

## Hamre, John G.

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## Filing Accepted

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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	
<b>Court</b>	Burleigh County - South Central District
<b>Case Number</b>	08-2021-CV-01508
<b>Case Style</b>	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.	)	Case No. PU-20-356
	)	
Complainant,	)	
	)	
vs.	)	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</b>
	)	
Otter Tail Power Company,	)	
	)	
Respondent.	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**MAY \_\_\_\_, 2021**

**Appearances**

Commissioners Randy Christmann, Julie Fedorchak, and Brian Kroshus.

Kim J. Radermacher, Radermacher Law Firm, P.C., 506 Main St., Edgeley, ND 58433, appearing on behalf of Complainant Nodak Electric Cooperative, Inc.

Paul Sanderson, Evenson Sanderson, PC, 1100 College Drive, Suite 5, Bismarck, ND 58501, appearing on behalf of Respondent Otter Tail Power Company.

Brian L. Johnson, Legal Counsel, Public Service Commission, State Capitol, 600 E. Boulevard Avenue, Bismarck, ND 58505, appearing on behalf of Public Service Commission.

Mayor Charles Olson appearing at the hearing on behalf of Intervenor City of Drayton.

Timothy J. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14<sup>th</sup> Street, Suite 303, Bismarck, North Dakota 58503 as Procedural Hearing Officer.

**Preliminary Statement**

Complainant Nodak Electric Cooperative, Inc. ("Nodak") commenced this action on July 29, 2020, by filing a Complaint against Otter Tail Power Company ("Otter Tail") with the North Dakota Public Service Commission ("Commission") requesting it enjoin Otter Tail from extending electric service to property located in the McFarland's Addition in the City of Drayton.

On August 17, 2020, Otter Tail filed its Answer asserting the Commission lacked jurisdiction over the City of Drayton's determination of which electric service provider was to serve McFarland's Addition.

On December 4, 2020, the City of Drayton filed a Petition to Intervene in this action asserting it had the constitutional right to determine the electric service provider to McFarland's Addition located in the City of Drayton.

On December 10, 2020, the Administrative Law Judge granted the City of Drayton's Petition to Intervene.

On December 11, 2020, Otter Tail filed a Motion to Dismiss Nodak's Complaint asserting the Commission lacked 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.

On March 3, 2021, the Commission issued a Notice of Hearing setting forth three issues to be considered at the hearing:

1. Whether the Commission should grant Otter Tail's motion to dismiss?
2. Whether Otter Tail's extension would interfere with existing services provided by Nodak?
3. If there would be a duplication of services, whether the duplication of services would be unreasonable?

The hearing in this case was held before the Commission on April 16, 2021. Nodak presented testimony of two witnesses, Steve Breidenbach and Mylo Einarson, and introduced twelve exhibits. Otter Tail presented testimony from four witnesses, City of Drayton Mayor Charles Olson, Steve Walters, Tyler Jacobson, and Chris Waltz, and introduced four exhibits.

On April 30, 2021, Nodak and Otter Tail filed Post-Hearing Briefs.

On May 7, 2021, Nodak and Otter Tail filed Reply Briefs.

Having allowed all interested persons an opportunity to be heard, and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

#### **Findings of Fact**

1. Nodak is a rural electric cooperative providing electric service to its members in North Dakota.

2. Otter Tail is an investor-owned electric utility providing electric service to customers in North Dakota under the regulatory jurisdiction of this Commission.
3. The property at issue in this case, McFarland's Addition, is located within the municipal limits of the City of Drayton.
4. The City of Drayton granted a franchise to Otter Tail to construct, install, and maintain an electric light and power system within the City. Otter Tail has been providing electric service to residents of the City of Drayton pursuant to a franchise since the 1930s.
5. Nodak does not possess a franchise agreement with the City of Drayton permitting it to provide electric service to customers within the City.
6. On August 12, 2019, the City Council of Drayton approved annexation of McFarland's Addition into the corporate city limits of the City of Drayton. The Plat of McFarland's Addition and annexation was filed by the City with the Pembina County Recorder on August 19, 2019.
7. In April 2020, the City of Drayton passed a resolution authorizing and obligating Otter Tail to provide electric service to McFarland's Addition pursuant to its franchise with the City.
8. Neither Nodak nor Otter Tail provide electric service to any customers in McFarland's Addition.
9. McFarland's Addition was subsequently purchased by a company with the intent to construct a Love's Travel Stop on the property.
10. Love's requested Otter Tail provide electric service to its new facility, noting its internal bill comparisons using the rates provided by each utility for its own service showed that Nodak's annual bills would be approximately 25% higher than Otter Tail's for comparable electric service.
11. Both utilities would be required to extend nearby 3-phase service into McFarland's Addition to serve the Love's Truck Stop. Both utilities must cross the existing facilities of the other utility, but those existing facilities are inadequate to meet the customer's service requirements and would not be utilized to provide service. Nodak Witness Breidenbach and Otter Tail Witness Jacobson both testified that Otter Tail's design for extension of service into McFarland's Addition does not present any safety or code violations. Otter Tail has secured the necessary permits to bore under the interstate. The Commission finds that Otter Tail's extension of service will not physically or operationally interfere with Nodak's service or system.
12. Nodak Witness Einarson testified that annexation by the City of Drayton and implementation of its franchise with Otter Tail will foreclose future revenue opportunities from incremental investments made in 2009 or earlier. Mr. Einarson provided no

quantification of Nodak's incremental investment in the annexed area for consideration. Company Witness Chris Waltz testified that Otter Tail has made and is committed to make investments necessary to meet its obligations pursuant to its franchise with the City of Drayton to serve the City's residents and to promote the orderly growth and development in the City. The Commission finds that Otter Tail's extension of services to McFarland's Addition will not result in an any unreasonable duplication of Nodak's services.

From the foregoing Findings of Fact, the Commission makes the following:

### **Conclusions of Law**

1. Article VII, § 11, of the North Dakota Constitution provides that 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."
2. Section 40-05-01(57), N.D.C.C., states that the governing body of a municipality shall have the power 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."
3. The Commission's authority to regulate is limited to that authority provided to it by the North Dakota Legislature. Env'tl. Law & Policy Ctr. v. N. Dakota Pub. Serv. Comm'n, 2020 ND 192, ¶ 11, 948 N.W.2d 838.
4. Nodak's Complaint requests the Commission enjoin Otter Tail from extending electric service to the McFarland's Addition in the City of Drayton pursuant to the power granted the Commission by the Legislative Assembly under Ch. 49-03, N.D.C.C. However, N.D.C.C. § 49-03-06(8) provides, "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." Nodak's Complaint seeks to have the Commission abridge the City of Drayton's franchise with Otter Tail to serve McFarland's Addition.
5. Pursuant to North Dakota Supreme Court precedent, the Commission only possesses authority under N.D.C.C. Ch. 49-03 to decide whether a utility's extension of services in a City will unreasonably interfere with and duplicate services of a cooperative when both the utility and cooperative have franchises to provide electric service to the property. See Cap. Elec. Co-op., Inc. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788.
6. Because Nodak does not possess a franchise from the City of Drayton, it has no right to extend service to a new customer in McFarland's Addition. See Capital Electric, 2007 ND 128, at ¶ 13; see also Montana-Dakota Utilities Co. v. Divide County School Dist., 193 N.W.2d 723, 730 (N.D. 1971).

7. In this case, the Commission has no authority to abridge the City of Drayton's franchise by enjoining Otter Tail's extension of service to McFarland's Addition under the regulatory authority in N.D.C.C. Ch. 49-03 because Nodak does not possess a franchise to serve the property from the City of Drayton. See Capital Electric, 2007 ND 128, at ¶ 13.

8. Even if the merits of Nodak's Complaint could be addressed, Nodak has not established that Otter Tail's extension of its facilities inside the City of Drayton to serve McFarland's Addition would result in interference with existing services or unreasonable duplication of services.

9. Because the Commission finds that it possesses no regulatory authority over the City of Drayton's constitutional franchise power, and because such issue is dispositive regarding Otter Tail's Motion to Dismiss, the Commission concludes there is no genuine issue of material fact remaining for determination.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

### Order

The Commission Orders:

1. Otter Tail's Motion to Dismiss is hereby granted and Nodak's Complaint is dismissed as a matter of law.

### **PUBLIC SERVICE COMMISSION**

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Randy Christmann  
Commissioner

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Julie Fedorchak  
Chair

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Brian Kroshus  
Commissioner



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By: /s/ Paul Sanderson  
Paul R. Sanderson (ID# 05830)