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May 25, 2018

VIA HAND DELIVERY

Darrell Nitschke, Executive Director
North Dakota Public Service Commission
State Capitol Building, Dept. 408
600 East Boulevard
Bismarck, ND 59505-0480

In re: Montana Dakota Utilities Co., a Division of MDU Resources Group, Inc.
2017 Natural Gas Rate Increase Application
Case No. PU-17-295

Dear Mr. Nitschke:

Enclosed for filing in the above-referenced matter is Advocacy Staff's Response to MDU's Motion in Limine and Affidavit of Service.

Thank you for your attention to this matter.

Respectfully,

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Special Assistant Attorney General for
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Advocacy Staff's Response to MDU's Motion in Limine
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Montana Dakota Utilities, Co., a Division
of MDU Resources Group, Inc.
2017 Natural Gas Rate Increase Application**

Case No. PU-17-295

**ADVOCACY STAFF'S RESPONSE TO MDU'S
MOTION IN LIMINE**

I. INTRODUCTION

[¶1] MDU has filed a motion in limine to exclude evidence of a voluntary stipulation it entered into in Montana on April 24, 2018, and which it is asking the Montana PSC to accept by order. MDU seeks to exclude this voluntary stipulation with the Montana Consumer Counsel under the guise of N.D.R. Ev. 408 and 403. However, the evidence is admissible, is not subject to rule 408, and is not unduly prejudicial. MDU simply knows the evidence is harmful to its case so wants it to be excluded. MDU wants the Commission to think its SSIP program is necessary now, even though it has deferred implementation in Montana within the last month. Further, MDU wants the Commission to hear testimony that a 10% return on equity is required to provide a fair and reasonable return even though it agreed to a 9.4% ROE in Montana. Regardless, it is premature to make a ruling on this evidence until and if it is offered at the hearing.

II. APPLICABLE LAW AND ARGUMENT

[¶2] First, it is premature to rule on the admissibility of the stipulation. It is not a stipulated exhibit, and may not even be offered at the hearing. Staff's use of the stipulation is dependent on the testimony of MDU's witnesses at the hearing. Therefore,

a decision on its admissibility should be made based on when, how, and why it is being offered.

[¶3] It has long been the law in a rate proceeding that “[a] public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.” Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia et al., 262 U.S., 679, 692-93 (1923). Accordingly, all parties in this case have discussed within their testimony various different issues and how they have been addressed around the country. This includes issues of ROE and SSIP-like mechanisms.

[¶4] For instance, MDU’s pre-filed testimony and other exhibits indicate it wants to show to the Commission that numerous other states have enacted tracking mechanisms like it claims the SSIP is. Part of MDU’s basis for SSIP is that most states are doing it, so should North Dakota. Yet, it has withdrawn its similar SSIP mechanism by stipulation in Montana until its next rate case. MDU wants to tell the Commission that its SSIP program is necessary for safety and reliability now, while not letting the Commission know it is willing to forego the program “right next door” to North Dakota. If MDU’s voluntary withdrawal of the mechanism at this time in Montana is excluded, all other evidence about how any other jurisdictions address this issue must also be excluded. Frankly, the Commission should be allowed to consider how this is being

handled everywhere or nowhere. If the situation in Montana is truly different, it should not take unnecessary time for MDU to explain why, and then the Commission can make a decision based on all the evidence.

[¶5] With respect to ROE, the witnesses on this issue discuss ROEs awarded to utilities by either stipulation or in adjudicated rate cases. Further, Mr. Gaske has filed testimony that “a return on common equity of 10.0 percent is required in order for Montana-Dakota’s North Dakota gas distribution operations to be in a position to raise capital on reasonable terms.” Gorman Rebuttal at p. 3:10-12. If 10% is “required” per Dr. Gaske yet MDU is agreeable to 9.4% in Montana, an explanation is necessary why those two positions are not inconsistent. Certainly, the stipulation is timely, entered into a mere month ago. It is also in the same geographical area, North Dakota’s western neighbor. And, it is involving the same company.

[¶6] Evaluating and applying the rules of evidence in these proceedings necessarily includes a review of the Commission’s role in regulating public, monopolistic utilities. In that regard, MDU has cited part of N.D. Admin. Code § 69-02-05-01, while ignoring the rest of the rule. The remainder of the rule provides:

The commission or the hearing officer, however, may waive the rules of evidence where such waiver is necessary to ascertain the substantial rights of a party but only relevant evidence is admitted. A waiver of the rules of evidence must be stated specifically. When objection is made to the admissibility of evidence, the hearing officer may receive the evidence subject to later ruling by the commission.

This rule recognizes that in PSC proceedings, given the nature of the PSC’s responsibilities and powers, it may sometimes have to evaluate issues that do not fit neatly into the rules of evidence to execute its legislative function in a quasi-judicial setting. As the hearing proceeds, the ALJ will see that this case is not viewed in a

vacuum. Various witnesses rely on information gathered from around the country to evaluate several issues in this case (including ROE and SSIP) in order to determine what is a just and reasonable rate. In this circumstance, it is curious that MDU seeks to exclude evidence of what it is doing in the last month in Montana. While Advocacy Staff believes the stipulation at issue here is admissible under the rules, it certainly would affect the substantial rights of the paying ratepayers to not allow the Commission to consider what MDU has agreed and is requesting the Montana PSC to order in the last month. At the very least, the ALJ should receive the evidence subject to a later ruling by the Commission.

[¶7] Under this backdrop, Rule 408, N.D.R.Ev. does not apply to exclude this evidence. The rule provides:

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

(a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

It is not entirely clear where MDU claims its stipulation fits in this rule. It is certainly not conduct or a statement made during negotiations as it is a final, public stipulation that

MDU is asking the Montana PSC to accept. Therefore, MDU must be claiming it falls within subsection (1). It is not clear to Advocacy Staff how the voluntary, publicly-filed stipulation that is requested to be adopted by the Montana Commission falls within the language of the rule. Similar filings are frequently cited and used in PSC testimony and hearings. On that basis alone, MDU's motion should be denied.

[¶8] Even if the stipulation falls within part (a) of the rule, there are exceptions that need to be evaluated. A ruling cannot be made to exclude the evidence until the ALJ can evaluate whether one of the exceptions applies. For instance, Staff believes the stipulation will likely be used in part to prove a witness's or witnesses' bias or prejudice. Further, depending on the witnesses' testimony, the stipulation also may be necessary to dispute a contention of undue delay. But, that all depends on the testimony at the hearing and if the stipulation is even offered. A ruling at this time would be entirely premature.

[¶9] Further, MDU argues the parties to the stipulation agreed not to use it any other proceeding. However, the language of the stipulation does not say what MDU purports. Of course, the ND PSC Advisory Staff is not one of the parties to the stipulation or the Montana proceeding. Further, the stipulation provides "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." It appears clear from the stipulation that the parties to it (which did not include the Commission or Advocacy Staff), meant they would not use the stipulation in any other Montana proceeding. The stipulation does not say that it will never be used in another proceeding by anybody anywhere, and there is no authority provided for the

proposition that the parties' stated intended use of the claimed restrictions are binding on the North Dakota Public Service Commission. All the stipulation says is that if it is used, it should be explained that it is an "aggregate compromise and not intended to be used as evidence in other proceedings of any particular position of a party." MDU can certainly explain this without taking too much time—and in fact, the stipulation itself says so. But, in a public utility rate case where geographical and time issues are relevant, it would be error to exclude this public agreement in a neighboring state that MDU is asking be accepted by its Public Service Commission relating to the same issues MDU is currently litigating.


[¶10] In addition, the evidence is not excludable under N.D.R. Ev. 403. "Generally, any doubt about the existence of unfair prejudice should be resolved in favor of admitting the evidence, taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge." State v. Randall, 2002 ND 16, ¶ 15, 639 N.W.2d 439. Of course, this is not a jury trial, and is more similar to a bench trial. In a bench trial, the supreme court has said a judge "should ordinarily admit all evidence which is not clearly inadmissible because a judge, when deliberating the ultimate decision, is capable of distinguishing between admissible and inadmissible evidence. Entry of incompetent evidence in a nonjury trial will rarely be reversible error while exclusion of competent evidence will cause reversal when justice requires. We presume a court in a bench trial considered only competent evidence. Consequently, it is not reversible error to admit incompetent evidence in a bench trial unless it induced an improper finding." Titan Machinery, Inc. v. Patterson Enterprises, Inc., 2016 ND 19, ¶ 8, 874 N.W.2d 317 (quoting In re R.L.-P., at ¶ 37). While the

Commission is not a “court”, it is certainly not a jury. Further, the Commission has Advisory Staff, including an attorney, who can advise of the propriety of the use of this evidence if it offered at the hearing. Therefore, if offered at the hearing, this evidence should be admitted and given the weight and credibility the Commission so determines after evaluating the entirety of the case.

III. CONCLUSION

[¶11] For the foregoing reasons, Advocacy Staff requests MDU’s motion in limine be denied.

Dated this 25th day of May, 2018.

By: 
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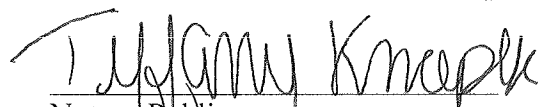
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Subscribed and sworn before me this 25th day of May, 2018.



Notary Public
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