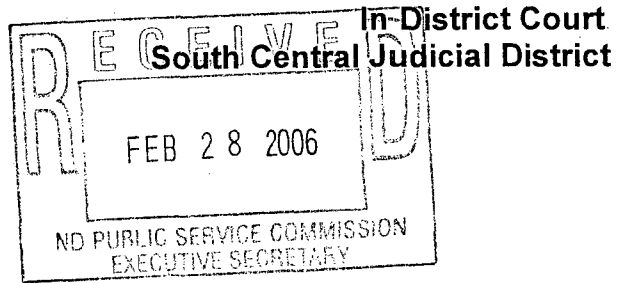


State of North Dakota  
County of Burleigh



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. )

**Montana-Dakota Utilities Co.'s  
Brief on Appeal**

Case No. 05-C-2303

The Court has ordered that it will consider the complaint of Capital Electric Cooperative, Inc. ("CEC") as an appeal from the November 14, 2005 order of the Bismarck Board of City Commissioners. In that order, the City Commission determined that electric utility service to Boulder Ridge First Addition ("Boulder Ridge") is properly provided by Montana-Dakota Utilities Co. ("Montana-Dakota") under its franchise from the City of Bismarck. Montana-Dakota understands the Court will consider CEC's appeal at the hearing scheduled for March 2, 2006. Montana-Dakota submits the following brief in response to CEC's appeal.

**PRELIMINARY**

CEC's filings in this proceeding state various challenges to the validity of the Commission's order. Most of these challenges involve the Commission's authority to interpret its franchises. Montana-Dakota believes this question has been decided by the Court's order of January 30, 2006 determining that the power to franchise supports

the City's authority under its regulatory powers, or those necessarily implied from the statutory grant, to define a party's rights under a franchise.

The Court's order is consistent with the recent holding in GO Committee v. City of Minot, 2005 N.D. 136, 701 N.W.2d 865, in which the Court reviewed the City of Minot's interpretation of its ordinance creating a temporary surtax to fund water supply improvements. The Court implicitly recognized a municipality's power to interpret its franchises by holding that the judiciary's role in reviewing such an interpretation is limited by the doctrine of separation of powers to deciding if the municipality clearly abused its broad discretion to determine the manner and means of exercising the powers delegated to it by state law. Id. at ¶ 8. By its recognition that the judiciary's jurisdiction to review a municipality's interpretation of its ordinances is limited by the separation of powers doctrine, the Court's holding necessarily means that the authority for initial interpretation of those ordinances rests with the municipality.

Because the Court has held that the Bismarck Board of City Commissioners had the authority to interpret its franchises, Montana-Dakota will not further address CEC's arguments regarding that authority.

#### **STANDARD OF REVIEW**

The Supreme Court's decision in GO Committee v. City of Minot, Id. at ¶ 8-9 includes a thorough discussion of the appropriate standard of review by the courts in considering challenges to a municipality's interpretation of its ordinances.

Although enactment of ordinances is a legislative function, interpretation thereof are quasi-judicial acts by the City Commission. Munch v. City of Mott, 311 N.W.2d 17, 22 (N.D. 1981). Courts will not substitute their judgment for that of the municipality's

governing body in interpreting or applying ordinances unless an abuse of discretion is clearly shown. To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably. A & H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994). The manner and means of exercising municipal powers, where not prescribed by the Legislature, are left to the discretion of the municipal authorities. This implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-454 (N.D. 1988).

Ordinances are interpreted like statutes. City of Fargo v. Ness, 551 N.W.2d 790, 792 (N.D. 1996). Statutory interpretation is a question of law subject to full review upon appeal. In construing an ordinance, the Court's duty is to ascertain the municipality's intent, which initially must be sought from the ordinance language itself, giving it its plain, ordinary, and commonly understood meaning. GO Committee v. City of Minot, supra at ¶ 9. If an ordinance is ambiguous, the municipality and the courts may delve further than the words used in the ordinance and consider extrinsic evidence for the determination of the municipality's intent or policy. In re Juran & Moody, Inc., 2000 N.D. 136, 613 N.W.2d 503. Ordinances like statutes are to be construed in a practical manner. See McDowell v. Gillie, 2001 N.D. 91, 626 N.W.2d 666. 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. Pulkrabek v. Morton County, 389 N.W.2d 609, 614-615 (N.D. 1986). The courts will ordinarily defer to a

reasonable interpretation by the municipality of its franchise. GO Committee v. City of Minot, supra at ¶ 9.

### ISSUES AND ARGUMENT

**A: The City's franchise power has been implemented by ordinance.**

CEC has cited Mini-Mart, Inc. v. City of Minot, 347 N.W.2d 131 (N.D. 1984) in support of a position that the order of the City Commission should be reversed because the City of Bismarck has not enacted ordinances to effect regulatory powers under N.D.C.C. § 40-05-01. CEC notes that statutory powers must be implemented by ordinance and contends that the City of Bismarck has not enacted an ordinance that allowed the City to hear Montana-Dakota's petition to declare the franchise rights to serve Boulder Ridge and that the City cannot rely on unwritten and unspecified criteria in reaching its decision.

CEC's reliance on Mini-Mart v. City of Minot, supra, is misplaced. The City of Bismarck has enacted an ordinance to implement its franchise authority under N.D.C.C. § 40-05-01. By Article 3, Section 10 of the City's Home Rule Charter, the City of Bismarck has the power to grant and regulate utility franchises. That authority was implemented by Section 10-11-01 of the Bismarck City Ordinances which prohibits use of the city streets or rights of way to operate an electric system without a franchise granted by resolution of the Board of City Commissioners. Moreover, unlike the situation in Mini-Mart, CEC was not denied a franchise based upon unwritten and unspecified criteria. To the contrary, CEC was issued a franchise to provide electric service within a limited geographic area of the City of Bismarck in 1993. The franchise specifically provides the geographic limitation is intended to prevent duplication of

electric facilities between CEC and other franchise holders. CEC accepted the franchise with this limitation. Nor does Mini-Mart stand for the position that the criteria for issuance or denial of a franchise must be specifically spelled out in the ordinance. The Court in Mini-Mart specifically stated that it did not intend to imply that a municipal licensing ordinance must specifically address all conceivable factual variations which might arise and which might legitimately and reasonably support a decision that a particular license ought not to be issued. 347 N.W.2d at 141.

Similarly, the City Commission did not deny CEC a franchise by its order of November 14, 2005. Rather, it interpreted CEC's existing franchise. The City did not rely on unwritten and unspecified criteria in interpreting that franchise but rather relied upon the criteria established by the North Dakota Supreme Court for interpretation of ordinances. That is, the City Commission interpreted CEC's limited franchise by determining the intent of the Commission at the time the franchise was issued under the facts and circumstances that existed and the purposes to be accomplished by the limited franchise.

Nor was the City Commission required to enact an ordinance or adopt formal procedures for the consideration of Montana-Dakota's petition to interpret the respective franchises. There is no requirement that a municipality adopt an ordinance establishing a procedure to conduct quasi-judicial acts in the interpretation of its franchises. See Mini-Mart, Inc. v. City of Minot, 347 N.W.2d 131-136 (N.D. 1984). Rather, the Commission was only required in the exercise of its discretion to interpret the franchises by employing a procedure that was consistent with the criteria established by the North Dakota Supreme Court for interpretation of ordinances.

CEC's position that the City Commission failed to properly enact ordinances for the implementation of its franchise authority is without merit and does not provide a basis for reversal of the City Commission's decision.

**B. CEC was not denied due process.**

CEC contends that the procedure used by the City in reaching its decision did not afford CEC a fair hearing. It is unclear how CEC could have been prejudiced by the procedure used by the City. Montana-Dakota filed its Petition to Declare Franchise Rights with the City on August 30, 2005 and served a copy of that petition on CEC. CEC filed a reply to the petition on September 7, 2005. In its reply, CEC requested that the Commission deny Montana-Dakota's petition and in turn requested that the City Commission determine that CEC was the authorized franchise provider of electric utility service to Boulder Ridge. By letter dated September 14, 2005, the City notified the parties that the City Commission would hold a hearing on the petition on October 11, 2005 and that the parties had the opportunity to submit written materials and information regarding this matter by October 5, 2005. Accordingly, CEC had essentially a month from the date of its reply to submit whatever materials it wanted the Commission to consider in reaching an interpretation of the franchises; an interpretation that it also sought by its reply to Montana-Dakota's petition.

In accordance with the procedure outlined by the City, CEC submitted a brief dated October 4, 2005 arguing that its franchise gave it the right to serve Boulder Ridge. Both parties appeared before the City Commission on October 11, 2005 and presented argument in support of their positions and responded to the Commission's questions. CEC never objected to the procedure used by the Commission in either its brief or at

oral argument. CEC never suggested the procedure was deficient or asked for the opportunity to submit additional information or materials for the Commission's consideration. CEC never suggested that the City's procedure was deficient nor contended there was any requirement for the City Commission to adopt any prescribed procedure for considering such requests. The procedure used by the Commission gave both parties a full opportunity to present information and argument to the Commission in support of their respective interpretations of the franchises. The Commission's procedure was not deficient and did not deny CEC due process.

**C. The City Commission's interpretation of the franchises was not unreasonable, arbitrary or capricious.**

A municipality's decision is not arbitrary, capricious or unreasonable if the City's 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. Fandrich v. Wells County Board of County Commissioners, 2000 N.D. 181, 618 N.W.2d 166. As noted by the Court in its Memorandum Opinion and Order, this is the real issue before the Court in reviewing the City Commission's decision.

CEC has contended that the Commission's decision is unreasonable because its Conclusion of Law No. 1 states that pursuant to Article VII, 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. CEC cites Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980) for the position that the North Dakota Constitution does not grant powers to municipalities and therefore the City's conclusion of law is incorrect. The Court's

discussion of municipal powers in Litten was based upon the provisions of former Article VI, Section 130 of the North Dakota Constitution. In 1982, new Article VII of the Constitution was approved at the primary election. Section 2 of Article VII provides that the Legislative Assembly shall provide by law for the establishment and the government of all political subdivisions and such political subdivisions shall have and exercise such powers as provided by law. Article VII, Section 11, N.D. Const. further provides:

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.

Regardless of whether Section 11 is deemed a grant of authority to municipalities or a limitation on the authority of the Legislative Assembly to restrict the ability of municipalities to franchise the operation of public utilities, the effect for purposes of this proceeding is the same. In either instance, the City of Bismarck is the exclusive franchise authority for the construction and operation of public utilities within its corporate limits. Whether the City of Bismarck derives that authority from the North Dakota Constitution or the Legislative Assembly does not affect the validity of the Commission's order in this proceeding.

CEC has also suggested that the City of Bismarck did not have authority to alter or amend its franchise. That argument, of course, requires the Court to accept CEC's self-serving interpretation that its limited franchise authorized CEC to provide service to Boulder Ridge prior to the City Commission's order. The City of Bismarck did not alter or amend CEC's franchise – it interpreted that franchise. Based on that interpretation, the City of Bismarck determined the geographic limits of the franchise did not encompass subdivisions annexed after 1993, including Boulder Ridge. Accordingly, the

City of Bismarck did not alter or amend CEC's franchise and it was not required to enact a resolution to amend or alter the franchise. CEC's franchise authorizes it to provide electric service within the same limited geographic area that it has been authorized to serve since it was issued by resolution of the City in 1993.

CEC has also asserted that the City of Bismarck had no authority to delegate power to Montana-Dakota to determine whether subdivisions annexed by the City after 1993 would be added to the geographic limitation of CEC's franchise. First, the City Commission's order of November 14, 2005 did not delegate any power to Montana-Dakota; it simply interpreted the geographic limitation within CEC's existing franchise. Likewise, CEC's franchise as issued by the City of Bismarck in 1993 did not empower Montana-Dakota to determine CEC's franchise area. Rather, it provided that the geographic limitation of CEC's 1993 franchise would be automatically adjusted to include subdivisions annexed to the City of Bismarck after 1993 if CEC and Montana-Dakota agreed in an amendment to the Area Service Agreement that such subdivisions would be included by reference within the geographic limitation of CEC's franchise. To the extent the CEC franchise allowed Montana-Dakota and CEC to effectively amend the franchise, it was a delegation of authority to both Montana-Dakota and CEC. CEC consented to that delegation when it accepted the 1993 franchise. If the City of Bismarck was prohibited by law from delegating such authority to the parties, then the unauthorized delegation within CEC's 1993 franchise was void and no additional subdivisions could be added to the franchise without the approval of the City Commission. This was effectively the result of the City Commission's order of November 14, 2005 when it concluded that the geographic limits of the franchise had

not been altered because there had been no agreed amendments to the Area Service Agreement by Montana-Dakota and CEC to add any subdivisions to the CEC franchise. Finally, an agreement with Montana-Dakota to amend to the Area Service Agreement was not the only way in which CEC could obtain an amendment to its franchise to include new subdivisions annexed to the City of Bismarck. Nothing limits CEC's ability, with or without agreement of Montana-Dakota, to petition the Commission for an amendment of its franchise to include any newly annexed subdivision to the City of Bismarck.

CEC has contended the Commission's order did not sufficiently explain the rationale for its decision. To the contrary, in determining the intent of the City Commission in the issuance of CEC's franchise, the Commission examined and recited the history and purpose behind the geographic limitation of CEC's franchise and the Area Service Agreement that was incorporated by reference within the franchise. Under CEC's interpretation of its franchise, the "limitation" within the franchise entitled it to serve every new subdivision annexed to the City of Bismarck now and into the future to the exclusion of Montana-Dakota which is the general electric utility franchise holder for the City of Bismarck and has been providing electric service to the City of Bismarck since 1895. In Conclusion of Law No. 3, the Commission determined that the intent of the City when it awarded a limited franchise to CEC based upon the Area Service Agreement was that Montana-Dakota would remain the main provider of electric distribution service within the City of Bismarck and that it was not the intent of the City for CEC to be the exclusive electric utility provider for all new areas to the City outside the line shown on the Area Service Agreement. The City concluded that CEC's

franchise does not grant CEC the authority to serve new annexed areas of the City without amendment to the Area Service Agreement, which has since been cancelled, or amendment of the franchise by resolution of the City Commission. The City's order clearly states the rationale for its decision and that rationale is supported by the materials submitted by the parties for the Commission's consideration.

### **CONCLUSION**

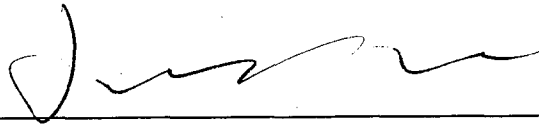
The City Commission properly exercised its quasi-judicial authority in interpreting the rights of the parties under their respective franchises by determining the intent to the City when it issued those franchises. The Commission examined the language of the franchises, including the geographic limitation within CEC's franchise, the circumstances that existed when the franchises were issued, and the purpose of the limitation within CEC's franchise. The City Commission's decision is supported by the record and is not arbitrary, capricious or unreasonable. Accordingly, CEC's appeal to the City Commission's decision should be dismissed.

Dated this 28<sup>th</sup> day of February, 2006.

Respectfully submitted,  
Montana-Dakota Utilities Co., a Division of  
MDU Resources Group, Inc.

Daniel S. Kuntz (ID# 03490)  
Assistant General Counsel  
MDU Resources Group, Inc.  
1200 West Century Avenue  
P.O. Box 5650  
Bismarck, ND 58506-5650  
(701) 530-1006

Pearce & Durick  
Patrick W. Durick (ID# 03141)  
Jerome C. Kettleon (ID# 03095)  
314 East Thayer  
P.O. Box 400  
Bismarck, ND 58502-0400  
(701) 223-2890

By:   
\_\_\_\_\_  
Jerome C. Kettleon