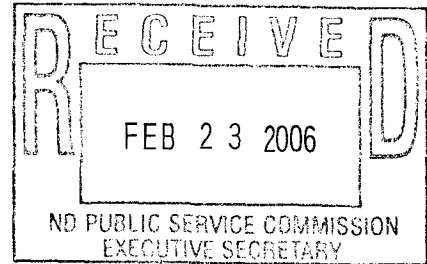


STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

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



**MOTION FOR RECONSIDERATION  
AND BRIEF**

**Docket Number 05-C-2303**

Pursuant to Rule 7(b) of the North Dakota Rules of Civil Procedure, the Plaintiff, Capital Electric Cooperative, Inc., moves the Court to reconsider its Order dated January 30, 2005, entered on the Rule 12 Motion of the Defendant City of Bismarck for dismissal of the action for failure to state a claim or in the alternative (under Rule 3.2) for a more definite statement, and to provide a reasonable opportunity to respond to the Motion to Dismiss as one for Summary Judgment under Rule 56, since the Court did not exclude, and considered, matters outside the pleadings, without prior notice to Capital.

**BACKGROUND**

Capital commenced this action seeking a declaratory judgment under N.D.C.C. §

32-23 as an appropriate form of action and remedy for judicial review of action taken by the Board of Commissioners of the City of Bismarck, action described in Capital's Complaint and in its Amended Complaint.

The City of Bismarck's alternative motions for dismissal for failure to state a claim on which relief can be granted and for a more definite statement were both premised on its evaluation of the Complaint as "overbroad." (City's December 19, 2005, Brief in Support of Motion, pages 7 & 8) . The City's brief also argued Capital's complaint should "be dismissed for failure to exhaust its available administrative remedies," i.e. a proceeding before the North Dakota Public Service Commission under N.D.C.C. § 49-03. After Capital's brief responding to the Motion, the City's Reply Brief (January 13, 2006) asserted the Complaint should be dismissed "as a matter of law".

The Court's January 30, 2005, Memorandum Opinion and Order determined that the Motion to Dismiss should be granted, not because the Complaint was "overbroad" or because of the availability of an administrative remedy, as urged by the City of Bismarck, but because Capital's grievance with the Board of Commissioners' action is not within the scope of a declaratory judgment action. The Court opined that Capital has a remedy under N.D.C.C. § 27-05-04 (4) to appeal the City's decision to the District Court, and concluded the Complaint should be dismissed unless designated to be an appeal to the District Court of the City's decision. The Court also addressed the "matter of law" asserted in the City's January 13, 2006, Reply Brief, without arguments on the matter being received from Capital.

## GROUNDS FOR MOTION

A.

Under N.D.C.C. § 27-05-06 (4), the District Court has “jurisdiction of appeals from ... the determinations of inferior officers, boards, or tribunals, in such cases and pursuant to such regulations as may be prescribed by law.” (Emphasis added.) Similarly, N.D.C.C. § 28-34-01 enacts procedures to govern “.. any appeal provided by statute from the decision of a local governing body...” (Emphasis added.) However no ordinances, resolutions, or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck for an appeal from the November 14<sup>th</sup> Order, and no statute enacted by the North Dakota Legislatures provides for appeal from the November 14<sup>th</sup> Order. There is no “appeal provided” or “prescribed by law” for Capital to obtain judicial review of the November 14<sup>th</sup> Order by appeal.

In the absence of an “appeal provided by statute” or “prescribed by law,” judicial review of a City’s action is available in an action for declaratory judgment. See, e.g., GO Committee v. City of Minot, 2005 N.D. 136. As the words used in any statute are to be understood in their usual sense, (N.D.C.C. §1-02-02), it is plain from the words of N.D.C.C. § 32-23 that it provides an appropriate procedure for Capital to obtain judicial review of the City Board’s action and a declaration of Capital’s rights, status, or other legal relations under its franchise affected by the November 14<sup>th</sup> Order.

Even if an “appeal” were available, “the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Rule 57 N.D.R.Civ.P., see also, N.D.C.C. § 32-23-01.

B.

The City's Motion to dismiss under Rule 12 (b) N.D.R.Civ.P. relied not only on its accompanying brief, but also on attached exhibits and other file materials. The City's January 13, 2006, Reply Brief expanded its Motion seeking dismissal as a matter of law. The Court's January 30, 2006, Memorandum and Order apparently treated the Motion as one for Summary Judgment, opining on the matters of law addressed in the City's January 13, 2006, Reply Brief. The City's expanded Motion did not notify Capital of a Summary Judgment Motion. The Court's Order did not afford Capital a reasonable opportunity to present all pertinent material, did not afford the minimum 34 days opportunity for Capital to respond under Rules 12 and 56. The City's expanded Motion and the Court's Order did not afford Capital a reasonable opportunity to present argument on the matters of law addressed in the City's January 13, 2006, Reply Brief or in the Court's January 30, 2006, Order. Capital requests a reasonable opportunity to respond to the City's Motion if considered as a Rule 56 Motion.

C.

In its January 30, 2006, Memorandum and Opinion and Order, the Court concluded, without reference to the material considered by the City Commission, that "CEC failed to plead that the City had no authority to hear the Petition and issue its Order." Upon complete submission of Rule 56 summary judgment materials, the Court will see that Capital did raise that issue and also objected to the City's jurisdiction to reinterpret and rewrite a 20-year franchise resolution. Under the heading "Jurisdiction," Capital in its Brief to the City asserted:

“The City of Bismarck does not have the right to amend or alter its franchise with CEC without CEC’s consent. The Court’s have exclusive jurisdiction to resolve contract disputes pursuant to the North Dakota Constitution Article VI, Section 8.”

This Court should reconsider its erroneous conclusion “that CEC apparently had not challenged the City to hear the Petition and issue its Order...”. See also paragraph X of Capital’s proposed Amended Complaint filed on February 3, 2006, in response to the Alternative Motion for a More Definite Statement.

D.

The City made an Alternative Motion for a More Definite Statement with its Motion to Dismiss of December 19, 2005. Capital filed its Motion to Amend Complaint, and the City on February 6, 2006, gave its written consent to the Amended Complaint. Therefore, this Court should expressly allow filing and service of Capital’s Amended Complaint.

THEREFORE, Capital seeks an Order:

1. Withdrawing the Court’s Memorandum and Order of January 30, 2006;
2. Establishing a reasonable opportunity and schedule of procedures for the parties to assemble all material pertinent to a Rule 56 Motion and for the filing of briefs addressing matters of law pertinent to a Rule 56 Motion; and
3. Granting Capital’s Motion to Amend its Complaint.

Dated this 22 day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

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