleep. Ahh, but when, when you talk about the '73 document and the,
18 that piece about the Area Service Agreement, boundaries changing every five years. Ahh,
19 you said that hasn't happened and I guess my question to MDU is why not? If, if it's you know
20 sounds like the essential question is what is the grant of authority so if it's limited then why
21 would MDU not expect that the REC would continue to serve the customers that they were
22 servicing but as those areas came into the City then that territory belonged to MDU.

23 ATTORNEY KUNTZ: Well as I understand it, the franchise, Commissioner, if they
24 were brought into the City but outside the boundary line before it was cancelled, my
25 interpretation or at least the way was carried out and this was before my time, but the way it
was carried out, that those became the service areas of Capital Electric. Now it was
supposed to be, the companies were supposed to meet and talk about modifications. They
met, but the line was never seriously modified. So, in and by about the late 1990's basically

1 we, Montana-Dakota, started bumping up against that boundary line all around the City and
2 got to the situation, got to the situation where there were no longer any areas, growth areas,
3 for it to serve in the situation we have on the map. And that's basically what brings us, you
4 know, here to you now saying that this Area Service Agreement's not being modified the way
5 it was suppose to and we believe that wasn't the intent of the franchise, wasn't suppose to
6 work that way. That they were suppose to, you know, get those, those areas that they had
7 been serving that were, you know, that were outside the boundary line and once it was
8 cancelled, they'd have to come back to you if they want to add some new areas to that.

8 COMMISSIONER SPRYNCZYNATYK: Why wasn't the, why wasn't the service line
9 or the service boundary modified every five years roughly?

10 ATTORNEY KUNTZ: As I said it, as I understand the parties met but there wasn't any
11 agreement. It takes two parties to agree to a modification and Capital Electric wasn't willing to
12 agree to any significant modifications is my understanding.

13 COMMISSIONER SPRYNCZYNATYK: So then you, so then essentially MDU just let
14 it ride until MDU's service area bumped right up against that green line on the map?

15 ATTORNEY KUNTZ: And we're before you now and we cancelled the agreement and
16 we come before you now. We really had no other ... there's no other force in agreement if
17 you will other than through the Commission here, you know, through your franchising
18 authority.

18 COMMISSIONER SPRYNCZYNATYK: Thanks.

19 MAYOR WARFORD: Dan could you talk a little bit about canceling the agreement?
20 Ahh, your grounds on that, ahh, just how that, how that process went?

21 ATTORNEY KUNTZ: Well, the process and again it was before I was working for the
22 company and I wasn't involved, ahh, but basically a letter went out to Montana-Dakota in
23 June, 2002 and said that this agreement is being cancelled for all areas outside the City and
24 again I think by saying outside the City we were respecting the franchise amendment or the
25 franchise language and Area Service Agreement amendment that we had agreed to in '93 that
if we're cancelled inside the City, we would still respect the service areas inside the City. We

1 weren't gonna go out and start duplicating their facilities. We didn't expect them to duplicate
2 our facilities inside the City, but everything outside the City basically all bets were off and we
3 were gonna compete for those, for those service areas and that's what brings us before, to
4 you today. It certainly wasn't our intent back in '93 to say that that's gonna be forever yours
5 Capital Electric.

6 MAYOR WARFORD: Any other questions Commissioners?

7 COMMISSIONER TABOR: I have to step up a little.

8 MAYOR WARFORD: Commissioner Tabor?

9 COMMISSIONER TABOR: Dan, has the old Supreme Court case and the Eighth
10 Circuit case have they been altered in any way by subsequent legislation?

11 ATTORNEY KUNTZ: The Eighth Circuit case?

12 COMMISSIONER TABOR: That one.

13 ATTORNEY KUNTZ: Regarding area service agreements?

14 COMMISSIONER TABOR: Um-mmm.

15 ATTORNEY KUNTZ: Not by legislation. Well, let me back up. There is legislation
16 that was passed this last legislative session that would allow the parties to enter into area
17 service agreements approved by the Public Service Commission. Under Anti-trust case law I
18 think it was generally the belief of the legislature and all the parties that if the Public Service
19 Commission gave blessing to these area service agreements then they wouldn't violate, they
20 wouldn't be against public policy which was the basis for the original ruling of the Eighth
21 Circuit back in 1958. Ahh, the other agreement or the other case there was a modification of
22 that case later on by the Supreme Court that said that said some dicta in there about whether
23 or not they ahh were members wasn't important. The Supreme Court in a later case says
24 well, we think that would have, could be important but really didn't describe how it would be
25 important, but otherwise that case is still good law.

COMMISSIONER TABOR: Okay. And I guess that if the PSC has the authority now
under new legislation to approve the area service agreements and since the area service
agreement upon which the franchise was based, has now been cancelled, then is it fair to

1 think the PSC will now be involved in this issue because a new area service agreement may
2 need to be developed?

3 ATTORNEY KUNTZ: If the parties could agree to a new area service agreement they
4 would need to take that to the Public Service Commission for approval and that would be their,
5 their, that would be their involvement. With respect to this particular dispute and the absence
6 of an area service agreement I don't believe the Commission would have jurisdiction because
7 the only thing that we're talking about that still remains of the area service agreement is the
8 piece that's tied to the City franchise inside the City. As I indicated before, the PSC doesn't
9 have any authority to interpret your franchises so I think that's exclusively within your
jurisdiction.

10 COMMISSIONER TABOR: So just as a follow-up again if I may, ahh, since there is
11 no area service agreement at least under your interpretation

12 ATTORNEY KUNTZ: Outside the City limits.

13 COMMISSIONER TABOR: And I assume that's true since it's been cancelled, ahh,
14 how do we ensure an orderly development as we annex into the City?

15 ATTORNEY KUNTZ: Well, I think what you would have to do is deal with these on a
16 case-by-case basis. If the parties can't come to an agreement on new area service
17 agreement, ahh, under our franchise we've got an unlimited right to provide electric service. If
18 Capital Electric believes that this, an area is being annexed is, ahh, part of their area service
19 agreement or should be part of their franchise I should say, they would need to come to the
20 Commission and ask for an amendment to their franchise. Not a big deal. That's done, I
21 believe in other cities or at least some other cities around the state when electric cooperatives
22 want to add pieces of property that they've historically served to their franchise. They'd simply
23 come to the City and ask for an amendment to the franchise and at that time Montana-Dakota
24 or somebody else could object to whether or not there should be an amendment to that
25 franchise and it would be up to you to make the determination with respect to orderly
development as to which supplier should serve that area.

MAYOR WARFORD: Commissioner Sprynczynatyk?

1 COMMISSIONER SPRYNCZYNATYK: I have another question for you Dan about
2 the, about the change in law as of this last legislative session. Ahh, is it your understanding
3 that this Commission as the governing body regarding the franchise agreements, this
4 Commission could require that service area agreements and amendments come to this
5 Commission for action?

6 ATTORNEY KUNTZ: For a new area service agreement? I think in essence you
7 would have to do that. I mean the parties, even though they had the blessing of the Public
8 Service Commission, that's still not gonna do you any good inside the City unless the City
9 Commission agrees with that as well so assuming that tomorrow MDU and Capital Electric
10 Cooperative came to a new area service agreement that included the City of Bismarck and
11 marched off to the Public Service Commission and they blessed it, we would still need to
12 come to you to the extent that that new area service agreement was different than what our
13 franchise authority was.

14 COMMISSIONER SPRYNCZYNATYK: Thank you.

15 MAYOR WARFORD: Any other questions? Dan I just had a question, you know with
16 this Board represents the citizens of Bismarck, ahh, how in your view does this issue ahh
17 would this issue affect ahh the citizens of Bismarck?

18 ATTORNEY KUNTZ: I think it affects the City, the citizens from the standpoint in
19 terms of traditional service that these, these companies have provided. They're both good
20 suppliers of electricity. Ahh, they're both excellent companies, but one is an industrial and
21 utility that's provided service to this Commission based upon investment risk going back to
22 1895. The other's a rural electric cooperative that was intended to serve rural areas and I
23 think you have to keep that in mind when you determine where these area service agreements
24 should be established. Whatever the Commission determines I think the citizens of Bismarck
25 will still be well served with respect to the provision of electric service. There are differences
certainly with respect to the tax treatment, the regulatory treatment between the two
companies and I think you need to take that into consideration as well in your deliberations.

 MAYOR WARFORD: Commissioner Tabor?

1 COMMISSIONER TABOR: So Dan, define rural.

2 ATTORNEY KUNTZ: Rural is defined in Chapter 10-13 of the Century Code with
3 dealing with electric cooperatives and it's basically it says it's an area under 2,500 population.
4 Ahh, but then there's some case law, in fact the statute talks about that, well, once its interpret
5 ... once it's annexed if it still remains a rural area, but then you'd get into certain situations
6 about whether or not the area is also, has available ahh electric service from a central station
7 power its referred to in terms of eligibility for membership and so forth because that's, its, the
8 statute talks about both the purpose of rural electric cooperatives as well as who's eligible for
9 rural, to be a member of rural electric cooperatives, both of those two concepts are tied to that
10 rural definition.

11 COMMISSIONER TABOR: Excuse me for a minute. Joel, Joel, could you ask the
12 people in the hallway to quiet down please? Thank you. Dan, is rural really an issue here?
13 Do we need to be worrying about that?

14 ATTORNEY KUNTZ: I don't think so.

15 COMMISSIONER TABOR: Okay.

16 ATTORNEY KUNTZ: No, I think this is an issue for you to determine from a franchise
17 standpoint.

18 MAYOR WARFORD: Any other questions Commissioners?

19 COMMISSIONER SSPRYNCZYNATYK: I think I'm okay.

20 ATTORNEY KUNTZ: Thank you for your time.

21 COMMISSIONER TABOR: Thank you Dan.

22 ATTORNEY LARSON: Mayor Warford, members of the Commission, good evening.
23 My name is Carol Larson. I'm the attorney for Capital Electric Cooperative and it's a pleasure
24 to be here today. Ahh, a couple points that I want to make before I get started on my
25 presentation. I think when you go back and give a clean and reasonable reading to the Area
Service Agreement and to the grant of franchise, the intention is clear. The intention is is that
Capital Electric would serve the citizens outside the line of what is contained in the map of the
Area Service Agreement and MDU would serve the citizens who are within the line. Now that

1 Area Service Agreement line provided for covered the initial City of Bismarck, provided some
2 additional areas for MDU to grow into, and yet protected Capital Electric's right to continue to
3 serve the members that it had served who resided or had service outside of that line. That's
4 the primary intention of that agreement was to maintain that integrity and the purpose of that,
5 of course, is to avoid the duplication of services in this area that is very Capital intensive to
6 allow the two entities to make long-range plans and to serve the citizens of this area. The
7 issue simply stated today is does Capital Electric have a franchise to serve areas annexed
8 into the City of Bismarck after June 26 of 2003, and of course Capital Electric contends that
9 yes, we do in fact have a franchise with the City. Ahh, the City, Capital has a franchise that
10 most recently was granted to us in 1993 and that grant of franchise allows us to serve the City
11 as now or hereafter enumerated and that grant also incorporates into it the Area Service
12 Agreement. And again, the intention of that Area Service Agreement was to delineate service
13 territory between Capital Electric and MDU for the efficient and orderly development of the
14 City of Bismarck. That plan was developed by consent between Capital Electric and MDU.
15 And back in 1973 the two parties met over a period of time and negotiated that agreement and
16 embodied that into the Area Service Agreement. The agreement at that time allowed for a
17 one-year cancellation provision and neither party exercised that during that time period. In
18 1993 when Capital Electric's franchise was up for renewal MDU was concerned about the
19 possibility that Capital might be granted a general franchise and that we might be competing
20 for loads that were within the City. The parties agreed that the citizens of Bismarck would be
21 best served by continuing to operate under the Area Service Agreement and that provided that
22 Capital would serve the areas outside of the line and MDU would serve the areas within the
23 line. So at that time MDU had had the opportunity as well as Capital to see how the Area
24 Service Agreement had worked for 20 years. But to address the issue of what would happen
25 if there was a cancellation, the parties agreed that even if either party cancelled the
agreement nevertheless the Service Agreement would continue in effect throughout the period
of the franchise. And that agreement was imbedded, embodied and imbedded in Capital
Electric's franchise grant. And it couldn't be stated more clearly that both parties were giving

1 up the right, not forever, but for the period of the franchise, to terminate the agreement. If they
2 chose to terminate it, the termination extension deadline would be extended through the
3 period of Capital's franchise. And Capital has a 20-year franchise and that continues until
4 2013. What I've just provided to you in response to, I guess MDU's brief, is a letter dated
5 June 7, 1993. This is the transmittal letter that was sent by Capital Electric to MDU. MDU
6 was the first party to sign the amendment to the agreement, Capital was the second party, and
7 following their annual meeting the Board of Directors authorized the manager to enter into that
8 agreement and simply stated it states, this signed amendment pertains to the continuing of the
9 Service Area Agreement during the respective terms of either party's franchise with the City of
10 Bismarck. So nowhere in that agreement in the Area Service Agreement, in the grant of
11 franchise, um, or in the amendment to the grant of franchise, does it state that if MDU chooses
12 to cancel a portion of the agreement that Capital Electric's right to serve is gonna be
13 terminated. This City Commission did not, in exercising its franchise authority, give that right
14 to MDU. You couldn't have. I mean statutorily, constitutionally, it is the City Commission of
15 Bismarck who has the right and the responsibility to monitor and to, to, ah, franchise their
16 electric distribution system and in exercising that grant you have worked with Capital Electric
17 and MDU to provide for the orderly development, and clearly and plainly stated the parties
18 agreed that Capital's franchise would, or that the rights under the Area Service Agreement
19 would continue throughout the period of the franchise and Capital Electric had a right to rely
20 on that, MDU's had a similar right to rely on that, and we have done so. We have spent
21 millions of dollars investing in the area that is north of Bismarck to provide service to our
22 members, ah, in that area to develop the backbone of the system. Within the last two years
23 we have built a delivery substation combined with WAPA at a cost of over seven million
24 dollars to provide this, to provide this. When you listen to Mr. Kuntz's argument you know
25 what's clear is that MDU has enjoyed the benefits of the Area Service Agreement. They have
been allowed to grow and develop their business without any duplication of service or
interference by Capital Electric. They have grown through, for the, for the, area that was
outside of the City limits of Bismarck, they have grown into those areas without any

1 interference by Capital. Capital has not made an attempt to extend its line into the service
2 area that MDU was provided so in that case MDU has, has again accepted all of the benefits
3 of the service agreement and now when it no longer suits their purposes, purports to cancel it.
4 But there isn't any provision in the Area Service Agreement that allows for a partial
5 cancellation of the contract. They can't pick and choose, well, gee, we'd like the protection of
6 being able to serve without any competition or without any duplication of services within the
7 City, but for the areas that are newly annexed which were in Capital's territory, we want to now
8 have the right to compete and that's what they're asking you to do today and we would
9 suggest that that is not, ahh, that is not permissible. One point that I think you should take
10 note of is this interpretation or I think it's a concoction of an interpretation, to, to suggest that
11 by their purporting to cancel the agreement that it freezes our franchise rights. If that were the
12 case, MDU would have sent to the City Commission a letter telling you that the Area Service
13 Agreement was cancelled on June 26th of 2002. They purported to make that effective June
14 26th of 2003. So here we are two years later. MDU didn't send you that notice because MDU
15 didn't believe that that's what would happen. They didn't believe that they had the right to
16 terminate our franchise and we certainly don't believe they had that right either. Since they
17 purported to have cancelled that agreement on June 26th of 2003, there've been 15
18 subdivisions annexed into the City of Bismarck that are in Capital Electric's service territory.
19 Capital Electric serves those and has served so without objection from the City of Bismarck
20 and without objection by MDU. There have been no objection to our serving those areas until
21 MDU decided to cherry-pick Boulder Ridge. Ah, there is the issue of the rural area but what
22 one needs to keep in mind and one, when you review the different statutes that are involved in
23 this decision, once the Area Service Agreement was entered into and Capital had begun
24 serving, areas that were then designated as rural remain rural. The statute 10-13-04 which I
25 believe I provided a copy to you, states that in pertinent part, "that no change thereafter in the
population of a rural area as defined herein regardless of the reason for the change, shall
operate to effect in any way its status as a rural area for the purposes of this chapter." And
that's the rule that's known as once rural, always rural. So in this situation when Capital

1 Electric and MDU entered into their service territory, the area that was identified as the City is
2 the area that was granted under the franchise and under the Area Service Agreement to MDU.
3 The area that was outside of that line is areas that were rural at that time and because they
4 were designated as rural at that time, they continue to be rural and they continue to ... Capital
5 Electric continues to have that right to serve. Now, MDU argues and, and, I don't find any
6 authority for it in the Area Service Agreement, it does state that the parties are to meet and
7 ah, to discuss any modifications that might be necessary, but it doesn't state that the line just
8 moves out. That Capital Electric it loses its territory whenever MDU decides if that's what's
9 appropriate. In the past there have been meetings and there have been amendments to the
10 service agreement and they have been of a give-and-take variety. MDU has, has had areas
11 that didn't necessarily make sense for them to serve. Capital has had areas that didn't
12 necessarily make sense for them to serve and the parties have traded service territories.
13 MDU's current idea of negotiation is we want, you give and that just doesn't work. We are
14 willing to and we will sit down and negotiate. We think there are areas that do make sense for
15 MDU to serve and for Capital to serve, but this isn't just a one-way street and nothing in that
16 Area Service Agreement can be construed to require that this is just a moving out of the line.
17 The line was established to protect Capital Electric's right to serve its customers, the
18 customers that MDU didn't want and that were expensive to serve. Ahh, we have made the
19 investment, we have provided those facilities and having areas that have a greater population
20 density than many parts of our system helps us to spread the cost and to help to more
21 economically provide service to all of the members throughout Capital Electric's service
22 territory, not just the areas around MDU. It's, it's also I think quite apparent that MDU has
23 grown under the service agreement. There have been, there have been a number of
24 annexations that are within MDU's service territory and MDU has served those areas
25 uninterrupted and unimpeded by Capital Electric, but there are also many areas of the City in
the developments that have been part of the City of Bismarck for decades that continue to be
developed. Ahh, recently MDU has added a large number of loads to its system and those
would include Lowe's, Kohl's, Pet Smart, Best Buy, the Commerce Center it's going to serve,

1 the Super Wal-Mart it's going to serve, Menards, Dan's Super Value, there have been
2 apartment buildings, there've been a number of developments that have taken place within
3 MDU's service territory. I think it's undisputed and based on the maps that are provided both
4 in, by, in Capital's appendix as in MDU's appendix that Boulder Ridge is in Capital Electric's
5 service area. Capital Electric has served that area since 1949. We have developed that
6 property, we have or excuse me, that service, we have upgraded our service, and we run
7 directly alongside that service area with three-phase power. For MDU to serve that area it has
8 to infiltrate our service territory by about 2800 feet or a half a mile. It has to cross our lines to
9 bring its service into that area. The Public Service Commission has said over and over and
10 over again that crossing the line is, is evidence of wasteful duplication of service. This area is
11 in, this subdivision is in Capital service area. Capital is ready, willing and able to serve this
12 area and has made the necessary investment in facilities and is in fact, or was the only utility
13 that had service in this area until MDU's infiltration. I have nothing further and would be
14 available for any questions.

14 MAYOR WARFORD: Commissioners, questions? Commissioner Hill?

15 COMMISSIONER HILL: Yes. On the first page and I mean the prefix's and I think
16 that by the time we're through here tonight you're going to find out my ability as a lawyer is
17 very limited. And I should probably ask some questions but I In the first page of your brief
18 you make the statement that the City of Bismarck does not have the right to amend or alter its
19 franchise with CEC. Where do you get that?

19 ATTORNEY LARSON: Well, I'm, ahh, my opinion sir is that once the City of Bismarck
20 grants a commit or grants a franchise that that franchise becomes a contract between the
21 utility and the City of Bismarck and unless you've retained the specific authority or right to
22 amend those contractual rights, in my opinion, you don't have the right to do that, but you do
23 have the right to regulate franchises and to grant franchises.

24 COMMISSIONER HILL: Well, I guess to follow up on that, in reading some of the
25 history of this, there were some limited subdivisions you were, you sought to get and you were
given those in an earlier agreement. I think that goes back maybe to the sixties.

1 ATTORNEY LARSON: Well, I think in the

2 COMMISSIONER HILL: Isn't that still binding?

3 ATTORNEY LARSON: Ahh, no sir, in my opinion it does not. The correspondence
4 that MDU has filed in its Appendix is correspondence that dates back to 1961 for franchise
5 that wasn't granted. Ahh, in my opinion, that has nothing to do with the franchise that was in
6 fact granted in 1993. The terms of the franchise are imbedded in the grant of the franchise
7 and that is the document that I believe that we need to go to, to determine what the respective
8 rights are with respect to the parties.

9 MAYOR WARFORD: Commissioner Sprynczynatyk?

10 COMMISSIONER SPRYNCZYNATYK: Well, if that's true Carol, then, then I'm
11 looking at the, at a document from looks like its May of 1993 that says under specifically under
12 grant of authority because it seems to be all of this argument hinges on, on what we believe
13 the grant of authority was to Capital Electric and if you read all of the documentation leading
14 up until now, everything talks about limited, limited, limited, limited. And then I'm looking at
15 this sentence, ahh, it's, Commissioners, it's on Exhibit 7, it's the _____ of brief, it's MDU's grant
16 of authority.

17 ATTORNEY LARSON: Excuse me. Are we talking about the Capital Electric
18 franchise?

19 COMMISSIONER SPRYNCZYNATYK: Yes. The resolution granting to Capital
20 Electric Cooperative a franchise, okay.

21 ATTORNEY LARSON: Okay. Thank you.

22 COMMISSIONER SPRYNCZYNATYK: So under Article II it says subject to the
23 conditions contained herein. So, if it...

24 ATTORNEY LARSON: If it's a... I'm sorry.

25 COMMISSIONER SPRYNCZYNATYK: So go to, to, do you have the ...

 ATTORNEY LARSON: I have the resolution for Capital Electric's franchise.

 COMMISSIONER SPRYNCZYNATYK: Look beyond that first page, Article II.

 ATTORNEY LARSON: Okay.

1 COMMISSIONER SPRYNCZYNATYK: Grant of authority?

2 ATTORNEY LARSON: Okay, I've got it. I'm sorry.

3 COMMISSIONER SPRYNCZYNATYK: It seems to me that that is not expansive.

4 You know I think we've had commission discussion about this I suspect we will, but the
5 question is, is the Capital Electric franchise restrictive or is it expansive and that sounds
6 restrictive to me. I'm like Commissioner Hill not a lawyer, don't play one on TV, but it says
7 subject to conditions contained herein. It's a limited franchise and so...

8 ATTORNEY LARSON: I agree that it's a limited franchise. I agree that Capital does
9 not have the ability to provide electric service to the areas that were designated in its, in the
10 Area Service Agreement, as being MDU's, other than there were a few grandfathered
11 exceptions, but, but, yes, by and large, I completely agree with that statement.

12 COMMISSIONER SPRYNCZYNATYK: Okay. So, what I can't get straight in my mind
13 is how Capital Electric especially when I read all of the documentation where there's repeated
14 use of the phrase limited, limited, limited, Capital Electric's request on some of the oldest
15 documents in this stack of papers; you know there's a repeated statement that we're just
16 looking to serve the customers we've always served. Now that says to me that that the Area
17 Service Agreement boundary was anticipated to change. In fact, there's language about you
18 know changing or meeting at least every five years and you know now we're coming to the
19 point where Capital Electric's argument is that all of the land outside the City limits as its
20 incorporated into the City's limits remains the service of Capital Electric. That does not make
21 sense to me.

22 ATTORNEY LARSON: The...keep in mind that the term limited franchise does not
23 mean second-class franchise. It is a grant of franchise and it is limited only geographically by
24 the area's that are designated as Capital Service area in the Area Service Agreement. So
25 what that ... what Capital intended to do back in 1973 and what it intends to do today is to
serve its base, its customers, its members outside the line of the Area Service Agreement.
We haven't changed. I mean that's, that's been our service territory. That's what MDU
agreed that those were our, those were our members, that's where we were to serve.

1 COMMISSIONER SPRYNCZNATYK: But, but, Carol, what I'm not seeing is how you
2 then make the leap to the argument that, that as the land is incorporated into the City, that all
3 those customers that are coming on board because now we have development. We actually
4 have residential development. It's not rural anymore, it's not part of somebody's farm. It's not
5 one farmhouse a mile into a section. You know we're looking at areas that are going to be
6 city. They are not rural by any stretch of the imagination so, so how, what's your argument
7 that those customers, because they did not exist, was that an area the rural electric served?
8 Yes, that's what you were established to do. No dispute about that. But, but, make the
9 argument for me that as that, as that territory becomes part of the City, that's its not just, that
10 the service area boundary doesn't move really essentially with the boundaries of the City or
11 with the City's ETZ zoning authority?

12 ATTORNEY LARSON: That's precisely the issue the legislature was addressing in
13 10-13-04 is that once rural always rural.

14 COMMISSIONER SPRYNCZYATYK: Okay, then let me ask you this and here's
15 where I get dangerous because a little knowledge, little knowledge is dangerous, but, but who
16 does somebody somewhere in the audience have recollection of the Article in the North
17 Dakota Constitution? I've been looking for it. I can't ... The reason I know it is because of an
18 issue not related to electric service but it's something like the authority of a municipality to
19 issue franchise for a public utility or any other such enterprise may not be abridged by the
20 legislative assembly. Do I have that roughly, Dan?

21 COMMISSIONER TABOR: Dan talked about it and knows it.

22 ATTORNEY KUNTZ: Article 7, Section 1.

23 COMMISSIONER SPRYNCZYATYK: There you go.

24 COMMISSIONER TABOR: Uh-huh.

25 COMMISSIONER SPRYNCZYATYK: And is that essentially what that says?

 ATTORNEY KUNTZ: Exactly.

 ATTORNEY LARSON: Yeah.

1 COMMISSIONER SPRYNCZNATYK: Okay so you make the argument how that
2 Article in the Constitution plays with your argument that the legislature's Territorial Integrity Act
3 takes precedence over that constitutional article.

4 ATTORNEY LARSON: No, I, okay, I didn't say the Territorial Integrity Act takes
5 precedence. I absolutely agree and concede that, ahh, you have the City of Bismarck has the
6 responsibility and the right to grant franchises. You did that. You granted to Capital Electric a
7 franchise to serve the areas that are outside the line. That's what by incorporating the Area
8 Service Agreement and the Area Service Agreement says Capital Electric's area is the area
9 outside the line and MDU's area is the area with inside the line. I can read it to you verbatim
here. Ahh

10 COMMISSIONER SPRYNCZNATYK: Well, before you do that ...

11 ATTORNEY LARSON: Um-mmm.

12 COMMISSIONER SPRYNCZNATYK: Let me just ask you ahh what if, what if, what if
13 we didn't have a map with a green line that said here's our current understanding of the
14 Service Area Agreement, what if the agreement said boundaries of the corporate limits of the
15 City.

16 ATTORNEY LARSON: I think that would have been within your authority to do that.

17 COMMISSIONER SPRYNCZNATYK: So your assumption would be then that the line
18 does move, I mean the line was anticipated to move apparently by both parties when they
19 agreed and they said both parties said and we're going to revisit this and we're going to
change it periodically. At least every five years I think is what it said.

20 ATTORNEY LARSON: I believe it said that they would meet, ahh, every five years.

21 COMMISSIONER SPRYNCZNATYK: Well, why would they meet if not to come to
22 agreement on changes in that line?

23 MAYOR WARFORD: Commissioner I think it says they would meet at least every five
24 years.

25 COMMISSIONER SPRYNCZNATYK: Right, right, and so my assumption is that my
understanding would be discussion for purposes of the line of the service area.

1 ATTORNEY LARSON: Okay. What it says in paragraph 11 is it is realized that the
2 foregoing instrument will not cover all conditions, which may arise but if followed in good faith
3 by both parties will serve as a guide to future developments and growth for both organizations.
4 Thus it's mutually agreed that this agreement will be reviewed at least once every five years
5 for purpose of evaluating its operation and to discuss possible modifications, which may be
6 desirable to more effectively carry out the intent of both parties. That does not say that the
7 line will move when MDU wants the line to move.

8 COMMISSIONER SPRYNCZNATYK: What does it say to you?

9 ATTORNEY LARSON: It says that the parties will meet and discuss modifications
10 and they have done that and there have been modifications. Those modifications have been
11 more along the lines of exchanges that MDU will serve this area that was previously in Capital
12 Service area and Capital will serve areas that was previously in MDU's area. I'm not saying
13 that it's limited to that. I mean, I think the parties could agree if they chose, if they mutually
14 determined that it was, ahh, beneficial. That it doesn't require that but that has been the
15 course of dealing, but I don't think that there is anything in here that said, I mean the purpose,
16 the intent of the agreement, was to protect Capital's right to serve its customers so that it
17 wasn't going to lose those to the City of ... to MDU.

18 COMMISSIONER SPRYNCZNATYK: The current customers? I mean, I don't think,
19 I'm trying to figure out where we have agreement and I think there's agreement, there's no
20 disagreement that any customer in place that Capital was serving that would continue to be
21 their customer and the same for MDU? Is that generally agreed at least that part?

22 ATTORNEY LARSON: Well, it's, it's not a one-for-one customer. I mean, Capital, the
23 areas where Capital has, has service and in Boulder Ridge Capital had service and it's
24 annexed into the City then under the grant of franchise, our franchise is expanded to include
25 that area just the same way that MDU's grant of franchise is expanded when areas that were
within, that were outside of the City limits but were within MDU's service territory were
annexed by the City. That's what the City Commission intended. That's what has happened
up until this past summer. That has been the course of dealing is that if the area is in our

1 service territory and the City has annexed it then Capital has served it. When areas have
2 been annexed out from, outside of the City, in MDU's service territory, MDU has served it.
3 And that continues. There's, there's a whole separate process that involves modifications of
4 the service area when MDU seeks permission to serve areas that are outside of the City limits
5 of Bismarck and in that sense they're outside of your franchise authority and those cases, ahh,
6 if, if they file an application for a certificate of...

7 COMMISSIONER SPRYNCZNATYK: Right.

8 ATTORNEY LARSON: Necessity and Capital acquiesces then MDU serves those
9 and that in essence becomes a modification of the line. In areas where we don't agree then
10 those cases go to the Public Service Commission, it applies it's factors and it makes its
11 determination so that results in a modification of the line.

12 MAYOR WARFORD: Commissioner Tabor?

13 COMMISSIONER TABOR: Let's talk first about service to the area because I get
14 confused sometimes. To me service means that you're providing service to a home or
15 something, ahh, in your brief it seems like you provided service and in fact I think you state
16 that you've provided service to Boulder Ridge since 1949. Now was there actually a house
17 there that you were providing service to?

18 ATTORNEY LARSON: I believe that is the case.

19 COMMISSIONER TABOR: And is that house still there?

20 ATTORNEY LARSON: No.

21 COMMISSIONER TABOR: Okay and when did the house go away?

22 ATTORNEY LARSON: I'm sorry I don't know the answer to that.

23 COMMISSIONER TABOR: But it's not there now...

24 ATTORNEY LARSON: No.

25 COMMISSIONER TABOR: So, but, what you have there is lines or holes or
whatever, ahh, but when then later on in the brief it says you've have to, you'd extend the line
for a short distance, like a half mile or I don't remember the exact, but you would extend the
line to serve Boulder Ridge so I got confused.

1 ATTORNEY LARSON: Oh, now that would be MDU. MDU would be required to and
2 all we have to do is hook it up. I mean we have facilities, we have facilities right there, ahh,
3 Boulder Ridge is ready to be energized, we, we, I mean...

4 COMMISSIONER TABOR: It says in here Carol, CC is able to extend service to the
5 site through a shorter extension at a lower cost.

6 ATTORNEY LARSON: Okay. I'm sorry.

7 COMMISSIONER TABOR: That's where I got all confused.

8 ATTORNEY LARSON: A shorter extension means its virtually...

9 COMMISSIONER TABOR: Shorter like an extension cord?

10 ATTORNEY LARSON: (Laughter) Well ...

11 COMMISSIONER TABOR: Well, I just

12 ATTORNEY LARSON: But that's about the case.

13 COMMISSIONER TABOR: I just got confused about whether you were actually
14 serving the area or if the area was larger than what we were talking about.

15 ATTORNEY LARSON: I think that Sandi if you look at the ... if you look at our Exhibit
16 6, 7 and 8. All of those facilities there that are right around the corner of Boulder Ridge.

17 COMMISSIONER TABOR: The pictures you're talking about?

18 ATTORNEY LARSON: Yeah. Those are our facilities.

19 COMMISSIONER TABOR: Okay. Okay that was the only thing I was a little unclear
20 about.

21 ATTORNEY LARSON: Yeah.

22 COMMISSIONER TABOR: Now I want to take you back to the intent language.
23 Kinda following up on what Commissioner Sprynczynatyk was discussing because it seems to
24 me and I mentioned this when Dan was at the podium, that all along Capital Electric is simply
25 been looking for a way to be able to maintain the service that they were providing when an
areas annexed and, and I know that you can try and argue that the '93 agreement doesn't
really include that intent but I challenge you on it because I'm, I think the intent all along has
been kinda clear about that issue. So, so when these areas that are on the north side since

1 that's what we're mainly talking about, of the service area boundary where Capital Electric
2 isn't really serving someone. I'm, I'm struggling with how they believe the geographically
3 limited franchise gives them a right over MDU's more expansive franchise once it's annexed.

4 ATTORNEY LARSON: Well, I think I would refer you, ahh, again to the grant of the
5 franchise that embodies the area service agreement that states that that area north of the line
6 is ahh, our service territory.

7 COMMISSIONER TABOR: Well, but again, and I think that's where the issue is
8 because to me the limited geographically immediately raises a question about what the intent
9 of that language was and when I look back at the historical intent of all this, I don't, I just don't
10 see it that clear.

11 ATTORNEY LARSON: Are you referring to the correspondence from '61?

12 COMMISSIONER TABOR: Um-mmm and the court cases, which pretty much put a
13 nail in the coffin of Capital Electric.

14 ATTORNEY LARSON: Well, I guess I would disagree with you on that point.

15 COMMISSIONER TABOR: Well they lost both of them, Carol.

16 ATTORNEY LARSON: Well, which case are you referring to?

17 COMMISSIONER TABOR: The Eighth Circuit and the Supreme Court. The '57 case
18 and the '61 or whatever the Eighth Circuit date was, I can't remember.

19 ATTORNEY LARSON: Yeah, that is the case that discusses the validity of area
20 service agreements for areas outside of the City.

21 COMMISSIONER TABOR: Um-mmm.

22 ATTORNEY LARSON: In, in this situation, and the, the case that you're referring to is
23 a service agreement that wasn't blessed by the regulatory authority.

24 COMMISSIONER TABOR: Um-mmm.

25 ATTORNEY LARSON: In this case it's the City of Bismarck who has exercising its
franchising authority that has approved and incorporated the area service agreement.

COMMISSIONER TABOR: Um-mmm.

1 ATTORNEY LARSON: So I think this case is different than that Williams County
2 case.

3 COMMISSIONER TABOR: Yeah, I'm not sure I agree with you but we won't get into
4 that any further, but the real issue is that the documentation from back in the sixties which as I
5 understand the history of this, evolved into the '73 agreement is that Capital was really just
6 trying to protect who they were already serving.

7 ATTORNEY LARSON: And the area that we had developed and were serving.

8 COMMISSIONER TABOR: Well, that's not what you said in the document.

9 COMMISSIONER HILL: How did you get the expansion? That's what all of this, ahh,
10 it's hard to understand where this authorized you to expand like that.

11 ATTORNEY LARSON: On the grant of authority discusses the public grounds of the
12 City as now or hereafter constituted.

13 COMMISSIONER TABOR: Um-mmm.

14 ATTORNEY LARSON: And that's the grant, that's the language that's used both in
15 Capital's and MDU's. I think that that indicates an inference that the, the franchises were
16 intended to expand as areas were annexed into the agreement and from there you go to the
17 area service agreement which is embedded, embodied in the, or embedded in the franchise
18 that says you know you're gonna recognize your obligation to avoid duplication of services,
19 ahh, provided that the company serve the customers within the boundary and, and the
20 cooperative serves the areas outside of the boundary. I believe that that is expansive but that
21 is indicates an intention and that's the way this agreement has been interpreted by the City
22 and by the parties since, ahh, 1973.

23 COMMISSIONER TABOR: I don't know about whether the City has interpreted that
24 way. The two companies may have but until we were put on notice there was an issue here,
25 which is, I think exactly why we have to go back to the intent of that language. Ahh, I'm not
sure that we had any actual knowledge of some of these amendments. Did anybody write us
a letter Charlie?

 CHARLIE WHITMAN: Not that I know of.

1 COMMISSIONER TABOR: Yeah.

2 COMMISSIONER SPRYNCZYNATYK: Commissioner Tabor, can I go on record?

3 MAYOR WARFORD: Commissioner Sprynczynatyk?

4 COMMISSIONER TABOR: Yeah.

5 COMMISSIONER SPRYNCZYNATYK: Just to throw into the mix because I'm getting
6 old and I'll forget but I finally found some of the language Carol that I think we're talking about.
7 This is a letter in 1961 from Ray _____, Capital Electric, to John Zuger who was Bismarck City
8 Attorney at the time. It says we are asking only that the Commission may grant us a franchise
9 to allow us to continue serving customers presently located within the City limits and
10 customers that we may be serving in areas at the time of annexation in the future. We are not
11 asking that this franchise allow us to extend our service into the City limits as you have
12 indicated in your letter, we ask only that we be allowed to keep our service intact within the
13 present City limits and in future annexed areas. So I guess that's where I got confused
14 because I mean that seemed to, seemed to say to me that Capital Electric all along has had
15 an intention to serve the existing customers, the existing customers not all future customers,
16 but the existing. Cause I'm just using your own language here.

17 ATTORNEY LARSON: But bear in mind, ahh, Commissioner, that that letter concerns
18 a franchise that wasn't granted. That's 1961. Capital didn't have a franchise until 1973.

19 COMMISSIONER SPRYNCZYNATYK: I understand that.

20 ATTORNEY LARSON: That has no relevance to...

21 COMMISSIONER SPRYNCZYNATYK: I understand that.

22 ATTORNEY LARSON: To the current grant.

23 COMMISSIONER SPRYNCZYNATYK: Well, I'm just ... that's what I think. I mean,
24 I'm sorry, that's what I thought we were going to need to do was really decide what is the,
25 what is the grant of authority that the City has given to both parties under their different
franchises and the question to me is and since you're the law trained one, you can jump in on
this if my understanding is incorrect, but my understanding is that, that the language for
Capital Electric is not expansive, it's restrictive. And to me that is essential question.

1 COMMISSIONER TABOR: Clearly restrictive. Just a question Carol, let's hop off
2 this. Can you explain to me why you think the amendment to the franchise agreement in '93
3 was signed, if it has no real meaning? I mean I'm sensing that's what you kinda are
4 suggesting is that it really doesn't mean anything.

5 ATTORNEY LARSON: Oh, I think it means a lot.

6 COMMISSIONER TABOR: Why is it necessary?

7 ATTORNEY LARSON: I think it was necessary to make sure that MDU would
8 continue to have the right to serve within its area service and Capital would have the right to
9 serve the property that was in its delineated service area and that the both parties were giving
10 up their right to cancel to the one year cancellation provision by representing to the City that
11 you have an orderly plan for development. It's gonna continue throughout the period of the
12 franchise and that's what, that's what has happened and that's what's been done. So I think
13 that I mean, I think that's the amendments incredibly important because that is what I believe
14 binds the parties to the language in the Area Service Agreement.

15 COMMISSIONER TABOR: Well, then why would you ever be able to cancel it?

16 ATTORNEY LARSON: Well, you, you can't, the cancellation, ahh, is going to come at
17 the end of Capital's franchise.

18 COMMISSIONER TABOR: Okay, but why would, in the meantime why would you, I
19 mean I guess I'm struggling with why would you need this language because if somehow this
20 is good in perpetuity or at least for the 20 years, why would you ever be able to cancel the
21 Area Service Agreement? I just am confused about that.

22 ATTORNEY LARSON: Well the Area Service Agreement has a cancellation
23 provision.

24 COMMISSIONER TABOR: Right.

25 ATTORNEY LARSON: And it says that either party can cancel it on one year's notice.

 COMMISSIONER TABOR: Right. And the franchises are all centered around that
agreement.

 ATTORNEY LARSON: Right.

1 COMMISSIONER TABOR: One way or another.

2 ATTORNEY LARSON: I agree with that.

3 COMMISSIONER TABOR: Okay.

4 ATTORNEY LARSON: So, that I think creates the difficulty is what happens, what
5 would have happened if either party had cancelled that agreement. It's embedded in the
6 franchise but yet the agreement says that there's a cancellation provision. So MDU got the
7 benefit of serving unimpeded within the City limits of Bismarck and the areas that it, that it had
8 delineated as, as areas that it could grow into without duplication or interference by Capital.
9 That's, that's what was in it for MDU.

10 COMMISSIONER TABOR: And of course that's why it was unlimited general
11 franchise.

12 COMMISSIONER SPRYNCZYNATYK: Right.

13 ATTORNEY LARSON: Well, it, but the other option at that time is that the City could
14 have granted Capital Electric an unlimited general franchise.

15 COMMISSIONER TABOR: But they didn't.

16 ATTORNEY LARSON: They didn't because...

17 COMMISSIONER TABOR: They issued a limited geographically franchise. I mean
18 it's, it's very clear to me I know earlier you'd said it's something about this not being a second-
19 tier or secondary agreement but there's a piece of me that thinks that's exactly what they had
20 in mind when they did this. That MDU would have the ability to do an unlimited franchise but
21 recognizing that Capital Electric had made some improvements, had some customers and as
22 the City grew would have some customers that we would inevitably annex and that it wasn't
23 fair to Capital to, to divest them of that ability much like happened in those Supreme Court
24 cases.

25 ATTORNEY LARSON: And I would contend that that's, that if you decide that MDU
has the right to limit our franchise that MDU regulates utilities in the City of Bismarck. That's,
that is what happens. We lose our investment, we lose our customers, we lose our ability and
the City loses its orderly development, ahh ...

1 COMMISSIONER TABOR: Let me ask you this and then I'll be done. Ahh, what is,
2 what is, and this might not be a fair question so if you don't want to answer, 'cause you're not
3 in management, I mean I understand your role. But have you talked with your clients about
4 the potential for you and MDU to sit down after this and so let's look at that Area Service
5 Agreement again and see if we can come to some agreement?

6 ATTORNEY LARSON: Yes.

7 COMMISSIONER TABOR: And are you guys willing to do that?

8 ATTORNEY LARSON: Yes.

9 COMMISSIONER TABOR: Okay. Dan, come on up here. Excuse me for just a
10 second, Carol.

11 ATTORNEY LARSON: No problem.

12 COMMISSIONER TABOR: I'm not going to cut you off. So you've heard the
13 question, what's your answer?

14 ATTORNEY KUNTZ: We've offered to sit down and we've tried to sit down but ... I'm
15 not real optimistic 'cause I think the parties have some vastly different ideas as to what an
16 equitable participation and the growth here ... now maybe after tonight those ideas will get
17 closer together, we are certainly willing to do that any time, any place, define the hour.

18 COMMISSIONER TABOR: Okay. Thank you. Carol I didn't mean to cut you off
19 anytime so ...

20 ATTORNEY LARSON: That's okay.

21 COMMISSIONER TABOR: So if anybody else has questions I think I'm done.

22 MAYOR WARFORD: Carol, my only you know concern goes back ahh, you know we
23 can, we can talk about defining the wants you know what both sides are, but to go back to the
24 intent and my concern is is that since 1973 we've had a line, this line and even a year ago
25 you've said there's been some give and take, this line has never really moved much you know
since then and I just cannot believe that it was not the intention of both parties way back when
that this line here we are 2005 that we'd have the same line, would be fighting over the line
and that territory and not understand how you could argue that you know that this line has not

1 moved and you did state earlier that you know that the line didn't move in but it only moved
2 out. You know, you know, how, how do you answer that? That, that there's been not give and
3 take I mean on your side of this issue?

4 ATTORNEY LARSON: Well, I guess I would respond by saying that in 1993 when
5 Capital's franchise was up for renewal there was something in it for MDU to agree that the
6 service agreement would stay intact throughout the period of either party's franchise. And I
7 think you're underestimating the value to MDU of developing all of its service territory as
8 delineated in the Area Service Agreement. That was a valuable right, it continues in my
9 opinion to be a valuable right, there are still areas within the City of Bismarck that have not
10 been developed, there is development going on within the City of Bismarck, so I do think that
11 there was a tremendous value because if there wasn't, MDU would have or could have
12 cancelled its service agreement at that, the service agreement at that time if they had believed
13 that it was not a value to them, there would have been a cancellation, not an agreement to
14 continue the, the Area Service Agreement throughout the period of the franchise. I mean they
15 are sophisticated business people.

16 COMMISSIONER TABOR: I would hope.

17 MAYOR WARFORD: Commissioner Hill?

18 COMMISSIONER HILL: One last question. I think we've established that you have a
19 limited franchise, right?

20 ATTORNEY LARSON: Yes.

21 COMMISSIONER SPRYNCZYNATYK: Don't admit anything.

22 COMMISSIONER HILL: Now one of the things in this document that you handed out
23 to here to us earlier it talks in here about several instances where, ahh, where electricity is
24 provided by Capital Electric and then when the area is annexed into the City then MDU has
25 the right to take over that with just compensation to you. Now, I'm just wondering how that fits
in here because I'm, ahh, several of these briefs here and this West Law document that you
gave me, ahh, indicate that that's happened in the past and that's what is intended to happen
in the future.

1 ATTORNEY LARSON: I think, ah, Commissioner Hill that that would only be true for
2 areas where the City, where the utility did not have a franchise. If Capital did not have a
3 franchise with the City of Bismarck and areas where ... from our territory were annexed into
4 the City of Bismarck, we would have a problem. But we do have a franchise and...

5 COMMISSIONER HILL: Oh, I think this goes back to the...Are we talking about a
6 limited franchise? I don't think you have a full franchise.

7 ATTORNEY LARSON: I agree that we do not have a franchise to serve areas that
8 are delineated as MDU's service territory and to that degree our franchise is limited. But it is
9 not limited and it does allow Capital to serve areas annexed into the City that are delineated
as Capital's under the Area Service Agreement.

10 MAYOR WARFORD: Any further questions Commissioners?

11 COMMISSIONER TABOR: Just one quick one.

12 MAYOR WARFORD: Yes.

13 COMMISSIONER TABOR: Carol do you think that we have the authority to grant a
14 limited franchise outside the City limits?

15 ATTORNEY LARSON: No.

16 COMMISSIONER TABOR: Thank you.

17 ATTORNEY LARSON: I do think you have the right to anticipate, ah, expansion and
18 growth and provide for that. Once the area is annexed, in my opinion, then it becomes that
19 property and those rights are the same as people who live in the original townsite of the City of
20 Bismarck subject to our franchise, subject to MDU's franchise and subject to your franchise
authority.

21 COMMISSIONER TABOR: Thank you.

22 MAYOR WARFORD: No further questions. Commissioners, ahh, Commissioner
23 Tabor?

24 COMMISSIONER TABOR: Well, Commissioners, I'm wondering if we shouldn't,
25 based on everything we've heard tonight, direct City Attorney to do a little research into
contract law, contract interpretation and draft some Findings for us to look at? It's my

1 understanding he won't be at the next meeting so maybe we could have him circulate some
2 Findings and then have a discussion at the first meeting in November.

3 COMMISSIONER HILL: If that's a motion I'll second it.

4 COMMISSIONER TABOR: It is.

5 MAYOR WARFORD: We have a motion and second to take all of this information
6 under advisement and to ahh ...

7 COMMISSIONER SPRYNCZYNATYK: Question.

8 MAYOR WARFORD: Bring it up at the November meeting, the first meeting in
9 November. Commissioner Sprynczynatyk?

10 COMMISSIONER SPRYNCZYNATYK: Thank you Mr. President. Might I also
11 suggest that perhaps since both parties have been present, patient, thank you all for the
12 information, ahh, it might be a good idea for both parties to try one more time to get together,
13 to take another look at that Service Area Agreement. I can just tell you from, I'm not sure if
14 Commissioner Tabor, if you were on the Commission in '93 when we had a previous
15 discussion, but let me end this on a positive note and that is even though I recall the
16 discussion in 1993, I think it was the corner of Century and State Street where the swinging
17 tractor used to be, ahh, the Commission made a determination at that point about whose
18 service area we were really talking about and it struck me back then what strikes me today,
19 ahh, its true today, we have two good companies that may have a difference of opinion on
20 this, ahh, we will obviously have to come to some determination about, about what the Service
21 Area Agreement means, what the limited franchise or the expansive franchise language
22 means, but we have two good companies that serve their customers well, ahh, my personal
23 preference today is the same as it was back then. Get together and work it out and I know
24 that we're willing to make a decision if we have to but I think we'd also prefer that the two
25 companies, the two fine companies get together and work it out.

24 MAYOR WARFORD: Thank you Commissioner and thank all of the people that had
25 information this evening. Please call the...Commissioner Hill?

1 COMMISSIONER HILL: Ahh, clarification on the date when we're coming back on
2 this.

3 COMMISSIONER TABOR: The first meeting in November whatever date that is.

4 COMMISSIONER HILL: I happen to be out of town that week. Can we ...

5 COMMISSIONER SPRYNCZYNATYK: Ahh. I'm gone, too. November 8th.

6 COMMISSIONER TABOR: You're gone, too?

7 COMMISSIONER SPRYNCZYNATYK: I am.

8 COMMISSIONER TABOR: We might not even have a meeting.

9 COMMISSIONER SPRYNCZYNATYK: Don't we have another Commission member
10 or silent partner over there?

11 COMMISSIONER TABOR: Well, we can do it at the end of the month, at the end of
12 November. I just don't think we should do it without Charlie being here.

13 COMMISSIONER SPRYNCZYNATYK: No, I agree, but ahh, but with two of us out of
14 town on the 8th, should we be looking at moving the meeting? I'd like it since everybody's
15 here I'd like everybody to know what kind of time line we're working under.

16 COMMISSIONER TABOR: Well, we...

17 CHARLIE WHITMAN: No, we'd have to schedule a special meeting.

18 COMMISSIONER TABOR: A special meeting?

19 MAYOR WARFORD: Possibly a special meeting?

20 CHARLIE WHITMAN: We're getting pretty far out there.

21 COMMISSIONER TABOR: Yeah, that's what I think.

22 COMMISSIONER SPRYNCZYNATYK: Okay then. A special meeting would be
23 great.

24 COMMISSIONER TABOR: How about if we do this, we'll set, Bill can poll us
25 tomorrow for a date, maybe the first week in November, and then we can let the parties know
so they know what to expect.

COMMISSIONER SPRYNCZYNATYK: We'll do a special meeting? Okay.

MAYOR WARFORD: So the motion is modified to a special meeting will be held. Any

1 Further questions or modifications? Please call the roll.

2 COMMISSIONER SPRYNCZYNATYK: Yes.

3 COMMISSIONER HILL: Yes.

4 COMMISSIONER TABOR: Yes.

5 MAYOR WARFORD: Yes. Motion carries. Thank you very much everyone. To be
6 continued.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



November 14, 2005
Meeting

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CITY COMMISSION MEETING
Tom Baker Meeting Room, City and County Office Building
221 North Fifth Street, Bismarck, North Dakota 58506
Special Meeting of November 14, 2005

APPEARANCES:

Mayor John Warford
City Commissioners:
Sandra Tabor
David Jensen
Connie Sprynczynatyk
H. Bryce Hill
City Attorney:
Charlie Whitman

(THE FOLLOWING PROCEEDINGS WERE HAD AND MADE OF RECORD AS FOLLOWS, on the 14th day of November, 2005, commencing at _____ p.m.)

MAYOR WARFORD: We are now at our Regular Agenda. The first item is further deliberations on the Petition to Declare Electric Franchise. Commissioners I have a report for you. This is our report. Ahh, the floor is open for deliberations and discussion at this table. Well, I'll open it up. You know essentially as I've stated in the past, ahh, we as a Commission were hopeful that the parties would have gotten together and would have come up with an agreement, but, ahh, seeing and hearing that we have no agreement and I don't think there's been any meeting prior to this meeting in the last few hours. Ahh, ahh, ahh, it's this Board's decision with regard to Boulder Ridge, and we'll try to focus our discussions on Boulder Ridge and the discussions on the area service agreement. And essentially I just wrote down a couple of, you know, couple of comments with regard to the intent I guess and I'll just read you know, my thoughts there, and that is the Commission's intentions in 1973 and 1993 was to grant to Capital Electric Cooperative a limited franchise; limited to those customers that were

1 already serving when the land was annexed and any other areas as agreed between them
2 and MDU. This was the intention, that was the intention for Capital Electric Cooperative and
3 MDU to meet, get together as the City grew, to make amendments to the Area Service
4 Agreement. MDU was to continue to be the primary provider to the City. So I think that you
5 know the intent of the original franchise you know, what is that. And then just to comment on
6 the interpretation you know beyond that and that is that Capital Electric's franchise does not
7 give them you know everything outside the line and it is really unlikely that the 1973
8 Commission, the City Commission, would have not recognized that problem and given them a
9 franchise to allow them to do that. So just some opening comments at least my prospective
and how I read the Area Service Agreement. Commissioner Jensen.

10 COMMISSIONER JENSEN: Well, I was there, at the discussion, what I remember
11 was we removed Basin Electric from the area around Century High School and north of there
12 to align to the north and we called that the Service Area Agreement and they had to stay north
13 of that line or west, east of that line and MDU could service everything inside the area of the
14 '93 agreement so it wasn't that we didn't tell them they couldn't service anything outside the
15 city limits or future city limits but we did tell them they couldn't service anyone inside the '93
16 agreement area. That's what I remember the discussion at the table. We can review the
tapes if you want.

17 MAYOR WARFORD: Commissioner Hill.

18 COMMISSIONER HILL: Well, I think it's from what I read and considering all these
19 factors here the ... I think we need to stress the fact that it was a limited franchise that was
20 issued and it very specifically laid out what was going to happen there from the very beginning
21 from letters that were written back in the 60's as to where that was gonna go so I think that we
22 need to, ahh, to move on and I'm not sure about this line, ahh, as to how, but the bottom line
23 is that we need to work out, ahh, well, I think really, we're, this whole issue here is dealing with
24 Boulder Ridge and from where I see and what I see here and what I've seen in the past, ahh,
25 the Boulder Ridge is really something that is the issue and I, I, from my perspective its
something that MDU should have.

1 MAYOR WARFORD: Any other comments Commissioners? Commissioner
2 Sprynczynatyk?

3 COMMISSIONER SPRYNCZYNATYK: Commissioners, I'm sure as you did I went
4 back through all of the information that was provided to us previously, and, and I was
5 pondering the question of whether the franchise when it was issued was intended to be
6 restrictive or expansive. So, I went back through the documentation that was provided to us
7 by both sides before our previous meeting and I just looked for language that seemed either
8 limiting or expansive and just started turning down the pages of the larger report. Every time I
9 found a, you know, something in a document that talked about whether it was restrictive or
10 not. I found all kinds of examples of restrictive language, limited franchise. I did not find
11 expansive language. So I am hard-pressed to think that the intent of the Commission with
12 earlier actions was to create two franchises operating on the same level. Once again it
13 appears to me that the intent was to issue a franchise to Capital Electric that was restrictive
and not expansive.

14 MAYOR WARFORD: Any other discussion, Commissioners? Any further
15 deliberations?

16 COMMISSIONER JENSEN: I have a question.

17 MAYOR WARFORD: Commissioner Jensen.

18 COMMISSIONER JENSEN: I question if Charlie maybe, who owns the access lines
19 that go to homeowners? I mean the homeowner has, gives an easement to the power
company regardless who the power company is and the telephone company.

20 COMMISSIONER SPRYNCZYNATYK: No.

21 CHARLIE WHITMAN: No. Generally speaking when you order service you're giving
22 them permission to come from wherever they are on an easement into your home. I think that
23 the power companies own those lines though. You don't actually pay, you may pay for the
24 hookup but I don't think you're actually paying for those lines and I think you know right up to
25 the meter it's the power companies, after the meter then its your problem inside your house.

 COMMISSIONER JENSEN: Is that for indefinitely, forever they own those lines?

1 CHARLIE WHITMAN: Sure.

2 COMMISSIONER JENSEN: You know even on private property and as a
3 homeowner?

4 CHARLIE WHITMAN: Unless at some point in time you cancel the service and ask
5 them to remove them.

6 COMMISSIONER JENSEN: And then you could sign up and have someone come up
7 and..

8 CHARLIE WHITMAN: They come up behind your house.

9 COMMISSIONER JENSEN: What I'm afraid of Charlie, and correct me if I'm wrong,
10 what we're doing is we're changing what I interpret was a franchise agreement and when we
11 change that then we negate our franchise with MDU inside the city, I see it being wide open
12 for anyone to come in and service anyone it so wishes to have it served. What right do we
13 have as a City to tell someone they can't serve? Both companies have power lines going
14 through our city. Why can't a trailer court in the middle of the city hook up to a different power
15 company?

16 CHARLIE WHITMAN: Back up a little bit. Any utility that meets the qualifications of
17 the franchise can provide utility services. In North Dakota I don't believe that they have a right
18 to provide it on the other company's lines.

19 COMMISSIONER JENSEN: Right.

20 CHARLIE WHITMAN: But they...

21 COMMISSIONER JENSEN: Right. But they can put in their own.

22 CHARLIE WHITMAN: Exactly. They would have to duplicate that service.

23 COMMISSIONER JENSEN: So basic line...

24 CHARLIE WHITMAN: The whole basis is...

25 COMMISSIONER JENSEN: So the whole line goes by the trailer courts and they
decide that the home operator ...

1 CHARLIE WHITMAN: The whole basis for the area service agreement was to take
2 care of those issues of duplication. So the City wouldn't necessarily have to grant extra
3 franchises for the exact same geographic area.

4 COMMISSIONER JENSEN: So if somebody else comes in now, one of the trailer
5 courts, and decide they want to have service, we have to give them service to whoever they
6 chose to be their provider, right?

7 CHARLIE WHITMAN: My best answer to that is it would depend.

8 COMMISSIONER JENSEN: Okay.

9 CHARLIE WHITMAN: Because the City wouldn't necessarily have to allow the
10 damage to the right-of-way, using up space for utilities in the right-of-way, I mean there's just a
11 lot of, there's a lot of issues there. It's not just yes they would. But let's say for example all of
12 those issues aren't an issue and they could simply get to the trailer court easily and they were
13 a competent utility, yeah that's very possible, but it's way more complicated than just they
14 want to do it so they can do it. It's a lot more complicated than that. But we are the
15 franchising authority within the city. We have attempted to not have duplication of service
16 because it's very inefficient to do that.

17 MAYOR WARFORD: Any further questions? Any further discussion?
18 Commissioners your wishes, the subject at hand is the Boulder Ridge, the Boulder Ridge
19 issue. Commissioner Hill.

20 COMMISSIONER HILL: I may need some help on this motion but, ahh, I would make
21 a motion to give MDU the Boulder Ridge area which is now part of the City of Bismarck.

22 MAYOR WARFORD: We have a motion. Do we have a second? Do we have a
23 second to that motion?

24 COMMISSIONER TABOR: I'll second it.

25 MAYOR WARFORD: We have a second to that motion. Discussion. The motion is
to grant the franchise rights and I don't know if I'm using the exact term to MDU.
Commissioner Sprynczynatyk.

1 COMMISSIONER SPRYNCZYNATYK: Ahh, just, just really a procedural question for
2 Charlie. Do we need to create record of findings and ... do we need to do something more
3 formally?

4 CHARLIE WHITMAN: What I would suggest is that the motion include the draft
5 Findings and Conclusions that the Mayor provided to you, ahh, and adopt those as part of
6 your motion.

7 COMMISSIONER HILL: I accept those.

8 COMMISSIONER SPRYNCZYNATYK: Yep.

9 MAYOR WARFORD: Motion and seconded to make the Findings of Fact that I
10 passed out to the Commissioners to be part of the motion, a part of the record. Okay. Any
11 further discussion Commissioners? Any further thoughts and discussion? Any further
12 discussion? Seeing and hearing, please call the roll.

13 COMMISSIONER SPRYNCZYNATYK: Yes.

14 COMMISSIONER HILL: Yes.

15 COMMISSIONER TABOR: Yes.

16 COMMISSIONER JENSEN: No.

17 MAYOR WARFORD: Yes. Motion carries.

18

19

20

21

22

23

24

25

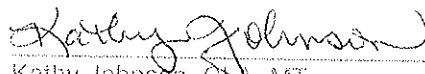
CERTIFICATE OF TRANSCRIPTIONIST

STATE OF NORTH DAKOTA)
) ss
COUNTY OF MERCER)

I, Kathy Johnson, a Certified Legal Assistant and Certified Medical Transcriptionist,
CERTIFY that I recorded and transcribed the foregoing proceedings from DVD tapes
had and made of record at the time and place indicated.

I FURTHER CERTIFY that the foregoing and attached 48 typewritten pages contain
an accurate transcript of the recorded DVD tapes taken from the Bismarck City Commission
meetings so noted.

Dated at Hazen, North Dakota, on August 16, 2006.


Kathy Johnson, CLM, MT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25