
IN THE
SUPREME COURT OF NORTH DAKOTA

SUPREME COURT NUMBER 20220122
BURLEIGH COUNTY CASE NUMBER 08-2021-CV-01508
PSC CASE NUMBER PU-20-356

NODAK ELECTRIC COOPERATIVE, INC.,
PLAINTIFF/APPELLANT

v.

OTTER TAIL POWER COMPANY,
DEFENDANT/CROSS-APPELLANT/APPELLEE,
NORTH DAKOTA PUBLIC SERVICE COMMISSION
AND THE CITY OF DRAYTON,
DEFENDANTS/APPELLEES

ON APPEAL FROM THE ORDER AFFIRMING PUBLIC SERVICE COMMISSION ORDER
DATED MARCH 2, 2022, AND JUDGMENT DATED MARCH 3, 2022,
THE HONORABLE DOUGLAS BAHR, DISTRICT COURT JUDGE, PRESIDING

ORAL ARGUMENT REQUESTED

BRIEF FOR APPELLANT, NODAK ELECTRIC COOPERATIVE, INC.

Kimberly J. Radermacher (ID #05856)
RADERMACHER LAW FIRM, P.C.
Special Counsel for Appellant Nodak Electric Cooperative, Inc.
506 Main St. – P.O. Box 103
Edgeley, North Dakota 58433
(701) 349-3665
kimrader@radermacherlaw.com

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STATEMENT OF ISSUES

- [¶1] The District Court erred in affirming the Commission’s findings that there would not be interference by Otter Tail with Nodak Electric’s existing services and/or that such findings were supported by a preponderance of the evidence.
- [¶2] The District Court erred in affirming the Commission’s findings that there was not unreasonable duplication of services and/or that such findings were supported by a preponderance of the evidence.
- [¶3] The District Court erred in concluding that the 1968 service area agreement between Nodak Electric and Otter Tail was subject to the provisions of N.D.C.C. § 49-03-06 and further concluding that “the service area agreement was not ‘valid and enforceable’ by the Commission under 49-03-06(6).”
- [¶4] The District Court did not err in affirming the PSC’s decision in denying Otter Tail Power Company’s Motion to Dismiss.

STATEMENT OF THE CASE

- [¶5] This is an appeal from the Order Affirming Public Service Commission Order dated March 2, 2022, signed by the Honorable Douglas Bahr (R117) and Judgment dated March 3, 2022 (R119).
- [¶6] This matter came before the North Dakota Public Service Commission (hereinafter “Commission”) on Complaint by Nodak Electric Cooperative, Inc. (hereinafter “Nodak Electric”) alleging that Otter Tail Power Company (hereinafter “Otter Tail”) is planning to construct an extension of its public utility plant and system and of its transmission and distribution lines to serve Love’s Travel Stop to be located in McFarland’s Addition in the City of Drayton, North Dakota, which is in Nodak Electric’s service territory. See (R8, 9). That by doing so, Otter Tail threatens to interfere with

Nodak Electric's service and system and result in an unreasonable and wasteful duplication of facilities. *Id.*

[¶17] On or about December 11, 2020, Otter Tail filed a Motion to Dismiss claiming that the Commission did not have authority to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to McFarland's Addition within the City of Drayton. *See* (R32-35). On December 28, 2020, Nodak Electric responded that the Commission does have authority to address the issues raised in Nodak Electric's Complaint by virtue of the provisions found in Chapter 49-03 of the North Dakota Century Code. *See* (R36).

[¶18] On March 3, 2021, the Commission issued a Notice of Hearing. *See* (R40). A hearing before the Commission was held on April 16, 2021. At the hearing, the following three issues were addressed:

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 Electric?
3. If there would be a wasteful duplication of services, whether the duplication of services would be unreasonable?

[¶19] On April 30, 2021, Otter Tail and Nodak Electric filed closing arguments and briefs. *See* (R75, 76). On May 7, 2021, Otter Tail and Nodak Electric filed reply briefs. *See* (R77, 79). On May 28, 2021, the Commission held its first work session relative to Nodak Electric's Complaint. Subsequent to that work session, both Otter Tail and the City of Drayton filed requests for oral argument. On June 15, 2021, Nodak Electric filed a response to the requests for Oral Argument opposing the requests on the grounds that a full hearing had already been had and any additional argument would be

inappropriate and duplicative. The requests for oral argument were ultimately denied. A second work session was held on June 16, 2021.

[¶10] On July 14, 2021, the Commission issued its Findings of Fact, Conclusions of Law and Order dismissing Nodak Electric’s Complaint and denying the relief being requested by Nodak Electric. The Commission also denied Otter Tail’s Motion to Dismiss. *See* (R82). On August 13, 2021, Nodak Electric filed a Notice of Appeal and Specifications of Error in District Court for the County of Burleigh, State of North Dakota. *See* (R1). On the same day, Otter Tail filed a Notice of Cross Appeal and Specifications of Error relative to the Commission’s ruling on Otter Tail’s Motion to Dismiss. *See* (R4).

[¶11] On February 7, 2022, oral arguments were held in front of the Honorable Judge Douglas Bahr. On March 2, 2022, Judge Bahr issued his written findings, affirming the Commission’s decisions on all matters. Judgment was entered on March 3, 2022, and Notice of Entry of Judgment was filed on March 11, 2022. This appeal follows.

STATEMENT OF THE FACTS

[¶12] Nodak Electric is a “rural electric cooperative” under N.D.C.C. § 49-03-01.5(6). Otter Tail is an “electric public utility” under N.D.C.C. § 49-03-01.5(2). Nodak Electric provides electric service to rural customers outside of the City of Drayton, North Dakota, and also serves at least one commercial customer inside of city limits. Otter Tail primarily provides electric service to the City of Drayton pursuant to a franchise agreement dated May 3, 2011.

[¶13] On February 23, 2019, a consulting engineer, Paul Bryant of CEI, contacted Nodak regarding the proposed location for a new Love’s Truck Stop (hereinafter

“Love’s”) to be located west of I-29 and in Nodak Electric’s service territory. (Transcript of Proceedings, April 16, 2021, Pages 25-26, 34- 35, 46-47). Bryant inquired about the cost for extending service and asked for transformer pad specifications so they could build in their design to pour a pad for the transformer. Id. On May 30, 2019, Steve Breidenbach, Nodak’s Engineering Manager, asked Bryant if Nodak Electric could get a site plan for Love’s, which was emailed to Nodak Electric the same day the request was made. Id. On June 10, 2019, Breidenbach once again talked with Bryant and indicated that Nodak Electric and Love’s should start the paperwork for the new service. Id. Shortly thereafter, Nodak Electric learned that the City of Drayton was seeking to annex the Love’s site into the city limits of Drayton. Id. Because of this, Bryant felt that Otter Tail, not Nodak Electric, should serve the site and therefore did not follow through with submitting the application for membership to Nodak Electric. On April 13, 2020, the City of Drayton passed a resolution authorizing Otter Tail to serve the site. Nodak Electric received a request for a line locate, seemingly indicating that Otter Tail planned on moving ahead with extending service to the site. (Transcript of Proceedings, April 16, 2021, Page 51).

[¶14] It is Nodak Electric’s contention that it, and not Otter Tail, has the right to provide service to Love’s. Nodak Electric and Otter Tail had a service area agreement that was signed in April 1958. (Transcript of Proceedings, April 16, 2021, Pages 113-114); *see also* (R53). At the end of 1960, maps for each of the relevant townships had been negotiated, drawn and signed by both parties. Since then, each time a change to a map was made, a new one was drawn and signed by the parties and replaced in the file. Id. In

February 1968, a new agreement was signed by the parties that referenced “the attached maps,” which included the signed maps from the 1960 agreement and encompassed the territory where Love’s intends to construct its truck stop. *Id.* The 1968 service area agreement is almost verbatim to the original except that it changed some language referring to what happens when a municipality annexes area between the existing city limits and the territory boundary where the cooperative has existing facilities and/or consumers. *Id.* The service area boundaries were drawn outside the existing city limits in some cases up to a mile, and in some cases the cooperative had existing members or infrastructure in that area. *Id.* The initial agreement provided for the sale of those facilities and accounts from the Nodak Electric to Otter Tail once the property was annexed. *Id.* The subsequent agreement took that out and provided for an option to sell if all parties agreed. (Transcript of Proceedings, April 16, 2021, Pages 113-114); *see also* (R53). This was only for newly annexed property inside the service area boundary. *Id.* According to the agreement and maps, Nodak Electric would have the right to provide electric service to the site, despite the subsequent annexation of said territory into the city limits of Drayton. *Id.*

[¶15] Furthermore, Nodak Electric contends that Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve Love’s would interfere with Nodak Electric’s service and system and is a wasteful duplication of facilities. Nodak Electric has a single-phase line that intersects the Love’s service location and a three-phase line that is directly adjacent to the service location. Some of these lines have been in existence since the 1950’s, were later

converted to underground and in 2009 received an upgrade to increase capacity in the area. (Transcript of Proceedings, April 16, 2021, Page 29, lines 8-17). Based on the initial site plan provided by Love's, Nodak Electric could extend service off the single-phase line already located on the property or extend three phase service by 350 feet to the proposed location of Love's transformer. (Transcript of Proceedings, April 16, 2021, Page 350); *see also* (R48). Otter Tail's extension of service would require boring under Interstate 29 (hereinafter "I-29") and crossing over Nodak Electric's already existing lines, as Otter Tail currently has no electrical plant adjacent to or on the property. *See* (R74). Otter Tail's proposed extension would be approximately three times in length and cost to that of Nodak Electric's. *Id.*; *see also* (R50); (Transcript of Proceedings, April 16, 2021, Page 301, lines 12-16). Due to the annexation of the service location into the city limits by the City of Drayton, Nodak Electric now has additional facilities located within the City of Drayton.

[¶16] The Commission held a hearing on April 16, 2021. Nodak Electric called two witnesses, Steve Breidenbach and Mylo Einarson. *See generally* (Transcript of Proceedings, April 16, 2021). Otter Tail called Charles Olson, Steve Walters, Tyler Jacobson and Chris Waltz as witnesses. *Id.* The Commission issued its Findings of Fact, Conclusions of Law and Order on July 14, 2021, which dismissed Nodak Electric's Complaint and denied the relief being requested by Nodak Electric. The Commission also denied Otter Tail's Motion to Dismiss. *See* (R82).

[¶17] Nodak Electric filed a Notice of Appeal and Specifications of Error on August 13, 2021. *See* (R1). In its Notice, Nodak Electric set forth various errors that the Commission

made relative to its Findings of Fact, Conclusions of Law and Order. *Id.* Most notably, the Commission's order is not in accordance with the law and its findings of fact and conclusions of law are not supported by the evidence adduced at trial. In particular, the Commission erred by: 1) concluding that the 1968 service areas agreement and terms of the agreement do not meet the prerequisites provided by the legislature to grant Commission review; 2) not finding physical interference with Nodak Electric's facilities by Otter Tail; 3) finding that Nodak Electric customers will not experience an interruption of service as a result of Otter Tail's designed extension, and Nodak Electric will not lose existing infrastructure or customers from Otter Tail's extending service to McFarland's Addition; 4) concluding that Nodak Electric did not meet the burden necessary to demonstrate that Otter Tail's extension into McFarland's Addition will cause interference with Nodak Electric's service; 5) not considering economic interference in determining overall interference with Nodak Electric's service as part of its determination on this factor; 6) concluding that it must look at just existing facilities to determine whether extension in this case would constitute a duplication of capital-intensive facilities and services; 7) concluding that an extension by Otter Tail that is close to three times in length and cost to that of Nodak Electric's proposed extension is "relatively minor"; 8) concluding that Otter Tail has made capital expenditures to serve the area, particularly any area west of I-29 (the record is devoid of any reference to any such investment made by Otter Tail as Otter Tail has no customers or infrastructure outside of its overhead transmission line in the vicinity of the proposed Love's Truck Stop site); 9) concluding that Nodak Electric does not have extensive system in place to

serve the annexed territory or that there is not unreasonable duplication of facilities and services by Otter Tail with regard to its proposed extension in the area; and 10) dismissing Nodak Electric's Complaint and denying Nodak Electric's request for relief. *See* (R1, 82).

[¶18] After briefing, the District Court held oral argument on the merits of Nodak Electric's appeal and Otter Tail's cross-appeal. On March 2, 2022, the Honorable Judge Douglas Bahr filed his written findings, which affirmed the Commission's decisions on all matters up on appeal. *See* (R117). On March 3, 2022, judgment was entered and on March 11, 2022, notice of entry of judgment was filed. *See* (R119-120). Thereafter on May 3, 2022, Nodak Electric filed its notice of appeal to the North Dakota Supreme Court, which was followed by a notice of cross-appeal by Otter Tail on May 12, 2022. *See* (R124, 128).

STANDARD OF REVIEW

[¶19] An appeal from a decision of the Public Service Commission is governed by the Administrative Agencies Practice Act, promulgated at N.D.C.C. Chapter 28-31. 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."

[¶20] "A review of the factual basis for the agency's decision involves a three-step process to decide whether its findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, and its decision is in accordance with the law and is supported by its conclusions of law." Sletten v. Briggs, 448 N.W.2d 607, 610 (N.D.1989). It is not the court's function to act as a super board when reviewing decisions by an administrative agency. Skjefte v. Job Serv. N.D., 392 N.W.2d 815, 817 (N.D. 1986). "When there is substantial evidence to support the decision of the agency, the decision must be affirmed." Application of Otter Tail Power Co., 169 N.W.2d 415, 419 (N.D. 1969).

[¶21] In an appeal to the North Dakota Supreme Court from a district court's decision on an appeal from a Commission decision, the Supreme Court reviews the Commission's order in the same manner as the District Court. See N.D.C.C. § 28-32-49. The Commission's decision on questions of law is fully reviewable. Capital Elec. Coop., Inc. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788 (N.D. 2007). In reviewing the Commission's findings of fact, however, the Supreme Court does not substitute its judgment for that of the Commission or make independent findings. *Id.* See Power

Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979). Rather, in reviewing the Commission's findings of fact, the Supreme Court “determine[s] 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.” Capital Electric, at ¶ 31 (quoting Power Fuels, at 220).

LAW AND ARGUMENT

I. The District Court erred in affirming the Commission’s findings that there would not be interference by Otter Tail with Nodak Electric’s existing services and/or that such findings were supported by a preponderance of the evidence.

[¶22] Nodak Electric contends that Otter Tail’s extension of service to Love’s site would interfere with Nodak Electric’s existing services and the Commission erred by finding otherwise. In determining this issue, the Commission must look at services generally in the area and not just services provided to actual customers. See Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181, 186-88 (N.D. 1988). In that case, “Cass asserted that although it had no customers which it presently served in South Pointe, NSP’s extension into the subdivision interfered with the economic viability of the electric system Cass had already developed to serve the larger annexed area, and that this interference constitutes a violation of Secs. 49-03-01 and 49-03-01.4, N.D.C.C.” *Id.* at 184. “Because Cass was not presently providing any electric service to customers within the subdivision, the PSC determined that under the provisions of Sec. 49-03-01.3, NSP’s extension of its electric distribution facilities did not ‘interfere with existing electric service of Cass...nor unreasonably duplicate services within South Pointe.’ Consequently, the PSC dismissed Cass’s complaint. The District Court reversed and

remanded the case to the PSC for further consideration, concluding that the PSC's interpretation of Sec. 49-03-01.3 was 'too restrictive'". *Id.*

[¶23] The District Court found that "the commission in this case read the language which refers to existing services as only meaning those identifiable sites which are already being served at the time that incorporation is completed by a municipality. I am of the opinion that this is too restrictive of a reading. If that were true, the last line in the paragraph would be unnecessary in its reference to duplication of services. It is my belief that the commission must look at the availability of services in the area annexed and determine whether extension of NSP lines would be unnecessarily duplicating the services provided by Cass. If so, the injunction requested by Cass County should be granted since they have the right to serve in the general area involved in this proceeding." *Id.* The Supreme Court agreed and concluded that "if the statute were interpreted to prohibit only interference with actual service to existing customers, the last sentence of the first paragraph of Sec. 49-03-01.3 could only be ascribed a meaning which is wholly at odds with the paramount purpose of the Territorial Integrity Act. While this court has in the past declined to say whether rural electric cooperatives or public utilities were given special preference as suppliers of electricity under the Act, we have recognized that keeping to a minimum wasteful duplication of capital-intensive utility services is one of its primary goals. Under the PSC's analysis, it would have no authority to act, regardless of the amount of duplication in investments and electric facilities in an annexed area, unless NSP attempted to serve a customer already being served by Cass, and under that rationale, NSP could extend its services to areas as small

as city lots without creating an unreasonable duplication of services under the statute. We do not believe this was intended by the Legislature when it enacted the Territorial Integrity Act.” Cass County Elec. Co-op., Inc. v. Northern States Power Co., 419 N.W.2d 181, 187 (N.D. 1988).

[¶24] While it is true that Nodak Electric currently serves no customers in McFarland’s Addition, the same is true for Otter Tail. Where the parties differ is that Nodak Electric has significant facilities already in the area constituting and surrounding McFarland’s Addition. Otter Tail does not. Breidenbach testified at the hearing that “We’ve [Nodak Electric] had line in general on that whole property since almost 1950. It started out as an overhead line. There was a farmstead in the approximate location. And subsequent years later, we converted it to underground. And in 2009 we replowed and increased the capacity of the line. We still have one ought line going through the property and we have three-phase going north and south along the property serving -- you can see it’s kind of a bin site, a former -- a former seed plant that we serve now.” (Transcript of Proceedings, April 16, 2021, Page 29, lines 8-17); *see also* (R51). Furthermore, pursuant to the service area agreement between the parties, this area is clearly within Nodak Electric’s service territory. *Id.* Based on the siting of the Love’s Travel Stop transformer, Nodak Electric’s extension would consist of “line trenching, [350’ of] new three-phase cabling, transformer, and basically the connections at each side” at an estimated cost to Nodak Electric of \$19,037.50. (Transcript of Proceedings, April 16, 2021, Page 37, lines 3-10); *see also* (R50). Otter Tail, on the other hand, has no single-phase or three-phase distribution lines on the west side of I-29. *Id.* It only has a transmission line, which

Breidenbach testified would not be ideal to extend service to the Love's site as it "is usually quite expensive to -- to serve a single customer unless it's a large customer. And this would be...too small a customer." (Transcript of Proceedings, April 16, 2021, Page 39, lines 3-8). The only plausible way that Otter Tail can extend service to the area is by boring under I-29 and extending off of its facilities to the east of I-29, which is way more extensive than Nodak Electric's proposed extension. *Id.* Otter Tail's proposed extension would be approximately three times longer than Nodak Electric's and come at a cost approximately three times more than that proposed by Nodak Electric. (Transcript of Proceedings, April 16, 2021, Page 301, lines 12-16). While no physical estimation of cost was provided by Otter Tail at the time of the hearing, Tyler Jacobson, Senior Engineer for Otter Tail, testified that the cost of the proposed extension is estimated to be in excess of \$52,000.00. *Id.* Otter Tail did not submit an exhibit or any detailed testimony as to how it came up with those numbers or exactly what facilities were going to be used to extend service. *Id.* Jacobson did indicate that the numbers had been revised since the original proposal but did not state how. *Id.* At the time Nodak Electric requested discovery in this matter, Otter Tail did not appear to have any numbers to provide; although, it seems they were available as early as 2019 according to Jacobson's testimony. (Transcript of Proceedings, April 16, 2021, Pages 302-303). Jacobson also testified that the bore for Otter Tail's proposed extension would occur approximately "50 feet...give or take" north of where Nodak Electric's underground line is currently located under I-29 (Transcript of Proceedings, April 16, 2021, Page 306). Both parties can agree that Otter Tail would have to extend service under one of Nodak Electric's

overhead lines. However, it is not clear if Otter Tail will have to cross over Nodak Electric's underground lines in the area. According to Breidenbach, Otter Tail's extension would cross Nodak Electric's line "[o]ne at a minimum, and depending on if they have to shift the line to the south, they could be crossing it a few times." (Transcript of Proceedings, April 16, 2021, Page 42, lines 11-13). Otter Tail admits that to cross over Nodak Electric's underground lines would not be an ideal extension of service and appeared to want to avoid that at all costs. (Transcript of Proceedings, April 16, 2021, Page 306). However, it is plausible that this could occur if Otter Tail has to move south with its extension under I-29. Such a crossing as proposed would significantly interfere with Nodak Electric's facilities located in the area and create a serious safety hazard when digging. (Transcript of Proceedings, April 16, 2021, Pages 42-43).

[¶25] Not only would Otter Tail's proposed extension interfere physically with Nodak Electric's facilities, it would also interfere economically. As stated in the Cass County Electric case, this inquiry is not limited to just existing members, but service in the area generally. 419 N.W.2d 181, 187 (N.D. 1988). Nodak Electric officials testified that it extended service in and around McFarland's Addition the way it did due to the prospect of future growth. *See generally* (Transcript of Proceedings, April 16, 2021, Testimony of Steve Breidenbach and Mylo Einarson). Nodak Electric not only sized the line in contemplation of this, but also upgraded lines in 2009 and extended three-phase service into the area. *Id.* According to Breidenbach, "...we build out infrastructure there to serve the whole area. We don't just put power to, like, the grain handling service and -- and don't have enough for the next person. So we build out our whole infrastructure so that

we can serve an area, not just one person. So that's -- that's basically how it would conflict with our service.” (Transcript of Proceedings, April 16, 2021, Page 83, lines 7-15). Breidenbach also testified that “we [Nodak Electric} have farmsteads that utilize three-phase in the area, and we wanted to do some system improvement for system planning. And with the grain place that's currently there, we thought an expansion could be inevitable.” (Transcript of Proceedings, April 16, 2021, Page 30, lines 9-15). Mylo Einarson, President and CEO of Nodak Electric, testified that the west side of I-29 throughout the state has been seeing a lot of growth and so it made sense to make the investment when updating its facilities in the Drayton area. (Transcript of Proceedings, April 16, 2021, Pages 123, 138). Because of this prior investment, Nodak Electric is able to extend service at a significantly reduced cost. (Transcript of Proceedings, April 16, 2021, Pages 48-49; 147-150). Due to the Commission’s findings, it effectively stranded Nodak Electric’s existing single-phase line because it was annexed into city limits. *Id.* Now if any cooperative service is needed north or south of McFarland’s Addition, Nodak Electric and its members is looking at increased costs for extending service that would not have otherwise existed but for said annexation and findings of the Commission. *Id.* While the existing single-phase line could still be used to continue providing power to already existing members on that line, it has become worthless for any future development. *Id.*

[¶126] Furthermore, Nodak Electric projects that Love’s could bring in annual gross revenues to the cooperative ranging from \$57,000.00 to \$98,000.00 (depending on if load management is used). *See* (R8-10). Based on the lowest proposed net revenue,

after taking into consideration cost of power and other expenses, Nodak Electric could still recoup its investment for just the extension to the Love's Travel Stop in less than four years. *Id.* The net revenue could also be used to recoup prior investment made by Nodak Electric in the area, as well as reduce overall electric costs for all Nodak Electric members. *Id.* As Einarson testified, commercial loads are ideal loads to have due to the revenue that they bring in for the electric cooperative. (Transcript of Proceedings, April 16, 2021, Pages 109-112). When one of those loads goes to a public utility when it was originally in the electric cooperative's territory, the cooperative as a whole is financially impacted. *Id.* When more territory is annexed into a municipality, it results in additional property being contiguous to the municipality and opens up the door to more of the cooperative's service territory being usurped by the city and the public utility without any oversight from the Commission.

[¶27] Lastly, 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. Otter Tail argued that N.D.C.C. § 49-03-06, which was passed in 2005, invalidates the 1968 service area agreement. While the Commission did not go as far as Otter Tail in stating the agreement is invalid, it did state that because it did not meet the prerequisites of N.D.C.C. § 49-03-06 that the agreement was not subject to Commission review. In reviewing the legislative history relative to SB 2412, nowhere does it indicate that N.D.C.C. § 49-03-06 would have retroactive application to already existing service area agreements, but rather to agreements reached subsequent to the enactment of

said statute. Prior to 2005, there appears to be no requirement that service area agreements be approved by the Commission or cities that may be affected by such agreements. Both parties provided testimony that they have been operating under the agreement since its inception, including after the passage of N.D.C.C. § 49-03-06 in 2005. Nodak Electric believes that the Commission would have the authority to consider the 1968 service area agreement, particularly in the context of whether an extension by Otter Tail would interfere with Nodak Electric's service. It is evident that based on the testimony and exhibits entered at the hearing, as well as on file herein, that Otter Tail's proposed extension of service would interfere both physically and economically with Nodak Electric's services.

II. The District Court erred in affirming the Commission's findings that there was not unreasonable duplication of services and/or that such findings were supported by a preponderance of the evidence.

[¶28] "The Territorial Integrity Act was enacted by the Legislature in 1965. It amended Sections 49-03-01 and 49-03-05, N.D.C.C., which required a public utility, before beginning construction or operation of a public utility plant or system, or an extension thereof, to obtain from the PSC a certificate of public convenience and necessity. (citations omitted). The primary purpose of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity. Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181, 186-88 (N.D. 1988). The cases decided under this Act [prior to the Cass County Electric case] have thus far generally involved situations where an electric public utility seeks to serve customers in rural areas outside the corporate limits of a municipality."

Id. The Cass County Electric case was “the first time a cooperative in North Dakota has attempted to prevent a utility extension within a municipality on the grounds that the extension interferes with the economic viability of the cooperative’s system.” *Id.* “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.* at 186-87. The Commission erred by looking solely at McFarland’s Addition when considering what facilities and customers each entity had in the area. Prior to the annexation into city limits in 2020, McFarland’s Addition did not exist and was otherwise just a bare plot of land on the west side of I-29, outside of city limits and adjacent to customers being served by Nodak Electric. Unlike Otter Tail, Nodak Electric did not require annexation of said property into city limits to make it part of Nodak Electric’s service territory – it already was and Nodak Electric contends it still is. Nodak Electric had been exclusively serving the area west of I-29 long before the annexation, as can be evidenced by the fact that there is not one Otter Tail customer or distribution line in that area. At the time of the hearing, Otter Tail had no facilities outside of a transmission line in the area that could serve the proposed Love’s site. Even the Commission acknowledged that said transmission line could not feasibly service the site. Nodak Electric has single phase service located within McFarland’s Addition and has three phase service directly adjacent to the site. Said three phase

service is closer to McFarland's Addition than the 350 feet referred to in testimony, as the 350 feet refers to the required length of extension to get to the proposed location of the transformer pad near the truck stop, which is located some distance into McFarland's Addition. Nodak Electric is literally at Love's front door, whereas Otter Tail is not.

[¶29] Furthermore, the Commission erred in stating that Otter Tail has made investments in planning its system to serve customers located in Drayton with the ability for expansions and relying on this premise in finding that Nodak Electric did not meet its burden relative to the issue of wasteful and unreasonable duplication of services. The facts clearly show that Otter Tail has only a transmission line on the west of I-29, and no distribution lines. The transmission line is not a feasible option to serve McFarland's Addition or any other area on the west side of I-29. Otter Tail has made no investment near the site that can even logically be considered by the Commission in support of its decision. Otter Tail would have to bore over 1,000 feet and under I-29 from the east to bring its facilities to the site. Nodak Electric would only have to trench approximately 350 feet of line. The improvements made by Nodak Electric back in 2009 in the area were done in part based on the possibility of future load growth. While Nodak did not provide hard numbers as to these prior investments at trial, it can be assumed by extrapolating from testimony and other exhibits introduced at trial that they were substantial. Otter Tail provided zero evidence as to its investments and provided no cost breakdown of its proposed extension to the site. We are left to assume that the numbers provided by Otter Tail are accurate, whereas no assumptions need to be made

relative to Nodak Electric as Nodak Electric provided concrete evidence to support its cost of extension. While Otter Tail and the Commission think that investing in excess of \$52,000.00 in plant is relatively minor and not unreasonable, it is three times more than Nodak Electric's proposed extension and it is not a logical extension of Otter Tail's services. At this time, Otter Tail's extension of service to the Love's Travel Stop would be only for the benefit of Love's Travel Stop and no other customer of Otter Tail's. Future development in that area by Otter Tail is limited, if not impracticable, unless the City of Drayton annexes additional property into city limits or Otter Tail obtains a Certificate of Public Convenience and Necessity from the Commission. Furthermore, for Otter Tail to do so would be in violation of the service area agreement between the parties. The Supreme Court stated In Capital Electric Cooperative, Inc. v. North Dakota Public Service Commission, "Construction of additional infrastructure by one party to service a single customer when the opposing party has existing infrastructure in place that services multiple existing customers, and that can be easily modified or upgraded to provide service, can be a wasteful duplication of services." 2016 ND 73, ¶ 15, 877 N.W.2d 304 (N.D. 2016). Such is the case here.

[¶30] In addition, Nodak Electric can serve the load just as economically as Otter Tail, which also plays into wasteful duplication. Figures presented at the time of the hearing show that if Love's would implement a generator as part of its load management that Nodak Electric could serve the load at a significant cost savings to Love's when compared to Otter Tail. See (R55-57, 59). Even without load management, Nodak

Electric's rates are still competitive with Otter Tail's, particularly when taking into account capital credits that ultimately get returned back to the member. *Id.*

[¶31] The numbers entered into evidence, as well as the maps depicting the proposed extensions of service and what each power supplier has for facilities in the area, clearly indicate that Otter Tail's proposed extension of service would be duplicative, wasteful and unreasonable. It should not be the overall dollar amount expended on simply the extension that should control, but also the overall investment made and facilities located by each entity in the area and how each is proportionate to the other. As simply stated by Commissioner Kroshus in his dissent, "it is an unreasonable increase of 273.1 percent." If it takes three times the extension and dollars by one entity to extend service to an area already being served by another entity for the better part of 70 years, that is the very definition of wasteful and unreasonable duplication in services.

[¶32] Lastly, the facts of this case on the issue of wasteful duplication of services are analogous to those found in Capital Electric Cooperative, Inc., v. City of Bismarck, 2007 ND128; 736 N.W.2d 788 (N.D. 2007) and Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n, 2020 ND 12; 938 N.W.2d 118 (N.D. 2020). In the Capital Electric case, the Commission found, and the North Dakota Supreme Court upheld, that MDU's extension of service in the Boulder Ridge addition of Bismarck would have "interfere[d] with and constitute[d] an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital." *Id.* at ¶34. The Commission made these findings that are worth noting as they are similar to facts relating to Nodak Electric in the current action:

“Boulder Ridge is entirely surrounded by areas served by Capital; Montana-Dakota’s extension of its facilities crossing and running parallel to Capital’s facilities in the northerly part of original French’s 1st Addition, crossing 43rd Avenue into Boulder Ridge, and crossing and running parallel to Capital’s facilities on the north side of 43rd Avenue, interferes with and constitutes an unreasonable duplication of investment and available facilities and services in Boulder Ridge provided by Capital; that service by Capital would best promote and serve orderly and economic development of electric service in the Boulder Ridge subdivision. Capital is able to extend service to Boulder Ridge through a shorter extension at a lower cost. Service by Capital to Boulder Ridge will not result in checker boarding of customers served by Montana-Dakota and Capital; that Montana-Dakota’s extension of its facility to Boulder Ridge, an area not contiguous to Montana Dakota’s existing service areas, would create a checkerboard of service areas; that Capital is best able to serve Boulder Ridge economically due to the nature and extent of its investment in plant, facilities, framework, and system; and that Montana-Dakota’s extension of its electric distribution lines into Boulder Ridge 1st Addition interferes with and constitutes an unreasonable duplication of investment and services provided by Capital.” *Id.* at ¶ 36.

[¶33] In the Minn-Kota case, Otter Tail proposed an extension of service that was approximately three times as costly as the extension proposed by Dakota Valley, even though some of Otter Tail’s infrastructure it intended to use to extend service was directly adjacent to the site, while Dakota Valley’s was not. 2020 ND 12; 938 N.W.2d 118 (N.D. 2020). Ultimately, both the Commission and the Supreme Court found in favor of Dakota Valley. *Id.* In that case, the Supreme Court stated that “duplication is not necessarily wasteful duplication. See N. States Power Co. v. N.D. Pub. Serv. Comm’n, 452 N.W.2d 340, 344 (N.D. 1990). Whether construction of a facility is duplicative or wasteful is one of fact for the PSC to decide. *Id.* at 345. This Court has upheld a PSC’s finding that construction of a new facility would be wasteful when a rural electric cooperative ‘had an extensive system in place for the annexed territory, and...extension of electric service into [this territory by an electric public utility] would constitute an

unreasonable duplication of the facilities and services provided by [the cooperative] in the area.’ *Id.* at 344. Dakota Valley has recently made investments in its infrastructure that will service the Minn-Kota facility. Otter Tail’s construction of a new substation and extension of service would be duplicative of the facilities and services invested in and provided by Dakota Valley in the area. The PSC’s finding that Otter Tail’s proposal would lead to a wasteful duplication of investment or service is supported by a preponderance of the evidence in the record. This finding is further supported by the PSC’s findings that Dakota Valley serves more customers within a two-mile radius, and Dakota Valley would best serve orderly and economic development of electric service in the general area.” *Id.* In both Capital Electric and Minn-Kota, the Commission found that the investor-owned utility’s extension of service would be a wasteful duplication of services already in place by the rural electric cooperative. The same should have been found here as the facts in this case are truly no different than those in the Capital Electric and Minn-Kota cases.

III. The District Court erred in concluding that the 1968 service area agreement between Nodak Electric and Otter Tail was subject to the provisions of N.D.C.C. § 49-03-06 and further concluding that “the service area agreement was not ‘valid and enforceable’ by the Commission under 49-03-06(6).”

[¶34] N.D.C.C. § 49-03-06, which was passed in 2005, essentially gives the Commission governance and jurisdiction over service area agreements between electric providers. In order for the Commission to have jurisdiction to mediate disputes arising under a service area agreement, the conditions set forth under N.D.C.C. § 49-03-06 must be followed. There is nothing set forth in the legislative history or in case law that the statute was intended to apply retroactively to already existing service area agreements,

nor is there any indication that such agreements are not “valid and enforceable” because they were not subsequently filed with the Commission in accordance with the statute. The District Court concluded in this matter that the 1968 service area agreement was subject to the provisions of N.D.C.C. § 49-03-06 and therefore concluded the agreement was not valid and enforceable by the Commission. At no time did the Commission make a finding that the 1968 service area agreement was invalid or unenforceable. Rather, the Commission indicated that because it did not meet the prerequisites of N.D.C.C. § 49-03-06, that the agreement was not subject to Commission review. The District Court clearly erred when it made its own findings on this issue, which were contrary to the findings of the Commission and to the law. Nodak Electric was not seeking to litigate before the Commission or the District Court the provisions of the 1968 service area agreement. Rather, Nodak Electric referenced and relied upon the service area agreement to show how there would be interference with and wasteful duplication of Nodak Electric’s current facilities and future growth by Otter Tail in an area that Nodak Electric believes it has every right to serve under the agreement. Nodak Electric is cognizant that the Commission does not have the jurisdiction to settle any breach of contract dispute arising out of Otter Tail’s extension into Nodak Electric’s service territory and that a separate action in District Court would be more appropriate. However, this does not automatically preclude the Commission from at least considering the 1968 service area agreement in the context requested by Nodak Electric in this action. Furthermore, Nodak Electric argues that the validity and enforceability of a service area agreement that arose well before the enactment of N.D.C.C. § 49-03-06

does not hinge on that statute. Otter Tail acknowledged in testimony that it knew that the 1968 agreement existed but did not realize it also addressed the City of Drayton. Both parties provided testimony that they have been operating under the agreement since its inception, including after the passage of N.D.C.C. § 49-03-06 in 2005. The overly broad reading of the statute and its retroactive applicability to a pre-2005 service area agreements made by the District Court could have a profound effect on similar matters going forward and as such this error needs to be remedied.

IV. The District Court did not err in affirming the PSC's decision in denying Otter Tail Power Company's Motion to Dismiss.

[¶35] Otter Tail has continually alleged that the Commission is without authority to interfere with a franchise granted to Otter Tail by the City of Drayton to serve McFarland's Addition and the Love's site and therefore Nodak Electric's Complaint should be dismissed. Otter Tail contends that the City of Drayton has the sole constitutional authority to determine the electrical provider for McFarland's Addition. Otter Tail has repeatedly failed to recognize that the Commission's authority granted to it under Chapter 49-03 of the North Dakota Century Code. That chapter provides remedies to electric cooperatives and electric public utilities alike when another electric public utility threatens to unreasonably interfere with their service or system, such as is alleged in this case. Specifically, N.D.C.C. § 49-03-01.3 states that "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.” (emphasis added). N.D.C.C. § 49-03-01.4, provides that “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.”

[¶36] N.D.C.C. § 49-03-01.3 is specific to the construction of facilities within a municipality. If a municipality could simply overrule the Commission’s authority by granting a franchise to one electrical provider over another, regardless of unreasonable duplication and interference by one, what is the purpose of the statute? Most municipalities have franchises in place to provide electrical service within its city limits and yet, the statute has not been repealed or amended to accommodate this “[insurmountable] sole constitutional authority” alleged by Otter Tail. While the North Dakota Supreme Court has addressed cases similar to this one, there are facts in this case that make it distinguishable from the those. In Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971), 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.* (emphasis added). *Id.* at 730. Charles Olson, the mayor of Drayton, was called by Otter Tail to testify at the hearing. Otter Tail introduced three different exhibits relative to action taken by the City of Drayton in relation to the franchises given to Otter Tail and the annexation of McFarland’s Addition. Nowhere in Olson’s testimony or included in the exhibits was evidence that the City of Drayton has an ordinance requiring a franchise to provide electrical services inside the city limits of Drayton. To the contrary, Olson knew at the time of the hearing and beforehand that Nodak Electric was in fact providing electrical service to a service station located within city limits and had been doing so since the 1980s. *See* (R58). Olson indicated that since Nodak Electric was already providing electrical service to the site at the time of annexation that he did not see any issue with Nodak Electric continuing to serve the load without a franchise. Interestingly, Otter Tail now argues that it should be entitled to purchase Nodak Electric’s facilities serving this

service station because Nodak Electric does not possess a franchise with the City of Drayton and cannot operate in a municipality (despite Otter Tail stating multiple times at the hearing that rural electric cooperatives can and do serve loads in municipalities all over the state).

[¶37] Otter Tail has cited N.D.C.C. § 49-03-06(8), which states that “nothing in this chapter [49-03] shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-50-01” in support of its position. *See* (R75). Nodak Electric was and is not seeking to have the franchise set aside, but rather to enjoin Otter Tail from interfering with Nodak Electric’s service and plant located in and around McFarland’s Addition in the City of Drayton as provided for N.D.C.C. Chapter 49-03. Otter Tail claims that because it possesses a franchise to serve the City of Drayton that Nodak Electric is automatically precluded from serving Love’s proposed service station and the Commission was without authority to hear this matter. First, the franchise held by Otter Tail to serve the City of Drayton is not exclusive. Otter Tail has claimed repeatedly that “given the City of Drayton’s ordinance adopting the Resolution directing Otter Tail, its only franchisee, to furnish electric service to all residents within the City, Nodak has no right to provide service to McFarland’s Addition...” Neither the Ordinance dated in 2011, nor the Resolution dated in 2020, specifically state what Otter Tail alleges. Otter Tail’s own Chris Waltz testified neither the Ordinance dated 2011, nor the Resolution dated in 2020 were exclusive. Rather, said documents grant Otter Tail permission to build plant to provide electric service to the City and the inhabitants thereof. Nowhere in the documents is said right specifically exclusive to Otter Tail, nor

can it be under N.D.C.C. § 40-05-01(57). Furthermore, no evidence has ever been provided that the City of Drayton has an ordinance prohibiting an entity from providing electrical service within the City of Drayton without a franchise, as such ordinance does not exist. This fact is what makes this case distinguishable from the facts in Montana-Dakota Utilities Company v. Divide County School District No. 1, 193 N.W.2d 723 (N.D. 1971).

[¶38] Also worth noting is that in the Divide case, the city of Crosby had twice declined to issue a limited franchise to the REC. No such action has ever been taken by the City of Drayton. While Nodak Electric had expressed to the City of Drayton that it would be willing to get a franchise if one was needed, the issue was never formally brought before the city council and voted on. Nodak Electric has maintained its position that it was lawfully serving the areas annexed into the City of Drayton by virtue of the 1968 service area agreement it has with Otter Tail. Because the City of Drayton does not have an ordinance in place prohibiting electrical service from being provided without a franchise and is in fact presently allowing such practice to occur, the Commission was not precluded from hearing this matter as provided for in Chapter 49-03 of the North Dakota Century Code and its denial of Otter Tail's Motion to Dismiss was appropriate.

[¶39] Moreover, Otter Tail fails to recognize that the Divide and Tri-County Electric Cooperative, Inc. v. Elkin, 224 N.W.2d 785, 794 (N.D. 1974) cases are not persuasive, nor controlling, authority on the issue of whether cooperatives can statutorily serve new customers within an annexed area. In Cass County Electric Coop., Inc. v. Northern States Power Co., 419 N.W.2d 181 (N.D. 1988), Northern States Power Company tried making a

similar argument to Otter Tail's regarding the ability of a rural electric cooperative to serve members who are receiving or can receive central station service. The Supreme Court held that "Section 49-03-01.3, N.D.C.C., implicitly recognizes that a rural electric cooperative may lawfully provide electric services within a municipality which is served by an electric public utility. We are required to construe together all statutes relating to the same subject matter so as to harmonize them, if possible, and give full force and effect to the legislative intent (citations omitted). We believe it is possible to harmonize these provisions...Thus, when a 'rural area' is annexed by a municipality, its population in effect 'changes' because it has become united with that of the municipality of which it is now a part. In view of Sec. 49-03-01.3, which specifically contemplates the possibility of continued electric service by a cooperative within an annexed area, we conclude that Sec. 10-13-04 does not prohibit Cass from providing electric service in South Pointe." *Id.* at Page 185.

[¶40] Furthermore, Nodak Electric continues to allege that the Commission had authority and jurisdiction to hear this matter by virtue of the now existing ordinances within the City of Drayton. Otter Tail's Exhibit OTP-1, which is the franchise Otter Tail has with the City of Drayton, states in Section 9 that "this contract shall be subject to any present or future laws of a regulatory nature enacted by the State of North Dakota, or any amendment or addition to such laws, and *further shall be subject to the rules and regulations laid down by the Public Service Commission of the State of North Dakota.*" (emphasis added). See (R60). Otter Tail attempted to argue through the testimony of Chris Waltz that this provision was only included because Otter Tail's rates are subject to

regulation by the Commission and for no other reason. This argument is not compelling. Section 8 of the franchise specifically addresses the issue of rates and what authority the Commission has in that regard. Section 9 is independent of Section 8 and does not appear to be limited in any way. Because of this, Nodak Electric would argue that any amendment to the franchise and expansion of services by Otter Tail in the City of Drayton would be subject to the scrutiny and jurisdiction of the Commission and in particular, the authority granted to the Commission under Chapter 49-03. Therefore, Otter Tail's Motion to Dismiss and its cross appeals relative to the denial of said motion are without merit.

CONCLUSION

[¶41] Based on the foregoing, as well as the entire record in this matter, Nodak Electric respectfully requests that this Court reverse the decision of the Commission and District Court relative to the dismissal of Nodak Electric's Complaint and its relief requested therein and remand for further proceedings. Nodak Electric asks that this Court affirm the decision of the Commission and District Court denying Otter Tail's Motion to Dismiss. Lastly, Nodak Electric asks that this Court reverse and remand or clarify the issue relative to the applicability of N.D.C.C. § 49-03-06 to pre-2005 service area agreements.

REQUEST FOR ORAL ARGUMENT

[¶42] Appellant hereby requests oral argument to be held. Appellant believes there are novel issues before the Court and that oral argument would be beneficial to both

the Court and Appellant in fleecing out some of the primary concerns of Appellant relative to the findings made by the Commission and the District Court.

CERTIFICATE OF COMPLIANCE

[¶43] The undersigned, as attorney for the Appellant Nodak Electric Cooperative, Inc. in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 35 pages.

Respectfully submitted at Edgeley, ND, this 27th day of July, 2022.



Kimberly J. Radermacher (#05856)
RADERMACHER LAW FIRM, P.C.
Special Counsel for Appellant Nodak
Electric Cooperative, Inc.
506 Main St. – P.O. Box 103
Edgeley, North Dakota 58433
(701) 349-3665
kimrader@radermacherlaw.com

