

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.,)

Appellant,)

v)

The City of Bismarck, North Dakota,)

and)

Montana-Dakota Utilities, Inc., a)

Division of MDU Resources Group,)

Inc.,)

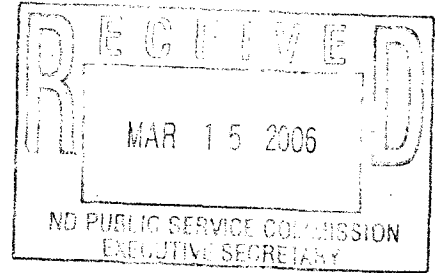
and)

The Public Service Commission of)

North Dakota,)

Appellees.)

.....)



ORDER ON APPEAL
Case No. 05-C-2303

Before the Court is the appeal by Capital Electric Cooperative, Inc. ("Capital") of the Findings, Conclusions Decision and Order issued by the Bismarck Board of City Commissioners ("Commission") on November 14, 2005.

The issue before the Court is whether the Commission abused its discretion in issuing its Order. To establish an abuse of discretion, Capital must show that the Commission acted arbitrarily, capriciously, or unreasonably. See, A&H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994).

Procedural History

While not necessary to decide the issue before the Court, the Court believes it would be helpful to recap the procedural history of this case.

On August 30, 2005, Montana-Dakota Utilities, Inc. a Division of MDU Resources Group, Inc., ("MDU") filed with the Commission a Petition to Declare Electric Franchise Rights (Record of Proceedings Before the Board of City Commissioners Exhibit 1, hereafter cited as "RC"). The Petition filed by MDU asked the Commission to determine that:

1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within "Part of the 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 distribution service within "Part of the Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.

Capital filed a Reply to Petition to Declare Electric Franchise Rights (RC. Ex. 2). The Reply asked the Commission to determine that:

1. Capital is 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.
2. Capital is authorized under its franchise to provide electric distribution services to all other areas annexed to the City of Bismarck designated as Capital's service area as set forth in the Area Service Agreement, as amended.
3. Montana-Dakota is not authorized to provide electric distribution service to Boulder that "part of Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.
4. Montana-Dakota is authorized to provide electric service distribution service to all future territory annexed to the City of Bismarck

designated as Montana-Dakota's service area as set forth in the Area Service Agreement, as amended.

Capital's Reply does not include an objection to the Commission's authority to consider MDU's Petition. In fact, the Reply asked the Commission to go beyond MDU's Petition and make a determination as to "all other areas annexed to the City of Bismarck" and "all future territory annexed to the City of Bismarck."

The Commission considered the Petition and the Reply to the Petition at three separate meetings; September 13, 2005; October 11, 2005; and at a special meeting November 14, 2005. Before the October 11, 2005 meeting, each party submitted a brief with attached exhibits. (RC. Exs. 5, 6.) At the October 11, 2005 meeting, counsel for each party appeared before the Commission and presented their respective positions to the Commission. (RC. Ex. 7.)

The Commission issued its Findings, Conclusions Decision and Order on November 14, 2005. The Commission limited its Decision and Order to a determination "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." (RC. Ex. 11, p. 5)

Capital filed a Complaint in the district court on December 1, 2005. The Complaint requested the following relief. "Therefore, Capital requests judgment declaring its rights under its franchise to operate an electric distribution system in Bismarck granted by the City on May 23, 1993." Capital, in its Complaint, did not claim the Commission lacked authority to hear the Petition. Likewise, the Complaint does not claim the Commission's Findings, Conclusions Decision and Order were wrong. The Complaint is styled as a declaratory judgment action asking the Court to enter a judgment generally declaring Capital's rights under the franchise.

On December 20, 2005, MDU filed its Answer. Included in its Answer are paragraph 9 that claims the district court cannot abridge the power of the governing body of a city to franchise the construction and operation of a public utility; paragraph 13 that claims declaratory relief is not available to perform a legislative function delegated by law to the City of Bismarck; paragraph 15 that claims declaratory relief is not available to Capital because its franchise rights have been determined by the Commission; and paragraph 16 that claims declaratory relief is not available to collaterally attack the declaration of franchise rights by the Commission.

Also on December 20, 2005, the City of Bismarck ("City") filed a Motion to Dismiss or in the Alternative for a More Definite Statement. The Motion to Dismiss alleged failure to state a claim upon which relief may be granted and failure to exhaust administrative remedies. The Motion for a More Definite Statement requested a more definite statement as to the cause of action against the City and the relief requested. In its brief in support of its Motion, the City included an argument about the City's powers to exercise franchise authority. (Defendant City of Bismarck's Brief in Support of Motion to Dismiss or in the Alternative for a More Definite Statement at p. 5).

MDU filed a brief in support of the City's Motion. In its brief, MDU again raised the issue of whether declaratory relief was available to challenge the Commission's decision. (Brief of Montana-Dakota Utilities Co. in Support of Motion to Dismiss at p. 3).

In its Response to the City's Motions, Capital conceded that a more definite statement was appropriate, and included a more definite statement. (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p. 3). Because Capital conceded the Motion and provided a more definite statement (and because of the Court's subsequent Order) the Court did not issue an Order

granting City's the Motion for More Definite Statement. Also in its Response, Capital now claimed the Commission exceeded its authority in issuing its Findings, Conclusions Decision and Order, and that the Commission's Findings, Conclusions Decision and Order were wrong. (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p.4)

Based on the pleadings and on the positions expressed by the parties in their respective briefs and responses, the Court found it necessary, as a prerequisite to deciding the City's Motions, to address the two issues raised by the parties: (1) did the Commission have authority to hear the Petition and issue the Findings, Conclusions Decision and Order, and (2) if the Commission had such authority, what remedy was available to Capital to challenge the Commission's decision? The Court's decisions on those issues determined the next step to be taken.

As to the issue of the Commission's authority, the Court first found that Capital had not challenged the Commission's authority to hear the Petition and issue its Order. Contrary to Capital's later claim, the Court did not go outside the pleadings to make that finding. The Court wrote "Nothing either party provided to the Court shows CEC objected to or challenged the authority of the City Commissioners to hear the Petition." (Memorandum Opinion and Order at p. 2). If the City had already filed the record of the Commission proceedings at that time, the Court was not aware of the filing and did not review the record. The Court further wrote, on that issue, "Nowhere in its Complaint does CEC directly claim the City did not have authority to hear MDU's Petition and to issue its Order on the Petition." (Memorandum Opinion and Order at p. 3, emphasis added). Further, the Court wrote, "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." (Id. Emphasis added). The Court then went on

to discuss the Commission's authority, and found that the Commission did have the authority to interpret the franchise. (Memorandum Opinion and Order at pp. 3-5).

The Court then discussed the issue of available remedy. The Court determined, in large part based on the arguments set out by Capital in its Response to Motion to Dismiss or in the Alternative for a More Definite Statement, that Capital was not in fact seeking declaration of its rights under the franchise, but that Capital was in fact seeking judicial reversal of the Commission's Decision and Order on the merits of the Decision and Order. The Court's conclusion was unavoidable given Capital's own statements. "Capital states that it does indeed challenge the validity of the determinations made by the City Commission. The determinations were not only wrong, they were made outside the scope of the City Commission's legislative authority." (Plaintiff's Response to Motion to Dismiss or for More Definite Statement at p. 4). Having found that the remedy of a declaratory judgment is not an available remedy to challenge the merits of a determination made by a municipal governing body, the Court then determined that an appeal of the Commission's decision was a remedy available to Capital. Finally, the Court decided that, rather than dismiss the action and make Capital start a new proceeding, the Court would allow the matter to proceed as if Capital had filed a proper appeal.

The Court held a hearing on the appeal on March 3, 2006 despite Capital's request for a continuance. The Court explained its reasons for denying Capital's request in its Order of March 1, 2006.

Did the Commission Abuse Its Discretion in Its Findings, Conclusions Decision and Order?

N.D.C.C. §28-34-01 governs appeals from "local governing bodies." The term "local governing bodies" includes any officer, board, commission resource or conservation district, or other political subdivision. The Commission is a "local governing body." The standard of review on appeal is whether the Commission acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision. See, Klindt v. Pembina County Water Resource Board, 2005 N.D. 106, 697 N.W.2d 339; Pic v. City of Grafton, 1998 N.D. 202, 586 N.W.2d 159. The North Dakota Supreme Court in Klindt held that a decision of a local governing body 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. The North Dakota Supreme Court has further held that the courts must not substitute their judgment for that of the local governing body that made the decision. Pic at ¶11.

Both MDU and the City of Bismarck filed briefs on appeal. Capital did not. Capital did file an Amended Complaint and Notice of Appeal in which Capital set out a number of things that can be taken as objections to Findings and Conclusions of the Commission. At the March 3, 2006 hearing, counsel for Capital further summarized Capital's objections. The Court will address Capital's assertions both as set out in its Amended Complaint and at the hearing.

In paragraph XIII of the Amended Complaint, Capital states that the Commission's Conclusion of Law Number 1 is "erroneous as a matter law." Paragraphs XIV, XV, XVI, XVII, XVIII, XIX, XX, and XXVI all address the issue of the Commission's jurisdiction or authority. Counsel for Capital stated Capital's objection to Conclusion of Law Number 1 at the hearing on appeal. Also at the hearing, counsel for Capital stated Capital's objection "to the procedure by the City of Bismarck as an ad hoc adventure unsupported by any procedures or

standards under any state statute or local ordinance.” The Court does not know what an “ad hoc adventure” is. However, the Court has already rendered its decision on the issue of the Commission’s authority and will not repeat its decision or its reasoning.

Paragraph XXI of the Amended Complaint is a blanket objection to the Findings of Fact made by the Commission. The paragraph does not specify what findings are objected to. Likewise, paragraph XXII states that the Commission’s Order “is not in accordance with the law, and is therefore arbitrary, capricious, unreasonable.” Capital does not specify further in this paragraph how the Order is not in accordance with the law.

Paragraph XXIII states that the procedure used by the Commission in hearing MDU’s Petition and in the Commission’s decision did not afford Capital a fair hearing, and that Capital was denied due process. Capital did not articulate either in its Amended Complaint or at the hearing on appeal in what way it was denied due process. Each party was afforded an opportunity to file briefs, including exhibits, with the Commission. Each party was afforded the same amount of time to present oral arguments to the Commission. The Court was unable to find anything in the record on appeal that shows that Capital at any time objected to the Commission’s procedure. The Court finds that due process was afforded Capital.

Paragraph XXIV of the Amended Complaint states that the Commission’s “conclusions of law and the order of the November 14th Order do not sufficiently explain its rationale for its decision.” A review of the Conclusions of Law of the Commission reveal that, in each Conclusion, there is a clear summary of the Commission’s rationale and reasoning.

Paragraph XXV of the Amended Complaint is, again, a conclusory statement without detail, that the Commission's Order is arbitrary, capricious, and unreasonable.

Paragraphs XXVII, XXVIII, XXXI and XXXII argue, in summary, that no statute or ordinance allows for an appeal of the Commission's Order. The Court has already determined this issue, but, in short: N.D.C.C. §27-05-04(4) provides jurisdiction to district courts to hear appeals from "inferior officers, boards, or tribunals" and N.D.C.C. §28-34-01 governs appeals from "local governing bodies." These statutes clearly give Capital an appeal of the Commission's Order.

The remaining paragraphs are either procedural summaries or conclusory statements that are not disputed or disputable.

At the hearing on appeal, counsel for Capital articulated further objections to the Commission's Findings and Conclusions.

Capital objects to the Commission's references to materials from "the early 1960s" in Finding of Fact Number 2. First, the Finding is based on fact in the form of materials submitted to the Commission by MDU. (Exs. 1 and 2 attached to RC. 6). Second, the Commission found, in Conclusion of Law 2, that the Area Service Agreement was ambiguous (see discussion below) and therefore determined that it was necessary to consider extrinsic evidence about the parties' intent. The Court finds it was not unreasonable for the City to do so. The fact that Capital originally generated the materials gives the materials even more weight and relevance in interpreting Capital's intent in entering into the Area Service Agreement.

Capital objects to Finding of Fact (3)(b). Finding of Fact (3)(b) is supported by the Area Service Agreement itself (Ex. 3 attached to RC. 5). Paragraph 11 of the Area Service Agreement clearly supports the Commission's Finding that the

intent of the parties was to review the agreement every five years. Exhibits 1 and 2 attached to MDU's brief (RC. 6) also support the Finding as to Capital's intent. MDU's understanding of the agreement is supported by the foregoing Exhibits as well as counsel's statements at the October 11, 2005 Commission meeting.

Capital objects to Finding of Fact 5. At the hearing on appeal, counsel for Capital said "[T]here is no provision in the area service agreement for partial cancellation of the area service agreement" and "Therefore, the purported cancellation by MDU had no effect on Capital's franchise. Any determination by the City to the contrary is arbitrary, capricious, and unreasonable." Finding of Fact 5 does not find there was a "partial cancellation" of the Area Service Agreement, nor does the Finding address any effects of cancellation of the Area Service Agreement on Capital's franchise. Finding of Fact 5 merely points out that MDU cancelled the Area Service Agreement, and that the cancellation was effective June 26, 2003. That Finding is supported by Exhibit 10 attached to RC. 6 and the June 3, 1993 amendment to the Area Service Agreement (Ex. 4 attached to RC. 5).

Capital objects to Conclusion of Law 1 that the Commission had the authority to decide the Petition. The Court has addressed that issue.

Capital objects to Conclusion of Law 2 that the Area Service Agreement is ambiguous. The fact is that, as found in Conclusion of Law 2, Capital and MDU "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." If that were not the case, this dispute would not exist. That fact in and of itself supports a conclusion of ambiguity. Adding to the Conclusion is the fact that the Area Service Agreement could be reasonably interpreted three ways:

1. The Agreement includes just the areas that were in the City in 1993 when the franchises were issued, and any areas that are brought in as a result of amendments to the Agreement.

2. The Agreement includes all the areas within the City in 1993 plus any areas annexed to the City after 1993 that were within the Agreement until it was cancelled.

3. The Agreement includes all the areas that were in the City in 1993 as well as all the areas annexed into the City thereafter.

Each of those interpretations is reasonable. Therefore, the Agreement is, as found by the Commission, ambiguous; therefore the consideration of extrinsic evidence of intent is necessary; and therefore the Commission's ultimate interpretation of the Agreement is not unreasonable.

Capital objects to Conclusion of Law 3 in that the intention of the City when it awarded the franchise to Capital was that MDU was to remain the main provider of electrical services within the City, except for Capital's existing customers and any other customers or service conceded to Capital by MDU. This Conclusion is supported by paragraph 1 of the Area Service Agreement, wherein it is stated:

"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 the area and new areas contiguous to the city as further stipulated and identified in this agreement."

Paragraph 4 of the Agreement further defines the intent of the parties and supports the Commission's Conclusion. Capital also objects to the Commission's Conclusion of Law 3 insofar as the Conclusion is that it was not the intention of the parties that the map attached to the Area Service Agreement would be in

place for forty years without amendment, but rather that it would be amended as the City grew to allow for growth of both MDU and Capital. First, the inclusion of the geographic limitation in Capital's franchise, but not in MDU's, supports the Conclusion. Second, the agreement that the parties would review the Agreement every five years supports the Conclusion. Third, paragraphs 1 and 2 of the Agreement that discuss the scope of each parties' past service supports the Conclusion. Fourth, the provision of paragraph 4 of the Agreement stating that MDU will serve "any new consumers who come into that area and that [Capital] will continue to serve its present consumers within the heavy dashed black line and will serve new consumers within the heavy black dashed line only under conditions further stipulated in this agreement" supports the Conclusion. Capital further objected to Conclusion of Law 3 insofar as the Conclusion is that it was not the intent of the City that Capital would become the exclusive electric power supplier for all new areas of the City outside the line shown on the Area Service Agreement. This Conclusion is supported by the same evidence as supports the other objected to portions of Conclusion of Law 3.

Capital objects to Conclusion of Law 5 as to its conclusions regarding the limitations of Capital's franchise. Again, the terms of Capital's franchise itself, as well as the limitations contained in the Area Service Agreement, support this Conclusion. Capital further objects to the Conclusion that the ability of the parties to execute new agreements ended on June 6, 2003, the effective date of cancellation of the Area Service Agreement by MDU. This Conclusion is supported by the Amendment to the Agreement (Ex. 4 attached to RC. 5) and MDU's letter of cancellation (Ex. 5 attached to RC. 5).

Capital objects to Conclusion of Law 6 "for the reason that the City was not empowered and has failed to enact resolutions or ordinances, and that no provision of any other statute and no provision of the North Dakota Constitution

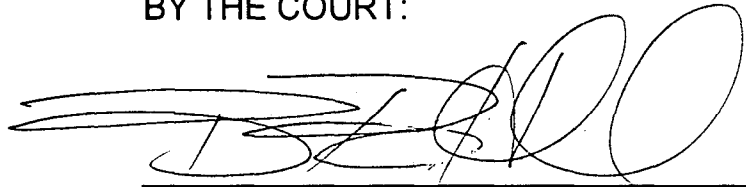
empowers the City to adjudicate conflicting claims between the holders of non-exclusive franchises that the City has granted." Conclusion of Law 6 contains none of the conclusions to which Capital objects.

The Court finds that Capital has not shown that the Findings, Conclusions Decision and Order of the Commission were arbitrary, capricious or unreasonable. The Court finds that the Order was based on a rational mental process supported by the evidence in the record on appeal. The Court ORDERS that Capital's appeal is hereby DENIED.

The Court is aware that MDU filed a Counterclaim in the original action. Because this matter was treated as an appeal, and because some of the parties to the appeal are not proper parties to the Counterclaim, it is further ORDERED that MDU's Counterclaim is DISMISSED without prejudice.

Dated at Bismarck, North Dakota, this 14 day of March, 2006.

BY THE COURT:



Bruce B. Haskell, District Judge
South Central Judicial District

Carol Larson
Randall Bakke
Jerome Kettleson
Daniel Kuntz
William Binek