

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2021-CV-01508

Nodak Electric Cooperative, Inc.,
Appellant,

vs.

**ORDER AFFIRMING PUBLIC
SERVICE COMMISSION ORDER**

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

Appellees, and Cross-Appellants.

[¶1] This is an administrative appeal under N.D.C.C. § 28-32-42 of the North Dakota Public Service Commission's July 14, 2021 Findings of Fact, Conclusions of Law and Order. Oral argument was held via Zoom on February 7, 2022. Mylo Einarson appeared as Nodak Electric Cooperative, Inc.'s (Nodak Electric) representative. The following attorneys appeared: Kimberly Radermacher on behalf of Nodak Electric; Paul Sanderson and Robert Endris on behalf of Otter Tail Power Company (Otter Tail); Paul Anderson on behalf of the City of Drayton (the City); and Brian Johnson on behalf of the North Dakota Public Service Commission (the Commission).

[¶2] After considering the administrative record, briefs, and oral argument, this Court finds the Commission's Findings of Fact are supported by a preponderance of the evidence, the Commission's Conclusions of Law are supported by its Findings of Fact, the Commission's Order is in accordance with the law, and the Commission's Order does not violate the City of Drayton's constitutional rights. This Court AFFIRMS the Commission's July 14, 2021 Findings of Fact, Conclusions of Law and Order.

Procedural History and Issues on Appeal

[¶3] The procedural history of this case is documented by the administrative record and will not be repeated here.

[¶4] Nodak Electric raises two primary issues. First, whether the Commission erred when it found Otter Tail's extension into McFarland's Addition would not interfere with Nodak Electric's existing services. Second, whether the Commission erred when it found Otter Tail's extension into McFarland's Addition would not result in unreasonable duplication of services.

[¶5] The primary issue raised by Otter Tail is whether the Commission erred in finding it had jurisdiction to hear Nodak Electric's Complaint.

[¶6] The issue raised by the City of Drayton, which intervened in this matter, is whether the Commission's Order is in violation of the City's constitutional rights.

STANDARD OF REVIEW

[¶7] The Public Service Commission is a state agency created by statute. See N.D.C.C. ch. 49-01. An appeal from a Commission decision is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. See *Minn-Kota Ag Prod., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2020 ND 12, ¶ 28, 938 N.W.2d 118. Judicial review of a Commission order is based on the administrative record filed with the court and is governed by N.D.C.C. § 28-32-46.

[¶8] "The Commission's decision on questions of law is fully reviewable. In reviewing the Commission's findings of fact, [courts] do not substitute [their] judgment for that of the Commission or make independent findings." *Id.* (citation omitted). "Rather, in reviewing the Commission's findings of fact, [courts] determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.* (quoting *Capital Elec. Co-op., Inc. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788). "This standard defers to the [fact-finder's] opportunity to hear the witnesses' testimony and to judge their credibility[,] and [courts] will not disturb the agency's findings unless they are against the greater weight of the evidence." *Voigt v. N. Dakota Pub. Serv. Comm'n*, 2017 ND 76, ¶ 9, 892 N.W.2d 149 (quoting *Johnson v. N.D. Dept of Transp.*, 530 N.W.2d 359, 361 (N.D. 1995)). Moreover, "[a]gency expertise is entitled to

appreciable deference if the subject matter is highly technical.” *Id.* (quoting *Capital Elec. Coop.*, 2016 ND 73, ¶ 6, 877 N.W.2d 304).

Motion to Dismiss

[¶9] In its Answer, Otter Tail asserted the Commission lacks jurisdiction over “a municipality’s determination of the choice of electric service provider within the municipality pursuant to a lawful franchise.” Doc. 12 at ¶ VIII. Otter Tail further asserted the Commission “lacks jurisdiction over the City of Drayton’s determination as to which electric service provider can extend electric service within the City of Drayton pursuant to a lawful franchise.” *Id.* at ¶ XI.

[¶10] The City filed a Petition to Intervene, which was granted by the Commission. See Docs. 26, 30.

[¶11] Otter Tail filed a Motion to Dismiss Nodak Electric’s Complaint. See Docs. 32-35. The Commission denied Otter Tail’s Motion to Dismiss. The Commission’s specific findings of fact regarding Otter Tail’s Motion to Dismiss are at Findings of Fact nos. 9 through 17. See Doc. 82 at 3-4. The Commission made the following Conclusion of Law regarding Otter Tail’s Motion to Dismiss.

3. Otter Tail’s Motion to Dismiss is largely based upon a constitutional argument regarding the extent of a municipality’s franchise authority. Such determination may be better suited for judiciary to decide. However, N.D.C.C. § 49-03-01.3 provides that the Commission has jurisdiction to prevent interference with existing services and unreasonable duplication caused by an electric utility extension.

Doc. 82 at 7.

[¶12] Citing article VII, § 11, of the North Dakota Constitution, the City of Drayton argues the North Dakota Constitution gives it “sole authority to franchise the operation of public utilities in its boundaries.” Doc. 112 at 2-3. It then asserts it “exercised its franchise rights regarding the electric service provider for McFarland’s Addition and the Commission did not have the authority to interfere with the City of Drayton’s exercise of that right.” *Id.* at 3. “Accordingly,” the City

asserts, “the Commission’s Order denying Otter Tail’s Motion to Dismiss was not in accordance with the law.” *Id.*

[¶13] This Court’s role under chapter 28-32 is to review the Commission’s Order, not Nodak Electric’s Complaint. The issue before this Court is whether the Commission’s Order was in accordance with the law or violated the City’s constitutional rights. The issue is not whether the relief *requested* by Nodak Electric in its Complaint but *not* granted by the Commission was in accordance with the law or would have violated the City’s constitutional rights *if* granted. A judicial tribunal or administrative agency may have subject matter jurisdiction even if the plaintiff, petitioner, or complainant requests relief that the judicial tribunal or administrative agency lacks authority to grant. Jurisdiction and available relief are separate and distinct issues.

[¶14] The Commission dismissed Nodak Electric’s Complaint and denied Nodak Electric’s request for relief. See Doc. 82 at 8-9. The Commission’s exercise of jurisdiction of Nodak Electric’s Complaint did *not* infringe on the City’s constitutional rights. And the Commission’s Order in no way infringes upon or impacts the City’s exercise of its franchise rights regarding the electric service provider for McFarland’s Addition. As correctly stated by the Commission: “At no point has the Commission stated that the City of Drayton does not have the right to exercise its Constitutional franchise, nor does it[s] decision interfere with Drayton’s right to franchise.” Doc. 110 at ¶ 4.

[¶15] Although academically interesting, whether the Commission would have infringed on the City’s rights had it granted Nodak Electric’s requested relief is not properly before this Court because the Commission dismissed Nodak Electric’s Complaint and denied Nodak Electric’s request for relief. Courts do not issue advisory opinions. Court decisions should be limited to questions involving existing rights and real controversies. See *Matter of Estate of Nohle*, 2017 ND 100, ¶ 17, 893 N.W.2d 755; *Gray v. Berg*, 2015 ND 203, ¶ 10, 868 N.W.2d 378. A real

controversy does not exist on this issue because the Commission's Order in no way infringes on the City's constitutional right or statutory authority to franchise electric service providers.

[¶16] This Court concludes the Commission's Order does not violate the City of Drayton's constitutional rights. This Court further concludes the issue raised and briefed by the City is not a present or live controversy.

[¶17] For similar reasons, this Court rejects Otter Tail's argument the Commission's Order denying its Motion to Dismiss was not in accordance with the law. Summarizing its argument, Otter Tail asserts: "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." Doc. 104 at ¶ 28. Stating "[t]he 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," Otter Tail argues, "[b]ecause 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." *Id.*

[¶18] Expounding on its argument, Otter Tail writes: "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." *Id.* at ¶ 33. Otter Tail then concludes: "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." *Id.*; see also Doc. 115 at ¶ 2 ("Pursuant to the Constitution, the City

of Drayton's selection of Otter Tail as the electric provider may not be abridged by the Commission and granted to another provider.").¹

[¶19] This Court's role is to determine whether the Commission's Order, not the requested but denied relief, is in accordance with the law. The Commission's Order regarding Otter Tail's Motion to Dismiss is quite limited. First, the Commission concluded "Otter Tail's Motion to Dismiss is largely based upon a constitutional argument" and that "[s]uch determination may be better suited for judiciary to decide." Next, the Commission concluded that section 49-03-01.3 "provides that the Commission has jurisdiction to prevent interference with existing services and unreasonable duplication caused by an electric utility extension."

[¶20] The Commission's first conclusion is in accordance with case law as evidenced by *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580 (N.D. 1984). In *First Bank of Buffalo*, the North Dakota Supreme Court wrote that chapter 28-32, "the Administrative Agencies Practice Act, is not designed to resolve constitutional questions. Neither do administrative agencies have the authority to accomplish this." *Id.* at 584. As "creatures of legislative action," the Supreme Court continued, administrative agencies "have only such authority or power as is granted to them or necessarily implied from the grant." *Id.* at 584-85. "As a general rule, administrative agencies do not determine constitutional issues" *Id.* at 585; *cf. Ash v. Traynor*, 1998 ND 112, ¶ 3, 579 N.W.2d 180 (noting "the ALJ refrained from ruling on the constitutional issues presented"); *Hamich, Inc. v. State By & Through Clayburgh*, 1997 ND 110, ¶ 7, 564 N.W.2d 640 (noting the ALJ declined to rule on the constitutional question).

¹ Nodak Electric's Complaint requested the Commission issue an "order restraining, enjoining and requiring Otter Tail to cease and desist . . ." Doc. 8 at ¶ 4. Nodak Electric did not request the Commission order the City of Drayton to grant Nodak Electric a franchise or to invalidate the City's franchise with Otter Tail. *See id.* This Court understands Otter Tail to argue that those events would have been the effective result had the Commission granted Nodak Electric its requested relief.

[¶21] Regarding its second conclusion, the Commission simply concluded that section 49-03-01.3 provides it “jurisdiction to prevent interference with existing services and unreasonable duplication caused by an electric utility extension.” That conclusion is quite limited. The Commission did not interpret article VII, § 11 and made no finding or conclusion regarding its authority over a city’s franchise rights. The Commission’s very limited conclusion regarding its jurisdiction is in accordance with the law.

[¶22] The Commission has the powers and jurisdiction established in chapter 49-02. Under section 49-02-01(4), the Commission’s jurisdiction extends to and includes electric utilities.

[¶23] Chapter 49-03 addresses electric utility franchises. As used in sections 49-03-01 through 49-03-01.5, “‘Electric provider’ means either an electric public utility or a rural electric cooperative.” N.D.C.C. § 49-03-01.5(1). “‘Electric public utility’ means a privately owned supplier of electricity offering to supply or supplying electricity to the general public.” N.D.C.C. § 49-03-01.5(2). “‘Rural electric cooperative’ includes any electric cooperative organized under chapter 10-13. An electric cooperative, composed of members as prescribed by law, shall not be deemed to be an electric public utility.” N.D.C.C. § 49-03-01.5(6).

[¶24] Nodak Electric and Otter Tail are electric providers under section 49-03-01.5(1). Otter Tail is an electric public utility; Nodak Electric is a rural electric cooperative. See Doc. 8 at ¶¶ 1, 2; Doc. 12 at ¶¶ II, III; Doc. 82 at 3, FOF 1, 2.

[¶25] Section 49-03-01(1) provides that an electric public utility must obtain from the Commission a certificate of public convenience and necessity before beginning “construction or operation of a public utility plant or system, or of an extension of a plant or system.” However, an electric public utility is not required “to secure a certificate for an extension within any municipality within which the electric public utility has lawfully commenced operations.” *Id.*; see also N.D.C.C. § 49-03-01.3 (providing “[s]ections 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”). Section 49-03-01(1) further provides: “If any electric public utility in constructing or extending its line, plant, or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions.”

[¶26] Section 49-03-01.1 prohibits electric public utilities from extending their “electric transmission or distribution lines beyond or outside of the corporate limits of any municipality” and from serving “any customer where the place to be served is not located within the corporate limits of a municipality, unless and until, after application, such electric public utility has obtained an order from the commission authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines and to serve such customer.”

[¶27] Section 49-03-01.4 addresses enforcement of chapter 49-03. Subsection 1 of section 49-03-01.4 provides:

If any electric public utility or electric transmission provider violates or threatens to violate any of the provisions of sections 49-03-01 through 49-03-01.5 or interferes with or threatens to interfere with the service or system of any other electric public utility or rural electric cooperative, the commission, after complaint, notice, and hearing as provided in chapter 28-32, shall make its order restraining and enjoining the electric public utility or electric transmission provider from constructing or extending its interfering lines, plant, or system. In addition to the restraint imposed, the commission shall prescribe any terms and conditions as the commission deems reasonable and proper.

[¶28] In the present case, Otter Tail was not required to secure a certificate of public convenience and necessity from the Commission. However, Nodak Electric filed a complaint

under section 49-03-01(1) alleging Otter Tail was in violation of sections 49-03-01 through 49-03-01.5. See Doc. 8 at ¶ 8.

[¶29] Sections 49-03-01(1) and 49-03-01.4(1) grant the Commission jurisdiction over a complaint filed by an electric cooperative alleging an electric public utility's construction or extension of its line, plant, or system "unreasonably interferes with or is about to interfere unreasonably with the service or system of" the electric cooperative. See also N.D.C.C. § 49-03-01.3 (providing that although electric public utilities are not required to secure certificates of public convenience and necessity, their extensions of electric distribution lines within the corporate limits "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"). Nodak Electric's Complaint falls under section 49-03-01(1). Accordingly, the Commission had jurisdiction to hear Nodak Electric's Complaint. Whether the Commission had authority to grant Nodak Electric's requested relief is a separate and distinct issue not properly before this Court for the reasons previously stated.

[¶30] A simple review of Otter Tail's brief demonstrates that the issue it raises and spends significant time briefing is not properly before this Court. Otter Tail argues "[t]he 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." Doc. 104 at ¶ 28. Yet the Commission did *not* make that conclusion. Similarly, Otter Tail asserts "the Commission has no authority to grant Nodak Electric with a franchise to serve within the City of Drayton." *Id.* Again, the Commission did *not* grant Nodak Electric with a franchise to serve within the City of Drayton. Because the Commission did *not* grant Nodak Electric a franchise, Otter Tail's assertion "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," *id.* at ¶ 35, has no bearing on whether the Commission's Order is in accordance

with the law. Similarly, after asserting “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,” that “the Constitution prohibits the legislative assembly from granting such power,” and that “there is no provision in N.D.C.C. Ch. 49-03 which grants the Commission the authority to abridge a city’s constitutional franchise authority for electric service within city limits,” Otter Tail argues “[a]ny interpretation to the contrary must be rejected as unconstitutional.” *Id.* at ¶ 36. The simple point is – the Commission did *not* interpret the Constitution or chapter 49-03 to the contrary because it made no conclusions of law on the issue.

[¶31] This Court’s holding does not elevate chapter 49-03 over the North Dakota Constitution. See Doc. 115 at ¶ 3. Like the Commission, this Court makes no conclusions regarding the interplay between article VII, § 11 and chapter 49-03. Like the Commission, this Court also makes no conclusions regarding the Commission’s authority over a city’s franchise rights. Those issues are not properly before this Court because this Court reviews the Commission’s Order and the Commission’s Order does not address those issues.

[¶32] Moreover, courts avoid addressing constitutional issues when a case can be resolved on other grounds. See *Frokjer v. North Dakota Bd. of Dental Examiners*, 2009 ND 79, ¶ 20, 764 N.W.2d 657 (“This Court will not consider or decide questions, particularly constitutional questions, that are not necessary to the determination of an appeal.”); *Billey v. North Dakota Stockmen’s Ass’n*, 1998 ND 120, ¶ 23, 579 N.W.2d 171 (a court generally will not decide constitutional questions which are not necessary to its decision); *Glaspie v. Little*, 1997 ND 108, ¶ 15, 564 N.W.2d 651 (“We inquire into the constitutionality of a statute only to the extent required by the case before us.”); *Little v. Graff*, 507 N.W.2d 55, 59 (N.D. 1993) (“Courts refrain from deciding constitutional questions if they can decide a dispute on other grounds.”); *Bismarck Pub. Sch. v. Walker*, 370 N.W.2d 565, 566 (N.D. 1985) (“It is a well-settled rule of decision

making that a court will refrain from deciding constitutional issues where there are appropriate alternative grounds to resolve the case before it.”). The pending appeal can be resolved without this Court addressing the constitutional issue raised by the City and Otter Tail.

[¶33] This Court concludes the Commission properly found it had jurisdiction over Nodak Electric’s Complaint. According, this Court finds that Conclusion of Law no. 3 is in accordance with the law. Although not directly challenged, this Court reviewed and finds that Findings of Fact nos. 9 through 17 are supported by a preponderance of the evidence and that Conclusion of Law no. 3 is supported by the Commission’s Findings of Fact.

Interference With Existing Services

[¶34] The Commission’s specific findings of fact regarding Nodak Electric’s claim of interference with existing services are Findings of Fact nos. 22 through 29. See Doc. 82 at 5. The relevant conclusions of law are Conclusions of Law nos. 5 through 9. See *id.* at 7.

[¶35] As previously explained, in reviewing the Commission’s findings of fact, this Court determines only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. Nodak Electric has not identified any finding of fact by the Commission that lacks factual support in the record. In fact, many of the Commission’s factual findings appear undisputed.

[¶36] Nodak Electric argues “the Commission must look at services generally in the area and not just services provided to actual customers.” Doc. 102 at ¶ 14. The Commission’s Findings of Fact demonstrate it did so.

[¶37] Nodak Electric appears to argue the Commission should have given different weight to some of the testimony and evidence. See Doc. 102 at ¶ 15. But the Commission is the fact-finder. It heard the testimony and is the judge of witness credibility. It is not the role of this Court to reweigh the evidence or substitute its judgment for that of the Commission. Moreover, the Commission is the expert in this highly technical area and is entitled to appreciable

deference. See *Montana-Dakota Utilities Co., Div. of MDU Res. Grp. v. Pub. Serv. Comm'n of State of N.D.*, 413 N.W.2d 308, 312 (N.D. 1987) (“The PSC's expertise in weighing those variables is entitled to deference, and if there is evidence in the record to support the PSC decision we will not substitute our judgment for that of the qualified experts in the PSC.”); *Application of Zimbelman*, 356 N.W.2d 99, 101 (N.D. 1984) (“Giving deference to the expertise of the PSC in this area, we will not substitute our judgment for that of the agency or reevaluate the evidence.”); *Johnson v. Elkin*, 263 N.W.2d 123, 130 (N.D. 1978) (stating the “conclusions are particularly within the expertise of the PSC and its staff” and the Supreme Court is “reluctant to substitute [its] judgment for that of administrative experts on matters of a technical nature”).

[¶38] Nodak Electric asserts the Commission should have considered that Otter Tail's proposed extension will interfere both physically and economically with Nodak Electric's facilities, implying the Commission did not consider the alleged economic interference. See Doc. 102 at ¶ 16. The Commission's factual findings considered the economic interference with Nodak Electric's facilities. See Doc. 82 at 5-6, FOF ¶¶ 26, 29, 32, 33. As was its prerogative as fact-finder, the Commission gave different weight to the alleged economic interference than Nodak Electric believes it should have. This Court will not reweigh the evidence or substitute its judgment for that of the Commission, the expert in this area. See *Montana-Dakota Utilities Co.*, 413 N.W.2d at 312 (N.D. 1987) (“Those determinations involve technical matters within the expertise of the PSC.”).

[¶39] Nodak Electric also argues “to allow Otter Tail to extend into an area that is Nodak Electric's service territory by virtue of the 1968 service area agreement between the parties is contrary to said agreement and would interfere with services provided by Nodak Electric.” Doc. 102 at ¶ 18. The Commission's specific findings of fact regarding the Service Agreement

(service area agreement) are Findings of Fact nos. 18 through 21. See Doc. 82 at 4-5.

Concerning the service area agreement, the Commission concluded:

4. N.D.C.C. § 49-03-06 provides notice, approval, and a finding that a service agreement is in the public interest as prerequisites for Commission regulation. The 1968 service area agreement and terms of the agreement do not meet the prerequisites provided by the legislature to grant Commission review.

Id. at 7. The Commission's findings of fact regarding the service area agreement appear to be undisputed. Conclusion of Law no. 4 is supported by the Commission's Findings of Fact and is in accordance with the law.

[¶40] The service area agreement did not meet the requirements of section 49-03-06. Subsection 2 requires "[t]he 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." Subsection 4 provides a service area agreement must "be promptly filed with the commission which must issue a notice of the filing within thirty days," and that the Commission may order a hearing on the service area agreement and must hold a hearing "if an affected electric consumer or electric provider requests a hearing within twenty days of the notice." Under subsection 5, the Commission "shall approve or disapprove a service area agreement." Under subsection 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."

[¶41] It is undisputed the above requirements were not met with regard to the service area agreement. Because they were not, the service area agreement was not "valid and enforceable" by the Commission under section 49-03-06(6). Thus, Conclusion of Law no. 4 is in accordance with the law.

[¶42] The Commission considered the unapproved service area agreement and, as fact-finder, gave it the weight it deemed appropriate when determining whether Otter Tail's proposed

extension would interfere with Nodak Electric's facilities. This Court will not second guess the weight the Commission gave to the unapproved service area agreement.

[¶43] Although not specifically addressed in this Order, this Court considered Nodak Electric's other arguments on this issue. If there is further appeal the North Dakota Supreme Court will review the Commission's decision and not the decision of this Court. See *Montana-Dakota Utilities Co.*, 413 N.W.2d at 310. For this reason, this Court will not make specific findings as to each of Nodak Electric's argument. Nodak's Electric's arguments are addressed in the briefs of Otter Tail and the Commission.

[¶44] This Court concludes Findings of Fact nos. 22 through 29 are supported by a preponderance of the evidence. This Court further concludes that Conclusions of Law nos. 5 through 9 are supported by the Commission's Findings of Fact.

Unreasonable Duplication of Services

[¶45] The Commission's specific findings of fact regarding Nodak Electric's claim of unreasonable duplication of services are Findings of Fact nos. 30 through 34. See Doc. 82 at 6. The relevant conclusions of law are Conclusions of Law nos. 10 through 14. See *id.* at 7-8.

[¶46] Nodak Electric has not identified any finding of fact by the Commission that lacks factual support in the record. In fact, many of the Commission's factual findings on this and the other issues appear undisputed. Nodak Electric's challenge appears to be more to the weight the Commission gives to certain facts.

[¶47] Nodak Electric argues the Commission "must look at 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." Doc. 102 at ¶ 19 (quoting *Cass Cty. Elec. Co-op., Inc. v. N. States Power Co.*, 419 N.W.2d 181, 186-87 (N.D. 1988)). Nodak Electric then asserts the Commission "erred by looking solely at McFarland's Addition when

considering what facilities and customers each entity had in the area.” *Id.* Yet the Commission’s findings and conclusions evidence that its consideration was not as narrow as asserted by Nodak Electric. Rather, Nodak Electric disagrees with the weight the Commission gave to the evidence. But this Court may not reweigh the evidence and must give deference to the Commission because of its expertise in this technical area.

[¶48] Importantly, “unreasonable” is a subjective term. The fact-finder, not this Court, determines unreasonableness. This Court finds that the Commission’s conclusion Otter Tail’s extension does not result in unreasonable duplication is not against the greater weight of the evidence, particularly when giving appropriate deference to the Commission as the finder of fact and expert in this area.

[¶49] Although not specifically addressed in this Order, this Court considered Nodak Electric’s other arguments on this issue. This Court will not make specific findings as to each of Nodak Electric’s argument. Nodak’s Electric’s arguments are addressed in the briefs of Otter Tail and the Commission.

[¶50] This Court concludes Findings of Fact nos. 30 through 34 are supported by a preponderance of the evidence. This Court further concludes that Conclusions of Law nos. 10 through 14 are supported by the Commission’s Findings of Fact.

CONCLUSION

[¶51] This Court **AFFIRMS** the Public Service Commission’s July 14, 2021 Findings of Fact, Conclusions of Law and Order.

[¶52] **IT IS ORDERED** that Otter Tail Power Company filed a proposed judgment.

LET JUDGMENT BE ENETERD ACCORDINLGY.

Dated on this the 2nd day of March, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Douglas F. Balon". The signature is written in a cursive style with a large initial "D" and a stylized "B".

District Judge