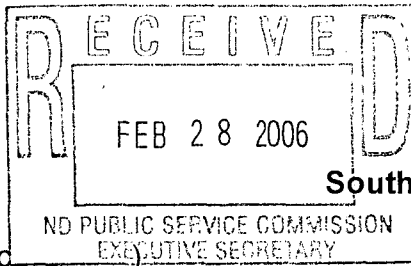


State of North Dakota
County of Burleigh



In District Court
South Central Judicial District

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

**Brief of Montana-Dakota Utilities Co.
in Response to Plaintiff's Motion for
Reconsideration**

Case No. 05-C-2303

Montana-Dakota Utilities Co. ("Montana-Dakota") submits the following brief in response to the motion of Capital Electric Cooperative, Inc. ("CEC") dated February 22, 2006 requesting reconsideration of the Court's Memorandum Opinion and Order of January 30, 2006. The purpose of CEC's motion for reconsideration, and indeed its position in this proceeding, is unclear. On one hand, CEC states in its brief that it commenced this action "as an appropriate form of action and remedy for judicial review of action taken by the Board of City Commissioners of the City of Bismarck."¹ On the other hand, it seeks reconsideration of the Court's order of January 30, 2006 in which the Court directed that it would allow CEC's action to proceed as an appeal of the City Commission's order thereby providing precisely the judicial review that CEC says it seeks. Whether by coyness or lack of clarity, CEC has added an unnecessary level of

¹ Although CEC now states it commenced this action to obtain judicial review of the City Commission's order, such relief was not requested in CEC's complaint in this proceeding.

confusion to this proceeding and seems determined to prevent or delay judicial review of the City Commission's order rather than to obtain such review.

It is important to note that although CEC argues that the Court treated the City of Bismarck's motion to dismiss as a motion for summary judgment, the Court did not dismiss CEC's complaint under either Rule 12 or Rule 56. Instead, the Court ruled that it would allow the proceeding to move forward for the purpose of reviewing the City Commission's decision of November 14, 2005. Whether that judicial review is denoted as an appeal under N.D.C.C. § 27-05-06(4) or as a declaratory judgment action under N.D.C.C. Chapter 32-23 is a matter of form over substance. In either instance, the standard of review of the City Commission's order by the District Court is the same.

Courts will not substitute their judgment for that of the municipality's governing body in interpreting or applying ordinances unless an abuse of discretion is clearly shown. (Citation omitted) To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably. (Citation omitted)

A & H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994). See also GO Committee v. City of Minot, 2005 N.D. 136, 701 N.W.2d 865, ¶ 8. Accordingly, CEC's arguments, even if correct, do not provide grounds for reconsideration of the Court's January 30, 2006 order.

It is ironic that CEC complains that the Court considered materials outside the pleadings and treated the City's motion to dismiss as a motion of summary judgment without providing notice and adequate opportunity for CEC to respond to the City's motion. CEC has apparently forgotten that it was the party that submitted a number of documents outside the pleadings as exhibits to its response to the City's motion to dismiss. After the City filed its reply brief requesting CEC's lawsuit be dismissed as a

matter of law, CEC responded with its own brief dated January 18, 2006 in which it observed the City's brief argued against CEC's claim as if arguing a motion for summary judgment. CEC did not request an opportunity to submit additional materials or for additional time to further respond to the City. Moreover, it is unclear what CEC would have sought with such additional time or materials since the Court ruled that it will consider CEC's action as an appeal from the City Commission's decision which it says is the purpose of its action.

To the extent CEC is seeking reconsideration of the Court's ruling that the Board of City Commissioners had the authority to interpret its own franchise, that ruling was clearly a question of law appropriate for the Court's decision and a ruling which did not require review of materials outside the pleadings. The Court's observation that CEC "apparently had not challenged the City's authority to hear the Petition and issue its Order" is simply an alternative grounds for the Court's holding and does not change the primary holding that the City had the authority to interpret its own franchises. This primary holding is supported by a long series of North Dakota Supreme Court cases – most recently GO Committee v. City of Minot, supra.

Finally, it is unclear what CEC substantively hopes to obtain by the Court's reconsideration of its January 30, 2006 Memorandum Opinion and Order. CEC's brief indicates it seeks an opportunity to amend its complaint. Yet, as indicated by the Court's letter of February 9, 2006, there is no necessity for an amended complaint to request or state the basis for judicial review of the City Commission's decision. Pleadings exist for the purpose of joining the issues. In this case, the Court clearly defined the issue for review of the City Commission's decision:

On appeal, the issue is not whether the City's decision was correct, but, rather, only whether in reaching its decision, the City abused its discretion and acted in an arbitrary, capricious or unreasonable manner.

This is the standard of review recited by the Court in GO Committee v. City of Minot, supra, which is the only case cited by CEC in support of its Motion for Reconsideration. The Court having defined the issue on appeal, there is nothing that prevents CEC from raising the allegations stated in its amended complaint as arguments in support of its position that the City abused its discretion and acted in an arbitrary, capricious or unreasonable manner unless such arguments are an attempt to challenge the City Commission's authority to interpret its own franchise which has already been ruled upon by the Court as a matter of law.

Montana-Dakota requests that CEC's motion for reconsideration be denied.

Dated this 28th day of February, 2006.

Respectfully submitted,
Montana-Dakota Utilities Co., a Division of
MDU Resources Group, Inc.

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