

CASE NO. A08-1928
STATE OF MINNESOTA
IN THE COURT OF APPEALS

Bridgewater Telephone Company, Inc.,)
a Minnesota corporation,)
)
Plaintiff-Appellant,)
)
v.)
)
City of Monticello, Minnesota,)
)
Defendant-Appellee.)

**BRIEF OF PLAINTIFF-APPELLANT BRIDGEWATER TELEPHONE
COMPANY, INC. IN REPLY TO BRIEF OF AMICUS NATIONAL
ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS**

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INTRODUCTION

It is no surprise that the National Association of Telecommunications Officers and Advisors (“NATOA”) – consistent with its mission statement – believes that broadband connections should be made available to every citizen through the combined efforts of the private and public sector. However, this case is not about whether it is a good idea for public entities to make broadband connections available to citizens. That is for the legislature to decide. The only question for this Court to decide is whether the revenue bond act allows the City to issue bonds for the purposes stated in the bond documents. That is a matter of statutory construction, not policymaking.

With regard to the legal issue before the Court, the NATOA allows its policy preferences to color its interpretation of the statute’s terms. Yet even though it ultimately supports the City’s conclusion that the phrase “utility or other public convenience” encompasses the Fiber Project, it is noteworthy that the NATOA does not agree with the City’s construction of the statute. The NATOA refuses to endorse the City’s assertion that anything conducive to comfort or ease is covered by the “other public convenience” language of the act. Even though NATOA does not read the statute in the limitless manner of the City, it still fails to give it a reasonable construction consistent with its plain language and with the intent of the legislature that amended the act to include the subject provision in 1949. Its arguments on appeal are no more persuasive than the City’s. The NATOA breaks even more cleanly from the City with respect to whether Bridgewater has stated a claim that the City is proposing to use the revenue from the bonds for the impermissible purpose of paying current expenses. The

NATOA does not even address the argument, perhaps because the City's position is indefensible and perhaps because the NATOA recognizes that municipalities do not need to be relieved of the current expense prohibition in order to develop a broadband system. If the NATOA believed that broadband projects could never be financed by municipalities unless three years worth of salaries and other expenses could be included as capital expenses by magically labeling them "start-up" costs, surely it would have said so.

ARGUMENT

I. THE NATOA'S STATUTORY CONSTRUCTION ARGUMENTS ADD NOTHING TO THE INADEQUATE ARGUMENTS OF THE CITY.

A. The Grammatical Argument Is Baseless.

The NATOA first argues that the word "utility" in the revenue bond act provides no limit on the phrase "other public convenience" because a utility is simply one form of "public convenience." (Amicus Brief at 4-5). This, of course, renders the explicit reference to "utilities" superfluous. If, as NATOA claims, "all utilities are 'public conveniences'" (Amicus Br. at 5), then there was no reason to identify utilities in the first instance. The statute would merely need to authorize the use of revenue bonds for all public conveniences.

The word "utility" is not mere surplusage in the statute. The legislature included "utility" to give meaning to "other public convenience," because "public convenience" is not a well-defined term of art. Indeed, as the briefing to date makes clear, the words mean different things in different contexts. The NATOA's assertion that utilities are a lesser included class of public convenience is, moreover, question begging,

as it offers no assistance in defining the scope of public convenience. The NATOA's analogy to quadrilaterals and squares is misplaced: both quadrilaterals and squares are well-defined and understood words. Here the legislature used one well understood term, "utility," as a guide to defining the less common "public convenience." Minn. Stat. § 475.52, subd. 1.

B. The Fiber Project Is Not A Utility.

The NATOA next argues that a broadband network is a utility. (Amicus Br. at 5-7). This argument is not based on statutory construction -- reflecting the intent of the legislature -- but on NATOA's view of the importance of broadband. The organization is an advocate for the position that broadband development is vital for "wealth creation, social development and personal expression." (Amicus Br. at 11). The NATOA expresses its frustration that others do not agree. As it notes, "the United States currently lacks a national broadband strategy [and] investment in broadband infrastructure is lacking." (*Id.*). The NATOA no doubt sincerely believes, as it argues, that the proposed broadband system in Monticello "*should* be considered a utility." (Amicus Br. at 7) (emphasis added). But this is aspirational, and not an argument about the meaning of a statute passed before broadband technology could even have been dreamed of. Lightning-fast internet connectivity is still more luxury than necessity, and the NATOA points to no authority finding that an internet service provider is a utility.

The NATOA -- like the City -- points to Minn. Stat. § 471.656, subd. 3(c), which defines "municipal public utilities" under that act to include telecommunications and cable television. The NATOA says that the internet services to be provided by the

Fiber Project are encompassed by the allowance of “cable television and related services.” (Amicus Br. at 6-7). It reaches this conclusion by asserting that “‘related’ means ‘similar’.” (*Id.* at 7). Related, in this context, clearly means a service that is part and parcel of those enumerated: such as the sale of on-demand movies by a cable television operator. It does not encompass fundamentally different enterprises from those listed, such as high-speed internet service. The statute was enacted in 2002, at a point when internet service providers were well established. Had the legislature intended to include internet service in the definition of municipal public utilities it would have plainly said so, and not used an oblique reference to “related services.”

C. The Fiber Project Is Not A Public Convenience.

Finally, the NATOA argues that the Fiber Project is a “public convenience.” It relies solely upon authorities – none from Minnesota – that address the words “public convenience” in entirely different settings. The authorities, including the definition from an older version of Black’s Law Dictionary, involve matters relating to findings of public convenience or necessity in the context of determinations by Public Utilities Commissions and similar governmental boards that certain actions could or could not be taken. In the statute at issue, the public convenience is the object to be built with the proceeds of revenue bonds. But in each of the authorities cited the words refer to the effect on the public of a project proposed by private actors for approval by a regulatory body. Because of the differing context, the NATOA’s authorities are inapposite.

For example, the Black's Law Dictionary definition cited to by NATOA provides, in its entirety:

Public convenience and necessity. The common criterion used in public utility matters when a board or agency is faced with a petition for action at the request of the utility. In a statute requiring the issuance of a certificate of public convenience and necessity by the Public Utilities Commission for the operation of a public transportation line, "convenience" is not used in its colloquial sense as synonymous with handy or easy of access, but in accord with its regular meaning of suitable and fitting, and "public convenience" refers to something fitting or suited to the public need. *See also* Public Utility.

Black's Law Dictionary 1288 (6th Ed. 1990).¹

Similarly, *Hunter v. Mayor and Aldermen of Newport*, 5 R.I. 325, 1858 WL 2609 (1858), involved a statutory requirement that a finding of "necessity" be made for construction of a roadway. The city council found that the "public convenience" required the construction, and the issue was whether this finding sufficed. The court determined that the finding was adequate, as "necessity" was not an absolute and could be met by "inconvenience . . . so great that it is unreasonable that the public should be subjected to it." *Hunter*, 5 R.I. 325, 1858 WL 2609, at *4. *Abbott v. Public Utilities Comm'n.*, 136 A. 490 (R.I. 1927) involved a similar issue in connection with a petition to Rhode Island's Public Utilities Commission for a "certificate of public convenience and necessity to

¹ It is noteworthy that, even in this setting, convenience is not merely anything conducive to ease, as the City argues.

operate jitneys.” *Id.* at 491.² The other cases cited by the NATOA involve the same issue, *i.e.*, whether a governmental regulatory board should permit some construction or activity. *Luxor Cab Co. v. Cahill*, 98 Cal. Rptr. 576 (Cal. App. 1971) (taxicab licenses); *Hearst-Argyle Stations, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 659 N.W.2d 424 (Wis. App. 2003) (special use permit); *Sidney Tel. Co. v. Public Service Comm’n.*, 23 Ohio Dec. 639 (Ohio Com. Pl. 1913) (certificate to operate telephone exchange).

The statute before this Court uses public convenience to identify an enterprise that a statutory city may finance through revenue bonds. In each case cited by the NATOA, the words defined a showing to be made by a private business to offer goods or services or to secure a zoning exception. The citation of these cases for the first time in this action by an *amicus* is not a testament to its superior researching abilities. It is, rather, because the NATOA has strayed even farther into irrelevancy than the City.

II. THE POLICY ARGUMENTS OF NATOA ARE MATTERS FOR THE LEGISLATURE.

The only issues before this Court are whether the revenue bond statute permits use of bond proceeds for the Fiber Project and whether any of those funds can be used for current expenses. The question of whether the law of Minnesota should permit revenue bonds to be used to support broadband systems is an issue for the legislature, not the courts.

² In *Abbott*, the certificate was denied because the service was already provided and additional service would hurt the incumbent. 136 A. at 492. Here, of course, Bridgewater already provides fiber service.

The NATOA's arguments about the importance of broadband and the need for municipal development have no place here. (Amicus Br. at 10-16). Bridgewater agrees that broadband development is important – that is why it has laid fiber throughout Monticello. But permitting municipalities to use tax-free financing to attempt to undercut private enterprise will be a disincentive to the growth of broadband systems. There are good reasons for the legislature to leave development to the private sector. Those reasons, however, are for the legislature to consider, not the courts.

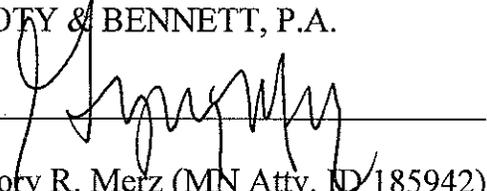
CONCLUSION

For the reasons stated herein and in its Opening and Reply Briefs, plaintiff-appellant Bridgewater Telephone Company, Inc. requests that this Court reverse the District Court's Findings of Fact, Conclusions of Law and Orders of October 8, 9 and 10, and remand this action to permit the action to proceed on the merits of the proposed Amended or Second Amended Complaints.

Dated: February 2, 2009

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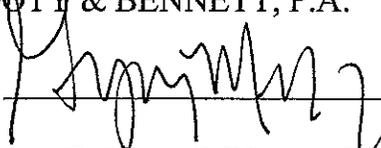
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R.
Civ. App. P. 132 for a brief produced with proportional font.

The length of this brief is 1,860 words, excluding the Table of Contents and
Table of Authorities.

Dated: February 2, 2009

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