



at book value, the distribution facilities located in and used by MDU to serve Boulder Ridge First Addition.

The District Court at the request of MDU stayed the PSC Order while the District Court considered the appeal before the District Court as provided under N.D.C.C. §§ 28-32-48 and 49-05-14. (Attachment 3).

Following the entry of the Judgment on October 9, 2006 affirming the PSC decision, MDU filed its Notice of Appeal to the Supreme Court (Attachment 4) and also filed a motion for stay upon appeal with the District Court. The Court denied the motion for a stay in an order dated October 20, 2006. (Attachment 5). The District Court did provide a temporary stay of 20 days from the date of the Order “. . . so as to facilitate a further motion for stay pending appeal under Rule 8 of the North Dakota Rules of Appellate Procedure.”

The District Court, in its Order denying the stay, found MDU “. . . failed to satisfy the standard established for a stay of judgment . . . . Specifically the Court finds that there has not been a strong showing by the appellant that it will succeed on the merits of its appeal to the Supreme Court; nor has the appellant established that unless a stay is granted it will suffer irreparable injury.” The Court was referencing two of the four elements that need to be shown when a party seeks to stay an injunction pursuant to Rule 62 (c) of the North Dakota Rules of Civil Procedure. Cass County Electric Cooperative v. Wold Properties, Inc., 253 N.W. 2d 323 (N.D. 1997).

### **FACTS**

MDU provides retail electric service to customers in North Dakota and, in particular, in the City of Bismarck. The proceeding before the PSC was initiated by Capital Electric Cooperative, Inc.

("CEC") by the filing of a Complaint, dated September 28, 2005. (Attachment 6). The complaint alleged Boulder Ridge First Addition to the City of Bismarck ("Boulder Ridge") is part of CEC's franchised service area and MDU's extension of service into Boulder Ridge interfered with and unreasonably duplicated the service and system of CEC in violation of N.D.C.C. §§ 49-03-01 and 49-03-01.3. The Complaint requested the Commission enter an Order: (1) restraining and enjoining MDU from constructing or extending its 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) such other terms and conditions as the Commission may deem reasonable and proper. MDU filed an Answer, in which it denied Boulder Ridge was within CEC's franchised service area and alleged Boulder Ridge was within MDU's service area under its unlimited franchise from the City of Bismarck.

On February 9, 2006, the Commission held a hearing on CEC's complaint. During the hearing, the PSC recognized an Order entered in Capital Electric Cooperative, Inc. v. City of Bismarck, et al, South Central District Civil No. 05-C-2303, Honorable Bruce Haskell presiding, in which the PSC was a party. (Attachment 7). Judge Haskell affirmed a decision of the City of Bismarck determining MDU was the proper franchise holder to provide electric power to Boulder Ridge and CEC's limited franchise did not include the right to provide service to Boulder Ridge. Nonetheless on June 22, 2006, the PSC, on a 2-1 vote, issued its Findings of Fact, Conclusions of Law and Order finding MDU's facilities interfered with and unreasonably duplicated CEC's services. The PSC's order directed MDU to cease providing service to Boulder Ridge and to sell its facilities in Boulder Ridge to CEC.

**RELIEF REQUESTED**

MDU requests a stay of the Judgment dated October 9, 2006 pursuant to Rule 62 of the North Dakota Rules of Civil Procedure and Rule 8 of the North Dakota Rules of Appellate Procedure.

Rule 62(d), N.D.R.Civ.P., requires that an appellant obtain a supersedeas bond approved by the Court in order for a stay to be ordered. MDU has appended hereto a proposed supercedeas bond in the amount of \$250 which it asks the Court to approve as an appropriate bond. In its stay of the PSC order during the appeal to the District Court, the District Court did not require any bond different than the \$250 bond recommended by MDU. CEC did not object to the form or the amount of the bond suggested by MDU. MDU contends a bond in the same amount is appropriate in this appeal, as the issues and the facts are the same as they were in the appeal from the PSC to the District Court. Moreover, MDU obviously has the ability, without the security of a bond, to comply with the PSC's order if affirmed on appeal.

MDU's request for a stay pending appeal is also governed by the Administrative Agencies Practices Act at N.D.C.C. 28-32, as well as arguably N.D.C.C. § 49-05-14. Specifically, N.D.C.C. § 28-32-48 provides in pertinent part:

An appeal from an order or the rulemaking action of an administrative agency does not stay the enforcement of the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order or for a stay in the effect of a published rule.

With respect to the terms and conditions to be imposed with a stay of an order of the PSC, N.D.C.C. § 49-05-14, provides:

In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond first shall have been executed and filed with and approved by the district court, payable to the state of

North Dakota, and sufficient in amount and security to ensure the prompt payment, by the party appealing, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all monies which any person, corporation, or limited liability company may be compelled to pay, pending the appeal, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case said order or decision is sustained. The district court, in case it stays or suspends the order or decision of the commission in any manner affecting rates, also by order shall direct the public utility affected to pay into court, from time-to-time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation, limited liability company, or person in excess of the sum which such corporation, limited liability company, or person would have been compelled to pay if the order of the commission had not been stayed or suspended. Upon a final determination of an appeal, the court shall make an appropriate order disposing of the impounded funds in accordance with such determination. In the event the public utility shall fail to comply with the conditions of the stay bond, the commission may sue thereon for the use and benefit of the patrons or others who have suffered damage by reason of the stay.

Although the above section is primarily directed to appeals from orders of the PSC involving utility rates, MDU is prepared to comply with the conditions of N.D.C.C. § 49-05-14 by executing and filing a suspending bond if directed by the Court. MDU believes, however, that a stay granted with an approved supercedeas bond as described above is appropriate in this proceeding because no person will be monetarily damaged by a stay that will allow the customers of Boulder Ridge to continue to receive electric service from MDU pending the appeal.

Rule 62(d), N.D.R.Civ.P., subject to the exceptions in Rule 62(a), entitles an appealing party to a stay of enforcement of a judgment as a matter of right if a supersedeas bond is filed with the court. See 12 Moore's Federal Practice, § 62.03[1] (Matthew Bender 3d Ed.). Only when the posting of the bond will not protect the rights of the nonappealing party, will a stay not be granted. Id. at §62.03[3][b]. When the appellant seeks a stay of an injunction pending an appeal under Rule

62(c), the courts apply a test similar to that used in deciding whether to issue a preliminary injunction. Cass County Electric Cooperative v. Wold Properties, Inc., 253 N.W. 2d 323 (N.D. 1997).

Before discussing the elements of deciding a stay of an injunction, MDU contends this is not an injunction case even though the Wold case suggests it may be. The PSC's order (Attachments 2) is in conflict with a prior Order of the City affirmed by the District Court (Attachment 7) which determined MDU has the right to provide service to Boulder Ridge and CEC does not. The City's order affirmed by Judge Haskell and the PSC's order affirmed by Judge Jorgensen are inconsistent and cannot both be effective without shutting off electric service to Boulder Ridge. The PSC did not attempt to countermand the order of Judge Haskell or of the City of Bismarck, but nonetheless entered an order that is in conflict with those decisions and makes it unreasonable for both the City's order and the PSC's order to be effective.

MDU submits the criteria adopted in Cass County Electric Cooperative v. Wold Properties, Inc., supra, for seeking a stay of an injunction should be limited to stays of a judicial injunction under N.D.C.C. Chapters 32-05 and 32-06 and not to stays of administrative orders. Neither N.D.C.C. § 28-32-48 applicable to stays pending appeals of administrative orders in general, nor N.D.C.C. § 49-05-14 applicable specifically to stays of appeals of PSC orders, requires a showing similar to that required to obtain a preliminary injunction. Instead, both statutes envision the issuance of a stay pending appeal on terms and conditions sufficient to protect the public or affected parties. Accordingly, the Court should grant a stay conditioned on the terms and amount of a bond which the Court deems appropriate considering, for the reasons discussed later, that neither the public nor CEC

will be injured by a stay pending appeal.

If the Court determines the PSC's order is in the nature of an injunction and MDU is required to meet the test set out in Wold, the issuance of a stay pending appeal requires the following showing: (1) the appellant is likely to succeed upon appeal; (2) unless the stay is granted the appellant will suffer irreparable injury; (3) no substantial harm will come to any party if the stay is granted; and (4) no substantial harm to the public interest will result on account of the stay. Id. Some federal courts when implementing this four-part test have held the four factors need not be applied rigidly. In a case involving a serious legal question, which MDU believes is the case at bar, the moving party need only present a substantial case on the merits and show the balance of equities weighs in favor of granting the stay in order to be successful. Ruiz v. Estelle, 650 F2d, 555,565 (5th Cir. 1981), cert denied 460 US 1042(1983). Under this four-part test, MDU is entitled to a stay of the PSC's Order and the Judgment of the District Court.

**1. MDU Is Likely To Succeed Upon Appeal.**

Under North Dakota's Territorial Integrity Act ("TIA") at N.D.C.C. Chapter 49-03, a public utility such as MDU cannot extend its facilities outside a municipality without a certificate of public convenience and necessity from the PSC. The TIA contains an exception, however, at N.D.C.C. § 49-03-01.3 allowing a public utility to extend service without a certificate in a city where it has lawfully commenced operations provided the extension does not interfere with existing services or unreasonably duplicate the services of a rural electric cooperative.

MDU contends its extension of facilities within the City of Bismarck to serve Boulder Ridge is not an unreasonable interference with or duplication of CEC's service and facilities. CEC does not

have a franchise from the City of Bismarck to serve customers within Boulder Ridge. The November 14, 2005 Order by the Bismarck Board of City Commissioners concluded CEC's limited franchise to provide electric distribution service within the City of Bismarck did not extend to newly annexed areas such as Boulder Ridge and electric service to Boulder Ridge is properly provided by MDU under its general franchise subject to CEC retaining service to any existing customers. (Attachment 8). The City's Order was appealed by CEC to the South Central District Court. The District Court denied CEC's appeal determining the City's order was not arbitrary, capricious or unreasonable. Capital Electric Cooperative, Inc. v. City of Bismarck, et al, Civil No. 05-C-2303. (Attachment 7). The case is currently before the Court as Supreme Court No. 20060199.

Bismarck City Ordinance 10-11-01 prohibits the operation of electric facilities for provision of electric distribution service without a franchise from the City:

10-11-01. Franchises Required. Except as otherwise provided by law, a person, firm, corporation or utility may not place or maintain any permanent or semi permanent fixtures, including poles, wire, cable, conduit, or any other medium used to transmit or transport electric or electronic signals, natural gas or other materials, in, over, upon or under any street or public place without a franchise to do so from the city. A franchise may be granted by resolution of the Board of City Commissioners.

Because CEC is prohibited by Bismarck City Ordinance from constructing and maintaining electric distribution facilities to provide electric service in an area within the City of Bismarck for which CEC does not have a franchise, MDU's extension of facilities in Boulder Ridge to serve customers not within CEC's franchised service area can not interfere with or unreasonably duplicate CEC's nonexistent service and unauthorized facilities.

MDU is likely to prevail on the merits of its appeal because the PSC failed to apply relevant

judicial precedent and incorrectly determined it could not consider or interpret two constitutional provisions that are in conflict with its decision. The PSC also failed to consider a similar statutory provision. These constitutional and statutory provisions prohibit the exercise of the PSC's authority under the TIA in a manner that interferes with the franchise authority of the City.

The PSC acknowledged its decision was based solely upon N.D.C.C. § 49-03-01.3 of the TIA without regard to the City of Bismarck's right to franchise electric service areas. (Attachment 2). The PSC concluded it could not interpret constitutional provisions regarding the franchise authority of the City and therefore did not consider MDU's authority, or CEC's lack of authority, to provide service within Boulder Ridge under their respective franchises. Commissioner Tony Clark in his concurring opinion noted the PSC could not reconcile seemingly conflicting provisions of the TIA and the North Dakota Constitution without direction from the courts. (Attachment 2).

CEC relied upon the South Pointe cases (see Cass County Electric Coop v. NSP, 419 N.W.2d 181 (N.D. 1988) and NSP v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990)) in support of its complaint before the PSC. Those cases, however, involved a situation in which the complaining rural electric cooperative had an agreement with the City of Fargo to provide electric service for the area in dispute. Cass County Electric Coop v. NSP, supra at 187. That is not the situation in this appeal. Because the City of Bismarck determined CEC's franchise does not include Boulder Ridge, the South Pointe cases are inapplicable under the facts of this case.

The relevant judicial precedent on the issue before the Court is Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 723, 730 (N.D. 1972) in which the court held a rural electric cooperative is prohibited from continuing service to customers within an annexed area

of the city in the absence of a franchise when the city has an ordinance prohibiting such service without a franchise.

The plain language of applicable statutory and constitutional provisions provide further authority that MDU is likely to prevail on the merits of its appeal. First, N.D.C.C. § 49-03-06(8) provides in pertinent part:

Nothing in this chapter shall be construed to limit the authority of a governing body of a city to exercise its franchise authority under § 40-05- 01. [Emphasis added]

The PSC made no attempt to reconcile this unambiguous limitation on the TIA and the PSC's authority under N.D.C.C. § 49-03-01.3 with its order prohibiting MDU from exercising its franchise to provide electric distribution service in Boulder Ridge.

Second, N.D. Const. art. XII, § 10 provides:

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.

This constitutional provision prohibited the PSC, under the guise of the TIA, from requiring MDU to sell its public utility facilities to CEC or from directly or indirectly allowing CEC to operate such facilities within Boulder Ridge without a franchise from the City. To the extent the PSC's order suggests CEC is entitled to provide service within Boulder Ridge without a franchise, the above constitutional provision clearly establishes the contrary.

Finally, N.D. Const. art. VII, § 11 establishes the TIA cannot operate to infringe on the City's power to determine franchise service areas within the corporate limits of the City:

The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged

by the legislative assembly.

This constitutional provision originated with the North Dakota Constitutional Convention of 1972 and was adopted by that body as Montana-Dakota Utilities Co. v. Divide County School District #1, supra, was making its way through the courts. The people of North Dakota, through this constitutional provision adopted in 1982, unequivocally established the powers of municipal governing bodies to franchise utility service can not be superseded by acts of the state legislature. The Debates of the North Dakota Constitutional Convention of 1972 (hereafter “Debates”) (Attachment 8, p. 694-695) indicate this provision was opposed by rural electric cooperatives because it would confirm on a constitutional basis the result reached by the trial court in Montana-Dakota Utilities Co. v. Divide County School District #1, supra.

DELEGATE SANSTEAD: I think the real answer to the question raised by Delegate Kelsch is the fact that the recent Crosby case, which was a serious case as far as the RECs were concerned and which will be appealed very shortly as their spokesman told us, that very case left the decision more to the cities. And as a result of that the RECs would rather take their chances in the courts rather than have something like this specified within the framework of the Constitution.

Debates (Attachment 8, p. 698).

Delegate Sinner provided an interesting hypothetical that shows the delegates envisioned the city’s franchise authority would control over any conflicting authority of the TIA:

DELEGATE SINNER: . . . If an area west of Bismarck - a traditionally rural area – is served by a rural electric cooperative, and the city expands into that area, the city may then say to the REA, “I’m sorry. You can’t serve anymore. You have to take your – pull out your poles, get your services out, because we can’t franchise you because we’re larger than 2,500 citizens and the law prohibits us to franchise you,” and the Legislature can’t protect them because, under this language, we would give the city council veto power over the Legislature.

Debates (Attachment 8, P. 1109).<sup>1</sup> Other delegates noted, however, that electric cooperatives are not regulated by the PSC and therefore the cities should have the right to control if and where the cooperatives operate in their cities. Debates p. 1113. Ultimately, arguments in favor of local rather than legislative control as summarized by Delegate Nething prevailed in the adoption of the amendment:

DELEGATE NETHING: . . . It seems to me that the only thing we should be concerned about here is whether or not we believe that the cities should control the franchising ability that we currently have. Now, as a legislator, it seems rather ridiculous for me to sit and determine what's good for the City of Bismarck or the City of Fargo or Minot or Ellendale – any one of them. Those people in that city are the ones that know what's the best for them, and that's why we've reserved this right of franchising to the cities, and I think that, since its their business, they're the ones that should have the say – not a legislator, like myself, from Jamestown, because I don't know anything about the problems of that city; those people know them. I think we should adopt the amendment.

Debates (Attachment 8, p. 1110). N.D. Const. art VII, § 10 could not be clearer that MDU is likely to prevail in its argument that the City of Bismarck's franchising authority controls any conflicting language of the TIA to determine electric service areas within the City of Bismarck.

Ignoring the statutory and constitutional limitations on its authority under the TIA, the PSC broadly interpreted its authority under N.D.C.C. § 49-03-01.3 to trump the City's determination of the proper electric franchise provider for Boulder Ridge. The Commission's order renders each of the above constitutional and statutory limitations meaningless and is contrary to the precedent of the North Dakota Supreme Court in Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1972).

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<sup>1</sup> It is worth noting that the City Commission order of November 14, 2005 did not require Capital Electric to remove its existing facilities or discontinue service to its existing customers.

CEC argued the PSC had no authority, based upon Johnson v. Elkin, 263 N.W.2d 123, 126 (N.D. 1978), to decide the constitutionality of the TIA. MDU, however, did not ask the PSC to declare N.D.C.C. § 49-03-01.3 unconstitutional. Although MDU disagrees with the PSC's determination that it does not have authority to consider the Constitution in its interpretation of the TIA, there is no question the Court has the authority to harmonize interpretations of statutes with relevant provisions of the North Dakota Constitution. N.D.C.C. § 1-02-38; City of Bismarck v. Nassif, 449 N.W.2d 789, 794 (N.D. 1989); Grand Forks Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

Because N.D. Const. art. VII, § 11 prohibits legislation that interferes with a municipality's power to franchise public utilities, the Court must construe N.D.C.C. § 49-03-01.3 consistent with that constitutional limitation and public policy. Accordingly, N.D.C.C. § 49-03-01.3 should be interpreted such that CEC's claim of interference and unreasonable duplication of services are determined based on the service areas established by the City under its franchise authority. Indeed, CEC's witness agreed with this interpretation:

Q. (MR. KUNTZ CONTINUING) You just described for me a situation, Mr. Lipp, in south Bismarck where you have to cross MDU facilities, but you don't consider that interference or duplication because you're reaching an area that is your service area and not MDU's; is that correct?

A. That's correct.

Q. If Boulder Ridge is designated by the city to be within the franchise of MDU and not within the franchise service area of Capital Electric, then is MDU's crossing of your facilities on 43<sup>rd</sup> Avenue still interference and duplication?

A. If you guys - - if it's in your service area, no, I would say.

(Attachment 9, Tr. p. 123-124).

Judge Jorgensen, in affirming the PSC's Order, attempted to resolve the conflict between the City's franchise authority and the PSC's authority under the TIA by determining sua sponte that CEC does have a franchise to serve Boulder Ridge. (Attachment 2). Of course, this question was not before Judge Jorgensen as the PSC order did not attempt to interpret CEC's franchise. More importantly, Judge Jorgensen's determination is directly contrary to the City Commission's order affirmed by Judge Haskell and was a clear violation of the doctrine of separation of powers. A&H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994). Judge Jorgensen reached his conclusion without the benefit of the record and arguments made to the City and Judge Haskell. Certainly, Judge Jorgensen had no jurisdiction to reverse the City or Judge Haskell in a collateral administrative appeal to which the City wasn't even a party.

The PSC Order leaves no party with the legal right to provide electric service to Boulder Ridge. Pursuant to the City's order affirmed by Judge Haskell, CEC does not have a franchise to serve Boulder Ridge and is prohibited by Bismarck City ordinance from providing electric service within the subdivision. The PSC Order affirmed by Judge Jorgensen directing MDU to cease and desist providing service in Boulder Ridge has the nonsensical result that there is no authorized electric service provider for the area which the PSC determined it was prohibiting unreasonable interference and duplication of services. This result is certainly a persuasive reason that MDU's is likely to prevail on appeal.

**2. Unless the Stay is Granted, MDU Will Suffer Irreparable Injury.**

MDU will suffer irreparable injury if, after extending its lines to Boulder Ridge to provide service under its franchise, it is not permitted to provide that service. If a stay is not granted, MDU

will lose revenues from the Boulder Ridge customers that it will be unable to recover from customers, the PSC, or CEC.

In addition to lost revenue, MDU will be irreparably harmed if it is prevented from exercising the franchise rights granted to it by the City of Bismarck. Even when the authority to exercise those franchise rights is restored after completion of this appeal, the Court is unable to award damages to MDU to compensate for any interim loss of or infringement on those rights.

Although CEC may argue it will be equally harmed if it is unable to provide service in Boulder Ridge, CEC has not made a comparable investment to provide service in Boulder Ridge and more importantly, does not have a franchise to provide service in Boulder Ridge. CEC cannot be irreparably harmed by being unable to provide a service that it is precluded from providing by Bismarck City Ordinance and order of the Bismarck City Commission. While CEC has appealed the order of the Bismarck City Commission, CEC has taken no action to allow it to provide service without a franchise pending the outcome of its appeal.

Customers of MDU within Boulder Ridge will also be irreparably harmed if MDU is not allowed to provide them with electric service pending this appeal. Because CEC does not have a franchise to serve the area and therefore is prohibited by law from serving these customers, the customers face the prospect of not having electric service if a stay is not granted.

MDU presented these same arguments to the District Court in support of its motions for stays pending its appeals of the PSC order to the District Court and then to this Court. The District Court determined MDU met the showing of irreparable harm in support of its motion for a stay pending appeal to the District Court but reached the contrary determination with respect to MDU's motion for

a stay to this Court presumably based on the District Court's determination that MDU had not made a strong showing it would prevail on the merits of its appeal. Considering the Court, on an administrative appeal, reviews the decision of the administrative agency and not the District Court, MDU submits it has made the required showing of irreparable harm.

**3. No Substantial Harm Will Come to Any Party if the Stay is Granted.**

If a stay is granted, the status quo will bring no substantial harm upon any party to this appeal. At the present time, service is being provided to persons living in Boulder Ridge, whereas under the Judgment, there will be no service available from a lawful provider because the City has not given its consent to CEC to serve the area.

**4. No Substantial Harm to the Public Interest Will Result on Account of the Stay.**

Maintaining the status quo until the Court determines the appeal will not result in substantial harm to the public interest.

MDU asserts a stay is consistent with the public interest because a stay assures continuation of electric service to customers within Boulder Ridge pending this appeal. Although CEC may argue the PSC or the District Court gave it the ability to commence electric service if MDU complies with the PSC's cease and desist order, neither the PSC nor the District Court can authorize CEC to provide service without the consent of the City. N.D. Const. art XII, § 10.

The public interest is served not only by the customers of Boulder Ridge continuing to receive electric service but also by such electric service being legally provided by a franchised provider selected by the City in accordance with Bismarck City Ordinance 10-11-01.

CONCLUSION

MDU has made any necessary showing for a stay and is accordingly entitled to a stay of the Commission's order pending appeal. Upon approval of MDU's application for a stay, it will file a supersedeas bond in the amount of \$250.00 or such other amount deemed appropriate by the Court. MDU respectfully requests the Supreme Court to issue a stay of the enforcement of the Order of the Public Service Commission in this case until such time as all issues herein are resolved by this Court.

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

Respectfully submitted,

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

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Jerome C. Kettleon

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Montana-Dakota Utility Company, )  
 )  
 Appellant, )  
 and )  
 )  
 The Public Service Commission of )  
 North Dakota and Capital Electric, )  
 Cooperative, Inc., )  
 )  
 Appellees. )

**JUDGMENT**

CIVIL NO. 06-C-1177

The Court, the Honorable Donald L. Jorgensen presiding, entered its Order affirming Administrative Decision on September 25, 2006 that the Administrative Decision of the North Dakota Public Service Commission (PSC) dated June 22, 2006 is hereby affirmed. This Order is incorporated herein by reference in its entirety.

IT IS FURTHER ORDERED that Montana-Dakota Utility Company shall comply with the provisions of the June 22, 2006 Order from the North Dakota Public Service Commission and shall have 30 days from the date of September 25, 2006 to do so.

WITNESS the Honorable Donald L. Jorgensen, District Judge for the South Central Judicial District and my hand and seal this 9<sup>th</sup> day of October, 2006.

*Debra Simenon*

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 Clerk of District Court  
 South Central Judicial District

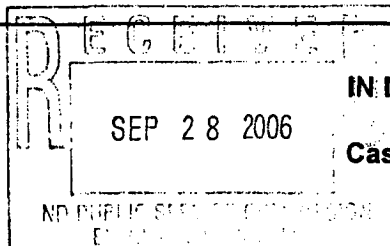
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Ck. of Crt. Burleigh Co.

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STATE OF NORTH DAKOTA  
COUNTY OF Burleigh



IN DISTRICT COURT  
Case No. 06-C-1177

Montana-Dakota Utility Company,

Plaintiff,

vs.

North Dakota Public Service  
Commission and Capital Electric  
Cooperative,

Defendants.

**ORDER AFFIRMING  
ADMINISTRATIVE DECISION**

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

**ISSUES UPON APPEAL**

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

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

#### DECISION

Section 28-32-42, N.D.C.C. mandates the District Court to affirm the Administrative Agency's decision unless the Court finds that any of the following are present:

1. The Order is not in accordance with the law.
2. The Order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the Appellant a fair hearing.
5. The Findings of Fact made by the agency are not supported by a preponderance of the evidence.
6. The Conclusions of Law and Order of the agency are not supported by its Findings of Fact.
7. The Findings of Fact made by the agency do not sufficiently address the evidence presented to the agency by the Appellant.
8. The Conclusions of Law and Order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

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

following standards:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, Section 49-03-01.3 is not a legislative effort to limit the authority of the City of Bismarck to grant franchises, rather, it is an effort to provide efficient and economic delivery of electric service which is the goal of the Territorial Integrity Act. *Cass County Elec. Coop.*, 419 N.W.2d at 188. Therefore, it does not violate N.D. Const. art. VIII, § 11 which states: "The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly."

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

Public Service Commission.

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

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

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

Dated September 25, 2006.

BY THE COURT:

  
Donald Jorgensen  
District Judge

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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

**Case No. PU-05-551**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**June 22, 2006**

**Appearances**

Commissioners Tony Clark, Susan E. Wefald, and Kevin Cramer

Daniel S. Kuntz, Assistant General Counsel, MDU Resources Group, Inc., P.O. Box 5650, Bismarck, North Dakota 58506-5650, appearing on behalf of Montana-Dakota Utilities Co.

Carol K. Larson, Pringle & Herigstad, P.O. Box 1000, Minot, North Dakota 58702, appearing on behalf of Capital Electric Cooperative, Bismarck, North Dakota.

William W. Binek, Chief Counsel, North Dakota Public Service Commission, State Capitol, Bismarck, North Dakota 58505, appearing on behalf of the Public Service Commission.

Al Wahl, Office of Administrative Hearings, 1707 North 9th Street, Bismarck, North Dakota 58501-1882, appearing as Hearing Examiner.

**Preliminary Statement**

On September 29, 2005, Capital Electric Cooperative, Inc. (Capital) filed a Complaint alleging that Montana-Dakota Utilities Co. (Montana-Dakota) (1) intends to provide electric service to a development in Complainant's service area and (2) such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital Electric.

On October 18, 2005, the Commission issued a Notice of Hearing scheduling the hearing for December 13, 2005.

On October 20, 2005, Montana-Dakota filed an Answer and Counterclaim. Montana-Dakota admitted that it intended to provide electric distribution services in that part of Boulder Ridge that has been annexed to the City of Bismarck. Montana-Dakota denied its service would interfere with service or facilities of Capital. Montana-Dakota

also asserted that the Complaint should be dismissed on the basis that the Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchised authority to provide electric distribution services in the City of Bismarck, including Boulder Ridge.

On November 10, 2005, Capital filed its reply to Montana-Dakota's Counterclaim requesting the Counterclaim be dismissed.

On November 23, 2005, Montana-Dakota filed a Motion to Dismiss the Complaint again asserting that the Commission does not have jurisdiction and asserting that Capital is not authorized to provide service within Boulder Ridge and therefore cannot, as a matter of law, interfere with the services of Capital.

On November 30, 2005, the December 13 hearing was continued.

On December 30, 2005, the Commission issued a Notice of Reschedule Hearing for February 9, 2006.

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

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

At the hearing Montana-Dakota renewed its Motion to Dismiss and moved to voluntarily dismiss its Counterclaim in view of the proceeding in South Central District Court. The hearing officer granted Montana-Dakota's motion to voluntarily dismiss its Counterclaim.

At the hearing, Capital presented evidence consisting of testimony and exhibits. Montana-Dakota cross-examined Capital's witness. Montana-Dakota presented no direct testimony.

At the close of the hearing, the Commission set a briefing schedule. Then on February 10, 2006, the Commission held a public working session for the purpose of discussing the best course of action for the Commission. The Commission held the working session the day after the hearing so the parties would be apprised of the Commission's considerations regarding the matter. The Commission took into consideration the pending action before the District Court regarding the franchise issues. The Commission determined at the working session that the most appropriate

action would be to continue the complaint proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

An Order for Continuance was prepared and was put on the regular agenda for the February 22, 2006 Commission meeting. The agenda item was held over to consider a minor change in language. The Order for Continuance was put on the regular agenda for the March 7, 2006 Commission meeting. The agenda item was withdrawn following receipt of the Motion and Brief for Hearing on "Continuance" filed by Capital Electric on March 6, 2006.

On March 7, 2006, the Commission suspended the briefing schedule in this proceeding.

On March 13, 2006, the Commission issued a Notice of Hearing scheduling a public hearing on March 23, 2006, to hear oral arguments on the issue of whether the Commission has authority to issue an order continuing the proceeding for an indefinite period of time until the issue of the city franchise rights is finally determined.

On March 16, 2006, Commission staff filed a Brief in Support of Continuance.

On March 20, 2006, Capital filed Proposed Findings of Fact, Conclusions of Law and Order and Brief on Complaint against MDU.

On March 21, 2006, Capital Electric filed a Supplemental Brief on the Commission's Motion for Continuance.

The hearing was held on March 23 as scheduled.

On April 27, 2006, Montana-Dakota filed Proposed Findings of Fact, Conclusions of Law and Order and Brief in Support of Motion to Dismiss.

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

### **Findings of Fact**

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

entire area of Boulder Ridge is 92.27 acres, subdivided into more than 170 lots. Boulder Ridge is bound on the west by North Washington Street and on the south by 43<sup>rd</sup> Avenue.

4. In April of 2005, Part of Boulder Ridge 1<sup>st</sup> Addition was annexed to the City of Bismarck. Both Capital and Montana-Dakota asserted a right to serve Boulder Ridge with electric distribution service.

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

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

7. By letter dated June 26, 2002, Montana-Dakota cancelled the Area Service Agreement with Capital. By terms of the Area Service Agreement, the cancellation became effective June 26, 2003.

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

9. Capital Electric initiated a Declaratory Judgment proceeding by filing a Complaint dated December 1, 2005 in the District Court, South Central Judicial District, Burleigh County, North Dakota, naming Montana-Dakota, the City of Bismarck, and the Public Service Commission as Defendants seeking a judgment declaring Capital Electric's rights under its franchise to operate an electric distribution system in Bismarck.

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

after the City Commissioners have decided the issue, and after resulting appeal, may the Public Service Commission determine whether Montana-Dakota is unreasonably interfering with Capital Electric's operations. The Court acknowledged that the Public Service Commission may have a different opinion concerning the matter.

11. On March 2, 2006 a hearing on the appeal of the decision issued by the City of Bismarck regarding the franchise rights for electric service to the area was held. The Order on Appeal was issued by the District Court on March 14, 2006, denying Capital Electric's appeal.

12. A second Order was issued by the District Court on May 30, 2006 granting Montana-Dakota's Motion for Dismissal of Amended Complaint.

13. Before Boulder Ridge was platted and annexed to the City of Bismarck, Capital was the only provider of electric service in the part of Haycreek Township now named Boulder Ridge. Capital provided electric service to a location in Section 16 since 1949. In 2005 that service extension was removed in preparation for the development of Boulder Ridge. Capital had other services in Section 16, since the mid-1990s, still in place in 2005. Capital had three-phase lines along the west and south sides of Section 16 since 1973, still in place in 2005.

14. At the time Boulder Ridge was annexed, Capital's service in the subdivision was limited to two street lights and a CATV booster located in the road right-of-way along 43<sup>rd</sup> Avenue. Previous service to a pasture well by Capital within Boulder Ridge was abandoned prior to the annexation of Boulder Ridge.

15. Both Montana-Dakota and Capital extended distribution facilities to serve customer locations within Boulder Ridge. Montana-Dakota constructed its distribution facilities by extending a three-phase feeder line approximately 2,000 feet from a location in French's Addition south of 43<sup>rd</sup> Avenue and east of Washington Street. Capital extended distribution facilities from its three-phase feeder lines location along Washington Street and 43<sup>rd</sup> Avenue. Montana-Dakota's extension of its underground feeder line crossed Capital's overhead feeder line along 43<sup>rd</sup> Avenue. Montana-Dakota was in the process of installing its facilities at the time Capital began installing its facilities.

16. Capital has a three-phase framework around the area of Capital's northwest Bismarck service area, served from 4 different substations. Capital's facilities nearest to Boulder Ridge are three-phase facilities immediately contiguous to Boulder Ridge along the west side of Section 16 (east of Washington Street) and along the south side of Section 16 (North of 43<sup>rd</sup> Avenue) of Haycreek Township. Capital's three-phase facilities were in place before Boulder Ridge was platted and before part of Boulder Ridge was annexed to the City of Bismarck. The facilities were also in place before Montana-Dakota extended its facilities to provide electric distribution services in Boulder Ridge.

17. Capital's feeder lines located along 43<sup>rd</sup> Avenue and Washington Street were built prior to 1973 to tie together Capital's substations at other locations. The use of these feeder facilities has not changed in the last 20 years. Prior to 1973, Capital did not have a franchise with the City of Bismarck or an Area Service Agreement with Montana-Dakota.

18. Capital has substantial facilities within the corporate limits of Bismarck and within a two-mile radius of Boulder Ridge and in the area designated as "The principal service area of the Cooperative [Capital]" under the 1973 Area Service Agreement.

19. Capital is the only provider of electric service in areas outside the corporate limits of Bismarck within a two mile radius of Boulder Ridge.

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

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

22. Montana-Dakota's facilities nearest to Boulder Ridge are in the southerly part of French's 1st Addition, approximately ½ mile from the southerly boundary of Boulder Ridge. It is off these facilities that Montana-Dakota extended its facilities to Boulder Ridge. Montana-Dakota has no other facilities closer to Boulder Ridge. Montana-Dakota's facilities in Boulder Ridge cannot be operated in a looped fashion in the event of an outage.

23. Montana-Dakota's extension of facilities into Boulder Ridge crossed Capital's facilities in two places, in French's 1<sup>st</sup> Addition and on the north side of 43<sup>rd</sup> Avenue in Boulder Ridge and Montana-Dakota's extension of its facilities ran parallel to Capital's facilities in two places, in French's 1<sup>st</sup> Addition and on the north side of 43<sup>rd</sup> Avenue in Boulder Ridge.

24. Boulder Ridge is entirely surrounded by areas served by Capital.

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

and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital.

26. The Commission finds that service by Capital would best promote and serve orderly and economic development of electric service in the Boulder Ridge subdivision. Capital is able to extend service to Boulder Ridge through a shorter extension at a lower cost. Service by Capital to Boulder Ridge will not result in checker boarding of customers served by Montana-Dakota and Capital.

27. The Commission finds Montana-Dakota's extension of its facility to Boulder Ridge, an area not contiguous to Montana-Dakota's existing service areas, would create a checkerboard of service areas.

28. The Commission finds Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework, and system.

29. The Commission finds Montana-Dakota's extension of its electric distribution lines into Boulder Ridge 1<sup>st</sup> Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital.

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

### **Conclusions of Law**

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

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

Sections 49-03-01 through 49-03-01.5 shall not be construed to require an electric public utility to discontinue service to customers thereof

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

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

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

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

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

6. The question of which electric suppliers' facilities are actually duplicative or wasteful is one of fact for the Commission to determine. In making the determination, the Commission considers which supplier is better able to serve the area due to the nature and extent of existing facilities in the area, whether the electric public utility's extension into the area would constitute an unreasonable duplication of capital intensive

facilities and services already provided by the rural electric cooperative and which would best promote orderly and economic development of electric service. The Commission must look at the existing electric facilities that Capital and Montana-Dakota have in place and determine whether extension of Montana-Dakota's services to Boulder Ridge would constitute an unreasonable duplication of capital intensive services already provided by Capital.

7. Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, through French's 1<sup>st</sup> Addition, and across 43<sup>rd</sup> Avenue and across Capital's facilities interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, under North Dakota Century Code Section 49-03-01.3. There is no evidence in the record upon which to base an ultimate decision that Montana-Dakota can serve the Boulder Ridge area without wasteful duplication of investment or service.

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

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

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

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

### **Order**

The Commission Orders:

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

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

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

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

**PUBLIC SERVICE COMMISSION**

Voting "Nay"

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**Susan E. Wefald  
Commissioner**

*Tony Clark* *Kevin Cramer*  
**Tony Clark** **Kevin Cramer**  
**President** **Commissioner**

**CONCURRING OPINION**  
**Commissioner Tony Clark**

**June 22, 2006**

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

**Case No. PU-05-551**

Let me begin by stating what this decision is not. It is not a slap at the Bismarck City Commission. The City of Bismarck has the right to franchise under state law, the PSC does not. This order simply acknowledges that the PSC is charged by the legislature to enforce Title 49 of the Century Code, while the City of Bismarck has the right to franchise within its borders. This order keeps those two issues separate. What is potentially at stake in the courts, is what happens when the manner in which a city issues franchises has the effect of causing utility companies to run afoul of state laws intended to protect consumers from unreasonable and uneconomic duplication of services.

Neither is this order any sort of grandiose statement on the Territorial Integrity Act (TIA). Few issues have given rise to such intense debate in our legislative sessions the past few years. Try as some have to entice the PSC to become involved in that debate, we have steadfastly refused to do so. Frankly, if PSC orders in these contentious matters are to be regarded as unbiased by the parties and the general public, then we must remain neutral on the larger policy questions regarding the statute itself. The law is what it is, and this order is simply the result of a dispassionate interpretation of the weight of the evidence presented to us.

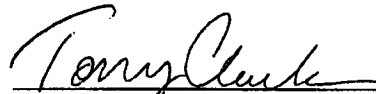
Now to the heart of the matter in this case. There is little doubt that MDU serving Boulder Ridge violates the spirit of the TIA. In fact, MDU effectively conceded as much by not presenting any evidence to the contrary. Rather, MDU asks the PSC to declare that holding a city franchise is a threshold, a prerequisite, to a public utility filing a valid interference complaint. In this case, Capital does not at this time hold such a franchise. But in asking the PSC to make this determination, MDU is asking us to do something we cannot. As an administrative agency, we are not to make such constitutional interpretations and reconciliations. That can only be made by our courts. The courts have previously dealt with issues of franchising, such as in the Divide County case (in which it is clear a utility must ultimately obtain a franchise if it is to operate within a city), but there is no guiding precedent given to us when we have the type of conflict presented to us in as in this case. The PSC must assume that the statutes we are charged with enforcing mean exactly what they say, and that they are constitutional. The legislature could have plainly stated that the TIA, as to be applied within municipalities, is only intended for a franchise holding utility. The legislature did not do so. I can only conclude that the legislature viewed wasteful duplication of services as a

separate issue from franchising. The decision I have come to is in no small part influenced by the guidance that the courts have given the PSC in stating that we should not go out of our way to find ways to limit too narrowly our own authority in enforcing what has been assigned to us by the legislature.

Admittedly, this leaves the situation unsettled. We now have a public utility, MDU, that is unable to provide service under state statute. Yet the provider, whose service is in accordance with state law, does not hold a valid city franchise. Again, this is an issue that is beyond the ability of the PSC to resolve, because the PSC has no authority over the manner in which cities franchise utilities. Reconciliation of these contradictions must be handled by the courts, or ultimately, the legislature.

It is entirely possible the courts will resolve the matter by simply creating a new threshold for the PSC to consider when executing our duties, specifically that a utility must first hold a franchise before the TIA applies. If this becomes the new standard, it seems apparent at this point that MDU will serve Boulder Ridge.

Or the courts could decide that the TIA stands separate from franchising. There would be any number of ways to address the outcome of such a decision if that is how the courts rule, but such speculation goes beyond the scope of this opinion.

  
Tony Clark, President

**CONCURRING OPINION**  
**Commissioner Kevin Cramer**

June 22, 2006

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

**Case No. PU-05-551**

After careful and thorough review of the evidence in this case and attentive discussion with staff, I have concluded the most logical and defensible action the Public Service Commission can take is to find in favor of Capital Electric's complaint.

I believe this action, supported by a majority of the PSC, is the strongest position under the constitution and laws of North Dakota and serves as the best vehicle to advance the question of which company will serve this important growing area of Bismarck.

Although the "franchise" matter is still unresolved as all appeals are not yet exhausted in the courts, that is not an issue for PSC consideration as we are not authorized to decide constitutional issues.

The question in this complaint is does MDU's extension of distribution lines in Boulder Ridge interfere with and constitute an unreasonable duplication of investment and services provided by Capital? That question is easy to answer with the evidence and testimony presented by the parties. Yes it does.

Having said that, MDU's motion to dismiss on the basis of the franchise issued it by the City of Bismarck is hard to ignore. Especially following the District Court's opinion and decision upholding the city's position. Yet, I cannot reconcile that argument with the constitutional question of PSC authority without definitive direction from the courts and/or the legislature. Rather, the PSC's jurisdiction is limited to matters delegated to it by the legislature under NDCC Title 49. For the PSC to grant a dismissal based on the franchise argument seems arbitrary and capricious to me.

The motion to dismiss without prejudice is without any merit at this point in the process. It is a motion I could have and probably would have supported several months ago. But to simply act as though no hearings were ever held and no evidence presented nine months after the complaint was filed does nothing to move the issue toward resolution and diminishes the efforts of all of the parties who have invested so much in this case, including the PSC and our staff.

Whether the PSC would have granted MDU's motion to dismiss or find in favor of the complaint as we have, both are defensible positions certain to be appealed, at which time clarity will be provided by someone with the authority to provide it. I am hopeful this order will move the ball forward and resolve this dispute to the benefit of the citizens.

  
Kevin Cramer, Commissioner

**DISSENTING OPINION**  
**Commissioner Susan E. Wefald**

June 22, 2006

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

**Case No. PU-05-551**

When making a determination under North Dakota Century Code Section 49-03-01.3 the Commission must give proper consideration to all four issues that are contained in this section of law.

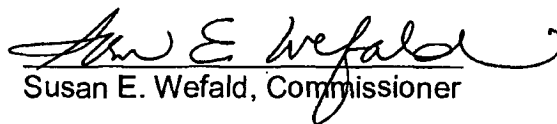
First, it has to consider whether the electric public utility is operating in the corporate limits of a municipality. The facts in this case are that in April of 2005, the service area in question was annexed to the city of Bismarck.

Second, Section 49-03-01.3 requires the Commission to determine if the electric public utility has "lawfully commenced operations." This important phrase dictates that the commission consider to which electric company the city has given a franchise. I agree that the Commission does not have jurisdiction regarding franchises under Article VII Section 11 of the North Dakota Constitution. That being said, it is important for the Commission to give the attention called for in Section 49-03-01.3 to this franchise issue. The facts in this case are that on November 14, 2005, the city of Bismarck awarded a franchise to Montana-Dakota Utilities Co. to serve the area in question in this case.

Third, Section 49-03-01.3 requires the Commission to consider whether "such extension or extensions" shall not interfere with existing services provided by a rural electric cooperative or another public utility within such a municipality. I generally agree with the Commission's findings in this order on these matters.

Finally, Section 49-03-01.4 requires the Commission to consider the following: "and provided duplication of services is not deemed unreasonable by the Commission." The Commission needs to consider all three of the preceding issues in order to come to a thoughtful conclusion to the final issue.

In this case, my fellow commissioners have given too much weight to the third issue of Section 49-03-01.3 and have failed to give enough consideration to issues one, two, and four.

  
Susan E. Wefald, Commissioner

7/26/06

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

Case No. 08-06-C-1177

Appellant,

vs.

ORDER GRANTING STAY  
PENDING APPEAL

North Dakota Public Service Commission,  
And Capital Electric Cooperative, Inc.,

Defendant.

The above-entitled administrative appeal, perfected by the Appellant by and through its legal counsel, Attorney Jerome C. Kettleson, seeks to appeal the Order of the Public Service Commission, State of North Dakota, in Case No. PU-05-551, as issued on June 22, 2006. Simultaneous with said appeal, the Appellant has filed and served the Appellant's motion for a stay of said Order pending a determination of this administrative appeal.

Appellee North Dakota Public Service Commission, by and through its legal counsel, Attorney William Binek, has offered no opposition to the motion for stay pending appeal.

Appellee Capital Electric Cooperative, by and through its legal counsel, Attorney Carol K. Larson has filed and served the Appellee's resistance to said motion to stay pending appeal. Each of the foregoing has filed their respective briefs in support of their positions and have filed supplemental pleadings.

RECEIVED & FILED

JUL 26 2006

Clt. of Crt. Burleigh Co.

33

## UNDISPUTED FACTS

1. The City of Bismarck as a municipal entity has constitutional authority under North Dakota Constitutional Article VII, Section 11, to franchise the construction and operation of a public utility within the City.
2. The City of Bismarck did issue a franchise to Montana Dakota Utilities Co. (MDU) to construct and operate an electric utility service within the City of Bismarck.
3. This Court in 05-C-2303 affirmed the Order of the City Commission, Bismarck, North Dakota, in its issuance of a franchise to MDU.
4. The Order of the Public Service Commission in Case No. PU-05-551, dated June 22, 2006, provides in relevant part:
  1. Within 30 days after the date of this Order Montana Dakota shall cease and desist from providing electric service to Boulder Ridge, First Addition to the City of Bismarck, and from further extending its electric service in that area.
  2. Montana Dakota shall offer to sell to Capital and Capital shall purchase from Montana Dakota at book value, the distribution facilities located in and used by Montana Dakota to serve Boulder Ridge, First Addition, to the extent compatible with Capital's system and not constituting an unnecessary duplication of Capital's facilities.
  3. So that users of electricity in Boulder Ridge, First Addition, shall not be without service, Montana Dakota may continue to provide service

beyond the 30 days referenced in order paragraph 1 until Capital can begin providing service.

5. That the foregoing order precludes MDU from any exercise of its franchise as granted by the City of Bismarck, North Dakota, to Boulder Ridge, First Addition.

#### DECISION

The foregoing administrative appeal is subject to the provisions of Section 28-32-46, N.D.C.C., and mandates the Court to affirm an agency order unless there are deficiencies as therein identified.

Under N.D.C.C. Section 28-32-48, a stay of an existing agency order is not an automatic consequence of an administrative appeal. The Appellant seeking a stay of an administrative order must satisfy the standards as set forth in Cass County Electric Coop v. Wold Properties, Inc., 253 N.W.2d 323 (ND 1977), which include the following:

1. The moving party for a preliminary order must show a substantial probability that it will prevail in the litigation.
2. That the moving party would should it would suffer an irreparable injury if a preliminary order was not granted.
3. A preliminary order must not harm the interests of other parties; and
4. A preliminary order must not adversely affect the public interest.

For the purposes of this Order of Stay, the Court does herewith adopt the Findings of Fact as entered by the Public Service Commission in support of its Order, dated June 22, 2006. Said Findings of Fact establish that each of MDU and Capital Electric have existing customers within Boulder Ridge, First Addition to the City of Bismarck, and the

continuation of reliable and timely delivery of electric power to said residents is a primary concern. Further, the Findings of Fact of the Public Service Commission establish that this matter has been pending since September, 2005, and that neither MDU nor CEC have alleged any harm as a result of the delay in the entry of said administrative decision.

The Order of the Public Service Commission, dated June 22, 2006, not only terminates in its entirety the MDU franchise as granted by the City of Bismarck, North Dakota, but further mandates the involuntary sale of MDU distribution facilities located in and used by MDU to serve Boulder Ridge, First Addition, and then only to the extent that the same does not constitute unnecessary duplication of CEC's facilities. The loss of said franchise, the sale of distribution facilities at book value, and only to the extent that the same are not unnecessary duplication, may indeed cause irreparable harm to MDU if the appeal of MDU of the administrative decision is successful.

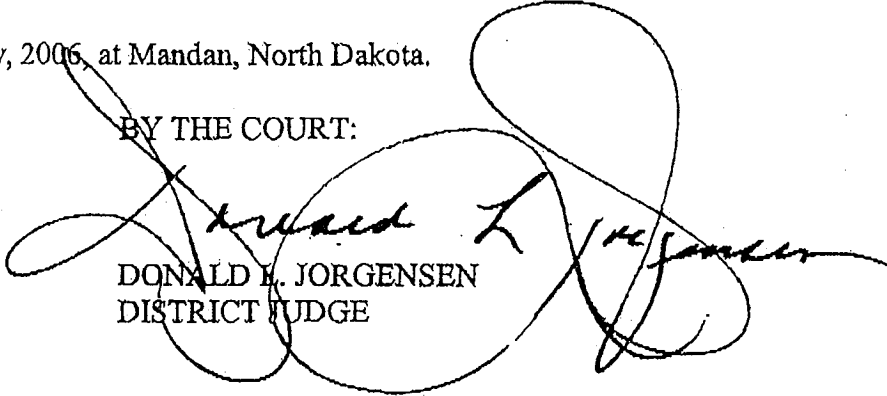
Finally, it is the obligation of the Court to determine whether or not the moving party has established a substantial probability of a successful appeal. As set forth above, and as undisputed by the parties, the City of Bismarck, North Dakota, is authorized by the constitution of the State of North Dakota to issue public utility franchises. Equally, the North Dakota Public Service Commission is expressly authorized under Section 49-03-01.4 to hear and determine any allegations of violation of Section 49-03-01 through 49-03-01.5.

Absent an appearance of prejudging the appeal herein, the present record before the Court from the Public Service Commission hearing appears to establish a substantial probability that MDU may prevail in its appeal of the Public Service Commission order entered in Case No. PU-05-551.

IT IS THEREFORE THE ORDER OF THE COURT that the motion of the Appellant to stay the Order of the Public Service Commission, dated June 22, 2006, in Public Service Commission Case No. PU-05-551 is herewith stayed during the pendency of the foregoing administrative appeal or until further order of this Court.

Dated this 26th day of July, 2006, at Mandan, North Dakota.

BY THE COURT:



DONALD E. JORGENSEN  
DISTRICT JUDGE

C: Jerome C. Kettleon  
Carol Larson  
William W. Binek

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

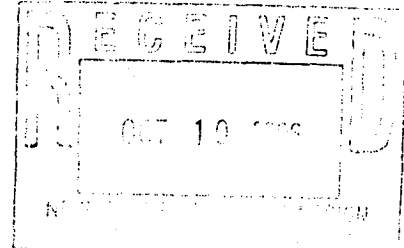
CIVIL NO. 06-C-1177

Appellant,

vs.

North Dakota Public Service Commission  
and Capital Electric Cooperative, Inc.

Appellees.



NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Montana-Dakota Utilities, Inc., a Division of MDU Resources Group, Inc., Defendant above named, hereby appeals to the North Dakota Supreme Court from the Judgment entered in this action on October 09, 2006.

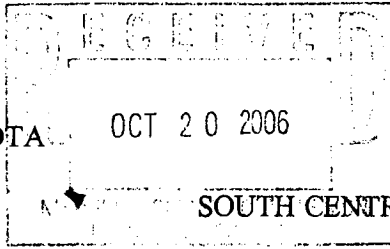
Dated at Bismarck, North Dakota this 9 day of October, 2006.

Respectfully submitted,

Montana-Dakota Utilities Co.,  
a Division of MDU Resources Group, Inc.  
Daniel S. Kuntz (ID# 03490)  
Assistant General Counsel  
MDU Resources Group, Inc.  
1200 West Century Avenue  
P.O. Box 5650  
Bismarck, ND 58506-5650  
(701) 530-1006

Pearce & Durick  
Patrick W. Durick (ID# 03141)  
Jerome C. Kettleon (ID# 03095)  
314 East Thayer Avenue  
Bismarck, ND 58502-0400  
(701) 223-2890

Jerome C. Kettleon



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

OCT 20 2006

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Montana Dakota Utilities Co.,  
A Division of MDU Resources Group, Inc.,

Case No. 08-06-C-1177

Appellant,

vs.

The Public Service Commission of  
North Dakota and Capital Electric  
Cooperative, Inc.,

Appellees.

ORDER DENYING MOTION  
FOR STAY UPON APPEAL  
AND ORDER GRANTING  
TEMPORARY STAY

Under the date of September 25, 2006, this Court entered its Order affirming the administrative decision of the North Dakota Public Service Commission, and on October 9, 2006, entered an Order for Judgment upon the same. Said Judgment provided to Appellant Montana Dakota Utilities Co. 30 days from and after the date of September 25, 2006, within which to comply with the Order of the Public Service Commission.

Now pending before the Court is the motion of the Appellant seeking a stay of the Judgment affirming said administrative decision, under Rule 62 of the North Dakota Rules of Civil Procedure. Said motion offered by co-counsel for the Appellant, Attorneys Daniel S. Kuntz and Jerome C. Kettleison.

In response thereto, Appellee North Dakota Public Service Commission, by and through Attorney William W. Binek, has offered no opposition to said motion to stay Judgment.

Appellee Capital Electric Cooperative, Inc. has opposed any stay by this Court of its Order affirming the Public Service Commission administrative decision.

Both parties have submitted their respective briefs upon the issue, and hearing was held on the 17<sup>th</sup> day of October, 2006, at which time legal counsel for Appellant MDU and Appellee Capital Electric Cooperative appeared before the Court for oral argument upon the same.

#### DECISION

The foregoing proceeding, controlled by the provisions of Chapter 28-32, N.D.C.C., grants to the District Court authority to issue a stay from the enforcement of an order or judgment of an administrative agency. It does not, however, expressly set forth the standards to be employed by the Court in a determination of the same.

In Cass County Electric Cooperative v. Wold Properties, Inc., 253 N.W.2d 232 (ND 1977), it established guidelines for the District Court in consideration of a motion for stay of judgment:

A stay pending appeal under Rule 62(c) and (d), N.D.Civ.)P., should be granted only

(a) after the applicant for a stay has made a strong showing that he is likely to succeed on the merits of the appeal;

(b) after the applicant has established unless a stay is granted he will suffer irreparable injury;

(c) if the applicant for a stay can show that no substantial harm will come to other interested parties; and

(d) if the Court finds that granting the stay will do no harm to the public interest.

This is an administrative appeal under the provisions of Section 28-32-46 and, accordingly, is limited within the context thereof. The scope of said appeal to district court mandates affirmation of the agency decision unless the Court finds express deficiencies as therein itemized. The primary challenge in said administrative appeal, as

offered by the Appellant, centers upon an undisputed constitutional authority to the City of Bismarck to select and grant franchise to an electric service provider versus that of the Public Service Commission to fulfill its statutory obligation in the efficient and effective delivery of electrical services. Appellant argues to the Court that Capital Electric Cooperative v City of Bismarck, 05-C-2303, Burleigh County District Court, assures Appellant success of its appeal in the foregoing administrative decision. No argument has been presented to the Court to establish that the Appellant will suffer irreparable injury, nor that any substantial harm will come to other interested parties. Appellant does suggest that by virtue of conflicting orders from the 05-C-2203, District Court, Burleigh County, North Dakota, and the order affirming administrative decision herein, that a risk of loss of electrical supply to residents of Boulder Ridge may occur. Appellee in its response to Appellant's argument has assured the Court that under no circumstance will any electric service consumer be subject to an interruption or discontinuance of electrical services.

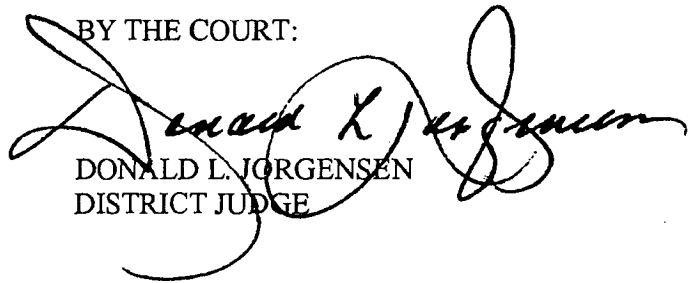
It is the determination of this Court that the Appellant has failed to satisfy the standards established for a stay of judgment in the above-entitled administrative proceeding. Specifically, the Court finds that there has not been a strong showing by the Appellant that it will succeed on the merits of its appeal to the Supreme Court; nor has the Appellant established that unless a stay is granted it will suffer irreparable injury.

IT IS THEREFORE THE ORDER OF THE COURT that the motion of the Appellant Montana Dakota Utilities Co. to stay the administrative decision of the Public Service Commission as herein affirmed and this Court's resulting judgment of affirmation, is herewith denied.

IT IS THE FURTHER ORDER OF THE COURT that a temporary stay of twenty (20) days from the date hereof is herewith granted, so as to facilitate a further motion for stay pending appeal under Rule 8 of the North Dakota Rules of Appellate Procedure.

Dated this 20<sup>th</sup> day of October, 2006.

BY THE COURT:

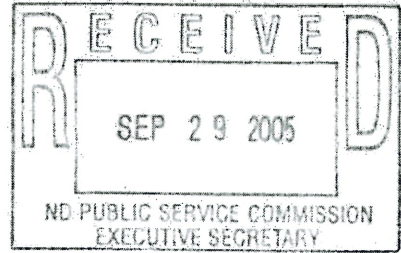


DONALD L. JORGENSEN  
DISTRICT JUDGE

CC: Jerome C. Kettleson  
Daniel Kuntz  
Carol Larson  
William W. Binek

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. *CKL*

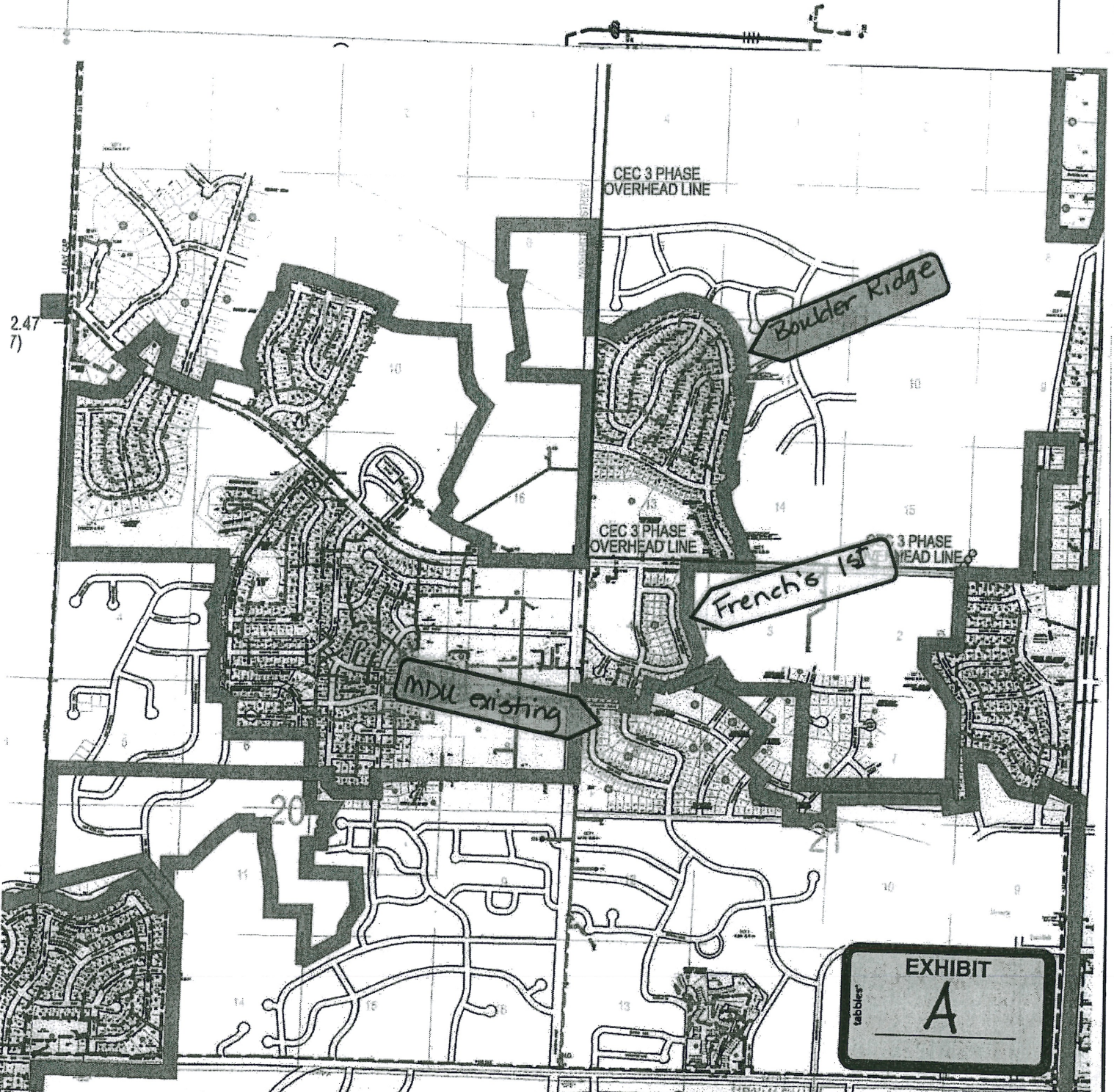
By: *Carol K. Larson*  
Carol K. Larson - #04406  
Attorneys for Capital Electric Cooperative, Inc.  
Pringle & Herigstad, P.C.  
2525 Elk Drive  
PO Box 1000  
Minot, ND 58702-1000  
(701) 852-0381

# 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"

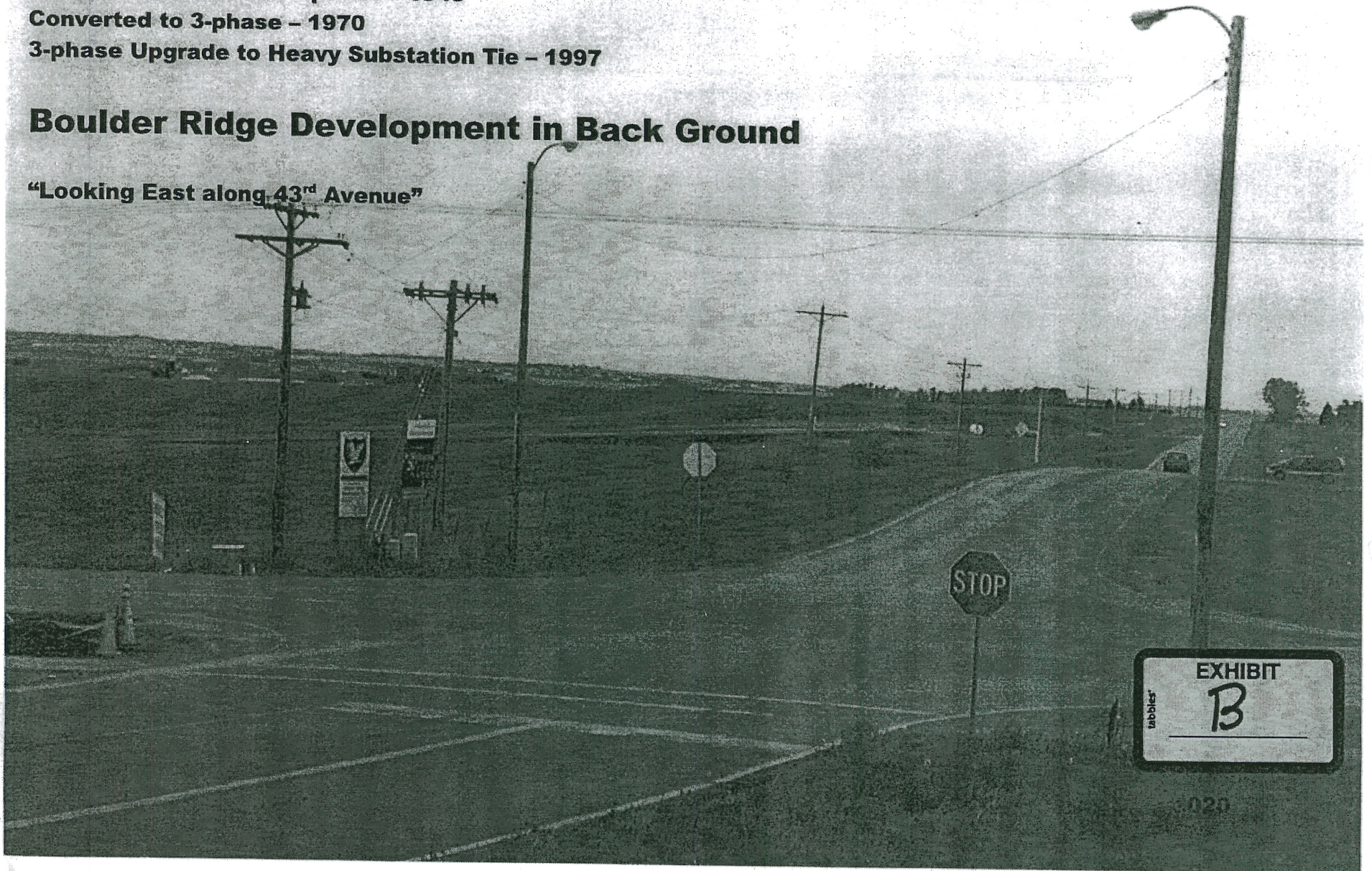


EXHIBIT  
B

020

# **Capital Electric Cooperative**

**North Washington Street**

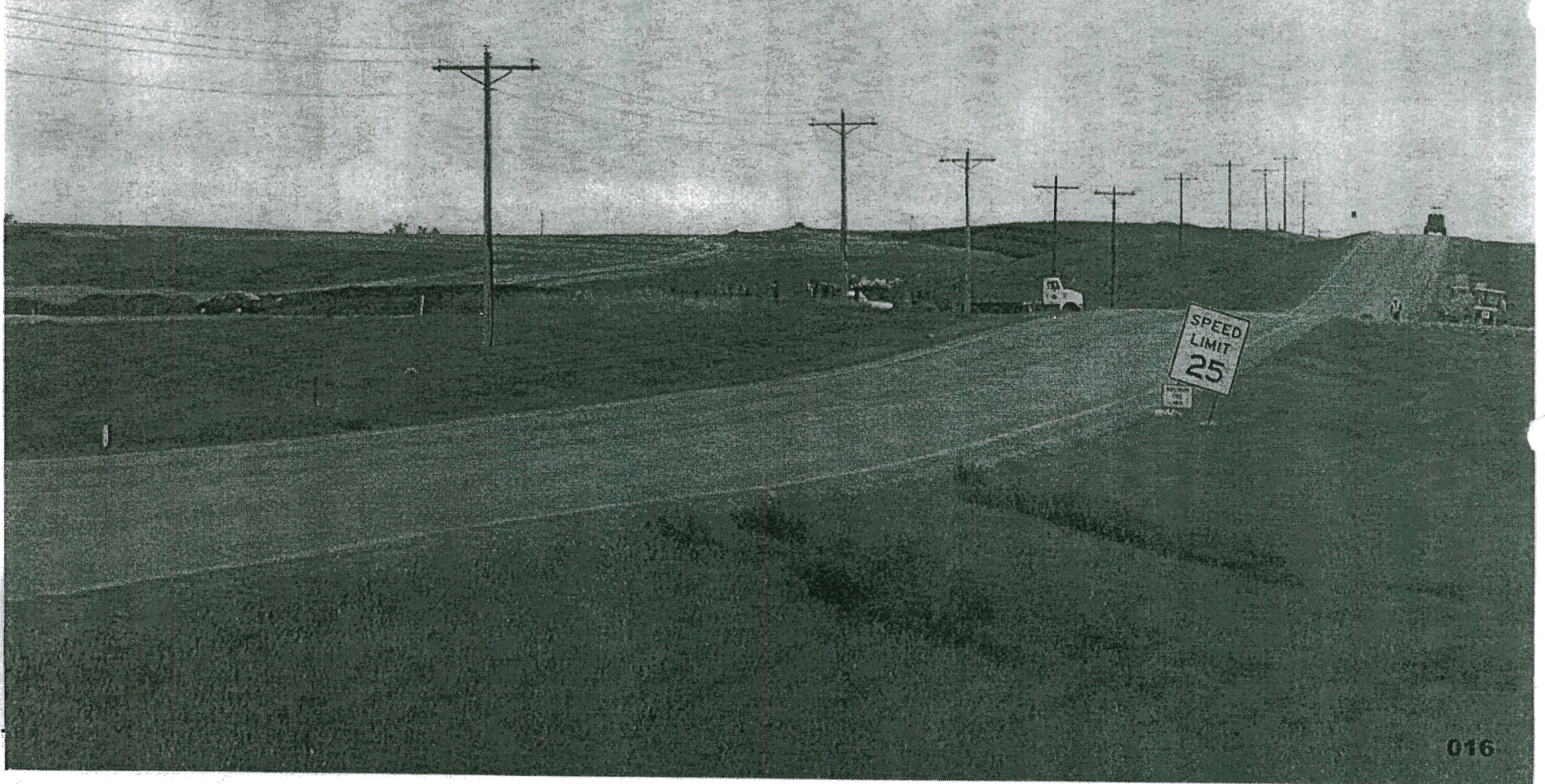
**3-phase Distribution Line**

**Original Construction 1-phase - 1948**

**Converted to 3-phase - 1970**

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

**Boulder Ridge Development in Back Ground**





## **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)**

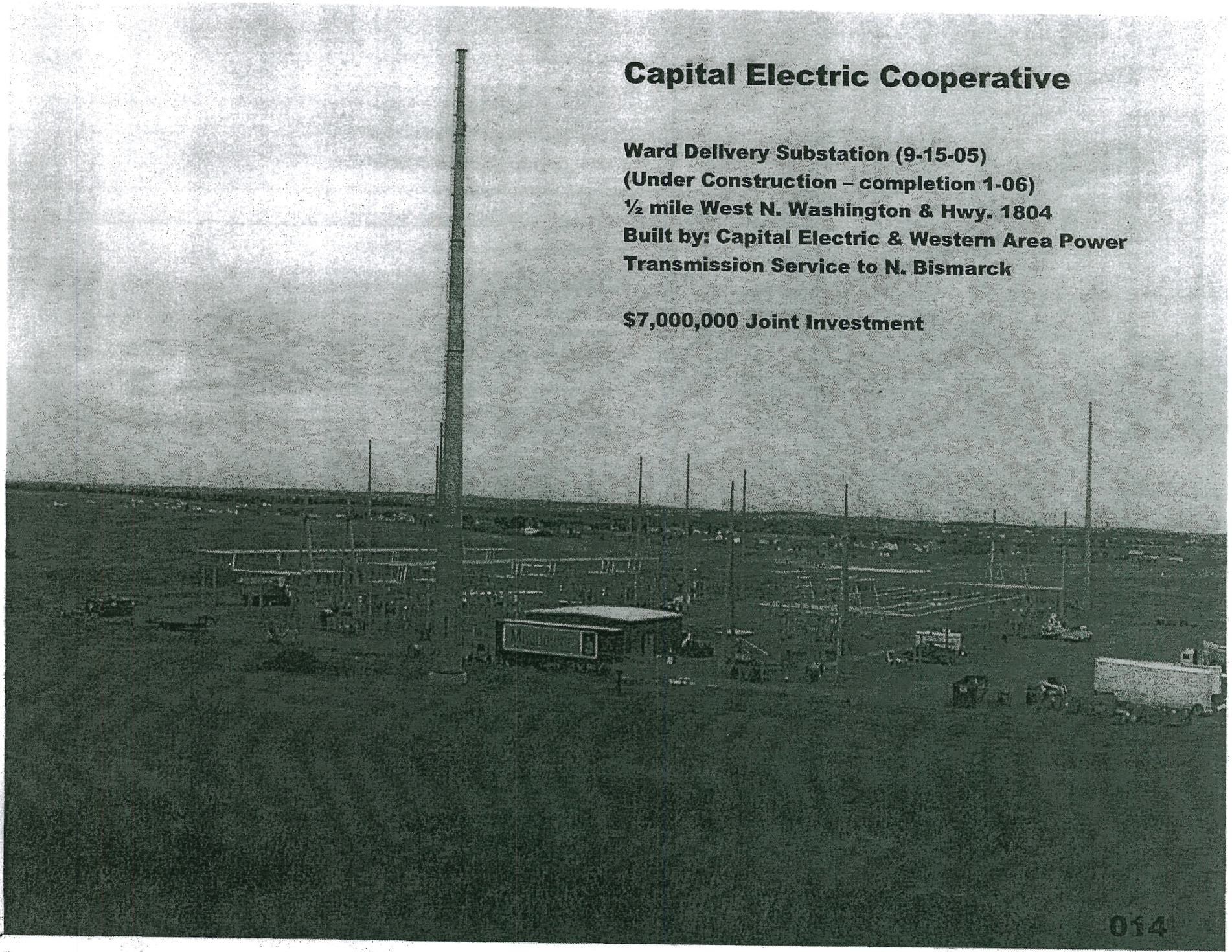
**(Under Construction - completion 1-06)**

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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 of 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

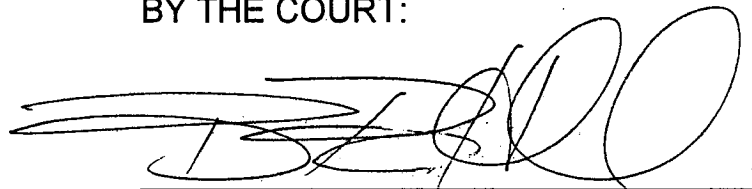
empowers the City to adjudicate conflicting claims between the holders of non-exclusive franchises that the City has granted." Conclusion of Law 6 contains none of the conclusions to which Capital objects.

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 Kettleon  
Daniel Kuntz  
William Binek

8008 5/11  
2006

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.

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, 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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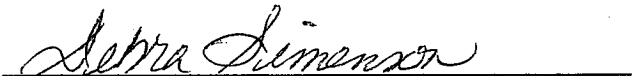
Clk. of Crt. Burleigh Co.

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 is 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 8<sup>th</sup> day of June, 2006.

BY THE COURT



Clerk of the District Court

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 )

MEMORANDUM OPINION  
AND ORDER

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

Case No. 05-C-2303

and )

The Public Service Commission of )  
 North Dakota, )

Defendants. )  
.....)

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.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 unabridgible 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.

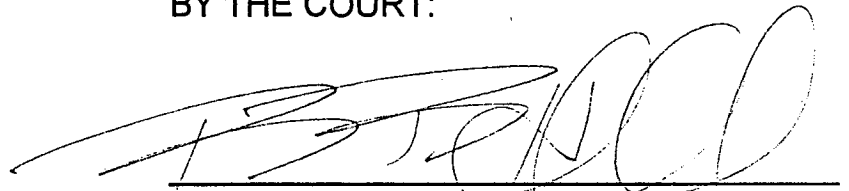
N.D.C.C. §49-02-02(4) gives the PSC the power to compel the obedience of lawful orders of mandamus, injunction, or other proper proceedings. More specifically, N.D.C.C. §49-03-01 allows the PSC to order enforcement of Chapter 49-03, N.D.C.C. with respect to allegations of unreasonable interference by 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

*Debates*  
*of the*  
*North Dakota Constitutional Convention*  
*of 1972*



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TWO VOLUMES  
VOL. I & VOL. II

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WILLISTON

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LOIS VOGEL, *Secretary*  
FARGO

do not want to cut off anybody in offering amendments to the proposal. And for that reason we certainly would not oppose his motion.

PRESIDENT WENSTROM: The question before the Convention is that Committee Proposal No. 1-12 be placed at the foot of the calendar.

As many as are in favor of the motion will say "aye;" opposed "no." The "ayes" have it. It will be — 1-12 will go to the foot of the calendar.

Next for consideration of the Convention is Committee Proposal No. 1-101.

Is there any discussion? Just a moment, the Clerk will read it.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-101, introduced by Committee on Education, Resources and Public Lands:

"Be it resolved by the North Dakota Constitutional Convention that section 139 of the constitution of the state of North Dakota be repealed; and that Article XVII to the constitution of the state of North Dakota be created, both of which pertain to public utilities.

"SECTION 1. REPEAL.) Section 139 of the constitution of the state of North Dakota is hereby repealed.

"SECTION 2.) Article XVII to the constitution of the state of North Dakota is hereby created to read as follows:

**"ARTICLE XVII  
"PUBLIC UTILITIES**

"Section 1. No law shall be passed by the legislative assembly granting the right to construct or operate any public utility or similar service within a city without requiring the consent of the governing body of that city."

PRESIDENT WENSTROM: Is there any discussion?

DELEGATE DEVINE: Mr. President.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President, Fellow Delegates:

Committee Proposal 1-101 is the committee's version of an updated Section 139. And it is the same as Section 2 of Committee Proposal No. 1-20 prior to amendment. Committee Proposal No. 1-20 was the one dealing with corporations. And we amended it to remove any sections on which there were questions. And we have done so.

Basically Section 139 provides now that: "No law shall be passed by the legislative assembly pertaining to 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." And a street railroad isn't too big of an issue any more. The committee decided to bring this section up to date and recognize modern technology. We have made several changes which I do not feel have changed the basic intent of the section. We have changed the enumerated public utilities to the general term "public utilities or similar service". It was our intent that this term would not only include telephone and telegraph but would include such things as natural gas systems, water systems, cable TV and other things that may not even be dealt with at this time.

We included the term "or similar service" so that the Legislature could not evade this section by calling the horse a different name.

We have also changed the term "local authority" having control of the street or highway which will be occupied for such purposes to the "governing body of that city". The intent of this change would be to clear up any problems pertaining to a section. What would be the significance when you have a street that runs through the city that is always a state highway or part of it, a county highway or farm-to-market road for part of it and the city street? To avoid this problem we have just amended the reference to local authority.

We also amended the reference to occupying streets and highways and just made reference to "within any city". At this time to occupy — to operate a public utility within a city you would ordinarily have to put poles on the streets. In the years ahead we don't know if this will necessarily be true; as witness a demonstration of a telephone in use on a TV show. Basically the committee looked at this

section as one that reserves the power to local cities, one that will give them the veto power over the operation of utilities within a city. We feel that this is an important right that should be reserved to them.

PRESIDENT WENSTROM: Any further discussion?

Delegate Peterson.

DELEGATE PETERSON: I have an amendment which I believe is at the desk.

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101.

On page 1, delete lines 12 through 15, inclusive, and insert in lieu thereof the following:

"Section 1. 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."

PRESIDENT WENSTROM: Do we have a second to the proposed amendment?

DELEGATE MEIDINGER: Second.

PRESIDENT WENSTROM: Seconded by Delegate Meidinger.

Any discussion?

DELEGATE PETERSON: I want to — Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: As you can see, the amendment is the original Section 139. And in order to bring this to the attention of the delegates, where they stand, of the Rural Electric Cooperatives to the attention of the delegates, I brought it in as an amendment. And I would like to read their position. They firmly believe that Proposal 1-101 does not belong to any state constitution and certainly not in the new constitution for North Dakota.

"We believe, and has so testified before the Committee on Land, Resources and Education, that the proposed language constitutes unnecessary and restrictive legislation. And delegates to this most important convention, legislation simply has no place in our new constitution. No significant reason has been offered to us why this language should be included. Conversely, if included, it would seem only to clutter and confuse our governing document and place a further burden upon our citizenry by virtue of a potential flood of litigation. Statute law now exists covering the concerns which were expressed by members of the committee. We all share in a common concern for the people's rights. It's our sincere belief that the proposal is not in the best interests of the people."

And then one more point, I want to call your attention to the LRC study of 1965 regarding 139. And they say:

"This is a needless restriction on the legislature because the legislature could not grant any right to utilities to build and operate in a city."

PRESIDENT WENSTROM: Any further discussion?

DELEGATE LANDER: Mr. President.

PRESIDENT WENSTROM: Delegate Lander.

DELEGATE LANDER: Yes. I would rise to speak in opposition to the amendment, which then too, as you know, has been explained to replace the existing section with the one proposed here. I am a bit confused because we debated the whole issue for hours on end all through the summer and fall and again since we've been here as to whether there ought to be any in there at all. And one of the main reasons that we have anything in here was because Delegate Peterson's concern was shared by some of the rest of us that we really ought to maintain the veto power of the city.

We tried in reworking this to have a statement which would at least be relevant and relate to what is true today. It would seem to me that the most important choice here is between adopting 101 as proposed or simply repealing 139. If you do not desire to have any statement at all, please do not go back to the archaic old wording.

PRESIDENT WENSTROM: Any further discussion?

Delegate Kelsch.

DELEGATE KELSCH: I wonder if Delegate Peterson, who is suggesting the return of the old language, could point out where they differ?

DELEGATE PETERSON: Well, actually, as far as the REC's are concerned, they prefer deletion. And probably there is—in my estimation the only difference as far as I was concerned at the time that we worked on this was that I wanted the words "local authority" retained. And other than that I—I myself am not taking a specific position. I'm speaking mostly for the REC position.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: One more question. Do I understand that the Rural Electric Co-ops are opposed to cities having the power to decide whether or not—when and how their streets may be used?

DELEGATE PETERSON: Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: I read the statement that they gave. And I can give a copy to you if you want what I read.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: To answer Delegate Kelsch's question, I believe her statement was prepared before or without the realization that Section 139 was even in the constitution. Because when they came in with a prepared statement and we pointed out that Section 139 was there, they couldn't understand why we were addressing ourselves to this subject. They were seemingly unaware of Section 139.

To answer your specific question, I asked them that. They said, "No." They said the cities should have the franchise power.

DELEGATE SANSTEAD: Mr. President.

PRESIDENT WENSTROM: Delegate Sanstead.

DELEGATE SANSTEAD: Well, Mr. President, as a member of the committee also, I was a little dubious about this. And I would say that the REC's came back after the initial submission of this twice on occasion and said they were still opposed to the inclusion of this specific article, particularly from a point of view that the consent of the governing body in that city could well extend far beyond the streets and highways operation as the language was now worded. And I would just agree and say that the entire franchise thing—I disagree with Delegate Devine in the sense that I believe that we have extended over into the entire franchising possibilities in cities. And I realize that was the intent of the committee. But at the same time I think it might be leading to a great deal of struggle, and a great deal of difficulty outside of the realm of courts and maybe within the courts, particularly in regard to the fact that the governing body of that city shall make these decisions. And when you get into this kind of a struggle, which might be a struggle between a private utility and a cooperative, you know, of course, what could happen to that governing body. I can imagine all the luncheons, dinners, meals, trips and everything that could well be involved in the decision of a city governing body making this kind of a decision. And I think really legislating has been indicated in the Constitution by changing just the provisions proposed and cites to the franchise provision. And I, while not wanting to return certainly, Delegate Lander, to the archaic language which the committee dealt with, I am going to vote "no". Because I don't think we ought to interject ourselves into this kind of situation.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Peterson.

DELEGATE CART: Mr. President.

PRESIDENT WENSTROM: Delegate Cart.

DELEGATE CART: This is kind of a unique question before the assembly. All that I can see that this new proposal by the committee does is to broaden the area from the few that were enumerated in the original Constitution. It takes in all public utilities.

I would like to comment further, though, in regard to what Delegate Peterson has said, that the REA or the Rural Electric Association or REC's are not public

utilities. They have a right under the statute as passed in 1937 to serve those who desire their services in the rural areas. And they have also the right by the management of the REC's to refuse service whenever they so desire. That has all been tested out in court in the Williams County v. The Board of Railroad Commissioners, Public Service Commission, way back in 1954-55, where the District Court pointed these things out. And it was affirmed on appeal to the Supreme Court. So you have a unique situation here where they are wanting to stop the cities from having control over their own streets and alleys, and the franchising of a public utility within the city. For what purpose, I'm just at a loss to understand.

PRESIDENT WENSTROM: Any further discussion?

Delegate Aubol.

DELEGATE AUBOL: Mr. President, I think that the proposal before us would include REC's. It says "public utility or similar service". Now I didn't appear before this committee and I haven't heard their arguments. But I think that one of the objections that the REC's have to this provision is that they think it is statutory to a certain degree. And also because in a recent court decision that has affected their operation in North Dakota. If I recall correctly this — what they are afraid of is that they can work in a rural area or around a town, outskirts, put up their lines and serve the area and this provision leaves it wide open for the city to go out and include them within the city limits by extending the city limits and then telling the REC that they cannot operate in that area that they have developed. And I think there was an occasion just recently that stemmed a concern of this section. But somebody on the committee knows more about this than I.

PRESIDENT WENSTROM: Delegate Fritzell.

DELEGATE FRITZELL: Mr. President: I don't know if I can clarify some of this a little. I was on the committee. And I certainly — I don't feel to strongly about including this one way or the other. But we were trying to rework 139. And I certainly hope you don't — I am against the amendment of going back to the archaic language. But we did have some legal advice on this, and they told us that there was nothing that would prevent the city from giving two franchises under this particular proposal. But the REC's definitely did come in and were definitely against the proposal. And as I see it now they would prefer to work under 139 which they didn't know was in the Constitution until — until during our committee meetings and then they would work under our present proposal 101. But, as I said, I have no strong feelings about leaving either one of them in the Constitution.

PRESIDENT WENSTROM: Any further discussion?

The question before the Convention is —

DELEGATE DEVINE: Mr. President.

PRESIDENT WENSTROM: — on the adoption of the amendment as offered by Delegate Peterson.

Delegate Devine.

DELEGATE DEVINE: Just a short statement. The League of Municipalities did appear. They are in favor of this. I feel that there is a basic right here. This is why I would like to see it personally included in the Constitution. Should we reserve this power to the cities? I believe that we should reserve as many powers to local government as is possible.

PRESIDENT WENSTROM: Any further discussion?

The question is on the adoption of the amendment as offered by Delegate Peterson.

Those that will favor it will vote "aye," and those that will oppose it will vote "no." As many as are in favor of the motion to adopt the amendment will say "aye;" those opposed vote "no." The "noes" have it, and the amendment lost.

Now we are back on Committee Proposal No. 1-101.

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: I decided I'd be in order because I really want to address the thing before us rather than talk previously. I think we should understand the history of why this kind of a section is in a constitution written in 1889.

It was a custom back at that time in the latter part of the eighteen hundreds for legislatures to be wined and dined and sold on the idea of legalizing franchises for different public utilities within specific cities. And so we had a lot of special and local legislation.

Now we have before us the Report of the Constitutional Revision Commission that met in the sixties. And it recommended that 139 be repealed. And because, as Delegate Peterson said, this is a restriction on the Legislature. And it pointed out that in the legislative article there is language prohibiting special and local legislation. And this language is in Proposal 1-85, which if we have not passed already we will be passing in the near future. And so we will carry forward the prohibition against local and special laws.

Now since the REC's have decided that this is a matter of concern, and since the questions of territorial status of the private utilities and the REC's is in flux, I think that in view of the recommendation that this section be deleted by previous study, and in view of the fact that the REC's will feel that this is a legislative matter, and they feel it is a matter of concern to them now, I think the subject really should be left to the Legislature and let them fight out the battles between the private utilities and the REC's rather than us try to be the Legislature here. So I would urge the Convention to vote "no" and defeat this proposal.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: If I could understand the reason for the concern I would go along with Delegate Omdahl. What bothered me about his argument is that he's urged on the one hand that the Legislature does not have the power to pass local or special laws relating to the city affairs, and yet you're urging that the matter should be left to the Legislature. Now either this is a question, it seems to me, of home rule of the cities or it isn't. Now I might want to agree with Delegate Omdahl it doesn't need to be in the Constitution if we have a home rule provision in our Constitution that does leave the matter of home rule to the cities. But I think the issue at stake here, as I think we've all probably decided, if we adopt the later section which we will come to, the Legislature shall not grant franchises to municipalities, the Legislature cannot pass local laws, then we are saying this is not a matter that should be left to the city. So if I could see a real reason — now it seems to me that either this — there is territorial rights or dual franchises or single franchises be granted, this is a problem that anybody that wants — has that problem is going to have to face in dealing with the city. And I don't think it should be a legislative question. I agree it shouldn't be a legislative question. But if I could see any real reason why I think it should be in the Constitution — I don't think it should be in there — if I could see any reason they fear its presence in the Constitution. I'm really at a loss to understand what their reasoning is.

DELEGATE SANSTEAD: Mr. President.

PRESIDENT WENSTROM: Delegate Sanstead.

DELEGATE SANSTEAD: I think the real answer to the question raised by Delegate Kelsch is the fact that the recent Crosby case, which was a serious case as far as the REC's were concerned and which will be appealed very shortly as their spokesman told us, that very case left the decision more to the cities. And as a result of that the REC's would rather take their chances in the courts rather than have something like this specified within the framework of the Constitution. And I think that's very understandable from their point of view.

The whole question, as my colleague here has said, putting 76 is dynamite into the Constitution at this point. It reminds me a little bit of a recent play I saw in Chicago called "Hair". There's something in it to insult everybody. And I think we are getting pretty close to that in some of these kinds of decisions when, in effect, we could just as well leave it alone and do as other people recommended, leave this section out of the Constitution. Because it is not a serious question at the present time except the courts work a decision between the REC's who have worked into some city areas and who do have poles sticking into places like Bonanza here in Bismarck and other places. I think those places are essentially that kind of decision. And we ought not to specify it by including this new wording in the Constitution.

PRESIDENT WENSTROM: Any further discussion?

Delegate Diehl.

DELEGATE DIEHL: Mr. President, members of this assembly:

I have conferred with the REC's on this matter. But I am a little bit confused or a little bit concerned about the language here changing "to construct or operate". Originally it was "construct and operate". I'm concerned about those Rural Electrics who are already in the cities. And this, as I understand it, would not allow them to continue to operate. So it puts them in kind of a precarious position. Maybe we wouldn't have any trouble, but in my particular co-op around Grand Forks we're in the city in areas. And we would run into some problems. Presently we're trying to get a franchise to continue to operate, which of course we will do, I believe. And this is not unusual to have more than one utility of one kind or another operating within one city. Twin Cities, I think, has at least six franchises to different utilities — the same kind of electric utilities. And that is my only concern about this. I really think it is a legislative matter myself and probably shouldn't be in the Constitution.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President: I would like to attempt to ask — answer a couple questions that have been raised on the floor.

First of all, I do not view this section as an REC versus public power proposition. I happen to be a member of a law firm that represents an REC, and I certainly don't view it as that type of situation.

The second proposition is a reference that's been made a couple times to a Williston case. The case I think that they are referring to is a proposition where the REC's were serving some people that were later annexed into the city. The court initially at this point and time has said that the city then has the right to control the service after the annexation. This particular case was not decided on Section 139. The case, as I understand it, did not refer to 139 as it now exists. It was decided on statutory law.

So I would like to see that particular case or particular problem held outside of the discussion of this section. Plain and simple question before the body is should the city have the right to control utility or similar type services within their boundaries.

PRESIDENT WENSTROM: Delegate McIntyre.

DELEGATE McINTYRE: Mr. President. It seems to me that most of the discussion has dealt in line with the REC position and that it should either be repealed or new language, as stated in 101, be adopted. Now we voted down the amendment to go back to the old section. But I don't understand why, if this is the question, why an amendment hasn't been made to repeal this section. Overtures from both the committee and from the floor here this morning have told us this. Now if we vote "no" on 101, we — and that prevails — we go back to the old language. So I have no alternative but to vote "yes".

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President: I have to confess that I'm confused, I think with a lot of other people, but as I read this section what it really says is that the Legislature does not have power over the political subdivisions, particularly cities. In 1965, when we had the bitter, bitter territory fight in the Legislature, part of the language of that legislation granted electric cooperatives the right to continue to serve customers that they were serving in territory that was annexed to a city. For example: If a farmsite alongside of Grand Forks was served by an electric cooperative and industrial development developed along that area, all of which was served by a cooperative, this territory would be subsequently annexed to Grand Forks and the City of Grand Forks, the commission, voted to not allow that electric cooperative to continue to serve those customers and would force them to abandon all of their facilities because the City Commission voted that way, the Legislature by this language would be unable to protect that cooperative from that sort of action.

And, Mr. President, the political subdivisions are creatures of the state and they are to be governed by the policy board of the state. And are we to disinvolve the state with this kind of language and not let them govern the political subdivisions? I think, Mr. President, I think we should move, and I do move, that this be moved to the bottom of the calendar.

PRESIDENT WENSTROM: Delegate Sinner moves that Committee Proposal No. 1-101 be placed at the foot of the calendar.

Do we have a second?

DELEGATE KWAKO: Second.

PRESIDENT WENSTROM: Second by Delegate Kwako.

The question is on Delegate Sinner's motion that Committee Proposal No. 1-101 be placed at the foot of the calendar.

As many as are in favor of the motion say "aye," those opposed "no." The "noes" have it and the motion lost.

Delegate Aubol.

DELEGATE AUBOL: Mr. President: May I inquire of possibly one of the committee members if they considered any amendment that might — it appears that the REC's have expressed their situation, and I'm sure it would also be expressed by a private utility if it were placed in the same situation that the REC's have found themselves in up in Crosby.

PRESIDENT WENSTROM: Will one of the committee members answer Delegate Aubol's question?

DELEGATE DEVINE: Delegate Aubol, one question raised was this particular problem. And I am referring to my notes at the time they appeared. And my question to them is what to do when the city annexes territory concerning an REC, because I was concerned that this may be an unfair type situation. Their answer was that they are protected. I don't know what the nature of the protection is. This was their plain and simple — their people, their attorney was there, and they told me they are protected. Because I was thinking of putting in a specific provision to protect REC's and this type of thing. So that they don't lose something that they have, their investment if nothing else, in serving an area that later was annexed. And they came back plain and simple with their explanation that they were protected.

DELEGATE KELSCH: Mr. President.

PRESIDENT WENSTROM: Delegate Kelsch.

DELEGATE KELSCH: We may have a tempest in a teapot, I don't know. But I do think that in response to Delegate Sinner's question, the Legislature will always retain the power, and it does exercise the power, to specify how territory will be annexed to cities. It is a rather controversial problem in the Legislature, but they do have that power. I don't know if the present annexation laws govern that to protect a utility that's now serving an area. I think they should be. I don't think that their property should be forfeited. But I think that the basic issue is are we prepared to say that cities — that this is a question for cities to decide who will use their streets or not or should the Legislature get in the act? And I don't imagine the Legislature really cares to get in this act. But I do think that they have the power. I think all the Supreme Court said in that case, if I'm not mistaken, is the cities have the power to decide who should use the streets. It didn't say it couldn't grant 55 franchises if they want to. It is up to the city. You have got a problem of new territory if someone's already there. No reason why the city couldn't say you could stay in the new territory.

PRESIDENT WENSTROM: Delegate Meidinger.

DELEGATE MEIDINGER: Mr. President: In partial answer to Delegate Aubol, these people did appear before us and objected to the language that we had. We then put off further consideration for four or five or six days and they again appeared before us. They offered no satisfactory amendments to the committee. And that was the result of it.

PRESIDENT WENSTROM: Delegate Sinner, did you wish the floor?

DELEGATE SINNER: Mr. President: After Delegate Kelsch's statement, I think that we prohibit the granting of franchises to electric cooperative in cities over 2500. And by that sort of combination of circumstances and combination of laws, the city could not grant that franchise. And this is all new to me, this whole discussion. But I was deeply involved in that other issue in '65 and I know that it's a very complex question. And I'd hate to see us by sheer oversight here do something that we didn't intend to do at all.

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: I have to agree with Delegate Kelsch. I think we do have a tempest in a teapot. And I don't think it was the intent of the committee to change the meaning of 139. I arrived at the conclusion that 139 was extraneous language without regard to the REC's. And I still think Section 139 is extraneous language. And I have an amendment at the desk which would leave the language in 1 and 2 that Section 139 of the Constitution of the State of North Dakota be repealed. And which would strike the rest of that title and leave Sections 6 and 7, which would merely repeal Section 139. I would like to move that amendment at this time.

PRESIDENT WENSTROM: It has been moved — Delegate Omdahl moves an amendment to Committee Proposal 1-101.

Would you read it from the desk?

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101. In line 2, following the word "repealed" delete the balance of the line.

Delete lines 3 and 4.

Delete lines 8 through 15, inclusive.

And renumber the lines accordingly.

PRESIDENT WENSTROM: Now do we have a second?

DELEGATE PETERSON: Second.

PRESIDENT WENSTROM: Seconded by Delegate Peterson.

Now any discussion? Any discussion?

Hearing none, the question is on the adoption of the amendment as offered by Delegate Omdahl. As many as are in favor of the motion will say "aye," those opposed "no." The Chair is in doubt. Those that are in favor will vote "yes," those opposed will vote "no." The key will be opened, you will record your preference.

Has every delegate indicated his choice? Any wish to change? Hearing none, the vote is closed.

Roll call discloses 50 "ayes," 43 "nays," five delegates absent and not voting. The amendment is adopted.

Now we are back on Committee Proposal No. 1-101 as amended.

DELEGATE LONGMIRE: Question.

CHIEF CLERK GILBREATH: Suspend the rules and deem it properly engrossed.

PRESIDENT WENSTROM: Can't do it.

DELEGATE HAUGEN: Mr. President.

PRESIDENT WENSTROM: If there is no further discussion — Delegate Haugen.

DELEGATE HAUGEN: I believe a motion to suspend the rule and consider it properly engrossed is in order, and I do so move.

PRESIDENT WENSTROM: Delegate Haugen moves that the rules be suspended; that Committee Proposal No. 1-101 be deemed properly re-engrossed; that it be placed on the calendar for first passage as amended. Do we have a second?

DELEGATE LONGMIRE: Second.

PRESIDENT WENSTROM: Seconded by Delegate Longmire.

Delegate Baker.

DELEGATE BAKER: I resist the motion to suspend the rules on the grounds that now we have a whole new ballgame. And I think we better check it out a little more.

PRESIDENT WENSTROM: Any further discussion?

The question is on the suspension of the rules; that the proposal be deemed properly re-engrossed; that it be placed on the calendar for first passage as amended.

As many as are in favor of the motion will say "aye," those opposed "no." The "noes" have it and Committee Proposal No. 1-101 will be on the tenth order of business tomorrow.

*Debates*  
*of the*  
*North Dakota Constitutional Convention*  
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PRESIDENT WENSTROM: Delegate Cart, did you have a question?

DELEGATE CART: No. It would be the same answer they got.

PRESIDENT WENSTROM: I believe Delegate Birkeland wanted the floor.

DELEGATE BIRKELAND: It's been answered.

PRESIDENT WENSTROM: It's been answered.

The question before the Convention is on the first passage of Committee Proposal 1-96. No further discussion?

Those in favor of passage will vote "aye," those opposed will vote "nay."

The Clerk will open the key. You will record your vote.

Has every delegate voted? Any delegate wish to change his vote? The vote is closed.

The roll call discloses 69 "aye" votes, 27 "nays," two delegates absent and not voting. Committee Proposal No. 1-96 is passed.

Next for consideration, Committee Proposal No. 1-101.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-101, introduced by Committee on Education, Resources and Public Lands:

"Be it resolved by the North Dakota Constitutional Convention that section 139 of the constitution of the state of North Dakota be repealed.

"SECTION 1. REPEAL.) Section 139 of the constitution of the state of North Dakota is hereby repealed."

PRESIDENT WENSTROM: Any discussion?

DELEGATE LITTEN: Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: Mr. President. Fellow delegates, I have an amendment. I'll appreciate having it read at the desk. It's been distributed to everybody's desk, incidentally, fellow delegates.

PRESIDENT WENSTROM: Will you read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to Proposal 1-101:

On page 1, line 2 of the title, delete the period and insert in lieu thereof the following: "; and that article XVII to the constitution of the state of North Dakota be created, both of which pertain to public utilities."

On page 1, line 6, add the following new section:

"SECTION 2.) Article XVII to the constitution of the state of North Dakota is hereby created to read as follows:

#### "ARTICLE XVII

#### "PUBLIC UTILITIES

"Section 1. No law shall be passed by the legislative assembly granting the right to construct or operate any public utility or similar service within any city without requiring the consent of the governing body of that city."

PRESIDENT WENSTROM: Do we have a second to the proposed amendment?

DELEGATE DECKER: Second.

PRESIDENT WENSTROM: Delegate Decker seconded.

Delegate Litten.

DELEGATE LITTEN: Fellow delegates, you recognize immediately, of course, this proposed amendment restores the Committee Proposal which we discussed on, I believe it was, either Wednesday or Thursday of last week, and we turned it right back to where the Committee on Resources, Education and Public Lands was when we made our original presentation. I can't put this discussion in any better terms than Delegate Miller did here a few moments ago when he said that — when he was talking about consideration on the previous proposal having to do with the fact that it boiled down to personal philosophy, and that's exactly what 1-101 does; it boils down to personal philosophy.

We can visit about the problems with reference to the fringe area. We can talk about race. We can talk about the problems of the REC's. But you can't escape the fact that what we're really talking about is the very simple problem or proposition having to do with the home rule and the rights of our cities in North Dakota.

Now, very simply, this amendment is going to accomplish three very salient points that our Committee has discussed at great length. In the first place, it is going to preserve the concept of Section 139 of our present Constitution. Secondly, this amendment is going to prohibit the Legislature from usurping the authority that justifiably belongs to our cities. We're hearing a lot about home rule these days and we are rather enthusiastic about it; but when we start talking about public utilities or similar services, for some strange reason we think that this concept belongs in another ballpark.

And then thirdly, fellow delegates, and probably the most important point of all, is that this amendment and this Proposal from our Committee reserves the exclusive rights to the cities to franchise, and we submit to you, Mr. President and fellow delegates, that without a doubt and no question at all, the cities of North Dakota deserve the right to guide their own destinies within the boundaries of their respective cities. This is the amendment.

PRESIDENT WENSTROM: Any further discussion?

DELEGATE SINNER: Mr. President.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: If you look in Section 6 of Committee Proposal C-12, which we passed just a short time ago, which establishes the home rule concept that Delegate Litten has just spoken of — pardon me — Committee Proposal 1-12 — you will find the language "The legislative assembly shall provide . . ."

Are we now to give the cities veto power over the Legislature? Because that's what Committee Proposal 1-101 would say, if we were to put this language back in. We have already established the concept that the Legislature shall provide for the concept of home rule. Are we now saying that the cities shall have veto power over the Legislature in its effort to protect the rights of citizens and citizen groups in the exercise of that home rule concept? This is simply what this section means and can mean, and without trying to hide any of it, this is what it's all about. If an area west of Bismarck — a traditionally rural area — is served by a rural electric cooperative, and the city expands into that area, the city may then say to the REA, "I'm sorry. You can't serve any more. You have to take your — pull your poles, get your services out, because we can't franchise you because we're larger than 2500 citizens and the law prohibits us to franchise you," and the Legislature can't protect them because, under this language, we would give the city council veto power over the Legislature. If in my town, which has been served by Otter Tail Power, the City decided to franchise an REA, the Legislature would have no way, under this language, to protect the property of the Otter Tail Power Company in my town.

Now, Mr. President, what's basically wrong here is that it denies to the Legislature the right to protect the property of the citizens. It gives to city government veto power over the duties of the Legislature to protect those rights.

Secondly, the language of the amendment is not the same as the language of old 139. The language of 139 was bad enough; but a neat little replacement has been made. The word "and" in line 2 has been substituted by the word "or" — pardon me — the word "or". Under the old language, the Legislature could at least allow an existing utility in a newly-franchised area, which did not include that earlier utility, the Legislature could at least allow them to operate. Under this language, the Legislature could not even do that. Mr. President, the amendment that we adopted the other day when we repealed both of these sections and presented that language as it is now before us, without this amendment, is the right approach because it preserves for the Legislature the right to protect the property and the property rights of all its citizens.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President and Fellow Delegates:

I'd like to make three points, and that is the amendment as is proposed is not granting a new right to the cities. Section 139 contains essentially the same provisions as to utilities, telephones, telegraphs and street railroads. Now, we have broadened it. We are not denying that. We're taking into consideration such things as cable TV. So we're not creating a new right. What we're trying to do is preserve the existing rights of cities to franchise.

Point No. 2.: There was some discussion that we have home rule — that this

takes care of it. No, it does not. Some of the cities will not exercise the home rule provision. This amendment as proposed will preserve those cities who do not exercise this provision the franchise right. I think this is important — that the cities who stay with the the form of government. that we now have will still have their existing rights as they do under Section 139.

And, No. 3, I won't be as definite about this, but I checked on the word — the impact of the word "or" as against "and," as suggested by Delegate Diehl, and I was told by the Public Service Commission that in law it has no law or effect, and now that's relaying an opinion that was expressed to me and is not my opinion.

PRESIDENT WENSTROM: Further discussion? Delegate Nething.

DELEGATE NETHING: Mr. President and Fellow Delegates:

It seems to me that the only thing we should be concerned about here is whether or not we believe that the cities should control the franchising ability that they currently have. Now, as a legislator, it seems rather ridiculous for me to sit and determine what's good for the City of Bismarck or the City of Fargo or Minot or Ellendale — any one of them. Those people in that city are the ones that know what's the best for them, and that's why we've reserved this right of franchising to the cities, and I think that, since it's their business, they're the ones that should have the say — not a legislator, like myself, from Jamestown, because I don't know anything about the problems of that city; those people know them. I think we should adopt the amendment.

DELEGATE DOBSON: Mr. President.

PRESIDENT WENSTROM: Delegate Dobson.

DELEGATE DOBSON: Mr. President. Frankly, I don't see the need for the amendment. Under Section 21 of the Committee Proposal 1-75, which has passed, the Legislature is forbidden to pass local or special laws. It seems to me that this covers the situation, and that the amendment would simply be extraneous.

PRESIDENT WENSTROM: Further discussion?

DELEGATE OMDAHL: Mr. President.

PRESIDENT WENSTROM: Delegate Omdahl.

DELEGATE OMDAHL: It seems to me that this Convention is getting taken into an area which is purely legislative in character. The other night, when I was looking through my big yellow book here that has the recommendations from the 1965 Constitutional Study Commission, and I found that they had recommended that this section be deleted from the Constitution, and I took it at face value and thought "Why should we put it in the Constitution?" The next day it was up on the calendar and we got into all kinds of discussions on the floor that surprised me; and then, after the discussion, I noted a number of lobbyists lurking about the outer chambers for the private companies, and then in the afternoon came a number of lobbyists lurking again, except from the REC's. And so we've had lobbyists lurking about as though we're in the Legislature's business, and I'm sorry to suspect that we are getting into the Legislature's business. I have no objection to the Legislature considering this matter of the territorial integrity and the battle between the REA's and the private power companies, and I think battle between the REA's and the private power companies should be sent to the Legislative Assembly, and if we would kill this amendment and just repeal Section 139 and be silent on the matter, then the Legislature can continue to deal with the question of territorial integrity, as they have for the last few years.

PRESIDENT WENSTROM: Any further discussion?

DELEGATE SIMONSON: Mr. President.

PRESIDENT WENSTROM: Delegate Simonson.

DELEGATE SIMONSON: Would Delegate Litten yield to a question?

DELEGATE LITTEN: Yes, I will.

DELEGATE SIMONSON: Would this apply to counties, too?

DELEGATE LITTEN: I'm just looking here. Pardon me, Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: I don't have a line number, delegates, but the next-to-the-last line applies to cities — "within any city without requiring the consent of the governing body of that city." It has no bearing on the counties.

PRESIDENT WENSTROM: Delegate Rundle.

DELEGATE RUNDLE: Well, Mr. President and Ladies and Gentlemen:

I don't like foxiness and I feel that I was had in this argument before, because we didn't come out in the open when we voted on it. I didn't know quite what it was. Now I don't know that this requires an answer or not, but someone asked the question about the one word being changed from the old Constitution, and I would like to know if there's any reason for that word "and operate" to have been changed to "or". Delegate Litten, could you explain that?

DELEGATE LITTEN: Well — Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: Delegate Rundle, I think I should yield to Delegate Devine, because he's the one that talked to the attorney having to do with these two words.

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President. Delegate Rundle, no; this came in in the drafting procedure. As far as I know, there was no special intent given to it, and I would object to amending it back. The reason we didn't amend it back was because I checked with this guy, and we didn't want to foul up the issue any more.

Does that answer your question?

DELEGATE RUNDLE: Yes, it answers my question. Now I would like you do that then, that you amend it back. We have been getting along after a fashion under the old Constitution, and I do not want to be confused any further. If there isn't any significance, I would like — will you move it?

DELEGATE DEVINE: I'll second it.

DELEGATE RUNDLE: I'll move that the "or" on line 13 be changed to "and."

PRESIDENT WENSTROM: Delegate Rundle, you are offering an amendment to the amendment; is that right?

DELEGATE RUNDLE: Yes.

CHIEF CLERK GILBREATH: Do you want — after the words "to construct," you want to strike the word "or" and insert the word "and"?

DELEGATE RUNDLE: Yes.

PRESIDENT WENSTROM: And Delegate Devine seconded the proposed amendment.

Any discussion? The question is on the adoption of the amendment to the amendment — that we strike the word "or" following the word "construct" in the amendment and as distributed, and insert the word "and."

So it would read "construct and operate".

As many as are in favor of adopting the proposed amendment will say "aye," those opposed "no."

The "ayes" have it and the amendment is adopted.

Now we're back on the amendment as offered by Delegate Litten.

Any further discussion?

DELEGATE AUBOL: Mr. President.

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: I have only one question, and it's similar to the technicality which was brought up by Delegate Rundle.

The old Section 139 requires the consent of the local authorities having the control of the streets or highways supposed to be occupied for such purposes. Under the proposed amendment, you set up local authorities having controls of the street or highway. It refers to the governing body of that city. So my question is: What's the difference between the old 139 and the proposed amendment?

PRESIDENT WENSTROM: Delegate Devine.

DELEGATE DEVINE: Mr. President, if I may answer the question.

By way of explanation, we first just put the city, and the reason we changed from local authorities was the problem of concurrent jurisdiction of a street going through a town — that maybe part of it may be a state highway, part of it might be a county farm-to-market road, part of it a city street. Who would the local authorities

having the jurisdiction be? And for this reason, we're dealing with cities. We just simplified it to "cities" to get away from this problem of checking with one, two, three or four different governing groups to get the permission. We felt the intent of the provision was to give the franchise power to the cities; so we addressed it to that specifically.

PRESIDENT WENSTROM: Delegate Chase.

DELEGATE CHASE: Just a brief comment.

I think we are being drawn into a utilities-REC Convention fight here in this Convention, which, I feel, has no place in this Convention. It seems to me the Legislature can and should and will pass a law protecting the cities' right to franchise. Now, I'm from a city and I fully agree that that should be in there. As Delegate Omdahl mentioned the '65 Commission recommended we delete this, and I think it should be deleted and we should not be drawing or dividing ourselves in favor or against public or private utilities. I don't think it has anything in there at all.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President. Delegate Simonson and I were talking about the question of why only cities? We've provided the machinery for home rule for counties. Is there a legitimate reason for your language leaving out counties, and would you object to an amendment to include it? I have one ready, but I don't want to move it through the machinery if there's some strong objection.

PRESIDENT WENSTROM: Delegate Devine, do you have an answer?

DELEGATE DEVINE: Were you asking a question that you wanted answered by the Committee? Speaking as to my opinion why the Committee amended this: You get into other political subdivisions, townships and counties. Basically, they're not franchising — staying out of this public power-REC thing that caused all the smoke last time, and, I think, caused the defeat of the Committee Proposal — and this is in answer to the question: We looked at the section and said, "What does it do?" And we felt it gave the cities the franchise right and effectively it gave it only to the cities. You get out into the country and you get into all these problems of concurrent jurisdiction — township, county, state and what not. It comes down to the nitty-gritty — should the city have the franchise right? And we addressed ourselves to that question.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President, I'm going to move the amendment at the desk. If I can get a second, I'll explain why.

DELEGATE SIMONSON: Second.

PRESIDENT WENSTROM: Would you read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to the amendment is as follows:

Under Article XVII, Public Utilities, Section 1., following the words "any city" insert "or county" and following the words "that city" insert the words "or county".

PRESIDENT WENSTROM: The proposed amendment was seconded by Delegate Simonson.

DELEGATE SINNER: Mr. President.

PRESIDENT WENSTROM: Delegate Sinner.

DELEGATE SINNER: Mr. President, I wish, too, that the problems between the investor-owned utilities and the consumer-owned utilities would go away; but, however, much as I wish it, they won't. And for all of the controversy and turmoil that existed in the 1965 session dealing with territorial integrity, the real question was: Do the REC's have a right to a rural franchise? It was the franchise question in the country. And we've been willing to say for years that the cities have a right to grant franchises to investor-owned utilities, and the question in 1965 was will we grant a right for a franchise to a consumer-owned utility in the country?

Now, Mr. President, it seems strange to me that we are willing to grant to a city a veto power over the Legislature that we are unwilling to grant to the county. I think there's every bit of logic on the side of granting the same veto power to the counties. I hope you will support the amendment.

PRESIDENT WENSTROM: Delegate Cart.

**DELEGATE CART:** Well, Mr. President, I'd like to review a little bit of REA history in the State of North Dakota.

In 1937, when the Federal Attorney came up here to Bismarck to promote the adoption of the statute under which these electric companies operate, he sat down with the then Public Service Commission, which included S. S. McDonald, Ben Larkin and myself, and our attorney, and we went over this from beginning to end. He got everything exactly as he wanted it, with a minor exception that was on standards of construction, and the Commission insisted that they would have to observe those standards. Even the private line, if someone builds their own line, has to observe that. That means clearance above ground, crossing a — going over crossings and streets and attachment to homes or buildings. Those are safety things and their lines are just as dangerous as those owned by the Montana-Dakota or the Northern States Power, because if you come in contact with it, you generally get killed. So, with that exception, they got everything exactly as they wanted it, which was a permissive right to serve in rural areas — not an exclusive right — and he didn't want that, because then he would have been up against the problem of regulation. That's why you have regulation — is when you give some company an exclusive right. So they got a permissive right, exactly as they wanted it, and they have the right to discontinue services as the corporation sees fit. Now there's your differences between those two services.

**PRESIDENT WENSTROM:** Further discussion?

**DELEGATE BAKER:** Mr. President.

**PRESIDENT WENSTROM:** Delegate Baker.

**DELEGATE BAKER:** Mr. President, I'm curious about how Delegate Sinner would suggest that such a constitutional provision be implemented. As I'm sure you know, counties do not now have any ordinance-making authority — any legislative authority. Counties operate under state law. Would you suggest that each of the counties then adopt home rule provisions, including the legislative authority?

**PRESIDENT WENSTROM:** Delegate Sinner.

**DELEGATE SINNER:** Mr. President.

Delegate Baker, I'm only suggesting they have the same veto power over the Legislature that this amendment would give to the cities.

**PRESIDENT WENSTROM:** Delegate Aas.

**DELEGATE AAS:** Mr. President and Fellow Delegates:

I would resist the amendment. It's clear that the cities have had the power to issue franchises to authorized franchisees. The county has not had this. The cities do want this for the future. There's no reason to have this in here for any subsequent laws or in this Constitution, and I think it's — it should be clear that if we want to regulate both the REC's and the private power companies, they should all be under the Public Service Commission, and that is when we can stop regulating them. Until that time, the cities need their right, which they have under the present 139, and they will need it in the future. They are disturbed by this, and there is no reason to have the counties in here. It will clutter up the issues. The cities need it and the counties don't have it at the present time and, therefore, I would urge the defeat of this amendment.

**PRESIDENT WENSTROM:** Delegate Knudson.

**DELEGATE KNUDSON:** Mr. President, I also oppose the proposed amendment. I see it as an attempt to further cloud the issue.

I'll reiterate what other members of the Committee have said: All we are attempting to do is continue to permit cities to have a right which they have historically had — the right to grant franchises.

**PRESIDENT WENSTROM:** Delegate Lerberg.

**DELEGATE LERBERG:** I think, under the circumstances, I would oppose the amendment, too, because I feel, as the former delegate has, that it's just muddying up the situation. The counties now have no franchise right or ordinance right, and I personally have never been involved in a rural area problem in terms of this situation; but if you have — I think those of you who have will recognize that this is a fairly basic right and one that probably shouldn't be changed. I have been an attorney for an REA telephone for about 17 years. The REA telephones are under the jurisdiction of the Public Service Commission and have had relatively little boundary prob-

lems under this jurisdiction. The REA electricians are not under the Public Service Commission and they and the investor-owned power companies have had a multitude of boundary problems and have been continually in the Legislature, and until this matter is resolved, I would say that we better leave this section alone for the protection of the cities.

PRESIDENT WENSTROM: Delegate Nething.

DELEGATE NETHING: Mr. President and Fellow Delegates:

I am against this amendment, just as I am for the original amendment. It seems rather foolish to me to have the city first grant a franchise to somebody and then have that same group have to go to the county for the authority for that franchise which the city has already given them, which this amendment would provide. After all, all cities lie within counties; so the counties are, in effect, again controlling the cities, and I think the cities know more of their own problems and should have control of this lone business — not the county commissioners that run the counties.

PRESIDENT WENSTROM: Any further discussion?

The question before the Convention is on the adoption of the amendment as offered by Delegate Sinner.

Those that are in favor will vote "aye;" those opposed will vote "nay."

As many as are in favor of adopting the amendment will say "aye;" those opposed "nay."

The "nays" have it and the amendment lost.

Now we're back on the amendment as — no. We passed that. Okay.

Then we are back on 1-101 — the amendment as offered by Delegate Litten and amended by Delegate Rundle.

So now we are back on the amendment as amended.

The question is on the adoption of the amendment as offered by Delegate Litten.

DELEGATE PETERSON: Mr. President.

PRESIDENT WENSTROM: Delegate Peterson.

DELEGATE PETERSON: I guess I was the one that got this thing back on the floor in the first place. I definitely am speaking for the REC's and myself and for 1,000 farmers when I feel that they feel that this is not good, and I feel it should be out of here. I think it should be deleted as it was passed last time, and I very much oppose having it restored, and we did not discuss it in Committee after the last vote, so I don't know whether the Committee has changed its position in any way. But as far as I'm concerned, if I can't have the old one, I definitely would like to see this one deleted.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Litten — the amendment as it is now amended.

Those in favor will vote "aye;" those opposed will vote "nay." As many as are in favor of adopting the amendment will say "aye;" those opposed "no."

The Chair will rule the "ayes" have it.

DELEGATE SINNER: Let's have a division.

PRESIDENT WENSTROM: A division has been requested. A division is granted.

Again, those in favor will vote "aye;" those opposed will vote "nay."

The Clerk will open the key. Any questions? You will record your vote.

Has every delegate voted? Any delegate wish to change? Hearing none, the vote is closed.

The vote indicates 59 "ayes," 36 "nays," three delegates absent and not voting. The amendment has been adopted.

DELEGATE LITTEN: Mr. President.

PRESIDENT WENSTROM: Delegate Litten.

DELEGATE LITTEN: With your permission, Mr. President and Fellow Delegates, I would like to move that the rules be suspended, that Committee Proposal 1-101 be deemed properly re-engrossed and placed on the calendar for first passage.

DELEGATE STANTON: Second.

PRESIDENT WENSTROM: The motion was seconded by Delegate Stanton, and the motion before the Convention is that the rules be suspended and that Committee Proposal No. 1-101 be deemed properly re-engrossed, to be placed on the calendar for first passage as amended.

As many as are in favor of the motion will say "aye;" those opposed "no." The "ayes" have it and the amendment — or the motion is adopted and Committee Proposal 1-101 is before the Convention for first passage.

The question — Delegate Sinner.

DELEGATE SINNER: Mr. President, I couldn't help resist this one parting shot:

The other day, when we were debating the merits of Committee Proposal 1-89, I heard Delegate Pearce make a statement that was repeated sometime later in the debate, in which he said "Eminent Domain must be under the sovereignty of the State." And it seems to me that that's in large part what we're dealing with here, and I hope that this Convention does not now vote to give the cities veto power over the Legislature.

PRESIDENT WENSTROM: The question — Delegate Aubol.

DELEGATE AUBOL: Mr. President, I have an amendment at the desk that's being prepared; but before that is done, I still have a question on this governing body thing, and if I could direct a question to Delegate Devine —

PRESIDENT WENSTROM: Does Delegate Devine yield?

DELEGATE DEVINE: Mr. President, Delegate Devine yields.

DELEGATE AUBOL: If I recall, you said that you have now given the city board authority to grant this franchise. Now, what happens if this franchise is also going to be involved with county property or state property, such as a highway, and the states say, "No, we don't want this franchise running across our property"?

DELEGATE DEVINE: Mr. President. Delegate Aubol. I'm not sure — you mean if, in order to construct and operate a utility, it will be necessary to — going across on a state highway, for example, the person requesting to design or operate would need an easement. If the property is property of the State of North Dakota, it would need an easement from the State of North Dakota. This does not — if I can go just one step further. Like most other things, if they have to occupy private property, they would have to obtain easements.

PRESIDENT WENSTROM: Delegate Larsen.

DELEGATE LARSEN: Fellow Delegates: Mr. President.

We've heard a lot of argument, but there is one statement that I question a little bit. Sometime ago it was said that people of the city did not and should not have any say in county government. Now, in our county, the people of the city, if they vote properly, they can control the county commissioners — they vote for them — and because of that statement, I'm in very much favor of supporting Delegate Peterson in her statements. I feel that this Section 139 should definitely be left up to the Legislature.

PRESIDENT WENSTROM: Further discussion?

The question before the Convention — Delegate Aubol.

DELEGATE AUBOL: Mr. President. There is an amendment being prepared at the desk, which I would like an opportunity to offer.

PRESIDENT WENSTROM: The Clerk will read the amendment.

CHIEF CLERK GILBREATH: Proposed amendment to Proposal 1-101:

In the re-engrossed Committee Proposal, after the words in the last line "that city" insert the following "provided, however, that no public utility or similar service shall have its property taken without receiving just compensation for the loss of business and for the loss in physical facilities."

PRESIDENT WENSTROM: Could we have a second to the proposed amendment?

DELEGATE BASSINGTHWAITE: Second.

PRESIDENT WENSTROM: Delegate Bassingthwaite.

DELEGATE LANDER: Mr. President, could we have that repeated, please?

PRESIDENT WENSTROM: Delegate Lander, you wish the amendment repeated?

DELEGATE LANDER: Please.

PRESIDENT WENSTROM: Will you re-read the amendment?

CHIEF CLERK GILBREATH: Proposed amendment to Committee Proposal 1-101:

In the last line of the re-engrossed Committee Proposal, after the words, "that city" insert the following: "provided, however, that no public utility or similar service shall have its property taken without receiving just compensation for the loss of business and for the loss in physical facilities."

PRESIDENT WENSTROM: Delegate Aubol.

DELEGATE AUBOL: Mr. President, this question came up the last time we debated this issue, and I toyed with this idea and I talked to some people, and they thought it had some merit. Now, I didn't pursue this thing very far, except we have given the city a lot of power to grant franchises and say who is going to be operating in their city. By the same token, I think we have given the city the power now to say, "Okay, MDU, we don't want you in. Leave!" And the same would be true of REC's. And so I think that both public utilities and similar services should have some protection as to property rights, and it for that reason I offer this amendment.

DELEGATE PEARCE: Mr. President.

PRESIDENT WENSTROM: Delegate Pearce.

DELEGATE PEARCE: I have intentionally stayed out of this debate; but I must point out two things: I suppose a nonprofit corporation could have no damages for lost businesses; and, secondly, I'm not sure who's to pay.

PRESIDENT WENSTROM: The question — can someone answer the question as raised by Delegate Pearce?

The question before the Convention is on the adoption of the amendment as offered by Delegate Aubol. Those in favor will vote "aye;" those opposed will vote "nay."

Delegate Sinner.

DELEGATE SINNER: Mr. President, I'd ask Delegate Pearce who he thinks should pay.

DELEGATE PEACE: Mr. President.

PRESIDENT WENSTROM: Delegate Pearce.

DELEGATE PEARCE: How long have we got?

(Laughter)

I would only say, since I am intimately acquainted with the utility business, anyone who operates on a franchise basis stands to lose his property if his franchise runs out. That's one of the risks of business that you take. Now, if the city gives a franchise to someone other than the one already operating, if they're going to pay for the one that's ousted, if you should pay at all, what should you do? — require the competitor who now has the franchise to pay? That might be impossible. Or ask the public to pay? Equally so. I don't think it could be either one. I think anyone who operates on a temporary-permit basis, which is what a franchise is, whether it's for twenty years or ten, he takes the risks if he loses that franchise.

PRESIDENT WENSTROM: The question before the Convention is on the adoption of the amendment as offered by Delegate Aubol. Those in favor of adopting the amendment will vote "aye;" and those opposed will vote "nay."

As many as are in favor of adopting the amendment will vote "aye;" those opposed vote "nay."

The "nays" have it and the amendment lost.

We're back on first passage of Committee Proposal No. 1-101 as amended.

As many as — those in favor of passage will vote "aye;" those opposed to passage will vote "nay."

The Clerk will open the key and you will record your vote.

Has every delegate voted? Does any delegate wish to change his vote? The vote is closed.

The roll call discloses 63 "ayes," 32 "nays," three delegates absent and not voting. Committee Proposal No. 1-101 has passed.

Next for consideration, Committee Proposal No. 1-57.

CHIEF CLERK GILBREATH: Committee Proposal No. 1-57, introduced by Committee on Preamble, Bill of Rights and Suffrage:

Page 1

1 STATE OF NORTH DAKOTA

2 PUBLIC SERVICE COMMISSION

3

4 Capital Electric Cooperative, Case No.  
5 Inc. vs. Montana-Dakota PU-05-551  
6 Utilities Co. Complaint

7

8

9

10 TRANSCRIPT OF

11 HEARING

12

13

14

15

16 Taken At  
17 State Capitol  
18 600 East Boulevard  
19 Bismarck, North Dakota  
20 February 9, 2006

21

22 BEFORE JUDGE AL WAHL  
23 -- HEARING OFFICER --

24

25

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1 APPEARANCES

2

3 COMMISSIONERS PRESENT:

4 COMMISSIONER TONY CLARK  
5 COMMISSIONER SUSAN E. WEFALD  
6 COMMISSIONER KEVIN CRAMER

7

8 MR. WILLIAM E. BINEK  
9 General Counsel  
10 Public Service Commission  
11 State Capitol  
12 600 East Boulevard Avenue  
13 Bismarck, North Dakota 58505

14

15 FOR THE PUBLIC  
16 SERVICE COMMISSION.

17

18 MS. CAROL K. LARSON of  
19 Pringle & Harigstad, P.C.  
20 Attorneys at Law  
21 2525 Elk Drive  
22 P.O. Box 1000  
23 Minot, North Dakota 58702-1000

24

25 FOR THE COMPLAINANT.

MR. DANIEL S. KUNTZ  
Assistant General Counsel  
MDU Resources Group, Inc.  
1200 West Century Avenue  
P.O. Box 5650  
Bismarck, North Dakota 58506-5650

FOR THE RESPONDENT.

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5 Cross-examination by Mr. Kuntz 110  
6 Examination by Mr. Binek 129  
7 Examination by Commissioner Wefald 133  
8 Redirect Examination by Ms. Larson 137  
9 Recross-examination by Mr. Kuntz 140  
10 Further Examination by Mr. Binek 142

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12 MOTION EXHIBITS:

13

No.	Description	Off'd	Rec'd
1	Montana-Dakota's Requests for Admission	11	13
2	Capital Electric Cooperative's Response to Montana-Dakota's Requests for Admissions	11	13

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15 COMPLAINANT'S EXHIBITS:

C-1	February 8, 2005, letter to Randall Bakke from Dennis Schlenker, with attachments	69	70
C-2	Map of City Limits, Service Agreement, and CEC Distribution/Transmission Facilities in 1973	75	75
C-3	Map of City Limits, Service Agreement, and CEC Distribution/Transmission Facilities in 1993	79	82
C-4	Map of City Limits, Service Agreement, and CEC Distribution/Transmission Facilities in 2005	79	82
C-5	Map of CEC Service Area Boulder Ridge Area	79	82

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1 CONTENTS (continued)

2

3 COMPLAINANT'S EXHIBITS:

No.	Description	Off'd	Rec'd
C-6	CEC Service Area North Bismarck Area	79	82
C-7	Two photographs	109	109

25



1 Bismarck or outside the City of Bismarck where  
 2 Capital Electric has crossed the facilities of MDU?  
 3 A. Along Century Avenue, I believe -- I know  
 4 because we've got -- we don't serve anything there,  
 5 but we have to run a tie line to a big, heavy  
 6 feeder to serve consumers outside of our -- or in  
 7 our area.  
 8 Q. So you cross in or over their lines; is  
 9 that correct?  
 10 A. Well, we try not to, but, sure -- I'm sure  
 11 we do.  
 12 Q. Do you consider that an interference of  
 13 their facilities?  
 14 A. No, because we don't serve anything.  
 15 Q. And it doesn't affect their ability to use  
 16 those facilities, does it?  
 17 A. Our facilities?  
 18 Q. No. MDU's facilities. They can still use  
 19 them the way they've always used them?  
 20 A. That's correct.  
 21 Q. How about in south Bismarck, are there  
 22 situations down there where your lines parallel MDU  
 23 lines that were there before?  
 24 A. That's correct.  
 25 Q. And there's situations there where your

1 is if you have to cross an area that's been your --  
 2 if you have to cross an MDU line to get to an area  
 3 that's designated as your service area, that's not  
 4 interference, is it?  
 5 A. I wouldn't say, no.  
 6 Q. And it's not duplication, is it? If you  
 7 have to cross our facilities to get to an area that  
 8 you're authorized to serve, that's not duplication,  
 9 is it?  
 10 A. No, because we can serve it.  
 11 Q. So if MDU has the franchise to serve  
 12 Boulder Ridge and Capital Electric doesn't, is that  
 13 interference if it has to cross your facilities to  
 14 get into Boulder Ridge?  
 15 MS. LARSON: Objection, goes beyond the  
 16 scope of this witness's -- that's for the  
 17 Commission to determine.  
 18 JUDGE WAHL: Overruled.  
 19 THE WITNESS: Okay. What's the question?  
 20 Q. (MR. KUNTZ CONTINUING) You just described  
 21 for me a situation, Mr. Lipp, in south Bismarck  
 22 where you have to cross MDU facilities, but you  
 23 don't consider that interference or duplication  
 24 because you're reaching an area that is your  
 25 service area and not MDU's; is that correct?

1 lines cross MDU lines that were there before?  
 2 A. I'm sure.  
 3 Q. Do you consider that duplication and  
 4 interference?  
 5 A. No.  
 6 Q. Why is that?  
 7 A. Because we don't serve anything there. I  
 8 mean, it's not --  
 9 Q. Are there situations where you do serve in  
 10 south Bismarck where you cross the facilities of  
 11 MDU to make that service?  
 12 A. Yeah. I'm sure there is down in Tatley,  
 13 I'm sure, because you guys serve.  
 14 Q. And do you consider that duplication and  
 15 interference?  
 16 A. Well, no. I guess -- you can say that it  
 17 is, but, no, to me it isn't.  
 18 Q. And why not?  
 19 A. Well, because we got designated service  
 20 area and then our lines serve that, and you guys  
 21 have designated service area and you serve that,  
 22 so, okay, we cross. You know, okay, if we have an  
 23 outage, we'll have to make damn sure that ours  
 24 is --  
 25 Q. So make sure I understand. Your position

1 A. That's correct.  
 2 Q. If Boulder Ridge is designated by the city  
 3 to be within the franchise of MDU and not within  
 4 the franchise service area of Capital Electric,  
 5 then is MDU's crossing of your facilities on 43rd  
 6 Avenue still interference and duplication?  
 7 A. If you guys -- if it's in your service  
 8 area, no, I would say.  
 9 Q. And those facilities along 43rd, when were  
 10 they installed?  
 11 A. Oh, wow, way back, 19 -- before 1973, I  
 12 guess. It was before my time and then we upgraded  
 13 them.  
 14 Q. And do you know, why were they put in back  
 15 in -- whenever it was?  
 16 A. For tie lines -- for our tie lines for our  
 17 substations.  
 18 Q. So they tie your two substations together?  
 19 A. Right.  
 20 Q. And when MDU went under that line with its  
 21 underground service, did it affect your ability to  
 22 use that line to tie your substations?  
 23 A. No.  
 24 Q. You're still able to use it now the same  
 25 way you have for the last 20 years; is that