

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Capital Electric Cooperative, Inc.)	
)	
Complainant,)	
)	
vs.)	CAPITAL ELECTRIC COOPERATIVE'S
)	BRIEF OPPOSING MDU'S MOTION
Montana-Dakota Utilities, Inc., a)	FOR CONTINUANCE
Division of MDU Resources Group,)	
Inc.)	Case No. PU-06-278
)	Case No. PU-07-425
Respondent.)	Case No. PU-07-682

The issues in these cases under N.D.C.C. 49-03, the Territorial Integrity Act, 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. PU-06-078 is the Promontory Point III case, No. PU-07-425 is the Sonnet Heights case, and No. PU-07-682 is the Promontory Point IV case.)

This is MDU's fourth 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.

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 No. PU-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.)

After a final decision was reached in the Boulder Ridge Appeal, on September 4, 2007, the Commission scheduled the Promontory Point III and the Sonnet Heights case for hearings on November 19 and 20, 2007. A hearing on the Promontory Point IV Case No. PU-07-682 has not been scheduled.

On September 21, 2007, MDU filed its third request for a delay in the hearing of the Promontory Point III case and its first request for a delay in the hearing of the Sonnet Heights case. The request for delays was filed as a motion for a "stay" ". . . 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. On October 12, 2007, MDU's motion was dismissed, because the Commission does not have authority to issue a "stay."

On October 17, 2007, MDU filed its fourth request for a delay in the hearing of the Promontory Point III case, its second request for a delay in the hearing of the Sonnet Heights case, and its first request for a delay in the hearing of the Promontory Point IV case. This pending request for a delay was filed as a motion for continuance.

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.

MDU's motion for a continuance of the Promontory Point IV case, Case No. PU-07-682, is untimely because a hearing has not yet been scheduled. (Capital has suggested the Promontory Point IV case be scheduled for coincident with the Promontory Point III hearing.)

MDU's motion for a continuance of the Promontory Point III and Sonnet Heights cases, is subject to "good cause" criteria, and the same would apply to a timely motion affecting the Promontory Point IV case.

MDU asserts as good cause to support its most recent motion a different cause than it asserted in any of its previous motions for delay. Whereas in the past it asserted the pendency of the Boulder Ridge appeal or the pendency of MDU's various pleas to Bismarck's City Commission as reasons for the Public Service Commission to delay its proceedings, MDU now asserts the pendency of the parties' endeavors to negotiate a settlement as good cause for the Commission to delay its hearings.

MDU's brief also repeats old arguments as an alternative cause for a continuance. (MDU Brief, p. 5.) MDU argues that the Public Service Commission should defer to MDU's petitions to Bismarck's City Commission, an argument undermined by the Supreme Court's denial of MDU's petition for rehearing in the Boulder Ridge case. 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 alternative arguments MDU asserts 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 opposes MDU's assertion that settlement negotiations are good cause for a continuance.

Capital and MDU are negotiating. Capital is cautiously optimistic that the negotiations will produce a service area agreement under N.D.C.C. 49-03-06 that is acceptable not only to the parties, but also to the Public Service Commission and Bismarck's City Commission.

MDU's motion for a continuance ". . . until the parties have completed their commitment to good faith negotiations. . ." and ". . . to allow the parties an opportunity to seek . . . a resolution of these contested proceedings" (MDU's Motion and Brief, p 5.) should be denied because the pendency of negotiations is not good cause for a continuance.

The pendency of hearings is an opportunity to negotiate resolution of disputes. If and when negotiations produce a service area agreement, the parties may join in a motion for continuance of hearings in these cases, pending the Public Service Commission's and Bismarck's City Commission's action on the agreement. To grant a continuance might impair negotiations, because the pendency of hearings is more than an opportunity, it is an incentive to seek and to achieve a negotiated resolution. To grant MDU's fourth unilateral request for a delay would diminish the incentive to negotiate; to grant the motion

would be counter-productive to both parties' stated goal to achieve a negotiated agreement.

If the parties are not able to resolve their disputes by a negotiated agreement in the time remaining before the hearings scheduled for November 19 and 20, 2007, it will then be the Commission's responsibility to hear, consider and decide these cases.

MDU's answers in the three 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. A final decision has been reached in the Boulder Ridge Appeal. The Commission has the Court's "direction." 2007 ND 128.

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.

MDU's first and second requests for delay in proceeding with the Promontory Point III 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."

If the parties are able to resolve their disputes by a negotiated agreement in the time remaining before the hearings scheduled for November 19 and 20, 2007, the parties will then have an opportunity to file a bilateral motion for continuance, pending the Public Service Commission's and Bismarck's City Commission's action on the agreement.

Accordingly, MDU's unilateral motion for a continuance under ND Administrative Code 69-02-04-03 should be denied.

Dated this 30th day of October, 2007.

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