

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)
)
Complainant,)
)
vs.)
)
Montana-Dakota Utilities, Inc., a)
Division of MDU Resources Group,)
Inc.)
)
Respondent.

**CAPITAL ELECTRIC COOPERATIVE'S
BRIEF OPPOSING MDU'S MOTION
FOR A STAY**

Case No. 06-078
07-425

MDU has moved the Commission to stay proceeding with the hearings in these cases that are scheduled for November 19 and 20, 2007, “. . . pending issuance of an order by the City of Bismarck in response to a petition by Montana-Dakota. . .” to decide the electric service territory disputes that are the subjects of these cases pending before the PSC.

The issues in these cases are substantially identical to one another and to the issues in the Boulder Ridge Case, No 05-551, 2007 ND 128. (To use names instead of numbers, No. 06-078 is the Promontory Point III case, and No. 07-425 is the Sonnet Heights case. Another case is pending, Promontory Point IV.)

This is MDU's third request for a delay in the Promontory Point III case. It first requested a stay on August 1, 2006, before a hearing was scheduled.

On August 23, 2006, the Commission dismissed MDU's motion for a stay, because the Commission does not have authority to order a “stay” of proceedings. That is reason and precedent enough for MDU's 2007 motion in both cases to be denied or dismissed.

As noted by the Commission in its August 23, 2006 Order, the Commission's rules

authorize a "continuance" to be ordered for "good cause," after a hearing is scheduled. ND Administrative Code 69-02-04-03.

On August 23, 2006, the Commission also scheduled the case to be heard on October 30, 2006.

In response to the Commission's action of August 23, 2006, MDU requested a continuance in the Promontory Point III case until the parties and the Commission had "benefit of direction from the court" in the Boulder Ridge appeal. (MDU Motion for Continuance in Case N0 06-278, August 24, 2006.) The Commission granted MDU's motion for continuance, "until a final decision is reached in the Boulder Ridge Appeal." (Order, October 12, 2006.) A final decision has been reached in the Boulder Ridge Appeal. 2007 ND 128. The Commission has the Court's "direction."

Considering the procedural history of the Promontory Point III case, it might be predicted that the Commission would dismiss the pending motion for a "stay" and that MDU would immediately respond with a fourth motion, asking for a "continuance." As hearings have already been scheduled in both cases, the Commission should regard MDU's motion for a stay as a mislabeled motion for a continuance and act on the motion under the "good cause" criteria.

After the Boulder Ridge appeal, the reason MDU now asserts is a good cause for the Commission to delay proceeding in the Promontory Point III and Sonnet Heights cases is this: MDU should have a new opportunity to go back to Bismarck's City Commission to try again to achieve what it failed to accomplish in the Boulder Ridge case.

MDU's answers in the pending cases assert legal arguments substantially identical

to its arguments in the Boulder Ridge case, arguments not only to the Public Service Commission, but also to two district judges, and finally to the Supreme Court, which said:

“To the extent MDU argues the PSC’s decision failed to consider Bismarck’s authority to franchise utility services in Bismarck, we reject those arguments because both Capital Electric and MDU have a franchise to serve the Boulder Ridge area involved in this proceeding. The PSC therefore has jurisdiction. . . .” 2007 ND 128, Par. 28

“Because of our resolution of these appeals, it is not necessary to address other issues raised by the parties.” 2007 ND 128, Par. 36.

Clearly, the Supreme Court’s decision in the Boulder Ridge case is a precedent affecting the Promontory Point and Sonnet Heights cases and any similar cases that might come to the Commission where MDU makes the arguments like those that were rejected by the Supreme Court in the Boulder Ridge case.

The Boulder Ridge decision’s status as a precedent affecting the Promontory Point and Sonnet Heights cases is reinforced by the Supreme Court’s denial of MDU’s petition for rehearing. Not only does the denial of the petition for rehearing reaffirm the PSC’s jurisdiction, the Court’s denial of a rehearing rejected exactly the same arguments MDU now offers as “good cause” for delaying PSC proceedings in the Promontory Point and Sonnet Heights cases. The Court rejected MDU’s request that the Boulder Ridge case be remanded for action by Bismarck’s City Commission. Likewise, the Commission should reject MDU’s request that hearings be delayed while MDU makes another effort to displace the Commission’s jurisdiction under the Territorial Integrity Act.

Capital has filed complaints with the PSC, invoking the PSC’s jurisdiction under existing state statutes. MDU has filed a petition with the Bismarck City Commission, not invoking any existing state or local law but requesting the City Commission to exercise its

authority to enact local ordinances that MDU hopes will prevail over state statutes that serve the public's interest in preventing unreasonable duplication of facilities.

MDU's suggestion that the PSC should refrain from proceeding with hearing the Promontory Point and Sonnet Heights cases under existing law while MDU pursues its hopes and its petition to the Bismarck City Commission is not much different from another suggestion it might make: MDU so dislikes the TIA and the Supreme Court's decision in the Boulder Ridge case that MDU intends to seek an amendment to the TIA at the next legislative session, in 2009. In the meantime, MDU's ardent hope that it will successfully lobby a satisfactory bill to enactment is a good cause for the PSC to delay proceeding with cases pending under existing law. That kind of self interest argument is devoid of merit in the public arena. MDU's political agenda is not good cause for the PSC to refrain from proceeding with its responsibilities under existing law.

Whatever legal arguments might be made on either side, they should be made after the relevant and material facts are collected in an evidentiary hearing. After that, MDU will have adequate opportunity to make its legal arguments under existing laws, statutes, ordinances and precedents. That was the order of procedure in the Boulder Ridge case, and there is no reason for the PSC to depart from that ordinary course in the Promontory Point and Sonnet Heights cases without regard to MDU's efforts to lobby new laws.

MDU's first and second requests for delay in proceeding with the Promontory Point case were premised on its proposal that the Commission should await "benefit of direction from the court" in the Boulder Ridge appeal. The Commission accepted that suggestion; a continuance was granted. A final decision has been reached in the Boulder Ridge

Appeal. 2007 ND 128. The Promontory Point III and Sonnet Heights cases are scheduled for hearing. In MDU's own words, the time has arrived for the Promontory Point and similar cases to be heard and decided. The Commission has the "benefit of direction from the court." MDU's latest petition to the Bismarck City Commission is not good cause for the Public Service Commission to delay proceeding with the hearings in these cases.

Accordingly, MDU's motion for a stay should be considered as a motion for a continuance under ND Administrative Code 69-02-04-03, and the motion should be denied.

Dated this 1st day of October, 2007.

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