

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Montana-Dakota Utilities Co., a
Division of MDU Resources Group, Inc.

CIVIL NO. _____

Appellant,

vs.

BRIEF IN SUPPORT OF MOTION
FOR STAY OF
PUBLIC SERVICE COMMISSION
ORDER PENDING APPEAL

North Dakota Public Service Commission
and Capital Electric Cooperative, Inc.

Appellees

JUN 22 2006

Montana-Dakota Utilities Co, a Division of MDU Resources Group, Inc. ("MDU") submits the following brief in support of its Motion for a Stay of the order of the Public Service Commission pending MDU's appeal of that order in this proceeding.

On June 22, 2006, the Public Service Commission ("PSC") entered its Order in Case No. PU-05-551 directing that MDU:

1. Within 30 days, cease and desist from providing electric service to Part of Boulder Ridge First Addition to the City of Bismarck; and
2. Offer to sell to Capital Electric Cooperative, and Capital shall purchase from MDU, at book value, the distribution facilities located in and used by MDU to serve Boulder Ridge First Addition.

MDU promptly filed with the District Court a Notice of Appeal from the Order pursuant to N.D.C.C. § 28-32-42. MDU requests that the Court stay operation of the Commission's Order as provided under N.D.C.C. §§ 28-32-48 and 49-05-14 pending a final order of the Court on appeal.

FACTS

MDU provides retail electric service to customers in North Dakota and, in particular, in the City of Bismarck. The proceeding from which MDU filed its Notice of Appeal was initiated by Capital Electric Cooperative, Inc. ("CEC") by the filing of a Complaint, dated September 28, 2005, with the PSC. The complaint alleged that Boulder Ridge First Addition to the City of Bismarck ("Boulder Ridge") is part of CEC's franchised service area and MDU's extension of service into Boulder Ridge unreasonably interferes with the service and system of CEC in violation of N.D.C.C. §§ 49-03-01 and 49-03-01.3. The Complaint requested the Commission enter an Order: (1) restraining and enjoining MDU from constructing or extending its lines, plant, or system into CEC's franchised service area; (2) requiring immediate removal of all of MDU's facilities in CEC's service area; and (3) such other terms and conditions as the Commission may deem reasonable and proper.

MDU filed an Answer and Counterclaim, dated October 20, 2005, in which MDU denied Boulder Ridge is within CEC's franchised service area, and alleged Boulder Ridge is within the area of MDU's unlimited franchise from the City of Bismarck. In its counterclaim, MDU alleged CEC is providing electric distribution service to customers who are not eligible for membership in CEC and whose numbers exceed 10% of the number of CEC members. MDU requested the Commission issue an Order: (1) dismissing CEC'S complaint against MDU; (2) declaring that CEC is prohibited from providing electric distribution service within Boulder Ridge; and (3) restraining and enjoining CEC from interfering with the service of MDU in Boulder Ridge.

On February 9, 2006, the Commission heard testimony on CEC's complaint. At the hearing, MDU's counterclaim was voluntarily dismissed because of proceedings in South

Central District Court captioned Capital Electric Cooperative, Inc. v. City of Bismarck, et al, Civil No. 05-C-2303. On June 22, 2006, the Commission, on a 2-1 vote, issued its Findings of Fact, Conclusions of Law and Order.

MDU contends its extension of facilities to serve Boulder Ridge is not an unreasonable interference with or duplication of CEC's service and facilities. Contrary to the allegations of its complaint, CEC does not have a franchise from the City of Bismarck to serve customers within Boulder Ridge. On November 14, 2005, the Bismarck Board of City Commissioners issued Findings of Fact, Conclusion, Decision and Order in response to a Petition to Declare Franchise Rights filed by MDU. In its Order, the City concluded that CEC's limited franchise to provide electric distribution service within the City of Bismarck did not extend to newly annexed areas such as Boulder Ridge and that electric service to Boulder Ridge is properly provided by MDU under its general franchise subject to CEC retaining service to its existing customers. The Order of the City Commission was appealed by CEC to the South Central District Court. The District Court denied CEC's appeal determining that the City's order was not arbitrary, capricious or unreasonable. Capital Electric Cooperative, Inc. v. City of Bismarck, et al, Civil No. 05-C-2303.

At the hearing before the Commission, MDU moved to dismiss CEC's complaint on the grounds that CEC did not have a franchise to serve Boulder Ridge and therefore could not prove the allegations of its complaint and MDU's extension of service to the subdivision could not be an unreasonable interference with CEC's service or facilities.

Although the City of Bismarck in its November 14, 2005 Order stated it would allow CEC to continue service to its existing customers, CEC did not offer evidence to show that it has obtained an amendment to its existing franchise to include such existing customers.

Moreover, CEC did not offer evidence showing that MDU had extended electric service to customers that were receiving service from CEC when Boulder Ridge was annexed.

Bismarck City Ordinance 10-11-01 prohibits the operation of electric facilities for provision of electric distribution service without a franchise from the City:

10-11-01. Franchises Required. Except as otherwise provided by law, a person, firm, corporation or utility may not place or maintain any permanent or semipermanent fixtures, including poles, wire, cable, conduit, or any other medium used to transmit or transport electric or electronic signals, natural gas or other materials, in, over, upon or under any street or public place without a franchise to do so from the city. A franchise may be granted by resolution of the Board of City Commissioners.

Because CEC is prohibited by Bismarck City Ordinance from constructing and maintaining electric distribution facilities to provide electric service in an area within the City of Bismarck for which CEC does not have a franchise, MDU's extension of facilities in Boulder Ridge to serve customers that are not within CEC's franchised service area can not unreasonably interfere with or duplicate CEC's nonexistent service and unauthorized facilities and accordingly, the Order of the PSC should be stayed by the Court pending appeal.

LAW – MDU'S APPLICATION FOR STAY

MDU's request for a stay pending appeal is governed by the Administrative Agencies Practices Act at N.D.C.C. 28-32 as well as N.D.C.C. § 49-05-14. Specifically, N.D.C.C. § 28-32-48 provides in pertinent part:

An appeal from an order or the rulemaking action of an administrative agency does not stay the enforcement of the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order or for a stay in the effect of a published rule.

With respect to the terms and conditions to be imposed with a stay of an order of the PSC, N.D.C.C. § 49-05-14, provides:

In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond first shall have been executed and filed with and approved by the district court, payable to the state of North Dakota, and sufficient in amount and security to ensure the prompt payment, by the party appealing, of all damages caused by the delay in the enforcement of the order' or decision of the commission and of all monies which any person, corporation, or limited liability company may be compelled to pay, pending the appeal, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case said order or decision is sustained. The district court, in case it stays or suspends the order or decision of the commission in any manner affecting rates, also by order shall direct the public utility affected to pay into court, from time-to-time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation, limited liability company, or person in excess of the sum which such corporation, limited liability company, or person would have been compelled to pay if the order of the commission had not been stayed or suspended. Upon a final determination of an appeal, the court shall make an appropriate order disposing of the impounded funds in accordance with such determination. In the event the public utility shall fail to comply with the conditions of the stay bond, the commission may sue thereon for the use and benefit of the patrons or others who have suffered damage by reason of the stay.

Although the above section is primarily directed to appeals from orders of the Commission involving utility rates such that a stay allows the utility to collect rates higher than would otherwise be allowed under the order being appealed, MDU is prepared to comply with the conditions of N.D.C.C. § 49-05-14 by executing and file a suspending bond. MDU believes, however, that a stay without a bond is appropriate in this proceeding because no person will be monetarily damaged by a stay that will allow the customers of Boulder Ridge to continue to receive electric service pending the appeal.

Unlike N.D.R.Civ.P. Rule 62 governing a stay on appeal from a judgment of the district court, N.D.C.C. § 28-32-48 does not provide any standards or guidelines for the issuance of a stay of an order of an administrative agency. The Administrative Agencies

Practices Act, however, generally relies upon the North Dakota Rules of Civil Procedure to fill in procedural gaps of the Act. See, N.D.C.C. § 28-32-21. The provisions of N.D.C.C. § 28-32-48 are similar to those of Rule 62(d) which allows the appellant from a judgment of the district court to obtain a stay by giving a supersedeas bond approved by the court. This provision entitles an appealing party to a stay of enforcement of a judgment as a matter of right if a supersedeas bond is filed with the court. 12 Moore's Federal Practice, § 62.03[1] (Matthew Bender 3d Ed.). Only when the posting of the bond will not protect the rights of the nonappealing party, will a stay not be granted. *Id.* at § 62.03[3][b]. In comparison, when the appellant seeks a stay of an injunction (such as the Commission's order to cease and desist) pending an appeal under Rule 62(c), the courts apply a test similar to that used in deciding whether to issue a preliminary injunction. Cass County Electric Cooperative v. Wold Properties, Inc., 253 N.W. 2d 323 (N.D. 1997). That is, a stay of an injunction pending appeal requires a showing: (1) that the appellant is likely to succeed upon appeal; (2) that unless the stay is granted the appellant will suffer irreparable injury; (3) that no substantial harm will come to any party if the stay is granted; and (4) that no substantial harm to the public interest will result on account of the stay. *Id.*

In this case, MDU seeks a stay of an order that is similar in effect to an injunction. Accordingly, the Court should grant MDU's application for a stay based upon the four-part test applicable to a stay pending an appeal of an injunction. Under this four-part test MDU is entitled to a stay of the Commission's order.

1. MDU Is Likely To Succeed Upon Appeal.

The PSC Order leaves no party with the legal right to provide electric service to Boulder Ridge. The South Central District Court for Burleigh County, the Honorable Bruce

Haskell, has entered its Order denying CEC's appeal from the Findings, Conclusions, Decision and Order entered by the City of Bismarck. Accordingly, CEC does not have a franchise to serve Boulder Ridge and is prohibited by Bismarck City ordinance from providing electric service within the subdivision. The PSC Order presupposes CEC has service within Boulder Ridge and yet that cannot be because the Court found clearly and conclusively that the City of Bismarck did not abuse its discretion in determining that MDU is the franchise holder in Boulder Ridge. The result of the PSC Order directing MDU to cease and desist providing service in Boulder Ridge is that there is no service provider within the area for which the PSC has determined it is prohibiting unreasonable interference and duplication facilities. This nonsensical result of having no one with the right to serve customers in the subdivision in order to prevent unreasonable duplication and interference of service is most certainly not a result intended by N.D.C.C. Chapter 49-03.

MDU is also likely to prevail on the merits because the Commission incorrectly determined it could not consider or interpret two constitutional provisions that are in conflict with its decision. More inexplicable was the Commission's failure to consider or even address a similar statutory provision. These constitutional and statutory provisions resolve any conflict between the authority of the PSC and the City by limiting the authority of the Commission to prevent interference with the franchise authority of the City. N.D. Const. Art. VII, § 11 provides the power of a city to franchise construction and operation of any public utility service within the city shall not be abridged by the legislative assembly. The Commission's interpretation of its authority under N.D.C.C. Chapter 49-03 would result in the Commission being able to reverse the City of Bismarck's determination of the proper electric franchise provider for Boulder Ridge and prevent MDU from exercising that

franchise authority – a clear violation of the constitutional limitation. Similarly, N.D.C.C. Const. Art. XII, § 10 prohibits the Legislative Assembly from granting the right to construct and operate an electric light plant within a city without requiring the consent of the city. Contrary to this restriction, the Commission’s order places Boulder Ridge within CEC’s service area and directs MDU to sell its facilities to CEC without considering that CEC does not have a franchise from the City to serve the subdivision. Finally N.D.C.C. § 49-03-06(8) specifically provides that “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.” Notwithstanding the obvious limitation of this section on the Commission’s authority under N.D.C.C. § 49-03-01.3, the Commission, at the urging of CEC, completely ignores this statutory provision and instead broadly interprets its authority under N.D.C.C. § 49-03-01.3 to trump the City’s determination of the electric franchise provider for Boulder Ridge. The Commission’s order effectively renders each of the above constitutional and statutory limitations meaningless and is contrary to the precedent of the North Dakota Supreme Court in Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1972).

2. Unless the Stay is Granted, MDU Will Suffer Irreparable Injury.

MDU will suffer irreparable injury if, after having extended its lines to Boulder Ridge to provide service under its franchise, it is not permitted to provide that service. If a stay is not granted, MDU will lose revenues from the Boulder Ridge customers that it will be unable to recover from customers, the Public Service Commission, or CEC. It will be irreparably harmed.

Customers of MDU within Boulder Ridge will also be irreparably harmed if MDU is

not allowed to provide them with electric service pending this appeal. Because CEC does not have a franchise to serve the area and therefore is prohibited by law from serving these customers, the customers face the prospect of not having electric service if a stay is not granted. The Commission recognized this potential harm and the need for a stay by delaying the effectiveness of its order for 30 days to allow MDU the opportunity to obtain a stay.

3. No Substantial Harm Will Come to Any Party if the Stay is Granted.

If a stay is granted, the status quo will have no substantial harm upon any party to this action. At the present time, service is being provided to citizens of the City of Bismarck living in Boulder Ridge, whereas under the Commission's order, there will be no service available from a lawful provider because CEC does not have a franchise for the area.

4. No Substantial Harm to the Public Interest Will Result on Account of the Stay.

Maintaining the status quo until the District Court determines the appeal of the PSC Order will not result in substantial harm to the public interest. In fact, the opposite is true. If a stay is not granted, the customers of Boulder Ridge may be without power.

CONCLUSION

The Order entered by the Public Service Commission provides that MDU cease and desist providing electrical services to Boulder Ridge and to sell its facilities to CEC. The Order fails to address and consider the threshold issue of whether Capital Electric Cooperative has the right to provide service in Boulder Ridge and ignores contrary constitutional and statutory limitations on the Commission's authority.

The PSC's Order, as a result, is deficient and contrary to law. Before the PSC can conclude that MDU must cease and desist providing services to Boulder Ridge based on

unreasonable interference of CEC's service and duplication of CEC's facilities, it must first determine whether CEC or MDU has the right to serve Boulder Ridge under a municipal franchise. This was precisely the suggestion of the District Court in Capital Electric Cooperative, Inc. v. City of Bismarck, Civil No. 05-C-2303 which the Commission's order also ignores. Without a finding that CEC is authorized by the City to serve the area, there can be no interference or duplication by MDU in providing service under its franchise.

MDU has made any necessary showing for a stay and is accordingly entitled to a stay of the Commission's order pending appeal. Upon approval of MDU's application for a stay, it will file a suspending bond if determined appropriate and ordered by the Court. MDU respectfully requests the Court to issue a stay of the Commission's order.

Dated at Bismarck, North Dakota, this 21 day of June, 2006.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of
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