

STATE OF NORTH DAKOTA

IN DISTRICT COURT

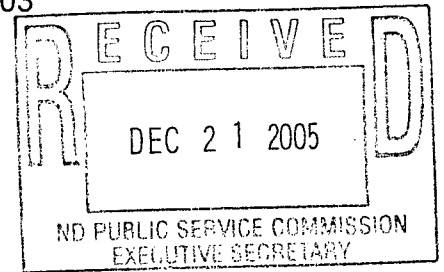
COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.)
)
 Plaintiff)
)
 vs.)
 The City of Bismarck, North Dakota)
 and)
)
 Montana-Dakota Utilities Co., a)
 Division of MDU Resources Group, Inc.)
 and)
)
 The Public Service Commission of)
 North Dakota)
)
 Defendants.)

**ANSWER AND COUNTERCLAIM
of Montana-Dakota Utilities Co.**

Case No. 05-C-2303



Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), for its Answer and Counterclaim to the Complaint of Capital Electric Cooperative ("CEC"), alleges and states as follows:

ANSWER

1. Except as otherwise answered or specifically admitted, Montana-Dakota denies each and every allegation and statement of CEC's complaint.
2. Montana-Dakota admits the allegations of paragraphs I, II, III, IV, V, and XI of CEC's complaint.
3. Answering paragraph VI of CEC's complaint, Montana-Dakota admits CEC holds a franchise adopted by the Bismarck Board of City Commissioners, but states such franchise was adopted on May 25, 1993. Montana-Dakota states the franchise is a limited franchise and refers the Court to the franchise for its complete terms.

4. Answering paragraph VII of CEC's complaint, Montana-Dakota admits CEC filed a complaint with the North Dakota Public Service Commission on or about September 29, 2005 and refers the Court to the complaint for the full extent of the allegations of the administrative complaint.

5. Answering paragraph VIII of CEC's complaint, Montana-Dakota admits it filed an answer and counterclaim to the complaint filed by CEC with the Public Service Commission. Montana-Dakota further admits that its answer asserted that CEC is not authorized by law or franchise to provide electric distribution service to Part of Boulder Ridge First Addition to the City of Bismarck. Montana-Dakota refers the Court to Montana-Dakota's Answer and Counterclaim for its full terms.

6. Montana-Dakota admits the allegations of paragraph IX of CEC's Complaint and refers the Court to Montana-Dakota's Petition to Declare Franchise Rights for its full terms.

7. Montana-Dakota admits the allegations of paragraph X of CEC's Complaint and refers the Court to the "Findings, Conclusions Decision and Order" of the Bismarck Board of City Commissioners for its full terms.

8. Answering paragraph XII of CEC's Complaint, Montana-Dakota admits the North Dakota Public Service Commission is a constitutional body under Article V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law. The remaining allegations are legal conclusions that require no response.

9. Answering paragraph XIII of CEC's Complaint, Montana-Dakota admits that pursuant to Article VI, Section 8, of the North Dakota Constitution, and except as

otherwise provided by law, the District Court has original jurisdiction of all causes. Montana-Dakota admits the District Court has discretionary power to declare rights, status, or legal relations under a statute, municipal ordinance, contract, or franchise, provided such jurisdiction delegated to the District Court by the Legislative Assembly cannot abridge the power of the governing board of a city to franchise the construction and operation of a public utility within the city as provided in Article VII, Section 11 of the North Dakota Constitution.

10. Montana-Dakota admits the allegations of paragraph XIV of CEC's complaint and alleges that CEC's rights, status, and other legal relations with respect to the provision of electric power service within the City of Bismarck have been determined by the Bismarck Board of City Commissioners in its Findings, Conclusions Decision and Order issued November 14, 2005.

11. CEC's complaint fails to state a claim upon which relief can be granted.

12. CEC has failed to exhaust its administrative remedies.

13. Declaratory relief is not available to perform a legislative act delegated by law to the City of Bismarck.

14. The Court cannot sustain bifurcated self-initiated judicial and administrative proceedings by CEC covering the same legal question. CEC's complaint should be dismissed while its complaint covering the same legal question is pending before the North Dakota Public Service Commission.

15. Declaratory relief is not available to CEC because its franchise rights within the City of Bismarck have been determined by the Bismarck Board of City Commissioners.

16. Declaratory relief is not available to collaterally attack the declaration of franchise rights by the Bismarck Board of City Commissioners.

Counterclaim

For its Counterclaim against CEC, Montana-Dakota alleges and states as follows:

A. Montana-Dakota holds a 20-year unlimited franchise accepted May 29, 1987 from the City of Bismarck to provide electric distribution service within the City of Bismarck as then or thereafter constituted.

B. Montana-Dakota is willing and able to provide electric distribution service to all its franchised areas within the City of Bismarck through its existing electric distribution facilities or through the extension or purchase of electric distribution facilities.

C. Pursuant to Article VIII, Section 11 of the North Dakota Constitution, the governing board of the City of Bismarck has the power to franchise the construction and operation of public utility or similar service within the City of Bismarck.

D. Pursuant to Article 3; Section 10 of the Home Rule Charter for the City of Bismarck, the Bismarck Board of City Commissioners is the franchising authority for public utilities for all public areas within the City of Bismarck.

E. In its Findings, Conclusions Decision and Order issued November 14, 2005, the Bismarck Board of City Commissioners determined that CEC's franchise is limited geographically to those areas that were both: (1) within the City at the time the franchise was adopted May 25, 1993; and (2) described in an Area Service Agreement executed by CEC and Montana-Dakota and any future amendments thereto.

F. CEC and Montana-Dakota did not execute amendments to the Area Service Agreement after May 25, 1993 to add any annexed areas to CEC's limited franchise.

G. The Area Service Agreement between CEC and Montana-Dakota was cancelled effective June 26, 2003 which ended the ability of the parties to amend the Area Service Agreement.

H. CEC has not sought or obtained a new or amended franchise to include any areas annexed to the City of Bismarck after May 25, 1993.

I. In its Findings, Conclusions Decision and Order issued November 14, 2005, the Bismarck Board of City Commissioners determined that Part of Boulder Ridge First Addition to the City of Bismarck is properly served with electric service by Montana-Dakota subject to the right of CEC to obtain a limited franchise to continue service to customers of CEC that existed at the time Part of Boulder Ridge First Addition was annexed to the City of Bismarck in April 2005.

J. CEC had no existing customers within Part of Boulder Ridge Addition at the time it was annexed to the City of Bismarck.

K. Montana-Dakota is the sole franchised provider of electric service in areas annexed to the City of Bismarck after May 25, 1993.

L. Customers within areas annexed to the City of Bismarck after May 25, 1993 had central station electric service available to them pursuant to Montana-Dakota's franchise from the City of Bismarck.

M. Areas annexed to the City of Bismarck after May 25, 1993 that were not receiving electric service from CEC at the time of annexation are not rural areas as defined under North Dakota Century Code section 10-13-04.

N. Customers within an area annexed to the City of Bismarck after May 25, 1993 that were not receiving electric service from CEC at the time of annexation are not eligible for membership in CEC.

O. N.D.C.C. § 10-13-03 limits the provision of electric distribution service to non-members by a cooperative to persons not in excess of ten percent of the number of its members.

P. CEC's provision of electric service in Part of Boulder Ridge First Addition to the City of Bismarck and other areas annexed to the City of Bismarck after May 25, 1993 interferes with or threatens to interfere with the service of Montana-Dakota.

Therefore, Montana-Dakota requests the Court to issue its order and judgment:

1. Enjoining and restraining CEC from providing electric service within areas annexed to the City of Bismarck after May 25, 1993 for which CEC does not hold a franchise from the City of Bismarck.

2. Enjoining and restraining CEC from providing electric service to customers within areas annexed to the City of Bismarck after May 25, 1993 who are not eligible for membership within CEC and whose number exceeds ten percent of the number of CEC's members.

3. Enjoining and restraining CEC from interfering with the electric service of Montana-Dakota within Part of Boulder Ridge First Addition to the City of Bismarck by

enjoining and restraining CEC from providing or offering to provide electric distribution service within Part of Boulder Ridge First Addition to the City of Bismarck.

Dated this 20 day of December, 2005.

Respectfully submitted,

PEARCE & DURICK

By 

PATRICK W. DURICK (ID # 03141)
JEROME C. KETTLESON (ID # 03095)
Individually and as Members of the Firm
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Daniel S. Kuntz (ID# 03490)
MDU Resources Group, Inc.
1200 West Century Avenue
P.O. Box 5650
Bismarck, ND 58506-5650
(701) 530-1016

Attorneys for Montana-Dakota Utilities Co., a
Division of MDU Resources Group, Inc.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.,)

CIVIL NO. 05-C-2303

Plaintiff,)

vs.)

AFFIDAVIT OF SERVICE

The City of Bismarck, North Dakota,)
and)

Montana-Dakota Utilities Co., a)
Division of MDU Resources Group, Inc.,)
and)

The Public Service Commission of)
North Dakota,)

Defendants.)

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF BURLEIGH)

Evelyn Froebe, being first duly sworn on oath, does depose and say: That she is over the age of eighteen years, and not a party to the above-entitled matter;

That on the 20th day of December, 2005, this affiant deposited in the mailing department of the United States Post Office at Bismarck, ND, a true and correct copy of the following document in the above-captioned action:

ANSWER AND COUNTERCLAIM OF MONTANA-DAKOTA UTILITIES CO.

That the copy of the above document was enclosed and secured in an envelope with postage duly prepaid and addressed as follows:

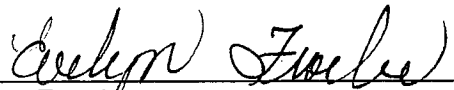
Carol Larson
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
Attorney for Capital Electric Cooperative, Inc.

Randall J. Bakke
Attorney at Law
116 North 2nd Street
P.O. Box 460
Bismarck, ND 58502-0460
Attorney for The City of Bismarck, North Dakota

William W. Binek
Public Service Commission
State Capitol
Bismarck, ND 58505-0480
Attorney for The Public Service Commission of North Dakota

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the parties intended to be so served.

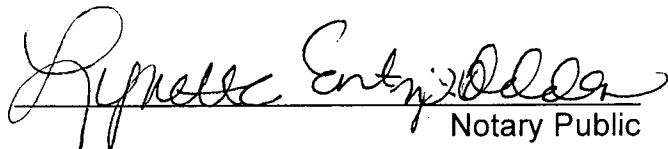
That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Evelyn Froebe

Subscribed and sworn to before me this 20th day of December, 2005.





Notary Public