

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)	
)	
Complainant,)	
)	
vs.)	CAPITAL ELECTRIC COOPERATIVE'S
)	BRIEF OPPOSING MONTANA-DAKOTA
)	UTILITIES' MOTION FOR
Montana-Dakota Utilities, Inc., a)	CONTINUANCE
Division of MDU Resources Group,)	
Inc.)	Case No. PU-06-278
)	
Respondent.)	

On June 30, 2006, Capital Electric Cooperative, Inc. (Capital) filed a Complaint with the Commission alleging Montana-Dakota Utilities, Inc. (MDU) intends to provide electric service in the Promontory Point III subdivision within the municipality of Bismarck, North Dakota. Further, Capital complains MDU has commenced construction to extend its electric distribution lines to the Promontory Point III subdivision, and that such extension by MDU interferes with existing services provided by Capital and unreasonably duplicates available services provided by Capital within the City of Bismarck, in violation of N.D.C.C. § 49-03-01.3.

On July 12, 2006, the Commission determined Capital's Complaint presented a prima facie case against MDU.

On July 13, 2006, MDU commenced a special proceeding in district court, seeking a writ of prohibition to prohibit the Commission from exercising its jurisdiction to proceed with this case. The petition was denied by the court on July 26, 2006.

On August 1, 2006, MDU filed its answer to Capital's complaint, accompanied by

a motion for stay in this case. The motion was dismissed by the Commission on August 23, 2006.

On August 24, 2006, MDU filed a motion for continuance of this proceeding pending an order of the court on MDU's appeal of the Commission's decision and order in Commission case No. PU-05-551, the "Boulder Ridge Case."

MDU's answer admits essential facts of the case, that MDU has extended electric distribution lines in Promontory Point III. (Answer paragraph 5 admitting complaint paragraph 7.) Otherwise, MDU's answer asserts legal arguments similar to its arguments in the Boulder Ridge Case.

MDU's motion declares "The claims before the Commission in this proceeding are similar to those presented to the Commission in Case No. PU-05-551 which is the subject of the Boulder Ridge appeal." Capital agrees; the issues in the Boulder Ridge case and in the Promontory Point III case are similar, however, there are factual differences.

First in its petition for a writ of prohibition, then in its motion for a stay, and now in its motion for continuance, MDU asserts the Commission should not proceed in the normal course to hear and decide the Promontory Point III case.

Under the Commission's rules, a continuance may be ordered for "good cause." ND Administrative Code 69-02-04-03. The cause asserted by MDU is ". . . the PSC's proper consideration of the City's franchise in this proceeding remains in question until the Boulder Ridge appeal is decided [and] conducting discovery and a hearing in this proceeding without receiving the benefit of direction from the court in the Boulder Ridge Appeal would

be a waste of resources for both the parties and the PSC.” (MDU motion for continuance, page 2.)

The reasons asserted by MDU are not good cause for continuance. When a party to one Commission proceeding (such as the Boulder Ridge case) appeals the decision in that case, the Commission is not temporarily disabled from proceeding in similar cases while the appeal is pending. The Commission is able to hold a hearing, deliberate and decide the Promontory Point III case in the normal course without wasting resources or incurring extraordinary burdens unique to this case and without waiting for the Boulder Ridge appeal to be decided.

MDU is not interested in having the Commission save its resources. MDU wants the Commission to refrain from using its resources to enforce the Territorial Integrity Act. MDU is not interested in having the Commission save Capital’s resources. MDU wants the Commission to stop Capital from using its resources to assert its rights under the Territorial Integrity Act. Capital’s Complaint and the Commission holding a hearing are appropriate uses of their resources in response to MDU’s conduct in Promontory Point III following the Commission’s decision in the Boulder Ridge case.

MDU’s complaining about the burdens of preparing for a hearing are incredible, for many reasons.

MDU says the issues in the Promontory Point III case are similar to the issues in the Boulder Ridge case. MDU presented no direct testimony in the Boulder Ridge case. *[Order in PSC Case. No. PU-05-551, page 2; Transcript, pp. 143-144.]* The cost to make a similar presentation in this similar case must be minimal.

In the Boulder Ridge case, MDU relied solely on legal arguments in its motion to dismiss, arguments repeated in its answer in the Promontory Point III case. MDU's briefs from the Boulder Ridge case can be duplicated for the similar Promontory Point III case, without extraordinary expense. (The ease is illustrated by comparing MDU's motion for continuance to its previous motion for stay. MDU's continuance motion was obviously cloned from the stay motion and was served the day after the stay motion was denied.) But it is not Capital's or the Commission's burden to predict MDU's litigation costs and evaluate whether the costs are too much for MDU to bear.

Whatever the costs of litigation incurred by MDU, they are not imposed by Capital or the Commission. Capital's Complaint and the Commission's hearing on the Complaint in the Promontory Point III case were predictable responses to MDU's actions in Promontory Point III following the Commission's decision in the Boulder Ridge case. MDU assumed the risk of litigation and all its costs when it made its extension into Promontory Point III duplicating and interfering with Capital's facilities.

MDU's feigned concern to avoid waste of resources is difficult to be taken seriously, considering all the lawyering MDU expended in the Boulder Ridge case to avoid a hearing and a decision on the fundamental issue of wasteful duplication, and in one, two and now three endeavors to avoid a hearing in the Promontory Point III case that MDU expects will produce a result similar to the Boulder Ridge case. These territorial cases are all about avoidance of wasteful duplication of capital intensive utility facilities, a principle of public policy that MDU seeks to violate in its effort to evade the Commission's exercise of its jurisdiction under the Territorial Integrity Act. It is plain to see that it is not waste of

resources MDU seeks to avoid. What MDU seeks to avoid is another kind of duplication: an unfavorable result in the Promontory Point III case similar to the result in the Boulder Ridge case.

MDU's suggestion the Commission should wait for direction from the court in the Boulder Ridge appeal before hearing and deciding the Promontory Point III case is a thinly veiled suggestion that the Commission should anticipate the direction received will be reversal based on MDU's theories about municipalities' governing bodies having powers superior to the Commission as a matter of constitutional law. The Commission has already recognized, in the Boulder Ridge case, that the Commission must presume the constitutionality of the statutes under which it operates. [*Order in PSC Case. No. PU-05-551 Conclusion of Law No. 10.*] Under that principle, the motion for continuance should be denied.

If the Commission's decision in the Boulder Ridge case were fairly described as a radical departure from the history of precedents under the Territorial Integrity Act, perhaps there would be some merit in waiting for the appeal to run its course, to see if the Supreme Court agrees that the Commission is proceeding in the right direction. But the Commission's decision in the Boulder Ridge is entirely in accordance with the direction of precedents, particularly the South Pointe cases and also Application of Otter Tail Power Co. 451 N.W.2d 95 (ND 1990). There is nothing extraordinary about the Commission's decision in the Boulder Ridge case indicating that the Commission should refrain from performing its responsibilities to hear and decide similar cases in the normal course.

What is radical about the Boulder Ridge case, and now the Promontory Point III case, is MDU's new theory that it is constitutionally exempt from the Commission's jurisdiction. The Commission may acknowledge MDU's sincerity in its persistent commitment to shoot down the Territorial Integrity Act on theories of constitutional law. But MDU's dedication to its principle that what is good for MDU is good for North Dakota is not good cause for the Commission to refrain from proceeding in the normal course to hear and decide the Promontory Point III case.

MDU's implication the Commission is, or should be, insecure about its decision in the Boulder Ridge case is bluntly contradicted by the Commission's brief in the Boulder Ridge appeal. No better argument can be made against MDU's motion for continuance than the Commission's defense of its decision in the Boulder Ridge case. The Commission's forceful and confident defense of its decision in the Boulder Ridge case supports a reversal of MDU's arguments on its motion for continuance of the Promontory Point III case. The similarity of issues in the Promontory Point III case to the Boulder Ridge case is not a reason for the Commission to refrain from a hearing and decision in the normal course. The similarity of the cases is a reason to proceed to hear and decide the Promontory Point III case. In addition, there are factual differences in the two cases. The City of Bismarck has issued no "decision" granting to MDU the right to serve Promontory Point III. The facts once developed will prove that MDU's extension of facilities into Promontory Point III is an even a more egregious violation of the Territorial Integrity Act than in the Boulder Ridge case. MDU has started a course of conduct in direct violation

of the Territorial Integrity act. This course of conduct must be stopped before additional wasteful duplication of facilities continues.

MDU's motion for continuance should be denied because there is no good cause for delay.

Dated this 6th day of September, 2006.

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