STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Nodak Electric Cooperative, Inc.,	)	Case No. PU-20-356
	)	
Complainant,	)	
	)	**RESPONDENT'S REPLY BRIEF**
vs.	)	
	)	
Otter Tail Power Company,	)	
	)	
Respondent.	)	

Respondent Otter Tail Power Company ("Otter Tail") submits the following Reply Brief to address the issues raised in Complainant Nodak Electric Cooperative's ("Nodak") Closing Argument Brief.

I. The North Dakota Constitution is the controlling legal authority.

Nodak's post-hearing Brief failed to address, or even cite, the controlling law in this dispute, North Dakota Constitution Article VII, § 11. Instead, Nodak erroneously asserts the Territorial Integrity Act ("TIA"), N.D.C.C. Ch. 49-03, controls and grants the Commission the authority to abridge the City of Drayton's right to select the electric service provider for McFarland's Addition. However, Nodak's interpretation of the TIA ignores the provision most relevant to the issues in this case, § 49-03-06(8), which provides that nothing in the TIA shall be construed to limit the authority of a city to exercise its franchise authority—a clear deference to a city's constitutional authority. Nodak's self-serving interpretation of the TIA to support its position in this case violates the fundamental principles of statutory interpretation under North Dakota law. The Commission should reject Nodak's erroneous interpretation of the TIA which would have the Commission abridge the City of Drayton's constitutional rights.

Nodak argues the Commission should exercise the authority granted to it pursuant to the TIA in disregard of the constitutional limitation on that authority. The North Dakota Constitution

states that the power of the governing board of a city to franchise the construction and operation of any public utility within the city shall not be abridged by the legislative assembly. N.D. Const. Art. VII, § 11. Under North Dakota law, constitutional provisions are limitations upon the power of the legislature. State ex rel. Johnson v. Baker, 21 N.W.2d 355, 358–59 (N.D. 1945). The legislature has plenary powers except as limited by the North Dakota Constitution. State ex rel. Agnew v. Schneider, 253 N.W.2d 184, 188 (N.D. 1977) (explaining that, unlike the United States Constitution, the North Dakota Constitution is an instrument of limitations).

Nodak's argument in this case presents the Commission with a question of statutory interpretation of the authority granted to it by TIA. The North Dakota Supreme Court set forth the general principles governing statutory interpretation:

> Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence. In construing statutes, we consider the context of the statutes and the purposes for which they were enacted. When a general statutory provision conflicts with a specific provision in the same or another statute, the two must be construed, if possible, so that effect may be given to both provisions. When statutes relate to the same subject matter, this Court makes every effort to harmonize and give meaningful effect to each statute.

State v. Johns, 2019 ND 227, ¶ 8, 932 N.W.2d 893. If the language of a statute is clear and unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." State v. Holbach, 2014 ND 14, ¶ 16, 842 N.W.2d 328.

Another fundamental principle of statutory interpretation is that the Legislature's enactment of a statute is presumed to comply with the State Constitution. N.D.C.C. § 1–02–38(1). In enacting a statute, it is presumed the legislation is intended to comply with the state constitution, the entire statute is intended to be effective, a just and reasonable result is intended, a result feasible of execution is intended, and public interest is favored over any private interest. MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 44, 855 N.W.2d 31. Whenever possible, statutes are construed

in harmony with the constitution to avoid constitutional infirmities. See N.D.C.C. § 1–02–38(1); see also Holbach, 2014 ND 14, at ¶ 16. Statutes are to be interpreted to avoid constitutional conflicts if possible. Kasprowicz v. Finck, 1998 ND 4, ¶ 11, 574 N.W.2d 564. If a statute is open to divergent constructions, one that would make it of doubtful constitutionality and one that would not, North Dakota courts must adopt the construction that avoids a constitutional conflict. Gregory v. N. Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 28, 578 N.W.2d 101.

Nodak's interpretation of the TIA violates North Dakota's fundamental rules of statutory interpretation. Nodak's interpretation fails to read the TIA as a whole and to give meaning to the relevant provisions. Nodak fails to even acknowledge § 49-03-06(8) of the TIA, which mandates that no provision in the TIA "shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-05-01." The Legislature's intent in enacting § 49-03-06(8) could not be more "clear and unambiguous" and the letter of this section's express mandate is not to be disregarded under the pretext of pursuing Nodak's strained interpretation of the TIA to reach its desired result in this case. See Holbach, 2014 ND 14, at ¶ 16. Nodak's interpretation of the TIA as granting the Commission the authority to abridge the City of Drayton's franchise authority would render § 49-03-06(8) of the TIA meaningless. The Commission cannot adopt Nodak's interpretation of the TIA without violating North Dakota's fundamental principles of statutory interpretation. See Johns, 2019 ND 227, at ¶ 8.

Moreover, the State Constitution mandates that the power of a city to franchise the construction and operation of a public utility within the city shall not be abridged by the legislative assembly. N.D. Const. Art. VII, § 11. Nodak's argument presumes the TIA supersedes the State Constitution and grants the Commission the power to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to McFarland's Addition. Nodak has it backward. The

Commission should reject Nodak's misguided interpretation of the TIA that would conflict with the State Constitution. See N.D.C.C. § 1–02–38(1); see also Holbach, 2014 ND 14, at ¶ 16.

Rather than follow Nodak's erroneous interpretation of the TIA, the Commission should adopt the North Dakota Supreme Court's interpretation that construed the TIA in harmony with the Constitution. See Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788. In construing both Art. VII, § 11 of the Constitution and the TIA's regulatory authority granted to the Commission, the Capital Electric Court held that when both the public utility and cooperative have franchises to provide electric service in the city, then the Commission has authority to decide whether either entity's extension of services will unreasonably interfere with and duplicate services of the other under § 49–03–01.3 of the TIA. Id. at ¶ 13. Such interpretation harmonizes both the city's exclusive constitutional franchise power and the Commission's limited authority under the TIA to protect the public interest in unreasonable interference and duplication of services where two providers have been authorized to serve. Id. at ¶ 27. Article VII, § 11 of the Constitution and the TIA do not inherently conflict with each other except under Nodak's self-serving interpretation which, therefore, must be rejected.

The argument that the TIA grants the Commission the authority to regulate public utilities without constraint has been previously rejected by this Commission and the North Dakota Supreme Court. In North Central Electric Cooperative v. Otter Tail, PU-11-701, the Commission concluded the TIA did not grant it jurisdiction over an Indian Tribe's sovereign right to select the electric service provider to a tribal-owned casino located on tribal land. On appeal, the North Dakota Supreme Court affirmed the Commission's dismissal of North Central's Complaint against Otter Tail concluding the Commission properly determined it lacked authority under the TIA to regulate the Tribe's decision authorizing Otter Tail to supply electric service to the tribal-owned casino on

tribal trust land within the reservation. N. Cent. Elec. Co-op., Inc. v. N. Dakota Pub. Serv. Comm'n, 2013 ND 158, ¶ 22, 837 N.W.2d 138. The North Central case demonstrates that the TIA's grant of regulatory authority to the Commission has limitations and must not be interpreted to abridge the legal rights of entities over which the Commission has no regulatory authority.

II. Nodak has no right to extend electric service to new customers in the City of Drayton without a franchise.

Nodak spends a considerable portion of its Brief attempting to convince the Commission that North Dakota law does not require Nodak to possess a franchise to extend service to Love's in the City of Drayton. Nodak's argument is contrary to North Dakota law and the long-standing precedent of the North Dakota Supreme Court.

Nodak's unfounded argument that it can serve customers in a city without a franchise as long as the city has not passed an ordinance prohibiting service without a franchise is a perverse interpretation of North Dakota law. The definition of the word franchise demonstrates the fallacy of Nodak's argument. The North Dakota Supreme Court defined "franchise" as "a special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right". Williams Bros. Pipe Line Co. v. City of Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968) (citing Black's Law Dictionary (4th ed. 1957)). The granting of a franchise to operate a public utility is an exercise of the legislative function of the sovereign and, in the absence of a constitutional or statutory provision providing therefor, a public utility commission has no power to grant a franchise to a public utility. Greater Wilmington Transp. Auth. v. Kline, 285 A.2d 819, 822 (Del. 1971) (citing 73 C.J.S. Public Utilities § 42); see also Commissioners of Cambridge v. E. Shore Pub. Serv. Co., 192 Md. 333, 339, 64 A.2d 151, 154 (1949) (explaining the public service commission is a regulatory body that has no power to

grant a municipal franchise). A franchise would not constitute a special privilege conveyed by the city if every citizen could exercise the same privilege absent an express statement to the contrary.

Nodak's assertion that its authority to provide electric service arises from the lack of city ordinances precluding service providers is incorrect. Nodak's right to serve arises from the authority granted it by the Electric Cooperative Act. A rural electric cooperative's right to provide electric service in the State is governed by North Dakota's Electric Cooperative Corporations Act, N.D.C.C. Ch. 10-13. Under the Act, electric cooperatives may be organized for the purpose of engaging in rural electrification by furnishing electric energy to "persons in rural areas who are not receiving central station service". N.D.C.C. § 10-13-01(1). No provision of the Act grants electric cooperatives the right to extend service to customers within cities that are receiving central station service.

The scope of an electric cooperatives power to serve customers in a city with central station service was determined by the North Dakota Supreme Court in the Divide County case. Montana-Dakota Utilities Co. v. Divide County School Dist., 193 N.W.2d 723 (N.D. 1971). In Divide County, the Court concluded that, when a customer resides in a city receiving central station service following annexation, the electric cooperative cannot serve that customer in the absence of a franchise from the city. Id. at 730. Nodak attempts to distinguish the Divide County case by erroneously arguing the determining factor whether a coop may serve is whether a city has adopted an ordinance prohibiting all electric service providers from providing service without a franchise. Nodak's argument is based upon its misguided interpretation of the Divide County holding. The Divide County Court determined the coop had no right to serve residents of Crosby after annexation based upon the provisions in the Electric Cooperative Corporations Act, not on an exclusive franchise ordinance:

> The authority and power of a city or village, qualifying as a rural area under the Electric Co-operative Corporations Act, to annex territory has not been limited by the Electric Co-operative Corporations Act. Where a city receiving central station service annexes territory which is being served by an electric cooperative corporation, persons within the annexed area become persons who are receiving central station service and, under the charter of the electric cooperative formed under the Act, these persons no longer qualify for membership in the electric cooperative corporation for the purpose of receiving electric service to their facilities located within the city.

Id. The Divide County Court would not have been required to analyze the Electric Cooperative Corporations Act if the issue was simply a determination of whether the City of Crosby enacted an exclusivity ordinance. However, both the Divide County and Capital Electric Courts recognized that a coop may serve customers receiving central station service within a city if the coop obtains a valid franchise to serve from the city. See Divide County, 193 N.W.2d at 730; see also Capital Electric, 2007 ND 128, at ¶ 27 (recognizing that the city's constitutional authority to grant a franchise to a coop would supersede the Legislature's limitation on coop authority under Ch. 10-13).

Nodak's reliance on the Supreme Court's N.S.P. cases regarding service disputes to South Pointe development in Fargo is equally misplaced. See N.S.P. v. P.S.C., 452 N.W.2d 340 (N.D. 1990); Cass County Elec. Coop v. N.S.P., 419 N.W.2d 181 (N.D. 1988). In those cases, the City of Fargo previously granted Cass County Electric Cooperative a franchise to serve the South Pointe property:

> On October 28, 1975, Cass and the city of Fargo entered into an agreement giving Cass a nonexclusive right-of-way for its facilities in areas served by Cass and subsequently annexed by the city. Under the terms of this agreement, any area served by Cass which was annexed to the city would remain Cass's service area absent an objection by the city or another electric supplier.
>
> In 1978 the city annexed a large area served by Cass south of 32nd Avenue South and west of U.S. Highway 81. The area now known as South Pointe is part of this annexed territory. No objections were lodged to Cass's claim to serve existing and

> new customers within the annexed area, and, prior to October 1986, Cass was the only supplier of electricity in the annexed territory.

N.S.P., 419 N.W.2d at 183. In the N.S.P. cases, the coop possessed a valid franchise from the City of Fargo to serve South Pointe, which was the controlling factor for the Commission's authority. Id. Similarly, in the Capital Electric case, the coop obtained a valid franchise from the City of Bismarck to serve Boulder Ridge, thus securing the Commission's jurisdiction over the service area dispute. Capital Electric, 2016 ND 73, at ¶ 3. In the present case, if Nodak had obtained a valid franchise from the City of Drayton to serve McFarland's Addition, it could properly argue it had the ability to serve Love's and that, pursuant to the TIA, the Commission possessed the legal authority to determine whether to enjoin Otter Tail from interference and unreasonable duplication of its facilities. However, because Nodak does not possess a franchise from the City of Drayton, the N.S.P. cases are distinguishable and provide no support for Nodak's argument that it can extend service to new customers in the City of Drayton without a franchise.

In its Brief, Nodak inaccurately asserts the City of Drayton has no issue with Nodak serving loads without a franchise based upon Mayor Olson's hearing testimony that Nodak was serving the Cenex station at the time of annexation. See Nodak Brief, at pg. 7. Nodak's implication is that because the City of Drayton does not actively exclude Nodak from serving Cenex in that annexed area, then Nodak is permitted to serve any other annexed area in the City of Drayton. However, the actual testimony of Mayor Olson indicates the City of Drayton has not made any determination as to the legality of Nodak's service of Cenex without a franchise. See electronic recording of hearing, https://psc.nd.gov/database/documents/20-0356/041-010.mp3, at 6:39:40. At no time did Mayor Olson testify the City of Drayton has authorized Nodak to provide electric service to customers in the City without a franchise. See id. It should also be noted that Mayor

Olson was not the Mayor of Drayton in 2006 when the Cenex property was annexed, nor was he on the City Council at the time.

Nodak also asserts that because the City of Drayton has not denied a request for a franchise then Nodak is not precluded from serving Love's Truck Stop. The absence of rejecting a request that was not made does not equal approval. Nodak's assertion that it can extend electric service to a new customer within the City of Drayton without a franchise is both factually and legally incorrect. The North Dakota Supreme Court has clearly stated that a coop must possess a franchise from the city to extend service to new customers receiving central station service within city limits. See Divide County, 193 N.W.2d at 730; see also Capital Electric, 2007 ND 128, at ¶ 27. The Court has never ruled that a lack of rejection confers franchise rights, nor does Nodak cite any legal authority to support this illogical position. Nodak has no legal right to serve McFarland's Addition without a franchise and, therefore, Otter Tail's Motion to Dismiss should be granted.

III. The City of Drayton's franchise with Otter Tail contains no provision giving the Commission authority to abridge the City's constitutional rights.

Nodak argues the terms of the franchise between the City of Drayton and Otter Tail confer jurisdiction to the Commission to invalidate the franchise. The franchise provision Nodak relies upon is Section 9, which states, "This contract shall be subject to any present or future laws of a regulatory nature enacted by the State of North Dakota, or an amendment or addition to such laws and further be subject to the rules and regulations laid down by the Public Service Commission of the State of North Dakota." See Ex. OTP-1, at § 9. The franchise also expressly provides that the rates to be charged by Otter Tail shall be filed with the Commission and no change in rates shall be made except in accordance with the Commission. Id. at § 8. What cannot be found anywhere in the document is the City of Drayton expressly granting the Commission the authority to abridge

the City's constitutional right to select the service provider for McFarland's Addition and grant Nodak a franchise to serve.

Nodak's argument implies the City of Drayton implicitly waived its constitutional rights in § 9 of the franchise. Waiver is traditionally defined as the voluntary and intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed. Brunsoman v. Scarlett, 465 N.W.2d 162, 168 (N.D. 1991). Under North Dakota law, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. State v. Olson, 544 N.W.2d 144, 146 (N.D. 1996). Waivers of constitutional rights by a party are not to be inferred, but must be clearly and intentionally made. State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (stating presuming waiver of constitutional rights from a silent record is impermissible). Nodak implies that in the very act of exercising its right to specifically select Otter Tail, the City of Drayton gave the Commission discretion to negate that express franchise with Otter Tail and grant the franchise to Nodak. There is no legal support for this illogical conclusion.

The City of Drayton's grant of authority to the Commission to regulate electric service between its residents and Otter Tail cannot be construed as a waiver or intentional relinquishment of the City's constitutional franchise rights. Rather, § 9 of the franchise is an acknowledgement that the City does not have the expertise to regulate electric service, fix rates, measure meter accuracy, ensure safe and reliable construction and operation standards, or resolve potential disputes between Otter Tail and its residents regarding electric service. Section 9 of the franchise cannot be interpreted as a knowing relinquishment of the City of Drayton's constitutional right to franchise for electric service in the city. See Kranz, 353 N.W.2d at 752. Moreover, § 9 of the

City's franchise also cannot be read to authorize the Commission the power to grant Nodak a franchise to serve new customers in the City of Drayton.

Nodak asserts Otter Tail "attempted to argue through the testimony of Chris Waltz, Manager of Sales and Economic Development for Otter Tail, that this provision was only included because Otter Tail's rates are subject to regulation by the Commission and for no other reason." See Nodak Brief, at pg. 8. Nodak's assertion is a misrepresentation of Waltz's testimony. Waltz testified Otter Tail is regulated by the Commission, whether it be rates, rate cases, or revisions to Otter Tail's general rules and regulations. See electronic recording of hearing, https://psc.nd.gov/database/documents/20-0356/041-010.mp3, at 8:38:30. By referring to "general rules and regulations", Waltz indicated Otter Tail is subject to the Commission's regulation throughout Title 49, N.D.C.C. Waltz did not testify the Commission's authority over Otter Tail's franchise was limited to rates and "for no other reason."

Otter Tail acknowledges and consents to the Commission's exclusive regulatory jurisdiction over its operations in the State of North Dakota, but such regulatory jurisdiction does not extend to abridging a valid franchise agreement between Otter Tail and the City of Drayton. See N.D. Const. Art. VII, § 11. The City of Drayton's franchise with Otter Tail confers the Commission with regulatory authority over the electric service to be provided by Otter Tail to residents of the City of Drayton. However, the franchise's express provision in § 9 cannot be read as an intentional relinquishment of the City of Drayton's constitutional right to select an electric service provider in the city. Nodak's argument that § 9 of the franchise grants the Commission the power to abridge Otter Tail's constitutional franchise power and grant Nodak a franchise to serve McFarland's Addition should be rejected.

IV. The Commission has no authority to enforce the 1968 service area agreement between Otter Tail and Nodak.

Nodak contends the Commission should enjoin Otter Tail from providing electric service to McFarland's Addition because Nodak possesses the sole right to serve that property under a 1968 service area agreement between Nodak and Otter Tail. However, Nodak fails to cite any legal authority which would grant the Commission the jurisdiction to decide a contract dispute between private parties. Nodak's plea to the Commission to enforce the 1968 service area agreement should be rejected because no authority exists to permit the Commission to enforce that private contract.

Nodak mistakenly believes the Commission acts as a court of law possessing general jurisdiction over private contract disputes. Despite its repeated assertions that the Commission should enforce the 1968 service area agreement, Nodak has never cited any legal authority granting the Commission with jurisdiction to decide contract disputes between private parties. Nodak also fails to cite any caselaw where the Commission has exercised original jurisdiction to decide contract disputes between private parties. Contrary to Nodak's argument, the Commission has no jurisdiction to decide a contractual dispute between Nodak and Otter Tail regarding the 1968 service are agreement.

It should be noted that in 2005, the Legislature granted the Commission limited authority over service area agreements between public utilities and cooperatives. See N.D.C.C. § 49-03-06. However, for a service area agreement to be enforceable by the Commission, the agreement must be filed with and approved by the Commission. Id. In the present case, for whatever their own reasons, neither Nodak nor Otter Tail filed the 1968 service area agreement with the Commission for approval. Absent prior approval in accordance with § 49-03-06, the Commission lacks authority to enforce the terms of the 1968 agreement.

Even assuming the 1968 agreement was enforceable between Otter Tail and Nodak, the agreement is not enforceable by the Commission against the City of Drayton. Section 49-03-06(8) states that the governing board of a city may require approval of a service area agreement between electric providers when the agreement encompasses locations within the city. The same section also states that nothing in the chapter shall be construed to limit a city's power to exercise its franchise authority. N.D.C.C. § 49-03-06(8). There is no evidence that the City of Drayton was party to the 1968 agreement nor consented to be bound by the agreement nor, for that matter, that it was even aware of it. Further, there is nothing in the 1968 service area agreement that would give the Commission the authority to abridge the City of Drayton's constitutional right to select an electric service provider for property located in the City.

The legislative history of § 49-03-06 further rebukes Nodak's argument that the 1968 agreement is enforceable against the City of Drayton. During the committee hearing in the House, Harlan Fuglesten, General Counsel and Government Relations Director for North Dakota RECs, was specifically asked about § 49-03-06(8) of the bill relating to a city's franchise authority:

> **Representative Keiser**: On page three, lines 11 does it give the city some additional authority, what is the intent of that subsection?
>
> **Harlen Fuglesten**: Under current law the cities have the right to franchise public utilities and we do not want anything in this bill to compromise that or the authority, in my view what would be anticipated would be if you have an agreement that touched on the city limits, or involved areas within the city, the utilities would bring that agreement to the city as well to make sure that they have franchise authority of the city in place to take care of that agreement as well as to the PSC. And I think the city would be an important party in any proceeding with the PSC with respect to whether there was interest in approving any particular agreement they might touch on.

See Hearing on S.B. 2412 Before the House Industry, Business & Labor Committee, 59th N.D. Legis. Sess. (March 31, 2005) (testimony of Harlan Fuglesten, General Counsel and Government Relations Director for North Dakota RECs). In addition to acknowledging the fact that

cooperatives understood they are required to have a franchise to serve within a city, Fugelsten's testimony makes it clear that service area agreements do not supersede a city's constitutional franchise power.

Nodak also claims "Otter Tail attempts to argue that N.D.C.C. § 49-03-06, which was passed in 2005, invalidates the 1968 service area agreement." See Nodak's Brief, at pg. 9. This is simply a mischaracterization of Otter Tail's position in this case. Otter Tail does not argue the 1968 service area agreement is invalid; rather Otter Tail's contends this Commission has no authority to enforce a private contract between the parties. The Commission is not a court of law possessing subject-matter jurisdiction over contract disputes between private parties. See City of Grafton v. Ottertail Power Company, 86 N.W.2d 197, 202 (N.D. 1957) (stating the Commission is prohibited from acting in any field in which the Legislature has not authorized it to enter). Prior to 2005, no law in North Dakota granted the Commission that jurisdiction. In 2005, the Legislature granted the Commission limited jurisdiction to enforce service area agreements, if, and only if, certain prerequisites were met including prior filing and approval of the service area agreement with the Commission. See N.D.C.C. § 49-03-06(6). If, as Nodak argues, the Commission already had jurisdiction to enforce service area agreements prior to 2005, there would have been no need for enactment of the statute. In any event, the Commission lacks authority in this case to enforce the 1968 service area agreement because it has not been previously filed with and approved by the Commission. Nodak has a potential legal recourse for its alleged breach of the 1968 service area agreement, but that legal recourse should be determined by a court of law, not this Commission.

V. Otter Tail's proposed three-phase service does not interfere with nor result in unreasonable duplication of Nodak's existing facilities.

Even if the merits could be reached under North Dakota law, Nodak has not met its burden of proof required to enjoin Otter Tail's extension of service in this case. Nodak's claims of

interference and unreasonable duplication are based, in large part, on the fact that Otter Tail's three-phase extension will cross Nodak's single-phase overhead line. Nodak's argument ignores the fact that its own proposed underground extension will cross Otter Tail's existing overhead transmission line. Notably, both engineering witnesses agreed there would be no physical interference with the respective extensions. At the end of the day, Nodak failed to meet its burden of presenting sufficient evidence establishing that Otter Tail's proposed extension would interfere with or unreasonably duplicate Nodak's existing system.

When it is within the Commission's jurisdiction to decide, the question of which electric supplier's facilities are actually duplicative or wasteful is one of fact for the Commission's determination. Cap. Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n, 2016 ND 73, ¶ 25, 877 N.W.2d 304. In the 2016 Capital Electric dispute, the North Dakota Supreme Court stated that it may not always be possible to prevent some actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems. Id. The Court noted that one factor to be considered in determining wasteful duplication is whether, in order to serve the customer in question, one supplier's extension of facilities must cross the facilities of another supplier. Id. at ¶ 24. The Court affirmed the Commission's determination that because both suppliers' extension would cross each other's lines there would be some duplication, but that such duplication would not be "wasteful." Id. (concluding a reasoning mind could have determined that no wasteful duplication of investment or service would result from granting the certificate of public convenience and necessity to MDU). Nodak Witness Breidenbach testified that it is both common and necessary for extensions to cross other utility's lines in North Dakota.

The present case is analogous in some respects to the alleged duplication in the 2016 Capital Electric dispute. The undisputed fact is that both Otter Tail and Nodak would be required

to extend three-phase service to McFarland's Addition from their existing facilities on the adjacent property. Both Otter Tail and Nodak's extensions would cross the other's existing facilities, but those existing facilities would not be used to provide service to the customer. Even though both Otter Tail and Nodak's extensions would cross the other's facilities and there would be some duplication, there was no evidence presented at the hearing that such duplication would be considered "wasteful". See Capital Electric, 2016 ND 73, at ¶ 24.

Nodak further argues that Otter Tail's extension of service to McFarland's Addition would constitute wasteful duplication because Otter Tail's extension would cost more than Nodak's extension. Otter Tail's witness, Tyler Jacobson, testified its extension would cost approximately $52,000, which included the cost of boring the entire extension. Nodak introduced an exhibit indicating its proposed extension would cost $19,037.50, which budgeted $2/foot for surface trenching its extension through the neighbor's existing driveway and through the adjacent county road, 160th Ave. NE. See Ex. Nodak-3. In the 2016 Capital Electric case, the coop made a similar argument, that its proposed cost of extension was $82,000 less than MDU's extension. See Capital Electric, 2016 ND 73, at ¶ 18. However, the mere fact that one provider's extension is more costly than the other does not equate to unreasonable or wasteful duplication of services.

Nodak also argues Otter Tail's extension would result in economic duplication of services. To support its economic duplication argument, it claims Love's selection of Otter Tail was based upon Otter Tail's misrepresentations regarding the cost of Nodak's service, i.e., the bill comparison. See Nodak Brief, at pg. 16. Nodak's characterization of the evidence is incorrect. During cross-examination, Love's Real Estate Project Manager, Steve Walters, repeatedly testified that Love's relied on its own estimated bill comparisons based upon the information provided to him by Nodak President Mylo Einarson. See electronic recording of hearing,

https://psc.nd.gov/database/documents/20-0356/041-010.mp3, at 7:25:00. In a protracted, nearly four-minute cross examination on this topic, Walters specifically and repeatedly testified that Love's relied on its own analyses, along with Einarson's email to Walters providing Nodak's rates, to reach its electric service provider decision and "the chips fell where they fell". Id. Nodak's counsel then criticized Walters for not meeting with Nodak alone, without other parties present, leaving the suggestion that if only the two of them had sat down in the proverbial smoke-filled backroom Love's could have gotten a better deal from Nodak.

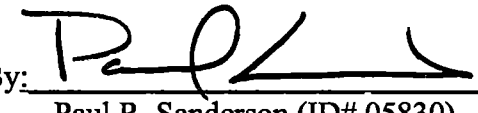
Nodak also bases its economic interference argument on its repeated suggestion that Love's could take Nodak's interruptible rate for a cost savings. However, Walters testified Love's would not accept interruptible service because it would not meet its requirements. Further, Nodak's argument that its rates are competitive if Love's will invest in a large generator and accept controlled interruptions simply shifts this cost so that Nodak's comparison looks attractive. Nodak does not fairly compare apples to apples, it compares its own costs only after shifting significant costs onto the customer that Otter Tail does not. The evidence presented at the hearing did not support Nodak's assertion that economic interference exists because Nodak could provide service to Loves more economically that Otter Tail. The evidence overwhelmingly proves the opposite.

CONCLUSION

The City of Drayton selected Otter Tail as the service provider for McFarland's Addition in the City of Drayton. The North Dakota Constitution precludes the Commission from abridging the City of Drayton's franchise authority selecting Otter Tail as the service provider for the property at issue. For the reasons set forth in Otter Tail's Post-Hearing Brief and this Reply Brief, Otter Tail Power Company respectfully requests the Commission grant its Motion to Dismiss Nodak's Complaint.

Dated this 7th day of May, 2021.

EVENSON SANDERSON PC
Attorneys for Otter Tail Power Company
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243
psanderson@esattorneys.com

By: 
Paul R. Sanderson (ID# 05830)