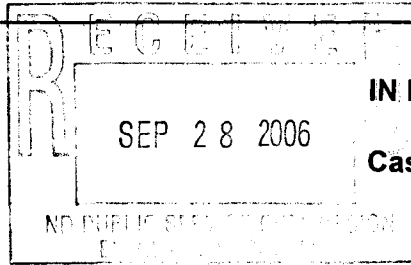


**STATE OF NORTH DAKOTA**  
**COUNTY OF Burleigh**



**IN DISTRICT COURT**  
**Case No. 06-C-1177**

Montana-Dakota Utility Company,

Plaintiff,

vs.

North Dakota Public Service  
Commission and Capital Electric  
Cooperative,

Defendants.

**ORDER AFFIRMING  
ADMINISTRATIVE DECISION**

The above-entitled administrative appeal was perfected by Montana Dakota Utilities Co., (MDU) by and through its co-legal counsel, Attorneys Daniel S. Kuntz and Jerome C. Kettleison, under Section 28-32-42, N.D.C.C., therein appealing the Order of the North Dakota Public Service Commission, dated June 22, 2006. To facilitate said appeal, this Court has issued its Order granting the Appellant's Stay of the Order of June 22, 2006. The North Dakota Public Service Commission (PSC), by and through its legal counsel, Attorney William W. Binek, has filed the Commission's brief in response to said appeal, as has Capital Electric Cooperative, Inc. (CEC), by and through its legal counsel, Attorney Carol K. Larson. Each of the parties hereto have filed their respective briefs, and Certificate of Record on Appeal has been provided by Illona A. Jeffcoat-Sacco, Executive Secretary, Public Service Commission, State of North Dakota, under the date of July 11, 2006.

**ISSUES UPON APPEAL**

The Appellant's itemization of issues upon appeal is set forth in their Specifications of Error, and the Court does herewith incorporate the same in its

entirety. At the heart of said alleged specification of error is the alleged failure of PSC to recognize the constitutional authority of the City of Bismarck to franchise utility service areas and that the PSC improperly exercised its authority under the Territorial Integrity Act (TIA). N.D.C.C. § 49-03-01 et. seq.

#### DECISION

Section 28-32-42, N.D.C.C. mandates the District Court to affirm the Administrative Agency's decision unless the Court 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.

In reviewing the determination of the Public Service Commission, the court uses the

following standards:

- '1. We do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence.
2. We exercise restraint when we review administrative agency findings.
3. It is not the function of the judiciary to act as a super board when reviewing administrative agency determinations.
4. We will not substitute our judgment for that of the qualified experts in the administrative agencies.'

*Northern States Power Co. V. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 343 (N.D. 1990) (quoting *Montana-Dakota Util. Co. V. Pub. Serv. Comm'n*, 413 N.W.2d 308, 310 (N.D. 1987)).

The Appellant argues to the Court that the PSC under the provisions of Chapter 49-03, N.D.C.C., has violated North Dakota Constitution Article VII, Section 11, which provides: "The power of the governing board of a city to franchise the construction and operation of any public utility or similar service shall not be abridged by the legislative assembly."

A review of the record certified by the PSC to this Court establishes that the evidence received by the PSC in hearing upon the complaint of CEC does support the findings of fact numbered 1 through 29 and establishes the chronology of the foregoing case, which this Court adopts by reference.

That the City of Bismarck has a constitutional right to grant franchises and accept service agreements is not in dispute, and is recognized by this Court in *Capital Electric Cooperative v. City of Bismarck*, 05-C-2303. In 1987, the City of Bismarck granted to MDU a non-exclusive franchise to distribute electricity in Bismarck. In 1993, the City of Bismarck granted CEC a limited franchise to distribute electricity in Bismarck subject to the Area Service Agreement entered into between MDU and CEC,

which included Boulder Ridge. The City of Bismarck, in granting each of the franchises to MDU and CEC, properly and lawfully exercised its constitutional authority under North Dakota Constitution, Article VII, Section 11.

MDU unilaterally cancelled the Area Service Agreement in 2002, effective 2003. The Area Service Agreement provided that if the agreement were cancelled by either party "all privileges, rights, obligations and restrictions as therein stated shall continue to apply." Therefore, while MDU cancelled the Area Service Agreement and it can no longer be amended, the Agreement as it existed in 2003 continues to apply to CEC's franchise. MDU's unilateral abandonment of the Area Service Agreement does not allow CEC to be left without a service agreement and without an area which it is able to serve.

In 2005 Boulder Ridge First Addition was annexed to Bismarck. Boulder Ridge is part of CEC's franchised area under the Area Service Agreement. Following the annexation of Boulder Ridge, MDU commenced installation of distribution facilities to serve Boulder Ridge. Prior to the annexation of Boulder Ridge, CEC had facilities in place to serve Boulder Ridge. For over 20 years CEC has had reliable distribution facilities in the Boulder Ridge area. Further, CEC incorporated the 1973 Area Service Agreement, which includes Boulder Ridge in CEC's service area, into its long range plans and has expended over 7 million dollars in the Boulder Ridge area.

MDU's subsequent attempt to have CEC's franchise, in effect, terminated is absent support in fact or law. While the City of Bismarck has the authority to grant franchises, it does not have the ability to revoke those franchises without cause. CEC was granted a 20 year franchise in 1993, therefore, that franchise will continue until 2013.

Since both MDU and CEC have current franchises with the City of Bismarck, the PSC is required to apply the statutory mandate for enforcement when franchises are granted. This mandate includes N.D.C.C. § 49-03-01.3 which states in part:

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.

The Public Service Commission determined that MDU's services interfere with and unreasonably duplicate the services already provided by CEC. This conclusion is supported in both law and fact. The *South Pointe Cases* (*Cass County Elec. Coop. v. Northern States Power Co.*, 419 N.W.2d 181 (N.D. 1988) & *Northern States Power Co. V. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340 (N.D. 1990)) are factually similar to the present case. In the *South Pointe* cases, the statutory obligation of the PSC under Chapter 49-03, N.D.C.C. was addressed. Therein, the Supreme Court recognized the obligation and the scope of said obligation of the PSC to fulfill its fundamental purpose in the area of the liberty of electric services by precluding unnecessary duplication of investment in utility facilities and to minimize conflicts between electric public utilities in the delivery of electrical services. To accomplish the foregoing, the Court found the obligation of the PSC to make specific findings upon existing facilities and investment by existing electric public utilities and to determine whether duplication of services was occurring.

In the *South Pointe* dispute, Cass County Electric Cooperative (Cass) brought a complaint to the PSC alleging that Northern States Power Company's (NSP) extension of electrical service into three Fargo subdivisions was unreasonable

duplication under the TIA. 452 N.W.2d at 341. Until 1975, NSP and Cass had a territorial agreement in place which designated their respective service areas, much like the area service agreement in this case. *Id.* In 1975, NSP and Cass abandoned the agreement. *Id.* Cass had no franchise from the City but did establish an agreement for a non-exclusive right-of-way with the City after the area service agreement was abandoned. *Id.* Cass had incorporated the subdivisions in its long range plans, had made a large financial expenditure in the area, and was the only supplier of electricity in the disputed area prior to its annexation. *Id.* at 341, 343.

Likewise, the PSC found that CEC incorporated the 1973 Area Service Agreement, which included Boulder Ridge in CEC's service area, into its long range plans, expended over 7 million dollars (a sum more than 5 million more than Cass expended in the South Pointe cases) in the area which includes Boulder Ridge, and prior to annexation, CEC was the only electric provider for the Boulder Ridge area. In contrast to the South Pointe cases, effective in 1993, CEC was granted a franchise by the City to provide electric service.

The City of Fargo exercised the same scope of authority, notwithstanding the constitutional arguments, as the City of Bismarck. The City of Fargo entered into an agreement with Cass and the City of Bismarck entered into a franchise with CEC, both allowing the rural electric cooperative to provide service in certain, limited areas of the city.

Since the Public Service Commission determined that MDU's service in the Boulder Ridge area interferes and unreasonably duplicates that of CEC, it was then required to enforce the act under N.D.C.C. § 49-03-01.4. Under § 49-03-01.4, if the Public Service Commission determines that an electric public utility "violates or

threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system” of the rural electric cooperative, the Public Service Commission is to enforce the act by “mak[ing] its order restraining and enjoining said electric public utility from constructing or extending its interfering lines, plant, or system” and “prescribe such terms and conditions as it shall deem reasonable and proper.”

The Public Service Commission determined that MDU’s extension into Boulder Ridge unreasonably interfered with and duplicated CEC’s existing electric distribution. The Public Service Commission then ordered MDU to cease and desist providing electricity to Boulder Ridge and to offer to sell its interfering facilities to CEC. This is well within the Public Service Commission’s power under the TIA. “[T]he question of ‘which electric suppliers’ facilities are actually duplicative or wasteful’ is one of fact for the PSC to determine.” *Northern States Power Co. V. N.D. Pub. Serv. Comm’n*, 452 N.W.2d 340, 345 (N.D. 1990).

Finally, Section 49-03-01.3 is not a legislative effort to limit the authority of the City of Bismarck to grant franchises, rather, it is an effort to provide efficient and economic delivery of electric service which is the goal of the Territorial Integrity Act. *Cass County Elec. Coop.*, 419 N.W.2d at 188. Therefore, it does not violate N.D. Const. art. VIII, § 11 which states: “The power of the governing board 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.”

This court’s review of the Public Service Commission’s decision should not be overly broad. A reasoning mind could reasonably determine that the weight of the evidence supports the Finding of Facts and Conclusions of Law as entered by the

Public Service Commission.

The Order of the PSC dated June 22, 2006 is in accordance with applicable law; there is no violation of Appellant's constitutional rights; the provisions of Chapter 28-32, N.D.C.C. have been fulfilled; and the PSC has sufficiently explained its rationale.

If the Court is in error in its application of the constitutional authority of the City in the foregoing decision, an electric service provider would enter a service area adjacent to an incorporated municipality at risk of losing its entire investment. In addition thereto, annexation by a municipality, while granting to the city government its constitutional authority to franchise, does not encompass forfeiture of existing property rights and rights of public service.

It is therefore the Order of the Court that the Administrative Order of the PSC dated June 22, 2006 is herewith affirmed. It is the further Order of the Court that Appellant shall comply with the provisions of the June 22, 2006 PSC Order and shall have thirty days from the date hereof to do so.

Dated September 25, 2006.

BY THE COURT:

  
Donald Jorgensen  
District Judge