

OPINION
64-50

March 25, 1964 (OPINION)

CITIES

RE: Municipal Electric System - Role of Public Service Commission

In your letter of 20 April 1964 you state: "The City of Hankinson was authorized by an election held October 22, 1963, to issue its Electric Distribution System revenue bonds in the total amount of \$190,000.00 for the construction of city owned electric distribution system and equipment thereof. An engineer has been retained to draw plans and specifications for the construction of this project which will include electric supply lines intended to carry a constant potential alternating current of over 5,000 volts. The city is presently served by a private utility. The city plans to enter into a contract with a wholesale supplier of electrical energy. The private utility presently serving this city has standard general franchise, but does have a term franchise for street lighting only."

Your questions are:

1. Is the city, in regard to the engineer's plans and specifications for the electric distribution system and equipment thereof, subject to the regulatory jurisdiction of the Public Service Commission as defined in 49-20-02 through 49-20-04?
2. Is the city, in regard to the first question, free of the jurisdiction of the Public Service Commission defined in chapter 49-20 in regard to the plans and specifications of the electric distribution system and equipment thereof by virtue of 49-02-01.1?
3. What, if any, is the jurisdiction of the Public Service Commission over any contract the city may negotiate with a wholesale supplier of electric energy other than the private utility presently serving the city?
- "4. In the advertisement for construction bids, may the city request that bids be made on a unit price basis as well as a fixed total price for the project?"

The answer to your first question is in the negative. Section 49-02-01.1, North Dakota Century Code. See also *City of Grafton v. Ottertail Power Co.*, 86 N.W.2d. 197 (N.D. 1957), wherein our court held that the aforesaid statute indicates ". . . . a policy on the part of the Legislature to withhold from the Public Service Commission authority to control the production, transmission and use of electric power by the sovereign state of North Dakota and its political subdivisions.", *id.* at 202, and that said commission is ". . . . a state agency that is clearly designed to regulate privately owned utilities for the benefit and protection of the

public welfare." Id. at 203.

Your second question is answered by the response to the first.

As to the third question: Where a municipality contracts to purchase electric energy at wholesale from other than a private utility, said energy to be resold to the residents of said municipality through a municipally owned distribution system, the Public Service Commission is without jurisdiction. In the first instance, commission jurisdiction over municipalities is by statute specifically debarred. Section 49-02-01.1, North Dakota Century Code; see also, City of Grafton v. Ottertail Power Co., 86 N.W.2d. 197 (N.D. 1957). In the second instance, as the city of Hankinson does not intend to purchase its power requirements from a private utility, it may be surmised that the city is going to purchase its power either from a federal agency or from a nonprofit cooperative. The commission is, of course, without jurisdiction over sales of electric energy by a federal agency, and the commission is also without jurisdiction over sales of energy by a nonprofit cooperative. Section 49-02-01.1, North Dakota Century Code. Finally, even if the city were going to purchase its power requirements from a private utility, and if any of the energy supplied originated out-of-state (which would in all probability be the case), the transaction would be a sale of electric energy at wholesale in interstate commerce subject to Sections 201, 205, and 206 of the Federal Power Act and, therefore, the transaction would be subject to the jurisdiction of the Federal Power Commission rather than the North Dakota Public Service Commission. Federal Power Commission v. Southern Cal. Edison Co., ___U.S.____, 11 L.Ed.2d. 638, 84 S. Ct.____ (1964).

As to your fourth and last question: Chapter 48-02, North Dakota Century Code, requires competitive bidding where the city intends to alter, repair, or construct any building. The project in question does not involve the alteration, repairing, or constructing of any building and, therefore, chapter 48-02 does not apply. Section 40-33-05 requires that the city comply with chapter 40-22 where the city proposes to pay for a municipal utility by special assessment. Chapter 40-22 requires competitive bidding. However, it appears that the city of Hankinson proposes to pay for the distribution system and equipment thereof out of the earnings of said system and, therefore, chapter 40-22 is not applicable. Consequently, it appears that if the city of Hankinson chooses to request bids there is no reason why it may not request bids be made on unit price basis as well as a fixed price for the project as a whole. That being the case, it is unnecessary to decide whether or not a city may request that bids be made on a unit price basis where the law requires that bids be requested.

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