

## MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer

FROM: Bill Binek and Annette Bendish

DATE: March 6, 2006

RE: Capital Electric v. MDU, Case No. PU-05-551 -- Motion by Capital Electric for Hearing on Continuance

This afternoon, Capital Electric Cooperative, Inc. (Capital) filed a Motion and Brief for Hearing on "Continuance" challenging the Commission's right to continue this proceeding.

Following the hearing on February 9, 2006, the Commission held a work session on February 10 for the purpose of discussing the best course of action for the Commission taking into consideration the pending action before the District Court regarding franchise issues. The Commission decided that the most appropriate action would be to continue this proceeding for an indefinite period of time until the issue of city franchise rights is finally determined.

Capital's motion is based on the position that a continuance under the Commission's rule, N.D. Admin. Code § 69-02-04-03 is out of order because the hearing in the case was commenced and completed on February 9<sup>th</sup>. The rule provides that "[a]fter hearings are scheduled, continuances may be granted by the commission for good cause." The rule does provide that the Commission may continue a hearing on its own motion.

The Commission has the authority under N.D. Admin. Code § 69-02-01-11 to suspend on its own motion "any rule of procedure or part thereof, upon due notice to all parties, whenever the public interest or the interest of any party to the proceeding will not be substantially prejudiced thereby." N.D.C.C. § 28-32-39 provides that an agency shall issue its final order within 30 days after the evidence has been received, briefs filed, and arguments closed, "or as soon thereafter as possible . . . ."

In the proposed order, the Commission states that it is of the opinion that based on the evidence presented at the hearing and is of the opinion that based on the evidence presented at the hearing and based on the legal arguments of counsel that a threshold issue to a determination by the Commission of the issues relating to interference is the determination of which company, MDU or Capital Electric, has the right under franchise from the City of Bismarck to provide electric service to Part of Boulder Ridge First Addition. The Commission points out that the question of franchise rights is not one that can be determined by the Commission, and that that issue is presently before the District Court.

The Commission believes the franchise issue is a threshold issue that needs to be determined prior to the Commission issuing a decision in this case. The Commission has no authority to determine the franchise issue. Therefore, it is not possible for the Commission to issue a decision until the franchise issue is determined.

Staff recommends that the Commission suspend by motion the briefing schedule set at hearing and that the Commission schedule a hearing to consider the proposed continuance of this proceeding.