

**OPINION
67-166**

October 30, 1967 (OPINION)

Mr. Elmer Olson

Secretary

Public Service Commission

RE: Public Service Commission - Extension of Utility Service - Proce

This is in response to your letter in which you state the following:

While the Supreme Court's decision in Montana-Dakota Utilities Company, et al, v. Johanneson, et al, is not yet final, it appears that it will soon be necessary for this commission to process pending applications under chapter 319, Session Laws 1965, as that statute may be ultimately modified by the judicial decree. Our experience indicates that the number of certificate applications may increase our new case load approximately 70 percent.

This commission, cognizant of its responsibility to conduct its proceedings in a manner most conducive to the dispatch of business and to the ends of justice (49-01-07, North Dakota Century Code), is anxious to assist the public in obtaining electric service when required insofar as it is within its jurisdiction, with minimum administrative cost and delay. Toward this end, an application with the electric consumer's request for service, and a conditional order in the form attached is under consideration by this commission for use in those cases where immediate service is needed. The employment of this procedure would permit prompt dispatch of our business at minimal cost to the taxpayer. At the same time, it is believed that it permits any other electric utility or electric cooperative corporation to complain under the circumstances contemplated by sections 49-03-01, 01.4, North Dakota Century Code.

Where notice and hearing has been waived by the applicant utility and the electric consumer, would the procedure reflected in the attached documents, in your opinion, be consistent with relevant statutes? Your early advice will be appreciated." (Underscoring yours.)

This question involves the interpretation and construction of chapter 49-03, as amended, and the general authority, duties, and functions of the Public Service Commission. Section 49-03-01, as amended by chapter 319 of the 1965 Session Laws, as is material here, provides as follows:

* * * No public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof, without first obtaining from the commission a certificate that public convenience and necessity

require or will require such construction and operation. This section shall not be construed to require any such public utility to secure such certificate for an extension within any municipality within which it has lawfully commenced operations. The provisions of this section shall not be construed to exempt a public utility, operating an oil or gas pipeline gathering system for the purpose of collecting oil or gas at the well producing the oil or gas and transporting such products to another destination, from obtaining a certificate of public convenience and necessity from the public service commission prior to extending such pipelines to provide service to any wells in an oil or gas field not presently served, unless such oil or gas field borders within three miles of an oil or gas field presently being served. If any public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other public utility, or any electric cooperative corporation, the commission on complaint of the public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may make such order enforcing this section with respect to such public utility and prescribe such terms and conditions as are just and reasonable." (Underscoring ours.)

The provisions of section 49-03-01 as quoted herein are the same as they appeared prior to the amendment and were the law prior to the enactment of chapter 319 of the 1965 Session Laws, and are still the law. In this respect there is a substantial similarity between this section and section 49-03-05.

Section 49-03-01.1, which is also a product of chapter 319, provides as follows:

* * * No electric public utility henceforth shall begin in the construction or operation of a public utility plant or system or extension thereof without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation, nor shall such public utility henceforth extend its electric transmission or distribution lines beyond or outside of the corporate limits of any municipality, nor shall it serve any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the public service commission of the state of North Dakota authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer." (Underscoring ours.)

It should be observed that the opening language of section 49-03-01.1 of the 1965 Session Laws, quoted above, substantially is the same as the language found in section 49-03-01. The new material, or different material, follows the first "nor" and is underscored. We must therefore assume that the opening language has the same meaning as it had before. The new language, as pertaining to the extension

of the utility beyond corporate limits, contains similar conditions such as requiring an approval or order from the Public Service Commission.

We would further observe that section 49-03-01 makes no specific reference nor does it set out any method or manner which is to be employed by the Public Service Commission in disposing of an application submitted to it. It does, however, provide that upon a complaint being filed and after notice has been given, a hearing is to be held presumably on the application, as provided for in Title 49.

As to applications, section 49-03-02 of the North Dakota Century Code would seem to apply and provides as follows:

PREREQUISITES TO ISSUANCE OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY. Before any certificate may issue under this chapter, a certified copy of the articles of incorporation or charter of the utility, if the applicant is a corporation, shall be filed with the commission. At the hearing of said application upon notice as provided in this title, the utility shall submit evidence showing that such applicant has received the consent, franchise, permit, ordinance, or other authority of the proper municipality or other public authority, if required, or has or is about to make application therefor. The commission shall have the power, after notice and hearing, to:

1. Issue the certificate prayed for;
2. Refuse to issue such certificate;
3. Issue it for the construction or operation of a portion only of the contemplated facility, line, plant, system, or extension thereof; or
4. Issue it for the partial exercise of the right or privilege sought, conditioned upon the applicant's having secured or upon his securing the consent, franchise, permit, ordinance, or other authority of the proper municipality or other public authority, and may attach to the exercise of the rights granted by any certificate such terms and conditions as in its judgment the public convenience and necessity may require." (Underscoring ours.)

The above section provides for a notice and hearing, but it is not self-sufficient. It refers to some other provision in Title 49. It does not state how notice is to be given, nor does it state the length of notice, etc. As to the parties, we can assume that it includes only those who are normally considered "parties of interest" and come within the jurisdiction of the Public Service Commission. It would appear to be a futile effort to require persons to appear when the Public Service Commission has no jurisdiction over such persons. If the statute were to state upon whom notice is to be served, it would be different.

In the absence of any provision, we must assume that the provisions of chapter 28-32, "Administrative Practices Act", would apply. We

are not aware of any conflict between said Act and the provisions of Title 49. Under the provisions of chapter 28-32 the parties may waive notice and hearing.

As to the proceedings on a complaint, section 49-05-03 specifically provides that chapter 28-32 shall govern. It should also be observed that section 49-05-01 states who may file a complaint.

On the subject of hearings, the Supreme Court of the State of California in *Ventura County Waterworks v. Public Utility Commission*, 393, P. 2d. 168, which amongst other things said as follows:

* * * The public utility has no constitutional right to be protected from competition. But, it is entitled to a hearing before the commission may grant a certificate of public convenience and necessity to a competitor."

The above case, of course, is in harmony with the proposition that the party concerned may demand a hearing but it is not essential that the Public Service Commission hold a hearing if the applicant waives such notice and hearing. General discussion on this matter can be found in 73 C.J.S., Public Utilities, section 55, page 1122, which appears as follows:

Generally speaking, in the absence of a statute requiring it, a public utility commission is not required to hold hearings before taking action in matters before it unless the action to be taken would run counter to some constitutional guaranty, and it has been held that a hearing is not essential where the action to be taken is legislative or quasi-legislative in character, although the commission may, as a matter of discretion, accord a hearing in such case. On the other hand, if the commission is exercising a judicial or quasi-judicial function, due process of law requires that there be a hearing before a decision. Apart from the requirements of due process, a hearing must be held when directed by statute or express constitutional provision. * * *."

As to the disposition of matters before the commission, we should also observe that section 49-01-07, as is material here, provides as follows:

* * * The commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice. * * *."

As to the parties, we must also take into consideration section 49-02-01.1 of the North Dakota Century Code relating to the jurisdiction of the Public Service Commission, which provides as follows:

JURISDICTION OF COMMISSION LIMITED AS TO CERTAIN UTILITIES.
Nothing in this chapter shall authorize the commission to make any order affecting rates, contracts, services rendered, the safety 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, village, or other political subdivision of the state or any public utility that is not operated for profit, but all other provisions herein shall apply to such utilities. However, any telephone and telegraph utility so owned or operated shall be subject to the jurisdiction of the commission and to the provisions contained in sections 49-02-05 and 49-21-09."

Electric cooperatives are not under the jurisdiction of the Public Service Commission because they are not a utility which is operated for profit. This concept has been affirmed as being valid in the case of Montana-Dakota Utilities v. Johanneson, et al., Civil No. 8355, which was decided by the North Dakota Supreme Court on August 23, 1967. A utility not within the jurisdiction of the Public Service Commission apparently can become a party of interest only by filing a complaint as provided for in section 49-03-01.

The Public Service Commission in considering an application submitted to it must take into consideration the interest of the public - what effect it might have on the service or rate to the public, and whether or not the circumstances are such so as to spell out a public convenience and necessity. A general discussion on this subject is found in 73 C.J.S., PUBLIC UTILITIES, Section 42, Page 1097.

With reference to the language in section 49-03-02, which provides "At the hearing of said application upon notice as provided in this title, * * *", we are not aware of any provisions in Title 49 which spell out or call to our attention how the notice is to be given, upon whom, length of time, etc. We must therefore assume that such language is sufficiently flexible to permit a construction in harmony with administrative and judicial practices. We think the language does not impose any greater requirement than what is normally found or followed in similar situations in judicial proceedings. This, in effect, means that if the matter is fully submitted to the Public Service Commission by the interested parties in such a manner so that the Public Service Commission can make a decision, and if the parties waive notice and hearing, the Public Service Commission may make a determination and issue its order accordingly. This would be our conclusion if we were examining the pertinent statutes for the first time without considering any executive or administrative construction placed on the statutory provisions arising out of custom and usage.

We must take into account the practices followed by the Public Service Commission prior to the 1965 Act. Administrative and executive construction of the statutes, which have been reenacted by the legislature in substantially the same form, are entitled to great weight. (Payne v. Board of Trustees of the Teachers' Insurance & Retirement Fund, 35 N.W. 2d. 553, 76 N.D. 278.) (See also cases cited in Dakota Digest, Vol. 10, Key 219 in Supplement.) You do not advise as to what procedures the Public Service Commission followed prior to the 1965 amendments to chapter 49-03, consequently, we do not know what construction you placed on the statutes.

We are aware that the North Dakota Supreme Court declared section 3 of chapter 319 of the 1965 Session Laws unconstitutional. In many respects, as to the question presently involved, the provisions of chapter 319 of the 1965 Session Laws (minus section 3) are

substantially the same as they were prior to the amendment. It is therefore our advice that you should adhere to the procedures followed prior to the amendment as pertaining to notices and hearings.

As to conditional approval, subsection 4 of section 49-03-02 seems to be somewhat controlling and would allow same. 73 C.J.S., on Page 1100, states as follows:

CONDITIONAL APPROVAL. The commission may, in the public interest, annex reasonable conditions or limitations, which it may subsequently modify or withdraw, to its approval of an application for a certificate of convenience and necessity. Such conditions must be within the express or implied power of the commission conferred by statute. In the exercise of its statutory power it has been held that the commission may annex such conditions as will properly safeguard, under the particular circumstances, the public interest as to safety, or those which relate to methods of construction and the quality and extent of service with respect to rates and other factors, but not conditions relating to controversies between contending utility companies in respect of matters involving damages to their properties. The conditions imposed may be either conditions precedent to the issuance of the certificate, or conditions subsequent thereto and to be complied with after issuance, and, in ascertaining whether they are conditions precedent or conditions subsequent, the nature of the acts to be done and the intention of the commission, as manifested by the language of its order, should be examined."

The North Dakota Supreme Court has had occasion to speak out on this matter in the case of Public Service Commission v. Montana-Dakota Utilities Co., 100 N.W.2d. 140, and held that the grant of a certificate of public convenience and necessity in the construction and operation of a natural gas transmission pipeline, conditioned upon the proposition that the utility agreed to comply with the provisions of the rate orders issued by the Commission, was a condition for which the Public Service Commission had no authority. Without specifically stating so, we believe that the Court, amongst other things, held such condition invalid on the proposition that the fixing of rates was a separate and distinct item to be considered on its own merits and not by arbitrary determination extending into the future, without taking into consideration what the facts at such future date might be. It should be further observed that the compliance with rates established or ordered by the Commission has no direct relation to the question or issue whether or not a public convenience or necessity exists.

It is therefore our opinion that the Public Service Commission may issue its order and certificate subject to certain conditions as outlined in the proposed order submitted for our consideration. If, as stated earlier herein, the Public Service Commission prior to amendment issued orders and certificates upon the express waiver of notice and hearing by the parties of interest, then if the information is submitted in such a manner so that the Public Service Commission can consider it, and if the information is adequate and same can be deemed sufficient to make a decision, it could legally

follow the same procedures now and it could use the proposed forms and procedures as outlined in the documents attached to your letter.

HELGI JOHANNESON

Attorney General