

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)
)
Complainant,)
)
vs.)
)
Montana-Dakota Utilities, Inc., a)
Division of MDU Resources Group,)
Inc.)
)
Respondent.)

REPLY MOTION TO DISMISS

Case No. PU-05-551

The Complainant (Capital) responds to the Respondent's (Montana-Dakota) Motion to Dismiss dated November 23, 2005. The Motion to Dismiss should be denied.

Montana-Dakota's November 23, 2005, Motion to Dismiss repeats its assertions contained in its Answer and the request that Capital's Complaint be dismissed. The PSC has responded to the issue raised in the Answer, stating in its Notice of Hearing that one of the issues to be considered at the hearing is whether the Commission has jurisdiction. Montana-Dakota's filing of a separate motion implies that Montana-Dakota wants the Commission to dismiss the case summarily, without holding a hearing. The Motion to Dismiss should not be granted without a hearing, because of fundamental principles of due process.

Capital resists Montana-Dakota's Motion to Dismiss, both as presented in Montana-Dakota's Answer and in its separate motion. Capital has invoked the jurisdiction delegated by the legislature to the Commission, and disputes Montana-Dakota's arguments that the Commission should deny that it has jurisdiction.

The Commission should follow the procedure outlined in a remarkably similar situation. In Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956), a rural electric cooperative complained that Montana-Dakota's extension of its service interfered with the service and system of the cooperative, in violation of N.D.C.C. 49-03-01 (as provided in 1953, before enactment of the Territorial Integrity Act), and also in violation of an area service agreement. The Commission acknowledged its limited jurisdiction did not include judicial power to adjudicate alleged contractual rights under the area service agreement. The Commission correctly proceeded to hear and decide the interference complaint under the applicable statute and without regard to the alleged contract. That approach to the case was affirmed by the Supreme Court.

So also in the current situation, the Commission should proceed to hear and decide whether Montana-Dakota's actions interfere with Capital's service or system in violation of N.D.C.C. chapter 49-03, without regard to Montana-Dakota's theories of municipal government law regarding franchises, or Montana-Dakota's claims about Capital's franchise, or how Capital's franchise is affected by the Area Service Agreement, or by the Bismarck City Commission's decision and order.

The Commission has indicated it will address the jurisdiction issue. Its Notice of Hearing on Capital's Complaint alleging Montana-Dakota's interference with Capital's service and system specifies as the first issue "Whether the Public Service Commission has jurisdiction to award the relief requested by the Complainant."

The Commission has no power to decide the jurisdiction and franchise issues raised by Montana-Dakota. Williams Electric Cooperative v. Montana-Dakota Utilities Co. supra. See also City of Grafton v. Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1958): "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." (Court Syllabus No. 6.) The Commission has no power to consider, to adopt or to reject, Montana-Dakota's interpretation of municipal government law regarding franchises under N.D.C.C. Title 40 and related state constitutional law. Those are fields which the legislature has not authorized the Commission to enter.

Evidently, the Commission regards Montana-Dakota's claim about franchises as presenting a threshold issue as to jurisdiction that should be resolved before the Commission proceeds to determine whether Montana-Dakota's action amounts to prohibited interference with Capital's service and system. With due respect for the Commission's concern that the threshold issues of jurisdiction and the status of franchises should be resolved, and with due regard to the established principle that the jurisdiction of the Commission is limited, Capital has commenced an action in district court for a judicial determination of Capital's rights, status, or other legal relations affected by statute, municipal ordinance, contract or franchise, under Chapter 32-23.

After the court determines these threshold issues, the Commission can proceed to exercise its jurisdiction and determine whether Montana-Dakota's action amounts to prohibited interference with Capital's service and system.

Montana-Dakota's motion to dismiss should be denied. The motion should be denied because: 1) To grant the motion summarily is contrary to due process; 2) The Commission lacks jurisdiction to deny it has jurisdiction; 3) the issues presented by the motion are now before a court that has jurisdiction.

Dated this 6th day of December, 2005.

PRINGLE & HERIGSTAD, P.C.

By: /s/ Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381