

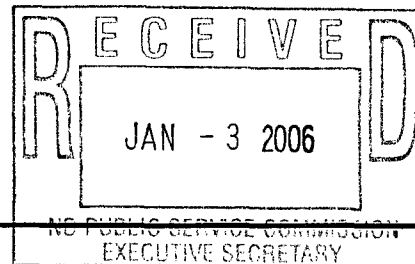


MONTANA-DAKOTA

UTILITIES CO.

A Division of MDU Resources Group, Inc.

400 North Fourth Street
Bismarck, ND 58501
(701) 222-7900



Direct Dial No.
(701) 530-1016
(701) 530-1731 (fax)

December 30, 2005

Debra Simenson
Clerk of District Court
Burleigh County Courthouse
PO Box 1055
Bismarck, ND 58502-1055

Re: Capital Electric v. City of Bismarck, et al.
Burleigh County Civil No. 05-C-2303

Dear Ms. Simenson:

Enclosed for your filing in the above referenced proceeding is the brief of the defendant Montana-Dakota Utilities Co. in support of the motion by the City of Bismarck to dismiss the plaintiff's complaint.

Please contact me if you have any questions regarding this filing.

Sincerely,

Daniel S. Kuntz
Senior Attorney

DSK/djv
Enclosure

cc: Carol K. Larson
Randall J. Bakke
William W. Binek
Jerome Kettleon

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Capital Electric Cooperative vs.
Montana-Dakota Utilities Co.
Complaint

Case No. 05-C-2303

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

Dorothy Vedvick deposes and says that:

she is over the age of 18 years and not a party to this action and, on the 30th day of **December, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with fully prepaid, securely sealed and containing a copy of:

Brief of Montana-Dakota Utilities Co. In Support of Motion to Dismiss

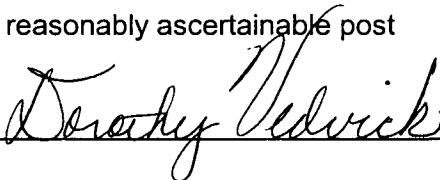
The envelopes were addressed as follows:

Carol K. Larson
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702


Randall J. Bakke
Smith Bakke Porsborg & Schweigert
116 North 2nd St.
Bismarck, ND 58501

William W. Binck
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

The address shown is the respective addressee's last reasonably ascertainable post office address.



Subscribed and sworn to before me
this 30th day of December, 2005.



Notary Public



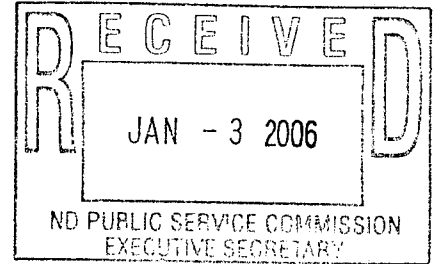
**State of North Dakota
County of Burleigh**

**In District Court
South Central Judicial District**

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

**BRIEF OF
MONTANA-DAKOTA UTILITIES CO.
IN SUPPORT OF MOTION TO
DISMISS**

Case No. 05-C-2303



Brief of Montana-Dakota Utilities Co. in Support of Motion to Dismiss

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), submits this brief in support of the motion brought by the City of Bismarck to dismiss the complaint of Capital Electric Cooperative ("CEC").

SUMMARY

In its complaint, CEC makes a vague request for "judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." CEC's complaint, however, acknowledges that on November 14, 2005, the Bismarck Board of City Commissioners adopted "Findings, Conclusions Decision and Order" declaring franchise rights of Montana-Dakota and CEC under their respective franchises to provide electric distribution service within the City of Bismarck. CEC's complaint does not challenge the determinations made by the Board of City Commissioners nor did CEC attempt to appeal from the Board's Order.

Moreover, CEC does not allege that it has sought a franchise to serve any of the areas which the Board of City Commissioners determined were not within the scope of CEC's existing franchise. Until CEC seeks a franchise to serve these areas and the City has acted on that request, CEC has not exhausted its administrative remedies.

ARGUMENT

A. CEC's complaint does not state a basis for Declaratory Relief.

The issuance of a municipal franchise is a legislative function of the City founded upon the police power inherent in the State and granted to the municipality. See Braunagel v. City of Devils Lake, 2001 N.D. 118, 629 N.W.2d 567; A & H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855 (N.D. 1994); Tayloe v. City of Wahpeton, 62 N.W.2d 31 (N.D. 1953). The police power is one of the most essential powers of city government and its imperative necessity precludes any limitation on it when not arbitrarily used. Tayloe v. City of Wahpeton, *supra*.

The North Dakota Constitution and the North Dakota Legislature have given municipalities the authority to regulate utility franchises. North Dakota Constitution, Article VII, § 11; N.D.C.C. § 40-05-01. Consequently, the designation and regulation of utility franchises is a legislative function which can neither be performed by nor delegated to the judiciary. See City of Horace v. City of Fargo, 2005 ND 61, 694 N.W.2d 1. In A & H Services, Inc. v. City of Wahpeton, *supra* at 857, the Supreme Court stated that once it is determined that a city has the general authority to regulate a certain subject matter, the burden is upon the party challenging the action to demonstrate how that authority was exceeded. The Court also described the limited role of the Courts in reviewing actions of a city in the exercise of its authority:

Our review of a municipality's adoption, interpretation and application of its own ordinances is strictly limited by the doctrine of separation of powers. A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law. (Citations omitted) Courts will not substitute their judgment for that of the municipality's governing body in interpreting or applying ordinances unless an abuse of discretion is clearly shown. (Citation omitted) To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably. (Citation omitted)

514 N.W.2d at 858.

CEC's complaint does not allege that the Bismarck Board of City Commissioners exceeded its authority in determining the franchise rights of Montana-Dakota and CEC in the City's order of November 14, 2005. Nor does CEC allege that the Board acted arbitrarily, oppressively or unreasonably in the issuance of its order. Because CEC's complaint does not challenge the validity of the Board's November 14, 2005 order, the Court should not exercise jurisdiction in attempting to declare unspecified franchise rights that either have been or should be determined in the first instance by the Board in the proper exercise of its police powers. Declaratory relief is available for resolution of issues that are not otherwise subject to the City's determination rather than for the usurpation or avoidance of authority that has been delegated to the City. Tooley v. Alm, 515 N.W.2d 137 (N.D. 1994). While declaratory and injunctive relief are available if a municipality fails to follow statutory procedures in the exercise of its authority, they are not available to test the wisdom of a city's action. Braunagel v. City of Devils Lake, supra at ¶ 12.

Even if CEC's complaint was intended as an attempt to challenge the City Commission's order of November 14, 2005, a declaratory judgment action is not the proper vehicle to do so. The purpose of declaratory judgments is to settle uncertainty

and insecurity with respect to rights, status and other legal relations and not for determining the correctness of an order. N.D.C.C. § 32-23-12; 22A Am. Jur. 2d Declaratory Judgments § 82. Similarly, declaratory relief is inappropriate where an alleged violation of rights has already occurred. Richland County Water Resources Board v. Pribbernaer, 442 N.W.2d 916 (N.D. 1989). Accordingly, CEC's complaint for declaratory relief would not be appropriate to challenge the correctness of the Commission's order of November 14, 2005.

B. CEC failed to exhaust its Administrative Remedies.

The doctrine of separation of power also requires those who seek judicial review of administrative matters must first exhaust their administrative remedies. Medical Arts Clinic, PC. v. Franciscan Initiatives, Inc., 531 N.W.2d 289, 296 (N.D. 1995). The exhaustion requirement serves the dual objective of preserving agency authority and promoting judicial efficiency. Medcenter One, Inc. v. N.D. State Board of Pharmacy, 1997 ND 54, 561 N.W.2d 634. The doctrine preserves agency authority by recognizing the agency's initial decision making authority. Id. Failure of a plaintiff to pursue administrative remedies and instead seek judicial declaratory relief would have the courts thrust into the local controversy and result in second guessing of the municipality prematurely which is contrary to judicial efficiency. Gottbreht v. State, 1999 N.D. 159, 598 N.W.2d 794. After a party has exhausted its administrative remedies, a party may seek judicial review through an appeal or special proceeding. See Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc., supra at 296.

The doctrine of exhaustion of administrative remedies is also appropriate with respect to any request by CEC for a declaration of its franchise rights. Although the

North Dakota Legislature has provided the District Court with discretionary jurisdiction under Chapter 32-23 to declare rights under an ordinance or franchise, the citizens of North Dakota adopted amendments to the North Dakota Constitution in 1982 that included the Article VII, Section II:

The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly.

CEC has not sought a franchise for any area which the City Commission determined was not within the geographic scope of CEC's existing franchise. Until it does so, CEC has not exhausted its administrative remedies with respect to any area other than Boulder Ridge First Addition which the Board of City Commissioners determined in its November 14, 2005 Order would be served by Montana-Dakota. Under the constitutional limitation set forth above, the Court should not exercise its declaratory judgment jurisdiction in response to a request to effectively avoid the constitutional authority of the City of Bismarck to determine the franchise rights of the affected utilities to operate within the City.

CONCLUSION

Because CEC's complaint does not challenge the validity of the determinations made by the Board of City Commissioners in its order issued November 14, 2005, and because CEC has not exhausted its administrative remedies by seeking a franchise to serve those areas (other than Boulder Ridge) which the City of Bismarck determined are not within CEC's existing franchise, CEC has not exhausted its administrative remedies and its complaint should be dismissed.

Dated this 30th day of December, 2005

Respectfully submitted,

Daniel S. Kuntz (ID# 03490)
MDU Resources Group, Inc.
1200 West Century Avenue
P.O. Box 5650
Bismarck, ND 58506-5650
(701) 530-1016

Pearce & Durick
Patrick W. Durick (ID# 03141)
Jerome C. Kettleon (ID# 03095)
314 East Thayer
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

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

By: 