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. Appellant, vs. The Public Service Commission of North Dakota and Capital Electric Cooperative, Inc. Appellees.	**APPELLEE CAPITAL ELECTRIC COOPERATIVE'S BRIEF OPPOSING APPELLANT'S MOTION FOR STAY PENDING APPEAL** **Case No. 06-C-1177**

NATURE OF PROCEEDING

This case is one of a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. Capital Electric Cooperative complained to the North Dakota Public Service Commission (PSC) under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about Montana-Dakota Utilities Co.'s extension of service in a rural area inside the corporate limits of a municipality. The disputed area is part of Boulder Ridge First Addition to the City of Bismarck (herein Boulder Ridge). The parties are referred to as Capital and MDU.

"[T]he typical conflict . . . arises when a potential customer, on or near the edge of a city served by a public utility under a franchise but within a rural area served by a rural electric cooperative, seeks service which each of the suppliers would like to furnish. It was

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to settle such controversies with a minimum of wasteful duplication and conflict that the Territorial Integrity Act was passed." Cass County Elec. Coop. v Wold Properties, Inc., 249 N.W.2d 514, 520 (N.D. 1977). In Capital Elec. Coop. v Public Service Commn., 534 N.W.2d 587, 590 and 592 (N.D. 1995), the Supreme Court's most recent decision under the Territorial Integrity Act, where the court reiterated, "The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities" and "the purposes of the Act to minimize conflicts between electric public utilities and rural electric cooperatives and to provide territorial protection for rural electric cooperatives."

The dispute over Boulder Ridge seems untypical because it is not a situation where an electric public utility seeks to serve customers in a rural area outside the corporate limits of a municipality. This dispute is about electric service in a rural area that has been annexed to a municipality.

Though it may seem untypical, this dispute is not unprecedented. It has an antecedent in Cass County Elec. Coop. v Northern States Power Co., 419 N.W.2d 181 (N.D. 1988) and Northern States Power Co. v Public Service Commn., 452 N.W.2d 340 (N.D. 1990). (The two cases are referred to herein as Cass v NSP and NSP v PSC, respectively, and collectively as the "South Pointe cases.") The South Pointe cases settled a dispute in the Fargo area substantially the same as this one between Capital and MDU over Boulder Ridge in Bismarck. Capital's Complaint to the PSC against MDU is like Cass's Complaint against NSP in the South Pointe cases.

In the Boulder Ridge case, the PSC heard the evidence, considered the parties'

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arguments, and issued its Findings of Fact, Conclusions of Law, and Order (herein PSC Order). The PSC found and concluded under N.D.C.C. § 49-03-1.3 that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered that MDU shall cease and desist from providing electric service to Boulder Ridge. PSC Order, Finding No. 29, Conclusion No 7, and Order No. 1. MDU has appealed from the PSC's Order under N.D.C.C. § 28-32-42, and MDU has moved the court to stay the PSC Order pending the appeal.

FACTS

The facts of the case are stated in the PSC Order, incorporated in this brief by reference. The findings of fact are based on the evidentiary record compiled by the PSC, which comprises the entire body of evidence to be considered on appeal. N.D.C.C. § 28-32-44 (5). The PSC's findings and the record is the sole source of evidence available to MDU to support its motion for a stay.

MDU's presentation under the heading "facts," pages 2-4 of its brief, includes a mix of the procedural history of the case before the PSC, assertions of fact not supported by the record, and MDU's arguments that are later repeated under the claim that MDU is likely to succeed on appeal. MDU's motion documents do not include any affidavits of facts offered in support of its motion, as is customary in applications for preliminary relief. MDU's procedure on appeal is consistent with its participation in the PSC hearing, arguing much but offering no proof. See PSC Order, page 2.

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ARGUMENT

I. An applicant for a stay pending appeal must make a strong showing that passes a four point test. MDU fails the test.

Under N.D.C.C. § 28-32-48, a stay is not an automatic consequence of an appeal from an agency's order. See also N.D.C.C. § 28-32-41; N.D.C.C. § 49-05-11. N.D.C.C. § 28-32-48 does not provide any standards to guide the court in considering an appellant's motion for a stay, but there are available points of reference.

"MDU seeks a stay of an order that is similar in effect to an injunction." (MDU's brief in support of its motion, page 6.) MDU suggests the court's consideration of the motion under the four-part test applicable to a stay pending appeal of an injunction, under Cass County Elec. Coop. v Wold Properties, Inc. 253 N.W.2d 323 (N.D. 1977) (herein Cass v Wold II). Capital agrees, and offers another point of reference to the same effect.

MDU's notice of appeal and motion for a stay are similar to a plaintiff's complaint and request for a preliminary injunction, a request for judicial action to sustain the plaintiff's position during the pendency of litigation under N.D.C.C. § 32-06-02. The criteria are:

1. The party moving for a preliminary order must show a substantial probability it will prevail in the litigation.
2. The moving party must show it would suffer irreparable injury if a preliminary order is not granted.
3. A preliminary order must not harm other parties.
4. A preliminary order must not adversely affect the public interest.

See Vorachek v Citizens State Bank, 461 N.W.2d 580 (N.D. 1990); F-M Asphalt, Inc. v

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N.D. State Hwy. Dept., 384 N.W.2d 663 (N.D. 1986) (herein Vorachek and F-M Asphalt).

The exact words of the four-part test under Cass v Wold II are:

> "(a) After the applicant for a stay has made a strong showing that he is likely to succeed on the merits of the appeal;
> (b) After the applicant has established that unless a stay is granted he will suffer irreparable injury;
> (c) If the applicant for a stay can show that no substantial harm will come to other interested parties; and
> "(d) If the court finds that granting the stay will do no harm to the public interest."

253 N.W.2d at 327.

When litigants cite the same case, it is useful to consider the parties in the cited case as the litigants' alter egos. Here, it is ironic to observe that Northern States Power, a company that ordinarily is on the same side as MDU in electric territorial disputes, is Capital's alter ego in Cass v Wold II, urging that the moving party -- the loser in a territorial dispute -- bears a heavy burden to justify a stay. Cass v Wold II, 253 N.W.2d at 327.

All four parts of the test must be met, and the four parts are applied under a fifth stringent rule consistent with the principle that a stay is not an automatic consequence of a litigant's filing appeal documents. The applicant must make a "strong showing." Id. A preliminary order is an extraordinary and drastic remedy and should not be granted unless the moving party meets its burden of persuasion by a clear showing on all four parts of the test. See Vorachek, 461 N.W.2d at 585.

Although the three cited cases are consistent with each other on the four-part test, there are distinguishing features, none of which supports MDU's motion. Cass v Wold II established the test, and remanded the case for the district court to apply the test; it did not involve the Supreme Court's ruling on a lower court's application of the test. 461 N.W.2d

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at 585-86. Vorachek and F-M Asphalt did. In Vorachek, the trial court's preliminary order was reversed. In F-M Asphalt, the trial court's denial of a preliminary order was affirmed. 384 N.W.2d at 665. The Vorachek and F-M Asphalt cases demonstrate that preliminary orders are extraordinary and drastic, not granted as a matter of routine. The same point is integral to the Cass v Wold II precedent. Whether a motion for a stay pending appeal shall be granted is subject to the court's discretion. If a stay is granted, the court should "set forth its findings with specificity." Cass v Wold II, 253 N.W.2d at 327.

II. MDU has not made a strong showing it is likely to succeed on the merits of its appeal.

Whether MDU will ultimately prevail in its appeal of the PSC's decision and Order is controlled by N.D.C.C. § 28-32-46:

> [T]he court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

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The essence of N.D.C.C. § 28-32-46 is that the judiciary does not function as a "super board" but is restrained in the review of administrative agency decisions. See NSP v PSC, 453 N.W.2d at 342-43; Montana-Dakota Utilities Co. v Public Service Commn., 413 N.W.2d 308, 310 (N.D. 1987). The standard of review does not portend a substantial probability that MDU will prevail in its appeal from the Public Service Commission's decision in the Boulder Ridge case.

MDU's appeal documents include many specifications of error under N.D.C.C. § 28-32-46, all of which MDU and the appellees will address when the appeal is fully briefed and argued. MDU's brief in support of its motion for a stay re-argues its defense before the PSC:

> [T]hat CEC is not authorized to provide service within Boulder Ridge and, therefore, Montana-Dakota cannot, as a matter of law, interfere with the services of CEC. CEC's Complaint should also be dismissed on grounds that the Public Service Commission does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge.

(MDU's November 23, 2005, Motion to Dismiss, pages 2 & 3.)

The grounds of MDU's motion to dismiss Capital's Complaint to the PSC, now repeated at this preliminary stage of the appeal process, are alternate ways of expressing a single idea: The Boulder Ridge dispute is not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of Bismarck's City Commission, as a matter of law under the State Constitution. According to MDU's legal theory, N.D.C.C. § 49-03-01.3 is unconstitutional under Article VII Section 11 of the State Constitution, and for that reason the PSC has no jurisdiction. MDU cites Bismarck's

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ordinances and a district court decision in a collateral proceeding in support of the argument that the PSC has no jurisdiction.

Capital contests MDU's assertion "that the [PSC] does not have jurisdiction to restrain or enjoin Montana-Dakota from exercising its franchise authority as provided by the Board of City Commissioners of the City of Bismarck to provide electric distribution services within Boulder Ridge." (MDU's November 23, 2005, Motion to Dismiss, pages 2 & 3.) Capital asserts that a local franchise is not a constitutional right or license that permits MDU to violate the State law that prohibits interference with Capital's service, whether or not Capital has a franchise.

Capital disputes MDU's assertion that the PSC does have the responsibility and jurisdiction to adopt and enforce MDU's new theories that municipal governing bodies have powers to supersede acts of the state legislature. Capital disputes MDU's claim that the Bismarck City Commission has exercised such a power affecting MDU, Capital and Boulder Ridge. The collateral proceeding referred to in MDU's brief, Capital Electric Cooperative, Inc. v City of Bismarck, et. al., Burleigh County District Court Civil No. 05-C-2303, addressed some aspects of MDU's theory. That case did not produce any order that any party act or refrain from acting in any respect. The judgment in that case has been appealed to the North Dakota Supreme Court. That case has no status as res judicata or collateral estoppel to control the PSC's action on Capital's Complaint or to affect MDU's appeal from the PSC's decision. That collateral case is not before the court on this appeal.

In Capital's view, the PSC correctly concluded, and courts on appeal should conclude, that N.D.C.C. § 49-03-01.3 is an integral ingredient of the Territorial Integrity

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Act's comprehensive regulatory scheme to accomplish a legislative policy and purpose to keep to a minimum wasteful duplication of capital-intensive utility services, to minimize conflicts between suppliers of electricity, and to provide territorial protection for rural electric cooperatives. The comprehensive policy and regulatory regimen of the Act applies to the entire State of North Dakota. It is a legislated regulatory policy sustained by the Legislature's constitutional police powers, a policy and a power that apply throughout the State of North Dakota without regard to the vagaries of municipal boundaries or of local governing bodies. The legislature's policy and power prevail over claims of municipal sovereignty. Further, a utility regulated by the Act lacks standing to assert claims of municipal sovereignty as a defense to the PSC's enforcement of the Act.

All of MDU's and Capital's arguments, and the PSC's arguments in support of its decision, will be expanded and repeated in due course in the appeal process. At this preliminary stage, MDU cannot sustain its burden to make a strong showing that it is likely to prevail.

(The PSC's statement that it does not oppose MDU's motion does not help MDU. Though the PSC has taken no position on the preliminary motion, that certainly does not amount to a concession that MDU is likely to prevail in its appeal. On the contrary, the PSC's position supporting its decision on appeal amounts to an argument that MDU is not likely to prevail, and has not passed the first part of the four-part test.)

At this preliminary stage, the substantial probability is that MDU will not prevail, that the PSC's Order will be affirmed as in accordance with the law, entirely in accordance with N.D.C.C. 49-03 and precedents, particularly the South Pointe cases. The PSC's decision

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and Order against MDU is similar to its decision and order against NSP in the South Pointe case, affirmed by the Supreme Court in NSP v PSC. 452 N.W.2d 340. Because the PSC's Order is in accordance with N.D.C.C. § 49-03 and the South Pointe precedents, there is not a substantial probability that MDU will prevail on appeal.

MDU's arguments to the PSC that the South Pointe precedents do not apply to the Boulder Ridge dispute were rejected by the PSC. The PSC did not adopt MDU's new theories about N.D.C.C. § 49-03. MDU's new theories include its concepts of constitutional law, issues properly addressed to the judiciary rather than the PSC. See Johnson v Elkin, 263 N.W.2d 123 (N.D. 1978).

There is not a substantial probability that MDU's theories of constitutional law will prevail. All statutes are presumed constitutional. N.D.C.C. § 1-02-38 (1); Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (N.D. 1967). The presumption of constitutionality of statutes is more than a statutory or judicial rule of interpretation; it is a principle established by the Constitution itself! No statute can be declared unconstitutional except by action of four Supreme Court justices. North Dakota Constitution, Article VI, Section 4. See also State v Hansen, 2006 N.D. 139; State v Hanson, 558 N.W.2d 611 (N.D. 1996). MDU's constitutional arguments are not a strong showing to persuade a district court judge to discretely predict in a preliminary ruling that MDU's arguments will ultimately be sustained by a super-majority of Supreme Court justices. MDU has failed to rebut the presumption of the Act's constitutionality. The Territorial Integrity Act is more than presumptively constitutional, for it has been declared constitutional. Johannason, 153 N.W.2d 414.

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"Heavy artillery" is required to support claims of rights and powers under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. So. Valley Grain Dealers v Bd. of City Commissioners, 257 N.W.2d 425, 434 (N.D. 1977). Effertz v Workmen's Compen., 481 N.W.2d 218, 223 (N.D. 1992) and Froysland v Workers' Compen. Bureau, 432 N.W.2d 883, 892 n. 7 (N.D. 1988). MDU's conclusory arguments without supportive reasoning do not show that it is likely to succeed on the merits of its appeal.

MDU does not assert its constitutional rights; it asserts a theory of municipal government law affected by the State Constitution, but it lacks standing to assert that theory. Application of Otter Tail Power Co. 451 N.W.2d 95 (N.D. 1990); see also City of Bismarck v Materi, 177 N.W.2d 530 (1970).

MDU's arguments also hang on one sentence in the Territorial Integrity Act, part of N.D.C.C. § 49-03-06 (8). That subject was covered in the parties' briefs to the PSC, likely to be repeated in the course of this appeal. (The parties' briefs to the PSC are part of the record available for the court's review. N.D.C.C. § 28-32-44 (4)(d)). At this preliminary stage, it is sufficient to respond that MDU's arguments in its brief in support of its motion are like its arguments about constitutional law, conclusory and lacking supportive reasoning based on established principles of statutory construction, not achieving the high standard of persuasion necessary to pass the test.

Against the legal history of Supreme Court decisions under the Territorial Integrity Act and under fundamental principles affecting claims of constitutional rights and statutory interpretation, MDU has not shown a substantial probability that it will prevail. For that

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reason alone, MDU's motion for a stay of the PSC's order should be denied.

Under Cass v Wold II, all four parts of the test must be applied; MDU's failure to pass the first part renders the others moot.

III. MDU has not made a strong showing it will suffer irreparable injury.

The second part of the test, irreparable injury, is moot because MDU's failure to show it will prevail on the merits also shows it has suffered no injury to be repaired by legal processes.

However, if the second part of the test were to be applied, MDU would still fail. The PSC's Order does not inflict irreparable injury on MDU. Even if MDU were to ultimately prevail, if the district court or the Supreme Court were to conclude the PSC erred in its Order, MDU's compliance with the PSC's Order in the meantime does not amount to irreparable injury. MDU's potential loss is only the loss of time, the normal consequences of litigation. The PSC Order protects MDU from that loss, the time value of money.

MDU complains it will lose revenues from Boulder Ridge customers, that it will lose the opportunity to reap a return on its investment in facilities the PSC has concluded are an unreasonable duplication of investment. But the PSC Order does not impose on MDU the loss of that investment, the loss of revenues received in the past or the loss of the opportunity to earn a future return on its capital investment. The PSC Order provides for MDU to sell the facilities to Capital and for Capital to compensate MDU. MDU may reinvest the proceeds; it will not lose the opportunity to earn a future return on its properly invested capital. MDU will not be injured; it will be compensated.

MDU asserts "status quo" arguments, a concept not included in the four-part test.

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The cases do not establish a principle simply to preserve a static state of facts during litigation or appeals. Maintenance of the status quo is not a reason to grant a stay. Maintenance of the status quo is a consequence of a stay that is granted if the four-part test is passed.

MDU argued to preserve the status quo under the third and fourth parts of the test, but maintenance of the status quo is better considered as an aspect of the second part, the requirement that an applicant for preliminary relief must show it would suffer irreparable injury if preliminary relief is not granted. The main purpose of the irreparable injury criterion is not to protect litigants. The purpose is to maintain the efficacy of judicial relief, to prevent litigants from disabling the court to grant effective relief *if* the plaintiff/appellant ultimately carries its burdens of proof and persuasion in the litigation. But the test is a four-part test. Where the first part of the test is not passed, the second, third and fourth parts are moot and preliminary relief will not be granted to maintain the status quo. Where the second part of the test is applied and is not passed because the moving party fails to make a strong showing of irreparable injury, the first, third and fourth parts are moot and preliminary relief will not be granted to maintain the status quo. See generally Vorachek, 461 N.W.2d 580; F-M Asphalt, 384 N.W.2d 663.

MDU cannot show that it will suffer irreparable injury unless a stay is granted. For that reason alone, MDU's motion for a stay of the PSC's Order should be denied.

IV. MDU has not made a strong showing a stay order would not harm Capital.

Loss of revenue is the injury asserted by MDU. It is self-evident that a stay order that protects MDU from the loss of revenue has the effect to equally harm Capital. The

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potential harm is equal on both sides, and in neither case is it irreparable. But that does not mean the decision whether a stay should be granted is a toss-up, or that a stay can be granted because to do so does no substantial harm to an appellee. On the contrary, under the principles recited in Cass v Wold II, Vorachek and F-M Asphalt, preliminary relief should not harm the defendant/appellee.

V. MDU has not made a strong public interest showing.

MDU's makes a disingenuous claim that the public interest requires a stay order, in order to avoid the "nonsensical result of having no one with the right to serve customers in the [Boulder Ridge] subdivision. . . ." and "[i]f a stay is not granted, the customers of Boulder Ridge may be without power." (MDU brief in support of motion, pages 7 and 9.) But that result flows from MDU's arguments; that result will not be caused by the PSC's Order that MDU wants to be suspended. The PSC's Order plainly provides for Capital to commence electric service when MDU complies with the PSC's cease and desist Order.

Notice, MDU does not assert the public will go unserved. MDU asserts "no one with the right to serve," arguing in circles, essentially repeating its claim on the merits. But MDU has not passed the first part of the four-part test.

MDU's claim that Capital has no right to serve is only a claim, a claim not before the PSC and therefore not before this court on appeal. See City of Grafton v Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1957). ("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.); see also Capital Elec. Coop., 534 N.W.2d 587; Cass v NSP, 518 N.W.2d

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216; Williams Elec. Coop. v Montana-Dakota Utilities Co., 79 N.W.2d 508 (N.D. 1956). (PSC does not have power to enforce contracts. Courts do not enforce contracts on appeal from PSC decision.)

MDU's claim that Capital has no right to serve is only a claim, not a claim before the PSC or this court. The claim is the subject of collateral litigation. That claim will be decided in the due course of that litigation and appeals.

MDU's new theories, argued in both cases, that the Bismarck City Commission has the power and has exercised the power to deprive the PSC of its statutory power and responsibility to regulate MDU's conduct of its public service is only a theory, not at all certain to be sustained in either case. The public will not go unserved while MDU argues its claims and theories. The public will not go unserved when MDU and Capital comply with the PSC Order.

Capital is ready, willing and able to comply with the PSC Order, to purchase MDU's facilities and to use those facilities and Capital's other facilities that are described in the PSC Order, to provide uninterrupted electric service to consumers in the Boulder Ridge subdivision, all while Capital and MDU continue this appeal and the collateral litigation. (See Affidavit of Lars Nygren, submitted in opposition to MDU's motion for a stay.) For Capital to comply with the PSC Order may be contrary to MDU's legal theories, but it is not disobedient to any order of the court in the collateral litigation. The collateral litigation has not produced any order that any party act or refrain from acting in any respect. The only outstanding order is the PSC Order, that MDU cease and desist from providing electric service in Boulder Ridge.

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It is noteworthy that MDU has reported to the court that it presented its claim as a counterclaim, requesting the PSC to prohibit Capital from providing electric service in Boulder Ridge and that MDU voluntarily dismissed the counterclaim because of the collateral case. (MDU brief in support of motion, pages 2-3; PSC Order, page 2.) Having abandoned the counterclaim, MDU cannot resurrect that claim in the preliminary stages of its appeal from the PSC Order. Even if MDU's claims about Capital's right to serve were pursued as an adjunct to the PSC case, it would ultimately fail, because the Territorial Integrity does not authorize the PSC to regulate rural electric cooperatives. See Capital Elec. Coop., 534 N.W.2d 587. MDU did the right thing when it dismissed its counterclaim.

There are other flaws in MDU's "public interest" arguments. As quoted above, the fourth part of the test is "(d) If the court finds that granting the stay will do no harm to the public interest." Cass v Wold II, 253 N.W.2d at 327. MDU has distorted this criteria, arguing that the PSC Order is against the public interest and the court should adopt MDU's contrary view of the public interest. As stated above, the public interest in the continued availability of electric service has been addressed by the PSC, and no intervention by the court is necessary during the pendency of MDU's appeal. The judiciary does not function as a "super board" to supersede public interest decisions of the PSC.

The F-M Asphalt case is a good example of the public interest part of the test. 384 N.W.2d 663. A disappointed bidder for a government contract asked for a preliminary injunction, in effect asking for the court to pre-judge its case and award the contract. Id. The court declined to interfere with government contracting processes at the commencement of the litigation. Id.

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Like the F-M Asphalt case, the case between MDU and Capital is more than ordinary commercial litigation between competitors. The litigation involves electric service that is regulated in the public interest. Under N.D.C.C. Chapter 49-03, the public interest issue - which of MDU or Capital should provide electric service in Boulder Ridge -- has been decided by the PSC in the exercise of its jurisdiction under the Territorial Integrity Act.

The case before the PSC was Capital vs MDU, but the appeal before the court is not only MDU vs Capital, and the motion for a stay is not to restrain Capital. The appeal is MDU vs the State's Public Service Commission. MDU wants the court to suspend the operation of an Order issued by a state agency, as if it were a foregone conclusion that MDU will prevail on its appeal. MDU has not made a strong showing that it is likely MDU will ultimately prevail in its efforts to reverse the decision of the PSC. The public interest is well served if the PSC's decision and Order is immediately effective rather than being postponed until the Order is affirmed by a judiciary that acknowledges it does not function as a super board that substitutes its judgement for decisions of the Public Service Commission.

SUMMARY AND CONCLUSION

A party requesting a preliminary order must satisfy all four parts of the test under the Cass v Wold II, Vorachek, and F-M Asphalt cases. MDU has not shown a substantial probability it will prevail in its appeal. MDU has not shown irreparable injury. MDU has not shown no injury to other parties. MDU has not shown its position is in the public interest. MDU has not made a clear showing on any of the four parts of the test.

The Public Service Commission has made its decision and issued an order. It is not

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the appellees' burden to persuade the court whether or not to make any preliminary order. MDU has not carried its burden to make a clear showing that the court should take drastic and extraordinary action to suspend the PSC Order during the pendency of appeal processes.

For all these reasons, MDU's motion for a stay pending appeal should be denied.

Dated this 12 day of July, 2006.

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