

Memorandum

To: Commissioners Christmann, Haugen-Hoffart and Kringstad

From: Chris Hanson, Public Utility Analyst

Date: June 6, 2025

Re: Montana-Dakota Utilities Co., Deferred Accounting – Congestion Litigation, Application, Case No. PU-24-388

On January 23, 2024, Montana-Dakota Utilities (MDU) filed a complaint with the Federal Energy Regulatory Commission (FERC) asserting that Southwest Power Pool (SPP) and Midcontinent Independent System Operator (MISO) had violated the terms of their Joint Operating Agreement and the terms of the Settlement Agreement between MDU, SPP and MISO by conducting unwarranted market-to-market (M2M) coordination of congestion on the Charlie Creek to Watford City line, resulting in duplicative charges estimated at \$21 million in 2023.

On October 10, 2024, MDU requested that the FERC grant rehearing and direct relief which was denied. MDU subsequently filed a Petition for Review with the Eighth Circuit Court of Appeals, from which no response has yet been received. MDU estimates the total external legal expenses incurred at the time of this application to be \$550,000 with an additional \$500,000 expected related to the appeal.

On December 26, 2024, MDU filed an application with the North Dakota Public Service Commission (Commission) requesting that a regulatory asset be created to allow MDU to recover the external legal fees associated with the ongoing FERC complaint, Docket No. EL24-061.

In assessing MDU's request to create a regulatory asset, there are several questions that need to be answered:

1. What is the legal basis for this action?
2. Were the expenses prudently incurred?
3. Who would benefit from these actions?
4. What would be the impact of rejecting this proposal?
5. What are the Commission's options regarding this request?

What is the legal basis for this action?

North Dakota law neither prescribes or proscribes any particular treatment of this situation. The Federal Energy Regulatory Commission (FERC) uniform system of accounts, Title 18, Code of Federal Regulations, Part 101 defines the accounting treatment for regulatory assets (i.e. deferred accounting) in account 182.3 (other regulatory assets). The creation of regulatory assets and liabilities is thus an anticipated practice as part of the regulatory process. Assets that are no longer in service but where

the costs were prudently incurred and where a return is warranted are a common type of regulatory asset. An example of that would be case PU-19-317 where regulatory assets were created for Lewis & Clark and Heskett power plants. However, it can also be utilized to create a regulatory asset for expenses that were prudently incurred and would not be otherwise recoverable. Case PU-20-191 is an example where deferred accounting treatment was applied to expenses.

Were the expenses prudently incurred?

There are two factors that affect prudence. Were the expenses reasonable in relation to the potential amount to be recovered via litigation and was there a basis to expect the effort would be successful?

MDU initially expended about \$500k to file the FERC case and another estimated \$550k in order to potentially recover \$21 million of costs incurred due to the Charlie Creek congestion issue.

MDU informed the Commission in late 2023 regarding its intention to pursue legal action on this issue. Subsequent to filing this case, they also prepared a presentation to explain the background of their legal action in this case and provided additional information subsequent to that presentation. The essential argument was that MDU had anticipated this congestion issue when Basin Electric Power Cooperative (Basin) had applied to join Southwest Power Pool (SPP). MDU had filed comments, and a settlement agreement was signed in 2015 between MDU, Basin and other parties to address the fact that Basin joining SPP would cause MDU's load in the Northwest North Dakota to be located wholly within SPP and thereby be transmission constrained.

Further, MDU contested that their load demand was not the cause of the congestion in this area. But rather, Atlas Power Data Center, which added up to 200 MW of load by April 2023 and which was approved by Basin and SPP, was the proximate driver of the congestion. Commissioner Christmann requested that MDU provide a report to verify this assertion. MDU provided a report showing that MDU's load had actually decreased by 7.7% over the period from 2018-2024. Thus, it appears that it was clearly Basin's load that was causing the congestion and not MDU's.

Based upon these and other factors, MDU had an expectation that their initial filing and the appeal would be successful.

Who will benefit from these actions?

A key consideration in this request is that MDU customers would receive 100% of the benefit if they had or do prevail in this case. None of the proceeds would accrue to MDU shareholders. However, as it now stands, MDU shareholders are bearing 100% of the estimated \$1.05 million expense to pursue these benefits. By creating a deferred asset, MDU seeks to recover the costs from the party that stands to benefit. Based upon the \$1.05 million estimated external legal expenses, this would increase the Fuel and Purchased Power Rider by approximately \$0.40 per month per average customer for a period of one year.

What is the impact of rejecting this proposal?

It seems logical that if the Commission rejects the recovery of these expense, MDU management would hesitate to incur future expenses where the shareholders would bear the costs but not stand to benefit from the legal action.

What are the Commission's options regarding this request?

In this particular case (PU-24-388), MDU is only requesting the approval of deferred accounting and the creation of a regulatory asset for the external legal expenses related to these legal proceedings and leaving the treatment of that asset for a later filing.

Based upon this request, the Commission has three options:

1. Deny the request
2. Approve the request
3. Approve the request with limitations or restrictions

Deny the request

Denying the request preserves the status quo where MDU shareholders are fully bearing the costs of these legal expenses and no costs are passed along to ratepayers.

Approve the request

The Commission can also simply approve this request which will result in MDU reclassifying all past and future external legal expenses related to this case to a regulatory asset.

Approve the request with limitations, restrictions or direction

The final option is that the Commission can approve the request with limitations, restrictions or directions. Some of these could include:

- Whether to approve all or only a portion of the expenses, and whether there will be a maximum amount
- Whether to approve the recovery of all expenses incurred or only those incurred subsequent to the December 26, 2024, filing date
- Whether to only allow recovery of the expenses or also allow the company a return on the regulatory asset
- When to start charging the costs to the customer and the recovery period to be used