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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	
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Case Style	Nodak Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.
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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.,)	
Complainant,)	
)	NODAK ELECTRIC'S RESPONSE TO OTTER TAIL'S
-vs-)	MOTION TO DISMISS
)	
Otter Tail Power Company,)	Case No. PU-20-356
Respondent.)	

FACTS

[1] Nodak Electric Cooperative, Inc. (hereinafter "Nodak") is a "rural electric cooperative" under N.D.C.C. § 49-03-01.5(6). Otter Tail Power Company (hereinafter "Otter Tail") is an "electric public utility" under N.D.C.C. § 49-03-01.5(2). 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.

[2] 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. Bryant 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, asked Bryant 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, Breidenbach once again talked with Bryant and indicated that Nodak and Love's should start the paperwork for the new service. 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, Bryant 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 planned on moving ahead with extending service to the site.

[3] It is Nodak's contention that it, and not Otter Tail, has the right to provide service to Love's. 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," which included the signed maps from the 1960 agreement and encompassed the territory where Love's intends to construct its truck stop. The 1968 service area agreement is almost verbatim to the original except that 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. According to the agreement and maps, Nodak would have the right to provide electric service to the site, despite the subsequent annexation of said territory into the city limits of Drayton.

[4] Furthermore, Nodak contends in its Complaint that 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 a 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 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 currently has no electrical plant adjacent to or on the property. 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. On December 11, 2020, Otter Tail filed a Motion to Dismiss claiming that the Public Service Commission does not have authority to invalidate a franchise Otter Tail has with the City of Drayton to provide electric service to the proposed Love's service station. This response follows.

LAW AND ARGUMENT

[5] In its Motion to Dismiss, Otter Tail claims that Nodak has erroneously characterized this case as a Territorial Integrity Act ("TIA") dispute, when it is exactly opposite since Otter Tail possesses a franchise with the City of Drayton and therefore has the authority to serve the proposed Love's service station without intervention or additional inquiry by the Commission. This is a mischaracterization of the allegations being made in Nodak's complaint. Nodak does not allege that Otter Tail should be required to obtain a certificate of public convenience and necessity. Rather, Nodak is seeking to invoke other remedies available to it under N.D.C.C.

Chapter 49-03. While N.D.C.C. § 49-03-01 states that said section does not require an electric public utility to secure a certificate for an extension within any municipality within which the electric public utility has lawfully commenced operations, it does provide that “if **any** electric public utility in constructing or extending its line, plant, or system, **unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected,** after notice and hearing as provided in this title, **may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions.**” (emphasis added).

[6] Other applicable provisions under N.D.C.C. Chapter 49-03 that apply to the nature of Nodak’s complaint include N.D.C.C. §§ 49-03-01.3 and 49-03-01.4. Specifically, N.D.C.C. § 49-03-01.3 states that “Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; **provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission.**” (emphasis added). N.D.C.C. § 49-03-01.4, provides that “if any electric public utility or electric transmission provider violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric

cooperative, the commission, after complaint, notice, and hearing as provided in chapter 28-32, 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. In addition to the restraint imposed, the commission shall prescribe any terms and conditions as the commission deems reasonable and proper.” Over the years, Nodak has made substantial improvements to its facilities near the City of Drayton in contemplation of further development in territory Nodak believed was rightfully its to serve under the TIA and the service area agreement between Nodak and Otter Tail. The City of Drayton, and ultimately Otter Tail, have essentially engaged in an unlawful taking of Nodak’s facilities and territory by annexing said facilities and territory into city limits and leaving Nodak without compensation or a way to serve members from said facilities. Now Otter Tail, by way of its Motion to Dismiss, would like to further deprive Nodak of due process and the right to be fully heard by the Public Service Commission or to seek the remedies available to it under N.D.C.C. Chapter 49-03.

[7] Otter Tail claims that because it possesses a franchise to serve the City of Drayton that Nodak is automatically precluded from serving Love’s proposed service station and the Public Service Commission is without authority to hear this matter. First, the franchise held by Otter Tail to serve the City of Drayton is not exclusive. In its brief, Otter Tail erroneously claims that “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...” Neither the Ordinance dated in 2011, nor the Resolution dated in 2020, specifically state what Otter Tail alleges. Rather, said documents grant Otter Tail permission to build plant to provide electric service to the City and the

inhabitants thereof. Nowhere in the documents is said right specifically exclusive to Otter Tail, nor can it be under N.D.C.C. § 40-05-01(57). Furthermore, no evidence has been provided that the City of Drayton has an ordinance prohibiting an entity from providing electrical service within the City of Drayton without a franchise. Next, the ordinance granting Otter Tail a franchise specifically states that **“this contract shall be subject to any present or future laws of a regulatory nature enacted by the State of North Dakota, or 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.”** (emphasis added). The City of Drayton, by the plain language of its ordinance, subjects the franchise in question to the jurisdiction and scrutiny of the Public Service Commission. Based on the above, Nodak firmly believes that the facts of this case are distinguishable from the two cases cited by Otter Tail in its brief and that the Public Service Commission has jurisdiction and authority to hear and decide this matter pursuant to the provisions found in N.D.C.C. Chapter 49-03.

[8] Lastly, Nodak would argue that by virtue of the 1968 service agreement entered into between the parties, Nodak has the right to serve the site of Love’s proposed service station. In its brief, Otter Tail refers to N.D.C.C. § 49-03-06 and claims that said statute, which was passed in 2005, invalidates the 1968 service area agreement. In reviewing the legislative history relative to SB 2412, nowhere does it indicate that N.D.C.C. § 49-03-06 would have retroactive application to already existing service area agreements, but rather to agreements reached subsequent to the enactment of said statute. Prior to 2005, there appears to be no requirement that service area agreements be approved by the Public Service Commission or cities that may be affected by such agreements.

[9] Based on the above, as well as any evidence and argument yet to be adduced at a hearing on this matter, Nodak would respectfully request that the Public Service Commission deny Otter Tail's Motion to Dismiss and any relief requested therein, as well as set a hearing on the merits of Nodak's Complaint as provided for by N.D.C.C. Chapter 49-03.

Dated this 28th day of December, 2020.



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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

**CERTIFICATE OF SERVICE
(ELECTRONIC AND BY FIRST CLASS MAIL)**

Case No. PU-20-356

STATE OF NORTH DAKOTA)
)ss
COUNTY OF LAMOURE)

[1] I, Kimberly J. Radermacher, do hereby certify that on December 28, 2020, I served the following documents:

A. Nodak Electric’s Response to Otter Tail’s Motion to Dismiss

[2] by sending a true and correct copy thereof via email to:

North Dakota Public Service Commission at ndpsc@nd.gov
ALJ Timothy J. Dawson at tjdawson@nd.gov
John Hamre at jghamre@nd.gov
Brian L. Johnson at brljohnson@nd.gov
Paul Sanderson at psanderson@esattorneys.com
John M. Schuh at jschuh@nd.gov

[3] and by sending an original and seven copies via First Class Mail, United States Postal Service to:

**North Dakota Public Service Commission
600 E. Boulevard Ave. Dept. 408
Bismarck, ND 58505-0480**

[4] To the best of my knowledge, information and belief, such addresses are the actual email/postal addresses of the parties intended to be served. That the above document was duly e-mailed or mailed in accordance with the applicable provisions of North Dakota law.

Dated this 28th day of December, 2020.



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