IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20060270
Burleigh County District Court No. 06-C-1177

MONTANA-DAKOTA UTILITIES CO., A
DIVISION OF MDU RESOURCES GROUP, INC.

Appellant,

vs.

NORTH DAKOTA PUBLIC SERVICE COMMISSION
AND CAPITAL ELECTRIC COPPERATIVE, INC.

Appellees,

BRIEF OF APPLLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

ON APPEAL FROM
SOUTH CENTRAL JUDICIAL DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE DONALD JORGENSEN

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I. Preliminary Statement.

The decision issued by the North Dakota Public Service Commission ("PSC") was not a unanimous decision and therefore further reference to the PSC with regard to the decision will be to the majority decision of the Commissioners. Furthermore, because this decision is not a unanimous decision and because this proceeding involves a territorial dispute between two electric suppliers and because the Public Service Commission staff did not take an adversarial position in the case, the PSC's brief will, for the most part be limited to a discussion of the PSC's rational for its decision in this case. Factual and Legal arguments will be left to the adversarial parties, Montana-Dakota Utilities Co. ("MDU") and Capital Electric Cooperative, Inc. ("CEC").

II. Public Service Commission Rational for its Decision.

The PSC's authority in this proceeding is under Chapter 49-03 of the North Dakota Century Code, commonly referred to as the Territorial Intergrity Act ("TIA"). The Legislature and the courts have given the PSC explicit directives regarding its role in deciding a complaint case brought by a rural electric cooperative against an electric public utility for interference with existing services of the rural electric cooperative caused by the extension of electric distribution lines of an electric public utility. The PSC is the governmental body that has been given the authority to determine whether or not the provisions of the TIA have been violated.

North Dakota Century Code Section 49-03-01.3 allows an electric public utility to extend its electric distribution lines within the corporate limits of a municipality where it has lawfully commenced operations "provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric

cooperative . . . within such municipality; and provided duplication of services is not deemed unreasonable by the commission." N.D.C.C. §49-03-01.4 provides that "[i]f any 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 any other electric public utility or rural electric cooperative, the commission, after complaint, notice, and hearing . . . shall make its order restraining and enjoining said electric public utility from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe such terms and conditions as it shall deem reasonable and proper."

The PSC recognizes that a city has the right to issue franchises. The PSC does not believe that the right to grant franchises can be costrued in a manner that would compel public utilities to circumvent or violate state laws that are designed to prevent an electric public utility from interfering with the service or system of another electric provider and to prevent the wasteful duplication of capital intensive facilities. The North Dakota Supreme Court determined in Cass County Electric Cooperative, Inc. v. Northern States Power Company, 419 N.W.2d 181,184 (N.D. 1988), that the primary purpose of the TIA was to keep to a minimum the wasteful duplication of capital-intensive utility services.

MDU asserts that the PSC cannot exercise its jurisdiction over a utility in a manner that circumvents the Constitutional provision giving the city the right to franchise public utility service. MDU states that with the exception of the PSC's decision in the present case, every application of the TIA within a city has recognized the city's franchise of electric service within the city. MDU cites as authority for its statement Montana-Dakota Utils Co. v. Divide County Sch.Dist. No. 1, 193 N.W.2d 723 (N.D.

1971), Tri-County Elec. Coop., Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974) and Cass County Elec. Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988).

MDU places its reliance on the constitutional rights of cities to grant franchises and ignores the legislature's mandate against interference and wasteful duplication of facilities. MDU also relies heavily on the precedent established in Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, 193 N.W.2d 723 (N.D. 1971) ("Divide County"). The Divide County case is readily distinguishable from the present case. Divide County was not a complaint case before the PSC under Chapter 49-03, and therefore questions of interference and wasteful duplication were not issues considered in the case. Divide County was not a situation where a rural electric cooperative had built extensive facilities to serve the general area where the annexed property was situated. In Divide County, unlike the present case, the city refused to grant the electric cooperative even a limited franchise. Divide County simply says that an electric supplier must have a franchise before serving within a city. The Court did not order the city to either give or not give a franchise, and the Court did not say anything about what happens when the effect of a city's decision is to cause a violation of separate state laws.

Tri-County Elec. Coop., Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974) ("Tri-County") involved a case before the PSC under Chapter 49-03 regarding an area not annexed to the city. The question before the PSC was whether a certificate of public convenience and necessity should be issued to the investor owned utility to serve the customer in question. The only discussion concerning a franchise related to a possible eventuality that the area could some day be annexed to the city of Jamestown, and the Court observed that the city could give the cooperative a franchise to continue to serve the customers it was serving.

Both Divide County and Tri-County were decided prior to the decisions in Cass County Elec. Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988) ("Cass County") and Northern States Power Co. v. North Dakota Public Service Commission, 452 N.W.2d 340 (N.D. 1990) ("Northern States Power") (collectively referred to as "South Pointe"). The South Pointe cases, like the present complaint case, were complaint cases brought before the PSC under Chapter 49-03. The only real difference between the South Pointe cases and the present case is that in South Pointe both Northern States Power Company and Cass County Electric Cooperative, Inc. had general franchises from the city of Fargo to provide electric service in the annexed area, so the question of general franchise vs. limited franchise was not addressed.

The Court, in deciding the Cass County, 419 N.W.2d at 187, found that the decision in Tri-County did not preclude cooperatives from serving new customers within an annexed area. The Court further found that the PSC interpreted N.D.C.C. §49-03-01.3 too narrowly. Cass County, 419 N.W. 2d at 187. The Court directed that in complaint cases brought under that section of law the PSC must look at the existing electric facilities that both electric suppliers have in place in the area to determine if extension of the public utility's service into the annexed area would constitute an unreasonable duplication of capital-intensive facilities and services already provided by the electric cooperative. Id. The Court remanded the case to the PSC directing the PSC to determine whether the public utility's extension of service interferes with and would constitute an unreasonable duplication of investment and available facilities and services provided by the electric cooperative. Id. at 188. In Northern States Power, 452 N.W.2d at 345, the Court determined that the question of which electric suppliers' facilities are duplicative and wasteful is one of fact for the PSC to determine.

MDU contends that the PSC had no authority to make its decision under Chapter 49-03 because N.D.C.C. 49-03-06(8) states that nothing in Title 49 limits the authority of a city to exercise its franchise authority. The specific language of N.D.C.C. §49-03-06(8) conflicts with the general language of N.D.C.C. §49-03-06 which authorizes service area agreements to encourage harmony and operational efficiency among electric providers and to discourage the unreasonable duplication of electric facilities. The specific language of N.D.C.C. §49-03-06(8) also conflicts with the general language of N.D.C.C. §49-03-01.3 which prohibits interference and unreasonable duplication of services. Whenever the general provision of one statute conflicts with a special provision in the same or in another statute, the two must be construed if possible to give effect to both provisions. N.D.C.C. §1-02-07.

The Legislature enacted N.D.C.C. §49-03-06 during the 2005 legislative session to encourage service area agreements between electric public utilities and rural electric cooperatives primarily in areas around municipalities. The stated purpose is "to encourage harmony and operational efficiency among electric providers, promote safety, discourage unreasonable duplication of facilities, assure adequate and reliable service for all consumers and territories within the state, and provide antitrust immunity to electric providers that negotiate service area agreements in accordance with this section." Subsection 8 of N.D.C.C. §49-03-06 recognizes the right of a city to exercise its franchise authority, but the exercise of that authority is meant to facilitate service area agreements and not to prohibit such agreements. The purpose of Section 49-03-06 is to discourage the very type of checkerboarding that MDU's position in the present case promotes.

The PSC has no authority under Chapter 49-03 to interpret the franchises, but the PSC does have the statutory authority to regulate electric public utilities under Title

49 of the North Dakota Century Code and to determine interference and unreasonable duplication of services under Chapter 49-03. The PSC cannot ignore its statutory responsibilities. The evidence in the case does not permit a decision by the PSC that favors MDU. The evidence is overwhelming in favor of the position of Capital Electric Cooperative, Inc. ("CEC"). Not only would a decision favoring MDU violate Chapter 49-03, it would also violate the PSC's regulatory responsibilities under Title 49, because it would permit MDU to build duplicative facilities that would be added to MDU's regulated ratebase and would be paid for by MDU's ratepayers.

The record reflects that the actions by the City of Bismarck up to this time not only encouraged, but required CEC to build facilities to serve new annexed areas. The City of Bismarck regularly up until this time allowed CEC to serve new annexed areas under CEC's existing franchise as evidenced by the testimony of CEC's witness, Ron Lipp. (App. at 68).

> Q. All right. Moving on to Exhibit C-4, does Exhibit C-4 -- again, with the same foundation, it shows the black line which was the area service agreement and the red line which is the new city limits of Bismarck in 2005; is that correct?
>
> A. That's correct.
>
> Q. And the areas that are shaded in green, what do they represent?
>
> A. They're Capital Electric's area inside the city limits.
>
> Q. Those were areas that were annexed into the City of Bismarck?
>
> A. That's correct.
>
> Q. And who serves those new annexations?
>
> A. Well, we serve the ones that are in the light green.
>
> Q. Okay. So Capital has served the new areas annexed into the City of Bismarck since -- from 2003 to 2005?

A. That's correct.

MDU's position effectively sets up cities as a fourth branch of government with powers above all other branches of government so long as those powers are derived through the franchising process. This leads to the ability of cities to potentially nullify state laws that were enacted for the protection of the general public including environmental laws, electric safety laws, and laws prohibiting wasteful duplication of electric services. This is a direct attack on the constitutional powers expressly granted to the legislative, executive and judicial branches of state government.

MDU's threshold argument implies that in order to have standing to bring a complaint for interference under Chapter 49-03, an electric supplier must have a franchise from the city. Nowhere does the TIA restrict the filing of a complaint to franchise holding electric suppliers. Although the present case is about economic duplication, the law exists also to protect against interference generally including, for instance, interference that affects another supplier's service reliability. The plain reading of the law is that is that the existence of a franchise is not a threshold requirement under the TIA. The Legislature could have placed such a limitation in the law, but chose not to do so.

The franchising laws and the TIA laws are separate and distinct, and each has a separate and distinct purpose. The primary purpose of the TIA is to prevent wasteful duplication of electric facilities and services. The only reason for the PSC to consider the franchise issue is in how the franchise or lack of a franchise could cause a duplication of service. The Supreme Court directives in Divide County and Tri-County concerning the need for a franchise are not directives for the PSC to consider the existence or lack of a franchise as being something similar to customer preference where the city is expressing a preference over electric providers. Instead, the PSC

believes that consideration of the franchise issue in a Chapter 49-03 complaint case is to aid in a determination of what a city's action will have on the issue of duplication. A city exercising its franchising authority in a manner that results in checkerboarding causes wasteful duplication of electric systems which Chapter 49-03 prohibits. In summary, the TIA is all about preventing unreasonable and wasteful duplication of facilities and services and the protection of ratepayers from excessive charges resulting from such wasteful duplication. The TIA is not about new thresholds that do not exist in statutes, and it is not about the PSC having to weigh the preferences of cities.

The right of a city to grant a franchise is not a fiat for cities to force utilities to violate state law. In decisions issued by the Supreme Court, the Court has not ordered a city either to give or not give a franchise and has not commented on what happens when the effect of a city's decision causes a violation of separate state laws. The PSC's decision, like the Court's decision in Divide County, puts the ball in the city's court. The city can either authorize service by the electric supplier that is in the best position to provide service to customers, or it can issue franchises in such a way that electric suppliers do not violate state laws. Both of these alternatives would recognize both the City's constitutional and statutory franchise rights and the TIA which exists to protect all of the consumers of MDU and CEC from wasteful duplication of services. Any court decision to the contrary will likely force the PSC to allocate those wasteful costs to the ratepayers within the city that forced the wasteful duplication in order to protect ratepayers in other locations from wasteful investment that was created by the actions of the city.

CONCLUSION

The PSC carefully considered in its decision its obligations under Chapter 49-03 and the mandates set forth by Legislature and the North Dakota Supreme to minimize

wasteful duplication of capital-intensive electric facilities. The PSC correctly exercised its authority under the law in issuing its decision. The decision of the PSC should be affirmed.

Dated this **15th** day of **December 2006.**

Respectfully Submitted,
North Dakota Public Service Commission

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, on December 15, 2006, that true and correct copies of the foregoing **APPELLEE BRIEF** have been served upon the following individuals by placing a true and correct copy thereof in envelopes addressed as follows:

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