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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.
vs. Otter Tail Power Company
Complaint**

Case No. PU-20-356

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

July 14, 2021

Appearances

Commissioners Julie Fedorchak, Randy Christmann, 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, intervened on behalf of Drayton, appeared as a witness for Otter Tail Power Company.

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

Preliminary Statement

On July 29, 2020, Complainant Nodak Electric Cooperative, Inc. ("Nodak") commenced this action 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 ("Drayton"). Nodak's complaint as clarified in later filings provided that Nodak alleged that Otter Tail's service to the McFarland's Addition would interfere with its existing services and that it would lead to unreasonable duplication of services.

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

On August 26, 2020, the Commission found that the Complaint stated a prima facie case and served the complaint on Otter Tail.

On December 4, 2020, Charles Olson, Mayor, petitioned to intervene on behalf of Drayton asserting it had the constitutional right to determine the electric service provider to McFarland's Addition. On December 10, 2020, the Administrative Law Judge granted Drayton's Petition to Intervene.

On December 11, 2020, Otter Tail filed a Motion to Dismiss Nodak's Complaint asserting the Commission lacked authority due to Drayton's constitutional right to franchise with Otter Tail to provide electric service to the McFarland's Addition.

On December 28, 2020, Nodak filed its response to Otter Tail's Motion to Dismiss.

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?

On April 16, 2021, a public hearing on the Complaint was held as scheduled. Nodak and Otter Tail appeared. Nodak presented testimony of two witnesses, Steve Breidenbach and Mylo Einarson, and introduced twelve exhibits. Otter Tail presented testimony from four witnesses, Drayton Mayor Charles Olson, Steve Walters, Tyler Jacobson, and Chris Waltz, and introduced four exhibits. Drayton's only participation was through Mr. Olson's appearance as a witness on behalf of Otter Tail.

Subsequent to the Public Service Commission's May 28, 2021 work session, Otter Tail filed a Request for Oral Argument on June 6, 2021 and Drayton filed a Request for Oral Argument on June 8, 2021. Both requests for oral argument cited Otter Tail's Motion to Dismiss and Drayton's constitutional rights.

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

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 area at issue in this case is McFarland's Addition. On August 12, 2019, the City Council of Drayton approved annexation of McFarland's Addition into the corporate city limits of Drayton. On August 19, 2019, Drayton filed the Plat of McFarland's Addition and annexation with the Pembina County Recorder. As a result, McFarland's Addition is located within the municipal limits of Drayton.
4. On November 4, 2019, McFarland's Addition was purchased by a company with the intent to construct a Love's Travel Stop ("Love's") on the property.
5. The existing electric infrastructure located within the McFarland's Addition includes: (1) Otter Tail's high voltage electric transmission line following the south side of 80th St. NE, crossing 160th Ave NE into McFarland's Addition, and continuing south along the east side of 160th Ave NE until it exits McFarland's Addition and (2) Nodak's single-phase underground distribution line passing through the McFarland's Addition, passing under Interstate 29, through areas served by Otter Tail in Drayton, to serve a Genex station and customers north of Drayton.
6. Love's requires three-phase service for its operations. Both utilities would need to extend nearby three-phase service into McFarland's Addition to serve Love's.
7. Otter Tail proposes to extend existing three-phase service approximately 1000 feet by boring under Interstate 29 to the Love's site. Otter Tail's existing high voltage transmission line in the annexed area would need to be stepped down. This design is not preferred or cost-effective.
8. Nodak proposes to extend three-phase service by approximately 350 feet from a grain bin location existing outside of the annexed area by trenching across 160th Ave NE to Love's. Nodak's single-phase line in the annexed area will not meet Love's requirement for three-phase service.

Motion to Dismiss

9. Otter Tail has been providing electric service to residents, businesses, and industrial customers in Drayton since 1931 via franchise granted by Drayton to construct, install, and maintain an electric light and power system within the city. The current 20-year franchise agreement was approved by Drayton, Ordinance 51, on May 3, 2011.

10. In April of 2020, Drayton resolved that Otter Tail's Franchise extends without ambiguity to McFarland's Addition. The resolution cited the desire for efficient and unified operation of electrical services in the city, Love's desire to utilize the existing franchise Drayton has with Otter Tail to provide electric service, and Otter Tail's obligation under its existing franchise agreement to provide electrical service to McFarland's Addition to Drayton.

11. Nodak does not possess a franchise agreement with Drayton permitting it to provide electric service to customers within the city.

12. Nodak attended a city council meeting and corresponded with the city attorney about the process to acquire a franchise. Despite Nodak attempting to engage with Drayton to obtain a franchise, no application for franchise was filed with Drayton.

13. Nodak currently serves one confirmed customer within the city limits of Drayton. The customer is a Cenex station Nodak has served since 1989. The area, including the Cenex station, was subsequently annexed into Drayton in 2006.

14. Drayton does not have an ordinance expressly requiring a franchise before providing electric service within the city.

15. Nodak Witness Einarson and Otter Tail Witness Mayor Olson testified that the city informed Nodak of its plan to annex the McFarland's Addition with the intention that Otter Tail would provide service to the annexed area.

16. Love's is not currently a coop member with Nodak and has not applied for cooperative membership with Nodak.

17. There are no current Nodak or Otter Tail customers in McFarland's Addition.

Service Area Agreement

18. Nodak and Otter Tail have an executed 1968 service area agreement. The service area agreement specifies that Otter Tail shall serve all territory located within and adjacent to urban areas served by the Company as outlined on attached maps.

19. The service area agreement provides that to avoid any transfer of customers when annexed by municipalities, areas are designated between Otter Tail and Nodak consistent with an attached map. The map appears to provide that the McFarland Addition is outside of the service area specified for Otter Tail.

20. The service area agreement was not filed with the Commission, no notice of the filing was issued, and no approval of the service area agreement has occurred. Furthermore, it does not provide that it is subject to the continued jurisdiction of the Commission to settle disputes under the agreement.

21. Drayton did not sign or participate in the service area agreement and did not approve the agreement.

Interference with Existing Services

22. Nodak Witness Steve Breidenbach testified that the parallel lines on the same property and construction can cause confusion for contractors in the event of one-call markings and construction within the area. Mr. Breidenbach also testified that the crossing of the lines is a concern for Nodak's operations and safety.

23. Otter Tail's design proposal crosses under a single overhead Nodak line that is co-located on Otter Tail's existing overhead transmission poles. Otter Tail has secured the necessary permits to bore under Interstate 29 and boring is a common construction practice for extending utility infrastructure.

24. Nodak's design proposal crosses under an existing Otter Tail transmission line to serve the location. Nodak's existing distribution line traversing the McFarland's Addition also currently crosses under Otter Tail's transmission line.

25. Nodak Witness Breidenbach and Otter Tail Witness Jacobson both testified that there are no statutory or regulatory prohibitions for Otter Tail's design proposal and that it does not violate National Electric Safety Code. Mr. Breidenbach also testified that underground line crossing under an overhead line frequently occurs.

26. Nodak Witness Einarson testified that annexation by Drayton and implementation of its franchise with Otter Tail creates "economic interference" that will foreclose future revenue opportunities from incremental investments made in 2009 or earlier. Mr. Breidenbach provided that it will interfere with Nodak from the standpoint that it is missing out on an additional load. Mr. Breidenbach corroborated that technical interference is not as much of the issue as is interference with plans and ability to provide service to the area based on existing investments.

27. Otter Tail's proposed design and construction will not take away an existing Nodak customer and there will be no service interruptions or impacts to Nodak's existing customers.

28. No Nodak infrastructure will be taken or impacted by Otter Tail's extension into McFarland's Addition.

29. Otter Tail's service to McFarland's Addition will not prevent Nodak from running three-phase service to other locations.

Unreasonable Duplication

30. There is no existing three-phase service within McFarland's Addition to serve Love's.

31. Nodak's proposed extension of three-phase service to the Love's location by approximately 350 feet will cost a total of \$19,037.50. Otter Tail's extension of approximately 1000 feet will cost an estimated \$52,000.

32. Nodak's proposed three-phase service line serves 3 customers within the 2-mile radius with neither of the other two three-phase customers within close proximity to McFarland's Addition. Nodak testified that it will continue to provide three-phase service to its existing customers regardless of whether Otter Tail provides service to McFarland's Addition.

33. Nodak testified that it made investments planning to serve the area's customer growth and development. Nodak Witness Einarson also agreed that Otter Tail has made investments in its system to serve customers located in Drayton and likely made investments for possible expansion.

34. Nodak's single-phase distribution line crosses McFarland's Addition, continues through areas in Drayton with joint occupancy on Otter Tail's infrastructure before crossing ND Highway 66 to serve Cenex, as well as additional customers.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

Motion to Dismiss

1. Otter Tail's Motion to Dismiss argues that Drayton has a constitutional right to franchise that shall not be abridged by operation of the legislative body or the Commission and that Nodak has no right to extend service to customers in Drayton without a franchise.

2. Nodak's response argues that this is subject to Commission review pursuant to N.D.C.C. § 49-03-01 which provides that an electric utility shall not be required to secure a certificate for extension within the corporate limits of a municipality in 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." Nodak also argues that the Commission has jurisdiction to hear the complaint by virtue of section 9 of the franchise that states that the "contract shall be subject to any . . . laws of regulatory nature . . . and further be subject to the rules and regulations laid down" by the commission.

3. Otter Tail's Motion to Dismiss is largely based upon a constitutional argument regarding the extent of a municipality's franchise authority. Such determination may be better suited for judiciary to decide. However, N.D.C.C. § 49-03-01.3 provides that the Commission has jurisdiction to prevent interference with existing services and unreasonable duplication caused by an electric utility extension.

Service Area Agreement

4. N.D.C.C. § 49-03-06 provides notice, approval, and a finding that a service agreement is in the public interest as prerequisites for Commission regulation. The 1968 service area agreement and terms of the agreement do not meet the prerequisites provided by the legislature to grant Commission review.

Interference with Existing Service

5. N.D.C.C. § 49-03-01.3 provides that Otter Tail may lawfully commence operations; provided, however, that such extension or extensions shall not interfere with existing services of another company and duplication is not deemed unreasonable by the Commission.

6. Nodak argues that having a parallel electrical line in proximity to its distribution line could cause difficulties and confusion for contractors in the area. Under N.D.C.C. § 49-23, excavators and the operators have a responsibility to accurately locate and prudently excavate to protect underground facilities. The Commission concludes that possible future confusion for contractors in using the one-call system does not constitute interference with Nodak's services.

7. Nodak argues that the crossing of facilities would result in interference. However, this is a common practice, is not prohibited by the National Electric Safety Code or other safety regulations, will not prevent extension of three-phase service to other locations, and will not impact existing Nodak infrastructure.

8. There are no current customers in McFarland's Addition, Nodak customers will not experience an interruption of service as a result of Otter Tail's designed extension, and Nodak will not lose existing infrastructure or customers from Otter Tail extending service to McFarland's Addition.

9. Nodak did not meet the burden necessary to demonstrate that Otter Tail's extension into McFarland's Addition will cause interference with Nodak's service.

Unreasonable duplication

10. In evaluating unreasonable duplication, the Commission must look at existing facilities to determine whether extension of Otter Tail's services to McFarland's would constitute duplication of capital-intensive facilities and services already provided by

Nodak. The Commission also recognizes that some duplication is not necessarily wasteful duplication.

11. There is no existing three-phase service within McFarland's Addition. A step-down from Otter Tail's transmission line is not a cost-effective option for extension of service. An extension from Nodak's distribution line that passes through McFarland's and Drayton to extend service to existing Nodak customers is also not capable of providing the service requested by Love's.

12. Nodak's proposed 350-foot extension will cost an estimated \$19,037.50. Otter Tail's proposed 1000-foot extension will cost an estimated \$52,000. Both extensions are relatively minor for an electric distribution company to serve a new area.

13. Nodak testified that it made investments planning to serve the area's customer growth and future development. Otter Tail has also made investments in planning its system to serve customers located in Drayton with the ability for expansion. While both Nodak and Otter Tail have made capital intensive expenditures to serve the area, neither party has convincingly demonstrated that they have made capital-intensive expenditures for the purpose of McFarland's Addition.

14. While Nodak does have three-phase service closer to Love's by merit of the nearby grain bin site, neither Nodak nor Otter Tail had an extensive system in place for the annexed territory that would constitute an unreasonable duplication of facilities and services provided in the area. The Commission concludes Otter Tail's extension does not result in unreasonable duplication.

Request for Oral Argument

15. Otter Tail had an opportunity to provide oral argument at the evidentiary hearing. The issues have been raised and briefed throughout the proceeding.

16. Drayton had the opportunity to appear during the evidentiary hearing and provide oral arguments during the evidentiary hearing. They did not appear and Mayor Charles Olson instead appeared as a witness for Otter Tail.

17. Otter Tail and Drayton did not suggest any additional evidence to supplement the record that may necessitate additional proceedings. No additional oral arguments are necessary for the purpose of the Commission's decision.

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

Order

1. Otter Tail's Motion to Dismiss is denied.

2. Nodak's Complaint is dismissed and Request for Relief is denied.
3. Otter Tail's and Drayton's Request for Oral Arguments are denied.

PUBLIC SERVICE COMMISSION



Randy Christmann
Commissioner



Julie Fedorchak
Chair

Brian Kroshus
Commissioner

7-14-2021

Dissenting Opinion – Commissioner Brian Kroshus – Case Number PU-20-356

Wasteful Duplication of Service

I dissent from today's order on case number PU-20-356, Nodak Electric Cooperative, Inc. vs. Otter Tail Power Company Complaint, because it results in unreasonable duplication of service.

The area of dispute is known as the "McFarland's Addition" located adjacent to the west corridor of Interstate 29 in Pembina County. The intended end-use customer to be served with electrical service is Love's Travel Stop, currently under construction within the area in dispute.

Love's Travel Stop initiated contact in February of 2019 with Nodak, seeking electric service from Nodak. The McFarland's Addition was subsequently annexed into the city of Drayton in August of 2019, after Nodak had already begun the process to extend service to Love's.

The Commissions responsibilities in matters like this, set forth in Section 49-03-06 of NDCC, include discouraging the wasteful duplication of services, and encouraging cooperative and harmonious interaction and operational efficiency among electric providers operating within the state.

Nodak Electric has an existing distribution facility within the McFarland's Addition, an underground single-phase distribution line. It also has in service a three-phase distribution line immediately adjacent to the west property line of the McFarland's Addition providing power to an existing customer. While Love's Travel Stop desires three-phase service, NDCC does not qualify what type of distribution line qualifies as existing infrastructure.

Nodak Electric testified that it has made previous investments in the area intended to create capacity to serve the vicinity of Drayton, based on the service area agreement between Nodak and Otter Tail, signed by both parties in 1968 and again reviewed in 1972.

Nodak's distribution line in the McFarland's Addition was upgraded in 2009, demonstrating a continued commitment to reliably serving load in proximity to the city of Drayton.

Although Otter Tail has a transmission line running parallel and within the western edge of the McFarland's Addition, a transmission line is not an economical means of providing service to end-use customers without significant investment, which would include the construction and placement of a substation, necessary to "step down" electricity, before placement of a distribution line would even be possible.

The economics do not support service from Otter Tail Power. Cost to provide service from Nodak is \$19,000, significantly less than the \$52,000 necessary for Otter Tail to provide service to the same proposed customer, an unreasonable increase of 273.1 percent.

While it was argued that the \$33,000 additional increase for Otter Tail is not a relevant amount, I disagree. Century Code does not state what unit of measurement is deemed “material,” including dollar amount. The amount is in fact material, given the significant percentage cost difference to provide service between the two electric providers involved in this case. The cost difference, when applied to the thousands of electric service extensions occurring throughout North Dakota each year, would be considerable and certainly not deemed economical by any existing standard.

Simply put, the economics clearly favor Nodak as the service provider for Love’s Travel Stop.

Further, the dollar and percentage increase for Otter Tail to serve the customer must be kept in perspective. While the amount may not be material to a larger publicly traded company such as Otter Tail, the same standard cannot be applied to a smaller member-owned, non-profit utility such as Nodak with a substantially smaller revenue base.

Service Area Agreement

While not eligible for review by the Commission and therefore not a factor in my dissent, the existing service area agreement and associated map, representing the city of Drayton and area in proximity to Drayton, executed by authorized representatives for both parties, defines agreed-upon service area territories for both Nodak and Otter Tail, respectively.

The terms of the agreement and map clearly demonstrates the McFarland’s Addition is within the designated service territory of Nodak.

Again, though not eligible for review by the Commission, that factor does not nullify the legal standing of the executed service area agreement between Nodak and Otter Tail.

Legislative Intent

I find it difficult to believe that the North Dakota Legislature, when creating North Dakota Century Code, intended for annexation of an area into an existing city within the state, to be used as a mechanism to supersede the territorial rights of a rural electric cooperative.

While the basis of my dissent is unreasonable and wasteful duplication of service, as previously defined, I also recognize the troubling precedence set forth by today’s decision.

Larger entities such as Otter Tail Power naturally become more economical with additional load growth while smaller, yet equally important rural electric utilities like Nodak, critical to serving North Dakota’s rural community, become less economical and competitive over time, negatively impacting the homes and businesses they serve and creating an uneven playing field between the two utility types.

Legislative intent supports and promotes orderly development, fair competition and harmonious interaction between electrical providers for the benefit and welfare of the citizens of North Dakota. That threshold has not been met by today’s order in Case Number PU-20-356.