

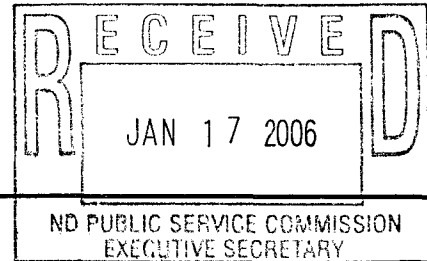


MONTANA-DAKOTA

UTILITIES CO.

A Division of MDU Resources Group, Inc.

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Bismarck, ND 58501
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January 13, 2006

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 Reply Brief of the defendant Montana-Dakota Utilities Co. in the above referenced proceeding.

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

Sincerely,

Daniel S. Kuntz
Assistant General Counsel

DSK/djv

Enclosure

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

**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.)

**REPLY BRIEF OF
MONTANA-DAKOTA UTILITIES CO.**

Case No. 05-C-2303

Montana-Dakota Utilities Co. ("Montana-Dakota") submits the following reply to the response brief of Capital Electric Cooperative ("CEC").

In its response to the City of Bismarck's motion for a more definite statement, CEC states that its grounds for a declaratory judgment are:

1. That the City Commission's decision in an order of November 14, 2005, exceeds the scope of the Commission's authority; and
2. That the City Commission's position as stated in its decision and order is wrong under applicable law.

CEC's statement confirms that CEC's complaint, at least in part, does not state a claim upon which relief can be granted and should be dismissed.

The City Commission acted within the scope of its authority and declaratory relief is not available to challenge the Commission's authority.

As acknowledged in CEC's complaint, the November 14, 2005 order of the Board of City Commissioners declared the franchise rights of Montana-Dakota and CEC under

their respective franchises to provide electric distribution service within the City of Bismarck. Within its order, the City of Bismarck determined that: (1) CEC's existing limited franchise did not encompass subdivisions annexed to the City of Bismarck after May 25, 1993; and (2) Montana-Dakota, under its unlimited franchise, should be the provider of electric distribution service in the Boulder Ridge subdivision.

Although nowhere indicated in the document, CEC now contends its complaint is challenging the authority of the Commission to determine the provider of electric service to Boulder Ridge under the existing franchises. CEC concedes that the City Commission has the legislative power to grant franchises but contends the Commission does not have judicial power to adjudicate conflicting claims between holders of franchises granted by the City. CEC's contention begs the question by its implied assumption that its existing franchise includes the Boulder Ridge subdivision. In its November 14, 2005 order, the City Commission interpreted CEC's franchise and correctly determined that the franchise did not extend to Boulder Ridge. Because CEC's existing franchise does not authorize service to Boulder Ridge, there is no conflict between authorized providers because only Montana-Dakota's franchise authorizes service in the area.

Although sometimes termed "quasi-judicial acts," the North Dakota Supreme Court has frequently recognized the authority of municipalities to interpret their ordinances and regulations. See Bigwood v. City of Wahpeton, 565 N.W. 2d 498, 501 (N.D. 1997) ("Enactment of municipal ordinances are legislative functions, but interpretations of these ordinances by the municipality's governing body are quasi-judicial acts."); City of Fargo v. Ness, 551 N.W. 2d 790 (N.D. 1996); A & H Services v.

City of Wahpeton, 514 N.W. 2d 855 (N.D. 1994). Even if the commission had determined that both franchises authorized service to the Boulder Ridge subdivision, the City Commission had the authority to interpret the franchises to resolve any conflicts and prevent duplication of service.

Moreover, declaratory relief is not available to challenge the jurisdiction of the City. Writs of Certiorari or Prohibition are appropriate remedies if a party contends a board or tribunal has exceeded its jurisdiction and there is no appeal or other plain, speedy or adequate remedy available to the party. N.D.C.C. Chapters 32-33 and 32-35; Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc., 531 N.W. 2d 289, 296 (N.D. 1995).

CEC's argument that its franchise is actually a contract is also without merit. If its franchise created a contractual relationship between the City and CEC, and CEC contends the City breached the contract by not allowing it to exercise that franchise authority, then its claim for relief should be for breach of contract and not a declaratory judgment. In addition, this argument is entirely inconsistent with CEC's other position that its complaint seeks to resolve a conflict between CEC and Montana-Dakota under the respective franchises. Certainly, the franchises do not create a contractual relationship between Montana-Dakota and CEC.

Because the City had authority to interpret its franchises and because a petition for declaratory relief is not available to challenge the jurisdiction of the City, CEC's complaint fails to state a claim upon which relief can be granted on its contention that the City's order exceeded the Commission's authority.

Declaratory relief is only limitedly available to review the City's interpretation of its franchise.

CEC's explanation of the second grounds for its complaint acknowledges that the City Commission's action on November 14, 2005 was an interpretation of CEC's franchise. CEC asserts, however that the City Commission incorrectly interpreted the franchise under applicable law.

Montana-Dakota does not contest that an action for declaratory relief may be available to review the City's construction of its franchises as a quasi-judicial act under N.D.C.C. § 32-23-02. The scope of that review, however, is strictly limited. A & H Services, Inc. v. City of Wahpeton, supra. Even for review of quasi-judicial acts, the separation of powers doctrine applies and the Court cannot substitute its judgment for that of the municipality's governing body in interpreting an ordinance unless an abuse of discretion is shown. A & H Services, Inc. v. City of Wahpeton, supra; Mini-Mart, Inc. v. City of Minot, 347 N.W. 2d 131 (N.D. 1984); Munch v. City of Mott, 311 N.W. 2d 17 (N.D. 1981). To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively, or unreasonably. Id.

CEC contends the City Commission's order is incorrect because it did not properly interpret CEC's franchise under applicable law. The failure of a governing body to correctly interpret and apply controlling law can constitute arbitrary, capricious, or unreasonable conduct. City of Fargo v. Ness, 529 N.W. 2d 572, 577 (N.D. 1995). Although CEC indicates it does not want to show its hand by identifying to the Court and the parties what law was not correctly applied, the applicable law regarding construction of an ordinance are the ordinary principles of statutory construction- to ascertain the intent of the enacting body. Pulkrabek v. Morton County, 389 N.W. 2d 609 (N.D. 1986).

The basic rule of construction is to ascertain the intent of the enacting body . . . An ordinance must be viewed as a whole and given a fair and reasonable construction in view of the setting in which it was enacted; the goals and purposes of the ordinance; the plain and ordinary meaning of the words; and the general structure of the ordinance.

Id. at 614-615. See also City of Fargo v. Ness, 551 N.W. 2d 790, 792 (N.D. 1996).

The governing body's interpretation of ambiguities in the ordinance must be given deference by the Court. City of Fargo v. Ness, 551 N.W. 2d 790, 794 (N.D. 1996).

A review of the City Commission's order attached to CEC's brief clearly demonstrates the Commission correctly applied the controlling law by ascertaining the intent of the City in interpreting the geographic limitation of CEC's franchise. On that basis, CEC's complaint should be dismissed. To the extent CEC contends the City failed to correctly apply some other unidentified law in the interpretation of the franchise, law which CEC was required to present to the Commission during the City's deliberation, then the Court should establish a schedule for briefing and argument of this matter.¹ Montana-Dakota requests that CEC be required to submit a brief in support of its claim within 30 days and the defendants be given a corresponding period to submit responsive briefs. Alternatively, CEC's complaint should be dismissed in its entirety.

¹ In its brief to the City Commission in reply to Montana-Dakota's Petition to Declare Franchise Rights, CEC did not cite a statute or court case in support of its interpretation of its franchise.

Dated this 13th day of January, 2006

Respectfully submitted,

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

By: 

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 **13th day of January, 2006**, she deposited in the United States Mail, Bismarck, North Dakota, one envelope with fully prepaid, securely sealed and containing a copy of:

Reply Brief of Montana-Dakota Utilities Co.

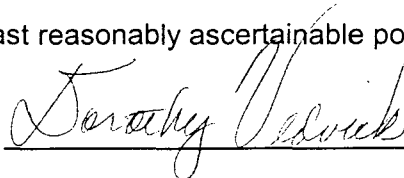
The envelopes were addressed as follows:

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. Binek
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 **13th day of January, 2006**.



Notary Public

