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November 14, 2006

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**CAPITAL ELECTRIC COOPERATIVE, INC.
VS.
CITY OF BISMARCK, ET AL.**

Supreme Court No. 20060199

Dear Penny:

Enclosed herewith is Plaintiff/Appellant's original unbound reply brief, together with seven bound copies. Also enclosed is a diskette containing the same.

If you have any questions on the enclosed, please do not hesitate to contact me.

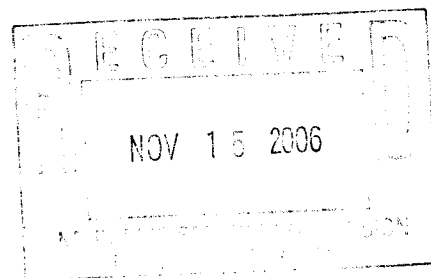
Yours truly,



Carol K. Larson
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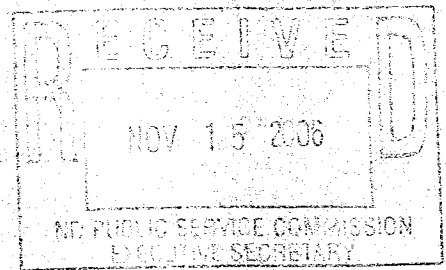
Enclosures

cc: Jerome C. Kettleon
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Capital Electric Cooperative, Inc.,)
Plaintiff and Appellant,) No. 20060199
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)



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

REPLY BRIEF ON BEHALF OF
CAPITAL ELECTRIC COOPERATIVE, INC.,
APPELLANT

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ARGUMENT

The Bismarck City Commission's Order was not the exercise of a power under the North Dakota Constitution, North Dakota statutes, or Bismarck's ordinances.

Bismarck's and MDU's briefs share a common theme: Reliance on a theory that municipal governing bodies have inherent powers, powers that are subject to a single standard of judicial review (arbitrary-capricious-unreasonable) without regard to procedure. They reflect an assumption somewhat like that of Minot's city council in the Mini-Mart case: Surely it was within the realm of reason to believe that beer and gasoline don't mix, so how can any action based on such a rationale breach the city fathers' legal power and authority? Mini-Mart, Inc. v City of Minot, 347 N.W.2d 131 (ND 1984) (herein Mini-Mart v Minot).

The answer is: The rule of strict construction precedes questions about whether action is unreasonable. There is a difference between questions whether a power exists and questions about the exercise of a power that exists. The first question is whether a power exists and that question is subject to a rule of strict construction. GO Committee ex rel. Hale v City of Minot, 2005 ND 136, 701 N.W.2d 865 (herein Committee v Minot); Braunagel v City of Devils Lake, 2001 ND 118, 629 N.W.2d 567 and Frey v City of Jamestown, 548 N.W.2d 784 (ND 1996).

Local governing bodies do not have inherent powers. The Constitution itself does not grant any powers to home rule cities; whatever powers home rule cities may have are based upon statutory provisions. Litten v City of Fargo, 294 N.W.2d 628 (ND 1980). The rule of strict construction demands that an available power be "reserved" or "implemented" before the power is asserted and exercised by a local governing body. Mini-Mart v Minot, 347 N.W.2d at 139 and 141, citing N.D.C.C. § 40-05-01(1); Litten v City of Fargo, 294

N.W.2d 628 at 632, citing N.D.C.C. § 40-05.1-06. The object of N.D.C.C. § 40-05-01(1) (requiring available powers to be implemented by ordinance) is to prevent the local governing body from exercising large grants of authority without specific regulations having been first made by some enactment which has the force of law. Engstad v Dinnie, 76 N.W. 292 (ND 1898).

There is no disputing the power of Bismarck's City Commission to grant franchises, the power exercised when it granted non-exclusive franchises to MDU in 1987 and to Capital in 1973 and 1993. Capital does not challenge the City Commission's power to grant franchises. Capital disputes Bismarck's and MDU's assertion the order to grant MDU's petition was the exercise of the City Commission's "power to regulate." The City Commission's "conclusion of law" (Nov. 14 order, page 4, App. 64) "That pursuant to Article 7, Section 11 of the North Dakota Constitution the City of Bismarck has the power to regulate the franchises of any public utility within the City" is wrong, an erroneous conclusion of law under the rule of strict construction.

If no power exists under ordinances implementing a power available under statutes, an ad hoc assertion of power cannot be sustained on claims the local governing body made a reasonable decision. Mini-Mart v Minot, 347 N.W.2d at 138, note 4. "Bismarck has enacted ordinances regarding the granting of franchises, but has not enacted ordinances regarding regulation of franchises." (Bismarck's February 28, 2006, brief, page 7.) Just as Minot's City Council was powerless to act on its belief that beer and gasoline don't mix, so also Bismarck's City Commission was powerless to entertain and decide MDU's petition to declare MDU's rights under Capital's franchise.

MDU's petition for the City Commission to declare MDU's rights under Capital's franchise invoked a non-existent power. In the absence of any law to confer, implement, ordain, or otherwise create the "power to regulate" claimed by the City Commission to sustain its order to grant MDU's petition, the order is ineffective. It is ineffective not because the order is unreasonable; that is not the main issue. It is ineffective because Bismarck's City Commission lacks the legal power to make the order. Mini-Mart v Minot, 347 N.W.2d at 137-39.

MDU's and Bismarck's briefs share another feature, claims that Capital has not sufficiently complained about the City Commission's assertion of non-existent powers. Their distorted logic leads them to conclude that Capital has somehow legitimized MDU's invocation of the City Commission's non-existent power. Neither MDU nor Capital is the source of the City Commission's legal power. The Commission's power arises from the Constitution and statutes of North Dakota, if implemented by local ordinances. "Bismarck has enacted ordinances regarding the granting of franchises, but has not enacted ordinances regarding regulation of franchises." (Bismarck's February 28, 2006, brief, page 7.)

Dated this 14 day of November, 2006.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys, for the Plaintiff and Appellant, Capital Electric Cooperative, Inc., in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum, signature block, certificate of service, and certificate of compliance totals 772.

Dated this 14 day of November, 2006.

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CERTIFICATE OF SERVICE

A copy of the Reply Brief on Behalf of Capital Electric Cooperative, Inc., Appellant, was served by via first class mail to the following on November 14, 2006:

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