

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.

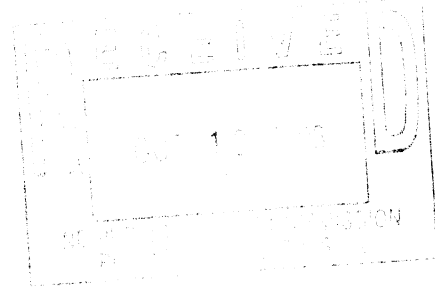
CIVIL NO. 06-C-1177

Appellant,

vs.

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

Appellees.



**BRIEF IN SUPPORT OF MOTION FOR STAY UPON APPEAL
OF JUDGMENT AFFIRMING ADMINISTRATIVE DECISION**

Montana-Dakota Utilities Co, a Division of MDU Resources Group, Inc. ("MDU") submits the following brief in support of its Motion for Stay Upon Appeal of Judgment Affirming Administrative Decision filed in this case with the Clerk of the Burleigh County District Court on October 09, 2006.

The Judgment appealed from is based on an order of the South Central District Court for Burleigh County dated September 25 which affirms an Administrative Decision by the PSC dated June 22, 2006. The Judgment and supporting order ("Judgment") directs that within 30 days, MDU shall comply with the provisions of the PSC Order

The June 22, 2006 Public Service Commission ("PSC") Order directed 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.

The District Court stayed the Commission's Order while it considered the appeal as provided under N.D.C.C. §§ 28-32-48 and 49-05-14.

MDU has now filed its Notice of Appeal of the Judgment to the North Dakota Supreme Court. At the same time, MDU files this Motion for a stay of the Judgment.

MDU requests a stay of the Judgment pursuant to Rule 62 of the North Dakota Rules of Civil Procedure and Rule 8 of the North Dakota Rules of Appellate Procedure.

Rule 62(d), N.D.R.Civ.P., requires that an appellant obtain a supersedeas bond approved by the Court. MDU has appended hereto a supercedeas bond in the amount of \$250 which it asks the Court to approve as an appropriate bond. The Court approved a bond in the amount of \$250.00 in this case when MDU appealed the decision of the PSC to the District Court. MDU contends a bond in the same amount is appropriate in this appeal as the issues and the facts are the same in both appeals.

MDU's request for a stay pending appeal is also arguably 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, MDU is prepared to comply with the conditions of N.D.C.C. § 49-05-14 by executing and filing 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.

Rule 62(d), N.D.R.Civ.P., entitles an appealing party to a stay of enforcement of a monetary 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]. 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 a Judgment 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 Judgment and the Commission's order.

1. MDU Is Likely To Succeed Upon Appeal.

The Judgment of the District Court appealed from 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, entered its Order in Capital Electric Cooperative v. City of Bismarck, Civil No. 05-C-2303 denying CEC's appeal from the Findings, Conclusions, Decision and Order entered by the City of Bismarck. The City found, and Judge Haskell affirmed, that CEC's limited franchise does not include Boulder Ridge and further found MDU does have a franchise and the right to provide electric power in Boulder Ridge . Accordingly, CEC is prohibited by Bismarck City ordinance from providing electric service within the subdivision.

The Judgment is premised on a sua sponte determination by the Court that CEC does have a franchise to serve Boulder Ridge:

Boulder Ridge is part of CEC's franchised area under the Area Service Agreement. MDU respectfully submits the Court exceeded its authority in this appeal of a collateral

administrative proceeding in attempting to overturn the City Commission's decision and Judge Haskell's order and judgment affirming that decision. Moreover, the Court reached its conclusion without the benefit of the record and arguments that were available to the City Commission and Judge Haskell. The Judgment also fails to properly consider the constitutional and statutory provisions that resolve any conflict between the authority of the PSC and the City by limiting the authority of the PSC 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 interpretation in the Judgment of the PSC's authority under N.D.C.C. 49-03 would result in the Court and the PSC being able to reverse the City of Bismarck's determination of the proper electric franchise provider for Boulder Ridge and prevent MDU from exercising its 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 Judgment and the earlier Commission's order place Boulder Ridge within CEC's service area and direct MDU to sell its facilities to CEC without consent from the City. 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 this limitation on the Commission's authority under N.D.C.C. § 49-03, the Judgment broadly interprets the PSC's authority under N.D.C.C. § 49-03-01.3 to trump the City's determination that MDU is the proper electric franchise provider for Boulder Ridge. The Judgment and the Commission's order effectively render

each of the above constitutional and statutory limitations meaningless and are 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.

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

If a stay is granted, the status quo will bring 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 Judgment, there will be no service available from a lawful provider because the City has not given its consent to CEC to service the area.

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

Maintaining the status quo until the Supreme Court determines the appeal of the Judgment will not result in substantial harm to the public interest.

MDU asserts a stay is consistent with the public interest because a stay assures continuation of electric service to customers within Boulder Ridge pending this appeal. Although CEC may argue it has the ability to commence electric service if MDU complies with the PSC's cease and desist order, the Court cannot authorize CEC to provide service without the consent of the City.

The public interest is served not only by the customers of Boulder Ridge continuing to receive electric service but also by such electric service being legally provided by a franchised provider selected by the City in accordance with Bismarck City Ordinance 10-11-01.

CONCLUSION

The Judgment entered in this case provides that MDU cease and desist providing electrical services to Boulder Ridge and to sell its facilities to CEC. The Judgment is inconsistent with the order of the Bismarck City Commission and the judgment of Judge Haskell affirming that order. Obviously, the Judgment and Judge Haskell's order and judgment cannot both be correct.

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 enforcement of the Judgment in this case.

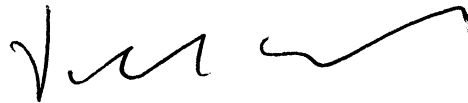
Dated at Bismarck, North Dakota, this 9 day of October, 2006.

Respectfully submitted,

Montana-Dakota Utilities Co., a Division of
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UNDERTAKING ON APPEAL TO SUPREME COURT

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., deposits with the Clerk of the above-named Court, pursuant to Rule 7(a) of the North Dakota Rules of Appellate Procedure and 62(d) of the North Dakota Rules of Civil Procedure, a check in the amount of Two Hundred Fifty and No/100 Dollars (\$250.00) as an undertaking in this proceeding to the State of North Dakota as obligee upon the conditions that Montana-Dakota Utilities Co. will prosecute the appeal herein without delay and pay all costs adjudged against Montana-Dakota Utilities Co. in the Supreme Court.

Dated at Bismarck, North Dakota, this ____ day of October, 2006.

Respectfully submitted,

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

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