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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.
Date/Time Submitted	9/14/2021 2:02 PM CST
Date/Time Accepted	9/15/2021 8:56 AM CST
Accepted Comments	
Filing Type	Exhibit
Filing Description	CR Exhibit 57 Response to Otter Tail's Post-Hearing Brief
Activity Requested	EFileAndServe
Filed By	John Hamre
Filing Attorney	John Schuh

Document Details	
Lead Document	57 - CR Exhibit 57 Response to Otter Tail's Post-Hearing Brief.pdf
Lead Document Page Count	15
File Stamped Copy	View Stamped Document
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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

[1] Nodak Electric Cooperative, Inc. (hereinafter "Nodak Electric"), by and through special counsel Kimberly J. Radermacher, submits the following response to Otter Tail Power Company's (hereinafter "Otter Tail") Post-Hearing Brief filed on April 30, 2021.

LAW AND ARGUMENT

ISSUE 1: The Commission should deny Otter Tail's Motion to Dismiss.

[2] Otter Tail once again alleges in its brief that the Commission is without authority to interfere with a franchise granted to Otter Tail by the City of Drayton to serve McFarland's Addition and ultimately the proposed Love's Travel Stop site and therefore Nodak Electric's Complaint must be dismissed. Otter Tail claims the City of Drayton has the sole constitutional authority to determine the electrical provider for McFarland's Addition. Otter Tail has repeatedly failed to recognize the Commission's authority granted to it under Chapter 49-03 of the North Dakota Century Code. That chapter provides remedies to electric cooperatives and electric public utilities alike when another electric public utility threatens to unreasonably interfere with their service or system, such as is alleged in this case. 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.”

[3] N.D.C.C. § 49-03-01.3 is specific to the construction of facilities within a municipality. If a municipality could simply overrule the Commission’s authority by granting a franchise to one electrical provider over another, regardless of unreasonable duplication and interference by one, what is the purpose of the statute? Most municipalities have franchises in place to provide electrical service within its city limits and yet, the statute has not been repealed or amended to accommodate this “[insurmountable] sole constitutional authority” alleged by Otter Tail. While the North Dakota Supreme Court has addressed cases similar to this one, there are facts in this case that make it distinguishable from those. In Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2nd 723 (N.D. 1971), the City of Crosby passed Ordinance No. 220, which prohibited any electrical supplier from furnishing electricity to the inhabitants of the city of Crosby without first obtaining a franchise. Because of this specific ordinance, the North Dakota

Supreme Court held that Burke-Divide Rural Electric Cooperative was not in compliance with N.D.C.C. Sections 10-13-01(1) and 10-13-03(1) because it was supplying power to persons in rural areas who were receiving central station service. Specifically, the Court stated “[W]here any such person resides within or seeks service for facilities within a city defined as a rural area which is receiving central state service, such person cannot be served within the corporate limits, in the absence of a franchise, **where the city has in existence an ordinance prohibiting such service in the absence of a franchise.** (emphasis added). *Id.* at 730. Charles Olson, the mayor of Drayton, was called by Otter Tail to testify at the hearing. Otter Tail introduced three different exhibits relative to action taken by the City of Drayton in relation to the franchises given to Otter Tail and the annexation of McFarland’s Addition. Nowhere in Olson’s testimony or included in the exhibits was evidence that the City of Drayton has an ordinance requiring a franchise to provide electrical services inside the city limits of Drayton. To the contrary, and despite the false claims made by Otter Tail in its brief, Olson knew at the time of the hearing and beforehand that Nodak Electric was in fact providing electrical service to a service station located within city limits and had been doing so since the 1980s. *See* Exhibit NODAK-11, Dkt. #55. Olson indicated that since Nodak Electric was already providing electrical service to the site at the time of annexation that he did not see any issue with Nodak Electric continuing to serve the load without a franchise. Interestingly, Otter Tail now argues that it should be entitled to purchase Nodak Electric’s facilities serving this service station because Nodak Electric does not possess a franchise with the City of Drayton and cannot operate in a municipality (despite the law stating otherwise and Otter Tail acknowledging multiple times at the hearing that rural electric cooperatives can and do serve loads in municipalities all over the state). It seems that Otter Tail is not standing by its position that “what is good for one, is good

for us all,” but would rather continue to selfishly usurp Nodak Electric’s territory and facilities in the Drayton area.

[4] Otter Tail also cites N.D.C.C. § 49-03-06(8), which states that “nothing in this chapter [49-03] shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-50-01.” Nodak Electric is not asking that the Commission grant it a franchise or to strike down the franchise granted to Otter Tail. Rather, Nodak Electric is asking the Commission to invoke its authority to enjoin Otter Tail from interfering with its service and plant located in and around McFarland’s Addition in the City of Drayton as provided for in N.D.C.C. Chapter 49-03. Otter Tail claims that because it possesses a franchise to serve the City of Drayton that Nodak Electric is automatically precluded from serving Love’s proposed service station and the 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 briefs and at the hearing in this matter, 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. Furthermore, Otter Tail’s Chris Waltz testified neither the Ordinance dated 2011, nor the Resolution dated in 2020 was exclusive. 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 ever 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, as such ordinance does not exist. This very

fact is what makes every other case Otter Tail cites in support of its argument distinguishable from the case at hand (in Capital Electric Cooperative, Inc., v. City of Bismarck, 2007 ND 128, the City of Bismarck had an ordinance requiring electric service providers to have a franchise to provide service within the city; and in Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2nd 723 (N.D. 1971), the City of Crosby passed Ordinance No. 220, which prohibited any electrical supplier from furnishing electricity to the inhabitants of the city of Crosby without first obtaining a franchise).

[5] Moreover, Otter Tail fails to realize that the Divide and Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 794 (N.D. 1974) cases are not persuasive, nor controlling, authority on the issue of whether cooperatives can statutorily serve new customers within an annexed area. In Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988), Northern States Power Company tried making a similar argument to Otter Tail's regarding the ability of a rural electric cooperative to serve members who are receiving or can receive central station service. The North Dakota Supreme Court held that "Section 49-03-01.3, N.D.C.C., implicitly recognizes that a rural electric cooperative may lawfully provide electric services within a municipality which is served by an electric public utility. We are required to construe together all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent (citations omitted). We believe it is possible to harmonize these provisions...Thus, when a 'rural area' is annexed by a municipality, its population in effect 'changes' because it has become united with that of the municipality of which it is now a part. In view of Sec. 49-03-01.3, which specifically contemplates the possibility of continued electric service by a cooperative within an annexed area, we conclude that Sec. 10-13-04 does not prohibit Cass from

providing electric service in South Pointe.” *Id.* at Page 185.

[6] Over the years, Nodak Electric has made substantial improvements to its facilities near the City of Drayton in contemplation of further development in territory Nodak Electric believes is rightfully its to serve under the Territorial Integrity Act and the service area agreement between Nodak Electric and Otter Tail. According to Steve Breidenbach, Engineering Manager for Nodak Electric, Nodak Electric has been serving the area dating back to the 1940s and made upgrades to its system as late as 2009. Nodak Electric has a single-phase service that intersects the entirety of McFarland’s Addition and has three-phase service within 350 feet of the proposed transformer pad for Love’s Travel Stop. The annexation of the single-phase service into city limits, and action by the Commission if Otter Tail’s relief is granted, would paralyze Nodak Electric’s ability to further extend off of portions of that line. This coupled with the fact that the extension of Otter Tail’s facilities in service territory belonging to Nodak Electric will interfere with Nodak Electric’s facilities and result in an unreasonable duplication of services, it is evident that the Commission has authority to hear and decide the merits of Nodak Electric’s Complaint as provided by law.

[7] It is also worth noting that in the Divide case, the city of Crosby had twice declined to issue a limited franchise to the rural electric cooperative. No such action has ever been taken by the City of Drayton. While Nodak Electric had expressed to the City of Drayton that it would be willing to get a franchise if one was needed, the issue was never formally brought before the city council and voted on. Nodak Electric has maintained its position that it was lawfully serving the areas annexed into the City of Drayton by virtue of a 1968 service area agreement it has with Otter Tail. Because the City of Drayton does not have an ordinance in place prohibiting electrical service from being provided without a franchise and is in fact presently allowing such practice to occur, the

Commission is not precluded from hearing this matter as provided for in Chapter 49-03 of the North Dakota Century Code.

[8] Nodak Electric would also argue that the Commission has authority and jurisdiction to hear this matter by virtue of the now existing ordinances within the City of Drayton. Otter Tail's Exhibit OTP-1, which is the franchise Otter Tail has with the City of Drayton, states in Section 9 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). Otter Tail attempted to argue through the testimony of Chris Waltz, Manager of Sales and Economic Development for Otter Tail, that this provision was only included because Otter Tail's rates are subject to regulation by the Commission and for no other reason. This argument is not compelling. Section 8 of the franchise specifically addresses the issue of rates and what authority the Commission has in that regard. Section 9 is independent of Section 8 and does not appear to be limited in any way. Because of this, Nodak Electric contends that any amendment to the franchise and expansion of services by Otter Tail in the City of Drayton would be subject to the scrutiny and jurisdiction of the Commission and in particular, the authority granted to the Commission under Chapter 49-03.

[9] Finally, by virtue of the 1968 service agreement entered into between the parties, Nodak Electric has the sole right to serve the proposed site for the Love's Travel Stop. Otter Tail attempts to argue that N.D.C.C. § 49-03-06, which was passed in 2005, invalidates the 1968 service area agreement. This argument fails. 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 Commission or cities that may be affected by such agreements. Otter Tail acknowledged in testimony that it knew that the 1968 agreement existed but did not realize it also addressed the City of Drayton. Both parties provided testimony that they have been operating under the agreement since its inception, including after the passage of N.D.C.C. § 49-03-06 in 2005. Otter Tail has not attempted at any time to invalidate or rescind the 1968 service area agreement except in the context of this case.

ISSUE 2: Otter Tail’s extension would interfere with existing services provided by Nodak Electric.

[10] The evidence shows that Otter Tail’s extension of service to the Love’s Travel Stop site would interfere with existing services provided by Nodak Electric. In determining this issue, Otter Tail would like the Commission to limit its inquiry to just physical interference and to existing customers in McFarland’s Addition. However, the Commission would be in error to do so. In Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988), 186-88, the North Dakota Supreme Court held that “the Commission must look at the **existing electric facilities** that [Nodak Electric] and [Otter Tail] have in place in the area and determine whether extension of [Otter Tail’s] services...would constitute an unreasonable duplication of capital-intensive facilities and services already provided by [Nodak Electric].” (emphasis added). While it is true that Nodak Electric currently serves no customers in McFarland’s Addition, the same holds true for Otter Tail. Where the parties differ is that Nodak Electric has significant facilities already in the area constituting and surrounding McFarland’s Addition. Otter Tail does not. Currently Nodak Electric has a single-phase service that intersects the entire width of McFarland’s Addition and also runs

parallel thereto. It also has three-phase directly adjacent to McFarland's Addition that would be used to extend service to the Love's Travel Stop site. Based on the siting of the Love's Travel Stop transformer, Nodak Electric would have to extend its existing three-phase service by approximately 350 feet at an estimated cost to Nodak Electric of \$19,037.50. Otter Tail, on the other hand, has no single-phase or three-phase distribution lines on the west side of I-29. It only has a transmission line. The only plausible way that Otter Tail can extend service to the area is by boring under I-29 and extending off of its facilities to the east of I-29. Otter Tail's proposed extension would be approximately three times longer than Nodak Electric's and come at a cost approximately three times more than that proposed by Nodak Electric. While no physical estimation of cost was provided by Otter Tail at the time of the hearing, Tyler Jacobson, Senior Engineer for Otter Tail, testified that the cost of the proposed extension is estimated to be in excess of \$52,000.00. Jacobson also testified that the bore for Otter Tail's proposed extension would occur approximately "50 feet, give or take" north of where Nodak Electric's underground line is currently located under I-29. Nodak Electric is a bit skeptical about this proposed extension. Otter Tail indicated that it had a permit to bore under I-29. To date, no such permit has been provided as evidence. Fifty feet, give or take, doesn't leave a lot of room for error, particularly given that Otter Tail didn't even have Nodak Electric's underground facilities properly depicted on the map laying out its proposed extension. For Otter Tail to seemingly blame this error on flags currently located by Nodak Electric out near the site is ridiculous. Both parties can agree that Otter Tail would have to extend service under one of Nodak Electric's overhead lines. However, it is not clear if Otter Tail will have to cross over Nodak Electric's underground lines in the area. Otter Tail admits that to cross over Nodak Electric's underground lines would not be an ideal extension of service and appeared to want to

avoid that at all costs. Such a crossing would significantly interfere with Nodak Electric's facilities located in the area and create a serious safety hazard when digging. Otter Tail states that such an interference is merely speculative, and that Otter Tail will follow the law and call 811 before excavating. This does nothing to curb Nodak Electric's legitimate concerns, nor should it give the Commission any comfort over the legitimate safety concerns this would pose."

[11] Not only would Otter Tail's proposed extension potentially interfere physically with Nodak Electric's facilities, it would also interfere economically. As stated in the Cass County Electric case, the Commission must not limit this inquiry to just existing members in the area. Nodak Electric officials testified that it extended service in and around McFarland's Addition the way it did due to the prospect of future growth. Nodak Electric not only sized the line in contemplation of this, but also upgraded lines in 2009 and extended three-phase service into the area. Mylo Einarson, President and CEO of Nodak Electric, testified that the west side of I-29 throughout the state has been seeing a lot of growth and so it made sense to make the investment when updating its facilities in the Drayton area. Because of this prior investment, Nodak Electric is able to extend service at a significantly reduced cost. Otter Tail argues that "if Nodak has been making speculative investment decisions on a sixty-year-old imprecise hand-drawn map, it would have been prudent to have had an agreement meeting with Otter Tail more recently than 1972." As the saying goes, "if it ain't broke, don't fix it" – meaning "that if something is performing or functioning well enough, there is no need to change or interfere with it (as you may introduce new problems as a result)." There appears to be no reason the parties needed to revisit the agreement as meetings were only required if changes needed to be made or problems addressed. There is no doubt that the parties entered into a service area agreement in 1968 and territory surrounding the City of Drayton was

included under that agreement. The parties have been operating under it ever since. Otter Tail has never attempted to rescind the agreement. The passing of N.D.C.C. § 49-03-06 in 2005 does nothing to invalidate it.

[12] Otter Tail also alleges that Nodak offered no evidence of the extent to which its investment was “upsized” in anticipation of load growth. The fact that Nodak Electric can extend service to the site for under \$20,000.00 versus Otter Tail’s investment in excess of \$52,000.00, reflects the type of investment that Nodak Electric has already made in the area. Furthermore, the maps introduced at the hearing depict the amount of line and facilities that Nodak Electric has in the area. Lastly, Nodak Electric officials testified about this investment, the sizing and location of the line, etc. There has been no evidence provided by Otter Tail to suggest that this testimony was in any way not credible.

[13] Furthermore, Nodak Electric projects that the Love’s Travel Stop load could bring in annual gross revenues ranging from \$57,000.00 to \$98,000.00 (depending on if load management is used). Based on the lowest proposed net revenue, after taking into consideration cost of power and other expenses, Nodak Electric could still recoup its investment for just the extension to the Love’s Travel Stop in less than four years. The net revenue could also be used to recoup prior investment made by Nodak Electric in the area, as well as reduce overall electric costs for all Nodak Electric members. Nodak Electric’s projection relative to the revenue and return on investment that could be made from the Love’s Travel Stop is not “logically flawed” as alleged by Otter Tail in its brief. Rather the projections made by Otter Tail relative to Nodak Electric’s rates that were provided to Love’s Travel Stop were flawed but were unfortunately considered by Love’s Travel Stop in making its determination on electrical providers.

ISSUE 3: There would be a wasteful duplication of services and such duplication is unreasonable.

[14] “The Territorial Integrity Act was enacted by the Legislature in 1965. The primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity. Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988), 186-188. “In determining interference with existing services and unreasonable duplication of services...the PSC must look at the existing electric facilities that the rural electric cooperative and the public utility have in place in the area and determine whether the extension of services into the area would constitute an unreasonable duplication of capital-intensive facilities and services provided by the other entity.” *Id.* at 186-87.

[15] Otter Tail simply is not the logical choice for providers when it comes to serving the Love’s Travel Stop load as it is not currently physically situated in such a way to readily provide service to the site. It would require a substantial extension by Otter Tail to bring service to the site, which is not necessary as Nodak Electric is already at Love’s Travel Stop’s front door. As previously stated, Nodak Electric has single-phase and three-phase service in direct proximity to McFarland’s Addition. Nodak Electric can bring the desired three-phase service to Love’s Travel Stop by extending its three-phase service west of the area by 350 feet. The extension as proposed is minimally invasive and would cost less than \$20,000.00 to do. Otter Tail has no distribution facilities located on the west side of I-29. The only way it can extend service is by boring under I-29. According to Otter Tail, this is not a big deal and no greater of an extension or investment than that of Nodak Electric’s. Yet, Otter Tail fails to acknowledge that its own testimony and evidence introduced at the hearing proves that its extension would be three times that of Nodak Electric’s in both length and cost. It would require an extensive bore under I-29 as the proposed route not only

intersects the south and north bound lanes, but both the on and off ramps. Nodak Electric already has facilities going under I-29, although those relate to the single-phase service currently intersecting McFarland's Addition. Nodak Electric's extension of three-phase service would only require trenching across a county road just west of the site. A single lane county road is not in any way synonymous to a four-lane interstate highway with on and off ramps. It is evident based on the testimony that Nodak Electric has already made significant improvements to its facilities in the area of McFarland's Addition. Those improvements date back to at least 2009, although Nodak Electric has had facilities in the area dating back to the 1940s. Otter Tail has made no similar improvements to the area as it serves no consumers on the west side of I-29 anywhere in the vicinity of the proposed Love's Travel Stop. In order to do so, it would have to make a substantial investment - one Nodak Electric has already made because it is Nodak Electric's territory and it is currently serving members in close proximity. While Otter Tail argues that an investment of \$52,000.00 in plant is not unreasonable, the Commission needs to keep in mind that this extension is three times that of Nodak Electric's and it is not a logical extension of Otter Tail's services. At this time, Otter Tail's extension of service to the Love's Travel Stop would be only for the benefit of Love's Travel Stop and no other customer of Otter Tail's. Future development in that area by Otter Tail is limited, if not impracticable, unless the City of Drayton annexes additional property into city limits or Otter Tail obtains a Certificate of Public Convenience and Necessity from the Commission.

[16] Furthermore, Nodak Electric can serve the load just as economically, if not more economically, than Otter Tail. Figures presented at the time of the hearing show that if Love's Travel Stop would implement a generator as part of its load management that Nodak Electric could serve the load at a significant cost savings to Love's Travel Stop when compared to Otter Tail. Even

without load management, Nodak Electric's rates are still competitive with Otter Tail's, particularly when taking into account capital credits that ultimately get returned back to the member. Otter Tail will likely argue that it can serve Love's Travel Stop more economically as it originally projected Nodak Electric's cost of service to be in excess of \$30,000.00 annually over that of Otter Tail's rates. However, the numbers estimated by Otter Tail were inaccurate and misleading and were unfortunately relied upon by Love's Travel Stop when formulating a preference as to who should supply power to the site (despite it being Nodak Electric's service territory). Otter Tail also misstated to the customer that controlled power equated to interruptible power meaning that Love's Travel Stop would be without power at certain parts of the day. However, that is simply untrue. Nodak Electric can extend electrical service to Love's Travel Stop and provide power more economically than Otter Tail can. The numbers entered into evidence, as well as the maps depicting the proposed extensions of service and what each power supplier has for facilities in the area, clearly indicate that Otter Tail's proposed extension of service would be duplicative, wasteful and unreasonable.

CONCLUSION

[17] Based on the reasons set forth herein, as well as the evidence that has been entered on the record in this matter, the Commission must deny Otter Tail's Motion to Dismiss and grant Nodak Electric the relief requested in its Complaint, namely to enjoin Otter Tail from extending service to the proposed Love's Travel Stop in McFarland's Addition to the City of Drayton, North Dakota.

Dated this 7th day of May, 2021.



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