

PROCEDURAL HISTORY

[2] Appellee North Dakota Public Service Commission agrees with the Appellant's statement of the procedural history.

STATEMENT OF THE FACTS

[3] Nodak is a rural electric cooperative as defined in North Dakota Century Code (NDCC) §49-03-01.5(6) providing electric service to its members in North Dakota.

[4] Otter Tail is an investor-owned electric utility as defined in NDCC §49-03-01.5(2) providing electric service to customers in North Dakota under the regulatory jurisdiction of this Commission.

[5] The area at issue in this case is McFarland's Addition. On August 12, 2019, the City Council of Drayton approved annexation of McFarland's Addition into the corporate city limits of Drayton. Index #61 On August 19, 2019, Drayton filed the Plat of McFarland's Addition and annexation with the Pembina County Recorder. As a result, McFarland's Addition is located within the municipal limits of Drayton. Id.

[6] On November 4, 2019, McFarland's Addition was purchased by a company with the intent to construct a Love's Travel Stop ("Love's") on the property. Index #62.

[7] The existing electric infrastructure located within the McFarland's Addition includes: (1) Otter Tail's high voltage electric transmission line following the south side of 80th St. NE, crossing 160th Ave NE into McFarland's Addition, and continuing south along the east side of 160th Ave NE until it exits McFarland's Addition (Index #51) and (2) Nodak's single-phase underground distribution line passing through the McFarland's Addition, passing under Interstate 29, through areas served by Otter Tail in Drayton, to serve a Cenex station and customers north of Drayton. Index #51.

[8] Love's requested three-phase service for its operations. Transcript pg. 266 line 8. Both utilities would need to extend nearby three-phase service into McFarland's Addition to serve Love's.

[9] Otter Tail proposes to extend existing three-phase service approximately 1000 (Transcript pg. 48 lines 20-24) feet by boring under Interstate 29 to the Love's site. Transcript pg. 48 lines 20-24. Otter Tail's existing high voltage transmission line in the annexed area would need to be stepped down. This design is not preferred or cost-effective. Transcript pg. 39 lines 1-9.

[10] Nodak proposes to extend three-phase service by approximately 350 feet from a grain bin location existing outside of the annexed area by trenching across 160th Ave NE to Love's. Transcript pg. 34 line 19. Nodak's single-phase line in the annexed area will not meet Love's request for three-phase service. Transcript pg. 266 line 8.

FACTS RELATING TO THE MOTION TO DISMISS

[11] Otter Tail has been providing electric service to residents, businesses, and industrial customers in Drayton since 1931 via franchise granted by Drayton to construct, install, and maintain an electric light and power system within the city. Index # 66 and 67. The current 20-year franchise agreement was approved by Drayton, Ordinance 51, on May 3, 2011. Index # 60.

[12] In April of 2020, Drayton resolved that Otter Tail's Franchise extends without ambiguity to McFarland's Addition. Index # 62. The resolution cited the desire for efficient and unified operation of electrical services in the city, Love's desire to utilize the existing franchise Drayton has with Otter Tail to provide electric service, and Otter Tail's obligation

under its existing franchise agreement to provide electrical service to McFarland's Addition to Drayton. Transcript pg. 242 lines 20-25 and pg. 243 lines 1-14.

[13] Nodak does not possess a franchise agreement with Drayton permitting it to provide electric service to customers within the city. Transcript pg. 129 lines 10-11, pg. 243 lines 23-25, and pg. 151 lines 2-6.

[14] Nodak attended a city council meeting and corresponded with the city attorney about the process to acquire a franchise. Despite Nodak attempting to engage with Drayton to obtain a franchise, no application for franchise was filed with Drayton. Transcript pg. 243 lines 15-22.

[15] Nodak currently serves one confirmed customer within the city limits of Drayton. The customer is a Cenex station Nodak has served since 1989. The area, including the Cenex station, was subsequently annexed into Drayton in 2006. Transcript pg. 31 lines 9-25, pg. 32 lines 1-25, pg. 33 lines 1-18.

[16] Drayton does not have an ordinance expressly requiring a franchise before providing electric service within the city.

[17] Nodak Witness Einarson (Transcript pg. 126 lines 15-20) and Otter Tail Witness Mayor Olson testified that the city informed Nodak of its plan to annex the McFarland's Addition with the intention that Otter Tail would provide service to the annexed area. Transcript pg. 242 lines 5-25.

[18] Love's is not currently a coop member with Nodak and has not applied for cooperative membership with Nodak. Transcript pg. 69 lines 12-14.

[19] There are no current Nodak customers (Transcript pg. 67 lines 24-25, pg. 68 lines 1-3) or Otter Tail customers in McFarland's Addition. Transcript pg. 122 lines 18-22.

FACTS RELATING TO THE SERVICE AREA AGREEMENT

[20] Nodak and Otter Tail have an executed 1968 service area agreement. Index 53. The service area agreement specifies that Otter Tail shall serve all territory located within and adjacent to urban areas served by the Company as outlined on attached maps. Index 53 pg. 2 paragraph 2.

[21] The service area agreement provides that to avoid any transfer of customers when annexed by municipalities, areas are designated between Otter Tail and Nodak consistent with an attached map. Id. Paragraphs 2 and 3. The map appears to provide that the McFarland Addition is outside of the service area specified for Otter Tail. Id. Page 5.

[22] The service area agreement was not filed with the Commission, no notice of the filing was issued, and no approval of the service area agreement has occurred. Furthermore, it does not provide that it is subject to the continued jurisdiction of the Commission to settle disputes under the agreement. Transcript pg. 177 lines 24-25, pg. 178 lines 1-13.

[23] Drayton did not sign or participate in the service area agreement and did not approve the agreement. Transcript pg. 178 Lines 14-25, pg. 179 lines 1-4.

FACTS RELATING TO THE INTERFERENCE WITH EXISTING SERVICES

[24] Nodak Witness Steve Breidenbach testified that the parallel lines on the same property and construction can cause confusion for contractors in the event of one-call markings and construction within the area. Mr. Breidenbach also testified that the crossing of the lines is a concern for Nodak's operations and safety. Transcript pg. 42 Lines 14-25, pg. 43 lines 1-5

[25] Otter Tail's design proposal crosses under a single overhead Nodak line that is co-located on Otter Tail's existing overhead transmission poles. Otter Tail has secured the necessary permits to bore under Interstate 29 and boring is a common construction practice for extending utility infrastructure. Transcript pg. 289 lines 19-25, pg. 290 lines 1-17

[26] Nodak's design proposal crosses under an existing Otter Tail transmission line to serve the location. Nodak's existing distribution line traversing the McFarland's Addition also currently crosses under Otter Tail's transmission line. Index 51.

[27] Nodak Witness Breidenbach (Transcript pg. 66 lines 8-13) and Otter Tail Witness Jacobson (Transcript pg. 293 lines 23-25, pg. 294 lines 1-2) both testified that there are no statutory or regulatory prohibitions for Otter Tail's design proposal and that it does not violate National Electric Safety Code. Mr. Breidenbach also testified that underground line crossing under an overhead line frequently occurs. Transcript pg. 58 lines 22-25, pg.59 lines 1-6.

[28] Nodak Witness Einarson testified that annexation by Drayton and implementation of its franchise with Otter Tail creates "economic interference" that will foreclose future revenue opportunities from incremental investments made in 2009 or earlier. Transcript pg. 147 lines 21-25, pg. 148 lines 1-7. Mr. Breidenbach provided that it will interfere with Nodak from the standpoint that it is missing out on an additional load. Transcript pg. 98 lines 22-25, pg. 99 lines 1-2. Mr. Breidenbach corroborated that technical interference is not as much of the issue as is interference with plans and ability to provide service to the area based on existing investments. Transcript pg. 99 line 25, pg. 100 lines 1-4.

[29] Otter Tail's proposed design and construction will not take away an existing Nodak customer and there will be no service interruptions or impacts to Nodak's existing customers. Transcript pg. 98 lines 10-17.

[30] No Nodak infrastructure will be taken or impacted by Otter Tail's extension into McFarland's Addition. Transcript pg. 100 lines 5-10.

[31] Otter Tail's service to McFarland's Addition will not prevent Nodak from running three-phase service to other locations. Transcript pg. 99 Lines 21-25, pg. 100 lines 1-4.

FACTS RELATING TO THE UNREASONABLE DUPLICATION OF SERVICES

[32] There is no existing three-phase service within McFarland's Addition to serve Love's.

[33] Nodak's proposed extension of three-phase service to the Love's location by approximately 350 feet will cost a total of \$19,037.50. Transcript pg. 37 line 3. Otter Tail's extension of approximately 1000 feet will cost an estimated \$52,000. Transcript pg. 301 line 12-16.

[34] Nodak's proposed three-phase service line serves 3 customers within the 2-mile radius with neither of the other two three-phase customers within close proximity to McFarland's Addition. 08-2021-CV-01508 Index #52. Nodak testified that it will continue to provide three-phase service to its existing customers regardless of whether Otter Tail provides service to McFarland's Addition. Transcript pg. 99 line 25, pg. 100 1-4.

[35] Nodak testified that it made investments planning to serve the area's customer growth and development. Transcript pg. 30 lines 6-15. Nodak Witness Einarson also agreed that Otter Tail has made investments in its system to serve customers located in

Drayton and likely made investments for possible expansion. Transcript pg. 123 lines 21-25, pg. 124 lines 1-5.

[36] Nodak's single-phase distribution line crosses McFarland's Addition, continues through areas in Drayton with joint occupancy on Otter Tail's infrastructure before crossing ND Highway 66 to serve Cenex which is located within the city limits of Drayton, as well as additional customers. Transcript pg. 30 lines 16-25, pg. 31 lines 1-20.

STANDARD OF REVIEW

[37] An appeal from a decision of the Public Service Commission is governed by the Administrative Agencies Practice Act, The District Court exercises a limited review in appeals from administrative agency decisions. *Bergum v. North Dakota Workforce Safety & Ins.*, 2009 ND 52, ¶ 8, 764 N.W.2d 178 (N.D. 2009). Under N.D.C.C. § 28-32-46, the District Court "shall affirm the order of the agency 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) 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; or 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 any administrative law judge."

LAW AND ARGUMENT

Issue 1: The commission's order denying Otter Tail's motion to dismiss was in accordance with the law.

[38] Otter Tail claims that the commission lacks the jurisdiction to hear Nodak's complaint for two reasons. 1) The commission cannot interfere with the City of Drayton's ability to franchise and 2) The city of Drayton has granted exclusive authority to Otter Tail to serve the McFarland's addition.

[39] Otter Tail relies heavily on Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2nd 723 (N.D. 1971). However, the commission finds several key differences that allow the commission to hear Nodak's complaint.

[40] The first major difference is the fact that in Montana-Dakota Utilities Co. the city of Crosby had an ordinance that required a franchise to provide power. In the case at hand Drayton does not have an ordinance requiring a franchise to provide power within the city limits. Id. at 727.

[41] In Montana-Dakota Utilities Co. Id., the City of Crosby passed Ordinance No. 220, which prohibited any electrical supplier from furnishing electricity to the inhabitants of the city of Crosby without first obtaining a franchise. Because of this specific ordinance, the North Dakota Supreme Court held that Burke-Divide Rural Electric Cooperative was not in compliance with N.D.C.C. Sections 10-13-01(1) and 10-13-03(1) because it was supplying power to persons in rural areas who were receiving central station service. Specifically, the Court stated "[W]here any such person resides within or seeks service for facilities within a city defined as a rural area which is receiving central state service, such person cannot be served within the corporate limits, in the absence

of a franchise, where the city has in existence an ordinance prohibiting such service in the absence of a franchise.” *Id.* at 730.

[42] Drayton does not have an ordinance requiring a franchise, and Nodak currently has a customer within the city limits of Drayton. An official franchise for Nodak does not exist. This a major difference from Montana-Dakota Utilities Co., *Id.* where the franchise was denied to the co-op, and also from Capital Elec. Co-op., v. City of Bismarck, 736 N.W.2d 788, where both the co-op and utility had franchises.

[43] The effect of Drayton not having an ordinance requiring a franchise coupled with the fact Nodak currently has a customer within the city limits creates a factual difference from existing case law. Both Nodak and Otter Tail serve customers within the city limits of Drayton, so the commission has the authority to decide if either entity’s extension of services in the McFarland’s addition will interfere with and create unreasonable duplication.

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 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). In *Cass County Elec. Coop.*, 419 N.W.2d at 183, both a public utility and a rural electric cooperative were authorized by the City of Fargo to serve the South Pointe area that had been annexed to Fargo. This Court decided the PSC must look at both entities' existing facilities in the entire surrounding area to determine whether the public utility's extension of services into South Pointe would constitute an unreasonable duplication of capital-intensive facilities and services already provided by the rural electric cooperative and remanded for further proceedings. *Id.* at 187. After remand, this Court held that a preponderance of evidence supported the PSC's decision that the public utility's extension of services into the South Pointe area was a duplication of the electric cooperative's facilities in the area. *N.S.P.*, 452 N.W.2d at 345.

Capital Electric Co-op. *Id.* at 794-795

[44] The effect of this interpretation and because Drayton does not have an ordinance requiring a franchise gives both Nodak and Ottertail the ability to serve the McFarland's addition and does not interfere with the constitutional authority of Drayton to grant a franchise.

We conclude the "non-exclusive" franchises, when construed as a whole and in conjunction with the area service agreement, authorize both Capital Electric and MDU to provide electric service in Bismarck as "now, or hereafter constituted" and Capital Electric's franchise does not preclude it from serving Boulder Ridge. The practical effect of interpreting the franchises to give both Capital Electric and MDU a franchise in the Boulder Ridge area is that the issue of unreasonable duplication is subject to the jurisdiction of the PSC under N.D.C.C. § 49-03-01.3 and this Court's decisions culminating in *Cass County Elec. Coop.*, 419 N.W.2d at 181, and *N.S.P.*, 452 N.W.2d at 340. In the absence of any explicit language providing otherwise, we believe that interpretation ultimately favors the public's interest in preventing unreasonable duplication of facilities, while recognizing a municipality's constitutional authority to grant a franchise. That interpretation does not interfere with Bismarck's constitutional authority to issue a utility franchise; rather, that interpretation recognizes that Bismarck has granted both Capital Electric and MDU a franchise for Boulder Ridge. We conclude Bismarck erred in construing Capital Electric's non-exclusive franchise to provide electric service in Bismarck as "now, or hereafter constituted" to preclude Capital Electric from providing electric service to Boulder Ridge. We hold that both Capital Electric and MDU have franchises to serve Boulder Ridge, and we reverse the district court judgment in Capital Electric's appeal.

In MDU's appeal from the district court judgment affirming the PSC's decision, MDU argues the PSC's decision failed to consider Bismarck's authority to franchise utility services within a city. Several of MDU's arguments are premised on the incorrect assumption that Capital Electric does not have a franchise to serve Boulder Ridge. To the extent MDU argues the PSC's decision failed to consider Bismarck's authority to franchise utility services in Bismarck, we reject those arguments because both Capital Electric and MDU have a franchise to serve the Boulder Ridge area involved in this proceeding. The PSC therefore has jurisdiction under N.D.C.C. § 49-03-01.3 and this Court's decisions in *Cass County Elec. Coop.*, 419 N.W.2d at 181, and *N.S.P.*, 452 N.W.2d at 340.

Capital Electric Co-op. Id. at 798-799

[45] Nodak claims that it was denied a franchise by Drayton. The facts show that Nodak inquired about a franchise and stated they were willing to get one, but no formal application or attempt was made other than the inquiry.

[46] The commission believes that Drayton has the right to franchise, however this does not preclude the commission from making the determination that there is no interference with the co-op's system and does not result in unreasonable duplication.

Otherwise, there would be no purpose for NDCC § 49-03-01.3 to exist.

49-03-01.3. Exclusions from limitations on electric distribution lines, extension, and service and on issuance of certificates of public convenience and necessity.

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.

NDCC § 49-03-01.3

[47] Drayton has passed a resolution stating that Otter Tail's franchise extends to the McFarland's addition without ambiguity. Index #62 As Stated in Montana-Dakota

Utilities Co.:

When territory is annexed to a city the annexed territory becomes a part of the city and all ordinances are immediately in effect governing the annexed territory. Likewise, the powers of the city, which are provided by the statutes, are extended to the annexed territory. The annexed territory is as much a part of the city as the original townsite, when it becomes "a part thereof." Section 40-51.1-01, N.D.C.C. Most cities have grown since original incorporation and have annexed territory from time to time as the city grew. The annexation to a city of territory which had previously been without the city is an act of the state and such territory thereafter stands

just as any other property within the city. 56 Am.Jur.2d, Municipal Corporations, Section 56.

193 N.W.2d at 727.

[48] Even if Otter Tail is considered to have the only franchise, and the resolution creates a requirement for Nodak to have a franchise to serve the McFarland's addition, the commission still has the authority to determine if Otter Tail's extension interferes with Nodak's existing services or creates unreasonable duplication.

[49] However, since no ordinance requiring a franchise exists for the city of Drayton, and Nodak currently serves a customer within the city limits of Drayton, the commission did not err in determining it has the authority under NDCC § 49-03-01.3 to determine if Otter Tail's extension interferes with Nodak's existing services or creates unreasonable duplication. This interpretation is in the public interest in preventing unreasonable duplication and interference of facilities and also preserves Otter Tail's right to franchise.

Issue 2: The commission did not err in finding that Otter Tail's extension would not interfere with existing services provided by Nodak Electric and is in accordance with the law.

[50] The existing lines of both parties are encompassed on Index 51 of this case which is a map of Otter Tail and Nodak's existing lines near the Love's travel stop site also known as the McFarland's addition. The commission must look at current customers and the availability of services in and around the area. Cass Co. Electric Cooperative v. Northern States Power, 419 N.W.2d 181 (N.D. 1988). Neither party has any customers within the annexed area.

[51] Each party would have to cross under the overhead facilities of the other to install the requested three phase service to the Love's Travel site. Nodak also argued that Otter Tail's boring of their line could be too close to their single-phase underground which could cause damage and/or cause issues with locating facilities later when required. Transcript pg. 289 lines 19-25, pg. 290 lines 1-17.

[52] Lines cross in many fashions and one only needs to look around to see lines crossing lines above ground. Lines cross underground as well as run alongside of each other above and below ground.

[53] The PSC commonly orders that construction, maintenance, and operation of electrical transmission facilities follows the National Electric Safety Code.

[54] These conditions exist and must exist at times and places for a reliable electric grid and are done so under the National Electric Safety Code. Otter Tail's extension would conform with current industry standards in its construction. Since there is no physical interference with the current electrical system or any existing customers of Nodak, there is no interference.

Issue 3: The commission did not err in it's finding that Otter Tail's extension would be an unreasonable duplication and is in accordance with the law.

[55] Three cases give guidance to the commission when determining unreasonable duplication. They are Cass Co. Electric Cooperative v. Northern States Power, Id. the subsequent appeal by NSP in Northern States Power Co. v. North Dakota Public Service Com'n, 452 N.W.2d 340 (N.D. 1990) and Capital Electric Cooperative, Inc., v. City of Bismarck, et. al., 736 N.W.2d 788.

[56] The main concept that comes from Cass Co. Electric Co-op, is how the PSC is to interpret NDCC § 49-03-01.3. 419 N.W.2d at 187. The PSC must not just look to see if

Nodak is currently serving any customers, and consider the availability of services in and around the area annexed. As stated in the facts outlined in this brief developed during the hearing and from the filings Nodak does not have any customers in the area. Nodak did not introduce any evidence that long range development plans for the McFarland's addition exist or were contemplated. No long-range plans, discussions, or further evidence of long-range planning for serving the area to be annexed were introduced. These were important facts in Northern States Power Co. 452 N.W.2d. at 343

[57] The commission did look at the availability of services of both Nodak and Otter Tail power. As stated in the facts above Nodak has three phase three hundred and fifty feet from the Love's location. Otter Tail has three phase located about 1000 feet from the Love's location. Nothing presented by Otter Tail or Nodak shows a contemplation to serve the area prior to being annexed. Both have services very close, but no evidence was introduced to show a long-range plan to serve this area if it was developed.

[58] In Northern States Power Co., NSP challenged the commission's decision after remand. 452 N.W.2d 340. Upon remand and rehearing the commission found that there would be an unreasonable duplication of capital-intensive investment based on filings by Cass:

The exhibits demonstrated that Cass had constructed 35.29 circuit miles of electrical lines, 13 line switches, and 263 transformers in the territory. The testimony also indicated that Cass had spent well over two million dollars in the construction of facilities to serve the entire annexation, that Cass was supplying electric service to a number of accounts throughout the annexed area, and that NSP had supplied no electric service in the annexed territory prior to the time it extended its lines into South Pointe in October of 1986.

Id. at 344

[59] In looking at Capital Electric Co-op., 736 N.W.2d 801 ¶34, again we see Capital Electric entered in substantial evidence of its long-range plans and development:

20. Capital included “The principal service area of the Cooperative [Capital]” under the 1973 Area Service Agreement in its long range plans and has made substantial investments to serve it. Capital has invested in excess of 7 million dollars in the area northwest of Bismarck, west of Highway 83, including Boulder Ridge. These 15 facilities were planned and constructed to provide an electric system for new developments, such as Boulder Ridge.

21. Capital’s framework is a reliable system of substations and distribution lines that can be operated in a looped fashion. In the event of an outage, Capital can provide looped service to Boulder Ridge. Capital’s three-phase framework in the area northwest of Bismarck, west of Highway 83, is supplied from four different substations, the closest of which is within one mile of Boulder Ridge. Capital’s system includes a 5th delivery substation under construction.

[60] Also stopping all duplication is not always possible. In Northern States Power Co., the North Dakota Supreme court states, “Thus, in light of the current regulatory situation, it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems.” 425 N.W.2nd at 344.

[61] Nodak does not have any infrastructure in the annexed McFarland’s area in the case at hand for serving the area that was annexed. Nodak’s three phase system was put into place to serve the grain bin site and was also extended to other customers that required three phase service as well.

[62] Additional factors in Capital Electric Co-op. looked at the checkerboarding of service. Id. at 802 ¶ 34. This was also important in the commission’s decision in

determining unreasonable duplication. In this case no checkerboarding will be created.

Capital Electric Co-op. also states:

In Cass County Elec. Coop., 419 N.W.2d at 186-87, this Court held that in determining interference with existing services and unreasonable duplication of services, the PSC must not look solely at actual customers in the area. Rather, the PSC must look at the existing electric facilities that the rural electric cooperative and the public utility have in place in the area and determine whether the extension of services into the area would constitute an unreasonable duplication of capital intensive facilities and services provided by the other entity. Id. The question of “‘which electric suppliers’ facilities are actually duplicative or wasteful’ is one of fact for the PSC to determine.” N.S.P., 452 N.W.2d at 345.

Id. at 800 ¶33.

[63] Nodak estimates their extension to cost \$19,000 and require an extension of 350 feet. Otter Tail’s extension is estimated to cost \$52,000 and require an extension of 1,000 feet. The commission has taken into consideration the existing customers, existing infrastructure of both Nodak and Otter Tail, and the total cost. The commission has determined that Otter Tail’s extension is not unreasonable duplication, and the difference of \$37,000 does not amount to unreasonable duplication of capital-intensive investment.

Issue 4: The commission did not err in its finding that it lacks the authority under NDCC § 49-03-06 to enforce the 1968 service area agreement and is in accordance with the law.

[64] As stated in the facts, Otter Tail and Nodak entered into a Service Area Agreement in 1958. Maps were added in 1960, and in 1968 a new agreement was signed. Maps were also attached to the new agreement.

[65] The commission has not heard any complaints of Service Area Agreements. The commission does not have the authority to interpret a contract between two private

parties generally. Service Area agreements were addressed by the Legislature in 2005. Prior to 2005 there was no statutory authority for the commission to approve or accept Service Area Agreements. After 2005 NDCC § 49-03-06 became law and states:

49-03-06. Service agreements among electric providers.

1. This section authorizing service area agreements is intended to encourage harmony and operational efficiency among electric providers, promote safety, discourage unreasonable duplication of electric facilities, assure adequate and reliable electric service for all consumers and territories within the state, and provide antitrust immunity to electric providers that negotiate service area agreements in accordance with this section.
2. An electric provider may enter into agreements with other electric providers having adjacent or intermingled electric supply facilities for the purpose of establishing service areas and designating the service locations to be served by each electric provider. The designated service locations may include all or any portion of the service locations within a service area that are being served by the electric providers at the time of the agreement, or that could be economically served by the then existing facilities of the electric providers, or by reasonable and economic extensions of such existing facilities. The service area agreement must provide that it is subject to the continuing jurisdiction of the commission to settle all service location disputes between the contracting electric providers arising under the agreement.
3. Electric providers may enter into written agreements for the sale, transfer, exchange, or lease of equipment or facilities used to serve the areas that are the subject of a service area agreement. Any sale, exchange, transfer, or lease of equipment, plant, or facilities made under this subsection is subject to sections 49-04-05 and 10-13-08.1.
4. A service area agreement shall be promptly filed with the commission which must issue a notice of the filing within thirty days. Upon the commission's order, or if an affected electric consumer or electric provider requests a hearing within twenty days of the notice, the commission shall hold a hearing on the service area agreement.
5. The public service commission shall approve or disapprove a service area agreement. The commission may not revise a service area agreement except by mutual consent of the parties to the agreement.

6. A service area agreement shall be valid and enforceable if the commission, after notice as provided in subsection 4, approves the agreement and finds that the agreement complies with this section and is in the public interest.
7. Upon approval of a service area agreement, the commission shall issue its order and any necessary certificates of public convenience and necessity authorizing an electric public utility to extend its plant and system and to provide electric service to service locations within the service areas.
8. The governing board of a city may require approval or disapproval of a service area agreement between electric providers to the extent the agreement encompasses service locations within the city. 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.

[66] In § 2 it states the service area agreement must provide that it is subject to the continuing jurisdiction of the commission to settle all service location disputes between the contracting electric providers arising under the agreement.

[67] Starting with §4 there are important requirements that it must be filed with the commission, notice of the filing, an opportunity for hearing if a consumer or provider requests one, that the commission approve or disapprove the agreement and may not modify it, it is valid and enforceable if the commission finds it complies with the section and is in the public interest, and lastly that the governing board of a city may require approval or disapproval if the agreement affects areas within the city limits and specifically states it does not affect the authority of a city to issue franchise authority under section 40-05-01.

[68] In § 8 the governing board of a city may require approval or disapproval of a service area agreement. Drayton was not a party to the service area agreement reached between Nodak and Otter Tail.

[69] Prior to the hearing the service area agreement was not filed with the commission and does not meet the statutory requirements of the law enacted after the agreement was entered. The agreement does not give the commission the jurisdiction to settle disputes arising under the service area agreement.

[70] If the parties desire, they should seek a determination of the district court as to the validity and enforcement of the Service Area Agreement which is a contract between them. The commission does not state the agreement is not valid, just that it lacks the jurisdiction to enforce its provisions as it does not meet the requirements of NDCC § 49-03-06.

[71] As stated in Capital Electric Co-op., "The interpretation of a written contract to determine its legal effect is a question of law for a court to decide, and on appeal, this Court will independently examine and interpret the contract to determine whether it has been erroneously construed. (Internal citations omitted)

736 N.W.2d 795 ¶15

Conclusion

[72] In conclusion the commission's order is in accordance with the law and correctly denied Otter Tail's motion to dismiss, found that Otter Tail's extension does not interfere with Nodak's system or services, that Otter Tail's extension does not amount to unreasonable duplication, and the commission does not have the authority to interpret the 1968 service agreement. The commission asks the District Court to affirm its decision.

Dated this 24th day of November 2021.

A handwritten signature in black ink, appearing to read 'Brian Johnson', written over a horizontal line.

Brian Johnson
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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 24, 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
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I declare, under penalty or perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on November 24, 2021, at Bismarck, North Dakota, USA, by:

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