

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.)

BRIEF IN SUPPORT OF MOTION
TO DISMISS AMENDED
COMPLAINT AND NOTICE
OF APPEAL

The City of Bismarck, North Dakota,)

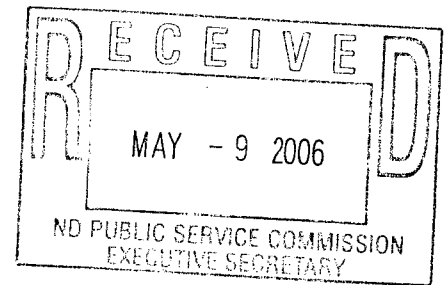
and)

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

Defendant and Counterclaimant)
and)

The Public Service Commission of)
North Dakota,)

Defendants.)



COMES NOW Montana-Dakota Utilities Co., a division of MDU Resources Group, Inc., and for its Brief in Support of Motion to Dismiss Amended Complaint and Notice of Appeal says:

The Court granted Capital Electric Cooperative's Motion to Amend Complaint on April 10, 2006. The Amended Complaint was served by Plaintiff on April 24, 2006. In Orders entered in this case dated January 30, 2006 and March 14, 2006, Burleigh County District Court, the Honorable Bruce Haskell, District Judge, decided all issues raised by plaintiff Capital Electric Cooperative, Inc. in its Amended Complaint. The Amended Complaint should be dismissed by the Court and the

parties permitted to enter Judgment based on orders already entered in this case.

1. The first request for relief in the Amended Complaint is for declaratory relief pursuant to §32-23, N.D.C.C. The same claim for relief was made by Capital Electric Cooperative in its first Complaint in this case dated November 30, 2005. All of the allegations contained in the November 30, 2005 Complaint are contained in the Amended Complaint, and the same remedy is requested. The Court, in its Memorandum Opinion and Order dated January 30, 2006, found the Declaratory Relief requested was not available. The Court found that neither of the requests for relief set out in the Complaint were within the scope of a declaratory judgment action. Capital Electric Cooperative made two “challenges” to the City of Bismarck’s authority in its Complaint. The first was to the “. . . City’s authority to issue an order on the petition”; and the second was to claim the City’s decision was wrong. The Court, in its January 30, 2006 Order, agreed to treat the Complaint for Declaratory Relief as an Appeal from City of Bismarck, City Commission, Findings, Conclusions, Decision and Order dated November 14, 2005 under §27-05-06(4) N.D.C.C. In summary, the first claim for relief in the Amended Complaint has been determined by the Court. The Court has ordered, after hearing all parties, that declaratory relief is not available.

2. The Amended Complaint contains a second request for relief, which is an Appeal from City of Bismarck City Commission Findings, Conclusions, Decision and Order dated November 14, 2005. Although Capital Electric Cooperative did not

properly serve a Notice of Appeal of the City's Findings, Conclusions, Decision and Order pursuant to §28-34-01, N.D.C.C., the Court ordered that the Complaint requesting Declaratory Relief could be considered an appeal from the City Commission's Findings, Conclusions, Decision and Order. The Court heard the parties regarding the appeal from the City Commission; reviewed the record from the City proceedings as provided to it; received and reviewed briefs related thereto; and finally, entered its Order on March 14, 2006 finding that: ". . . Capital has not shown that the Findings, Conclusions, Decision and Order of the Commission were arbitrary, capricious, or unreasonable. The Court finds that the order was based on a rational mental process supported by the evidence in the record on appeal. The Court orders that Capital's appeal is hereby denied."

There are no claims for relief in the Amended Complaint not already decided by the Court. Only two issues were raised: (1) whether the plaintiff should have declaratory relief, to which the Court answered "no"; and (2) whether the City Commission Findings, Conclusions Decision and Order, dated November 14, 2005 was arbitrary, capricious and unreasonable, to which the Court also answered "no".

For the above reasons, the Amended Complaint of Capital Electric Cooperative, Inc. should be dismissed and the parties be permitted to enter judgment on the basis previously ordered by the Court.

Dated at Bismarck, North Dakota, this 8 day of May, 2006.

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

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