

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.)
)
Complainant,)
)
vs.)
)
Otter Tail Power Company,)
)
Respondent.)

Case No. PU-20-356

**RESPONDENT'S REPLY BRIEF IN
SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Otter Tail Power Company submits its Reply Brief in Support of Motion to Dismiss to address the issues Nodak Electric Cooperative, Inc. ("Nodak") raised in its Response Brief to Otter Tail's Motion to Dismiss.

Nodak's Response does not raise any material factual issues that are in dispute in Otter Tail's Motion to Dismiss. The relevant facts in the present Motion are undisputed:

- 1) the property in question, McFarland's Addition, is located within the city limits of the City of Drayton;
- 2) Otter Tail possesses a valid franchise to provide electric service within the City of Drayton;
- 3) Nodak does not possess a franchise to provide electric service within the City of Drayton; and
- 4) the City of Drayton passed a Resolution granting Otter Tail the right to provide electric service to McFarland's Addition.

Because no factual issues exist, the determination of Otter Tail's Motion to Dismiss is a question of law for the Commission to decide. See *Cuozzo v. State*, 2019 ND 95, ¶ 14, 925 N.W.2d 752 (explaining where the facts are undisputed, the issue becomes a question of law). Otter Tail's Motion to Dismiss should be granted and Nodak's Complaint should be dismissed pursuant to the Commission's informal disposition power under N.D.C.C. § 28-32-22. In addition, the Commission is not required to hold a hearing on

Nodak's Complaint, pursuant to N.D.C.C. ch. 28-32, when it lacks authority to grant the requested relief. See Env'tl. Law & Policy Ctr. v. N. Dakota Pub. Serv. Comm'n, 2020 ND 192, ¶ 28, 948 N.W.2d 838.

I. The City of Drayton has the constitutional right to select the electric service provider for the McFarland's Addition.

Because it was unable to obtain a valid franchise from the City of Drayton, Nodak filed the present Complaint requesting the Commission usurp the City of Drayton's lawful franchise with Otter Tail to provide electric service to McFarland's Addition and grant Nodak a de facto franchise to serve the property. Nodak fails to cite to any legal precedent in its Response which would grant the Commission the authority to interfere with the City of Drayton's constitutional franchise right to determine the provider of electric service within the City. The City of Drayton has the exclusive, constitutional right to select the electric service provider for McFarland's Addition.

Article VII, § 11 of the North Dakota Constitution grants the City of Drayton the exclusive authority to enter into a franchise for electric service within the City. Under North Dakota law, constitutional provisions are limitations upon the power of the legislature. State ex rel. Johnson v. Baker, 21 N.W.2d 355, 358–59 (N.D. 1945). Indeed, the limitation in Article VII, § 11 is explicitly stated, the power of the city to franchise "shall not be abridged by the legislative assembly."

In its Response, Nodak erroneously asserts the unreasonable interference provision in N.D.C.C. § 49-03-01(1) gives the Commission authority to grant Nodak a franchise to serve the McFarland's Addition. However, Nodak's argument fails to take into consideration other provisions of Chapter 49-03, which expressly prohibit the Commission from interfering with a city's exclusive power to exercise its franchise

authority. The Commission's authority to regulate is limited to that authority provided to it by the legislature. Envtl. Law & Policy Ctr., 2020 ND 192, at ¶ 11 (noting challenges to an agency's authority presents the question of whether an agency has gone beyond what it legislatively has been permitted to do). The Commission is further prohibited from acting in any field in which the Legislature has not authorized it to enter. City of Grafton v. Ottertail Power Company, 86 N.W.2d 197, 202 (N.D. 1957).

Contrary to Nodak's argument, Chapter 49-03 does not grant the Commission with legal authority to interfere with the City of Drayton's constitutional right to determine the provider of electric service to McFarland's Addition. While N.D.C.C. § 49-03-01 does grant the Commission some authority over a public utility's unreasonable interference with the service of other providers, that authority is limited by § 49-03-06(8) which states, **"Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-05-01."** See Gross v. N. Dakota Dep't of Human Servs., 2002 ND 161, ¶ 8, 652 N.W.2d 354 (explaining a fundamental principle of statutory interpretation is that statutes must be read as a whole to harmonize and give meaning to each word and phrase). The express language of Section 49-03-06(8), N.D.C.C., establishes the Commission does not have the authority to usurp a city's constitutional and statutory franchise right to select an electric service provider. See N.D.C.C. § 1-02-38 (expressing the intent of enactment of statutes and providing that in enacting a statute, it is presumed that the Legislature intended the statute to comply with the State Constitution). Based upon the undisputed facts in the present case, the City of Drayton's Resolution determined Otter Tail has the exclusive right to provide service to McFarland's Addition and the Commission has no authority to interfere

with the City's constitutional franchise.

It should be noted, Otter Tail is not asserting the Commission would never have the authority to determine which electric service provider may provide service within a city. The North Dakota Supreme Court previously identified the factual scenario which would permit the Commission to make such a determination as to unreasonable interference of electric service within city limits. See Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788. In Capital Electric, the Court determined that when a public utility and cooperative both have a valid franchise to serve the property in the city, the Commission has the authority to determine whether either provider's service would unreasonably interfere with and duplicate services of the other under N.D.C.C. Ch. 49-03, and to resolve the issue of who should serve the property in question. Id. However, the Capital Electric case is not applicable to the Nodak's Complaint because Nodak does not possess a lawful franchise to provide electric service in the City of Drayton. See id. (stating that under North Dakota law, a cooperative must have a franchise to serve property after that property was annexed into the city).

Nodak also erroneously argues that Otter Tail's franchise with the City of Drayton is not exclusive, therefore Nodak has the right to provide electric service to McFarland's Addition. Nodak's argument ignores the fact that the City of Drayton passed a Resolution clarifying its intent that Otter Tail had the exclusive right to provide electric service to McFarland's Addition. In addition, although the City of Drayton retained the right to grant additional franchises, it has declined to do so. Specifically, the City of Drayton has declined to grant a franchise to Nodak. For all practical purposes, Otter Tail's franchise is exclusive, subject to future decisions by the City of Drayton. See Montana-Dakota

Utilities Co. v. Divide County School Dist., 193 N.W.2d 723 (N.D. 1971) (finding MDU's franchise was "exclusive" since it possessed the only franchise to serve the City of Crosby). Moreover, the City of Drayton's franchise with Otter Tail does not empower the Commission to grant a franchise to Nodak in contravention of the City's constitutional power.

II: Nodak's 1968 service area agreement does not grant the Commission authority to grant Nodak a franchise to serve the City of Drayton.

Nodak also argues its 1968 service area agreement grants the Commission the authority to grant it a franchise and interfere with the City of Drayton's constitutional franchise power. Nodak's argument is simply erroneous. The 1968 service area agreement does not convey to the Commission the authority to usurp the City of Drayton's constitutional right to choose the electric service provider for the City.

The Commission's authority to regulate is limited to that authority expressly provided to it by the North Dakota Legislature. Envtl. Law & Policy Ctr., 2020 ND 192, at ¶ 11. As noted above, the North Dakota Legislature cannot grant regulatory authority that the Constitution says it does not possess. Id. In 2005, the North Dakota Legislature granted the Commission the authority to regulate service agreements among electric providers. See N.D.C.C. § 49-03-06. However, under the new law, a service area agreement is only valid and enforceable if the service area agreement is filed with the Commission and the Commission approves the agreement finding that it complies with the law and is in the public's best interest. N.D.C.C. § 49-03-06(6). The new law recognized that the "governing board of a city may require approval or disapproval of a service area agreement between electric providers to the extent the agreement encompasses service locations within the city." N.D.C.C. § 49-03-06(8). Most importantly,

in enacting the new service agreement statute, the North Dakota Legislature stated, “Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-05-01.” Id. Nodak’s interpretation of N.D.C.C. ch. 49-03 completely ignores the legislative mandate that the Commission does not have the authority to interfere with the City’s of Drayton’s exclusive franchise authority. The Commission would exceed its legislative authority if it were to approve Nodak’s Complaint and grant Nodak a franchise to provide service to customers in the City of Drayton.

In the present case, neither Nodak nor Otter Tail filed the 1968 service area agreement with the Commission for approval pursuant to N.D.C.C. § 49-03-06. Likewise, the Commission has never issued an order approving the 1968 service area agreement finding that the agreement complies with the law and is in the public’s best interest. Further, the City of Drayton was not a party to the 1968 service area agreement, nor can it be argued the City is bound by the agreement. Contrary to Nodak’s argument, the Commission does not have the authority under N.D.C.C. § 49-03-06 to enforce the 1968 service area agreement.

Nodak also erroneously argues N.D.C.C. § 49-03-06 does not have “retroactive application” to service area agreements in existence prior to its 2005 enactment. Regardless of whether § 49-03-06 applied to pre-enactment service area agreements, the Commission had no authority granted to it prior to 2005 to enforce a contractual service area agreement between two electric providers. More importantly, no provision of the 1968 service area agreement would grant the Commission the legal authority to invalidate the City of Drayton’s constitutional franchise right to select the electric service

provider within city limits. Nodak's arguments that the 1968 service area agreement provides authority to the Commission to grant Nodak a franchise to serve the McFarland's Addition in the City of Drayton are without merit.

III. Nodak's Complaint Improperly Invokes the Territorial Integrity Act.

Nodak erroneously argues that Otter Tail has "mischaracterized" Nodak's Complaint as alleging that Otter Tail should be restricted from providing service to McFarland's Addition because Otter Tail failed to obtain a Certificate of Public Convenience and Necessity under the Territorial Integrity Act ("TIA"). However, Nodak specifically alleges the absence of a CPCN not once, but twice: Complaint at para. 3; and Mr. Einarson's Affidavit in Support of Complaint at para. 7. But that is not even the essence of Otter Tail's Answer and Motion to Dismiss.

As explained above, Otter Tail's position is based upon Constitutional authority not statutory authority. Notably, the entirety of Nodak's request for relief rests upon Commission enforcement of the TIA contrary to the City's rights *inside the City's boundaries*, which the Constitution specifically prohibits being abridged. Nodak does not—and cannot—cite to a single legal precedent where the Commission or a reviewing court has ruled in favor of an electric cooperative's unilateral right to provide electric service inside city boundaries without being granted franchise authorization from the city.

Moreover, Nodak's interpretation of legal authority creates an impossibility that the North Dakota Legislature cannot be found to have intended. To wit: since the City of Drayton has exercised its constitutional right to preclude Nodak from serving inside city limits, a Commission finding of "unreasonable interference" under N.D.C.C. § 49-03-01.4 would mandate the Commission enjoin Otter Tail from providing central station service

that the city customer has requested (“shall make its order restraining and enjoining the electric public utility or electric transmission provider from constructing or extending its interfering lines, plant, or system.”)(emphasis added). Such an interpretation would give an electric cooperative, through Commission action, veto authority over a city customer’s right to receive electric service absent a capitulation of the City’s constitutional franchise authority. A more severe case of abridging would be hard to find.

CONCLUSION

The property at issue in this case is located within the corporate limits of the City of Drayton. The City of Drayton granted a franchise to Otter Tail to provide electric service within the City of Drayton. Nodak does not possess a franchise from the City of Drayton to provide electric service within the City. The City of Drayton, through the exercise of its constitutional rights, passed a Resolution directing Otter Tail to furnish electric service to the McFarland’s Addition. Based upon these undisputed facts, the Commission lacks authority to grant Nodak’s request to interfere with the City of Drayton’s constitutional right to determine the electric service provider within the City pursuant to a lawful franchise. For these reasons, Otter Tail Power Company respectfully requests the Commission grant its Motion to Dismiss Nodak’s Complaint.

Dated this 7th day of January, 2021.

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