

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

Petitioner

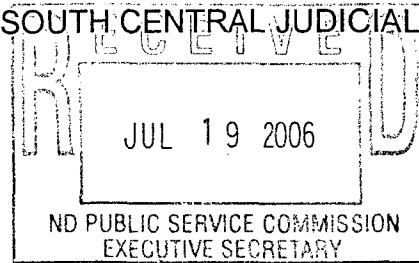
vs.

North Dakota Public Service
Commission,

Defendant and
Third-Party Plaintiff

vs.

Capital Electric Cooperative, Inc.
Third-Party Defendant.



**CAPITAL ELECTRIC COOPERATIVE'S
RESPONSE TO PETITION FOR
WRIT OF PROHIBITION**

CIVIL NO. 06-C-1290

Intervener and Respondent Capital Electric Cooperative, Inc. (herein Capital) responds to MDU's Petition for Writ of Prohibition. The following numbered paragraphs respond to the identically numbered paragraphs of the petition, admitting, denying and otherwise responding to the Petitioner's allegations of fact and responding to its arguments of law.

1. Capital admits that Montana-Dakota Utilities Co. (herein MDU) is a division of MDU Resources, Inc., and is a public utility providing electric energy in North Dakota and in Bismarck, ND. Capital asserts that MDU is subject to the jurisdiction of the North Dakota Public Service Commission under Title 49 of the North Dakota Century Code.

2. Capital admits that the North Dakota Public Service Commission (herein PSC) is an administrative agency established under Article V, Section 2 of the North Dakota Constitution.
3. Capital admits it is a rural electric cooperative organized under North Dakota Century Code Chapter 10-13. Capital asserts that the words of MDU's petition ". . . to provide electric energy to its members in rural areas not receiving central station power" is a misstatement of N.D.C.C. Chapter 10-13.
4. Capital admits that it named MDU as respondent in a complaint to the PSC in its Case No. PU-06-255.
5. Capital admits that the PSC has determined that Capital's complaint against MDU in Case No. PU-06-255 states a prima facie case against MDU.
6. Capital admits that its complaint in PSC Case No. PU-06-255 requests the PSC to issue its order to restrain and enjoin MDU from constructing or extending its interfering lines, plant, or system into Promontory Point III and requiring immediate removal of MDU's facilities in Promontory Point III. Capital states that its complaint invokes the PSC's jurisdiction over MDU under the provisions of N.D.C.C. Title 49, including Sections 49-03-01.3, -01.4 and -01.5.
7. Capital admits that Promontory Point III is part of the City of Bismarck. Capital admits that MDU holds a franchise to provide electric distribution service within the City of Bismarck, including Promontory Point III. Capital asserts that franchises granted by the City of Bismarck are non-exclusive, under N.D.C.C. 40-05-01, Subsection 57.

8. Capital denies MDU's allegation that Capital does not hold a franchise from the City of Bismarck to provide electrical services in Promontory Point III. Capital alleges that it does hold a franchise to provide electric distribution service within the City of Bismarck, including Promontory Point III.
- 9/10. Capital admits that the PSC issued an Order in its Case No. PU-05-551 that MDU shall cease and desist from providing electric service to Boulder Ridge First Addition to Bismarck and that MDU has filed and served its notice of appeal and a motion for stay concerning that Order in Burleigh County District Court Civil No. 06-C-1177. Capital agrees that PSC Cases No. PU-05-551 (the Boulder Ridge case) and PU-06-255 (the Promontory Point case) are similar.
11. Capital disputes MDU's arguments that the PSC has no authority. Capital asserts that MDU lacks standing to assert the local self-government interests of the City of Bismarck to defeat the PSC's authority over the activities of MDU. Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990).
12. Capital admits MDU has correctly copied the PSC's 4th conclusion of law in its Case No. PU-05-551, the Boulder Ridge case.
13. Capital admits that "the Public Service Commission entered its Order on June 22, 2006 [in its Case No. PU-05-551, the Boulder Ridge case] directing that Montana-Dakota cease and desist providing services in part of Boulder Ridge First Addition to the City of Bismarck, and that it sell its distribution assets in the are to Capital Electric."

To the extent MDU's word "nonetheless" implies an argument that the PSC's Order in its Case No. PU-05-551 is not consistent with the PSC's 4th conclusion of law or in accordance with law, Capital asserts that the PSC's Order in its Case No. PU-05-551 is consistent with the PSC's 4th conclusion of law and is in accordance with law.

14. Capital agrees that PSC Cases No. PU-05-551 about Boulder Ridge and PU-06-255 about Promontory Point III are similar regarding Capital's requests for relief.
15. The relief requested by Capital in PSC Case No. PU-06-255, the Promontory Point case, is not beyond the authority of the Public Service Commission. See Cass County Electric Cooperative v Northern States Power Co., 419 N.W.2d 181 (N.D. 1988) and Northern States Power Co. v Public Service Commission, 452 N.W.2d 340 (N.D. 1990). (The "South Pointe cases.")

The Order of June 22, 2006 issued by the PSC in its Case No. PU-05-551, the Boulder Ridge case, is not the subject of the petition for a writ of prohibition. As stated in petition paragraph 10, MDU has filed and served its notice of appeal concerning that Order in Burleigh County District Court Civil No. 06-C-1177.

16. MDU's assertion "that the City has exclusive constitutional authority. . ." that bars the PSC from exercising its authority is unsustainable.

MDU is subject to the jurisdiction of the North Dakota Public Service Commission under Title 49 of the North Dakota Century Code. Capital's complaint to the PSC in Case No. PU-06-255, the Promontory Point case, invokes the PSC's jurisdiction over MDU under N.D.C.C. Title 49, including Chapter 49-03 and

Sections 49-03-01.3, -01.4 and -01.5.

Capital's complaint to the PSC about MDU's activities in Promontory Point is not unprecedented. It has an antecedent in the South Pointe cases. The South Pointe cases settled a dispute in the Fargo area substantially the same as the dispute between Capital and MDU over Promontory Point in Bismarck. Capital's Complaint to the PSC against MDU is like Cass's Complaint against NSP in the South Pointe case.

The Promontory Point dispute also has an antecedent in the Boulder Ridge case that is referred to in MDU's petition for a writ of prohibition against the PSC's proceeding with the Promontory Point case.

In the Boulder Ridge case, the PSC heard the evidence, considered the parties' arguments, and issued its Findings of Fact, Conclusions of Law, and Order. The PSC found and concluded under N.D.C.C. 49-03-1.3 that MDU's extension of its electric distribution lines into Boulder Ridge interferes with and constitutes an unreasonable duplication of investment and services provided by Capital, and ordered that MDU shall cease and desist from providing electric service to Boulder Ridge. The PSC's decision and order against MDU in the Boulder Ridge case is similar to its decision and order against NSP in the South Pointe case, affirmed by the Supreme Court. As stated in its petition to prohibit the PSC from proceeding with the Promontory Point case, MDU has appealed from the PSC's order in the Boulder Ridge case under N.D.C.C. 28-32-42.

In the Boulder Ridge appeal, and now in its petition for a writ of prohibition regarding Promontory Point, MDU asserts its activities within municipalities are not within the jurisdiction of the PSC under N.D.C.C. Chapter 49-03, but is within the exclusive jurisdiction of local governing bodies, as a matter of law under the State Constitution. According to MDU's legal theory, N.D.C.C. 49-03-01.3 is unconstitutional under Article VII Section 11 of the State Constitution, and for that reason the PSC has no jurisdiction.

Capital denies MDU's assertion that the PSC does not have jurisdiction to restrain or enjoin MDU's providing electric distribution services in Promontory Point. Capital asserts that a local franchise is not a constitutional right or license that permits MDU to violate the State law that prohibits MDU's interference with existing service and facilities provided by Capital.

N.D.C.C. Chapter 49-03 enacts a legislative policy and purpose to keep to a minimum wasteful duplication of capital-intensive utility services, to minimize conflicts between suppliers of electricity. See, e.g., the South Pointe cases. It is a legislated regulatory policy sustained by the Legislature's constitutional police powers, a policy and a power that apply throughout the State of North Dakota. The legislature's policy and power prevail over MDU's claims that Bismarck has municipal sovereign powers superior to the state itself.

17. It is axiomatic that a writ of prohibition is an extraordinary remedy, out of the normal course of legal procedure. A court does not prohibit another body from proceeding if the petitioner has an adequate alternative procedure available to assert its claims

or defenses.

MDU's claim that it "has no adequate remedy by appeal or otherwise" is not credible, considering MDU's allegations about the similarity of the case its petition attacks, PSC Case No. PU-06-255 regarding Promontory Point III, and Case No. PU-05-551 regarding Boulder Ridge. MDU's claim that it has no adequate remedy regarding Promontory Point is not credible, considering MDU's record in the Boulder Ridge case.

The PSC has decided the Boulder Ridge case. MDU has filed and served its notice of appeal and a motion for stay concerning that Order in Burleigh County District Court Civil No. 06-C-1177. MDU's specifications of error in its notice of appeal include claims about constitutional issues identical to its arguments in its petition for a writ of prohibition. (See MDU's petition, paragraph 10.) MDU cannot credibly argue in this case that an appeal is not an adequate remedy while it pursues appeal of another case that MDU describes as similar to this case. In fact, MDU's motion for a stay order in the Boulder Ridge case is premised in part on MDU's claim it is "likely to succeed on appeal." (See MDU brief in support of motion for stay in Civil No. 06-C-1177.) Obviously, Capital disagrees with MDU on that point, but MDU cannot have it both ways, asserting identical claims in two similar cases in the same court, asserting that it is likely to succeed on appeal in one case and claiming that appeal is inadequate in the other.

MDU does have procedures available to make its arguments in PSC Case No. PU-06-255 regarding Promontory Point. It can make its constitutional claims

in that case, just as it made similar claims in PSC Case No. PU-05-551 regarding Boulder Ridge. The PSC will not rule for or against MDU on those claims, because (as MDU now acknowledges) "The Commission's jurisdiction is limited to matters delegated to it by the North Dakota Legislature under the North Dakota Century Code Title 49. The Commission does not have jurisdiction regarding the franchise under Article VII, Section 11 of the North Dakota Constitution." (MDU petition, paragraph 12.)

The PSC will not rule on MDU's constitutional claims because ". . . administrative agencies have no authority to decide upon the constitutionality of the statutes under which they operate." Johnson v Elkin, 263 N.W.2d 123, 126 (N.D. 1978). According to Johnson v Elkin, when a constitutional issue arises in an administrative agency proceeding that challenges the PSC's authority, the PSC should not attempt to resolve the constitutional issue.

When a party to a PSC proceeding (such as MDU) raises a constitutional objection to the PSC's jurisdiction, the PSC should proceed to hear and decide the case before it because it is obligated to presume the constitutionality of the statutes that it enforces, a principle acknowledged by the PSC in its Boulder Ridge decision. Any constitutional issues will be decided on appeal. "We reserve the issue of constitutionality to the first court to which the agency decision is appealed." 263 N.W.2d at 127 (that is, appealed from a PSC decision under the Administrative Agencies Practice Act). That is the orderly way to deal with MDU's constitutional claims, under Johnson v Elkin and under the Administrative Agencies Practice Act,

N.D.C.C. 28-32-42 and -46. The remedy of appeal is adequate. N.D.C.C. 28-32-46 specifically provides for an appellant to claim that an agency's order is in violation of the constitutional rights of the appellant.

In June of 2006, the Supreme Court issued an opinion, State v Hansen, 2006 N.D. 139, where the court emphasized the principle that litigation be conducted in accordance with orderly processes. Orderly procedure is particularly important where constitutional issues are involved, because all statutes are presumed constitutional. N.D.C.C. 1-02-38, Subsection 1; Montana-Dakota Utilities Co. v Johanneson, 153 N.W.2d 414 (N.D. 1967). 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, Section 4. See also State v Hansen, supra and State v Hanson, 558 N.W.2d 611 (N.D. 1996) (One district judge cannot have the final say about the constitutionality of a statute.)

The presumption of constitutionality is supported by the principle that "heavy artillery" is required to support claims under the Constitution. Conclusory arguments without supportive reasoning may be summarily dismissed. So. Valley Grain Dealers v Board of City Commissioners, 257 N.W.2d 425, 434 (N.D. 1977). Effertz v Workmen's Compensation Bureau, 481 N.W.2d 218, 223 (N.D. 1992) and Froysland v Workers' Compensation Bureau, 432 N.W.2d 883, note 7 at 892 (N.D. 1988). MDU's petition should be summarily dismissed because its arguments lack

substantial supportive reasoning.

Judicial insistence on orderly procedure applies to MDU's petition for a writ of prohibition. An orderly adequate appeal process is available. It is not only available, it is under way, addressing MDU's appeal of the PSC's decision and order in the Boulder Ridge case. Having lost and appealed that case, MDU is ill situated to seek the extraordinary remedy that a court should prohibit the PSC from proceeding, to shield MDU from a similar losing experience. The same orderly procedure followed by MDU in the Boulder Ridge case is available regarding MDU's expectation that a similar result is forthcoming in the similar case of Promontory Point. Orderly procedure is not inadequate.

In Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990), the Supreme Court rejected a collateral attack on the PSC's jurisdiction virtually identical to MDU's petition that the court prohibit the PSC from proceeding in Case No. PU-06-255. Otter Tail tried to avoid PSC jurisdiction by a collateral proceeding seeking a writ of prohibition. The Supreme Court decided that Otter Tail lacked standing to assert self-government interests of an Indian Tribe to defeat the PSC's authority over Otter Tail's activities. In the case of MDU's effort to avoid the PSC's jurisdiction over MDU's activities in Bismarck and Promontory Point, MDU lacks standing to assert any self-government interests of the City of Bismarck to defeat the PSC's authority over MDU under N.D.C.C. Chapter 49-03 .

In the Otter Tail case, the district court issued a writ of prohibition and the Supreme Court ordered the writ vacated, allowing the PSC to proceed subject to

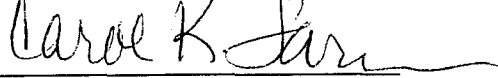
normal review procedures. Likewise, the petition before this court should be denied, so the Promontory Point case can be heard and decided under normal, orderly adequate procedures. Those procedures include adequate appellate review under N.D.C.C. 28-32-46 of an appellant's claim that an agency's order is in violation of the constitutional rights of the appellant.

CONCLUSION

MDU has not carried its burden to show that it does not have an adequate procedure available to make its claims to defeat the PSC's authority over MDU under N.D.C.C. Chapter 49-03. Under all the relevant precedents, particularly Johnson v Elkin, Application of Otter Tail Power Co., and State v Hansen, MDU's petition for a writ of prohibition should be dismissed.

Dated this 18 day of July, 2006.

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