

Radermacher Law Firm, P.C.

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Kimberly J. Radermacher
Attorney-at-Law
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*Licensed in ND/SD

July 27, 2020

Executive Secretary
North Dakota Public Service Commission
North Dakota State Capital
600 E. Boulevard Ave. Dept. 408
Bismarck, ND 58505-0480

RE: Nodak Electric Cooperative, Inc. v. Otter Tail Power Company

Dear Commissioners,

Enclosed for docketing in the above captioned matter, please find the following:

- A. Complaint; and**
- B. Affidavit in Support of Complaint (with exhibits).**

I have included one original, eight (8) copies (seven copies for the PSC and one for the Respondent) and also one courtesy copy. Once said Complaint is filed, please provide to my office a file stamped copy.

As always, please do not hesitate to contact my office should you have any questions or concerns.

Thank you.

Sincerely,
RADERMACHER LAW FIRM, P.C.

Kimberly J. Radermacher

Enclosures

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.,)	
Complainant,)	
)	COMPLAINT
-vs-)	
)	Case No.
Otter Tail Power Company,)	
Respondent.)	

[1] Nodak Electric Cooperative, Inc. (hereinafter “Nodak”) is a “rural electric cooperative” under N.D.C.C. § 49-03-01.5(6). Nodak is an interested electric cooperative corporation under ND.C.C. § 49-03-05.

[2] Otter Tail Power Company (hereinafter “Otter Tail”) is an “electric public utility” under N.D.C.C. § 49-03-01.5(2). Its principal office address is 215 South Cascade Street, P.O. Box 496, Fergus Falls, MN, 56538-0496.

[3] Otter Tail threatens to begin the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer to be located in McFarland’s Addition located in Section 26, Township 159 North, Range 51 West, Pembina County, North Dakota (the place to be served), without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and service.

[4] The place to be served is now located within the corporate limits of the City of Drayton, North Dakota because it was annexed in after the site was chosen by the customer. This also resulted in some of Nodak’s facilities being annexed into the City of Drayton. Nodak contends that a service area agreement between Nodak and Otter Tail dictates that Nodak should serve

the site.

[5] The place to be served is also located in Nodak's service area. Nodak has a single-phase line that intersects the place to be served and a three-phase line that is directly adjacent to the place to be served. Based on the initial site plan provided by the customer, Nodak could extend service off of the single-phase line already located on the place to be served or extend three phase service by 350 feet to the proposed location of the customer's transformer. Otter Tail's extension of service would require boring under Interstate 29 and crossing over Nodak's already existing lines, as Otter Tail has no facilities adjacent to the property capable of serving the load.

[6] Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer at the place to be served threatens to interfere with Nodak's service and system and is wasteful duplication of facilities.

[7] The allegations are shown by the attached affidavit of Mylo R. Einarson, with accompanying exhibits.

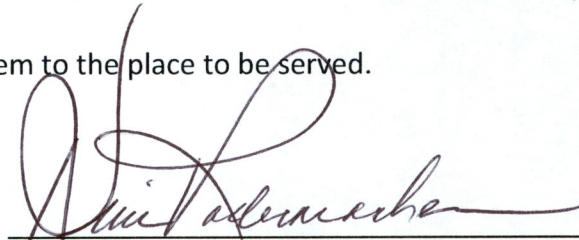
[8] Otter Tail's construction of an extension of its public plant and system and of its transmission and distribution lines to the place to be served is a violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5.

[9] Otter Tail is subject to the jurisdiction of the Public Service Commission. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984); Application of Otter Tail Power Co., 451 N.W.2d 95, (N.D. 1990).

[10] Therefore, pursuant to N.D.C.C. §§ 49-02-02 (2), (4), 49-03-01.1, 49-03-01.4, and 49-03-05, Nodak requests the Commission, with or without notice, to make its order restraining,

enjoining and requiring Otter Tail to cease and desist from constructing an extension of its electric public utility plant and system to and from serving any customer at the place to be served and to require Otter Tail to conform to the laws of this State, until the further order of the Commission after hearing after due notice and that Otter Tail be ordered to remove any extension of its electric public utility plant and system to the place to be served.

Dated this 21st day of July, 2020.



Kimberly J. Radermacher,
Attorney for Complainant
Radermacher Law Firm, P.C.
P.O. Box 597 – 27 Center Ave. W.
LaMoure, ND 58458-0597
Telephone: (701) 883-5125
Facsimile: (701) 883-5928
kimrader@radermacherlaw.com

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.,)	
Complainant,)	
)	AFFIDAVIT IN SUPPORT OF COMPLAINT
-vs-)	
)	Case No.
Otter Tail Power Company,)	
Respondent.)	

[1] I, Mylo R. Einarson, declare on oath:

[2] I am President and CEO of Nodak Electric Cooperative, Inc. (hereinafter "Nodak"). I make this declaration in support of Nodak's attached complaint against Otter Tail Power Company (hereinafter "Otter Tail").

[3] Nodak provides electric service to rural customers outside of the City of Drayton, North Dakota. Otter Tail primarily provides electric service to the City of Drayton pursuant to a franchise agreement dated May 3, 2011. There is also a service area agreement involving Nodak and Otter Tail that encompasses the service location that is in dispute and the subject of this Complaint.

[4] On February 23, 2019, a consulting engineer, Paul Bryant of CEI, contacted Nodak regarding the proposed location for a new Love's Truck Stop (hereinafter "Love's") to be located west of I-29 and in Nodak's service territory (see attached map which is incorporated by reference herein). Paul inquired about the cost for extending service and asked for transformer pad specifications so they could build in their design to pour a pad for the transformer. On May 30, 2019, Steve Breidenbach, Nodak's Engineering Manager, had asked Paul if Nodak could get a site plan for Love's, which was emailed to Nodak the same day the request was made. On

June 10, 2019, Steve once again talked with Paul and indicated that Nodak and Love's should start the paperwork for the new service. The application for membership was sent to Paul as he had indicated that all contact for Love's was supposed to be routed through him. Shortly thereafter, Nodak learned that the City of Drayton was seeking to annex the Love's site into the city limits of Drayton. Because of this, Paul felt that Otter Tail, not Nodak, should serve the site and therefore did not follow through with submitting the application for membership to Nodak. On April 13, 2020, the City of Drayton passed a resolution authorizing Otter Tail to serve the site. Nodak received a request for a line locate, seemingly indicating that Otter Tail is moving ahead with extending its service. This was all done despite the fact that Nodak has repeatedly expressed its willingness to serve Love's, objected to Otter Tail serving the load, and the service area agreement between the parties.

[5] By way of background, Nodak and Otter Tail had a service area agreement that was signed in April 1958. At the end of 1960, maps for each of the relevant townships had been negotiated, drawn and signed by both parties. Since then, each time a change to a map was made, a new one was drawn and signed by the parties and replaced in the file. In February 1968, a new agreement was signed by the parties that referenced "the attached maps" and has all those signed maps from 1960 attached to it. The new agreement was almost verbatim from what was in the 1958 agreement except it changed some language referring to what happens when a municipality annexes area between the existing city limits and the territory boundary where the cooperative has existing facilities and/or consumers. The service area boundaries were drawn outside the existing city limits in some cases up to a mile, and in some cases the cooperative had existing members or infrastructure in that area. The initial agreement provided

for the sale of those facilities and accounts from the Nodak to Otter Tail once the property was annexed. The subsequent agreement took that out and provided for an option to sell if all parties agreed. This was only for newly annexed property inside the service area boundary. The two parties apparently met annually for some period of time to discuss the agreement. It is assumed that at some point the parties stopped meeting because there were not any changes to the maps. (See attached map and agreements, which are incorporated by reference herein). According to the agreement and maps, Nodak and not Otter Tail, would have the right to provide electric service to the site, despite the subsequent annexation of said territory into the city limits of Drayton.

[6] Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve Love's would interfere with Nodak's service and system and is wasteful duplication of facilities. Nodak has a single-phase line that intersects the Love's service location and a three-phase line that is directly adjacent to the service location. Based on the initial site plan provided by Love's, Nodak could extend service off of the single-phase line already located on the property or extend three phase service by 350 feet to the proposed location of Love's transformer. Otter Tail's extension of service would require boring under Interstate 29 and crossing over Nodak's already existing lines, as Otter Tail has no facilities adjacent to the property capable of serving the load. Due to the annexation of the service location into the city limits by the City of Drayton, Nodak now has facilities located within the City of Drayton.

[7] Otter Tail has not obtained from the Public Service Commission a certificate that public convenience and necessity require or will require such construction and service by Otter Tail.

Dated this 21 day of July, 2020.



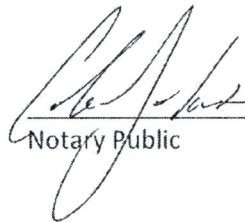
Mylo R. Einarson, President and CEO
Nodak Electric Cooperative, Inc.

STATE OF NORTH DAKOTA)

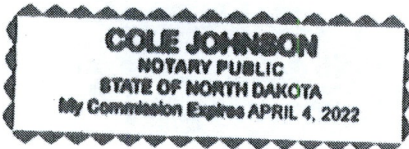
COUNTY OF GRAND FORKS)

The foregoing instrument was subscribed and sworn to before me on the 21 day of July, 2020.

(SEAL)



Notary Public



REC'D M/R 15 1968

MAR 25 1968

9. 24 3/25



Otter Tail Power Company

Jamestown, North Dakota
March 14, 1968

*Don't forget you
received a separate
copy of signed copies
in the back of these
agreements
Jim*

Mr. Jim Coleman, Manager
Nodak Rural Electric Cooperative, Inc.
Grand Forks, North Dakota

Dear Jim:

Attached are two copies that we have signed of the service agreement between Nodak and Otter Tail, and I want to thank you for the fine meeting we had, and the way we have been getting along.

I think it will be real good to have a meeting together once a year, and bring up anything that may have bothered either one of us in the year's operation.

Yours very truly,

Bob
Division Manager

RWNygard/kwm
Attach:

EXHIBIT
tabbies
Nodak #1

SERVICE AGREEMENT

1. In an earnest and sincere effort to avoid misunderstanding and disagreement over areas to be served by the Nodak Rural Electric Cooperative, Inc., hereafter referred to as the Cooperative, and the Otter Tail Power Company, hereafter referred to as the Company, both parties agree to the following general conditions, and further agree that these conditions as set forth, shall be used as a guide to peacefully settle any differences that may arise.
2. We hereby agree that the Company shall serve all territory located within and adjacent to urban areas served by the Company as outlined on the attached maps, the intent being to avoid any transfer of customers when such areas may be annexed by the municipalities. In general, this adjacent territory shall not extend more than one mile beyond the corporate limits or definitely plotted area in any direction. It is understood that the cooperative and the power company can negotiate, trade or buy properties of either party, if it is mutually agreed in writing by the two parties, and the customers being affected by any such exchange.
3. We further agree that when requests for electric service develop outside of the limits of any community, and the adjacent area as outlined in the attached maps, it shall be assumed that all such loads will be served by the Cooperative.
4. Where it is necessary and desirable to trade or sell territory or areas served by either the Cooperative or the Company, the price of the property to be sold or transferred shall be the depreciated value of the property plus an amount equal to two times the gross earnings of the property during the preceding year.
5. If the operation of this agreement requires considerable expense in the construction or retirement of line to either party to accomplish its purpose, the resultant expenses shall be equitably shared by both parties, or as may be mutually agreed prior to such relocation.
6. It is realized that the foregoing agreement will not cover all conditions which may arise, but if followed in good faith by both parties, will serve as a guide to future developments and growth of our respective organizations, and to the best interest of the consumers involved.

7. Upon mutual agreement, any maps, prints, revisions, or sketches used to further describe territory changes shall become a part of the agreement.

These consist of as follows:

<u>Map Description</u>	<u>Date Made Part of This Agreement</u>	<u>Company Initials</u>	<u>Cooperative Initials</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

8. It is also agreeable to both parties, that sometime within the month of January or February, the Board of Directors of the Cooperative and the Manager and people so designated by the Otter Tail Power Company, will get together for a meeting to discuss any problems that may have occurred the last year, and talk about any further agreements that may take place.

Dated February 19, 1968

Attest: Harvey T. Callahan
Its Secretary

Corporate Seal

Nodak Rural Electric Cooperative, Inc.

By Robert Kinney
President

Dated February 19, 1968

Attest: John M. West
Its Secretary

Corporate Seal

Otter Tail Power Company

By Albert V. Smith
President

NODAK RURAL ELECTRIC COOPERATIVE, INC.
 FIELD NO. NORTH DAKOTA 11 GRAND FORKS
 GRAND FORKS, NORTH DAKOTA

TOWNSHIP OF
DRAYTON
 COUNTY OF
PEMBINA
T 159 N
R 51 W

ORIGINAL DRAWING
 BY J.W.J. DATED 12-4-44
 F.L.S. 12-20-44
 FIELD DRIVEN BY

REVISIONS	
A	REVISIONS
B	5.49 Revised To Map
C	
D	
E	
F	
G	
H	
I	
J	
K	
L	
M	

PREPARED BY
 GENERAL ENGINEERING CORP.
 MINNEAPOLIS, MINN.

DRAWING NUMBER
401-

KEY MAP REFERENCE NO.

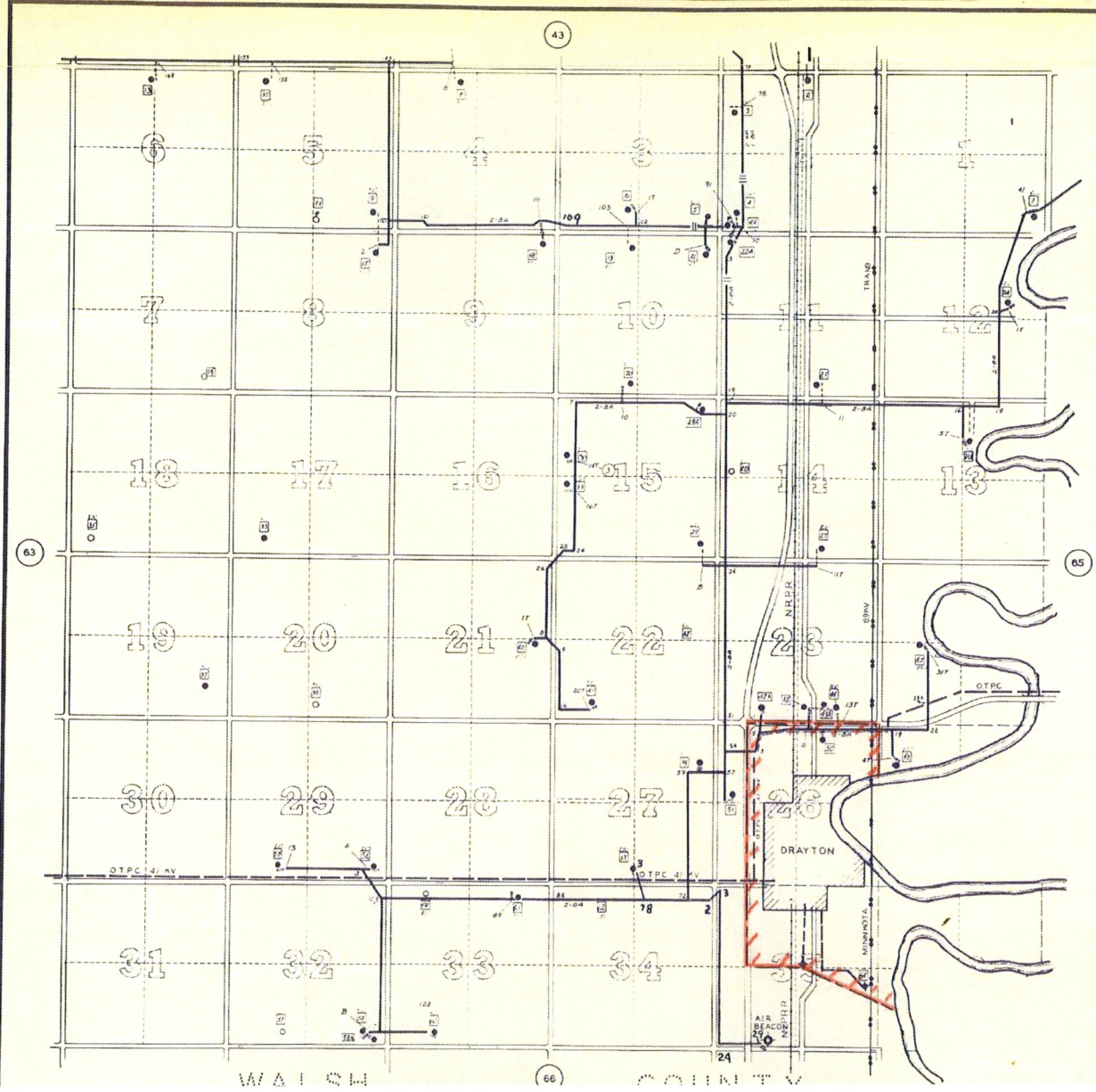


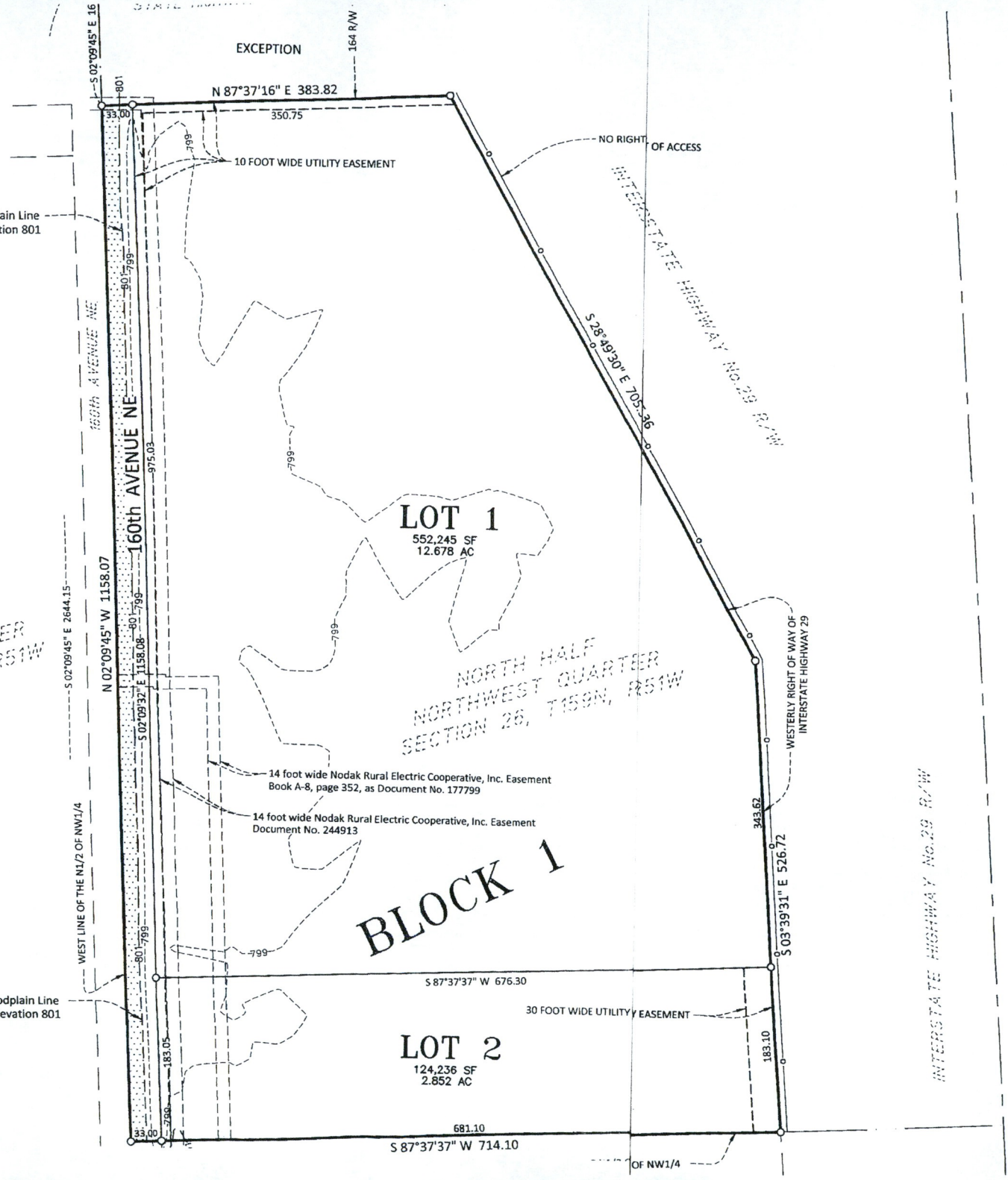
EXHIBIT
Nodak #2
tabbles

100 Year Floodplain Line
Base Flood Elevation 801

NORTHEAST QUARTER
SECTION 27, T159N, R51W

NORTH HALF
NORTHWEST QUARTER
SECTION 26, T159N, R51W

SCHUMACHER PARK



INTERSTATE HIGHWAY No. 29 R/W

OF NW1/4

ADDITION

RTH DAKOTA
ARTER SECTION 26, T159N, R51W

LEGEND

○	5/8" x 18" LONG REBAR, MONUMENT SET CAP MARKED BY LIC. NO. LS-6703
●	MONUMENT FOUND
—	SUBJECT PROPERTY LINE
- - -	EXISTING PROPERTY LINE
- - -	EASEMENT LINE
- - -	ACCESS CONTROL LINE
- - - 799	EXISTING CONTOUR LINE
[Pattern]	AREA NOT WITHIN 100 YEAR FLOODPLAIN

OWNERS DESCRIPTION AND DEDICATION

KNOW ALL MEN BY THESE PRESENTS, That Tyler L.E. McFarland and Christine McFarland, husband and wife, owners of a parcel of land located in that part of the North Half of the Northwest Quarter of Section 26, Township 159 North, Range 51 West of the Fifth Principal Meridian, Pembina County, North Dakota, being more particularly described as follows:

That part of the North Half of the Northwest Quarter of Section 26, Township 159 North, Range 51 West, 5th Principal Meridian, Pembina County, North Dakota, lying westerly of the west right of way line of Interstate Highway 29, less and except the North 164.00 feet thereof.

Containing 16.408 acres, more or less.

Said owners have caused the above described parcel of land to be surveyed and platted as "McFARLAND'S ADDITION" to the City of Drayton, Pembina County, North Dakota, and do hereby dedicate to the public, for public use, the streets, avenues and utility easements as shown on this plat and do hereby dedicate to Lot 1 the 30 foot wide private utility easement in Lot 2 for the purposes so stated.

OWNER:

Tyler L.E. McFarland
By: Tyler L.E. McFarland

Christine McFarland
By: Christine McFarland

State of North Dakota }
County of Pembina } ss

On this 8 day of August, 2019 before me, a notary public within and for said County and State, personally appeared Tyler L.E. McFarland and Christine McFarland, husband and wife, known to me to be the people that are described in and who executed the within instrument, and acknowledged to me that they executed the same as a free act and deed.

Steven C. Ekman
Notary Public

STEVEN C. EKMAN
Notary Public
State of North Dakota
My Commission Expires December 8, 2022

BENCHMARK

NGS MONUMENT "ROBBIN" THE MARK IS A PUNCH MARK ON THE TOP OF A DRIVEN 1/2 INCH DIAMETER BY 28 FT LONG STAINLESS STEEL ROD WITH A 3 FT PLASTIC STABILIZER SLEEVE. ACCESS TO THE DATUM POINT IS THROUGH A 5 INCH LOGO CAP THAT IS FLUSH WITH THE GROUND, STAMPED—ROBBIN 1994—, SET ON TOP OF A 5 INCH DIAMETER BY 24 INCH LONG PVC PLASTIC PIPE FILLED WITH SILICA SAND AND SET IN CONCRETE. A METAL SPIKE WAS PLACED IN THE SILICA SAND MAKING THE MARK MAGNETIC. THE MARK IS LOCATED IN THE NW 1/4 OF SECTION 28, T159N, R50W, 0.9 MILES EAST OF THE TOWN OF ROBBIN, 0.9 MILE EAST ALONG TRUNK HIGHWAY 11 FROM THE BRIDGE OVER THE RED RIVER, AT TRUNK HIGHWAY 11 MILEPOINT 0.9, 80.5 FEET SOUTH OF TRUNK HIGHWAY 11, 72 FEET EAST OF TOWNSHIP ROAD, 45.0 FEET NORTH-NORTHEAST OF A POWER POLE, 3.1 FEET EAST OF A WITNESS POST.
ELEVATION = 798.80 NAVD88 DATUM.

DRAYTON CITY COUNCIL APPROVAL

By resolution duly passed by the City Council of Drayton, North Dakota, this 12th day of August, 2019, the plat of "McFARLAND'S ADDITION", as shown herein was duly approved and acc and the plat ordered filed in the office of the Recorder of Pembina Coun North Dakota; a copy of the same to be filed in the office of the City Aud

Charles Olson
Charles Olson, Mayor Date: 8/15/2019

Attest: *Grace Puppe*
Grace Puppe, City Auditor Date: 8/15/19

255638

Pembina Co. Clerk Recorder Recorded: 8/19/2019 at 10:20 AM
Return To: STEVEN C. EKMAN P.C.
PO BOX 70

Page 1 of 1

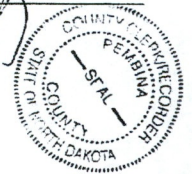
GRAFTON ND 58237

255638

\$20.00

Pembina Co. Clerk Recorder, ND 8/19/2019 10:20 AM
I certify that this instrument was filed for record this date
KAY NEWELL BRAGET, County Recorder

By: *Kay Newell Braget*



SURVEYOR'S CERTIFICATE AND ACKNOWLEDGEMENT

I, Gregg Stroeing, Registered Professional Land Surveyor under the laws of the State of North Dakota do hereby certify that this plat is a correct representation of the survey, that all distances shown are correct and that the monuments for the guidance of future surveys have been located or placed in the ground as shown and that the outside boundary lines are correctly designated on the plat.

Gregg Stroeing
Date: 8/2/19

Gregg Stroeing, Professional Land Surveyor
North Dakota License Number LS-6703

State of North Dakota }
County of Cass } ss

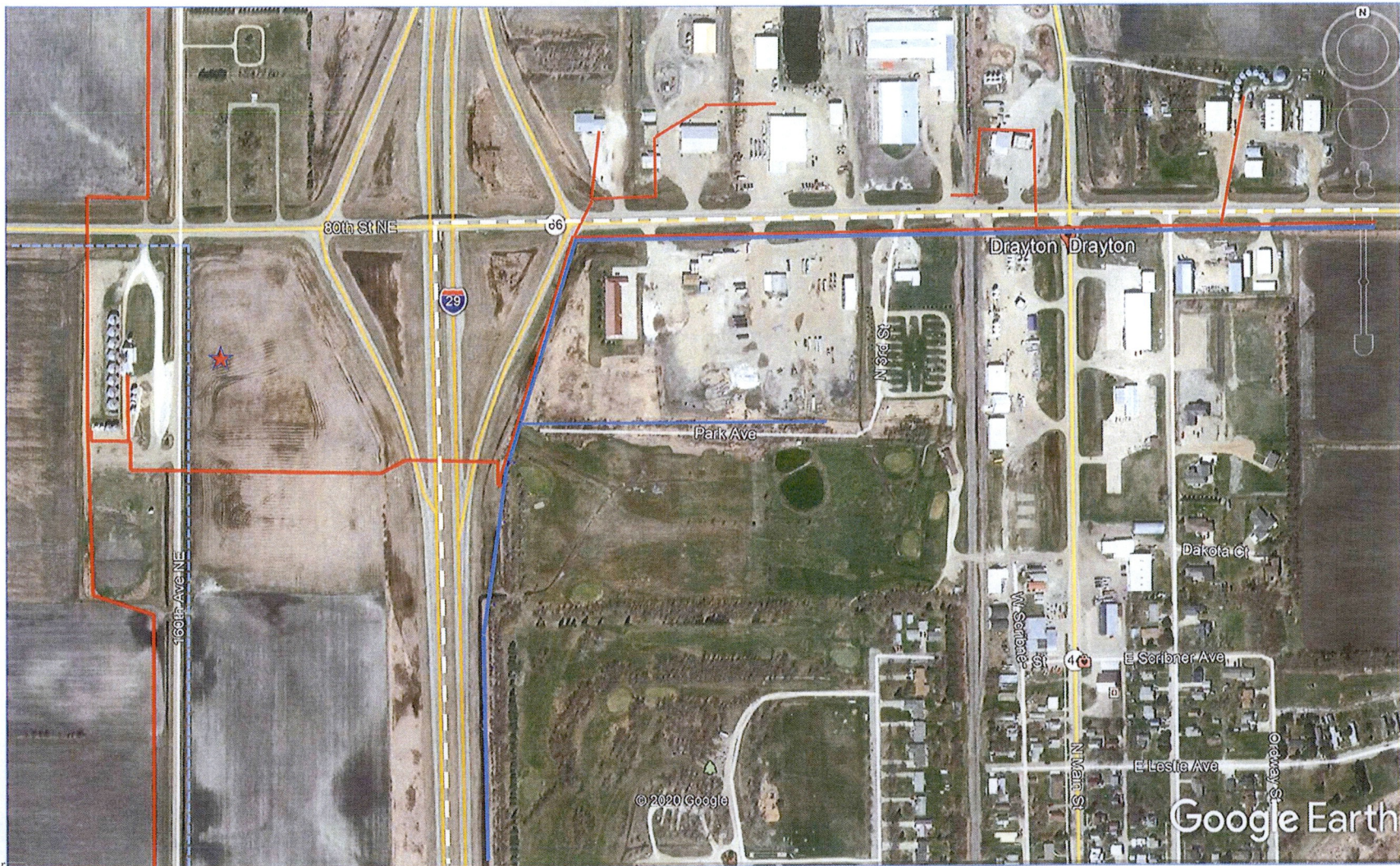
On this 2 day of AUGUST, 2019 before me, a notary public within and for said County and State, personally appeared Gregg Stroeing, Professional Land Surveyor, known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

Jeff Zelinger
Notary Public

JEFF ZELINGER
Notary Public
State of North Dakota
My Commission Expires May 20, 2022



TRANSFER ENTERED
August 19 2019
Sandra Schlittenhan
COUNTY AUDITOR - PEMBINA COUNTY, ND
BY: _____
DEPUTY
Current taxes or current special assessments or installment payments on assessments are unobscured.



--- OTP Transmission Line

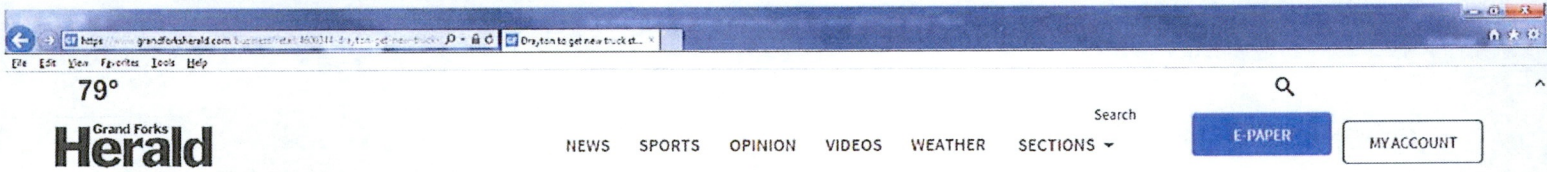
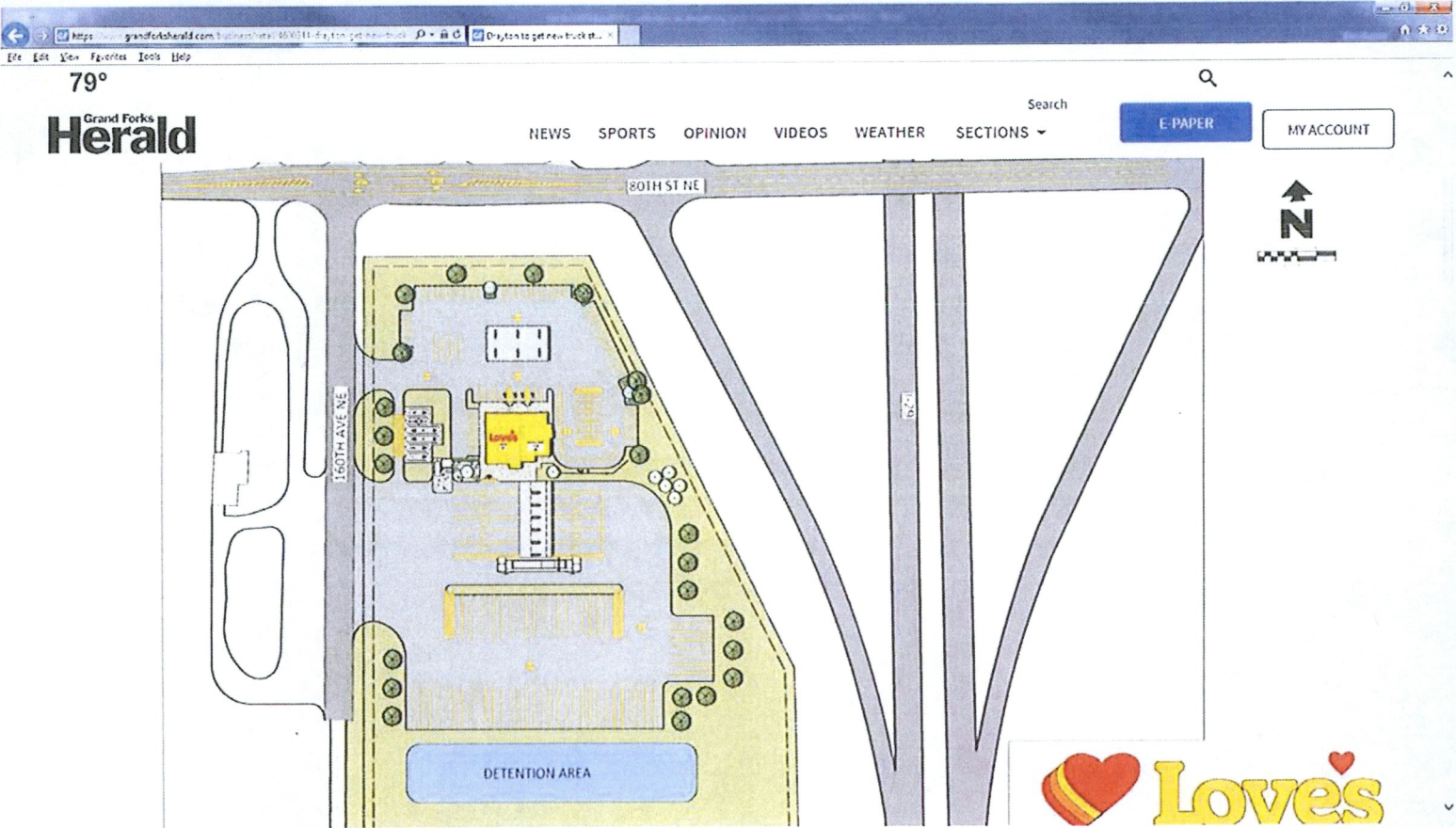
— OTP w/Nodak Underbuild

★ Love's Truck Stop Transformer location

— Nodak Distribution Line

— OTP Transmission w/OTP Underbuild

--- Service Area Boundary Line (white dashed line)



Conceptual rendering of the Love's to be built in Drayton. The design has not been approved or permitted yet. Contributed photo

Drayton is expected to get a Love's truck stop, and with it more than two dozen new jobs.

Mayor Chip Olson confirmed the company is coming to Pembina County. The truck stop will be on the corner of 80th Street Northeast and 160th Avenue Northeast, right off of I-29. The facility will cost between \$8 million and \$10 million dollars to construct.

Olson said the city has annexed the land, but he isn't sure when construction will start. He said it could be either later this spring or as late as next spring. Steve Walters, real estate project manager for Love's, said there is no beginning date for construction because of snow and major flooding in the region.

The facility will include showers, a laundry facility and a convenience store.

Walters said the truck stop will add anywhere from 25 new jobs to 40 jobs. There will be three to five managerial positions.

'Love's approached the city about building a truck stop in town, which we're obviously really excited about because it will bring a bunch of jobs to town,' Olson said. 'A lot of towns our size would kill to have that many jobs brought to town.'

Love's has nearly 500 travel stops in 41 states, two of which are in North Dakota, Walters said.

Related Topics

[DRAYTON](#) [TRUCK STOP](#) [PEMBINA COUNTY](#)

*Yellow - Courtyard Seals
Red - Travel Stop
Blue - Hotel*

