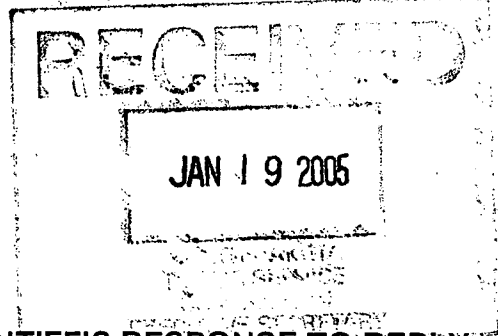


STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

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



**PLAINTIFF'S RESPONSE TO REPLY
BRIEFS OF CITY OF BISMARCK AND
MONTANA DAKOTA UTILITIES**

Docket Number 05-C-2303

The essence of the City's pending motion to dismiss for failure to state a claim and the reply briefs of both the City of Bismarck and MDU boils down to this assertion: The City's action challenged by Capital's complaint is final, not subject to judicial review.

Capital's first responsive brief asserted it cannot be seriously claimed that the action of the City Board is final, immune from judicial review. See Mini-Mart, Inc. v City of Minot, 347 N.W.2d 131 (N.D. 1984) and Munch v City of Mott, 311 N.W.2d 17 (N.D. 1981). Judicial review of a city's action sometimes takes the form of an action for mandamus (Mini-Mart, Inc. v City of Minot, supra) or an action for an injunction (Munch v City of Mott,

supra), or an action for declaratory judgment (City of Fargo v Harwood Township, 256 N.W.2d 694 (N.D. 1977).

Now, in the second round of briefs, MDU backs off a bit, admitting 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 declaratory judgment statute]." MDU's January 13, 2006, brief, page 4. That admission is consistent with Mini-Mart, Inc. v City of Minot, supra, which clearly indicates that any action of a city's governing board that might be described as "quasi-judicial" is nevertheless subject to judicial review. Likewise, and consistent with Braunagel v City of Devils Lake, 629 N.W.2d 567 (N.D. 2001) (cited by MDU in its December 12, 2005, brief, pages 2 and 3), declaratory relief is available where a City's procedures are challenged.

Mini-Mart provides more guidance. Whereas the City and MDU defend the City Board's Order of November 14, 2005, as an exercise of its powers to grant and regulate franchises under N.D.C.C. 40-05-01, subd 57, in Mini-Mart the Supreme Court made it clear that such ad hoc decisions are ineffective:

"We hold only that a municipality must reserve its legislative grant of discretion through the use of written criteria which both adequately inform applicants of the standards and policies to be contemplated by the municipality, and adequately guide the licensing authority in arriving at its decision. Aside from any constitutional considerations, fundamental fairness would seem to require nothing less.

We conclude that, under the facts in the instant case, the trial court was correct in ruling that the City could not rely on unwritten and unspecified criteria in denying Mini Mart's application for a retail beer license." 347 N.W.2d at 141.

The Defendants' briefs criticizing Capital's complaint have a perverse quality, replete with assertions that Capital has not exhaustively briefed all the issues in the preliminary stages of the litigation. E.g., "Nor does CEC provide any argument disputing that the determination of franchise rights for service areas within the City of Bismarck lies exclusively with the Board of City Commissioners." (MDU's December 12, 2005, brief, page 1). In its second brief, MDU suggests the court should require Capital to submit a brief in support of its claim within 30 days. (MDU's January 13, 2006, brief, page 5.) The City has a similar position: "If Capital believes there is any law supporting its position, it must disclose it now before the court decides the City's motion to dismiss." (City's January 13, 2006, brief, page 5.) In effect, the Defendants seem to be waging some sort of pre-trial discovery, probing the Plaintiff's legal theories, demanding a pre-trial brief as a condition to the Capital's right to maintain its action. Capital expects to submit a comprehensive brief in due course, at the court's order.

The motion before the court is simply the City's claim that Capital's Complaint does not state a claim on which relief can be granted. However, the briefs presented in support of the motion do not argue there is no claim presented. They argue against the claim, as if arguing a motion for summary judgment. They argue that the City's action of which Capital complains is authoritative, exclusive, final and immune from judicial review. The

claim is otherwise. The claim is that the City's action is not final, it is subject to judicial review, and that the City's action is action was wrongly taken. That is a claim on which judicial relief can be granted. The Defendants' arguments are the kind that might be expected in support of a motion for summary judgment, after pleading is completed and after discovery develops adequate undisputed evidence for the case to be argued and decided as a matter of law. Indeed, MDU has already served interrogatories and requests for admissions. Capital is developing its own pre-trial inquiries. Obviously, there are more facts for the court to consider than are recited in the parties' respective pleadings, motions and briefs. Pleadings, motions and briefs are not the vehicles by which facts are brought to the court. That is the function of discovery procedures and trials. The Defendants' arguments against Capital's claim implies there is indeed a claim on which relief can be granted, after facts are developed by discovery or by trial.

Look at it this way. There is a dispute over whether Capital or MDU has the superior right to provide electric service in Boulder Ridge. The contestants have different views about where lies the jurisdiction to resolve the dispute. Capital believes the PSC has the jurisdiction to resolve the dispute and has commenced a proceeding at the Public Service Commission. MDU denies the PSC has the jurisdiction. If and when that dispute is decided, the loser will have the right to appeal the PSC decision, seeking judicial review under the Administrative Agencies Practice Act. If MDU is the loser at the PSC, surely its appeal will include continued assertions that the PSC has no jurisdiction. Ultimately, a court will decide.

MDU believes the City of Bismarck's Board of City Commissioners has jurisdiction to resolve the dispute and has commenced its proceeding, its "Petition to Declare Franchise Rights" filed with the City Board. When that dispute was decided against Capital, Capital had the right to seek judicial review, a right it exercised by commencing this action for a declaratory judgment. Had the City Board decided otherwise, MDU would have had the right to seek judicial review.

In either case, ultimately a court will decide. Where action of a municipal governing body is challenged and subjected to judicial review, "A trial anew is necessary." Mini-Mart, Inc. v City of Minot, supra 347 N.W.2d at 136. A new trial means the complaint challenging the City's action should not be dismissed on preliminary motions that deny the right of judicial review.

CONCLUSION

Capital's Complaint states a claim upon which relief can be granted, a claim for judicial review of action taken by the City of Bismarck's Board of City Commissioners. Accordingly, the motion to dismiss should be denied.

Dated this 18 day of January, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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.)

**AFFIDAVIT OF SERVICE BY
UNITED STATES MAIL**

Docket Number 05-C-2303

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF WARD)

LaRae A. Thomas, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age, and is not a party to nor interested in the above entitled action; that on the 18 day of January, 2006, this Affiant served by depositing in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in the above entitled action:

- 1. Plaintiff's Response to Reply Briefs of City of Bismarck and Montana Dakota Utilities.**

That said envelopes were addressed to the following person at his known address as follows:

Jerome C. Kettleon
Attorney at Law
PO Box 400
Bismarck, ND 58502-0400

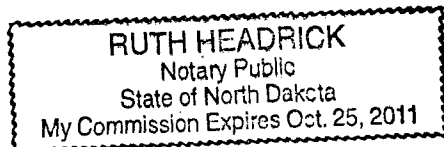
William W. Binek
PUBLIC SERVICE COMMISSION
600 E Boulevard Avenue, Department 408
Bismarck, ND 58505-0480

Randall J. Bakke
Smith Bakke Porsborg & Schweigert
116 North 2nd Street
PO Box 460
Bismarck, ND 58502-0460

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

LaRae A Thomas
LaRae A. Thomas

SUBSCRIBED AND SWORN to before me this 18 day of January, 2006.



Ruth Headrick
Notary Public
For the State of North Dakota
My Commission expires: 10-25-11

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
SCOTT M. KNUDSVIG
ERIKA L. SLEGER
RYAN D. SANDBERG



LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

2525 ELK DRIVE
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@srt.com

OF COUNSEL
HERBERT L. MESCHKE

RETIRED
THOMAS A. WENTZ
MARK F. PURDY
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)

January 18, 2006

CLERK OF DISTRICT COURT
BURLEIGH COUNTY COURTHOUSE
PO BOX 1013
BISMARCK, ND 58502-1013

**CAPITAL ELECTRIC COOPERATIVE, INC. vs.
THE CITY OF BISMARCK, and
MONTANA-DAKOTA UTILITIES, INC., A DIVISION OF MDU RESOURCES GROUP,
INC., and THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA
DOCKET NUMBER 05-C-2303**

Enclosed for filing in connection with the above referenced matter are the following documents:

1. Plaintiff's Response to Reply Briefs of City of Bismarck and Montana Dakota Utilities; and
2. Affidavit of Service by United States Mail.

If you have any questions on the enclosed, please do not hesitate to contact me.

Yours truly,

Carol K. Larson
lat

Enclosures

cc w/ encl: Lars Nygren
Jerome C. Kettleon
William W. Binek
Randall J. Bakke