

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2021-CV-01508

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

**CITY OF DRAYTON'S RESPONSE BRIEF
 IN SUPPORT OF OTTER TAIL POWER
 COMPANY'S CROSS-APPEAL**

The City of Drayton, by and through its counsel of record, submits the following Response Brief in support of Otter Tail Power Company's Cross-Appeal.

STATEMENT OF FACTS

The City of Drayton granted Otter Tail Power Company ("Otter Tail") a franchise to provide electric services within city limits. Index # 60. Otter Tail is the only entity authorized by City franchise to provide electric service within the City of Drayton. Id. The City of Drayton has not granted any franchise to Nodak Electric Cooperative ("Nodak") to provide electric service within the City.

The property at issue in the present case is referred to as McFarland's Addition. On August 12, 2019, the City of Drayton annexed McFarland's Addition into the City. Index # 61. The McFarland's Addition plat was filed by the City of Drayton with the Pembina County Recorder on August 19, 2019. Id.

With the annexation of McFarland's Addition, the City of Drayton passed a Resolution expressly authorizing Otter Tail to provide all electric services to McFarland's Addition in

accordance with its franchise from the City. Index # 62. Id. Specifically, the Resolution provided in part: “Otter Tail Power Company’s franchise to provide electrical services within the City of Drayton in accordance to Ordinance 51, be extended without ambiguity to McFarland’s Addition.” Id.

On July 21, 2020, Nodak filed a Complaint with the North Dakota Public Service Commission (“Commission”) requesting it order Otter Tail to refrain from providing electric service to McFarland’s Addition and permit Nodak to provide electric service to the property. Index # 8. On December 4, 2020, the City of Drayton filed its Petition to Intervene asserting only the City has the authority, not the Commission, to determine which utility company provides electric services to McFarland’s Addition in the City of Drayton. Index # 26. Otter Tail filed a Motion to Dismiss Nodak’s Complaint asserting the Commission lacks jurisdiction over Nodak’s Complaint because North Dakota’s Constitution grants the City of Drayton the exclusive authority to grant a utility franchise in its boundaries. Index # 34. The Commission denied Otter Tail’s Motion to Dismiss. Index # 82.

Otter Tail filed a cross-appeal in the present action asserting the Commission’s Order denying Otter Tail’s Motion to Dismiss is not in accordance with the law. The City of Drayton submits the following Response Brief in support of Otter Tail’s cross-appeal because the Commission lacks jurisdiction to determine which service provider is permitted to provide electric service to McFarland’s Addition in the City of Drayton.

LAW AND ARGUMENT

The City of Drayton intervened in this action because it challenges the City’s constitutional right to franchise utility service providers. The North Dakota Constitution unequivocally gives all cities, including the City of Drayton, sole authority to franchise the

operation of public utilities in its boundaries. The City of Drayton has exercised its franchise rights regarding the electric service provider for McFarland's Addition and the Commission did not have the authority to interfere with the City of Drayton's exercise of that right. Accordingly, the Commission's Order denying Otter Tail's Motion to Dismiss was not in accordance with the law.

The North Dakota Constitution provides cities with the sole authority to franchise the operation of public utilities in city boundaries:

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.

N.D. Const. Art. VII, § 11. Pursuant to the plain language of the Constitution, a municipality has the unabridged right to decide who provides utilities within its boundaries. Id. The Legislative Assembly is without authority to interfere with that right. Id.

Additionally, North Dakota Century Code § 40-05-01(57) authorizes a municipality to grant franchises:

The governing body of a municipality shall have the power:

Franchises. 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.

Thus, North Dakota statutory law also provides municipalities with the sole discretion to determine who provides electricity within its boundaries via its franchise authority.

In this case, the Commission concluded it has regulatory authority to determine which electric service provider should provide service to McFarland's Addition in the City of Drayton. However, the Commission is a regulatory body created by statute. See N.D.C.C. Title 49. The Commission's power to regulate is wholly derived from the authority granted by the Legislative

Assembly. Envtl. Law and Policy v. N. Dakota Pub. Serv. Comm'n, 2021 N.D. 192, ¶ 11, 948 N.W.2d 838. Further, there is no provision in the North Dakota Century Code authorizing the Commission to interfere with or regulate a municipality's decision to grant a utility franchise. Both the State Constitution and the Century Code place that exclusive authority in the hands of a municipality. See N.D. Const. Art. VII, § 11; and N.D.C.C. § 40-50-01(57). The Commission has no jurisdiction or legal authority to determine which entity is permitted to provide electric services in the City of Drayton. That decision is exclusively the City's exercised through its franchise authority.

The Commission erroneously determined that it has jurisdiction to regulate which utility provides services in McFarland's Addition. Index # 82. According to the Commission, their purported authority is derived from N.D.C.C. § 49-03-01.3. Id. However, in the same Chapter the Commission claims grants it authority to regulate the City of Drayton's franchises, the North Dakota Legislature expressly prohibited the Commission from interfering with a municipality's franchise authority:

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.

See N.D.C.C. § 49-03-06(8). Therefore, applying Art. VII, § 11, of North Dakota's Constitution, and Section 49-03-06(8), N.D.C.C., the Commission does not have the legal authority it claims to regulate a municipality's franchise. The Commission's conclusion that it has authority to regulate the City of Drayton's franchise under N.D.C.C. § 49-03-01.3 fails because it would be in direct conflict with North Dakota's Constitution and Century Code.

The City of Drayton authorized Otter Tail as its sole electric services provider pursuant to its franchise authority. Otter Tail is the only electric services provider with a franchise in the

City of Drayton. The City of Drayton expressed its clear intent that Otter Tail is to provide electric services to McFarland's Addition. The City's Resolution eliminates any doubt as to who possesses the sole franchise to provide electric services to McFarland's Addition, or any other place within city limits. The Commission has no legal authority to abridge the City's decision.

CONCLUSION

The North Dakota Constitution bestows on the City of Drayton the exclusive authority to grant a franchise to utility providers. See N.D. Const. Art. VII, § 11. There is no in North Dakota which grants the Commission the legal authority to abridge the City of Drayton's exclusive franchise authority. Therefore, the Commission had no jurisdiction over Nodak's Complaint and it should have dismissed. For the foregoing reasons, the City of Drayton respectfully requests the Court reverse the Commission's Order and grant Otter Tail's Motion to Dismiss.

Dated this ___ day of 12/22/2021.

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