

June 22, 2006

The Public Service Commission convened in the Harvest Room, State Capitol, Bismarck, North Dakota, on June 22, 2006, 10:00 a.m. Present were Commissioners Clark, Wefald, and Cramer.

Minutes

Mr. Cramer: I move the minutes of June 7, 2006, be approved.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Bills

Mr. Cramer: I move the following bills, as reviewed by the Commission, be approved and paid:

Dans Building Specialties	22,446.20
ND Newspaper Association	389.53
NDSU – Restricted Fund Accounting	333.83
William W. Binek	722.80
Alltel	287.41
Plaza-Makoti Equity Elevator	100.00
Lawrence County Sheriff's Office	29.42
Guy Welch	577.40
William E. Dodd	489.32
ND Newspaper Association	335.88
Quality Construction	36,359.68
ITD – 5/06 ph chgs	1,367.28
ITD – 5/06 DP fees	2,760.93
DOT – 5/06 motor pool	12,721.03
Secretary of State	260.00
Elan	4,228.33

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. AU-06-254  
Adolph Hepper  
Auctioneer  
License Application

Mr. Cramer: I move the Commission approve the auctioneer license application for Adolph Hepper, Mobridge, South Dakota.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-06-196  
Montana-Dakota Utilities Co., a  
Division of MDU  
Dick Hanshew, Hettinger, ND  
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Montana-Dakota Utilities Co. to extend electric service to Dick Hanshew for a residential site near Hettinger, North Dakota, Case No. PU-06-196.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-06-197  
Otter Tail Corporation  
Verizon Wireless, Enderlin, ND  
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Corporation to extend electric service to Verizon Wireless for a cell tower site

Case No. PU-06-197 Continued

near Enderlin, North Dakota, Case No. PU-06-197.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-06-226  
Montana-Dakota Utilities Co., a  
Division of MDU  
Cogeneration/Small Power Producer  
Rates  
Rates Suspension

Mr. Cramer: I move the Commission suspend  
Montana-Dakota Utilities Co.'s Cogeneration/Small  
Power Producer rates, Case No. PU-06-226.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-06-234  
Square Butte Electric Cooperative  
Request for Jurisdictional  
Determination  
PSC Comments / Letters

Mr. Cramer: I move the Commission acknowledge  
that the Commission determines that no siting is  
required for raising and possible relocation by Minnkota  
Power Cooperative, Inc. of structures numbered 1392-  
1396 within the existing route of the Square Butte  
Electric Cooperative DC transmission line in the NE ¼  
and NW ¼ of Section 11, Township 137N, Range 54W.  
Highland Township, Cass County, North Dakota, Case  
No. PU-06-234.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-06-236  
South Dakota Wheat Growers  
Association  
Facility Based Grain Buyer - Norway  
Spur, ND  
Discontinue Business

Mr. Clark: I move the Commission issue an order in  
Case No. GE-06-236 granting the request of South  
Dakota Wheat Growers Association doing business as  
James Valley Grain, Aberdeen, South Dakota, to  
discontinue business as a facility-based grain buyer at  
Norway Spur, North Dakota.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-06-237  
Technology Crops, Inc.  
Grain Warehouse - Winston-Salem, NC  
License Application

Mr. Clark: I move the Commission issue an order in  
Case No. GE-06-237 granting the request of Technology  
Crops, Inc., Winston-Salem, North Carolina, to operate a  
170,000-bushel grain warehouse at Karnak, North  
Dakota and a 295,000-bushel grain warehouse at  
Wyndmere, North Dakota, effective June 12, 2006.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-06-238  
Strasburg Farmers Elevator  
License No. 64 - Strasburg, ND  
Discontinue Business

Mr. Clark: I move the Commission issue an order in  
Case No. GE-06-238 granting the request of Strasburg  
Farmers Elevator to discontinue business at Strasburg,  
North Dakota.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-06-239  
CHS, Inc.  
Facility-Based Grain Buyer - Strasburg,  
ND  
License Application

Mr. Clark: I move the Commission issue an order in Case No. GE-06-239 granting the request of CHS, Inc., doing business as Northern Plains Coop., St. Paul, Minnesota, to operate as a facility-based grain buyer at Strasburg, North Dakota.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-2967-03-666  
BEK Communications Cooperative, et  
al.  
vs. SmartNET, Inc.  
Complaint

Mr. Clark: I move the Commission adopt the order denying SmartNET Inc.'s Motion for Continuance in Case No. PU-2967-03-666, BEK Communications Cooperative, et al. vs. SmartNET, Inc., Complaint.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

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

Mrs. Wefald: I move the Commission adopt the Order granting the Motion to Dismiss without prejudice in Capital Electric Cooperative, Inc. vs. Montana-Dakota Utilities Co., Case No. PU-05-551.

Mr. Cramer: I second the motion.

Roll Call: Mr. Clark votes "Nay".

Mrs. Wefald votes "Aye".

Mr. Cramer votes "Nay".

Mr. Clark: I move the Commission adopt the Findings of Fact, Conclusions of Law and Order in Capital Electric Cooperative, Inc. vs. Montana-Dakota Utilities Co., Case No. PU-05-551.

Mr. Cramer: I second the motion.

Roll Call: Mr. Clark votes "Aye".

Mrs. Wefald votes "Nay".

Mr. Cramer votes "Aye".

Commissioner Clark's  
Concurring Opinion

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

Neither is this order any sort of grandiose statement on

Commissioner Clark's  
Concurring Opinion Continued

the Territorial Integrity Act (TIA). Few issues have given rise to such intense debate in our legislative sessions the past few years. Try as some have to entice the PSC to become involved in that debate, we have steadfastly refused to do so. Frankly, if PSC orders in these contentious matters are to be regarded as unbiased by the parties and the general public, then we must remain neutral on the larger policy questions regarding the statute itself. The law is what it is, and this order is simply the result of a dispassionate interpretation of the weight of the evidence presented to us.

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

Admittedly, this leaves the situation unsettled. We now have a public utility, MDU, that is unable to provide service under state statute. Yet the provider, whose service is in accordance with state law, does not hold a valid city franchise. Again, this is an issue that is beyond

Commissioner Clark's  
Concurring Opinion Continued

the ability of the PSC to resolve, because the PSC has no authority over the manner in which cities franchise utilities. Reconciliation of these contradictions must be handled by the courts, or ultimately, the legislature.

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

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

---

Tony Clark, President

Commissioner Cramer's  
Concurring Opinion

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

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

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

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

Commissioner Cramer's  
Concurring Opinion Continued

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

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

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

---

Kevin Cramer, Commissioner

Commissioner Wefald's  
Dissenting Opinion

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

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

Second, Section 49-03-01.3 requires the Commission to determine if the electric public utility has "lawfully

Commissioner Wefald's  
Dissenting Opinion Continued

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

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

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

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

---

Susan E. Wefald, Commissioner

Case No. PU-06-224  
Great Plains Natural Gas Co.  
June 2006  
Cost of Gas Adjustment

Mr. Cramer: I move the Commission approve Great Plains Natural Gas Co.’s Cost of Gas adjustment for June 2006, Case No. PU-06-224  
Mr. Clark: I second the motion.  
Roll Call: All voting "Aye."

Case No. PU-06-240  
Montana-Dakota Utilities Co., a  
Division of MDU  
July 2006  
Cost of Gas Adj./Natural Gas

Mr. Cramer: I move the Commission approve Montana-Dakota Utilities Co.’s Natural Gas Cost of Gas Adjustment for July 2006, Case No. PU-06-240.  
Mr. Clark: I second the motion.  
Roll Call: All voting "Aye."

Case No. GS-05-631  
North Dakota One-Call  
CY2006 - R079-07  
Application

Mr. Cramer: I move the Commission issue an Intent to Award a contract to Odney Advertising Agency PO Box 2035, Bismarck, North Dakota 58502-2035 in the amount of \$11,125.52 for a state-wide radio media buy using North Dakota One Call Grant funds.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Salary Adjustment

Mr. Cramer: I move the Commission, consistent with the intent of the 2005 Legislature, grant position number 5001 a salary adjustment as identified in the Executive Secretary's 9 June 2006 supporting memorandum effective 1 June 2006.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

ATTEST

THE COMMISSION ADJOURNED AT 11:35 A.M.

---

Executive Secretary

---

TONY T. CLARK, PRESIDENT