

Case No. A08-1928

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Bridgewater Telephone Company, Inc., a Minnesota corporation,

Appellant,

v.

City of Monticello, Minnesota,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT CITY OF MONTICELLO

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Whether a statute that, without exception, authorizes “any statutory city” to “issue bonds or other obligations . . . for any utility or other public convenience from which a revenue is or may be derived” precludes the City of Monticello from issuing revenue bonds to create a network of City-owned fiber capable of conveying telephone, cable television and high-speed internet service to every home and business in the City?

The district court answered: no

Relevant Authorities:

Minn. Stat. § 475.52, subd. 1 (2008).

Clark v. Pawlenty, 755 N.W.2d 293 (Minn. 2008).

Orme v. Atlas Gas & Oil Co., 217 Minn. 27, 12 N.W.2d 757 (1944).

Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123, 49 N.W.2d 804 (1951).

2. After the district court dismissed Bridgewater’s complaint for failure to state a claim upon which relief may be granted, did it abuse its discretion by denying two motions of Bridgewater for leave to amend its complaint, where neither of the amendments would have cured the defects in the original Complaint and would have prejudiced the City?

The district court denied leave to amend under these circumstances.

Relevant Authorities:

Rosenberg v. Heritage Renovations, LLC, 685 N.W.2d 320 (Minn. 2003).

Bebo v. Delander, 632 N.W.2d 732 (Minn. Ct. App. 2001).

Sprangers v. Fundamental Bus. Tech., 412 N.W.2d 47 (Minn. Ct. App. 1987).

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).

STATEMENT OF FACTS

On or around May 21, 2008, Appellant Bridgewater Telephone Company, Inc. (“Appellant” or “Bridgewater”), filed and served a Complaint against the City of Monticello (“the City”), a statutory City, challenging the City’s authority to offer \$25,680,000 in revenue bonds in order to construct a “fiber-to-the-premises” (“FTTP”) broadband communications network that would include telephone, internet service, and cable television. Comp. ¶1, Appellant’s Appendix (“A”) 1 (Tab 1).¹ The Complaint, which made few factual allegations, asserted one cause of action – that the revenue bonds the City was about to issue for the FTTP project were not authorized under Minn. Stat. § 475.52, subd. 1 (2008). A1 (Tab 1).

Bridgewater’s Complaint alleged that “[t]he FTTP Project revenue bonds are not authorized by Minnesota law, and the issuance and sale of the bonds by Monticello is not lawful.” A3 (Tab 1). In support of this claim, Bridgewater invoked only Minn. Stat. § 475.52, subd. 1 (2008). That subsection states:

¹ After the lawsuit was commenced, the City issued the bonds on June 19, 2008. The mere pendency of this lawsuit caused the prospective purchasers of the bonds to change their position and to insist upon additional protections, thus creating a delay while market interest rates increased. Respondent’s Appendix (“RA”) 13-14, 16-17. The size of the bond issue increased accordingly beyond the amount stated in the Complaint.

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.**

Minn. Stat. § 475.52, subd. 1 (emphases added). Although the Complaint alleged that the proposed FTTP project “is not a permitted use for revenue bonds authorized by the above-quoted statute” A3 (Tab 1), it pleaded no facts that tend to call into question whether the FTTP project constitutes a “utility or other public convenience from which a revenue is or may be derived.”

The only language in section 475.52, subdivision 1, that is referenced in Bridgewater’s factual allegations is found in paragraph 12 of the Complaint, which alleges that, pursuant to section 475.52, subdivision 1, “proceeds from revenue bonds cannot be used for ‘current expenses.’” A3 (Tab 1). Bridgewater’s claim that the City would be using revenue bonds for current expenses was initially based on its interpretation of the May 5, 2008 Preliminary Official Statement (“POS”), which Bridgewater attached to its Complaint and, thus, incorporated into it for purposes of

Rule 12.02(e).² A2 (Tab 1) (Compl. ¶ 4); A6 (Tab 2) (Ex. 1 to Compl.). The first page of the POS stated in part:

The 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 of Monticello, Minnesota (“the City”) to be used for government and community connectivity for educational and other governmental services, along with the provision of certain other broadband communications 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 the Bonds. See “ESTIMATED USES OF PROCEEDS” and “THE FTTP PROJECT” herein.

A7 (Tab 2). The Complaint alleged that the POS “provides that \$1,250,000 of the bond proceeds will be used to establish an ‘Operating Reserve Fund’” and that “[t]he Operating Reserve Fund is established for the purpose of providing funds to operate the FTTP project during the initial start-up period.” A3 (Tab 1). The Complaint then alleged that “the Operating Reserve Fund is intended to be used for current expenses during the period before the FTTP Project generates positive cash flow.” A3 (Tab 1).

On June 6, 2008, the City answered and filed a motion to dismiss Bridgewater’s Complaint. A107 (Tab 3); A111 (Tab 4); A113 (Tab 5). On June 13, 2008, the parties appeared before the district court for a hearing on a motion the City had brought seeking to require Bridgewater to post a surety bond under Minn. Stat. § 562.02 (2008) and to expedite proceedings. A162 (Tab 8). In support of its Motion, the City filed several

² On a Rule 12.02(e) motion, a court “may also consider documents and statements that are incorporated by reference into the pleadings.” *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92, 95 (Minn. Ct. App. 2005).

affidavits that described in detail how the City would be harmed by the mere pendency of this lawsuit. RA1-18. The district court acknowledged the loss or damage that the pendency of the lawsuit might impose on the City and the taxpayers by ordering that Bridgewater post a surety bond in the amount of \$2,500,000. A163 (Tab 8).

The commencement of the lawsuit delayed the issuance of the revenue bonds. RA16 (Fick Aff. at ¶ 3). On or about June 19, 2008, the City entered into an Indenture of Trust, in which the City agreed to place the bonds and their proceeds into escrow until this litigation is brought to a full conclusion. A246-342 (Tab 25); A624-25 (Tab 26). This provision was included in the Indenture to provide the potential bond purchasers adequate security that their interests would not be harmed by this lawsuit. RA13-14 (O'Neill Aff. ¶ 3-4, 6). The result is that the City cannot access the bond proceeds to fund the construction or operation of the FTTP project so long as this suit is pending. *Id.*

As recognized by the district court, this delay of the issuance of the revenue bonds had the potential to harm the City financially. *See* A162 (Tab 8); *see also* RA 1-2, 4-5 (Decl. of Douglas A. Dawson at ¶¶ 3, 5, 10, 12). In an attempt to mitigate some of this damage, the City decided to proceed with construction of a subset of the FTTP project and to pay for construction of that subset out of the City's existing reserves, rather than out of the inaccessible revenue bond proceeds. RA33-44 (VanderWiel Aff., Exs. E, F.) This subset was an 11.19-mile stretch of fiber ("fiber loop") that would provide high-speed Internet only, and no telephone or cable. *Id.* It would have the ability to connect approximately 200 businesses, including the downtown area, much of the City's Industrial Park, and the City Hall, Community Center, and Public Works facilities. *Id.*

The cost of the fiber-loop project was estimated to be approximately \$1,150,000. *Id.* It was planned that the fiber loop eventually would be incorporated into the FTTP project once the lawsuit concluded. *Id.*

On or around July 14, Bridgewater served a memorandum in support of a motion for leave to file an amended complaint. A259 (Tab 18), A261 (Tab 19). The proposed Amended Complaint, which has over twice as many pages as the Complaint, alleged numerous facts that had not been alleged in the original Complaint. A261 (Tab 19). It also attached a copy of the June 1, 2008 Indenture of Trust, by which the bonds and their proceeds were placed into escrow by the City. A268 (Tab 19); A246 (Tab 25). However, none of the new facts alleged changed the relief Bridgewater was seeking or its ability to prove that it was entitled to such relief. A268-70 (Tab 19).

In its reply memorandum in support of this Motion for Leave to File Amended Complaint, Bridgewater served on the City a proposed *Revised* Amended Complaint. A642 (Tab 28); A658 (Tab 31). In addition to the amendments included in the proposed Amended Complaint, the proposed Revised Amended Complaint included numerous allegations regarding the City's contractual relationship with a third party, Hiawatha Broadband Corporation ("Hiawatha"), an entity that the City had retained to provide management services for the FTTP project, including training of personnel, on behalf of the City. A718-19 (Tab 38).³

³ The full list of Hiawatha's responsibilities is set forth in the Management Agreement, which was attached as an Exhibit to Bridgewater's proposed Second Amended Complaint. A718-21 (Tab 38).

On August 5, 2008, Bridgewater filed and served a motion for leave to file yet another amended complaint. A693 (Tab 34). This proposed Second Amended Complaint included all the prior amendments, as well as a new count alleging that the City's use of existing reserves, as opposed to funds from the revenue bonds, to construct the fiber loop would be an unlawful expenditure of public funds and would violate the City's cable franchise ordinance. A713-14 (Tab 37).

In an Order filed October 8, 2008, the district court granted the City's Motion to Dismiss, holding 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'" and that nothing in section 475.52, subdivision 1, precluded the City from using revenue derived from the revenue bonds to fund current expenses. A253-54 (Tab 16).⁴

⁴ Bridgewater's brief twists the district court's holding regarding current expenses in at least one important respect. It claims that "the District Court held that the City *had the inherent authority* to use revenue bond proceeds to fund current expenses of the Fiber Project as 'start-up costs.'" App. Br. 6 (emphasis added). The district court's decision includes no recognition of any "inherent authority" of the City. At most, the district court concluded that, even if it were to construe the last clause in the second sentence of Minn. Stat. § 475.52, subd. 1, 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." A254 (Tab 16) (citing Minnesota Supreme Court's statement in *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 131, 49 N.W.2d 804, 810 (1951), that "authority so granted must include every essential step in the process by which a building once begun – and however it may have begun – can be carried to completion where its public use becomes an accomplished fact"). *Id.* The Supreme Court has recognized on multiple occasions that a city possesses powers that "can reasonably be implied" from more explicit provisions. *See, e.g., Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 503-04, 162 N.W.2d 206, 215 (1968); *In re Bd. of County Comm'rs of Cook County*, 146 Minn. 103, 106, 177 N.W. 1013, 1014 (1920).

The following day, October 9, 2008, the district court issued an Order denying Bridgewater leave to file its First Amended Complaint, including the revisions in the Revised Amended Complaint, holding that the proposed amendment would serve no useful purpose because the new factual allegations made by Bridgewater in the Amended Complaint “merely question the political process by which the City undertook to . . . issue [the] bonds,” and thus they “do not change the Court’s analysis of the underlying issue of the litigation – whether or not the City is statutorily authorized to issue revenue bonds for the FTTP projects.” A690-92 (Tab 33).

Finally, on October 10, 2008, the district court issued an Order denying Bridgewater leave to file its Second Amended Complaint, holding that the new claim regarding the fiber loop is unrelated to the initial causes of action and that permitting Bridgewater to amend its Complaint to include this new, unrelated claim would “significantly delay this matter,” in which “[t]ime is of the essence,” and “potentially [would] harm the public body.” A784-87 (Tab 42).

Bridgewater now appeals from the district court’s orders granting the City’s Motion to Dismiss and denying Bridgewater leave to amend its Complaint.

SUMMARY OF LEGAL ARGUMENT

The suit of Bridgewater against the City is based on a misreading of a Minnesota statute, which the district court appropriately detected early in the case. Even when the well-pleaded factual allegations in the Complaint were taken as true, this misreading of the statute caused the Complaint to fail to state a claim upon which relief may be granted.

As a result, the district court concluded that City was entitled to dismissal with prejudice under Minn. R. Civ. P. 12.02(e).

The most critical statutory sentence provides that “any statutory city may issue bonds or other obligations . . . for any utility or other public convenience from which a revenue is or may be derived.” Minn. Stat. § 475.52, subd. 1. Bridgewater’s brief explicitly acknowledges that the “plain meaning” rule of statutory construction governs, by conceding that “statutes are to be construed ‘according to their most natural and obvious usage.’” App. Br. 12 (quoting *ILHC of Eagan v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005)). Yet Bridgewater’s brief fails to present any legal argument showing that its interpretation of that critical statutory sentence reflects the plain meaning (or “most natural and obvious usage”) of the Legislature’s words. To the contrary, Bridgewater’s argument invokes (but misapplies) lesser-known canons of construction, accompanied by prose that is rarely interrupted by citations, and is centered around whether particular interpretations of the phrase “public convenience” are sufficiently “limited” in their scope, as if that were the required test for statutory construction.

The fate of this appeal is sealed by Bridgewater’s unwillingness even to attempt to demonstrate why this Court should conclude that the City’s actions violated the “most natural and obvious usage” of those words. It is confirmed by Bridgewater’s misapplication of *ejustem generis*, and by the inappropriateness of its result-oriented insistence upon a sufficiently “limited” interpretation of the Legislature’s actual words.

In fact, even if the Court were to agree with Bridgewater that *ejustem generis* applies to this statute, and also agrees with Bridgewater that it requires the Court to

construe the phrase “other public convenience” to mean only “utility-like projects” (App. Br. 14), Bridgewater’s arguments still would fail. This is because, as the City showed below, the Minnesota Legislature’s most recent definition of the phrase “[m]unicipal public utilities” explicitly includes “telecommunications . . . or cable television and related services.” Minn. Stat. § 471.656, subd. 3(c). Bridgewater’s continued theorizing about what is and is not a “utility-like project,” citing next to nothing while ignoring the Minnesota Legislature’s latest word on the subject, ably demonstrates that Bridgewater’s approach to statutory interpretation has virtually nothing to do with divining actual legislative intent.

The district court correctly recognized that there is not a “current expenses” exception in the sentence of section 475.52, subdivision 1, that authorizes the issuance of the bonds at issue in this lawsuit. But even if Bridgewater’s interpretation of that statute had been correct, the City nevertheless still would have been entitled to dismissal, because the Minnesota Supreme Court and other courts have recognized that start-up costs do not fall within the scope of the “current expenses” exception to the final sentence of subdivision 1.

After granting the City’s motion to dismiss the district court did not commit a clear abuse of discretion by declining Bridgewater’s two requests to amend its Complaint. None of the proposed amendments would have cured the defects that entitled the City to dismissal. If permitted, the amendments would have prejudiced the City by delaying the entry of final judgment in a way that would have palpably increased the harm to the City arising from the mere pendency of this lawsuit.

LEGAL ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED BRIDGEWATER'S ACTION.

In reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question before the reviewing court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Dismissal for failure to state a claim serves the useful purpose of “disposing of legal issues with a minimum of time and expense to the interested parties.” *Hiland Dairy Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968). A motion to dismiss is a particularly appropriate procedural context to address claims that rest upon a misapprehension of the plaintiff’s legal rights or the defendant’s legal duties. *See Nelson v. Productive Alternatives Inc.*, 715 N.W.2d 452, 456 (Minn. 2006) (granting motion to dismiss when plaintiff failed to establish statutory or common-law authority for claim). For this reason, the Court has both the right and the responsibility to look beyond the legal labels and pejorative adjectives used by a plaintiff in its complaint to characterize the facts it alleges. As the Minnesota Supreme Court recently ruled, courts “are not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting with approval Third Circuit’s observation in *Anspach v. City of Philadelphia*, 503 F.3d 256, 260 (3d Cir. 2007), that “legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss”). “In testing the legal sufficiency of the complaint, the well-pleaded allegations are taken as

admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted.” *Hiland Dairy*, 402 F.2d at 973.

Bridgewater’s suit challenged the legality of public financial transactions. Such suits come before the court with a “presumption that the City’s actions were proper.” *Nielsen v. City of Roseville*, No. 98-1625, 2001 WL 1640040, at *4 (D. Minn. Aug. 27, 2001) (rejecting claim that a city’s use of tax-increment to finance forgivable loan to business was *ultra vires*) (attached at RA45). Specifically, “there is a strong presumption, although a rebuttable one, favoring action taken by a city.” *Id.* (quoting *Arcadia Dev. Corp. v. City of Bloomington*, 267 Minn. 221, 226, 125 N.W.2d 846, 850 (1964)). Moreover, as the Minnesota Supreme Court recognized long ago (when addressing a challenge to a county’s exercise of its bonding authority), “the grant to counties of power to issue and sell their bonds carries with it the implied power to do whatever is essential to the efficient exercise of the power expressly granted.” *In re Bd. of County Comm’rs of Cook County*, 146 Minn. 103, at 177 N.W. at 1014.

A. Bridgewater acknowledges that the “plain meaning” rule governs, but then relies upon anything but the plain meaning of the statute in seeking reversal of the district court’s dismissal.

The Minnesota Supreme Court has repeatedly emphasized that “[a] statute must be construed according to its plain language.” *Munger v. State*, 749 N.W.2d 335, 337 (Minn. 2008) (quoting *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002)); *see also* Minn. Stat. § 645.08(1) (2006). Bridgewater has finally conceded as much. App. Br. 12.

However, conspicuously absent from Bridgewater’s brief is *any* citation to any definition in any Minnesota statute, dictionary, or court decision, or any other recognized

source of authority on the “plain meaning” of statutory words in Minnesota. Had any such authority provided even marginal support for its interpretation, Bridgewater would have had every reason to have referenced it in its opening brief, because “perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived.” *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000).⁵ Instead, Bridgewater has left the Court with nothing to rest Bridgewater’s purported definition upon, except for the questionable force of its attorneys’ own rhetoric. Before the district court, Bridgewater at least attempted to cite cases in which the phrase “public convenience” had been used,⁶ but even a cursory examination revealed that those decisions fell far short of the billing given to them in Bridgewater’s briefs.⁷ Now it has apparently decided that citing *no* authority is better than citing *contrived* authority. In either event, it demonstrates why its interpretation of Minn. Stat. § 475.52, subd. 1, must be rejected.

⁵ The City presumes that Bridgewater has not chosen to keep the missing citations to itself until its reply brief. A court in Chicago recently criticized the “troubling” practice of “withholding until the reply brief of any attempt at development of the argument and the withholding of citation of supporting authorities.” *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.* 235 F.R.D. 435, 437 (N.D.Ill. 2006). It noted that “[t]he courts have characterized this tactic in a variety of ways—all negative. Blind-siding, gamesmanship, and sandbagging are the most commonly used epithets. Regardless of the name applied, the gambit has no place in the judicial system.” *Id.*

⁶ See A209-210 (Tab 14) (mischaracterizing *State v. Northwest Airlines*, 213 Minn. 395, 398, 7 N.W.2d 691, 694 (1942), *Texas-New Mexico Utils. Co. v. State ex rel. Teague*, 174 S.W.2d 57, 61 (Tex. App. 1943); *Henrietta Country Club v. Jacobs*, 269 S.W. 137, 139 (Tex. App. 1991), and *Abrams v. City of Rockville*, 596 A.2d 116, 123 (Md. Spec. App. 1991)).

⁷ The City explained Bridgewater’s mischaracterization of those cases in its reply brief (A233-34 (Tab 15)), and in its oral arguments in support of the surety bond motion (June 13, 2008 Tr. at 17-18) and its motion to dismiss (July 18, 2008 Tr. at 15-17).

With increasing frequency, the Minnesota Supreme Court uses dictionary definitions as a reflection of the plain meaning of words. *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 304 (Minn. 2008) (citing *The American Heritage Dictionary of the English Language*); *Auto Owners Ins. Co. v. Perry*, 749 N.W.2d 324, 327 (Minn. 2008) (using *Black's Law Dictionary* to define “status” when explaining “plain language interpretation” of insurance statute); *State v. Jackson*, 742 N.W.2d 163, 171 (Minn. 2007) (relying upon three dictionaries when defining “repose”). It is the type of authority relied upon most often by the Minnesota Supreme Court in such situations, at least when no showing has been made that the word is a technical term and has otherwise acquired a special meaning. Bridgewater has never attempted to show that “public convenience” is a “term of art,” here or below.

Such recognized authorities prove that the plain meaning of “convenience” is very broad.⁸ This year, when resolving a question regarding the plain meaning of two words in a Minnesota statute, the supreme court adopted definitions in the Merriam-Webster Collegiate Dictionary, available at www.merriam-webster.com. *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 9 (Minn. 2008). According to that dictionary, the meaning of the noun “convenience” is (1) “fitness or suitability for performing an action or fulfilling a requirement;” (2a) “something (as an appliance, device or service) conducive to comfort or ease;” (2b) “*chiefly British*: Toilet;” (3) “a suitable or convenient time <at

⁸ Recent editions of *Black's Law Dictionary* do not include a definition of “convenience,” *see* Bryan A. Garner, *Black's Law Dictionary* 355 (8th ed. 2004) and Bryan A. Garner, *Black's Law Dictionary* 332 (7th ed. 1999), further justifying the City's reliance upon a standard dictionary in this setting.

your convenience>;” or (4) “freedom from discomfort: Ease.” See <http://www.merriam-webster.com/dictionary/convenience> (accessed December 23, 2008).⁹

Below, and before this Court, Bridgewater has made no effort to show that the proposed FTTP project would fall outside of the dictionary definition of a “convenience.” That is because the FTTP project, when constructed, would be something conducive to comfort or ease.¹⁰ As the exhibit that Bridgewater attached to its Complaint states, “The FTTP Project will be used to provide multi-channel video programming service, including cable television service, high speed Internet Access, and voice service.” A37 (Tab 2) (Ex. 1 to Compl.). The cable programming would include “pay-per-view programming as well as video-on-demand programming.” *Id.* The high-speed Internet access would include basic service (at a 10 to 100 Megabytes per second rate) with an option for customers to purchase service at even faster speeds (that can be increased up to 200 Megabytes per second). A37-38 (Tab 2). In other words, the document that Bridgewater chose as its characterization of the FTTP project and its financing for

⁹ This broad construction of the term “convenience” is supported by the Minnesota Supreme Court’s statement that “retail lumber yards in the various cities, towns, and villages *are not only a public convenience, but a public necessity.*” *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 232, 55 N.W. 1119, 1120 (1893) (emphasis added). Bridgewater represents to this Court that the City “placed its primary reliance” upon this opinion (App. Br. 13 n.10). But in the City’s Motion to Dismiss brief, as in this brief, the City properly relegated it to a sentence in a footnote identical to the first sentence of this footnote. A192 (Tab 13).

¹⁰ Below, Bridgewater did criticize the City for not choosing one of the other Merriam-Webster Dictionary meanings of “convenience” (A209 (Tab 14)), but never suggested whether or why a more appropriate choice in this setting was “toilet,” “fitness or suitability for performing an action or fulfilling a requirement,” “a suitable or convenient time,” or “ease.”

purposes of the lawsuit demonstrates that the proposed FTTP project is “something (as an appliance, device or service) conducive to comfort or ease.”

In short, Bridgewater’s brief concedes that statutes are to be construed “according to their most natural and obvious usage,” App. Br. 12, and makes no attempt to show that the phrase “public convenience” is a technical term or has otherwise acquired a special meaning (so as to suggest that its plain and ordinary meaning ought not to be relied upon). Yet it provides no basis for the Court to conclude that Bridgewater’s suggested interpretation, rather than the City’s, is the phrase’s “most natural and obvious usage.”

B. The *ejusdem generis* canon of construction set forth in Minn. Stat. § 645.08(3) helps only the City, not Bridgewater.

In support of its purported interpretation that the phrase “utility or other public convenience” must mean “utility or utility like projects,” App. Br. 14, Bridgewater cites Minn. Stat. § 645.08(3), which states, “[G]eneral words are construed to be restricted in their meaning by preceding particular words.” This statutory provision is a codification of the common-law canon known as “*ejusdem generis*.” *Lefto v. Hoggsbreath Enters. Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). Black’s Law Dictionary provides an example of the operation of this rule: “For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal* – despite its seeming breadth – would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.” Bryan A. Garner, *Black’s Law Dictionary* 556 (8th ed. 2004) .

Setting aside for a moment the question of whether Bridgewater correctly invokes and applies this canon when arguing that “any utility or other public convenience” means “any utility or utility-like project,” it must be noted that this argument simply begs the question of what does and does not constitute a “utility-like project.” On that point, Bridgewater’s only attempt to tie its hand-crafted concept of “utility” to Minnesota law is a reference to Minn. Stat. § 412.321, subd. 1 as a “*see, e.g.*,” citation, purporting to support the assertion that “commonly recognized utilities include waterworks, gas plants, and power plants.” App. Br. 15. But this statute does not define utilities, let alone provide an all-encompassing list of utilities and utility-like projects.

A statute Bridgewater does not cite, Minn. Stat. § 471.656, subd. 3(c) (2008),¹¹ *does* define “[m]unicipal public utilities.” That statutory provision addresses the bonding authority of Minnesota municipalities and defines “[m]unicipal public utilities” to include the provision of “telecommunications . . . or cable television and related services.” Minn. Stat. § 471.656 subd. 3(c). Section 471.656 generally restricts the ability of Minnesota municipalities to issue bonds for projects located outside their jurisdictions, but provides an exception for bonds issued to finance property for “municipal public utilities,” as defined in subdivision 3(c). Minn. Stat. § 471.656, subd. 2(5). This statute is the Legislature’s latest word on the meaning of “[m]unicipal public utilities.” Because the definition is found within a statute defining the bonding authority of Minnesota

¹¹ Minn. Stat. § 471.656, subd. 3(c) (2008), was enacted in 2002 pursuant to Minn. Laws ch. 390, § 14.

municipalities and authorities, it is particularly pertinent to the interpretation of the Minnesota bonding statute at issue here.

This definition of “[m]unicipal public utilities” in section 471.656, subdivision 3(c), reveals the inaccuracy in Bridgewater’s assumption that the Minnesota Legislature would exclude the FTTP project from that set. This definition should resolve any doubt that the FTTP project will provide services that are akin to those provided by a public utility. *See also Cequel III Comm. I, LLC, v. Local Agency Formation Comm’n of Nevada County*, 149 Cal. App. 4th 310, 317 (Cal. App. 3d 2007) (“The District and LAFCo claim the Legislature’s grant of authority in section 16461 for a [Public Utility District] to acquire, construct, own, and operate works for supplying its inhabitants with ‘other means of communication’ authorizes the District to supply broadband services, including cable television, to its inhabitants. We agree.”). Moreover, if, as Bridgewater asserts, a municipality has no authority to issue bonds for the FTTP project because cable television and related services are not a “utility or other public convenience from which revenue may be derived,” there would have been no purpose for the Legislature to have included “telecommunications . . . or cable television and related services” when referring to the extraterritorial bond issuance powers of municipalities in section 471.656.

Most important, though, the existence of this statutory definition eliminates the supposed “slippery slope” depicted in Bridgewater’s brief. With the benefit of this statutory definition, the Court has the option of upholding the City’s bond issuance merely because the services of the FTTP project are either the same as, or of a similar kind to, the services offered by a municipal public utility within the meaning of section

471.656. Such a ruling would not affirm that governments may use revenue bonds for anything and everything, nor would it open the door for Bridgewater's imaginative hypotheticals.

But even if the Court were to ignore the Minnesota Legislature's most recent statement of what constitutes a municipal public utility, Bridgewater cannot use *ejusdem generis* to circumvent the "plain meaning" rule, and nullify the independent meaning of the phrase "other public convenience."

When explaining the narrow function of the *ejusdem generis* canon, the Minnesota Supreme Court has emphasized that "the rule should be applied cautiously." *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 40, 12 N.W.2d 757, 765 (1944). The canon "can be used only as an aid in ascertaining the legislative intent, and when that is apparent from the statute itself the rule has no application." *Winters v. City of Duluth*, 82 Minn. 127, 129, 84 N.W. 788, 789 (1901); *see also Lefto*, 581 N.W. 2d at 856 (giving several examples in which supreme court "did not apply the principle of *ejusdem generis* even though [it] had ample opportunity to do so").

In reducing the meaning of "any utility or other public convenience" to "any utility or other utility," Bridgewater has ignored the canon of construction that "[e]very law shall be construed, if possible, to give effect to all of its provisions." Minn. Stat. § 645.16; *see also* Minn. Stat. § 645.17(2) (courts may presume that "the legislature intends the entire statute to be effective and certain"). Based on this canon, the Minnesota Supreme Court has held that "no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 284

(Minn. 1999). Minnesota court rulings have made it clear that the *ejusdem generis* canon gives way in such settings. *See, e.g., Astleford Equip. Co. v. Navistar Intern. Transp. Corp.*, 632 N.W.2d 182, 189 (Minn. 2001); *Amoco Pipeline Co. v. Minn. Valley Landscaping, Inc.* 467 N.W.2d 351, 355 n.1 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 557 (Minn. 1992).

C. The canon of construction favoring interpretations that give effect to each statutory word helps only the City, not Bridgewater.

Bridgewater argues that its interpretation of the phrase “utility or other public convenience” is “compelled by the plain language of the statute, as it is the only construction that gives the meaning to the word ‘other.’” App. Br. 14. It argues that the Legislature’s “use of the word ‘other’ . . . ties public convenience into utility not merely as matters of co-equal importance, but also of the same kind.” *Id.*

As a matter of Minnesota law, Bridgewater has it exactly backward. “The word ‘other’ means in addition to *and different from* those mentioned.” *Orme*, 217 Minn. at 36, 13 N.W.2d at 763 (emphasis added). For example, “[a]ny other’ action, law, or regulation means all actions, laws, or regulations other than those mentioned.” *Id.*; *see also Pettit Grain & Potato Co. v. N. Pac. Ry. Co.*, 227 Minn. 225, 35 N.W.2d 127 (1948). The United States Supreme Court takes the same approach to statutory interpretation. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (holding that, to avoid violating violate settled rule that statute must, if possible, be construed so that every word has some operative effect, “[t]he words ‘other ownership interest,’ when following the

word ‘shares,’ should be interpreted to refer to a type of interest other than ownership of stock”).

Bridgewater also argues that its interpretation “is compelled by the requirement that all provisions of the statute be given effect,” because “there would be no need for the delineation of the specific uses for revenue bonds – no fewer than 27 – if public convenience meant anything that made life easier for the public (City’s construction) or anything that was important to the public (District Court’s construction).” App. Br. 14. Such an argument rests on a careless reading of section 475.52, subdivision 1. Bridgewater neglects to notice that the “any utility or other public convenience” clause is the only clause in the subdivision that is limited to actions “from which a revenue is or may be derived.” As a result of the separate enumeration (in separate clauses) of the other types of public facilities, services, and activities, municipalities can use bonds to finance these facilities, services, and activities without needing to show that those other enumerated activities might also derive a revenue. Thus, no matter how broadly “other public convenience” is construed, the specific enumeration of revenue-irrelevant activities in the other clauses carries an important meaning that keeps them from being rendered superfluous by that construction.

- 1. Bridgewater’s effort to limit the set of “other public conveniences” to services already in universal use demonstrates the self-interested absurdity of its approach to statutory interpretation.**

Bridgewater argues, for the first time on appeal, that an “other public convenience” is not utility-like unless it has the “near universal usage common to a

utility.”¹² App. Br. 16. Bridgewater maintains that that neither cable television nor internet service (or high-speed internet service) “has the near universal usage common to a utility,” and thus they may not be deemed to be “utility like.” App. Br. 16.

“The goal in reading a statute is to effectuate the purpose of the legislature.” *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 359 (Minn. Ct. App. 2001). Here, it is beyond dispute that the Legislature’s purpose in section 475.52 is to provide meaningful revenue bonding authority. It would be absurd to conclude that the Minnesota Legislature chose to accomplish that purpose by allowing revenue bonds to be used only to fund the creation of systems that provide services that already are in universal or near-universal use.¹³ If a service already is universally used, then few if any cities would *want* to finance and install a system for providing it. Under Bridgewater’s approach, the Tennessee Valley Authority electrical system would not have been a utility or utility-like project at the time of its creation because too few residents of the region already used electricity. Public sewer and water systems in southern Dakota County or northern Anoka County would not be utilities or utility-like projects when created because too many of the homes and businesses were already served by septic systems and wells. As these examples show, an *absence* of universal service and usage is a problem to which

¹² Bridgewater depicts utilities as rate-regulated monopolies providing “essential” services “used by all members of the community,” and contrasts this with data from the Monticello Feasibility Study’s statistics, which show the percentage of citizens who have cable television (57 percent, 74 percent if satellite television is included), Internet service (“about 70 percent”), and high-speed Internet service (“less than half”). App. Br. 16.

¹³ Moreover, the use of certain services – such as natural gas – is far from universal, yet few would suggest that systems to provide them are, for that reason, neither utilities nor “utility-like projects.”

revenue bond authority is a potential solution. It thus would obstruct the obvious legislative intent for a court to require universal or near-universal usage before a service could be considered a “utility or other public convenience” capable of being financed through revenue bonds.

D. If the plain meaning of the Legislature’s words is too broad for Bridgewater’s taste, then it is for the Legislature, not the courts, to add limiting language

By rejecting alternative interpretations of the statute because they are not “limiting” enough, Bridgewater displays its disregard for the proper role of the judiciary in a system of separated powers. Throughout its brief, Bridgewater attacks the district court for allegedly providing an interpretation of “public convenience” that “provided no meaningful limitation on the City’s authority” (App. Br. 13), had “virtually limitless meaning (App. Br. 14), and that “is wholly unworkable” (App. Br. 14 n.11). Such criticisms are unfair to the district court and inaccurate, and miss a more important point. Conspicuously absent from these criticisms is any citation to any statute or canon of construction that requires courts to become the “limiters” of the meaning of the Legislature’s chosen words, broad as they may be. Instead, the governing canons require courts to do the opposite – to give the Legislature’s words their plan meaning. As this Court stated in *Educ. Minn.-Chisholm v. Indep. Sch. Dist. No. 695*, “The scope of a statute, however, is the province of the legislature, not the courts.” 649 N.W.2d 474, 480 (Minn. Ct. App. 2002). ““The decision concerning the reach of a statute rests with the legislature.”” *Id.* (quoting *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 248 (Minn. Ct. App. 2002)).

As statutes such as the Tax-Increment Act, Minn. Stat. § 469.174 et. seq., the Housing and Redevelopment Authority Act, Minn. Stat. § 469.002 et seq., and the Johnson-Bakk eminent domain reform bill, 2006 Minn. Laws ch. 214, demonstrate, the Minnesota Legislature knows how to add exceptions, definitions, provisos, and other limiting language in statutes to curtail general delegations of authority to municipalities – when that is its intent. In this case, the Legislature has chosen not to do so, but has instead left the broadly-worded delegation of authority intact for over 50 years. If the Minnesota Legislature regrets the words it chose when adopting the clause in question in this case, it is free to replace those words with new, more limited words. *See Koes*, 636 N.W.2d at 360 (“If a statute needs to be changed, the change must come from the legislature[.]”). Until it does so, however, cities retain the authority to issue revenue bonds for “any utility or other public convenience from which a revenue is or may be derived.”

E. Bridgewater’s nostalgic interpretation of the word “public” cannot support its effort to cause this Court to legislate from the bench

Because the FTTP project will be a “convenience” and will be a *public* network,¹⁴ it must for that reason be a “public convenience.” The FTTP network will be owned by

¹⁴ As the Minnesota Supreme Court observed in *State v. Browning*:

and available to the public, as it will “be built to cover the entire area within the City boundaries,” and will be “built on every street in the City.” A2 (Tab 1); A33 (Tab 2) (Ex. 1 to Compl.).¹⁵

Bridgewater’s brief in opposition to the City’s Motion to Dismiss included a single paragraph asserting that, “even if the FTTP Project could be deemed a ‘convenience,’ it is not public,” because “a service that is primarily used for private purposes and that is not available to everybody cannot be deemed public.” A210 (Tab 14). *Public* conveniences, it argued, are things like playgrounds and streetlights, because they were available to everyone. Bridgewater understandably cited no authority in that paragraph (*id.*), or when making that argument at the hearing on the motion to dismiss (July 18, 2008 Tr. 49-68). But after the hearing on the Motion to Dismiss, when Bridgewater briefed *other* motions, including its two motions to amend its complaint, it began to analogize the meaning of “public” in “public convenience” to its meaning in an old case involving only the “public purpose” doctrine of state constitutional law, asserting that “as the Supreme Court ruled

The word ‘public’ may be variously defined. It may be defined as meaning open for the use, enjoyment, and participation of the public generally, even though a fee is charged, as a public dance hall, a public carrier, etc.; it may be defined as meaning owned by the public, that is, by the government or some of its subdivisions, as a public building, public courthouse, etc.; it may in certain situations be defined as meaning operated for the benefit of the public rather than for the benefit of a private individual; it may have other meanings which it here is not necessary to mention or to discuss.

192 Minn. 25, 27-28, 255 N.W. 254, 255 (1934); see also *Black’s Law Dictionary, supra*, at 1264 (stating that, if something relates to or belongs to an entire community, state or nation, it is “public”).

¹⁵ Bridgewater’s Complaint and briefs do not dispute that the network is something “from which a revenue is or may be derived.”

in *Borgelt v. City of Minneapolis*, [271 Minn. 249, 256,] 135 N.W.2d 438, 433 [sic] (1965), a public purpose does not include ‘any private business enterprise or occupation such as is usually pursued by private individuals.’” A647. Before this Court, Bridgewater relies upon the same analogy and the same case when seeking to overturn the district court’s dismissal, and for the first time asserts that “activities undertaken by a government are ‘public,’ however, when they ‘serve as a benefit to the community as a body’ and are ‘directly related to the functions of government.’” App. Br. 17-19 (quoting *Borgelt*, 271 Minn. at 255, 135 N.W.2d at 443). Drifting further from plain meaning and closer to a particular political philosophy, Bridgewater also adds that “the central role of a private business [Hiawatha] in the Fiber Project also defeats any claim that it is a ‘public convenience.’” *Id.*

Bridgewater has again overlooked the importance of how the clause in the statute ends – with a limitation to utilities and public conveniences “from which a revenue is or may be derived.” That portion of the clause is significant for a number of reasons. First, it demonstrates that the Legislature anticipated that cities would be using revenue bonds to finance things that would generate revenue – a point that is at odds with Bridgewater’s basic hostility to the notion that local government would be allowed to use such bonds to compete with the private sector. Second, it demonstrates that the Legislature could not have meant to limit the category of “any utility or other public convenience” to things that are available to the world for free, such as playgrounds and streetlights, because their very accessibility means that they will never generate revenue. In this fashion, Bridgewater’s arguments reflect that it has strayed far from common sense and the plain

meaning of the words actually chosen by the Legislature in its pursuit of a gerrymandered interpretation that will serve its own private financial interests.

Bridgewater's analogy to the "public purpose" doctrine, as supposedly embodied in dicta from *Borgelt* is particularly misplaced, because the approach taken by cases in the era ending with *Borgelt* has been abandoned by the Minnesota Supreme Court in favor of a much less intrusive approach. The *Borgelt* dicta is a vestige of a line of cases from the early twentieth century in which courts conducted an intrusive inquiry into whether the proffered purpose of a governmental entity's expenditure was the "real purpose." See, e.g., *Burns v. Essling*, 156 Minn. 171, 175, 194 N.W. 404, 405-06 (1923). However, in an effort to "comport with the changing conditions of modern life," *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978), over the past thirty years the supreme court has recognized a wide range of objectives as "public" purposes, including job-creation and private development. *Id.* at 338. In 1970, the supreme court noted that "the concept of 'public purpose' has proved to be an expanding one, and courts have frequently extended its permissible limits to approve public financing of currently popular projects." *City of Pipestone v. Madsen*, 287 Minn. 357, 366, 178 N.W.2d 594, 600 (1970) (upholding use of public funds to assist packing plant to move into community). Equally important, the supreme court held that legislative findings regarding public purpose "must carry great weight." *Port Auth. of City of St. Paul v. Fisher*, 275 Minn. 157, 167, 145 N.W.2d 560, 568 (1966); see also *City of Pipestone*, 287 Minn. at 364, 178 N.W.2d at 599.

Bridgewater has advanced the argument that because the FTTP project benefits Hiawatha, a private party, the project is no longer public. In the modern era, that argument has been roundly rejected by the supreme court. In *R.E. Short*, the City of Minneapolis proposed to construct a public parking ramp in order to induce a private developer to construct a hotel on the adjacent parcel. *R.E. Short*, 269 N.W.2d at 335. The city and the private developer entered into a contract by which the developer was to manage the parking ramp for a term of 20 years. *Id.* at 335. The plaintiff, the owner of a competing hotel, asserted that the city was constructing the parking ramp primarily for the benefit of the hotel developer and therefore the ramp served a private rather than public interest. *Id.* at 338-39. The supreme court rejected this argument and reversed the district court, which had found that the parking ramp did not serve a public purpose, and held that “[t]he mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public.” *Id.* at 337. The supreme court held that the district court erred when it focused exclusively on the contract between the city and the hotel developer – rather, it determined that the proper focus was on the economic benefits that would accrue to the city, such as increased tax revenues and downtown redevelopment, as a result of the hotel development, of which the parking ramp was only a “necessary adjunct.” *Id.* at 340.

Similar arguments were raised in *City of Pipestone*. In that case, the City sold \$3,000,000 in revenue bonds to purchase land and to construct a meat packing plant. *City of Pipestone*, 178 N.W.2d at 596. The City entered into a 20-year lease with a private corporation, under which the private corporation would use the plant for the operation of

a meat packing business. *Id.* at 597. The plan was challenged on the ground that the benefit of the plan accrued to the private corporation, rather than to the city. In rejecting that argument, the supreme court stated:

We are also persuaded that any benefits derived by Pawnee Corporation are only incidental to the accomplishment of the primary purpose of the encouragement and development of industry in order to prevent the emergence of blighted and marginal lands and areas of chronic unemployment. *It is beyond question that Pawnee Corporation will receive a large benefit from this program; however, this fact alone should not invalidate the project.*

Id. at 603 (emphasis added).

Under these authorities, Hiawatha's involvement in the FTTP project does not prevent the FTTP project from being "public."

F. Bridgewater cannot evade the meaning of "public convenience" by claiming that a portion of the proceeds from the bonds will be used for "current expenses."

In paragraph 12 of its Complaint, Bridgewater construes section 475.52, subdivision 1, as a universal ban on the use of revenue bond proceeds for "current expenses." A3 (Tab 1) (citing only Minn. Stat. § 475.52, subd. 1). The Complaint alleges that less than five percent of the revenue from the bond issuance – an operating reserve fund of \$1,250,000 out of \$25,680,000 – will be used for "current expenses," because a stated purpose of the reserve fund is to provide "funds to operate the FTTP project during the initial start-up period." A3 (Tab 1) (Compl. ¶ 11). For at least two reasons, Bridgewater's reliance upon the "current expenses" exception in the second sentence cannot salvage its lawsuit. The exception in the second sentence does not reach

the first sentence (which provides all the authority the City needed), and in any event, start-up costs are not a kind of “current expense.”

1. Bridgewater’s theory ignores the structure of subdivision 1.

Most fundamentally, to entertain Bridgewater’s claim the Court must first rewrite Minn. Stat. § 475.52, subd. 1, such that a “current expenses” exception is present not only in the very last grant of authority, *but also in every other grant of authority in that statute*. But the statute simply is not written in that way. Instead, as the district court recognized, “Subdivision 1 is made up of two distinct sentences.” A253 (Tab 16). The first sentence sets forth a series of specific examples of authorized uses, but includes no exceptions. As the district court observed, the second sentence sets forth a “catch-all” grant of authority (to “issue bonds to provide money for any authorized corporate purpose”), and exempts from *that* grant “current expenses.” A253 (Tab 16). Because the district court correctly recognized that “[t]he second sentence explicitly does not limit the prior sentence,” and “[t]he last clause of the second sentence only limits the first clause of the second sentence,” there exists no “current expenses” exception to the authority provided to cities in the first sentence, including the power to issue revenue bonds for “any utility or other public convenience.” A253 (Tab 16).

On appeal, Bridgewater argues that the City and the district court are misreading “the introductory clause of the second sentence,” which states “without limitation by the foregoing.” App. Br. 22. Bridgewater’s complaint is that this clause may prevent the first sentence from modifying the second sentence but does not necessarily prevent the second sentence from modifying the first sentence. *Id.* But with or without these

introductory words, the second sentence simply does not purport to modify the first sentence. Bridgewater's analysis assumes, incorrectly, that the district court must have implicitly relied only upon the first few words of that sentence when "isolating" it from the first sentence. That is another misreading of the district court's decision.

2. The City's authority to issue bonds for "any utility or other public convenience from which revenue is or may be derived" includes both capital and operating costs of the public convenience.

Even if Bridgewater were correct in its attempt to relocate the "current expenses" exception from the second sentence to the first, the district court's ruling nevertheless should stand. As the Minnesota Supreme Court and others have recognized, start-up costs are not current expenses.

In *Otter Tail Power Co. v. Village of Wheaton*, the challenger argued "that the proposed bond issue is illegal because included among costs are items such as salaries, fuel, and spare parts; and the village council voted only to [c]onstruct a plant and system." 235 Minn. 123, 131, 49 N.W.2d 804, 810 (1951). In response, the Minnesota Supreme Court quoted with approval from the Louisiana Supreme Court's statement that "it follows inevitably that the 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." *Id.* (quoting *Sharp v. Police Jury of Parish of East Baton Rouge*, 194 La. 220, 229, 193 So. 594, 597 (1940)). Elaborating, the Minnesota Supreme Court stated:

It is a matter of simple business practice that **costs of beginning operation must be included in construction costs** where the purpose is enunciated to be “the generation and distribution of electricity.” Words are to be taken in their reasonable meaning; and, when the village electors voted to construct the plant, they necessarily must have had initial operation in mind.”

Id. at 132, 49 N.W.2d at 810 (emphasis added). Thus, the supreme court has recognized that if a particular cost is an “essential step in the process by which a building once begun . . . can be carried to completion where its public use becomes an accomplished fact,” *id.* at 131-32, 49 N.W.2d at 810, the government necessarily has the authority to bond for those costs. Accordingly, the necessary implication of the outcome of *Otter Tail Power* is that start-up costs are not “current expenses,” and thus may be paid from revenue bond funds.

After serving its Complaint and receiving the City’s opening brief in support of its surety bond request, Bridgewater’s “current expenses” theory began to evolve, away from the claim as pleaded (that start-up costs constitute “current expenses”) toward an argument that the operating reserve fund would actually be used for purposes beyond start-up costs, notwithstanding its clearly articulated purpose. That claim was founded in part upon a typographical error in the Preliminary Offering Statement that mistakenly indicated that the surplus fund would automatically receive any remaining funds from the operating reserve fund “three years after June 1, 2011” (i.e. in 2014), rather than June 1, 2011. But as the district court correctly recognized in footnote 12 of its Order granting the City’s Motion to Dismiss, “[t]he 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.” A254 n.12 (Tab 16). It

was also based on Bridgewater's selective reading of an irrelevant definition., The Indenture, which the parties agreed could and should be considered by the district court,¹⁶ includes a definition of "Operation and Maintenance Expenses" that Bridgewater repeatedly quotes. A267 (Tab 19), even though that definition has no relationship to the operating reserve fund, but simply relates to the determination of the adjusted net revenues and net revenues pledged to pay the bonds. A527, 540, 567 (Tab 25).

In the Indenture, the City clarified how the operating reserve fund will *not* be used. Section 5.09 of the Indenture provides in relevant part,

At any time prior to the occurrence of an Event of Default hereunder amounts on deposit in the Operating Reserve Fund shall be disbursed by the Trustee in accordance with a City Request for: (1) costs of operating and maintaining the Facilities for an initial start-up period, not to exceed the period ended June 1, 2011, or such shorter period ending on the date operating revenues of the Facilities exceed operating costs (exclusive of depreciation and amortization) or (2) nonrecurring costs incurred prior to June 1, 2011, directly associated with the implementation of the Facilities; Any funds remaining in the Operating Reserve Fund on June 1, 2011, shall be transferred to the Surplus fund."

A575 (Tab 25) (emphasis added). This clarification – with its explicit references to "costs of operating and maintaining the Facilities for an initial start-up period," and "nonrecurring costs," should have put to rest any serious claim that the fund is going to be used for "current expenses." Yet Bridgewater has instead simply ignored this clarification in making its argument regarding the start-up costs.

¹⁶ See A259 (Tab 18) (Bridgewater urging in its opening brief in support of the Motion to Amend that the Indenture should now be attached to the Complaint) and A631 (Tab 26) ("The City does not oppose the Plaintiff's attempt to update the bond documents in this matter, but the addition of these documents should not delay the court's ruling on the pending motion to dismiss").

II. DENIAL OF BRIDGEWATER'S FIRST REQUEST TO AMEND ITS COMPLAINT WAS NOT AN ABUSE OF DISCRETION.

The district court has broad discretion to deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Leave to amend should be denied when allowing the amendment would result in prejudice to the opposing party, *id.*, or when the amendment would serve no purpose, *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2003) (holding that a motion to amend should be denied where proposed amendment could not withstand summary judgment).

Bridgewater argues that the district court abused its discretion when it denied Bridgewater's Motion for Leave to File First Amended Complaint for Declaratory Relief because the district court failed to consider the newly added allegations regarding Hiawatha's role in the FTTP project and regarding the Indenture. App. Br. 26-27. Bridgewater also argues that the district court erroneously allowed the need to expedite this lawsuit to "trump the need for a correct resolution." App. Br. 28. These arguments are erroneous.

A. **Bridgewater's challenge to denial of leave to file the First Amended Complaint mischaracterizes what the district court actually said and did with regard to the Hiawatha and Indenture allegations.**

In arguing that the district court abused its discretion in denying Bridgewater leave to file its proposed First Amended Complaint, Bridgewater argues that the district court "should have considered the additional facts alleged in the First Amended Complaint"

regarding Hiawatha because the allegations related to Hiawatha “were relevant to the authority to issue revenue bonds.” App. Br. 27, 29.

Contrary to Bridgewater’s argument to this Court, however, the district court *did* consider Bridgewater’s allegations regarding Hiawatha’s involvement when ruling on the City’s Motion to Dismiss, as if those allegations had been pleaded. The district court held that “the fact that Hiawatha Broadband Company, Inc., will benefit from the municipality’s plan does not negate the municipality’s authority to implement it.” A252 (Tab 16). Put another way, the district court recognized that the allegations were insignificant to the analysis of whether the FTTP project was an “other public convenience” within the meaning of section 475.52, subdivision 1.

Because the district court did consider the additional facts regarding Hiawatha (and recognized that such facts would not be important to the disposition of this lawsuit), Bridgewater’s argument that the district court erred in failing to consider these facts necessarily fails.

Bridgewater also challenges the district court’s denial of its motion for leave to file the First Amended Complaint by arguing that the district court failed to consider the City’s “dispositive admission” in the Indenture. App. Br. 26-27. Specifically, Bridgewater argues that the district court should have considered the City’s statement in the Indenture that “‘Operating and Maintenance Expenses’ means . . . any other current expenses or obligations required to be paid by the City” and should have concluded that such statement constitutes an admission that the operation and maintenance expenses to

be paid from proceeds from the revenue bonds were current expenses. *Id.* (citing A540 (Tab 25)).

This argument and the proposed amendments it addresses are focused solely on the question of whether the City will use the revenue bond proceeds for “current expenses.” That question became academic as soon as the district court correctly concluded that there is no “current expenses” exception in the clause in section 475.52, subdivision 1, that permits a city to use revenue bonds for “other public convenience[s].” Therefore, as the district court accurately concluded, denial of leave to amend the Complaint to include these allegations would have been improper because these allegations “would not serve a useful purpose in this litigation.” A692 (Tab 33).

B. In any event, the new material in Bridgewater’s proposed First Amended Complaint did not cure the flaws in the existing claims, or state a viable additional claim.

The district court was well within its discretion in denying Bridgewater’s motion for leave to file its First Amended Complaint because, as the district court correctly concluded, the amendments contained in paragraphs 4-9, 12, 13, 20, 21, and 25 of the First Amended Complaint would have served no legitimate purpose. *See Bebo v. Delander*, 632 N.W.2d 732, 741 (Minn. Ct. App. 2001) (affirming denial of motion to amend complaint to allege that coworkers made certain statements when alleged statements were derogatory but not defamatory and therefore added nothing to complaint and amendments would have prejudiced respondent by making additional discovery necessary); *Sprangers v. Fundamental Bus. Tech.*, 412 N.W.2d 47 (Minn. Ct. App. 1987)

(holding that district court's denial of amendment to include facts not material to the lawsuit was proper).

Paragraphs 12, 13, and 25 alleged that the City had failed to hold a referendum on the issuance of the bonds and, thus, the bonds were invalid under Minn. Stat. § 475.58, subd. 1,¹⁷ if they were issued solely pursuant to the "authorized corporate purpose" provision of § 475.52, subdivision 1. A266-269 (Tab 19) ¶¶ 12, 13, 25.

As the district court concluded before ruling on Bridgewater's motions for leave to amend, and as set forth above, the revenue bonds were appropriately issued pursuant to the "other public convenience" provision of the first sentence of § 475.52, subdivision 1. The "authorized corporate purpose" clause appears only in the second sentence of that subdivision. Because the district court was not required to reach the "authorized corporate purpose" issue when deciding whether the City was acting within its authority, adding the allegations in paragraphs 12, 13, and 25 would have served no legitimate purpose.

The six paragraphs (paragraphs 4-9) in the section of the proposed First Amended Complaint entitled "Background on the FTTP Project" neither stated a new claim nor supported an existing claim. Rather, these paragraphs contained factual allegations regarding statements that the City allegedly made in connection with the referendum the City held on the question of whether to authorize a local exchange telephone system and

¹⁷ While section 475.58, subdivision 1, does require municipalities to conduct a referendum prior to issuing bonds, that provision also makes several exceptions, including for bonds "payable wholly from the income of revenue producing conveniences." Minn. Stat. § 475.58, subd. 1(4).

allegations that such statements were false. A262-5 (Tab 19) ¶¶ 4-9. None of these allegations were relevant to the only cause of action asserted in the proposed First Amended Complaint – that the City did not have authority under section 475.52, subdivision 1, to issue the bonds. Even if true, these allegations did not advance Bridgewater’s legal theories or move it any closer to the relief that it sought.

Paragraphs 20 and 21 of the proposed First Amended Complaint appeared under the heading “Claim for Relief.” A268 (Tab 19). However, neither paragraph alleged facts that supported any claim for relief Bridgewater pleaded. Both paragraphs 20 and 21 referred to the fact that the bonds are being held in escrow, awaiting the resolution of this lawsuit, and that if the Court declares the City’s bonds void, the bondholders are entitled to mandatory redemption. A268 (Tab 19) ¶¶ 20, 21. While these paragraphs underscored the City’s concerns that this litigation be concluded as quickly as possible, they had no place in the Complaint. Bridgewater did not allege that it owned any of the bonds issued in this lawsuit. Nor did it allege that the redemption of the bonds would provide Bridgewater with any benefit. The facts were not material to the lawsuit or to the relief to which Bridgewater might be entitled. Any benefit of the mandatory redemption would accrue to third parties, whose interests Bridgewater does not have standing to invoke.

For these reasons, the addition of paragraphs 4-9, 12, 13, 20, 21, and 25 served no legitimate purpose, and thus the district court appropriately denied these amendments.

C. The special kind of prejudice that Bridgewater's First Amended Complaint was designed to create demonstrates that denying leave to amend was not an abuse of discretion.

In any event, an inevitable (and intended) effect of allowing this amendment would have been to exponentially widen the scope of discovery requests in this lawsuit.¹⁸ This unnecessary discovery would have resulted in a unique type of prejudice to the City that is not found in most other lawsuits. It also would have diluted the protection the district court provided to City by requiring Bridgewater to post a bond under Minn. Stat. § 562.02 and would have circumvented the protections provided the City by Minn. Stat. § 562.04 (requiring lawsuit to be expedited). For these reasons, it was within the district court's broad discretion to deny leave to amend the Complaint. *See Bebo*, 632 N.W.2d at 741 (affirming denial of motion to amend complaint because amendments would have prejudiced respondent by making additional discovery necessary); *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. Ct. App. 1987) ("If substantial delay will result, the amendment may be denied.").

The very pendency of this lawsuit placed the City at risk, especially if it were unresolved by June 2009. Simply by filing its Complaint on the eve of the scheduled placement of the revenue bonds, Bridgewater was able to delay that placement and the commencement of activities that are necessary for the implementation of the FTTP

¹⁸ Bridgewater's attempt to add to its Complaint allegations that City officials made false statements in the referendum campaign followed on the heels of unsuccessful efforts by Bridgewater to subpoena documents from third parties. *See Exs. A through E to Aff. of Pamela L. VanderWiel in Support of Motion to Quash Subpoena of Hiawatha Broadband Communications, Inc.; Oppenheimer & Co. Inc.; Faegre & Benson, LLP; Best & Flanagan, LLP; and Campbell Knutson, P.A., dated July 7, 2008.*

project. To avoid losing potential purchasers who had become concerned about the impact of this lawsuit, the City then had to agree to a number of conditions that had not been required prior to the lawsuit. RA13 (O'Neill Aff. at ¶ 3). Included among the conditions are that the proceeds of the bond sales be placed in escrow until the conclusion of the litigation (including any appeal), and that, if the litigation, including any appeal, continued for over a year, the City was required to redeem the bonds. RA13-14 . (*Id*).

In that environment, further prolonging the resolution of the case through amendments would have caused additional harm to the public. So long as the pendency of this litigation deprived the City of the bond proceeds and thus prevented completion of the FTTP project, the City would lose its potential revenues from users of the network and its ability to collect interest on those revenues. RA4-6 (Dawson Decl. at ¶¶ 11, 14, 16). The City projected that just an 11-month delay in rolling out FTTP project would result in a loss of \$2,730,268 in customer revenues and interest income over the next six years. RA7 (*Id.* at ¶ 18). Moreover, placing the bond proceeds in escrow required the City to paying to the purchasers interest on the bonds until the escrow is released. RA17 (Fick Aff. at ¶ 4). As a result, the City will be required to pay the purchasers approximately \$85,000 for every month this lawsuit continues. *Id.*

In addition, the prospect that the litigation would become prolonged beyond June 19, 2009, also poses a type of catastrophic risk to the City and its ability to ever complete the FTTP project. If the mandatory redemption provision were triggered because the resolution of the litigation is delayed, the City would be required to pay the Original Investor Discount (“OID”) of \$527,436. RA17 (*Id.* at ¶ 16). In order to continue the

FTTP project, the City would then be required to reissue the bonds, which would result in the City incurring yet another \$581,871 in reissuance costs. RA17 (*Id.* at ¶ 5). In addition, the City likely would need to reissue the bonds at a higher interest rate. RA18 (*Id.* at ¶ 17). Even then, such a scenario assumed that underwriters and willing buyers would be available for the bonds, even after a mandatory redemption.

For the very reason that further delays in this litigation would prejudice the City, such delays would have rewarded Bridgewater. Simply by delaying the entry of final judgment, Bridgewater would have maximized the probability that it will be able to obtain the result it seeks in this litigation – the prevention of the FTTP project – whether it is entitled by law to that relief or not. Thus, once the district court found that the complaint failed to state a claim upon which relief may be granted, it was anything but a clear abuse of discretion for the district court to deny Bridgewater’s first Motion for Leave to Amend.

III. DENIAL OF BRIDGEWATER’S SECOND REQUEST TO AMEND ITS COMPLAINT WAS NOT AN ABUSE OF DISCRETION.

Bridgewater, through its second attempt to amend its Complaint, sought to add an additional Count challenging the City’s attempt to mitigate the losses caused by the pendency of this lawsuit by using general funds, as opposed to funds derived from the revenue bonds, to construct the fiber loop. The district court denied Bridgewater’s Motion for Leave to File Second Amended Complaint, holding that the new allegations therein were “wholly unrelated” to the issues raised in the initial Complaint and that, because “[t]ime is of the essence in this litigation,” leave to amend to add this unrelated

claim must be denied in order to avoid the significant delay and resulting harm to the public body that would result from any such amendment. A785-6 (Tab 42) ¶¶ 3-4, 7.

Bridgewater challenges this decision on appeal. But, rather than raising any of the arguments that it presented to the district court,¹⁹ Bridgewater argues for the first time on appeal²⁰ that requiring it to bring this additional count in a separate lawsuit rather than as an amendment to the Complaint in the present lawsuit would cause a “significant and undue burden” to Bridgewater because of the prospect that it again might be required to respond to a motion to post a surety bond and to post such a bond. App. Br. 31. Bridgewater also argues, again for the first time, that the district court should have granted leave to amend and entered a partial judgment under Rule 54.02, as this would have “fully protected” the City’s interests in an expeditious appeal. App. Br. 31.

Appellate courts “must generally consider only those issues that the record shows were presented to and considered by the [district] court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellate courts will consider issues not presented to the district court only when the issue is a constitutional issue that was

¹⁹ Because the arguments Bridgewater presented to the district court are absent from its opening brief, those arguments necessarily are waived, and Bridgewater is precluded from raising them as a fallback in its reply brief. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. Ct. App. 1990) (holding that issues not raised or argued in initial brief cannot be revived in reply brief), *review denied* (Minn. Sept. 28, 1990); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).

²⁰ Bridgewater filed both an opening brief and a lengthy, vituperative reply brief in support of its Motion for Leave to File Second Amended Complaint. A696-7 (Tab 35) and A763-783 (Tab 42). None of the arguments that it now presents as a ground for reversing the district court’s denial of leave appeared in either brief. *Id.*

implied in the district court, *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982); the issue is plainly decisive of the entire controversy, *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997); or considering the issue would forestall additional litigation on remand,²¹ *Franklin v. Western Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 407 n.2 (Minn. 1998). None of these exceptions is applicable here. Thus, it cannot reasonably be said that the district court committed a “clear abuse of discretion” by failing to imagine and heed arguments that Bridgewater, a well-represented litigant, did not consider worthy of including in briefs to the district court. Moreover, Bridgewater’s failure to make such arguments below means that the record does not contain the type of supporting evidence needed for this Court to conclude that the district court clearly abused its discretion.

Even if Bridgewater had appropriately raised the arguments it now asserts on appeal before the district court, those arguments would not satisfy the “clear abuse of discretion” standard of review. As the district court concluded, the City would have been unduly prejudiced if the district court had granted Bridgewater leave to file the Second Amended Complaint, as doing so would have further delayed this litigation. This holding

²¹ The “forestall additional litigation” exception applies when the additional litigation would occur on remand. In *Franklin*, the district court determined that it need not reach a particular issue because of its holding on a related issue. 574 N.W.2d at 407 n.2. When the Supreme Court reversed that holding, it concluded that it would address the particular issue in order to avoid the need for the district court to do so on remand. *Id.*

This exception is inapplicable here. The district court concluded that the fiber loop issue raised on Bridgewater’s Proposed Second Amended Complaint was entirely unrelated to the allegations in the initial Complaint. Thus a reversal of the district court’s decision to grant the City’s Motion to Dismiss would not necessitate any additional consideration of the unrelated fiber loop issue on remand.

appropriately considers the harm that would result to the City, *see Fabio*, 504 N.W.2d at 761 (holding that leave to amend should be denied when amendment would result in prejudice to non-moving party), and is fully supported by the record before the district court. RA1-18. That record establishes that any amendment would have further delayed the City's ability to access the proceeds of the bonds it sold and to begin constructing the FTTP project. *Id.* It also establishes that such a delay could also result in this matter extending beyond the mandatory redemption date for the bonds. *Id.* Contrary to Bridgewater's argument, it is this harm to the City, as the non-moving party, that is relevant to the amendment analysis, not the hypothetical harm that Bridgewater now maintains it may face if it is required to undergo a second surety bond hearing in a second lawsuit. *See Fabio*, 504 N.W.2d at 761.

Bridgewater also erroneously asserts that the district court should have exercised its Rule 54.02 authority to allow the revenue-bond claims to proceed on appeal while entertaining claims raised for the first time in the proposed amendment. This assertion is flawed for at least three reasons. First, that Bridgewater would be required to post a second surety bond in a second suit not certain, but is merely a hypothetical. Second, Bridgewater's argument presumes that it would *not* have been required to provide additional surety to the City had the district court allowed the new claim to be brought as part of the present suit. The Order granting the current surety bond, and its amount, was based solely on the risk that Bridgewater might not prevail on its claims that the City's use of the revenue bonds is improper under section 475.52, subdivision 1. The new count in the Second Amended Complaint presented an entirely new claim – that the City's use

of its general funds to develop the fiber loop is improper – and thus an entirely new risk. Thus the new count could have become the subject of a surety bond hearing even if it had been added to the present lawsuit. Third, even if the Court were to fully agree with Bridgewater’s argument, nothing positive would be accomplished by reversing the district court’s denial of leave to amend, because it would simply require the district court to allow a claim to proceed as the sole focus of this suit that could just as easily proceed as a separate suit.

Beyond the flaws in Bridgewater’s argument, however, is the principle that Bridgewater should not be rewarded for engaging in tactics that are solely intended to delay the resolution of this lawsuit. It was to Bridgewater’s tactical advantage not to raise its Rule 54.02 argument before the district court, because prevailing on that argument could have resulted in the precise outcome that Bridgewater was seeking to avoid –the district court’s Order granting the City’s Motion to Dismiss would become appealable. Only now, after Bridgewater has failed in its efforts to further delay that appeal, is Bridgewater inclined to raise this argument. The Court should not reward such tactics by overlooking the general rule that arguments not raised below will not be considered on appeal. *See Thiele*, 425 N.W.2d at 582.

For these reasons, the district court’s denial of Bridgewater’s Motion for Leave to File its Second Amended Complaint was a proper exercise of the district court’s discretion.

IV. SO THAT THE PARTY THAT IS ENTITLED TO PREVAIL AS MATTER OF LAW DOES NOT LOSE AS A MATTER OF FACT, THE CITY RESPECTFULLY URGES THIS COURT TO GIVE ITS RULING PRECEDENCE, AND TO RULE WITH DISPATCH.

Although the district court correctly found that the City's issuance of revenue bonds was authorized by law, there is an increasing danger that the mere pendency of this appeal will render the City's statutory authority moot. That is why proceedings to date have been expedited by the district court (A162) and the administrative panel of this Court. *See* Dec. 10, 2008 Order of this Court at 3 (scheduling oral argument on expedited basis). This also is why the City is filing this brief over 20 days before its deadline. This increasing danger also provides good cause for this Court to give the issuance of its ruling in this case precedence over rulings in non-expedited cases.

While the City defeated Bridgewater's claim that the bond issuance was unauthorized by law, its lawsuit forced the bond proceeds into escrow, off-limits to the City, while this appeal remains pending. While the mere pendency of this suit has stalled the City's ability to accomplish its plans for the FTTP project, Bridgewater has pushed ahead of the City. It is actively exploiting the City's lack of access to the bond proceeds by completing its own system (App. Br. 2 ("Bridgewater and TDS have just completed a \$6.6 million project to install a high-speed fiber-optic network in Monticello.)) and attempting to lock the City's customers into long-term contracts for telephone, television and high-speed internet service before the City can provide any alternative. *See* Ex. G to Aff. of John M. Baker in Support of Motion for Expedited Schedule (filed Nov. 19, 2008). Thus, every day that this appeal is pending is a day in which Bridgewater wins a

marketing battle by default. Bridgewater has achieved that enviable position merely by bringing an invalid but disruptive suit, and keeping it alive through appeal. The Court should be concerned about whether others will copy Bridgewater's tactics in similar settings, as they see the anticompetitive advantage that results. The City recognizes that all cases before this Court are important. However, it respectfully requests that the Court consider the extraordinary circumstances of this lawsuit when preparing its ruling.

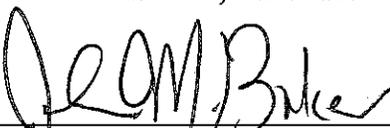
CONCLUSION

For the reasons set forth above, Respondent City of Monticello respectfully requests the Court to affirm the district court's rulings in all respects.

Respectfully submitted,

Dated: December 24, 2008

GREENE ESPEL, P.L.L.P.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2007, which reports that the brief contains 13,643 words, exclusive of tables and this certificate.

