

STATE OF NORTH DAKOTA

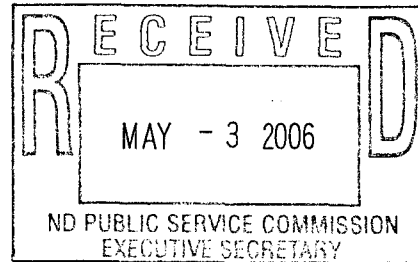
IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc.,)
)
 Appellant,)
)
 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,)
)
 Appellees.)



**DEFENDANT CITY OF BISMARCK'S
 ANSWER TO AMENDED COMPLAINT
 AND NOTICE OF APPEAL**

COMES NOW defendant City of Bismarck (hereinafter "Bismarck") for its answer to plaintiff Capital Electric Cooperative, Inc.'s (hereinafter "Capital Electric") Amended Complaint and Notice of Appeal (hereinafter "plaintiff's Amended Complaint"), states and alleges as follows:

I

Bismarck denies each and every allegation, matter and thing in plaintiff's Amended Complaint, except that which is hereinafter admitted, qualified or explained.

II

Bismarck admits the allegations in paragraphs II and VII of plaintiff's Amended

Complaint.

III

Bismarck asserts the allegations in paragraph IV of plaintiff's Amended Complaint are unintelligible. It is unclear what Capital Electric means by the term "constitutional body".

IV

Bismarck is without sufficient knowledge or information to either admit or deny the allegations in paragraphs I, III and XI of plaintiff's Amended Complaint.

V

Bismarck admits the allegations contained in paragraph V of plaintiff's Amended Complaint and asserts the franchise was created by a franchise agreement, which speaks for itself.

VI

With respect to the allegations contained in paragraph VI of plaintiff's Amended Complaint, Bismarck admits Capital holds a franchise and asserts the franchise was created by a franchise agreement, which speaks for itself. Bismarck alleges the franchise was granted on May 25, 1993, not May 23, 1993.

VII

With respect to the allegations in paragraph VIII of plaintiff's Amended Complaint, Bismarck admits that Capital Electric filed a complaint on or about September 28, 2005. Without admitting the accuracy of the complaint, Bismarck asserts that the complaint speaks for itself.

VIII

Bismarck denies the allegations in paragraphs IX and X of plaintiff's Amended

Complaint and asserts that Capital's brief and presentation speak for themselves.

IX

With respect to the allegations in paragraph XII of plaintiff's Amended Complaint, Bismarck admits the President of the Board of City Commissioners and the City Administrator executed a document titled "Findings, Conclusions Decision and Order" "In the Matter of a Petition to Declare Franchise Rights Filed by Montana Dakota Utilities Co." With respect to the remaining allegations in paragraph XII of plaintiff's Amended Complaint, Bismarck alleges the document speaks for itself.

X

With respect to the allegations in paragraphs XIII and XXIV of plaintiff's Amended Complaint, Bismarck alleges the November 14, 2005 Board of City Commissioners' Conclusions of Law speaks for itself. Bismarck alleges North Dakota case law speaks for itself. Further, Bismarck specifically denies all legal conclusions alleged by Capital Electric, and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, specifically with respect to paragraph XIII, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority. Specifically with respect to paragraph XXIV, Bismarck denies the Board of City Commissioners' conclusions of law and the November 14th Order do not sufficiently explain its rationale for its decision. There is a clear summary of the Commission's rationale and reasoning.

XI

With respect to the allegations in paragraphs XIV, XV, XVI, XVII, XIX, XX, XXIII, XXVII, XXVIII, XXX, XXXI and XXXII of plaintiff's Amended Complaint, Bismarck asserts North Dakota statutes, constitution, case law, and Bismarck ordinances, resolutions and

regulations speak for themselves, as do any brief(s) filed by Capital in relation thereto. Bismarck specifically denies all legal conclusions and any other claims alleged by Capital Electric in the aforementioned paragraphs and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority. Further, paragraph XXIII fails to articulate in what way Capital Electric was allegedly denied due process. Bismarck asserts Capital Electric was not denied due process.

XII

With respect to the allegations in paragraph XVIII of plaintiff's Amended Complaint, Bismarck alleges Montana-Dakota's Petition to the Board of Commissioners of the City of Bismarck and the November 14, 2005 Order speak for themselves. Bismarck asserts the North Dakota case law and constitution speak for themselves. Bismarck specifically denies all legal conclusions alleged by Capital Electric. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XIII

Bismarck asserts the allegations in paragraph XXI of plaintiff's Amended Complaint are unintelligible. It is unclear what Capital Electric means by the phrase "takes exception to and objects to...." The paragraph does not specify what findings are objected to. These allegations are therefore denied.

XIV

With respect to the allegations contained in paragraphs XXII and XXV of plaintiff's Amended Complaint, Bismarck specifically denies the November 14, 2005 order was arbitrary, capricious or unreasonable. Bismarck specifically denies all legal conclusions alleged by Capital

Electric. Bismarck denies the November 14, 2005 Order was not in accordance with the law. With respect to the allegations contained in paragraph XXII of plaintiff's Amended Complaint, Bismarck further asserts the allegations in paragraphs XXII and XXV of plaintiff's Amended Complaint are unintelligible because the paragraphs do not specify how the Order is not in accordance with the law or how it is arbitrary, capricious and unreasonable. The paragraphs are conclusory without detail.

XV

With respect to the allegations in paragraph XXVI of plaintiff's Amended Complaint, Bismarck asserts Capital Electric's franchise, Area Service Agreement between Capital and Montana-Dakota and the November 14, 2005 Order speak for themselves. Bismarck asserts North Dakota statutes, constitution, case law, and Bismarck ordinances, resolutions and regulations speak for themselves. Bismarck specifically denies all legal conclusions alleged by Capital Electric in the aforementioned paragraphs and asserts that all findings by the Board of City Commissioners regarding franchise issues are well grounded and proper. Further, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XVI

The allegations in paragraph XXIX of plaintiff's Amended Complaint are unintelligible to the extent they allege that the North Dakota Public Service Commission is a "constitutional body". Bismarck specifically denies all legal conclusions alleged by Capital Electric and any other allegations by Capital Electric in paragraph XXIX of plaintiff's Amended Complaint.

XVII

With respect to the allegations in paragraph XXXIII of plaintiff's Amended Complaint, Bismarck denies Capital Electric is a person. Capital Electric's allegation that it "is affected by

the November 14 Order” is unintelligible. These allegations are denied.

DEFENSES

XVIII

Bismarck realleges all previous allegations and denials.

XIX

Bismarck alleges that plaintiff’s Amended Complaint fails to state a claim upon which relief may be granted.

XX

That Capital Electric’s claims are barred by the applicable statute of limitations.

XXI

That plaintiff’s Amended Complaint is barred due to illegality, estoppel, laches, release, res judicata, collateral estoppel, and waiver.

XXII

Bismarck alleges that if Capital Electric did suffer any loss, injury or damage, it was due to facts or circumstances over which Bismarck had no control.

XXIII

That as to the damages claimed by Capital Electric, Bismarck denies that Capital Electric was damaged at all or to the extent claimed.

XXIV

That there has been a failure to mitigate damages, if any, by Capital Electric.

XXV

Bismarck claims immunity pursuant to the relevant provisions of Chapter 32-12.1 of the North Dakota Century Code and other applicable provisions of North Dakota law governing

immunity and political subdivisions.

XXVI

That plaintiff lacks standing.

XXVII

That the relief sought by plaintiff may be in violation of statutory law (including but not limited to that set forth in N.D.C.C. ch. 10-13) and/or plaintiff's articles of incorporation, thereby preventing plaintiff from receiving the relief requested.

XXVIII

That the district court lacks subject matter jurisdiction to review Bismarck's November 14, 2005 Order. Should the court be found to have jurisdiction, it is limited to a determination of whether Bismarck acted arbitrarily, capriciously or unreasonably, or whether there is not substantial evidence to support the decision, as required by N.D.C.C. Ch. 28-34 and other North Dakota law.

XXIX

That plaintiff's Amended Complaint requests an advisory opinion.

XXX

That plaintiff's Amended complaint is moot.

XXXI

That plaintiff's notice of appeal is untimely.

XXXII

That declaratory relief is not available to plaintiff.

XXXIII

That no justiciable controversy exists.

XXXIV

That Capital Electric has waived the right to appeal, if any such right ever existed, because, among other things, Capital Electric has not complied with the appeal requirements set forth in N.D.C.C. Ch. 28-34 and other North Dakota law.

XXXV

That the Board of City Commissioners' decision was within its powers as set forth in the North Dakota Constitution, N.D.C.C. § 40-05-01(57), Home Rule Charter for the City of Bismarck, and other North Dakota law. Regardless, the Court has already rendered its decision on the Board of City Commissioners' jurisdiction and authority.

XXXVI

Capital Electric has failed to exhaust its administrative remedies.

WHEREFORE, Bismarck requests plaintiff's Amended Complaint be in all things dismissed; that Bismarck recover its costs and disbursements herein; and that the Court award such other relief as the Court may deem just and proper.

Dated this 2nd day of May, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

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