

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc., )  
 ) No. 20060199  
Appellant, )  
 )  
vs. )  
 )  
The City of Bismarck, North Dakota, )  
 )  
and )  
 )  
Montana-Dakota Utilities Co., a division of )  
MDU Resources Group, Inc. )  
 )  
and )  
 )  
The Public Service Commission )  
of North Dakota, )  
 )  
Appellees )

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ON APPEAL FROM THE  
SOUTH CENTRAL JUDICIAL DISTRICT COURT  
BURLEIGH COUNTY, NORTH DAKOTA  
THE HONORABLE BRUCE HASKELL

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BRIEF ON BEHALF OF  
CAPITAL ELECTRIC COOPERATIVE, INC.,  
APPELLANT

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## ISSUES PRESENTED

1. Whether the District Court erred where it decided that a declaratory judgment is not an available remedy to challenge action by a municipal governing body, and dismissed Capital Electric Cooperative's Amended Complaint for a declaratory judgment.

2. Whether the Board of City Commissioners of the City of Bismarck erred as a matter of law and exceeded its legislative power and authority under the Constitution of the State of North Dakota, North Dakota Century Code Title 40 and Bismarck's Code of Ordinances where it issued "Findings, Conclusions, Decision and Order" that "... Order[ed] 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."

[The issue is stated with reference to the decision of the Board of City Commissioners of the City of Bismarck, rather than with reference to the decision and judgment of the district court, because the Supreme Court independently determines the propriety of the local governing body's action, without according any special deference to the district court's review. Tibert v City of Minto, 2006 ND 189; Pic v City of Grafton, 1998 ND 202, 586 N.W.2d 159.]

The issues are matters of law. The scope of review by the Supreme Court is not limited.

## STATEMENT OF THE CASE

### 1. Nature of Action.

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. In this case, the rural electric cooperative is Capital Electric Cooperative, Inc. (herein Capital) and the electric public utility is Montana-Dakota Utilities Co. (herein MDU). The disputed territory is part of Boulder Ridge First Addition to the City of Bismarck (Boulder Ridge).

This case originated with MDU's petition to the Board of City Commissioners of the City of Bismarck (herein City Commission or Commission), in which MDU asked the Commission to "Declare Electric Franchise Rights" to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13) The City Commission issued "Findings, Conclusions, Decision and Order" that "... Order[ed] 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." (App. 61)

Capital commenced a declaratory judgment action under N.D.C.C. Chapter 32-23 for a judgment declaring its rights under its franchise with the City of Bismarck (herein Bismarck). (App. 67) Bismarck is the principal defendant; MDU and the Public Service Commission are named as defendants under N.D.C.C. § 32-23-11.

On Bismarck's N.D.R.Civ.P. Rule 12 motion to dismiss Capital's complaint for failure to state a claim on which relief can be granted (supported by MDU), the district court, on its own, without motion by any defendant, decided that a declaratory judgment is not an

available remedy to challenge the merits of a determination made by a municipal governing body, that an appeal of the City Commission's decision was an available remedy, and that the court would allow the matter to proceed as if Capital had filed an appeal. (App. 114) The court dismissed Capital's Complaint. Later, the court issued Orders that Capital's appeal was denied and dismissed Capital's Amended Complaint. Judgment was entered "that the Declaratory Judgment Action brought by the plaintiff is dismissed." (App. 187)

Capital seeks reversal of the district court's orders and judgment dismissing Capital's declaratory judgment action. Alternatively, Capital seeks an order from the Supreme Court directing entry of summary judgment declaring that Capital has rights to provide electric distribution services in the City of Bismarck under the franchise granted to Capital by the City Commission, the City Commission's Order to the contrary notwithstanding.

**2. Chronology of the Boulder Ridge Dispute and Proceedings Below.**

In 1973, Bismarck's City Commission granted a 20 year franchise to Capital. (App. 50) In 1987, the City granted a franchise to MDU, renewing an expiring 20 year franchise. (App. 53) In May of 1993, the City granted a franchise to Capital, renewing the expiring 20 year franchise granted in 1973. (App. 56) 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.

In April of 2005, part of Boulder Ridge was annexed to Bismarck. (App. 64)

On August 30, 2005, MDU petitioned the City Commission to "Declare Electric

Franchise Rights” to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13)

On September 28, 2005, Capital complained to the PSC that MDU was extending its facilities to Boulder Ridge in violation of N.D.C.C. § 49-03-01.3. (App. 94)

On November 14, 2005, the City Commission issued “Findings, Conclusions, Decision and Order” that “. . . Order[ed] 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.” (herein the Order or the Nov. 14 Order). (App. 61)

On November 23, 2005, MDU moved the PSC to dismiss Capital’s Complaint. (App. 111)

On November 30, 2005, Capital commenced an action in district court under N.D.C.C. Chapter 32-23, for a declaration of rights under its franchise granted by the City Commission in 1993. (App. 67)

On December 19, 2005, Bismarck moved to dismiss Capital’s Complaint in the court action for failure to state a claim and moved alternatively for a more definite statement. (App. 73)

On December 19, 2005, the PSC answered Capital’s Complaint in the court action. (App. 71)

On December 20, 2005, MDU answered Capital’s Complaint in the court action. (App. 75)

On December 30, 2005, MDU filed a brief in support of Bismarck's motion to dismiss Capital's Complaint. (Docket 19)

On January 30, 2006, the district court issued a Memorandum Opinion and Order that the City Commission had authority to interpret Capital's franchise, that a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, that an appeal of the City Commission's decision was a remedy available to Capital, and that the court would allow the matter to proceed as if Capital had filed an appeal. (App. 114)

On February 3, 2006, Capital filed an amended complaint and related motions. (App. 123) The amended complaint responded to Bismarck's motion for a more definite statement and added an alternative notice of appeal, responding to the court's January 30, 2006, Order.

On February 9, 2006, the court informed counsel that the practical effect of its January 30 ruling was that the complaint is dismissed and the court would proceed as if the City Commission's decision had been appealed. (App. 134)

On February 22, 2006, Capital moved for reconsideration of the court's January 30, 2006, Order asserting an action for declaratory judgment is an available procedure for judicial review of the Order, and there is no available procedure named appeal. (App. 138)

On March 2, 2006, the district court held a hearing on the appeal. (App. 148)

On March 14, 2006, the district court issued its Order on Appeal. (App. 148) The court stated the issue before it was whether the City Commission abused its discretion in issuing the Order. (App.148) The court reiterated its January 30 determinations: "... the Commission did have the authority to interpret the franchise." and "Having found that the

remedy of a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, the Court then determined that an appeal of the Commission's decision was a remedy available to Capital" [and] "rather than dismiss the action and make Capital start a new proceeding, the Court would allow the matter to proceed as if Capital had filed a proper appeal." (App. 148-160) The Order on Appeal declared ". . . that Capital's appeal is hereby DENIED." (App. 160)

On April 10, 2006, the district court issued its Order denying Capital's motion for reconsideration and granting Capital's motion to amend complaint. (App. 161)

On May 30, 2006, the district court issued its Order granting MDU's motion to dismiss Capital's amended complaint. (App. 186)

On June 7, 2006, the district court issued its Order for Judgment and entered Judgment that "the plaintiff's Appeal from Findings, Conclusions, Decision and Order issued by the Bismarck Board of City Commissioners on November 14, 2005 is denied; [and] that the Declaratory Judgment Action brought by the plaintiff is dismissed." (App. 187)

### **SUMMARY OF ARGUMENT**

The District Court erred where it decided that a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body, dismissed Capital's Complaint for a declaratory judgment and proceeded as if Capital had filed an appeal. There is no statutory provision for an appeal procedure. Under the North Dakota Rules of Civil Procedure, N.D.C.C. Chapter 32-23 and precedents, a declaratory judgment action is an available remedy to obtain judicial review of action of a municipal

governing body. The district court's error led it to another error, restricting the scope of judicial review of the City Commission's Order.

The Bismarck's City Commission erred as a matter of law and exceeded its legislative power and authority where it issued "Findings, Conclusions, Decision and Order" that ". . . Order[ed] 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." (App. 61)

"Jurisdiction is the power to hear and determine a proceeding." Capital Elec. v Public Service Com'n of State of N.D., 534 N.W.2d 587 at 589 (ND 1995). The City Commission had no power under the Constitution or statutes of North Dakota or Bismarck's ordinances to hear and determine the Boulder Ridge dispute. The Commission had no jurisdiction to make the Order granting MDU's petition. Bismarck's City Commission's action to determine which of MDU or Capital had a superior right to provide electric service in Boulder Ridge was the attempted exercise of judicial power by a legislative body, a violation the constitutional principle of separation of powers.

The City Commission's action determining that MDU had a right under the terms of Capital's franchise to impose geographical limits on Capital's franchise was a violation of the constitutional principle against delegation of legislative authority. The unconstitutional provision of the franchise should be severed from Capital's franchise.

Entry of summary judgment should be ordered under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, with the provisions of paragraph 1 of Article II stricken from the franchise.

## ARGUMENT

### **I. Background.**

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. ". . . [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 Elec. Co-op v Wold Properties, Inc., 249 N.W.2d 514 at 520 (ND 1976) (herein Cass v Wold). See also Capital Elec. Co-op, Inc. v Public Service Com'n of State of N.D., 534 N.W.2d 587 (ND 1995) (herein Capital v PSC), the Supreme Court's most recent decision under the Territorial Integrity Act (1965 Session Laws, Chapter 319, codified as N.D.C.C. § 49-03-01.1, et seq.).

Most litigated territorial disputes begin as a proceeding before the North Dakota Public Service Commission (herein PSC), where an electric public utility seeks to serve a customer in a rural area outside the corporate limits of a municipality. See, e.g., Capital v PSC and Application of Otter Tail Power Co., 169 N.W.2d 415 (ND 1969). The Boulder Ridge dispute is atypical. First, this dispute is not about electric service in a rural area outside a municipality; this dispute is about electric service in a rural area that has been annexed to a municipality.

Second, this appeal did not originate in a proceeding before the PSC. This case originated with MDU's petition to Bismarck's City Commission, in which MDU asked the

Commission to “Declare Electric Franchise Rights” to determine that MDU is authorized and Capital is not authorized under their respective franchises to provide electric distribution service in Boulder Ridge. (App. 13) The Commission issued “Findings, Conclusions, Decision and Order” that “. . . Order[ed] 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.” (App. 61) Capital commenced a declaratory judgment action for judgment declaring its rights under its electric franchise with Bismarck. (App. 67)

Though atypical, the Boulder Ridge dispute is not unprecedented. It has an antecedent in Cass County Elec. Co-op, Inc. v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v North Dakota Public Service Com’n, 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 resolved a dispute in the Fargo area substantially the same as the dispute over Boulder Ridge in Bismarck.

Nor is the procedure unprecedented. Other territorial disputes have come to the Supreme Court via routes other than appeals from PSC proceedings. See, e.g., Cass v Wold (electric cooperative’s action for declaratory judgment); Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (ND 1972) (electric utility’s action for injunction); Application of Otter Tail Power Co., 451 N.W.2d 95 (ND 1990) (herein Otter Tail 1990) (electric utility’s action for writ of prohibition against PSC’s jurisdiction).

After MDU filed its petition with Bismarck’s City Commission, Capital commenced a proceeding before the PSC, complaining of MDU’s extending its facilities to Boulder

Ridge in violation of the provisions of the Territorial Integrity Act that prohibit MDU's interference with Capital's existing service and system in the Boulder Ridge area. (App. 94) Capital's complaint to the PSC against MDU is like Cass's complaint to the PSC against NSP in the South Pointe cases.

The two separate proceedings, MDU's petition to Bismarck's City Commission and Capital's Complaint to the PSC, clashed when MDU moved the PSC to dismiss Capital's complaint. (App. 111) MDU's motion to dismiss was premised "on the grounds that CEC [Capital] 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". (App. 112-113)

According to MDU's theory presented to the PSC, the Boulder Ridge dispute is not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of Bismarck's City Commission, under Article VII, § 11 the State Constitution. (App. 111-113)

Capital's response to MDU's motion to dismiss was the PSC should deny MDU's motion. The PSC should deny the motion to dismiss as a matter of routine because the PSC should not consider, has not jurisdiction to decide, the issue of constitutional law presented by MDU's motion. ". . . [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). When a party to a PSC proceeding (such as MDU) raises a constitutional objection to the PSC's jurisdiction, the PSC should not attempt to resolve the constitutional issue. Any constitutional issues will be decided on appeal. "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 127 (that is, appealed from a PSC decision under N.D.C.C. § 28-32-42). That is the right way to deal with MDU's constitutional claims. That was Capital's position, but it was not certain the PSC would follow Johnson v Elkin.

MDU's defensive claim in the PSC case explains why Capital commenced the declaratory judgment action for judicial review of the City Commission's Order. The PSC had scheduled a hearing on Capital's complaint, listing as one of the issues whether the PSC has jurisdiction, and the PSC scheduled separate consideration of MDU's motion to dismiss. The PSC was poised to consider and perhaps grant MDU's motion to dismiss on the grounds the City Commission's Order deprived the PSC of jurisdiction.

The City of Bismarck (herein Bismarck) is the principal defendant in Capital's declaratory judgment action. MDU and the PSC are named as defendants, but not as wrongful actors; they are parties because N.D.C.C. § 32-23-11 requires persons who might be affected by declaratory relief to be made parties. Capital's action against Bismarck challenges its City Commission's Order to grant MDU's Petition, so it is clear from N.D.C.C. § 32-23-11 that MDU must be a party to the action. The PSC might be "affected" also, because MDU alleged the City Commission's Order as the basis for its motion to dismiss Capital's complaint to the PSC.

Capital's declaratory judgment action may be regarded as a "helpful" collateral proceeding. See Application of Otter Tail Power Co., 354 N.W.2d 701 (ND 1984) (herein Otter Tail 1984). (A collateral action may be helpful to resolve questions of jurisdiction.). See also Otter Tail 1990 (Collateral proceedings by utility challenging PSC's jurisdiction; PSC's jurisdiction sustained.). The entire record of this case marks it as collateral in relation

to the PSC proceeding. MDU's petition to the City Commission was a pre-emptive collateral attack on the PSC's jurisdiction. Capital's action for a declaratory judgment collaterally supports the PSC's jurisdiction by seeking a judicial declaration that the City Commission has not the power it claims, a power that MDU claims has been exercised to its benefit to deprive the PSC of its jurisdiction under the Territorial Integrity Act.

If the City Commission's action was ineffective, there is no conflict between its action and the PSC's jurisdiction to act on Capital's complaint. But if the court were to sustain the City Commission's action, that would not resolve the constitutional conflict set up by MDU. If the City Commission's action were sustained, whether that action is constitutionally inferior to or superior to the PSC's authority, is not an issue in this case.

The court action does not challenge the PSC's jurisdiction. No party to the court action, not Capital, not MDU, not the city of Bismarck, and not the PSC, has asked the court to make a collateral determination of the PSC's jurisdiction or its status as inferior or superior to the City Commission's. The only challenge to the PSC's jurisdiction is MDU's motion to the PSC to dismiss Capital's Complaint. (App. 111) That motion was denied by the PSC; the PSC's order has been appealed by MDU, under Johnson v Elkin. On September 25, 2006, the PSC's Order was affirmed. (District Court Case No. 06-C-1177).

Capital's action should not be regarded as the commencement of a collateral proceeding; it continues a collateral proceeding commenced by MDU. MDU's petition, asking for the City Commission's help in MDU's territorial dispute with Capital, was a pre-emptive collateral attack on the PSC's jurisdiction, pre-meditated as MDU prepared to extend its facilities into Boulder Ridge, anticipating Capital would complain to the PSC, like

Cass complained about NSP in the South Pointe cases. Capital's action for judicial review is the second stage of MDU's collateral attack on the PSC's jurisdiction.

**II. The District Court erred where it decided an action for declaratory judgment is not an available remedy to challenge Bismarck's City Commission's order granting MDU's petition to the Commission to declare franchise rights, dismissed Capital's complaint for a declaratory judgment, and proceeded as if Capital had filed an appeal.**

Capital commenced this action for declaratory judgment under N.D.C.C. Chapter 32-23 for judicial determination of its franchise rights and review of action taken by Bismarck's City Commission. (App. 67)

Bismarck's alternative motions for dismissal for failure to state a claim on which relief can be granted or for a more definite statement were both premised on its evaluation of the complaint as "overbroad," "failing to allege specific facts" or "specific relief sought." (App. 73)

The district court's January 30, 2006, memorandum opinion and order determined that the motion to dismiss should be granted, but not on grounds asserted by Bismarck. The Court opined on its own, without any party asserting that the remedy of a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body, and the court determined that Capital has a remedy under N.D.C.C. § 27-05-04(4) to appeal the City Commission's decision to the district court. The court concluded the complaint should be dismissed but would be considered to be an appeal of the City Commission's Order. (App. 114)

The district court's opinion “. . . that the remedy of a declaratory judgment is not an available remedy to challenge a determination made by a municipal governing body. . . .” is erroneous. (App. 148, 153)

The plain words of N.D.C.C. Chapter 32-23 provide that a declaration of Capital's rights, status, or other legal relations under its franchise as affected by the Nov. 14 Order, is an appropriate procedure for judicial review of the Order.

District courts have “jurisdiction of appeal from . . . the determinations of inferior officers, boards, or tribunals, in such cases as pursuant to such regulations as may be prescribed by law.” N.D.C.C. § 27-05-06(4). Similarly, N.D.C.C. § 28-34-01 enacts procedures to govern “. . . any appeal provided by statute from the decision of a local governing body. . . .” There is no “appeal provided by statute” or “prescribed by law” for Capital to obtain judicial review of the City Commission's Order by a procedure named “appeal.”

No statute provides for appeal from the Nov. 14 Order. North Dakota statutes include rights to judicial review of some actions of local governing bodies under procedures named “appeal” (See, e.g. N.D.C.C. § 40-39-10 (appeal of decision as to vacation of public grounds, streets or alleys) and N.D.C.C. § 40-47-11 (appeal of zoning decision)), but no statute provides for appeal from the Nov. 14 Order. N.D.C.C. Chapters 40-05 and 40-05.1, arguable bases of the City Commissions' claimed powers exercised in the Order, do not include any provisions for an appeal from a municipal governing body's action under either Chapter. Bismarck has no ordinance that provides for appeal from the Order.

There is no “appeal provided by statute” or “prescribed by law” for Capital to obtain

judicial review of the Order by a procedure called “appeal.” (The absence of appeal procedures parallels the absence of statutes or ordinances to sustain the Commission’s action making the Order, a subject of the following sections of this brief.)

Even if an appeal were available, the existence of another adequate remedy does not preclude declaratory relief. N.D.C.C. § 32-23-01; N.D.R.Civ.P. Rule 57. Declaratory relief is not precluded where there is no “appeal” process provided by statute or otherwise prescribed by law.

In the absence of an “appeal provided by statute” or an appeal “prescribed by law,” or as an alternative to any procedure called “appeal,” an action for declaratory judgment is an available remedy to obtain judicial review of a city governing body’s action. It is not only commonly used, e.g. Go Committee ex rel. Hale v City of Minot, 701 N.W.2d 865 (ND 2005) and City of Fargo v Harwood Township, 256 N.W.2d 694 (ND 1977), the opinion in one case that came to the Supreme Court via a certiorari procedure ended with the court’s remark that an action for declaratory judgment is a proper method to challenge the city commission’s action. Cowan v Stroup, 284 N.W.2d 447 (ND 1979).

The district court’s decision “. . . that the remedy of a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body. . .” (App. 148, 153) and dismissal of Capital’s complaint were erroneous. Precedents, the Rules of Civil Procedure and the plain words of N.D.C.C. Chapter 32-23 provide that a declaratory judgment action is an appropriate procedure for judicial review of the City Commission’s Order.

Capital is aggrieved by the district court’s erroneous procedural decision and action,

its self-initiated conversion of Capital's Complaint to an appeal where there is no "appeal provided by statute," and no appeal "prescribed by law." Compare State v Hansen, 2006 ND 139, 717 N.W.2d 541, where the Supreme Court was critical of a district court's raising an issue on its own initiative, pre-determining the outcome, and failing to follow established procedures and orderly process.

As stated in Capital's motion to the district court for reconsideration, the court's actions were equal to summary judgment procedures, except its rush to judgment deprived Capital of a reasonable opportunity to make a complete presentation under N.D.R.Civ.P. Rule 12 and N.D.R.Civ.P. Rule 56. If the record was sufficient to decide the legal issues without more evidence, the district court should have entered summary judgment against the moving party, under N.D.R.Civ.P. Rule 56.

**III. The Bismarck City Commission's Order was not the exercise of a power under the North Dakota Constitution, North Dakota statutes, or Bismarck's ordinances.**

**A. The Order was not the exercise of a power granted by the Constitution.**

Bismarck's City Commission purported to exercise a power conferred by the Constitution. The Order's "conclusion of law" "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City" is wrong, an erroneous conclusion of law. (App. 64)

"Heavy artillery" is required to support claims of rights and powers under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. Southern Valley Grain Dealers Ass'n v Board of City Com'rs of Richland

County, 257 N.W.2d 425, 434 (ND 1977). Effertz v North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 223 (ND 1992) and Froysland v North Dakota Workers Compensation Bureau, 432 N.W.2d 883, note 7 at 892 (ND 1988). Bismarck's (and MDU's) arguments should be dismissed, not merely because they are conclusory, but because reasoning shows they are wrong.

Article VII, § 11 of the State Constitution provides:

“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.”

Article VII of the Constitution was adopted at a general election in 1982 as one part of constitutional revision proposed by the legislature in 1981. 1981 ND Laws, Chapter 665. (The draft constitution proposed and rejected in 1972 included Article VII, § 11.) Article VII, § 2 encompasses former Section 130, which empowered the legislative assembly to provide by general law for the organization of municipalities. There is a paucity of legislative history as to new Article VII as proposed in 1981 and an absolute dearth as to Section 11. Article VII, § 11 has no history of judicial interpretation.

Section 139 of the State's original 1889 Constitution addressed the same subject and to the same general effect as new Article VII, § 11, adopted in 1982. The provisions of original Section 139 remain in the Constitution after the 1982 election, renumbered as Article XII, § 10:

“No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes.”

In City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1957) (herein Grafton v Otter Tail), the city asserted Section 139 was a grant of power to 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.

This long standing interpretation of Article XII, § 10 leads to the consistent interpretation that Article VII, § 11 is “not a grant of power to municipalities.” Statutes relating to the same subject matter are construed together so as to harmonize them. Cass v NSP, 419 N.W.2d at 185. The principles of construction applicable to statutes are generally applicable to construction of the Constitution. Johnson v Wells County Water Resource Bd., 410 N.W.2d 525 (ND 1987).

To construe Article VII, § 11 as not a grant of power to municipalities is consistent with the interpretation of former Section 130 of the Constitution, now Article VII, § 2.

“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) (herein Litten v Fargo).

The Nov 14. Order's conclusion of law “That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City” is erroneous. (App. 64)

Article VII, § 11 is not a grant of power to municipalities. Article VII, § 11 “. . . in itself does not grant any powers to home rule cities.” Litten v Fargo, 294 N.W.2d at 631; Grafton v Otter Tail, 86 N.W.2d at 205. 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.)

Not only is Article VII, § 11 not self-executing as to powers to grant franchises, nothing in Article VII, § 11 supports the Order’s statement “That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City.” (Underscoring added.) (App. 64) The power referred to in (not granted by) Article VII, § 11 is the power “to franchise.” (The word “franchise” is used as a verb in the Constitution and as a noun in the statutes. “To franchise” as used in the Constitution and “to grant franchises” as used in the statutes are obviously synonymous.) N.D.C.C. § 40-05-01(57) empowers cities “to grant franchises” and “to regulate the use of the same” and refers to “the regulatory powers of the governing body” (i.e. powers under subsections 1 and 13). N.D.C.C. § 40-05.1-06 empowers cities “to grant and regulate” franchises. “The power to regulate” claimed by the City Commission is not granted by, and is not referred to in the Constitution.

**B. The Order was not the exercise of a power granted by any statute.**

Bismarck’s City Commission’s Order claims “the power to regulate” under Article VII of the Constitution. (App. 64) It has no such constitutional power.

“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 Fargo, 294 N.W.2d at 631.

“Cities are agencies of the state and have only the powers expressly conferred upon them by the legislative branch of the government or such powers as may be necessarily implied from the powers thus conferred.” Fradet v City of Southwest Fargo, 59 N.W.2d 871 (ND 1953) (Court syllabus No. 5).

These judicial expressions reflect the provisions of Article VII of the Constitution:

“The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.” Constitution, Article VII, § 2.

“The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities.” Constitution, Article VII, § 6.

After Capital commenced its declaratory judgment action to challenge the City Commission’s Order that asserted non-existent constitutional powers, Bismarck modified its theory about jurisdiction. Now it is claimed the Order was the exercise of a statutory power to regulate under N.D.C.C. § 40-05-01(57) (Bismarck’s January 13, 2006, brief, pages 2-4; Docket #24), a claim not made in the Order. (App. 61-66)

N.D.C.C. § 40-05-01(57) provides:

“**Powers of all municipalities.** The governing body of a municipality shall have the power. . . .

“57. Franchises. To grant franchises or privileges to persons, associations, or corporations, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.” (Underscoring added) . . . .

There is no disputing the power of Bismarck’s City Commission to grant franchises,

the power exercised when it granted non-exclusive franchises to MDU in 1987 and to Capital in 1973 and 1993. Capital does not challenge the City Commission's power to grant franchises. (The wrongful delegation of that power is challenged. See Section III A, below.) Capital disputes Bismarck's and MDU's assertion the Order was the exercise of the City Commission's power to grant franchises and "to regulate the use of the same" or the exercise of "the regulatory powers of the governing body." The quoted words are taken from N.D.C.C. § 40-05-01(57). N.D.C.C. § 40-05-01 also provides:

**"Powers of all municipalities.** The governing body of a municipality shall have the power. . . .

"1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, or as the general welfare of the municipality may require, and to alter repeal, alter, or amend the same.

. . . .  
"13. Gas and water mains - Sewers - Electric light and gas plants. To regulate the laying of gas or water mains and pipes, and the building, laying, or repairing of sewers, tunnels, and drains, and the erecting of gas and electric light plants. Any company or association of persons organized for the purpose of manufacturing illuminating gas or electricity to supply municipalities and the inhabitants thereof shall have authority, subject to existing rights, with the consent of the governing body of the municipality, to erect gas or electric light works and lay down pipes and string wires or poles in streets or alleys subject to such regulations as the municipality may prescribe by ordinance." (Underscoring added) . . . .

These provisions of N.D.C.C. § 40-05-01 that apply to all cities are substantially the same as statutes that also govern home rule cities. Under N.D.C.C. § 40-05.1-06(10), the power "to grant and regulate franchises" is conditioned: "if implemented through ordinances."

The object of N.D.C.C. § 40-05-01(1) is to prevent the local governing body from exercising large grants of authority without specific regulations having been first made by

some enactment which has the force of law. Engstad v Dinnie, 76 N.W. 292 (ND 1898). See also (Mini Mart, Inc. v City of Minot, 347 N.W.2d 131 (ND 1984) (herein Mini Mart v Minot).

Nothing in N.D.C.C. Title 40 is a self-executing grant of power to the governing body of any municipality "to regulate." What is granted by statute, using words of N.D.C.C. § 40-05-01, is power "to grant franchises," that are "subject to the regulatory powers of the governing body," i.e. "such regulations as the municipality may prescribe by ordinance." What is granted by statute are separate powers "to grant and regulate franchises" "if implemented through ordinances" (words taken from N.D.C.C. § 40-05.1-06(10)).

**C. The Order was not the exercise of a power implemented by any ordinance.**

Whatever power any city has "to regulate" is not a constitutional power. Whatever power any city might have "to regulate," it is a statutory power under N.D.C.C. Chapter 40-05, or 40-05.1, a power Bismarck's City Commission does not have in the absence of implementing ordinances.

"It is not sufficient merely to examine the subsections of 40-05.1-06, N.D.C.C., to determine what powers the city of Fargo, a home rule city, may have. To make this determination, it is also necessary to review the charter to determine if those powers are included in the charter, and if they are it then becomes necessary to determine if they were implemented by ordinance. It therefore follows that if the powers are not stated in the charter, or if they are stated in the charter but are not implemented by ordinance, the home rule city may not avail itself of the powers enumerated in 40-05.1-06, N.D.C.C., but would be governed by the statutes applicable generally to all cities." Litten v Fargo, 294 N.W.2d at 632.

“ . . . in order to make the grant of such power [to grant or deny liquor licenses] effectual, the municipality must enact ordinances reserving the legislative grant of discretion and prescribing reasonable rules and standards to govern the exercise of that discretion.

“ . . . a municipality must reserve its legislative grant of discretion through the use of written criteria which both adequately inform applicants of the standards and policies to be contemplated by the municipality, and adequately guide the licensing authority in arriving at its decision. Aside from any constitutional considerations, fundamental fairness would seem to require nothing less.” Mini Mart v Minot, 347 N.W.2d at 139 and 141, citing N.D.C.C. § 40-05-01(1).

No ordinances have been enacted by Bismarck’s City Commission to implement regulatory powers available under N.D.C.C. § 40-05-01 or § 40-05.1-06. Article 3, Section 10 of Bismarck’s home rule charter does not fill the void; it is merely a restatement of a City’s powers under N.D.C.C. § 40-05.1-06 to grant and regulate franchises. Those powers are conditioned: “if implemented through ordinances.” N.D.C.C. § 40-05.1-06. Litten v Fargo.

Bismarck’s ordinances do include the power to grant franchises (Chapter 10-11), the power exercised when it granted franchises to MDU and to Capital. There are no provisions in Bismarck’s ordinances that sustain the power “to regulate” claimed by the City Commission in its Order. There are no provisions in Bismarck’s ordinances that sustain the claimed power to hear and decide local territorial disputes between holders of non-exclusive franchises granted by the Commission, as if the City Commission were also Bismarck’s little public service commission. “Bismarck has enacted ordinances regarding the granting of franchises, but has not enacted ordinances regarding regulation of franchises.” (Bismarck’s February 28, 2006, brief, page 7; Docket #51.)

**D. Bismarck's City Commission's Order was not a legal exercise of power.**

Bismarck's City Commission's Order is not the exercise of any power created by legislation at any level. Not by the Constitution; not by any statute; not by any ordinance.

In the proceedings below, the district court, Bismarck and MDU relied on the principle that judicial review of local governing bodies' legislative decisions is limited by the doctrine of separation of powers. See, e.g., GO Committee ex rel. Hale v City of Minot, 701 N.W.2d 865 (ND 2005) (herein Committee v Minot) and Pic v City of Grafton, 1998 ND 202, 586 N.W.2d 159. They argued the City Commission's decision was not arbitrary or unreasonable, not an abuse of discretion. They made the same mistake the Commission did in its Order, erroneously concluding the Commission acted within the scope of its legislative power.

There is a difference between questions about whether a power exists and questions about the exercise of a power that exists. As explained in Committee v Minot, the rule of strict construction applies. See also Braunagel v City of Devils Lake, 629 N.W.2d 567 (ND 2001) and Frey v City of Jamestown, 548 N.W.2d 784 (ND 1996), distinguishing between an illegal exercise of power and discretionary exercise of a legal power. The arbitrary/unreasonable standard applies to a power that exists, one that is authorized by statute and implemented by local ordinance, a power that exists under the rule of strict construction.

Courts have the ultimate responsibility to decide whether a claimed discretionary legislative power exists. If no power exists under ordinances implementing a power available under statutes, an ad hoc assertion of power cannot be sustained on claims the local

governing body made a reasonable decision. Mini Mart v Minot, 347 N.W.2d at 138, note 4. In the absence of any law to confer, implement, ordain, or otherwise create the “power to regulate” claimed by the City Commission to sustain its Order, the Order is ineffective. It is ineffective not because the Order is unreasonable; that is not the main issue. It is ineffective because Bismarck’s City Commission lacks the legal power to make the Order. Mini Mart v Minot, 347 N.W.2d at 137-39.

The City Commission’s Order was not the exercise of a legal power. It is not sustainable under the Constitution, any statute, or any ordinance to implement any statutory power. The Order exceeded the City Commission’s scope of legislative authority.

“The failure of a governing body to correctly interpret and apply controlling law can constitute arbitrary, capricious or unreasonable conduct.” (MDU’s January 13, 2006, brief, page 4, citing City of Fargo v Ness, 529 N.W.2d 572, 577 (ND 1995); Docket #26). See also Committee v Minot, 701 N.W.2d at ¶ 11. (“We conclude that the construction of the ordinance advocated by Minot is unreasonable.”)

The City Commission’s Order included two particularly extreme failures to correctly interpret and apply controlling law, failures that constitute arbitrary, capricious or unreasonable action, mistakes in use of the power of office where no legal power really exists. The Order violated fundamental constitutional principles.

IV. **Bismarck's City Commission's Order violated fundamental constitutional principles.**

In the course of claiming constitutional powers, the City Commission itself violated constitutional principles. The Commission delegated its legislative powers to MDU to govern Capital's franchise. The City Commission imagined itself having judicial powers; it breached the constitutional wall of separation between legislative and judicial functions of government when it assumed the power to resolve the territorial dispute between Capital and MDU.

A. **The franchise granted to Capital by Bismarck's City Commission included an unconstitutional delegation of legislative authority to MDU.**

Bismarck's City Commission "performs the legislative functions of the city." N.D.C.C. § 40-05.1-00.1(3). The Commission performed a legislative function when it granted franchises to MDU in 1987 and to Capital in 1973 and 1993. Capital's franchise refers to an Area Service Agreement between Capital and MDU. The Agreement is referred to in the Order.

The Agreement has its own legal history. Electric providers sometimes tried to arrange by private agreement for orderly development of service without unreasonable duplication of capital-intensive facilities. The agreements were unreliable because they were unenforceable, easily abandoned unilaterally when one of the parties deemed the agreement no longer advantageous. See Williams Elec. Co-op, Inc. v Montana-Dakota Utilities Co., 79 N.W.2d 508 (ND 1956); Montana-Dakota Utilities Co. v Williams Elec. Co-op Inc., 263 F.2d 431 (8<sup>th</sup> Cir. 1959). That is part of the history of territorial disputes, before and after

the Territorial Integrity Act was enacted in 1965. See Cass v NSP, and NSP v PSC. That is also the background of the Boulder Ridge dispute. Order, Findings 3, 4 and 5 and Conclusions 2, 3, 4, and 5. (App. 61-66)

The main ingredient of the Order is the City Commission's interpretation of the Area Service Agreement and how that Agreement (as interpreted by the Commission) affected Capital's franchise and the Commission's decision on MDU's petition. Principal references to the Agreement are: The Agreement "removed MDU's objections" to the City's granting a franchise to Capital (Finding 3). (App. 62) "The franchises of both MDU and CEC [Capital] are similar except that the CEC Franchise incorporates the provisions of the Area Service Agreement" (Finding 3c and Conclusion 4, referring to paragraph 1 of Article II of Capital's franchise.). (App. 62, 63, 65) The Agreement "is incorporated into the CEC Franchise" (Conclusion 2). (App. 64) "CEC's Franchise is limited by the language of Article II of that Franchise, which incorporates the Area Service Agreement between MDU and CEC." The Agreement and Capital's franchise installed MDU as the "main provider of electric service within the City" excepting Capital's "existing customers" or "customers or service areas conceded to CEC by MDU." Capital's franchise did not extend to areas later (after 1993) annexed to Bismarck except "by an Amendment to the Area Service Agreement" or "specifically consented to by MDU." When MDU unilaterally canceled the Agreement, MDU foreclosed Capital's franchise extending to annexed areas (Conclusions 3 & 5). (App. 64, 65)

The City Commission's action was initiated by MDU's petition to declare its rights. (App. 13) But MDU's franchise was not the object of the Order. The object of MDU's

petition and the Commission's Order was Capital's franchise and MDU's rights under Capital's franchise, MDU's rights to impose limits on Capital's franchise. "Pursuant to the terms of the CEC franchise, the cancellation of the Area Service Agreement [by MDU] froze the boundaries of the CEC franchise to those areas within the City of Bismarck as described by the Area Service Agreement as of the effective date of cancellation." (MDU's petition, page 2) (App. 14). "The Board of Commissioners Orders that the Petition of MDU is granted. . . ." (Order, App. 66)

Whether or not Capital's franchise was ambiguous when it was granted in 1993 (Capital does not agree it was ambiguous) the Order was not. In 2005, the City Commission declared Capital's franchise is geographically limited, limited by powers held by MDU, powers granted to MDU by the Commission when it granted Capital's franchise. Bismarck's City Commission unambiguously declared that it delegated to MDU the legislative power to determine the geographical limits of Capital's franchise.

Delegation of legislative power is unconstitutional. Legislative bodies routinely delegate authority to inferior governmental agencies to administer laws enacted by the legislature, but legislative authority may not be delegated. See, e.g. Stutsman County v State Historical Soc. of North Dakota, 371 N.W.2d 321 (ND 1985). Legislative authority may not be delegated to private parties. Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967) (herein MDU v Johanneson). The principle that legislative authority cannot be delegated applies to local governing bodies. Cowan v Stroup, 284 N.W.2d 447 (ND 1979).

Here we have a small mirror image of the delegation issue in MDU v Johanneson. Small, because the delegation issue in this case involves Bismarck's City Commission and the city's municipal limits, not the State Legislature and the entire State's area. The City Commission (and MDU) interpret the grant of Capital's franchise as including a grant of power to MDU by the Commission, the power to decide whether a rural electric cooperative may provide electric service in rural area that has been annexed to the municipality. The reflection is the ironic resemblance to the original Territorial Integrity Act, where rural electric cooperatives were empowered to determine "whether a certificate of public convenience and necessity shall be granted to a public utility in the area outside the limits of the municipality," a power determined by the Supreme Court to be an unconstitutional delegation of legislative authority. MDU v Johanneson, 153 N.W.2d at 421.

Under the Order, the City Commission interpreted Capital's 1993 franchise as including, by incorporation of the Agreement (as interpreted by the Commission), MDU's unilateral power to geographically limit Capital's franchise, a power exercised by MDU and wrongly sanctioned by the Nov. 14 Order.

In MDU's words, "The issuance of a municipal franchise is a legislative function of the City founded upon the police power inherent in the State and granted to the municipality." (MDU brief in support of Bismarck's motion to dismiss, December 30, 2005, page 2; Docket #19.) The City Commission's delegation of that power to MDU is unconstitutional, under principles championed by MDU, in MDU v Johanneson.

**B. Bismarck's City Commission's assumption of power to decide the dispute between Capital and MDU violated the principle of separation of powers.**

Bismarck's City Commission "performs the legislative functions of the city." N.D.C.C. § 40-05.1-00.1(3). MDU's petition to the City Commission did not invite the exercise of a legislative function, nor does the Nov. 14 Order record the exercise of a legislative function. The City Commission's Order violated the constitutional principle of separation of governmental powers.

The City Commission's Nov. 14 Order is the subject of judicial review, not MDU's franchise and not Capital's franchise. There is a difference between two kinds of actions. The City Commission granted franchises to MDU in 1987 and to Capital in 1993, exercising a legislative power under enabling statutes, charter powers, and local ordinances. The Order issued on November 14, 2005, is different.

The Order purports to grant a petition to resolve a territorial dispute between holders of non-exclusive franchises granted by the city. No constitutional provision, no enabling statute, no charter power or local ordinance sustains that process or that decision. The Order is wholly lacking any legal foundation as a legislative act. The Order is ineffective not only because it was not authorized under any state statutes or local ordinances, it is also ineffective because legislative bodies are constitutionally excluded from exercising judicial powers.

Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166

N.W.2d 377 (ND 1969). Courts do not invade local legislative provinces, as demonstrated by City of Carrington v Foster County, and more recently by Committee v Minot. And courts attend to the other side of the boundary, to restrict local governing bodies to the exercise of legislative functions. See, e.g., Cowan v Stroup and Fradet v City of Southwest Fargo.

The Nov. 14 Order itself demonstrates it is not a legislative act, that it was an attempted judicial act. Bismarck's City Commission entertained MDU's "Petition to Declare Franchise Rights" to determine that MDU is authorized and Capital is not authorized to provide electric distribution service in Boulder Ridge. The title of the Commission's response to MDU's petition, "Findings, Conclusions, Decision and Order" and the words used in that document indicate the Commission made its findings, reached its conclusions and issued its decision and order as if it were a panel of judges. (App. 61)

Its decisive words were judgmental: "Accordingly, the Board of City Commissioners 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 the City of Bismarck." (Order, p. 6; App. 66) The Order adopted the form and expressions of a judicial forum, perceiving the conflict as affected by ambiguities in a contractual agreement, resolving the perceived ambiguities, citing and interpreting the State Constitution, all leading to a decision and order as to the litigants' rights as affected by the Constitution, statutes, municipal ordinances, a contract and Capital's franchise.

The City Commission not only asserted power to adjudicate conflicting claims under Capital's franchise. The Commission conferred on itself jurisdiction to adjudicate the Area

Service Agreement between Capital and MDU, to declare that Agreement to be ambiguous and to interpret the Agreement as if the Commissioners were judges exercising powers of contract interpretation under N.D.C.C. Chapter 09-07. The City Commission used its interpretation of the Agreement to make its interpretation of Capital's franchise. ("The Area Service Agreement is ambiguous and the Commission may consider extrinsic evidence to interpret the provisions of the Area Service Agreement and related provisions of the CEC Franchise." (Order Conclusion 2; App. 64)

A real court would have distinguished between interpretation of a franchise granted under an ordinance and interpretation of a private agreement, recognizing that private parties' intent uncertainly expressed in the agreement cannot be superimposed on the franchise. "When construing a statute, a court must `begin by examining the text, not by psychoanalyzing those who enacted it.'" State ex rel. Stenehjem v FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828.

If ambiguity was an issue with the Agreement, a real court would not have tried to reconstruct original intent uncertainly expressed in 1993 or 1973 without looking to the parties' conduct through 2005. See National Bank of Harvey v International Harvester Co., 421 N.W.2d 799 (ND 1988) ("The parties' conduct in the course of performance after the contract's formation can help determine the meaning of ambiguous language."). The Order did not consider the City's, MDU's or Capital's conduct with respect to electric service in areas annexed to Bismarck after the 1993 franchise and agreement and before MDU's 2005 petition. (See App. 61-66, Transcript of City Commission Meeting, pp. 9-11, 14 and 22.) Although that meeting consisted of much argument and little evidence, it did include MDU's

admissions of facts about how the parties' conduct differs from MDU's arguments about how Capital's franchise should be interpreted. Id. Compare NSP v PSC, 452 N.W.2d at 343, note 1.

Bismarck's City Commission's interpretation of the Area Service Agreement between MDU and Capital was a principal feature of the Order. Contract interpretation is a judicial function under N.D.C.C. Title 09, not a local governing body's legislative function. Where contract interpretation involves resolving ambiguity, that is a question of law to be resolved by courts. National Bank of Harvey v International Harvester. See also Williams Electric Cooperative v Montana-Dakota Utilities Co., 79 N.W.2d 508 (ND 1956) and Northwestern Bell Telephone Company v Hagen, 234 N.W.2d 841 at 845 (ND 1975). ("Its [the PSC's] jurisdiction does not extend into the enforcement of contracts between public utility companies, a judicial function that is rooted in tradition, constitution and statute.").

A real court might have been troubled by MDU's arguments about resolving claimed ambiguities and enforcing in 2005 an agreement that MDU purported to cancel in 2003. A real court would have recognized MDU's claim that its cancellation of the Agreement had the legal effect to limit Capital's franchise is integral to the delegation problem. Even if MDU has the legal privilege or power to cancel the unenforceable Agreement, to exercise that power cannot affect Capital's franchise because the grant of a franchise is a legislative act and that legislative power cannot be delegated. MDU's actions cannot deprive Capital of its franchise with the city.

MDU and Bismarck have cited cases where cities' governing bodies' actions have been upheld under the test whether the legislative body acted arbitrarily, capriciously or

unreasonably, a principle applied most recently in Tibert v City of Minto, 2006 ND 189. That principle does not sustain the Nov. 14 Order or shield it from judicial review. The rationale of all those cases is the principle of separation of powers. See, e.g., Pic v City of Grafton, 460 N.W.2d 706, at 710 (ND 1990). (“Judicial review of non-judicial decision making is, under the separation of powers, limited to whether the decision is arbitrary, capricious, or unreasonable.”) The arbitrary/unreasonable standard is applied to restrict courts from invading the legislative province, not to expand local governing bodies’ legislative powers into judicial decision making. It is arbitrary, capricious, unreasonable to the nth degree for any local legislative body to breach the wall of separation of powers, to invade the judicial sphere in an ad hoc hearing with no procedural or substantive foundation under any existing law, to interpret contracts, to adjudicate a territorial dispute between holders of non-exclusive franchises.

In the context of the current litigation, it is fair comment to say the Order to declare franchise rights resembles action of a district court with jurisdiction to render a declaratory judgment. Bismarck’s City Commission has no such jurisdiction, and its decision is erroneous.

The Nov. 14 Order is not legislation, it is usurped adjudication. It should be rejected under the constitutional principle of separation of powers.

**V. The City Commission’s interpretation of Capital’s franchise is unreasonable.**

Capital is confident that the City Commission’s Nov. 14 Order cannot be sustained because it violates two fundamental principles of constitutional law, the prohibition of

delegation of legislative powers and the separation of powers. Capital is also mindful that courts avoid constitutional issues if a case can be decided on any other basis. There is another basis on which the court can reject the City Commission's interpretation of Capital's franchise. The Commission's interpretation is unreasonable.

Ultimately, the interpretation of Capital's franchise is a judicial function. Bismarck asserts and Capital agrees: A franchise is like an ordinance and "Ordinances are interpreted like statutes." and "Statutory interpretation is a question of law subject to full review upon appeal." (Bismarck's February 28, 2006, brief, page 3, citing City of Fargo v Ness). A city governing body's interpretation of its ordinance that is unreasonable may be rejected by the court. Committee v Minot. An interpretation may be rejected as unreasonable, without being adjudged as unconstitutional.

Capital asserts the Commission's interpretation of Capital's franchise was unreasonable, because Article II of Capital's franchise was not ambiguous. The text is clear; Capital's franchise applies to a certain geographical area. It was unreasonable for the City Commission to declare Capital's franchise to be ambiguous. It was unreasonable for the City Commission to look outside the text of the franchise to a private agreement to determine a previous governing body's intent underlying the franchise. It was unreasonable for the Commission to interpret the franchise in such a way that the Commission allowed MDU's cancellation of the Area Service Agreement had the effect that MDU re-defined the geographical area affected by Capital's franchise. Capital's franchise states unambiguously that if the Agreement is canceled by either party "all privileges, rights, obligations and restriction as therein stated shall continue to apply." (App. 57) The City Commission's

interpretation of Capital's franchise should be rejected as unreasonable, so whether the interpretation was also unconstitutional need not be decided.

### **RELIEF REQUESTED**

**The district court's judgment of dismissal should be reversed, and the case remanded for further proceedings, or with directions for the entry of summary judgment that Capital has franchise rights to provide electric distribution services in the City of Bismarck.**

There are alternate ways for the Supreme Court to remedy the district court's errors. It could reverse the erroneous dismissal of Capital's complaint and remand with appropriate directions for Capital's action to be reinstated. If remanded, the action would go back to the district court to be tried or addressed on summary judgment proceedings, possibly appealed again and finally decided later. If remanded, the action would not go back to the City Commission. Remand to the district court would only delay remedying Bismarck's City Commission's errors.

Even though the record in this case is not as fully developed as it might have been had the district court not proceeded as it did, even though on remand Capital would have the opportunity to present more evidence at a trial or in summary judgment processes (particularly evidence of conduct affecting the ambiguity issue), it is within the Supreme Court's power to provide complete relief now, not merely correcting the district court's procedural errors but providing complete relief to remedy the City Commission's errors. Instead of remand to the district court, the Supreme Court should exercise its plenary powers

under N.D.R.App.P. Rule 35 to remedy the errors of Bismarck's City Commission and its Order, as the district court should have done.

By operation of N.D.R.Civ.P. Rule 12, Bismarck's motion to dismiss must be treated as a motion for summary judgment under N.D.R.Civ.P. Rule 56, because the motion was decided by consideration of matters outside the pleadings. The Supreme Court may look at the entire record and acknowledge there is no disputed issue of material fact. Continued litigation might produce additional evidence, but no more evidence is necessary to remedy the errors of Bismarck's City Commission's Order.

Under N.D.R.Civ.P. Rule 56, summary judgment may be entered against the moving party, and that may happen on appeal. See Montana-Dakota Utilities Company v Divide County School District, 193 N.W.2d 723 (ND 1972) (Summary judgment against electric utility reversed and district court ordered to enter judgment against electric cooperative) and Fredericks v Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164 (ND 1990). See also State ex rel. Stenehjem v FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (whether summary judgment is appropriate is a question of law subject to de novo review by the Supreme Court.)

On the basis of the present record, a remand and further proceedings are unnecessary for the Supreme Court to conclude under N.D.R.Civ.P. Rule 56: As a matter of law, Bismarck's City Commission had no power under the Constitution, State statutes, or any of Bismarck's ordinances to make the Nov 14 Order. This conclusion as a matter of law cannot be materially affected by additional evidence that might be produced on further proceedings following a remand.

An equivalent result would be achieved if Capital's complaint were regarded as an appeal, and the City Commission's Order is reversed under the arbitrary/capricious/unreasonable standard of review because that test is failed. The test is failed because no constitutional provision, no state statute, no charter provision and no local ordinance sustains the Order as an exercise of the City Commission's legislative power.

Having said so much about Bismarck's City Commission's lack of power and about principles of separation of powers, Capital does not suggest that the Supreme Court should cross the line to usurp legislative powers. The Court should assert and exercise judicial power to restrict Bismarck's City Commission to acting within its scope of legislative power, to declare ineffective the Nov. 14 Order that was not produced by the exercise of legislative power. Ultimately, the interpretation of Capital's franchise is a judicial function.

All of the Order's findings and conclusions regarding interpretation of Capital's franchise were focused on paragraph 1 of Article II, the provision of Capital's franchise that "... incorporates the provisions of the Area Service Agreement" (Order Finding 3c; App. 62-63), the provision that constitutes an unconstitutional delegation of legislative authority. In these circumstances, interpretation of paragraph 1 of Article II is less than moot, because that provision must be severed from Capital's franchise when the franchise is interpreted like statutes. Just as the delegation section of the original Territorial Integrity Act was severed from the Act as unconstitutional, so also paragraph 1 of Article II of Capital's franchise should be severed from Capital's franchise. The provisions of paragraph 1 of Article II of Capital's franchise can be stricken from the franchise without in any manner affecting the validity of the balance of the franchise. MDU v Johanneson, 153 N.W.2d at 424-25;

N.D.C.C. § 01-02-20. "The franchises of both MDU and CEC are similar except the CEC Franchise incorporates the provisions of the Area Service Agreement" (Order Finding 3c; App. 62-63). The franchises are virtually identical when Capital's franchise is emancipated from the unenforceable Agreement and the unconstitutional provision delegating to MDU the power to impose geographical limits on Capital's franchise.

Alternatively, the Court may decline to address the City Commission's interpretation of Capital's franchise on constitutional principles, instead rejecting the Nov. 14 Order as an unreasonable interpretation of Capital's franchise.

Entry of summary judgment should be ordered under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, with the provisions of paragraph 1 of Article II stricken from the franchise.

### **CONCLUSION**

For all these reasons, Capital requests relief from the errors of the district court and of Bismarck's City Commission. Capital requests reversal of the district court's order dismissing Capital's complaint and an order for entry of summary judgment under N.D.R.Civ.P. Rule 56 and N.D.C.C. Chapter 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck under its franchise granted by Bismarck on May 25, 1993, Bismarck's City Commission's Order to the contrary notwithstanding, and with paragraph 1 of Article II stricken from the franchise. Alternatively, Capital requests reversal of the district court's order dismissing Capital's

complaint and an order remanding the case for further proceedings as an action for declaratory judgment under N.D.C.C. Chapter 32-23. Alternatively, if Capital's action is regarded as an appeal, Capital requests reversal of Bismarck's City Commission's Order of November 14, 2005.

Dated this 2nd day of October, 2006.

PRINGLE & HERIGSTAD, P.C.

By: /s/ Carol K. Larson

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CERTIFICATE OF SERVICE

A copy of the Brief and Appendix of Appellant, Capital Electric Cooperative, Inc., was served by via first class mail to the following on October 2nd 2006:

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/s/ Carol K. Larson

Carol K. Larson - #04406

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc., )  
 )  
 Appellant, ) No. 20060199  
 )  
 vs. )  
 )  
 The City of Bismarck, North Dakota, )  
 )  
 and )  
 )  
 Montana-Dakota Utilities Co., a division of )  
 MDU Resources Group, Inc. )  
 )  
 and )  
 )  
 The Public Service Commission )  
 of North Dakota, )  
 )  
 Appellees )

---

ON APPEAL FROM THE  
SOUTH CENTRAL JUDICIAL DISTRICT COURT  
BURLEIGH COUNTY, NORTH DAKOTA  
THE HONORABLE BRUCE HASKELL

---

APPENDIX

---

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STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT 20060199  
SOUTH CENTRAL JUDICIAL DISTRICT

CAPITAL ELECTRIC COOPERATIVE, INC.

RECEIVED BY CLERK  
SUPREME COURT  
AUG 25 2006

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

Plaintiff

vs.

CLERK'S CERTIFICATE  
OF RECORD

AUG 25 2006

STATE OF NORTH DAKOTA

CITY OF BISMARCK, NORTH DAKOTA  
MONTANA-DAKOTA UTILITIES, INC.  
PUBLIC SERVICE COMMISSION OF NORTH DAKOTA )  
Defendant )  
.....)

CASE # 08-05-C-02303/001

I, Debra Simenson, Clerk of District Court in and for Burleigh County within the South Central Judicial District of the State of North Dakota, do hereby certify that the attached papers are the original papers on file in this Court in the above entitled action and the same are hereby transferred to North Dakota Supreme Court pursuant to Notice of Appeal.

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Bismarck, North Dakota this 23rd day of August, 2006.

*Debra Simenson*

Debra Simenson  
Clerk of District Court

*By: Shanayna Mills, deputy*

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AUG 23 2006

Clk. of Ct. Burleigh Co.

1.

8/23/2006

REGISTER OF ACTIONS

KSS920

CAPITAL ELECTRIC COOPERATIVE INC. VS CITY OF BISMARCK NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

INTERESTED PARTIES

CASE # : 08 05-C-02303

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ATTY. FOR DEFENDANT	BAKKE, RANDALL
ATTY. FOR DEFENDANT	KETTLESON, JEROME
ATTY. FOR DEFENDANT	KUNTZ, DANIEL S.
ATTY. FOR PLAINTIFF	LARSON, CAROL K
ATTY. FOR PLAINTIFF	BINEK, WILLIAM
DEFENDANT 001	CITY OF BISMARCK, NORTH DAKOTA
DEFENDANT 002	MONTANA-DAKOTA UTILITIES, INC.
DEFENDANT 003	PUBLIC SEVICE COMMISSION OF NORTH DAKOTA
PLAINTIFF 001	CAPITAL ELECTRIC COOPERATIVE, INC.
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CAPITAL ELECTRIC COOPERATIVE INC. VS CITY OF BISMARCK NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

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8/23/2006

REGISTER OF ACTIONS

155920

CAPITAL ELECTRIC COOPERATIVE, INC. VS CITY OF BISMARCK, NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

\*\*\* CONTINUED \*\*\*

CASE # : 08 05-C-02303

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✓93	CLERK'S CERTIFICATE OF RECORD	08/23/2006

STATE OF NORTH DAKOTA } ss  
COUNTY OF BURLEIGH

I, DEBRAH. SIMENSON, Clerk of District Court for Burleigh County, North Dakota, DO HEREBY CERTIFY that I have carefully compared the foregoing with the original record in my office and that the same is a true and correct copy thereof. IN WITNESS WHEREOF, I have signed and affixed the seal of the Court, at Bismarck, ND.  
on this 23<sup>rd</sup> day of August 2006

DEBRAH. SIMENSON

CLERK OF DISTRICT COURT

By [Signature] Deputy

4

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

CAPITAL ELECTRIC COOPERATIVE, INC. )

Plaintiff

vs.

CITY OF BISMARCK, NORTH DAKOTA  
MONTANA-DAKOTA UTILITIES, INC.  
PUBLIC SEVICE COMMISSION OF NORTH DAKOTA )  
Defendant

20060199

*First Supplemental*  
CLERK'S CERTIFICATE  
OF RECORD

CASE # 08-05-C-02303/001

I, Debra Simenson, Clerk of District Court in and for Burleigh County within the South Central Judicial District of the State of North Dakota, do hereby certify that the attached papers are the original papers on file in this Court in the above entitled action and the same are hereby transferred to North Dakota Supreme Court pursuant to Notice of Appeal ~~Change of Venue~~.

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Bismarck, North Dakota this 25th day of August, 2006.

*Debra Simenson*

Debra Simenson  
Clerk of District Court

*By: Shanayna Mills, deputy*

*Entry Nos. 94-96*

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

AUG 28 2006

STATE OF NORTH DAKOTA

RECEIVED & FILED

AUG 25 2006

Clk. of Dist. Burleigh Co.

8/25/2006

REGISTER OF ACTIONS

155920

CAPITAL ELECTRIC COOPERATIVE, INC. VS CITY OF BISMARCK, NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

INTERESTED PARTIES

CASE # : 08 05-C-02303

PAGE 1

ATTY. FOR DEFENDANT BAKKE, RANDALL  
 ATTY. FOR DEFENDANT KETTLESON, JEROME  
 ATTY. FOR DEFENDANT KUNTZ, DANIEL S.  
 ATTY. FOR PLAINTIFF LARSON, CAROL K  
 ATTY. FOR PLAINTIFF BINEK, WILLIAM  
 DEFENDANT 001 CITY OF BISMARCK, NORTH DAKOTA  
 DEFENDANT 002 MONTANA-DAKOTA UTILITIES, INC.  
 DEFENDANT 003 PUBLIC SEVICE COMMISSION OF NORTH DAKOTA  
 PLAINTIFF 001 CAPITAL ELECTRIC COOPERATIVE, INC.  
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JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

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REGISTER OF ACTIONS

ASS920

CAPITAL ELECTRIC COOPERATIVE INC. VS CITY OF BISMARCK NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

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STATE OF NORTH DAKOTA } ss  
COUNTY OF BURLEIGH

I, DEBRA H. SIMENSON, Clerk of District Court for Burleigh County, North Dakota, DO HEREBY CERTIFY that I have carefully compared the foregoing with the original record in my office and that the same is a true and correct copy thereof. IN WITNESS WHEREOF, I have signed and affixed the seal of the Court, at Bismarck, ND, on this 25<sup>th</sup> day of August 2006

DEBRA H. SIMENSON

CLERK OF DISTRICT COURT

By Sharon M. Miller Deputy

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

20060199

CAPITAL ELECTRIC COOPERATIVE, INC. )

Plaintiff

vs.

CITY OF BISMARCK, NORTH DAKOTA  
MONTANA-DAKOTA UTILITIES, INC.  
PUBLIC SERVICE COMMISSION OF NORTH DAKOTA )  
Defendant

*Second  
Supplemental*  
CLERK'S CERTIFICATE  
OF RECORD

CASE # 08-05-C-02303/001

I, Debra Simenson, Clerk of District Court in and for Burleigh County within the South Central Judicial District of the State of North Dakota, do hereby certify that the attached papers are the original papers on file in this Court in the above entitled action and the same are hereby transferred to North Dakota Supreme Court pursuant to Notice of Appeal.

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Bismarck, North Dakota this 25th day of August, 2006.

*91. Admin. BOA  
97. Register  
98. second supp.*

*Debra Simenson*  
Debra Simenson  
Clerk of District Court

*By: Sharilynn Mills,  
deputy*

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

AUG 28 2006

STATE OF NORTH DAKOTA

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Clk. of Ct. Burleigh Co.

8/25/2006

REGISTER OF ACTIONS

K55920

CAPITAL ELECTRIC COOPERATIVE, INC. VS CITY OF BISMARCK, NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

OFFENSE : OTHER

INTERESTED PARTIES

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ATTY. FOR DEFENDANT BAKKE, RANDALL  
 ATTY. FOR DEFENDANT KETTLESON, JEROME  
 ATTY. FOR DEFENDANT KUNTZ, DANIEL S.  
 ATTY. FOR PLAINTIFF LARSON, CAROL K  
 ATTY. FOR PLAINTIFF BINEK, WILLIAM  
 DEFENDANT 001 CITY OF BISMARCK, NORTH DAKOTA  
 DEFENDANT 002 MONTANA-DAKOTA UTILITIES, INC.  
 DEFENDANT 003 PUBLIC SEVICE COMMISSION OF NORTH DAKOTA  
 PLAINTIFF 001 CAPITAL ELECTRIC COOPERATIVE, INC.  
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CAPITAL ELECTRIC COOPERATIVE INC.

VS CITY OF BISMARCK, NORTH DAKOTA

JUDGE ASSIGNED: BRUCE B. HASKELL

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CAPITAL ELECTRIC COOPERATIVE, INC. VS CITY OF BISMARCK, NORTH DAKOTA

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OFFENSE : OTHER

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## PETITION TO DECLARE ELECTRIC FRANCHISE RIGHTS

To the Board of City Commissioners of the City of Bismarck:

WHEREAS, Montana Dakota Utilities, Inc., a division of MDU Resources Group, Inc., (hereafter Montana-Dakota) holds a twenty year electric distribution franchise granted by resolution of the Board of City Commissioners on May 12, 1987. The franchise granted to Montana-Dakota the right to construct, maintain and operate an electric distribution system for public and private uses within the City of Bismarck as then or thereafter constituted. Montana-Dakota and its predecessor have continuously provided electrical distribution service to the City of Bismarck and its residents since; and

WHEREAS, Capital Electric Cooperative, Inc. (hereafter CEC), a rural electric cooperative organized under Chapter 10-13 of the North Dakota Century Code for the purpose of furnishing electric energy to persons in rural areas not receiving central station power, holds a twenty year limited electric distribution franchise granted by resolution of the Board of City Commissioners on May 25, 1993. The franchise granted to CEC the right to construct, maintain and operate an electric distribution system for public and private uses within a limited geographic area of the City of Bismarck described in an Area Service Agreement dated July 5, 1973 between Montana-Dakota and CEC, as modified by future amendments thereto. The franchise resolution states the geographic limitation was imposed on the CEC franchise to avoid duplication of facilities between CEC and other electrical franchises, and

WHEREAS, the Area Service Agreement described in the CEC franchise was

cancelled for all areas outside the City of Bismarck by letter dated June 26, 2002 effective June 26, 2003. Pursuant to the terms of the CEC franchise, the cancellation of the Area Service Agreement froze the boundaries of the CEC franchise to those areas within the City of Bismarck as described by the Area Service Agreement as of the effective date of cancellation. No substitute Area Service Agreement has been agreed to between CEC and Montana-Dakota. Since the Area Service Agreement was canceled effective June 26, 2003 and the CEC franchise has not been amended, the CEC franchise does not include new areas annexed to the City of Bismarck since June 26, 2003; and

WHEREAS, both Montana-Dakota and CEC have stated their intent to provide electric distribution service to an area known as "Part of Boulder Ridge First Addition to the City" which was annexed to the City of Bismarck on April 12, 2005. "Part of Boulder Ridge First Addition to the City" is within Montana-Dakota's franchise, but is not within the geographic limitation of CEC's franchise.

THEREFORE, Montana-Dakota petitions that the Board of City Commissioners of the City of Bismarck to determine that:

1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within "Part of the Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005; and
2. CEC is not authorized under its franchise to provide electric distribution service within "Part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April, 12, 2005.

Dated this 30 day of August, 2005.

MONTANA-DAKOTA UTILITIES, INC., a Division  
of MDU Resources Group, Inc.

Paul K. Sandness, General Counsel  
Daniel S. Kuntz, Senior Attorney  
918 East Divide Avenue  
P.O. Box 5650  
Bismarck, ND 58506-5650  
(701) 222-7880

And

PEARCE & DURICK

By Jerome C. Kettle

Patrick W. Durick, #03141  
Jerome C. Kettle, #03095  
Individually and as Members of the Firm  
314 East Thayer Avenue  
P.O. Box 400  
Bismarck, ND 58502-0400  
(701) 223-2890

Attorneys for Montana-Dakota Utilities, Inc., a  
Division of MDU Resources Group, Inc.

**REPLY TO PETITION TO DECLARE  
ELECTRIC FRANCHISE RIGHTS**

To The Board of City Commissioners of the City of Bismarck:

WHEREAS, Montana-Dakota Utilities, Inc. has petitioned the Board of City Commissioners of the City of Bismarck to determine that:

1. Montana-Dakota Utilities, Inc. is authorized under its electric distribution franchise to provide electric distribution service within "part of the Boulder Ridge First Addition to the City Bismarck" as annexed to the City of Bismarck on April 12, 2005; and
2. Capital Electric Cooperative is not authorized under its franchise to provide electric distribution service within "part of the Boulder Ridge First Addition to the city of Bismarck" as annexed to the city of Bismarck on April 12, 2005.

WHEREAS, Capital holds a 20 year franchise for an electric distribution system dated May 25, 1993, which grant of authority states as follows:

"Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the street, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for public and private use. (emphasis added)

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted Capital

Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990, and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution."

WHEREAS, after the grant of franchise, Capital and Montana-Dakota entered into a letter agreement amending Area Service Agreement between Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Company on June 3, 1993. This amendment incorporated into the Area Service Agreement the franchise requirement that if the Area Service Agreement was "canceled by either Capital Electric Cooperative, Inc. or Montana-Dakota Utilities Co. during the term of either party's existing franchise with the

City of Bismarck, North Dakota, that all of the privileges, rights, obligations, and restrictions as contained in such July 5, 1973, Service Agreement, as amended, shall, notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co." Capital Electric's 20 year franchise is in effect until May 25, 2013.

WHEREAS, since the renewal of Capital Electric's franchise in 1993, additional property contained in the Area Service Agreement has been annexed by the City of Bismarck and electric distribution service has been provided to the annexed territories by Montana-Dakota and Capital Electric in accordance with the Area Service Agreement. Both parties have relied upon the Area Service Agreement with respect to investment, building of facilities, installation, and provision of electric distribution services to new city residents since 1973.

WHEREAS, Montana-Dakota sent a letter dated June 26, 2002, effective June 26, 2003, purporting to cancel the Area Service Agreement for all areas outside the City of Bismarck. However, the terms of the franchise, as well as terms of the Area Service Agreement, as amended, provides that all of the privileges, rights, obligations, and restrictions as contained in the Service Agreement, as amended, shall notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Company. The grant of authority in Capital's franchise agreement expressly provides that the franchise applies to the ". . . public grounds of the City as now, or hereafter constituted". . . (emphasis added). When territory is annexed into the City

such territory stands just as any other property within the City, subject to the Area Service Agreement, and Capital Electric's franchise.

WHEREAS, the area known as "part of Boulder Ridge First Addition to the City" which annexed to the City of Bismarck on April 12, 2005, is clearly within Capital Electric's service area and Capital Electric has made the necessary investment in facilities to provide electric service to this territory. Service to this area by Montana-Dakota would be a wasteful duplication of services and interference with Capital's franchise.

WHEREAS Capital denies that the purported cancellation of the Area Service Agreement "freezes" Capital's Service Agreement as growth of the City was clearly contemplated and provided for in the grant of authority in Capital's franchise.

THEREFORE, Capital Electric requests that the relief sought in to the Petition of Montana-Dakota Utilities Company be denied, and requests the City Commission determine that:

1. Capital is authorized under its franchise to provide electric distribution service within "part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.
2. Capital is authorized under its franchise to provide electric distribution services to all other areas annexed to the City of Bismarck designated as Capital's service area as set forth in the Area Service Agreement, as amended.
3. Montana-Dakota is not authorized to provide electric distribution service to Boulder that "part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.

4. Montana-Dakota is authorized to provide electric distribution service to all future territory annexed to the City of Bismarck designated as Montana-Dakota's service area as set forth in the Area Service Agreement, as amended.

Dated this day 07th of September, 2005.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

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**BRIEF OF CAPITAL ELECTRIC COOPERATIVE, INC.  
IN SUPPORT OF ITS REPLY TO PETITION  
TO DECLARE ELECTRIC FRANCHISE RIGHTS**

**TO: THE BOARD OF CITY COMMISSIONERS OF THE CITY OF BISMARCK**

Capital Electric Cooperative, Inc., hereafter "CEC", hereby submits its Brief in Support of its Reply to Petition to Declare Electric Franchise Rights.

**I.**

**NATURE OF THE PROCEEDINGS**

This is a proceeding initiated by Montana-Dakota Utilities, Inc., hereafter "MDU", to deny Capital Electric Cooperative, Inc.'s franchised right to provide electric service to property annexed in its designated service area on or after June 26, 2003.

**II.**

**JURISDICTION**

Pursuant to N.D.C.C. § 40-05-01(57) the City of Bismarck has the power to grant franchises, and to regulate the use of the same.

Chapter 49-03 of the N.D.C.C. grants to the North Dakota Public Service Commission the responsibility to resolve conflicting claims within electric service areas, including unreasonable duplication of electric facilities within municipalities. A complaint has been filed by CEC with North Dakota Public Service Commission seeking an order restraining and enjoining MDU from constructing or extending its interfering line into CEC's franchised service area. The City of Bismarck does not have the right to amend or alter its franchise with CEC without CEC's consent. The Courts have exclusive jurisdiction to

resolve contract disputes pursuant to the North Dakota Constitution, Article VI, Section 8.

III.

FACTS AND ARGUMENT

Capital Electric Cooperative, Inc. holds a twenty (20) year franchise with the City of Bismarck for an electric distribution system dated May 25, 1993, which grant of authority states in pertinent part as follows:

"Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the street, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for public and private use. (emphasis added)

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990, and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area

Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution." (emphasis added). See Exhibits 1, 3 and 4.

Montana-Dakota Utilities, Inc. also holds a twenty (20) year electric distribution franchise granted on May 12, 1987. This franchise grants to MDU the right to construct, maintain and operate an electric distribution system for public and private uses within the City of Bismarck as then or thereafter constituted. See Exhibit 2. The eventuality of annexation was, therefore, expressly provided for in CEC's franchise grant, as well as MDU's.

CEC and MDU are parties to an Area Service Agreement dated July 5, 1973. See Exhibit 3. This agreement was the product of mutual negotiations between the parties. The City was provided with a copy of the agreement, prior to its execution, on February 13, 1973. CEC and MDU entered into a letter agreement amending the Area Service Agreement on June 3, 1993, agreeing to be bound to the service agreement through the period of either parties' franchise. See Exhibit 4. The City, exercising its franchise powers, with the knowledge, and consent of CEC and MDU, adopted the Area Service Agreement, and its amendment, as its plan for the orderly development of Bismarck's electric distribution system, by incorporating the Area Service Agreement into CEC's

franchise grant. MDU confirmed its agreement with the plan by executing the amendment to the Area Service Agreement on June 3, 1993. MDU, CEC, and the City recognized the need to avoid costly duplication of facilities for the primary benefit of the City of Bismarck, and secondarily, to allow each electric provider to make appropriate long range plans to serve Bismarck and its surrounding area.

MDU sent a letter to CEC dated June 26, 2002, to be effective June 26, 2003, purporting to cancel the Area Service Agreement for all areas outside the City of Bismarck. See Exhibit 5. However, the terms of the franchise, as well as terms of the Area Service Agreement, as amended, specifically provides that all of the privileges, rights, obligations, and restrictions as contained in the Service Agreement, as amended, shall notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck, to apply equally to both CEC and MDU. See Exhibits 1 and 4.

Since the renewal of CEC's franchise in 1993, additional property contained in the Area Service Agreement has been annexed by the City of Bismarck. Electric distribution service has been provided to the annexed territories by MDU and CEC in accordance with the Area Service Agreement. Both parties have relied upon the grant of franchise, and upon the Area Service Agreement, with respect to investment, building of facilities, installation, and provision of electric distribution services to newly annexed city residents.

CEC has provided electric service to the location in what is now known as Boulder Ridge since its line was energized on April 23, 1949. Original construction of 1-phase line was completed in 1948. The line was converted to 3-phase in 1970, and the 3-phase was rebuilt and upgraded, adding more capacity in 1997. The 3-phase circuit in Boulder Ridge

taps the CEC line and the circuit is ready to be energized by CEC. In addition, CEC and WAPA have invested \$7 million in construction of the Ward Delivery Substation to provide transmission service to North Bismarck. This Delivery Substation is expected to be completed in January, 2006. See attached Exhibit 6, consisting of four photographs of CEC's facilities long the boundary of Boulder Ridge. CEC has a signed customer request to provide service within Boulder Ridge.

MDU has indicated its intention to serve Boulder Ridge. Such service by MDU will unreasonably interfere with the service or system of CEC. It is believed that MDU intends to infiltrate CEC's service territory by a half-mile of line to tie their system into Boulder Ridge, which ultimately requires them to cross CEC's power line. See Exhibit 7. CEC's facilities are the only facilities located on the property to be served, prior to MDU's infiltration, the subject of this dispute. MDU has never provided electric service to this area. MDU's closest existing facility is approximately one-half (1/2) mile (2,800 feet) from Boulder Ridge. CEC is able to extend service to the site through a shorter extension at a lower cost, which is a primary consideration of orderly and economic development. Service by CEC is a natural extension of service from its existing facilities and will not result in checker boarding customers served by MDU and CEC.

#### IV.

#### ARGUMENT

The Bismarck City Commission, in exercising its franchise power, has developed a plan for the orderly development and provision of electric distribution service to the City of Bismarck. This plan is embodied in the CEC and MDU Area Service Agreement and is

outlined for clarity of location in the "CEC-MDU Service Area Map".

MDU now alleges that CEC's service area was somehow "frozen" in 2003 when they purported to cancel a portion of the service agreement. See Exhibits 2 and 4. This interpretation is contrary to the plain meaning of the amendment, and more importantly, to the interpretation given by CEC, the City, and MDU for the past two years.

Since June 26, 2003, fifteen (15) subdivisions have been annexed to the City of Bismarck in CEC's service area, and have been, and are served by CEC, pursuant to its franchise. There has been no objection to CEC providing service to the annexed property by either MDU or the City because they each recognized CEC's right to serve. CEC, as well as MDU, have built their distribution systems in reliance upon the franchise granted by the City of Bismarck, and the Area Service Agreement, which delineates CEC's and MDU's respective service area. CEC has invested millions of dollars to fulfill its obligation to serve North Bismarck.

When territory is annexed into the City such territory stands just as any other property within the City, subject to the Area Service Agreement, and CEC and MDU's franchise. On April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City", hereafter "Boulder Ridge", was annexed to the City of Bismarck. Pursuant to the grant of franchise, which incorporates the Area Service Agreement, Boulder Ridge is located in CEC's service area. See Exhibit 3 Map and Exhibit 7.

MDU may argue that the Area Service Agreement is void based on the Eighth Circuit Courts of Appeals opinion in Montana-Dakota Utilities Co., the Williams Electric Cooperative Inc., 263 F 2<sup>nd</sup> 431(Eighth Circuit. 1959): This case can be distinguished from

the present case. The Area Service Agreement entered into by CEC and MDU in 1973, was approved by the Bismarck City Commission and incorporated into CEC's franchise grant in 1993. It is not for the City Commission to determine whether the service agreement outside the city limits is valid or not. That is a question only a court can resolve. The City Commission of Bismarck had the power and authority to grant CEC its franchise, designated <sup>Service Areas</sup> and to anticipate annexation. MDU has no right to impair CEC's rights under the franchise.

MDU has accepted all of the benefits of the Area Service Agreement since 1973. MDU has developed its service area without duplication or interference by CEC. MDU and CEC executed the amendment to the agreement to clarify each party's right to serve within its designated service area, without costly duplication of services or interference by the other electric provider. The City wanted an orderly plan for the development of electric service to the City as now, or hereafter constituted, without costly duplication of service as well. All parties got what they bargained for, and the citizen of Bismarck have been well served.

In 2005, the North Dakota legislature adopted 49-03-06 concerning service agreement among electric providers. This statute permits electric providers to enter into agreements with other electric providers having adjacent or intermingled electric supply facilities for the purpose of establishing service areas and designating service locations to be served by each electric provider and provides anti-trust immunity that negotiates service agreements in accordance with this section. However, it should be noted, that this new statute specifically states that "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." As a result, this current dispute with MDU over Boulder Ridge is not about the validity of the MDU-CEC Area Service Agreement. This dispute concerns whether the City Commission of Bismarck, in exercising its franchise authority, granted CEC the right and obligation to serve the areas annexed to the City within its service area. MDU was also granted the right and obligation to serve new areas of the City annexed into its service area as delineated on the map. Clearly, this was the City's intention for the orderly development of the City of Bismarck.

In reviewing and construing the franchise grant, the grant must be given a fair and reasonable interpretation. The practical construction of a contract by the parties is deemed of great, if not controlling, influence. A franchise is a contract which is entitled to protection of constitutional guarantees. It is not subject to alteration without the consent of the Grantee, unless the right to alteration has been reserved in the grant.

V.

CONCLUSION

The Bismarck City Commission has established the service areas between its two electric providers and delineated those service areas into the CEC-MDU Service Area Map. Exercising its franchise powers, the Commission has made its plan for the orderly development of the electric distribution system for the City of Bismarck. The City recognized the need to avoid costly duplication of services between its two electric providers. MDU and CEC assisted the Commission by working together to develop the Area Service Agreement. The plan has worked and orderly development has occurred.

MDU has no right to deny CEC's right to serve property annexed into the City in CEC's service territory. The City had the power to grant CEC that right and did so in 1993. CEC's right to serve under its franchise cannot be impaired by MDU.

RESPECTFULLY submitted this 4 day of October, 2005.

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**BEFORE THE  
CITY OF BISMARCK**

**BOARD OF CITY COMMISSIONERS**

**Brief of Montana-Dakota Utilities Co. in Support of its Petition to Declare  
Franchise Rights**

**SUMMARY**

Montana-Dakota Utilities Co. ("Montana-Dakota") petitions the Bismarck Board of City Commissioners to declare the respective franchise rights of Montana-Dakota and Capital Electric Cooperative ("CEC") to provide electric service within subdivisions annexed to the City of Bismarck after June 2003 including "Part of Boulder Ridge First Addition to the City of Bismarck" which was annexed to the City on April 12, 2005. Montana-Dakota submits this petition because CEC contends its limited franchise encompasses virtually every new annexed area to the City of Bismarck and that CEC is the exclusive provider of electric service within those areas. CEC's interpretation of its limited franchise is incorrect. CEC's franchise is geographically limited to those areas within the City as defined by a 1973 Area Service Agreement between Montana-Dakota and CEC. This Agreement was cancelled effective June 2003 for all areas outside the City. Therefore, CEC is not entitled to provide electric service within areas that are annexed to the City after June 2003 unless it obtains an amendment to its franchise.

**BACKGROUND**

A background explanation of the Area Service Agreement and its incorporation into CEC's limited franchise is important to the interpretation of the franchise.

In the late 60's and early 70's, Bismarck experienced significant population growth that resulted in expansion of the city limits. Within the newly incorporated subdivisions were isolated customers served by CEC which began providing service in the rural area outside Bismarck in 1948. At the time, Montana-Dakota held the sole electric franchise to serve customers within the city limits. Because it did not hold a franchise from the City, CEC was concerned that it would be required to turn over its facilities and customers within the annexed subdivisions to Montana-Dakota. To resolve its concerns, CEC sought to enter into a "gentlemen's agreement" regarding service areas. In a letter of March 10, 1958, CEC described its proposal to deal with future growth under such an agreement:

In years to come, if the city should expand beyond these boundaries, I would believe re-negotiations should be held and a new boundary established.

(Appendix 1, p. 14) Montana-Dakota did not enter into the "gentlemen's agreement" because of concerns following an United States Eighth Circuit Court of Appeals holding that such agreements were against public policy under North Dakota law. (Appendix 1, p. 16) Montana-Dakota Utilities Co., v. Williams Electric Cooperative, 263 F.2d 431 (8<sup>th</sup> Cir. 1959). Unable to obtain a "gentlemen's agreement" with Montana-Dakota, CEC in 1961 sought a limited franchise from the City of Bismarck. In its application transmittal letter, CEC explained the scope of the requested limited franchise in relation to Montana-Dakota's existing franchise and service:

However, we recognize that the Montana-Dakota Utilities Company has the right to expand with the city and therefore we are asking only for a limited franchise whereby we can continue to serve our customers and the areas between said customers and still allow Montana-Dakota Utilities to realize the benefit of most of the cities (sic) future growth.

(Appendix 1, p. 3) In a subsequent letter to City Attorney John A. Zuger, CEC further explained the scope of its request:

We ask only that we be allowed to keep our service intact within the present city limits and in future annexed areas.

Our Board of Directors have gone on record as recognizing Montana-Dakota Utilities' right to serve private residential and commercial customers in Bismarck and have always denied requests for electric service from these customers which locate within the city and shall continue to do so. It is only the customers we were serving prior to annexation that we are asking authority to continue to serve. (Appendix 2, p. 1)

CEC's franchise application was apparently not granted.

In 1965, the North Dakota Legislature passed the "Territorial Integrity Act" ("TIA") at the request of the rural electric cooperatives to prevent public utilities from "cherry picking" electric service customers in rural areas. As a result of the TIA, a public utility such as Montana-Dakota can only extend its facilities outside the corporate limits of a city if it obtains a Certificate of Public Convenience and Necessity ("PC&N") from the North Dakota Public Service Commission.<sup>1</sup> If an adjoining rural electric cooperative files an objection to the application, the Commission holds a formal hearing to determine which supplier will be allowed to serve the location based upon a list of factors such as who has the closest facilities and who can extend service at the least cost.

Although the TIA limited the ability of public utilities to extend service outside a city, public utilities still had an opportunity to grow because they were allowed to serve customers in areas annexed by the city. In 1972, in a proceeding initiated by Montana-Dakota, the North Dakota Supreme Court decided the case of Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W. 2<sup>nd</sup> 723 (N.D. 1972) which

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<sup>1</sup> See North Dakota Century Code Chapter 49-03.

addressed the provision of electric service in a newly annexed area to the City of Crosby. The Court, recognizing that electric cooperatives are organized under North Dakota law for the purpose of serving persons in rural areas, held that when a city annexes territory that is served by a rural electric cooperative, the cooperative can not continue to provide service in the annexed area without a franchise from the City:

Where a city receiving central station [public utility] service annexes territory which is being served by an electric cooperative corporation, persons within the annexed area become persons who are receiving central station service and, under the charter of the electric cooperative formed under the Act, these persons no longer qualify for membership in the electric cooperative corporation for the purpose of receiving electric service to their facilities located within the city.

The Electric Co-operative Corporations Act allows an electric cooperative to serve, in addition to its membership, an additional number of persons not in excess of ten percent of the number of its members. Section 10-13-03(1), N.D.C.C. However, where any such person resides within or seeks service for facilities within a city defined as a rural area which is receiving central station service, such person cannot be served within the corporate limits, in the absence of a franchise, where such city has in existence an ordinance prohibiting such service in the absence of a franchise. 193 N.W.2d at 730.

(Appendix 3) Bismarck City Ordinance 10-11-01 prohibits operation of a utility system within the City in the absence of a franchise.

In response to enactment of the TIA and CEC's desire for a limited franchise to serve its existing customers following the Supreme Court's ruling in Montana-Dakota Utilities Co. v. Divide County School District No. 1, Montana-Dakota and CEC signed an Area Service Agreement in July 1973 for the areas immediately surrounding the City of Bismarck. (Appendix 4) The Area Service Agreement included a map with a line drawn around the City of Bismarck approximately one-half mile outside the then existing city limits. (Appendix 4, 5)

The agreement allowed Montana-Dakota to obtain certificates of PC&N to serve new customers within the Area Service Agreement boundary line without objection from CEC. In return, Montana-Dakota would not apply for certificates of PC&N to serve customers outside the Area Service Agreement boundary line without CEC's consent. The Agreement was also the basis for CEC to obtain its first limited franchise from the City of Bismarck in August 1973 to comply with the Supreme Court's holding in Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra. This limited franchise allowed CEC to serve its existing customers and future subdivisions of the City that were outside Montana-Dakota's service area under the Area Service Agreement. (Appendix 6)

The Area Service Agreement map was not intended to be a permanent boundary of Montana-Dakota's service area. Paragraph 11 specifically provided, as envisioned in CEC's original proposal for an area service agreement, that if the Agreement was followed in good faith, the boundaries of the Area Service Agreement would be modified and moved as the City grew to allow for future development and growth for both companies:

11. It is realized that the foregoing instrument will not cover all conditions which may arise, but if followed in good faith by both parties, will serve as a guide to future developments and growth for both organizations, thus it is mutually agreed that this agreement will be reviewed at least once every five years for the purpose of evaluating its operation and to discuss possible modifications which may be desirable to more efficiently carry out the intent of both parties.

Also, contrary to CEC's current position, the Agreement did not make CEC the exclusive supplier of electric service outside the Area Service Agreement boundary line. Rather, the Agreement simply recognized in paragraph 4 that CEC's principal service

area would be the area outside the boundary line. Paragraph 1 of the Agreement recognized, as CEC had previously acknowledged, that Montana-Dakota was the principal supplier of electricity within the City and that Montana-Dakota should continue to serve the City and new areas contiguous to the City. (Appendix 4) Paragraph 2 recognized that CEC was organized under the law to provide electricity to consumers in rural areas not receiving utility service. The agreement acknowledged CEC should continue service in rural areas and the areas within the City where it was already providing service. (Appendix 4)

CEC's current position that its franchise, which adopts the Area Service Agreement by reference, makes CEC the exclusive electric supplier in the newly annexed areas contiguous to the City is directly contrary to the intent of the Agreement as expressed in the above paragraphs. If the parties had intended that CEC would forever be the exclusive supplier of electric service outside the boundary line, the parties would have stated as much in a single sentence. Instead, they drafted the two page agreement that described the respective roles of the companies in their traditional service areas and provided for future modifications consistent with those traditional service areas.

Montana-Dakota and CEC certainly did not envision in 1973 that CEC would be the exclusive electric service supplier in all areas outside the area service boundary line that were subsequently annexed to the City. Based on the Supreme Court's holding in Montana-Dakota Utilities Co. v. Divide County School District No. 1, *supra*, CEC's ability to serve customers in newly annexed areas was very limited in the absence of a

franchise from the City and an Area Service Agreement with Montana-Dakota.<sup>2</sup> Montana-Dakota, which had just prevailed in establishing its right to provide service in an annexed area to the City of Crosby, would not have voluntarily agreed to allow CEC to be the exclusive electric supplier in future annexed areas of Bismarck, the largest community Montana-Dakota served.

Upon expiration of its initial 20 year franchise in 1993, Capital Electric proposed a new franchise which again included a geographic limitation tied to the Area Service Agreement. The proposed franchise, however, added a provision that the geographic limitation would be cancelled if the Area Service Agreement was cancelled. (Appendix 7) This provision would have allowed CEC to serve all existing and future areas of the City if the Area Service Agreement was cancelled. This provision was not adopted by the City Commission. Instead, the franchise accepted by the City includes a provision agreed upon by Montana-Dakota and CEC as an amendment to the Area Service Agreement, that if the Area Service Agreement is "canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co." (Appendix 8 and 9) This provision assured that if the Area Service Agreement was cancelled, the parties would continue to recognize the respective service areas within the City to prevent chaotic duplications of established facilities and service areas within the City. The preface to the Area Service Agreement amendment states that the amendment only applied to the service areas in the City of Bismarck. (Appendix 8) The provision did not mean, and Montana-Dakota

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<sup>2</sup> Under North Dakota law and the holding in Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra, electric cooperatives could only serve annexed areas as nonmembers of the cooperative.

would not have agreed to a provision, that all areas outside the boundary line would be CEC's exclusive service area if the Area Service Agreement was cancelled. Again, if such had been the intent of the franchise and the amendment, it could have been stated in a simple sentence.

As stated earlier, the Area Service Agreement provided that if it was followed in good faith, the boundary line was to be modified as the City grew to provide Montana-Dakota with the opportunity to serve new areas that were natural extensions of its electric distribution system. CEC, however, has refused any meaningful modifications to the boundary line. In June 2002, Montana-Dakota cancelled the Area Service Agreement for all areas outside the City pursuant to its terms effective 12 months from the date of the notice. (Appendix 10) As provided in the franchise and the amendment to the Area Service Agreement, the Area Service Agreement continues to govern the service areas that were within the City at the time of the cancellation. Accordingly, Montana-Dakota has continued to honor the Area Service Agreement for areas that were annexed to the City before June 2003 and has foregone opportunities to extend its facilities to new customers inside the City that are within CEC's service area.

CEC, however, contends the Area Service Agreement also governs the scope of its franchise for areas that were outside the City when the Agreement was cancelled. Under CEC's interpretation, areas annexed to the City after the effective date of the cancellation are part of CEC's franchise. This interpretation effectively makes CEC the exclusive provider of electric service in the annexed areas to the City of Bismarck. CEC's interpretation provides a nonsensical result that the Area Service Agreement could not effectively be cancelled for areas outside the City even though the Area

Service Agreement, the 1993 amendment to the Agreement, and CEC's franchise recognize that the Agreement could be cancelled. CEC made a similar argument in a recent case before the Public Service Commission in which CEC objected to Montana-Dakota's application for a Certificate of PC&N to serve a new customer located outside the City limits and outside the Area Service Agreement boundary line:

If this area becomes a part of the City, it will be in the Capital Electric service area as part of the Capital Electric limited franchise with the City of Bismarck. Even if it does not become part of the City, it is in the rural Capital Electric service area and in the area in which Capital Electric has invested heavily. Post Hearing Brief of Capital Electric Cooperative, Inc., NDPSC Case No. PU-04-560.

In an order issued on June 8, 2005, the PSC rejected CEC's position and awarded a Certificate of PC&N to Montana-Dakota. (Appendix 11) Montana-Dakota's service to this customer demonstrates why the Area Service Agreement can no longer apply to define franchise rights in areas annexed to the City after the Area Service Agreement was cancelled. Under CEC's interpretation, if this new customer location is annexed to the City, it would become part of CEC's existing franchise even without an amendment to its franchise. CEC would be the exclusive provider of service to this customer notwithstanding that Montana-Dakota was serving the customer under a Certificate of PC&N from the Public Service Commission prior to annexation. This interpretation is contrary to the TIA which prohibits such interference.

CEC's interpretation could also result in situations in which CEC would hold a franchise to serve customers that it is prohibited by law from serving. North Dakota law allows rural electric cooperatives to be organized for the purpose of furnishing electric energy to persons in rural areas who are not receiving central station service. N.D.C.C. §10-13-01. A rural area is defined as any area not included within the boundaries of an

incorporated city with a population greater than 2,500. An area that is annexed to the City is no longer a rural area for purposes of determining CEC's right to serve customers as members unless CEC had previously initiated service in the area. In the event of such an annexation, CEC would be prohibited by law from serving customers as members in such a subdivision annexed to the City. Although cooperatives are allowed to serve customers as non-members in such a situation, the number of such non-members is limited to 10 percent of the cooperative's total membership. In addition, Capital Electric's bylaws prohibit it from providing service to non-members. (Appendix 12) Accordingly, CEC would be prohibited from serving customers in such undeveloped areas annexed to the City even though it interprets its franchise to make it the exclusive electric supplier in these areas.

Finally, while CEC contends the Area Service Agreement remains effective for establishing the rights and obligations of the parties, CEC refuses to recognize its obligation to negotiate modifications to the Agreement to reflect the growth of the City. CEC can't demand continued enforcement of one part of the Agreement while refusing to abide by the other part of the Agreement that would allow Montana-Dakota to supply service to new growth areas.

#### REQUESTED RELIEF

Currently there are very few undeveloped areas within the boundary line of the former Area Service Agreement. (Appendix 13) Adoption of CEC's interpretation of its franchise would effectively result in Montana-Dakota being unable to serve any newly annexed areas to the City even though it and its predecessors have been serving the City with electric service since 1895. Instead, CEC which was created, exists under the

law, and receives favorable tax, regulatory, and finance treatment for the purpose of serving rural areas without public utility service, will become the exclusive provider of electric service in all the new urban subdivisions to the City. At the same time, it continues to be the primary supplier of electricity to new rural subdivisions and other new customers outside the City. Montana-Dakota does not believe this was the result intended when the City granted CEC its limited franchise, nor does Montana-Dakota believe such a result is in the best interests of the City.

As a consequence of CEC's refusal to modify the Area Service Agreement to reflect the growth in the City of Bismarck, and its assumption of service in newly annexed areas, CEC is capturing the vast majority of new electric customers in Bismarck and its extra territorial zoning area. Moreover, CEC's market share of such new customers is increasing. Of a total of 541 residential and commercial building permits issued in 2004 for Bismarck and its extra territorial zoning area, CEC supplied electric service to 357, or 66 percent, of those locations. Through September 20, 2005 CEC supplied electric service to 319 of 385, or 82.8 percent, of the locations for which residential and commercial building permits were issued for the same areas.

2004 Residential and Commercial Building Permits						
	Inside City Limits		Extra Territorial		Total	
	Number	Percent	Number	Percent	Number	Percent
MDU	184	50.3	0	0	184	34.0
CEC	182	49.7	175	100	357	66.0
<b>TOTAL</b>	366	100	175	100	541	100.0

2005 Residential and Commercial Building Permits						
	Inside City Limits		Extra Territorial		Total	
	Number	Percent	Number	Percent	Number	Percent
MDU	65	30.4	1	0.6	66	17.2
CEC	149	69.6	170	99.4	319	82.8
TOTAL	214	100	171	100	385	100.0

Growth in electricity sales tells a similar story. In a year-over-year comparison of electricity sales growth for each of the suppliers in the Burleigh County area since 2000, CEC's electricity sales have grown at an average annual rate of over six percent while Montana-Dakota's sales have grown at an average annual rate of less than one percent.

PERCENT CHANGE IN ELECTRIC SALES		
YEARS	CEC	MDU
2000-2001	9.1	3.6
2001-2002	6.9	1.8
2002-2003	7.3	1.8
2003-2004	1.6	(4.3)
AVERAGE	6.2 percent	0.7 percent

Montana-Dakota has sought negotiation of a new Area Service Agreement with CEC under recently enacted legislation authorizing such agreements subject to

approval by the Public Service Commission. Those efforts have been unsuccessful. The parties are currently disputing the right to serve Part of Boulder Ridge First Addition to the City of Bismarck as annexed on April 12, 2005. Montana-Dakota believes Part of Boulder Ridge First Addition is within the scope of its franchise and outside the scope of CEC's franchise because the area was annexed after the Area Service Agreement was cancelled for areas outside the City. Based on that belief, Montana-Dakota extended electric distribution lines into the subdivision. After being served with Montana-Dakota's petition for a declaration of franchise rights, CEC nonetheless extended its facilities into the subdivision. As a result, there are duplicate sets of electric distribution facilities in the subdivision. This is the situation the City Commission sought to avoid when it issued CEC's limited franchise.

Montana-Dakota requests the City Commission to determine that the Area Service Agreement defines the scope of CEC's franchise for areas that were within the City at the time the franchise was issued as well as for areas annexed to the City prior to cancellation of the agreement for areas outside the City. Because the Area Service Agreement did not apply to areas outside the City limits after its cancellation in 2003, areas annexed to the City after June 2003 are not included in CEC's limited franchise. Accordingly, CEC is not allowed to provide electric service in those subdivisions unless the City grants an amendment to CEC's franchise to include the newly annexed areas.

Although the issue is not presently before the Commission, Montana-Dakota believes that any amendments to CEC's limited franchise should be consistent with CEC's statutory purpose of providing service to members in rural areas who do not have access to utility service. In that regard, Montana-Dakota believes any franchise

amendments should be limited to those portions or subdivisions actually served by CEC with existing customers. Indeed, these are the only areas that CEC said it was seeking it serve when it first applied for a franchise in 1961. Future growth within those portions of annexed subdivisions, as well as continued growth in rural subdivisions, will provide CEC with an opportunity to grow its business comparable to Montana-Dakota's opportunity to grow its business within the remaining portions of new subdivisions annexed to the City. In this manner, both parties will have an opportunity to equitably participate in supplying electric service to customers in and around the City of Bismarck.

### CONCLUSION

For the reasons described above, Montana-Dakota petitions the Commission to declare that CEC's franchise is limited to the areas defined by the Area Service Agreement that were within the City of Bismarck at the time the Area Service Agreement was cancelled for areas outside the City in June 2003. "Part of Boulder Ridge First Addition to the City of Bismarck" was not a part of the City at the time the Area Service Agreement was cancelled for areas outside the City in June 2003. Montana-Dakota further requests the Commission to declare that CEC is required to obtain an amendment to its franchise in order to serve any areas annexed to the City after June 2003.

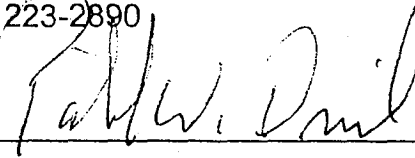
Dated this 5<sup>th</sup> day of October, 2005

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

Paul K. Sandness  
General Counsel  
Daniel S. Kuntz  
Senior Attorney  
MDU Resources Group, Inc.  
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314 East Thayer  
P.O. Box 400  
Bismarck, ND 58502-0400  
(701) 223-2890

By: \_\_\_\_\_



Attorneys for Montana-Dakota Utilities Co.

AREA SERVICE AGREEMENT

93-23  
4/2/20

The Montana-Dakota Utilities Co., (hereinafter referred to as the Company) and Capital Electric Cooperative, Inc., (hereinafter referred to as the Cooperative), in an earnest and sincere effort to avoid misunderstanding and disagreement over areas to be served by each party and to further avoid unnecessary and costly duplication of facilities, agree to the following general conditions:

1. Since the Company is and has been the principal supplier of electricity to the area encompassing the city of Bismarck, both parties agree that the Company should continue to serve this area and new areas contiguous to the city as further stipulated and identified in this agreement.
2. The Cooperative organized under the laws of the state of North Dakota to supply electricity to consumers in rural areas who are not receiving central station service as identified by law, thereby, both parties agree the Cooperative should continue such service in rural areas and other areas that are stipulated and identified in this agreement.
3. The parties hereto, recognize their obligation to avoid any duplication of facilities in order to provide electric service as efficiently and economically as possible to the public and to the Cooperative's members.
4. It is agreed that the interests of the consumer can best be met by providing that the Company serve those consumers within the area bounded by the heavy dashed black line on the attached map, which shall be made a part of this agreement, as well as any new consumers who come into that area and that the Cooperative will continue to serve its present consumers within the heavy dashed black line and will serve new consumers within the heavy dashed black line only under conditions further stipulated in this agreement. The principal service area of the Cooperative will be that area which lies outside the heavy dashed black line. The agreement shall apply only to area described by the map.
5. In the event there is need for either party to this agreement to serve a prospective consumer located in the area served by the other party, such service shall be supplied only with the written consent of the other party, provided that such individual exception shall not in any way alter the basic intentions of the parties, that each shall serve or offer service to the new consumers within their respective service areas.
6. In the event it becomes necessary or desirable to trade or sell electric facilities owned by either party, the selling price for such facilities shall be an amount equal to three times the gross annual revenue received from the property during the highest revenue year of the past 5 years. Only the existing facilities of value in serving customer by purchasing party shall be sold. Balance of facilities shall be disposed of as enumerated in Section 7.
7. It is mutually agreed that in the event that either party will terminate service to a consumer or consumers which it has served and it is necessary that one party remove its facilities from such an area, the other party will share the removal costs of direct labor, plus 25% and only in an amount equal to one-half the total labor costs for removing such facilities.

EXHIBIT  
3  
tabbles

8. It is mutually agreed by both parties that each will continue to serve customers it now has within the boundaries of the other party as stipulated and identified in the agreement. Such customer identification shall be from the books and records of each of the parties as of date of signing of this agreement. If an exchange of customers can be agreed upon by both parties and to the satisfaction of the consumer or consumers, such an exchange can be made.


9. This agreement will in no way affect the Company's or Cooperative's needs or plans to construct transmission line facilities for the purpose of providing adequate electric power for the consumers in the area it serves.

10. This agreement is subject to approval, order, and other actions of the Public Service Commission of North Dakota or any other governmental agencies or bodies having jurisdiction over transactions and service herein covered.

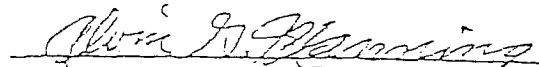
11. It is realized that the foregoing instrument will not cover all conditions which may arise, but if followed in good faith by both parties, will serve as a guide to future developments and growth for both organizations, thus it is mutually agreed that this agreement will be reviewed at least once every five years for the purpose of evaluating its operation and to discuss possible modifications which may be desirable to more efficiently carry out the intent of both parties.

12. This agreement shall remain in force from the date hereof until cancelled by either party by giving twelve month's written notice to the other party of such cancellation.

MONTEANA-DAKOTA UTILITIES CO.

  
President

CAPITAL ELECTRIC COOPERATIVE, INC.

  
President

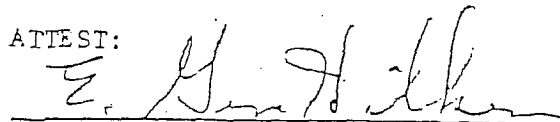
ATTEST:

  
Secretary

July 5, 1973  
Date

(SEAL)

ATTEST:

  
Secretary

June 22 - 1973  
Date

(SEAL)

MISSOURI RIVER  
MORTON CO.  
MISSOURI RIVER

BISWARCK  
CCT 2

BISWARCK

BISWARCK

CCT 1

CCT 5

CEC-MDU SERVICE AREA NO. 1  
CAPITAL ELECTRIC COOP  
BISWARCK, NORTH DAKOTA  
N. D. 35 - BURLEIGH

47

DATE: 10/1/50 BY: J. W. BURLEIGH

LETTER AGREEMENT  
AMENDING SERVICE AREA AGREEMENT  
BETWEEN  
CAPITAL ELECTRIC COOPERATIVE, INC.  
AND  
MONTANA-DAKOTA UTILITIES CO.

It is intended by the parties hereto to amend the July 5, 1973, Area Service Agreement, as amended, between Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co., which agreement sets forth and describes the service areas in the City of Bismarck, North Dakota, to be served by Capital Electric Cooperative, Inc., and describes the service areas in the City of Bismarck, North Dakota, to be served by Montana-Dakota Utilities Co.

It is agreed and understood that in the event that the said Service Agreement of July 5, 1973, as amended, is canceled by either Capital Electric Cooperative, Inc. or Montana-Dakota Utilities Co. during the term of either party's existing franchise with the City of Bismarck, North Dakota, that all of the privileges, rights, obligations, and restrictions as contained in such July 5, 1973, Service Agreement, as amended, shall, notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co.

AGREED TO and made a part of the 1973 Area Service Agreement this

3<sup>rd</sup> day of June, 1993.

CAPITAL ELECTRIC COOPERATIVE, INC.

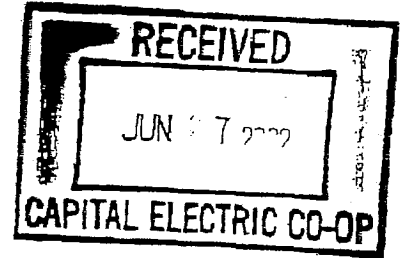
MONTANA-DAKOTA UTILITIES CO., a  
division of MDU RESOURCES GROUP, INC.

Duane Lasher

Oran Vinger

 **MONTANA-DAKOTA**  
UTILITIES CO.  
A Division of MDU Resources Group, Inc.

400 North Fourth Street  
Bismarck, ND 58501  
(701) 222-7900



June 26, 2002

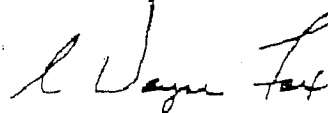
Capital Electric Cooperative, Inc.  
PO Box 730  
Bismarck, ND 58502-0730

Re: Area Service Agreement Dated July 5, 1973 and Amendments

Gentlemen:

Pursuant to paragraph 12 of the Area Service Agreement dated July 5, 1973 and amendments thereto between Montana-Dakota Utilities Co. and Capital Electric Cooperative, Inc., relating to electric service at Bismarck, North Dakota, Montana-Dakota hereby give 12 months written notice from the date hereof of Agreement cancellation for all areas covered by the Agreement outside the city limits of Bismarck and thereby not covered by Capital Electric's limited electric franchise from the City of Bismarck.

Sincerely,

A handwritten signature in cursive script that reads "C. Wayne Fox".

C. Wayne Fox  
President

ORDINANCE NO. 3183

AN ORDINANCE GRANTING TO CAPITAL ELECTRIC COOPERATIVE, INC., A COOPERATIVE, IT'S SUCCESSORS AND ASSIGNS, THE FRANCHISE AND RIGHT TO CONSTRUCT, MAINTAIN AND OPERATE, WITHIN AND UPON, IN AND UNDER THE STREETS, ALLEYS, AND PUBLIC GROUNDS OF THE FOLLOWING ADDITIONS AND SUBDIVISIONS: TYLER'S FIRST SUBDIVISION, WESTON FIRST ADDITION, SWEETNEY ADDITION, BOUTROUS SECOND ADDITION, CAMRUD-FOSS FIRST ADDITION, INTERSTATE COMMERCIAL PARK FIRST ADDITION, REPEAT OF PART OF TIBESAR'S FIRST SUBDIVISION, CASEY COMMERCIAL PARK, CITY PARK PROPERTY NW 1/4 NW 1/4 SECTION 35 139 N 80 W, GUSSNER INDUSTRIAL TRACTS SECOND DIVISION, GUSSNER INDUSTRIAL TRACTS FIRST DIVISION, AIRPORT ROAD ADDITION, COLONIAL ESTATES ADDITION, LICHTY ADDITION, AIRPORT EXPRESSWAY ADDITION, WACHTER'S THIRD ADDITION, AND CITY PARK PROPERTY SE 1/4 SE 1/4 SEC 8-138 N 80 W, IN THE CITY OF BISMARCK, AN ELECTRIC DISTRIBUTION SYSTEM FOR TRANSMITTING AND DISTRIBUTING ELECTRIC ENERGY FOR ALL PUBLIC AND PRIVATE USE UNDER TERMS AND CONDITIONS SET FORTH IN SERVICE AREA AGREEMENT SIGNED BY CAPITAL ELECTRIC COOPERATIVE, INC., AND MONTANA-DAKOTA UTILITIES DATED JULY 6, 1973.

BE IT ORDAINED BY THE BOARD OF CITY COMMISSIONERS OF THE CITY OF BISMARCK, NORTH DAKOTA:

Section 1. For convenience, herein, said municipal corporation is designated and referred to as "Municipality" and Capital Electric Cooperative, Inc., is designated and referred to as "Grantee". Any reference to either includes their respective successors and assigns.

Section 2. There is hereby granted to Capital Electric Cooperative, Inc., a cooperative Grantee, its successors and assigns, subject to the limitations herein stated, the right of franchise to occupy and use the streets, alleys and public grounds of the municipality as now, or hereafter constituted, for the purpose of constructing, maintaining, and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for all public and private uses.

Section 3. Grantee shall maintain an efficient distribution system for furnishing electric energy for public and private use during twenty-four (24) hours of each day at such reasonable rates as may be promulgated under the law, and under such regulations as may be approved by the Public Service Commission of the State of North Dakota.

Section 4. This franchise shall not be exclusive and shall not be construed to prevent the Municipality from granting to any other party the right to use the streets, alleys, and public grounds of the Municipality for like purposes.

Section 5. The municipality reserves any right it may have, under its police power or otherwise, to control and regulate the use of said streets, alleys and public grounds by the Grantee, and any construction, reconstruction, or relocation occasioned by a change in streets, alleys or public ways shall be at Grantee's own expense for its property.

Section 6. Grantee shall indemnify and save and hold the Municipality harmless from all loss or damage due to suits, judgments, claims or demands whatsoever caused by Grantee's negligence in the construction, installation, and maintenance of its distribution system in the streets, alleys and public grounds of the municipality.

Section 7. Grantee shall have the right with the approval of the Municipality to assign this franchise to any person, association, or corporation, but all the obligations of the grantee hereunder shall be binding upon its successors.

**Section 8. Future additions or subdivisions annexed to the city that fall within the service area of the Grantee as outlined in the Service Area Agreement between Montana-Dakota Utilities and the Grantee dated July 5, 1973, the Grantee will enjoy all rights of franchise heretofore granted.**

**Section 9. Within thirty (30) days after passage and final approval of this Ordinance Grantee shall file with the clerk or auditor of the municipality, its written acceptance this franchise.**

**Section 10. This franchise shall continue and remain in full force and effect for a period of twenty (20) years from the date upon which this ordinance shall become effective as provided by law.**

**First reading: August 1, 1973**

**Second reading: August 14, 1973**

**Final passage and adoption: August 14, 1973**



RESOLUTION

A Resolution granting to Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc., a Corporation, its successors and assigns, the franchise and right to construct, maintain and operate, within and upon, in and under the streets, alleys and public grounds of the City of Bismarck, North Dakota, an electric distribution system for transmitting and distributing electric energy for public and private use.

WHEREAS, pursuant to law the City has the power to grant a non-exclusive franchise for a term of no more than twenty years; and,

WHEREAS, pursuant to city ordinance the City may grant a franchise, by resolution, following public hearing; and,

WHEREAS, on the 12th day of May, 1987, a public hearing was held by the Board of City Commissioners; and,

WHEREAS, it is in the public interest that a franchise be granted to Montana Dakota Utilities Co., a division of MDU Resources Group, Inc., for an electric distribution system.

NOW, THEREFORE, BE IT RESOLVED by the Board of City Commissioners of the City of Bismarck, North Dakota:

Article I. Definitions. As used herein, the following words and terms are defined as follows:

1. "City" means the City of Bismarck, North Dakota.
2. "Franchise" means all of the rights and obligations extended by City to Grantee herein.
3. "Grantee" means Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc.

Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the streets, alleys and public grounds of the city as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for public and private use.

Article III. Grantee's Obligations. Grantee shall maintain an efficient distribution system for furnishing electric energy for public and private use at such reasonable rates as may be approved by the Public Service Commission of the State of North Dakota and under such orders, rules or regulations as may be issued by any federal or state agency having jurisdiction thereof.

Article IV. Non-Exclusive Grant. This franchise shall not be exclusive and shall not be construed to prevent the City from granting to any other party the right to use the streets, alleys and public grounds of the City for like purposes.

Article V. Compliance With Laws and Ordinances. Grantee shall at all times during the life of this franchise comply with all applicable laws and ordinances of the City.

Article VI. Reservation of Rights. City reserves any right it may have, under its police power, or otherwise, to control or regulate the use of the streets, alleys and public grounds by Grantee, and to enact all ordinances necessary and proper in the exercise of that power. City also reserves the right, pursuant to state laws and rules and regulations of the Public Service Commission and the City's Home Rule Charter, as such charter may be amended from time to time, and City ordinances as such ordinances may be amended from time to time, to impose, by ordinance, a reasonable franchise tax for revenue purposes applicable to all franchises of like kind.

Article VII. Conditions on Street Occupancy.

1. All transmission and distribution structures, lines and equipment erected by the Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places. Wherever feasible and practical, new transmission lines, and existing lines whenever they are modernized, upgraded or extensively rehabilitated, shall be placed underground, or they shall be constructed in a manner that causes minimum interference with the landscape or appearance of the city.

2. In case of any disturbance of pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the City Engineer, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good condition as before said work was commenced, and shall maintain the restoration in an approved condition for a period of six years.

3. In event that at any time during the period of this franchise the City shall lawfully elect to alter, or change the grade of, any street, alley or other public way, the Grantee, upon reasonable notice by the City, shall remove, relay and relocate its poles, wires, cables, underground conduits, manholes and other fixtures at its own expense.

4. The Grantee shall not place poles or other fixtures where the same will interfere with any electric light, water hydrant or water main, or in such a manner as to interfere with the usual travel on said streets, alleys and public ways.

5. The Grantee shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than forty-eight hours advance notice to arrange for such temporary wire changes.

Article VIII. Insurance and Indemnification. Grantee shall maintain, at all times during the term of the franchise, liability insurance, insuring Grantee and the City against any and all damages, losses or claims of any nature arising out of Grantee's operations under the franchise, in the minimum amount of \$500,000. A copy of the policy shall be filed with the City at the time of acceptance of the franchise, along with evidence of payment of required premiums and copies of endorsements, and notices of cancellation or non-renewal, during the term of the franchise. Grantee agrees to protect and save harmless City from any claims for damages or injuries resulting from Grantee's operations under the franchise, and to defend and indemnify City against all claims, actions, proceedings, costs, damages and liabilities, including attorneys fees.

Article IX. Assignment. Grantee may assign this franchise to another party or corporation, subject to all obligations of the Grantee hereunder, with the consent of the City, which may not be unreasonably withheld.

Article X. Acceptance. Within thirty days after Grantee is notified of adoption of this Resolution, Grantee shall file with the City Auditor its written acceptance of this franchise, subject to all of its terms and conditions.

Article XI. Term. This franchise shall continue and remain in full force and effect for a period of twenty years from the date upon which it is accepted by the Grantee.

Adopted this 12th day of May, 1987.

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH )

I, Dennis Schlenker, do hereby certify that I am the duly appointed, qualified and acting Deputy City Auditor of the City of Bismarck, North Dakota, and that the attached is a full, true and correct copy of the resolution adopted by the Board of City Commissioners at its meeting of May, 12, 1987.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the City of Bismarck, North Dakota, this 14th day of May, 1987.

SEAL)

[Signature]
Dennis Schlenker, Deputy City Auditor
Bismarck, North Dakota

## RESOLUTION

A Resolution granting to Capital Electric Cooperative, Inc., a corporation, its successors and assigns, the franchise and right to construct, maintain and operate, within and upon, in and under the streets, alleys and public grounds of the City of Bismarck, North Dakota, an electric distribution system for transmitting and distributing electric energy for public and private use.

WHEREAS, pursuant to law the City has the power to grant a non-exclusive franchise for a term of no more than twenty years; and

WHEREAS, pursuant to city ordinance the City may grant a franchise, by resolution, following public hearing; and

WHEREAS, on the 25th day of May, 1993, a public hearing was held by the Board of City Commissioners; and

WHEREAS, it is in the public interest that a franchise be granted to Capital Electric Cooperative, Inc., for an electric distribution system.

NOW, THEREFORE, BE IT RESOLVED by the Board of City Commissioners of the City of Bismarck, North Dakota:

Article I. Definitions. As used herein, the following words and terms are defined as follows:

1. "City" means the City of Bismarck, North Dakota.
2. "Franchise" means all of the rights and obligations extended by City to Grantee herein.
3. "Grantee" means Capital Electric Cooperative, Inc.

Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the streets, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for public and private use.

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990, and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If

the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution.

Article III. Grantee's Obligations. Grantee shall maintain an efficient distribution system for furnishing electric energy for public and private use at such reasonable rates as may be approved by and under such orders, rules or regulations as may be issued by any federal or state agency having or obtaining jurisdiction thereof.

Article IV. Non-Exclusive Grant. This franchise shall not be exclusive and shall not be construed to prevent the City from granting to any other party the right to use the streets, alleys and public grounds of the City for like purposes.

Article V. Compliance With Laws and Ordinances. Grantee shall at all times during the life of this franchise comply with all applicable laws and ordinances of the City.

Article VI. Reservation of Rights. City reserves any right it may have, under its police power, or otherwise, to control or regulate the use of the streets, alleys and public grounds by Grantee, and to enact all ordinances necessary and proper in the exercise of that power. City also reserves the right, pursuant to state laws and rules and regulations of the Public Service Commission and the City's Home Rule Charter, as such charter may be amended from time to time, and City ordinances as such ordinances may be amended from time to time, to impose, by ordinance, a reasonable franchise tax for revenue purposes applicable to all franchises of like kind.

Article VII. Conditions on Street Occupancy.

1. All transmission and distribution structures, lines and equipment erected by the Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places. Wherever feasible and practical, new transmission lines, and existing lines whenever they are modernized, upgraded or extensively rehabilitated, shall be placed underground, or they shall be constructed in a manner that causes minimum interference with the landscape or appearance of the city.

2. In case of any disturbance of pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the City Engineer, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good

condition as before said work was commenced, and shall maintain the restoration in an approved condition for a period of six years.

3. In event that at any time during the period of this franchise the City shall lawfully elect to alter, or change the grade of, any street, alley or other public way, the Grantee, upon reasonable notice by the City, shall remove, relay and relocate its poles, wires, cables, underground conduits, manholes and other fixtures at its own expense.

4. The Grantee shall not place poles or other fixtures where the same will interfere with any electric light, water hydrant or water main, or in such a manner as to interfere with the usual travel on said streets, alleys and public ways.

5. The Grantee shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than forty-eight hours advance notice to arrange for such temporary wire changes.

Article VIII. Insurance and Indemnification. Grantee shall maintain, at all times during the term of the franchise, liability insurance, insuring Grantee and the City against any and all damages, losses or claims of any nature arising out of Grantee's operations under the franchise, in the minimum amount of \$500,000. A copy of the policy shall be filed with the City at the time of acceptance of the franchise, along with evidence of payment of required premiums and copies of endorsements, and notices of cancellation or non-renewal, during the term of the franchise. Grantee agrees to protect and save harmless the City from any claims for damages or injuries resulting from Grantee's operations under the franchise, and to defend and indemnify the City against all claims, actions, proceedings, costs, damages and liabilities, including attorneys fees.

Article IX. Assignment. Grantee may assign this franchise to another party or corporation, subject to all obligations of the Grantee hereunder, with the consent of the City, which may not be unreasonably withheld.

Article X. Acceptance. Within thirty days after Grantee is notified of adoption of this Resolution, Grantee shall file with the City Auditor its written acceptance of this franchise, subject to all of its terms and conditions.

Article XI. Term. This franchise shall continue and remain in full force and effect for a period of twenty years from the date upon which it is accepted by the Grantee.


Adopted this 25th day of May, 1993.

STATE OF NORTH DAKOTA     )  
                                  )    ss.  
COUNTY OF BURLEIGH        )

I, Dan Dahlgren, do hereby certify that I am duly appointed and qualified to execute contracts and certify documents on behalf of the City of Bismarck, North Dakota, and that the attached is a full, true and correct copy of the Resolution adopted by the Board of City Commissioners at its meeting of May 25, 1993.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the City of Bismarck, North Dakota, this 25th day of May, 1993.


( S E A L )


  
\_\_\_\_\_  
Dan Dahlgren, City Coordinator  
Bismarck, North Dakota

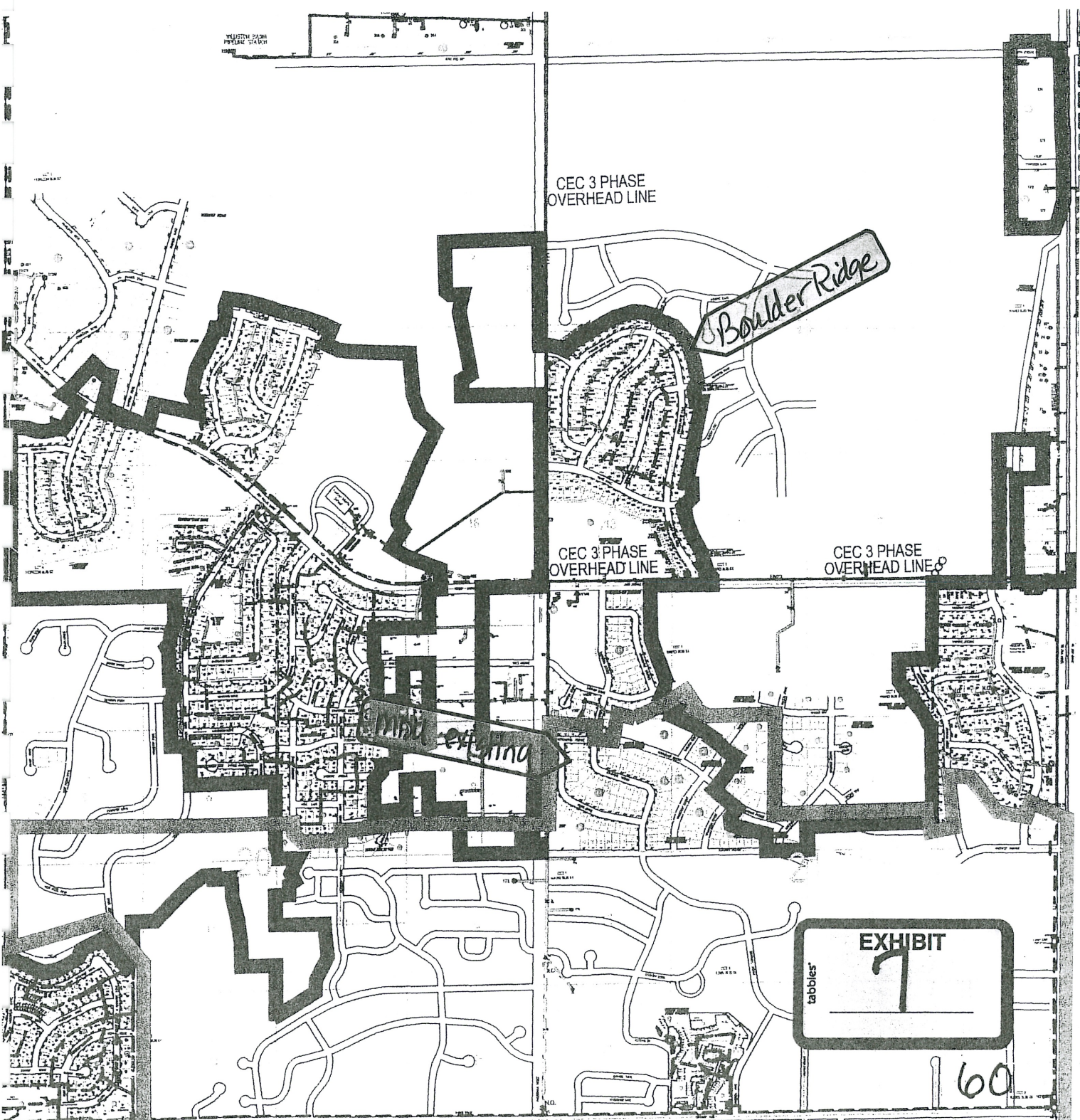
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# LEGEND

 BISMARCK CITY  
LIMITS BOUNDARY

 CEC/MDU SERVICE  
AGREEMENT BOUNDARY



RECEIVED

**BISMARCK BOARD OF CITY COMMISSIONERS**

IN THE MATTER OF A  
PETITION TO DECLARE FRANCHISE  
RIGHTS FILED BY MONTANTA  
DAKOTA UTILITIES CO

**FINDINGS, CONCLUSIONS  
DECISION AND ORDER**

The Bismarck Board of City Commissioners considered the matter of a Petition to Declare Franchise Rights filed by Montana Dakota Utilities Co. (MDU). MDU and Capital Electric Cooperative (CEC) were notified by letter dated September 14, 2005, of a hearing to be held October 11, 2005 and of their opportunity to submit written materials and information regarding this matter by October 5, 2005. A hearing before the Board of City Commissioners was held on October 11, 2005 to determine the franchise rights of the parties and in particular the franchise rights of the parties with respect to part of Bolder Ridge subdivision in Bismarck. At the hearing, Daniel Kuntz, representing MDU, appeared and presented information and evidence on behalf of MDU's Petition. Carol Larson, representing CEC, appeared and presented information and evidence on behalf of CEC. The Commission again took up deliberation of the Petition at a special meeting held November 14, 2005. After reviewing the information submitted by both parties and hearing the information submitted and after due consideration, the City Commission makes the following:

**FINDINGS OF FACT**

That as a result of information presented by the parties, the City Commission finds:

1. That MDU holds a Franchise to operate an electric distribution system over, on and under all of the public ways of the City of Bismarck, dated May 12, 1987, for a term of 20 years. CEC holds a Franchise to operate an electric distribution system over, on and under the public ways, dated May 25, 1993, for a term of 20 years. CEC's Franchise contains a geographic limitation not contained in MDU's Franchise.

2. CEC originally approached the City in the early 1960s in an attempt to secure a limited franchise to operate within the City of Bismarck. At that time, CEC stated that their request was limited to permission to retain existing customers currently within the City, to serve existing customers outside the City when they are annexed to the City and permission to serve certain units of state or local governments when requested to do so all with the

understanding that CEC would not build any new lines within the City without the City's explicit permission. Information submitted by MDU indicates that CEC had long sought a service agreement with MDU to enable CEC to obtain a City franchise. The intent of the parties during those discussions appears to have been to allow CEC a limited presence in the City with MDU to be the primary supplier of electric services within the City.

3. In 1973, MDU and CEC entered into an Area Service Agreement in an attempt to reduce service conflicts between them and plan for orderly growth for each utility. The intent of the agreement was to regulate the service areas of the two utilities and to avoid conflicts that might occur if CEC was granted a franchise to operate within the City. The Area Service Agreement sets out geographic service areas for each utility and also a framework for cooperation in the event of conflicts that might arise in areas of over-lap or areas where it is more economic for one of the utilities to provide electric service. The signing of the Area Service Agreement coincided with the City's award of a limited franchise to CEC. The Area Service Agreement appears to have removed MDU's objections regarding a franchise award to CEC.

a. The Area Service Agreement contains a map, as an attachment, that describes the respective service areas of both of the utilities as agreed to by them in 1973.

b. The Area Service Agreement contains a provision in which the parties agree that as Bismarck grows and conditions change, the Area Service Agreement would be revisited at least every 5 years and the parties would in good faith review the agreement for modifications that "may be desirable to more efficiently carry out the intent of both parties." This intent was more explicitly stated in the CEC proposal to the City (1961) wherein CEC proposed that the boundary would be modified as the City grew. This was MDU's stated understanding of how the Area Service Agreement would work.

c. The franchises of both MDU and CEC are similar except that the CEC Franchise incorporates the provisions of the Area Service Agreement. The CEC Franchise contains the following provision:

Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the streets, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for

transmitting and distributing electric energy for public and private use.

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted to Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990 and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution.

4. That the Area Service Agreement was amended by a Letter of Agreement between MDU and CEC dated October 25, 1990. That Letter of Agreement describes a certain service areas of the parties but does not include Boulder Ridge First Addition to the City of Bismarck. The Area Service Agreement was amended in June of 1993, by a letter agreement signed by both of the parties. The letter agreement amended the Area Service Agreement by adding the language regarding the parties' rights upon cancellation of the Area Service Agreement during the term of either franchise. The language added by the amendment is similar to language contained in Article II, Paragraph 1 of CEC's franchise, as stated above. The Area Service Agreement may also have been amended by writings or by oral agreements between the parties that the City Commission is unaware of.

5. By letter dated June 26, 2002, MDU cancelled the Area Service Agreement. By the terms of the Area Service Agreement, the cancellation was effective June 26, 2003.

6. That in April of 2005, part of Boulder Ridge First Addition to the City of Bismarck was annexed and became a part of the City. Boulder Ridge First Addition is located outside the bold line on the map attached to the Area Service Agreement. Both MDU and CEC claim the right to serve this new subdivision.

#### CONCLUSIONS OF LAW

1. That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City. Pursuant to Article 3, Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck City Commission is the franchising authority for both MDU and CEC 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.

2. MDU and CEC have offered differing opinions regarding the meaning and interpretation of the CEC Franchise. MDU and CEC have offered differing opinions regarding the meaning, interpretation and application of the Area Service Agreement as it is incorporated into the CEC Franchise. The Area Service Agreement is ambiguous and the Commission may consider extrinsic evidence to interpret the provisions of the Area Service Agreement and related provisions of the CEC Franchise.

3. That both MDU and CEC have valid franchises to operate electric power distribution systems over, on and under the public ways within the City. CEC's Franchise is limited by the language of Article II of that Franchise, which incorporates the Area Service Agreement between MDU and CEC. The intention of the parties in the Area Service Agreement and by extension, the intention of the City when it awarded a franchise to CEC, was for MDU to remain the main provider of electric services within the City, except for CEC's existing customers and any other customers or service areas conceded to CEC by MDU. It was not the intention of the parties or of the City, that the map attached to the Area Service Agreement would be in place for 40 years without amendment but rather that it would be amended as the City grew to allow for healthy efficient growth for both utilities. It was not the intent of the City that CEC would become the exclusive electric power supplier for all new areas of the City outside the line shown in the Area Service Agreement. It was the City's intent, in including the Area Service Agreement in the CEC Franchise, that the line on the Area Service Agreement map would move outward as the City grew.

4. That pursuant to the terms of the CEC Franchise, at Article II, the CEC Franchise includes areas within the City "as now or hereafter constituted" but is "subject to the conditions herein". The CEC Franchise is specifically limited in scope. In Paragraph 1 of Article II, it is stated that

In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted to Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990 and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. (emphasis added)

5. CEC's Franchise is limited to those areas within the City that are described in the Area Service Agreement or any amendments thereto. The areas "within the City" described in the Area Service Agreement are as shown on the Area Service Agreement map outside the bold line and within the City. The "areas within the City" would also include any areas later annexed to the City that were named by an amendment to the Area Service Agreement. Customers of CEC within the City in 1973 and any other customers specifically consented to by MDU would also be included under the express terms of the Area Service Agreement. CEC's Franchise does not grant the authority to serve all new areas of the City that are outside the bold line on the map without amendment to the Area Service Agreement. The ability of the parties to execute new amendments ended on June 26, 2003, the effective date of cancellation of the Area Service Agreement by MDU.

6. That the hearing was properly noticed and that all parties had opportunity to appear and present evidence.

#### DECISION AND ORDER

Based upon the Findings and the Conclusions, the Board of City Commissioners concludes that electric power service to part of Bolder Ridge First Addition to the City of Bismarck is properly served by MDU, subject to CEC retaining any existing customers. The Board of City Commissioners strongly urges MDU and CEC to meet and agree on a new service agreement for the future development and provision of electric services within the City of Bismarck as it now exists or exists in the future and submit such agreement to the Board of City Commissioners for their approval pursuant to NDCC Section 49-03-06(8).



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 The City of Bismarck, North Dakota )  
 )  
 and )  
 )  
 Montana-Dakota Utilities, Inc., a )  
 Division of MDU Resources Group, )  
 Inc. )  
 )  
 and )  
 )  
 The Public Service Commission of )  
 North Dakota )  
 )  
 Defendants. )

COMPLAINT

Docket Number 05-C-2303

I.

Plaintiff (herein "Capital") is a cooperative organized and operated under North Dakota Century Code Chapter 10-13 providing electric energy in North Dakota.

II.

The Defendant City of Bismarck (herein the "City") is a city under North Dakota Century Code Title 40.

III.

The Defendant Montana-Dakota Utilities, Inc. a division of MDU Resources Group,

Inc. (herein "Montana-Dakota") is a business corporation providing electric energy in North Dakota.

IV.

The North Dakota Public Service Commission (herein "Commission") is a constitutional body under Article V, Section 2 of the North Dakota Constitution and under North Dakota Century Code Title 49.

V.

Montana-Dakota holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 12, 1987.

VI.

Capital holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 23, 1993.

VII.

On September 28, 2005, Capital filed a complaint with the Commission under N.D.C.C. 49-03-01, -01.4 and -05, alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital's service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.

VIII.

On October 20, 2005, Montana-Dakota filed an answer and counterclaim to Capital's complaint, asserting Capital "... is not authorized by law or franchise to provide

electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck.”

IX.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a “Petition to Declare Franchise Rights” requesting the Board “to determine that: “1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck’ as annexed to the City of Bismarck on April 12, 2005; and 2. CEC [Capital] is not authorized under its franchise to provide electric distribution service within ‘Part of Boulder Ridge First Addition to the City of Bismarck’ as annexed to the City of Bismarck on April 12, 2005.”

X.

On November 14, 2005, the President and City Administrator of the City executed a document titled “Findings, Conclusions Decision and Order” “In the matter of a Petition to Declare Franchise Rights Filed by Montana Dakota Utilities Co.,” wherein “the Board of City Commissioners 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 the City of Bismarck.”

XI.

The Board of Commissioners of the City of Bismarck performs the legislative functions of the city.

XII.

The North Dakota Public Service Commission is a constitutional body under Article

V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise.

XIII.

The district court has judicial power and original jurisdiction of all causes including the power to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, section 27-05-06 and chapter 32-23.

XIV.

Capital is a person whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract or franchise with respect to the provision of electric power services within the City of Bismarck.

Therefore, Capital requests judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993.

Dated this 30 day of November, 2005.

PRINGLE & HERIGSTAD, P.C.

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

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

---

Capital Electric Cooperative, Inc.,  
Plaintiff,  
vs.  
The City of Bismarck, North Dakota  
and  
Montana-Dakota Utilities, Inc., a  
Division of MDU Resources Group, Inc.  
and  
The Public Service Commission of  
North Dakota  
Defendants.

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CIVIL NO. 05-C-2303

ANSWER

The North Dakota Public Service Commission ("Commission"), for its Answer to the Complaint of Capital Electric Cooperative, Inc. ("Capital Electric") alleges and states as follows:

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted. The Defendant Commission answers the Complaint, but because there are no claims against this answering Defendant, the Commission informs the Court that it does not anticipate that it will actively participate in the legal proceedings before the Court
2. The Commission admits the allegations contained in paragraphs I, II, III and IV of the Complaint.

3. The Commission is without sufficient information to admit or deny the allegations contained in paragraphs V and VI of the Complaint and therefore denies the same and puts the Complainant to its proof therein.

4. The Commission admits the allegations contained in paragraphs VII, VIII, IX, X and XI of the Complaint.

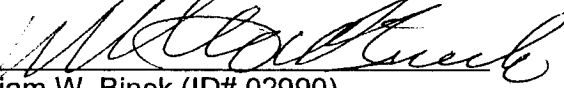
5. The Commission admits the allegations contained in paragraph XII that it is a constitutional body under Article V, Section 2 of the North Dakota Constitution, and that it has only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a municipal ordinance, contract or franchise, but denies that it lacks jurisdiction to determine rights, status, or other legal relations affected by a statute. Capital Electric in fact alleges in paragraph VII of the Complaint that it has filed a Complaint with the Commission requesting relief under specific statutes.

6. The Commission, upon information and belief, admits the allegations contained in paragraphs XIII and XIV.

Therefore, the Commission requests that the Court issue an order dismissing the Complaint of Capital Electric against the Commission.

Dated this 19th day of December, 2005.

Respectfully Submitted,  
North Dakota Public Service Commission

By:   
William W. Binek (ID# 02990)

Chief Counsel  
Public Service Commission  
600 E. Boulevard Avenue, Dept 408  
Bismarck, ND 58505  
(701)328-4088

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 The City of Bismarck, North Dakota )  
 )  
 and )  
 )  
 Montana-Dakota Utilities, Inc., a Division )  
 of MDU Resources Group, Inc. )  
 )  
 and )  
 )  
 The Public Service Commission of North )  
 Dakota, )  
 )  
 Defendants. )

**DEFENDANT CITY OF BISMARCK'S  
 MOTION TO DISMISS OR IN THE  
 ALTERNATIVE FOR A MORE  
 DEFINITE STATEMENT**

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Pursuant to Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure the defendant City of Bismarck moves the Court to dismiss this action for failure to state a claim upon which relief can be granted. Alternatively, the City of Bismarck moves pursuant Rule 12(e) of the North Dakota Rules of Civil Procedure and Rule 3.2 of the North Dakota Rules of Court, for an order requiring plaintiff Capital Electric Cooperative, Inc. to provide a more definite statement regarding its alleged cause of action as to the City and as to the relief requested. This motion is supported by the attached brief and exhibits, and all of the materials thus far contained in the record.

Dated this 19<sup>th</sup> day of December, 2005.

SMITH BAKKE OPPEGARD PORSBORG WOLF

By: *Randall Bakke*

Randall J. Bakke  
116 North Second Street  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
ND State Bar ID No. 03898

Attorneys for Defendant,  
City of Bismarck

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANT CITY OF BISMARCK'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT** was on the 19<sup>th</sup> day of December, 2005, mailed to the following:

ATTORNEYS FOR PLAINTIFF:

Carol K. Larson  
Attorney at Law  
P.O. Box 1000  
Minot, ND 58702-1000

ATTORNEY FOR DEFENDANT MONTANA DAKOTA UTILITIES:

Daniel S. Kuntz  
MDU Resources Group, Inc.  
P. O. Box 5650  
Bismarck, ND 58502-5650

ATTORNEY FOR DEFENDANT PUBLIC SERVICE COMMISSION:

William W. Binek  
Public Service Commission  
State Capitol  
Bismarck, ND 58505-0480

By *Randall Bakke*

RANDALL J. BAKKE

74

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

**ANSWER AND COUNTERCLAIM  
of Montana-Dakota Utilities Co.**

Case No. 05-C-2303

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), for its Answer and Counterclaim to the Complaint of Capital Electric Cooperative ("CEC"), alleges and states as follows:

**ANSWER**

1. Except as otherwise answered or specifically admitted, Montana-Dakota denies each and every allegation and statement of CEC's complaint.
2. Montana-Dakota admits the allegations of paragraphs I, II, III, IV, V, and XI of CEC's complaint.
3. Answering paragraph VI of CEC's complaint, Montana-Dakota admits CEC holds a franchise adopted by the Bismarck Board of City Commissioners, but states such franchise was adopted on May 25, 1993. Montana-Dakota states the franchise is a limited franchise and refers the Court to the franchise for its complete terms.

4. Answering paragraph VII of CEC's complaint, Montana-Dakota admits CEC filed a complaint with the North Dakota Public Service Commission on or about September 29, 2005 and refers the Court to the complaint for the full extent of the allegations of the administrative complaint.

5. Answering paragraph VIII of CEC's complaint, Montana-Dakota admits it filed an answer and counterclaim to the complaint filed by CEC with the Public Service Commission. Montana-Dakota further admits that its answer asserted that CEC is not authorized by law or franchise to provide electric distribution service to Part of Boulder Ridge First Addition to the City of Bismarck. Montana-Dakota refers the Court to Montana-Dakota's Answer and Counterclaim for its full terms.

6. Montana-Dakota admits the allegations of paragraph IX of CEC's Complaint and refers the Court to Montana-Dakota's Petition to Declare Franchise Rights for its full terms.

7. Montana-Dakota admits the allegations of paragraph X of CEC's Complaint and refers the Court to the "Findings, Conclusions Decision and Order" of the Bismarck Board of City Commissioners for its full terms.

8. Answering paragraph XII of CEC's Complaint, Montana-Dakota admits the North Dakota Public Service Commission is a constitutional body under Article V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law. The remaining allegations are legal conclusions that require no response.

9. Answering paragraph XIII of CEC's Complaint, Montana-Dakota admits that pursuant to Article VI, Section 8, of the North Dakota Constitution, and except as

otherwise provided by law, the District Court has original jurisdiction of all causes. Montana-Dakota admits the District Court has discretionary power to declare rights, status, or legal relations under a statute, municipal ordinance, contract, or franchise, provided such jurisdiction delegated to the District Court by the Legislative Assembly cannot abridge the power of the governing board of a city to franchise the construction and operation of a public utility within the city as provided in Article VII, Section 11 of the North Dakota Constitution.

10. Montana-Dakota admits the allegations of paragraph XIV of CEC's complaint and alleges that CEC's rights, status, and other legal relations with respect to the provision of electric power service within the City of Bismarck have been determined by the Bismarck Board of City Commissioners in its Findings, Conclusions Decision and Order issued November 14, 2005.

11. CEC's complaint fails to state a claim upon which relief can be granted.

12. CEC has failed to exhaust its administrative remedies.

13. Declaratory relief is not available to perform a legislative act delegated by law to the City of Bismarck.

14. The Court cannot sustain bifurcated self-initiated judicial and administrative proceedings by CEC covering the same legal question. CEC's complaint should be dismissed while its complaint covering the same legal question is pending before the North Dakota Public Service Commission.

15. Declaratory relief is not available to CEC because its franchise rights within the City of Bismarck have been determined by the Bismarck Board of City Commissioners.

16. Declaratory relief is not available to collaterally attack the declaration of franchise rights by the Bismarck Board of City Commissioners.

### **Counterclaim**

For its Counterclaim against CEC, Montana-Dakota alleges and states as follows:

A. Montana-Dakota holds a 20-year unlimited franchise accepted May 29, 1987 from the City of Bismarck to provide electric distribution service within the City of Bismarck as then or thereafter constituted.

B. Montana-Dakota is willing and able to provide electric distribution service to all its franchised areas within the City of Bismarck through its existing electric distribution facilities or through the extension or purchase of electric distribution facilities.

C. Pursuant to Article VIII, Section 11 of the North Dakota Constitution, the governing board of the City of Bismarck has the power to franchise the construction and operation of public utility or similar service within the City of Bismarck.

D. Pursuant to Article 3; Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck Board of City Commissioners is the franchising authority for public utilities for all public areas within the City of Bismarck.

E. In its Findings, Conclusions Decision and Order issued November 14, 2005, the Bismarck Board of City Commissioners determined that CEC's franchise is limited geographically to those areas that were both: (1) within the City at the time the franchise was adopted May 25, 1993; and (2) described in an Area Service Agreement executed by CEC and Montana-Dakota and any future amendments thereto.

F. CEC and Montana-Dakota did not execute amendments to the Area Service Agreement after May 25, 1993 to add any annexed areas to CEC's limited franchise.

G. The Area Service Agreement between CEC and Montana-Dakota was cancelled effective June 26, 2003 which ended the ability of the parties to amend the Area Service Agreement.

H. CEC has not sought or obtained a new or amended franchise to include any areas annexed to the City of Bismarck after May 25, 1993.

I. In its Findings, Conclusions Decision and Order issued November 14, 2005, the Bismarck Board of City Commissioners determined that Part of Boulder Ridge First Addition to the City of Bismarck is properly served with electric service by Montana-Dakota subject to the right of CEC to obtain a limited franchise to continue service to customers of CEC that existed at the time Part of Boulder Ridge First Addition was annexed to the City of Bismarck in April 2005.

J. CEC had no existing customers within Part of Boulder Ridge Addition at the time it was annexed to the City of Bismarck.

K. Montana-Dakota is the sole franchised provider of electric service in areas annexed to the City of Bismarck after May 25, 1993.

L. Customers within areas annexed to the City of Bismarck after May 25, 1993 had central station electric service available to them pursuant to Montana-Dakota's franchise from the City of Bismarck.

M. Areas annexed to the City of Bismarck after May 25, 1993 that were not receiving electric service from CEC at the time of annexation are not rural areas as defined under North Dakota Century Code section 10-13-04.

N. Customers within an area annexed to the City of Bismarck after May 25, 1993 that were not receiving electric service from CEC at the time of annexation are not eligible for membership in CEC.

~~O. N.D.C.C. § 10-13-03 limits the provision of electric distribution service to non-members by a cooperative to persons not in excess of ten percent of the number of its members.~~

P. CEC's provision of electric service in Part of Boulder Ridge First Addition to the City of Bismarck and other areas annexed to the City of Bismarck after May 25, 1993 interferes with or threatens to interfere with the service of Montana-Dakota.

Therefore, Montana-Dakota requests the Court to issue its order and judgment:

1. Enjoining and restraining CEC from providing electric service within areas annexed to the City of Bismarck after May 25, 1993 for which CEC does not hold a franchise from the City of Bismarck.

2. Enjoining and restraining CEC from providing electric service to customers within areas annexed to the City of Bismarck after May 25, 1993 who are not eligible for membership within CEC and whose number exceeds ten percent of the number of CEC's members.

3. Enjoining and restraining CEC from interfering with the electric service of Montana-Dakota within Part of Boulder Ridge First Addition to the City of Bismarck by

enjoining and restraining CEC from providing or offering to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck.

Dated this 20 day of December, 2005.

Respectfully submitted,

PEARCE & DURICK

By Jerome Kettle

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Division of MDU Resources Group, Inc.

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
The City of Bismarck, North Dakota )  
 )  
and )  
 )  
Montana-Dakota Utilities, Inc., a )  
Division of MDU Resources Group, )  
Inc. )  
 )  
and )  
 )  
The Public Service Commission of )  
North Dakota )  
 )  
Defendants. )

**PLAINTIFF'S RESPONSE TO  
MOTION TO DISMISS OR FOR  
MORE DEFINITE STATEMENT**

**Docket Number 05-C-2303**

This action for a declaratory judgment involves a territorial dispute between Capital Electric Cooperative (Capital) and Montana Dakota Utilities (MDU) over an area known as Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge).

One of the Defendants, the City of Bismarck, has presented alternative motions to dismiss or for a more definite statement "regarding its alleged cause of action as to the City and as to the relief requested." According to the City's brief in support of its motion, "Without knowing the scope of the relief sought, the City is unable to prepare a responsive pleading." (Page 8).

Capital's complaint includes the following allegations of fact:

IX.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a "Petition to Declare Franchise Rights" requesting the Board "to determine that: "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005; and 2. CEC [Capital] is not authorized under its franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005."

X.

On November 14, 2005, the President and City Administrator of the City executed a document titled "Findings, Conclusions Decision and Order" "In the matter of a Petition to Declare Franchise Rights Filed by Montana (sic) Dakota Utilities Co.," wherein "the Board of City Commissioners 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 the City of Bismarck."

XI.

The Board of Commissioners of the City of Bismarck performs the legislative functions of the city.

MDU has answered and has filed a brief in support of the City's motion to dismiss. Notably, MDU did not find Capital's complaint too indefinite to prepare a responsive pleading. MDU's answer admits the allegations of Capital's complaint quoted above.

Capital concedes that a more definite statement will facilitate the City's preparation of a responsive answer. The more definite statement further demonstrates that the motion to dismiss should not be granted.

I.

Responding to the City's request for a more definite statement "as to the relief requested," Capital states that it seeks a judgment declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding.

II.

Responding to the City's request for a more definite statement "regarding its alleged cause of action as to the City," and understanding that request as inquiring about Capital's legal theories, Capital responds as follows. (The following is a precis of arguments expected to be made at greater length in the course of litigation. These abbreviated arguments also respond to the City's alternative motion to dismiss.)

Capital contends:

A) That the City Commission's decision and order of November 14, 2005, exceeds the scope of the Commission's authority; and

B) That the City Commission's position as stated in its decision and order is wrong under applicable law.

Responding to MDU's brief in support of the City's motion, that Capital's complaint "does not challenge the validity of the determinations made by the Board of City Commissioners in its order issued November 14, 2005," Capital states that it does indeed challenge the validity of the determinations made by the City Commission. The determinations were not only wrong, they were made outside the scope of the City Commission's legislative authority.

A.

Capital's action in this court complains of the Bismarck Board of City Commissioners' assumption of power to declare Capital's franchise rights. Capital's action invokes the court's power of judicial review of the Commission's action and invokes the court's jurisdiction under N.D.C.C. 32-23 to declare Capital's franchise rights. The declaratory judgment statute provides:

"Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and may obtain a declaration of rights, status, or other legal relations thereunder." N.D.C.C. 32-32-02

As the words used in any statute are to be understood in their usual sense unless a contrary intention plainly appears (N.D.C.C. 10-02-02), it is plain from the words of N.D.C.C. 32-23 that it provides the appropriate procedure for Capital to obtain judicial

review of the City Commission's action and a declaration of Capital's rights, status, or other legal relations under its franchise.

It cannot be seriously claimed that the action of the City Commission is final, immune from judicial review. See Mini-Mart, Inc. v City of Minot, 347 N.W.2d 131 (N.D. 1984) and Munch v City of Mott, 311 N.W.2d 17 (N.D. 1981). Judicial review of a city's action sometimes takes the form of an action for mandamus (Mini-Mart, Inc. v City of Minot, supra) or an action for an injunction (Munch v City of Mott, supra), or an action for declaratory judgment (City of Fargo v Harwood Township, 256 N.W.2d 694 (N.D.1977)).

Under N.D.C.C 40-05.1-00.1, subd 3, the Board of Commissioners of the City of Bismarck "performs the legislative functions of the city." Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (N.D. 1969). Just as courts do not exercise legislative functions, Murphy v City of Bismarck, 109 N.W.2d (N.D. 1961) so also legislative bodies do not exercise judicial functions, Fradet v City of Southwest Fargo, 59 N.W.2d 871 (N.D. 1953). MDU's brief in support of the City's motion to dismiss makes the same point, citing additional authorities. On this point, Capital and MDU agree: The grant of a municipal franchise is a legislative function.

MDU's petition to the City Commission did not invite the exercise of a legislative function, nor was the Commission's consequent action of November 14, 2005, the exercise of a legislative function. The petition and City Commission's decision reflect an assumption the Commission has judicial powers to adjudicate conflicting claims between

holders of non-exclusive franchises that the City has granted in its legislative function. The City Commission's title of its response to MDU's petition, "Findings, Conclusion and Order" is a judicial label, and the words employed in that document indicate the City Commission made its findings, reached its conclusion and issued its order in the fashion of a panel of judges deciding the conflicting claims of litigants. "... the Board of City Commissioners 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 the City of Bismarck." (See exhibit A.)

There is no disputing the City Commission's power to grant non-exclusive franchises under N.D.C.C. 40-05-01, subd. 57, or 40-05.1-06 subd. 10. But neither of those provisions, and no other provision of any statute or charter - and no provision of the North Dakota Constitution - empowers the City Commission to breach the wall of separation between the legislative and judicial branches of government and to adjudicate conflicting claims between holders of non-exclusive franchises that the City has granted in its legislative function.

The impropriety of the City Commission's assumption of a judicial role to decide Capital's and MDU's dispute over electric service in Boulder Ridge is also indicated by the nature of the City's relationships with franchisees. It is common to consider a franchise as akin to a permit granted by a governmental entity to engage in a regulated enterprise. But a franchise is different from, more than, a permit such as might be granted to a liquor store. A franchise is a contract by which a state or city commissions a non-governmental entity to provide an essential service to the public. See Northwestern Telephone Exchange

Company v Anderson, 98 N.W. 706 (N.D. 1904); see generally 36 Am.Jur.2d Franchises.

The status of a franchise as a contract is also indicated by the City's document granting a franchise to Capital, a resolution expressed in contractual verbiage of rights and obligations. (See exhibit B.)

Considering the relationship between Capital and the City as parties to a contract, the City Commission's assumption of power to judge its own case and to decide Capital's rights and obligations under its contractual franchise cannot be sustained. The authority to interpret contracts and to resolve disputes under contracts where one of the contracting parties is a governmental entity is a function of the judicial branch of government. See Seher v Woodlawn School District, 59 N.W.2d 805 (N.D. 1953).

The City's first argument for dismissal, "Capital has failed to exhaust its administrative remedies" is erroneous, because there is no administrative remedy available for Capital to seek.

The City and MDU suggest that the City itself is the administrative agency which Capital should approach for relief. They suggest that Capital should seek some action from the City Commission contrary to its previous action, in lieu of this action for judicial review of the City's previous action. See City's brief, page 5 ("It [Capital] should present those arguments to the City first.") and MDU's brief, pages 4 & 5. In effect, the City and MDU suggest that Capital should adopt the procedure invented by MDU when it "petitioned" the City Commission to "declare franchise rights," the same defective procedure that is challenged in this court action. However, there is no administrative remedy available from the City. See Mini-Mart, Inc. v City of Minot, supra 347 N.W.2d at

136. (A municipal government is not an administrative agency for purposes of the administrative agencies practice act.)

Neither the City nor MDU asserts that the PSC is an agency that might have jurisdiction to address the legal issues presented by Capital's complaint in the court action, but the court might ask whether it should abstain from exercising its jurisdiction, in lieu of the PSC's consideration of the issues. Capital has considered the question and asserts 1) the franchise issue is not within the subject matter jurisdiction of the PSC but is within the jurisdiction of the Court under N.D.C.C. 32-23; and 2) the City is not a party to the PSC proceeding but it is the principal defendant in the court action for a declaratory judgment. For these reasons, the two cases - Capital's complaint to the PSC about MDU's interference and Capital's Complaint to the Court about the City's purported decision and order affecting Capital's franchise - present separate legal issues.

Capital complains of the City Commission's wrongful action, the wrongful assumption of judicial powers, and erroneous conclusions produced in that venture. MDU and the PSC are named as defendants, but not as wrongful actors. MDU and the PSC are named as defendants in the court action because N.D.C.C. 32-23-11 requires persons who might be affected by declaratory relief to be made parties. It appears that MDU and the PSC might be affected because MDU has alleged the City Commission's purported decision of November 14, 2005, affects a separate pending proceeding before the PSC that also involves the territorial dispute between Capital and MDU over Boulder Ridge. The City is not a party to the PSC proceeding. (See exhibit C.)

"The same legal question" is the foundation of the principle of judicial administration

that courts disfavor "bifurcated" procedures covering the same legal question. In Shark Bros., Inc. v Cass County, 256 N.W.2d 701 (N.D. 1977), the court authored its now cited formulation, "We do not favor or encourage, nor do we sustain, bifurcated self-induced or self-initiated procedures, one in the administrative process and one in the judicial process covering the same legal questions." The court was careful to preface that statement with the premise "...the same legal question is involved in both proceedings." (256 N.W.2d at 705). That is not the situation now before the court. The same legal question is not involved in both the PSC proceeding and the declaratory judgment action in court. The same legal question is not involved because the parties are not the same and the jurisdiction of the PSC and jurisdiction of the court are not the same.

Capital has no remedy available from the PSC as an alternative to the action for declaratory judgment. The jurisdiction of the PSC is limited. The PSC has only the powers and duties conferred upon it by the Legislature. North Dakota Constitution, Article V, Sections 12 and 13; Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 (ND 1995); Public Service Commission v Montana Dakota Utilities Co., 100 N.W.2d 140 (N.D. 1959); Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956); City of Grafton v. Otter Tail Power Co, 86 N.W.2d 197 (N.D. 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.)

North Dakota precedents about bifurcation have sustained courts' abstention from proceeding only where there was no doubt about the alternative administrative agency's

jurisdiction to address the same legal question. Tooley v Alm, 515 N.W.2d 137 (N.D. 1994); Transportation Division of Fargo Chamber of Commerce v Sandstrom, 337 N.W.2d 160 (N.D. 1983); and Shark Bros, Inc. v Cass County, supra. As noted by the Court in Tooley, citing In Interest of McCullen, 470 N.W.2d 196 (N.D. 1991), declaratory relief is available to resolve an issue which is not subject to administrative determination.

The PSC's powers do not include power to review, affirm or reverse action of a municipality. Nor does the PSC have power to independently interpret or enforce the franchise granted by the City to Capital considered as a contract. Williams Electric Cooperative v. Montana-Dakota Utilities Co., supra. The City and MDU have impliedly conceded these points as to the unavailability of remedies from the PSC, as neither has asserted that the PSC is an administrative agency from which Capital might obtain authoritative adjudication of the franchise issues. (Similarly, MDU's counterclaim in the court action indicates its implied agreement that the Court and not the PSC is the appropriate forum to consider the franchise issues.)

The City's second argument for dismissal, "Capital's complaint should be dismissed for failure to state a claim" has already been implicitly addressed. Capital claims that the City Commission overreached its authority, breached the constitutional wall of separation between legislative and judicial functions and usurped a judicial power when it presumed to entertain MDU's "Petition to Declare Franchise Rights" adverse to Capital.

The City Commission's purported "Decision and Order" of November 14, 2005, has been asserted by MDU as affecting the Public Service Commission's exercise of its jurisdiction in the pending administrative proceeding between MDU and Capital. The

combination of the City's action and MDU's assertions in the PSC proceeding indicate the presence of a justiciable controversy, ripe for judicial scrutiny under declaratory judgment procedures.

B.

In the course of this action for a truly judicial determination of Capital's rights under its franchise, it is to be expected the City Commission would advocate that it correctly interpreted Capital's franchise when it issued its order on November 14, 2005. Capital does not dispute the City Commission's option to take a position and to argue that position in the pending action for a judicial determination and declaration of franchise rights.

As stated, Capital contends the City Commission's position as stated in its November decision and order is wrong under applicable law, the law applicable to the interpretation of Capital's franchise considered as a legislative enactment and considered as a contract. Now it is appropriate to assert that pleadings should not be extended as presentations of evidence or as briefs as to applicable law. For the purposes of a more definite statement to facilitate the City's preparation of a responsive pleading, it seems sufficient to definitely state: Capital asserts its franchise granted to it by the City of Bismarck on May 25, 1993, properly interpreted under applicable law, includes rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding.

**CONCLUSION**

The foregoing response provides a more definite statement that will facilitate the

City's preparation of a responsive answer to Capital's complaint.

Capital's complaint states a claim upon which relief can be granted, and there is no administrative remedy available as an alternative to relief in the form of a declaratory judgment. Accordingly, the motion to dismiss should be denied.

Dated this 10<sup>th</sup> day of January, 2006.

PRINGLE & HERIGSTAD, P.C.

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(701) 852-0381

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.        )  
   )  
                           Complainant,                )  
   )  
                   vs.                                        )  
   )  
 Montana-Dakota Utilities, Inc., a        )  
   Division of MDU Resources Group,    )  
   Inc.   )  
   )  
                           Respondent.                )

COMPLAINT

Case No. \_\_\_\_\_

Complainant, hereafter "CEC", is a rural electric cooperative organized under Chapter 10-13 of the North Dakota Century Code. Respondent, hereafter "MDU", is a North Dakota public utility.

Complainant alleges:

I.

CEC holds a twenty (20) year franchise with the City of Bismarck for an electric distribution system dated May 25, 1993, which grant of authority states in pertinent part as follows:

"Article II. Grant of Authority. There is hereby granted by the City to the Grantee, subject to the conditions contained herein, the right and privilege to occupy and use the street, alleys and public grounds of the City as now, or hereafter constituted, for the purpose of constructing, maintaining and operating, within, upon, in and under the same, an electric distribution system for transmitting and distributing electric energy for public and private

use. (emphasis added)

1. In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990, and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co. A copy of the Area Service Agreement and Amendment are attached as Exhibits A and B to this resolution."

II.

After the grant of franchise, CEC and MDU entered into a letter agreement amending the Area Service Agreement between CEC, and MDU on June 3, 1993. This amendment incorporated into the Area Service Agreement the franchise requirement that if the Area Service Agreement was "canceled by either Capital Electric Cooperative, Inc.

or Montana-Dakota Utilities Co. during the term of either party's existing franchise with the City of Bismarck, North Dakota, that all of the privileges, rights, obligations, and restrictions as contained in such July 5, 1973, Service Agreement, as amended, shall, notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both Capital Electric Cooperative, Inc. and Montana-Dakota Utilities Co."

### III.

Since the renewal of CEC's franchise in 1993, additional property contained in the Area Service Agreement has been annexed by the City of Bismarck. Electric distribution service has been provided to the annexed territories by MDU and CEC in accordance with the Area Service Agreement. Both parties have relied upon the grant of franchise, and upon the Area Service Agreement, with respect to investment, building of facilities, installation, and provision of electric distribution services to new city residents.

### IV.

MDU sent a letter to CEC dated June 26, 2002, to be effective June 26, 2003, purporting to cancel the Area Service Agreement for all areas outside the City of Bismarck. However, the terms of the franchise, as well as terms of the Area Service Agreement, as amended, provides that all of the privileges, rights, obligations, and restrictions as contained in the Service Agreement, as amended, shall notwithstanding such cancellation, continue during the term of either party's respective franchise with the City of Bismarck to apply equally to both CEC and MDU. The grant of authority in CEC's franchise agreement expressly provides that the franchise applies to the ". . . public grounds of the City as now,

or hereafter constituted". . . (emphasis added). The eventuality of annexation was expressly provided for in CEC's franchise grant.

V.

MDU alleges that CEC's service area was "frozen" in 2003 when they purported to cancel a portion of the service agreement. However, since June 26, 2003, fifteen (15) subdivisions have been annexed to the City of Bismarck in CEC's service area, and have been, and are served by CEC, pursuant to its franchise. There has been no prior objection to CEC providing service by either MDU or the City.

VI.

When territory is annexed into the City such territory stands just as any other property within the City, subject to the Area Service Agreement, and CEC's franchise. On April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City", hereafter "Boulder Ridge", was annexed to the City of Bismarck. Pursuant to the grant of franchise incorporating the Area Service Agreement, Boulder Ridge is located in CEC's service area. See attached Exhibit A.

VII.

CEC had previously provided electric service to a location in what is now known as Boulder Ridge since April 23, 1949. In preparation for the development of Boulder Ridge, CEC pulled the meter on March 17, 2005, and retired the service on April 8, 2005. CEC has a signed customer request to provide service within Boulder Ridge.

VIII.

MDU has indicated its intention to serve Boulder Ridge. Such service by MDU will

unreasonably interfere, or is about to interfere unreasonably, with the service or system of CEC. On September 27, 2005, MDU requested an underground facility located in French's 1<sup>st</sup> Addition to the City of Bismarck. This is a subdivision located directly south of Boulder Ridge, also in CEC's service area. It is believed that MDU intends to infiltrate CEC's territory by a half-mile of line to tie their system into Boulder Ridge, which ultimately requires them to cross CEC's power line. CEC's facilities are the only facilities located on the property to be served, prior to MDU's infiltration, the subject of this dispute. MDU has never provided electric service to this area. MDU's closest existing facility is approximately one-half (½) mile (2,800 feet) from Boulder Ridge. CEC is able to extend service to the site through a shorter extension at a lower costs, which is a primary consideration of orderly and economic development. Service by CEC is a natural extension of service from its existing facilities and will not result in checker boarding customers served by MDU and CEC.

IX.

CEC has built its distribution system in reliance upon the franchise granted by the City of Bismarck, which grant incorporates the terms of the Area Service Agreement. With respect to Boulder Ridge specifically, original construction of 1-phase line was completed in 1948. The line was converted to 3-phase in 1970, and the 3-phase was rebuilt and upgraded, adding more capacity in 1997. The 3-phase circuit in Boulder Ridge taps the CEC line and the circuit is ready to be energized by CEC. In addition, CEC and WAPA have invested \$7 million in construction of the Ward Delivery Substation to provide transmission service to North Bismarck. This Delivery Substation is expected to be

completed in January, 2006. See attached Exhibit B, consisting of four photographs of CEC's facilities.

X.

MDU's construction into CEC's franchised service area violates and threatens to violate the provisions of Section 49-03-01 and 49-03-01.3 N.D.C.C.

WHEREFORE the Complainant requests that the NDPSC to issue an order:

1. Restraining and enjoining MDU from constructing or extending its interfering lines, plant, or system, into CEC's franchised service area;
2. Requiring immediate removal of all of MDU's facilities in CEC's service area; and
3. In addition to the restraint imposed, that the Commission prescribe such other terms and conditions as it shall deem reasonable and proper.

Dated this 28<sup>th</sup> day of September, 2005.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

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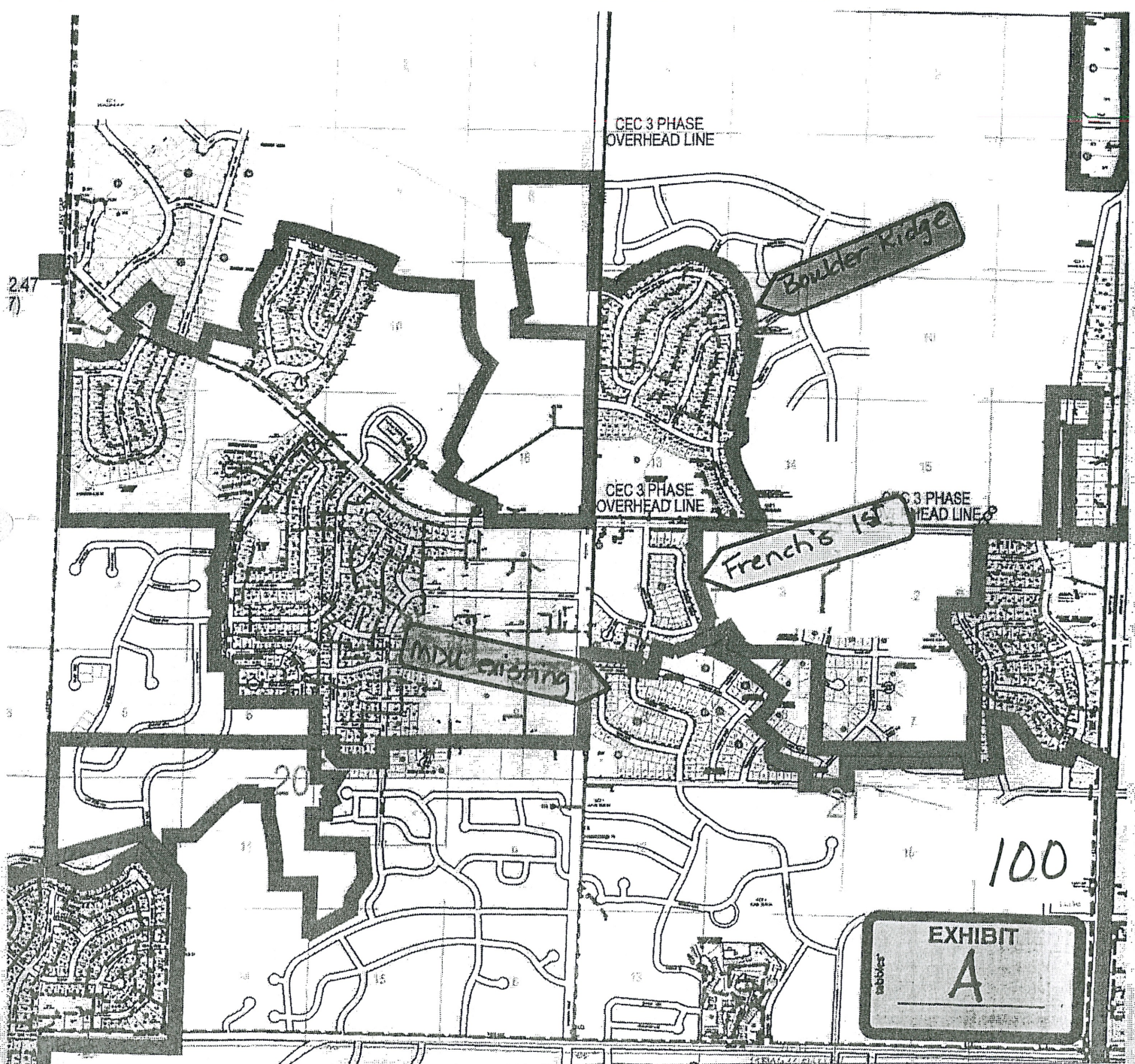
(701) 852-0381



# LEGEND

**——** BISMARCK CITY  
LIMITS BOUNDARY

**——** CEC/MDU SERVICE  
AGREEMENT BOUNDARY



# Capital Electric Cooperative

North Washington Street & 43<sup>rd</sup> Avenue

3-phase Distribution Line

Original Construction 1-phase - 1948

Converted to 3-phase - 1970

3-phase Upgrade to Heavy Substation Tie - 1997

## Boulder Ridge Development in Back Ground

"Looking East along 43<sup>rd</sup> Avenue"

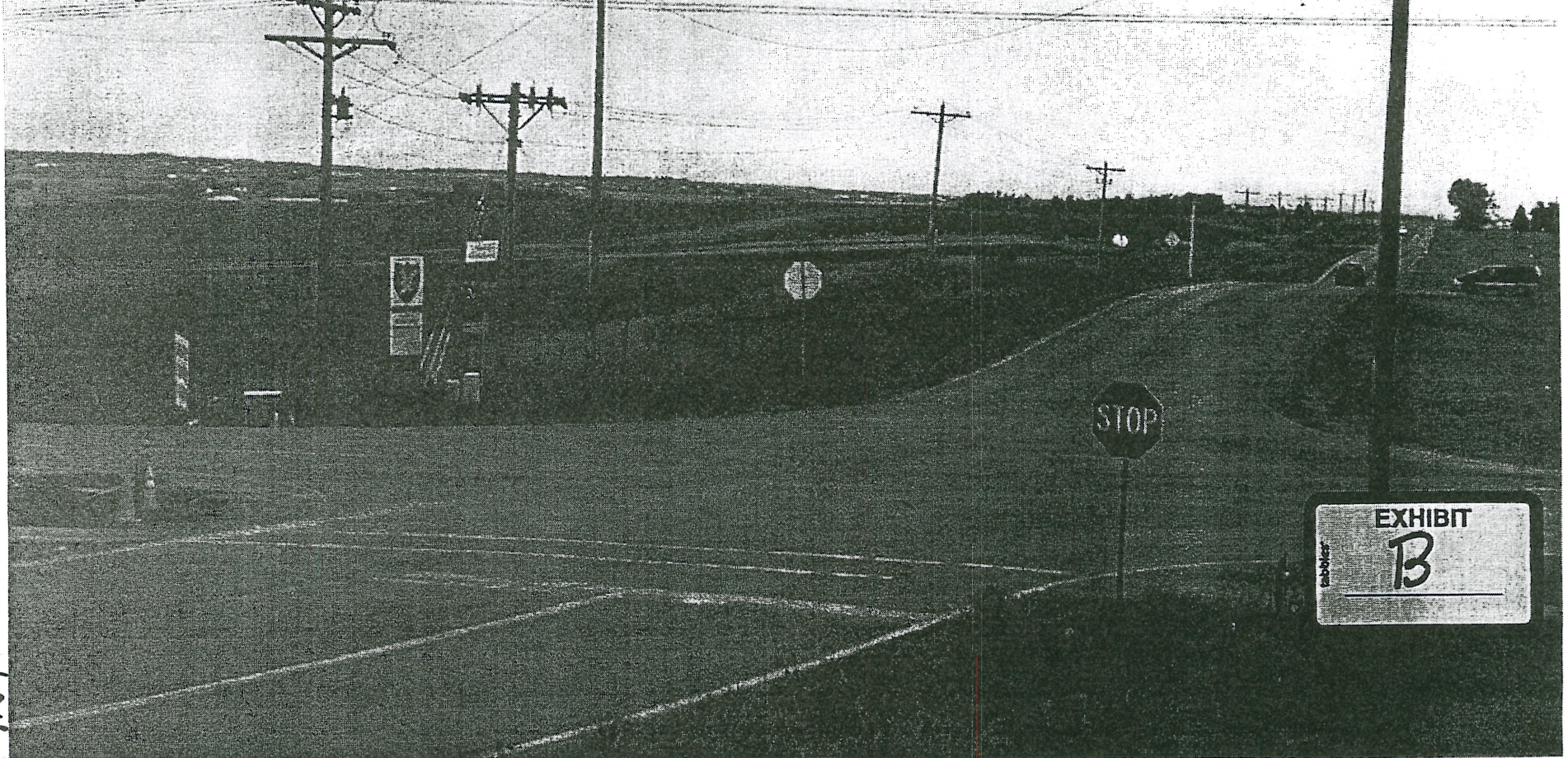


EXHIBIT  
B

101

# Capital Electric Cooperative

North Washington Street

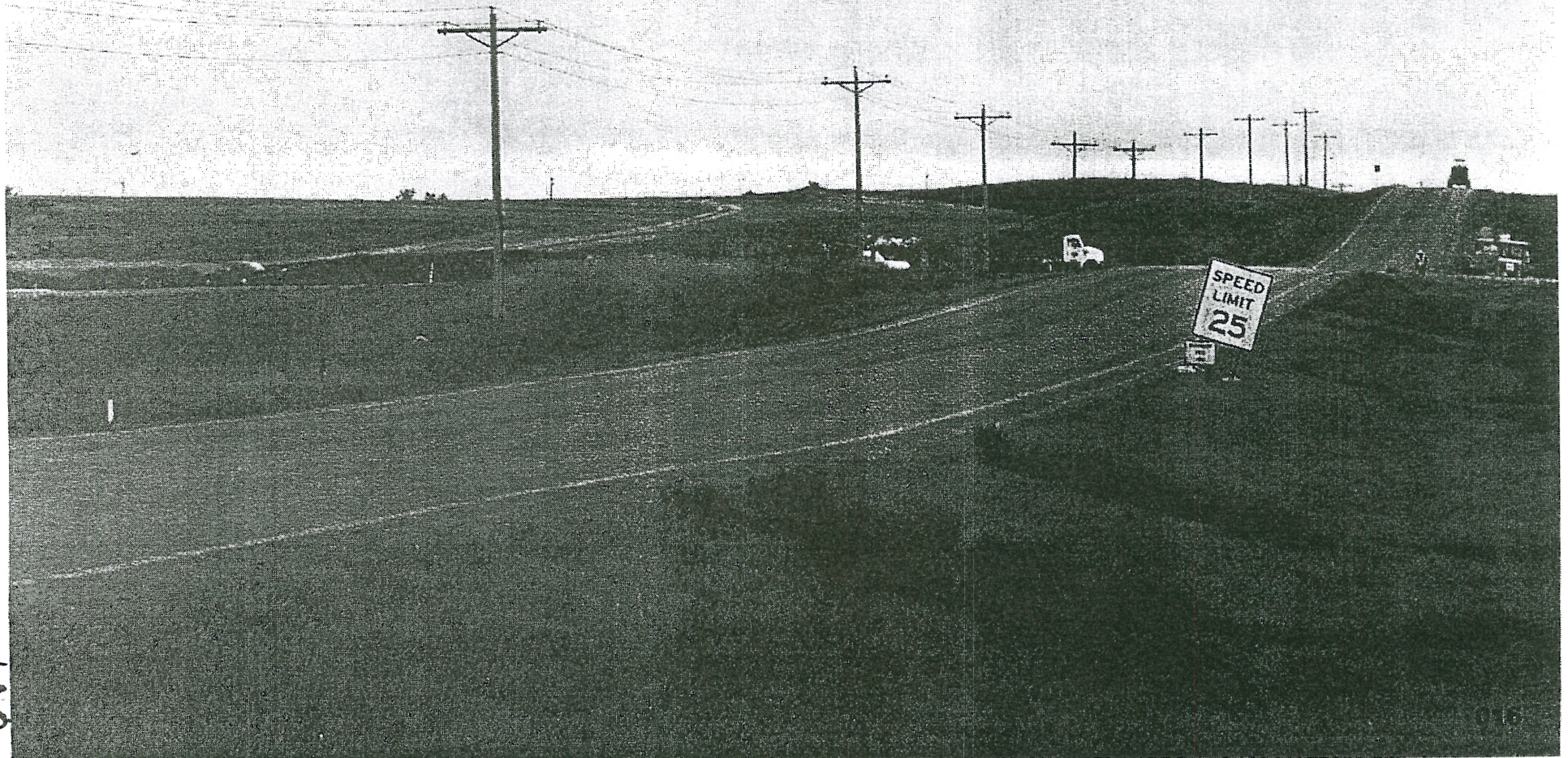
3-phase Distribution Line

Original Construction 1-phase - 1948

Converted to 3-phase - 1970

3-phase Upgrade to Heavy Substation Tie - 1997

**Boulder Ridge Development in Back Ground**



102



**Capital Electric Cooperative**

**43<sup>rd</sup> Avenue East of Washington Street**

**3-phase Distribution Line**

**Original Construction 1-phase - 1948**

**Converted to 3-phase - 1970**

**3-phase Upgrade to Heavy Substation Tie - 1997**

**Boulder Ridge Development in Back  
Ground**

**"3-phase circuit into Boulder Ridge taps CEC line, circuit  
ready to energize"**

## **Capital Electric Cooperative**

**Ward Delivery Substation (9-15-05)**

**(Under Construction - completion 1-06)**

**½ mile West N. Washington & Hwy. 1804**

**Built by: Capital Electric & Western Area Power  
Transmission Service to N. Bismarck**

**\$7,000,000 Joint Investment**



104

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc. )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 Montana-Dakota Utilities Co., a )  
 Division of MDU Resources Group, Inc.)  
 )  
 Respondent. )

**ANSWER AND COUNTERCLAIM**

Case No. PU-05-551

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), for its Answer and Counterclaim to the Complaint of Capital Electric Cooperative ("CEC") alleges and states as follows:

**ANSWER**

1. Answering paragraph I of the Complaint, Montana-Dakota admits CEC holds a franchise adopted by the Bismarck Board of City Commissioners on May 25, 1993. Montana-Dakota alleges the franchise is a limited franchise and refers the Public Service Commission to the franchise for its complete terms.

2. Answering paragraph II of the Complaint, Montana-Dakota admits that it and CEC entered into an amendment dated June 3, 1993 to an Area Service Agreement dated July 5, 1973. Montana-Dakota alleges the amendment has no applicability for areas outside the City of Bismarck and refers the Public Service Commission to the amendment for its complete terms.

3. Montana-Dakota admits the allegation of paragraph III of the Complaint for property annexed to the City of Bismarck between May 25, 1993 and June 26, 2003. Montana-Dakota denies the allegations of paragraph III of the Complaint to the extent it

alleges the parties relied upon the Area Service Agreement for provision of service to areas outside the City of Bismarck after June 26, 2003.

4. Answering paragraph IV of the Complaint, Montana-Dakota admits it cancelled the Area Service Agreement effective June 26, 2003 for all areas outside the City of Bismarck. Montana-Dakota denies the allegations of paragraph IV of the Complaint to the extent it alleges the Area Service Agreement could not be cancelled for areas outside the City of Bismarck. Montana-Dakota denies that CEC's franchise extends to all annexed areas of the City of Bismarck. Montana-Dakota alleges that CEC's franchise rights to serve annexed areas is expressly subject to the geographic limits of CEC's limited franchise.

5. Answering paragraph V of CEC's Complaint, Montana-Dakota admits that by virtue of the cancellation of the Area Service Agreement for areas outside the City of Bismarck, property annexed to the City after that date was not subject to the Area Service Agreement and was not part of Capital Electric's limited franchise without an amendment to include the annexed property within the geographic limits of the franchise. Montana-Dakota admits on information and belief, that CEC is serving customers annexed to the City of Bismarck after June 26, 2003 without a franchise. Montana-Dakota denies that it was obligated to object in some form or manner to CEC's service without a franchise and alleges it was CEC's affirmative duty to obtain an amendment to its franchise to include the areas annexed after June 26, 2003.

6. Montana-Dakota admits the allegation of paragraph VI of the Complaint that on April 12, 2005, the area known as "part of Boulder Ridge First Addition to the City" was annexed to the City of Bismarck. Montana-Dakota denies the remaining

allegations of paragraph VI of the Complaint and states that Part of Boulder Ridge First Addition to the City of Bismarck is not within the scope of CEC's limited franchise but is within Montana-Dakota's franchise from the City of Bismarck.

7. Montana-Dakota is without sufficient information to admit or deny the truthfulness of the allegations of paragraph VII of the Complaint and therefore denies the same and puts the Complainant to its proof thereon.

8. Montana-Dakota admits that it has extended its facilities and intends to provide electric distribution service to Part of Boulder Ridge First Addition to the City of Bismarck pursuant the rights and obligations of its franchise from the City of Bismarck. Montana-Dakota denies its service will interfere with service or facilities of CEC because CEC is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck.

9. Answering paragraph IX of the Complaint, Montana-Dakota denies that CEC built its distribution system in reliance on its limited franchise or the Area Service Agreement. Montana-Dakota is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph IX and therefore denies the same and puts the Complainant to its proof thereon.

10. Montana-Dakota denies the allegations of paragraph X of the Complaint. Montana-Dakota holds an unlimited franchise to provide electric distribution service within the City of Bismarck.

11. Part of Boulder Ridge First Addition to the City of Bismarck is within the scope of Montana-Dakota unlimited franchise.

12. 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 North Dakota Century Code section 49-03-06 provides that nothing in Chapter 49-03 shall be construed to limit the authority of the governing board of a city to exercise its franchising authority under section 40-05-01.

13. The Complainant's Complaint should be dismissed on grounds the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority to provide electric distribution services in the City of Bismarck including Part of Boulder Ridge First Addition to the City of Bismarck.

14. The Complainant's Complaint should be dismissed on grounds that it fails to state a claim upon which relief can be granted.

15. The Public Service Commission does not have jurisdiction to interpret or enforce an Area Service Agreement between Montana-Dakota and CEC entered into prior to April 12, 2005.

16. CEC breached the Area Service Agreement between CEC and Montana-Dakota by its refusal to agree to modifications to the agreement to carry out the intent of the parties that Montana-Dakota should serve future developments and growth areas contiguous to the city of Bismarck.

17. The Complainant's Complaint against Montana-Dakota should be dismissed because CEC is barred by operation of law and its bylaws from serving customers within Part of Boulder Ridge First Addition to the City of Bismarck.

## COUNTERCLAIM

18. CEC has submitted itself to the jurisdiction of the Public Service Commission regarding the provision of service in Part of Boulder Ridge First Addition to the City of Bismarck by the filing of its Complaint in this matter.

19. Montana-Dakota holds a 20 year unlimited franchise accepted May 29, 1987 from the City of Bismarck to provide electric distribution service within the City of Bismarck as then or thereafter constituted.

20. Customers within Part of Boulder Ridge First Addition had central station power available to them pursuant to Montana-Dakota's franchise upon annexation of Part of Boulder Ridge First Addition to the City of Bismarck.

21. Part of Boulder Ridge First Addition of the City of Bismarck was not a rural area, as defined under North Dakota Century Code section 10-13-04, after its annexation to the City of Bismarck.

22. Customers within Boulder Ridge First Addition to the City of Bismarck are not eligible for membership in CEC after annexation of Boulder Ridge First Addition to the City of Bismarck.

23. There were no electric distribution customers within Boulder Ridge First Addition to the City of Bismarck at the time of its annexation.

24. CEC's bylaws do not allow for the provision of electric distribution service to non-members.

25. CEC's extension of electric distribution facilities within Part of Boulder Ridge First Addition to the City of Bismarck and its intent to provide electric distribution

service within Part of Boulder Ridge First Addition to the City of Bismarck interferes with or threatens to interfere with the service of Montana-Dakota.

Therefore, Montana-Dakota requests the Public Service Commission to issue an order:

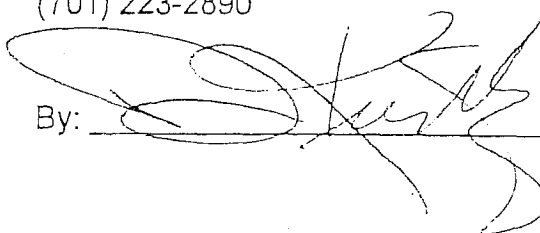
1. Dismissing the Complaint of CEC against Montana-Dakota;
2. Declaring that CEC is prohibited from providing electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck;
3. Restraining and enjoining CEC from interfering with the service of Montana-Dakota in Part of Boulder Ridge First Addition to the City of Bismarck by offering electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck.

Dated this 30<sup>th</sup> day of October, 2005.

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

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By: 

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

Capital Electric Cooperative, Inc. )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 Montana-Dakota Utilities Co., a )  
 Division of MDU Resources Group, Inc.)  
 )  
 Respondent. )

**Motion to Dismiss or in the  
Alternative Motion for Continuance**

Case No. PU-05-551

The respondent, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), moves the Commission to dismiss the complaint of Capital Electric Cooperative ("CEC"). In the alternative, Montana-Dakota moves the Commission for a continuance of the hearing in this proceeding.

**MOTION TO DISMISS**

In its complaint, Capital Electric Cooperative alleges that pursuant to the grant of a franchise from the City of Bismarck, the area known as "part of Boulder Ridge First Addition to the City of Bismarck" ("Boulder Ridge") is located within CEC's service area. CEC further alleges that Montana-Dakota's intention to provide Boulder Ridge with electric utility service will unreasonably interfere with the service of CEC. CEC requests an order restraining Montana-Dakota from interfering with CEC's franchised service area.

On November 14, 2005, the Bismarck Board of City Commissioners entered its Findings, Conclusions, Decision and Order on the petition of Montana-Dakota to declare the franchise rights of Montana-Dakota and CEC to serve Boulder Ridge. A copy of Findings, Conclusions, Decision and Order of the Board of City Commissioners is attached hereto. The Board of City Commissioners concluded that Boulder Ridge is properly served by MDU under its franchise subject to CEC retaining any existing

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customers at the time Boulder Ridge was annexed on April 12, 2005. CEC has not applied to amend its franchise to include any existing customers served by CEC at the time of the annexation of Boulder Ridge. In its complaint in this proceeding, CEC acknowledges that it retired its previous service to this area on April 8, 2005 and therefore had no existing customers at the time of annexation. Accordingly, CEC does not hold a franchise to serve any areas or customers within Boulder Ridge. As a matter of law, Boulder Ridge is not part of CEC's service area.

Capital Electric filed its complaint in this proceeding under N.D.C.C. §§ 49-03-01 and 49-03-01.3 based on allegations that it was seeking to prevent interference by Montana-Dakota with services provided by CEC at Boulder Ridge. Because CEC is not authorized to provide service to Boulder Ridge, there can be no such interference by Montana-Dakota. 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.

### ALTERNATIVE MOTION FOR CONTINUANCE

In the event the Public Service Commission determines not to dismiss the complaint of CEC, Montana-Dakota requests the hearing in this matter scheduled for December 13, 2005 be continued. The undersigned counsel for Montana-Dakota as well as Montana-Dakota's Assistant Vice President of Regulatory Affairs are scheduled to appear at a proceeding before the South Dakota Public Utilities Commission involving a number of parties that has been set for hearing for December 13-16, 2005. Because of the significant importance of both of these proceedings, Montana-Dakota requests a short continuance of the hearing in this matter to allow participation of its representatives in both proceedings.

Dated this 23<sup>rd</sup> day of November, 2005.

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

Daniel S. Kuntz (ID# 03490)  
Senior Attorney  
MDU Resources Group, Inc.  
918 East Divide Avenue  
P.O. Box 5650  
Bismarck, ND 58506-5650  
(701)222-7612

By: 

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc., )  
)  
Plaintiff, )

v )

The City of Bismarck, North Dakota, )

and )

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

and )

The Public Service Commission of )  
North Dakota, )

Defendants. )  
.....)

MEMORANDUM OPINION  
AND ORDER

Case No. 05-C-2303

This case involves a territorial dispute between two electric power providers, Capital Electric Cooperative, Inc. (CEC) and Montana-Dakota Utilities, Inc., a Division of MDU Resources Group (MDU). CEC and MDU each hold franchises from the City of Bismarck (City) regarding operation of electric distribution systems in and around the City.

In August 2005, MDU filed a "Petition to Declare Franchise Rights" with the City that requested the City to decide that "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005, and 2. CEC is not authorized under its franchise to

provide electric service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005." On October 11, 2005, the Bismarck Board of City Commissioners held a hearing on the Petition. At the hearing, CEC and MDU each presented information and evidence to the City Commissioners. Nothing either party provided to the Court shows CEC objected to or challenged the authority of the City Commissioners to hear the Petition. The City Commissioners issued Findings, Conclusions, Decision and Order dated November 14, 2005.

CEC filed a declaratory judgment action. The original Complaint seeks "judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." In its brief filed in response to the City's Motion to Dismiss or in the Alternative for a More Definite Statement, CEC's counsel wrote:

"Responding to the City's request for a more definite statement 'as to the relief requested,' Capital states that it seeks a judgment declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding."<sup>1</sup>

The City filed a Motion to Dismiss or in the Alternative for a More Definite Statement. MDU filed a Motion to Dismiss. The City's Motion alleges failure to exhaust administrative remedies and failure to state a claim upon which relief may be granted as grounds for dismissal. As noted above, the City asks, in the alternative, that CEC be required to provide a more definite statement of the relief

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<sup>1</sup>While CEC's Brief sets out a more definite statement, CEC has not filed an amended complaint with similar language.

CEC requests. MDU's Motion to Dismiss alleges failure to state a basis for declaratory relief and failure to exhaust administrative remedies as grounds for dismissal.

Resolution of the Motions comes down to two issues: (1) did the City have authority to hear the Petition filed by MDU and issue its Order, (2) if the answer to (1) is "yes" what remedy does CEC have to challenge the City's determination?

### City's Authority to Hear Petition and Issue Order

Nowhere in its Complaint does CEC directly claim the City did not have the authority to hear MDU's Petition and to issue its Order on the Petition. However, in its Plaintiff's Response to Motion to Dismiss or for More Definite Statement, CEC claims that the "City Commission's decision and order of November 14, 2005 exceeds the scope of the Commission's authority . . ."

Plaintiff's Response at 3. CEC further claims "Capital's action in the court complains of the Bismarck Board of City Commissioner's assumption of power to declare franchise rights."

Although CEC failed to plead that the City had no authority to hear the Petition and to issue its Order, the Court must address that issue as a threshold question.

Article VII, §11 of the North Dakota Constitution reads:

"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."

Clearly, then, the City has the unabridgible power to franchise public utilities. N.D.C. §40-05-01 relates to Powers of Municipalities. Subsection (57) reads:

“Franchises. To grant franchises or privileges to persons, associations, corporations, or limited liability companies, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to *regulate* the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the *regulatory powers* of the governing body.”

(Italics added). The question is whether the Order issued by the City is within the City’s regulatory power as it relates to an electric service franchise.

“Cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant.” Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991). However, the North Dakota Supreme Court loosens this restrictive statement in the same case by holding that “the manner and means for exercising those powers, unless prescribed by the legislature, are within the discretion of the City.” *Id.*

The fact that municipalities are given the unbridgible power to franchise utilities in the North Dakota Constitution, coupled with the language of N.D.C.C. §40-05-01(57), strongly supports the concept that the City has the authority under its regulatory powers or those necessarily implied from the statutory grant to define parties’ rights under a franchise. It would be a ludicrous interpretation of the law to say the City has the right to issue a franchise and set its terms, but not to interpret its terms or its scope. The North Dakota Supreme Court has recognized that municipalities may engage in quasi-judicial activities in interpreting their own statutes and ordinances. See, e.g. Bigwood v. City of Wahpeton, 565 N.W.2d 498, 501 (N.D. 1997). No logical reasons exist to treat a city’s interpretation of a franchise differently.

As a procedural matter, this Court notes that CEC apparently had not challenged the City's authority to hear the Petition and issue its Order until the statements set out in its Response. Therefore, it has failed to preserve this issue for review.

**What is the Appropriate Remedy**

CEC has filed a declaratory judgment action. Chapter 32-23, N.D.C.C. governs declaratory judgments. N.D.C.C. §32-23-02 reads, in pertinent part:

"Any person whose rights, status, or other legal relations are determined by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and may obtain a declaration or rights, status, or other legal relations thereunder."

In reviewing the Complaint, it appears that CEC is simply asking this Court to declare its rights under its franchise. However, when one reads CEC's Response to Motion to Dismiss, it becomes clear this is not so. CEC actually is challenging the City's authority to issue its Order on the Petition, and is arguing that the City's decision was wrong. Plaintiff's Response to Motion to Dismiss of for More Definite Statement at 3-4. Neither of those are within the scope of a declaratory judgment action.

CEC has a remedy under N.D.C.C. §27-05-06(4). CEC may appeal the City's decision to the district court. On appeal, the issue is not whether the City's decision was correct, but, rather, only whether in reaching its decision, the City abused its discretion and acted in an arbitrary, capricious or unreasonable manner. See, e.g. Lindteigen v. Bismarck, 1997 ND 123, 565 N.W.2d 47.

**Exhaustion of Administrative Remedies**

MDU and the City claim the Court should dismiss CEC's Complaint because CEC has failed to exhaust its administrative remedies, pointing to the fact that CEC has filed a complaint with the Public Service Commission (PSC). The Complaint CEC filed with the PSC asks the PSC to enjoin and restrain MDU's activities in CEC's claimed franchise service area. MDU's response asks for similar relief against CEC.

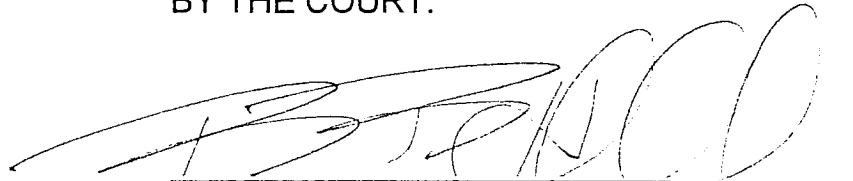
N.D.C.C. §49-02-02(4) gives the PSC the power to compel the obedience of lawful orders of mandamus, injunction, or other proper proceedings. More specifically, N.D.C.C. §49-03-01 allows the PSC to order enforcement of Chapter 49-03, N.D.C.C. with respect to allegations of unreasonable interference by an electric utility with the operations of another electric utility. This power is in the context of a certificate of public convenience and necessity.

N.D.C.C. §49-03-01 does not require an electric utility to secure a certificate of public convenience and necessity for extension of service within a municipality within which it has lawfully commenced operations. *See, also* N.D.C.C. 49-03-01.3. The question of whether MDU is operating lawfully under its franchise agreement is one of franchise interpretation by the City Commissioners. Only after the City Commissioners have decided the issue, and after any resulting appeal, may the PSC determine whether MDU is unreasonably interfering with CEC operations. If the City Commissioners, the district court, and the North Dakota Supreme Court all decide MDU has the service rights in Boulder Ridge under the parties' respective franchises, the PSC would have no basis for action. While the PSC may have a different opinion, it is this Court's opinion that this case is the horse and the PSC action is the cart.

To avoid unnecessary delay and expense, the Court would consider CEC's Complaint to be an appeal to the district court of the City's decision, would allow CEC to file an appropriate pleading setting out the issue as noted above; and would allow the parties to address the issue at the hearing now scheduled for March 2, 2006. Should any defendant object to this procedure, the Court will Order the Complaint dismissed and CEC may proceed accordingly.

Dated at Bismarck, North Dakota, this 30 day of January, 2006.

BY THE COURT:



Bruce B. Haskell, District Judge  
South Central Judicial District

Carol Larson  
Randall Bakke  
William Binek  
Daniel Kuntz  
Jerome Kettleson

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

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

and )

The Public Service Commission of )  
North Dakota )

Defendants. )

**PLAINTIFF'S MOTION FOR LEAVE  
OF COURT TO AMEND COMPLAINT  
AND NOTICE OF MOTION**

**Docket Number 05-C-2303**

Plaintiff, Capital Electric Cooperative, Inc. (Capital), moves the Court for leave to amend its Complaint to provide a more definite statement of its claim to answering Defendant's, Montana-Dakota Utilities, Inc., a Division of MDU Resources Group Inc. (MDU) and the Public Service Commission (PSC). Capital has asserted its right to amend its Complaint once as a matter of right against the Defendant, City of Bismarck, North Dakota, as the City has not answered the Complaint. Service of the Amended Complaint has been made upon the City. A copy of the proposed Amended Complaint as to answering Defendants is attached.

NOTICE OF MOTION

TO: The City of Bismarck, by and through their attorney, Randall J. Bakke; Montana-Dakota Utilities, Inc., by and through their attorney, Jerome C. Kettleon; and the Public Service Commission, by and through their attorney, William W. Binek.

YOU WILL PLEASE TAKE NOTICE that the attached Motion to Amend Complaint and Notice of Appeal is being made to the Court pursuant to the provisions of Rule 3.2 of the North Dakota Rules of Court. You are further advised that you have 10 days after service of this Motion within which to file an answer brief and other supporting papers. Upon the filing of briefs, or upon expiration of the time for filing, the Motion is deemed submitted to the Court unless counsel requests oral argument on the Motion.

Dated this 3<sup>rd</sup> day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

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Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )

Inc. )

and )

The Public Service Commission of )

North Dakota )

Defendants. )

**AMENDED COMPLAINT  
AND NOTICE OF APPEAL**

**Docket No. 05-C-2303**

I.

Plaintiff (herein "Capital") is a cooperative organized and operated under North Dakota Century Code Chapter 10-13 providing electric energy in North Dakota.

II.

The Defendant City of Bismarck (herein the "City") is a city under North Dakota Century Code Title 40.

III.

The Defendant Montana-Dakota Utilities, Inc., a division of MDU Resources Group,

Inc. (herein "Montana-Dakota") is a business corporation providing electric energy in North Dakota.

IV.

The North Dakota Public Service Commission (herein "PSC") is a constitutional body under Article V, Section 2 of the North Dakota Constitution and under North Dakota Century Code Title 49.

V.

Montana-Dakota holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 12, 1987.

VI.

Capital holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 23, 1993.

VII.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a "Petition to Declare Franchise Rights" requesting the Board "to determine that: "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005; and 2. CEC [Capital] is not authorized under its franchise to provide electric distribution service within `Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005."

VIII.

On September 28, 2005, Capital filed a complaint with the Commission under N.D.C.C. 49-03-01, 03-01.3., -01.4 and -05, alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital's service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.

IX.

On October 4, 2005, Capital outlined the nature of the proceedings in its brief before the City Commission as "a proceeding initiated by Montana-Dakota Utilities, Inc., hereafter "MDU", to deny Capital Electric Cooperative, Inc.'s franchised right to provide electric service to property annexed in its designated service area on or after June 26, 2003."

X.

Also, in its October 4, 2005, city filing, Capital acknowledged the City's right to grant franchises and to regulate the use of same. Capital further asserted the PSC had the responsibility to resolve conflicting claims within municipalities, that a complaint had been filed with the PSC, and further that the City did not have the right to amend or alter Capital's franchise without its consent. Capital further asserted that Courts have exclusive jurisdiction to resolve contract disputes, and that Capital had invested millions of dollars, in reliance upon the franchise, to fulfill its obligation to serve North Bismarck. Capital reasserted these issues to the City Commission, to the extent permitted by the 20 minute presentation Capital was allowed, at that October 11, 2005, hearing.

XI.

On October 20, 2005, Montana-Dakota filed an answer and counterclaim to Capital's PSC Complaint, asserting Capital "...is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck."

XII.

On November 14, 2005, the President and City Administrator of the City executed a document titled "Findings, Conclusions Decision and Order" "In the matter of a Petition to Declare Franchise Rights Filed by Montanta (sic) Dakota Utilities Co.," wherein "the Board of City Commissioners 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 the City of Bismarck." (Herein November 14<sup>th</sup> Order.)

XIII.

The Board of City Commissioners stated as one of its "Conclusions of Law" in support its decision in the November 14<sup>th</sup> Order "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City." (November 14<sup>th</sup> Order, page 4.) That statement is erroneous as a matter of law under North Dakota Supreme Court decisions that establish that the Constitution does not grant powers to municipalities. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XIV.

The Board of Commissioners of the City of Bismarck performs the legislative

functions of the city, including, under N.D.C.C. 40-05-01, the powers:

"1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to alter repeal, alter, or amend the same."

and

"57. Franchises. To grant franchises or privileges to persons, associations, or corporations, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body."

Under North Dakota Supreme Court decisions affecting powers of governing bodies of municipalities, if statutory powers are not implemented by ordinance the city may not avail itself of the powers enumerated by statute. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XV.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck in the exercise of its power under N.D.C.C. 40-05-01, Subsection 1, to carry into effect the regulatory powers of the governing body affecting franchises granted under N.D.C.C. 40-05-01, Subsection 57.

XVI.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to authorize the Board to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVII.

No statute enacted by the North Dakota Legislature authorizes the Board of Commissioners of the City of Bismarck to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVIII.

Montana-Dakota's Petition to the Board of Commissioners of the City of Bismarck did not request the exercise of a legislative function, nor does the November 14<sup>th</sup> Order record the exercise of a legislative function. The Petition requested and the November 14<sup>th</sup> Order presumed the Board's authority to render a decision to resolve the conflicting claims of litigants, a judicial function. Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (N.D. 1969). The Board's assumption of authority to hear and decide Montana-Dakota's Petition violated the Constitutional principle of separation of powers.

XIX.

A franchise granted by the governing body of a municipality under N.D.C.C. 40-05-01, Subsection 57 is a contract between the municipality and the grantee of the franchise. The authority to interpret contracts and to resolve disputes under contracts where one of the contracting parties is a governmental entity is a function of the judicial branch of government. Seher v Woodlawn School District, 59 N.W.2d 805 (N.D. 1953).

XX.

The November 14<sup>th</sup> Order exceeds the scope of power and authority of the Board of Commissioners of the City of Bismarck under the statutes of the State of North Dakota and under Bismarck's ordinances, resolutions or regulations. The Board had no power or authority under ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to hear and decide Montana-Dakota's Petition or to issue the November 14<sup>th</sup> Order.

XXI.

Capital takes exception to and objects to the findings of fact under the November 14<sup>th</sup> Order.

XXII.

The November 14<sup>th</sup> Order is not in accordance with the law, and is therefore arbitrary, capricious, unreasonable.

XXIII.

The procedure of the Board of Commissioners of the City of Bismarck in hearing Montana-Dakota's Petition and in the Board's decision has not afforded Capital a fair hearing. The Board's decision violates Capital's constitutional right to due process. The Board's decision violates constitutionally protected property rights to its franchise and its electric distribution system.

XXIV.

The Board of Commissioners of the City of Bismarck's conclusions of law and the

order of the November 14<sup>th</sup> Order do not sufficiently explain its rationale for its decision.

XXV.

The November 14<sup>th</sup> Order, if made within the scope of the power and authority of the Board of Commissioners of the City of Bismarck, is arbitrary, capricious and unreasonable.

XXVI.

The franchise granted to Capital by the City of Bismarck in 1993 refers to an Area Service Agreement between Capital and Montana-Dakota. The Agreement is referred to in the November 14<sup>th</sup> Order (Findings of Fact 3, 4 and 5; Conclusions of Law numbered 2, 3, 4, and 5.). Under the November 14<sup>th</sup> Order, the Board of Commissioners of the City of Bismarck asserted authority to declare the Area Service Agreement to be ambiguous and to interpret the Agreement, (Conclusion of Law numbered 2) which interpretations produced the result that Montana-Dakota, not the Board of Commissioners of the City of Bismarck, determined the rights of Capital under its franchise (Conclusions of Law numbered 3, 4, and 5). The Board of Commissioners of the City of Bismarck had no power or authority under its ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to interpret the Area Service Agreement. The Board of Commissioners of the City of Bismarck has no power or authority under the statutes of the State of North Dakota or under the Constitution of the State of North Dakota to delegate to Montana-Dakota the Board's legislative authority to grant franchises or to regulate franchises. Montana-Dakota Utilities Co. V Johanneson, 153 N.W.2d 414 (1967).

XXVII.

No ordinance, resolution or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to provide for appeal from the November 14<sup>th</sup> Order, asserted as an exercise of "the power to regulate the franchises of any public utility within the City"..."pursuant to Article 7, Section 11 of the North Dakota Constitution." (November 14<sup>th</sup> Order, page 4.)

XXVIII.

No statute enacted by the North Dakota Legislatures provides for appeal from the November 14<sup>th</sup> Order asserted as an exercise of "the power to regulate the franchises of any public utility within the City"..."pursuant to Article 7, Section 11 of the North Dakota Constitution." (November 14<sup>th</sup> Order, page 4.)

XXIX.

The North Dakota Public Service Commission is a constitutional body under Article V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise.

XXX.

The district court has judicial power and original jurisdiction of all causes including the power to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06 and Chapter 32-23. N.D.C.C. 32-23 provides for judicial review of the November 14<sup>th</sup> Order. E.g. City of Fargo

v. Harwood Township, 256 N.W.2d 694 (N.D. 1977).

XXXI.

The district court has judicial power and original jurisdiction of all causes including jurisdiction of appeals from determinations of inferior officers, boards or tribunals, in such cases and pursuant to such regulations as may be prescribed by law, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06.

XXXII.

No regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order considered as a determination of inferior officers, boards or tribunals.

XXXIII.

Capital is a person whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract or franchise with respect to the provision of electric power services within the City of Bismarck, and is affected by the November 14<sup>th</sup> Order.

**THEREFORE**, Capital requests judgment under N.D.C.C. 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's November 14<sup>th</sup> Order to the contrary notwithstanding.

Alternatively, if the Court should determine that statutes enacted by the North Dakota Legislature do provide for appeal from the November 14<sup>th</sup> Order, or that regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order, Capital appeals such

Order and requests an Order reversing the November 14<sup>th</sup> Order as arbitrary, capricious, and unreasonable, for the reasons more fully and previously set forth in this Complaint.

For any and all other appropriate relief within the jurisdiction of the District Court.

Dated this 3<sup>rd</sup> day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

P.O. Box 1013

BISMARCK, NORTH DAKOTA 58502

BRUCE B. HASKELL  
JUDGE

(701) 222-6682  
FAX (701) 222-6689

February 9, 2006

Mr. Randall Bakke  
Attorney at Law  
PO Box 460  
Bismarck, ND 58502-0460

Ms. Carol Larson  
Attorney at Law  
PO Box 1000  
Minot, ND 58702-1000

Mr. Jerome Kettleon  
Attorney at Law  
PO Box 400  
Bismarck, ND 58502-0400

Mr. Daniel Kuntz  
Attorney at Law  
PO Box 5650  
Bismarck, ND 58502-5650

RE: Capitol Electric Cooperative v. City of Bismarck, et. al  
Burleigh County Civil 05-C-2303

Dear Counsel:

Mr. Bakke sent me a letter dated February 6, 2006 regarding the captioned case. Mr. Bakke's letter poses several questions. It is my intention that the hearing on March 2, 2006 will address only the issue delineated in my decision. If either party wishes to submit a brief addressing the issue, the party may do so as long as I receive the brief at least one full day before the hearing. My decision renders the Motion for More Definite Statement moot. The practical effect of my ruling is that the Complaint is dismissed. However, again given my ruling, I see no

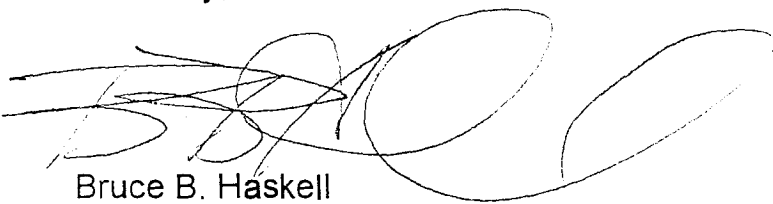
CEC v. City of Bismarck, et. al  
Burleigh County 05-C-2303  
Page Two

necessity for an amended complaint to be filed. Instead, we will proceed as if the City's decision had been properly appealed.

The hearing on March 2, 2006 is set for one hour. If a party does not think one hour is enough time for the hearing, the hearing will have to be rescheduled, as I will be involved in a jury trial that day.

Please contact the Scheduling Clerk if it is necessary to reschedule the hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce B. Haskell", written over a large, faint circular stamp or watermark.

Bruce B. Haskell  
District Judge

BBH/ls

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc., )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

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

and )

The Public Service Commission of North )  
Dakota, )

Defendants. )

**CERTIFICATION OF RECORD ON  
APPEAL TO DISTRICT COURT**

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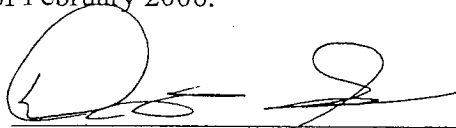
TO THE CLERK OF THE DISTRICT COURT OF BURLEIGH COUNTY IN THE SOUTH  
CENTRAL JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA.

I, Dennis Schlenker, Investment/Finance Officer of the City of Bismarck, do hereby  
certify that I have compared the following papers and documents with the originals on file and of  
record in this office, and state the same to be true and correct copies of the original papers and  
documents and the same do constitute the full and complete record of the proceedings had and of  
the papers and documents filed in connection with the above entitled matter before the Board of  
City Commissioners of the City of Bismarck, and which record is herewith transmitted to the  
District Court:

COPY 136

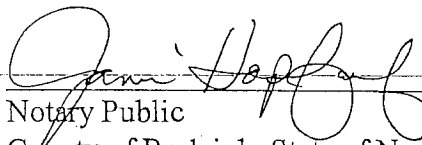
1. Petition to Declare Electric Franchise Rights (MDU)
2. Reply to Petition (CEC)
3. Minutes from September 13, 2005 City Commission Meeting
4. VHS Tape of September 13, 2005 City Commission Meeting
5. Brief and Exhibits (CEC)
6. Brief and Exhibits (MDU)
7. Minutes from October 11, 2005 City Commission Meeting
8. VHS Tape of October 11, 2005 City Commission Meeting
9. Minutes from November 14, 2005 City Commission Meeting
10. VHS Tape of November 14, 2005 City Commission Meeting
11. Findings, Conclusions, Decision and Order

IN TESTIMONY WHEREOF, I have hereunto set my hand on behalf of the City of Bismarck Board of City Commissioners this 17<sup>th</sup> day of February 2006.



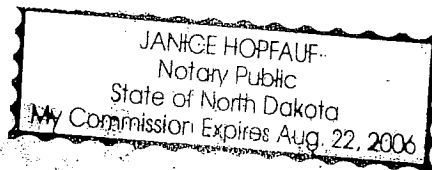
Dennis Schlenker, Investment/Finance Officer  
Bismarck, North Dakota

Subscribed and sworn to before me this 17<sup>th</sup> day of February, 2006.



Notary Public  
County of Burleigh, State of North Dakota  
My commission expires:

Cert of Record



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )

Inc. )

and )

The Public Service Commission of )

North Dakota )

Defendants. )

**MOTION FOR RECONSIDERATION  
AND BRIEF**

**Docket Number 05-C-2303**

Pursuant to Rule 7(b) of the North Dakota Rules of Civil Procedure, the Plaintiff, Capital Electric Cooperative, Inc., moves the Court to reconsider its Order dated January 30, 2005, entered on the Rule 12 Motion of the Defendant City of Bismarck for dismissal of the action for failure to state a claim or in the alternative (under Rule 3.2) for a more definite statement, and to provide a reasonable opportunity to respond to the Motion to Dismiss as one for Summary Judgment under Rule 56, since the Court did not exclude, and considered, matters outside the pleadings, without prior notice to Capital.

**BACKGROUND**

Capital commenced this action seeking a declaratory judgment under N.D.C.C. §

32-23 as an appropriate form of action and remedy for judicial review of action taken by the Board of Commissioners of the City of Bismarck, action described in Capital's Complaint and in its Amended Complaint.

The City of Bismarck's alternative motions for dismissal for failure to state a claim on which relief can be granted and for a more definite statement were both premised on its evaluation of the Complaint as "overbroad." (City's December 19, 2005, Brief in Support of Motion, pages 7 & 8) . The City's brief also argued Capital's complaint should "be dismissed for failure to exhaust its available administrative remedies," i.e. a proceeding before the North Dakota Public Service Commission under N.D.C.C. § 49-03. After Capital's brief responding to the Motion, the City's Reply Brief (January 13, 2006) asserted the Complaint should be dismissed "as a matter of law".

The Court's January 30, 2005, Memorandum Opinion and Order determined that the Motion to Dismiss should be granted, not because the Complaint was "overbroad" or because of the availability of an administrative remedy, as urged by the City of Bismarck, but because Capital's grievance with the Board of Commissioners' action is not within the scope of a declaratory judgment action. The Court opined that Capital has a remedy under N.D.C.C. § 27-05-04 (4) to appeal the City's decision to the District Court, and concluded the Complaint should be dismissed unless designated to be an appeal to the District Court of the City's decision. The Court also addressed the "matter of law" asserted in the City's January 13, 2006, Reply Brief, without arguments on the matter being received from Capital.

## GROUNDS FOR MOTION

A.

Under N.D.C.C. § 27-05-06 (4), the District Court has "jurisdiction of appeals from ... the determinations of inferior officers, boards, or tribunals, in such cases and pursuant to such regulations as may be prescribed by law." (Emphasis added.) Similarly, N.D.C.C. § 28-34-01 enacts procedures to govern "... any appeal provided by statute from the decision of a local governing body...." (Emphasis added.) However no ordinances, resolutions, or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck for an appeal from the November 14<sup>th</sup> Order, and no statute enacted by the North Dakota Legislatures provides for appeal from the November 14<sup>th</sup> Order. There is no "appeal provided" or "prescribed by law" for Capital to obtain judicial review of the November 14<sup>th</sup> Order by appeal.

In the absence of an "appeal provided by statute" or "prescribed by law," judicial review of a City's action is available in an action for declaratory judgment. See, e.g., GO Committee v. City of Minot, 2005 N.D. 136. As the words used in any statute are to be understood in their usual sense, (N.D.C.C. §1-02-02), it is plain from the words of N.D.C.C. § 32-23 that it provides an appropriate procedure for Capital to obtain judicial review of the City Board's action and a declaration of Capital's rights, status, or other legal relations under its franchise affected by the November 14<sup>th</sup> Order.

Even if an "appeal" were available, "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Rule 57 N.D.R.Civ.P., see also, N.D.C.C. § 32-23-01.

B.

The City's Motion to dismiss under Rule 12 (b) N.D.R.Civ.P. relied not only on its accompanying brief, but also on attached exhibits and other file materials. The City's January 13, 2006, Reply Brief expanded its Motion seeking dismissal as a matter of law. The Court's January 30, 2006, Memorandum and Order apparently treated the Motion as one for Summary Judgment, opining on the matters of law addressed in the City's January 13, 2006, Reply Brief. The City's expanded Motion did not notify Capital of a Summary Judgment Motion. The Court's Order did not afford Capital a reasonable opportunity to present all pertinent material, did not afford the minimum 34 days opportunity for Capital to respond under Rules 12 and 56. The City's expanded Motion and the Court's Order did not afford Capital a reasonable opportunity to present argument on the matters of law addressed in the City's January 13, 2006, Reply Brief or in the Court's January 30, 2006, Order. Capital requests a reasonable opportunity to respond to the City's Motion if considered as a Rule 56 Motion.

C.

In its January 30, 2006, Memorandum and Opinion and Order, the Court concluded, without reference to the material considered by the City Commission, that "CEC failed to plead that the City had no authority to hear the Petition and issue its Order." Upon complete submission of Rule 56 summary judgment materials, the Court will see that Capital did raise that issue and also objected to the City's jurisdiction to reinterpret and rewrite a 20-year franchise resolution. Under the heading "Jurisdiction," Capital in its Brief to the City asserted:

"The City of Bismarck does not have the right to amend or alter its franchise with CEC without CEC's consent. The Court's have exclusive jurisdiction to resolve contract disputes pursuant to the North Dakota Constitution Article VI, Section 8."

This Court should reconsider its erroneous conclusion "that CEC apparently had not challenged the City to hear the Petition and issue its Order...". See also paragraph X of Capital's proposed Amended Complaint filed on February 3, 2006, in response to the Alternative Motion for a More Definite Statement.

D.

The City made an Alternative Motion for a More Definite Statement with its Motion to Dismiss of December 19, 2005. Capital filed its Motion to Amend Complaint, and the City on February 6, 2006, gave its written consent to the Amended Complaint. Therefore, this Court should expressly allow filing and service of Capital's Amended Complaint.

THEREFORE, Capital seeks an Order:

1. Withdrawing the Court's Memorandum and Order of January 30, 2006;
2. Establishing a reasonable opportunity and schedule of procedures for the parties to assemble all material pertinent to a Rule 56 Motion and for the filing of briefs addressing matters of law pertinent to a Rule 56 Motion; and
3. Granting Capital's Motion to Amend its Complaint.

Dated this 20 day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )  
Inc. )

and )

The Public Service Commission of )  
North Dakota )

Defendants. )

**MOTION OF CONTINUANCE  
AND FOR SCHEDULING ORDER**

**Docket Number 05-C-2303**

Pursuant to Rule 3.2 and 6.1 of the North Dakota Rules of Court, Plaintiff, Capital Electric Cooperative, Inc., makes this expedited Motion for Continuance. The basis for this Motion is more fully explained in the attached brief. This Motion is supported by the attached Brief and Affidavit, and all of the materials contained in the record.

The Motion for Continuance has been promptly filed and good cause having been shown, the continuance should be granted. Capital requests the time allotted on March 2, 2006, to be converted to a telephone conference to allow the court and the parties to clarify the procedural matters and establish a scheduling order.

Dated this 15<sup>th</sup> day of March, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

ORDER  
Case No. 05-C-2303

Capital Electric Cooperative's Motion for Continuance and for Scheduling Order is DENIED.

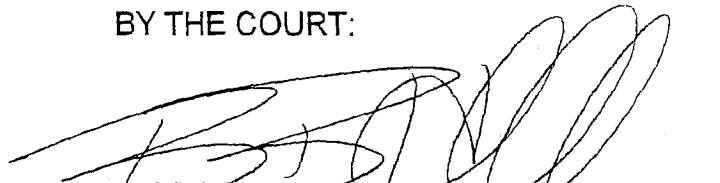
1. There is no need to "clarify the procedural matters." The Court made clear in its January 30, 2006 Order what the issue at the March 2 hearing would be. The Court further clarified what the scope of the hearing would be in its letter to Randall Bakke dated February 9, 2006, which letter was copied to counsel.
2. The other pending Motions are set for hearing April 7, 2006.
3. Capital Electric Cooperative, Inc. had the same access and right to the record of the proceedings before the Bismarck Board of City Commissioners as did the other parties.

4. No "amendments or additions" to the record of the proceedings will be allowed. The record is what it is, and it is upon the record as it exists that the Court will make its determination.

5. The proceedings before the PSC have no relevance to the proceedings before the City Commission in the context of the issue before the Court.

Dated at Bismarck, North Dakota, this 1<sup>st</sup> day of March, 2006.

BY THE COURT:



Bruce B. Haskell, District Judge  
South Central Judicial District

Carol Larson  
Daniel Kuntz  
Jerome Kettleson  
William Binek  
Randall Bakke

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

ORDER ON APPEAL  
Case No. 05-C-2303

Before the Court is the appeal by Capital Electric Cooperative, Inc. ("Capital") of the Findings, Conclusions Decision and Order issued by the Bismarck Board of City Commissioners ("Commission") on November 14, 2005.

The issue before the Court is whether the Commission abused its discretion in issuing its Order. To establish an abuse of discretion, Capital must show that the Commission acted arbitrarily, capriciously, or unreasonably. See, A&H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994).

Procedural History

While not necessary to decide the issue before the Court, the Court believes it would be helpful to recap the procedural history of this case.

On August 30, 2005, Montana-Dakota Utilities, Inc. a Division of MDU Resources Group, Inc., ("MDU") filed with the Commission a Petition to Declare Electric Franchise Rights (Record of Proceedings Before the Board of City Commissioners Exhibit 1, hereafter cited as "RC"). The Petition filed by MDU asked the Commission to determine that:

1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within "Part of the Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005; and
2. CEC is not authorized under its franchise to provide electric distribution service within "Part of the Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.

Capital filed a Reply to Petition to Declare Electric Franchise Rights (RC. Ex. 2). The Reply asked the Commission to determine that:

1. Capital is authorized under its franchise to provide electric distribution service within "part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.
2. Capital is authorized under its franchise to provide electric distribution services to all other areas annexed to the City of Bismarck designated as Capital's service area as set forth in the Area Service Agreement, as amended.
3. Montana-Dakota is not authorized to provide electric distribution service to Boulder that "part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.
4. Montana-Dakota is authorized to provide electric service distribution service to all future territory annexed to the City of Bismarck

designated as Montana-Dakota's service area as set forth in the Area Service Agreement, as amended.

Capital's Reply does not include an objection to the Commission's authority to consider MDU's Petition. In fact, the Reply asked the Commission to go beyond MDU's Petition and make a determination as to "all other areas annexed to the City of Bismarck" and "all future territory annexed to the City of Bismarck."

The Commission considered the Petition and the Reply to the Petition at three separate meetings; September 13, 2005; October 11, 2005; and at a special meeting November 14, 2005. Before the October 11, 2005 meeting, each party submitted a brief with attached exhibits. (RC. Exs. 5, 6.) At the October 11, 2005 meeting, counsel for each party appeared before the Commission and presented their respective positions to the Commission. (RC. Ex. 7.)

The Commission issued its Findings, Conclusions Decision and Order on November 14, 2005. The Commission limited its Decision and Order to a determination "that electric power service to part of Boulder Ridge First Addition to the City of Bismarck is properly served by MDU, subject to CEC retaining any existing customers." (RC. Ex. 11, p. 5)

Capital filed a Complaint in the district court on December 1, 2005. The Complaint requested the following relief. "Therefore, Capital requests judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." Capital, in its Complaint, did not claim the Commission lacked authority to hear the Petition. Likewise, the Complaint does not claim the Commission's Findings, Conclusions Decision and Order were wrong. The Complaint is styled as a declaratory judgment action asking the Court to enter a judgment generally declaring Capital's rights under the franchise.

On December 20, 2005, MDU filed its Answer. Included in its Answer are paragraph 9 that claims the district court cannot abridge the power of the governing body of a city to franchise the construction and operation of a public utility; paragraph 13 that claims declaratory relief is not available to perform a legislative function delegated by law to the City of Bismarck; paragraph 15 that claims declaratory relief is not available to Capital because its franchise rights have been determined by the Commission; and paragraph 16 that claims declaratory relief is not available to collaterally attack the declaration of franchise rights by the Commission.

Also on December 20, 2005, the City of Bismarck ("City") filed a Motion to Dismiss or in the Alternative for a More Definite Statement. The Motion to Dismiss alleged failure to state a claim upon which relief may be granted and failure to exhaust administrative remedies. The Motion for a More Definite Statement requested a more definite statement as to the cause of action against the City and the relief requested. In its brief in support of its Motion, the City included an argument about the City's powers to exercise franchise authority. (Defendant City of Bismarck's Brief in Support of Motion to Dismiss or in the Alternative for a More Definite Statement at p. 5).

MDU filed a brief in support of the City's Motion. In its brief, MDU again raised the issue of whether declaratory relief was available to challenge the Commission's decision. (Brief of Montana-Dakota Utilities Co. in Support of Motion to Dismiss at p. 3).

In its Response to the City's Motions, Capital conceded that a more definite statement was appropriate, and included a more definite statement. (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p. 3). Because Capital conceded the Motion and provided a more definite statement (and because of the Court's subsequent Order) the Court did not issue an Order

granting City's the Motion for More Definite Statement. Also in its Response, Capital now claimed the Commission exceeded its authority in issuing its Findings, Conclusions Decision and Order, and that the Commission's Findings, Conclusions Decision and Order were wrong. (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p.4)

Based on the pleadings and on the positions expressed by the parties in their respective briefs and responses, the Court found it necessary, as a prerequisite to deciding the City's Motions, to address the two issues raised by the parties: (1) did the Commission have authority to hear the Petition and issue the Findings, Conclusions Decision and Order, and (2) if the Commission had such authority, what remedy was available to Capital to challenge the Commission's decision? The Court's decisions on those issues determined the next step to be taken.

As to the issue of the Commission's authority, the Court first found that Capital had not challenged the Commission's authority to hear the Petition and issue its Order. Contrary to Capital's later claim, the Court did not go outside the pleadings to make that finding. The Court wrote "Nothing either party provided to the Court shows CEC objected to or challenged the authority of the City Commissioners to hear the Petition." (Memorandum Opinion and Order at p. 2). If the City had already filed the record of the Commission proceedings at that time, the Court was not aware of the filing and did not review the record. The Court further wrote, on that issue, "Nowhere in its Complaint does CEC directly claim the City did not have authority to hear MDU's Petition and to issue its Order on the Petition." (Memorandum Opinion and Order at p. 3, emphasis added). Further, the Court wrote, "Although CEC failed to plead that the City had no authority to hear the Petition and to issue its Order, the Court must address that issue as a threshold question." (Id. Emphasis added). The Court then went on

to discuss the Commission's authority, and found that the Commission did have the authority to interpret the franchise. (Memorandum Opinion and Order at pp. 3-5).

The Court then discussed the issue of available remedy. The Court determined, in large part based on the arguments set out by Capital in its Response to Motion to Dismiss or in the Alternative for a More Definite Statement, that Capital was not in fact seeking declaration of its rights under the franchise, but that Capital was in fact seeking judicial reversal of the Commission's Decision and Order on the merits of the Decision and Order. The Court's conclusion was unavoidable given Capital's own statements. "Capital states that it does indeed challenge the validity of the determinations made by the City Commission. The determinations were not only wrong, they were made outside the scope of the City Commission's legislative authority." (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p. 4). Having found that the remedy of a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, the Court then determined that an appeal of the Commission's decision was a remedy available to Capital. Finally, the Court decided that, rather than dismiss the action and make Capital start a new proceeding, the Court would allow the matter to proceed as if Capital had filed a proper appeal.

The Court held a hearing on the appeal on March 3, 2006 despite Capital's request for a continuance. The Court explained its reasons for denying Capital's request in its Order of March 1, 2006.

Did the Commission Abuse Its Discretion in Its Findings, Conclusions  
Decision and Order?

N.D.C.C. §28-34-01 governs appeals from "local governing bodies." The term "local governing bodies" includes any officer, board, commission resource or conservation district, or other political subdivision. The Commission is a "local governing body." The standard of review on appeal is whether the Commission acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision. See, Klindt v. Pembina County Water Resource Board, 2005 N.D. 106, 697 N.W.2d 339; Pic v. City of Grafton, 1998 N.D. 202, 586 N.W.2d 159. The North Dakota Supreme Court in Klindt held that a decision of a local governing body is "not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." Klindt at ¶12. The North Dakota Supreme Court has further held that the courts must not substitute their judgment for that of the local governing body that made the decision. Pic at ¶11.

Both MDU and the City of Bismarck filed briefs on appeal. Capital did not. Capital did file an Amended Complaint and Notice of Appeal in which Capital set out a number of things that can be taken as objections to Findings and Conclusions of the Commission. At the March 3, 2006 hearing, counsel for Capital further summarized Capital's objections. The Court will address Capital's assertions both as set out in its Amended Complaint and at the hearing.

In paragraph XIII of the Amended Complaint, Capital states that the Commission's Conclusion of Law Number 1 is "erroneous as a matter law." Paragraphs XIV, XV, XVI, XVII, XVIII, XIX, XX, and XXVI all address the issue of the Commission's jurisdiction or authority. Counsel for Capital stated Capital's objection to Conclusion of Law Number 1 at the hearing on appeal. Also at the hearing, counsel for Capital stated Capital's objection "to the procedure by the City of Bismarck as an ad hoc adventure unsupported by any procedures or

standards under any state statute or local ordinance.” The Court does not know what an “ad hoc adventure” is. However, the Court has already rendered its decision on the issue of the Commission’s authority and will not repeat its decision or its reasoning.

Paragraph XXI of the Amended Complaint is a blanket objection to the Findings of Fact made by the Commission. The paragraph does not specify what findings are objected to. Likewise, paragraph XXII states that the Commission’s Order “is not in accordance with the law, and is therefore arbitrary, capricious, unreasonable.” Capital does not specify further in this paragraph how the Order is not in accordance with the law.

Paragraph XXIII states that the procedure used by the Commission in hearing MDU’s Petition and in the Commission’s decision did not afford Capital a fair hearing, and that Capital was denied due process. Capital did not articulate either in its Amended Complaint or at the hearing on appeal in what way it was denied due process. Each party was afforded an opportunity to file briefs, including exhibits, with the Commission. Each party was afforded the same amount of time to present oral arguments to the Commission. The Court was unable to find anything in the record on appeal that shows that Capital at any time objected to the Commission’s procedure. The Court finds that due process was afforded Capital.

Paragraph XXIV of the Amended Complaint states that the Commission’s “conclusions of law and the order of the November 14<sup>th</sup> Order do not sufficiently explain its rationale for its decision.” A review of the Conclusions of Law of the Commission reveal that, in each Conclusion, there is a clear summary of the Commission’s rationale and reasoning.

Paragraph XXV of the Amended Complaint is, again, a conclusory statement without detail, that the Commission's Order is arbitrary, capricious, and unreasonable.

Paragraphs XXVII, XXVIII, XXXI and XXXII argue, in summary, that no statute or ordinance allows for an appeal of the Commission's Order. The Court has already determined this issue, but, in short: N.D.C.C. §27-05-04(4) provides jurisdiction to district courts to hear appeals from "inferior officers, boards, or tribunals" and N.D.C.C. §28-34-01 governs appeals from "local governing bodies." These statutes clearly give Capital an appeal of the Commission's Order.

The remaining paragraphs are either procedural summaries or conclusory statements that are not disputed or disputable.

At the hearing on appeal, counsel for Capital articulated further objections to the Commission's Findings and Conclusions.

Capital objects to the Commission's references to materials from "the early 1960s" in Finding of Fact Number 2. First, the Finding is based on fact in the form of materials submitted to the Commission by MDU. (Exs. 1 and 2 attached to RC. 6). Second, the Commission found, in Conclusion of Law 2, that the Area Service Agreement was ambiguous (see discussion below) and therefore determined that it was necessary to consider extrinsic evidence about the parties' intent. The Court finds it was not unreasonable for the City to do so. The fact that Capital originally generated the materials gives the materials even more weight and relevance in interpreting Capital's intent in entering into the Area Service Agreement.

Capital objects to Finding of Fact (3)(b). Finding of Fact (3)(b) is supported by the Area Service Agreement itself (Ex. 3 attached to RC. 5). Paragraph 11 of the Area Service Agreement clearly supports the Commission's Finding that the

intent of the parties was to review the agreement every five years. Exhibits 1 and 2 attached to MDU's brief (RC. 6) also support the Finding as to Capital's intent. MDU's understanding of the agreement is supported by the foregoing Exhibits as well as counsel's statements at the October 11, 2005 Commission meeting.

Capital objects to Finding of Fact 5. At the hearing on appeal, counsel for Capital said "[T]here is no provision in the area service agreement for partial cancellation of the area service agreement" and "Therefore, the purported cancellation by MDU had no effect on Capital's franchise. Any determination by the City to the contrary is arbitrary, capricious, and unreasonable." Finding of Fact 5 does not find there was a "partial cancellation" of the Area Service Agreement, nor does the Finding address any effects of cancellation of the Area Service Agreement on Capital's franchise. Finding of Fact 5 merely points out that MDU cancelled the Area Service Agreement, and that the cancellation was effective June 26, 2003. That Finding is supported by Exhibit 10 attached to RC. 6 and the June 3, 1993 amendment to the Area Service Agreement (Ex. 4 attached to RC. 5).

Capital objects to Conclusion of Law 1 that the Commission had the authority to decide the Petition. The Court has addressed that issue.

Capital objects to Conclusion of Law 2 that the Area Service Agreement is ambiguous. The fact is that, as found in Conclusion of Law 2, Capital and MDU "offered differing opinions regarding the meaning and interpretation of the CEC franchise. MDU and CEC have offered differing opinions regarding the meaning, interpretation and application of the Area Service Agreement as it is incorporated into the CEC franchise." If that were not the case, this dispute would not exist. That fact in and of itself supports a conclusion of ambiguity. Adding to the Conclusion is the fact that the Area Service Agreement could be reasonably interpreted three ways:

1. The Agreement includes just the areas that were in the City in 1993 when the franchises were issued, and any areas that are brought in as a result of amendments to the Agreement.

2. The Agreement includes all the areas within the City in 1993 plus any areas annexed to the City after 1993 that were within the Agreement until it was cancelled.

3. The Agreement includes all the areas that were in the City in 1993 as well as all the areas annexed into the City thereafter.

Each of those interpretations is reasonable. Therefore, the Agreement is, as found by the Commission, ambiguous; therefore the consideration of extrinsic evidence of intent is necessary; and therefore the Commission's ultimate interpretation of the Agreement is not unreasonable.

Capital objects to Conclusion of Law 3 in that the intention of the City when it awarded the franchise to Capital was that MDU was to remain the main provider of electrical services within the City, except for Capital's existing customers and any other customers or service conceded to Capital by MDU. This Conclusion is supported by paragraph 1 of the Area Service Agreement, wherein it is stated:

"Since [MDU] is and has been the principal supplier of electricity to the area encompassing the City of Bismarck, both parties agree that [MDU] should continue to serve the area and new areas contiguous to the city as further stipulated and identified in this agreement."

Paragraph 4 of the Agreement further defines the intent of the parties and supports the Commission's Conclusion. Capital also objects to the Commission's Conclusion of Law 3 insofar as the Conclusion is that it was not the intention of the parties that the map attached to the Area Service Agreement would be in

place for forty years without amendment, but rather that it would be amended as the City grew to allow for growth of both MDU and Capital. First, the inclusion of the geographic limitation in Capital's franchise, but not in MDU's, supports the Conclusion. Second, the agreement that the parties would review the Agreement every five years supports the Conclusion. Third, paragraphs 1 and 2 of the Agreement that discuss the scope of each parties' past service supports the Conclusion. Fourth, the provision of paragraph 4 of the Agreement stating that MDU will serve "any new consumers who come into that area and that [Capital] will continue to serve its present consumers within the heavy dashed black line and will serve new consumers within the heavy black dashed line only under conditions further stipulated in this agreement" supports the Conclusion. Capital further objected to Conclusion of Law 3 insofar as the Conclusion is that it was not the intent of the City that Capital would become the exclusive electric power supplier for all new areas of the City outside the line shown on the Area Service Agreement. This Conclusion is supported by the same evidence as supports the other objected to portions of Conclusion of Law 3.

Capital objects to Conclusion of Law 5 as to its conclusions regarding the limitations of Capital's franchise. Again, the terms of Capital's franchise itself, as well as the limitations contained in the Area Service Agreement, support this Conclusion. Capital further objects to the Conclusion that the ability of the parties to execute new agreements ended on June 6, 2003, the effective date of cancellation of the Area Service Agreement by MDU. This Conclusion is supported by the Amendment to the Agreement (Ex. 4 attached to RC. 5) and MDU's letter of cancellation (Ex. 5 attached to RC. 5).

Capital objects to Conclusion of Law 6 "for the reason that the City was not empowered and has failed to enact resolutions or ordinances, and that no provision of any other statute and no provision of the North Dakota Constitution

empowers the City to adjudicate conflicting claims between the holders of non-exclusive franchises that the City has granted." Conclusion of Law 6 contains none of the conclusions to which Capital objects.

The Court finds that Capital has not shown that the Findings, Conclusions Decision and Order of the Commission were arbitrary, capricious or unreasonable. The Court finds that the Order was based on a rational mental process supported by the evidence in the record on appeal. The Court ORDERS that Capital's appeal is hereby DENIED.

The Court is aware that MDU filed a Counterclaim in the original action. Because this matter was treated as an appeal, and because some of the parties to the appeal are not proper parties to the Counterclaim, it is further ORDERED that MDU's Counterclaim is DISMISSED without prejudice.

Dated at Bismarck, North Dakota, this 14 day of March, 2006.

BY THE COURT:



Bruce B. Haskell, District Judge  
South Central Judicial District

Carol Larson  
Randall Bakke  
Jerome Kettleson  
Daniel Kuntz  
William Binek

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc., )

Plaintiff, )

v )

The City of Bismarck, North Dakota, )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )

Inc., )

and )

The Public Service Commission of )

North Dakota, )

Defendants. )

.....)

ORDER RE: MOTION FOR RECONSIDERATION

Case No. 05-C-2303

The Court hereby DENIES the Capital Electric Cooperative's (Capital) Motion for Reconsideration. Capital specified several grounds for reconsideration that will be discussed in the order set out in the Motion.

As a preliminary matter, the Court notes that there is nothing in the North Dakota Rules of Civil Procedure that provides for "reconsideration."

1. Capital argues that "[T]here is no 'appeal provided' or 'proscribed by law' for Capital to obtain judicial review of the November 14<sup>th</sup> Order by Appeal." N.D.C.C. §27-05-06(4) clearly provides for appeals to the district court of "determinations of inferior officers, boards, or tribunals . . ." Capital further argues that the availability of one remedy does not preclude a party from seeking another remedy, in this case, a declaratory judgment. While true, the fact is that,

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regardless of how Capital attempts to characterize its Complaint, Capital is not seeking a declaratory judgment. A declaratory judgment is a "declaration of rights, status, or other legal relations" under a statute, municipal ordinance, contract or franchise. Capital in fact wants the Court to "declare" that the City had no jurisdiction to hear MDU's petition, and that the City's decision was wrong.

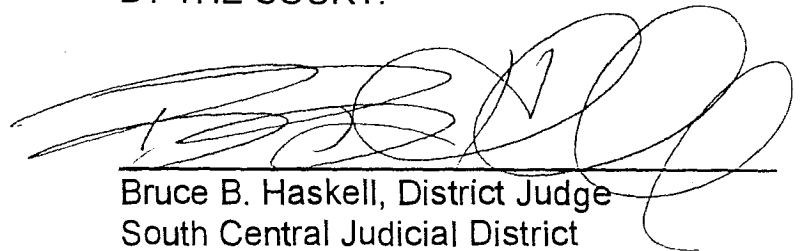
2. Capital argues that the Court issued a summary judgment without the defendants providing Capital proper notice, and without the Court allowing Capital the time for response contained in Rule 12 and 56, N.D.R.Civ.P. The Court did not issue a summary judgment.

3. Capital states that, "without reference to the material considered by the City Commission" the Court concluded that "CEC failed to plead that the City had no authority to hear the Petition and issue its Order." The Complaint filed by Capital contained no challenge to the City's authority to hear MDU's Petition. That was the extent of the Court's reference to Capital's failure to challenge to City's jurisdiction, and was accurate.

4. The Court GRANTS Capital's Motion to Amend Complaint, although the Motion has become largely moot because of the Court's ruling on Capital's appeal.

Dated at Bismarck, North Dakota, this 10<sup>th</sup> day of April, 2006.

BY THE COURT:

  
Bruce B. Haskell, District Judge  
South Central Judicial District

Carol Larson  
Daniel Kuntz  
Randall Bakke  
William Binek  
Jerome Kettleson

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

---

Capital Electric Cooperative, Inc.,  
Plaintiff,  
vs.  
The City of Bismarck, North Dakota  
and  
Montana-Dakota Utilities, Inc., a  
Division of MDU Resources Group, Inc.  
and  
The Public Service Commission of  
North Dakota  
Defendants.

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CIVIL NO. 05-C-2303

ANSWER TO AMENDED COMPLAINT

The North Dakota Public Service Commission ("Commission"), for its Answer to the Amended Complaint of Capital Electric Cooperative, Inc. ("Capital Electric") alleges and states as follows:

1. The Amended Complaint fails to state a claim against the Defendant upon which relief can be granted. The Defendant Commission answers the Amended Complaint, but because there are no claims against this answering Defendant, the Commission informs the Court that it does not anticipate that it will actively participate in the legal proceedings before the Court.
2. The Commission admits the allegations contained in paragraphs I, II, III and IV of the Amended Complaint.

3. The Commission is without sufficient information to admit or deny the allegations contained in paragraphs V and VI of the Amended Complaint and therefore denies the same and puts the Complainant to its proof therein.

4. The Commission admits the allegations contained in paragraphs VII and VIII of the Amended Complaint.

5. The Commission, upon information and belief, admits the allegations contained in paragraphs IX and X of the Amended Complaint.

6. The Commission admits the allegations contained in paragraphs XI and XII of the Amended Complaint.

7. The Commission admits that portion of the allegations contained in Paragraph XIII of the Amended Complaint that the Board of City Commissioners stated as one of its "Conclusions of Law" in its November 14, 2005 Order "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City." The remaining allegations are opinions and legal conclusions expressed by Capital Electric that require no response.

8. The Commission admits that portion of the allegations contained in Paragraph XIV of the Amended Complaint that the Board of Commissioners of the City of Bismarck performs the legislative functions of the city. The remaining allegations are opinions and legal conclusions expressed by Capital Electric that require no response.

9. The Commission is without sufficient information to admit or deny the allegations contained in paragraphs XV, XVI, XVII, XVIII, XIX and XX of the Amended Complaint and therefore denies the same and puts the Complainant to its proof therein. Furthermore, the allegations contain opinions and legal conclusions expressed by Capital Electric that require no response.

10. The allegations contained in Paragraph XXI of the Amended Complaint require no response.

11. The Commission is without sufficient information to admit or deny the allegations contained in paragraphs XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of the Amended Complaint and therefore denies the same and puts the Complainant to its proof therein. Furthermore, the allegations contain opinions and legal conclusions expressed by Capital Electric that require no response.

12. The Commission admits the allegations contained in paragraph XXIX of the Amended Complaint that it is a constitutional body under Article V, Section 2 of the North Dakota Constitution, and that it has only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a municipal ordinance, contract or franchise, but denies that it lacks jurisdiction to determine rights, status, or other legal relations affected by a statute. Capital Electric in fact alleges in paragraph VIII of the Amended Complaint that it has filed a Complaint with the Commission requesting relief under specific statutes.

13. The Commission admits that portion of the allegations contained in Paragraph XXX of the Amended Complaint that relate to the judicial power and original jurisdiction of the district court. The remaining allegations are legal conclusions expressed by Capital Electric that require no response.

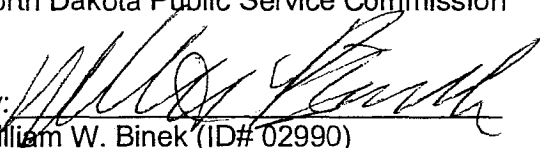
14. The Commission, upon information and belief, admits the allegations contained in Paragraph XXXI of the Amended Complaint.

15. The Commission is without sufficient information to admit or deny the allegations contained in Paragraphs XXXII and XXXIII of the Amended Complaint and therefore denies the same and puts the Complainant to its proof therein.

Therefore, the Commission requests that the Court issue an order dismissing the Amended Complaint of Capital Electric against the Commission.

Dated this 18th day of April, 2006.

Respectfully Submitted,  
North Dakota Public Service Commission

By:   
William W. Binek (ID# 02990)  
Chief Counsel  
Public Service Commission  
600 E. Boulevard Avenue, Dept 408  
Bismarck, ND 58505  
(701)328-4088

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

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

and )

The Public Service Commission of )  
North Dakota )

Defendants. )

**AMENDED COMPLAINT  
AND NOTICE OF APPEAL**

**Docket No. 05-C-2303**

I.

Plaintiff (herein "Capital") is a cooperative organized and operated under North Dakota Century Code Chapter 10-13 providing electric energy in North Dakota.

II.

The Defendant City of Bismarck (herein the "City") is a city under North Dakota Century Code Title 40.

III.

The Defendant Montana-Dakota Utilities, Inc., a division of MDU Resources Group,

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Inc. (herein "Montana-Dakota") is a business corporation providing electric energy in North Dakota.

IV.

The North Dakota Public Service Commission (herein "PSC") is a constitutional body under Article V, Section 2 of the North Dakota Constitution and under North Dakota Century Code Title 49.

V.

Montana-Dakota holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 12, 1987.

VI.

Capital holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 23, 1993.

VII.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a "Petition to Declare Franchise Rights" requesting the Board "to determine that: "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005; and 2. CEC [Capital] is not authorized under its franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005."

VIII.

On September 28, 2005, Capital filed a complaint with the Commission under N.D.C.C. 49-03-01, 03-01.3., -01.4 and -05, alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital's service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.

IX.

On October 4, 2005, Capital outlined the nature of the proceedings in its brief before the City Commission as "a proceeding initiated by Montana-Dakota Utilities, Inc., hereafter "MDU", to deny Capital Electric Cooperative, Inc.'s franchised right to provide electric service to property annexed in its designated service area on or after June 26, 2003."

X.

Also, in its October 4, 2005, city filing, Capital acknowledged the City's right to grant franchises and to regulate the use of same. Capital further asserted the PSC had the responsibility to resolve conflicting claims within municipalities, that a complaint had been filed with the PSC, and further that the City did not have the right to amend or alter Capital's franchise without its consent. Capital further asserted that Courts have exclusive jurisdiction to resolve contract disputes, and that Capital had invested millions of dollars, in reliance upon the franchise, to fulfill its obligation to serve North Bismarck. Capital reasserted these issues to the City Commission, to the extent permitted by the 20 minute presentation Capital was allowed, at that October 11, 2005, hearing.

XI.

On October 20, 2005, Montana-Dakota filed an answer and counterclaim to Capital's PSC Complaint, asserting Capital "...is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck."

XII.

On November 14, 2005, the President and City Administrator of the City executed a document titled "Findings, Conclusions Decision and Order" "In the matter of a Petition to Declare Franchise Rights Filed by Montanta (sic) Dakota Utilities Co.," wherein "the Board of City Commissioners 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 the City of Bismarck." (Herein November 14<sup>th</sup> Order.)

XIII.

The Board of City Commissioners stated as one of its "Conclusions of Law" in support its decision in the November 14<sup>th</sup> Order "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City." (November 14<sup>th</sup> Order, page 4.) That statement is erroneous as a matter of law under North Dakota Supreme Court decisions that establish that the Constitution does not grant powers to municipalities. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XIV.

The Board of Commissioners of the City of Bismarck performs the legislative

functions of the city, including, under N.D.C.C. 40-05-01, the powers:

"1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to alter repeal, alter, or amend the same."

and

"57. Franchises. To grant franchises or privileges to persons, associations, or corporations, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body."

Under North Dakota Supreme Court decisions affecting powers of governing bodies of municipalities, if statutory powers are not implemented by ordinance the city may not avail itself of the powers enumerated by statute. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XV.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck in the exercise of its power under N.D.C.C. 40-05-01, Subsection 1, to carry into effect the regulatory powers of the governing body affecting franchises granted under N.D.C.C. 40-05-01, Subsection 57.

XVI.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to authorize the Board to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVII.

No statute enacted by the North Dakota Legislature authorizes the Board of Commissioners of the City of Bismarck to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVIII.

Montana-Dakota's Petition to the Board of Commissioners of the City of Bismarck did not request the exercise of a legislative function, nor does the November 14<sup>th</sup> Order record the exercise of a legislative function. The Petition requested and the November 14<sup>th</sup> Order presumed the Board's authority to render a decision to resolve the conflicting claims of litigants, a judicial function. Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (N.D. 1969). The Board's assumption of authority to hear and decide Montana-Dakota's Petition violated the Constitutional principle of separation of powers.

XIX.

A franchise granted by the governing body of a municipality under N.D.C.C. 40-05-01, Subsection 57 is a contract between the municipality and the grantee of the franchise. The authority to interpret contracts and to resolve disputes under contracts where one of the contracting parties is a governmental entity is a function of the judicial branch of government. Seher v Woodlawn School District, 59 N.W.2d 805 (N.D. 1953).

XX.

The November 14<sup>th</sup> Order exceeds the scope of power and authority of the Board of Commissioners of the City of Bismarck under the statutes of the State of North Dakota and under Bismarck's ordinances, resolutions or regulations. The Board had no power or authority under ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to hear and decide Montana-Dakota's Petition or to issue the November 14<sup>th</sup> Order.

XXI.

Capital takes exception to and objects to the findings of fact under the November 14<sup>th</sup> Order.

XXII.

The November 14<sup>th</sup> Order is not in accordance with the law, and is therefore arbitrary, capricious, unreasonable.

XXIII.

The procedure of the Board of Commissioners of the City of Bismarck in hearing Montana-Dakota's Petition and in the Board's decision has not afforded Capital a fair hearing. The Board's decision violates Capital's constitutional right to due process. The Board's decision violates constitutionally protected property rights to its franchise and its electric distribution system.

XXIV.

The Board of Commissioners of the City of Bismarck's conclusions of law and the

order of the November 14<sup>th</sup> Order do not sufficiently explain its rationale for its decision.

XXV.

The November 14<sup>th</sup> Order, if made within the scope of the power and authority of the Board of Commissioners of the City of Bismarck, is arbitrary, capricious and unreasonable.

XXVI.

The franchise granted to Capital by the City of Bismarck in 1993 refers to an Area Service Agreement between Capital and Montana-Dakota. The Agreement is referred to in the November 14<sup>th</sup> Order (Findings of Fact 3, 4 and 5; Conclusions of Law numbered 2, 3, 4, and 5.). Under the November 14<sup>th</sup> Order, the Board of Commissioners of the City of Bismarck asserted authority to declare the Area Service Agreement to be ambiguous and to interpret the Agreement, (Conclusion of Law numbered 2) which interpretations produced the result that Montana-Dakota, not the Board of Commissioners of the City of Bismarck, determined the rights of Capital under its franchise (Conclusions of Law numbered 3, 4, and 5). The Board of Commissioners of the City of Bismarck had no power or authority under its ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to interpret the Area Service Agreement. The Board of Commissioners of the City of Bismarck has no power or authority under the statutes of the State of North Dakota or under the Constitution of the State of North Dakota to delegate to Montana-Dakota the Board's legislative authority to grant franchises or to regulate franchises. Montana-Dakota Utilities Co. V Johanneson, 153 N.W.2d 414 (1967).

XXVII.

No ordinance, resolution or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to provide for appeal from the November 14<sup>th</sup> Order, asserted as an exercise of "the power to regulate the franchises of any public utility within the City"..."pursuant to Article 7, Section 11 of the North Dakota Constitution." (November 14<sup>th</sup> Order, page 4.)

XXVIII.

No statute enacted by the North Dakota Legislatures provides for appeal from the November 14<sup>th</sup> Order asserted as an exercise of "the power to regulate the franchises of any public utility within the City"..."pursuant to Article 7, Section 11 of the North Dakota Constitution." (November 14<sup>th</sup> Order, page 4.)

XXIX.

The North Dakota Public Service Commission is a constitutional body under Article V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise.

XXX.

The district court has judicial power and original jurisdiction of all causes including the power to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06 and Chapter 32-23. N.D.C.C. 32-23 provides for judicial review of the November 14<sup>th</sup> Order. E.g. City of Fargo

v Harwood Township, 256 N.W.2d 694 (N.D. 1977).

XXXI.

The district court has judicial power and original jurisdiction of all causes including jurisdiction of appeals from determinations of inferior officers, boards or tribunals, in such cases and pursuant to such regulations as may be prescribed by law, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06.

XXXII.

No regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order considered as a determination of inferior officers, boards or tribunals.

XXXIII.

Capital is a person whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract or franchise with respect to the provision of electric power services within the City of Bismarck, and is affected by the November 14<sup>th</sup> Order.

**THEREFORE**, Capital requests judgment under N.D.C.C. 32-23, declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's November 14<sup>th</sup> Order to the contrary notwithstanding.

Alternatively, if the Court should determine that statutes enacted by the North Dakota Legislature do provide for appeal from the November 14<sup>th</sup> Order, or that regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order, Capital appeals such

Order and requests an Order reversing the November 14<sup>th</sup> Order as arbitrary, capricious, and unreasonable, for the reasons more fully and previously set forth in this Complaint.

For any and all other appropriate relief within the jurisdiction of the District Court.

Dated this 24 day of April, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc., )

Appellant, )

vs. )

The City of Bismarck, North Dakota )

and )

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

and )

The Public Service Commission of North )  
Dakota, )

Appellees. )

**DEFENDANT CITY OF BISMARCK'S  
ANSWER TO AMENDED COMPLAINT  
AND NOTICE OF APPEAL**

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COMES NOW defendant City of Bismarck (hereinafter "Bismarck") for its answer to plaintiff Capital Electric Cooperative, Inc.'s (hereinafter "Capital Electric") Amended Complaint and Notice of Appeal (hereinafter "plaintiff's Amended Complaint"), states and alleges as follows:

I

Bismarck denies each and every allegation, matter and thing in plaintiff's Amended Complaint, except that which is hereinafter admitted, qualified or explained.

II

Bismarck admits the allegations in paragraphs II and VII of plaintiff's Amended

Complaint.

III

Bismarck asserts the allegations in paragraph IV of plaintiff's Amended Complaint are unintelligible. It is unclear what Capital Electric means by the term "constitutional body".

IV

Bismarck is without sufficient knowledge or information to either admit or deny the allegations in paragraphs I, III and XI of plaintiff's Amended Complaint.

V

Bismarck admits the allegations contained in paragraph V of plaintiff's Amended Complaint and asserts the franchise was created by a franchise agreement, which speaks for itself.

VI

With respect to the allegations contained in paragraph VI of plaintiff's Amended Complaint, Bismarck admits Capital holds a franchise and asserts the franchise was created by a franchise agreement, which speaks for itself. Bismarck alleges the franchise was granted on May 25, 1993, not May 23, 1993.

VII

With respect to the allegations in paragraph VIII of plaintiff's Amended Complaint, Bismarck admits that Capital Electric filed a complaint on or about September 28, 2005. Without admitting the accuracy of the complaint, Bismarck asserts that the complaint speaks for itself.

VIII

Bismarck denies the allegations in paragraphs IX and X of plaintiff's Amended

Complaint and asserts that Capital's brief and presentation speak for themselves.

IX

With respect to the allegations in paragraph XII of plaintiff's Amended Complaint, Bismarck admits the President of the Board of City Commissioners and the City Administrator executed a document titled "Findings, Conclusions Decision and Order" "In the Matter of a Petition to Declare Franchise Rights Filed by Montana Dakota Utilities Co." With respect to the remaining allegations in paragraph XII of plaintiff's Amended Complaint, Bismarck alleges the document speaks for itself.

X

With respect to the allegations in paragraphs XIII and XXIV of plaintiff's Amended Complaint, Bismarck alleges the November 14, 2005 Board of City Commissioners' Conclusions of Law speaks for itself. Bismarck alleges North Dakota case law speaks for itself. Further, Bismarck specifically denies all legal conclusions alleged by Capital Electric, and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, specifically with respect to paragraph XIII, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority. Specifically with respect to paragraph XXIV, Bismarck denies the Board of City Commissioners' conclusions of law and the November 14<sup>th</sup> Order do not sufficiently explain its rationale for its decision. There is a clear summary of the Commission's rationale and reasoning.

XI

With respect to the allegations in paragraphs XIV, XV, XVI, XVII, XIX, XX, XXIII, XXVII, XXVIII, XXX, XXXI and XXXII of plaintiff's Amended Complaint, Bismarck asserts North Dakota statutes, constitution, case law, and Bismarck ordinances, resolutions and

regulations speak for themselves, as do any brief(s) filed by Capital in relation thereto. Bismarck specifically denies all legal conclusions and any other claims alleged by Capital Electric in the aforementioned paragraphs and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority. Further, paragraph XXIII fails to articulate in what way Capital Electric was allegedly denied due process. Bismarck asserts Capital Electric was not denied due process.

XII

With respect to the allegations in paragraph XVIII of plaintiff's Amended Complaint, Bismarck alleges Montana-Dakota's Petition to the Board of Commissioners of the City of Bismarck and the November 14, 2005 Order speak for themselves. Bismarck asserts the North Dakota case law and constitution speak for themselves. Bismarck specifically denies all legal conclusions alleged by Capital Electric. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XIII

Bismarck asserts the allegations in paragraph XXI of plaintiff's Amended Complaint are unintelligible. It is unclear what Capital Electric means by the phrase "takes exception to and objects to...." The paragraph does not specify what findings are objected to. These allegations are therefore denied.

XIV

With respect to the allegations contained in paragraphs XXII and XXV of plaintiff's Amended Complaint, Bismarck specifically denies the November 14, 2005 order was arbitrary, capricious or unreasonable. Bismarck specifically denies all legal conclusions alleged by Capital

Electric. Bismarck denies the November 14, 2005 Order was not in accordance with the law. With respect to the allegations contained in paragraph XXII of plaintiff's Amended Complaint, Bismarck further asserts the allegations in paragraphs XXII and XXV of plaintiff's Amended Complaint are unintelligible because the paragraphs do not specify how the Order is not in accordance with the law or how it is arbitrary, capricious and unreasonable. The paragraphs are conclusory without detail.

XV

With respect to the allegations in paragraph XXVI of plaintiff's Amended Complaint, Bismarck asserts Capital Electric's franchise, Area Service Agreement between Capital and Montana-Dakota and the November 14, 2005 Order speak for themselves. Bismarck asserts North Dakota statutes, constitution, case law, and Bismarck ordinances, resolutions and regulations speak for themselves. Bismarck specifically denies all legal conclusions alleged by Capital Electric in the aforementioned paragraphs and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XVI

The allegations in paragraph XXIX of plaintiff's Amended Complaint are unintelligible to the extent they allege that the North Dakota Public Service Commission is a "constitutional body". Bismarck specifically denies all legal conclusions alleged by Capital Electric and any other allegations by Capital Electric in paragraph XXIX of plaintiff's Amended Complaint.

XVII

With respect to the allegations in paragraph XXXIII of plaintiff's Amended Complaint, Bismarck denies Capital Electric is a person. Capital Electric's allegation that it "is affected by

the November 14 Order" is unintelligible. These allegations are denied.

DEFENSES

XVIII

Bismarck realleges all previous allegations and denials.

XIX

Bismarck alleges that plaintiff's Amended Complaint fails to state a claim upon which relief may be granted.

XX

That Capital Electric's claims are barred by the applicable statute of limitations.

XXI

That plaintiff's Amended Complaint is barred due to illegality, estoppel, laches, release, res judicata, collateral estoppel, and waiver.

XXII

Bismarck alleges that if Capital Electric did suffer any loss, injury or damage, it was due to facts or circumstances over which Bismarck had no control.

XXIII

That as to the damages claimed by Capital Electric, Bismarck denies that Capital Electric was damaged at all or to the extent claimed.

XXIV

That there has been a failure to mitigate damages, if any, by Capital Electric.

XXV

Bismarck claims immunity pursuant to the relevant provisions of Chapter 32-12.1 of the North Dakota Century Code and other applicable provisions of North Dakota law governing

immunity and political subdivisions.

XXVI

That plaintiff lacks standing.

XXVII

That the relief sought by plaintiff may be in violation of statutory law (including but not limited to that set forth in N.D.C.C. ch. 10-13) and/or plaintiff's articles of incorporation, thereby preventing plaintiff from receiving the relief requested.

XXVIII

That the district court lacks subject matter jurisdiction to review Bismarck's November 14, 2005 Order. Should the court be found to have jurisdiction, it is limited to a determination of whether Bismarck acted arbitrarily, capriciously or unreasonably, or whether there is not substantial evidence to support the decision, as required by N.D.C.C. Ch. 28-34 and other North Dakota law.

XXIX

That plaintiff's Amended Complaint requests an advisory opinion.

XXX

That plaintiff's Amended complaint is moot.

XXXI

That plaintiff's notice of appeal is untimely.

XXXII

That declaratory relief is not available to plaintiff.

XXXIII

That no justiciable controversy exists.

XXXIV

That Capital Electric has waived the right to appeal, if any such right ever existed, because, among other things, Capital Electric has not complied with the appeal requirements set forth in N.D.C.C. Ch. 28-34 and other North Dakota law.

XXXV

That the Board of City Commissioners' decision was within its powers as set forth in the North Dakota Constitution, N.D.C.C. § 40-05-01(57), Home Rule Charter for the City of Bismarck, and other North Dakota law. Regardless, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XXXVI

Capital Electric has failed to exhaust its administrative remedies.

WHEREFORE, Bismarck requests plaintiff's Amended Complaint be in all things dismissed; that Bismarck recover its costs and disbursements herein; and that the Court award such other relief as the Court may deem just and proper.

Dated this 2nd day of May, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

By: *Randall J. Bakke*

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Attorneys for Defendant,  
City of Bismarck

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc., )  
)  
Plaintiff, )

v )

The City of Bismarck, North Dakota, )  
)  
and )

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

and )

The Public Service Commission of )  
North Dakota, )

Defendants. )  
.....)

ORDER

Case No. 05-C-2303

Defendant MDU's Motion for Dismissal of Amended Complaint is GRANTED. The only reason the Court issued its Order allowing Capital to file the Amended Complaint was because Capital insisted that the Court issue such an Order, even though, in the Court's opinion, the Court had already decided all pending issues.

Dated at Bismarck, North Dakota, this 30<sup>th</sup> day of May, 2006.

BY THE COURT:



Bruce B. Haskell, District Judge  
South Central Judicial District

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc., )

CIVIL NO. 05-C-2303

Plaintiff, )

vs. )

ORDER FOR JUDGMENT

The City of Bismarck, North Dakota, )

and )

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

Defendant and Counterclaimant )  
and )

The Public Service Commission of )  
North Dakota, )

Defendants. )

The Court, the Honorable Bruce Haskell presiding, having entered its Order on May 30, 2006 dismissing the Amended Complaint of the plaintiff; the Court having earlier decided all pending issues in Orders dated:

1. March 14, 2006, in which the Court denied plaintiff's Appeal from Findings, Conclusions, Decision and Order issued by the Bismarck Board of City Commissioners on November 14, 2005; in the same Order the Court dismissed the Counterclaim of defendant Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., without prejudice;

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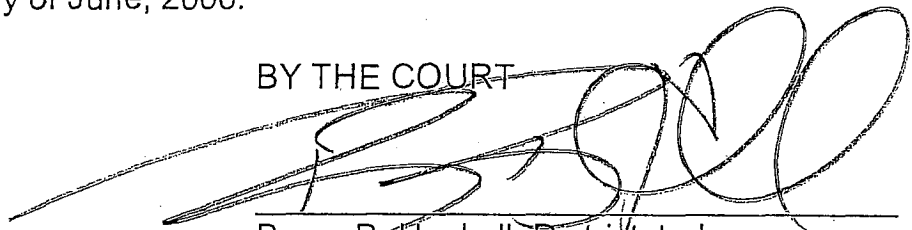
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2. January 30, 2006 in which the Court ordered that the action brought by plaintiff Capital Electric Cooperative, is not properly brought as a declaratory judgment action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in accord with the Court's Orders: that the plaintiff's Appeal from Findings, Conclusions, Decision and Order issued by the Bismarck Board of City Commissioners on November 14, 2005 is denied; that the Counterclaim of defendant Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., is dismissed without prejudice; that the Declaratory Judgment Action brought by the plaintiff is dismissed.

Dated this 7 day of June, 2006.

BY THE COURT

A large, stylized handwritten signature in black ink, appearing to read 'B. Haskell', is written over a horizontal line.

Bruce B. Haskell, District Judge  
South Central Judicial District

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc., )

CIVIL NO. 05-C-2303

Plaintiff, )

vs. )

NOTICE OF ENTRY  
OF JUDGMENT

The City of Bismarck, North Dakota, )

and )

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

Defendant and Counterclaimant )  
and )

The Public Service Commission of )  
North Dakota, )

Defendants. )

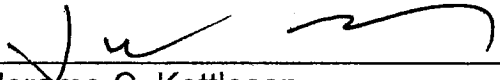
**YOU ARE HEREBY NOTIFIED** that Judgment has been entered in the above-entitled matter on the 8<sup>th</sup> day of June, 2006. A copy of the Judgment is attached.

Dated at Bismarck, North Dakota, this 9 day of June, 2006.

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

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\_\_\_\_\_  
Jerome C. Kettleson

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc. )

Plaintiff, )

vs. )

The City of Bismarck, North Dakota )

and )

Montana-Dakota Utilities, Inc., a )

Division of MDU Resources Group, )  
Inc. )

and )

The Public Service Commission of )

North Dakota )

Defendants. )

**NOTICE OF APPEAL**

**Docket Number 05-C-2303**

NOTICE IS HEREBY GIVEN that Capital Electric Cooperative, Inc., Plaintiff above named, hereby appeals to the North Dakota Supreme Court from the Judgment entered in this action on June 8, 2006.

Dated this 11<sup>th</sup> day of July, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

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