

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)	TO COMPEL DISCOVERY
Division of MDU Resources Group,)	
Inc.)	Case No. PU-06-278
)	Case No. PU-07-425
Respondent.)	

These cases are before the PSC under N.D.C.C. § 49-03-01.3, and are scheduled for hearing on November 19 and 20, 2007.

These cases are two in a continuing series of territorial disputes between rural electric cooperatives and electric public utilities. Capital Electric Cooperative (Capital) complained to the North Dakota Public Service Commission (PSC) under the Territorial Integrity Act (N.D.C.C. Chapter 49-03) about Montana-Dakota Utilities Co.'s (MDU) extension of service in a rural area inside Bismarck's municipal limits. "The primary purpose of the Act was to minimize conflicts between suppliers of electricity and wasteful duplication of investment in capital-intensive utility facilities" and ". . . to provide territorial protection for rural electric cooperatives." Capital Electric Cooperative v Public Service Commission, 534 N.W.2d 587 at 590 and 592 (N.D. 1995). See also Cass County Electric Cooperative v Northern States Power Company, 419 N.W.2d 181 (N.D. 1988) and Northern States Power Company v Public Service Commission, 452 N.W.2d 340 (N.D. 1990) (Cass v NSP and NSP v PSC, respectively and collectively the South Pointe cases.)

The disputed areas in these cases are Promontory Point III and Sonnet Heights additions to the City of Bismarck. (To use names instead of numbers, No. 06-078 is the

Promontory Point III case, and No. 07-425 is the Sonnet Heights case.) The pleadings show the issues in these cases are substantially identical to one another and to the issues in the Boulder Ridge Case, PSC Case No. 05-551; Montana-Dakota Utilities Co. v Public Service Commission, 2007 ND 128. Presumably the Boulder Ridge case is the prior proceeding referred to in MDU's brief, on page 3. A copy of the Commission's Findings of Fact, Conclusions of Law and Order, in the Boulder Ridge case is attached for reference.

MDU has requested Capital to produce information about the number of services added by Capital and the percentage change in sales of electric energy made by Capital, separately stated as to areas within and outside of Bismarck and on an annual basis for the years 2003 through 2007. (See MDU brief in support of its motion, pages 2 & 3). Capital objected, because the information requested is neither relevant evidence nor likely to lead to relevant evidence.

MDU's brief asserts "The overriding issue in this proceeding is whether Montana-Dakota's extension of electric service into the disputed subdivisions will interfere with Capital Electric's existing services or unreasonably duplicate such services." and asserts the information sought is relevant because ". . . the number of customers and electric load added by Capital Electric outside the City [Bismarck] is relevant to determining whether service extensions by Montana-Dakota within the annexed area will interfere with, or unreasonably duplicate, facilities of Capital Electric in the vicinity of the disputed area that are also used to serve customers and service areas outside the City." (MDU brief in support of motion, page 3.) How the specified years' historical data about Capital's growth in numbers of customers and values of sales of electric energy might be relevant to the

issue of the un-reasonableness of MDU's duplicative service extensions is not explained by MDU.

Perhaps MDU sees the requested information as relevant to the issue as articulated by MDU. But it is not necessary for Capital to argue the disconnect between the issue as articulated by MDU and the relevance of the requested information. MDU has not cited any authority, no PSC case and no Supreme Court case, where the kind of information requested by MDU was regarded as relevant to the issues under N.D.C.C. § 49-03-01.3. Capital asserts the requested information is not relevant to the issues under N.D.C.C. § 49-03-01.3 as articulated by the PSC and by the Supreme Court in controlling precedents.

In the Boulder Ridge case, the PSC's finding 29 that "Montana-Dakota's extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital" followed 28 previous findings that focused on MDU's and Capital's facilities. The PSC's decision and the Supreme Court's decision affirming the PSC's followed the South Pointe cases.

"In Cass County Elec. Coop., 419 N.W.2d at 186-87, this Court held that in determining interference with existing services and unreasonable duplication of services, the PSC must not look solely at actual customers in the area. Rather, the PSC must look at the existing electric facilities that the rural electric cooperative and the public utility have in place in the area and determine whether the extension of services into the area would constitute an unreasonable duplication of capital-intensive facilities and services provided by the other entity. Id. The question of "which electric suppliers' facilities are actually duplicative or wasteful" is one of fact for the PSC to determine." N.S.P., 452 N.W.2d at 345. Montana-Dakota Utilities Co. v Public Service Commission, 2007 ND 128, at ¶33

At the hearing, Capital will offer evidence about its existing facilities, and the presentation of that evidence might involve some historical background about the development of existing facilities, as in the Boulder Ridge case. But that historical data is

not relevant to MDU's defense whether its extension of its facilities would constitute an unreasonable duplication of Capital's existing facilities.

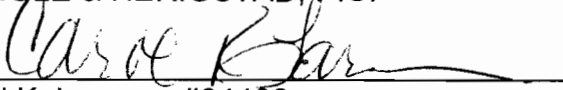
Facilities. Existing facilities. The overriding issue is: The PSC must look at the existing electric facilities that Capital and MDU have in place in the area and determine whether extension of MDU's services in Promontory Point or Sonnet Heights would constitute an unreasonable duplication of capital-intensive facilities and services already provided by Capital. Montana-Dakota Utilities Co. v Public Service Commission, 2007 ND 128; Cass v NSP, 419 N.W.2d at 187; NSP v PSC, 452 N.W.2d at 342. Existing facilities, not a recent few years' history of electric suppliers' growth in numbers of customers or value of sales, is the overriding issue.

CONCLUSION

The requested information is not relevant to the issues under N.D.C.C. § 49-03-01.3 as articulated by the PSC and by the Supreme Court in controlling precedents. The motion should be denied.

Dated this 11th day of October, 2007.

PRINGLE & HERIGSTAD, P.C.

By: 

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

cklarson@srt.com