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September 18, 2006

Ms. Debra Simenson
Clerk of the District Court
Burleigh County
P.O. Box 1055
Bismarck, ND 58502-1055

Re: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. v. North Dakota Public Service Commision and Capital Electric Cooperative, Inc.
Civil No. 06-C-1177

Dear Ms. Simenson:

Enclosed is Reply Brief of Montana-Dakota Utilities Co., together with Affidavit of Service.

Thank you for your attention to this matter.

Very truly yours,

PEARCE & DURICK

By

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JCK/ef
Enclosure
cc. (w/encl.) Carol Larson
(w/encl.) William W. Binek
(w/o encl.) Hon. Donald L. Jorgensen

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. Appellant, vs. North Dakota Public Service Commission and Capital Electric Cooperative, Inc. Appellees	CIVIL NO. 06-C-1177 REPLY BRIEF OF MONTANA-DAKOTA UTILITIES CO.

INTRODUCTION

The appellee briefs of both the Public Service Commission ("PSC") and Capital Electric Cooperative, Inc. ("CEC") are based on the premise that Montana-Dakota Utilities Co. ("MDU") violated the Territorial Integrity Act ("TIA") by constructing a line extension that allegedly duplicated facilities of CEC in the area. From this premise the PSC and CEC argue that statutory and constitution provisions protecting a municipality's authority to franchise public utilities should not override the purpose of the TIA in preventing wasteful duplication of capital intensive facilities. The premise that MDU violated the TIA begs the question of this appeal. If the TIA is correctly interpreted and applied in a manner that recognizes MDU's franchise to serve Boulder Ridge, and the lack of such a franchise by CEC, there is no violation of the TIA as CEC does not have the legal right to provide electric service in Boulder Ridge. Neither the PSC nor CEC has shown the PSC was free to disregard the City of Bismarck's franchise in determining whether MDU's extension of service to Boulder Ridge interfered with or unreasonably duplicated the non-existent services of CEC.

A. THE PSC'S ORDER NOT IN ACCORDANCE WITH THE LAW

1. Duplication of Facilities is not a Per Se violation of the TIA.

Both the PSC and CEC imply that any extension of facilities by MDU within the City of Bismarck that duplicates facilities of CEC is prohibited by the Territorial Integrity Act ("TIA") because it is contrary to the frequently stated purpose of the TIA of preventing wasteful duplication of capital intensive facilities. CEC even suggests MDU is effectively required to obtain a Certificate of Public Convenience and Necessity whenever an extension of its facilities is challenged by a cooperative.[1] The TIA does not prohibit every duplication of facilities and a duplication of facilities is not a per se violation of the TIA. The Supreme Court has recognized the TIA's purpose of preventing of wasteful duplication is not always accomplished because the statute is not a comprehensive regulatory scheme. See Northern States Power Company v. North Dakota Public Service Commission, 452 N.W.2d 340, 2 44 (N.D. 1990); Capital Electric Cooperative, Inc. v. Pubic Service Commission, 534 N.W.2d 587 (N.D. 1995).[2]

The PSC and CEC arguments gloss over the language of N.D.C.C. § 49-03-01.3 and equate duplication of facilities with unreasonable duplication of services. Section 49-03-01.3 doesn't refer to or prohibit duplication of facilities. Rather its' prohibition is to

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[1] This argument was specifically rejected by the Supreme Court in Cass County Electric Cooperative v. N.S.P., 419 N.W.2d 181, 188 (N.D. 1988). Moreover, a certificate of PC&N is not required of a public utility to provide service within a municipality in which the utility has lawfully commenced operations. N.D.C.C. § 49-03-01. MDU and its predecessor companies have continuously provided service within the City of Bismarck since prior to the enactment of Chapter 49-03.

[2] The PSC and CEC decry the checkerboarding that may occur if the PSC's decision is not upheld and CEC is not allowed to be the exclusive provider of electric service in newly annexed areas to the City. Unless a cooperative is required to surrender its services to its existing customers in newly annexed areas, which was the situation in Bismarck until CEC requested and received its first limited franchise in 1973, checkerboarding in newly annexed areas served by a public utility is a natural result of the TIA's current restriction that prevents public utilities from extending service in new growth areas outside a city without a certificate of PC&N.

interference with existing services and unreasonable duplication of services.[3] While facilities are a component of services, they are not in themselves services. The TIA allows MDU to extend its facilities anywhere within the City and duplicate the facilities of CEC unless the extension interferes with CEC's existing services or the PSC determines the duplication of services is unreasonable. The PSC's determination of unreasonableness, however, must be supported by a preponderance of the evidence. Neither the PSC nor CEC argues that MDU's extension of facilities in Boulder Ridge interferes with CEC's existing services as CEC continues to provide the services it has always provided and uses its facilities in the way it has always used them. Rather, they argue MDU's extension of facilities is an unreasonable duplication from a global perspective because CEC constructed a patchwork of facilities in the area prior to the annexation of Boulder Ridge and therefore MDU is precluded from providing service in the annexed area notwithstanding that it holds the only franchise from the City of Bismarck to provide electric service within the subdivision. MDU's extension of facilities to provide services within Boulder Ridge, however, can not be deemed an unreasonable duplication of CEC's services if CEC is not and cannot offer the services provided by MDU within the subdivision.[4]

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[3] Compare N.D.C.C. § 49-03-01.3 with N.D.C.C. § 49-03-01 which prohibits extensions which interfere with "the service or system" another public utility or electric corporation. (Emphasis added)

[4] The PSC and CEC, support their positions by painting a threat that MDU's extension of service to Boulder Ridge will negatively impact other customers through increased rates resulting from this extension. There is absolutely no evidence in the record that this relatively short line extension to serve the entire Boulder Ridge subdivision will negatively impact other customers. Indeed, the impact of the PSC's order in preventing MDU to extend its system to new growth areas is much more likely to negatively impact MDU's existing customers. The PSC's and CEC's unsupported assertion is inappropriate argument in this appeal. The feigned concern for MDU's customers is particularly ironic coming from CEC which has not hesitated to construct wasteful and duplicative facilities to the economic detriment of its customers to get a "leg-up" in the application of the TIA. See Capital Electric Cooperative v. Public Service Commission, 534 N.W.2d 587, 593 (N.D. 1995)

2. CEC cannot provide electric service in Boulder Ridge without a franchise.

To determine if MDU's extension of facilities is an unreasonable duplication of CEC's services requires a threshold determination that CEC can provide electric services within Boulder Ridge. MDU's extension of facilities cannot, as a matter of law, constitute an unreasonable duplication of facilities if CEC is legally unable to provide services in Boulder Ridge.

Neither the PSC nor CEC dispute that Bismarck City Ordinance 10-11-01 requires a franchise from the City of Bismarck to provide utility service in Boulder Ridge. They both dismiss this franchise obstacle by suggesting the objective of the TIA should control over this City ordinance. There is nothing within the TIA, however, that allows CEC to provide services within Boulder Ridge without a franchise from the City. Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971) holds the opposite.

The PSC and CEC attempt to distinguish Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra by arguing the complaint in Divide County was brought in District Court and not before the PSC under the TIA. The Divide County case is essentially a mirror image of this case. The complaint in Divide County was brought in District Court to protect MDU's franchise service territory in the annexed area of the City of Crosby. The complaint was brought in District Court because the PSC has no jurisdiction over RECs and therefore MDU's complaint to prevent interference and duplication of its services could not be brought before the PSC. A public utility's right to bring an action in District Court for protection of its service area was recognized in

Montana-Dakota Utilities Co. v. Johannson, 153 N.W.2d, 414, 422-423 (N.D. 1967) in which the Court held the TIA gives a public utility the right to bring an action in District Court against cooperatives which unreasonably interfere with the customers of the public utility or encroach upon its territory. In Divide County, the majority rejected the arguments offered by Justice Paulson in dissent, which are the same arguments made by CEC in this proceeding; that is that N.D.C.C. § 49-03-01.3 allows a cooperative to continue service in a rural area that is annexed to a city even without a franchise from the City. Id. at 737.

If CEC had refused to comply with the City of Bismarck's order of November 14, 2005 in determining that Boulder Ridge was within MDU's and not CEC's franchised service area, MDU could have and would have maintained an action in District Court to prevent CEC's interference with MDU's service territory. That action would have been determined based upon the precedent of Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra. Before the City Commission reached its decision, however, CEC initiated its complaint before the PSC essentially raising the same issue as to who is entitled to serve Boulder Ridge. The outcome of a court action or administrative proceeding to determine the proper provider of electric service within an annexed area of the City should be the same regardless of the forum where the action is brought.

CEC's suggestion that the TIA gives it the right to serve "rural areas" that are annexed to the City without a franchise confuses its corporate ability as a REC to provide service within an annexed area with the municipal authority to provide such service. As a REC, CEC is allowed to provide service to its members in "rural areas"

and to a limited number of customers that are not located within a rural area. See N.D.C.C. Chap. 10-13. In Cass County Electric Coop v. Northern States Power, 419 N.W.2d 181, 185 (N.D. 1988), the Court held the organizational statute for cooperatives at N.D.C.C. 10-13-04 does not prohibit a REC from continuing to provide electric service within a "rural area" after annexation by a city. That ruling, however, does not overturn the holding in Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra, that the cooperative nonetheless needs a franchise from the City to provide service in the annexed area. Just as MDU has the corporate ability but nonetheless needs a franchise to provide service within a municipality, CEC likewise needs such a franchise.

CEC's position that the TIA entitles it to serve within a municipality is also inconsistent with even the earliest interpretations of the Act. The Supreme Court has recognized the TIA was enacted at the urging of rural electric cooperatives to prevent "pirating" in rural areas. Capital Electric Cooperative v. Public Service Commission, supra at 590. In 1967 legislation was proposed to repeal the TIA enacted in 1965. Clarence Welander, President of the North Dakota Association of Rural Electric Cooperatives, testified on behalf of the Association against the proposed legislation before the House Industry, Business and Labor Committee:

> I ask each of you to please remember that we aren't even asking to compete in a wide-open ball game. We can't and don't want to go into the cities. We just want to play the game by fair rules in the rural areas that we developed.

Attachment 1.

The 1967 Legislature did not pass the proposed bill but instead passed House Concurrent Resolution "B-2" which created an interim committee to study the issue.

The report of this special committee, which included Mr. Welander as one of two representatives of the RECs on the committee, was printed in the 1969 House Journal. The report included the following description of the position of the cooperatives regarding any changes to the TIA:

> Any change in the present Act is opposed by this group until such time as inequities exist which in their opinion require revision of the law. They point to the North Dakota Supreme Court decisions interpreting the present law as clearly indicating that cooperatives are given a preference over public utilities in the furnishing of service outside the corporate limits of municipalities. Thus, the law has created two territorial jurisdictions in their viewpoint – franchised areas within municipalities which are to be served by the public utilities, and nonfranchised areas outside of municipalities which are to be served by cooperatives.

Attachment 2, March 17, 1969 House Journal at 1419.

Without conceding it is required to have a franchise to provide electric service within Boulder Ridge, CEC offers two specious arguments that it has such authority. First, it says it has a franchise from the City notwithstanding the franchise is a limited franchise which the City Commission has determined does not extend to Boulder Ridge. COR 95. CEC's limited franchise to serve certain subdivisions within the City of Bismarck other than Boulder Ridge has no more relevance to the issues in this case than a franchise to serve the City of Lincoln.

CEC also argues the City Commission's order of November 14, 2005 is not final and therefore should not be considered by the Court because the order is currently on appeal by CEC to the Supreme Court. The City Commission's order and the District Court's judgment affirming the City Commission's order are final orders or they could not have been appealed to the Supreme Court. N.D.C.C. § 28-27-01; In re A.B. and M.B., 2005 N.D. 216, ¶ 5, 707 N.W.2d 75. The City's order defines the scope of CEC's

limited franchise and is effective unless and until it is reversed by the Supreme Court. The PSC considered delaying its decision in this proceeding pending the outcome of the final appeal of the City Commission's decision. COR 119. CEC objected and demanded the PSC issue its order so it could be reviewed on appeal rather than await the outcome of any appeal of the City Commission's order. COR 126. CEC convinced the PSC to "skip over" the franchise issue because this was an issue to be decided by the courts and not the PSC. COR 126 at p. 17. CEC can hardly complain that the PSC accepted CEC's demand. Accordingly, the Court must decide the appeal of the PSC's order based upon the current state of the record which reflects the City Commission's order is final and effective.

3. Statutory and Constitutional limitations required the PSC to consider the franchise from the City of Bismarck.

Constitutional and statutory provisions also establish the TIA does not and cannot allow CEC to provide service in Boulder Ridge without a franchise from the City. N.D.C.C. § 49-03-06(8) clearly states that nothing within the TIA shall be construed to limit the City's franchise authority. The plain language of this recent statutory provision confirmed, contrary to the positions of the PSC and CEC, the TIA does not provide an exception to the City's ordinance that utility service cannot be provided within the City without a franchise. The PSC and CEC, however, go to some length arguing N.D.C.C. § 49-03-06(8) does not mean what it says. These arguments ignore the most basic principle of statutory construction that a statute must be interpreted in accordance with its plain language.

Although the PSC and CEC argue the PSC was required to follow legislative intent in interpreting § 49-03-06(8), legislative intent is first sought from the language of the statute. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 833 (N.D. 1995). When statutory language is clear and unambiguous, it cannot be disregarded as legislative intent is presumed to be clear from the face of the statute. Id. There is nothing ambiguous about N.D.C.C. § 49-03-06(8). The statute is a clear statement by the Legislature that nothing within Chapter 49-03 can be interpreted in any manner that would interfere with the right of a city to franchise electric service areas within the city. The statute prohibits construing Chapter 49-03 in the manner argued by the PSC and CEC such that a determination of interference or duplication by the PSC under N.D.C.C. § 49-03-01.3 overrides the franchise authority of a city by either precluding a public utility from exercising its franchise authority or by allowing a cooperative to provide service in an area without a franchise. The statute is legislative confirmation the PSC's authority under the TIA does not confer the right to encroach on a City's right to franchise utility service areas. This confirmation is also consistent with the interpretation of the TIA as stated by the Association of Rural Electric Cooperatives. See appendices 6 and 7 to MDU's appellant's brief.

As noted by the PSC and CEC, the amendments to Chapter 49-03 adopted during the 2005 Legislative session, including § 49-03-06, allow public utilities and rural electric cooperatives to negotiate area service agreements subject to the approval of the PSC. The legislative amendments were carefully scrutinized by the interested parties and the language in N.D.C.C. § 49-03-06(8) that nothing in Chapter 49-03 can be construed to limit a municipality's franchise authority was not an oversight or a

drafting error. The language makes clear that area service agreements adopted by the affected providers and approved by the PSC are nonetheless subordinate to the franchise authority of a municipality to determine service providers within its corporate limits. The language also makes clear that municipalities remain the authoritative body for determining service areas within their corporate limits consistent with the North Dakota Constitution, the precedent of the North Dakota Supreme Court, and the position repeatedly stated by the North Dakota RECs. The argument of the PSC and CEC that 49-03-06(8) does not operate as a limitation on § 49-03-01.3 despite its plain language to the contrary is precisely the argument that 49-03-06(8) was designed to prevent. The application of subsection 8 to the entirety of Chapter 49-03 was intended to prevent an argument that the limitation only applied to area service agreements under N.D.C.C. § 49-03-06 and therefore by implication the other provisions of Chapter 49-03 were not limited by a municipality's franchise authority. Subsection 8 did not introduce a new principle but confirmed previous interpretations, as well as the enactment of N.D. Const. art. VII, § 11, that a municipality's authority to franchise is a limitation upon all the provisions of Chapter 49-03. The statute is neither ambiguous nor is in conflict with N.D.C.C. § 49-03-01.3. Two statutes cannot be harmonized to by ignoring the plain language of one of the statutes that is a specific limitation on the other.

In addition to the TIA's internal limitation at § 49-03-06(8), N.D. Const. art VII, § 11 also prohibits an interpretation and application of the TIA in a manner that would either allow CEC to serve Boulder Ridge without a franchise or prohibit MDU from exercising its franchise. CEC and the PSC adopt a condescending position that the City

of Bismarck cannot be entrusted with the power to designate public utility service areas within its boundaries and only the PSC is capable of making such decisions for the City. The people of North Dakota, through the adoption of N.D. Const. art. VII, § 11, have said otherwise. The history of this constitutional provision, from which MDU quoted extensively in its brief, clearly shows the drafters of the provision intended that a city's issuance of a utility franchise pre-empted anything to the contrary in the TIA. CEC no longer refutes this legislative history but now suggests the history is irrelevant because the constitutional provision was not adopted until 10 years after it was drafted. The plain language of the constitutional provision, however, did not change over that time; nor did its purpose. CEC is grasping at straws to support the PSC's decision in the face of this constitutional limitation of legislative power.

Contrary to arguments of CEC and the PSC that the Constitutional provision elevated the City's police power over that of the Legislature, the Constitution limited the exercise of this police power within the boundaries of a city to the governing body of the city. The suggestion by the PSC and CEC that the people of North Dakota, through their constitution, cannot create such a limitation upon the powers of the Legislature is without merit. In the same manner that the PSC is an agency of the State, cities are also agencies of the State. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197, 204 (N.D. 1957). The power to grant franchises to use the streets of a municipality resides with the Legislature except when the Constitution requires consent from the municipality. Id. The North Dakota Constitution not only requires such consent, it specifically restricts the Legislature from enacting laws that would interfere with or nullify a city's franchise of public utilities. Id. As stated by the Court in City of Grafton, these

constitutional provisions are "a limitation upon the sovereign power of the state." Id. at 205. Under North Dakota's Constitution, the franchising of utility service areas can only be exercised by municipalities as agencies of the State and cannot be delegated by the Legislature to the PSC.

The PSC in its brief concedes that CEC must ultimately obtain a franchise from the City of Bismarck to provide service within Boulder Ridge. This is an important concession from two aspects. First, recognition that CEC needs but does not have a franchise to provide service within Boulder Ridge is directly contrary to the PSC's determination that MDU's extension of facilities is an unreasonable duplication of CEC's services. Second, the PSC asserts its decision "puts the ball in the city's court." In other words, the City can either issue a franchise to the service provider selected by the PSC or the citizens within Boulder Ridge can go without electric service. Any reasonable observer would conclude the PSC's interpretation of its authority under the TIA in a manner that imposes this Hobson's choice on the City is in direct conflict with both the statutory and constitutional provisions prohibiting the TIA from interfering with a city's right to franchise utility service.

The PSC contends the City's right to grant franchises does not give the City "the right to circumvent or violate state laws" designed to prevent interference or duplication of facilities. As a matter of constitutional law, a city's right to franchise cannot violate the TIA. The PSC only has such power as has been conferred upon it by the Legislature. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197, 202 (N.D. 1957). The Legislature is prohibited by the Constitution from conferring any power on the PSC that would interfere with the authority of a municipality to franchise electric

service. To the extent there is any conflict between the City's right to franchise electric services and the PSC's authority to prevent duplication of electric facilities, North Dakota statutes and Constitution unequivocally resolve the conflict in favor of the City. The PSC argument also again begs the question of whether MDU's extension of service violated the TIA. By providing a service in accordance with a franchise issued by the City, MDU did not interfere with or unreasonably duplicate services CEC cannot provide within the franchised area.

In its attempt to frame the issues in a manner that might support the PSC's order, CEC repeatedly argues MDU has not met the requirements to declare the TIA unconstitutional. As noted in its initial brief, MDU has not asserted before the PSC or this court that the TIA is unconstitutional. Rather, MDU contends the TIA must be interpreted in a manner that respects the rights of the City to franchise electric service areas within its boundaries so as to prevent a conflict with the constitutional provisions that prohibit interference with such franchise authority. N.D.C.C. § 1-02-38; City of Bismarck v. Nassif, 449 N.W.2d 789, 794 (N.D. 1989) (Courts will construe statues so as to harmonize their provisions with the Constitution it if is possible to do so); Grand Forks Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987). To determine the public policy of the State, the Court must look first to the State Constitution. See Continental Casualty Company v. Kinsey, 499 N.W.2d 574, 580 (N.D. 1993). There is a substantial difference between MDU's position that the TIA must be interpreted in a manner to avoid conflict with constitutional provisions and an argument that the statute is unconstitutional and therefore void under any interpretation. It is CEC that seeks interpretation of the TIA such that it would run afoul of the constitutional provisions

protecting a city's right to franchise public utilities. MDU agrees that if the TIA is interpreted in the manner urged by CEC that the PSC ignore and override a City's determination of franchised utility service areas, then that section of the TIA would be unconstitutional. As MDU has argued throughout this proceeding, however, that is an incorrect interpretation of the TIA.

The only authority relied upon by the PSC and CEC to support the PSC's decision are the South Pointe cases. The PSC states the only real difference between the South Pointe cases and this case is that in South Pointe the public utility and the cooperative both had franchises to provide services in the annexed area so the question of general franchise versus limited franchise was not addressed. That difference, however, is what this case is all about because CEC, unlike the cooperative in South Pointe, does not have authority to provide service in the annexed areas. The Court in South Pointe specifically determined as a threshold issue that the cooperative had authority from the City of Fargo to provide service in the annexed area.

The PSC's brief states that notwithstanding the South Pointe cases, a plain reading of the law is that the existence of a franchise is not a threshold requirement under the TIA. This argument like other parts of the PSC's brief is disturbing for several reasons. First, the argument ignores both the statutory limitation of N.D.C.C. § 49-03-06(8) and the constitutional limitation of Const. art. VII, § 11 which clearly make the franchise a threshold issue. Second, notwithstanding its initial statement that its brief would be limited to a discussion of the rationale for the PSC's decision and that factual and legal arguments would be left to the parties, the PSC's brief goes far beyond the rationale of the PSC and takes adversarial legal positions and arguments that were

neither stated nor addressed in the PSC's order.[5] Finally, while the PSC's counsel argues that under a plain reading of the law the existence of a franchise is not a threshold requirement under the TIA, counsel made the opposite argument in advising the PSC during the course of the PSC proceeding. In its brief in support of a continuance the PSC's counsel stated:

> Commission Staff ("Staff") position is that a threshold issue to a determination by the Commission of the issues relating to interference is the determination of which company, MDU or Capital Electric, has the right under the franchise from the City of Bismarck to provide electric service to Part of Boulder Ridge First Addition. All parties agree that the question of franchise rights is not one that can be determined by the Commission. That issue is presently before the District Court.
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> . . . The franchise right to provide service to the area is a critical component to an electric provider's ability to provide electric service to the area and is a factor that Staff believes must be considered in determining under N.D.C.C. § 49-03-01 whether an electric provider is interfering or is about to interfere unreasonably with the service or system of another electric provider. North Dakota law clearly gives municipalities the authority to issue franchises to providers of electric service and to require an electric provider to obtain a franchise prior to providing electric service within the municipality. It is also clear under law that only the municipality can decide who should have a franchise.
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> . . .
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> . . . The franchise issue is a critical component of this proceeding and is a threshold issue. No matter what the Commission may consider regarding infrastructure that is in place or other factors that pertain to a determination of interference under N.D.C.C. § 49-03-01, Capital Electric must have a franchise from the City of Bismarck to provide service to the area.

COR 120, p. 3-4. While MDU appreciates the unenviable position of PSC counsel in defending an order on appeal that it is contrary to advice counsel previously

[5] As example of this improper argument, the PSC states in its brief "that the actions by the City of Bismarck up to this time not only encouraged but required CEC to build facilities to serve new annexed areas." The PSC did not make such a finding in support of its order and there is no evidence in the record to support the statement. Although CEC extended its services into newly annexed areas under its broad and self-serving interpretation of its limited franchise without objection by the City until CEC was challenged by MDU with regard to Boulder Ridge, there is no evidence the City ever encouraged, let alone required, these extensions.

gave to the PSC, the PSC's current arguments should be considered by the Court with a large grain of salt. Indeed, the Court might consider which of the two arguments is more credible – the one given in advising the PSC or the one offered to defend its decision. Although N.D.C.C. § 49-03-01.3 may not specifically state that a City's franchise is a threshold consideration, the Constitution as well as § 49-03-06(8) make a City's franchise a threshold issue.

4. MDU has standing to appeal the PSC's Incorrect Interpretation and Application of the TIA.

CEC argues MDU does not have standing to assert the constitutional rights of a city to franchise public utilities. The standing requirement determines if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court. Nodak Mutual Insurance Company v. Ward County Farm Bureau, 2004 ND 60, ¶ 10, 676 N.W.2d, 752, 757. The Court provided an extensive analysis of the standing requirement in the context of an administrative agency appeal in Shark v. US West Communications, Inc., 545 N.W.2d 194, 198 (N.D. 1996):

> As an aspect of justiciability, the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the Court's remedial powers on his behalf. Inquiry is two-fold. First, the plaintiff must have suffered some threatened or actual injury resulting from the punitively illegal action. Second, the asserted harm must not be a generalized grievance shared by all or a large class of citizens; the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.

In short, the Court employs a three part analysis of standing for review of an agency order: one who is factually aggrieved, directly interested, and participates. Id. at 198.

MDU has standing to raise the franchise issue in this proceeding because it is directly interested, factually aggrieved, and participated in the agency proceeding. MDU is the respondent in the complaint proceeding brought by CEC in which the PSC, through the improper interpretation and exercise of its authority under the TIA, would prohibit MDU from exercising its franchise from the City of Bismarck to provide electric service within Boulder Ridge. A public utility holding a franchise has a property right or interest entitling it to restrain another person attempting to operate a competing business without lawful authority. Annot., 90 A.L.R.2d 7 (1963). MDU's standing to seek enforcement of municipal franchise rights was impliedly recognized in Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra when MDU filed an action asserting its franchise from the City of Crosby constituted a property right and that the furnishing of electricity by the REC within the corporate limits of the City without a franchise was illegal and would cause MDU irreparable injury and damage. Id. at 727. See also Montana-Dakota Utilities Co. v. Johannsen, supra.

Allowing the sale of electricity within MDU's franchise area by CEC or prohibiting MDU from exercising its property rights under its franchise to provide electric service within Boulder Ridge will irreparably harm MDU. In this case, the PSC improperly interpreted the TIA by failing to recognize and respect the constitutional and statutory limitations of its authority under the TIA by issuing its order directing MDU to cease and desist the exercise of its franchise. The PSC also failed to recognize that the City through its franchise authority determines electric service areas within the boundaries of the City and that CEC cannot provide services in Boulder Ridge without such a franchise. Responding to a complaint against it for improper extension of its facilities

under the TIA, MDU is entitled, and certainly has standing, to assure the TIA is properly interpreted and applied in a manner consistent with the facts and with the statutory and constitutional limitations applicable to the Act.

CEC's reliance upon Application of Otter Tail Power Company, 451 N.W.2d 95 (N.D. 1990), which dealt with the PSC's exercise of jurisdiction on an Indian Reservation is misplaced. That case did not involve similar North Dakota statutory and constitutional restrictions on the PSC's TIA authority. Correspondingly, this is not a case in which MDU is seeking to preserve a city's right to self government. Rather, MDU is seeking a correct interpretation of the TIA and a recognition by the PSC of the statutory and constitutional limits on its authority to impose the relief sought by CEC. In Baker Electric Cooperative v. Chaske, 28 F.3d 1466, 1475-1476 (8th Cir. 1994) and Baker Electric Cooperative v. Otter Tail Power Company, 116 F.3d 1207, 1215-1216 (8th Cir. 1997) the Court recognized the standing of a public utility to assert its right to provide electric service to certain Tribal operations.

5. The PSC lacked authority to order MDU to sell its facilities in Boulder Ridge to CEC.

Neither the PSC nor CEC attempts to argue the PSC acted within the scope of its authority under the TIA in ordering MDU to sell certain of its facilities in Boulder Ridge to CEC. This order was a clear violation of N.D. Const. art XII, § 10.

B. THE PSC IMPROPERLY APPLIED PC&N STANDARDS FOR DETERMINING INTERFERENCE AND UNREASONABLE DUPLICATION

Neither the PSC nor CEC deny the PSC applied the standards for issuing of certificates of PC&N in determining CEC's complaint of interference and unreasonable duplication. The PSC does not directly address the issue but acknowledges it made its

decision based upon its view of which company was best able to serve Boulder Ridge rather than on whether MDU's facilities would interfere with or unreasonably duplicate CEC's nonexistent service. CEC repeatedly asserts the PC&N factors are equally pertinent to a complaint proceeding under N.D.C.C. § 49-03-01.3 for interference and unreasonable duplication citing a footnote within Cass County Electric Cooperative, Inc. v. Northern States Power Company, 419 N.W.2d 181, 188 (N.D. 1988). The dicta within this footnote does not support CEC's argument. As MDU previously noted, this footnote simply says the PC&N factors are not irrelevant in the consideration of interference and duplication. It does not stand for the proposition that PC&N factors are equally pertinent to a complaint for interference and duplication.

Statutory standards of interference and unreasonable duplication are different than standards of public convenience and necessity particularly when the REC does not have authority to provide services within the contested area of a municipality. As acknowledged by CEC, the PC&N standards used by the PSC in this proceeding were created by the Court in Application of Otter Tail Power Company, 169 N.W.2d 415, 418 (N.D. 1969) after the standard under the original TIA of requiring the cooperative's permission for public utility extensions outside a city was declared unconstitutional in Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414 (N.D. 1967). A cooperative's permission was never required for public utility extensions within a city. The standards for extensions by a public utility of service inside and outside a city have always been separate and distinct under the TIA and the standards for judging interference or unreasonable duplication for extensions within a city were not changed by either Montana-Dakota Utilities Co. v. Johanneson, supra, or Application of Otter Tail

Power Company, supra. The PSC's role in a complaint proceeding is not to determine which provider, in its opinion, is best able to serve the annexed area, but rather to prevent interference and duplication of services which the REC is authorized to provide under a franchise within the annexed area.

C. THE PSC DID NOT DECIDE THE CASE BASED UPON THE ALLEGATIONS STATED IN THE COMPLAINT OR THE ISSUES STATED IN THE NOTICE OF HEARING.

Neither the PSC nor CEC dispute the issues decided by the Commission were not the issues set forth in CEC's complaint or the PSC's notice of hearing. Interestingly, on page 31 of its brief, CEC lists three of the ten issues routinely stated the PSC's notices of hearing for PC&N cases. While CEC acknowledges these were the issues decided by the PSC in this proceeding, they were not the issues stated in the PSC's notice of hearing. The PSC's failure to decide the case based upon the issues stated in the notice of hearing did not comply with the Administrative Agency's Practices Act and was a denial of due process.

D. THE COMMISSION'S FINDINGS OF FACT ARE NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

Both the PSC and CEC conclusively state that the evidence overwhelmingly supports the PSC's determination. Those arguments might have merit if this was a certificate of PC&N application and the PSC's role was to determine which of the two providers had the closest facilities in the area. That, however, is not the standard for determining interference with existing services or unreasonable duplication of services under N.D.C.C. § 49-03-01.3. Neither the PSC nor CEC points to any evidence in the record to support a determination that MDU's extension of facilities interferes with CEC's existing services as CEC is continuing to provide services to the same

customers and in the same manner that it provided prior to MDU's extension. Similarly, neither the PSC or CEC seriously disputes that CEC is legally prohibited by Bismarck City Ordinance from providing services in Boulder Ridge, and therefore, MDU's services do not duplicate in any manner, let alone unreasonably duplicate, CEC's services. Most importantly, the PSC and CEC conspicuously ignore the testimony of CEC's only witness who testified MDU's extension of facilities to Boulder Ridge would not constitute either interference or unreasonable duplication if MDU has the franchise to serve Boulder Ridge. When the testimony of the complainant's only witness does not support the basic contentions of the complaint or the PSC's order, the order is not supported by the preponderance of the evidence. The dichotomy between this testimony and the Commission's order is the PSC's order is based upon evidence regarding PC&N factors (without considering whether CEC can provide the services it contends MDU is unreasonably duplicating) rather than evidence regarding the statutory standards of interference and unreasonable duplication. If the PSC had decided the case based upon the issues stated in the notice of hearing, there would be no evidence in the record to support the PSC's current order.

MDU does not ask the Court to "reweigh and reevaluate the evidence" as argued by CEC. Instead, where the undisputed evidence shows that CEC does not have authority to provide service within Boulder Ridge, only one inference can be drawn and consequently as a matter of law, MDU's extension of facilities did not interfere with or unreasonably duplicate CEC's nonexistent services. Nygaard v. Robinson, 341 N.W.2d 349, 354 (N.D. 1983); Fettig v. Whitman, 285 N.W.2d 517 (N.D. 1979).

Other PSC findings challenged by MDU as not supported by the preponderance of the evidence were not addressed by the PSC or CEC or were lightly dismissed as typographical or harmless errors. Regardless of the rationale for these erroneous findings, they are nonetheless not supported by the preponderance of the evidence and cannot be dismissed as harmless if they were given any consideration in the PSC's determination.

E. THE PSC FAILED TO ADDRESS THE EVIDENCE PRESENTED BY MDU

Obviously, the Commission did not consider MDU's franchise, or CEC's lack of a franchise, to serve Boulder Ridge in determining unreasonable duplication of facilities. Rather, the PSC made a determination of which provider in its opinion should have a franchise to serve in Boulder Ridge and on that basis determined MDU's extension of service would constitute interference and unreasonable duplication with the PSC's preferred hypothetical service provider. The PSC did not sufficiently address the evidence offered by MDU that Boulder Ridge is within MDU's franchise area as determined by the only governing body with authority to determine such service areas.

CONCLUSION

The PSC's order should be reversed and the matter remanded to the Commission for dismissal of CEC's complaint.

Dated this 18 day of September, 2006.

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

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By: 

Attachment 1

Statement of Clarence Welander, Fullerton, N. Dak., president of North Dakota Association of Rural Electric Cooperatives, before House Industry, Business and Labor Committee, hearing on House Bill 775, Feb. 1

Mr. Chairman, and members of this committee.

It is a privilege for me to appear before your committee. My name is Clarence Welander, a farm owner and operator and member of James Valley Electric Cooperative in Dickey County. I also am president of the North Dakota Association of Rural Electric Cooperatives, and chairman of the association's 16-member legislative committee. I appear here as a spokesman for the association.

In order to conserve on the time allocated to us, with your permission Chairman Domacker, I am going to give the highlights of my statement orally, and will file the entire statement with the committee clerk.

We have had several meetings with our legislative committee, the Statewide directors, board presidents and staff people of our distribution cooperatives. They represent 65,000-plus rural and farm people who are member-owners of the 21 distribution cooperatives in the state. These leaders have voted unanimously to respectfully but urgently request this committee to indefinitely postpone House Bill 775.

I will give a general outline as to why the rural electrics could not live for long with this type of legislation, and others will follow me, including managers and other staff personnel of our cooperatives.

Some 30 years ago there were no lights or electric power of any kind in most of the rural area, and very little hope of getting electrical power in the near future. Kerosene lamps and coal stoves were the order of the day.

Then Congress, with bipartisan support, enacted the Rural Electrification Act, with a Federal agency designated to grant loans out of appropriated funds at 2 per cent interest to anyone who would build lines and provide power to rural areas. One of the stipulations for this low interest rate was that anyone who received the loans had to guarantee area coverage---which means they had to serve all the loads in the rural areas, if the service was requested, and not just the large, profitable loads.

The private power companies, with just a few exceptions, turned down this proposal, saying it would never work, that it wasn't profitable and that farmers wouldn't pay for it and other excuses. The REA Act remained idle and unused for a year and a half, and the whole idea was about to die for the lack of someone to accept the offer.

But farmers did not want to see this offer die by the wayside. They knew that farmers wanted electrical power, and that they would pay for it. They formed rural electric cooperatives to do the job--in North Dakota and all over the country.

In those few short years, the 21 North Dakota distribution cooperatives have now developed a total utility plant valued at $100,272,824 as of the end of 1965. You can more than double this figure for generation and transmission plants, and you see we are big factors in the North Dakota economy.

From the first energizing of our lines, the rural electrics have grown at a rapid rate, to demonstrate that farmers' faith was correctly placed. The rural electrics have given good and total service to the rural areas, as was required of them by Congress.

Now we find that the same private power companies which weren't interested 30 years ago, now would like to serve some of the more choice, profitable loads in the countryside, and until very recently, have been taking these loads away from the rural electrics with regularity

In the 1965 legislative session, the rural electrics were instrumental in supporting legislation which did an effective job of putting a stop to the territorial fights and the piracies of the private power companies. That bill, House Bill 724, better known as the Territorial Integrity Act of 1965, was sponsored by members of both political parties. It became law through majority action of the Legislature in which the House was controlled by Democrats and the Senate by Republicans.

This law was challenged as unconstitutional by the power companies and 30 days after the Act became effective, the power companies took every distribution cooperative, the Public Service Commission and the Attorney General into court. The district court upheld most of the law, but declared one important section unconstitutional, then an appeal was taken to the North Dakota Supreme Court.

This lawsuit is still being deliberated in that court, and I urge you to await that court's competent decision before taking legislative action on this very difficult subject.

House Bill 775, in Section 5, Lines 90 through 92, repeals all of the important language in the 1965 Territorial Integrity Act. But the repeal is only part of House Bill 775. House Bill 775 goes much further than repealing the 1965 Act. Others will discuss the extent to which 775 goes, to the detriment of our cooperatives and which we contend is not in the interest of sound territorial legislation.

The rural electric cooperatives, with their 65,000-plus consumer-owners, believe the 1965 Act was a good fair play law and that it should be allowed a fair chance to work. We believe you should not destroy the 1965 Act, which was examined, debated and discussed at great length in that session, while the Supreme Court is deliberating. We feel the Supreme Court is entitled to continue the job they have started in examing this law. Rate-payers, too, of ours and the private power companies, are entitled to receive a judicial judgment of that 1965 law. As you no doubt know, great sums of money have been spent on legal costs involving the court test.

I can personally testify, as a farmer, how our North Dakota farmers are already in a price-cost squeeze. Tight money policies and high interest rates have combined to make farming a more hazardous, less profitable business than ever before. Since 1947, our costs of doing business have gone up approximately 100 per cent, yet the prices we receive for our investment, labor and products have gone steadily downhill.

If our cooperatives are denied the right to serve the better loads, leaving them only the indiviaual farms, pasture wells and other small loads, the power rates for farmers will go up accordingly.

Another problem is our loss of customers through the movement off the farms. Last year in my own cooperative, James Valley lost 60-some individual farms. Our manager, Mr. D. D. McChesney, estimates we will lose at least that many again this year. On the state level, over 1,000 farms per year have been merged into other, larger holdings, with a proportionate number of people leaving the rural areas to move into towns and cities.

Any legislation that would tend to decrease the economic strength of our rural electric cooperatives will directly aggravate and speed up this movement off the farms.

In the last six years, according to the Economic Development Commission, nearly 46,000 people--or the population of the City of Fargo--have left North Dakota. Most of this loss was in the rural, small-population areas of the state which could least afford the loss. We are all interested in attracting new industry to North Dakota, as well as keeping what industry we have. With 87 per cent of North Dakota's economy directly related to the industry of agriculture, we should be doing everything possible to strengthen farmers' investments, such as rural electric cooperatives. Another witness will tell you the extent of these investments, which total many millions of dollars.

We of the rural electrics believe that the fair legislation we now have is good for all rate-payers in North Dakota. House Bill 775 would cripple our ability within the rural areas to show rate-payers the true cost of electricity, and would remove what small element of competition there is in the North Dakota power industry.

I ask each of you to please remember that we aren't even asking to compete in a wide-open ball game. We can't and don't want to go into the cities. We just want to play the game by fair rules in the rural areas that we developed.

Thank you for your attention and your consideration.

Attachment 2

cooperate in the planning of such bridge and the integration of State and local road systems with such bridge; and

Be It Further Resolved, that copies of this resolution be forwarded to the Chief of Army Engineers, the Commissioner of the Bureau of Indian Affairs, the North Dakota congressional delegation, the State Highway Commissioner, and the respective boards of county commissioners of Dunn and McKenzie Counties.

Filed March 13, 1967.

1967

HOUSE CONCURRENT RESOLUTION "B-2"

(Streibel, Johnson(23), Unruh)

STUDY OF EXTENSION OF ELECTRICAL SERVICE

A concurrent resolution requesting that a two-year study be made of the laws relating to certificates of public convenience and necessity for extensions of service by electric suppliers and the extensions of electric transmission and distribution lines of electric utilities.

WHEREAS, the House of Representatives' Standing Committee on Business and Industry has had before it House Bill No. 775, relating to the territorial integrity problem which currently exists between the private electrical suppliers and the rural cooperative electrical suppliers; and

WHEREAS, both electrical suppliers cannot come to an agreement as to what is an equitable solution to the problem; and

WHEREAS, there is presently before the North Dakota Supreme Court a case concerning the laws relating to the issuance of certificates of public convenience and necessity for the extensions of service by the electrical suppliers of this State; and

WHEREAS, representatives of the private electrical suppliers and the rural cooperative electrical suppliers are in tentative agreement that a study of this problem should be made;

Now, Therefore, Be It Resolved by the House of Representatives of the State of North Dakota, the Senate Concurring Therein:

That a committee composed of three members of the House of Representatives appointed by the Speaker of the House of Representatives and two members of the Senate appointed by the President pro tem of the Senate meet during the next two years with two persons representing the electric public

ROLL CALL

The question being on the final passage of the bill, as amended, by the Senate, the roll was called and there were ayes, 92; nays, 1; absent and not voting, 5.

Those voting in the affirmative were:

Aafedt	Emerson	Kelsch	Rivinius
Aamoth	Erickson, K.	Kingsbury	Sandness
Aas	Erickson, W.	Knudson	Sanstead
Anderson	Freeman	Kuehn	Schaffer
Atkinson	Froelich	Lang	Seibel
Austin	Gackle	Larson, G.	Simonson
Backes	Ganser	Larson, L.	Solberg, I.
Belter	Giffey	Leibhan	Solberg, O.
Berg	Goodman	Lillehaugen	Stoltenow
Bernabucci	Grant	Linderman	Stone
Bier	Halcrow	Link	Streibel
Boustead	Haugland	Lundene	Strinden
Boyum	Henning	Matheny	Swedlund
Bullis	Hensrud	Metzger	Thompson
Bunker	Hentges	Miedema	Thorsgard
Burke	Hickle	Mueller	Tweten
Connolly	Hillebbe	Olienyk	Wagner
Dahl	Hoffner	Opedahl	Weber
Dawson	Hoghaug	Peterson, J.	Welder
DeKrey	Hougen	Peterson, R.	Wells
Dick	Jenkins	Powers	White
Diehl	Johnson, K.	Register	Wilkie
Eagles	Jones	Reimers	Mr. Speaker

Those voting in the negative were:

Rundle

Absent and not voting:

Davis	Glaspey	McDonald	Moquist
Dornacker			

So the bill passed and the title was agreed to.

Rep. Streibel moved that the vote by which House Bill No. 105 was passed be reconsidered and the motion to reconsider be laid on the table.

Which motion prevailed.

Rep. Boustead moved that House Bill No. 163 be moved to the bottom of the twelfth order, which motion prevailed.

Speaker E. Johnson announced the House would be at ease for ten minutes.

House reconvened with Speaker E. Johnson presiding.

Rep. Wagner requested that the Journal show that he was absent on a Conference Committee when the vote was taken on House Bill No. 292, which request was granted.

Rep. Goodman requested that the following report be printed in the Journal, which request was granted.

REPORT
of the
SPECIAL COMMITTEE ON ELECTRICAL SERVICES
to the
FORTY-FIRST LEGISLATIVE ASSEMBLY

The Special Committee on Electrical Services was created by House Concurrent Resolution "B-2" of the Fortieth Legislative Assembly. Members appointed to the Committee were Representatives Glen Goodman, Chairman, Jack Bernabucci, and Richard J. Backes; Senators Guy Larson and L. D. (Lee) Christensen; Mr. Clarence Welander and Mr. Loren Richards, representing the rural electric cooperatives; and Mr. Robert Nygaard and Mr. Richard Jacobson, representing the

investor-owned or public-utility companies. Senator George Rait later replaced Senator Christensen who was injured in an accident and was unable to serve on the Committee.

The Committee was directed to meet during the interim to study what method, if any, should be provided to resolve territorial disputes between electrical suppliers, whether more lucrative market areas were essential to the efficiency of rural electrical coopratives, and if rural electrical cooperatives should be regulated in the same manner as rural telephone cooperatives. The Committee was further directed to report its findings to the Forty-first Legislative Assembly, together with any legislation that might be proposed.

The Special Committee on Electrical Services met on seven separate occasions during the interim to receive testimony and conduct studies relative to the areas assigned to it for investigation. The major portion of the study dealt with an examination of the present status of North Dakota territorial laws relating to electrical suppliers.

TERRITORIAL INTEGRITY ACT

In 1965, the Legislative Assembly enacted chapter 319 of the Session Laws which was to be known popularly as the "Territorial Integrity Act."

Under this Act, a public utility may not begin the construction or extension of a public utility plant or system, until a certificate of public convenience and necessity is obtained for such construction or extension. A public utility also may not extend transmission or distribution lines beyond the corporate limits of a municipality or serve any customer outside a municipality, unless an order and a certificate of public convenience and necessity is first gained. While chapter 319 did not require that public utility companies discontinue service to customers who were being served outside of municipalities prior to the effective date of the Act, they were required to file maps within ninety days showing all such customers, or it was conclusively presumed that the customer was not being served. In this event, the customer could not be served unless authorized by the Commission in accordance with those provisions of the Act relating to extensions of service.

Public utilities were allowed to make extensions of service in municipalities where they had lawfully commenced operations without obtaining a certificate, if the extension would not interfere with services already provided by a cooperative or another public utility, or result in an unreasonable duplication of services.

Certain limitations were placed on the issuance of orders and certificates of public convenience and necessity by the Public Service Commission. They were not to be issued to any private utility to allow an extension of distribution lines outside a municipality or allow the service of a new customer outside the municipality, unless the nearest cooperative had consented to the service in writing, or unless it was shown upon hearing that the cooperative could not supply the service. And, certificates were not necessary for the extension of facilities if a "consent" agreement was entered into between the cooperative and the public utility as to service areas and the agreement was approved by the Public Service Commission.

Thus, the Act basically allowed cooperatives to extend service in rural areas and public utilities to extend service in municipal areas without first obtaining a certificate of public convenience and necessity from the Public Service Commission — admittedly a time-consuming process — the theory being that the delineation of service areas would allow each type of enterprise to expand within it own sphere without conflict with each other. Problems arose, however, as the public utility companies felt that by being confined to municipal areas except as provided by the Act, they were being denied a fair share of the business arising in the rural "growth" areas. This ob-

jection to the effect of the Territorial Integrity Act culminated in the case of **Montana-Dakota Utilities Company v. Johanneson**, 153 N.W2d 414 (N. D. Sup. Ct. 1967), which squarely attacked its constitutionality. In **Johanneson**, the public utility companies took the position that the law was on an unconstitutional classification for several reasons. They contended that cooperatives were given a monopoly in rural areas and were allowed to operate without Public Service Commission regulation, while the public utilities were regulated in every respect by that agency. Further, they claimed that cooperatives could infringe on the existing service areas of public utility companies in rural localities and that new customers could be gained in municipal areas only if there was no interference with cooperative services already provided in the municipality. Finally, they asserted that cooperatives had a right to complain against public utilities' actions, but the utilities had no such right as against actions of the cooperatives. Thus, they maintained that the Territorial Integrity Act was unfair, arbitrary and unreasonable, *and* discriminated against the public utility companies and the public generally.

The North Dakota Supreme Court in **Johanneson** upheld the constitutionality of the Act in all but one respect. It was held that the Act did amount to a classification in that public utilities and cooperatives were treated dissimilarly, but the classification was not objectionable, as it was based on legally justifiable distinctions. And, while public utilities were denied the right under the Act to complain of improper actions by cooperatives, the right remained to bring an action in the courts of the state for redress of any injury that might be suffered. Thus, the court reasoned, the public utilities did have an adequate remedy and were not prejudiced.

It was found to be otherwise with regard to section three of the Act which conditioned the issuance of certificates of public convenience and necessity on the written consent of the nearest cooperative, or upon a finding that the cooperative could not provide the service. Here, the court found that it was ". . . the cooperative, and not the Public Service Commission . . . that *determines* whether a certificate of public convenience and necessity shall be granted to a public utility in the area outside the limits of the municipality" and that "(n)o guidelines are set out in the law to be followed by the cooperative in making such determination, and no safeguards are provided against arbitrary action . . . ." Thus, the court held that where ". . . the Act attempts to delegate, to either the Public Service Commission or the cooperative, powers and functions which determine such policy and which fix the principles which are to control, the Act is unconstitutional." Likewise, the court found that the portion of the Act which permitted supplying of service without certificates if a "consent" agreement was entered into by the cooperative and public utility as to service areas also was unconstitutional, as again the cooperative was permitted to determine whether a certificate should be granted.

The impact of the **Johanneson** decision immediately became evident. Since the provisions of the Territorial Integrity Act allowing for "consent" agreements in lieu of certificates of public convenience and necessity were declared unconstitutional, it was apparent that the caseload of the Commission in the issuance of certificates would increase substantially. In anticipation of this increase and to reduce the delay caused by the notices and hearings necessary for the issuance of certificates, the Public Service Commission requested an opinion of the Attorney General as to whether conditional certificates could be issued without the usual full-scale hearing and determination. The Attorney General, by opinion dated October 30, 1967, found that the issuing of conditional certificates without hearing was proper, provided that the controversy was fully submitted to the Commission by the interested parties in such a manner so that a decision could be made, and that the parties waive the notice and hearing required in the issuance of a

certificate of public convenience and necessity. Thus, the issuing of temporary certificates under certain conditions was upheld and is presently being practiced by the Commission. Procedurally, temporary certificates have been issued by the Commission only in situations where an emergency has arisen, defined as the immediate need for electrical service by a consumer.

CONTENT OF THE STUDY

A. Public Service Commission

During the course of the study, the Committee drew on the expertise and experience of the Public Service Commission in the area of electrical services generally, and received considerable advice and assistance from this agency. Testimony received from the Commissioners on the subject of regulation by the Public Service Commission was especially illuminating to the members of the Committee. Generally, satisfaction was voiced as to the bipartisanship of the Public Service Commission, and it was commented by one of the Commissioners that it was his opinion that the positions should be appointive, rather than elective, since little interest in the office is shown by the voters. On the subject of whether cooperatives should be placed under the jurisdiction of the Public Service Commission, the Commissioners were not in agreement. One felt that cooperatives should be regulated, one felt that they should not, and one felt that cooperatives should be regulated when they began serving nonmembers. The Commissioners were basically of the opinion that the present Territorial Integrity Act was beneficial and pointed out some areas where improvements could be made. While it was reported that the workload of the Commission has been increased by the administration of the Act, it was also indicated that the issuance of temporary certificates has helped considerably to speed the procedure by which service is authorized.

Testimony given by one of the Commissioners suggested that as an aid to determine when temporary certificates should be issued, guidelines should be set out by the legislature. It was also indicated that in rural areas where a public utility was providing existing service, the laws should be amended to permit service without obtaining a certificate when the connection could be made with a secondary drop. The Commissioners also felt that "consent" agreements as to service areas were desirable and some way should be found whereby such agreements could be constitutionally made.

B. Position of the Cooperatives

As a method of defining the problems that face cooperative and public utility companies, the two groups were invited by the Committee to outline their position on the matters under investigation and to submit proposals for consideration.

Basically, the cooperatives feel that the Territorial Integrity Act is working, and that fair and adequate guidelines are being developed by the Public Service Commission in following the interpretation placed on the law by the North Dakota Supreme Court in the **Johanneson** case.

Any change in the present Act is opposed by this group until such time as inequities exist which in their opinion require revision of the law. They point to the North Dakota Supreme Court decisions interpreting the present law as clearly indicating that cooperatives are given a preference over public utilities in the furnishing of service outside the corporate limits of municipalities. Thus, the law has created two territorial jurisdictions in their viewpoint — franchised areas within municipalities which are to be served by the public utilities, and nonfranchised areas outside of municipalities which are to be served by cooperatives.

The cooperatives maintain that any change in the law would result in considerable expense to cooperative and public utility companies

alike, as interpretative measures would have to begin anew. This cost would be detrimental to the consumer, they claim, as it would be passed on to him in the form of an increase in the cost of service.

The cooperatives contend that testimony that the caseload of the Commission has leveled off proves that the present law is working satisfactorily. They further claim that they are protesting very few applications for certificates of public convenience and necessity by public utilities to serve in rural areas, and have submitted documents tending to point this out.

Regulation by the Public Service Commission is not necessary, claim the cooperatives, as they are regulated by their members. All earned margins are returned to their consumers, making regulation in any area other than that of safety needless.

Finally, the cooperatives maintain that to survive, they must continue to grow, and to grow, they must be able to attract and serve new customers. They point out that the population distribution within the state is presently experiencing a shift, from rural to urban, thus placing them at a disadvantage in attaining new consumers. They state that consumer density on cooperative lines is approximately 1.3 consumers per mile, while the public utilities have a concentration of approximately 29.4 consumers per mile. Annual revenue estimates, according to their calculations, approximate $300 per mile of line for cooperatives, and $8,600 per mile of line for public utilities. Thus, it is the cooperatives' position that they furnish a service to rural areas of the state that public utilities could not economically furnish, and, as the burden of serving such areas would be passed on to the municipal consumer, it is a service the public utilities companies should not be allowed to furnish.

Position of the Public Utilities Companies

The public utilities companies maintain that the cooperatives should be brought under jurisdiction of the Public Service Commission. They point out that they are regulated in all respects by the Commission, and contend that it is basically unfair to allow the cooperatives to complain to the Commission concerning practices of the utilities, without allowing the utilities the same procedure. It is important to realize, they claim, that they suffer a disadvantage in the rural areas that they are lawfully serving through extensions of service made before the inception of the Territorial Integrity Act, as they must secure a certificate of public convenience and necessity before a new consumer can be served in these areas. This process, involving waiting periods sometimes in excess of six months, they believe causes considerable delay and expense to the utility and hardship to the rural consumer who needs service immediately. In agreeing that the issuance of temporary certificates has somewhat eased the situation, they state that an inequity is involved here also, as the right to permanently serve may well be awarded to the nearest cooperative company, thus causing a considerable loss to the utility from the construction of service facilities they cannot utilize.

Of greatest concern to the public utilities are the outlying portions of metropolitan areas where population is increasing. The present territorial law, they maintain, stifles growth and creates confusion and uncertainty, as the utilities are not allowed to expand with the population move from city and rural areas into the fringe locations around cities. They feel that since they are ready, willing, and able to serve these new markot areas and, in fact, are serving many consumers in these locations already by virtue of extensions made before the territorial laws, a preference for cooperatives is unfair. Therefore, the public utilities are not opposed to cooperative monopoly in the far rural areas of the state, but vigorously maintain that in order to serve their customers economically and provide a return to their stockholders, they must also continue to grow, and the only area

where growth is possible is in the metropolitan-fringe area. They point out that duplication of facilities in such locations is economically prejudicial to the consumer and should not be permitted.

Thus, the public utilities feel that a change in the law is necessary to permit costly and time-consuming controversies arising from uncertainty in metropolitan fringe areas to be quickly resolved, thereby benefiting the consumer. In order to effect this change, they propose changes in the law which would provide for Public Service Commission jurisdiction over cooperative electrical companies, allow for territorial "consent" agreements between electrical suppliers as to service areas, permit extensions of service without a certificate of public convenience and necessity unless the extension came within a prescribed distance from an existing service of another supplier, and codify and clarify the law regarding temporary permits.

STATEMENT OF THE CHAIRMAN WITH RESPECT TO THE STUDY

As chairman of the Special Committee on Electrical Services, I would like to take this opportunity to commend the members of the Committee for the manner in which they conducted themselves during Committee hearings. All members showed a genuine interest and concern in the matters considered during the biennium relative to the study. I also wish to thank the Public Service Commissioners and the many witnesses who appeared before the Committee and submitted testimony in regard to the matters under consideration.

Although the Committee makes no recommendations, it is my opinion as Chairman that considerable knowledge was gained in respect to the problems faced by both the rural electric cooperatives and private utilities groups, and I hope that this report will give the members of the Forty-first Legislative Assembly some insight into the problems.

Respectfully submitted,
GLEN GOODMAN, Chairman
Special Committee on Electrical Services

MOTIONS

Rep. Tweten moved that the House reconsider the action by which the House did not concur on Senate amendments to House Bill No. 469, which motion prevailed.

Rep. Boustead moved that the House concur in the Senate amendments to House Bill No. 469, which motion prevailed.

Rep. Boustead moved that the rules be suspended, and House Bill No. 469 be considered properly engrossed and placed on final passage, which motion prevailed.

SECOND READING OF A HOUSE BILL

House Bill No. 469. A Bill for an Act to amend and reenact subsection 1 of section 39-12-04 of the North Dakota Century Code, relating to marking of overwidth vehicles for visibility while they are operated on the highway.

Was read the second time.

ROLL CALL

The question being on the final passage of the bill, as amended, by the Senate, the roll was called and there were ayes, 82; nays, 4; absent and not voting, 12.

Those voting in the affirmative were:

Aafedt	Erickson, W.	Kuehn	Sandness
Aamoth	Freeman	Lang	Schaffer
Aas	Froelich	Larson, G.	Seibel
Atkinson	Ganser	Larson, L.	Simonson
Austin	Giffey	Lillehaugen	Solberg, I.
Belter	Goodman	Linderman	Solberg, O.

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.,	)	CIVIL NO. 06-C-1177
Appellant,	)	
vs.	)	AFFIDAVIT OF SERVICE
North Dakota Public Service Commission and Capital Electric Cooperative, Inc.,	)	
Appellees.	)	
STATE OF NORTH DAKOTA	)	
	) ss.	
COUNTY OF BURLEIGH	)	

Evelyn Froebe, being first duly sworn on oath, does depose and say: That she is over the age of eighteen years, and not a party to the above-entitled matter;

That on the 18th day of September, 2006, this affiant served a true and correct copy of the following document in the above-captioned action:

(1) REPLY BRIEF OF MONTANA-DAKOTA UTILITIES CO.

That the copies of the above document were enclosed and secured in an envelope with postage duly prepaid and addressed as follows:

Carol Larson
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
Attorney for Capital Electric Cooperative, Inc.

William W. Binek
Special Assistant Attorney General
Public Service Commission
State Capitol
Bismarck, ND 58505-0480
Counsel for The Public Service Commission of North Dakota

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the parties intended to be so served.

That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Evelyn Froebe

Evelyn Froebe

Subscribed and sworn to before me this 18th day of September, 2006.

CARI WEIAND
Notary Public
State of North Dakota
My Commission Expires Aug. 27, 2008

Notary Public