

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Nodak Electric Cooperative, Inc.,

Supreme Court No. 20220122

Appellant,

Civil No. 08-2021-CV-01508

vs.

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

Appellees and Cross-Appellant

ON APPEAL FROM THE JUDGMENT DATED MARCH 3, 2022,
BURLEIGH COUNTY DISTRICT COURT,
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS A. BAHR
ORAL ARGUMENT REQUESTED

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

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STATEMENT OF THE ISSUES

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

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

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

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

STATEMENT OF THE CASE

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

[6] On December 4, 2020, the City of Drayton filed a Petition to Intervene asserting it had the constitutional right to determine the electric service provider to

McFarland's Addition in the City of Drayton. On December 10, 2020, the Administrative Law Judge granted the City of Drayton's Petition to Intervene.

[7] On December 11, 2020, Otter Tail moved to dismiss Nodak Electric's Complaint and Brief in Support asserting the Commission lacked authority to invalidate the City of Drayton's franchise with Otter Tail to provide electric service to the McFarland's Addition within the City of Drayton.

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

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

[9] A hearing was held before the Commission on April 16, 2021. The Commission issued its Findings of Fact, Conclusions of Law, and Order on July 14, 2021, denying Otter Tail's motion to dismiss, denying Nodak Electric's request for relief in its Complaint, and dismissing the Complaint. On August 13, 2021, Nodak Electric filed a Notice of Appeal and Specifications of Error. On the same day, Otter Tail filed its Notice of Cross-Appeal and Specifications of Error.

[10] On March 2, 2022, the District Court issued its Order Affirming Public Service Commission Order and Judgment. On May 3, 2022, Nodak Electric filed a Notice of Appeal. On May 12, 2022, Otter Tail filed its Notice of Cross-Appeal.

STATEMENT OF FACTS

[11] The property at issue in this action, McFarland's Addition, is located in the City of Drayton, Northwest Quarter of Section 26, Township 159 North, Range 51 West in

Pembina County, North Dakota. (R61) (Annexation of McFarland's Addition). McFarland's Addition is a parcel of land located between Interstate 29 ("I-29") on the east and 160th Ave. on the west. Id. The City of Drayton is located in Section 26, Township 159 North, Range 51 West in Pembina County, North Dakota. Id.

[12] Otter Tail has been providing electric service to the City of Drayton since at least 1931. (R92:311:6-13). Otter Tail possesses a franchise with the City of Drayton to provide electric service pursuant to a franchise agreement dated May 3, 2011. (R60) (Otter Tail Franchise with the City of Drayton). Otter Tail's franchise with the City of Drayton requires it to provide electric service to customers within Drayton city limits. (R91:235:2-5; R92:311:19-23).

[13] A representative of Love's Truck Stop ("Love's") approached the Mayor of Drayton in late summer of 2018 inquiring about potential annexation of the McFarland's Addition property into the City of Drayton for construction of a new truck stop. (R91:236:2-19; and 264:13-15). By January 2019, the City of Drayton decided to begin the annexation process for McFarland's Addition. (R91:237:14-25). The Drayton City Council approved annexation of the McFarland's Addition property into the City of Drayton on August 12, 2019. (R61). The Plat of McFarland's Addition and annexation was filed by the City with the Pembina County Recorder on August 19, 2019. Id. Nodak Electric does not provide electric service to any customers in McFarland's Addition. (R89:67:24-68:3). The City of Drayton's annexation of McFarland's Addition did not result in the taking of any Nodak Electric lines or facilities in the annexed area. (R90:171:18-25).

[14] The Mayor of Drayton testified the City of Drayton chose Otter Tail to provide power to McFarland's Addition. (R91:243:11-14). Mayor Olson testified the City of Drayton has exclusive authority to decide which utility supplies power to the McFarland's Addition and in April 2020 passed a resolution clarifying that Otter Tail was to provide electric service. (R91:243:20-244:5); (R62). Mayor Olson testified that if the City of Drayton had wanted Nodak Electric to serve McFarland's Addition, the City could have granted it a franchise, but the City has not done so. (R91:255:5-24). Mayor Olson testified that it was the City's decision to select Otter Tail to provide electric service to Love's Truck Stop and to every other customer in the City. (R91:234:35).

OTTER TAIL'S EXTENSION OF SERVICE

[15] At the hearing before the Commission, Otter Tail's senior area engineer, Tyler Jacobson, testified regarding Otter Tail's proposed extension of electric service to the new Love's facility in McFarland's Addition. Otter Tail introduced a map showing how it would provide three-phase service to the Love's from its existing three-phase line on the adjacent property located in the City of Drayton directly to the east of McFarland's Addition. (R74) (Map of Otter Tail extension). Otter Tail's extension would go underground crossing Nodak Electric's existing overhead single-phase distribution line on the east side of I-29. Id. Otter Tail would then extend its three-phase line by boring under I-29. (R91:290:9-23). Mr. Jacobson testified Otter Tail's extension of three-phase service to McFarland's Addition would be approximately 1,000 feet and cost \$52,000. (R91:301:8-16).

[16] Otter Tail obtained permits in May 2020 to bore under I-29 and those permits were extended in 2021. (R91:291:7-16). Mr. Jacobson further explained that

boring for underground electric lines is customary practice in the industry and is more common than trenching a facility. (R91:291:17-23). Mr. Jacobson testified there are no National Electric Safety Code (“NESC”) regulations that would prohibit boring under I-29. (R91:292:5-13). He testified that there is no NESC guideline or regulation that prohibits Otter Tail’s extension under Nodak Electric’s existing overhead line. (R:292:21-25).

[17] Mr. Jacobson also testified Otter Tail’s proposed extension would not interfere with Nodak Electric’s current infrastructure or customers. (R91:295:22-6). Mr. Jacobson testified that Otter Tail’s extension would be located approximately fifty feet north of Nodak Electric’s existing single-phase underground line in McFarland’s Addition. (R91:293:4-10). He testified Otter Tail’s extension of electric service would not constitute an unreasonable duplication of electric services because Nodak Electric has no existing three-phase facilities or customers in McFarland’s Addition. (R91:295:15-21).

[18] Nodak Electric’s engineer, Steve Briedenbach, confirmed Otter Tail’s proposed extension as designed would not cross any of Nodak Electric’s underground facilities. (R89:73:10-14). While Otter Tail’s underground line would cross under Nodak Electric’s existing overhead line, Mr. Breidenbach conceded there is no provision in the NESC or any other regulation that would prohibit Otter Tail from constructing an underground extension under Nodak Electric’s existing overhead distribution line. (R89:66:8-13).

[19] Mr. Breidenbach testified Otter Tail’s proposed extension would not require Nodak Electric to move its existing overhead line. (R89:67:2-6). He further testified Otter Tail’s construction of the underground extension under Nodak Electric’s existing overhead

lines would not interrupt service to any of Nodak Electric's customers. (R89:67:7-11). Mr. Breidenbach also conceded that Otter Tail's extension of service would not interfere with any service Nodak Electric is providing to any customers. (R89:98:14-17; R90:156:15-21). He admitted Otter Tail's proposed extension would not take away any existing customers that are receiving electric service from Nodak Electric. (R89:98:10-13).

[20] Nodak Electric acknowledged it had no infrastructure in place in McFarland's Addition that would be taken as a result of Otter Tail's extension of service. (R89:100:6-10). Mr. Breidenbach admitted Otter Tail's proposed extension of three-phase service to McFarland's Addition would not impact its existing three-phase customer located to the west of McFarland's Addition. (R89:99:8-12). Further, Nodak Electric admitted Otter Tail's extension of service to McFarland's Addition would not prevent it from extending three-phase service to any new customers from its existing three-phase facility located west of McFarland's Addition. (R89:99:21-24). Nodak Electric conceded its argument that Otter Tail's extension could take away future customers is based on speculation. (R89:102:15-21).

NODAK ELECTRIC'S EXTENSION OF SERVICE

[21] Nodak Electric proposed extending three-phase service to McFarland's Addition from an existing three-phase facility located on property in Section 27 directly west of McFarland's Addition. (R48). Nodak Electric would be required to trench its extension to McFarland's Addition through 160th Ave. NE, which separates Sections 26 and 27. *Id.* Nodak Electric's underground extension would be required to cross under Otter Tail's existing overhead transmission line, which is located on the west side of

McFarland's Addition. (R89:57:18-25). Nodak Electric testified that construction of its proposed underground three-phase line would not interfere with Otter Tail's existing overhead transmission lines. (R89:58:4-9).

[22] Nodak Electric testified it had an existing single-phase line on the south side of McFarland Addition, but it could not use that single-phase line to provide three-phase service to Love's. (R89:56:9-14). Love's representative, Steve Walters, testified Love's would not be willing to accept interruptible service for its facility. See id.; see also (R91:272:10-13). Nodak Electric's engineer conceded that, while both it and Otter Tail have existing lines on McFarland's Addition, neither utility intended to provide three-phase service to Love's from those existing lines. (R89:57:11-17). Love's specifically requested three-phase service for their new facility. (R91:266:6-8). Love's representative testified it would not take service off a single-phase electric line with a phase converter to obtain three-phase service. (R91:266:9-15).

[23] Nodak Electric testified its existing three-phase service to the west of McFarland's Addition was constructed for a specific customer that requested three-phase service. (R90:158:15-22). Nodak Electric conceded its existing three-phase customer to the west of McFarland's Addition will still have three-phase service whether or not Otter Tail's extension is built. (R90:158:23-159:1).

[24] Nodak Electric did not quantify any investment made upgrading its facilities in 2009 for service to future potential customers in the area. (R90:196:14-25). Nodak Electric could not identify what members were charged for alleged upgrades in 2009. (R90:200:6-10). With respect to its investment in the area, Nodak Electric could not identify when the three-phase service was first constructed or the size of the transformer

facilities located on the three-phase site to the west of McFarland's Addition. (R90:215:14-25). However, Nodak Electric's CEO admitted the transformer for the existing three-phase customer to the west of McFarland's Addition was not sized larger for future load growth, but rather sized for that specific customer's needs. (R90:216:1-7).

1968 SERVICE AREA AGREEMENT

[25] Nodak Electric and Otter Tail entered into a service area agreement in 1968. (R53) (1968 service area agreement). The City of Drayton was not party to the 1968 service area agreement. *Id.* Neither party filed the 1968 service area agreement or any corresponding maps with the Commission. (R90:177:21-178:2). The 1968 service area agreement does not acknowledge Commission jurisdiction to enforce the agreement. (R53). Nodak Electric knew North Dakota's enactment of a service area agreement statute in 2005 provided that a city may require approval of service area agreements between electric providers if the agreement encompasses locations within the city. (R90:178:7-13). The Mayor of Drayton testified the City of Drayton never approved nor consented to be bound to the terms of the 1968 service area agreement between Otter Tail and Nodak Electric. (R90:178:14-24).

STANDARD OF REVIEW

[26] Otter Tail accepts the Standard of Review set forth by Nodak in Appellant's Brief while noting the additional standard: "Agency expertise is entitled to appreciable deference if the subject matter is highly technical." *Cap. Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2016 ND 73, ¶ 6, 877 N.W.2d 304.

SUMMARY OF ARGUMENT

[27] 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 a complaint with the Commission effectively seeking to invalidate Otter Tail's franchise and grant it a *de facto* franchise to serve McFarland's Addition claiming it interfered with and duplicated Nodak Electric's service. Otter Tail moved to dismiss Nodak Electric's Complaint because the Commission lacked jurisdiction over the City of Drayton's determination granting Otter Tail the franchise to serve McFarland's Addition. The North Dakota Constitution grants the exclusive authority to franchise electric service to the cities and states that a city's power to franchise shall not be abridged by the Legislature. This Court has held that the Commission only has authority to decide whether a utility's extension of services in a city will unreasonably interfere with and duplicate services of the other under N.D.C.C. § 49-03-01.3 if the cooperative has a franchise to serve in the city. Nodak Electric does not possess a franchise to serve in the City of Drayton; therefore, the Commission had no authority to determine interference or unreasonable duplication and Otter Tail's Motion to Dismiss should have been granted. Because the Commission's conclusion denying Otter Tail's Motion to Dismiss was not in accordance with the law and should be reversed, there is no need for the Court to address the Commission's conclusions regarding Nodak Electric's claims for interference and unreasonable duplication.

[28] However, if the Court were to consider Nodak Electric's appeal of the Commission's conclusions that Nodak Electric failed to meet its burden, this Court's review is limited to a determination of whether the Commission's conclusions of law and order are supported by its findings of fact and whether the Commission's findings of fact are supported by a preponderance of the evidence. On appeal, Nodak Electric is requesting this Court reweigh the facts and place more weight on facts Nodak Electric believes support its

claims. Contrary to Nodak Electric's arguments, the Commission's conclusions that Nodak Electric failed to meet its burden of proof establishing interference and unreasonable duplication were overwhelmingly supported by its findings of fact and the preponderance of the evidence and should be affirmed. The Commission's conclusion that it lacked authority under N.D.C.C. § 49-03-06 to enforce the 1968 service area agreement was in accordance with the law

LAW AND ARGUMENT

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

[29] Otter Tail has cross-appealed the District Court's judgment affirming the Commission's denial of Otter Tail's motion to dismiss. Otter Tail sought dismissal of Nodak Electric's Complaint on the grounds the Commission lacked jurisdiction to grant the requested relief. Nodak Electric does not possess a franchise to serve McFarland's Addition in the City of Drayton, and yet it filed a Complaint seeking to prevent Otter Tail from serving McFarland's Addition and requesting the Commission permit Nodak Electric to serve the new customer. Under North Dakota law, the City of Drayton has the exclusive constitutional authority to determine the electric service provider for McFarland's Addition in the City of Drayton.

A. The District Court erred in concluding it need not address the subject matter jurisdiction challenge.

[30] The District Court erred in affirming the Commission's Order denying Otter Tail's motion to dismiss for lack of jurisdiction. The District Court erroneously concluded that because Otter Tail and the City of Drayton prevailed on the merits before the Commission it did not have to address the constitutional subject matter jurisdiction

question. When subject matter jurisdiction is contested, the court must address that threshold issue before proceeding to the merits. See Burr v. N. Dakota State Bd. of Dental Examiners, 2021 ND 31, ¶ 5, 955 N.W.2d 112; see also Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008), aff'd, 561 U.S. 247 (2010) (determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate it).

[31] While subject matter jurisdiction can be raised at any point, both Otter Tail's Answer and its motion to dismiss challenged the subject matter jurisdiction of the Commission over Nodak Electric's Complaint before the case proceeded to hearing. The Commission must have subject matter jurisdiction over the complaint before it can rule on the merits of the case. See id. The District Court erred in affirming the Commission's decision on the merits without analyzing whether the Commission had jurisdiction to do so. See id.

[32] The Commission expressly reserved the constitutional question of jurisdiction for the courts, before proceeding to address the merits of Nodak Electric's complaint. Similarly, the District Court held that constitutional questions should be avoided where possible by noting the result of Commission's ruling on the merits favored the City and Otter Tail. Both decisions misconstrue the fundamental legal principle that it is a flawed statutory interpretation finding of Commission jurisdiction that implicates the constitutional question. Section 49-03-1.3, N.D.C.C., requires the Commission to enjoin Otter Tail from providing electric service to a City resident if it were to find interference or unreasonable duplication and by enjoining would thus negate the City's franchise

authority. Without a franchise being granted to Nodak Electric by the City, interpreting the statute to give the Commission authority to grant Nodak Electric permission to serve the new City customer usurps the City's constitutional franchise authority. Allowing the Commission to rule on the merits of interference and duplication does not avoid the constitutional question—it creates it.

B. The Commission lacked authority to decide whether Otter Tail's extension to McFarland's Addition would interfere with or unreasonably duplicate Nodak Electric's facilities.

[33] Had the District Court addressed the jurisdictional argument, it would have concluded the Commission's denial of Otter Tail's motion to dismiss was not in accordance with the law because the Commission lacked authority to decide Nodak Electric's Complaint. This Court delineated the boundaries of the Commission's authority to determine whether a public utility's proposed extension inside of city limits will interfere with or unreasonably duplicate a cooperative's facilities pursuant to N.D.C.C. § 49-03-01.3. See Capital Electric, 2007 ND 128, ¶ 13, 736 N.W.2d 788. In Capital Electric, this Court explained:

If both [the public utility] and [cooperative] have franchises to provide electric service to [the annexed property], the PSC has authority to decide whether either entity's extension of services in [the annexed property] 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).

Id. (*emphasis added*). The Court specifically noted that in the Cass County cases both the public utility and cooperative had a franchise to serve the annexed area in the City of Fargo, as did Capital Electric Cooperative in the City of Bismarck. The Capital Electric Court further explained that, under North Dakota law, a cooperative must have a franchise to

serve the annexed property. Id. (citing Montana-Dakota Utilities Co. v. Divide County Sch. Dist., 193 N.W.2d 723 (N.D. 1971)).

The Capital Electric holding is founded upon the North Dakota Constitution:

The power of the governing board of a city to franchise the construction and operation of any public utility or similar service within the city *shall not be abridged by the legislative assembly.*

N.D. Const. Art. VII, § 11 (*emphasis added*). North Dakota's Constitution establishes that a city has the exclusive authority to franchise the construction and operation of public utilities within the city's boundaries. Id. Most importantly, the North Dakota Constitution provides that a city's franchise authority cannot be limited or curtailed by the Legislature's enactment of statutory law. Id. Further constraining the Commission's jurisdiction is that as a state agency it can only act where the Legislature has empowered it. City of Grafton v. Ottortail Power Co., 86 N.W.2d 197, 202 (N.D. 1957).

[34] Despite Otter Tail's franchise and the City's Resolution confirming Otter Tail's right and obligation to serve McFarland's Addition, Nodak Electric filed a Complaint requesting the Commission enjoin Otter Tail from extending electric service to the McFarland's Addition pursuant to N.D.C.C. Ch. 49-03. However, the relevant provision of Chapter 49-03, N.D.C.C., expressly acknowledges the Legislature is prohibited from empowering the Commission to abridge the city's exclusive power to exercise its franchise authority:

Nothing in this chapter shall be construed to limit the authority of a governing board of a city to exercise its franchise authority under section 40-05-01.

N.D.C.C. § 49-03-06(8). A City is free to extend a franchise to as many electric service providers it wishes, but where it has chosen only one franchisee the Commission may not

add another. Any interpretation to the contrary must be rejected as unconstitutional.

[35] Nodak Electric and the Commission argued below that because the City of Drayton does not have a “preclusion” ordinance prohibiting provision of electric service inside city limits without a franchise, the Commission has jurisdiction granted by N.D.C.C. § 49-03-1.3. While this Court observed that such preclusion ordinances were present in prior cases, it has never held that a co-op without a franchise can serve inside a city receiving central station service. Similarly, this Court has never held that the lack of a preclusion ordinance opens the door for any electric service provider other than the franchisee.

[36] Simply put, a preclusion ordinance is superfluous under the Constitution’s franchise framework. A franchise scheme establishes authority to determine who is permitted to serve inside city limits. Establishing who *can* serve (Otter Tail) coincidentally confirms who *cannot* (everyone else). To require a preclusion ordinance by a city to prevent statute-based Commission jurisdiction over the franchise decision would make abridging automatic unless a second action is taken by a city to preclude it. Under North Dakota law, constitutional provisions are limitations upon the power of the legislature. See State ex rel. Johnson v. Baker, 21 N.W.2d 355, 358–59 (N.D. 1945).

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

[37] The relevant facts supporting Otter Tail’s motion to dismiss are undisputed: the property at issue in this action, McFarland’s Addition, is located within the City limits of Drayton as approved by the City Council on August 12, 2019. (R61). Otter Tail’s most recent franchise agreement from the City is dated May 3, 2011. (R60) (Otter Tail Franchise). Otter Tail has been providing electric service to customers in Drayton pursuant

to continuous successive lawful franchises since the 1930s. Both the City of Drayton and Otter Tail recognize this franchise obligates Otter Tail to provide electric service to all customers within the City of Drayton. (R91:24522-24; R92:320:6-11). The City of Drayton passed a resolution authorizing Otter Tail to provide electric service to McFarland's Addition eliminating any doubt as to the electric service provider the City chose to provide service in McFarland's Addition. (R62).

[38] A franchise is "a special privilege conferred by government on an individual or corporation, and which does not belong to citizens of country generally of common right". Williams Bros. Pipe Line Co. v. Grand Forks, 163 N.W.2d 517, 522 (N.D. 1968) (citing Black's Law Dictionary). Pursuant to North Dakota law, the governing body of a municipality has the power to grant franchise for public utilities. See § 40-05-01(57); see also City of Grafton, 86 N.W.2d at 204 (recognizing a franchise gives the utility the right to use public right of way for the installation and operation of its facilities). The City of Drayton has clearly and unequivocally exercised its constitutional power to grant Otter Tail the sole franchise to serve McFarland's Addition. (R62).

[39] Nodak Electric argues the City waived its rights designating Otter Tail as its sole franchisee. First, Nodak Electric claimed at the Commission and the District Court that Mayor Olson testified that since Nodak Electric was already providing electrical service to a different customer in a different part of the City at the time of annexation that "he did not see any issue with Nodak Electric continuing to serve the load without a franchise." See Appellant's Brief, at ¶36. Nodak Electric does not cite to the record to support this assertion, and Otter Tail has twice noted in proceedings below that the transcript is void of any such testimony by Mayor Olson. To the contrary, Mayor Olson

testified that it was the City's decision to select Otter Tail to provide electric service to Love's Truck Stop and to every other inhabitant of the City. (R91:234 – 35).

[40] Second, Nodak Electric claimed the language of the franchise agreement by its terms subjects the City to the authority of both the Legislative Assembly and the Commission through N.D.C.C. § 49-03-1.3, and thereby the City waived its exclusive right to franchise electric service. In both its Commission and District Court pleadings, Nodak Electric states "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." Appellant's Brief at ¶ 40. In both proceedings Otter Tail corrected Nodak Electric's misrepresentation by noting Mr. Waltz' actual testimony identified Otter Tail's "general rules and regulations" which by their very nature incorporate the breadth of Title 49 and covers *inter alia* the topics of rates, billing, metering, safety, reliability, customer rights, and customer complaint processes. (R93:365:16-25).

[41] Waiver is traditionally defined as the voluntary and intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed. Brunson v. Scarlett, 465 N.W.2d 162, 168 (N.D. 1991). Under North Dakota law, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. State v. Olson, 544 N.W.2d 144, 146 (N.D. 1996). Waivers of constitutional rights by a party are not to be inferred but must be clearly and intentionally made. State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (stating presuming waiver of constitutional rights from a silent record

is impermissible). Nodak implies that the City—in the very act of exercising its constitutional right to specifically select Otter Tail—also gave the Commission the authority and discretion to grant a *de facto* franchise to any other provider. Nodak Electric’s argument is both illogical and unworkable.

D. This Court’s precedent affirms Nodak Electric is required to possess a franchise to serve McFarland’s Addition.

[42] A review of North Dakota case law yields two fundamental results: 1) this Court has never held that a coop without a franchise may serve inside the boundary of a city receiving central station service; and 2) this Court has never held that a City must pass a “preclusion” ordinance to prevent an unfranchised coop from serving inside City limits. Either of these holdings would intrude upon a city’s constitutional right noted above. Denying Otter Tail’s motion to dismiss requires both.

[43] Nodak Electric filed the present Complaint effectively seeking to have the Commission grant it a *de facto* franchise for permission to provide electric service in the City of Drayton while also stopping Otter Tail from serving Love’s. Nodak Electric’s strategy was necessary because it cannot provide electric service to McFarland’s Addition without a lawful franchise. See Capital Elec., 2007 ND 128, at ¶ 13. Nodak Electric’s strategy is misplaced because as noted earlier the Commission lacks authority to grant Nodak Electric the right to provide electric service within the City of Drayton. See N.D. Const. Art. VII, § 11.

[44] Soon after the Territorial Integrity Act (“TIA”) was enacted, this Court decided a factually analogous case determining that a cooperative without a franchise has no right to provide electric service to property newly annexed into city limits. See Divide County, 193 N.W.2d 723. The Divide County Court specifically addressed whether the

rural coop could continue to serve property upon which it was providing electric service after annexation into the City. Id. The Court found that the Electric Cooperative Act, N.D.C.C. Ch. 10-13, did not limit the authority and power of a city to annex property. Id. at 730. The Court concluded that when a customer resides in a city receiving central station service, the electric coop cannot serve that customer in the absence of a franchise. Id. The Divide County Court held that the coop's right to furnish electricity on the property ceased when the property became annexed into the City of Crosby. Id. Thus, even where there was an existing customer desiring and receiving service from the coop, the municipality's constitutional right to choose its franchisee was sustained once the property was annexed into the city. Id.

[45] The Divide County holding was reiterated in Tri-County Elec. Co-op, Inc. v. Elkin, 224 N.W.2d 785 (N.D. 1974). In considering the issue of customer preference under the TIA, the Tri-County Court stated that when there is only one supplier of electricity franchised in a municipality, the customer must accept service from the franchised supplier unless the customer generates his own electricity or goes without. Id. at 792. The Tri-County Court also addressed the Divide County holding when discussing the effects of annexation. Id. at 794. The Court recognized the law is clear when it comes to orderly continuance or transfer of electric systems following annexation:

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

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

[46] The Capital Electric, Divide County and Tri-County cases set forth controlling precedent applicable to this case. Once the City of Drayton annexed McFarland's Addition into the City, any right Nodak Electric claims to furnish electric service ceased because Nodak Electric does not possess a franchise with the City of Drayton. See Divide County, 193 N.W.2d at 730; see also Capital Electric, 2007 ND 128, at ¶ 13. There is no authority in North Dakota which says otherwise.

II. The Public Service Commission's conclusion of no interference was supported by a preponderance of the evidence.

[47] Nodak Electric argues the Commission erred when it found that Otter Tail's extension would not interfere with Nodak Electric's existing service. The Commission made multiple findings of undisputed fact that established Otter Tail's extension of service would not interfere with Nodak Electric's service. The Commission's conclusion that Nodak Electric failed to meet its burden of proof was supported by a preponderance of the evidence.

[48] In its Order, the Commission made eight findings of fact regarding the issue of Otter Tail's alleged interference with Nodak Electric's service. (R82:5:¶¶22-29). The Commission specifically found that underground crossings of an overhead line occur frequently and both of Nodak Electric's witnesses testified that there are no statutory or regulatory prohibitions against Otter Tail's design, nor does it violate the NESC. Id., at ¶ 25; see also (R89:66:8-13; R90:157:13-16). The Commission's conclusion was amply supported by its findings of fact and the undisputed evidence presented at the hearing.

[49] The Commission next found that Otter Tail secured the necessary permits to bore under I-29 for its extension and that boring is a common construction practice for extending utility infrastructure. (R82:5:¶23). Otter Tail's project engineer testified Otter

Tail obtained permits for boring under I-29 in May 2020 and those permits were extended into 2021. (R91:291:7-16). Mr. Jacobson further testified that boring electric utility lines is customary practice in the industry and is more common for Otter Tail than trenching an extension and that there are no NESC regulations that prohibit boring under I-29. (R91:291:17-23; 292:5-13). Nodak Electric's own single-phase transmission line was bored under I-29. (R48). The Commission's findings that Otter Tail secured the necessary permits to bore under I-29 for its extension and that such boring is a common construction practice were supported by the undisputed evidence.

[50] In support of its conclusion of no interference, the Commission found that "Otter Tail's proposed design and construction will not take away any existing Nodak customer and there will be no service interruptions or impacts to Nodak Electric's existing customers." (R82:5:¶27). The Commission's findings again were supported by uncontroverted testimony. Nodak Electric conceded it had no customers in McFarland's Addition that would be taken by Otter Tail's extension of service. (R89:67:24-68:3). Nodak Electric's Mr. Breidenbach agreed that Otter Tail's extension would not interrupt or interfere with any service Nodak Electric is currently providing to any customer. (R89:67:7-11; R89:98:14-17). He also admitted Otter Tail's proposed extension would not take away any existing customers that are currently receiving electric service from Nodak Electric. (R89:98:10-13). Specifically, Mr. Breidenbach admitted Otter Tail's extension would not impact its existing three-phase customer to the west of McFarland's Addition. (R89:99:8-12). The Commission's conclusion that Otter Tail's extension would not result in an interruption of service to any Nodak Electric's customers was supported by the evidence.

[51] The Commission also found “No Nodak infrastructure will be taken or impacted by Otter Tail’s extension into McFarland’s Addition.” (R82:5:¶28). Otter Tail’s Mr. Jacobson testified its proposed extension would not physically interfere or impact any of Nodak Electric’s current infrastructure. (R91:295:22-6). Otter Tail’s proposed extension would be an underground bore under Nodak Electric’s existing overhead line and would not require Nodak Electric to move any of its existing facilities. (R89:67:2-6). Mr. Breidenbach agreed that Otter Tail’s proposed extension under Nodak Electric’s existing overhead lines would not take nor require Nodak Electric to move its overhead lines. (R89:67:2-6).

[52] The Commission also found “Otter Tail’s service to McFarland’s Addition will not prevent Nodak from running three-phase service to other locations.” (R82:5:¶29). Otter Tail’s extension to McFarland’s Addition would be from the east and would have no impact on Nodak Electric’s existing three-phase service located west of the property. (R74). As previously recognized, Otter Tail will not be taking or utilizing any of Nodak Electric’s existing infrastructure as part of its extension. (R89:100:6-10). Mr. Breidenbach admitted Otter Tail’s proposed extension will not impact its existing three-phase facilities west of McFarland’s Addition. (R89:99:8-12). Mr. Breidenbach further admitted that Otter Tail’s extension of service to McFarland’s Addition from the east would not prevent Nodak Electric from extending three-phase service to any new customers from its existing three-phase facility located west of McFarland’s Addition. (R89:99:21-24). The Commission correctly determined Otter Tail’s extension will not economically interfere with Nodak Electric’s future business when all its facilities will still be in place, and

nothing will prevent it from using those facilities to provide service to future customers. (R82:7:¶¶7-8).

[53] On appeal, Nodak Electric argues economic interference will occur because “[d]ue to the Commission’s findings, it effectively stranded Nodak Electric’s existing single-phase line because it was annexed into the City.” See Appellant Brief, at ¶ 25. Nodak Electric’s argument is misplaced and does not support its allegation of economic interference. Neither the Commission nor Otter Tail annexed McFarland’s Addition, the City of Drayton did. (R61). The validity of the City of Drayton’s annexation of McFarland’s Addition properly was not an issue determined by the Commission and is not before this Court on appeal. Further, the City’s annexation of McFarland’s Addition neither resulted in the taking of Nodak Electric’s single-phase line nor determined the fate of future service extensions in the southern part of McFarland’s Addition which became subject to new ownership. Nodak Electric’s argument that annexation or the purchase by Love’s resulted in economic interference is not relevant to the issues on appeal and should be rejected.

[54] Nodak Electric also argues that Otter Tail’s proposed extension could cross its existing underground lines in the area. See Appellant Brief, at ¶ 24. This argument is pure speculation based on the hypothetical possibility that Otter Tail’s boring under I-29 might, through unforeseen circumstances, be forced to move southward past Nodak Electric’s existing underground line. Nodak Electric asserted that such underground crossing within McFarland’s Addition could present line locating and safety hazards. See Appellant Brief, at ¶ 24. The Commission specifically rejected this argument, concluding that possible future confusion for contractors does not constitute interference. (R82:7:¶6).

Otter Tail's engineer testified its extension would be located approximately fifty feet north of Nodak Electric's existing single-phase underground line located in McFarland's Addition. (R91:293:4-10). Nodak Electric's engineer admitted Otter Tail's proposed extension as designed would not cross any of Nodak Electric's underground facilities. (R89:73:10-14). Moreover, after alleging potential safety concerns, Nodak Electric's Mr. Breidenbach admitted that under North Dakota law each utility has an obligation to mark its own underground facilities before any excavation legally may occur. (R89:73:6-9). Nodak Electric's argument claiming hypothetical interference is based on pure speculation to which the Commission applied its agency expertise and rejected.

[55] The Commission's conclusion of no interference was supported by a preponderance of the evidence on highly technical subject matters. Accordingly, this Court must affirm the Commission's Order on this issue. See Capital Electric, 2007 ND 128, at ¶ 35.

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

[56] In its Order, the Commission concluded Otter Tail's extension of service to McFarland's Addition would not result in unreasonable duplication of services. (R82:8:¶14). Nodak Electric argues the District Court erred in affirming the Commission's findings of fact that were not supported by a preponderance of the evidence. Contrary to Nodak Electric's argument, the Commission's conclusion that Otter Tail's extension would not result in unreasonable duplication of Nodak Electric's facilities was supported by a preponderance of the evidence. The District Court rejected Nodak Electric's argument finding that Nodak failed to identify any findings of fact made by the Commission on the

issue of unreasonable duplication that lacked factual support in the record. (R117:14:¶46) (noting “many of the Commission’s factual findings on this and the other issues appear undisputed”).

[57] In consideration of unreasonable duplication, the Commission properly determined it must look at both utilities’ existing facilities in the annexed area to determine whether the proposed extension would constitute duplication of capital-intensive facilities and services already provided. (R82:7:¶10); see also Capital Electric, 2007 ND 128, at ¶ 33 (setting forth the standard for review of Commission’s determination of unreasonable duplication). The question of which electric supplier’s facilities are actually duplicative is one of fact for the Commission to determine. Capital Electric, 2007 ND 128, at ¶ 33. In this case, the Commission appropriately recognized that some duplication is not necessarily wasteful. (R82:7:¶10).

[58] The Commission made five specific findings of fact in support of its conclusion that Otter Tail’s extension of service to McFarland’s Addition did not result in unreasonable duplication of Nodak Electric’s facilities. (R82:6:¶¶30-34). First, the Commission found neither Otter Tail nor Nodak Electric had existing three-phase service within McFarland’s Addition necessary to serve Love’s. (R82:6:¶30). This finding of fact is undisputed, as Nodak Electric had a single-phase line and Otter Tail had a transmission line on the property. (R74). Neither Nodak Electric nor Otter Tail proposed serving Love’s off these existing lines. Both Otter Tail and Nodak Electric proposed service to Love’s by extending a new three-phase line from their respective facilities on property directly bordering McFarland’s Addition. Id.

[59] The Commission also found that Otter Tail's extension to serve McFarland's Addition would be approximately 1,000 feet and cost approximately \$52,000, while Nodak Electric's extension would be approximately 350 feet and cost approximately \$19,037.50. (R82:6:¶31). The Commission's findings on the proposed length of the extensions and costs were based on the testimony of Otter Tail's and Nodak Electric's engineers. The Commission concluded that both extensions are relatively minor for an electric distribution company to serve a new area. In comparison, other extensions involve significantly greater investments. See e.g., Capital Electric, 2016 ND 73, at ¶ 3 (finding the public utilities' cost of extension for service was \$513,669.84 while the coop's cost would be \$575,883.84). The Commission's findings regarding the length and cost of the proposed service extensions were supported by the evidence.

[60] In its conclusion, the Commission recognized that both Otter Tail and Nodak Electric had made investments in their respective facilities to serve customers in the Drayton area, however neither party demonstrated they made specific capital-intensive investments to serve McFarland's Addition. (R82:8:¶13). There is no dispute that both Otter Tail and Nodak Electric had three-phase facilities on property bordering McFarland's Addition. When asked, Nodak Electric could not quantify any specific investment made in any upgrades in 2009 for three-phase service for future customers in the area. (R90:196:14-25).

[61] In prior cases before the Commission, evidence was introduced regarding capital investments made to serve the specific annexed area in dispute. See e.g., Capital Electric, 2007 ND 128, at ¶ 34 (indicating the Commission found the coop had invested in excess of seven million dollars to serve Boulder Ridge pursuant to the City's permission

to serve the annexed area); N.S.P., 452 N.W.2d at 344 (noting the Commission found the coop constructed 35.29 circuit miles of electrical lines, 13 line switches, and 263 transformers in the annexed territory at a cost of over two million dollars). Nodak Electric admits it failed to present any evidence to the Commission establishing the cost of capital improvements in the area. See Appellant Brief, at ¶ 29 (asking the Court to assume its investments were “substantial”).

[62] Nodak Electric argues the Commission erred in finding that Otter Tail had made capital investments near McFarland’s Addition. See Appellant Brief, at ¶ 29. Nodak Electric’s argument is based on its own creation of a magical dividing line of I29 on the east side of McFarland’s Addition. This argument is factually incorrect, as Otter Tail had constructed three-phase service within the City of Drayton in Section 26 adjacent to McFarland’s Addition to the east. (R74).

[63] Nodak Electric erroneously argues Otter Tail’s extension of service to McFarland’s Addition “is not a logical extension of Otter Tail’s services.” See Appellant’s Brief, at ¶ 29. Otter Tail made previous investment into existing three-phase service to serve customers in the City of Drayton. (R:74). At the hearing, Nodak Electric’s CEO conceded that Otter Tail designed their existing three-phase systems in Drayton to serve future customer growth within the City. (R90:160:4-8). McFarland’s Addition is now part of the City of Drayton and is a natural extension of Otter Tail’s existing three-phase facilities to serve customers in the City of Drayton.

[64] On appeal, Nodak Electric again argues the “Commission erred by looking solely at McFarland’s Addition when considering what facilities and customers each had in the area.” See Appellant’s Brief, at ¶ 28. The District Court specifically rejected this

argument recognizing the Commission's findings considered both Nodak Electric and Otter Tail's existing three-phase customers in the surrounding area. (R117:14:¶47).

[65] In support of its unreasonable duplication argument, Nodak Electric relies on Minn-Kota Ag Prod., Inc. v. N. Dakota Pub. Serv. Comm'n, 2020 ND 12, ¶ 2, 938 N.W.2d 118. However, the critical facts supporting unreasonable duplication in Minn-Kota are distinguishable from those in this case. First, the Commission proceeding in Minn-Kota involved a certificate of public convenience and necessity for an extension well outside of any city's boundaries and thus considered an additional eight factors not relevant to this case. Id., at ¶ 4. Second, Otter Tail's service extension required construction of a new substation to serve the customer while the coop had recently invested in and could adequately serve the customer from an existing substation. Id., at ¶ 35. Third, the difference in costs to extend service involved in Minn-Kota were significantly larger compared to this case. Id., at ¶ 2; (R82:¶26). Fourth, the relative distance cut sharply against the winning coop in Minn-Kota, with Otter Tail proposing a 1,000 foot line extension versus approximately 21,000 foot line extension by Dakota Valley Electric Cooperative. Id.

[66] The Commission correctly applied its agency expertise to conclude that while Nodak Electric does have three-phase service marginally closer to the site, neither Nodak Electric nor Otter Tail had facilities in place within McFarland's Addition that would, considering all relevant facts, constitute unreasonable duplication of facilities and service in the area. This Court must affirm the Commission's Order. See N.D.C.C. § 28-32-46.

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

[67] On appeal, Nodak Electric contends the Commission should have enjoined Otter Tail from providing electric service to McFarland's Addition because it believes it possesses the sole right to serve the property granted by a 1968 service area agreement between Nodak Electric and Otter Tail. Nodak Electric inexplicably argues the Commission and the district court "retroactively" applied the 2005 TIA amendment that grants the Commission an ability to enforce service area agreements. Appellant's Brief ¶34. The Commission's conclusion that it did not have authority to enforce the 1968 service area agreement was in accordance with the law particularly considering the constitutional constraints noted above.

[68] The Commission made multiple findings of fact regarding the 1968 service area agreement. (R82:4-5:¶¶18-21). Specifically, the Commission found the 1968 service area agreement was not filed with the Commission, the Commission had not approved the agreement, the agreement did not provide the Commission with jurisdiction to settle disputes between the parties, and the City of Drayton was neither party to the agreement nor given an opportunity to approve it. *Id.*, at ¶ 20. The District Court properly concluded these findings of fact were undisputed. (R117:13:¶39). The Commission properly concluded that, under N.D.C.C. § 49-03-06, it lacked authority to regulate the 1968 service area agreement because the agreement did not meet the statutory prerequisites for Commission enforcement. (R82:7:¶4).

[69] Nodak Electric cites no legal authority granting the Commission with jurisdictional authority to decide contract disputes between private parties. Nodak Electric

also fails to cite any case law where the Commission has exercised original jurisdiction to decide contract disputes between private parties. The Commission simply is not a court of law possessing subject-matter jurisdiction over contract disputes between private parties. See City of Grafton, 86 N.W.2d at 202 (stating the Commission is prohibited from acting in any field in which the Legislature has not authorized it to enter).

[70] Prior to the 2005 amendment regarding service area agreements, no law in North Dakota granted the Commission such jurisdiction. In 2005, the Legislature granted the Commission limited jurisdiction to enforce service area agreements if certain prerequisites were met, including prior filing and approval of the service area agreement by the Commission. See N.D.C.C. § 49-03-06(6). It is undisputed that the 1968 service area agreement was not filed with the Commission as required by N.D.C.C. § 49-03-06(4). Nor did the Commission approve the service area agreement as required by N.D.C.C. § 49-03-06(5). Further, § 49-03-06(2) requires that such agreements explicitly acknowledge Commission jurisdiction to enforce the agreement, along with opportunity for a city to approve or deny if it would cover areas inside city limits. None of these three requirements were met by the 1968 service area agreement. Absent the necessary prerequisites, the Commission lacks authority in this case to enforce the 1968 service area agreement. N.D.C.C. § 49-03-06(6).

[71] Even assuming the 1968 agreement was enforceable between Otter Tail and Nodak Electric, which it is not, the agreement is not enforceable against the City of Drayton. Section 49-03-06(8), N.D.C.C., states that the governing board of a city may require approval of a service area agreement between electric providers when the agreement encompasses locations within the city. The same section also states that nothing

in the chapter shall be construed to limit a city's power to exercise its franchise authority. Id. The Commission explicitly found the City of Drayton was not a party to the 1968 agreement nor approved the agreement. (R82:5:¶21). The Mayor of the City of Drayton testified the City has never approved, nor consented to be bound by, the terms of the 1968 agreement between Otter Tail and Nodak Electric. (R90:178:14-24). Absent the City of Drayton's approval and express consent to Commission jurisdiction, the 1968 service area agreement could not intrude upon the City's constitutional franchise rights.

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

CONCLUSION

[73] The North Dakota Constitution precludes the Commission from abridging the City of Drayton's franchise authority and from directly requiring the City of Drayton to permit Nodak Electric to provide electric service to a new City resident. Because Nodak Electric does not possess a franchise from the City of Drayton, and a franchise cannot be granted by the Commission, the Commission lacks authority to decide whether Otter Tail's extension of services in McFarland's Addition will interfere with or unreasonably duplicate Nodak Electric's services under N.D.C.C. § 49-03-01.3. The Commission erred in denying Otter Tail's Motion to Dismiss. Otter Tail respectfully requests this Court reverse the Commission's Order on this issue.

[74] Alternatively, if this Court determines the Commission had jurisdiction to determine the merits of Nodak Electric's complaint, the Court should affirm the Commission's conclusions that Nodak Electric failed to meet its burden to establish

Otter Tail's proposed extension of service constituted interference or unreasonable duplication. Pursuant to the applicable standard of review, the Commission's conclusions that Nodak Electric failed to meet its burden of proof establishing interference and unreasonable duplication were supported by its findings of fact and the preponderance of the evidence.

Dated this 26th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned as attorneys for the Appellee and Cross-Appellant Otter Tail Power Company in the above matter, and as authors of the above brief, hereby certify, in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief hereby certify in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief complies with the page limitations set forth in Rule 32(a)(8).

