

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2021-CV-01508

Nodak Electric Cooperative, Inc.,)
)
 Appellant,)
)
 vs.)
)
 North Dakota Public Service)
 Commission, Otter Tail Power)
 Company, and City of Drayton,)
)
 Appellees, and)
 Cross-Appellants.)
)

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW,
 AND ORDER DATED JULY 14, 2021, FROM THE
 NORTH DAKOTA PUBLIC SERVICE COMMISSION

**CROSS-APPELLANT BRIEF AND RESPONSE BRIEF
 OF OTTER TAIL POWER COMPANY**

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STATEMENT OF THE ISSUES

[1] I. Whether the Public Service Commission's order denying Otter Tail's motion to dismiss was in accordance with the law?

[2] II. Whether the Public Service Commission's conclusion that Otter Tail's extension of service to McFarland's Addition would not interfere with Nodak Electric's service was supported by a preponderance of the evidence?

[3] III. Whether the Public Service Commission's conclusion that Otter Tail's extension of service to McFarland's Addition would not be unreasonable duplication of Nodak Electric's service was supported by a preponderance of the evidence?

[4] IV. Whether the Public Service Commission's conclusion that it lacked authority under N.D.C.C. § 49-03-06 to enforce the 1968 service area agreement was in accordance with the law?

STATEMENT OF THE CASE

[5] Complainant Nodak Electric Cooperative, Inc. ("Nodak Electric") commenced this action on July 29, 2020, by filing a Complaint against Otter Tail Power Company ("Otter Tail") 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.

[6] 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.

[7] On December 11, 2020, Otter Tail filed a Motion to Dismiss Nodak Electric's Complaint asserting the Commission lacked authority 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.

[8] 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 Otter Tail's motion to dismiss?
2. Whether Otter Tail'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?

[9] A hearing was held before the Commission on April 16, 2021. Nodak Electric 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.

[10] The Commission issued its Findings of Fact, Conclusions of Law, and Order on July 14, 2021, denying Otter Tail's Motion to Dismiss, denying Nodak Electric's request for relief in its Complaint, and dismissing the Complaint.

[11] On August 13, 2021, Nodak Electric filed a Notice of Appeal and Specifications of Error. On the same day, Otter Tail filed its Notice of Cross-Appeal and Specifications of Error.

STATEMENT OF FACTS

[12] The property at issue in the present action, McFarland's Addition, is located in the Northwest Quarter of Section 26, Township 159 North, Range 51 West in Pembina County, North Dakota. See Docket Index ("Index") # 61 (Annexation of McFarland's Addition). McFarland's Addition is a parcel of land located between Interstate 29 ("I-29") on the east and 160th Ave. on the west. Id. A representative of Love's Truck Stop approached the Mayor of Drayton in late

summer of 2018 inquiring about potential annexation of the McFarland's Addition property into the City of Drayton for construction of a new truck stop. See Index # 89 – 94 (Transcript "Tr." p. 236, l. 2-19; p. 264, l. 13-15). By January 2019, the City of Drayton made the decision to begin the annexation process for McFarland's Addition. (Tr. p. 237, l. 14-25). The Drayton City Council approved annexation of the McFarland's Addition property into the City of Drayton on August 12, 2019. See Index # 61. The Plat of McFarland's Addition and annexation was filed by the City with the Pembina County Recorder on August 19, 2019. Id. Nodak Electric did not provide electric service to any customers in McFarland's Addition. (Tr. p. 67, l. 24 – 68, l. 3). The annexation of McFarland's Addition did not result in the taking of any Nodak Electric lines or facilities in the annexed area. (Tr. p. 171, l. 18-25).

[13] The City of Drayton is located in Section 26, Township 159 North, Range 51 West in Pembina County, North Dakota. See Docket # 61. Otter Tail has been providing electric service to the City of Drayton since at least 1931. (Tr. p. 311, l. 6-13). Otter Tail possesses a franchise with the City of Drayton to provide electric service pursuant to a franchise agreement dated May 3, 2011. See Index # 60 (Otter Tail Franchise with the City of Drayton). Otter Tail's franchise with the City of Drayton requires it to provide electric service to customers within Drayton city limits. (Tr. p. 235, l. 2-5; p. 311, l. 19-23; p. 320, l. 6-11).

[14] The Mayor of Drayton testified that the City of Drayton chose Otter Tail to provide power to McFarland's Addition. (Tr. p. 243, l. 11-14). In April 2020, the City Council of Drayton passed a Resolution that Otter Tail is the utility that is to provide electric service to McFarland's Addition via its franchise. See Index # 62 (Drayton Resolution). Mayor Olson testified that the City of Drayton believes the City has exclusive authority to decide which utility supplies power to the McFarland's Addition and the City passed a resolution indicating that Otter Tail was to provide

electric service. (Tr. p. 243, l. 20-5). Mayor Olson testified that if the City of Drayton wanted Nodak Electric to serve McFarland's Addition the City could grant it a franchise, but the City has not done so. (Tr. p. 254, l. 5-24).

OTTER TAIL'S EXTENSION OF SERVICE

[15] Otter Tail's senior area engineer, Tyler Jacobson testified at the hearing regarding Otter Tail's proposed extension of electric service to the new Love's facility in McFarland's Addition. Otter Tail introduced a map at the hearing showing how it would provide three-phase service to the Love's facility from its existing three-phase line on the adjacent property located in the City of Drayton directly to the east of McFarland's Addition. See Index # 74 (Map of Otter Tail extension). Otter Tail's extension would cross under Nodak Electric's existing overhead single-phase distribution line on the east side of I-29. Id. Otter Tail would then extend its three-phase line by boring under I-29. (Tr. p. 290, l. 9-23). Jacobson testified Otter Tail's extension of three-phase service to McFarland's Addition would be approximately 1,000 feet and cost \$52,000. (Tr. p. 301, l. 8-16).

[16] Otter Tail obtained permits in May 2020 to bore under I-29 and those permits were extended in 2021. (Tr. p. 291, l. 7-16). Otter Tail further explained that boring for underground electric line is common practice in the industry and is more common than trenching a facility. (Tr. p. 291, l. 17-23). Jacobson testified there are no National Electric Safety Code ("NESC") regulations that would prohibit boring under I-29. (Tr. p. 292, l. 5-13). Jacobson further testified that there is no NESC guideline or regulation that prohibits Otter Tail's extension under Nodak Electric's existing overhead line. (Tr. p. 292, l. 21-25).

[17] Jacobson testified Otter Tail's proposed extension would not interfere with Nodak Electric's current infrastructure or customers. (Tr. p. 295, l. 22-6). Jacobson testified that Otter

Tail's extension would be located approximately 50 feet north of Nodak Electric's existing single-phase underground line located in McFarland's Addition. (Tr. p. 293, l. 4-10). Jacobson testified that because Nodak Electric has no existing facilities and customers in McFarland's Addition, Otter Tail's extension of electric service would not constitute an unreasonable duplication of electric services provided by Nodak Electric. (Tr. p. 295, l. 15-21).

[18] Nodak Electric's engineer testified that Otter Tail's proposed extension as designed would not cross any of Nodak Electric's underground facilities. (Tr. p. Tr. p. 73, l. 10-14). While Otter Tail's underground line would cross under Nodak Electric's existing overhead line, Nodak Electric's engineer conceded there is no provision in the NESC or any other regulation that would prohibit Otter Tail from constructing an underground extension under Nodak Electric's existing overhead distribution line. (Tr. p. 66, l. 8-13).

[19] Nodak Electric's engineer testified that Otter Tail's proposed extension would not require Nodak Electric to move its existing overhead line. (Tr. p. 67, l. 2-6). He further testified that Otter Tail's construction of the underground extension under Nodak Electric's existing overhead lines would not interrupt service to any of Nodak Electric's customers. (Tr. p. 67, l. 7-11). Nodak Electric's engineer further conceded that Otter Tail's extension of service would not interfere with any service Nodak Electric is currently providing to any customers. (Tr. p. 98, l. 14-17; p. 156, l. 15-21). He admitted Otter Tail's proposed extension would not take away any existing customers that are currently receiving electric service from Nodak Electric. (Tr. p. 98, l. 10-13).

[20] Nodak Electric acknowledged that it had no infrastructure in place in McFarland's Addition that would be taken as a result of Otter Tail's extension of service. (Tr. p. 100, l. 6-10). Nodak Electric's engineer admitted Otter Tail's proposed extension of three-phase service to

McFarland's Addition would not impact its existing three-phase customer located to the west of McFarland's Addition. (Tr. p. 99, l. 8-12). Further, Nodak Electric admitted that Otter Tail's extension of service to McFarland's Addition would not prevent it from extending three-phase service to any new customers from its existing three-phase facility located west of McFarland's Addition. (Tr. p. 99, l. 21-24). Nodak Electric conceded that its argument that Otter Tail's extension could take away future customers is based on speculation. (Tr. p. 102, l. 15-21).

[21] Otter Tail's analysis established that its proposed annual rates to serve Love's were approximately \$32,000 lower than Nodak Electric's rates. (Tr. p. 337, l. 2-5). Otter Tail's rate to provide service to Love's would be \$78,363.58 annually. See Index # 59; see also (Tr. p. 316, l. 5-12). Nodak Electric's published rates to provide the exact same service to Love's would be approximately \$110,000. (Tr. p. 336, l. 21- p. 337, l. 1). Nodak Electric introduced an exhibit at the hearing indicating it could provide service to Love's for approximately \$93,351, but this was calculated upon its projected electric consumption of what it believed to be similar-sized facilities. See Index # 55. Nodak Electric did provide lower rates for controlled (interruptible) service for Love's, however Love's representative, Steve Walters, testified that it would not be willing to accept interruptible service for its facility. See id.; see also (Tr. p. 272, l. 10-13). Mr. Walters also testified that Love's accounting personnel independently calculated a significant service cost differential in Otter Tail's favor using rates provided by Nodak Electric's CEO, Mr. Einarson. (Tr. p. 271, l. 8-15; p. 272, l. 4-7; p. 276-7, l. 21-2).

NODAK ELECTRIC'S EXTENSION OF SERVICE

[22] Nodak Electric proposed extending three-phase service to McFarland's Addition from its existing three-phase facility located on property in Section 27 directly west of McFarland's Addition. See Index # 48. Nodak Electric would be required to trench its extension

to McFarland's Addition through 160th Ave. NE, which separates Sections 26 and 27. Id. Nodak Electric's underground extension would be required to cross under Otter Tail's existing overhead transmission line, which is located in McFarland's Addition. (Tr. p. 57, l. 18-25). Nodak Electric testified that construction of its proposed underground three-phase line would not interfere with Otter Tail's existing overhead lines. (Tr. p. 58, l. 4-9).

[23] Nodak Electric testified it had an existing single-phase line on the south side of McFarland Addition, but it would not use that single-phase line to provide three-phase service to Love's. (Tr. p. 56, l. 9-14). Nodak Electric's engineer conceded that, while both it and Otter Tail have existing lines on McFarland's Addition, neither utility intended to provide three-phase service to Love's from those existing lines. (Tr. p. 57, l. 11-17). Love's specifically requested three-phase service for their new facility. (Tr. p. 266, l. 6-8). Love's representative testified that it would not take service off a single-phase electric line with a phase converter to obtain three-phase service. (Tr. p. 266, l. 9-15).

[24] Nodak Electric's existing three-phase service to the west of McFarland's Addition was constructed for a specific customer that requested three-phase service. (Tr. p. 158, l. 15-22). Nodak Electric conceded its existing three-phase customer to the west of McFarland's Addition will still have three-phase service whether or not Otter Tail's extension is built. (Tr. p. 158, l. 23-1).

[25] With respect to its argument of economic interference, Nodak Electric did not quantify the investment made in any upgrades in 2009 for service for other customers in the area. (Tr. p. 196, l. 14-25). Nodak Electric could not identify what members were charged for alleged upgrades in 2009. (Tr. p. 200, l. 6-10). With respect to its investment in the area, Nodak Electric could not testify when the three-phase service was first constructed or the size of the transformer

facilities located on the three-phase site to the west of McFarland's Addition. (Tr. p. 215, l. 14-25). However, Nodak Electric's CEO admitted the transformer for the existing three-phase customer to the west of McFarland's Addition was not sized larger for future load growth, but rather sized for that specific customer's needs. (Tr. p. 216, l. 1-7).

1968 SERVICE AREA AGREEMENT

[26] Nodak Electric and Otter Tail entered into a service area agreement in 1968. See Index # 53. The 1968 agreement referenced certain maps, purportedly including the area near Drayton. Id. The City of Drayton was not party to the 1968 service area agreement. Id.

[27] Nodak Electric never filed the 1968 service area agreement or any corresponding maps with the Commission. (Tr. p. 177, l. 21 – 178, l. 2). The 1968 service area agreement does not acknowledge Commission jurisdiction to enforce the agreement. See Index # 53. Nodak Electric was aware that North Dakota's enactment in 2005 of a service area agreement statute provided that a city may require approval of service area agreements between electric providers when the agreement encompasses locations within the city. (Tr. p. 178, l. 7-13). The Mayor of Drayton testified the City of Drayton has never approved nor consented to be bound by the terms of the 1968 service area agreement between Otter Tail and Nodak Electric. (Tr. p. 178, l. 14-24).

SUMMARY OF THE ARGUMENT

[28] Having failed to obtain a franchise from the City of Drayton to serve the new Love's truck stop in the City of Drayton, Nodak Electric filed this action with the Commission seeking to invalidate Otter Tail's franchise and grant it a *de facto* franchise to serve the property in the City of Drayton. However, the North Dakota Constitution grants the exclusive authority to franchise electric service to the cities and mandates that a city's power to franchise shall not be abridged by the Legislature. The Commission obtains its regulatory authority solely from powers granted to it

by the Legislature. The Commission's conclusion that North Dakota statute § 49-03-01.3 grants it the power to abridge the City of Drayton's constitutional franchise authority is contrary to North Dakota law and should be overturned. Further, the Commission has no authority to grant Nodak Electric with a franchise to serve within the City of Drayton. The North Dakota Supreme Court has previously ruled that a cooperative must possess a franchise to serve within a city after property is annexed into the city. Because Nodak Electric does not have a franchise to serve in the City of Drayton, the Commission has no authority to determine interference or unreasonable duplication and Otter Tail's Motion to Dismiss should have been granted. Because the Commission's conclusion denying Otter Tail's Motion to Dismiss was not in accordance with the law and should be overturned, there is no need for the Court to address the Commission's conclusions regarding Nodak Electric's claims for interference and unreasonable duplication.

[29] However, if the Court were to consider Nodak Electric's appeal of the Commission's conclusions that Nodak Electric failed to meet its burden to establish Otter Tail's proposed extension of service constituted interference or unreasonable duplication, this Court's review is limited to a determination of whether the Commission's conclusions of law and order are supported by its findings of fact, and whether the Commission's findings of fact are supported by a preponderance of the evidence. The Court's role on appeal is not to make its own independent findings of fact or substitute its judgment for that of the Commission to determine whether it erred, but rather should decide only whether a reasoning mind could have decided that the Commission's factual conclusions were proved by the weight of the evidence from the record. On appeal, Nodak Electric is requesting this Court reweigh the facts and place more weight on facts Nodak Electric believes support its claims. Contrary to Nodak Electric's arguments, the Commission's conclusions that Nodak Electric failed to meet its burden of proof establishing interference and

unreasonable duplication were supported by its findings of fact and the preponderance of the evidence. If applicable, the Commission's conclusions on interference and duplication should be affirmed.

STANDARD OF REVIEW

[30] An appeal from a decision by the Commission is governed by the Administrative Agencies Practice Act in N.D.C.C. Ch. 28-32. North Central Elec. Coop. v. N.D. PSC, 2013 ND 158, ¶ 6, 837 N.W.2d 138. Under N.D.C.C. § 28-32-46, a district court must affirm an administrative agency order unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

[31] The Commission's determination will not be disturbed on appeal unless it can be shown that such decision or determination is not in accordance with the law, or the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. In re Otter Tail Power Co., 169 N.W.2d 415, 419 (N.D. 1969). In reviewing the Commission's findings of fact, the district court does not make independent findings of fact or substitute its judgment for that of the Commission; rather, the court should decide only whether a reasoning mind reasonably could have decided the Commission's

factual conclusions were proved by the weight of the evidence from the entire record. Coteau Props. Co. v. Oster, 2000 ND 23, ¶ 5, 606 N.W.2d 876. It is not a district court's function to act as a super board when reviewing decisions by an administrative agency. Id. "Agency expertise is entitled to appreciable deference if the subject matter is highly technical." Cap. Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n, 2016 ND 73, ¶ 6, 877 N.W.2d 304. However, the Commission's decisions on questions of law are fully reviewable on appeal. Cap. Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788.

[32] It should be noted that Nodak Electric's Brief attempts to apply the wrong standard of review to the Commission's order on appeal. Nodak Electric argues the "Commission erred" in finding Otter Tail's extension would not interfere with or be unreasonable duplication of services provided by Nodak Electric because it did not give sufficient weight to evidence that Nodak Electric believes is compelling. See Index # 102. This is a request on appeal to reweigh the evidence. On appeal from the Commission's decision under the Administrative Agencies Practices Act, this Court's review is limited to whether the Commission's order is in accordance with the law, whether the Commission's conclusions of law and order are supported by its findings of fact, and whether the Commission's findings of fact are supported by a preponderance of the evidence. See N.D.C.C. § 28-32-46. A district court's role on appeal is not to make its own independent findings of fact or substitute its judgment for that of the Commission to determine whether it "erred", but rather should decide only whether a reasoning mind could have decided that the Commission's factual conclusions were proved by the weight of the evidence from the record. See Coteau Props., 2000 ND 23, at ¶ 5.

LAW AND ARGUMENT

I. The Public Service Commission's order denying Otter Tail's motion to dismiss was not in accordance with the law.

[33] The Commission denied Otter Tail's Motion to Dismiss seeking dismissal of Nodak Electric's Complaint on the grounds the Commission lacked authority to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to the McFarland's Addition. Nodak Electric's Complaint sought to have the Commission invalidate the City of Drayton's franchise with Otter Tail to serve McFarland's Addition and grant Nodak Electric a *de facto* franchise to serve. Under North Dakota law, the City of Drayton has the exclusive constitutional authority to determine the electric service provider for McFarland's Addition in the City of Drayton. The Commission's denial of Otter Tail's Motion to Dismiss was not in accordance with North Dakota law because the Commission lacks authority over the City of Drayton's exercise of its constitutional franchise authority to select the electric service provider for McFarland's Addition.

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

[34] 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 Legislature's enactment of statutory law. Id.

[35] The North Dakota Public Service Commission is a State Agency granted power by the North Dakota Legislature. See N.D.C.C. Title 49. 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. Specifically, there is no North Dakota statute empowering the Commission the power to grant or limit franchises for the operation of public utilities within cities in the State.

[36] Nodak Electric's Complaint requested the Commission enjoin Otter Tail from extending electric service to the McFarland's Addition property in the City of Drayton pursuant to N.D.C.C. Ch. 49-03. However, the relevant provision of Chapter 49-03, N.D.C.C., expressly prohibits the Commission from abridging the city's exclusive power to exercise its 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). Section 49-03-06(8) clearly 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, and with good reason—the Constitution prohibits the legislative assembly from granting such power. Consequently, 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 withing city limits. Any interpretation to the contrary must be rejected as unconstitutional.

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

[37] 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 Index # 61 (Drayton's Annexation of McFarland's Addition). The Drayton City Council approved annexation of McFarland's Addition into the City of Drayton on August 12, 2019, and it was filed by the City with the Pembina County Recorder on August 19, 2019. Id. 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 Index # 60 (Otter Tail Franchise). Otter Tail has been providing electric service to customers in Drayton pursuant to lawful franchise since the 1930s. Both the City of Drayton and Otter Tail recognize this franchise obligates Otter Tail to provide electric service to all customers within the City of Drayton. (Tr. p. 245, l. 22-24; p. 320, l. 6-11). Conversely, Nodak Electric does not possess a franchise agreement with the City of Drayton which would permit it to provide electric service within the City.

[38] Due to the impending dispute regarding the electric service provider to McFarland's Addition, the City of Drayton passed a resolution authorizing Otter Tail to provide electric service to McFarland's Addition. See Index # 62. The City of Drayton's resolution eliminates any doubt as to the electric service provider the City chose to provide service in McFarland's Addition. Id.

[39] 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 power to grant Otter Tail the franchise to serve McFarland's Addition. See Index # 62. The City of Drayton's determination that Otter Tail will provide electric service to McFarland's Addition cannot be abridged by this Commission. See

N.D. Const. Art. VII, § 11; 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 id. Accordingly, Otter Tail's Motion to Dismiss should have been granted by the Commission. The Commission's Order denying Otter Tail's Motion to Dismiss was not in accordance with North Dakota law and should be reversed.

C. North Dakota Supreme Court precedent affirms Nodak Electric is required to possess a franchise to serve McFarland's Addition.

[40] Nodak Electric 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 grant it a *de facto* franchise to provide electric service in the City of Drayton. Nodak Electric's strategy was necessary because it is unable to provide electric service to McFarland's Addition without a lawful franchise. See Capital Elec., 2007 ND 128, at ¶ 13. However, Nodak Electric's strategy is misplaced because the Commission lacks authority to grant Nodak Electric a franchise to provide electric service within the City of Drayton. See N.D. Const. Art. VII, § 11.

[41] The North Dakota Supreme Court defined a franchise as "a special privilege conferred by government on an individual or corporation, and which does not belong to citizens of country generally of common right". Williams Bros. Pipe Line Co. v. Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968) (citing Black's Law Dictionary). Pursuant to North Dakota law, the governing body of a municipality has the power to grant franchise for public utilities. See § 40-05-01(57); see also City of Grafton, 86 N.W.2d at 204 (recognizing a franchise gives the utility the right to use public right of way for the installation and operation of its facilities).

[42] 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 electric service to the school asserting it was illegal for the Coop to provide electric service in city limits without a franchise. Id. at 727.

[43] 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.

[44] The Divide County Court next addressed the issue of whether the Coop could continue to serve property, upon which it was providing electric service, after it 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.

[45] 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.

[46] 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 Electric could claim to furnish electric service ceased because Nodak Electric does not possess a franchise with the City of Drayton. See Divide County, 193 N.W.2d at 730; see also Capital Electric, 2007 ND 128, at ¶ 13 (stating that under North Dakota law, a coop must have a franchise to serve an area after that area was annexed into the city).

[47] Moreover, there is no legal authority for the Commission to hear a Complaint to determine between electric service providers inside city limits unless both entities possess a valid franchise to serve therein. In Capital Electric, the Court undertook an extensive analysis to establish that the electric coop had, in fact, been permitted by the City to serve the annexed area in question before concluding the applicability of N.D.C.C. 49-03. Id. (explaining that "[i]f 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 and this Court's decisions culminating in Cass County Elec. Coop v. N.S.P., 419 N.W.2d 181 (N.D. 1988), and N.S.P. v. P.S.C., 452 N.W.2d 340 (N.D. 1990)"). The Court's review of the history of the Territorial Integrity Act includes no cases where an electric coop was found to have the right to serve inside city limits without permission from the city. See id.

[48] Nodak Electric has asserted that, because the City of Drayton does not have a second ordinance prohibiting electric service inside city limits, the Commission has jurisdiction to

apply 49-03-1.3. See Index # 75 at ¶ 11. The Commission simply asserted its jurisdiction under 49-03-1.3, leaving the Constitutional question for the courts. See Index # 82 at p.7, ¶ 3. Both assertions are wrong under the law. While the N.D. Supreme Court has noted and addressed such second ordinances where they existed, it has never held that a co-op without a franchise can serve a city receiving central station service. Similarly, the Court has never held that the lack of a second ordinance opens the door for any electric service provider other than the franchisee.

[49] Simply put, a second ordinance is superfluous under the Constitution's franchise framework. First, as noted above, a franchise scheme establishes authority to determine who is permitted to serve inside city limits. Establishing who *can* serve (Otter Tail) coincidentally establishes who *cannot* (everyone else). A non-exclusive franchise does not mean that any and all others may serve within a city. Instead, it means that a current city council cannot prevent future city councils from exercising the right to franchise additional providers, as evidenced in the Capital Electric and Cass County cases where the respective cities granted franchises to multiple electric service providers. Second, as noted above the constitutional prohibition against statutory "abridging" reserves the franchise authority exclusively to the city. To require a second ordinance by a city in order to prevent Commission jurisdiction over the franchise question would make abridging automatic unless a positive action is taken by a city. This would elevate the statutory framework above the constitutional framework in the hierarchy of authority. Under North Dakota law, constitutional provisions are limitations upon the power of the legislature. See State ex rel. Johnson v. Baker, 21 N.W.2d 355, 358–59 (N.D. 1945). Furthermore, requiring a positive action by a city to cut off Commission jurisdiction contradicts the plain language of N.D.C.C. § 49-03-6(8) noted above.

[50] Finally, under N.D.C.C. § 49-03-1.3 the Commission is required to enjoin the

public utility franchisee from extending service to a new customer if it finds interference or unreasonable duplication of service. However, the statute does not confer authority to the Commission to grant a franchise to a co-op in the first instance. This means that if a co-op without a franchise can invoke Commission jurisdiction under 49-03-1.3 then they can potentially hold the city and the new customer hostage without electric service unless the city grants a franchise to the co-op. Statutory legislation cannot empower a co-op to use the Commission to usurp the city's Constitutional franchise authority.

II. The Public Service Commission's conclusion that Nodak Electric did not meet its burden to establish that Otter Tail's extension of service to McFarland's Addition would interfere with Nodak Electric's service was supported by a preponderance of the evidence.

[51] In its Order, the Commission concluded Nodak Electric did not meet its burden of proof to demonstrate that Otter Tail's extension of service would interfere with Nodak Electric's service. See Index # 82. On appeal, Nodak Electric argues the Commission erred when it found that Otter Tail's extension would not interfere with Nodak Electric's existing service. See Index # 102, at ¶ 14. The Commission's conclusion was supported by a preponderance of the evidence.

[52] In support of its conclusion that Otter Tail's proposed extension to serve McFarland's Addition would not interfere with Nodak Electric's service, the Commission made several findings of fact. Index # 82, at p. 5. The Commission found that Otter Tail's proposed extension would cross under Nodak Electric's existing overhead distribution line attached to Otter Tail's transmission structures. Id. The Commission also found that underground crossings of an overhead line frequently occur and that both Nodak Electric witnesses testified that there are no statutory or regulatory prohibitions against Otter Tail's design, nor does it violate the NESC. Id. (See Tr. p. 66, l. 8-13; Tr. p. 157, l. 13-16). Otter Tail's engineer also testified there are no NESC guidelines or regulations prohibiting Otter Tail's extension under Nodak Electric's existing

overhead line. (Tr. p. 292, l. 21-25). The Commission's conclusion that Otter Tail's extension crossing under Nodak Electric's overhead lines is common practice and not prohibited by the NESC or other safety regulations was amply supported by its findings of fact and the undisputed evidence at the hearing.

[53] The Commission next found that Otter Tail secured the necessary permits to bore under I-29 for its extension and boring is a common construction practice for extending utility infrastructure. Index # 82, at p. 5. The Commission's findings again were supported by the undisputed evidence. Otter Tail's project engineer Tyler Jacobson testified Otter Tail obtained permits for boring under I-29 to extend service in May 2020 and those permits were extended into 2021. (Tr. p. 291, l. 7-16). Jacobson further testified that boring electric utility lines is common practice in the industry and is more common for Otter Tail than trenching an extension. (Tr. p. 291, l. 17-23). Further, Jacobson testified that there are no NESC regulations that prohibit boring under I-29. (Tr. p. 292, l. 5-13). Nodak Electric's own single-phase transmission line was bored under I-29. See Index # 48. Nodak Electric did not present any evidence disputing the existence of Otter Tail's permits at the hearing. (Tr. p. 96 l. 5-23) (Breidenbach's testimony indicating he has no personal knowledge of Otter Tail's permits). The Commission's findings were supported by the undisputed evidence.

[54] In support of its conclusion of no interference, the Commission found that "Otter Tail's proposed design and construction will not take away any existing Nodak customer and there will be no service interruptions or impacts to Nodak's existing customers." Index # 82, at p. 5. The Commission's finding was again supported by the uncontroverted testimony. Nodak Electric conceded it had no customers in McFarland's Addition that would be taken by Otter Tail's extension of service. (Tr. p. 67, l. 24-3). Otter Tail's engineer testified that Otter Tail's proposed

extension would not interfere with Nodak Electric's current system or customers. (Tr. p. 295, l. 22-6). Nodak Electric's engineer agreed that Otter Tail's extension would not interrupt or interfere with any service Nodak Electric is currently providing to any customer. (Tr. p. 67, l. 7-11; Tr. p. 98, l. 14-17). He also admitted Otter Tail's proposed extension would not take away any existing customers that are currently receiving electric service from Nodak Electric. (Tr. p. 98, l. 10-13). Specifically, Nodak Electric's engineer admitted Otter Tail's extension would not impact its existing three-phase customer to the west of McFarland's Addition. (Tr. p. 99, l. 8-12). The Commission's conclusion that Otter Tail's extension would not result in an interruption of service to any Nodak Electric's customers was supported by the evidence.

[55] The Commission's next relevant finding of fact was "No Nodak infrastructure will be taken or impacted by Otter Tail's extension into McFarland's Addition." Index # 82, at p. 5. Again, the Commission's finding was supported by the uncontroverted evidence. Otter Tail's engineer testified that Otter Tail's proposed extension would not interfere or physically impact any of Nodak Electric's current infrastructure. (Tr. p. 295, l. 22-6). Otter Tail's proposed extension would be an underground bore under Nodak Electric's existing overhead line and would not require Nodak Electric to move any of its existing facilities. (Tr. p. 67, l. 2-6). Nodak Electric's engineer agreed that Otter Tail's proposed extension under Nodak Electric's existing overhead lines would not take nor require Nodak Electric to move its overhead lines. (Tr. p. 67, l. 2-6). The Commission's conclusion that Nodak Electric would not lose any existing infrastructure from Otter Tail's extension of service to McFarland's Addition was supported by the evidence.

[56] The Commission's final relevant finding of fact supporting its conclusion of no interference was "Otter Tail's service to McFarland's Addition will not prevent Nodak from running three-phase service to other locations." This finding was supported by the uncontroverted

evidence. Otter Tail's extension to McFarland's Addition would be from the east and would have no impact on Nodak Electric's existing service to the west of the annexed area. Index # 74. As previously recognized, Otter Tail will not be taking or utilizing any of Nodak Electric's existing infrastructure as part of its extension. (Tr. p. 100, l. 6-10). Nodak Electric's engineer admitted Otter Tail's proposed extension will not impact its existing three-phase facilities west of McFarland's Addition. (Tr. p. 99, l. 8-12). Further, Nodak Electric's engineer admitted that Otter Tail's extension of service to McFarland's Addition would not prevent it from extending three-phase service to any new customers from its existing three-phase facility located west of McFarland's Addition. (Tr. p. 99, l. 21-24). The Commission correctly determined Otter Tail's extension will not economically interfere with Nodak Electric's future business when all its facilities will still be in place and nothing will prevent it from utilizing those facilities to provide service to future customers. The Commission's finding that Otter Tail's service to McFarland's Addition will not prevent Nodak from serving future customers was supported by the evidence.

[57] On appeal, Nodak Electric argues economic interference “[d]ue to the Commission’s findings, it effectively stranded Nodak Electric’s existing single-phase line because it was annexed into the City.” See Index # 102, at ¶ 16. Nodak Electric’s argument is misplaced and does not support its allegation of economic interference. The Commission did not annex McFarland’s Addition, the City of Drayton did. Index # 61. The validity of the City of Drayton’s annexation of McFarland’s Addition was not an issue determined by the Commission and is not before this Court on appeal. Further, the City’s annexation of McFarland’s Addition neither resulted in the taking of Nodak Electric’s single-phase line nor determined whether the purchase of the property by Love’s foreclosed future service extensions in the southern part of the Addition.

Nodak Electric's argument that annexation resulted in economic interference is not relevant to the issues on appeal and should be rejected.

[58] Nodak Electric also argues that Otter Tail's proposed extension could cross its existing underground lines in the area. This argument is pure speculation based on the unfounded hypothetical possibility that Otter Tail's boring under I-29 might, through unforeseen circumstances, be forced to move southward past Nodak Electric's existing underground line. Nodak asserted that such underground crossing within McFarland's Addition could present line locating safety hazards. The Commission rejected Nodak Electric's argument, concluding that possible future confusion for contractors does not constitute interference. See Index # 82, at p. 7. Otter Tail's engineer testified its proposed extension would be located approximately 50 feet north of Nodak Electric's existing single-phase underground line located in McFarland's Addition. (Tr. p. 293, l. 4-10). Nodak Electric's engineer admitted that Otter Tail's proposed extension as designed would not cross any of Nodak Electric's underground facilities. (Tr. p. 73, l. 10-14). Moreover, after alleging potential safety concerns, Nodak Electric's engineer admitted that under North Dakota law each utility has an obligation to mark its own underground facilities before any excavation may occur. (Tr. p. 73, l. 6-9). Nodak Electric's argument claiming hypothetical interference is based upon pure speculation and does not form a legitimate basis for overturning the Commission's order.

[59] The Commission's conclusion of no interference was supported by a preponderance of the evidence. Accordingly, this Court must affirm the Commission's Order on this issue. See Capital Electric, 2007 ND 128, at ¶ 35 (affirming the Commission's Order concluding an appellate court does not "reweigh or reevaluate the evidence" from the hearing and does not "function as a super board and second guess the [Commission's] findings").

III. The Public Service Commission's finding that Otter Tail's extension of service to McFarland's Addition would not be unreasonable duplication of Nodak Electric's service was supported by a preponderance of the evidence.

[60] In its Order, the Commission concluded Otter Tail's extension of service to McFarland's Addition would not result in unreasonable duplication of services. See Index # 82. On appeal, Nodak Electric argues the Commission erred in so concluding. Contrary to Nodak Electric's argument, the Commission's conclusion that Otter Tail's extension would not result in unreasonable duplication was supported by a preponderance of the evidence.

[61] In consideration of unreasonable duplication, the Commission properly determined it must look at both utilities' existing facilities in the annexed area to determine whether the proposed extension would constitute duplication of capital-intensive facilities and services already provided. See Index # 82, at p. 7; see also Capital Electric, 2007 ND 128, at ¶ 33 (setting forth the standard for review of Commission's determination of unreasonable duplication). The question of which electric supplier's facilities are actually duplicative is one of fact for the Commission to determine. Capital Electric, 2007 ND 128, at ¶ 33. In the present case, the Commission recognized that some duplication is not necessarily wasteful duplication. See Index # 82, at p. 8.

[62] In support of its conclusion of no unreasonable duplication, the Commission made several findings of fact. First, the Commission found that neither Otter Tail nor Nodak Electric had existing three-phase service within McFarland's Addition necessary to serve the Love's Facility. See Index # 82, at p. 6. This finding of fact is undisputed, as Nodak Electric had a single-phase line and Otter Tail had a transmission line on the property. See Index # 74. Neither Nodak Electric nor Otter Tail proposed serving Love's off their existing lines. Both Otter Tail and Nodak Electric proposed service to Love's by extending a new three-phase line from their respective facilities on property directly bordering McFarland's Addition. Id. Nodak Electric's existing

three-phase service was located in Section 27 on the other side of 160th Ave. NE. See Index # 61. Otter Tail's existing three-phase service was located in Section 26 directly east of I-29. Id. The Commission's finding that neither Otter Tail nor Nodak Electric had existing three-phase service in McFarland's Addition to serve Love's was supported by the evidence.

[63] The Commission found that Otter Tail's extension to serve McFarland's Addition would be approximately 1,000 feet and cost \$52,000, while Nodak Electric's extension would be approximately 350 feet and cost \$19,037.50. See Index # 82, at p. 6. The Commission's findings on the proposed length of the extensions and costs were accurate based upon the testimony of Otter Tail's and Nodak Electric's engineers. The Commission concluded that both extensions are relatively minor for an electric distribution company to serve a new area. In comparison, other extensions involve significantly greater investments. See e.g., Capital Electric, 2016 ND 73, at ¶ 3 (finding the public utilities' cost of extension for service was \$513,669.84 while the coop's cost would be \$575,883.84). The Commission's findings regarding the length and cost of the proposed service extensions were supported by the evidence.

[64] In its conclusion, the Commission recognized that both Otter Tail and Nodak Electric had made investments in their respective facilities to serve customers in the Drayton area, however neither party demonstrated they made specific capital-intensive investments for the purpose of serving McFarland's Addition. See Index # 82, at p. 6. In prior cases before the Commission, evidence was introduced regarding capital investments made to serve the specific annexed area in dispute. See e.g., Capital Electric, 2007 ND 128, at ¶ 34 (indicating the Commission found the coop had invested in excess of seven million dollars to serve pursuant to the City's permission to serve the annexed area); N. States Power Co. v. N. Dakota Pub. Serv. Comm'n, 452 N.W.2d 340, 344 (N.D. 1990) (noting the Commission found the coop constructed

35.29 circuit miles of electrical lines, 13 line switches, and 263 transformers in the annexed territory at a cost of over two million dollars). Nodak Electric argues the Commission erred in finding that Otter Tail had made capital investments near McFarland's Addition. See Index # 102, at ¶ 20. Nodak Electric's argument is simply wrong, as Otter Tail had constructed three-phase service directly adjacent to McFarland's Addition to the east and had existing infrastructure and customers within the City of Drayton in Section 26. See Index # 74. There is no dispute that both Otter Tail and Nodak Electric had three-phase facilities on property directly bordering McFarland's Addition, but there was no evidence presented at the hearing demonstrating that either utility made specific investments to serve future growth in McFarland's Addition. Specifically, Nodak Electric provided three-phase service to a farm west of McFarland's Addition, but could not testify when the three-phase service was first installed or the size of the transformer facilities. (Tr. p. 215, l. 14-25). Nodak Electric admitted the transformer for the site to the west of McFarland's Addition was not sized larger for future load growth, but rather sized for that specific customer's needs. (Tr. p. 216, l. 1-7). More importantly, Nodak Electric when asked could not quantify any specific investment made in any upgrades in 2009 for three-phase service for future customers in the area. (Tr. p. 196, l. 14-25). Nodak Electric concedes in its Brief that it failed to present any evidence at the hearing quantifying the expenditures it allegedly made to serve area. See Index # 102, at ¶ 20. Nodak Electric also could not identify what members were charged for alleged upgrades in 2009. (Tr. p. 200, l. 6-10). Contrary to Nodak Electric's assertion, the evidence established Otter Tail also invested in constructing three-phase service on the adjacent property to the east of McFarland's Addition to serve the City of Drayton. See Index # 74. The Commission's finding that both Otter Tail and Nodak Electric made investments in their respective facilities to serve customers in the Drayton area, but neither presented evidence of any specific capital-

intensive investments for the purpose of serving McFarland's Addition, was supported by the evidence at the hearing.

[65] Nodak Electric erroneously argues Otter Tail's extension of service to McFarland's Addition "is not a logical extension of Otter Tail's services." See Index # 102, at ¶ 20. Otter Tail made previous investment into existing three-phase service to serve customers in the City of Drayton. Index # 74. At the hearing, Nodak Electric's CEO conceded that Otter Tail designed their existing three-phase systems in Drayton to serve future customer growth within the City. (Tr. p. 160, l. 4-8). McFarland's Addition is now part of the City of Drayton and is a natural extension of Otter Tail's existing three-phase facilities to serve customers in the City of Drayton.

[66] Nodak Electric also mistakenly claims that from the customer's perspective it could serve the load just as economically as Otter Tail. See Index # 102, at ¶ 21. The evidence at the hearing comparing the same levels of energy demand established Otter Tail's rates were significantly lower than Nodak Electric's rates. Part of the reason Love's preferred Otter Tail to provide electric service to its new facility was because Otter Tail's rates were approximately \$30,000 less per year. Nodak Electric contends its rates would be competitive with Otter Tail's "if Love's would implement a generator as part of its load management". Index # 102, at ¶ 21. However, Love's representative testified it would not be willing to utilize interruptible service for its new facility. (Tr. p. 272, l. 10-13). There is no evidentiary basis for Nodak Electric's argument that it could serve the load as economically as Otter Tail.

[67] The Commission correctly concluded that while Nodak Electric does have three-phase service closer to the site, neither Nodak Electric nor Otter Tail had facilities in place to serve McFarland's Addition that would constitute unreasonable duplication of facilities and service in the area. The Commission's finding that Otter Tail's extension would not result in unreasonable

duplication was supported by a preponderance of the evidence. Therefore, this Court must affirm the Commission's Order. See N.D.C.C. § 28-32-46.

IV. The Public Service Commission's conclusion that it lacked authority under N.D.C.C. § 49-03-06 to enforce the 1968 service area agreement was in accordance with the law.

[68] On appeal, Nodak Electric contends the Commission should have enjoined Otter Tail from providing electric service to McFarland's Addition because it believes it possesses the sole right to serve the property under a 1968 service area agreement between Nodak Electric and Otter Tail. However, Nodak Electric failed to cite any legal authority which would grant the Commission the jurisdiction to decide a contract dispute between private parties. The Commission's conclusion that it did not have authority to enforce the 1968 service area agreement was in accordance with the law.

[69] Despite its repeated assertions that the Commission should enforce the 1968 service area agreement, Nodak Electric fails to cite any legal authority granting the Commission with jurisdiction or legal authority to decide contract disputes between private parties. Nodak Electric also fails to cite any caselaw where the Commission has exercised original jurisdiction to decide contract disputes between private parties. Contrary to Nodak Electric's argument, the Commission lacks jurisdiction to decide a contractual dispute regarding the 1968 service area agreement. The Commission is not a court of law possessing subject-matter jurisdiction over contract disputes between private parties. See City of Grafton, 86 N.W.2d at 202 (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 such 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 by the Commission. See N.D.C.C. § 49-03-06(6). It is undisputed in this case that the

1968 service area agreement was not filed with nor approved by the Commission. Further, the statute requires that such agreements explicitly acknowledge Commission jurisdiction to enforce the agreement, along with opportunity for a city to approve or deny if it would cover areas inside city limits. None of these three requirements is met by the 1968 service area agreement. Absent the necessary prerequisites, the Commission lacks authority in this case to enforce the 1968 service area agreement under N.D.C.C. § 49-03-06 because the agreement has not been previously filed with and approved by the Commission.

[70] Nodak Electric erroneously states Otter Tail argued that N.D.C.C. § 49-03-06, which was passed in 2005, invalidates the 1968 service area agreement. See Index # 102, at ¶ 18. Nodak Electric misinterprets Otter Tail's argument. In the present case, neither Nodak Electric nor Otter Tail filed the 1968 service area agreement with the Commission for approval as a prerequisite to Commission enforcement under N.D.C.C. § 49-03-06. Otter Tail's position is simply that absent prior approval and the other requirements in accordance with § 49-03-06, the Commission lacks authority to enforce the terms of the 1968 agreement. See N.D.C.C. § 49-03-06. The Commission correctly determined that N.D.C.C. § 49-03-06 did not grant the Commission with the authority to enforce the 1968 service area agreement in this action.

[71] Even assuming the 1968 agreement was enforceable between Otter Tail and Nodak Electric, which it is not, the agreement is not enforceable against the City of Drayton. Section 49-03-06(8), N.D.C.C., 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. Id. There is no evidence that the City of Drayton was party to the 1968 agreement nor even aware of it. The Mayor of the City of Drayton testified the City has

never approved nor consented to be bound by the terms of the 1968 agreement between Otter Tail and Nodak Electric. (Tr. p. 178, l. 14-24). 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.

[72] The legislative history of § 49-03-06 further rebukes Nodak Electric'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 Rural Electric Cooperatives, was specifically asked about section 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?

Harlan 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, Fuglesten's testimony makes it clear that service area agreements do not supersede a city's constitutional franchise power.

[73] The Commission's conclusion that the 1968 service area agreement did not meet the requirements for enforcement by the Commission pursuant to N.D.C.C. § 49-03-06 was in accordance with the law and should be affirmed.

CONCLUSION

[74] 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 Electric. The Commission should have granted Otter Tail's Motion to Dismiss Nodak Electric's Complaint. Otter Tail respectfully requests this Court reverse the Commission's order and grant Otter Tail's Motion to Dismiss.

[75] Alternatively, if this Court determines the Commission had jurisdiction to reach the merits, the Court should affirm the Commission's conclusions that Nodak Electric failed to meet its burden to establish Otter Tail's proposed extension of service constituted interference or unreasonable duplication. Pursuant to the applicable standard of review, the Commission's conclusions that Nodak Electric failed to meet its burden of proof establishing interference and unreasonable duplication were supported by its findings of fact and the preponderance of the evidence. The Commission's conclusions should be affirmed.

Dated this 23rd day of November, 2021.

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO: 08-2021-01508

Nodak Electric Cooperative, Inc.,)

Appellant,)

vs.)

North Dakota Public Service)
Commission, Otter Tail Power)
Company, and City of Drayton,)

Appellees, and)
Cross-Appellants.)

DECLARATION OF SERVICE

STATE OF NORTH DAKOTA)

) ss

COUNTY OF BURLEIGH)

I hereby declare that I am of legal age and not a party to the above-entitled matter. On November 23, 2021 the following documents:

Cross-Appellant Brief and Response Brief of Otter Tail Power Company

were filed/served electronically with the Clerk of Court through Odyssey File and Serve system and a Service Notification e-mail will be sent to the following:

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ALJ Timothy J. Dawson
Administrative Law Judge
tidawson@nd.gov

I declare, under penalty or perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on November 23, 2021, at Bismarck, North Dakota, USA, by:

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