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Case Style: Nodak Electric Cooperative, Inc. vs. North Dakota Public Service Commission, et al.



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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

Nodak Electric Cooperative, Inc.,)	Case No. PU-20-356
)	
Complainant,)	
)	RESPONDENT’S POST-HEARING BRIEF
vs.)	
)	
Otter Tail Power Company,)	
)	
Respondent.)	

Respondent Otter Tail Power Company (“Otter Tail”) submits the following Post-Hearing Brief.

PROCEDURAL HISTORY

Complainant Nodak Electric Cooperative, Inc. (“Nodak”) commenced this action on July 29, 2020, by filing a Complaint with the North Dakota Public Service Commission (“Commission”) requesting it enjoin Otter Tail from extending electric service to property located in the McFarland’s Addition in the City of Drayton. On August 17, 2020, Otter Tail filed its Answer asserting the Commission lacked jurisdiction over the City of Drayton’s determination of which electric service provider was to serve McFarland’s Addition.

On December 4, 2020, the City of Drayton filed a Petition to Intervene in this action asserting it had the constitutional right to determine the electric service provider to McFarland’s Addition located in the City of Drayton. On December 10, 2020, the Administrative Law Judge granted the City of Drayton’s Petition to Intervene.

On December 11, 2020, Otter Tail filed a Motion to Dismiss Nodak’s Complaint asserting the Commission lacked jurisdiction to invalidate the City of Drayton’s franchise with Otter Tail to provide electric service to the McFarland’s Addition within the City of Drayton.

On March 3, 2021, the Commission issued a Notice of Hearing setting forth three issues to be considered at the hearing:

1. Whether the Commission should grant OTP's motion to dismiss?
2. Whether OTP's extension would interfere with existing services provided by Nodak?
3. If there would be a duplication of services, whether the duplication of services would be unreasonable?

The hearing in this case was held before the Commission on April 16, 2021. Nodak presented testimony of two witnesses, Steve Breidenbach and Mylo Einarson, and introduced twelve exhibits. Otter Tail presented testimony from four witnesses, City of Drayton Mayor Charles Olson, Steve Walters, Tyler Jacobson, and Chris Waltz, and introduced four exhibits. At the conclusion of the hearing, the Administrative Law Judge ordered that both parties file Post-Hearing Briefs.

LAW AND ARGUMENT

I. The Commission should grant Otter Tail's Motion to Dismiss.

Otter Tail's Motion to Dismiss asserts the Commission lacks authority to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to the McFarland's Addition. Nodak's Complaint seeks to have the Commission invalidate the City of Drayton's franchise with Otter Tail to serve McFarland's Addition and grant Nodak a franchise to serve. The City of Drayton has the sole constitutional authority to determine the electric provider for McFarland's Addition. Otter Tail's Motion to Dismiss should be granted because the Commission lacks authority over with the City of Drayton's exercise of its franchise for electric service for McFarland's Addition.

A. The North Dakota Constitution prohibits the Commission from abridging the City of Drayton authority to franchise electric service for McFarland's Addition.

The North Dakota law governing Otter Tail's Motion to Dismiss is clear:

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 (*emphasis added*). North Dakota's Constitution mandates that a city has the exclusive authority to franchise the construction and operation of public utilities within the city's boundaries. *Id.* Most importantly, the North Dakota Constitution provides that a city's franchise authority cannot be limited or curtailed by the legislative authority. *Id.* The North Dakota Legislature also codified a city's power to enter 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.

N.D.C.C. § 40-05-01(57).

The Commission's authority to regulate is limited to that authority provided to it by the North Dakota Legislature. Envtl. Law & Policy Ctr. v. N. Dakota Pub. Serv. Comm'n, 2020 ND 192, ¶ 11, 948 N.W.2d 838 (noting challenges to an agency's authority presents the question of whether an agency has gone beyond what it legislatively has been permitted to do); City of Grafton v. Ottertail Power Company, 86 N.W.2d 197, 202 (N.D. 1957). The Commission is prohibited from acting in any field in which the Legislature has not authorized it to enter. City of Grafton, 86 N.W.2d at 202.

Nodak's Complaint requests the Commission enjoin Otter Tail from extending electric service to the McFarland's Addition property in the City of Drayton pursuant to the power granted

upon the Commission by the Legislative Assembly under N.D.C.C. Ch. 49-03. However, Nodak's Complaint fails to take into consideration the relevant provision of Chapter 49-03, N.D.C.C., which expressly prohibits the Commission from abridging the city's exclusive power to exercise its franchise authority. Section 49-03-06(8), N.D.C.C., establishes that the regulatory authority granted to the Commission in Chapter 49-03 does not include the power to limit a city'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.

N.D.C.C. § 49-03-06(8). There is no provision in N.D.C.C. Ch. 49-03 which grants the Commission the authority to abridge a city's constitutional franchise authority for electric service within city limits.

B. The City of Drayton exercised its constitutional right to select Otter Tail to provide electric service to McFarland's Addition.

The following relevant undisputed facts were established at the hearing in this case: The property at issue in the present action, McFarland's Addition, is located within the City limits of Drayton. See OTP Ex. 2. The Drayton City Council approved annexation of McFarland's Addition into the City of Drayton on August 12, 2019. Id. The Plat of McFarland's Addition and annexation was filed by the City with the Pembina County Recorder on August 19, 2019. Id. Nodak did not serve any existing customers in McFarland's Addition at the time the property was annexed.

Otter Tail possesses a lawful franchise with the City of Drayton to provide electric service pursuant to the franchise agreement dated May 3, 2011. See OTP Ex. 1. Otter Tail has been providing electric service to customers in Drayton pursuant to lawful franchise since the 1930s. Both of Nodak's witnesses and the Mayor of Drayton testified at the hearing that Nodak does not

possess a franchise agreement with the City of Drayton permitting it to provide electric service within the City.

Due to the dispute Nodak raised regarding the electric service provider to the new Love's Truck Stop in McFarland's Addition, the City of Drayton passed a resolution authorizing Otter Tail to provide electric service to McFarland's Addition. See OTP Ex. 3. The City of Drayton's Resolution eliminates any doubt as to the electric service provider it chose to provide service in McFarland's Addition. Id.

The North Dakota Constitution bestows upon the City of Drayton the exclusive authority to grant a franchise to Otter Tail to provide electric service to customers within McFarland's Addition. See N.D. Const. Art. VII, § 11. The City of Drayton has clearly and unequivocally exercised its constitutional right to determine that Otter Tail will provide electric service to McFarland's Addition. See Ex. OTP-3. The City of Drayton's determination that Otter Tail will provide electric service to McFarland's Addition cannot be abridged by this Commission. See id.; see also N.D.C.C. § 49-03-06(8). The Commission lacks legal authority to abridge the City of Drayton's exclusive constitutional right to determine the provider of electric service within McFarland's Addition pursuant to a lawful franchise. See N.D. Const. Art. VII, § 11.

C. North Dakota Supreme Court precedent affirms Nodak requires a franchise to serve McFarland's Addition.

Nodak was unable to obtain a lawful franchise from the City of Drayton to serve McFarland's Addition, so it filed the present Complaint seeking to have the Commission direct the City of Drayton to grant it a franchise to provide electric service. Nodak's strategy is necessary because it is unable to provide electric service to McFarland's Addition without a lawful franchise. See Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788. However, Nodak's strategy is misplaced because the Commission lacks authority to grant Nodak a franchise

to provide electric service in the City of Drayton. See N.D. Const. Art. VII, § 11.

In a factually analogous case, the North Dakota Supreme Court determined that a cooperative has no right to provide electric service to property newly annexed into city limits without a franchise. See Montana-Dakota Utilities Co. v. Divide County School Dist., 193 N.W.2d 723 (N.D. 1971). In Divide County, MDU had a franchise to provide electric service to the City of Crosby. Id. at 727. The Divide County School District owned property outside the Crosby city limits and intended to construct a new high school on the property. Id. The Burke-Divide Rural Electric Cooperative (“Coop”) contracted with the Divide County School District to provide electric service to the new high school. Id. The Coop then erected a yard light and began providing electric service to the property where the new high school was to be constructed. Id. The City of Crosby subsequently annexed the property into the city limits. Id. The Coop did not have a franchise to provide electric service within the City of Crosby. Id. at 728. MDU commenced an action against the Coop to enjoin it from providing service to the school asserting it was illegal for the Coop to provide electric service in the Crosby city limits without a franchise. Id. at 727.

On appeal, the North Dakota Supreme Court recognized that electric cooperatives are organized under N.D.C.C. § 10-13-01(1) for the purpose of engaging in rural electrification by furnishing electric energy to “persons in rural areas who are not receiving central station service”. Divide County, 193 N.W.2d at 728 (*emphasis added*). The Court found that the City of Crosby was a “rural area” because its population was under twenty-five hundred people, however the City was providing “central station service” to the city inhabitants. Id. at 729. The Court held that residents of the City of Crosby were receiving central station service pursuant to the City’s franchise with MDU. Id. Therefore, the Coop could not be organized and operated to serve the City of Crosby. Id.

The Divide County Court next addressed the issue of whether the Coop could serve property, upon which it was providing electric service, that had been recently annexed into the City. Id. The Court found that the Electric Cooperative Act did not limit the authority and power of a city to annex property. Id. at 730. The Court explained that when a city receiving central station service annexes property which is being served by an electric cooperative, “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 Court concluded that when a customer resides in a city receiving central station service, the electric cooperative cannot serve that customer in the absence of a franchise. Id. The Divide County Court held that the Coop’s right to furnish electricity to the yard light on the property ceased when the property became annexed into the City of Crosby. Id. Thus, even where there was an existing customer desiring and receiving service from the Coop, the municipality’s constitutional right to choose its franchisee was upheld once the property was annexed into the city. Id.

The Divide County holding that a cooperative does not have authority to serve a property once the property is annexed into a city was affirmed by the North Dakota Supreme Court in Tri-County Elec. Co-op, Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974). In considering the issue of customer preference, the Tri-County Court stated that when there is only one supplier of electricity franchised in a municipality, the customer must accept service from the franchised supplier unless the customer generates his own electricity or goes without. Id. at 792. The Tri-County Court also addressed the Divide County opinion when discussing the effects of annexation. Id. at 794. The Court recognized the law is clear when it comes to orderly continuance or transfer of electric

systems following annexation:

The cooperative could continue to serve its customers until such time as its property in the annexed area is acquired by the franchised utility by negotiation or eminent domain. Or the City could give the cooperative a franchise to continue to serve the customers it is serving.

Id. (citing Divide County, 193 N.W.2d 723). The Tri-County opinion further confirms that a cooperative has no right to serve customers within property annexed into a city without a lawful franchise granted by the city. See id.

The Divide County and Tri-County cases set forth controlling precedent applicable to the present case. Once the City of Drayton annexed McFarland's Addition into the City, any right Nodak could claim to furnish electric service ceased because Nodak does not possess a franchise with the City of Drayton. See Divide County, 193 N.W.2d at 730; see also Cap. Elec. Co-op., Inc. v. City of Bismarck, 2007 ND 128, ¶ 13, 736 N.W.2d 788 (stating that under North Dakota law, a coop must have a franchise to serve an area after that area was annexed into the city). Because Nodak possesses no legal franchise to serve McFarland's Addition, Nodak filed a Complaint seeking to have the Commission force the City of Drayton to grant it a franchise. However, there is no legal authority permitting the Commission to interfere with the City of Drayton's constitutional right to franchise with an electric service provider. Further, the Commission possesses no legal authority to grant franchises to electric cooperatives to provide service within municipalities. If the Commission were to grant Nodak's request to enjoin Otter Tail from providing service, Otter Tail would be in breach of its contractual franchise obligations to the City. Because the Commission lacks authority to grant the legal relief requested, Otter Tail's Motion to Dismiss Nodak's Complaint should be granted.

Otter Tail anticipates Nodak will argue that it does not need a franchise to serve McFarland's Addition because it is currently serving a customer in the City of Drayton without a

franchise and without objection. On the morning of the hearing, Nodak produced for the first time a new exhibit, Ex. Nodak 11, which is purportedly the annexation of the Cenex property into the City of Drayton in 2006. No evidence was presented that the City of Drayton was aware before the hearing as to which entity was providing electric service to Cenex. However, the fact that Nodak was serving an existing customer located in an area that was annexed into the City without a franchise does not give it the right to extend service to new customers in the City without a franchise. The North Dakota Supreme Court's holdings in both Divide County and Tri-County explain that a cooperative "shall be permitted to continue to serve its customers within an annexed area until such time as the electrical facilities owned by the REC and located within the area annexed, have been purchased by the franchisee". See Divide County, 193 N.W.2d at 733; see also Tri-County, 224 N.W.2d at 794 (stating a cooperative could continue to serve customers located in the annexed property "until such time as its property in the annexed area is acquired by the franchised utility by negotiation or eminent domain").

Under North Dakota law, Nodak can continue serving its existing customer, Cenex, following annexation until the time when Otter Tail would purchase Nodak's existing electric facilities. See id. However, Nodak would be required to possess a lawful franchise from the City of Drayton to extend service to any new customers, including the Love's Truck Stop in McFarland's Addition. See id. It should also be noted that Nodak was not serving any customers in McFarland's Addition at the time of annexation, so the present case is not a scenario where Nodak could continue to serve an existing customer until such time as its existing facilities in the newly annexed area are purchased by the franchise utility. Further, neither the North Dakota Constitution nor the North Dakota Century Code provide that the City of Drayton's constitutional right is waived through adverse possession or course of conduct. Thus, a Nodak argument that it

docs not need a franchise to serve McFarland's Addition is simply erroneous.

D. The Commission lacks authority to determine whether Otter Tail's extension of service to McFarland's Addition would interfere with or constitute an unreasonable duplication of existing services provided by Nodak under N.D.C.C. § 49-03-01.3.

Under North Dakota law, the Commission lacks jurisdiction to consider whether Otter Tail's extension would interfere with or constitute an unreasonable duplication of existing services provided by Nodak. The Commission's legal authority for consideration of these issues is set forth under N.D.C.C. § 49-03-01.3. However, as a prerequisite to Commission's authority to consider these issues, Nodak must possess a valid franchise to serve the property at issue. The undisputed facts establish Nodak does not meet the legal prerequisite of possessing a valid franchise to serve McFarland's Addition. Because Nodak does not possess a valid franchise to serve McFarland's Addition, the Commission lacks authority to consider the interference and unreasonable duplication arguments in the present case.

Nodak's Complaint seeking to enjoin Otter Tail from providing service to the new Love's Truck Stop in McFarland's Addition located within the corporate limits of the City of Drayton is governed by N.D.C.C. § 49-03-01.3, which provides:

Sections 49-03-01 through 49-03-01.5 shall not be construed to require any such electric public utility to secure such order or certificate for an extension of its electric distribution lines within the corporate limits of any municipality within which it has lawfully commenced operations; provided, however, that such extension or extensions shall not interfere with existing services provided by a rural electric cooperative or another electric public utility within such municipality; and provided duplication of services is not deemed unreasonable by the commission.

Otter Tail is not required to obtain a certificate of public convenience and necessity ("CPCN") from the Commission to extend service to Love's Truck Stop in the present case because the service location is located in the City of Drayton and Otter Tail has a lawful franchise to serve customers within the City of Drayton. See N.D.C.C. § 49-03-01.3.

Under N.D.C.C. Ch. 49-03, the North Dakota Legislative Assembly granted the Commission with the authority to determine whether a utility's proposed extension within the corporate limits of a municipality shall interfere with or result in an unreasonable duplication of a coop's existing services. N.D.C.C. § 49-03-01.3. The Commission has the authority to restrain or enjoin a utility's proposed extension if it violates § 49-03-01.3. See N.D.C.C. § 49-03-01.4.

However, in a line of cases interpreting the Territorial Integrity Act and culminating in Cap. Elec. Co-op., Inc. v. City of Bismarck, 2007 ND 128, 736 N.W.2d 788 (hereinafter "Capital Electric"), the North Dakota Supreme Court limited the scope of the Commission's authority under N.D.C.C. §§ 49-03-01.3 to those cases where the cooperative possesses a valid franchise from the city to serve the location at issue. In Capital Electric, the coop filed a complaint with the Commission under N.D.C.C. § 49-03-01.3 seeking to enjoin MDU from extending service to customers in Boulder Ridge. Id. at ¶ 8. The Commission was asked to determine whether MDU's proposed extension interfered with the coop's existing services and constituted an unreasonable duplication of services. Id. On appeal, the North Dakota Supreme Court stated, "**If both MDU and Capital Electric have franchises to provide electric service to Boulder Ridge**, the PSC has authority to decide whether either entity's extension of services in Boulder Ridge will unreasonably interfere with and duplicate services of the other under N.D.C.C. § 49-03-01.3". Id. at ¶ 13 (*emphasis added*). The legal rationale for the Capital Electric holding regarding the Commission's authority was explained by the Court, "Under North Dakota law, Capital Electric must have a franchise to serve Boulder Ridge after that area was annexed to Bismarck." Id. (citing Divide County, 193 N.W.2d at 730-31). The Capital Electric Court concluded that since both MDU and the coop possessed valid franchises from the City of Bismarck to serve Boulder Ridge, "the issue of unreasonable duplication is subject to the jurisdiction of the PSC under N.D.C.C. § 49-03-

01.3”. Id. at ¶ 27. The Court explained its ruling requiring the coop to possess a lawful franchise protects the “public’s interest in preventing unreasonable duplication of facilities, **while recognizing a municipality’s constitutional authority to grant a franchise.**” Id. (*emphasis added*). The Capital Electric Court explained its holding does not interfere with Bismarck’s constitutional authority to franchise because Bismarck granted the coop a franchise to serve Boulder Ridge. Id. The Capital Electric case clearly establishes that the Commission’s authority under N.D.C.C. § 49–03–01.3 to decide a complaint exists only if the complaining coop possesses a valid franchise to serve granted by the City.

The Capital Electric pronouncement that the Commission has authority to decide whether a utility’s extension of services will unreasonably interfere with and duplicate services under N.D.C.C. § 49–03–01.3 only if the coop has a franchise to serve is an express recognition of the constitutional limitation of the Commission’s authority set forth in Art. VII, § 11. The North Dakota Supreme Court limited the Commission’s authority to determine disputes over interference and duplication within city boundaries to those cases where both the public utility and coop possess valid franchise from the city. See Capital Electric, 2007 ND 128, at ¶ 13; see also 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) (recognizing the City of Fargo granted the coop a franchise through an agreement to serve the annexed South Pointe development in dispute). The North Dakota Supreme Court’s opinions have clearly established that the Commission’s authority under N.D.C.C. § 49–03–01.3 is limited to cases in which both the utility and coop possess valid franchises from the city to serve the area in dispute. See id.

Nodak’s Complaint seeks to have the Commission determine Otter Tail’s proposed extension interferes with and is an unreasonable duplication of services and grant it a *de facto*

franchise to serve the new customer in McFarland's Addition. However, Nodak's Complaint is improper in the present case because the undisputed facts establish Nodak does not possess a valid franchise from the City of Drayton to serve customers in McFarland's Addition or anywhere else inside the City of Drayton's corporate limits. The Commission's authority under the Territorial Integrity Act is limited by Art. VII, § 11, of the North Dakota Constitution, which prevents the legislative assembly, and hence the Commission, from abridging the power of a municipality to franchise for electric service within a city. See Capital Electric, 2007 ND 128, at ¶ 27. Because Nodak does not possess a franchise to serve in the City of Drayton, the Commission lacks authority to decide whether Otter Tail's extension of services in McFarland's Addition will unreasonably interfere with and duplicate services of Nodak under N.D.C.C. § 49-03-01.3. See Capital Electric, 2007 ND 128, at ¶ 13.

Any attempt to enjoin Otter Tail from providing service to McFarland's Addition would constitute interference with the City of Drayton's constitutional right to franchise for electric service. Such an action by the Commission would force the City of Drayton to issue a franchise to Nodak or risk losing this highly beneficial economic development project. N.D.C.C. § 49-03-01.3 cannot be interpreted to authorize the Commission to exert that kind of influence over municipal franchise decisions or it would be unconstitutional. Therefore, consistent with the Supreme Court precedent laid out above, the Commission only has jurisdiction to determine interference or duplication if both Otter Tail and Nodak have lawful franchises to serve the City of Drayton. Because the Commission lacks the authority to grant the relief requested in Nodak's Complaint, Otter Tail's Motion to Dismiss Nodak's Complaint should be granted.

If the Commission grants Otter Tail's Motion to Dismiss, there is no need to address the remaining issues in this case. However, for purposes of the Post-Hearing Brief, Otter Tail will address the remaining issues identified in the Commission's Notice of Hearing.

II. OTP's Extension of service to McFarland's Addition will not interfere with existing services provided by Nodak.

Nodak alleges in its Complaint that Otter Tail's service to the new customer locating in McFarland's Addition would interfere with Nodak's facilities because it would "cross over" Nodak's existing lines. See Complaint, Affidavit of Mylo Einarson, at p. 3. In responding to Otter Tail's Motion to Dismiss, Nodak further asserts that "[o]ver the years, Nodak has made substantial improvements to its facilities near the City of Drayton in contemplation of further development in territory Nodak believed was rightfully its to serve under the TIA and the service area agreement between Nodak and Otter Tail." See Nodak Response to Otter Tail's Motion to Dismiss, p. 5. Nodak goes on to accuse the City of Drayton and Otter Tail of an unlawful taking of Nodak's facilities and territory by annexing said facilities and territory into city limits. Id. Nodak asserted at the hearing that Otter Tail *could* potentially interfere with Nodak's existing services if Otter Tail were to fail to properly construct its facilities or if Otter Tail's or Nodak's line locators were to fail to follow North Dakota's One Call Excavation Notice law. Nodak then complained, incorrectly, that the City's annexation of McFarland's Addition has the effect of "landlocking" Nodak's single-phase service there and that annexation represents "encroachment" upon Nodak's system. For the reasons explained below, these arguments fail to establish interference.

As noted above, Nodak has no right to serve inside Drayton's city limits. Nodak does not have a franchise and does not serve any customers in the annexed area. While there is no court precedent for evaluating a claim of interference where there is no franchise to serve, the evidence presented at the hearing established there is no interference.

A. Otter Tail's lines would not cross over Nodak's lines

Nodak's first allegation, that Otter Tail's service line would interfere by crossing over Nodak's existing line, is not true. Otter Tail Witness Tyler Jacobson, Senior Area Engineer for the Drayton area, testified that Otter Tail's preliminary plan is to go entirely underground subject to final engineering requirements to be provided by Love's. Using the facilities map in Otter Tail Exhibit No. 4, he explained that at no time would Otter Tail cross over Nodak's lines. Jacobson further testified that there are no provisions of the National Electric Safety Code ("NESC") which would prohibit such engineering design and construction. Jacobson testified that an underground conductor crossing beneath an overhead conductor is a common occurrence and that the NESC provides guidance for how to safely do so.

Nodak Witness Steven Breidenbach also testified that there are no NESC regulations prohibiting such overhead/underground crossings. Breidenbach testified that the presence of Nodak's lines over which it asserted Otter Tail would cross is a Nodak distribution underbuild attached to Otter Tail's existing transmission poles. In other words, Nodak's line is present at that location because Otter Tail allowed it, which he admitted benefited Nodak.¹ Moreover, Breidenbach used Nodak's facilities map, Exhibit No. 2, to explain that Nodak's own design would construct an underground conductor passing beneath an existing overhead Otter Tail transmission line. If Otter Tail's underground service crossing an existing Nodak overhead is interference, then so must Nodak's proposed service extension crossing underground below Otter Tail's existing overhead line. Nodak is not permitted to argue Otter Tail's underground crossing constitutes interference, yet its same underground crossing would not constitute interference with Otter Tail's facilities.

¹ Mr. Breidenbach and Mr. Einarson both described the arrangement as a lease, but Mr. Einarson had not seen it nor had any knowledge about payments.

B. There will be no physical interference with Nodak's existing services

It was established unequivocally at the hearing that Otter Tail's service to Love's in McFarland's Addition would not interfere with Nodak's existing services. Breidenbach admitted under cross examination that Nodak's existing services to customers would not be interrupted—only potential future customers that would not be added. Nodak Witness Einarson similarly testified that there would be no physical interference with Nodak's existing services, just “economic interference.”

During the hearing, Breidenbach implied that Otter Tail might inadvertently “nick” Nodak's line during construction, thus causing a potential immediate safety concern as well as potential future reliability and repair problems. He also asserted a potential safety concern from having two underground conductors on the same parcel if line location personnel fail to locate and mark both lines. These concerns were fully debunked upon further examination.

On the first concern, that Otter Tail might somehow contact or damage Nodak's underground single-phase facility, Jacobson testified that Otter Tail plans to construct its underground facility approximately fifty feet (50') from Nodak's underground facility. He further testified that he drew his map after personally visiting the property and lining up visible landmarks including Nodak's overhead distribution lines and Nodak's own line locate flags that were still on the property.

Breidenbach, conversely, insinuated that Otter Tail might not be able to construct exactly according to its design and that Nodak's facilities might not be where Otter Tail thinks they are located. He opined that Otter Tail therefore could be forced to bore under I-29 somewhere south of Nodak's single-phase line. Nodak failed, however, to introduce any specific evidence that Otter Tail would not be able to construct its underground facility fully in accordance with its design,

relevant NESC guidance, approved permits, and any and all safety measures. Further, consistent with the discussion below, Otter Tail, as an excavator, is required under North Dakota law to submit a ticket request to 811 before excavating that will prompt Nodak to accurately mark its underground line so that Otter Tail can take care to avoid contact with it.

With respect to future line location apprehensions, it was established in the testimony of Nodak Witness Breidenbach that Otter Tail and Nodak are each responsible to locate and mark their own lines. In fact, under the “Call Before You Dig” law, each utility with underground facilities in an area of imminent excavation is required to positively “clear” a locate ticket by indicating that its lines have been marked. See N.D.C.C. 49-23-04. Excavators receive notification of each utility’s location marking status, and would be well aware if either utility failed to positively respond. Otter Tail, Nodak, and/or the excavator would have to violate the law for excavation to begin before both electric lines are clearly and accurately marked.

The Commission should not base any finding of fact on the unfounded speculation that Otter Tail will violate or otherwise fail to comply with a rule or law, especially those that deal with safety or reliability. The Commission should give no weight to Nodak’s safety arguments.

C. Nodak’s area investment does not justify curtailing the City’s right to franchise.

Nodak’s claim of economic interference, that its investment in the area would be “taken” unlawfully by the annexation if Otter Tail is allowed to serve Love’s Truck Stop, is both flawed and unavailing for several reasons. First, Nodak should not have expected any investment near the City to be “annexation proof.” As noted above, Divide County has been the law of the land for nearly sixty years—a coop’s investment in an area subject to annexation is speculative and is made at the coop’s own risk. Divide County, *Supra*. Arguably, such speculative investment to serve empty fields made by Nodak many years or even decades earlier has already been “taken”

by the passage of time and the lack of any revenues. Investment without any prospect for timely revenues is more like the proverbial “bridge to nowhere” than a carefully planned system. Einarson testified that Nodak’s entire \$168 million system is built this way and not isolated to just this one circuit.

Moreover, if Nodak has been making speculative investment decisions based on a sixty-year old imprecise hand-drawn map, it would have been prudent to have had an agreement meeting with Otter Tail more recently than 1972. Similarly, prudence would dictate bringing the agreement under the jurisdiction and enforcement authority of the Commission by updating it to include the required TIA language and to add the City of Drayton as a signatory. Einarson’s two excuses for not doing so were that it would take effort, and his speculation that Otter Tail might request additional terms that Nodak did not want. Einarson further explained he received legal advice that pre-existing agreements were somehow bootstrapped into compliance with the 2005 amendment that gave the Commission jurisdiction to enforce Area Service Agreements that include the local municipality as a signatory and specifically acknowledge the Commission’s jurisdiction for enforcement. See N.D.C.C. § 49-03-06. Einarson asserted that updating the agreement is unnecessary because the legislature cannot have intended all existing agreements to become “null and void.” However, Otter Tail is asserting that the Area Service Agreement between Otter Tail and Nodak is “null and void.” The issue Otter Tail raised is that the statute requires the agreement to be filed and approved by the Commission before the Commission possesses jurisdiction to enforce it. Further, contrary to Einarson’s assertion, an agreement between Otter Tail and Nodak is not legally binding upon non-signatory City of Drayton, nor does it curtail the City of Drayton’s constitutional franchise rights.

Second, Nodak offered no evidence of the extent to which its investment was ‘upsized’ in anticipation of load growth in McFarland’s Addition or anywhere else in the vicinity. Nodak’s Response to Otter Tail’s Motion to Dismiss makes such an assertion, and Einarson insinuated that Nodak had made past investments to serve speculative future new loads but provided no evidence at the hearing of the magnitude of such incremental investment. From the evidentiary record presented at the hearing, the Commission cannot reasonably assess the magnitude or the reason for the alleged upgrades including whether it was a replacement of deteriorated assets installed in the 1940s. Nodak’s claims are unsupported assertions with no evidentiary foundation for consideration.²

Moreover, Nodak’s own analysis of the prospective return on investment as depicted in Nodak Exhibit 9 shows that Nodak has not attributed any incremental investment to serve McFarland’s Addition except the estimated line extension costs from the neighboring property. In other words, Nodak itself has not detailed any incremental investment that was made specifically to serve load growth from future development of McFarland’s Addition. A proper attribution of incremental investment costs—if they occurred—would yield a lower return on investment than shown in Nodak Exhibit 9. When considering Nodak’s criticism of Otter Tail Witness Steve Walters for not sitting down “face-to-face” with Nodak to see how much further Nodak would discount its rates, the return-on-investment calculation becomes that much more uncertain. Nodak’s projected return on investment is mathematically and logically flawed and should be given no weight.

² In response to Commissioner Fedorchak’s question to quantify the incremental investment in 3-phase near that location, Nodak Witness Einarson stated “In essence it’s \$168 million in plant in our service territory.” However, Nodak’s entire Net Utility Plant as stated on p.9 of its 2020 Annual Report is \$104 million: https://www.nodakelectric.com/wp-content/uploads/2021/03/2020_Nodak_Annual_Report.pdf.

Finally, it cannot be ignored that the Area Service Agreement which Nodak improperly seeks to have the Commission enforce would provide Nodak with no monetary compensation associated with this annexation. The agreement calls for compensation in the event of annexation to be based on purchasing assets at the depreciated property value to serve transferred customers plus two times the prior year gross earnings. See Ex. Nodak Exhibit 6, ¶ 4. In this case, both values are zero: the Nodak facilities currently located in McFarland's Addition are inadequate to meet the Love's service requirements—meaning that Otter Tail cannot make use of purchasing that property—and Nodak uses its single-phase line to serve other customers; and there simply are no prior year earnings from the empty field. Thus, the uncompensated value of the “takings” Nodak complains of is nonexistent.

D. The City of Drayton's annexation of McFarland's Addition followed proper procedure.

Nodak Witness Breidenbach testified that annexation of McFarland's Addition “landlocks” Nodak's existing single-phase so that no additional customers may be served from it.³ He also testified that annexation represents an “encroachment” upon Nodak's services. Einarson testified that this case may be an example of using annexation to “usurp” the question of obtaining a CPCN from the Commission. Einarson also testified that the City did not solicit Nodak's input regarding the annexation, and that, in his opinion, Otter Tail should not have renewed its franchise with the City because it purportedly conflicts with the 1968 Area Service Agreement. While these assertions imply a nefarious motive, contrary to Nodak's narrative, Otter Tail did not participate in the City of Drayton's decision to annex McFarland's Addition and even courteously informed Nodak of the impending action two months in advance. Furthermore, the City's procedure is

³ Nodak Witness Einarson did not indicate in his testimony whether Nodak's east-west easement in McFarland's Addition includes any rights to extend service southward out of the property.

exactly how annexation is supposed to work—the annexed area becomes part of the municipality and subject to the full panoply of ordinances and regulations including the right to grant a franchise or not.

Coops generally have long understood the effect of annexation under the Constitution. See e.g., *Divide County*, 193 N.W.2d at 730; *Tri-County*, 224 N.W.2d at 794. For example, Harland Fuglesten, General Counsel and Government Relations Director of the North Dakota Associations of RECs, presented written testimony regarding the TIA before the North Dakota Legislature stating that as the city grows, the public utility has the exclusive right to serve customers in areas previously served by the rural electric cooperative. Mr. Fuglesten also testified before the North Dakota legislature that:

In many other communities, however, co-ops did not obtain franchises. In these cities, the IOUs get all the growth. For example, because Montana-Dakota has the only franchise to serve the city of Williston, the local electric co-op sells its lines to MDU as the city expands into areas where the co-op has facilities. (*emphasis added*)

See Hearing on H.B. 1454 Before the House Industry, Business & Labor Committee, 58th N.D. Legis. Sess. (Feb. 5, 2003) (testimony of Harlan Fuglesten, General Counsel and Government Relations Director for North Dakota RECs).

Nodak also once understood this constitutional relationship. As Einarson testified, the 1961 agreement called for Otter Tail to automatically purchase Nodak facilities in the event of an annexation leading to a transfer of customers. He further testified that, in the 1968 version of the Area Service Agreement, the automatic purchase provision was changed to provide that a “necessary or desired” purchase of facilities would be subject to negotiation between the parties. Presumably, such purchases would only be “necessary” if Nodak were unable to secure a franchise and thus precluding it from continuing to serve transferred customers post-annexation. As

mentioned above, the 1968 agreement provided for the compensation for such purchases in the amount of the depreciated value of property plus twice the prior year gross earnings.⁴

With no physical interference, no taking of property, and no economic interference given Nodak's lack of ability to serve absent a franchise, Nodak has not met its burden of proof and the Commission should find there is no interference with Nodak's existing services.

III. Otter Tail's extension of service to Love's Truck Stop will not cause unreasonable duplication of services.

Nodak asserts in its Complaint that Otter Tail's extension of service to McFarland's Addition would be a "wasteful" duplication of services because Nodak "could extend service off of the single phase line already located on the property or extend three phase service by 350 feet to the proposed location of Love's transformer." See Complaint, p. 3, Response to Motion to Dismiss, p. 3. Despite Nodak's repeated claim that Love's could be served from Nodak's single-phase line on the property, Walters' testimony made clear that such service would be inadequate to meet Love's requirements for electric service and therefore be unacceptable. Specifically, Walters testified that Love's' engineering experts categorically rejected use of a phase converter. Thus, there is no merit to the assertion that Nodak's single-phase conductor can serve any purpose other than what it has been used for decades—through and out to serve Nodak's customers located east of I-29 and north of Hwy 66.

At the hearing, Nodak focused on the relative distance and cost for each utility to extend service to Love's from their respective adjacent 3-phase facilities to establish duplication. See Ex. Nodak 3. However, as Nodak's and Otter Tail's map exhibits demonstrated, both parties' existing facilities are adjacent to McFarland's Addition separated

⁴ Notably, Nodak presented no evidence regarding annexation compensation under the Area Service Agreement.

by a roadway — I-29 for Otter Tail, and 160th Ave. for Nodak. Both parties have invested in serving customers in the area—a few dozen or so for Nodak, and a few hundred for Otter Tail. Both parties require a line extension to serve McFarland’s Addition. Both parties indicated that boring for their respective services would be routine and that construction would be fully compliant with NESC requirements. Both parties have already secured the necessary permits.

Nodak’s argument of purported duplication of services is, in reality, one of the relative costs for line extensions and not one of actual duplication. Such a comparison of relative cost as one of the Ten Factors TIA Test may be appropriate where both utilities are permitted to serve; however, this case is about denying the City of Drayton’s right to select its sole franchisee to serve a new customer inside its municipal boundary. Nodak has presented no relevant legal authority supporting its unreasonable duplication argument.

As for any concerns that annexation could “pull the rug out from under” Nodak, that prospect has existed ever since the North Dakota Constitution first reserved to municipalities the unabridged right to franchise electric service within City boundaries. As noted above, this constitutional “home rule” authority is a well-documented and accepted legal principle. Further, if Nodak’s property is condemned, ‘taken,’ or otherwise used by a public utility due to annexation, existing laws sufficiently protect Nodak’s rights.

CONCLUSION

The North Dakota Constitution precludes the Commission from abridging the City of Drayton’s franchise authority and directly requiring the City of Drayton to grant a franchise to Nodak. The Commission should dismiss Nodak’s Complaint for lack of jurisdiction over the question of interference or duplication of services. As the North Dakota Supreme Court

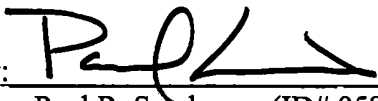
has ruled, the only choice a customer has for electric service inside a municipal boundary with a sole franchisee is the incumbent franchise holder.

Alternatively, Nodak's claims of interference and unreasonable duplication do not withstand scrutiny. Nodak has not proved that physical or economic interference will occur and the Commission should enjoin Otter Tail from serving this new load inside the City of Drayton.

For the reasons set forth in this Brief, Otter Tail Power Company respectfully requests the Commission grant its Motion to Dismiss Nodak's Complaint.

Dated this 30th day of April, 2021.

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