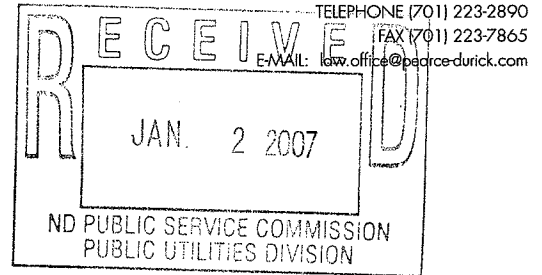




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December 29, 2006

HAND-DELIVERED

Ms. Penny Miller, Clerk
North Dakota Supreme Court
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530

Re: *Montana-Dakota Utilities Co. v. The Public Service Commission
of North Dakota, et al*
Supreme Court No. 20060270
Burleigh County No.: 06-C-01177

Dear Ms. Miller:

Enclosed for filing is the original and seven copies of Reply Brief of Appellant Montana-Dakota Utilities Co., along with a disk containing the same. The attached disk has been scanned by a virus protection program.

Thank you for your attention to this matter.

Sincerely,

PEARCE & DURICK

By 

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cc. (w/encl.) Carol Larson
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

REPLY BRIEF OF APPELLANT MONTANA-DAKOTA UTILITIES CO.

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ARGUMENT

A. THE PSC'S ORDER NOT IN ACCORDANCE WITH THE LAW.

1. Duplication of Facilities is not a Per Se Violation of the TIA.

The PSC and CEC arguments assume any extension of facilities by MDU within the City of Bismarck that duplicates facilities of CEC is prohibited by the TIA. They then bootstrap an argument that statutory and constitution protections of a municipality's authority to franchise utilities should not override the TIA's purpose of preventing duplication of facilities. Duplication of facilities, however, is not a per se violation of the TIA. The Court has recognized the TIA's purpose of preventing duplication is not always accomplished because the TIA is not a comprehensive regulatory scheme. See Northern States Power Company v. North Dakota Public Service Commission, 452 N.W.2d 340, 2 44 (N.D. 1990); Capital Electric Cooperative, Inc. v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995). While the PSC and CEC decry the checkerboarding that may occur if CEC is not allowed to be the exclusive provider of electric service in annexed areas to the City, some degree of checkerboarding is a natural result of the TIA's restriction limiting public utilities from extending service in growth areas before annexation.

The PSC and CEC arguments equate duplication of facilities with unreasonable duplication of services. Section 49-03-01.3 doesn't prohibit duplication of facilities. While facilities are a component of services, they are not services. The TIA allows MDU to extend its facilities anywhere within the City unless the extension interferes

with existing services or the PSC determines the duplication of services is unreasonable. MDU's extension of facilities in Boulder Ridge does not interfere with CEC's existing services as CEC continues to provide the services it has always provided in the manner it has always provided them. Nor is MDU's extension of facilities that cross CEC's facilities an unreasonable duplication of services if CEC cannot offer the services provided by MDU. Although the PSC and CEC paint a concern that MDU's extension to Boulder Ridge will increase rates to other customers, there is no evidence this relatively short line extension to serve the entire Boulder Ridge subdivision will negatively impact other customers. The feigned concern for MDU's customers is particularly ironic as CEC has not hesitated to construct duplicative facilities to the economic detriment of its customers. See Capital Electric Cooperative v. Public Service Commission, 534 N.W.2d 587, 593 (N.D. 1995).

2. CEC cannot Provide Electric Service in Boulder Ridge.

Bismarck Ordinance 10-11-01 requires a franchise as a condition to provide utility service in Boulder Ridge. The PSC and CEC dismiss this obstacle by arguing the objective of the TIA must control over the ordinance. There is nothing within the TIA, however, allowing CEC to provide services without a franchise. Montana-Dakota Utilities Co. v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971) holds the opposite.

The PSC and CEC attempt to distinguish Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra by arguing the complaint in Divide County

was brought in District Court and not before the PSC under the TIA. The Divide County complaint was brought in District Court because the PSC has no jurisdiction over RECs. Therefore MDU's complaint to prevent interference with its franchise service area could only be brought in District Court. See Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d, 414, 422-423 (N.D. 1967).

If CEC refuses to comply with Bismarck's order determining Boulder Ridge is not within CEC's franchised service area, MDU can maintain an action in District Court to prevent CEC's interference with MDU's service. Montana-Dakota Utilities Co. v. Divide County School District No. 1, *supra*. The outcome of a proceeding to prevent interference with electric service within an annexed area should be the same regardless of the forum.

CEC offers a specious argument that it has a franchise from the City. CEC's limited franchise to serve areas other than Boulder Ridge has no relevance to duplication of service in Boulder Ridge.

3. The PSC was Required to Consider the City Franchises.

The PSC and CEC argue N.D.C.C. § 49-03-06(8) does not mean what it says. The statute, however, is Legislative confirmation that nothing within Chapter 49-03, not even § 49-03-01.3, can be interpreted to encroach on a city's right to franchise utility service areas within the city. The statute prohibits application of Chapter 49-03 in a manner that a determination of interference or duplication under N.D.C.C. § 49-03-01.3

either precludes a public utility from exercising its franchise or allows a cooperative to provide service without a franchise.

N.D.C.C. § 49-03-06(8) is not a product of careless drafting. The language makes clear service area agreements, while subject to approval by the PSC, are nonetheless subordinate to the franchise authority of a municipality. The application of subsection 8 to the entirety of Chapter 49-03 is intended to prevent CEC's argument that the limitation only applies to area service agreements under N.D.C.C. § 49-03-06 and therefore by implication the other provisions of Chapter 49-03 are not limited by a municipality's franchise authority. The statute is not in conflict with but rather is a limitation upon N.D.C.C. § 49-03-01.3.

CEC and the PSC suggest the City cannot be entrusted to designate utility service areas and only the PSC is capable of making such important decisions. The people of North Dakota, through the adoption of N.D. Const. Art. VII, § 11, said otherwise. CEC argues the history of this constitutional provision is irrelevant because the constitutional provision was not adopted until 10 years after it was drafted. The plain language of the provision, however, did not change over that time; nor did its purpose.

While the PSC is an agency of the State, cities are also agencies of the State. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197, 204 (N.D. 1957). The power to grant franchises to use the streets of a municipality resides with the Legislature except when the Constitution requires consent from the municipality. Id. The

Constitution not only requires such consent, it specifically restricts the Legislature from enacting laws that interfere with a city's franchise of utilities. Id. at 205. Under the Constitution, the franchising of utility services can only be exercised by municipalities as agencies of the State and cannot be delegated by the Legislature to the PSC. North Dakota statutes and its Constitution unequivocally resolve any conflict between the City's right to franchise electric services and any authority of the PSC to prevent duplication of electric facilities in favor of the City.

The PSC concedes CEC needs but does not have a franchise to provide service within Boulder Ridge which is contrary to the PSC's determination that MDU's extension of facilities is an unreasonable duplication of CEC's services. The PSC also asserts its decision "puts the ball in the city's court." In other words, the City can either issue a franchise to the PSC's preferred service provider or the citizens within Boulder Ridge can do without electric service. An interpretation of the PSC's authority to impose this Hobson's choice on the City is in conflict with both statutory and constitutional provisions prohibiting the TIA from interfering with a city's right to franchise utility service.

CEC argues MDU has not met the requirements to declare the TIA unconstitutional. MDU has not asserted the TIA is unconstitutional. There is a substantial difference between MDU's position the TIA must be interpreted to avoid conflict with constitutional provisions and an argument the statute is unconstitutional and therefore void under any interpretation. City of Bismarck v. Nassif, 449 N.W.2d

789, 794 (N.D. 1989). It is CEC which seeks interpretation of the TIA in a manner that runs afoul of the Constitution.

The only authority relied upon by the PSC and CEC to support the PSC's decision are the South Pointe cases. The PSC states the only real difference between the cases is the public utility and the cooperative in South Pointe both had franchises to serve the annexed area. That difference, however, is what this case is about. The Court in South Pointe specifically determined as a threshold issue the cooperative had authority from the City to serve the annexed area. CEC does not have similar authority.

The PSC also argues a plain reading of the law indicates a franchise is not a threshold requirement for a TIA complaint. The argument ignores both the limitations of N.D.C.C. § 49-03-06(8) and Const. art. VII, § 11 which make the franchise question a threshold issue. Indeed, the PSC's counsel previously advised the PSC exactly the opposite:

... The franchise issue is a critical component of this proceeding and is a threshold issue. No matter what the Commission may consider regarding infrastructure that is in place or other factors that pertain to a determination of interference under N.D.C.C. § 49-03-01, Capital Electric must have a franchise from the City of Bismarck to provide service to the area.

PSC Doc. # 120, p. 3-4.

4. MDU has Standing to Appeal an Incorrect Application of the TIA.

CEC contends MDU does not have standing to assert the constitutional rights of a city to franchise utilities. The Court provided an extensive analysis of the standing requirement in administrative agency appeals in Shark v. US West Communications,

Inc., 545 N.W.2d 194, 198 (N.D. 1996). In short, the Court employs a three part analysis of standing for review of an agency order: one who is factually aggrieved, directly interested, and participates. Id. at 198.

MDU is the respondent in the complaint proceeding brought by CEC in which the PSC, through the improper application of the TIA, would prohibit MDU from exercising its franchise. A public utility holding a franchise has a property interest entitling it to restrain another person attempting to operate a competing business without lawful authority. Annot., 90 A.L.R.2d 7 (1963); see Montana-Dakota Utilities Co. v. Divide County School District No. 1, supra at 727; Montana-Dakota Utilities Co. v. Johannsen, supra. Responding to a complaint for improper extension of its facilities, MDU has standing to assure the TIA is applied consistent with the facts and the law.

CEC's reliance upon Application of Otter Tail Power Company, 451 N.W.2d 95 (N.D. 1990), which dealt with the PSC's exercise of jurisdiction on an Indian Reservation, is misplaced. That case did not involve North Dakota statutory and constitutional restrictions on the PSC's authority at issue in this proceeding. In Baker Electric Cooperative v. Chaske, 28 F.3d 1466, 1475-1476 (8th Cir. 1994) and Baker Electric Cooperative v. Otter Tail Power Company, 116 F.3d 1207, 1215-1216 (8th Cir. 1997) the Court recognized the standing of a public utility to assert its right to provide electric service to certain Tribal operations.

5. The PSC lacked Authority to order MDU to sell its Facilities.

Neither the PSC nor CEC attempts to argue the PSC acted within the scope of its authority under the TIA in ordering MDU to sell certain of its facilities to CEC.

B. THE PSC IMPROPERLY APPLIED PC&N STANDARDS FOR DETERMINING INTERFERENCE AND UNREASONABLE DUPLICATION

Statutory standards of interference and unreasonable duplication of services are different than PC&N standards particularly when the REC does not have authority to provide services within the contested area. The PC&N standards were created by the Court in Application of Otter Tail Power Company, 169 N.W.2d 415, 418 (N.D. 1969) after the PC&N standard under the TIA of requiring the cooperative's permission for public utility extensions outside a city was declared unconstitutional. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414 (N.D. 1967). A cooperative's permission was never required for public utility extensions within a city. The standards for determining interference or unreasonable duplication of services within a city therefore have always been different from PC&N standards and were not changed by either Montana-Dakota Utilities Co. v. Johanneson, *supra*, or Application of Otter Tail Power Company, *supra*. The PSC's role in a complaint proceeding is not to determine which provider, in its opinion, is best able to serve the annexed area, but rather to prevent interference and duplication of services if the REC is authorized to provide the services under a franchise for the annexed area.

C. THE CASE WAS NOT DECIDED UPON THE ISSUES STATED IN THE COMPLAINT OR THE NOTICE OF HEARING.

If the PSC had decided the case based on CEC's complaint allegations or on the issues stated in the notice of hearing, CEC's complaint would have been summarily dismissed. The PSC's failure to decide the case on those issues violated the Administrative Agency Practices Act and was a denial of due process.

D. THE FINDINGS OF FACT ARE NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

The evidence might support the PSC's determination if this was a PC&N proceeding. However, neither the PSC nor CEC point to any evidence to support a finding that MDU's extension of facilities interferes with CEC's existing services. Similarly, MDU's extension cannot rationally unreasonably duplicate services which CEC cannot provide. The PSC and CEC arguments conspicuously ignore the testimony of CEC's only witness who testified MDU's extension of facilities would not constitute either interference or unreasonable duplication if MDU has the franchise to serve Boulder Ridge. The dichotomy between this testimony and the Commission's order is the PSC's order is based upon evidence regarding PC&N factors rather than evidence regarding interference and unreasonable duplication.

MDU does not ask the Court to "reweigh and reevaluate the evidence." Instead, because the undisputed evidence shows CEC does not have authority to provide service within Boulder Ridge, only one inference can be drawn. As a matter of law, MDU's extension of facilities did not interfere with or unreasonably duplicate CEC's

nonexistent services. Nygaard v. Robinson, 341 N.W.2d 349, 354 (N.D. 1983); Fettig v. Whitman, 285 N.W.2d 517 (N.D. 1979).

Other PSC findings challenged by MDU were not addressed by the PSC or CEC or were lightly dismissed as harmless error. These erroneous findings are not supported by the preponderance of the evidence and cannot be dismissed as harmless if they were given any consideration in the PSC's determination.

E. THE PSC FAILED TO ADDRESS THE EVIDENCE PRESENTED BY MDU.

The PSC did not address the evidence offered by MDU that Boulder Ridge is within MDU's and not CEC's franchise area as determined by the only governing body with authority to determine service areas within the City. Rather, the PSC decided which provider, in its opinion, should serve in Boulder Ridge. On that basis it determined MDU's extension of service would interfere with and unreasonably duplicate the PSC's preferred hypothetical service provider.

CONCLUSION

The PSC's order should be reversed and CEC's complaint dismissed.

DATED this 29 day of December, 2006.

Respectfully submitted,

Montana-Dakota Utilities Co., a
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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.)

AFFIDAVIT OF SERVICE

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

Belinda Dickson, being first duly sworn on oath, does depose and say: That she is over the age of eighteen years, and not a party to the above-entitled matter;

That on the 29 day of December, 2006, this affiant deposited in the mailing department of the United States Post Office at Bismarck, ND, a true and correct copy of the following documents in the above-captioned action:

- (1) Reply Brief of Appellant Montana-Dakota Utilities Co.

That the copies of the above documents were enclosed and secured in an envelope with postage duly prepaid and addressed as follows:


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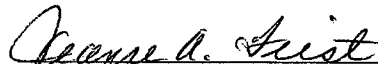
To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Belinda Dickson

Subscribed and sworn to before me this 29 day of December, 2006.



Notary Public

