

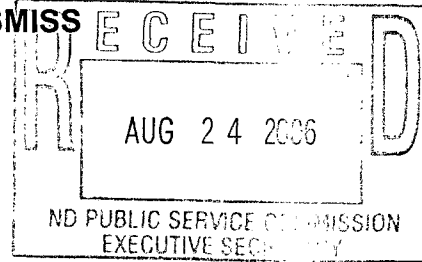
STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

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

CIVIL NO. 06-C-1177

**MONTANA-DAKOTA UTILITIES CO.'S  
RETURN TO CAPITAL ELECTRIC  
COOPERATIVE'S MOTION AND  
BRIEF IN SUPPORT OF MOTION  
TO DISMISS**



COMES NOW Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., and by and through its counsel, says:

Capital Electric Cooperative, Inc. (hereafter "CEC") contends Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (hereafter "MDU") did not properly serve the Attorney General of North Dakota when it served its Notice of Appeal and Specifications of Error in this case. On June 22, 2006, the North Dakota Public Service Commission (hereafter "PSC") entered an Order directing that MDU cease and desist from providing electric service to Boulder Ridge First Addition to the City of Bismarck, and to offer to sell certain of its facilities in Boulder Ridge to CEC. On June 23, 2006, MDU filed its Notice of Appeal and Specifications of Error with the South Central Judicial District in Burleigh County, North Dakota. The Administrative Agencies Practice Act (N.D.C.C. Chap. 28-32) contains procedures to follow in appealing an order of the PSC. The appeal from the PSC order in this case is to the District Court of

Burleigh County. The statute requires service of the notice of appeal and specifications of error upon the agency, upon the attorney general or an assistant, and upon other parties to the litigation. N.D.C.C. § 28-32-42 (4). It is undisputed that MDU completed service upon Special Assistant Attorney General of the State of North Dakota and Chief Counsel of Public Service Commission, William Binek, and upon the Public Service Commission. CEC contends, even though Mr. Binek is a special assistant attorney general, that service made upon Mr. Binek is insufficient service.

**1. The special assistant attorney general for Public Service Commission is a proper party to receive notice of appeal and specification of error in this case.**

A. William Binek, Special Assistant Attorney General and Chief Counsel to the Public Service Commission, was personally served notice of appeal and specification of errors in this appeal from a Public Service Commission Order on June 23, 2006. He received the notice on June 23, 2006 after a true and correct copy of the Notice was delivered to him by a process server on behalf of the appellant, MDU. (See Exhibit 3, CEC Motion and Brief). Mr. Binek made no objection to his ability to accept service.

As a special assistant attorney general, Mr. Binek has the same powers as an assistant attorney general, except to the extent limited by his appointment as a special assistant. N.D.C.C. § 54-12-11. The statute is clear: "The powers conferred upon special assistant attorneys general are the same as are exercised by the regular assistant attorneys general, unless the powers are limited specifically by the terms of the appointment." N.D.C.C. § 54-12-08. The assistant attorney general has the power to receive notice of appeal and specifications of error in an appeal from the

Administrative Agencies Practice Act in the following language: "4. An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken upon the administrative agency concerned, upon the attorney general or an assistant attorney general and upon all the parties of the proceedings before the administrative agency . . .". N.D.C.C. § 28-32-42 (4). The special assistant, by this logic, also has the power to accept service of notice of appeal pursuant to N.D.C.C. § 28-32-42 (4), unless the power is limited by his appointment documents.

In his appointment document as a special assistant attorney general, attached as Exhibit 4 to CEC Brief, William W. Binek is appointed to provide legal services to the North Dakota Public Service Commission and there is no limitation in the appointment excepting the power of an assistant attorney general to receive service of process of a notice of appeal.

A clear example of the special assistant attorney general having power to accept notice of appeal under the Administrative Agencies Practice Act is clearly evident in MacDonald v. North Dakota Commission on Medical Competency, 492 N.W.2d 94. In the MacDonald case, the court addressed jurisdictional service problems related to the appeal of an order to the district court pursuant to § 28-32-15.<sup>1</sup> In § 28-32-15, service was required to be made upon the attorney general or an assistant just as it is in the current statute (N.D.C.C. § 28-32-42). In the MacDonald case, the court addressed whether it was sufficient for the appellant to serve the agency as the Commission on Medical Competency, or rather was it required that the Board of Medical Examiners also

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<sup>1</sup> N.D.C.C. § 28-32-15 contains the same provisions as § 28-32-42 as it relates to service of notice of appeal upon the attorney general or assistant attorney general. In 2001, all of the Administrative Agencies Practice Act was repealed and reenacted. The section in effect before 2001, N.D.C.C. § 28-32-15, was the section setting out appeal rights and procedures.

be served. The court found service on the commission was appropriate. But, what is more important about the case and what is instructive for the purposes of this case, is that the **appellant served the special assistant attorney general with the notice of appeal and specifications of error** in that case. The special assistant also represented the Commission. No question was raised at trial with regard to service on the special assistant attorney general, no argument was made that the special assistant attorney general has no authority to receive service of the notice of appeal, nor was the service found by the court to be ineffective.

Even more instructive is Sande v. State, 440 N.W. 2d 264 (1989) in which the appellant served the notice of appeal on the attorney who represented the Board of Nursing during the administrative hearing. The record reflects the attorney was James S. Hill, a private practice attorney, appointed as a special assistant attorney general to represent the Board of Nursing specifically for the proceeding before the Board. The Court noted the following regarding service of the notice of appeal and notably made no distinction regarding Mr. Hill's status as a special assistant attorney general:

The documents were timely served on the assistant attorney general who represented both the Board and the State in the administrative proceedings. The Board admitted that service on the assistant attorney general was proper service on the attorney general, but asserted that the mandate for service on the Board demanded service on at least one of the Board's members. Sande argued, and the district court ruled, that service on the assistant attorney general was sufficient under the Rules of Civil Procedure. We agree.

440 N.W.2d at 266.

In this case, the same situation arises. Special Assistant General William W. Binek represented the Commission. He also is a special assistant attorney general. Service on the attorney general in this case is effective just as it was in the MacDonald and

Sande cases. The obvious purpose for the requirement to serve of a notice of appeal on the attorney general or assistant attorney general is to assure that the attorney authorized by law to represent the agency is timely given notice of the appeal. In this case, the attorney specially appointed as the assistant attorney general to represent the Public Service Commission is Mr. Binek. The purpose of the statute is fulfilled when the attorney specially appointed as the assistant attorney general to represent the agency is the assistant attorney general served with the notice of appeal.

Mr. Binek is also Chief Counsel of the Public Service Commission ("Commerce Counsel") and in that capacity is given powers and duties by N.D.C.C. § 49-01-09. N.D.C.C. § 49-01-09 makes it clear that the commerce counsel (chief counsel to the PSC) has the authority and the power to ". . . appear for and represent the state at all hearings of the Commission or appeals therefrom when necessary." Accordingly, the language of N.D.C.C. § 49-01-09 authorizes the designated assistant attorney general to accept notice of appeal and specifications of error pursuant to N.D.C.C. § 28-32-42 (4). The Legal Division Organization Chart found in the current edition of the Administrative Code lists the legal division as commerce counsel following NDAC 69-01-01-01. In addition, commerce counsel Binek appears on several occasions in the past as commerce counsel on various PSC orders, to include Case No. PU-1564-98-428, which is a case completed in April, 2000. Because Mr. Binek, as commerce counsel, is able to represent the State in administrative appeals, as the statute indicates, he may also accept service of notice of appeal pursuant to Chapter 28-32, and, in fact, Mr. Binek did accept service of process on behalf of the attorney general in this case as is apparent from Exhibit 3 to CEC Motion and Brief.

In its brief, CEC contends (Page 5) that limitations to his appointment states that "he is not an employee of the Office of Attorney General; thus he has no authority to accept service on the Attorney General's behalf." That conclusory remark is misleading. There is a requirement that all assistants, special assistants and other attorneys who represent the State or its agencies be appointed by the attorney general. N.D.C.C. § 54-12-08. Some are employees of the Office of Attorney General and some are not. CEC further argues that as a result of not being employed by the attorney general somehow the special assistant is not permitted to accept service. Employment does not have any bearing on whether he can accept service of notice of appeal. In the absence of a limitation prohibiting acceptance of service, N.D.C.C. § 49-01-09 suggests Mr. Binek can, in fact, accept service, and as a special assistant attorney general, even without the authority set out in § 49-01-09, he has the authority as agreed above. He is the attorney for the State in his representation of the PSC, and by that representation is authorized to accept service of process and notice of appeals pursuant to the Administrative Agencies Practice Act.

In its brief, CEC relies upon Benson v. Workforce Safety and Insurance, 2003 ND 193. The Benson case is of no value in determining service in the instant case. In Benson, neither the agency nor the attorney general were served. In the instant case, there is service upon the agency and service upon the attorney general, which, of course, is being contested, but nonetheless has been completed, whereas in Benson it had not. Another case relied upon is State v. Higgins, 145 N.W.2d 478, 481 (N.D. 1966). State v. Higgins is a criminal case dealing with criminal rules and procedures which are significantly different than rules related to appeals and administrative

proceedings. State v. Higgins is of no precedential value. The third case relied upon is Reliable Incorporated v. Stutsman County Commission, 409 N.W.2d 632, 634 (N.D.D. 1987). Reliable is an appeal from a public service commission order to the district court that has to do with completion of service by mail and whether all parties to the proceeding before the PSC need to be served notice of appeal -- not issues in this case.

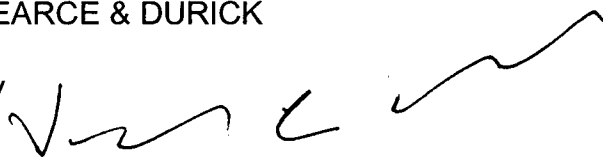
In summary, MDU asks that the Court enter its order directing CEC's Motion to Dismiss be denied and that the parties proceed with the appeal as originally noticed.

Dated this 23rd day of August, 2006.

Respectfully submitted,

PEARCE & DURICK

By



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STATE OF NORTH DAKOTA

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CIVIL NO. 06-C-1177

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AFFIDAVIT OF SERVICE

North Dakota Public Service Commission )  
and Capital Electric Cooperative, Inc., )  
Appellees. )

STATE OF NORTH DAKOTA )  
COUNTY OF BURLEIGH ) ss.  
)

Evelyn Froebe, being first duly sworn on oath, does depose and say: That she is over the age of eighteen years, and not a party to the above-entitled matter;

That on the 23rd day of August, 2006, this affiant served a true and correct copy of the following document in the above-captioned action:

- (1) MONTANA-DAKOTA UTILITIES CO.'S RETURN TO CAPITAL ELECTRIC COOPERATIVE'S MOTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS

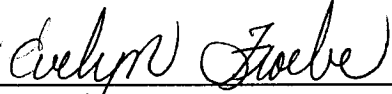
That the copies of the above document were enclosed and secured in an envelope with postage duly prepaid and addressed as follows:

Carol Larson  
Pringle & Herigstad, P.C.  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702-1000  
*Attorney for Capital Electric Cooperative, Inc.*

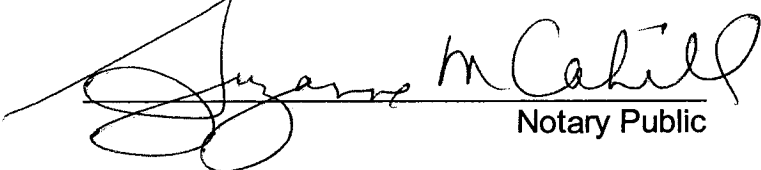
William W. Binek  
Special Assistant Attorney General  
Public Service Commission  
State Capitol  
Bismarck, ND 58505-0480  
*Counsel for The Public Service Commission of North Dakota*

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the parties intended to be so served.

That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil Procedure.

  
\_\_\_\_\_  
Evelyn Froebe

Subscribed and sworn to before me this 23rd day of August, 2006.

  
\_\_\_\_\_  
Notary Public

