

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Public Service Commission)
Montana-Dakota Utilities Co.)
2017 Natural Gas Rate Increase)
)
)
)**


Case No. PU-17-295

NOTICE OF MOTION

Please take notice that Applicant Montana-Dakota Utilities, Co. has submitted its Motion in Limine to Exclude Evidence of a Settlement Agreement pursuant to N.D. Admin. Code § 69-02-05-01 and Rules 403 and 408 of the North Dakota Rules of Evidence, Rule 3.2 of the North Dakota Rules of Court, and other applicable law and rule. This motion is supported by the accompanying brief, attached exhibits, and all pleadings and documents of record. Due to the timing of the Hearing, Montana-Dakota Utilities requests an expedited briefing schedule and determination of this Motion.

Dated this 24th day of May, 2018.

EVENSON SANDERSON PC
Attorneys for MDU
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243
psanderson@esattorneys.com

By: 
Paul R. Sanderson (ID# 05830)

request to establish a funding mechanism for its SSIP program, both of which are at issue in the present North Dakota case. Id., at ¶¶ 9(B) and 11. As part of the Montana Settlement Agreement, MDU and Montana Consumer Counsel specifically set forth their agreement regarding use of the settlement in other proceedings:

Neither party shall use any part of this Stipulation in any other proceeding before the Commission, and shall not advance any argument in any other proceeding that is predicated on any portion of this Stipulation. By entering into and executing this Agreement the parties acknowledge that this Agreement is unique to the facts of this Docket, the parties agree and understand that they are entering into this Stipulation as a resolution of the particular facts of this proceeding, and agree that they are not bound by their representations and settlement in this docket. The parties shall not use this Stipulation or the advocacy of either party as evidence in any other proceeding without explaining that the Stipulation was an aggregate compromise and not intended to be used as evidence in other proceedings of any particular position of a party.

Id., at ¶ 15.

Under N.D. Admin. Code § 69-02-05-01, admissibility of evidence before this commission or hearing officer is governed by the North Dakota Rules of Evidence. In accordance with Rule 408 of the North Dakota Rules of Evidence, evidence of settlement is not admissible to prove or disprove the validity or amount of a disputed claim. If settlement evidence is offered to show liability for, invalidity of, or the amount of a claim, exclusion is the norm. See Schlossman & Gunkelman, Inc. v. Tallman, 1999 N.D. 89, 593 N.W. 2d 374 (N.D. 1999) (quoting Thomas v. Stickland, 500 N.W.2d, 598, 600 (N.D. 1993)). The MDU's Montana Settlement Agreement is an offer of compromise and, therefore, is not admissible Under Rule 408 to establish the validity or amount in dispute in the present case.

Advocacy Staff's attempt to introduce evidence regarding the Montana Settlement Agreement is troubling when the agreement itself specifically states it should not be used

in other proceedings and Montana's Consumer Counsel agreed it would not be used as evidence in other proceedings. See Ex. 1. As the Montana Settlement Agreement explicitly provides, it is an aggregate compromise not intended to be used as evidence in other proceedings of any particular position of a party. Id. The Montana Settlement Agreement states that it is a resolution of the particular facts of the Montana Public Service Commission matter, and the parties are not bound by their representations and settlement in the Agreement. Id. As the Montana Settlement Agreement is particular to the facts of a distinct and separate issue in a different jurisdiction, it is not applicable, nor relevant, to the issue before this Commission. The North Dakota Supreme Court has stated that the use of a settlement agreement to prejudice a separate and discrete claim is a disincentive for which Rule 408 was adopted to avoid. Thomas v. Strickland, 500 N.W.2d 598, 600 (N.D. 1993) (quoting Branch v. Fidelity & Cas. Co. of New York, 783 F.2d 1289, 1294 (5th Cir. 1986)).

Setting aside the fact that the Montana Settlement Agreement is excluded under Rule 408, the Agreement lacks relevance because the facts of the Montana matter and the matter before this Commission differ substantially and the regulatory frameworks in each jurisdiction differ significantly. Quite tellingly, Advocacy Staff's own expert, Marlon Griffing, in this case testified that the return on equity rates of settled regulatory cases should not be used as evidence because they are not reliable due to the competing interests of settlement:

I rejected outcomes of settled cases because settlements can reflect tradeoffs parties make to reach agreement. Thus, an authorized ROE in a settled case may reflect compromise rather than strict application of ratemaking principles.

See Exhibit 2 (Griffing direct testimony, pg. 34, lines 7-11). Advocacy Staff's own expert testimony establishes that evidence of settlement agreements from other jurisdictions are

unreliable and not relevant to the current regulatory proceeding.

Even if the previous Montana Stipulation were found to be relevant and admissible under Rule 408, the agreement would serve to unfairly prejudice Montana-Dakota by misleading and confusing the fact-finder in this matter. Any alleged probative value of the Stipulation would be substantially outweighed by the danger that the agreement be considered for other improper purposes, such as evidence to support Advocacy Staff's desired ROE value. See N.D.R.Ev. 403. Moreover, introduction of this irrelevant evidence would require MDU to present evidence of all the issues in the Montana settlement which supported the agreement. This would result in a needless waste of time at the hearing by presenting all the issues in the Montana case that justified a settlement.

For the foregoing reasons, Montana-Dakota respectfully requests its Motion in Limine to exclude evidence of a previous settlement agreement in Montana be granted.

Dated this 24th day of May, 2018.

EVENSON SANDERSON PC
Attorneys for MDU
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243
psanderson@esattorneys.com

By:



Paul R. Sanderson (ID# 05830)

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of) REGULATORY DIVISION
MONTANA-DAKOTA UTILITIES CO., A)
Division of MDU Resources Group, Inc., for) DOCKET NO. D2017.9.79
Authority to Establish Increased Rates for)
Natural Gas Service)

STIPULATION

COME NOW, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (Montana-Dakota) and the Montana Consumer Counsel (MCC), and agree and stipulate as follows:

1. On September 25, 2017, Montana-Dakota filed with the Montana Public Service Commission (Commission) an Application for authority to implement a general rate increase in the rates it is authorized to charge for natural gas service in Montana. The requested general rate increase was docketed as PSC Docket D2017.9.79. The MCC intervened in the docket.

2. The requested general rate increase would have raised an additional \$2,820,168 in annual distribution revenues from Montana-Dakota ratepayers. Montana-Dakota also requested authority to modify its existing rate design. Included in the Application was a request for approval of a System Safety Integrity Program (SSIP) funding mechanism, proposed Rate 94. Montana-Dakota also sought to recover costs anticipated in the abandonment of service to certain customers in an area around Saco, Montana (Saco Abandonment Costs). All of the proposed changes in rates and rate forms were set forth in proposed tariff sheets using legislative annotation and submitted as part of Appendix B to the Application.

3. The Commission denied the Company's interim rate request.



4. On December 29, 2017, the Commission issued a Notice of Commission Action in Docket N2017.12.94 imposing requirements on Montana's regulated utilities, regarding impacts from the federal Tax Cuts and Jobs Act of 2017 (TCJA), which in relevant part ordered Montana-Dakota to determine and address the TCJA impacts in this docket.

5. The MCC pre-filed the testimonies of its expert witnesses in this docket on February 6, 2018.

6. Montana-Dakota filed supplemental testimony regarding the TCJA on February 23, 2018, which indicated that changes implemented as a result of the TCJA reduced Montana-Dakota's requested revenue increase to \$1,619,286, which was supported by amended schedules and exhibits, including a proposal that excess accumulated deferred income taxes (EDIT) associated with Montana-Dakota's plant be amortized according to the average rate assumption method (ARAM) and EDIT associated with non-plant assets be amortized over a ten (10) year period based on the weighted average life.

7. The MCC filed supplemental testimony of Ralph C. Smith on March 23, 2018, in which he raised issues regarding the amortization of EDIT, including segregation of plant related EDIT into protected and non-protected components and proposing a faster amortization for non-protected plant and non-plant EDIT.

8. The positions of the parties are fully set forth in the documents on file with the Commission in this docket.

9. For settlement purposes, a fair and equitable resolution of the issues in this docket, one which would result in the establishment of just and reasonable rates, has been reached between Montana-Dakota and MCC, as further described below:

A. Montana-Dakota should be authorized, in a final rate order entered in PSC

Docket D2017.9.79, an overall annual increase in the rates it is authorized to charge its ratepayers for natural gas service in Montana in the amount of \$975,000, apportioned as \$366,000 to distribution revenues and \$609,000 to the state and local tax base, provided the rate increase is spread among rate classes in conformity with Paragraph 9.C below. The settled revenue amount is derived solely for the purposes of this Stipulation based upon the unique issues and specific factual circumstances and evidence presented in this Docket, and is a compromise in aggregate between Montana-Dakota and MCC that takes into consideration the specific rate making components not individually identified.

B. Because of the substantial divergence between the parties, as set forth in the record on file in this Docket with the Commission, in both their rate making methodologies, and the end results of those rate making methodologies, the parties present the stipulated increase in annual revenues, to be effective on a final basis, to the Commission as a compromise settlement derived solely for the basis of settlement on an authorized rate of return on equity of 9.4%, and a compromise in aggregate of other cost of capital, capital structure and cost of service items that are not individually identified.

C. The distribution revenue increase specified in Paragraph 9.A above should be allocated between customer classes based on an equal percentage of total revenues less the tax tracking adjustment and excluding contract transportation customers (Flex customers), as set forth in Exhibit 1. The state and local tax base increase shall be applied as currently authorized. The Basic Service Charge for the Residential Class should be set at \$0.26 per day representing a monthly charge of \$7.90 on average. The Basic Service Charges for the other customer classes shall be as reflected in Stipulation

Exhibit 2. The resulting rate changes are set forth in Exhibit 1 and Exhibit 2 to this Stipulation. The reasonableness of the proposed additional revenues set forth in Paragraph 9.A is dependent upon the interclass allocation of that revenue requirement, and the rate design, set forth in this subparagraph, being adopted by the Commission in its final order in this docket.

D. The parties agree that for purposes of this settlement only, and with no prejudice to this issue in future cases, EDIT will be amortized as follows:

- i. All plant related EDIT shall be amortized using ARAM; and
- ii. All non-plant related EDIT shall be amortized over five (5) years.

E. Montana-Dakota will apply the changes in depreciation rates listed on Exhibit DJG-3.

10. The parties agree that this Stipulation resolves all issues, for purposes of this docket, related to the TCJA regarding Montana-Dakota gas distribution operations in Montana.

11. In order to achieve the settlement of issues set forth in this Stipulation, Montana-Dakota withdraws its requested authorization for the SSIP funding mechanism proposed as Rate 94, and Montana-Dakota agrees to not seek implementation of this or a similar funding mechanism prior to its next general rate case, but reserves the right to seek implementation of this or a similar funding mechanism in any future general rate case.

12. Montana-Dakota withdraws, without prejudice, its request to recover anticipated Saco Abandonment Costs. The parties understand Montana-Dakota reserves its right to initiate a separate proceeding regarding Saco Abandonment Costs, and MCC reserves all rights regarding any such proceeding.

13. Montana-Dakota withdraws, without prejudice, its request to add Billing Adjustment terms to its Rate 100. The parties understand Montana-Dakota reserves its right to initiate a separate proceeding to implement Billing Adjustment terms incorporating the Commission's decisions regarding applicable statutes of limitations, and MCC reserves all rights regarding any such proceedings.

14. Attached to this Stipulation as Exhibit 2 are proposed tariffs implementing the various provisions of this Stipulation.

15. The parties to this Stipulation present it to the Commission as a reasonable settlement of the issues raised in this docket. Neither party's position in this docket is accepted by the other party by virtue of their entry into this Stipulation, nor does it indicate their acceptance, agreement, or concession to any rate making principle, cost of service determination, or legal principle embodied, or arguably embodied, in this Stipulation. Neither party shall use any part of this Stipulation in any other proceeding before the Commission, and shall not advance any argument in any other proceeding that is predicated on any portion of this Stipulation. By entering into and executing this Agreement the parties acknowledge that this Agreement is unique to the facts of this Docket, the parties agree and understand that they are entering into this Stipulation as a resolution of the particular facts of this proceeding, and agree that they are not bound by their representations and settlement in this docket. The parties shall not use this Stipulation or the advocacy of either party as evidence in any other proceeding without explaining that the Stipulation was an aggregate compromise and not intended to be used as evidence in other proceedings of any particular position of a party.

16. The parties further agree that approval of this Stipulation by the Commission shall not be deemed to work any estoppels upon any party or to otherwise establish or create any

limitation on or precedent of the Commission.

17. The various provisions of this Stipulation are inseparable from the whole of the agreement between the parties to the Stipulation. The reasonableness of the proposed settlement set forth in this Stipulation is dependent upon its adoption, in its entirety, by the Commission. If the Commission decides not to adopt, in its entirety, the proposed settlement set forth in this Stipulation, then the entire Stipulation is null and void, no party to the Stipulation is bound by any provision of it, and it shall have no force or effect whatsoever.

Dated this 24th of April, 2018.

**MONTANA CONSUMER
COUNSEL**

 /s/ Jason Brown
Jason Brown
P.O. Box 201703
Helena, MT 59620-1703
Attorney for Montana Consumer Counsel

CROWLEY FLECK PLLP

 /s/ Michael Green
Michael Green
P. O. Box 797
Helena, MT 59624-0797
Attorneys for Montana-Dakota Utilities, Co.

BEFORE THE NORTH DAKOTA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF
MONTANA-DAKOTA UTILITIES CO., A
DIVISION OF MDU RESOURCES GROUP,
INC. FOR AUTHORITY TO ESTABLISH
INCREASED RATES FOR NATURAL GAS
SERVICE

DOCKET NO. PU-17-295

DIRECT TESTIMONY OF

MARLON F. GRIFFING, PH.D.

ON BEHALF OF

NORTH DAKOTA PUBLIC SERVICE COMMISSION STAFF

DECEMBER 18, 2017



1 economic indicators such as inflation rates, and so forth for previous rate cases can be
2 different and become outdated when compared with these factors for a current rate case.
3 Therefore, recently authorized ROEs should serve only to establish whether a current ROE
4 result is reasonably close to what has happened, not be a substitute for forward-looking
5 analysis based on current conditions.

6 **Q. PLEASE DESCRIBE THE SET OF AUTHORIZED ROES YOU COLLECTED.**

7 A. I found seven cases for 2017 in which ROEs were authorized in fully litigated rate cases. I
8 found nine authorized ROEs for the same type of cases for 2016. I rejected outcomes of
9 settled cases because settlements can reflect tradeoffs parties make to reach agreement.
10 Thus, an authorized ROE in a settled case may reflect compromise rather than strict
11 application of ratemaking principles.

12 **Q. WHAT WERE THE ROE VALUES YOU FOUND IN YOUR SET?**

13 A. The mean ROE for the 2017 cases was 9.82 percent, with a range from 8.70 to 11.88
14 percent. The mean ROE for the 2016 cases was 9.59 percent, with a range of 9.11 to 10.10
15 percent. The median ROE for both years was 9.50 percent.⁴²

16 **Q. PLEASE DISCUSS THE ROE AWARDS MADE IN 2016 AND 2017.**

17 A. The awarded ROE of 11.88 percent was made in Alaska, serving to illustrate why I exclude
18 awards made in that state and Hawaii from my ROE analysis. This Alaska ROE is 1.78
19 percent higher than any other award in 2016-2017. If this outlier is removed from the 2017
20 set of awards, the average award drops to 9.63 percent. The three lowest awards over the
21 two years are 8.70 percent, 9.11 percent, and 9.25 percent. My DCF analysis ROE of 8.91
22 percent fits with those values.

⁴² Exhibit MFG-15.