

IN DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA

Nodak Electric Cooperative, Inc.,)	
Appellant,)	
)	
-vs-)	NODAK ELECTRIC’S RESPONSE
)	TO APPELLEES’ BRIEFS ON APPEAL
North Dakota Public Service Commission;)	
Otter Tail Power Company; and)	Case No. 08-2021-CV-01508
City of Drayton,)	
Appellees.)	

[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”) and the North Dakota Public Service Commission’s (hereinafter “Commission”) briefs submitted on appeal on November 23, 2021, and November 24, 2021, respectively.

LAW AND ARGUMENT

[2] Under N.D.C.C. § 28-32-42, an appeal from an administrative agency “shall be taken by serving a notice of appeal and *specifications of error* specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken.” (emphasis added). On August 13, 2021, Nodak Electric filed its notice of appeal and specifications of error. In its brief, Nodak Electric consolidated the specifications of error into three main issues, which were the same issues the Commission addressed at the hearing in this matter. Those issues are:

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 Electric?
3. If there would be a wasteful duplication of services, whether the duplication of services would be unreasonable?

[3] In its brief, Otter Tail argues that Nodak Electric applied the wrong standard of review that the trial court must adhere to on appeal because Nodak Electric used the word "erred" in setting forth the issues. In taking an appeal from an administrative agency, the appellant must set forth specifications of error, i.e. how the administrative agency "erred" in coming about its decision. Nodak Electric set forth the correct standard of review in its brief and its use of the word "erred" was proper. Otter Tail also argues that Nodak Electric is seeking to have the trial court reweigh the evidence, which Otter Tail says the trial court cannot do in any way. Yet, under N.D.C.C. § 28-32-46, the standard of review relied upon by all parties in this matter, the trial court has to determine whether the findings of fact made by the agency are supported by a preponderance of the evidence, as well as whether the findings of fact made by the agency *sufficiently address the evidence presented to the agency by the appellant*. See N.D.C.C. § 28-32-46. (emphasis added). Nodak Electric is arguing on appeal, in part, that the findings of fact made by the Commission are not supported by the preponderance of the evidence, nor do said findings sufficiently address the evidence presented to the Commission by Nodak Electric. Nodak Electric believes that the trial must review the entire record on appeal to determine whether the Commission's decision survives the scrutiny set forth in N.D.C.C. § 28-32-46.

[4] In reviewing the entire record and the applicable law in this case, the trial court will find that the Commission did not err in denying Otter Tail's motion to dismiss and its decision to do so was in accordance with the law. In its brief, the Commission agrees with Nodak Electric's position

on this issue and sets forth similar law and argument to that of Nodak Electric. Otter Tail's argument that North Dakota Supreme Court precedent affirms Nodak Electric is required to possess a franchise to serve McFarland's Addition is absurd and its reliance on Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2nd 723 (N.D. 1971) in support of this argument is misplaced. In the Divide case, 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.

[5] This case is clearly distinguishable from the Divide case as the evidence unequivocally shows that that the City of Drayton does not have an ordinance requiring a franchise to provide electrical services inside the city limits of Drayton and therefore Nodak Electric is not automatically precluded from doing so. In fact, Nodak Electric is currently providing electrical service to at least one customer within the city of limits of Drayton without a franchise and Drayton Mayor Charles Olson testified that he did not see any issue with Nodak Electric continuing to serve the load without a franchise. Interestingly, the City of Drayton has not once raised the franchise or jurisdictional issues at the time of the hearing or on appeal. While it filed a request for oral

argument on Otter Tail's motion to dismiss, the City of Drayton never filed its own motion to dismiss, nor submitted a legal brief as to these issues at any time relevant to these proceedings. Because the City of Drayton does not have an ordinance requiring a franchise, the Commission had jurisdiction to hear this matter and determine whether the provisions of N.D.C.C. §§ 49-03-01.3 and 49-03-01.4 precluded Otter Tail from extending service into McFarland's Addition. On this point, the Commission agrees with Nodak Electric.

[6] The Commission also agrees with Nodak Electric that Otter Tail is improperly relying on the Divide and Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 794 (N.D. 1974) cases to support its position on this issue as neither are persuasive, nor controlling authority on 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 made 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 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.

[7] Otter Tail continues to allege that Nodak Electric “filed this action with the Commission seeking to invalidate Otter Tail’s franchise and grant it a *de facto* franchise to serve the property in the City of Drayton.” See Otter Tail’s Brief, ¶ 28. Nowhere does the evidence or pleadings support this assertion. Nodak Electric never asked the Commission to grant it a franchise. Furthermore, Nodak Electric never asked the Commission to invalidate Otter Tail’s franchise. Rather, Nodak Electric asked that the Commission exercise its authority 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.” 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? Furthermore, there is nothing in the statute that requires that “both entities possess a valid franchise to serve therein” in order to the Commission to hear a complaint brought under Chapter 49-03 of the North Dakota Century Code. *See* Otter Tail’s Brief, ¶ 47. While there is case law that touches on this issue, such case law only mandates a franchise be had by all when there is in existence an ordinance specifically prohibiting providing electrical power within a municipality without a franchise. Again, such an ordinance does not exist for the City of Drayton and that is where this case is clearly distinguishable from the case law cited by Otter Tail in its brief.

[8] Otter Tail once again cites in its brief 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.” *See* Otter Tail’s Brief, ¶ 36. 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 was without authority to hear this matter. First, the franchise held by Otter Tail to serve the City of Drayton is not exclusive. Otter Tail has claimed repeatedly 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).

[9] Furthermore, the Commission had 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). See Dkt. #60.

[10] Otter Tail once again fails to provide compelling argument and controlling case law in support of its motion to dismiss. The Commission's decision to deny Otter Tail's motion to dismiss was supported by the evidence and in accordance with the law. Where the Commission erred is in finding that Otter Tail's extension would not interfere with existing services provided by Nodak Electric or that there would not be an unreasonable and wasteful duplication of services.

[11] In Paragraph 54 of its brief, Otter Tail references the Court's finding that "Otter Tail's proposed design and construction will not take away any existing Nodak customer and there will be no service interruptions or impacts to Nodak's existing customers" and that this is supported by uncontroverted testimony. Otter Tail has not yet begun to extend service to McFarland's Addition and therefore the testimony that was received on this finding is merely speculative. While it is true

that Otter Tail's proposed design and construction will not take away "any existing Nodak customer," it precludes Nodak Electric from extending any additional services off the single-phase line that intersects McFarland's Addition in the future. As such, the Commission's finding that "no Nodak infrastructure will be taken or impacted by Otter Tail's extension into McFarland's Addition" is not supported by the evidence. See Otter Tail's Brief, ¶ 55. The single-phase line owned by Nodak Electric in McFarland's Addition will most certainly be impacted by Otter Tail's extension due to the annexation of the property into city limits in order for Otter Tail to even be eligible to serve the load. It is also worth noting relative to these findings that the converse is also true in that Nodak Electric's proposed design and construction would not take away any existing Otter Tail customers as Otter Tail serves no customers on the southwest side of I-29, which is where McFarland's Addition is located.

[12] Furthermore, as previously argued, the Commission must look beyond just actual customers in determining whether there would be an interference with existing services and a wasteful and unreasonable duplication of services. In Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988), 186-88, the Supreme Court held that Commission must look at the existing electric facilities that each entity has in place in the area and determine whether extension of by one would constitute an unreasonable duplication of capital-intensive facilities and services already provided by the other. The District Court in that case concluded that the "PSC's interpretation of Sec. 49-03-01.3 was 'too restrictive' ... [in that it] read the language which refers to existing services as only meaning those identifiable sites which are already being served at the time that incorporation is completed by a municipality. I am of the opinion that this is too restrictive of a reading. If that were true, the last line in the paragraph would be unnecessary in its reference to

duplication of services. It is my belief that the commission must look at the *availability of services* in the area annexed and determine whether extension of NSP lines would be unnecessarily duplicating the services provided by Cass. If so, the injunction requested by Cass County should be granted since they have the right to serve in the general area involved in this proceeding. If not, and the commission determines that it is in the best interest of the general public, and the public convenience and necessity requires it, then the extension of NSP's line should be allowed and the injunction denied." *Id.* at 184. (emphasis add). Otter Tail has a transmission line in or near McFarland's Addition, but no other infrastructure immediately adjacent to the site. Otter Tail's transmission line could not feasibly serve Love's or any other consumer. Nodak Electric has both three-phase and single-phase lines throughout the area that could easily and more readily serve Love's and the surrounding area. *See generally* (Transcript of Proceedings, April 16, 2021, Testimony of Steve Breidenbach); *see also* Dkt. #51.

[13] Not only would Otter Tail's proposed extension interfere physically with Nodak Electric's facilities, but it would also interfere economically. Otter Tail wrongfully alleges in its brief that "the Commission correctly determined Otter Tail's extension will not economically interfere with Nodak Electric's future business when all its facilities will still be in place and nothing will prevent it from utilizing those facilities to provide service to future customers." *See* Otter Tail's Brief, ¶ 57. The Commission never addressed the issue of economic interference and Nodak Electric specifically raised this in its Notice of Appeal and Specifications of Error as an error made by the Commission in deciding this matter. 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. *See generally* (Transcript of Proceedings, April 16, 2021, Testimony of Steve Breidenbach and Mylo Einarson). 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. *Id.* 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. (Transcript of Proceedings, April 16, 2021, Pages 123, 138). Because of this prior investment, Nodak Electric is able to extend service at a significantly reduced cost. (Transcript of Proceedings, April 16, 2021, Pages 48-49; 147-150). While no costs of those improvements were entered into evidence, it can be implied that the extensions were significant based on the balance of the evidence that was entered. Maps showing Nodak Electric's infrastructure were entered into evidence, as was a breakdown for the cost of the line extension to Love's. Otter Tail presented no breakdown of how it reached the cost of its line extension to Love's. Otter Tail wants to rely heavily on statements made by Mylo Einarson that it is plausible that Otter Tail has also made improvements to its system. Einarson was not basing that on personal knowledge, but rather what is typical across the industry. Otter Tail provided no evidence either of its improvements and without a cost breakdown for its proposed extension, it would almost be impossible to extrapolate an overall investment in infrastructure in the area. Furthermore, in its brief, Otter Tail also refers to these "alleged improvements" as being directly adjacent to McFarland's Addition. Otter Tail fails to account that I-29 divides McFarland's Addition from the remainder of the City of Drayton. While McFarland's Addition is contiguous to the rest of the City of Drayton for the purposes of annexation, it is not immediately adjacent thereto and neither is Otter Tail's infrastructure it proposes to utilize in extending service to McFarland's Addition. Otter Tail's infrastructure is on the east side of I-29 and to bring it to McFarland's Addition requires boring under I-29. The Commission's conclusion of law

relative to Otter Tail having made capital expenditures to serve the area in and around McFarland's Addition is not supported by the facts.

[14] Two of the Commissioners also erred by concluding that investing in excess of \$52,000.00 in plant is relatively minor and not unreasonable. Commissioner Kroshus clearly disagreed with this finding/conclusion and wrote a dissenting opinion primarily on this issue. The evidence clearly shows that Otter Tail's extension is three times more than Nodak Electric's proposed extension 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. Furthermore, for Otter Tail to do so would be in violation of the service area agreement between the parties.

[15] Nodak Electric still stands by its prior contention that it can serve the load just as economically, if not more economically, than Otter Tail, which also plays into wasteful duplication. 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. *See* Dkt. #55-57, 59. Otter Tail stated in its brief that Love's did not want interruptible service. The service proposed by Nodak Electric is not interruptible service, but rather a load management program. Love's would never go without service when utilizing the load management program, but Nodak Electric never got to explain that to Love's. Rather Love's was left to rely on the clearly biased advice and faulty facts provided by Otter Tail, which also included skewed numbers for Nodak Electric's cost of service still

being relied upon by Otter Tail to this day. Nodak Electric entered exhibits into evidence, which directly contradict Otter Tail's numbers for cost of service. 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. *Id.*

[16] 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. It should not be the overall dollar amount expended on simply the extension that should control, but also the overall investment made and facilities located by each entity in the area and how each is proportionate to the other. As simply stated by Commissioner Kroshus in his dissent, "it is an unreasonable increase of 273.1 percent." If it takes three times the extension and dollars by one entity to extend service to an area already being served by another entity for the better part of 70 years, that is the very definition of wasteful and unreasonable duplication in services.

[17] Lastly, to allow Otter Tail to extend into an area that is Nodak Electric's service territory by virtue of the 1968 service area agreement between the parties is contrary to said agreement and would interfere with services provided by Nodak Electric. Otter Tail argued that N.D.C.C. § 49-03-06, which was passed in 2005, invalidates the 1968 service area agreement. While the Commission did not go as far as Otter Tail in stating the agreement is invalid, it did state that because it did not meet the prerequisites of N.D.C.C. § 49-03-06 that the agreement was not subject to Commission review. 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. The Commission acknowledged in its brief that McFarland's Addition fell within Nodak Electric's territory based on the maps that were attached to the service area agreement. The Commission also eluded that Nodak Electric may have a breach of contract dispute that it could bring separately before the Court, which Nodak Electric believes that it does. However, where Nodak Electric and the Commission continue to disagree is on whether the service area agreement is subject to the purview of the Commission. Nodak Electric believes that the Commission has the authority to consider the 1968 service area agreement, particularly in the context of whether an extension by Otter Tail would interfere with Nodak Electric's service. The City of Drayton was not required to be a party to the service area agreement because the agreement predates the statutory change in 2005. Furthermore, the statute does not mandate city approval of all service area agreements after 2005, rather it says that "a city *may* require approval..." Nodak Electric believes that the service area agreement is enforceable against the City of Drayton and Otter Tail and there is nothing in the 2005 statute that invalidates it. Furthermore, the testimony of Harlen Fuglesten relied upon by Otter Tail in its brief in support of its position relative to the enforceability of the service area agreement is not proper as it is not law. While legislative history can be useful in interpreting the meaning of the law when it is vague that does

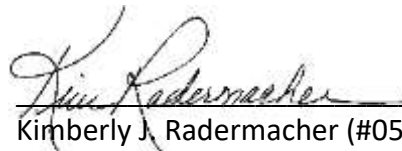
not apply here. Mr. Fuglesten appeared to be stating more of an opinion as to how things should be handled between municipalities and service providers and therefore did not want to encroach on that with the proposed language of the statute.

[18] It is evident that based on the testimony and exhibits entered at the hearing, as well as on file herein, that Otter Tail's proposed extension of service would interfere both physically and economically with Nodak Electric's services.

CONCLUSION

[19] Based on the foregoing, as well as the entire record in this matter, Nodak Electric respectfully requests that the District Court affirm the decision of the Commission to deny Otter Tail's motion to dismiss and reverse the decision of the Commission relative to the dismissal of Nodak Electric's Complaint and its relief requested therein and remand for further findings consistent with those originally presented by Commissioner Brian Kroshus.

Dated this 9th day of December, 2021.



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IN DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA

Nodak Electric Cooperative, Inc.,)
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-vs-)
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City of Drayton,)
Appellees.)

CERTIFICATE OF ELECTRONIC SERVICE

Case No. 08-2021-CV-01508

STATE OF NORTH DAKOTA)
)ss
COUNTY OF LAMOURE)

[1] I, Kimberly J. Radermacher, do hereby certify that on December 9, 2021, I served the following documents:

A. NODAK ELECTRIC'S RESPONSE TO APPELLEES' BRIEFS ON APPEAL

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

North Dakota Public Service Commission at ndpsc@nd.gov
John Hamre at jghamre@nd.gov
Brian L. Johnson at brljohanson@nd.gov
Paul Sanderson at psanderson@esattorneys.com
John M. Schuh at jschuh@nd.gov
Steven Ekman at Steven@ekman.com and office@stevenekmanlaw.com
Paul Anderson at paul@stevenekmanlaw.com

[3] 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 9th day of December, 2021.



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