

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

v)

The City of Bismarck, North Dakota,)

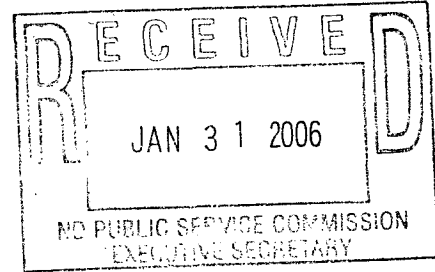
and)

Montana-Dakota Utilities, Inc., a)
Division of MDU Resources Group,)
Inc.,)

and)

The Public Service Commission of)
North Dakota,)

Defendants.)
.....)



MEMORANDUM OPINION
AND ORDER

Case No. 05-C-2303

This case involves a territorial dispute between two electric power providers, Capital Electric Cooperative, Inc. (CEC) and Montana-Dakota Utilities, Inc., a Division of MDU Resources Group (MDU). CEC and MDU each hold franchises from the City of Bismarck (City) regarding operation of electric distribution systems in and around the City.

In August 2005, MDU filed a "Petition to Declare Franchise Rights" with the City that requested the City to decide that "1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005, and 2. CEC is not authorized under its franchise to

provide electric service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005." On October 11, 2005, the Bismarck Board of City Commissioners held a hearing on the Petition. At the hearing, CEC and MDU each presented information and evidence to the City Commissioners. Nothing either party provided to the Court shows CEC objected to or challenged the authority of the City Commissioners to hear the Petition. The City Commissioners issued Findings, Conclusions, Decision and Order dated November 14, 2005.

CEC filed a declaratory judgment action. The original Complaint seeks "judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." In its brief filed in response to the City's Motion to Dismiss or in the Alternative for a More Definite Statement, CEC's counsel wrote:

"Responding to the City's request for a more definite statement 'as to the relief requested,' Capital states that it seeks a judgment declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993, the Board of City Commissioner's purported decision and order of November 14, 2005, to the contrary notwithstanding."¹

The City filed a Motion to Dismiss or in the Alternative for a More Definite Statement. MDU filed a Motion to Dismiss. The City's Motion alleges failure to exhaust administrative remedies and failure to state a claim upon which relief may be granted as grounds for dismissal. As noted above, the City asks, in the alternative, that CEC be required to provide a more definite statement of the relief

¹While CEC's Brief sets out a more definite statement, CEC has not filed an amended complaint with similar language.

CEC requests. MDU's Motion to Dismiss alleges failure to state a basis for declaratory relief and failure to exhaust administrative remedies as grounds for dismissal.

Resolution of the Motions comes down to two issues: (1) did the City have authority to hear the Petition filed by MDU and issue its Order, (2) if the answer to (1) is "yes" what remedy does CEC have to challenge the City's determination?

City's Authority to Hear Petition and Issue Order

Nowhere in its Complaint does CEC directly claim the City did not have the authority to hear MDU's Petition and to issue its Order on the Petition. However, in its Plaintiff's Response to Motion to Dismiss or for More Definite Statement, CEC claims that the "City Commission's decision and order of November 14, 2005 exceeds the scope of the Commission's authority . . ."

Plaintiff's Response at 3. CEC further claims "Capital's action in the court complains of the Bismarck Board of City Commissioner's assumption of power to declare franchise rights."

Although CEC failed to plead that the City had no authority to hear the Petition and to issue its Order, the Court must address that issue as a threshold question.

Article VII, §11 of the North Dakota Constitution reads:

"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."

Clearly, then, the City has the unabridgible power to franchise public utilities. N.D.C. §40-05-01 relates to Powers of Municipalities. Subsection (57) reads:

“Franchises. To 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, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the *regulatory powers* of the governing body.”

(Italics added). The question is whether the Order issued by the City is within the City’s regulatory power as it relates to an electric service franchise.

“Cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant.” Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991). However, the North Dakota Supreme Court loosens this restrictive statement in the same case by holding that “the manner and means for exercising those powers, unless prescribed by the legislature, are within the discretion of the City.” *Id.*

The fact that municipalities are given the unabridgible power to franchise utilities in the North Dakota Constitution, coupled with the language of N.D.C.C. §40-05-01(57), strongly supports the concept that the City has the authority under its regulatory powers or those necessarily implied from the statutory grant to define parties’ rights under a franchise. It would be a ludicrous interpretation of the law to say the City has the right to issue a franchise and set its terms, but not to interpret its terms or its scope. The North Dakota Supreme Court has recognized that municipalities may engage in quasi-judicial activities in interpreting their own statutes and ordinances. See, e.g. Bigwood v. City of Wahpeton, 565 N.W.2d 498, 501 (N.D. 1997). No logical reasons exist to treat a city’s interpretation of a franchise differently.

As a procedural matter, this Court notes that CEC apparently had not challenged the City's authority to hear the Petition and issue its Order until the statements set out in its Response. Therefore, it has failed to preserve this issue for review.

What is the Appropriate Remedy

CEC has filed a declaratory judgment action. Chapter 32-23, N.D.C.C. governs declaratory judgments. N.D.C.C. §32-23-02 reads, in pertinent part,:

"Any person whose rights, status, or other legal relations are determined by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and may obtain a declaration of rights, status, or other legal relations thereunder."

In reviewing the Complaint, it appears that CEC is simply asking this Court to declare its rights under its franchise. However, when one reads CEC's Response to Motion to Dismiss, it becomes clear this is not so. CEC actually is challenging the City's authority to issue its Order on the Petition, and is arguing that the City's decision was wrong. Plaintiff's Response to Motion to Dismiss of for More Definite Statement at 3-4. Neither of those are within the scope of a declaratory judgment action.

CEC has a remedy under N.D.C.C. §27-05-06(4). CEC may appeal the City's decision to the district court. On appeal, the issue is not whether the City's decision was correct, but, rather, only whether in reaching its decision, the City abused its discretion and acted in an arbitrary, capricious or unreasonable manner. See, e.g. Lindteigen v. Bismarck, 1997 ND 123, 565 N.W.2d 47.

Exhaustion of Administrative Remedies

MDU and the City claim the Court should dismiss CEC's Complaint because CEC has failed to exhaust its administrative remedies, pointing to the fact that CEC has filed a complaint with the Public Service Commission (PSC). The Complaint CEC filed with the PSC asks the PSC to enjoin and restrain MDU's activities in CEC's claimed franchise service area. MDU's response asks for similar relief against CEC.

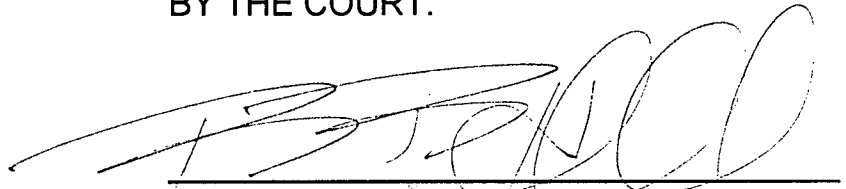
N.D.C.C. §49-02-02(4) gives the PSC the power to compel the obedience of lawful orders of mandamus, injunction, or other proper proceedings. More specifically, N.D.C.C. §49-03-01 allows the PSC to order enforcement of Chapter 49-03, N.D.C.C. with respect to allegations of unreasonable interference by an electric utility with the operations of another electric utility. This power is in the context of a certificate of public convenience and necessity.

N.D.C.C. §49-03-01 does not require an electric utility to secure a certificate of public convenience and necessity for extension of service within a municipality within which it has lawfully commenced operations. See, *also* N.D.C.C. 49-03-01.3. The question of whether MDU is operating lawfully under its franchise agreement is one of franchise interpretation by the City Commissioners. Only after the City Commissioners have decided the issue, and after any resulting appeal, may the PSC determine whether MDU is unreasonably interfering with CEC operations. If the City Commissioners, the district court, and the North Dakota Supreme Court all decide MDU has the service rights in Boulder Ridge under the parties' respective franchises, the PSC would have no basis for action. While the PSC may have a different opinion, it is this Court's opinion that this case is the horse and the PSC action is the cart.

To avoid unnecessary delay and expense, the Court would consider CEC's Complaint to be an appeal to the district court of the City's decision, would allow CEC to file an appropriate pleading setting out the issue as noted above; and would allow the parties to address the issue at the hearing now scheduled for March 2, 2006. Should any defendant object to this procedure, the Court will Order the Complaint dismissed and CEC may proceed accordingly.

Dated at Bismarck, North Dakota, this 30 day of January, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'B. Haskell', written over a horizontal line.

Bruce B. Haskell, District Judge
South Central Judicial District

Carol Larson
Randall Bakke
William Binek
Daniel Kuntz
Jerome Kattleson