

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-17-295

**MONTANA-DAKOTA UTILITIES CO.'S REPLY BRIEF IN SUPPORT OF
MOTION IN LIMINE TO EXCLUDE EVIDENCE**

Montana-Dakota submits the following Reply Brief in support of its Motion in Limine to exclude evidence of a Settlement Agreement with Montana Consumer Counsel in a pending rate case in Montana.

Advocacy Staff's Brief makes it clear it is offering the evidence of the settlement agreement for the impermissible purpose of disproving the validity of MDU's claims for return on equity ("ROE") and its proposed SSIP recovery mechanism. Under Rule 408, evidence of settlement is inadmissible to prove liability, nonliability, or the amount of a claim. Thomas v. Stickland, 500 N.W.2d 598, 600 (N.D. 1993). The intent of Rule 408 is clear, it prohibits offering evidence of settlements to either prove or disprove the validity of a claim. See N.D.R.Evid. 408. The objective of excluding evidence of compromise under Rule 408 is to encourage compromise of disputed claims. Thomas, 500 N.W.2d at 600 (N.D. 1993) (citing 10 Moore's Federal Practice § 408.02 (1988)). The "subsequent use of a settlement agreement to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent." Id. "Under N.D.R.Evid. 408, if settlement evidence is offered to show liability for, invalidity of, or the amount of a disputed claim, exclusion of the evidence is the norm." Schlossman & Gunkelman, Inc. v. Tallman, 1999 ND 89, ¶ 16, 593 N.W.2d 374. Because Advocacy Staff is attempting to offer evidence of a settlement

to dispute the validity of MDU's claims for ROE and SSIP, evidence of the Montana Settlement Agreement should be excluded under N.D.R.Evid. 408.

Advocacy Staff recognizes that the express terms of the Montana Settlement Agreement preclude its use in any other regulatory proceeding, but erroneously argues that because it was not a party to the Montana Settlement, it can offer the Settlement Agreement in a regulatory proceeding in North Dakota. Advocacy Staff's assertion is contrary to the established law. The North Dakota Supreme Court held Rule 408 excludes evidence of settlements between litigants and third parties. Thomas, 500 N.W.2d at 600. Application of Rule 408 is not restricted to parties who were involved in the settlement. Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc., 219 F.R.D. 135, 144 (N.D. Iowa 2003); Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361, 365 (Tex. 1987) (stating admission of a settlement in another case with different parties is generally not admissible). Federal courts have recognized that evidence of a settlement in a different case is not admissible to show liability under Federal Rule of Evidence 408. Thomas v. Sheahan, 514 F. Supp. 2d 1083, 1091 (N.D. Ill. 2007) (rejecting plaintiff's attempt to introduce evidence of defendant's settlement in a similar lawsuit to establish the validity of a claim in the present case). Rule 408 precludes Advocacy Staff's attempt to offer evidence of the Montana Settlement Agreement entered into by MDU.

Moreover, admission of MDU's Montana Settlement Agreement would also have a chilling effect on future settlements. Rule 408 furthers a well-recognized public policy encouraging out-of-court compromise and settlement of disputed claims to avoid costly and time-consuming litigation. Schlossman & Gunkelman, Inc. v. Tallman, 1999 ND 89, ¶ 15, 593 N.W.2d 374. Other courts have recognized that settlement agreements in utility rate cases are not admissible:

Rate litigation is costly and a compromise rate offered by a utility company in an endeavor to buy its peace with its consumers does not necessarily mean that such rate will produce a fair return. For the Commission, in arriving at the temporary rates, to take into consideration any estimate or data involved in the negotiations between petitioner and its customers was highly prejudicial.

See e.g., Rockland Light & Power Co. v. Maltbie, 266 N.Y.S. 377 (S.C. of New York 1933).

Allowing evidence of a foreign settlement agreement to be used against a utility despite its express terms prohibiting use in subsequent proceedings would have a chilling effect on a utility's desire to resolve regulatory claims and would encourage costly rate cases.

The South Carolina Supreme Court recently held that a public utility's settlement agreement is not relevant evidence and should not be admitted at a hearing in a rate case. Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff, 420 S.C. 305, 315 (S.C. 2017). The South Carolina Supreme Court explained the settlement agreement "contained no factual evidence or stipulations related to [the utility's] revenue increase requests" and "did not resolve any issues before the Commission". Id. (holding the Commission erred in admitting and considering the Settlement Agreement). Similar to the South Carolina case, MDU's Montana Settlement Agreement contains no factual evidence or stipulation related to its revenue requests made in North Dakota and does not resolve any issue before the North Dakota Public Service Commission in the present case.

Introducing such evidence would also result in a needless waste of time at the hearing. If Advocacy Staff is allowed to introduce the Montana Settlement Agreement, MDU would be required to take the time to explain the regulatory differences between the two jurisdictions and discuss the various components of the settlement, none of which are relevant to the North Dakota case. Also, if Advocacy Staff is permitted to introduce the Montana Settlement Agreement for purposes of establishing the validity of a ROE,

then MDU should be permitted to introduce evidence of settled ROEs in other jurisdictions, including South Dakota, Minnesota, Wyoming, Idaho and Washington. Admission of settlement agreements from foreign jurisdictions is a slippery slope and would result in a needless waste of time on issues that are not relevant to North Dakota.

The fallacy of Advocacy Staff's argument that the Montana Settlement is relevant as evidence of the ROE is demonstrated by its own expert. Advocacy Staff tries to argue MDU's Montana Settlement is relevant to establish the validity of its ROE claim in the present case, however, its own expert in this case testified that the ROE established in regulatory settlements should not be used as evidence because they are not reliable due to the competing interests of settlement. See Exhibit 2 (Griffing direct testimony, pg. 34, lines 7-11). Advocacy Staff's relevancy argument is simply a ruse to improperly interject impermissible and prejudicial evidence of a prior settlement agreement into this proceeding.

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 29th 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)

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-17-295

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the following:

**Montana Dakota Utilities Co.'s Reply Brief in Support of Motion in
Limine to Exclude Evidence**

was served electronically on the following:

Darrell Nitschke
ND Public Service Commission
dnitschk@nd.gov

John Hamre
ND Public Service Commission
jhamre@nd.gov

Illona Jeffcoat-Sacco
Public Service Commission
ijs@nd.gov

Patrick J. Ward
Administrative Law Judge
pward@zkslaw.com

Mitchell D. Armstrong
Special Assistant Attorneys General for PSC
marmstrong@smithporsbor.com

Natalie A. Cepak
AFLOA/JACE-ULFSC
Natalie.cepak.2@us.af.mil

Andrew J. Unsicker
Maj. USAF AFLOA/JACe-ULFSC
Andrew.unsicker@us.af.mil

John Schuh
Public Service Commission
jschuh@nd.gov

John B. Coffman
john@johncoffman.net

Lanny L. Ziemann, Capt., USAF
AFLOA/JACE-ULFSC
Lanny.ziemann.1@us.af.mil

Dave Tschider
dtschider@tschider-smithlaw.com

Mr. Thomas A. Jernigan
AFCEC/JA-ULFSC
Thomas.jernigan.3@us.af.mil

Ryan K. Moore, TSgt., USAF
AFLOA/JACE-ULFSC
Ryan.moore.5@us.af.mil

Dated today, May 29, 2018.

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

By: /s/ Paul R. Sanderson
Paul R. Sanderson (ID# 05830)