

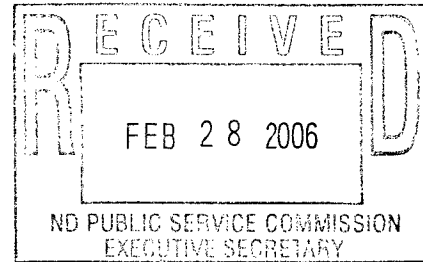
STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 05-C-2303

Capital Electric Cooperative, Inc.,)
)
Appellant,)
)
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,)
)
Appellees.)

**BRIEF OF APPELLEE, CITY OF
BISMARCK**



I. INTRODUCTION

This is an appeal by Capital Electric Cooperative, Inc. [hereinafter "CEC"] from the Bismarck Board of City Commissioner's November 14, 2005, decision that "electric power service to part of Boulder Ridge First Addition to the City of Bismarck is properly served by MDU, subject to CEC retaining any existing customers." R. at 11, p. 5. The Board's decision arose from a *Petition to Declare Franchise Rights* filed by Appellee MDU. R. at 1. CEC responded to the petition (R. at 2), and briefs and oral arguments were presented to the Board. R. at 2-8. Pursuant to the Court's January 30, 2006 Order, this matter is an appeal of the Board's decision.

II. STATEMENT OF FACTS

MDU holds a Franchise dated May 12, 1987 to operate an electric distribution system over, on and under all of the public ways of the City of Bismarck. R. at 11, p. 6. MDU's Franchise is for a twenty-year term and does not contain any geographical restrictions within the City of Bismarck. Id. CEC also holds a twenty-year franchise, dated May 25, 1993 to operate an electric distribution system over, on and under the public ways. Id. CEC's franchise contains a geographic limitation, not contained in MDU's Franchise, which states:

In order to avoid a duplication of facilities between the Grantee [CEC] and other electrical franchises, the authority granted Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990, and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. The Grantee shall enjoy all of the privileges and rights described in the Area Service Agreement. If the Area Service Agreement and Amendments thereto are canceled by either electric supplier during the term of this franchise, all privileges, rights, obligations and restrictions as therein stated shall continue to apply to both Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co.

R. at 5, Exhibit 1, Art. II, ¶ 1 (emphasis added).

CEC had originally approached the City in the early 1960s in an attempt to secure a limited franchise to operate within the City of Bismarck. R. at 11, p. 1. At that time, CEC stated that their request was limited to permission to retain existing customers currently within the City, to serve existing customers outside the City when they are annexed to the City and permission to serve certain units of state or local governments when requested to do so, all with the understanding that CEC would not build any new lines within the City without the City's explicit permission. Id. at p. 1-2. CEC had long sought a service agreement with MDU to enable CEC to obtain a City franchise. Id. at p. 2. The City determined the intent of those discussions appears

to have been to allow CEC a limited presence in the City with MDU to be the primary supplier of electric services within the City. Id.

In 1973, an Area Service Agreement was entered into between CEC and MDU in an attempt to reduce service conflicts between them and plan for orderly growth for each utility. Id. The intent of the Area Service Agreement was to regulate the service areas of the two utilities and to avoid conflicts that might occur if CEC was granted a franchise to operate within the City. Id. The Area Service Agreement sets out geographic service areas for each utility and a framework for cooperation in the event of conflicts that might arise in areas of over-lap or areas where it is more economic for one of the utilities to provide electric service. Id. The signing of the Area Service Agreement coincided with the City's award of CEC's limited franchise. Id. The Area Service Agreement contains a provision in which the parties agree that as Bismarck grows and conditions change, the Area Service Agreement would be revisited at least every 5 years and the parties would in good faith review the agreement for modifications that "may be desirable to more efficiently carry out the intent of both parties." Id. The respective franchises of MDU and CEC are similar except that CEC's Franchise incorporates the provisions of the Area Service Agreement. Id.

The Area Service Agreement was amended by agreement of MDU and CEC on October 25, 1990. Id. at p. 3. This letter agreement did not address the Boulder Ridge First Addition to the City of Bismarck. Id. The Area Service Agreement was amended again in June 1993. Id. The 1993 amendment added language regarding the parties' rights upon cancellation of the Area Service Agreement similar to language contained in Article II, Paragraph 1 of CEC's Franchise, as state above. Id. MDU cancelled the Area Service Agreement by letter dated June 26, 2002. Id. Cancellation of the agreement was effective June 26, 2003. Id. In April 2005, part of

Boulder Ridge First Addition to the City of Bismarck was annexed and became a part of the City. Id. at p. 4. Boulder Ridge First Addition is located outside the bold line on the map attached to the Area Service Agreement and both MDU and CEC claim the right to serve the new subdivision. Id.

In evaluating which utility company could provide electric power service to part of the Boulder Ridge First Addition to the City of Bismarck, the Board concluded that CEC's franchise, which incorporates the Area Service Agreement, did not grant CEC authority to serve all new areas of the City which are not covered by the Area Service Agreement. Id. at p. 5. Accordingly, the Board concluded part of Boulder Ridge First Addition in the City of Bismarck is properly served by MDU. Id. The Board strongly encouraged MDU and CEC to agree on a new service agreement for the future development of the City of Bismarck and to submit such agreement to the Board for approval. Id.

III. LEGAL ARGUMENT

A. JURISDICTION AND STANDARD OF REVIEW

This is an appeal under N.D.C.C. § 27-05-06(4) of the decision of the Bismarck Board of City Commissioners on November 14, 2005, that "electric power service to part of Bo[u]lder Ridge First Addition to the City of Bismarck is property served by MDU, subject to CEC retaining any existing customers." Appeals of decisions of local governing bodies are governed by N.D.C.C. Ch. 28-34.¹ A "local governing body" is any officer, board, commission,

¹ Capital Electric has not complied with the appeal requirements set forth in N.D.C.C. § 28-34-01. N.D.C.C. § 28-34-01 ("notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body" and "a copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules

resource or conservation district, or other local political subdivision. N.D.C.C. § 28-34-01. The City of Bismarck Board of City Commissioners falls within this definition and therefore, any appeal from its decision must be governed by section 28-34-01. See Pic v. City of Grafton, 1998 ND 202, ¶ 11, 586 N.W.2d 159. The standard of review applicable to appeals under ch. 28-34 is whether the board "acted arbitrarily, capriciously or unreasonably, or there is not substantial evidence to support the decision." Id.; see also Klindt v. Pembina County Water Res. Bd., 2005 ND 106, ¶ 12, 697 N.W.2d 339 (discussing Supreme Court standard of review, which is the same standard applied by the district court); Lindteigen v. Bismarck, 1997 ND 123, 565 N.W.2d 47. In

of Civil Procedure"). In Reliable, Inc. v. Stutsman County Comm'n, 409 N.W.2d 632 (N.D. 1987), the Supreme Court evaluated language similar to that in § 28-34-01. The Court stated:

In order for subject matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding. King v. Menz, 75 N.W.2d 516, 521 (N.D. 1956). Accordingly, in order for a court to have subject matter jurisdiction over an appeal, the appellant must meet the statutory requirements for perfecting the appeal. See Matter of Estate of Bieber, 256 N.W.2d 879, 882 (N.D. 1977) ("Unless the statutory requirement as to service of notice of appeal, and timely filing of proofs of service, are complied with, the district court acquires no jurisdiction."); Indianhead Truck Line, Inc. v. Thompson, 142 N.W.2d 138, 140 (N.D. 1966) (failure to file proofs of service within the statutory 30-day period held fatal to an appeal from a decision of the Public Service Commission); State v. Higgins, 145 N.W.2d 478, 481 (N.D. 1966) (defendant's failure to serve notice of appeal held fatal to the appeal); Reub's Minot Camera, Inc. v. General Electric Credit Corp., 201 N.W.2d 877, 880 (N.D. 1972) (absence of proof of service of a notice of appeal in the record conferred no jurisdiction upon the Supreme Court thereby warranting dismissal of the appeal).

Because Reliable failed to perfect its appeal by serving a member of the board of county commissioners as required by NDCC § 11-11-41, the district court did not acquire subject matter jurisdiction over the appeal.

Id. at 634-35. In the present case, CEC failed to take the appropriate measures provided under chapter 28-34 to timely appeal the matter, and therefore, the subject matter jurisdiction of the district court to hear this appeal has been compromised by CEC. As a result, the City reserves the right to continue to assert there has been a waiver of any appeal, and a failure to timely appeal by CEC in this matter.

reviewing a decision of a local governing body, "the courts must not substitute their judgment for that of the local governing body who initially made the decision." Pic, at ¶ 11. "A decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." Klindt, at ¶ 12.

B. THE BOARD'S DECISION WAS WITHIN ITS AUTHORITY, AND WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

The scope of review of an appeal from a local governing body is limited to determining if the governing body's decision was arbitrary, capricious, or unreasonable. Pic, 1998 ND 202, ¶ 11, 586 N.W.2d 159. A review of the underlying decision and record in this case clearly indicates the Board's decision was "the product of a rational mental process by which the facts and the law relied upon [were] considered together for the purpose of achieving a reasoned and reasonable interpretation." CEC has never indicated how it claims the Board's decision was not the result of a rational mental process based on the evidence in the record. Instead, CEC has steadfastly, yet incorrectly, maintained that the City did not have authority to render its decision and that the Board's decision is simply wrong.

1. The Board's Decision was within its Powers as Set Forth in the North Dakota Constitution, N.D.C.C. § 40-05-01(57), and Bismarck's Home Rule Charter, and regardless, whether the Board Exceeded its power is not an issue on this appeal.

In regards to whether the Board had authority to act as it did, it is the City's position that the issue has been decided by the Court's order of January 30, 2006, at pages 3-5. Therefore, the City will not continue to reiterate its position with respect to this issue. However, despite the

Court's ruling, CEC has continued to assert the City lacked authority. See Amended Complaint and Notice of Appeal at ¶ XIV (Feb. 3, 2006). To the extent that CEC continues to assert such an argument, the City incorporates by reference the arguments made in its *Brief in Support of Motion to Dismiss or in the Alternative, for a More Definite Statement* dated December 19, 2005, and its *Reply Brief in Support of Motion to Dismiss* dated January 13, 2006. Section 40-05-01(57), N.D.C.C. provides all municipalities with the power to grant and regulate franchises. See also N.D.Const. Art VII, § 11. Capital has maintained that N.D.C.C. § 40-05.1-00.1(3) limits the City's authority in this regard. However, section 40-05.1-00.1 provides definitions for chapter 40-05.1 and does not limit the City's authority. Chapter 40-05.1 addresses home rule cities and sets forth some powers of home rule cities in section 40-05.06. Chapter 40-05.1 is not exhaustive and does not contain any provision regarding franchises, except for levying and collecting franchise taxes. See N.D.C.C. § 40-05.1-06(12). Further, § 40-05.1-06 states that "statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters." Bismarck has not passed any ordinance contrary to N.D.C.C. § 40-05-01(57) and its home rule Charter simply states, consistent with § 40-05-01(57), one of its enumerated powers is "[t]o engage in any utility, business, or enterprise permitted by the constitution and not prohibited by statute or to grant and regulate franchises therefore to a private person, firm, or corporation." Home Rule Charter for the City of Bismarck, Art. 3(10) (emphasis added). Bismarck has enacted ordinances regarding the granting of franchises, but has not enacted ordinances regarding regulation of franchises. City of Bismarck, Code of Ordinances ch. 10-11. As a result, section 40-05-01(57) and/or the Home Rule Charter provide the City authority to regulate the franchises the City has granted in this case.

In its untimely *Amended Complaint and Notice of Appeal*, CEC alleges Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980) supports CEC's position that an ordinance must be enacted by a city for the city to avail itself to the powers granted by statute. The actual holding of Litten is inapposite to this case because the Court was evaluating whether an ordinance or charter could supersede/exceed state law. In Litten, the Supreme Court, in evaluating whether Fargo could change its form of city government, held:

to permit a conclusion that an ordinance supersedes a state law, providing the charter and implementing ordinance requirement have been met, it is not only essential that the power given to the city by the legislature is clearly expressed or necessarily implied from the grant but also that it conflicts with the laws generally applicable to cities.

294 N.W.2d at 634. This holding is inapplicable to the present case because Bismarck's Home Rule Charter simply expresses the power that the North Dakota Constitution and N.D.C.C. § 40-05-01(57) already provide to the City. This case does not involve a situation where the City is trying to supersede or exceed the powers granted to Bismarck.

Further, Litten does not support CEC's position in this case. In Litten the Court expressly stated, "[i]f the authority or power to enact an ordinance on a specific subject is not found in § 40-05.1-06 or in Ch. 40-05.1, or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities". Id.; see also N.D.C.C. § 40-05.1-06 ("statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters"). The City of Bismarck does not have an ordinance governing regulation of franchises, regulation is merely provided for in Bismarck's charter. As stated in Litten, "if the powers are not stated in the charter, or if they are stated in the charter but are not implemented by ordinance, the home rule city may not avail itself of the powers enumerated in §

40-05.1-06, NDCC, but would be governed by the statutes applicable generally to all cities." 294 N.W.2d at 632 (emphasis added). Therefore, § 40-05-01(57), a statute applicable generally to all cities, provides the power to the City to regulate its franchises.

It is entirely consistent with section 40-05-01(57), Bismarck's Home Rule Charter, and section 40-05.1-06, for the Board to regulate its franchise with CEC. In exercising this power, the city has broad discretion and may engage in quasi-judicial activities. Bigwood v. City of Wahpeton, 565 N.W.2d 498, 501 (N.D. 1997); 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"). CEC's continued arguments to the contrary ignore the applicable law and the Court's order.

The City further notes that in CEC's brief to the Board (R. at 5, page 1), CEC admitted, "Pursuant to N.D.C.C. § 40-05-01(57) the City of Bismarck has the power to grant franchises, and to regulate the same." See also N.D.Const. Art VII, § 11. CEC never objected to the Board's authority to regulate franchises in the proceedings below. CEC's position appears to be that the Board rewrote or reinterpreted its franchise. See Motion for Reconsideration and Brief filed by CEC (Feb. 22, 2006). However, the City did not rewrite or reinterpret the franchise. It simply determined which company could provide electric services to Part of Boulder Ridge First Addition as part of its regulatory role. In order to regulate the Franchise, it was necessary to interpret the Franchise. There is nothing unfair in the Board's actions. Nothing in CEC's franchise granted it exclusive authority to provide electric services to Part of Boulder Ridge First Addition and CEC never objected to the Board's authority to regulate franchises, which is authority the Board clearly has and which was exercised in this case.

CEC's arguments regarding the Board's authority fail as a matter of law, have already been decided in this matter, and were waived in the proceedings below. Regardless, neither an appeal nor a declaratory judgment action is the appropriate avenue to challenge whether the Board exceeded its authority.

2. The Board's decision was not arbitrary, capricious, or unreasonable.

Based on the Court's January 30, 2006 Order and the underlying proceedings, the sole issue on this appeal is whether the Board's decision that "electric power service to part of [Boulder] Ridge First Addition to the City of Bismarck is properly served by MDU, subject to CEC retaining any existing customers" was arbitrary, capricious, or unreasonable. A review of the record and the City's decision clearly indicates the Board's decision was a result of a rational mental process by which the facts and the law relied upon were considered together for the purpose of achieving a reasoned and reasonable interpretation. Adopting CEC's argument would mean that MDU's franchise to provide electric service within the entire City of Bismarck is geographically limited. However, a review of the MDU and CEC franchises indicates that CEC's franchise is the only one that contains a geographical limitation. CEC's position is entirely inconsistent with the language in the respective franchises.

In relevant part, the Board concluded:

2. MDU and CEC have offered differing opinions regarding the meaning and interpretation of the CEC Franchise. MDU and CEC have offered differing opinions regarding the meaning, interpretation and application of the Area Service Agreement as it is incorporated into the CEC Franchise. The Area Service Agreement is ambiguous and the Commission may consider extrinsic evidence to interpret the provisions of the Area Service Agreement and related provisions of the CEC Franchise.
3. That both MDU and CEC have valid franchises to operate electric power distribution systems over, on and under the public ways within the City. CEC's Franchise is limited by the language of Article II of that Franchise,

which incorporates the Area Service Agreement between MDU and CEC. The intention of the parties in the Area Service Agreement and by extension, the intention of the City when it awarded a franchise to CEC, was for MDU to remain the main provider of electric services within the City, except for CEC's existing customers and any other customers or service areas conceded to CEC by MDU. It was not the intention of the parties or of the City, that the map attached to the Area Service Agreement would be in place for 40 years without amendment but rather that it would be amended as the City grew to allow for healthy efficient growth for both utilities. It was not the intent of the City that CEC would become the exclusive electric power supplier for all new areas of the City outside the line shown in the Area Service Agreement. It was the City's intent, in including the Area Service Agreement in the CEC Franchise, that the line on the Area Service Agreement map would move outward as the City grew.

4. That pursuant to the terms of the CEC Franchise, at Article II, the CEC Franchise includes areas within the City "as now or hereafter constituted" but is "subject to the conditions herein". The CEC Franchise is specifically limited in scope. In Paragraph 1 of Article II, it is stated that

In order to avoid a duplication of facilities between the Grantee and other electrical franchises, the authority granted to Capital Electric under this franchise is limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973 executed by Capital Electric Cooperative, Inc., and Montana-Dakota Utilities Co., as modified by Amendment dated October 25, 1990 and any future amendments to the Area Service Agreement agreed to by Grantee and Montana-Dakota Utilities. (emphasis added)

5. CEC's Franchise is limited to those areas within the City that are described in the Area Service Agreement or any amendments thereto. The areas "within the City" described in the Area Service Agreement are as shown on the Area Service Agreement map outside the bold line and within the City. The "areas within the City" would also include any areas later annexed to the City that were named by an amendment to the Area Service Agreement. Customers of CEC within the City in 1973 and any other customers specifically consented to by MDU would also be included under the express terms of the Area Service Agreement. CEC's Franchise does not grant the authority to serve all new areas of the City that are outside the bold line on the map without amendment to the Area Service Agreement. The ability of the parties to execute new amendments ended on June 26, 2003, the effective date of cancellation of the Area Service Agreement by MDU.

R. at 11, pp. 4-5. These conclusions are supported by the evidence and are consistent with the Board's ultimate decision.

CEC's position fails to acknowledge that its franchise, which incorporates the Area Service Agreement, only applies to "areas within the city", at least insofar as the City can regulate it. See R. at 5, Exh. 1, Art. II. On the date of CEC's franchise, the areas on the Area Service Agreement map were particularly discernable and defined and did not include Boulder Ridge. Boulder Ridge could not be included in the CEC area without an amendment to the map because it was outside the City at the time. The City of Bismarck does not have the authority to proscribe rights and privileges for the provision of electric services for areas that are not within the City.

CEC's argument is essentially that, in 1973, CEC and MDU agreed that any future areas outside the boundary line indicated in the Area Service Agreement, would be served by CEC. This argument fails to account for the entire language of CEC's franchise and clause 11 of the Area Service Agreement, which clearly indicate this was not the purpose of the agreement. The Area Service Agreement was to be updated every five years, in good faith, between MDU and CEC to avoid precisely this type of issue. For reasons the City is not aware of, there were no substantial modifications to the Area Service Agreement and the Area Service Agreement was cancelled in 2003. Regardless, it is clear from the Area Service Agreement that it could not cover all conditions that may arise. However, CEC's position is that the Area Service Agreement did cover all conditions and that CEC is entitled to be the exclusive provider of electric services outside the boundary line indicated in the agreement. CEC's position is directly contrary to the language contained in its franchise and in clause 11 of the Area Service Agreement.

CEC's Franchise from the City only covered areas "within the city", i.e., the areas the City could regulate. CEC's Franchise is what is critical to the issue on appeal. The Franchise (R. at 5, Exh. 1) clearly states it is "limited geographically to the areas within the city described in the Area Service Agreement dated July 5, 1973." *Id.* at Exh. 1, ¶ 1 (emphasis added). The Franchise does not regulate or grant CEC any authority for areas outside the city which are later annexed into the city after cancellation of the Area Service Agreement. It is clear from the record that the Area Service Agreement, and the resulting Franchise to CEC, were based on CEC's apparent intent to service its existing customers, when and if, those customers' locations were annexed by the City of Bismarck. It did not provide exclusive service for new customers in all future areas annexed by the City who were located outside the boundary line on the Area Service Agreement map.

CEC's Franchise is also geographically limited by the language in the Area Service Agreement; MDU's Franchise is not. Therefore, MDU's franchise allows it to provide electrical service to the entire City of Bismarck. CEC's Franchise allows it to provide services within the City of Bismarck consistent with the geographical limitations contained in the Area Service Agreement. CEC can hardly complain about this as such limitation was necessary for it to be granted a franchise in the first place. As CEC contended below, "[t]his dispute concerns whether the City Commission of Bismarck, in exercising its franchise authority, granted CEC the right and obligation to serve the areas annexed to the City within its service area." *Brief of Capital Electric Cooperative, Inc. In Support of Its Reply to Petition to Declare Electric Franchise Rights*, R. at 5, p. 8. The statement itself is somewhat overbroad, as the dispute is solely related to the area being referred to as "Part of Boulder Ridge First Addition." There may be broader implications to this case. However, the issue on this appeal is solely limited to the City's

decision in regards to which company would provide electric services to Part of the Boulder Ridge First Addition.

The Area Service Agreement provided the following:

11. It is realized that the foregoing instrument will not cover all conditions which may arise, but if followed in good faith by both parties, will serve as a guide to future developments and growth for both organizations, thus it is mutually agreed that this agreement will be reviewed at least once every five years for the purpose of evaluating its operation and to discuss possible modifications which may be desirable to more efficiently carry out the intent of both parties.

Area Service Agreement, R. at 5, Exhibit 3, ¶ 11 (emphasis added). The plain language of the Area Service Agreement indicates that it was not intended to cover every possible contingency. It is expected that CEC will argue the City should not have evaluated the intent of the parties in making its decision. CEC must argue this because it is clear that it was not the intent of the CEC, MDU, or the City to grant CEC the exclusive right to provide electric service to areas annexed to the City, but outside the boundary line on the Area Service Agreement map. Such an agreement would have been inconsistent with both CEC's and MDU's franchises. This clause in the Area Service Agreement explicitly indicates that the intent of the parties must be determined.

The intent of the parties in regards to annexed areas of the City is clear in the respective franchises and from the underlying circumstances leading to the Area Service Agreement. In a letter of March 10, 1958, CEC stated "In years to come, if the city should expand beyond these boundaries, I would believe re-negotiations should be held and a new boundary line established." R. at 6, at App. 1, p. 14. In 1961, CEC stated "we recognize that the Montana-Dakota Utilities Company has the right to expand with the city and therefore we are asking only for a limited franchise whereby we can continue to serve our customers and the areas between said customers and still allow Montana-Dakota utilities to realize the benefit of most of the [City's] future

growth.” Id. at App. 1, p. 3 (emphasis added). CEC also stated that it has “always denied requests for electric service from [private residential and commercial customers] which locate within the city and shall continue to do so. It is only the customers we were serving prior to annexation that we are asking authority to continue to serve.” Id. at 3. In a letter of May 15, 1961, CEC further stated, in relevant part “We ask only that we be allowed to keep our service [i]ntact within the present city limits and in future annexed areas. . . . It is only the customers we were serving prior to annexation that we are asking authority to continue to serve.” Id. at App. 2. Therefore, based on the evidence in the record, it is clear that it was the intent of CEC, MDU, and the City to grant CEC a franchise allowing it to serve its existing customers and not to have exclusive authority to serve all areas outside the boundaries as indicated on the 1973 Area Service Agreement. Based on this evidence, the Board’s decision cannot be considered arbitrary, capricious, or unreasonable. Rather, its decision simply recognized CEC’s, MDU’s, and the City’s obvious intent in regards to the underlying franchises at issue. The 1973 franchise simply granted authority to CEC to continue serving its existing customers if and when those customers’ locations were annexed by the City. This was necessary at the time due to a 1971 decision by North Dakota Supreme Court requiring electric cooperatives to have a franchise with a city in order to continue providing electric service to existing customers who have been annexed to a city and can receive central station service. Montana-Dakota Util. Co. v. Divide Co. Sch. Dist. No. 1, 193 N.W.2d 723, 730 (N.D. 1971). CEC’s franchise, including the Area Service Agreement incorporated therein, did not grant CEC the exclusive ability to service any and all future areas annexed to the City but outside the boundary line indicated in the Area Service Agreement. Boulder Ridge is a new development and not a development which CEC can claim it previously provided with electrical service.

In addition to the actual Franchise language, additional support for the Board's decision is found at clause 4 of the Area Service Agreement. The clause provides:

It is agreed that the interest of the consumer can best be met by proving that [MDU] serve those consumers within the area bounded by the heavy dashed black line on the attached map, which shall be made a part of this agreement, as well as any new consumers who come into that area and that the Cooperative will continue to serve its present consumers within the heavy dashed black line and will serve new consumers within the heavy dashed black line only under conditions further stipulated in this agreement. The principal service area of the Cooperative will be that area which lies outside the heavy dashed black line. The agreement shall apply only to area described by the map.

R. at 5, Exh. 3, ¶ 4. This clause does not provide CEC the exclusive right to serve areas annexed by the City in the future. It merely provides that the area outside the boundary line on the map will be CEC's principal service area. It does not grant CEC the exclusive authority to provide electrical service to areas outside the line, if and when, those areas are annexed. This is consistent with language from paragraph 1 of the Area Service Agreement which indicates that since MDU "is and has been the principal supplier of electricity to the area encompassing the city of Bismarck, both parties agree that [MDU] should continue to serve this area and new areas contiguous to the city as further stipulated and identified" in the Area Service Agreement. R. at 5, Exh. 3, ¶ 1 (emphasis added). It is further consistent with the recognition that CEC, as an electric cooperative, is intended to provide rural areas with electric services. The Board's decision rationally applied the terms of the Area Service Agreement to the present dispute involving part of Boulder Ridge First Addition based on these clauses.

The Area Service Agreement was amended by Letter Agreement dated June 3, 1993. R. at 5, Exh. 4. This amendment, signed by representatives of both CEC and MDU, expressly states that the Area Service Agreement "sets forth and describes the service areas in the City of Bismarck, North Dakota, to be served by Capital Elective Cooperative, Inc., and describes the

service areas in the City of Bismarck, North Dakota, to be served by Montana-Dakota Utilities.”
 Id. (emphasis added). This recognizes that the Area Service Agreement, as incorporated in CEC’s franchise, only addressed areas of service within the City. It did not provide expansive or exclusive authority for CEC to provide electric services for all areas outside the boundary line on the Area Service Agreement map.

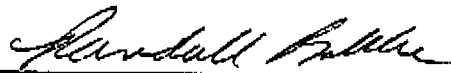
Finally, in its *Amended Complaint and Notice of Appeal* (¶ XXIII), CEC raises due process concerns for the first time in this matter. These allegations are entirely without merit and border on frivolous. During the proceedings below, MDU filed a petition to declare its franchise rights, CEC responded, briefs were submitted, a hearing was held, and a decision was made. This was not a matter that was taken lightly and appropriate procedures were followed by the City. CEC never objected to the process in the proceedings below. CEC was allowed to file a brief and submit oral argument to the Board in support of its position. Further, CEC has not set forth any additional argument that it claims it was not permitted to make in the proceedings below. Put simply, CEC was accorded due process in all respects.

IV. CONCLUSION

For the foregoing reasons, the City of Bismarck requests its November 14, 2005, decision be affirmed in all respects.

Dated this 28th day of February, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

By: 
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