

Hamre, John G.

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Filing Accepted

Envelope Number: 4452039

Case Number: 08-2021-CV-01508

Case Style: Nodak Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.



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Filing Details	
Court	Burleigh County - South Central District
Case Number	08-2021-CV-01508
Case Style	Nodak Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.
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Filed By	John Hamre
Filing Attorney	John Schuh

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.)	Case No. PU-20-356
)	
Complainant,)	
)	
vs.)	RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS
)	
Otter Tail Power Company,)	
)	
Respondent.)	

INTRODUCTION

Nodak Electric Cooperative, Inc. ("Nodak"), filed a Complaint against Otter Tail under N.D.C.C. Ch. 49-03 requesting the North Dakota Public Service Commission enjoin Otter Tail from providing electric service to the McFarland's Addition property in the City of Drayton. The McFarland's Addition is located within the corporate limits of the City of Drayton. The City of Drayton granted a franchise to Otter Tail in 2011 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. Based upon these undisputed facts, Otter Tail moves the Commission for dismissal of Nodak's Complaint, as the Commission lacks authority to interfere with the City of Drayton's constitutional right to determine the provider of electric service within the City pursuant to a lawful franchise.

Nodak filed this Complaint with the Commission because the City of Drayton has not granted it a franchise. Under North Dakota law, Nodak must have a valid franchise to provide electric service in the City of Drayton. Because Nodak does not possess a franchise from the City of Drayton, Nodak's Complaint seeks to have the Commission invalidate the City of Drayton's lawful franchise with Otter Tail and order the City of

Drayton to grant a de facto franchise to Nodak to allow it to provide electric service to the McFarland's Addition. The Commission lacks authority to compel the City of Drayton to grant Nodak a franchise to provide electric service within the City. The North Dakota Constitution grants the City of Drayton the exclusive authority to select which electric service providers can provide service within the City.

Nodak's Complaint has erroneously characterized this case as a Territorial Integrity Act ("TIA") dispute. A TIA dispute arises when an electric public utility seeks to extend service to a new customer outside the corporate limits of a municipality in which it possesses a franchise. In the present case, Otter Tail is not seeking to extend service to a new customer outside the City of Drayton. The property at issue in this case, the McFarland's Addition, is located within the corporate limits of the City of Drayton and Otter Tail has a valid franchise to provide electric service within the City. Nodak's Complaint in the present case is the opposite of a TIA case, as Nodak is seeking to provide electric service to a customer inside city limits in a City in which it does not possess a lawful franchise. Therefore, the ten TIA factors the Commission identified for consideration at the hearing in this case are not applicable. Otter Tail is not required to obtain a certificate of public convenience and necessity for an extension of service within a City where it possesses a lawful franchise under N.D.C.C. Ch. 49-03.

UNDISPUTED FACTS

The following undisputed facts are relevant for purposes of the present Motion to Dismiss. The property at issue in the present action, McFarland's Addition, is located within the City limits of Drayton. See Complaint, at ¶ 4; Answer, at ¶ 4; and Nodak Affidavit in Support of Complaint, at ¶ 6. The Drayton City Council approved annexation

of the property into the City of Drayton on August 12, 2019. See Ex. 1 (Affidavit of Charles Olson, Ex. B)¹. The Plat of McFarland's Addition and annexation was filed by the City with the Pembina County Recorder on August 19, 2019. Id.

Otter Tail possesses a franchise with the City of Drayton to provide electric service pursuant to the franchise agreement dated May 3, 2011. See Olson Affidavit, Ex. A; see also Nodak Affidavit in Support of Complaint, at ¶ 3. In April 2020, the City of Drayton passed a resolution authorizing Otter Tail to provide electric service to McFarland's Addition. See Olson Affidavit, Ex. C.

Nodak does not possess a franchise agreement with the City of Drayton permitting it to provide electric service within the City. See Olson Affidavit, at ¶ 5. Further, Nodak does not furnish electric service to any customers in McFarland's Addition.

ISSUE

Whether the Public Service Commission has authority to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to the McFarland's Addition within the City of Drayton.

LAW AND ARGUMENT

The North Dakota Constitution grants the City of Drayton the exclusive authority to enter into a franchise for electric service within the City. Specifically, N.D. Const. Art. VII, § 11 provides:

The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly.

¹ Mayor Olson executed the referenced Affidavit and the original notarized affidavit was mailed to undersigned counsel. However, at the time for filing this Motion to Dismiss, the notarized Affidavit had not been received. A copy of the Affidavit and corresponding Exhibits is being filed with the Brief. The original notarized Affidavit will be filed with the Commission upon receipt.

Further, the North Dakota Legislature also codified a City's power to enter franchises:

The governing body of a municipality shall have the power:

Franchises. To grant franchises or privileges to persons, associations, corporations, or limited liability companies, any such franchise, except when given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.

N.D.C.C. § 40-05-01(57).

The power of the North Dakota Public Service Commission is limited to those powers granted to it by the North Dakota Legislature. City of Grafton v. Ottertail Power Company, 86 N.W.2d 197, 202 (N.D. 1957). The PSC is prohibited from acting in any field in which the Legislature has not authorized it to enter. Id.

Nodak's Complaint under N.D.C.C. Ch. 49-03 requests the Commission enjoin Otter Tail from providing electric service to the McFarland's Addition. In essence, Nodak's Complaint seeks to have the Commission invalidate the lawful franchise entered between the City of Drayton and Otter Tail for electric service within the City. Further, Nodak is seeking to have the Commission order the City of Drayton to allow Nodak to provide electric service to a new customer in the City limits, despite the fact Nodak possesses no franchise to provide electric service to customers in the City. There is no statutory provision in N.D.C.C. Ch. 49-03 granting the Commission the authority to invalidate a city's constitutionally protected right to enter into a lawful franchise agreement with a public utility to provide electric service in the city. To the contrary, the North Dakota Legislature made it clear that Chapter 49-03, N.D.C.C., does not give the Commission the power to limit a city's franchise authority:

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.

N.D.C.C. § 49-03-06(8).

In the present case, the City of Drayton has the constitutional right to select the electric service provider for the City. N.D. Const. Art. VII, § 11. The City of Drayton exercised that right in granting Otter Tail a franchise to provide electric service in the City. See Olson Affidavit, Ex. A. The property in dispute, the McFarland's Addition, is located within the City limits of Drayton. See Olson Affidavit, Ex. B. Based upon these undisputed facts, the Commission lacks authority to grant Nodak's request to enjoin Otter Tail from providing service to McFarland's Addition pursuant to a lawful franchise granted to it by the City of Drayton.

Nodak has been unable to obtain a lawful franchise from the City of Drayton, so it filed the present Complaint to have the Commission force the City of Drayton to grant Nodak a franchise to provide electric service in the City. Nodak's strategy is necessary because it is unable to provide service to McFarland's Addition without a lawful franchise. See Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788. The North Dakota Supreme Court previously decided a factually analogous case between a public utility and coop regarding electric service to property newly annexed into the city limits. See Montana-Dakota Utilities Co. v. Divide County School Dist., 193 N.W.2d 723 (N.D. 1971). In Divide County, MDU had a franchise to provide electric service to the City of Crosby. Id. at 727. The Divide County School District owned property outside the Crosby city limits and intended to construct a new high school on the property. Id. On August 16, 1966, the Burke-Divide Rural Electric Cooperative ("Coop") contracted with the Divide County School District to provide electric service to the new high school. Id.

On August 29, 1966, the Coop erected a yard light and began providing electric service to the property where the new high school was to be constructed. Id. On October 2, 1967, the City of Crosby annexed the property into the city limits. Id. The Coop did not have a franchise to provide electric service within the City of Crosby. Id. at 728. MDU commenced an action against the Coop to enjoin it from providing service to the school asserting it was illegal for the Coop to provide electric service in the Crosby city limits without a franchise. Id. at 727.

On appeal, the North Dakota Supreme Court recognized that electric cooperatives are organized under N.D.C.C. § 10-13-01(1) for the purpose of engaging in rural electrification by furnishing electric energy to “persons in rural areas who are not receiving central station service”. Divide County, 193 N.W.2d at 728. The Court found that the City of Crosby was a “rural area” because its population was under twenty-five hundred people, however the City was providing “central station service” to the city inhabitants. Id. at 729. The Court held that residents of the City of Crosby were receiving central station service pursuant to the City’s franchise with MDU. Id. Therefore, the Coop could not be organized and operated to serve the City of Crosby. Id.

The Divide County Court then addressed the issue of whether the Coop could serve property, upon which it was providing electric service, that had been recently annexed into the City. Id. The Court found that the Electric Cooperative Act did not limit the authority and power of a city to annex property. Id. at 730. The Court explained that when a city receiving central station service annexes property which is being served by an electric cooperative, “persons within the annexed area become persons who are receiving central station service and, under the charter of the electric cooperative formed

under the Act, these persons no longer qualify for membership in the electric cooperative corporation for the purpose of receiving electric service to their facilities located within the city.” Id. The Court concluded that when a customer resides in a city receiving central station service, the electric cooperative cannot serve that customer in the absence of a franchise. Id. The Divide County Court held that the Coop’s right to furnish electricity to the yard light on the property ceased when the property became annexed into the City of Crosby. Id. Thus, even where there was an existing customer desiring and receiving service from the Coop, the municipality’s right to choose its franchisee was upheld once the property was annexed into the city. Id.

The Divide County case sets forth controlling precedent applicable to the present case. Once the City of Drayton annexed McFarland’s Addition into the City, any right Nodak could claim to furnish electric service ceased because Nodak does not possess a franchise with the City of Drayton. See Divide County, 193 N.W.2d at 730. Because Nodak possesses no legal right to serve McFarland’s Addition, Nodak filed a Complaint seeking to have the Commission force the City of Drayton to grant it a franchise. However, there is no legal authority to permit the Commission to interfere with the City of Drayton’s constitutional right to franchise with an electric service provider. Further, if the Commission were to grant Nodak’s request to enjoin Otter Tail from providing service, Otter Tail would be in breach of its contractual obligations to the City. There exists no legal basis for the Commission to grant Nodak’s requests in this case.

It should be noted that the North Dakota Supreme Court has recognized the Commission’s authority to decide service disputes within a city if both the public utility and electric cooperative possess valid franchises to serve. See e.g., Capital Elec., 2007 ND

128, at ¶ 13. In the Capital Electric case, both MDU and Capital Electric had been granted franchises to serve the Boulder Ridge property in the City of Bismarck. Id. The Court recognized that North Dakota law requires an electric cooperative to have a valid franchise to serve customers located in a city after property has been annexed. Id. (citing Divide County). The Court concluded that since both MDU and Capital Electric have franchises to serve Boulder Ridge, the Commission had authority to decide whether either provider's service would unreasonably interfere with and duplicate services of the other under N.D.C.C. Ch. 49-03. Id.

Nodak's Complaint in the present case is distinguishable from the Boulder Ridge dispute, as in that case the electric cooperative had an existing franchise with the City to provide electric service to the property. Therefore, the Commission had authority to perform a TIA analysis to ensure there was no unreasonable interference and wasteful duplication under N.D.C.C. Ch. 49-03. In the present case, Nodak does not possess a franchise from the City of Drayton to provide service to McFarland's Addition. Given the City of Drayton's ordinance adopting the Resolution directing Otter Tail, its only franchisee, to furnish electric service to all residents within the City, Nodak has no right to provide service to McFarland's Addition absent express authorization from the City. See Divide County, 193 N.W.2d at 730. The Capital Electric case is also distinguishable because the cooperative was providing electric service to customers in Boulder Ridge prior to annexation. 2007 ND 128, at ¶ 5. In the present case, Nodak provides no service to any customers in McFarland's Addition.

Otter Tail anticipates that Nodak will argue that a service area agreement was entered into between Nodak and Otter Tail in 1968 and that agreement dictates that

Nodak should provide electric service to the McFarland's Addition. See Complaint, at ¶ 4; and Nodak Affidavit in Support of Complaint, at ¶ 5. Regardless of the validity of the alleged service area agreement to McFarland's Addition, Otter Tail asserts the service agreement is not enforceable under North Dakota law. Further, the service area agreement cannot supersede the City of Drayton's constitutional right to choose the electric service provider for the City.

In 2005, the North Dakota Legislature enacted a new section in N.D.C.C. Ch. 49-03, entitled "Service agreements among electric providers". See N.D.C.C. § 49-03-06. The new law governing service area agreements requires that any such agreement "shall be promptly filed with the commission". N.D.C.C. § 49-03-06(4). Upon filing of the service area agreement, the Commission "shall approve or disapprove" the agreement. N.D.C.C. § 49-03-06(5). Under the new law, a service area agreement is only valid and enforceable if the Commission approves the agreement and finds that the agreement complies with the law and is in the public's best interest. N.D.C.C. § 49-03-06(6). The new service agreement statute specifically 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.

In the present case, neither Nodak nor Otter Tail filed the 1968 service area agreement with the Commission for approval. 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. Accordingly, the 1968 service area agreement is not enforceable pursuant to N.D.C.C. § 49-03-06. Even if it were enforceable, the service area agreement does not stand for the proposition Nodak claims because the stated intent of the agreement is to "avoid the transfer of any customers when such areas may be annexed by the municipalities." See Complaint, Exhibit A, at ¶ 2. There will be no transfer of customers in the annexed area to avoid because Nodak does not serve any customers in McFarland's Addition.

Further, the City of Drayton was not a party to the 1968 service area agreement. The 2005 statute recognized that city approval may be required for agreements that encompass service locations within a city. N.D.C.C. § 49-03-06(8). Further, the 2005 statute provides that nothing in the law shall limit a city's right to exercise its franchise authority. There is no legal basis to support Nodak's argument that the 1968 service area agreement, to which the City of Drayton was not a party, supersedes the City's constitutional right to select the electric service provider in the City. Nor does the 1968 service area agreement grant the Commission the legal authority to compel the City of Drayton to grant a franchise to Nodak to provide electric service in the City.

For these reasons, Nodak's argument that the 1968 service area agreement grants it authority to provide service to McFarland's Addition is unavailing.


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, specifically directed Otter Tail exclusively to furnish electric service to the annexed property. 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 the foregoing reasons, Otter Tail Power Company respectfully requests that the Commission grant its Motion to Dismiss Nodak's Complaint.

Dated this 11th day of December, 2020.

EVENSON SANDERSON PC
Attorneys for Otter Tail Power Company
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243
psanderson@esattorneys.com

By: 
Paul R. Sanderson (ID# 05830)

Further, this affiant sayeth naught.

Charles Olson

STATE OF NORTH DAKOTA)
) SS
COUNTY PEMBINA)

Before me, a notary public in and for said County and State, personally appeared Charles Olson and acknowledged that he did sign the foregoing instrument and that the same is his free and voluntary act and deed.

In testimony whereof, I have set my hand at _____, North Dakota, on this ____ day of December, 2020.

Notary Public

ORDINANCE NO. 51

An Ordinance granting to the Otter Tail Corporation, a Minnesota Corporation, its successors and assigns, permission to erect, construct, install and maintain within the City of Drayton, an electric light and power system and transmission lines and to operate the same and to install conduits, poles, wires, pipes and other fixtures in, upon and under the streets, alleys, bridges, and public grounds of said City for the purpose of furnishing electric light, heat and power to said City and the inhabitants thereof.

BE IT ORDAINED, BY THE CITY COUNCIL OF THE CITY OF Drayton, North Dakota, Hereinafter called the "City":

SECTION 1

There is hereby granted to Otter Tail Corporation, a Minnesota Corporation, its successors and assigns, hereinafter called the Grantee, for a period of twenty (20) years from and after the passage and approval of this Ordinance and during all of said time, subject to the conditions and requirements hereinafter set forth, permission to construct, install and maintain an electric light and power system and transmission lines and to operate and maintain the same within and through the City and to transmit electricity to and from other towns or cities for the purpose of light, power and heat and to erect, construct, install and maintain conduits, poles, wires, pipes and other necessary fixtures and attachments upon and under the streets, alleys, bridges and public grounds of said City for the purpose of furnishing and selling electricity for light, heat and power and such other purposes for which electricity may be used by the inhabitants of said City, said permission and franchise to become operative and continue under the conditions hereinafter set forth.

SECTION 2

Said Grantee shall use poles, wires, crossarms, equipment and devices to conform with the standards of construction adopted by the National Electrical Safety Code of the United States, Department of Commerce, and all apparatus connected therewith shall be located so as not to obstruct the avenues, streets, and alleys of said City or to endanger persons or property or to hinder or to obstruct the use of said avenues, streets, and alleys for public places by the inhabitants of said City, or public in general, or to interfere with any street, sidewalk, curb, gutter or park improvements that the City may deem proper to make along the lines of said avenues, streets and public places.

SECTION 3

All conduits, poles, wires and pipes installed by virtue of this Ordinance shall be installed in such places and in such manner as not unnecessarily to encroach upon streets, alleys, bridges, or public grounds of said City, and so as not to unnecessarily obstruct the use thereof for the ordinary purpose of travel thereon, and the erection thereof shall be subject to the reasonable supervision and direction of the City Council of the said City. Whenever practicable, all poles shall be set in alleys, and poles now in position upon or along the streets, whenever practicable, shall be removed, and the locations of all of said poles shall be designated by the Mayor under the supervision of the City Council of the said City.

All poles where set in alleys shall be set at or near the boundary line thereof, and where set in streets shall be located at such distances, as shall be directed by the city, from the property line of the abutting owner, and shall be placed so as not to interfere with the construction of placing of any waterpipes, sewers, or drains or the flow of water therefrom which have been or may be placed by authority of said City. In the event that said Grantee shall make any unnecessary obstruction of said streets, alleys, public grounds or places not designated by the City Council, the City may cause the removal of such obstructions and charge and collect from such Grantee the actual cost of such removals.

SECTION 4

During the construction, maintenance or enlargement of any part of said electric light and power system, said Grantee shall not unnecessarily impede or block travel in said streets and highways in said city, and shall leave all streets, highways, alleys, sidewalks, curbs, lanes and public places and all grounds disturbed by said construction in good condition upon the completion of said work.

The City reserves the right for itself and its agents to make and adopt, and the rights and privileges hereby granted shall at all times be and remain subject to, such reasonable regulations of a police nature as it may deem necessary for the best interests of the City but the City will not by such regulations or by acts of its own or agents do anything to prevent or interfere with the Grantee carrying on its business in accordance with the franchise hereby granted.

SECTION 5

Whenever the said Grantee in erecting, constructing and maintaining said lines or poles, shall take up any of the pavements, sidewalks crossings or curbs on any of the avenues, streets and alleys or public places in said City or shall make any excavations thereon; such excavations shall be refilled and the sidewalk, crossing or curb replaced under the direction of the said City and any excavation so made shall be properly lighted at night during the construction, and in case of the failure to do so on the part of the said Grantee, then the said City may do the same at the expense of said Grantee and said Grantee agrees to pay said City for the reasonable cost or value of said work. Said Grantee shall be liable for all loss or damage caused by the negligence of Grantee, which may result to persons or property within the said City, caused by it, or its agents, servants, or employees in erecting, operating and maintaining the said electric system within said City, and shall at all times save the City harmless from any and all damages to persons or property in erecting, operating or maintaining said electric system.

SECTION 6

There is granted to said Grantee, its successors and assigns, during the term hereof, permission and authority to trim all trees in alleys, streets and public grounds of said City so as to remove all parts of said trees interfering with the proper erection maintenance and operation of poles, cables, wires, masts or other fixtures, or appliances installed or to be installed pursuant to authority hereby granted.

Said Grantee shall have full right and authority to assign any person, persons, firm or corporation all the rights that are given it by this Ordinance, provided that the assignee of such rights by accepting such assignment shall become subject to the terms and conditions of this Ordinance.



SECTION 7

The Grantee shall use due diligence and care in furnishing electric service as herein provided but shall not be liable for any loss or damage which may arise from failure of the service, either partial or total, but this shall not be construed to exempt said Grantee from liability for negligence.

SECTION 8

The rates to be charged by said Grantee in the said City shall be filed with the Public Service Commission of the State of North Dakota, and no increase or decrease in said rates shall be made except in accordance with the rules and regulations of the Public Service Commission.

SECTION 9

This contract shall be subject to any present or future laws of a regulatory nature enacted by the State of North Dakota, or an any amendment or addition to such laws and further shall be subject to the rules and regulations laid down by the Public Service Commission of the State of North Dakota.

SECTION 10

The City reserves the right during the term hereof to enact and assess a franchise fee such as it deems necessary, upon reasonable advance notice to Grantee of not less than thirty (30) days.

SECTION 11

In the event the City should sell or transfer real property which is subject to Grantee's franchise and should it become necessary to remove conduits, poles, wires or pipes installed by virtue of this ordinance the removal shall be done at the expense of the Grantee upon the request of the City.

Section 12

This Ordinance shall take effect and be in full force from and after its passage and approval by the City Council. The said Grantee shall specify its acceptance of this franchise in writing, to be filed with the City Auditor and in no event shall this Ordinance be binding on said Grantee until the filing of such acceptance.

Approved this 3rd day of May, 2011


Mayor, City of Drayton

Attest Carol Gardner
Title City Auditor
City Auditor, City of Drayton

ACCEPTANCE

OTTER TAIL POWER COMPANY, a Minnesota corporation, acting through its proper officers thereunto duly authorized, does hereby accept Ordinance No. 51 of the City of Drayton, North Dakota, being an Ordinance granting a franchise to Otter Tail Power Company, and being entitled:

"AN ORDINANCE GRANTING TO THE OTTER TAIL POWER COMPANY, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO ERECT, CONSTRUCT, INSTALL, AND MAINTAIN WITHIN THE CITY OF DRAYTON, NORTH DAKOTA, AN ELECTRIC LIGHT AND POWER SYSTEM AND TRANSMISSION LINE, AND TO OPERATE THE SAME, AND TO INSTALL CONDUITS, POLES, WIRES, PIPES, AND OTHER FIXTURES IN, UPON AND UNDER THE STREETS ALLEYS, BRIDGES, AND PUBLIC GROUNDS OF SAID CITY FOR THE PURPOSE OF FURNISHING ELECTRIC LIGHT, HEAT, AND POWER TO SAID CITY AND THE INHABITANTS THEREOF";

and all of the terms, conditions, requirements, and provisions of said Ordinance No. 51.

IN WITNESS WHEREOF, Otter Tail Power Company has caused this Acceptance to be duly executed this 2nd day of June, 2011.

In Presence of:


OTTER TAIL POWER COMPANY,

Becky Lubning
Diane Meyer

By Chuck MacFarlane
President
And Bruce Gerhardson
Associate General Counsel,
Otter Tail Power Company

STATE OF MINNESOTA)
)SS
COUNTY OF OTTER TAIL)

On this 2nd day of June, 2011, before me, a Notary Public within and for said County, personally appeared Chuck MacFarlane and Bruce Gerhardson to me personally known, who, being each by me duly sworn, did say that they are, respectively, the President, and Associate General Counsel of Otter Tail Power Company, the corporation named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by authority of its Board of Directors, and said Chuck MacFarlane and Bruce Gerhardson acknowledged said instrument to be the free act and deed of said corporation.

 PENNY MICHELLE MOSHER
Notary Public-Minnesota
My Commission Expires Jan 31, 2015
(Notarial Seal)

Penny Michelle Mosher

The foregoing Acceptance was duly filed in the office of the City Auditor of the City of Drayton, North Dakota, this 14th day of July, 2011.

Carol Gardner
City Auditor

CERTIFICATE

STATE OF NORTH DAKOTA)
)SS
COUNTY OF PEMBINA)


I, Carol Gardner, do hereby certify that I am the duly appointed, qualified, and acting City Auditor of the City of Drayton, North Dakota, and as such have possession, custody, and control of all of the books, files, and records of said City; that the attached _____ pages are true and correct copies of each of the following instruments:

1. Ordinance No. 51, granting a franchise to Otter Tail Power Company, a Minnesota corporation, which is duly recorded in the Ordinance Book of said City on pages _____.
2. Affidavit of Publication of said Ordinance No. 51 and that the newspaper stated in said Affidavit of Publication is the official newspaper of said City;
3. Acceptance by Otter Tail Power Company of said Ordinance No. 51 together with the date of filing the same with the undersigned as Auditor of said City;

as the originals of each of said instruments and the whole thereof, are contained in the official books and records on file in my office; and that I have compared each of said instruments, and the whole of each of the same, with the originals thereof appearing in the official books and records on file in my office and that the same, and each of them are true and correct copies thereof.

I FURTHER CERTIFY that no petition requesting a referendum on the adoption of the foregoing ordinance was filed with the City within the time period permitted by North Dakota Century Code, Section 40-12-08.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 13th day of August, 2011.


City Auditor

(Official City Seal)

ADDITION

RTH DAKOTA
 JARTER SECTION 26, T159N, R51W

LEGEND

○	5/8" x 18" LONG REBAR, MONUMENT 5" CAP MARKED BY LIC. NO. LS-6703
●	MONUMENT FOUND
—	SUBJECT PROPERTY LINE
- - -	EXISTING PROPERTY LINE
- - -	EASEMENT LINE
- - -	ACCESS CONTROL LINE
- - - 799 - - -	EXISTING CONTOUR LINE
[Hatched Box]	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:

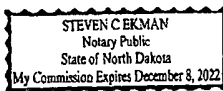
[Signature]
 By: Tyler L.E. McFarland

[Signature]
 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.

[Signature]
 Notary Public



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 MILEPOST 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 NAVD83 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 County North Dakota; a copy of the same to be filed in the office of the City Auditor.

[Signature]
 Charles Olson, Mayor

Date: 8/15/2019

Attest: *[Signature]*
 Grace Puppe, City Auditor

Date: 8/15/19

255638

Page 1 of 1
 Pembina Co. Clerk Recorder Recorded: 8/19/2019 at 10:20 AM
 Return To: STEVEN C. EKMAN P.C.
 PO BOX 70

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: *[Signature]*



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.

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

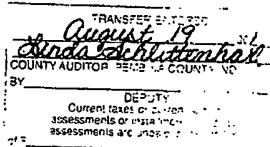
Date: 8/2/19



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.

[Signature]
 Notary Public



RESOLUTION AUTHORIZING EXPANSION OF ELECTRICAL SERVICE TO
MCFARLAND'S ADDITION TO THE CITY OF DRAYTON

The following Resolution was presented on April _____, 2020 at a regularly called meeting of the City of Drayton, to wit:

RECITALS

WHEREAS, the City of Drayton (City) has authority under North Dakota Constitution Article VII, § 11 and N.D.C.C. § 40-05-01(57) to grant a franchise to a company to provide electric services within the municipal boundaries of the City; and

WHEREAS on May 3, 2011, by Ordinance 51, the City granted to Otter Tail Power Company, its successors and assign, "permission to erect, construct, install and maintain within the city of Drayton an electric light and power system and transmission line, and to operate the same, and to install conduits, poles, wire, pipes, and other fixtures in, upon and under the streets, alleys, bridges, and public grounds of said City for the purpose of furnishing electrical light, heat, and power to said City and the inhabitants thereof;" and

WHEREAS, on August 19, 2019, a new subdivision to the City of Drayton was platted and annexed into the City known as McFarland's Addition to the City of Drayton, contained within the N1/2NW1/4-26-159-51 lying westerly of the West right of way of Interstate Highway 29; and

WHEREAS on November 4, 2019 a Deed was recorded to transfer Lot 1 of Block 1 of McFarland's Addition to the City of Drayton to Roserock Holdings LLC with the intention of developing there a Love's Truck Stop facility; and

WHEREAS Love's Truck Stop desires to utilize the existing franchise the City has with Otter Tail Power Company to provide electrical power to said premises; and

WHEREAS Otter Tail Power Company is obligated under its existing franchise agreement to provide electrical services to McFarland's Addition to the City of Drayton; and

WHEREAS the City desires to facilitate the efficient and unified operation of electrical services in the City.

NOW THEREFORE in consideration of the recitals herein contained, BE IT RESOLVED that Otter Tail Power Company's franchise to provide electrical services within the City of Drayton in accordance to Ordinance 51 be extended without ambiguity to McFarland's Addition.

Approved: _____

Charles M. M.
Mayor

Attest: _____

Shari K. W.
Auditor

