

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2021-01508

Nodak Electric Cooperative, Inc.,)
)
 Appellant,)
)
 vs.)
)
 North Dakota Public Service)
 Commission, Otter Tail Power)
 Company, and City of Drayton,)
)
 Appellees, and)
 Cross-Appellants.)

**Cross-Appellee’s Response
to Cross-Appellant**

[1] The North Dakota Public Service Commission (Commission), by and through Special Assistant Attorney General Brian Johnson, submits the following response to Otter Tail Power Company’s (Otter Tail) brief submitted on November 23, 2021.

Law and Argument

[2] Otter Tail argues that the Commission’s order denying Otter Tail’s motion to dismiss was not in accordance with the law. Otter Tail asserts that the Commission lacked the authority to hear the matter and its decision invalidates the City of Drayton’s right to Franchise granted it under the North Dakota Constitution Art. VII, §11.

[3] The North Dakota Constitution Art. VII, §11 states 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.

[4] At no point has the Commission stated that the City of Drayton does not have the right to exercise its Constitutional franchise, nor does it decision interfere with Drayton’s

right to franchise. What is important is that the facts of this case deal with the annexation of an area that has facilities of a rural electric cooperative within the area that existed at the time of annexation.

[5] N.D.C.C. §49-03-01.3 states:

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity. 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.

[6] Otter Tail correctly states that the North Dakota Public Service Commission is a State Agency, and its power is granted to it by the North Dakota Legislature. Env't. Law & Policy Ctr. v. N. Dakota Pub. Serv. Comm'n, 2020 ND 192, ¶ 11, 948 N.W.2d 838, and also City of Grafton. The Commission is prohibited from acting in any field in which the Legislature has not authorized it to enter. City of Grafton, 86 N.W.2d at 202.

[7] It is clearly stated in N.D.C.C. §49-03-01.3 that Otter Tail is not required to obtain an order or certificate for the extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations. Otter Tail has a current Certificate of Public Convenience and Necessity and lawfully operates in the city of Drayton. Index 60. However, N.D.C.C. §49-03-01.3 continues and states “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.” Otter Tail and Drayton are free to enter a franchise and the McFarland’s addition is now part of the city of Drayton. Also, Otter Tail is free to extend its electric distribution lines, but the Legislature has clearly stated the Commission has the authority to ensure that the extension does not interfere with a rural electric cooperative or another electric public utility or create unreasonable duplication. So even though Otter Tail holds a franchise with the city of Drayton the Commission can prevent an extension if there is interference or unreasonable duplication of services.

[8] The city of Drayton does not have an ordinance requiring a franchise to serve within the city limits of Drayton. Existing case law in Montana-Dakota Utilities Co. v. Divide County School District, 193 N.W. 2d. 723 (N.D.1971), Cass County Elec. Coop. v. N.S.P., 419 NW.2d 181 (N.D. 1988), and Cap. Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788, deals with facts where there is an ordinance to have a franchise, or where both utilities possessed a franchise. Otter Tail’s argument that the Commission’s denial of their motion to dismiss would be more persuasive if there was an ordinance requiring a franchise to serve within the city limits of Drayton. If Drayton did have such an ordinance, we would have facts similar to Montana-Dakota Utilities Co. v. Divide County School District, 193 N.W. 2d. 723 (N.D.1971). However, that is not the facts we are dealing with here.

[9] In this case we have Drayton who does not require a franchise but has granted a franchise to Otter Tail. In all the cases cited above, a requirement to hold a franchise to serve existed. Otter Tail states a franchise is required to serve but no ordinance exists that states this fact. Otter Tail relies heavily on Divide and the decision that the rural

electric coop could not continue to serve without a franchise. *Id.* at 730. This was based on Crosby's ordinance requiring a franchise. Simply put because there is no requirement for a franchise to serve within the City of Drayton, either Otter Tail or Nodak could serve within the city. Otter Tail cites to Tri-County Elec. Co-op, Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974). This case is very different in that it is a traditional Territory Integrity Act case and was not followed in Cass. 419 NW.2d 181 (N.D. 1988). Cass states that in Tri County Electric there was no indication that the Court believed the annexed area could remain the exclusive service area of the cooperative, and that cooperatives are not statutorily precluded from serving new customers in the annexed area. *Id.* at 187.

[10] While the Commission can provide its interpretation the commission is not the appropriate forum to determine a constitutional question and it should be addressed to the courts. Johnson v. Elkin, 263 N.W.2d 123, 126 (N.D. 1978).

[11] The commission has the authority to hear this case. N.D.C.C. §49-03-01.4 allows the commission to hear Nodak's complaint because Nodak alleged interference or threat of interference. Anytime an extension of a public utility interferes or threatens to interfere with the service or system of any other public utility or rural electric cooperative the commission has the authority to receive the complaint and after complaint, notice, and hearing issue its order.

[12] Nodak issued its complaint to the commission and the received the complaint, issued notice and held the hearing. Index 8-9. After the hearing the commission found no merit to the complaint. Nodak did not meet the burden of showing Otter Tail's

extension either interfered with current services or system or created unreasonable interference.

[13] The Commission agrees with Otter Tail that on appeal the Court is limited to whether the Commission conclusion of law and findings of facts are supported by the preponderance of the record. Cross Appellant Brief and Response Brief of Otter Tail Power Company pg. 11 ¶29. The Court's role isn't to substitute judgement but rather is the Commission's decision in accordance with the evidence from the record. In reviewing an agency's findings of fact, the court should not substitute its judgment for that of the agency or make independent findings. Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Certificates of public convenience and necessity have been recognized by the courts as subject matter that is entitled to appreciable deference and an area of "expertise of the PSC and its staff of engineers, accountants, and [utility] specialists." Johnson v. Elkin, 262 N.W.2d 123, 130 (N.D. 1978); see also Cap. Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n, 2016 ND 73, ¶ 6, 866 N.W.2d 304 and Cass Cty. Elec. Coop., Inc. v. N. States Power Co., 518 N.W.2d 216, 220 (N.D. 1994). As an area of agency expertise, the court does "not reweigh or reevaluate the evidence . . . [or] function as a super board and second guess the [Commission's] findings." Capital Elec. Coop., 2007 ND 128, ¶ 31, 736 N.W.2d 788.

[14] The Commission's decision on interference and unreasonable duplication is supported by the record.

[15] Regarding interference, neither Nodak nor Otter Tail has any customers that existed at the time of annexation. Cass is clear in that the Commission must look at more than just the existing customers. 419 N.W.2d 181 (N.D. 1988). The commission

did look at the availability of services of both Nodak and Otter Tail power. The facts show Nodak has three phase three hundred and fifty feet from the Love's location. Otter Tail has three phase located about 1000 feet from the Love's location. Neither the transmission line of Otter Tail nor the single-phase line of Nodak are suitable to serve the customers needs economically. This leaves extending existing 3 phase power by both parties. Nodak and Otter Tail's proposed extension create no physical interference with the others system, and no current customers exist. This leaves only economic interference.

[16] Otter Tail addresses Nodak's contention that Otter Tail interferes with its future potential customers and economic development. Cross Appellant Brief and Response Brief of Otter Tail Power Company pg. 25 ¶57. However, Nodak did not produce any evidence of long-range plans to develop service to the McFarland's addition. This was heavily contemplated in Cass. Id. at 344.

[17] The Commission and Otter Tail both correctly assert that there is no economic interference. Cross Appellant Brief and Response Brief of Otter Tail Power Company pg. 25 ¶57. There is nothing in the record that supports Nodak's claim of economic interference only that Nodak feels that the McFarland addition is an area that they could have developed in the future. Nodak did not introduce any evidence that it had made investments to serve future customers in the McFarland addition. Nodak asserts serving customers near the McFarland's addition equates to economic investment in the area. The Commission cannot assume facts not entered into the record. The Commission's conclusion of no interference was supported by a preponderance of the evidence, and this Court must affirm the Commission's order on this issue.

[18] On the issue of unreasonable duplication the Commission agrees with Otter Tail that there is no unreasonable duplication. Cross Appellant Brief and Response Brief of Otter Tail Power Company pg. 27 ¶60. The record and case law support the Commission's conclusion that Otter Tail's extension does not amount to unreasonable duplication.

[19] In determining that Otter Tail's extension is not unreasonable the Commission looked at the length and cost of both parties' extension. Nodak would extend 3 phase service 350 feet at an approximate cost of \$19,035.50, and Otter Tail's extension would extend 3 phase service 1000 feet at an approximate cost of \$52,000. It is obvious that there is a cost difference and Otter Tail's extension is longer and costs more. But the standard is unreasonable duplication.

[20] Otter Tail cites to Capital Electric on page 28 ¶63 of its brief where the coop was granted the right to serve despite their cost for extension being higher than that of the Utility. 2016 ND 73, at ¶3. The public utility's cost was \$513,669.84 for extension and the coop's cost for extension was \$575,883.84. So cost alone is not the deciding factor in determining unreasonable duplication. In Northern States Power Co., 452 N.W.2d 340, upon remand and rehearing the commission found that there would be an unreasonable duplication of capital-intensive investment based on filings by Cass:

The exhibits demonstrated that Cass had constructed 35.29 circuit miles of electrical lines, 13 line switches, and 263 transformers in the territory. The testimony also indicated that Cass had spent well over two million dollars in the construction of facilities to serve the entire annexation, that Cass was supplying electric service to a number of accounts throughout the annexed area, and that NSP had supplied no electric service in the annexed territory prior to the time it extended its lines into South Pointe in October of 1986.

Id. at 344

[21] In Northern States Power Co., it is clear that a capital investment was made and demonstrated in the record. Since cost alone is not the only factor the Commission also looked at existing infrastructure in the area. Id. In the case at hand there is a minor cost difference and no other capital investment that is supported by the record. Nodak failed to meet the standard of unreasonable duplication was not met. Stopping all duplication is not always possible. In Northern States Power Co., the North Dakota Supreme court states, "Thus, in light of the current regulatory situation, it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems." Id. at 344.

Conclusion

[22] In conclusion the commission's order is in accordance with the law and correctly denied Otter Tail's motion to dismiss, found that Otter Tail's extension does not interfere with Nodak's system or services, that Otter Tail's extension does not amount to unreasonable duplication, and the commission does not have the authority to interpret the 1968 service agreement. The commission asks the District Court to affirm its decision.



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DECLARATION OF SERVICE

STATE OF NORTH DAKOTA)
) ss
 COUNTY OF BURLEIGH)

I hereby declare that I am of legal age and not a party to the above-entitled matter. On December 22, 2021 the following documents:

Cross-Appellee’s Response to Cross-Appellant

were filed/served electronically with the Clerk of Court through Odyssey File and Serve system and a Service Notification e-mail will be sent to the following:

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