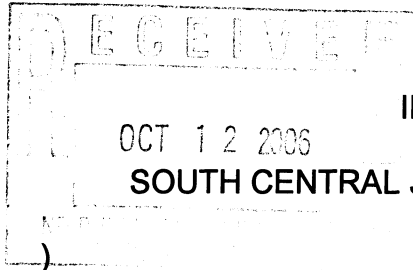


STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH



IN DISTRICT COURT

OCT 12 2006  
SOUTH CENTRAL JUDICIAL DISTRICT

Montana-Dakota Utilities Co.,  
a Division of MDU Resources  
Group, Inc. )  
Appellant, )  
vs. )  
North Dakota Public Service )  
Commission )  
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 proceeding is ancillary to MDU's appeal from a decision of North Dakota's Public Service Commission (PSC) under N.D.C.C. Chapter 49-03, appealed to and affirmed by the district court under N.D.C.C. §§ 28-32-42 and 46, and now appealed by MDU to the Supreme Court under N.D.C.C. § 28-32-49. MDU requests the district court to stay the enforcement of the PSC's order and the court's decision affirming the PSC's order enjoining MDU to cease and desist from providing electric service to Boulder Ridge 1<sup>st</sup> Addition to the City of Bismarck.

This proceeding for a stay pending the Supreme Court appeal is comparable to MDU's motion for a stay of the PSC's order pending the district court's decision on MDU's appeal to the district court. The stay order granted by the court was countermanded by the court's September 25, 2006 Order Affirming Administrative Decision that included ". . . the further Order of the Court that Appellant shall comply with the provisions of the June 22,

2006 PSC Order and shall have thirty days from the date hereof to do so.”

This proceeding is governed by Rule 62 (c) of North Dakota Rules of Civil Procedure and Cass County Electric Cooperative v Wold Properties, Inc., 253 N.W.2d 323 (ND 1977) (herein Cass v Wold II).

### **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.R.Civ.P. Rule 62 (c), a stay is not an automatic consequence of an appeal from a district court’s order affirming an agency’s injunctive order. Likewise, under N.D.C.C. § 28-32-48, a stay is not an automatic consequence of an appeal from an agency’s order to district court. Neither N.D.C.C. § 28-32-48 nor N.D.R.Civ.P. Rule 62 (c) provides any standards to guide the court in considering an appellant’s motion for a stay. Whether a stay pending appeal shall be granted is subject to a four-part test under Cass County Electric Cooperative v Wold Properties, Inc., 253 N.W.2d 323 (ND 1977).

“A stay pending appeal under rule 62 (c) and (d), N.D.R.Civ.P. should be granted only:

“(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.”

Court Syllabus No. 2, 253 N.W.2d at 323.

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." Cass v Wold II, 253 N.W2d at 327. A stay order should not be granted unless the moving party meets its burden of persuasion by a strong showing on all four parts of the test. If a stay is granted, the court should "set forth its findings with specificity." 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.**

This proceeding for a stay pending the Supreme Court appeal is comparable to MDU's motion for a stay of the PSC's order pending the district court's decision on MDU's appeal to the district court, but there is a substantial difference. MDU's appeal to the district court has been decided.

The district court's order granting a stay during the pendency of the district court appeal was granted on the basis of the court's preliminary opinion of a substantial probability that MDU may prevail in its district court appeal, but that order did not prejudice the appeal. (Order granting stay pending appeal, page 4, July 26, 2006.) The appeal has now been decided; MDU did not prevail. After consideration of the parties' arguments, the court affirmed the PSC's Order. (Order affirming administrative decision, September 25, 2006.)

The July 26 Order was made on the basis of the district court's opinion about possible action the district court might take, but MDU's motion now under consideration invites the district court to declare what the Supreme Court will likely decide on appeal.

MDU urges the district court to opine “with specificity” that its decision is likely to be reversed on appeal.

Cass v Wold II involved a loser’s plea that enforcement of a decision in an electric territorial dispute should be suspended during the appeal process. That case answered the question on what criteria a court should suspend its own order while an appeal of the order is pending. Although the Supreme Court did not say so directly, the strong implication was that a district court that has issued an order should not suspend its own order, pre-judging the appeal as if the district court’s decision was wrong.

The PSC made its decision. MDU appealed the PSC’s decision to district court. The district court made its decision. The district court’s decision affirming the PSC’s decision certainly implies the district court’s expectation the Supreme Court will affirm the decisions of the PSC and the district court. Against the history of the case and at this stage in the appeal process, MDU cannot sustain its burden to make a strong showing to the district court that MDU is likely to succeed on the merits of its appeal to the Supreme Court.

The likelihood is that MDU will not prevail. The likelihood is that the district court’s and the PSC’s decisions will be affirmed by the Supreme Court under all the statutes and precedents, particularly the “South Pointe cases,” Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (ND 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (ND 1990). The South Pointe cases were cited by the district court in support of its order affirming the PSC’s Order. Because both the PSC’s and the district court’s decisions are in accord with the South Pointe precedents, it is not likely that MDU will prevail on appeal.

III. **MDU's "status quo" arguments are irrelevant.**

Cass v Wold II, like the case now before the court, involved the question whether the losing party will have its way, or will it abide by a court order while the appeal is pending. The essential rule is: A losing party must obey orders while it argues its appeal. The losing party in an electric service territorial dispute is not entitled to a reprieve, but the court can grant a stay order if the losing party can persuade the court on all four parts of a four part test. Where the first part of the test is not passed, the second, third and fourth parts are moot.

MDU's arguments under the second, third and fourth parts of the test amount to "status quo" arguments, a concept not included in the four-part test. 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. The district court will not grant a stay order under N.D.R.Civ.P. Rule 62 (c) based on a rationale to maintain the status quo.

Arguments that a stay should be granted to maintain the status quo are not relevant to a motion addressed to the district court under N.D.R.Civ.P. Rule 62 (c). Any request for a stay based on status quo arguments should be addressed to the Supreme Court, under N.D.R.Civ.P. Rule 62 (I).

**SUMMARY AND CONCLUSION**

A party requesting a preliminary stay order must satisfy all four parts of the test under Cass v Wold II. MDU fails the first part of the test; it has not shown it is likely to succeed on the merits of its appeal. MDU's failure to pass the first part renders the

others moot.


MDU's "status quo" arguments are irrelevant to a motion under N.D.R.Civ.P. Rule 62 (c).

The Public Service Commission has made its decision and issued its order. The district court has made its decision and issued its order. It is not the appellees' burden to persuade the court whether or not to order a stay. MDU has not carried its burden to make a strong showing that the district court should suspend the PSC order or the court's order during the appeal processes.

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

Dated this 11<sup>th</sup> day of October, 2006.

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