

**MINNESOTA PUBLIC UTILITIES COMMISSION**

Nancy Lange	Chair
Daniel Lipschultz	Commissioner
Matthew Schuenger	Commissioner
Katie Sieben	Commissioner
John Tuma	Commissioner

Docket No. E129,324/SA-17-141

In Matter of North Star Electric  
Cooperative, Inc.  
and Warroad Municipal  
Light & Power Department

**VERIFIED INITIAL COMMENTS OF THE  
CITY OF WARROAD**

**SYNOPSIS**

Two non-regulated utilities – the Warroad Municipal Light & Power Department of the City of Warroad (the “City”), a municipal utility, and North Star Electric Cooperative, Inc. (“North Star”), a rural electric cooperative utility – reached a settlement agreement in September of 2013 that adjusted their electric service territory boundaries. The Minnesota Public Utilities Commission (the “Commission”), as the keeper of the official service territory map, should update the official map to reflect this change in boundaries. Although a customer has intervened, the customer presented no challenge to the updating of the map, and the Commission should do so.

The customer has instead raised concerns about the nature of its electric rates, which falls outside of the jurisdiction of the Commission and, by statute, remains the jurisdiction of the City as a municipal utility. Accordingly, the Commission should decline to determine these issues.

## FACTS

This docket commenced by the February 15, 2017 filing of North Star “request[ing] the Commission [to] update its official records as to the electric service territory boundaries.” Petition at 1. The filing enclosed the September 9, 2013 Service Territory Agreement (the “2013 Agreement”) reflecting the change in boundaries.<sup>1</sup> The City submits that the Commission need only implement this boundary change. Nonetheless, in the interest of time and in responding to anticipated other filings, the City provides further background information.

The City had long provided electric service to a Seven Clans casino associated with the Red Lake Band of Chippewa Indians (“Red Lake”) and located within the City’s assigned service territory and within the physical area of the city limits. Red Lake informally contacted the City in early 2011, and later by letter, seeking City services for a proposed new casino located outside of the then-existing city limits. A letter from Red Lake Chairman Floyd Jourdain, Jr. dated July 31, 2012, explained that Red Lake wanted the City to provide water, sewer, and electric services to the new casino. See Exhibit 1. The letter noted “infrastructure needs” and working closely with the City on pre-construction and design work. *Id.* The letter also identified Raymond Brenny, the CEO of Red Lake Gambling Inc., as the “point of contact” for the project. *Id.*

Thereafter, Mr. Brenny contacted the City to continue discussions about water, sewer, and electric service. The City clarified that utility services could not be provided

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<sup>1</sup> The City Attorney’s office had previously requested a change in the official maps through an email dated September 24, 2013. The email was directed to [consumerpuc@state.mn.us](mailto:consumerpuc@state.mn.us), and asked whether additional information should be provided, or if the request should be directed to a different address. The City did not receive any response to this email.

outside of the city limits, and that the City could not provide electric service outside of its assigned service territory. On November 6, 2012, Red Lake submitted a Petition for Annexation, by Red Lake Gambling Enterprises, Inc, and signed by Mr. Brenny, as CEO. The annexation request concerned over 160 acres. The City and Lake Township ultimately entered an Orderly Annexation Agreement, which was approved on April 22, 2013.

In light of the petition for annexation and the request for City utility services by Red Lake, the City began negotiating with North Star to transfer the electric service territory associated with the annexation area outside of the City's assigned service territory. As directed by Red Lake, the City also worked with Mr. Brenny, providing regular updates. During the negotiations with North Star, the City repeatedly communicated with Mr. Brenny the City's expectation that Red Lake (or any ultimate customers, if other than Red Lake) would be responsible for any payments made to North Star to achieve this transfer. Mr. Brenny indicated his agreement. The City requested input from Red Lake as to the preferred payment terms.

The City and North Star ultimately entered the 2013 Agreement. (Feb. 15, 2017 filing). The 2013 Agreement was the result of arms-length negotiations, with each party represented by counsel. It stated that "the Parties have negotiated a mutual settlement and wish to avoid litigation regarding compensation for such electric service territory matters related to the Annexed Area . . . ." *Id.*, at 1. The 2013 Agreement also specified a one-time, lump-sum payment of \$600,000 as consideration for the transfer of service territory. *Id.*, Section 2.1. The City made the payment to North Star within 60 days of the effective date.

Red Lake constructed the new casino and it opened for business on or about mid-October of 2014. Only as the City sought to recover its costs and implement payment terms with Red Lake did Red Lake express concern and its position that it was not aware of the City's requirements. Mr. Brenny no longer works on behalf of Red Lake. Since October 21, 2015, the City has included in its billing statements a fee of one-and one-half cents (\$0.015) or 15 mills per kilowatt hour of electric energy used in the transfer area. This rate applies to any service in the transferred area based upon usage. In this particular situation, the entire area that was annexed is owned by one entity; as additional customers locate within the area, the rate will be spread over all applicable customers.

The City is a non-profit entity and is not seeking to make any return or profit. The City electric rates are set on a cost-of-service basis. The City has sought to recover its costs due to the request to provide services and the associated change in boundaries. Even so, the City will not fully recoup these costs. It will begin to recover these costs many years after the City's up-front payment to North Star. That initial payment precludes the City's use of those funds for other projects or purposes to benefit its electric customer base. The City's policy decision to impose a 15 mill/kWh fee links the rate to the parties benefited. Otherwise, the City's remaining customers would be in a position of subsidizing the annexed area customer(s). Under the discretion granted to municipal utilities, the City was authorized to consider how to implement its rates, considering the cost of service, the City's resources, and the interests of all of its customers.

## ARGUMENT

### **I. THE COMMISSION SHOULD UPDATE THE ELECTRIC SERVICE TERRITORY MAPS TO REFLECT THE UTILITIES' AGREEMENT.**

The primary issue in this matter is the need to adjust the electric service territory boundaries and update the official map to reflect a change in boundaries from August 2013. The Commission was directed by statute to “establish the assigned service areas of each electric utility and shall prepare or cause to be prepared a map or maps to accurately and clearly show the boundaries of the assigned service area of each electric utility.” Minn. Stat. 216B.39, subd. 2 (2016). In 2014, the Commission adopted a digital map of the assigned electric service territories. *In re Matter of Establishing Digital Service Area Maps*, No. E-999/CI-12-957, at 2 (April 9, 2014) (“[T]he Commission adopts the EUSA digital map developed by MnGeo as the official service territory boundary map required under Minn. Stat. § 216B.39, without prejudice to any utility.”). In that same order, the Commission noted that “service boundaries are constantly changing” and ordered that “[a]ll electric utilities must hereafter file any service territory boundary change with the Commission for its approval.” *Id.* at 2.

Updating the official service territory maps in response to a request by utilities is quite different from another potential role of the Commission – determining the terms of compensation. As provided by statute, municipal utilities may acquire service territory upon payment of appropriate compensation. Minn. Stat. § 216B.44(b) (2016) (“The municipality acquiring the facilities shall pay to the electric utility formerly serving the area the appropriate value of its properties within the area . . . giving due consideration to revenue from and value of the respective properties); see *also* Minn. Stat. § 216B.45 (2016) (upon notice by a utility that “the parties . . . have been unable to agree on the

amount to be paid . . . . the commission shall, by order, determine the just compensation).

Minnesota statutes distinguish between (1) a request for the Commission to update the official maps, and (2) a request for the Commission to determine compensation because the utilities are unable to reach agreement. Minn. Stat. § 216B.44(b). Under Section 216B.44, only if the utilities are unable to agree, and one utility files a petition with the Commission requesting a determination, does the Commission decide compensation terms: “In the event the municipality and the electric utility involved are unable to agree as to the terms of the payment . . . , the municipality or the electric utility may file an application with the commission requesting that the commission determine the appropriate terms for the exchange or sale.” *Id.*(b)(emphasis added).

In the present case, the two utilities at issue reached an arms-length agreement as to the “appropriate value.” Neither utility requested the Commission to determine the appropriate terms for the sale of electric service territory rights. Accordingly, the Commission’s role under the statutes is focused upon updating the official electric service territory maps. Because the two utilities reached agreement as to a service territory transfer and because neither utility requested the Commission to determine the compensation terms, the Commission should update the official service territory maps to reflect the change in boundaries.

## **II. THE COMMISSION SHOULD DECLINE TO ADDRESS ANY OTHER ISSUES.**

The Red Lake Band filed a Notice of Appearance in this matter on March 4, 2017. The filing letter stated that “the Red Lake Band objects to the City of Warroad’s

attempt to collect the costs of the service territory acquisition.” The letter states no objection to the changing of the service territory map itself. The Commission should proceed with the changing of the service territory boundaries.

Indeed, the public policy choice by the Legislature in 1974 was to avoid a “customer choice” scenario and to instead assign service territory to each electric utility. See Minn. Stat. § 216B.37 (2016)(“ It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.”). The request of North Star and the City to modify the boundaries is consistent with this public policy determination.

The Red Lake Band’s objection is instead as to the electric charges between it and the City. But the Commission lacks jurisdiction to determine or judge the rates of municipal utilities. The Commission should decline to address issues beyond the revisions to the official service territory maps.

**A. The Rates of a Municipal Utility Are Beyond the Commission’s Jurisdiction.**

Of course, the overarching legislative regulatory scheme in Chapter 216B does not regulate municipal utilities, except as specifically provided by statute. “Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them. . . it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.”

Minn. Stat. § 216B.01 (2016); see also *In re Investigation into Commission's Jurisdiction*, 707 N.W.2d 223, 227 (Minn. App. 2005) (“We conclude that the language of section 216B.01 is clear on its face” and holding that Commission lacked jurisdiction over municipal utility’s gas pipeline).<sup>2</sup> In addition, the definition of “public utility” expressly “does not include . . . a municipality or a cooperative electric association. . . .” Minn. Stat. § 216B.02, subd. 4. Accordingly, neither the City nor North Star is regulated by the Commission as a general matter, nor as to customer rates.

**B. The Commission Cannot “Undo” the 2013 Agreement.**

As noted above, neither of the utilities has requested the Commission to “determine” the terms and financial conditions of the service territory transfer. The 2013 Agreement includes representations and warranties that “[t]his Agreement constitutes a valid and binding obligation of each Party enforceable in accordance with its terms.” Section 4.1. And the City and North Star have acted in reliance of the 2013 Agreement, installing facilities, making and receiving payment for the service territory rights, and conducting operations and maintenance in providing electric service.

The intervener bears the burden of proof. “The party seeking to void a settlement has the burden of showing sufficient grounds for its vacation.” *Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981). It is also unclear how the Commission would, as a practical matter, evaluate and criticize or approve the parties’

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<sup>2</sup> By contrast, public utilities are expressly regulated. Minn. Stat. § 216B.01 (“It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided”); see also Minn. Stat. § 216B.08 (“The commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility as defined herein.”).



agreement.<sup>3</sup> Would it require North Star to document its loss-of-revenue analysis and related components? Such an approach raises public policy concerns, as parties may seek a compromise that reflects a position other than their litigation posture. “One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public.” *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986). Indeed, in the 2013 Agreement, the utilities noted that they “have negotiated a mutual settlement and wish to avoid litigation regarding compensation for such electric service territory matters . . . .” Agreement, at 1.

As a matter of public policy, it creates a slippery slope for the Commission to delve into an arms-length agreement based upon the later objection of a customer. The statute does not authorize the Commission to consider an agreement as an after-the-fact arbiter to somehow judge the parties’ agreement. Indeed, such an approach would be unwieldy and inherently imprecise, as it is entirely unclear what standards the Commission would apply, and how Commission could review the parties’ final resolution.

Courts do not second-guess the provisions of a settlement agreement, but instead rely upon the result of the parties’ arms-length negotiations as a contract. “The settlement of a lawsuit is contractual in nature, requiring offer and acceptance for its formation, and it is subject to all of the other rules of interpretation and enforcement.” *Beach v. Anderson*, 417 N.W.2d 709, 711 (Minn. App. 1988), *rev. denied* (Minn. Mar. 3, 1988). “Courts should not, nor do they, look for excuses or loopholes to avoid contracts

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<sup>3</sup> Any such review would raise factual issues that would need to be fully developed in the course of a contested case proceeding. The interests of judicial economy, as well as the public policy issues, counsel against delving into any issues beyond the updating of the official service territory maps.

fairly and deliberately made whether such be by individuals or corporations." *Equitable Holding Co. v. Equitable Bldg. & Loan Ass'n*, 202 Minn. 529, 535, 279 N.W. 736, 740 (1938). In the present case, neither the City nor North Star has asked the Commission to vacate or reconsider the 2013 Agreement. It stands as a completed contract.

Indeed, delving into the terms and conditions of the 2013 Agreement raises significant public policy concerns by undermining settlement. The Minnesota Supreme Court has espoused a public policy of favoring amicable settlement of disputes. "Settlement of claims is encouraged as a matter of public policy." *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008); *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986) ("This court has often stated that it favors the settlement of disputed claims without litigation."); *Esser v. Brophay*, 212 Minn. 194, 196, 3 N.W.2d 3, 4 (1942) ("the law favors the settlement of disputed claims without litigation."); see also *Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571, 573 (Minn., 1981) (declaring public policy favoring settlement).

Finally, the Commission should seriously consider whether, as a matter of policy, it desires to extend its regulatory authority over municipal utilities under these circumstances. The principle of deference to local governance has been embodied in state law for many years. Municipal utility rates are decided by councils and commissions composed of city residents. They weigh the benefits and risks of utility projects with the advantage of their local knowledge and perspective. It is not better than state regulation – but it is the functional equivalent, appropriate to city-owned and operated utilities -- honored in time and producing a lengthy record of low-cost, reliable


utility service. The Commission should honor the local regulation of municipal utilities. That position is well supported by governing law and sound public policy.

### **CONCLUSION**

The City of Warroad respectfully requests that Commission update the official electric service territory maps to reflect the permanent transfer of service territory from North Star to the City of Warroad. The Commission should decline to address any other issues in this docket.

Date: Oct. 17, 2017

MCGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, CHARTERED

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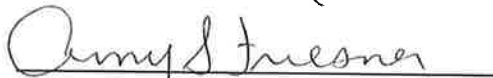
**VERIFICATION**

I, Kathy Lovelace, am the City Administrator for the City of Warroad. I have read the foregoing document and know the contents thereof. To the best of my knowledge, the factual statements and matters alleged therein are true of my own personal knowledge.

Dated: 10-17-2017

  
City of Warroad  
by Kathy Lovelace  
its City Administrator

Subscribed and sworn to before  
me this 17<sup>th</sup> day of October 2017.

  
Notary Public



**RED LAKE BAND**  
**of CHIPPEWA INDIANS**  
**RED LAKE NATION HEADQUARTERS**



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WILLIAM "BILLY" GREENE  
RICHARD BARRETT, SR.

**ADVISORY COUNCIL:**  
7 HEREDITARY CHIEFS

PO Box 550, Red Lake, MN 56671

Phone 218-679-3341 • Fax 218-679-3378

July 31, 2012

Warroad City Office  
Mr. Bob Marvin, Mayor  
121 Main Ave NE  
P.O. Box 50  
Warroad, Minnesota 56763

Dear Mayor:

This letter is in response to our meeting that we had with the City Council sometime early last year regarding our intention to update our Seven Clans Casino Warroad facility. Since our meeting, we have done some preliminary work in estimating costs associated with the new facility using Northern Engineering out of Bemidji, MN and Dsgw Architects located in Duluth, MN. Since that time, the Red Lake Gaming Board of Directors approved the project to move forward in relocating the existing casino across the river to a new location situated on the Lake of the Woods on Tribal Trust Land.

We wanted to inform the City of our intentions as our Civil Engineers and Architects will need to work closely with your team regarding infrastructure needs. We estimate that pre-construction work and project design to commence this fall with construction commencing in the spring of 2013. Early estimates indicate that the facility would include additional slot machines, table games, a 60 room hotel, two restaurant and retail space.

We would be happy to share information on the project as we proceed through the pre-construction and project design phase. Our point of contact for the project is Raymond J. Brenny, CEO of Red Lake Gaming Inc., he can be reached at 1-218-679-2111.

Sincerely,

Floyd Jourdain, Jr.,  
Chairman