

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Montana-Dakota Utilities Co.,)	
a Division of MDU Resources)	
Group, Inc.)	
Appellant,)	Supreme Court No. 20060270
vs.)	Burleigh County No. 06-C-1177
North Dakota Public Service)	
Commission)	
and)	
Capital Electric Cooperative, Inc.)	
Appellees.)	

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

Appellee Capital Electric Cooperative's Supplemental Appendix

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

**APPENDIX TO
 APPELLEE CAPITAL ELECTRIC
 COOPERATIVE'S BRIEF**

Public Service Commission Order

Case No. 06-C-177

This appendix is an annotated facsimile of the Order of the Public Service Commission from which the Appellant has appealed. The annotations are references to the record and to controlling statutes and precedents, to show in context how the findings of fact are supported by the evidence, how the conclusions of law and order are supported by the findings of fact, and how the conclusions of law and order are in accordance with the law and do not violate constitutional rights of the appellant. N.D.C.C. § 28-32-46.

Capital's Annotations are in bold and italics.

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

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. **[Certified Record on Appeal, Docket item No. 1.] (Herein abbreviated Rec.Doc.No.)**

On October 18, 2005, the Commission issued a Notice of Hearing scheduling the hearing for December 13, 2005. **[Rec.Doc.No.2]**

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. **[Rec.Doc.No.7]**

On November 10, 2005, Capital filed its reply to Montana-Dakota's Counterclaim requesting the Counterclaim be dismissed. **[Rec.Doc.No.10]**

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. **[Rec.Doc.No.12]**

On November 30, 2005, the December 13 hearing was continued. **[Rec.Doc.No.14]**

On December 30, 2005, the Commission issued a Notice of Reschedule Hearing for February 9, 2006. **[Rec.Doc.No.34]**

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.

[Rec.Doc.No.34]

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. **[Transcript, pp 11-21; 64-65.]**

At the hearing, Capital presented evidence consisting of testimony and exhibits. **[Tr. pp 70-110; 137-140; Exhibits C-1 through C-7.]** Montana-Dakota cross-examined Capital's witness. **[Tr. pp 110-129; 140-142.]** Montana-Dakota presented no direct testimony. **[Tr. pp 143-144.]**

(Preliminary statement's summary of post-hearing procedures are omitted from appendix.)

The findings of fact made by the agency are supported by a preponderance of the evidence.

N.D.C.C. § 28-32-46(5)

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. **[N.D.C.C. § 49-03-01.5(4)]**
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. **[N.D.C.C. § 49-03-01.5(2)]**
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 43rd Avenue. **[Complaint, paragraph VI; Answer, paragraph 6; Tr. Pp.76-77; Exhibit C-5.]**

4. In April of 2005, Part of Boulder Ridge 1st Addition was annexed to the City of Bismarck. **[Complaint, paragraph VI; Answer, paragraph 6.]** Both Capital and Montana-Dakota asserted a right to serve Boulder Ridge with electric distribution service. **[Complaint & Answer, in their entireties.]**

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. **[Motion Exhibits 1 & 2.]**

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. **[Complaint, paragraphs I & II; Answer, paragraphs 1 & 2; Exhibit C-1; Motion Exhibits 1 & 2.]**

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. **[Complaint, paragraph IV; Answer, paragraph 4.]**

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. **[Motion Exhibits 1 & 2.]**

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. **[Rec.Doc.No.15.]**

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. **[Rec.Doc.No.52.]**

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. **[Rec.Doc.No.116.]**

12. A second Order was issued by the District Court on May 30, 2006 granting Montana-Dakota's Motion for Dismissal of Amended Complaint. **[Rec.Doc.No.160.]**

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. **[Complaint, paragraph III; Answer, paragraph 3; Exhibits C-1, C-2, C-3, C-4, C-5 and C-6.]**

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 43rd Avenue. Previous service to a pasture well by Capital within Boulder Ridge was abandoned prior to the annexation of Boulder Ridge. **[Tr. Pp. 99-100; 126-28.]**

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 43rd Avenue and east of Washington Street. Capital extended distribution facilities from its three-phase feeder lines location along Washington Street and 43rd Avenue. Montana-Dakota's extension of its underground feeder line crossed Capital's overhead feeder line along 43rd Avenue. Montana-Dakota was in the process of installing its facilities at the time Capital began installing its facilities. **[Tr. Pp. 94-97; 102-03; 119; Exhibit C-5.]**

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 43rd 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. **[Tr. Pp.77, 87, 91-108; 93-103; Exhibits C-2, C-3, C-4; C-5 and C-6.]**

17. Capital's feeder lines located along 43rd 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. **[Tr. Pp. 74-77; Exhibit C-2.]** Prior to 1973, Capital did not have a franchise with the City of Bismarck or an Area Service Agreement with Montana-Dakota. **[Motion Exhibits 1 & 2.]**

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. **[Transcript, Pages 104-08; 113-16 Exhibits C-4, C-5 and C-6.]**

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. **[Exhibit C-6.]**

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. **[Transcript, Pages 104-08; 113-16 Exhibits C-4, C-5 and C-6]**

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. **[Transcript pp. 87, 91, 104-08; Exhibits C-4 and C-6.]**

22. Montana-Dakota's facilities nearest to Boulder Ridge are in the southerly part of French's 1st Addition, approximately 1/2 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. **[Tr. Pp 87, 93-97, 108-09; Exhibits C-1, C-3, C-4, C-5, and C-6.]**

23. Montana-Dakota's extension of facilities into Boulder Ridge crossed Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge and Montana-Dakota's extension of its facilities ran parallel to Capital's facilities in two places, in French's 1st Addition and on the north side of 43rd Avenue in Boulder Ridge. **[Tr. Pp 93-97; 102-03; Exhibit C-5.]**

24. Boulder Ridge is entirely surrounded by areas served by Capital. **[Exhibits C-4, C-5 and C-6.]**

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 1st Addition, crossing 43rd Avenue into Boulder Ridge, and crossing and running parallel to

Capital's facilities on the north side of 43rd Avenue, interferes with and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital. [Tr. Pp 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier. The Commission has consistently held that one electric supplier crossing the line of another electricity supplier to provide service to a customer indicates a wasteful duplication of facilities. Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 30, citing Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990).

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. [Tr. Pp. 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor to be considered in determining whether duplication of facilities has occurred is whether construction of service to a customer from one supplier exceeds the cost to extend service to that same customer from a second supplier. Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Findings No. 28 and 29. In the Boulder Ridge case, MDU's cost to extend its facilities approximately ½ mile through French's 1st Addition and across 43rd Avenue to Boulder Ridge exceeds Capital's cost to extend service "zero" feet from its existing facilities in Boulder Ridge. MDU's cost to extend service to Boulder Ridge would be greater than Capital's cost because its existing facilities are approximately ½ mile further from Boulder Ridge and MDU would need to cross 43rd Avenue to make the extension.

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier, resulting in "checker boarding." Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28.

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. [Tr. Pp 93-97; 102-03; Exhibits C-4, C-5, C-6.]

One factor considered in determining duplication of service is whether a supplier's extension of facilities would need to cross the facilities of another supplier, resulting in "checker boarding." Montana-Dakota Utilities Co. Public

Service Commission Case No PU-04-560, Findings of Fact, Conclusions of Law and Order, June 5, 2005, Finding No. 28.

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. **[See findings 13 through 27 and references to the evidence that support those findings.]**

The words of PSC Order Finding No. 28, that Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework and system, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 20), affirmed by Northern States Power Co. v Public Service Commission, 451 N.W.2d 340 (ND 1990).

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. 49-03 were established in Application of Otter Tail Power Co., 169 N.W.2d 415 at 418 (ND 1969). These include “which of the proposed suppliers will be able to serve the area more economically” and “which also can best develop electric service in the area in which such site is located without wasteful duplication of investment or service.” Factors to be considered in a dispute involving extensions of service outside the limits of municipalities are equally pertinent in a case under N.D.C.C. § 49-03-01.3 regarding an extension of service in a rural area that has been annexed to a municipality. See Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d at 188, note 1.

29. The Commission finds Montana-Dakota’s extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital. **[See findings 13 through 28 and references to the evidence that support those findings.]**

The words of PSC Order Finding of Fact No. 29, that Montana-Dakota’s extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 22), affirmed by Northern States Power Co. v Public Service Commission, supra.

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

Conclusions of Law

**The conclusions of law of the agency are supported by its findings of fact.
N.D.C.C. § 28-32-46(6).**

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.

Conclusion of Law No. 1 is an accurate recital of the cited statutes.

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.

The second sentence in Conclusion of Law No. 2 is an accurate recital of the provisions of the North Dakota Constitution. Article VII, § 11. The other two

sentences are legal opinions that are beyond the PSC's jurisdiction (see conclusion of law no 4), but within its privilege to comment. See Johnson v Elkin, 263 N.W.2d 123, at 127 (ND 1978).

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.

Conclusion of Law No. 3 is an accurate description of the cited ordinance.

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.

Conclusion of Law No. 4 is a correct statement of the law. The jurisdiction of the PSC is limited.

"The PSC has only the powers and duties conferred upon it by the Legislature. N.D. Const., Art. V, §§ 12,13." Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 at 589 (ND 1995).

"The Public Service Commission is a constitutional body having only such powers and duties as are prescribed by law." Public Service Commission v Montana-Dakota Utilities Co. 100 N.W.2d 140 (ND 1959) (Court Syllabus No. 1.)

"The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1958) (Court Syllabus No. 6.)

". . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123, at 126 (ND 1978).

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.

Conclusion of Law No. 5 is an accurate recital of the cited statutes.

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.

Conclusion of Law No. 6 is an accurate recital of the controlling precedents. Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 at 187 and Northern States Power Co. v Public Service Commission, 451 N.W.2d 340 at 342 and 345.

7. Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, through French's 1st Addition, and across 43rd 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.

Montana-Dakota presented no direct testimony. [Tr. pp 143-144.]

Conclusion of Law No. 7 is supported by findings of fact 1 through 29, particularly including but not limited to findings 13 through 29. Conclusion of Law No. 7 is in accordance with law, N.D.C.C. § 49-03-01.3 and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra.

The words of Conclusion of Law No. 7, that Montana-Dakota's extension of its electric distribution lines into Boulder Ridge, interferes with and constitutes an unreasonable duplication of investment and available services provided by Capital, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (conclusion no. 3), affirmed by Northern States Power Co. v Public Service Commission, supra.

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

Conclusion of Law No. 8 is supported by findings of fact 1 through 29, particularly including but not limited to findings 13 through 29. Conclusion of Law No. 8 is in accordance with law, N.D.C.C. §§ 49-03-01.3, 49-03-01.4, 49-03-05, and

controlling precedents, *Cass County Electric Cooperative v Northern States Power Co. supra.* and *Northern States Power Co. v Public Service Commission, supra.*

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 1st Addition, to the extent not duplicated by and compatible with Capital's system.

Conclusion of Law No. 9 is an accurate recital of the cited statute. See also N.D.C.C. § 49-03-05. Conclusion of Law No. 9 is an accurate recital of controlling precedents. The words of Conclusion of Law No. 9, that it is reasonable and proper to require Capital to purchase and to require Montana-Dakota to sell distribution facilities, are taken from *Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (conclusion no. 7), affirmed by Northern States Power Co. v Public Service Commission, supra.*

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.

Conclusion of Law No. 9 is an accurate recital of controlling precedents and statutes. *Cass County Electric Cooperative v Northern States Power Co.*, 419 N.W.2d at 187 and *Northern States Power Co. v Public Service Commission*, 451 N.W.2d at 342. *Montana-Dakota Utilities Co. v Johanneson*, 153 N.W.2d 414 (ND 1967). N.D.C.C. § 1-02-38.

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

Order

The order is in accordance with the law.

The order does not violate the constitutional rights of the appellant.

The order of the agency is supported by its findings of fact.

N.D.C.C. § 28-32-46(1)(2) & (6).

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 1st Addition to the City of Bismarck and from further extending its electric service in that area.

Order No. 1 is supported by findings of fact 1 through 29. Order No. 1 is in

accordance with law, N.D.C.C. §§ 49-03-01.3, 49-03-01.4, 49-03-05, and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra.

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.

Order No. 2 is in accordance with law, N.D.C.C. §§ 49-03-01.4 and 49-03-05. The words of Order No. 2, requiring Capital to purchase and Montana-Dakota to sell distribution facilities, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (order no. 2), affirmed by Northern States Power Co. v Public Service Commission, supra.

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.

Order No. 3 is in accordance with law, N.D.C.C. §§ 49-03-01.4 and 49-03-05. The words of Order No. 3, assuring that users of electricity in Boulder Ridge shall not be without service, are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (order no. 3), affirmed by Northern States Power Co. v Public Service Commission, supra.

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

Order No. 4 is in accordance with the law under N.D.C.C. § 49-03-01.3 and controlling precedents, Cass County Electric Cooperative v Northern States Power Co. supra. and Northern States Power Co. v Public Service Commission, supra. Neither N.D.C.C. § 49-03-06(8) nor North Dakota Constitution, Article VII, § 11 or Article XII, § 10 limits the jurisdiction conferred on the Commission by the Legislature's enactment of N.D.C.C. §§ 49-03-01 through 49-03-05. MDU has no rights under North Dakota Constitution, Article VII, § 11 or Article XII, § 10. Application of Otter Tail Power Co. 451 N.W.2d 95 (ND 1990). The PSC Order does not violate MDU's right of substantive due process. Johnson v Elkin, 263 N.W.2d 123, at 126-27 (ND 1978) and Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967).