

# MDU RESOURCES

GROUP, INC.

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March 15, 2011

RECEIVED

MAR 15 2011

PUBLIC SERVICE COMMISSION

Darrel Nitschke  
Executive Secretary  
North Dakota Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Re: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.  
City of Kenmare – Ward County  
Public Convenience and Necessity  
Case No. PU-11-37

Dear Mr. Nitschke:

Enclosed for filing are the original and seven copies of a Notice of Withdrawal by Montana-Dakota Utilities Co. in the above-referenced proceeding. A copy of the Notice is being served upon the attorney for Burke-Divide Electric Cooperative, Inc.

Sincerely,

  
Daniel S. Kuntz  
Associate General Counsel

DSK/djv

Enclosure

cc: Don Negaard  
Tamie Aberle

6 PU-11-37 Filed: 3/15/2011 Pages: 10  
Notice of withdrawal

Montana-Dakota Utilities Co., a Division of MDU Resources  
Group, Inc.  
Daniel S. Kuntz

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Montana-Dakota Utilities Co.  
City of Kenmare – Ward County  
Public Convenience and Necessity

Case No. PU-11-37

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 **15<sup>th</sup> day of March, 2011**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

**Notice of Withdrawal**

The envelope was addressed as follows:

Don Negaard  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702-1000

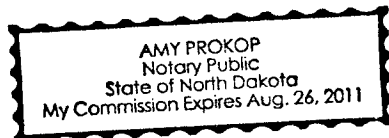
Each address shown is the respective addressee's last reasonably ascertainable post office address.

  
\_\_\_\_\_

Subscribed and sworn to before me  
this **15<sup>th</sup> day of March, 2011**.

  
\_\_\_\_\_  
Notary Public

SEAL



**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Montana-Dakota Utilities Co.**  
**City of Kenmare-Ward County**  
**Public Convenience and Necessity**

**Case No. PU-11-37**  
**Notice of Withdrawal**

Montana-Dakota Utilities Co. ("Montana-Dakota"), a Division of MDU Resources Group, Inc., files with the Public Service Commission ("Commission") pursuant to N.D. Admin.C. § 49-02-02-07, notice of withdrawal of its application in this proceeding to extend electric service to the City of Kenmare at a location described in the application. Alternatively, Montana-Dakota moves the Commission for an order dismissing the application of Montana-Dakota on grounds the Commission lacks jurisdiction over the extension of service by Montana-Dakota to the City of Kenmare. No hearing has been held or convened in this proceeding.

On January 14, 2011, Montana-Dakota filed an application for an order and a certificate of public convenience and necessity authorizing Montana-Dakota to extend electric service to the City of Kenmare to serve a water booster station located outside the City of Kenmare in Section 20, Township 160N, Range 88W, Ward County, North Dakota. A response and protest to the application were filed by Burke-Divide Electric Cooperative, Inc. Montana-Dakota is providing notice of its withdrawal of the application, or in the alternative, requesting an order of dismissal of the application, on the grounds the Commission does not have jurisdiction under N.D.C.C. Title 49 over the extension of electric service by Montana-Dakota to the City of Kenmare.

The North Dakota Supreme Court has consistently held the Commission does not have jurisdiction over utility services provided by a public utility to the State of North

Dakota or its political subdivisions. In Western Electric Co. v. City of Jamestown, 47 N.D. 157, 181 NW 363 (1921) a dispute existed between the City of Jamestown and Western Electric Co. regarding electric rates that were established under a 1902 ordinance for city pumping service. Western sought to recover additional revenue for electric service furnished to the City of Jamestown after 1919 pursuant to rates set forth in the Company's tariff. Western argued that by enactment of the Public Utilities Act in 1919, currently N.D.C.C. Chapter 49, the State of North Dakota, through what was then the Board of Railroad Commissioners, assumed full regulation and control concerning rates and charges for all public utilities and therefore Western was required to furnish electric service to the City at Western's tariff rates approved by the Board. The Supreme Court held that while the Public Utilities Act granted the Board regulatory ratemaking jurisdiction over public utilities, the Act did not deprive a city of its powers and privileges to create or enforce a franchise or the rates charged for the provision of electric service to the city in consideration for the franchise. Id. at 367-368. Accordingly, the Board's regulatory authority did not extend to the electric rates between Western and the City.

In Chrysler Light & Power Co. v. City of Belfield, 58 N.D. 33, 224 N.W. 871 (1929), a similar issue was presented. In 1915, the Village of Belfield granted a franchise to George Chrysler which was subsequently assigned to Chrysler Light & Power Company. The franchise included terms and conditions by which Chrysler would furnish electricity to the village at rates specified in the franchise. The Village subsequently incorporated and in 1920 Chrysler filed an application with the Board of Railroad Commissioners for an increase in the rates charged for electric service to the

City of Belfield and its inhabitants. In response to the application, the Board set rates to be charged by Chrysler and the City paid the tariff rates until 1927 when it refused to pay rates above those specified in the 1915 franchise. In its opinion, the Supreme Court noted the power conferred upon the City to contract for street lighting for the City at a certain fixed rate is quite different from the power to regulate the rates of an electric power company doing business within the City; in contracting for the provision of electricity for street lighting purposes, the City is acting in its own interest as a legal entity. Id. at 875. The Court held the Board of Railroad Commissioners had only such powers to regulate rates of public utilities as had been conferred upon it by the Legislature and the Public Utilities Act of 1919 did not confer any authority upon the Board to interfere with the rates for electric service furnished by a utility to a City when such rates were fixed by contract in the franchise granted by the city to the electric company. Id.

In 1957 the Supreme Court addressed a dispute between the City of Grafton, which operated a municipal electric power system, and Otter Tail Power Company regarding the provision of electric service to the North Dakota State Board of Administration for the State School of Grafton. City of Grafton v. Otter Tail Power Company, 86 N.W.2d 197 (ND 1957). In 1955, Otter Tail entered into an agreement with the Board of Administration to furnish supplemental electricity to the State School of Grafton. The service was to be provided over a transmission line constructed by the Board of Administration between a substation to be built by the Board and Otter Tail's transmission line facilities. The City of Grafton had previously provided electric service to the State School and filed a complaint against Otter Tail with the Commission

seeking an order requiring Otter Tail to cease and desist from supplying service to the School. Following hearing, the Commission issued an order directing Otter Tail to cease and desist from furnishing electric service to the School. On appeal, the District Court reversed the order of the Commission and the City of Grafton appealed to the Supreme Court. On appeal, the City argued: (1) the Board of Administration could only contract with public utilities in accordance with rules and regulations of the Commission; and (2) the Commission could properly direct Otter Tail to cease and desist from furnishing electricity to be conveyed over a line erected and maintained in contravention of the constitutional powers of the City. Upon review, the Supreme Court repeated its holding in Chrysler that the Commission has only such powers as have been conferred upon it by the Legislature. Id. at 201. The Court also recited from what is essentially now N.D.C.C. § 49-02-01.1 which in its current form states: “Nothing in this chapter or in chapter 49-21 authorizes the commission to make any order affecting rates, contracts, services rendered, adequacy, or sufficiency of facilities, or the rules or regulations of any public utility owned and operated by the state or by any city, county, township, or other political subdivision of the state . . .” The Court noted the statute indicated an intention on the part of the Legislature to, in large measure, withhold from the Commission jurisdiction and authority over public utilities owned and operated by the State. Id. at 202. The Court recognized the power plant, with the transmission line erected by the Board of Administration between the State School and Otter Tail, was not a public utility but only a facility for the exclusive use of the State School. The Court stated, however, “that the statute has some bearing as indicating a policy on the part of the Legislature to withhold from the Public Service Commission authority to control the

production, transmission and use of electric power by the sovereign state of North Dakota and its political subdivisions.” Id. at 202-203. The Court further recognized the statutory construction rule that statutes that tend to encroach upon the affairs of the government receive a strict interpretation favorable to the public and in the absence of express provision or necessary implication, the sovereign remains unaffected. Id. at 203. In its holding on the first issue presented by the City of Grafton to require the State to comply with the regulations and orders of the Public Service Commission, the Court held:

“We find no provisions of the law which vest in the Public Service Commission power to interfere with the lawful conduct of the Board of Administration including the making and carrying out of contracts for the purchase of commodities reasonably necessary for the operation of the institution under its control. Such a commodity is light and power.”

On the City’s second issue, the Court held that the Commission’s jurisdiction over public utilities could not restrain the State’s power to operate its facilities and therefore, the Public Service Commission had no authority to order Otter Tail to cease and desist from furnishing electric power to the Board of Administration. The Court held the Public Service Commission’s order was beyond its authority and directed dismissal of the City’s complaint before the Commission.

In 1965 the Public Service Commission issued an order to Montana-Dakota and the City of Williston to show cause why the rates charged by Montana-Dakota to the City for electric service to the City’s facilities were not unjust, unreasonable, and unjustly discriminatory. Following hearing, the Commission concluded the rates were unreasonable and that a higher rate previously filed with and approved by the Commission was reasonable and should be charged to the City. On appeal, an

argument was made by Northern States Power Company, as amicus curiae, that a decision by the Board of Railroad Commissioners that was not appealed following the Court's decision in Western Electric v. City of Jamestown, *supra*, provided the Commission with jurisdiction to determine the reasonableness of rates charged to a municipality whether or not they were part of a franchise. NSP argued that 1929 legislation which allowed a city the authority to enter into contracts to furnish electric service to the city, but which included a provision that nothing within the statute deprived the Board of Railroad Commissioners of any of its existing regulatory powers with reference to such contract rates, effectively overruled the Court's decision in Western. The Public Service Commission argued that its jurisdiction extended to all the rates of public utilities, including contract rates to municipalities, and that no utility could discriminate through its contract rates by providing any locality undue or unreasonable preference or advantages. The Supreme Court rejected both arguments holding the 1929 legislation did not change the Court's earlier rulings and the Commission had no jurisdiction over electric service under contracts with cities.

The above line of cases was most recently noted in Otter Tail Power Company v. North Dakota Public Service Commission, 354 N.W.2d 701 (N.D. 1984) in which the Court recognized the holding from these cases, that the PSC cannot interfere with or encroach upon the state's affairs, is consistent with federal court cases cited on the issue of federal preemption.

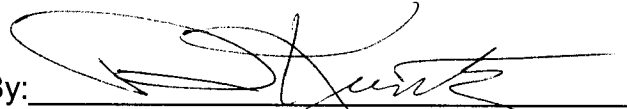
In summary, the above cases hold the Legislature did not bestow upon the Public Service Commission authority to interfere with contracts for services between a public utility on one hand, and the State of North Dakota or its political subdivisions on the

other hand. While the holdings in these cases dealt primarily with issues regarding rates for services, the holding in City of Grafton v. Otter Tail Power Company, *supra*, recognized the Commission does not have any jurisdiction to interfere with such contracts for utility service, directly or indirectly. Accordingly, Montana-Dakota is not required to obtain a certificate of public convenience and necessity to provide electric service to the City of Kenmare. The authority to require that Montana-Dakota obtain such a certificate of public convenience and necessity would necessarily include the power to deny such a certificate and thereby deny the City the right to negotiate terms and conditions for the provision of electric service with the provider of its choice. Such a limitation, particularly with regard to the provision of electric service to the City's water utility, would be in direct conflict with the limitations on the Commission's jurisdiction set forth in N.D.C.C. § 49-02-01 in the same manner as though the Commission sought to prohibit Montana-Dakota's service over a line extension owned by the City between its booster pump and Montana-Dakota's existing line. For the foregoing reasons, Montana-Dakota withdraws, pursuant to N.D. Admin.C. § 69-02-02-07(2), its application for a certificate of public convenience and necessity to serve the City of Kenmare. Alternatively, Montana-Dakota requests the Public Service Commission to dismiss Montana-Dakota's application on grounds that the Public Service Commission lacks jurisdiction over the electric service provided by Montana-Dakota to the City of Kenmare.

Respectfully submitted this 15<sup>th</sup> day of March, 2011.

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

By: \_\_\_\_\_

A handwritten signature in black ink, appearing to read "D. Kuntz", is written over a horizontal line. The signature is stylized and cursive.

Daniel S. Kuntz (ID #03490)  
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