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STATE OF NORTH DAKOTA

IN THE
SUPREME COURT OF NORTH DAKOTA

SUPREME COURT NUMBER 20220122
BURLEIGH COUNTY CASE NUMBER 08-2021-CV-01508
PSC CASE NUMBER PU-20-356

NODAK ELECTRIC COOPERATIVE, INC.,
APPELLANT/CROSS-APPELLEE

v.

OTTER TAIL POWER COMPANY,
APPELLEE/CROSS-APPELLANT,
NORTH DAKOTA PUBLIC SERVICE COMMISSION
AND THE CITY OF DRAYTON,
APPELLEES

ON APPEAL FROM THE ORDER AFFIRMING PUBLIC SERVICE COMMISSION ORDER DATED MARCH 2, 2022, AND JUDGMENT DATED MARCH 3, 2022, THE HONORABLE DOUGLAS BAHR, DISTRICT COURT JUDGE, PRESIDING

ORAL ARGUMENT REQUESTED

REPLY BRIEF FOR APPELLANT, NODAK ELECTRIC COOPERATIVE, INC.

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TABLE OF CONTENTS

Page Number, Paragraph Number

TABLE OF AUTHORITIES

Cases

Statutes

LAW AND ARGUMENT

I. The District Court erred in affirming the Commission's findings that there would not be interference by Otter Tail with Nodak Electric's existing services and/or that such findings were supported by a preponderance of the evidence.

[¶1] In its brief, the Commission alleges that that Otter Tail's design and construction will not take away any existing Nodak customers and that there will be no service interruptions or impacts to Nodak's existing customers. Moreover, the Commission alleges that no Nodak infrastructure will be taken or impacted by Otter Tail's extension into McFarland's Addition. (Brief of Commission, page 10, ¶¶ 37-38). While the proposed service does not anticipate taking away existing Nodak customers, it will most certainly impact the ability of Nodak Electric to acquire and serve additional customers in the area. Furthermore, Otter Tail hadn't even extended into the area of McFarland's Addition at the time of the hearing. Neither the Commission nor Otter Tail can say with any certainty that there were will not be any service interruptions or impacts to Nodak Electric's existing customers. It is clear, however, that Nodak Electric's current infrastructure will be affected by Otter Tail's extension to McFarland's Addition as Nodak Electric currently has a single-phase line located within McFarland's Addition.

[¶2] The Commission also alleges in its brief that Nodak Electric only provided a generic statement that future development was part of its long-term plans, but that is not supported by other evidence. Yet, somehow the Commission was able to conclude that Otter Tail has also made investments in infrastructure where they would extend service to Loves. There is absolutely no evidence in the record that Otter Tail has made any investments in infrastructure anywhere near where the proposed Love's station will

be located. Both witnesses for Nodak Electric testified that Nodak Electric has made improvements to its system in contemplation of future growth along the I-94 corridor. They indicated that Nodak Electric upgraded its system in 2009 by converting its overhead line to underground. It also extended its three-phase service in the area. Otter Tail made absolutely no mention of its investments in the area during its case in chief. Rather, both the Commission and Otter Tail use a vague statement by Mylo Einarson, Nodak Electric's manager, that Otter Tail likely made investment in the area. How is it that Mylo Einarson, who does not work for Otter Tail, can provide sufficient evidence by the Commission's standards to support Otter Tail's alleged investment in the area, but yet somehow can't provide sufficient evidence to support Nodak Electric's investment in the area? Such a position is absurd and it is evident that the Commission was grasping at straws to support its findings and conclusions on this issue.

II. The District Court erred in affirming the Commission's findings that there was not unreasonable duplication of services and/or that such findings were supported by a preponderance of the evidence.

[¶3] In Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181, 186-88 (N.D. 1988), this Court held that "the PSC must look at the existing electric facilities [and not just customers] that the rural electric cooperative and the public utility have in place in the area and determine whether the extension of services into the area would constitute an unreasonable duplication of capital-intensive facilities and services provided by the other entity…Under the PSC's analysis, it would have no authority to act, regardless of the amount of duplication in investments and electric facilities in an annexed area, unless NSP attempted to serve a customer already being

served by Cass, and under that rationale, NSP could extend its services to areas as small as city lots without creating an unreasonable duplication of services under the statute. We do not believe this was intended by the Legislature when it enacted the Territorial Integrity Act." *Id.* This Court ultimately remanded that case back to the PSC "for a determination of whether or not NSP's extension interferes with and would constitute an *unreasonable duplication of investment and available facilities and services* provided by Cass." (emphasis added). *Id.* at 188.

[¶4] Otter Tail argues that wasteful duplication is no way synonymous with unreasonable duplication, yet this Court has used the phrases interchangeably in cases involving Territorial Integrity Act disputes, regardless of whether such a dispute requires a certificate of public convenience or necessity or is a complaint originating under N.D.C.C. § 49-03-01.3. As such, Nodak Electric stands by its argument relative to this issue and the case law cited by it in its principal brief to support its argument. Otter Tail and the Commission contend that the relatively small dollar amounts required to extend service in this case automatically preclude a finding of unreasonable duplication. Nowhere in case law or statute is there a magical formula that dictates what exactly constitutes unreasonable or wasteful duplication of services. This Court has declined to limit the scope of this inquiry to just consumers or members being served in the area and has directed the Commission to look at overall investment, as well as available facilities and services provided by each electrical provider. Otter Tail claims that Nodak Electric failed at the hearing to provide any evidence to support the prior investments it made in the area. But then goes on to state that Otter Tail has made similar investments

in the area and such is supported by the evidence. As stated previously, this is absurd and simply untrue. Furthermore, Nodak Electric has three phase service within 350 feet of the Love's proposed substation site that can be easily accessed at minimal cost to extend service to the site. Otter Tail presented no evidence of its prior investment in the area and it can be surmised that it hasn't made any investment in the area of McFarland's Addition based on its lack of infrastructure on the west of I-29. Prior to the annexation of McFarland's Addition into the city limits of Drayton, the city limits of Drayton did not extend to the west side of I-29. Absent the annexation, Otter Tail could not have served any customers on the west side of I-29 without first obtaining a certificate of public convenience and necessity from the Commission. Due to its lack of infrastructure on the west side of I-29, Otter Tail would need to access three phase service on the east side of I-29, which would require boring under I-29 and having to lay approximately 1,000 feet of line at an approximate cost of $52,000.00. While it is not uncommon for utility companies to bore under an interstate highway to extend service, it is clearly much more extensive than trenching under a gravel county road. While Otter Tail and the Commission think that investing in excess of $52,000.00 in plant is relatively minor and not unreasonable, it is three times more than Nodak Electric's proposed extension and it is not a logical extension of Otter Tail's services. The reasons Nodak Electric believes it is not a logical extension is because Otter Tail has no customers southwest of I-29 and it would require boring under I-29 to even provide service just to Love's. 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. This

Court stated In Capital Electric Cooperative, Inc. v. North Dakota Public Service Commission, 2016 ND 73, ¶ 15, 877 N.W.2d 304 (N.D. 2016), "construction of additional infrastructure by one party to service a single customer when the opposing party has existing infrastructure in place that services multiple existing customers, and that can be easily modified or upgraded to provide service, can be a wasteful duplication of services." Such is the case here.

III. The District Court erred in concluding that the 1968 service area agreement between Nodak Electric and Otter Tail was subject to the provisions of N.D.C.C. § 49-03-06 and further concluding that "the service area agreement was not 'valid and enforceable' by the Commission under 49-03-06(6)."

[¶5] N.D.C.C. § 49-03-06, which was passed in 2005, essentially gives the Commission governance and jurisdiction over service area agreements between electric providers. In order for the Commission to have jurisdiction to mediate disputes arising under a service area agreement, the conditions set forth under N.D.C.C. § 49-03-06 must be followed. There is nothing set forth in the legislative history or in case law that the statute was intended to apply retroactively to already existing service area agreements, nor is there any indication that such agreements are not "valid and enforceable" because they were not subsequently filed with the Commission in accordance with the statute. The City of Drayton is not required to consent to the service area agreement under the statute as alleged by the parties. Rather, under the statute, a city *may* require approval or disapproval of a service area agreement. (emphasis added). However, Nodak Electric contends that this condition applied only to any service area agreements arising after the enactment of the statute in 2005. Worth noting is that at the time the service area agreement was entered in 1968, McFarland's Addition was not in existence

or within the city limits of the City of Drayton and therefore the City of Drayton would have had no authority to approve or disapprove the agreement.

IV. The District Court did not err in affirming the PSC's decision in denying Otter Tail Power Company's Motion to Dismiss.

[¶6] The arguments of Otter Tail, the North Dakota League of Cities and the City of Drayton in support of their positions on this issue are flawed. All of them argue that the City of Drayton requires a franchise in order to provide electrical service within the city limits of Drayton. That is simply untrue. While the City of Drayton may have exercised its authority to grant a franchise to Otter Tail, that franchise is not exclusive, nor can it be under the law. Under N.D.C.C. § 40-05-01(57), municipalities 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 (emphasis added). The League of Cities contends this statute "grants cities the ability to enter into franchise agreements to only allow companies with franchise agreements to operate in the city." (Brief of Amicas Curiae, page 5, ¶3). The statute grants the power, but it is up to the cities on how to exercise that power and determine whether a franchise is even required to provide such service inside of city limits. In this case, the City of Drayton has exercised its right to grant a franchise to Otter Tail, but it does not have in place an ordinance that requires a franchise to provide electrical service inside of city limits and it cannot be inferred by statute or other city ordinances that such a requirement exists.

Furthermore, simply granting a franchise to one electrical provider does not automatically preclude service by another provider or confer a requirement that a franchise be required to provide electrical service, absent an ordinance or other provisions that state otherwise. If such were the case, this Court would not have needed to take the time to meticulously delineate in similar cases whether one or both of the investor-owned utility and the rural electric cooperative respectively held franchises and when the rural electric cooperative did not possess a franchise, whether the city had the applicable preclusion ordinance in place. In the case, Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2nd 723 (N.D. 1971), which is so heavily relied upon by Otter Tail and the League of Cities in support of their position, such a delineation is made. In that case, the City of Crosby passed an ordinance 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, this 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. Otter Tail argues that "a preclusion ordinance is superfluous under the Constitution's franchise framework…to require a preclusion ordinance by a city to

prevent statute-based Commission jurisdiction over the franchise decision would make abridging automatically unless a second action is taken by a city to preclude it." (Brief of Otter Tail, page 18, ¶36). It is clear that in the Divide case, the City of Crosby specifically took that second step to require a franchise to provide electrical services within city limits. It is clear that the City of Bismarck took that step in Capital Electric Cooperative, Inc., v. City of Bismarck, 2007 ND 128; 736 N.W.2d 788 (N.D. 2007). In this case, the City of Drayton did not.

[¶7] Second, the same parties allege in their briefs that Nodak Electric was seeking to have the Commission grant it a franchise or "de facto" franchise. A review of Nodak Electric's pleadings submitted in these matters would disclose that Nodak Electric has never once asked the Commission to grant it a franchise to provide electrical service inside the city limits of Drayton. Rather, Nodak Electric is exercising its rights available to it under Chapter 49-03 of the North Dakota Century Code. Nowhere in said chapter is a requirement that the rural electric cooperative has to have a franchise in order to invoke the remedies provided for therein. Rather it simply requires that the rural electrical cooperative have existing services within the municipality. As previously argued by Nodak Electric, this does not relate merely to customers, but also to infrastructure. Nodak Electric currently has infrastructure in McFarland's Addition that existed well before the property was platted and annexed into the City of Drayton. Currently, Otter Tail has no infrastructure located in McFarland's Addition. Nodak Electric alleges that Otter Tail extending service will interfere with the services Nodak Electric has in the area and as a result filed a complaint with the Commission. If a

municipality could simply overrule the Commission's authority conferred to it under these provisions by granting a franchise to one electrical provider over another, regardless of unreasonable duplication and interference by one, the statutes would serve no purpose.

CONCLUSION

[¶8] Based on the foregoing, as well as the entire record in this matter, Nodak Electric respectfully requests that this Court reverse the decision of the Commission and District Court relative to the dismissal of Nodak Electric's Complaint and remand for further proceedings. Nodak Electric asks that this Court affirm the decision of the Commission and District Court denying Otter Tail's Motion to Dismiss. Lastly, Nodak Electric asks that this Court clarify the issue relative to the applicability of N.D.C.C. § 49-03-06 to pre-2005 service area agreements.

CERTIFICATE OF COMPLIANCE

[¶9] The undersigned, as attorney for the Appellant Nodak Electric Cooperative, Inc. in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 12 pages.

Respectfully submitted at Edgeley, ND, this 15th day of September, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Nodak Electric Cooperative, Inc., Appellant/Cross Appellee,	)	
	)	**CERTIFICATE OF ELECTRONIC SERVICE**
-vs-	)	
	)	
Otter Tail Power Company, Appellee/Cross Appellant; And North Dakota Public Service Commission, and City of Drayton, Appellees.	)	Supreme Court File: 20220122 District Court File: 08-2021-CV-01508

STATE OF NORTH DAKOTA)
)ss
COUNTY OF LAMOURE)

[1] I, Kimberly J. Radermacher, do hereby certify that on September 15, 2022, I served the following documents:

REPLY BRIEF FOR APPELLANT, NODAK ELECTRIC COOPERATIVE, INC.

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

North Dakota Public Service Commission at ndpsc@nd.gov
Brian L. Johnson at brljohnson@nd.gov
Paul Sanderson at psanderson@esattorneys.com
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[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 15th day of September, 2022.

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