



plain, speedy, and adequate remedy in the ordinary course of law. Section 32-35-02 also provides that the writ is issued" upon affidavit on the application of the person beneficially interested."

The Commission opposes MDU's petition for the reason that MDU's petition does not meet the statutory requirements for issuance of a writ of prohibition under Chapter 32-35 of the North Dakota Century Code because: (1) the Commission has jurisdiction under North Dakota Century Code Chapter 49-03 to decide the issues set forth in the complaint before the Commission; and (2) MDU has a plain, speedy and adequate remedy in the ordinary course of law.

#### **The Commission Has Jurisdiction in the Complaint Proceeding**

The complaint proceeding before the Commission, Capital Electric Cooperative, Inc. Complainant v. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., Respondent, Case No. PU-06-278 is a case brought under North Dakota Century Code Chapter 49-03, commonly referred to as the Territorial Integrity Act ("TIA"). The Commission clearly has jurisdiction under this chapter.

N.D.C.C. §49-03-01.3 provides that an electric public utility is not required to secure an order or certificate from the Commission to extend its electric distribution lines within the corporate limits of a municipality where it has lawfully commenced operations "provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission." (emphasis added).

Commission jurisdiction to enforce TIA provisions is provided under N.D.C.C.

§49-03-01.4, which states in part:

If any electric public utility violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric cooperative, **the commission**, after complaint, notice, and hearing as provided in chapter 28-32, shall make its order restraining and enjoining said electric public utility from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe such terms and conditions as it shall deem reasonable and proper.” (emphasis added).

Clearly the Commission has jurisdiction under the law to hear and decide the complaint in Case No. PU-06-278.

MDU's petition is based upon MDU's claim that the Commission does not have jurisdiction to determine franchise rights. The Commission readily admits that it has no jurisdiction to determine franchise rights, but the determination of franchise rights is not what the Commission is directed to resolve under Chapter 49-03. The primary purpose of the Territorial Integrity Act is to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities. Capital Electric Cooperative, Inc., v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995), Cass County Electric Cooperative, Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988).

#### **MDU Has an Adequate Remedy in the Ordinary Course of Law**

N.D.C.C. §32-35-02 provides that a writ of prohibition may be issued where there is not a plain speedy, and adequate remedy in the ordinary course of law. The North Dakota Supreme Court has ruled that a writ of prohibition will not be issued if there is a remedy of appeal. Selzer v. Bagley, 19 N.D. 697, 124 N.W. 426 (N.D. 1910). MDU

clearly has an adequate remedy under the law because MDU has the right to appeal any final decision of the Commission. MDU has in fact already filed its notice of appeal of the Commission's decision in Case No. PU-05-551 because of alleged errors made by the Commission. MDU will have the same right to appeal the decision by the Commission in Commission Case No. PU-06-278. A writ of prohibition is not a process for the correction of errors. Lynch v. District Court, 48 N.D. 431, 185 N.W. 303 (N.D. 1921). A writ of prohibition is to be employed sparingly and only in cases where there is no adequate remedy by appeal or otherwise. Schneider v. Seaworth, 376 N.W.2d 49 (N.D. 1985).

### **Conclusion**

A writ of prohibition is an extraordinary remedy under the law to prevent an inferior body or tribunal from acting without or in excess of its jurisdiction when there is not a plain, speedy, and adequate remedy in the ordinary course of law. Old Broadway Corporation v. Backes, 450 N.W.2d 734 (N.D. 1990). In the present case the complaint is for interference under Chapter 49-03 of the North Dakota Century Code. The Commission has jurisdiction to hear and decide the case under the law. Therefore, there is no basis for MDU's petition for a writ of prohibition to prevent the Commission from acting without or in excess of its jurisdiction. In addition, MDU has a plain, speedy and adequate remedy under the law because it has the right to appeal the Commission's decision.


While a delay of the present proceeding before the Commission may be appropriate for consideration, such request should be presented to the Commission for consideration and not be presented as an extraordinary remedy addressed to the

Court. The Commission has the authority under N.D. Admin. Code §69-02-04-03 to continue a proceeding for good cause.

The Commission requests that the Court deny MDU's petition for writ of prohibition.

Dated this **19th** day of **July 2006**.

Respectfully Submitted,  
North Dakota Public Service Commission

By:   
William W. Binek (ID# 02990)  
Special Assistant Attorney General  
Counsel for Public Service Commission  
600 E. Boulevard Avenue, Dept 408  
Bismarck, ND 58505  
(701) 328-4088