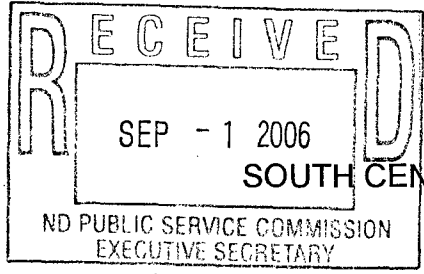


STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH



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.)

**CAPITAL ELECTRIC COOPERATIVE'S
REPLY BRIEF TO MONTANA-DAKOTA
UTILITIES' RETURN TO
CAPITAL ELECTRIC COOPERATIVE'S
MOTION TO DISMISS**

Case No. 06-C-1177

The issue in Sande v State, 440 N.W.2d 264 (ND 1989) addressed the issue of whether service of process for the assistant attorney general representing the Board of Nursing constituted service on the Board. The Supreme Court concluded that it did. The case identifies the attorney as an assistant attorney general not as a "special" assistant attorney general. This case does not stand for the proposition that service of process on a "special" assistant attorney general constitutes service on the attorney general.

The purpose for the requirement of service of notice of appeal on the attorney general, or an assistant attorney general, is to assure that service will be made on the chief legal officer of the State of North Dakota, the Attorney General. Service on the administrative agency is separately required, and can be accomplished by service on its attorney, who may be a "special assistant attorney general."

MDU argues that the special assistant attorney general is the attorney for the state in his representation of the PSC. That statement flies in the face of the unambiguous terms of the special assistant attorney general appointment agreement with William Binek which states the special assistant shall provide legal services to the PSC only for the purpose of "representing the North Dakota Public Service Commission." Exhibit 4.


N.D.C.C. § 69-01-01-01(2c) states that "The attorney general is the attorney for the commission but based on commission recommendation has appointed counsel to act as legal advisor to the commission." The entire appointment agreement for the special assistant attorney general is a limitation on his appointment. Exhibit 4. By the express limitation on the appointment of William Binek as "special" assistant attorney general, the Attorney General did not authorize Mr. Binek to represent the state, rather Mr. Binek's appointment is limited to representation of the PSC only. The Attorney General has not relinquished his right to serve a chief legal counsel to the State of North Dakota nor has he relinquished his right to service of process of administrative agency appeals.

Mr. Binek did not accept service on behalf of the Attorney General. He was personally served solely in his capacity as "Special Assistant Attorney and Counsel to Public Service Commission" as set forth on Exhibit 3. He did not hold himself out as an assistant attorney general, nor did he hold himself out as having authority to accept service on behalf of the Attorney General.

For these reason, and the reasons stated more fully in Capital's brief of August 10, 2006, the appeal must be dismissed per N.D.R.Civ.P. 12(h)(3) because the district court lacks subject matter jurisdiction.

Dated this 31 day of August, 2006.

PRINGLE & HERIGSTAD, P.C.

By: 

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381