

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. )

**AMENDED COMPLAINT  
AND NOTICE OF APPEAL**

**Docket No. 05-C-2303**

I.

Plaintiff (herein "Capital") is a cooperative organized and operated under North Dakota Century Code Chapter 10-13 providing electric energy in North Dakota.

II.

The Defendant City of Bismarck (herein the "City") is a city under North Dakota Century Code Title 40.

III.

The Defendant Montana-Dakota Utilities, Inc., a division of MDU Resources Group,

Inc. (herein "Montana-Dakota") is a business corporation providing electric energy in North Dakota.

IV.

The North Dakota Public Service Commission (herein "PSC") is a constitutional body under Article V, Section 2 of the North Dakota Constitution and under North Dakota Century Code Title 49.

V.

Montana-Dakota holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 12, 1987.

VI.

Capital holds a franchise to operate an electric distribution system in Bismarck, North Dakota granted by the City on May 23, 1993.

VII.

On August 30, 2005, Montana-Dakota filed with the Board of Commissioners of the City of Bismarck a "Petition to Declare Franchise Rights" requesting the Board "to determine 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 [Capital] is not authorized under its 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."

### VIII.

On September 28, 2005, Capital filed a complaint with the Commission under N.D.C.C. 49-03-01, 03-01.3., -01.4 and -05, alleging that Montana-Dakota has extended its facilities within the corporate limits of Bismarck in violation of N.D.C.C. 49-03-01 and 01.3, and alleging that Montana-Dakota intends to provide electrical service to a development in Capital's service area and such service will unreasonably interfere or is about to unreasonably interfere with the service or system of Capital.

### IX.

On October 4, 2005, Capital outlined the nature of the proceedings in its brief before the City Commission as "a proceeding initiated by Montana-Dakota Utilities, Inc., hereafter "MDU", to deny Capital Electric Cooperative, Inc.'s franchised right to provide electric service to property annexed in its designated service area on or after June 26, 2003."

### X.

Also, in its October 4, 2005, city filing, Capital acknowledged the City's right to grant franchises and to regulate the use of same. Capital further asserted the PSC had the responsibility to resolve conflicting claims within municipalities, that a complaint had been filed with the PSC, and further that the City did not have the right to amend or alter Capital's franchise without its consent. Capital further asserted that Courts have exclusive jurisdiction to resolve contract disputes, and that Capital had invested millions of dollars, in reliance upon the franchise, to fulfill its obligation to serve North Bismarck. Capital reasserted these issues to the City Commission, to the extent permitted by the 20 minute presentation Capital was allowed, at that October 11, 2005, hearing.

XI.

On October 20, 2005, Montana-Dakota filed an answer and counterclaim to Capital's PSC Complaint, asserting Capital "...is not authorized by law or franchise to provide electric distribution services to Part of Boulder Ridge First Addition to the City of Bismarck."

XII.

On November 14, 2005, the President and City Administrator of the City executed a document titled "Findings, Conclusions Decision and Order" "In the matter of a Petition to Declare Franchise Rights Filed by Montanta (sic) Dakota Utilities Co.," wherein "the Board of City Commissioners Orders that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to the City of Bismarck." (Herein November 14<sup>th</sup> Order.)

XIII.

The Board of City Commissioners stated as one of its "Conclusions of Law" in support its decision in the November 14<sup>th</sup> Order "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City." (November 14<sup>th</sup> Order, page 4.) That statement is erroneous as a matter of law under North Dakota Supreme Court decisions that establish that the Constitution does not grant powers to municipalities. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XIV.

The Board of Commissioners of the City of Bismarck performs the legislative

functions of the city, including, under N.D.C.C. 40-05-01, the powers:

"1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to alter repeal, alter, or amend the same."

and

"57. Franchises. To grant franchises or privileges to persons, associations, or corporations, 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."

Under North Dakota Supreme Court decisions affecting powers of governing bodies of municipalities, if statutory powers are not implemented by ordinance the city may not avail itself of the powers enumerated by statute. E.g. Litten v City of Fargo, 294 N.W.2d 628 (N.D. 1980).

XV.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck in the exercise of its power under N.D.C.C. 40-05-01, Subsection 1, to carry into effect the regulatory powers of the governing body affecting franchises granted under N.D.C.C. 40-05-01, Subsection 57.

XVI.

No ordinances, resolutions or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to authorize the Board to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVII.

No statute enacted by the North Dakota Legislature authorizes the Board of Commissioners of the City of Bismarck to hear Montana-Dakota's Petition or to Issue the November 14<sup>th</sup> Order.

XVIII.

Montana-Dakota's Petition to the Board of Commissioners of the City of Bismarck did not request the exercise of a legislative function, nor does the November 14<sup>th</sup> Order record the exercise of a legislative function. The Petition requested and the November 14<sup>th</sup> Order presumed the Board's authority to render a decision to resolve the conflicting claims of litigants, a judicial function. Under the North Dakota Constitution and its structure of separate legislative, executive and judicial branches of government, there is an implied exclusion of each branch from the exercise of the functions of the others. City of Carrington v Foster County, 166 N.W.2d 377 (N.D. 1969). The Board's assumption of authority to hear and decide Montana-Dakota's Petition violated the Constitutional principle of separation of powers.

XIX.

A franchise granted by the governing body of a municipality under N.D.C.C. 40-05-01, Subsection 57 is a contract between the municipality and the grantee of the franchise. The authority to interpret contracts and to resolve disputes under contracts where one of the contracting parties is a governmental entity is a function of the judicial branch of government. Seher v Woodlawn School District, 59 N.W.2d 805 (N.D. 1953).

XX.

The November 14<sup>th</sup> Order exceeds the scope of power and authority of the Board of Commissioners of the City of Bismarck under the statutes of the State of North Dakota and under Bismarck's ordinances, resolutions or regulations. The Board had no power or authority under ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to hear and decide Montana-Dakota's Petition or to issue the November 14<sup>th</sup> Order.

XXI.

Capital takes exception to and objects to the findings of fact under the November 14<sup>th</sup> Order.

XXII.

The November 14<sup>th</sup> Order is not in accordance with the law, and is therefore arbitrary, capricious, unreasonable.

XXIII.

The procedure of the Board of Commissioners of the City of Bismarck in hearing Montana-Dakota's Petition and in the Board's decision has not afforded Capital a fair hearing. The Board's decision violates Capital's constitutional right to due process. The Board's decision violates constitutionally protected property rights to its franchise and its electric distribution system.

XXIV.

The Board of Commissioners of the City of Bismarck's conclusions of law and the

order of the November 14<sup>th</sup> Order do not sufficiently explain its rationale for its decision.

XXV.

The November 14<sup>th</sup> Order, if made within the scope of the power and authority of the Board of Commissioners of the City of Bismarck, is arbitrary, capricious and unreasonable.

XXVI.

The franchise granted to Capital by the City of Bismarck in 1993 refers to an Area Service Agreement between Capital and Montana-Dakota. The Agreement is referred to in the November 14<sup>th</sup> Order (Findings of Fact 3, 4 and 5; Conclusions of Law numbered 2, 3, 4, and 5.). Under the November 14<sup>th</sup> Order, the Board of Commissioners of the City of Bismarck asserted authority to declare the Area Service Agreement to be ambiguous and to interpret the Agreement, (Conclusion of Law numbered 2) which interpretations produced the result that Montana-Dakota, not the Board of Commissioners of the City of Bismarck, determined the rights of Capital under its franchise (Conclusions of Law numbered 3, 4, and 5). The Board of Commissioners of the City of Bismarck had no power or authority under its ordinances, resolutions or regulations, no power or authority under the statutes of the State of North Dakota and no power or authority under the Constitution of the State of North Dakota, to interpret the Area Service Agreement. The Board of Commissioners of the City of Bismarck has no power or authority under the statutes of the State of North Dakota or under the Constitution of the State of North Dakota to delegate to Montana-Dakota the Board's legislative authority to grant franchises or to regulate franchises. Montana-Dakota Utilities Co. V Johanneson, 153 N.W.2d 414 (1967).

XXVII.

No ordinance, resolution or regulations have been enacted or adopted by the Board of Commissioners of the City of Bismarck to provide for appeal from the November 14<sup>th</sup> Order, asserted as an exercise of “the power to regulate the franchises of any public utility within the City”...”pursuant to Article 7, Section 11 of the North Dakota Constitution.” (November 14<sup>th</sup> Order, page 4.)

XXVIII.

No statute enacted by the North Dakota Legislatures provides for appeal from the November 14<sup>th</sup> Order asserted as an exercise of “the power to regulate the franchises of any public utility within the City”...”pursuant to Article 7, Section 11 of the North Dakota Constitution.” (November 14<sup>th</sup> Order, page 4.)

XXIX.

The North Dakota Public Service Commission is a constitutional body under Article V, Section 2 of the North Dakota Constitution having only such powers and duties as are prescribed by law, not including powers to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise.

XXX.

The district court has judicial power and original jurisdiction of all causes including the power to determine rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06 and Chapter 32-23. N.D.C.C. 32-23 provides for judicial review of the November 14<sup>th</sup> Order. E.g. City of Fargo

v Harwood Township, 256 N.W.2d 694 (N.D. 1977).

XXXI.

The district court has judicial power and original jurisdiction of all causes including jurisdiction of appeals from determinations of inferior officers, boards or tribunals, in such cases and pursuant to such regulations as may be prescribed by law, under the North Dakota Constitution, Article VI Sections 1 and 8, and North Dakota Century Code, Section 27-05-06.

XXXII.

No regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order considered as a determination of inferior officers, boards or tribunals.

XXXIII.

Capital is a person whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract or franchise with respect to the provision of electric power services within the City of Bismarck, and is affected by the November 14<sup>th</sup> Order.

**THEREFORE**, Capital requests judgment under N.D.C.C. 32-23, 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 November 14<sup>th</sup> Order to the contrary notwithstanding.

Alternatively, if the Court should determine that statutes enacted by the North Dakota Legislature do provide for appeal from the November 14<sup>th</sup> Order, or that regulations are prescribed by law for appeal from the November 14<sup>th</sup> Order, Capital appeals such

Order and requests an Order reversing the November 14<sup>th</sup> Order as arbitrary, capricious, and unreasonable, for the reasons more fully and previously set forth in this Complaint.

For any and all other appropriate relief within the jurisdiction of the District Court.

Dated this 3<sup>rd</sup> day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

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 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 3rd day of February, 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. Amended Complaint and Notice to Appeal.**

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

Randall J. Bakke  
Smith Bakke Porsborg & Schweigert  
116 North 2<sup>nd</sup> 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 3 day of February, 2006.

RUTH HEADRICK  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 25, 2011

Ruth Headrick  
Notary Public  
For the State of North Dakota  
My Commission expires: \_\_\_\_\_