

MEMORANDUM

TO: Commissioners Wefald, Cramer and Clark

FROM: Bill Binek and Jerry Lein

DATE: November 2, 2007

RE: Motion for Continuance-Capital Electric Cooperative, Inc. v. Montana-Dakota Utilities Co., Case Nos. PU-06-278, PU-07-425 and PU-07-682

On October 18, 2007, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("MDU") filed a motion for continuance of the hearings in these cases pursuant to N.D. Admin. Code §69-02-04-03.

MDU states that on August 2, 2007, it filed a petition with the Bismarck Board of City Commissioners to resolve disputes between MDU and Capital Electric Cooperative, Inc. ("CEC") under the electric distribution franchises from the City of Bismarck, regarding the provision of electric distribution to the Promontory Point III and Sonnet Heights Subdivisions. MDU requested that it be designated as the electric service provider in those subdivisions, and that CEC be directed not to provide electric service in those subdivisions, pending the implementation of an ordinance regulating electric service under the franchises issued to MDU and CEC or adoption of a new service area agreement by the parties.

MDU states that on September 11, 2007, the Board of City Commissioners approved a motion directing its staff to meet with MDU and CEC to develop a process and procedural schedule for the City Commission to address MDU's petition. In response to the directive of the City Commission, MDU and CEC agreed to mediate in good faith any disputed terms of a proposed Service Area Agreement under N.D.C.C. §49-03-06 in the event the parties are not able to reach the terms of such an agreement by negotiation.

MDU states that the Service Area Agreement, if developed and approved before the hearings scheduled in these cases, will resolve the provision of electric distribution service in the disputed areas and the issues in these proceedings will be moot. MDU states that if the parties are unable to reach agreement on a Service Area Agreement through negotiation or mediation, the City has indicated that it will schedule a procedural process for a hearing on MDU's petition.

On October 30, 2007, CEC filed its Brief Opposing MDU's Motion for Continuance. CEC points out that on August 24, 2006, MDU filed a Motion for Continuance in Case No. PU-06-278 until the parties and the Commission had direction from the Court in the Boulder Ridge appeal. On October 12, 2006, the Commission granted MDU's Motion for Continuance until a final decision was reached in the Boulder Ridge Appeal.

CEC asserts that MDU's motion for a continuance of the Promontory Point IV case, Case No. PU-07-682, is untimely because a hearing in that case has not been scheduled.

CEC states that N.D. Admin. Code §69-02-04-03 authorizes the Commission to grant a continuance for good cause. CEC states that that the pendency of the parties' endeavors to negotiate a settlement does not constitute good cause.

CEC states that MDU's brief argues as an alternative cause for a continuance that the PSC should defer to MDU's petitions to the Bismarck City Commission, but that this argument is undermined by the Supreme Court's denial of MDU's petition for rehearing in the Boulder Ridge case because it rejected the same alternative arguments MDU asserts as good cause for continuing these proceedings.

CEC states that it is negotiating with MDU and is cautiously optimistic that the negotiations will produce a service area agreement under N.D.C.C. §49-03-06 that will be acceptable to the parties, the PSC and the City of Bismarck. However, CEC states that MDU's Motion should be denied because the pendency of negotiations is not good cause for a continuance. CEC states that if and when negotiations produce a service area agreement, the parties may join in a motion for continuance of these cases pending the PSC's and Bismarck City Commission's action on the agreement. CEC states that 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 PSC's responsibility to hear, consider and decide the cases.

The fact that MDU and CEC are negotiating is a positive step toward resolution of the service area dispute. However, there appear to be no timelines set out for completion of negotiations or when a determination will be made that the parties are unable to negotiate a service area agreement. Staff does not recommend that an open-ended continuance be granted in Case Nos. PU-06-278 and PU-07-425. However, staff does not oppose continuance for a reasonable period of time if it can avoid a hearing that might later prove unnecessary. Staff agrees with CEC that the motion for continuance of Case No. PU-07-682 is untimely because no hearing has been scheduled.