

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.,

Case No. 08-06-C-1177

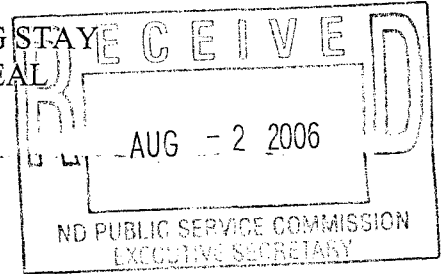
Appellant,

vs.

ORDER GRANTING STAY
PENDING APPEAL

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

Defendant.



The above-entitled administrative appeal, perfected by the Appellant by and through its legal counsel, Attorney Jerome C. Kettleison, seeks to appeal the Order of the Public Service Commission, State of North Dakota, in Case No. PU-05-551, as issued on June 22, 2006. Simultaneous with said appeal, the Appellant has filed and served the Appellant's motion for a stay of said Order pending a determination of this administrative appeal.

Appellee North Dakota Public Service Commission, by and through its legal counsel, Attorney William Binek, has offered no opposition to the motion for stay pending appeal.

Appellee Capital Electric Cooperative, by and through its legal counsel, Attorney Carol K. Larson has filed and served the Appellee's resistance to said motion to stay pending appeal. Each of the foregoing has filed their respective briefs in support of their positions and have filed supplemental pleadings.

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UNDISPUTED FACTS

1. The City of Bismarck as a municipal entity has constitutional authority under North Dakota Constitutional Article VII, Section 11, to franchise the construction and operation of a public utility within the City.
2. The City of Bismarck did issue a franchise to Montana Dakota Utilities Co. (MDU) to construct and operate an electric utility service within the City of Bismarck.
3. This Court in 05-C-2303 affirmed the Order of the City Commission, Bismarck, North Dakota, in its issuance of a franchise to MDU.
4. The Order of the Public Service Commission in Case No. PU-05-551, dated June 22, 2006, provides in relevant part:
 1. Within 30 days after the date of this Order Montana Dakota shall cease and desist from providing electric service to Boulder Ridge, First Addition to the City of Bismarck, and from further extending its electric service in that area.
 2. Montana Dakota shall offer to sell to Capital and Capital shall purchase from Montana Dakota at book value, the distribution facilities located in and used by Montana Dakota to serve Boulder Ridge, First Addition, to the extent compatible with Capital's system and not constituting an unnecessary duplication of Capital's facilities.
 3. So that users of electricity in Boulder Ridge, First Addition, shall not be without service, Montana Dakota may continue to provide service

beyond the 30 days referenced in order paragraph 1 until Capital can begin providing service.

5. That the foregoing order precludes MDU from any exercise of its franchise as granted by the City of Bismarck, North Dakota, to Boulder Ridge, First Addition.

DECISION

The foregoing administrative appeal is subject to the provisions of Section 28-32-46, N.D.C.C., and mandates the Court to affirm an agency order unless there are deficiencies as therein identified.

Under N.D.C.C. Section 28-32-48, a stay of an existing agency order is not an automatic consequence of an administrative appeal. The Appellant seeking a stay of an administrative order must satisfy the standards as set forth in Cass County Electric Coop v. Wold Properties, Inc., 253 N.W.2d 323 (ND 1977), which include the following:

1. The moving party for a preliminary order must show a substantial probability that it will prevail in the litigation.
2. That the moving party would should it would suffer an irreparable injury if a preliminary order was not granted.
3. A preliminary order must not harm the interests of other parties; and
4. A preliminary order must not adversely affect the public interest.

For the purposes of this Order of Stay, the Court does herewith adopt the Findings of Fact as entered by the Public Service Commission in support of its Order, dated June 22, 2006. Said Findings of Fact establish that each of MDU and Capital Electric have existing customers within Boulder Ridge, First Addition to the City of Bismarck, and the

continuation of reliable and timely delivery of electric power to said residents is a primary concern. Further, the Findings of Fact of the Public Service Commission establish that this matter has been pending since September, 2005, and that neither MDU nor CEC have alleged any harm as a result of the delay in the entry of said administrative decision.

The Order of the Public Service Commission, dated June 22, 2006, not only terminates in its entirety the MDU franchise as granted by the City of Bismarck, North Dakota, but further mandates the involuntary sale of MDU distribution facilities located in and used by MDU to serve Boulder Ridge, First Addition, and then only to the extent that the same does not constitute unnecessary duplication of CEC's facilities. The loss of said franchise, the sale of distribution facilities at book value, and only to the extent that the same are not unnecessary duplication, may indeed cause irreparable harm to MDU if the appeal of MDU of the administrative decision is successful.

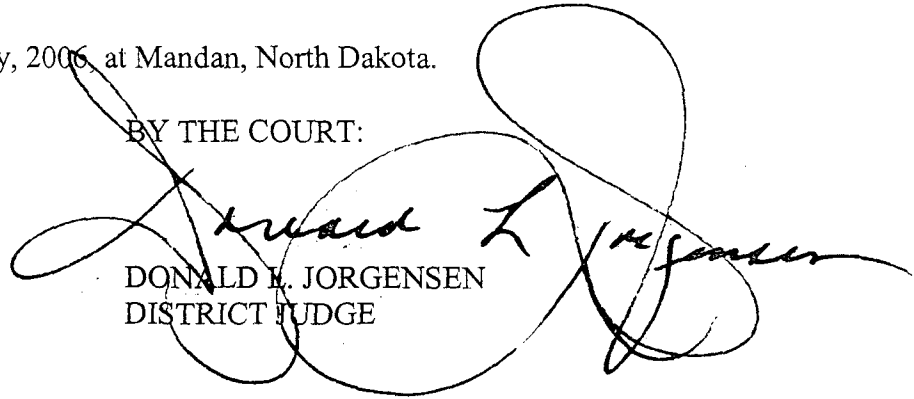
Finally, it is the obligation of the Court to determine whether or not the moving party has established a substantial probability of a successful appeal. As set forth above, and as undisputed by the parties, the City of Bismarck, North Dakota, is authorized by the constitution of the State of North Dakota to issue public utility franchises. Equally, the North Dakota Public Service Commission is expressly authorized under Section 49-03-01.4 to hear and determine any allegations of violation of Section 49-03-01 through 49-03-01.5.

Absent an appearance of prejudging the appeal herein, the present record before the Court from the Public Service Commission hearing appears to establish a substantial probability that MDU may prevail in its appeal of the Public Service Commission order entered in Case No. PU-05-551.

IT IS THEREFORE THE ORDER OF THE COURT that the motion of the Appellant to stay the Order of the Public Service Commission, dated June 22, 2006, in Public Service Commission Case No. PU-05-551 is herewith stayed during the pendency of the foregoing administrative appeal or until further order of this Court.

Dated this 26th day of July, 2006, at Mandan, North Dakota.

BY THE COURT:

A large, stylized handwritten signature in black ink, appearing to read "Donald E. Jorgensen". The signature is written over the printed name and title of the judge.

DONALD E. JORGENSEN
DISTRICT JUDGE

C: Jerome C. Kettleson
Carol Larson
William W. Binek