

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

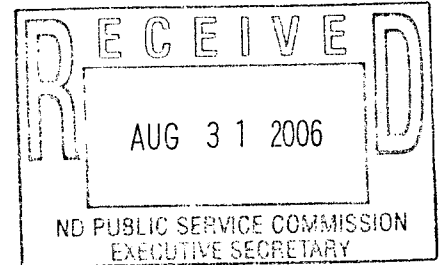
Montana-Dakota Utilities Co.,)
a Division of MDU Resources)
Group, Inc.)
Appellant,)

vs.)

The Public Service Commission of)
North Dakota)

and)

Capital Electric Cooperative, Inc.)
Appellees.)



Case No. 06-C-1177

**APPELLEE
CAPITAL ELECTRIC COOPERATIVE'S
BRIEF**

Carol K. Larson - #04406
PRINGLE & HERIGSTAD, P.C.
Attorneys for Capital Electric Cooperative, Inc.
2525 Elk Drive
PO Box 1000
Minot, ND 58702-1000
(701) 852-0381

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I. NATURE OF PROCEEDING

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. Capital Electric Cooperative complained to the North Dakota Public Service Commission (PSC) under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about Montana-Dakota Utilities Co.'s extension of service in a rural area inside the corporate limits of a municipality. The disputed area is part of Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge). The parties are referred to as Capital and MDU.

"... [T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Electric Cooperative v Wold Properties, Inc., 249 N.W.2d 514, 520 (ND 1977). See also Capital Electric Cooperative v Public

Service Commission, 534 N.W.2d 587 (ND 1995), (herein Capital v PSC), the Supreme Court's most recent decision under the Territorial Integrity Act. In that case, the court reiterated, "The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities" and ". . . the purposes of the Act to minimize conflicts between electric public utilities and rural electric cooperatives and to provide territorial protection for rural electric cooperatives." 534 N.W.2d at 590 and 592.

The Boulder Ridge dispute may seem untypical, because it is not a situation where an electric public utility seeks to serve customers in a rural area outside the corporate limits of a municipality. This dispute is about electric service in a rural area that has been annexed to a municipality.

Though it may seem untypical, this dispute is not unprecedented. It has an antecedent in Cass County Electric Cooperative, Inc. v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990). (The two cases are referred to herein as Cass v NSP and NSP v PSC, respectively, and collectively as the "South Pointe cases.") The South Pointe cases settled a dispute in the Fargo area substantially the same as this one between Capital and MDU over Boulder Ridge in Bismarck. Capital's Complaint to the PSC against MDU is like Cass's Complaint against NSP in the South Pointe case. The PSC's decision and order against MDU in the Boulder Ridge case is like its decision and order against NSP in the South Pointe case, affirmed by the Supreme Court in NSP v PSC. In both cases, the PSC exercised its jurisdiction under N.D.C.C. § 49-03-01.3 to regulate electric utilities' interference with services provided by a rural electric cooperative in a rural area annexed to a municipality.

In the Boulder Ridge case, the PSC heard the evidence, considered the parties' arguments, and issued its Findings of Fact, Conclusions of Law, and Order (herein PSC Order). The PSC found and concluded under N.D.C.C. § 49-03-1.3 that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered that MDU shall cease and desist from providing electric service in Boulder Ridge. *[PSC Order, Finding of Fact No. 29, Conclusion of Law No. 7, and Order No.1.]* MDU has appealed from the PSC Order under N.D.C.C. § 28-32-42.

Chronology of the Boulder Ridge Dispute and Proceedings Below.

Both Capital and MDU provided electric service in the northwest Bismarck area before the Boulder Ridge dispute erupted in the late summer of 2005.

In 1973, the Board of City Commissioners of the City of Bismarck (the City Commission) granted a 20 year franchise to Capital. In 1987, the City Board granted a franchise to MDU, renewing an expiring 20 year franchise. In May of 1993, the City granted to Capital a franchise, renewing the expiring 20 year franchise granted in 1973. In each case the franchise was non-exclusive, in accordance with N.D.C.C. § 40-05-01(57). The franchise documents are identical, except for Article II, Section 1 of Capital's franchise referring to an Area Service Agreement between Capital and MDU. No similar provision is included in MDU's franchise. *[Motion exhibits 1 and 2.]*

The Boulder Ridge dispute began in August of 2005.

On August 30, 2005, MDU filed with the City Commission a "Petition to Declare Electric Franchise Rights," to declare that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. *[PSC Order, Finding of Fact No. 8.]*

On September 29, 2005, Capital filed a Complaint against MDU with the Public Service Commission, alleging that MDU intended to extend its facilities within the corporate limits of Bismarck and alleging that such service will interfere with the service provided by Capital, in violation of N.D.C.C. § 49-03-01.3 [PSC Order, p 1.]

On October 20, 2005, MDU filed an answer to Capital's complaint. MDU admitted it extended its facilities to provide electric distribution services in Boulder Ridge and that it intends to provide electric distribution services in Boulder Ridge. MDU alleged that action is taken pursuant to the rights under its franchise from the City of Bismarck and asserted that the PSC does not have jurisdiction. [PSC Order, p 1 -2.]

On November 14, 2005, the City Commission issued its "Findings, Conclusions Decision and Order" where it "... Orders that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck." [PSC Order, Finding of Fact No. 8 Motion Exhibits 1 & 2, herein the City Order.] Capital has challenged the City Order in a separate action now pending before the North Dakota Supreme Court. [PSC Order, Finding of Fact No. 9.]

On November 23, 2005, MDU filed with the PSC a motion to dismiss Capital's complaint. [PSC Order, p 2.]

On February 9, 2006, the PSC held an evidentiary hearing on Capital's complaint. At the hearing, MDU renewed its motion to dismiss. MDU presented no evidence, no testimony and no exhibits other than its motion exhibits. [PSC Order, p 2; transcript, pp 11-13; 143-144.]

On June 22, 2006, the PSC issued its findings of fact, conclusions law and order. [The PSC Order.]

The PSC found and concluded under N.D.C.C. § 49-03-1.3 that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered that MDU shall cease and desist from providing electric service in Boulder Ridge. [*PSC Order, Finding of Fact No. 29, Conclusion of Law No. 7, and Order No. 1.*]

II. FACTS

The detailed facts of the case are stated in the PSC Order, incorporated in this brief by reference. The findings of fact are based on the evidentiary record compiled by the PSC, which comprises the entire body of evidence to be considered on appeal. N.D.C.C. §§ 28-32-44(5) and 28-32-46.

III. SUMMARY OF ARGUMENTS

On appeal from an administrative agency's decision, the court's jurisdiction is limited by N.D.C.C. § 28-32-46. The court must affirm the order of the agency unless the court finds a statutory reason for not affirming the decision.

In reviewing the agency's findings, the court does not make independent findings of fact or substitute its judgment for that of the agency. The court determines only whether a reasoning mind could reasonably have determined that the factual conclusions reached were supported by the weight of the evidence. The court does not function as a "super board" and second guess the PSC's determinations.

N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. Despite filing 28 specifications, MDU particularly claims one matter truly at issue, specification 1a, capsulized in MDU's words: "In failing to recognize the constitutional authority of the City of Bismarck to franchise utility service areas, the Commission improperly exercised its

jurisdiction under the TIA.” (i.e. The Territorial Integrity Act, N.D.C.C. Chapter 49-03.)
[Appellant’s brief, Conclusion, p 35.]

On this appeal, MDU does not assert the PSC made a wrong decision after a hearing under N.D.C.C § 49-03-01.3. MDU asserts the PSC should have made no decision; Capital’s complaint should have been dismissed by the PSC without an evidentiary hearing. The essence of MDU’s defense against the PSC’s exercise of its jurisdiction is that Bismarck’s City Commission has bestowed on MDU a constitutional right, immunity or exemption from the PSC’s jurisdiction to enforce N.D.C.C. § 49-03-01.3 because that statute conflicts with Article VII, §11 of the North Dakota Constitution, according to MDU.

MDU holds an Order issued by Bismarck’s City Commission as a shield against the PSC’s Order that MDU shall cease and desist from providing electric service in Boulder Ridge. The City Order is the subject of separate pending collateral litigation. The City Order and the collateral litigation are not final and have no effect under rules of collateral estoppel or res judicata. Whatever is the final outcome of the separate litigation about Capital’s franchise, the City Order is not a constitutional license for MDU to violate State law, N.D.C.C. Chapter 49-03.

North Dakota’s jurisprudence requires “heavy artillery” to support claims of rights and powers under the Constitution. No pertinent precedent supports MDU’s claim. MDU lacks standing to assert rights under Article VII of the Constitution. The Territorial Integrity Act is presumed to be constitutional, and it is more than presumptively constitutional. The Act has withstood two previous attacks by MDU. It cannot be successfully maintained that the Legislature does not have the power to regulate public utilities under the police powers of the State.

The case now before the court is not unprecedented. It is not the first time a utility regulated under N.D.C.C. Chapter 49-03 has argued concepts of local self-government pre-empt the PSC's jurisdiction under state law. The state's interest in regulating a public utility outweighs minimal burdens on local self-government. The comprehensive policy and regulatory regimen of the Territorial Integrity Act applies to the entire state of North Dakota. It is a policy and legislated regulatory scheme sustained by the Legislature's constitutional police powers. The legislature's policy and power are not superceded by theories of municipal sovereignty. A utility regulated by the Act lacks standing to assert theories of municipal sovereignty as a defense to enforcement of the Act.

The PSC has ordered that MDU shall cease and desist from providing electric service in Boulder Ridge. The decision is supported by the weight of the law and the weight of the evidence. The court must affirm the order of the PSC because there is no statutory reason for not affirming the decision. The PSC order does not violate the constitutional rights of MDU. N.D.C.C. § 28-32-46.

A. North Dakota statutes and precedents limit the scope of judicial review of agency decisions.

On appeal from an administrative agency's decision ". . . the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

N.D.C.C. § 28-32-46.

The court must affirm an agency's decision unless one of the enumerated reasons for not affirming the agency is found to exist. See, e.g., Hakanson v North Dakota Dept. of Human Services, 479 N.W.2d 809 (1992).

B. The scope of judicial review of the factual basis of an agency's decision is strictly limited.

Judicial review of the factual basis of an administrative agency's decision under N.D.C.C. § 28-32-46 is a three step process to determine: (1) if the findings of fact are supported by a preponderance of evidence; (2) if the conclusions of law are supported by the findings of fact; and (3) if the agency's decision is supported by the conclusions of law. See, e.g. Johnson v North Dakota Workers' Compensation Bureau 484 N.W.2d 292 (ND 1992). In reviewing the agency's findings the court does not make independent findings of fact or substitute its judgment for that of the agency. The court only determines whether a reasoning mind could reasonably have determined that the factual conclusions reached were supported by the weight of the evidence. See, e.g., Grotte v North Dakota Workers' Compensation Bureau, 489 N.W.2d 875 (ND 1992). These general rules have been particularly applied in several cases under the Territorial Integrity Act.

The Supreme Court will not "function as a 'super board' and second guess the PSC's determinations." NSP v PSC, 453 N.W.2d 340 at 342-43 (the second of the South Pointe cases), citing and quoting Montana-Dakota Utilities Co. v Public Service Commission, 413 N.W.2d 308 at 310 (ND 1987); Application of Northern States Power Co., 171 N.W.2d 751 (ND 1969); Application of Otter Tail Power Co., 169 N.W.2d 415 (1969).

See also Williams Electric Cooperative v Montana Dakota Utilities Co., 79 N.W.2d 508 (ND 1956) (herein Williams v MDU).

To paraphrase NSP v PSC as applied to the PSC's decision about the facts of the Boulder Ridge case, a reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence, and that the PSC's conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that Capital had an extensive system in place for the annexed territory, and that MDU's extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. 452 N.W.2d at 344.

C. An agency's determination on questions of law within its jurisdiction is fully reviewable.

Whereas the scope of review of agency decisions on issues of fact is limited, questions of law are fully reviewable. See Capital v PSC and Cass v NSP, as to judicial review of the PSC's determinations on questions of law under the Territorial Integrity Act.

The principle that questions of law are fully reviewable is subject to an important clarification. Where an agency's jurisdiction is limited, the court's jurisdiction on appeal is similarly limited to review of issues of law that are within the agency's jurisdiction.

The jurisdiction of the PSC is limited. See, e.g., Capital v PSC and City of Grafton v Otter Tail Power Co, 86 N.W.2d 197 (ND 1958): "The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." (Court Syllabus No. 6.)

On this appeal, the court's scope of appellate review under N.D.C.C. § 28-32-46 does not include the power to enforce MDU's theories of municipal franchise law that are beyond the PSC's jurisdiction under N.D.C.C. Chapter 49-03. See Williams v MDU.

The principle that limits on the PSC's jurisdiction also limit the appellate court's jurisdiction is subject to an important exception that affects this appeal.

“. . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. . . . We reserve the issue of constitutionality to the first court to which the agency decision is appealed.” Johnson v Elkin, 263 N.W.2d 123, at 126-27 (ND 1978).

MDU's arguments about constitutional law were beyond the PSC's jurisdiction but are not excluded from consideration on appeal

D. The scope of review of the PSC's decision is limited by the appellant's previous arguments.

N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. Vetter v North Dakota Workers' Compensation Bureau, 554 N.W.2d 451 (ND 1996) and Dean v North Dakota Workers' Compensation Bureau, 554 N.W.2d 455 (ND 1996). MDU presented 28 specifications of error, more or less specific in words, but none specifically identifying a particular numbered finding or conclusion of the PSC Order claimed to be erroneous, and only two specifications identified any provision under North Dakota's Constitution or statutes. Specifications 1a and 1b present for the court's review MDU's motion made to the PSC, to dismiss Capital's complaint. These two items are the matters truly at issue.

E. The PSC Order should be affirmed because none of the reasons for not affirming exists.

If none of the reasons enumerated in N.D.C.C. § 28-32-46 is found to exist, the PSC

Order must be affirmed, under the plain meaning of that statute and as exemplified in the final South Pointe case, NSP v PSC. The non-existence of any reversible error is demonstrated two ways.

1. MDU's notice of appeal presented 28 specifications under 5 subsections of N.D.C.C. § 28-32-46 in a format that adopted N.D.C.C. § 28-32-46 as an outline. Capital's arguments below follow the same order and respond point-by-point to MDU's grounds of its appeal.

2. A facsimile of the PSC Order is attached as an appendix, annotated with references to the record and to controlling statutes and precedents, to show in context how the findings of fact are supported by the evidence, how the conclusions of law and order are supported by the findings of fact, and how the conclusions of law and order are in accordance with the law and do not violate constitutional rights of the appellant. Under N.D.C.C. § 28-32-46, the court must affirm the PSC order because none of the reasons for not affirming will be found to exist.

F. The PSC Order is in accordance with the law. (N.D.C.C. § 28-32-46(1)).

MDU specified the following grounds of its appeal under N.D.C.C. § 28-32-46(1).

"1. The Order is not in accordance with the law in at least the following respects:"

Capital's response: Each of the 17 grounds (a through q) specified under N.D.C.C. § 28-32-46(1) will be addressed in order. MDU's words "at least" do not leave open to MDU the opportunity to look for more grounds for its appeal. The grounds of the appeal are limited by the statute, MDU's specifications, and the record of the PSC proceedings.

Some of MDU's grounds for appeal specified under Subsection 1 are misplaced.

Specifications 1a, 1c and 1d assert constitutional grounds that are properly addressed under N.D.C.C. § 28-32-46(2).

Specifications 1g, 1j, 1k, 1l, 1m, 1n, 1o, 1p and 1q criticize the PSC's consideration of certain factors and criticize determinations made by the PSC as "not in accordance with the law." Each of these specifications is wrong, contrary to specific Supreme Court precedents identifying factors to be considered by the PSC in making its determinations under N.D.C.C. Chapter 49-03. These specifications are a thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." See NSP v PSC, 452 N.W.2d at 345. MDU has no right to re-argue to an appellate court any issue of fact as if it were properly raised as an issue of law.

MDU ground 1a: "The Order is not in accordance with N.D. Const. Art. VII, §11 and Art. XII §10."

Capital's response: Constitutional grounds are properly addressed under N.D.C.C. § 28-32-46(2) not (1).

MDU ground 1b: "The Order is not in accordance with N.D.C.C. § 49-03-06(8)."

Capital's response: In this legal battle over Boulder Ridge, both contestants rely on the Territorial Integrity Act. Capital relies on N.D.C.C. § 49-03-01.3, the prohibition of an electric public utility's interference with a rural electric cooperative's existing service and system in a rural area that has been annexed to a municipality, and relies on that prohibition as applied in the South Pointe cases. MDU relies on one sentence in Subsection 8 of N.D.C.C. § 49-03-06 (enacted in 2005): "Nothing in this chapter shall be construed to limit the authority of the governing board of a city to exercise its franchise

authority under Section 40-05-01.” MDU argues this one sentence limits the PSC’s regulatory authority under N.D.C.C. § 49-03-01.3. [*Appellant’s brief, pp. 19-20.*]

That one sentence was addressed in extensive detail in Capital’s brief to the PSC on MDU’s motion to dismiss Capital’s complaint, including a review of principles of statutory interpretation at pages 12-32. [*Certified Record on Appeal, Docket item No. 109.*] That lengthy analysis is available for the court’s review without repetition in this brief. The parties’ briefs in the PSC proceedings are part of the record on appeal (N.D.C.C. § 28-32-44(4)(d)). A summary is presented here.

The fundamental principle of statutory interpretation is to harmonize, to reconcile and to give effect to all related statutes. “The entire statute is intended to be effective.” N.D.C.C. § 1-02-38(2); Cass v NSP, 419 N.W.2d at 185 (“We are required to construe together all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent.”); Capital v PSC, 534 N.W.2d at 589 (Statutes must be construed as a whole to determine the legislative intent, and they must be harmonized, if possible, to give full force and effect to each part.).

MDU ignores these fundamental judicial and legislated rules of interpretation. MDU seems to assume a negative rule of statutory interpretation: A recent enactment is intended to contradict pre-existing law. MDU is wrong.

The fundamental principle of statutory interpretation is to harmonize, to reconcile and to give effect to all related statutes, regardless of chronology of enactment. N.D.C.C. § 1-02-08 provides only a limited role for chronology in statutory interpretation. The clause last in order of date or position shall prevail only in cases of a conflict between clauses in a statute, and if a) the clauses are irreconcilable, and b) except as otherwise directed by the rules of interpretation in N.D.C.C. § 1-02-07. For both reasons, the exceptional rule

of N.D.C.C. § 1-02-08 does not apply. The detailed analysis is set forth in Capital's brief to the PSC.

N.D.C.C. §§ 49-03-01.3 and 49-03-06 can be reconciled and harmonized; both can be given effect. N.D.C.C. § 49-03-06 does not limit the PSC's authority over the activities of MDU under N.D.C.C. § 49-03-01.3.

Under the general terms of N.D.C.C. §§ 49-03-01 and 49-03-01.3, a new certificate is not required for each and every extension within a municipality where a public utility has been granted both a franchise and a certificate of public convenience and necessity. However, under the special terms of N.D.C.C. § 49-03-01.3, a public utility's extension of its service into a rural area that has been annexed to the municipality is not automatically sanctioned by its previously granted certificate. Under N.D.C.C. § 49-03-01.3, a regulated utility's certificate of public convenience and necessity does not authorize extensions that interfere with the service of a rural electric cooperative, even though the utility holds a franchise. A previously granted certificate does not authorize extensions that interfere. Neither does a franchise authorize extensions that interfere, because interference is specifically prohibited by N.D.C.C. § 49-03-01.3

MDU's interpretation of N.D.C.C. § 49-03-06 not only contradicts N.D.C.C. § 49-03-01.3, it also contradicts another long-standing part of N.D.C.C. Chapter 49-03. Since 1927, it has been the law of the State that a regulated utility's franchise cannot be exercised without a certificate of public convenience and necessity.

No public utility henceforth shall exercise any right or privilege under any franchise or certificate hereafter granted, or under any franchise or certificate heretofore granted, the exercise of which has been suspended or discontinued for more than one year, without first obtaining from the commission a certificate that public convenience and necessity require the exercise of such right or privilege. N.D.C.C. § 49-03-03.

Though a regulated public utility might be granted a franchise by a municipality's governing body under N.D.C.C. § 40-05-01, the utility may not construct and operate an electric distribution system under that franchise unless it complies with N.D.C.C. Chapter 49-03, including N.D.C.C. § 49-03-01.3.

Harmony between the statutes is established by acknowledging an electric public utility regulated under N.D.C.C. Chapter 49-03 might hold a franchise issued under N.D.C.C. § 40-05-01, but that franchise cannot be exercised without compliance with N.D.C.C. Chapter 49-03, including N.D.C.C. § 49-03-01.3. A franchise granted by a city cannot be exercised in a way that interferes with the service and system of another provider of electric service. A local franchise is not a license to violate state law.

N.D.C.C. §§ 49-03-01.3 and 49-03-06 can be harmonized; both can be given effect. N.D.C.C. § 49-03-01.3 can be given the same effect after the 2005 enactment of N.D.C.C. § 49-03-06 that it had before 2005, and N.D.C.C. § 49-03-06 can be given effect without being hindered by anything in N.D.C.C. § 49-03-01.3. This seems plainly evident from the words of N.D.C.C. § 49-03-06 and from all the history of the Territorial Integrity Act before it was amended by enactment of N.D.C.C. § 49-03-06.

Before the enactment of N.D.C.C. § 49-03-06, territorial disputes under Chapter 49-03 were addressed on a case-by-case basis. Electric providers' endeavors to arrange by private agreement for orderly development of service without unreasonable duplication of capital-intensive facilities were sometimes made, but were ineffective because they were unreliable, unreliable because they were unenforceable, easily abandoned unilaterally when one of the parties deemed the agreement no longer advantageous. Litigation ensued. Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508;

Montana-Dakota Utilities Co. v Williams Electric Cooperative, Inc., 263 F.2d 432 (8th Cir 1959).

That is the background of the Territorial Integrity Act, and the same pattern of conduct persisted after the Act was enacted in 1965. See Cass v NSP, 419 N.W.2d at 183 and NSP v PSC, 451 N.W.2d at 341. That is also the factual background of the Boulder Ridge dispute. [*PSC Order, Findings 6 & 7; Complaint, paragraphs I, II, and IV; Answer, paragraphs 2 and 4; Tr. P. 104; Motion exhibits 1 & 2; Exhibit C-1.*]

The legislature made a change in 2005, but not everything changed. What was changed was an addition to N.D.C.C. Chapter 49-03, a new way to resolve territorial disputes, with no subtraction from the old ways. The new addition is N.D.C.C. § 49-03-06, beginning with a plainly declared legislative purpose integral to the statute.

49-03-06. Service agreements among electric providers.

1. This section authorizing service area agreements is intended to encourage harmony and operational efficiency among electric providers, promote safety, discourage unreasonable duplication of electric facilities, assure adequate and reliable electric service for all consumers and territories within the state, and provide anti-trust immunity to electric providers that negotiate service area agreements in accordance with this section.

The new section specifies in Subsections 2 through 7 what is required for a service area agreement to be valid and enforceable, including its required submission to the Public Service Commission for a determination whether the agreement complies with the section and is in the public interest. The last subsection provides:

8. The governing board of a city may require approval or disapproval of a service area agreement between electric providers to the extent the agreement encompasses service locations within the city. Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under Section 40-05-01.

Under Subsection 8, governing boards of cities may have a role in this new alternative process, where it is initiated by electric providers. Governing boards of cities may have a role in this new alternative process, if the city asserts its power to require approval or disapproval.

Where electric providers are able to negotiate a service area agreement under N.D.C.C. § 49-03-06, including gaining governmental approvals of the agreement, "the agreement shall be valid and enforceable." Subsection 6. This new statute, establishing a new way to resolve territorial disputes, can be given effect unaffected by N.D.C.C. § 49-03-01.3 that governs situations where electric providers have not settled disputes by agreements. And conversely, in situations where electric providers have not settled disputes by agreements under N.D.C.C. § 49-03-06, the PSC has jurisdiction to resolve territorial disputes as they occur on a case-by-case basis, under N.D.C.C. § 49-03-01.3.

The two sections can be harmonized and reconciled to give effect to both. N.D.C.C. § 49-03-01.3, authorizing the PSC to resolve disputes, can be given full effect independent of the terms of N.D.C.C. § 49-03-06, authorizing area service agreements. The PSC's authority under N.D.C.C. Chapter 49-03 to restrain interference that is prohibited by N.D.C.C. § 49-03-01.3 is unaffected by N.D.C.C. § 49-03-06.

MDU's argument -- that one sentence in N.D.C.C. § 49-03-06 limits the PSC's jurisdiction under N.D.C.C. § 49-03-01.3 -- is inconsistent with the entire Section 6. That one sentence in N.D.C.C. § 49-03-06(8) refers to the authority of governing boards of cities, but that section provides absolutely nothing about the jurisdiction or authority of the PSC. On the other hand, all the other subsections (excepting only the statement of intent in Subsection 1) of N.D.C.C. § 49-03-06 do address the PSC's jurisdiction. Subsections 2, 3, 4, 5, 6, and 7 are all related to the PSC's jurisdiction in the administration of the new

alternate way of resolving territorial disputes. Subsection 8 provides nothing about the PSC's jurisdiction or authority.

Additionally, 2005 N.D.S.L. Chapter 394 amended not only N.D.C.C. Chapter 49-03, but also N.D.C.C. § 49-02-01.1. Before the 2005 amendment of that section, the PSC's jurisdiction over rural electric cooperatives was limited. In order for the new way of resolving territorial disputes by governmentally sanctioned agreements to be fully effective, it was necessary not only to install many details in the several subsections of the new N.D.C.C. § 49-03-06. It was also necessary to modify N.D.C.C. § 49-02-01.1 to empower the PSC with limited jurisdiction over rural electric cooperatives for regulation of service area agreements under new section N.D.C.C. § 49-03-06. The point of this observation is this: Where the legislature was so attentive to this detail, amending pre-existing provisions of N.D.C.C. § 49-02-01.1 to increase the PSC's jurisdiction, it is incredible for MDU to argue that the same legislation decreased the PSC's jurisdiction under N.D.C.C. § 49-03-01.3 where there is no similar detail in Chapter 394 specifically amending any pre-existing sections of N.D.C.C. Chapter 49-03.

2005 N.D.S.L. Chapter 394 added a new section to N.D.C.C. Chapter 49-03. Chapter 394 does not include any reference to or amendment of any pre-existing section of Chapter 49-03. Chapter 394 does not include any statutory language specifically decreasing the PSC's jurisdiction under N.D.C.C. § 49-03-01.3, as applied in the South Pointe cases. The absence of any amendment in 2005 N.D.S.L. Chapter 394 and in all the intervening years after the South Pointe decisions in 1988 and 1990 indicates legislative approval of the PSC's exercise of its authority under N.D.C.C. § 49-03-01.3 to restrain electric utilities' interference with rural electric cooperatives' service in rural areas that have been annexed to municipalities. See Public Service Commission v City of

Williston and Montana Dakota Utilities Co., 160 N.W.2d 534 (ND 1968). See also Capital v PSC, 534 N.W.2d at 592.

In judicial construction of statutes, "The consequences of a particular construction" may be considered. N.D.C.C. § 1-02-39(5). MDU's theory that the PSC is excluded from exercising its jurisdiction within the corporate limits of municipalities runs 180 degrees contrary to the Territorial Integrity Act's "comprehensive regulatory scheme." NSP v PSC, 452 N.W.2d at 344-45. The Act specifically includes a prohibition of a public utility's interference with and duplication of a rural electric cooperative's service and system within the corporate limits of any municipality. N.D.C.C. § 49-03-01.3 and South Pointe cases.

Territorial disputes typically arise on or near the edge of cities served by public utilities under franchises but within rural areas served by rural electric cooperatives. "It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Electric Cooperative v Wold Properties, Inc., 249 N.W.2d 514 at 520. If MDU's theory were to be adopted, such controversies that arise in rural areas that have been annexed to municipalities would not be settled by the PSC under the Act's comprehensive regulatory scheme, as in the South Pointe cases. Instead of such controversies being settled by the PSC under the Territorial Integrity Act, those controversies that arise in rural areas that have been annexed to municipalities would be entirely removed from the jurisdiction of the PSC. Those controversies would instead be subjected to a newly discovered municipal power that excludes the Territorial Integrity Act's comprehensive regulatory scheme, if MDU's theory were to be adopted. In effect, by the process of annexation of rural areas, any city -- not only Bismarck's, but any city's governing body -- would have the power to remove from the Territorial Integrity Act the very territories whose integrity the Act was intended to protect. If MDU's theory were

adopted, then the Act's comprehensive regulatory policy of territorial integrity and avoidance of wasteful duplication would be repealed and replaced by a balkanized and disintegrated non-system. MDU's theory would make N.D.C.C. § 49-03-01.3 meaningless, an interpretation the court will not abide in the absence of a clear and unambiguous legislative intent. Cass v NSP, 419 N.W.2d at 186.

MDU's argument under Subsection 8 of N.D.C.C. § 49-03-06 must be regarded as the smaller sibling of its larger argument under Article VII, § XII of the Constitution, addressed below. It is appropriate to give passing reference to the argument that is based on the Constitution, because of a long-standing principle of constitutional law: Courts avoid constitutional issues if a case can be decided on any other basis. The court's disinclination to address constitutional issues might lead it to give enhanced attention to MDU's argument about N.D.C.C. § 49-03-06. But that statute should not be interpreted as MDU suggests solely for the purpose of avoiding constitutional issues. Under the rules of statutory interpretation, N.D.C.C. § 49-03-06 does not deprive the PSC of its jurisdiction under N.D.C.C. § 49-03-01.3. MDU's constitutional arguments about limits on the PSC's jurisdiction must be considered and are addressed below, under N.D.C.C. § 28-32-46(2).

MDU ground 1c: "The Order results in an unlawful delegation of authority to Capital Electric Cooperative, Inc."

Capital's response: "Unlawful delegation" is an aspect of constitutional law. See, e.g. Stutsman County v State Historical Society of North Dakota, 371 N.W.2d 321 (ND 1985). Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967) (herein MDU v Johanneson). Constitutional grounds are properly addressed under N.D.C.C. § 28-32-46(2), not (1).

MDU did not pursue specification 1c in its brief.

MDU ground 1d: “The Order is based on a broad interpretation of the jurisdiction of the Public Service Commission without recognition of constitutional and statutory limitations on that jurisdiction.”

Capital’s response: See Appendix, re PSC Order, Conclusion of Law Nos. 4 & 10

An appellant is required to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. MDU’s specification 1d does not identify what constitutional and statutory limitations on jurisdiction the PSC failed to recognize. Specifications of error are supposed to be specific. Capital does not waive its right to object to MDU’s procedural errors, but responds for the purpose of complete argument.

Constitutional grounds are properly addressed under N.D.C.C. § 28-32-46(2), not (1). But response to the complaint about statutory limitations is affected by the complaint about constitutional limitations. The jurisdiction of the PSC is limited under the Constitution. The PSC has only the powers and duties conferred upon it by the Legislature. The PSC Order exercised jurisdiction conferred upon it by the Legislature under N.D.C.C. Title 49, Chapter 49-03. The PSC Order did not breach the limits of N.D.C.C. Chapter 49-03. *[PSC Order, Conclusion of Law No. 4.]*

MDU’s arguments about statutory limitations on the PSC’s jurisdiction under N.D.C.C. § 49-03-06(8) are answered in response to specification 1b. Neither MDU’s specifications nor the Appellant’s brief asserted any other statutory limitation on the PSC’s jurisdiction.

The PSC's decision and order against MDU in the Boulder Ridge case is like its decision and order against NSP in the South Pointe case. In both cases, the PSC exercised its jurisdiction to regulate electric utilities' interference with services provided by rural electric cooperatives under N.D.C.C. § 49-03-01.3. The South Pointe cases specifically addressed MDU's complaint about "broad" interpretation of the PSC's jurisdiction. The Supreme Court said the PSC should not take a narrow view of its jurisdiction. The PSC must look at the existing electric facilities that Capital and MDU have in place and determine whether extension of MDU's services to Boulder Ridge would constitute an unreasonable duplication of capital intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d 181, at 187, reiterated in NSP v PSC, 452 N.W.2d at 342. The PSC Order is based on a broad interpretation of its jurisdiction under N.D.C.C. Chapter 49-03 and with recognition that N.D.C.C. Title 49 is the limit of the PSC's jurisdiction. The PSC Order did not breach the limits of Title 49, Chapter 49-03. [*PSC Order, Conclusions of Law Nos 4 & 10.*]

MDU ground 1e: "The Order is not in accordance with judicial precedent and state and local requirements that an electric service provider hold a municipal franchise to provide electric distribution service within a municipality."

Capital's response: N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. MDU's ground 1e does not specify what judicial precedent, what state requirement, or what local requirement requires an electric service provider hold a municipal franchise to provide electric service within a municipality, or what electric service provider is the subject of the sentence submitted as specification 1e. Specifications of

error are supposed to be specific. Capital does not waive its right to object to MDU's procedural errors, but responds for the purpose of complete argument.

This non-specific claim appears to be related to MDU's claim that ". . . the determination of which company holds a franchise from the City of Bismarck to provide electric services within Boulder Ridge was a threshold determination in the PSC's consideration of CEC's complaint." [*Appellant's brief, pp 6-7. See also MDU's December 12, 2005, Brief to the PSC, pages 2 & 3.*]

The judicial precedent to which MDU refers is Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (ND 1972) (herein Divide County School).

That case stands discredited by Cass County electric Cooperative v Wold Properties, Inc. 249 N.W.2d at 520 and the South Pointe cases, Cass v NSP, 419 N.W.2d at 186-87, but MDU continues to depend on that one case. MDU's claim that the Divide County School case controls the PSC's and the courts' decisions under the Territorial Integrity Act is wrong for a fundamental reason, a distinction with a very big difference. That case that did not involve the PSC or N.D.C.C. Chapter 49-03.

The Divide County School case was a civil action initiated in district court under its general jurisdiction. It was a court action decided on the basis of state and local laws that are not within the PSC's jurisdiction. The Divide County School case does not stand as a precedent on this appeal because that case was not an appeal from a decision of the PSC; it was not decided under N.D.C.C. Chapter 49-03; it was not decided as an appeal from the order of an administrative agency under N.D.C.C. Chapter 28-32.

The PSC has no jurisdiction to enforce local franchise laws. On appeal from a PSC case where a party asserts contract claims, a court has no power to adjudicate those claims, even though the court would have jurisdiction if a contract action had been

commenced in court. See Williams v MDU. Similarly, on this appeal, the court's scope of appellate review does not include the power to enforce MDU's theories about municipal franchise laws that are beyond the PSC's jurisdiction, even though the court would have jurisdiction in a civil action like the Divide County School case.

The case now before the court is an appeal from an administrative agency's decision. Under N.D.C.C. § 28-32-46, the Court must affirm the agency's decision unless certain kinds of errors are discovered. It was not erroneous for the PSC to refrain from deciding issues it cannot decide. The PSC was right when it concluded in the Boulder Ridge case that it has no jurisdiction to decide issues of municipal government law affecting franchises. *[PSC Order, Conclusion of Law No. 4.]*

MDU has a huge problem with its own theory that relies on the Divide County School case. Capital is not in the same situation in 2005-06 as the rural electric cooperative in the 1972 case. Capital has a twenty-year franchise granted by the City of Bismarck in 1993. MDU admitted that Capital has a franchise. Capital's franchise was offered and received in evidence. *[Complaint, paragraphs I and II; Answer, paragraph 1; Motion exhibits 1 and 2; exhibit C-1.]* The PSC found that the City of Bismarck issued a franchise to Capital. *[PSC Order, Finding No. 6.]* Capital passes the new threshold test promoted by MDU.

No, not a problem, not according to MDU. MDU contrived a solution to its problem. As MDU prepared to extend its facilities into Boulder Ridge, it faced the likelihood that Capital would complain to the PSC (like Cass complained about NSP in the South Pointe cases). MDU launched a pre-emptive collateral attack on the PSC's jurisdiction. MDU asked Bismarck's City Commission to declare Capital's franchise was limited, to exclude Boulder Ridge from Capital's franchised service territory. MDU holds the city commission's

decision as a legal barrier to the PSC's exercise of its jurisdiction under N.D.C.C. Chapter 49-03.

MDU's defense against Capital's complaint to the PSC comes down to this one point: The Bismarck City Commission has bestowed on MDU a constitutional right, immunity or exemption from the PSC's jurisdiction to enforce the Territorial Integrity Act. The decision in the Divide County School case was not based on constitutional law, a matter of legal history highlighted in MDU's brief at pages 9-13. Constitutional issues are addressed below under N.D.C.C. § 28-32-46(2).

Because the Divide County School case did not involve issues within the PSC's jurisdiction under N.D.C.C. Chapter 49-03, the legal basis of that case does not affect any issues within the scope of this appeal under N.D.C.C. § 28-32-46.

Specification 1e also refers to an unspecified "state requirement." Perhaps MDU had in mind a favorite old argument, that rural electric cooperatives are limited to service in rural areas, meaning areas outside of municipalities, and the limitation causes rural electric cooperatives' service areas to shrink as municipalities' boundaries grow. That is not the law. The first of the South Pointe cases, Cass v NSP ended that argument. 419 N.W.2d at 185-87. The argument is not pursued in MDU's brief.

Specification 1e also refers to an unspecified "local requirement." Perhaps MDU refers to a local ordinance in Bismarck, but none was specified in the specifications of error. Bismarck's ordinances include the power to grant franchises (Chapter 10-11), the power exercised when it granted non-exclusive franchises to MDU and Capital. There are no provisions in N.D.C.C. Chapter 49-03 or in Bismarck's ordinances that sustain MDU's argument that the PSC is empowered or required to superimpose Bismarck's ordinances as a "threshold" to the PSC's jurisdiction to administer N.D.C.C. Chapter 49-03. Or

perhaps MDU refers to the City Order that is on appeal in collateral litigation. Whatever "local requirement" MDU relies on, the PSC's jurisdiction does not include the enforcement of municipal laws. See City of Grafton v Otter Tail Power Co and Williams v MDU.

MDU ground 1f: "The Order does not make a proper evaluation of reasonableness under the law and evidence."

Capital's response: MDU's specification 1f is misplaced. It does not address questions of law that are fully reviewable. It is a thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." See NSP v PSC, 452 N.W.2d at 345.

MDU ground 1g: "The Commissions' determination that in deciding unreasonable duplication of facilities and interference of service, the Commission should look to existing facilities and which supplier is better able to serve an area and promote orderly and economic development of electric service, is not in accordance with the law."

Capital's response: See Appendix, re PSC Order, Conclusion of Law No. 6.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in Application of Otter Tail Power Co, 169 N.W.2d at 418. These include "which of the proposed suppliers will be able to serve the area more economically" and "which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service."

Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3

regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1.

Conclusion of law No 6 of the PSC Order (the object of MDU's specification 1g), "The Commission must look at the existing facilities that Capital and Montana-Dakota have in place and determine whether extension of Montana-Dakota's services to Boulder Ridge would constitute an unreasonable duplication of capital intensive services already provided by Capital" is directly supported by the South Pointe cases, Cass v NSP, 419 N.W.2d at 187 and NSP v PSC, 452 N.W.2d at 342.

Consideration of the location of the lines of the suppliers is most definitely in accordance with the law.

MDU ground 1h: "The Commission's determination that it does not have authority to consider franchises issued by a municipality is not in accordance with the law."

Capital's response: MDU's ground 1h utterly fails to meet the requirement of N.D.C.C. § 28-32-42 that an appellant file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. MDU presented 28 specifications of error, more or less specific in words, but none specifically identifying a particular numbered finding or conclusion of the PSC Order claimed to be erroneous. Comparing the words of MDU's non-particular specifications to the words of the PSC Order helps to identify some of MDU's claims. Study of the PSC Order shows it made no "... determination that it does not have authority to consider franchises issued by a municipality. . . ." Specifications of error are supposed to be specific. Capital does not waive its right to object to MDU's procedural errors, but responds for the purpose of complete argument.

The Order shows that the PSC did consider franchises. [*PSC Order, Findings of Fact Nos. 5 through 11.*]

The PSC's Order includes Conclusion of Law No. 4:

"The Commission's jurisdiction is limited to matters delegated to it by the North Dakota Legislature under North Dakota Century Code Title 49. The Commission does not have jurisdiction regarding the franchise under Article VII, Section 11 of the North Dakota Constitution."

If this is the focus of MDU's ground 4h, the specification of error is erroneous. The PSC's conclusion of law No. 4 is in accordance with the law. The jurisdiction of the PSC is limited.

"The PSC has only the powers and duties conferred upon it by the Legislature. N.D. Const., Art. V, §§ 12,13." Capital v PSC, 534 N.W.2d at 589.

"The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." City of Grafton v Otter Tail Power Co, 86 N.W.2d 197 (ND 1958) (Court Syllabus No. 6.)

In its specification 1d, MDU complains the PSC Order is based on a broad interpretation of the jurisdiction of the PSC without recognition of constitutional and statutory limitations on that jurisdiction. Executing a turnabout in specification 1h, MDU complains about the PSC's recognition of limitations on its jurisdiction, that it does not have authority to decide questions of municipal law regarding franchises. The PSC exercised its jurisdiction in precise accordance with the law. It exercised powers and duties conferred on it by the legislature under N.D.C.C. Chapter 49-03, not taking a narrow view of its jurisdiction within the boundaries of Chapter 49-03, and not breaching those limits.

MDU ground 1i: "The Commission's failure to consider the existence of a franchise authorizing MDU's provision of service in Boulder Ridge, and the lack of such a franchise

for CEC, in determining unreasonable duplication of facilities and interference of service is not in accordance with the law.”

Capital's response: MDU's specification 1i repeats specifications 1e and 1h, in slightly different words. Capital's responses 1e and 1h also respond to specification 1i.

MDU's ground 1i misstates the record when it asserts the PSC's "failure" to consider franchises, and it misstates the evidence when it says Capital lacks a franchise. Capital does not lack a franchise. The evidence is uncontroverted that Capital has a franchise. Capital has a twenty-year franchise granted by the City of Bismarck in 1993. MDU admitted that Capital has a franchise. Capital's franchise was offered and received in evidence. [*PSC Order, Finding of Fact No. 6. Complaint, paragraphs I and II; Answer, paragraph 1; Motion exhibits 1 and 2; exhibit C-1*]. The Order shows that the PSC did consider franchises and MDU's argument that Capital lacks a franchise. [*PSC Order, Findings of Fact Nos. 5 through 12.*]

MDU argues Capital's franchise vanished when the Bismarck City Commission decided "... that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck." [*Motion Exhibits 1 & 2*]. Capital challenged the City Order in a separate district court action now pending before the North Dakota Supreme Court. (Although details of that action were not matters of evidence in the PSC proceeding, the PSC Order does refer to the action, *Findings of Fact Nos. 9 - 12*, and in the certified record on this appeal.) The PSC acknowledged the existence of the City Order, gave it due consideration, and did not include the City Order as a basis of its findings, conclusion or order. The validity of the City Order was not

decided by the PSC, is not within the PSC's jurisdiction, and is not a matter at issue in this appeal.

MDU wants the City Order in the collateral proceeding to control the PSC's decision on Capital's complaint. MDU wants the district court's order in the collateral proceeding to control the PSC's decision. MDU wants the City Order and the district court's order in the collateral proceeding to control the decision on appeal from the PSC Order. On what legal principle?

The other proceeding is not only collateral, it is not final. While on appeal it has no status as a precedent. For the other proceeding to receive any attention in this appeal would be to forecast the outcome of the other appeal. The outcome of the collateral litigation in the Supreme Court should not be pre-judged by a district court judge in this appeal under N.D.C.C. § 28-32-46.

The other proceeding is not only collateral, it is not final. Not being final, it has no status under former adjudication principles bearing labels such as collateral estoppel or res judicata. More than finality may be missing. Identity of issues or identity of parties may be missing. But those possible issues are not before any court while the collateral case is not final. The collateral case cannot control the outcome of the appeal under N.D.C.C. § 28-32-46. The voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that MDU's extension of its facilities into Boulder Ridge interferes with Capital's services. [*PSC Order, Findings Nos. 13-29*]. MDU persists in its argument that the facts of its interference with Capital's service and system are facts to be ignored as if those facts did not exist, as if the City Order caused Capital's service and system that exists in the real world to vanish, "as a matter of law."

The real facts cannot be ignored. In accordance with the law, as a matter of law, the PSC must look at the existing electric facilities that Capital and MDU have in place in the area and determine whether extension of MDU's services in Boulder Ridge would constitute an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d at 187; NSP v PSC, 452 N.W.2d at 342.

This 10th of MDU's 28 specifications is the first to use specific words of N.D.C.C. § 49-03-01.3. The PSC's determination of unreasonable duplication of facilities and interference is in accordance with the law. Whatever is the outcome of the collateral proceeding, neither the City Order nor MDU's franchise is a license for MDU to violate State law.

MDU ground 1j: "The Commission's consideration that CEC is the only provider of electric service outside the City of Bismarck within a two-mile radius of Boulder Ridge, for purposes of determining unreasonable duplication of facilities and interference of service within the City of Bismarck, is not in accordance with the law."

Capital's response: See Appendix re PSC Order, Findings of Fact No. 18 and 19.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in 1969, in Application of Otter Tail Power Co, 169 N.W.2d at 418. These include "the location of the lines of the suppliers." In the intervening years, scores, perhaps hundreds, of cases have been decided by the PSC under its formula of ten issues, including:

- "2. What electric suppliers are operating in the general area?
- "3. What electric supply lines exist within a two mile radius of the location to be served, and when were they constructed?
- "4. What customers are served by electric suppliers within at least a two mile radius of the location to be served?"

See, e.g., Findings of Fact, Conclusions of Law and Order in Montana-Dakota Utilities Co., Public Service Commission Case No. PU-04-560, June 8, 2005, a territorial dispute under N.D.C.C. Chapter 49-03 involving a location near Bismarck, and involving MDU and Capital.

In the intervening years, it has been generally accepted that these three questions address “the location of the lines of the suppliers.” The absence of any amendment to N.D.C.C. Chapter 49-03 to change the factors indicates legislative approval of the PSC’s consideration of electric service within a two mile radius of Boulder Ridge. See Public Service Commission v City of Williston and Montana Dakota Utilities Co. and Capital v PSC, 534 N.W.2d at 592. Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe Cases, Cass v NSP, 419 N.W.2d at 188, note 1.

Consideration of the location of the lines of the suppliers is most definitely in accordance with the law.

MDU ground 1k: “The Commission’s consideration of the existence and location of CEC’s facilities constructed before annexation of Boulder Ridge, for the purpose of determining unreasonable duplication of facilities and interference of service within Boulder Ridge, is not in accordance with the law.”

Capital’s response: See Appendix, re PSC Order, Findings of Fact Nos. 13-21 & 24.

See Capital’s response to MDU’s ground 1j, regarding the location of lines of suppliers as a factor to be considered by the PSC. Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in

a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1.

Consideration of the location of the lines of the suppliers is in accordance with the law.

MDU ground 1i: “The Commission’s consideration of CEC’s facilities within the City of Bismarck but outside Boulder Ridge, for the purpose of determining unreasonable duplication of facilities and interference of service, is not in accordance with the law.”

Capital’s response: See Appendix, re PSC Order, Findings of Fact Nos. 13-21 & 24.

See Capital’s response to MDU’s ground 1j, regarding the location of lines of suppliers as a factor to be considered by the PSC. Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1.

Consideration of the location of the lines of the suppliers is in accordance with the law.

MDU ground 1m: “The Commission’s consideration of investment made by CEC outside of Boulder Ridge to serve areas under an area service agreement, but without consideration of CEC’s lack of a franchise to serve those areas within the City of Bismarck or the cancellation of the area service agreement, for purposes of determining unreasonable duplication of facilities and interference of service within Boulder Ridge, is not in accordance with the law.”

Capital's response: See Appendix re PSC Order, Findings of Fact Nos. 5-12; 20.

Response to MDU's specification 1m requires the sentence to be dissected. The Commission's consideration of investment made by CEC outside of Boulder Ridge to serve areas under an area service agreement, ~~but without consideration of CEC's lack of a franchise to serve those areas within the City of Bismarck or the cancellation of the area service agreement,~~ for purposes of determining unreasonable duplication of facilities and interference of service within Boulder Ridge, is not in accordance with the law. See Capital's response to MDU's ground 1j, 1k and 1l, regarding the location of lines of suppliers as a factor to be considered by the PSC. The stricken part of the sentence misstates the evidence and the Commission's consideration of the evidence.

The Order shows that the PSC did consider franchises and MDU's argument that Capital lacks a franchise. *[PSC Order Findings of Fact Nos. 5 through 12.]* See also Capital's response to MDU's specification 1i. The Order shows that the area service agreement and "the cancellation of the area service agreement" were considered by the PSC. *[PSC Order Findings of Fact Nos. 6 & 7.]*

As acknowledged by the PSC in its Conclusion of Law No. 4 and as stated in Capital's response to MDU's specifications 1e and 1h, neither contract law nor franchise law is within the PSC's jurisdiction.

Regardless of limitations on the PSC's authority to interpret or enforce the area service agreement, regardless of limitations on its authority to interpret or enforce franchise law, and regardless of MDU's cancellation of the agreement, it is an uncontroverted fact that Capital's facilities and services have developed in accordance with the 1973 area service agreement between Capital and MDU, and in accordance with Capital's 1973 and 1993 franchises. And it is a fact that Capital's facilities continued to develop after MDU

abandoned the agreement in 2003. [*Findings of Fact Nos. 13, 16, 17, 18, 19, and 20; Complaint paragraph III; Answer, paragraph 3; Exhibits C-1, C-2, C-3, C-4, C-5 and C-6.*] See also NSP v PSC, 452 N.W.2d at 343.

MDU's specification 1m is one of many thinly veiled attempts to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." See NSP v PSC, 452 N.W.2d at 345. MDU has no right to re-argue to an appellate court any issue of fact as if it were properly raised as an issue of law.

MDU ground 1n: "The Commission's consideration of investment made by CEC to serve new areas in general but not specifically to serve Boulder Ridge, for the purpose of determining unreasonable duplication of facilities and interference of service within Boulder Ridge, in not in accordance with the law."

Capital's response: See Appendix, re PSC Order, Finding of Fact No.20.

See Capital's response to MDU's ground 1j, 1k and 1l, regarding the location of lines of suppliers as a factor to be considered by the PSC. The law does not restrict the PSC to looking specifically at Boulder Ridge or any area defined by any real estate developer in the PSC's administration of the Territorial Integrity Act.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in Application of Otter Tail Power Co., 169 N.W.2d at 418. These include "the location of the lines of the supplier," "which of the proposed suppliers will be able to serve the area more economically" and "which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service." Factors to be considered in a dispute involving extensions of service outside the limits of municipalities

are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1. The PSC must look at the existing electric facilities that Capital and MDU have in place in the area and determine whether extension of MDU's services in Boulder Ridge would constitute an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d at 187; NSP v PSC, 452 N.W.2d at 342.

MDU ground 1o: "The Commission's determination of which provider can best serve an area within the City of Bismarck through extension of facilities, for purposes of determining unreasonable duplication of facilities and interference of service, is not in accordance with the law."

Capital's response: See Appendix, re PSC Order, Finding of Fact No. 26.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in Application of Otter Tail Power Co, 169 N.W.2d at 418. These include "which of the proposed suppliers will be able to serve the area more economically" and "which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service."

Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1.

MDU ground 1p: "The Commission's consideration that MDU's extension of facilities in an area that is not contiguous to existing facilities would create

checkerboarding, for purposes of determining unreasonable duplication of facilities and interference of service within the City of Bismarck, is not in accordance with the law.”

Capital’s response: See Appendix, re PSC Order, Findings of Fact No.24, 26 & 27.

A major factor considered in determining duplication of service is whether a supplier’s extension of facilities would need to cross the facilities of another supplier, resulting in a “checkerboarding.” Checkerboarding is a slang term, used by the PSC and repeated by the Supreme Court in Application of Otter Tail Power Co., 354 N.W.2d at 702 (ND 1984), and recently applied by the PSC in Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28. Consideration of the location of the lines of the suppliers is in accordance with the law.

The area named Boulder Ridge is entirely surrounded by areas served by Capital. *[Exhibits C-4, C-5 and C-6.]* MDU’s extension of its facilities to Boulder Ridge, an area not contiguous to MDU’s existing service areas, would create a checkerboard of service areas. See also MDU’s specification of error 4e and Capital’s response, regarding MDU’s crossing of Capital’s facilities.

MDU ground 1q: “The Commission’s consideration of which provider is best able to serve Boulder Ridge based on investment, for purposes of determining unreasonable duplication of facilities and interference of service within the City of Bismarck, is not in accordance with the law.”

Capital’s response: See Appendix, re PSC Order, Finding No. 28.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in Application of Otter Tail Power Co., 169 N.W.2d at 418. These include “which of the proposed

suppliers will be able to serve the area more economically” and “which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.”

Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See the South Pointe Cases, Cass v NSP, 419 N.W.2d at 188, note 1. The words of PSC Order Finding No. 28, that Capital is best able to serve Boulder Ridge economically, are taken directly from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 20), affirmed by NSP v PSC. Finding No. 28 is in accordance with the law.

G. The PSC Order does not violate MDU's constitutional rights. (N.D.C.C. § 28-32-42(2)).

MDU specified the following grounds of its appeal, under N.D.C.C. § 28-32-46(2).

“2. The Order violates the constitutional rights of MDU in at least the following respects:”

Capital's response: MDU's words “at least” do not leave open to MDU the opportunity to look for more grounds for its appeal. The grounds of the appeal are limited by MDU's specifications.

As noted above, many of MDU's grounds for appeal specified under subsection 1 are misplaced. Three of those made constitutional arguments. Those claims are addressed below under N.D.C.C. § 28-32-46(2), following the one constitutional claim appropriately specified by MDU under Subsection 2.

MDU ground 2a: “ The Order’s interpretation and application of N.D.C.C. § 49-01-01.3 in a manner that prohibits MDU from exercising its franchise from the City of Bismarck violates MDU’s right of substantive due process.”

Capital’s response: MDU did not assert “substantive due process” in the PSC proceedings, but the right to make that dubious claim has not been waived. Claims of constitutional rights may be raised for the first time on appeal of an agency decision to a district court. Johnson v Elkin.

The imprecise claim of a right of due process does not meet the requirement that grounds for appeal be specifically stated. What right? Under what Constitution?

Presumably, the right of substantive due process asserted by MDU is the discredited notion that activist judges of a certain philosophical persuasion are constitutionally endowed with supreme power to override legislated policy. Under Johnson v Elkin, the claim can be raised, but it must be rejected under both the United States and North Dakota Constitutions. MDU’s claimed right of substantive due process should be rejected not only because of the comprehensive principles recited in Johnson v Elkin, but also by specific application of those principles to the Territorial Integrity Act.

When the Territorial Integrity Act was passed over 40 years ago, MDU was the lead plaintiff when 3 electric utilities brought an action “. . . against 21 rural electric co-operatives, joining the Attorney General of the State and members of the Public Service Commission . . . to test the validity of Chapter 319 of the Session Laws of 1965 . . . generally referred to as the Territorial Integrity Law.” After introductory remarks, the Supreme Court said:

“In the light of these general observations, let us now examine the law which the plaintiffs contend is unconstitutional. It cannot be successfully maintained that the Legislature does not have the power to regulate public

utilities under the police powers of the state. The plaintiffs make no such contention. It is conceded, we believe that the power to regulate includes the power to eliminate competition.” MDU v Johanneson, 153 N.W.2d at 418; 420-21.

“Heavy artillery” is required to support claims of rights and powers under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. So. Valley Grain Dealers v Board of County Com’rs of Richland County, 257 N.W.2d 425 at 434 (ND 1977). Effertz v North Dakota Workers’ Compensation Bureau, 481 N.W.2d 218 at 223 (ND 1992) and Froysland v North Dakota Workers’ Compensation Bureau, 432 N.W.2d 883, note 7 at 892 (ND 1988). The argument about substantive due process is not pursued in MDU’s brief, and may be summarily dismissed.

MDU’s claim of substantive due process rights should be dismissed, not only because the claim lacks support, but also because relevant precedents shoot down the claim. Johnson v Elkin and MDU v Johanneson.

MDU ground 1a: The Order is not in accordance with N.D. Const. Art. VII, §11 and Art. XII §10.

Capital’s response: The PSC recited its understanding of N.D. Const. Art. VII, §11 in its conclusion of law No.2 but did not base its decision on constitutional law. The PSC has no jurisdiction to decide constitutional issues.

“ . . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. . . . We reserve the issue of constitutionality to the first court to which the agency decision is appealed.” Johnson v Elkin, 263 N.W.2d at 126-27.

MDU’s constitutional arguments are now in court, under the orderly procedure established under Johnson v Elkin, and under N.D.C.C. § 28-32-46(2).

Even though MDU is entitled to assert constitutional claims, it bears the usual risk of litigation. Its arguments might fail, a result exemplified by Johnson v Elkin. Now that

MDU is entitled to assert its constitutional arguments in a forum with jurisdiction, those arguments should be dismissed by the court, a response not available to the PSC.

MDU's specification 1a identifies a matter truly at issue; it renews MDU's Motion to Dismiss:

"The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck. Article VII, Section 11 of the North Dakota Constitution provides that the power of the City of Bismarck to franchise the operation of a public utility shall not be abridged by the legislative assembly. Subsection 8 of N.D.C.C. § 49-03-06 provides that nothing in Chapter 49-03 shall be construed to limit the authority of the governing board of the City to exercise its franchising authority under N.D.C.C. § 40-05-01. Accordingly, the Commission has no authority under either N.D.C.C. § 49-03-01 or 49-03-01.3 to limit the determination of the Board of City Commissioners that Montana-Dakota is entitled to provide electric utility service within Boulder Ridge under its franchise with the City of Bismarck."

"CEC's complaint should be dismissed on the grounds that CEC is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a matter of law, interfere with the services of CEC. CEC's Complaint should also be dismissed on grounds that the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge." (MDU's November 23, 2005, Motion, pages 2 & 3.)

"In failing to recognize the constitutional authority of the City of Bismarck to franchise utility service areas, the Commission improperly exercised its jurisdiction under the TIA." [*Appellant's brief, p. 14.*] According to MDU's theory, N.D.C.C. § 49-03-01.3 is unconstitutional under Article VII § 11 of the State Constitution, and for that reason the PSC has no jurisdiction.

H. MDU lacks standing to assert Bismarck's self-government rights.

Courts' consideration of litigants' constitutional arguments are limited by rules as to "standing." A litigant may assert only its own constitutional rights. See City of Bismarck

v Materi, 177 N.W.2d 530 (ND 1970). That principle is also integral to the statute under which MDU's appeal is before the court. Under N.D.C.C. § 28-32-46(2), an appellant may assert "its" constitutional rights.

MDU claims constitutional rights under Article VII, § 11 of the North Dakota Constitution. Article VII is titled "Political Subdivisions." Section 11 provides:

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

Section 1 of Article VII provides:

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

The State's original 1889 Constitution included Section 139, addressing the same subject and to the same general effect as new Article VII, § 11, adopted in 1982. Former Section 139 remains in the Constitution after the 1982 election, renumbered as Article XII, § 10.

Obviously, Bismarck might exercise its power of self-government under Article VII to affect franchises, but that is Bismarck's power, not MDU's right. Bismarck had a right to intervene in the PSC proceeding under N.D.C.C. § 28-32-28. Bismarck did not intervene; it is not a party. MDU lacks standing to assert Bismarck's self-government interests under Article VII, § 11.

Application of Otter Tail Power Co., 451 N.W.2d 95 (ND 1990) (herein Otter Tail 1990) dealt with that utility's proposed extension of service onto an Indian reservation. "Otter Tail asserted that assumption of jurisdiction by the PSC under N.D.C.C. Chapter 49-03 would unlawfully interfere with the Tribe's sovereign rights of self-government." The Court concluded "... Otter Tail had no standing to advance the Tribe's self-government

interests.” 452 N.W.2d at 97. Paraphrasing Otter Tail 1990 to fit this case: MDU asserts that assumption of jurisdiction by the PSC would unlawfully interfere with the City of Bismarck’s sovereign rights of self-government under the Constitution. MDU has no standing to advance the City’s self-government interests.

The structure of the Constitution does not support MDU on the standing issue. Article VII is titled “Political Subdivisions.” As discussed below, North Dakota’s constitutional history includes a proposal rejected in 1972 to install in the Constitution an article titled “Public Utilities” to include provisions that reflect MDU’s theories asserted in 2006. There is no such provision in the Constitution. This point is reinforced by MDU’s arguments. [*Appellant’s brief, p 12.*] MDU has no standing to assert rights under the Constitution as if it were a political subdivision.

MDU’s arguments based on Bismarck’s self-government rights should be rejected because MDU lacks standing. If there is any preliminary “threshold” issue in this case, this is it. The PSC and the court should not stop Capital at the threshold of the Commission’s hearing room from complaining about MDU’s interfering with and duplicating Capital’s facilities and services. MDU should be stopped from arguing about Bismarck’s powers under Article VII, § 11 as if MDU were representing the City of Bismarck.

Complete argument requires more attention, hypothetical argument as if MDU had standing. See Otter Tail 1990, 451 N.W.2d at 98. (“Even assuming that Otter Tail had standing to assert the self-government interests of the Tribe, we nevertheless conclude that the PSC had jurisdiction in this case.”)

I. **N.D.C.C. § 49-03-01.3 is not unconstitutional under or Article VII § 11 or Article XII §10.**

MDU relies on one defense against the PSC’s exercise of jurisdiction under

N.D.C.C. § 49-03-01.3. MDU asserts that statute is unconstitutional because it conflicts with Article VII, § 11. (MDU argued about Article VII § 11 in the PSC proceedings; its specifications of error 1a added Article XII §10 to its arguments.) MDU denies attacking N.D.C.C. § 49-03-01.3 as “unconstitutional”; MDU claims these constitutional provisions “are a limitation on the operation of N.D.C.C. Chapter 49-03.” [*Appellant’s brief, pp. 14-15.*] If any statute breaches limitations under the Constitution, the statute is unconstitutional. MDU’s preferred word, limitation, is synonymous with unconstitutional.

All statutes are presumed to be constitutional, and a challenged statute is construed with a purpose to sustain its constitutionality. N.D.C.C. § 1-02-38. Exactly these principles have been applied in sustaining the Territorial Integrity Act of which N.D.C.C. § 49-03-01.3 is an integral part! See MDU v Johanneson. Courts “must presume that an Act of the Legislative Assembly is constitutional and valid, and any doubts as to its constitutionality must, if at all possible, be resolved in favor of its validity.” 153 N.W.2d at 420. The presumption of constitutionality of statutes is more than a statutory or judicial rule of interpretation; it is a principle established by the Constitution itself. No statute can be declared unconstitutional except by action of four Supreme Court justices. Constitution, Article VI, § 4. See also State v Hansen, 2006 ND 139, and State v Hanson, 558 N.W.2d 611 (ND 1996). (One district judge cannot have the final say about the constitutionality of a statute.)

The “heavy artillery” rule mentioned above is a corollary of the presumption of constitutionality. “One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.” So. Valley Grain Dealers v Board of County Com’rs of Richland County, 257 N.W.2d at 434. MDU’s arguments are conclusory, without citation

or supportive reasoning and may be summarily dismissed as not amounting to heavy artillery. Effertz v Workmen's Compensation Bureau, 481 N.W.2d at 223 and Froysland v Workers' Compensation Bureau, 432 N.W.2d 883, footnote 7 at 892. In these circumstances, the presumption prevails. MDU has not shot down N.D.C.C. § 49-03-01.3.

Though Capital regards MDU's arguments to be lightweight, a litigant cannot lightly dismiss an adversary's constitutional claims. MDU's claims are asserted with a seriousness of purpose, even though its arguments do not accomplish the purpose. A hefty brief is the appropriate response to defend the Territorial Integrity Act and its underlying policy against MDU's low caliber attack.

Going beyond the presumption for purposes of argument, the arguments below sustain the constitutionality of the Territorial Integrity Act.

The Territorial Integrity Act is more than presumptively constitutional; it has been decided to be so, surviving MDU's past attacks. The Boulder Ridge dispute is not MDU's first constitutional assault on the Territorial Integrity Act. When the Territorial Integrity Act was passed over 40 years ago, MDU was the lead plaintiff when 3 electric utilities went to court to challenge the legislation. MDU lost that case.

It cannot be successfully maintained that the Legislature does not have the power to regulate public utilities under the police powers of the State. The plaintiffs make no such contention. It is conceded, we believe, that the power to regulate includes the power to eliminate competition. MDU v Johanneson, 153 N.W.2d at 420-21.

MDU tried a different theory and lost again. Application of Montana-Dakota Utilities Co., 219 N.W.2d 174 (ND 1974). The Territorial Integrity Act has been the subject of rigorous litigation and found to be a constitutional exercise of the Legislature's comprehensive police power under the State Constitution. Now, nearly 40 years later, MDU ignores the

status of all of the Territorial Integrity Act as more than presumptively constitutional, and mounts another attack.

MDU argues that Article VII, § 11 was adopted in 1982 and supersedes the 1967 and 1974 decisions upholding the constitutionality of the Territorial Integrity Act. MDU is wrong again. The 1967 and 1974 decisions sustained the legislature's comprehensive police powers to regulate public utilities, and those decisions remain the law today. A secondary argument is constitutional law has changed as to the State Legislature's regulation of utilities' activities inside political subdivisions. MDU argues: After Article VII, § 11 was adopted in 1982, cities are sovereign Vatican-like islands surrounded by the State, and MDU's activities within municipal islands are immune from the legislature's police power as exercised in the Territorial Integrity Act. And, as the islands grow and the state shrinks, the Legislature's police power recedes, as if cities secede from the state by exercise of the statutory power of annexation. According to MDU.

MDU asserts "Article VII, § 11 originated from the North Dakota Constitutional Convention which was being held as Montana-Dakota Utilities Co. v Divide County School District No. 1, *supra*, was making its way through the courts." [Appellant's brief, p 9.] MDU refers to the record of the 1972 convention, including debates about a proposed new "Public Utilities" article that would, in MDU's words, ". . . confirm on a constitutional basis the result reached. . ." in the Divide County School case. [Appellant's brief, p 10.]

The draft constitution that emerged from the 1972 constitutional convention did not propose adoption of a new Public Utilities article. This historical fact is reinforced by MDU's arguments. [Appellant's brief, p 12.] The draft constitution proposed in 1972 did include Article VII, § 11 as a proposed addition to the Political Subdivisions article, Article VII. See Chapter 529, 1973 S.L. for the text of the proposed 1972 Constitution. The

proposed constitution was rejected by the voters of North Dakota at a special election on April 28, 1972. Later, in 1981, the legislature proposed constitutional amendments that were adopted in 1982. Article VII was adopted as a new article replacing former Article VII, as one aspect of constitutional revision proposed by the Legislature in 1981. The new Article VII includes § 11. 1981 N.D. Laws, Chapter 665. There is a paucity of legislative history as to the entire new Article VII and an absolute dearth as to § 11. [*Appellant's brief, exhibit 5.*]

MDU argued about Article VII § 11 in the PSC proceedings; its specifications of error 1a added Article XII §10 to its arsenal. That long standing provision is somewhat similar to Article VII § 11, with a historical difference. The State's original 1889 Constitution included Section 139. That remains in the Constitution after the 1982 election, renumbered as Article XII, § 10. The similarity of the two provisions undercuts MDU's argument that Article VII, § 11 was adopted in 1982 with a purpose or effect to change North Dakota's constitutional law with respect to the Legislature's power to regulate public utilities.

The proposal that was made in 1972 to add a Public Utilities article was not proposed or adopted in 1982. Despite the efforts of a certain interest group in 1972 [*Appellant's brief at pages 9-13 and attached exhibit 3*], the North Dakota Constitution does not contain special provisions under an article titled "Public Utilities." The history of a failed effort to amend the Constitution 34 years ago is insufficient to overcome the presumption of the continuing constitutionality of the Territorial Integrity Act, including N.D.C.C. § 49-03-01.3.

The principles of construction applicable to statutes are applicable to construction of the Constitution. See Johnson v Wells County Water Resource Board, 410 N.W.2d 525

(ND 1987); McCarney v Meier, 286 N.W.2d 780 (ND 1979). So, interpretation of Article VII, § 11, should harmonize that provision with the entire Constitution, including the legislature's comprehensive police power that it exercised in enactment of the Territorial Integrity Act. Harmonizing all provisions of the Constitution leads to the conclusion that cities are not independent sovereign entities. Cities do have home rule powers, but those powers do not include the power to license conduct that violates state laws.

Capital criticized the consequences of MDU's argument about the interpretation of the Act, and those same criticisms apply to MDU's arguments about the Constitution. If MDU's theory were adopted, any city's governing body would have the power to remove from the Territorial Integrity Act the very territories whose integrity the Act was intended to protect. If MDU's theory were adopted, then the Act's comprehensive regulatory policy of territorial integrity and avoidance of wasteful duplication would be repealed and replaced by a balkanized and disintegrated non-system.

Ratcheting the argument to a constitutional plane, MDU promotes serious consequences. If Article VII §11 and Article XII §10 of the Constitution were interpreted as MDU suggests, overriding N.D.C.C. § 49-03-1.3, then the comprehensive police power of the Legislature under the Constitution is also over-ridden, not comprehensive. Instead, any city's governing body would have the constitutional power (exercised by the statutory process of annexation) to limit the Legislature's constitutional power. The legislature has no power to regulate the activities of any public utilities inside the limits of municipalities, as a matter of State constitutional law. According to MDU.

Capital asserts: N.D.C.C. § 49-03-01.3 is an integral ingredient of the Territorial Integrity Act's comprehensive regulatory scheme to accomplish a legislative policy and purpose to keep to a minimum wasteful duplication of capital-intensive utility services, to

minimize conflicts between suppliers of electricity, to provide territorial protection for rural electric cooperatives. The comprehensive policy and regulatory regimen of the Act applies to the entire state of North Dakota. It is a policy and legislated regulatory scheme sustained by the Legislature's constitutional police powers, a policy and a power that apply throughout the State of North Dakota without regard to the vagaries of municipal boundaries or of local governing bodies. The legislature's policy and power are not superceded by theories of municipal sovereignty. And a utility regulated by the Act lacks standing to assert theories of municipal sovereignty as a defense to enforcement of the Act.

Three older cases foreshadowed the current arguments. In the early days of regulation of electric public utilities' rates, the question arose whether the PSC's statutory power to regulate rates extended to the financial terms of a franchise -- how did a utility compensate a city for granting a franchise. See Chrysler Light & Power v City of Belfield, 224 N.W. 871 (ND 1929), and Western Electric Co. v Jamestown, 181 N.W. 363 (ND 1921). In upholding franchise agreements against PSC rate orders in the older cases, the Supreme Court was careful to distinguish the terms of franchise contracts from comprehensive rate regulation. See Chrysler Light & Power v City of Belfield, 224 N.W. at 875. A similar result was reached in Public Service Commission v City of Williston and Montana Dakota Utilities Co., 160 N.W.2d 534 (ND 1968). But in 1968 the court acknowledged arguments (referring to the older cases) "... [T]he state of the industry's art at the time of those decisions was such that the consequences of the decisions were not felt outside of the municipalities involved. . . . A similar ruling in the case at bar would mean that all of Respondent MDU's patrons in North Dakota would pay for Williston's bargain rates." 160 N.W.2d at 540. The court acknowledged the problem and regarded

it as one for legislative attention. Though the court acknowledged the problem, it followed the Belfield precedent, under the rule of stare decisis.

The case at bar is not a case of rate regulation under N.D.C.C. 49-02, like the 1968 MDU/Williston case that was controlled by older precedents. The Boulder Ridge case is one where the state of the industry's art is such that the adverse consequences of wasteful duplication of capital-intensive facilities are felt outside of the municipalities where that might occur, and where the applicable law enacted in 1964 regulates those consequences. The Boulder Ridge case involves regulation of extensions of capital-intensive facilities under N.D.C.C. Chapter 49-03, like the 1990 Otter Tail case and the South Pointe cases.

MDU wants a ruling that the Constitution limits the PSC's jurisdiction under N.D.C.C. Chapter 49-03, a ruling that would mean that all of MDU's patrons in North Dakota would pay for its wasteful duplication of capital-intensive facilities in Boulder Ridge, and wherever it follows the same course.

MDU's defensive theory has already been addressed and rejected by the Supreme Court, in Otter Tail 1990. The court's rationale for sustaining the PSC's jurisdiction -- the State's interest versus claimed local self-government interests -- is paraphrased: The state's interest in regulating suppliers of electricity in furtherance of the public good is substantial and ranks among the most important functions traditionally associated with the police power of all states. Because electric service is capital-intensive, state regulation designed to avoid wasteful duplication of facilities between competing electric suppliers benefits all consumers of electricity. The electric supply systems of MDU and Capital are not confined to Bismarck but extend to a large portion of the State. Thus, the economic impact of operations within the City of Bismarck can adversely affect other customers of those electric suppliers. A claim of infringement on self-government rights is

incomprehensible where Bismarck has not developed a regimen for regulating electric suppliers. The State's constitutional authority over electric suppliers is not pre-empted by Bismarck's local self-government interests. 451 N.W.2d at 107. See also MDU v Johanneson, regarding the State's power to regulate public utilities under the police powers of the State.

The territorial dispute involved in Otter Tail 1990 was re-litigated in federal courts, this time by action commenced by parties with standing. The federal action was an instance of collateral litigation, but it might be regarded as an "appeal" of the action in state court, asserting some federal law prevails over state law. The result of the federal action was to confirm Otter Tail 1990, with a limited exception. The Tribe had the right under federal law to determine who is to supply electrical service to Tribal owned businesses on Indian owned land, without regard to regulations of the North Dakota Public Service Commission. With this limited exception, the Territorial Integrity Act prevailed over claims of Tribal sovereign authority within the boundaries of the reservation. In re Otter Tail Power Company, 116 F.3d 1207, 1210 (8th Cir. 1997); Baker Electric Cooperative, Inc. v Chaske, 28 F.3d 1466 (8th Cir. 1994); Devils Lake Sioux Indian Tribe v North Dakota Public Service Commission, 896 F. Supp. 955 (D.N.D. 1995).

Without digressing too far into the unique thorny thicket of states' jurisdiction with respect to Indian Tribes' activities on reservations that are affected by federal law, this conclusion can be drawn from Otter Tail 1990: Because the State Supreme Court declared the State's Territorial Integrity Act's pre-eminence over claims of Indian Tribes' sovereignty, a decision confirmed in collateral litigation in federal court, North Dakota's district courts should expect the State Supreme Court will conclude the Territorial Integrity Act prevails over claims that North Dakota municipalities have powers of self government

superior to the State itself. See also Stutsman County v State Historical Society of North Dakota, 371 N.W.2d 321 (ND 1985) and City of Grafton v Otter Tail Power Co.

In the 1990 Otter Tail case, the PSC followed the admonition of the South Pointe cases. The PSC did not take a narrow view of its jurisdiction. The PSC asserted and exercised its jurisdiction. The PSC rejected the arguments that local self government concepts pre-empted the Commission's jurisdiction. The PSC's assertion of jurisdiction was upheld by the Supreme Court and in collateral federal litigation. The decision in Otter Tail 1990, concluding that the state's interest in regulating a public utility outweighs the minimal burden on local self-government, indicates the final outcome of the dispute over Boulder Ridge.

There are two "operational" aspects to MDU's argument based on the Constitution. 1) The existence of Article VII §11 and Article XII §10 create a constitutional right for MDU to be exempt from the PSC's exercise of its jurisdiction. 2) Bismarck's local governing body has exercised its power under the Constitution to grant MDU a constitutional right or exemption from the PSC's exercise of its jurisdiction.

J. Article VII §11 and Article XII §10 do not create a constitutional right for MDU to be exempt from the PSC's exercise of its jurisdiction.

Whether asserted by Bismarck or if MDU is accorded standing to assert Bismarck's self-government powers under the Constitution, in either case Article VII §11 and Article XII §10 are not self-executing.

Section 11 is new to Article VII, but Article VII is not new, and it is not self-executing. Article VII encompasses former Section 130, now § 2 of Article VII.

"Section 130, as amended and approved in 1966, basically removed limitations previously placed upon the legislature relating to cities, directed the legislature to enact laws authorizing home rule, and permitted the legislature to devolve certain powers upon home rule cities. This

constitutional provision in itself does not grant any powers to home rule cities. Whatever powers home rule cities may have are based upon statutory provisions." Litten v City of Fargo, 294 N.W.2d 628, at 631 (ND 1980).

Article XII §10 (original Section 139) was central to one reported case addressing the relative powers of a municipality and the state in the resolution of an electric service territorial dispute. In City of Grafton v Otter Tail Power Co., the City asserted Section 139 as granting the City a power superior to the state's power. The Supreme Court's response was:

"Section 139 of the Constitution is not a grant of power to municipalities but a restriction upon the legislature designed to prevent it from authorizing indiscriminate use of the streets of a municipality by certain enumerated public utilities without control by the local authorities. To that extent it is a limitation upon the sovereign power of the state." 86 N.W.2d at 205.

Two older cases included statements such as "The power reserved by Section 139 of the Constitution to a village or city to either grant or refuse permission to an electric light company to occupy the streets of such village or city. . . ." Chrysler Light & Power v City of Belfield, 224 N.W. 871 at 874 (ND 1929) and Western Electric Co. v Jamestown, 181 N.W. 363 (ND 1921). The issue in both cases was whether the PSC's statutory power to regulate rates extended to the financial terms of a franchise -- how did the utility compensate the city for granting the franchise. The decisions were interpretations of statutes. The decisions did not rely on Section 139, so the remarks about Section 139 can be regarded as dicta. To the extent these dicta might be regarded as affecting the PSC's statutory power to regulate territorial disputes, they are superseded by the later decisions, City of Grafton v Otter Tail Power Co. and Litten v City of Fargo. Those cases addressed Section 130 and 139 and do have status as precedents of constitutional interpretation, establishing the principle that Article VII §11 and Article XII §10 are not self-executing. See also Public Service Commission v City of Williston and Montana Dakota Utilities Co., 160

N.W.2d 534 at 540 (ND 1968), following the Belfield and Jamestown cases, but expressly declining to address Section 139 of the Constitution. See also Johnson v Wells County Water Resource Board, 410 N.W.2d at 528. (Constitutional provisions relating to eminent domain powers of local governing bodies are inoperative until appropriate legislation is enacted.) And the State's power's prevailing over Grafton's leads to the conclusion that the Territorial Integrity Act prevails over claims that North Dakota municipalities have powers of self government superior to the State itself.

Under these cases, neither Article VII §11 or Article XII §10 is self executing, neither is a grant of power to any municipality, and neither is the grant of a constitutional right to any public utility to be exempt from the Territorial Integrity Act.

K. Bismarck's local governing body did not grant MDU a constitutional right or exemption from the PSC's exercise of its jurisdiction.

The Boulder Ridge dispute is fundamentally no different from the South Pointe cases. MDU's extension of its service into a rural area that has been annexed to a municipality interferes with and constitutes an unreasonable duplication of investment and services provided by Capital. *[PSC Order, Finding of Fact No. 29.]*

MDU claims Bismarck's power to grant franchises has been exercised to grant MDU a constitutional right or exemption from the PSC's exercise of its jurisdiction under N.D.C.C. Chapter 49-03. MDU has not said it overtly, but it implies that a franchise granted by a city is a local certificate of public convenience and necessity, that the authority of municipal governing bodies to grant franchises is a police power comparable to the legislative police power that the State Legislature exercised by enactment of N.D.C.C. Chapter 49-03 in 1927 and by its action in 1965 adding the Territorial Integrity Act to N.D.C.C. Chapter 49-03. Comparable, except a municipality's power is a superior

constitutional power that supercedes the State Legislature's power under the same Constitution -- under MDU's theories of constitutional law and municipal sovereignty.

But MDU's theory about the constitutional status of a municipal governing body's power to grant franchises is insufficient to make a complete defense. The Constitution refers to the power of the governing board of a city to franchise the construction and operation of a public utility, but that constitutional provision is not self-executing; it does not grant any powers to home rule cities. Whatever powers a home rule city may have are based upon statutory provisions and upon implementation of those powers under its charter and ordinances. Litten v City of Fargo, 294 N.W.2d 628, at 631. The legislature has enacted statutory provisions empowering cities' governing boards to grant franchises. N.D.C.C. §§ 40-05-01(57) and 40-05.1-06. Bismarck has implemented this power and has exercised it, to grant franchises to both MDU and Capital. MDU admitted that Capital has a franchise. Capital's franchise was offered and received in evidence. [*PSC Order, Finding No. 6. Complaint, paragraphs I and II; Answer, paragraph 1; Motion exhibits 1 and 2; exhibit C-1*]. If MDU's franchise is supported by the Constitution, so is Capital's. MDU needs more than its franchise to evade and avoid enforcement of N.D.C.C. § 49-03-01.3 as exemplified in the South Pointe cases.

As MDU prepared to extend its facilities into Boulder Ridge, it faced the likelihood that Capital would complain to the PSC, like Cass complained about NSP in the South Pointe cases. As a matter of litigation strategy, MDU launched a pre-emptive collateral attack on the PSC's jurisdiction. MDU petitioned Bismarck's Commissioners to declare Capital's franchise was limited, to exclude Boulder Ridge from Capital's franchised service territory. The City Commission decided ". . . that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First

Addition to Bismarck.” [PSC Order, Finding of Fact No. 8 Motion Exhibits 1 & 2.] Wrap up the City Order in the Constitution, and MDU has a constitutional right to extend its service into Boulder Ridge, free to interfere with Capital’s existing service and system, free of the PSC’s jurisdiction under N.D.C.C. § 49-03-01.3. According to MDU.

The City Order, not MDU’s franchise, is MDU’s claimed constitutional shield. When MDU made its motion to dismiss Capital’s complaint on the day of the hearing, MDU offered motion exhibits including MDU’s franchise, Capital’s franchise, and “. . . most importantly the order that was issued by the City Commission. . . .” Tr. p. 12. The City Order in conjunction with Article VII §11 and Article XII §10 protect MDU from the State Legislature and the PSC’s exercise of its jurisdiction conferred by N.D.C.C. Chapter 49-03. According to MDU.

MDU’s defense against Capital’s complaint to the PSC comes down to this one point: MDU believes it has discovered or created a loophole in the Territorial Integrity Act. More than a loophole, a constitutional right. The Bismarck City Commission has bestowed on MDU a constitutional right, immunity or exemption from the PSC’s jurisdiction to enforce the Territorial Integrity Act. According to MDU.

The PSC did not accept or reject the argument, because the PSC has no jurisdiction to decide constitutional issues, presumes the constitutionality of the statutes under which it operates, and does not take a narrow view of its jurisdiction. [PSC Order, Conclusions of Law Nos. 4 & 10.] NSP v PSC; Cass v NSP; Johnson v Elkin.

MDU does not say it directly, but it implies that its petition to Bismarck’s City Commission is comparable to Capital’s complaint to the PSC under N.D.C.C. Chapter 49-03. MDU regards the City Order as comparable to the PSC Order, except the City Order is superior to the PSC Order. The City Order is the exercise of a constitutional power

under Article VII §11 or Article XII §10, so the City Order supercedes the jurisdiction and authority of the PSC conferred on it by the Legislature in its exercise of comprehensive police powers under the Constitution. According to MDU's theories.

There is a difference between the two actions taken by Bismarck's local governing body. It granted franchises to both MDU and Capital, not exercising a power granted by Article VII §11 or Article XII §10 of the Constitution, but exercising a power that does exist under enabling statutes, charter powers, and local ordinances. It issued the City Order responding to MDU's petition. What constitutional provision, what enabling statute connected to any constitutional provision, what charter power connected to any constitutional provision, what local ordinance connected to any constitutional provision sustains that process and that decision? None! The City Order is wholly lacking any foundation under Article VII §11 or Article XII §10 of the Constitution.

Obviously, these arguments are somewhat related to the collateral litigation, where Capital has challenged the City Order issued in response to MDU's petition. The collateral litigation is on appeal and will reach its own conclusion. The collateral litigation has not yet been decided by the Supreme Court and should not be pre-judged by a district court judge in this appeal from the PSC's exercise of its jurisdiction.

Pages ago, this brief embarked on a course of arguments to sustain the constitutionality of the Territorial Integrity Act, going beyond the presumption of constitutionality. But it is not Capital's burden to sustain the constitutionality of the Act. MDU challenges the PSC Order on constitutional grounds; it is MDU's burden to overcome the presumption of constitutionality. MCI Telecommunications Corp. v Heitkamp, 523 N.W.2d 548, at 555 (ND 1994). Capital relies not only on its arguments to sustain the constitutionality of the Act, Capital also relies on the presumption of constitutionality.

All statutes are presumed to be constitutional, and a challenged statute is construed with a purpose to sustain its constitutionality. N.D.C.C. § 1-02-38. See MDU v Johanneson. Courts “must presume that an Act of the Legislative Assembly is constitutional and valid, and any doubts as to its constitutionality must, if at all possible, be resolved in favor of its validity.” 153 N.W.2d at 420. “One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.” So. Valley Grain Dealers v Board of County Com’rs of Richland County, 257 N.W.2d at 434; Effertz v Workmen’s Compensation Bureau, 481 N.W.2d at 223; and Froysland v Workers’ Compensation Bureau, 432 N.W.2d 883, footnote 7 at 892. The presumption of constitutionality of statutes is a principle established by the Constitution itself. No statute can be declared unconstitutional except by action of four Supreme Court justices. Constitution, Article VI § 4. See also State v Hansen, 2006 ND 139, and State v Hanson, 558 N.W.2d 611 (One district judge cannot have the final say about the constitutionality of a statute.). The presumption is so strong that a statute will not be declared unconstitutional “unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.” MCI Telecommunications Corp. v Heitkamp, 523 N.W.2d at 552, quoting Menz v Coyle, 117 N.W.2d 290, at 293 (ND 1962).

The court has the City Order before it on one plate of the proverbial scales of justice. What else is on that plate? No regimen for regulating electric suppliers, no enabling statute, charter power or local ordinance is on the plate to sustain the process that produced the City Order. MDU’s argument that the order has constitutional status under Article VII §11 or Article XII §10 of the Constitution. MDU’s conclusory arguments with no

supportive citation add no weight. The City Order is not supported by a presumption of constitutionality. There is nothing on the plate with the City Order.

The PSC Order is on the other plate. The PSC Order in the Boulder Ridge case is one order among many cases to enforce a comprehensive state-wide regimen for the regulation of electric suppliers and the avoidance of wasteful duplication of capital-intensive facilities and services. The PSC Order was produced in a statutory process under N.D.C.C. Chapters 28-32 and 49-03 in exact accordance with precedents, particularly Otter Tail 1990 and the South Pointe cases. N.D.C.C. Chapter 49-03, including N.D.C.C. § 49-03-01.3 sustain the policy and the process that produced the PSC Order. The Territorial Integrity Act and the PSC Order have constitutional status under the Legislature's comprehensive power to regulate public utilities such as MDU. N.D.C.C. Chapter 49-03, including § 49-03-01.3, is presumed to be Constitutional. The presumption is a strong, heavy weight. The Territorial Integrity Act's constitutionality is more than presumptively constitutional; that has been decided, twice, in response to MDU's previous attacks. All of this is on the plate with the PSC Order.

There is no reason to doubt the validity of the Territorial Integrity Act or of the PSC Order under the Act. The weight of the law is like the weight of the evidence. Both sustain the PSC Order. The City Order is not a constitutional license that immunizes or exempts MDU from enforcement of the Act.

L. The order does not result in an unlawful delegation of authority to Capital.

MDU ground 1c: The Order results in an unlawful delegation of authority to Capital Electric Cooperative, Inc.

Capital's response: "Unlawful delegation" is an aspect of constitutional law. Constitutional claims are properly addressed under N.D.C.C. § 28-32-46(2), not (1).

Legislative bodies routinely delegate authority to inferior governmental agencies to administer laws enacted by the legislature, but legislative authority may not be delegated. Legislative authority may not be delegated to private parties. See, e.g. Stutsman County v State Historical Society of North Dakota and MDU v Johanneson.

MDU's imprecise claim of unlawful delegation does not meet the requirement that grounds for appeal be specifically stated. Specifications of error are supposed to be specific. Capital does not waive its right to object to MDU's procedural errors, but responds for the purpose of complete argument.

In its brief to the PSC, MDU argued that Capital's establishment of a service in a rural area before annexation should not determine its service area after annexation. This seems to be what MDU calls unlawful delegation. MDU did not pursue specification 1c in its appellant's brief to the court.

Capital (and other rural electric cooperatives) have the right under N.D.C.C. Chapter 10-13 to provide electric service in rural areas, and have the right under N.D.C.C. Chapter 49-03 to have their service areas protected, including rural service areas that are annexed to municipalities. See, e.g., the South Pointe cases. When a territorial dispute arises and a rural electric cooperative asserts those rights by filing a complaint with the PSC, the dispute is decided by the PSC. The Legislature has delegated authority to the PSC to ascertain the facts and conditions to which the policy of the Territorial Integrity Act, as declared by the Legislature, is to apply. This is a constitutional delegation of administrative authority to the PSC, not a delegation of authority to the rural electric cooperative. See MDU v Johanneson, 153 N.W.2d at 421. Capital's right under the Act to complain that MDU has violated the Act is not "the authority to make a law," but "pertains only to the execution of a law which was enacted by the Legislature" in dealing with conflicts between

suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities. See MCI Telecommunications Corp. v Heitkamp, 523 N.W.2d 548, at 555 (ND 1994).

"Heavy artillery" is required to support claims of rights and powers under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. The argument about unlawful delegation is not pursued in MDU's brief, and may be summarily dismissed, not only because the claim lacks support, but also because relevant precedents shoot down the claim.

M. The order is within the Public Service Commission's limited jurisdiction.

MDU ground 1d: "The Order is based on a broad interpretation of the jurisdiction of the Public Service Commission without recognition of constitutional and statutory limitations on that jurisdiction."

Capital's response: Constitutional grounds are properly addressed under N.D.C.C. § 28-32-46(2), not (1).

An appellant is required to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. MDU's specification 1d does not identify what constitutional limitations on jurisdiction the PSC failed to recognize. Specifications of error are supposed to be specific. Capital does not waive its right to object to MDU's procedural errors, but responds for the purpose of complete argument.

The jurisdiction of the PSC is limited under the Constitution, a matter of law acknowledged by the PSC Order, Conclusion of Law No. 4.

"The PSC has only the powers and duties conferred upon it by the Legislature. N.D. Const., Art. V, §§ 12,13." Capital v PSC, 534 N.W.2d at 589.

"The Public Service Commission is a constitutional body having only such powers and duties as are prescribed by law." Public Service Commission v Montana-Dakota Utilities Co. 100 N.W.2d 140 (ND 1959) (Court Syllabus No. 1.)

"The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1958) (Court Syllabus No. 6.)

". . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. . . . We reserve the issue of constitutionality to the first court to which the agency decision is appealed." Johnson v Elkin, 263 N.W.2d at 126-27.

In 1996, the PSC's status as a constitutional body was moved from Article V §§ 12 & 13 to § 2. Article V § 2 specifically provides "The powers and duties of the . . . public service commissioners . . . must be prescribed by law." The PSC Order recognized these constitutional limitations. The PSC Order exercised jurisdiction conferred upon it by the Legislature under N.D.C.C. Chapter 49-03. The PSC did not venture beyond those limits.

MDU's arguments about statutory limitations on the PSC's jurisdiction are addressed under N.D.C.C. § 28-32-46(1), not (2).

N. The PSC's proceedings complied with N.D.C.C. Chapter 28-32 (N.D.C.C. § 28-32-46(3)).

MDU specified the following grounds of its appeal, under N.D.C.C. § 28-32-46(3).

"3. The provisions of N.D.C.C. Chapter 28-32 were not complied with in at least the following respects:"

MDU ground 3a: "The Order was not decided on the claims presented in the complaint or the issues stated in the Commission's Notice of Hearing."

Capital's response: N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that reasonably identify particular errors claimed and what matters

are truly at issue. MDU's ground 3a does not identify what specific provisions of N.D.C.C. Chapter 28-32 are claimed to be violated.

MDU's brief does not identify what specific provisions of N.D.C.C. Chapter 28-32 are claimed to be violated. Instead, arguments under N.D.C.C. § 28-32-46(3) include the code words "due process," three times, as if making a constitutional claim of procedural due process. [*Appellant's brief, pp 25, 27 & 28.*] MDU's specifications of error did not include any claim that its constitutional rights of procedural due process were violated. Nor is its due process argument supported by any "heavy artillery." Specification No. 3 may be summarily dismissed.

If any procedural matters were truly at issue, MDU might have claimed error under the "fair hearing" requirement of N.D.C.C. § 28-32-46(4). MDU has not asserted it was not afforded a fair hearing.

The record speaks for itself. Capital's complaint and the PSC's notice of hearing informed MDU of the issues under N.D.C.C. Chapter 49-03 and the potential outcome. MDU's pleadings addressed the issues that were considered at the hearing and addressed in the Order. [*PSC Order, Preliminary Statement, pp 1-3.*]

Capital's complaint against MDU invoked the PSC's jurisdiction under N.D.C.C. Chapter 49-03. MDU answered. The PSC Order included a preliminary statement describing the pleadings. Capital complained that MDU intended to provide electric service to a development in Capital's service area and that service will unreasonably interfere with the service or system of Capital. MDU's answer admitted it intended to provide electric distribution service in Boulder Ridge and denied that would interfere with service or facilities of Capital. MDU also asserted the PSC does not have jurisdiction. After proceedings that complied with N.D.C.C. Chapter 28-32, the Order was decided on the

claims presented in Capital's complaint, on defensive claims presented by MDU's answer, and on the issues stated in the Commission's Notice of Hearing.

O. **The findings of fact in the PSC Order are supported by a preponderance of the evidence. (N.D.C.C. § 28-32-46(5)).**

MDU specified the following grounds of its appeal, under N.D.C.C. § 28-32-46(5).

"4. The Findings of Fact made by the Commission are not supported by a preponderance of the evidence in at least the following respects:"

Capital's response: The specifications presented by MDU under N.D.C.C. § 28-32-46(5) are another thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." See NSP v PSC, 452 N.W.2d at 345.

A reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence, and that the PSC's conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that Capital had an extensive system in place for the annexed territory, and that MDU's extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

The annotated facsimile of the PSC Order attached as an appendix shows how all the PSC's findings of fact are supported by the evidence. Each of MDU's 6 specific complaints about the findings of fact (a through f) is responded to below by cross-reference to the appendix. One of MDU's grounds for appeal misplaced under Subsection 1 is also addressed under N.D.C.C. § 28-32-46(5).

MDU ground 4a: “The Commission’s finding that MDU’s facilities interfere with the facilities and services of CEC is not supported by a preponderance of the evidence.”

Capital’s response: See Appendix, re PSC Order, Findings of Fact Nos. 13-29.

In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC’s findings and conclusions that Capital had an extensive system in place for the annexed territory, and that MDU’s extension of electric service into Boulder Ridge would constitute an unreasonable duplication of and interfere with the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

MDU ground 4b: “The Commission’s finding that CEC was planning to serve Boulder Ridge is not supported by a preponderance of the evidence.”

Capital’s response: See Appendix, re PSC Order, Finding of Fact No. 20. See also Capital’s response to MDU’s specification 1n.

MDU ground 4c: “The Commission’s determination that Boulder Ridge is part of CEC’s service area is not supported by a preponderance of the evidence.”

Capital’s response: See Appendix, re PSC Order Findings of Fact Nos. 13-29. See also Capital’s response to MDU’s specifications 1j, 1k, 1l, 1m, and 1p and 4e.

MDU ground 4d: “The Commission’s finding that MDU’s general franchise from the City of Bismarck is limited is not supported by the evidence.”

Capital’s response: See Appendix, re PSC Order, Finding of Fact No. 5.

The PSC’s statement that MDU complains about is “. . . the Board of City Commissioners of the City of Bismarck issued Montana-Dakota a general limited franchise” [*PSC Order Finding of Fact No. 5.*] MDU’s brief complains of the statement as

"inconsistent." *[Appellant's brief, page 28.]* MDU does not make any argument about how this supposed "inconsistent" statement affected or infected the PSC's ultimate findings and decision that MDU's activities in Boulder Ridge violated N.D.C.C. § 49-03-01.3.

MDU has focused on but has not recognized a harmless typographical error.

A typographical error; obviously only that. At the close of the hearing, the parties were invited to submit proposed findings for the PSC's consideration as it weighed the evidence and pondered the legal arguments. *[Tr. Pp 144-150]*. Capital and MDU each filed its proposals. *[Certified Record on Appeal, Docket items Nos. 122 & 144.]* Study of the PSC Order shows that the PSC considered the parties' proposed findings. The PSC Order conforms to convention, reciting evidentiary facts in findings of fact 3 through 23, evidence supporting the PSC's ultimate findings 25 through 29. The PSC's recital of evidentiary facts shows it considered both parties' arguments about the evidence. The PSC's findings of fact numbered 3, 8, 13, 16, 18, 19, 20, 21, 22, 23, and 24 reflect Capital's proposed findings. The PSC's findings numbered 4, 5, 6, 7, 8, 14, 15, and 17 reflect MDU's proposed findings. The PSC's finding of fact no. 5, of which MDU now complains, is a verbatim acceptance of MDU's proposed finding no. 3, except for the typographical error; the word should have been unlimited, not limited.

N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that reasonably identify particular errors claimed and what matters are truly at issue. A harmless typographical error does not meet that standard.

This typographical error caused no harm to MDU's cause, because the PSC Order shows that the PSC did consider evidence about franchises and MDU's arguments about franchises, because the PSC did not misunderstand the 1987 franchise or MDU's arguments about its status as "unlimited," because the PSC did not regard the status of the

1987 franchise as either "limited" or "unlimited" as pivotal as it reached its ultimate findings expressed in findings of fact 25 through 29. The PSC made its decision within its limited jurisdiction that does not include franchises. [*PSC Order Findings of Fact Nos. 5 through 12 and 25 through 29; Conclusion of Law No. 4.*]

The PSC must look at and did look at the existing electric facilities that Capital and MDU have in place in the area as it determined that extension of MDU's services in Boulder Ridge interferes with and constitutes an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d at 187; NSP v PSC, 452 N.W.2d at 342. The franchise issue was not a factor in the decision compelled by the weight of the evidence.

MDU ground 4e: "The Commission's finding that MDU crossed CEC's facilities in two locations is not supported by the preponderance of the evidence."

Capital's response: See Appendix, re PSC Order, Finding of Fact No. 23.

"The Commission has consistently held that one electric supplier crossing the line of another electric supplier to provide service to a customer indicates a wasteful duplication of facilities." Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 30, citing Cass v NSP and NSP v PSC. After Capital filed its complaint, MDU extended its facilities to Boulder Ridge, crossing one-half mile through another subdivision of Bismarck that is in Capital's service area, crossing Capital's facilities in two places. [*Tr. Pp 93-97; 102-03; Exhibit C-5.*]

MDU ground 4f: "The Commission's finding that CEC constructed facilities for service of new developments such as Boulder Ridge is not supported by the evidence."

Capital's response: See Appendix, re PSC Order, Finding of Fact No. 20. See also Capital's response to MDU's specifications 1m and 1n.

MDU ground 1f: "The Order does not make a proper evaluation of reasonableness under the law and evidence."

Capital's response: This complaint is so non-specific it can be responded to only by reiterating: It is a thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." NSP v PSC, 452 N.W.2d at 345. A reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence, and that the PSC's conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that Capital had an extensive system in place for the annexed territory, and that MDU's extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

P. **The conclusions of law and order in the PSC Order are supported by its findings of fact. (N.D.C.C. § 28-32-46(6)).**

N.D.C.C. § 28-32-42 requires an appellant to file specifications of error that identify particular errors claimed and what matters are at issue. MDU did not specify as grounds of its appeal any complaint under N.D.C.C. § 28-32-46(6). MDU's brief did not assert any belated claims under N.D.C.C. § 28-32-46(6). There is no contest under Subsection 6. It must be concluded that the PSC's conclusions of law and order are supported by its findings of fact.

The annotated facsimile of the PSC Order attached as an appendix shows how the PSC's uncontested conclusions of law and order are supported by the findings of fact.

Q. The findings of fact in the PSC Order sufficiently address the evidence presented by MDU. (N.D.C.C. § 28-32-46(7)).

MDU specified the following grounds of its appeal, under N.D.C.C. § 28-32-46(7).

"5. The Commissions Findings of Fact do not sufficiently address the evidence presented by MDU in at least the following respects:"

Capital's response collective to 5a, 5b, and 5c: MDU presented no evidence, no testimony and no exhibits other than its motion exhibits. "At the hearing, Capital presented evidence consisting of testimony and exhibits. Montana-Dakota cross-examined Capital's witness. Montana-Dakota presented no direct testimony." [*PSC Order, p.2; tr. pp 11-13; 143-144.*]

There was no "evidence presented to the agency by the appellant." N.D.C.C. § 28-32-46(7). Apparently, MDU believes it scored some points on cross-examination that overwhelms all the evidence presented by Capital. The specifications presented by MDU under Subsection 7 are a thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, an appellate court does not function as a "super-board" or "second guess the PSC's determinations." See NSP v PSC, 452 N.W.2d at 345.

The facsimile of the PSC Order attached as an appendix shows how the findings of fact are supported by the evidence. A reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence, and that the PSC's conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that Capital had an extensive system in

place for the annexed territory, and that MDU's extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

IV. CONCLUSION

The appeal before the court commenced with Capital's complaint to the PSC under N.D.C.C. Chapter 49-03, alleging MDU's violation of N.D.C.C. § 49-03-01.3. The PSC found and concluded that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital. [*PSC Order Finding of Fact No. 29; Conclusion of Law No. 7.*] All the PSC's findings and conclusions are supported by the weight of the evidence and are in accordance with the law under N.D.C.C. § 49-03-01.3 and pertinent precedents. New provisions in N.D.C.C. Chapter 49-03 enacted in 2005 to authorize area service agreements as an alternative method to resolve territorial disputes did not change the PSC's jurisdiction to resolve territorial disputes under N.D.C.C. § 49-03-01.3.

MDU's principal defense is not that its activities are in accordance with the law under N.D.C.C. Chapter 49-03 and pertinent precedents. MDU's defense is to avoid the statute, claiming a constitutional right. According to MDU, "In failing to recognize the constitutional authority of the City of Bismarck to franchise utility service areas, the Commission improperly exercised its jurisdiction under the TIA." [*Appellant's brief, Conclusion, p 35.*]

MDU's accuses the PSC of trying to "trump" or "override" the city's authority. [*Appellant's brief, pp 15 & 20.*] The metaphor is misplaced. If the meaning of trump is an apparent low ranking power prevails because of some exception to general rules of priority of powers, then it is MDU who is trying to promote and play the low card, the City Order, to override the PSC Order.

When MDU claims the City Order has constitutional status to pre-empt the PSC Order, MDU disregards the status of the PSC and the PSC Order. The PSC is a constitutional body exercising powers prescribed by law. The PSC Order was made under a regulatory statute enacted by the State Legislature in the exercise of its comprehensive police powers under the Constitution. The City of Bismarck has no constitutional status; it is a political subdivision with home rule powers based on statutory provisions enacted by the State Legislature under the political subdivisions article of the Constitution. The City Order has no basis in the Constitution, no basis in statutory provisions or in Bismarck's home rule charter or ordinances. Cities' home rule powers do not include the power to license conduct that violates State laws.

MDU hopes there is a trump card in the deck, but if there is one it is not in MDU's hand. The City Order, whatever its validity or priority vis a vis the PSC Order, is not in MDU's hand; it is in the City's. The claim of trump might be made by the City of Bismarck, but not by MDU. The City is not at the table, not in this case. Using legal terms instead of metaphors, MDU lacks standing to assert the City of Bismarck has local government powers superior to the State Legislature's comprehensive powers under the Constitution.

Not only does MDU lack standing to assert its theory of local sovereignty, its experiment with its theory is incomplete. The City Order is not in play. The City Order produced by MDU's petition to Bismarck's city commission is the subject of collateral litigation that is not final. Under res judicata and collateral estoppel principles, no order issued by any court, agency or governmental entity has status as a matter decided when the order is not final.

Even if MDU were accorded standing to assert rights under Article VII §11 of the Constitution, and even if the City Order were regarded as a proper exercise of Bismarck's

home rule powers, the State's constitutional authority to regulate public utilities is not pre-empted by any municipality's local self-government interests. The PSC Order is supported by the Constitution and is not pre-empted by the City Order.

"Our jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims. . . ." State v Hansen, 2006 ND 139 §11, 717 N.W.2d 541 (ND 2006). North Dakota courts do not render advisory opinions in the absence of an actual case or controversy, a general principle that applies with special force where a constitutional claim is asserted. "Our procedure for constitutional adjudication requires deliberate and reasoned review of statutes, which requires that constitutional claims be properly raised." Id., at §10.

The constitutional claim raised by MDU presents a hypothetical conflict of jurisdiction between the State Legislature's comprehensive power and local governing bodies' home rule powers. MDU conceived the problem, and it offers a solution: adoption of MDU's theory that the City Order has constitutional status superior to the PSC Order's constitutional status. Capital's solution is to reject MDU's theory, because the PSC Order is in accordance with N.D.C.C. Chapter 49-03, a statute that has been held to be constitutional, twice, and because of specific precedent: The State's constitutional authority over electric suppliers is not pre-empted by local self-government interests.

MDU lacks standing to claim a municipality's self government powers as MDU's constitutional right to be exempt or immune from enforcement of a state statute. MDU has not properly raised constitutional claims. Neither a single district court judge nor the Supreme Court is obliged to grant MDU standing to assert Bismarck's self government interests. This appeal can be decided without regarding MDU's arguments as presenting a justiciable constitutional crisis.

This appeal is not about the political subdivisions article of the North Dakota Constitution, because MDU has no rights under that article and no standing to assert Bismarck's interests. This appeal is about MDU's activities that are regulated under Chapter 49-03, particularly N.D.C.C. § 49-03-01.3. A new certificate of public convenience and necessity is generally not required for each and every extension of MDU's electric distribution lines within the corporate limits of a municipality where it is lawfully operating. But under the special terms of N.D.C.C. § 49-03-01.3, an electric public utility's extensions shall not interfere with existing services of a rural electric cooperative within a municipality.

The PSC found and concluded that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital. [*PSC Order, Finding of Fact No. 29; Conclusion of Law No. 7.*] All the PSC's findings and conclusions are supported by the weight of the evidence and are in accordance with the law under N.D.C.C. § 49-03-01.3 and pertinent precedents. [*Appendix, annotated PSC Order.*] New provisions in N.D.C.C. Chapter 49-03 enacted in 2005 did not change the PSC's jurisdiction under N.D.C.C. § 49-03-01.3. The PSC Order is not in violation of MDU's constitutional rights.

The PSC Order must be affirmed because there does not exist any of the enumerated reasons for not affirming. N.D.C.C. § 28-32-46.

Dated this 30 day of August, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Montana-Dakota Utilities Co.,)
a Division of MDU Resources)
Group, Inc.)
Appellant,)
vs.)
The Public Service Commission of)
North Dakota)
and)
Capital Electric Cooperative, Inc.)
Appellees.)

**APPENDIX TO
APPELLEE CAPITAL ELECTRIC
COOPERATIVE'S BRIEF**

Public Service Commission Order

Case No. 06-C-177

This appendix is an annotated facsimile of the Order of the Public Service Commission from which the Appellant has appealed. The annotations are references to the record and to controlling statutes and precedents, to show in context how the findings of fact are supported by the evidence, how the conclusions of law and order are supported by the findings of fact, and how the conclusions of law and order are in accordance with the law and do not violate constitutional rights of the appellant. N.D.C.C. § 28-32-46.

Capital's Annotations are in bold and italics.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative, Inc. vs
Montana-Dakota Utilities Co.
Complaint

Case No. PU-05-551

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 22, 2006

Preliminary Statement

On September 29, 2005, Capital Electric Cooperative, Inc. (Capital) filed a Complaint alleging that Montana-Dakota Utilities Co. (Montana-Dakota) (1) intends to provide electric service to a development in Complainant's service area and (2) such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital Electric. **[Certified Record on Appeal, Docket item No. 1.] (Herein abbreviated Rec.Doc.No.)**

On October 18, 2005, the Commission issued a Notice of Hearing scheduling the hearing for December 13, 2005. **[Rec.Doc.No.2]**

On October 20, 2005, Montana-Dakota filed an Answer and Counterclaim. Montana-Dakota admitted that it intended to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. Montana-Dakota denied its service would interfere with service or facilities of Capital. Montana-Dakota also asserted that the Complaint should be dismissed on the basis that the Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchised authority to provide electric distribution services in the City of Bismarck, including Boulder Ridge. **[Rec.Doc.No.7]**

On November 10, 2005, Capital filed its reply to Montana-Dakota's Counterclaim requesting the Counterclaim be dismissed. **[Rec.Doc.No.10]**

On November 23, 2005, Montana-Dakota filed a Motion to Dismiss the Complaint again asserting that the Commission does not have jurisdiction and asserting that Capital is not authorized to provide service within Boulder Ridge and therefore cannot, as a matter of law, interfere with the services of Capital. **[Rec.Doc.No.12]**

On November 30, 2005, the December 13 hearing was continued. **[Rec.Doc.No.14]**

On December 30, 2005, the Commission issued a Notice of Reschedule Hearing for February 9, 2006. **[Rec.Doc.No.34]**

On February 9, 2006, the Commission held a public hearing to consider the issues identified in its Notice of Rescheduled Hearing. The issues identified for hearing were:

1. Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant.
2. Whether Respondent should be restrained and enjoined from constructing or extending its lines, plant, or system into Complainant's franchised service area.
3. Whether Respondent should remove all of its facilities in the Complainant's service area.

[Rec.Doc.No.34]

At the hearing Montana-Dakota renewed its Motion to Dismiss and moved to voluntarily dismiss its Counterclaim in view of the proceeding in South Central District Court. The hearing officer granted Montana-Dakota's motion to voluntarily dismiss its Counterclaim. **[Transcript, pp 11-21; 64-65.]**

At the hearing, Capital presented evidence consisting of testimony and exhibits. **[Tr. pp 70-110; 137-140; Exhibits C-1 through C-7.]** Montana-Dakota cross-examined Capital's witness. **[Tr. pp 110-129; 140-142.]** Montana-Dakota presented no direct testimony. **[Tr. pp 143-144.]**

(Preliminary statement's summary of post-hearing procedures are omitted from appendix.)

The findings of fact made by the agency are supported by a preponderance of the evidence.

N.D.C.C. § 28-32-46(5)

Having heard and considered this matter, the Commission makes its:

Findings of Fact

1. Capital is an electric cooperative organized under North Dakota Century Code Chapter 10-13 providing electric service to its members in North Dakota. **[N.D.C.C. § 49-03-01.5(4)]**
2. Montana-Dakota is an investor owned electric utility providing electric service to customers in North Dakota under the regulatory jurisdiction of the Commission under Title 49 of the North Dakota Century Code. **[N.D.C.C. § 49-03-01.5(2)]**
3. Boulder Ridge is a subdivision in northwest Bismarck in Section 16 of Township 139 North, Range 80 West, Haycreek Township in Burleigh County. The entire

area of Boulder Ridge is 92.27 acres, subdivided into more than 170 lots. Boulder Ridge is bound on the west by North Washington Street and on the south by 43rd Avenue. **[Complaint, paragraph VI; Answer, paragraph 6; Tr. Pp.76-77; Exhibit C-5.]**

4. In April of 2005, Part of Boulder Ridge 1st Addition was annexed to the City of Bismarck. **[Complaint, paragraph VI; Answer, paragraph 6.]** Both Capital and Montana-Dakota asserted a right to serve Boulder Ridge with electric distribution service. **[Complaint & Answer, in their entirety.]**

5. By resolution dated May 12, 1987, the Board of City Commissioners of the City of Bismarck issued Montana-Dakota a general limited franchise to construct and maintain an electric transmission and distribution system within the City of Bismarck for a period of 20 years. **[Motion Exhibits 1 & 2.]**

6. By resolution dated May 25, 1993, the Board of City Commissioners of the City of Bismarck issued a franchise to Capital to construct and maintain an electric transmission and distribution system within a limited geographic area of the City of Bismarck. The franchise provides the authority granted to Capital is limited geographically to avoid duplication of facilities between Capital and other electric franchises. The geographic limits to the franchise are those that were described in an Area Service Agreement dated July 5, 1973 between Capital and Montana-Dakota as modified by an amendment dated October 25, 1990 and any future amendments. **[Complaint, paragraphs I & II; Answer, paragraphs 1 & 2; Exhibit C-1; Motion Exhibits 1 & 2.]**

7. By letter dated June 26, 2002, Montana-Dakota cancelled the Area Service Agreement with Capital. By terms of the Area Service Agreement, the cancellation became effective June 26, 2003. **[Complaint, paragraph IV; Answer, paragraph 4.]**

8. The Complaint before the Commission was preceded by Montana-Dakota's filing with the Bismarck Board of City Commissioners a Petition to Declare Franchise Rights of Montana-Dakota and Capital Electric to provide electric service to Part of Boulder Ridge First Addition to the City of Bismarck. On November 14, 2005, the Board of City Commissioners issued its Findings, Conclusions, Decision and Order that electric power service to Part of Boulder Ridge Subdivision is properly served by Montana-Dakota, subject to Capital Electric retaining any existing customers. **[Motion Exhibits 1 & 2.]**

9. Capital Electric initiated a Declaratory Judgment proceeding by filing a Complaint dated December 1, 2005 in the District Court, South Central Judicial District, Burleigh County, North Dakota, naming Montana-Dakota, the City of Bismarck, and the Public Service Commission as Defendants seeking a judgment declaring Capital Electric's rights under its franchise to operate an electric distribution system in Bismarck. **[Rec.Doc.No.15.]**

10. On January 30, 2006, the District Court issued its Memorandum Opinion and Order on the City of Bismarck's Motion to Dismiss or in the Alternative for a More Definite Statement and on Montana-Dakota's Motion to Dismiss. The Court stated its opinion that the question of whether Montana-Dakota is operating lawfully under its franchise is one of

franchise interpretation by the City Commissioners, and that only after the City Commissioners have decided the issue, and after resulting appeal, may the Public Service Commission determine whether Montana-Dakota is unreasonably interfering with Capital Electric's operations. The Court acknowledged that the Public Service Commission may have a different opinion concerning the matter. **[Rec.Doc.No.52.]**

11. On March 2, 2006 a hearing on the appeal of the decision issued by the City of Bismarck regarding the franchise rights for electric service to the area was held. The Order on Appeal was issued by the District Court on March 14, 2006, denying Capital Electric's appeal. **[Rec.Doc.No.116.]**

12. A second Order was issued by the District Court on May 30, 2006 granting Montana-Dakota's Motion for Dismissal of Amended Complaint. **[Rec.Doc.No.160.]**

13. Before Boulder Ridge was platted and annexed to the City of Bismarck, Capital was the only provider of electric service in the part of Haycreek Township now named Boulder Ridge. Capital provided electric service to a location in Section 16 since 1949. In 2005 that service extension was removed in preparation for the development of Boulder Ridge. Capital had other services in Section 16, since the mid-1990s, still in place in 2005. Capital had three-phase lines along the west and south sides of Section 16 since 1973, still in place in 2005. **[Complaint, paragraph III; Answer, paragraph 3; Exhibits C-1, C-2, C-3, C-4, C-5 and C-6.]**

14. At the time Boulder Ridge was annexed, Capital's service in the subdivision was limited to two street lights and a CATV booster located in the road right-of-way along 43rd Avenue. Previous service to a pasture well by Capital within Boulder Ridge was abandoned prior to the annexation of Boulder Ridge. **[Tr. Pp. 99-100; 126-28.]**

15. Both Montana-Dakota and Capital extended distribution facilities to serve customer locations within Boulder Ridge. Montana-Dakota constructed its distribution facilities by extending a three-phase feeder line approximately 2,000 feet from a location in French's Addition south of 43rd Avenue and east of Washington Street. Capital extended distribution facilities from its three-phase feeder lines location along Washington Street and 43rd Avenue. Montana-Dakota's extension of its underground feeder line crossed Capital's overhead feeder line along 43rd Avenue. Montana-Dakota was in the process of installing its facilities at the time Capital began installing its facilities. **[Tr. Pp. 94-97; 102-03; 119; Exhibit C-5.]**

16. Capital has a three-phase framework around the area of Capital's northwest Bismarck service area, served from 4 different substations. Capital's facilities nearest to Boulder Ridge are three-phase facilities immediately contiguous to Boulder Ridge along the west side of Section 16 (east of Washington Street) and along the south side of Section 16 (North of 43rd Avenue) of Haycreek Township. Capital's three-phase facilities were in place before Boulder Ridge was platted and before part of Boulder Ridge was annexed to the City of Bismarck. The facilities were also in place before Montana-Dakota extended its facilities to provide electric distribution services in Boulder Ridge. **[Tr. Pp.77, 87, 91-108; 93-103; Exhibits C-2, C-3, C-4; C-5 and C-6.]**

17. Capital's feeder lines located along 43rd Avenue and Washington Street were built prior to 1973 to tie together Capital's substations at other locations. The use of these feeder facilities has not changed in the last 20 years. **[Tr. Pp. 74-77; Exhibit C-2.]** Prior to 1973, Capital did not have a franchise with the City of Bismarck or an Area Service Agreement with Montana-Dakota. **[Motion Exhibits 1 & 2.]**

18. Capital has substantial facilities within the corporate limits of Bismarck and within a two-mile radius of Boulder Ridge and in the area designated as "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement. **[Transcript, Pages 104-08; 113-16 Exhibits C-4, C-5 and C-6.]**

19. Capital is the only provider of electric service in areas outside the corporate limits of Bismarck within a two mile radius of Boulder Ridge. **[Exhibit C-6.]**

20. Capital included "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement in its long range plans and has made substantial investments to serve it. Capital has invested in excess of 7 million dollars in the area northwest of Bismarck, west of Highway 83, including Boulder Ridge. These facilities were planned and constructed to provide an electric system for new developments, such as Boulder Ridge. **[Transcript, Pages 104-08; 113-16 Exhibits C-4, C-5 and C-6]**

21. Capital's framework is a reliable system of substations and distribution lines that can be operated in a looped fashion. In the event of an outage, Capital can provide looped service to Boulder Ridge. Capital's three-phase framework in the area northwest of Bismarck, west of Highway 83, is supplied from four different substations, the closest of which is within one mile of Boulder Ridge. Capital's system includes a 5th delivery substation under construction. **[Transcript pp. 87, 91, 104-08; Exhibits C-4 and C-6.]**

22. Montana-Dakota's facilities nearest to Boulder Ridge are in the southerly part of French's 1st Addition, approximately ½ mile from the southerly boundary of Boulder Ridge. It is off these facilities that Montana-Dakota extended its facilities to Boulder Ridge. Montana-Dakota has no other facilities closer to Boulder Ridge. Montana-Dakota's facilities in Boulder Ridge cannot be operated in a looped fashion in the event of an outage. **[Tr. Pp 87, 93-97, 108-09; Exhibits C-1, C-3, C-4, C-5, and C-6.]**

23. Montana-Dakota's extension of facilities into Boulder Ridge crossed Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge and Montana-Dakota's extension of its facilities ran parallel to Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge. **[Tr. Pp 93-97; 102-03; Exhibit C-5.]**

24. Boulder Ridge is entirely surrounded by areas served by Capital. **[Exhibits C-4, C-5 and C-6.]**

25. The Commission finds Montana-Dakota's extension of its facilities crossing and running parallel to Capital's facilities in the northerly part of original French's 1st Addition, crossing 43rd Avenue into Boulder Ridge, and crossing and running parallel to

Capital's facilities on the north side of 43rd Avenue, interferes with and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital. [Tr. Pp 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier. The Commission has consistently held that one electric supplier crossing the line of another electricity supplier to provide service to a customer indicates a wasteful duplication of facilities. Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 30, citing Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990).

26. The Commission finds that service by Capital would best promote and serve orderly and economic development of electric service in the Boulder Ridge subdivision. Capital is able to extend service to Boulder Ridge through a shorter extension at a lower cost. Service by Capital to Boulder Ridge will not result in checker boarding of customers served by Montana-Dakota and Capital. [Tr. Pp. 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor to be considered in determining whether duplication of facilities has occurred is whether construction of service to a customer from one supplier exceeds the cost to extend service to that same customer from a second supplier. Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Findings No. 28 and 29. In the Boulder Ridge case, MDU's cost to extend its facilities approximately ½ mile through French's 1st Addition and across 43rd Avenue to Boulder Ridge exceeds Capital's cost to extend service "zero" feet from its existing facilities in Boulder Ridge. MDU's cost to extend service to Boulder Ridge would be greater than Capital's cost because its existing facilities are approximately ½ mile further from Boulder Ridge and MDU would need to cross 43rd Avenue to make the extension.

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier, resulting in "checker boarding." Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28.

27. The Commission finds Montana-Dakota's extension of its facility to Boulder Ridge, an area not contiguous to Montana-Dakota's existing service areas, would create a checkerboard of service areas. [Tr. Pp 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier, resulting in "checker boarding." Montana-Dakota Utilities Co. Public

Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28.

28. The Commission finds Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework, and system. *[See findings 13 through 27 and references to the evidence that support those findings.]*

The words of PSC Order Finding No. 28, that Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework and system, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 20), affirmed by Northern States Power Co. v Public Service Commission, 451 N.W.2d 340 (ND 1990).

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. 49-03 were established in Application of Otter Tail Power Co, 169 N.W.2d 415 at 418 (ND 1969). These include “which of the proposed suppliers will be able to serve the area more economically” and “which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.” Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d at 188, note 1.

29. The Commission finds Montana-Dakota’s extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital. *[See findings 13 through 28 and references to the evidence that support those findings.]*

The words of PSC Order Finding of Fact No. 29, that Montana-Dakota’s extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 22), affirmed by Northern States Power Co. v Public Service Commission, supra.

From the foregoing Findings of Fact, the Commission makes its:

Conclusions of Law

The conclusions of law of the agency are supported by its findings of fact. N.D.C.C. § 28-32-46(6).

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. The Commission has jurisdiction under North Dakota Century Code Section 49-03-01.4 to hear and determine the Complaint of Capital alleging Montana-Dakota's extension of its electric distribution lines to Boulder Ridge is a violation of North Dakota Century Code Section 49-03-01.3. Section 49-03-01.3 states:

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity. Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission.

Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof whose places receiving service are located outside the corporate limits of a municipality on July 1, 1965; provided, however, that within ninety days after July 1, 1965, any electric public utility furnishing service to customers whose places receiving service are located outside the corporate limits of a municipality shall file with the commission a complete map or maps of its electric distribution system showing all places in North Dakota which are located outside the corporate limits of a municipality and which are receiving its service as of July 1, 1965. After ninety days from July 1, 1965, unless a customer whose place being served is located outside the corporate limits of a municipality is shown on said map or maps, it shall be conclusively presumed that such customer was not being served on July 1, 1965, and cannot be served until after compliance with the provisions of section 49-03-01.1.

Conclusion of Law No. 1 is an accurate recital of the cited statutes.

2. The City of Bismarck has the power to regulate the franchises of any public utility within the City of Bismarck under Article VII, Section 11 of the North Dakota Constitution. Article VII, Section 11 states: "The power of the governing body of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly." Under Article 3, Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck City Commission is the franchising authority for both Capital and Montana-Dakota for all public areas within the City of Bismarck and the City Commission has the authority to decide questions regarding the franchises issued by it.

The second sentence in Conclusion of Law No. 2 is an accurate recital of the provisions of the North Dakota Constitution. Article VII, § 11. The other two

sentences are legal opinions that are beyond the PSC's jurisdiction (see conclusion of law no 4), but within its privilege to comment. See Johnson v Elkin, 263 N.W.2d 123, at 127 (ND 1978).

3. Section 10-11-01 of the Bismarck City Ordinances prohibits the placement or maintenance of an electric distribution system in, over, upon or under any street or public place within the City of Bismarck without a franchise granted by resolution of the Bismarck Board of City Commissioners.

Conclusion of Law No. 3 is an accurate description of the cited ordinance.

4. The Commission's jurisdiction is limited to matters delegated to it by the North Dakota Legislature under North Dakota Century Code Title 49. The Commission does not have jurisdiction regarding the franchise under Article VII, Section 11 of the North Dakota Constitution.

Conclusion of Law No. 4 is a correct statement of the law. The jurisdiction of the PSC is limited.

"The PSC has only the powers and duties conferred upon it by the Legislature. N.D. Const., Art. V, §§ 12,13." Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 at 589 (ND 1995).

"The Public Service Commission is a constitutional body having only such powers and duties as are prescribed by law." Public Service Commission v Montana-Dakota Utilities Co. 100 N.W.2d 140 (ND 1959) (Court Syllabus No. 1.)

"The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1958) (Court Syllabus No. 6.)

". . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123, at 126 (ND 1978).

5. Under the general provisions of North Dakota Century Code Section 49-03-01 and 49-03-01.3, an electric public utility must obtain from the Commission a certificate of public convenience and necessity authorizing construction or operation of a public utility plant or system, but a new certificate is not required for each and every extension of its electric distribution lines within the corporate limits of a municipality within which it has lawfully commenced operations.

Conclusion of Law No. 5 is an accurate recital of the cited statutes.

6. The question of which electric suppliers' facilities are actually duplicative or wasteful is one of fact for the Commission to determine. In making the determination, the Commission considers which supplier is better able to serve the area due to the nature and extent of existing facilities in the area, whether the electric public utility's extension into the area would constitute an unreasonable duplication of capital intensive facilities and services already provided by the rural electric cooperative and which would best promote orderly and economic development of electric service. The Commission must look at the existing electric facilities that Capital and Montana-Dakota have in place and determine whether extension of Montana-Dakota's services to Boulder Ridge would constitute an unreasonable duplication of capital intensive services already provided by Capital.

Conclusion of Law No. 6 is an accurate recital of the controlling precedents. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 at 187 and Northern States Power Co. v Public Service Commission, 451 N.W.2d 340 at 342 and 345.

7. Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, through French's 1st Addition, and across 43rd Avenue and across Capital's facilities interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, under North Dakota Century Code Section 49-03-01.3. There is no evidence in the record upon which to base an ultimate decision that Montana-

Dakota can serve the Boulder Ridge area without wasteful duplication of investment or service.

Montana-Dakota presented no direct testimony. [Tr. pp 143-144.]

Conclusion of Law No. 7 is supported by findings of fact 1 through 29, particularly including but not limited to findings 13 through 29. Conclusion of Law No. 7 is in accordance with law, N.D.C.C. § 49-03-01.3 and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra.

The words of Conclusion of Law No. 7, that Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (conclusion no. 3), affirmed by Northern States Power Co. v Public Service Commission, supra.

8. Under North Dakota Century Code Chapter 49-03, Montana-Dakota should cease and desist from providing electric services to Boulder Ridge Addition.

Conclusion of Law No. 8 is supported by findings of fact 1 through 29, particularly including but not limited to findings 13 through 29. Conclusion of Law No. 8 is in accordance with law, N.D.C.C. §§ 49-03-01.3, 49-03-01.4, 49-03-05, and

controlling precedents, *Cass County Electric Cooperative v Northern States Power Co. supra.* and *Northern States Power Co. v Public Service Commission, supra.*

9. Under North Dakota Century Code Section 49-03-01.4, the Commission may prescribe reasonable terms and conditions in addition to the restraint imposed. It is reasonable and proper to require Capital to purchase from Montana-Dakota and to require Montana-Dakota to sell to Capital, at book value, the distribution facilities currently located in and used by Montana-Dakota to serve part of Boulder Ridge 1st Addition, to the extent not duplicated by and compatible with Capital's system.

Conclusion of Law No. 9 is an accurate recital of the cited statute. See also N.D.C.C. § 49-03-05. Conclusion of Law No. 9 is an accurate recital of controlling precedents. The words of Conclusion of Law No. 9, that it is reasonable and proper to require Capital to purchase and to require Montana-Dakota to sell distribution facilities, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (conclusion no. 7), affirmed by Northern States Power Co. v Public Service Commission, supra.

10. Under North Dakota Century Code Section 49-03-01.3 and precedents of the Commission the North Dakota Supreme Court, the Commission should not take a narrow view of its jurisdiction, particularly in view of the presumption of the constitutionality of the statutes under which it operates.

Conclusion of Law No. 9 is an accurate recital of controlling precedents and statutes. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d at 187 and Northern States Power Co. v Public Service Commission, 451 N.W.2d at 342. Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967). N.D.C.C. § 1-02-38.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes its:

Order

The order is in accordance with the law.

The order does not violate the constitutional rights of the appellant.

The order of the agency is supported by its findings of fact.

N.D.C.C. § 28-32-46(1)(2) & (6).

The Commission Orders:

1. Within 30 days after the date of this Order Montana-Dakota shall cease and desist from providing electric service to Boulder Ridge 1st Addition to the City of Bismarck and from further extending its electric service in that area.

Order No. 1 is supported by findings of fact 1 through 29. Order No. 1 is in

accordance with law, N.D.C.C. §§ 49-03-01.3, 49-03-01.4, 49-03-05, and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra.

2. Montana-Dakota shall offer to sell to Capital, and Capital shall purchase from Montana-Dakota, at book value, the distribution facilities located in and used by Montana-Dakota to serve Boulder Ridge First Addition, to the extent compatible with Capital's system and not constituting an unnecessary duplication of Capital's facilities.

Order No. 2 is in accordance with law, N.D.C.C. §§ 49-03-01.4 and 49-03-05. The words of Order No. 2, requiring Capital to purchase and Montana-Dakota to sell distribution facilities, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (order no. 2), affirmed by Northern States Power Co. v Public Service Commission, supra.

3. So that users of electricity in Boulder Ridge First Addition shall not be without service, Montana-Dakota may continue to provide service beyond the 30 days referenced in ordering paragraph 1 until Capital can begin providing service.

Order No. 3 is in accordance with law, N.D.C.C. §§ 49-03-01.4 and 49-03-05. The words of Order No. 3, assuring that users of electricity in Boulder Ridge shall not be without service, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (order no. 3), affirmed by Northern States Power Co. v Public Service Commission, supra.

4. Montana-Dakota's Motion to Dismiss Capital's Complaint is DENIED.

Order No. 4 is in accordance with the law under N.D.C.C. § 49-03-01.3 and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra. Neither N.D.C.C. § 49-03-06(8) nor North Dakota Constitution, Article VII, § 11 or Article XII, § 10 limits the jurisdiction conferred on the Commission by the Legislature's enactment of N.D.C.C. §§ 49-03-01 through 49-03-05. MDU has no rights under North Dakota Constitution, Article VII, § 11 or Article XII, § 10. Application of Otter Tail Power Co. 451 N.W.2d 95 (ND 1990). The PSC Order does not violate MDU's right of substantive due process. Johnson v Elkin, 263 N.W.2d 123, at 126-27 (ND 1978) and Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967).