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November 7, 2006

HAND-DELIVERED

Ms. Penny Miller, Clerk
North Dakota Supreme Court
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530

Re: *Supreme Court No. 20060270*
Burleigh Co. No. 06-C-1177
Montana Dakota Utilities Co., a division of MDU Resources Group, Inc.
v. North Dakota Public Service Commission and Capital Electric
Cooperative, Inc.

Dear Ms. Miller:

Enclosed for filing in the captioned matter is original and seven copies of Reply Brief in Support of Motion for Stay Upon Appeal of Judgment Affirming Administrative Decision, together with Affidavit of Service.

If you have any questions, please do not hesitate to contact our office.

Sincerely,

PEARCE & DURICK

By: 

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JCK/ef

Enclosures.

cc: (w/encl.) Mr. William Binek
(w/encl.) Ms. Carol Larson
(w/encl.) Wayne K. Stenehjem, Attorney General of North Dakota

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,)	
)	REPLY BRIEF IN SUPPORT OF
vs.)	MOTION FOR STAY UPON
)	APPEAL OF JUDGMENT
North Dakota Public Service Commission)	AFFIRMING ADMINISTRATIVE
and Capital Electric Cooperative, Inc.,)	DECISION
)	
Appellees.)	

Part of Capital Electric Cooperative’s argument in its brief in opposition to the stay requested by MDU is found on page 2 where it summarizes the rule with regard to stays and injunctive orders. The summary on page 2 fails to properly summarize Rule 62 of the North Dakota Rules of Civil Procedure. The rule for injunction pending appeal is as follows:

“Rule 62(c) Injunction Pending Appeal. If an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.”

The above rule is a long way from what Capital Electric Cooperative claims it to be on page 2 of its brief. Capital Electric (CEC) claims the rule is:

“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”

The rule instead is what is set out above.

In its brief in opposition to a stay, Capital Electric Cooperative (“CEC”) argues that MDU has not shown it is likely to prevail on the merits of its appeal and notes that typically

the judiciary is restrained in its review of an administrative agency decision. This is not an appeal from a typical administrative agency decision. Rather, the PSC acknowledged its decision was based solely upon N.D.C.C. § 49-03-01.3 of the Territorial Integrity Act (“TIA”) without regard to the City of Bismarck’s right to franchise electric service areas. The Public Service Commission concluded it could not interpret constitutional provisions regarding the franchise authority of the City and therefore did not consider MDU’s authority or CEC’s lack of authority to provide services within Boulder Ridge under their respective franchises. Commissioner Tony Clark in his concurring opinion noted the Commission could not reconcile seemingly conflicting provisions of the TIA and the North Dakota Constitution without direction from the court. Commission Clark went on to say:

“Admittedly, this leaves the situation unsettled. We now have a public utility, MDU, that is unable to provide service under this state statute. Yet the provider, whose service is in accordance with the state law, does not hold a valid city franchise. Again, this is an issue that is beyond the ability of the PSC to resolve, because the PSC has no authority over the manner in which cities franchise utilities. Reconciliation of these contradictions must be handled by the courts, or ultimately the Legislature.”

(See, Attachment 2 to MDU Brief in Support of Motion for Stay Upon Appeal).

Kevin Cramer, Commissioner of the Public Service Commission, in his concurring opinion also indicates that the decision of the PSC is made in a vacuum in that it does not consider the ability of CEC to provide the service which it directs that CEC can provide.

“Having said that, MDU’s motion to dismiss on the basis of the franchise issued it by the City of Bismarck is hard to ignore. Especially following the district court’s opinion and decision upholding the City’s position. Yet, I cannot reconcile that argument with the constitutional question of PSC authority without definitive direction from the courts and/or the legislature. ”

In the Findings of Fact, Conclusions of Law and Order of the Public Service

Commission (Attachment 2 to MDU Brief in Support of Motion for Stay Upon Appeal), the PSC acknowledges at no. 11 that the District Court found CEC had no franchise in part of Boulder Ridge Addition to the City of Bismarck. Later in those same findings of fact, the Commission finds that CEC should provide service in Boulder Ridge, and still later in its Order, it determines that MDU should cease and desist in providing service and that it shall offer to sell its private property to a rural cooperative which it acknowledges does not have the authority to provide service in the area. The Order is flawed in that respect; it is not in accordance with the law and it violates the constitutional rights of MDU to due process and to the right to maintain its contractual franchise arrangement with the City of Bismarck. For the above reason alone, MDU is likely to succeed on the merits of this appeal. See, N.D.C.C. § 28-32-48.

With many of the critical questions presented to the Court in this appeal being questions of law, most of which were not addressed by the PSC, and specifically deferred to the Court, this is not an administrative appeal in which the Court defers to the expertise of the administrative agency. Instead, the Court is being asked to reconcile the TIA with statutory and constitutional provisions regarding the right of a city to declare a franchise service area within the corporate limits of a municipality. Fortunately, as indicated in MDU's initial brief on motion for stay, there is considerable authority to guide the Court. In MDU's initial brief, MDU indicates the authority is not the South Pointe case as cited by CEC, but rather, the Court should look to Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, 193 N.W. 2d 723, 730 (N.D. 1972).

One of the striking problems with the Public Service Commission's Order and the

Judgment of the District Court is that it admittedly does not take into account all of the rights and obligations of Montana-Dakota Utilities. It does not consider the constitutional issues and yet based on an incomplete review of the circumstance and the rights of the parties, it directs that MDU divest itself of property which it owns, which it has a right to use, and requires without an appeal right that the property be sold to a rural cooperative and that it not offer services which it is obligated and entitled to offer under its franchise agreement with the City. The Order cannot be a legitimate order for injunctive relief in that it admittedly ignores or does not address significant rights and obligations of MDU.

In its brief, CEC incorrectly states that MDU has a right to serve Boulder Ridge because it does have a franchise in Boulder Ridge. The Affidavit of Lars Nygren is not correct. It is not in keeping with the Order of the District Court and the finding of the City Commission of Bismarck in Case No. 200660199 which is presently pending before the Court on appeal. Even Commission Clark, in his concurring opinion, indicates that CEC does not hold a "valid city franchise". There is no basis for the sworn statement of Mr. Nygren. His statement is incorrect and in direct conflict with the Order of the District Court, the City of Bismarck, and the PSC which all found CEC does not have a franchise to serve Boulder Ridge.

The obvious intent of the PSC in this case is to enter an order based on what two members of the PSC perceived the situation to be and then to await direction from a higher court with regard to the constitutional rights and other rights of MDU. If a stay is not granted, MDU will be forced to cease and desist providing service to an area which it is contracted to provide service to without the right to be heard on several of the issues as is

indicated by both Commission Clark and Commissioner Kramer. That, in itself, is adequate reason to suspend, modify or grant the injunctive relief granted in this case if, in fact, it is truly injunctive relief and to grant MDU the right to a stay on the terms and conditions requested in its initial brief in this matter.

Dated at Bismarck, North Dakota, this 7th day of November, 2006.

Respectfully submitted,

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

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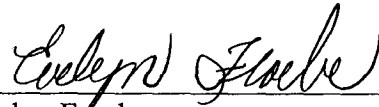
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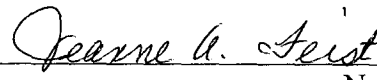
To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

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



Evelyn Froebe

Subscribed and sworn to before me this 7th day of November, 2006.



Notary Public

