

January 13, 2006

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

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

Dear Ms. Simenson:

Enclosed for filing and the Court's consideration in the above-referenced matter, please find the following original documents:

1. *Defendant City of Bismarck's Reply Brief in Support of Motion to Dismiss.*

Thank you for your attention to this matter.

Very truly yours,


Randall J. Bakke

RJB:jm
Encl.

cc: Carol K. Larson (w/encl.)
Daniel S. Kuntz (w/encl.)
William W. Binek (w/encl.)
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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc.,)
)
 Plaintiff,)
)
 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,)
)
 Defendants.)

**DEFENDANT CITY OF BISMARCK'S
 REPLY BRIEF IN SUPPORT OF
 MOTION TO DISMISS**

I. INTRODUCTION

Plaintiff Capital Electric Cooperative, Inc. [hereinafter "Capital"] initiated an action against defendants via summons and complaint dated November 30, 2005. Capital's complaint alleges the Court has jurisdiction pursuant to N.D.C.C. ch. 32-23 (Declaratory Judgments) and Capital is requesting the court to declare its rights under a "franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." Complaint at p. 4 (copy attached as Exhibit A). The City moved that Capital's complaint be dismissed for failure to state a claim under N.D.R.Civ.P. 12(b)(vi) and for failure to exhaust administrative remedies. Alternatively, pursuant to N.D.R.Civ.P. 12(e), the City of Bismarck ["Bismarck"] requested the

Court order Capital to provide a more definite statement regarding the relief sought. Capital responded, and based on the response, it is clear that Capital's complaint must be dismissed as a matter of law.

II. APPLICABLE LAW AND ARGUMENT

A. Capital's Complaint Alleging The City Had No Right To Regulate Its Franchise Should Be Dismissed As A Matter Of Law

In its response brief, Capital contends that "the City Commission's decision and order of November 14, 2005, exceeds the scope of the Commission's authority; and [t]hat the City Commission's position as stated in its decision and order is wrong under applicable law." Capital's Response at 3-4. Capital claims the City's decision of November 14, 2005, was made outside the scope of the City Commission's "legislative authority." *Id.* at 4. Capital's claim that the decision was outside the scope of the City's authority is contrary to express North Dakota constitutional and statutory law.

North Dakota Constitution Article VII, § 11, specifically provides the governing board of the City has the power to franchise any public utility within the City and that no law may take away the power of the City's governing board to exercise its franchise authority. See also N.D.C.C. § 49-03-06(8). Further, the governing body of a city has the power "[t]o grant franchises or privileges to persons, associations, corporations, or limited liability companies, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same." N.D.C.C. § 40-05-01(57) (emphasis added); see also *A & H Services, Inc. v. City of Wahpeton*, 514 N.W.2d 855, 858 (N.D. 1994) ("A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law"). Capital is attempting to argue that the City's regulation of the

franchise rights granted CEC somehow infringes upon the judicial branch. Such a classification regarding whether the decision is legislative or judicial is unnecessary and misleading as the authority exercised by the City in this matter is clearly provided by law. The North Dakota Constitution and N.D.C.C. § 40-05-01(57) specifically allow the City to grant and regulate franchises. In support of its claim, Capital seems to claim that the City only has authority to perform “legislative functions.” Capital cites N.D.C.C. § 40-05-00.1(3) as support for this proposition. Capital’s argument fails to recognize that the section it cites is directly related to only N.D.C.C. ch. 40-05.1. See N.D.C.C. § 40-05.1-00.1 (governing home rule charters). Capital also entirely ignores N.D.C.C. ch. 40-05, which addresses powers of municipalities and sets forth various powers, including the right to grant and regulate franchises. See N.D.C.C. § 40-05-01(57). Attempting to label the City’s action as “judicial” or “legislative” is simply misleading and ignores applicable law.

The action of the City challenged by Capital in this case is a specific power granted to the City under the North Dakota Constitution and N.D.C.C. § 40-05-01(57). It is clear the City did not “overreach its authority,” as alleged by Capital in its response brief (although not in its Complaint), based upon the explicit statutory authority to regulate the use of Capital’s franchise and the City’s broad discretion in determining the manner and means of exercising its powers. The City’s November 14, 2005, decision is clearly within its power to regulate franchises within the City. Capital is attempting an end-around of the City’s authority to regulate electric franchises by seeking a judicial interpretation of the franchise beyond what the City clearly intended to provide Capital when the franchise was granted and is seeking franchise rights never granted. The North Dakota Constitution and N.D.C.C. § 40-05-01(57) allow the City to regulate Capital’s franchise. Therefore, Capital’s argument that the Commission’s decision exceeds its

authority fails as a matter of law.

Capital attempts to argue that the City has declared Capital's franchise rights. The City is vested with the authority to grant franchise rights and to regulate them. The City has exercised its authority to regulate its franchise agreement, which is provided for by law. Regardless, an action under N.D.C.C. ch. 32-23 is not the appropriate avenue for claiming the City exceeded its authority. See N.D.C.C. § 32-23-02 (declaratory judgment action is appropriate for construing rights under contract, but no mention of addressing question of whether government has exceeded its authority). If there was a time to challenge the City's authority to decide the issue, it was prior to the City's decision. Declaratory relief is not an appropriate avenue for challenging the City's authority or the correctness of the City's decision.

B. Capital Fails To Cite Any Law Which City Allegedly Failed To Properly Apply In Interpreting The Franchise Agreement

As stated by the North Dakota Supreme Court in A & H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855 (N.D. 1994):

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. 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. To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably.

Id. at 857-58 (citations and quotations omitted). The City's interpretation of the franchise agreement constituted a quasi-judicial act. See Bigwood v. City of Wahpeton, 565 N.W.2d 498, 501)(stating "Enactment of municipal ordinances are legislative functions, but interpretations of these ordinances by the municipality's governing body are quasi-judicial acts.")

Capital alleges on page 11 of its brief City incorrectly interpreted the franchise agreement

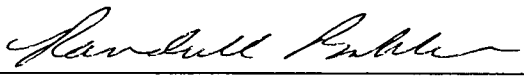
under applicable law. However, Capital fails to cite any law which the City allegedly failed to properly apply in interpreting the franchise agreement. Capital has not cited any law which allegedly supports its position. If Capital believes there is any law supporting its position, it must disclose it now before this Court decides the City's motion to dismiss. Capital cannot possibly establish an entitlement to relief without providing the legal support for its claim. Capital's assertion that it is sufficient for it to simply state there is legal support for its claims, without identifying the legal support therefore, cannot withstand City's motion to dismiss. By failing to identify any legal support for its claim, Capital effectively concedes lack of legal support, thereby waving its claims and its ability to argue it has legal support in the future in this action.

III. CONCLUSION

For the foregoing reasons and those discussed in the City's and MDU's additional briefs requesting dismissal, the City requests Capital's lawsuit be dismissed as a matter of law, including, but not limited to, for failure to state a cause of action.

Dated this 13th day of January, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT CITY OF BISMARCK'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** was on the 13th day of January, 2006, mailed to the following:

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By 
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