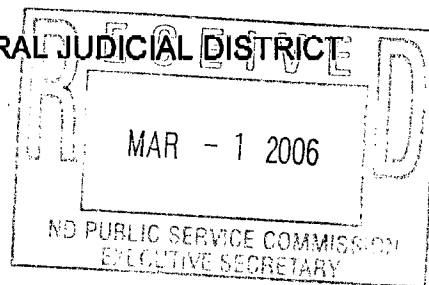


STATE OF NORTH DAKOTA

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. )

**PLAINTIFF'S BRIEF IN SUPPORT  
OF MOTION FOR CONTINUANCE**

**Docket Number 05-C-2303**

**INTRODUCTION**

This action for a declaratory judgment involves a territorial dispute between Capital Electric Cooperative (Capital) and Montana Dakota Utilities (MDU), a dispute over which has the superior legal right to provide electric service in an area known as Part of Boulder Ridge First Addition to the City of Bismarck Boulder Ridge, a subdivision in northwest Bismarck (Boulder Ridge).

**RELEVANT FACTS**

1. Capital commenced a declaratory judgment action by Summons and Complaint dated November 30, 2005.

2. On December 19, 2005, the City of Bismarck filed a Motion to Dismiss or in the Alternative for a More Definite Statement.
3. On December 19, 2005, the PSC filed its Answer.
4. On December 20, 2005, MDU filed its Answer and Counterclaim.
5. On January 6, 2006, the Plaintiff filed its Response to the Motion to Dismiss or in the Alternative for a More Definite Statement.
6. On January 12, 2006, the Plaintiff filed its Reply to Counterclaim.
7. Additional replies and responses to the Motion to Dismiss were filed by the parties.
8. On January 19, 2006, Capital filed its Notice of Hearing on Defendant's City of Bismarck Motion to Dismiss or in the Alternative for a More Definite Statement.
9. On January 24, 2006, the Court requested an explanation concerning the need for a hearing.
10. On January 27, 2006, anticipating the Court would enter an Order for a More Definite Statement, Capital withdrew its request for a hearing.
11. On January 30, 2006, the Court entered its Memorandum, Opinion and Order. In the Court's Order, without a request by any of the parties to the proceeding, the Court determined that Capital did not have a remedy under the declaratory judgment statute, but did have a remedy under N.D.C.C. Section 27-05-06(4). The Court further determined that "to avoid unnecessary delay and expense, the Court would consider CEC's Complaint

to be an appeal to the District Court of the City's decision, would allow CEC to file an appropriate pleading setting out the issue as noted above; and would allow the parties to address the issue at the hearing now scheduled for March 2, 2006. Should any Defendant object to this procedure, the Court will Order the Complaint dismissed and CEC and may proceed accordingly."

12. On February 1, 2006, Capital requested a ruling on the Motion for More Definite Statement and an opportunity to comply with an Order for More Definite Statement.
13. On February 3, 2006, Capital filed its Motion for Leave of Court to Amend Complaint and Notice of Motion and Brief.
14. On February 6, 2006, the City filed a letter with the Court indicating that "the City would have no objection to Capital Electric serving and filing an Amended Complaint." Pursuant to Rule 3.2:

"the adverse party shall have 10 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within five days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the Court unless counsel for any party requests oral argument on the motion. If any party who has timely served and filed a brief requests oral argument, the request must be granted."

Capital has timely filed a request for oral argument, which is scheduled for April 7, 2006. As the main Defendant in this action, the City, has consented, and the other named Defendants have not responded to the Motion to Amend Complaint, the Motion should be granted. The Motion to Amend is

still pending.

13. On February 22, 2006, Capital filed its Motion for Reconsideration and Brief and served its Notice of Motion. The time for responding for this Motion is still open. Capital has requested a hearing on this Motion which is also scheduled for April 7, 2006.
14. On February 28, 2006, Capital filed its Supplemental Brief outlining the issue as understood by Capital as whether this case would proceed as a declaratory judgment or an appeal.
15. Also on February 28, 2006, the Defendants (the City and MDU) filed their Supplemental Briefs. These Briefs indicate that these Defendants understand the hearing to be the hearing on the merits of the appeal.

#### **ARGUMENT**

There is procedural confusion as to the status of this lawsuit. Capital requests clarification of the issue to be addressed at the March 2, 2006, hearing. If the hearing is to allow the parties an opportunity for oral argument on the Court's conversion from a declaratory judgment action to an appeal, Capital withdraws its request for continuance. If the Court intended the hearing on March 2, 2006, to address Capital's appeal on its merits, Capital requests a continuance for the following reasons:

- a. Capital did not understand the hearing to be scheduled as the appeal on the merits.
- b. Capital has two pending Motions which must be addressed prior to a hearing

on the merits.

- c. Capital received the City's record on appeal on February 24, 2006, while counsel for Capital was out-of-town. Capital further requires a written transcript of the video meeting held by the City to properly prepare its case, whether framed as a declaratory judgment action or framed as an appeal.
- d. Capital requires sufficient time to review the City's record on appeal, including the written transcript, complete discovery and research, and to determine whether amendments or additions are necessary to complete the record. In addition, Capital has now been notified that the transcript of the Public Service Commission hearing has been completed. Capital also needs an opportunity to review this transcript as well to determine whether amendments or additions from this proceeding are necessary to complete the record.

### CONCLUSION

Capital requests, and is entitled to a meaningful opportunity to address the issue of appeal raised by the Court, not raised by the pleadings or the parties to the lawsuit and not previously briefed or argued. Whether this case proceeds as a declaratory judgment action, or an appeal pursuant to N.D.C.C. 28-34-01, affects the procedures available to the parties to prepare their case. If the hearing were to proceed as an appeal on its merits, Capital has no meaningful opportunity to prepare and present its case.

Capital requests that the time allotted on March 2, 2006, be converted to a

telephone conference to allow the Court and the parties to clarify the procedural matters and establish a scheduling order, consistent with the rules of North Dakota Rules of Civil Procedure and the North Dakota Rules of Court.

Dated this 15<sup>th</sup> day of March, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

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