

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
SCOTT M. KNUDSVIG
RYAN D. SANDBERG
OF COUNSEL
HERBERT L. MESCHKE

PH
LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

2525 ELK DRIVE
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@srt.com

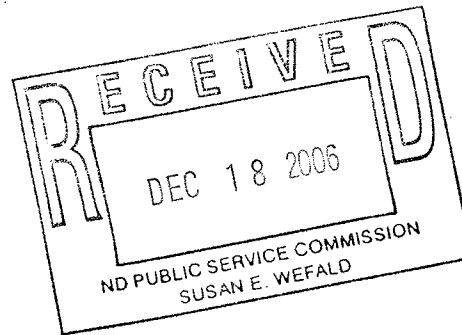
RETIRED
THOMAS A. WENTZ
MARK F. PURDY
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)

COPY

December 15, 2006

PENNY L. MILLER, CLERK
NORTH DAKOTA SUPREME COURT
JUDICIAL WING - 1ST FLOOR
600 E. BOULEVARD AVE., DEPT. 180
BISMARCK, ND 58505-0530



**MONTANA-DAKOTA UTILITIES CO.
VS.
NORTH DAKOTA PUBLIC SERVICE COMMISSION &
CAPITAL ELECTRIC COOPERATIVE**

Supreme Court No. 20060270

Dear Penny:

Enclosed herewith is Appellee's, Capital Electric Cooperative, original unbound brief and seven bound copies, together with enclosed diskette. Also enclosed are eight bound copies of our Supplemental Appendix.

If you have any questions on the enclosed, please do not hesitate to contact me.

Yours truly,

A handwritten signature in cursive script that reads "Carol K. Larson".

Carol K. Larson
lat

Enclosures

cc: Jerome C. Kettleon
William W. Binck
Wayne Stenehjerm

TABLE OF CONTENTS

Table of Authorities i

STATEMENT OF THE CASE 1

 A. Nature of Proceeding 1

 B. Proceedings Below 2

 C. Facts 3

STATEMENT OF ISSUES 3

SUMMARY OF ARGUMENTS 4

ARGUMENT 4

 A. The scope of judicial review of agency decisions is defined by statute ... 4

 B. The scope of judicial review of the factual basis of an agency’s decision is limited 5

 C. An agency’s determination of law is fully reviewable 6

 D. The PSC Order should be affirmed because there is no reason for not affirming 7

 1. The PSC Order is in accordance with the law 8

 2. The PSC Order does not violate MDU’s constitutional rights .. 19

 a. MDU lacks standing to assert Bismarck’s self-government rights 20

 b. N.D.C.C. § 49-03-01.3 is not unconstitutional under Article VII § 11 or Article XII §10 22

 c. Bismarck’s local governing body did not grant MDU a constitutional right or exemption from the PSC’s exercise of its jurisdiction 29

 3/4. The PSC’s proceedings complied with N.D.C.C. Chapter 28-32 32

5.	The findings of fact in the PSC Order are supported by a preponderance of the evidence	33
6.	The conclusions of law and order in the PSC Order are supported by its findings of fact	36
7.	The findings of fact in the PSC Order sufficiently address the evidence presented by the appellant	37
	CONCLUSION	38
	Certificate of Compliance	40
	Certificate of Service	41

TABLE OF AUTHORITIES

CASES:

<u>Application of Montana-Dakota Utilities Co.</u> , 219 N.W.2d 174 (ND 1974)	23
<u>Application of Northern States Power Co.</u> , 171 N.W.2d 751 (ND 1969)	6
<u>Application of Otter Tail Power Co.</u> , 169 N.W.2d 415 (ND 1969)	6
<u>Application of Otter Tail Power Co.</u> , 354 N.W.2d 701 (ND 1984)	7, 25, 35
<u>Application of Otter Tail Power Co.</u> , 451 N.W.2d 95 (ND 1990)	20, 21, 28, 29
<u>Baker Elec. Co-op. Inc. v Chaske</u> , 28 F.3d 1466 (8 th Cir. 1994)	28
<u>Capital Elec. Co-op Inc. v Public Service Comm'n of State of N.D.</u> , 534 N.W.2d 587 (ND 1995)	1, 6, 9, 13, 18
<u>Cass County Elec. Co-op. Inc. v Northern States Power Co.</u> , 419 N.W.2d 181 (ND 1988)	1, 2, 6, 8-11, 13, 14, 16, 17, 29, 31, 34, 35
<u>Cass County Elec. Co-op. Inc. v Wold Properties, Inc.</u> , 249 N.W.2d 514 (ND 1976)	1, 13, 14, 35
<u>Chrysler Light & Power Co. v City of Belfield</u> , 224 N.W. 871 (ND 1929)	26, 27
<u>City of Bismarck v Materi</u> , 177 N.W.2d 530 (ND 1970)	20
<u>City of Grafton v Otter Tail Power Co.</u> , 86 N.W.2d 197 (ND 1957)	17-19, 29
<u>County of Stutsman v State Hist. Soc'y</u> , 371 N.W.2d 321 (ND 1985)	29
<u>Devils Lake Sioux Indian Tribe v North Dakota Public Service Comm'n</u> , 896 F. Supp. 955 (D.N.D. 1995)	29
<u>Effertz v North Dakota Workers' Compensation Bureau</u> , 481 N.W.2d 218 (ND 1992)	23
<u>Froysland v North Dakota Workers Compensation Bureau</u> , 432 N.W.2d 883 (ND 1988)	23
<u>In re Otter Tail Power Company</u> , 116 F.3d 1207 (8 th Cir. 1997)	28

<u>Johnson v Elkin</u> , 263 N.W.2d 123 (ND 1978)	7, 19, 20, 31
<u>Johnson v Wells County Water Resource Bd.</u> , 410 N.W.2d 525 (ND 1987)	25, 30
<u>Lewis v Workers' North Dakota Comp. Bureau</u> , 2000 ND 77, 609 N.W.2d 445	15
<u>Litten v City of Fargo</u> , 294 N.W.2d 628 (ND 1980)	30
<u>MCI Telecommunications Corp. v Heitkamp</u> , 523 N.W.2d 548 (ND 1994)	32
<u>Menz v Coyle</u> , 117 N.W.2d 290 (ND 1962)	32
<u>Montana-Dakota Utilities Co. v Divide County School Dist. No. 1</u> , 193 N.W.2d 723 (ND 1972)	14-17, 24
<u>Montana-Dakota Utilities Co. v Johanneson</u> , 153 N.W.2d 414 (ND 1967) .	22, 23, 28, 31
<u>Montana-Dakota Utilities Co. v Public Service Comm'n of State of N.D.</u> , 413 N.W.2d 308 (ND 1987)	5, 6
<u>Montana-Dakota Utilities Co. v Williams Elec. Co-op Inc.</u> , 263 F.2d 431 (8 th Cir 1959)	11
<u>Northern States Power Co. v North Dakota Public Service Comm'n</u> , 452 N.W.2d 340 (ND 1990)	1, 2, 6-8, 11, 13, 14, 16, 29, 31, 34-37
<u>Public Service Commission v Montana-Dakota Utilities Co.</u> , 100 N.W.2d 140 (ND 1959)	18
<u>Public Service Comm'n v City of Williston</u> , 160 N.W.2d 534 (ND 1968)	13, 27
<u>Southern Valley Grain Dealers Ass'n v Board of City Com'rs of Richland County</u> , 257 N.W.2d 425 (ND 1977)	22
<u>State v Hansen</u> , 2006 ND 139, 717 N.W.2d 541	38
<u>Western Electric Co. v City of Jamestown</u> , 181 N.W. 363 (ND 1921)	26
<u>Williams Elec. Co-op Inc. v Montana-Dakota Utilities Co.</u> , 79 N.W.2d 508 (ND 1956)	6, 7, 11, 15, 17, 19, 31

OTHER CASES:

Cass County Electric Cooperative, Inc. vs Northern States Power Company,
Commission Case No.10,884 35

Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560 35

STATUTES:

N.D.C.C. Chapter 28-32 15, 32, 33

N.D.C.C. Chapter 49-02 27

N.D.C.C. Chapter 49-03 1, 10-13, 15-17, 19, 21, 27, 29-31, 33, 34, 37, 39

N.D.C.C. Title 49 6, 15, 18, 31

N.D.C.C. § 01-02-07 9

N.D.C.C. § 01-02-08 9

N.D.C.C. § 01-02-38 22

N.D.C.C. § 01-02-38(2) 9

N.D.C.C. § 01-02-39(5) 13

N.D.C.C. § 28-32-28 20

N.D.C.C. § 28-32-42 36

N.D.C.C. § 28-32-46 3-8, 15, 19, 39

N.D.C.C. § 28-32-46(1) 8, 33

N.D.C.C. § 28-32-46(2) 17, 19, 20, 33

N.D.C.C. § 28-32-46(3) 32, 33

N.D.C.C. § 28-32-46(4) 33

N.D.C.C. § 28-32-46(5) 33

N.D.C.C. § 28-32-46(6)	36
N.D.C.C. § 28-32-46(7)	37
N.D.C.C. § 28-32-49	5, 19
N.D.C.C. § 40-05.1-06	30
N.D.C.C. § 40-05-01	9-12
N.D.C.C. § 40-05-01(57)	30
N.D.C.C. § 49-02-01.1	12, 13
N.D.C.C. § 49-03-01	9
N.D.C.C. § 49-03-01.3	2, 8-14, 22, 24-26, 34, 36, 39
N.D.C.C. § 49-03-03	10
N.D.C.C. § 49-03-06	9-14
N.D.C.C. § 49-03-06(8)	8, 11, 12

OTHER:

1973 N.D.S.L., Chapter 529	24
1981 N.D.S.L., Chapter 665	24
2005 N.D.S.L., Chapter 394	11-13
N.D. Const. art. V, § 2	18
N.D. Const. art. VI, § 4	22
N.D. Const. art. VII	20, 21, 30
N.D. Const. art. VII, § 1	20
N.D. Const. art. VII, § 2	30

N.D. Const. art. VII, § 11 18-25, 30, 31, 38
N.D. Const. art. XII, §10 19, 22, 24, 25

STATEMENT OF THE CASE

A. Nature of Proceeding

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. Capital Electric Cooperative complained to the North Dakota Public Service Commission (PSC) under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about Montana-Dakota Utilities Co.'s extension of service in a rural area inside Bismarck's municipal limits. The disputed area is part of Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge).

"... [T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Elec. Co-op, Inc. v Wold Properties, Inc., 249 N.W.2d 514, 520 (ND 1976) (Cass v Wold). "The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities" and "... to provide territorial protection for rural electric cooperatives." Capital Elec. Co-op v Public Service Comm'n of State of N.D., 534 N.W.2d 587 at 590 and 592 (ND 1995). (Capital v PSC.)

The Boulder Ridge dispute may seem untypical, because the dispute is about electric service in a rural area that has been annexed to a municipality. Though it may seem untypical, the Boulder Ridge dispute is not unprecedented. Its antecedents are Cass County Elec. Co-op, Inc. v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern

States Power Co. v North Dakota Public Service Comm'n, 452 N.W.2d 340 (ND 1990). (Cass v NSP and NSP v PSC, and collectively the “South Pointe case.”) The South Pointe case resolved a dispute in Fargo substantially the same as the Boulder Ridge dispute in Bismarck. The PSC’s decision and order against MDU in the Boulder Ridge case is like its decision and order against NSP in the South Pointe case, affirmed in NSP v PSC. In the South Pointe and Boulder Ridge cases, the PSC exercised its jurisdiction under N.D.C.C. § 49-03-01.3 to regulate electric utilities’ interference with services provided by a rural electric cooperative in a rural area annexed to a municipality.

The PSC found and concluded under N.D.C.C. § 49-03-01.3 that MDU’s extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered MDU to cease and desist from providing electric service in Boulder Ridge. [*PSC Order, esp. Finding of Fact No. 29, Conclusion of Law No. 7, and Order No.1; MDU Appendix 31.*]

B. Proceedings Below.

On September 29, 2005, Capital filed a Complaint with the PSC, alleging that MDU intended to extend its facilities within the corporate limits of Bismarck and that such service will interfere with the service provided by Capital, in violation of N.D.C.C. § 49-03-01.3 [*Apx. 12.*]

On October 20, 2005, MDU answered. MDU admitted it extended its facilities and that it intends to provide electric distribution services in Boulder Ridge. MDU alleged its action is taken pursuant to rights under its franchise from the City of Bismarck and asserted

that the PSC does not have jurisdiction. [Apx. 23]

On November 23, 2005, MDU moved the PSC to dismiss Capital's complaint. [Apx. 3; PSC Docket 12.]

On February 9, 2006, the PSC held an evidentiary hearing on Capital's complaint. At the hearing, MDU renewed its motion to dismiss. MDU presented no evidence, no testimony and no exhibits other than motion exhibits. [Apx. 32.]

On June 22, 2006, the PSC made its findings of fact, conclusions of law and order. The PSC found and concluded under N.D.C.C. § 49-03-01.3 that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered MDU to cease and desist from providing electric service in Boulder Ridge. [Apx. 31-44.]

C. Facts

The facts of the case are stated in the PSC Order, incorporated in this brief by reference. [Apx. 31, 33-37.]

STATEMENT OF ISSUES

Whether there is any reason under N.D.C.C. § 28-32-46 for not affirming the PSC's Order.

SUMMARY OF ARGUMENTS

On appeal from an administrative agency's decision, the court's scope of review is defined by N.D.C.C. § 28-32-46. The court must affirm the order of the agency unless the court finds a statutory reason for not affirming the decision. The court does not make independent findings of fact or substitute its judgment for the agency's.

MDU's defense is a claimed constitutional right to be exempt from the PSC's jurisdiction to enforce the Territorial Integrity Act within the corporate limits of Bismarck.

Capital argues: The Territorial Integrity Act is sustained by the Legislature's constitutional police powers. The comprehensive policy of the Act applies to the entire state of North Dakota. The Legislature's power is not superceded by theories of municipal sovereignty. A utility regulated by the Act lacks standing to assert a city's self government interests as a defense to enforcement of the Act.

The PSC's Order that MDU cease and desist from providing electric service in Boulder Ridge is in accordance with the law and supported by the weight of the evidence. The court must affirm the PSC Order because there is no reason for not affirming the Order. N.D.C.C. § 28-32-46.

ARGUMENT

A. The scope of judicial review of agency decisions is defined by statute.

On appeal from an administrative agency's determination "... the court must affirm the order of the agency unless it 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."

N.D.C.C. § 28-32-46.

On appeal under N.D.C.C. § 28-32-49, the Supreme Court reviews the decision of the PSC, not the district court's. See, e.g., Montana-Dakota Utilities Co. v Public Service Comm'n of State of N.D., 413 N.W.2d 308 (ND 1987).

B. The scope of judicial review of the factual basis of an agency's decision is limited.

In reviewing the agency's findings, the court does not make independent findings of fact or substitute its judgment for the agency's. The court determines whether a reasoning mind could reasonably have determined that the factual conclusions reached were supported by the weight of the evidence. This principle has been applied in many cases under the Territorial Integrity Act.

The Supreme Court will not “function as a ‘super board’ and second guess the PSC’s determinations.” NSP v PSC, 453 N.W.2d at 345, quoting Montana-Dakota Utilities Co. v Public Service Commission, 413 N.W.2d at 310; Application of Northern States Power Co., 171 N.W.2d 751 (ND 1969); Application of Otter Tail Power Co., 169 N.W.2d 415 (ND 1969). See also Williams Elec. Co-op Inc. v Montana-Dakota Utilities Co., 79 N.W.2d 508 (ND 1956) (Williams v MDU).

To paraphrase NSP v PSC as applied to the PSC Order in the Boulder Ridge case, a reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence, and that the PSC’s conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC’s findings and conclusions that Capital had an extensive system in place for the annexed territory, and that MDU’s extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. 452 N.W.2d at 344.

C. An agency’s determination of law is fully reviewable.

Agency decisions on questions of law are fully reviewable. Capital v PSC and Cass v NSP exemplify judicial review of the PSC’s decisions on questions of law under the Territorial Integrity Act.

Under N.D.C.C. § 28-32-46, an appellate court reviews questions of law that are within the agency’s jurisdiction. Where a party has implored the PSC to exercise some power not within the PSC’s jurisdiction under N.D.C.C. Title 49, judicial review of the

agency's decision does not include judicial enforcement of claimed legal rights that are beyond the PSC's jurisdiction, even though the court would have jurisdiction if an action had been commenced in court. See Williams v MDU.

The principle that limits on the PSC's jurisdiction also affect the court's scope of review is subject to an important exception.

“ . . . [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. . . . We reserve the issue of constitutionality to the first court to which the agency decision is appealed.” Johnson v Elkin, 263 N.W.2d 123, at 126-27 (ND 1978).

See also Application of Otter Tail Power Co., 354 N.W.2d 701 (ND 1984) (herein Otter Tail 1984). MDU's arguments about constitutional law were beyond the PSC's jurisdiction but are not excluded from consideration on appeal.

D. The PSC Order should be affirmed because there is no reason for not affirming.

The PSC Order must be affirmed unless a reason for not affirming is found under N.D.C.C. § 28-32-46. See, e.g., NSP v PSC. The non-existence of reversible error is demonstrated two ways.

1. A facsimile of the PSC Order is included in Capital's supplemental appendix annotated with references to the evidentiary record and to controlling statutes and precedents. The annotations show that the findings of fact are supported by the evidence, the conclusions of law and order are supported by the findings of fact, and the conclusions of law and order are in accordance with the law. (Supplemental Apx. 1-13.)

2. MDU filed 28 specifications of error using N.D.C.C. § 28-32-46 as an outline. (Apx. 45) MDU did not pursue all 28 specifications. (E.g., MDU’s brief does not pursue specification 2a that asserted “substantive due process.”) Capital’s brief follows the same seven points statutory outline, limited to the smaller number of arguments in MDU’s brief.

1. **The PSC Order is in accordance with the law. (N.D.C.C. § 28-32-46(1)).**

MDU specification 1b: “The Order is not in accordance with N.D.C.C. § 49-03-06(8).”

MDU specification 1d: “The Order is based on a broad interpretation of the jurisdiction of the Public Service Commission without recognition of constitutional and statutory limitations on that jurisdiction.”

Capital’s response: Capital and MDU both rely on the Territorial Integrity Act. Capital relies on N.D.C.C. § 49-03-01.3, the prohibition of an electric public utility’s interference with a rural electric cooperative’s existing service and system in a rural area that has been annexed to a municipality. The PSC’s order against MDU in the Boulder Ridge case is like its order against NSP in the South Pointe case. In both cases, the PSC exercised its jurisdiction to regulate electric utilities’ interference with services provided by rural electric cooperatives. The PSC should not take a narrow view of its jurisdiction under N.D.C.C. § 49-03-01.3. Cass v NSP, 419 N.W.2d at 187, reiterated in NSP v PSC, 452 N.W.2d at 342.

MDU argues the PSC’s jurisdiction is narrowed by one sentence in Subsection 8 of N.D.C.C. § 49-03-06, enacted in 2005: “Nothing in this chapter shall be construed to limit

the authority of the governing board of a city to exercise its franchise authority under Section 40-05-01.” MDU argues this one sentence limits the PSC’s jurisdiction under N.D.C.C. § 49-03-01.3. [MDU’s brief, pp. 21-22.] MDU seems to assume a negative rule of statutory interpretation, that a recent enactment contradicts pre-existing law. MDU is wrong.

The fundamental principle of statutory interpretation is to give effect to all related statutes, regardless of chronology of enactment. N.D.C.C. § 01-02-08 provides a limited role for chronology in statutory interpretation. The clause last in order of date or position prevails only in cases of a conflict between clauses in a statute, and if a) the clauses are irreconcilable, and b) except as otherwise directed by the rules of interpretation in N.D.C.C. § 01-02-07. The exceptional rule of N.D.C.C. § 01-02-08 does not apply, because there is no conflict. N.D.C.C. §§ 49-03-01.3 and 49-03-06 can be reconciled and harmonized. Both can be given effect.

“The entire statute is intended to be effective.” N.D.C.C. § 01-02-38(2); Cass v NSP, 419 N.W.2d at 185 (“We are required to construe together all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent.”); Capital v PSC, 534 N.W.2d at 589 (“Statutes must be construed as a whole to determine the legislative intent, and they must be harmonized, if possible, to give full force and effect to each provision.”).

Under the general terms of N.D.C.C. §§ 49-03-01 and 49-03-01.3, a regulated public utility is required to obtain a certificate of public convenience and necessity to construct and operate an electric system or extension of a system, but a new certificate is not required for each and every extension of facilities within a municipality where a public utility has

lawfully commenced operations. However, under the special terms of N.D.C.C. § 49-03-01.3, a public utility's extension of its service into a rural area that has been annexed to the municipality is not automatically sanctioned by its previously granted certificate. Under N.D.C.C. § 49-03-01.3, a regulated utility's extensions within the corporate limits of a municipality shall not interfere with or unreasonably duplicate the existing service of a rural electric cooperative. Neither a previously granted certificate nor a franchise authorizes such extensions, because interference and unreasonable duplication are specifically prohibited by N.D.C.C. § 49-03-01.3. Cass v NSP.

MDU's interpretation of N.D.C.C. § 49-03-06 not only contradicts N.D.C.C. § 49-03-01.3, it also contradicts N.D.C.C. § 49-03-03. Since 1927, it has been the law of the State that a regulated utility's local franchise cannot be exercised without a certificate of public convenience and necessity. Though a regulated utility might be granted a franchise by a municipality's governing body under N.D.C.C. § 40-05-01, the utility may not construct and operate an electric distribution system under that franchise unless it complies with all of N.D.C.C. Chapter 49-03, including N.D.C.C. § 49-03-01.3. A franchise granted by a city cannot be exercised in a way that interferes with or unreasonably duplicates the service and system of another provider of electric service. A local franchise is not a license to violate any provision of N.D.C.C. Chapter 49-03.

Before the enactment of N.D.C.C. § 49-03-06, electric providers' endeavors to arrange by private agreement for orderly development of service without unreasonable duplication of capital-intensive facilities were sometimes made, but were ineffective. They were ineffective because they were unenforceable, easily abandoned unilaterally when one

of the parties deemed the agreement no longer advantageous. That is the background of N.D.C.C. § 49-03-06, before and after the Territorial Integrity Act was enacted in 1965. See Williams v MDU, Montana-Dakota Utilities Co. v Williams Elec. Co-op Inc., 263 F.2d 431 (8th Cir 1959), Cass v NSP, 419 N.W.2d at 183 and NSP v PSC, 451 N.W.2d at 341. That is also the background of the Boulder Ridge dispute. [*Apx. 12-15; 23-24; 34; 80-81; MDU brief, p 5.*]

The legislature made an addition to N.D.C.C. Chapter 49-03 to supplement, not contradict, other provisions of N.D.C.C. Chapter 49-03. Service area agreements were authorized as a new way to resolve territorial disputes, with no subtraction from the old ways.

2005 N.D.S.L., Chapter 394 added N.D.C.C. § 49-03-06 to Chapter 49-03. The new section specifies in subsections 2 through 7 what is required for a service area agreement to be valid and enforceable, including submission to the PSC for a determination whether the agreement is in the public interest. Subsection 8 provides:

The governing board of a city may require approval or disapproval of a service area agreement between electric providers to the extent the agreement encompasses service locations within the city. Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under Section 40-05-01.

Under Subsection 8, governing boards of cities may have a role in this new alternative process, where the new process is initiated by electric providers.

N.D.C.C. §§ 49-03-01.3 and 49-03-06 can be harmonized; both can be given effect. Where electric providers negotiate a service area agreement under N.D.C.C. § 49-03-06, including gaining governmental approvals of the agreement, “the agreement shall be valid

and enforceable.” Subsection 6. This new statute, establishing a new way to resolve territorial disputes, can be given effect unaffected by N.D.C.C. § 49-03-01.3 that governs situations where electric providers have not made agreements. And conversely, in situations where electric providers have not made a service area agreement under N.D.C.C. § 49-03-06, the PSC has jurisdiction to resolve territorial disputes as they arise, under N.D.C.C. § 49-03-01.3. The PSC’s authority to restrain interference that is prohibited by N.D.C.C. § 49-03-01.3 is unaffected by § 49-03-06.

MDU’s argument -- that one sentence in N.D.C.C. § 49-03-06 limits the PSC’s jurisdiction under § 49-03-01.3 -- is inconsistent with the entire section. That one sentence in N.D.C.C. § 49-03-06(8) refers to the authority of governing boards of cities under § 40-05-01, but Subsection 8 provides nothing about the PSC. Other operative subsections of N.D.C.C. § 49-03-06 do address the PSC’s jurisdiction. Subsections 2, 3, 4, 5, 6, and 7 all affect the PSC’s jurisdiction in the administration of the new alternate way of resolving territorial disputes. Subsection 8 provides nothing about the PSC’s jurisdiction. Subsection 1 is a statement of legislative intent, not including a purpose to limit the PSC’s jurisdiction.

2005 N.D.S.L., Chapter 394 amended not only N.D.C.C. Chapter 49-03, but also § 49-02-01.1. That section limits the PSC’s jurisdiction over rural electric cooperatives. In order for the new way of resolving territorial disputes by governmentally sanctioned agreements to be fully effective, it was necessary to install many details in new N.D.C.C. § 49-03-06. It was also necessary to modify N.D.C.C. § 49-02-01.1 to empower the PSC with jurisdiction over rural electric cooperatives who make service area agreements under § 49-03-06. Where the legislature was attentive to this detail, amending pre-existing provisions

of N.D.C.C. § 49-02-01.1 to increase the PSC's jurisdiction, it is incredible for MDU to argue that the same legislation decreased the PSC's jurisdiction under § 49-03-01.3. There is no similar detail in Chapter 394 amending any pre-existing sections of Chapter 49-03.

N.D.C.C. § 49-03-06 does not limit the PSC's authority over the activities of MDU under § 49-03-01.3. 2005 N.D.S.L., Chapter 394 does not include any reference to or amendment of any pre-existing section of N.D.C.C. Chapter 49-03. Chapter 394 does not include any statutory language decreasing the PSC's jurisdiction under N.D.C.C. § 49-03-01.3 as applied in the South Pointe case. The absence of any amendment in Chapter 394 and in all the intervening years after the South Pointe decisions in 1988 and 1990 indicates legislative approval of the PSC's exercise of its authority under N.D.C.C. § 49-03-01.3 to restrain electric utilities' interference with and duplication of rural electric cooperatives' service in rural areas that have been annexed to municipalities. See Public Service Comm'n v City of Williston, 160 N.W.2d 534 (ND 1968) and Capital v PSC, 534 N.W.2d at 592.

In judicial construction of statutes, "The consequences of a particular construction" may be considered. N.D.C.C. § 01-02-39(5).

Territorial disputes typically arise in or near cities served by public utilities under franchises but within rural areas served by rural electric cooperatives. "It was to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass v Wold, 249 N.W.2d at 520. The Act's "comprehensive regulatory scheme" prohibits a regulated utility's interference with and duplication of a rural electric cooperative's service and system within the corporate limits of any municipality. N.D.C.C. § 49-03-01.3; NSP v PSC, 452 N.W.2d at 344-45. If MDU's theory were adopted,

territorial disputes in rural areas annexed to municipalities would not be resolved by the PSC under the Act's comprehensive regulatory scheme, as in the South Pointe case. Instead, territorial disputes in rural areas annexed to municipalities would be removed from the jurisdiction of the PSC. By the process of annexation of rural areas, any city -- not only Bismarck's, but any city's governing body -- would remove from the PSC's jurisdiction under the Territorial Integrity Act the very territories whose integrity the Act was intended to protect. This would result under MDU's interpretation even in the absence of an approved service area agreement. The Act's comprehensive regulatory policy of territorial integrity and avoidance of wasteful duplication would be replaced by a balkanized and disintegrated non-system -- if MDU's theory were adopted. MDU's interpretation of N.D.C.C. § 49-03-06 would render § 49-03-01.3 meaningless, an interpretation the court will not adopt in the absence of a clear and unambiguous legislative intent. Cass v NSP, 419 N.W.2d at 186.

MDU specification 1e: "The Order is not in accordance with judicial precedent and state and local requirements that an electric service provider hold a municipal franchise to provide electric distribution service within a municipality."

Capital's response: The judicial precedent to which MDU refers is Montana-Dakota Utilities Co. v Divide County School Dist. No. 1, 193 N.W.2d 723 (ND 1972) (herein Divide County School). That case is discredited by Cass v Wold, 249 N.W.2d at 520 and Cass v NSP, 419 N.W.2d at 186-87, but MDU depends on that one case to sustain its claim that "... the determination of which company holds a franchise from the City of Bismarck to provide electric services within Boulder Ridge was a threshold determination in the PSC's consideration of CEC's complaint." [*MDU's brief, p 9.*]

MDU's claim that Divide County School controls the PSC's and the courts' decisions under the Territorial Integrity Act is wrong for a fundamental reason, a distinction with a significant difference. That case that did not involve the PSC or N.D.C.C. Chapter 49-03.

Divide County School was a civil action in district court under its general jurisdiction, decided on the basis of state and local laws that are not within the PSC's jurisdiction. Divide County School is not controlling precedent on this appeal because that case was not decided under N.D.C.C. Chapter 49-03 or Chapter 28-32.

The PSC was right when it concluded in the Boulder Ridge case that it has no jurisdiction to decide issues of municipal government law affecting franchises. [*Apx. 38.*] Because Divide County School did not involve issues within the PSC's jurisdiction under N.D.C.C. Chapter 49-03, the legal basis of that case does not affect any issues within the scope of this appeal under N.D.C.C. § 28-32-46.

The PSC has no jurisdiction to enforce local franchise laws, just as it has no jurisdiction to enforce contract claims. On appeal from a PSC decision where a party asserts contract claims denied by the PSC, an appeal under N.D.C.C. § 28-32-46 does not invoke judicial power to adjudicate those claims, even though the court would have jurisdiction if a contract action had been commenced in court. See Williams v MDU. Similarly on this appeal, judicial review of the PSC's decision does not include judicial action on MDU's claims under municipal franchise laws that are outside the PSC's jurisdiction under N.D.C.C. Title 49, even though the court could have jurisdiction in a civil action like the Divide County School litigation. Cf. Lewis v North Dakota Workers Comp. Bureau, 2000 N.D. 77, 609 N.W.2d 445, distinguishing courts' purely appellate function in the administrative

process from courts' action under the rules of civil procedure.

MDU's action indicates its acknowledgment the PSC lacks jurisdiction to adopt Divide County School as a legal threshold to the PSC's determination of Capital's complaint. MDU asserted a counterclaim, urging the PSC to usurp judicial powers to enforce MDU's claimed franchise rights [Apx. 27-28]. MDU later moved for dismissal of its counterclaim, because "We have filed basically the same counterclaim in District Court, which I think has jurisdiction to consider it." [Apx. 67-a]

MDU has another huge problem with its theory that relies on Divide County School. Capital is not in the same situation in 2005-06 as the rural electric cooperative in the 1972 case. Capital has a twenty-year franchise granted by the City of Bismarck in 1993. MDU admitted that Capital has a franchise. [Apx. 12-13;23.] The PSC found that the City of Bismarck issued a franchise to Capital. [Apx. 34.]

MDU contrived a solution to its problem. As MDU prepared to extend its facilities into Boulder Ridge, it faced the likelihood that Capital would complain to the PSC (like Cass complained about NSP in the South Pointe case). MDU launched a pre-emptive collateral attack on the PSC's jurisdiction. MDU asked Bismarck's City Commission to declare Capital's franchise was limited, to exclude Boulder Ridge from Capital's franchised service territory. MDU asserts the City Commission's decision [Apx. 79] (the City Order) is a legal barrier to the PSC's exercise of its jurisdiction under N.D.C.C. Chapter 49-03.

MDU's defense against Capital's complaint to the PSC comes down to this one point: The Bismarck City Commission has bestowed on MDU a constitutional right, immunity or exemption from the PSC's jurisdiction to enforce the Territorial Integrity Act. But the

decision in Divide County School was not based on constitutional law, a matter of legal history highlighted in MDU's brief at pages 12-15. Constitutional issues are addressed below, under N.D.C.C. § 28-32-46(2).

MDU's specification 1e also asserts an unspecified "state requirement." MDU repeats an old argument, that rural electric cooperatives are limited to service in rural areas, meaning areas outside of municipalities, and the limitation causes rural electric cooperatives' service areas to shrink as municipalities' boundaries grow. That is not the law. Cass v NSP ended that argument. 419 N.W.2d at 185-87.

Specification 1e also asserts an unspecified "local requirement." MDU's brief (pp. 10, 16, 30) cites a local ordinance. Bismarck's ordinances include the power to grant franchises (Chapter 10-11), the power exercised when it granted non-exclusive franchises to MDU and Capital. There are no provisions in N.D.C.C. Chapter 49-03 that sustain MDU's argument that the PSC is empowered or required to superimpose Bismarck's ordinances as a "threshold" to the PSC's jurisdiction to administer the Territorial Integrity Act. The PSC's jurisdiction does not include the enforcement of municipal laws. See City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (ND 1957) and Williams v MDU.

MDU's specification 1i repeats specification 1e in slightly different words. MDU's specification 1i misstates the record when it asserts the PSC's "failure to consider" franchises, and it misstates the evidence when it says Capital lacks a franchise. Capital does not lack a franchise. Capital has a franchise, a twenty-year franchise granted by the City of Bismarck in 1993. MDU admitted that Capital has a franchise. [*Apx. 12-13; 23.*] MDU invented and promotes a legal fiction: The facts of MDU's interference with Capital's

service and system are facts to be ignored as if those facts did not exist because (MDU argues) Capital's service and system that exist in the real world became non-existent "as a matter of law" when the Bismarck City Commission made the City Order. [MDU Motion, PSC Docket 12, Apx. 3.]

The PSC did consider franchises and MDU's argument that Capital lacks a franchise. The PSC acknowledged the City Order existed, gave it due consideration, and did not include the City Order as a basis of its findings, conclusion or order because "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." [Apx. 34-35; 38.]

The PSC's Conclusion of Law No. 4 [Apx. 38] is in accordance with 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 at 589.

"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 (Court Syllabus No. 6.)

"The powers and duties of the . . . public service commissioners . . . must be prescribed by law." Constitution, Article V, § 2.

The PSC Order recognized these constitutional limitations. The PSC Order exercised

jurisdiction conferred upon it by the Legislature under N.D.C.C. Chapter 49-03. The PSC did not venture beyond those limits. The validity of the City Order was not decided by the PSC, is not within the PSC's jurisdiction, and is not a matter at issue in this appeal under N.D.C.C. §§ 28-32-46 or 28-32-49. City of Grafton v Otter Tail Power Co. and Williams v MDU.

2. **The PSC Order does not violate MDU's constitutional rights. (N.D.C.C. § 28-32-46(2)).**

Many of MDU's specifications of error under Subsection 1 are misplaced, including constitutional claims. Those claims are addressed under N.D.C.C. § 28-32-46(2).

MDU ground 1a: The Order is not in accordance with N.D. Const. Art. VII, §11 and Art. XII §10.

MDU ground 1d: "The Order is based on a broad interpretation of the jurisdiction of the Public Service Commission without recognition of constitutional and statutory limitations on that jurisdiction."

Capital's response: The PSC did not base its decision on constitutional law. [*Apx. 38-39.*] The PSC has no jurisdiction to decide constitutional issues.

"... [A]dministrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate. ... We reserve the issue of constitutionality to the first court to which the agency decision is appealed." Johnson v Elkin, 263 N.W.2d at 126-27.

MDU's constitutional arguments are now in court, under the orderly procedure established under Johnson v Elkin, and under N.D.C.C. § 28-32-46(2).

Even though MDU is entitled to assert constitutional claims, it bears the risk of loss,

a result exemplified by Johnson v Elkin. Now that MDU is asserting its constitutional arguments in a forum with jurisdiction, those arguments should be dismissed.

a.) **MDU lacks standing to assert Bismarck's self-government rights.**

Courts' consideration of constitutional arguments are limited by rules as to "standing."

A litigant may assert only its own constitutional rights. See City of Bismarck v Materi, 177 N.W.2d 530 (ND 1970). That principle is also integral to the statute under which MDU's appeal is before the court. Under N.D.C.C. § 28-32-46(2), an appellant may assert "its" constitutional rights.

MDU claims constitutional rights under Article VII, § 11 of the North Dakota Constitution. Article VII is titled "Political Subdivisions." Section 11 provides:

"The power of the governing board of a city to franchise the construction and operation of a public utility within the city shall not be abridged by the legislative assembly."

Section 1 of Article VII provides:

"The purpose of this article is to provide for maximum self-government by all political subdivisions with a minimum of duplication of functions."

Bismarck might assert powers of self-government under Article VII to affect franchises, but that would be Bismarck's power; it is not MDU's right. Bismarck had a right to intervene in the PSC proceeding under N.D.C.C. § 28-32-28. Bismarck did not intervene; it is not a party.

Application of Otter Tail Power Co., 451 N.W.2d 95 (ND 1990) (Otter Tail 1990)

dealt with that utility's proposed extension of service onto an Indian reservation. "Otter Tail asserted that assumption of jurisdiction by the PSC under N.D.C.C. Chapter 49-03 would unlawfully interfere with the Tribe's sovereign rights of self-government." The Court concluded: ". . . Otter Tail had no standing to advance the Tribe's self-government interests." 451 N.W.2d at 97. Paraphrasing Otter Tail 1990 to fit this case: MDU asserts that assumption of jurisdiction by the PSC would unlawfully interfere with the Bismarck's sovereign rights of self-government under the Constitution. MDU has no standing to advance the city's self-government interests.

The structure of the Constitution does not support MDU on the standing issue. Article VII is titled "Political Subdivisions." North Dakota's history includes a proposal rejected in 1972 to install in the Constitution an article titled "Public Utilities." [*MDU's brief, p 12-15.*] There is no such provision in the Constitution. MDU is a public utility with no standing to assert rights under the Constitution as if it were a political subdivision.

MDU's arguments based on Bismarck's self-government interests should be rejected because MDU lacks standing. If there is any preliminary threshold issue in this case, this is it. The Court should not stop Capital at the threshold of the PSC's hearing room from complaining about MDU's interfering with and duplicating Capital's facilities and services. MDU should be stopped from arguing about Bismarck's powers under Article VII, § 11, as if MDU were representing the city's interests.

MDU's theories may be hypothetically argued. See Otter Tail 1990, 451 N.W.2d at 98. ("Even assuming that Otter Tail had standing to assert the self-government interests of the Tribe, we nevertheless conclude that the PSC had jurisdiction in this case.")

b.) **N.D.C.C. § 49-03-01.3 is not unconstitutional under Article VII § 11 or Article XII, §10.**

MDU's specification 1a asserts "The Order is not in accordance with N.D. Const. Art. VII, §11 and Art. XII §10." Its brief asserts the PSC Order under N.D.C.C. § 49-03-01.3 "is contrary to" and "in direct conflict with North Dakota Constitution Article VII, § 11." MDU denies attacking N.D.C.C. § 49-03-01.3 as unconstitutional. [MDU's brief, pp.11, 16]. If a statute is not in accordance with, contradicts or conflicts with the Constitution, the statute is unconstitutional. That is MDU's claim.

All statutes are presumed to be constitutional; a challenged statute is construed with a purpose to sustain its constitutionality. N.D.C.C. § 01-02-38. These principles have been applied in sustaining the Territorial Integrity Act, of which N.D.C.C. § 49-03-01.3 is an integral part. Courts "must presume that an Act of the Legislative Assembly is constitutional and valid, and any doubts as to its constitutionality must, if at all possible, be resolved in favor of its validity." Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414, at 420 (ND 1967). The presumption of constitutionality is more than a statutory or judicial rule of interpretation; it is a principle established by the Constitution itself. No statute can be declared unconstitutional except by action of four Supreme Court justices. Constitution, Article VI, § 4.

North Dakota's "heavy artillery" rule is a corollary of the presumption of constitutionality. "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." Southern Valley Grain Dealers Ass'n v Board of City Com'rs of

Richland County, 257 N.W.2d 425 at 434. (ND 1977), Effertz v North Dakota Workers' Compensation Bureau, 481 N.W.2d 218 (ND 1992) and Froysland v North Dakota Workers Compensation Bureau, 432 N.W.2d 883 (ND 1988).

The Territorial Integrity Act is more than presumptively constitutional; it has been decided to be constitutional. 40 years ago, MDU was the lead plaintiff when three electric utilities challenged the Act. MDU lost that case.

“It cannot be successfully maintained that the Legislature does not have the power to regulate public utilities under the police powers of the State. The plaintiffs make no such contention. It is conceded, we believe, that the power to regulate includes the power to eliminate competition.” MDU v Johanneson, 153 N.W.2d at 420-21.

MDU tried a different theory and lost again. Application of Montana-Dakota Utilities Co., 219 N.W.2d 174 (ND 1974). The 1967 and 1974 decisions sustained the Territorial Integrity Act as constitutional, an exercise of the Legislature's comprehensive police powers to regulate public utilities. Those decisions remain the law today.

MDU argues constitutional law has changed as to the Legislature's regulation of utilities' activities inside political subdivisions. After Article VII § 11 was adopted in 1982, cities are sovereign Vatican-like islands surrounded by the State, and MDU's activities within municipal islands are immune from the Legislature's police power as exercised in the Territorial Integrity Act. According to MDU. As municipal islands grow, the state shrinks and the Legislature's police power recedes, as if cities engage in an ongoing process of secession from the state by exercising the statutory power of annexation. According to MDU.

MDU asserts “Article VII, § 11 originated from the North Dakota Constitutional

Convention which was being held as Montana-Dakota Utilities Co. v Divide County School District No. 1, supra, was making its way through the courts.” [MDU’s brief, p 12.] MDU refers to the record of the 1972 convention, including debates about a proposed new “Public Utilities” article that would, in MDU’s words, “. . . confirm on a constitutional basis the result reached. . .” in the Divide County School litigation. [MDU’s brief, p 13.]

The draft constitution proposed by the 1972 convention did not propose adoption of a new Public Utilities article, a historical fact reinforced by MDU’s brief, pp. 12-15. The draft constitution did include Article VII, § 11 in the proposed Political Subdivisions article. 1973 N.D.S.L., Chapter 529. The proposed constitution was rejected at a special election in 1972. Later, the Legislature proposed constitutional amendments that were adopted in 1982. 1981 N.D. Laws, Chapter 665. The new Political Subdivisions Article VII includes § 11. There is little legislative history as to the entire new Article VII and an absolute dearth as to § 11. What history there is seems more related to counties’ government than to cities’. [See MDU addendum, pp. 48, 50-51.]

The proposal made in 1972 to add a Public Utilities article was not revived in 1982. Despite the efforts of a certain interest group in 1972 [MDU’s brief at pages 12-15 and addendum at 12], the Constitution does not contain special provisions under an article titled “Public Utilities.” The history of that failed effort to amend the Constitution 34 years ago is insufficient to overcome the presumption of the continuing constitutionality of the Territorial Integrity Act, including N.D.C.C. § 49-03-01.3.

MDU argued about Article VII § 11 in the PSC proceedings; its specification of error 1a added Article XII §10 to its arguments. That provision is similar to Article VII § 11, with

a historical difference. The State's original 1889 Constitution included Section 139. That remains in the Constitution after the 1982 election, renumbered as Article XII, § 10. The similarity of the two provisions undercuts MDU's argument that Article VII, § 11 was adopted in 1982 to change North Dakota's constitutional law with respect to the Legislature's power to regulate public utilities.

The principles of interpretation applicable to statutes are applicable to the Constitution. See Johnson v Wells County Water Resource Board, 410 N.W.2d 525 (ND 1987). Interpretation of Article VII, § 11, should harmonize that provision with the entire Constitution, including the Legislature's comprehensive police power exercised by enactment of the Territorial Integrity Act. See also Otter Tail 1984, 354 N.W.2d at 704 (dicta at n. 6). Harmonizing all provisions of the Constitution leads to the conclusion that cities are not independent sovereign entities. Cities' home rule powers do not include the power to license conduct that violates laws of state-wide application enacted under the Legislature's comprehensive police powers.

Capital criticized the consequences of MDU's argument about the interpretation of the Territorial Integrity Act. The same criticisms apply to MDU's arguments about the Constitution. If MDU's theory were adopted, the Act's comprehensive regulatory policy of territorial integrity and avoidance of wasteful duplication would be replaced by a balkanized, disintegrated non-system.

Ratcheting the argument to a constitutional plane, MDU promotes serious consequences. If Article VII, §11 were interpreted as MDU suggests, overriding N.D.C.C. § 49-03-1.3, then the police power of the Legislature under the Constitution is also over-

ridden, not comprehensive. Instead, any city's governing body would have the constitutional power (exercised by the statutory process of annexation) to limit the Legislature's constitutional power. The legislature has no power to regulate the activities of any public utilities inside the limits of municipalities, as a matter of State constitutional law. According to MDU.

Capital asserts: N.D.C.C. § 49-03-01.3 is an integral ingredient of the Territorial Integrity Act's comprehensive regulatory scheme to accomplish a legislative policy and purpose to keep to a minimum wasteful duplication of capital-intensive utility services, to minimize conflicts between suppliers of electricity, to provide territorial protection for rural electric cooperatives. The comprehensive policy and regulatory regimen of the Act applies to the entire state of North Dakota. It is a policy and legislated regulatory scheme sustained by the Legislature's constitutional police powers, a policy and a power that apply throughout the State of North Dakota without regard to the vagaries of municipal boundaries or of local governing bodies. The Legislature's policy and power are not superceded by theories of municipal sovereignty. And a utility regulated by the Act lacks standing to assert theories of municipal sovereignty as a defense to enforcement of the Act.

Three older cases foreshadowed the current arguments. In the early days of regulation of electric public utilities, the question arose whether the PSC's statutory power to regulate rates affected the financial terms of a franchise -- how a utility compensated a city for granting a franchise. The court held the PSC's statutory power to regulate rates did not include regulation of the financial terms of franchises. See Chrysler Light & Power Co. v City of Belfield, 224 N.W. 871 (ND 1929) and Western Electric Co. v City of Jamestown,

181 N.W. 363 (ND 1921). The decisions interpreted statutes. The decisions mentioned, but did not rely, on Section 139 of the Constitution. The issue came up again in Public Service Commission v City of Williston and Montana Dakota Utilities Co., 160 N.W.2d 534 (ND 1968). In 1968 the court acknowledged arguments (referring to the older cases) “. . . [T]he state of the industry’s art at the time of those decisions was such that the consequences of the decisions were not felt outside of the municipalities involved. . . . A similar ruling in the case at bar would mean that all of Respondent MDU’s patrons in North Dakota would pay for Williston’s bargain rates.” 160 N.W.2d at 540. The court acknowledged the problem, but followed the Belfield precedent under the rule of stare decisis. The court expressly declined to address constitutional questions. The court acknowledged the problem, and regarded the problem as one for legislative attention.

The Boulder Ridge case is not a case of rate regulation under N.D.C.C. Chapter 49-02. The Boulder Ridge case involves regulation of extensions of capital-intensive facilities under N.D.C.C. Chapter 49-03. The Boulder Ridge case is one where the state of the industry’s art is such that the adverse consequences of wasteful duplication of capital-intensive facilities are felt outside of the municipalities where that might occur, a problem for legislative attention, a problem addressed by the Legislature’s enactment of the Territorial Integrity Act. The Act has been sustained as a constitutional exercise of the Legislature’s comprehensive police powers to regulate public utilities. MDU wants a ruling that the Constitution limits the PSC’s jurisdiction under N.D.C.C. Chapter 49-03, a ruling that would mean that all of MDU’s patrons in North Dakota would pay for its wasteful duplication of capital-intensive facilities in Boulder Ridge, and wherever MDU follows the same course.

MDU's defensive theory has already been considered and rejected by the Supreme Court, in Otter Tail 1990. The court's rationale for sustaining the PSC's jurisdiction -- the State's interest versus claimed local self-government interests -- is paraphrased: The state's interest in regulating suppliers of electricity in furtherance of the public good is substantial and ranks among the most important functions traditionally associated with the police power of all states. Because electric service is capital-intensive, state regulation designed to avoid wasteful duplication of facilities between competing electric suppliers benefits all consumers of electricity. The electric supply systems of MDU and Capital are not confined to Bismarck but extend to a large portion of the State. Thus, the economic impact of operations within the City of Bismarck can adversely affect other customers of those electric suppliers. A claim of infringement on self-government rights is incomprehensible where Bismarck has not developed a regimen for regulating electric suppliers. The State's constitutional authority over electric suppliers is not pre-empted by Bismarck's local self-government interests. Otter Tail 1990, 451 N.W.2d at 107. See also MDU v Johanneson, regarding the State's power to regulate public utilities under the police powers of the State.

The territorial dispute in Otter Tail 1990 was re-litigated in federal courts, actions commenced by parties with standing and asserting federal law prevails over State law. The federal litigation confirmed Otter Tail 1990, with a limited exception. The Tribe had the right under federal law to determine who may supply electrical service to Tribal owned businesses on Indian owned land. With this limited exception, the Territorial Integrity Act prevailed over claims of Tribal sovereign authority within the boundaries of the reservation. In re Otter Tail Power Company, 116 F.3d 1207, 1210 (8th Cir. 1997); Baker Elec. Co-op.

Inc. v Chaske, 28 F.3d 1466 (8th Cir. 1994); Devils Lake Sioux Indian Tribe v North Dakota Public Service Comm'n, 896 F. Supp. 955 (D.N.D. 1995).

Without digressing into issues about states' jurisdiction with respect to activities on Indian reservations that are affected by federal law, this conclusion can be drawn from Otter Tail 1990: Just as the Court declared the State's Territorial Integrity Act's pre-eminence over claims of Indian Tribes' sovereignty, so also the Act prevails over claims that North Dakota's municipalities have powers of self government superior to the State's powers. See also County of Stutsman v State Hist. Soc'y, 371 N.W.2d 321 (ND 1985) and City of Grafton v Otter Tail Power Co.

In the Otter Tail 1990 case, the PSC followed the admonition of the South Pointe case. The PSC did not take a narrow view of its jurisdiction. The PSC asserted and exercised its jurisdiction. The PSC rejected arguments that local self government concepts pre-empted the Commission's jurisdiction. The PSC's assertion of jurisdiction was upheld by the Supreme Court. The decision in Otter Tail 1990, that the state's interest in regulating a public utility outweighs minimal burdens on local self-government, indicates the final outcome of the dispute over Boulder Ridge.

- c.) **Bismarck's local governing body did not grant MDU a constitutional right or exemption from the PSC's exercise of its jurisdiction.**

MDU claims Bismarck's power to grant franchises has been exercised to grant MDU a constitutional right or exemption from the PSC's exercise of its jurisdiction under N.D.C.C. Chapter 49-03. MDU implies that a franchise granted by a city is a local certificate

of public convenience and necessity, that the authority of municipal governing bodies to grant franchises is a power comparable to the police power that the State Legislature exercised by enactment of N.D.C.C. Chapter 49-03. Comparable, except a municipality's power is a constitutional power that supercedes the State Legislature's power under the same Constitution -- according to MDU's theories of constitutional law and municipal sovereignty.

The Constitution does not grant any such powers to home rule cities. Article VII encompasses former Section 130, now § 2 of Article VII.

“Section 130, as amended and approved in 1966, basically removed limitations previously placed upon the legislature relating to cities, directed the legislature to enact laws authorizing home rule, and permitted the legislature to devolve certain powers upon home rule cities. This constitutional provision in itself does not grant any powers to home rule cities. Whatever powers home rule cities may have are based upon statutory provisions.” Litten v City of Fargo, 294 N.W.2d 628, at 631 (ND 1980)

Section 11 of Article VII refers to the power of the governing board of a city to franchise the construction and operation of a public utility, but that constitutional provision is not a self-executing grant of powers. Whatever powers home rule cities may have are based upon statutory provisions and upon implementation of those powers under its charter and ordinances. Litten v City of Fargo. See also Johnson v Wells County Water Resource Board, 410 N.W.2d 525. The Legislature has enacted statutes empowering cities' governing boards to grant franchises. N.D.C.C. §§ 40-05-01(57) and 40-05.1-06. Bismarck has implemented this power and has exercised it, granting franchises to both MDU and Capital. MDU admitted that Capital has a franchise. [Apx. 12-13; 23.] If MDU's franchise is supported by the Constitution, so is Capital's.

The City Order, not MDU's franchise, is MDU's claimed constitutional shield.

When MDU made its motion to dismiss Capital's complaint on the day of the PSC hearing, MDU offered motion exhibits including MDU's franchise, Capital's franchise, and ". . . probably most importantly, is the order that was issued by the City Commission. . . ." [Apx. 67.] The City Order in conjunction with Article VII §11 shield MDU from the State Legislature and the PSC's exercise of its jurisdiction conferred by N.D.C.C. Chapter 49-03. According to MDU.

The PSC did not accept or reject the argument, because the PSC has no jurisdiction to decide constitutional issues or legal issues outside of N.D.C.C. Title 49. Johnson v Elkin and Williams v MDU. The PSC presumes the constitutionality of the statutes under which it operates. MDU v Johanneson. The PSC does not take a narrow view of its jurisdiction under N.D.C.C. Title 49. NSP v PSC and Cass v NSP. [Apx. 38-39].

MDU implies that its petition to Bismarck's City Commission is comparable to Capital's complaint to the PSC under N.D.C.C. Chapter 49-03. MDU regards the City Order as comparable to the PSC Order, except the City Order is superior to the PSC Order. The City Order supercedes the jurisdiction and authority of the PSC conferred on it by the Legislature in its exercise of comprehensive police powers under the Constitution -- according to MDU's theories.

There is a difference between the two actions taken by Bismarck's local governing body. It granted non-exclusive franchises to both MDU and Capital, not exercising a power granted by Article VII §11 of the Constitution, but exercising a power that does exist under enabling statutes, charter powers, and local ordinances. It issued the City Order responding to MDU's petition. What constitutional provision, what enabling statute connected to any

constitutional provision, what charter power connected to any constitutional provision, what local ordinance connected to any constitutional provision sustains that process and that decision? None! The City Order is wholly lacking any foundation under the Constitution.

Pages ago, this brief embarked on a course of arguments to sustain the constitutionality of the Territorial Integrity Act, going beyond the presumption of constitutionality. But it is not Capital's burden to sustain the Act. It is MDU's burden to overcome the presumption of constitutionality. The presumption is so strong that a statute will not be declared unconstitutional "unless its invalidity is, in the judgment of the court, beyond a reasonable doubt." MCI Telecommunications Corp. v Heitkamp, 523 N.W.2d 548, at 552, (ND 1994) quoting Menz v Coyle, 117 N.W.2d 290, at 293 (ND 1962).

There is no reason to doubt the validity of the Territorial Integrity Act or of the PSC's Order under the Act. The Territorial Integrity Act is more than presumptively constitutional; that has been decided, twice, in response to MDU's previous attacks. The Territorial Integrity Act and the PSC Order have constitutional status under the Legislature's comprehensive power to regulate public utilities such as MDU. The City Order is not a constitutional license that immunizes or exempts MDU from enforcement of the Act.

3/4. The PSC's proceedings complied with N.D.C.C. Chapter 28-32 (§ 28-32-46(3)).

MDU specification 3a: "The Order was not decided on the claims presented in the complaint or the issues stated in the Commission's Notice of Hearing."

Capital's response: Neither MDU's specification 3a nor its brief identifies provisions of N.D.C.C. Chapter 28-32 claimed to be violated. Instead, MDU's arguments under N.D.C.C. § 28-32-46(3) include the legally significant words "due process," making a constitutional claim. [MDU's brief, pp. 28, 30 & 31] MDU has not claimed under N.D.C.C. § 28-32-46(2) that its constitutional rights of procedural due process were violated by the PSC. Nor is MDU's due process argument supported by any "heavy artillery." Specification No. 3 may be summarily dismissed.

Capital's complaint and the PSC's notice of hearing informed MDU of the issues under N.D.C.C. Chapter 49-03 and the potential outcome. [Apx. 12, 30.] The PSC's Order [Apx. 30-44.] was decided on the claims presented in Capital's complaint, on defensive claims presented by MDU's answer, and on the issues stated in the Commission's Notice of Hearing.

If procedural matters were truly at issue, MDU might have claimed error under the "fair hearing" requirement of N.D.C.C. § 28-32-46(4). MDU has not asserted it was not afforded a fair hearing.

5. The findings of fact in the PSC Order are supported by a preponderance of the evidence. (N.D.C.C. § 28-32-46(5)).

Many of MDU's grounds for appeal specified under N.D.C.C. § 28-32-46(1) are misplaced. Specifications 1f, 1g, 1j, 1k, 1l, 1m, 1n, 1o, 1p and 1q do not address whether the PSC Order is "in accordance with the law." These are MDU's thinly veiled attempt to have the court reweigh and reevaluate the evidence. On these issues of fact, the Supreme

Court does not function as a “super-board” or “second guess the PSC’s determinations.” See NSP v PSC, 452 N.W.2d at 345. All the misplaced specifications and others listed under subsection 5 (4a, 4b, 4c, 4e and 4f) are wrong, contrary to precedents identifying factors to be considered by the PSC in making its determinations under N.D.C.C. Chapter 49-03.

The factors to be considered by the PSC in making determinations of public convenience and necessity under N.D.C.C. Chapter 49-03 were established in Application of Otter Tail Power Co., 169 N.W.2d at 418. These include “the location of the lines of the supplier,” “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 over 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 the South Pointe cases, Cass v NSP, 419 N.W.2d at 188, note 1.

The PSC’s consideration of public convenience and necessity factors (criticized in MDU’s brief at pp 24-28) is sanctioned by the South Pointe cases and is authorized by the words of N.D.C.C. § 49-03-01.3 that proscribe unreasonable duplication as determined by the PSC. The PSC must look at and did look at the existing electric facilities that Capital and MDU have in place in the area as it determined that extension of MDU’s services in Boulder Ridge interferes with and constitutes an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Cass v NSP, 419 N.W.2d at 187; NSP v PSC, 452 N.W.2d at 342. [*Apx. 31.*]

A major factor considered in determining duplication of service is whether a supplier's extension of facilities crosses the facilities of another supplier, causing "checkerboarding," a descriptive term used by the PSC and by the Supreme Court in Otter Tail 1984, 354 N.W.2d at 702, and in Cass v Wold, 249 N.W.2d at 521. Boulder Ridge is entirely surrounded by areas served by Capital. [Apx.36.] MDU's extension of its facilities to Boulder Ridge, an area not contiguous to MDU's existing service areas, would create a checkerboard of service areas.

"The Commission has consistently held that one electric supplier crossing the line of another electric supplier to provide service to a customer indicates a wasteful duplication of facilities." Order, Montana-Dakota Utilities Co. Public Service Commission Case No PU-04-560, Finding No. 30, citing Cass v NSP and NSP v PSC. After Capital filed its complaint, MDU extended its facilities to Boulder Ridge, crossing one-half mile through another subdivision of Bismarck that is in Capital's service area, crossing Capital's facilities in two places. [Apx. 36, 71.]

The words of the PSC's finding that Capital is best able to serve Boulder Ridge economically [Apx 37] are taken from Cass County Electric Cooperative, Inc. vs Northern States Power Company, Commission Case No.10,884 (finding no 20), affirmed by NSP v PSC. A reasoning mind could have reasonably concluded that the factual findings entered by the PSC were supported by the weight of the evidence and that the PSC's conclusions were supported by the findings. In short, the voluminous testimony and numerous exhibits presented at the hearing contained substantial evidence to support the PSC's findings and conclusions that Capital had an extensive system in place for the annexed territory, and that

MDU's extension of electric service into Boulder Ridge would constitute an unreasonable duplication of the facilities and services provided by Capital in the area. NSP v PSC, 452 N.W.2d at 344.

MDU's specification 4d complains about the PSC's finding of fact #5, "... the City of Bismarck issued Montana-Dakota a general limited franchise" [Apx. 34.] The PSC Order conforms to convention, reciting evidentiary facts in findings 3 through 24, evidence supporting the PSC's ultimate findings 25 through 29. Study of the Order shows finding #6 reflects MDU's proposed finding about Capital's franchise and that finding #5 about which MDU complains is a verbatim acceptance of MDU's proposed third finding [Apx. 9; PSC Docket 144], except the word should have been unlimited, not limited. MDU makes no argument about how this supposed error affected the PSC's decision that MDU's extension into Boulder Ridge violated N.D.C.C. § 49-03-01.3. The typographical error caused no harm to MDU's cause, because the PSC did not regard the status of either franchise as "limited" or "unlimited" as influential to its ultimate findings of fact 25 through 29, and because the PSC did not purport to make any decision based on franchise law. [Apx. 31-44.]

N.D.C.C. § 28-32-42 requires specifications of error that identify matters truly at issue. A harmless typographical error does not meet that standard.

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

MDU did not specify claimed errors under N.D.C.C. § 28-32-46(6). It must be concluded that the PSC's conclusions of law and order are supported by its findings of fact.

7. **The findings of fact in the PSC Order sufficiently address the evidence presented by the appellant. (N.D.C.C. § 28-32-46(7)).**

“At the hearing, Capital presented evidence consisting of testimony and exhibits. Montana-Dakota cross-examined Capital’s witness. Montana-Dakota presented no direct testimony.” [Apx. 32.] There was no “evidence presented to the agency by the appellant.” N.D.C.C. § 28-32-46(7).

MDU’s arguments under Subsection 7 are a thinly veiled attempt to have the court reweigh and reevaluate the evidence. On issues of fact, an appellate court does not function as a “super-board” or “second guess the PSC’s determinations.” See NSP v PSC, 452 N.W.2d at 345.

CONCLUSION

The PSC found and concluded that MDU’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. The PSC’s findings and conclusions are supported by the weight of the evidence and are in accordance with the law under N.D.C.C. Chapter 49-03.

MDU accuses the PSC of trying to “trump” the city’s authority. [MDU’s brief, p 22.] The metaphor is misplaced. It is MDU who is trying to promote and play the low card, the City Order, to override the PSC Order. When MDU claims the City Order has constitutional status to pre-empt the PSC Order, MDU disregards the status of the PSC and the PSC Order. The PSC is a constitutional body. The PSC Order was made under a regulatory statute

enacted by the Legislature exercising its comprehensive constitutional police powers.

Bismarck has no constitutional status; it is a political subdivision with home rule powers based on statutory provisions enacted by the Legislature under the political subdivisions article of the Constitution. The City Order has no basis in the Constitution, no basis in statutes or in Bismarck's home rule charter or ordinances.

A claim of trump might be made by Bismarck, but the City is not at the table. Using legal terms instead of metaphors, MDU lacks standing to assert the City has local government powers superior to the State Legislature's comprehensive powers under the Constitution.

North Dakota's Supreme Court does not issue advisory opinions, a principle that applies with special force where a constitutional claim is asserted. "Our jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims. . . ." "Our procedure for constitutional adjudication requires deliberate and reasoned review of statutes, which requires that constitutional claims be properly raised." State v Hansen, 2006 ND 139 §§10, 11; 717 N.W.2d 541. Lacking standing, MDU has not properly raised Bismarck's self government interests as a defense to the PSC's jurisdiction to enforce the Territorial Integrity Act.

Even if MDU were accorded standing to assert Bismarck's interests under Article VII §11 of the Constitution, the State Legislature's constitutional authority to regulate public utilities is not pre-empted by any municipality's local self-government interests. Cities' home rule powers do not include the power to license conduct that violates State laws.

This appeal should not be about the political subdivisions article of the Constitution,

because MDU has no rights under that article and no standing to assert Bismarck's interests. This appeal is about MDU's activities that are regulated under N.D.C.C. Chapter 49-03. New provisions in N.D.C.C. Chapter 49-03 enacted in 2005 to authorize area service agreements as an alternative method to resolve territorial disputes did not change the PSC's jurisdiction to resolve territorial disputes under N.D.C.C. § 49-03-01.3.

The PSC Order is in accordance with N.D.C.C. Chapter 49-03. The PSC found and concluded that MDU'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. All the PSC's findings and conclusions are supported by the weight of the evidence and are in accordance with the law, N.D.C.C. § 49-03-01.3 and pertinent precedents. The PSC Order is not in violation of MDU's constitutional rights.

The PSC Order must be affirmed because there is not present any of the statutory reasons for not affirming. N.D.C.C. § 28-32-46.

Dated this 15th day of December, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys, for the Appellee, Capital Electric Cooperative, Inc., in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum, signature block, certificate of service, and certificate of compliance totals 10,442.

Dated this 15th day of December, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K Larson

Carol K. Larson - #04406

Attorneys for Plaintiff and Appellant,
Capital Electric Cooperative, Inc.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

CERTIFICATE OF SERVICE

A copy of the Brief of Appellee, Capital Electric Cooperative, Inc., was served by via first class mail to the following on December 15th, 2006:

Jerome C. Kettleson
Pearce & Durick
PO Box 400
Bismarck, ND 58502-0400

William W. Binek
PUBLIC SERVICE COMMISSION
600 E Boulevard Avenue, Dept 408
Bismarck, ND 58505-0480

The Honorable Wayne Stenehjem
Attorney General of North Dakota
600 East Boulevard Avenue, Dept 125
Bismarck, ND 58505



Carol K. Larson - #04406