



WILLIAM P. PEARCE  
PATRICK W. DURICK  
B. TIMOTHY DURICK  
GARY R. THUNE  
JEROME C. KETTLESON  
LARRY L. BOSCHEE ••  
LAWRENCE BENDER, P.C. •  
JONATHAN P. SANSTEAD  
TIFFANY L. JOHNSON  
JEFFREY T. GLYNN

ATTORNEYS AT LAW  
314 EAST THAYER AVENUE  
P.O. BOX 400  
BISMARCK, NORTH DAKOTA 58502

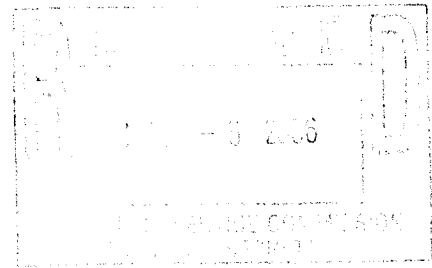
TELEPHONE (701) 223-2890  
FAX (701) 223-7865  
E-MAIL: law.office@pearce-durick.com

November 3, 2006

**HAND-DELIVERED**

Ms. Penny Miller, Clerk  
North Dakota Supreme Court  
600 East Boulevard Avenue, Dept. 180  
Bismarck, ND 58505-0530

Re: *Capital Electric Coop., Inc. v. City of Bismarck, et al*  
*Supreme Court No. 20060199*  
*Burleigh County No.: 05-C-02303*



Dear Ms. Miller:

Enclosed for filing is original and seven copies of Brief of Appellee Montana-Dakota Utilities Co., together with disk. The attached disk has been scanned by a virus protection program.

Thank you for your attention to this matter.

Very truly yours,

PEARCE & DURICK

By *Jerome C. Kettleson*

Jerome C. Kettleson

Phone: (701) 333-0104

Email: jck@pearce-durick.com

JCK/ef  
Enclosures

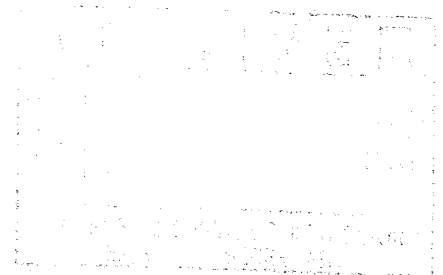
cc. (w/encl.) Carol Larson  
(w/encl.) Randall J. Bakke  
(w/encl.) William W. Binek  
(w/encl.) Wayne K. Stenehjem

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc., )  
Plaintiff and Appellant, )  
vs. )  
City of Bismarck, North Dakota, )  
Defendant and Appellee, )  
and )  
Montana-Dakota Utilities Co., a )  
Division of MDU Resources Group, Inc., )  
Defendant, Counterclaimant )  
and Appellee. )  
and )  
The Public Service Commission of )  
North Dakota, )  
Defendant and Appellee. )

Supreme Court No. 20060199  
Burleigh Co. No. 05-C-02303



---

ON APPEAL FROM  
SOUTH CENTRAL JUDICIAL DISTRICT COURT  
BURLEIGH COUNTY, NORTH DAKOTA  
THE HONORABLE BRUCE HASKELL

---

**BRIEF OF APPELLEE MONTANA-DAKOTA UTILITIES CO.**

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 Avenue  
Bismarck, ND 58502-0400  
(701) 223-2890

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	i
NATURE OF THE CASE .....	1
Statement of the Facts and Course of Proceedings.....	1
ARGUMENT .....	11
1. The District Court Properly Considered CEC’s Challenge to the City Commission’s Order .....	11
2. The City Had Authority to Interpret Its Franchises .....	14
3. The City’s Order Did Not Violate Constitutional Principles.....	22
4. The City’s Interpretation of CEC’s Franchise Was Reasonable.....	27
5. CEC’s Requested Relief Would Violate the Separation of Powers Doctrine.....	32
CONCLUSION.....	32

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	i
NATURE OF THE CASE .....	1
Statement of the Facts and Course of Proceedings .....	1
ARGUMENT .....	11
1. The District Court Properly Considered CEC’s Challenge to the City Commission’s Order .....	11
2. The City Had Authority to Interpret Its Franchises .....	14
3. The City’s Order Did Not Violate Constitutional Principles.....	22
4. The City’s Interpretation of CEC’s Franchise Was Reasonable.....	27
5. CEC’s Requested Relief Would Violate the Separation of Powers Doctrine.....	32
CONCLUSION.....	32

**TABLE OF AUTHORITIES**

	<u>Page</u>
<u>A&amp;H Services v City of Wahpeton</u> , 514 N.W.2d 855 (N.D. 1994) .....	13, 14, 20, 21, 26
<u>Bigwood v. City of Wahpeton</u> , 1997 ND 124, 565 N.W.2d 498.....	12, 20, 26
<u>Braunagel v. City of Devils Lake</u> , 2001 ND 118, 629 N.W.2d 567 .....	11
<u>Capital Elec. Coop., Inc. v. Pub. Serv. Comm. of the State of N.D., et al</u> , 534 N.W.2d 587 (N.D. 1995) .....	3
<u>Christenson v. Job Serv. North Dakota</u> , 399 N.W.2d 300 (N.D. 1987) .....	19
<u>Choutalos v. North Dakota State Personnel Bd.</u> , 429 N.W.2d 441 (N.D. 1988)..	19
<u>City of Fargo v. Ness</u> , 551 N.W.2d 790 (N.D. 1996) .....	13, 20, 26, 27
<u>County of Stutsman v. St. Historical Soc.</u> , 371 N.W.2d 321 (N.D. 1985) .....	19
<u>Fandrich v. Wells County Bd. of County Commiss’rs</u> , 2000 ND 181, 618 N.W.2d 166 .....	28
<u>GO Comm. v. City of Minot</u> , 2005 ND 136, 701 N.W.2d 865 .....	13, 20, 26, 27, 28
<u>Haugland v. City of Bismarck</u> , 429 N.W.2d 449 (N.D. 1988) .....	21
<u>In re Juran &amp; Moody, Inc.</u> , 2000 N.D. 136, 613 N.W.2d 503 .....	27
<u>McDowell v. Gillie</u> , 2001 N.D. 91, 626 N.W.2d 666.....	27
<u>Messer v. Bender</u> , 1997 ND 103, 564 N.W.2d 291 .....	20

<u>Mini-Mart, Inc. v. City of Minot</u> , 347 N.W.2d 131 (N.D. 1984) .....	20, 21, 22
<u>Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1</u> , 193 N.W. 2d 723 (N.D. 1972) .....	3, 4, 5, 6, 30
<u>Montana-Dakota Utils. Co. v. Johanneson</u> , 153 N.W.2d 414 (N.D. 1967) .....	23, 25
<u>Montana-Dakota Utils. Co., v. Williams Elec. Coop.</u> , 263 F.2d 431 (8th Cir. 1959).....	2
<u>Munch v. City of Mott</u> , 311 N.W.2d 17 (N.D. 1981) .....	20
<u>Pulkrabek v. Morton County</u> , 389 N.W.2d 609 (N.D. 1986) .....	27
<u>Ramsey Financial Corp. v. Haugland</u> , 2006 ND 167, 719 N.W.2d 346.....	28
<u>Robertson v. North Dakota Workers Compensation Bureau</u> , 2000 ND 167, 616 N.W.2d 844 .....	11, 12
<u>Tibeit v. City of Minto</u> , 2006 ND 189, 720 N.W.2d 921.....	13
<u>Transp. Div. of Fargo Chamber of Comm. v. Sandstrom</u> , 337 N.W.2d 160 (N.D. 1983) .....	12
 <u>Cites and Authorities.</u>	
N.D.C.C. § 27-05-06(4) .....	12
N.D.C.C. § 28-34-01 .....	12
N.D.C.C. § 31-11-05.....	19
N.D.C.C. Ch. 32-23 .....	12
N.D.C.C. § 32-23-02.....	11
N.D.C.C. § 32-23-12 .....	11
N.D.C.C. § 40-05-01 .....	21
N.D.C.C. § 40-05-01(57) .....	16
N.D.C.C. § 40-05.1-06(10) .....	16
N.D.C.C. Ch. 49-03 .....	3
N.D.C.C. § 49-03-01 .....	3
N.D.C.C. § 49-03-06.....	8, 31, 32

Other

City of Bismarck, Ordinance 10-11-01..... 17, 21

Debates of the North Dakota Constitutional Convention of 1972,  
pp. 694-701, 1108-16, 1452, 1458, 1461-66, 1693-95, 1725, 1728-29,  
1735-36, 1791, 1797-98, 1849..... 15

Home Rule Charter for the City of Bismarck, Art. 3 ..... 16, 17

Home Rule Charter for the City of Bismarck, Art. 9 ..... 17

North Dakota Constitution, Article VII, Section 11  
1965 N.D. Laws ch. 319 ..... 14, 15

## NATURE OF THE CASE

This is an appeal from a District Court judgment affirming an Order of the Bismarck Board of City Commissioners interpreting the electric franchises of Montana-Dakota Utilities Co. (“MDU”) and Capital Electric Cooperative (“CEC”) with regard to the provision of electric service to Part of Boulder Ridge First Addition to the City of Bismarck (“Boulder Ridge”). The City determined CEC’s limited franchise did not encompass the newly annexed Boulder Ridge subdivision and MDU was entitled to provide electric service to Boulder Ridge under its general franchise from the City.

### Statement of the Facts and Course of Proceedings<sup>1</sup>

In the late 60’s and early 70’s, the City of Bismarck experienced significant population growth that resulted in expansion of the city limits. Within the newly incorporated subdivisions were isolated customers served by CEC which began providing service in the rural area outside Bismarck in 1948. At the time, MDU held the sole electric franchise to serve customers within the city limits. Because it did not hold a franchise from the City, CEC was concerned for some time that it would be required to turn over its facilities and customers within the annexed subdivisions to MDU. To resolve its concerns, CEC first sought to enter into a “gentlemen’s

---

<sup>1</sup> The background facts recited herein were described in MDU’s brief submitted to the City of Bismarck in support of its Petition to Declare Franchise Rights and supported with document appended to the Brief. Appendix 30. The brief and appended documents are included in Certificate of Record (“COR”) #41. CEC included MDU’s brief and some of the appended documents in its Appendix.

agreement” regarding service areas. In a letter of March 10, 1958, CEC described its proposal to deal with future growth under such an agreement:

In years to come, if the city should expand beyond these boundaries, I would believe re-negotiations should be held and a new boundary established.

(COR #41 (App.1, p. 14)). MDU did not enter into the “gentlemen’s agreement” because of concerns following a United States Eighth Circuit Court of Appeals ruling that such agreements were against public policy under North Dakota law. (COR #41 (App.1, p. 16)); Montana-Dakota Utils. Co., v. Williams Elec. Coop., 263 F.2d 431 (8th Cir. 1959). Unable to obtain a “gentlemen’s agreement” with MDU, CEC in 1961 sought a limited franchise from the City of Bismarck. In its transmittal letter, CEC explained the scope of the requested limited franchise in relation to MDU’s existing franchise and service:

However, 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 cities (sic) future growth.

(COR #41 (App.1, p. 3)). In a subsequent letter to City Attorney John A. Zuger, CEC further explained the scope of its request:

We ask only that we be allowed to keep our service intact within the present city limits and in future annexed areas.

Our Board of Directors have gone on record as recognizing Montana-Dakota Utilities’ right to serve private residential and commercial customers in Bismarck and have always denied requests for electric service from these 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.

(COR #41 (App. 2, p. 1)). CEC's franchise application was not granted.

In 1965, the North Dakota Legislature passed the "Territorial Integrity Act" ("TIA"), (1965 N.D. Laws ch. 319) as amendments to N.D.C.C. Chap. 49-03 at the request of the rural electric cooperatives to prevent public utilities from "pirating" electric service customers in rural areas. See Capital Elec. Coop., Inc. v. Pub. Serv. Comm. of the State of N.D., et al, 534 N.W.2d 587, 590 (N.D. 1995). As a result of the TIA, a public utility such as MDU can only extend its facilities outside the corporate limits of a city if it obtains a Certificate of Public Convenience and Necessity ("PC&N") from the North Dakota Public Service Commission. Id. N.D.C.C. Chap. 49-03. If an adjoining rural electric cooperative files an objection to the application, the Commission holds a hearing to determine which supplier is best able to serve the location based upon a list of factors such as which supplier has the closest facilities and can extend service at the least cost.

Although the TIA limited the ability of public utilities to extend service outside a city, public utilities still had an opportunity to grow through the extension of facilities to serve customers in areas annexed by cities served by the utilities. N.D.C.C. 49-03-01.3. In 1972, in a proceeding initiated by MDU, the Court addressed the provision of electric service in a newly annexed area to the City of Crosby. Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, 193 N.W. 2d 723 (N.D. 1972). The Court, recognizing electric cooperatives are organized under North Dakota law for the purpose

of serving persons in rural areas, held when a city annexes territory served by a rural electric cooperative, the cooperative can not continue to provide service in the annexed area without a franchise from the City:

Where a city receiving central station [public utility] service annexes territory which is being served by an electric cooperative corporation, persons within the annexed area become persons who are receiving central station service and, under the charter of the electric cooperative formed under the Act, these persons no longer qualify for membership in the electric cooperative corporation for the purpose of receiving electric service to their facilities located within the city.

The Electric Co-operative Corporations Act allows an electric cooperative to serve, in addition to its membership, an additional number of persons not in excess of ten percent of the number of its members. Section 10-13-03(1), N.D.C.C. However, where any such person resides within or seeks service for facilities within a city defined as a rural area which is receiving central station service, such person cannot be served within the corporate limits, in the absence of a franchise, where such city has in existence an ordinance prohibiting such service in the absence of a franchise.

Id. at 730

Partly in response to enactment of the TIA and partly due to CEC's desire for a limited franchise to serve its existing customers following the Supreme Court's ruling in Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, MDU and CEC signed an Area Service Agreement in July 1973 for the areas immediately surrounding the City of Bismarck. Appendix 45-46. The Area Service Agreement included a map with a line drawn around the City of Bismarck approximately one-half mile outside the then existing city limits. Appendix 47.

The agreement allowed MDU to obtain certificates of PC&N to serve new customers outside the City but within the Area Service Agreement boundary line without objection from CEC. In return, MDU would not apply for certificates of PC&N to serve customers outside the Area Service Agreement boundary line without CEC's consent. The Agreement was also the basis for CEC to obtain its first limited franchise from the City of Bismarck in August 1973 to comply with the Supreme Court's holding in Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, *supra*. This limited franchise allowed CEC to serve its existing customers and subdivisions within the City and future subdivisions of the City that were outside MDU's service area under the Area Service Agreement. Appendix 50-52.

The Area Service Agreement map was not intended to be a permanent boundary of MDU's service area. Paragraph 11 specifically provided, as envisioned in CEC's original proposal for an area service agreement, that if the Agreement was followed in good faith, the boundaries of the Area Service Agreement would be modified and moved as the City grew to allow for future development and growth for both companies:

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.

Appendix 46. The Agreement also did not make CEC the exclusive supplier of electric service outside the Area Service Agreement boundary line. Rather, the Agreement recited in paragraph 4 stated that CEC's principal service area would be the area outside the boundary line. Paragraph 1 of the Agreement stated, as CEC had previously acknowledged, that MDU was the principal supplier of electricity within the City and that MDU should continue to serve the City and new areas contiguous to the City. Appendix 45. Paragraph 2 recognized CEC was organized under the law to provide electricity to consumers in rural areas not receiving utility service. Paragraphs 2 and 4 acknowledged CEC should continue service in rural areas and the areas within the City where it was already providing service. Id.

On May 12, 1987, the City of Bismarck granted a new general unlimited 20-year electric franchise to MDU. Appendix 53-55. Although the franchise did not contain any geographic limits, MDU nonetheless respected the City's desire to avoid duplication of facilities as recited in CEC's franchise and did not extend facilities to areas served by CEC.

Upon expiration of its initial 20-year franchise in 1993, Capital Electric proposed a new franchise which again included a geographic limitation tied to the Area Service Agreement. The proposed franchise, however, added a provision that the geographic limitation would be cancelled if the Area Service Agreement was cancelled. (COR #41 (App. 7)). This provision would have allowed CEC to serve all existing and future areas of the City if the Area Service Agreement was cancelled. This provision

was not adopted by the City Commission. Instead, the franchise accepted by the City included the geographic limitation tied to the Area Service Agreement and references an amendment to the Area Service Agreement agreed to by MDU and CEC that if the Area Service Agreement is “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.” Appendix 48, 56-59.<sup>2</sup> This provision assured that if the Area Service Agreement was cancelled, the parties would continue to recognize the respective existing service areas within the City to prevent duplication of established facilities and service areas within the City. The preface to the Area Service Agreement amendment stated it applied only to the service areas in the City of Bismarck. (COR #4 (App. 8)).

As indicated earlier, the Area Service Agreement stated if it was followed in good faith, the boundary line was to be modified as the City grew to provide both parties the opportunity to serve new areas. CEC, however, refused any meaningful modifications to the boundary line. In June 2002, MDU cancelled the Area Service Agreement for all areas outside the City pursuant to its terms effective 12 months from the date of the notice. (COR #41 (App. 10)).

---

<sup>2</sup> CEC states the MDU and CEC franchises are otherwise identical. CEC Brief, p. 3. This is incorrect. Article III of MDU’s franchise requires MDU to furnish service under rates approved by the Public Service Commission. Because cooperatives are exempt from regulation by the Public Service Commission, this condition is not contained in CEC’s franchise.

As MDU interpreted CEC's limited franchise, and the 1993 Amendment to the Area Service Agreement, the Area Service Agreement defined CEC's franchise for areas that were within the City at the time the franchise was issued as well as areas annexed to the City prior to cancellation of the agreement. Appendix 37, 42. Because the Area Service Agreement did not apply to areas outside the City after the agreement was cancelled in 2003, areas annexed to the City after June 2003 were not included in CEC's limited franchise. Appendix 42. Accordingly, CEC's franchise would not include a subdivision annexed after June 2003 unless the City granted an amendment to CEC's franchise to include the annexed subdivisions. Appendix 42.

CEC adopted a more expansive interpretation and contended the Area Service Agreement continued to govern the scope of its franchise for areas that were outside the City when the Agreement was cancelled but later annexed to the City. Appendix 26. Under CEC's interpretation, areas annexed to the City after the cancellation were part of CEC's franchise even though they were not subject to the Agreement prior to annexation. This interpretation would have effectively made CEC the exclusive provider of electric service in all newly annexed areas to the City of Bismarck.

MDU sought to negotiate a new Area Service Agreement with CEC under an amendment to the TIA enacted during the 2005 Legislative session that authorized such agreements subject to approval by the Public Service Commission and the applicable municipality. Appendix 41-42; See N.D.C.C. § 49-03-06. Those attempts were unsuccessful. On April 12, 2005, Boulder Ridge was annexed to the City of Bismarck.

Based on its interpretation that Boulder Ridge was within its franchise and not within CEC's franchise because it was annexed after the Area Service Agreement was cancelled, MDU extended electric distribution lines into the subdivision. Appendix 42. Because CEC indicated its intent to also serve Boulder Ridge, MDU filed a petition with the City asking it to interpret the respective franchises and determine:

1. MDU 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 Boulder Ridge First Addition to the City of Bismarck" as annexed to the City of Bismarck on April 12, 2005.

Appendix 13-15. After being served with MDU's petition, CEC extended its lines into Boulder Ridge and filed a reply to MDU's petition which included its own request for the City to determine:

1. CEC 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. CEC is authorized under its franchise to provide electric distribution services to all other areas annexed to the City of Bismarck designated as CEC's service area set forth in the Area Service Agreement, as amended.

3. MDU 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. MDU is authorized to provide electric distribution service to all future territory annexed to the City of Bismarck designated as

MDU's service area as set forth in the Area Service Agreement, as amended. App. 19-20

Appendix 16-20. CEC did not object to the City Commission's authority to interpret the franchises as to provide the requested relief in either its reply to MDU's petition or CEC's supporting brief filed with the City.

Following a presentation by the parties at a City Commission meeting, the Commission on November 14, 2005, issued its findings, conclusions and order in which it granted MDU's petition. Appendix 61-66. In its order the Commission did not adopt the interpretation of either MDU or CEC regarding the scope of CEC's limited franchise. Instead, the Commission determined the geographic limits of CEC's franchise did not encompass subdivisions annexed after the franchise was issued in 1993 without an amendment to the Area Service Agreement. Appendix 65.

CEC subsequently filed a complaint for a declaratory judgment in the District Court for the South Central Judicial District naming the City, MDU and the North Dakota Public Service Commission as defendants. Although CEC's complaint acknowledged the City's order of November 14, 2005, it nonetheless requested a judgment declaring its rights under its franchise. Appendix 67-70. On January 30, 2006, the District Court granted the City's motion to dismiss the declaratory judgment action on the grounds the City had authority to interpret its franchises. Appendix 114-120. The Court ruled, however, that it would consider CEC's complaint as an appeal of the City's order. Following receipt of briefs and argument, the District Court issued its order denying CEC's appeal. Appendix 148-160. The Court determined CEC had failed

to show the City's order was arbitrary, capricious or unreasonable. The Court later denied CEC's motion for reconsideration and also dismissed an amended complaint by CEC reasserting its declaratory judgment claims. Appendix 161-162, 186. Judgment was entered June 8, 2006 and Notice of Appeal filed by CEC on July 12, 2006. Appendix 187-191.

### ARGUMENT

**1. The District Court Properly Considered CEC's Challenge to the City Commission's Order.**

CEC argues the District Court erred in considering this matter as an appeal from the City Commission's order rather than as a declaratory judgment action. N.D.C.C. § 32-23-02 allows a party to initiate a declaratory judgment action to determine "any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and may obtain a declaration of rights, status or other legal relations thereunder." In this case, however, the City had already interpreted the franchise and determined CEC's rights under the franchise CEC sought to construe by its declaratory judgment action. The purpose of declaratory judgments is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. N.D.C.C. § 32-23-12. It is not a substitute for an appeal and is not available to test the wisdom or correctness of a legislative act. Braunagel v. City of Devils Lake, 2001 ND 118, ¶ 12, 629 N.W.2d 567, 571. Ordinarily, a party must exhaust available administrative remedies before seeking declaratory relief. Robertson v. North Dakota

Workers Compensation Bureau, 2000 ND 167, ¶ 13, 616 N.W.2d 844, 849; Transp. Div. of Fargo Chamber of Comm. v. Sandstrom, 337 N.W.2d 160, 162-63 (N.D. 1983).

The District Court determined CEC was entitled to appeal from the City's order under the Court's general jurisdiction set forth at N.D.C.C. § 27-05-06(4) and further determined it would consider CEC's filing as an appeal. Appendix 114. CEC contends a declaratory judgment action was appropriate to challenge the City's order because no statute specifically authorizes an appeal from such an order which CEC argues is a requirement under N.D.C.C. § 28-34-01.

Even if CEC is correct that it had no statutory right of appeal from the City's order, CEC does not explain how it was prejudiced by the District Court's consideration of its action as an appeal rather than a declaratory judgment action. CEC's position is even more puzzling by its request to the Court to review the City's order as a matter of summary judgment rather than remand the matter to the District Court for further proceedings.

Whether the District Court correctly considered CEC's action as an appeal under N.D.C.C. § 27-05-06(4) or as a declaratory judgment under N.D.C.C. Chap. 32-23 is a matter of form over substance with regard to the appropriate standard of review by the District Court or this Court. The Court has frequently recognized the authority of municipalities to interpret their ordinances and regulations. Bigwood v. City of Wahpeton, 1997 ND 124, ¶ 10, 565 N.W.2d 498, 501 ("Enactment of municipal ordinances are legislative functions, but interpretations of these ordinances by the

municipality's governing body are quasi-judicial acts.”); City of Fargo v. Ness, 551 N.W.2d 790, (N.D. 1996); A&H Services v City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994).

In Tibeit v. City of Minto, 2006 N.D. 189, ¶ 8, 720 N.W.2d 921, 924, the Court recited the standard of review applicable to an appeal from a decision of a local governing body:

In an appeal from the decision of a local governing body under N.D.C.C. § 28-34-01, our scope of review is the same as the district court's review and is very limited. Pic v. City of Grafton, 1998 ND 202, ¶¶ 6, 8, 586 N.W.2d 159. Our function is to independently determine the propriety of the decision, without according any special deference to the district court's decision, and unless the local governing body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision, it must be affirmed. Graber v. Logan County Water Res. Bd., 1999 ND 168, ¶ 7, 598 N.W.2d 846. 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 v. Pembina County Water Res. Bd., 2005 ND 106, ¶ 12, 697 N.W.2d 339.

This is the same standard of review used in declaratory judgment actions challenging a municipality's application of an ordinance. Certainly, CEC does not obtain a broader standard of review by a declaratory action challenging a city's decision from which there is no statutory right of appeal than it would by challenging a city's action for which there is a right of appeal. In GO Committee v. City of Minot, 2005 ND 136, ¶ 8, 701 N.W.2d 865, 869-70, which was an appeal from a declaratory judgment action challenging the City of Minot's application of its municipal ordinance,

the Court quoted the following from A&H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 858 (N.D. 1994):

Our review of a municipality's adoption, interpretation and application of its own ordinances is strictly limited by the doctrine of separation of powers. A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law. (Citation omitted) Courts will not substitute their judgment for that of a municipality's governing body in interpreting or applying ordinances unless an abuse of discretion is clearly shown. (Citation omitted) To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably. (Citation omitted)

Because the Court reviews the City's interpretation of its franchise and not the District Court's interpretation under either an appeal of declaratory judgment action, and because the standard of review is the same for either type of challenge, CEC was not prejudiced by the District Court's determination to treat CEC's action as an appeal of the City's order. The District Court applied the correct standard of review and properly determined CEC had not shown the City's order was arbitrary, capricious or unreasonable.

**2. The City Had Authority to Interpret Its Franchises.**

CEC argues the City erred in its conclusion of law 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. Contrary to CEC's assertion, there is considerable history regarding this relatively recent constitutional provision. Although Article VII was not enacted until 1982, it originated in the 1972 constitutional convention. While the convention's proposed constitution was not

enacted when it was initially presented to the voters of North Dakota, many of its provisions, including Article VII, have subsequently been adopted. The Debates of the North Dakota Constitutional Convention of 1972, pp. 694-701, 1108-16, 1452, 1458, 1461-66, 1693-95, 1725, 1728-29, 1735-36, 1791, 1797-98, 1849 express a clear intent that the proposed constitutional provision that later became Article VII, Section 11, was intended to exclusively reserve to the cities the power to franchise public utilities:

DELEGATE NETHING: . . . It seems to me that the only thing we should be concerned about here is whether or not we believe that the cities should control the franchising ability that we currently have. Now, as a legislator, it seems rather ridiculous for me to sit and determine what's good for the City of Bismarck or the City of Fargo or Minot or Ellendale – any one of them. Those people in that city are the ones that know what's the best for them, and that's why we've reserved this right of franchising to the cities, and I think that, since its their business, they're the ones that should have the say – not a legislator, like myself, from Jamestown, because I don't know anything about the problems of that city; those people know them. I think we should adopt the amendment.

Debates p. 1110.

Article VII, Section 11 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.

It is immaterial for purposes of this proceeding 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. In either instance, the City of Bismarck is the exclusive franchise authority for the construction and operation of public utilities within its corporate limits and no other

authority, including the Court, is able to exercise that authority. Whether the City of Bismarck derives that authority from the North Dakota Constitution or statutory enactment by the Legislative Assembly does not affect the validity of the City's order in this proceeding.

CEC concedes the City has the power by legislative enactment at § 40-05-01(57) to grant and regulate the use of franchises. This same general power given to all cities is also specifically given to home rule cities at N.D.C.C. § 40-05.1-06(10) if the power is included in the City's charter and implemented through ordinance. Although CEC necessarily acknowledges cities have the self-executing power to grant franchises, it argues the power to regulate such franchises must be implemented by ordinance. CEC maintains the City has not enacted any ordinances to implement the power to regulate franchises. CEC then leaps to conclude the City had no power to issue its order interpreting the respective franchises issued to MDU and CEC.

CEC misconstrues both the extent of the City's power to franchise and the nature of its November 14, 2005 order. On the first point, N.D.C.C. § 40-05-01(57) does not require a city to adopt an ordinance to implement its general powers "to grant franchises" and "to regulate the use of the same." Moreover, the City of Bismarck's home rule charter provides at Article 3 of the Home Rule Charter for the City of Bismarck that the City "shall have all powers granted to municipal corporations by the constitution and laws of this state and by the charter, together with all the implied powers necessary to carry into execution all powers granted." (Addendum 1). Article 3

of the Charter specifically provides the powers that which may be implemented by ordinance include the authority:

8. To lay out or vacate streets, alleys, and public grounds, and provide for the use, operation, and regulation thereof.

....

10. To engage in any utility, business, or enterprise permitted by the constitution and not prohibited by statute or to grant and regulate franchises thereof to a private person, firm, or corporation.

....

13. To exercise in the conduct of its affairs all powers usually exercised by a corporation.

Article 9 of the Charter gives the Board of City Commissioners the power to enact and make all necessary ordinances, resolutions, and orders to carry out the City's express and implied powers:

The governing body, except when powers are reserved to the people, may enact and make all proper and necessary ordinances, resolutions and orders to carry out and give effect to the express and implied powers granted by law or in this charter to the end that a complete, harmonious and effective municipal government may be initiated, installed, operated and maintained in the city.

In exercising these powers, the Bismarck Board of City Commissioners enacted ordinances at Chapter 10-11, including section 10-11-01, regarding the requirement for and issuance of franchises:

10-11-01. Franchises Required. Except as otherwise provided by law, a person, firm, corporation or utility may not place or maintain any permanent or semipermanent fixtures, including poles, wire, cable, conduit, or any other medium used to transmit or transport electric or electronic signals, natural gas or other materials, in, over, upon or under any street or public place without a franchise to do so

from the city. A franchise may be granted by resolution of the Board of City Commissioners.

(Addendum 2). The City further properly exercised its powers by adopting resolutions granting franchises to MDU and CEC subject to the terms and conditions therein. Appendix 53, 56. Finally, the Commission properly exercised its powers by issuing its order of November 14, 2005 interpreting these franchises. Every action of the City was properly implemented and within its authorized powers.

On the second point, CEC misconstrues the nature of the City's order by characterizing the City's action as resolving a "territorial dispute" and "acting as Bismarck's little public service commission." CEC also asserts MDU filed its petition with the City as a preemptive strike against a complaint filed by CEC before the Public Service Commission. CEC's arguments that the City was acting to resolve a territorial dispute and was regulating conflicting franchises begs the question that CEC's limited franchise included Boulder Ridge. MDU presented its petition to the City not to "regulate" the franchises but rather to obtain the City's interpretation of whether or not the authority to serve Boulder Ridge was within the scope of CEC's limited franchise or MDU's general franchise. MDU's petition was not a preemptive strike to a PSC proceeding because the PSC has no authority to interpret the City's franchises. CEC never challenged the City's authority to interpret its franchises. Instead, CEC's reply to MDU's petition included the assertion that Boulder Ridge was included within CEC's franchise and requested the Commission to make a determination that CEC was authorized under its franchise to serve Boulder Ridge and other annexed areas and that

MDU was not authorized to serve those areas. Appendix 19. In its subsequent brief to the City, CEC stated the City had the power to grant and regulate the use of franchises and designate service areas. Appendix 21, 27. It acknowledged the dispute before the City was whether the City, “in exercising its franchise authority” granted CEC the right to serve Boulder Ridge. Appendix 28. It further recognized that in “reviewing and construing the franchise grant”, the City was required to give the franchise a fair and reasonable interpretation. Id. In its appearance before the city, CEC’s counsel said:

The issue simply stated today is does Capital Electric have a franchise to serve areas annexed into the City of Bismarck after June 23, 2003, and of course Capital Electric contends that yes, we do in fact have a franchise with the City.

Transcript 20. CEC’s counsel also reaffirmed CEC’s position that the City has the right to regulate franchises and to grant franchises. Transcript 24. Not prevailing on its requested interpretation, CEC now attempts to change the nature of the City’s action and argue the City acted outside its authority even though it is clear in North Dakota that an issue not raised in an initial proceeding ordinarily may not be raised on appeal. Choutalos v. North Dakota State Personnel Bd., 429 N.W.2d 441 (N.D. 1988). A matter not raised before the agency is not preserved for appeal. Christenson v. Job Serv. North Dakota, 399 N.W.2d 300 (N.D. 1987). The general rule is that the reviewing court will confine its review to those issues which were raised before the agency. County of Stutsman v. St. Historical Soc., 371 N.W.2d 321, 329 (N.D. 1985). See also N.D.C.C. § 31-11-05. (One who consents to an act is not wronged by it and acquiescence in error takes away the right of objecting to it.) The Court should not

sanction CEC's appellate strategy of claiming the City was without authority to interpret its franchises when CEC previously requested and acknowledged the City had authority make the interpretations. Messer v. Bender, 1997 ND 103, ¶ 10, ¶ 11, 564 N.W.2d 291, 293.

Sometimes termed "quasi-judicial acts" the Court has frequently recognized the authority to municipalities to interpret their ordinances and resolutions. See Bigwood v. City of Wahpeton, 1997 ND 124, ¶ 10, 565 N.W.2d 498, 501 ("Enactment of municipal ordinances are legislative functions, but interpretations of those ordinances by the municipality's governing body are quasi-judicial acts"); City of Fargo v. Ness, 551 N.W.2d 790 (N.D. 1996); A&H Services v. City of Wahpeton, 514 N.W.2d 855 (N.D. 1994). The Court has held the separation of powers doctrine applies in the review of these quasi-judicial acts and the Court cannot substitute its judgment for that of the municipality's governing body in interpreting an ordinance unless an abuse of discretion is shown. GO Committee v. City of Minot, 2005 ND 136, ¶ 8, 701 N.W.2d 865; A&H Services, Inc. v. City of Wahpeton, *supra*; Mini-Mart, Inc. v. City of Minot, 347 N.W.2d 131, 136 (N.D. 1984); Munch v. City of Mott, 311 N.W.2d 17, 21 (N.D. 1981). By recognizing 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 recognizes the authority for initial interpretation of those ordinances rests with the municipality.

To the extent CEC implies the City was required to enact an ordinance to implement its quasi-judicial power to interpret its franchises, CEC is incorrect. The City's charter gave the City Commission the power to issue such orders necessary and proper to carry out and give effect its express and implied powers. The manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities which 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, 453-54 (N.D. 1988). A City is not required to enact an ordinance to address all conceivable situations that might confront the City in the exercise of its discretionary power. A&H Services, Inc. v. City of Wahpeton, supra. There is also 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 Court for interpretation of ordinances.

The City's order was a reasonable exercise of its quasi-judicial authority to interpret its franchises. The City has enacted an ordinance to implement its franchise authority under N.D.C.C. § 40-05-01. Section 10-11-01 of the Bismarck City Ordinances 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. The

City adopted resolutions granting franchises to CEC and MDU that were subject to the terms and conditions stated in the franchises. Unlike the situation in Mini-Mart v. City of Minot, 347 N.W.2d 131 (N.D. 1984), CEC was not denied a franchise based upon unwritten and unspecified criteria. To the contrary, CEC was granted a franchise in 1993 to provide electric service within a limited geographic area of the City. 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. The City's order was not a denial of a franchise but rather an interpretation of existing franchises. The City did not rely on unwritten and unspecified criteria in interpreting the franchises but rather relied upon the criteria established by the 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 purpose to be accomplished by the limited franchise.

**3. The City's Order Did Not Violate Constitutional Principles.**

CEC makes the bald assertion that "Bismarck unambiguously declared that it delegated to MDU the legislative power to determine the geographic limits of Capital's franchise." CEC cites no part of the City's order to support this assertion because the City made no such declaration. CEC also equates the City's interpretation of CEC's franchise to provisions of the TIA that were declared unconstitutional delegations of

legislative power in Montana-Dakota Utils. Co. v. Johanneson, 153 N.W.2d 414 (N.D. 1967). Again CEC mischaracterizes the Commission's order.

MDU and its predecessors have continuously provided electric service in Bismarck since 1895. MDU holds an unlimited general franchise from the City and prior to 1973 it held the only franchise for the use of the City's rights of way to provide electric service. It was only after MDU and CEC entered into the 1973 area service agreement that outlined respective service areas to prevent conflicts and duplication of service areas that the City granted CEC a limited franchise to serve certain subdivisions within CEC's service area under the Area Service Agreement.

When CEC was issued a new franchise in 1993, the franchise was limited to the geographic area within the City as described in the 1973 Area Service, as modified by a 1990 amendment, and any future amendments to the Area Service Agreement agreed to by CEC and MDU. The franchise specifically stated it was limited geographically in order "to avoid a duplication of facilities between the Grantee and other electrical franchises." Appendix 56. In its order of November 14, 2005, the City interpreted the franchise limitation, after reviewing the franchise and the history of the franchise and the Area Service Agreement. The City concluded it was the intent of the parties to the Area Service Agreement and, by extension, the intention of the City when it awarded a franchise to CEC, that MDU would remain the main provider of electric service within the City, except for CEC's existing customers, and any other customers or service areas conceded to CEC by MDU by virtue of the Area Service Agreement. This conclusion

was simply a recognition of the obvious nature of an Area Service Agreement – MDU conceded certain service areas to CEC within the City and CEC conceded certain service areas to MDU outside the City. The concessions and agreement, however, did not change the legal requirements that CEC’s ability to serve the areas within the City was dependent upon it obtaining a franchise from the City and MDU’s ability to serve areas outside the City was dependent upon it obtaining a certificate of public convenience and necessity from the Public Service Commission.

The City did not conclude, as suggested by CEC, that CEC’s ability to add newly annexed areas to its 1993 franchise was dependent upon consent from MDU. Rather, it interpreted CEC’s 1993 franchise to provide the geographic limitation of the franchise would be automatically adjusted to include subdivisions annexed to the City of Bismarck after 1993 if CEC and MDU agreed in an amendment to the Area Service Agreement that such subdivisions would be included within the geographic scope of CEC’s franchise. Appendix 65. To the extent the CEC franchise allowed MDU and CEC to effectively amend the franchise, it was a delegation of authority to both MDU and CEC. CEC consented to that delegation when it accepted the 1993 franchise. If the City of Bismarck was prohibited from delegating such authority to the parties, then the delegation within CEC’s 1993 franchise was void and no additional subdivisions could be added to the franchise without specific action by the City. This was effectively the result of the City Commission’s order of November 14, 2005 when it concluded the

geographic limits of the franchise had not been altered because there had been no further amendments to the Area Service Agreement prior to its cancellation in 2003.

Amendment of the Area Service Agreement was not the only way CEC could obtain a franchise authority to serve new subdivisions annexed to the City. Nothing limited CEC's ability, with or without agreement of MDU, to petition the Commission for an amendment to its existing franchise to include any newly annexed subdivision to the City. This method remains available to CEC to amend the franchise to add new subdivisions.

Even if the City had unlawfully delegated power to MDU or CEC to amend CEC's franchise, the removal of the geographic limits within the franchise as requested by CEC would not be an appropriate remedy anymore than voiding the entire franchise would be an appropriate remedy. If CEC is correct that the delegation is similar to that in Montana-Dakota v. Johanneson, supra, then the remedies are equally appropriate. In Johanneson, voiding the unlawful delegation of authority to the rural cooperatives did not remove the restriction placed on public utilities regarding extension of facilities into rural areas. Rather the Court required the regulatory decisionmaking be made by the proper regulatory authority (i.e., the Public Service Commission) without the requirement of consent from the cooperatives. Accordingly, in this case any regulatory decisionmaking to add annexed areas to CEC's franchise must be made by the City without any requirement of consent from MDU; which is exactly the current status as a result of the City's order of November 14, 2005.

CEC also maintains the City violated the constitutional principle of separation of powers because its order was an exercise of judicial rather than legislative power. CEC reaches this position by characterizing the City's order as granting a petition to resolve a territorial dispute. The "territorial dispute" was the result of the differing interpretations of CEC's franchise. MDU's petition sought resolution by requesting the City to interpret the franchise to determine if Boulder Ridge was or was not within the scope of CEC's franchise.

The Court has clearly and repeatedly recognized a City's interpretation of its ordinances is a quasi-judicial function within a City's powers. GO Committee v. City of Minot, *supra*; Bigwood v. City of Wahpeton, *supra*; City of Fargo v. Ness, *supra*; A&H Services v. City of Wahpeton, *supra*. Indeed, it would be a violation of the separation of powers doctrine for the judiciary to usurp the City's authority to interpret its franchises. Id. The interpretation of CEC's franchise necessarily required consideration and interpretation of the Area Service Agreement which was incorporated by reference in the franchise. The City did not adjudicate the parties rights, if any, under the unenforceable Area Service Agreement, but rather considered the intent of the agreement and the franchise for the purpose of determining if essentially every newly annexed area to the City of Bismarck was to be encompassed within the geographic limit of CEC's franchise as claimed by CEC.

**4. The City's Interpretation of CEC's Franchise Was Reasonable.**

The standard of review of a City's quasi-judicial action in interpreting its ordinances is limited to determining if the municipality clearly abused its discretion. GO Committee v. City of Minot, *supra*. To establish an abuse of discretion, it must be shown the municipality's governing body acted arbitrarily, oppressively or unreasonably. *Id.* Notwithstanding this critical standard governing the Court's review of the City's order, CEC devotes only a single paragraph of conclusionary statements in support of its position that the City's interpretation of CEC's franchise was unreasonable.

Ordinances are interpreted like statutes. City of Fargo v. Ness, 551 N.W.2d 790, 792 (N.D. 1996). In construing an ordinance, the municipality and the Court seek 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, ¶ 6, 613 N.W.2d 503, 506. Ordinances like statutes are to be construed in a practical manner. See McDowell v. Gillie, 2001 N.D. 91, ¶ 11, 626 N.W.2d 666, 671. 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, 614-15 (N.D. 1986). The Courts will ordinarily defer to a reasonable interpretation by the municipality of its ordinance. GO Committee v. City of Minot, supra at ¶ 9. 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 Bd. of County Commiss'rs, 2000 ND 181, ¶ 7, 618 N.W.2d 166, 170.

An ordinance, like a statute, is ambiguous if its is susceptible to meanings that are rational but different. Ramsey Financial Corp, v. Haugland, 2006 ND 167, ¶ 14, 719 N.W.2d 346, 351. There are at least three different interpretations of CEC's franchise with respect to its inclusion of newly annexed areas to the City – the least rational of which is CEC's.

CEC interpreted its limited franchise to include every new subdivision that was annexed to the City that lay outside the boundary line of the Area Service Agreement, even after the Area Service Agreement was cancelled by MDU in 2003. This would have essentially made CEC, an unregulated rural cooperative with statutory membership limitations, the exclusive provider of electricity in every new subdivision annexed to the City until the franchise expired in 2113 and correspondingly would have foreclosed MDU, the general franchise holder and the City's primary electric provider since 1895, from using and extending its existing facilities and investment to serve any

of these areas including areas that MDU might be serving prior to annexation under a certificate of public convenience and necessity. (COR #41 (App. 11)).

MDU interpreted CEC's limited franchise to include all areas outside the boundary line of the Area Service Agreement and annexed to the City prior to cancellation of the Area Service Agreement in 2003. Thereafter, areas no longer subject to the Area Service Agreement that were annexed to the City would be included within CEC's franchise only by amendment of the franchise by the City. MDU would be allowed to serve any subdivisions under its general franchise that were not granted to CEC under an amendment to its franchise.

The City adopted a third interpretation not offered by either party which is the most consistent with the plain language of the franchise. That is, the City interpreted CEC's franchise as limited to areas outside the boundary line of the Area Service Agreement, but within the City at the time the franchise was issued in 1993. Thereafter, newly annexed areas would be added to the franchise by agreement of the parties through amendment of the Area Service Agreement or action by the City Commission.

The City's interpretation was made after considering the evidence and arguments offered by the parties, the language of the franchise including the incorporated Area Service Agreement, the background of the franchises and the Area Service Agreement, and the purpose of the geographic limit within CEC's franchise. The Commission's decision reflects a rational mental process which relies in significant part on its determination:

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.

Appendix 64. As recognized by the City, the Area Service Agreement reflected an intent the parties would periodically adjust the boundary line of the Area Service Agreement to reflect the growth of the City and to allow for efficient development and growth for both CEC and MDU. Appendix 46, 64. CEC's refusal to negotiate meaningful adjustments to the boundary line but instead laying claim to all the newly annexed areas as its service territory was not consistent with the intent of the Area Service Agreement or the City's limited franchise to CEC. If the parties had intended CEC would forever be the exclusive supplier of electric service outside the boundary line, they would have stated as much in single sentence. Instead, they drafted the two page agreement that described the respective roles of the companies in their traditional service areas and provided for future modifications of the agreement consistent with those traditional service areas. MDU and CEC certainly did not envision in 1973 that CEC would be the exclusive electric service supplier in all areas outside the area service boundary line that were subsequently annexed to the City. Based on the holding in Montana-Dakota Utils. Co. v. Divide County Sch. Dist. No. 1, *supra*. CEC's ability to serve customers in newly annexed areas was very limited in the absence of a franchise from the City and an area service agreement with MDU. MDU, which had just prevailed in establishing its right to provide service in an annexed area in the City of

Crosby, would not have voluntarily agreed to allow CEC to be the exclusive supplier in future annexed areas of Bismarck, the largest community served by MDU.

CEC argues the City unreasonably interpreted that MDU's cancellation of the Area Service Agreement could redefine the scope of CEC's franchise. Under the City's interpretation, cancellation of the Area Service Agreement had no effect on the scope of CEC's franchise except to remove the ability of the parties to amend the Area Service Agreement in a manner that affected CEC franchise – an ability CEC now claims was improper in any regard.

CEC also argues the City's interpretation of its franchise was inconsistent with the parties' prior course of conduct which reflected CEC's extension of service in new subdivisions after 1993 without amendment of its franchise. CEC's and MDU's course of conduct between 1993 and 2003 was based on their mutual mistaken interpretation that areas annexed between 1993 and 2003 outside the boundary line were automatically encompassed within CEC's franchise without written amendment to the Area Service Agreement. Obviously, MDU's and CEC's mistaken interpretation was not binding on the City. MDU's course of conduct after cancellation of the Area Service Agreement is consistent with both MDU's and the City's interpretation. After MDU cancelled the Area Service Agreement for areas outside the City effective June 2003, and it was unable to reach agreement with CEC on a new Area Service Agreement under the emergency legislation adopted during the 2005 Legislative session

at N.D.C.C. § 49-03-06, MDU challenged CEC's interpretation of its franchise regarding service to Boulder Ridge.

The Court should not assume CEC will lose its ability to serve areas where it extended services and facilities between 1993 and 2005 on its mistaken, albeit self-serving, interpretation of its franchise. Rather, CEC needs to request an amendment of its franchise from the City to include these areas. CEC has not made that request presumably because it does not want to prejudice its position in this appeal.

**5. CEC's Requested Relief Would Violate the Separation of Powers Doctrine.**

After dedicating the majority of its brief to arguments in support of its position regarding limitations on the proper exercise of municipal power, CEC asks the Court to breach the separation of powers doctrine by exercising the City's legislative powers and granting CEC an unlimited franchise to provide electric service within the City of Bismarck. It is undisputed that CEC's franchise is geographically limited and was always intended and understood by all parties as a limited franchise. CEC's request of the Court to strike the limitation from its franchise would clearly invade the legislative powers of the City.

**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 of the City when it issued CEC's limited franchise. 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, the City Commission's decision should be affirmed.

DATED this 3 day of November, 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 Avenue  
Bismarck, ND 58502-0400  
(701) 223-2890



---

Jerome C. Kettleon

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document, Brief of Appellee Montana-Dakota Utilities Co., was on the 3 day of November, 2006, mailed to the following:

Carol Larson  
Pringle & Herigstad, P.C.  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702-1000

Randall J. Bakke  
Smith Bakke Porsborg & Schweigert  
P. O. Box 460  
Bismarck, ND 58502-0460

William W. Binek  
Public Service Commission  
600 East Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480

Wayne K. Stenehjem  
Attorney General of North Dakota  
Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

  
\_\_\_\_\_  
JEROME C. KETTLESON