

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
SCOTT M. KNUDSVIG
RYAN D. SANDBERG
OF COUNSEL
HERBERT L. MESCHKE

PH
LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

2525 ELK DRIVE
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@srt.com

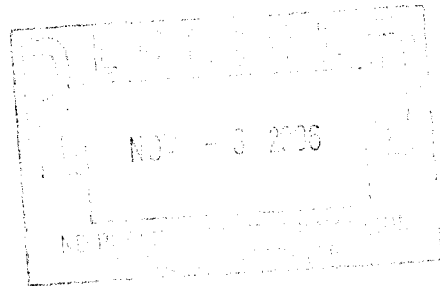
RETIRED
THOMAS A. WENTZ
MARK F. PURDY
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)

November 3, 2006

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NORTH DAKOTA SUPREME COURT
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BISMARCK, ND 58505-0530

**MONTANA-DAKOTA UTILITIES CO.
VS.
ND PUBLIC SERVICE COMMISSION AND
CAPITAL ELECTRIC COOPERATIVE, INC.**



**Supreme Court No. 20060270
Burleigh Co. No. 06-C-1177**

Dear Penny:

Enclosed please find Appellee Capital Electric Cooperative's Brief Opposing Appellant's Motion for Stay Pending Appeal, together with Affidavit of Service.

If you have any questions on the enclosed, please do not hesitate to contact me.

Yours truly,

Carol K. Larson

Carol K. Larson

lat

Enclosures

cc: Jerome C. Kettleson
William W. Binek
Wayne Stenehjem, ND Attorney General

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” and the judgment entered on October 9, 2006. (MDU’s October 30, 2006 brief, attachment 1.) MDU moved the district court for a second stay, pending the Supreme Court appeal. The motion was denied. (Order Denying Motion For Stay Upon Appeal, October 20, 2006; MDU’s October 30, 2006 brief, attachment 5.)

SUMMARY OF ARGUMENT

The fundamental rule is: a losing party must obey an injunctive order while it argues its appeal. The losing party is not entitled to a reprieve, but a stay may be ordered if the losing party/appellant makes a strong showing on a four part test. The motion should be denied because MDU fails the test and because the district court did not abuse its discretion in denying a stay.

ARGUMENT

This proceeding under Rule 8 of the North Dakota Rules of Appellate Procedure is affected by Rule 62 of the North Dakota Rules of Civil Procedure and by N.D.C.C. § 28-32-48. The rules and the statute do not provide any standards to guide courts in considering an appellant’s motion for a stay pending appeal, but there is a pertinent precedent. In proceedings before the district court, MDU argued for consideration of its motions for a stay pending appeal under the four-part test established in Cass County Electric Co-op, Inc. v Wold Properties, Inc. 253 N.W.2d 323 (ND 1977) (herein Cass v Wold II). Capital agrees that is the test to be applied.

“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.W.2d at 327. A stay should not be granted unless the moving party makes a strong showing on all four parts of the test.

A motion under appellate Rule 8 may be made to the Supreme Court only after a Rule 62 motion to the district court has been denied. MDU’s Rule 8 motion is the equivalent of an appeal from the district court’s denial of MDU’s motion for a stay under Rule 62. The standard of review is whether the district court abused its discretion in denying the motion. Cass v Wold II, 253 N.W.2d at 327.

Having failed to pass the test as applied by the district court, MDU now disavows its reliance on the four-part test of Cass v Wold II. Now, MDU argues that the Supreme Court should not consider the four-part test of Cass v Wold II. MDU argues the Supreme Court should instead make an ad hoc decision to maintain the status quo, i.e. the state of facts

created by MDU, a state of facts that the PSC has determined violates the Territorial Integrity Act, a determination affirmed by the district court under N.D.C.C. § 28-32-46. (MDU's October 30, 2006 brief, page 6.) But MDU still pursues the four-part test of Cass v Wold II as if it were entitled to a stay by making a weak showing on any one part of the four-part test.

I.

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

Whether MDU will ultimately succeed on the merits of its appeal of the PSC's decision and order is controlled by N.D.C.C. § 28-32-46:

“. . . the 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.”

Under N.D.C.C. § 28-32-46, the judiciary does not function as a “super board” but is restrained in the review of administrative agency decisions. See Northern States Power Co. v North Dakota Public Service Commission, 452 N.W.2d 340 (ND 1990) and Montana-Dakota Utilities Co. v Public Service Com’n of State of N.D., 413 N.W.2d 308 at 310 (ND 1987). The standard of review negates a likelihood that MDU will prevail in its appeal from the Public Service Commission’s decision in the Boulder Ridge case.

The “South Pointe cases,” Cass County Electric Co-op, Inc. 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) were cited by the PSC and by the district court in support of its order affirming the PSC’s order. The South Pointe precedents negate a likelihood that MDU will succeed on the merits of its appeal from the Public Service Commission’s decision in the Boulder Ridge case.

Against the standard of appellate review and precedents applying that standard, on this preliminary motion MDU cannot sustain its burden to make a strong showing that it is likely to succeed on the merits of its appeal. But MDU advances new arguments against the weight of precedents.

MDU’s brief in support of its motion for a stay is a preview of its arguments on the merits, arguments that the Territorial Integrity Act and the South Pointe precedents do not apply to the Boulder Ridge case, arguments rejected by the PSC and by the district court, arguments based on MDU’s new theories of constitutional law that supercede the Territorial Integrity Act, according to MDU. MDU relies on its new theories of constitutional law to sustain its burden to make a strong showing that it is likely to succeed on the merits of its appeal.

All statutes are presumed constitutional. N.D.C.C. § 01-02-38(1); Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (ND 1967). “One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.” Southern Valley Grain Dealers Ass’n v Board of County Com’rs of Richland County, 257 N.W.2d 425 at 434 (ND 1977). 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, § 4.

The Territorial Integrity Act is more than presumptively constitutional; it has been decided to be so, surviving MDU’s past attacks. When the Territorial Integrity Act was passed over 40 years ago, MDU was the lead plaintiff when 3 electric utilities went to court to challenge the legislation. MDU lost that case.

“It cannot be successfully maintained that the Legislature does not have the power to regulate public utilities under the police powers of the State. The plaintiffs make no such contention. It is conceded, we believe, that the power to regulate includes the power to eliminate competition.” MDU v Johanneson, 153 N.W.2d at 420-21.

MDU tried a different theory and lost again. Application of Montana-Dakota Utilities Co., 219 N.W.2d 174 (ND 1974). The Territorial Integrity Act has been the subject of rigorous litigation and found to be a constitutional exercise of the Legislature’s comprehensive police power under the State Constitution. Now, nearly 40 years later, MDU ignores the status of all of the Territorial Integrity Act as more than presumptively constitutional, and mounts another attack.

MDU argues that Article VII § 11 was adopted in 1982 and supersedes the 1967 and 1974 decisions upholding the constitutionality of the Territorial Integrity Act. The 1967 and 1974 decisions sustained the legislature's comprehensive police powers to regulate public utilities, and those decisions remain the law today. MDU's principal argument is constitutional law has changed as to the State Legislature's regulation of utilities' activities inside political subdivisions.

MDU asserts Article VII § 11 originated from the North Dakota Constitutional Convention of 1972. MDU refers to the record of the 1972 convention, including debates about a proposed new "Public Utilities" article. (MDU's October 30, 2006 brief, pages 11 & 12, and attachment 8.)

The draft constitution that emerged from the 1972 constitutional convention did not propose adoption of a new Public Utilities article. The draft constitution proposed in 1972 did include Article VII § 11 as a proposed addition to the Political Subdivisions article, Article VII. See Chapter 529, 1973 S.L. for the text of the proposed 1972 Constitution. The proposed constitution was rejected at a special election on April 28, 1972. Later, in 1981, the legislature proposed constitutional amendments that were adopted in 1982. The new Political Subdivisions Article VII includes § 11. 1981 N.D. Laws, Chapter 665.

The proposal that was made in 1972 to add a Public Utilities article was not proposed or adopted in 1982. Despite the efforts of a certain interest group in 1972 (MDU's October 30, 2006 brief, attachment 8), the North Dakota Constitution does not contain special provisions under an article titled "Public Utilities." The history of a failed effort to amend the Constitution 34 years ago is insufficient to amount to a likelihood that MDU will succeed on the merits of its appeal.

1. **MDU lacks standing to assert Bismarck's self-government rights.**

Courts' consideration of litigants' constitutional arguments are limited by rules as to "standing." A litigant may assert only its own constitutional rights. See City of Bismarck v Materi, 177 N.W.2d 530 (ND 1970). That principle is also integral to the statute under which MDU's appeal is before the court. Under N.D.C.C. § 28-32-46(2), an appellant may assert "its" constitutional rights.

MDU claims constitutional rights under Article VII, § 11 of the North Dakota Constitution. Article VII is titled "Political Subdivisions." Section 11 provides:

"The power of the governing board of a city to franchise the construction and operation of a public utility within the city shall not be abridged by the legislative assembly."

Section 1 of Article VII provides:

"The purpose of this article is to provide for maximum self-government by all political subdivisions with a minimum of duplication of functions."

Bismarck might claim powers of self-government under Article VII to affect franchises, but that is Bismarck's power, not MDU's right. Bismarck had a right to intervene in the PSC proceeding under N.D.C.C. § 28-32-28. Bismarck did not intervene; it is not a party. MDU lacks standing to assert Bismarck's self-government interests under Article VII § 11.

Application of Otter Tail Power Co., 451 N.W.2d 95 (ND 1990) (herein Otter Tail 1990) dealt with that utility's proposed extension of service onto an Indian reservation. "Otter Tail asserted that assumption of jurisdiction by the PSC under N.D.C.C. Chapter 49-03 would unlawfully interfere with the Tribe's sovereign rights of self-government." The court concluded ". . . Otter Tail had no standing to advance the Tribe's self-government

interests.” 451 N.W.2d at 97. Paraphrasing Otter Tail 1990 to fit this case: MDU asserts that assumption of jurisdiction by the PSC would unlawfully interfere with the City of Bismarck’s sovereign rights of self-government under the Constitution. MDU has no standing to advance the City’s self-government interests.

2. Orderly process precludes constitutional claims being decided on preliminary proceedings.

MDU not only relies on new theories of constitutional law, MDU’s endeavor to show that it is likely to succeed on the merits in this Case No. 20060270 depends on its prediction of the outcome of a separate case now pending before the Supreme Court, Case No. 20060199. (MDU’s October 30, 2006 brief, pages 7-14.) In effect, MDU’s motion for a preliminary order in one case invites the court to pre-judge the merits of two cases involving constitutional issues.

“Our jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims. . . .” State v Hansen, 2006 ND 139 §11, 717 N.W.2d 541. Orderly process precludes constitutional claims being decided on preliminary proceedings. North Dakota courts do not render advisory opinions in the absence of an actual case or controversy, a general principle that applies with special force where a constitutional claim is asserted. “Our procedure for constitutional adjudication requires deliberate and reasoned review of statutes, which requires that constitutional claims be properly raised.” Id., at §10.

MDU’s reliance on its new theories of constitutional law forecloses their ability to make a strong showing on this preliminary motion that MDU is likely to prevail on the

merits. Measured against the presumption of constitutionality and Montana-Dakota Utilities Co. v Johanneson, and lacking standing, MDU's arguments fall short of a strong showing on a preliminary motion that MDU's new theories are likely to be sustained by a supermajority of Supreme Court justices. The district court considered MDU's arguments on appeal to that court. MDU did not succeed on the merits of its appeal to the district court. On MDU's motion for a stay pending appeal to the Supreme Court, the district court reviewed MDU's arguments and concluded "It is the determination of this Court that the Appellant has failed to satisfy the standards established for a stay of judgment in the above-entitled administrative proceeding. Specifically, the Court finds that there has not been a strong showing by the Appellant that it will succeed on the merits of its appeal to the Supreme Court. . . ." (October 20, 2006 Order Denying Motion for Stay Upon Appeal, page 3; MDU's October 30, 2006 brief, attachment 5.) The district court's decision was explained with rational specificity. The district court did not abuse its discretion in denying a stay.

The weight of the law does not support MDU's claim that it is likely to succeed on the merits of its appeal.

3. 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 make a substantial showing it is likely to succeed on the merits also shows it has suffered no injury to be repaired by legal processes.

Even if the second part of the test were to be applied, the PSC's order does not inflict irreparable injury on MDU. Even if MDU were to ultimately prevail, if 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 is a 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.

It is not enough for MDU to plead injury or to claim it is that perceived injury is irreparable. Irreparable injury must be proven on a strong showing to the district court. On MDU's motion for a stay pending appeal to the Supreme Court, the district concluded "It is the determination of this Court that the Appellant has failed to satisfy the standards established for a stay of judgment in the above-entitled administrative proceeding. Specifically, the Court finds that there has not been a strong showing by the Appellant that it will succeed on the merits of its appeal to the Supreme Court; nor has the Appellant established that unless a stay is granted it will suffer irreparable injury." (October 20, 2006 Order Denying Motion for Stay Upon Appeal, page 3; MDU's October 30, 2006 brief, attachment 5.) The district court did not abuse its discretion.

MDU has not shown that it will suffer irreparable injury unless a stay is granted. For that reason alone, MDU's motion for a stay pending appeal should be denied.

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

The third part of the test, no injury to an appellee, is moot because of MDU's failure on parts one and two.

Loss of revenue is the injury asserted by MDU under the second part of the four-part test. It is self-evident that a stay order to protect MDU from the loss of revenue would have the effect to equally harm Capital. The 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, preliminary relief should not harm the defendant/appellee to any degree. The appellee should not be harmed by delays in the enforcement of orders where the appellant has failed parts one and two of the four-part test.

5. **MDU has not made a strong public interest showing.**

MDU claims that the public interest requires a stay order because "... customers face the prospect of not having electric service if a stay is not granted." and "... a stay assures continuation of electric service to customers within Boulder Ridge pending this appeal." (MDU's October 30, 2006 brief, pages 15 and 16.) The argument is specious. MDU might as well argue the public faces the prospect of not having electric service if the Supreme Court affirms the decisions and orders of the PSC and the district court, if MDU does not succeed on the merits of its appeal.

The PSC's order provides for Capital to commence electric service when MDU complies with the PSC's cease and desist order. The public will not face the prospect of not

having electric service if MDU does not succeed on the merits of its appeal and the public will not face the prospect of not having electric service if a stay is not granted while the appeal is pending.

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 attached Affidavit of Ordean "Lars" Nygren, submitted in opposition to MDU's first motion for a stay.) Denial of MDU's motion and MDU's compliance with the PSC's order will not cause customers within Boulder Ridge to prepare for winter without electricity.

There is a fundamental flaw in MDU's "public interest" argument. 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 County Electric Co-op Inc. v Wold Properties, Inc., 253 N.W.2d at 323 (ND 1977). But MDU has distorted this criteria, arguing that the PSC order is against the public interest. As stated, 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.

MDU's public interest argument takes it back to the first part of the test, MDU's reliance on new theories of constitutional law and MDU's presumption it will prevail in Case No. 20060199.

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 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.

The appeal before the court is not only MDU vs Capital. The appeal is also MDU vs the State's Public Service Commission. MDU's motion requests the court to suspend the operation of an order issued by a state agency, as if the PSC should be presumed to have erred. The fundamental rule is: a losing party must obey orders while it argues its appeal. One court has already affirmed the PSC's order and has opined MDU has not made a strong showing it is likely to succeed on the merits of its next appeal. The public interest is well served if the PSC's decision and order is given due respect, obeyed and enforced while MDU argues its appeal.

II.

MDU's "status quo" arguments should be rejected.

Cass v Wold II, like the case now before the court, involved the question whether the losing party in an electric service territorial dispute will have its way, or will it abide by an injunctive order while the appeal is pending.

MDU virtually concedes the first part of the test is not passed; it cannot make a strong showing it is likely to succeed on the merits of its appeal. MDU argues its failure should be excused, that a stay should be granted because its arguments are "substantial" and because of "equities." (MDU's October 30, 2006 brief, pages 6-7.) MDU's "equities" arguments are presented under the second, third and fourth parts of the four-part test, except MDU

wants the standard lowered so that it does not need to make a strong showing on all four parts of the test.

MDU's arguments under the second, third and fourth parts of the test amount to a "status quo" argument that no change in facts should be imposed until a final decision is made. MDU wants a stay pending appeal, as if the PSC's and the district court's decisions and orders have no status until affirmed by the Supreme Court. It bears repeating: a losing party must obey orders. The losing party is not entitled to a reprieve while it argues its appeal. 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.

Rule 8 of the Rules of Appellate Procedure does not include maintenance of the status quo as a rationale to grant a stay order. N.D.C.C. § 28-32-48 does not include maintenance of the status quo as a rationale to grant a stay order. Cass v Wold II does not include maintenance of the status quo as a rationale to grant a stay order. The only authoritative reference to "status quo" concepts is Rule 62 (1) of the Rules of Civil Procedure.

Rule 62 (1) does not establish a principle simply to preserve a static state of facts -- a state of facts created by the appellant and determined to be unlawful -- pending a decision by the Supreme Court. Rule 62 (1) does not treat an appellant as if it were entitled to a presumption it will succeed on the merits of its appeal. The purpose of status quo orders is to maintain the efficacy of judicial relief, to disable litigants from disabling the court to grant effective relief *if* the appellant ultimately prevails on its appeal. MDU has not addressed that essence of status quo concepts. MDU has not shown or even suggested that its adversaries, the PSC or Capital, would or could somehow disable the Supreme Court from ordering effective relief to MDU if MDU were to ultimately succeed on the merits of its appeal after

complying with the PSC's order during the pendency of the appeal.

Maintenance of the status quo is not a reason to grant a stay. If the appellant were entitled to a stay pending its appeal solely to maintain the status quo, that would contradict the first part of the four-part test, whether the appellant has made a strong showing it is likely to succeed on the merits of its appeal. Status quo arguments should be rejected where the appellant has failed the first part of the four-part test.

SUMMARY AND CONCLUSION

A losing party must obey orders while it argues its appeal, but a stay may be ordered if the losing party makes a strong showing on all four parts of a four part test under Cass v Wold II.

MDU fails the first part of the test. Measured against the presumption of constitutionality and lacking standing, MDU has not made a strong showing that it is likely to succeed on the merits of in its appeal. North Dakota's jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims. Orderly process precludes constitutional claims being decided on preliminary proceedings.

MDU's failure to pass the first part renders the others moot. MDU also fails the other parts of the four-part test. MDU has not made a strong showing that maintenance of the status quo is necessary to preserve the efficacy of judicial relief if MDU were to succeed on the merits of its appeal.

The district court considered MDU's arguments on appeal to that court. MDU did not succeed on the merits of its appeal to the district court. On MDU's motion for a stay pending appeal to the Supreme Court, the district court reviewed MDU's arguments and

concluded "It is the determination of this Court that the Appellant has failed to satisfy the standards established for a stay of judgment in the above-entitled administrative proceeding." (October 20, 2006 Order Denying Motion for Stay Upon Appeal, page 3; MDU's October 30, 2006 brief, attachment 5.) The district court's decision was explained with rational specificity.

The Public Service Commission has made its decision and issued its order. The district court has made its decision and issued its order affirming the PSC's order. The district court did not abuse its discretion in denying MDU's motion for a stay pending appeal.

It is not the Supreme Court's purpose on a motion under Rule 8 to pre-judge the merits of the appeal. 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 Supreme Court should suspend the PSC's order or the district court's order during the appeal processes.

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

Dated this 3 day of November, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

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.)

**AFFIDAVIT OF
ORDEAN "LARS" NYGREN
IN RESPONSE TO
APPELLANT'S MOTION FOR STAY**

Case No. 06-C-1177

AFFIDAVIT OF ORDEAN "LARS" NYGREN

I, Ordean "Lars" Nygren, being first duly sworn, makes the following statement on the basis of his personal knowledge and information.

I am the general manager of Capital Electric Cooperative, Inc., (herein referred to as Capital) one of the appellees in the matter before the court.

Contrary to the allegations on pages 3 and 7 of MDU's brief filed with its motion to stay the PSC Order in this case, Capital does have a franchise from the City of Bismarck to serve customers within Boulder Ridge.

On May 25, 1993, the Board of City Commissioners of the City of Bismarck issued a 20 year franchise to Capital to construct and maintain an electric transmission and distribution system within a limited geographic area of the City of Bismarck. Capital has

constructed and maintained an electric distribution system in areas annexed to Bismarck since May 25, 1993. Capital has substantial facilities within the corporate limits of Bismarck.

Before Capital commenced the proceeding in the North Dakota Public Service Commission that is the subject of the appeal now before the court, MDU filed with the Bismarck Board of City Commissioners a petition to declare franchise rights of MDU and Capital. Capital responded by filing a complaint in the District Court, Burleigh County, seeking a judgment declaring Capital's rights under its franchise to operate an electric distribution system in Bismarck. The court granted MDU's motion for dismissal of Capital's amended complaint, and Capital has appealed that decision to the North Dakota Supreme Court.

Capital is engaged in good faith litigation with MDU concerning Capital's rights under its franchise to construct and maintain its electric distribution system in Bismarck.

Capital is ready, willing and able to provide electric service in Boulder Ridge in the ordinary course of its business. Capital is ready, willing and able to:

- (1.) 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;
- (2.) use those facilities in connection with Capital's other facilities that are described in the PSC Order; and
- (3.) for Capital to begin providing service to users of electricity in Boulder Ridge in compliance with the Order of the North Dakota Public Service Commission on June 22, 2006.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Montana-Dakota Utilities Co., a) Supreme Court No. 20060270
Division of MDU Resources Group, Inc.,) Burleigh Co. No. 06-C-1177
)
Appellant,)
)
vs.) AFFIDAVIT OF SERVICE
)
North Dakota Public Service Commission)
and Capital Electric Cooperative, Inc.,)
)
Appellees.)

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF WARD)

LaRae A. Thomas, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age, and is not a party to nor interested in the above entitled action; that on the 3 day of November, 2006, this Affiant served by depositing in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in the above entitled action:

1. Appellee Capital Electric Cooperative's Brief Opposing Appellant's Motion for Stay Pending Appeal.

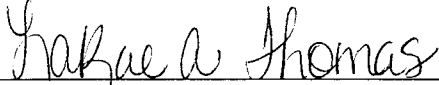
That envelopes were addressed to the following persons at their known address as follows:

Jerome C. Kettleon
Pearce & Durick
PO Box 400
Bismarck, ND 58502-0400

William W. Binek
PUBLIC SERVICE COMMISSION
600 E Boulevard Avenue, Dept 408
Bismarck, ND 58505-0480

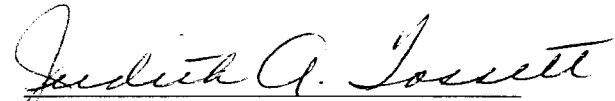
The Honorable Wayne Stenehjem
Attorney General of North Dakota
600 East Boulevard Avenue, Dept 125
Bismarck, ND 58505

That the above provisions were duly mailed in accordance with the provisions of the
North Dakota Rules of Civil Procedure.



LaRae A. Thomas

SUBSCRIBED AND SWORN to before me this 3rd day of November, 2006.



Notary Public
For the State of North Dakota
My Commission expires: _____

