

**DISTRICT COURT OF MINNESOTA
TENTH JUDICIAL DISTRICT**

JONATHAN N. JASPER
JUDGE OF DISTRICT COURT



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Date: October 8, 2008

VIA FAX

Pages (including cover): 16

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Re: Wright County Court File No. 86-CV-08-4555

Sarah Sicheneder
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Honorable Jonathan N. Jasper
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STATE OF MINNESOTA
COUNTY OF WRIGHT

DISTRICT COURT
TENTH JUDICIAL DISTRICT
CIVIL DIVISION

Court File No.: 86-CV-07-4555

Bridgewater Telephone Company, Inc.,

Plaintiff,

v.

City of Monticello,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
MOTION TO DISMISS
AND JUDGMENT**

FILED
10-8-08
DISTRICT COURT
WRIGHT COUNTY MINNESOTA
by *[Signature]*

The above-captioned matter came before the undersigned Judge of District Court, at the Wright County Government Center, Buffalo, Minnesota on July 18, 2008, on Defendant's Motion to Dismiss.

Patrick O'Donnell, Esq. and Richard O'Brien, Esq. (appearing *pro hac vice*) appeared for Plaintiff. John Baker, Esq. and Pamela Vander Wiel, Esq. appeared for Defendant.

Based on evidence adduced at the hearing, together with the oral arguments of counsel, and all files, records, and proceedings herein, the Court finds it helpful in making its decision to review the:

HISTORY OF THE CASE

1. On May 21, 2008, Plaintiff Bridgewater Telephone Company, Inc. ("Bridgewater") filed a Complaint for Injunctive, Declaratory and Other Relief ("Complaint") against the City of Monticello ("City") in the above-named matter. The Complaint requested that the Court provide the following relief: (1) preliminarily and then permanently enjoining the issuance or sale of the fiber-to-the-premises ("FTTP") project revenue bonds; (2) declaring any revenue bonds issued to be void; and (3) entering such other and further relief as the Court deems just.

2. On June 6, 2008, the City filed a Notice of Motion and Motion to Require Plaintiff to Post a Surety Bond under Minn. Stat §562.02 and to Expedite Proceedings.

3. On June 13, 2008, the Court found that this litigation presented a substantial issue of statutory construction. The Court ordered Bridgewater to post a surety bond in the amount of \$2.5 million to protect the public or taxpayers from any loss or damage which may result from the pendency of this action. On July 14, 2008, a personal surety bond was posted by Bridgewater in the amount of \$2.5 million.

4. Pursuant to Minn. Stat. §562.04 (2000) and the posting of the bond, the Court gave the parties the ability to have motions heard on an expedited basis by reorganizing the Court's normal hearing calendar to accommodate a more speedy resolution of contested matters which affect the public body.

5. On June 20, 2008, the City filed an Amended Motion to Dismiss Complaint Pursuant to Minn.R.Civ.Pro. 12.02(e).¹

6. On July 9, 2008, pursuant to an Order and based upon the request of the parties, the undersigned Judge of the District Court was assigned as the single judge to the above-captioned matter.²

¹ The City's original Motion to Dismiss was filed on June 6, 2008.

² The parties' desire in having the matter assigned to one judge was to facilitate a speedy resolution of a complicated issue of first impression. This Order has been delayed due to a confluence of events. As noted below, thousands of pages have been submitted to the Court for review. Numerous cases have been cited, though the parties nearly always disagree as to the law established by those cases. This has required an enormous time commitment from this Court at a time when the Wright County bench has had one judge retire on June 27 and another be appointed to the Minnesota Court of Appeals which was announced on June 24 and effective July 11, 2008. The latest weighted case load study indicates Wright County needs 6.4 judges to handle its case load. Currently, there are four chambered judges. The judicial team includes one law clerk per judge whose time is often dedicated to the kind of work required in reviewing the submissions and analyzing the case law in a case such as this. Minn. Stat. §484.545, subd. 1 (1997). Until the last couple of weeks, Wright County has had two full-time and one part-time law clerk (one additional law clerk recently started) out of the 6 law clerks needed. The severe underfunding of the Court system that has been regularly reported by the news media has left the District Court Administrators under-staffed by about 10% from the state's minimum standards during the pendency of this motion (and the foreseeable future). See, Editorial, *Put Courts at Head of the Line for Funds*, STAR TRIBUNE, Sept. 24, 2008. Despite these shortages, the Court's caseload and work load is increasing, not decreasing. This Judge apologizes for the delay attendant to this confluence of events.

7. The Court heard argument on the Amended Motion to Dismiss on July 18, 2008 and took the matter under advisement. After taking the dismissal motion under advisement and before ruling, the Court heard argument on the following additional motions brought by the parties:

- a. On August 8, 2008, the Court heard Bridgewater's Motion for Leave to File an Amended Complaint.
- b. On August 8, 2008, the Court heard the City's Motion to Quash Subpoenas of Hiawatha Broadband Communications, Inc., Oppenheimer & Co., Inc., Faegre & Benson, LLP, Best & Flanagan, LLP, and Campbell Knutson, PA.
- c. On August 21, 2008, the Court heard Bridgewater's Motion for Leave to File a 2nd Amended Complaint.
- d. On August 21, 2008, the Court heard the City's Motion to Quash Subpoenas of Springsted, Inc. and Dain International Services or in the Alternative for a Protective Order.

The above-named matters were also taken under advisement pending this Court's decision on the City's dismissal motion.³

FINDINGS OF FACT⁴

8. Bridgewater is a Minnesota corporation that provides telephone and internet service in and around the City of Monticello and video service through the DISH network.

9. The City of Monticello is a statutory city located in Wright County, Minnesota.

10. On or about May 5, 2008, the City released a Preliminary Official Statement which states in part that:

Bonds are being delivered to provide funds (i) to pay the cost of acquiring, installing, developing and constructing a "fiber-to-the-premises" broadband communications network within the service territory of the City

³ Separate orders addressing the issues heard at these hearings will be issued following this Order.

⁴ During the short pendency of this motion, the Court file has become voluminous. Each party has filed thousands of pages of argument, documents, and case law, all of which was necessarily reviewed by the Court. However, the factual allegations made in later pleadings are not relevant to the determination of the original dismissal motion. As stated below in the Conclusions of Law, the Court is limited to the facts alleged in the Complaint and therefore, the Findings of Fact are necessarily brief.

of Monticello...to be used for government and community connectivity for education and other governmental services, along with the provision of certain other broadband communication services to business and residential customers such as cable television services, Internet access, and voice services (the "FTTP" project), (ii) to pay capitalized interest on the Bonds during the construction of the FTTP project, (iii) to fund the 2008 Reserve Requirement (herein defined) for the Bonds, (iv) to pay start-up costs, and (v) to pay costs of issuance of bonds.⁵ (Compl., Ex. 1).

11. The revenue bonds proceeds are to be used to build a network that would provide internet, cable television, and telephone services (a "broadband network").

12. The broadband network is to be managed by Hiawatha Broadband Communication, Inc. (Compl., Ex. 1 at 24).

13. According to the Preliminary Operating Statement, the Operating Reserve Fund is to receive approximately \$1,250,000.00 from bond proceeds "[t]o be applied to start-up expenditures related to the FTTP Project." (Compl., Ex. 1 at 13).⁶

14. Bridgewater's Complaint challenges the City's statutory authority under Minn. Stat. §475.52, subd. 1 (2008) to issue bonds to generate funds for the FTTP project. Specifically, the Complaint alleges that the FTTP project exceeds the City's statutory authority under Minn. Stat. §475.52, subd. 1 because (1) the City has no express or implied authority under the statute to issue bonds to fund a business that would offer internet, cable television, and telephone services to the City of Monticello; and (2) the Operating Reserve Fund is going to be used to fund current expenses which are expressly prohibited by the statute.⁷

⁵ The Preliminary Official Statement was attached as Exhibit 1 to the Complaint and therefore may be used by the Court in determining whether or not Plaintiff has stated a claim for relief that can be granted without converting the dismissal motion into a summary judgment motion.

⁶ Both parties agree that the Operating Reserve Fund is to continue until 2011 (a reserve of three years) even though the Preliminary Official Statement contains contrary information.

⁷ As part of both the Motion for Leave to File an Amended Complaint and Motion for Leave to File a 2nd Amended Complaint, Bridgewater claims that the process by which the FTTP project was conceived was politically flawed. However, that allegation is not before the Court with respect to the dismissal motion. The only issue before the Court is whether the City has statutory authority to issue the bonds.

CONCLUSIONS OF LAW

Standard of Review

1. "A pleading which sets forth a claim for relief...shall contain a short and plain statement of the claim showing that the pleader is entitled to relief[...]." Minn. R. Civ. Pro. 8.01.

2. Under Minnesota Rule of Civil Procedure 12.02(e), pleadings that fail to state a claim upon which relief can be granted must be dismissed. *In re Milk Indirect Purchaser Antitrust Litigation*, 588 N.W.2d 772, 774 (Minn.Ct.App. 1999). However, dismissal is not appropriate when,

it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.

Doyle v. Kuch, 611 N.W.2d 28, 31 (Minn.Ct.App. 2000), *citing Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

3. In determining whether a complaint fails to state a claim upon which relief can be granted, the Court considers only the facts alleged in the complaint, accepting those facts as true, and construes all reasonable inferences in favor of the nonmoving party. *See, Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 227 (Minn. 2008).⁸ If evidence other than the complaint is considered then the determination is made under a summary judgment standard. *See, Carlson v. Lilyerd*, 449 N.W.2d 185 (Minn.Ct.App. 1989). However, the Court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment. *Northern States Power Co. v. Minnesota Metropolitan Council*, 684 N.W.2d 485, 489 (Minn. 2004).

⁸ The Court's determination with respect to the dismissal motion does not include any fact finding. Both parties have supplied the Court with memorandums which include myriad contradictory facts which are wholly irrelevant to the Court's decision with respect to the motion to dismiss. The parties have used the Court file to mount a public relations effort despite the fact that the only issue before the Court is one of statutory construction.

4. If a complaint fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Martens v. Minnesota, Mining & Manufacturing Company*, 612 N.W.2d 732, 748 (Minn.Ct.App. 2000).

The City's Authority to Issue Bonds

5. A presumption exists that decisions made by a governmental body were "performed...in a regular and lawful manner" and those actions were not illegal or unlawful. *R.E. Short Company v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn.1978)(internal citation omitted). The Court is to pay great deference to actions of the governing body and any review should be narrowly done. *Id.* The party challenging the action has the burden of proving that the action was a capricious, arbitrary, or unreasonable exercise of governmental authority. See, *Id.* (citing, *Douglas v. City of Minneapolis*, 230 N.W.2d 577, 586 (1975)).

6. "[M]unicipalities have no inherent powers and possess only such powers as are expressly conferred by statute..." *Mangold Midwest Co. v. Village of Richfield* 143 N.W.2d 813 (Minn. 1966)(internal citations omitted). Minn. Stat. §475.52, subd. 1 (2008) confers cities the following power to issue bonds:

Any statutory city may issue bonds or other obligations for the acquisition or betterment of public buildings, means of garbage disposal, hospitals, nursing homes, homes for the aged, schools, libraries, museums, art galleries, parks, playgrounds, stadia, sewers, sewage disposal plants, subways, streets, sidewalks, warning systems; for any utility or **other public convenience** from which a revenue is or may be derived; for a permanent improvement revolving fund; for changing, controlling or bridging streams and other waterways; for the acquisition and betterment of bridges and roads within two miles of the corporate limits; for the acquisition of development rights in the form of conservation easements under chapter 84C; and for acquisition of equipment for snow removal, street construction and maintenance, or fire fighting. Without limitation by the foregoing the city may issue bonds to provide money for **any authorized corporate purpose except current expenses**. (emphasis added).

Counties are given similar authority to issue bonds under the statute. See, *Id.* at subd. 3. For the purpose of the Court's analysis which follows, the controlling language in the statute is:

- Sentence one: Any statutory city may issue bonds...for any utility or other public convenience from which a revenue is or may be derived...
- Sentence two: [Additionally] the city may issue bonds to provide money for any authorized corporate purpose except current expenses.

7. The statute provides cities and counties with an enumerated list of purposes for which bonds can be issued. While the enumerated lists differ, both provide express authority to issue bonds for specific named purposes. In addition to the express purposes listed, the statute confers implied authority to issue bonds for additional purposes. *See, In re Board of Comm'rs of Cook County*, 177 N.W. 1013 (Minn. 1920)(finding that counties have implied power "to do whatever is essential to the efficient exercise of the power expressly granted"). However, powers can only be implied when necessary to enable the entity to exercise its express powers. *Id.* (internal citation omitted). Because the statute conferring the power to issue bonds by a county is so similar to the grant of authority given to cities, the Court finds the analysis found in *In re Board of Comm'rs of Cook County* instructive. Bonds may only be issued for an expressed purpose under the statute. Authority may only be implied to effectuate the exercise of an expressed purpose.

8. The City argues that it possesses an express grant of authority from that statute to issue bonds to fund the FTTP project because it constitutes both a public convenience and an authorized corporate purpose. Bridgewater argues that the City lacks an express grant of authority to issue bonds to build a broadband network and the authority cannot be implied based upon the wording of the statute. The only issue before the Court is one of statutory construction that is analyzed below.

Statutory Construction of the Term "Other Public Convenience"

9. "The fundamental rule of statutory construction is that a court should look first to the specific statutory language and be guided by its natural and most obvious meaning." *Heaslip v. Freeman*, 511 N.W.2d 21 (Minn.Ct.App. 1994). Judicial construction is not necessary when a statute's meaning is plain from its language as applied to the facts of the particular case. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Only if the statute is ambiguous or unclear does the Court apply rules of statutory construction. *Correll v. Distinctive Dental Servs., P.A.*, 607 N.W.2d 440, 445 (Minn. 2000). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. §645.16 (2008).

10. "Under the basic canons of statutory construction, [the Court] [is] to construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 418 (Minn. 2005). Statutory construction also requires reading the statute in context to determine the meaning of the particular provision. *Id.* A statute should be interpreted to give effect to all of its provisions. *Amaral*, 598 N.W.2d at 384. "No word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Id.*

11. The legislature's intent in enacting Minn. Stat. §475.52, subd.1 is not expressly stated by the statute. Based upon a holistic reading of statute, an inference about the legislature's intent in granting cities the authority to issue bonds becomes clear. Bonds may be issued for the "betterment" of public buildings. Museums, art galleries, parks and playgrounds may also be funded by bonds issued by a city. These enumerated purposes elucidate the intent to permit cities to issue bonds to make a city a better place for its citizens to live. This purpose therefore must be reflected in the Court's construction of the term "other public convenience."

12. There is no natural and most obvious meaning of the term "other public convenience." The term as used in the statute is not defined either therein or even in the

chapter. See, *Id.* and Minn. Stat. § 475.51 (2008). While the term "public convenience" is used in other contexts, the meaning in those contexts is not applicable to the statute at issue here in determining if authority is given to issue bonds. See, e.g., *Petition of American Freight Systems, Inc.* 380 N.W.2d 192, 196-7 (Minn.Ct.App. 1986)(determining that the definition of the term "public convenience and necessity" is elastic in reference to a freight carrier's application for certificate of public convenience); *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206, 211 (Minn. 1968)(stating that the police power may be exercised to promote the public convenience and general prosperity or welfare of the people); and *Bohn Mfg. Co. v. Hollis*, 55 N.W. 1119 (Minn. 1893)(finding that local, privately owned retail lumber yards are "not only a public convenience, but a public necessity").⁹ Because the term as used in the statute is undefined, the Court is required to apply the canons of statutory instruction to determine the meaning of "other public convenience" in relation to the City's grant of authority to issue bonds.

13. The City urges the Court to adopt a plain meaning definition of "public convenience" by defining the two words separately. The City defines the FTTP project as "public" because it would be available to the general public. "Convenience" is defined by the City using the Merriam-Webster Collegiate Dictionary as "something that is conducive to comfort or ease." Under the City's interpretation, the plain meaning of the term "public convenience" is something that is available to the general public that is conducive to comfort or ease. The City concedes this interpretation is very broad.

14. Bridgewater urges the Court to adopt a narrow interpretation which limits the definition of "other public convenience" to the term "utility" that precedes it in the statute. Under Bridgewater's interpretation, "other public convenience" only refers to activities that are akin to

⁹ Both parties cite a plethora of cases to define "other public convenience" which all predate the invention of the internet. While these cases are helpful by analogy, there has been no case law from this jurisdiction provided that is on point.

those provided by a public utility like a telephone system, but not internet or cable television. Additionally, Bridgewater argues that even if the Court were to construe the term convenience to include a broadband network, the service is not public because subscribers would be required to pay for the services provided. Therefore, the proposed broadband network would not be a "*public convenience*" within the meaning of the statute.

15. The interpretation of the term "other public convenience" advanced by each party represents two extremes. Under the City's interpretation the statute provides the authority to issue bonds for limitless purposes including funding a gas station or hair salon. This interpretation is too broad. Based upon the context of the statute, this grant of authority certainly was not contemplated by the legislature when giving cities the ability to issue bonds for the acquisition or betterment of public building and other enumerated purposes.

16. Conversely, Bridgewater's interpretation is extremely narrow. "Other public convenience" as defined by Bridgewater would only be another form of a utility. Bridgewater postulates that "other public convenience" in the form of a utility could mean a telephone company. To interpret "other public convenience" to mean utility would be to assume the statutory phrase "other public convenience" is superfluous, which this Court cannot do.

17. This Court construes the words and phrases in the statute according to rules of (1) grammar; (2) according to their most natural and obvious usage; and (3) unless it would be inconsistent with the manifest intent of the legislature.

18. Grammar is a complementary analytical tool for understanding how language is used in a statute to convey meaning. *ILHC of Eagan*, 693 N.W.2d at 419. "Or" is a conjunction. Conjunctions "indicate the relation between the elements joined." Diana Hacker, A Writer's Reference 411 (4th ed. 1999). The word "or" as used in "for any utility or other public convenience" is a coordinating conjunction which links ideas of equal importance. *Id.* at 98. Grammatically speaking, the phrase "or other public convenience" is not necessarily limited to meaning "utility" per se, but a service of equal importance.

19. Adopting the most natural and obvious usage, a telephone service is akin to a utility. See, e.g., Minn. Stat. §161.46, subd. 1(1)(2006)(defining utility as "...systems for supplying power, light, gas, telegraph, telephone, water, pipeline, or sewer service"); Minn. Stat. §452.01, subd. 3 (2008)(defining public utilities as "street railways, telephones, waterworks, gas works, electric light, heat or power works, public docks, union depots and terminal systems, ice plants, stone quarries, creosoting works, and public markets"); and Minn. Stat. §471.656, subd. 3(5)(c)(2002)(defining municipal public utilities as "electricity, natural gas, water, wastewater removal and treatment, telecommunications, district heating, or cable television and related services").¹⁰

20. Municipalities have been given the express authority to own and operate a telephone exchange within its own borders. Minn. Stat. §237.19 (2003). This grant of authority also permits the municipality to enter into a joint venture with a telecommunications organization to provide telecommunications services within its service area. *Id.* Moreover, municipalities are expressly authorized to operate a public cable communications system. Minn. Stat. §238.08, subd. 3 (2003).¹¹ The crux of the issue in this case is whether the municipality has authority to operate internet access over the fiber optic cable it is expressly allowed to construct to operate both telephone and cable televisions system.

21. In the same chapter in which the legislature grants municipalities the authority to operate telecommunications, it states the goal of "encouraging economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission." Minn. Stat. §237.011 (2008).

¹⁰ Under these broad definitions of utility, broadband internet access may well be a utility as "telecommunications" or "related services." The Court need not reach this issue.

¹¹ There is no limit this Court can find to the quality of the telephone and television services municipalities are expressly authorized to operate. Therefore, they are presumably authorized to provide fiber-optic infrastructure for transmission. The question is whether they can also provide internet service over the same infrastructure.

22. If the Court were to construe the definition of "other public convenience" to mean a utility or an entity similar to a utility, a service which provides an infrastructure for telecommunications would satisfy that criteria. Because the intent of the legislature is expressly stated in Minn. Stat. §237.19 relating to a telephone exchange system (which under Bridgewater's interpretation is a permissible use of city issue bonds), then the proposed FTTP project would satisfy those expressed intents.

23. Bridgewater argues that even if the FTTP project is a convenience, it is not *public* because the City has partnered with a private enterprise to manage the system and the users will have to pay a fee. The statute expressly permits the issuance of bonds to fund garbage disposal, hospitals, nursing homes, museums, art galleries, stadia, sewers, and subways, all of which traditionally require users to pay a fee. The inclusion of these activities represents an intent to permit cities to issue bonds to fund enterprises for which users are required to pay. The statute explicitly allows for a public convenience "from which a revenue is or may be derived," recognizing the venture may cost users money and still be public. Minn. Stat. §475.52, subd. 1. "While legislative determinations of public purpose are not binding on the courts, they are entitled to great weight." *Minnesota v. Printy*, 351 N.W.2d 319, 338 (Minn. 1984).

24. The fact that Hiawatha Broadband Company, Inc. will benefit from the municipality's plan does not negate the municipality's authority to implement it. See, e.g., *Pipestone v. Madsen*, 178 N.W.2d 594, 603 (Minn. 1970). For example, the telephone exchange statute specifically authorizes a city to partner with a private entity (or even to take away a private telephone exchange through eminent domain). See, Minn. Stat. §237.19 (authorizing a joint venture with a telecommunications organization to provide telecommunications services within its service area).

25. Like water, sewer, telephone, electric, public cable television, and natural gas, the City is going to provide access to the proposed infrastructure to all residents and

businesses, but charge an access fee. This access satisfies the requirement that the services be "public."

26. The Court concludes that the City has express authority under Minn. Stat. §475.52, subd. 1 to issue bonds to fund the FTTP project as an "other public convenience." The FTTP project is similar to the express grant of authority given to cities to construct a telecommunications system and the goal of the project fulfills the expressed legislative intent to bolster telecommunications services. The project is not different in character from other utilities the municipality is authorized to build through the issuance of bonds.

Statutory Construction of the Term "Operating Reserve Fund"

27. If the statute's language is plain and unambiguous, the Court does not need to construe the statute to give it meaning. *Correll*, 607 N.W.2d at 445. When reviewing the language of a statute, the Court views the "statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

28. Bridgewater urges the Court to conclude that the provision in the Preliminary Offering Statement that creates an Operating Reserve Fund is not authorized under Minn. Stat. §475.52, subd. 1 because the allocated funds are being used for "current expenses."

29. Even though the term "current expenses" is not defined by the statute, statutory interpretation is unnecessary. Subdivision 1 is made up of two distinct sentences. The second sentence of Minn. Stat. §475.52, subd. 1 states, "Without limitation by the foregoing the city may issue bonds to provide money for any authorized corporate purpose except current expenses." This second sentence explicitly does not limit the prior sentence. The last clause of the second sentence only limits the first clause of the second sentence. As such, if the City were issuing bonds not for the enumerated purposes in the statute, but under a catch-all of "any authorized corporate purpose" then the funds could not be used for current expenses. However, in giving effect to all of the statute's provisions, if the bonds are being issued for a "utility or other public

convenience" then those funds could be used for current expenses. The Court has concluded the term "other public convenience" includes the proposed FTTP project and therefore, if the Operating Reserve Fund were being used to fund current expenses, the City would not be acting outside of its authority as contemplated by the statute.

30. Even if the Court were to construe the last clause of the second sentence to limit the preceding sentence, the City is permitted to use funds allocated to the Operating Reserve Fund as an implied power to be used in carrying out an expressly authorized power. *See, e.g., Otter Tail Power Co. v. Village of Wheaton*, 49 N.W.2d 804, 810 (Minn. 1951)(finding that "authority so granted must include every essential step in the process by which a building once begun-and however it may have been begun-can be carried to completion where its public use becomes an accomplished fact.").

31. The Operating Reserve Fund is to fund so-called start up costs which are necessarily incurred until the project begins to generate base-line income. The Operating Reserve Fund is limited in duration to three years. If not used, the money will be applied to bond retirement.¹² The Operating Reserve Fund cannot be used for general current expenses unrelated to the FTTP project. The Court concludes that the City is not proposing to impermissibly use funds gained from issuing bonds for "current expenses" as prohibited under the statute.¹³ The bonds issued do not, therefore, exceed the City's authority.

32. Because neither issuing the bonds to fund the FTTP project nor the creation of the Operating Reserve Fund exceeds the City's authority as provided in Minn. §475.52, subd. 1,

¹² The parties stipulated in Court that the Preliminary Official Statement regarding the sunset provision of the Operating Reserve Fund has been amended to three years as is contained in the Indenture of Trust between City of Monticello and Wells Fargo Bank, National Association, as Trustee. (Aff. of Patrick O'Donnell filed on July 14, 2008 Ex. M, pg. 51). There is no factual dispute on this point, nor are these facts dispositive.

¹³ The Court does not determine whether issuance of bonds to fund the FTTP project would constitute an "authorized corporate purpose" as such a ruling is unnecessary in light of the Court's conclusion that the issuance of the bonds is permitted as an "other public convenience."

Plaintiff's Complaint does not state a claim upon which relief can be granted and dismissal of the Complaint is the appropriate remedy.

ORDER

IT IS HEREBY ORDERED THAT:

1. Defendant City of Monticello, Minnesota's Motion to Dismiss Complaint Pursuant to Minn.R.Civ.P. 12.02(e) is **GRANTED**.
2. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE AND ON THE MERITS**.¹⁴

LET JUDGMENT BE ENTERED ACCORDINGLY.

IT IS SO ORDERED.

Dated: October 8, 2008

I hereby certify that the foregoing constitutes the Judgment of the court.

LaVonn Nordeen, Court Administrator

By: [Signature] Deputy

Dated: October 8, 2008

BY THE COURT:

[Signature]
Jonathan N. Jasper
Judge of District Court

¹⁴ Pursuant to Minn. Stat. §562.04 (2000), "An appeal from any judgment entered in any district court in any litigation in which a bond has been required hereunder shall be taken to the Court of Appeals within 30 days after notice of entry of judgment, notwithstanding the Rules of Civil Appellate Procedure. The party appealing, or the respondent, may apply to the Court of Appeals for an order fixing the time and manner of the hearing of the appeal, whereupon the court may provide for a speedy hearing in the manner provided by the Rules of Civil Appellate Procedure."