



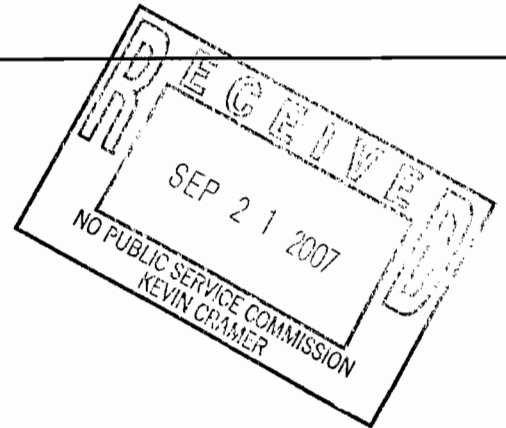
# MONTANA-DAKOTA

UTILITIES CO.

A Division of MDU Resources Group, Inc.

400 North Fourth Street  
Bismarck, ND 58501  
(701) 222-7900

Direct Dial No.  
(701) 530-1016  
(701) 530-1731



September 20, 2007

Ms. Illona Jeffcoat-Sacco  
Executive Secretary  
North Dakota Public Service Commission  
State Capitol – Department 408  
600 East Boulevard Avenue  
Bismarck, ND 58505-0480

Re: Case Nos. PU-06-278 and PU-07-425 - Capital Electric Cooperative v. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

Dear Ms. Jeffcoat-Sacco:

Enclosed for filing on behalf of Montana-Dakota Utilities Co. is the original and seven copies of the Motion and Brief in Support of Motion for Stay in the above referenced cases, Montana-Dakota requests a stay of these cases pending issuance of an order by the City of Bismarck in response to a petition by Montana-Dakota Utilities Co. to resolve the franchise disputes and regulate the electric franchise rights in the two subdivisions that are the subject of the above referenced cases. Please date stamp the extra copy of this letter for our files.

Sincerely,

Daniel S. Kuntz  
Associate General Counsel

DSK/djv

Enclosure

cc: Carol K. Larson  
William W. Binek  
Donald Ball  
K. Frank Morehouse  
Frank Morehouse  
Dave Goodin

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative vs.  
Montana-Dakota Utilities Co.

Case Nos. PU-07-425  
and PU-06-278

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that:

she is over the age of 18 years and not a party to this action and, on the 20<sup>th</sup> day of September, 2007, she deposited in the United States Mail, Bismarck, North Dakota, one envelope securely sealed and containing a photocopy of:

Motion and Brief in Support of Motion for Stay

The envelope was addressed as follows:

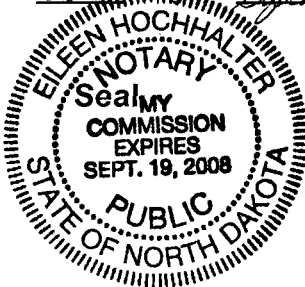
Carol K. Larson  
Pringle & Herigstad, P.C.  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702

William W. Binek  
North Dakota Public Service Commission  
State Capitol – Department 408  
600 East Boulevard Avenue  
Bismarck, ND 58505-0480

Each address shown is the respective addressee's last reasonably ascertainable post office address.

Dorothy Vedvick

Subscribed and sworn to before me  
this 20<sup>th</sup> day of September, 2007.



Eileen Hochhalter  
Notary Public

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

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

**MOTION AND BRIEF IN  
SUPPORT OF MOTION FOR STAY  
PU-06-278**

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

**PU-07-425**

**MOTION**

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), moves the North Dakota Public Service Commission ("Commission" or "PSC") for a stay of the proceedings in these cases pending issuance of an order by the City of Bismarck in response to a petition by Montana-Dakota to resolve the franchise disputes and regulate the electric franchise rights in the two subdivisions that are the subject of these cases pending before the PSC.

**BRIEF**

On June 30, 2006, Capital Electric Cooperative, Inc. ("Capital Electric") filed its complaint with the PSC requesting an order restraining Montana-Dakota from

constructing or extending its electric distribution facilities into the Promontory Point III Subdivision to the City of Bismarck. On July 5, 2007, Capital Electric filed a similar complaint seeking an order restraining Montana-Dakota from constructing or extending its electric distribution facilities into the Sonnet Heights 1<sup>st</sup> Replat Subdivision to the City of Bismarck. The Commission has scheduled hearings on these complaints for November 19, 2007 and November 20, 2007.

On August 2, 2007, Montana-Dakota filed a petition with the Bismarck Board of City Commissioners to resolve the disputes between Montana-Dakota and Capital Electric, under the electric distribution franchises from the City of Bismarck, regarding provision of electric distribution service to the Promontory Point III and Sonnet Heights Subdivisions. Montana-Dakota requested that it be designated as the electric service provider in these subdivisions, and directing Capital Electric not to provide electric service in these subdivisions, pending the implementation of an ordinance regulating electric service under the franchises issued to Montana-Dakota and Capital Electric or adoption of a new area service agreement by the parties. A copy of the petition filed with the Bismarck Board of City Commissioners is attached.

In its decision in Capital Electric Cooperative, Inc. v. City of Bismarck, et al, 207 N.D. 128, the North Dakota Supreme Court determined that both Capital Electric and Montana-Dakota have franchises to serve areas annexed to the City of Bismarck that lie outside the boundary line of the cancelled Area Service Agreement between Montana-Dakota and Capital Electric:

We conclude the “non-exclusive” franchises, when construed as a whole and in conjunction with the area service agreement, authorize both Capital Electric and to provide electric service in Bismarck as “now, or hereafter constituted” and Capital Electric’s franchise does not preclude it from

serving Boulder Ridge. The practical effect of interpreting the franchises to give both Capital Electric and MDU a franchise in the Boulder Ridge area is that the issue of unreasonable duplication is subject to the jurisdiction of the PSC under N.D.C.C. § 49-03-01.3 and this Court's decisions culminating in Cass County Elec. Coop., 419 N.W.2d at 181, and N.S.P., 452 N.W.2d at 340. In the absence of any explicit language providing otherwise, we believe that interpretation ultimately favors the public interest in preventing unreasonable duplication of facilities, while recognizing a municipality's constitutional authority to grant a franchise. That interpretation does not interfere with Bismarck constitutional authority to issue a utility franchise, rather, that interpretation recognizes that Bismarck has granted both Capital Electric and MDU a franchise for Boulder Ridge. Id. at ¶ 27.

The Supreme Court also recognized, but did not address in its opinion, the constitutional and statutory authority of a city to regulate its franchises:

"Under N.D. Const. art. VII, § 11, '[t]he power of the governing board of a city to franchise the construction and operation of any public utility or similar service within a city shall not be abridged by the legislative assembly.' Section 40-05-01(57), N.D.C.C., authorizes the governing body of a municipality to 'grant franchises . . . to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable, but subject to the regulatory powers of the governing body.' Section 40-05.1-06(10), N.D.C.C., also authorizes home rule cities "to grant or regulate franchises" for utilities. Id. at ¶ 12.

In addition to the constitutional and statutory provisions cited by the Supreme Court, the recently enacted amendments to the Territorial Integrity Act provide at N.D.C.C. § 49-03-06(8) that "Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchising authority under Section 40-05-01."

Montana-Dakota's petition to the Bismarck Board of City Commissioners falls within the scope of the City's authority to regulate the operation of its franchises. At its meeting on September 11, 2007, the Board of City Commissioners voted 4-0 to approve a motion directing its staff to meet with Montana-Dakota and Capital Electric to develop a process and procedural schedule for the Commission to address Montana-Dakota's

petition. Indeed, the City is the only regulatory authority with jurisdiction over both Montana-Dakota and Capital Electric to resolve franchise disputes within the City. To the extent there is any conflict in the regulatory authority of the PSC and the City Commission in the provision of service under the duplicative franchises, the City's regulatory authority prevails under the previously cited statutory and constitutional provisions. In the absence of a service area agreement, only the adoption of a process by the City of Bismarck to regulate the provision of service under its franchises will avoid the continued filing of complaint proceedings before the Commission regarding disputes to serve areas within the franchised area of both companies.

In recognition of the constitutional and statutory authority of the City to regulate its franchises, the PSC should stay these proceedings and defer further action until the City of Bismarck has acted on Montana-Dakota's petition. The PSC should then consider the complaints filed by Capital Electric in these proceedings in light of any order issued by the City of Bismarck regarding the regulation of the franchises issued to Montana-Dakota and Capital Electric. Some or all of the Public Service Commissioners have previously expressed their desire that the City of Bismarck take action to resolve these disputes. Accordingly, it is appropriate for the PSC to stay these proceedings and to allow the City of Bismarck an opportunity without interference to exercise its regulatory authority towards such a resolution.

Dated this 20<sup>th</sup> day of September, 2007.

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

Daniel S. Kuntz (ID# 03490)  
Associate General Counsel  
MDU Resources Group, Inc.  
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Bismarck, ND 58506-5650  
(701) 530-1006

By: 



# MONTANA-DAKOTA

UTILITIES CO.

*A Division of MDU Resources Group, Inc.*

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400 North Fourth Street  
Bismarck, ND 58501  
(701) 222-7900

August 2, 2007

Bill Wocken  
City Administrator  
City of Bismarck  
221 North 5<sup>th</sup> Street  
Bismarck, ND 58501

Re: Petition to Resolve Franchise Disputes and Regulate Electric Franchise Rights

Dear Mr. Wocken:

Enclosed for presentation to the Board of City Commissioners is a petition by Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), requesting the City Commission to resolve, at least on a temporary basis, two existing franchise disputes between Montana-Dakota and Capital Electric Cooperative ("Capital Electric") under their electric distribution franchises from the City of Bismarck. In addition, the petition requests the City Commission to implement an ordinance regulating the provision of electric distribution service within those areas annexed to the City of Bismarck since June 26, 2003, to prevent duplication of services and provide an equitable opportunity for both Montana-Dakota and Capital Electric to provide electric distribution service to newly annexed areas to the City of Bismarck.

The City Commission on a number of occasions over the last two years has directed Montana-Dakota and Capital Electric to negotiate a new Area Service Agreement for the provision of electric distribution service for the City of Bismarck. Despite meeting on a regular basis over that period, the parties have been unable to reach agreement. While I and other representatives of Montana-Dakota will continue to meet with Capital Electric on this issue, Montana-Dakota is not optimistic that the parties will reach an agreement in the near term.

As indicated in the petition, a dispute currently exists between Montana-Dakota and Capital Electric regarding the provision of electric service to Promontory Point III Subdivision and Sonnet Height 1<sup>st</sup> Replat to the City of Bismarck. Montana-Dakota has extended electric facilities to these subdivisions and intends to provide electric service to customers within the subdivisions upon request. Capital Electric has indicated its intent to also provide service to the same subdivisions and has filed complaints with the Public Service Commission to prevent Montana-Dakota from providing electric service in the subdivisions under its franchise from the City of Bismarck. As stated in the

enclosed petition, Montana-Dakota firmly believes that the authority to resolve disputes and to regulate the provision of service under franchises issued by the City of Bismarck exists with the City under its Home Rule Charter, the North Dakota Century Code, and the North Dakota Constitution.

By this petition, Montana-Dakota is requesting the City Commission to implement an ordinance to regulate the distribution of electric service in the absence of an Area Service Agreement in those areas where both Montana-Dakota and Capital Electric are authorized to provide such service under their respective franchises. If requested, Montana-Dakota is willing to participate with representatives of Capital Electric and the City Commission staff in the development of a proposed ordinance for presentation to the City. In the meantime, Montana-Dakota requests the City Commission to designate Montana-Dakota as the provider of electric service in Promontory Point III Subdivision and Sonnet Heights 1<sup>st</sup> Replat and direct Capital Electric not to provide electric service in those subdivisions pending the implementation of an ordinance regulating electric service under the franchises or adoption of a new Area Service Agreement.

Sincerely,



K. Frank Morehouse  
Vice President – Operations

DSK/djv

Attachment

cc: John Warford, Honorable Mayor of the City of Bismarck  
Charles Whitman  
Jay Skabo  
Lars Nygren

**BEFORE THE BOARD OF CITY COMMISSIONERS OF THE CITY OF BISMARCK**

**PETITION TO RESOLVE FRANCHISE DISPUTES AND  
REGULATE ELECTRIC FRANCHISE RIGHTS**

**To the Board of City Commissioners of the City of Bismarck:**

WHEREAS, Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc., (hereafter "Montana-Dakota") holds a twenty year electric distribution franchise granted by resolution of the Board of City Commissioners on December 12, 2006, which grants to Montana-Dakota the right to construct, maintain and operate an electric distribution system for public and private uses within the City of Bismarck as then or thereafter constituted. Montana-Dakota and its predecessor have continuously provided reliable and economic electrical distribution service to the City of Bismarck and its residents since 1895; and

WHEREAS, Capital Electric Cooperative, Inc. (hereafter "CEC"), a rural electric cooperative organized under Chapter 10-13 of the North Dakota Century Code for the purpose of furnishing electric energy to persons in rural areas not receiving central station power, holds a twenty year limited electric distribution franchise granted by resolution of the Board of City Commissioners on May 25, 1993. The franchise grants to CEC the right to construct, maintain and operate an electric distribution system for public and private uses within a limited geographic area of the City of Bismarck described in an Area Service Agreement dated July 5, 1973 between Montana-Dakota and CEC, as modified by future amendments thereto. The franchise resolution states the geographic limitation was imposed on the CEC franchise to avoid duplication of facilities between CEC and other electrical franchises; and

WHEREAS, the Area Service Agreement described in the CEC franchise was cancelled for all areas outside the City of Bismarck by letter dated June 26, 2002 effective June 26, 2003. No substitute Area Service Agreement has been agreed to between CEC and Montana-Dakota to govern areas outside the boundary line of the cancelled Area Service Agreement and annexed to the City after June 26, 2003; and

WHEREAS, the North Dakota Supreme Court on July 27, 2007 issued an opinion in Capital Electric v. City of Bismarck, et al, 2007 N.D. 128, which opinion is subject to a petition for rehearing, in which the Court determined that both Montana-Dakota and CEC have franchises to serve newly annexed areas outside the boundary line of the cancelled Area Service Agreement; and

WHEREAS, North Dakota Century Code § 40-05-01(57) grants to cities the power to grant franchises and regulate the use of the same; such franchises not being irrevocable but subject to the regulatory powers of the governing body; and

WHEREAS, North Dakota Century Code § 40-05.1-06(10) also grants to home rule cities the power to regulate franchises; and

WHEREAS, North Dakota Constitution Article VII, § 11 provides the “power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the City shall not be abridged by the legislative assembly”; and

WHEREAS, North Dakota Century Code § 49-03-06(8) provides the authority of the North Dakota Public Service Commission under the Territorial Integrity Act at North Dakota Century Code Chapter 49-03 cannot limit the authority of the City to exercise its franchise authority; and

WHEREAS, the Home Rule Charter of the City of Bismarck provides the City of Bismarck the power, which may be implemented by ordinance, to grant and regulate franchises for utility services; and

WHEREAS, the City of Bismarck has implemented Ordinance 10-11-01 providing for the issuance of franchises pursuant to which the electric distribution franchises were issued to Montana-Dakota and CEC; and

WHEREAS, the City of Bismarck has previously exercised its authority to regulate the franchises of Montana-Dakota and CEC and to prevent the duplication of facilities and services; and

WHEREAS, the Board of City Commissioners has directed Montana-Dakota and CEC to negotiate a new Area Service Agreement for the City of Bismarck; and

WHEREAS, Montana-Dakota and CEC have negotiated but have been unable to reach agreement on a new Area Service Agreement for the City of Bismarck; and

WHEREAS, Montana-Dakota has extended electric distribution facilities to provide service to Promontory Point III Subdivision to the City of Bismarck and to Sonnet Heights 1<sup>st</sup> Replat to the City of Bismarck; and

WHEREAS, CEC has stated its intent to also provide electric distribution service to Promontory Point III Subdivision and to Sonnet Heights 1<sup>st</sup> Replat and seeks to prevent MDU from the exercise of its electric franchise in those subdivisions;

THEREFORE, Montana-Dakota petitions the Board of City Commissioners of the City of Bismarck to:

1. Designate Montana-Dakota under its electric distribution franchise to be the electric distribution service provider within Promontory Point III Subdivision and to

Sonnet Heights 1<sup>st</sup> Replat to the City of Bismarck, subject to implementation of an ordinance regulating the provision of electric distribution service under the electric utility franchise granted to Montana-Dakota and CEC; and

2. Direct CEC not to provide electric distribution service within Promontory Point III Subdivision or Sonnet Heights 1<sup>st</sup> Replat to the City of Bismarck, subject to implementation of an ordinance regulating the provision of electric distribution service under the electric utility franchises granted to Montana-Dakota and CEC; and

3. Implement an ordinance regulating the provision of electric distribution service within those areas annexed to the City of Bismarck since June 26, 2003 to prevent duplication of services and provide for an equitable opportunity for both Montana-Dakota and CEC to provide electric distribution service to growth areas in and around the City of Bismarck.

Dated this 2<sup>nd</sup> day of August, 2007.

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

Pearce & Durick  
Patrick W. Durick  
Jerome C. Kettleson  
314 East Thayer  
P.O. Box 400  
Bismarck, ND 58502-0400  
(701) 223-2890

Daniel S. Kuntz (ID# 03490)  
Associate General Counsel  
MDU Resources Group, Inc.  
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P.O. Box 5650  
Bismarck, ND 58506-5650  
(701) 530-1016

By: 

The President of the Board of City Commissioners announced the hour had arrived for the public hearing to resolve franchise disputes and regulate electric franchise rights between Montana Dakota Utilities and Capital Electric Cooperative.

President Warford stated that neither party was given enough notice that the hearing had been scheduled, therefore a hearing could not be held on this issue.

Commissioner Sprynczynatyk stated that the commission is anxious for resolution of this situation in order to avoid duplication of services. The City has issued franchises to both Montana Dakota Utilities and Capital Electric Cooperative, one expansive and one limited and that there is a desire for a process to be developed to address current and future franchise service area issues. Commissioner Sprynczynatyk suggested that Charlie Whitman, City Attorney, work on developing the process and a schedule for review of the petitions.

Commissioner Jensen asked why this issue wasn't left to the PSC to decide, like other cities had in the past, and was told that this was our franchise and we need to ask the parties to settle the issue.

Charlie Whitman, City Attorney, stated that Bill Wocken should be included in the process to handle the petitions. They can meet with the parties to develop a schedule and report back to the commission.

Commissioner Tabor excused herself from the table at this time.

Commissioner Sprynczynatyk made a motion directing the City Attorney and the City Administrator to develop a process and schedule to deal with petitions and report to the commission. Commissioner Schwab seconded the motion. Upon roll call, the commissioners voted as follows: Ayes: Commissioners Sprynczynatyk, Jensen, Schwab and President Warford. Nays: None, the motion carried. Commissioner Tabor did not vote.